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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 8, 2007

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 8th day of June, 2006, between the hours of 9:05 a.m. and 2:15 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

07-11 Proposed changes to TRAP 24.2

07-12 Proposed TRAP 9.8, 20.1, 41, 52.6 (6-5-07)

07-13 TRAP 41, 2-16 version

07-14 Proposed changes to garnishment rules

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CHAIRMAN BABCOCK: Welcome, everybody, and we'll start as usual with a report from Justice Hecht.

HONORABLE NATHAN HECHT: Well, the session is over.

MR. DUGGINS: Yea.

HONORABLE NATHAN HECHT: You may have seen on the news yesterday that a fistfight broke out in the Alabama Senate, so it's -- you know, we deal with a lot of difficult and sometimes inflammatory issues that -- here that don't have to do with punctuation and language structure, but with very few exceptions over the time I've been here with complete decorum and trying to hear each other out and produce a good product, and it's just seeing that that doesn't always obtain in other forums, it's just great to know that it does here, and so I hope that will -- I'm sure that will never change.

Of note, the Legislature passed Senate Bill 237 which requires e-filing in the justice courts by January the 1st, and so we'll have to have a task force -- and we're going to work with Judge Lawrence in putting the membership together -- to look at the template that we're using already in the district and county courts and see if that will work in the justice courts, and it won't. We already know it won't, but maybe we can tweak it without major work so that it will be useful there, and I hope we have that committee appointed, that

task force, in the next few days and that they can take a look at it this summer and report back to this committee by the August meeting so that we can finish work on those rules and get them out for comment so that they'll be in place by January the 1st.

Now, if we run into a snag on that, and it's just too early to tell, then we'll do what we've done in the past and take the mandate of this particular statute to be an exception to the public comment, general public comment required by the Enabling Act, and just shorten the period and finish it up in our October meeting, put it out for comment, and it will just barely be a month before they take effect, but we'll make that deadline no matter what. I think there are 835 justice courts in Texas; is that right?

HONORABLE TOM LAWRENCE: About that, yes, sir.

CHAIRMAN BABCOCK: And so this is a fairly large undertaking, and we're trying to get our most -- our best JPs on there to help us with this as well as counsel who use that system a lot for landlord/tenant disputes and claims on small claims so that we'll make sure this rolls out relatively well. Of course, it's a pretty big deal to the providers of the e-filing service because there are a lot of filings, so if a lot of people use them it will generate a lot of revenue, and so we need to make sure that works well.

So that's the only thing that the Legislature

requires in the way of rule-making. There were a couple of other bills that would have directed the Court to make rules on various subjects, certainly not the least of which was the complex case statute that would have made a -- sort of like an MDL sort of system for complex cases, and the Court was going to be asked to write rules for that, but that didn't pass.

Unfortunately a lot of the -- whatever you think of that bill, a lot of good restructuring bills that would have tried to simplify the jurisdictional structure of the trial courts didn't pass either, and I hope Senator Duncan doesn't tire of trying to do good for the state, although he certainly could if he wanted to, because we just desperately need some simplicity in the court structure, but it -- maybe we'll make more progress next session.

The House Bill 335 passed, which requires -- it's on the Governor's desk, I don't know if he's signed it -- which requires court reporters to provide the transcript within 120 days after request is made and payment is arranged for. Of course, current Rule 35.1 of the appellate rules specifies 60 days. A rule which, of course, is honored in breach. I've never understood that expression actually, but whatever it's supposed to mean, that's what's happening, and so this is supposed to make a more definite time period, and we might want to think about conforming the rule to that.

PROFESSOR DORSANEO: What bill is that?

HONORABLE NATHAN HECHT: It's House Bill 335. And there's no provision in the statute one way or the other about the Court making rules, so but probably we ought to conform. While we're doing all these other changes in the appellate rules we probably should conform that one.

Then Senate Bill 699 passed, and it adopts a new section 30.014 of the Remedies Code, which states -- and it's brief, and I'll just read to it you. "In a civil action filed in the district court, county court, statutory county court, each party or the party's attorney shall include in its initial pleading the last three numbers of the party's driver's license number, if the party has been issued a driver's license, and the last three numbers of the party's Social Security number if the party has been issued a Social Security number."

Subdivision (b), "A court may on its own motion or the motion of a party order that an initial pleading be amended to contain the information listed above if the court determines that the pleading does not contain that information. A court may find a party in contempt if the party does not amend the pleading as ordered by the court under this subsection."

So here is a bill that was supported rather strongly by the title companies and the data miners, and it will take effect on September 1st, and now from now on any pleading you file on behalf of an actual person who has a

driver's license number or Social Security number in a state -- in a court in Texas, you're going to have to put -- well, not the justice courts. They got out somehow.

PROFESSOR DORSANEO: Does it define "pleading"?

HONORABLE NATHAN HECHT: Huh?

PROFESSOR DORSANEO: Does it define "pleading" or does it say "paper"?

HONORABLE NATHAN HECHT: It says "in its initial pleading." It will have to contain the last three digits. Now, the bill started out, didn't it, Jody, that you have to put the whole number in there?

MR. HUGHES: Uh-huh.

HONORABLE NATHAN HECHT: And that seemed even a little much for the supporters of the bill, so then we were -- you know, our position, the Court's position with respect to that bill, was just background, that we've done all this work, we know something about these issues as regards to pleadings, and we have looked at other states, and here's what we found out, and so then do with that information what you will; but we did suggest to the proponents of the bill that this was not a good idea and even suggested that at least they retain a provision in the bill that would allow the Court to adjust it if necessary, as for example, by putting the numbers in sensitive data form, which is the paradigm that the Federal courts are following to some extent, although, they're going to

have numbers in some of their pleadings.

But anyway, some effort to look for a comprehensive solution, and that view did not prevail, although it was -- it ended up with the assurance of some of the supporters that they would work with the Court to try to come up with a solution that would -- more practical and observant of privacy interest, but there is very strong sentiment, as I thought there might be, to put more of this information in the public sphere, and I don't think that -- I don't think that sentiment will evade until something bad happens as a result of it. So we -- the Court has sort of held off on its work on the rules to see what the sense of the Legislature was, because there is a very strong policy component to these issues, not just -- you know, not just making it work and trying to come up with good rules, but what should be public and what should be private.

So we'll go forward with that now and work with the supporters of this legislation and see what we can work out. But I just note that the idea that this information ought to be out there and ought to be out there in court clerk's records, which is a little bit troubling I guess because you just don't think of the court clerks as being the collecters of private data on the people that use the court system, but anyway, it does not apply to corporations. You don't have to put the tax identification number in. It only applies to

natural persons, but it will make a big difference.

And then, finally, the House Bill 2300 exempts judges, Federal and state judges in Texas, from the proficiency requirements of the concealed handgun law. So the nonjudicial members of this committee may want to worry at the October meeting and not only about the temperament of the judges in the room but what they have under their coats.

HONORABLE JAN PATTERSON: Or their proficiency.

HONORABLE NATHAN HECHT: Of course, if they don't have to meet the proficiency requirements they probably can't hit anything, but a blow was struck for justice there.

The funding of the judiciary was very generous this time, and for the first time in several sessions I think we have the wherewithal to make some improvements. We've had to tighten our belts just like everybody else in the state did when times were lean, and now they're relaxed a little bit, and that's good news, and the committee was refunded, right? This committee.

MR. HUGHES: Yeah.

HONORABLE NATHAN HECHT: Yeah. So that's good, and that's the report.

CHAIRMAN BABCOCK: Great. Justice Brister is with us today. Do you have any comments, or you've got the floor if you want it?

HONORABLE SCOTT BRISTER: Glad to be here.

CHAIRMAN BABCOCK: Okay. Judge Lawrence.

HONORABLE TOM LAWRENCE: Senate Bill 618 doubled the jurisdictional limit in civil cases and JP courts from 5,000 to 10,000, and the last time that happened we had a -- from 2,500 to 5,000, we had a pretty dramatic increase in case load, and most of these JP court rules in the five hundred series are unchanged since 1947 and some even before that. So at some point I'd like to request that we take a look at those, because as we have the jurisdictional limit raised we're going to have more attorneys practicing, and some of the deficiencies in these rules are probably going to become more apparent.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: One rule that people don't seem to pay much attention to or don't necessarily understand what it means is the JP court not being able to charge the jury, may need to be looked at. Because it would get to a point where there's no law that's applicable to a 10,000-dollar case, and that might be regarded as wrong-headed.

CHAIRMAN BABCOCK: Yeah. That's great. By the way, I forgot to mention I'm happy to be here today because I answered my jury summons yesterday and was waiting in the hall to serve in a criminal jury when the defense lawyers came out and took a look at us and immediately copped a plea. So I don't know if I had any role in that, but -- all right, we're on to TRAP 24.2, and I think Elaine is up to bat.

PROFESSOR CARLSON: You should have a handout, imaginatively titled "24.2, Amount of Bond, Deposit or Security," dated 6-5-07, so that's what we're going to work off of, and the last time we took up this rule in February we left off on 24.2(c)(2), which is where I'd like to begin, discussing whether or not -- what the trial court should do in the instance in which a judgment debtor fails to put on sufficient proof of their net worth with the current rule requiring the trial court must have a net worth contest and issue an order that states the debtor's net worth with particularity, explaining the factual basis for their determination; and so much of our debate focused upon the judgment debtor having the burden of proof as to net worth and why should the judgment creditor have to put on any evidence about net worth and how should we change the rule to deal with this.

It was suggested it's unfair and it's -- to a trial judge to require them to make a net worth finding when the state of the evidence is so shaky or nonexistent, and I think those were all reasonable observations if we were writing the rule on a blank slate, but we're not.

I went back to look at the statutory language of 52.006, and on page two and three of your handout I reproduced Chapter 52. You'll note that 52.00 -- turn the page, 52.005, subsection (b) says "not withstanding," blah-blah-blah, "the Government Code, the Supreme Court may not adopt rules in

conflict with this chapter" and that came into play back after the Pennzoil decision where the Legislature wanted to have the final say I suppose on the subject. And so when -- and 52.006 was changed, as we know, to allow the judgment debtor to post security, supersedeas, at a cap that didn't exceed the lesser of 50 percent of the judgment debtor's net worth or 25 million.

If you look at the language in 52.006(b), which is in 16 font bold print, the Legislature in writing the statute said, "Notwithstanding any other law or rule of court," that's us, "when a judgment is for money the amount of security must not exceed the lesser of that cap." The whole statute is silent about who has the burden of proof. This committee and ultimately the Supreme Court in enacting TRAP 24 logically placed the burden of proof on the judgment debtor to establish net worth, and the Supreme Court also compelled the trial court to make a net worth finding that states with particularity the basis for its determination.

I think the Court was correct in the way the rule was crafted to be consistent with the legislative intent mandated by 52.006. I don't believe -- and I'm not speaking for our committee, subcommittee on this, the appellate subcommittee, because we did not meet again on this issue. It's kind of a Mikey issue, you know, give it to Mikey. I'm Mikey. We sent it around for comment, everybody says, "Yeah, she'll talk about it." So I don't mean to speak for my

colleagues on that subcommittee, but I don't think the Legislature viewed net worth as a matter on which the judgment debtor solely might have the burden of proof based upon the language I just cited in 52.006. I think it is realistic to suggest that the Legislature thought the judgment debtor should have the burden of proof to establish the net worth it claimed, and the judgment creditor would have the burden of proof to establish the number they think is net worth.

It's very similar to what we do just in venue proceedings. Venue proceedings we say, you know, the defendant has the burden of proof to show venue is proper where they claim and the plaintiff has burden of proof to show venue is proper where they filed suit. And, you know, our Rule 87 of the Texas Rules of Civil Procedure has a provision when there is a failure of proof that says in the event the parties fail to meet that burden of proof in the venue context the trial court may direct the parties to make further proof. I don't know how helpful that is to trial judges, but we do have that type of a scheme in place for Rule 87. It's my own personal opinion -- and, as I said, it's only my opinion -- that we ought not to change 52 point -- I mean 24.2(c)(2), as much of our committee discussion suggested back in February, but nonetheless, being a fairminded, evenhanded person and an academic I can always see two sides of the issue.

Page two of your handout I did craft an

alternative that I think incorporates the thought process or the debate that we had in February, and under that proposal, again, the judgment debtor would have the net worth -- the burden of proof on net worth, and then you see in the second paragraph on page two under (c)(2) the alternative, that the trial court must issue an order that states the basis, factual basis, for the net worth number or why the proof of claimed net worth is insufficient to allow the court to make a net worth finding, and then it continues "should the trial court sustain the judgment creditor's contest to the judgment debtor's -- due to the judgment debtor's failure to sustain its burden of proof or because it determines the judgment debtor's proof is not credible then the trial court may order enforcement of the judgment is no longer suspended."

So that's kind of where we left off, Chip, and I guess I'd like to get a sense of the committee if they read 52.006 as restrictively as I do. To me in my mind 52.006 says "notwithstanding other law," and that would include the law of the sufficiency of the evidence. You recall that Hugh Rice Kelly commented, and a few other folks, about the potential for mischief when the trial court can just say, "I don't have enough to go by here" that in some counties in Texas you're not going to be able to get your judgment suspended because you're never going to meet that level of nirvana in some counties, and the trial court is not going to be required to make a net worth

finding.

On the other hand, you know, you can argue that maybe the Legislature didn't really mean any other law including sufficiency of evidence and if the judgment debtor can't make out a burden of proof for the trial court to make a number then the trial court shouldn't have to make a number.

CHAIRMAN BABCOCK: And, Elaine, you think that the alternative that's on the second page of the handout, your personal view is that that would not be consistent with section 52.006?

PROFESSOR CARLSON: That is my personal opinion.

CHAIRMAN BABCOCK: And does the subcommittee have any view on that?

PROFESSOR CARLSON: I'd love to hear from them.

CHAIRMAN BABCOCK: Bill. Subcommittee member.

PROFESSOR DORSANEO: I don't know whether additional or alternative language is necessary or appropriate, but I basically don't agree with anything that Elaine said about the statute and the requirement that it be left alone, and I don't think that that language can be stretched to mean that you don't consider the sufficiency of the evidence in deciding an evidentiary issue about the judgment debtor's net worth. I think that's what it is, but whether the alternative language is something we ought to do is, therefore, I don't think constrained by any statutory requirements, but it may not

be a good idea anyway.

What do trial judges think? I mean, my immediate reaction to this was that that's pretty tough on a trial judge who is going to get reversed if it's not possible to satisfy the particularity of the factual basis for the determination requirement, which is the one case that we had.

PROFESSOR CARLSON: Out of the Supreme Court.

CHAIRMAN BABCOCK: Yeah. Sarah.

HONORABLE SARAH DUNCAN: Yeah, I agree with Bill. Elaine promises me that she's going to convince me of her view of this. I'm not convinced yet. As I read 52.006, subsection (b), it's talking about what the amount of security can and can't be; and as Elaine said, there's nothing in the statute that burden of proof -- there's nothing in the statute that talks about when the party with the burden fails to meet that burden and there's nothing that talks about how do you review a trial judge's decision on net worth when the record the person with the burden made is insufficient to evaluate the correctness of that finding; and that's, I think, what our discussions on this issue has been addressed to, is what do we do when the trial judge doesn't get enough evidence to make a good finding and it comes up on appeal? How do we review it? And I just don't think the statute even purports to address that situation.

CHAIRMAN BABCOCK: Okay. Anybody else with

views on that? Surely somebody else has views on this. It's too early, huh? It's only 9:30.

HONORABLE SARAH DUNCAN: We want to hear from trial judges.

CHAIRMAN BABCOCK: Trial judges?

HONORABLE SARAH DUNCAN: Our reticent trial judges.

CHAIRMAN BABCOCK: We have a few here. We have some former trial judges, too.

HONORABLE TRACY CHRISTOPHER: Well, I think --

CHAIRMAN BABCOCK: Yes.

HONORABLE TRACY CHRISTOPHER: I mean, I think I talked about the problem the last time, and I mean, I look at 52.006, and I don't see your argument, I guess, on the burden of proof, and I still think we have kind of a hole as to what the burden of proof is and what kind of evidence needs to be presented and, you know, if they present one thing and the other side just sort of nitpicks away at it, how do you come up with a number? So, you know, I support a change, but we can talk about which one would work better.

CHAIRMAN BABCOCK: So you think 52.006 doesn't prevent us adopting either --

HONORABLE TRACY CHRISTOPHER: It doesn't -- it just says 50 percent of the judgment debtor's net worth. Well, it doesn't say how we're supposed to determine that number or

who has the burden to determine that number. It doesn't say we have to believe whatever the judgment debtor tells us.

CHAIRMAN BABCOCK: Okay. Okay. Justice Bland.

HONORABLE JANE BLAND: Well, the problem with the issue about whether the proof is credible, that's a problem because if the debtor is only required to bring in the financial statement, say, for their business and it shows a net worth, then, you know, the trial judge I suppose could just say, "Well, I don't find that financial statement credible," even if it's supposed to be under the statute prima facie evidence of net worth, and then you're left with the what do you do -- you know, but there's no real contrary evidence to except what the financial statement -- I mean to discount what the financial statement says. They haven't come in and attacked the financial statement in any way other than to say, "Well, we don't believe it. It's not credible," and because a lot of these things are done on affidavits I think it's going to be kind of a difficult -- I mean, I think you cannot believe witnesses and presumably you can cannot believe documents if you have some basis for not believing them, but the credibility thing is a little bit of a problem with the alternative.

CHAIRMAN BABCOCK: Is the way it works, Elaine, that regardless of what the debtor's net worth is that you'll never have to post more security than 25 million?

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: It's the lesser of those two.

CHAIRMAN BABCOCK: Right. So the 25 million is a ceiling and then it could be less than that, and why hasn't the Legislature given room for the courts to make decisions below the ceiling? I mean, they've set the ceiling, and somehow you've got to come to a resolution below the ceiling, and why can't the Court allocate the burden and decide who's met the burden if it's below the ceiling?

PROFESSOR CARLSON: I'm probably too close to the issue, but again, this was part of a tort reform package, and it's part of a national issue that's taken up on a really bona fide concern over the ability of a judgment debtor -- the judgment debtor to -- meaningful ability of the judgment debtor to bring an appeal; and, of course, carving out punitive damages from the supersedeas formula goes a long way to doing that; but I think our Legislature in both times they've approached the subject, back in '88 and this last time, really intend for the trial court to have the responsibility to figure out how to do that in getting the number, the net worth number.

You know, the trial court does have the discretion under 52.006(c) to lower the -- in fact, has a mandatory discretion to lower the amount of the security even lower than the cap we just discussed --

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: -- if the judgment debtor can show substantial economic harm.

CHAIRMAN BABCOCK: Well, certainly by rule the Supreme Court couldn't say it could be 30 million, couldn't do that.

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: And the Supreme Court couldn't say, "We don't think 50 percent is okay. 65 sounds to us like the right number."

PROFESSOR CARLSON: True.

CHAIRMAN BABCOCK: They couldn't do that, but isn't the way you get to 50 percent just a procedural mechanism and not prohibited by this?

PROFESSOR CARLSON: That's really the issue, Chip, and determining the procedural issue in light of the legislative intent; and reasonable minds can differ, but that's the really threshold issue, to figure out whether we go with the first --

CHAIRMAN BABCOCK: The Legislature didn't say that if the judgment creditor puts -- throws out a number that that's conclusive.

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: And so there's got to be a way to determine that. Sarah.

HONORABLE SARAH DUNCAN: And, frankly, I don't think the Legislature envisioned the type of cases where this is going to be a problem or is going to come up.

CHAIRMAN BABCOCK: What is that type of case?

HONORABLE SARAH DUNCAN: I think the Legislature is still thinking about Texaco. This is going to come up, I think, in a case where there is less than full and adequate disclosure either because of shenanigans or because of maybe less than competent parties or counsel. I mean, Texaco was straight up, right, Texaco didn't try to hide its assets. Pennzoil didn't try to fabricate assets that Texaco had. It was a straight-up dispute about there is not enough bonding capacity in the world.

CHAIRMAN BABCOCK: And there were no shenanigans.

HONORABLE SARAH DUNCAN: Well, I mean, they agreed to paragraph 7 of the judgment, which indicates that both parties were operating in good faith to try to resolve a problem for both of them, but where this has come up on -- is from what I've seen, is people that come in like with an audited financial statement by the Mickey Mouse accounting firm; or they come in and say, "I have a negative net worth" and yet everybody agrees they have asset upon asset upon asset.

So I don't -- I mean, I would ask the trial judges and the trial lawyers, but that's just what I've seen

from the reported cases.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think the choices that were being evaluated in Pennzoil are similar to the ones that are coming up now, just on a smaller scale. It's a judgment debtor looking at the potential of bankruptcy because they have insufficient assets to satisfy the judgment but they would like to pursue the appeal, and so then the question is how much proof is adequate. I think it's okay to defer to the trial court about whether or not they've met their burden of proof, but to basically -- you know, one man's Mickey Mouse financial statement is someone else's, you know, facially correct snapshot of the business, and especially when you're talking about a small business, because the prospect of getting audited financials for a small business is daunting, it's expensive, and most of them don't do it.

HONORABLE SARAH DUNCAN: Right.

HONORABLE JANE BLAND: So I don't think there is a problem with, you know, a trial judge making a finding that they haven't met their burden, but the finding has to be supported by something, not just by the thought that "I don't believe the financial statement because it was created by somebody within the company."

HONORABLE SARAH DUNCAN: But how do you go from there to -- if the trial judge is required to find a number,

and all the trial judge has is an audited financial statement by the Mickey Mouse accounting firm, how does the trial judge go from that financial statement to a number?

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: Well, I mean, there are a few cases out there that say the number is assets minus liabilities, so that's how you get the number; and then the trial judge says, you know, "Are these assets that they've listed, do I believe that they exist and that they're assets, are these liabilities real liabilities or are they some sort of sham liability?" I can see the analysis and how it goes. I don't know if that really -- I don't know one way or another about the proposed change in the rule, but I don't think it's an impossible analysis to do; and theoretically if you're required to put a number up and they haven't proved to you a number, you can find it to be, you know --

HONORABLE TRACY CHRISTOPHER: Well, that's the problem right there. They haven't proved the number, so what number do you put down?

HONORABLE SARAH DUNCAN: Right.

HONORABLE JANE BLAND: And if it's zero, that doesn't work.

