* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 8, 2021

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 8th day of October, 2021, between the hours of 9:00 a.m. and 5:00 p.m., at the Texas Association of Broadcasters, 502 E. 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:

--*-*-*

CHAIRMAN BABCOCK: Welcome, everybody. I can see I have no more authority in person than I ever did to get people to pay attention. I know we have some people on the phone as well. Quit talking, Judges. Oblivious.

Judge Estevez, Judge Miskel, we've started the meeting. Just chatting with each other. Justice Christopher, are we ready to go?

MR. WARREN: Good morning, good morning, excuse us.

CHAIRMAN BABCOCK: Are we ready to go?

HONORABLE TRACY CHRISTOPHER: Any time.

CHAIRMAN BABCOCK: You are now our parliamentarian.

MR. MEADOWS: You're at the wrong end of the table.

CHAIRMAN BABCOCK: I know, I know, the world is upside down in more than ways than one. We're in the wrong -- wrong end of the room. But, welcome, everybody. It's been far too long. Wouldn't everybody agree with that? We got an e-mail from somebody, and I forget who it was, inquiring whether everybody -- whether we were going to inquire about whether everybody had been vaccinated, and I responded or I think we responded that, no, we just

assumed everybody either had been vaccinated or has a negative test, and we're not going to -- hi, Richard. We're not going to go around and make you produce your cards. We're just relying on everybody's good faith on that, and again, it's terrific, terrific to be here.

We got some new members, and we got a new assistant for me, Shiva Zamen, who is to my left. You've seen her before on Zoom calls, but this is the first time in person, and she's doing a terrific job taking over for Marti Walker, who retired, took her retirement package, and then went right back to work, and good for her, by the way. So without further adieu, as we always do, we will hear from Chief Justice Hecht.

HONORABLE NATHAN HECHT: Well, good morning, everyone, and I join Chip in saying it's good to be back in person. We got a lot of work done when we were working remotely, but this is good to see everybody again. And you don't look that much older, so --

CHAIRMAN BABCOCK: You got a haircut, so you look younger.

HONORABLE NATHAN HECHT: Yeah. We're glad to have the Court rules attorney, Jackie Daumerie, back at full strength here, almost full strength. And Pauline, our paralegal at the Court passed the second and final part of her paralegal certification exam, so she's now a

certified paralegal. So congratulate Pauline.

(Applause)

HONORABLE NATHAN HECHT: We're awaiting appointment, obviously, of Justice Guzman's successor still. We have gone ahead and made new liaison assignments, and there -- I don't have a copy of them here, but we can get you one if you are interested.

You probably know that David Slayton left as administrative director of the Office of Court Administration, August the 31st, to take a position with the National Center for State Courts as vice-president of court consulting services. So our loss is the country's gain, and David is still keeping in touch and working on OCA's initiatives, just from a national level now.

The interim director, is Mena Ramon. Some of you know Mena, but she has been the general counsel at the Office of Court Administration for 24 years, and she was the interim director when we were looking for David, so she's agreeed to serve in that capacity as long as we need her, but we're looking hard to fill that -- fill that position as soon as we can. And Osler McCarthy, our public information officer, retired at the end of August, so no more historical snippets with your orders on Fridays, unless we can get somebody else to fill that role. And we're looking for Osler's replacement. He had

been there over 20 years, so we wish him well also.

We have a new subscription service for rules advisories, and some of you have already signed up. If you haven't, please go to the Court's website and follow the prompts to sign up for it. Also, we have moved the -- Osler's e-mail list for orders over to the subscription service, so you should be getting those a little different way than you have up until now. We will also start adding a synopses of cases that are set for argument and cases that are issuing, so those will be additions to that subscription service as well.

The Court resumed in-person arguments in September for the first time. We had conference in-person twice in June, and we had in-person conference already once this September, so the legal staff, the law clerks, seem to be anxious to get back on the floor and work with each other more in person, so that looks like the direction that we're headed, at least for the time being.

And then you should know, if you haven't noticed, that the Judicial Council -- Judicial Commission on Mental Health is having a summit on October 14th and 15th, and Justice Bland is liaison to that group, and they've worked very hard on this, and last year even though it was remote, I think we were over a thousand --

HONORABLE JANE BLAND: 1,300.

CHAIRMAN BABCOCK: Yeah, 1,300 attendees, and we already have -- I was told yesterday, it's full up in-person and there's a waiting list, and then a bunch of people have already signed up for remote. So this is one of our most successful initiatives, the Mental Health Commission, and they're doing great work and are a model for the country.

We -- on emergency orders, we put out Emergency Order 41, extending the deadline for membership fees in the State Bar until October 31st like we did last year, so the automatic suspension date will be November 1st. Executive order -- I'm sorry, Emergency Order 42 continues the eviction diversion program, which I think I mentioned last time is also a model for the country; and a lot of other states are trying to copy our program because ours actually works; and eviction is still a big issue because of the pandemic; and so we need this program to help both tenants, landlords, and society. It's a win-win-win program.

And then Emergency Order 43 is the omnibus order, like the first order, Emergency Order 1, that was issued for the first time. But it's changing a little bit, so we hear from the district and county judges that they don't really need authority to suspend deadlines and procedures like they did at the first, so that part of the

order has been omitted. We also hear from the justices of the peace and the municipal court judges that they do need that authority, so it's in there for them, but their training associations are working very hard on trying to get their procedures in place so that on down the line they perhaps will not need the authority as well.

The dismissal dates for CPS cases are still in place. We're still encouraging courts to adopt minimum standard health protocols around the state; and everyone seems to be cooperating mostly on doing that; and the order still provides that courts may require or allow remote hearings, depositions, or other proceedings; and Chief Justice Christopher has the lead on the task force that's looking out to make these more permanent -- excuse me, in rules changes; and it's a gigantic job to go through and find out all of the parts of our procedural process that can be altered, improved, I hope, with remote proceedings. So the emergency order continues to allow that to happen.

We have -- you may have seen in the news, the Governor's Operation Lone Star project at the border is getting some attention, and our role in that is to make sure that the people who are arrested are magistrated properly under the law. We have 30 extra judges who are -- who go online three times a day to make sure

magistrations are occurring timely and properly, and then we have also lined up lawyers to help provide -- to be appointed counsel in these cases. So these counties are small, and they -- this is sort of overwhelming for their criminal justice systems, but with the help of RioGrande Legal Aid and some other folks, we are providing legal assistance for the people who are detained in that operation.

We finally approved rules amendments to appellate Rule 49, the rehearing rule, and you might want to take a look at those, and we changed the Canon of Judicial Conduct 6B to allow for constitutional court judges to act as arbitrators or mediators on the side. Justice of the peace can do this. Municipal judges, district and county judges cannot. As you well know, in most of the counties, the constitutional county judge is more an executive position and does not have a whole lot of judicial responsibilities. Some places, some places that's not true, but this will give them that flexibility. The committee talked about this sometime ago, and now it's been put out for comment. And I think, Chip, that's all I've got by way of an update.

CHAIRMAN BABCOCK: Thank you, Chief. Justice Bland.

HONORABLE JANE BLAND: It's just really good

to see everyone. I don't have anything to add.

CHAIRMAN BABCOCK: Okay. Housekeeping, on the phone, we have a number of people. Lisa Hobbs, Richard Orsinger, David Peeples, and Pam Baron, and I know there are others. If you're on the committee, I wonder if you could identify yourself for the record. If you're a member of the public, you don't need to identify yourself. So anybody that wants to chime in.

PROFESSOR HOFFMAN: Chip, Lonny Hoffman on also.

CHAIRMAN BABCOCK: Professor Hoffman. Welcome.

(Inaudible)

CHAIRMAN BABCOCK: Sorry, after --

MR. MUNZINGER: Richard Munzinger.

CHAIRMAN BABCOCK: Munzinger, got that.

MS. CORTELL: Nina Cortell.

CHAIRMAN BABCOCK: Nina. Got that.

MS. GREER: Marcy Greer is on the phone. Good morning.

CHAIRMAN BABCOCK: Marcy. Not that easy to do this. Lisa Hobbs, Richard Orsinger, David Peeples, Pam Baron, Lonny Hoffman, Richard Munzinger, Nina Cortell, and Marcy. Who else?

(Inaudible)

THE REPORTER: I didn't get that.
CHAIRMAN BABCOCK: Try it again one at a time.
MS. WOOTEN: Kennon Wooten.
UNIDENTIFIED PHONE SPEAKER: It's hard to do it one at a time.
CHAIRMAN BABCOCK: I know. Elaine. I heard Elaine. So somebody else say something.
MS. WOOTEN: Kennon Wooten.
CHAIRMAN BABCOCK: Got you, Kennon.
MR. LEVY: Robert Levy.
HONORABLE KENT SULLIVAN: Sullivan.
CHAIRMAN BABCOCK: Levy, Sullivan. Got that.
MR. WATSON: Skip Watson.
CHAIRMAN BABCOCK: Watson, got that.
HONORABLE LEVI BENTON: Levi.
CHAIRMAN BABCOCK: Levi Benton.
(Inaudible)
CHAIRMAN BABCOCK: Who was that? Who was that last one after Levi?
HONORABLE TOM GRAY: Tom Gray.
CHAIRMAN BABCOCK: Justice Gray. Thank you.
MR. BERRELEZ: Manuel Berrelez.
CHAIRMAN BABCOCK: Manuel. Anybody else?

Okay. And, Shiva, do we have a procedure if they want to speak how they do it? Do they just --

MS. ZAMEN: I e-mailed my cell phone, if they want to text me or e-mail me.

CHAIRMAN BABCOCK: Okay. So say what you want them to do if they want to speak.

MS. ZAMEN: Okay. If you want to text me to have like your hand raised in line, you can go ahead and text me at 832-904-6014. Or send me an e-mail. I'm checking both.

CHAIRMAN BABCOCK: Okay. A little awkward. Sorry about that, but we tried to get Zoom technology in here and were not able to do it, so -- so with that out of the way, we'll go to seizure exemption rules and form, and Jim and Pete, who is going to lead this? Jim Perdue and Pete Schenkkan, who is going to lead?

MR. PERDUE: Pete's more qualified, but unfortunately, I've drawn this bean so far. And I'm going to be very brief. Y'all have got a ton of material that came to you, to the credit of a group of stakeholders that kind of got together and were forced to have an in-person discussion without me there. So you've got Craig Noack here on behalf of the creditors bar and the receivers association. Rich Tomlinson is here on behalf of Lone Star Legal Aid, who is obviously working on this project

on behalf of the debtors. And then Bronson Tucker, who I have not had the pleasure of meeting, but welcome.

MR. TUCKER: Thank you.

MR. PERDUE: And Bronson works with the court training center training the JPs and the judges on these issues. I am certainly not a thought leader, although I have been a judgment creditor, fortunately, a couple of times in my career. So I'm going to turn it over to them, but thematically, I think that, as a complete amateur in this, for those of you who don't know it at all as well, there's kind of two things that I've taken away that complicate this project out of the legislation. Texas does not have wage garnishment, and therefore, in this kind of conceptualization, which this committee confronts oftentimes, Texas is different, Texas is unique, Texas does things differently. Because we don't do it the way some 46 other states tend to address this issue, there's not an easy best practices model because -- and you'll find, I think, that there's a central issue regarding wages and garnishment and then receivership, which is uniquely Texan in some regard.

The second thematic thing that has come to me, just from personal experience, and this is no fault of the stakeholders, but we all confront this in this committee all the time, and y'all should be aware of this,

that we see this. It's a big state, and so this committee ends up writing 254-county solutions for things that may be happening or anecdotally heard about somewhere, but you've got a rule that applies to everything and everybody. A JP credit card receivership is a different entity than a plaintiff, either in a business or a tort context, who takes a 2 million-dollar judgment and has a business concern or an entity or somebody perhaps untoward who is avoiding that collection effort. And while the vast majority of this docket may be represented in the former, it's -- the concept here, which perhaps then lends to these certain constituents, gets very focused on that, but there is a -- there is a spectrum of creditor and debtor relation cases and judgments that even in JP court look different than simply a 3,000-dollar credit card default effort with a receivership.

So those two kind of big themes complicate the idea of, I think, basically a 40-word provision within the omnibus courts bill that has led us here, and this discussion, which has given you -- by the way, you don't need to read the whole bill. The bill is 80 pages of a 140-page PDF that you got. Don't worry about the bill, although we can talk about legislative intent and what the project actually is, because I think that is relevant to the scope of the discussion and the dispute between the

two groups. And I lean more towards obedience to the legislative intent, but we could talk about that, and despite my hyperbole in my e-mail to the gentlemen, they have done the best to bring as much resolution as they could to us, with the understanding that the judgment sits now in your collective hands after this presentation. So with that, whoever wants to go first, Rich, Craig, y'all take the floor.

MR. TOMLINSON: Again, I'm Rich Tomlinson. This is only like the third time I've appeared inside without mask, and I went to federal court twice a month or so ago, and we all wore masks until we spoke, and that's what I'm doing here.

CHAIRMAN BABCOCK: Rich, could I interrupt you for two seconds?

MR. TOMLINSON: Sure.

CHAIRMAN BABCOCK: Everybody, particularly if you're at the other end of the room, if you could speak loud enough so that this Polycom phone could pick it up, that would be great, and we've got an auxiliary mic that Rich is supposed to use, so talk in your normal way, swiveling your head so that you embrace everybody, but remember, we've got people on the phone that need to hear you.

MR. TOMLINSON: Okay.

MR. TUCKER: No pressure.

CHAIRMAN BABCOCK: Thanks.

MR. TOMLINSON: I'll try to remember that, thank you. Basically we -- we came here earlier during the September meeting. The creditors groups and the debtor group came up with proposals. We -- we have met repeatedly since then on the instructions of Mr. Perdue, and we've made progress. I can't tell you we've reached an agreement as stakeholders on what the rule or rules should look like. We have not. But what I would like to do is tell you that we've made progress and tell you just basically where we're at. It's discussed a lot in our joint memo to you-all. We kind of put it together like a -- you know, like a pretrial order in federal court where each side gets to write its own part of that pretrial order, and that's -- our point was to get our points across to you, without too much infighting among us about what we're going to say.

So I represent the debtors group. I'm a long-time legal aid lawyer. I've been in private practice. I was working at the AG's office in consumer protection before that. I've lived in Houston a long time. I'm older than I think everybody else in the group except maybe Tom Kolker, but we have -- and Ann Baddour is here from Texas Appleseed. She's worked with me, and some

other legal aid attorneys worked with us as well. So basically when we came here back in September, there was -- there was a very radical difference between the proposals, and all I can tell you is we've narrowed the differences. That's the main thing I can tell you.

So we did meet. We have had numerous meetings. We've exchanged proposals and ideas by e-mail this whole time ever since that last meeting, but -- and what we've done, I think where we have had some specific changes, we've agreed on certain things that are not within the legislative mandate that we would withdraw. We had suggested that rulings on exemption claims should be final orders, and that -- so that they could be appealable from JP court to county court, for example. We've dropped that. It's not explicitly in the legislative mandate. We also dropped a reference to the turnover rules being governed by strict compliance standard, which is the way it's done with garnishment. I got instructions that that's not likely to be within the view of the committee as to what the legislative mandate was.

And in addition, I would say that the creditors agreed to withdraw a reference in their proposal that would require a waiver of exemption rights. So I think those are all major changes, but we have some issues, and I just want to sort of cover those issues,

sort of show where the differences are, and maybe suggest to you where -- where there might be a favorable resolution. So there's two kinds of disputes. There's some where I think there are reasonable differences between us. We might be able to bridge -- you know, maybe the gap can be bridged, maybe not. We've had a lot of -- I think there's been a lot of movement on some issues, and I want to go over those first. There are a couple of other issues where really there hasn't been a change in the positions of the parties, and I'm going to end with those, but the first thing is to talk about those issues where I think there's been some improvement. Well, let me put it this way, a reduction in disagreement.

So one of the first things is when do the notices of exemption rights go out. So that's something that's very important to us. We initially proposed that that notice should go out within a day after either the service of the writ of garnishment or the levy letter from a turnover receiver, and that's what we specifically addressed before. And that's -- we wanted some specificity about it because, for example, in garnishment, there's just a rule that says -- and 663a just says that that notice in the garnishment context should be given as soon as practicable, and the current notice in 663a doesn't say very much, just says you can file a motion to

dissolve a writ of garnishment, doesn't tell a pro se anything. Doesn't tell them about their exemption rights.

So we have changed our proposal. We moved to three days, which is consistent with what Georgia does. Georgia and Iowa are the states that have revised their post-judgment garnishment systems most recently because of constitutional attacks, and Georgia is the most recent one. There was a court ruling in 2015 that initially that eventually led to the Georgia changing their rules. So that's what we've suggested. The creditors believe -- they still stand on the notion that it should be as soon as practicable, that you need that level of give so that their folks can do it. I'm very much opposed to that and let me just tell you where we're coming from on that. If you look at the garnishment context, there's some case law about this.

What does as soon as practicable mean? Well, it means -- three cases have said, very specifically, it should never be more than 14 days. There's one case that says it can be 18 days, and the problem with that is if a turnover receiver or a garnisher have frozen or seized somebody's entire checking account or all of their accounts and that's all the money they possess in the world, the money they need to pay their bills, when that happens they're destitute. So the longer it takes for

them to raise their exemption rights, the longer they're going to suffer. So for us it's important for that notice to be sent out in a specific time period. We suggested three days, to be consistent with the Georgia approach, which is what they did to respond to a constitutional attack. So that's where we come from on that.

Timing of the hearing. So the debtor group initially proposed that when there is a hearing on an exemption claim -- and so what we're talking about is pro ses can fill out a claim form, they can submit it to the court, send a copy to the judgment creditor and/or a receiver, and then there can be a hearing. The whole point of this in the legislative mandate is to have an expedited process. The current garnishment rule, sequestration rule, which is a prejudgment remedy, they both provide -- as does the distress warrant rule, they provide that hearings should be held within 10 days. I can tell you that that doesn't always happen. It's probably directory as well. It doesn't assure that a hearing is going to happen in 10 days, but it is -- you know, it is something that's before the courts and before the clerks to know that they're supposed to hear them as promptly as possible.

So the position of the creditors has been that it should be basically prompt, but there should also

be a right to have continuances so they can do discovery. My reaction to that is if somebody has a valid exemption claim and they've been rendered destitute by the levy on their accounts, you need a hearing as soon as possible; and the rules should encourage hearing as quickly as possible; and the best way to do that is to be specific. So I would add that one of the cases involving garnishment that's in the past, back in the Eighties, from the Third Circuit -- and I cited to it in our joint memo -- it talks about a system in Pennsylvania where the hearing was supposed to be within 15 days, but there was no limit on how many continuances you could get, and they found that that was basically an unconstitutional procedure because it was not an expedited procedure for raising exemption rights.

Exemption rights are a form of property right, and so you have a right to a due process on it, and what they said is that needs to be expedited, and that's also the legislative mandate here. So we still have a dispute. We want it to be an expedited procedure, and this is very important. We're -- actually, all we're trying to do on this issue is to be consistent with what is currently in the garnishment rule, the sequestration rule, and the distress warrant rule. Those are all resulting from a finding that our garnishment procedure

was unconstitutional back in the Seventies, and it led to rule changes.

So another issue is the length of the suspension period. The bill talks about a need for there to be a hold on whatever is frozen or seized for a period of time, so that more likely if there's an exemption claim you can get the money or property back promptly. Garnishment really has a process for handling this. It really doesn't need much addition on this. It basically says that, you know, money is frozen in the account but until there's a judgment in the proceeding, that money cannot be distributed, so it can't be seized. Where the real issue is, is with turnover particularly, because garnishment and turnover, particularly turnover, and receiverships are the two main ways that judgments are collected now in Texas. There is -- there is the possibility of doing writs of execution. I can just tell you that that is not a common event. Typically when people get writs of execution it's because they want to extend the life of the judgment, but we're addressing that nevertheless.

We -- we suggested initially 60 days, and even then I got pushback at the September meeting. We have come down to the idea that 30 days is a better rule. Mr. Noack pointed out in his memo that they had done a

survey of some states relating to, I believe, probably garnishment procedures, but what they are -- or restraint procedures are what they're called in some states, and there were six states that came out that said 20 days was -- is what they required. What we're suggesting is their current proposal now is they've gone from 10 days to 14 days with three additional days if the notice was sent by mail, which is probably going to be most of the time. So between, basically, 17 in most cases and 30. I'm suggesting that if the Court is going to consider a number less than 30, that we go for 21 days. It's a straight three weeks. It fits within what is commonly done now in many of the rules to make things on a week basis.

Then there's a new issue that came up that didn't come up at the September meeting. The creditors' proposal now is that they want a time limit on when the exemption claims can be filed and if you want to get a ruling on exemptions prior to distribution of funds or before, for example, tangible personal property is sold, for example, with a writ of execution. So their proposal is that this is a new proposal. Seven days before distribution or sale the exemption claim has to be filed before that. Now, the problem is there's no known date in the notice that I've seen, the notice that's been proposed by the creditors. That is not the way we work with most

other things that if you have a right to stop a certain kind of collection procedure, for example, foreclosures, it can be done at -- it can be done at any time prior to the sale.

So we are not in favor of this. I think basically what it does is it limits the time period in which a judgment debtor can raise an effective exemption claim where they can quickly get their money back, particularly money, because money is typically the issue. It's typically money and bank accounts. It does come up in the context of execution sales or other sales, but that is a far less common event. So we are -- we are not in favor of this. They are in favor of it. It's a concern of the creditors, and I'll let him explain it to you. I think it's inconsistent with the legislative mandate that we have an expedited procedure, and it makes it more difficult for judgment debtors to make their exemption claims.

During the September meeting, Justice Bland mentioned that she was urging us to look into the possibility of having some sort of form orders for the appointment of turnover receivers. I have to tell you that Mr. Noack and I and our groups, we worked on this, but we had so little time to work just on the exemption side, we pretty much limited our work, and it's reflected

by our memo. We limited our work as to what should be in an order in terms of language regarding exemption. That's what we've done so far. There is a proposal from some creditor attorneys that I don't know that they represent any group, but that is before you. I saw it literally day before yesterday, and I had to work on a brief yesterday, so I can't tell you very much about it. I'm not prepared to respond to that today. What I can tell you is in terms of what we talked about on exemption language. In exemption language we are agreed that there should be some sort of language in the turnover order that says you need to comply with the new rule or rules. And so -- gesundheit.

Where we disagree is whether there should be anything more. So our concern was this: Turnover receivers, typically when they learn about whether or not property has been seized or frozen when they sent a levy letter to a bank, they learn about it when the judgment debtor calls them because they were given that number by the bank when they couldn't access their money. So that's the process by which they learn, and what I've learned is -- and I've experienced this with my own clients, is that typically a turnover receiver will attempt to work out a payment plan at this point. Now, the problem with the payment plan before you get notice of your exemption

rights means that somebody whose only income is exemption, is exempted, could agree to waive their exemption rights and agree to pay some money. There's nothing wrong with agreeing to do that if you know about your exemption rights and decide to waive them.

The problem is what we want, we want them to at least say if they're having that first conversation, to say you may -- your funds, your property, may be exempt from seizure, you're going to receive a form in the mail. You have a right to look at that. We're asking for that. And then the second thing is before they distribute funds, before they sell property, before they enter into payment plans, we're asking that receivers be instructed to consider whether or not exemptions apply. That doesn't say how they do it. We're saying that they should consider it. That's what we're asking. Those two proposals are unacceptable to the creditors at this point.

So you're saying sounds like there's still a lot of conflict between the parties. There still is, and it's -- so the next three issues are -- are a little bit even more intractable. So one of them is whether there are more exemptions in the turnover context than there would be in the garnishment context when you're talking about funds. So there is a subsection (f) of the turnover statute that was added in 1989. It was done to provide

more -- in my view, to provide more protection to judgment debtors from turnover, because turnover is really probably one of the most extraordinary remedies you can imagine, and sometimes it really is necessary. I mean, I'm aware of judgment debtors that owe money and they even have the ability to pay and they're not. But it's a little different when you're dealing with small-time judgment debtors, who I commonly represent.

So that subsection (f) says that if something is exempt at some point, could be wages or something in a spendthrift trust, and then there is it is disbursed or it is the proceeds is passed on to the judgment debtor, it remains exempt from turnover. I've cited to some cases, including a Texas Supreme Court case from a long time ago, which talk about the whole point of this amendment was to protect paychecks and at that time retirement checks. Retirement checks are now protected even upon receipt. They were not back in the Eighties. They've changed that portion of the Property Code to make sure that even when you receive it for a certain period of time, that money is exempt. That is not true for wages. It is not true for disbursements from a spendthrift trust; or as a Tyler case pointed out, if you're getting royalties from a homestead, that's considered proceeds, and it's protected from turnover. So that's just to give

you an example.

It's our position that there are additional exemptions that apply to turnover, and that is not the creditors' position. They disagree with my legal analysis, and we've stated it in the memo. You can look at it. I don't want to misstate what Mr. Noack has said, but that is where we disagree, first; and then second, related to that is whether we have one rule or multiple rules. We proposed early on that there should be changes to turnover and garnishment. One of the things that Mr. Craig Noack pointed out in September was that the bill requires us to cover any kind of post-judgment collection writ or order or warrant, and so in my review of the rules, I think what that meant is we needed to also write a rule that would cover execution, the execution process. It doesn't apply to sequestration because it is prejudgment. It doesn't apply to distress warrants. That is prejudgment. It doesn't apply to a number of other possibilities that are prejudgment; but in terms of post-judgment remedies, there's three types of collection; and what we think is because there's so many differences, they should be addressed separately, and particularly with garnishment, where you already have an established procedure. And the Judicial Council, when it issued some resolutions that led to this language in House Bill 3774,

they pointed out that they recommended that Rules 663a and 664a, which relate to procedures for challenging writs of garnishment, should be amended to allow this, basically a pro se expedited procedure for raising exemptions.

We believe that's the correct approach. We should build on what we already have in garnishment. We don't need to have a totally -- another set of rules that covers everything. We think they should have that. And then there's turnover and execution. Basically turnover hasn't had any rules. They've operated solely from whatever the orders that are issued by the court and the statute. And we're just suggesting that there should be separate rules and in part because there are differences between turnover and garnishment. One of them is there's a need, because there is no provision for an escrow period or a hold period, while they hold things so that people can bring an exemption claim. That's already in existence in the garnishment context. It does not exist with turnover. That's where the other possibility -- if you have funds being seized generally, and there's a need for it. That's going to be -- that doesn't have to follow the garnishment model, but you do have to agree on a certain time period, and that's one of the things we've talked about before, whether you go with 14 plus 3 or you go with 30 days or you go with some day in between of 21. You

don't need this for garnishment. Garnishment already covers this. So --

CHAIRMAN BABCOCK: Rich, hang on for one second. There's some people on the phone who either have not muted inadvertently or don't know how to mute, and we're getting some feedback here. You can mute and unmute yourself by pressing star six, and so if everybody would mute themselves who are on the phone, that would be great, because there have been a couple of instances where people here in the room have been distracted, even though Rich is making a compelling and charismatic presentation.

MR. TOMLINSON: I would not call it charismatic.

CHAIRMAN BABCOCK: Anyways, if y'all could do that, that would be great. Sorry to interrupt, Rich.

MR. TOMLINSON: No, no, that's fair. Another concern we have about doing one rule is that you have one standard, you already have an established standard for how you do things with garnishment, and we're asking to build on it. If you have a different standard and a separate rule that covers exemption claims in one rule, what you might have is different procedures with different timing. For example, if you go with a prompt hearing and then you can send the notice as soon as practicable, you know, you may have a slower exemption

claim process than you would in the garnishment context, and that doesn't make sense. My concern here is that basically if somebody is a judgment debtor, they hire a lawyer, they might be able to file, for example in the garnishment context, a motion to dissolve a writ of garnishment and get a quicker ruling, get a quicker resolution than somebody who is unrepresented and files an exemption claim. And that's why I want the rules to be -- apply to each context, not have one rule.

Related to that, multiple forms. So I -- I've mentioned this. One of the problems is we don't think there should be one single notice of exemption, and the reason for that is -- there's a couple. One is I think it's really hard to write one form that's short and in plain language that most pro ses can understand. And it's easier to do if you -- if you have forms set aside for different -- for the different kinds of procedures involved.

And second of all, related to that is there are differences. So in the context of execution, typically it's going to be the seizure of tangible personal property that could be sold, and that has its own types of exemptions. You know, so many cattle, so many dogs, so many whatever are exempt when you're talking about tangible personal property. That doesn't come up in

the context of money that's being seized, for example, through a garnishment. It can if you get into a safe deposit box. We even tried to address that, and one way to do it to make it simpler is to have three different forms, but then there's the issue as I've mentioned before. If turnover has more exemptions than garnishment, that needs to be recognized, and you could put it in one form, but then you would have an even more complicated form, and it's harder to understand.

So -- and that's basically, I think, where we have disagreements. There's also a proposal from the Texas Justice Court Training Center, and I'm going to just briefly mention it. Bronson Tucker is here right next to me. He proposed that there be -- with the notice of judgment, whether you're in JP court or county court or district court, that there be a notice that says to the judgment debtor, "You may have exemption rights. You may want to contact an attorney." I'm paraphrasing, hopefully not in the full room.

MR. TUCKER: A plus.

MR. TOMLINSON: Thank you. The point is we pretty much believe that's a good idea. It's one way to advise people that they have exemption rights, that, you know, they might want to research it on their own or get to an attorney. It might help them decide whether or not

to raise their exemption rights. The creditors have a more nuanced approach to this. They're not sure it's necessarily a good idea without bringing in more stakeholders. They're not sure that it follows the legislative mandate. I think it does because I think anything that assures that judgment debtors know about their exemption rights is consistent with the idea of providing an expedited procedure for raising those rights. The whole point is to give people notice of exemptions, and this is one way to do that.

And I'm going to sit down, and because Bronson has to leave, I thought he might want to speak briefly before you had to leave. Bronson.

MR. PERDUE: I was going to ask exactly that. So Bronson's got to go, and so, Craig, if you'll let him, since there is something on the table from you.

MR. NOACK: Sure.

MR. PERDUE: I may ask you to comment a little bit on Rich as well from your perspective.

MR. TUCKER: Okay, sure. So my name is Bronson Tucker. I'm the director of curriculum for the Justice Court Training Center, and I've been refereeing the battles between Rich and Craig for the last few weeks, and it's been very enjoyable. The reason why I had come up with this proposal was as kind of a compromise to maybe

help them find some common ground. One concern that Rich and Ann had raised was all of these rules that are being discussed are all things that are happening after there is a seizure or after there is a freeze; and so there was concern of, for example, the concern Rich rose -- brought up about payment plans, entering into a payment plan and not knowing you're waiving your rights. Well, if the rule only applies after there's a seizure, if a receiver reaches out and says, "Hey, let's work this out," the concern was raised, hey, I don't know -- you know, now they enter a payment plan, they never got that notice, right, because the rule only applies if there's already been a seizure, which there hadn't been in that scenario.

And then from the creditors' perspective, there was some concern about the difficulty of quickly getting that notice to people. Right, there was some logistical concerns of, okay, well, how fast can we actually, you know, get this notice. We don't always know immediately that there's been a seizure. They often don't know until the judgment debtor reaches out and says, "Hey, I can't get my money, help," and then now they're aware. But that might have been a few days after the actual seizure took place, and so there was concern that the clock might already be running, and so my thought to kind of maybe address both of those concerns was to put a

notice either in the notice of judgment, as is commonly practice in county and district court, or just in the justice court judgment itself, which would have to be served on the judgment debtor, a simple one to two-line notice. "You may have personal property exemption rights. You may wish to discuss these with an attorney." And we did include in the proposal -- I included the website that was also included in the form, which is the txcourts.gov, you know, legal assistance line or website for people who don't have representation.

There was concern raised about that of whether or not we would want to have a specific website in that rule because then if the website changed that could create a problem. You know, hopefully with it being a txcourts.gov website if that did change there could be a concerted, you know, we will change these rules at the same time we change the website, but that was raised, and that was the reason why I brought that up.

As far as, you know, kind of the creditor and the debtor kind of positions, obviously the -- my primary focus for the training center is just making sure that there's a process that's clear and understandable for the judges and for the parties who are largely pro se. I did -- on the creditor -- or on the debtor rules proposal on the execution, I did have a concern on the tangible

personal property on how that would affect if a constable goes out and seizes money, because that does occur, certainly especially if someone has a DBA and they have a cash box. The constable sometimes will seize that money, and so if the rule just says "tangible personal property," are we saying that cash is actually tangible personal property, or are we trying to differentiate that from money? And it could be exempt, right? Theoretically it could be exempt, and there could be other situations like a safe deposit box. I know Craig had mentioned that.

And so my thought would be in that kind of rule would not want to distinguish because the constable could be levying on cash, and rather than deciding does that actually count for tangible personal property, and if it doesn't the person not being able to raise an exemption or being provided the protection, so I would think that would make sense.

And then I had a comment on Craig's proposal also, which you haven't heard. I know in Craig's proposal he mentions the notice that would -- or the language that would need to be in any order appointing a receiver. There's -- that's one of the things that's being discussed is what should that language be, how do you tell -- you know, in the court order what does that need to say to the receiver to put them on notice of these rules, that they

need to follow it. In their proposal they mention putting it in a miscellaneous order, and from the training center's perspective I would just strongly encourage the committee to actually put it in the rules themselves, simply because from a -- you know, for justice of the peace judges and for pro se people, they're much less likely to actually find it if it's in a miscellaneous order versus in the Rules of Procedure. Part V of the Rules of Procedure lay out things and then they direct them to the other rules, but there's nothing directing any judge or party to miscellaneous orders that may exist. And so if I'm a judge who takes the bench in 2023 and I'm issuing an order to appoint a receiver, how am I actually supposed to know that there's a miscellaneous order out there somewhere that says this is what language has to be in that order? So that would be my only comment on the proposals that these gentlemen have put out. I would be happy to -- if there's anyone had any questions over any of that.

