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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

8 October 1, 2011

9 (SATURDAY SESSION)

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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in and for the State of Texas, reported
21 by machine shorthand method, on the 1st day of October,
22 2011, between the hours of 8:57 a.m. and 11:59 a.m., at
23 the Texas Association of Broadcasters, 502 East 11th
24 Street, Suite 200, Austin, Texas 78701.
25

INDEX OF VOTES

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

Documents referenced in this session

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

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

1 *-*-*-*-*

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

7 MR. DYER: Okay. We'll add a version of the
8 form of the writ. Current Rule 594 contains that form,
9 and somehow that got deleted in the editing process, but
10 I'll put that back so that will be the new No. 3. On No.
11 3, contents of the writ, part (a), "Writ of attachment
12 must be dated and signed." The rest of that, it's derived
13 from 593, 594, 596, but we've modernized the language and
14 taken out the "tested as other writs" language as in the
15 current rule.

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

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

1 exempt under Federal or state law." In the larger
2 committee and the subcommittee on these four sets of rules
3 there was a great deal of talk about the notice not
4 providing very understandable language to a respondent.
5 This was the compromise solution to proposals that were
6 several paragraphs long advising the respondent of
7 different rights and exemptions that they have. This was
8 a compromise just to alert them that there may be claims
9 that the property attached is exempt.
10 Subpart (e), okay, I had earlier indicated
11 we dropped form of the writ. I'm sorry. We've included
12 that as subpart (e), and that comes straight out of 594
13 with modifications to make it clear and to incorporate the
14 30, 60, 90 return days.
15 CHAIRMAN BABCOCK: Okay. Let's talk about
16 subpart (a), general requirements. Anybody have any
17 comments about that?
18 HONORABLE TOM GRAY: Chip, I'll just ask if
19 it is clear to everyone that by stating that it must be
20 signed by the district or county clerk or the justice of
21 the peace, if that means that a deputy clerk is included,
22 or is that overly specific?
23 MR. DYER: I would say it's included.
24 HONORABLE TOM GRAY: I would agree, but I
25 just raise the issue. Sometimes we get, shall we say,

1 technical arguments that it was a deputy clerk, not the
2 clerk, on appeal.
3 MR. DYER: Well, my -- go ahead.
4 MS. WINK: It was our understanding from
5 working with the clerks that this is an understood issue,
6 just like the term "officer" throughout the rules has a
7 particular defined meeting meaning of refinement. They're
8 very comfortable with it.
9 CHAIRMAN BABCOCK: Judge Yelenosky.
10 HONORABLE STEPHEN YELENOSKY: Yeah, the
11 things I see signed by the district clerk have the
12 district clerk's name and then a signature by a deputy,
13 and if people want to argue about that I don't think we
14 should concede to that stupidity.
15 CHAIRMAN BABCOCK: You say you replaced the
16 phrase "tested as other writs."
17 MR. DYER: Yeah. Nobody knew exactly what
18 that meant.
19 CHAIRMAN BABCOCK: That was going to be my
20 question, "tested as other writs."
21 MR. DYER: So what we believed it to mean
22 was that it had to bear -- had to be dated and had to be
23 signed in an official capacity and bear the seal of the
24 court.
25 CHAIRMAN BABCOCK: Okay. Was there any case

1 law on "tested as other writs"?
2 MR. DYER: No, not to my knowledge.
3 CHAIRMAN BABCOCK: Okay. Any other comments
4 on (a)?
5 Okay, let's talk about (b). Comments on
6 subpart (b)?
7 MR. DYER: Okay. You will notice I've not
8 included private process servers, and that's because these
9 rules deal with the seizure of property.
10 CHAIRMAN BABCOCK: Okay. Any comments on
11 (b)? Hearing none, let's go to (c).
12 MR. DYER: Got one over here.
13 CHAIRMAN BABCOCK: Yeah. Carl.
14 MR. HAMILTON: Same question about the writ
15 being returnable. In view of the new legislative mandate,
16 do we need to change that and just say that it's the
17 service of the writ that's returnable?
18 MS. WINK: If I could -- I think I can give
19 a better answer to that than I did yesterday. In certain
20 ancillary sets of rules a main proceeding will be in one
21 court, perhaps district, and an ancillary proceeding will
22 be in another court, such as JP court. So where the writ
23 is returnable in this language is just telling the person
24 it goes back to whichever court issued it in general.
25 There is a separate rule, and again, given yesterday's

1 discussions we'll have to update the rules on the returns
2 of the various writs to make sure they comply with the
3 new -- the new bill. But that's -- you'll see that in
4 Rule 4.
5 CHAIRMAN BABCOCK: Richard.
6 MR. MUNZINGER: The note says that
7 subsection (c) is derived from Rule 606, and Rule 606 has
8 a provision that requires that the return identify the
9 property, et cetera, but that has been deleted, and unless
10 I have missed something, it's not carried over into other
11 subsections of the rule.
12 MS. WINK: Rule 4.
13 MR. MUNZINGER: It's in a different rule
14 now.
15 MS. WINK: Yes, sir.
16 MR. DYER: Yes.
17 MS. WINK: I think once you get through
18 attachments you'll find that the sets of rules as we've
19 harmonized them tried to put them in particular orders, so
20 there's always a separate rule about delivery of the writ
21 and return of -- and the return.
22 MR. MUNZINGER: Well, you have two rules
23 then that address return of the writ, 3(c) and then those
24 provisions of 4 that concern return of the writ.
25 MS. WINK: Well, 3(c) is what the command of

1 the writ must say. 3(c) is telling us what the contents
2 of the writ must say; and the writ must say, as it always
3 has, which court it's returnable to and where it's
4 returnable; and we'll have further instructions for the
5 return by the officer who actually served it.
6 MR. DYER: Yeah. Rule 3 is directed toward
7 the contents of the writ as a whole, so it must contain
8 the 30-, 60-, 90-day language.
9 MR. MUNZINGER: I'm just wondering if
10 practitioners or others might be confused if you have two
11 places where you talk about return of the writ, and I
12 wonder if that subsection (c) in Rule 3 might be better if
13 it were just part of (b) of Rule 3.
14 MR. DYER: Well, it could be, but the
15 section is entitled "Contents of the writ," so this just
16 deals with what language must be contained within the
17 writ, so the writ must contain the returnable language;
18 and if we go to Rule 4, that deals with delivery, levy,
19 and then what the return of the writ must actually say.
20 MR. FRITSCHE: Perhaps we could address it
21 by changing the titles of the sections. In other words,
22 in 3(c) "The return" and in 4(d) "The officer's return."
23 Would that make it --
24 MR. MUNZINGER: I can live with either one.
25 I'm just pointing out the difference, and as a person who

1 read this probably for the first time in his life today,
2 it just -- it raised the questions that I've raised.
3 PROFESSOR HOFFMAN: I guess I would second
4 what Richard says. I agree. I think it's a little hard
5 to tell, though, frankly, whether the problem comes in the
6 way you've done the statutory setup or in your green
7 boxes. Your green box tells us to go look to 606 because
8 you derived it from there, but when we go to 606 we see
9 all sorts of stuff that isn't here. So it makes us go,
10 "What the heck are you doing and where did it go?" Then
11 you say "Well, that's in another rule," so maybe that's
12 just a function of the way you presented this as opposed
13 to the way you wrote the --
14 CHAIRMAN BABCOCK: The green box should have
15 said "derived in part from 606."
16 PROFESSOR HOFFMAN: Anyway, it's a little
17 hard to follow.
18 CHAIRMAN BABCOCK: Well, changing the title
19 of 3(c) might not be a bad idea.
20 MR. FRITSCHE: Okay.
21 CHAIRMAN BABCOCK: But you couldn't
22 change -- you would still have to leave 4 as "Return of
23 the writ."
24 MS. WINK: We could say, "Officer's return."
25 CHAIRMAN BABCOCK: Well, you've got it in

1 the title.
2 MS. WINK: Uh-huh.
3 CHAIRMAN BABCOCK: You say "Delivery, levy,
4 and return of writ."
5 MR. DYER: We can work on the title.
6 MR. MUNZINGER: Is the purpose of subsection
7 (c) to set out the time for the return?
8 MR. DYER: Yes. It's to state that it must
9 contain language that it's returnable 30, 60, or 90 days.
10 MR. MUNZINGER: Maybe that's the title,
11 "Time for return of writ." In any event, the point has
12 been raised.
13 CHAIRMAN BABCOCK: The point has been made.
14 All right. Any more comments on (c)?
15 PROFESSOR HOFFMAN: Can you talk for a
16 minute about the substantive point about 30, 60, or 90?
17 Why does anybody choose -- why are you giving them a
18 choice, and why doesn't everybody choose the shortest one?
19 MR. DYER: In writ of execution practice it
20 depends on the circumstances. If you have reason to
21 believe that property is going out very -- going out of
22 the state, you're going to want the quickest return date
23 you can. Secondly, if you've got a writ of execution and
24 you need a little bit more time to assemble information,
25 you're typically going to choose the 90-day language. The

1 other thing is frequently because of the number of writs
2 that are out there the officer may not have sufficient
3 time to return the writ within 30 and then it expires and
4 you have to go get another writ. So I would say in my
5 experience the most frequent option is 90, but you've got
6 a 30-, 60-, and 90-day option in execution. We think that
7 you ought to have that same option depending on the
8 applicant request for all of these writs.
9 PROFESSOR HOFFMAN: And where does the 30-,
10 60-, or 90-day formulation come from? It's not in 606 or
11 in Civil Practice & Remedies Code 61.023.
12 MS. WINK: It is new. It is new.
13 MR. DYER: Well, it comes from writ of
14 executions, and I believe it's -- you'll see that in
15 sequestration it doesn't let -- it doesn't say the 30-,
16 60-, 90-day rule, but it says you can use the rules that
17 come out of execution. So I figured if they use it the
18 same way on sequestration then there's no reason in my
19 mind to change it, make it different on attachment. No
20 one on the committee knew why we had a return date 10:00
21 o'clock Monday following 15 days.
22 PROFESSOR HOFFMAN: Okay.
23 CHAIRMAN BABCOCK: Okay.
24 PROFESSOR HOFFMAN: I'm sorry.
25 CHAIRMAN BABCOCK: Go ahead.

1 PROFESSOR HOFFMAN: That was actually a sigh
2 of not resignation but of continued uncertainty.
3 CHAIRMAN BABCOCK: Okay.
4 MR. DYER: Do you see a difference on --
5 PROFESSOR HOFFMAN: No. No. I don't even
6 understand. So, so your green box tells me that this rule
7 was derived from either Rule 606 or Civil Practice &
8 Remedies Code 61.023, but in neither section is there
9 anything about 30, 60, or 90. So then you said, "No, that
10 came from another rule entirely."
11 MR. DYER: Yes.
12 PROFESSOR HOFFMAN: What other rule
13 entirely?
14 CHAIRMAN BABCOCK: The "at or before 10:00
15 o'clock on Monday" may have no purpose -- maybe nobody
16 knows, but it's quaint.
17 MS. WINK: As Pat is looking for the precise
18 place for that, keep in mind that the task force as a
19 whole had people who were specialists in each of these
20 particular issues, and they as well as members of our
21 constable staff and our sheriff's organizations were there
22 on part of the task force as well. They were able to tell
23 us some of the challenges that they've run into and how
24 they don't have a problem with the 30, 60, 90 because it
25 gives them the flexibility in the other sets of writ rules

1 whereas they didn't have it here and they couldn't see any
2 reason that we shouldn't. So you will see throughout all
3 of these that we've made an effort when it makes sense, we
4 hope when it makes sense, to harmonize the rules so the
5 same flexibility is provided throughout these
6 extraordinary writs.
7 PROFESSOR HOFFMAN: Okay. So I understand,
8 one is just a tell me where to look for the new language
9 that you don't tell me where it comes from. Then once we
10 do that then my next question, of course, is going to be
11 what has been the experience with that other language? So
12 you're telling me there have been no problems, but we
13 haven't had any discussion about that, and one question
14 that I would have as a reader of this for the first time
15 would be how do I choose and is the choice entirely mine
16 as to pick it and are there any guidelines for the court
17 to consider in protecting the property owner in deciding
18 whether it should be 30, 60, or 90 days?
19 So, I mean, these are all the questions that
20 are raised by addition of new language. I'm not quibbling
21 with your substantive point that the experts in the field
22 think that it's worked well in this context, why not have
23 it work well in this context, but I'd like to hear more
24 about it before we just stamp, okay, this works here as
25 well.

1 MS. WINK: Understood.
2 MR. DYER: Can I find that language at our
3 break?
4 HONORABLE NATHAN HECHT: 629.
5 MR. DYER: 629 is an execution rule. The
6 rule that I'm looking for is in one of the other ancillary
7 rules that incorporates the writ of execution returnable
8 days at 30, 60, 90. I just can't find it.
9 PROFESSOR HOFFMAN: Okay. Then how about
10 let's do this. Since we can't find the language --
11 CHAIRMAN BABCOCK: How about 621?
12 PROFESSOR HOFFMAN: If we can't find the
13 language, talk about then those other questions I just
14 asked, which are is the choice -- it sounds like, Pat, you
15 were saying the choice is entirely up to the applicant.
16 It's their discretion to pick door one, two, or three.
17 MR. DYER: Yes. 621 on execution makes it
18 30, 60, or 90 days as requested by the plaintiff, his
19 agent, or attorney.
20 PROFESSOR HOFFMAN: Okay. And is there any
21 role here that we should be considering of discretion for
22 the trial judge in protecting the interests of the
23 property owner as between the 30-, 60-, or 90-day option?
24 Does it matter?
25 MR. DYER: No, because the property hasn't

1 yet been seized. This is at the option of the applicant
2 to decide how quickly he wants it returned, but whether
3 it's -- regardless of the time that it's returned, it
4 doesn't affect any of the rights of the respondent.
5 HONORABLE STEPHEN YELENOSKY: It's just how
6 long they can try to find the property, and it doesn't
7 affect the respondent until it's actually executed.
8 PROFESSOR HOFFMAN: So why not write the
9 rule that says "up to 90 days"?
10 MR. DYER: Well, you also have to have some
11 kind of deadline by which that writ expires. You have to
12 know whether it's still good.
13 PROFESSOR HOFFMAN: So why not just have
14 them all expire no later than 90 days?
15 CHAIRMAN BABCOCK: Judge Yelenosky.
16 HONORABLE STEPHEN YELENOSKY: Well, then you
17 say because you want to convey to the officer that it
18 needs to be done more quickly in some instances.
19 MR. DYER: Uh-huh. If you just say "up to
20 90 days" then all of the discretion goes to who's serving
21 it.
22 PROFESSOR HOFFMAN: And it slows the process
23 down.
24 MR. DYER: Yes, and there's no
25 prioritization.

1 CHAIRMAN BABCOCK: Justice Gray.
2 HONORABLE TOM GRAY: Not if you give them
3 the flexibility to do it up to 90 days and then you
4 specify in the writ the number of those -- in other words,
5 the flexibility is in the rule to have a writ that lasts
6 for no longer than 90 days, but when you draw the writ --
7 I mean, my confusion here came from, well, used to you
8 could command it to be done within 15 days. You could do
9 it less than 30 days. Now you get at least -- I mean,
10 it's at least 30 days, so the officer on day 29, it may
11 not be there anymore where it was there on day 14 or 15,
12 and if you were allowed to specify in the writ that it was
13 returnable in 15 days then you would have gotten your
14 property. It would -- but as I read the rule as drafted,
15 it has to say it's returnable in 30, returnable in 60, or
16 returnable in 90.
17 CHAIRMAN BABCOCK: Dulcie.
18 MS. WINK: What the officers told us is, is
19 a little bit like the world of the lawyer. When we know
20 we have 30 days, we have a window. They're very familiar
21 with the 30, 60, 90 as a result of executions. The
22 practitioner, when he or she applies for the writ and gets
23 the writ, and maybe they choose a 30-day window. That
24 does not stop them from talking to the officer directly,
25 explaining the need, explaining whatever information they

1 have, and trying to shepherd that through, which will help
2 if they have the ability to get it in 15 days, but like
3 anything else, especially in some counties there are very
4 few officers with everyone's request. In other counties
5 there are very populous situations where we have never
6 enough officers to get to the requests.
7 So things are going to be prioritized, and
8 it really is up to the applicant to get a window that
9 helps with the prioritization and also to follow through
10 with the officer to do that, and Professor Hoffman also
11 asked a good question. We've already been asked as a task
12 force to be prepared once the forms of the new rules are
13 ready to write those bar articles that explain here's what
14 is new, here's how this changed, here's how the
15 flexibility, and to give the practitioners more
16 information.
17 MR. DYER: Rule 598 says, "A writ of
18 attachment shall be levied in the same manner as is or may
19 be the writ of execution upon similar property." And the
20 actual practice is that these writs are made returnable
21 30, 60, 90 because that's the way execution is done, and
22 that's the way you can prioritize. I think if you allow
23 someone to say "returnable in 15 days," everybody is going
24 to try to preempt it because that would put you at the top
25 of the list. Now, to some extent that's going to still