HONORABLE SARAH DUNCAN: That's the problem.

HONORABLE TRACY CHRISTOPHER: You can't put zero like a jury does. You can't say "no." You can't say, "Sorry,

you lose." You're not allowed to do that.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: No, no. Actually, it could be zero. For a healthy, growing, concerned company, it could be zero.

HONORABLE JANE BLAND: Exactly. But, I mean, we're faced with the idea of the normal -- the normal consequence of a failure to meet the burden of proof is a negative. You haven't proved it, so you get nothing, you get no relief, but here, you know, you're not -- it's the opposite way.

HONORABLE LEVI BENTON: Except for there's another problem.

HONORABLE TRACY CHRISTOPHER: They get a hundred percent.

HONORABLE LEVI BENTON: The statute doesn't say net worth at the time of filing, net worth at the time of judgment, doesn't say net worth on an accrual basis, net worth on a cash basis. There is other problems there, too.

CHAIRMAN BABCOCK: How does it work now? I mean, if the judgment debtor comes in and shows you and has got the Mickey Mouse accounting firm and it says the net worth is two million --

HONORABLE TRACY CHRISTOPHER: Well, what will usually happen is assets will be depreciated on a balance

statement, but the assets still have value, but, you know, in the whole sort of accounting system they've depreciated those assets down to nothing, showing a zero net worth, but we all know those assets still exist and still have value in terms of being able to borrow money against them to post a bond.

CHAIRMAN BABCOCK: So the plaintiff comes in with their accountant who is the solid gold accounting firm --

HONORABLE TRACY CHRISTOPHER: And says zero.

CHAIRMAN BABCOCK: -- and they testify and they say, "Judge Christopher, they've had -- they've improperly depreciated these assets and, by the way, they've got a manufacturing plant out there that's not even on these books."

HONORABLE TRACY CHRISTOPHER: Yeah, and then you don't know what that manufacturing plant is worth.

CHAIRMAN BABCOCK: Well, my opinion is that it's worth, you know, 20 million.

HONORABLE TRACY CHRISTOPHER: But you don't get that kind of evidence. That's the problem.

HONORABLE JANE BLAND: That's where I think the idea behind the statute is that you put on some prima facie proof, and that prima facie proof should be good enough unless it's somehow discredited.

HONORABLE TRACY CHRISTOPHER: Well, then we're reversing. We're putting the burden on the creditor, which is okay. I don't mind putting it on the creditor. I just --

HONORABLE JANE BLAND: We're not putting it on the creditor initially --

HONORABLE TRACY CHRISTOPHER: -- want to know where it goes.

HONORABLE JANE BLAND: -- but once there's been some -- I mean, to basically come in and say, "Here's what we have, here's what our net worth is," that's what the Legislature I guess required in the statute, and at some point that's got to be enough. Otherwise, you know, there's the issue of, well, you can never have enough proof to prove it. But, you know, when we're talking about sham transactions or things not listed, that's not -- you know, to me those are things done outside the ordinary course of business. If you are depreciating assets --

HONORABLE TRACY CHRISTOPHER: That's --

HONORABLE JANE BLAND: -- and it's the ordinary course of business because you've done so for the last five years, that's one thing. If you do it --

CHAIRMAN BABCOCK: Just since the trial.

HONORABLE JANE BLAND: Exactly. That's another thing.

HONORABLE TRACY CHRISTOPHER: But even if you do it in the ordinary course of business for your books, that doesn't mean that it's not a valuable asset that could be used to satisfy the judgment.

HONORABLE JANE BLAND: But at that point wouldn't you have to at least controvene -- I mean, if basically the assets are depreciated down to $20,000 and you're carrying it on your books at $20,000, shouldn't somebody have to come in and say, "No, this asset is not worth 20, it's worth 30." Otherwise then this whole idea that you've met your prima facie burden by putting in some evidence of what your assets minus liabilities are, is gone. You just basically have a trial.

HONORABLE TRACY CHRISTOPHER: Well, the prima facie affidavit is just to stop the execution. There is no prima facie ruling here with respect to the contest, and that's the problem. Okay. If we wanted to say whatever the judgment debtor presents to us is, you know, prima facie evidence of their net worth in the contest, you know, that's a different situation, but I don't read the rule this way. Maybe I'm reading it incorrectly, but if I'm allowed to take whatever their affidavit is as, you know, evidence, basically telling the creditor they're the ones who are going to have to discredit it and give me another number, that's okay. I just need a little guidance on it.

CHAIRMAN BABCOCK: Harvey, then Bill Dorsaneo.

HONORABLE HARVEY BROWN: Well, the only time I have been involved in this, that was the way it practically worked out. I was representing the defendant in a case, and so

we got a major accounting firm to take past financial statements, update them, and say "Here's our net worth," and then they went through and they sent us exhaustive discovery. I mean, they went through every major asset, you know, not what is its book value but its market value, what did you pay for it, you know, have you received any appraisal for it, and they went through every major asset and finally the case settled, but that became by itself a major piece of litigation just figuring out the net worth.

But I think that's -- it seemed to me at the time that that was the way it had to work because you've got to come forward with some evidence, but once you do, putting the burden of proof on the party that's going to say, no, you should not be able to stay execution and here's why. Since we're stopping somebody's right to appeal it seemed to me that once the initial burden of proof is met it's easier to put it on the contestant to say there's something wrong and point out what's wrong.

CHAIRMAN BABCOCK: Bill, and then Buddy.

PROFESSOR DORSANEO: Well, I think probably because the statute is so opaque with respect to net worth and how it's determined and all of that, that we improve things by saying the judgment debtor has the burden of proving net worth, but perhaps not enough. I think it at least should say something about how the judgment debtor would go about doing

that, whether we're thinking calling that prima facie case or just saying simply something like this: "The judgment debtor has the burden of proving net worth by presenting evidence of the judgment debtor's assets and liabilities," you know, say something to kind of set a standard for when -- if you wanted to add the alternative language or something like it, when the court could say that "I don't have enough -- I don't have enough information here." I think that would improve things.

So I would make that initial first suggestion and then I hear the trial judges or ex-trial judges talking about this prima facie proof and what they would like to see as the alternative. Can you come up with some language or is this language sufficient, the alternative language that the hostile to the whole concept professor selected?

CHAIRMAN BABCOCK: Buddy, then Sarah.

MR. LOW: Chip, I just had a question. This came up before this committee back in Pennzoil, and there had been a suit filed in New York saying that our bonding statute was unconstitutional. Now, whether there were cases, I didn't get involved -- Jim Sales was involved in that, and I had another friend, Joe was on the other side, and we didn't amend our statute at that time because that might be a comment, but later amended. My question is, were there constitutional issues decided by cases in, you know, other courts, other states, which said what your burden was in order to lower your

bond beyond this, the face amount it should be?

Now, whether any of those cases decided that you have a constitutional right to appeal, if you prove or -- I don't know. I've never read any of those cases, and there might not be any. Are there any out there? Because they were cited in the case in New York about the big issue was that our bonding procedure was unconstitutional because we had the -- do you know of any?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: The litigation in the Southern District of New York argued that Texaco had a meaningful right to appeal.

MR. LOW: Right.

HONORABLE SARAH DUNCAN: And if it was forced to -- and that there was not enough bonding capacity in the world for it to supersede enforcement of the judgment and that it didn't have a meaningful right to appeal if it had to go into Chapter 7 bankruptcy because it couldn't supersede this judgment, but 52.006 was a response to that. It didn't exist at the time of the litigation in the Southern District of New York.

The case that does I think have some significance -- and I think Elaine and I do agree on this -- is Dillingham vs. Putnam, which says if the state -- if you have the right to appeal, you have a right to a meaningful appeal,

and if you can't pursue your appeal because you can't supersede enforcement of the judgment, your right to appeal is not very meaningful, because you're going to lose it.

MR. LOW: But weren't constitutional issues -- they were raised and I'm wondering --

PROFESSOR DORSANEO: We lost in the second circuit.

CHAIRMAN BABCOCK: Who is we?

PROFESSOR DORSANEO: Texaco.

HONORABLE SARAH DUNCAN: We. We, we. Not Michelle Wie, but we, we. But the United States --

PROFESSOR DORSANEO: Arguments were made that were not successful.

HONORABLE SARAH DUNCAN: -- Supreme Court has said that if the state grants the right to an appeal it must be a meaningful right to appeal. That's I think the constitutional --

HONORABLE NATHAN HECHT: What Buddy is asking, as I understood it, is are there any cases that are talking about that right that then go to the next step and say, "And besides that, this is how you determine it."

MR. LOW: How you determine that, that I say, "Well, that's just too much bond, I don't have that much." Okay. You have a constitutional right to appeal, say, "Well, in order to exercise your constitutional right you've got to go

to the point of showing that." Is there -- are there any cases on how you show that, is what I'm talking about that. I wasn't involved in the case. I was on the committee back then but --

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Yeah, the problem, Buddy, at the time of Texaco and Pennzoil is there was no alternative standard. You could not come in and show that the inability to post a bond would cause irreparable harm or something like that.

MR. LOW: I want to forget Texaco and Pennzoil. I want to talk about the cases they were relying on. There must be some Federal cases or something talking about the constitutional right, and just as Justice Hecht said, what do you have to do to exercise, prove, exercise that right? Just forget Pennzoil. I know that was a -- are there any cases that say that?

CHAIRMAN BABCOCK: Bill, you think there are none?

PROFESSOR DORSANEO: Well, like even -- finding cases would not be that easy since many of the systems that we would be talking about would leave the bond, the amount of the bond, to the discretion of the trial judge. That's the Federal system. So that's -- that takes care of it. It's only where you have a system that says that the bond has to be in the amount of the judgment, interest and costs, period, that you

start wondering whether that, you know, impairs somebody's ability to prosecute an appeal. Dillingham and Putnam is a cost bond case, isn't it? Huh?

PROFESSOR CARLSON: I think so.

PROFESSOR DORSANEO: Rather than a supersedeas bond case.

HONORABLE SARAH DUNCAN: Oh, yeah. Definitely it was back when you had to file a supersedeas bond to appeal.

PROFESSOR DORSANEO: Cost bond to appeal.

HONORABLE SARAH DUNCAN: No, a supersedeas bond.

PROFESSOR DORSANEO: Okay. All right. Yeah. So you can't impose that, but pushing that to the limit of saying that your supersedeas law needs to be relaxed to the point where somebody is not, you know, economically depressed by the appeal is maybe pushing it too far. I don't know.

MR. LOW: But there were --

PROFESSOR DORSANEO: But I don't think we're going to find any cases that tell us the answer to this problem.

MR. LOW: Okay. Well, I'm not aware of one or I wouldn't ask the question, but there were other people that had different -- other states that had -- state courts had different bonding procedures than we did then, and there was a lot of money involved in Texaco, and that's why I figured -- and a lot of smart lawyers, somebody might have come up with a

case that said that the reason we amended it in Massachusetts was because Jones vs. Smith, the Supreme Court or some Federal court held, and I'm wondering if any of the Federal cases set forth guidelines, and I've gotten an answer, no, and I'll say no more.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Well, and Bill is quite right. In Federal court the trial judge has a great deal of discretion, as does the appellate court, and so you don't see these issues. On the state side, Buddy, there are some cases, but they deal with situations that are very different than ours. There are some states that have bonding requirements of two and a half times your judgment, interest and costs, and that's been held to be excessive and to abrogate your meaningful right to appeal, but there's nothing right on point.

Now, if you look, if we flash forward to today's date and we look what other states are doing in response to their tort reform packages, most of the states that passed statutes put a monetary cap on it, and it can never be more than this. My research shows there were only three other states that dealt with the cap through an "or" of "money or net worth," and so I looked at those other three states to say, well, what do they do with their net worth. Some of those, one of those states, does define what net worth is in the assets less liability, the classic accounting definition under

generally accepting accounting principles.

We talked about that back in 2003-4, when we were dealing with this and the consensus of this committee was we ought to let that percolate and that will be judicially determined, so now we have conflicting decisions. We do have the Fourteenth Court of Appeals in Ramco saying it's assets less liabilities. The First Court of Appeals, you know, May 10th issued an unpublished opinion and said, you know, "It's not necessarily that." We're going to take Judge Christopher's approach and said, "We think you can -- the court can consider the fair market value of the assets," because under generally accepted accounting principles -- I don't want to get too much into it -- you're quite right that assets are depreciated and they're not appreciated except for a very small category of cases like marketable securities. So when you're looking at book value it's not necessarily fair market value. It could be different, but is accepted in the accounting world.

So the First Court has said, no, you look at the fair market value, and there is some evidence of what a willing buyer would purchase the company for, so now we don't have a set standard determined by a higher court on this. We could, Bill, pick one in this committee if we felt that was a good idea or we could continue to let the law percolate on that issue.

PROFESSOR DORSANEO: My suggestion earlier was

actually short of deciding that by saying putting on evidence of assets and liabilities. It doesn't talk about generally accepted accounting principles or any standards. It just has somebody talking about something.

PROFESSOR CARLSON: Well, assets less liability is the GAP standard, generally accepted accounting principle standard.

HONORABLE SARAH DUNCAN: Right. It's how you measure the asset or liability.

CHAIRMAN BABCOCK: The threshold, Elaine, that you started out with that you wanted to get a sense of the committee on was whether or not section 52.006 precluded us meddling in this area, right?

PROFESSOR CARLSON: Well, whether or not it would excuse a trial judge from making a finding of net worth when there's a net worth contest.

CHAIRMAN BABCOCK: Whether the -- you think 52.006 could -- is -- you read that to say that the trial court can't make any --

HONORABLE SARAH DUNCAN: Has to.

CHAIRMAN BABCOCK: -- ruling on that?

PROFESSOR CARLSON: Has to. I think the legislative intent was you must.

CHAIRMAN BABCOCK: Must.

PROFESSOR CARLSON: You must do that.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Has to, even though all it has is an incredible statement of assets and liabilities.

PROFESSOR CARLSON: Could I -- yes. Could I comment just a little bit further?

CHAIRMAN BABCOCK: Yes.

PROFESSOR CARLSON: Because I have been involved in a few of these hearings. It would be an unusual situation where a judgment creditor does not take advantage of the opportunity to conduct discovery when the judgment debtor says, "Here's my net worth," and my experience is the judgment creditors just start, you know, licking their chops, going "Let's look at the books, let's look at the assets. Hallelujah, we'll figure out whether we're going to be able to collect on this sucker, whether we should have settled to begin with." So you have an incredible amount of discovery. You have the Texas Supreme Court in In Re: Smith saying you can look at alter ego issues in the context of setting net worth even though alter ego was not an issue in the underlying lawsuit.

So I tell my clients, "And are you ready for them to look at the assets of related companies? You know, you're pretty comfortable on this issue even though it was never tried at the trial court." The Supreme Court said in In Re: Smith you can't hold a related company that wasn't a named

party to the judgment, they're not responsible, but the trial court could in a net worth contest look at the assets of a related company when alter ego was established at that finding. So it's not like the judgment debtor has a walk in the park on these things; and the judgment creditor has a huge incentive, huge, to conduct discovery and, in my experience, put on contrary evidence; but that obviously isn't true from listening to trial judges. In some cases the judgment creditor doesn't avail themselves of that opportunity, but I'm sorry, Chip, that was a longwinded response to your --

CHAIRMAN BABCOCK: No, no. That's good. Sarah.

HONORABLE SARAH DUNCAN: Can we talk more to Judge Christopher's -- I don't know that it was actually a suggestion, but statement that if the prima facie proof, if that were made, prima facie proof at the contest hearing, wouldn't that solve Hugh Rice Kelly's I thought excellent comment that a trial judge could just not make a finding to create a just --

PROFESSOR CARLSON: To preclude supersedeas.

HONORABLE SARAH DUNCAN: To preclude supersedeas, thank you. But wouldn't that solve that problem? At the same time it would solve what I perceive to be a problem that the trial judge is required to make a finding even when the evidence before the judge is all Mickey Mouse affidavits, if the judge were told by the rule the affidavit is prima facie

proof of net worth, then that's a legitimate finding if there's nothing -- if there's no evidence on the other side; and if the judge had to make that finding if there were no evidence on the other side, that would resolve the concern that this process might be used to preclude supersedeas. Isn't that a middle ground?

HONORABLE TRACY CHRISTOPHER: Yeah. I think it would be. I mean, it kind of shifts the burden a little bit more to the creditor, but, I mean, you know, that's really what happens, is they'll come in with their proof and the creditor will start sort of picking away at it and saying, "This isn't right" or "That's not right," and at the end of the day you might think, yeah, that's not right, but how do you come up with a number because you haven't been given an alternative number that you feel is a legitimate number, but if I could say, "Well, you know, the creditor hasn't done enough," and I can just accept whatever the debtor says, then I take what the debtor says and send it off.

CHAIRMAN BABCOCK: Yeah. Harvey.

HONORABLE HARVEY BROWN: I was just going to point out that the creditor has a lot of motive to show that the number is too low. I mean, it seems to me that most creditors aren't going to want to just come in and say, "That's the wrong number." They're going to say, "And the number should be three times higher than that" because they've now

increased the bond and, therefore, are able to collect on their judgment. I think the economic incentive helps as a practical cure some of these problems.

HONORABLE SARAH DUNCAN: I do, too, and that's why I think it's important to focus on what cases really are the problem here. It's not the cases probably that most people around this table are involved in where, you know, there's a mountain of discovery directed at Harvey's client or there's a lot of picking at the number and saying, "Judge Christopher, this is the right number." The problem is in those cases where the judgment debtor comes in with a Mickey Mouse affidavit and the judgment creditor doesn't give you another number, just maybe picks at the edges, but doesn't give you another number.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE SARAH DUNCAN: And then do you have to find the Mickey Mouse affidavit number to be a correct number, and I think we can provide some support to the trial judges in saying, yeah, in that situation, if the judgment creditor doesn't give you a good number, you can go with the Mickey Mouse number, but at the same time say you have to find a number because you have to give the judgment debtor an opportunity to supersede.

CHAIRMAN BABCOCK: Elaine, what's wrong with that?

PROFESSOR CARLSON: Nothing. I like that

suggestion.

CHAIRMAN BABCOCK: Okay. Anybody think that's a bad idea? Okay.

PROFESSOR CARLSON: I might work on some language.

CHAIRMAN BABCOCK: Why don't you work on some language?

PROFESSOR CARLSON: That would be a good thing.

CHAIRMAN BABCOCK: Okay. Yes, Judge Benton.

HONORABLE LEVI BENTON: Something that's not come up and maybe the cases and the Court's jurisprudence already speak to it, but I just don't recall, but is it net worth at the date of verdict, at the date of judgment, at the date suit was filed? How has that issue percolated, because the statute clearly doesn't say?

PROFESSOR CARLSON: Judge Benton, I think there is one unreported opinion that says current means as of the time of the hearing. The statute does not say when it's decided. TRAP 24 does say "current," whatever "current" means. And if I could just answer, go beyond, one other thing. One of the states of the three that went net worth after the tort reform movement directed the trial court to accept an audited statement as of the preceding year end, prepared under generally accepted accounting principles, so you did have a definitive time, and, of course, current is important for

determining whether the judgment is or isn't included or is it the time the lawsuit is brought or is it the time the judgment is signed. Just one unpublished opinion says current means the time of the net worth hearing. Otherwise, I don't know of any other courts addressing it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think the rule contemplates current as of the hearing, and it also provides that it can be constantly evaluated throughout the course of the appeal, so that if you're worth --

PROFESSOR CARLSON: Yes.

HONORABLE JANE BLAND: -- you know, the amount of the judgment, you know, more than twice the amount of the judgment at the date of your net worth hearing, that doesn't preclude you from going to the court of appeals six months later and saying, "We're now bankrupt, and we would like our -- you know, we would like a new net worth hearing." It contemplates a continuous series of evaluations and the snapshot being the snapshot on the day that -- that then day, whether it's, you know, a year after the judgment or not.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Which I certainly agree, but I can foresee circumstances in which current on the day of the hearing is not possible. When you've got a multinational corporation and they can't necessarily say what

the Brazilian mine is worth on the day of the hearing or even what they carry it on their books on because there may have been a fire in the Brazil -- I'm not even --

HONORABLE JANE BLAND: No, I agree with you. I think they can say go back and say our net worth as of the time of -- you know, as of then, as of December 31st, is this and that's what we're seeking. I'm just saying it benefits the debtor. They can actually go back in later when they're net worth somehow declines and seek a new determination of that.

HONORABLE SARAH DUNCAN: Yeah, I don't think we're arguing. I just want to --

HONORABLE JANE BLAND: You know, I think that you can't just basically get an audited financial for the day of the hearing.

HONORABLE SARAH DUNCAN: Right.

HONORABLE JANE BLAND: But all I'm saying is that as the financial picture changes the rule contemplates that the parties can go in and seek a new determination of that number.

CHAIRMAN BABCOCK: Okay. Elaine, how long is it going to take you to do some language?

PROFESSOR CARLSON: I might be able to do that by this afternoon. I can defer to Bill at this point and see what I can do.

CHAIRMAN BABCOCK: Great. Let's do that.

Bill, using minors' initials, TRAP 9.8.

PROFESSOR DORSANEO: The suggestion was made that we add something somewhere in the rule book to deal with termination appeals to eliminate the use of minors' or to eliminate the use of minors' names and to call for the use of initials, and, frankly, I hesitated before talking about this because this is still in the earliest stages, but the proposal that we have that's before you, you know, speaks -- speaks for itself. If we have a termination of parental rights case, the name of the child or the identification of the child in any brief filed or received by an appellate court is initial letters of the minor's first, middle, and last name, unless the court orders otherwise, and then with an additional requirement if the -- if we have the same initials.

CHAIRMAN BABCOCK: The George Foreman rule, huh?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Because all of his kids are George.

PROFESSOR DORSANEO: All of his sons are named George.

CHAIRMAN BABCOCK: Not everybody knows that.

PROFESSOR DORSANEO: And the same idea is extended to matters that are included in an appendix to a brief or a petition in an original proceeding with the idea there being that we redact the documents so that the minor is

identified only by initial letters, minor's first, middle, and last name.

Jody, what's the last sentence for? "Nothing in this rule authorizes alteration of the original appellate record except as specifically authorized by court order." In other words, we're not going to go redact --

MR. HUGHES: We're talking about the copies you're putting in the petition, not the -- nothing in the record.

