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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 19, 2011

(SATURDAY SESSION)

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[COPY]

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 19th day of November,
2011, between the hours of 9:01 a.m. and 11:55 a.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

- 11-33 Garnishment commentary
(Ancillary Proceedings Task Force)
- 11-34 Distress Warrants (Ancillary Proceedings Task Force)

1 *-*-*-*-*

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

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

9 CHAIRMAN BABCOCK: Well --

10 HONORABLE SARAH DUNCAN: I think it was page
11 one.

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

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

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

18 MR. DYER: You need to get a life.

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

25 HONORABLE JANE BLAND: Not maybe at the back

1 of the rule, but some statement about the grounds.

2 MR. DYER: Would a comment be appropriate?

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

5 CHAIRMAN BABCOCK: Yeah, good. Good.

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

10 HONORABLE JANE BLAND: Attachment.

11 HONORABLE SARAH DUNCAN: And attachment.

12 MR. DYER: And sequestration.

13 PROFESSOR CARLSON: Distress warrants.

14 HONORABLE SARAH DUNCAN: All three are
15 available prejudgment?

16 PROFESSOR CARLSON: Right.

17 MR. DYER: Yes.

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

1 than post-judgment in aid of enforcement, put the
2 post-judgment in aid of enforcement parts of the rule
3 first and then have a separate section on prejudgment.

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

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

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

13 HONORABLE TRACY CHRISTOPHER: In garnishment
14 to --

15 PROFESSOR CARLSON: Yeah, we could do that.

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

19 PROFESSOR CARLSON: Uh-huh.

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

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

1 HONORABLE JANE BLAND: We were well past
2 that.

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

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

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

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

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

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

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

24 MR. DYER: Well, no, the application.

25 HONORABLE SARAH DUNCAN: He's put it in the

1 application.

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

4 HONORABLE SARAH DUNCAN: In the order.

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

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

11 PROFESSOR CARLSON: In a prejudgment
12 proceeding --

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

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

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

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

1 MR. DYER: Yes.

2 CHAIRMAN BABCOCK: Okay.

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

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

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

14 HONORABLE SARAH DUNCAN: Right. Right.

15 CHAIRMAN BABCOCK: Okay. Yeah, Carl.

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

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

24 MR. HAMILTON: Chance of --

25 MR. DYER: Of excessive levy, so that you

1 don't go out and garnish way more -- all right. Let's say
2 you have three writs and they're directed to different
3 institutions. You want to alert the officer who's serving
4 the writs that there are other outstanding writs out there
5 and keep in touch with the officer so that if one hits and
6 gets the maximum amount that you sought to garnish, the
7 other two aren't going to hit also.

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

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

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

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

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

1 MR. DYER: Actually, no, I don't think we
2 really took it out that far.

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

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

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

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

19 CHAIRMAN BABCOCK: Okay. Yeah, Justice
20 Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, I mean,
22 the way the garnishment most often works is you say, okay,
23 the person owes me a hundred thousand dollars, and you hit
24 five banks because you know he has bank accounts in these
25 five banks because he's moving his money around and you're

1 trying to find it. Conceivably, one bank could have a
2 hundred thousand dollars, and if you froze money in the
3 other banks at the same time that you've already frozen
4 this hundred thousand dollars, you, the person trying to
5 get the garnishment, can be in trouble because now you've
6 frozen more than the amount of the debt, and you've got to
7 immediately get those things released in the other
8 accounts. So I think the whole mechanism of the ability
9 to say this was wrongful garnishment will protect the
10 potential debtor with the multiple writ situation.

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

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

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

22 PROFESSOR CARLSON: And they answer.

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

1 we have," but you don't know going in.

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

4 MR. DYER: No.

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

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

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

1 excess writs or something.

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

6 MR. ORSINGER: You could get sued.

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

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

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

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

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

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

22 MR. DYER: Yeah.

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

1 CHAIRMAN BABCOCK: And they wanted to know
2 if there are multiple writs?

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

5 MR. DYER: Yeah, I think so.

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

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

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

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

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

22 PROFESSOR CARLSON: That's right.

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

25 MR. DYER: Okay. Rule 2 is the bond

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

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

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

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

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

24 MR. DYER: No.

25 CHAIRMAN BABCOCK: Now, now.

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

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

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

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

13 MR. MUNZINGER: Thank you.

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

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

17 CHAIRMAN BABCOCK: Yeah, Carl.

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

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

25 MR. HAMILTON: "Or an appeal bond is filed

1 and approved by the justice of the peace."

2 HONORABLE SARAH DUNCAN: That's the only
3 place you have an appeal bond remaining. You don't have
4 an appeal bond other than in the JP court now, have for
5 some years.

6 MR. HAMILTON: Okay.

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

9 MR. DYER: (c) is --

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

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

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

18 MR. HAMILTON: It's a statute.

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

21 MR. DYER: Yes. It's --

22 PROFESSOR CARLSON: 63.001.

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

1 satisfy the debt."

2 MR. ORSINGER: Okay.

3 MR. DYER: That's for prejudgment.

4 MR. ORSINGER: Oh, wait a minute, but it's
5 not for post-judgment?

6 MR. DYER: No.

7 MR. ORSINGER: Okay. I would like to
8 argue --

9 HONORABLE SARAH DUNCAN: That was my
10 question yesterday.

11 MR. DYER: Oh, I'm sorry. I'm sorry. It's
12 for both. In subpart (3), the post-judgment one, "Valid
13 subsisting judgment," "and makes an affidavit stating
14 within plaintiff's knowledge defendant does not possess
15 property in Texas subject to execution sufficient to
16 satisfy that judgment," so it applies pre- and post-.

17 MR. ORSINGER: Okay. Thank you.

18 CHAIRMAN BABCOCK: Any more on (b)? Okay.
19 Keep going.

20 MR. DYER: (c) is straight out of 658. We
21 deleted the "verified" for the same reason, the new
22 statute that allows a declaration to be used instead.
23 (d), it's out of 658. (e), the two additions are subpart
24 (4) and subpart (5). Subpart (4) says, "The property must
25 be kept safe and preserved subject to further order of the

1 court," which we have in all of the other rules. Subpart
2 (5) clarifies that no bond is required in the
3 post-judgment context. Subpart (6) is a replevy bond,
4 which is unchanged. Subpart (f) we have the multiple
5 writs language.

6 MR. ORSINGER: Comment on (f).

7 CHAIRMAN BABCOCK: Yeah, Richard.

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

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

20 MR. ORSINGER: Okay. That's --

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

24 MR. GILSTRAP: Question.

25 CHAIRMAN BABCOCK: Frank.

1 MR. GILSTRAP: All of these distinguish
2 between the order and the writ. Are those in real terms
3 separate documents --

4 MR. DYER: Yes.

5 MR. GILSTRAP: -- in practice?

6 MR. DYER: Yes.

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

10 MR. DYER: Yes.

11 MR. GILSTRAP: In all these cases.

12 MR. DYER: Yes.

13 CHAIRMAN BABCOCK: Okay. Yeah, Justice
14 Gray.

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

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

25 MR. DYER: Uh-huh. Move the third sentence

1 to the second.

2 CHAIRMAN BABCOCK: Makes a little bit of
3 sense. Okay. What else? All right. Rule 4, doesn't
4 look like there are any changes on Rule 4.

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

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

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

17 CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

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

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

25 MR. ORSINGER: Deposits?

1 MR. DYER: Yeah.

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

5 MR. DYER: Yes.

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

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

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

19 MR. DYER: Correct.

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

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

1 effect.

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

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

6 MR. ORSINGER: Right.

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

9 MR. ORSINGER: Okay.

10 CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

24 HONORABLE TRACY CHRISTOPHER: Let's fix it.

25 MR. DYER: Okay.

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

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

5 HONORABLE TOM GRAY: Why not just eliminate
6 everything prior to the comma and capitalize "the"?

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

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

13 HONORABLE TRACY CHRISTOPHER: Right.

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

22 HONORABLE TRACY CHRISTOPHER: Perfect.

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

25 HONORABLE TRACY CHRISTOPHER: Yeah, I think

1 so.