CHAIRMAN BABCOCK: That's what -- that's what I was going to suggest. Does anybody have questions of Bronson before -- before he has to leave? And when do you have to leave?

MR. TUCKER: Definitely by 10:30, so I've still got some flexibility.

CHAIRMAN BABCOCK: All right. Any questions from people in the room of Bronson Tucker? Anybody on the phone want to ask him a question?

MR. PERDUE: I've got a question.

CHAIRMAN BABCOCK: Jim, yeah, go ahead.

MR. PERDUE: From the perspective of training the judges, which is what you're here on that perspective, can this mandate be satisfied with one rule?

MR. TUCKER: Yeah. So I think from -- from the judges' perspective I do think it could be satisfied by one rule. One thing that I had mentioned in our discussions is that I would prefer that in the justice court rules, in part V of the justice court rules, that there be a reference to wherever these rules go, right; and so if that's multiple rules, I would prefer, you know, in the judgment section, Rule 505 of the justice court rules, a reference to it, whether it's multiple rules or whether it's a single rule. I think from the court's -- from the justice courts perspective, if there's a rule that can be referred to, that's probably simpler, just, oh, we have to follow -- I know in Craig's it's -- is it 621b, Craig?

MR. NOACK: Yes.

MR. TUCKER: You know, and so, you know, in that including "as provided by Rule 621b," that's simple,

but I think it could also be "as provided in part VI" under Rich's proposal. I think that works as well, but certainly I think from the courts' perspective one rule could work. Yeah.

MR. PERDUE: From the training center's perspective, is -- do you have any position on whether one rule is preferable?

MR. TUCKER: I would say I would prefer from the courts' perspective one rule. I think giving justice court judges and pro se people a one stop shop to go to I think is generally going to be simpler and more likely to be followed and effective. I don't think it's mandatory, but I do think that it's more likely -- and obviously it kind of depends on how it's constructed, right, and if there's a reference to it and where it's put, and all of that stuff kind of plays in, but in a vacuum I would say one rule is probably more simpler from the justice courts' perspective.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So right now in the Rules of Appellate Procedure we have forms and certificates in appendixes to the rules. Would that be something that would work for the JPs, because, I mean, they all get a copy of, you know, the main rule book, right, that would have those appendixes?

MR. TUCKER: Well --

HONORABLE TRACY CHRISTOPHER: Or no?

MR. TUCKER: I would say, Your Honor, that the majority of the judges have access to -- to the rules, but I would say the majority of them use them online from the Texas courts website rather than an actual tangible book. I certainly think that there could be, you know, for example, an appendix, especially if it was -- you know, again, referenced in the part V of the rules or added at the end of part V of the rules, something like that, but if you're talking only about an appendix in the book itself, I do think that there are going to be a -- some judges and also --

HONORABLE TRACY CHRISTOPHER: No, no, these are available online. I just wondered whether that format would work as opposed to trying to put forms within the rules themselves.

MR. TUCKER: Yes, Your Honor. And I think one of the issues that as a group I think everyone was kind of in agreement that rather than a full-on form appointing receiver for there to be an agreement, because it's different from case to case. A lot of justice court receiver appointments are going to be different than county and district court receiver appointments, so I think the group's perspective was instead of having a

full-on receiver appointment form to have basically a paragraph or a line that "This must be included in the order appointing the receiver"; and then the judge is going to have flexibility on the time frame and what duties and powers that the receiver has, because that differs from case to case. And, I mean, there are some aggressive duties and powers that, you know, may be appropriate in a, you know, seven figure judgment, but justice court judges are very hesitant, for example, to allow someone to be locked out of their house or have their mail seized for a 2,500-dollar judgment, just as an example.

So I think the idea that the group came together with was that having, you know, an order appointing receiver must contain this language, was I think the idea, rather than a full form, and to just tie back to your original question, so the judges are directed to these rules, and they also -- the judges are required to make part V of the Rules of Civil Procedure available for pro se parties, and so that would be my concern, is things that aren't mentioned or referenced or covered in part V, that raises the issue of how do pro se people know that these things actually exist.

CHAIRMAN BABCOCK: Any other questions?

MR. PERDUE: I have.

CHAIRMAN BABCOCK: Jim, go ahead.

MR. PERDUE: From the justice -- from the Justice Court Training Center, what is the pragmatic difference between a rule that helps the justice courts navigate this issue as far as exemptions versus butting up with the way county courts, district courts, address a judgment creditor/debtor action situation?

MR. TUCKER: Yeah, you know, I don't know that there is as much of a, you know, specific difference in that perspective, just other than that, you know, it's obviously much more common in county and district courts to have, you know -- if you have large judgments against, you know, corporate entities and things like that, this doesn't apply to that, right. Those corporations don't have these exemptions, and I would say those are going to be more common in those courts; and so, for example, in the rule that I put in, in the proposal in the county and district court rules it specifies an individual defendant, just to make sure that, you know, the courts don't have to do this when, you know, Wal-Mart gets sued for, you know, $3 million or whatever in their court. You don't have to send Wal-Mart a notice of personal property exemptions.

MR. PERDUE: That goes to federal court. That's okay.

MR. TUCKER: Yeah. So, you know, and

obviously pragmatically, right, you have 90 percent of the justice court judges aren't attorneys, and so they're going to be by definition less familiar with the layout of the entire set of rules. Now, obviously that's where we try to come in and help, you know, make them familiar and help guide them. They also have a significantly higher proportion of unrepresented people in their courts, and so, you know, if the processes can be clear and accessible, you know, not only for the judges but for people who are directed and say, "Hey, if you read these rules, you'll understand what's going to happen."

I was on the task force. I helped rewrite those rules, and the edict from the Legislature and from the Supreme Court was to write those rules in a way that if you're getting sued in justice court, you can read the rules, understand what's happening, and not have to pay for an attorney for your, you know, 3,500-dollar lawsuit. Now, obviously since that happened, the jurisdiction has increased from 10,000 to $20,000, so you do have, you know, some higher, larger suits, where, you know, if you're getting sued for 17 grand, yeah, maybe, you know, you're more likely to want to have an attorney. But that was the goal in the justice court rules from the Legislature and the Supreme Court, is you really shouldn't have to have an attorney to navigate the seas of justice

court, and so I would just encourage that that mindset and that approach continue with this as these cases apply to justice court.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, given the fact that we have a lot of JPs that are not attorneys, who is generally preparing the turnover form? Isn't that usually the creditor?

MR. TUCKER: Yes, Your Honor.

HONORABLE TRACY CHRISTOPHER: So wouldn't it be better to have an actual form for the JPs to use that has been blessed, rather than, you know, relying on them to look at the creditors' form and say, "Oh, that's wrong," or "This is wrong"?

MR. TUCKER: And that -- that may well be. I think -- and I don't want to speak for -- for Craig or for Rich. I think the concern with a set appointment of receiver form wouldn't be as much from the courts' perspective, if -- as it's generally, you know, it's obviously very rare that a pro se plaintiff comes up and is like "I would like to have a turnover and appointment of receiver" because they don't know how it works or that it exists. I think the concern was hashing out what all of the terms should be in that. And so if we're saying every receiver in every case is going to have the exact

same duties, powers, responsibilities, and the exact same time frame of appointment, then that's going to be, I think, difficult in the practice of that, and I'll let them talk about that, if they want to. But from the courts' perspective, directly, I mean, yeah, it would be easy in that -- from that aspect of having a set form. Yes, Your Honor.

MR. PERDUE: I have got one last one. So the creditors take issue with the debtors kind of forcing the issue as far as getting a hearing and seem to suggest in the materials that the deadlines that are built in for having the issue heard will jam up the courts. What's your position on that, given the workload?

MR. TUCKER: Yeah, I mean, I think that's going to hugely vary from court to court, right. I mean, we have a lot of courts that, you know, are not overwhelmed and then there are courts in urban areas that do have significant heavy docket load, and so, I mean, obviously at some point the court is going to have to make priorities, right. You have to triage it; and if these are designed, as the legislative mandate indicates, to be expedited then the court is going to have to take steps to do that just like they have to do with eviction cases, for example, or with contests of a statement of inability where they have to be heard in a short time frame. Even,

you know, tow hearing cases, dangerous dog cases, all of those kind of things have these kind of time frames, so I wouldn't say it's unworkable.

I would say from -- the courts would definitely prefer the ability to continue the hearing if there's evidence that needs to be heard. If the court feels like, hey, you know, this was quick, this person says, "Hey, I have this evidence. I don't have it here in court today," or, you know, or that issue is raised for the court to be able to say, "Okay, I want to reset it to be able to hear that issue," I think the courts would definitely prefer that. But as far as -- I mean, you know, as far -- I mean, it has to be an expedited hearing either way; and so I think whether or not you say "as soon as possible" or have a set time frame, I think the courts are going to have to accommodate that; and that may mean in some busy dockets things like your standard civil trials or your criminal trials, they may slow down just a touch so you can work in these things that have to be expedited, just like they already are in other types of expedited hearings.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Of course, I want to make sure I heard you right. You said 90 percent of the JPs are not lawyers?

MR. TUCKER: Yes, Your Honor.

HONORABLE PETER KELLY: I knew there was a percentage. I always thought it was like 20 or 25. I had no idea it was 90 percent. Secondly, how many of these receivership proceedings or garnishment proceedings are there in the State of Texas? How big a problem is this compared to, as when Jim Perdue was talking earlier, you have the large issues, the large multimillion-dollar judgment cases, and how many of these smaller consumer based receiverships are there?

MR. TUCKER: You know, I don't have a specific number for you. I can say, I mean, we -- at the training center we field legal questions from the judges; and we have gotten certainly over the last, you know, five to eight years, a steady significant increase in questions about garnishment and about turnovers and about receivers and have increased the education we provide on those topics, so we do get more and more questions from courts on that. I think part of that, it happened when -- when we rewrote the rules in justice court and specifically carved out a process for debt claim cases, and so that kind of helped drive, you know, where -- it filtered out a lot of the bad cases, so they're more likely to get judgments, and so those judgments are now more likely to be trying to be enforced. And I think that, as Rich kind

of alluded to, execution has been found to be less effective, so I think judgment creditors have discovered that garnishment, turnover, and receivers are really the way to try to get those satisfied. And we certainly were fully anticipating a further increase in that once the jurisdiction increased to 20,000, which occurred on September 21st, 2020.

Obviously there was a little bit of a intervening factor in 2020 that kind of threw off what everyone was doing and how the numbers worked, you know, and so it remains to be seen exactly how that -- as time goes forward, how that increase will happen, but it is something that definitely does happen on a significant frequent basis in justice court.

CHAIRMAN BABCOCK: Chief Justice Hecht.

HONORABLE NATHAN HECHT: I can tell you that before the pandemic, debt collection cases had grown to 45 percent of the civil nonfamily filings.

CHAIRMAN BABCOCK: Wow.

HONORABLE NATHAN HECHT: So that would be about roughly 115,000 cases, something like that.

CHAIRMAN BABCOCK: Judge Miskel, did you have your hand up? Maybe not. Any other questions from the room? Yeah.

MR. PHILLIPS: She did.

CHAIRMAN BABCOCK: There is Judge Miskel's hand.

HONORABLE EMILY MISKEL: I was just going to add, I pulled up -- so on txcourts.gov we have the annual statistical report, and it has numbers about debt cases. I was looking at the 2020 one, which is affected by the pandemic, but if you're curious, it's in the annual statistical.

CHAIRMAN BABCOCK: So I missed what you said about the stats.

HONORABLE EMILY MISKEL: It's -- the one I'm looking at is 2020, so affected by the pandemic, but it says --

MR. STOLLEY: Can you speak louder?

HONORABLE EMILY MISKEL: Yes, sorry. There were 1.3 million new civil cases filed. 34 percent of those were in municipal courts. Of the total 1.3 million, 28 percent of those were in debt cases, if I'm reading this correctly.

CHAIRMAN BABCOCK: 28 percent are debt collection matters, yeah. Good. John.

MR. WARREN: As it relates to the forms that the justice courts will use, who is going to -- who is going to assist those debtors in completing those forms, given that you can't -- nobody can -- you can't assist by

giving legal advice?

MR. TUCKER: Sure, yeah, and so our courts obviously cannot provide legal advice to folks. They can provide legal information. They can provide forms, just, for example, as they do with the statement of inability to afford payment of court costs. We also have -- on our website we have a page for self-represented litigants that includes some forms and information packets, and we also direct -- on that page, we direct folks to Lone Star Legal Aid, to Texas RioGrande Legal Aid, to the North Texas -- I can't think of the name right now, but the Northwest Texas, Legal Aid of Northwest Texas, and the State Bar referral service. So that's where we kind of train our judges, is you can't give legal advice, but here are resources to send people to where they can figure out what's going on. Yes, sir.

MR. WARREN: I was watching the news this morning, they were talking about department stores. They are now doing buy now/pay later. Will that have an impact on the number of cases that we're seeing at some point in time?

MR. TUCKER: You know, that's an interesting question. I would presume yes, right. Any time you open the door to, you know, people getting the goods or services without having yet paid, right, and I know we --

the justice courts get a lot of cases in, you know, places like the rent-a-center places and things like that, which is I guess kind of a similar type of consideration in some ways, where, you know, it's we'll put it down the road to when the payment is made and then -- yeah, so that could be.

MR. WARREN: My last question I promise. As it relates to the cap, I think it's 20,000 for JP court and 90 percent of the JPs being nonlawyers, will there actually be a ceiling on the -- the maximum amount that will be heard in the JP courts, or will that be a requirement for the JPs to become more educated or at least have a paralegal certificate or perhaps to --

MR. TUCKER: Yeah.

MR. WARREN: If they're going to manage cases at that level.

MR. TUCKER: I would say -- I would say this. That's come up a couple of times, and, you know, I want to make sure I'm clear. Like, I'm definitely not trying to say that because they're not lawyers that they can't handle these issues or that they can't do it. They by huge majority are very diligent and work very hard, and some of the very best judges that we have are actually not attorneys, so I definitely don't want to in any way imply that.

My main concern is just that, you know, being able to find the information clearly and easily, and again, not just for the judges but for the pro se people in the court who are told per the Supreme Court's rules, "Hey, you need to have these rules available and be able to read these rules and understand." So, you know, I don't -- I don't know that it would be something that would be necessary to bump those up, you know, to increase that requirement. I think they do have the training requirement that we fulfill for them. Their first year they have to have 80 hours of training, and every year after that they have to have 20 hours of training, and 10 hours of that 20 has to be on civil and evidentiary matters. So we do have a set of desk books also that are available on our website, so we feel like we're putting them in a position to succeed without the necessity of that, I would say. Yes, sir.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Are there other nonofficial forms or resources for, say, pro ses? Like a few years ago we had pretty much a pitch battle about the family law pro se forms to -- for pro se litigants to get divorces, and then I heard anecdotally afterwards that even after the Court promulgated these forms people were just using Legal Zoom just like they were before the forms

were promulgated. Are there like Legal Zoom forms that the litigants, pro se litigants, can use now?

MR. TUCKER: Yes, Your Honor. So we have some forms that people can use. For example, we have petition forms. We have, obviously, the Supreme Court's form on statement of inability. We have applications for things like a writ of re-entry, for example, when someone is illegally locked out from -- from their home, and we make those available on our self-represented litigants page. I do know also TexasLawHelp.com has a lot of forms that they make available. I know Appleseed has been instrumental in creating some of those forms. So I don't know that there's necessarily official repository for forms for people to use, but I know a lot of our courts help make those types of forms available for pro se litigants.

CHAIRMAN BABCOCK: Anybody else in the room? Anybody on the phone want to ask Mr. Tucker any questions?

MR. JEFFERSON: Chip, can I ask a quick question? There's been a lot of comment about whether one rule or multiple rules.

CHAIRMAN BABCOCK: Are you on the phone?

MR. JEFFERSON: I'm sorry?

CHAIRMAN BABCOCK: No, go ahead, Lamont. Sorry, just kidding.

MR. JEFFERSON: One rule or multiple rules, are we talking about one rule for all courts or one rule for different -- for judgments and receiverships?

MR. TUCKER: Yeah, so, yes, sir. So the discussion among the group had been should there be -- for example, should we put information in the execution part of the rules and then information in the garnishment part of the rules and then a separate new part for the turnover, since there aren't any turnover rules right now. Or the creditor proposal instead took that information and created a new Rule 621b that basically just says in any, you know, turnover or execution, garnishment, distress warrant, whatever, these things apply; and so it would be kind of a, you know, this is there; and so, you know, obviously the pro approach to that is it's a one-stop shop, you can easily refer to this rule.

The con, I think from Rich's perspective would be, well, what then if I go and I'm reading the garnishment part if I don't know that Rule 621b is there, which I would -- you know, in that situation I think you could make a reference in the garnishment rule, you know, must include all necessary information, you know, including that required by Rule 621b; and so that way you can't just read the garnishment rule and not know that this other thing exists. But that's what we're talking

about, rather than -- no one had proposed having kind of one set of these rules for justice court and one for county and district court. I think that would be very difficult and tricky to try to do that and, you know, for even down to the constables and receivers to try to, you know, constantly keep that -- that straight and make sure you're, you know, doing it that way.

CHAIRMAN BABCOCK: Now any questions from the room? Before the people on the phone who are waiting with baited breath --

MR. JEFFERSON: Oh, I'm sorry, I get it now.

CHAIRMAN BABCOCK: -- waiting to ask questions. Okay. Nobody in the room has their hand up. Anybody on the phone want to ask a question of Bronson? And you will have to unmute yourself.

All right. It sounds like the phone participants are not as curious as the in-room participants. So you're welcome to stay. I know you've got 10 minutes before you have to leave, but thanks so much for coming and --

MR. TUCKER: Well, thank you all for having me here and giving me the opportunity to kind of present from the justice courts, and my e-mail address is bt16@txstate.edu, and so if anyone had any further comments, questions, thoughts, questions about the justice

courts' perspective I would be more than happy to try to share those, and I just thank y'all for the work you do and appreciate the opportunity to be here today. So thank y'all all so much.

CHAIRMAN BABCOCK: Great. Thanks so much. Jim, you want to --

MR. PERDUE: You want to go on to Craig?

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: Yeah, so I'm being told by my learned colleague, Judge Schaffer, that I'm doing a horrible job at moderating this conversation.

HONORABLE ROBERT SCHAFFER: I did not say that.

MR. PERDUE: Because --

HONORABLE ROBERT SCHAFFER: I said other things.

CHAIRMAN BABCOCK: He said terrible, not horrible.

MR. PERDUE: Craig, what I -- obviously Rich took a lot of time. Bronson was very helpful. I know as an -- as somebody in the audience trying to parse this, I think we're trying to figure out where the issues are joined, and maybe we can start talking about this in -- so you need to make a global, but it's time to kind of help us understand exactly what we -- because Chip likes taking

votes, and I have no idea, given how much there is remaining differences in this, Chip, as to what may qualify as a vote or what would be helpful for the Court to take as a vote at this point in time, because it's kind of a fire hydrant from Rich and a fire hydrant from Craig, and then you guys get to parse the molecules of the water. So, Craig, kind of help a little bit.

CHAIRMAN BABCOCK: Jim, I second that big time, and I was trying to take notes as Rich was talking, and the issues that I thought he said were -- there was still some gap or some place to discuss, when do notices of exemption rights go out, one. Two, timing of the hearing on exemption claims. That's number two. Three, the length of the suspension. Four, a new issue that has arisen, a time limit on when exemption claims can be filed. Five, form orders for turnover orders or, you know, they're just in the rule. Six, more exception -- more exemptions as a result of subsection -- did you say (f) or (s)?

MR. TOMLINSON: (F).

CHAIRMAN BABCOCK: (F), as in Frank.

MR. TOMLINSON: As in Frank. Yeah, sorry.

CHAIRMAN BABCOCK: That's how I wrote it down first. And then one rule or multiple rules, and then whether there should be multiple forms. So eight issues

that I wrote down. There may be more, or these may not be issues, but that's what notes I took and where I was going to break down the discussion, but not until Craig has had a chance to fully speak and take as long as he thinks he needs, and so the floor is now yours.

MR. NOACK: I'm going to take that as guidance that I need to keep it to 10 minutes and then I need to make it -- make it very simple and tee it up for everybody.

CHAIRMAN BABCOCK: Well, simple is good for this group, obviously. We'll take the simple and make it complex.

MR. NOACK: All right. First of all, I am concerned that maybe there's never been so many filings before the court represented in just one seat. I never knew that we were quite that many filings before the court, debt claims. We knew it was a lot, but we are a consumer debt society now, and I do want to just spend 60 seconds explaining to the Court why, because I do not think that everybody knows. The practical reality is that because of federal regulation and the creation of the Consumer Financial Protection Bureau, it has become much harder over the last 10 years for creditors and owners of debt to collect on debt not through the legal channel past the statute of limitations. That's the practical reality

of it. It used to be that if you had a debt and you let the statute of limitations expire, yep, that meant you couldn't sue on it, but you could still call on it. And eventually there was a policy decision made that said we are kind of annoyed with those phone calls, and so it basically has been regulated so that in a lot of states you can't do that anymore. If you do send letters or you do call, you have to give disclosure that say you can't sue on it anymore.

And so what has that done? It had a practical effect. It meant that if you do loan money and that channel is now closed to you, what are you going to do to recover your money? It means that more of those cases now have to go into the legal channel. If those cases go into the legal channel, guess what, it costs more money to actually recover that money. You have to pay the court's filing fee. You have to pay a lawyer. You have to pay service. And so what happens is there's more -- you actually have to recover the money. You can't give those accounts to a call center, and just if they collect something, they get a percentage, and so you don't have to worry about it as the creditor. Now you've put it out to an attorney and you have to follow those rules and you have to invest in it.

So that, I think, if you're wondering how

it's grown, I became an attorney in 2001, and I just watched that process unfold. I spent 11 years in-house with major publicly traded specialty finance companies, and I just -- I watched the CFPB come out. I watched this happen, and that's really why you see more of these cases. There's no -- it's just a practical function of what happens when the system gets regulated and a channel gets closed off. It just flows to another channel, and that's what we're seeing.

So I -- and the other thing I want to say is I thought about just bringing a cowboy hat and a fez and a beret and swapping out, depending on what I'm saying. I am here in a number of different capacities. So I am here on behalf of the Texas Creditors Bar Association, and my commentary on a lot of what Rich has said is going to be wearing that hat. I am also here on behalf of the Texas Association of Turnover Receivers. Peter Ruggero is in the back of the room. He is a board member as well. He is also here, and if he throws something at me while I'm talking, that means that maybe I am not talking on behalf of them, but I definitely on a lot of this, we are very much aligned, but there are differences of opinion.

And the main difference there is that turnover receivers act on behalf of the courts. They -- they are appointed by the court. They do not represent

the creditor. They do not represent the defendant, and that independence is something that the turnover receivers are very, very concerned about when we talk about these rules, and especially the rules proposed by Rich's side where they want to impose upon the receiver a lot of obligations that, frankly, cause them to become an advocate for one side or the other. And I can talk about that a little bit.

The third hat that I wear is my own hat. I'm not sure which one of those it is, but the committee does have a separate proposal that I gave in response to Justice Bland's comments where we started talking about a form order, the idea that maybe a form order would be a good idea in justice courts. I can tell you that even amongst my organizations there's a lot of concern about that. Primarily because, while it might be a good idea in the justice courts, if it starts to bleed up into larger cases in county and district courts, that would be a substantial detriment to receiver practices. Because in justice courts -- and I reference this in our proposal and in the memo. In justice courts, the regulated entities and the individuals that you're going after in justice courts, let's be honest, in Texas everything is exempt except potentially money in the bank account, and so a limited receivership when you're going after a consumer

debt or a small claims case in justice court, you're looking for exempt -- or, excuse me, nonexempt funds or you're looking for a safety deposit box, and you're looking for financial records to demonstrate that defendant's ability to pay.

In a county or district court opinion, there's much more to the chase, and there's much more to the assets, and the receiver needs more powers, and so the biggest concern, I think, is while there's -- there's potentially some merit to a form order for receivership courts, receivers really need -- and judges really need the ability to give receivers the power they need to enforce judgments, because Texas is a very tough state to enforce judgments, very, very tough. I can say, having supervised the practices in all 50 states, Texas is hands-down the most debtor friendly in the United States. The only thing that Texas does not have that every other state has is a blanket cash exemption, and not every state has a blanket cash exemption, but Texas doesn't, and it's because we have a blanket wage exemption and a blanket homestead exemption, right, so we've just struck a different balance there.

Narrowing down the issues. Okay. I'm just going to channel being a parent here, and what I would say is you can break it down into issues that we would

probably sulk about if you decided them and issues that we would throw a tantrum about, right? That's essentially what we're talking about, but if there's one thing that I think that this committee needs to decide on that would simplify the issues, almost all of them if you decide them -- I think there are actually two of them, but we'll talk about the one that you really need to kind of decide if you're going to address, because so much of the differences of opinion and the differences in the proposals flow from it, and that is the -- that is the 31.002(f) issue.

The position of the debtors group is that receiverships have an exemption that garnishments don't. Every organization on my side and me personally, we all strenuously disagree with that, and we briefed it in there. The cases don't say it. There's been an attempt to address this legislatively on their side. It didn't work. The cases don't say what they claim it says; but the bottom line is this isn't the place to deal with that; and when you look at the debtors' proposal and the need for many rules and the need for many forms, they all stem from this concept of, well, you need to have a different form because you're going after different assets. You need to have a different form because it needs to be more prominent in this process that this process has different

exemptions than the other one. If you make the decision that 31 -- 31.002(f), that's not the issue before us, then there's really no need for multiple forms and multiple rules. So I would say that a decision on that point I think then clarifies a lot of issues.

The second thing I would say is a decision on global rules versus rules that only apply to judgments against individual defendants. And this is something that also caused, I think, the majority -- or a good chunk of the inability to agree. The rule as proposed by the creditors is one rule, and I believe it was you, Justice Christopher, who last time said why did you put it in the 700's for, nobody looks there. We moved it up. We said, okay, where do you look? Let's look at 621. 621 says you can enforce judgments of the county, district, or justice courts by any -- by any post-judgment proceeding. 621a says you can use post-judgment discovery in any manner that you would use prejudgment.

So here's 621b, and 621b is you have exemptions for individuals. What we have to remember is -- and this is critical from our perspective. Personal property exemptions only apply to persons. They only apply to judgments against individuals. The creditor group proposal recognizes that. It says have a rule where you are applying post-judgment processes against

individuals. The proposal from the debtors group and the proposal that you have to deal with if you modify every rule and every proceeding is do we tweak this to apply this rule to every judgment enforcement proceeding against every type of defendant everywhere, even if there's no individuals involved; or do we recognize what the legislative intent was, just create an exception if you're going after an individual's assets. And I think if we -- you know, if the committee decides to think about it that way, then I think that also militates in favor of one rule as opposed to multiple rules.

So if you're asking me how to start thinking about making decisions on this, that is how I would approach it, simply because those are kind of the key differences that we have. The debtors group couldn't get to a world where they were willing to create a process that only applies where individual exempt -- personal property exemptions might apply, right. The proposal is these rules apply in every garnishment, in every receivership, in every execution. And if I'm executing against a corporate defendant, if I'm down as a receiver or if I'm down there as a creditor's attorney and I sent out a deputy on a writ of execution and it's against a corporate defendant, this process should not have any spot. It's pointless.

And to remind -- and the other thing I want to mention is we have to remember that we are often instructing third parties, like deputies or constables, whether they're assisting me on a writ of turnover or they're executing on a writ of execution, and that has a time limit on it. Writs are good for 30, 60, or 90 days. So when we are talking about 30 days or 60 days to suspend, it's not as simple as, okay, well, the receiver can just sit on the funds. I agree in those circumstances that, yes, there's no cost to sitting on those funds, but when we talk about, you know, the original proposal from the debtors group was 60 days, that would more or less make 30-day and 60-day writs of execution utterly useless, and we should just strike them out of the rules.

In a 90-day writ there would be no ability to seize any personal property against an individual with a 90-day writ. We would have to start considering 180-day writs of execution. If we -- we have to be thinking about those other time limits where we're talking about the suspension period, and that's why we initially proposed 10 days. It's why we think it's very important that we have a shut-off period. We have to have certainty when selling personal property that is potentially of a limited dollar value. It is one thing when you are trying to sell real property on the courthouse steps and somebody files an

eleventh-hour TRO. It is another thing when you are talking about a claim of exemption and somebody -- you're selling on the courthouse steps, you know, of -- last one I sold at writ of execution were two vans -- they were two vans.

And if I was selling them on the courthouse steps through the deputy at 10:00 a.m. and at 9:30 somebody files a claim of exemption in Bexar JP 4, is that writ -- is that sale now -- and they didn't copy me, because they're an individual, and they didn't bring it down to the sale. Is that now invalid? Do I then have to go back and get it from the innocent third party who bought it on the courthouse steps? Do I have to unwind it? I mean, there's just a lot of stuff there that we really don't want to get into. We need to give them enough time to file their exemption. We need to be very clear about when that expiration period is, and then we need to let the process move.

So as far as Bronson's reference to, you know, wanting to maybe put some stuff in the 500's to reference a rule, I think we would be very supportive of that. I certainly don't want there to be any kind of belief that we're not open to other amendments as necessary. If the -- if the committee thinks that there might be -- it might be worth dropping a reference in a

rule somewhere to a proposed Rule 621 to help clarify that they should go look at that, you know, I think we would be open to that.

I think -- but at the end of the day what we're really interested in is, you know, the language that the Supreme Court had in 1991 on the turnover statute, which said it's to put a reasonable remedy in the hands of a diligent creditor; and what we're really afraid of here is we do not want the creation of an exemption process to throw the baby out with the bath water and to mean that you no longer have a reasonable remedy in Texas. And for -- you know, for far too long there has not been a reasonable remedy to enforce a judgment, and our true fear here is a lot of the positions taken on some of these issues would deny creditors that reasonable remedy.

And so to the extent that the committee is looking at reasonable solutions, I think you'll find that the -- our organizations are definitely open to those, and I do have copies of our proposal if anybody is interested in a hard copy. The final brief note is individually I did submit a what -- in response to Justice Bland's comment, I did submit kind of a form justice court order and what it might look like. It's -- it's very similar to what is currently being used. It is very similar, and it is something I have -- I have been appointed under an

order very similar to this hundreds and hundreds of times, and it is an order under which, you know, a typical creditor will go after -- will ask for a receiver to go after just bank funds and financial information, and that's it.

And I think what I want to -- what I want to leave the committee with is the fact that turnover receiverships are uniquely Texas, but they are actually a uniquely wonderfully balanced tool for judgment enforcement; and I say that, yes, admittedly, I'm a turnover receiver, I believe in the remedy; but I spend day after day talking to defendants; and I can tell you, hands down, 90 percent of the time what they want to do is they want to be heard and they want to work something out that fits within their budget and lets them move on with their lives; and the role of receiver is to be that independent third party to understand that the judge has ruled against them and that the judgment needs to be enforced, but that they can't ignore the judgment and that it does need to be satisfied. And if you look in this form order, this is a form order that is in 95 percent probably of the form justice court orders. It gives the receiver the ability to enter into an installment plan if I reasonably believe it's in the best interest of satisfying the judgment. And that's what I do. And I do

that day in and day out, is I enter into reasonable installment agreements. I get really afraid when people say, no, but before you do that, before they want to talk to you, you have to say, "I can't talk to you." You have to go through -- you have to jump through these hoops, because I get people who won't tell me where they live. I get people who are afraid that it's a scam. I get people who won't talk to me at all in the --

MR. PERDUE: Are you wearing your receiver hat right now?

MR. NOACK: I am wearing my receivership hat right now.

MR. PERDUE: I want to make sure everybody understands the voice you're speaking in right now.

CHAIRMAN BABCOCK: That's the fez.

MR. NOACK: Picture me in the fez. That will help me with my credibility. But that ability to work things out is something I don't see in other processes, and I'm truly afraid that that ability to work things out is not -- is lost, and that -- on a personal level, that is something that I am truly afraid of, because that is what people want, and in a garnishment context you do not get that. Garnishment is a lawsuit. It's unique to Texas. It is a lawsuit filed against the bank, and whenever somebody calls me on a garnishment I

have to tell them, "I'm sorry, I have to wait for the bank to call me and tell me what's in the account and how much in attorney's fees they're charging me before I can even talk to you about whether or not I can resolve it." And then they have to go close their account and open up their account at another bank, and it is financially devastating to them. So I would rather have these rules instruct the court to act promptly and with reason. I would rather have a rule that tells me to follow the rules, and I would rather be able to work with judgment debtors, and I think that is the best thing that we can do.

I can talk as to the specifics -- as to any of the issues that were outlined. Richard did an admirable job of going down the memo point by point, but -- but I know that we need to kind of get cracking, and so I think I went over my 10 minutes.

MR. PERDUE: Do you think there can be a form receiver order?

MR. NOACK: Which hat do you want me to wear? I do -- I do not. I want to be emphatic.

MR. PERDUE: If you're wearing two hats there can't be a conflict, so --

MR. NOACK: Yeah. So I want to be emphatic. I do not believe that there can be a form receivership order in the county and district courts, period. That is

-- when you're dealing with situations where you have to come to the court and say, "I have done my initial investigation, here are the assets that I see that they have, here are -- here are the things that the creditor has seen them do in the past. I want these powers," I think that there are many district and county court at law judges who have their own opinions about what powers they want the receivers to have, and so I think that's a -- that's a tall order.

HONORABLE ROBERT SCHAFFER: What about a cafeteria style order? Checklist, you check things off.