PROFESSOR DORSANEO: So our discussion, you know, among ourselves is this seems like a good idea, but what is it really trying to accomplish? What it seems to me to be accomplishing is less than might be accomplished, but maybe this is a concession to what's realistically possible to do as a partial measure.

CHAIRMAN BABCOCK: Is it out of order to inquire of what's driving this? I mean, did Orsinger petition the Court or --

HONORABLE NATHAN HECHT: I think, didn't the clerk raise the issue? Yeah. Our clerk just raised the issue about wouldn't this be a good idea and, you know, there has been some discussion over the years about use of names of minors in opinions. Occasionally somebody would draft something that used a name or maybe a first name, and every conversation I recall, the point was made, no, we should just

use initials, we always use initials, and so shouldn't we put that in the rule book.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: In the trial court in termination proceedings do they just use the initials or do they use the name?

HONORABLE NATHAN HECHT: I don't know. They probably do everything. I suspect in the trial itself -- I don't know and maybe the trial judges have tried one. I never tried one, but I suspect that at the trial itself the parents or people are probably talking about "Joey."

MR. HAMILTON: And if the names are used there what good does it do to change them on appeal?

CHAIRMAN BABCOCK: Well, that was Bill's point, I think.

HONORABLE NATHAN HECHT: Well, it's practical obscurity. I mean, you could go find the record someplace and get the name, but it's not as easy as looking in the Southwest reports.

PROFESSOR DORSANEO: These books are on the shelves.

CHAIRMAN BABCOCK: Unless it's on the internet.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think there's an

increasing sensitivity given the computerization of Lexis and Westlaw of all of these names being flooded into computers for victims as well -- victims of crimes as well as children in parental either divorce cases or termination cases, but I will also tell you -- and I think that this is a good rule, although I have a little tweaking suggestion, but in the transcripts coming up they all use the names, and in the briefing coming up they almost always use the names, so it's something that we inject really at the appellate stage almost always or at least as a matter of uniformity, and not all courts of appeals use initials. But I think that there is a growing sensitivity to that, and I think it's a good idea given Lexis and Westlaw.

This is a little specific for me. Why not just say "use initials"? I think because sometimes there are some initials that are more identifying than others and sometimes they don't have middle names, but why the specificity of first, middle, and last and then also the use of numbers, because sometimes you use first and last or just first, and occasionally for -- to make something clear I have seen in opinions that they give them made up names and call them by name, but it's not their real name, but I think "initials" would do with no more specificity than that because all you really want is some identifying information and also to be able to distinguish one child from the other if there are identical, not just names, but abbreviations and initials.

CHAIRMAN BABCOCK: Are the parents' names in the opinion?

HONORABLE JAN PATTERSON: The parents' names are in the proceeding, so if you have a particular specific name and the child is -- you know, we had a recent one, AAZ, that's fairly identifiable, and particularly if the name is identifiable, so there's only so much I think you can do, and I struggle with it all the time but have kind of encouraged a greater sensitivity to it. If I could figure out a way to be more sensitive to that, I would be, but I think we've arrived at a point that's useful or respectful, and, frankly, I think we're probably a little bit more protective than the parents, the system, anybody --

HONORABLE SARAH DUNCAN: Certainly the lawyers.

HONORABLE JAN PATTERSON: -- even in the system below, but even the parents in divorce cases involving nasty custody and child issue matters, we very often inject that concern where it hasn't been identified by the lawyers or litigants below.

CHAIRMAN BABCOCK: Lonny, and then Sarah.

PROFESSOR HOFFMAN: On a lighter note, we are already going to have the last three digits of the driver's license and Social Security number in there, so just start calling them by those numbers.

CHAIRMAN BABCOCK: 007.

PROFESSOR HOFFMAN: On a more serious note, though, why don't we adopt a rule that applies not just for parental termination cases? Why don't we just adopt a rule that says as a general practice we should never be using the names of minors in any proceedings?

HONORABLE NATHAN HECHT: Well, in that connection, as I recall our deliberations so far, we were thinking about that in the sensitive data context, that you wouldn't -- you wouldn't even use initials, just use some designator, X, you know, in pleadings, and that way there is just no reason to tiptoe around the edge if you don't need it at all. However, I can't -- I think it would be difficult to conduct a trial with parents referring to their kid as X, and I think they're going to want to say Joey or Mary or something, and so it's going to be in the reporter's record, but at least you would keep it out of the clerk's record.

HONORABLE SARAH DUNCAN: Chip.

CHAIRMAN BABCOCK: You're trying to protect these minors because you don't want anybody to find out about them, but anybody who wants to find out about them can find out about them in a nanosecond. Right?

HONORABLE SARAH DUNCAN: Not a nanosecond.

CHAIRMAN BABCOCK: Well, pretty well.

HONORABLE SARAH DUNCAN: No. But they can find out about them.

CHAIRMAN BABCOCK: Get the name of the parents.

HONORABLE SARAH DUNCAN: The Family Code actually says that it is, I believe, discretionary with the court --

HONORABLE JAN PATTERSON: Yes.

HONORABLE SARAH DUNCAN: -- to use initials in opinions, and I believe everybody at the Fourth Court does. I know there are other appellate judges around the state that are not using initials. I'm not as concerned about somebody else going to try to find this information out as the child trying to find it out upon adulthood. There are some things that none of these children -- that I do not think it would be in their best interest to ever find out about.

The sensitive data form is going to have to deal with it, assuming that goes forward. The problem with the briefs right now is the briefs are now available at least on Westlaw, that I know of, and some of these children could easily go do a Westlaw search for themselves, assuming their name hasn't been changed, and find out some really awful facts about their family of origin, about their origins, so I think it's a good rule.

I agree with Justice Patterson. I would not make it as specific as this rule is, and I would go even further and say I don't think this is just a question of termination of parental rights. There are some really ugly

divorce cases out there. There are some pretty horrible adoption cases. I know one is near and dear to my heart, not my own, although I keep telling my parents nobody in either of their families was named Sarah, so why am I? But there is a lot of stuff in the cases involving children that if they find out it ought to be hard for them, difficult for them to find out, I think, and certainly it shouldn't be available on the internet for other disassociated, unassociated people to find out.

So I would broaden the rule to include, as Professor Hoffman says, all minor children, and I would not make it as specific as far as how the court will disguise this person's identity.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I drafted an opinion using pseudonyms in a case, and frankly, right now I don't remember if it was a criminal case or a domestic relations case, and I met opposition on the court and went back to some other convention. I think it was initials. I would like whatever we do to be made clear that at the court's discretion that we can use pseudonyms in an opinion because I think this is much broader than just a minor issue. Since I have been on the court I have been somewhat amazed at what one human being will do to another, and I think every victim of a crime, children or adults, need to at least be accorded the opportunity to be

protected in the opinion because there are some things that have been done to other people that they don't want publicly available, and once you see it in a written criminal opinion appearing, whether it's electronic or in printed text, you know, the general public knows.

And I really -- I understand what specific problem this would cure, but I think the -- and I will support this if this is all we can have, but I, like others that have spoken, think that the problem is larger; and while I thought the rules were very clear that I could use a pseudonym, it just wasn't worth the internal fight and I went on. But I think if it was clear they would not have opposed the issue, and understand that the whole purpose of the opinion is simply to tell the public the whole process that we got through to the result, and who the -- what names we append to the actors in this are largely irrelevant. I mean, you know, sometimes gender is important, but most of the time it's not, and you just go through the -- you know, you could literally -- well, I mean, how many Jane Doe cases did we have on abortion issues? And so, you know, you really can make it where it protects the identity.

I think what's driving this one more than anything else and why it's coming from the Supreme Court clerk is they were the first ones to put the briefs online, and so that's where the issue hit first. All of the sudden we're

getting these termination cases that you can get a notice from Osler, and it says, "These are the ones that are going to be argued and here is the briefs of the party." You can click on it and read the brief. There is mom and dad's name, child's name. Everybody's names are there. There is just no need to have that level of familiarity.

I'd like to see if you're going to do this -- this is in jest now, but go to (c) and let me put a hundred dollars per letter for every violation of the rule, because the problem is going to be how do you get the practitioners to do this, because notwithstanding they can do it now by pseudonym or by letters, by some other designation, they don't, and so what are you going to do about that?

CHAIRMAN BABCOCK: Why don't they?

HONORABLE TOM GRAY: I think it's pressures of time and resources and, you know, they were involved -- a lot of them were involved in the battle at the trial court, so that's just the way they're comfortable talking about it, and you have to consciously think about, wait a minute, let's think about where else this is going to go. We have one district attorney in McClennan County that's very sensitive to this issue, and most of her indictments that she uses use pseudonyms in the indictment, and so that starts the process of protection of privacy of the victim all the way through the trial, and it works fairly well, because everybody, all her witnesses, all

the state's witnesses, are woodshedded to refer to the victim by the pseudonym, and so the transcript, the briefs, everything developed very well. But that's because she is particularly sensitive to it, and we don't have time or resources to retrain the entire bar. All we can do is a rule, so I would support anything like this and any expanse of it that we can give.

CHAIRMAN BABCOCK: There's another side to that argument, but Bill.

PROFESSOR DORSANEO: Oh.

CHAIRMAN BABCOCK: You had your hand up a minute ago.

PROFESSOR DORSANEO: Yes, I was pursuing this concept of what kind of cases. I think we're going to say -- we say suits affecting the parent-child relationship. That has a definite meaning, and then I started looking at one of my companions that's always with me about juvenile cases, and I'm not exactly sure how to describe juvenile cases, because I've never had anything to do with a juvenile case as a lawyer or in any other capacity, thankfully.

HONORABLE SARAH DUNCAN: Proceedings involving juveniles under the Texas Family Code. Texas Juvenile --

HONORABLE NATHAN HECHT: Why wouldn't you just say any time a minor's name is used, wrongful death case or anything?

PROFESSOR DORSANEO: Well, you could say that,

but that's --

CHAIRMAN BABCOCK: Judge Christopher, you had your hand up.

PROFESSOR DORSANEO: What are you trying to accomplish?

HONORABLE NATHAN HECHT: Ease, to some people.

HONORABLE SARAH DUNCAN: But most of the time it doesn't make a difference.

HONORABLE TRACY CHRISTOPHER: So any minor case? So any personal injury to a minor case that we would have to have initials for the minor?

HONORABLE NATHAN HECHT: Well, I'm just wondering. I mean, rather than try to -- I mean, we're already worried that the lawyers aren't going to follow it, and so it just seems to me it would be a whole lot easier to teach them to say if the kid's under 18 at the time of trial don't put the name in the brief.

HONORABLE SARAH DUNCAN: Well, but most of these cases, most of these types of cases, are handled -- at least in my experience, are handled by lawyers who tend to do that type of case over and over. To me the way to enforce it is give the appellate court authority to require the brief to be redone if it's not -- if the rule is not followed.

PROFESSOR DORSANEO: And witnesses and everybody else who is involved, you just have a bunch of initials. I

don't know who these people are. It just makes it too hard to function as a lawyer.

HONORABLE JAN PATTERSON: Well, to respond to your question about why don't they do it, I think it is because traditionally these were matters in the trial for the trial level, never to be appealed. My first couple of years on the bench we never saw divorce cases, much less termination, all these cases involving children. Now it comprises about 20 percent of the civil docket, and these cases have flooded, and now they are being appealed to the Supreme Court, so the briefs on the record really are a major problem, but I'm not sure that we want to do it across the board, because there may be instances where for clarity or precision that -- and it might be silly not to use a child's name in an airplane case or, you know, but it's not complicated. It seems to work just fine in juvenile cases, divorce, custody, termination cases.

I mean, there seems to be -- I mean, maybe if we left it discretionary but encouraged, I mean, I think people would adopt the system. I think they understand why it's good, and I don't think anybody has any incentive not to do that. I think it's a matter really of education of lawyers. I think if we spoke at the next family law conference and said we encourage you to do this, that they would do that, because I don't think they have traditionally carried the cases through to appeal, and now that's happening, and now they're ending up

in the law books.

CHAIRMAN BABCOCK: The reason I asked the question was I wondered if the lawyers are doing it because their clients were instructing them to do it a particular way.

HONORABLE JAN PATTERSON: Yeah, I don't get the sense that there is any warfare over use of names. I mean, there is warfare over everything else, but --

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, pretty soon the trial transcripts are going to be available online, too, so I mean, if what we're worried about is somebody reading briefs then we have to worry about the trial transcript, too.

HONORABLE SARAH DUNCAN: That's what I was talking about with the sensitive data form rules, because clearly that's coming, but the briefs in the Fourth Court of Appeals are online now on Westlaw, and I imagine other courts have also -- Chief Justice Gray is nodding that not his court. It's a voluntary thing that a court of appeals can provide its briefs to Westlaw, who sends them to China, I think, to be typed, but clearly we're going to get to the point that reporter's records and clerk's records are available online, but as far as I know, we're not there yet. It may be --

HONORABLE TRACY CHRISTOPHER: I mean, I think they're --

HONORABLE SARAH DUNCAN: -- a year, but we're

not there yet.

HONORABLE TRACY CHRISTOPHER: I think they're opening the First and Fourteenth to start submitting them electronically from the court reporter to the court of appeals. I don't think it's required yet, but I think they're hoping to get to that, and our court reporters are thrilled about that idea.

HONORABLE SARAH DUNCAN: The Fourth Court of Appeals gets them electronically, but they're not posted on the web, so you're still going to have to go to the court, you're going to have to know your case number, you're going to have to check out the case number, and you're going to have to read the file, because the only thing that's available online is the opinion and the briefs. So if we could just clear up the opinions and the briefs, we would solve the problem for now, and we can deal with the problem of online reporters' records and clerks' records when it happens, which I predict will be sooner rather than later, but you can only do so much.

CHAIRMAN BABCOCK: Yes, Justice Hecht.

HONORABLE NATHAN HECHT: Since we're on the subject, could I just ask David what his reaction would be to the idea that reporters had to redact certain sensitive data in making the reporter's record?

MR. JACKSON: It wouldn't be a problem as long as we clearly understood what that meant, because, you know,

under 52 we're required to give a verbatim transcript and changing, you know, "Clara Brown" to "IDC" is not a verbatim transcript in our brain.

HONORABLE NATHAN HECHT: Right.

MR. JACKSON: And when we hear the words "Clara Brown" we write the words "Clara Brown," and there is no way we have time to translate that, so it's going to be on some format "Clara Brown."

HONORABLE NATHAN HECHT: But if -- are there other practical problems in preparing the reporter's record for appeal in redacting that kind of information?

MR. JACKSON: There is no problem at all. What you do is do a global define that changes "Clara Brown" to "IDQ" and it changes everywhere in the transcript.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Can you -- do you feel that you would comply -- what verb does the statute use when it says you have to take a verbatim transcript? Does it say you have to provide it or --

MR. JACKSON: It says it has to be verbatim.

HONORABLE SARAH DUNCAN: -- you have to take it?

MR. JACKSON: Our goal is to turn out a verbatim transcript of everything that's said.

HONORABLE SARAH DUNCAN: Well, but I'm trying to figure out can you comply with the statute?

MR. JACKSON: I don't think we can.

HONORABLE SARAH DUNCAN: Okay. That's my question.

MR. JACKSON: That's why I think we would have to have some clarity about --

HONORABLE SARAH DUNCAN: There will have to be an amendment to the statute.

MR. JACKSON: Right.

MR. GARCIA: You also have realtime, because -- and with the new software there is remote. You take a deposition in Houston, and people in Shanghai have it that second, and they're commenting back, and it floats around immediately, so there is no way to stop that.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. TIPPS: Well, with regard to -- I have no particular comment on the -- I haven't thought through the trial transcript issue, but with regard to what is said in appellate briefs and appellate opinions, it seems to me listening to all of this that it's going to be really hard to come up with a bright line rule for when you want to protect the minor's privacy or an adult's privacy, for that matter, and when you don't and that the better course might well be simply to have a rule that authorizes the court, the appellate court, either on its own motion or in response to a motion by one or the other of the parties to direct the parties in this

particular case, given the circumstances with which the court and the parties are familiar, to use initials or pseudonyms in describing this particular person and sort of do it on a case-by-case basis, but I can see the benefits of having a rule like that in light of Justice Gray's experience in which he at least perceived that to be appropriate and somebody else thought, well, you can't do that. It seems to me that the court ought to have the authority to do that, but it needs to make that decision on a case-by-case basis.

HONORABLE SARAH DUNCAN: I hope the court has that authority because the Fourth Court did it, but the problem I have with that suggestion -- I think the court certainly should have that authority. I agree with you. The problem is that until the court gets the first brief it doesn't necessarily -- all it knows is the case is civil or criminal.

MR. TIPPS: Right. But a party, one would think that the party whose privacy is at stake would be most likely to identify the concern.

HONORABLE SARAH DUNCAN: Huh-uh. That doesn't happen.

MR. TIPPS: Okay.

HONORABLE SARAH DUNCAN: I'm sorry to say.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I've done that over the years, when you see opinions and they say something about

somebody and then somebody says, "That's not accurate information about me, I would like it removed or changed," but they're not a party to the case. I've gone to the court, Dallas court of appeals, and gotten opinions, you know, modified to delete kind of gratuitous references attributing things to people who really weren't litigators, so I would assume there is that authority anyway, but maybe we should have a rule.

Where I am so far, Chip, on this is suits affecting the parent-child relationship, juvenile cases. I think it ought to talk about appellate opinions, too, if appellate courts, court of appeals, aren't uniform on this. And then just initials, without particularizing, you know, "WVD" and going into detail on that.

HONORABLE SARAH DUNCAN: And I would add to Bill's list in accordance with Chief Justice Gray's suggestion and a case that we actually did this, "and any other case in which the court deems it appropriate."

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I was just going to join. I thought Stephen had a good idea. I think there ought to be a group of cases, like cases involving a minor where the parties are instructed this is a routine deal, you always do that, but I think there ought to be also another group of cases because we have situations -- we had a situation where a

confidentiality of an adult was involved. The parties didn't bring it to our attention, but it seemed perfectly silly for us to write a decision based on the confidentiality of someone's identity and then to put his name into the opinion, so I think there are situations where -- that are not easily classifiable, but that there are statutes out there that preserve the confidentiality of individuals, and we ought to have a vehicle for permitting a motion by a party or just a sua sponte decision by the court.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: One of my favorites, use of the names would be expunction where we use the full name, the expunction of the record of opinions. Those are always good.

CHAIRMAN BABCOCK: Well, you know, it occurs to me before -- as we get caught up in making things from public record private, that if you go back to our history, you know, everybody in the community has known what's -- I'm perhaps affected by the fact I just finished Larry McMurtry's most recent novel and, you know, everybody in Thalia knew what everybody else was doing and knew what everybody else's history was, and the community didn't crumble because of that, and, you know, this whole effort to try to put the genie back in the bottle is somewhat, it seems to me, a little bit of a reaction, overreaction, to the internet; and we do have a public system of justice in our country and the more you make it private, the

more you're at odds with that; and all these examples that everybody is talking about, people just instinctively are open in our society. I mean, that defines us in a lot of ways, and so when people use the name in an expunction order that's almost instinctive for us, and what I hear around this table is trying to do something that to me is counterintuitive and opposite what our history has been. Jan.

HONORABLE JAN PATTERSON: That's why -- I think that's an excellent point, and I think there is a distinction between an open system and making trial available and known to the community, which is one thing; but to allow data mining through opinions is another thing; and I think perhaps we ought to specify what our goal is here; and mine really is to avoid that kind of data mining through opinions, not so much even a child going back and seeing the background; but people, for example, witnesses to crimes, sometimes their identities as witnesses are relative, sometimes it's not; and for people to be able to run identities through opinions and get that kind of information about people I think is what I have in mind; but I think your point is an excellent one that we don't want to overdo it.

CHAIRMAN BABCOCK: Yeah, and sometimes victims, although the D.A. always thinks that the people are victims, sometimes they're not victims. Sometimes the person that's accused is not guilty of the crime, and if you shield the

identity of the victim then people who in the community who would otherwise have information about it don't come forward to help exonerate the person whose been wrongfully accused.

HONORABLE JAN PATTERSON: Well, we call them complainants as a result of that.

CHAIRMAN BABCOCK: But if you hide their identity then people who might know about it, about the alleged crime and the fact that a crime wasn't committed, don't come forward because they don't know about it.

HONORABLE JAN PATTERSON: But you're talking about a much later point.

CHAIRMAN BABCOCK: Yeah, I am. All right. Why don't we take our morning break? Is that okay with everybody? Ten minutes.

(Recess from 10:40 a.m. to 10:59 a.m.)

CHAIRMAN BABCOCK: All right. We're back on the record, and Justice Hecht has indicated that we got a good discussion that you can maybe go back to the drawing board, and what did you say, more admonitory?

MR. WADE: The goal has been clearly delineated.

PROFESSOR DORSANEO: Let it be written, let it be done, right?

CHAIRMAN BABCOCK: Yeah, let it be written, let it be done. So why don't we talk about 20.1, when a party is indigent?

PROFESSOR DORSANEO: All right. We don't have much to talk about here because -- and we've talked about this too much. If you go down to (3) on page two of the short version of the memo, the extension of time alternatives, this comes initially I think from David Gaultney's point that the Higgins and I guess Hood case required some remedial work to be done to the extension of time provision of this rule.

The two versions, I guess I'll refer to the first version that's a fix that was suggested at a meeting some months ago, see, this is the Jennings alternative, that "The appellate court may not dismiss the appeal on the ground that the appellant has failed to file" -- I guess there is a choice within a choice -- "an affidavit or a sufficient affidavit of indigence," and I would remove the brackets and say both of those things, "has failed to file an affidavit or a sufficient affidavit of indigence without providing the appellant a reasonable time to do so after notice from the court." I think that's fine as-is.

The other alternative that was also hand-delivered to me by a member of the committee, the Yelenosky alternative, is the second one. "The appellate court must notify the appellant of the appellant's failure to file a sufficient affidavit of indigence and must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or a sufficient affidavit of indigence

before dismissing the appeal or affirming the trial court's judgment due to the appellant's failure to comply with paragraph (1)."

Actually, my recollection is that's kind of an amalgamation of a prior draft by me and with some suggestions from Judge Yelenosky. Take your pick, first or second. I think that the subcommittee did discuss this, did we not, and did we not say that we like the first one better on our telephone conference? I think that's right. At any rate I like the first one. Is that right, Jody?

MR. HUGHES: I think so.

