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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 8, 2021

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 8th day of October,
2021, between the hours of 9:00 a.m. and 5:00 p.m., at the
Texas Association of Broadcasters, 502 E. 11th Street,
Suite 200, Austin, Texas 78701.

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

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

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

12 CHAIRMAN BABCOCK: Are we ready to go?

13 HONORABLE TRACY CHRISTOPHER: Any time.

14 CHAIRMAN BABCOCK: You are now our
15 parliamentarian.

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

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

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

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

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

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

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

1 certified paralegal. So congratulate Pauline.

2 (Applause)

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

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

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

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

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

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

19 And then you should know, if you haven't
20 noticed, that the Judicial Council -- Judicial Commission
21 on Mental Health is having a summit on October 14th and
22 15th, and Justice Bland is liaison to that group, and
23 they've worked very hard on this, and last year even
24 though it was remote, I think we were over a thousand --

25 HONORABLE JANE BLAND: 1,300.

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

8 We -- on emergency orders, we put out
9 Emergency Order 41, extending the deadline for membership
10 fees in the State Bar until October 31st like we did last
11 year, so the automatic suspension date will be November
12 1st. Executive order -- I'm sorry, Emergency Order 42
13 continues the eviction diversion program, which I think I
14 mentioned last time is also a model for the country; and a
15 lot of other states are trying to copy our program because
16 ours actually works; and eviction is still a big issue
17 because of the pandemic; and so we need this program to
18 help both tenants, landlords, and society. It's a
19 win-win-win program.

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Thank you, Chief.
24 Justice Bland.

25 HONORABLE JANE BLAND: It's just really good

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

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

9 PROFESSOR HOFFMAN: Chip, Lonny Hoffman on
10 also.

11 CHAIRMAN BABCOCK: Professor Hoffman.
12 Welcome.

13 (Inaudible)

14 CHAIRMAN BABCOCK: Sorry, after --

15 MR. MUNZINGER: Richard Munzinger.

16 CHAIRMAN BABCOCK: Munzinger, got that.

17 MS. CORTELL: Nina Cortell.

18 CHAIRMAN BABCOCK: Nina. Got that.

19 MS. GREER: Marcy Greer is on the phone.

20 Good morning.

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

25 (Inaudible)

1 THE REPORTER: I didn't get that.

2 CHAIRMAN BABCOCK: Try it again one at a
3 time.

4 MS. WOOTEN: Kennon Wooten.

5 UNIDENTIFIED PHONE SPEAKER: It's hard to do
6 it one at a time.

7 CHAIRMAN BABCOCK: I know. Elaine. I heard
8 Elaine. So somebody else say something.

9 MS. WOOTEN: Kennon Wooten.

10 CHAIRMAN BABCOCK: Got you, Kennon.

11 MR. LEVY: Robert Levy.

12 HONORABLE KENT SULLIVAN: Sullivan.

13 CHAIRMAN BABCOCK: Levy, Sullivan. Got
14 that.

15 MR. WATSON: Skip Watson.

16 CHAIRMAN BABCOCK: Watson, got that.

17 HONORABLE LEVI BENTON: Levi.

18 CHAIRMAN BABCOCK: Levi Benton.

19 (Inaudible)

20 CHAIRMAN BABCOCK: Who was that? Who was
21 that last one after Levi?

22 HONORABLE TOM GRAY: Tom Gray.

23 CHAIRMAN BABCOCK: Justice Gray. Thank you.

24 MR. BERRELEZ: Manuel Berrelez.

25 CHAIRMAN BABCOCK: Manuel. Anybody else?

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

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

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

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

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

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

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

3 MR. TUCKER: Thank you.

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

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

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

17 So those two kind of big themes complicate
18 the idea of, I think, basically a 40-word provision within
19 the omnibus courts bill that has led us here, and this
20 discussion, which has given you -- by the way, you don't
21 need to read the whole bill. The bill is 80 pages of a
22 140-page PDF that you got. Don't worry about the bill,
23 although we can talk about legislative intent and what the
24 project actually is, because I think that is relevant to
25 the scope of the discussion and the dispute between the

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

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

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

16 MR. TOMLINSON: Sure.

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

25 MR. TOMLINSON: Okay.

1 MR. TUCKER: No pressure.

2 CHAIRMAN BABCOCK: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 survey of some states relating to, I believe, probably
2 garnishment procedures, but what they are -- or restraint
3 procedures are what they're called in some states, and
4 there were six states that came out that said 20 days
5 was -- is what they required. What we're suggesting is
6 their current proposal now is they've gone from 10 days to
7 14 days with three additional days if the notice was sent
8 by mail, which is probably going to be most of the time.
9 So between, basically, 17 in most cases and 30. I'm
10 suggesting that if the Court is going to consider a number
11 less than 30, that we go for 21 days. It's a straight
12 three weeks. It fits within what is commonly done now in
13 many of the rules to make things on a week basis.

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

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

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

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

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

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

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

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

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

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

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

1 you an example.

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

1 they pointed out that they recommended that Rules 663a and
2 664a, which relate to procedures for challenging writs of
3 garnishment, should be amended to allow this, basically a
4 pro se expedited procedure for raising exemptions.

5 We believe that's the correct approach. We
6 should build on what we already have in garnishment. We
7 don't need to have a totally -- another set of rules that
8 covers everything. We think they should have that. And
9 then there's turnover and execution. Basically turnover
10 hasn't had any rules. They've operated solely from
11 whatever the orders that are issued by the court and the
12 statute. And we're just suggesting that there should be
13 separate rules and in part because there are differences
14 between turnover and garnishment. One of them is there's
15 a need, because there is no provision for an escrow period
16 or a hold period, while they hold things so that people
17 can bring an exemption claim. That's already in existence
18 in the garnishment context. It does not exist with
19 turnover. That's where the other possibility -- if you
20 have funds being seized generally, and there's a need for
21 it. That's going to be -- that doesn't have to follow the
22 garnishment model, but you do have to agree on a certain
23 time period, and that's one of the things we've talked
24 about before, whether you go with 14 plus 3 or you go with
25 30 days or you go with some day in between of 21. You

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

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

12 MR. TOMLINSON: I would not call it
13 charismatic.

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

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

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

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

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

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

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

20 MR. TUCKER: A plus.

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

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

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

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

17 MR. NOACK: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. PERDUE: I've got a question.

5 CHAIRMAN BABCOCK: Jim, yeah, go ahead.

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

9 MR. TUCKER: Yeah. So I think from -- from
10 the judges' perspective I do think it could be satisfied
11 by one rule. One thing that I had mentioned in our
12 discussions is that I would prefer that in the justice
13 court rules, in part V of the justice court rules, that
14 there be a reference to wherever these rules go, right;
15 and so if that's multiple rules, I would prefer, you know,
16 in the judgment section, Rule 505 of the justice court
17 rules, a reference to it, whether it's multiple rules or
18 whether it's a single rule. I think from the court's --
19 from the justice courts perspective, if there's a rule
20 that can be referred to, that's probably simpler, just,
21 oh, we have to follow -- I know in Craig's it's -- is it
22 621b, Craig?

23 MR. NOACK: Yes.

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

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

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

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

19 CHAIRMAN BABCOCK: Justice Christopher.

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

1 MR. TUCKER: Well --

2 HONORABLE TRACY CHRISTOPHER: Or no?

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

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

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

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

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

24 CHAIRMAN BABCOCK: Any other questions?

25 MR. PERDUE: I have.

1 CHAIRMAN BABCOCK: Jim, go ahead.

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

8 MR. TUCKER: Yeah, you know, I don't know
9 that there is as much of a, you know, specific difference
10 in that perspective, just other than that, you know, it's
11 obviously much more common in county and district courts
12 to have, you know -- if you have large judgments against,
13 you know, corporate entities and things like that, this
14 doesn't apply to that, right. Those corporations don't
15 have these exemptions, and I would say those are going to
16 be more common in those courts; and so, for example, in
17 the rule that I put in, in the proposal in the county and
18 district court rules it specifies an individual defendant,
19 just to make sure that, you know, the courts don't have to
20 do this when, you know, Wal-Mart gets sued for, you know,
21 \$3 million or whatever in their court. You don't have to
22 send Wal-Mart a notice of personal property exemptions.

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

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

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

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

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

4 CHAIRMAN BABCOCK: Justice Christopher.

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

9 MR. TUCKER: Yes, Your Honor.

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

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

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

7 Yes, Your Honor.

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

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

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

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

22 CHAIRMAN BABCOCK: Justice Kelly.

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

1 MR. TUCKER: Yes, Your Honor.

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

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

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

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

15 CHAIRMAN BABCOCK: Chief Justice Hecht.

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

19 CHAIRMAN BABCOCK: Wow.

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

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

25 MR. PHILLIPS: She did.

1 CHAIRMAN BABCOCK: There is Judge Miskel's
2 hand.

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

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

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

14 MR. STOLLEY: Can you speak louder?

15 HONORABLE EMILY MISKEL: Yes, sorry. There
16 were 1.3 million new civil cases filed. 34 percent of
17 those were in municipal courts. Of the total 1.3 million,
18 28 percent of those were in debt cases, if I'm reading
19 this correctly.

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

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

1 giving legal advice?

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

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

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

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

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

14 MR. TUCKER: Yeah.

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

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

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

18 CHAIRMAN BABCOCK: Justice Kelly.

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

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

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

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

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

22 CHAIRMAN BABCOCK: Are you on the phone?

23 MR. JEFFERSON: I'm sorry?

24 CHAIRMAN BABCOCK: No, go ahead, Lamont.

25 Sorry, just kidding.

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

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

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

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

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

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

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

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

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

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

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

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

8 CHAIRMAN BABCOCK: Yeah.

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

12 HONORABLE ROBERT SCHAFFER: I did not say
13 that.

14 MR. PERDUE: Because --

15 HONORABLE ROBERT SCHAFFER: I said other
16 things.

17 CHAIRMAN BABCOCK: He said terrible, not
18 horrible.

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

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

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

20 MR. TOMLINSON: (F).

21 CHAIRMAN BABCOCK: (F), as in Frank.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 probably sulk about if you decided them and issues that we
2 would throw a tantrum about, right? That's essentially
3 what we're talking about, but if there's one thing that I
4 think that this committee needs to decide on that would
5 simplify the issues, almost all of them if you decide
6 them -- I think there are actually two of them, but we'll
7 talk about the one that you really need to kind of decide
8 if you're going to address, because so much of the
9 differences of opinion and the differences in the
10 proposals flow from it, and that is the -- that is the
11 31.002(f) issue.

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

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

6 The second thing I would say is a decision
7 on global rules versus rules that only apply to judgments
8 against individual defendants. And this is something that
9 also caused, I think, the majority -- or a good chunk of
10 the inability to agree. The rule as proposed by the
11 creditors is one rule, and I believe it was you, Justice
12 Christopher, who last time said why did you put it in the
13 700's for, nobody looks there. We moved it up. We said,
14 okay, where do you look? Let's look at 621. 621 says you
15 can enforce judgments of the county, district, or justice
16 courts by any -- by any post-judgment proceeding. 621a
17 says you can use post-judgment discovery in any manner
18 that you would use prejudgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHAIRMAN BABCOCK: That's the fez.

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

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

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

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

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

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

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

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

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

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

18 HONORABLE ROBERT SCHAFFER: I've never seen
19 it.

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

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

3 CHAIRMAN BABCOCK: Okay. Jim.

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

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

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

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

4 CHAIRMAN BABCOCK: Lamont.

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

25 In our case, that's what our argument is

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

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

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

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

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

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

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

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

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

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

21 CHAIRMAN BABCOCK: Justice Christopher.

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

25 MR. NOACK: So are you saying if this

1 exemption claim were to --

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

5 MR. NOACK: Sure.

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

9 MR. NOACK: Okay. I will walk you through
10 that on a writ of execution, because that was -- that was
11 the one that I referenced. In that case I obtained a
12 90-day writ of execution from -- I believe it was the
13 justice court, Precinct 3. I then took that writ to the
14 constable for Precinct 3. In that instance I actually
15 knew where the vans were. The -- they had actually made
16 it easy for me. They had abandoned. It was pursuant to
17 a -- an eviction, and they had abandoned the vans. The
18 vans were on the property. The creditor came to me and
19 said, "Well, I want them off the property, but if you can
20 -- you know, if you can sell them and help pay the
21 judgment, that would be great." Okay.

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

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

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

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

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

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

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

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

5 MR. NOACK: Yeah.

6 MR. TOMLINSON: And they typically are
7 20-day notices. The constable sends it out instead of the
8 judgment creditor or, you know, in a nonjudicial. It
9 works the same way.

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

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

14 MR. NOACK: Me?

15 HONORABLE TRACY CHRISTOPHER: Creditor.

16 MR. NOACK: I represented the creditor.

17 MR. PERDUE: You represented the creditor.

18 HONORABLE TRACY CHRISTOPHER: Getting the
19 vans.

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

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

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

1 MR. NOACK: Correct.

2 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

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

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

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

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

16 HONORABLE TRACY CHRISTOPHER: Okay.

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

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

1 MR. NOACK: They do.

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

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

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

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

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

1 CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

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

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

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

25 I'm just saying it should be a process

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

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

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

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

7 So --

8 CHAIRMAN BABCOCK: Okay. Justice
9 Christopher.

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

19 CHAIRMAN BABCOCK: Justice Kelly.

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

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

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

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

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

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

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

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

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

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

6 HONORABLE ROBERT SCHAFFER: He escaped.

7 MR. TOMLINSON: He's around.

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

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

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

24 MR. NOACK: That is a great question.

25 MR. TOMLINSON: No.

1 CHAIRMAN BABCOCK: I couldn't find it.

2 MR. NOACK: We do have the commentary.

3 CHAIRMAN BABCOCK: I saw the commentary.

4 MR. NOACK: The bill analysis.

5 MR. TOMLINSON: There's two bill analyses in
6 that.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. NOACK: I can pull it up.

9 CHAIRMAN BABCOCK: Well, we're all
10 textualists here, so having the actual text of the
11 statute, so I'm wondering if maybe we had it last time,
12 but in any event, while we look for it why don't you --
13 why don't you give the argument for and against why it
14 either adds something or doesn't?

15 MR. NOACK: Would you like me to read it?

16 CHAIRMAN BABCOCK: Reading it would be
17 great.

18 MR. NOACK: Okay. 31.002(f), and this is
19 under the Civil Practice & Remedies Code, says, "A court
20 may not enter or enforce an order under this section that
21 requires the turnover of the proceeds of or the
22 disbursement of property exempt under any statute,
23 including section 42.0021, Property Code. This subsection
24 does not apply to the enforcement of a child support
25 obligation or a judgment for past due child support."

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

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

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

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

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

1 garnishment you can reach these assets.

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

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

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

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

19 MR. TOMLINSON: That is a fair comment.

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

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

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

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

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

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

9 MR. TOMLINSON: He can do that.

10 CHAIRMAN BABCOCK: You're better than that.

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

1 appeals on an issue that literally is not an issue.

