* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 10, 2011

(SATURDAY SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 10th day of December, 2011, between the hours of 8:57 a.m. and 12:00 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

11-38 Ancillary Rules - Trial of right of property (annotated)

11-04d Ancillary Proceedings Task Force draft, January 2011 (Portion for 12-9-11 meeting only)

--*-*-*

CHAIRMAN BABCOCK: We'll be on the record, and we will start with TRP No. 4, the claimant's right to immediate possession. I know it's early, but does anybody have any comments on TRP 4? I know everybody's settling in here, but anything, David, you're worried about in this rule?

MR. FRITSCHE: Nothing other than the implication. Part of this comes out of the implication in 719. It, again, clarifies the procedure. I don't really have anything further.

CHAIRMAN BABCOCK: Okay. Any other comments? All right. Let's go to TRP 5.

MR. FRITSCHE: TRP 5, the -- there was not clear direction to the officer who was executing under the original levy as to what the officer did with the levy once the -- once the application was filed. So we added date and time of notification, the manner that the officer was notified, and if the notification was not by the clerk or justice of the peace, the date and time that the officer confirmed that an application had been filed because once that notification occurs, all proceedings under the writ or distress warrant are stayed.

CHAIRMAN BABCOCK: Okay. Any comments about TRP 5? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: And this is only if the officer still has the writ or the warrant in his possession? If it's already been returned to the court, should there be the same sort of notation put on it at the court?

MR. FRITSCHE: So the return has been -- let me think about that. The return has been filed.

HONORABLE TRACY CHRISTOPHER: I mean, the idea is to put people on notice that there is some issue with this return. I just don't understand why the officer has to do something that then the court doesn't have to do if the court has possession of the warrant.

CHAIRMAN BABCOCK: Let the record reflect there's muttering going on over at the ancillary --

HONORABLE TRACY CHRISTOPHER: I don't know the answer.

CHAIRMAN BABCOCK: You think that's a problem or not?

MR. FRITSCHE: I'm thinking through the preliminary to trial, that period of time between the preliminary hearing and the trial, and I think the key is -- the key thing is that the court -- the underlying -- the court where the underlying writ issued from needs to have some sort of notification. Justice Christopher makes a good point. I think we need to think through at what

point that underlying court has notice.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And this kind of dovetails to the J word, too, if we end up filing somewhere else.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I'd like to back up just briefly to 4. I'm not going to get back into that J problem of yesterday, but the -- is there a situation with regard to multiple claims to the piece of property that is now transferred maybe to somewhere else and here the officer is having to deliver it to someone? In other words, if there's multiple claimants that think they own the property, I mean, I assume there are multiple claimants that think they own their property or we wouldn't be having this trial, and so one of them goes and gets a bond and the officer has got to deliver it to that person, but what if there are multiple people obtaining the bonds, or is that even a possibility under this procedure?

MR. FRITSCHE: I think there's a possibility. I think --

HONORABLE TOM GRAY: Is it so remote we don't have to worry about it in the rule?

MR. FRITSCHE: Exactly. I think it's very remote.

CHAIRMAN BABCOCK: Okay. Any more comments about 5? All right. Let's go to 6, the trial. Richard Munzinger.

MR. MUNZINGER: 6(a) requires the claimant to file a written statement or be dismissed from the case, and I know that earlier the claimant is required to file a written statement, but if the claimant's application requires the claimant to set out in detail the origins of the claimant's right or claim to the right of the property, why must the claimant file a written statement in addition to the application and suffer dismissal if he or she fails? That seems to me to be overkill. It may come from the original rule, but I wonder about whether it's prudent. I mean, if I had filed an application that says, "Gee whiz, I bought this. Here's my certificate or title" or whatever it might be, and I fill it out in detail, and I do it in a sworn affidavit, and I think I protected myself. I'm a layperson, I don't have a lawyer, and all of the sudden I'm dismissed from the case because I didn't file the written statement, which is duplicative of what I did. It's a problem to me.

MR. FRITSCHE: There are two explanations for that that would make sense. One is it may be that the hearing is going to be in a different court from where -- it may be in the court of the underlying suit, to which the

transfer has been made. The second aspect of that is the original temporary order following the temporary hearing from back in TRP 2(c)(1)(e) sets the deadline for those statements to be made. If, for instance, the court issuing the preliminary order decides that the court believes that the evidence is sufficient enough to issue the preliminary order but wants further clarification, in that preliminary order it may require that the claimant to be more clear, provide more information prior to trial.

MR. MUNZINGER: Yeah, but the way that Rule 6 is now written, regardless of whether the trial court has asked for more information or not, shall have judgment against the claimant by default for the failure to file a duplicative written statement.

MR. FRITSCHE: Well, if you consider what happens at trial, for instance, (b), if the plaintiff fails to file a written statement or appear, the plaintiff in the writ -- the plaintiff is saying, "I give up, I didn't have any right to levy upon that property, or the officer had no right to levy on the property." The case goes away, claimant wins. I think what the original rules intended was that let's have everybody join issue for a final trial; and if claimant joins issue properly, whether or not they amend, if plaintiff fails to join issue, plaintiff loses; and I really think there was an intent to make certain that

as for -- or at the time of the final trial everybody joined issue. Again, that's the only explanation I can add, Richard.

MR. MUNZINGER: I understand, and I'm not -- this comes from the original rule, as I understand it.

MR. FRITSCHE: Well, no.

MR. MUNZINGER: Whether it comes from the original rule or not, it troubles me that I'm assuming y'all deal with pro se people from time to time, if not frequently in this context, so here's a pro se person who comes in and says, "This is my" -- whatever it is. "I bought it," and from whatever, "and here's the bill of sale, and it's mine," and he does this under oath. He thinks he's joined issue, and in fact, he has joined issue. He's filed a sworn complaint, which would be admissible in evidence theoretically, and yet he's told that he gets a default judgment if he doesn't file a written statement that says the same thing. That strikes me as odd and unnecessary and probably a trap for the unwary.

MR. DYER: So what you'd prefer is that the claimant can rely on the previously filed written statement.

MR. MUNZINGER: If it's sufficient for the purposes of the court, but the way this is written it's mandatory that the court enter judgment against the

claimant if the claimant fails to file a duplicative written statement. That doesn't make sense to me.

MR. GILSTRAP: Well, it says "or appear."

MR. DYER: Well, the appearance is different from the filing of the written statement. We can fix that on the written statement just to say that if they've already filed a statement then they can rely on that.

MR. MUNZINGER: Well, maybe something along the lines of if the court is satisfied that the application joins the issue or whatever, sets out the -- is adequate and no written statement from the claimant is required then it's not needed. If you're going to cure it. It just seems to me that this is a problem to a pro se person seeking to protect his or her property --

MR. DYER: Uh-huh.

MR. MUNZINGER: -- who would think that they had done so if they filed an affidavit swearing to the truth of certain facts and even provided evidence showing that they own the property. A failure to file a written statement seems to me to be a technicality that would cause them to lose their property unnecessarily and unjustly.

CHAIRMAN BABCOCK: Okay. What -- that's a point to consider. What else do we have in this rule? Richard Orsinger.

MR. ORSINGER: I notice that if the claimant

fails to appear then the plaintiff under the writ or distress warrant wins a default judgment, but if the plaintiff fails to appear there is just a nonsuit, which to me would not be a binding adjudication, and that's kind of a disparate treatment there. The third party is out with a res judicata bar, but the judgment creditor is not and can do the same thing the next day if he wants to and have to go through the whole process. Is there a reason why, or should they both be -- if you fail to show up for trial, you lose, that's it, you don't have to relitigate?

MR. FRITSCHE: Well, Richard, this is -- I mean, this set of rules is one we really struggled with, and it's -- you know, we were trying to divine what the original intent was. The only thing I can say to that is, you know, under current Rule 726, the -- it appeared that the intent of the drafters was to -- 725 and 726, that there had to be certain judgments or certain findings by the court or orders of the court at this trial, and all we had to work with was this one statement that said, "If the plaintiff does not appear, he shall be nonsuited," and --

MR. ORSINGER: Is that a statutory statement or a rule statement?

MR. FRITSCHE: That's Rule 726.

MR. ORSINGER: So that's subject to modification by the Supreme Court.

MR. FRITSCHE: It is. It is.

MR. ORSINGER: Is there a policy that would support allowing the plaintiff who issued the writ to fail to show up and still reissue the same writ against the same property at a later time?

MR. FRITSCHE: There's nothing to prevent that.

MR. ORSINGER: Okay. It seemed to me that it -- you know, what's fair is fair. If you don't show up, you lose, and that's it, it's over, you don't get another shot at it.

CHAIRMAN BABCOCK: Okay. We'll take that into consideration. What else? Anything on 6?

MR. ORSINGER: Yes, on 6(c), I'm a little bit nervous about saying that the proceeding and practice on the trial shall be governed by the Rules of Civil Procedure on account of we've thrown so many of them by the wayside to get a 21-day trial, and I don't know exactly what Rules of Procedure -- I guess they're talking about the rules governing juries and jury charges and that kind of thing. Maybe this is not a problem, but we've changed a lot of rules, and maybe they're all pretrial rules, and maybe that's not a problem.

MR. FRITSCHE: Richard, if you look at Footnote 36, the current 727 says, "The proceedings and

practice on the trial shall be as nearly as may be the same as in other cases before such court or justice." We tried to be more clear, and I think you raise a good point that perhaps if, you know, for instance, it's in justice court, the rules are relaxed currently.

MR. ORSINGER: This may toughen and change that process.

CHAIRMAN BABCOCK: Yeah, I've seen language that says to the extent not inconsistent with these rules we're governed by the Texas Rules of Civil Procedure. Okay, Roger.

MR. HUGHES: When I saw that rule I went and looked at the Rules of Evidence, and there's a question in my mind about whether the Rules of Evidence normally apply in justice court or a small claims court where a judgment might issue from, so you start out in a court where the Rules of Evidence by their own terms don't apply, and then all of the sudden the JP or the municipal judge, or pardon me, small claims judge, all of the sudden has to apply the Rules of Evidence in this procedure. I mean, the rule as is currently written, it just says "as nearly the same as" -- "may be the same as other cases before such court or justice," and like I said, I'm just concerned that all of the sudden we're putting a whole set of rules on judges who normally don't have to apply them.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I thought your suggestion was a good one, Chip, because it seems like we've got a special provision for discovery here, too, and I don't know if you want to bring in all the discovery rules and issues.

CHAIRMAN BABCOCK: That's one possible solution. We'll figure it out as we go along. Any other comments? That's a good comment. Any others about Rule 6? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: On the burden of proof --

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TRACY CHRISTOPHER: -- issue, I would assume that there might be a question as to where the property -- whether it was in the possession of the claimant, and is that a judge decision? I mean, who decides whether it was in the possession of the claimant in order to determine this burden of proof?

MR. DYER: I would think the court has to decide that issue.

HONORABLE TRACY CHRISTOPHER: As a matter of law, not a question of fact for the jury as to whether a piece of property was in the possession of the claimant.

MR. DYER: There may be instances where it's a matter of law, but I would think most often it's a fact

question. Usually, I mean, possession would include in the possession of an agent, for example, so there could be fact questions as to whether someone --

HONORABLE TRACY CHRISTOPHER: Yeah, suppose my car was parked in front of the debtor's house, all right, and it got -- it got executed on and taken away, all right, and then I try to come in and say that was my car. Well, was I there and just left it there overnight, or did I give it to him so that it was in his possession? I mean, you know, it seems to me that that would be an issue, and I just wondered who decided it.

MR. DYER: It is an issue, and the court would decide it. We have not included here when the court must decide it. I would assume it goes up to the time of trial.

CHAIRMAN BABCOCK: Okay. Orsinger.

MR. ORSINGER: On the same subject, do we really need to differentiate the burden of proof that way, or can we just always put the burden of proof on the claimant? Because you can presume that the issuance of the writ was lawful. It's a lawful act by a lawful court, and someone that's coming in to overturn that lawful act, maybe they ought to just have the burden of proof under all circumstances.

MR. DYER: I don't know why they have the

burdens this way, but my guess is there's a presumption based on possession. That's why the burden shifts.

CHAIRMAN BABCOCK: Nine-tenths of the law, you know.

MR. ORSINGER: Yes, it is.

CHAIRMAN BABCOCK: Okay. Any other comments on 6? All right. Let's go to 7, judgment following trial. Any other -- any comments on TRP 7? Anything you're worried about, David?

MR. FRITSCHE: This was just further clarification to try to take the rules and make it very clear as to the return of the property primarily after an adverse decision for whichever party had possession at the time of the trial, so I think we tried to be -- make it more clear.

CHAIRMAN BABCOCK: Okay. Any comments on 7? All right. Going to 8, claim as a release of damages. Yes, Richard.

MR. MUNZINGER: I have two comments. The first is punctuation. Why is the phrase under the provisions of this section set off by commas? In the dark ages I was taught that that qualified the meaning of the clause, making it unessential and unnecessary, so I raise that question, but the real thing I want to talk about is "a release of all damages." I think that's awfully broad.

I think it should limit itself to the damages relating to the property and relating to the officer's conduct under the writ, but a release of all damages is overly broad.

CHAIRMAN BABCOCK: Yeah. Good point. All right. What else? Yeah, Richard.

MR. ORSINGER: I'd ask for a little context. If a constable is serving a lawful writ and doesn't violate the law in doing it, are they subject to liability if it turns out that the judgment debtor is not the owner of the asset?

MS. WINK: No.

MR. ORSINGER: So when are they subject to a damage claim?

MR. DYER: I think they're only subject to a damage claim if while property is in their possession they allow it to deteriorate negligently, or potentially, I guess.

MR. ORSINGER: So this would mean that if you exercise the right to recover your property, even if it was improperly damaged due to mishandling while it was in the government's possession, you have to choose between suing for damages and not taking the property back or taking the property, but you can't do both?

MR. DYER: That's what this says, yes.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, why -- why is the constable liable or the sheriff or constable liable for, you know, the damage to property in his possession? I mean, isn't he immune as in all other contexts? Why do we need -- I'm not familiar with this kind of release of the officer in any other context, and I just wonder why we need it.

MR. DYER: I agree with you. I'm not familiar with any other provision like this either, but sheriffs and constables do have a duty to properly maintain property in their custody, in their possession, and if they don't do that then they can be liable.

MR. GILSTRAP: They're not immune?

MR. DYER: They're not immune.