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

5 HONORABLE TRACY CHRISTOPHER: Right. That
6 will fix it.

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

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

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

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

19 MR. DYER: Correct.

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

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

25 HONORABLE TRACY CHRISTOPHER: Right.

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

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

6 MR. DYER: But if that's a concern it
7 doesn't matter --

8 CHAIRMAN BABCOCK: Wait a minute. Hold on.

9 HONORABLE TRACY CHRISTOPHER: Right.

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

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

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

25 HONORABLE TRACY CHRISTOPHER: Yes.

1 CHAIRMAN BABCOCK: Yep. Okay. Any more on
2 4? Good catch. Yeah, Richard.

3 MR. ORSINGER: On (d).

4 CHAIRMAN BABCOCK: On what?

5 MR. ORSINGER: (d) as in dog.

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

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

8 CHAIRMAN BABCOCK: I don't think so.

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

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

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

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

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

25 MR. DYER: No, he also receives a copy of

1 the writ, the order, and the application.

2 MR. ORSINGER: Okay. Now, in subdivision
3 (b) it says that when we give the notice to the respondent
4 we're going to warn them their property has been seized
5 but it may be exempt, but we require that that be put in
6 the writ, not in a separate notice, but then over on (e)
7 in the form of the writ itself we don't say anything about
8 that caveat.

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

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

25 MR. DYER: Well, it's in the existing rules.

1 I don't -- there isn't a whole lot of statute dealing in
2 garnishment.

3 MR. ORSINGER: Well, I don't know whether --
4 I mean, it may be that nobody cares; but, actually, if
5 you're going to give meaningful notice to these third
6 parties then we probably ought to have a separate thing
7 called a notice, and we ought to tell them a little more
8 than that their stuff has been garnished and that there's
9 potential exemptions that apply; and one thing, for
10 example, is I believe that they have the opportunity to
11 intervene if they wish; isn't that right, Kent?

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

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

1 automatically a party?

2 MR. DYER: Yes.

3 PROFESSOR CARLSON: Yeah.

4 MR. DYER: And can move to dissolve the writ
5 or modify the writ. And the other thing is when the
6 garnishee files an answer, both the plaintiff and the
7 defendant have the right to controvert that answer.

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

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

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

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

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

25 MR. DYER: Well, unless you satisfy the

1 requirements for an ex parte issuance of a writ.

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

4 MR. DYER: Yes.

5 MR. ORSINGER: That's your understanding?

6 MR. DYER: Yes.

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

10 CHAIRMAN BABCOCK: Roger, and then Carl.

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

14 MR. DYER: Right.

15 MR. HUGHES: And, I mean, I was asking the
16 same questions, so I kind of skipped ahead and read, and
17 the rule requires that -- is it Rule 6(d), as in dog,
18 requires service of the writ on the garnishee? So that's
19 how he gets the notice, and then it provides you have to
20 have a certificate of service that you've served the writ
21 on the judgment debtor, and it has to be on file 10 days
22 before they can enter judgment on the garnishment. I
23 mean, all the writ of garnishment does in post-judgment
24 proceeding is to say, "You've got to hold that property,"
25 and then you have a subsequent proceeding that says, "Now

1 give it to me," and so the judgment debtor can go -- you
2 know, his attitude can be "I'm dead, there's nothing for
3 me to contest. That is my property. They've got a
4 judgment. What's there to fight about?" Or he may say,
5 "No, it's" -- you know, "You're seizing too much
6 property," or "It's exempt," or whatever, so he doesn't --
7 he's a party. He can intervene. He just doesn't have to.

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

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

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

20 MR. ORSINGER: Yes, if they want to be heard
21 or if they want to participate in the trial of the
22 garnishment or if they want to fight the order to open the
23 safety deposit box. In Dallas they're not given notice.
24 They're not treated as a party. The garnishment goes
25 forward between the garnisher and the garnishee without

1 the active participation of the judgment debtor, unless
2 the judgment debtor intervenes and makes themselves a
3 party, and I, frankly, don't see in these rules that the
4 judgment debtor is a party.

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

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

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

10 MR. ORSINGER: What rule would that be?

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

12 MR. ORSINGER: Okay.

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

18 CHAIRMAN BABCOCK: Elaine.

19 PROFESSOR CARLSON: You know, Richard, we
20 have a case in our textbook on garnishment, and that
21 particular court talked about exactly what you're alluding
22 to, that the garnishment is a case within a case. So
23 you'd have the plaintiff and the defendant, the debtor and
24 the creditor are the original cause number. That's the
25 original proceeding, and then out of that comes within

1 that case the garnishment proceeding, of which you now
2 have, as you point out, the garnisher and the garnishee,
3 with notice to the defendant in the underlying proceeding.

4 MR. ORSINGER: Right, and I guess what's
5 happening is we're saying that because this action is
6 derivative of the other in some minds the judgment debtor
7 is treated as a party, but --

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

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

17 CHAIRMAN BABCOCK: How do you get an order
18 then?

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

21 CHAIRMAN BABCOCK: With a new number?

22 MR. ORSINGER: With a new plaintiff and a
23 new defendant and new indication of jurisdiction. If the
24 underlying judgment goes final because it's not appealed
25 and no motion for new trial is filed, at the end of 30

1 days the trial judge can't do anything in the old cause.

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

4 HONORABLE JANE BLAND: Exactly.

5 PROFESSOR CARLSON: -- forever into time.

6 MR. ORSINGER: Well, in my opinion you have
7 to file a new proceeding if you're going to ask the trial
8 court. You can get a writ of execution from the clerk,
9 but if you're going to ask for turnover relief you have to
10 initiate a new proceeding, which is a turnover proceeding,
11 and the court loses plenary power over its original
12 judgment, but what I want to get away from is --

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

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

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

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

25 MR. ORSINGER: Well, they also permit third

1 parties to do that. Let's say that somebody's son comes
2 in and says, "That's not really my father's money. That's
3 really my money." So the son can come in and file a
4 motion and try to have the garnishment released; isn't
5 that right?

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

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

21 CHAIRMAN BABCOCK: Justice Hecht.

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

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

1 HONORABLE NATHAN HECHT: It calls them the
2 defendant.

3 HONORABLE SARAH DUNCAN: But that's --

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

6 HONORABLE NATHAN HECHT: Yeah, right.

7 HONORABLE SARAH DUNCAN: It's the defendant
8 in the garnishment.

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

11 PROFESSOR CARLSON: It is.

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

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

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

1 garnishee.

2 CHAIRMAN BABCOCK: Carl.

3 MR. HAMILTON: Well, I agree with Richard
4 that in our county they're treated as a separate suit, and
5 like it says under 659, they're docketed in the name of
6 the garnisher as plaintiff and garnishee as defendant,
7 they get a new number, and we don't -- we don't serve the
8 judgment debtor with that. We give them notice, but we
9 don't serve them, and I don't think they're a party.

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

12 MR. HAMILTON: Beg pardon?

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

15 MR. HAMILTON: Not necessarily, no.

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

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

25 MR. DYER: It's both.

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

3 MR. DYER: Yes.

4 HONORABLE DAVID GAULTNEY: So I guess there
5 is a slight -- this is a little bit off topic if I can go
6 here, but the way you have it organized is slightly
7 different from the current rules in the sense that -- and
8 this probably is intentional, but I think it started
9 Richard's questioning about why does the writ that's
10 served on the garnishee include a notice to the defendant,
11 right? And currently rules -- it's not set up that way,
12 and currently, as I read it, the writ that's served on the
13 garnishee doesn't include that notice. It's the copy
14 that's served on the defendant or the respondent that
15 includes the notice, and if you wanted to stay with that
16 form, you could move the notice to the service rule. In
17 other words, you've got it set out as it's got to be on
18 the face of the writ that's served on the garnishee. If
19 you wanted to you could move that notice into when you're
20 serving the defendant. That's when you're serving a
21 notice, but that's a minor deal. I don't know if you were
22 looking for --

23 MR. DYER: I think that the practice is just
24 keep it all in one writ. I mean, I understand that it
25 doesn't necessarily make sense that a notice to respondent

1 is in a writ served on the garnishee. But it's just one
2 piece of paper, so if everything is in that one piece of
3 paper you're only messing with one instead of two.

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

7 MR. DYER: Yes. It's in the writ itself.
8 We could break out the notice to respondent, make it a
9 separate document for garnishment, but --

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

13 CHAIRMAN BABCOCK: Sarah, did you have a
14 comment?

15 HONORABLE SARAH DUNCAN: It's been a long
16 time since I've spent a whole lot of time with these
17 rules, but at one point I did spend an enormous amount of
18 time with these rules, and what I noticed to be a problem
19 then I think is still a problem, and it's evident from our
20 discussion around the table, and that's that we're using
21 different terms to describe the same person without a
22 whole lot of specificity. Are we talking about the
23 defendant in the garnishment action, are we talking about
24 the defendant in the underlying action, are we talking
25 about -- I mean, this rule, for instance, starts off

1 talking about the judgment creditor filing the
2 application, but then without any explanation we
3 transition and start calling the judgment creditor the
4 applicant.

