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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 18, 2011

(FRIDAY SESSION)

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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 18th day of November,
2011, between the hours of 8:57 a.m. and 4:58 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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HB 274-Proposed Rule 94a	23087
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Documents referenced in this session

11-26	HB 274 (Article I)
11-27	Letter from Tex-ABOTA with proposed rule (8-25-11)
11-28	Proposed Rule 13a from State Bar of Texas
11-29	Proposed Rule 94a from SCAC subcommittee
11-30	Memo from Frank Gilstrap (11-17-11)
11-31	Attachment commentary with SCAC revisions (Ancillary Proceedings Task Force)
11-32	Sequestration commentary (Ancillary Proceedings Task Force)
11-33	Garnishment commentary (Ancillary Proceedings Task Force)

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2 CHAIRMAN BABCOCK: Good morning, everyone, a
3 full agenda today, and we will start off as usual with a
4 status report from Justice Hecht.

5 HONORABLE NATHAN HECHT: Just to say that
6 everything is moving along. We've gotten a number of
7 comments on the electronic service rule and also on the
8 foreclosure rules.

9 CHAIRMAN BABCOCK: I don't know if that was
10 cymbals or --

11 MR. LOW: Drum roll.

12 HONORABLE NATHAN HECHT: But they're on
13 target for being in effect January the 1st.

14 MS. SECCO: Right.

15 HONORABLE NATHAN HECHT: And then we're
16 working on Rule of Judicial Administration 16, which has to
17 do with additional funding for some cases, and also on
18 House Bill 906 rules, which have to do with parental rights
19 termination cases, and all of those are on the Court's
20 agenda, and we plan to talk about them at the conference in
21 December. The task force on small claims is meeting
22 diligently under the leadership of Justice Casey in Fort
23 Worth, and Chief Justice Phillips' group on expedited cases
24 has been meeting and is working on coming up with their
25 report, so we think all of those rules that we've been

1 charged by the Legislature with implementing are in hand.

2 Then, lastly, we are undertaking to look at
3 changing the limitations on appellate briefs from pages and
4 font size to numbers of characters and similar to the
5 Federal rules; and the several people who are interested in
6 this, appellate lawyers, our clerk, Blake Hawthorne,
7 others, are working on a draft; and they plan to present to
8 it the Council of Chief Justices at their January 19th
9 meeting, so when we get through some of this legislative
10 material that we have to cover, we look forward to having
11 that rule, which will help us because page limits make less
12 sense with electronic filing and we need some other way of
13 measuring the length of briefs, so that's what the Court is
14 doing. I'll be happy to try to answer questions.

15 CHAIRMAN BABCOCK: Any questions from
16 anybody? Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: Are y'all going
18 to -- are you working on any forms in connection with 736?
19 Because the rule said that you might promulgate forms.

20 HONORABLE NATHAN HECHT: We're not working on
21 them right this second. Tommy --

22 MS. SECCO: Bastian.

23 HONORABLE NATHAN HECHT: -- Bastian has
24 offered to do some, but we haven't -- we don't have a
25 target date on that.

1 HONORABLE TRACY CHRISTOPHER: I think there's
2 still concern about the homeowners association and what the
3 rule is actually going to look like --

4 HONORABLE NATHAN HECHT: Yeah.

5 HONORABLE TRACY CHRISTOPHER: -- in terms of
6 foreclosure, and when Tommy was here before he said there
7 were not any nonjudicial foreclosures of homeowners
8 association liens now, but we have heard that there are
9 some now, and I assume it's based on homeowners
10 associations that have been created more recently than the
11 old ones that would require a judicial foreclosure, and the
12 question is still whether you have one of those old
13 homeowners associations that require normal judicial
14 foreclosure, is 736 in place of that now, or do they still
15 have to do a regular judicial foreclosure?

16 HONORABLE NATHAN HECHT: I don't know.

17 HONORABLE TRACY CHRISTOPHER: That's the
18 question.

19 HONORABLE NATHAN HECHT: We'll have to look
20 at that.

21 CHAIRMAN BABCOCK: Okay. Any other
22 questions? All right. We're on to dismissal, House Bill
23 274, and Judge Peeples has led our subcommittee on this,
24 which has been meeting, and, Judge Peeples, take it away.

25 HONORABLE DAVID PEEPLES: Thank you. Let me

1 first tell you, you'll need to have five documents in front
2 of you. The major one is the subcommittee draft, and it
3 says that at the top. It's a little bit more than a page,
4 and we'll be going through that section by section. That's
5 the first thing. Also, you should have the statute that
6 mandates that -- and gives the Supreme Court rule-making
7 power and tells it to come up with a dismissal rule, and
8 there's also a section that talks about attorney's fees, so
9 you need the statute. Also we had drafts from ABOTA and
10 from the State Bar committee. You ought to have those, and
11 then fifth, Frank Gilstrap, who is a member of the
12 subcommittee, wrote a very good memo that we'll be talking
13 about a little bit, and I asked him to get it in shape for
14 the full committee here and asked Angie to send it to you.
15 So you'll need to have the subcommittee draft, ABOTA, the
16 State Bar draft, the statute, and Frank Gilstrap's memo.

17 Let me say that -- I want to tell you who was
18 on this subcommittee. There were 11 of us. We had three
19 telephone conference calls, and nine of the members were on
20 all three of those calls, and two other members were on
21 some but not all, very well attended, and I feel very good
22 about our subcommittee, and those members are Jeff Boyd,
23 Elaine Carlson, Nina Cortell, Bill Dorsaneo, who couldn't
24 be here today. He's got a publication project he's working
25 on. Frank Gilstrap, Rusty Hardin, and Rusty is in trial in

1 Newark, New Jersey, and couldn't be here. Lonny Hoffman,
2 Richard Munzinger, Gene Storie, and Marisa Secco.

3 Just one general statement. Some of the
4 things in this draft that are before you today are straight
5 out of the statute, just mandated by the statute, and we
6 just put them in. There are other provisions that are not
7 mandated by the statute but we think are within the spirit
8 of the statute, so there will be some discussion about
9 things that are straight out of the statute and things that
10 are maybe implicit but not mandated expressly by the
11 statute, and that may be an issue on some of these. Now,
12 what I want to do is take the subcommittee draft and take
13 it section by section and move through it, and by far the
14 most weighty part of this draft is section (a), grounds and
15 content of motion, and I'll say just a few things by way of
16 preface and then open it up for discussion.

17 The Gilstrap memo has I think 11 different
18 shades and varieties of possible things that could be meant
19 by a claim for which there is no basis in law or fact.
20 That wording is out of a statute, and we have the statute's
21 wording here in our proposal A, but Frank's memo has things
22 like "failure to state a claim on which relief could be
23 granted," "failure to state a cause of action," and things
24 like that, which are in the ballpark, and you might want to
25 look at those just to see what some of the shades and

1 varieties of this could be, but in the first part of sub
2 (a), sub (1), we have our proposal on that and then the
3 second subdivision of that section just has some additional
4 matters. We need to talk about all of this in just a
5 moment.

6 And let me say, take a look at sub (a), lines
7 five and six. That language is straight -- most of it is
8 straight out of the statute, and the committee was divided
9 on whether to have lines five and six and nothing else. In
10 other words, not have sub (a) and sub (b) or whether to
11 have lines five and six and in addition subsections (a) and
12 (b), which attempt to elaborate a little bit on what it
13 means to say a claim has no basis in law and has no basis
14 in fact; and the language that we have there is
15 substantially what was recommended by the State Bar
16 committee; and sub (a), lines 8 through 10, comes from
17 procedural Rule 13 and the Federal sanctions rule. I think
18 that's 11, and there's a provision in the Civil Practice
19 and Remedies Code, so this is substantially based upon that
20 but not entirely.

21 Let me flag for you that on line five, "upon
22 motion and hearing," those two words, "and hearing," are
23 intended to say that the court needs to hold a hearing on
24 this, that it should not be decided on submission. Now,
25 that may be an issue, but instead of having a standalone

1 provision that says there must be an oral hearing or the
2 court should hold an oral hearing we just put those two
3 words there, but that's the intent of those, and that might
4 be an issue, and with that said, I guess I'll open it up.

5 CHAIRMAN BABCOCK: Okay. Stephen.

6 MR. TIPPS: I suggest a technical correction
7 or adjustment on line 10 to insert the word "for," f-o-r
8 after the word "or" and before (d) because I think the
9 intent is to say that a claim would have a basis in law if
10 "by a reasonable argument for either the extension,
11 modification, or reversal of existing law or for the
12 establishment of new law," but without the word "for" it's
13 not -- that's not entirely clear. So unless I'm
14 misunderstanding the committee's intent I think that the
15 intent would be furthered by adding "for" parallel to "for
16 the extension, modification, or reversal."

17 CHAIRMAN BABCOCK: Richard Munzinger.

18 MR. MUNZINGER: I was a member of the
19 subcommittee, and there was -- I wasn't the only person I
20 think who felt this way, but if others agree they can speak
21 up. I do not believe that subdivision (a) is intended by
22 the Legislature when it enacted the statute. The
23 Legislature does not make use of any language concerning
24 arguable claims or good faith arguments for the extension,
25 modification, et cetera, of existing law. This language

1 came from the State Bar's draft, and my personal belief is
2 that the State Bar's draft is defective for the same
3 reason, and I don't want to take a long time, but the long
4 and short of my position is if the state Legislature, aware
5 that Rule 13 and various sections of the Civil Practice and
6 Remedies Code use language such as "for the extension,
7 modification of existing law or the establishment of new
8 law," but does not include that in its statute, it must
9 under ordinary rules of statutory interpretation be
10 intended not to have used that language.

11 The language for the extension, modification,
12 et cetera, does appear in Rule 13. It does appear in more
13 than one statute, but it does not appear in the statute
14 that requires the Supreme Court to adopt a rule concerning
15 dismissal, and my personal belief is, is that if you
16 include something along the lines of subdivision (a), you
17 have the exception has swallowed the rule; that is, it
18 really makes the rule meaningless. My personal belief is,
19 is that the Legislature intended for the Supreme Court to
20 adopt a rule similar to Rule 12(b)(6) of the Federal rules
21 and Rule 12(c) of the Federal rules, which is a motion for
22 judgment on the pleadings, and I believe that to be the
23 case because the Supreme Court among other things -- I mean
24 the Legislature among other things says, "No evidence is to
25 be considered," but I did not want this group to believe

1 that all of the committee believed that subdivision (a)
2 should be part of the rule. I do not.

3 CHAIRMAN BABCOCK: Elaine.

4 PROFESSOR CARLSON: I think it's fair to say
5 that the majority did think that --

6 MR. MUNZINGER: I agree with that.

7 PROFESSOR CARLSON: -- that it should be
8 included, and one of the things that we did not determine
9 definitively and the Court will wrestle with is really
10 what's the implication of the dismissal with a mandatory
11 imposition of attorney's fees? Is it with or without
12 prejudice? There's obviously extraordinary far-reaching
13 implications either way. Even without prejudice you have
14 the potential for res judicata problems on claims that
15 could have been asserted unless the court interprets it
16 some way.

17 The legislative intent is kind of hard to
18 glean because we've got three sentences. The first says,
19 "The Supreme Court shall adopt rules that provide for the
20 dismissal of actions that have no basis in law and fact on
21 motion without evidence," and I think the majority of the
22 subcommittee felt that this would be a proper standard for
23 the Supreme Court to consider in adopting the rule because
24 of the implications of dismissal and mandatory attorney's
25 fees.

1 CHAIRMAN BABCOCK: Okay. Yeah, Frank.

2 CHAIRMAN BABCOCK: Then Judge Christopher.

3 MR. GILSTRAP: The simplest approach would be
4 to do what Richard says and just say that the court must
5 dismiss the claim for leave, it has no basis in law or
6 fact. Then we could go ahead and work through all the
7 procedural aspects of the rule. It would be real neat,
8 real nifty, and real easy, and we would leave to the courts
9 the task of deciding what has no -- what does "no basis in
10 law or fact" mean. The problem is we would be handing the
11 courts a mess. We are not writing on a clean slate.

12 There's a lot of law under Chapter 13 and 14 of the Civil
13 Practice and Remedies Code. Chapter 13 deals with suits by
14 in forma pauperis, if I'm saying that right, and Chapter 14
15 deals with subset, which is prisoner suits. There's a lot
16 of law there. None of us as practitioners ever deal with
17 it because we don't represent paupers or prisoners. The
18 people that deal with it are the people in the DA's office,
19 the Attorney General's office, and the court of appeals
20 judges. They're -- those statutes say the suit shall be
21 dismissed if it has no arguable basis in law or fact.

22 Now, you can think for a while if there's
23 some difference between no arguable basis in law or fact
24 and no basis in law or fact and try to get your mind
25 wrapped around that. I really haven't had much luck there.

1 The problem is the courts are almost certainly going to
2 reach to this body of law to try to construe these words,
3 and the cases there are split. There's a split in the
4 court of appeals. There's even a case out of the
5 Fourteenth Court in Houston where there's a dissent and a
6 majority opinion on this very issue, and I've got it cited
7 in that little standards memo.

8 One group says it's based -- that it has no
9 arguable basis in law if it's based on -- first of all,
10 those cases say that it can't be dismissed for no arguable
11 basis in fact without a hearing, so all the cases involve
12 no arguable -- dismissal for no arguable basis in law, and
13 then there's two standards. One group says it means an
14 indisputably meritless legal theory or an irrational or
15 wholly incredible factual allegations, and they get those
16 out of some Federal cases. The other group says it means
17 it fails to state a cause of action, and they kind of draw
18 on Rule 12(b)(6). The Federal law underneath that is
19 equally convoluted, and if -- you know, if the Court wants
20 to adopt and simply say "no basis in law or fact" and let
21 the courts figure it out, that's fine, but the Court, the
22 Supreme Court, will ultimately wind up deciding that issue.

23 And, secondly, but it's our job to at least
24 let the Court know that the problem is there and see if we
25 can come up with maybe a better, cleaner standard that will

1 avoid the problem, because that's -- that's what you do
2 when you make rules.

3 CHAIRMAN BABCOCK: Justice Christopher.

4 HONORABLE TRACY CHRISTOPHER: A couple of
5 just sort of technical things. If the subcommittee wanted
6 an oral hearing, you need to say "oral hearing," because
7 the summary judgment rule that contains the word "hearing"
8 has been construed by the courts to mean a submission,
9 without an oral hearing. So if you really want oral,
10 you've got to say it, and then my second sort of technical
11 question is the statute says it has to be granted within 45
12 days of the filing of the motion --

13 HONORABLE DAVID PEEPLES: Yeah.

14 HONORABLE TRACY CHRISTOPHER: -- and you-all
15 have within 45 days of the hearing.

16 HONORABLE DAVID PEEPLES: Let me just -- on
17 line 25, I goofed on that. I hate to say it, but I goofed,
18 and it needs to say at the end "must be decided within 45
19 days of filing" instead of "of hearing," and I just made a
20 mistake.

21 CHAIRMAN BABCOCK: Alex, and then Judge
22 Yelenosky.

23 PROFESSOR ALBRIGHT: I have some questions
24 about the standard that you-all chose for no basis in fact,
25 so I don't know if y'all want to get into that now or wait.

1 Frank, this is really helpful, this memo of all these
2 standards. The statute says you can't consider evidence,
3 right?

4 HONORABLE STEPHEN YELENOSKY: Yes.

5 HONORABLE DAVID PEEPLES: Yes.

6 PROFESSOR ALBRIGHT: So what you-all chose is
7 a Keller's type statement of the no evidence standard,
8 but -- so I have two comments. One, I don't see how it can
9 be -- how you can -- you can make it a no evidence standard
10 without considering evidence because then it's like a
11 summary judgment, so I don't -- I don't see how we can use
12 the no evidence standard in this motion, because then it
13 becomes a summary judgment. Two, if we do decide a no
14 evidence standard, why don't we just say no evidence,
15 because this statement right here steps right in the middle
16 of the Keller issue as to whether is it no evidence or is
17 it factually insufficient evidence, so if we do want it no
18 evidence, I would prefer to have it clearer. I do think
19 it's problematic to have it no evidence.

20 It seems to me that what we're -- what the
21 Legislature was probably wanting us to do is do something
22 more like the Federal plausibility standard where you --
23 which is very problematic, but it's where you look at the
24 face of pleadings and make some kind of judgment
25 determination about whether you think that they really can

1 prove this, and I don't think that's what y'all are doing
2 here.

3 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

4 HONORABLE STEPHEN YELENOSKY: Well, since the
5 statute came out I've been wondering about this, and so I
6 read the case law as best I could, and obviously I haven't
7 read as much as the committee has, and I also sent an
8 e-mail around to judges yesterday in Travis County and got
9 one response on one of my questions, and I'll probably get
10 some more while we're sitting here, but the first part
11 doesn't trouble me much, no basis in law. I'm not sure
12 what's going on in the dispute between the courts of
13 appeals, and I didn't really look at that carefully, but it
14 seems to me that's something we do everyday, and we do it
15 on -- you know, people phrase them as traditional motions
16 for summary judgment or special exceptions or no evidence
17 motions, but basically they're saying, "This isn't a
18 claim," or you can't make a claim like this, whatever.
19 That doesn't seem so new to me.

20 The part that Alex is talking about and Frank
21 alluded to so much troubles me a lot because you mentioned
22 court of appeals judges deal with 13 and 14. Well, of
23 course, the first judges who deal with it are trial judges,
24 and 13 and 14 say -- are for pauper's affidavits and
25 prisoners, and I've dealt with both of those. I can't

1 remember ever -- and I'm waiting for a district judge in
2 Travis County to tell me when he or she has ever dismissed
3 a pauper's affidavit -- I mean, a petition filed with a
4 pauper's affidavit or by a prisoner and with a pauper's
5 affidavit because -- specifically because no arguable basis
6 in fact. It's in my experience always because they make
7 some kind of claim that just isn't a claim, and if I were
8 to do that under the prior statutes and case laws -- case
9 law, as Frank alluded to, I could only do that after a
10 hearing.

11 The courts of appeals say if a judge under 13
12 or 14 has dismissed a case and just generically says, "No
13 arguable basis in law or fact," and yet did not hold a
14 hearing, and by that I take it as some kind of opportunity
15 to present evidence, if the judge did not give that
16 opportunity to present evidence, it can only be upheld if
17 there's no arguable basis in law. So this is a sea change
18 because this says you can't hold an evidentiary hearing,
19 and so since I can't hold an evidentiary hearing, then the
20 only basis -- the only way I could say there's no arguable
21 basis in fact -- I can't hear anything you have to say
22 about what facts you have for this -- is to read the
23 pleadings and decide that it is, as some of the Federal
24 case law says, incredible, delusional, whatever. The U.S.
25 Supreme Court case Frank cites is one in which -- again, a

1 prisoner case, almost all of these are prisoner cases --
2 said that he had been raped in prison in a particular
3 manner with the guards involved and allowing other
4 prisoners into his cell, and the lower court had said,
5 well, that in itself is not implausible, but he's coupled
6 that with claiming five other instances of something -- of
7 exactly the same sequence of rape in like three different
8 prisons, and the judge could properly say that just
9 couldn't have happened, but basically, that's the
10 standards -- kind of standard that we district judges will
11 be faced with. You say this happened. That just couldn't
12 have happened, and I can't think of an instance -- I think
13 the one in the U.S. Supreme Court case, there was actually
14 an affidavit from another prisoner saying, "Yeah, I saw the
15 guards let that person into his cell," but nonetheless, the
16 U.S. Supreme Court upheld that, but I can't think of a
17 petition, short of one that says something like "I was
18 taken to the moon," where I would feel comfortable saying
19 that there's no -- there's no arguable basis in fact, or
20 whatever you want to call it semantically, just saying
21 that, no, you can't go forward with your case because I
22 just don't believe it and nobody could believe it.

23 So thankfully -- I mean, unfortunately the
24 statute requires no evidence. Thankfully as a district
25 judge I am not required to decide no arguable basis in fact

1 unless I'm comfortable with it, and I can't really imagine
2 that being applicable unless somebody says something like
3 "I was taken to the moon." So I guess we can argue around
4 and around about exactly what it ought to say, whether it's
5 no evidence or not, but whatever you call it, it's got --
6 it's dangerous territory because you're basically having a
7 judge say, "I don't believe that and nobody else could
8 believe that, and I can't hear what you have to say that
9 might convince me to believe it."

10 CHAIRMAN BABCOCK: Alex, and then Justice
11 Pemberton.

12 PROFESSOR ALBRIGHT: Speaking about the moon
13 cases, I had a conversation with a Federal magistrate a few
14 months ago about the plausibility standard and how that
15 really worked for her, and she says what it really is
16 helpful for is all the cases she gets where there's a claim
17 that a Federal agent planted something in the brain that
18 lets the Federal government know everything and martians
19 taking them away and --

20 HONORABLE STEPHEN YELENOSKY: And I've had
21 one case in seven years like that.

22 PROFESSOR ALBRIGHT: So, I mean, so that's
23 the kind of case that it's helpful for, I guess, but
24 it's -- the plausibility standard is used in a lot more
25 cases than that is what I'm told.

1 HONORABLE STEPHEN YELENOSKY: Well, the
2 cases -- the first type of case, I've had one of those in
3 seven years, and the defendant didn't need a whole lot of
4 help in getting rid of that case. The other cases that
5 apply to a lot more things are the ones that I'm concerned
6 about.

7 PROFESSOR ALBRIGHT: Yeah, exactly.

8 CHAIRMAN BABCOCK: Justice Pemberton.

9 HONORABLE BOB PEMBERTON: Well, the
10 subcommittee I imagine plowed through this ground, but I
11 just want to throw this out there for whatever it's worth.
12 You know, we presume in construing a statute that the
13 Legislature is aware of the background law. "Cause of
14 action" is a term of art which means a set of facts which
15 give rise to a right of relief. In that context a cause of
16 action that has no basis in law or fact, we determine facts
17 in well-established practice. I know at least in pleas to
18 the jurisdiction we take facts as true. It may lead to the
19 conclusion that really what the Ledge is getting at here is
20 simply the legal sufficiency of the facts pled; that is,
21 due to the facts pled -- and maybe this ties into what
22 Richard said earlier, whether on the face of the pleadings,
23 the facts would support a cause of action if taken as true,
24 and it just seems like it could be that simple, and we're
25 wandering into these areas of maybe -- I agree, it's a

1 naughty problem where we're going to have courts making
2 some kind of qualitative judgment about the truth of facts
3 asserted in a pleading. I don't know how you do that
4 without having some opportunity for the other party to
5 confront and negate facts.