MR. FRITSCHE: Frank, I think also it may be that if, in fact, the officer levied upon property that was not the judgment debtor's, the claimant could potentially go after the bond that had been posted by the constable or sheriff.

CHAIRMAN BABCOCK: I will note this has been in the rule since 1981.

MR. GILSTRAP: It doesn't seem like an archaic provision then.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: It just strikes me as

singular, and I just -- you know, I'm kind of at seed with this whole notion that, one, he's liable and, two, that there's an automatic release.

CHAIRMAN BABCOCK: Yeah. Okay.

MR. DYER: That one needs further research.

CHAIRMAN BABCOCK: Any other on -- any other comments on 8, Richard?

MR. ORSINGER: Yeah, as a follow-up to that --

CHAIRMAN BABCOCK: It's only one sentence here, Richard.

MR. ORSINGER: I know, but the discussion is broader than just the language itself. Don't the -- isn't it true that sometimes the officer who's executing the writ will ask the judgment creditor to post a bond or an agreement -- agree to indemnify the officer if they designate --

MR. DYER: They used to be able to do that. They can't do that anymore.

MR. ORSINGER: Hmm, so that means that the officer takes the risk that the asset has been misidentified and they're taking property that's not of the judgment debtor? That risk is now on the officer and not on the party who's specified the asset?

MR. DYER: In that situation the officer is

not liable. The person who says to the officer, "Seize that property," that person may be liable.

MR. ORSINGER: Okay. And that person is not released by this clause. Only the officer is released.

MR. DYER: Correct.

MR. ORSINGER: So the only liability that's being released here really is mishandling the asset while it's in official custody, right?

MR. DYER: I don't know why this is in here. Because to me the duty -- well, I don't know why it's in here.

CHAIRMAN BABCOCK: Probably because some officers were on the task force that drafted the rule in '80, is what my guess would be. All right. Any other comments on 8? All right. Let's go to 9. Any comments on TRP 9, levy and other property? Roger.

MR. HUGHES: Well, I think it's pretty straightforward except that Rule 5 requires the officer to return the warrant, so I guess I'm a little concerned about the interplay between these two. I don't want -- I can understand that if, you know, just because you might have seized somebody else's Lamborghini instead of the Lamborghini owned by the judgment debtor that you not be able to proceed forward.

On the other hand, we have a rule that says

the officer executing the original warrant has to return it, so I'm wondering if maybe this is -- this is a theoretical problem that never occurs in practice, so I'm just worried that if you get out a new writ the officer is going to say, "I'm sorry, I can't execute it. It's already been recalled." So has this just never come up or what?

MR. FRITSCHE: That's another -- go ahead, Pat.

MR. DYER: I'm not sure I understand the question.

MR. HUGHES: Well, what I'm saying is that Rule 9 says the plaintiff can continue having levy made on other property of the defendant, yet Rule 5 says the officer has to return the warrant. Now, if he's returned the warrant, he's going to have trouble executing it. Now, what it would seem to me is that what we're talking about is you don't want the officer continuing to execute on the property in dispute, but you want to be able to go after others. So I'm just worried that these two sections are going to cause some poor officer to go, "Well, I get this warrant here. I'm supposed to return it. Now you're telling me to go out and execute it on some other property. What do I do?"

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Isn't that where we have

the rule -- like under the distress warrants it was Rule 1, sub (f), where we -- there are multiple warrants, and so if one warrant becomes the subject of a -- and it's on the writs, too. All those procedures have the possibility of multiple writs being issued. One piece of property that gets attached or gets -- becomes the subject of one of these suits for trial to -- try title to property doesn't affect everything else that all the other warrants or writs that may have been issued under multiple warrants.

MR. DYER: Correct.

HONORABLE TOM GRAY: Or levies. So it would just affect the one that has to be returned on the property that is now the subject of this proceeding, not the other warrants or writs that had been issued from the original court.

MR. DYER: Correct.

MR. FRITSCHE: Well, it could also -- that's a good point, because it could also create a priority problem if the officer has levied on multiple properties and has to return the writ and there's another judgment creditor right behind the first judgment creditor attempting to levy. There's a priority problem, so I think we would have to modify something in 5, that last sentence in Rule 5, to address the interplay with Rule 9. The only issue then becomes how does the court that issued the writ

become aware of the trial of right of property occurring or the -- without the writ being returned with the notification from the officer.

CHAIRMAN BABCOCK: Okay. It looks like you spotted an issue that we need to study. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if we're going to redo in connection with the jurisdictional issue, it seems to me you file wherever the writ is returned to. You file your application there first. There's a notation gets put on the writ, either by the officer or the court, depending on who has the writ. Then if that court doesn't have jurisdiction over your property, you file a second piece, and we don't have this whole transfer problem. You file a second application in the court that has the jurisdiction, proper jurisdiction over your property.

So that puts the notation on the writ down there in JP court, and so if they end up having -- you know, they want to sell, they go to final judgment there in JP court and they want to sell, it shows right there on the writ that this piece of property is subject to this other trial, so you can't sue -- you can't sell it until that other trial is finished.

CHAIRMAN BABCOCK: Okay. All right. Richard.

MR. ORSINGER: All of this discussion causes me to want to look at the effect of the filing of the application, which is back under Rule 1, subdivision (b), subdivision (b) -- no, subdivision (d), the effect of the filing of the application is to stay further proceedings under the writ, but I think this conversation has pointed out it's possible you may have multiple pieces of property subject to the same writ or distress warrant, and you should only suspend the effect against the property that's put in contention. So if you've got four vehicles on a lot and one of them there's a claim against, you shouldn't suspend the effect on the other three, and so could we narrow that down to say "stay any further proceedings under the writ or distress warrant related to the property against which the claim is asserted"?

CHAIRMAN BABCOCK: Great. Good point. Anything else on 9, the one sentence rule?

All right. Let's go to execution. And that is found on page 85 of the large handout that was downloaded for this meeting and is probably available in the back. And who is going to lead us through execution?

PROFESSOR CARLSON: Donna Brown.

CHAIRMAN BABCOCK: Donna Brown.

PROFESSOR CARLSON: Let me introduce Donna Brown. She practices here in Austin and is the leading

authority on execution and speaks frequently on the topic at CLEs, and are you in the collection manuals?

MS. BROWN: Yes.

PROFESSOR CARLSON: One of the authors on the *Texas Collection Manuals*.

CHAIRMAN BABCOCK: Okay, great. Glad to have you, Donna. Thanks for your work, and get ready to be subjected to what you've seen.

MS. BROWN: I'm so thrilled.

CHAIRMAN BABCOCK: Just happy to be here, right?

MS. BROWN: I could be Christmas shopping instead.

CHAIRMAN BABCOCK: Yeah, that's true. You want to give us a little overview of --

MS. BROWN: Sure.

CHAIRMAN BABCOCK: -- what we're looking at in the proposed rule, 15 of them?

MS. BROWN: Thank you for this opportunity. Thanks for all the work you-all do on the rules. It's a painful process to group draft, and you-all do it even more than we have on the task force, but it's also been a real learning experience, and I appreciate the opportunity to have served.

We looked at the writs of execution from the

standpoint of what rules are problematic to the practitioner, what rules are problematic to the clerks and the constables that are out in the field handling these writs of execution, and that was the first look at the rules before we modernized them, and there was some issues that I want you to be aware of. One was the issue of whether or not you could get multiple writs of execution issued at one time. There was -- there's 254 counties, and let me tell you, there's 254 ways the clerks do it and even more than that, and so we had clerks that would issue only one at a time and would not issue a new one unless the other one was returned or you had an affidavit that it was lost. That's the only way you could get a second writ. There were other clerks that if you said, "I need three writs because the debtor has property in three different counties," they would say, "That will be $24," so there was that issue.

Another issue that was problematic was the issue of getting in fights with secured creditors over property that had liens on it and how do we -- how do we make that work, how do we provide a structure of balancing the rights of secured creditors to the judgment creditors, and some of us discovered new law that was there all along, which is always an interesting prospect. When you actually have to read each and every rule, every single word, every

single comma and period, you do get one with the law, so we battled through that.

There was another issue that the clerk's offices had, and it was having an execution docket, and you-all go "What, a what?" And there were some clerks who even though under the rules were required under penalty of some sort of damages or claim to maintain an execution docket, we did a poll, and there were many clerks from major metropolitan areas who did not maintain an execution docket. So that was something of concern for the clerks' offices, and we've addressed that. There's also some missing things for those of us practitioners who deal with this all the time, one being writ of scire facias for purposes of revival of judgments, and we've provided a rule for that, and we'll talk about that toward the end of the rule. So kind of did a poll. We talked to clerks, we talked to deputies, constables, and practitioners to get some feedback before we went forward with the rules.

So with that, I'd like to just start at the first and kind of go through without reading to you some of the reasons why we left things in and took things out. Under the first one, enforcement of judgment, it would indicate to everyone that judgments could be forced by -- enforced by execution or other process. You think, why is that in there? Well, because it was in there before. We

also have clerks who unless you have a judgment that says "for which let execution issue," they won't issue a writ of execution. They want that magic language, so something short of a nunc pro tunc. We've got this rule and left it in here that says judgments can be enforced by execution.

Second item, we thought it would be good to define "judgment creditor," "judgment debtor." There was inconsistency in the rules about how the parties were talked about, and so we thought that would be useful to provide that definition. Also, because there is a huge industry right now of selling debts and selling judgments and, you know, ABC Recovery Systems is now the judgment creditor for purposes of enforcement of the judgment, we wanted to make it clear that whoever is the current owner of the judgment stands in the shoes of the judgment creditor, and as a successor in interest in the ownership of the judgment should have the same rights as any judgment creditor to enforce its judgments. So that was just for clarification purposes and also to update what is now a very standard industry that we're all dealing with.

CHAIRMAN BABCOCK: Okay. Let's pause here for a second and see if there are any comments on Rule 1. Anybody have anything?

MR. MUNZINGER: (b) and (c) are new; is that correct?

MS. BROWN: I believe so, (b) being the definition and (c) just confirming what is in the case law and in practice the successor rights in the judgment.

CHAIRMAN BABCOCK: All right. Let's go to Rule 2, Donna, if we can.

MS. BROWN: Rule 2 is, of course, from the old 621a. This is where sometimes the action really begins post-judgment for a collection action. It also, of course, affects discovery for purposes of setting supersedeas bonds. We looked at a couple of issues, one being the -- what do you do post-judgment with discovery, and those who are in general litigation, oftentimes it ends at trial. For collection lawyers it begins sometimes with the judgment, and we have a problem often with judgment debtors attorneys who it's who do you serve it on? Okay. If you've got an unrepresented debtor it's easy. If you've got a represented debtor, they file an answer.

There may be nothing filed to a motion for summary judgment. You get your judgment, and then you're going forward with collection post-judgment, and it's who do you serve the discovery on, and oftentimes if you serve it on the lawyer, they take the position that, "No, I don't represent them post-judgment." If you serve it on the debtor and don't serve it on the lawyer, "What are you doing serving discovery on my client? They're still my

client," and there's nothing in the rules that talk about when does that representation end, and so we -- instead of saying when it ended we provided that it be served on both the judgment debtor and the judgment debtor's trial counsel and clarified also if it's -- if the -- if this is a appellate procedure situation where you're looking for information about the judgment debtor's assets for purposes of supersedeas that you would serve it on the appellate counsel.

The other thing that is -- that is not really noted in a footnote that I want to share with you is a provision in (c). If you look at the Rules of Civil Procedure regarding service of deposition notices, it provides you can -- a witness has to be served with subpoena unless they're represented by counsel, at which point you can serve counsel, and so many times post-judgment you've got the issue where you've got unrepresented parties, and there was an addition to the end of (c) which I wanted to disclose to you that hopefully gets us around the necessity of having to serve the -- a subpoena to an unrepresented party post-judgment.

There is -- it adds to the expense of the process. The defendant is already before the court. They've chosen not to be represented by counsel, and to require the additional service of a subpoena post-judgment

adds to a lot of -- a lot of expense to the collection of the judgment, and this nuance is not recognized by some practitioners. Some practitioners take the position if you're not represented by counsel you're representing yourself, you are your own lawyer, we can serve you if you are a party with the notice for deposition. A close reading of 199.3 would indicate that, no, probably you need to subpoena an unrepresented party for post-judgment discovery, and so it was requested by those of us on the committee that do a lot of collection work that this requirement of the service of a subpoena on an unrepresented party be eliminated for post-judgment purposes.

CHAIRMAN BABCOCK: Okay. Any comments on Rule 2? Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: I wonder why in (a) and (b) you refer to the discovery as "any form of pretrial discovery" when you more or less define that in (c) and say what the discovery is. It just seems a little unusual to designate it pretrial discovery in (a) and (b).

MS. BROWN: Let's see.

HONORABLE JAN PATTERSON: Third line, "Any form of pretrial discovery authorized by these rules" and then same thing in (b), "any form of" --

MS. BROWN: This may be a situation that it

-- just not changing it remarkably from 621a. I just have to --

HONORABLE JAN PATTERSON: Okay.

MS. BROWN: I think this is a situation where it was all -- you know, here is modernizing the rules. We took a big, fat rule and broke it up and gave it subtitles.

HONORABLE JAN PATTERSON: Okay.

MS. BROWN: And so --

HONORABLE JAN PATTERSON: And all of (c) is there as well?

MS. BROWN: (c) was there, yes.

HONORABLE JAN PATTERSON: It was there, okay.

MS. BROWN: Yes. Uh-huh. Saying that all the rules apply and the other, the forms of discovery. It was just, again, breaking up the pre-existing rule, modernizing it by adding subtitles, and so it's -- it wasn't meant to be a duplicative thing, but really just a matter of pointing out the aspects of the rule.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: You say that the judgment debtor is before the court, but it's been eight years since anything happened in the lawsuit. He gets a notice, and that's enough to bring him, to make him appear for deposition?

MS. BROWN: That is the intention of the

change to the rule.

MR. GILSTRAP: And how does he get the notice? Is it served on him?

MS. BROWN: Certified and regular mail under 21a, or just certified mail in 21a.