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

7 HONORABLE SARAH DUNCAN: At the bottom of
8 page three.

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

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

22 MR. DYER: The subcommittee did at one point
23 at the outset of these rules say to have a definitional
24 section, that applicant means this, respondent means this,
25 garnishee means this. I think they decided they didn't

1 need it, but that was on the table at one point.

2 HONORABLE SARAH DUNCAN: Well, somebody
3 decided at one point it wasn't needed for the current
4 rules, and they're just a mess, I think we'll all agree,
5 because they describe -- you can't tell necessarily --
6 when the current rules say defendant, you can't
7 necessarily tell if you're talking about the defendant in
8 the garnishment action or the defendant in the underlying
9 action, and they're used to describe both sometimes. So
10 my plea is for a definitional section maybe for all these
11 rules and that a lot of care be taken to use that
12 definition -- to use that word every time to mean the same
13 person --

14 MR. DYER: Okay.

15 HONORABLE SARAH DUNCAN: -- is my plea.

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

19 MR. HAMILTON: Another thing that's
20 confusing is the prejudgment and post-judgment process.
21 In prejudgment garnishment we generally file an
22 application for garnishment in the same suit, and it
23 doesn't get docketed as a separate cause with the
24 plaintiff and defendant, but yet it doesn't comply with
25 Rule 659, because 659 says the clerk docket it separately

1 and gives it a separate name and so on. Post-judgment we
2 generally file it as a separate lawsuit and then it does
3 get docketed.

4 HONORABLE SARAH DUNCAN: If I can suggest
5 part of the reason for that may be that post-judgment you
6 may be seeking garnishment over a person or entity over
7 whom the district judge in the underlying suit doesn't
8 remotely have jurisdiction. You may have to go to South
9 Texas and seek out your writ of garnishment over funds in
10 the LNB, and you can't do that in Clarendon, Texas,
11 because Clarendon, Texas, as far as I know doesn't have an
12 LNB and LNB doesn't do business in whatever county that
13 is.

14 CHAIRMAN BABCOCK: Donley.

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

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

24 HONORABLE SARAH DUNCAN: It's not
25 reflected --

1 MR. HAMILTON: -- fit with the rules.

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

3 CHAIRMAN BABCOCK: Orsinger, then Munzinger.

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

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

9 MR. ORSINGER: Okay. Well, I think you can.
10 I think a garnishment is a lawsuit, and you can file it in
11 any court that has jurisdiction. That's my opinion, and I
12 think I'm not alone in that opinion. Now, if that's
13 true --

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

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

25 Okay. So if you'll acknowledge or admit

1 that a garnishment is a new lawsuit, a separate lawsuit,
2 is not required to be brought in the court that granted
3 the judgment then we're going to have to have a defendant
4 and we're going to have to have notice, and what we've got
5 right now is we have service on the garnishee, which is
6 recognition of the fact that there's now a lawsuit against
7 a defendant called a garnishee, but we have service on the
8 respondent, which is not -- it's not by the court. It's
9 not by an officer. It's by the applicant, and the
10 applicant can serve either in the same way that you served
11 a citation or any service permitted under Rule 21a, which
12 will be certified mail return receipt requested.

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

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

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

24 CHAIRMAN BABCOCK: Munzinger.

25 MR. MUNZINGER: Is Section 63 of the Civil

1 Practice and Remedies Code the exclusive source of
2 authority for the writ of garnishment?

3 MR. DYER: Yes.

4 MR. MUNZINGER: Section 63.001 provides the
5 grounds for garnishment. Subsection (3), this is
6 post-judgment garnishment. "A plaintiff has a valid
7 subsisting judgment and makes an affidavit stating that
8 within the plaintiff's knowledge, the defendant does not
9 possess property in Texas subject to execution sufficient
10 to satisfy the judgment." The statute itself contemplates
11 that the debtor is the defendant in the case. So whatever
12 Dallas has done, I don't want to say that Dallas is wrong
13 about it, but the statute itself says that the judgment
14 debtor is the defendant in every garnishment case, and the
15 garnishee is the bank. That's the way -- I mean, the word
16 "defendant" is the word "defendant." It doesn't say
17 "judgment debtor." It doesn't say "respondent." It says
18 "defendant." So I think that the statute is correct, and
19 I think the rule is using the correct nomenclature.

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

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

1 where the judgment was granted.

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

5 MR. HAMILTON: Yeah.

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

8 MR. HAMILTON: Right.

9 MR. MUNZINGER: "A plaintiff has a valid
10 subsisting judgment and makes an affidavit stating that
11 within the plaintiff's knowledge the defendant does not
12 possess property in Texas."

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

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

21 MR. HAMILTON: Correct.

22 MR. ORSINGER: I agree with that.

23 HONORABLE TRACY CHRISTOPHER: You get
24 notice, but --

25 MR. ORSINGER: Yeah, you get notice, but

1 you're not a party.

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

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

7 MR. ORSINGER: Well, I mean, even a third
8 party that's unrelated to the lawsuit has the right to
9 move to have the garnishment lifted if they own the
10 property instead, so I think the point here is that our
11 rules don't really make this clear whether this is just an
12 ancillary proceeding to the underlying litigation or
13 whether this is really a lawsuit. I think it's really a
14 lawsuit.

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

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

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

23 MR. ORSINGER: I'm involved in another case
24 right now where we're registering a judgment from another
25 state, and we plan to get a writ of garnishment out after

1 we register it. But when we register it the court, you
2 know, under the Full Faith in Credit clause, is going to
3 be the court where we register it is the court that's
4 treated as if it's issued the judgment. So we cannot
5 always assume that the garnishment is going to be filed in
6 the same court that issued the underlying judgment, and if
7 we accept that possibility then maybe we realize that this
8 is kind of ill-defined. It's neither a fish nor fowl, and
9 do we want to do anything about that, or do we want to
10 just perpetuate that into the future?

11 CHAIRMAN BABCOCK: Justice Bland spits in
12 your face.

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

25 CHAIRMAN BABCOCK: The party being the

1 defendant in the --

2 HONORABLE JANE BLAND: Right.

3 CHAIRMAN BABCOCK: -- underlying suit.

4 HONORABLE JANE BLAND: The judgment debtor.

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

11 MR. ORSINGER: Oh, I don't think so. I
12 think the garnishment itself is a new lawsuit. I think it
13 can be filed in any court with jurisdiction, and if in the
14 event of an out of state judgment it has to be filed in
15 the court that didn't issue the underlying judgment. So
16 if it's going to be treated as a new lawsuit and we have
17 this odd situation where the defendant is entitled to
18 notice but he's not told to file an answer, and he doesn't
19 have to file an answer to be a party under that
20 conception, but he can file a motion as anyone can.

21 Any party who claims an interest in the
22 garnished asset has the right to file a motion, whether
23 they've been served or not or whether they're a party or
24 not, so I don't know what to say, other than it's -- and I
25 agree that the terms are inconsistently used as well, but

1 it seems to me like what we ought to do, what's -- I've
2 always envisioned garnishment as a lawsuit between the
3 garnisher and the garnishee. You give notice to the third
4 party. The only notice we're giving them now is notice
5 that their property has been garnished. We're not telling
6 them they're entitled to file an answer or required to
7 file an answer or may be subject to a default judgment.
8 We're telling them that their property may be exempt, but
9 we haven't told them that they have the right to
10 participate in the trial.

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

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

14 MR. DYER: Yes.

15 HONORABLE TRACY CHRISTOPHER: Uh-huh.

16 MR. ORSINGER: Okay.

17 CHAIRMAN BABCOCK: Justice Bland, and then
18 Roger.

19 HONORABLE JANE BLAND: I think that 63.005
20 contemplates that this would be a proceeding out of the
21 court where the judgment is, and that -- and it has some
22 provisions that deal with if it's going to be somewhere
23 else, because it's a foreign bank or for other reasons;
24 and so I think that there's some statutory authority, just
25 looking at it quickly, that would kind of deal with what

1 to do when the proceeding needs to be moved or held
2 somewhere else, but that the default is that it's in the
3 court that rendered the judgment. So I would look at
4 63.005, Richard, and see if you still think we need to do
5 something in the rule.