6 CHAIRMAN BABCOCK: Judge Peeples, let me --
7 Richard, I'll get to you in a second. What Richard
8 Orsinger said and what Justice Pemberton just said worries
9 me a little bit. Let me try a hypothetical on you. In
10 this state, unlike many states, we don't have a cause of
11 action for false light invasion of privacy. The Texas
12 Supreme Court has said that's too close to defamation, so
13 we're not going to recognize that. So Jeff Boyd files a
14 lawsuit with one cause of action for false light invasion
15 of privacy. That's all he says. I come back and I say, "I
16 want to move to dismiss this, because it is not warranted
17 by existing law. The Supreme Court has spoken, and so this
18 ought to go away," and further I say, "Jeff ought to be
19 sanctioned because that case has been on the books forever
20 and he knows it. He's a smart lawyer, and my client
21 shouldn't have to spend money responding to this lawsuit
22 that has no basis in law."

23 Jeff's response is "Yeah, I know, I can read,
24 *Cane vs. Hurst* says what Mr. Babcock says it says, but it
25 was a narrow vote. It was five-four, I think, or close

1 vote, long time ago, time marches on, and I in good faith
2 want to seek reversal of that decision. So, number one,
3 don't sanction me, and furthermore, don't dismiss it under
4 (a)(1)(A) because I am seeking the reversal of existing
5 law, and so you can't -- under this rule you can't -- you
6 can't grant this motion to dismiss. You've got to let me
7 go forward and do some evidence so I can have a full record
8 to go up to the Supreme Court and get them to reverse what
9 they've done before." Now, is that what we intend?

10 HONORABLE DAVID PEEPLES: Well, that may be
11 one weakness of this language. On line nine the word
12 "reasonable" -- phrase "reasonable argument" is there, and
13 I think what you would argue is "What Jeff Boyd has pleaded
14 here, your Honor, is not a reasonable argument because the
15 law is well settled and so forth, and sanction him." So
16 but, I mean, some judges would not see it that way, but I
17 think that's the reason for the word "reasonable argument"
18 there, but let me just say several things. It needs to
19 be -- we need to remember that we have a special exception
20 practice, which is essentially the same thing as Federal
21 12(b)(6). It's very similar, and while the -- if all
22 you're looking at is the wording of the rule on special
23 exceptions you might not know that, but there's case law
24 for a century, and so we have a procedural mechanism
25 already for saying, "This pleading fails to state a cause

1 of action," and you could do that without this statute.
2 This simply says the court can sanction or grant attorney's
3 fees to the prevailing party, and I just wanted to say
4 that.

5 Let me say two or three things, and I mean,
6 I'm willing to wait and let everybody else talk, but I've
7 got three or four questions and/or comments.

8 CHAIRMAN BABCOCK: No, go ahead. Go ahead.

9 HONORABLE DAVID PEEPLES: The special
10 exception practice is still there, and sometimes it already
11 happens with our special exception practice and it will
12 happen with this motion to dismiss, that things are muddled
13 and you have to file a motion for summary judgment. I
14 mean, sometimes that will happen, and that's the only
15 remedy that an unsuccessful movant will have. I want to
16 say this about the point that Alex made up, and that is --

17 CHAIRMAN BABCOCK: She didn't make it up.
18 It's her point.

19 HONORABLE DAVID PEEPLES: Brought up, brought
20 up, I'm sorry. Brought up or made up.

21 PROFESSOR ALBRIGHT: Either one.

22 HONORABLE DAVID PEEPLES: Okay. You pointed
23 to lines 12 and 13 and said that that might -- you don't
24 know whether that's the no evidence standard or factual
25 insufficiency, but when you look at subsection (c), lines

1 27, 28, when you put those together, isn't it clear that
2 this is a no evidence standard, not legal sufficiency?

3 PROFESSOR ALBRIGHT: Well, I don't think you
4 can use no evidence, because no evidence is does the
5 plaintiff have any evidence, so you would have to have a
6 hearing like a summary judgment where the plaintiff would
7 have an opportunity to present affidavits, and I don't
8 think that's what this is going at. This is going at just
9 dismissal based upon the pleadings as opposed to does the
10 plaintiff have any evidence to support those pleadings.

11 HONORABLE DAVID PEEPLES: Well, whether the
12 plaintiff can prove something is a different matter, but
13 under this rule and under special exceptions and 12(b)(6)
14 you accept what is pleaded as true.

15 PROFESSOR ALBRIGHT: Yeah, but so what is
16 your standard?

17 HONORABLE DAVID PEEPLES: You can do that
18 without having --

19 PROFESSOR ALBRIGHT: So what's your standard?
20 If you're trying to state a no evidence standard, a no
21 evidence standard is, okay, here's your pleadings, can you
22 prove them.

23 HONORABLE DAVID PEEPLES: Okay, if a prisoner
24 said, "A guard abused me on a certain occasion," you've got
25 to accept that as true.

1 PROFESSOR ALBRIGHT: Right.

2 HONORABLE DAVID PEEPLES: Now, something that
3 hasn't been brought up but I think is out there, it's one
4 thing when the pleader or a witness says, you know, A, B, C
5 happened as a matter of historical fact. That's one thing.
6 Sometimes there's no direct testimony as to what happened,
7 as to someone's state of mind or as to an event, and it's
8 all based on circumstantial evidence --

9 PROFESSOR ALBRIGHT: Right.

10 HONORABLE DAVID PEEPLES: -- and sometimes
11 the appellate courts say those circumstances are enough to
12 get you to the jury, and sometimes they say the
13 circumstances are not enough to get you to the jury, and I
14 think this sub (b) would encompass that kind of allegation,
15 too. It seems to me if somebody says, "I was an eyewitness
16 to something that happened" even if we all are saying, "Oh,
17 yeah, let's see you prove that," under this standard and
18 12(b)(6) and special exceptions you've got to accept it as
19 true.

20 HONORABLE STEPHEN YELENOSKY: That's not what
21 it says.

22 PROFESSOR ALBRIGHT: That's not what this
23 says.

24 HONORABLE STEPHEN YELENOSKY: It says you
25 don't believe the material allegations.

1 PROFESSOR ALBRIGHT: This one says, "No
2 reasonable person could believe that the material
3 allegations are true."

4 HONORABLE DAVID PEEPLES: That's different
5 from "I personally don't believe it."

6 PROFESSOR ALBRIGHT: I know, but you still
7 are --

8 HONORABLE DAVID PEEPLES: Objective standard,
9 no reasonable person could believe this allegation.

10 PROFESSOR ALBRIGHT: Well, except that are
11 you saying that those factual allegations aren't plausible?

12 HONORABLE STEPHEN YELENOSKY: You're arguing
13 the ABOTA proposal, which is you presume that the facts are
14 true, but that's not what this says, and that's not what
15 the U.S. Supreme Court decision says where this kind of
16 language comes from. Those are the cases in which the
17 court says, "I'm not going to presume that's true. In
18 fact, it's not true, no rational person could believe it's
19 true." You're arguing what Justice Pemberton says this
20 ought to be written to say and what ABOTA says this ought
21 to be written to say, but that's not what you've written.

22 HONORABLE DAVID PEEPLES: Very quickly --

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE DAVID PEEPLES: I think the
25 committee was thinking that sub (b) is basically the City

1 of Keller standard, and so you may be quibbling with that.

2 PROFESSOR ALBRIGHT: No, I think -- yeah.

3 HONORABLE DAVID PEEPLES: Let me just say
4 this. I mean, we're here to put it before the committee,
5 and if this is bad, at some point somebody is going to say,
6 "Here's what you ought to say," and I'm eager to hear that.

7 CHAIRMAN BABCOCK: Frank, and then Pete, and
8 then --

9 MR. GILSTRAP: I want to talk to what Judge
10 Yelenosky and Professor Albright said and then come back to
11 Chip's comment. With regard to no basis in law, I think
12 the proper approach is you take the facts as pleaded and
13 accept them as true. With regard to no basis in fact,
14 since we can't have a hearing I think the only way to look
15 at it is say that we're not -- you know, there are some
16 cases in which you can't accept the pleaded facts as true,
17 that I was taken to Mars or I'm the Governor of Texas or I
18 met with the Legislature of Texas and we seceded. Those
19 are simply implausible, they're impossible, and the courts
20 are going to have the power to go beyond the pleaded
21 statement of facts and say, "This is so improbable or
22 incredible that we're not going to believe it, and
23 therefore, there's no -- there can be no basis in fact for
24 this suit." Now --

25 PROFESSOR ALBRIGHT: It's not plausible.

1 MR. GILSTRAP: Yeah, although, I don't like
2 "plausible" because that gets you to the Iqbal standard,
3 and what's going on in the Federal courts is we've had the
4 Conley standard which says that you can't -- there's no set
5 of facts you can allege that will get you there, and now
6 they're making it even -- they're giving the court even
7 more discretion with Iqbal. The problem is in the reality
8 of the Federal courts they pour you out all the time under
9 that standard. I mean, you get 12(b)(6) in every lawsuit.
10 So I'm really hesitant to go in and try to borrow the
11 12(b)(6) standard and bring it into this rule.

12 With regard to Chip's comment, if you look at
13 (a) and you change "a reasonable argument" and change that
14 to "nonfrivolous," that is verbatim out of Chapter 10 of
15 the Civil Practice and Remedies Code or Federal Rule 11.
16 That is the standard for sanctioning people. Now, one
17 thing, I don't know that the award of attorney's fees in
18 this case is a sanction. You could -- I guess you could
19 make an award of attorney's fees against you and you could
20 also be sanctioned, but that's another problem.

21 The suggestion -- the inference behind what
22 Chip's saying is that, well, the Legislature didn't say
23 that. They said no basis in law and fact, and that doesn't
24 allow you to go on and argue for the extension,
25 modification, or reversal or existing law or establishment

1 of new law. If the Legislature had said "no basis in
2 established law," I would agree, but it used this general
3 language, and I don't think we should infer from this
4 language that the Legislature meant to curtail the historic
5 power of the courts to apply the common law and to develop
6 new causes of action in response to changing modern
7 factors. That would be an incredible step. I guess maybe
8 the Legislature could do it, but I don't believe that we
9 should believe that the Legislature intended that here.

10 CHAIRMAN BABCOCK: Well, okay. Jeff, and
11 then Judge Yelenosky. Wait a minute. Pete was in line
12 ahead of you. Pete, sorry.

13 MR. SCHENKKAN: Two questions that are a
14 little afield from the current discussion and then a third
15 one that goes to the current one. The rule draft uses
16 "claim for relief" and "claim," "claim," and "claim." The
17 statute says "cause of action." Is there a difference, and
18 if so, what is it and why are we using the "claim for
19 relief"? So that's the first question.

20 The second is on the idea of "upon motion and
21 hearing," having had my attention focused to the fact that
22 the statute requires in now corrected (B) to provide the
23 decision would be made within 45 days of the filing. It
24 seems to me a bad idea to require a hearing in every case.
25 There may well be many situations in which the matter can

1 be disposed of on the papers, and if they can be, given
2 everybody's schedule and busyness, that may be a real good
3 idea.

4 Now, third, as to what we've just been
5 talking about, it seems to me that we are -- that one layer
6 of this problem about the facts is not the only layer.
7 This is not a solution to the full problem of Iqbal and all
8 these other issues, but one layer of the problem might be
9 solvable if you provided in (A)(1)(a) where we are talking
10 about claims or causes of actions that have no basis in
11 law, if we said, "A claim or cause of action has no basis
12 in law when," comma, "taking the facts pled as true,"
13 comma, "it is not warranted by existing law or" -- and
14 so forth, and then when we get down to (c), no evidence, we
15 take out the words "accepting as true the facts pleaded,"
16 because it seems to me that (A)(1)(b), "A claim or cause of
17 action has no basis in fact when no reasonable person could
18 believe that the material allegations are true" is
19 irreconcilable with accepting as true the facts pleaded.
20 You just really can't have it both ways, and I'm thinking
21 you no longer need it if you've got in the law category
22 when we're deciding that you don't have a cause of action
23 under the law, taking your fact pleadings as true, that's
24 different from this problem we're going to wrestle with
25 about what do you mean by "have no basis in fact." So

1 those are my three.

2 CHAIRMAN BABCOCK: Jeff Boyd. And then
3 Richard you had your hand up a long time ago, and then
4 Justice Christopher, and Alex.

5 MR. BOYD: I was on the subcommittee and in
6 the minority vote, and my strong position is that we ought
7 to have sub (a)(1) but should not have little (a) or little
8 (b), which the rule should simply say (a)(1); and I'll also
9 say that I was involved in the process that led to the
10 statute, although I tried real hard in the subcommittee not
11 -- to base my comments on what the statute says rather than
12 my own experience in how it got there, and so I'll try and
13 do the same here.

14 I think you have to start by recognizing that
15 this rule that allows for a motion to dismiss has to be
16 understood in the context of the rest of the statute, House
17 Bill 274, which says that the court must award attorney's
18 fees to the prevailing party on that motion. So you have
19 now a motion to dismiss with the loser pay or prevailing
20 party attorney's fees, mandatory attorney's fees,
21 provision. The statute does not do away with special
22 exceptions or motions for summary judgment or pleas to the
23 jurisdiction or sanction dismissals, other methods to get
24 rid of a case, so there has to be some intent by the
25 Legislature that this does something different than all of

1 those previously existing procedures do. And so the
2 question is we've got a rule now or the statute says we
3 need a rule that allows for the dismissal and mandatory
4 award of attorney's fees and then the issue is, well, on
5 what standard, and that was the issue the Legislature had
6 to decide.

7 As originally filed this bill had a Rule
8 12(b) standard, and I don't have that language in front of
9 me, but the original House Bill 274 said that the party
10 could come in and move to dismiss on a 12(b) standard, the
11 Federal Rule 12 standard, and if that motion is granted the
12 party shall be awarded their attorney's fees. It ended up
13 being enacted on this other standard, which is if the claim
14 has no basis in law or fact as opposed to failure to state
15 a claim. That language comes from our Rule 13, but it
16 comes from Rule 13 in the context of defining the word
17 "groundless," and Rule 13 talks about sanctions for
18 dismissal of groundless claims, and it says that a claim is
19 groundless for purposes of this rule means no basis in law
20 or fact and not warranted by good faith argument for the
21 extension, modification, or reversal of existing law.

22 Had the Legislature intended what we've
23 proposed here as (A)(1)(a), it would have just said the
24 word "groundless" because that's already well-defined in
25 the law. It didn't. It picked one portion of that

1 definition of groundless, which is "no basis in law or
2 fact" without -- and so I think we have -- I think
3 statutory construction rules would say we have to presume
4 the Legislature intentionally omitted the second portion of
5 that definition, which is "and not warranted by good faith
6 argument for extension, modification, or reversal," which
7 is what now the committee is suggesting we add back in,
8 what the Legislature, I think we have to presume,
9 intentionally chose not to include.

10 The effect of doing that is you're basically
11 saying that the trial courts when faced with this kind of
12 motion don't get to reverse or modify or change existing
13 law. They must dismiss if there's no basis in law or fact.
14 The party can then appeal and try and convince the
15 appellate courts to change the law, but for purposes of
16 this motion, if the moving party decides to file this
17 motion, which, by the way, they take a risk when they do
18 because if their motion to dismiss is denied, the court
19 shall award the claimant attorney's fees on that motion, so
20 they don't have to. The defendant or counter-defendant can
21 choose to file special exceptions instead or can choose to
22 file a motion for summary judgment instead or whatever
23 other procedure, a plea to the jurisdiction or whatever,
24 but if they choose to go under this rule they bear the risk
25 that motion is going to be denied. If it is granted I

1 think statutory construction says that had the court wanted
2 us to include (A)(1)(a) in here it would have used the word
3 "groundless." It didn't. It chose just the phrase "no
4 basis in law or fact."

5 Now, then you get to -- and so I don't think
6 we ought to be changing that policy decision. I think the
7 Legislature made that policy decision, and we need to honor
8 that. We may not think that's the right way to do it, but
9 we need to honor the policy decision they made. Then you
10 get to, okay, what does it mean to have no basis in law or
11 what does it mean to have no basis in fact, and there are,
12 I understand -- the other thing you've got to add into this
13 is the statute clearly says that the motion shall be
14 determined without evidence, that this is a nonevidentiary
15 motion, so it's based on the pleadings.

16 So then you get to -- so the simple -- I
17 mean, I think the example you gave about false light
18 invasion of privacy, the one I kept using in the
19 subcommittee was negative infliction of emotional distress,
20 whatever. That's easy. There's no basis in law for this
21 claim. There's just no basis in law. If there's no basis
22 in law, you may have all the arguments in the world as to
23 why the law ought to be changed. Under this statute, the
24 rule I think we're supposed to adopt under this statute,
25 sorry, you're out of luck. I'm going to grant the motion

1 to dismiss and award attorney's fees and now you get to go
2 to the appellate courts to create or change law in Texas.

3 On no basis in fact I think first you deal
4 with the easy situations, which are those where basically
5 the person pleads themselves out of court, so you sue me
6 for some tort, and in your pleading you say it happened in
7 1952. Now, I can choose at that point to file a motion for
8 summary judgment based on statute of limitations, but I've
9 got to go through discovery, and so instead I just file a
10 motion to dismiss. There is no basis in fact. Take all
11 the factual pleadings as true. There's no basis in fact,
12 and so, "Judge, dismiss it and award my attorney's fees."
13 The other example would be a defamation claim where the
14 person pleads, "It is true that I did these things, but it
15 still hurts my feelings and my reputation that you
16 published that I did these things." Well, I just pled, in
17 fact, there's no basis for that.

18 HONORABLE STEPHEN YELENOSKY: Isn't that just
19 no basis in law?

20 MR. BOYD: Well, it's no basis in law based
21 on the facts pled, right? Now, clearly no basis in law
22 setting aside the facts pled would be the false light
23 invasion of privacy or negligent infliction claim where as
24 a matter of law you can plead all the gray facts in the
25 world, but it doesn't work. No basis in fact is when you

1 plead facts that your legal claim is recognizable but not
2 on the facts you've pled. Then you get into the harder
3 stuff. Well, what if you plead you've gone to Mars, right,
4 and there, I don't think (A)(1)(b) should be in there
5 because I do think the legislation is clear that the
6 decision has to be made without evidence, and so I think
7 you've got to take that as true. I'm not going to dismiss
8 it. Now, you know, we can go through the discovery, and,
9 you know, that's when I as the defendant am going to file
10 as a motion for summary judgment, and then you get into how
11 do you take the affidavit and so forth in response to it.

12 But for those reasons, I -- I think I was in
13 Munzinger's camp and voted that we should not include (a)
14 and (b) in this at all. There are a lot of standards the
15 court -- the Legislature could have chosen, and I can
16 assure you it was a hotly negotiated process that led to
17 this standard being picked as opposed to a 12(b) on the one
18 hand or a groundless frivolous standard on the other end.
19 This is the one that they picked, and I think we should
20 honor that rather than try and change that policy
21 compromise.

22 CHAIRMAN BABCOCK: Okay. Let me get the
23 lineup straight here. Orsinger is next for sure, and then,
24 Judge Christopher, do you still want to --

25 HONORABLE TRACY CHRISTOPHER: Yes, I do.

1 Thank you.

2 CHAIRMAN BABCOCK: Okay, so Justice
3 Christopher is next, and Alex had her hand up, and Judge
4 Yelenosky had his hand up.

5 HONORABLE STEPHEN YELENOSKY: You can put me
6 at the end.

7 CHAIRMAN BABCOCK: He'll pass, and then
8 Roger, and then Pete. Okay. So we'll go Orsinger,
9 Christopher, Albright, Hughes, and Schenkkan. There we go.

10 MR. ORSINGER: Did you write that down?

11 CHAIRMAN BABCOCK: I'm going to try to
12 remember that.

13 MR. ORSINGER: Okay. The concern I have
14 about this approach is that it's overly analytical, and
15 that's not surprising considering the people that were on
16 the subcommittee.

17 CHAIRMAN BABCOCK: Overly analyzed.

18 MR. ORSINGER: I'm not criticizing analysis
19 because I'm overly analytical myself.

20 CHAIRMAN BABCOCK: Some have said.

21 MR. ORSINGER: Most of the people that plead
22 cases are not terribly analytical, and what I find is you
23 get a garbled factual description with no identified cause
24 of action or with a string of causes of action that they
25 claim apply to those poorly pled facts, and normally the

1 way you clean that up is through special exceptions, and
2 you make them eventually get the extraneous facts out and
3 the necessary facts in and identify a cause of action.
4 Now, the way (A)(1)(a) and (b) are set up, they assume that
5 you have a clearly stated claim that a judge can say is
6 either valid or invalid and clearly pled facts that the
7 judge can say either supports the clearly pled claim or
8 doesn't, but what I think is more realistic is the problem,
9 is that poorly pled facts don't support either the pled
10 claim or any claim, and it's the connection between (b) and
11 (a) that's the breakdown. It's not (a) alone that's the
12 breakdown or (b) that's the breakdown.

13 The way this is structured is that you have
14 an analysis of whether the claim is viable and, (b),
15 whether the facts are plausible and support the claim.
16 What you really need to do is tie the two together. You
17 need to evaluate whether the facts pled support a
18 recognized cause of action, and because of the way (a) and
19 (b) are evaluated independently, is the claim viable, (b),
20 are the facts believable. What if the claim is viable, the
21 facts are believable, but the believable facts don't fit
22 the claim? You should be able to dismiss, but under this
23 analytical approach you can't.