PROFESSOR DORSANEO: Yeah, I like that better anyway, so that's the issue.

HONORABLE SARAH DUNCAN: I don't think I was able to be in on that conversation, but the alternative says one thing that I think is different, and that is that the court may not affirm the judgment without giving sufficient notice of the defect and an opportunity to cure, and I prefer also the first alternative, but I think it ought to say "but the appellate court may not dismiss the appeal on the ground that the appellant has failed to file an affidavit or a sufficient affidavit of indigence or affirm the trial court's judgment without providing the appellant a reasonable time to cure the defect after notice from the court."

PROFESSOR DORSANEO: Done.

HONORABLE SARAH DUNCAN: That was easy.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Somewhere I was -- I think I was taught not to start a sentence with the word "but."

HONORABLE JAN PATTERSON: That's changed.

MR. MUNZINGER: And I question the necessity for that.

HONORABLE SARAH DUNCAN: You were taught wrong.

MR. MUNZINGER: Was I?

HONORABLE SARAH DUNCAN: Uh-huh. So was I. I can say that because I was taught wrong, too. That was because we were too immature to start a sentence with "but" when we were learning these rules. Now we are sufficiently mature to know when it is appropriate.

CHAIRMAN BABCOCK: She's from generation Y, by the way.

HONORABLE NATHAN HECHT: That's because my grandma said, "Don't say 'but' to me."

HONORABLE SARAH DUNCAN: What's generation Y?

CHAIRMAN BABCOCK: What's generation Y?

HONORABLE JANE BLAND: The generation that came before the millennials.

HONORABLE SARAH DUNCAN: That what came before the millennial?

HONORABLE JANE BLAND: Gen X, Gen Y, the

millenials.

PROFESSOR CARLSON: Trust me, you're none of those.

MR. DUGGINS: Yeah, I'm none of those.

CHAIRMAN BABCOCK: All of my jokes are going over everybody's head today. I thought the George Foreman thing was good.

HONORABLE JANE BLAND: You're a baby boomer, and they're all just waiting for you to retire.

HONORABLE SARAH DUNCAN: That's all I am, is a baby boomer.

PROFESSOR DORSANEO: Sarah, are you sure that that language that you added is added in the right place?

HONORABLE SARAH DUNCAN: No.

HONORABLE NATHAN HECHT: You add it up earlier.

HONORABLE SARAH DUNCAN: Yeah, it should be after "ground," I'm sorry. No, it should be after "appeal." Sorry.

PROFESSOR DORSANEO: Okay.

HONORABLE SARAH DUNCAN: "May not dismiss the appeal or affirm the trial court's judgment" --

MS. BARON: Bill.

CHAIRMAN BABCOCK: We all happy about that? Pam.

MS. BARON: Yes, kind of a slightly different

issue. I've been working with the appellate section on a pro bono project where the Supreme Court will be able to refer cases out where litigants are representing themselves pro se and meet the IOLTA guidelines if a court determines that they need extra briefing help, and we're having a few issues, one of which is that there is really no provision past the initial point if a party later becomes indigent or wants to later claim indigent status at the Supreme Court level, and right now I think that the Court accepts affidavits for the first time at that point, and I just want to make sure that our program is protected so that we don't have people who actually could meet the IOLTA guidelines and need assistance are somehow precluded from getting that assistance. Jody, have you thought about that or talked with -- I think it's McKay?

MR. HUGHES: I have talked with Macy.

MS. BARON: Marcy.

MR. HUGHES: Marcy, sorry.

MS. BARON: Marcy Greer, yeah.

MR. HUGHES: About this a little bit, and you know, there was the concern -- she raised that concern, but then was also of the idea of not wanting to advertise in the rule, by the way, you can do this any time. I mean, it's one of those you want to leave the door open, but you don't want to necessarily put a light over the door.

MS. BARON: Right. Do you think that the

extension of time rule kind of protects it as long as it says you can't dismiss a standard?

MR. HUGHES: That's what I told her, that I thought there was adequate protection there.

MS. BARON: I just want that on the record just so we know we're okay on that. Okay.

PROFESSOR DORSANEO: Are we ready to vote?

CHAIRMAN BABCOCK: I think we are. Anybody -- Buddy.

MR. LOW: No, no. I'm saying I'm ready.

CHAIRMAN BABCOCK: And I don't sense that there is a lot of dissension on this. Anybody opposed to the rule as Sarah has proposed the amendment? Okay. So that wins by acclamation.

PROFESSOR DORSANEO: All right.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So we have a vote on that one, Jody.

MR. HUGHES: Got it.

CHAIRMAN BABCOCK: All right.

PROFESSOR DORSANEO: And the next one is Rule 41, and this has been on the table for quite a while. Look at the one page with the (7) at the bottom that comes from an earlier memo. Everybody have that?

MR. HUGHES: It's the one that has a handwritten

"statutorily" on it at the top.

PROFESSOR DORSANEO: Coming back to this Rule 41 over and over and over and over again and redrafting it, today we concluded that we were better off with something that actually passed unanimously on February 16th, right? And I'm happy to leave it at that, but the long history of it is that we have Chapter 74 and 75 of the Government Code that authorize the chief justice to appoint people, justices and judges, to sit on courts of appeals under particular circumstances. The statute provides qualifications for appellate justices and appellate judges, and the statutes say that active district court judges can be appointed as well, but it doesn't provide any more additional qualifications for active district court judges. You don't have to be tall or have red hair or have any particular certificates to qualify. So the way the thing passed unanimously on the 16th is fine as drafted.

We had an issue that has been an appellate subcommittee issue and another issue that deals with the -- that deals with the bracketed parenthetical at the end of (b) and at the end of (c) and in 41.2(b) as well. The parenthetical or the bracketed material says "who is qualified for appointment by Chapter 74 and 75 of the Government Code." And the issue is people on the committee said, well, that could change. Maybe it will not be Chapter 74 and 75 of the Government Code. It's likely to change, and this will end up

being wrong at that point. It occurred to me today that we could say instead of "who is qualified for appointment by Chapter 74 and 75 of the Government Code," we could say, "who is qualified by law, by statute or by law," and that will work fine. If we do that then the first word in (b) on the first one, a bracketed "qualified" would come out. Okay. And "who is qualified by law" would replace the second bracket, and that would happen in (b), 41.1(b). It would happen again in 41.1(c). It would happen again in 41.2(b), and we would be done.

HONORABLE SARAH DUNCAN: Whew.

PROFESSOR DORSANEO: Okay. And that's my recommendation, not the subcommittee's recommendation, but I think at least the first one already passed. Maybe all of them passed. Do you know whether your notes reflect that every one of those passed or just the first one?

MR. HUGHES: I think just the first one did, but we came back to it because then we got into these alternatives, and we never picked an alternative on them. So it sort of initially passed, but --

PROFESSOR DORSANEO: Carl said the second one passed, too. Yeah.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And then we put the statutory reference in the comment, which would typically leave

out -- you know, at the time the change was made this is where you look. That way if somebody looks at it and they need some help finding it, they can drop down and see it, but if it changes it won't change the rule.

PROFESSOR DORSANEO: So you want to put a comment, write a little comment there. I think we did talk about that, too. So are we done?

CHAIRMAN BABCOCK: Anybody opposed to that? Any comments on that? Pete, you've been awful quiet today.

MR. SCHENKKAN: No comment.

CHAIRMAN BABCOCK: Okay. No comment from Pete, so we're good there.

MR. HUGHES: I'm going to have to go back and read the transcript again to make sure I've got all the notes on here. You're working off of this thing.

PROFESSOR DORSANEO: Yeah. That takes us to 52.6.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And I don't remember, this was just ready for Supreme Court Advisory Committee discussion. "A reply may be no longer than 15 pages if filed in the court of appeals or eight pages if filed in the Supreme Court," lengthening the number of pages for a reply in the court of appeals. That's all that it does, right?

MR. HUGHES: Correct.

PROFESSOR DORSANEO: And I suppose 15 pages, I don't remember us discussing this exactly, but I do remember discussing similar issues as to whether it should be 15 or 20 or 25, et cetera, so I think that's the issue, isn't it, how many pages?

MR. HUGHES: Yeah, and it's -- I mean, the comment came as a result of if you got -- in the court of appeals you've got 50 pages for the petition and 50 for the response and then eight for the reply, so you can't necessarily reply to a 50-page response in eight pages, so it could be 15 or 20 or 25, but --

PROFESSOR DORSANEO: So this number 15 is a --

MR. HUGHES: I just kind of made it up.

MS. BARON: Yeah, in the briefing rules it would be 50, 50, 25 for an ordinary appeal, right?

MR. TIPPS: I can't see any reason why this shouldn't be 50, 25 either, if you need 25 to reply to a normal brief why would you not need 25 to reply to a mandamus?

MS. BARON: I don't think you should have 50-page mandamuses but -- if you want them to be granted, but I do think 50, 50, 25 is how it should work if you're going to do it.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Why did we make it so different in the court of appeals from the Supreme Court?

HONORABLE NATHAN HECHT: Because they just get one shot in the Supreme Court. They file briefs on the merits in the court of appeals or maybe --

HONORABLE SARAH DUNCAN: But this --

HONORABLE NATHAN HECHT: I mean, that's why we did it. Maybe that's not a good idea, but that's why we did it. We treated the mandamus proceeding in the court of appeals like an appeal and we treated it in the Supreme Court like a petition. Now, maybe it should be treated like a petition in the court of appeals, I don't know, but that's why we did it.

CHAIRMAN BABCOCK: So 15, going once?

PROFESSOR DORSANEO: What do you think? Appellate lawyers?

MS. BARON: No.

CHAIRMAN BABCOCK: Pam.

MS. BARON: No.

CHAIRMAN BABCOCK: Pam.

MS. BARON: If we're going to do it, it should be consistent with the briefing rules

CHAIRMAN BABCOCK: Okay. Who else?

MR. HATCHELL: I agree with that, and Judge Hecht, I'm correct that if the Court orders merits briefing in a mandamus then it is the 50, 50, and 25 in the Supreme Court.

HONORABLE NATHAN HECHT: Yes.

PROFESSOR DORSANEO: 25.

HONORABLE NATHAN HECHT: And 8 actually.

MR. HATCHELL: Yes. Well, no, it wouldn't.

HONORABLE NATHAN HECHT: No, it's 25. That's right. That's right.

MR. HUGHES: This is petition.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: As long as what's in the rule doesn't prevent us from ignoring it, I don't have a problem with that.

HONORABLE JAN PATTERSON: Are you saying you don't have to read it?

CHAIRMAN BABCOCK: Why don't we put that in a comment? The court may --

HONORABLE TOM GRAY: Let me make sure that I'm clear. That's ignoring the rule, not ignoring the reply.

CHAIRMAN BABCOCK: I thought you meant the reply.

HONORABLE TOM GRAY: Yeah, I realized that after I -- no, it's the rule, because I have to say I didn't even realize there was a page limit on the reply, so we've never counted reply pages.

CHAIRMAN BABCOCK: Anybody opposed to 25, so strongly advocated by Hatchell and Baron?

PROFESSOR DORSANEO: I think it's fair to say that the appellate rules subcommittee, at least the lawyers on

it, would say 25 is a good number.

CHAIRMAN BABCOCK: Okay. Anybody opposed?

HONORABLE NATHAN HECHT: No less than.

MR. HAMILTON: The eight stays the same?

CHAIRMAN BABCOCK: The eight stays the same. All right. So that goes -- you're on a roll today, Bill.

PROFESSOR DORSANEO: It's only taken a year to get through this.

CHAIRMAN BABCOCK: Anything else you want to bring up right now?

All right. We will go to Judge Lawrence, who has got some stuff about writs, and I have a letter from Tod Pendergrass, who is here, I think, that -- Judge Lawrence, have you seen this?

HONORABLE TOM LAWRENCE: I don't think so.

CHAIRMAN BABCOCK: Okay. Why don't you make a copy for him and give it to Judge Lawrence?

Tom, take us through wherever you want to take us.

HONORABLE TOM LAWRENCE: Well, as I understand it, the Court received a letter from the private process servers asking that they be allowed to serve writs of garnishment and -- thank you -- and we discussed this at the last meeting, and we discussed the pros and cons of having private process servers do it.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: Now it's limited to the sheriffs and constables. We did not take a vote on it, but the direction was that we prepare a change to the rules of procedure to allow private process servers to serve these writs of garnishment. So what you have before you are changes to Rule 662 and 663. There is more to a writ of garnishment than just an initial service of -- you've got the writ of garnishment itself, which is served on a bank, typically a bank. Sometimes it can be someone else that holds property that can be seized and sold, but usually 90 percent of the time it's probably a bank. Then there is the service of the copy of the writ of garnishment on the defendant, and then ultimately if the property has to be sold, it can be ordered to be -- the garnishee, the person that has the property, can be ordered to turn the property over to the sheriff or constable for sale.

So you've got separate issues. On one hand you've got the service of the notice of writ of garnishment or the copy of the writ of garnishment on the defendant. Then you've got the service of the writ of garnishment itself on the bank, and then you've got the provisions to have the property turned over to a sheriff or constable to be held and possibly ultimately to be sold. So the way the changes are drafted, Rule 662 and 663 would basically track the language in 103, the recent changes to 103 where you allow the sheriff or constable

or any person authorized by law or by written order of the court who is not less than 18 years of age or any person certified under order of Supreme Court to make the service, and that would be consistent, again, with 103.

There was some objections raised to that. One of the issues that was discussed was maybe having the private process servers board institute an additional certification, and this certification would be for those that are going to serve these writs of garnishment that would require them to undergo some additional training. The reason there is no language is that there is no mechanism currently to allow the private process servers to do that. I mean, they could do that, but they have not done that yet, so is there is no additional certification or endorsement on their certification so to speak, so it might be a good idea to do that at some point in the future.

The other issue is that you really don't want -- under Rule 670 and 672 you would not want the private process server, nor would they really be able, to receive the goods, the garnished goods, from the garnishee, and sale -- and sell those. That has to be done under statute by sheriff or constable, which leads us to the necessity of having a comment, because in essence if you are someone who wants to do a garnishment you could have a private process server serve the writ of garnishment on the bank, serve the defendant with a

copy of the writ of garnishment in 662 and 663, but you would not be able to under 670 and 672 have a private process server receive those effects, as they call them, the property, or conduct the sale, so you really have kind of a -- you would have a dual track, which may cause some confusion.

If it's possible that there's going to be a need to have property sold, then you probably wouldn't want to have a private process server start the garnishment. You would want to go through the sheriff or constable. Arguably, if you go through the private process server, it's possible the sheriff or constable would not want to have anything to do with the receiving of that property or the sale of it since they weren't involved in it. That's speculation, but I think it's possible that could occur. So that's it in a nutshell.

If the constables -- they would object, sheriff or constables, particularly the constables, would object for a couple of reasons. They say that that under 670, for example, when the property is not returned you wouldn't want to have a private process server do that because ultimately if the property is not returned it leads to a contempt and someone possibly being jailed. Under the proposal today a private process server wouldn't be doing that. It would be the sheriff or constable, but also if there is a problem with the garnishment, for example, let's say that you served the defendant first before the bank is served, well, the defendant

in all likelihood is going to go and clean out that bank account, if the bank has not been served first. So if you have some problem like that or the wrong party is served, you know, there are various things that could go wrong. The sheriff or constable would have -- they have an official bond, and the county, the employees would be liable for that, which would not necessarily be the case with a private process server, so that's one of the arguments by the constable why there should not be a change made.

I didn't receive really much in the way of comments from the committee, and I sent this both to the committee on 103 and the committee for the garnishments, and Jody had some stylistic changes which are reflected in the comment, but I do think a comment is going to be needed so that parties understand that if they think there is a possibility it's going to have to be sold, property sold, they don't want to use a private process server in all likelihood. They probably want to go with the sheriff or constable so they'll follow that throughout, but I think it's possibly going to cause some confusion.

CHAIRMAN BABCOCK: Okay. We had a couple of people that petitioned -- not petitioned, but asked if they could speak, and of course, that's generally our custom, anybody that wants to speak within reason may do so, but apparently they thought that we wouldn't be as far along on our

agenda as we are, so they probably won't make it, but who is it, Jody, that --

MR. HUGHES: Well, it's Ron Hickman, Constable Ron Hickman from Harris County is a member of the Process Server Review Board and I think he's representing the constables, and Carl Weeks, who is the chair of the board, and they have a board meeting going on right now. I could call them and see if they could come over their lunch break or something. I just don't know where they are in their meeting.

CHAIRMAN BABCOCK: Yeah. How does everybody feel about that? Judge Lawrence, do we need their input?

HONORABLE TOM LAWRENCE: Well, I think -- I don't want to misquote them, but I think the private process servers would probably argue that the writ itself, at least to the bank and to the defendant, is just -- it's a citation and, therefore, they should be allowed to serve it. I haven't heard that they are arguing that they should be allowed to sell the property. I don't think the statute would allow them to do that anyway.

CHAIRMAN BABCOCK: What's the constables' objection to this?

HONORABLE TOM LAWRENCE: Well, the constables think that they -- they would argue -- well, the constables undergo education for this, and a substantial amount of the education that the civil deputies get is in serving writs of

executions, writs of garnishment and attachments and various things like that, so they would contend that they are trained not to be able to make the mistakes with garnishments that would cause a problem to the person that's trying to get the property. They would also argue that they would be able to follow through to the very end of the sale of the property, whereas a private process server wouldn't, and then they would further argue that they have -- that if there is liability that you would be able to go after the official bond or go after the county that employs them if something goes wrong; whereas that wouldn't be the case with a private process server. And there are other arguments, but I think those are probably the main ones.

CHAIRMAN BABCOCK: All right. Anybody got any comments about this rule? We talked about it a fair amount at the last meeting, for those of you who were here, and although we didn't take a vote, my sense -- and, Judge, maybe yours was the same or different -- that we were headed toward permitting this, permitting the language that you've drafted. Yeah, Carl.

MR. HAMILTON: I just have a comment about, whether we pass it or don't, Rule 662 says, "Writ of garnishment shall be dated and tested as other writs." I haven't got a clue what that means, and I'd like to change that to say "shall be issued by the clerk." I don't know how the clerk tests a writ, and if they don't test it, it may be

invalid, so we may not want that in the rule.

CHAIRMAN BABCOCK: Strap it on and pump it up. Buddy.

MR. LOW: This is not something of great significance, but Judge Lawrence and I have discussed this, that in the JP rules we always use "him," the constable, and in these rules we are talking about amending, ten times they use "him," and I don't know if we want to amend these rules and use the correct wording there for it when all the others still have it that way or what you want to do, but I would point out that they do use "him" or "he" in all these rules that we're attempting -- for instance, the first one at the bottom four lines "belonging to him," "delivered to him," and we've amended our other rules, but again, this would just be a drop in the bucket because all the JP rules are that way.

PROFESSOR DORSANEO: Most of our rules are that way.

MR. LOW: Not most of them, because the ones we've amended, and we've amended a lot over the last 12 years or 15, and we've never put "him" or "he" or "she."

HONORABLE TOM GRAY: I bet the codification is gender neutral.

PROFESSOR DORSANEO: It is.

CHAIRMAN BABCOCK: You said that somewhat wistfully, Bill.

PROFESSOR DORSANEO: Well, I talked to myself about the codification and decided I would speak about it no more forever.

MR. LOW: That's the next item on the agenda.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: We've got a couple of other issues that are involved in this. One is that Rule 15 says that all writs are to be directed to the sheriff or constable. Now, that wasn't -- I guess we didn't worry too much about that when 103 was amended, so I don't know if we want to go back and look at that now. I didn't propose any additional language on that, but also there's -- there are other -- as you've talked about at the last meeting, there are some other rules, like writs of injunction, for example, that don't require the taking of property, and I don't know if there's a -- you know, if we want to look at changing that.

CHAIRMAN BABCOCK: Well, not just now.

HONORABLE TOM LAWRENCE: Okay. Well, I'm just saying in the interest of consistency that we're wanting to change the garnishment rules but we're not doing anything to injunction. Also, writs of possession under the eviction rules don't require -- at least the original filing of the lawsuit, the notice, the citation doesn't require the taking of property. That's excluded under 103, but so there might -- some might say that there are some inconsistencies, but if you

want to change the garnishment rules then this would allow you to do it to allow process servers to at least serve the writs of garnishment and the copy on the defendant.

CHAIRMAN BABCOCK: Judge, does the subcommittee have a view on this?

HONORABLE TOM LAWRENCE: There was a noted lack of response from the subcommittee.

CHAIRMAN BABCOCK: All right. Let met put it a different way. How do you feel about it?

HONORABLE TOM LAWRENCE: I assumed it was because of my drafting, but it may have been other reasons. But there wasn't much response from either 103 or the 536 subcommittee.

CHAIRMAN BABCOCK: Well, how do you feel about it?

HONORABLE TOM LAWRENCE: About whether or not we change the writs -- allow garnishments?

CHAIRMAN BABCOCK: Yeah, to change these rules in the way that you've indicated.

HONORABLE TOM LAWRENCE: Well, I think the constables have a point about the education. I would feel -- if you wanted to do it, I would feel more comfortable if you did not just universally apply the 103 standard. For example, you're going to allow under 103 anybody authorized by law or written order of court who is less than 18 can now serve a writ

of garnishment. I would think at the very least if you wanted to expand it -- and as I understand the argument for expanding it is that there are some problems in some of the counties getting writs of garnishment served by the sheriff or constable, so the need is to perhaps expand the pool, as I understand the argument. I would think it would make more sense to me to allow only someone certified who has had some additional training and has that endorsement on their certification to be able to serve this type of writ. That would make more sense, but there is no training like that now.

CHAIRMAN BABCOCK: Justice Brister.

HONORABLE SCOTT BRISTER: The distinction between garnishment and everything else, of course, is because that this property can disappear real fast. When you're talking about the bank account it's the work of a moment to pull up to the drive-through window, the money is gone, and if the constable delays, the money is gone. There is no purpose of having a garnishment, so when you want a garnishment and if it's a bank account, you want it done right now; and that's, like it or not, more likely to be done by somebody you hire than a government official.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What is the difference? What kind of training do you have to have that's different than handing somebody a citation and handing them a writ of garnishment? I

mean, hand it to them, and I fill out I served them and so forth. I mean, what extra training to do you need for garnishment? I don't know anything about garnishment.