6 CHAIRMAN BABCOCK: Roger.

7 MR. HUGHES: Well, I think we -- I don't
8 think the world can be neatly divided into things that are
9 -- it's either a new lawsuit or it's not. This is an
10 ancillary proceeding, and somehow they're some sort of
11 queer animals that are somehow loosely attached to the
12 original lawsuit and part of it, and so I think the main
13 question is going to be how do we provide notice to the
14 judgment debtor that this proceeding exists and the
15 adequacy of the notice rather than is this a brand new
16 lawsuit and try to solve issues of venue and jurisdiction
17 altogether.

18 I think the real problem here is what's
19 notice to the debtor, and what I'm a little concerned
20 about is something I've noticed, that once the judgment is
21 entered and there's no appeal or the appeal is over with,
22 all of the sudden, you know, the judgment debtor
23 disappears, he loses touch with his counsel, et cetera, et
24 cetera, and it's entirely -- I'm a little concerned about
25 a rule that simply says you could do a certificate of

1 service saying return -- "Yeah, I sent this guy the notice
2 by a return receipt mail." You never quite mention that
3 it came back unserved.

4 The -- because -- or the -- you've served it
5 on his former counsel, the guy who represented him a year
6 ago in that lawsuit and hasn't seen hide nor hair of the
7 client since, and so I can understand Rule 21a service if
8 in a prejudgment garnishment. I'm a little concerned
9 about using it post-judgment because the rule as -- the
10 next rule as written, the notice on the judgment debtor
11 will either be by formal service just like he was serving
12 a petition or a writ or an order by using a third party or
13 by Rule 1 -- 21a. So we may want to think about that,
14 because I think that's a real problem about this person
15 has rights and he -- that person needs to know whether --
16 you know, the circumstances have arisen. Do you want to
17 use them or not?

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

21 HONORABLE TOM GRAY: Well, I was only going
22 to make the comment that on the post-judgment garnishment
23 we have to remember these people have been accorded full
24 due process before that judgment was rendered, and they
25 have the opportunity to contest it, appeal it, and so

1 that's already been done, and now the person who has the
2 benefit of that judgment is now trying to collect it, and
3 so it's not exactly the same as taking someone's property
4 without all of the trappings of due process like we think
5 of on the front end of a lawsuit.

6 CHAIRMAN BABCOCK: Unless you take too much
7 property.

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

13 CHAIRMAN BABCOCK: Says who?

14 HONORABLE TOM GRAY: Well, I thought they
15 had to get an order to actually turn over the property,
16 so --

17 CHAIRMAN BABCOCK: Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: Right. You
19 have to get an order to actually get the property, so
20 you're protected there. I think 21a notice is sufficient.
21 We certainly do that -- if it's prejudgment, the lawsuit
22 is ongoing, and 21a notice is sufficient. If it's
23 post-judgment and you send it to the lawyer who
24 represented the defendant in the case and if that lawyer
25 no longer wants to represent the client, he files a motion

1 to withdraw and, you know, gets himself out of it with the
2 last known address of the defendant, and, therefore, you
3 then serve last known address of the defendant. You don't
4 want to actually have to do full service on someone who's
5 already gotten all of the process involved. I think 21a
6 notice is plenty.

7 CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

8 HONORABLE SARAH DUNCAN: If I could just
9 say, I think there's a fundamental failure of the
10 underpinnings of garnishment law. We couldn't be
11 disagreeing on what we're disagreeing on. I'm looking,
12 and I don't trust these -- oh, I would trust David Beck.
13 This is a 2000 case out of the Houston First. "Section
14 63.005(a) is jurisdictional; i.e., once a garnishee's
15 answer has been controverted the only action a trial court
16 can take is to transfer the proceeding to the county of
17 the garnishee's residence." Well, if it's not a separate
18 suit, you can't transfer the proceeding to the county of
19 the garnishee's residence without losing jurisdiction over
20 the underlying suit. I think there's a -- some missing
21 historical knowledge here, and it's reflected in the
22 confusion of the current rules and, frankly, of the
23 proposed rules.

24 CHAIRMAN BABCOCK: Okay. Any other comments
25 about that issue? We got any other comments on Rule 5

1 specifically other than the broad comments we've been just
2 talking about? Justice Christopher.

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

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

21 MR. DYER: 6(a), delivery of the writ, we
22 added in "other authorized officers." We wouldn't
23 necessarily have to refer to the specific rules, which I
24 think we probably could just say "or other persons
25 authorized to serve." Subpart (b), we've also added that,

1 "other authorized persons," and then have added in the
2 part that's highlighted with regard to serving a writ that
3 requires the actual taking of possession. That's reserved
4 for the sheriff or constable. It also alerted the
5 practitioner that if the garnishee is a financial
6 institution, service of the writ is governed by the
7 provisions of the Texas Finance Code.

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

16 CHAIRMAN BABCOCK: Okay. Comments about 6?
17 Frank.

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

1 just be served by Paul Process Server and no further
2 identification that's --

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

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

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

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

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

17 MR. GILSTRAP: And just a further comment,
18 the service of respondent, we don't have a return. We
19 just have a certificate of service, which seems an even
20 weaker thing. I don't know what it is, but I just
21 wondered why we would have something different there,
22 certificate of service, as opposed to a return.

23 MR. DYER: Well --

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

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

4 MR. GILSTRAP: Okay.

5 MR. ORSINGER: -- a return.

6 MR. GILSTRAP: For 21a.

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

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

12 CHAIRMAN BABCOCK: Justice Christopher.

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

17 CHAIRMAN BABCOCK: Elaine, you remember?

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

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

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

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

5 HONORABLE TRACY CHRISTOPHER: Well --

6 CHAIRMAN BABCOCK: Yeah. Makes sense.

7 Munzinger, did you have your hand up?

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

13 MR. DYER: Well, the convention we tried to
14 adopt across the board was to change it from "plaintiff"
15 to "applicant" because the applicant doesn't necessarily
16 have to be the plaintiff and "respondent" to "defendant"
17 because the respondent isn't always the defendant. So we
18 changed that throughout. This requires service on the
19 respondent, not the garnishee. The garnishee is actually
20 served with citation.

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

23 MR. DYER: Yes.

24 MR. MUNZINGER: The judgment debtor.

25 MR. DYER: Yes.

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

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

10 CHAIRMAN BABCOCK: Justice Christopher.

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

15 MR. DYER: Yes.

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

18 MR. DYER: I would say no, because I think
19 we've got a provision in here --

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

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

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

9 MR. ORSINGER: I believe I've got this
10 right, but when the original writ of garnishment is served
11 there's no anticipated turnover of anything. That's just
12 notice of a lawsuit, and so if someone voluntarily tries
13 to give you whatever being garnished, the officer is going
14 to decline, whether -- even if it's a licensed peace
15 officer because that's not the appropriate time for a
16 turnover. That's just the time that the garnishee gets
17 notice of the garnishment. Then at the end of the
18 garnishment trial there's an order of turnover or order of
19 garnishment, which when that's served then someone's
20 taking possession of a physical object or something like
21 that. Isn't that --

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

24 MR. ORSINGER: Okay. So the proviso,
25 "However, only a sheriff or constable may serve a writ of

1 garnishment that requires the actual taking of
2 possession," that's going to be a writ that issues after
3 the garnishment trial, not the writ that issues when the
4 garnishment is first filed, correct?

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

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

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

1 MR. DYER: Yes.

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

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

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

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

17 MR. ORSINGER: The constables or sheriffs
18 are?

19 MR. DYER: Yes.

20 MR. ORSINGER: Well, we definitely don't
21 want private process servers doing that, but I don't think
22 we want sheriffs or constables doing that either because
23 the process is supposed to work out. You're supposed to
24 go into a court and prove to a judge that you're entitled
25 to have property, and if the garnishment is being effected

1 at the service of the writ then we're having the judgment
2 being executed when the garnishment proceeding is just
3 filed. It really bothers me.

4 CHAIRMAN BABCOCK: Carl, then Judge Wallace.

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

10 MR. DYER: Yeah.

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

17 CHAIRMAN BABCOCK: Judge Wallace.

18 HONORABLE R. H. WALLACE: The only thing
19 I've ever seen a writ of garnishment used for is to get
20 money that's in some kind of an account. I mean, I guess
21 it could be used for other things, I suppose, but in 30 or
22 35 years that's all I've ever seen a writ of garnishment
23 used for, and a banker is -- I've never seen one just say,
24 "Here, you take the defendant's money." It just doesn't
25 happen.