1 exist with the 30-, 60-, 90-day option, but my experience
2 is most people do go with the 90 unless there are exigent
3 circumstances and then they want to try to go with the 30,
4 but what we've done is made it consistent with execution
5 and actual practice.
6 CHAIRMAN BABCOCK: Nina.
7 MR. DYER: I think that that's what Rule 598
8 means.
9 CHAIRMAN BABCOCK: Nina.
10 MS. CORTELL: I guess my question is with
11 regard to the property that you know is going to be gone
12 in a week, and if it's returnable in 30 then the officer
13 may say, "I get to do this day 29." So my question is are
14 you saying that the officers are saying this would put an
15 undue burden on them to allow us to put an earlier return
16 date on it? In other words, is that the problem you're
17 trying to balance?
18 MR. DYER: Yes.
19 MS. WINK: Yes.
20 MR. DYER: Now, let's say that you do have
21 information that it's going to be gone in 15 days and
22 you've got a writ that's returnable in 30, 60, 90. Maybe
23 you choose 30, maybe you choose 90, but you call up the
24 constable, and a lot of times they will drop whatever else
25 they are doing or look on their priority list and say,

1 "Okay, we can get somebody out there today." It doesn't
2 always happen, but if you set it up to where they must do
3 it then I think that creates a problem.
4 HONORABLE LEVI BENTON: Chip?
5 CHAIRMAN BABCOCK: Yeah, Levi.
6 HONORABLE LEVI BENTON: Pat and Dulcie, my
7 problem with that is we shouldn't leave it up to the
8 discretion of the officer. We ought to be able to have
9 language in the writ that commands the officer to act in a
10 shorter period of time if the circumstances require. Even
11 if the writ itself won't expire, the officer ought to be
12 commanded to go out and act. Circumstances may be that he
13 or she can't act, and you don't want to cause the
14 applicant to have to go back to the courthouse to get
15 another writ, fine, but there should be no discretion left
16 to the officer. The officer is just executing a
17 ministerial duty.
18 MS. WINK: They just don't want every lawyer
19 asking for 10 or 15 --
20 HONORABLE LEVI BENTON: Of course they
21 don't.
22 MS. WINK: -- because then they would have
23 an unmanageable load. They wouldn't be able to satisfy
24 any of those writs.
25 HONORABLE LEVI BENTON: Of course they

1 don't, and trial judges don't want lawyers to take --
2 excuse me, lawyers don't want trial judges to take matters
3 under advisement. You know, I want my ruling right now,
4 you know. That's -- it's human nature, but --
5 MR. DYER: But shouldn't the discretion be
6 with the judge and not the officer? If you think that
7 that property is going to disappear in 15 days, get a TRO.
8 You know, you go to the judge and you get the TRO. I
9 don't think you put in the writ to command a sheriff or
10 constable that depending on, you know, what circumstances
11 and who presents those circumstances to the constable and
12 how does he have the judicial discretion to say, "Okay,
13 yeah, I will go out and do that now." I don't see how you
14 do that in a writ practice.
15 HONORABLE LEVI BENTON: The TRO is an order
16 on the party, and the party may or may not respect the
17 court. The writ is directed to the officer, who is him or
18 herself a public servant, and presumably will give greater
19 deference or more deference to the role of the court. I
20 just don't think we ought to give the discretion to the
21 officer to -- or what if -- what if we're in a small --
22 what if we're in El Paso, and everybody knows that Richard
23 Munzinger is the king of El Paso County, and we've got a
24 writ to attach his property and, you know, and the
25 applicant is represented by a lowly Harris County lawyer.

1 Do we want to give the El Paso County constable the
2 opportunity to slow boat executing on Mr. Munzinger's
3 property? I mean, I just don't think so. I think they
4 ought to be directed to act.
5 MR. DYER: Well, if I'm not mistaken, there
6 are rules that govern the duties of the sheriff or
7 constable serving process, and if there's undue delay,
8 there are circumstances under which they can be held
9 personally liable, but your scenario, in fact, happens.
10 HONORABLE LEVI BENTON: I know.
11 MR. DYER: There is no doubt that it
12 happens. You get a writ, and the constable says "not
13 going to be served." So, yeah, you have a problem. Can
14 you address that by adding additional language to the
15 writ? I don't see how. If a constable is going to ignore
16 the writ in the first place or the TRO in the first place,
17 why wouldn't he ignore language in the writ? But I think
18 current rules regarding the duties of sheriff and
19 constables cover that scenario. But how do you deal with
20 a hundred writs come in the same day, and the officer is
21 commanded to execute on all of them that day?
22 HONORABLE LEVI BENTON: Here's what you do.
23 You go see Commissioner Munzinger or over at
24 commissioner's court and say, "We need more resources."
25 The taxpayers have a policy choice.

1 CHAIRMAN BABCOCK: Judge Yelenosky.
2 HONORABLE STEPHEN YELENOSKY: Well, I don't
3 know, it sounds like we're going after a problem that
4 nobody has identified. I mean, the experts are telling us
5 it's working now. I also raised my hand just to point
6 out, is it Rule 621, enforcement of judgment? That says
7 execution is returnable in 30, 60, or 90 days.
8 MR. DYER: Right, as requested by the
9 plaintiff.
10 HONORABLE STEPHEN YELENOSKY: Right. Is
11 that what you're sourcing?
12 MR. DYER: That's the execution, but in the
13 attachment rules themselves, Rule 598, it says, "Writ of
14 attachment shall be levied in the same manner as is or may
15 be the writ of execution."
16 HONORABLE STEPHEN YELENOSKY: So it's those
17 two together.
18 MR. DYER: Yes. That's why we brought the
19 language of 30, 60, 90 from execution into attachment
20 because 598 says that that's the same way levy should be
21 made on attachment.
22 MR. FRITSCHE: Chip?
23 CHAIRMAN BABCOCK: Yeah, David.
24 MR. FRITSCHE: Let me just point out Rule
25 4(b) as well, because we have two issues here. We have

1 the levy and when the return must be filed. In Rule 4(b),
2 4(b)(2), the constable and sheriff are directed to proceed
3 as soon as practicable to execute the levy, to levy upon
4 the property. So remember when we're talking about when
5 the writ is returnable it really doesn't have any
6 practical effect on time of levy. It's when the officer
7 must file the return back with the originating court or
8 the court to which it's returnable. So I think we tried
9 to address the issue of immediate levy or as soon as
10 practicable in 4(b)(2). If we want to give more direction
11 to the officer on timing of the levy, perhaps we could
12 address it in 4(b).
13 CHAIRMAN BABCOCK: Uh-huh. Gene.
14 MR. STORIE: Yeah, I was having a similar
15 thought, because it seemed to me if you had some urgency
16 in trying to get the property it's in the levy, and not in
17 the return of a writ, so you could theoretically have a
18 levy the week after a writ's received, and they don't tell
19 you about it for a couple of months if you had the 90-day
20 framework.
21 CHAIRMAN BABCOCK: Maybe I'm reading this
22 wrong, but aren't you affecting a pretty big change by
23 this 30, 60, 90 because --
24 MS. WINK: No.
25 CHAIRMAN BABCOCK: Well, I'm sure I'm

1 reading this wrong, but 606 has been around since --
2 according to the source, since 1942, and that says the
3 "10:00 o'clock on the Monday after 15 days in all cases,"
4 and so you're shaving off, you know, 12 to 15 days when
5 you move it to 30, and maybe there's no reason to have it
6 at 10:00 o'clock after the expiration of 15 days, but it's
7 been in the rule a long time, and --
8 MR. DYER: No one we spoke to had ever
9 complied with that. They did it on the 30, 60, 90, and no
10 one could figure out why it was there in the first place
11 because it looks like you're filing an answer.
12 CHAIRMAN BABCOCK: Yeah. I mean, it's very
13 similar to the answer language.
14 MR. DYER: Yes. But it's the officer who is
15 required under the old language to return it within that
16 period.
17 CHAIRMAN BABCOCK: Okay. Yeah, Levi.
18 HONORABLE LEVI BENTON: The exchange I was
19 having with Pat -- and if I was too early or too late I
20 apologize, but I was really focused on the levy and not
21 the return, and so the rule we're talking about, Rule 3,
22 deals with the return, not the levy.
23 MR. DYER: Correct.
24 CHAIRMAN BABCOCK: Right.
25 HONORABLE LEVI BENTON: We're going to get

1 to the levy in just a second.
2 MR. DYER: Yes.
3 HONORABLE LEVI BENTON: In which case we'll
4 just insert everything I said so I don't have to say it
5 again.
6 MR. DYER: Copy and paste.
7 CHAIRMAN BABCOCK: All right. Let's move on
8 to 3(d). Any comments on 3(d)?
9 MR. DYER: I will say that the subcommittee
10 on attachment as well as sequestration and garnishment,
11 there was an element that insisted that there be
12 additional warnings in plain language to alert the
13 respondent to a number of different possible exemptions.
14 The subcommittee as a whole said that was going too far
15 and would that mean that we would have to amend the rule
16 every single time a new exemption came up and how much are
17 we putting ourselves in a position of advising the
18 respondent as to legal rights. So this was a compromise
19 solution just to alert the respondent that there might be
20 an exemption.
21 CHAIRMAN BABCOCK: Okay. Any comments on
22 that?
23 MR. FRITSCHE: And that change is throughout
24 all of the harmonized rules, every one.
25 CHAIRMAN BABCOCK: Okay. Well, then let's

1 then get to 3(e).

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

3 CHAIRMAN BABCOCK: On (d)? Okay.

4 MR. HAMILTON: On (d), yeah. Super

5 technical, that 12-point type, is that something that is

6 determinable on these computers now or --

7 MR. DYER: Well, I can't read 10-point type

8 anymore. The 12-point doesn't necessarily fix it because

9 you can change the font that you're using, and 12-point in

10 one font may not be readable as 12-point in Times New

11 Roman, but we thought that at least we ought to increase

12 the point from 10 to 12.

13 HONORABLE NATHAN HECHT: This is 12.

14 MR. HAMILTON: I know, but does it make any

15 sense to talk about 12-point anymore when that was on

16 typewriters, wasn't it?

17 HONORABLE STEPHEN YELENOSKY: No, computers

18 do the same.

19 MR. HAMILTON: Computers, do that, too?

20 MR. DYER: And the appellate courts require

21 14-point.

22 HONORABLE NATHAN HECHT: 13.

23 MR. DYER: 13-point. So we just said let's

24 just increase it from 10 to 12. I'm okay with 13 or 14.

25 MR. MUNZINGER: Is the correct word "type"

1 or "font"?
2 MR. DYER: This is just the point. We
3 didn't specify the font.
4 CHAIRMAN BABCOCK: Okay. Justice Gray.
5 HONORABLE TOM GRAY: You know, being from
6 over in East Texas, somebody hands me this writ, and it
7 says property owned by me has been attached. I'm not
8 going to know what that means, and if we're trying to
9 communicate information to the person who might have just
10 had their prize game fighting roosters seized we might
11 want to define. I mean, is there a better word than
12 "attached"? I mean, "taken," "seized," something. I
13 mean, I know there's other rules that talk about that.
14 MR. DYER: Well, when we get to how an
15 attachment levy is made that's where you'll see the
16 problem. If you attach real property you don't actually
17 seize it and take it away from somebody. You file the
18 writ in the county records, and you post a notice. If you
19 attach something that's immovable, say like, you know, a
20 hundred pounds of gold, you attach a notice to it. You
21 don't physically pick it up and move it. So if we were to
22 say "seized," is that really accurate in all of those
23 circumstances? We thought "attached," even though people
24 may not understand what it is, contains all of the --
25 HONORABLE TOM GRAY: Okay.

1 MR. DYER: -- different ways property can be
2 seized.
3 HONORABLE TOM GRAY: Well, I'm just glad
4 y'all thought about me when you were trying to define what
5 word to use.
6 CHAIRMAN BABCOCK: Well, and it goes on to
7 say, "You may regain possession," so that sort of tells
8 the person they've lost something.
9 HONORABLE TOM GRAY: Except, you know, I
10 seize up when I see that my property has been attached,
11 and I don't know what that is, so --
12 MS. WINK: Wait until you hear the cattle on
13 the range explanations. There are many, many details that
14 we're leaving out.
15 CHAIRMAN BABCOCK: Justice Hecht.
16 HONORABLE NATHAN HECHT: What sort of
17 exemptions are there?
18 MR. DYER: Well, for example, exempt
19 property.
20 MS. SECCO: Like homestead?
21 MR. FRITSCHE: The concerns in the committee
22 were the new Federal rules on subsidies and funds that are
23 deposited into individuals' accounts, either possibly
24 Social Security or Medicare. There's -- there are new
25 rules on banks having to remain segregated or be careful

1 in garnishment situation of -- and, I mean, this was
2 Raul's concern.
3 MR. DYER: Uh-huh. Uh-huh.
4 MR. FRITSCHE: And I'm trying to think of
5 what the specific Federal monies -- is it Social Security?
6 MS. WINK: Social Security.
7 MS. SECCO: There's the anti-alienation
8 provisions in the Social Security Act.
9 MR. FRITSCHE: Right.
10 CHAIRMAN BABCOCK: Judge Yelenosky.
11 HONORABLE STEPHEN YELENOSKY: One that I
12 thought of that might be useful for an unrepresented
13 person is tools of the trade, right? Isn't that an
14 exemption?
15 MR. DYER: Right.
16 HONORABLE STEPHEN YELENOSKY: A guy with the
17 prize rooster who is a plumber might want to know that.
18 MR. DYER: Yeah. I mean, you've got your 30
19 and 60,000-dollar personal property exemption. You've got
20 homestead exemption. There are a host of exemptions in
21 existing Texas law and also under Federal law, so we
22 didn't want to list all of those because as the law
23 changes you'd have to go back and change the rule.
24 CHAIRMAN BABCOCK: Carl.
25 MR. HAMILTON: Did I understand you to say

1 that if he levied on a hundred pounds of gold he would
2 just leave it there? He would take possession of it,
3 wouldn't he?
4 MR. DYER: Well, if they had the immediate
5 resources to do so, yes, but if they've got to go back and
6 get a truck to pick it up, they're going to attach a piece
7 of paper there, and then probably the constable would
8 probably stay there until they went and got a truck.
9 MR. HAMILTON: But they are going to
10 actually take possession?
11 MR. DYER: If they can. But if it is a,
12 quote, "immovable object" and they can't pick it up then
13 they attach a piece of paper saying that it's been
14 attached and the law says it's now attached.
15 MS. WINK: And sometimes, Carl, the sheriffs
16 and deputies in some counties have yards for the
17 protection of property. In some smaller counties they may
18 or may not. Sometimes the facilities that they have
19 available to them won't store, you know, thousands of
20 yards of pipe that's being taken from a pipe yard, for
21 instance. So what they take and what they move is going
22 to depend on what's available and what the cost is in some
23 situations.
24 MR. DYER: You know, that -- if you come in
25 on 71 they've got all of that pipe out on the land?

1 You're not going to want to incur the time and expense to
2 try to actually seize possession of that and move it
3 someplace else. You would just attach a notice that says
4 it's been attached.
5 CHAIRMAN BABCOCK: Yeah, Levi.
6 HONORABLE LEVI BENTON: Is there a deadline
7 on getting the rewrite of these done?
8 MR. DYER: On getting --
9 HONORABLE LEVI BENTON: Getting this project
10 finished? Is there a Court-imposed --
11 MR. DYER: No, not --
12 CHAIRMAN BABCOCK: Our lifetime.
13 HONORABLE LEVI BENTON: The reason I ask --
14 MR. DYER: We started this process three
15 years ago.
16 HONORABLE JAN PATTERSON: 30, 60, or 90
17 years.
18 HONORABLE LEVI BENTON: I just wonder
19 whether it would be worthwhile to ask -- I think it was
20 Justice Christopher who led the subcommittee on plain
21 English on jury instructions, to ask that subcommittee to
22 maybe look at the language of writs before this becomes
23 final because, I mean, everyone around this table --
24 excuse me, we understand most of the language, but even
25 those around this table struggle with some of the

1 language, and if we're going to redo these rules, you
2 know, we ought to avail ourselves with the opportunity to
3 have the plain English folks take a look at writs
4 particularly before we make them final.
5 CHAIRMAN BABCOCK: Yeah, David.
6 MR. FRITSCHE: Part of the concern was in
7 some of the statutory direction, like in sequestration,
8 the Legislature tells us what has to be in the writ.
9 HONORABLE LEVI BENTON: Okay.
10 MR. FRITSCHE: In other words, 62.023
11 directs that this language must be there, so this language
12 is basically the sequestration language harmonized among
13 the attachment, garnishment, and the like.
14 HONORABLE LEVI BENTON: Okay. Out of the
15 statute, got it. Okay.
16 MR. FRITSCHE: But I will tell you it's not
17 in the attachment statute, so we took it from
18 sequestration, since that was the legislative directive.
19 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.
20 HONORABLE STEPHEN YELENOSKY: Are you saying
21 that whatever statute you're deriving this from would
22 preclude us from doing plain language?
23 MS. WINK: In sequestration, yes. In
24 sequestration, yes. And to the extent we tried to make
25 these rules as harmonized across so the practitioner

1 doesn't say, well, there must be a reason that they're
2 using different language here than there, we've tried to
3 comply with existing law as well as how do we make it
4 understandable.
5 HONORABLE STEPHEN YELENOSKY: But the
6 requirement that arcane, unintelligible law be in it or
7 the words be in it wouldn't preclude you from adding plain
8 language, would it, and it wouldn't preclude you from then
9 conforming other things not governed by a statute to that
10 plain language?
11 MS. WINK: Agreed.
12 HONORABLE STEPHEN YELENOSKY: I mean,
13 ancillary proceedings, the language is a mess, and
14 starting with the word "writ" and going on from there.
15 MR. DYER: We actually considered trying to
16 get rid of the writ practice, but the consensus was that
17 just was not ever going to happen, that that was not going
18 to be approved. But your point about adding language to
19 what's in the statute, that's -- I don't have a problem
20 with that. Keep in mind, the attachment statute doesn't
21 require this. The sequestration statute does.
22 HONORABLE STEPHEN YELENOSKY: I understand.
23 MR. DYER: The sequestration statute also
24 requires it to be in 10-point.
25 HONORABLE STEPHEN YELENOSKY: Well, I'm just

1 saying you obviously have to comply with the statute, and
2 if you want to be consistent between them it may be that
3 you would then add plain language where it's -- where the
4 arcane language is statutorily required and use only the
5 plain language in the others, but you know better than I.
6 I was just expressing frustration.
7 MS. WINK: We feel it. We do.
8 HONORABLE STEPHEN YELENOSKY: You feel my
9 pain.
10 CHAIRMAN BABCOCK: They feel your pain.
11 MS. WINK: We've been feeling it for years.
12 CHAIRMAN BABCOCK: Richard, did you have
13 your hand up?
14 MR. MUNZINGER: Only to point out that if
15 you attempt to do this in plain language, what's a
16 layperson -- 12-year-old person's definition of
17 attachment? "Your property has been temporarily taken by
18 a government officer to be" -- it goes on and on and on
19 and on and on. I don't know that you really do anybody
20 any good by doing all of that. A, you extend the length
21 of the writ. If they can't understand that they've lost
22 their property and that there's some government guy that
23 took it from them, that's what the word "attached" means.
24 Leave it there and in the next sentence you tell them, or
25 two sentences away, you can get it back. I think you can

1 carry this -- and I don't mean it in any critical way. I
2 just think there's a limit to how far we can dumb down the
3 law and dumb down life.
4 CHAIRMAN BABCOCK: There you have it.
5 HONORABLE STEPHEN YELENOSKY: Well, it's not
6 -- it's not dumbing it down because language changes, and
7 perfectly correct language that is not dumb language could
8 better explain what happens.
9 MR. MUNZINGER: I used bad words. Dumb down
10 was a shorthand of trying to explain it. I didn't mean it
11 in a critical way, but there is a limit to what you can do
12 with the complexities of these things and be exact. What
13 is attachment? It's a process. There's a piece of paper
14 that takes your property away from you and puts it in
15 custodia legis, in the custody of the law, pending
16 whatever.
17 CHAIRMAN BABCOCK: What was that thing you
18 just said?
19 HONORABLE STEPHEN YELENOSKY: Custodia
20 legis. I agree with you. I agree with you, and I fight
21 against condensing the language so much that it's
22 meaningless. There is a point, but there are different
23 words, and we moved way from Latin words, for example, and
24 "writ" is an English word, but it's not one that anybody
25 uses outside of this room.