HONORABLE TOM LAWRENCE: Well, you know, I can only relate the argument from the constables, and they say that if you've got, for example, a defendant in one county and the garnish -- and the bank account in other counties, that typically the sheriffs and constables tend to coordinate this to make sure that the garnishees are served first before the defendant is served. Also, the constables say that there sometimes are issues making sure you get the right party served, and that's their argument.

MR. LOW: But I bet that's not taught to do that. I mean -- okay.

HONORABLE TOM LAWRENCE: Well, I can only tell you that the constables argue that in their schools that they go into this to make sure that they coordinate it and to make sure that the defendant is not served before the garnishee and to make sure they serve the right party. That's their argument.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: If we want to allow the private process servers to serve a writ of garnishment, for example, on a bank where they don't actually take the money, I don't like the way we've done it here. I

think the way it's done here is confusing. I think the rules ought to be rewritten to show that we're allowing garnishment by the private process servers in certain circumstances, but if you're going to take property, then it needs to be by the sheriff. I don't think having just this little commentary is enough.

CHAIRMAN BABCOCK: You don't think the comment is enough?

HONORABLE TRACY CHRISTOPHER: And it will be confusing.

HONORABLE TOM LAWRENCE: What would you add to the comment?

HONORABLE TRACY CHRISTOPHER: Well, no, I would make two different types of writs of garnishment, one that, you know, requires taking of property and one that doesn't, and allow the private process servers to serve the one that doesn't, because otherwise -- I mean, I just think the way this is written is going to cause a lot of problems, just like the constable says, the writ gets served on somebody by a private process server, but then the constable, they're not going to want to go pick up the property because they didn't serve the writ, and I just don't think the mechanism that we have here explains what needs to be done, if we want to do it that way.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: I think it's

confusing to have it just, you know, put down here in the commentary, "Oh, by the way, if you really want to take something, make sure you hire a constable."

CHAIRMAN BABCOCK: Yeah. Okay. Any other comments? Hatchell, you feel strongly about this?

MR. HATCHELL: I like Judge Christopher's view of that.

CHAIRMAN BABCOCK: Okay. Judge Patterson.

HONORABLE JAN PATTERSON: I just have a question. Bill has referred me to a case involving levying on a property and a constable and insured is being found liable for the full amount of debt. I mean, how much does this have to do with accountability, and are constables more accountable than private -- this is a case out of El Paso, 2007.

HONORABLE TOM LAWRENCE: Well, if the constable or sheriff does something wrong then you've got their official bond and then you've got certainly liability on the part of the county, I would think. The constables argue that the --

HONORABLE JAN PATTERSON: And does that happen?

HONORABLE TOM LAWRENCE: You mean do they get sued? I couldn't tell you. I don't know how common that is. The constables argue that the private process servers are not even required to be insured, so they may not have the deep pockets to be able to go after that -- that's the constables' argument.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: But back to Justice Brister's point, shouldn't the party have the option if they want to take the risk, let them have the option of going private process or a constable? I think they should have the option.

CHAIRMAN BABCOCK: Yeah, it seems like maybe the marketplace is going to take care of the, you know, which is preferable to the users of the writ service. Yeah.

MR. MUNZINGER: It's one thing to serve a writ and give notice to someone that you have legal obligations that you must honor or suffer a penalty. It's another thing to take property. We don't want -- I don't want private people taking property, whether they're insured or not insured. It's the State of Texas that takes the property because the law has been honored, not because somebody has gone between so-and-so county and another county and gotten a good process server and done it in a hurry. In my personal opinion it's a very bad thing for this group to say that we ought to draft rules that let private people take other people's property from them under color of law.

CHAIRMAN BABCOCK: Yeah, I don't think that's the proposal, is it?

HONORABLE SCOTT BRISTER: Garnishment doesn't take property. Garnishment just puts a lien on property.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: That's why I'm looking at the rules. The usual garnishment certainly is you deliver, you know, the writ to the bank and it just freezes things, but I'm thinking about Fuentes vs. Shevin and her washing machine, and --

CHAIRMAN BABCOCK: You are a baby boomer. Fuentes vs. Shevin, that's 1970, isn't it?

HONORABLE SARAH DUNCAN: Well, that's the reason all the garnishment rules were changed, is to comply with constitutional due process, and I believe in that case they actually did take her washing machine, didn't they? And that's why I'm looking at the rules to see or think it's -- wasn't it a washing machine?

HONORABLE SCOTT BRISTER: That's attachment or sequestration.

HONORABLE TOM LAWRENCE: No. No. Well, as I understand the rules, under garnishment, the normal garnishment is going to be the bank account, but it also could be other effects.

HONORABLE SARAH DUNCAN: Right.

HONORABLE TOM LAWRENCE: And there could be an order from the court to the garnishee to turn over these other effects to the sheriff or constable who will ultimately sell it.

HONORABLE SARAH DUNCAN: That's right.

HONORABLE TOM LAWRENCE: I've never had one of those garnishments in my court, but I'm sure that they happen.

HONORABLE SARAH DUNCAN: And that's the reason for the whole bond and replevy process, which I researched more than I want apparently to remember now. Now, this was 20 years ago, but we're not -- all I'm saying is I'm not sure we're just talking about freezing funds in a bank account. I think we may be talking about people's property, which --

MR. MUNZINGER: 669.

HONORABLE SARAH DUNCAN: -- is unique, and if it's not unique, it has more value to them frequently than it has in fair market value that can be replaced in some type of compensatory proceeding.

MR. LOW: I thought we were making it clear that we were restricting it just to service, but there is some provision that it wouldn't take the property. That's the way the thing started out. I didn't know -- now you're talking about something different.

HONORABLE SARAH DUNCAN: That's what we're talking about.

MR. LOW: What I understood was just to serve it, but to make it clear that they could not take the property. But -- and I think that was the proposal initially. If it's a different proposal then I missed something in the meanwhile.

CHAIRMAN BABCOCK: Yeah. Well, that's Sarah's

point. If we could limit it to Munzinger's washing machine maybe that'd be okay.

HONORABLE SARAH DUNCAN: I'll loan you mine.

HONORABLE TOM LAWRENCE: Well, the purpose of the comment was to point out that under Rule 669, 670, and 672 that only a sheriff or constable could do that, and that's the taking of the effects or the property and the selling of the property, so that would remain only the sheriff or constable.

MR. LOW: Right.

HONORABLE TOM LAWRENCE: All you would be doing under this proposal would be to add private process servers to those persons that may serve the writ of garnishment on the bank or the person that had the property or a copy on the defendant, so that's in keeping with the spirit of Rule 103 where private process servers can't serve anything taking property.

MR. LOW: Including washing machines.

CHAIRMAN BABCOCK: Huh?

MR. LOW: Including washing machines.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: You know, one question that I raised a minute ago is do we really want to have (2) in there where "any person authorized by law or written order of the court"? Is that good policy or do we want to limit it just to sheriff or constable or to certified process servers?

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: Again, assuming that we're bifurcating this so that these people aren't taking possession or seizing property, I don't know why we wouldn't allow any other -- leave (2) in there, because it's really no different than citation.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Yeah, I'm looking at Rule 669, which is entitled "Judgment for Effects," and I do think that garnishment for effects cases are exceedingly rare, but that rule is the rule that says "should it appear from the garnishee's answer, otherwise the garnishee has any effects, the court shall render a decree ordering sale of such effects under execution and directing the garnishee to deliver them to the proper officer for that purpose."

Now, I think if you wanted to bifurcate, a place to bifurcate would be in 669 and 670, which normally wouldn't come into play, and just simply say at the end "to a sheriff or constable for that purpose," and then it wouldn't need to be the same person who served the writ of garnishment. I don't see any reason at all -- and I may be, you know, sufficiently unschooled to not be able to see on this point, but I don't see why the same person needs to be involved in service of the writ of garnishment and in enforcing the court's judgment to sell effects.

HONORABLE TOM LAWRENCE: Well, I suspect as a practical matter that some sheriffs and constables may be reluctant to sell the property if they've not served the writ of garnishment.

PROFESSOR DORSANEO: But they would be ordered to do that, and that reluctance should be pretty quickly dissipated by normal methods.

CHAIRMAN BABCOCK: By the order. Okay. Jody tells me that the representative of the private process servers and the Harris County constable are on their way, so we'll see who gets here first.

MR. WADE: We'll determine it that way.

CHAIRMAN BABCOCK: How we go on this rule, but if we've -- if we don't have anything more to say about this, maybe Elaine is ready to talk about -- while we wait for these guys.

PROFESSOR CARLSON: All right. Going back to the 6-5-07, 24.2, "Amount of Bond, Deposit or Security."

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: I think this will work, and I think Justice Duncan concurred, but feel free to jump in.

CHAIRMAN BABCOCK: You guys hold hands while you do this.

PROFESSOR CARLSON: Kumbaya.

HONORABLE SARAH DUNCAN: Kumbaya

PROFESSOR CARLSON: If we took the last sentence in 24.2(c)(1) and moved it down after the second sentence of the second paragraph of (c)(2) --

CHAIRMAN BABCOCK: Read the sentence you're talking about.

PROFESSOR CARLSON: "A net worth affidavit filed with the trial clerk is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit, or security, required to suspend enforcement of the judgment."

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: So if we moved that sentence, following the second sentence in (c)(2), that would clarify that the net worth affidavit is prima facie evidence not only to just get a hearing but is prima facie evidence at the contest stage as well.

PROFESSOR DORSANEO: I don't like that. I think you ought to be required to put on evidence at the contest stage to do the judgment debtor.

HONORABLE SARAH DUNCAN: I think you lost that vote

PROFESSOR CARLSON: Well, we didn't vote on that, but I understood Justice Duncan and Justice Bland and Judge Christopher's comments to say we have to have something, and the something by default could be the affidavit.

PROFESSOR DORSANEO: An affidavit that doesn't even comply with the requirements for the affidavit, which is sufficient to kind of --

PROFESSOR CARLSON: Yes.

PROFESSOR DORSANEO: -- supersede things if there's no contest.

PROFESSOR CARLSON: Yes.

PROFESSOR DORSANEO: But it ought not to be sufficient if it doesn't provide the right information at the hearing on the contest.

PROFESSOR CARLSON: Well, you know, this committee has already voted not to have some mechanism to strike the net worth affidavit for facial insufficiencies.

PROFESSOR DORSANEO: I'm not suggesting we should revisit that. I'm suggesting that at the hearing the judgment debtor should come up with something that indicates what the assets and liabilities are, some evidence to that effect, rather than just saying, "Judgment creditor, what do you think about my affidavit, which says that I have no net worth?"

MR. LOW: But couldn't it be just like if you put an expert on, you tender him, say he's an expert and then somebody challenges. If they don't challenge -- if they do challenge then the burden is they have to show evidence. In other words, just what if you just give an affidavit? All

right. If nobody challenges it, what's the problem? If they challenge it then they have to go in and show these specific things and so forth. Then the burden is on the other side to come in and show that it's not right and the assets and then let the trial judge have discretion of what to do.

PROFESSOR DORSANEO: I'm not sure I was understanding all the pronouns, who "they" are and who you were talking about, but in my mind it's a simple idea, that if there's a contest then the affidavit is gone and then you need to have evidence at the hearing, with the burden being on the judgment debtor. Now, if we want to put the burden on the judgment creditor, we ought to just do that directly and just say the burden is on the judgment creditor, but I think the burden properly should be on the judgment debtor to make some kind of a plausible showing.

MR. LOW: If somebody says they contest it then it does shift to him. If you contest it then it shifts to him to prove it.

PROFESSOR DORSANEO: At the hearing.

MR. LOW: Right.

PROFESSOR DORSANEO: That's all I'm saying, it should do that.

MR. LOW: But unless you contest it then that ought to be prima facie proof, and then that's it.

PROFESSOR DORSANEO: There is a contest. We

already have the contest or we wouldn't be in (c)(2).

PROFESSOR CARLSON: Well, how is that different from how the rule currently reads and the problem we were trying to address?

PROFESSOR DORSANEO: Well, the rules, the way the rules currently read, they just don't tell you much about what the judgment debtor needs to do in order to satisfy the judgment debtor's burden. So it's conceivable that the judgment debtor could just hand in the affidavit at the hearing, even if the affidavit didn't say anything about assets and liabilities, but just specify that "I have a negative net worth," which as I understand, some of these cases are like that, that that's the information that you get, and that ought not to be enough if there's a contest and you're already at the hearing stage.

All I would do is say in some -- just some tiny little language that would say, as I suggested earlier, that the burden is on the judgment -- the burden is on the judgment debtor to present evidence of the judgment debtor's assets and liabilities.

MR. LOW: Well, the affidavit is some evidence.

PROFESSOR DORSANEO: If it has that information, but it doesn't -- under our draft, even if it doesn't it will work, unless it's contested. Under our draft it can be just conclusory couple of sentences, one sentence without compliance

with the requirements of the rule, and the clerk accepts it and it's prima facie evidence of net worth for the purpose of, you know, being sufficient to be used to decide the amount of the supersedeas bond.

MR. LOW: Well, what if the affidavit said, "I own ten shares of General Motors, I own this, this, this, that, the other, and it's not worth that, and that's all I own"? That couldn't be proof?

CHAIRMAN BABCOCK: In the draft that Elaine gave us, 24.2(c)(1) says, "The affidavit states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained."

MR. LOW: Right.

CHAIRMAN BABCOCK: Isn't that getting at what you're looking for, Bill? No?

PROFESSOR DORSANEO: Did you move the whole sentence, Elaine?

PROFESSOR CARLSON: No, Bill. That's currently in the rule. I guess --

PROFESSOR DORSANEO: I know, but you suggested moving it from up top.

PROFESSOR CARLSON: To the contest. From (c)(1) to (c)(2).

PROFESSOR DORSANEO: The contest part.

PROFESSOR CARLSON: But I think what Bill is addressing is what happens if an affidavit gets filed that is conclusory and doesn't have that, which does happen.

CHAIRMAN BABCOCK: An affidavit that doesn't comply with the rule.

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Put a different way.

MR. LOW: Right.

PROFESSOR CARLSON: That doesn't contain complete, detailed supporting data.

PROFESSOR DORSANEO: I don't understand why you're moving it from up top.

PROFESSOR CARLSON: The reason, as I understood the compromise discussion earlier today, was there are two positions you could take, either the trial court must make a net worth finding or the trial court can decline if the evidence in the trial court's mind isn't sufficient, and if you go with the first position, you believe the trial court must make a net worth finding, then where does that number come from? Ideally it comes from evidence put on by both sides. What if that evidence isn't there?

Then the discussion went, well, then the trial judge can use the affidavit number. You're not satisfied with that. I had understood that others might be as a default. You're really a (c)(2) alternative kind of guy, I think, and if

under your world the judgment debtor failed to put on proof beyond its affidavit of their assets and liability, the trial court could decline to make any type of net worth finding, just say, "I don't have the proof." Is that correct?

PROFESSOR DORSANEO: Yeah, but I would treat a sufficient affidavit as sufficient, but what we did before on the clerk's job is the affidavit is sufficient for the purpose of being used to determine the amount of the bond unless it's contested, regardless of whether it complies with the specific information requirement, so I at least wouldn't want -- I wouldn't want it to be sufficient after it's contested if it didn't comply with the requirements of containing complete detailed information about assets and liabilities.

CHAIRMAN BABCOCK: Bill, if you amended it to say, this sentence to say, "A net worth affidavit filed with the trial court clerk and in compliance with (c)(1)," 24.2(c)(1), "is prima facie evidence," that would get you part of the way there, right?

PROFESSOR DORSANEO: Yeah. Although, I think the beginning part talking about prima facie evidence, too, maybe that's -- all the words "prima facie" mean is it's enough to keep going.

CHAIRMAN BABCOCK: Right. Right.

PROFESSOR DORSANEO: That's all that means. So maybe we should get rid of the Latin.

CHAIRMAN BABCOCK: "On its face." Elaine's problem, though, what if it's not in compliance?

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: With -- if the judge feels it's not in compliance with (c)(1), then what happens?

PROFESSOR CARLSON: Yeah. What should the trial court do under your suggestion if there is a noncompliant affidavit that's been accepted by the clerk, there's been a contest filed, and there's no other evidence put on or the evidence put on is not --

CHAIRMAN BABCOCK: Persuasive.

PROFESSOR CARLSON: -- is meager circumstantial or scintilla or doesn't rise to the level that would support a finding. What should the trial court do then?

PROFESSOR DORSANEO: Write down whatever number the trial judge thinks is the appropriate number and give the reasons.

PROFESSOR CARLSON: That's the problem with Perrywood, Bill, where he said -- you know, the trial court writes down a number. You said, well, it goes up, and they sent it back and said, "Well, you didn't give factual support for it."

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We're talking about the trial court here setting this bond, but the way this rule is worded,

it seems to me that if there is no contest the clerk sets the amount of the bond because the affidavit is merely filed with the clerk, so where does the trial court even come into play on that?

PROFESSOR DORSANEO: The affiant sets the amount of the bond.

PROFESSOR CARLSON: That's a correct observation and not different than our prior practice before the 2003 change.

MR. HAMILTON: How's the clerk going to tell if the affidavit doesn't say "and comply with certain guidelines"? The clerk won't be able to tell.

CHAIRMAN BABCOCK: Yeah. Good point. Harvey and then Justice Bland. Sorry, he had his hand up first.

HONORABLE HARVEY BROWN: One of the problems that you are representing the party is trying to satisfy this requirement is what is "complete, detailed information"? Maybe I'm jaded by my own experience, but we had like a 20, 30-page report, and the other side still thought it wasn't detailed enough. I mean, they wanted to get into every single piece of property down to the pieces of furniture, and to me that's why it's good to put the burden back on the contesting party, because you come forward with something and they want to say, "No, we need more detail there," I don't want to be at risk without somebody coming back at least and saying, "Here's the

information that we think is insufficient and here's where you need to go get more," because it's difficult to know how much detail to put into this type of evidence.

CHAIRMAN BABCOCK: So you want a system where the trial judge says, "Okay, I'm looking at this net worth affidavit, and I find that it's in compliance with (c)(1). Now, what have you got?"

HONORABLE HARVEY BROWN: Exactly, and then if there's a problem, the other side comes forward and points out the problem

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: And I have a question, if you don't mind. Is this an evidentiary hearing, and by that I mean if there's a contest, is an affidavit admissible?

PROFESSOR CARLSON: Up to this point the answer has been "no." The affidavit got you the hearing and then it's an evidentiary hearing.

HONORABLE HARVEY BROWN: Okay.

PROFESSOR CARLSON: This would change that, if we go this new direction where the compliant or noncompliant affidavit would serve as -- could be introduced and could be considered by the trial court.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, to me, I like Elaine's compromise with your amendment. I think it gets us

where we want to be. I'm not sure about that last part that you just said because I'm not sure that that would end up becoming admissible. I would think you would have to bring somebody with personal knowledge that could prove up the information once it gets to the evidentiary hearing if somebody was truly contesting it, but as far as getting us to where the trial court needs to go when there's a failure of proof, I think your solution is a good one.

CHAIRMAN BABCOCK: Okay. Any other comments about this? Well, a fine mess you've created here, Elaine.

PROFESSOR CARLSON: That's the job of professors, is to raise the issues and write law reviews for 10 years discussing it.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I'll make one observation, and maybe it's because I may have a low threshold for becoming frustrated, but this seems to be the third time we've dealt with this systemic problem of affidavits, contests, what happens, in the last two meetings. It's an issue in indigence determination, it's an issue in medical costs, and now it's an issue in this net worth.

I direct you to Rule 20 regarding the contest to the affidavit of indigence, and that's Rules of Appellate Procedure. It's very specific about the contest, what happens when no contest is filed, who has the burden of proof, and yet,

we still have some problems with the implementation of that. In that particular rule the only time that the affidavit becomes evidence that has to be considered by the court that is determining indigence is if the affiant happens to be incarcerated, and so to kind of put an end on this, it would seem if it's a typical evidentiary hearing then that affidavit, once contested and you get to the hearing, is not evidence, but it's unlikely that that judgment creditor is going to be incarcerated.

CHAIRMAN BABCOCK: Okay. Judge Patterson.

HONORABLE JAN PATTERSON: I agree with Harvey's comment about the complete and detailed. I wonder what that adds, why we can't just say "sufficient information from which net worth can be ascertained," instead of "complete, detailed." It seems to me that adds more of a confusion than --

CHAIRMAN BABCOCK: Okay. Has that been a problem, Judge Christopher, complete and detailed?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: No. Okay. Well, it seems to me if you back up and just looking at the practicalities of the thing, if somebody has got a complete and detailed affidavit or an affidavit with lots of stuff in it, the other side has right of discovery, so that they can presumably get a witness from the judgment debtor and cross-examine him in a deposition and then, you know, haul him to court, or if not, just read the

deposition in court, and so there really wouldn't be any prejudice to the judgment creditor if you went to the hearing and the debtor says, "Hey, Exhibit 1 is my affidavit, and that's all I'm going to say about this." Now, they run the risk that they're going to lose, but if they want to do that, they can do that. That's evidence. The judge can look at it, and if the judgment creditor says, "Well, I want to read this deposition, because the guy that put this together, you know, didn't even graduate from grade school, he's so dumb, and furthermore, that there's more assets there than they say," and in other words, nobody's hurt if you allow the affidavit to go into evidence, I would think, but I may be missing something.

HONORABLE JAN PATTERSON: Well, I agree with that, and further, I think one of the points of dispute that we're having here really gets into what is a contest and what is a hearing, because a contest could really just be, you know, "I object to the affidavit," and the court may or may not hold a true evidentiary hearing, it would seem, but a hearing could be many things, and I think --

CHAIRMAN BABCOCK: Well, if the creditor wants a hearing, an evidentiary hearing, they could certainly, I would think, under this rule get one.

HONORABLE JAN PATTERSON: Right.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I couldn't hear Jan. I

couldn't hear Justice Patterson

CHAIRMAN BABCOCK: She said a hearing could be many things, that, you know, you could just have an affidavit and nobody else says anything or you could have witnesses.

HONORABLE JAN PATTERSON: And a contest could be many things.

CHAIRMAN BABCOCK: And a contest could be many things. Anything else you want me to -- I'm just sort of a relay. Judge Benton.

HONORABLE LEVI BENTON: One other point that perhaps has been made other ways about this complete and detailed information. Justice Duncan talked about the shyster accounting firm or something. What if the affidavit said --

CHAIRMAN BABCOCK: Mickey Mouse.