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

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

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

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

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

14 HONORABLE R. H. WALLACE: Yeah.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, I think
17 that you would want the person to be able to turn the
18 tractor over to the constable who comes out. Why are you
19 forcing the garnishee to, you know, file some sort of a
20 pro se answer in court when the garnishee says, "It's not
21 mine. You-all go fight about it." Yeah, it's, you know,
22 the respondent's. We give notice to the -- I mean, I
23 would want the constable -- if he came out and said, you
24 know, "Turn over Jim's car that's sitting in your
25 driveway," and I said, "Okay, here's Jim's car. Take it."

1 I mean, I wouldn't want to have to file a lawsuit and get
2 involved in the whole thing. It's Jim's car and the
3 person trying to get Jim's car gets to, you know, get the
4 order.

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

10 HONORABLE TRACY CHRISTOPHER: But --

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

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

16 MR. HUGHES: The only thing, in getting back
17 to the issue of notice, I mean, if you're going to serve
18 it like a citation, you're going to have a return that
19 said whether it was served or not served, which sort of
20 leads me to believe people will use a certificate of
21 service under Rule -- under 21a because then they never
22 have to tell the court the green card never -- I mean, the
23 thing came back unopened, moved, left no forwarding
24 address, et cetera, et cetera; or in the case of the
25 attorney, well, the attorney died, or whatever; and so I

1 would think if you're going to rely on Rule 21a in this
2 circumstance you at least ought to have the person file
3 the certificates not only that he sent it but as to
4 whether it was received as well.

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

9 CHAIRMAN BABCOCK: Justice Christopher.

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

21 MR. DYER: And I think it's going to get
22 more complicated because there are new Federal rules
23 requiring banks to take a look at the source of some of
24 the funds to determine whether they're exempt. I'm not
25 sure if they're finalized yet.

1 CHAIRMAN BABCOCK: Sarah.

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

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

18 HONORABLE TRACY CHRISTOPHER: Right.

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

23 HONORABLE SARAH DUNCAN: Well, that's what
24 I'm saying, though, is you have the responsibility to say,
25 "No, I don't have any of Duncan's money."

1 MR. DYER: If that's true.

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

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

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

16 MR. DYER: Well --

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

22 CHAIRMAN BABCOCK: Richard Orsinger.

23 MR. ORSINGER: One possibility -- I'm very
24 attracted to what Judge Christopher suggested, and one
25 possibility is to provide for a bank, instead of filing an

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

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

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

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

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

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

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

25 MR. ORSINGER: -- and if there is a third

1 party, they can file a motion with the judge and say,
2 "That's my money, please give it to me."

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

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

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

21 MR. ORSINGER: Creditor, yeah.

22 MR. DYER: And you will run into financial
23 institutions that are beholden to some very large
24 depositors who will be very evasive in responding to a
25 writ, and I think you would let them off the hook if you

1 just allowed them to pay in what they wanted.

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

9 CHAIRMAN BABCOCK: Judge Wallace.

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

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

1 suppose you could still have those fights, but I don't
2 know if that solves the problem.

3 CHAIRMAN BABCOCK: Yeah. Justice Bland did
4 you --

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

23 CHAIRMAN BABCOCK: Okay. On that note let's
24 take our morning break, and we'll come back and talk about
25 Rule 7. 10:29 AM.

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

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

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

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

15 PROFESSOR CARLSON: Right.

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

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

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

24 MR. ORSINGER: Right. And the rule provides
25 that the notice is to be done after the writ is served.

1 MR. DYER: Yes.

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

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

7 CHAIRMAN BABCOCK: Yep.

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

1 we've also added this with regard to the judgment against
2 the respondent on the replevy bond.

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

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

18 MR. DYER: Yes.

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

24 CHAIRMAN BABCOCK: Okay. Justice
25 Christopher.

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

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

6 HONORABLE TRACY CHRISTOPHER: Well --

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

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

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

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

1 which was added to alert the practitioner that if it's a
2 financial institution default judgment is covered by the
3 Texas Finance Code.

4 CHAIRMAN BABCOCK: Okay. Any comments about
5 8?

6 MR. GILSTRAP: Yes.

7 CHAIRMAN BABCOCK: Yeah, Marisa.

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

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

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

25 MR. DYER: Okay.

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

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

10 MR. DYER: Yes.

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

14 MR. HAMILTON: It would apply to both.

15 MR. DYER: Yeah, this applies to both.

16 MR. ORSINGER: I think this underscores the
17 concern that I had and that Judge Christopher had, is that
18 we're using the term "judgment" to apply to the
19 garnishment judgment as well as the underlying judgment,
20 and I wish we would have some terminology we could agree
21 on like underlying judgment or judgment of the underlying
22 proceeding versus garnishment judgment in the garnishment
23 proceeding. Now then the next -- carrying on with the
24 sentence, and I guess I just didn't realize this, but if
25 the garnishee doesn't file an answer then they can suffer

1 a default judgment for the full amount of the underlying
2 judgment even if they only had \$10 in their possession?

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

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

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

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

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

21 PROFESSOR CARLSON: It's case law.

22 MR. ORSINGER: Okay. I have a problem with
23 that, and it may be that that's not our position to even
24 talk policy here, but that seems to me to be an
25 extraordinarily severe punishment that's going to be

1 visited on somebody that otherwise has no stake in this
2 and may not even have a regular lawyer that they see and
3 may not understand the writ properly, and the next thing
4 they know they owe somebody a hundred thousand or
5 \$500,000. It just doesn't seem like it makes any sense
6 whatsoever. So it would seem to me that the default
7 judgment ought to somehow relate to what they should have
8 turned over in the garnishment proceeding plus the
9 attorney's fees and costs to the garnisher associated with
10 the allowance of a default to be taken. That makes more
11 sense to me.

12 CHAIRMAN BABCOCK: Justice Gray.

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

16 MS. SECCO: Yes.

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

19 MS. SECCO: Yes.

20 HONORABLE TOM GRAY: Okay. That was my
21 comment.

22 CHAIRMAN BABCOCK: Justice Gaultney.

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

1 MR. DYER: Yes.

2 HONORABLE DAVID GAULTNEY: The requirements
3 are.

4 CHAIRMAN BABCOCK: Justice Christopher.

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

15 CHAIRMAN BABCOCK: Carl.

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

19 MR. DYER: No.

20 MR. HAMILTON: Just have it in both places.

21 MR. DYER: Yes.

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

25 PROFESSOR CARLSON: Right.

1 MR. HAMILTON: And then we were left with
2 nothing. We didn't know what they had or what they didn't
3 have or how to proceed at that point. So, you know, there
4 needs to be some kind of default provision.

5 CHAIRMAN BABCOCK: Justice Gaultney.

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

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

15 CHAIRMAN BABCOCK: Okay. Any other comments
16 about 8?

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

20 MR. DYER: Would "governed" be better?

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

23 CHAIRMAN BABCOCK: Okay. Anything more on
24 8? All right. 9.

25 MR. DYER: 9 deals with the garnishee's

1 answer. It may be controverted by either the applicant or
2 the respondent, and then subpart (b) deals with Rule 674
3 and 63.005 of the CPRC and dealing with where the trial of
4 the garnishment will take place. If it's a garnishee who
5 is a resident of the county or a foreign corporation then
6 it has to be tried in the county where the garnishment
7 proceeding is pending. Otherwise it has to be tried in
8 the county in which the garnishee resides, and it is
9 jurisdictional, so it's not just a matter of venue, but
10 once the answer is controverted, if it's not a resident of
11 the county and not a foreign corporation, then it has to
12 be transferred to the county of the garnishee's residence.

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

17 CHAIRMAN BABCOCK: Okay.

18 MR. GILSTRAP: I have a comment.

19 CHAIRMAN BABCOCK: Comments about Rule 9.

20 Yeah, Frank.

21 MR. GILSTRAP: I think in (b) instead of --
22 in the last sentence it should say instead of "shall be
23 tried in the county in which the garnishee resides" it
24 needs to be say "shall be transferred to the county in
25 which the garnishee resides," and then that kicks you over

1 to (c) which ends by saying "the matter shall be tried as
2 in other cases."

3 MR. DYER: Okay. All right.

4 CHAIRMAN BABCOCK: Okay. Carl.

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

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

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

22 CHAIRMAN BABCOCK: Yeah.

23 PROFESSOR CARLSON: Yeah, and that's
24 consistent with 63.005 of the Civil Practice and Remedies
25 Code that governs garnishment. It talks about "the issues

1 raised by the answer and controverting affidavits shall be
2 tried in the county."