24 So an alternative approach, David, since you
25 were saying an alternative approach, is you could say that

1 "The facts, if believed, do not support a viable claim."
2 In other words, take the facts that were pled, assume
3 they're true, and see if they support a claim. If they
4 support a claim, they survive. If they don't support a
5 claim, they don't survive. Now, that's left out the
6 believability of the facts pled. That's the Keller issue,
7 which is a separate issue, but the point I would like to
8 make, whether we go all the way with Keller or not, it's
9 the linkage between the facts and the claim that's the
10 problem, not the claim and the abstract or the facts
11 measured against some no evidence standard. So because of
12 the way this is broken down analytically it makes perfect
13 sense, but I don't think it's going to address the usual
14 problem that poorly pled facts don't support a cause of
15 action.

16 CHAIRMAN BABCOCK: I don't know, to me that
17 sounds overly analytical.

18 MR. ORSINGER: It is overly analytical.

19 CHAIRMAN BABCOCK: Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well, actually
21 that was the point I was going to make. What if someone
22 pleads you have intentionally inflicted emotional distress
23 on me, and they make a series of facts that under our case
24 law do not rise to the level of intentional infliction of
25 emotional distress. There's a lot of case law that says

1 it's got to be really extreme before it rises to that
2 level. The statute itself says "no basis in law or fact."
3 It doesn't say "and fact." It doesn't actually say you
4 take the facts and see if it's that cause of action. So, I
5 mean, if we're going to stick with just the language of the
6 statute, it says "or."

7 CHAIRMAN BABCOCK: Well, but --

8 HONORABLE TRACY CHRISTOPHER: But there is a
9 basis in law that cause of action exists.

10 CHAIRMAN BABCOCK: It would have no basis in
11 fact, though, because you take the allegations as true, and
12 they're not extreme as a matter of law, and there are 15
13 cases that say that, so the claim is gone.

14 HONORABLE TRACY CHRISTOPHER: That's not what
15 (a) and (b) say. (a) and (b) never say you put them
16 together, and the statute itself doesn't say that. It uses
17 the word "or."

18 MR. ORSINGER: But we really need to do that.
19 If we're going to do a rule we have to link the facts to
20 the pleadings even if the Legislature didn't, otherwise
21 this isn't going to work in my opinion.

22 CHAIRMAN BABCOCK: Okay. Well, Professor
23 Albright in our laundry list is next. Then Roger.

24 PROFESSOR ALBRIGHT: Jeff Boyd is convincing
25 me we should just leave this -- the words the way they are

1 in the statute, because if we're having this much trouble
2 articulating it, I'm afraid we're going to create a bigger
3 mess than the statute already has, but I think the point I
4 wanted to make is that, Judge Peeples, I think in (b) I was
5 thinking you were trying to articulate a no evidence
6 standard, and I think you're maybe trying to articulate a
7 standard different from no evidence standard. Is that -- I
8 guess I'm still confused as to what (b) is trying to be.
9 Is (b) trying to say plaintiff has no evidence, you know,
10 let's have a mini-summary judgment hearing, or is (b)
11 saying the judge looks at the pleadings and I can't -- I
12 just can't believe them?

13 HONORABLE DAVID PEEPLES: Just --

14 CHAIRMAN BABCOCK: Yeah, go ahead.

15 HONORABLE DAVID PEEPLES: How we got there,
16 Alex, in the State Bar proposal they had more than this,
17 and they talk about "more than a de minimis probability
18 exists" and so forth, and we thought that was not helpful,
19 and this we thought was more helpful.

20 PROFESSOR ALBRIGHT: Okay.

21 HONORABLE DAVID PEEPLES: And beyond that I'm
22 not sure I can say.

23 PROFESSOR ALBRIGHT: So you weren't
24 anticipating a -- I mean, a no evidence standard is does
25 the plaintiff have any evidence, and so this is taking the

1 pleadings and looking at the pleadings and saying that no
2 reasonable person could believe these allegations.

3 HONORABLE DAVID PEEPLES: Well, Chip, let me
4 just say, Pete Schenkkan raised three very good points, and
5 at some point I think we need to have some more discussion
6 about his third proposal or point, which was we ought to on
7 line eight add and have it say, "A claim has no basis in
8 law when," comma, "taking the allegations as true," comma,
9 "it is not warranted." And then strike section (c), lines
10 27 and 28, and then we would need something for (b), I
11 think, but that might be one way to --

12 PROFESSOR ALBRIGHT: Why would you strike
13 (c)?

14 HONORABLE DAVID PEEPLES: Because the
15 language that Pete suggested I think does the work that (c)
16 is doing, taking the allegations as true.

17 MR. TIPPS: You just need to strike the
18 phrase "accepting as true the facts pleaded." The rest of
19 it can stay because you need to make clear that you're not
20 going to have an evidentiary hearing.

21 HONORABLE DAVID PEEPLES: Could.

22 CHAIRMAN BABCOCK: Roger. You've been very
23 patient.

24 Yeah, you.

25 MR. HUGHES: Oh, I'm sorry. I didn't hear

1 you. I was -- the whole thing about trying to strike the
2 part of subsection (a) about "warranted by a reasonable
3 argument for extension," et cetera, I was a bit troubled
4 because part of the justification is, well, if the
5 appellate courts are going to recognize a cause of action
6 or extend the law in that direction it will just get
7 reversed on appeal. Well, looking at this statute and that
8 rule, on what basis? If I were the defendant I'd argue the
9 Legislature has commanded this case be dismissed if
10 existing law doesn't support it, and if you want to
11 announce a new cause of action that's prospective in
12 nature, go ahead and do it, but you still have to dismiss
13 it, it still has to stay affirmed, and I get my money for
14 attorney's fees.

15 It's a nice way of freezing the law, and I
16 suppose another way of saying it is simply that the first
17 person will -- to try to argue it is going to take the hit.
18 They're going to lose, and they're going to pay attorney's
19 fees, and only the subsequent people are going to benefit
20 from it, but if the -- if the trial court can't deny the
21 motion on the basis that there is a valid basis for
22 extending law or a good faith argument then I don't
23 understand on what basis the appellate court can reverse
24 the trial judge. The trial judge followed the statute,
25 committed no error.

1 The second thing is there was a question
2 about the linkage, what happens when the person has alleged
3 a plausible set of facts and a valid cause of action, but
4 the facts won't link up. In other words, those facts won't
5 support that cause of action, and all I can think of is
6 that perhaps the Legislature didn't intend to address that
7 particular evil, that if they did, they'd have picked the
8 12(b) standard language at the beginning, not the end, and
9 what the evilness addressed is not the misguided pleader
10 who just can't get his facts married up to this cause of
11 action, but rather to address cases where people are suing
12 on delusional facts or nonexistent causes of action, and
13 that's all we can address.

14 CHAIRMAN BABCOCK: Okay. Pete, you're next
15 in line.

16 MR. SCHENKKAN: Two points this time. One is
17 a little technical but concrete and I hope will pass
18 Richard's not overly analytical test.

19 CHAIRMAN BABCOCK: Is that a test?

20 MR. SCHENKKAN: And the other goes to what
21 Roger was just talking about, but takes it a layer further.
22 The technical one is in capital letter B, not (A)(1)(b),
23 but capital letter B, the time provision. I've got a
24 significant problem with a motion to dismiss a claim or
25 cause of action that -- having to be filed within 60 days

1 after the pleading containing the cause of action is served
2 if, as I now understand, this statute and rule are not
3 substitutes for special exceptions practice, but are an
4 additional layer on top of it. I would envision many
5 scenarios in which I first need to go through special
6 exceptions to get this person on the other side to tell me
7 what the heck it is, the cause of action being alleged is,
8 and once I get that nailed down then I'm going to file a
9 motion under this to say that's ridiculous, and I get my
10 attorney's fees, so I've got a problem with that one.

11 Now, on the substance, I think Roger is
12 exactly right, that on Jeff's theory proves way too much.
13 If Jeff's theory is the Legislature here, without saying
14 so, has passed a statute that says the Supreme Court of
15 Texas no longer has the power that it has always had over
16 the common law to extend, modify, or reverse it in light of
17 changed circumstances, the core common law power, if Jeff
18 is right that the trial courts no longer have this under
19 this language, it seems to me that Roger is right that
20 neither do the appellate courts, and that, of course, is
21 not the law.

22 The law is that the abrogation by the
23 Legislature of the common law is disfavored, and you don't
24 do it unless the Legislature has expressly said we're doing
25 it and has provided an adequate substitute for it,

1 generally speaking. And it's also not -- does not seem to
2 me to be the natural reading of the words. It seems to me
3 that the words, "a basis in law," include a reasonable
4 legal argument for extension, modification, reversal. That
5 is part of the legal system, a reasonable basis for
6 extending, modifying, or reversing an existing common law
7 rule is a valid kind of legal argument, and then finally,
8 why does this matter? It seems to me that in the trial
9 court sometimes your arguments that are reasonable for a
10 extension, modification, or reversal of the common law need
11 some trial court proceedings. They need some facts. Not
12 always, but sometimes they do, and again, I would not
13 lightly assume the Legislature meant to circumscribe the
14 Supreme Court's and the legal system's efficient way of
15 being able to process those things.

16 I'll end by saying the statute that -- the
17 sentence of the statute that contains this language, the no
18 basis in law or fact, is not a statute that says cases that
19 have no basis in law or fact shall be dismissed on motion
20 and with no evidence. Instead the sentence says, "The
21 Supreme Court shall adopt rules to provide for the
22 dismissal of such actions," and so it seems to me that in
23 addition to this fundamental theory that we don't like to
24 read in statutes to say the common law has been frozen by
25 the Legislature, that this one is especially unlikely to

1 have been intended that way since it is a grant of
2 rule-making power.

3 MR. GILSTRAP: Can I interject just a quick
4 note to what Pete just said?

5 CHAIRMAN BABCOCK: Anybody object to Gilstrap
6 butting in?

7 MR. GILSTRAP: The next sentence, the next
8 sentence in the statute says, "The rule shall provide that
9 the motion to dismiss shall be granted or denied within 45
10 days." There the Legislature said what shall be in the
11 rule. There's -- in the earlier sentence it just says what
12 the rule should accomplish. There's a difference between
13 provide for and provide that, and you know, we've got to
14 follow the orders of the Legislature. If they had meant
15 that it would -- had to be dismissed on -- if they meant to
16 use the words "no basis in law or fact," it would say
17 provide that. They didn't. That's all.

18 CHAIRMAN BABCOCK: Okay. Gene's had his hand
19 up, and then Richard, then Stephen, and then I'll come
20 around to Carl and Richard again.

21 MR. STORIE: I think the first fundamental
22 question we all wrestled with was what does the Legislature
23 mean, and I think we've pretty much all decided we don't
24 know. So the second question is at least you have some
25 delegation to the Court, so we know the overall idea was

1 get the garbage out of the system as quickly as possible
2 before people have to spend money and award attorney's fees
3 to parties who have to put up with dealing with the junk.
4 So that much we have, and I was originally in the Munzinger
5 and Boyd camp because I thought, well, they have at least
6 some standard that does not appear to track anything we
7 currently know exactly, so it must mean something
8 different, but I came around to the majority camp because I
9 think what the Court has done, much as Frank said and as he
10 said in our discussions, is to delegate to the Court the
11 opportunity to make rules to identify the junk and go from
12 there. So I guess the first thing is, if you're wanting a
13 vote, is to decide whether we need any standard beyond the
14 statutory language or some standard and then we try to
15 figure out what that is.

16 CHAIRMAN BABCOCK: Yeah. Yeah. Richard.

17 MR. MUNZINGER: We can get into a lot of --
18 we've had the same discussion generally in the subcommittee
19 that the group has had here, with some differing insights
20 obviously from the group here. One of my thoughts was that
21 you can make this more complicated than, in fact, it has to
22 be. The Supreme Court tells us over and over that we apply
23 statutory interpretation of the rules, the Legislature has
24 intended -- is presumed to know the existing law, et
25 cetera, and if it doesn't use a phrase, that that was

1 intentional. If you adopt A(1)(a) as we have now, what is
2 the Supreme Court going to do with that line of authority?
3 And because that clearly, it seems to me at least, would
4 violate the standard rules of statutory interpretation.
5 The Supreme Court would be inserting a clause that the
6 Legislature must be presumed to have intentionally not
7 intended. So you get into this philosophical discussion.

8 Why isn't it correct to look at the statute
9 as being limited in scope and intent? As of today there is
10 no analog in the Texas Rules of Civil Procedure that I'm
11 aware of to Rule 12(c) of the Federal rules, a motion for
12 judgment on the pleadings, so-called as a motion for
13 judgment on the pleadings. In Rule 12(c) in the Federal
14 system you look at the pleadings, you take all allegations
15 as true, and you dismiss the case if you can get a judgment
16 on the pleadings. That would honor the legislative command
17 to adopt such a rule. We would be obeying -- the Supreme
18 Court would be obeying the Legislature if it did that.

19 The problem about whether something is true
20 or not in fact, the Legislature has said there will be no
21 evidence, should be no evidence in connection with this
22 rule. I'm one of those who believes you don't need a
23 hearing. That's a separate point, but the point about no
24 evidence, some years ago there were lots -- there were lots
25 of litigation where people claimed the Republic of Texas

1 existed and that the Republic of Texas statutes and this
2 and that and so forth voided contracts and the Uniform
3 Commercial Code did not apply, et cetera. I was involved
4 in two or three of those cases with people. Obviously you
5 can file a special exception saying that doesn't state a
6 cause of action.

7 The Legislature has given a new rule here or
8 the opportunity for a new rule. If you face that, you've
9 got a motion for judgment on the pleadings. There is no
10 such thing as the Republic of Texas. It ended in whatever
11 it was, 1846, when we joined the union. We all know that.
12 We don't have to have hearings to that, and we darn sure
13 don't have to adopt a rule that ignores a decision of the
14 Legislature not to include language about reasonable
15 arguments for the extension, modification, et cetera, and
16 we don't have to implicate the Supreme Court in the
17 question of whether or not this little terse statute was
18 intended to stop the development of the common law.

19 It wasn't intended to stop the development of
20 the common law, in my opinion. It was intended to stop the
21 abuse of the court system by allowing courts to read a
22 judgment -- or a petition rather, or a claim or a
23 counterclaim and say, "This is nuts." Why should we force
24 Bank of America to spend a quarter of a million dollars in
25 attorney's fees to defend a claim which is saying that

1 someone has a 14th Amendment right to a free cash machine?
2 That doesn't make sense. If you view this rule as limited
3 in scope, I think you finesse a lot of the philosophical
4 questions that are raised in the discussion that we're
5 having, and you are loyal to the command of the
6 Legislature, which is the Legislature, and the Governor
7 signed it. It's our law. So let's obey the law, do
8 exactly what they said, adopt a rule that says in essence
9 we now have an analog to 12(c) under the state rules.
10 We've always had an analog to 12(b)(6) under the special
11 exceptions. We could even point that out to practitioners
12 in the comments to the rule, but we finesse all of this
13 discussion, and we don't get into this philosophical
14 struggle, which in my opinion is unnecessary if you avoid
15 the inclusion of this language and you view the thing as
16 being a limited effort to cure a limited problem.

17 CHAIRMAN BABCOCK: Okay. Skip.

18 MR. WATSON: To come in on what Pete was
19 saying, I think I get what the intent was here. I'm a
20 little disturbed by what Jeff was saying, that we should
21 give automatic deference to the Legislature's intent to
22 penalize somebody for daring to want to make a good faith
23 change in the law by having them pay attorney's fees before
24 they go to the court of appeals. That's what this does.
25 That's what the inclusion of the attorney's fees provision

1 does. I think Pete is absolutely correct that whether that
2 was the intent of the Legislature, that's the effect. For
3 the first time -- I mean, for years under special exception
4 practice I was able to go in and say, "These facts don't
5 fit this claim" or "There is no claim under these facts,
6 order them to replead. We have no general demurrer, so
7 just order them to replead. If they can't replead facts
8 that make a claim, dismiss." You have that right.
9 Beaucoups of cases saying that, but there were no
10 attorney's fees saying that. The person that wanted to go
11 on up and say, "Yes, but there should be a claim under
12 these facts," could without the state penalizing that
13 person for daring to have access to the courts and asking
14 the courts that are the sole arbiters of the common law to
15 change the common law. That's what this does, and that's
16 what I'm having a problem with.

17 CHAIRMAN BABCOCK: Okay. Stephen was next,
18 and then Carl and Richard, and then I'll move around.

19 MR. TIPPS: I'm in favor of having an (a) and
20 a (b) under (A)(1), and, frankly, I find the committee's
21 draft, subject to the suggestions that have been made, to
22 be perfectly satisfactory, but I want to speak to why I
23 think we should -- the Court should go beyond promulgating
24 a rule that simply says that the court must dismiss a claim
25 that has no basis in law or in fact, for at least two

1 reasons. The first is that I agree with Pete and Frank and
2 others who have pointed out that the Legislature chose to
3 implement its will by asking the Supreme Court to
4 promulgate a rule; and I think that certainly is an
5 indication that the Court is being asked to exercise some
6 judgment concerning how this objective of making it
7 possible to have a claim that has no basis in law or fact
8 be dismissed; and so I think it's perfectly appropriate for
9 the Court to go beyond A(1) and add an (a) and (b).

10 And second, it seems to me that if we chose
11 the other course and simply parroted the language of the
12 statute and said that "Upon motion a court must dismiss a
13 claim for relief that has no basis in law or fact," period,
14 that courts are going to feel obligated to interpret that
15 language; and what we're going to have is four years of
16 litigation in the appellate courts, ultimately ending up in
17 the Supreme Court, in which lawyers are going to make the
18 various arguments for what those words mean that are set
19 out in Frank's memorandum because there are many different
20 choices; and at the end of the day after we've had a lot of
21 litigation, the Court, the Supreme Court, is ultimately
22 going to have to tell us what it meant or what the
23 Legislature meant by "no basis in law or fact"; and it just
24 seems to me more appropriate for the Court to go ahead and
25 make that decision at this young juncture rather than

1 leaving it up to what would be a fairly messy judicial
2 process.

3 CHAIRMAN BABCOCK: Okay. Carl.

4 MR. HAMILTON: The ABOTA report indicates
5 that the Legislature did not intend to adopt 12(b)(6). I
6 don't know where they get that from, maybe the hearings or
7 something, but was there any discussion on the difference
8 between "failure to state a claim upon which relief can be
9 granted" under 12(b)(6) and "no basis in law or in fact"?
10 It seems to me like those are pretty much the same thing,
11 but I don't know.

12 MR. GILSTRAP: I can answer the question
13 about the legislative intent. The original version of the
14 statute said that the Court shall make a rule and shall
15 model it after Rules 12 and 9. Rule 9 is the one involving
16 particularized pleading of fraud of the Federal rules.
17 That was taken out when it went to the House committee, and
18 the current language wound up -- at the end of the sausage
19 making we wound up with the current language that we have,
20 but the 12 language was taken out immediately. That's all.

21 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

22 MR. ORSINGER: I'd like to echo what Steve
23 Tipps said but maybe a little bit differently. I think
24 that the Legislature is used to delegating implementation
25 to the courts and that they speak in broad terms and they

1 allow the court system to develop the way that the broadly
2 stated laws apply to individual situations. So I don't
3 think that there's anything wrong with the rule-making
4 process or the court system attempting to take these broad
5 principles and make them applicable to specific litigation.
6 We have a choice, as Stephen pointed out. We can either
7 have the Supreme Court through its rule-making process
8 decide now what all of these terms mean and how it applies,
9 or we can carry forward the broad language of the statute
10 and let the courts of appeals develop it over a period of
11 three to five or seven years, by which time it eventually
12 gets to the Supreme Court, and we get what is tantamount to
13 a rule handed down in a specific case.

14 Now, in some instances that ferment of all
15 the different court of appeals with all their different
16 perspectives coming up with all their solutions is good,
17 and it's worth it. It's like the Federal system at the
18 national level, but in some instances it's just a waste of
19 everybody's time and money for us to litigate our way
20 through the appellate system over a period of 5 to 10 years
21 to the ultimate solution. We already have paradigms. We
22 have Federal paradigms, we have rule sanction paradigms, we
23 have statute sanction paradigms. I think it's perfectly
24 fine and I favor the Supreme Court cutting out 3 to 5 to 7
25 to 10 years worth of court of appeals differing opinions

1 and then ultimately some capstone Supreme Court case to
2 just go ahead and promulgate a rule right now that tells
3 everybody of all of these standards that are floating
4 around out there that you might find analogous these are
5 the ones that we're going to apply in Texas under this
6 statute.

7 So I'm in favor of having (1)(a) and (b), but
8 I still go back to my previous comment, and David, that we
9 need to link (b) and (a) or (a) and (b), and I would make a
10 suggestion that we do it in this way. We leave (a) exactly
11 the way it is, which endorses an argument for the reversal
12 of existing law, which I think is a policy that as a free
13 country and a common law jurisdiction we should encourage.
14 In (b), though, I think we should say, "A claim has no
15 basis in fact when the facts pled do not support the
16 claim." Got to be a linkage there between the facts pled
17 and the claim that you're asserting, and then follow that
18 up with the statement, "The court shall not consider facts
19 pled that no reasonable person could believe."

20 So you've got to have a linkage between the
21 facts pled and the claim asserted, but the facts have to be
22 plausible enough that at least one reasonable person would
23 believe it, and if that's your standard, an objective
24 standard about a reasonable person, it's going to be
25 reviewable all the way up to the Supreme Court of Texas,

1 and it is very important in my opinion that the Supreme
2 Court of Texas have jurisdiction to evaluate a dismissal
3 based on these pleadings. It has to be an objective
4 standard, and it has to be a no evidence standard or else
5 we're never going to get into the Supreme Court, or at
6 least arguably you can't. So, at any rate, that's my
7 contribution.

8 CHAIRMAN BABCOCK: Richard, your point, using
9 again the hypothetical I had, so somebody makes a
10 reasonable argument to the trial judge that the Supreme
11 Court will change its view on false light for A, B, and C
12 reasons. So the trial judge says, "Yeah, that's a
13 reasonable argument. That makes sense to me, so I'm going
14 to deny the motion and award attorney's fees against the
15 moving party," which is the defendant, who was relying on
16 existing law. That's the consequence, right?

