

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR NEW RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of existing rule:

There is no existing rule at this time.

II. Proposed Rule:

Rule 13a. Dismissal of Causes of Action with No Basis in Law or Fact.

(a) This rule governs a motion to dismiss a cause of action that has no basis in law or no basis in fact. A party may move to dismiss a cause of action under this rule no later than 60 days after the date the moving party was first served with a pleading stating the cause of action.

(b) A cause of action has no basis in law when the cause of action is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) A cause of action has no basis in fact when no reasonable person, from the face of the pleading, could believe that more than a de minimis probability exists that the factual allegations in support of the cause of action could be proven at trial.

(d) At least 21 days before filing a motion under this rule, the moving party must serve a notice of intent to file the motion; however, if a cause of action is added or amended less than 45 days before the date set for trial, then the moving party may serve a notice of intent to file a motion under this rule for dismissal of the added or amended cause of action. The notice may be in letter form and must: identify each cause of action that will be the subject of the motion; state whether the cause of action has no basis in law, no basis in fact, or both; and provide at least a brief description of the grounds for dismissal. The responding party may nonsuit a cause of action before a motion is filed under this rule.

(e) If a cause of action is nonsuited before a motion is filed under this rule, then the cause of action may not be the subject of a motion under this rule. If a cause of action is amended before a motion is filed under this rule, then a moving party may serve an amended notice of intent to file a motion under this rule, and only the amended cause of action may be the subject of a motion under this rule.

(f) A motion under this rule must: identify each cause of action that is the subject of the motion; state whether the cause of action has no basis in law, no basis in fact, or both; and state the specific grounds for dismissal.

(g) A response to a motion under this rule may contain a certificate of conference or affidavit describing what efforts were made by the responding party, before the filing of the motion, to inform the moving party of the grounds for and authorities supporting the cause of action.

(h) In determining whether a cause of action has no basis in law or no basis in fact, the court must not admit or consider evidence.

(i) The court must rule on a motion under this rule no later than 45 days after the date on which the motion is filed.

(j) If the court grants or denies, in whole or in part, a motion under this rule, then the court must award to a prevailing party the costs and attorney's fees that were reasonable and necessary in prosecuting or defending the motion.

(1) In determining whether a party is a prevailing party, the court may consider the extent to which the motion was granted or denied, the relative importance of the parts of the motion that were granted and denied, whether any part of the motion was denied because a pleading defect was cured by or is curable by amendment, and any other factor that may, from the face of the record and without the admission or consideration of evidence, be considered in an equitable and just determination. The court may determine that a party has prevailed on all or only a part of the motion, that no party has prevailed on any part of the motion, or that different parties have prevailed on different parts of the motion.

(2) In determining whether costs and attorney's fees were reasonable and necessary, the court may consider any relevant evidence, including the content of the notice of intent served under subdivision (d), of any certificate of conference or affidavit provided under subdivision (g), and of any other communications between the moving and responding parties regarding the grounds for and authorities supporting either the cause of action or the motion.

(3) The court may assess an award of costs and attorney's fees against the party, the party's counsel, or both, but if an award is made because a cause of action has no basis in law, the court may not assess the award against a represented party.

(4) This subdivision (j) does not apply to an action by or against the State, other governmental entities, or public officials acting in their official capacity or under color of law.

(k) This rule does not preempt or supersede, but exists in addition to, all other procedures and remedies that exist for the dismissal of causes of action, sanctions for pleading misconduct, and any other related subject, whether such procedures and remedies exist by rule, by statute, at common law, or by other legal authority.

(l) This rule does not apply to actions under the Family Code.

III. Comments of the State Bar Court Rules Committee Regarding this Proposal:

1. Section 22.004(g) of the Texas Government Code requires the Supreme Court of Texas to adopt a dismissal rule for causes of action that have “no basis in law or fact.” The Committee noted that the Legislature chose the phrase “no basis in law or fact” instead of the Federal Rule of Civil Procedure 12(b)(6) language of “failure to state a claim upon which relief can be granted.” The phrase “no basis in law or fact” appears in an existing sanctions rule (Texas Rule of Civil Procedure 13), and the similar phrase “no arguable basis in law or in fact” appears in two statutes pertaining to frivolous actions (Texas Civil Practice and Remedies Code §§ 13.001(b)(2) and 14.003(b)(2)). From this, the Committee concluded that the Legislature intended Texas Government Code § 22.004(g) to require a sanction rule rather than a general dismissal rule. The Committee therefore recommends that the new rule be numbered 13a so that it follows the existing general sanctions rule.