HONORABLE LEVI BENTON: Mickey Mouse. I mean, an affidavit by the partner assigned -- the partner from the big four auditing firm that just audited the Fortune 100 defendant's financial statements of the prior fiscal year, just that conclusory statement should be sufficient. You shouldn't have to go into complete and detailed information because the audited net worth number is set out on the financial statement, so I don't -- this language of "complete, detailed information" would suggest that the statement by the audit partner or the chief financial officer of the public company would be insufficient.

HONORABLE SARAH DUNCAN: Well, but to defend complete and detailed --

CHAIRMAN BABCOCK: Because it's your word, isn't it?

HONORABLE SARAH DUNCAN: No, it's not. It is not. It's the Supreme Court's words. If all that the judgment debtor submitted was the affidavit of the senior partner from the big four accounting firm saying, "I audited last year and here's what the net worth is," that doesn't give the judgment creditor anything to test that conclusory statement against. Just because big four senior partner says one million doesn't mean that the financial statement itself supports that and doesn't show the judgment creditor here are the flaws -- it doesn't give them a way to determine the flaws in the audited financial statement.

HONORABLE LEVI BENTON: I don't understand that. I mean, General Motors, public company, prepares their financial statements, files them with the SEC, December 31, 2006. Ernst & Young partner says, "I'm the audit partner on the engagement. The financial statements are on file with all of the reviewing public agencies, and those financial statements set out that the net worth of General Motors is X, period. Further affiant say it not." What's wrong with that?

HONORABLE SARAH DUNCAN: I think it's conclusory, and it would be no evidence under appellate

standards.

HONORABLE LEVI BENTON: Okay. Now, I agree with that, which takes me to the second point. I don't understand why we have all this stuff about the contents of prima facie evidence when we have a whole body of law already on the adequacy of testimony set out in affidavits.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: But you take the same thing, you're going to treat General Motors different from you. Say you've got an accountant that's filed your income tax returns for years. Is he going to be able to give an affidavit, "I'm familiar with your returns and what you own and I believe that it's worth this"? Is that -- are you going to treat that just like somebody that's audited General Motors?

HONORABLE LEVI BENTON: I don't know.

MR. LOW: I mean, it's a question of individual.

CHAIRMAN BABCOCK: Is that rhetorical or did you want Judge Benton to respond?

MR. LOW: No, he couldn't respond. If he could have, he would have.

CHAIRMAN BABCOCK: Carl.

HONORABLE LEVI BENTON: Oooh.

CHAIRMAN BABCOCK: Take it outside, boys.

MR. HAMILTON: It seems like we're going at this backwards. It doesn't make any difference what the affidavit

says. If there's a contest, we're going to have a hearing. So the only reason we need to try to define something for the affidavit is for the benefit of the clerk, so that if there is no contest the clerk has enough evidence there to set a bond, but any time there's a contest filed, it doesn't matter what the affidavit says, we're going to have a hearing.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I was going to defend complete and detailed because I do think that there needs to be an encouragement on the person who is filing the affidavit to say something more than just X, so that the other side can have a reasonable basis for deciding whether or not to contest it. Basically if they say, "My net worth is a million" with no information, then you're always going to have to contest it, and it's going to be just a waste of time for our trial courts to have hearings on it.

The idea is to have somebody come forward with a little bit of information, and particularly if we're going to be using the affidavits as some kind of evidence at the hearing at that -- and the judge has to make a finding, and the judge has to give an explanation on how he or she arrived at net worth, then you can't just have a number. There's got to be some basis, so I think it's just a good practice.

CHAIRMAN BABCOCK: Here's Elaine's proposal that I'd like to get an expression of vote on. Elaine's proposal is

to take the sentence, "A net worth affidavit filed with the trial court is prima facie evidence of the debtor's net" -- "and in compliance with section (c)(1) hereof is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit, or security required to suspend enforcement of the judgment" and place that after the second sentence in TRAP Rule 24.2(c)(2). So everybody that's in favor of Elaine's proposal raise your hand.

Everybody against, raise your hand. It passes by 16 to 6. That's not the end of it, though, because the Supreme Court still has to weigh in on this, so we'll see what they have to say.

In the meantime, Mr. Weeks and Mr. Hickman have rushed over here only to listen to our gibber jabber about the supersedeas bonds, and Mr. Pendergrass has been patiently sitting here all morning, so, Jody, I don't care who gets to talk first, but we'll get back onto the writ of garnishment issue as we --

HONORABLE JAN PATTERSON: And Constable Elfant also is here.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE JAN PATTERSON: Constable Elfant is also here.

CHAIRMAN BABCOCK: Constable Elfant is also

here. Thank you for coming. Which of you gentlemen wants to talk first? Anybody have a preference?

CONSTABLE HICKMAN: They've all pointed to me. I guess that makes me first. I'm Constable Ron Hickman from Houston. Judge Lawrence is one of my JPs, and it's an honor to be here and get a chance to talk before you. Judge Lawrence and I have had some conversations about this issue, and we have some serious concerns and would urge due caution be given to reviewing the rules for writ of garnishments.

I assume he's provided you with the information, and I took considerable amount of time to detail what we thought were areas of concern for us. Changing that particular approach creates some complexity and difficulty for us in after the service has been effected where a defendant would need to file a replevy bond with someone or if they refuse to turn over property when that service has been effected by a process server on the front end and would certainly encourage you to review that cautiously and carefully and deliberate on that before proceeding further.

HONORABLE SARAH DUNCAN: Can I ask --

CHAIRMAN BABCOCK: Yeah, sure.

HONORABLE SARAH DUNCAN: Justice Hecht.

HONORABLE NATHAN HECHT: I have a question. We were talking earlier about garnishment of money or accounts or something like that, debts versus some kind of tangible piece

of property. How often does the latter happen and what kinds of property do you find subject to writ of garnishment?

CHAIRMAN BABCOCK: Particularly washing machines.

HONORABLE NATHAN HECHT: Yeah. A stereo, actually.

CONSTABLE HICKMAN: Well, I deign to avoid speaking ill of attorneys or judges in a group like this, but on the receiving end of some of the paper work that we get, a tremendous variety exists in what tools attorneys will use to achieve a certain acquisition. Drilling well pipe, all kinds of different things where you would think maybe a sequestration or possession might be a better tool, unfortunately we get all kinds of writs where garnishment is issued for things other than money.

I mean, and Carl and I are decent friends, although we disagree professionally on this particular issue. In some instances where you see the writ of garnishment is simply a delivery of a notice to freeze assets or to seize or dispossess someone, you're not actually going back with anything. In those cases, you know, where you don't have an action after the fact, not a major problem, but when you're going to in effect dispossess or seize property on the garnishment as a turnover order it could be some serious problems.

HONORABLE NATHAN HECHT: And just to follow up on that, do you conduct sales of property as a result of service of a writ of garnishment?

CONSTABLE HICKMAN: Yes, sir. I'm sure we do, and I'll tell you my experience -- and Judge Lawrence can probably attest to that -- if I ever have to serve a paper or hold a sale, I'm firing a whole bunch of people because I don't touch those things. I have a fairly large staff of people that specialize in that stuff, and I provide leadership and direction, but Constable Zane Hilger, who is trying to sneak in the back door, is a lot more experienced about that than I am, but handling the sales after that property is turned over is certainly part of what we do, but how often, you know, whether they file the replevy bond or actually go through the sale would be a matter that would take some research the answer for you.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: That's my question, because looking at the rules the only provision I see for actually selling the property, I guess there are two. One is when there is a judgment by default on the garnishment and then 668 and 669 where there's a judgment when the garnishee is indebted to the defendant and a judgment for effects, and those are by court order, that there is an order from the court that says, "Constable Hickman, go sell the property."

CONSTABLE HICKMAN: Seize and sell.

HONORABLE SARAH DUNCAN: But when an attorney gives you, asks for, gets, a writ of garnishment for the pipe, do you deliver that and it freezes the pipe in the hands of the garnishee or do you take physical possession of the pipe?

CONSTABLE HICKMAN: Well, the defendant has the option to refuse, and there is a provision for what to do with the refusal.

HONORABLE SARAH DUNCAN: Well, what do you perceive to be your authority to take possession of the pipe?

CONSTABLE HICKMAN: We're to freeze it in place, and I would assume that following would be an order from the court to sell.

HONORABLE SARAH DUNCAN: What provision is it that you believe says you can seize the physical property? That's the rule I can't find.

CONSTABLE HICKMAN: Yeah, I'm not going to take it away from them. When I deliver them the notice of the garnishment they're notified it's frozen at that point.

HONORABLE SARAH DUNCAN: That's right. It's frozen.

CONSTABLE HICKMAN: We're not leaving with anything.

HONORABLE SARAH DUNCAN: But you don't take the pipe?

CONSTABLE HICKMAN: No

HONORABLE SARAH DUNCAN: That's what I finally concluded, is that I don't -- I don't find anything, and that's why I'm asking you, the expert, do you know of anything that permits you to take possession of a physical thing?

CONSTABLE HICKMAN: It would depend, I think, on the language in the order, and that's the thing we're --

HONORABLE SARAH DUNCAN: I'm not talking about a court order. I'm talking about just the writ of garnishment.

CONSTABLE HICKMAN: You would be amazed what we see in writs.

HONORABLE SARAH DUNCAN: That's what concerns me. Thank you.

CHAIRMAN BABCOCK: Any more questions? Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: One of the issues is the level of training required. Is there a difference in the training that should be required to serve a writ of garnishment versus a regular citation, and what type of training do the sheriffs and constables receive?

CONSTABLE HICKMAN: Well, constables in particular are required to have 20 hours of specific civil process training during each cycle, on top of the 40 hours training required by TCLEOSE for maintaining our state license. The individual training for specialty areas like writs, the

training that we provide through the Justice Court Training Center provides specialist training on executions of writs. There are writ specialists and certain levels of proficiency. There is a civil proficiency certification under your Texas Peace Officer license, so those folks who specialize in that area of work have a level of proficiency that they can dictate to them, and we provide different tracks of training for those folks.

I will probably never serve a civil paper, at least I hope I don't have to, but I do take basic training to understand the process. Now, the people that I have who work in writs where we're taking -- seizing people's property, I want them to know it very well, so all of them are required to have their civil proficiency certificate as well as attend writ specialist training because it's a much more complicated part of that process, and when you're dispossessing someone of their children or their property or belongings, we think that's something very important that needs special attention.

HONORABLE TOM LAWRENCE: I have a question for either one of the three constables, I guess, is that is there something more complicated about a garnishment that would engender something going wrong that could cause liability? What would justify, in other words, having just a sheriff or constable serve a garnishment, the liability and other things?

CONSTABLE HICKMAN: I think the issue there is

if there is a defect in service or some other problem where a lawsuit would entail. Our current requirements for process servers do not provide justification for insurance regulations or bonds, where the counties that are represented by sheriffs or constables are not going away. There is always a deep pocket for resolution of those issues if a defect in service or a damage is done to a case. There is someone there to back up and substantiate those claims. We have no requirements at this juncture for process companies to even be insured. They can go bankrupt, fold, and move over to another company and open up and be back in business, and then we don't cure our resolution of the damage done in a suit.

CHAIRMAN BABCOCK: Justice Brister.

HONORABLE SCOTT BRISTER: If somebody called you up and said, "I've got to have a writ served on the bank at 8:01 tomorrow morning," are you-all always able to do that?

CONSTABLE HICKMAN: Are we always able to do that?

HONORABLE SCOTT BRISTER: Right.

CONSTABLE HICKMAN: No hundred percent guarantee comes with any of us, whether it's process servers or sheriff, but because we're all in a business to provide a service to a client or customer we always try to encourage immediate service.

HONORABLE SCOTT BRISTER: I'm just -- you know,

the argument for the private process servers is "There's enough of us out here where you can hire somebody that we'll do it at 8:01, no exceptions every time."

CONSTABLE HICKMAN: Yes, sir, I'm aware of that claim.

HONORABLE SCOTT BRISTER: And the argument is that the government, we're not -- those of us in government are not always that compliant sometimes.

CONSTABLE HICKMAN: Well, I will tell you that our business has become over the last several years much more competitive. We have that same problem with, you know, service where you have to attach a child. I can't say, "Well, I don't have enough people," but that child is going to be leaving school heading for Louisiana, I can't say that, you know, I can justify not being able to approach the problem a lot more aggressively.

CHAIRMAN BABCOCK: Any other questions?

CONSTABLE HICKMAN: If the answer to your question is do we do rush service, yes.

HONORABLE SCOTT BRISTER: Yeah.

CHAIRMAN BABCOCK: Any other questions?

CONSTABLE HICKMAN: Constable Zane Hilger from Fort Worth is also here as well as Constable Bruce Elfant.

CHAIRMAN BABCOCK: Great. Thanks.

CONSTABLE HILGER: If I may, sir, to address

your problem or your question, we do that quite often. We understand that those are very hot, and the plaintiff attorney typically will get with us to say, "We want it served this time frame," and we understand that, and we very much customize it in Tarrant County because we understand that that money is going to be there at X time and we need to lock it down if it's a bank, for example.

CHAIRMAN BABCOCK: Carl, you had a question, and then Mike Hatchell.

MR. HAMILTON: Yeah. Did I understand you to say you get crazy writs sometimes that --

CONSTABLE HICKMAN: Crazy is not the language I would use. Unusual language.

MR. HAMILTON: Unusual writs. Do they ever tell you to seize the property?

CONSTABLE HICKMAN: I don't know if I've seen one that says "seize."

HONORABLE SCOTT BRISTER: Well, we've got a rule that says what the writ is supposed to say, and it doesn't say "seize." It's Rule 661.

MR. HAMILTON: I know, but if the writ doesn't say what the rule is supposed to say do you-all have some way you say, well, we're not going to serve this because it's not in compliance with the rule?

CONSTABLE HICKMAN: We will always go back to

our county attorney for guidance on how to approach the court if language does not provide adequate liability coverage for us. We do get unusual writs. We recently seized 15 billion cubic feet of natural gas in the ground, and that is a somewhat complex situation, and it took us several weeks to coordinate the language through both the county attorney's office and the plaintiff's office in order to make sure that gas didn't go away through some other pumping mechanism and I be held liable for it, so we review every writ that is of complex nature with the county attorney's office to make sure that the language does not expose our constituents to a lawsuit.

HONORABLE SARAH DUNCAN: That's a --

CHAIRMAN BABCOCK: Mike Hatchell.

HONORABLE SARAH DUNCAN: I'm sorry.

CHAIRMAN BABCOCK: Hatchell was next.

MR. HATCHELL: Do any of you know if there is a requirement that the person that serves the writ of garnishment also has to be -- or office, also has to be the same person or office that executes any order from the court such as seizing property or selling property?

CONSTABLE HICKMAN: Not necessarily, because I think those can be in separate places.

MR. WEEKS: They can and have been, yes.

CHAIRMAN BABCOCK: Okay. Great.

HONORABLE SARAH DUNCAN: The natural gas is a --

CHAIRMAN BABCOCK: Go.

HONORABLE SARAH DUNCAN: Is a good example of my continuing interest in this question of seizure. Was that a writ of attachment or sequestration?

CONSTABLE HICKMAN: Actually, I think that was probably a writ of sequestration.

HONORABLE SARAH DUNCAN: Okay

CONSTABLE HICKMAN: But because of the complexity and the nature on that and they're arguing about who owns what, and I'm not in a position to control that technically.

HONORABLE SARAH DUNCAN: You used the word "seized," and it's the seized that I think has several members around the table concerned.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Are claims made against sheriffs and constables for not executing these the way the person who got it issued wanted them to, and how often are they successful?

CONSTABLE HICKMAN: Well, I don't know about writs of garnishment specifically. I know there are firms in Texas that pursue suits against counties on execution of other writs, and there are about eight or ten I believe that have been successful to the tune of about $6 million.

CHAIRMAN BABCOCK: Okay. Anybody else?

Mr. Pendergrass, Mr. Weeks, do you want to speak or --

MR. PENDERGRASS: Sure, I can speak.

CHAIRMAN BABCOCK: You don't have to.

MR. PENDERGRASS: Oh, I definitely do. My name is Tod Pendergrass. I'm the director of the Certified Process Servers Association, and I think this issue has gotten more complicated than it really is. I wanted to clarify a couple of things. Process servers don't want to and are not seeking to be able to take possession of anything. We're simply addressing the delivery of a writ of garnishment, which is clearly in the form of writ, is a notice to the garnishee to freeze whatever assets they have. That is similar to a temporary restraining order. I serve a person with a temporary restraining order, and I do a return that indicates that the person has been lawfully served, and if the person violates that restraining order then a law enforcement officer would go back later and enforce the restraining order.

So the delivery of the writ of garnishment is all that is at issue right here, and if you look in the form of the writ, it clearly says that the garnishee is served and then has an opportunity to appear the Monday following the expiration of 20 days, like with other citations, and then at that point an order would be issued by the court directing law enforcement to take possession or do whatever action is necessary, and that may be where you get into some unusual

requests for unusual, different types of assets.

Another clarification is that we are currently serving writs of garnishment. Pursuant to the newly worded Rule 103 we serve any writ that does not require us to take any action when we serve it, and in fact, we have -- we have been serving writs of garnishment prior to Supreme Court certification. Rule 103 as written in 1988 said that we are authorized to serve citations and other notices. It's always been understood by process servers and the attorneys that hire them that you can deliver anything that doesn't require us to take any enforcement action. I've been serving for 20 years. I've never had an attorney even ask me to go and do any kind of attachment or sequestration.

There is a question about the requirement for additional training for service of writs of garnishment. Being that a writ of garnishment is simply a delivery just like any other citation, there is no special training with regard to that. I walk into the bank, I deliver it to the correct person, I fill out the return. That's it. All of the enforcement action is out of my control after that, and process servers, again, we don't want to be responsible for taking possession of anything, so the need for a bond or insurance or additional training is not at issue here.

Now, with that being said, I think that the issue today is just trying to conform different rules in the

rule book, because Rule 103 was originally written in 1988, and the new rule was just written in 2005, and we're dealing with writs in rules regarding other types of process that were written in the Forties, and so it was common practice to say "sheriff or constable" back then, so if you want to conform the writ of garnishment rule with regard to who may serve it, you're going to find that you have similar problems in other rules.

For instance, the rules regarding service of a temporary restraining order, that would be Rule 688 and 699. That rule also says, if I can just get there --

MR. WEEKS: It says "officers."

MR. PENDERGRASS: It says "sheriffs or officers," and 699, "The officer receiving the writ of injunction shall endorse thereon," et cetera, et cetera. Well, as long as the writ doesn't require me to do any enforcement action, we serve it, even though it says "officer," and we're not officers of the court, we're process servers. So you're going to find other areas in the rules with regard to different process that need to be amended like you're trying to do with writs of garnishment right now.

Rule 115 for the service of citation by publication, it's in my opinion ridiculous to think that a person with a badge and gun needs to take that citation from the clerk's office over to the newspaper and deliver it, but

it's clear in there that a sheriff or constable must deliver those. To keep ourselves out of trouble we don't do those, but that rule was written before the new Rule 103. So there are -- there is more than just one place of rules that need to be clarified. I think the wording in the proposed changes in this rule are fine, but you're going to find that you're going to have to take all of that wording and put it here and there in all these different rules.

I think one suggestion would be to look at rule -- let me get it here. There's some wording that's already available. In Rule 686 under ancillary proceedings -- and this seems to relate to writs of injunction -- 686 reads in part that "The court shall issue a citation to the defendant as in other cases which shall be served and returned in like manner as ordinary citations from the said court." You might consider making that just, you know, distinction in all the different types of process, that this type of process as long as it doesn't require enforcement can be served just like a citation.

And then again in 700, 700(a), service on writ on a defendant. Now, this is under sequestration, and this is a good example. It says, "The defendant shall be served in any manner provided for service of citation or as provided in Rule 21a"; however, that writ is creating an enforcement action, so even though it says that I can serve it as pursuant to any other citation, if it requires enforcement, I can't. So the

newly worded Rule 103 precludes me from serving any writ that requires me to take enforcement action.

The last thing I wanted to mention was there was a reference to Rule 15; and this was something I wrote about and submitted a letter to at the last meeting; and Rule 15, again, is another rule that I believe was written before 1988, reads in part, which I believe is the part that's always referred to, "Every such writ and process shall be directed to any sheriff or constable within the state and shall be made returnable," but just prior to that it says "unless otherwise specially provided by law or these rules." So, you know, I think that Rule 103 is in these rules, and even though it says the sheriff or constable must get it, Rule 103 says I can serve those papers

CHAIRMAN BABCOCK: Great. Thanks. Sarah, you had a question.

HONORABLE SARAH DUNCAN: For each of you. If you go to serve a writ and a constable or a process server either doesn't serve the writ or serves the writ improperly and I'm the attorney or the party, who can I sue and what do I sue on? In your case can I sue on the bond?

CONSTABLE HICKMAN: You can sue for the damages, the bond being one of the resolutions for that. The other is the county --

HONORABLE SARAH DUNCAN: Right. One of the

funds.

CONSTABLE HICKMAN: The county party at whole is there to back that up.

HONORABLE SARAH DUNCAN: Okay. And, Mr. Pendergrass, if you served or didn't serve properly the writ?

MR. PENDERGRASS: You could definitely sue me.

HONORABLE SARAH DUNCAN: But you said you don't have a bond?

MR. PENDERGRASS: No, I don't have a bond.

HONORABLE SARAH DUNCAN: So I would be limited in my recovery to your individual assets.

MR. PENDERGRASS: Yes, as long as you're not confusing the collection of assets or the failure to collect assets and we're just --

HONORABLE SARAH DUNCAN: I'm just talking about serving writs.

MR. PENDERGRASS: Just the service issue, right, if I improperly served the document you can sue me. Definitely. There's just not a high instance for that in the industry

CHAIRMAN BABCOCK: Hatchell, then Judge Lawrence.

MR. HATCHELL: If the private process servers do not want to do anything more than something they can to service

of process, what is your objection to giving them that rule?

CONSTABLE HICKMAN: My objection would be to, as was mentioned, the potential damage to the defendant's case as well as the post-delivery activities, to whom will they deliver the replevy bond, what actions will the defendant have to take when we're asked to do something after the fact but didn't serve the first part of it, you know.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: You say you're serving writs of garnishment now?

MR. PENDERGRASS: Yes.