17 MR. ORSINGER: Well, I think that that's an
18 unfortunate consequence if you have just one --

19 CHAIRMAN BABCOCK: But that's the
20 consequence?

21 MR. ORSINGER: Yes, but the consequence goes
22 the other way, which is any time that anyone arguing --
23 let's say, for example, that when the Texas Supreme Court
24 first addressed an issue only three other jurisdictions had
25 adopted it, and now 20 years later 37 have adopted it.

1 CHAIRMAN BABCOCK: Well, it would be a
2 reasonable argument to change it.

3 MR. ORSINGER: Right. So the question, if
4 you say nothing it isn't going to eliminate the problem.
5 The problem is created by the mandatory award of attorney's
6 fees if you win or lose.

7 CHAIRMAN BABCOCK: Right.

8 MR. ORSINGER: And when we get to this part
9 we'll discuss it, but how do you pick the prevailing party
10 if the defendant attacks three or two causes of action and
11 wins on one and loses on one?

12 CHAIRMAN BABCOCK: There's another issue.

13 MR. ORSINGER: Yeah.

14 CHAIRMAN BABCOCK: Okay. Now, Judge Peeples
15 next.

16 HONORABLE DAVID PEEPLES: The discussion is
17 wonderful, and I appreciate it. I want to say something
18 that's responsive to a bunch of points. There are some
19 boundary stretching cases that I personally wouldn't want
20 to see the person making the claim have to pay attorney's
21 fees. The Sabine Pilot case, where a person was allegedly
22 fired for reporting of a statutory violation, and you take
23 the El Chico case, a drunk driver, you know, is made more
24 drunk by a tavern and goes out and hurts someone; and so as
25 this is worded, that person who makes that claim, unless

1 that's rejected and maybe all the way up, would not have to
2 pay attorney's fees under this statute; but in terms of
3 changing the law and worrying about freezing the law and
4 tying the hands of the appellate courts, that defendant
5 ought to, and I think would, specially except or bring it
6 up by summary judgment.

7 There are procedural ways to tee that up for
8 the appellate court system, and their hands would not be
9 tied, but my view is there are also some cases that are
10 just, frankly, not good faith plausible attempts to stretch
11 the law. I'm just giving you an example, and I'm going
12 from memory of a case I -- and the subcommittee, I'm sorry,
13 they're going to have to hear this for the third time.
14 There were a couple of guys, oil field workers, and they
15 met a couple of girls at a bar, and I don't know what
16 happened, but they leave and the girls chase after them and
17 shoot at them, and the guys were injured.

18 MR. TIPPS: That's a movie.

19 MR. GILSTRAP: That's the Thelma and Louise
20 case.

21 HONORABLE DAVID PEEPLES: Now, there was a
22 suit against the girls, who don't have insurance for that
23 and who are judgment proof, and the tavern or the bar was
24 sued also, but the employer was sued for not warning these
25 guys to stay away from girls at bars. Okay.

1 CHAIRMAN BABCOCK: With guns.

2 HONORABLE DAVID PEEPLES: I dismissed that.
3 I dismissed that. I don't remember if it was on special
4 exceptions or summary judgment. It was never appealed, and
5 in my opinion that is a good candidate for the defendant
6 who had to hire a lawyer and attack that ought to be able
7 to use a rule like this and get attorney's fees. That's
8 not in the same case as Sabine Pilot and El Chico and some
9 other cases, and why would the plaintiff make that claim?

10 Well, maybe the employer -- the judge will
11 say, no, let the jury decide this, and they'll pay some
12 money to settle it; but those kinds of things happen; and
13 they're never written up in the appellate courts because if
14 the court grants it, dismisses it, there's no appeal; and
15 if the court doesn't dismiss it, it's settled; and so those
16 things do happen; and what I'm looking for here is,
17 frankly, maybe at some point we want to tidy up the special
18 exception rule to make it explicit in the wording of the
19 rule that we've got a 12(b)(6) or a failure to state a
20 cause of action motion for which you don't get attorney's
21 fees, but you can attack a claim that's just too far out
22 and then also we would have this motion to dismiss, which
23 is not as potent. It's got to be a worse claim asserted,
24 but you can get attorney's fees against you if --

25 CHAIRMAN BABCOCK: Jeff.

1 HONORABLE DAVID PEEPLES: -- you lose.

2 MR. BOYD: I have a question first and then a
3 comment. Under current existing law if -- and using your
4 hypothetical -- I sue you for false light invasion of
5 privacy, and that's the only cause of action or claim that
6 I assert and you file a motion for summary judgment in
7 Judge Yelenosky's court, does Judge Yelenosky have
8 discretion to deny the motion for summary judgment on the
9 ground that he's going to recognize that cause of action in
10 spite of what the Supreme Court has already said?

11 CHAIRMAN BABCOCK: I would think he would get
12 reversed by the intermediate court.

13 MR. BOYD: So he's going to say, "No, I'm
14 going to deny the motion for summary judgment. We're going
15 to trial to the jury on a false light invasion of privacy
16 cause of action because I think the law ought to be
17 changed." I don't think he can do that.

18 CHAIRMAN BABCOCK: Well, he can do it.

19 HONORABLE SARAH DUNCAN: Sure he can.

20 HONORABLE TRACY CHRISTOPHER: Sure he can.

21 CHAIRMAN BABCOCK: He can do it.

22 MR. BOYD: The trial court can change the law
23 to turn existing --

24 CHAIRMAN BABCOCK: Well, you could maybe
25 mandamus him or if there's an interlocutory appeal.

1 MR. BOYD: Yeah, no, you can't mandamus, but
2 you're right.

3 HONORABLE STEPHEN YELENOSKY: But the
4 alternative is the case that was just decided in Fort Worth
5 where the person sues saying they should be able to get the
6 sentimental value of their dog, and what I'm supposed to do
7 under your view of it is dismiss it and award attorney's
8 fees, and as everybody else says, the court of appeals
9 ought to uphold me on that because that's not the law right
10 now.

11 MR. BOYD: Yeah, and I don't agree with that.
12 I don't agree that the court of appeals or ultimately the
13 Supreme Court, that either this statute or the rule
14 contemplated by the statute prohibits an appellate court
15 from recognizing changes in the law.

16 HONORABLE STEPHEN YELENOSKY: But how would
17 they?

18 MR. BOYD: I think what it does is it
19 prohibits the trial court from doing so on a motion filed
20 under this rule.

21 HONORABLE STEPHEN YELENOSKY: How would they
22 reverse me? I haven't committed error. I did exactly what
23 I'm supposed to do.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. BOYD: Same way they would reverse you if

1 you granted the summary judgment and then they decided to
2 change the law. That's why they reverse you in the exact
3 same way they do now.

4 HONORABLE HARVEY BROWN: Different question.
5 One is discretion.

6 CHAIRMAN BABCOCK: Yeah, but your point is
7 Judge Yelenosky has ignored the Supreme Court decision,
8 which clearly says there's no cause of action for false
9 light, and he's denied summary judgment, and he's taken the
10 defendant through trial. You know, I'm not sure he -- I
11 guess he can do that.

12 MR. BOYD: And then he gets reversed on
13 appeal.

14 CHAIRMAN BABCOCK: Yeah, he gets reversed on
15 appeal.

16 MR. BOYD: Or alternatively he grants the
17 motion to dismiss because there is no such cause of action.

18 CHAIRMAN BABCOCK: Right.

19 MR. BOYD: The claimant appeals, and the
20 court of appeals or -- and/or ultimately the Supreme Court
21 reverses because they change --

22 HONORABLE STEPHEN YELENOSKY: But they can't
23 reverse me because the question before me was what's
24 existing law, and I got that right.

25 MR. BOYD: They can reverse you now if you --

1 HONORABLE STEPHEN YELENOSKY: Because --

2 MR. BOYD: -- if they change the law.

3 HONORABLE STEPHEN YELENOSKY: Yeah, because
4 the question before them is different. The question before
5 me under your scenario is was this the existing law, and I
6 was right about that. If it goes through a trial and then
7 goes up on appeal, the question is what's the common law?

8 MR. BOYD: I don't see that. Because if I
9 sue for the sentimental value of the pet and you say under
10 Texas law we don't recognize that claim and so I'm going to
11 dismiss. I appeal and get all the way to the Supreme
12 Court, and the Supreme Court says, "Well, historically
13 we've never recognized that claim, but we hereby do as a
14 matter of common law recognize that claim." They're going
15 to remand it just like they would now when they change the
16 law.

17 HONORABLE STEPHEN YELENOSKY: Well, that --
18 yeah, but -- well, that depends. I mean, I think everybody
19 else is saying, no, what they're going to do is see if I
20 was wrong when I applied the new statute, which said for me
21 to decide whether or not there was existing law to support
22 it, and I said there's no existing law to support it, and
23 I'm supposed to dismiss it. If everybody else, Schenkkan
24 and others are right, that goes all the way to the Supreme
25 Court and I get upheld because there was no existing law to

1 support it and the Supreme Court has said that. Now,
2 Justice Hecht is shaking his head, so let's get an answer
3 for him.

4 CHAIRMAN BABCOCK: Yeah, you got the answer?

5 HONORABLE NATHAN HECHT: Well, but, you know,
6 we have --

7 CHAIRMAN BABCOCK: Well, but you know.

8 HONORABLE NATHAN HECHT: We have this idea in
9 the -- that decisions ought to be fully retroactive, so
10 when the Supreme Court decides that although we've never
11 said it before this is the law, it's always been the law
12 back till God was two, and so while you thought you were
13 following existing law because the Supreme Court had said
14 it before, you were just mistaken, because really the law
15 was the other way. You just don't know it yet. You know,
16 but there is a -- you know, in applying the law
17 retrospectively, the idea is that it's always been that
18 way.

19 MR. BOYD: So --

20 HONORABLE NATHAN HECHT: And the other idea
21 is if you make it prospective, that's really legislation,
22 and courts shouldn't be legislating.

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: I want to follow-up that
25 thought and then tie it back to another comic relief from

1 our high jurisprudence in the technicality about the rules.
2 In that scenario, I'm Judge Yelenosky and I have been
3 presented with a claim that is in fact a -- an assertion
4 that there should -- a good faith and plausible, let's
5 assume, assertion or at least arguably plausible assertion
6 for an extension, modification, or reversal of the law and
7 then I'm presented with a motion from the other side that
8 says, "There's no basis in existing law, I want my
9 attorney's fees," and whichever way Judge Yelenosky goes --
10 and I'm going to let y'all think about if it makes a
11 difference which way he goes, the other side takes it up
12 and wins, and wins. Now, do they get their attorney's fees
13 for the whole case all the way up and back on a remand
14 under this rule? I'm thinking they do. I'm thinking
15 that's a pretty significant constraint on abuse of this
16 scenario by either side, and we're probably going to only
17 have these ones go up where there is in fact a reasonable
18 argument for a extension, modification, or reversal of the
19 law, and in those cases, at least if I'm on the defendant's
20 side, I'm going to be very cherry about invoking this rule.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: Yeah, when it says "under law,"
23 does that mean just Texas law? What if the Supreme Court
24 of Texas has not ruled on a point, the courts of appeals
25 have. Florida, California, and the trend of the law now is

1 going another way, but there's no Texas law to support
2 that. The Supreme Court hadn't ruled on it. Does it mean
3 -- "under the law" mean no law or just means under existing
4 Texas law as it stands now? I don't know.

5 CHAIRMAN BABCOCK: Case of first impression
6 in Texas.

7 MR. LOW: Right.

8 CHAIRMAN BABCOCK: So the trial judge in the
9 first instance has to decide what the law is.

10 MR. LOW: Yeah. No, but the court of appeals
11 has ruled a certain way, and other courts in other states,
12 their high courts have gone differently. Does that mean
13 no -- do we construe that to mean that under Texas law?

14 CHAIRMAN BABCOCK: Yeah. Yeah. Skip.

15 MR. WATSON: A couple of things. On the
16 point that the trial court is constrained to follow the
17 law, announcement of the Supreme Court, we know that's the
18 principle, the Supreme Court announces the law; and, you
19 know, I've had cases where even the courts of appeals have
20 said, "We would like to go this way, but we're bound by the
21 last pronouncement of the Supreme Court so we're going this
22 way" and, in effect, inviting the grant of a petition; but
23 part of my feelings, just to give you the background, I
24 have been fortunate enough to clerk at a court with Mary
25 Lou Robinson. She was Chief Justice at the Amarillo court,

1 and she told a story of the adoption of 402a in Texas,
2 which is an example like Chip was talking about where we
3 all knew it was coming, but it hadn't happened yet; and, of
4 course, my memory is fuzzy, but -- and I'm not sure if the
5 story was accurate, but the way that she explained it was
6 that as a district judge, I think Wayne Barfield brought up
7 a very, very small claim that could barely afford to be
8 presented, but it was a 402a claim; and I think that was
9 Tungs. I think it was *Diamond Shamrock vs. Tungs*, and it
10 was her case, and instead of following -- and we had this
11 discussion, and instead of following that that cause of
12 action has never been recognized in Texas, as you know,
13 Mary Lou stepped out and said, "It has been now and rather
14 than go through -- because Mr. Tungs can't afford to go up
15 and take this up, I'm going to deny the summary judgments.
16 I'm going to put this case to trial, and you're taking it
17 up." And, of course, it went up and we got 402a.

18 My point is, is that I wish we could fashion
19 a way, I wish the Court would fashion a way, so that the
20 Tungs of the world or the Diamond Shamrocks of the world
21 defending it did not have to pay a penalty for a judge
22 having to make that call, and I know we have in here that
23 it can't be converted to a summary judgment, but, boy, I
24 would think if I were a trial judge I would say, "Yeah, but
25 it doesn't say that I can't convert it to a special

1 exception," you know, and just get out of having to punish
2 somebody for advancing the judicial process by adopting
3 something that you know the rest of the nation has adopted.

4 CHAIRMAN BABCOCK: Justice Gaultney, then
5 Roger.

6 HONORABLE DAVID GAULTNEY: I really just have
7 a question for the subcommittee that was working on this
8 rule, and really your comment about the practical effect of
9 the rule troubles me. So you have a -- you have a
10 defendant move for a dismissal under existing law because
11 an argument that there's a reasonable basis and the motion
12 was denied. That makes the person arguing for new law the
13 prevailing party entitled to attorney's fees, as I
14 understand it.

15 I think there's a similar problem with (D).
16 In other words, before granting a motion the court must
17 allow the amendment, so you file a motion based on what is
18 a frivolous claim. You're in good faith, an opportunity to
19 amend, at which the trial court says, "Yes, that is a good
20 claim," and again, the moving party pays attorney's fees,
21 if I understand it. So my question is did the committee
22 consider a possible determination of who is the prevailing
23 party in (F) to include something other than absolute
24 victory and whether or not the court could have authority
25 under the statute or the rule to say under those

1 circumstances, either one of those two, either the
2 reasonable extension of law or the amendment of the
3 pleading, you don't get attorney's fees for the movant?

4 CHAIRMAN BABCOCK: Justice Christopher, then
5 Jeff.

6 HONORABLE TRACY CHRISTOPHER: I think if we
7 don't explain what the rule means and if we go with the
8 Jeff theory that we just put out number one there, no one
9 will use the rule for all of the reasons that we have
10 stated here today. They won't understand it. They're not
11 sure what the standard is, and they're going to be afraid
12 that they're going to be stuck with costs, and you know,
13 I'm not sure whether the costs include going up on appeal
14 or not, but that would be an interesting question as to
15 whether it did. I also think, as Justice Gaultney said,
16 that we have a real problem with the amendment and who
17 becomes the prevailing party at that point and that if
18 we're going to allow amendment, which, of course, I think
19 we should allow amendment, we should make it clear that
20 after the amendment you get to decide whether you want to
21 move forward with the motion to dismiss and the other side
22 doesn't get their fees for it.

23 I mean, an example on my intentional
24 infliction of emotional distress case, all right, I've pled
25 it very vaguely because I don't want to put the really bad

1 facts in my petition that become then, you know, open to
2 everyone. I'd rather have it in the discovery process, in
3 a deposition where those things are not filed of record.
4 So I don't put it in there. They move to dismiss. Well,
5 now I have to. Now I have to, you know, put in some really
6 nasty factual allegations. You know, should there be a
7 penalty at that point because I didn't plead it to begin
8 with, I amended.

9 CHAIRMAN BABCOCK: Yeah, good point. All
10 right. Jeff, and then we'll take a break.

11 MR. BOYD: Well, first, I also am in the
12 minority in voting against allowing the right to amend, but
13 we'll get to that point, I assume.

14 CHAIRMAN BABCOCK: Yeah, let's --

15 MR. BOYD: For the reason that Justice Hecht
16 described I still don't agree that if the trial court can't
17 change the law then the Supreme Court can't either in a
18 given case, but to me I think those who are arguing in
19 favor of (A)(1)(a), I think you have to ask yourself from a
20 matter of statutory construction then why didn't the
21 Legislature just say "groundless" in this statute? There's
22 a real important point I think I need to note, which is
23 section 102 of the statute which says that "The prevailing
24 party shall recover attorney's fees," the Legislature did
25 not ask or instruct the Court to adopt rules on that.

1 That's just statutory. Now, we as a subcommittee talked
2 about, well, they didn't tell us we can't so maybe we
3 should so that it is in the rule and people will know about
4 it, but I think we have to be very careful making any kind
5 of change to what the Legislature said in the 102 about
6 "shall award attorney's fees."

7 So I get back to that question, why didn't
8 they just use the word "groundless" if, in fact, the
9 Legislature meant for this rule to say what we say here in
10 (A)(1)(a), because that's what y'all are arguing. What I
11 can tell you is as filed it was 12(b).

12 CHAIRMAN BABCOCK: (6).

13 MR. BOYD: 12(b)(6), yes. Well, 12, and
14 what's the other Federal rule? Nine?

15 MR. GILSTRAP: Nine.

16 MR. BOYD: 12 and 9 as filed. Interested
17 parties in the legislation wanted it to say "groundless"
18 and through the negotiations the parties all -- and this is
19 all on record where you can go to the record of the
20 committee hearing that was held late that Saturday night.
21 Right before it got passed the committee met. Every party
22 that was involved in those negotiations, myself, TTLA, TLR,
23 ABOTA. Mike Gallagher was there for TTL. We all got on
24 record and said, "We have all agreed to this language."
25 The effect of what this proposal is, is to say in spite of

1 all of that now we, this committee, or the Court through
2 the rule-making process is going to say it doesn't matter,
3 we're going to pick what one of those parties wanted by
4 using the definition of the word "groundless" when the
5 Legislature did not use either the word "groundless" or the
6 definition of the word "groundless" in the statute, and I
7 just don't think this committee or the Court should be
8 making those policy choices to change what the Legislature
9 has done in the language they adopted.

10 CHAIRMAN BABCOCK: I promised we're going to
11 break, but one question of Judge Peeples. Did either the
12 Texas bar or ABOTA, either of those proposed rules, did
13 they use this language that we have in (A)(1)(a)?

14 HONORABLE DAVID PEEPLES: ABOTA did not, but
15 the State Bar proposal is roughly comparable.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE DAVID PEEPLES: We changed it up,
18 but they made an effort to do what we have here.

19 CHAIRMAN BABCOCK: All right. We know who
20 ABOTA is. Who was on the State Bar committee?

21 HONORABLE DAVID PEEPLES: I don't know that.

22 MS. SECCO: It's chaired by --

23 CHAIRMAN BABCOCK: Russ Meyer.

24 MS. SECCO: Russ Meyer. And Jody Hughes was
25 on the committee, Kennon Peterson. I have a full list I

1 can send to you.

2 CHAIRMAN BABCOCK: All right. Great. Let's
3 take our morning break. Great discussion. Thank you.

4 (Recess from 10:38 a.m. to 11:00 a.m.)

5 CHAIRMAN BABCOCK: All right. We're back on
6 the record, and, Judge Peeples, do you think there would be
7 any benefit in having a show of hands with respect to the
8 controversy on (a)(1)?

9 HONORABLE DAVID PEEPLES: Absolutely. I
10 think we need to have a vote on whether to leave it general
11 in the language on lines five and six or whether to add
12 something along the lines of (a) and (b), and so we need
13 that vote, I think, and then second, I would like to get
14 the sense of the house on Richard Orsinger's fix for (a)
15 and (b), and we haven't talked about the requirement of a
16 hearing. I mean, I think that's probably all we need a
17 vote on, and I guess, also, I'm curious how much more time
18 we have. I think there will be discussion on everything
19 else we have except possibly the family law. That's --

20 CHAIRMAN BABCOCK: We'll set aside the
21 afternoon for the family law thing.

22 HONORABLE DAVID PEEPLES: That will not get
23 discussion, but attorney's fees needs some discussion.

24 CHAIRMAN BABCOCK: Yeah, for sure.

25 HONORABLE DAVID PEEPLES: They all do, but

1 that one for sure.

2 CHAIRMAN BABCOCK: Are we in a position in
3 your mind to take a vote on the one hand just leaving it
4 with the language in lines five and six as opposed to
5 adding something, or does that need more discussion?

6 HONORABLE DAVID PEEPLES: I kind of liked
7 putting it do we want lines five or six or those lines with
8 something else and if the vote is for something else we can
9 talk about what else that would be a little bit more.

10 CHAIRMAN BABCOCK: So we're ready to take
11 that.

12 HONORABLE DAVID PEEPLES: I think we are, but
13 maybe people want to say more.

14 CHAIRMAN BABCOCK: All right. Does anybody
15 want to say more on that topic?

16 MR. HAMILTON: I do.

17 CHAIRMAN BABCOCK: All right. Carl does.

18 MR. HAMILTON: Well, Chapter 10 of the Civil
19 Practice and Remedies Code pleadings uses the same language
20 in (a) and (b).

21 CHAIRMAN BABCOCK: Right.

22 MR. HAMILTON: So it's already in the
23 statute.

24 CHAIRMAN BABCOCK: Richard Orsinger.

25 MR. ORSINGER: I sympathize with Jeff's point

1 about maybe drifting away from the intent of the
2 negotiators when we start defining terms, but I think it's
3 unavoidable because if we don't do it at the rules stage
4 the courts are going to have to do it at the litigation
5 stage in the published appellate opinions, so there will be
6 a judicial interpretation of this. The question is, is it
7 going to be through the rule process or through the appeal
8 process.