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

22 And the case law has been there since the
23 1920's from the Supreme Court that when you deposit funds
24 into the bank account, it is transformed. It is
25 transformed into a debt between the bank and the debtor.

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

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

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

25 MR. MUNZINGER: If your comment about me is

1 correct, the committee is in deep trouble.

2 CHAIRMAN BABCOCK: Well, we knew that.

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

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

25 What about the argument that because the

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

6 MR. TOMLINSON: Yes.

7 CHAIRMAN BABCOCK: One of your arguments.
8 Justice Christopher.

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

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

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

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

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

10 MR. NOACK: His form.

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

14 MR. NOACK: Yes, that's correct.

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

1 10 days worth of wages that cannot be reached through the
2 employer, unless it's child support.

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

12 MR. NOACK: And just to clarify --

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

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

23 CHAIRMAN BABCOCK: Judge Estevez, then Bobby
24 Meadows.

25 HONORABLE ANA ESTEVEZ: I just have a

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

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

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

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

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

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

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

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

16 MR. NOACK: No, I --

17 HONORABLE ANA ESTEVEZ: But this appears --

18 MR. NOACK: I would tell you --

19 THE REPORTER: Wait.

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

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

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

1 MR. TOMLINSON: Well, I beg to differ.

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

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

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

1 than rising from below.

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

7 CHAIRMAN BABCOCK: Bobby, do you remember
8 your comment?

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

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

14 MR. PERDUE: What was the question?

15 CHAIRMAN BABCOCK: -- he can address that
16 question.

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

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

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

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

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

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

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

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

14 CHAIRMAN BABCOCK: Craig.

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

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

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

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

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

5 CHAIRMAN BABCOCK: Bobby.

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

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: John.

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

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

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

20 CHAIRMAN BABCOCK: Justice Christopher, then
21 Bobby.

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

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

1 the Property Code or the Constitution?

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

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

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

9 MR. NOACK: Yes, ma'am.

10 HONORABLE TRACY CHRISTOPHER: "Current
11 wages."

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

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

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

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

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

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

5 MR. DAWSON: Shots fired.

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

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

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

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

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

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

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

3 CHAIRMAN BABCOCK: Judge Miskel.

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

13 MR. NOACK: Both of them list --

14 MR. TOMLINSON: Let me go first this time.

15 MR. NOACK: Sure.

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

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

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

8 MR. TOMLINSON: Yes.

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

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

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

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

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

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

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

1 I'm sorry -- "for services"?

2 MR. NOACK: "For personal services."

3 HONORABLE EMILY MISKEL: Okay.

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

12 MR. PERDUE: So --

13 CHAIRMAN BABCOCK: Jim.

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

24 MR. NOACK: Direct quote from the Property
25 Code.

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

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

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

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

22 CHAIRMAN BABCOCK: Judge Miskel.

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

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

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

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

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

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

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

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

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

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

8 HONORABLE TRACY CHRISTOPHER: Property Code.

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

10 MR. NOACK: Yeah.

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

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

15 CHAIRMAN BABCOCK: Vote --

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

25 CHAIRMAN BABCOCK: Yeah. Rich.

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

4 CHAIRMAN BABCOCK: Connie, speak up.

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

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

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

1 not going to know what in the world that means.

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

14 CHAIRMAN BABCOCK: Yeah. Evan.

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

18 MR. TOMLINSON: I would be happy to.

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

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

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

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

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

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

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

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

21 CHAIRMAN BABCOCK: No. But anyway. Yeah.

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

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

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

22 CHAIRMAN BABCOCK: Eduardo, and then Richard
23 Orsinger.

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

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

9 CHAIRMAN BABCOCK: Yeah.

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

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

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

16 CHAIRMAN BABCOCK: Yeah, I'm with you.

17 Richard Orsinger, the second most wise Richard on the
18 committee is -- after Munzinger. Orsinger.

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

20 CHAIRMAN BABCOCK: So you have a comment?

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

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

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

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

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

1 language. Just saying there's no inconsistencies.

2 CHAIRMAN BABCOCK: Okay.

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

5 CHAIRMAN BABCOCK: Got it. Craig

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

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

1 list them all.

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

8 CHAIRMAN BABCOCK: Okay. Yeah, Judge
9 Miskel.

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

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

24 MS. DAUMERIE: Yes, with the legislative
25 deadlines.

1 CHAIRMAN BABCOCK: Yeah, January 1, right?

2 MS. DAUMERIE: Yeah.

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

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

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

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

19 MS. PFEIFFER: Up to E.

20 MR. PERDUE: Up to E --

21 MS. PFEIFFER: It's debtors.

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

25 CHAIRMAN BABCOCK: Yeah, D is -- as I

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

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

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

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

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

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

19 MR. NOACK: That's correct.

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

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

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

6 MR. PERDUE: Yeah. So Rich's garnishment is
7 5B.

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

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

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

15 CHAIRMAN BABCOCK: Yes, it does.

16 MR. PHILLIPS: Very industrious.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 CHAIRMAN BABCOCK: Yeah.

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

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

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

6 CHAIRMAN BABCOCK: Okay.

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

13 CHAIRMAN BABCOCK: Fair enough. Yeah, Judge
14 Estevez.

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

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

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

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

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

1 sir, explain it to me.

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

5 MR. NOACK: Absolutely.

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

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

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

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

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

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

6 CHAIRMAN BABCOCK: Rich, then Judge Miskel.

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

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

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

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

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

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

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

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

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

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

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

23 MR. NOACK: Correct.

24 HONORABLE EMILY MISKEL: Okay.

25 CHAIRMAN BABCOCK: Anybody have any more

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

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

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

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

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

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

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

24 HONORABLE TOM GRAY: Can you hear me?

25 CHAIRMAN BABCOCK: We can now. You were

1 undoubtedly on mute before.

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

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

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

24 CHAIRMAN BABCOCK: Yep.

25 HONORABLE TOM GRAY: -- that we got late

1 yesterday.

2 CHAIRMAN BABCOCK: I think --

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

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

10 HONORABLE TOM GRAY: Hand raised.

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

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

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

18 THE REPORTER: I couldn't hear that.

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

22 MR. ORSINGER: Right.

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

25 (No response)

1 CHAIRMAN BABCOCK: Pam Baron?

2 (No response)

3 CHAIRMAN BABCOCK: Lonny? Professor

4 Hoffman?

5 (No response)

6 CHAIRMAN BABCOCK: Richard Munzinger?

7 MR. MUNZINGER: No.

8 CHAIRMAN BABCOCK: Judge Wallace?

9 (No response)

10 CHAIRMAN BABCOCK: Nina Cortell?

11 MS. CORTELL: Opposed.

12 CHAIRMAN BABCOCK: Marcy.

13 MS. GREER: I apologize, but the form that

14 I'm looking at is one form.

15 CHAIRMAN BABCOCK: Okay. Professor Carlson?

16 PROFESSOR CARLSON: No.

17 CHAIRMAN BABCOCK: Kennon?

18 (No response)

19 CHAIRMAN BABCOCK: Judge Benton?

20 (No response)

21 CHAIRMAN BABCOCK: Manuel?

22 (No response)

23 CHAIRMAN BABCOCK: Did I miss anybody on the

24 phone?

25 MR. LEVY: Robert Levy.

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

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

6 THE REPORTER: I can't hear her.

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

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

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

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

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

23 MS. HOBBS: That's okay.

24 CHAIRMAN BABCOCK: I'm sorry, Lisa.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 CHAIRMAN BABCOCK: Huh?

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

9 CHAIRMAN BABCOCK: We're going to have
10 lunch.

11 HONORABLE EMILY MISKEL: Okay.

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

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

17 CHAIRMAN BABCOCK: I know.

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

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

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

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

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

8 CHAIRMAN BABCOCK: Great, thank you. Craig.

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

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

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

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

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

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

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

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

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

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

4 CHAIRMAN BABCOCK: Good. Yeah, Rich.

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

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

21 MR. MEADOWS: Can I ask one question?

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

23 CHAIRMAN BABCOCK: Bobby.

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

1 handled?

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

18 CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

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

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

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

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

7 CHAIRMAN BABCOCK: Right.

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

10 CHAIRMAN BABCOCK: Yeah.

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

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

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

22 CHAIRMAN BABCOCK: So you refuse to answer.

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

25 CHAIRMAN BABCOCK: Any other thoughts?

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

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

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

9 MR. ORSINGER: I'm here.

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

12 MR. ORSINGER: No, that was earlier.

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

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

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

19 MR. ORSINGER: No.

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

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

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

6 CHAIRMAN BABCOCK: Yep.

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

9 CHAIRMAN BABCOCK: Yeah.

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

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

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

20 CHAIRMAN BABCOCK: Right.

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

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

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

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

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

20 MR. NOACK: So can I respond to that?

21 CHAIRMAN BABCOCK: Yeah, of course.

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

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

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

18 CHAIRMAN BABCOCK: Rich, you want to --

19 MR. TOMLINSON: Some --

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

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

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

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

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

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

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

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

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

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

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

15 MR. TOMLINSON: We don't.

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

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

24 CHAIRMAN BABCOCK: Craig.

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

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

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

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

1 is serving the writ of execution, or are you going to
2 impose that on the creditor? If you have the receiver
3 doing it, are you going to impose that on the receiver, or
4 are you going to impose that on the creditor? If it's a
5 garnishment, are you going to impose that on the constable
6 or sheriff serving the writ on the bank, or are you going
7 to impose it on the bank, or are you going to impose it on
8 the creditor?

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

21 CHAIRMAN BABCOCK: Yeah, Justice Kelly.

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

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

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

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

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

1 CHAIRMAN BABCOCK: Yeah, Judge Miskel.

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

6 MR. STOLLEY: Can you speak up?

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

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

1 practicable, and there's a -- there's a provision in
2 there. It's 663a, and it says "to the defendant" and it's
3 got a provision in there, and it says, "You have the right
4 to regain possession," and it goes through that. And then
5 664 has a list of "defendant may replevy" and it says, you
6 know, "on reasonable notice to the opposing party, which
7 may be less than three days."

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

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

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

7 HONORABLE EMILY MISKEL: Okay, so --

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

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

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

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

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

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

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

3 MS. DAUMERIE: Yes.

4 MR. PHILLIPS: Yes.

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

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

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

16 MS. DAUMERIE: Yes. Yes.

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

19 MS. DAUMERIE: Yes.

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

23 MS. DAUMERIE: Yes.

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

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

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

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

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

12 CHAIRMAN BABCOCK: Yeah.

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

15 CHAIRMAN BABCOCK: Yeah. Okay. Hayes.

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

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

25 HONORABLE TRACY CHRISTOPHER: Well, I've

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

4 CHAIRMAN BABCOCK: We did.

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

7 CHAIRMAN BABCOCK: Yeah.

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

17 CHAIRMAN BABCOCK: Which it is.

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

21 CHAIRMAN BABCOCK: Yeah, I think that makes
22 a lot of sense, and should we take the proposed new rule
23 621b and let's maybe isolate, Rich, where you say if we're
24 just going to pass this, you've got problems with it, and
25 what are -- identify your problems with Tab 4 of 621b.

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

4 CHAIRMAN BABCOCK: Right.

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

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

13 MR. TOMLINSON: Okay.

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

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

19 MR. TOMLINSON: Yes.

20 MR. NOACK: Okay.

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

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

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

6 MR. TOMLINSON: Okay.

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

10 MR. TOMLINSON: Yes.

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

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

15 CHAIRMAN BABCOCK: That was my subtle point.

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

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

20 MR. TOMLINSON: I'm old enough.

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

24 MR. NOACK: He says three business days.

25 MR. TOMLINSON: Three business days, and we

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

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

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

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

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

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

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

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

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

23 MR. NOACK: It would be better.

24 CHAIRMAN BABCOCK: Yeah. All right.

25 Anybody else have any thoughts about "as soon as

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

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

15 CHAIRMAN BABCOCK: Chop, chop.

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

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

25 MR. PHILLIPS: Three or five, yeah.

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

4 MR. WARREN: He stole my response.

5 CHAIRMAN BABCOCK: Did he really?

6 MR. PHILLIPS: I apologize.

7 MR. TOMLINSON: Telepathy.

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

12 HONORABLE TRACY CHRISTOPHER: Three.

13 CHAIRMAN BABCOCK: Three. Okay.

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

23 CHAIRMAN BABCOCK: Yeah.

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

1 when you should do it from when you have notice.

2 CHAIRMAN BABCOCK: Yeah.

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

6 CHAIRMAN BABCOCK: Yeah. John.

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

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

11 MR. WARREN: Okay.

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

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

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

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

23 MR. ORSINGER: Five.

24 CHAIRMAN BABCOCK: And Carlson?

25 PROFESSOR CARLSON: Five.

1 CHAIRMAN BABCOCK: Munzinger?
2 MR. MUNZINGER: Three.
3 CHAIRMAN BABCOCK: Peeples?
4 (No response)
5 CHAIRMAN BABCOCK: Baron?
6 (No response)
7 CHAIRMAN BABCOCK: Hoffman?
8 (No response)
9 CHAIRMAN BABCOCK: Nina?
10 MS. CORTELL: Five.
11 CHAIRMAN BABCOCK: Kennon?
12 (No response)
13 CHAIRMAN BABCOCK: Levi?
14 (No response)
15 CHAIRMAN BABCOCK: Marcy?
16 MS. GREER: Five.
17 CHAIRMAN BABCOCK: Judge Wallace?
18 HONORABLE R. H. WALLACE: Five.
19 MS. GREER: Chip, it's Marcy. Did you get
20 me?
21 CHAIRMAN BABCOCK: Marcy, I got you at five.
22 MS. GREER: Correct.
23 CHAIRMAN BABCOCK: Manuel?
24 (No response)
25 CHAIRMAN BABCOCK: Justice Gray?

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

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

5 MR. LEVY: Yeah, Robert Levy. Three.

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

9 MR. PORTER: This is Chris Porter. Five.

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

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

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

21 MR. TOMLINSON: Right, we did.

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

25 MR. ORSINGER: Richard Orsinger.

1 CHAIRMAN BABCOCK: Hey, Richard.

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

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

18 MR. TOMLINSON: Yes.

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

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

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

4 MR. TOMLINSON: So in the last paragraph of
5 621.

6 CHAIRMAN BABCOCK: The new rule behind
7 Tab 4.

8 MR. TOMLINSON: Which is Craig's proposal.

9 CHAIRMAN BABCOCK: 621b.

10 MR. TOMLINSON: Yes. I misstated.

11 CHAIRMAN BABCOCK: Yeah.

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

18 CHAIRMAN BABCOCK: Okay.

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

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

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

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

1 MR. TOMLINSON: Right. And, I mean, there's
2 language in the current 664a, which that same sentence in
3 664a says unless there's an agreement among the parties it
4 will happen --

5 CHAIRMAN BABCOCK: Absent agreement.

6 MR. TOMLINSON: -- in 10 days.

7 CHAIRMAN BABCOCK: Okay. Let's discuss
8 that.

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

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

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

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

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

11 Even if in my levy to the bank I also asked
12 for statements, there is no way I'm going to get that
13 information by the time of that hearing. So that hearing,
14 if it is final and dispositive and it is within less than
15 10 days, it is a hearing that in my view denies due
16 process to the creditor because it limits the creditor's
17 ability to have an actual hearing on the evidence as
18 opposed to those rights.