1 HONORABLE JAN PATTERSON: Except East Texas
2 maybe.
3 CHAIRMAN BABCOCK: Yeah, Carl.
4 MR. HAMILTON: The statute says, "The
5 officer attaching the personal property shall retain
6 possession," and I'm wondering is there any case law that
7 says if he just puts a sign on there saying it's been
8 attached, does the case law say that is the same thing as
9 it's now in the legal custody of the sheriff?
10 MS. WINK: Yes. To make a long story short,
11 there is not only case law, if I remember correctly, from
12 the officers who serve in the task force and who teach the
13 officers across the state of Texas how it works, so
14 they're very knowledgeable gentlemen, but they explained
15 to us that, yes, this is why we do it, and they've had --
16 and that case law has grown up over all the years that
17 Texas has existed. There are just certain things you
18 can't move to a more secure location. They do amazing
19 things. Sometimes they have to take custody of crops, and
20 if the crop has to be harvested, they have to do the
21 harvest. They have to hire people to get out there and do
22 the harvest.
23 MR. HAMILTON: Okay, but if that's in the
24 case law why don't we get it in the rule so people will
25 understand that when they put a sign on their personal

1 property that means that it's in the legal custody of the
2 sheriff now and also put that on the -- on the writ?
3 MR. DYER: So they understand what legal
4 custody is, even if it doesn't appear to be in physical
5 possession of the sheriff?
6 MR. HAMILTON: Well, I don't know.
7 CHAIRMAN BABCOCK: Justice Patterson.
8 HONORABLE JAN PATTERSON: Well, there's a
9 lot to say for words that put one on notice to make
10 further inquiry, and I think that may be what one -- that
11 is one of those words, and as Chip pointed out, it is in
12 the context of the next sentence, but it does make one
13 make further inquiry, and I think that's part of the
14 purpose of a notice. It can't be so exhaustive that it
15 has to explain every word or dumb it down so that we can
16 understand it all.
17 MR. DYER: Well, one of the suggestions was
18 the first sentence ought to be "Go get a lawyer."
19 HONORABLE JAN PATTERSON: Well, and this
20 probably accomplishes that, the word "attached," I think.
21 HONORABLE STEPHEN YELENOSKY: Well,
22 increasingly people can't go get lawyers, can't afford
23 them.
24 MR. DYER: That's true.
25 HONORABLE JAN PATTERSON: That's a different

1 issue.

2 CHAIRMAN BABCOCK: Nina.

3 MS. CORTELL: I would be in favor of a

4 little more clarification to a nonlawyer, and I agree the

5 next sentence does it in a reverse sort of way, but why

6 can't you use that concept that your rights to this

7 property have been taken away or something like that? You

8 can talk in terms of rights instead of -- since it won't

9 always have been physically taken.

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

11 concept.

12 HONORABLE LEVI BENTON: Well, since Justice

13 Christopher is not here we ought to just put it all on her

14 to take --

15 CHAIRMAN BABCOCK: Please note in the record

16 that Judge Christopher has been given homework. Okay.

17 Any more comments about (d)? Let's move on to (e). Any

18 comments about (e)? Yeah, Gene.

19 MR. STORIE: Just maybe to sort of reiterate

20 what I said before, I don't see why you wouldn't just

21 return the writ if it's been levied as soon as practicable

22 after it's been levied and then your outside date would be

23 the 30, 60, or 90, because you wouldn't want -- and I'm

24 sure this doesn't happen, but you wouldn't want the

25 constable to send the writ, you know, after two or three

1 weeks because he's just too busy, although the literal
2 language says maybe you can do that since --
3 MR. DYER: That does sometimes happen. It
4 just depends on the county and how many writs are out
5 there, but we deal with the return of the writ in Rule 4,
6 so --
7 MR. STORIE: Right.
8 MR. DYER: The command is they're supposed
9 to do it as soon as practicable, but the 30, 60, 90 is
10 when that writ expires. So if it's practicable for them
11 to do it that first day then they can do it and then they
12 return the writ immediately.
13 MR. STORIE: I just didn't read the rule to
14 actually say that. I mean, I think that's what happens,
15 and I'm ignorant of what happens.
16 MR. DYER: We've got that in Rule 4(b)(2).
17 CHAIRMAN BABCOCK: Well, speaking of Rule 4,
18 why don't you take us through that?
19 MR. DYER: What we've done with regard to
20 delivery, levy, and return of writ is incorporate the
21 execution rules and some of the case law interpreting
22 those rules to provide a method of delivery, levy, and
23 return in each of the four sets of rules so that a
24 practitioner could go to just the attachment section and
25 say, "Okay, how is this levied on?" So if we look at Rule

1 4, this says who the writ, once it's issued, goes to -- it
2 can go immediately to the sheriff or constable or at the
3 request of the applicant deliver it to the applicant who
4 then delivers to the constable. The reason being -- and
5 this is current practice -- frequently the clerk's office
6 may be overwhelmed with business, and it may take them a
7 very long time to deliver it to the sheriff, so when you
8 file your writ your transmittal letter says, "Please
9 prepare it and I will pick it up, and I will deliver it to
10 the sheriff," so you can cut your time lag down
11 considerably.
12 Part -- subpart (b), time and extent of
13 levy. We may have to adjust this language to conform with
14 the changes to 17.030, but this is just the writ we're
15 talking about right now. "Endorse the writ with the date
16 of receipt, and as soon as practicable proceed to levy on
17 the property." The language in existing Rule 596 and 597,
18 in 597 the word was "immediately proceed to execute the
19 same." We did not believe that that was reality. There
20 is no way the writ can immediately be levied, so we
21 changed that to "as soon as practicable" because that is
22 what, in fact, happens. They do it as quickly as they
23 can, but they cannot do all writs immediately.
24 And then (b)(3) is out of the current rules.
25 This is where the sheriff or constable has to make a

1 determination of value of the property. Yesterday we
2 spoke about how they did not want to be involved in that
3 valuation when it came to determining the amount of the
4 bond, and our proposed rules get rid of that valuation
5 aspect, but they still have this valuation aspect where
6 they have to go out and actually determine how much
7 property to levy on to satisfy the demand.
8 (c) is all new in the rules of attachment,
9 but these are the methods of levy that come out of
10 execution rules and the interpretation of those rules. So
11 with regard to real property, the way that you levy on
12 real property, you describe property on the return and you
13 file it for record with the county clerk, so now there is
14 a document in the county clerk's office that's a --
15 certainly a cloud on title, but shows that a claim has
16 been made on the real property.
17 Personal property, it depends on the size
18 and extent of it. The easiest way is if it's something
19 you can pick up and store in a location, that's the way
20 that it's done. Seizing the property in place deals with
21 bulky and immovable items, and it may also involve cattle,
22 and there is some very bizarre case law out there about
23 how you levy on cattle on the open range and what an open
24 range means and whether it's unfenced. We decided we
25 weren't going to get that specific in the rules, and we'll

1 continue to let the sheriff and constables who deal with
2 that issue continue to deal with it the way that they've
3 done in the past.
4 Part (c), seizing the property and holding
5 it in a bonded warehouse or other secure location, and
6 then we've got a provision in there that if the property
7 is released -- now, keep in mind, in attachment when
8 property is attached it goes into the sheriff or
9 constable's possession or custody. The applicant doesn't
10 get it, but the applicant -- the respondent has a right to
11 file a replevy bond and then get the property taken into
12 the procession of the respondent, but before possession is
13 moved, if you've got a piece of property that's been
14 attached and is very, very valuable, one of the options is
15 to seize it and put it into a bonded warehouse, and I
16 think that that's the current practice with most sheriffs
17 and constables, is to put it in a bonded warehouse.
18 You will see later on, we encountered a
19 problem with a whole lot of applicants saying, well, the
20 problem with the bonded warehouse is it only takes two
21 months before the storage charges exceed the value of the
22 property that's been attached, and we need to address that
23 situation. We will get to it later, but what we wanted to
24 do for attachment and the other rules was make clear how
25 this writ is levied, so that right now if you go to the

1 attachment rules you don't really know how it's levied.
2 You have to go to the execution rules to determine it. We
3 thought why not put it all in the same section to make it
4 easier for the practitioner.
5 (d), the return of the writ, comes out of a
6 combination of 596, 606, and 61.021. We may have to
7 adapt -- change this language to meet with the changes of
8 17.030 because here we have that the return must be in
9 writing, must be signed by the sheriff or constable, and
10 then it's returnable to the clerk or JP from which it
11 issued. Subpart (2), that the action must be endorsed on
12 or attached to the writ. Since the change in 17.030 talks
13 about process, that would include writ, so we'll have to
14 make appropriate changes to that. The rest of the
15 description on the return, you have to state the action
16 that the sheriff or constable took, describe the property
17 attached with sufficient certainty to identify and
18 distinguish it from property of like kind, state when it
19 was ceased and where it's being held. If the property has
20 been replevied then the sheriff or constable must deliver
21 the replevy bond to be filed with the papers of the suit.
22 CHAIRMAN BABCOCK: Okay. Let's go back to
23 (a). Any comments on (a)? Carl.
24 MR. HAMILTON: I have a comment on (c)(1),
25 real property.

1 CHAIRMAN BABCOCK: Okay. Hold that thought.
2 Hang on for a second. Anything on (a)? Anything on (b)?
3 Yeah, Hayes.
4 MR. FULLER: It may be stating the obvious
5 but under (b)(2), I would just say "as soon as practicable
6 before the writ expires."
7 MR. JACKSON: That should be (b)(2) and not
8 (b)(3). I have a (b)(3) on mine, a (b)(1) and a (b)(3).
9 MR. DYER: You don't have a (b)(2)?
10 MR. JACKSON: No. Well, mine is missing
11 (b)(2).
12 MR. FULLER: Mine says (b)(2).
13 HONORABLE LEVI BENTON: The one that was, I
14 guess, sent --
15 MR. DYER: We're just messing with you.
16 CHAIRMAN BABCOCK: Yeah, Richard.
17 MR. MUNZINGER: (b)(3).
18 CHAIRMAN BABCOCK: Yes.
19 MR. MUNZINGER: "Levy on property in an
20 amount that the sheriff or constable determines to be
21 sufficient to satisfy the writ." The source of that is
22 Rule 597, which currently reads "and found within his
23 county as may be sufficient to satisfy the command of the
24 writ." The old rule limited the amount on its face. The
25 new rules seems to give discretion to the officer. I know

1 that as a practicable matter the officer has some
2 discretion. He obviously must exercise it, but does this
3 work a substantive change? Is the officer liable
4 for error? Is the officer I -- I mean, if he takes too
5 much. My debt is a thousand dollars and he takes my brand
6 new Mercedes, which he knows is a hundred times more than
7 a thousand-dollar debt. Does he have any liability for
8 that?
9 MR. DYER: No.
10 MR. MUNZINGER: I think that the change
11 works a substantive change in the law.
12 MR. DYER: No. I disagree. But let's say I
13 do have a thousand-dollar claim and the only property I
14 can attach is your hundred thousand-dollar Mercedes. I
15 can attach it. It's up to you to come in and say, "Hey,
16 Judge, this is way excessive. I'll put a bond up for a
17 thousand dollars and give me my car back."
18 MR. FRITSCHE: Or replace it.
19 MR. DYER: Yeah. Or you can move to
20 substitute property. You can say, "Okay, I've been hiding
21 this thousand-dollar tractor I've got over here. Let me
22 put that up for attachment and give me my Mercedes."
23 CHAIRMAN BABCOCK: Or you can have the
24 hubcaps.
25 MR. DYER: Yes. You've got the spinners,

1 right?

2 MR. MUNZINGER: Apart from my example you do

3 not believe that this works any substantive change in the

4 rule?

5 MR. DYER: No.

6 MR. MUNZINGER: Apart from a practical

7 standpoint.

8 MR. DYER: No, I don't think it works any.

9 The sheriff and constable have always had discretion to

10 determine how much property they seize to satisfy the

11 debt. That discretion doesn't always please the

12 applicant. You know, the applicant may say, "I think

13 you've way overvalued that. I want this piece of property

14 out there," and it's up to the constable --

15 MR. MUNZINGER: I was only concerned that we

16 not inadvertently change the substance.

17 CHAIRMAN BABCOCK: Jeff, are you scratching

18 your head, or do you have your hand up?

19 MR. BOYD: Scratching my head.

20 CHAIRMAN BABCOCK: Scratching his head.

21 There we go. It's in the record now. It's tricking the

22 Chair, though.

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

24 CHAIRMAN BABCOCK: Anything else about 4(b)?

25 MR. WATSON: Chip?

1 CHAIRMAN BABCOCK: Yeah, Skip.
2 MR. WATSON: Just a question. I understand
3 that in (b)(2) that "immediately" was changed to -- excuse
4 me, "as soon as practicable" because immediately is -- is
5 not possible, but it's never been possible; and I was
6 trying to think, okay, why did they ever say immediately"
7 if it was obviously could not be complied with; and it
8 looks to me like we're working kind of a subtle change in
9 where discretion is vested. The court has the right once
10 it says "immediately" to say, "You're not doing what I
11 told you to do," you know, "get out there and do it," but
12 when it is changed to "as soon as practicable," discretion
13 just shifted to the officer.
14 Now, I understand the difference between
15 appearance and reality, but I'm talking about the ability
16 to enforce, the ability to say, "Hey, you know, I'm
17 overwhelmed," the judge says, "That's fine, that's fine,"
18 versus the ability to say, "That one goes on the back
19 burner, I'm going to have another donut." You know, we
20 don't -- do we really want to shift this to a -- to be
21 saying that the judge no longer has the power to say, "I
22 said immediately and I meant immediately"? I mean, I
23 think it's obvious to everyone "immediately" was never
24 possible, so why did they use that word?
25 MR. DYER: That's an excellent question.