MR. NOACK: Oh, that's interesting. The struggle I have is that the -- so for a time there were Harris County civil court at law judges that had a form order that they loved, and if you want to go cafeteria style on that order, that would be like 30 or 40 checkboxes.

HONORABLE ROBERT SCHAFFER: I've never seen it.

MR. NOACK: Yeah, it would be, you know, you go -- sometimes you have to divert mail. Sometimes you have to -- you want to talk about whether I need to void transfers subsequent to the entry of the receivership order. Sometimes you've got to talk about, you know, stock and whether or not, you know, the power of -- to

vote the stock. Stuff like that. It's -- it would be interesting, but it would be tough.

CHAIRMAN BABCOCK: Okay. Jim.

MR. PERDUE: Can there be a form order specific to JP courts?

MR. NOACK: So what I will tell you is that there's -- there's disagreement as to whether there should be a form order. I will tell you that for those practitioners who are in justice court a lot, I think that most of us see a -- a benefit to a form justice court order, primarily because you have nonattorneys most of the time, and you have a wide variety of customs and practices. You have some judges who don't understand the law so won't do it. You have some judges who don't recognize the law around the receiver's fee, and so they'll adjust it. You have some receivers who will insist that you do post-judgment writs of execution before you get to it and some who don't. So there's a wide array. So I personally am a fan.

I will tell you that it was a -- it is not an issue that I think that TATR, Texas Association of Turnover Receivers, can support right now primarily because it's -- it's just a tough issue. It's just -- I think the biggest fear is it would bleed over to the county and district courts, and all of the sudden you

would have judges who would say, "All you really want is a limited order, right, so let me just give you the limited order."

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: So Craig and I have -- I don't do this for a living by any means, but we've got a case against each other now that involves a lot of these sorts of issues. I'm kind of on the periphery of it, and if the issue is how do you exert an exemption, and if an exemption is just applicable to a person, why do we care. We should only be dealing with cases that involve judgments against individuals. It's more complicated than that, and based on our case, where there are a lot of unresolved issues. So there are -- there's a -- in our case, and it's the only case I know, so that's why I'm speaking up. In our case there's a judgment against an individual. Individual has either been involved in or created a number of different entities, so while Texas is a debtor friendly state from an exemption standpoint, it's also a debtor friendly state from either, pick your phrase, hiding -- hiding assets or protecting assets. You can do that legally in Texas in a lot of different ways, and so you can also do it in ways that aren't legal, and then they're subject to a claim by a judgment creditor.

In our case, that's what our argument is

about, is whether the judgment that was obtained -- it's a lawful judgment. It's final. It's done. It's a decade old, but the question is can you enforce that judgment against entities that the judgment debtor created at different times, before and after the judgment; and the debtor in that case -- who I'm not representing. I represent actually the daughter of the debtor. The debtor in that case is saying, "I don't own these assets. These entities own these assets, and these bank accounts that you're trying to take -- get into possession and freeze are actually my wages. They're exempt." And so the receiver in that -- there was a receiver appointed, receiver specific to this case, and so the judge fashioned a remedy and said, "I'm going to appoint a receiver. Receiver, you can do this."

And the situation is so particular to this case, but at the same time, the issues involve is this exempt or not? And so you come down to the same problems of the timeliness, how much time should you have to exert an exemption, when is a claim that an asset is exempt, when is that attachable? When should a receiver be able to attach something, and even how do you adjudicate the issue about whether the exemption should apply to a particular bank account? And, you know, does that have to go up and does that have to be decided? And then the bank

account owner in our case is not the judgment debtor, but there is a claim that the receiver has made that the bank account owner -- that the bank account owner should have to turn over these funds.

So all to say that I don't think -- although I appreciate the exemptions, only individuals can apply exemptions, but in Texas, there is a question about whether these individual exemptions should also apply to assets that are under the control of other at least ostensible entities. Whether they're alter egos or not, they are other entities, and so the timing of whether you ought to be able to do this as expeditiously as the creditors, as I understand, are advocating here is -- I don't think you can just ignore the rights of the -- of the purported asset owners.

MR. NOACK: So if I could respond briefly to that, and just to clarify, I'm not the receiver in that case. I represent the judgment creditor in that case. So what I would say, specifically, with respect to our proposal, right, is I agree with you. I think that we're talking about an issue of account ownership versus exemption right, right, and admittedly, you know, those could be tied together, but I think what our proposed rule would say -- and that's why the rule ties the notice not to service but to actual seizure, right. So actual

exercise or control, right. So if the account is frozen, that's when the receiver or the judgment creditor would send the notice. If -- but I don't think the rule is designed, and I don't know that the legislative mandate is, to also adapt to if somebody else is coming in and asserting that despite, you know, what the bank does or does not do or what's on the bank account that the ownership has to be contested as an exemption right, right.

So what I would tell you in response to kind of your scenario is let's set up a hypothetical scenario where a receiver freezes a bank account, and there is a -- you know, and the bank actually freezes it. The receiver thinks it's against an individual, but somebody else says, "No, we don't think it is," right. It's still subject to dispute. I would just say it's not subject to dispute under an exemption analysis. It's subject to dispute under an ownership analysis.

MR. TOMLINSON: Let me just add something to that, just very briefly. We proposed in September that the rights of third parties to joint accounts could be raised through an exemption procedure. We dropped it because it's technically not an exemption, but that is a common issue post-judgment in collection. If you seize a joint account, the question is can they take all of the

money if the judgment debtor is -- has a name on the account, and actually, there's law on this that says, no, before anybody dies on a joint account it belongs to the -- in proportion to how much has been paid in. My clients typically haven't put a dime into those accounts. Either their teenage child has put the money in from work or, you know, their siblings have put money into an account that they all control to support their mother. I've run into that a lot, but we dropped it. We dropped it because his argument was it's not in the mandate, and we got that instruction from Mr. Perdue, and we followed that.

MR. NOACK: And, you know, and just briefly in response to that, right, there's obviously a lot of disagreement over those scenarios and how often they occur. I will tell you that as a receiver most often it's, yep, it's a joint account and it's husband/wife and it's community property, et cetera, et cetera. So I do recognize, though, that that was one of the issues, believe it or not, we did talk about and manage to narrow down for this committee.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Could you walk us through how you get two vans to sell, with respect to the timing of this exemption claim?

MR. NOACK: So are you saying if this

exemption claim were to --

HONORABLE TRACY CHRISTOPHER: No, just how you got two vans to sale, to pick up and, you know, get them on the courthouse and sell them. What's the timing?

MR. NOACK: Sure.

HONORABLE TRACY CHRISTOPHER: How does the debtor know about it? What's going on in that whole process?

MR. NOACK: Okay. I will walk you through that on a writ of execution, because that was -- that was the one that I referenced. In that case I obtained a 90-day writ of execution from -- I believe it was the justice court, Precinct 3. I then took that writ to the constable for Precinct 3. In that instance I actually knew where the vans were. The -- they had actually made it easy for me. They had abandoned. It was pursuant to a -- an eviction, and they had abandoned the vans. The vans were on the property. The creditor came to me and said, "Well, I want them off the property, but if you can -- you know, if you can sell them and help pay the judgment, that would be great." Okay.

So got the writ of execution, delivered it to the constable and said, "Constable, I know where they are. They're here. Please go pick them up. Here is the information I've pulled with respect to their titles.

There's no liens on them. Please seize them, take them under your possession, and sell them." I will tell you it took about a month before the constable -- it made it through their queue and got to the point where he actually picked it up and worked it for the first time. So a month before I ever heard anything.

He then called me. We arranged for him to go out there. He went out. I met him there. We inspected them. In that instance he said, "Well, this looks pretty secure, I'm actually -- to save you a little bit of money, I'm just going to put tags on here saying that they're subject to my control." I was very appreciative of that fact, because if he didn't do that he would be taking them to the downtown impound lot, and I would be getting charged $75 a day, right, so radically eating into whatever amounts they would be sold for.

So he did that, and then I think the timing was such that I had already missed the first black Tuesday of that month, so he sent out a notice of sale to the defendant's last known address for the sale of those vehicles on -- on the next black Tuesday.

HONORABLE TRACY CHRISTOPHER: And how many days' notice does he normally have to give for that sale? And what is the --

MR. NOACK: Yeah, it's just like -- I think

it's the same rules for foreclosure. I would have to go look at it, but it's --

MR. TOMLINSON: Yeah. It's called an execution sale --

MR. NOACK: Yeah.

MR. TOMLINSON: And they typically are 20-day notices. The constable sends it out instead of the judgment creditor or, you know, in a nonjudicial. It works the same way.

HONORABLE ANA ESTEVEZ: Can I jump a question with her real quick?

MR. PERDUE: I'm lost on your pronouns. Just real quick, so you represented the debtor?

MR. NOACK: Me?

HONORABLE TRACY CHRISTOPHER: Creditor.

MR. NOACK: I represented the creditor.

MR. PERDUE: You represented the creditor.

HONORABLE TRACY CHRISTOPHER: Getting the vans.

MR. PERDUE: And the execution is the -- "he," is that the constable?

MR. NOACK: That's the constable is doing all of this.

MR. PERDUE: Okay. There is no receiver in this context.

MR. NOACK: Correct.

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: And the notice was sent to his last known address, which was where he was evicted and he no longer lives.

MR. NOACK: No, I had actually done -- I had actually done a skip trace and provided a more recent address and gave that to the constable. I think he sent it to the last address on the -- on the suit, and he sent it to the last address that I gave him as well.

HONORABLE TRACY CHRISTOPHER: Okay. And on your writ of execution, notice is given to the debtor at that point?

MR. NOACK: Uh-huh. And it's posted on the courthouse steps, yes.

HONORABLE TRACY CHRISTOPHER: Okay.

MR. NOACK: And so then black Tuesday comes around, constable got up to the podium, sold it. I was wildly happy to find out that we had bidders, and so we had bids. I believe they sold for about $11,000. They were sold, and it took another 60 days to get a sheriff's deed on the vehicles.

HONORABLE TRACY CHRISTOPHER: Okay. So right now in like home foreclosures, people -- people file their TRO on the day of, you know, the sale.

MR. NOACK: They do.

HONORABLE TRACY CHRISTOPHER: So why then is that not a practical thing to do in your scenario?

MR. NOACK: And what I would tell you is that if they get a TRO -- if they go to the court and suspend the sale via TRO or an actual hearing that they give us -- they serve us and give us notice of, I think they absolutely can, but what I want to prevent is what is -- what is presented in here with no shut-off is a process whereby a defendant can put the exemption claim in the mail the day before the sale and that that somehow stops the sale process. And so, again, I'm looking for some kind of reasonable process to stop what could be some very bad results if you don't think through those scenarios.

MR. TOMLINSON: If I might approach this and say a couple of things. I have actually sought a TRO to stop an execution sale. I've done it. It's -- and the first thing to tell you is execution sales are not very common. They do happen. Execution sales of personal property are even less common, and you should know that execution is not a big part of the process of collecting judgments for any kind of judgments. Mostly they're looking for cash. They want cash. That's -- that's the first thing I want you to know. I got a TRO. That's what

I did to stop it, and I -- you know, in my experience when people come to me to stop a foreclosure, they never come to me early enough, if you know what I'm saying. So it's not like the lawyer is not acting as promptly as they should, but a lot of times -- I tell my lawyers, you know, you need to file them as early as you possibly can. The Friday before is way preferable to Monday afternoon, and so we try to do that, but you can't always -- you can't always do that. I mean, and the fact is there is a process for doing that.

His concern about exemption claims being filed, you know, we could require it to be filed. I have no problem with -- and they have notice before that would stop a sale or render it invalid. We can talk about that. That is not something we've talked about here today. But when you're talking about execution sales, it's a tiny sliver of the post-judgment collection. That is not how they collect judgments right now. I mean, money, liquid money, fungible funds, that's what they're looking for; and frankly, if I were in his shoes, that's what I would look for; and when I'm trying to collect judgments, that's what I'm looking for. I don't want to pursue a vehicle because most vehicles have liens. I'm just telling you, it's a very small proportion of it, and I would just urge you to keep that in mind.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if it's so small, why isn't seven days notice ahead of time reasonable?

MR. TOMLINSON: Well, should we treat judgment debtors who are raising an exemption claim different from somebody who is protecting their homestead rights when there's a foreclosure? They're allowed to file a TRO.

HONORABLE TRACY CHRISTOPHER: But there's a difference between getting a TRO where you have to make some sort of proof to get the TRO versus just filing an exemption and automatically stopping something.

MR. TOMLINSON: Okay. So I get that. And particularly with a sale that there may be practical reasons for doing that so that there's not going to be a question about whether a sale that's not been stopped beforehand or they've not learned about the exemption claim beforehand. That's something we can address, but in the context of funds, which is where it normally happens, where most collection occurs, you either have a garnishment order or you have a turnover levy, a levy letter from a turnover receiver to a bank.

And the problem for my clients and many middle class people is that when that happens all of their

funds that they are living on have either been frozen or seized, and sometimes turnover receivers do not just ask for a freeze. They ask for the money to be turned over to them. They say, "It's nonexempt funds, turn it over to me." The banks do it. What I'm trying to tell you right now is if you delay the process, you say that they're only going to get -- they're not going to get notice very quickly, they could take 14 to 18 days to get the notice out and then the hearing doesn't have to be held any specific time. It could be whatever a judge thinks is prompt, and it could vary based on their docket. You could have somebody who doesn't have a hearing for a month.

And on top of it you're saying before -- if you set a seven-day limit before something happens, the problem is I didn't see anything in the proposal about when that disbursement date is in there. It's not, as far as I know. There's no disbursement date, so how are they going to know that that's their deadline? I'm not opposed to something that makes sense practically, but I want to make sure that judgment debtors have sufficient time to pursue their exemption rights and that it can be done by pro ses, so they don't have to come to me. Not that I don't want to represent them.

I'm just saying it should be a process

that's relatively simple for them to raise and pursue, and it's really important for them to get it done quickly, because they are rendered destitute because we don't have any limitation, like he was talking about, a cash exemption, like other states have. There was a proposal to make accounts -- some limitation on how much could be taken from checking accounts for individuals in the last session. It was pushed by the Judicial Council. It didn't pass.

MR. NOACK: Could I briefly just add some color to that real quick, which is just let me speak to -- because he said he wanted to talk about distributions, so let me just add as a turnover receiver. My concern is I file a motion to distribute and I say, "I have seized this much money, I am going to -- I am going to distribute these funds." I ask for approval of my fee, and I'm going to distribute. I send that motion to the court. The court signs the order. I am now teeing up to distribute that. Under the current proposal, again, the defendant could file their claim of exemption, and I wouldn't know about it, and I'm still cutting a check.

So I appreciate Rich saying, you know, we're talking about funds and so writs of execution we shouldn't think about. I think we still have to because I think even if I'm doing a writ of turnover and I'm seizing an

asset, I have to think about the fact that I might be seizing funds plus assets, if I go to a business and I do a till tap and I'm seizing property and inventory plus money; but I agree, a lot of enforcement is bank account-related; but even if I have the funds in hand, I have to have a process where I know I can distribute. So --

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the fact that you-all keep intermixing the garnishment problems, the execution problems, the receivership problems, sort of speaks to separate rules for each. I like the simplicity of one rule, but it seems to me if we have one rule, we'll have so many subparts to address the different problems that it would almost be better to put the rule in garnishment, put the rule in receivership, rather than one rule with all of these subparts going that way.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I'm a proud owner of a 10 percent interest in a soft serve ice cream machine that I obtained by sheriff's execution about 20 years ago, so if anybody wants that, contact me during a break. But to follow up on Justice Christopher's point, because when you're dealing with, you know, collecting on a judgment --

this was in a slip-and-fall lawsuit against Dairy Queen, so we got some cash, some insurance. They went bankrupt and sold their assets, and we ended up in the possession of it. But there needs to be separate rules for different types of property. So bank deposit box is treated differently from checking account. It is treated differently from a van, and one has to go through an execution sale; one you can just seize. And where there might be a philosophical simplicity to treating all property as the same and fungible, there has to be some sort of separate guidelines for them, because the procedures for capitalizing or monetizing these assets is different.

MR. NOACK: So can I ask, does that mean that the exemption process should be baked in for corporate defendants as well? Because that's, I think, where you get unless you're tweaking each set of rules to say you get one set of suspension -- you know, you're going to apply the suspension for when you're going after garnishment against individuals versus corporations, because I think -- and I don't -- I couldn't wrap my head around that, like --

HONORABLE PETER KELLY: Well, I think philosophically there's not really a problem with it, because we're seeing that sort of a speciation of rules at

the initiation of lawsuits for -- depending on the size of the lawsuit you get X amount of discovery. We have proportionality in discovery. You can't go ransacking GM's files because you had a car wreck. So if we're willing to make these distinctions at the outset of litigation, what the type of -- what the type of lawsuit is, what the goal of the lawsuit is, then those distinctions can also be made at the end of the litigation. And while it would be nice to have a uniform set of rules that affect all lawsuits, you can't really do that at the trial court level, if somebody goes all the way through initiation of the lawsuit, discovery of the lawsuit, and collecting the proceeds of the lawsuit.

MR. TOMLINSON: Let me just add one thing. I agree with him when he says that exemptions only apply to individuals. I -- you know, when he said that my proposals necessarily would require that, you know, that this exemption procedure might be available to corporate defendants, that has never been our intent. Our intent is to protect individuals, so I -- I can't say that that couldn't be dealt with in the way in which we draft the rules. I mean, I just -- I just wanted to make that comment.

CHAIRMAN BABCOCK: We're going to take our morning break, and for those of you on the phone, we will

be returning at 11:20, so we're in recess. Thanks.

(Recess from 11:06 a.m. to 11:21 a.m.)

CHAIRMAN BABCOCK: All right. We are back on the record, as soon as Jim Perdue gets here. Where has he gone?

HONORABLE ROBERT SCHAFFER: He escaped.

MR. TOMLINSON: He's around.

CHAIRMAN BABCOCK: He should be around somewhere. Or he has fled. He has fled us in horror. How do people feel about -- about our sort of format for discussing this? There has been a suggestion by Craig that we take up this 31.002(f) issue and then global rules versus individual rules. That's one way to do it, and then we could go down the items that Rich has identified. Rich, how do you and Craig feel about it in terms of organizationally how we should go about this?

MR. TOMLINSON: I have no problem with that procedure, going with those two first and then following with the other issues.

CHAIRMAN BABCOCK: Okay. Well, then why don't we do that, and I was trying to see if in any of our voluminous materials we had a copy of 31.002(f), and the question is, do we?

MR. NOACK: That is a great question.

MR. TOMLINSON: No.

CHAIRMAN BABCOCK: I couldn't find it.
MR. NOACK: We do have the commentary.
CHAIRMAN BABCOCK: I saw the commentary.
MR. NOACK: The bill analysis.
MR. TOMLINSON: There's two bill analyses in that.
CHAIRMAN BABCOCK: Yeah.
MR. NOACK: I can pull it up.
CHAIRMAN BABCOCK: Well, we're all texturalists here, so having the actual text of the statute, so I'm wondering if maybe we had it last time, but in any event, while we look for it why don't you -- why don't you give the argument for and against why it either adds something or doesn't?
MR. NOACK: Would you like me to read it?
CHAIRMAN BABCOCK: Reading it would be great.
MR. NOACK: Okay. 31.002(f), and this is under the Civil Practice & Remedies Code, says, "A court may not enter or enforce an order under this section that requires the turnover of the proceeds of or the disbursement of property exempt under any statute, including section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support."

CHAIRMAN BABCOCK: Okay. And why in your view, Rich, does that add something that wasn't there before?

MR. TOMLINSON: So let me find my notes here so I don't misstate what I was going to say. So -- so basically in my -- in the joint memo, there's a reference to three cases that talk about subsection (f), that one of them is a Supreme Court case, two others are intermediate courts of appeal decisions; and they explicitly say that the point of this amendment was to protect paychecks and retirement checks from turnover. So at that time in 1989 there was no protection for retirement checks, pension checks, for example. If you got a pension check and you received it, it was no longer exempt. It could be garnished if it was in your bank account. The same for wages. It could be garnished, and the question here was should you allow that seizure to occur through turnover?

There are -- these cases that I cited say that the whole point of that subsection, which added to the bill, to the turnover statute in 1989, was to make it clear that we're not allowing turnover to be used as a mechanism to take anything that has once exempt and then it becomes the proceeds or disbursements of that formerly exempt asset; and once it's received by the judgment debtor, it remains exempt from turnover.

So there's a recent case out of Tyler that talks about where somebody receives royalties resulting from their homestead. They have a rural homestead. It's a couple of acres. There's a well on it, a jack on it, and they get royalties from it. They said that's the proceeds of something that's exempt. Namely, one of the benefits of owning the entire estate, the land, is that it also includes the wealth underneath, and that's a proceed. But certainly, there's a case that says if you get a payment from your spendthrift trust, when you receive it, that is not protected from garnishment. It is, however, according to a case from the Dallas court of appeals. It is protected from being seized through turnover because of subsection (f). That case and others and then there's a Supreme Court case that says you're not to use this to take paychecks.

Now, I know there is arguments about how you can distinguish these cases. We don't use checks anymore, for one thing. People get paid by wire. That's a distinction with no meaning, in my view. So I believe there are exemptions from turnover that apply because of subsection (f). I have cited to case law. It's been raised in garnishment cases a couple of times as well. I noted those cases, and what they said is we're not here on a turnover. We're here on a garnishment, and a

garnishment you can reach these assets.

So what I'm trying to say is there are exemptions for turnover that don't apply in the garnishment context; and it's because turnover, turnover and a turnover receivership, really probably is the most extraordinary remedy that Texas law provides for the collection of judgments; and the Legislature, in exercise of its wisdom, decided that it was best to protect that; and I believe there's a mandate to list all of the exemptions, which is how I read that bill. If that's true, then we have to also account for that with turnover. That means you have to say that anything that -- you need a list of things that could be exempt, and there's -- we listed two things. One is if you get wages, you have received it, that's exempt from turnover and should be on the turnover exemption form as a possible exemption. The same thing if you get a disbursement from a spendthrift trust.

Now, the number of people who get disbursements from a spendthrift trust I doubt is very significant. People who get wages is a big deal, and I think the whole point of this amendment was the idea of the turnover statute was is it intended to go after self-employed individuals who are evading their duty to pay judgments when they have the ability to pay. It has

now morphed. There is now a huge industry using it to collect against primarily wage earners. I can say that for sure in Harris County. I know it's happening in other metropolitan counties in particular, and what I'm trying to tell you is in my view that is not what the Legislature intended, even in the beginning when they passed the turnover statute, and it certainly was not what they intended after they passed subsection (f). So that's why I believe you should make sure that you recognize that there are different exemptions for turnover as opposed to garnishment.

CHAIRMAN BABCOCK: So it sounds like what you're saying is the case law is not clear, to the extent there are cases, one could distinguish it, so would it be appropriate in your view for the Court by rule to resolve that -- those ambiguities in the law without the benefit of full briefing in an advocate -- an adversary proceeding?

MR. TOMLINSON: That is a fair comment.

CHAIRMAN BABCOCK: It's not a comment. It's a question.

MR. TOMLINSON: Well, I'll try to address it as a question. I don't know how. We have a mandate. I believe the committee has a mandate to come up with a rule that discloses all exemptions, and that's why I think you

might have to deal with subsection (f) as a result of that. That said, there is disagreement on whether these cases really mean what I -- what I say they stand for. He disagrees. You can read his critique of my argument in the joint memo. I -- I don't know if there's a middle ground in this. The only thing I can suggest is one way to approach it and one thing we've done with our forms is instead of saying these are exempt, we say they "may be exempt" and then we list them; and that means the courts wouldn't necessarily be saying we're confirming that wages are protected from turnover, but it might be. They can check that box. They can go in front of a JP or a county judge, and the county judge can say, "I agree with Craig, it's not protected."

I mean, that's one way to approach it. You know, I think we have a -- the conflict is this: I think the case law is pretty clear when it discusses this about what the intent of the law was, that -- where they passed subsection (f). The only problem here is they're disagreeing with what that is, and it might be better if it was before the Supreme Court on a case where everybody could argue, everybody could brief, and then we get best possible opinion. And maybe the best way to approach this is something that says this may be an exemption, it may not be. I've tried -- you know, what we tried to do in

our proposal was to say all of these may be exempt, and the idea is not to let people think that the Court is saying absolutely, but this would still give judgment creditors an opportunity to make their arguments, and they could still win.

CHAIRMAN BABCOCK: Yeah. Craig, what's your counterpoint? Don't give us the My Cousin Vinny answer that everything he said is all BS.

MR. TOMLINSON: He can do that.

CHAIRMAN BABCOCK: You're better than that.

MR. NOACK: I don't know. So the problem is, is that a middle ground on this position, from our perspective, doesn't exist because the position being advocated is so far off the edge of the spectrum that the middle ground isn't on the spectrum either, and to try and find a middle ground on this position is really about -- is really about finding a position where what they're building in is a tilting of the forms so that you're putting current wages at the top of the notice on the receivership form so that everybody is asserting an exemption all the time. And all of the sudden you get all of these exemption claims saying, "Well, I just saw that wages are exempt," and now you've got a hundred hearings on exemption claims in justice courts and then you're getting a lot of appeals and a lot of appeals and a lot of

appeals on an issue that literally is not an issue.

And if you look at -- at the creditors' critique that starts at page nine of the order, we go through point by point every case that they cite, starting with *Caulley V. Caulley*, going through every single case. The reality of this situation is that people started using the turnover section -- the turnover proceeding as an end run around wage garnishment to say -- to get an order, not from a receiver, but just a turnover order saying, "Turn over your paychecks once you get them," right? And *Cain vs. Cain* came out. It was an El Paso court of appeals case, and it said that seems okay, and subsection (f) was addressed specifically for that scenario. You cannot obtain the turnover of paychecks because those are still current wages. It was not -- and the bill analysis says this, and the case law backs this up, because it is limited to that holding. The case law -- it was not designed to create some new and radical innovative exemption for turnover receiverships that says that once money is deposited in the bank account it is not fair game.

And the case law has been there since the 1920's from the Supreme Court that when you deposit funds into the bank account, it is transformed. It is transformed into a debt between the bank and the debtor.

It is -- it is -- it loses its current wages status, and it has been demonstrated that if the Legislature wants to create an exemption for those funds subsequent to that time, it knows how to do that. That is why funds that are proceeds from the sale of a homestead are exempt for six months afterwards. It is why distributions from retirement are exempt for 60 days afterwards, but current wages do not enjoy that, neither do commissions for -- unpaid commissions for personal services, which is also in Chapter 42.

This argument is -- is one that has been crafted and raised over the last few years as an attempt to try and throw a wrench into the first process that actually allows for the recovery and enforcement of judgments, and it's a frustrating argument to see, because it ignores what the concept of proceeds are. It ignores what the concept of current wages are, and it ignores the concept of what -- of what the bill was and what the purpose behind chapter -- subchapter (f) was supposed to do.

CHAIRMAN BABCOCK: Richard Munzinger is on the phone, and for those of you who don't know, he is one of the wisest members of our committee, and he has a comment. So, Richard, give us your comment.

MR. MUNZINGER: If your comment about me is

correct, the committee is in deep trouble.

CHAIRMAN BABCOCK: Well, we knew that.

MR. MUNZINGER: It seems to me that the discussion centers around the text of the statute, and if that is the case, the first principle to be applied is one of interpreting the statutes. As I heard the statute being read, it does not appear to me to be at all ambiguous. There were no qualifications in the breadth of the statute to make it comparable to a particular type of circumstance, wages, nonwages, exempt or not exempt, that says it's exempt property. So I think that before you have crafted -- the Court has crafted the rule, the statute needs to be examined carefully to determine if it is at all ambiguous. Because if it is not, then the Court's own cases forbid going behind the statute to craft some kind of legislative intent, et cetera. We have always interpreted that to be as they are written, thinking that the Legislature knows how to speak English just as well as the Court does. My comment is finished. Thank you.

CHAIRMAN BABCOCK: Thank you, Richard. Insightful as always. What other comments about this issue on statutory interpretation of subsection (f)? Anybody else have any thoughts? I might call on people.

What about the argument that because the

Legislature has tossed this issue to the Court in its rule-making position that they're going to have to make a call one way or the other on this, so we've got to -- we've got to choose? What about that argument? That's Rich's argument, as I understand it.

MR. TOMLINSON: Yes.

CHAIRMAN BABCOCK: One of your arguments. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Could I understand the exact difference between the two creditors -- now we're talking about a form and we're going to give the debtors that says, "You may raise the following exemptions," and what is the difference between the two proposals on that -- on this particular point?

MR. NOACK: So if I can answer that, so the difference is that the creditors have proposed one form, and they have proposed one two-page form that lists all of the exemptions, and you provide it in every context, and you start with the federal exemptions. Then you go to the state exemptions, and at the top of the state exemptions is current wages. Okay. So it's listed there.

What the debtors are proposing is that you have three separate forms for each type of process and that for the form for receiverships, you basically at the very top, you're saying wages, current wages, may be

exempt, and then if you want to file your exemption, here's how to fill out the form and submit it. I believe there's a little bit more, Rich, I think, in your most recent proposal. It's attachment -- is it B or is it D? It's D.

HONORABLE TRACY CHRISTOPHER: So is the distinction between your form that says "current wages" and his form that says "current wages that are in a bank account"?

MR. NOACK: His form.

MR. PERDUE: So it's 5D, Tab 5D, and the debtors form, number one, says "wages deposited in an account."

MR. NOACK: Yes, that's correct.

MR. TOMLINSON: And our form only puts it on the turnover form because we do not believe that wages deposited into an account are exempt from garnishment, but it is in the turnover form, and it's based on this argument, and so -- in their proposal they list current wages. I don't think that's appropriate when it's -- you're giving it to a judgment debtor whose account has been frozen or seized, because current wages, basically it says if you've earned some wages, you've worked -- you have a two-week pay period, and you've already worked 10 days in that pay period, and basically you're entitled to

10 days worth of wages that cannot be reached through the employer, unless it's child support.

But once it's -- the case law says once it's received by you, it can be garnished by judgment creditor, and I'm not contesting that. That's why we didn't put it on the garnishment form. We did not put wages when deposited, because it's not exempt under the law. Our argument is it is exempt with turnover because of subsection (f). It intended to prevent turnover from being used to seize wages, and that's why we put it that way.

MR. NOACK: And just to clarify --

HONORABLE TRACY CHRISTOPHER: But it doesn't mention wages. The change to (f) does not mention wages. All it says is "exempt property."

MR. TOMLINSON: It does not, but the case law that I cited, two of those cases very explicitly say the intention of this subsection (f), as you read it, the effect of it is it's going to protect wages upon receipt by the -- by the judgment debtor. And that's what the cases say, two of the cases say. I'm just telling you that's my position.

CHAIRMAN BABCOCK: Judge Estevez, then Bobby Meadows.

HONORABLE ANA ESTEVEZ: I just have a

question. If you're allowing basically to do a garnishment in the turnover once it's the proceeds, do you even need a garnishment statute anymore?

MR. NOACK: To be perfectly honest, if you look at the statistics for the number of writs of garnishments asked for in, say, Harris County, it's extremely low because garnishment -- the garnishment process is pretty expensive. So, no, you really don't -- most creditors don't --

HONORABLE ANA ESTEVEZ: I don't know that that's necessarily good for your position, because then wouldn't that mean that that meant nothing, the way we're interpreting we're taking away any need for a whole statute?

MR. NOACK: So I would tell you that regardless of your decision on receiverships, it doesn't change the fact that garnishments are often cost prohibitive and don't make sense. So I don't --

HONORABLE ANA ESTEVEZ: Didn't they do that on purpose? Because they -- they don't want to encourage that because it's a little -- it's harder. They make it harder because people rely on that money, and they need to take that time to figure out --

MR. NOACK: I would say that I don't think that it was intentionally made so that a post-judgment

writ of garnishment is so cost prohibitive that it is essentially something that nobody can use on any judgment less than, say, $5,000, which is the way it is right now, practically speaking. And I wasn't there; and I have no idea, you know, what the intent was behind the rules; but effectively right now, given the costs, the new filing fee, the service, the fact that it has to go serve the bank at the registered agent, et cetera, all of that, the fact that the bank gets their attorney's fees, effectively all of that tells a rational creditor or creditor's attorney that you are gambling every time you do a writ of garnishment. So I hear what you're saying. I mean, you're essentially saying --

HONORABLE ANA ESTEVEZ: You're trying to go behind the protections of the garnishment rules --

MR. NOACK: No, I --

HONORABLE ANA ESTEVEZ: But this appears --

MR. NOACK: I would tell you --

THE REPORTER: Wait.

HONORABLE ANA ESTEVEZ: -- to be a way --

CHAIRMAN BABCOCK: Whoa, whoa, one at a time.

MR. NOACK: I apologize. I would tell you that a receivership has greater protections than a garnishment by far.

MR. TOMLINSON: Well, I beg to differ.

HONORABLE ANA ESTEVEZ: Okay. I just wanted to know if there was another place that you would need a garnishment. You wouldn't.

MR. NOACK: I believe that a good receiver does everything that a garnishment needs and more, yes.

MR. TOMLINSON: Let me just add a comment to what he said. I do think there are incentives to use turnover receivers instead of garnishment, and a lot of it's monetary. I will tell you, I've been doing debt defense for a large part of my practice for over 20 years, and I did notice that there was a period after debt buyers that are large publicly held corporations got a lot of judgments, tens of thousands, hundreds of thousands of judgments in this state, they started to collect judgments, literally, five, six, seven years ago. And there was a huge increase in the number of garnishments, but I really hadn't seen that many before, and I was known for representing people at -- who were judgment debtors and needed representation, and so I think there was an increase in garnishments, and then it declined with time because a lot of people figured out that turnover receivers, which typically have been used in larger disputes to collect larger judgments, it seeped -- as he would say, it seeped into the JP courts from above, rather

than rising from below.