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

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

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

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

18 MR. NOACK: I would be fine with that.

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

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

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

6 CHAIRMAN BABCOCK: Sure.

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

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

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

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

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

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

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

21 MR. TOMLINSON: No.

22 HONORABLE TRACY CHRISTOPHER: Why is that?

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

1 wasn't improperly issued. If you are asserting a writ
2 of -- if you are asserting an exemption, you can bring
3 your property to -- you can bring your proof to the court,
4 but if I am -- and let's be very clear about this. If I'm
5 in justice court and I get a notice -- and, by the way,
6 664 says it may be on less than three days notice, right,
7 so less than three days notice, I have to show up to the
8 hearing. I would say that it is very difficult in the
9 writ of garnishment context to litigate that issue, but in
10 my entire practice on writs of garnishment, I've had it
11 done to me twice. I expect this to happen a whole lot
12 more often.

13 CHAIRMAN BABCOCK: Hayes.

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

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

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

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

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

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

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

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

1 just telling you what the case law says. The courts have
2 said it's directory. It's not something that would lead
3 to -- it doesn't have a lot of effect if the judge doesn't
4 follow it. The point of it is, is to tell the judges that
5 they should give this emphasis and try to hear them within
6 10 days. If they don't, there's no consequence on either
7 the judge or the judgment creditor. That's why I'm saying
8 it's a soft requirement. It's a soft guardrail. It's not
9 a hard guardrail, and so most of the time they're going to
10 have plenty of time. That's the first thing, so if they
11 wanted to do even a subpoena of the bank, they might well
12 be able to do it.

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

19 CHAIRMAN BABCOCK: Yeah, Craig.

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

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

10 MR. WARREN: I'm sorry.

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

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

15 MR. NOACK: Yeah.

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

19 MR. NOACK: Pleadings, how? How so?

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

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

1 the court.

2 MR. WARREN: Okay.

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

8 MR. FULLER: Again, I may be slow. How does
9 10 days help the debtor unfairly win and 10 days unfairly
10 make the creditor lose? And if there is a fair date
11 certain, what is that date? I think that's what Chip was
12 trying to ask when he said 14 days work okay? I
13 understand that if you go too far out you may have taken a
14 poor person and put him on the street, but how does the
15 other way --

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

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

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

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

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

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

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

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

21 CHAIRMAN BABCOCK: Justice Christopher.

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

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

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

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

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

20 MR. PHILLIPS: Yes.

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

23 MS. PFEIFFER: That was my idea, too.

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

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

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

6 (No response)

7 HONORABLE ANA ESTEVEZ: Start with Robert.

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

10 MR. ORSINGER: Yes.

11 CHAIRMAN BABCOCK: Professor Carlson?

12 PROFESSOR CARLSON: Yes.

13 CHAIRMAN BABCOCK: Richard Munzinger?

14 MR. MUNZINGER: Yes.

15 CHAIRMAN BABCOCK: Robert Levy.

16 MR. LEVY: Yes.

17 CHAIRMAN BABCOCK: Chris Porter.

18 MR. PORTER: Yes.

19 CHAIRMAN BABCOCK: Lisa Hobbs?

20 MS. HOBBS: Yes.

21 CHAIRMAN BABCOCK: Nina Cortell?

22 MS. CORTELL: Yes.

23 CHAIRMAN BABCOCK: Marcy?

24 MS. GREER: Yes.

25 CHAIRMAN BABCOCK: Judge Wallace?

1 HONORABLE R. H. WALLACE: Yes.

2 CHAIRMAN BABCOCK: Manuel?

3 (No response)

4 CHAIRMAN BABCOCK: Justice Gray?

5 (No response)

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

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

13 CHAIRMAN BABCOCK: Huh?

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

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

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

23 CHAIRMAN BABCOCK: Yeah. Right.

24 HONORABLE ROBERT SCHAFFER: What rule number
25 are we on?

1 MR. TOMLINSON: It's his 621b.

2 HONORABLE ROBERT SCHAFFER: Thank you.

3 CHAIRMAN BABCOCK: Tab 4.

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

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

14 MR. TOMLINSON: You want to find it?

15 MR. NOACK: -- up above, "The notice and
16 form may be served pursuant to Rule 21a or 501.4," sorry,
17 so at the bottom of the first paragraph is a sentence that
18 says, "The notice and form may be served pursuant to Rule
19 21a or 501.4," which is the justice court similar rule as
20 applicable; and the intent there, and maybe it's inartful,
21 maybe it isn't, but the intent there was to say if you
22 serve personally then it's 14 days, but if you serve by
23 mail, then the mailbox rule would add an additional three
24 days.

25 CHAIRMAN BABCOCK: Got it. And, Rich, you

1 say that's too short?

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

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

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

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

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

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

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

25 So, again, you've heard me say it before.

1 We're open to a reasonable solution and a reasonable
2 remedy. We moved from 10, because 10 was kind of the
3 notice period for other stuff. We moved to 14; and we're
4 willing to kind of add three days for the mailbox rule;
5 but realistically as a receiver, what I'm looking at is
6 the fact that whether it's 10, 14, or 17, the bank is
7 still processing the funds, all of that kind of stuff.
8 I'm not really all that worried about it. We start to get
9 into 30 days, 60 days as originally proposed, that's when
10 it's -- honestly, the defendant at that point is kind of
11 frustrated by the whole thing.

12 CHAIRMAN BABCOCK: Thank you, Craig, for not
13 getting emotional about this. John.

14 MR. WARREN: What's the percentage that
15 would actually be going through U.S. postal mail? I ask
16 because I heard yesterday on the news that the postal
17 inspector is reducing the volume of mail to save money,
18 and so that slows down mail, so what impact will that
19 have?

20 MR. NOACK: So my understanding is, to
21 answer your question, so first of all, on bank
22 garnishments and receiverships, I wouldn't hesitate to say
23 that the majority of these exemptions are going to go by
24 mail. That makes the most sense. Secondly, my
25 understanding from the announcement, I did see that. I

1 did look at that, because I thought about the mailbox
2 rule. My understanding is that for these kinds of notices
3 it shouldn't apply, but I don't know that for sure.
4 That's definitely something we should all care about in
5 general for the mailbox rule, but if the mailbox rule
6 changed to three days instead of four days, because of
7 those kind of concerns, then this rule would change with
8 that.

9 CHAIRMAN BABCOCK: Any other discussion?
10 Yes, Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, I think
12 it's kind of odd that Rich wants extra time here while at
13 the same time complaining that, oh, my gosh, you know, the
14 world is coming to the end because you've frozen my
15 property. So it seems --

16 MR. TOMLINSON: So you're saying I've got
17 the unreasonable position here this time.

18 HONORABLE TRACY CHRISTOPHER: Yes, I do. I
19 think so.

20 MR. TOMLINSON: I am picking up on that,
21 Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Because if
23 you're really that upset about your money, you would think
24 you would get that form in as soon as you could. Just my
25 thought.

1 MR. TOMLINSON: No, I get that. All of
2 these timing things, I was more uncomfortable with our
3 position here, but it -- than any other, because a lot of
4 states have 10 days, some states have 14 days. There is a
5 number that have 20, and I just thought 21 was a better
6 number because it's a multiple of days, weeks, and that
7 would assure that my -- my clients, my folks, would have
8 more time to fill out the forms. I get your point, and
9 that's one way to resolve this issue. I'm not -- I will
10 not cry for hours if I lose on this. So how's that for a
11 response?

12 CHAIRMAN BABCOCK: What period of time?

13 HONORABLE TRACY CHRISTOPHER: Craig needs to
14 win one.

15 MR. NOACK: Thank you.

16 MR. TOMLINSON: He won this morning, just so
17 you know.

18 CHAIRMAN BABCOCK: I want to know what
19 period of time you will cry. It will be prompt.

20 MR. TOMLINSON: I was going to cry this
21 morning, but it just didn't, you know --

22 CHAIRMAN BABCOCK: Didn't seem right.

23 MR. TOMLINSON: Didn't seem right.

24 CHAIRMAN BABCOCK: And for the record and
25 those people on the phone, Chief Justice Christopher did

1 have a demonstrative like hand-wringing for it when she
2 was talking about Rich's position. So how about those in
3 favor of 14 days with the three days if served by mail?
4 Everybody in favor of that, raise your hands.

5 HONORABLE ROBERT SCHAFFER: What's the
6 alternate?

7 CHAIRMAN BABCOCK: 21 days. 14 days with
8 three days by mail.

9 All right. And on the phone, Benton, are
10 you in favor or not?

11 (No response)

12 CHAIRMAN BABCOCK: Orsinger?

13 MR. ORSINGER: 14 days.

14 CHAIRMAN BABCOCK: Professor Carlson?

15 PROFESSOR CARLSON: 14 days.

16 CHAIRMAN BABCOCK: Richard Munzinger?

17 MR. MUNZINGER: 14, agree.

18 CHAIRMAN BABCOCK: Nina Cortell?

19 MS. CORTELL: Agreed.

20 CHAIRMAN BABCOCK: Judge Wallace?

21 HONORABLE R. H. WALLACE: 14 days. 14 days.

22 CHAIRMAN BABCOCK: Marcy. Sorry, I skipped
23 you.

24 MS. GREER: No problem. 14 days.

25 CHAIRMAN BABCOCK: Okay. Manuel?

1 (No response)

2 CHAIRMAN BABCOCK: Justice Gray?

3 (No response)

4 CHAIRMAN BABCOCK: Robert Levy?

5 MR. LEVY: 14 plus three.

6 CHAIRMAN BABCOCK: Thank you. Justice Gray,
7 did you chime in there?

8 (No response)

9 CHAIRMAN BABCOCK: Chris Porter?

10 MR. PORTER: 14.

11 CHAIRMAN BABCOCK: And Lisa?

12 MS. HOBBS: 14, agree.

13 CHAIRMAN BABCOCK: Okay. So, Rich, I don't
14 know when you're going to start crying, but you can start
15 right now. Yeah, Scott.

16 MR. STOLLEY: I vote yes on 14.

17 CHAIRMAN BABCOCK: Huh?

18 MR. STOLLEY: I vote yes on 14.

19 CHAIRMAN BABCOCK: Okay. So it was
20 unanimous, the Chair not voting, and a whole bunch for and
21 nobody against. Did anybody vote against? I didn't take
22 an against, did I? Judge Schaffer voted against, sorry.
23 Almost unanimous. Anybody else against?

24 All right. Let's move on to the -- to what
25 was described this morning as a new issue, a time limit on

1 when exemption claims can be filed. What's the -- where
2 is it in this rule, if it is anywhere?

3 MR. NOACK: So it is -- let's see. Ah, yes,
4 thank you. I only wrote it. The first sentence of the
5 full -- of the third paragraph, "A defendant must file and
6 serve on all parties a form asserting an exemption at
7 least seven days prior to sale or distribution."

8 CHAIRMAN BABCOCK: Okay. And, Rich, what's
9 wrong with that?

10 MR. TOMLINSON: I get the -- the creditors
11 attorneys would gain a benefit from this, but it would
12 really shorten the time period by which judgment debtors
13 can get their exemption claim form and effectively get,
14 for example, their money back. I mean, so it's like I get
15 it that they shouldn't have to hold the property for a
16 long time, but if the deal is it's going to be -- they're
17 only holding the property for 14 days plus three if notice
18 was sent by mail. You have 17 days and yet you have to
19 get your notice in basically within 10 days, and I'm
20 saying that's not enough time, given the fact that the
21 postal service -- hopefully no one has anybody who works
22 with the postal service -- is not working as well as it
23 used to, and it means that my clients are not going to get
24 the notice as quick. The notice may not even get to them,
25 I mean, quickly enough, and then they won't have

1 sufficient time. I have a really big problem with this,
2 but --

3 CHAIRMAN BABCOCK: Did your rule, Rich, have
4 any time --

5 MR. TOMLINSON: No.

6 CHAIRMAN BABCOCK: -- restraint? I didn't
7 see it. Yeah, okay. Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: So I'm -- I
9 just want to understand the timing of it. They get served
10 with a notice. You have to wait 14 days before you
11 dispose of the property or deliver it to the plaintiff, at
12 a minimum, right? You have to wait that 14 days.

13 MR. NOACK: Correct.

14 HONORABLE TRACY CHRISTOPHER: But if you are
15 in the garnishment proceeding or in a receivership, you
16 actually go to court and get a court order before you do
17 those things, right, or no?

18 MR. NOACK: So a garnishment you need to
19 have either a judgment in garnishment, or you need to have
20 the agreement of all of the parties. Sometimes you have a
21 Rule 11 agreement with all of the parties. On an
22 execution or a receivership, you don't always have an
23 order specific to that seizure. In justice court you
24 typically have a motion to approve a distribution, so
25 you'll file a motion and then the court will sign off on

1 it, but you may have had a prior order, and so you may be
2 seizing property subsequently after, you know, maybe six
3 months down the road or something like that. I hope that
4 answers your question.

5 HONORABLE TRACY CHRISTOPHER: Well, I'm just
6 trying to understand how the timing would work in terms of
7 asserting the exemption seven days before the sale or
8 distribution. So that's why I'm trying to figure out when
9 the sale or distribution would occur, what kind of notice
10 they would have, to even create a seven days before.

11 MR. NOACK: So, yeah, so, and this problem
12 actually arose because of an agreement that we made. So
13 if you look at the original proposals, basically the
14 debtors group said you can raise it -- you can raise an
15 exemption at any time, essentially. The creditors group
16 said, well, you need to file it within this period of
17 time, and if you don't have a timely claim of exemption
18 then we can move forward. And very early on the group,
19 actually, one of the things we did agree on, was we said,
20 well, look, we'll have the suspension period, but there's
21 no intent to cut off a debtor's rights here. So if a
22 debtor comes in with an untimely claim of exemption but
23 it's still prior to sale or distribution, we still want
24 that to be triggered. We still want that to be heard,
25 especially as a receiver.

1 If somebody is -- if I get it on the 15th
2 day, right, I don't -- I don't want to close the door to
3 that defendant, right. But my biggest problem is if I get
4 a pro se defendant or if I get a defendant who is playing
5 games and the day before the hearing files a claim of
6 exemption and just puts it in the mail and doesn't tell
7 me, and so if I'm doing a sale to a bona fide purchaser
8 for value, either on the courthouse steps or pursuant to a
9 private sale, and I've given notice of all of that stuff,
10 and I don't have a window where I can be assured that I
11 was notified of a claim of exemption, then I get really,
12 really nervous about what's going to happen if Rich comes
13 by after the fact and says he wants to unwind that sale of
14 a 4,000-dollar piece of equipment. So the intent behind
15 it was not to kind of advance the clock or anything, but
16 to say after that 14-day, plus seven, there is this window
17 here where I am saying I'm going to disburse or I'm saying
18 I'm going to sell and give me some advance time that
19 you've got to serve me before I sell. That was the point.