CHAIRMAN BABCOCK: Tom Riney. No? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: While I do recognize the problem with the debtor versus the trial counsel in terms of service, and often, you know, a case will be dead for a year and you'll get a motion to withdraw from the trial lawyer, and the clerk will be like, you know, "Why are they trying to withdraw, this case is over"; and I said, "Well, they want to have an official withdrawal in connection with post-judgment matters." It seems to me that, although I understand why you did it this way, that we should put something in the rule that indicates that the trial counsel should withdraw if they're not going to continue to represent the debtor, because if we get to the motion to compel aspect after you've served the discovery on trial counsel and the debtor and you hold a hearing, and am I expecting trial counsel to show up or the debtor to show up and can I proceed if just the debtor shows up when there hasn't been a withdrawal by the trial counsel? I mean, to me that ought to be cleared up.

MS. BROWN: The creditors bar actually really would like that. The debtors bar would not like that, so this was our way of kind of splitting the baby as far as service of the notice. I think it would be very welcome to have a bright line rule that says that once you're on you're on until you formally withdraw. It would give a comfort level to anyone doing post-judgment discovery or post-judgment remedies of any kind.

HONORABLE TRACY CHRISTOPHER: I mean, I don't think that's too much to ask a trial counsel, although I can understand the debtors wouldn't, but so a judgment has been rendered against your client, they're not going to pay it, they're not going to appeal it, and you know, no bond is going to be issued. You know, this post-judgment stuff is going to come against them. You know, at that point how does the judgment creditor even know what the current address is for the judgment debtor?

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Going back to the pretrial discovery, I think the phrase "insofar as applicable" is going to bedevil courts for a long time, and let me give some examples. We have pretrial discovery rules on levels, and on one hand one might say, well, that has nothing to do with post-judgment discovery. Why should the judgment creditor when he tries to issue a writ of -- tries to do

discovery start talking about is this a level 1, 2, or 3 proceeding, but it certainly is important to the responding party because the levels put limits on, say, deposition length, number of depositions, lengths of -- and number of interrogatories, et cetera, and so forth. One might say, well, those should be out the window, this is post-judgment. On the other hand, one could say there is no more reason that, you know, burdensome and harassing discovery should exist at -- in order to enforce the judgment that then -- to get the judgment in the first place.

MS. BROWN: That's been addressed by the rules already, and those limitations are -- for post-judgment are excepted, and I've always got to hunt to find it, but it's around the 190s. So limitations on the amount of depositions, the amount of interrogatories you can send are specifically excepted from post-judgment discovery. It's already in there, and I've just got to find it.

MR. HUGHES: Oh, well, okay. Then we have problems that we're talking if this is also part of the discovery into net worth for our supersedeas stuff, well, we have limitations on expert witness discovery, and I have found that in these kind of fights, accountants and other kinds of economic experts are pretty critical. So are we

going to apply the rules about you have to designate them and provide their reports or, et cetera, so many days before the hearing and so on and so forth? And then when it says all of the rules regarding pretrial discovery, I mean, does that mean we have to send out new requests for disclosures, and are request for admissions really the kind of post-judgment tools we want to have.

Now, the other thing of it is I can understand the service requirement, and perhaps one way to alleviate part of the burden is to allow trial counsel to simply file the notice, "I don't represent this person anymore," at some point post-judgment and not have to have the court hold a hearing to permit them to withdraw. It seems kind of -- well, a waste of judicial effort at that point. It seems to me, though, that if a final judgment has been entered and the time to file a notice and a motion for new trial or a notice of appeal have gone by, it seems counsel ought to be able to simply file a notice, "I don't represent this person anymore."

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Well, I haven't thought through that suggestion completely, but I don't have -- I think it could work, but there are other matters that clerks and reporters have to contact someone about after a case is over. Costs might be still at issue, the

return of costs. That's when a clerk is going to be involved. The reporter maintains exhibits, and they send notices to trial counsel on the destruction or return of exhibits, and so I'd like some thought given to making sure that the rule is -- takes into account those issues, because until we get a withdrawal of counsel, we're going to contact counsel about issues that concern the administration of the file, wherever, and we do it all the time.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I want to second Justice Christopher and what she's saying, because, I mean, I've had a situation where the judgment creditor was wanting to throw the guy in jail for not showing up for depositions. They were sending notices to his trial counsel, and his trial counsel was saying, "I don't represent him anymore," but you're still attorney of record, you know, and so I do think -- I hadn't thought about just filing a notice, "I no longer represent," but something, I agree, there ought to be some bright line to know when and who is either unrepresented or represented.

CHAIRMAN BABCOCK: Okay. Justice Gray and --

HONORABLE TOM GRAY: We've got a pretty good template for that already in the appellate Rule 6.4, nonrepresentation notice. It happens all the time in

appellate procedures where the appeal gets started and the lawyer is getting all the notices related to late briefs, late record, payments, that kind of stuff, and the attorney can file it.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: What we're talking about here is what the default rule ought to be, and I think it's going to be different -- or, you know, the realities will be different in different cases. If there's insurance or a very solvent defendant, the lawyer is probably still going to be representing them, but there won't be levy of execution in that kind of case. We're talking about cases where the defendant's solvency is marginal. That means the lawyer is probably not getting paid anymore, and I think we ought to try to figure out what the bar says the usual situation is and draft and have our default rule be that, and then the burden is -- we would then say, "To get off the case you file a notice I'm off the case, or to stay on the case you file a notice," but I think our default rule ought to represent the realities most of time.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I support the suggestion that started with Roger to have kind of a notice of nonrepresentation, but I think we ought to move it up into

the general Rules of Procedure. We have this problem recurrently in family law because you can have post-judgment litigation in family law ad infinitum, and once the judgment goes final, the court loses plenary power in my view to sign an order permitting you to withdraw. My law firm will do that anyway. We go down and get an order of withdrawal from a judge that no longer has any jurisdiction in the case, but the problem is not just a writ of execution problem, and I think that the paradigm that Justice Gray pointed out in the appellate rules has worked extremely well, as controversy as it was at the time, Sarah Duncan may recall, was extremely upset about that process and had to leave the deliberations for it to cool down a little bit.

HONORABLE TOM GRAY: Sarah did? I'm surprised.

MR. ORSINGER: It was the most controversial point of the whole new appellate rules, I think, but it has worked well, I think, and it's optional. So if you have a continuing relationship as a large law firm, you can allow yourself to remain; and if it's a one time representation, you file this unilateral notice; and it has effect because of the rules, not because it's signed by a court that no longer has jurisdiction. So I would support Roger's suggestion back in the regular rules for all purposes, not

just for execution.

CHAIRMAN BABCOCK: Pat.

MR. DYER: I was going to say, that's a good thing. I don't think you should force an attorney to have to file a motion to withdraw after judgment. I thought case law said there is a presumption you no longer represent the party post-judgment unless you make an appearance on their behalf post-judgment.

CHAIRMAN BABCOCK: Richard Munzinger.

HONORABLE DAVID EVANS: I haven't seen that.

MR. MUNZINGER: I think a rule that says you have to file a notice of withdrawal can increase the liability of the attorney. Pat's point I think is well-taken. I have an engagement letter with Joe Schmoe, and I try his case. My engagement letter says that I'll try the case. I tried the case; I lost it; he lost it. A judgment has been entered. Four years later someone comes along and seeks execution on the judgment. I didn't file a notice to withdraw as a matter of course. I did what I was supposed to do, albeit I lost. I think my representation of this client is over because my engagement letter limited my engagement to the trial of the case, not to post-judgment activities, and now you're going to adopt a Rule of Procedure that says if I don't file a notice to withdraw I remain his counsel.

I think that's almost an ethical rule. I think it imposes ethical obligations and legal obligations on the attorney, and I think you need to be careful about how you do this. I would want people at the Advanced Civil Trial Lawyer waving flags, saying, "Hey, you guys, pay attention to this arcane rule on execution because it says if you lost the case you're still the guy's lawyer for 10 years regardless of what your engagement letter said." That's problematic.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Well, it doesn't say that they're still the lawyer. What the rule, the proposed rule, says is trying to get service, trying to get notice to the judgment debtor, and the lawyer or the former lawyer presumably has -- either has the ability to do that, or there is at least a likelihood that he can figure it out, you know, how to find his former client and let him know that there's something going on. I mean, it doesn't offend me that the rule says serve the former lawyer because if -- if he's a former lawyer. He might still be the current lawyer, but just serving him doesn't seem to me to impose any particular hardship.

CHAIRMAN BABCOCK: Pat, then --

MR. DYER: I don't think that's fair to that lawyer. Now you're impugning notice to that client when

the attorney-client relationship has ended, and to say that you can still serve the lawyer because the lawyer will know where the client is, well, you're still imposing an obligation on the lawyer. What does that lawyer have to do, file a motion with the court, go down there, argue, "You know, Judge, I need to withdraw"? What if the judge denies it? You're stuck with representing this person forever?

MR. JEFFERSON: That's for the lawyer to decide, right, what his responsibility is at that point. The rule just says serve the lawyer. The rule doesn't affect the attorney-client relationship.

MR. DYER: Well, but you're only getting service on the client through serving the lawyer, so it's the same attorney-client imputation.

MR. JEFFERSON: The rule says serve both, right? Am I misreading that?

MR. DYER: No, it does say serve both, but the issue I'm talking about is what obligation does an attorney have post-judgment. Should we presume that the attorney continues to represent that client, or should we say unless that attorney makes a post-judgment appearance the attorney does not continue to represent the client.

CHAIRMAN BABCOCK: Okay. I think we've got the issue discussed. What about Rule 3, Donna?

MS. BROWN: All right. I want to get my old rules in front of me, so give me just a second.

CHAIRMAN BABCOCK: No, we don't want to discuss the old rules. We want to discuss the new rules.

MR. DYER: The new and improved.

MS. BROWN: The -- well, it's the issuance of a writ of execution is historic or as a practical matter occurs when the clerk's office puts their stamp on it and signs it and then it is sent to the sheriff or constable. There's case law that says issuance isn't complete until it's delivered to a sheriff or constable, and so while we request the clerk to issue a writ of execution, it's a little bit more. They actually just prepare it, and once it gets to the constable's office it is considered issued. That's case law, and so the committee struggled with how do we define "issuance" in a way that takes into consideration existing case law that says issuance is not merely the clerical act of the clerk but also putting it unequivocally in the hands of a sheriff or constable for levy, and so the rules were written to talk in terms of the two-part process as opposed to it being the clerk issuing -- issuing it being the clerical act.

We've also provided that it go either to the sheriff or constable designated by the judgment creditor or to the judgment creditor, and that's important because you

want to be able to direct where the writ goes when you request a writ of execution. It's problematic when the clerk's office issues a writ and sends it to the constable in the courthouse, and sometimes you see that happening, because it may not be the constable that would be -- that would necessarily handle the writ, and especially it would be problematic if the judgment debtor is outside the county or outside that constable's precinct if the practice in that county is that the constables handle writs on a precinct exclusive basis. So the committee wanted to clarify issuance, that two-part process, and that's the part (a).

Part (b) addresses the issue of multiple writs, and I think there must have been a case somewhere or a training process somewhere or something where clerks got the idea we can only issue one at a time. Other clerks didn't get the memo, and they issued multiple ones, and we've discussed that, and so when you are in the heat of collection and you're trying to satisfy your judgment, that is, the judgment creditor, and you've got debtors that have property in multiple counties, the constable's power is limited to the county in which the property can be found, the exception being adjacent real property that goes over county lines.

And so if the judgment debtor thinks you're

coming after them, there may be a need to get writs out to multiple constables, okay, so that the property doesn't disappear, as it has been known to do; and so we wanted a provision that would allow specifically and straightforwardly that you can get multiple writs out. The flip side of that and the other concern was, well, what about excessive levies, we don't want to have an excessive levy problem, and how are the constables or sheriffs going to know if there are multiple writs out; and so we put the burden on the judgment creditor or their attorney or agent to coordinate that with the sheriff or constable's office; and as a practical matter that's what happens.

You say -- you would theoretically say, "Constable Brown, we've got three writs out," and usually the judgment creditor knows what's out there. They know the approximate value, especially if they're sending three writs out. They don't want to have an excessive levy, and so you wouldn't get multiple writs out unless you think you're going to need them, but it puts the coordination on the judgment creditor. The rules regarding the constables' duties in execution were changed about six years ago or eight years ago. The constables' lobby made it to where they don't have to work really hard unless -- on the writs of execution you still get some really good hard-working constables out there handling writs and really going above

and beyond what the rules now say that they do, but the judgment creditor has to point out property. So it's not the constable, "Here's a writ, go run around and find the property." You've actually got to point it out to them, so this is just an extension of that evolving relationship in which -- in which the judgment creditor is pointing out property and coordinating the potential of multiple levies. Does anybody have any question about that?

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: Yes, I was going to suggest on 3(b) where you talk about informing the officers that multiple writs are outstanding that you require them to identify who the officers are with.

MS. BROWN: I'm sorry?

MR. ORSINGER: The provision that requires that you give notice to the officer that multiple writs are outstanding --

MS. BROWN: Okay.

MR. ORSINGER: -- doesn't require that you tell the officer who the other officers are so they can communicate with each other, and I'm wondering if you should go ahead and require that the identity of the other officers be shared so they can communicate.

MS. BROWN: Well, the officer is going to take direction from the judgment creditor to levy on

property, to ask them to also coordinate with other constables is -- just adds to their burden, okay, and so it's under Chapter 34, and I don't have that in front of me exactly, but we talked about that, letting them know and trying to get them to coordinate. It's not their responsibility to coordinate when the levy is going to happen, when a sale is going to happen, whether it's going to be excessive levy. The coordination needs to be just with the judgment creditor, and just because I have constable A and constable B out with writs, the instructions given to those constables as to what to levy on and when and whether we negotiate anything is where really my responsibility as the judgment creditor, and they're just taking directions from me, and so there's not a need for any kind of coordination and, therefore, no need for a communication between the constables.

MR. ORSINGER: Then why is there a need to inform the officer that there are other writs out if it's the judgment creditor's duty to be sure that there's no overexecution? It doesn't -- just to tell them that there are other writs out is a useless act if they're not going to use that information in some way.

MS. BROWN: I'll ask my co-committee folks what our idea was on informing the constables about the multiple writs. I don't remember the --

MR. DYER: I think it was we thought they were going to coordinate, and I think Carlos does coordinate.

MS. BROWN: With --

MR. DYER: With other constables, but I don't know if that's commonplace.

MR. ORSINGER: If that is what you want, even if it's optional, you ought to give them a name and a telephone number rather than just to say, "There's some writs, go figure it out."