HONORABLE TOM LAWRENCE: But you're not serving citation under Rule 116 and the language is the same, so how do you distinguish between those two? Why are you serving one and not the other?

MR. PENDERGRASS: The 103 order as recently written says that we may serve citations and writs that do not require immediate enforcement action, so we brought this issue up at our meeting, our last meeting, Rule 116, service of citation by publication, and I said, "Can we stretch that to include citations?" And we just came to the conclusion that, well, it says you can serve citation and writs that don't require immediate enforcement action, so I couldn't really stretch it to be citations and writs that don't require immediate enforcement action. I want to serve those, and I had

to turn one down the other day, but because 116 clearly says that it shall be served by the sheriff or any constable, there's -- you can't really say there's another rule that, you know, supersedes that. So erring on the side of caution.

HONORABLE TOM LAWRENCE: Well, if you're serving a writ of garnishment now and I think some would argue that private process servers are not specifically authorized under the garnishment rules now, if a court was to say that the service was defective because a private process server did it and the judgment debtor suffered some harm by having his account frozen, how would you satisfy the concerns of that judgment debtor?

MR. PENDERGRASS: Well, I think the new Rule 103 is very clear that we may serve any writ that does not require immediate enforcement action, so that's why we're here. The discrepancy between the garnishment rule the way it reads, "sheriff and constable," and Rule 103 says we can serve any writ that does not require immediate enforcement action, so we're trying to make a difference -- well, in my mind there's a difference between a citation and a writ as written in the rules, although there is no difference in the delivery.

HONORABLE TOM LAWRENCE: Well, if you think you can serve it now, why are we going through this exercise of trying to amend the rules? Why did you request that?

MR. PENDERGRASS: I didn't request that.

MR. WEEKS: I requested that, and I requested that as a result of -- I'm sorry, for the record, Carl Weeks, chair of the Process Server Review Board for the Court, and it was I that posed the question to Jody to resolve this dilemma of the controverting language between the writs rule and the newly amended 103 whereby the Court delineated, as Tod just referred to, that we can serve writs, citations, and notices, and I think puts very clear language in there to say "except if it requires the taking of person, property, or thing."

There was this case in Dallas that you took up at your last meeting where the attorneys, you know, they went and reheard the question and the judge ruled in favor that service was valid, that the new rule superseded the old language of "officer and sheriff" that's in the writs rule at this time. So it was -- I was the reason that this question came up because I have gotten a number of calls from not only process servers, from attorneys and, you know, JPs and different people that wanted to have some clarification on this because it does simply appear to be controverting language between where we only had sheriffs and constables years ago that were serving process, period. We didn't have private process servers for a long time, and now we do, and when the Supreme Court revised 103 and 536a they made it very clear what the limitations were for that.

So the question was does the newly revised 103,

536a that the Court issued in June of '05 supersede the old rule, and because that question was posed to me and I didn't feel comfortable answering it. I personally felt like it did. Usually a new rule supersedes an old rule, but sometimes on specific issues that's not the case. I posed the question back to Jody, and he brought it before this committee. The court in that case, as you know, ruled in favor that private process was valid under the new rule, under Rule 103, 536a as amended in June of 2005 to provide that the writ of garnishment was valid, served properly by a private process server because it does not require the taking of person, property, or thing.

And to answer the question that was brought up earlier about one person can serve the citation, it's just simply saying -- even though it's a writ, it's just simply a notice, and the parties still have the obligation under 661 to come before the court, and the court at that time is certainly going to determine not only that the terms of awarding the judgment but they're going to determine if a party has an objection to valid service. I think the court can rule on that at that time, so it would thereby eliminate the question of if service was proper. They've got to appear before the court to attach or seize property. There is no seizure, there is no attachment in the service of the writ of garnishment to the garnishee and to the debtor defendant. It is simply a notice to freeze, so thereby the parties have to come before the

court. They're compelled to come before the court.

HONORABLE TOM LAWRENCE: Let me ask you one last question. On part (2) would be "any person authorized by law or written order of the court who is less than 18," part (3), "a certified process server of the Supreme Court." Should we have (2) in there or should it just be a certified process server?

MR. WEEKS: Well, my personal opinion would be that I think judges should certainly have the discretion to authorize on a case-by-case basis. We have some counties in this great state that don't have certified process servers due to the size of the state, and we have some counties that actually don't even have constables to serve civil process, and the judge in that case I think should still have the discretion to authorize his process server, who is a private process server, if you will, for lack of a better term, who is not on the Supreme Court order who has been serving the process out of that court, maybe ten or twelve papers a year. You know, and it's old Joe, the wrecker driver or whatever, the judge has known his whole life. I think that the court should still have that discretion personally.

Personally, you know, I can see the argument both ways. I wish everybody would go through the certification program of the Court and they'll get trained, and it would be a better thing, but it's a large state, so we've got unique

circumstances

CHAIRMAN BABCOCK: Sarah, then Roland.

HONORABLE SARAH DUNCAN: Well, speaking only for myself, I would just like to say that when 103 was amended I certainly didn't consider all of the problems that seem to be raised by all of the ancillary proceeding rules, and I didn't -- I didn't contemplate. Do you consider private process servers to be trained in approving replevy bonds?

MR. WEEKS: No, I do not.

HONORABLE SARAH DUNCAN: Do you have a suggestion on if a private process server serves the writ of garnishment, what then do we say is the appropriate person to approve the replevy bond?

MR. WEEKS: Well, the judge always in practicality --

HONORABLE SARAH DUNCAN: Which is what I believe Constable Hickman, that's the problem he raised, is that in the old days when there were just constables and sheriffs doing this there was a continuity in the process --

MR. WEEKS: Right.

HONORABLE SARAH DUNCAN: -- from service of the writ through sale of the property.

MR. WEEKS: Right. If there's a replevy bond, there's an issue before that, it's going to be at a hearing before the court, and the court's going to set the bond.

HONORABLE SARAH DUNCAN: No, this rule provides that the person who served the writ approves the replevy bond, and that's why I was asking you if you consider private process servers to be trained in approving replevy bonds.

MR. WEEKS: No, I do not, but I also will say that I don't think the practice is now in most jurisdictions is that anybody approves the replevy bond. The court sets the bond.

CHAIRMAN BABCOCK: Roland.

MR. GARCIA: Well, I think I'm not really clear on the training part of it. He was mentioning for private process servers there's really no training and no training needed just to serve a writ of garnishment, it's just delivering papers.

MR. PENDERGRASS: Same as a citation.

MR. GARCIA: But you were saying -- but the constables are saying they go through 40 hours of training and other training. What is unique to delivering paper that you -- that is you would say an additional needed training?

CONSTABLE HICKMAN: Our training is much more comprehensive than just leaving the paper and run. We cover a lot more.

MR. GARCIA: Generally what is -- what is the training that is necessary to deliver the writ?

CONSTABLE HICKMAN: Well, we don't do training

specifically to writ of garnishment. Our training involves a whole lot, the rest of the writ process, you know, judgments and executions where you're factoring post-judgment interest and calculating, you know, the collection. So, I mean, there is a lot more comprehensive part of the collection process for the writs aside from writs of garnishment.

MR. GARCIA: But you're not arguing just the task of serving or delivering out a writ needs a lot of special training?

CONSTABLE HICKMAN: No, just the delivery of the writ doesn't need a lot of special training, but I don't want to make it appear like we're referring to dropping the pizza box at the front door and running either.

MR. GARCIA: Right.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Could I ask one question? The constables are bonded; is that correct?

CONSTABLE HICKMAN: That is correct.

MR. LOW: The private process servers are not bonded; is that correct?

MR. PENDERGRASS: That's correct.

MR. WEEKS: That's correct.

MR. LOW: Is there any requirement for liability insurance in lieu of bonding? Do you hav e--

MR. WEEKS: There is none.

MR. LOW: Okay.
CHAIRMAN BABCOCK: Yeah, Tod.
MR. PENDERGRASS: I would just like to say that being a private industry, we're all responsible for our own insurance and our own actions and everything.
MR. LOW: No, but you're not required to have --
MR. PENDERGRASS: There is no lawful requirement, but if that were an issue --
MR. LOW: Not lawful, but internally.
MR. PENDERGRASS: If that were an issue, there is something called the notary public provision, which was brought up several years ago that was approved by the advisory committee before certification took effect, and it basically said if you're a notary you can serve process, and notaries are bonded. So I just want to mention that should there be an issue about -- a concern about process servers being bonded, although it would be an option to -- you could be a notary or you could still go 103 order from judges. There is dozens of counties that have blanket orders for process servers that don't require Supreme Court certification, and there is counties that have removed the need for a written order of the court like Grayson County. Grayson County Courts at Law have basically said if you're over 18 and not a party and not interested you can serve all the process coming out of this court, no Supreme Court certification, no insurance, no bond,

no individual Rule 103 order, no blanket order. They've made it almost essentially the same as serving a subpoena, so there is lots of different ideas about what's best for the industry, but some judges are saying all this extra stuff is not necessary.

MR. LOW: But you answered my question. There is no requirement of liability insurance.

MR. PENDERGRASS: I apologize.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I'm having trouble understanding the consequences of the bonding or lack of bonding. I guess on the party who wants the writ of garnishment served it's sort of a free market situation. If you want to go with somebody who is not bonded and they don't do what you have hired them to do you're taking your chances by making that choice, so is what we're concerned about the effect of when the one or the other, either the constable or the private process server, has delivered a writ of garnishment to the wrong person and it's their -- it's the harm to them of being -- having a writ of garnishment?

HONORABLE SCOTT BRISTER: It wouldn't matter who you deliver it to, because you're stopping them from giving property to somebody else. The only person harmed would be if you stop the wrong person, but I think that's the purpose for immediate replevies and --

MR. SCHENKKAN: That's what I'm trying to get to and trying to understand, what the role the bonding plays, and I'm having difficulty getting it in mind.

CONSTABLE HICKMAN: If you served the defendant before you served the bank and he got to his money before the bank was served, or if you served the wrong person and you wind up freezing somebody's assets, lots of opportunities for different kind of damages there.

MR. LOW: Pete, I got involved in the person serving the wrong person, so and I'm not saying -- I mean, a lot of people might be like me. They might not know. You might have known that there wasn't liability issue or bonding. I'm not saying the significance of it. I'm just trying to determine the difference, so if there makes no difference we know it, and if there is enough difference to make a difference we know it. I'm not saying the significance of it.

MR. SCHENKKAN: And I don't have a position on it yet. I'm trying to understand where it fits in the system. I guess what I'm hearing is it fits in with the possibility that if it's delivered to the wrong person then somebody else is frozen in their ability to get that person's money for a while when they shouldn't have been.

HONORABLE SARAH DUNCAN: No, Pete, it's not that somebody else will be frozen. It's that you're the plaintiff, you want -- you have a judgment against me. You want to freeze

my assets.

MR. SCHENKKAN: Okay.

HONORABLE SARAH DUNCAN: Person serves writ of garnishment on Mike, who has none of my assets --

MR. SCHENKKAN: Okay.

HONORABLE SARAH DUNCAN: -- instead of Lamont, who has all of my assets. As a result you've achieved nothing by your writ of garnishment. You haven't frozen any of my assets because the only person you've served doesn't have any.

MR. SCHENKKAN: And on that I'm comfortable with the notion that's a market choice. If somebody is prepared to choose someone who is not bonded as opposed to somebody who is, somebody who can go bankrupt and form a new company overnight, as opposed to the county, which is always going to be there, I mean, I don't see that as a problem.

HONORABLE SARAH DUNCAN: But your intent was to serve the assets of mine that Lamont has in his hands.

MR. SCHENKKAN: Right.

HONORABLE SARAH DUNCAN: What happens is that Mike and Lock Liddell freeze my paycheck.

MR. SCHENKKAN: Now, that's where I'm trying to focus.

HONORABLE SARAH DUNCAN: And I am seriously damaged because I'm not getting a paycheck this week, and I'm just using that as one example because there could be -- it

could be freezing particular stock certificates that were found to have been fraudulently conveyed and it gets served on a corporation that freezes the wrong stock certificates. I'm making things up here, but when you're talking about particular property there are any number of ways that different people, I think, I think, can potentially be harmed.

CONSTABLE HICKMAN: And different things can go wrong.

HONORABLE SARAH DUNCAN: Yeah.

CONSTABLE HICKMAN: I mean, if you served it on the wrong person, that person is not damaged at all, but the plaintiff may be damaged, may have an opportunity to dispose of assets that you didn't freeze properly.

MR. SCHENKKAN: As far as I'm concerned that's the plaintiff's problem and plaintiff's counsel's problem. I'm trying to get at the ones where it's not the plaintiff's problem, where the mistake costs somebody other than the person who chose the nonbonded process server, and trying to -- because I do think those people, obviously they aren't respected in the choice that the plaintiff makes to ask a private process server. So I'm wondering who are those people, how are they injured, and what is their recourse, against whom and what is it, and maybe their recourse is against the plaintiff who --

MR. WEEKS: Yeah.

MR. SCHENKKAN: -- who wrongfully --

HONORABLE SARAH DUNCAN: And it's almost an impossible suit to win, my little bit of research in that area says.

MR. WEEKS: The Supreme Court -- I have been sworn as a peace officer for 15 years and served in the constables' offices before, and my bond has always been $5,000. I mean, there's just not a lot of remedy there for a party in a wrongful action like this, so -- and most lawyers, as you know, they're not going to go try to get through immunity on a government entity. They're going to re-serve the papers, in practicality what's going to happen, and re-serve the citation on the right defendant if that does take place, but I assure you that, you know, it's very seldom that that really happens.

HONORABLE SARAH DUNCAN: But when it's a county employee there's at least something to be made out of suing the county.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I was going to ask the constable what the amount of the bond is. It's $1,500, isn't it?

CONSTABLE HICKMAN: Our bond isn't the value. The value is the county stands behind us. If we make a mistake, the county is going to be there.

HONORABLE SARAH DUNCAN: I imagine it's in your

union agreement, isn't it, that there has to be indemnification by the county for any judgment against you in your official capacity?

CONSTABLE HICKMAN: We have no indemnification in private or official capacity.

HONORABLE SARAH DUNCAN: Really?

CHAIRMAN BABCOCK: Just for historical purposes, I think that two years ago or more than two years ago when we dealt with Rule 103 we discussed this issue, and the Court actually sent out for comment a rule that was broader than the current 103 and then got comments back that it shouldn't be so broad as to allow private process servers to serve process when there is going to be property exchange involved. Am I right about that?

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: And so historically we have sort of dealt with this issue when we talked about 103, so that's just for the record. If -- I know this committee gets very surly when they haven't been fed, so if nobody has any more questions, why don't we take a little shorter than normal lunch break, 45 minutes, and then come back and finish this up.

You-all are welcome to stay, and we really thank you for coming by, and sorry to inconvenience your schedules.

CONSTABLE HICKMAN: Thank you for the opportunity.

CHAIRMAN BABCOCK: Thank you for coming by.

(Recess from 12:48 p.m. to 1:32 p.m.)

CHAIRMAN BABCOCK: All right. Has the discussion that just took place changed anybody's thinking about anything or does it give us a new direction anywhere? Justice Bland apparently thinks that the way is clear, right?

HONORABLE JANE BLAND: No, I was just in favor of closing debate.

CHAIRMAN BABCOCK: Not that the way is clear, huh? Okay. Bill.

MR. DAWSON: Move to vote.

PROFESSOR DORSANEO: No, I'll defer. I'm not saying anything.

CHAIRMAN BABCOCK: Okay.

HONORABLE JAN PATTERSON: I'd like to hear people's thoughts if they have any.

CHAIRMAN BABCOCK: Okay. Anybody have thoughts?

HONORABLE SARAH DUNCAN: I have thoughts. Lots of thoughts.

CHAIRMAN BABCOCK: Sarah's got a thought.

HONORABLE SARAH DUNCAN: My thought is, what the bleep did we think we were doing in amending 103? We have now gotten it -- or did the Court think, did we think in recommending to the Court.

CHAIRMAN BABCOCK: Yeah, there you go.

HONORABLE SARAH DUNCAN: We've now got it where a private process server can serve a writ of garnishment and the garnishee or the defendant, the defendant, can seek a replevy bond, and the amount of the bond can be approved by the private process servers --

PROFESSOR DORSANEO: Sureties.

HONORABLE SARAH DUNCAN: -- who have admitted that they are not trained and do not know how to do this.

PROFESSOR DORSANEO: I think it's a sufficiency of the sureties, not the amount of the bond.

HONORABLE SARAH DUNCAN: It's amount. If you'll look at the rule, it's the amount.

HONORABLE TOM LAWRENCE: But 664, that rule doesn't change that to read "private process server." That remains "officer." As a practical matter --

HONORABLE SARAH DUNCAN: Well, that's a matter of interpretation.

HONORABLE TOM LAWRENCE: I have never even heard of an officer -- there are a couple of constables still in the room, but I've never heard of an officer setting the replevy bond. It's almost always the court, as far as I know. And if you look at the word "officer" in the context of Rule 658a, the bond, that's talking about the officer that issued the writ, so arguably the word "officer" in 664 could be referring to the officer that issues the writ in 665.

HONORABLE SARAH DUNCAN: But, Tom, if I could point out, if "officer" only means a law enforcement officer that means that a defendant can't replevy because the only one who's authorized to approve a replevy bond in 664 is the officer who levied the writ.

HONORABLE TOM LAWRENCE: Well, but in 662 they talk about the officer who issued it, and that's what we talked about last time. The words "officer," "sheriff" and "constable," sometimes are used interchangeably. Sometimes they're not necessarily used interchangeably. We haven't looked at all the other issues involving garnishment, trying to clean up all the other wording in these and trying to reconcile Rule 15 with 103 with the garnishment rules with the injunction rules, but there's other work that could be done on that.

HONORABLE SARAH DUNCAN: Well, my only point is that I think the Supreme Court Advisory Committee and ultimately the Court amended a rule -- we proposed the amendment, the Court amended the rule -- without realizing all of the ramifications of that amendment, and I am not inclined to amend any more of the ancillary proceeding rules without a better understanding of what this -- I mean, because the 664 problem I think is a real problem. If "officer" is interpreted to mean only constables and sheriffs and deputy sheriffs, then that means there is no one under 664 who is authorized to approve a replevy bond.

Now, I don't think that's what it would be held to mean by a court, but that's what a literal application of your definition of "officer" would mean, so I'm just suggesting that we are venturing into the world of ancillary proceedings that I bet nobody around this table has much experience in, and that makes me very nervous.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Well, I think the Supreme Court already ventured into it.

HONORABLE SARAH DUNCAN: I do, too.

PROFESSOR DORSANEO: When they did Rule 103 it's obviously different from what we recommended to them to do, and it's obviously much broader.

HONORABLE SARAH DUNCAN: Uh-huh.

HONORABLE NATHAN HECHT: Broader?

PROFESSOR DORSANEO: Broader than what the committee was talking about, which was a rule of citation. We were focused on citation. When I was listening to these gentlemen talk, I was thinking, well, how can that person think that you can serve a writ of garnishment when the garnishment rules say "sheriff or constable"? Well --

HONORABLE SARAH DUNCAN: It's Rule 103.

PROFESSOR DORSANEO: Read 103 for what it says, and they are inconsistent. To me, I would almost go the opposite direction. If the Court really meant that everything

is to be governed by the standard in 103 then everything ought to be changed --

HONORABLE SARAH DUNCAN: Uh-huh.

PROFESSOR DORSANEO: -- to comply with it, including the language in 664, which is odd on its own, that an officer would be the one approving, you know, anything, whether it's the amount of the bond or the sufficiency of the sureties, because that obviously either doesn't actually happen or it happens in a very nonchalant way.

HONORABLE SARAH DUNCAN: Well, I would like to suggest that we do exactly the opposite, which is unamend 103 until this whole ancillary proceedings set of rules can be clearly and specifically thought about in terms of private process server versus constable. I mean, I completely agree with Bill. They can do it now. What we're talking about is we're talking about -- what Mr. Pendergrass said is that they were asking that we conform the 600 series rules to what had already been done in 103.

HONORABLE JAN PATTERSON: So that they don't have to stretch.

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Yeah, and that's what the Court asked us to consider as well, so that's what we're talking about.

HONORABLE NATHAN HECHT: Well, just to add one

point, 24.1 of the appellate rules, 24.1(b)(2), requires the trial court clerk to approve supersedeas bonds, which I don't know if they do or not, but I don't know what that approval looks like.

HONORABLE SARAH DUNCAN: The bond.

HONORABLE NATHAN HECHT: And then it says, "On motion of any party the trial court will review the bond," and I expect there is a motion in every instance where there's a bond, so the idea that -- I mean, I think there is some idea in the rules that officers approve things when it's not going to -- it's not going to have any lasting effect. I mean, if there is any kind of question it's going to go to the court, but here is an instance where a clerk approves a bond.

HONORABLE SARAH DUNCAN: Right. But it used to be that we all knew what a supersedeas bond should look like, we used to know pretty much what the amount should be, we had pretty much institutional sureties, and the clerk could. We're now in an area, I think, with Chapter 50 that -- and if Bonnie were here, I think she's said many times, they no longer want to do that because it's too -- it's too imprecise now for them to be approving bonds.

HONORABLE NATHAN HECHT: Well, I just don't know enough about it anymore, but I was a trial judge five years, and the clerk never disapproved a supersedeas bond while I was there, and some of the bonds, the sureties were the

brother-in-law of the debtor who was even broker than the debtor was, so they went in and said, "Is this okay?" And the district clerk said "sure," and here they came upstairs, but I never had it come the other way where the district clerk said, "No, I'm not approving that," and they came upstairs and said, "You've got to approve that." So I'm not sure that it mattered that much.

HONORABLE SARAH DUNCAN: I had one like that where they didn't approve; and it was, of course, I thought a perfectly fine bond; and as a result, no writ of supersedeas issued; but be that as it may, we're talking about something, aren't we, a little different than just approving a bond to suspend enforcement. At least in the garnishment rules we're talking about freezing property, in the sequestration and attachment rules we're talking about seizing property, which I don't think the clerks are going to volunteer to do any more than the private process servers.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't think the -- I don't think 103 now is that confusing, but I think we could tweak it a little bit to make it clear that all we're talking about here is that the private process servers have a right to deliver papers. Period. That's all they want to do, just deliver papers. They don't have any right to set bonds, they don't have any right to seize property. I think we can tweak 103 to

make that clearer, maybe even put a comment in there that says that wherever in these rules it uses the word "officer" or "constable" or "sheriff," if it involves only delivering papers then --

CHAIRMAN BABCOCK: Then it's okay.