20 CHAIRMAN BABCOCK: Rich.

21 MR. TOMLINSON: I just want to add, though,
22 that not every turnover over says you have to go to the
23 court and get approval before you distribute. Some of
24 them say -- some of them I've commonly seen say they take
25 some money from a bank account, they can distribute it.

1 Now, there's -- they've changed the language on, you know,
2 having to get court approval on the attorney's fees or the
3 fee for the receiver, but they can distribute to the
4 plaintiff immediately, and they can hold 25 percent off
5 and then go get court approval for that, but the money can
6 be distributed very quickly. So if they send notice, they
7 might hold the money for 17 days, but if my client only
8 has 10 days in which to react and file an exemption claim
9 before the money is gone and then you have to wait -- you
10 could have a hearing, but the money is gone.

11 I mean, I think this -- seven-day
12 requirement, I understand that it's inconvenient to deal
13 with things that are late. One way to address this is
14 they have to file it in a timely manner, and that can be
15 before whatever that distribution date -- before the end
16 of this period, but, you know, if you make it seven days
17 then there's almost no time for an unsophisticated
18 judgment debtor to get the whole thing done. They need
19 time for the notice to arrive and time to respond to it
20 and get it filed.

21 CHAIRMAN BABCOCK: Rich.

22 MR. PHILLIPS: How does a defendant know
23 what that seven days is? If it's seven days before you're
24 going to distribute or sale, what notice goes to the
25 defendant to say, "This is the day I'm going to

1 distribute. Now, you have to do this." How does a
2 defendant know that?

3 MR. NOACK: So they're either going to get a
4 motion to distribute or they're going to get notice of the
5 sale from the constable.

6 MR. PHILLIPS: And how much notice do they
7 get of that?

8 MR. NOACK: So it's -- so on the notice
9 through the writ of execution it's set forth. It's -- I
10 think we talked about --

11 MR. TOMLINSON: It's like 20 days, 21 days.
12 It's like a foreclosure notice basically.

13 MR. NOACK: And as far as a motion, I'm
14 going to send the motion --

15 MR. TOMLINSON: And what I'm trying to tell
16 you is --

17 CHAIRMAN BABCOCK: Whoa, whoa, whoa. One at
18 a time.

19 MR. TOMLINSON: I apologize.

20 CHAIRMAN BABCOCK: That's okay.

21 MR. PHILLIPS: And I think the other point
22 is there may not always be a motion or something else.
23 It's not clear for me, for a pro se defendant, we're
24 saying you have to find this date and then back up seven
25 days to find out what your deadline is. I don't think

1 that's necessarily user-friendly.

2 MR. NOACK: And I guess what I would say in
3 response to that is if there's some kind of clarifying
4 language here that would either require some kind of point
5 to work back from and if that's language in a receivership
6 order that says in this kind of situation you have to do
7 that or it's in the rule that says you've got to give a
8 notice of the distribution or sale and then you work back
9 from that, I'm okay with that. I think those are all
10 reasonable approaches to that that would solve the
11 problem, but I was probably approaching it from the
12 perspective that most of the time they're going to get
13 that notice.

14 CHAIRMAN BABCOCK: Hayes, then Justice
15 Christopher, and then Scott.

16 MR. FULLER: So following up on both of
17 those questions, it looks --

18 CHAIRMAN BABCOCK: Speak up, Hayes.

19 MR. FULLER: It looks like what we're
20 looking for here is a date certain for distribution that
21 everybody knows after that point in time it's over.

22 MR. NOACK: In order to get that date, I
23 think --

24 MR. FULLER: So how do we get to that date?
25 That's -- that's what I think people are struggling with.

1 How do we calculate that date?

2 MR. NOACK: So and I think that -- again, I
3 think this is a result of the fact that we had an
4 agreement that a debtor can still assert their exemption
5 after the suspension period, right. So I think that you
6 can either work from the end of the suspension period,
7 right, so you can say that after the suspension period the
8 creditor may sell or distribute, unless they actually
9 receive the exemption -- the exemption claim prior to the
10 sale or distribution, right. That's one way you can look
11 at it.

12 MR. FULLER: That's my point. It seems to
13 me that would be helpful to have that firm date so that --
14 so that everybody knows that that's the date we're working
15 with.

16 MR. NOACK: I agree with that. I think it's
17 hard to -- yeah. It's tough to do.

18 MR. FULLER: I mean, anything that's going
19 to take place is going to take place prior to that date.
20 Either you're not going to distribute, the creditor is not
21 going to distribute until they get to the safe harbor, you
22 know, and the debtor knows that, you know, I may not want
23 to do snail mail. I know this is the date. Maybe I need
24 to hand deliver it and nail it to somebody's door.
25 Hyperbole.

1 CHAIRMAN BABCOCK: Okay. Justice
2 Christopher, and then Scott.

3 HONORABLE TRACY CHRISTOPHER: Well, I was
4 just going to say the same thing. How could a pro se
5 figure out what this date is? I mean, what -- because we
6 don't know what the seven days comes from, there's no way
7 for them to determine what this rule means. We can't even
8 figure it out. We just have to have some other procedure.

9 MR. NOACK: So I guess I would then be
10 asking -- then I guess I would ask my original proposal
11 was that's why you want to say there's a suspension period
12 and then you're done, right. So you've got 14 days and
13 then once you're done with the 14 days we can move
14 forward. When we discussed, right, when we kind of said,
15 well, you know what, we want to come together, we'll
16 agree -- we'll agree to let that go, right. We'll agree
17 that you can hold up the process and still entitle
18 yourself to all of the rights of the rule and the hearing
19 and fact that the debtor or the creditor or the receiver
20 shall not distribute, as long as that claim comes in
21 sometime before the sale or distribution.

22 So my response back to you would be that
23 would argue in favor of then going back and saying, well,
24 the easiest way to address that is to say we'll file it
25 within the 14 days and then -- that's the easiest way to

1 draw the line, and then after that the creditor can move
2 forward. Other than that, we've got to draw -- we've got
3 to pick a date that we can calculate that runs over
4 either -- either runs over three separate kinds of
5 processes or we've got to pick a date that is calculatable
6 independently of those processes.

7 CHAIRMAN BABCOCK: Scott, then Cynthia.

8 MR. STOLLEY: I think one of the things that
9 all of us are sort of thinking or talking about here is we
10 don't have a clear time line, and we really need a clear
11 time line, both the lawyers and the litigants. And the
12 way this 621b is drafted, it's totally confusing what the
13 time line is, and so all of these questions that you're
14 getting have to do with that time line, and the time line
15 needs to be figured out and then the rule needs to be
16 drafted based on that, with clear language that sets it
17 out.

18 CHAIRMAN BABCOCK: Okay. Cynthia.

19 MS. TIMMS: Yeah, I think part of that
20 problem is that the -- I understand now, having listened
21 to you, that the provisions of that third paragraph or
22 that last paragraph on the seven days --

23 CHAIRMAN BABCOCK: Cynthia, could you speak
24 up a little bit, please?

25 MS. TIMMS: I'm sorry. I understand now,

1 having listened to you, that the provisions -- the
2 seven-day provision only comes into effect after the
3 14-day provision has come and gone and that there has been
4 a delay in disposing of the property, but that is not
5 apparent from how it's written here. And so the way that
6 those two provisions are written, the 14-day provision and
7 then the seven-day provision, they seem to step on each
8 other's toes, and it's confusing as to which provision
9 we're under at any given point. So that's just a point
10 for going forward.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Instead of
13 doing that sentence at all, why don't we say, "Defendant
14 fails to assert within 14 days, the officer or receiver
15 having the property in possession, may at any time
16 thereafter dispose of the property or deliver the same to
17 plaintiff, unless the officer or receiver has actual
18 knowledge of an exemption."

19 MR. NOACK: "Of a claim of exemption."

20 HONORABLE TRACY CHRISTOPHER: Yes, "of a
21 claim of exemption." Because, you know, that way it
22 covers both of you, I think. You still get more time to
23 try to stop it before the order is signed or, you know,
24 the sale at the courthouse door or whatever, which we
25 don't know when that would happen.

1 MR. TOMLINSON: Well --

2 MR. NOACK: Tentatively, I like to --

3 MR. TOMLINSON: Execution sales are very
4 rare anyway, but my concern was it wasn't enough time for
5 my clients to make an exemption claim, and the way I read
6 it was you get a 17-day period, because almost all of the
7 notices go out by mail. I've seen one person served in a
8 garnishment context with personal notice, like with a
9 citation, and so it's 17 days. If you subtract seven days
10 from that, I just don't think that would work. If you say
11 that they have 17 days, that total period -- the total
12 period in which they can file their claim, that works if
13 the mail works. I mean, that's the real issue, and that
14 is one reason why I was hoping that the -- the suspension
15 period would be a little longer than 17 days. I was
16 hoping for 21.

17 CHAIRMAN BABCOCK: Justice Kelly.

18 HONORABLE PETER KELLY: My ears start
19 burning any time I hear "actual knowledge." "Has received
20 notice or notice has been delivered," when you start
21 getting into a subjective standard like actual knowledge,
22 you're going to have all sorts of collateral litigation
23 about it, so some other -- I get Justice Christopher's
24 point, but I don't think actual knowledge should be the
25 standard.

1 MR. NOACK: I mean, I would just say
2 conceptually, whether it's actual notice or we build some
3 way to understand that, you know, mailing plus three days
4 or something like that. Again, I think that's reasonable,
5 and I think it addresses the concern that this was drafted
6 to do. And so I think as long as we're addressing that
7 concept, I think that's really our biggest concern, and so
8 I do want to clarify, the seven days was never meant to
9 invade into the suspension period. So if it was
10 inartfully drafted, that is all me, and so, you know, it
11 was supposed to be because we're agreeing to extend past
12 the 14 days the fact that we can trigger this whole
13 process then we just wanted an end date. So I am -- I
14 would be supportive of some kind of language like that,
15 even if we have to polish it up.

16 MR. TOMLINSON: I mean, if that was his
17 intent, that this is seven days on top of 17, I would
18 prefer that to making it 17 days and then they can
19 distribute.

20 HONORABLE TRACY CHRISTOPHER: Well, it was
21 unclear --

22 MR. TOMLINSON: I know.

23 HONORABLE TRACY CHRISTOPHER: -- whether it
24 was 17 plus seven or 17 minus seven.

25 MR. TOMLINSON: That's how I read it.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MR. TOMLINSON: But if he's saying 17 plus
3 seven, I think I -- I think we could live with that on the
4 debtors' side.

5 CHAIRMAN BABCOCK: Any other comments on
6 this part? It seems to me that we have taken our
7 discussion beyond a 14-day versus unlimited time period.
8 Would you-all agree with that?

9 Okay. So we'll -- we'll figure out the
10 drafting, either by the subcommittee, which has in toto
11 abandoned us, or the Court's staff, and go on to the next
12 topic. I was trying to see something that we talked about
13 last time, but I think we've gone through the issues,
14 Rich, that you outlined this morning as --

15 MR. TOMLINSON: The only one left was what
16 we do with the turnover order language. I don't know if
17 that has to be decided today. That was not in the reknit
18 from the bill, but it is something that Justice Bland had
19 brought up, and we -- we have different proposals.

20 CHAIRMAN BABCOCK: Yeah. And I don't know
21 that it was in the charge from the Court, but if Justice
22 Bland wants us to talk about it, we're going to talk about
23 it, so do you-all have proposals about the form of the
24 order, and if so, where is it?

25 MR. NOACK: Well, so let's -- and so to be

1 clear, there were kind of two things, right.

2 CHAIRMAN BABCOCK: Right.

3 MR. NOACK: So what we did do as a group is
4 we talked about if -- if the committee wanted to recommend
5 that there should be language inside a receivership order,
6 what should that language be, and the -- the creditors
7 group has a kind of a one-sentence proposal, which is
8 essentially follow the rule, and the -- the debtors group
9 had a slightly larger proposal. The same section that we
10 were looking at for the proposed rule, if you look just
11 below it, has the proposed language for the creditors.

12 Separately, I had submitted a --
13 individually, a proposed order on justice courts that also
14 has that proposed language in there. I'm not sure what
15 tab that is, but it places --

16 MS. DAUMERIE: Tab 7.

17 CHAIRMAN BABCOCK: That's where I had gotten
18 to.

19 MR. NOACK: Tab 7, okay. And it places it
20 within the context, purely for example sake, of where you
21 would see that, you know, in a -- in a, for example,
22 justice court receivership order.

23 CHAIRMAN BABCOCK: Justice Bland, did you
24 have any particular concerns about the order, or were you
25 just freelancing?

1 HONORABLE JANE BLAND: Well, I think there
2 was a discussion about the great disparity of the orders
3 that are signed and in particular in justice court where
4 there may be less oversight of these receivership orders,
5 and given the -- you know, the powers that a receiver
6 exercises, the idea was to set forth consistent duties and
7 obligations for cases involving debts of \$20,000 or less
8 or debts in justice court.

9 CHAIRMAN BABCOCK: Okay. Anybody have
10 any -- yeah. Go ahead, Rich.

11 MR. TOMLINSON: I made a proposal. It's on
12 page seven of the joint memo. It's a paragraph. Beyond
13 saying you should comply with whatever the rule or rules
14 are, it does two things. One is it says when you get your
15 contact, first contact from the judgment debtor or
16 turnover receiver, you will tell them you may have
17 exemption rights and you're going to get something in the
18 mail. That's all I'm saying. Just let them know that
19 they're going to get some information about exemption
20 rights, and they can -- they can waive those if they want.
21 They should know at least that they may have exemption
22 rights. If they want to wait until they get the mailing
23 and then talk to them about a payment plan, they can. I'm
24 saying that if they agree to a payment plan without seeing
25 any -- getting any information about exemption rights,

1 they're likely to waive them, and that would make this a
2 procedure with no -- with no meaning. That's my concern.

3 And then the second part is I asked that
4 before they distribute, before they have a sale or enter
5 into a payment plan, that they consider. That's the last
6 sentence in my proposal, that they consider exemptions.
7 That's all it is. I mean, that's going to be within their
8 discretion, but I'm asking that they -- as part of their
9 exercise of discretion that they consider exemptions.

10 CHAIRMAN BABCOCK: Okay. And, Craig, I
11 think your response was that this was beyond the
12 legislative mandate. They didn't tell us to do this, but
13 the Court does have general rule-making authority, so --

14 MR. NOACK: Absolutely.

15 CHAIRMAN BABCOCK: If it wants to do it, it
16 can.

17 MR. NOACK: Certainly don't deny the power.
18 I think the Texas Association of Turnover Receivers was
19 opposed to this for a couple of reasons. One is it's just
20 borrowed trouble, and it's beyond the mandate, but I think
21 that kind of the bigger concern here is it has a different
22 understanding of what the role of the receiver is. It
23 really looks at the receiver as an instrumentality of the
24 creditor. I understand that the receiver enforcing the
25 judgment, you know, is obviously interested in enforcing

1 the judgment, which is the same as the creditor; but if a
2 receiver order tells me that I have to inform the debtor
3 of their rights and -- their exemption rights, here is how
4 the conversation is going to go: So your account has been
5 frozen, you have exemption rights. Like what? Like, you
6 know, proceeds of a sale of a house. So I hear your
7 account's been frozen. What's in there? Well, they're
8 exempt. Right?