1 CHAIRMAN BABCOCK: Well, and I'm not sure
2 that immediately is impossible. I give you the writ, I
3 say, "Immediately go out and do it." So you drop what
4 you're doing and you go out and --
5 MR. WATSON: Well, I mean, they were making
6 a very valid point about being overwhelmed by the volume
7 of the work.
8 CHAIRMAN BABCOCK: Yeah.
9 MR. WATSON: You know, and I'm sure
10 populations have increased greater than the number of
11 constables proportionately. I mean, I get it, you know,
12 but and I understand that the constables' input on the
13 task force was invaluable and important. I'm just not
14 sure that's a wise move. I like the idea of discretion
15 remaining in the hands of the black robe as opposed to the
16 person charged with it, and I don't see a hardship from
17 that. I just don't see it.
18 CHAIRMAN BABCOCK: David.
19 MR. FRITSCHE: And the word "proceed" I
20 think is important because you can immediately proceed
21 versus immediately levy. If you immediately proceed to
22 levy, that means forthwith.
23 MR. DYER: Ah, that's clear.
24 MR. WATSON: I don't mean to put too fine a
25 point on it, but I just think there was a reason that word

1 was used initially, and I don't think it should be
2 willy-nilly discarded.
3 CHAIRMAN BABCOCK: Judge Yelenosky, and then
4 Levi.
5 HONORABLE STEPHEN YELENOSKY: Skip, I think
6 very often we're faced with the option of saying what we
7 really mean when in the past we haven't, and the
8 unintended consequence is that people take that as a
9 change when it's not a change, except a change in the
10 language to conform to the reality. The way we've often
11 dealt with that is by a comment that says exactly that.
12 In general, I guess, and I don't feel that strongly on
13 this particular point, but in general I think where we
14 find language where we don't mean what we say, I think we
15 should change the language to say what we mean for future
16 generations so that they're not saddled with it and throw
17 in a comment.
18 As far as the judge's control, the judge is
19 going to be signing these things that are going to be
20 going out. If the person seeking them is concerned about
21 what the constable is doing, I have no doubt that the
22 judge is going to have authority to tell the constable
23 what to do, whatever the word is.
24 CHAIRMAN BABCOCK: Levi.
25 HONORABLE LEVI BENTON: Yeah, I don't -- I

1 don't agree with that, and I think the language should
2 provide that the constable's obliged to proceed to levy in
3 a time frame consistent with the language in the court
4 order or the writ so that you leave the discretion in the
5 judge. The judge can say if he wants as soon as
6 practicable or the judge can say "instanter," do it right
7 now. I just -- I don't want to leave the fall back
8 decision to, you know, the applicant can plan and go back
9 to the court and, you know, maybe -- with all due respect,
10 maybe it's an election year, the judge wants the
11 endorsement of the Travis County Sheriff's deputies. The
12 judge doesn't want to pick up the phone and say to the
13 constable, "Go do it right now," even though the order
14 says as soon as practicable. And so leave the discretion
15 for the -- judge can exercise his or her discretion in the
16 language of the writ.
17 HONORABLE STEPHEN YELENOSKY: Well, then the
18 judge isn't going to put "immediately."
19 HONORABLE LEVI BENTON: He might. She
20 might.
21 HONORABLE STEPHEN YELENOSKY: Well, if
22 they're concerned -- if they're truly not following their
23 oath and are doing something different because of an
24 election then they're going to do it in their order.
25 MR. DYER: Let me throw this out there. The

1 old rule says "immediately" --
2 HONORABLE LEVI BENTON: Right.
3 MR. DYER: -- "proceed." The old form of
4 the writ says "attach forthwith." The proposal we have is
5 we command that you "promptly attach." That's the
6 language of the writ and then in the timing and extent
7 we've used "as soon as practicable." If we want to keep
8 "immediately," shouldn't we address what that actually
9 means?
10 HONORABLE LEVI BENTON: Just a second.
11 Where is "immediately" in the language of the writ?
12 MR. DYER: It's not in the language of the
13 writ. It's in Rule 590 -- 597, "Sheriff or constable
14 receiving the writ shall immediately proceed to
15 execute." Okay. That's in the duty of the officer. 594,
16 the form of the writ which is directed to the sheriff, "We
17 command you that you attach forthwith."
18 HONORABLE LEVI BENTON: The provision that
19 has "immediately" I'm suggesting shouldn't be there. It
20 should express that the constable should act in a manner
21 consistent with what is -- with what's set out in the writ
22 or the order, and the judge should have flexibility on
23 language to put into the order because you can't have one
24 form for every circumstance.
25 CHAIRMAN BABCOCK: Carl.

1 HONORABLE LEVI BENTON: It might be -- it
2 might be you want to attach --
3 CHAIRMAN BABCOCK: In a minute.
4 HONORABLE LEVI BENTON: -- Carnival's boat
5 going out of Galveston Bay, and you can't wait.
6 MR. HAMILTON: Well, that's the point, that
7 the application for the writ is made because the defendant
8 is about to remove or hide the property, so we need
9 immediate action on the part of the sheriff, and giving
10 the sheriff discretion, as Richard says, could cause too
11 much delay.
12 MR. DYER: Well, but practically how do you
13 handle a hundred applications a day that all say they must
14 be immediately executed? How do you handle five of them
15 in one day in a county that only has one sheriff?
16 MR. HAMILTON: Hire more people.
17 MR. FRITSCHE: One of the practical concerns
18 is that the officer may not have access to the order
19 because the clerk issues the writ and then the constable
20 or sheriff acts pursuant to the writ without reliance upon
21 what the order says, and that's -- that has been current
22 practice, and that's just a practical concern.
23 CHAIRMAN BABCOCK: Levi.
24 HONORABLE LEVI BENTON: Well, I started to
25 ask this 10 minutes ago. Maybe this is a question for

1 another day, but if we permit private process servers to
2 serve citations why don't our -- you're shaking your
3 heads.
4 MS. WINK: No. Well, we do allow them -- in
5 Rule 103 we allow them to serve writs so long as that writ
6 does not require the taking of a person or property. The
7 reason being law enforcement may be needed to deal with
8 the heated situation if we're taking persons and property,
9 and that's already been done in Rule 103, so we stayed
10 consistent with that. This is attachment.
11 HONORABLE LEVI BENTON: Is that the only
12 reason that --
13 MS. WINK: Yes. Well, there are some
14 others.
15 MR. DYER: That was the subject of another
16 advisory committee, wasn't it, on the --
17 CHAIRMAN BABCOCK: It was. It was. Okay.
18 I think the Court's got the policy debate in mind. Good
19 point that you raise, Skip. Let's go to (c). Yeah,
20 Justice Gray.
21 HONORABLE TOM GRAY: Mine is primarily in
22 (c)(2)(c), so if you want to take them in order and
23 somebody has something before that.
24 CHAIRMAN BABCOCK: No, we're not going to be
25 that precise. Go ahead and talk about (c)(2)(c).

1 HONORABLE TOM GRAY: Okay. The way the
2 rule, as I understand it, is trying to be structured is
3 kind of in the sequence of events, and my concern about
4 the way (2)(c) -- or (c)(2)(c) is currently structured is
5 where it gets into the cost aspects of it. One of the
6 only cases that I can think of that this issue came into
7 our court, the issue that kept it coming back to our court
8 on various proceedings and appeals was the cost, and there
9 were two factors in the cost that came into play, and one
10 was the transfer cost, and the other was the cost of
11 holding, and I think the only costs that are addressed
12 here appear to be the holding costs or at least it's
13 arguable that the transfer costs are not involved, are not
14 directly involved, and this happened to be a bunch of
15 personal property at a rental business that they took from
16 one location and took it to the auctioneer, and multiple
17 auctions were delayed, and so they held it for a very,
18 very long time, but the wrecker driver and the company
19 that transferred all of this equipment were very
20 interested in getting paid as well. But I'm -- in looking
21 at that issue, it occurs to me that the cost of this
22 doesn't seem to really be involved in the levy, in the
23 method of the levy, and maybe the cost needs to be in a
24 separate rule or a separate part of the rule, not under
25 the method of levy of personal property.

1 In particular, in the last sentence of
2 subsection (c) is if it's released. That ought to be, it
3 seems like to me, in a replevy part. If the property is
4 released from a bonded warehouse or has been transferred
5 then the respondent has to worry about the transfer and
6 storage costs.
7 MR. FRITSCHE: It's in the -- it's in 9(b)
8 where we try to address that issue, and we may need to
9 expand what's in 9(b). "All judgments and any judgment,
10 all expenses associated with storage of the property may
11 be taxed as costs against the nonprevailing party."
12 MR. DYER: But maybe we could add "with
13 transfer and storage."
14 MS. WINK: In practical application the
15 transfer costs are being kept as part of the costs of
16 storage, that that is just part of what's going on, and it
17 varies significantly from county to county based on what
18 resources are available to them and also what kinds of
19 transportation facility they have.
20 HONORABLE TOM GRAY: Then my comment would
21 be that this is just not the place to address costs at
22 all.
23 MR. DYER: The reason why we do have it
24 there and we have it in several other sections is that we
25 wanted the practitioner to look at this and say, "Okay,

1 yeah, I can get possession of the property, but if I do
2 that I've got to pay the expenses," because under the
3 existing rules to us it appeared that there were not
4 enough provisions dealing with costs and when those costs
5 had to be paid as opposed to we'll just tax all of those
6 costs at the back end, which we thought was completely
7 insufficient. You know, if the respondent replevies and
8 gets the property right at the outset then they ought to
9 pay those storage charges then. They may seek to retax
10 them later on, but in terms of getting it paid right then
11 you've stopped those expenses, and that's the reason we've
12 included it here, and you'll see when we also deal with
13 the respondent's replevy bond and an applicant's replevy,
14 which attachment has never had before, we've added these
15 provisions about costs just to ensure that at every step
16 of the way they're addressed. I agree that it appears a
17 little bit out of place, but we just wanted to emphasize
18 it.
19 CHAIRMAN BABCOCK: Carl, did you have your
20 hand up?
21 MR. HAMILTON: Well, the (c)(1) on filing it
22 with the county clerk, I'm not sure the county clerk has
23 particular records of where these things get filed.
24 MS. WINK: Oh, yes.
25 MR. HAMILTON: Should they be filed in the

1 deed records?

2 MR. DYER: Yes. Or if that's not what

3 they're called maybe they're called real property records,

4 you know, whatever it's called where you file a mortgage

5 and a deed of trust. That's where it would be filed.

6 MR. HAMILTON: Well, should we say that so

7 the county clerk will know where to find it?

8 MS. WINK: They know. Anything that has to

9 do with real property --

10 MR. HAMILTON: Pardon?

11 MS. WINK: Anything that has to do with real

12 property, liens, attachments, they're accustomed to having

13 those filed in the county deed records. They're so

14 accustomed to this that's not even an issue.

15 CHAIRMAN BABCOCK: Richard.

16 MR. MUNZINGER: In (2)(c) the -- you say

17 "seizing the property and holding it in a bonded warehouse

18 or other secure location, in which case the applicant may

19 be held responsible for the costs." In the next sentence

20 if the respondent replevies you say he "must pay all

21 expenses." Why is it discretionary in the one and

22 mandatory in the other? That's my first question, and

23 then I have a question, you use "costs" in the first

24 sentence, "expenses associated with the storage" in the

25 second sentence, and "fees" in the third sentence, and I'm

1 wondering if those are all the same things, and if so,
2 shouldn't they all be called the same thing? My
3 suggestion would be "expenses associated with the storage
4 of the property," but I really also would like an answer
5 to the first question, why is it discretionary in the
6 first and mandatory in the second?
7 MR. DYER: The second point I completely
8 agree with. It should be -- they should all be
9 consistent. With regard to the first point, this is at
10 the stage where the respondent is replevying, filing a
11 bond to retake possession of the property. Our thought
12 was the only way it makes any sense and to stop any
13 continued fees, you have to pay those expenses right then
14 and there. If the respondent pays those and ultimately
15 the respondent wins in the lawsuit then the respondent can
16 ask that those storage fees be taxed against the applicant
17 as the nonprevailing party.
18 MR. MUNZINGER: Would it help if you said
19 "must pay the then incurred expenses associated with the
20 accrued or incurred expenses associated with the storage
21 of the property"? It may be a problem only in my mind and
22 not in others, but --
23 MR. DYER: Well, yeah, we can definitely
24 clarify the language, but what we wanted at this stage --
25 what frequently happens is respondent files a replevy

1 bond, takes it to the constable and says, "Okay, give me
2 the property." Constable says, "I'm not releasing this
3 property until somebody pays these storage fees." Well,
4 there's no court order out there that says I have to pay
5 it. What happens? It continues in storage, and these
6 storage fees are astounding.
7 MR. MUNZINGER: Yeah.
8 MR. DYER: So we thought this was the best
9 way to clear that issue up right then and there, not only
10 for the parties, but also for the sheriff or constable.
11 The reason why it says the applicant may be held
12 responsible for the costs is what ultimately happens in
13 the lawsuit. If the applicant wins, the applicant is
14 probably not going to be responsible for costs. The court
15 does have discretion, just like in any other award of
16 costs, to split it. So at this stage of the game we can't
17 say the applicant will or will not be. We're just saying
18 it's possible that at the end of the lawsuit the applicant
19 may be.
20 MR. MUNZINGER: Thank you.
21 CHAIRMAN BABCOCK: Justice Gray.
22 HONORABLE TOM GRAY: The argument that's
23 then going to be made to me at the appellate level is that
24 the respondent replevied the property and paid the
25 expenses, and, therefore, you cannot award the bonded

1 warehouse cost and transfer to me, they've already been
2 paid, that issue is moot, but you've just said if the
3 respondent wins the suit and it should have never been
4 taken in the first place that he should recover his costs.
5 MR. DYER: Well, but if I take an original
6 deposition and I pay the court reporter for that and I win
7 the lawsuit, I still get to ask the trial court to award
8 the cost of the original deposition even though I paid it.
9 Is there any difference here?
10 HONORABLE TOM GRAY: Well, as I understood
11 what you just explained there was, because this addresses
12 the expenses when they're paid. In other words, I mean,
13 the person that gets the replevy bond and gets the
14 property back, which I would suggest that needs to be the
15 operative word used instead of "released to the
16 respondent" in the event the property is replevied because
17 then it's very clear the precise circumstance in which it
18 is going to be applied. As I understood what you said a
19 minute ago, and I may have misunderstood it, is that the
20 respondent at that time pays the costs, and it's a dead
21 issue at that point. Because the --
22 MR. DYER: Why?
23 HONORABLE TOM GRAY: Well, because the
24 bondsman has been paid, the bailor. The bonded warehouse
25 has been paid.

1 MR. DYER: Right, but I'm seeking to recover
2 the cost.
3 MS. WINK: In 9(b), "At the time of
4 judgment. In any judgment all expenses associated with
5 the storage of the property may be taxed as costs against
6 the nonprevailing party," whoever that may be.
7 HONORABLE TOM GRAY: And I understand, and
8 I'll get off of this after this comment. I mean, I
9 understand why you're putting it here, but I think this is
10 such a reduced statement about costs and fees and expenses
11 and what you're trying to do that it makes it more
12 confusing than simply having the section that comes later
13 that's dedicated to it, and I'll get off of it with that
14 comment.
15 CHAIRMAN BABCOCK: Any other comments about
16 (c)?
17 PROFESSOR HOFFMAN: Yeah, I have one.
18 CHAIRMAN BABCOCK: Yeah, Lonny.
19 PROFESSOR HOFFMAN: I just had always
20 assumed that with real property we actually stuck a sign
21 in the ground that gave notice. We don't do that?
22 MR. DYER: You can.
23 MR. FRITSCHE: The key here is the levy,
24 which creates an attachment lien, and the world is on
25 notice once it's filed of record.

1 PROFESSOR HOFFMAN: Okay. I just was noting
2 the difference with personal property. You actually have
3 to -- where was that?
4 MS. SECCO: Affix a notice of seizure?
5 PROFESSOR HOFFMAN: Yeah, where am I --
6 MR. DYER: That's in 2(b)?
7 PROFESSOR HOFFMAN: Am I in the wrong place?
8 MR. DYER: In seizure of personal property
9 that is movable you don't have to place a notice anywhere,
10 but the respondent is notified.
11 PROFESSOR HOFFMAN: Yeah, I guess I'm asking
12 why is it that you affix a notice of seizure with the 2(b)
13 property, but you don't affix some kind of a notice with
14 real property?
15 MS. BARON: I think that's because that's
16 the only way you can do it. You don't have deed records
17 that cover immovable personal property, but it's very
18 common to file something in the deed records if you want
19 to put a cloud on title and that puts the burden on the
20 property owner to have the cloud removed.
21 PROFESSOR HOFFMAN: Check the deed. Yeah.
22 CHAIRMAN BABCOCK: All right. Yeah, Marisa.
23 MS. SECCO: I just had a quick -- to sort of
24 reiterate what Judge Gray said, when I first read
25 (c)(2)(c) and read "in the event the property is released

1 to the respondent" it was unclear to me if that was just
2 replevy or if that could be final judgment, so because the
3 property could be released at final judgment and not just
4 at replevy, so it kind of reads like the respondent would
5 have to pay those costs no matter what.
6 MR. DYER: Okay. Yeah. That's a good
7 point.
8 CHAIRMAN BABCOCK: Okay. How about (d)?
9 Any comments on (d)? Yeah, Richard.
10 MR. MUNZINGER: The last sentence of (d)(2)
11 is different than the subject matter of the title and
12 different -- it's a break in the narrative of what's gone
13 on here, and I'm just curious whether you want it there or
14 if you want to have it in a separate section or have it in
15 a different title or something else. You see my point?
16 The rule is talking about the return of the writ, but the
17 last sentence is talking about what the sheriff does if
18 the property has been replevied.
19 MR. DYER: We could move that to each of the
20 replevy sections.
21 CHAIRMAN BABCOCK: Okay. Any other
22 comments? Yeah, Gene.
23 MR. STORIE: Well, I guess I'm still
24 confused about the timing of things, and it's the same
25 thing I mentioned before, because if you return it in time

1 you have a -- to me at least, a disconnect between the
2 time for levy and the time for return of the writ, and I
3 don't know why you wouldn't want the writ returned as soon
4 as it's executed or not until it expires, the 30, 60, or
5 90 days, which --
6 MS. WINK: This is just long term -- long
7 term practice, the reality of it. Often -- I think some
8 of your concern may be that the officers are attaching the
9 property and you don't know about it until the return is
10 filed. Now, the reason we like to deliver these things to
11 the officers is the officers have our cards and they call
12 us and let us know, so there's often communication beyond
13 just the return.
14 MR. STORIE: Okay.
15 MS. WINK: And more than anything else they
16 just make sure they've got the time to get it done, filled
17 out properly, and filed with the court.
18 MR. DYER: So you're addressing the last
19 part of (1) within the time stated in the writ.
20 MR. STORIE: Yeah. And that's why I brought
21 the comment up originally on (3)(e), because that was the
22 form, which talks about "On or before 30, 60, 90 days from
23 the date of issuance."
24 MR. DYER: So if it's a 30-day and they
25 levy, they have to return it within the 30 days. If they