So that's what happened. I mean, turnover receivers are now way by far the most dominant method of judgment collection, and I strongly would suggest to you that the rights of judgment debtors are much stronger in garnishment right now than they are in turnover.

CHAIRMAN BABCOCK: Bobby, do you remember your comment?

MR. MEADOWS: Barely. So do we have a recommendation on this point by the subcommittee? I mean, typically it comes to us with a recommendation.

CHAIRMAN BABCOCK: Yeah, it does. That's a great point. As soon as Jim turns around --

MR. PERDUE: What was the question?

CHAIRMAN BABCOCK: -- he can address that question.

MR. MEADOWS: Subcommittee's recommendation on this point.

MR. PERDUE: Oh, we haven't deliberated this, Bobby. No, look, so we got -- this is a -- this is a bigger project; and we've got two constituencies who are the thought leaders in it that, you know, I played Solomon on it; and I said, "You guys go get in a room and do your best to work out what you can and bring it back to us." I was instructed that this would be the first item on this

agenda, and they were on a -- they were on a very tight calendar; and they worked very, very hard; but, I mean, they met Tuesday for their last meeting and got this work product to us Wednesday. So, no, we have not called a subcommittee meeting to take votes as a subcommittee on this. This is a conversation of the committee of the whole.

CHAIRMAN BABCOCK: Yeah. And we're on a little bit of a tight time frame on this, and I noticed that every single member of the subcommittee except for Jim has abandoned this in-person meeting, so John.

MR. WARREN: Can I ask a very crazy question? What would be the difference, I guess, in establishing the criteria? You mentioned child support. So what would be the difference between what's collectible in child support and what's collectible on a debt case? Minus the fact that there is a human attached to that.

MR. TOMLINSON: So child support is different because it is actually the one form of judgment that can be collected through wage garnishment in Texas. One, I mean, plus alimony, plus the feds can collect by very -- through wage garnishment as well, but basically that's the one thing there. And then subsection (f) is limited because if you're trying to collect a judgment for child support, none of the protections that are in (f)

apply to the judgment debtor at all. So that's what that last sentence reflects.

I don't believe that there are exemptions that would apply to child support, so typically that's not going to be an issue with regard to this proposal. I mean, I think the most common issue is going to be there's some sort of consumer debt judgment. It's either credit cards or auto deficiency, typically one of those two, and then they try to collect. And the issue is can they get -- can they get -- can they reach wages, can they reach the proceeds, royalty proceeds from a homestead, can they reach those through turnover, even though there's case law that says otherwise.

CHAIRMAN BABCOCK: Craig.

MR. NOACK: So one thing that, you know, if we are -- because we are talking about the language in the notices and a decision on this, you know, it really boils down to whatever exemption form you're talking about, do you say "wages deposited in an account" or do you say "current wages for personal services," which is in our form, which is kind of pulled from the statute. The one thing that the committee has to consider is if the committee decides that they need to kind of address this and decide on this issue whether or not exempt proceeds should somehow be protected under the personal property

exemptions because 31.002(f) is -- it somehow expands into bank accounts, is you also have to think about when the cut-off is, right. So under the debtor interpretation, wages deposit into an account, when do they stop being exempt? Was the intent that wages deposited in the bank account, if they stay there they're exempt forever more, or when do they stop becoming current? If they're proceeds of current, are they protected forever?

You know, these are kind of the issues that if I'm arguing this in front of a judge, this is kind of why it -- we talk about that transformative nature and why it doesn't become an issue when it's in the bank account, but when we're talking about kind of making a decision or when you have to make the decision, I think from the Texas Creditors Bar Association and especially from the Turnover Receiver Association, reasonably I think we have to stick with what the mandate says, which is list your exemptions. And the debtor proposal is to translate that exemption into what they believe it means, which is wages deposited in an account, which is not the language.

If we want to talk about proceeds of exempt property, right, here's the list of exempt property and then down below say "for receivership proceeds of exempt property" or something like that, those are concepts of middle ground. I don't agree with them, but those are

concepts, but when we talk about, you know, kind of exemption list plus transformative interpretation, I think that's where it was tough to hammer us and get us to agree to that concept.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: So to understand the issue, kind of the choice for us, is it fair to understand that the creditors -- that the debtors' position in the notice would confer greater rights to the debtor than currently exist in law?

MR. NOACK: I would say absolutely. And practically speaking, absolutely.

MR. MEADOWS: And I think if that's a fair summation of the issue, I think that's something we could vote on.

MR. TOMLINSON: It is -- it is a matter of law, and I'm telling you what I think the law says. He's telling you what he thinks the law says. He's saying it doesn't add anything in terms of exemptions. I'm saying it does, and there's explicit case law that says it does.

MR. NOACK: Let me add to that. Here's what I -- I think I was saying one more thing. What I'm telling you is that the actual practice of exemption law right now as it stands throughout the state of Texas is that if I am a receiver, I seize money all the time right

now that is traceable at some point to wages; and under his analysis, it would -- it would be exempt; and I get order after order after order confirmed saying it's not. Now, I don't get this issue raised a lot, but -- but I'm telling you the practical reality is that position is not -- is not the law of the land.

MR. TOMLINSON: And so let me just add to that. Most judgment debtors are not represented, just so you know. So the lucky ones that get an attorney either because they're eligible for legal aid or they're wealthy enough or have family that are wealthy enough to hire an attorney for them, these issues do get raised, and he doesn't win all the time on this issue. What I'm trying to say is no pro se is ever going to raise this issue because they don't know, and it is raised. It is -- I get it that he disagrees with me. Really is -- it is a question of law. It is a question of what that statute means. It says not just proceeds. It says disbursements, so if something was once exempt and it's been disbursed, that means it's been received by the judgment debtor; and if it was once exempt as current wages and then it's disbursed to me, it's exempt. I didn't come up with this out of whole cloth. This is in case law. I mean, I cited the cases where this is explicitly said.

CHAIRMAN BABCOCK: John.

MR. WARREN: All right. This is the problem with y'all putting a nonlawyer in a room full of lawyers. So what would be the difference between bankruptcy protection under Chapter 13 versus this one?

MR. TOMLINSON: I couldn't address, because all I know is I know enough about bankruptcy law to tell you I don't know enough.

MR. NOACK: So I -- unfortunately, I did wear a bankruptcy hat at one point. So I would tell you that under Chapter 13 bankruptcy law, you list -- you elect your state or your federal exemptions. If you're electing your state exemptions, you don't have a cash exemption. You do not have a state cash exemption, and I'm open to any input from any other bankruptcy attorneys in the room, but there is not a bankruptcy attorney out there that is asserting current wages as a bankruptcy exemption on your federal exemptions to say that the wages in there are current wages and, therefore, they're exempt. That is -- I have not seen that.

CHAIRMAN BABCOCK: Justice Christopher, then Bobby.

HONORABLE TRACY CHRISTOPHER: What is the language in the Constitution about wages?

MR. NOACK: So the language in the Constitution prohibits -- so, okay, are you asking about

the Property Code or the Constitution?

HONORABLE TRACY CHRISTOPHER: I'm asking about the Constitution first.

MR. NOACK: The Constitution prohibits the practice of wage garnishment. The Property Code provides the exemption for current wages.

HONORABLE TRACY CHRISTOPHER: Okay. So that's the language that the Property Code uses.

MR. NOACK: Yes, ma'am.

HONORABLE TRACY CHRISTOPHER: "Current wages."

MR. NOACK: "Current wages for personal services," and so and, again, when Rich talks about the fact that proceeds of current wages, it utterly destroys the concept of the exemption as current wages. Under that analysis, if you have the proceeds of current wages, you're really talking about just wages traced anywhere.

MR. TOMLINSON: What about disbursement? How do you write off the word "disbursement"?

MR. NOACK: It's a paycheck. That's the disbursement.

MR. TOMLINSON: That's my point. If it's a disbursement of a paycheck, it's exempt from turnover.

CHAIRMAN BABCOCK: All right, kids, hang on. Bobby, and then Judge Miskel.

MR. MEADOWS: Again, just trying to -- like I think most in the room, coming to terms with a lot of this for the first time since we don't have any guidance from the subcommittee.

MR. DAWSON: Shots fired.

MR. MEADOWS: But perhaps it would be helpful, at least to me, for each of you to tell us what the harm would be if the other's notice was adopted.

MR. NOACK: So I'll start with that. So their notice, which is I believe Exhibit D, for receiverships, which is really what we're talking about. It says, "Money that is protected in debt collection in turnover;" and number one is "wages deposited in the account," right. So it doesn't say "current wages," doesn't say "proceeds of exempt property." It says "wages deposited in account." So every single person that I send this to is going to look at that and say, number one, "Well, everything in my account is exempt, so I need to fill this out, and I need to send it into the court, and I need to go fight about this." And so they're going to send this in and then we're going to have a hundred hearings on this, and it's going to -- it's going to clog up the courts until we get a definitive ruling of -- and, by the way, we're going to be starting this at the justice court level, so we're going to get a lot of appeals and

then it's going to go to the county courts at law. I mean, it's just going to trickle up.

And what I will say and I think Rich has acknowledged this, is this is a huge chunk of the courts' business. We're talking about a lot of issues here, so this is not something that's going to go away. It's not going to get swept under the rug. Nobody is going to sit there and go, "Oh, well, you know what, that's not worth fighting about." So it's going to result in a lot of litigation, and it's going to result in a lot of courts rendering a lot of different decisions on this that's going to take up years until we get resolution on it.

MR. MEADOWS: But is it -- trying to reduce again, the real effect is it denies you access to collecting funds that you are now able to access.

MR. NOACK: No, because I don't know when I freeze an account what's in there. So -- and the bank does not send me a notice when I freeze the account that says, "By the way, we've done an analysis and we know exactly what's in there," right? But to be clear, especially in lower court judgments, what is the greatest asset -- the most valuable asset that most people have is their home that's exempt. The second most valuable asset that people have is their job and the proceeds that they deposit thereof. So we're talking about the source. The

second biggest asset that people have to satisfy judgments in the state of Texas.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: Okay. So I am very uneducated about this issue, so I will put my pro se hat on for this one. I want to make sure I understand the task that we're being asked to do today, so if I can restate, it sounds like the Legislature gave us the task to make some kind of notice to debtors to advise -- to list the exemptions, and is the dispute we're having right now is whether to list wages, disbursements, or proceeds, or what is the dispute over listing what?

MR. NOACK: Both of them list --

MR. TOMLINSON: Let me go first this time.

MR. NOACK: Sure.

MR. TOMLINSON: Thank you. The issue here is on the -- we believe with the notice that would go out to somebody whose funds in a checking account have been frozen or seized by a levy letter from a turnover receiver, that they should be getting a notice that says, "Wages received by you are exempt." We would not put that on the garnishment form, because we don't think it's exempt from garnishment. Garnishment has a lot of procedures, and this is clearly not in the statute that there's any such limitation. We believe subsection (f)

does add a separate exemption, and that's why we're suggesting -- that is the issue, should it be put in any kind of notice to judgment debtors when a turnover receiver seizes or freezes their funds in a checking account.

HONORABLE EMILY MISKEL: Okay. Can I ask like an even smaller question?

MR. TOMLINSON: Yes.

HONORABLE EMILY MISKEL: The word that you think should go on the form is what?

MR. TOMLINSON: What we put in there was "wages received by the debtor." Okay. I don't have the exact language.

MR. NOACK: No, you said "wages deposited in an account."

MR. TOMLINSON: Right, wages deposited. So --

HONORABLE EMILY MISKEL: And then hold on a second. So the word you think should go there is "current wages"?

MR. NOACK: We said "current wages for personal services."

HONORABLE EMILY MISKEL: Okay. So the dispute that we're trying to be asked to decide here is "wages deposited in an account" versus "current wages" --

I'm sorry -- "for services"?

MR. NOACK: "For personal services."

HONORABLE EMILY MISKEL: Okay.

MR. TOMLINSON: Current wages, though, that exemption only basically applies when the money is still in the hands of the employer. So as I mentioned before, if you worked 10 days out of the two-week pay period, you're entitled to 10 days worth of pay. They're not entitled to reach that money unless they're trying to collect child support or alimony directly through the employer.

MR. PERDUE: So --

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: So, Judge, so 131 of the global PDF has this form from the debtors. Number (1) says "wages deposited in an account." I will say again, as somebody who has desperately tried to be rather agnostic on the disputes here, that is the one -- that is the one in the list that doesn't find a clear corollary in either the Property Code or a case language. The debtors -- pardon me, the creditors' form for the notice says "current wages for personal services." I believe that -- Property Code?

MR. NOACK: Direct quote from the Property Code.

MR. PERDUE: So the Texas exemptions list in the creditors' form, which is in smaller font, but does get on two pages, says "current wages for personal services" and then the list indeed tracks the Property Code. The -- this particular dispute, which has been raised now for multiple meetings, is a -- a battle for really the issue, which is whether it is or isn't and whether there's -- and what's frustrating about you asking what is the task at hand, we've got a legislative mandate that says issue a form that has all of the exemptions on it. There is a 20-year controversy as to what 42.00(f) says and means that has now been brought to the committee for resolution so you can issue a form that says what's the exemptions are. I'm not quite sure that's the legislative mandate. There's many of you who are judges who get to rule on those things when they come, but that is literally what is in front of you.

Now, here's something relevant. The debtors' submitted exemption claim form, which is page 134 of the global PDF, converts the language. And so it says money that -- the claim form, that is what a debtor fills -- so the debtor gets a notice and then the debtor has a form to claim the exemption that it would be able to as a pro se file in a court. That form language says "wages," not "bank account," not a number of a bank account, not

"wages that are in bank account" such-and-such and such-and-such. It just says "wages." So even in the debtors' submission of the notice versus the actual claim form you've got different language, which I'm not sure this is as much a question of judicial conflict creating what Craig identified as the problem, Bobby, versus, again, from just kind of my -- what's the goal at hand.

Two things. Are we supposed to be making a policy decision through a rule that's really in a form? And second, you know, the policy ramifications here are I've got a judgment debtor who has got a 5,000-dollar bank account that's been $5,000 for years. They put a paycheck in there. I'm entitled to that other $5,000, but now I can't get it because they just put $300 of wages in there. I'm not sure, you know, that's practical to me. So it's -- you know, we could -- Chip, you've got time limits and, you know, your considerations, and I don't want to control the conversation, but I just happen to be moderating this, and, Judge, you kind of brought it back to task, which often happens in this committee. There's a little mission creep, but --

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I guess so my suggestion was going to be -- and then Craig spoke after, and so I don't think my suggestion addresses his concern

about the voluminous nature of dealing with all of it, but can we just in the notice use the statutory language, "current wages from personal services"; or we could say, "Wages may be exempt" and leave it up to the 20-yearlong running dispute and not make a decision in our form. Or I guess that would be -- can we sidestep the issue by saying "wages may be exempt" and then let the 20-year dispute come to its natural end by the normal process?

MR. PERDUE: Well, I think I'm right, but wages are exempt, and the --

HONORABLE EMILY MISKEL: Or, I'm sorry, deposits.

MR. PERDUE: -- creditors' form says current wages. Current wages.

HONORABLE EMILY MISKEL: Yeah, so current wages, but like this dispute, could you use the word "may" to sidestep it instead of "are"?

MR. NOACK: We actually -- to answer your question directly, we say in our memo that's what we should do. We say list the exemptions. So say you pick the debtors' form, you like it better, it's in bigger font. More pages, but let's pick it. If you deleted, "wages deposited in account" and you put in our phrase, "current wages for personal services" and you change "is protected" to "may be protected," we're a lot closer. I

mean, that's language that I think is much closer to the legislative mandate.

MS. PFEIFFER: I have a question. I'm not seeing "current" in the statute. Where are you getting "current", and what's the significance of that?

MR. PERDUE: He's getting it from the Property Code.

HONORABLE TRACY CHRISTOPHER: Property Code.

MR. TOMLINSON: It's 42.001, I think.

MR. NOACK: Yeah.

CHAIRMAN BABCOCK: Justice Christopher, did you have your hand up?

HONORABLE TRACY CHRISTOPHER: Well, if we're voting, I'd vote to use the statutory language.

CHAIRMAN BABCOCK: Vote --

HONORABLE TRACY CHRISTOPHER: If we were voting, I would vote to use the statutory language, "current wages for personal services," if that's truly what's in the Property Code. Someone is double-checking that, because even if you put that on the form, debtors will still check it; and the, you know, dispute can go forward in the courts; but putting "wages deposited in an account" when it is not in the statutory language would be wrong, in my opinion.

CHAIRMAN BABCOCK: Yeah. Rich.

MS. PFEIFFER: Just to clarify, "current" is in the Property Code, but it's not at the same reference in CPRC.

CHAIRMAN BABCOCK: Connie, speak up.

MS. PFEIFFER: "Current" is in the Property Code, but not the CPRC, and so I'm not clear on the significance of --

MR. TOMLINSON: It's in the Property Code only. So that's where the exemption chapter is, and so if you're looking for most exemptions that are going to be in Chapter 42 of the Property Code, but the turnover statute is in the CPRC. It's one section. One of the subsections is (f), and it does implicate exemptions. It just happens to be in a separate code.

So my only point about this is there's two kinds of statutory language. There is one on current wages. It is in 42.001, but there's also language in subsection (f). If you want to, you can use that language in subsection (f), which is if it's a disbursement or a proceeds of, something that was once exempt, you can claim it. Now, the problem with doing statutory language, in my opinion, is that is not plain language, and we are directed by the Legislature to use plain language. If that's too broad a tool, I get that. I'm just saying that that is not plain language, and most judgment debtors are

not going to know what in the world that means.

I was hoping that when we mention exemptions that we use language that ordinary people could understand, and we have a disagreement about what subsection (f) is. I get that. I mean, one way to approach it is to have that statutory language. I think there's clearly subsection (f) of the turnover statute did mean to add something in terms of exemptions, and you can't ignore it, not in toto. Now, one way to approach it I guess is use the statutory language and then, of course, then people could argue about it in front of judges and decide whether or not my read of subsection (f) is correct or not.

CHAIRMAN BABCOCK: Yeah. Evan.

MR. YOUNG: I would advocate using the statutory language and then urge you all to take a case up.

MR. TOMLINSON: I would be happy to.

MR. YOUNG: And then we'll come back and we can amend, but we've got to get a rule out by May of '22. This is probably not the right group, based on our professed ignorance of the topic, to advise the Supreme Court right now, which is the body that actually has the responsibility for it, and they can do it and brief cases after oral argument, I would think.

CHAIRMAN BABCOCK: Well, our charge was to come up with a form.

MR. YOUNG: Yeah, use the statutory language, because we know we're not going to be giving the Supreme Court bad advice then, but if we change the language in order to -- based upon our judgment that only a court ultimately can reach, I'm afraid we might be giving bad advice to our overseers.

CHAIRMAN BABCOCK: Yeah. Rich's argument is we could use the statutory language, but then it would -- it would not be in plain English, it would not be understandable.

HONORABLE EMILY MISKEL: I disagree. I think it's plain English.

I think the "current wages" is plain English the 42.001(f)(1).

CHAIRMAN BABCOCK: What he said is (f) is obtuse, obviously.

HONORABLE EMILY MISKEL: I think the phrase "current wages" is not unplain language.

CHAIRMAN BABCOCK: No. But anyway. Yeah.

MR. NOACK: I just want to make a brief point, and it is actually something we haven't really talked about, but I want to make sure because I think it's relevant to what Evan is saying about using the plain

language. We are completely ignoring and I think the debtors' proposal completely ignores the gig economy and the fact that we also have a very similar exemption for unpaid commissions for personal services not to exceed 25 percent of the aggregate, which is in our form, exemptions. It's separate because it's subject to the overall cap, right, but it's subject to the same argument, right. So what if you have the proceeds of unpaid commissions, but you don't see them making that argument because unpaid versus current, right. Well, how can you say the proceeds of unpaid? But if we stick to the statutory language, we don't get into that, and we just say "unpaid commissions not exceeding 25 percent of the aggregate."

I agree, plain language, that's tough, but I struggle there's no way to say that in a better way, so we need to list it and duck those issues, because I'm sure the next time Rich sees something he may be arguing that proceeds of unpaid wages in a bank account is exempt, and I'm going to have to argue that, but -- but it's the same issue. It's just in a different category.

CHAIRMAN BABCOCK: Eduardo, and then Richard Orsinger.

MR. RODRIGUEZ: My concern is the word "current service for personal" -- I mean "current wages

for personal services." I mean, what does that "personal services" mean? I mean, a guy that's working across the street building in a high-rise building, he may not think that working 10,000 feet up in the air is personal services because that implies that you're doing something for somebody personally. So, I mean, I would just say to me it would just -- the language should just be "current wages," period. Yeah.

CHAIRMAN BABCOCK: Yeah.

MR. RODRIGUEZ: If that's what we're talking about.

CHAIRMAN BABCOCK: Your argument is, look, if I'm getting paid for working, it's always personal to what I'm doing.

MR. RODRIGUEZ: Well, yes, to me it is.

CHAIRMAN BABCOCK: Yeah, I'm with you. Richard Orsinger, the second most wise Richard on the committee is -- after Munzinger. Orsinger.

MR. ORSINGER: Yeah, Chip, I'm here.

CHAIRMAN BABCOCK: So you have a comment?

MR. ORSINGER: Yes. I sent you an e-mail, so I'm going to read it so that it's more coherent. If we're going to help a pro se debtor understand his or her exemptions, whatever the Court does should bring clarity to the exemptions that apply to the collection remedy

being employed against the debtor. This generic form that lists all exemptions that might apply.

And then I have two points. One, it would be feasible to provide different forms, listing the exemption for each remedy. Number two, on the issue of whether funds exempt from certain sources, like current wages for personal services, remain exempt after receipt, ultimately the Supreme Court needs to decide the question. Is the rule-making process the place to decide this, or as Chip suggested, should it be in connection with a litigated case? Would it be possible for interested parties to run a test case up the appellate ladder to bring the matter to the Supreme Court fairly soon? In the meantime the Court could adopt a noncommittal interim rule to tide us over until the issue can decided in a Supreme Court decision. Those are my thoughts.

CHAIRMAN BABCOCK: Great, Richard. Thank you very much. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm just going to respond to Chief Justice Christopher's question a long time ago. It is -- the statutory language is the same as the constitutional language. I've just looked it up. So it says, Article 16, Section 28, "No current wages for personal service shall be subject to garnishment, except for the enforcement of court-ordered," so it's the same

language. Just saying there's no inconsistencies.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: So we should probably use that language, would be my vote if we vote.

CHAIRMAN BABCOCK: Got it. Craig

MR. NOACK: So I just want to address the comment on the phone about whether or not we can list each -- each -- the property specific to each remedy; and that is intuitively attractive, I agree. Unfortunately, in practice it can be difficult, so I -- let's just walk through them. In garnishment, garnishment is 99 percent of the time against funds, but you can garnish for property. You can garnish nonfinancial institutions. If you read through the rules, it absolutely provides for that. So if we're going to do a form, and it's got to provide for a hundred percent of the scenarios, you've got to have in your form for garnishment -- you've got to list out the personal property exemptions, not just talk about funds.

If you're talking about an execution, if you do a writ of execution against a sole proprietor, you can grab funds. If you grab funds of a sole proprietor, some of that may be something that he alleges is wages or commissions. Some of it may be funds that he deposited because it was the sale of his house. So you've got to

list them all.

If it's a receivership, I can hit safe deposit box and funds. I can go out, and I can seize personal property and funds. So, again, one of the reasons why we wanted one form was because under all of the remedies, all of the property is sometimes -- all of the exemptions are sometimes relevant.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Miskel.

HONORABLE EMILY MISKEL: Okay. I think everyone is feeling really stressed because we're feeling the pressure to do this brand new assignment and to produce a perfect form on our first draft, and so may I offer that we try to produce a good enough form on the first draft and then if practice shows that our form is deficient, it can be revised?

CHAIRMAN BABCOCK: Well, I think the Court's -- not speaking for the Court, but I think they always try to do the best they can on the forms and react to problems if it comes up, but as I understand it -- and I may be wrong about this -- but I thought that the Court wanted us to conclude our work this meeting. Am I right about that, Jane? Justice Bland.

MS. DAUMERIE: Yes, with the legislative deadlines.

CHAIRMAN BABCOCK: Yeah, January 1, right?

MS. DAUMERIE: Yeah.

CHAIRMAN BABCOCK: So we have a legislative deadline, so that's why we're having to get through this today.

HONORABLE EMILY MISKEL: That's what I mean. We're sharpening the pencil point extremely finely today, and my request would be can we go with some good enough statutory language or some "may" or some whatever it takes to get a form finished today, and then if we discover that there was something overlooked or something, you know, that's not happening correctly, it can be revised.

CHAIRMAN BABCOCK: Yeah. Yeah, sure. Yeah, absolutely. So Bobby is deep in -- I mean, Jim is deep in consultation, so I won't disturb that.

MR. PERDUE: No, no. I realized that Connie is right that some of the tabs, you may not know who they are attributed to, but generally I think up to --

MS. PFEIFFER: Up to E.

MR. PERDUE: Up to E --

MS. PFEIFFER: It's debtors.

MR. PERDUE: -- you're looking at debtors and then after that you get to the creditors, in the packet.

CHAIRMAN BABCOCK: Yeah, D is -- as I

understand it, D is appropriate as debtors, but the creditors I thought was B. Am I wrong about that?

MR. PERDUE: In the global PDF that I thought I had they were B.

MS. PFEIFFER: I mean, I think it would be helpful for us to all know the parties' proposals, and so there's multiple debtors' proposals.

MR. NOACK: I do have copies if anybody needs physical copies, but I'm happy to summarize ours.

MR. PERDUE: You said E, right, Chip?

CHAIRMAN BABCOCK: Well, Tab D, as in David, is Rich's debtors proposal, and we know that because it has the language "wages deposited in an account." So we know that. Now, I have been thinking that B, as in boy, is the creditors' form because that does not have "wages deposited in an account," but rather starts with "Social Security, retirement income." Am I right about that or am I wrong?

MR. NOACK: That's correct.

CHAIRMAN BABCOCK: That's right. Okay. So Tab B, as in boy, is creditors and D, as in David, is debtors. But what we've been talking about is the form behind Tab D, and the very first item, which is "wages deposited in an account," which Rich says should be there because of subsection (f), which is what the dialogue has

been about for the last few minutes. So if anybody wants to talk about that issue any more, we can. Rich.

MR. PHILLIPS: Chip, I think 5B is still one of Rich's. I think in the packet I'm looking at, the creditors' one is at Tab 4.

MR. PERDUE: Yeah. So Rich's garnishment is 5B.

MR. PHILLIPS: Yeah. Because the debtors have given us one for garnishment, one for turnover, one for execution. That's B, C, and something, but the one that the creditors have given us is behind Tab 4.

CHAIRMAN BABCOCK: Yeah, four, got it, okay.

MR. PERDUE: It's even got a seal of the Texas Supreme Court on it.

CHAIRMAN BABCOCK: Yes, it does.

MR. PHILLIPS: Very industrious.

CHAIRMAN BABCOCK: Very nice. But we certainly have the issue we've been discussing framed by the language in Tab 5D, as in David, right? So I think we've pretty thoroughly talked about it, and, Jim, do you want us to take a vote on this, whether the committee as a whole thinks that should be in there or not?

MR. PERDUE: Since I've provided such strong guidance as the subcommittee chair, I defer to the chairman of the committee of the whole.

CHAIRMAN BABCOCK: Man, you guys are punting -- you're back 15 yards behind the line.

MR. PERDUE: Well, since I already had a penalty called on me earlier I may be on the goal line.

CHAIRMAN BABCOCK: Whoa, there we go. There we go. Okay.

MR. PERDUE: I think it's worth a vote.

CHAIRMAN BABCOCK: Yeah, I think so, too. So people that are in favor of including on the form Rich's language that says "wages deposited in an account" raise your hand.

People opposed, raise your hand. On the telephone, is there anybody in favor, since you can't raise your hand that we can see it?

I hesitate to ask it this way, but is it safe in assuming that everybody on the phone is opposed to including in the form wages deposited in an account?

MS. HOBBS: This is Lisa. I'm opposed.

CHAIRMAN BABCOCK: Okay. I'll take it by your silence that everyone is opposed, which means, Rich, that with great respect the committee as a whole is not in favor. So there you go. I hope you feel like you had a fair hearing on this.

MR. TOMLINSON: Oh, you've allowed me to speak, and I appreciate that. Thank you.

CHAIRMAN BABCOCK: Okay. The next big issue that was identified was, I wrote down, global rules versus rules on individual basis. Craig, can you state it better than what I just said?

MR. NOACK: Well, yeah, so based on kind of the viewpoint on whether or not you want to highlight current wages as different, then I think the next decision point is are you going down the path of listing -- providing a list of the exemptions in a -- in a true list format; and if you are, then does that mean you need one form notice or do you want to have multiple forms, the debtors group has provided multiple forms, one for each type of process --

CHAIRMAN BABCOCK: Yeah.

MR. NOACK: -- versus we've provided one example form that could be used for any type of process.

CHAIRMAN BABCOCK: And, Justice Christopher, -- well, I'll call you guys in a minute. Justice Christopher made the point earlier that -- which I thought was a good one, that -- and maybe it's just because you specialize in it, but you guys jump back and forth between the different types of remedies; and so her point, if I took it correctly, was that would militate in favor of multiple forms as opposed to one form. Did I misstate that, Judge?

HONORABLE TRACY CHRISTOPHER: Well, no, actually, I think the form, now that we've resolved this issue, is the same for all types. I think the differences on the rules themselves, the garnishment rules versus the --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: -- turnover rules, as to whether -- you know, because the garnishment already has certain time frame built into it that we can work around in terms of when this form has to be sent to the debtor and when they have to assert their objection versus the receivership.

CHAIRMAN BABCOCK: Fair enough. Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: So as a judge that gets a lot of pro se people, I like to have different forms, so when someone comes with the divorce, no children, it's a lot easier to use that form and then divorce with children, use that form. So even if you can use a form, if there's going to be differences, I think pro se people, it is easier for them and therefore easier for the judge when there are more forms for them to pick from.

CHAIRMAN BABCOCK: Okay. Rich, did you have your hand up? I thought you did.

MR. PHILLIPS: I do, but I think Mr. Noack may have -- because I had a question for them about that.

MR. NOACK: Yeah, so I actually -- and obviously I have a personal interest in how many types of forms I have to send out, so I freely admit that, but I would actually argue the opposite. So as a creditor you often have multiple things going out at the same time. Maybe you're doing a garnishment and a writ at the same time. If you have multiple forms and you're sending more than one form to a pro se defendant at the same time, you might be bombarding them with multiple forms. That doesn't always happen that you've got both going at the same time, but it does happen, and so that's one piece.

The other thing I would say is they're already getting other notices, such as the garnishment notice, such as something from the constable, a copy of the writ, such as something from me. I'll get them a copy of the order, a copy of the order -- a copy of the judgment. So I will tell you that pro se defendants read about 50 percent of what I send them, and so if it's more than two pages of something that I'm already sending them five attachments by e-mail, I -- I would just -- I -- my experience is the opposite, and my perspective is obviously fundamentally different from yours, because I'm in that chair of you just sent me a bunch of paperwork,

sir, explain it to me.

HONORABLE ANA ESTEVEZ: Well, let me ask you this question. How many times -- do we have pro se creditors?

MR. NOACK: Absolutely.

HONORABLE ANA ESTEVEZ: Okay. Do we have a lot of pro se creditors in JP court?

MR. NOACK: More than in county and district, but --

MR. TOMLINSON: Way more in JP court, but they have very little success generally.

HONORABLE ANA ESTEVEZ: I'm good with a lawyer using whatever form they want, so I guess the question is, I don't know -- I'm not in JP court, but so I don't know what the need is. Let me put it that way. So if the need isn't there, then, sure, let's make it simple. Let's have one form. Let's make it where any attorney can pick it up and know what to use, and it will go much smoother, but if the need is also for some pro se creditors, it would be easier for them to have them separated out.

MR. NOACK: To channel Bronson -- and I can't speak for Bronson, obviously, but I think if I'm a pro se creditor -- and I have had pro se creditors come to me and say, "I have been trying and I can't do anything"

-- having one form that they send versus multiple forms is going to be helpful for them, but I'm going to go a step further and say that having one form for me to send versus multiple forms is -- is going to make a world of difference and just makes things a whole lot easier.

CHAIRMAN BABCOCK: Rich, then Judge Miskel.

MR. PHILLIPS: So, and admittedly, I'm not in this the way you guys are. I haven't read the materials as much based on when we got them, but my understanding was the primary reason the debtors had proposed three different forms was because of the issue we just got done resolving, because the debtors' view was this thing related to wages deposited in account applies only to turnover order, didn't apply to the other two. That's why there were three forms. So I guess my question is, having resolved that issue, is there any reason, any differences among the forms, to have multiple forms now? Because I didn't get that from the materials beyond the question about the turnover statute that we've already resolved.

MR. TOMLINSON: So there is a difference with the execution proposal that we made. The notice is different because we're listing -- listing prominently the personal property exemptions, because typically what happens with execution is you're seizing something

tangible, something you attach. You know, a vehicle, a piece of equipment. Exemptions still only apply to individuals, but that's -- that's execution.

Typically when you do garnishment it's not limited to fungible funds, but I will tell you 99.9 percent of the time I've seen it, it's always been funds. I have seen it in other circumstances, but it's typically funds, so the exemptions are different. If you -- if you put them all in one form -- let me just give you an example -- it's way more complicated, and California does that. They have a form that literally they must have a hundred different exemptions, and you can do that. I'm just telling you that is so busy, as my grandmother would say, that is such a busy form, that no one would understand what -- what the heck is going on. And it also only refers to statutory language, and I don't think that's typically plain language.

So I think there's still a reason for having more than one form, but if you-all have come to the conclusion, you've made that decision, that's fine. I get that. And I will shut up.