9 I have that conversation with the defendant
10 after I've asked my investigative questions. So I think
11 an order that tells me how to go about my due diligence
12 before I inform the defendant about their rights is a
13 little difficult. My role is independent. I'm supposed
14 to investigate the facts. My typical order gives me the
15 ability to ask for financial records. So I'm supposed to
16 be independent, and so this kind of requirement that I'm
17 supposed to kind of advise the defendant of their rights,
18 again, I'm not -- I'm not freaking out about it, but --
19 but it -- what it's going to do is it just means, okay, do
20 I have to start recording my conversations with the
21 defendant, that sort of thing. That's not as -- my
22 biggest concern is just it misunderstands the role of the
23 receiver.

24 The other piece to it, that I've got to
25 consider evidence related to exemptions, every receiver I

1 know considers whether or not the funds are exempt. The
2 concern that I have is that I often get funds where I
3 don't -- I don't get any contact from the defendant. Or
4 they refuse to participate in the process. Or I'm drop
5 checked, right. I send out the levy, and the bank sends
6 me a check three months later, and I still haven't heard
7 from the defendant, and a statement that I have to
8 evaluate all -- you know, that I have to evaluate whether
9 or not the money is exempt, is that imposing an
10 affirmative obligation on me now to go in and conduct a
11 full on investigation of -- and trace those funds for the
12 last six months? I don't think that's required.

13 I cite it in my response. An exemption is a
14 voluntarily claim. Most of the time when people call me
15 they just want to work things out. I absolutely respect
16 the right of people to assert the exemptions, and I never
17 want to trample on those rights, but there has to be a
18 reasonable balance. And what I want -- what I would like
19 the committee to consider for a reasonable balance is one
20 that imposes -- you know, there's no -- in a garnishment
21 there's no obligation of the creditor before -- you know,
22 before they even talk to the defendant to say, "You have
23 rights and I can't talk to you about settlement," and so
24 it's just a little strange to be treating the receiver
25 differently.

1 CHAIRMAN BABCOCK: Okay. If he's not going
2 to freak out, you can't cry, so --

3 MR. TOMLINSON: I might anyway.

4 CHAIRMAN BABCOCK: Huh?

5 MR. TOMLINSON: I might anyway.

6 CHAIRMAN BABCOCK: That's true. Okay.

7 We're going to take our afternoon break, but if you've got
8 something that you just need to say, let's say it.

9 MR. TOMLINSON: Just that debtors --
10 competence of debtor -- of receivers varies quite a bit,
11 and I have dealt with a number of turnover receivers who,
12 despite evidence of exemptions that no one questions, they
13 would force me to file a motion and go to a hearing, and
14 they would not -- I mean, I'm just telling you there's --
15 there are parts of that community that will not comply,
16 and there's a reason why I'm seeking these -- these soft
17 guardrails. The reason is that there are parts of that
18 community that don't recognize exemptions, and I know
19 they -- none agree on the wages part. I understand that.
20 But on other things, I have a number of turnover receivers
21 that I've dealt with where I had to file a motion, and I
22 had to go to a hearing, and these are judgment debtors
23 represented by counsel. What I'm trying to get at is not
24 every judgment turnover receiver is going to be like this
25 young man.

1 CHAIRMAN BABCOCK: Is that a good thing or a
2 bad thing?

3 MR. TOMLINSON: I think it's a good thing.
4 You know, it's a compliment towards him. What I'm trying
5 to say is there are receivers who don't do that; and I'm
6 trying to make sure that judgment debtors have a right
7 that is meaningful; and if the exemption right can be
8 easily waived during the first communication, they agree
9 to a payment plan without knowing they have exemptions,
10 they could be paying, you know, their Social Security,
11 they could be paying their unemployment comp, they could
12 be paying any of these things and not know until they get
13 that notice in the mail later after the payment plan.
14 That's my concern.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: Doesn't the
17 turnover order right now require a statement about
18 exemptions or no?

19 MR. NOACK: So there's no requirement, but
20 the vast majority of the orders have something very
21 similar to the bottom of the first paragraph of what I
22 said -- of what I have, which says, "This order does not
23 compel turnover of the homestead, checks for current
24 wages, or other exempt property." That's in 99 percent of
25 the orders that get signed.

1 CHAIRMAN BABCOCK: We're going to take our
2 afternoon break, and we will be back at 3:50, 15 minutes
3 from now. Thanks, everybody.

4 (Recess from 3:34 p.m. to 3:50 p.m.)

5 CHAIRMAN BABCOCK: All right, everybody,
6 let's get back and get after it. Roger, you ready to go?
7 All right, well, Craig and Rich, thank you so much for
8 everything. And as you probably know, we're going to take
9 a stab at -- I say "we." The Court is going the take a
10 stab at something, and I'm sure they'll seek your input
11 once they've put something together, but this is a -- the
12 discussion I think has been enormously helpful to the
13 committee and hopefully to the Court, and so thanks for
14 spending so much time on it, and hopefully the therapy
15 sessions that you both are going to have to have, you're
16 not going to --

17 MR. TOMLINSON: He's my therapist, just so
18 you know.

19 CHAIRMAN BABCOCK: Well, let's not get into
20 that on the record here, but don't send us a bill for
21 this.

22 All right. We're going to move on now to
23 the next item on our -- next and last item on our agenda,
24 suits affecting the parent-child relationship and out of
25 time appeals in parental rights termination cases, and

1 Bill is -- Bill Boyce is going to lead the discussion
2 here, and we're going to try to get some closure on this
3 today if we can, but if we can't then we'll come back and
4 do it the next time. So Bill.

5 HONORABLE BILL BOYCE: Thank you, Chip. So
6 this is a continuation of the discussion we have had over
7 multiple meetings about different facets of appeals
8 arising from orders terminating parental rights. By way
9 of a quick overview, we started out with notice of the
10 right to counsel. We moved to what the judgment will have
11 to say and whether or not there is a determination of the
12 desire to appeal. We have now moved to the part of this
13 discussion related to dealing with claims for ineffective
14 assistance of counsel arising in connection with a
15 parental termination decision. We had some pretty
16 significant discussion about this at the last meeting,
17 which the subcommittee has attempted to distill into a
18 rule proposal.

19 If the -- depending on how the discussion
20 goes today and at the discretion of the Chair, if -- if
21 we're at a position to make a vote on proposed rule
22 language, I think that's where the subcommittee would hope
23 that we could get to this afternoon. I guess we'll just
24 have to see how the discussion goes, but to recap the
25 discussion specifically in relation to ineffective

1 assistance, you will remember that we're operating against
2 a backdrop where, in the state-initiated proceedings
3 seeking termination, there is a right to effective
4 assistance of counsel that attaches both to appointed
5 counsel and, as of June from a recent decision from the
6 Texas Supreme Court, to retained counsel. So we're
7 operating in that realm. We're operating under the
8 Strickland standard, adapted from the criminal context
9 where there is a two-pronged showing that has to be made,
10 you know, which is, roughly paraphrased, representation
11 that does not meet the requirements of being effectively
12 represented, and then secondly, prejudice resulting from
13 that ineffective assistance.

14 So the discussion last time talked in terms
15 of a couple of different proposals or different approaches
16 to this. Roughly summarized, those approaches are do we
17 try to address ineffective assistance and provide a
18 procedural vehicle to pursue that claim and litigate it?
19 Do we do that in the context of the direct appeal itself
20 that is challenging the termination order, or do we try to
21 do it through a collateral attack? I default to something
22 akin to an equitable bill of review that could be
23 potentially configured to allow that. Or do we do some
24 combination of that?

25 One of the considerations is that a

1 challenge based on ineffective assistance of counsel is
2 part of or in conjunction with the direct appeal itself,
3 is going to be a lot more plausible if you're talking
4 about having different counsel for appeal than in the
5 trial court. If the same counsel is pursuing the appeal,
6 then you have a situation where you've got the same lawyer
7 telling the appellate court, "You need to reverse this for
8 X, Y, and Z reasons, and additionally, I was ineffective,"
9 and that's not really practical. And so a lot of our
10 discussion, subcommittee discussion leading up to today,
11 is based on the situation where we have different counsel
12 on appeal from the trial court, and we can come back and
13 have further discussion about what happens if that's not
14 the situation.

15 Additionally, you may recall from our last
16 meeting that there was substantial discussion around the
17 notion of dual tracking the ineffective assistance and the
18 merits challenges. What I understood that to mean, and
19 that may or may not be what everybody else thought it
20 meant, was that we were talking about looking for a
21 mechanism to have the ineffective assistance determination
22 made as part of or in conjunction with the direct appeal.
23 And because I personally find references to dual tracking
24 to be confusing, because it's not entirely clear whether
25 you're talking about as part of the main appeal, the

1 direct appeal, or some kind of collateral attack, I think
2 clarity will be helped if we talk about it in terms of a
3 simultaneous pursuit of an ineffective assistance of
4 counsel claim in conjunction with a direct appeal or a
5 separate appeal or separate challenge through some kind of
6 collateral means.

7 So what I'm going to try to do for the
8 remainder of the discussion today is to talk about this in
9 terms of a simultaneous mechanism. If you look at the
10 memo that was distributed to -- for today's meeting, the
11 ineffective assistance of counsel discussion starts at
12 page six. On page seven, carrying over to page eight of
13 the memo, you've got the House Bill 7 Task Force report
14 recommendation of -- of an additional Texas Rule of
15 Appellate Procedure 28.4, which sets out a procedure for
16 basically a simultaneous process with a direct appeal to
17 raise and determine claims for ineffective assistance of
18 counsel by the parent whose rights have been terminated.

19 I've summarized discussion from the
20 committee and from our last meeting, and if you get to
21 page 10, what you will see in redline format are -- is a
22 proposed tweak of the House Bill 7 Task Force proposal
23 that tries to incorporate some of the discussion that we
24 had from our last meeting; and what I hope, if the
25 discussion allows it, is that we will be in a position by

1 the close of proceedings today to take a vote about
2 whether this approach sketched out on page 10 of your memo
3 is the direction that the committee as a whole wants to go
4 in for the -- to recognize the mechanism for the
5 simultaneous appeal on the merits, plus a way to address a
6 potential ineffective assistance claim. Again, when
7 you're talking about a situation where there is different
8 counsel on appeal from the trial counsel.

9 So that's kind of the overview of what this
10 memo covers. I want to highlight a couple of points
11 before I invite anybody else on the subcommittee who wants
12 to add anything. What you're going to see in this memo is
13 that there's, you know, some back and forth on the
14 subcommittee, and I think Evan is going to have some
15 potential points that he wants to raise for consideration,
16 but going back to the proposal that -- the original House
17 Bill 7 proposal that we discussed at the last meeting, you
18 may recall that this proposal involved a motion plus a
19 remand and an abatement of the appeal for the trial court
20 to address a claim of ineffective assistance of counsel.
21 That kind of morphed into a discussion about dual
22 tracking, which, again, I understood to mean more of the
23 simultaneous pursuit of the appeal on the merits and the
24 ineffective assistance of counsel claim.

25 The main difference, just in practical

1 terms, between the House Bill 7 proposal that we looked at
2 last time and the revised proposal that you have on page
3 10 of your memo is that the revised proposal on page 10
4 does not assume there is an automatic abatement of the
5 appeal; and that's, I think, what the subcommittee's
6 understanding was -- it's certainly my understanding -- of
7 what we're trying to get at at this notion of dual
8 tracking, which is trying to have the appeal on the merits
9 go forward, provide a mechanism to challenge ineffective
10 assistance of counsel if a sufficient threshold showing of
11 that can be made, but not put the brakes on the appellate
12 process to such a degree that the ultimate determination
13 of whether or not the parental rights are going to remain
14 or be terminated is held in suspense indefinitely or for a
15 prolonged period of time, in reflection of one of the main
16 considerations here, which is not having the rights and
17 the circumstances of families and of the children kept in
18 suspense for a prolonged period of time while parental
19 termination is being fought out in an appellate arena.

20 That underlying policy is reflected in the
21 Rules of Judicial Administration, which place a time limit
22 or a recommended time frame within which these are to be
23 decided, and it's also reflected in the legislative
24 excerpt that was circulated, which we'll talk about in a
25 moment. So that's the balancing of interests, having the

1 appeal go forward, providing a mechanism for challenging
2 ineffective assistance of counsel, inappropriate
3 circumstances, but not tying up the process in knots
4 forever.

5 So the subcommittee has talked about this
6 across multiple meetings, and I think that the proposed
7 rule amendment that you have in front of you that appears
8 on page 10 is an effort to balance all of those
9 considerations; and it's largely modeled after Texas Rule
10 of Appellate Procedure 29.4, which deals with
11 circumstances when, in that case an interlocutory appeal,
12 a trial court can have some continuing participation in
13 the case. For example, in an appeal from a temporary
14 injunction, if there is a motion for contempt while the
15 appeal is ongoing from the temporary injunction, under
16 29.4 the court of appeals can refer that for findings or
17 recommendations to the trial court.

18 It's not really a formal remand and
19 abatement. It is, to our understanding, an example of
20 this ongoing dual process. The appeal is ongoing. It
21 lives in the court of appeals, but a discrete issue or
22 consideration is referred back to the trial court for
23 handling. Once the trial court handles it, it sends up
24 its recommendations to the court of appeals to be dealt
25 with in the context of the larger appeal. That's kind of

1 the logic behind this. Judge Schaffer.

2 HONORABLE ROBERT SCHAFFER: Is there a
3 similar procedure in the criminal courts for ineffective
4 assistance of counsel when it's recognized on appeal?

5 HONORABLE BILL BOYCE: To my understanding,
6 there is not kind of a similar referral mechanism. It
7 really divides into either you pursue it in a direct
8 appeal or you pursue it on a writ of habeas corpus.
9 There's not really this middle ground that I'm aware of.

10 HONORABLE ROBERT SCHAFFER: Okay.

11 HONORABLE BILL BOYCE: And so that's the
12 logic of this. I don't think that this proposal
13 necessarily forecloses an abatement, but the notion of a
14 referral as opposed to a remand has the notion of allowing
15 the appeal to go forward on the merits of termination. If
16 a threshold showing is met, then the trial court can be
17 enlisted to make findings and recommendations. Those go
18 up to the court of appeals, and it deals with it all at
19 the same time, presumably within the time frame that is
20 set out for recommended -- the recommended disposition for
21 these types of cases.