1 levy within that 30 days, it doesn't matter that it's
2 returned -- well, it has to be returned to the court
3 within the 30, but that 31st day doesn't somehow void the
4 levy. If the levy is done and the writ is returned within
5 the 30 days, your attachment is good. Now, if the officer
6 returns it beyond the 30 days, you've got problems.
7 MR. STORIE: Right, and I think, you know,
8 Dulcie may have answered my question about it. So if you
9 had a 90-day time frame and you had levy within two weeks,
10 why would you not want the return, you know, by two weeks
11 or three weeks? But she says the communication is ongoing
12 so it's not actually a problem.
13 MR. DYER: Right. It really isn't.
14 MR. STORIE: And they won't return it early
15 either because --
16 MS. WINK: Sometimes they do. Sometimes
17 they do.
18 MR. DYER: My experience in Harris County is
19 it's within a week or two weeks after levy. It's a pretty
20 quick turnaround. There's no real need for them to keep
21 it, and it just clutters things up.
22 MR. STORIE: Right. Okay. Now, let's say
23 -- and again, I'm just kind of speculating, but let's say
24 you have a 90-day framework and they go out after three
25 weeks and they don't find anything on the property. Are

1 they then discharged and they don't have to try again in a
2 month?
3 MS. WINK: Well, what -- again, what
4 generally happens is they'll let us know, "I went there,
5 it wasn't there" so that the attorney can do some checking
6 and investigation, say "Try this, try that." So it gives
7 them ongoing time frame. They don't just make one try and
8 say, "I'm done."
9 MR. STORIE: Well, that's what I thought,
10 but there's nothing in the rule that really sets that out,
11 because you don't have an expiration date for the writ.
12 You just have a return date, so that's why it's confusing
13 to me.
14 MR. DYER: But the return date is the
15 expiration date, but I will disagree. You do see it
16 happen where a sheriff says, you know, "I tried," and they
17 return it, you know, without calling you, and you've got
18 to go get another writ. The issue of successive levy of
19 an individual writ, yes, it is required. Does it happen?
20 There are a couple of cases out of Dallas involving a bar,
21 and they attached the daily proceeds.
22 MR. STORIE: Right.
23 MR. DYER: And the constable I think tried
24 to return it after only trying one or two nights, and they
25 sued under then existing rules dealing with or the statute

1 dealing with the duties of the officer and they won, and
2 the argument was "You should have gone there every single
3 night under this attachment and just taken all the daily
4 revenues." Well, they won, but they changed the statute
5 dealing with the constables, and frankly, I can't recall
6 exactly what it is now, but it didn't affect the issue of
7 successive levies under the same writ. That's ideally
8 what you want the sheriff or constable to do, but the only
9 way you're really going to get that done is if you
10 casually and repeatedly remind them that "I don't have to
11 go get a second writ. You can continue to levy this one
12 until it expires."
13 CHAIRMAN BABCOCK: Hayes.
14 MR. FULLER: Is there a problem in a
15 situation where you've got a 90-day writ, someone levies
16 on the property within 15 days, puts it in the bonded
17 warehouse so that there are costs accruing, but nobody is
18 told about that until the 90th day? So you've got two
19 months worth of costs that perhaps could have been avoided
20 had someone simply known the property was there.
21 MS. WINK: I can't say it doesn't happen,
22 and all I can say is I think the articles that will be
23 written to go with these rules that are much more friendly
24 to the practitioner should be planned to warn of these
25 practicalities, and those rules mean make sure you get to

1 know your sheriff or constable, make sure you're kind to
2 them. "Please" and "thank you" definitely helps, acting
3 like a bullish lawyer doesn't. So it's an imperfect
4 world, but it does help to keep following up.
5 MR. DYER: It could happen. I suspect it
6 has happened. Our rules don't really address it. The
7 only thing I would suggest is that the applicant file or
8 the respondent for that matter file a motion with the
9 court to address the issue. That does get the attention
10 of people who are charging pretty excessive storage fees.
11 MR. FULLER: Well, and my question goes to
12 is the applicant's notice that the property has actually
13 been seized that return?
14 MS. WINK: No, not always. Sometimes they
15 will call us if we give them our cards and we ask, and,
16 frankly, we call them, pick up the phone on a weekly basis
17 or every few days and ask the status because the squeaky
18 wheel does have a tendency to get attention.
19 CHAIRMAN BABCOCK: Carl.
20 MR. HAMILTON: Did you say that if the levy
21 is to be returned within 30 days and property is levied on
22 in 15 days, but the return is not made until 35 days,
23 that's a problem?
24 MR. DYER: I think that it is. I know under
25 the execution rules it is. If you -- if the return comes

1 in after it has expired, so I'm pretty sure it's --
2 MR. HAMILTON: But the levy has already been
3 made, and the levy has been sent over to the deed records
4 in the county clerk's office, but for some reason they
5 just didn't get returned to the district clerk.
6 MR. DYER: There's a case where writ of
7 execution is levied on property, property is sold after
8 the writ expired.
9 MR. HAMILTON: Yeah, but that's after the
10 writ expired.
11 MR. DYER: It's the same expiration date.
12 It's a 30, 60, 90 return date, but that's also the
13 expiration date. The levy was completed while it was
14 still a good writ. The fact that it was sold after the
15 expiration, court said, "No, that's an invalid sale." So
16 the logic to me would be the same. If I've attached
17 property, but then it's -- then don't get that return in
18 before the expiration date, I've got a problem. I can't
19 tell you that there's case law out there.
20 MR. HAMILTON: But in the execution case
21 they sold it after the writ expired.
22 MR. DYER: Right.
23 MR. HAMILTON: Here the attachment is
24 complete before the writ expires, and they just return it
25 later, so I don't know.

1 MR. DYER: Well, you may be right. It may
2 not be a problem in attachment.
3 CHAIRMAN BABCOCK: Justice Gaultney, and
4 then Justice Gray.
5 HONORABLE DAVID GAULTNEY: Well, this is an
6 area that I'm, again, not speaking about something I know,
7 but it seems to me that with the 30-, 60-, and 90-day
8 return period what you're trying to do is give flexibility
9 for the levy, right? Not for the return, but for the
10 levy, right?
11 MR. DYER: Uh-huh.
12 HONORABLE DAVID GAULTNEY: Why wouldn't
13 there be a requirement for an immediate return after levy,
14 and looking at (d)(1) on return, it says "within the
15 period of time," so if you've given them 90 days to levy,
16 presumably they would have 90 days to return. Let's say
17 if they levied early, they would have a period of time to
18 return, right?
19 MR. DYER: Uh-huh.
20 HONORABLE DAVID GAULTNEY: Okay. Yet if you
21 look at (c)(1), it says the return must be filed
22 immediately after levy on real property, right? Is
23 there -- first of all, is there an inconsistency there,
24 and secondly, is there something that can be done with the
25 rules that would allow the discretion in terms of time to

1 levy to try to get the return filed faster?
2 MS. WINK: Let me address the two things. I
3 think there is a different concern as to why the rule says
4 immediately with real property, because the outside world
5 is not on notice of that levy until proof of the levy is
6 filed in the deed records, so that's what really protects
7 the real property situation; whereas with personal
8 property it's either being taken, seized by the sheriffs
9 and constables and safeguarded, or it's being seized in
10 place and there is some kind of notice that lets people
11 know this property has been seized. So there are just a
12 little bit different issues there, and I think that's why
13 they probably say immediately with real property. Can I
14 cite you a case to that? No, but that seems to be the
15 logical answer.
16 With respect to the other issue, you know, I
17 think we may be focusing too much on how quickly the
18 return gets back. I know there's a concern that you want
19 to make sure that people know about it, but I think the
20 practitioner who is making the request at the time of the
21 application is going to have to balance all of those
22 things, how quickly do I think I can get something, how
23 often do I think I might have to look for property if it's
24 being moved around, and communicate back and forth with
25 law enforcement, and what's our realistic expectation of

1 law enforcement? If I'm trying to be kind to my officer
2 and trying to get my officer to help me, one of the things
3 I don't want to do unnecessarily is make his or her life
4 so impossible that I become their least favorite friend,
5 so to speak.
6 HONORABLE DAVID GAULTNEY: Can I just follow
7 up on that?
8 MS. WINK: Uh-huh.
9 HONORABLE DAVID GAULTNEY: As I understand
10 it then the real property is really kind of a -- return,
11 that it be returned immediately is really kind of an
12 exception to (d)(1), or am I wrong about that? I mean,
13 because of the need to get -- that's the only method of
14 giving notice to people with liens on the property.
15 MR. DYER: I agree with -- yeah, the way we
16 have it phrased, you're right.
17 MS. WINK: You're right, yeah.
18 CHAIRMAN BABCOCK: Yeah, Justice Gray.
19 HONORABLE TOM GRAY: In the case that you
20 were talking about, the time line was levy, expiration of
21 the writ or the return, however it's phrased, and then
22 sale of the property. When was the return actually made,
23 or was it ever actually made? Was it before or after the
24 sale?
25 MR. DYER: The return was made before the

1 sale.

2 HONORABLE TOM GRAY: Okay. Obviously a

3 number of us are concerned about the timing of the return.

4 With this anecdotal evidence of a specific case of a

5 problem with a late return, timely let -- I think you said

6 that one was in a different situation, but timely levy,

7 untimely return, some event occurs, and probably -- is

8 there a way that we could add to this a simple solution of

9 a return within 10 days, 15 days after the expiration

10 makes the process that was done, attachment, whatever,

11 valid? You understand what I'm saying?

12 MR. DYER: I'm definitely hearing that we

13 need more specific language with regard to when the return

14 should be filed.

15 HONORABLE TOM GRAY: And, see, I don't care

16 when it should be filed. I'm worried about the legal

17 effect of it.

18 MR. DYER: Right. And I need to address the

19 specific issue about whether the return of a writ of

20 attachment or sequestration beyond the date stated in the

21 writ, whether that definitively has an effect on the

22 validity of the writ, so I will address that, but what I'm

23 also hearing is we need better language with regard to

24 when that writ needs to be returned.

25 HONORABLE TOM GRAY: And there's no

1 question, I agree with you that if you take the action or
2 if the officer takes the action after the date, then it's
3 just bad. I mean, if it's after the 30-, 60-, 90-day
4 deadline, that's not any good.
5 MR. DYER: Right.
6 HONORABLE TOM GRAY: But what I'm worried
7 about is that officer that does get it done on the 29th or
8 30th day, but maybe that's a Saturday or Sunday, you know,
9 and maybe the rule saves him then, but maybe not. I don't
10 know. I would like that clarified.
11 CHAIRMAN BABCOCK: Okay. Good point. Yeah,
12 Hayes.
13 MR. FULLER: In other words, you may want to
14 tie (d)(1) into (b)(2) so that you're talking about doing
15 something as soon as practicable before the writ expires
16 or as soon as practicable within the time stated in the
17 writ. Make those two consistent.
18 CHAIRMAN BABCOCK: Okay. Any other comments
19 on that?
20 Okay. It's time for our morning break.
21 We'll be in recess for a little bit, come back in about 10
22 or 15 minutes.
23 (Recess from 10:30 a.m. to 10:47 a.m.)
24 CHAIRMAN BABCOCK: Okay, Pat, Rule 5,
25 attachment Rule 5 looks elegant in its simplicity. There

1 are very few words.
2 MR. DYER: We worked hardest on this rule.
3 CHAIRMAN BABCOCK: And so I'm sure there are
4 going to be no comments to attachment Rule 5, but in the
5 off chance that Carl's got something to say.
6 MR. HAMILTON: Just looking at Rule 5(d) --
7 it doesn't have a number on it.
8 CHAIRMAN BABCOCK: Rule 5 is a --
9 MR. HAMILTON: Well, 5 is the delivery of
10 the service on the respondent after levy, right?
11 CHAIRMAN BABCOCK: Yeah, service of writ on
12 respondent after levy.
13 MR. HAMILTON: Okay. Now, I'm assuming that
14 if there's no levy, nothing gets served on the respondent.
15 MR. DYER: Correct.
16 MR. HAMILTON: So why don't we over on Rule
17 3 where it's the notice to the respondent, instead of
18 saying that you're notified that property which you own
19 has been attached, why don't we say "has been levied upon
20 and seized" -- "or seized by the sheriff or constable"?
21 CHAIRMAN BABCOCK: Because that wouldn't be
22 plain English.
23 MR. HAMILTON: Huh? Well, I mean, that
24 tells them that the sheriff or constable has taken some of
25 their property, whereas I don't know that "attached" tells

1 them anything.
2 MS. WINK: Well, the writ is attached to the
3 notice. The writ is attached, so the language --
4 CHAIRMAN BABCOCK: I thought the property
5 was attached.
6 MS. WINK: Only for you, Chip.
7 MR. HAMILTON: I know the writ is attached,
8 but the language in the writ now says you're notified that
9 something you own has been attached. I'm just saying that
10 why don't we say "has been levied upon and seized by the
11 sheriff or constable"? That way they know something has
12 happened to their property.
13 MR. DYER: Well, I think this was the
14 earlier discussion about whether we should modernize the
15 language --
16 MR. HAMILTON: Yeah, I understand. Yeah.
17 MR. DYER: -- which I think we've agreed
18 we'll take a look at that.
19 MR. HAMILTON: Okay.
20 CHAIRMAN BABCOCK: But on Rule 5, Carl, is
21 there a problem with the way it's drafted?
22 MR. HAMILTON: No.
23 MR. DYER: I did want to add just briefly,
24 there is a slight change from the rule it was taken from.
25 The current rule doesn't state who is supposed to serve

1 the respondent. We wanted just to clarify it's the
2 applicant rather than the constable.
3 CHAIRMAN BABCOCK: Okay. Anything else on
4 5? All right. Then --
5 HONORABLE TOM GRAY: How is the applicant
6 going to get a copy to serve?
7 MR. DYER: I believe we do have the
8 constable giving the --
9 MS. WINK: The constable has to provide
10 things back, not only to the court but also to the
11 applicant, if I remember correctly.
12 HONORABLE TOM GRAY: I thought they only
13 returned it to -- and I don't think that comes out on the
14 transcription, but I had that in quotes, "returned it to"
15 the --
16 MR. DYER: The constable returns it to the
17 court. It's just up to the applicant to get a copy of
18 that and serve it on the respondent.
19 HONORABLE TOM GRAY: They return it to the
20 clerk or the JP.
21 MR. DYER: Correct.
22 HONORABLE TOM GRAY: And so then the
23 mechanics of that I'm concerned about, but they'll figure
24 it out. Never mind. I'll let it go.
25 CHAIRMAN BABCOCK: Richard.