MS. WINK: Let's also keep another thing in mind, and that is the officer who actually receives the writ may not be the ultimate officer who is executing, so at first when you're providing that information it might actually be the sheriff who has received the writ, but then the sheriff hands that off to someone else. If I remember correctly, Donna, and I could be wrong, but I believe Carlos' input -- and I can double-check with him -- was that they want to be able to coordinate with the debtor to make sure that they know they need to coordinate -- I'm sorry, with the creditor's counsel before taking further action. That was the reason we were giving them notice that there are multiple writs, is so that they could coordinate with creditor's counsel.

CHAIRMAN BABCOCK: Okay. What other

comments? Justice Gray, and then Justice Patterson.

HONORABLE TOM GRAY: Donna, you may have addressed this while I was getting a cup of coffee and I just didn't notice it, but is there a reason with regard to throughout 3 you add the "or the judgment creditor's agent or attorney" after you reference the judgment creditor? For example, you say in 3(a), "upon the request of the judgment creditor or the judgment creditor's agent or attorney," and my concern there is that nowhere else in the rules that I'm aware of do we make it anything other than a reference to a party or their position and always assume that that party or litigant's agent or attorney, most often attorney, can proceed on behalf of that designated person, and I would hate to not have that phrase in there somewhere and someone argue to me on appeal that obviously you meant something different because in this situation you reference only the judgment creditor and, therefore, it had to be the judgment creditor, not the agent or the attorney.

CHAIRMAN BABCOCK: Okay. Justice Patterson.

HONORABLE JAN PATTERSON: Is it correct that the creditors bar and the debtors bar agree on the concept of multiple writs? That's not a controversial concept between --

MS. BROWN: Really it was not an issue of creditors bar versus debtors bar. It was an issue of --

HONORABLE JAN PATTERSON: Clerks.

MS. BROWN: -- inconsistency among the clerks, and the clerks specifically -- the association specifically addressed with me on multiple occasions saying, "We need some direction on this multiple writ issue, and we need some consistency, and we want the direction in a rule. Give us a rule because we've got some attorneys who are insisting that we issue three writs, but that's not what we've done before, and we feel uncomfortable doing that, and we need direction." So it was really a request from the clerk's office more so than any kind of a conflict between the debtors and creditors bar.

HONORABLE JAN PATTERSON: Good. They sometime take great pride in doing things differently, so that's a good --

MS. BROWN: They wanted direction.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: On (c)(1) about if enforcement or judgment not suspended, that language doesn't work for me linguistically or, you know, grammatically or otherwise. To me I think you ought to strike all of the words leading up to "The clerk shall not prepare a writ until after the expiration of 30 days" and retitle that "No issuance within 30 days." It's my understanding that that is to respect

the possibility that a motion for new trial may be filed within that -- or a motion to modify judgment may be filed in that first 30-day period in which event the judgment may go away and the execution may be improper. So isn't that section really designed to say that no execution can issue within the first 30 days after judgment? Because the way it is right now it reads it -- if the enforcement has not been suspended, the clerk shall not prepare until 30 days has gone by. Well, what if it has been suspended? Can they do it within 30 days? The answer is no. So in any event they can't issue the writ within 30 days unless they can meet the emergency exception in 3.

MS. BROWN: Right, the emergency.

MR. ORSINGER: So I think it would be much cleaner if you just delete the first two and a half lines and change the title about not issuing within 30 days.

CHAIRMAN BABCOCK: What other comments on this?

MR. ORSINGER: I have a question on (c)(3).

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: The very end of (c)(3), this is the emergency exception. We can get a writ within -- well, while the court still has plenary power over the judgment, and if they're about to remove personal property you can get the execution out and then the last three lines

it's "or is about to transfer or secrete the debtor's property." That includes real property, right? The transfer, the imminent transfer of real or personal, or is it limited to personal property?

MS. BROWN: I don't think you can secrete real property.

MR. ORSINGER: But you could transfer it.

MS. BROWN: Yeah.

MR. ORSINGER: So I'd like to be clear because the previous clauses remove debtor's personal property. This clause is transfer property. I think that it's legitimate to say, "He's about to transfer real estate, I want my writ now," but I think because of the way the parallel construction that suggests that -- I'm unclear whether that applies to just personal property or also real.

MS. BROWN: Well, the first -- the first part of that sentence talks about -- is the removing the personal property and this, quite frankly, does not distinguish real or personal, so it would indicate that it was all property, and I have not thought -- I've never been too concerned about transferring of real property. Usually it's -- I drive by the debtor and I see a going out of business sale. That's when I act, or when my client says that's what's happening. It's not occurred to me that this

could actually apply on a real property transfer like you indicated.

MR. ORSINGER: Do you think it could?

MS. BROWN: So, I mean, you couldn't secrete real, but you could certainly transfer it in fraud.

MR. ORSINGER: Well, we could either specify, or we could just leave it vague, but I would -- I wish the record would reflect whether real property is included or not. Here, the record here today, so that anyone who wants to litigate this at some time and comes and digs through it knows, because it seems to me that the policy supporting an immediate issuance of a writ is just as valid for someone that's about to transfer title to land as it is to take personal property out of a jurisdiction.

CHAIRMAN BABCOCK: Okay. Roger, and then Justice Christopher.

MR. HUGHES: Well, if we're talking about a writ of execution, pardon me, my -- maybe I'm wrong about this, but one way you uphold that process is the day a judgment is signed can't you file an abstract of judgment?

MS. BROWN: Yes, you can, and --

MR. HUGHES: Of course, you would have to file that in the county where the real estate is for it to have any effect, but that's one way to keep the debtor from secreting real estate or transferring it before you can get

out a writ.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, it -- although I'm -- I can understand the issue about the real property, you know, it seems to me this is an emergency situation within the 30 days; and real property is not going away; and even if it got transferred to somebody in fraud, under a fraud situation, that could get undone without any danger of the real property disappearing, especially when you're within 30 days. You don't know, they might end up paying the judgment, or they might end up superseding the judgment. To stop the sale of someone's property just because you think you're worried about it seems extreme to me.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: On the abstract of judgment there is a time period for filing that, too. I forget whether it's 20 or 30 days.

MS. BROWN: No, sir, it's not. You can file it immediately.

MR. HAMILTON: Immediately?

MS. BROWN: Uh-huh.

MR. ORSINGER: Well, if the conclusion is that this only applies to personal property then I would suggest you put the word "personal" in there because the

words don't say that.

CHAIRMAN BABCOCK: Okay. Rule 4.

MS. BROWN: I'm trying to see if there was anything in particular I wanted to -- okay. The couple of things that we addressed I think throughout the rules was the issue of signing officially. I think the word "officially" was taken out of a number of the rules, and usually you get a signature and a stamp and that's it, and whether that's official or not official was -- the word "official" was taken out of the contents of the writ.

One of the -- (b)(1) I think has some of the -- one of the most important issues that we struggled with, and that was on the money judgments. The old rule talked in terms of the amount of the judgment then due should be included in the writ of execution, and quite frankly, that is not really done from the standpoint of the judgment creditor does not typically say "Based on payments that we've received, the amount due on the date of issue," which, of course, we know is not only signing now but also delivery, is $12,000.59.

What we see in writs of execution is it will reflect the items from the judgment, cause number, parties, amounts, dates, interest, et cetera, and then it will state credits to the judgment. In some instances the clerk's office will issue that $4,000 credits to the judgment. The

problem about that is when the constable's office gets it the question is when did those credits occur? Did they occur at the time of the judgment, in dribbles, yesterday, when? And one of the things that we do in Travis County is when I request a writ of execution, of course, I prepare it myself so that it has all of the information I want in it and then I list the credits on the dates of the credits; and sometimes my writ of execution will be two pages long because we've taken payments from this judgment debtor; and it has happened before that on a 5,000-dollar judgment we've got $6,000 in credits because they still owe eight because it's old, it's got 18 percent interest, and they still owe some money on the judgment; and so it was suggested that the practice that you see in Travis County or that I have used and that some of us of others have used is that we have the judgment debtor -- I mean, the judgment creditor provide the dates and amounts of credits to the clerk for inclusion in the writ.

Then when the writ goes to the constable's office or the sheriff's office to handle and they are calculating what is due on the judgment, they can do that math and just plug in the dates and know exactly what the payoff is on the judgment, and so that is what we included in for writs of execution on money judgments, the amounts and dates. Let's see, yeah, the dates and amounts of

credits to the judgment.

The second big issue that we struggled with was that people don't draft judgments very well, and post-judgment interest is all over the place. You've got people who will -- will actually put a number in, which is great, and that makes it easy for the constable's office to calculate the judgment. Other folks will not put an interest rate. They won't even say "and post-judgment interest." It's just silent, even though the statute regarding post-judgment interest says, "The judgment shall state a rate of interest," so we've got judgments where there's -- it's left out, and then you've got other ones that are sort of in between, "and post-judgment interest as allowed by law." Well, what is that?

And so there was a struggle, I'm told, between clerks' offices and constables' offices on how are we supposed to calculate this, Mr. Clerk, Miss Clerk, if you send me this and I don't have a number in there? You, clerk, you should put a number in there. They go, "Well, wait a minute, how do I put a number if I don't -- why should that be my responsibility if the judgment creditor didn't put a number in there," and so we spent a couple of hours struggling with whose responsibility is it. Obviously it's the judgment creditor. They don't do it. I've gotten plenty of judgments referred to me for

collection where it's not in there or it's that "and post-judgment interest as allowed by law." So it was decided if the number was not stated numerically in the judgment itself that the clerk's office could look at the Office of Consumer -- blah, blah, blah, blah, wherever it's posted, and put in a number for the judgment rate of interest on the date the judgment was signed, and that's what was included.

Now, one thing that -- somewhere between the last draft we did and the harmonizing committee a provision was taken out where what do you do if it fails to provide for post-judgment interest and leave it silent, and I may have to talk to my harmonizing people why that was taken out, because we had also thought, well, if it failed to state a rate of interest we should look to -- there was at least a case somebody found that said if it doesn't specifically state then it is the judgment rate of interest in effect at the time of the judgment, and so I would add to (b)(1), "If the judgment fails to specifies the rate of post-judgment interest numerically or fails to provide for post-judgment interest or is silent as to post-judgment interest, the clerk or justice of the peace must include the rate in effect the date the judgment was signed." So I'm not sure why that got left out in the harmonizing. Can y'all give me any reason? Typo? Dropped?

MR. DYER: I would say typo drop, yeah.

MS. WINK: Yeah.

MS. BROWN: So that would help the clerk, and again, I'm listening to the clerk and listening to the constable's office going, "What do we do when we get one of these crazy judgments? What do I do?" We just hope for the best that you can at least get the principal amount. So this -- the constable is limited to what they can do by the terms and the four corners of a writ of execution, so we've got a way to get a number in there by the clerk's office to the constable's office so they can do the math.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I have seen the problem, and the clerk, both county and district clerk in Tarrant, have refused to insert an interest rate or make a decision on what the interest rate is, and it's required a court action, generally in the form of a motion to direct the clerk to specify a certain rate of interest or credits. I just don't think you're going to find district clerks willing to stake their office out and make a decision on what the interest rate is on a judgment, but I may be wrong about that. I know ours doesn't. I know -- I believe Parker won't, and I think Collin and Denton are the same way. I haven't checked Dallas, but there's been a discussion about this problem because we do have these

unspecified rates out there.

CHAIRMAN BABCOCK: Yeah. Frank.

MR. GILSTRAP: I admire your desire to attack this problem, but it's even worse than you say. I mean, I see a lot of judgments where you've got to calculate prejudgment interest, and it will say it's so much plus prejudgment interest, and one reason they don't want to put a prejudgment interest figure in there is they prepare the judgment and then it doesn't get signed until a month later, they've lost a month of prejudgment interest. You also have the problem of appellate attorney's fees, and I've been doing this for a long time, and sometimes I have real difficulty figuring out how much is owed. I don't know what the problem is, but it may be that it comes down to requiring some order from the court when it's unclear, and maybe that will encourage people to try to be more specific.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just have a question. I know that that rate of interest changes monthly.

MS. BROWN: Yes.

HONORABLE TRACY CHRISTOPHER: And on that website --

MS. BROWN: Yes.

HONORABLE TRACY CHRISTOPHER: -- do they have all --

MS. BROWN: Yes.

HONORABLE TRACY CHRISTOPHER: -- past 10 years on a continuing basis?

MS. WINK: The one that I have been looking at does not.

MS. BROWN: The one you've been looking at does not?

MS. WINK: Last time I looked at it, so I'm not sure if we're talking about the same database. I think there's more than one place available right now on the internet that says the current rate of interest, Judge, but I can't tell you which or whether either of them provides the historical, so you're right, that's a big issue.

HONORABLE TRACY CHRISTOPHER: I mean, you know, it seems to me that if we have a published historical rate for the clerk to look at, that's fine, but if we don't, this is going to, you know, be a real difficulty for them.

MS. BROWN: Perhaps -- I'm almost sure we looked at that. I know some of you-all are surfing because I see you doing it. If I could get one of you surfers right now to look at the Office of Consumer Credit Commissioner for judgment rates and maybe we can answer the

question.

HONORABLE DAVID EVANS: Well, doesn't the judgment rate change based on what the judgment is and whether the -- whether you have a contract rate available?

MS. BROWN: Well, it should be the contract rate, and that would be the responsibility of the judgment creditor, but oftentimes they don't do that.

HONORABLE DAVID EVANS: Well, that's my point, is that rate would be higher than the Office of Credit, and the clerk won't make that decision on a typical credit type judgment as to whether the contract rate applies that was in the contract, which is 18 percent, or if it's a South Dakota judgment on a credit card, it's 32 percent, or whether it's the Office of Credit Association. I may be wrong about that. I just think you still run into a problem with the clerk. You can specify it, but I would want the district clerks and county clerks to have some word on what they think about it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I know there's a statute that says that the judgment shall state the rate --

MS. BROWN: Yes, sir.

MR. HAMILTON: -- of post-judgment interest, but are you saying that if the judgment is silent about even granting post-judgment interest that the clerk has to

figure that anyway?

MS. BROWN: The answer to our first question was it goes back to 1983 that it's published, the interest rate, so I think that probably cures any concerns about there not being a place to find the interest rates. So that's the first question. Second, second answer, another issue that you've raised is there is a statute that says it shall -- the judgment shall state a rate of interest.

MR. HAMILTON: I know. Are you saying if the judgment is silent about post-judgment interest, doesn't grant it at all, that the clerk is going to figure that anyway and put it in the writ?