CHAIRMAN BABCOCK: Don't feel like you have to shut up. Judge Miskel.

HONORABLE EMILY MISKEL: I just, again, would just like to make sure I understand the question

we're being asked to answer. So when we talk about forms, option A is the creditors' single two-page notice that's called "Personal Property Seizure Exemption Notice" that is in Tab 4, not of what we were e-mailed but of the link, versus the debtors have submitted three separate notices, which are 5B, 5D, and 5F, and we're picking one option versus the other option. Is that the question that we're doing right now?

MR. TOMLINSON: Well, I thought initially it was rules, whether we should have more rules, but I think we've gone onto forms, so, I mean, most of the discussion has been about whether there has been multiple forms, but --

MR. NOACK: I think those are separate issues, and when I had summarized them I had said if we decide one way on wages then the forms issue becomes simpler. I think the rules one does as well, but that's a separate issue, so I had been talking about this with respect to the forms.

HONORABLE EMILY MISKEL: But right now the question that we're talking about is one single notice or three separate notices.

MR. NOACK: Correct.

HONORABLE EMILY MISKEL: Okay.

CHAIRMAN BABCOCK: Anybody have any more

thoughts on that topic? Jim, do you want to take a vote on that?

MR. PERDUE: You can, but I -- Rich, is there a substantive difference -- with the resolution of the wages, is there a substantive difference between the forms, other than saying this is the form for garnishment, this is the form for execution, this is the form for receivership?

MR. TOMLINSON: Yes, and I was trying to mention that our notice on the writ of execution lists different exemptions, the ones that apply to tangible personal property, whereas -- and the others mention that, but in far less detail. They mention what is most common when it's the seizure of funds through garnishment or turnover, which is the exemptions that related to funds, so that's the reason it still remains to have multiple forms.

MR. PERDUE: So that goes back to a little bit of a philosophical difference between the two parties; and the creditors' proposal would capture everything in the Property Code, including personal property; and one of the things that's clear to me is that there's kind of a somewhat of an agreement, but a difference, that garnishment obviously tends to be cash, but sometimes is personal property apparently, and receivership has evolved

into very much a cash-oriented project and -- but execution protects you, so you have -- so recognize this, substantively then what the debtors' proposal would be is kind of self-select that which is relevant to the type of proceeding, so that the debtors' proposal would not list the personal property list in the garnishment form to the same extent of uniformly.

I think Craig would say, well, I've seen garnishment where there was some personal property; and so that just becomes a little bit of simplicity, a little bit of uniformity, a little bit of simple solution for all parties involved versus having self-entitled garnishment, execution; and there would be slight differences because of this different concept of personal property's relevance to those proceedings. The chair of the subcommittee, which has not taken a vote on any of these things, likes the single form, but we should have a -- we should have a vote of the committee of the whole, Chip.

CHAIRMAN BABCOCK: Yep. And Justice Gray, I think if I've read his text correctly, or Shiva has, has an idea about how to formulate a vote, or perhaps it's a comment on the vote. Justice Gray, another wise member of our committee.

HONORABLE TOM GRAY: Can you hear me?

CHAIRMAN BABCOCK: We can now. You were

undoubtedly on mute before.

HONORABLE TOM GRAY: All right. I saw you were fixing to vote, so I was anticipating the form of the vote, and so that was what I thought you were headed towards on a vote, because, frankly, I'll say, speaking on behalf of the members on the end of this phone, we can hear Dee Dee's typing better than we can hear most of the conversation in the room, except for Craig and you, Chip, and the debtor attorney. Everybody else, particularly, believe it or not, the subcommittee chair, we're having real trouble hearing y'all.

THE COURT: Well, thanks. I'll try to remember to make sure to ask people to talk up, especially Mr. Perdue, but why don't you go ahead and formulate how you think the vote should be characterized.

HONORABLE TOM GRAY: Well, I think it was laid out pretty well by the two advocates of do we put it in one form or do we have the form that lists the exemptions by federal first, state second, and then the state exemptions that are subject to the cap. I think the layout of that is the three forms and the attachments behind Tab 5 or the single form in the -- what is behind Tab 4 --

CHAIRMAN BABCOCK: Yep.

HONORABLE TOM GRAY: -- that we got late

yesterday.

CHAIRMAN BABCOCK: I think --

HONORABLE TOM GRAY: So basically the one form under 4 with the three breakdowns of the source of the exemption and the limitations on them versus the separate exemptions or separate forms.

CHAIRMAN BABCOCK: Thank you, Judge. I think that's right. So everybody in favor of the single form that is behind Tab 4, raise your hand.

HONORABLE TOM GRAY: Hand raised.

CHAIRMAN BABCOCK: I'll get to you guys in a minute.

All right, on the phone, everybody in favor of the single form behind Tab 4? I've got Justice Gray as a "yes" on that. I'll just call the roll. Orsinger?

MR. ORSINGER: I think multiple forms -- (Phone audio distortion)

THE REPORTER: I couldn't hear that.

CHAIRMAN BABCOCK: We're voting on one form right now. So you're a "no" on one form. You'll be a "yes" on --

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: -- multiple. All right. Judge Peeples?

(No response)

CHAIRMAN BABCOCK: Pam Baron?
(No response)
CHAIRMAN BABCOCK: Lonny? Professor Hoffman?
(No response)
CHAIRMAN BABCOCK: Richard Munzinger?
MR. MUNZINGER: No.
CHAIRMAN BABCOCK: Judge Wallace?
(No response)
CHAIRMAN BABCOCK: Nina Cortell?
MS. CORTELL: Opposed.
CHAIRMAN BABCOCK: Marcy.
MS. GREER: I apologize, but the form that I'm looking at is one form.
CHAIRMAN BABCOCK: Okay. Professor Carlson?
PROFESSOR CARLSON: No.
CHAIRMAN BABCOCK: Kennon?
(No response)
CHAIRMAN BABCOCK: Judge Benton?
(No response)
CHAIRMAN BABCOCK: Manuel?
(No response)
CHAIRMAN BABCOCK: Did I miss anybody on the phone?
MR. LEVY: Robert Levy.

THE COURT: Robert, sorry about that. Yes or no on the single form? Which way do you vote, Robert? Assuming you want to vote.

MS. GREER: This is Marcy again. I'm sorry I didn't -- (Phone audio distortion)

THE REPORTER: I can't hear her.

CHAIRMAN BABCOCK: "No" on single form. Okay, I got that. And, Robert, what's your vote on single form? Robert, if you're talking, we can't hear you. Okay.

MR. PORTER: This is Chris Porter, and opposed.

CHAIRMAN BABCOCK: Okay. Thanks, Chris. All right.

MS. HOBBS: This is Lisa Hobbs. I was going to vote opposed, but, I don't know, maybe from the last conversation it was really hard to hear, but I thought Mr. Perdue had kind of clarified some of my concerns, so I guess I'll just stay neutral, because it's just really hard for us to hear.

CHAIRMAN BABCOCK: Yeah, I'm sorry about that.

MS. HOBBS: That's okay.

CHAIRMAN BABCOCK: I'm sorry, Lisa.

MS. HOBBS: I'll just abstain on the vote.

I hear both sides very well, and it's a hard choice.

CHAIRMAN BABCOCK: Okay. Of those present in the room, how many are against the -- how many are against the single form? Okay. Thank you. So --

MR. LEVY: Sorry about that, Chip. I was on mute, but I'll also vote "no." This is Robert.

CHAIRMAN BABCOCK: Yep, I gotcha. Hang on for a minute. It is one of those rare times where we have a 14-14 tie, requiring the Chair to vote, and the Chair votes "yes," so it's 15-14, which doesn't help the Court very much. But there you have it, so --

HONORABLE JANE BLAND: We'll get that ninth judge in place.

CHAIRMAN BABCOCK: Huh? Yeah, because it will be split when you get there. Okay. So we've gotten those two behind us, but now whether we have global rules or individual rules by remedy. Is that -- is that where you-all came out?

MR. NOACK: Yeah. I think that was the next large issue to be discussed, I guess.

CHAIRMAN BABCOCK: All right. Rich, why don't you take the -- tell us what your side of that is, of that issue.

HONORABLE EMILY MISKEL: I'm sorry to interrupt. It's 12:43. Are we allowed to grab food while

we have the discussion, or are we going to take --

CHAIRMAN BABCOCK: I'm sorry, I can't hear you.

HONORABLE EMILY MISKEL: I was just going to ask about the lunch schedule. I'm sorry.

CHAIRMAN BABCOCK: Huh?

HONORABLE ANA ESTEVEZ: It's okay. I told her you'll give us a lunch. She didn't know.

CHAIRMAN BABCOCK: We're going to have lunch.

HONORABLE EMILY MISKEL: Okay.

CHAIRMAN BABCOCK: But I like to keep you a little bit on the edge of your seat about when it's going to be. Rich, why don't you -- the natives over here are getting very restless.

MR. TOMLINSON: I'm fearful at this point.

CHAIRMAN BABCOCK: I know.

MR. TOMLINSON: So my idea is we should build on what we already have. We have garnishment rules that need tweaking, that don't need to be -- they don't need more than that. And there already is some procedures in there that are effective if you have a lawyer. They really are not effective for pro ses. Our suggestion is that you amend 663a and 664a of the garnishment rules and then you have separate rules for -- of execution and for

turnover. In the turnover context there never have been rules, so this would be the first rules that would ever apply to the procedures relating to a turnover receivership.

So related to this, I think if you take a multiple rule approach, if you're looking to see what the requirements are for execution, if you look in the execution rules and you add in a execution rule that talks about exemptions you can find it there. If you look in garnishment, you're going to find exemptions discussed in both 663a and 664, and then there's going to be a separate set of rules with turnover, and what we propose is that it be placed in the same area as garnishment. They're the two main mechanisms for collecting judgments today, and they're placed in the same area, people are going to know, and you call that section of the rules "Garnishment and Turnover." So that allows them to be found by lawyers and judges as well as the parties.

In addition, the Judicial Council issued some resolutions back in September of 2020 that suggested basically this whole framework that got included in House Bill 3774, which is the omnibus bill, the courts bill. That was the underlying basis for it, and that -- those resolutions specifically suggested, among other things, that we amend the garnishment rules and that we add new

turnover rules. That's what they explicitly suggested. Now, you don't have to follow what the Judicial Council said. I'm just saying that's -- that's the basis for why we think that multiple rules make sense. I practice in this area. This is the way I would prefer to do it, but no one has to agree with me on this. This is my suggestion.

CHAIRMAN BABCOCK: Great, thank you. Craig.

MR. NOACK: So I -- and, again, I think the issue was not necessarily one of one versus many. It's also an issue of if you modify the many, is it going to apply to all, and I think the rules as proposed in attachesments A, C, and E, again, as drafted they apply to every single writ, every single garnishment, every single receivership order, regardless of whether or not personal property exemptions are implicated. So we came up with one rule that applies if you are implicating personal property of an individual.

I would tell you that I don't think the creditors or the receivers are opposed to if you want to take the garnishment rules and tweak them to reference a rule so that if you are proceeding against personal property then you know where to go and look, but as drafted, when you're looking at the multiple rules, you're looking at a 30-day hold period on every single

garnishment or every single writ of execution, even where everyone would agree it's not warranted. So at a minimum, if we're considering multiple rules, it needs to be tweaked. But I -- I would say that this one rule approach also already happens in the -- in the rules. I know it's a surprise to a lot of folks, but there is a trial of right to property in the 700's, so we have a -- we have a history of coming in and saying, well, if post-judgment you want to have a trial of right to property, at any point in these processes it's something you can do, and so this approach can work.

The other thing I would say is there's a lot of pieces to this kind of multiple rule approach that from our perspective haven't really been thought through on a practical level in terms of saying that, you know, here's everything that the person has to be served with, and the clerk has to issue this, and the clerk has to do that and the timing. All of that kind of stuff gets to some of the issues that we really haven't resolved, so if we're talking about the kind of core issue of should we draft multiple rules versus one rule, I mean, obviously we thought that one rule looks good, but we're much more concerned about what the contents of the rules are, rather than whether they're split up and you've got the content of the rules in multiple spots.

I will say that on behalf of the Texas Creditors Bar Association, we're governed by the judge, and it's unique to the situation. The order tells us what we can and can't do. As long as the order -- and we're going to abide by whatever rules are there, and we're going to abide by a rule that protects personal property, and we abide by the statutes, so the concept of creating new rules for turnover receivers, we think is outside the legislative mandate. We think, you know, it's -- if somebody wants to add something into the orders that tells us to obey the rules, of course we'll do that. That makes sense, but we're going to do that anyway, so whether or not we're going to spend a lot of time focused on that and create new rules just to do something that we're going to do anyway, you know, we just feel like it's just an additional thing to do. But I know hungers are there, so I'll stop there.

CHAIRMAN BABCOCK: All right. Obviously we'll get to what's in the rules after lunch, but -- but right now it's the issue between a single rule or multiple rules. Jim, did you have any thoughts?

MR. PERDUE: No. So this is where I completely glazed over in the project in trying to get down into the actual substantive differences between multiple rule versus single rule. There's a legislative

mandate that says "The Supreme Court shall." It ties itself to the idea of a form identifying the exemptions and then a claim form for the exemptions. That's what the -- what the bill requires. The creep then becomes when you take it to every single form of execution that the devil is in the details of the individual rules because there does become, it seems, some new procedures, some new substantive issues, some new extra stuff.

And so I -- I, you know, I like simpler solutions, but -- and but I think Judge Christopher, Justice Christopher, has already identified, you know, if you're in an execution proceeding, you look to the execution rule; if you're in a garnishment proceeding, you look to the garnishment rule; if you're in a receivership proceeding, you look to the receivership rule. So logistically, from the practitioner's standpoint, whether it be layperson or judge, that is appealing and makes sense, but to Craig's last point there, the project becomes we've got to as a committee then talk about what the substantive issues are. And the creditors' bar, because they've tendered you one rule, again, being agnostic on the vote of multiple rules versus one rule, the creditors' bar is going to have to verbalize for you the issues in the individual rules, because they don't have a proffer to you of three separate rules. So just

for the theme of the conversation going forward, having a sense of where this vote may lie, I just wanted to put that on the table.

CHAIRMAN BABCOCK: Good. Yeah, Rich.

MR. TOMLINSON: I'll be brief. One other thing that concerns me is if we went with a single rule like the one that's been proposed by Craig, that the problem is that procedure is definitely different from the garnishment procedure, so as I mentioned before, if you do that in your different time constraints, you may find that somebody gets the benefit of having a lawyer and challenging a writ of garnishment under 664a because it could be faster than his proposed rule, and it's -- I just don't think that should be. I think we should make the time constraints basically the same in both the garnishment rule and in any -- if you're going to have a single rule, they should be consistent, and they would not be if -- if we went with their single rule. That's it.

CHAIRMAN BABCOCK: Okay. Any other comments on this? Jim, do you want to take a vote on this?

MR. MEADOWS: Can I ask one question?

MR. PERDUE: I, again, defer to the Chair.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: So if we go with one rule, does it disturb the way garnishments are currently

handled?

MR. TOMLINSON: So, as I read it, it would not disturb it. You could hire a lawyer and attack a writ of garnishment under 664a. What I'm trying to say is somebody who has a lawyer and has the ability to file a motion to dissolve a writ may gain some advantages over a pro se person trying to raise the same exemption issue under this other single rule, because the way their proposal is written, it's not consistent with how the current garnishment procedure works. And what I'm trying to say is there would be differences, and so those people who use 664a are almost certainly going to be represented by counsel. They're going to know that there's those differences, and I'm suggesting there shouldn't be, and if you have multiple rules and you address it in the body of the garnishment rule, you're not going to have that issue. You're going to make it consistent.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: But is there a way to make one -- so we have specific timing in the garnishment rules. Do we have specific timing in the execution rules?

MR. TOMLINSON: No, not really. I mean --

HONORABLE TRACY CHRISTOPHER: So if we make one rule consistent with the timing in the garnishment

rules, then we would be okay. Or if we made one rule and changed the timing in the garnishment rules we would be okay.

MR. NOACK: And if I could respond to that, our initial draft was drafted to try and be consistent. We would be open to that concept, and I would agree with probably Rich's concept that ideally we would want to be consistent in our timing and that sort of thing. So I'm definitely open to that approach. We kind of moved our timing in our proposed rule to try and approach a center in our negotiations in terms of giving the debtor time. We would be open to if it means that we tweak the time that somebody has to dissolve a motion -- a writ of garnishment or something like that, to line up with a single rule, that's something that I think we would be willing to talk about and support.

CHAIRMAN BABCOCK: I would note that the mandate to us from the Court, following the mandate from the Legislature to the Court, was to establish a simple and expedited procedure for a judgment debtor to assert an exemption to the seizure of personal property by a judgment creditor or receiver, and then a form, which we've talked about, and then dealing with stays and when we set a hearing and stay proceedings until the hearing is set, that sort of thing. So how does that mandate cut?

Does it cut in favor of a single rule, single rule or multiple rules?

MR. PERDUE: The statute is very simple. It's the solution. I mean, the mandate, the mandate just says "shall" and it talks about a form and then a process for asserting it.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: It barely distinguishes between the -- I mean, it just deals with personal property.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: I mean, if you read it, there is absolutely nothing that would distinguish between garnishment, execution, receivership, really.

CHAIRMAN BABCOCK: I mean, wouldn't that -- wouldn't that suggest that if it says "personal property," then you would have a rule that would apply to all personal property?

MR. PERDUE: Chip, I have successfully avoided today talking about my legislative experience and what intent would involve in these deliberations of the legislative body.

CHAIRMAN BABCOCK: So you refuse to answer.

MR. PERDUE: I have no answer as to the intent of the 87th Legislature.

CHAIRMAN BABCOCK: Any other thoughts?

Well, I can tell even though we're taking lunch a little late today that the time has come to take lunch, because everybody is being a little cranky about all of this, so we will be in recess until 2:00 o'clock. Thank you.

(Recess from 12:57 p.m. to 2:01 p.m.)

CHAIRMAN BABCOCK: All right, everybody, let's get back to work. And, Richard Orsinger, are you on the line? Richard?

MR. ORSINGER: I'm here.

CHAIRMAN BABCOCK: Okay. You sent me an e-mail over the break, and --

MR. ORSINGER: No, that was earlier.

CHAIRMAN BABCOCK: Well, you sent me an e-mail earlier then.

MR. ORSINGER: And I already read that into the record.

CHAIRMAN BABCOCK: Okay. So nothing since that last one?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay, sorry. All right, cool, so we're back in session. And we have lost a few people, one, the chair of our subcommittee, who had an excused absence. His son is quarterbacking Saint John's tonight against Episcopal, and you don't miss those things because they're few and far between, so Jim left for that,

but we will continue on in his absence, and where do you -- where do you guys think we ought to go, Rich and Craig?

MR. TOMLINSON: I think we didn't take a vote on multiple rules versus single rule.

CHAIRMAN BABCOCK: Yep.

MR. TOMLINSON: I think that was up next and then we've got those other smaller issues that --

CHAIRMAN BABCOCK: Yeah.

MR. TOMLINSON: -- might not be as complicated.

CHAIRMAN BABCOCK: Okay. So does everybody remember the issue between a single rule versus multiple rules, and does anybody else want to say anything about them? Yeah, Evan, and then Hayes.

MR. YOUNG: As I was listening to it, it seemed like it was not a really big dispute, right. The one rule, fine, we can do it. We've got to make sure everything is correct.

CHAIRMAN BABCOCK: Right.

MR. YOUNG: If it's multiple rules, we can do that. We have to make sure everything is correct, so I don't know.

CHAIRMAN BABCOCK: Yeah, as long as it's all in there.

MR. YOUNG: In my mind, I've been going back and forth about it, but I find ultimately it doesn't seem like it matters very much. The key point is everything has to be correct, and that is going to have to require changes to either of the approaches, it sounds like, no matter what.

CHAIRMAN BABCOCK: Good point. And for those of you on the phone, Evan said that as long as -- as long as everything is in there, to him it doesn't matter much whether it's one rule or multiple rules, as long as we hit everything. So Hayes.

MR. FULLER: So to clarify that point, it seems to me that if we go with one rule, we're still going to be modifying multiple rules, and we're also going to be implementing a procedure that requires a pro se litigant to jump back and forth between rules. Is that correct, or should -- and whether we go to multiple rules and not a separate rule for exemptions, you're still going to be modifying multiple rules, whichever way you go.

MR. NOACK: So can I respond to that?

CHAIRMAN BABCOCK: Yeah, of course.

MR. NOACK: Because obviously our proponent was the one rule, so I think to kind of respond to that point, I think that if you're in a garnishment, I think that's correct, because -- because there are rules for how

you attack a garnishment other than through a claim of exemption, so I believe that is correct. Do you need possibly a reference in the rules of garnishment, if you want to have one rule. That's something the committee can consider.

With respect to receiverships, there are no rules on receiverships, so I do not believe that to be the case with respect to turnover receiverships. With respect to executions, yes, there are rules on executions, but, you know -- and somebody correct me -- but there aren't really rules on how to contest a writ of execution where you have to flip back and forth and say, oh, there's a different process for asserting my rights against a writ of execution. It's just there is a set for how you you do a writ of execution, but in terms of this new process for asserting rights, personal property right, you know, it's just a new process.

CHAIRMAN BABCOCK: Rich, you want to --

MR. TOMLINSON: Some --

CHAIRMAN BABCOCK: You had your mouth half open, so --

MR. TOMLINSON: I do that a lot. I don't think it's that simple. I mean, I think on garnishment, I think it's better to build on what we already have, and that means we can make exclusive amendments to those

rules. Turnover, we don't have any rules, and we need to apply them, and then whether that's a single rule or not, and then there's exemption, and there is no existing procedure for challenging a writ of exemption. People do do it. I've challenged execution sales before. They're just not very common anymore.

I mean, it used to be one of the mechanisms. I mean, you get a writ of execution, you'd go to a business that has a cash till and you take the money out. That money typically is not exempt, though. And so -- but if they took some property and there's an exemption claim because they're taking, you know, four cattle -- you know, they're taking four cattle and six are, you know, exempt under the law then that's an issue, and somebody wants to raise it. There is nothing in the exemption rules that covers it, but if you have a separate exemption rule in the execution rules, you're going to find it. That's part of my argument, is if you have a garnishment rule and you amend those, you're going to find those changes. If you have it in execution rules, you're going to find them. Okay.

Turnover rules are going to have to be new anyway. Whatever you do with turnover, you're not going to do the garnishment rules with them. It's going to be different, and there is no need for a rule in the

garnishment rules that says one of two things required by the statute; that is, you know, escrow period where they don't disburse. Well, you don't disburse money in garnishment until there's a judgment in the garnishment action, so there's time. There's already time in there. There's sufficient time, in my view, for judgment debtors to raise their claims.

So, you know, there isn't that on execution, and there are cases that have challenged writs of execution procedures in other states, and part of it is you do have to give them notice of their right to a -- you know, to raise exemptions and to have an expedited procedure. I just think it makes more sense to put, you know, changes to the garnishment rules in the garnishment place, put the changes to the execution rules in that place, and I -- more than anything else, though, I want the procedures to be consistent.

If we change -- if we are going to change garnishment and have two different kinds of procedures, his procedure is going to be significantly different from the existing garnishment procedure. That's one of the reasons I don't like that single rule approach. There's no reason why we couldn't make them consistent, so you could go the other way, but I believe the simple way to do this is amendments in garnishment and adding a rule or

rules in execution and a rule or rules for turnover, and they're going to be consistent overall. The general thrust is going to be the same. Some of it is going to be a little different. In turnover you have to impose two periods. One is how long they hold the property before they either sell it, or if it's funds, disburse it. That's not necessary in garnishment.

There's also needs to be a rule that says once an exemption claim form is filed, that until it's resolved everything is on ice. Well, that's already in the garnishment rule. You don't need to change that. I'm just trying to build on the current structure.

MR. FULLER: So because we do not have turnover rules --

MR. TOMLINSON: We don't.

MR. FULLER: -- we're going to be drafting a new rule and amending multiple rules, regardless of whichever way we go.

MR. TOMLINSON: I think you are going to have to -- I mean, I don't think there's any way to avoid that, and I think the clearest way is the approach we took, but I can't say that there's only one way to skin this cat.

CHAIRMAN BABCOCK: Craig.

MR. NOACK: So I just -- and I want to be --

I want to be very transparent about why we went with the one rule approach, and it wasn't because, you know, I watched Lord of the Rings and I think there's one ring to rule them all, right. It's because when you look at each remedy, they are so different in -- in the mechanism in which they operate, that when you start to take all of the issues that result from this supposedly simple legislative mandate and you try to implement them within each remedy, you start making different calls based on different processes.

And so if you walk through the processes, you get a situation where for receiverships you're creating new rules from scratch. For garnishments you're having to dovetail the exemption processes with the existing processes or about how to modify or dissolve the garnishment process. For executions, if you look at 635 you've got the fact that you can have a stay of execution in justice courts. You don't have that in county and district courts.

And you're having to replicate -- and you see this in the debtor proposal. You have to replicate the proposal several times, but then you have to tweak certain things, like who is supposed to be providing the notice to the debtor, right. In a writ of execution, are you going to impose that responsibility on the deputy who

is serving the writ of execution, or are you going to impose that on the creditor? If you have the receiver doing it, are you going to impose that on the receiver, or are you going to impose that on the creditor? If it's a garnishment, are you going to impose that on the constable or sheriff serving the writ on the bank, or are you going to impose it on the bank, or are you going to impose it on the creditor?

Those are all kind of decisions that you have to make with respect to each process, so when you're trying to decide each issue, it's a different policy decision and a different issue with respect to how the -- how the practicalities of each operation -- how each post-judgment process works, that made it truly tough to think about; whereas if you have one process and you say, look, this process can work, put the onus on the receiver or the creditor. And to Rich's point, if there's some syncing up that we can do, then sync it up, but if we don't do that, I think we're really going to dive into and start to edit a whole lot of -- of the 600's.

CHAIRMAN BABCOCK: Yeah, Justice Kelly.

HONORABLE PETER KELLY: And what is the problem with that? I mean, sometimes wholesale revisions require wholesale revisions, and trying to adopt a single rule that fits everything, when these -- as we've been

discussing all along, these are very different mechanisms that require different remedies and different -- so what is the problem with having to do extra drafting because they are very different mechanisms?

MR. NOACK: Because my response to that is I don't -- I truly do not think there is an issue with the mechanism that has been proposed. It is a very straightforward and simple mechanism that as a creditor's attorney I can tell you will work in every circumstance or as a receiver will work in every circumstance. I don't think that there are these conflicts that -- I know Rich is concerned about them, and I'm happy to walk through them, but I don't think that there's the concern that this one process is going to cause conflicts in a garnishment or in a receivership. I truly don't. So I just think it's borrowed -- I just think it's a borrowed headache given that.

HONORABLE PETER KELLY: It seems if we're dealing with 150, 200,000 of these a year, there's going to be conflicts. That's 200,000 different fact patterns and 200,000 different policy considerations that need to be weighed, and to try to have one rule to fit all of these things seems chimerical to me.

MR. NOACK: I'm happy to address that, but I think there are other folks with --

CHAIRMAN BABCOCK: Yeah, Judge Miskel.

HONORABLE EMILY MISKEL: So, again, this is not my area of expertise, but as I look at the assignment in the Government Code, the assignment in the Government Code says the Supreme Court shall --

MR. STOLLEY: Can you speak up?

HONORABLE EMILY MISKEL: I'm sorry. The assignment in the Government Code says, "The Supreme Court shall establish a simple procedure" -- "a simple procedure for personal property." And so to me that sounds like we're going to have one rule that has a simple procedure for personal property. The fly in that ointment is that it's been raised that that may conflict with the already existing garnishment rule; but I think what Chief Justice Christopher said earlier, what if we do the "a simple procedure" per the Government Code and then harmonize anything in the garnishment rule that causes problems or conflicts; and I think I've heard everyone say they don't have a problem with that way of doing it.

MR. NOACK: You would not see anything from the creditors bar saying if you want to harmonize the notice period and the method of sending the notices, which, in a garnishment, let's be clear, a garnishment says when you -- when you freeze the bank account, you send the notice. The creditor sends the notice as soon as

practicable, and there's a -- there's a provision in there. It's 663a, and it says "to the defendant" and it's got a provision in there, and it says, "You have the right to regain possession," and it goes through that. And then 664 has a list of "defendant may replevy" and it says, you know, "on reasonable notice to the opposing party, which may be less than three days."

A lot of effort went into the rule we proposed to try and use that same language in terms of "on reasonable notice, which may be less than three days," all of that kind of stuff, and so I think that's an approach that we would -- we would support.

MR. TOMLINSON: My -- and I will try to be brief. My only concern is it depends on what -- if we're going to go the single rule route, would I oppose that? It depends on whether or not it -- it restricts judgment debtor rights compared to what is in the current garnishment rule. I'm not in favor of changing the garnishment rule if what you're doing is constricting their rights. I'm just -- I'm telling you where I think the way it's written in their proposal, the single rule, is actually it's not -- in some ways it's not as -- it is not as friendly to judgment debtors as the current garnishment rules in 663a and 664a, particularly, among other things, you know, you can get a -- you're supposed

to get a hearing in a set period of time, and the only way you get a continuance is by agreement of all parties. And that's in the sequestration rules. It's in the distress warrant rule, and they are trying to save that, where -- if what they want is a single rule where they get changes that benefit their side of the bar, I'm not in favor.

HONORABLE EMILY MISKEL: Okay, so --

MR. TOMLINSON: But so I'm just telling you that's where I come down.

HONORABLE EMILY MISKEL: So what I'm hearing you say is conceptually you're not opposed to a personal property rule and harmonizing the garnishment. You just feel that they're harmonizing it in the wrong direction.

MR. TOMLINSON: Their proposal harmonizes in the wrong direction. That's a -- if the question is do we accept their proposed single rule, I'm saying I'm very much opposed.

CHAIRMAN BABCOCK: Let's -- maybe everybody else in the room is -- and on the phone are totally on top of this, but for my own edification, the -- Craig, you're proposing a new Rule 621b, which is behind Tab 4, right?

MR. NOACK: We are proposing a new Rule 621b under Part VI, Section 3 of executions.

CHAIRMAN BABCOCK: Right. And in our materials that's behind Tab 4, right?

MR. NOACK: Okay. I do not have the tabs in front of me, so I don't feel that --

MS. DAUMERIE: Yes.

MR. PHILLIPS: Yes.

CHAIRMAN BABCOCK: Okay. And, Rich, you're proposing in some cases amendments, but in other cases additions and one case a new rule to 663a and that's behind Tab 5A, right?

MR. TOMLINSON: Right. Amendments to two garnishment rules, the new rules for turnover, and new rules for execution.

CHAIRMAN BABCOCK: Okay. Well, let me just make sure we get the language right. So 663a, your proposal, is behind Tab 5A, right? You don't know the tabs, but I think that's right.

MS. DAUMERIE: Yes. Yes.

CHAIRMAN BABCOCK: Thank you. And then you propose Rule 660 and 660a, and that's behind Tab C, right?

MS. DAUMERIE: Yes.

CHAIRMAN BABCOCK: Okay, Jackie, now we're rolling, and then you propose 621b, c, and d, and that's behind Tab 5E, right?

MS. DAUMERIE: Yes.

CHAIRMAN BABCOCK: Okay. So now we know what the language that is being proposed, and, Justice

Christopher, get us out of this morass. How do we approach this discussion? How would be the most helpful way to do it?

HONORABLE TRACY CHRISTOPHER: Well, frankly, I don't think there's anything to vote on.

CHAIRMAN BABCOCK: There's not -- no, we don't need to vote right now. I know you love voting.

HONORABLE TRACY CHRISTOPHER: I do love voting. They can conceptually agree. They just haven't. Okay. I mean, that's the problem, as best I can tell from listening to the discussions.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: So it would be nice if they could conceptually agree.

CHAIRMAN BABCOCK: Yeah. Okay. Hayes.

MR. FULLER: And along those same lines, I understand that there's a -- at least there's an argument that there's legislative intent to have one procedure, but there's no legislative intent to go changing the garnishment rules and these separate individual procedures, and so therein, to me, lies the proverbial rub.

CHAIRMAN BABCOCK: Yeah. Yeah. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I've

been doing a little history digging. I know some members of the committee are new, but back in 2011, 2012, we totally rewrote all of these rules.

CHAIRMAN BABCOCK: We did.

HONORABLE TRACY CHRISTOPHER: And created a whole rule for receiverships and turnovers.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: So, I mean, there's a lot for the Court to draw on, if they want to, with respect to that; and, you know, adding in -- I mean, we've -- I think the main thing we have to figure out is answer the questions on how much notice and when you have to do it, when you have to raise your exemption. And then after that, I think the Court can take what they've done and figure out which way they would rather do it, especially if this is our last meeting on this point.

CHAIRMAN BABCOCK: Which it is.

HONORABLE TRACY CHRISTOPHER: Yeah. So, I mean, to me that's what I would be focusing on, this timing question, rather than the formatting question.

CHAIRMAN BABCOCK: Yeah, I think that makes a lot of sense, and should we take the proposed new rule 621b and let's maybe isolate, Rich, where you say if we're just going to pass this, you've got problems with it, and what are -- identify your problems with Tab 4 of 621b.

MR. TOMLINSON: So I'm -- I've addressed a number of issues that -- those other issues that are in the joint memo.

CHAIRMAN BABCOCK: Right.

MR. TOMLINSON: So there's the timing of when the notice needs to go out to the judgment debtors, we have a disagreement. The timing of when the hearing should occur, we have a disagreement. There is the length of the suspension period, actually, I think we've gotten very close on that, but we're still apart.

CHAIRMAN BABCOCK: Let's take them one by one. Okay.

MR. TOMLINSON: Okay.