22 I'll make one other comment and then ask
23 Evan or anybody else from the subcommittee who wants to
24 elaborate. One of the areas of discussion in the
25 subcommittee was the question of can you really

1 simultaneously address the merits and ineffective
2 assistance, and there may be some division of opinion on
3 that. You know, my view is I'm not sure how you get to
4 the prejudice prong of Strickland until you know what
5 happened on the merits of the appeal. That may or may not
6 be a universally shared view, but I'm not sure that that
7 particular procedural issue has to be definitively
8 answered if we have a mechanism that allows the court of
9 appeals to consider both the merits and ineffective
10 assistance in conjunction with one another as part of this
11 simultaneous process.

12 I think the remaining issues, aside from the
13 larger ones, are if we go down this road pursuant to this
14 proposal, what kind of time frames make sense and are
15 practicable. When we had our discussion last meeting I
16 think Chief Justice Christopher and others had raised very
17 legitimate concerns that the time frames that were spelled
18 out in the House Bill 7 Task Force proposal were mighty
19 tight, and again, in keeping with the desire to keep
20 things rolling, but a discussion to be had is what are
21 realistic time frames for both court of appeals and a
22 trial court to deal with these issues if we're going to
23 have this kind of simultaneous process.

24 So that kind of completes my overview, but I
25 would ask anybody else from the subcommittee who wants to

1 add or elaborate on anything to please do so.

2 MR. YOUNG: I would like to, and I might
3 come over and sit by you, because I've heard from people
4 on the phone that -- Pam is listening, and she said that
5 Bill sounds loud and clear. That was not the case for
6 people speaking earlier today, so it was a good call. I
7 agree with most everything that we've talked about. It
8 seems to me that as we've gotten deeper and deeper into
9 this topic, the -- the clarity that we're maybe coming to
10 is reflected by that statute, with the six-month deadline
11 for being able to file your challenge to the order of
12 termination, which reflects internal legislative desire
13 that we put some greater weight on the balance between the
14 right of the child to be able to get on with life and
15 remove the cloud of uncertainty about who his or her
16 parents are and the need, the essential need, that we have
17 to make sure that we're not terminating something as
18 precious as parental rights without being sure that the
19 law actually requires it. And so with that sort of
20 legislative command to ensure that there is an end at some
21 point to collateral attacks, which could otherwise go on
22 almost infinitely, the idea of keeping this as formally
23 part of the appeal has great attraction, and that's I think
24 the single most important thing that today's discussion
25 involves.

1 I think that we have to think of it quite
2 differently from a criminal conviction and a collateral
3 attack via habeas corpus or whatever else on it. The time
4 element is fundamentally different there, especially if
5 it's a long sentence, for example. It's not terribly
6 urgent, and so the general practice, of course, is that we
7 wait until the conviction is, in fact, final. It's gone
8 through all possible layers of review in the state courts
9 before you can even begin something like a federal habeas
10 or even a state habeas, is the general practice in the
11 state and certainly is the federal law and expects that.

12 This is different. This is almost exactly
13 the opposite. You know, we have a child there who is not
14 a party here, but is potentially a victim, but at the very
15 least has very important rights that are being drained
16 with each passing day of uncertainty through the judicial
17 process. And so keeping the ineffective assistance of
18 counsel issue as part of the direct appeal satisfies the
19 legislative limitation on time and creates the incentives,
20 if done correctly, to quickly, efficiently, accurately,
21 expeditiously identify ineffective assistance of counsel
22 such that if it, in fact, caused improper judgment of
23 termination, we can identify that, reverse it, and go back
24 through it again.

25 So a couple of different things about that.

1 You know, first, what is the prejudice? I think the
2 prejudice is supplied by the fact that we now have on
3 appeal an order terminating your rights. If the
4 performance, which is an objective, supposedly objective
5 standard, can be identified and it can be causally linked
6 to the order that the trial court issued, even if it might
7 ultimately be overturned on some other ground, I think
8 that for purposes of a direct appeal the appellate panel
9 can certainly regard that as supplying the necessary
10 prejudice to satisfy the Strickland standard. And, of
11 course, if it turns out that there is some other reason to
12 reverse the judgment of termination of parental rights and
13 that parental relationship, fine, then you don't need to
14 address that issue, or you could address it as an
15 alternative holding or something like that.

16 And that would be the case, for instance, if
17 the new lawyer coming in to take the case instantly
18 discovers upon, you know, receiving the -- you know, the
19 papers, something on the face of the record or by talking
20 to his client or the client's family members that the
21 prior counsel just never -- had all of this stuff and
22 never even opened the letters from relatives of the parent
23 whose rights have been terminated, never actually talked
24 to witnesses who are all too happy to talk, things that
25 would objectively satisfy the performance prong of

1 Strickland. That could easily be added to an appeal at
2 the very beginning, and then the court of appeals under a
3 world in which we didn't have this limited remand or
4 referral, would be able to address whichever issues it
5 wanted, just like we do in any other case where there
6 might be several interlocking or contingent issues. The
7 court doesn't have to address everything if it can reach a
8 judgment that is sufficient for the day based on only one
9 or two of the issues.

10 So then the question is what can we do to
11 incentivize that lawyer who is now coming into the case to
12 most quickly determine whether or not there is a basis for
13 pursuing the ineffective assistance of counsel claim, and
14 I think that there's something to the idea of an
15 abatement, if it can be done quickly. If we can say to
16 that counsel, you're not going to have to pursue this
17 entire appeal on the merits, file all of the briefs, if
18 pretty quickly on the face of the record or through some
19 initial investigation within whatever period of time -- I
20 don't know what that should be yet. This is all sort of
21 an analytical framework we're discussing today. If you
22 can, you know, within a set short period of time identify
23 that there's, you know, a good basis, a prima facie case,
24 for ineffective assistance of counsel claim, then we'll
25 abate the rest of it. We'll refer this back, a limited

1 remand perhaps, to the trial court to develop the facts,
2 make a recommendation on the law, and that may end up
3 shortcircuiting the need for the rest of it.

4 On the other hand, if we are going too far
5 into it -- and sometimes it's true, there may be an
6 ineffective assistance of counsel case that can be made
7 but that can't easily be identified at the outset. Well,
8 in that instance the court of appeals still should be able
9 to say we will accept this as a late issue -- still part
10 of the direct appeal. It's a late issue. There's good
11 cause shown for presenting an issue that wasn't presented
12 maybe when the opening brief was filed or whatever. We'll
13 send that back per everything that Justice Boyce is
14 describing, but we're not going to stop working on the
15 appeal. You're still going to have to brief the merits
16 issues. Meanwhile, the district court can continue to,
17 you know, flesh out and determine whether in the district
18 court's own judgment its termination may have been caused
19 by deficient performance of trial counsel, send that back
20 up.

21 The court of appeals can then take
22 everything before it issues its judgment. If the court of
23 appeals is able to reverse the judgment more speedily
24 before the trial court is able to hold that hearing, it
25 should do so, and send it back. The trial court could

1 still gather the facts if it wants to, but all of those
2 things will allow the six-month period to work pretty well
3 together to balance the rights and to incentivize counsel
4 and the courts, I think, to proceed in the most efficient
5 and expeditious way possible.

6 So that's why I don't think there's a
7 problem with identifying prejudice. I do think there's a
8 benefit to keeping it all within the appeal, a single
9 appeal. I don't think we then have to worry about what
10 this new vehicle will be. You know, the statute that
11 we've talked about, 161.211, puts a limit on how late you
12 can bring a collateral attack or direct appeal point
13 challenging the parental termination, but it does not give
14 you a vehicle to do it. It's just like saying, well, if
15 there is one, you have to do it within this amount of
16 time. That does not itself then bootstrap into giving you
17 a separate vehicle. I don't read it that way. It reads
18 as a restriction and not an authorization of anything, so
19 by continuing this as part of the direct appeal, in other
20 words, we would avoid the need to worry about some new
21 vehicle creating some new docket number and all of the
22 rest of it.

23 I'll mention this briefly. We've referred
24 to this as a matter for what happens when there's new
25 counsel, which is, you know, the most obvious thing; but

1 we do need to keep in mind, I think, that oftentimes it
2 will presumably be the same counsel who was there at the
3 trial court who will proceed; and we can sever that all
4 off and save that for another time; but if that six-month
5 restriction applies to that person, too, then I don't
6 think we're doing any great favor by saying, "Well, don't
7 worry about it, we'll deal with that some other time,"
8 because that person may have the parents' rights cut off
9 and be in a worse position because he never had another
10 lawyer able to take it up.

11 So I don't know what the best solution is.
12 It probably goes beyond the authority that the Court may
13 have, because I think that it may ultimately require some
14 legislative authorization of something like an ombudsman
15 who can go through and help scour these cases and verify
16 or the creation of a pro bono program where people can
17 help give some confidence that the appellate lawyer, who
18 is also the trial lawyer who might have been ineffective,
19 in fact, was not ineffective. But what I think we can do
20 is to say that if this six-month restriction actually
21 applies to everyone, whether you have new counsel or not,
22 the client needs to be told that at the moment that the
23 appeal occurs and to be said, "Look, you may be very happy
24 with your lawyer. The lawyer is continuing on." How do
25 we know ineffective assistance of counsel? Probably it's

1 all good. If you like your lawyer, you can keep your
2 lawyer, to paraphrase a famous line. But you should know
3 from six months when that judge terminated your rights, if
4 you later conclude that he was not an effective advocate
5 and his ineffectiveness is what caused you to lose your
6 rights, too bad.

7 So you need to be thinking about that, and
8 if you think that he did something that wasn't quite
9 right, you need to speak up now. You might need to talk
10 to another pro bono lawyer, which is tough if you're
11 sitting in a prison cell or something like that, right?
12 But it's better to tell them that and avoid having rights
13 terminated without them really knowing it, so that they
14 can at least try it pro se or getting another lawyer, and
15 then that creates the awkwardness, but still I think a
16 feasible awkwardness in this very, you know, dystopian
17 hellscape we're describing for someone whose rights are
18 about to be --

19 CHAIRMAN BABCOCK: Did you just say
20 "dystopian hellscape"?

21 MR. YOUNG: Yes. Yes.

22 CHAIRMAN BABCOCK: That's what I thought you
23 said.

24 MR. YOUNG: At the very least, they're in a
25 position to try to put that and make the claim, which

1 would satisfy the statutory six-month limit to try to make
2 that claim within that period of time, at which point the
3 appellate point would be raised up and you would have the
4 oddity, the awkwardness, of having one lawyer pursuing the
5 merits in the appeal and either a pro se or a separate
6 lawyer participating in the same appeal, challenging the
7 first lawyer's professional competency. Awkward, right,
8 but still something that would satisfy the statutory goals
9 of timeliness in advance of the child's interest, which I
10 think deserves a lot more compassion, consideration, and
11 solicitude than we maybe tend to give it just in an
12 abstract matter, sitting here thinking as lawyers about
13 dry legal text. It would facilitate that ultimate final
14 determination and give us at least a greater sense that
15 the ultimate result that the courts generate is an
16 accurate, fair, lawful, constitutional one, thus achieving
17 maybe the goals that we've been describing.

18 So all of that may sound complicated. I
19 actually think it would simplify things, and this is a
20 problem that has been deviling us now for how long?

21 HONORABLE BILL BOYCE: Long time.

22 MR. YOUNG: It seems like 50 or 60 years
23 that we have been talking about this topic. In the five
24 years that I've been on here, at least 50 of them have
25 been talking about this particular topic it feels like,

1 but I think that keeping it focused on a single appeal and
2 trying to work everything into it would actually simplify
3 the burdens on the courts and the parties and that we
4 might be able to pass, you know, a final recommendation on
5 to the Supreme Court before too many more children's --
6 too many children's rights have been muted out by turning
7 18.

8 HONORABLE BILL BOYCE: May I just make two
9 quick observations?

10 CHAIRMAN BABCOCK: Sure.

11 HONORABLE BILL BOYCE: Number one, I would
12 solicit from the committee as a whole your thoughts about
13 dealing with the same counsel issue. I don't mean to
14 suggest in any way that that should be postponed or
15 postponed indefinitely. I think in terms of breaking this
16 into pieces to try to deal with this question, the easier
17 and the threshold one that's reflected in today's memo is
18 a different counsel. I think that's somewhat easier to
19 address, but I think next up is what happens if it's not
20 different counsel?

21 And I also want to make one other
22 observation, and again, I'm not sure we need to resolve a
23 fight about whether theoretically you can or cannot decide
24 the merits -- decide ineffective assistance of counsel
25 before you decide the merits. I'm not entirely sure how

1 that opinion would write up, but I make this observation,
2 which is, an additional consideration that I would -- I
3 think we need to take into consideration is the
4 professional consideration of the attorney whose conduct
5 is being challenged as being ineffective. That, too, has
6 collateral consequences, and so I don't -- I have concern
7 about setting up -- assuming or setting up an incentive
8 that says a reviewing court can just say that without
9 reaching the merits we're going to conclude that attorney
10 X was ineffective for these reasons.

11 I think there's going to be some internal
12 resistance to doing that, putting aside the question of
13 even how does that write up.

14 CHAIRMAN BABCOCK: Okay. Scott.

15 Let the record reflect that Scott is moving
16 toward this end of the table.

17 MR. STOLLEY: I know Pam will want to hear
18 what I have to say. As -- as Bill and Evan have detailed,
19 this is a very thorny issue. A lot of people have spent a
20 lot of time on it. The task force spent a lot of time on
21 it. Our subcommittee, this whole committee talked about
22 it last time, I believe, and it's -- it's just very
23 difficult; and, like, for example, we got a lot of
24 pushback from the appellate judges that the time frames
25 for the so-called abatement were just too compressed, it

1 wasn't feasible to do. So I think we're trying to come up
2 with a process that would meet those concerns, and that's
3 why the subcommittee came back with the tweaked proposal
4 based on the task force proposal.

5 The problem that I have with the current
6 structure of the proposal is that to me it violates a
7 fundamental rule of appellate review, because the idea is
8 we're going to refer the matter back to the trial judge to
9 make some fact findings and then send it back, those
10 findings back to the appellate court, for the appellate
11 court to decide in the first instance has there been
12 ineffective assistance of counsel. But so where I think
13 this violates the rule -- sort of fundamental review of
14 what appellate review is, is there's no final ruling from
15 the trial court for the appellate court to review and say,
16 yes, that's a correct decision, there was ineffective
17 assistance or, no, that's an incorrect decision.

18 So we're making the appellate court the
19 court of first instance under this proposal, and I just
20 don't think that's the right way to structure it. I think
21 the trial judge has to make the call whether there was
22 ineffective assistance that resulted in harmful error and
23 then the appellate court can review that. So that's the
24 problem I have with the current proposal. I think that
25 could probably be -- that tweak could probably be put in

1 there, and I'll just throw out one hypothetical. If we do
2 it that way, what happens if the trial judge says, "Yes,
3 you know, I witnessed -- I saw the lawyer falling asleep,
4 and I think that was harmful error for reasons X, Y, and
5 Z, and I'm granting the appeal." Doesn't that moot the
6 appeal? Or does that expand the appeal and now make the
7 appeal also encompass was it error to grant a new trial?
8 I don't know the answer to that, but to me that kind of
9 points out that we really do need to let the trial judge
10 make that decision and not just make a recommendation.