9 CHAIRMAN BABCOCK: Justice Brown.

10 HONORABLE HARVEY BROWN: And related to that,
11 this is a rule that's designed to simplify things and
12 minimize expenses. If we don't define it, we're going to
13 have protracted litigation for years to come, and that
14 simple matter instead of being resolved quickly through the
15 rule is going to take years and lots of attorney's fees, so
16 it seems to me it's ironic that a simple rule designed to
17 save money costs more money for the litigants in the
18 short-term if we go with this one.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: And we need to
21 know -- there's a fundamental difference on (b) and whether
22 it's worded that way or not. We trial judges need to know
23 whether we're supposed to assume the facts pled are true or
24 we're supposed to go into some kind of plausibility
25 analysis. ABOTA and Jeff say it's assume. The

1 subcommittee's proposal is we go into a plausibility
2 analysis, and that's fundamentally different.

3 CHAIRMAN BABCOCK: Okay. Jeff.

4 MR. BOYD: Quick, so to the reference to
5 Chapter 10, the question is the same thing as the reference
6 to Rule 13, which is if that's what the Legislature
7 intended why didn't they just use the word "frivolous."
8 They didn't, and I can tell you there's a reason they
9 didn't, and I do agree -- and let me say, as is typical --
10 and I mean this as a compliment, not an insult, as is
11 typical with this committee, we have made this much more
12 complicated than it probably has to be because we want to
13 think ahead of all the possible implications, and that's
14 good, but I think here for the most part when parties
15 choose to use this rule it will be simple, and the trial
16 courts will recognize the simple. When the difficult case
17 comes up, I think it ought to be -- these issues ought to
18 be resolved by the courts in a real case of controversy as
19 opposed to by us in advance through hypotheticals and what
20 ifs.

21 CHAIRMAN BABCOCK: Okay. Yeah, I'm just --
22 if I can say something, I'm just reminded, no matter how we
23 vote on this vote, about how we took the offer of
24 settlement rule and recommended to the Court some changes
25 to it that have made it -- I mean, nobody uses it, and that

1 to me is not -- should not be our function, to amend a rule
2 and make it so complicated that nobody uses it. Justice
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: I think that's
5 true, but I think the opposite will happen here. If we
6 don't put information in the rule, no one will use it.
7 So --

8 CHAIRMAN BABCOCK: Maybe so. I'm not making
9 a judgment on that, but I think that's a -- something that
10 we need to keep in mind and try to avoid. Okay. Are we
11 ready to vote? Lisa. Lisa has been sitting in the corner
12 there. Are you part of this cavil of ABOTA/State Bar?

13 MS. HOBBS: No, I'm not, but I just want to
14 comment to Jeff's point, is I'm not sure what your rule
15 does apart from the statute if you don't define what it
16 means when they say "no basis in law or fact," because if
17 that was what the Legislature intended, they -- I'm not
18 sure what the Supreme Court is adding to the statute. Why
19 didn't they just say dismiss -- I mean, why didn't they
20 just track the language in lines five and six? I mean, it
21 seems like they wanted us or they wanted the Court to do
22 something with that, and I don't know what we would be
23 offering the Court if you don't define what that means.

24 CHAIRMAN BABCOCK: Okay. All right. We
25 ready to vote? All right. Judge Peoples, let's frame it

1 correctly. Would one camp be those who think that it ought
2 to be -- (a) ought to be grounds and content of motion,
3 (a)(1) should be just lines five and six, you would vote
4 for that, and then the people who are not in favor of that
5 would be in favor of something like what we find in lines 8
6 through 13, proposed (a) and (b)? Would that be the vote?

7 HONORABLE DAVID PEEPLES: Yes.

8 CHAIRMAN BABCOCK: Okay. Everybody that was
9 in favor of limiting (a)(1) to just lines five and six,
10 raise your hand. Geographic.

11 All right. Those who feel that something
12 should be added to lines five and six, raise your hand.

13 All right. The group that thinks it should
14 be limited to lines five and six, that had six votes, and
15 the group that thinks something should be added has 18
16 votes, and regardless of how that vote came out, we were
17 going to go talk about subparts (a) and (b) anyway, so,
18 Judge Peebles, where do you want to take the discussion
19 about what (a) and (b) should be?

20 HONORABLE DAVID PEEPLES: Well, number one, I
21 think that we ought -- the committee ought to get the sense
22 of the house, but without having our hands tied too much,
23 and I'm attracted to what Richard Orsinger said a while
24 back and he was kind enough to write it up for me, and I
25 think what I'd like to do is read it.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE DAVID PEEPLES: And then we can
3 talk about it some more. So on lines 8 through 13, he has
4 sub (a), 8 through 10, just the way it is, and then (b)
5 would be changed as follows: "A claim has no basis in fact
6 when the facts pleaded do not support the claim," period.
7 "The court shall not consider facts pleaded that no
8 reasonable person could believe," period.

9 CHAIRMAN BABCOCK: Okay.

10 PROFESSOR HOFFMAN: Can you reread the second
11 sentence?

12 HONORABLE DAVID PEEPLES: Yeah. (b), "A
13 claim has no basis in fact when the facts pleaded do not
14 support the claim. The court shall not consider facts
15 pleaded that no reasonable person could believe," period.

16 MR. GILSTRAP: Did Richard want to make these
17 two conjunctive?

18 MR. ORSINGER: I think that does.

19 MR. GILSTRAP: Okay. All right.

20 CHAIRMAN BABCOCK: Okay. Hang on. Okay.
21 Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: Judge Peeples, did
23 you also accept Pete's suggestion about adding the words
24 "accepting the facts" in (a) as they are pleaded?

25 HONORABLE DAVID PEEPLES: So we would add on

1 line eight, "A claim has no basis in law when," comma,
2 "taking the allegations as true," comma, "it is not
3 warranted"?

4 MR. WATSON: Yes.

5 HONORABLE DAVID PEEPLES: Pete, is that what
6 you had?

7 MR. SCHENKKAN: Or "taking the true" --
8 "taking as true the facts pleaded," the same language --

9 CHAIRMAN BABCOCK: Stephen Tipps.

10 MR. SCHENKKAN: -- that you had down in lines
11 27 and 28, just moving it up here.

12 MR. TIPPS: I am going to reurge my
13 suggestion that we include the preposition "for" in line
14 10.

15 HONORABLE DAVID PEEPLES: Yeah, and I'm fine
16 with that. I haven't heard an argument against it.

17 CHAIRMAN BABCOCK: So restate that, Stephen,
18 if you would.

19 MR. TIPPS: My proposal is in line 10 to
20 include the preposition "for," f-o-r between the word "or"
21 and the word "the" so as to make the establishment of new
22 law parallel with the extension, modification, or reversal
23 of existing law.

24 CHAIRMAN BABCOCK: Okay. Yeah, Jim.

25 MR. PERDUE: The proposed language that I

1 just heard read that I think came from Orsinger is straight
2 out of Iqbal and Twombly. I mean, that is 12(b)(6) Federal
3 language, which is exactly the legislative history that
4 this was not supposed to do, because now that makes this
5 essentially a pleading sufficiency motion, and you would
6 then be going into the facts of the pleading as the basis
7 for the motion to dismiss, which Jeff is absolutely
8 correct. I mean, that was the original language. That's
9 12 language, and that's completely inconsistent with what
10 the compromise was at the final bill. I understand the
11 challenge on no evidence as far as the present language in
12 lines 12 and 13, but that proposed language I think is
13 completely inconsistent with the legislative intent of this
14 statute.

15 CHAIRMAN BABCOCK: Pete Schenkkan.

16 MR. SCHENKKAN: I want to make a procedural
17 suggestion, which is that we have two separate votes, one
18 about (a) and one about (b). (a) is this issue of did the
19 Legislature not intend, but did they enact a statute that
20 freezes the common law, and the language that we have in
21 (a) would say that's -- we're making a rule that doesn't do
22 that, and that's one set of issues, and it's a different
23 issue from the Iqbal issue on (d), and it seems to me they
24 are, therefore, two separate votes.

25 CHAIRMAN BABCOCK: Okay. What do you mean,

1 it freezes the common law?

2 MR. SCHENKKAN: That if you have to dismiss
3 a -- under the statute you have to dismiss a cause of
4 action that has no basis in existing law, that that
5 precludes that no basis in law no longer -- a basis in law
6 no longer includes a good faith effort for extension,
7 modification, or reversal, that would be freezing the
8 common law, and I'm saying it didn't do that if it doesn't
9 require --

10 CHAIRMAN BABCOCK: Doesn't a trial judge have
11 to dismiss, if he's following a law, a claim that is not
12 recognized by our law?

13 MR. SCHENKKAN: No, I'm suggesting that it
14 depends on what you mean by "a reasonable argument for a
15 good faith extension" or whatever, maybe no.

16 CHAIRMAN BABCOCK: Yeah, but that's a
17 different issue. That's about who's going to pay for it.
18 But doesn't a trial judge or a court of appeal have to
19 follow the law?

20 MR. SCHENKKAN: Yes. And the law includes
21 good faith arguments for the extension, modification, and
22 reversal of the law. That's part of the law.

23 CHAIRMAN BABCOCK: But the trial judge can't
24 tell the Supreme Court that they're wrong.

25 MR. SCHENKKAN: No.

1 CHAIRMAN BABCOCK: A trial judge has got to
2 follow what the Supreme Court says the law is, the common
3 law. So you're only talking about who's going to pay for
4 it.

5 MR. SCHENKKAN: Which is exactly what the
6 purpose of this rule is; and it's the only rule-making
7 authority this Court, the Supreme Court, is exercising
8 here, is under this first sentence of this statute; and I'm
9 saying for this purpose, for the purpose of deciding who
10 has to pay for making such an argument, they get to say,
11 the Court gets to say, a basis in law includes a reasonable
12 argument for extension, modification, or reversal of the
13 law. They get to say that. They may be wrong to say it.
14 They may choose not to say it.

15 CHAIRMAN BABCOCK: Right.

16 MR. SCHENKKAN: But they get to say it, and
17 I'm saying we ought to take a vote on whether they ought to
18 choose to say it, and I'm saying they ought to choose to
19 say it.

20 CHAIRMAN BABCOCK: Richard Munzinger.

21 MR. MUNZINGER: Does the reasonable argument
22 for the extension, modification, or reversal of an existing
23 law have to be stated in the pleading attacked?

24 CHAIRMAN BABCOCK: What do you think?

25 MR. MUNZINGER: I'm just asking the question.

1 I mean, what's the sense of the committee? Because if you
2 file a motion to dismiss based on the pleadings and the
3 pleading says invasion -- the false light invasion of
4 privacy --

5 CHAIRMAN BABCOCK: Right.

6 MR. MUNZINGER: -- and that's all that it
7 says, and it doesn't give the reasonable argument for
8 extension. So now the defendant has to ask himself,
9 herself, do I file a motion under this rule and risk
10 attorney's fees, because they can come into court now and
11 make all these reasonable arguments that they don't make in
12 the pleading.

13 CHAIRMAN BABCOCK: Right. I see what you're
14 saying. Frank.

15 MR. GILSTRAP: I want to go back to Jim
16 Perdue's comment.

17 CHAIRMAN BABCOCK: Jim's got his hand up.

18 MR. GILSTRAP: Okay. Jim, are you saying
19 that the language in the proposed (A)(1)(b), you said that
20 that comes out of Iqbal. Are you saying it's verbatim from
21 Iqbal or it's just equivalent to the plausibility standard
22 in Iqbal?

23 MR. PERDUE: What I heard proposed by
24 Orsinger was the equivalent of the Iqbal standard.

25 MR. GILSTRAP: Okay. Yeah. Yeah.

1 MR. PERDUE: And we were just talking a
2 little bit, and I guess what the subcommittee got from you,
3 Frank, ended up being the Conley language, but I was
4 curious why the subcommittee didn't adopt either the State
5 Bar rules recommendation or the Chapter 13, 14 standard
6 that you identify.

7 MR. GILSTRAP: Let me respond here.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: I would be real disturbed if
10 the language itself came out of Iqbal because, you know,
11 we've all got a life-sized picture of where the Federal
12 courts are going with that --

13 MR. PERDUE: Thank you.

14 MR. GILSTRAP: -- and that's not where we
15 want the state courts to go, but at the same time if the
16 standard is no basis in fact, there has to be something
17 like a plausibility standard, you know, because we can't
18 hear facts. The court cannot hear facts in connection with
19 this motion, and yet "no basis in fact" has some meaning.
20 It must mean some statement of facts that simply can't be
21 sold, so we've got to have something in the nature of a
22 plausibility standard, but again, we sure don't want to use
23 language right out of Iqbal for the reasons I stated.

24 CHAIRMAN BABCOCK: Well, according to your
25 memo, Iqbal is plausible on its face.

1 MR. GILSTRAP: Yes.

2 CHAIRMAN BABCOCK: And according to your
3 memo, *City of Keller vs. Wilson* is "A reasonable person
4 could not believe that the material allegations in the
5 pleadings are true."

6 MR. GILSTRAP: Yes. Yes. But --

7 CHAIRMAN BABCOCK: And I assume that you're
8 accurate because you always are.

9 MR. GILSTRAP: Well, I kind of winged it on
10 *City of Keller*, you know, because *City of Keller* really
11 isn't that clear, but in this regard --

12 CHAIRMAN BABCOCK: Oh, so you're putting it
13 on the Court.

14 MR. GILSTRAP: In this regard it's not that
15 clear. I'm just saying what I wanted to guard against here
16 is simply lifting language out of 12(b)(6) or the 12(b)(6)
17 jurisprudence and bringing it into state court because then
18 we would be importing all of the Federal jurisprudence, and
19 I don't think we want to do that.

20 CHAIRMAN BABCOCK: Great. Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Well,
22 neither *Iqbal* nor *City of Keller* is about facts that are
23 delusional or crazy. I mean, *City of Keller* is about a
24 drainage ditch, right, so -- and the -- so I don't know how
25 useful those are, but when you said that nobody could say

1 no basis in law or fact requires some kind of plausibility
2 determination, well, somebody did. In fact, Jeff's telling
3 us that's what they all thought that no basis in fact or
4 law meant, presuming the facts to be true. I don't know.
5 I can see if you just do a straight statutory construction
6 you could say, well, it has to mean a plausibility, but
7 apparently other people didn't think that.

8 The last thing is, Chip, while you were
9 saying, "Well, the trial court can't do that," Judge
10 Christopher and I are over here shaking our heads. Well,
11 you know, I mean, years ago before the Supreme Court said
12 that sue or be sued is not a waiver of sovereign immunity
13 there was old Supreme Court case law that suggested it was.
14 In between those two I ruled in a case that's not a waiver
15 of sovereign immunity. All right. That is the law now.
16 That is not a waiver of sovereign immunity. What you're
17 saying is that what I did then was wrong.

18 CHAIRMAN BABCOCK: Well, I don't want to
19 comment on what you did then.

20 HONORABLE STEPHEN YELENOSKY: We figure out
21 what we think the law is based on everything that we've
22 seen, what trends might be happening, what the Supreme
23 Court might do, but to say that I couldn't determine
24 because there was a prior old Supreme Court decision that
25 suggested sue or be sued is a waiver of sovereign immunity,

1 I as a trial judge couldn't determine, no, that's not
2 right. This day and age the Supreme Court I think is going
3 to find that's not a waiver. You're saying I couldn't do
4 that.

5 CHAIRMAN BABCOCK: No, I wasn't saying that,
6 because obviously the hypothetical that I posited is as
7 black and white as I could make it because the Supreme
8 Court has said there is no cause of action for false light
9 invasion of privacy in this state despite the fact that
10 there are in many other states. Now, if you file a claim
11 against one of my clients, I would file something to try to
12 get rid of that claim, and I would think that you as a
13 trial judge would be duty bound to follow clear precedent
14 from the Texas Supreme Court. Now, if there was an
15 intermediate appellate decision or if the Court had later
16 in another case said, "Well, we said 20 years ago, no false
17 light, but we're not so sure about that anymore," that's
18 different. I mean, if you've got a hook to hang your hat
19 on, that's different, but the hypothetical I was trying to
20 propose was a very clear there isn't any claim here.

21 HONORABLE STEPHEN YELENOSKY: Right. But to
22 be clear --

23 CHAIRMAN BABCOCK: And not to criticize your
24 ruling that I didn't even know about.

25 HONORABLE STEPHEN YELENOSKY: No, I know. I

1 wasn't putting you in that box, but as Jeff is saying, you
2 can't even hang your hat on that. I mean, the trial court
3 would have been wrong in Jeff's view to rule like the court
4 of appeals did in the dog sentimental value, and so the
5 trial court would have been wrong even though the court of
6 appeals is right, and to me it seems that the trial court
7 should have been able to do what the court of appeals did
8 here, and retrospectively it would have been right.

9 CHAIRMAN BABCOCK: Richard.

10 MR. ORSINGER: We're arguing the simplest
11 case here, which is where we have clear Texas Supreme Court
12 authority that we're arguing to overturn. That's fairly
13 rare. What's usually going to happen is the law is going
14 to be changing in stages, and the example that comes to
15 mind to me is conflict of laws where the Texas Supreme
16 Court throughout all of the restatement first standards of
17 lex loci contractu and lex loci delicti, and they replaced
18 it in tort in one case, the most significant relationship
19 test. They did it in contract in another case, and they
20 haven't done it in family law. Only the court of appeals
21 have done it in family law, so some doctrines are
22 incrementally adopted rather than just adopting 402a of the
23 restatement of torts.

24 Secondly, and more significantly, is you're
25 going to have courts of appeals where there's only one

1 court of appeals that has ruled on something, and you're in
2 a different district, and so the question now is, is that
3 the law of Texas or is that not the law of Texas, and we
4 haven't debated that, and I don't know if we all agree or
5 not, but I discussed it with judges for 35 years, and every
6 judge has a different idea of what it means when one court
7 of appeals says that the law is a certain way.

8 CHAIRMAN BABCOCK: You are easily amused,
9 that's for sure.

10 MR. ORSINGER: And then the third category,
11 of course, is where there's no Texas law at all, Supreme
12 Court or court of appeals or statutory, and then you're
13 arguing that a recognized cause of action that's caught on
14 in 35 states should be recognized here or not, and I think,
15 you know, it's easy to say that a trial judge and even a
16 court of appeals doesn't overturn clear Texas precedent
17 from the Texas Supreme Court, but everything else, is that
18 a reasonable extension or if it's not -- if there's no case
19 saying that you can do it, does that mean you can't do it
20 without paying a price? I feel like this definition is
21 helpful because it says, yes, you can be the first
22 plaintiff to establish this cause of action, or, yes, you
23 can go to your court of appeals and have them disagree with
24 the Waco court of appeals or the Dallas court of appeals.
25 I think we should allow people to do that because that's

1 what makes the law expand.

2 CHAIRMAN BABCOCK: The problem is, in my
3 view, that you're taking language from a sanction rule and
4 importing it into this rule, which is designed to do
5 something different, and that may be appropriate because
6 there is a monetary aspect to this rule that the, quote,
7 loser pays. The problem is that, unlike the sanction rule
8 where only one party pays, here both parties are at risk of
9 paying, and so if you had this sanction rule imported into
10 this new Rule 94a you are likely by having this language to
11 emasculate the rule, because what person is going to --
12 what defendant is going to take the risk of using this rule
13 when there's this giant loophole there.

14 MR. ORSINGER: Well, maybe that's the
15 appropriate use of this rule, is when somebody is coming in
16 and arguing a statute that's in plain language doesn't mean
17 what it says or a Supreme Court decision that's five years
18 old should be reversed. That's where you should pay. But
19 if there's one court of appeals and maybe they have a
20 dissenting opinion, so it's a two to one decision out of
21 that, why shouldn't you be able to go into another court of
22 appeals and say that's not the law; or if Arizona and all
23 these states around Texas have adopted a rule but Texas
24 never has why shouldn't you be able to go in and say this
25 is the law? It doesn't say the statutory law of Texas. It

1 doesn't say the Supreme Court law of Texas. It doesn't say
2 the court of appeals law. It says "the law," and so I
3 think that if you pass this rule or evaluate this rule on
4 the simple case where a trial judge is being asked to
5 overrule clear Supreme Court precedent or go against the
6 clear language of the statute, they should pay, but in all
7 these other gray areas where the law is growing and being
8 imported and being changed, they shouldn't pay. That's my
9 view.

10 CHAIRMAN BABCOCK: Okay. I want to get back
11 to Jim's point and have any comments that people wish to
12 make about that, and that is whether or not -- whether it's
13 the subcommittee's language or Richard Orsinger's proposal,
14 whether that's not just importing Iqbal and Twombly into
15 our jurisprudence.

16 MR. ORSINGER: Can I clarify? I think the
17 attack was just on the second sentence and not the first;
18 is that right, Jim? The idea that the claim has no basis
19 in fact when the facts do not support the claim. Is it the
20 first sentence you think is objectionable or the second?

21 MR. PERDUE: I don't remember what came first
22 or second, but I think when you tie the analysis to whether
23 the facts state a claim, if the analysis of this motion to
24 dismiss is whether these facts state a claim, that's a
25 12(b)(6) analysis and then you get into Iqbal and Twombly,

1 whether the facts pled are sufficient to state a claim, and
2 that's not what this was supposed to do. It specifically
3 was supposed to stay out of that arena. I'm trying to find
4 any case that looks at Rule 13 interpreting no basis in
5 fact, but it seems to be kind of like pornography, you know
6 it when you see it. There's no basis in fact, there's no
7 basis in fact, but we've been down here talking about
8 plausibility, which I kind of embrace as a concept in that
9 you plead something that's just completely unbelievable,
10 it's a bad faith pleading. It's, you know, a harassing
11 pleading just making stuff up, there's no way it's true.
12 Well, that satisfies, I think, the concept, the legislative
13 concept of what was behind the rule, but once you get into
14 analyzing whether the facts establish a cause of action and
15 have pled it properly, that's clearly 12(b)(6); and once
16 you start talking about whether the facts satisfy the
17 pleading requirement of a cause, now we're outside notice
18 pleadings of Texas rules, we're into a Federal system, and
19 we've got this analog which was rejected by the
20 Legislature. So when you got into the idea of facts
21 satisfying a cause of action, that's the thing that raised
22 a red flag for me.