MS. BROWN: There is case law that indicates that it bears interest, post-judgment interest anyway, even though it doesn't state it, even though -- and granted you've got a statute that says "shall," case law that says it still bears interest. We're just providing a -- a means for which the clerk can include a number when it is silent, and we may be in a situation where the judgment creditor may be entitled to 18 percent. That's the cap on the contractual post-judgment rate of interest, but if they didn't put it in there, we at least have the default rate of 5 percent. Part of our problem is there's no Rule of Civil Procedure that tells us what must be in a judgment.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The Office of Consumer Credit does have a rate that goes back to 1983.

MS. BROWN: Right.

CHAIRMAN BABCOCK: That's what Elaine just said.

HONORABLE TRACY CHRISTOPHER: I'm sorry. I was looking at it.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I hate to raise the J word, so instead I'm going to talk about the W word, waiver. If the judgment creditor doesn't include an element of relief in the judgment why isn't that waived? I mean, I could understand the possibility of maybe a nunc pro tunc motion to insert --

HONORABLE DAVID EVANS: Yeah.

MR. HUGHES: -- the standard statutory rate of what is a minimum is 5 percent now for all judgments, but if the creditor didn't put it in the judgment and the creditor didn't prove a higher rate of interest applicable under some contract, what we're doing here is having some summary remedy post-judgment that may occur years later to insert a form of relief that the judgment creditor didn't put in the judgment at all, and it would seem to me that if they're entitled to do it, a nunc pro tunc is the way to do it instead of just to have the clerk pencil it in a writ of

execution.

CHAIRMAN BABCOCK: Judge Evans, did you have your --

HONORABLE DAVID EVANS: I gave notice on two of them where it was silent to the judgment debtor that the judgment creditor was requesting an interest rate be specified in the execution writ and in an abstract. There's also an abstract problem, too. You run into it there, and I required the notice be served upon the former counsel and got a response. It was a paying client involved, and so what happened on -- both of them came from the same law firm and against the same debtor, but they reached an agreement and resolved it, but it was to both judgments were silent as to the rate, but it did say, "The highest rate allowed by law for post-judgment interest," which I think is where the case law is now.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, yeah, I think what Judge Evans said about notice to the debtor is important because absent notice to the debtor, all of these procedures may protect the clerk and they may protect the constable, but if you get the judgment rate wrong and you get the judgment amount wrong, it's not going to bind the debtor unless he's had some form of prior notice.

CHAIRMAN BABCOCK: Okay. Let's go to Rule 5.

MR. ORSINGER: I still want to comment on something on 4.

CHAIRMAN BABCOCK: All right. Last comment on 4.

MR. ORSINGER: On (b)(1), 4(b)(1), about halfway through there's a sentence that starts, "It must command the sheriff or constable to satisfy the judgments and costs." It would help I think a lot if you put "accrued interests and costs" in there as well, because the judgment may not itself award interest as we've just discussed, and so we're really collecting the judgment and the costs and the accrued interest.

MS. BROWN: Well, in order to satisfy the judgment it would necessarily include accrued interest.

MR. ORSINGER: Which is a good reason to say it, because right now all it says to satisfy the judgment and yet you have all these procedures and all of these controversies about calculating interest, but it doesn't explicitly say that you're supposed to be collecting the interest either or as well, and it seems to me like it would be salutary to indicate that what you're paying out of the execution proceeds are the judgment, the accrued interest, and the costs. The costs are going to be taxed in the judgment, too. It's not redundant.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Did y'all discuss how to handle multiple writs? I'm in favor of the balance being placed in the execution writ and that the sheriff knows how much is to be collected and what's left on the judgment, but did you talk about how to handle the multiple or simultaneous writs that might be out there and how they might be satisfied if credits would come in, and does that affect the outstanding writ when there's a credit issue? If you execute in Parker County and you collect, does that invalidate the writ in Tarrant County that no longer reflects a proper amount that's due on the judgment? And I know that's a small point, but you are providing for multiple writs.

MS. BROWN: It's at the time it's issued. I mean, you're --

HONORABLE DAVID EVANS: That answered it.

MS. BROWN: You've got to have a point of at the time it's issued.

HONORABLE DAVID EVANS: So it's just an issue of wrongful execution on your part if you overcollect.

MS. BROWN: Excessive levy, yes.

CHAIRMAN BABCOCK: Okay. Yeah, Elaine.

PROFESSOR CARLSON: Roger, I don't think there's a waiver of post-judgment interest because you don't put it in the judgment. The Finance Code, section

304.005, sets out the general mandate that post-judgment interest accrues on a money judgment in this state, and I think that's been construed as a matter of law you have a right to post-judgment interest, with one limited exception in the statute dealing with the claimant's extension on a brief on appeal. There is a tolling time.

CHAIRMAN BABCOCK: David.

MR. JACKSON: Texas Finance Code, section 304.003, sets out a formula for calculating post-judgment interest. It's five percent if the Federal Reserve System rate is less than five percent, 15 percent if that same rate is over 15 percent.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: I have two questions. In the (b)(1) it must state the summary covered or directed to be paid. We usually state the sum as the amount of the judgment. Is this some -- I know it's in the old rules, but is that --

MS. BROWN: It does come from the old rules because there is a specific judgment for directing payment, and I can't tell you where it is, but I remember coming across --

MR. HAMILTON: Yeah, it's in the old rule, but it's terminology we don't normally use now. We use the amount of the judgment and then in paragraph --

subparagraph (3) you're talking about levy and execution for possession of real property, and I thought that we did that on a writ of possession rather than a writ of execution. In a trespass to try title case, for example, you get a writ of possession, not a writ of execution, to deliver possession of the real property.

MS. BROWN: This was, again, a carrying over from the old rules. A judgment for delivery of possession was handled by a writ of execution, and we didn't change that. The rules had money judgments, judgments for possession, judgments for possession or value, and I'm -- not anticipating your question, I'd have to go back and look and see where those are.

CHAIRMAN BABCOCK: While she does that let's take our morning break. Let's keep it to 10 minutes so we can get through this. We'll come back with Rule 5.

(Recess from 10:33 a.m. to 10:43 a.m.)

CHAIRMAN BABCOCK: All right. We're onto Rule 5, levy of the writ, or actually, Richard, levy of writ. No "the."

MR. ORSINGER: We'll let her explain and then I've got a comment.

CHAIRMAN BABCOCK: She better explain why the "the" is missing.

MR. ORSINGER: No. 5.

CHAIRMAN BABCOCK: No. 5.

MS. BROWN: No. 5. Oh, before we do that, 4(c), just to let you know, the return on the writ, 30, 60, 90 days, and if the creditor doesn't request a specific return date it would be a default of 90. Most clerks do that. They will issue it in 90 days, but we wanted to clarify that in the rules that that be the default return date.

Okay. Levy of the writ, I don't recall that we changed much on the issue of levy -- let's see, yeah. Yeah. Yeah, "without delay" was taken out because of the statute. Let me see. One of the things that we added to levy of the writ -- oh, well, no, I guess we did address the issue. Under part (b) -- no, that's not where it is. Just a second. No, sorry, that was No. 6. Levy on real property, one of the things that we added specifically under (c)(1) was a practice that is done in some counties and not in others where the constable when they levy on real property -- and to levy on real property all they have to do is endorse it on the writ that it's levied. There's no seizure. They don't have to go out and look at it, although they usually do, and how do you know that real estate has been levied on if you are an innocent purchaser for value, and it was suggested that we adopt a practice that some jurisdictions do where the constable will

actually file the notice of levy in the real property records of the county in which the property is located, and so it puts third parties on notice of a particular property that they might be purchasing, has been levied on under a writ of execution. This is something they do in Williamson County. It's not something they do in Travis County.

And so this, again, just put the world on notice that the property has been subject to levy so that it eliminates the situation where good faith purchaser comes in and buys and messes up the execution process, and there's no other means to really know that the property has been levied on. Even the posting of the sale may occur at some point in time after levy. There could be intervening time, so it was adopted -- it was suggested that we adopt this somewhat local practice as a practice across the board.

Another issue was the persons attending the levy. Again, many of the new stuff that you see is us trying to address issues raised by the clerks and the constables, and I personally don't ever want to go out on a levy because I'd rather send out a constable with a badge and a gun, and I don't want to be there when somebody gets mad. I also don't want to be there and have someone say, oh, I gave you legal advice and told you, yes, that was exempt or not exempt. Get me on the phone, I'll talk to

the constable, but I don't want to be there.

Some attorneys just like to get down and dirty with the constable's office and go take people's stuff, and some constables want them along. Some constables even try to get you to make you come along, which they can't make you do, and others say, "I don't want that lawyer there, and I certainly don't want the judgment creditor there, and it's just -- it would cause me too much problems," and so we put a provision in there that leaves it to the officer's discretion of whether or not someone attends, but they are not required to attend.

Let's see. Let's see if there was anything else that was important. Oh, one other item that was the inclusion of a practice, and that is under (c)(2), levy -- levying of property in place. In Travis County you used to could levy in place by having the constable put these big green stickers on the property, which works really good when it's like heavy rental equipment and you want to put third parties on notice that it's been levied on. That was in the olden days when we were a little more fast and loose. Now they won't do that unless you've also posted a security, so there is a provision now saying that specifically that we can levy in place, and I don't see in here -- this is -- did we take out in the harmonizing kind of requirements of securing the property?

MR. DYER: I don't think so.

MS. BROWN: It's unstated here, and I don't know if we need to state it or not. There's a provision under Chapter 34 of the constable's duty to preserve the property pending execution; and some constables, if they will do this levy in place, they do require bonded security for the property; and so I don't know if we want to get into that or just leave it under the regular -- leave the regular statute alone and let the constable's office make their requirements as far as what they require for securing a property. I think maybe that was a decision not to put it in here.

MS. WINK: I think you're right.

MS. BROWN: Okay.

CHAIRMAN BABCOCK: All right. Comments? Orsinger, you had one on the --

MR. ORSINGER: 4(b).

CHAIRMAN BABCOCK: 4(b) or 5(b)?

MR. ORSINGER: 5(b), pardon me. 5(b). It appears to me, and I am not as familiar with this obviously, that the whole concept of returning writ nulla bona has been eliminated. I don't see it in here anymore, but yet you do in 5(b) say that the constable or sheriff shall make a reasonable attempt to contact the judgment debtor to give them an opportunity to designate property

for levy, but I use -- is it somewhere else in here? I don't see it.

MS. BROWN: There's -- somewhere toward I'm thinking the end about post-execution sale matters, execution Rule 12(d), return of execution, the requirement of filing a return, and obviously nulla bona is a report that there was nothing to levy on.

MR. ORSINGER: Well, you've taken that out of the rules, so I'm nervous about that.

MS. BROWN: Where was it in the rule? Tell me, show me.

MR. ORSINGER: Gosh, I don't know. I don't even have the rules with me, but I can find it or maybe someone here can, but traditionally --

MS. BROWN: I don't recall that --

MR. DYER: I don't think it's in the rule.

MR. ORSINGER: It's not? Then it's in the case law. Then I would suggest we put it in the rules.

MS. BROWN: Well --

MR. ORSINGER: And I'll tell you why. It's my belief, and we can discuss this a little bit during the garnishment rules, that you can't get a writ of garnishment out unless you can establish there's not property subject to execution. Do you agree that that's right? Okay. And so to avoid a suit, a counterclaim, that you have gotten a

garnishment out when there was still property subject to execution, what I do is try to get the writ of execution served, and when it comes back nulla bona I have a designation by the government that there is no property subject to execution, and I have a green light on the garnishment.

MS. BROWN: I have an answer to that.

MR. ORSINGER: Okay.

MS. BROWN: It is not necessary. You are buying insurance by getting a writ of execution returned nulla bona that there's no property subject to execution sufficient in Texas to satisfy the judgment.

MR. ORSINGER: Right.

MS. BROWN: Okay. It's not -- that is not necessary. It is just insurance. To the extent you and/or your client have done sufficient discovery and have looked around and can -- and feel comfortable swearing that the judgment debtor does not have sufficient property in Texas subject to execution to satisfy the judgment, as long as you've got that comfort level to sign that affidavit, and I have that comfort level by doing discovery without getting a writ returned nulla bona.

MR. ORSINGER: And what if you can't get the discovery?

MS. BROWN: I go there without insurance

sometimes in that instance, because even if I had the constable go out and return a writ nulla bona I still would want to know because that constable only can look in one county.

MR. ORSINGER: I know, but the constable can serve the defendant and ask the defendant if you have any property, so that applies to the whole state.

MS. BROWN: Well, you can ask the defendant, but the constable's right to go and get property is limited to the county.

MR. ORSINGER: Okay. And let me -- I may misunderstand the process, and I certainly don't do it as much as you --

MS. BROWN: Okay.

MR. ORSINGER: -- but if I've got a writ of execution out, I've got an officer that's going to go find the judgment debtor and say, "Please tell me what property you have that's subject to execution to satisfy this judgment," and the debtor is going to say "none" and then it's going to come back nulla bona, which means the execution remedy is not available and you're allowed then to use the alternate remedies. Isn't that the way it works?

MS. BROWN: As a practical matter we request that the constable's office make personal demand on the

debtor. However, the charge of the writ is to go out and levy on property, not to go talk to the judgment debtor about levying on their property, so because I will have some constables that will not go and find the judgment debtor and have a face-to-face. They will send a letter to the judgment debtor, and they will look at the county records and go, "Sorry, Ms. Brown, there's nothing there. Nulla bona."

MR. ORSINGER: Do they tell you that over the phone, or do they write on their return?

MS. BROWN: They will write on the return, "nulla bona."

MR. ORSINGER: Okay. And I think that's a great procedure because that makes you bulletproof from a lawsuit that there was something out there and you should have found it before you issue the writ of garnishment. All I'm saying is why isn't that in the rule that when they make a reasonable attempt to contact the judgment debtor or whatever they're doing that they will return it saying that "We're not aware of any property subject to execution."

MS. BROWN: To tell a constable to return a writ nulla bona is a real dangerous thing because you are telling them not to go levy, okay. So to say, "Go return it nulla bona" is to ask them not to do their job. You've got to tell them, "Go out and levy on property to satisfy

this judgment." That is the charge of the writ of execution, and only if they say, "I've made -- I've made due diligence, and I cannot within this county find property subject to execution to levy on," then their return says "nulla bona," there was nothing to get.