CHAIRMAN BABCOCK: So point us to the language in the proposed new Rule 621b behind Tab 4 which raises the first issue on timing.

MR. NOACK: I'm sorry, are we talking about when the notice is first sent?

MR. TOMLINSON: Yes.

MR. NOACK: Okay.

MR. TOMLINSON: It says -- it says in the first sentence, "Whenever a post-judgment" -- blah, blah, blah, blah -- "writ, execution, attachment, other like writ, the plaintiff or receiver making the levy shall," and then it says "as soon as practicable, following notice

that the property has been seized serving notice to the defendant, regarding their rights to asserting exemption."

CHAIRMAN BABCOCK: Okay. You highlighted that the very first thing you said this morning, that that's a point of contention, so let's talk about that.

MR. TOMLINSON: Okay.

CHAIRMAN BABCOCK: As soon as practicable, as you pointed out, I think, can mean a lot of different things.

MR. TOMLINSON: Yes.

CHAIRMAN BABCOCK: You know, and maybe not the same as all deliberate speed, but it --

MR. TOMLINSON: And all deliberate speed took decades, just I might point out.

CHAIRMAN BABCOCK: That was my subtle point.

MR. TOMLINSON: Yes. And I went for it, hook, line, and sinker.

CHAIRMAN BABCOCK: No, but thank you. There is at least one person who gets my obtuse --

MR. TOMLINSON: I'm old enough.

CHAIRMAN BABCOCK: Well, that makes me feel great. Okay. So as soon as practicable, but you would say it ought to be 30 days, 60 days, what?

MR. NOACK: He says three business days.

MR. TOMLINSON: Three business days, and we

changed the trigger for the clock, so that it would be when they received actual notice. So they indicated to us that they most commonly learned when, you know, a turnover receiver has submitted a levy letter to a bank, they commonly learn about the fact that that money is either frozen or seized by the bank, at least not available to the judgment debtor, when the judgment debtor calls them; and our idea is start the clock when they know. They made a valid argument about that. He said we don't know when those letters are received by the bank and when they act on them.

So for purposes of the turnover receiver thing we changed that as the time period. We don't think as soon as practicable, though, is a reasonable approach. If you're going to have an expedited procedure, and you already have courts that say 14 days is okay, and even one court has said -- and actually the Fort Worth court of appeals has said 14 -- it has to be no more than 14 days, and another panel of that same court has said it can be 18 days. So I'm just telling you I think there's an explicit need to set a specific time.

CHAIRMAN BABCOCK: Well, what if you said "three business days following actual notice"?

MR. TOMLINSON: That was our intent. I may not have said it clearly enough, but that was my intent.

CHAIRMAN BABCOCK: And, Craig, what's wrong with that?

MR. NOACK: So this is actually one of the situations where we tried to harmonize the language with what is currently being used for writs of garnishment, so the language for the notice provided under 663a, the service of the writ on the defendant and the notice that you give them, says that the defendant shall be served in any manner provided as Rule 21a of a copy of the writ, the application, affidavits and orders, "as soon as practicable following the service of the writ." So, again, we lifted the language, and, again, speaking from the creditors' perspective, line up my timing. I'm going to send them a copy of the exemptions. I'm going to send them a copy of the 663a notice, all at the same time. I'm going to use the same envelope. I'm not going to mail these out differently, so we wanted to use the same language.

The cases that Rich talks about really speak to the fact that there are unique situations out there. He's talking about the outliers. In the proposed situation that's going on -- and this is in both proposals. The whole thing shuts down. No disbursements, no sale, nothing, while the suspension period is active. So the creditor, the receiver, they are incentivized to

send that notice out. Nothing can happen until it does. What the creditors' bar -- what the receivers are concerned about is what about those unique situations, what about where the constable seizes something on a Saturday and calls and leaves a message on somebody's voicemail that was let go, and nobody checks that voicemail until the following Wednesday, and somebody is arguing that's actual notice and because of that actual notice you didn't get the notice out in time you've got to give it up, even though that everybody agrees that it was actually nonexempt. And those are the kind of things that the outliers, right, that result in appellate court opinions about what is "as soon as practicable." What if somebody was sick, that kind of stuff, so that's the kind of concern that we have. In reality, 99 percent of the time three business days is probably okay, but there was a reason for "as soon as practicable," and especially if we are merging this rule or set of rules with the 663a notice. That's why we picked that language.

CHAIRMAN BABCOCK: Okay. So what if you made it five business days? Would that help? Or would that hurt, Rich? I mean, what about that?

MR. NOACK: It would be better.

CHAIRMAN BABCOCK: Yeah. All right. Anybody else have any thoughts about "as soon as

practicable" or three days or five days or some other time period? Yeah, Rich.

MR. PHILLIPS: Couple of quick things. The first one is I don't find it inconsistent with the garnishment rule. If you've got a hard deadline in this rule and you send the notices at the same time, you will have complied with as soon as practicable in the garnishment rule, so I don't think that's a problem. Generally my concern with this draft of the rule, if you look at it, and I went through it last night and highlighted it because it was so striking, all of the deadlines for the creditors are kind of like soft, just do it when you can get to it; and all of the deadlines for the debtors are hard, firm deadlines in there.

CHAIRMAN BABCOCK: Chop, chop.

MR. PHILLIPS: Right. They want to have as much -- the way it's been drafted is we'll do it when we get to it, but if you're the debtor and you don't give us notice by seven days before, too bad, so sad. And so if there's hard deadlines for one side, there ought to be hard deadlines for both sides. That just conceptually was frustrating to me.

CHAIRMAN BABCOCK: Okay. So you'd be in favor of --

MR. PHILLIPS: Three or five, yeah.

CHAIRMAN BABCOCK: -- changing it to three or five. Okay. John, you're nodding your head. You think that's the right way to go?

MR. WARREN: He stole my response.

CHAIRMAN BABCOCK: Did he really?

MR. PHILLIPS: I apologize.

MR. TOMLINSON: Telepathy.

CHAIRMAN BABCOCK: You guys go back to Dallas and figure it out. Okay. Justice Christopher, as the conscience of this exercise, what do you think, three to five or as soon as practicable?

HONORABLE TRACY CHRISTOPHER: Three.

CHAIRMAN BABCOCK: Three. Okay.

HONORABLE TRACY CHRISTOPHER: But to -- a requirement that you serve it within three days does not mean that you have somehow lost your rights if you don't. Okay. So, I mean, so from the creditors' point of view, you know, somebody will come up and say, "Well, I didn't get it for three days, so you have to excuse the fact that I'm late in filing." I mean, there's nothing in here that says if you don't do it within the three days, that's it, you lose your money.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: So, I mean, to me, you know, three days, that's the laudatory goal of

when you should do it from when you have notice.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I don't think that that's -- for an extraordinary writ, I don't think that that's too burdensome.

CHAIRMAN BABCOCK: Yeah. John.

MR. WARREN: We should specify that's three business days, not just three days.

CHAIRMAN BABCOCK: Yeah. That was my thinking and suggestion.

MR. WARREN: Okay.

MR. TOMLINSON: We made it business days in our proposal.

CHAIRMAN BABCOCK: I made it business days. Well, I imported business days into this. Okay. Anybody have any strong feelings, present company over here aside, about three or five? How many people like three?

How many like five? A large majority of threes over five.

How about on the phone? Is there -- well, you wouldn't know. I almost have to call roll. Orsinger, three or five?

MR. ORSINGER: Five.

CHAIRMAN BABCOCK: And Carlson?

PROFESSOR CARLSON: Five.

CHAIRMAN BABCOCK: Munzinger?
MR. MUNZINGER: Three.
CHAIRMAN BABCOCK: Peeples?
(No response)
CHAIRMAN BABCOCK: Baron?
(No response)
CHAIRMAN BABCOCK: Hoffman?
(No response)
CHAIRMAN BABCOCK: Nina?
MS. CORTELL: Five.
CHAIRMAN BABCOCK: Kennon?
(No response)
CHAIRMAN BABCOCK: Levi?
(No response)
CHAIRMAN BABCOCK: Marcy?
MS. GREER: Five.
CHAIRMAN BABCOCK: Judge Wallace?
HONORABLE R. H. WALLACE: Five.
MS. GREER: Chip, it's Marcy. Did you get me?
CHAIRMAN BABCOCK: Marcy, I got you at five.
MS. GREER: Correct.
CHAIRMAN BABCOCK: Manuel?
(No response)
CHAIRMAN BABCOCK: Justice Gray?

HONORABLE TOM GRAY: Five, with an option if you have some kind of good cause to run past the deadline.

CHAIRMAN BABCOCK: All right. Did I miss anybody on the phone?

MR. LEVY: Yeah, Robert Levy. Three.

CHAIRMAN BABCOCK: Robert, I'm sorry about that. Robert, three. Did it to you again. I will not do that again. Maybe.

MR. PORTER: This is Chris Porter. Five.

THE COURT: Porter, five. Okay, Chris, thank you. Anybody else that I missed?

Okay. The threes have a slight lead over five, but it's -- but it's virtually -- it's not tied, so the Chair is not voting, but it's the threes are leading by a couple over five. So we'll let the Court figure out three or five, but that's the sense of the committee. And it should be -- we've got consensus that it should be actual notice, right, Craig?

MR. NOACK: We did have an agreement on that.

MR. TOMLINSON: Right, we did.

CHAIRMAN BABCOCK: So "actual notice," that word will get thrown in there. Rich, what's the next -- sorry, somebody is trying to say something.

MR. ORSINGER: Richard Orsinger.

CHAIRMAN BABCOCK: Hey, Richard.

MR. ORSINGER: I have a concern about actual notice because it can be difficult to prove actual notice sometimes if it's measured from the standpoint of proving that the debtor received the notice, and, you know, does that require a subpoena, does it require a hearing. I really don't like time tables to start with actual notice if it means you have to prove when the respondent actually received it. Maybe -- in the Rules of Procedure we have a presumption that after you mail it, it is presumed received and then the burden is on them to prove they didn't get it. I think that's recognition of the practical difficulty of proving actual notice.

CHAIRMAN BABCOCK: Okay, great. Thank you. All right. Is the next issue, Rich, going back to what you were talking about in the morning, that timing of the hearing on exemption claims?

MR. TOMLINSON: Yes.

CHAIRMAN BABCOCK: Okay. And where -- let's get to the language in --

MR. NOACK: I'm sorry, just real briefly, because there's the timing of the -- I'm sorry, let's go ahead, because there's just a lot of issues around the notice. There's the when it's sent, how long they have to respond, all of that kind of stuff, but we can take it in

any order. It's just there's kind of the beginning, the middle, and the end of the notice, but we can do it in any order.

MR. TOMLINSON: So in the last paragraph of 621.

CHAIRMAN BABCOCK: The new rule behind Tab 4.

MR. TOMLINSON: Which is Craig's proposal.

CHAIRMAN BABCOCK: 621b.

MR. TOMLINSON: Yes. I misstated.

CHAIRMAN BABCOCK: Yeah.

MR. TOMLINSON: I easily forget these things. In the second sentence in the last paragraph, it says, "Upon the defendant's timely claim of exemption on reasonable notice to all parties, which may be less than three days, the court shall promptly set a hearing on the exemption."

CHAIRMAN BABCOCK: Okay.

MR. TOMLINSON: And then it goes on to say at the last sentence of the paragraph, "The court may extend any time period under this rule for good cause shown." So our proposal was that we should adopt the procedure that is already in the rule for garnishment and sequestration and the distress warrant rules where you can contest these procedures and end these procedures, and all

of those rules require that the hearing be held in 10 days. This is directory. It's not jurisdictional. I'm the first to admit it. The point of it is to -- just like a lot of other rules that say the trial court should give emphasis or give precedence to certain things, the court still controls their own docket. They get to set their own docket, but it would emphasize, and it would be consistent with the current procedure for challenging writs of garnishment and writs of sequestration. It would be 10 days.

The second part is those rules also say there will not be a continuance unless all parties agree, and I believe those two put together, that there should be -- you want the courts to know that these hearings should be held rapidly. I admit that this is directory, but it will have an effect, I believe. Just like an eviction, although some of the rules there are very strict and very -- impose more serious duties upon judges.

CHAIRMAN BABCOCK: Okay. So what you propose is that in the second sentence of the last paragraph, that it -- that it would say something like "Upon the defendant's timely claim of exemption on reasonable notice to all parties, the court shall set a hearing on the exemption within 10 days," and you can't -- no continuances?

MR. TOMLINSON: Right. And, I mean, there's language in the current 664a, which that same sentence in 664a says unless there's an agreement among the parties it will happen --

CHAIRMAN BABCOCK: Absent agreement.

MR. TOMLINSON: -- in 10 days.

CHAIRMAN BABCOCK: Okay. Let's discuss that.

MR. NOACK: Could I just briefly kind of --

CHAIRMAN BABCOCK: Yeah, Craig, you start the discussion.

MR. NOACK: So, first of all, the carrots and sticks are different in a post-judgment than in a sequestration and in prejudgment situation. The 10 days, you're dealing with somebody's car. You're dealing with the fact that you haven't already adjudicated the issue on the merits. The biggest concern for the creditors bar in this situation, we're open to something reasonable, but the biggest concern we have is not whether it's set in 10 days.

The issue is let's walk through the process. If you require a hearing within 10 days and no extension without agreement, then what's going to happen? As a receiver, I freeze an account. I get a notice. Somebody files a claim. A pro se defendant files a claim of

exemption and mails it to me. The court sets a hearing, say the next -- you know, and sets it five days out, and they mail me that notice. Okay. So three days later I get the claim of exemption, and the day after that I get the notice of hearing, and it's for two days from now. And neither the creditor, their attorney, nor the receiver, have any investigative ability to actually conduct any kind of investigation into that exemption. We are limited to what the debtor brings to the hearing, if anything, and what the debtor testifies to.

Even if in my levy to the bank I also asked for statements, there is no way I'm going to get that information by the time of that hearing. So that hearing, if it is final and dispositive and it is within less than 10 days, it is a hearing that in my view denies due process to the creditor because it limits the creditor's ability to have an actual hearing on the evidence as opposed to those rights.

So we believe in -- we believe it should be heard promptly, whether it's promptly versus 10 days. You know, as he said, advisory versus jurisdictional, there are judges out there who believe that those advisory 10 days is actually jurisdictional, and there are cases out there where that is an issue, so I don't think it's as clear-cut as that. But I want to hear them as quickly as

others, but my biggest concern is if I show up -- and I've had this happen, where there was counsel on the other side, and we show up for the hearing, and the judge says "Well, let's look at the statements"; and they say, "Well, we didn't bring them," well, what are we going to do? And if they say, "Well, no, we want to decide it right now," but there's no statements and they just want to assert their claim of exemption. That is -- that is not a reasonable way to decide property rights at issue.

So we need some kind of ability for the judge to say, yes, if you've brought all of your documents to the table, we can have this hearing and decide it now, but if you have not, if you have just made a bare claim of allegation and we need time to develop the evidence, that needs to happen, too.

CHAIRMAN BABCOCK: Okay. What if you made it 14 days with a good cause continuance?

MR. NOACK: I would be fine with that.

CHAIRMAN BABCOCK: All right. What's the danger in that, Rich?

MR. TOMLINSON: So this is my reaction. If you allow good cause continuance, it could last weeks, and the problem is this: If somebody has had all of their money taken, they have no access to any of it, they're instantly destitute. They are going to have to go to the

to food bank. They are not going to be able to pay their rent, and if, in fact, all of that income is exempt or even a significant portion of it is exempt, the longer they go without a ruling on it, they're being deprived of due process.

CHAIRMAN BABCOCK: Sure.

MR. TOMLINSON: And so my reaction to that is if he needs -- he needs the opportunity to try to contest in some cases, one way to do it is that he could subpoena the judgment debtor to bring their bank records to the hearing, and while the bank may be slow in doing that, the judgment debtor can go to the bank and pull those out immediately. It's not hard to do. We have to do it for receivers all the time.

CHAIRMAN BABCOCK: But the debtor shows up in his scenario and says, "Oh, I didn't know I was supposed to bring my bank records," and is that okay? Or what happens? Doesn't he need the ability to say, "Well, Judge, I need a couple more days" so that he can go home and get his bank records or whatever?

MR. TOMLINSON: Well, I mean, my approach is if he wants those records, he has some duty to try to get them, and what I'm trying to say is there is a way to do it. If that party doesn't show up with the records when they've been subpoenaed, I get that, and I think they have

a duty to follow subpoenas. When we get an order from a judge that says there's a receiver and they need these financial documents, we get them for them, and it's quicker through the judgment debtor than it is through the bank, I would be the first to admit, and it's also less expensive.

CHAIRMAN BABCOCK: Okay. Got it. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So the current solution or modification of writ of garnishment says you get three days notice and 10 days -- 10 days to determine the issue. If those are unreasonable, tell me how you get hurt in a garnishment. Because everything that you said would be unreasonable in this rule seems to apply in the garnishment.

MR. NOACK: There is no basis to dissolve a writ of garnishment based on exemptions. When you move to dissolve a writ of garnishment, it's not based on whether or not the cash in the bank account is exempt. The writ was still issued properly.

MR. TOMLINSON: No.

HONORABLE TRACY CHRISTOPHER: Why is that?

MR. NOACK: It's just you dissolve it because you can trace the funds and say the funds are exempt and thereby -- and thereby modify the writ, but it

wasn't improperly issued. If you are asserting a writ of -- if you are asserting an exemption, you can bring your property to -- you can bring your proof to the court, but if I am -- and let's be very clear about this. If I'm in justice court and I get a notice -- and, by the way, 664 says it may be on less than three days notice, right, so less than three days notice, I have to show up to the hearing. I would say that it is very difficult in the writ of garnishment context to litigate that issue, but in my entire practice on writs of garnishment, I've had it done to me twice. I expect this to happen a whole lot more often.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Rich, how do you take advantage of 10 days, and if he's trying to take advantage of 10 days, how do you defend yourself against it? Because it seems to me that those arguments are going to be pretty much the same, at least for the -- you know, anything one to ten days, and they're going to probably start getting a little bit skewed after you -- the further out you go. But, I mean, I think that --

MR. TOMLINSON: So let me try to address this. First of all, I want to say that this 10-day requirement, it's been in the garnishment rules a long time, since the Seventies, and the sequestration rules,

and I have filed motions to dissolve both of those kind of writs. I have never gotten a hearing in 10 days. Now, I made that comment to the clerks, and it still gets me quicker than I normally would get a lot of times, but what I'm trying to say is that also means that this is not as big a deal as he's making out to be, first of all. Second of all, there is a mechanism by which he can get documents if he wants them. He can subpoena the judgment debtor and get those records.

It's not that big a deal, and so there is a way for him to assure himself that this person actually has a proper exemption claim or not. I can't tell you whether every person that raises this claim is going to have, you know, written evidence as well as oral testimony, but we've had this procedure since the Seventies, basically almost 50 years of garnishment, and you know, I've never had a creditor tell me they viewed it as a denial of their due process.

MR. WARREN: Why is it not as -- why is it not the big deal that he's making it?

MR. TOMLINSON: Well, I can't speak for him.

MR. WARREN: Well, you said it's not as big of a deal as he's making it out to be. Why is that?

MR. TOMLINSON: So what I'm trying to say is this: This 10-day requirement is what's called directory,

just telling you what the case law says. The courts have said it's directory. It's not something that would lead to -- it doesn't have a lot of effect if the judge doesn't follow it. The point of it is, is to tell the judges that they should give this emphasis and try to hear them within 10 days. If they don't, there's no consequence on either the judge or the judgment creditor. That's why I'm saying it's a soft requirement. It's a soft guardrail. It's not a hard guardrail, and so most of the time they're going to have plenty of time. That's the first thing, so if they wanted to do even a subpoena of the bank, they might well be able to do it.

Second of all, if it's a quick hearing, there's a way to do it with a subpoena duces tecum to the judgment debtor, and if the judgment debtor doesn't respond to the subpoena and provide the documents after they've been validly served, a judge is free to take an adverse inference from that.

CHAIRMAN BABCOCK: Yeah, Craig.

MR. NOACK: So two things. The first is it is a gigantic difference to say that when somebody -- when somebody actively files a motion to dissolve a writ of garnishment and now they have taken an active interest in the case and they have an attorney and you can go back and forth with them on the evidence that you're going to bring

to the hearing versus the fact that we are now instituting a process whereby I am going to send a notice to every single judgment defendant subject to this process, and we are going to get a whole lot more claims, and we are going to get a whole lot more hearings. So to say that it's not as much of an issue in garnishment and, therefore, it's not going to be an issue in exemptions, I don't have a crystal ball, but I can tell you that this is going to be an issue. We are going to get more of these. So I --

MR. WARREN: I'm sorry.

MR. NOACK: -- do think this is going to pop up.

MR. WARREN: I don't mean to interrupt you, but --

MR. NOACK: Yeah.

MR. WARREN: -- because there is no cookie cutter way of doing things, can't that just be part of what you include in your pleadings as important?

MR. NOACK: Pleadings, how? How so?

MR. WARREN: You file your motion to do whatever. Can't you just express whatever you are wanting as it relates to this particular case in your motion to the court?

MR. NOACK: So, I apologize, but like in a receivership, I don't file any motions. I'm appointed by

the court.

MR. WARREN: Okay.

MR. NOACK: And I'm not going to be filing a motion until after this motion. I'm filing a motion to approve a distribution or something like that. So that's not really applicable to this piece of the puzzle. So, anyway, I apologize.

MR. FULLER: Again, I may be slow. How does 10 days help the debtor unfairly win and 10 days unfairly make the creditor lose? And if there is a fair date certain, what is that date? I think that's what Chip was trying to ask when he said 14 days work okay? I understand that if you go too far out you may have taken a poor person and put him on the street, but how does the other way --

MR. NOACK: Yeah, I think Rich responded to you first, so let me respond to you from my side, right. So there's two pieces to that. The first is if you say 10 days and everything is happening by mail, okay, then -- and you add it to the fact that you cannot continue the hearing, then what I end up with is effectively I have got basically two to three days' worth of notice, and I -- and it's a dispositive hearing on the nature of the property seized, and I have absolutely no effective way to do my own due diligence on that.

I know Rich is over here saying I can do a subpoena, but that is absolutely practically never going to happen, and I have a pro se judgment defendant on the other side. I can't get him served on 24 hours' notice. I can't -- and even if I did, he may not have it -- the documents in his possession. I can't force him to go to the bank and get them. It's -- it's an unworkable solution, so I would tell you, I -- honestly, 14 days plus good cause shown is probably okay. I'm okay with something that gives the judge the ability to say, okay, we're here, and we're here promptly, if everything is in front of us that we can take a look at, okay, let's move forward. If -- but if we're not, I need a day, and it may be come back this afternoon, it may be come back tomorrow, but if tomorrow was the 11th day or the 15th day, I want to be able to do that.

CHAIRMAN BABCOCK: Okay. Somebody else have -- yeah.

HONORABLE CATHLEEN STRYKER: So if the whole objective is to make sure this is an expedited process -- and I'm trying to speak loudly, and if I'm not loud enough, let me know. Is there not any room in here for perhaps putting the burden on the party making the exemption to at least state the basis up front, and if they're going to use documents to produce them to the

other side with their exemption claim? I mean, we do that kind of in family law. We make them exchange inventories and appraisements ahead of time to try to streamline things.

MR. NOACK: That's a great, great question, and if you look at the form that the creditors' bar proposed, it has a section to say, if you have -- so I think both proposed versions say bring documents to the hearing.

MR. TOMLINSON: You "may bring documents." I think that's what both of them say.

MR. NOACK: But our form, our actual form, says -- there's a box, "Yes, I have documents and I'm going to attach them." Right, and so the concept there being to encourage you to submit those documentation, but I don't know that we could get to a point to say you must submit those documents in order for your claim to be heard, but I absolutely agree we should be encouraging them to provide that so that we can make that resolution as quickly as possible.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I mean, really all we're arguing over at this point is whether the court shall promptly set a hearing on the exemption or shall set a hearing on the exemption within 10 days, correct? And

then you have a clause in yours that says the court may extend the time period. So I understand that the debtors don't want the extension, but, you know, the court may extend the time period upon good cause shown.

The problem with just saying "promptly" is, you know, promptly means different things to different people. It's better to have a 10-day deadline, 10 days in the garnishment rules. We should just keep it the 10 days.

CHAIRMAN BABCOCK: Okay. We're going to -- we're going to get a sense of the committee, and one proposal is promptly with a good cause continuance. That's one option. And the other option is 10 days with a continuance, with the consent of the parties and the judge. So how many people want to do it promptly with a good faith shown ability to continue? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I have a third option.

MR. PHILLIPS: Yes.

HONORABLE TRACY CHRISTOPHER: Ten days with good cause shown to extend it, not consent of the party.

MS. PFEIFFER: That was my idea, too.

CHAIRMAN BABCOCK: All right. So Connie seconds your proposal. Ten days with a good cause

continuance. How many people are in favor of 10 days with a good cause continuance?

All right. I'll call the roll. Ten days with a good cause continuance to the people on the phone. Levi Benton, are you on?

(No response)

HONORABLE ANA ESTEVEZ: Start with Robert.

CHAIRMAN BABCOCK: Yes or no? All right. Orsinger, yes or no?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Professor Carlson?

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Richard Munzinger?

MR. MUNZINGER: Yes.

CHAIRMAN BABCOCK: Robert Levy.

MR. LEVY: Yes.

CHAIRMAN BABCOCK: Chris Porter.

MR. PORTER: Yes.

CHAIRMAN BABCOCK: Lisa Hobbs?

MS. HOBBS: Yes.

CHAIRMAN BABCOCK: Nina Cortell?

MS. CORTELL: Yes.

CHAIRMAN BABCOCK: Marcy?

MS. GREER: Yes.

CHAIRMAN BABCOCK: Judge Wallace?

HONORABLE R. H. WALLACE: Yes.

CHAIRMAN BABCOCK: Manuel?

(No response)

CHAIRMAN BABCOCK: Justice Gray?

(No response)

CHAIRMAN BABCOCK: Did I miss anybody who is on the phone? All right. Anybody opposed to 10 days with a good cause continuance? Anybody in the room opposed? Anybody on the phone opposed? So this one is unanimous, 26 to nothing, the Chair not voting.

MR. TOMLINSON: Didn't need to this time, did you?

CHAIRMAN BABCOCK: Huh?

MR. TOMLINSON: Didn't need to this time.

CHAIRMAN BABCOCK: No, no, I didn't need to this time. All right. So that's where we've gotten to on that, and we're making terrific progress. The length of the suspension, somebody says 30 days, somebody says 21, and maybe somebody says something else. Where in the proposed new rule is that, if it's in there at all?

MR. NOACK: It's the second paragraph, the start of the second paragraph.

CHAIRMAN BABCOCK: Yeah. Right.

HONORABLE ROBERT SCHAFFER: What rule number are we on?

MR. TOMLINSON: It's his 621b.

HONORABLE ROBERT SCHAFFER: Thank you.

CHAIRMAN BABCOCK: Tab 4.

MR. TOMLINSON: Which is the second paragraph, and it says, "A court receiver or officer having the property in possession shall not cause the order of the disposition or delivery of personal property to the plaintiff for 14 days after the notice and form are served, but a receiver or officer may notice the property for sale if the date is after the expiration of the exemption period." You know, my recollection is there was a three-day extension for --

MR. NOACK: That's later. So --

MR. TOMLINSON: You want to find it?

MR. NOACK: -- up above, "The notice and form may be served pursuant to Rule 21a or 501.4," sorry, so at the bottom of the first paragraph is a sentence that says, "The notice and form may be served pursuant to Rule 21a or 501.4," which is the justice court similar rule as applicable; and the intent there, and maybe it's inartful, maybe it isn't, but the intent there was to say if you serve personally then it's 14 days, but if you serve by mail, then the mailbox rule would add an additional three days.

CHAIRMAN BABCOCK: Got it. And, Rich, you

say that's too short?

MR. TOMLINSON: I said it's too short. I said, though, that there are a number of states that adopted 20; and I'm suggesting that you should go with 21 days, the point being that a judgment debtor who is a pro se, unsophisticated, needs time for the notice to proceed because they have a certain number of days after seizure before they have to send the notice, then they need to get the form, need to review it, and they need to ask family members to help them or find a lawyer. Then they fill out the form, and then they have to file it, and they have to get it to the other side. And I'm just saying I think that needs to be more than 14 or even 17 days. I'm hoping you would agree to 21. That's what I'm hoping.

CHAIRMAN BABCOCK: And, Craig, you say that's absolutely totally outrageous because?

MR. NOACK: Thank you for summarizing the first part of my sentence. It's amazing how you read my mind.

HONORABLE ROBERT SCHAFFER: Okay, Chip, you can move on now.

MR. NOACK: Yeah, let's move on. So a couple of pieces, right, so first, at the bottom of our proposal we do summarize. We did an informal survey. You know, 30 days is really outside the spectrum for -- for

the states that kind of -- that go down this path. The second piece is if -- again, and I think based on kind of where we've been steering so far, if we have one notice, one form, and hopefully one rule, we have to contemplate the fact this is applying in circumstances where you are sitting on personal property and potentially paying for it to be stored. And so if you set that suspension period for that long a period, a couple of things happen. One is when you contemplate the notices that have to be given by the sheriff or the receiver or something like that, you very quickly start to make it almost impossible to sell within that 90 days.

The second piece is that 99 percent of the time this process isn't really going to be used, and you're also talking about 99 percent of the time this is going to be in justice court where you're giving 14 days to respond to the lawsuit. And so the argument that you should need 30 days to respond to your claim of exemption after you've already been given an opportunity to respond to the lawsuit, you've gotten the notice of the judgment, and now you're getting the notice of the claim of exemption, you know, at this point, a valid and legitimate judgment creditor has already waited a really long time to get to this point.

So, again, you've heard me say it before.

We're open to a reasonable solution and a reasonable remedy. We moved from 10, because 10 was kind of the notice period for other stuff. We moved to 14; and we're willing to kind of add three days for the mailbox rule; but realistically as a receiver, what I'm looking at is the fact that whether it's 10, 14, or 17, the bank is still processing the funds, all of that kind of stuff. I'm not really all that worried about it. We start to get into 30 days, 60 days as originally proposed, that's when it's -- honestly, the defendant at that point is kind of frustrated by the whole thing.

CHAIRMAN BABCOCK: Thank you, Craig, for not getting emotional about this. John.

MR. WARREN: What's the percentage that would actually be going through U.S. postal mail? I ask because I heard yesterday on the news that the postal inspector is reducing the volume of mail to save money, and so that slows down mail, so what impact will that have?

MR. NOACK: So my understanding is, to answer your question, so first of all, on bank garnishments and receiverships, I wouldn't hesitate to say that the majority of these exemptions are going to go by mail. That makes the most sense. Secondly, my understanding from the announcement, I did see that. I

did look at that, because I thought about the mailbox rule. My understanding is that for these kinds of notices it shouldn't apply, but I don't know that for sure. That's definitely something we should all care about in general for the mailbox rule, but if the mailbox rule changed to three days instead of four days, because of those kind of concerns, then this rule would change with that.

CHAIRMAN BABCOCK: Any other discussion? Yes, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think it's kind of odd that Rich wants extra time here while at the same time complaining that, oh, my gosh, you know, the world is coming to the end because you've frozen my property. So it seems --

MR. TOMLINSON: So you're saying I've got the unreasonable position here this time.

HONORABLE TRACY CHRISTOPHER: Yes, I do. I think so.

MR. TOMLINSON: I am picking up on that, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Because if you're really that upset about your money, you would think you would get that form in as soon as you could. Just my thought.

MR. TOMLINSON: No, I get that. All of these timing things, I was more uncomfortable with our position here, but it -- than any other, because a lot of states have 10 days, some states have 14 days. There is a number that have 20, and I just thought 21 was a better number because it's a multiple of days, weeks, and that would assure that my -- my clients, my folks, would have more time to fill out the forms. I get your point, and that's one way to resolve this issue. I'm not -- I will not cry for hours if I lose on this. So how's that for a response?

CHAIRMAN BABCOCK: What period of time?

HONORABLE TRACY CHRISTOPHER: Craig needs to win one.

MR. NOACK: Thank you.

MR. TOMLINSON: He won this morning, just so you know.

CHAIRMAN BABCOCK: I want to know what period of time you will cry. It will be prompt.

MR. TOMLINSON: I was going to cry this morning, but it just didn't, you know --

CHAIRMAN BABCOCK: Didn't seem right.

MR. TOMLINSON: Didn't seem right.

CHAIRMAN BABCOCK: And for the record and those people on the phone, Chief Justice Christopher did

have a demonstrative like hand-wringing for it when she was talking about Rich's position. So how about those in favor of 14 days with the three days if served by mail? Everybody in favor of that, raise your hands.

HONORABLE ROBERT SCHAFFER: What's the alternate?

CHAIRMAN BABCOCK: 21 days. 14 days with three days by mail.

All right. And on the phone, Benton, are you in favor or not?

(No response)

CHAIRMAN BABCOCK: Orsinger?

MR. ORSINGER: 14 days.

CHAIRMAN BABCOCK: Professor Carlson?

PROFESSOR CARLSON: 14 days.

CHAIRMAN BABCOCK: Richard Munzinger?

MR. MUNZINGER: 14, agree.

CHAIRMAN BABCOCK: Nina Cortell?

MS. CORTELL: Agreed.

CHAIRMAN BABCOCK: Judge Wallace?

HONORABLE R. H. WALLACE: 14 days. 14 days.

CHAIRMAN BABCOCK: Marcy. Sorry, I skipped you.

MS. GREER: No problem. 14 days.

CHAIRMAN BABCOCK: Okay. Manuel?

(No response)

CHAIRMAN BABCOCK: Justice Gray?

(No response)

CHAIRMAN BABCOCK: Robert Levy?

MR. LEVY: 14 plus three.

CHAIRMAN BABCOCK: Thank you. Justice Gray, did you chime in there?