23 CHAIRMAN BABCOCK: Yeah, Jim, just so we're
24 clear, Richard's second sentence said, I think, Richard,
25 "The Court shall not consider facts pleaded that no

1 reasonable person could believe." And that's what --
2 that's what got your attention?

3 MR. PERDUE: No, the first sentence.

4 CHAIRMAN BABCOCK: Oh, okay.

5 HONORABLE TRACY CHRISTOPHER: The first
6 sentence.

7 CHAIRMAN BABCOCK: "A claim has no basis in
8 fact when the facts pleaded do not support the claim."

9 MR. PERDUE: That's what concerns me.

10 CHAIRMAN BABCOCK: Okay. That's what
11 concerns you. Okay. Professor Albright.

12 PROFESSOR ALBRIGHT: Well, when I asked Jim
13 that he said that both sentences troubled him.

14 CHAIRMAN BABCOCK: Okay.

15 PROFESSOR ALBRIGHT: So, and, I think the
16 facts pleaded do not support the claim are Justice
17 Christopher's issue about the pleading facts that don't
18 rise to intentional conduct because you don't want to make
19 them of a record kind of situation. I would like to put a
20 third proposal out there just to get it on the table as an
21 alternative that says, "The court shall dismiss" -- says
22 that "A claim has no basis in fact when the claim is based
23 on irrational or wholly incredible factual allegations."

24 HONORABLE STEPHEN YELENOSKY: And that's
25 pulled out of that Federal case.

1 PROFESSOR ALBRIGHT: It's -- there's that
2 Federal case, and it's also here in the memo as --

3 MR. PERDUE: Number 11.

4 PROFESSOR ALBRIGHT: -- number 11 from
5 Chapters 13 and 14.

6 CHAIRMAN BABCOCK: Judge Wallace.

7 HONORABLE R. H. WALLACE: Did our
8 subcommittee consider the language that's in the State Bar
9 committee's proposed rule, the subsection (c), "The cause
10 of action has no basis in fact when no reasonable person
11 from the face of the pleading could believe that more than
12 a de minimis probability exists that the factual
13 allegations that support the cause of action could be
14 proven true at trial" and if so --

15 HONORABLE STEPHEN YELENOSKY: It sounds like
16 the definition of preponderance of the evidence.

17 HONORABLE R. H. WALLACE: Yeah, what I -- I
18 mean, more than a de minimis -- well, anyway, there's some
19 things about that I like, but I just wondered if y'all
20 considered that and rejected it for any particular reason.

21 HONORABLE DAVID PEEPLES: Yes, we did
22 consider it. I, frankly, don't see how that's all that
23 different from what we came up with.

24 CHAIRMAN BABCOCK: Okay. Frank.

25 MR. GILSTRAP: You know, now that I've heard

1 Jim Perdue talk again and seen more clearly his concern, I
2 am, too, concerned that if we say -- if we say that no
3 basis in fact means the facts pleaded do not support the
4 claim, I mean, aren't we importing a general demurrer
5 standard here? Isn't that what that is? And I don't think
6 that's what we want to do.

7 CHAIRMAN BABCOCK: Some people could
8 certainly argue that.

9 MR. GILSTRAP: I don't think that's where we
10 want to go with this.

11 CHAIRMAN BABCOCK: Yeah. Elaine.

12 PROFESSOR CARLSON: I think there's a lot of
13 subcommittee discussion about the legislative intent and
14 what would be the appropriate standard. We're really
15 talking about under what circumstances should we dismiss a
16 claim, and I think most of us felt -- and everybody can
17 speak for themselves -- that the Legislature didn't mean
18 for pleading defects, as Jim Perdue said --

19 CHAIRMAN BABCOCK: Didn't mean for what?

20 PROFESSOR CARLSON: For pleading defects or
21 pleading deficiencies, but that for those state of facts
22 that are not credible that there should be and that the
23 Legislature probably wisely thought about fee shifting. So
24 I think the way the subcommittee ended up drafting (A)(1)
25 with (a) and (b) was to try and draw a line between matter

1 of law and pleading deficiency, and so for that reason,
2 Richard, I'm not keen on your language either, that
3 additional language in (b).

4 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Well, fee
6 shifting on implausibility is going to be meaningless. I
7 mean, it's the case with the prisoner, you know, or it's
8 the pro se on an affidavit of inability who is psychotic.
9 You're never going to collect fees on that. If that's what
10 we're talking about we're not really doing anything here.

11 MR. GILSTRAP: That's the prisoner cases.
12 That's the prisoner cases.

13 HONORABLE STEPHEN YELENOSKY: Not just
14 prisoner cases.

15 HONORABLE TRACY CHRISTOPHER: Crazy people.

16 HONORABLE STEPHEN YELENOSKY: There are
17 people who will come in -- like she said, I had one saying,
18 "Something was put in my brain." Okay. I can dismiss
19 that. I can order fees, you know, but those get dismissed
20 now, and they're not going to pay the fees. They're
21 judgment proof.

22 CHAIRMAN BABCOCK: Okay. Roger.

23 MR. HUGHES: Well, if we take Orsinger's
24 proposal, what I'm afraid we're doing is in a rule about --
25 under Rule 94a we're really changing the whole standard of

1 pleading sufficiency in Texas because now we're saying you
2 not only have to plead a general theory, you have to plead
3 facts supporting each element of that theory, and I'm not
4 sure we particularly want to go there yet. Number two, if
5 we talk about plausibility, I can see in some product
6 liability cases, especially drug adverse reaction cases,
7 the manufacturer is just going to say, "I'm sorry, there is
8 no reasonable person on the face of the earth who believes
9 that my drug A causes adverse side effects B," and we'll
10 end up having what we might politely call Daubert motions
11 on pleading sufficiency because the manufacturer is going
12 to stoutly contend that --

13 HONORABLE STEPHEN YELENOSKY: Can't consider
14 evidence, though.

15 MR. HUGHES: Well, yeah, but how would you
16 decide it's plausible that -- I mean, we just had a
17 presidential candidate openly assert that -- what was it,
18 the HPV vaccine might cause certain adverse reactions, and
19 of course, there was a storm of controversy over that, but
20 if we're going to entertain plausibility what are we going
21 to do when the defendant says, "My drug can't possibly
22 cause that adverse reaction."

23 HONORABLE STEPHEN YELENOSKY: Deny the
24 motion.

25 MR. PERDUE: What you said.

1 CHAIRMAN BABCOCK: Carl.

2 MR. HAMILTON: I'm reading this statute a
3 little bit differently than -- and it says that the cause
4 of action has no basis in fact. It doesn't say the
5 pleadings are wrong or there's no basis and the facts are
6 not plausible. It says, "The cause of action has no basis
7 in fact," so that's a legal concept, the cause of action.
8 So I think Richard's right, the facts have to relate to a
9 claim, and I don't think we need to even define what we
10 mean by whether we've got the right facts in the pleadings.
11 As ABOTA suggests, we ought to take the pleadings on their
12 face and assume that all those facts are true, and if
13 they're true, do they state a cause of action. So I don't
14 know that we really need to focus so much on what the facts
15 are, except as they're pleaded.

16 CHAIRMAN BABCOCK: Okay. Richard.

17 MR. ORSINGER: My original concern and what
18 my language was attempted to rectify is that there's no
19 requirement that the -- that plausible facts support the
20 claim, and so we have two independent tests that are
21 unrelated to each other. One is have they asserted a claim
22 that is recognized, and, number two, have they stated facts
23 that someone could believe. There's no requirement that
24 those facts relate to the claim that they pled.

25 MR. GILSTRAP: What about material

1 allegations? See, that was -- that's why we put the word
2 "material" in there, was to relate it to the claims.

3 MR. ORSINGER: Well, if you are relating them
4 to the claims then you just have a less clear version of
5 the language I proposed, which is just to clarify that if
6 you've got a -- in this analysis we're determining
7 whether -- if you can prove what's in your pleadings do you
8 win, do have you a cause of action that's supported by
9 facts, and you may say that's a general demurrer. I don't
10 see that, but what good does it do to say they mentioned a
11 recognized tort and they have facts that someone could
12 believe, but they don't really relate to each other but
13 we're going to deny the motion anyway?

14 MR. GILSTRAP: When the facts that they
15 allege aren't material. That's the idea.

16 MR. ORSINGER: Well, if that's true, that
17 material allegations ties (b) and (a) then all I'm doing is
18 making clear what you're doing, and that means that you're
19 doing what you don't believe in, is the way I see it.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: You know, I was going to say, what
22 if they set forth, "I went to the moon, I did all of these
23 crazy things" and then the material facts tie in to the
24 cause of action? I think that's why they used the word
25 "material," and you don't use that word. I mean, just

1 because they don't believe one thing I said, does that
2 strike the whole thing? That's not plausible that I flew
3 to the moon, but then I gather my senses and I plead facts
4 that are correct, and you say, "Well, that's not plausible
5 either. He didn't go to the moon," gone. It would have to
6 be the material facts that I pled, doesn't it?

7 MR. ORSINGER: Yes, and in my view -- I mean,
8 and my language was a proposal --

9 MR. LOW: Yeah.

10 MR. ORSINGER: -- to try to make the goal
11 clearer, but if you have extraneous allegations but at
12 least you have some that support your claim, you should
13 survive.

14 MR. LOW: Yeah, that's what I'm saying, that
15 it shouldn't just --

16 CHAIRMAN BABCOCK: I'd like to go back to
17 Justice Christopher's example of this morning. I think we
18 have notice pleading in this state. In Federal court we
19 used to have notice pleading, and now I'm not so sure we do
20 anymore.

21 MR. GILSTRAP: Right.

22 CHAIRMAN BABCOCK: Probably don't, frankly,
23 under Twombly and Iqbal, and one issue is whether or not
24 we're going to retreat from notice pleading, which I think
25 that this implicates, which is what Jim raises, a good

1 point, and Judge Christopher raised a good point, too, on
2 the intentional infliction of emotional distress. You
3 know, if you plead and say, for all sorts of legitimate
4 reasons, the plaintiff engaged in a pattern of conduct
5 which was horrible, terrible, and you know, we'll get into
6 it at trial and discovery, but it's so bad that it rises to
7 a claim of intentional infliction. Now, is this rule going
8 to be intended to require the pleader to come back and
9 plead more facts in order to avoid a motion to dismiss?
10 That's a pretty interesting issue.

11 There's another -- there's another
12 circumstance. Let's suppose Justice Gaultney and Justice
13 Gray, God forbid, are running against each other for
14 judicial office and one of them sends out a two paragraph
15 campaign letter. Justice Gaultney sends it about Justice
16 Gray, and Justice Gray files a libel action, and as is
17 required, he sets out verbatim the language from the letter
18 that he says is defamatory. The language he sets out says
19 that he has been falsely accused of being a war hero and a
20 scholarship athlete at the University of Texas. Now, that
21 probably is not defamatory.

22 HONORABLE TOM GRAY: To an Aggie it would be.

23 CHAIRMAN BABCOCK: Well, I was thinking more
24 Baylor based on where you were, but does this rule allow
25 somebody to say, you know, "Look, whether language is

1 defamatory is for the court in the first instance. He's
2 set it out in his pleading as he's required to. It's not
3 defamatory. This case ought to be gone." Judge Peeples.

4 HONORABLE DAVID PEEPLES: That example is not
5 helpful to me because the same thing can happen right now
6 with the special exception practice. If a defendant wants
7 to, it can say, you know, I've got this -- you know, "The
8 petition pleads the elements of intentional infliction or
9 defamation, but the facts are not there. Your Honor, make
10 them be more specific."

11 CHAIRMAN BABCOCK: There's no more
12 specificity that can be provided here.

13 HONORABLE DAVID PEEPLES: Pardon?

14 CHAIRMAN BABCOCK: I mean, it's a two
15 paragraph letter, and they've set out the letter in the
16 pleading, so you're saying go ahead and file a special
17 exception.

18 HONORABLE DAVID PEEPLES: I'm saying that
19 that example doesn't advance the ball here because it can
20 happen already under the law that we've got.

21 CHAIRMAN BABCOCK: Well, then why do we need
22 this rule at all if everything can happen under the rules
23 we already have?

24 HONORABLE DAVID PEEPLES: Because this
25 authorizes -- mandates attorney's fees.

1 HONORABLE TRACY CHRISTOPHER: Fees.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
4 think that's a hard one. That to me falls under the
5 statute no matter what way we define this, and you get your
6 fees.

7 CHAIRMAN BABCOCK: Okay. But isn't it taking
8 the facts and applying it to the law?

9 MR. GILSTRAP: Facts as pleaded.

10 CHAIRMAN BABCOCK: Facts as pled.

11 HONORABLE STEPHEN YELENOSKY: Facts as pled,
12 it is, but you've pled yourself out of the case.

13 CHAIRMAN BABCOCK: Okay. Lonny.

14 PROFESSOR HOFFMAN: So here's I think where I
15 come down on this discussion about facts, and it is that
16 I -- I don't favor Richard's revision, nor do I like, after
17 kind of hearing the discussion, the existing language in
18 (b) and why ultimately I think Alex is right to favor the
19 irrational or wholly incredible factual allegations that
20 Frank has set out in 11 of his memo. So let me just see if
21 I can vet. I think that it's hard at least for me in
22 following the discussion to follow the difference. It's
23 sort of subtle, right? It's not so easy to figure out
24 which part -- Jim doesn't even know which part he doesn't
25 like, right?

1 CHAIRMAN BABCOCK: Yes, he does.

2 HONORABLE STEPHEN YELENOSKY: He just didn't
3 know whether it was first or last.

4 PROFESSOR HOFFMAN: We don't know, and part
5 of it is it's a hard distinction to figure out, what is the
6 difference between the language as proposed and what
7 Richard is suggesting and what does Twombly and what does
8 Iqbal actually require, what do we think it requires, what
9 do courts think it requires. These are hard things to
10 know, and they're subtle. So I would suggest, Chip, I sort
11 of agree fully with what you said in the end there, is some
12 of this implicates are we moving away from notice pleading,
13 which is also something Roger and others have said.

14 So I think one way to think about this is to
15 think about what is it that the Legislature is asking us to
16 write a rule for under this no basis in fact, and obviously
17 there are different ways you can go with it. You could go,
18 as I am agreeing with Alex, I think perhaps this is the
19 right way to go because it seems like the Legislature was
20 intending to get -- allow a procedure to get rid of in a
21 quick way and maybe even deter the filing in the first
22 instance of wholly incredible or irrational allegations;
23 but that's not the only way; and it's just that those other
24 ways, the do we want to require that people move away from
25 notice pleading, you know, they could have intended that;

1 and some of our language that we've been debating, like the
2 language in here, has the possibility of being interpreted
3 that way.

4 It could be intended that they intended to
5 adopt Twombly and Iqbal, although as Jim and others have
6 said, that feels unlikely given what the earlier version of
7 the statute did and then expressly didn't do, but some of
8 our language could suggest that. Indeed if we don't say
9 anything, that might lead some people to think that. So
10 for all those reasons, because it's confusing, my vote
11 would be that the best way to interpret what the
12 Legislature intended is they were trying to get rid of or
13 maybe deter in the first instance wholly incredible or
14 irrational allegations, not to import Twombly and Iqbal
15 into Federal practice, not to get rid of notice pleading;
16 and instead, therefore, going with that language is really
17 a useful use and is one way to explain what the Legislature
18 maybe was doing that was different than current law. So
19 anyway, I'll stop, but those are some thoughts on it.

20 CHAIRMAN BABCOCK: You know, and Buddy
21 brought up with me earlier off the record the impact that
22 what we do here will have on other rules, and, Buddy, go
23 ahead, you can speak to that.

24 MR. LOW: For instance, and fair notice is
25 still in Rule 45.

1 CHAIRMAN BABCOCK: Right.

2 MR. LOW: On fair notice and then in 90, it
3 says general demurrer is not to be used, but it also says
4 there's a waiver of a defect in the pleading if you don't
5 file special exceptions and so forth. It doesn't say that.
6 So we have to adjust that because this is not a special
7 exception.

8 CHAIRMAN BABCOCK: Okay.

9 MR. LOW: So we need to look at Rule 90 or
10 put something in there that this is not a waiver under Rule
11 90.

12 CHAIRMAN BABCOCK: I think we have consensus
13 on this point, but maybe we don't; and if we don't, we
14 should let the Court know; but does anybody have the sense
15 that the Legislature intended for us to import
16 Federal Iqbal/Twombly pleading requirements into our rules?
17 Does anybody want to make a case for that?

18 MR. LOW: No, not that, but I think the only
19 thing we can agree on, the Legislature knew about our
20 special exceptions. All right. That sometimes is lengthy
21 because you file exceptions, they have so much to amend,
22 and they can keep amending. They wanted something quick if
23 it's outrageous. I mean, I think nobody could disagree
24 with that, and then the pleadings and exceptions don't
25 provide for a penalty. They wanted something to deter and

1 to cost, so now what else they intended I don't know, but I
2 think those things are fairly clear, and what we're doing
3 so far I think is not inconsistent with those theories.

4 CHAIRMAN BABCOCK: Okay. But does -- yeah,
5 Justice Hecht.

6 HONORABLE NATHAN HECHT: I'm trying to be
7 overly analytical.

8 CHAIRMAN BABCOCK: It's catching.

9 MR. ORSINGER: That's what we do best.

10 HONORABLE NATHAN HECHT: So on no basis in
11 fact, what could it mean? It could mean the facts pleaded
12 are implausible in the sense that they're irrational or
13 wholly incredible, the chip planted in the brain, being
14 taken to Mars, that sort of thing, which it seems to me I
15 haven't heard anybody say it couldn't mean that, and I
16 can't think of an argument why it wouldn't. I just don't
17 know why the Legislature would pass a statute to call for
18 dismissal of those cases when we don't have many of them, I
19 wouldn't think, outside the prisoner context or maybe
20 informa pauper's cases.

21 Then the second thing I've heard people say
22 is it could mean the facts taken as true don't state a
23 cause of action. For example, IIED, and they say something
24 that really doesn't amount to anything more than your
25 feelings were hurt, and it's not anywhere near the kind of

1 outrageous conduct that there has to be and you can tell
2 that as a matter of law, and so you assume -- several
3 people have said this, you just take the facts as true, as
4 alleged, and they just don't get there.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE NATHAN HECHT: And I can't tell if
7 we think it means that or not, and then there's sort of
8 the Iqbal/Twombly. I'm not sure exactly what those cases
9 mean in the detail we're talking about here, but it might
10 mean that something in Twombly, it means that you can say
11 it's true, but unless you've got something to really back
12 it up we're not going to take it as true, so it involves
13 kind of a pleading element. You could say unfair pricing,
14 but you've got to have some more detailed reason. You
15 can't just say the words, which we talk about in our
16 jurisprudence is conclusory or unsupported, and I guess
17 that would be a question, and I'm just wondering if those
18 are the three we're talking about or if there's anything
19 else.

20 CHAIRMAN BABCOCK: Well, the example I've
21 pointed out where you know you've got the -- it could be a
22 contract or it could be a -- an allegedly defamatory
23 publication, but it's right there in the pleading.

24 HONORABLE NATHAN HECHT: Right.

25 CHAIRMAN BABCOCK: Or the contract might be

1 attached to the pleading.

2 HONORABLE NATHAN HECHT: Right. But that's
3 the facts taken as true don't state a cause of action. So
4 you say, "This is what was said and it's defamation," but
5 it just isn't.

6 CHAIRMAN BABCOCK: It isn't, right.

7 HONORABLE NATHAN HECHT: "This is what was
8 done, and it was IIED," but it just isn't. I mean, you
9 assume. But that's different from the Twombly situation
10 where you say, "This is unfair pricing," and you can't
11 really tell if you don't know more than that. You know, it
12 might be, it might not be.

13 CHAIRMAN BABCOCK: Yeah. Okay. Anything
14 else other than that? Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Well, Justice
16 Hecht, you said you didn't hear anybody say that this
17 wouldn't include the taking to Mars. Actually, I heard
18 Jeff say exactly that, that he thought this statute would
19 require the trial judge to assume the facts are true, even
20 if they're that wild. Isn't that what you said, Jeff?

21 MR. BOYD: Uh-huh.

22 HONORABLE STEPHEN YELENOSKY: So we are
23 hearing that, and there is a proposal on the table -- it's
24 the ABOTA proposal, and some other people have endorsed it
25 -- that we presume the facts to be true however irrational

1 or wholly unbelievable, so I just did want to make that
2 point.

3 HONORABLE NATHAN HECHT: Thank you.

4 CHAIRMAN BABCOCK: Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: Well, I would
6 like to make the point that on the libel where you might be
7 required to put in the pleading the specific libel, I'm not
8 sure that we have a requirement even after special
9 exceptions are filed that you put in every specific
10 allegation that you contend rises to the level of
11 intentional infliction of emotional distress.

12 CHAIRMAN BABCOCK: That's true.

13 HONORABLE TRACY CHRISTOPHER: And without
14 that requirement we can still have very general notice
15 pleadings.

16 CHAIRMAN BABCOCK: Roger, and then Professor
17 Hoffman.

18 MR. HUGHES: Well, I can understand why from
19 the language the Legislature enacted it might be possible
20 to argue that the -- a claim that has no basis in fact when
21 the alleged facts don't add up to a cause of action. You
22 know, that's going to cause a real change in our pleading
23 practice. If we're going to borrow from the Feds then I
24 think we ought to also borrow in some manner their 12(b)(6)
25 rule that the cutting edge is whether the plaintiff could

1 prove a set of facts consistent with their allegations that
2 will support a claim; and that is when the claim has no
3 basis, and so frequently this -- I mean, this gives the
4 judge latitude to say, "Look, maybe not everything they
5 need is there, but consistent with what they have said they
6 could plausibly prove facts which would fill in the gaps or
7 the holes, therefore I deny the motion"; and so if we're
8 going to go that -- to that length, I mean, we have to
9 build something into the rule to say, "Judge, when you're
10 trying to decide whether the facts alleged get them to home
11 base, you have to consider can they prove things consistent
12 with those facts, or is there -- are there plausible things
13 that they prove consistent with them, which will get them
14 to home base." Otherwise we're converting ourselves to
15 fact-based pleading, which in some commercial cases could
16 get really sticky.