So it's handled under 12(d), they must file a return stating concisely the actions taken pursuant to the writ and the law and filed with the clerk, and so they have gone out there and looked and there's nothing, then that's their nulla bona return. So --

MR. ORSINGER: And so even though the rules don't provide for it, there's just a custom that they do that and so we're going to --

MS. BROWN: No, the rule says you've got to say what you tried to do, "stating concisely the officer's action taken pursuant to the writ and the law" and then return the file. It's 12(d). It's the return of the writ, and that's where they write "nulla bona." I don't think nulla bona is a magic word. You can just say, "I went out and looked, and there was nothing to levy on."

MR. ORSINGER: Well, Carl has pointed out to me existing Rule 637 of the Rules of Procedure that are a little bit more directory than this, I think.

MS. BROWN: 637?

MR. ORSINGER: Yeah. It says, "The officer

shall first call upon the defendant if he can be found or, if absent, upon his agent within the county, if known, to point out property to be levied upon."

MS. BROWN: Well, and that is in the new rule, too, under part (b).

MR. ORSINGER: It says, yeah, "make a reasonable effort."

MS. BROWN: "Make a reasonable attempt to contact the judgment debtor," and some of them for that they send a form letter. That's their reasonable attempt. That's -- as a practical matter that's what will happen in some counties. In Travis County certain constables' offices the deputies will go to the debtor's home or business location and attempt to have face time. It varies, but there's your direction right there.

MR. ORSINGER: And in your estimation then the practice will continue even under the new rule that if they attempt to contact the defendant and he doesn't offer up nonexempt property and if they make a -- even a cursory examination and can't find it, they will return the writ nulla bona then.

MS. BROWN: Yes.

MR. ORSINGER: Even though there is nothing in here that requires them to do that.

MS. BROWN: They will return the writ because

it's required, and it will say "nulla bona" because there's nothing to get.

MR. ORSINGER: Okay.

MS. BROWN: Okay.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Over in part (c)(4) you deal with livestock running at large on the range, and that's right out of the old rule.

MS. BROWN: Right.

MR. GILSTRAP: And during the recently concluded boom there was -- I came across a lot of cases involving bank fraud where there was a very contentious fight over the -- over livestock that had been penned, and I just wonder, what do you deal -- when livestock has been penned, what's the practice for levying on it?

MS. BROWN: I've penned plenty of livestock, and I've handled plenty of execution, but not at the same time. I was raised on a farm. So --

MR. DYER: I think if they're penned they have to be picked up. The case law on running at large on the range is extraordinarily bizarre.

MS. BROWN: Well, sure.

MR. DYER: It has to be -- there was an instance where I think they had 600 head over six different counties, and that's not at large. You've got to go get

them.

MR. GILSTRAP: Yeah.

MR. DYER: So if they're penned then you've got to pick them up.

MR. GILSTRAP: You actually have to pick them up. You can't proceed under they're bulky and mark them in some way.

MS. BROWN: Well, as reading through this, I mean, like I said, I've never done a levy on cattle, but the way it actually provides when you look at all the rules, you designate a number and then you have a sale of a number and then whoever buys 12 cows at the execution sale, they go back out to the farm and pick their 12, which to me sounds a pretty good deal if you get to go pick your cows once you've bought them.

CHAIRMAN BABCOCK: Carl.

MS. BROWN: But that's -- I don't know how we might fix this, and it's probably brought over from the old days where there weren't lots of fences. Like you can't -- there's very few places in Texas where there are cows that you drive by that there's not fences, and of course, now there's a statute that says if a cow is let out and you run over your cow, it's your fault, not the cow's fault or not the cow's owner's fault, but so the running at large is probably a little antiquated. So do we change it and say

if you want to levy on cows you've got to get you some cowboys and pen them up and take them to a place and store them? I mean, think about that. That's probably part of the problem, is where do you store your running at large cattle once you've levied on them.

MR. GILSTRAP: There is a big problem with cows that are penned, I mean, you know, a very large problem with regard to --

MS. BROWN: Feeding them and watering them.

MR. GILSTRAP: Well, no, and multiple liens on them and phony cows that have been mortgaged and people fighting over, you know, these thousand cows and who owns them and who can get them, and it just may be some attention in that area might be helpful.

MR. DYER: Did you say phony cows?

MR. GILSTRAP: Fictitious cows.

MS. BROWN: Fictitious cows.

MR. GILSTRAP: Fictitious cows. A lot of those, I promise.

MS. BROWN: Oh, there's stories about showing the banker the cows over here and shoving the cows over here and taking some more cows. So --

CHAIRMAN BABCOCK: Carl had a comment about the cows.

MR. HAMILTON: Well, on that notice provision

on (c)(4) it says give notice of levy to the owner, but it doesn't say what that notice is, and I think it should require that a copy of the writ where they filled in the marks and so forth, the brands, should be served on the owner or somehow or another so that the owner knows, and the same is true on (c)(3) where it's -- you're going to give notice to the person who is in possession of the property. It says, "constable in person or by certified mail," but it doesn't tell us what "by person" means, and I think there we ought to also have the constable serve that person with a copy of the writ other than just walking up to him and telling him, if that's what that means.

MS. BROWN: Well, the levy is one thing, sale is another, okay, and this is -- this is where the constable goes and picks it out, and the way -- (c)(3) is really -- it doesn't talk about the judgment debtor. It's somebody who is holding the judgment debtor's property, and we -- that was added to this, the notice given to them that I'm levying on it is new. That was added; and there was also a provision added under the notice of sale that this person would also get notice of the sale; and that's really where the rubber meets the road in the execution process, is the sale notice, which describes what's being sold; and we have added in that provision a specific requirement that -- in addition to the old requirement of real estate

being -- notice of real estate being served on the judgment debtor that also notice of sale of personal property be served on the judgment debtor. That's a practice that is common among the constables; but it's not required under the current rules; and so -- so there's going to be a notice in which all of these things are described in the sale notice; and that is going to go to the judgment debtor; and this is just telling the person who is totally unrelated to the lawsuit, "Hey, we just want to let you know that this boat you've been keeping for the debtor has been -- is being levied on." Okay.

MR. HAMILTON: I know, but my point is that if the person in possession wants to help the debtor, all he's got to do is give possession to somebody else and on down the line, and the sheriff is not going to be able to find it, but if he's served with this writ and maybe the rules ought to provide that serving the one in possession with the writ requires that person to keep possession of it.

MS. BROWN: Well, you only get what the debtor is entitled to. If the debtor is not entitled to possession then the constable only can sell the interest the judgment debtor has. I'm trying to think of our example. Was it property that had been leased --

MS. WINK: Uh-huh.

MS. BROWN: -- to a third party, and since the judgment debtor didn't have right to possession of the party that the third party had right to possession only as a lessee, that you could nevertheless sell the debtor's interest in that property, which was the ownership of the property, but not entitlement to possession, and you're just letting the lessee know, hey, this property is going to be sold at execution, and you keep possession of it, but somebody else may become the owner. That's what (c)(3) envisioned, and so it's letting them know that it's been levied on, and then there's a sister provision letting them know that a sale is going to occur. And that's -- wasn't that -- that was the whole theory.

MR. FRITSCHE: That was one of them, and also if the judgment debtor merely owned a security interest in property that was in the possession of the debtor and the levy was on the security interest being tangible.

MS. BROWN: I don't recall that, but --

CHAIRMAN BABCOCK: Okay. Any other comments on Rule 5? Okay. Elaine, I was just handed a note. I had hoped that we were going to finish everything today, but it doesn't look like we are, and I consulted with Justice Hecht, and we'll just carry over what we don't finish to the next meeting, but you indicated maybe there's some people here from Dallas on receivers and turnovers. Do you

want -- do you propose breaking from execution now and moving to that or what?

PROFESSOR CARLSON: Donna, are you comfortable coming back --

MS. BROWN: I'm fine with that. Oh, sure.

PROFESSOR CARLSON: Because Donna offices here in Austin, and Mark Blendon and Mike Bernstein are here from the Dallas area. Would you be comfortable if we switched to that topic?

MS. BROWN: Absolutely. Absolutely.

CHAIRMAN BABCOCK: Okay. Well, if that's acceptable to everybody then we'll stop with the execution rules at Rule 5 and pick up Rule 6 at our next -- at our next meeting, which will be in January sometimes. And we'll see if we can spend about an hour, a little less than an hour, on the receivers and turnover rules, and, Elaine, what --

PROFESSOR CARLSON: Yeah, that starts on page 10 of the largest handout, and Mark and Mike are going to present on that.

CHAIRMAN BABCOCK: That sounds like a morning sports radio show, Mark and Mike.

MR. BLENDON: Not as effective as Mike and Mike, but we'll give it a try.

CHAIRMAN BABCOCK: Yeah, so take it away, and

first question is how are the Rangers going to do with the Angels now signing Pujols and C. J. Wilson?

MR. BLENDON: It is going to be challenging, no doubt.

CHAIRMAN BABCOCK: You want to expound on that, or we could talk about receivers and turnovers, whatever you think.

MR. BLENDON: All right, or the Cowboys and the Giants. Mark Blendon. I'm a Dallas attorney, actually in Bedford in the Dallas/Fort Worth area, and I do creditors work, and with me is Mike Bernstein, the vice-chair of the receivership committee. Mike has been a post-judgment receiver, I think, full-time. He was an attorney and post-judgment receiver since 1996 or so.

MR. BERNSTEIN: Something like that.

MR. BLENDON: And so today we're going to talk about turnover receivers, and the terminology is a little bit confusing. We talked about receivership statutes under 64 CPRC, and that's in your materials at page 118, so starting with the statutes, there is statutory authority for receiverships in general, and that's from 1943, and you're familiar with that. The relatively newcomer in 1985 is CPRC 32.00 -- or excuse me, 31.002 of CPRC, and that is collection of judgment through court proceedings.

31.002 is a post-judgment remedies statute starting out with "A judgment creditor is entitled to aid from the court," and so 31.002 is often referred to as a turnover statute, and the reason it's referred to as a turnover statute -- I really personally don't like the language. I'd prefer "post-judgment receivership," but the turnover statute allows a debtor to be ordered to turn over property, and so if you know that a debtor has a stock certificate or a Lamborghini or a boat, you could go into court and get a turnover order, and that's out of 31.002.

Now, another thing you could do in 31.002 is to go into court and ask the court to appoint a receiver to get the Lamborghini and the boat, and that would be a post-judgment receivership. That's a much more broad and, in my opinion, a much more effective and cost effective remedy.

So we've got Chapter 64, which is the old receivership from 1943. We've got turnover statutes, including the post-judgment receivership, sometimes referred to as a turnover receiver under 31.002; and now going to the rules, so we've got at page 110 we start out with two receivership rules; and talking about the statutory authority and the rules that relate to them, we have 64, the old receivership statutes that still exist; and those we had two rules that implemented that; and that

was old Rule 695 or existing Rule 695 and existing rule 695a. There currently are no Rules of Procedure as to the post-judgment receivership, so we are creating here; and I do want to thank Donna Brown and Mike Bernstein and Pat Dyer for -- I believe Donna crafted the first draft of our rules as to the turnover receivership or post-judgment receivership; and so these are a new animal when we get to those; but the first two at page 110 and 111, these are the attempt to harmonize and standardize Rules of Procedure. Updating old Rule 695 is REC 1 and updating Rule 695a is Rule 672, and because of our limited time, I believe that our time would be best served looking at the brand new rules which begin at page 111 with TRN 1, turnover 1, application for a turnover order, but before we go there, are there any questions on -- at page 110, REC 1 or REC 2?

CHAIRMAN BABCOCK: Any comments on those? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I don't know how this is going to end up looking when we put it in the rule book, you know, in terms of the new rules and things like that, but to just -- to make a receivership rule like this and call it REC 1 strikes me as confusing when most people are going to do receiverships under the turnover statute, so it's just a formatting question in my mind. I wouldn't call these two rules the receivership rules.

MR. BLENDON: I'll refer that to the harmonizing committee, but I believe the 671 in parentheses by REC 1, I believe the harmonizing committee is suggesting that what we'll have is Rule 671, 672, and the first post-judgment receivership rule would be 673.

HONORABLE TRACY CHRISTOPHER: Oh, so we're not going to renumber?

MR. DYER: No, I think our suggestion was, yes, they should be renumbered.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. DYER: But because we've taken out rules and added rules, we still don't have what that numbering system would be yet.

CHAIRMAN BABCOCK: Well, Judge Christopher's point is --

HONORABLE TRACY CHRISTOPHER: Well, I guess my question is, is it going to be just like Rule 671, or is it going to be Receivership Rule 1? And if it's going to be Receivership Rule 1, that's a little confusing. I think there ought to be like a chapter heading, this is Chapter 64 receiverships, and these are the two rules, and then there's another chapter heading that says "Chapter 31, Turnover and Receiverships," and these are those.

CHAIRMAN BABCOCK: Got it. Mike.

HONORABLE TRACY CHRISTOPHER: So you

understand where to go.

MR. BERNSTEIN: The turnover statute says that the court may do a couple of things in ordering turnover, and one of those things is to appoint a turnover receiver. So really these are -- the proposed rules are broader than just a turnover receivership. It's turnover rules. Turnover began in 1979. It was codified in '85, and the folks who's drafted it tell me that they really didn't expect it to grow into what it's become today, and so a set of rules would really be helpful to the courts, to attorneys, and there's a lot of confusion when you get down to it because everything is just receiver.

The goals -- the equities behind a Chapter 64 receivership are completely different than what we're doing under the turnover statute, so it's helpful when you get to the turnover rules to be talking about a turnover receiver, it's helpful to say a post-judgment receiver as opposed to a receiver under Chapter 64, which is pretty much preserving property in a prejudgment context.

CHAIRMAN BABCOCK: Yeah.

MR. BERNSTEIN: I think 695 to 695a, the title is, you know, "Receiver, no receiver of immovable property," bond and bonding divorce case and they talk about a receiver's bond. I think that's the way those rules were, and we've -- the committee has clarified that

just to say these rules do not talk about a turnover receiver or post-judgment receiver. They were written way before turnover was even in effect. I'm not aware of any case law that applies these two rules to a post-judgment or turnover receivership. In fact, there's one case that says either 695a or 695, I forget which one, does not apply. So we're trying to just clarify for all practitioners and for all courts these two rules that have been out there forever since the Forties don't apply when you're talking about a turnover receivership.

CHAIRMAN BABCOCK: Gotcha. All right. Other comments about receivership 1 or receivership 2? Okay. Let's go over to the turnover rules now.