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

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

9 HONORABLE SARAH DUNCAN: Post-judgment.

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

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

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

17 MR. DYER: Yes, this applies to both.

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

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

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

16 PROFESSOR CARLSON: I think so.

17 CHAIRMAN BABCOCK: Yeah. Okay, Richard.

18 MR. ORSINGER: My point is slightly
19 different, and that is the respondent has the right to
20 controvert, but as we know, they're not -- they're not
21 really served with process other than maybe getting a
22 notice by certified mail, and there is no proviso in here
23 for the garnishee's answer to be served on the judgment
24 debtor that I can see, so I guess the judgment debtor is
25 just going to have to be checking the courthouse everyday

1 to see when the answer is filed and what it says, and I'm
2 okay with that. As somebody pointed out, they've already
3 had all the due process they probably need, but we're not
4 providing for them to get notice, and then there's no
5 deadline by which anyone must controvert the answer, and
6 maybe that's okay, but it does seem to me at some point
7 somebody ought to have to come forward.

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

24 I know we specifically incorporate -- we
25 incorporate 21a's procedure by reference when we talk

1 about the notice of the filing --

2 MR. DYER: Right.

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

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

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

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

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

20 CHAIRMAN BABCOCK: Justice Gray.

21 HONORABLE TOM GRAY: Well, in direct
22 response to that, first, if the respondent has received
23 notice of the filing of the garnishment and has appeared
24 in the lawsuit at that point, then just like any other
25 party they're there. They have submitted themselves to

1 the jurisdiction of the court. They're there. They're
2 entitled to notice of everything that gets filed under
3 Rule 21a, but my point was that this does not provide --
4 first of all, the caption of 9(a) is "Either party may
5 controvert," and we've had that problem with "party" and
6 who are the parties and how many parties there may be, and
7 maybe we need to look at changing the caption to just "The
8 answer may be controverted," and then I would suggest --
9 and I don't know if it's the right place or if it should
10 be a subsection (b), but on the last sentence it seems to
11 me that it could be modified to say, "The respondent or
12 any other person with an interest in the property" or
13 "asserting an interest in the property." This gets back
14 to joint -- joint tenants with right of survivorship on
15 bank accounts --

16 CHAIRMAN BABCOCK: Sarah's niece.

17 HONORABLE TOM GRAY: -- co-owners. Sort of
18 Sarah's problems of we're not sure -- excuse me, the
19 problems that Sarah raised and articulated so well earlier
20 in the meeting about we may not be clear about whose
21 property this is. The garnishee, you know, comes into
22 court and says, you know, "Here's the bank accounts,
23 here's how they're styled." "Here's the tractor," here's
24 whatever. "I don't know who owns it, but by the way, I'm
25 claiming an interest in it," and somebody else may show up

1 as well. And so there needs to be another way to make it
2 clear to the court that's going to try all of these issues
3 that other people may be entering in that claim an
4 interest.

5 CHAIRMAN BABCOCK: Sarah.

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

23 I mean, with respect to turnover, if the
24 judgment debtor owns it it's subject to turnover. With
25 respect to that property, the judgment debtor has had all

1 the process that's due because they lost, but with respect
2 to the property of third parties, they've not necessarily
3 received any process.

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

17 CHAIRMAN BABCOCK: Roger, Richard, and
18 Sarah.

19 MR. HUGHES: Yes, I think there definitely
20 ought to be notice to the judgment debtor and perhaps some
21 form of deadline because I think another reason is if the
22 judgment debtor is going to effectively exercise their
23 right of replevy that they -- that they need to know these
24 things. I mean, sometimes you may have a case where the
25 judgment creditor has decided to be selective about what

1 assets go out into in order to inflict the maximum amount
2 of damage on the defendant.

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

16 CHAIRMAN BABCOCK: Richard.

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

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

24 MR. ORSINGER: And they don't admit that it
25 is or isn't the debtor's. They just say, you know, "The

1 debtor's name is on this account and they may or may not
2 own it"?

3 MR. DYER: Right, and sometimes you'll have
4 an answer that says, "Well, we don't know for sure, but we
5 heard allegations he might have an interest in this
6 account," and they just list that account, too.

7 MR. ORSINGER: Okay.

8 MR. DYER: And they freeze all of them.

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

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

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

22 MR. DYER: Yes.

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

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

1 modify.

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

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

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

12 MR. DYER: Yes.

13 MR. ORSINGER: Wow. Okay.

14 CHAIRMAN BABCOCK: Sarah.

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

19 MR. DYER: Prejudgment or post-?

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

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

1 HONORABLE SARAH DUNCAN: But what I'm saying
2 is let's say it's the defendant, because that makes it
3 easy. The defendant gets hit with a judgment. The
4 plaintiff, judgment creditor, files a garnishment
5 proceeding in that same case. Just the filing of a
6 garnishment application doesn't make the defendant no
7 longer a party to that suit, that cause of action with the
8 number at the top, and there's nothing that says the usual
9 service rules don't apply in an ancillary proceeding, so
10 why would the defendant, judgment debtor, not be treated
11 like any -- I mean, they're still a party. Just because
12 they lost doesn't make them not a party.

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

20 HONORABLE SARAH DUNCAN: I understand that,
21 but --

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

24 HONORABLE SARAH DUNCAN: I understand that,
25 but that's why I think garnishment is a separate

1 proceeding. Even if it's filed under the original cause
2 number, it should be given an A number to differentiate
3 from the original cause of action.

4 MR. DYER: In Harris County it is.

5 HONORABLE SARAH DUNCAN: Yeah, I know.

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

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

12 MR. DYER: Yes.

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

15 CHAIRMAN BABCOCK: Okay. Anything more on
16 9? Let's go to 10.

17 MR. DYER: Okay. The garnishment rules as
18 they presently exist have a number of provisions dealing
19 with how you handle the judgment. So subpart (a), you've
20 got an answer that is not controverted by anybody, and a
21 garnishee is not indebted, they don't have any cash, any
22 money, and they don't have any property of the defendant.
23 That being the case, the current rules say the court
24 discharges the garnishee. We wanted to make it clear what
25 that meant, that a take nothing judgment is entered

1 against the applicant and in favor of the garnishee, and
2 then subpart (2) states who the costs are taxed against.
3 In this case they would be taxed against the applicant.

4 Subpart (b), garnishee files an answer and
5 admits that it is indebted or it does have some effects.
6 Judgment gets entered for the amount admitted or found to
7 be due, and if that amount is in excess of the applicant's
8 judgment amount with interest and costs then it's for the
9 full amount of the judgment already rendered. Subpart (2)
10 is an allocation of costs depending on what transpires.
11 If the court enters judgment for the amount admitted by
12 the garnishee and the answer was not controverted then the
13 costs are taxed against the respondent. If the
14 garnishee's answer is successfully controverted then the
15 garnishee doesn't get its cost, and these are not in the
16 current rules, but they frequently become issues depending
17 on the garnishee's answer.

18 The last one, if the garnishee's answer is
19 not successfully controverted, the court may award and
20 apportion the costs as may be appropriate. Current rules
21 state "with costs to abide the issue," which we did not
22 feel anybody had a firm grasp of what that meant. Subpart
23 (d) was added to address the situation where you file an
24 application for garnishment, and the garnishee says,
25 "Yeah, I'm indebted, but it's for less than the amount of

1 the costs," which sometimes happens. Costs in the amount
2 of the indebtedness are then taxed against the respondent
3 with the balance against the applicant. So an applicant
4 files an application, and the garnishee answers, "I've got
5 a hundred dollars." Costs are already \$5,000 according to
6 the bank. Under this provision the court would tax \$100
7 to the respondent and \$4,900 to the applicant.

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

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

1 CHAIRMAN BABCOCK: Okay. Comments about 10?
2 Sarah.

3 HONORABLE SARAH DUNCAN: In 10(a)(1)(B) it
4 speaks of any effects of the respondent that the garnishee
5 has. Wouldn't this extend to effects over which the
6 garnishee has control even if they don't have the actual
7 effect?

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

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

14 MR. DYER: Uh-huh.

15 HONORABLE SARAH DUNCAN: Just a question.

16 CHAIRMAN BABCOCK: Okay. Frank.

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

21 MR. DYER: Yes.

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

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

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

5 MR. DYER: Yes, copying. They'll also hit
6 you for research time.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: Just a
9 question, because it seems to me -- and maybe we were
10 doing it wrong, but you garnish an account, the bank comes
11 in and says there's \$10,000 in it. The judgment is for
12 50,000, and it seemed to me -- and the bank says, "It cost
13 me \$5,000 to get here." It seemed to me that the judgment
14 that got entered was applicant gets 5,000 and bank gets
15 5,000 out of that 10,000-dollar pot rather than the bank
16 getting a judgment against the respondent for that \$5,000.