17 CHAIRMAN BABCOCK: Professor Hoffman.

18 PROFESSOR HOFFMAN: So I'm glad Roger said
19 that because that sort of builds on what I was going to
20 say. So, Justice Hecht, in talking about your list, I
21 guess one way that I would suggest it needs to be modified
22 a little bit is I think that Twombly is actually an example
23 of number two, and I think one of the places where the law
24 gets a little confused is because Iqbal has gone on and
25 made this confusing. So, in other words, Iqbal is really

1 category three.

2 Let me see if I can explain the difference.

3 In Twombly what happens is they allege generally that there
4 was a conspiracy; but they don't say who conspired, what
5 products were covered, what geographic markets were
6 covered, et cetera; and so the court says, "I can use my
7 red pen and I can scratch out the conspiracy words because
8 they don't actually say anything that I have to take as
9 true"; and then it's what you had left after conspiracy was
10 taken out, which was only parallel pricing, prices went up
11 and down at the same time; and the substantive law of
12 antitrust said you can't get to a jury if all you have is
13 prices going up and down at the same time. In other words,
14 the facts don't state a cause of action. Twombly,
15 therefore, is actually really not too much to be terribly
16 bothered by. It's really an example of just legal
17 insufficiency. It's just that you needed your red pen to
18 scratch out the conclusory allegations in order to see that
19 it was really just legal insufficiency.

20 Iqbal, the reason Iqbal is more bothersome to
21 many of us, and by the way, it's not just the crazy lefties
22 like me. Bob Bone, who is here at Texas and certainly
23 wouldn't fall under that category, has written the same
24 thing. It's that Iqbal seems to invite more of what Roger
25 was just talking about. It's that, okay, I've alleged that

1 Ashcroft and Mueller discriminated against me for a -- or
2 that they did these things to me for a bad reason, and now
3 the court is perhaps being given the power under one
4 interpretation of Iqbal; and, Justice Hecht, you're right,
5 we don't know actually if this is the right interpretation,
6 and it's way too early to say, which is yet another reason
7 we shouldn't dive into that swimming pool just yet; but,
8 anyway, at least one interpretation of Iqbal is that the
9 court does have the power to actually make that decision to
10 decide whether or not those are really believable or not;
11 and of course, that raises the question, okay, if you can
12 do that in that kind of a case, which maybe we want them to
13 do but we don't want Ashcroft involved, can you do it in an
14 employment discrimination case, can you do it in a tort
15 case, can you do it in a typical slip and fall case, you
16 know, whatever it is.

17 And so that's where -- and that sort of is
18 your category number three; and at the end of the day my
19 point earlier was just that while I have not as much
20 problem with number two, the facts don't state a cause of
21 action, writing a rule to that effect, the worry is can you
22 write the language such that it doesn't bleed into number
23 three; and because I worry that we can't and indeed our
24 discussion today suggests I think a lot that we can't, it
25 seems to me a better interpretation of what the Legislature

1 intended and a much cleaner one for our practice would be
2 to just end up with one. But could I live with another
3 two? Of course. It's just a question of can you write
4 good language.

5 CHAIRMAN BABCOCK: Okay. Yeah, Judge
6 Wallace, sorry.

7 HONORABLE R. H. WALLACE: Well, I mean, I
8 think the Legislature intended to create a rule that would
9 get rid of frivolous cases in a hurry and not create a new
10 level of pleading litigation like we have in Federal court,
11 and for that reason I like Professor Albright's definition.
12 It's simple, straightforward. You can look at the
13 pleading, you look at the facts and say, "You're out of
14 here." Now, that won't affect that many cases. I agree
15 with that, but it will make -- it will get rid -- I think
16 it will get rid of what the Legislature probably was mainly
17 trying to get rid of. As for the others, we've got special
18 exceptions, we've got summary judgments, but for just the
19 incredible, ridiculous, you know, why are we wasting our
20 time with this, I think that definition would be good.

21 CHAIRMAN BABCOCK: Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Except that the
23 Legislature shot itself in the foot because it excepted all
24 cases against the state, so the people who sue because
25 there has been an implant in their head usually by some

1 state entity are not subject to this motion.

2 MR. STORIE: Just on attorney's fees.

3 HONORABLE STEPHEN YELENOSKY: Is it only the
4 fee shifting?

5 PROFESSOR HOFFMAN: That's just about fee
6 shifting.

7 MR. SCHENKKAN: Two different sections.

8 CHAIRMAN BABCOCK: Gene. Did you hear what
9 Gene said?

10 MR. STORIE: Yeah, the state is excepted just
11 on attorney's fees and costs.

12 HONORABLE STEPHEN YELENOSKY: Yeah, no, I
13 heard it from him.

14 CHAIRMAN BABCOCK: Okay. All right. Good.
15 Yeah, Jim.

16 MR. PERDUE: If I could add, remember, this
17 is -- another rationale is you do have fee shifting in this
18 rule as far as if you don't prevail. You don't have that
19 in 12(b)(6).

20 CHAIRMAN BABCOCK: Right.

21 MR. PERDUE: So this is -- it's very
22 reasonable to interpret this as something more narrow, to
23 interpret it as something that was supposed to be a limited
24 universe, as Alex has defined it, and not open it up to --
25 if you say facts taken as true don't state a claim, which

1 is a pleading dismissal, the equivalent of 12(b)(6), but
2 that's not the universe it's supposed to be because of the
3 penalty that's in it that you don't have in 12(b)(6).

4 CHAIRMAN BABCOCK: Yeah, and to follow that
5 point up, I've always thought that because of that this
6 rule will not be over used like it is in Federal court.
7 Federal court 12(b)(6) motions are filed all the time which
8 get denied because they just probably never should have
9 been filed in the first place.

10 MR. GILSTRAP: Yeah, but it puts off your
11 pleading.

12 CHAIRMAN BABCOCK: What's that?

13 MR. GILSTRAP: It puts off filing your
14 answer. That's why you file it.

15 CHAIRMAN BABCOCK: Well, but that doesn't
16 always help. I mean, judges routinely say, "Let's do
17 discovery while this motion is pending," if you've done
18 anything in the Eastern District.

19 Okay. What other comments? Because I'm
20 about to move on to (a)(2). Justice Gray.

21 HONORABLE TOM GRAY: Well, I mean, we've kind
22 of skipped over Pete's initial comments that -- on the
23 discussion of the hearing and whether or not there is
24 intended definitional or distinction, I guess, between a
25 claim for relief that's used in the rule versus cause of

1 action as used in the statute, and, you know, I -- and
2 maybe everybody agrees that the hearing, it doesn't need to
3 be oral, that hearing implies something that's on
4 submission and can be done in chambers, because, you know,
5 that's going to be a real problem as I see it for these
6 cases, even under this narrow -- more narrow discussion
7 that y'all were having about the -- I guess you would say
8 the psychosis cases, if that's all it's going to reach, but
9 if these get applied to the inmate litigation cases and
10 other pro se cases, having -- particularly in the inmate
11 because then you have to, you know, get them back to the
12 courtroom and -- you don't have to, but that's normally
13 what you're going to wind up doing, and so that's a
14 problem, and then I kind of see a distinction between
15 claims for relief and causes of action.

16 I mean, last legislative session I was asked
17 to try to bring some terminology and standard, I guess,
18 parity using the same type terminology and standards to
19 Chapters 11, 13, and 14 of the Civil Practice and Remedies
20 Code, and, I mean, that's just a minefield, and they use
21 cause of action, they use claim, they use, you know,
22 different, you know, proceedings. I mean, there's just a
23 litany of words that get used and so use of different words
24 have meaning, so --

25 CHAIRMAN BABCOCK: Okay. And the two points

1 on this (a)(1) would be "Upon motion," and maybe it should
2 be "an oral hearing," Justice Christopher's point. We want
3 it to be an oral hearing, we probably ought to say so.

4 HONORABLE STEPHEN YELENOSKY: But we don't.

5 CHAIRMAN BABCOCK: And then you say we ought
6 to parallel the statute by saying "must dismiss a cause of
7 action for relief," right?

8 HONORABLE TOM GRAY: Yeah. That's what the
9 statute says, and all I was looking for, I know that
10 justice -- or Peebles had said that there was a reason and
11 we hadn't talked about it, and I just wanted to talk about
12 it.

13 CHAIRMAN BABCOCK: And the reason --

14 HONORABLE DAVID PEEPLES: Let me talk about
15 both of those.

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE DAVID PEEPLES: We used "claim" and
18 "claim for relief" because Rule 47 uses that terminology
19 instead of cause of action, I know the statute said cause
20 of action, but we said claim for that reason. I think
21 that's enough. I think oral hearing was intended by me,
22 and I was the main advocate for it for this reason: If you
23 lawyers want to be sure that the judge considered your
24 motion to dismiss, you want an oral hearing. I mean, if
25 you don't have a hearing in court you will never know

1 whether the judge read it or just denied it. And second, I
2 just will say from experience, oral argument helps. It
3 helps you understand things a lot. Now, if it's just a
4 slam dunk, easy, simple thing it might not be helpful, but
5 oral argument I find is very helpful beyond the written
6 documents in any kind of significant case of difficulty,
7 and for those two reasons I was in favor of oral hearing.
8 It's a pretty serious thing, and if it's granted there's
9 going to be an attorney's fees issue. If you don't have an
10 oral hearing, it will all be done on affidavits, and maybe
11 that's good, but that was the thinking by me on hearing.

12 CHAIRMAN BABCOCK: Okay. Hayes, and then
13 Pete.

14 MR. FULLER: Is "claim for relief" intended
15 to include an affirmative defense? Because I know a lot of
16 really thin affirmative defenses that may not get pled in
17 this rule if it does.

18 MR. GILSTRAP: I don't think it was intended
19 to.

20 HONORABLE DAVID PEEPLES: No. We intended
21 this to cover counterclaims and third party claims, but I
22 don't think affirmative defenses would fit.

23 CHAIRMAN BABCOCK: Pete.

24 MR. FULLER: If they did, I want a cause of
25 action.

1 MR. SCHENKKAN: I don't think Rule 47 is an
2 answer to why you need to use claims for relief because
3 what Rule 47 says is "An original pleading that sets forth
4 a claim of relief, whether original petition, counterclaim,
5 cross-claim, or third party claim," doesn't say affirmative
6 defense, "shall contain, (a), a short statement of the
7 cause of action sufficient to give" their notice and then
8 it goes on and talks about other components of the claim
9 for relief. So I think Rule 47 itself recognizes that a
10 cause of action is a part of or involved with a claim for
11 relief but is not identical to a claim for relief.

12 You know, there are a lot of smart people in
13 this room, and it may well be that many of them feel like
14 they know all the differences that there might be between a
15 claim for relief and a cause of action and are perfectly
16 comfortable that by making our rule go from cause of action
17 to claim for relief we have not caused a problem. I am not
18 among them.

19 CHAIRMAN BABCOCK: Gene.

20 MR. SCHENKKAN: I think that's an unwise
21 risk. Now, if I may respond to the second part of the
22 comment about the hearing.

23 CHAIRMAN BABCOCK: Certainly.

24 MR. SCHENKKAN: We can have two different
25 provisions for hearing. We can say you don't get an oral

1 hearing on the motion but you do get a hearing on the
2 attorney's fees. We're not obligated to recommend that the
3 court have the same rule on both, and I think it is a whole
4 separate question, which I hope we were going to put off
5 until we got to talking about the attorney's fees, whether
6 and under what circumstances we're going to have an oral
7 hearing, including possibly evidence on reasonable and
8 necessary attorney's fees. That's got a separate set of
9 issues in it. I'm in the camp that says for the motion
10 itself we should not make such a flat rule that that
11 creates a bunch of problems we don't need and that are not
12 worth the problems we get.

13 CHAIRMAN BABCOCK: Gene, and then Justice
14 Christopher.

15 MR. STORIE: Yeah, I was in the minority on
16 both of these because I think it should be cause of action
17 since that's what the statute says, and that helps to
18 eliminate the potential problem Hayes mentioned or
19 something else like maybe a wrong measure of damages where
20 you've got a cause of action that you're asking for relief
21 that you're not entitled to, and secondly, I think most
22 people would want a hearing because I completely agree with
23 Judge Peeples. That's where you would make your best pitch
24 for why you should win or not, but I don't think it should
25 be mandatory. Even though people may ask for them 99

1 percent of the time, they can get that without requiring
2 it.

3 CHAIRMAN BABCOCK: Okay. Justice
4 Christopher.

5 HONORABLE TRACY CHRISTOPHER: I do not want
6 to have a requirement of an oral hearing, especially if we
7 think this will involve a lot of prisoner litigation
8 because it's very costly to bring them into court for an
9 oral hearing.

10 CHAIRMAN BABCOCK: Good point. Yeah. Frank.

11 MR. GILSTRAP: I hadn't thought about
12 prisoner litigation. I think the way they dealt with that
13 in Chapter 14 is they said you may have a hearing, and the
14 courts construe that to say it's optional so we don't have
15 to bring the prisoner to court, and I agree that bringing
16 prisoners to court is a problem. However, the question of
17 having a hearing is part of a larger issue. I come from a
18 part of the state where you get a hearing on everything,
19 you know, even special exceptions. You get a hearing in
20 the trial court, you get a hearing in the court of appeals.
21 Apparently that -- where you actually see the judge
22 face-to-face, and apparently that's not true in some parts
23 of the state.

24 It's not true in Federal court, and I've had
25 cases in which people's entire livelihood, their business,

1 everything they have is at stake; and they lose it; and
2 they never even go to the courthouse, in a court of appeals
3 or in the Fifth Circuit; and that appears to be happening
4 in Texas. Do we really want that? I feel that if you're
5 going to die my case, I have a right at least to look the
6 judge in the eye at some point, and now we're heading in a
7 direction where you don't have that right.

8 CHAIRMAN BABCOCK: Richard Munzinger.

9 MR. MUNZINGER: I'm very sympathetic with
10 Frank's point of view and agree with it, except that we're
11 dealing with a legislative mandate that says you are to
12 adopt a rule that forbids the consideration of evidence.
13 So now I'm dealing with whether or not my adversary has
14 pled a sufficient cause of action. Presumptively I am
15 limited in that determination as to what the person has
16 said in the paper that has been filed, which raised --
17 prompted my question earlier of does the reasonable
18 argument for the extension of law have to be pled? Why
19 shouldn't it be pled if it's going to pass muster?

20 So now I'm in a situation where I have a bare
21 bones pleading which passes muster under our pleadings. I
22 understand that, but I'm filing a motion, and the argument
23 that is made is not included in the -- in the piece of
24 paper that I am attacking with this rule, which brings me
25 back to my original point that I really think the safest

1 way to deal with this rule is to deal with it as if it's a
2 12(b), 12(c) motion. It's just a motion for judgment on
3 the pleading, and you adopt the Federal standards for that,
4 which I recognize impacts our pleading system, but I don't
5 know what the solution to it is.

6 CHAIRMAN BABCOCK: Okay. Yeah, Stephen.
7 Then Elaine.

8 MR. TIPPS: Just to go to that point, it
9 would seem to me that the argument that a claim represents
10 a reasonable extension, modification, or expansion of the
11 law would be something that the plaintiff would make in his
12 response to the motion to dismiss.

13 CHAIRMAN BABCOCK: Right.

14 MR. TIPPS: I don't think you would ever put
15 that in your pleading, but if there's going to be a motion
16 to dismiss then surely the plaintiff has a right to respond
17 to that, and that's where you would make the legal
18 arguments for why the case shouldn't be dismissed.

19 CHAIRMAN BABCOCK: Elaine.

20 PROFESSOR CARLSON: Yeah, Judge Christopher
21 points out that if we use the word "hearing" that the court
22 has the election to have an oral hearing or to do it as a
23 question of law based on submission. It troubles me that
24 we have a lot of safeguards in our summary judgment
25 practice for that very thing, and you're required to notify

1 the litigants when you're going to take the matter up, and
2 we have a lot of safeguards in that rule that aren't
3 included in this rule, and that's, I think, because we
4 really couldn't determine what was the -- what was the end
5 of the story here. Is this a dismissal with or without
6 prejudice? I come out very different procedurally on
7 whether it's one or the other, and so until I know the
8 answer to that I guess I'm sort of leaning more toward more
9 protection than not.

10 CHAIRMAN BABCOCK: Okay. Anything else on
11 that? Let's go to (A)(2), and, Judge Peeples, any issues
12 on this or can we just blow right through this?

13 HONORABLE DAVID PEEPLES: I hope we don't
14 spend much time on it. This is basically taken from a
15 paragraph in the State Bar proposal, and it's just to be
16 sure that it's not a general demurrer by another name, and
17 it's fair to make the person who wants something dismissed
18 and to get attorney's fees to say why -- to point out the
19 claim or cause of action and say why.

20 CHAIRMAN BABCOCK: Okay. Any comments about
21 this? Justice Gray.

22 HONORABLE TOM GRAY: This is sort of back to
23 the claim for relief and cause of action question, and I'll
24 just say that in regard to the use of putting the burden on
25 the movant in the kind of time frame that you're talking

1 about to do this, having read several hundred or not
2 hundreds of these petitions and trying to figure out
3 whether or not there was anything in there upon which
4 relief could be granted under primarily prisoner cases, but
5 where the trial judge dismissed them under one of the
6 existing chapters in the Texas Civil Practice and Remedies
7 Code. Trying to get the movant to identify the claim is --
8 that in and of itself is a challenge, so I don't know how
9 the motion can identify the claim if the claimant didn't
10 identify it.

11 CHAIRMAN BABCOCK: Okay. Frank.

12 MR. GILSTRAP: The purpose of this is to
13 prevent the defendant from going to court and saying, "I
14 move to dismiss because there's no basis in law and fact,"
15 period; and then, you know, maybe you have a hearing and
16 the first time the plaintiff hears the argument is at that
17 hearing; and he has no idea why his petition was defective;
18 and it's like a general demurrer, where, you know, you
19 said, you know, "Fails to state cause of action," end of
20 story; and the court can pour you out for any reason it
21 wanted to. The idea is to require the movant to at least
22 articulate some basis other than simply stating the
23 statutory language and sitting down.

24 CHAIRMAN BABCOCK: So do you like this
25 language, or do you think it should be amplified?

1 MR. GILSTRAP: I think we need something like
2 (2). I sure do.

3 CHAIRMAN BABCOCK: Okay. All right. Any
4 other comments about this? Okay, well, good, we exhausted
5 everybody on (A)(1). You want to move forward to (b)?
6 Yeah, Orsinger.

7 MR. ORSINGER: I'm troubled -- I know that
8 the statute requires that we have this ruled on in a
9 certain specified period of time, 45 days, but I'm troubled
10 by the fact that people may amend in response to seeing one
11 of these motions and realize their pleading is defective,
12 or they may get into court and the judge says, "I'm going
13 to grant this motion."

14 "Well, your Honor, I'd like the opportunity
15 to amend." Does amending reset the clock, and if you amend
16 is the original motion successful and you get fees up to
17 that point? Or we've got to discuss the role of
18 amendments, because amendments will always happen, always;
19 and we don't say what we do with amendments either on the
20 timing or the fee question; and we need to or else I don't
21 know how anyone can make this statute apply.

22 CHAIRMAN BABCOCK: Well, in (D) we do talk
23 about amendments, but --

24 MR. ORSINGER: No, but the problem is, is
25 that if you've got to decide the motion within 45 days of

1 when it's filed, I file the motion, the plaintiff amends
2 their pleading. Okay. Now, maybe they amended the
3 pleading and it didn't do any good and they're still going
4 to lose, but what if they fix the problem or created a new
5 problem?

6 CHAIRMAN BABCOCK: Well, would a reasonable
7 construction of this be that if you amend and the -- and
8 the opponent still believes that the claim, even as
9 amended, is subject to dismissal, wouldn't he have 60 days
10 to bring that renewed motion to dismiss under this (B)?

11 MR. ORSINGER: If it was clear that that's
12 what that meant. Boy, this doesn't say that to me. And
13 also look at (D), Chip, because it says you have a right to
14 amend on the day -- probably the day of the hearing when
15 you find out that you're going to lose.

16 CHAIRMAN BABCOCK: Right.

17 MR. ORSINGER: So has that motion been ruled
18 on? Yes, it's dismissed, but you can amend and then -- and
19 it's not dismissed?

20 CHAIRMAN BABCOCK: Okay.

21 MR. ORSINGER: I think we've got to be really
22 careful how we handle that one.

23 CHAIRMAN BABCOCK: Yeah, good points.
24 Richard. I don't mean Richard. I mean Frank. Frank,
25 you're starting to look like Richard.

1 MR. GILSTRAP: Well, you complimented me.

2 CHAIRMAN BABCOCK: No, I meant Munzinger, not
3 Orsinger.

4 MR. GILSTRAP: One of the things we were
5 trying to deal with was where you have a lawsuit and the
6 claim, you know, they file, you know, four claims and
7 they're not subject to dismissal and then they amend later
8 on, and so we wanted to give them at least -- you know, we
9 wanted to give them a new chance to file the motion at that
10 point. The idea behind the 60 days, which is not in the
11 rule --

12 CHAIRMAN BABCOCK: Right.

13 MR. GILSTRAP: -- not in the statute, was the
14 idea that people needed to do this out front, early on in
15 the litigation, just like rule -- you know, just like Rule
16 12 in the Federal rules that you need -- we don't want
17 people going on for three or four years and then filing a
18 motion to dismiss under this statute, because among other
19 things it really confuses the issue of attorney's fees.