1 MR. MUNZINGER: I know that the language,
2 "Service may be in any manner prescribed for service of
3 citation or as provided in Rule 21a" has its origins in
4 that Rule 598a, and I believe also that it contemplates
5 the situation where the attachment is part of a suit which
6 is filed at the moment as distinct from an attachment
7 arising in an already pending suit. It appears to me that
8 the sentence allows a delay in service on a defendant in a
9 case in a pending suit because I can instead of giving the
10 service in a pending suit as required by Rule 21a, in a
11 pending suit I could delay serving my adversary by using
12 one of the service of citation rules. I could have him
13 served by the sheriff, who could lollygag around for two
14 weeks before he serves, or I could send it by certified
15 mail I guess, which would be the same as Rule 21a. Do
16 y'all see any problem at all in that?
17 MR. DYER: I don't.
18 CHAIRMAN BABCOCK: Okay. Anything more
19 about 5? Marisa.
20 MS. SECCO: I just had a question. In all
21 of the ancillary rules is the service of the writ, does it
22 come after the writ has already been returned by the
23 sheriff or constable?
24 MR. DYER: It doesn't have to be, but most
25 of the time it's going to be after the constable has

1 returned it to the court.
2 MS. SECCO: Okay.
3 CHAIRMAN BABCOCK: Okay. Anything more on
4 5? Okay. Let's go to 6.
5 MR. DYER: Okay. Respondent's replevy
6 rights, by and large this is all based on the existing
7 rules. Part (a) is where the replevy bond is filed. It's
8 with the court or sheriff or constable and serving the
9 applicant with a copy of the bond. You may ask why should
10 there be a replevy bond filed with a sheriff or constable
11 as opposed to the court. Well, let's say Saturday your
12 crops have been attached or your John Deere tractor has
13 been attached, and there's no way you can get to a judge,
14 but you can get to a sheriff or constable. You can
15 deliver a replevy bond to the sheriff or constable so that
16 you can get your property back and maybe harvest your crop
17 that weekend. So that's why there's a provision for
18 providing the bond to the sheriff or constable.
19 Keep in mind, by this time the amount of the
20 replevy bond has also been set in the court's order, so
21 the constable doesn't have to determine what that amount
22 is. The last sentence, "all motions regarding the
23 attached property must be filed with the court having
24 jurisdiction of the suit," that seems self-evident, but
25 there are situations where a justice of the peace court

1 issues a writ of attachment, but the piece of property
2 attached is beyond the jurisdiction of the JP court. In
3 that instance the motion is filed with the court having
4 jurisdiction over the amount in controversy rather than in
5 the JP court.
6 In part (b), the amount and form of the
7 replevy bond, it's -- first off it's set by the court's
8 order, and here again we've added "with sufficient surety
9 or sureties." The statute currently requires two
10 sureties, so we'll just make that change there. Our
11 preference was to have the Legislature change that because
12 two sureties are not required anymore for any of the other
13 statutes.
14 The part that's been added is who gets to
15 approve those surety or sureties. It's either the court
16 or by the sheriff or constable who has possession of the
17 property. So, once again, in the Friday afternoon
18 scenario where someone seized the John Deere tractor, you
19 can go to the sheriff or constable, the bond amount is
20 already in the court order. It's a sheriff or constable
21 who approves the sufficiency of the sureties, and that's
22 existing practice as well. And the change that we did
23 have, the current rules provide that the officer
24 determines the amount of the replevy bond based on his
25 valuation of the property. Like we discussed yesterday,

1 we disposed of that and just put the amount of the replevy
2 bond in the court's order.
3 Part (c) is a new rule, bringing us into
4 line with Rule 14c and alternative security. Part (d),
5 the review of the respondent's replevy bond, this is
6 current rules. The only language we've added is "After
7 hearing the court must issue a written order on the
8 motion." The last part of (d) was a subject of discussion
9 yesterday with regard to uncontroverted affidavits and the
10 parties must submit evidence. We will continue to work on
11 that language to make it better.
12 Part (e) is new, but we felt that the
13 current rules did not make it clear what happened when a
14 respondent filed a proper replevy bond, and it was not
15 challenged. So this is what we've garnered from not only
16 practitioners but from what the intent of the current
17 rules appears to be, and that is if a sheriff or constable
18 has possession of it, they must release it to the
19 respondent within a reasonable time after the sheriff or
20 constable gets a copy of the bond, and now we've added
21 again -- and we may need to move this elsewhere. The last
22 sentence of (e) is "Before the property is released the
23 respondent must pay all expenses associated." So we've
24 already said we'll address that again.
25 Part (f) deals with substitution of

1 property. This derives from the current rule, which
2 states, "No property on which liens have become affixed
3 since the date of levy on the original property may be
4 substituted." We thought that was a little bit hard to
5 understand, but I believe that the intent of it was you
6 can't come in and move to substitute to get property
7 released by putting other property in there that's already
8 got a lien on it. Okay. So the substitution aspect of
9 this rule allows the respondent to say, "Okay, you've got
10 my John Deere tractor in there for 50 grand. It's worth
11 50 grand. You've only got a $5 claim. I'm going to
12 substitute this piece of property that's worth 5 or 10
13 grand so I can get my tractor back." That's what this
14 allows.
15 The last section is new. It says "Unless
16 the court orders otherwise, no property on which a lien
17 exists may be substituted." We thought this was much more
18 clear than "no property on which liens have become
19 affixed," and I think they used "affixed" there because
20 they didn't want to say "attached" because we're dealing
21 with attachment, and, well, you get the picture.
22 Part (1), "Court must make findings." This
23 is in the current rule. Before a court can allow
24 substitution of property, the court has to determine the
25 value of the proposed substituted property. So in other

1 words, the respondent can't just come in and say, "This is
2 worth X dollars, so give me back my tractor." It's got to
3 be proven to the satisfaction of the court, and the court
4 has to make fact findings.
5 Part (2) is, again, addresses the issue of
6 substitution and the method and how you do it both with
7 personal property and real property. We wanted to make
8 sure as best as we could how to preserve an existing
9 attachment lien. By statute when a writ of attachment is
10 levied an attachment lien comes into place. So if someone
11 wants to substitute property for what you attached, say
12 two weeks ago, you want to make sure your lien is still
13 good from the date of your original attachment. So the
14 intent of this rule is I'm taking new property on which
15 there is no lien currently, and I am moving to substitute
16 the property that was attached two weeks ago on which
17 there is a lien. By this language that new property now
18 has the lien that the old one did as of that -- the date
19 of levy. And then only at that stage is the old property
20 released.
21 So we tried to make it as clear as possible
22 as to the timing of all of this and the perfection of
23 liens because let's say you've got your attachment two
24 weeks, you've got an attachment lien and there are
25 intervening creditors who file liens, so we wanted to

1 protect the priority of the attachment lien if there is a
2 substitution of property. Another way to do it would be
3 to say, nope, there are no substitution rights, but we
4 feel that would damage valuable rights to the respondent
5 to substitute property.
6 The last thing that we also allowed is
7 discretion in the court to allow there to be some existing
8 lien on the property, but not one that takes all the
9 equity in the property, so that you could theoretically
10 substitute property on which there is a minor lien, but
11 there is sufficient equity in the property to protect the
12 applicant. That was not addressed at all in the existing
13 rules, but we thought that that was a valuable right. And
14 that's -- also covers subsection (3).
15 CHAIRMAN BABCOCK: Okay. Let's go to 6(a).
16 Any comments on 6(a)? Carl.
17 MR. HAMILTON: How do we file -- how does
18 one file a bond with the sheriff or constable?
19 MR. DYER: You go down to the bonding
20 agency, you get your bond, and then --
21 MR. HAMILTON: Just hand it to them?
22 MR. DYER: Yeah, hand-deliver it to them.
23 If you want possession of the property, yeah, you
24 hand-deliver it to them.
25 MR. HAMILTON: That's filing, just handing

1 it to the sheriff?

2 MR. DYER: Yes, for purposes of getting

3 possession and filing the bond. Now, the bond ultimately

4 does have to go to the court, but in the situation we

5 discussed where the court isn't open and you can get

6 access to the sheriff or constable, giving it to the

7 sheriff or constable is sufficient. At that point the

8 sheriff or constable has to determine the sufficiency of

9 the sureties.

10 CHAIRMAN BABCOCK: Skip.

11 MR. WATSON: Can you go through just very

12 briefly how it comes about that the property has been

13 previously claimed or sold?

14 MR. DYER: Okay.

15 MR. WATSON: I mean, how does it just

16 disappear and suddenly you're looking at proceeds that may

17 be a fraction of what it's worth?

18 MR. DYER: Well, you've attached property,

19 and it's a truckload of tomatoes on the market. They're

20 already ripe. Under existing rules you can have an

21 immediate sale of the perishable goods, so now they're

22 gone, but you have proceeds.

23 MR. WATSON: It's only perishables then.

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

25 one example.

1 MR. WATSON: Well, let's say it's an
2 18-wheeler full of -- to use an example used earlier, of
3 Frank Zappa posters that for some people are
4 extraordinarily collectible and valuable, and I'm a
5 collector of Frank Zappa posters and I hear as a third
6 party that they've been attached, and I've been looking at
7 that for a long time. Can I go in and buy them and for an
8 amount that's greater than the amount of the attachment
9 but a very good deal for me?
10 MR. DYER: Well, if you're a Frank Zappa fan
11 you know the answer to that is the crux of the biscuit is
12 the apostrophe. I'm sorry, that's out there in the
13 lyrics, but the short answer --
14 CHAIRMAN BABCOCK: That's plain language,
15 man.
16 MR. DYER: Well, it was back in those days.
17 CHAIRMAN BABCOCK: You can't get any plainer
18 than that.
19 MR. DYER: The short answer to your question
20 is no.
21 MR. WATSON: Okay. Good. That's all I need
22 to know.
23 CHAIRMAN BABCOCK: Unless Munzinger has them
24 in his hundred thousand-dollar Mercedes.
25 MR. MUNZINGER: Is Frank Zappa the premier

1 of Greece or something like that?
2 MR. DYER: He was a rock star, that -- well,
3 let's say he had been to the well quite often.
4 CHAIRMAN BABCOCK: Succeeded by his son
5 Dweezil.
6 MR. DYER: And Moon Unit. See, you-all do
7 know.
8 CHAIRMAN BABCOCK: You're not going to put
9 any of this Zappa stuff over on us, I'll tell you that.
10 Okay. Any other comments about (a)? Yes, Marisa. Do you
11 know who Frank Zappa is?
12 MS. SECCO: I've heard the name. My dad was
13 a fan. I'm just kidding.
14 CHAIRMAN BABCOCK: From your grandfather, no
15 doubt.
16 MS. SECCO: Just the title of (a), "Where
17 filed," it seems like it's really addressing the right to
18 replevy and how you go about replevying, not just where
19 it's filed. I mean, the last sentence talks about where
20 it's filed, but kind of I think maybe that first sentence
21 that's in yellow and then ending with "by filing a replevy
22 bond" might be (a) and then all of these might be
23 subsections to (a) rather than having that. Because to me
24 that's just not the gist of (a). I don't know if anyone
25 agrees.

1 MR. DYER: Something like title (a),
2 "General," and then (a)(1), "The replevy bond must be
3 filed with the court or the sheriff or constable."
4 (a)(2), "All motions regarding must be" --
5 MS. SECCO: Something like that, yeah.
6 CHAIRMAN BABCOCK: Yeah, that's a good
7 point. Okay. Anything else on (a)? All right. Let's go
8 to (b). Any comments on (b)? Going once.
9 MR. HAMILTON: Wait a minute.
10 CHAIRMAN BABCOCK: Carl. Saved by Carl.
11 MR. HAMILTON: The replevy bond has to be in
12 an amount set -- oh, that's in the original court's order
13 then. It's not something that we go to get right now.
14 That's back in the original court's order.
15 MS. WINK: Yes.
16 MR. HAMILTON: Okay.
17 CHAIRMAN BABCOCK: Is that right?
18 MR. DYER: I'm sorry?
19 CHAIRMAN BABCOCK: Carl has a question.
20 MR. HAMILTON: She answered it.
21 CHAIRMAN BABCOCK: Oh, she did? Okay.
22 MS. WINK: I answered.
23 CHAIRMAN BABCOCK: All right. Anything else
24 about (b)? Richard.
25 MR. MUNZINGER: I just wonder about the

1 phrasing on the respondent satisfying, I wonder if that's
2 the way you want to express it. "Satisfaction by the
3 respondent to the extent of the penal bond of the
4 judgment." It seemed to me unusual, but that may be
5 because I don't know Frank Zappa.
6 MR. DYER: If you knew Frank Zappa you would
7 understand all things. I think this is existing language.
8 MR. MUNZINGER: I looked at Rule 599. I
9 didn't think it was, but --
10 MR. DYER: Let's see. 599 on the defendant
11 replevy, "condition that the defendant shall satisfy to
12 the extent of the penal amount of the bond any judgment
13 which may be rendered."
14 MR. MUNZINGER: You have "satisfying to the
15 extent of," and it's the "satisfying" that kind of threw
16 me.
17 CHAIRMAN BABCOCK: Okay. Any more on (b)?
18 All right. How about (c)? Moving on to (d), any comments
19 on (d)? All right. On (e). I had a comment on (e). You
20 say "must release the property to the respondent within a
21 reasonable time." In other instances where you're getting
22 the bond it's got to be as soon as practicable or
23 immediately. "Within a reasonable time" seems to be a
24 more leisurely pace than some of the other words that
25 we've used.

1 MR. DYER: So we should add "within a
2 leisurely time"?
3 CHAIRMAN BABCOCK: At a leisurely pace.
4 Well, I was thinking about speeding it up a little bit.
5 MR. FRITSCHE: "As soon as practicable."
6 CHAIRMAN BABCOCK: Yeah. That's what I was
7 thinking. Any other comments on (e)? Yeah, Skip.
8 MR. WATSON: Just the phrase "and the
9 replevy bond is not successfully challenged by the
10 applicant," just to go back to something you explained
11 earlier that as I recall the replevy bond can be taken, on
12 the weekend example, directly to the constable. Are there
13 situations where the constable must referee the challenge
14 to the replevy bond?
15 MR. DYER: No. No, that has to go through
16 the court. So on the Friday example, if the bond is in
17 the proper amount, the only discretion the constable has
18 is to determine the sufficiency of the two sureties.
19 They've got to be two sureties. If that's sufficient, the
20 property has to be released. The applicant's response
21 would have to be file a motion that following Monday to
22 increase the amount of bond.
23 MR. WATSON: I would just -- you might
24 consider "successfully challenged in the court" or
25 something to make it clear to the uninitiated like me of

1 what's going on there.
2 CHAIRMAN BABCOCK: Carl.
3 MR. HAMILTON: I'm still a little behind the
4 curve, but if you file a bond with the sheriff or
5 constable, how does it get to the clerk?
6 MR. DYER: Sheriff or constable has to
7 deliver it to the clerk.
8 MR. HAMILTON: It doesn't say that in the
9 rules anywhere.
10 MR. DYER: I thought we did have it.
11 MR. MUNZINGER: It's in an earlier rule.
12 HONORABLE TOM GRAY: It's under (d)(2), last
13 sentence, but we talked about moving it where it says
14 "When property have been replevied the sheriff or
15 constable must deliver the replevy bond to the clerk or
16 justice of the peace to be filed with the papers of the
17 suit."
18 MR. HAMILTON: Where is that?
19 HONORABLE TOM GRAY: Under Rule 4.
20 CHAIRMAN BABCOCK: 4(d)(2).
21 MR. DYER: So we could probably move 4(d)(2)
22 into a separate subsection in Rule 6?
23 MR. HAMILTON: Yeah, I think that would be
24 better if you put it over there.
25 MR. FRITSCHE: I think it has to be in (e).

1 It has to be in (e).

2 CHAIRMAN BABCOCK: Okay. Anything more on

3 (e)? Yeah, Richard.

4 MR. MUNZINGER: The current phraseology is

5 "If a replevy bond is not successfully challenged." What

6 is the situation if a motion has been filed attacking the

7 replevy bond but the court has not heard the motion, so

8 there is, in fact, a motion pending but the bond -- the

9 court has not ruled on it and can't because it's a Friday

10 or whatever. The way this rule is written the person who

11 has the replevy bond can replevy the property,

12 notwithstanding that there is a motion pending. Is that

13 --

14 MR. DYER: Correct.

15 MR. MUNZINGER: -- what is intended?

16 MR. DYER: Yes.

17 MR. MUNZINGER: Why?

18 MR. DYER: Because we want to err on the

19 side of the defendant who needs to get his property back

20 so that we don't increase the damages. If we allow the

21 defendant or the respondent to be damaged just by the

22 filing of a motion --

23 MR. MUNZINGER: I agree. Thank you.

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

25 MR. BOYD: Chip, I do.

1 CHAIRMAN BABCOCK: Yeah, Jeff.
2 MR. BOYD: Is there any concern about
3 needing to clarify what are the expenses associated with
4 the storage of the property?
5 MR. DYER: Yes. I think earlier we
6 addressed that. We're going to try to make that clear
7 probably in a separate section.
8 CHAIRMAN BABCOCK: Okay. Anything else on
9 (e)? All right. Let's go to (f). Substitution of
10 property. Comments on (f)? Justice Gray.
11 HONORABLE TOM GRAY: I'm not sure I entirely
12 understood your explanation of what could be substituted,
13 but I think I read the current rule differently than what
14 you are reading it. Where it said "no property on which
15 liens have become affixed since the date of the levy on
16 the original property may be substituted," as presented
17 here that was an absolute prohibition, and it would seem
18 that if Carl's hundred thousand-dollar Mercedes that only
19 had a thousand dollar lien on it because he paid cash for
20 the other $99,000 was levied on and then he said, "Well,
21 I'm going to fix this. I'm going to go get an additional
22 lien on it," that then the Mercedes under the old rule
23 could not be used at all, but under the new rule
24 because -- unless the court orders otherwise, that implies
25 that the court could substitute it, but then the timing of

1 the lien priorities becomes a challenge under the next
2 rule. So we've substituted an absolute prohibition for
3 some discretion that may create a timing problem, it seems
4 to me.
5 MR. DYER: Yes, and we've tried to address
6 that timing problem in the language.
7 HONORABLE TOM GRAY: Okay. I just wanted to
8 be sure I understood what we had done by the various
9 rules. Okay.
10 CHAIRMAN BABCOCK: Okay. Anything more on
11 this one? We're all good on (f)? Okay. Then we'll move
12 on to 7.
13 MR. DYER: Okay. 7, I'd like to address a
14 little differently. This is a brand new section and there
15 are differing views. I will give you the subcommittee
16 view, and David will give you the anti-subcommittee
17 minority report because it does involve some significant
18 differences.
19 CHAIRMAN BABCOCK: Richard.
20 MR. MUNZINGER: I apologize. I was
21 researching something in the current rules, and I wanted
22 to ask a question about subsection (f), and I didn't want
23 to ask the question and waste time until I had looked at
24 the rules.
25 CHAIRMAN BABCOCK: Okay.