MR. HAMILTON: -- process servers can do it without going through and changing every rule in the book.

MR. LOW: There's only two things that I've heard objected to, as Carl raised, and that is taking possession of property or approving bonds, and I've heard no other objection to private process servers other than that. That's -- maybe I didn't hear it all. Uh-oh, I've got one. I shouldn't have said that.

HONORABLE SARAH DUNCAN: What then are you going to do -- and I'm just bringing this up as an example. I am not professing to be an expert in the ancillary proceeding rules at all. The only one that's been brought to my attention is 664 where the private process servers say they are not trained to and not competent and don't want to approve replevy bonds, but they would be required to do so under 664 and I guess are now. Somebody's got to approve this bond, and I believe what Justice Hecht is saying is clerks approve bonds, so and I --

HONORABLE NATHAN HECHT: No, what I was saying is Bill's probably right, there's not much to the approval process, and if somebody doesn't like it, they're going to go

to the court.

CHAIRMAN BABCOCK: Okay. Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, if you read 664 as Sarah does, that the "officer" means that it's the sheriff or constable that serves it, then there would be a problem with changing the rules now because now you have a sheriff or constable serve it under 663, 663a. You've got the sheriff or constable as defined as an officer under 664 that would take the -- approve the surety bond. If you change it then you're going to have a private process server serve it, but only a sheriff or constable could approve the bond, and a sheriff or constable won't be involved in this. So you're going to have a disconnect there between who's going to approve that. Now, I think honestly as a practical matter that it normally comes back to the court, but there may be some that are having the sheriff or constable approve it, and no sheriff or constable is going to get involved -- and correct me if I'm wrong -- in approving a bond on a garnishment they didn't serve. Is that right, a fair statement?

CONSTABLE HILGER: I think it --

MR. LOW: But I thought you're not doing it now, you're not approving. Didn't you say you're not approving the bonds now?

CONSTABLE HILGER: On which -- depends on what instrument, sir. If it's a garnishment, I have not seen one in

my 25 years, but yes, sir, on a sequestration or an attachment, absolutely.

MR. LOW: What criteria do you use to approve it?

CONSTABLE HILGER: It's basically look over it. I work with the D.A.'s office. In fact, the first thing I do is validate the bond is good by making a phone call and make sure the date is correct and then if I see something a little funny on it I send it to the district attorney's office and have them approve or validate that what I'm looking at is good, and after a time they gradually got me to a point where I can look at them and --

MR. LOW: Well, what do you learn by handing them the papers that's in addition to what you go through to approve the bond then? What do you learn -- if somebody else has served papers, what would you have learned if you had served them?

CONSTABLE HILGER: If someone else has served the paper and we just approve the bond? Wow, I don't know.

MR. LOW: What information would you learn by just serving the papers rather than going through the process of approving the bond that you go through? In other words, somebody else has served.

CONSTABLE HILGER: I don't even know. You know, as the district attorney continues to tell me, I'm enforcing,

and at that point I don't know what instrument I'm enforcing, to be honest with you, sir. I don't know whether that's an appropriate answer for you, but how can I approve a bond on something that I didn't see?

MR. LOW: But my point is you go serve, you don't approve the bond. One comes back, and then it comes back to you to serve, and you didn't serve it. What better provides information to you, the fact that you had handed it -- because the district attorney is not there, and you had handed the papers, the service to that person, what information do you learn by handing it to him that you wouldn't have by just getting it back?

CONSTABLE HILGER: Okay. Remember, what I'm going to approve in that is the replevy bond, so that's after an action.

MR. LOW: Right.

CONSTABLE HILGER: And I think what you're trying to describe is an issue where the private process server served the paper, but yet I'm trying to approve the replevy bond on an instrument I don't even have. Does that more directly answer your question?

MR. LOW: I don't know. Somebody pled ignorance in this matter and I'm just --

CONSTABLE HILGER: Okay. The replevy bond, it's after action. Okay. The delivery is still -- okay, I'm sorry.

HONORABLE TOM LAWRENCE: As long as the private process server serves the writ of garnishment, say on a bank where there's no other property and there's no replevy bond and no other problems, there's not going to be any turnover of the assets or any sale of it, then there's not going to be a particular problem necessarily in having a private process server do it, but if there's going to be a replevy bond under 664 or a turnover of the assets or a sale of the assets, then a plaintiff would be foolish to have the private process server start that. They would have to have the sheriff or constable start that in order to make everything work correctly.

So you're going to have a dual system. If it's going to be easy and no problems, maybe a private process server, but if you anticipate any problems you really have to go with the sheriff and constable, and that's what I tried to use the comment to point out, whether I succeeded in that or not.

CHAIRMAN BABCOCK: Richard, then Pete.

MR. MUNZINGER: I have got the same problem Buddy does, though. I don't understand why a public officer cannot approve a bond because the public officer didn't himself serve the writ. The writ is a notice. If the writ has been properly served and the court records prove that the writ was properly served, how can a public official refuse to do the public official's duty? I don't understand that. I think

that's Buddy's problem.

MR. LOW: That's right.

MR. MUNZINGER: I have got a person that works for the State of Texas whose job is to approve a bond. He won't approve the bond because he didn't serve the piece of paper. Why? Well, he doesn't have a legal answer that I understand. I don't mean to be disrespectful, but that's Buddy's question. I don't understand this. I don't see it as a problem. What I see is the problem is that practice, as distinct from legal rights, duties, and the understanding of legal rights and duties, the practice is if I don't serve it, I don't approve it. Well, that ain't the law or shouldn't be.

MR. LOW: Right. Right.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: I'm not sure this is a substance problem, maybe just the words, but in 662 the way it is worded, you know, before the proposed changes, "The writ shall be dated and tested," whatever that means, and then --

PROFESSOR DORSANEO: It means attested.

MR. SCHENKKAN: -- "may be delivered to" and it used to say "the sheriff or constable by the officer who issued it," which makes me think that the meaning of the word "officer" for purposes of issuing a writ is a different meaning than "officer" as used in delivering things, and I'm thinking a judge, but maybe I don't understand.

HONORABLE TOM LAWRENCE: Clerk. County or district clerk.

MR. SCHENKKAN: Or the clerk, okay. And then we turn to 664, and we don't have any proposed language changes in there yet, and this is the replevy rule, the first of the replevy rules, and the first action there is by the defendant. The defendant may replevy the same, and so this is a party who hasn't done anything yet, and to replevy he gives the bond. Okay. Well, he is giving the right bond is his problem. That's not the process server or the constable or the official who issued the writ in the first place, and then "The bond has sufficient sureties as provided by the statute to be approved by the officer who levied the writ," and is "officer who levied the writ" to be read as "sheriff or constable who delivered the writ" or is it to be read as "judge or county or district clerk who issued the writ"?

HONORABLE TOM LAWRENCE: When I drafted this, I assumed, rightly or wrongly, that the word "officer" in 658a and the word "officer" in 662 and 664 did not mean sheriff or constable. That's why there's no change to 664.

MR. SCHENKKAN: And that's I guess what I'm getting at is if "officer who levied the writ" means the judge who issued the writ, why do we have a problem? Or the county or district clerk.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Well, I think it's at least absolutely clear to me that the word "officer" means "sheriff or constable" throughout here, and it always has. These rules were last revisited after Fuentes vs. Shevin, et cetera. Luke Soules and I revised them in about 1977 or '78, and we probably used a lot of -- detained a lot of the old terminology in making whatever due process changes we thought were appropriate, probably leaving in here -- and I'm speculating to an extent -- this approval by the sheriff or constable who, you know, levied, meaning served the writ.

The use of the word "levied" in this context for a writ of garnishment is kind of an odd word, but there are other odd words here used, too. The word "executed," is an odd word when we're just talking about, you know, serving the writ, and I wouldn't be too confident that you could attribute any kind of more complicated meaning to the words on the page here than the fact that it provided for sheriffs and constables to do relatively specific things according to the numbers from the initial days when these rules were put in whatever set of revised civil statutes they once, you know, inhabited, and then it got changed and some of the things that probably should have been changed weren't really changed, and what we've got here is a -- is something that needs to be fixed.

It doesn't seem to me in 664 that there's any reason whatsoever for any officer to approve, you know, any

part of the replevy bond. I think that's probably a bad idea for the officers themselves. It would be a bad idea if "the officer" included a private process server, perhaps a worse idea, but I don't know if it's any worse than the constable doing it.

MR. SCHENKKAN: I guess maybe what I'm getting at is maybe it wasn't, in fact, intended this way, but would it be okay as a solution if in these two places -- maybe other things have to be fixed other places, but if we made it clear in 662 that the writ could be delivered to a sheriff, constable, or private process server, but it was issued by the -- don't use the word "officer" but "county clerk" or the "district clerk" or "the court" and then in Rule 664 we say not "by the officer who levied the writ" but "by the district clerk, county clerk, or judge who issued the writ," and so if there is any approval it's done by the same person who issued it and it's not done by any of the people who are in the business of simply delivering the writ of garnishment, whether it's the sheriff or the constable or a private process server.

HONORABLE TOM LAWRENCE: And I'd do the same thing if you want to do that on 658a because you also have "officer authorized to issue such writ" and obviously officers don't issue writs, so that would probably was intended to be "clerk" or "judge," I would imagine.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I'd like to ask the constable, when a replevy bond comes into the picture, how does that work? Does the garnishee defendant or the defendant in the case, not the garnishee, does he just hand you a piece of paper that's a bond with sureties on it or does he file a document with the court requesting replevy and say "Here's my bond" and so on?

CONSTABLE HILGER: Typically they're more in the direction of the plaintiff's replevy, which is in part of the court order. That's what I was trying to address while ago, after I understood more of the question. The replevy bond, remember, the plaintiff or/and the defendant can place up that bond, and what we have to do is see a copy of it from the plaintiff to be able to move that forward back to the plaintiff, if that's the way pursuant to Rule 708 on seizing properties, but it very specifically in there says the amount of the bond that the plaintiff and the defendant has to place forward, and that's why we need a copy of the actual document to show what happened and what the amount of the bond is. Does that more specifically answer your questions, gentlemen?

MR. HAMILTON: I don't understand why is the plaintiff putting up the replevy bond?

CONSTABLE HILGER: That's --

HONORABLE SARAH DUNCAN: Actually, the court order requires that the amount -- it says "a post-judgment writ." Okay. Post-judgment writ under 658, the court's order

authorizing the issuance of the writ has to include the amount that will be required for the replevy bond. That's the second paragraph, end of the second paragraph of 658.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: I think what happens is that the court usually sets a replevy bond when you set -- when you sign the garnishment you set the replevy bond at that time. I think what this is referring to is a situation where it's an effect, some property, and it's a truck that the guy needs in his business, so rather than have the truck seized and held somewhere and not be able to use it, the defendant wants to post a replevy bond --

HONORABLE SARAH DUNCAN: Right.

HONORABLE TOM LAWRENCE: -- to give to the officer to approve it so the officer doesn't do anything to the truck at the time, and all the officer is just approving that as being a bond. They're not setting the bond, and normally you wouldn't -- well, I guess you could have that if it's a seizure at a bank, but normally I would think this would be used for other property more than a bank seizure, if that clears it up.

CHAIRMAN BABCOCK: Well, we're getting a little off and far afield here, because what the Court has asked us to do is take Rule 103 and 536 on the one hand, which appear to permit service by private process servers of writs of

garnishment, and Rule 662 and 663 on the other hand which seem to confine, not seem, does confine service of those writs to only a sheriff or a constable, and recommend how to resolve the apparent conflict between the two sets of rules.

Sarah says we should move -- we should move in favor of 662 and 663 and amend 103, kind of roll that back and say we didn't really mean that, and then others are proponents of the opposite. They say we did mean that in 103, and so we ought to amend 662 and 663, and if we do that, then as Sarah and others point out, then there may be some other rules that need revising as well, so that's the issue that we ought to vote on here.

HONORABLE SARAH DUNCAN: And I'm not proposing a permanent rollback of 103. I'm just concerned about what other problems have been created by the amendment of 103.

CHAIRMAN BABCOCK: Well, but for right now, we're just focusing on writs of garnishment because that's what the Court asked us to. When they want us to get to replevy bonds, then we'll get to that, writs of replevy, but right now we're on garnishment.

HONORABLE SARAH DUNCAN: This is garnishment.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, in one sense the service of -- although the service of the inquisitorial writ of garnishment doesn't cause anything to be seized, it does cause

it to be, you know, frozen.

CHAIRMAN BABCOCK: Freezed, not seized.

PROFESSOR DORSANEO: Yeah. And from the standpoint of the person seeking the -- seeking the writ of garnshment and wanting to get it served, if it wasn't served on the right person or in the right way, that would be, you know, just as damaging as the property not being, you know, seized and the property making its way off into Oklahoma or wherever. So to say that the only thing we're talking about is serving a paper here is right, but it's not -- it's not completely right.

CHAIRMAN BABCOCK: It's right, but it's not complete.

PROFESSOR DORSANEO: Yeah. And I still would probably opt in favor of changing the higher numbered rules to conform to 103. You say we're talking about this one now, so I'm talking about these particular rules, and that would require making some additional changes in 664 and perhaps in other places.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: But that would be the remedy that I would propose rather than heading in the opposite direction, because I think 103 is pretty clear, although it wasn't clear to me before this discussion today what the Court actually did.

CHAIRMAN BABCOCK: Okay. Well, that's what

we're being asked to resolve, and if the people of this committee think that 103 got it right then the only issue is then to try to come up with language in 662 and 663 and perhaps other rules to conform those rules to 103. Now, if we think that 103, we didn't get it right, then we ought to vote the other way, right? Right?

HONORABLE SARAH DUNCAN: My concern is not that I think 103 got it wrong. If you're saying that we or somebody is going to look at all the ancillary proceeding rules and conform those to 103, I don't have a problem with that, just to -- because you've been saying that you're stating my position, and I just want to say I don't have a problem with 103. I have a problem with messing with rules when we don't understand the impact of what we're doing.

CHAIRMAN BABCOCK: Do you think that 103 messed with the writs of garnishment service?

HONORABLE SARAH DUNCAN: I do. I do. Because at this point in time there is no one for a defendant to get a replevy bond approved by, and I think that's a problem.

CHAIRMAN BABCOCK: Okay. So the issue is we unmess in your view 103 or we further mess in your view 662 and 663.

HONORABLE SARAH DUNCAN: 663 does not -- 662 and 663 does not solve the problem that has been created in 664.

CHAIRMAN BABCOCK: I understand. There may be

some other issues. Okay. Does everybody -- I mean, does that -- I'm reading the charge of the Court, so I maybe have an advantage on everybody, but does everybody see what we're being asked to vote on here?

MR. LOW: Right.

MR. GARCIA: Could you circulate a copy of the current 103?

CHAIRMAN BABCOCK: Could I circulate a copy?

HONORABLE SARAH DUNCAN: It's in the rule book.

CHAIRMAN BABCOCK: I could but --

MR. ALLEN: Give me a copy of the book and I'll Xerox it.

CHAIRMAN BABCOCK: You may not be able to do that before we vote on this.

PROFESSOR DORSANEO: We can read it, the first line of it.

CHAIRMAN BABCOCK: Pete's got a copy for you.

HONORABLE JAN PATTERSON: Can we have a last comment from Judge Lawrence?

CHAIRMAN BABCOCK: Yeah. We can have a comment from anybody. We've got plenty of time, as long as everybody is --

HONORABLE JAN PATTERSON: Do you have any last thoughts or have any reaction to what the discussion is?

HONORABLE TOM LAWRENCE: Well, my last thought

is that what we were asked to do at the last meeting, I think the draft accomplishes that. The biggest problem I have is that plaintiffs, not all plaintiffs are represented by an attorney, and plaintiff that goes out and hires a private process server is probably not going to understand -- to serve the writ of garnishment probably is not going to understand that they're precluded from having the bond approved by him or the sale done by him, and I understand that in a pure world that there should be no problem with the sheriff or constable serving an order that comes from the court.

As a practical matter, I'm not sure throughout the state or Texas, rightly or wrongly, that every sheriff or constable is necessarily going to want to get involved in approving a replevy bond or receiving property or selling it if they didn't serve the writ of garnishment initially. So, rightly or wrongly, I think that's going to be a problem, so the two problems that I view are the confusion between having two different tracks of handling this garnishment, one by private process server that can only serve it and nothing else and the other by sheriff or constable that can do everything.

I think that's going to have some confusion, and what do you do if you're a plaintiff and you've hired the private process server and then something needs to be taken and sold And the sheriff or constable doesn't want to do that?

HONORABLE JAN PATTERSON: Well, is that a turf

issue or something else?

HONORABLE JAN PATTERSON: Well, I think there's some legitimate concerns on both sides, but I also believe that there probably is a turf battle going on. If anybody disagrees --

CHAIRMAN BABCOCK: Since you're the subcommittee chair and since that's your position, I think that's how we'll frame the vote. So let me give it a try. Everybody who is in favor of leaving 662 and 663 as-is, which means that only a sheriff or constable can serve a writ of garnishment and thereby amend 103 again to make clear that the private process servers can't, vote in favor of that by raising your hand.

That's going to be the vote because that's what the subcommittee chair thinks.

PROFESSOR DORSANEO: Don't we have a court decision saying that 103 does take care of 662? I mean, you can't make the problem go away by saying it's not a problem.

HONORABLE TOM LAWRENCE: That's a county court of law judge in Dallas that did that.

CHAIRMAN BABCOCK: We've got to amend one of them. We've got to amend something. It's either 103 or it's 662 and 663. All right. So the vote is everybody that is in favor of leaving 662 and 663 as it is, which means that only a sheriff or constable can serve a writ of garnishment and thereby amend -- and we'll have to work on that later -- 103 to

make clear that writs of garnishment are not to be served by private process servers. Everybody in favor of that, raise your hand.

Everybody opposed, raise your hand? Okay. By a vote of 5 in favor, 20 opposed, it appears that we will go in the other direction, and that is leave the recently amended 103 the way it is and work on language to correct 662, 663, and with the Court's permission maybe we ought to be able to work on 664 as well, if that's going to create problems, and I don't -- I don't want to draft new rules with a group of 35 people, but with that clarification, perhaps, Judge Lawrence, you could go back and maybe even consult with Judge Christopher who's -- because you weren't happy with this language, right?

So perhaps you could tell Judge Lawrence your thoughts or get on his subcommittee, whatever.

HONORABLE TOM LAWRENCE: Let me ask you, is there anything anybody perceives wrong with the language in 662 and 663 as amended? Is that okay with everybody?

HONORABLE SARAH DUNCAN: No.

CHAIRMAN BABCOCK: Well, Judge Christopher it wasn't, and Judge Duncan is shaking her head, too. And Pete.

MR. SCHENKKAN: And my problem is not with the amendments to it. It's the part that's not amended to keep us from having this problem that I don't think is a substance problem about replevy. If we just explain that the officer who

issued it is a reference to the judge and that's the same officer who's going to approve the surety for a replevy bond when the defendant tries to do that then I'm on board.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: So fix the word "officer" in 658a, 666, 664, change the word "officer." 662 and 663 are okay, and what about the comment?

CHAIRMAN BABCOCK: How does everybody feel about the comment?

MR. JEFFERSON: I like the comment.

PROFESSOR DORSANEO: Did you mention 669?

CHAIRMAN BABCOCK: We didn't talk about that.

PROFESSOR DORSANEO: I think 669 needs to be changed, too.

CHAIRMAN BABCOCK: To do what?

PROFESSOR DORSANEO: To not talk about "to the proper officer for that purpose."

HONORABLE TOM LAWRENCE: Where does it say "officer"? Oh, there it is, yeah. Okay.

PROFESSOR DORSANEO: And I think if you say "sheriff or constable" there instead of "proper officer" --

HONORABLE TOM LAWRENCE: Yeah.

PROFESSOR DORSANEO: -- I think is what you would want to say.

HONORABLE TOM LAWRENCE: Yeah.

PROFESSOR DORSANEO: Then you may want to look back at your comment. I think your comment is less necessary then but still accurate.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And would you please find out from our district clerk and county clerk members what they do when they approve bonds as they're required to do by various provisions of the rules and some statutes? Number one, what does that process entail, and number two, do they ever disapprove them?

CHAIRMAN BABCOCK: That would be Bonnie and Andy.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Yeah. Justice Gray.

HONORABLE TOM GRAY: I just have a question. I'm struggling with why in two different phrases in both 662 and 663 we have "any sheriff or constable or other person authorized by law" and then item (2) is "any person authorized by law." That seems to be redundant.

HONORABLE TOM LAWRENCE: Well, I just tracked the language in 103. That's how 103 is written, so I wanted to keep it consistent.

CHAIRMAN BABCOCK: We want to be sure that it's authorized by law.

HONORABLE TOM GRAY: Obviously.

MR. LOW: I really mean that.

HONORABLE TOM LAWRENCE: I thought the worst thing to do was to have different language here than you have in 103.

HONORABLE TOM GRAY: That explains why it's there, and I appreciate that.

CHAIRMAN BABCOCK: That's what 103 says. Okay. Yes, sir, Jody.

MR. HUGHES: Just a clarification. Somebody -- I think it was Carl -- raised this question of amending the language in the first sentence of 662 to say "issued by the clerk." Is that included in this?

MR. HAMILTON: Yeah, but if you look at Rule 15, however, the phrase should have said "shall be dated and attested as other writs," whether we still need even that I don't know because I don't know whether clerks attest to anything or not.

HONORABLE TOM LAWRENCE: Well, if we have to have a test, let's make it a multiple choice.

CHAIRMAN BABCOCK: As opposed to an attest. Okay. Any other comments?

Well, Justice Hecht said that it's embarrassing that we're done so quickly. I'm certainly embarrassed, but you shouldn't be. Thanks, everybody, and our next meeting is at the State Bar on August 24th.

MR. LOW: We didn't know Richard wouldn't be here.

CHAIRMAN BABCOCK: Yeah, we didn't know Orsinger wasn't going to be here.

MR. DAWSON: Make sure that's in the record.

CHAIRMAN BABCOCK: That's right. Thank you, and thank you all for attending.

(Adjourned at 2:15 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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

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D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2008
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-183