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

23 MR. DYER: Well, the intent was to maintain
24 the existing procedure. The bank takes it off the top,
25 but it can -- it still can be reassessed as costs against

1 the respondent, so it's not the bank having to go against
2 the respondent.

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

6 MR. DYER: Which provision?

7 HONORABLE TRACY CHRISTOPHER: Well, because
8 judgment when garnishee is indebted, I get "the judgment
9 of the amount admitted or found to be due to the
10 respondent from the garnishee," that would be the \$10,000
11 and the "not controverted," the costs, judgment for the
12 garnishee under (2)(a) is taxed against the respondent.
13 So I read that to say I get the judgment for \$10,000
14 against the garnishee, and the garnishee gets a
15 5,000-dollar judgment against the respondent, which means
16 I get the money and the bank is left holding the bag,
17 which --

18 MR. DYER: Yeah, it needs --

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

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

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

25 MR. DYER: Yes.

1 CHAIRMAN BABCOCK: Richard Orsinger.

2 MR. ORSINGER: I'm a little bit troubled by
3 what appears to me to be inconsistency in the way we're
4 handling and describing costs. 10(a), which is an
5 uncontroverted answer of no property, then it has its own
6 cost paragraph, which is Rule 10(2), 10(a)(2), that you
7 get costs, which include reasonable compensation to the
8 garnishee, and that doesn't say "attorney's fees," and I
9 don't think it means attorney's fees.

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

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

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

22 MR. ORSINGER: Well, and the other
23 provisions of law, which are mostly statutes, they say
24 "attorney's fees," and so I think that there might be some
25 wisdom in defining this compensation to the garnishee,

1 although I don't mean to exclude the research time for the
2 banks. I know that that's money out of pocket.

3 Now then, in (b)(2) we have another cost
4 provision where there is an indebtedness, and that just
5 uses in (b)(2)(B), entitled to recover its costs. "If the
6 garnishee's answer is successfully controverted the
7 garnishee is not entitled to recover its costs." I assume
8 that means not entitled to recover its costs including
9 reasonable compensation.

10 MR. DYER: Right.

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

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

21 MR. ORSINGER: And do we have any idea what
22 the standard is for apportionment there? Because it's
23 been a successful garnishment. I'm not understanding --
24 this is a judgment where the garnishee is indebted, so
25 that means the applicant did a good thing and he captured

1 some money, and yet when you get down here all of the
2 sudden it's not clear to me is the garnishee getting all
3 of their costs or is the applicant paying some of them or
4 is the respondent paying some of them? And then to go
5 onto (d), we have again respondent, "The balance of the
6 costs shall be taxed against the applicant," and it
7 doesn't say anything about including reasonable
8 compensation to the garnishee. So I would like it if we
9 had more concrete terms and if they were consistently
10 used.

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

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

24 CHAIRMAN BABCOCK: Okay. Anything else on
25 10? Yeah, Justice Gray.

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

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

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

16 CHAIRMAN BABCOCK: Okay. Any comments?

17 MR. ORSINGER: I have a question.

18 CHAIRMAN BABCOCK: Or questions.

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

23 MR. DYER: They're actually different.
24 That's from the existing rules. The controverting -- the
25 controverting answer doesn't pertain to a third party

1 under the existing rules. We haven't included it here
2 either.

3 MR. ORSINGER: So can a party move to do
4 something to the writ of garnishment without controverting
5 the garnishee's answer under oath? I figured -- I thought
6 that the garnishee's answer stood unless somebody filed an
7 affidavit saying it's wrong, but this appears to allow a
8 motion process that apparently occurs before the trial and
9 no sworn affidavit, and then matters that I would have
10 figured were reserved for trial after an affidavit had
11 been filed contesting the garnishee's answer instead get
12 resolved on nonsworn motions filed by nonparties before
13 the trial.

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

16 MR. ORSINGER: It's a sworn motion?

17 MR. DYER: Yeah.

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

20 MR. DYER: Right. Right.

21 MR. ORSINGER: Okay. I may be reading too
22 much into this, but it seems to me like if there's going
23 to be a bona fide dispute over whether the property
24 belongs to the judgment debtor or not, that ought to be
25 resolved in one trial where everybody that has something

1 to say shows up and calls witnesses and you get one result
2 at the end of the trial. This makes it look like
3 everybody that has a bone to pick can file a motion and
4 have a pretrial hearing and you piecemeal try all of these
5 claims and by the time the last motion is ruled on there
6 is no -- nothing left to try in the trial, and that seems
7 odd to me, that that's an odd way to take care of
8 business.

9 MR. DYER: It is possible, but it doesn't
10 normally work out that way. What you normally see with
11 the motion to dissolve the writ is the assertion of some
12 technical defect. If you get a bunch of other parties who
13 come in and lay claim to the property, it's rare that a
14 judge is going to determine that solely on motion. It's
15 usually all pushed into a trial.

16 CHAIRMAN BABCOCK: Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: One more
18 question on the judgment, and I don't know the answer to
19 this. In my scenario, 50,000-dollar judgment, I capture
20 10, the bank wants 5 of it, have I then gotten the
21 satisfaction of \$10,000 worth of the judgment or just
22 \$5,000 worth of the judgment when I'm continuing to go on
23 and try to get more money?

24 MR. DYER: 5,000.

25 HONORABLE TRACY CHRISTOPHER: Okay. Then I

1 think that we've got problems with the way the judgment is
2 written because it appears that I got my 10 when I didn't
3 really get it.

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

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

10 MR. DYER: I'm sorry?

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

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

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

20 MR. DYER: Yes.

21 HONORABLE TRACY CHRISTOPHER: Okay.

22 CHAIRMAN BABCOCK: Roger.

23 MR. HUGHES: Well, I'm sensitive to
24 Richard's claim that a motion to dissolve or modify or a
25 contest filed by a third party maybe ought to be rolled

1 over into any hearing on a contest of the original answer.
2 On the other hand, I'm all for saving a bank's money when
3 it's necessary, especially when they're going to be
4 charging their expenses to somebody else, and I'm not sure
5 if all we've got is some third party coming in and saying,
6 "That's really my money" or "He was holding it in trust
7 for me," and the bank really hasn't got a dog in that
8 fight because they're not quite sure, kind of like the
9 answer they normally file. I don't see why to determine
10 that fight we need to make the bank show up for that
11 hearing so that they can charge their expenses to sit
12 through a hearing which they're not really interested in
13 and then tax those costs against somebody else, so perhaps
14 that's one reason to keep it separate.

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

17 MR. ORSINGER: Yeah. Generally this whole
18 motion practice is a little bit disconcerting to me
19 because there's a provision here that the court has to
20 rule on the motion promptly after reasonable notice, which
21 can be less than three days; and so I'm a garnisher,
22 judgment creditor, and I've got an answer on file that's
23 basically admitted that I'm entitled to whatever -- you
24 know, whatever the garnishee has; and then all of the
25 sudden somebody files a motion, which must be sworn; and

1 then I get a phone call of get down here and prove up your
2 case because the applicant has to prove their case at this
3 hearing that might occur on 10 minutes' notice or
4 something; and then there's a provision in here about
5 ruling on the basis of affidavits unless they conflict;
6 and then you have to have a hearing. So we're talking
7 about like a trial on ownership on less than three days'
8 notice maybe before I have my witnesses lined up or
9 anything. I mean, does this ever cause trouble for
10 anybody? I mean, it seems to me like that's really
11 problematic for an applicant.

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

22 MR. ORSINGER: I mean, the reason -- I mean,
23 I might have my ducks lined up in that I can show I got
24 the judgment, but if somebody is coming in and said, "My
25 father is holding money in a trust for me" and that's not

1 apparent on the face of the bank records, but I'm prepared
2 -- this guy is prepared to testify that he doesn't own it
3 and that his son owns it and he's just a trustee, how am I
4 going to be prepared to deal with that with no discovery,
5 no depositions, no trial setting, less than three days
6 notice? It seems to me like that's really a problem and
7 then if you don't, you lose, you're out. You don't get a
8 trial, you don't get nothing. It's over. The hearing on
9 the motion is over, and you don't have any evidence to
10 controvert what the debtor and his son is saying, you
11 lose, right.