(No response)

CHAIRMAN BABCOCK: Chris Porter?

MR. PORTER: 14.

CHAIRMAN BABCOCK: And Lisa?

MS. HOBBS: 14, agree.

CHAIRMAN BABCOCK: Okay. So, Rich, I don't know when you're going to start crying, but you can start right now. Yeah, Scott.

MR. STOLLEY: I vote yes on 14.

CHAIRMAN BABCOCK: Huh?

MR. STOLLEY: I vote yes on 14.

CHAIRMAN BABCOCK: Okay. So it was unanimous, the Chair not voting, and a whole bunch for and nobody against. Did anybody vote against? I didn't take an against, did I? Judge Schaffer voted against, sorry. Almost unanimous. Anybody else against?

All right. Let's move on to the -- to what was described this morning as a new issue, a time limit on

when exemption claims can be filed. What's the -- where is it in this rule, if it is anywhere?

MR. NOACK: So it is -- let's see. Ah, yes, thank you. I only wrote it. The first sentence of the full -- of the third paragraph, "A defendant must file and serve on all parties a form asserting an exemption at least seven days prior to sale or distribution."

CHAIRMAN BABCOCK: Okay. And, Rich, what's wrong with that?

MR. TOMLINSON: I get the -- the creditors attorneys would gain a benefit from this, but it would really shorten the time period by which judgment debtors can get their exemption claim form and effectively get, for example, their money back. I mean, so it's like I get it that they shouldn't have to hold the property for a long time, but if the deal is it's going to be -- they're only holding the property for 14 days plus three if notice was sent by mail. You have 17 days and yet you have to get your notice in basically within 10 days, and I'm saying that's not enough time, given the fact that the postal service -- hopefully no one has anybody who works with the postal service -- is not working as well as it used to, and it means that my clients are not going to get the notice as quick. The notice may not even get to them, I mean, quickly enough, and then they won't have

sufficient time. I have a really big problem with this, but --

CHAIRMAN BABCOCK: Did your rule, Rich, have any time --

MR. TOMLINSON: No.

CHAIRMAN BABCOCK: -- restraint? I didn't see it. Yeah, okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So I'm -- I just want to understand the timing of it. They get served with a notice. You have to wait 14 days before you dispose of the property or deliver it to the plaintiff, at a minimum, right? You have to wait that 14 days.

MR. NOACK: Correct.

HONORABLE TRACY CHRISTOPHER: But if you are in the garnishment proceeding or in a receivership, you actually go to court and get a court order before you do those things, right, or no?

MR. NOACK: So a garnishment you need to have either a judgment in garnishment, or you need to have the agreement of all of the parties. Sometimes you have a Rule 11 agreement with all of the parties. On an execution or a receivership, you don't always have an order specific to that seizure. In justice court you typically have a motion to approve a distribution, so you'll file a motion and then the court will sign off on

it, but you may have had a prior order, and so you may be seizing property subsequently after, you know, maybe six months down the road or something like that. I hope that answers your question.

HONORABLE TRACY CHRISTOPHER: Well, I'm just trying to understand how the timing would work in terms of asserting the exemption seven days before the sale or distribution. So that's why I'm trying to figure out when the sale or distribution would occur, what kind of notice they would have, to even create a seven days before.

MR. NOACK: So, yeah, so, and this problem actually arose because of an agreement that we made. So if you look at the original proposals, basically the debtors group said you can raise it -- you can raise an exemption at any time, essentially. The creditors group said, well, you need to file it within this period of time, and if you don't have a timely claim of exemption then we can move forward. And very early on the group, actually, one of the things we did agree on, was we said, well, look, we'll have the suspension period, but there's no intent to cut off a debtor's rights here. So if a debtor comes in with an untimely claim of exemption but it's still prior to sale or distribution, we still want that to be triggered. We still want that to be heard, especially as a receiver.

If somebody is -- if I get it on the 15th day, right, I don't -- I don't want to close the door to that defendant, right. But my biggest problem is if I get a pro se defendant or if I get a defendant who is playing games and the day before the hearing files a claim of exemption and just puts it in the mail and doesn't tell me, and so if I'm doing a sale to a bona fide purchaser for value, either on the courthouse steps or pursuant to a private sale, and I've given notice of all of that stuff, and I don't have a window where I can be assured that I was notified of a claim of exemption, then I get really, really nervous about what's going to happen if Rich comes by after the fact and says he wants to unwind that sale of a 4,000-dollar piece of equipment. So the intent behind it was not to kind of advance the clock or anything, but to say after that 14-day, plus seven, there is this window here where I am saying I'm going to disburse or I'm saying I'm going to sell and give me some advance time that you've got to serve me before I sell. That was the point.

CHAIRMAN BABCOCK: Rich.

MR. TOMLINSON: I just want to add, though, that not every turnover over says you have to go to the court and get approval before you distribute. Some of them say -- some of them I've commonly seen say they take some money from a bank account, they can distribute it.

Now, there's -- they've changed the language on, you know, having to get court approval on the attorney's fees or the fee for the receiver, but they can distribute to the plaintiff immediately, and they can hold 25 percent off and then go get court approval for that, but the money can be distributed very quickly. So if they send notice, they might hold the money for 17 days, but if my client only has 10 days in which to react and file an exemption claim before the money is gone and then you have to wait -- you could have a hearing, but the money is gone.

I mean, I think this -- seven-day requirement, I understand that it's inconvenient to deal with things that are late. One way to address this is they have to file it in a timely manner, and that can be before whatever that distribution date -- before the end of this period, but, you know, if you make it seven days then there's almost no time for an unsophisticated judgment debtor to get the whole thing done. They need time for the notice to arrive and time to respond to it and get it filed.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: How does a defendant know what that seven days is? If it's seven days before you're going to distribute or sale, what notice goes to the defendant to say, "This is the day I'm going to

distribute. Now, you have to do this." How does a defendant know that?

MR. NOACK: So they're either going to get a motion to distribute or they're going to get notice of the sale from the constable.

MR. PHILLIPS: And how much notice do they get of that?

MR. NOACK: So it's -- so on the notice through the writ of execution it's set forth. It's -- I think we talked about --

MR. TOMLINSON: It's like 20 days, 21 days. It's like a foreclosure notice basically.

MR. NOACK: And as far as a motion, I'm going to send the motion --

MR. TOMLINSON: And what I'm trying to tell you is --

CHAIRMAN BABCOCK: Whoa, whoa, whoa. One at a time.

MR. TOMLINSON: I apologize.

CHAIRMAN BABCOCK: That's okay.

MR. PHILLIPS: And I think the other point is there may not always be a motion or something else. It's not clear for me, for a pro se defendant, we're saying you have to find this date and then back up seven days to find out what your deadline is. I don't think

that's necessarily user-friendly.

MR. NOACK: And I guess what I would say in response to that is if there's some kind of clarifying language here that would either require some kind of point to work back from and if that's language in a receivership order that says in this kind of situation you have to do that or it's in the rule that says you've got to give a notice of the distribution or sale and then you work back from that, I'm okay with that. I think those are all reasonable approaches to that that would solve the problem, but I was probably approaching it from the perspective that most of the time they're going to get that notice.

CHAIRMAN BABCOCK: Hayes, then Justice Christopher, and then Scott.

MR. FULLER: So following up on both of those questions, it looks --

CHAIRMAN BABCOCK: Speak up, Hayes.

MR. FULLER: It looks like what we're looking for here is a date certain for distribution that everybody knows after that point in time it's over.

MR. NOACK: In order to get that date, I think --

MR. FULLER: So how do we get to that date? That's -- that's what I think people are struggling with.

How do we calculate that date?

MR. NOACK: So and I think that -- again, I think this is a result of the fact that we had an agreement that a debtor can still assert their exemption after the suspension period, right. So I think that you can either work from the end of the suspension period, right, so you can say that after the suspension period the creditor may sell or distribute, unless they actually receive the exemption -- the exemption claim prior to the sale or distribution, right. That's one way you can look at it.

MR. FULLER: That's my point. It seems to me that would be helpful to have that firm date so that -- so that everybody knows that that's the date we're working with.

MR. NOACK: I agree with that. I think it's hard to -- yeah. It's tough to do.

MR. FULLER: I mean, anything that's going to take place is going to take place prior to that date. Either you're not going to distribute, the creditor is not going to distribute until they get to the safe harbor, you know, and the debtor knows that, you know, I may not want to do snail mail. I know this is the date. Maybe I need to hand deliver it and nail it to somebody's door. Hyperbole.

CHAIRMAN BABCOCK: Okay. Justice Christopher, and then Scott.

HONORABLE TRACY CHRISTOPHER: Well, I was just going to say the same thing. How could a pro se figure out what this date is? I mean, what -- because we don't know what the seven days comes from, there's no way for them to determine what this rule means. We can't even figure it out. We just have to have some other procedure.

MR. NOACK: So I guess I would then be asking -- then I guess I would ask my original proposal was that's why you want to say there's a suspension period and then you're done, right. So you've got 14 days and then once you're done with the 14 days we can move forward. When we discussed, right, when we kind of said, well, you know what, we want to come together, we'll agree -- we'll agree to let that go, right. We'll agree that you can hold up the process and still entitle yourself to all of the rights of the rule and the hearing and fact that the debtor or the creditor or the receiver shall not distribute, as long as that claim comes in sometime before the sale or distribution.

So my response back to you would be that would argue in favor of then going back and saying, well, the easiest way to address that is to say we'll file it within the 14 days and then -- that's the easiest way to

draw the line, and then after that the creditor can move forward. Other than that, we've got to draw -- we've got to pick a date that we can calculate that runs over either -- either runs over three separate kinds of processes or we've got to pick a date that is calculatable independently of those processes.

CHAIRMAN BABCOCK: Scott, then Cynthia.

MR. STOLLEY: I think one of the things that all of us are sort of thinking or talking about here is we don't have a clear time line, and we really need a clear time line, both the lawyers and the litigants. And the way this 621b is drafted, it's totally confusing what the time line is, and so all of these questions that you're getting have to do with that time line, and the time line needs to be figured out and then the rule needs to be drafted based on that, with clear language that sets it out.

CHAIRMAN BABCOCK: Okay. Cynthia.

MS. TIMMS: Yeah, I think part of that problem is that the -- I understand now, having listened to you, that the provisions of that third paragraph or that last paragraph on the seven days --

CHAIRMAN BABCOCK: Cynthia, could you speak up a little bit, please?

MS. TIMMS: I'm sorry. I understand now,

having listened to you, that the provisions -- the seven-day provision only comes into effect after the 14-day provision has come and gone and that there has been a delay in disposing of the property, but that is not apparent from how it's written here. And so the way that those two provisions are written, the 14-day provision and then the seven-day provision, they seem to step on each other's toes, and it's confusing as to which provision we're under at any given point. So that's just a point for going forward.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Instead of doing that sentence at all, why don't we say, "Defendant fails to assert within 14 days, the officer or receiver having the property in possession, may at any time thereafter dispose of the property or deliver the same to plaintiff, unless the officer or receiver has actual knowledge of an exemption."

MR. NOACK: "Of a claim of exemption."

HONORABLE TRACY CHRISTOPHER: Yes, "of a claim of exemption." Because, you know, that way it covers both of you, I think. You still get more time to try to stop it before the order is signed or, you know, the sale at the courthouse door or whatever, which we don't know when that would happen.

MR. TOMLINSON: Well --

MR. NOACK: Tentatively, I like to --

MR. TOMLINSON: Execution sales are very rare anyway, but my concern was it wasn't enough time for my clients to make an exemption claim, and the way I read it was you get a 17-day period, because almost all of the notices go out by mail. I've seen one person served in a garnishment context with personal notice, like with a citation, and so it's 17 days. If you subtract seven days from that, I just don't think that would work. If you say that they have 17 days, that total period -- the total period in which they can file their claim, that works if the mail works. I mean, that's the real issue, and that is one reason why I was hoping that the -- the suspension period would be a little longer than 17 days. I was hoping for 21.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: My ears start burning any time I hear "actual knowledge." "Has received notice or notice has been delivered," when you start getting into a subjective standard like actual knowledge, you're going to have all sorts of collateral litigation about it, so some other -- I get Justice Christopher's point, but I don't think actual knowledge should be the standard.

MR. NOACK: I mean, I would just say conceptually, whether it's actual notice or we build some way to understand that, you know, mailing plus three days or something like that. Again, I think that's reasonable, and I think it addresses the concern that this was drafted to do. And so I think as long as we're addressing that concept, I think that's really our biggest concern, and so I do want to clarify, the seven days was never meant to invade into the suspension period. So if it was inartfully drafted, that is all me, and so, you know, it was supposed to be because we're agreeing to extend past the 14 days the fact that we can trigger this whole process then we just wanted an end date. So I am -- I would be supportive of some kind of language like that, even if we have to polish it up.

MR. TOMLINSON: I mean, if that was his intent, that this is seven days on top of 17, I would prefer that to making it 17 days and then they can distribute.

HONORABLE TRACY CHRISTOPHER: Well, it was unclear --

MR. TOMLINSON: I know.

HONORABLE TRACY CHRISTOPHER: -- whether it was 17 plus seven or 17 minus seven.

MR. TOMLINSON: That's how I read it.

HONORABLE TRACY CHRISTOPHER: Right.

MR. TOMLINSON: But if he's saying 17 plus seven, I think I -- I think we could live with that on the debtors' side.

CHAIRMAN BABCOCK: Any other comments on this part? It seems to me that we have taken our discussion beyond a 14-day versus unlimited time period. Would you-all agree with that?

Okay. So we'll -- we'll figure out the drafting, either by the subcommittee, which has in toto abandoned us, or the Court's staff, and go on to the next topic. I was trying to see something that we talked about last time, but I think we've gone through the issues, Rich, that you outlined this morning as --

MR. TOMLINSON: The only one left was what we do with the turnover order language. I don't know if that has to be decided today. That was not in the reknit from the bill, but it is something that Justice Bland had brought up, and we -- we have different proposals.

CHAIRMAN BABCOCK: Yeah. And I don't know that it was in the charge from the Court, but if Justice Bland wants us to talk about it, we're going to talk about it, so do you-all have proposals about the form of the order, and if so, where is it?

MR. NOACK: Well, so let's -- and so to be

clear, there were kind of two things, right.

CHAIRMAN BABCOCK: Right.

MR. NOACK: So what we did do as a group is we talked about if -- if the committee wanted to recommend that there should be language inside a receivership order, what should that language be, and the -- the creditors group has a kind of a one-sentence proposal, which is essentially follow the rule, and the -- the debtors group had a slightly larger proposal. The same section that we were looking at for the proposed rule, if you look just below it, has the proposed language for the creditors.

Separately, I had submitted a -- individually, a proposed order on justice courts that also has that proposed language in there. I'm not sure what tab that is, but it places --

MS. DAUMERIE: Tab 7.

CHAIRMAN BABCOCK: That's where I had gotten to.

MR. NOACK: Tab 7, okay. And it places it within the context, purely for example sake, of where you would see that, you know, in a -- in a, for example, justice court receivership order.

CHAIRMAN BABCOCK: Justice Bland, did you have any particular concerns about the order, or were you just freelancing?

HONORABLE JANE BLAND: Well, I think there was a discussion about the great disparity of the orders that are signed and in particular in justice court where there may be less oversight of these receivership orders, and given the -- you know, the powers that a receiver exercises, the idea was to set forth consistent duties and obligations for cases involving debts of $20,000 or less or debts in justice court.

CHAIRMAN BABCOCK: Okay. Anybody have any -- yeah. Go ahead, Rich.

MR. TOMLINSON: I made a proposal. It's on page seven of the joint memo. It's a paragraph. Beyond saying you should comply with whatever the rule or rules are, it does two things. One is it says when you get your contact, first contact from the judgment debtor or turnover receiver, you will tell them you may have exemption rights and you're going to get something in the mail. That's all I'm saying. Just let them know that they're going to get some information about exemption rights, and they can -- they can waive those if they want. They should know at least that they may have exemption rights. If they want to wait until they get the mailing and then talk to them about a payment plan, they can. I'm saying that if they agree to a payment plan without seeing any -- getting any information about exemption rights,

they're likely to waive them, and that would make this a procedure with no -- with no meaning. That's my concern.

And then the second part is I asked that before they distribute, before they have a sale or enter into a payment plan, that they consider. That's the last sentence in my proposal, that they consider exemptions. That's all it is. I mean, that's going to be within their discretion, but I'm asking that they -- as part of their exercise of discretion that they consider exemptions.

CHAIRMAN BABCOCK: Okay. And, Craig, I think your response was that this was beyond the legislative manddate. They didn't tell us to do this, but the Court does have general rule-making authority, so --

MR. NOACK: Absolutely.

CHAIRMAN BABCOCK: If it wants to do it, it can.

MR. NOACK: Certainly don't deny the power. I think the Texas Association of Turnover Receivers was opposed to this for a couple of reasons. One is it's just borrowed trouble, and it's beyond the mandate, but I think that kind of the bigger concern here is it has a different understanding of what the role of the receiver is. It really looks at the receiver as an instrumentality of the creditor. I understand that the receiver enforcing the judgment, you know, is obviously interested in enforcing

the judgment, which is the same as the creditor; but if a receiver order tells me that I have to inform the debtor of their rights and -- their exemption rights, here is how the conversation is going to go: So your account has been frozen, you have exemption rights. Like what? Like, you know, proceeds of a sale of a house. So I hear your account's been frozen. What's in there? Well, they're exempt. Right?

I have that conversation with the defendant after I've asked my investigative questions. So I think an order that tells me how to go about my due diligence before I inform the defendant about their rights is a little difficult. My role is independent. I'm supposed to investigate the facts. My typical order gives me the ability to ask for financial records. So I'm supposed to be independent, and so this kind of requirement that I'm supposed to kind of advise the defendant of their rights, again, I'm not -- I'm not freaking out about it, but -- but it -- what it's going to do is it just means, okay, do I have to start recording my conversations with the defendant, that sort of thing. That's not as -- my biggest concern is just it misunderstands the role of the receiver.

The other piece to it, that I've got to consider evidence related to exemptions, every receiver I

know considers whether or not the funds are exempt. The concern that I have is that I often get funds where I don't -- I don't get any contact from the defendant. Or they refuse to participate in the process. Or I'm drop checked, right. I send out the levy, and the bank sends me a check three months later, and I still haven't heard from the defendant, and a statement that I have to evaluate all -- you know, that I have to evaluate whether or not the money is exempt, is that imposing an affirmative obligation on me now to go in and conduct a full on investigation of -- and trace those funds for the last six months? I don't think that's required.

I cite it in my response. An exemption is a voluntarily claim. Most of the time when people call me they just want to work things out. I absolutely respect the right of people to assert the exemptions, and I never want to trample on those rights, but there has to be a reasonable balance. And what I want -- what I would like the committee to consider for a reasonable balance is one that imposes -- you know, there's no -- in a garnishment there's no obligation of the creditor before -- you know, before they even talk to the defendant to say, "You have rights and I can't talk to you about settlement," and so it's just a little strange to be treating the receiver differently.

CHAIRMAN BABCOCK: Okay. If he's not going to freak out, you can't cry, so --

MR. TOMLINSON: I might anyway.

CHAIRMAN BABCOCK: Huh?

MR. TOMLINSON: I might anyway.

CHAIRMAN BABCOCK: That's true. Okay. We're going to take our afternoon break, but if you've got something that you just need to say, let's say it.

MR. TOMLINSON: Just that debtors -- competence of debtor -- of receivers varies quite a bit, and I have dealt with a number of turnover receivers who, despite evidence of exemptions that no one questions, they would force me to file a motion and go to a hearing, and they would not -- I mean, I'm just telling you there's -- there are parts of that community that will not comply, and there's a reason why I'm seeking these -- these soft guardrails. The reason is that there are parts of that community that don't recognize exemptions, and I know they -- none agree on the wages part. I understand that. But on other things, I have a number of turnover receivers that I've dealt with where I had to file a motion, and I had to go to a hearing, and these are judgment debtors represented by counsel. What I'm trying to get at is not every judgment turnover receiver is going to be like this young man.

CHAIRMAN BABCOCK: Is that a good thing or a bad thing?

MR. TOMLINSON: I think it's a good thing. You know, it's a compliment towards him. What I'm trying to say is there are receivers who don't do that; and I'm trying to make sure that judgment debtors have a right that is meaningful; and if the exemption right can be easily waived during the first communication, they agree to a payment plan without knowing they have exemptions, they could be paying, you know, their Social Security, they could be paying their unemployment comp, they could be paying any of these things and not know until they get that notice in the mail later after the payment plan. That's my concern.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Doesn't the turnover order right now require a statement about exemptions or no?

MR. NOACK: So there's no requirement, but the vast majority of the orders have something very similar to the bottom of the first paragraph of what I said -- of what I have, which says, "This order does not compel turnover of the homestead, checks for current wages, or other exempt property." That's in 99 percent of the orders that get signed.

CHAIRMAN BABCOCK: We're going to take our afternoon break, and we will be back at 3:50, 15 minutes from now. Thanks, everybody.

(Recess from 3:34 p.m. to 3:50 p.m.)

CHAIRMAN BABCOCK: All right, everybody, let's get back and get after it. Roger, you ready to go? All right, well, Craig and Rich, thank you so much for everything. And as you probably know, we're going to take a stab at -- I say "we." The Court is going the take a stab at something, and I'm sure they'll seek your input once they've put something together, but this is a -- the discussion I think has been enormously helpful to the committee and hopefully to the Court, and so thanks for spending so much time on it, and hopefully the therapy sessions that you both are going to have to have, you're not going to --

MR. TOMLINSON: He's my therapist, just so you know.

CHAIRMAN BABCOCK: Well, let's not get into that on the record here, but don't send us a bill for this.

All right. We're going to move on now to the next item on our -- next and last item on our agenda, suits affecting the parent-child relationship and out of time appeals in parental rights termination cases, and

Bill is -- Bill Boyce is going to lead the discussion here, and we're going to try to get some closure on this today if we can, but if we can't then we'll come back and do it the next time. So Bill.

HONORABLE BILL BOYCE: Thank you, Chip. So this is a continuation of the discussion we have had over multiple meetings about different facets of appeals arising from orders terminating parental rights. By way of a quick overview, we started out with notice of the right to counsel. We moved to what the judgment will have to say and whether or not there is a determination of the desire to appeal. We have now moved to the part of this discussion related to dealing with claims for ineffective assistance of counsel arising in connection with a parental termination decision. We had some pretty significant discussion about this at the last meeting, which the subcommittee has attempted to distill into a rule proposal.

If the -- depending on how the discussion goes today and at the discretion of the Chair, if -- if we're at a position to make a vote on proposed rule language, I think that's where the subcommittee would hope that we could get to this afternoon. I guess we'll just have to see how the discussion goes, but to recap the discussion specifically in relation to ineffective

assistance, you will remember that we're operating against a backdrop where, in the state-initiated proceedings seeking termination, there is a right to effective assistance of counsel that attaches both to appointed counsel and, as of June from a recent decision from the Texas Supreme Court, to retained counsel. So we're operating in that realm. We're operating under the Strickland standard, adapted from the criminal context where there is a two-pronged showing that has to be made, you know, which is, roughly paraphrased, representation that does not meet the requirements of being effectively represented, and then secondly, prejudice resulting from that ineffective assistance.

So the discussion last time talked in terms of a couple of different proposals or different approaches to this. Roughly summarized, those approaches are do we try to address ineffective assistance and provide a procedural vehicle to pursue that claim and litigate it? Do we do that in the context of the direct appeal itself that is challenging the termination order, or do we try to do it through a collateral attack? I default to something akin to an equitable bill of review that could be potentially configured to allow that. Or do we do some combination of that?

One of the considerations is that a

challenge based on ineffective assistance of counsel is part of or in conjunction with the direct appeal itself, is going to be a lot more plausible if you're talking about having different counsel for appeal than in the trial court. If the same counsel is pursuing the appeal, then you have a situation where you've got the same lawyer telling the appellate court, "You need to reverse this for X, Y, and Z reasons, and additionally, I was ineffective," and that's not really practical. And so a lot of our discussion, subcommittee discussion leading up to today, is based on the situation where we have different counsel on appeal from the trial court, and we can come back and have further discussion about what happens if that's not the situation.

Additionally, you may recall from our last meeting that there was substantial discussion around the notion of dual tracking the ineffective assistance and the merits challenges. What I understood that to mean, and that may or may not be what everybody else thought it meant, was that we were talking about looking for a mechanism to have the ineffective assistance determination made as part of or in conjunction with the direct appeal. And because I personally find references to dual tracking to be confusing, because it's not entirely clear whether you're talking about as part of the main appeal, the

direct appeal, or some kind of collateral attack, I think clarity will be helped if we talk about it in terms of a simultaneous pursuit of an ineffective assistance of counsel claim in conjunction with a direct appeal or a separate appeal or separate challenge through some kind of collateral means.

So what I'm going to try to do for the remainder of the discussion today is to talk about this in terms of a simultaneous mechanism. If you look at the memo that was distributed to -- for today's meeting, the ineffective assistance of counsel discussion starts at page six. On page seven, carrying over to page eight of the memo, you've got the House Bill 7 Task Force report recommendation of -- of an additional Texas Rule of Appellate Procedure 28.4, which sets out a procedure for basically a simultaneous process with a direct appeal to raise and determine claims for ineffective assistance of counsel by the parent whose rights have been terminated.

I've summarized discussion from the committee and from our last meeting, and if you get to page 10, what you will see in redline format are -- is a proposed tweak of the House Bill 7 Task Force proposal that tries to incorporate some of the discussion that we had from our last meeting; and what I hope, if the discussion allows it, is that we will be in a position by

the close of proceedings today to take a vote about whether this approach sketched out on page 10 of your memo is the direction that the committee as a whole wants to go in for the -- to recognize the mechanism for the simultaneous appeal on the merits, plus a way to address a potential ineffective assistance claim. Again, when you're talking about a situation where there is different counsel on appeal from the trial counsel.

So that's kind of the overview of what this memo covers. I want to highlight a couple of points before I invite anybody else on the subcommittee who wants to add anything. What you're going to see in this memo is that there's, you know, some back and forth on the subcommittee, and I think Evan is going to have some potential points that he wants to raise for consideration, but going back to the proposal that -- the original House Bill 7 proposal that we discussed at the last meeting, you may recall that this proposal involved a motion plus a remand and an abatement of the appeal for the trial court to address a claim of ineffective assistance of counsel. That kind of morphed into a discussion about dual tracking, which, again, I understood to mean more of the simultaneous pursuit of the appeal on the merits and the ineffective assistance of counsel claim.

The main difference, just in practical

terms, between the House Bill 7 proposal that we looked at last time and the revised proposal that you have on page 10 of your memo is that the revised proposal on page 10 does not assume there is an automatic abatement of the appeal; and that's, I think, what the subcommittee's understanding was -- it's certainly my understanding -- of what we're trying to get at at this notion of dual tracking, which is trying to have the appeal on the merits go forward, provide a mechanism to challenge ineffective assistance of counsel if a sufficient threshold showing of that can be made, but not put the brakes on the appellate process to such a degree that the ultimate determination of whether or not the parental rights are going to remain or be terminated is held in suspense indefinitely or for a prolonged period of time, in reflection of one of the main considerations here, which is not having the rights and the circumstances of families and of the children kept in suspense for a prolonged period of time while parental termination is being fought out in an appellate arena.

That underlying policy is reflected in the Rules of Judicial Administration, which place a time limit or a recommended time frame within which these are to be decided, and it's also reflected in the legislative excerpt that was circulated, which we'll talk about in a moment. So that's the balancing of interests, having the

appeal go forward, providing a mechanism for challenging ineffective assistance of counsel, inappropriate circumstances, but not tying up the process in knots forever.

So the subcommittee has talked about this across multiple meetings, and I think that the proposed rule amendment that you have in front of you that appears on page 10 is an effort to balance all of those considerations; and it's largely modeled after Texas Rule of Appellate Procedure 29.4, which deals with circumstances when, in that case an interlocutory appeal, a trial court can have some continuing participation in the case. For example, in an appeal from a temporary injunction, if there is a motion for contempt while the appeal is ongoing from the temporary injunction, under 29.4 the court of appeals can refer that for findings or recommendations to the trial court.

It's not really a formal remand and abatement. It is, to our understanding, an example of this ongoing dual process. The appeal is ongoing. It lives in the court of appeals, but a discrete issue or consideration is referred back to the trial court for handling. Once the trial court handles it, it sends up its recommendations to the court of appeals to be dealt with in the context of the larger appeal. That's kind of

the logic behind this. Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Is there a similar procedure in the criminal courts for ineffective assistance of counsel when it's recognized on appeal?

HONORABLE BILL BOYCE: To my understanding, there is not kind of a similar referral mechanism. It really divides into either you pursue it in a direct appeal or you pursue it on a writ of habeas corpus. There's not really this middle ground that I'm aware of.

HONORABLE ROBERT SCHAFFER: Okay.

HONORABLE BILL BOYCE: And so that's the logic of this. I don't think that this proposal necessarily forecloses an abatement, but the notion of a referral as opposed to a remand has the notion of allowing the appeal to go forward on the merits of termination. If a threshold showing is met, then the trial court can be enlisted to make findings and recommendations. Those go up to the court of appeals, and it deals with it all at the same time, presumably within the time frame that is set out for recommended -- the recommended disposition for these types of cases.

I'll make one other comment and then ask Evan or anybody else from the subcommittee who wants to elaborate. One of the areas of discussion in the subcommittee was the question of can you really

simultaneously address the merits and ineffective assistance, and there may be some division of opinion on that. You know, my view is I'm not sure how you get to the prejudice prong of Strickland until you know what happened on the merits of the appeal. That may or may not be a universally shared view, but I'm not sure that that particular procedural issue has to be definitively answered if we have a mechanism that allows the court of appeals to consider both the merits and ineffective assistance in conjunction with one another as part of this simultaneous process.

I think the remaining issues, aside from the larger ones, are if we go down this road pursuant to this proposal, what kind of time frames make sense and are practicable. When we had our discussion last meeting I think Chief Justice Christopher and others had raised very legitimate concerns that the time frames that were spelled out in the House Bill 7 Task Force proposal were mighty tight, and again, in keeping with the desire to keep things rolling, but a discussion to be had is what are realistic time frames for both court of appeals and a trial court to deal with these issues if we're going to have this kind of simultaneous process.

So that kind of completes my overview, but I would ask anybody else from the subcommittee who wants to

add or elaborate on anything to please do so.

MR. YOUNG: I would like to, and I might come over and sit by you, because I've heard from people on the phone that -- Pam is listening, and she said that Bill sounds loud and clear. That was not the case for people speaking earlier today, so it was a good call. I agree with most everything that we've talked about. It seems to me that as we've gotten deeper and deeper into this topic, the -- the clarity that we're maybe coming to is reflected by that statute, with the six-month deadline for being able to file your challenge to the order of termination, which reflects internal legislative desire that we put some greater weight on the balance between the right of the child to be able to get on with life and remove the cloud of uncertainty about who his or her parents are and the need, the essential need, that we have to make sure that we're not terminating something as precious as parental rights without being sure that the law actually requires it. And so with that sort of legislative command to ensure that there is an end at some point to collateral attacks, which could otherwise go on almost infinitely, the idea of keeping this as formally part of the appeal has great atraction, and that's I think the single most important thing that today's discussion involves.

I think that we have to think of it quite differently from a criminal conviction and a collateral attack via habeas corpus or whatever else on it. The time element is fundamentally different there, especially if it's a long sentence, for example. It's not terribly urgent, and so the general practice, of course, is that we wait until the conviction is, in fact, final. It's gone through all possible layers of review in the state courts before you can even begin something like a federal habeas or even a state habeas, is the general practice in the state and certainly is the federal law and expects that.

This is different. This is almost exactly the opposite. You know, we have a child there who is not a party here, but is potentially a victim, but at the very least has very important rights that are being drained with each passing day of uncertainty through the judicial process. And so keeping the ineffective assistance of counsel issue as part of the direct appeal satisfies the legislative limitation on time and creates the incentives, if done correctly, to quickly, efficiently, accurately, expeditiously identify ineffective assistance of counsel such that if it, in fact, caused improper judgment of termination, we can identify that, reverse it, and go back through it again.

So a couple of different things about that.

You know, first, what is the prejudice? I think the prejudice is supplied by the fact that we now have on appeal an order terminating your rights. If the performance, which is an objective, supposedly objective standard, can be identified and it can be causally linked to the order that the trial court issued, even if it might ultimately be overturned on some other ground, I think that for purposes of a direct appeal the appellate panel can certainly regard that as supplying the necessary prejudice to satisfy the Strickland standard. And, of course, if it turns out that there is some other reason to reverse the judgment of termination of parental rights and that parental relationship, fine, then you don't need to address that issue, or you could address it as an alternative holding or something like that.

And that would be the case, for instance, if the new lawyer coming in to take the case instantly discovers upon, you know, receiving the -- you know, the papers, something on the face of the record or by talking to his client or the client's family members that the prior counsel just never -- had all of this stuff and never even opened the letters from relatives of the parent whose rights have been terminated, never actually talked to witnesses who are all too happy to talk, things that would objectively satisfy the performance prong of

Strickland. That could easily be added to an appeal at the very beginning, and then the court of appeals under a world in which we didn't have this limited remand or referral, would be able to address whichever issues it wanted, just like we do in any other case where there might be several interlocking or contingent issues. The court doesn't have to address everything if it can reach a judgment that is sufficient for the day based on only one or two of the issues.