11 CHAIRMAN BABCOCK: I hate it when smart guys
12 point out all of these problems like that. Lisa Hobbs.

13 MS. HOBBS: Hey, guys, sorry I'm on the
14 phone. I guess my comment is not so much how y'all decide
15 it, because y'all seem to have a differing opinion. I
16 know appellate law -- I mean, hopefully, I mean, I'm board
17 certified. I've been doing this for 20 plus years.

18 CHAIRMAN BABCOCK: We'll stipulate.

19 MS. HOBBS: Yeah, we'll stipulate. I know
20 CPS cases because I've done them a lot with my partner who
21 does a lot of CPS cases. I am not following y'all. Like
22 I am not following what we're supposed to be voting on. I
23 feel like we're going back to a lot of previous
24 conversations or not. I followed Justice Boyce, former
25 Justice Boyce like entering -- when Evan started talking

1 it got very passionate, and I appreciate the passion.
2 There's a lot of passion on this issue, but I'm just lost,
3 and I'm one of the committee members who knows more about
4 both appellate and CPS, and I'm lost.

5 So, I don't know, maybe someone back me up
6 and like where are we going with this conversation?
7 Because we can converse for hours about this, but, I don't
8 know, I guess I just -- I'm lost, and if I'm lost, I'm
9 guessing 90 percent of that committee sitting in that room
10 and on this phone call is also lost. Where are we going?
11 What does the subcommittee need us to vote on or talk
12 about, because we're going into big pictures, and we just
13 went into six months on a constitutional thing, and I'm
14 like, nope, nope, whatever the Legislature says does not
15 mean what the Constitution says, so I'm out of that. I
16 just need this whole thing to be just narrowed down a
17 little bit, because I feel like we just went a little bit
18 off the rails.

19 CHAIRMAN BABCOCK: Yeah, actually, Lisa,
20 everybody has left the room, and they're wandering around
21 trying to find where we are on this thing. There are
22 answers --

23 MS. HOBBS: No, I don't take that lightly.
24 I'm just saying I do know these issues, and I really am
25 like if I were not as attuned, if I couldn't pick up

1 little pieces, I'm like, I disagree with that, I agree
2 with that, I disagree with that, but if y'all are just
3 drilling a lot in people who do not practice in this area
4 both in the appellate world and -- so that's just -- I'm
5 sorry that I have -- y'all may just hate me for making
6 that comment, but I'd guess there's some members of the
7 committee who are raising their hand and saying, "Yes,
8 Lisa Hobbs, I am as confused as you are."

9 CHAIRMAN BABCOCK: No problem, Lisa. I
10 didn't mean to make fun of your comment, and as I
11 understand it -- and I am the lowest common denominator
12 here, so everybody knows more than me, but as I understand
13 it, we are focusing on a proposed rule found at page 10 of
14 the memo, which would take Rule 28.4(d) and create
15 something that would happen while an appeal is pending in
16 order to get a reviewable thing for the court of appeals
17 on the issue of ineffective assistance of trial counsel.
18 Am I right about that, Bill?

19 HONORABLE BILL BOYCE: That's what I thought
20 we were doing.

21 CHAIRMAN BABCOCK: Okay.

22 MS. PFEIFFER: Chip, can I address one
23 aspect of what I hope will clarify this for Lisa and
24 everybody? There's a lot of complexity to this, and we've
25 probably brought up a lot of the complexity, and that may

1 make it seem harder than it is, but fundamentally I look
2 at this as a mechanism for expanding the record on appeal
3 when you've identified during the appellate process that
4 there is this potential ineffective assistance of counsel
5 claim, and so it gives a party the ability to go back down
6 to the trial court where you can create a bigger
7 evidentiary record and get findings of fact from the trial
8 judge that then can go up and become part of the appeal
9 that's already in process.

10 CHAIRMAN BABCOCK: Yeah. And that raises a
11 question that I had, which is you're sending it for
12 findings of fact, but not conclusions of law, which is the
13 issue that I think maybe Evan pointed out that normally
14 you have a trial court's ruling that you're going to ask
15 the appellate court to consider, and why did the
16 subcommittee just send it back for only findings of fact
17 and not conclusions?

18 MS. PFEIFFER: Well, that's a good point,
19 and I think the answer -- Bill can correct me -- is that's
20 how it was originally drafted, but I would agree that
21 there should also be conclusions of law in that trial
22 court proceeding.

23 CHAIRMAN BABCOCK: Yeah, then you would have
24 something reviewable for sure, I would think. But, yeah,
25 Cynthia. Yeah. Hang on, Cynthia. Yeah, somebody is on

1 the phone.

2 MR. ORSINGER: Yeah, Richard Orsinger, Chip.
3 In response to Lisa's comments, she and I were both on
4 this task force, House Bill 7 Task Force, and I feel like
5 what we were trying to grapple with was the fact that this
6 is an accelerated appeal where the record is put together
7 very quickly, and the brief has to move forward very
8 quickly, and yet the problem is ineffective assistance of
9 counsel that requires a hearing where some lawyer develops
10 the record on things that are not apparent. So we're not
11 talking about lawyer who falls asleep during the trial and
12 doesn't cross-examine any witnesses. We're talking about
13 situations where investigation was not done, where
14 potential witnesses were not called, and none of that is
15 going to be in the record that goes up on an accelerated
16 basis.

17 So first thing you have to figure out is,
18 you know, what do you do about the fact that the -- the
19 motion for new trial has to be heard so quickly? What do
20 you do about the fact that the appellate record has to go
21 to the appellate court so quickly and then what do you do
22 about the fact that the lawyer who would be expected to
23 raise this is the same lawyer that tried the case is
24 appealing it. Is the lawyer arguing his own incompetence
25 and he might not even see his own incompetence, much less

1 be able to persuasively argue it?

2 So I feel like what we're were trying to do
3 is uncouple the review of the ineffective assistance of
4 counsel argument from the accelerated appellate timetable
5 that gets the case into the court of appeals so quickly
6 that you can't effectively make a record in the trial
7 court for the court of appeals to review on this question.
8 That's my understanding of why we even had this
9 discussion, and, Lisa, I don't know if that resonates with
10 you or not.

11 CHAIRMAN BABCOCK: Thank you, Richard.
12 Cynthia has her hand up.

13 MS. TIMMS: Yes, I was wondering if the
14 committee considered the possibility that an appellate
15 court could raise this issue on its own motion so that it
16 might in part get around the problem of the same lawyer,
17 same appellate lawyer, having to attack his trial court
18 performance. It's just a question for the committee.

19 CHAIRMAN BABCOCK: If the court -- if the
20 court of appeals considered it sua sponte, they would
21 still need authority to toll the Rule 6.2 of the Rules of
22 Judicial Administration and perhaps have authority to
23 remand for that purpose, so it wouldn't be inconsistent
24 with this rule. Maybe there should be something
25 additional that permits the trial judge to consider it sua

1 sponte.

2 MS. TIMMS: I think that that would be
3 right, if the committee thinks that that's something that
4 they would want to think about. The rule as currently
5 written requires a written motion, and so I think --

6 CHAIRMAN BABCOCK: Yeah.

7 MS. TIMMS: -- you could expand that
8 language.

9 CHAIRMAN BABCOCK: Yeah. Good point. I
10 don't want to get off topic here, but it's something
11 that's been bothering me for three meetings, and I may
12 have raised it before, but I don't think I did. Are we
13 going to just blow by ineffective assistance of counsel on
14 appeal?

15 HONORABLE BILL BOYCE: No. I think part of
16 the discussion of other circumstances in which ineffective
17 assistance arises will have to encompass both the same
18 lawyer or ineffective assistance on appeal. As stated
19 another way, I'm not sure that we can escape some kind of
20 collateral attack to address those circumstances. I guess
21 I have a thought that what I think we're debating is do we
22 want to channel as much of the ineffective assistance
23 mechanism into the direct appeal or some kind of a
24 parallel direct appellate proceeding, while recognizing
25 there's still going to be some other circumstances that

1 have to be addressed?

2 And if I can actually respond to the
3 question, Chip, that you had asked earlier, the references
4 to the language, "findings and recommendations," that was
5 actually parroting TRAP 29.4, which is the formulation
6 used there. So I don't know that -- speaking for myself,
7 I'm not sure that there was a thought to exclude the
8 possibility of making conclusions of law as part of that,
9 but that's where that language came from.

10 CHAIRMAN BABCOCK: Yeah, no, that's great.
11 I was, frankly, was piqued by Evan saying, you know,
12 typically you've got to have something you're reviewing
13 and if all you have is findings -- or maybe it was Scott's
14 point. You fungible appellate lawyers over there. Yeah,
15 go ahead, Richard.

16 MR. LEVY: This is Robert, actually.

17 CHAIRMAN BABCOCK: Oh, Robert. Sorry.

18 MR. LEVY: Does the trial court retain
19 jurisdiction to enter orders in the case while it's on
20 appeal, and could the trial court enter or actually
21 disqualify -- or not disqualify, but find that counsel was
22 ineffective, and would that actually then moot the appeal
23 because the individual did not get effective assistance of
24 counsel? Doesn't that change the dynamic of what's being
25 appealed? Can they look at the merits if there's a

1 finding that counsel was ineffective?

2 HONORABLE BILL BOYCE: So speaking for
3 myself, Robert, the way that this current draft proposal
4 on page 10 reads, it's framed in terms of the trial court
5 making recommendations, and I think implicit in that is
6 the assumption that any ordering that gets done and any
7 finding that gets done would get done by the appellate
8 court in conjunction with the appeal.

9 MR. LEVY: That means the appellate court is
10 making an original ruling? That just seems very unusual.
11 In criminal cases wouldn't the trial court make the
12 determination of ineffective assistance?

13 HONORABLE BILL BOYCE: It would at the
14 start, and let me flag another potential analog, which is
15 another way to look at this is similar to review of
16 sufficiency of security or a supersedeas for appeal, where
17 the rules say that the trial court expressly retains
18 jurisdiction. Maybe that's a better fit, that you've got
19 the trial court retaining jurisdiction to make whatever
20 findings are needed and then those can be challenged on an
21 appeal -- or challenged I guess, you know, on motion to
22 the appellate court.

23 But following up on your first point, I'm
24 not sure that a referral would necessarily mean that an
25 appellate court is making fact findings that it doesn't

1 have jurisdiction to make. I think it would be folded
2 into the appeal and be reviewed. "It" being the
3 ineffective assistance component of the appellate
4 challenge would be folded in and be reviewed along with
5 the merits, but there may be room to debate that.

6 CHAIRMAN BABCOCK: Richard Munzinger.

7 MR. MUNZINGER: It appears to me that a
8 trial court would have an obligation to satisfy itself
9 that counsel's assistance had been satisfactory. The
10 paragraph judgment -- (phone audio distortion)

11 THE REPORTER: I can't get that.

12 MR. MUNZINGER: Especially in situations
13 where I may be in prison or something like that and where
14 a person doesn't have sophistication under the law; but a
15 trial judge, it seems to me, if he's going to take away
16 the party's right to be a parent, he has a duty to himself
17 or herself to be sure that the party has had adequate
18 counsel; and if he believes that counsel has not been
19 adequate, he must then ask himself a question as a trial
20 judge, has this failure been such as to warrant a new
21 trial. Is -- if there were a rule which would require the
22 trial court to so state in his or her judgment, that that
23 issue has been reviewed by the trial court and found that
24 date or the assistance was satisfactory or, for example,
25 was not satisfactory and a new trial was granted and

1 grants a new trial. Or it was not satisfactory but it did
2 not lead to reversible error.

3 Now he has something to review as in other
4 cases. In most cases the appellate courts avoid ruling on
5 cases that -- on issues, rather, that have not been
6 presented to or decided by the trial court. Why is it
7 different in this case? Because there has to be some kind
8 of constitutional review of the adequacy of
9 representation, but at the same time, the trial court, if
10 there has to be such a review, why doesn't the trial court
11 in a rule specify that that duty falls first on the trial
12 court so that you're not in the position of having two
13 lawyers reviewing the case or appealing the case and
14 having an appellate court passing upon the finality of a
15 judgment, which may or may not have been the result of
16 good lawyering, or adequate lawyering. Not good
17 lawyering, but adequate lawyering.

18 It just seems to me that to stay in line
19 with the Rules of Appellate Procedure, at least as I
20 understand them, and I'm certainly not a specialist, my
21 belief had always been that if I hadn't raised an issue
22 with a trial court I had waived it on appeal. While that
23 may not be true for the person under the circumstances
24 that we're addressing, you could put a specific duty on a
25 trial court in a rule which says you better -- you must

1 make a finding regarding the adequacy of representation
2 and specify why if you find it was bad, and so one problem
3 is we may not know all of the facts.

4 We don't know if this guy has good
5 representation or what have you. True enough, you may
6 have to put it in the rule that the trial court has to
7 make inquiry if it believes so, but I think you're getting
8 into a real problem of -- a conceptual problem of having a
9 lawyer defending his work while at the same time being
10 attacked by another lawyer in the case in order to save
11 time is -- ludicrous is the word that comes to mind. I
12 don't know if it's ludicrous or what it is. It's
13 certainly analagous.

14 In any event, it speaks to me that there is
15 something that can be done at the trial court level that
16 revisits this thing of having the adequacy of
17 representation being addressed in the same appeal on the
18 grounds of taking away the trial. You could put the onus
19 on the trial court. Then you've got a finding to be
20 reviewed. The trial court, whom we have to assume is
21 competent, reviews the records of the case before him and
22 the conduct of counsel before him and states, "I find the
23 representation to be inadequate. I grant a new trial."
24 He's got that authority. He's got that authority. The
25 trial judge has the authority sua sponte to grant a new

1 trial in the interest of justice; and if he doesn't, that
2 is something that someone can appeal; and he can be
3 required to make a statement on the record and then let
4 that be part of the matters going up; but not saying
5 anything about it and just kind of hedging it and putting
6 a new lawyer in the case doesn't make sense to me. I'm
7 finished with my comment.

8 CHAIRMAN BABCOCK: Richard, I wish you were
9 here. Because if you were, you could see all of the
10 appellate lawyers are huddled up here, and they all have
11 looks on their face like they want to take you out to an
12 alley and beat you up.

13 MS. PFEIFFER: I won the prize that I get to
14 go first, but there's a lineup. I mean, I think it's
15 helpful to process this in terms of when does the
16 ineffective assistance become apparent. So if it becomes
17 apparent during the trial, the trial judge could declare a
18 mistrial, the trial judge could be -- wait until it's
19 presented with a motion for new trial, or the trial judge
20 could sua sponte grant a new trial. So if it's evident in
21 the trial court, the trial court would have that
22 authority.

23 This -- we're really dealing with the issue
24 of when this isn't identified or raised until you're
25 already in the court of appeals; and so at that point you

1 would typically need to go back and get additional
2 evidence and additional findings, because oftentimes
3 ineffective assistance of counsel does not just depend on
4 the trial record, but things that are extrinsic to the
5 trial record; and so you might need to have testimony from
6 the attorney or testimony from third parties or different
7 pieces of evidence that you didn't develop in the trial
8 itself. And so what this is doing is giving a mechanism
9 and a procedure and a time frame and all of the rules you
10 need to then go down to the trial court, promptly do that
11 while the case proceeds on appeal, and I don't think of
12 this as a situation where the appellate court would be
13 making an order in the first instance.