MR. BERNSTEIN: I'm sorry, there may have been a typo as well. In the receivership 2, "No receiver shall be appointed under Chapter 64 of the Texas Civil Practice and Remedies Code without authority to take charge of property." I think probably that was just a typo and should be "with authority," and that phrase comes from the old rule.

CHAIRMAN BABCOCK: Okay. Great. All right, Mark, turnover Rule 1.

MR. BLENDON: All right. At page 111, turnover 1, and what we have done here is just simply attempted to look at the statutory authority in the Civil

Practice and Remedies Code and provide Rules of Procedure that the courts and litigants can look to in a post-judgment setting. One of the interesting parts of receivership -- and, again, remember that we're post-judgment here -- is (c), where filed, and the statute authorizes the filing of the post-judgment motion for turnover, which can include receivership and oftentimes is -- includes receivership, so that post-judgment motion for receivership in common parlance can (c)(1) be filed as a post-judgment motion.

You took a judgment. It hasn't been paid, and you file a motion for post-judgment receivership in the court that issued the judgment, but interestingly, the statute also allows an independent proceeding, and you can also file a motion to have a receiver appointed or to have property turned over as an independent proceeding in a court of competent jurisdiction, and in that case when you file a new proceeding then, of course, you're going to have to have citation issued and served on a judgment debtor, and that is the minority of cases.

CHAIRMAN BABCOCK: Okay. Any comments? Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: A court of competent jurisdiction would be what, where the property is located, where the people are located?

MR. BLENDON: I think that's just a catch-all phrase. I mean, one example would be if the judgment were taken in Laredo and he moved to Dallas that I could file my motion for receivership in Dallas. I'm not aware of any particular jurisdictional issue there.

HONORABLE R. H. WALLACE: Well, I'm just wondering can you go from county to county shopping around until you finally get the order that you're looking for.

MR. BERNSTEIN: That language comes from the statute, so I think we're just kind of copying the statute there.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: I think the language in the statute is "appropriate jurisdiction" and not "competent," and if you're going to track the statute I would suggest you use "appropriate jurisdiction" as opposed to "competent." Also, if we're -- I think that you're going to find if you file an independent proceeding in a district with multiple single county districts or overlap in districts you're going to get transferred back to the court that issued the judgment. For instance, if I grant a judgment and Judge Wallace, who sits in the same county, draws the independent lawsuit, I think under local practice it will end up with the judge who issued the original judgment. I suspect --

MR. BLENDON: I agree.

HONORABLE DAVID EVANS: -- that most local rules provide for that transfer, and then on No. 5, and that's (d)(5), and this has been the biggest problem I've seen with the appointment of receivers for turnovers, because apparently there was a creditor's seminar where this was first taught and then next thing we knew we had them. There's still required to be proof that there's nonexempt property and proof that it cannot be attached or levied by ordinary legal process, but you have shorthanded the code to just call it "nonexempt property," and there are situations where property is exempt for attachment, execution, or seizure for satisfaction of liabilities where the type of liability determines whether or not the property is exempt. Wages comes to mind with regard to child support.

And so I'm just not sure that -- I think you probably got it right with nonexempt, but you did differ from the Civil Practice and Remedies Code by just reducing that language, and there have been some distinctions made with what is exempt with regard to what type of liability, and I guess the unrefined area -- and just for the record, is that the act itself and the practice lends itself to conclusionary affidavits with just broad statements that there cannot -- property cannot be attached or levied by

ordinary legal process, and it is -- and there is -- there is exempt property. There is property that is not exempt from attachment, et cetera, without identifying how they know that that property meets those qualifications, and then you give the broadest powers in the world to a receiver, which is another discussion.

CHAIRMAN BABCOCK: Mike.

MR. BERNSTEIN: It is clear in the case law and clear in the statute that you've got to prove that up. The case law says over and over again that the statute contemplates there will be a hearing, and the elements do have to be proven up. You really shouldn't -- it was reversible error to go into court and say, "Judge, this is that problem case you know all about, and they're not paying, and we sure need a receiver," and the judge says, "Okay, fine, I'll sign the receiver." You've got to have your proof.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Most of my comments is primarily because I do a lot of insurance defense work. I -- as turnover Rule 1 cures some problems and seems to lend itself to some others. First, what I'm seeing now is people file their turnover application along with their motion to enter judgment, so the judgment hearing becomes a turnover hearing, as well as a motion to enter judgment, so

I like seeing that it has to be filed after the final judgment is signed.

I'm a little concerned in subsection (a) it talks about turnover of nonexempt property to the court. I'm not sure that's in the statute. The statute talks about turning it over to the sheriff or receiver or otherwise applying. I'm not sure we want to have a rule that encourages courts to somehow take active control or possession of property. In fact, I'm not sure courts -- when usually that involves upon the clerk to actually take it over to do that.

MS. BROWN: I will -- I've got an answer to that as far as getting the clerk involved and turning it over to the court, is if you're looking toward dollar amounts, proceeds from accounts receivable -- and I use it very regularly on proceeds for independent contractor, having it turned over to the registry of the court is -- is -- falls under the otherwise applying the property under the statute, so I would hate to see that taken out because it's a very, very useful tool having something -- dollars turned over to the registry of the court.

MR. HUGHES: Well, I'm not -- I'm not -- what I'm concerned about is the judge says, "Bring in the stock certificates and deliver them to chambers" or "Deliver them to the district clerk's office and he'll keep them in the

file" or, you know, "bring in the CDs" or whatever. I don't think that's what was contemplated. The next one is the verification. What troubles me about this is you're making the verified petition become a prima facie case and then requiring -- permitting affidavits that are signed merely on information and belief, and a couple of things there. First is wherever you set the bar, that's all you're going to get. So if you say affidavits based on information and belief will pass -- and, by the way, that also means that carries the day in front of the judge. That's all you're going to get. All you're -- and that's going to be sufficient to win.

The second thing of it is usually -- and so I would -- I would say we need to have -- I can understand wanting this quick and easy hearing; but on the other hand, some of these can be real fist fights; and if all somebody has to do is flop down some conclusory affidavits and they've made their case, it could be a bit daunting for the other side; and they may not even get a chance to examine that, which is the other thing here, is there really is no deadline to file these affidavits. What happens if the creditor files them the day before the hearing? He amends his pleading, files them the day before the hearing, judge doesn't want to hear it, says, "I'm sorry, the rule says that, I'm not granting a continuance." That may be the

first time you get it.

The other is subsection (g), and maybe this is a criticism that can't be remedied by rule. What I'm seeing a lot in these -- or reading a lot about, not personally seeing, is cases where they go, you know, "That person is actually an alter ego for the defendant, so I want to go after the personal assets of one of the shareholders of the corporate debtor on the basis of alter ego," and I'm not sure that this rule -- we can devise a rule to deal with the problem, but the way this is phrased it almost seems to summarily lend itself to simply saying, "Well, I'm going to go after a third party because he's a shareholder in the corporate debtor, and he's an alter ego of the corporation," and so the only question is, you know, can I reach him by adequate -- by adequate means, and maybe it's going to be a little more sophisticated than that, but I think that's where that one's going.

And also on the bond -- and I signal this because this is an issue later. I see a lot of people trying to jam through a turnover order before the defendant can file a supersedeas bond, and I think at some point we're going to have to deal with the issue of what happens when the defendant is finally able to get a supersedeas bond together and files it, but the turnover order has already been entered, which is one of the problems I

mentioned earlier when you face the risk that the turnover order is going to be signed the same day as the judgment. So I throw those out.

CHAIRMAN BABCOCK: Okay. Mike, did you have some comments?

MR. BERNSTEIN: On the third party issue, it's a real complicated and unsettled area of law. There is an awful lot of case law on it. I think this boils down to what we can safely say, and maybe it would be better not to have a rule, but we thought it would be helpful to counsel and to the courts. If the third party holds property of the debtor, it's the debtor's property; and the receiver's right to get that is the debtor's right to get that. If the debtor can say, "I want my property back," the receiver, who has that debtor's contract rights and property rights can also ask for it back. Now, as soon as the third party says, "No, I claim an interest in that, that's mine or that's partially mine," now they're a third party claiming an interest and they're entitled to full due process. They have to be sued just like the debtor would have to sue them if they didn't give back the debtor's property to the debtor. I think of a situation where -- easy situation comes up all the time is the bank has an account for the debtor. The bank's not claiming an interest, and turnover can reach that insofar as the debtor

can reach that and say, "Bank, I want my money on behalf of, you know, the receivership." So the essence of the basic is --

(Phone ringing)

MS. BROWN: I am so sorry. I never have my phone on.

MR. BERNSTEIN: We're not going to go after third parties' property. What we're going after is the debtor's property in the hands of a third party, and I think that's what we were trying to accomplish with that.

CHAIRMAN BABCOCK: Okay, great. Justice Gaultney.

HONORABLE DAVID GAULTNEY: On (c)(1), the last clause, are you saying "without citation"?

MR. BLENDON: I'm sorry?

HONORABLE DAVID GAULTNEY: (c)(1), where filed, post-judgment motion, the last clause "with or without service," are you saying "with or without citation"?

MS. BROWN: With or without notice to the judgment debtor because it can be ex parte.

HONORABLE DAVID GAULTNEY: With or without notice.

MR. BLENDON: Yes. There is authority for it to be ex parte, and that is brought over to the rules, and

we can address that.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I saw the same thing Justice Gaultney did, and I think that if it's the case where service either cannot or should not be made because the debtor may abscond, there should be something in the application to say why there should not be service.

CHAIRMAN BABCOCK: Okay. Yeah, Mike.

MR. BLENDON: The -- Judge David Hitner of Houston wrote the seminal article on receiverships, and I don't believe it's in the statute, but I believe in his article he stated -- and this was back in '85 or '86, I believe, but he said, "Notice should not be required in a post-judgment receivership context. Due process is satisfied because a judgment debtor should understand that somebody will be coming for his nonexempt property."

MR. BERNSTEIN: That's pretty much it. He's had his day in court, and the Texas case on it refers to a U.S. Supreme Court case on it, and the due process -- the constitutional due process issues have pretty much been settled by the case law, you can do it ex parte. Now, that doesn't stop the defendant from coming back in and saying, "Judge, we want a hearing on this."

MR. BLENDON: After the fact.

MR. BERNSTEIN: After the fact, and, yeah,

but it can be done ex parte.

CHAIRMAN BABCOCK: Okay. All right. Yeah, Richard Orsinger.

MR. ORSINGER: Back to Donna's point about paying money into the registry of the court, I notice that Rule 3 that has the contents of the turnover order doesn't carry forward that concept that the turnover order itself could require the turnover to the court, so you may want to insert that in there. You see what I'm saying? The application can request that it be turned over to the court, but you don't authorize the order to say that.

MR. DYER: In 3(a)(1) "or in the registry of the court" is the last part of that.

MR. ORSINGER: Oh, so that means the same as turn over to the court, okay. I understand that. I see what you're saying.

CHAIRMAN BABCOCK: Anything else?

MR. ORSINGER: Yes, I wanted to say that on the point we were just making on (g), "A turnover proceeding may not be used to determine the substantive rights of third parties," does that mean, pardon me, if a receiver is appointed or if the turnover order is directed to property in the hands of a third party and the third party says, "No, the debtor doesn't have an ownership interest," they're not allowed to raise that defense in the

turnover proceeding? Do they have to go to the trial of right to property, that special procedure with the 21-day trial, or how does that get implemented if there's a turnover directed to an asset in the hands of a third party?

MR. BERNSTEIN: Well, the way it comes up in the case law is that the third party gets a turnover order against them and they ignore it and then they're in contempt of court or otherwise in trouble; and what we're saying is we're not going to -- we're not going to allow that to happen that way; and that's where it gets sticky, because how can you say, okay, this asset belongs to the debtor. The law says you can determine what the debtor owns, but the other side of the coin is how do you make that finding without also implicitly saying "and someone else doesn't own it." So it's kind of tricky.

MR. ORSINGER: Well, who is it a restraint on? Is it a restraint on the applicant who is seeking an order against a third party, or is it a restraint on the third party who now wishes to vindicate their own ownership interest?

MR. BERNSTEIN: It would be a turnover order against a third party saying, "Turn over this property," and I think they're -- if they're claiming -- I don't know on the litigation side of it, but I think if they claim an

interest then they're entitled to due process, and maybe they could even ignore it.

MR. DYER: The case law that's out there -- for example, alter ego was raised. There is a case out there that says you cannot use turnover to determine an alter ego claim, but there are other cases out there that say you can use turnover on a fraudulent transfer claim, which to me is a substantive determination, so the case law is not clear. The attempt here was to take language -- and I believe this is straight out of Supreme Court opinion, the last sentence there -- to make it clear that you can't determine substantive rights.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The verification paragraph troubles me because the way it's written it seems that a verified application alone would be prima facie entitlement to turnover relief at the hearing, which seems to contradict "The court's determination may be based on affidavits if uncontroverted setting forth facts admissible in evidence" under Rule 2(b)(3). So I'm a little unclear if a verified pleading alone is sufficient, is prima facie, what then needs to be done at the hearing, and I'm unclear as to whether or not "facts stated on information and belief" are "affidavits setting forth facts admissible in evidence."

CHAIRMAN BABCOCK: Yeah. Mark.

MR. BLENDON: The -- in fact, the way most of these occur, at least with my judgment debtors, are that very, very often these are unopposed; and the attempt is made in an unopposed motion for post-judgment receivership to allow the efficient handling of the motion through that paragraph (e), verification, at 112, and then as you noted, TRN 2(b)(3) provides that the court determination may be based on affidavits if uncontroverted; and otherwise, the parties must submit oral testimony or other evidence at the hearing. So we're trying to make it efficient if it's unopposed, but provide due process if there is a contested issue.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Evans.

HONORABLE DAVID EVANS: I just would voice -- I would like to reinforce what Judge Christopher said, but here's the problem we see with really good lawyers representing the debtors. We get a pretty clear idea that there's been an investigation, that there is nonexempt property, what the identity of the nonexempt property is, and what order we're being asked to sign and place under receivership or turnover; but with a lot of people what we get is a pleading that is just -- and pleadings are just notice pleadings, including a motion for turnover; and they're not evidentiary; and they can be verified; and I

think that that doesn't satisfy the Civil Practice and Remedies Code to have a conclusionary statement that there is nonexempt property and that someone is about to remove it.