2. Unlike Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code § 10.001, Texas Government Code § 22.004(g) does not contain any “good faith,” “bad faith,” “best knowledge, information, and belief,” or other language that would support allowing an inquiry into the subjective culpability of the party or counsel who filed the pleading. Additional support for an objective standard is found in the requirement that a motion under the new rule be decided without evidence, as the introduction of evidence may be necessary to determine subjective culpability. The Committee therefore sought to define “no basis in law or fact” with objective standards.

3. The definition of “no basis in law” is based on Federal Rule of Civil Procedure 11(b)(2) and Texas Civil Practice and Remedies Code § 10.001(2). The text of those provisions reflects the common understanding of when a cause of action is legally baseless. By reproducing that text in this rule, courts applying this rule will have the benefit of the existing state and federal precedents interpreting that text.

4. The definition of “no basis in fact” reflects the Committee’s opinion that the new rule must be consistent with the Texas Constitution’s right of trial by jury. This would not permit dismissal merely because a cause of action is unlikely to succeed. On the other hand, a pleading may allege facts that are, on their face, so “irrational or wholly incredible” that no reasonable person would consider the probability of their proof to be anything more than *de minimis*. See *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (discussing when a federal court complaint is factually frivolous on its face). A cause of action dependent on such factual allegations should be dismissed under this rule.

5. The Committee is concerned that the fee-award requirement of Texas Civil Practice and Remedies Code § 30.021 could cause the new rule to become the subject of abuse, particularly by counsel who is more experienced in a particular subject area or who may wait until the last possible moment to disclose controlling or highly persuasive authority of which an opponent is unaware. The Committee does not believe that the court system

would be well-served by satellite litigation over the imposition of sanctions when the dismissal of a case could have been obtained inexpensively without the court's intervention. Accordingly, the proposed rule provides for pre-filing notice in a manner similar to Federal Rule of Civil Procedure 11(c)(2).

This notice provision draws on the experience of federal courts under Federal Rule of Civil Procedure 11. Absent a pre-filing notice under that rule, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11;" accordingly, the federal rule was revised so that, "under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions." FED. R. CIV. P. 11 (Adv. Comm. Note to 1993 am.).

Given the mandatory award of costs and attorney's fees to a prevailing party under the proposed rule, a party's reluctance to abandon questionable contentions may be greater than under the former federal rule. Such reluctance would likely result in additional litigation (and possibly an appeal) to prosecute and defend motions under this rule. The notice provision serves to limit such an undesirable result by encouraging communications between counsel that may result in dismissal of the cause of action or a decision not to file a motion. To further encourage open discussions, the proposed rule provides that the court may consider the content of the communications between the parties in determining whether a party's costs and attorney's fees were actually "reasonable and necessary."

The exception for causes of action that are added or amended "less than 45 days before the date set for trial" recognizes that a 21-day notice requirement may be impractical when a case is near its trial date. While a notice of intent is not necessary in that situation, the trial court may still consider the parties' efforts to confer, or the lack of such efforts, in determining whether costs and attorney's fees are reasonable and necessary. A similar period of 45 days is used in Texas Rules of Civil Procedure 167.2 and 190.2(b).

6. Texas Civil Practice and Remedies Code § 30.021 recognizes that a motion to dismiss may be granted in part and denied in part. In addition, a motion may be denied because a pleading defect was properly identified but was either cured by, or is curable by, amendment. In such circumstances, a court may be justified in finding that neither party was a prevailing party. The proposed rule addresses this situation.

7. Texas Civil Practice and Remedies Code § 30.021 does not specify whether an award of costs and attorney's fees should be assessed against a represented party or its counsel. Federal Rule of Civil Procedure 11(c)(5) and Texas Civil Practice and Remedies Code § 10.004(d) do not permit monetary sanctions against represented parties for legally frivolous pleadings and motions. The Committee believes that a similar provision should be included in the proposed rule. In other situations, the court must determine whether the award of costs and attorney's fees should be assessed against a party, the party's counsel, or both. In making that determination, the court should consider the Federal Rules Advisory Committee notes on the 1983 and 1993 amendments to Federal Rule of Civil

Procedure 11, precedent under that rule, and precedent under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code § 10.004(d).

8. The Committee has some concern that the denial of special exceptions or a motion for summary judgment, under some circumstances, could be treated as a motion under this rule. The Committee does not believe that the Legislature intended such a result for the reasons stated in Comment 1 above. The proposed rule therefore includes a saving clause that preserves all other procedures and remedies that may exist for the dismissal of causes of action, sanctions for pleading misconduct, and any other related subjects.

9. This proposal is being presented only on behalf of the State Bar of Texas Court Rules Committee. It should not be construed as representing the position of the Board of Directors, the Executive Committee, or the general membership of the State Bar.

Respectfully submitted,

/s/ Russ Meyer

Russ Meyer
Chair, State Bar Court Rules Committee

Date: November 15, 2011