14 I think of it as at that stage the trial
15 court no longer has plenary power to make a ruling on
16 this, but the trial court could make findings of fact. I
17 think the trial court could also make conclusions of law,
18 send that back up to the court of appeals; and if there's
19 a record now that develops ineffective assistance of
20 counsel, I think the court of appeals then can decide that
21 issue as plain error or something that doesn't have to be
22 preserved in the trial court, but it could be part of the
23 appeal.

24 CHAIRMAN BABCOCK: Yeah, Richard, the
25 appellate lawyers are now appearing to be relieved, but I

1 think Robert Levy is trying to get a comment in. Robert.

2 MR. MUNZINGER: Well, may I briefly respond?

3 CHAIRMAN BABCOCK: Yeah. We would be
4 disappointed if you didn't.

5 MR. MUNZINGER: I promise it will be brief.
6 The appellate court in the circumstance just outlined in
7 that reply becomes the finder of fact in the first
8 instance. Is that constitutional? Is the Supreme Court
9 bound by the court of appeals findings of fact when it
10 comes up to the Supreme Court, if it wasn't found by a
11 trial court? That's especially in the situation if there
12 had been a jury. I don't recall what Orsinger told
13 me about -- told us all about whether the jury said -- if
14 there was a jury that it was binding or not, but the point
15 is the appellate court is the finder of fact in the first
16 instance on this issue.

17 CHAIRMAN BABCOCK: Got it. Robert.

18 MR. LEVY: Yeah, so a couple of points on
19 that. What would happen if the trial court issues a
20 recommendation that counsel was ineffective and the court
21 of appeals, I guess, rejects it? That creates a very, I
22 think, potentially problematic fact pattern if the -- you
23 know, somebody's rights -- or the children are taken away,
24 but it also -- one of the questions that I had really for
25 the appellate judges is how easy it would be to analyze

1 the case where they're making the judgment on the
2 effectiveness of counsel at the same time they're looking
3 at the underlying facts that might clearly suggest that
4 custody should be removed. In other words, it's obvious
5 and apparent that the facts warrant the removal, but they
6 also have to consider ineffective assistance and
7 potentially send the case back for new trial, and it just
8 seems like it -- I agree with Richard.

9 It just makes much more sense to have the
10 fact-finding take place at the trial level, and the trial
11 court can hear ancillary evidence on effective assistance.
12 The trial court is not bound by what's before her or him
13 in the record of what they see. They could -- you know, I
14 don't know why they wouldn't be able to call witnesses and
15 make conclusions, but, you know; and what do you do if the
16 court of appeals doesn't feel that the trial court got
17 enough evidence about the issue? Do they send it back for
18 additional testimony, just because they don't -- they
19 can't reach a decision? That just seems very awkward to
20 do it that way.

21 CHAIRMAN BABCOCK: Yeah. A question that I
22 have -- and maybe there's an easy answer, but if the trial
23 court has lost plenary power, does it have jurisdiction to
24 do any of this?

25 MR. YOUNG: Limited remand.

1 MS. PFEIFFER: Yeah.

2 CHAIRMAN BABCOCK: I mean, but can the
3 Supreme Court by rule create jurisdiction in the trial
4 court? Yeah, Evan.

5 MR. YOUNG: I mean, to me the whole thing is
6 this is not reviewing a new judgment or anything like
7 that. We're smuggling this in as an appellate issue, and
8 the issue is should the trial court's judgment be
9 reversed, and we're allowing a new issue, and the issue is
10 -- to justify reversal is I got ineffective assistance,
11 and the court of appeals can allow -- you know, the rule
12 can allow that new issue to be brought up and say, "Well,
13 we don't have the evidence that we would need. We're not
14 a fact finder," and so that's the purpose of the referral.
15 And the judgment that's being reviewed is the same one
16 that would have been reviewed anyway on the merits, and so
17 it's not starting a whole new collateral attack, a whole
18 new docket number, all of that kind of stuff. It's, keep
19 the focus, court of appeals in an appellate capacity
20 deciding whether or not to affirm or reverse a single
21 judgment, and all that this would do would be an
22 expeditious way to send it back so that someone who is
23 capable of it -- but I disagree a little bit with Scott.
24 I don't think you need to have an actual judgment of any
25 sort that says it was ineffective. It's just now an

1 appellate point.

2 CHAIRMAN BABCOCK: Yeah, Bill.

3 HONORABLE BILL BOYCE: And in answer to your
4 question, can you do that by rule? Looking at TRAP
5 24.3(a), I think the answer is yes.

6 CHAIRMAN BABCOCK: Okay.

7 MS. PFEIFFER: When I said lost plenary
8 power, I'm referring to plenary power over the order and
9 the review. I don't think the trial judge could then
10 vacate its own order once it's on appeal.

11 MR. YOUNG: Exactly.

12 MS. PFEIFFER: But the trial court has power
13 to open an evidentiary record, make additional findings,
14 and send that back up.

15 CHAIRMAN BABCOCK: Go ahead.

16 MR. PHILLIPS: The way I've thought about
17 this -- and Scott's problem, too -- about the order is we
18 do say most of the time the court of appeals isn't going
19 to rule on something the trial judge didn't consider. But
20 that's only most of the time. We have a concept. Federal
21 courts call it plain error. We call it fundamental error.
22 There's very little of it, right? Most of the time if
23 you're trying to argue fundamental error in the court of
24 appeals you're going to lose because you don't have
25 anything better, but I think it's -- this fits in that

1 concept.

2 The idea is that the ineffective assistance
3 of counsel is a fundamental error that affects the
4 judgment, and that's what's being reviewed, is the
5 termination judgment; but to decide whether that
6 fundamental error exists, we -- the court of appeals can
7 send it back to the trial court for these fact findings
8 we've discussed; and then, yeah, it's either fact findings
9 and the court of appeals makes its own judgment as to
10 whether that fundamental error exists or the trial court
11 can make a conclusion of law and send that up.

12 But, again, it's not a matter of having an
13 order for the court to review. That's the termination
14 order. It's a matter of what are the issues that we can
15 appeal on. If one of those is ineffective assistance,
16 which I think could be couched in the idea of
17 fundamental error, then we'll get the fact findings we
18 need and let the court of appeals decide whether that
19 error happened.

20 The other thing I want to talk just briefly
21 on is this idea that the trial court should somehow be
22 obligated to figure this out before it goes up in the
23 first place, that they have to like put something in the
24 judgment that says they're comfortable there was effective
25 assistance. There may be some merit to that concept, but

1 what we're trying to address here is the idea that this
2 doesn't become apparent, right, because if it comes down
3 to things of there are witnesses that could have been
4 called, there's no way the trial court is going to know
5 that, would have any way to -- and we don't want to put it
6 on the trial court the burden to ask, "Is there anybody
7 else you could call?"

8 I mean, I get the need to want to have a
9 trial judge make that finding in the first instance, but I
10 just don't think it's feasible to do that or ask the judge
11 to make that affirmative finding before signing the
12 termination judgment, so this gives a procedure to do that
13 and then sort of allows them to continue at the same time
14 so we don't slow down the track of trying to get to a
15 final.

16 CHAIRMAN BABCOCK: Scott. Oh, I'm sorry.
17 Justice Kelly, and then Scott. How come you're not over
18 here?

19 HONORABLE PETER KELLY: Because I'm not one
20 of the appellate lawyers anymore.

21 CHAIRMAN BABCOCK: Well, you used to be.

22 HONORABLE PETER KELLY: Used to be. So I'm
23 over here with Justice Christopher.

24 HONORABLE TRACY CHRISTOPHER: In the middle.

25 CHAIRMAN BABCOCK: Yeah, Justice Christopher

1 is inching down here I noticed.

2 HONORABLE PETER KELLY: Judgment comes up
3 severing the parent-child relationship. In the court of
4 appeals, we have to give deference to the fact findings,
5 but we think something is fishy because someone has made a
6 motion to -- that there's been ineffective assistance, so
7 it goes back down for more fact finding. The trial court
8 finds facts that there was ineffective assistance, and
9 that comes up to us and then we have to give deference to
10 those facts. So essentially what we're doing is creating
11 an affirmative defense for a matter of an avoidance
12 because despite the fact that it's been established by the
13 facts we have to give deference to that the parent-child
14 relationship should be severed, we also have to give
15 deference to the facts that despite that finding we should
16 rule in favor of not severing the parent-child
17 relationship. Essentially it's an affirmative defense,
18 because it's been established in the trial court that
19 because counsel was ineffective, witnesses weren't called,
20 that the parent-child relationship should be severed, and
21 we would affirm.

22 MR. ORSINGER: Somebody on the phone has got
23 their phone off of mute, and it's making so much noise we
24 can't hear. Can everybody that is on the phone mute their
25 phone?

1 HONORABLE PETER KELLY: Am I getting this
2 wrong?

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: I'm not going
5 -- I'm not going to reply to Judge Kelly's comment, which
6 I thought was good. But so in the criminal system,
7 sometimes you will see ineffective assistance of counsel
8 raised for the first time on appeal, and we have something
9 in our courts that say, well, it's a silent record. We
10 don't really know what happened down there, so we don't
11 see ineffective assistance of counsel. So I think the
12 idea behind this is to no longer have the silent record.
13 We send it back, we develop the facts, then we don't have
14 a silent record.

15 It is possible that -- and it has happened,
16 although very rarely, that you can look at a claim of
17 ineffective assistance of counsel for the first time on
18 appeal and conclude that no reasonable lawyer would have
19 done what that lawyer did and order a new trial. And,
20 yes, you know, we do it, even though we've read the record
21 and see that the guy really, really, really did commit
22 that crime, right. We -- we still order the new trial,
23 because he had ineffective assistance of counsel. So we
24 have concluded that you have the right to effective
25 assistance of counsel in these cases, so it should be the

1 same procedure. By doing this, we fill in what's known as
2 the silent record problem in the courts of appeals.
3 It's -- it's not the best, but it's something that can be
4 done, because obviously on the criminal side you can do
5 habeas appeals after the fact, right. And you can take as
6 much time as you want to to develop the facts on a habeas
7 appeal and get it all done, but we don't have that luxury
8 in the parent-child termination situation.

9 So my only problem with the proposed rule is
10 I don't really know what it means to say "good cause." So
11 I didn't like that standard. You know, I would prefer to
12 say a, you know, "plausible claim of ineffective
13 assistance of counsel," something to that effect, because
14 I don't want to say "no good cause here" and have that
15 somehow terminate prematurely a claim of ineffective
16 assistance of counsel.

17 HONORABLE BILL BOYCE: Does "prima facie"
18 work for you?

19 HONORABLE TRACY CHRISTOPHER: Probably.
20 "Colorable." I like "colorable" better, because if you
21 make it "colorable," we'll grant them quicker, and it will
22 get down to the trial court faster and get back up to us
23 faster.

24 MS. PFEIFFER: I agree with that. I do
25 think "good cause" is sort of laden with different

1 interpretations.

2 MR. PHILLIPS: Chip, in response to Justice
3 Kelly's question, I think the way I've been thinking about
4 it is it's not that you have two competing fact findings
5 to defer to. I think the new ones would suggest that the
6 first judgment is infected with this fundamental error,
7 and so I think that's how I've been kind of thinking about
8 it. If there was ineffective assistance, then whatever
9 facts were found are defective because there's some other
10 thing that should have been done in that fact finding; and
11 so that's why I like the concept of fundamental error
12 here, because it undermines everything that happened in
13 the trial court; and so that would be where you put your
14 focus, I think, is if you think that those findings stand
15 up that there was ineffective assistance, then I think
16 that would allow remand on that, and you don't have to
17 kind of worry about deferring to the first fact finding,
18 because it infects it.

19 CHAIRMAN BABCOCK: Yeah, Scott.

20 MR. STOLLEY: I think the thing that really
21 makes this so thorny is the 180-day rule.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. STOLLEY: And so trying to shoehorn all
24 of this into 180 days is really difficult, but we all
25 understand the policy behind the 180-day rule, which is we

1 want to give the children and the parents a quick
2 resolution and some finality. My main point is if we're
3 going to go ahead and refer it back to the trial court, I
4 think we ought to unleash the trial judge not only to make
5 findings, but also to make -- to make a ruling that's then
6 reviewable.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. STOLLEY: I mean, as long as it's going
9 back to the trial judge, let the trial judge rule in the
10 first instance.

11 CHAIRMAN BABCOCK: Yeah. All right. Well,
12 I had hoped that we could bring closure to this entire
13 topic today, but we haven't, and there are several other
14 important aspects of it on pages 12, 13, and 14 of the
15 memo.

16 MR. YOUNG: All that is is my ruminations.
17 Not that important.

18 CHAIRMAN BABCOCK: Well, we'll be the judge
19 of that, although I tend to agree, but --

20 HONORABLE BILL BOYCE: We're going to refer
21 that.

22 CHAIRMAN BABCOCK: But for sure next time
23 we'll get to the end of this, don't you think, Bill? Next
24 meeting?

25 HONORABLE BILL BOYCE: Ineffective

1 assistance, yes. There's another piece of this with
2 Anders briefs and things like that.

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE BILL BOYCE: But I would hope we
5 can get direction.

6 CHAIRMAN BABCOCK: Well, thanks, everybody.
7 A very productive day, although difficult at times to
8 follow. But don't forget at Jackson Walker there is a
9 reception in about 28 minutes and the picture of our
10 committee, which for those of you who are new, we do every
11 three years when there's a new committee appointed by the
12 Court, and we would have done it several months ago but
13 for the fact that we weren't meeting in person at that
14 time. So the picture is going to be at 6:00-ish, so if
15 you're going to be late to the 5:30 reception, don't be
16 very late. Yeah, John.

17 MR. KIM: Yeah, as I look around, do you
18 prefer us to wear ties?

19 CHAIRMAN BABCOCK: You can wear whatever you
20 want. You're fine.

21 MR. KIM: That's good because I don't know
22 if I have time to go to Woolworth.

23 CHAIRMAN BABCOCK: A wig would be good,
24 actually, but yeah, go ahead, on the phone whoever is
25 talking.

1 MR. LEVY: It's Robert.

2 CHAIRMAN BABCOCK: Hey, Robert.

3 MR. LEVY: I will very much miss being there
4 with you in person, but for those of you who are from
5 Houston or Astros fans, it's a nice day at the ballpark.

6 HONORABLE ROBERT SCHAFFER: 9 to 4, Houston.

7 CHAIRMAN BABCOCK: 9 to 4, Houston
8 apparently. As expected, but good for the Astros. Okay.
9 We're in recess.

10 (Adjourned at 5:03 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 8th day of October, 2021, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 2,155.25.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 3rd day of November, 2021.

/s/D'Lois L. Jones
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