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

13 CHAIRMAN BABCOCK: Elaine.

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

1 look at.

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: All right. Other

1 comments? Rule 12.

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

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

8 PROFESSOR CARLSON: No.

9 CHAIRMAN BABCOCK: According to Mary Lou
10 Robinson, no.

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

13 CHAIRMAN BABCOCK: What?

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

16 CHAIRMAN BABCOCK: Rule 13.

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

19 CHAIRMAN BABCOCK: Rule 14.

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

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

24 MR. ORSINGER: Can I ask a question?

25 PROFESSOR CARLSON: Let's talk about

1 distress warrants.

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

7 MR. ORSINGER: Do we have any rules that
8 govern the transfer of ownership as a result of the
9 auctions or the conclusion of the process because I know
10 that the constables require -- they issue a bill of sale
11 and they require payment of that and whatnot, and I'm
12 wondering if all of that is done pursuant to law or each
13 constable just makes up his own rules.

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

19 MR. ORSINGER: Well, it may be pretty rare,
20 but I recently had a garnishment where I was -- had enough
21 good fortune to capture some silver and gold, and so we
22 sold that at auction, and it was a very careful process
23 that this constable went through. I was really impressed,
24 and he had to describe the property, conduct the auction,
25 take the money, count the money, and then give a bill of

1 sale and then charge fees for all of that, and I didn't
2 see that there was any authority to do any of that or any
3 directions on how to do it, so I figured that it was just
4 an internal process that they have.

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

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

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

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

13 CHAIRMAN BABCOCK: Okay. What is a distress
14 warrant?

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

23 MR. GILSTRAP: Have there been any rules?

24 MR. DYER: Everybody has followed the same
25 rules for attachment and sequestration. All of the forms

1 are patterned after them, but Judge Lawrence wanted to
2 include them, and there seems to be no reason why not to
3 include them to give practitioners and courts the
4 guidelines to follow, but the Property Code grants these
5 liens and, you know, like if you look at 54.001 through
6 005, those deal with the agricultural lien. 006 says when
7 you can get the distress warrant issued if you've got an
8 agricultural lien. It has a provision for a judgment on a
9 replevy bond. Then you look at 54.021 through 025, that's
10 for the commercial landlord lien.

11 So these are the guidelines on what the
12 statute says has to be filed; and sometimes, like with the
13 commercial landlord lien, you can only trap or your lien
14 is only good for a certain amount of time and for a
15 certain amount of rent, so it's fairly esoteric unless you
16 practice a lot in that area, but they all allow for the
17 distress warrant.

18 So if we now move back to Rule 1, you'll
19 note that the format is the same as in the others. (c),
20 the application, by the statute you have to state the
21 amount sued for is rent or advances that are covered by
22 the statute. The other thing about a distress warrant --
23 and, Elaine, you might have to help me out a little bit
24 with this, but normally what happens with a distress
25 warrant, it can only be issued by the JP, so you file your

1 underlying lawsuit in county or district court because the
2 JP doesn't have jurisdiction over the amount in
3 controversy, but you go get your distress warrant from the
4 JP court. So the writ is served coming out of the JP
5 court. It's returned to the court where your underlying
6 lawsuit was filed. This is a peculiarity of distress
7 warrants.

8 So subpart (2), you state the amount in
9 controversy of the underlying suit. Okay. You can have a
10 situation where the amount in controversy is within the
11 jurisdiction of the JP court, so the JP court has
12 jurisdiction of the underlying suit and is also the one
13 that issues the distress warrant, and that's where it's
14 returned, but in those instances where that's not the
15 case, subsection (4), you have to identify the underlying
16 suit. Subpart (d), the same verification requirement.

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

19 MR. DYER: Yes, and I did not have time --
20 actually I thought Judge Lawrence was going to be
21 presenting this one, so he owes me big time, but I did not
22 have time to go through this and do what I did with
23 attachment, sequestration, so the language will be made
24 parallel to all of those, so, yeah, there are quite a few
25 instances where it's not parallel but will be. I cannot

1 remember why we deleted from the existing rule a
2 requirement that the application state that it is not sued
3 out for the purpose of vexing or harassing. Any comments
4 on that? I can't remember why we deleted it. Perhaps
5 because we thought that that was already a part of our
6 rules with regard to frivolous pleadings, but I throw that
7 out there.

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

13 CHAIRMAN BABCOCK: Richard, you're not
14 crying, are you?

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

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

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

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

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

1 rules?

2 CHAIRMAN BABCOCK: That's what you said.

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

9 CHAIRMAN BABCOCK: Okay. Any comments about
10 1?

11 MR. GILSTRAP: Yes.

12 CHAIRMAN BABCOCK: Yeah, Frank.

13 MR. GILSTRAP: These requirements that "the
14 application shall not be quashed because two or more
15 grounds are stated conjunctively or disjunctively," is
16 that in the rule?

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

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

21 PROFESSOR CARLSON: It's in Rule 610.

22 MR. DYER: Yes. We did move the placement
23 of it. Instead of having it under "order" -- actually,
24 and also the part "issuance without notice," we have moved
25 those up. Issuance without notice went into subpart (a)

1 as the very last sentence. "The effect of pleading" was
2 moved to a standalone provision, so those same changes
3 will be made.

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

6 MR. DYER: Yes.

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

9 MR. DYER: Yes.

10 MR. GILSTRAP: Okay.

11 CHAIRMAN BABCOCK: What other comments about
12 1? Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: (a), (a) is a
14 little confusing to me. We talk about pending suit, we
15 talk about in (a). We talk about underlying suit in (c),
16 and just reading that, it's unclear to me what you said,
17 that normally there will be a suit in county court or
18 district court before this distress warrant gets filed.

19 MR. DYER: Yes.

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

24 MR. DYER: Okay.

25 HONORABLE TRACY CHRISTOPHER: Because (a)

1 says pending suit is required and then when you say, "An
2 application for a distress warrant may be filed at the
3 initiation of a suit," well, you should say, you know, you
4 have to file a pending suit in a court of appropriate
5 jurisdiction for rent, I guess, and then if you want the
6 application you go to the JP court. If that's what we're
7 trying to get here.

8 PROFESSOR CARLSON: Yeah. Yeah.

9 CHAIRMAN BABCOCK: Okay, Frank.

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

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

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

19 MR. DYER: Which section are you looking at?

20 CHAIRMAN BABCOCK: (7).

21 MR. GILSTRAP: (7).

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

1 short way to convey the meaning.

2 MR. GILSTRAP: Depends on what it means.

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

5 MR. GILSTRAP: Okay.

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

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

14 MR. HAMILTON: In several of these writs
15 we've got No. (2), the amount in controversy in the
16 underlying suit. Why is that important, the amount in
17 controversy in the underlying suit?

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

21 CHAIRMAN BABCOCK: Subject matter
22 jurisdiction?

23 MR. DYER: Uh-huh.

24 CHAIRMAN BABCOCK: Subject matter
25 jurisdiction was the answer.

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

3 MR. HAMILTON: Yeah.

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

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: Well, they might need
11 to know it because if it's for unpaid rent, they're trying
12 to -- I mean, the purpose of this is either leave the
13 premises, the lease premises, or put -- pay some money
14 into the registry of the court for the amount in dispute
15 of unpaid rent. So if you have a month that you're
16 disputing then you would know what to set the bond at.
17 You would know the amount in controversy and if -- if the
18 tenant remains in possession, that amount can increase and
19 they have to pay more money then.

20 CHAIRMAN BABCOCK: Okay. Any other comments
21 about 1?

22 Okay. Well, we'll stop there on the
23 distress rules for today, but I'm glad we got started on
24 that. This made me feel a whole lot better. Now, our
25 next meeting is on December 9th and 10th, and here's --

1 Pat, so you know, here's how we're going to do it. The
2 dismissal rule is going to come back for about an hour of
3 discussion and then Justice Phillips is going to report on
4 the expedited actions issue and then we're going to go
5 back into the ancillary rules and finish them. The
6 meeting on Friday will start not at our usual time of
7 9:00, but rather at 10:00 o'clock on the 9th, although
8 breakfast will be here as always, and you're welcome to
9 come by and eat breakfast.

10 PROFESSOR CARLSON: How civilized.

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

14 (Adjourned at 11:55 a.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

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

I further certify that the costs for my services in the matter are \$ 866.50 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 4th day of December, 2011.

D'Lois L. Jones

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