I think you've got to show a little bit more than that; and if it were -- if it is on default on the motion or ex parte, with the case law that exists that the court can accept an affidavit that's unobjected to hearsay, that has to be on personal knowledge and not on information and belief, at least that's my understanding, and has to be specific. So you have an evidentiary record that the judgment debtor can then take up or come back to you on and say, "You improperly issued this. This was a nonexempt property."

I am familiar with Judge Bitner's article, but there's been no determination, no litigation, over the fact that the property is exempt or nonexempt, and there's been no due process over whether or not the property -- there's adequate -- they're about to remove it. And so it's very troubling to me to have these broad receivership orders on conclusionary statements issued in a case of this nature without a hearing.

The other thing that I would like to suggest is when the Legislature used the term "appropriate jurisdiction," it immediately modifies the use of an

injunction to enforce the judgment; and if you're trying to enjoin people who are acting in concert with a judgment debtor to defraud a judgment creditor, that injunction might have to issue in the person's domicile, because venue is mandatory -- injunction venue is mandatory in the person's domicile; and so although the Civil Practice and Remedies Code is not a model of clarity, that really says "appropriate jurisdiction" on issuing -- and the term they're using "injunction to enforce the order," so I'm not real clear about filing a motion for turnover in a district court down in McAllen to enforce the judgment in Fort Worth, but that's just a part of the process.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: There may be case law out there on it.

CHAIRMAN BABCOCK: Yeah, Mike.

MR. BERNSTEIN: Just as from a practical practice standpoint, receivership is not like sending a constable out who has -- is elected in that county and has jurisdiction in that county. It wouldn't make sense to say, "Okay, you're the receiver over here and someone else is the receiver over here for some other property." Just in practice I don't see it working that way.

To go to Judge Evans' earlier point, the motion or the application, the notice, does not have to say

specifically what property we're going after because the whole -- when the drafters drafted the statute, the idea was we don't need to put the defendant on notice of what assets to go hide, and that gets confused in the case law sometimes with a totally separate issue, which is what do you have to prove up at the hearing. So we can have a kind of a bare bones blank affidavit that says -- that makes these allegations, and we can have an order because subsection (h) of the turnover statute says you don't have to mention specific property in the order. So we can have a laundry list order, say "all bank accounts." You don't have to say, "The bank account 123 at bank 1," but -- and this is where the affidavits come in or don't come in. You still have to prove it up. You still have to prove up your elements. The application can be, you know, kind of vague, but when it comes time to prove up whether it's by affidavit or whatever, it's got to -- the property has to -- something, one piece of property has to be proven up that meets the elements, and then I think the door swings open wide, because again, it wouldn't make sense to say, "You're going to go collect against this little bit of stuff over here, but not this particular thing over here."

It's not an element -- it's not required that the court be told the -- it's not an element that the debtor is about to remove or waste property. Those are

elements we all learned in law school having to do with a Chapter 64 receivership. The elements here are the guy's got his judgment and he owes the money and it's nonexempt property that's ordinarily -- that's readily leviable. You don't have to wait 30 days, don't have to prove imminent material harm or any of that stuff.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: With respect to the verification, the application doesn't have to list specific property, all right, and it can be verified, and according to your rule that verification is prima facie entitlement to turnover relief at the hearing. Well, it's not, because there hasn't been specific property identified. So, I mean, that statement in (e) is just wrong. If your application is general, you haven't identified specific property, and you have the burden to do that at the hearing, so I just think that needs to be rewritten.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I want to echo that, but I'm still concerned about having affidavits, controverted or otherwise, being sufficient to carry the day, because, number one, as I've pointed out earlier, wherever you set the bar, that's all you're going to get. There will be a

race to see how little we have to prove; but second, I mean, even in a summary judgment proceeding if the affidavits don't conclusively establish something, you don't win. And I am -- but the other thing of it is the question of notice about when you're going to file these affidavits, and I understand wanting to make sure that the judgment debtor doesn't hide assets. I mean, I live next to the border, so, you know, the biggest hiding place in the world is 20 miles south for assets; but there are other cases, like I said, where there's a real problem. There's some substantial questions, and if affidavits on information and belief that don't tell you much, which means you don't know what to controvert, are all that carries the day, I'm a little concerned.

CHAIRMAN BABCOCK: Pat.

MR. DYER: I just wanted to add that on information and belief is in attachment, sequestration, and garnishment, and it's straight out of the rules. That hasn't lowered the bar on any of those so that on information and belief for this set of rules was taken from those sets of rules.

MR. HUGHES: Well, but the thing of it is here we're now -- like I say, subsection (g) says we're tilting at litigating issues such as who -- you know, whether the debtor owns the property or somebody else owns

the property, and we're also talking about litigating things like alter ego and other ways it appears in the corporate veil, and then the other thing is I'm concerned is whether this then is also going to become an end run around the fraudulent transfer statutes. In other words, why file uniform -- a fraudulent transfer action? Let's just file a turnover proceeding and avoid some of the niceties of fraudulent transfer.

CHAIRMAN BABCOCK: Let's see if we can get some comments on Rule 2.

MR. BLENDON: All right. Rule 2 is at page 112, hearing on the application. "The court may order turnover relief only after a hearing, which may be ex parte," and somewhat mitigating that is the rule back at 116, Rule 7, allowing for a prompt dissolution or modification of the order; but it can be an ex parte order -- excuse me, an ex parte hearing, and then we talk again about the burden on the judgment creditor; and in partial response to the comments, I believe, I mean, it's certainly absolutely the judge's discretion whether he's going to grant this or not; and if all you did was verify an application that said, "On information and belief the debtor owns difficult to levy upon property," I don't think there is many trial judges that would say, "Well, yeah, let me sign that receivership order." It just wouldn't happen.

But and another example that I have received a check from the debtor on Bank of America, and the judgment debtor has a bank account at Bank of America, and we request a receivership be ordered, and I think Mike's comment is you then would get a broad order normally. You wouldn't get a receivership order saying, "Okay, Mike Bernstein, receiver, you can go to Bank of America only," but we would get an order allowing us then to pursue leviable assets of the judgment debtor. And then we attempt to talk about the hearing and lay out the hearing procedure there.

CHAIRMAN BABCOCK: Okay. Comments? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm probably wrong, but I thought you had to try to prove that you had collected judgment. Is that in the statute, (b)(1) in the last sentence?

MR. BLENDON: No.

HONORABLE TRACY CHRISTOPHER: No, it's not in the statute?

MR. BLENDON: No. There is no statute saying you've got to go get a nulla bona writ of execution before you get a -- before you do a receivership motion.

MS. BROWN: There's case law to that effect.

MR. BERNSTEIN: Yeah, the case law says you

don't have to prove that you've exhausted all of your remedies or anything like that.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: I may be repeating myself, but the judgment debtor has the burden of proof to show an exemption, for example, but the hearing could be ex parte, and I would still be more comfortable if there was some showing as to why the hearing should be ex parte. I know that can happen. I know it needs to happen sometimes, but it seems to me the creditor could at least say why that's necessary in this case.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, if we're going to require that the judgment debtor -- this is rule, turnover Rule 1(d)(5) -- "state that the judgment debtor owns nonexempt property that cannot be readily levied upon." If what we are talking about is requiring them to identify specific nonexempt property and not just come in with a broad statement saying, "upon information and belief," why don't we say "specific nonexempt property"?

MR. BLENDON: Well, as -- as we noted, there is an amendment to 32.001, I think it's (h), which is back at page I think 123 -- excuse me, 122 of your materials, and (h) of 31.002, the last subparagraph, "A court may enter or enforce an order under the section that requires

turnover of nonexempt property without identifying in the order the specific property subject to turnover." I don't know if that answers your question or not, but, I mean, in my mind, if I'm going before the trial judge, I am not going to go in there with the blanket, broad, "I know he owns hard to levy upon property," and that's it. You're not going to get a receivership order.

HONORABLE R. H. WALLACE: Well, some people think they are, because I agree with Judge Evans, that's what you get presented. It's usually a default judgment, so there's no one there, and they come in with a pleading and an affidavit. They probably had a writ of execution that's come back nulla bona, so they say, "There's no property there to levy or execute on that can be found, and upon information and belief there's nonexempt assets," and then they're asking for this broad order to turn over everything -- I mean, and I deny them, but I think sometimes people think, "Well, why are you denying it? The statute says you can do it."

MR. BERNSTEIN: Doesn't have to be in the order, doesn't have to --

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I raised my hand and almost raised it a couple of minutes ago. I guess I'm still galled by this, the ex -- I'm sharing the same

concerns that Gene has I think that maybe there ought to be some, you know, standard under which the hearing would be ex parte, because as I understand in looking at the rule, this can be filed any time post-judgment, right?

MR. BLENDON: Right.

HONORABLE DAVID GAULTNEY: So the judgment is signed?

MR. BLENDON: Right.

HONORABLE DAVID GAULTNEY: You don't have to show that you -- that he's got -- you don't have to show at the hearing that you've attempted to collect the judgment in any other way.

MR. BLENDON: Correct.

HONORABLE DAVID GAULTNEY: He's got an attorney of record possibly, right?

MR. BLENDON: Possibly.

HONORABLE DAVID GAULTNEY: The attorney doesn't get notice of this ex parte hearing with the judge that occurs the day after judgment is entered?

MR. DYER: Uh-huh.

HONORABLE DAVID GAULTNEY: I mean, you know, to me there ought to be perhaps some -- some standard that would differentiate the case when that emergency process is necessary from the routine where you apply -- where you try to use it in every case.

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

HONORABLE DAVID GAULTNEY: I guess I'm just not familiar with this process.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The problem is that -- and I think you're right. The problem is, is the disconnect between section (a) in the Civil Practice and Remedies Code and section (h). The movant has the burden to show that the judgment debtor owns property, present or future rights, that can't be readily attached by ordinary legal process or levy. So he's got to show that there's some kind of property that can't be attached or levied, so it's got to be some sort of description of what kind of property the debtor has and then he's got to show that it's not exempt from attachment, execution, or seizure for legal liabilities. Now, he's got to show that. The court's not required to specify that property in the order in (h), but the proof is still on the judgment creditor to show what the property is. The disconnect has come at the lower end of the collection bar because they point to (h) and say, "You don't have to specify it; therefore, I don't have to specify it, so give us a broad order, send us a receiver out"; and by the way, this guy is a professional receiver for these turnover orders; and he's got this order that

says that he can go out and pick up somebody's house and make a legal determination as to what's exempt and nonexempt; and it's just really abusive. It's a problem for us. And ex parte. And in a hurry.

MR. BERNSTEIN: This comes up in the *Tanner vs. McCarthy* case where the Houston receivership bar argued pretty -- first of all, they didn't prove up anything. They just went down and said, "We would like a receiver," and apparently it was signed, and a master in chancery, but what they did was they argued was because of subsection (h) that says you don't need to be specific that we don't have to have anything in the application or in the order and then they went on and said, "And, therefore, we really don't have to prove anything up," and the court in *Tanner vs. McCarthy* says, "No, no. You still have to prove something up." So that's all -- I mean, that's the clarity of it until you get to a point where now we're talking about a verified petition on information and belief, and that's where you get into trouble.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE DAVID EVANS: You know, the debtor part can take care of this easy. You enter an injunction against the debtor not to transfer anything and then you have your turnover hearing. You can issue that TRO with a bond, although I know that -- I know the code says you

don't have to have a bond, but you can enter a TRO, stop them from transferring anything, and then you can have your hearing on your turnover and really get a much better picture out of it. If they don't show then they get their turnover.

MR. BERNSTEIN: One last comment on the ex parte issue. It's not -- notice is not in the statute anywhere, and the case law all pretty much says it's not in the statute anywhere, so maybe that's something for the Legislature.

MS. BROWN: Well, and the debtor doesn't get notice that you've requested a writ of execution. They don't get notice that you file an application for post-judgment garnishment until after the garnishment, and so I think that's where the theory comes in, is you've got a judgment against you, you're on notice that somebody is going to try to collect it, and that's where the notice issue comes in. My experience has been on notice or not notice is I've rarely done them without notice because it's in the judge's discretion, and the judge is going to say, "Did you tell them you were coming," and I always do with the exception of I've got somebody who I believe is doing something dirty or going to, and I go to the judge and say, "Judge, in your discretion I'm asking you to grant this relief, and this is why I haven't given them notice, and

therefore, use your discretion to allow me to do this without notice," and so it's taken care of by virtue of the fact that this is reviewable under abuse of discretion, so that's it, as far as I'm concerned on notice or not, that that's where you get your protection.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, while the trial judges in this committee might have read Tanner and some of the other cases that deal with what you have to show in a receivership order, I can't say that every trial judge across the state has done so, and to me the way the rule is written it doesn't clearly establish that you have to prove specific nonexempt property that cannot readily be leveled (sic) on by an ordinary legal process, just because of the weird verification paragraph and the burden of proof doesn't say specific property, which is the requirement. So basically you could have somebody on information and belief, "I believe the judgment creditor owns nonexempt property that cannot readily be leveled -- levied on by ordinary legal process." Well, that appears to meet this rule as written, but my understanding of the case law is that would not be sufficient.

CHAIRMAN BABCOCK: Okay. Yeah, Mike.

MR. BERNSTEIN: What if the proof was, "Well, Judge, he's running a business and we're not quite sure who

the account receivables are, we're not quite sure where the bank account is, but he's running his business and here's our proof of that"? Specific enough? I mean, I wouldn't want to have to pin it down too definitely, and I would urge drafters not to use the word "specific" because subsection (h) already says you don't have to do that, and I wouldn't want to set up a conflict there, but for sure something has to be proved up.

CHAIRMAN BABCOCK: Mike and Mark, I apologize, because it looks like we're not going to get through these rules. Can you come back at our next meeting?

MR. BERNSTEIN: When is your next meeting?

CHAIRMAN BABCOCK: If I had known maybe we would have organized it a different way, but I'm sorry about that, but we really appreciate your work on this and your coming down here to visit with us, and we'll stop at Rule 2 and pick up at Rule 3 the next time, and in a minute we'll recess until the next meeting, which will probably be in January, but as everybody knows, our term ends right now, and I just want to thank you all for your service to this committee. It's the best thing I do professionally, and being associated with all of you is a tremendous honor and enriches my life and my practice, and I just want to thank you. So we're in recess.

(Adjourned at 12:00 p.m.)

* *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 10th day of December, 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 $ 844.50 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 30th day of December, 2011.

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2012
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-320