1 MR. MUNZINGER: "Substitution of property on
2 a reasonable notice, which may be less than three days,"
3 the current Rules of Procedure require three days' notice
4 on a motion unless the court allows it to the contrary.
5 We don't have that exception here. Why?
6 MR. DYER: This is out of the existing rule.
7 The existing rule always allowed reasonable notice to the
8 opposing party, which may be less than three days.
9 MR. MUNZINGER: Thank you.
10 CHAIRMAN BABCOCK: Now onto the subcommittee
11 and the anti-subcommittee.
12 MR. DYER: Attachment does not have an
13 applicant's replevy bond right. Sequestration, there is
14 an applicant's replevy bond right. Main difference
15 between sequestration and attachment, in sequestration the
16 applicant has an existing lien on the property. In
17 attachment you don't have any lien at all until you find
18 some property to attach, so you do not have a preexisting
19 lien. Because storage costs have escalated so rapidly
20 now, if you attach property and it gets put into a bonded
21 warehouse, it takes, generally speaking, just a couple of
22 months if the property is $10,000 or less for your storage
23 charges to exceed the value of the property, and it only
24 gets worse from there.
25 Harris County -- well, typically you're

1 required to put it in a bonded warehouse. Bonded
2 warehouses are much more expensive than public storage.
3 Unless you get the property out of that bonded warehouse,
4 they keep those daily charges hitting you and hitting you
5 and hitting you, and it basically means if you've got any
6 suit less than about 30 grand and you've got some attached
7 property, it's worthless. It basically invalidates the
8 procedure because the costs of storage are so high.
9 The subcommittee said, therefore, we should
10 allow an applicant to file a replevy bond if the defendant
11 hasn't already replevied so that the applicant can take
12 possession of the property and store it at a smaller
13 storage charge. Keep in mind, the applicant still has to
14 file a bond. So the subcommittee believed that even
15 though there are distinct legal rights, sequestration
16 versus attachment, that the defendant -- that a respondent
17 was adequately protected by the bond. Therefore, we
18 wanted to give the applicant a replevy bond.
19 MR. FRITSCHE: I think Pat pretty much
20 described the dilemma, and that is in sequestration there
21 is a security interest that is owned by the applicant.
22 There is a property right that preexists the lawsuit. The
23 concern here is if an applicant who has not reduced its
24 claim to judgment attaches personal or real property of
25 the respondent and replevies the personal property, takes

1 possession of it, then you have somehow damaged the
2 respondent perhaps irrevocably because that applicant has
3 had the use of that personal property, and essentially the
4 minority side is since there was never a property interest
5 granted to the applicant in an attachment situation other
6 than the lien that arises as a matter of law, there
7 shouldn't be a replevy right vested in an applicant under
8 attachment, so as we're going through, think about that
9 potential dilemma as we go through Rule 7.
10 MR. DYER: So that having been said, it
11 only -- the applicant's replevy right only kicks in if the
12 respondent has not replevied property within 10 days after
13 service, so there's a 10-day delay there. It is also
14 discretionary with the court. The other replevy bonds are
15 not. I mean, if the replevy bond is in the right amount
16 and the sureties are approved, the respondent gets
17 possession, period. It's not discretionary with the
18 court. The applicant's replevy bond is, so that the court
19 can address potential problems that we just discussed.
20 Part (c), the language itself comes out of
21 the respondent's replevy bond. Most of this language
22 tracks the applicant's replevy bond language in the
23 sequestration rules. The conditions of the applicant's
24 replevy bond, these are the same conditions that come out
25 of the sequestration rules dealing with what you are --

1 what you're required to do. Basically you can't take the
2 property out of the county; you can't injure, destroy it;
3 you've got a duty to maintain it in the same condition as
4 it was replevied together with the -- and the phrase is
5 value of fruits, hire, or revenue, and you may wonder
6 doesn't that language sound archaic. It does. It's out
7 of the existing rule, but fruits, offspring of cattle,
8 that's a fruit. Hire, rental revenues. Revenue, if
9 you've got an asset-producing property, that's the
10 revenue. So we decided to keep that language. We could
11 change it to bring it up to more modern terms, and then
12 you are required to return it if you end up losing the
13 suit. To the extent you don't return the property, this
14 is in 5(a), you've got to pay the value of the property
15 along with the fruits, hire or revenue, and to the extent
16 that the property is returned but it's not in the same
17 condition as it was when it was replevied, you have to pay
18 the difference between the value of the property as of the
19 date it was replevied and the date of the judgment,
20 regardless of the cost of the difference in value, and we
21 will also have to address that.
22 (e) is the Rule 14c paragraph that we've
23 used before. (f) deals with service on the respondent.
24 (g) deals with the right to possession upon compliance of
25 filing of a replevy bond that's been approved by the

1 court. The "regardless of the cause of the difference in
2 value," in sequestration on the return of property that is
3 not as valuable as it once was, you have to pay the
4 difference between the value from the day it was replevied
5 and the date of the judgment regardless of the difference
6 in value. There is old case law that says that you do not
7 have to account for normal depreciation because the theory
8 goes the property would have normally depreciated whether
9 it was in the possession of the constable or the
10 applicant; therefore, you can't get that. I think the
11 better rule is to make it clear you have to pay the
12 difference in value regardless of the difference in value
13 between the date of replevy and the date of judgment. I
14 think otherwise it's unclear, and there is not much case
15 law. I think there are only two cases dealing with normal
16 depreciation, and I think that the sequestration rules
17 that include the "regardless of the cause in difference of
18 value," I think that may have come after those cases
19 because those cases were pretty old. And that's all I've
20 got to say about that.
21 CHAIRMAN BABCOCK: If I -- are cattle
22 personal property?
23 MR. DYER: Yes.
24 CHAIRMAN BABCOCK: Okay. So as I understand
25 it, if I'm the respondent and I get a replevy bond and I

1 give it to the sheriff and I get -- and the sheriff says
2 "Yeah, this is fine," then I can get my cattle back?
3 MR. DYER: Yes.
4 CHAIRMAN BABCOCK: Okay. But if I'm the
5 applicant and I get a replevy bond, it gets approved, then
6 I can take the cattle?
7 MR. DYER: Yes. You go back to that same
8 sheriff and say --
9 CHAIRMAN BABCOCK: "Here, I've got a replevy
10 bond, too."
11 MR. DYER: No, if the respondent does it
12 first you don't have --
13 CHAIRMAN BABCOCK: You don't have any
14 rights.
15 MR. DYER: Yeah. If respondent does it --
16 CHAIRMAN BABCOCK: After 10 days if he
17 hadn't done it then I can go --
18 MR. DYER: Yes.
19 CHAIRMAN BABCOCK: -- and say, "Here's a
20 replevy bond, I want the cattle."
21 MR. DYER: Correct.
22 CHAIRMAN BABCOCK: And Munzinger is going to
23 have a question about that.
24 MR. MUNZINGER: Well, I need to leave to
25 catch my plane. That's why I raised my hand.

1 CHAIRMAN BABCOCK: But your parting shot is.
2 MR. MUNZINGER: My question is attachment is
3 a creature of the Legislature. Chapter 61 of the Civil
4 Practice & Remedies Code outlines and creates the remedy.
5 How does the Supreme Court get the right to give this new
6 weapon to the attaching creditor unless it is specifically
7 authorized by the Legislature in Chapters 61 of the Civil
8 Practice & Remedies Code? I don't know if you've briefed
9 that, but that is a problem to me because, as Chip points
10 out, you're taking somebody's property from them. Even
11 though the person didn't answer within 10 days, et cetera,
12 and we understand the problem that the expenses are
13 accruing on the warehouse or whatever it is so that the
14 value is being taken, but once again, where do we get --
15 does the Supreme Court get the power to create a remedy if
16 it's not contemplated by Chapter 61? I'm leaving. I'm
17 going to go study on Frank Zappa.
18 CHAIRMAN BABCOCK: Do you have an iPad?
19 MR. MUNZINGER: I do.
20 CHAIRMAN BABCOCK: Okay. Well, just type in
21 "Frank Zappa."
22 MR. MUNZINGER: I will.
23 CHAIRMAN BABCOCK: Or if you want to type in
24 "mothers of invention" that will get you to the same
25 place.

1 MR. DYER: That's a very good point. I
2 don't know the extent of the rule-making authority with
3 regard to Chapter 61.
4 CHAIRMAN BABCOCK: Well, it's a pretty good
5 point because this sort of sounds substantive, and the
6 Court's rule-making power is procedural, so Skip.
7 MR. WATSON: Well, right in that area, I
8 mean, it's obvious we're trying to address a very real
9 practical problem, which is -- as I understand it, is that
10 the extraordinary writ of attachment can be rendered
11 essentially moot or really a negative remedy by the
12 charges that are coming down on the attached property.
13 Now, my question is this, and I don't know anything about
14 your area, so forgive my ignorance here, but is there a
15 different way to approach the problem? Is there another
16 option that would be within the power of the Court and
17 wouldn't be stretching the envelope here, such as does the
18 court have the power to order, for example, the sheriff or
19 the constable to hold the property not in a bonded
20 warehouse at a thousand dollars a day where one or the
21 other is going to have to pay for it; and as I understand
22 it, the constable is having to pay, the county is having
23 to pay that thousand dollars a day whether anybody picks
24 it up or not? Those charges are accruing on counties that
25 don't have the money in the coffers to even pay for the

1 constables. Okay. Did I get that right?
2 MR. DYER: My -- okay.
3 MR. WATSON: All right. Now, if that's the
4 case, can -- does the court have the discretion to order
5 that the property be held in the sheriff's property room
6 with the -- with the stolen bicycles, the evidence from
7 all of the cases that are going on in the county
8 courthouse or in public storage? Is that an option?
9 MR. DYER: I don't have a direct answer, but
10 here's what I believe to be the case. I believe that
11 under the statutes the constables in a county that has a
12 bonded warehouse must place the property in the bonded
13 warehouse, and that's to protect the property against
14 fire, casualty, loss. Otherwise if it goes into private
15 storage, for example, someone has got to pick up insurance
16 for it, so that I think in counties that have a bonded
17 warehouse it has to go there. I'm not positive of that,
18 but I think so. In counties that don't have it the judge
19 does have more discretion, but you're still having going
20 to have to pick up the issue who is going to pay for the
21 insurance to cover the property.
22 MR. WATSON: What if it were in a county
23 building, and is it possible -- I don't know if you've
24 ever tried to track down missing exhibits from a record in
25 a county property room, but it's an interesting

1 experience, and once you get in there you see that there
2 are all manner of things stored there, and there's a lot
3 of room in some of them. I mean, some maybe not, but why
4 couldn't the court simply order for it to be -- you know,
5 when the sheriff seizes it or attaches it or whatever the
6 word is, to take it, take custody of it, and the court has
7 the power to tell the sheriff, "Put it here, put it in the
8 property room. It's under your care, and it's under the
9 care, custody, and control of the county."
10 MR. DYER: But is that going to be covered
11 under the county's insurance policy if for some reason
12 it's damaged?
13 MR. WATSON: Well, I don't know.
14 MR. DYER: I would think that's one of the
15 issues. I think that --
16 MR. WATSON: I guess if trial exhibits are,
17 so would this. I mean, I don't know. I'm just wondering
18 if there is another approach. I'm not trying to take a
19 position on either the majority or the minority report.
20 I'm just asking if what appears to me to be an option is
21 available.
22 CHAIRMAN BABCOCK: Aren't the cattle going
23 to make a mess of the property room?
24 MR. WATSON: Big ones. Cattle, try emus.
25 That's really --

1 CHAIRMAN BABCOCK: Carl.
2 MR. HAMILTON: Practice & Remedies Code
3 61.042 says, "The officer shall retain possession of the
4 property unless it is replevied." It doesn't say by who,
5 so I think that's broad enough to include the applicant's
6 replevy, but my question is, after the applicant
7 replevies, can the respondent replevy it again?
8 MR. DYER: Under our scenario, no.
9 MR. HAMILTON: Well, the Rule 6 says that
10 the respondent can replevy any time before judgment.
11 CHAIRMAN BABCOCK: You caught them.
12 MR. DYER: We couldn't pull any wool over
13 the eyes on that one.
14 CHAIRMAN BABCOCK: Makes it all worthwhile,
15 doesn't it, Carl?
16 MS. WINK: Carl, which subsection of Rule 6
17 was that?
18 MR. HAMILTON: 6(a).
19 MR. DYER: No. I don't think so. "At any
20 time before judgment if the attached property has not been
21 previously claimed."
22 HONORABLE TOM GRAY: Well, if Richard was
23 here, Richard would say, "What do you mean? I can't get
24 my property back by paying a bond? You must be kidding.
25 This is America."

1 CHAIRMAN BABCOCK: That's pretty good. I'm
2 sorry the record can't get the inflection. SO that is an
3 inconsistency, isn't it?
4 MR. DYER: I don't think so. I think
5 "claim" means that it's already been replevied by someone
6 else.
7 CHAIRMAN BABCOCK: Okay.
8 MR. DYER: Or that it's been sold. Clearly
9 if it's been sold the respondent can't file a replevy bond
10 to get it back.
11 MR. WATSON: What else could "claim" mean?
12 I mean, that's got to be what it's referring to.
13 MR. DYER: Well, that's one of them. The
14 other claim can be a third party claim.
15 MR. WATSON: I got it.
16 MR. DYER: Which we have also tried to
17 address in here.
18 CHAIRMAN BABCOCK: Okay.
19 MR. DYER: In a unique way.
20 CHAIRMAN BABCOCK: Is there any other for
21 this subcommittee? Yeah, Hayes.
22 MR. FULLER: Just briefly along the lines of
23 what Skip was suggesting there, when the court goes beyond
24 defining or telling the officer what authority they do
25 have under the law and starts telling them how to do their

1 job and where they're starting to put stuff, don't we have
2 a separation of powers issue in there of some sort between
3 -- with that?
4 MR. DYER: I think that it is -- yeah, that
5 that's a potential problem. The other thing is there are
6 statutes governing the conduct of officers and sheriffs
7 and constables and what they do, and I don't have those
8 with me, but I think we would have to look at those before
9 we could even attempt to make rules.
10 MR. FULLER: Okay.
11 MR. DYER: That's my concern. I mean, I
12 would love for a judge to have discretion to say, no, it
13 doesn't go into the expensive bonded warehouse, it goes
14 over here, but that's not the end of the story. Someone
15 is going to have to pay insurance on that. I don't think
16 you're going to get the sheriff or constable to have to
17 pay insurance if appropriations haven't been made and, you
18 know, so, yeah, it's -- it's a real problem.
19 MR. WATSON: I was just thinking it might be
20 cheaper than the sheriff or constable having to pay the
21 unappropriated storage fees.
22 MR. DYER: I completely agree. I just think
23 that -- I don't think we can do rules here that change
24 what the statute says the constables have to do.
25 MR. WATSON: That's all I'm asking, just

1 asking if it was possible.

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

5 MR. DYER: Rule 8, okay. Dissolution or
6 modification of the order or writ comes out of Rule 608,
7 almost virtually identical out of (a). It's on a motion
8 practice. (b) requires the prompt hearing, which may be
9 less than three days. (c), and this is out of existing
10 rule, "The filing of the motion stays any further
11 proceedings." (d), the conduct in hearing, we have --
12 we've added a little bit of language here, "burden of
13 applicant" comes out of the existing rule. You have to
14 prove the statutory grounds for your writ of attachment,
15 so keep in mind under Chapter 61 that means you have to
16 prove your general ground and then you also have to prove
17 one or more specific grounds.

18 We added the last language in (d)(1) to make
19 sure that the consequence was known, that if the applicant
20 fails to carry its burden, and the applicant has to go
21 first, the writ must be dissolved and the underlying order
22 set aside. So that's the end of it. The respondent at
23 that point doesn't have to do anything if the applicant
24 doesn't establish its burden of proof. If the applicant
25 does carry its burden of proof then the movant has to

1 prove the grounds alleged to dissolve or modify. If the
2 movant seeks to modify the order writ based on the value
3 of property then the movant has the burden to prove the
4 reasonable value of the property attached exceeds the
5 value necessary to secure the claim. The language was to
6 make clear that there existed more than one ground for a
7 respondent to dissolve the writ. The existing rule makes
8 it sound like the only reason is based on the value of the
9 property. There may be other reasons, extent to dissolve
10 the writ, so we wanted to clarify that, and finally, we
11 added that if the issue is substitution of property, the
12 movant has the burden to prove the facts to justify that
13 substitution.
14 Part (3), we're going to have to revise
15 based on the discussion yesterday about uncontroverted
16 affidavits and additional evidence. That will be done.
17 Part (e) deals with what the court can do on the
18 dissolution or modification. The only addition we made is
19 if the writ is dissolved the order must be set aside.
20 That's the order granting the application. The attached
21 property has to be released, and then all expenses
22 associated with the storage of property may be taxed as
23 costs to the appellant. Again, based on our discussion of
24 costs earlier --
25 CHAIRMAN BABCOCK: You mean applicant?