So then the question is what can we do to incentivize that lawyer who is now coming into the case to most quickly determine whether or not there is a basis for pursuing the ineffective assistance of counsel claim, and I think that there's something to the idea of an abatement, if it can be done quickly. If we can say to that counsel, you're not going to have to pursue this entire appeal on the merits, file all of the briefs, if pretty quickly on the face of the record or through some initial investigation within whatever period of time -- I don't know what that should be yet. This is all sort of an analytical framework we're discussing today. If you can, you know, within a set short period of time identify that there's, you know, a good basis, a prima facie case, for ineffective assistance of counsel claim, then we'll abate the rest of it. We'll refer this back, a limited

remand perhaps, to the trial court to develop the facts, make a recommendation on the law, and that may end up shortcircuiting the need for the rest of it.

On the other hand, if we are going too far into it -- and sometimes it's true, there may be an ineffective assistance of counsel case that can be made but that can't easily be identified at the outset. Well, in that instance the court of appeals still should be able to say we will accept this as a late issue -- still part of the direct appeal. It's a late issue. There's good cause shown for presenting an issue that wasn't presented maybe when the opening brief was filed or whatever. We'll send that back per everything that Justice Boyce is describing, but we're not going to stop working on the appeal. You're still going to have to brief the merits issues. Meanwhile, the district court can continue to, you know, flesh out and determine whether in the district court's own judgment its termination may have been caused by deficient performance of trial counsel, send that back up.

The court of appeals can then take everything before it issues its judgment. If the court of appeals is able to reverse the judgment more speedily before the trial court is able to hold that hearing, it should do so, and send it back. The trial court could

still gather the facts if it wants to, but all of those things will allow the six-month period to work pretty well together to balance the rights and to incentivize counsel and the courts, I think, to proceed in the most efficient and expeditious way possible.

So that's why I don't think there's a problem with identifying prejudice. I do think there's a benefit to keeping it all within the appeal, a single appeal. I don't think we then have to worry about what this new vehicle will be. You know, the statute that we've talked about, 161.211, puts a limit on how late you can bring a collateral attack or direct appeal point challenging the parental termination, but it does not give you a vehicle to do it. It's just like saying, well, if there is one, you have to do it within this amount of time. That does not itself then bootstrap into giving you a separate vehicle. I don't read it that way. It reads as a restriction and not an authorization of anything, so by continuing this as part of the direct appeal, in other words, we would avoid the need to worry about some new vehicle creating some new docket number and all of the rest of it.

I'll mention this briefly. We've referred to this as a matter for what happens when there's new counsel, which is, you know, the most obvious thing; but

we do need to keep in mind, I think, that oftentimes it will presumably be the same counsel who was there at the trial court who will proceed; and we can sever that all off and save that for another time; but if that six-month restriction applies to that person, too, then I don't think we're doing any great favor by saying, "Well, don't worry about it, we'll deal with that some other time," because that person may have the parents' rights cut off and be in a worse position because he never had another lawyer able to take it up.

So I don't know what the best solution is. It probably goes beyond the authority that the Court may have, because I think that it may ultimately require some legislative authorization of something like an ombudsman who can go through and help scour these cases and verify or the creation of a pro bono program where people can help give some confidence that the appellate lawyer, who is also the trial lawyer who might have been ineffective, in fact, was not ineffective. But what I think we can do is to say that if this six-month restriction actually applies to everyone, whether you have new counsel or not, the client needs to be told that at the moment that the appeal occurs and to be said, "Look, you may be very happy with your lawyer. The lawyer is continuing on." How do we know ineffective assistance of counsel? Probably it's

all good. If you like your lawyer, you can keep your lawyer, to paraphrase a famous line. But you should know from six months when that judge terminated your rights, if you later conclude that he was not an effective advocate and his ineffectiveness is what caused you to lose your rights, too bad.

So you need to be thinking about that, and if you think that he did something that wasn't quite right, you need to speak up now. You might need to talk to another pro bono lawyer, which is tough if you're sitting in a prison cell or something like that, right? But it's better to tell them that and avoid having rights terminated without them really knowing it, so that they can at least try it pro se or getting another lawyer, and then that creates the awkwardness, but still I think a feasible awkwardness in this very, you know, dystopian hellscape we're describing for someone whose rights are about to be --

CHAIRMAN BABCOCK: Did you just say "dystopian hellscape"?

MR. YOUNG: Yes. Yes.

CHAIRMAN BABCOCK: That's what I thought you said.

MR. YOUNG: At the very least, they're in a position to try to put that and make the claim, which

would satisfy the statutory six-month limit to try to make that claim within that period of time, at which point the appellate point would be raised up and you would have the oddity, the awkwardness, of having one lawyer pursuing the merits in the appeal and either a pro se or a separate lawyer participating in the same appeal, challenging the first lawyer's professional competency. Awkward, right, but still something that would satisfy the statutory goals of timeliness in advance of the child's interest, which I think deserves a lot more compassion, consideration, and solicitude than we maybe tend to give it just in an abstract matter, sitting here thinking as lawyers about dry legal text. It would facilitate that ultimate final determination and give us at least a greater sense that the ultimate result that the courts generate is an accurate, fair, lawful, constitutional one, thus achieving maybe the goals that we've been describing.

So all of that may sound complicated. I actually think it would simplify things, and this is a problem that has been deviling us now for how long?

HONORABLE BILL BOYCE: Long time.

MR. YOUNG: It seems like 50 or 60 years that we have been talking about this topic. In the five years that I've been on here, at least 50 of them have been talking about this particular topic it feels like,

but I think that keeping it focused on a single appeal and trying to work everything into it would actually simplify the burdens on the courts and the parties and that we might be able to pass, you know, a final recommendation on to the Supreme Court before too many more children's -- too many children's rights have been muted out by turning 18.

HONORABLE BILL BOYCE: May I just make two quick observations?

CHAIRMAN BABCOCK: Sure.

HONORABLE BILL BOYCE: Number one, I would solicit from the committee as a whole your thoughts about dealing with the same counsel issue. I don't mean to suggest in any way that that should be postponed or postponed indefinitely. I think in terms of breaking this into pieces to try to deal with this question, the easier and the threshold one that's reflected in today's memo is a different counsel. I think that's somewhat easier to address, but I think next up is what happens if it's not different counsel?

And I also want to make one other observation, and again, I'm not sure we need to resolve a fight about whether theoretically you can or cannot decide the merits -- decide ineffective assistance of counsel before you decide the merits. I'm not entirely sure how

that opinion would write up, but I make this observation, which is, an additional consideration that I would -- I think we need to take into consideration is the professional consideration of the attorney whose conduct is being challenged as being ineffective. That, too, has collateral consequences, and so I don't -- I have concern about setting up -- assuming or setting up an incentive that says a reviewing court can just say that without reaching the merits we're going to conclude that attorney X was ineffective for these reasons.

I think there's going to be some internal resistance to doing that, putting aside the question of even how does that write up.

CHAIRMAN BABCOCK: Okay. Scott.

Let the record reflect that Scott is moving toward this end of the table.

MR. STOLLEY: I know Pam will want to hear what I have to say. As -- as Bill and Evan have detailed, this is a very thorny issue. A lot of people have spent a lot of time on it. The task force spent a lot of time on it. Our subcommittee, this whole committee talked about it last time, I believe, and it's -- it's just very difficult; and, like, for example, we got a lot of pushback from the appellate judges that the time frames for the so-called abatement were just too compressed, it

wasn't feasible to do. So I think we're trying to come up with a process that would meet those concerns, and that's why the subcommittee came back with the tweaked proposal based on the task force proposal.

The problem that I have with the current structure of the proposal is that to me it violates a fundamental rule of appellate review, because the idea is we're going to refer the matter back to the trial judge to make some fact findings and then send it back, those findings back to the appellate court, for the appellate court to decide in the first instance has there been ineffective assistance of counsel. But so where I think this violates the rule -- sort of fundamental review of what appellate review is, is there's no final ruling from the trial court for the appellate court to review and say, yes, that's a correct decision, there was ineffective assistance or, no, that's an incorrect decision.

So we're making the appellate court the court of first instance under this proposal, and I just don't think that's the right way to structure it. I think the trial judge has to make the call whether there was ineffective assistance that resulted in harmful error and then the appellate court can review that. So that's the problem I have with the current proposal. I think that could probably be -- that tweak could probably be put in

there, and I'll just throw out one hypothetical. If we do it that way, what happens if the trial judge says, "Yes, you know, I witnessed -- I saw the lawyer falling asleep, and I think that was harmful error for reasons X, Y, and Z, and I'm granting the appeal." Doesn't that moot the appeal? Or does that expand the appeal and now make the appeal also encompass was it error to grant a new trial? I don't know the answer to that, but to me that kind of points out that we really do need to let the trial judge make that decision and not just make a recommendation.

CHAIRMAN BABCOCK: I hate it when smart guys point out all of these problems like that. Lisa Hobbs.

MS. HOBBS: Hey, guys, sorry I'm on the phone. I guess my comment is not so much how y'all decide it, because y'all seem to have a differing opinion. I know appellate law -- I mean, hopefully, I mean, I'm board certified. I've been doing this for 20 plus years.

CHAIRMAN BABCOCK: We'll stipulate.

MS. HOBBS: Yeah, we'll stipulate. I know CPS cases because I've done them a lot with my partner who does a lot of CPS cases. I am not following y'all. Like I am not following what we're supposed to be voting on. I feel like we're going back to a lot of previous conversations or not. I followed Justice Boyce, former Justice Boyce like entering -- when Evan started talking

it got very passionate, and I appreciate the passion. There's a lot of passion on this issue, but I'm just lost, and I'm one of the committee members who knows more about both appellate and CPS, and I'm lost.

So, I don't know, maybe someone back me up and like where are we going with this conversation? Because we can converse for hours about this, but, I don't know, I guess I just -- I'm lost, and if I'm lost, I'm guessing 90 percent of that committee sitting in that room and on this phone call is also lost. Where are we going? What does the subcommittee need us to vote on or talk about, because we're going into big pictures, and we just went into six months on a constitutional thing, and I'm like, nope, nope, whatever the Legislature says does not mean what the Constitution says, so I'm out of that. I just need this whole thing to be just narrowed down a little bit, because I feel like we just went a little bit off the rails.

CHAIRMAN BABCOCK: Yeah, actually, Lisa, everybody has left the room, and they're wandering around trying to find where we are on this thing. There are answers --

MS. HOBBS: No, I don't take that lightly. I'm just saying I do know these issues, and I really am like if I were not as attuned, if I couldn't pick up

little pieces, I'm like, I disagree with that, I agree with that, I disagree with that, but if y'all are just drilling a lot in people who do not practice in this area both in the appellate world and -- so that's just -- I'm sorry that I have -- y'all may just hate me for making that comment, but I'd guess there's some members of the committee who are raising their hand and saying, "Yes, Lisa Hobbs, I am as confused as you are."

CHAIRMAN BABCOCK: No problem, Lisa. I didn't mean to make fun of your comment, and as I understand it -- and I am the lowest common denominator here, so everybody knows more than me, but as I understand it, we are focusing on a proposed rule found at page 10 of the memo, which would take Rule 28.4(d) and create something that would happen while an appeal is pending in order to get a reviewable thing for the court of appeals on the issue of ineffective assistance of trial counsel. Am I right about that, Bill?

HONORABLE BILL BOYCE: That's what I thought we were doing.

CHAIRMAN BABCOCK: Okay.

MS. PFEIFFER: Chip, can I address one aspect of what I hope will clarify this for Lisa and everybody? There's a lot of complexity to this, and we've probably brought up a lot of the complexity, and that may

make it seem harder than it is, but fundamentally I look at this as a mechanism for expanding the record on appeal when you've identified during the appellate process that there is this potential ineffective assistance of counsel claim, and so it gives a party the ability to go back down to the trial court where you can create a bigger evidentiary record and get findings of fact from the trial judge that then can go up and become part of the appeal that's already in process.

CHAIRMAN BABCOCK: Yeah. And that raises a question that I had, which is you're sending it for findings of fact, but not conclusions of law, which is the issue that I think maybe Evan pointed out that normally you have a trial court's ruling that you're going to ask the appellate court to consider, and why did the subcommittee just send it back for only findings of fact and not conclusions?

MS. PFEIFFER: Well, that's a good point, and I think the answer -- Bill can correct me -- is that's how it was originally drafted, but I would agree that there should also be conclusions of law in that trial court proceeding.

CHAIRMAN BABCOCK: Yeah, then you would have something reviewable for sure, I would think. But, yeah, Cynthia. Yeah. Hang on, Cynthia. Yeah, somebody is on

the phone.

MR. ORSINGER: Yeah, Richard Orsinger, Chip. In response to Lisa's comments, she and I were both on this task force, House Bill 7 Task Force, and I feel like what we were trying to grapple with was the fact that this is an accelerated appeal where the record is put together very quickly, and the brief has to move forward very quickly, and yet the problem is ineffective assistance of counsel that requires a hearing where some lawyer develops the record on things that are not apparent. So we're not talking about lawyer who falls asleep during the trial and doesn't cross-examine any witnesses. We're talking about situations where investigation was not done, where potential witnesses were not called, and none of that is going to be in the record that goes up on an accelerated basis.

So first thing you have to figure out is, you know, what do you do about the fact that the -- the motion for new trial has to be heard so quickly? What do you do about the fact that the appellate record has to go to the appellate court so quickly and then what do you do about the fact that the lawyer who would be expected to raise this is the same lawyer that tried the case is appealing it. Is the lawyer arguing his own incompetence and he might not even see his own incompetence, much less

be able to persuasively argue it?

So I feel like what we're were trying to do is uncouple the review of the ineffective assistance of counsel argument from the accelerated appellate timetable that gets the case into the court of appeals so quickly that you can't effectively make a record in the trial court for the court of appeals to review on this question. That's my understanding of why we even had this discussion, and, Lisa, I don't know if that resonates with you or not.

CHAIRMAN BABCOCK: Thank you, Richard. Cynthia has her hand up.

MS. TIMMS: Yes, I was wondering if the committee considered the possibility that an appellate court could raise this issue on its own motion so that it might in part get around the problem of the same lawyer, same appellate lawyer, having to attack his trial court performance. It's just a question for the committee.

CHAIRMAN BABCOCK: If the court -- if the court of appeals considered it sua sponte, they would still need authority to toll the Rule 6.2 of the Rules of Judicial Administration and perhaps have authority to remand for that purpose, so it wouldn't be inconsistent with this rule. Maybe there should be something additional that permits the trial judge to consider it sua

sponte.

MS. TIMMS: I think that that would be right, if the committee thinks that that's something that they would want to think about. The rule as currently written requires a written motion, and so I think --

CHAIRMAN BABCOCK: Yeah.

MS. TIMMS: -- you could expand that language.

CHAIRMAN BABCOCK: Yeah. Good point. I don't want to get off topic here, but it's something that's been bothering me for three meetings, and I may have raised it before, but I don't think I did. Are we going to just blow by ineffective assistance of counsel on appeal?

HONORABLE BILL BOYCE: No. I think part of the discussion of other circumstances in which ineffective assistance arises will have to encompass both the same lawyer or ineffective assistance on appeal. As stated another way, I'm not sure that we can escape some kind of collateral attack to address those circumstances. I guess I have a thought that what I think we're debating is do we want to channel as much of the ineffective assistance mechanism into the direct appeal or some kind of a parallel direct appellate proceeding, while recognizing there's still going to be some other circumstances that

have to be addressed?

And if I can actually respond to the question, Chip, that you had asked earlier, the references to the language, "findings and recommendations," that was actually parroting TRAP 29.4, which is the formulation used there. So I don't know that -- speaking for myself, I'm not sure that there was a thought to exclude the possibility of making conclusions of law as part of that, but that's where that language came from.

CHAIRMAN BABCOCK: Yeah, no, that's great. I was, frankly, was piqued by Evan saying, you know, typically you've got to have something you're reviewing and if all you have is findings -- or maybe it was Scott's point. You fungible appellate lawyers over there. Yeah, go ahead, Richard.

MR. LEVY: This is Robert, actually.

CHAIRMAN BABCOCK: Oh, Robert. Sorry.

MR. LEVY: Does the trial court retain jurisdiction to enter orders in the case while it's on appeal, and could the trial court enter or actually disqualify -- or not disqualify, but find that counsel was ineffective, and would that actually then moot the appeal because the individual did not get effective assistance of counsel? Doesn't that change the dynamic of what's being appealed? Can they look at the merits if there's a

finding that counsel was ineffective?

HONORABLE BILL BOYCE: So speaking for myself, Robert, the way that this current draft proposal on page 10 reads, it's framed in terms of the trial court making recommendations, and I think implicit in that is the assumption that any ordering that gets done and any finding that gets done would get done by the appellate court in conjunction with the appeal.

MR. LEVY: That means the appellate court is making an original ruling? That just seems very unusual. In criminal cases wouldn't the trial court make the determination of ineffective assistance?

HONORABLE BILL BOYCE: It would at the start, and let me flag another potential analog, which is another way to look at this is similar to review of sufficiency of security or a supersedeas for appeal, where the rules say that the trial court expressly retains jurisdiction. Maybe that's a better fit, that you've got the trial court retaining jurisdiction to make whatever findings are needed and then those can be challenged on an appeal -- or challenged I guess, you know, on motion to the appellate court.

But following up on your first point, I'm not sure that a referral would necessarily mean that an appellate court is making fact findings that it doesn't

have jurisdiction to make. I think it would be folded into the appeal and be reviewed. "It" being the ineffective assistance component of the appellate challenge would be folded in and be reviewed along with the merits, but there may be room to debate that.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: It appears to me that a trial court would have an obligation to satisfy itself that counsel's assistance had been satisfactory. The paragraph judgment -- (phone audio distortion)

THE REPORTER: I can't get that.

MR. MUNZINGER: Especially in situations where I may be in prison or something like that and where a person doesn't have sophistication under the law; but a trial judge, it seems to me, if he's going to take away the party's right to be a parent, he has a duty to himself or herself to be sure that the party has had adequate counsel; and if he believes that counsel has not been adequate, he must then ask himself a question as a trial judge, has this failure been such as to warrant a new trial. Is -- if there were a rule which would require the trial court to so state in his or her judgment, that that issue has been reviewed by the trial court and found that date or the assistance was satisfactory or, for example, was not satisfactory and a new trial was granted and

grants a new trial. Or it was not satisfactory but it did not lead to reversible error.

Now he has something to review as in other cases. In most cases the appellate courts avoid ruling on cases that -- on issues, rather, that have not been presented to or decided by the trial court. Why is it different in this case? Because there has to be some kind of constitutional review of the adequacy of representation, but at the same time, the trial court, if there has to be such a review, why doesn't the trial court in a rule specify that that duty falls first on the trial court so that you're not in the position of having two lawyers reviewing the case or appealing the case and having an appellate court passing upon the finality of a judgment, which may or may not have been the result of good lawyering, or adequate lawyering. Not good lawyering, but adequate lawyering.

It just seems to me that to stay in line with the Rules of Appellate Procedure, at least as I understand them, and I'm certainly not a specialist, my belief had always been that if I hadn't raised an issue with a trial court I had waived it on appeal. While that may not be true for the person under the circumstances that we're addressing, you could put a specific duty on a trial court in a rule which says you better -- you must

make a finding regarding the adequacy of representation and specify why if you find it was bad, and so one problem is we may not know all of the facts.

We don't know if this guy has good representation or what have you. True enough, you may have to put it in the rule that the trial court has to make inquiry if it believes so, but I think you're getting into a real problem of -- a conceptual problem of having a lawyer defending his work while at the same time being attacked by another lawyer in the case in order to save time is -- ludicrous is the word that comes to mind. I don't know if it's ludicrous or what it is. It's certainly analagous.

In any event, it speaks to me that there is something that can be done at the trial court level that revisits this thing of having the adequacy of representation being addressed in the same appeal on the grounds of taking away the trial. You could put the onus on the trial court. Then you've got a finding to be reviewed. The trial court, whom we have to assume is competent, reviews the records of the case before him and the conduct of counsel before him and states, "I find the representation to be inadequate. I grant a new trial." He's got that authority. He's got that authority. The trial judge has the authority sua sponte to grant a new

trial in the interest of justice; and if he doesn't, that is something that someone can appeal; and he can be required to make a statement on the record and then let that be part of the matters going up; but not saying anything about it and just kind of hedging it and putting a new lawyer in the case doesn't make sense to me. I'm finished with my comment.

CHAIRMAN BABCOCK: Richard, I wish you were here. Because if you were, you could see all of the appellate lawyers are huddled up here, and they all have looks on their face like they want to take you out to an alley and beat you up.

MS. PFEIFFER: I won the prize that I get to go first, but there's a lineup. I mean, I think it's helpful to process this in terms of when does the ineffective assistance become apparent. So if it becomes apparent during the trial, the trial judge could declare a mistrial, the trial judge could be -- wait until it's presented with a motion for new trial, or the trial judge could sua sponte grant a new trial. So if it's evident in the trial court, the trial court would have that authority.

This -- we're really dealing with the issue of when this isn't identified or raised until you're already in the court of appeals; and so at that point you

would typically need to go back and get additional evidence and additional findings, because oftentimes ineffective assistance of counsel does not just depend on the trial record, but things that are extrinsic to the trial record; and so you might need to have testimony from the attorney or testimony from third parties or different pieces of evidence that you didn't develop in the trial itself. And so what this is doing is giving a mechanism and a procedure and a time frame and all of the rules you need to then go down to the trial court, promptly do that while the case proceeds on appeal, and I don't think of this as a situation where the appellate court would be making an order in the first instance.

I think of it as at that stage the trial court no longer has plenary power to make a ruling on this, but the trial court could make findings of fact. I think the trial court could also make conclusions of law, send that back up to the court of appeals; and if there's a record now that develops ineffective assistance of counsel, I think the court of appeals then can decide that issue as plain error or something that doesn't have to be preserved in the trial court, but it could be part of the appeal.

CHAIRMAN BABCOCK: Yeah, Richard, the appellate lawyers are now appearing to be relieved, but I

think Robert Levy is trying to get a comment in. Robert.

MR. MUNZINGER: Well, may I briefly respond?

CHAIRMAN BABCOCK: Yeah. We would be disappointed if you didn't.

MR. MUNZINGER: I promise it will be brief. The appellate court in the circumstance just outlined in that reply becomes the finder of fact in the first instance. Is that constitutional? Is the Supreme Court bound by the court of appeals findings of fact when it comes up to the Supreme Court, if it wasn't found by a trial court? That's especially in the situation if there had been a jury. I don't recall what Orsinger told me about -- told us all about whether the jury said -- if there was a jury that it was binding or not, but the point is the appellate court is the finder of fact in the first instance on this issue.

CHAIRMAN BABCOCK: Got it. Robert.

MR. LEVY: Yeah, so a couple of points on that. What would happen if the trial court issues a recommendation that counsel was ineffective and the court of appeals, I guess, rejects it? That creates a very, I think, potentially problematic fact pattern if the -- you know, somebody's rights -- or the children are taken away, but it also -- one of the questions that I had really for the appellate judges is how easy it would be to analyze

the case where they're making the judgment on the effectiveness of counsel at the same time they're looking at the underlying facts that might clearly suggest that custody should be removed. In other words, it's obvious and apparent that the facts warrant the removal, but they also have to consider ineffective assistance and potentially send the case back for new trial, and it just seems like it -- I agree with Richard.

It just makes much more sense to have the fact-finding take place at the trial level, and the trial court can hear ancillary evidence on effective assistance. The trial court is not bound by what's before her or him in the record of what they see. They could -- you know, I don't know why they wouldn't be able to call witnesses and make conclusions, but, you know; and what do you do if the court of appeals doesn't feel that the trial court got enough evidence about the issue? Do they send it back for additional testimony, just because they don't -- they can't reach a decision? That just seems very awkward to do it that way.

CHAIRMAN BABCOCK: Yeah. A question that I have -- and maybe there's an easy answer, but if the trial court has lost plenary power, does it have jurisdiction to do any of this?

MR. YOUNG: Limited remand.

MS. PFEIFFER: Yeah.

CHAIRMAN BABCOCK: I mean, but can the Supreme Court by rule create jurisdiction in the trial court? Yeah, Evan.

MR. YOUNG: I mean, to me the whole thing is this is not reviewing a new judgment or anything like that. We're smuggling this in as an appellate issue, and the issue is should the trial court's judgment be reversed, and we're allowing a new issue, and the issue is -- to justify reversal is I got ineffective assistance, and the court of appeals can allow -- you know, the rule can allow that new issue to be brought up and say, "Well, we don't have the evidence that we would need. We're not a fact finder," and so that's the purpose of the referral. And the judgment that's being reviewed is the same one that would have been reviewed anyway on the merits, and so it's not starting a whole new collateral attack, a whole new docket number, all of that kind of stuff. It's, keep the focus, court of appeals in an appellate capacity deciding whether or not to affirm or reverse a single judgment, and all that this would do would be an expeditious way to send it back so that someone who is capable of it -- but I disagree a little bit with Scott. I don't think you need to have an actual judgment of any sort that says it was ineffective. It's just now an

appellate point.

CHAIRMAN BABCOCK: Yeah, Bill.

HONORABLE BILL BOYCE: And in answer to your question, can you do that by rule? Looking at TRAP 24.3(a), I think the answer is yes.

CHAIRMAN BABCOCK: Okay.

MS. PFEIFFER: When I said lost plenary power, I'm referring to plenary power over the order and the review. I don't think the trial judge could then vacate its own order once it's on appeal.

MR. YOUNG: Exactly.

MS. PFEIFFER: But the trial court has power to open an evidentiary record, make additional findings, and send that back up.

CHAIRMAN BABCOCK: Go ahead.

MR. PHILLIPS: The way I've thought about this -- and Scott's problem, too -- about the order is we do say most of the time the court of appeals isn't going to rule on something the trial judge didn't consider. But that's only most of the time. We have a concept. Federal courts call it plain error. We call it fundamental error. There's very little of it, right? Most of the time if you're trying to argue fundamental error in the court of appeals you're going to lose because you don't have anything better, but I think it's -- this fits in that

concept.

The idea is that the ineffective assistance of counsel is a fundamental error that affects the judgment, and that's what's being reviewed, is the termination judgment; but to decide whether that fundamental error exists, we -- the court of appeals can send it back to the trial court for these fact findings we've discussed; and then, yeah, it's either fact findings and the court of appeals makes its own judgment as to whether that fundamental error exists or the trial court can make a conclusion of law and send that up.

But, again, it's not a matter of having an order for the court to review. That's the termination order. It's a matter of what are the issues that we can appeal on. If one of those is ineffective assistance, which I think could be couched in the idea of fundamental error, then we'll get the fact findings we need and let the court of appeals decide whether that error happened.

The other thing I want to talk just briefly on is this idea that the trial court should somehow be obligated to figure this out before it goes up in the first place, that they have to like put something in the judgment that says they're comfortable there was effective assistance. There may be some merit to that concept, but

what we're trying to address here is the idea that this doesn't become apparent, right, because if it comes down to things of there are witnesses that could have been called, there's no way the trial court is going to know that, would have any way to -- and we don't want to put it on the trial court the burden to ask, "Is there anybody else you could call?"

I mean, I get the need to want to have a trial judge make that finding in the first instance, but I just don't think it's feasible to do that or ask the judge to make that affirmative finding before signing the termination judgment, so this gives a procedure to do that and then sort of allows them to continue at the same time so we don't slow down the track of trying to get to a final.

CHAIRMAN BABCOCK: Scott. Oh, I'm sorry. Justice Kelly, and then Scott. How come you're not over here?

HONORABLE PETER KELLY: Because I'm not one of the appellate lawyers anymore.

CHAIRMAN BABCOCK: Well, you used to be.

HONORABLE PETER KELLY: Used to be. So I'm over here with Justice Christopher.

HONORABLE TRACY CHRISTOPHER: In the middle.

CHAIRMAN BABCOCK: Yeah, Justice Christopher

is inching down here I noticed.

HONORABLE PETER KELLY: Judgment comes up severing the parent-child relationship. In the court of appeals, we have to give deference to the fact findings, but we think something is fishy because someone has made a motion to -- that there's been ineffective assistance, so it goes back down for more fact finding. The trial court finds facts that there was ineffective assistance, and that comes up to us and then we have to give deference to those facts. So essentially what we're doing is creating an affirmative defense for a matter of an avoidance because despite the fact that it's been established by the facts we have to give deference to that the parent-child relationship should be severed, we also have to give deference to the facts that despite that finding we should rule in favor of not severing the parent-child relationship. Essentially it's an affirmative defense, because it's been established in the trial court that because counsel was ineffective, witnesses weren't called, that the parent-child relationship should be severed, and we would affirm.

MR. ORSINGER: Somebody on the phone has got their phone off of mute, and it's making so much noise we can't hear. Can everybody that is on the phone mute their phone?

HONORABLE PETER KELLY: Am I getting this wrong?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm not going -- I'm not going to reply to Judge Kelly's comment, which I thought was good. But so in the criminal system, sometimes you will see ineffective assistance of counsel raised for the first time on appeal, and we have something in our courts that say, well, it's a silent record. We don't really know what happened down there, so we don't see ineffective assistance of counsel. So I think the idea behind this is to no longer have the silent record. We send it back, we develop the facts, then we don't have a silent record.

It is possible that -- and it has happened, although very rarely, that you can look at a claim of ineffective assistance of counsel for the first time on appeal and conclude that no reasonable lawyer would have done what that lawyer did and order a new trial. And, yes, you know, we do it, even though we've read the record and see that the guy really, really, really did commit that crime, right. We -- we still order the new trial, because he had ineffective assistance of counsel. So we have concluded that you have the right to effective assistance of counsel in these cases, so it should be the

same procedure. By doing this, we fill in what's known as the silent record problem in the courts of appeals. It's -- it's not the best, but it's something that can be done, because obviously on the criminal side you can do habeas appeals after the fact, right. And you can take as much time as you want to to develop the facts on a habeas appeal and get it all done, but we don't have that luxury in the parent-child termination situation.

So my only problem with the proposed rule is I don't really know what it means to say "good cause." So I didn't like that standard. You know, I would prefer to say a, you know, "plausible claim of ineffective assistance of counsel," something to that effect, because I don't want to say "no good cause here" and have that somehow terminate prematurely a claim of ineffective assistance of counsel.

HONORABLE BILL BOYCE: Does "prima facie" work for you?

HONORABLE TRACY CHRISTOPHER: Probably. "Colorable." I like "colorable" better, because if you make it "colorable," we'll grant them quicker, and it will get down to the trial court faster and get back up to us faster.

MS. PFEIFFER: I agree with that. I do think "good cause" is sort of laden with different

interpretations.

MR. PHILLIPS: Chip, in response to Justice Kelly's question, I think the way I've been thinking about it is it's not that you have two competing fact findings to defer to. I think the new ones would suggest that the first judgment is infected with this fundamental error, and so I think that's how I've been kind of thinking about it. If there was ineffective assistance, then whatever facts were found are defective because there's some other thing that should have been done in that fact finding; and so that's why I like the concept of fundamental error here, because it undermines everything that happened in the trial court; and so that would be where you put your focus, I think, is if you think that those findings stand up that there was ineffective assistance, then I think that would allow remand on that, and you don't have to kind of worry about deferring to the first fact finding, because it infects it.

CHAIRMAN BABCOCK: Yeah, Scott.

MR. STOLLEY: I think the thing that really makes this so thorny is the 180-day rule.

CHAIRMAN BABCOCK: Yeah.

MR. STOLLEY: And so trying to shoehorn all of this into 180 days is really difficult, but we all understand the policy behind the 180-day rule, which is we

want to give the children and the parents a quick resolution and some finality. My main point is if we're going to go ahead and refer it back to the trial court, I think we ought to unleash the trial judge not only to make findings, but also to make -- to make a ruling that's then reviewable.

CHAIRMAN BABCOCK: Yeah.

MR. STOLLEY: I mean, as long as it's going back to the trial judge, let the trial judge rule in the first instance.

CHAIRMAN BABCOCK: Yeah. All right. Well, I had hoped that we could bring closure to this entire topic today, but we haven't, and there are several other important aspects of it on pages 12, 13, and 14 of the memo.

MR. YOUNG: All that is is my ruminations. Not that important.

CHAIRMAN BABCOCK: Well, we'll be the judge of that, although I tend to agree, but --

HONORABLE BILL BOYCE: We're going to refer that.

CHAIRMAN BABCOCK: But for sure next time we'll get to the end of this, don't you think, Bill? Next meeting?

HONORABLE BILL BOYCE: Ineffective

assistance, yes. There's another piece of this with Anders briefs and things like that.

CHAIRMAN BABCOCK: Right.

HONORABLE BILL BOYCE: But I would hope we can get direction.

CHAIRMAN BABCOCK: Well, thanks, everybody. A very productive day, although difficult at times to follow. But don't forget at Jackson Walker there is a reception in about 28 minutes and the picture of our committee, which for those of you who are new, we do every three years when there's a new committee appointed by the Court, and we would have done it several months ago but for the fact that we weren't meeting in person at that time. So the picture is going to be at 6:00-ish, so if you're going to be late to the 5:30 reception, don't be very late. Yeah, John.

MR. KIM: Yeah, as I look around, do you prefer us to wear ties?

CHAIRMAN BABCOCK: You can wear whatever you want. You're fine.

MR. KIM: That's good because I don't know if I have time to go to Woolworth.

CHAIRMAN BABCOCK: A wig would be good, actually, but yeah, go ahead, on the phone whoever is talking.

MR. LEVY: It's Robert.

CHAIRMAN BABCOCK: Hey, Robert.

MR. LEVY: I will very much miss being there with you in person, but for those of you who are from Houston or Astros fans, it's a nice day at the ballpark.

HONORABLE ROBERT SCHAFFER: 9 to 4, Houston.

CHAIRMAN BABCOCK: 9 to 4, Houston apparently. As expected, but good for the Astros. Okay. We're in recess.

(Adjourned at 5:03 p.m.)

* *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 8th day of October, 2021, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 2,155.25 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 3rd day of November, 2021.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 04/30/23
P.O. Box 72
Staples, Texas 78670
(512)751-2618

#DJ-629