1 MR. DYER: I mean applicant. We'll probably
2 consider and do a separate section that addresses costs.
3 A third party claimant, (f) is new, and this may be a
4 substantive change, but the existing rules do allow for a
5 third party claimant to make a claim to the property but
6 then follow the trial of right to property procedure. The
7 concern of the subcommittee was a piece of property is
8 attached, and there is absolutely no basis for the
9 allegation that either the plaintiff or the defendant owns
10 the property. Should the person who does own the property
11 be required to go through the procedure called trial of
12 right to property that most people have never heard of,
13 but you're going to have to go pay an attorney to do it?
14 We thought we should allow the possibility
15 of an expedited proceeding by motion challengeable by the
16 applicant and the respondent, and if by motion the judge
17 determines there is indeed no valid claim to this piece of
18 property then it gets released to the third party claimant
19 upon the filing of a bond, so there is a little bit of a
20 hedge there, just in case something changes, but we
21 thought that the third party should have an expedited
22 route to get the property back instead of having to file a
23 separate lawsuit against the applicant and respondent.
24 Part (g) also comes from sequestration.
25 Under the writ of sequestration, before you can recover

1 for wrongful sequestration the writ must first be
2 dissolved, and the claim for wrongful sequestration is a
3 compulsory counterclaim in the existing lawsuit. The
4 subcommittee agreed that before a claim for wrongful
5 attachment could be made that there should be a
6 prerequisite that the writ be first dissolved, but we
7 decided we did not want to make wrongful attachment a
8 compulsory counterclaim in the existing suit. It's
9 compulsory in sequestration because the statute says so.
10 There is no similar provision in the attachment statute,
11 and we came up with different scenarios where it made no
12 sense to require it to be a compulsory counterclaim in the
13 existing suit. And that's all of 8.
14 CHAIRMAN BABCOCK: Carl.
15 MR. HAMILTON: I forgot what it was now.
16 Let me find it.
17 CHAIRMAN BABCOCK: Yeah, sorry, you had your
18 hand up mid-presentation.
19 MR. HAMILTON: Oh, if the applicant -- if
20 the order is dissolved you say the expenses may be taxed
21 against the applicant. Why shouldn't that be a must?
22 Under what circumstances would you not charge the cost
23 against the applicant if his application gets dissolved?
24 MR. DYER: Let me give that some thought. I
25 suppose there are scenarios where the conduct of the

1 defendant may have contributed to an increase in cost.
2 CHAIRMAN BABCOCK: Skip.
3 MR. WATSON: I think this is the section
4 where this would come in, but if property is seized that
5 has a lien on it but the lien is small, and if I'm
6 remembering my own documents correctly, if property is
7 seized that is an event of default in and of itself. So
8 the first lienholder of my house or tractor or cap comes
9 in and says, "Okay, an attachment has occurred, property
10 has been seized. That's an event of default. I am
11 asserting the priority of my first lien." Is this section
12 where the first lienholder comes in and says, "Deliver the
13 property to me," and if it is why does that first
14 lienholder then have to put up a bond?
15 MR. DYER: The first lienholder could, but
16 under existing law, it's *In Re: Grocery Supply* which
17 involved a writ of execution. Writ of execution is
18 served, property is picked up. The prior secured creditor
19 says "You better not do anything with that property. I've
20 got the prior lien." The execution creditor says, "Look,
21 I know you've got a prior lien, but the rules specifically
22 allow me to execute on property that has a lien or
23 mortgage on it, and I take subject to that mortgage, so
24 you are protected." Creditor did not agree with that,
25 sued, and the court held, despite what the rules say, you

1 cannot sell that property if there's a prior lien, and
2 they take precedence, and you have to pay all of their
3 attorney fees for having said that you could sell this
4 property. So in your scenario, if I'm a prior secured
5 creditor, I'm already protected. I'm not going to mess
6 with filing trial of right of property or filing a claim
7 in that lawsuit. I'm going to send a notice to the
8 creditor who's taxed and say, "If do you anything with
9 that property I'm holding you responsible and you're going
10 to pay my attorney fees."
11 MR. WATSON: Thank you very much. That
12 helps.
13 CHAIRMAN BABCOCK: Yeah, Justice Gray.
14 HONORABLE TOM GRAY: On subsection (f) that
15 you've added to clarify or give an alternate remedy to a
16 person who owns the property to avoid this trial of right
17 to property. You know, we don't see a lot of these, but
18 if you're going to add something like that and the trial
19 court doesn't buy it, I would like to see the question of
20 whether or not a -- that's res judicata in the event that
21 he has to go try his trial of right to property. In other
22 words, trial court denies --
23 MR. DYER: That's a good point, yeah.
24 HONORABLE TOM GRAY: -- and all of the
25 sudden he's got an adverse ruling --

1 MR. DYER: Uh-huh.
2 HONORABLE TOM GRAY: -- from a previous
3 proceeding.
4 MS. WINK: That's huge.
5 MR. DYER: Yeah, that's a good point that we
6 did not consider, but will be considered.
7 CHAIRMAN BABCOCK: Any other comments?
8 MR. HAMILTON: Is there a current rule on
9 the third party claim?
10 MR. DYER: Yes. It's Rule 608, permits the
11 filing of a motion by an intervening party who claims an
12 interest in such property.
13 CHAIRMAN BABCOCK: Anything else on 8?
14 Okay. Let's go to 9.
15 MR. DYER: Okay. 9 deals with judgments.
16 Sequestration deals with judgments. It doesn't deal with
17 all judgments, and attachment, CPRC 61.063 deals with
18 judgment on replevy property involving a judgment against
19 a defendant. We thought we should address the different
20 scenarios and different judgments which could come from a
21 writ of attachment and the underlying lawsuit. So 9(a) is
22 (d) -- it's basically adopted from sequestration, but it
23 is new. Deals with a case that's decided against a
24 respondent who replevied the property. So in this
25 situation property has been attached, defendant has

1 replevied, defendant has possession, defendant loses the
2 underlying lawsuit.
3 So in this case final judgment should be
4 rendered against all the obligors on the respondent's
5 replevy bond, jointly and severally according to the terms
6 of the replevy bond, either for the amount of the judgment
7 plus interest and costs or an amount equal to the value of
8 the property replevied as of the date of replevy, plus
9 interest. All right. So you have two possible amounts
10 there, and it's going to be related to the value of the
11 property. If the value of the property is lower than the
12 amount of the claim then you have to look to the terms of
13 the replevy bond to see if the replevy bond states that
14 upon defendant losing you pay the higher of total amount
15 of claim and value of property. If in No. (2) -- No. (2)
16 we only deal with if we adopt the provision that an
17 applicant will have a replevy bond. It doesn't seem to me
18 that that's going to happen, but this is just a parallel
19 provision with regard to the respondent's replevy bond.
20 And then part (b) deals with awarding expenses. We're
21 going to rework that and probably do a separate section
22 entirely on costs and how they should be assessed.
23 CHAIRMAN BABCOCK: Any comments on 9?
24 PROFESSOR HOFFMAN: So I have a comment that
25 may not be specific to 9, and so I'm a little scared to go

1 back to 3, so I'm going to say it relates to 9, but it's
2 about the bond. This made me think of it now. I don't
3 know why I didn't think of it before, but it turns out
4 there's this really pretty interesting issue for kind of
5 procedural nerds about what happens after a judgment and
6 it's on appeal, or for that matter it could be that the
7 trial court does something with it, and we're trying to
8 figure out who won and who lost and whether the bond gets
9 released depending on that. So the story that I've
10 recently heard is a story involving a gigantic case. It
11 was a multi-hundred million-dollar judgment, and it goes
12 up on appeal, and it was only a battle about damages. So
13 they had all agreed on liability. It was a breach of
14 contract case. It was just a question of how much we owed
15 you. So they get this huge verdict, and so the lose --
16 that party appeals, and the appellate court reverses
17 because it says the evidence on damages was no good.
18 So now the issue becomes has the bond been
19 satisfied because the losing party won, and so bond -- the
20 appeal bond goes away. So it makes me think about that
21 same question could apply here. How do we know when you
22 won or not, and does the term of the bond sort of answer
23 when it is dissolved on its own? So it turns out in this
24 incredibly expensive context when you would think with
25 such high stakes litigation it would all be spelled out,

1 the bond is utterly confusing and vague. So I'm guessing
2 we have a problem with the bonds here as well if we've got
3 it with that.
4 MR. DYER: Well, are you talking about
5 assessing costs to the prevailing party, or are you
6 talking about the terms of the bond and what happens to
7 the bond after it is appealed?
8 PROFESSOR HOFFMAN: Yeah, the second one.
9 MR. DYER: But has the judgment been
10 superseded? If the judgment has been superseded then
11 nothing happens and the property should not be released.
12 If the judgment has not been superseded then the natural
13 consequences of a bond and a judgment involving that bond
14 go forward, which means the bond may be released if the
15 respondent wins. If the respondent loses, you've got to
16 pay up the bond. All right. So let's say on appeal it
17 gets reversed. Well, then you've got to go file suit to
18 recover that property, as you would in any other case.
19 So --
20 PROFESSOR HOFFMAN: Okay. Well, that answer
21 makes sense. I guess maybe my comment is more general,
22 which is in some other contexts it looks like we're
23 relying on the terms of the bond to be clear about when it
24 gets released or not and when you're under the hook to pay
25 under the bond as opposed to paying under the property,

1 which I assume for the creditor is a wonderful place to be
2 because the likelihood of payment goes way up --
3 MR. DYER: Yes.
4 PROFESSOR HOFFMAN: -- as a result of the
5 bond. Do the rules need to be more specific is my
6 question to either consider now or later as to what the
7 terms of when a bond is satisfied or not and thus when it
8 gets dissolved?
9 MR. DYER: We don't actually have a form of
10 bond in the rules. I think we looked at that and decided
11 that the forms that are currently used contain all the
12 information that's needed and that we didn't need to have
13 a rule that told them your rules -- or your forms need to
14 be different.
15 PROFESSOR HOFFMAN: Okay. Thank you.
16 CHAIRMAN BABCOCK: Okay. Anything more on
17 9? Yeah. Gene.
18 MR. STORIE: When you have either-or is it
19 the judgment or the bond that decides which of those
20 applies?
21 MR. DYER: It -- where are you? Are you
22 on --
23 MR. STORIE: Yeah 9(a)(1), "either for the
24 amount of the judgment plus interests and costs or for an
25 amount equal to the value of the property." Are those the

1 terms of the bond, or is that what the judgment is
2 providing?
3 MR. DYER: It should be -- okay. You do
4 raise a point, which is it's not as clear as it should be.
5 But the terms of the replevy bond determine the liability
6 of the obligors.
7 MR. STORIE: Okay.
8 MR. DYER: The existing language in
9 sequestration is even less clear and says that -- actually
10 it may be with the statute, that the obligors are jointly
11 and severally liable for the entire judgment and then it
12 says "according the terms of the bond." Well, you know,
13 "I only signed on as a surety here for five grand and yet
14 the respondent just lost $500,000. I'm responsible for
15 all of that?" So we attempted to clarify this, but I
16 agree it's not as clear as it should be. But it's the
17 terms of the bond that determine the obligor's liability,
18 not the underlying judgment against the respondent.
19 MR. HAMILTON: Can't we just put a period
20 or end the sentence, "terms of the replevy bond plus
21 interest" without putting that other phrase in there?
22 MR. DYER: I think we may be able to. I
23 can't say it absolutely yet without going back and looking
24 at the other provisions, but I think that that may -- that
25 may -- it solves the problem with regard to the obligors.

1 I just want to make sure that it doesn't mess up the
2 judgment against the respondent, so I just need to clarify
3 that.
4 CHAIRMAN BABCOCK: Okay, yeah, Justice Gray.
5 HONORABLE TOM GRAY: And I don't know if
6 this fits here or maybe after the next section or
7 something, but in reading this on judgments it occurred to
8 me that if the scenario that you've described happens and
9 in the case that you and I were talking about at the break
10 where the property has been attached during the suit.
11 Now, it comes time -- the respondent either directly in
12 the trial court or on appeal has prevailed. All of this
13 cost has been accruing, and it's in storage. It was never
14 replevied. How does the respondent go get his property
15 because the fees have still not been paid? And he's
16 entitled to it.
17 MR. DYER: That's an interesting question
18 because ideally they would have been taxes cost to the
19 prevailing party. Now that on appeal he's prevailed he
20 goes back to the trial court and says "You have to
21 reassess these against the plaintiff," but wouldn't the
22 trial court then say, "Okay, I can do that, but only at
23 the end of the litigation. I can't do it now"?
24 HONORABLE TOM GRAY: Well, see, and taxing
25 doesn't help you at all.

1 MR. DYER: Doesn't get it paid.
2 HONORABLE TOM GRAY: That's not money, and
3 so, I mean, somehow or another it seems like the trial
4 court or the -- we need to be able to put the respondent
5 back in possession of the property without regard to
6 payment of the cost and expenses.
7 MR. DYER: Well, to the extent that the
8 satisfactory appeal gives the respondent a claim for
9 wrongful attachment, that would be the remedy. Again,
10 that doesn't get you paid. It just gets you a claim. If
11 on appeal it does not give you a wrongful attachment, I
12 don't see any other vehicle to recover those other than on
13 the new trial. Assuming that it's been remanded. Was it
14 reversed and rendered or reversed and remanded?
15 HONORABLE TOM GRAY: Remanded, as I recall.
16 MR. DYER: If it's remanded, I don't see how
17 you can get those costs paid -- well, I don't see how you
18 can even get them taxed unless you bring that up in the
19 new trial. I don't.
20 HONORABLE TOM GRAY: Well, separate and
21 aside from the one that we had talked about at the break,
22 but I'm just talking about in a straightforward case, case
23 has been tried to judgment, and the -- either the
24 respondent wins at that level or it maybe goes on up to
25 the next level and gets reversed and rendered or whatever,

1 but the respondent wins. His property has been in custody
2 for the entire time of the trial. Absolute final
3 judgment, no liability, he's entitled to his property.
4 Trial court assesses costs against the losing party.
5 Plaintiff's been required to pay the costs. The
6 respondent has been awarded his judgment for costs. He
7 still doesn't have his property.
8 MR. DYER: Yeah. And that's sad, but
9 there's nothing that's out there that's going to get him
10 payment by somebody else. If he wants the property back,
11 he's going to have to pay.
12 HONORABLE TOM GRAY: He's going to have to
13 go pay the storage fees and the --
14 MR. DYER: Yep.
15 MS. WINK: And that's why that right of
16 replevy was so important in the first place.
17 HONORABLE TOM GRAY: Yeah, but he couldn't
18 afford that. You had all his property.
19 MS. WINK: I know. That's why we want
20 evidentiary standards when people are pleading for these
21 things.
22 CHAIRMAN BABCOCK: Carl.
23 MR. HAMILTON: Well, the applicant does have
24 a bond that ultimately you can recover on, I suppose,
25 but --

1 MR. DYER: But the bond value is typically
2 determined by the value of the property and the amount of
3 the claim.
4 MR. HAMILTON: Maybe we ought to increase
5 that then to like in other instances, two times the value
6 or something, to take care of the storage costs and all.
7 MR. DYER: That's possible. I don't know if
8 it would address that particular scenario.
9 MR. HAMILTON: Well, it won't get the money
10 right now to release the property, but he would get it
11 eventually.
12 MR. DYER: Well, what I have seen, though, I
13 mean, keep in mind you can modify the amount of the bond
14 more than once. I mean, even supersedeas bonds are
15 routinely modified during the pendency of an appeal. So
16 if your litigation is dragging out then you should go back
17 to the court and say, "Your Honor, I'm getting popped an
18 extra two grand a month for this to be in storage.
19 Increase the amount of the bond." Now, the only problem
20 is whose bond. If the applicant doesn't have a replevy
21 bond, we're only talking about the respondent's replevy
22 bond, right, so the applicant may say, "You've got to
23 increase the bond because these storage costs are
24 accruing, and if I win, that bond should be there to pay
25 the storage costs," but you don't have the similar

1 protection for the respondent, because the applicant
2 doesn't file a replevy bond. Not under -- you know, not
3 unless y'all go with what we've thrown out.
4 MR. HAMILTON: No, but the applicant filed a
5 bond originally to bring the attachment proceeding.
6 MR. DYER: Yeah, but that bond is to protect
7 against not pursuing the suit to effect. So that's a
8 relatively minor bond that basically covers the costs if
9 the applicant DWOPs the suit. Can it be used to cover
10 increased storage costs? I don't think that's what it's
11 designed for, but I'll take a look at that. Maybe it can.
12 CHAIRMAN BABCOCK: Nina.
13 MS. CORTELL: I just want to make sure I
14 understand. "Obligors" means the principal and the
15 sureties?
16 MR. DYER: Yes.
17 MS. CORTELL: And so even though the
18 sureties heretofore hadn't been really a party to the
19 suit. I mean, I don't have a problem if that's how the
20 supersedeas works, but --
21 MR. DYER: Right. Somebody asked me if a
22 bond obligor in one of these proceedings had a right to
23 come in and challenge the value of the property. I don't
24 believe they do. They're not considered a party to the
25 suit. Now, if there is a subsequent suit on the bond,

1 well, then they would have the defenses there, but the
2 determination of the value I think is something that's
3 already been determined.
4 MS. CORTELL: But we're saying here that the
5 court can enter judgment against them.
6 MR. DYER: Yes.
7 MS. CORTELL: Okay. I just wanted to be
8 sure I understood that.
9 MR. DYER: And that comes out of a couple of
10 parallel rules in sequestration.
11 MS. CORTELL: Okay. And then the other
12 question is -- and I think you've already got this, but
13 we're going to make clear that's not the entirety of the
14 judgment, because when we use the word "must" I'm a little
15 worried. In other words, it may be this, but it may be
16 more, right?
17 MR. DYER: Right. Right. I'm going to take
18 a look at what the effect of the deletion would have on
19 the judgment against respondent.
20 CHAIRMAN BABCOCK: Okay. Well, I think
21 we're going to stop here with Rule 9, and we'll take up
22 attachment Rule 10 at some point in our October meeting,
23 which is October 21 and 22, I believe. We're going to
24 have to start that meeting, as I said before, with the
25 parental rights termination rules, because their -- our

1 comments are due the following Monday, so we'll start with
2 that, and that may take a little bit of time, but we'll
3 get back to this and hopefully finish everything off. But
4 everybody gets a gold star for being here today. Thank
5 you, and Pat and David and Dulcie, thank you.
6 HONORABLE JAN PATTERSON: Thank you, you
7 guys, for all of your work on this.
8 CHAIRMAN BABCOCK: So we'll be in recess
9 until next month. Thanks, everybody.
10 MS. SENNEFF: Until this month.
11 CHAIRMAN BABCOCK: Until this month, right.
12 Three weeks from now.
13 (Adjourned at 11:59 a.m.)
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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 1st day of October, 2011, and the same was
12 thereafter reduced to computer transcription by me.
13 I further certify that the costs for my
14 services in the matter are $ 958.75 .
15 Charged to: The State Bar of Texas.
16 Given under my hand and seal of office on
17 this the 17th day of October , 2011.
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