20 CHAIRMAN BABCOCK: Yeah. Richard Munzinger,
21 then Pete.

22 MR. MUNZINGER: Under current law I have a
23 right to amend my pleading at any time up to seven days
24 prior to trial unless the trial court sets another date
25 under its pretrial powers. Nothing in the statute suggests

1 that that has been changed. Nothing in this rule should
2 suggest that that has been changed. Admittedly this is a
3 new motion, but I don't know that you have to say anything
4 in here. I do believe it's salutary to say that there
5 ought to be a right to amend. We've said -- the Supreme
6 Court has said that in motions attacking jurisdiction.
7 They've said there is a right to amend the pleading and I
8 -- unless the pleading, you can't amend, and they've done
9 it, but I do think that this statute does not affect the
10 right to amend; and under all this discussion, Richard's
11 fact situation, the plaintiff files a complaint or
12 petition. The defendant within 60 days files a motion to
13 dismiss. The plaintiff amends. That pleading is gone.
14 It's available now for judicial admission purposes, but it
15 is no longer a live pleading. It's not before the court.
16 There's nothing to bring to the court under those
17 circumstances. If I were a trial judge, I would say,
18 "Well, you want me to do what, give you attorney's fees? I
19 didn't dismiss this case. The plaintiff amended. He has a
20 right to amend, so go home, leave me alone."

21 CHAIRMAN BABCOCK: Pete.

22 MR. SCHENKKAN: I want to -- this may result
23 in a waste of time and may not be productive, but I want to
24 suggest that we've been talking a lot as if the analogy to
25 Federal Rule 12 could stop by saying Federal Rule 12.

1 Federal Rule 12 actually has for our purposes today two
2 different parts, (b) and (c), and they have different rules
3 about timing, very different rules about timing. In (b)
4 the rule is a motion asserting any of these defenses must
5 be made before a pleading if a responsive pleading is
6 allowed; but in (c), motion for judgment on the pleadings,
7 which Richard has been calling our attention to several
8 times, says after the pleadings are closed, but early
9 enough not to delay trial the party may move for judgment
10 on the pleadings.

11 It seems to me that the Court, the Texas
12 Supreme Court, in adopting this rule is free to go in
13 either direction, and, of course, they're not limited to
14 those two choices, but they're very much free to go in
15 either direction. Do we want to make this something that
16 you have to, you know, fire before you answer, first shot
17 out of the box, or in the current draft, 60 days after the
18 thing has appeared in paper; or do we want to push it the
19 other direction? I think the analogy to 12(c) would be --
20 to after the pleadings are closed would be after you've
21 used special exceptions to make the person say what the
22 heck it is they are trying to say, and you now know they've
23 taken their best shot at amending it. "This is what
24 they're left with, Judge. I say it has no basis in law or
25 fact, and I want it dismissed, and I want my fees."

1 CHAIRMAN BABCOCK: Well -- okay.

2 MR. SCHENKKAN: And I would offer for
3 discussion, maybe to frame it as a discussion, wouldn't
4 that be the better approach here for what we're talking
5 about, 12(c) approach?

6 CHAIRMAN BABCOCK: Well, but if you're saying
7 that, you know, I file special exceptions, I don't know how
8 you're going to attack my pleading yet, so I do my best and
9 then I got a motion to dismiss, and I say, "Oh, that's what
10 you're talking about," but based on your proposal I
11 wouldn't get a chance to amend that. So that would be an
12 issue to discuss. Justice Christopher.

13 HONORABLE TRACY CHRISTOPHER: I think we
14 should spell out clearly whether or not allowing an
15 amendment is the same thing as denying a motion to dismiss.

16 MR. STORIE: Right.

17 HONORABLE TRACY CHRISTOPHER: And the way (D)
18 is written here it says, "Before granting a motion to
19 dismiss the court must allow the party to amend," so that
20 kind of sounds like I'm holding the motion in abeyance,
21 they're going to amend, and then I'm going to rule; and to
22 me that puts the movant in a bad light if after the
23 amendment they don't want to go forward with the motion to
24 dismiss anymore.

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE TRACY CHRISTOPHER: It kind of
2 appears like the judge still has to rule on that original
3 motion based on the -- you know, even with an amended
4 pleading, which could lead to the nonmovant getting their
5 fees, so I think we need to make sure we know which way we
6 want to go on that.

7 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

8 PROFESSOR HOFFMAN: That's it.

9 CHAIRMAN BABCOCK: No? Gene.

10 MR. STORIE: I had some thoughts similar to
11 Richard Orsinger's, too. If you've got the day of hearing
12 amendment, and my feeling would be maybe it's like a
13 nonsuit where, yes, you can nonsuit, but if a defendant has
14 claimed affirmative relief you don't necessarily get out of
15 that. So I would be inclined to grant the motion in part
16 maybe for attorney's fees, even if an amendment cures the
17 original problem.

18 CHAIRMAN BABCOCK: Okay. I had a thought,
19 Judge Peeples, about this provision that says "must be
20 decided within 45 days of the filing."

21 HONORABLE DAVID PEEPLES: Yes.

22 CHAIRMAN BABCOCK: It says "hearing," but I
23 think you were going to change that to be "filing."

24 HONORABLE DAVID PEEPLES: Right.

25 CHAIRMAN BABCOCK: What if the judge does not

1 rule within that period of time? You know, Chapter 27 of
2 the Civil Practice and Remedies Code was amended to add a
3 motion to dismiss procedure, that Citizens Participation
4 Act, and that has the motion being denied by operation of
5 law if there is no ruling within the 30 days in that
6 statute. What do you think about that feature here?

7 MR. ORSINGER: Well, you're going to get
8 automatic fees that way, though. Fees go with the
9 overruling as a matter of law.

10 CHAIRMAN BABCOCK: Well, yeah.

11 MR. ORSINGER: That's pretty scary.

12 CHAIRMAN BABCOCK: What happens if the judge
13 doesn't rule within 45 days? That would be one implication
14 if you make it -- Justice Gray.

15 HONORABLE TOM GRAY: We get a mandamus.

16 CHAIRMAN BABCOCK: Yeah, you get a mandamus.

17 HONORABLE TOM GRAY: And so I'm begging you
18 to put in a default ruling so that we don't get the
19 mandamus, but that's exactly what I was going to ask,
20 what's the consequence.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: Chip, the State Bar rule does
23 address the party nonsuiting or amending. It says, "Cause
24 of action is amended before motion was filed and a moving
25 party may serve an amended notice," and they address that.

1 I'm not saying we should, but in (c) -- no, in (e) of the
2 State Bar rule they talk about that, and in (d) they talk
3 about a nonsuit. I don't know that we need to address it,
4 but I just point out that is addressed by them.

5 CHAIRMAN BABCOCK: Okay. Frank.

6 MR. GILSTRAP: And the statute you're talking
7 about was the slap suit statute, as I understand.

8 CHAIRMAN BABCOCK: Right.

9 MR. GILSTRAP: There's an interlocutory
10 appeal available.

11 CHAIRMAN BABCOCK: That's true.

12 MR. GILSTRAP: Okay. And there's not one
13 here, right? Okay. Okay. You know, the problem with a
14 default is, I mean, I would do it kind of like findings of
15 fact and conclusions of law. The judge didn't do it, but
16 he did it late, so it's okay, you know, I mean, and yes,
17 maybe you could mandamus in some case, but in most cases
18 the judge is probably going to decide it before the
19 mandamus is done. If the judge is just sitting on it, he
20 ought to be mandamusable.

21 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Yeah, I think
23 most of the statutes that tell judges to do things within a
24 particular time are determined to be -- I forget whether
25 directory or the opposite of that, but they're determined

1 to be requirements that we're supposed to try to follow,
2 but it doesn't deprive the court of jurisdiction or
3 anything like that if we miss the deadline, so why wouldn't
4 this be interpreted that same way? And on Gene's comment
5 you're saying you would award fees even if they amended and
6 fixed the problem and then so you're saying you could be a
7 prevailing party essentially on a catalyst theory?

8 MR. STORIE: Sort of, I mean, because I think
9 otherwise you still face the abuse of people filing junk
10 and then, you know, they admit it at the last minute, the
11 prevailing party who really in fact is the prevailing party
12 still had to go through the cost without getting any
13 recovery.

14 HONORABLE STEPHEN YELENOSKY: Well, that may
15 be a good policy reason, but where do we get the authority
16 to do that? I mean, the catalyst theory has pretty much
17 been rejected in plaintiffs cases, hasn't it?

18 CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

19 MR. BOYD: We covered a few topics. I want
20 to make sure I get on record on each of them. First, on
21 the 60 days, the rule's requirement that the motion be
22 filed within 60 days after the cause of action is pled, and
23 I want to argue that that should not be included. The
24 statute doesn't address that either way. I do think that's
25 the appropriate kind of procedural thing that this -- the

1 Court ought to be adopting a rule for, if it's -- ought to
2 be considering adopting a rule for, but I think there can
3 and will be circumstances where there is good reason for
4 the motion not being filed within 60 days, and the one that
5 is most obvious that comes to mind is you sue me for false
6 light invasion of privacy, and we're engaged in discovery
7 over that, and six months later the court comes out with
8 its decision saying in Texas there is no such cause of
9 action in a completely separate case. I ought to now have
10 the right to say, "Hey, you better dismiss this because
11 here's what the court said, you can't sue me for this." If
12 we put this language in there I can't use this method to
13 get rid of that -- I can use other ones still, summary
14 judgment, special exceptions, so on, but I can't use this
15 one, and so I would not -- I would vote against including
16 60-day requirement in there.

17 The second issue is about whether we allow
18 amendment, whether the rule should specifically allow the
19 judge to allow amendments, and my position on that is a
20 mixture, which is I think the parties -- the plaintiffs
21 should be allowed to freely amend in response to my motion
22 to dismiss. If I file the motion to dismiss and pay the
23 attorney's fees, the whole purpose is to get rid of these
24 things quickly; and so the claimant ought to be able to
25 move to dismiss; and, yeah, I'm afraid I don't get my

1 attorney's fees that way; but at least I got out of it.
2 You can't solve every single problem in the judicial
3 system; but the judge should not be granted the power to
4 deny the motion in order to allow amendment because,
5 remember, the motion shall be granted if there's no basis
6 in law or fact, nor to defer the motion for that purpose
7 because what the statute says is that the rules shall
8 provide that the motion to dismiss shall be granted or
9 denied within 45 days; and I think if you allow a judge to
10 say, "You know what, I ought to grant this motion because
11 there's no basis in law or fact, but I'm not going to, I'm
12 going to give you seven days to amend," then number one,
13 you've taken out the intended effect of the statute as
14 expressed in the language, "You shall grant or deny," and
15 number two, you've really made this so much like special
16 exceptions that you don't need this to begin with.

17 I mean, all the Legislature should have done,
18 if that's what they meant, was just say, okay, from now on
19 if you grant special exceptions, allow an opportunity to
20 amend and then after amending they still -- then you
21 dismiss. In other words, they could have just made a loser
22 pay component applicable to special exception practice.
23 That's not what they did. They created a motion to -- they
24 charged the Court with creating a motion to dismiss
25 practice, which Texas courts have never had before. So I

1 argue against allowing the judge to allow amendment once it
2 is either comes on oral argument or submission without oral
3 argument.

4 CHAIRMAN BABCOCK: Hayes.

5 MR. FULLER: I want to throw this in as kind
6 of tag along to this issue of amendment. Motions for
7 sanction survive a voluntary nonsuit. What about a motion
8 to dismiss under this rule? Will it survive a voluntary
9 nonsuit, or the guy says, "Whoops, I'm about to get hit for
10 attorney's fees, I'm done"?

11 CHAIRMAN BABCOCK: Yeah. Professor Albright,
12 and then we're going to take a break for lunch.

13 PROFESSOR ALBRIGHT: I had a question about
14 your example of, okay, we go through this case and then
15 suddenly the Supreme Court comes down with an opinion that
16 says you have no cause of action anymore, so you file this
17 motion to dismiss. Why should I now have to pay your
18 attorney's fees because this case came down from the
19 Supreme Court?

20 MR. BOYD: You don't, and we do say in this
21 proposed rule, which I do -- I think we were unanimously in
22 agreement with this, is that the attorney's fees that are
23 recoverable are those fees incurred in either the
24 preparation of prosecution of the motion to dismiss or the
25 preparation and defense -- of the response to the motion to

1 defense. So you don't get all your attorney's fees in the
2 case.

3 PROFESSOR ALBRIGHT: Right. Okay, but should
4 you at least have to call me and say, "Hey, I'm about to
5 file a motion to dismiss" and --

6 MR. BOYD: Well, what I would argue is -- and
7 I think, was it State Bar, or someone proposed that kind of
8 language and sort of --

9 HONORABLE STEPHEN YELENOSKY: State Bar.

10 MR. BOYD: Yeah, a confer kind of
11 requirement. I don't -- I don't support that because I
12 think instead if I don't call you, yeah, I should call you
13 and say, "Hey, look, they just came out with *Boils V.*
14 *Curvey*. You can't sue me for negligent infliction," but if
15 I don't then I file the motion to dismiss and you don't
16 even know it's coming. All you've got to do then is go
17 look at it, see the basis for it, and go "Oops, I'm
18 amending my pleading and I'm dropping that," before the
19 oral hearing or the submission without oral hearing, and
20 you avoid attorney's fees at that point.

21 HONORABLE STEPHEN YELENOSKY: Assuming it
22 doesn't survive --

23 MR. BOYD: And that's why I say I don't agree
24 it should survive. I don't agree with the catalyst theory
25 approach. I mean, maybe in a perfect world that would be a

1 part of it, but I don't think anybody in the process
2 intended for that to happen. I think it gives the easy
3 out. Look, I'm moving to dismiss this case and you better
4 dismiss it; and if you don't, if you're going to stand on
5 it, then the judge has to either grant or deny and award
6 attorney's fees, but if you choose to amend or dismiss then
7 you get away from the attorney's fees requirement.

8 CHAIRMAN BABCOCK: Okay. Let's break for
9 lunch.

10 PROFESSOR ALBRIGHT: So you are allowing an
11 amendment then.

12 MR. BOYD: I don't think the Rule should
13 allow --

14 CHAIRMAN BABCOCK: Unless you don't want to.

15 MR. BOYD: Once it comes to the judge, the
16 judge can't allow amendment, but before --

17 PROFESSOR ALBRIGHT: You can have a
18 prehearing. You can have a prehearing amendment.

19 MR. BOYD: In response to my motion you can
20 amend or dismiss before it gets to the judge, but once it
21 gets to the judge the judge has to either grant or deny and
22 award attorney's fees.

23 CHAIRMAN BABCOCK: Let's break for lunch.

24 (Recess from 12:31 p.m. to 1:32 p.m.)

25 CHAIRMAN BABCOCK: Judge Peeples, is there

1 more to be said about (B), or should we go to no evidence?

2 HONORABLE DAVID PEEPLES: We should move on.

3 CHAIRMAN BABCOCK: Let's go to no evidence.

4 We've already talked about it a little bit, but do people
5 have additional comments about no evidence? Jeff Boyd.

6 MR. BOYD: I'm sorry. Did we want to vote on
7 whether the rule should impose a deadline for filing a
8 motion to dismiss?

9 CHAIRMAN BABCOCK: We can.

10 MR. BOYD: I mean, I know I'm going to lose
11 the vote, but we may as well vote.

12 CHAIRMAN BABCOCK: I was going to say, if you
13 want to get hammered again by a vote.

14 MR. BOYD: Yeah. I'm having a great day,
15 Chip.

16 CHAIRMAN BABCOCK: We can do it. All people
17 who think we should have a deadline, raise your hand.

18 HONORABLE HARVEY BROWN: Chip? Chip?

19 PROFESSOR CARLSON: For filing it?

20 CHAIRMAN BABCOCK: Yeah, deadline for filing
21 it. Raise your hand.

22 HONORABLE HARVEY BROWN: Chip?

23 CHAIRMAN BABCOCK: Yes, Harvey, sorry.

24 HONORABLE HARVEY BROWN: I thought Jeff's
25 point about the law might change, therefore you have a good

1 reason to file it that you didn't have originally was worth
2 thinking about. I was thinking we could have a deadline
3 like the 60 days but have a good cause provision, allow a
4 party to come forward with good cause to why they didn't
5 file it originally.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: The problem is that's a
8 loophole you can drive a lot through. There's a lot of
9 reasons for good cause. My feeling is that there's a lot
10 of good reasons for requiring a short fuse on filing the
11 motion. We are going to drop -- we are going to lose the
12 cases that Jeff is talking about where the Supreme Court
13 changes the law, but that's a small price to pay. Those
14 people still can file a summary judgment motion. They just
15 can't proceed under this.

16 CHAIRMAN BABCOCK: Yeah. And if the Supreme
17 Court changes the law, should there be an automatic
18 attorney's fees kind of thing?

19 MR. WATSON: Yeah, I mean --

20 MR. BOYD: But the fees --

21 CHAIRMAN BABCOCK: Jeff.

22 MR. BOYD: But the fees only cover the costs
23 I incur in preparing and pursuing my motion to dismiss.

24 CHAIRMAN BABCOCK: Right.

25 MR. BOYD: It's not the two years worth of

1 discovery fees that I incurred before the Court changed the
2 law, but once the Court changed the law I shouldn't have to
3 deal with that cause of action anymore.

4 MR. MUNZINGER: At the committee level I
5 suggested the rule include a provision that the rule should
6 state that it is filed under this new rule.

7 CHAIRMAN BABCOCK: Right.

8 MR. MUNZINGER: And secondly, that it not be
9 joined with any other pleading seeking dismissal or changes
10 to the exceptions. The reason for that being you don't
11 want trial courts to be awarding fees in situations of an
12 ordinary special exception or a motion to dismiss. I don't
13 remember that we voted on that suggestion, but I did want
14 to bring it up.

15 HONORABLE DAVID PEEPLES: It's on line 17.

16 MR. MUNZINGER: Yeah, but that doesn't have
17 that it's not joined with other motions or special
18 exceptions seeking the same or similar relief.

19 CHAIRMAN BABCOCK: Aha. Gene.

20 MR. STORIE: I think it's hard to have the
21 rule apply to changes that occur in the law during the
22 pendency of the suit because where would the change occur?
23 Is it going to be in the same court of appeals, or is it
24 another court of appeals? And even if it's at the Supreme
25 Court I think we've all heard of the court either granting

1 a writ after originally denying the petition or changing
2 its position on rehearing, and what are you going to do
3 with those cases? Because you've got people on this 45-day
4 window for the judge to decide, and I think you could have
5 some kind of confusion created in the meantime if any
6 change in law that's not truly permanent is going to
7 trigger this attorney fee provision.

8 CHAIRMAN BABCOCK: Yeah, good point. Just to
9 satisfy Jeff's need for getting beaten, maybe we could just
10 have a quick vote, and the people who would be proponents
11 of having some deadline -- we can talk later about whether
12 it ought to be good cause or something, but some deadline
13 to file as opposed to no deadline to file. So everybody
14 who is in favor of a deadline to file, raise your hand.

15 All right. And those who think there should
16 be no deadline? Closer than I would have thought. 16 say
17 there should be a deadline, 7 said --

18 MR. BOYD: I did better on that one than I
19 did on the --

20 CHAIRMAN BABCOCK: You did. You did. So,
21 anyway, now the Court's got that sense of the committee.
22 Let's move on to no evidence.

23 MR. SCHENKKAN: Could we have a little
24 conversation about the nature of a deadline if there's
25 going to be one? That's the comment I wanted to make and

1 talk about that.

2 CHAIRMAN BABCOCK: Okay. Pete. Sure, sorry.

3 MR. SCHENKKAN: I'm not so concerned about
4 the Supreme Court changing the law or declaring law that we
5 didn't know.

6 CHAIRMAN BABCOCK: Right.

7 MR. SCHENKKAN: I think that's a legitimate
8 point, but I agree it's a small one and there are other
9 ways of dealing with it. I'm much more concerned about the
10 situation in which somebody is conscientiously using the
11 special exceptions approach to get the person to say what
12 the heck the claim means, and that's why I'm not in favor
13 of this one. It might be -- that's why I voted with Jeff
14 on this one. It might be that that is a solvable problem
15 with certain words, but the words that would solve it are
16 not the words -- not always the words "must be filed within
17 60 days after the pleading containing the claim was
18 served."

19 The claim might have been at least arguably
20 contained in the pleading that I successfully specially
21 excepted to and also contained in the one after the
22 amendment after my special exception is granted, and I may
23 or may not be in a situation in which I should be held to
24 that first 60 days, so that's why I at least want to slow
25 the train down and talk about whether we wanted to have a

1 deadline at all, and if so, what it should be. So maybe
2 the committee goes back and thinks about what it should be
3 if the consensus is there should be one, but that's the
4 problem I'm worried about.

5 CHAIRMAN BABCOCK: Okay. Yes, Justice
6 Christopher.

7 HONORABLE TRACY CHRISTOPHER: Especially if
8 we're going to -- if this rule is going to morph more into
9 a 12(b)(6) motion, it seems to me that people ought to be
10 able to have the ability to have some discovery before they
11 finally make their pleading that has all the facts
12 necessary on it to survive this kind of a motion. I'm not
13 saying it shouldn't morph into it. I'm just saying if
14 we're going to decide, if that's what it's turning into,
15 you ought to be able to have some discovery before you have
16 to replead before you're subject to this dismissal.

17 CHAIRMAN BABCOCK: Yeah, Roger.

18 MR. HUGHES: Well, I mean, I'm sympathetic if
19 we're going to confer this into some sort of thing where
20 you say your facts are plausible, but they don't add up to
21 a cause of action and you're going to have to plead more
22 facts. I know in Federal court when you plead qualified
23 immunity for a public official, the courts have limited
24 discretion to say, look, before I tell this plaintiff he's
25 washed out of court because he hasn't pled enough facts to

1 get around the defense of qualified immunity, he or she
2 gets to take a little bit of discovery targeted to that
3 way, and at first I thought that was horribly unnecessary
4 and terribly burdensome, but I've learned to live with it,
5 and many Federal judges have learned to live with it.

6 So I think whatever time period has to be
7 adjusted so that if the defendant needs time -- pardon me,
8 the plaintiff needs time in order to come up with something
9 that's going to get past the Rule 13 sanction for pleading
10 facts in bad faith, maybe there ought to be some leeway for
11 that.

12 CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

13 HONORABLE TOM GRAY: And I don't know if my
14 concern would be covered by the one that Frank is
15 uncomfortable with that says "good cause," but I'm still
16 very concerned about the inability to identify the claim
17 that is the target of the motion that the movant has to
18 specify, and I can just tell you from dealing with some of
19 the pro se litigants that my court's dealt with, is their
20 response is always going to be -- when the movant finally
21 gets it nailed down to a claim and files the motion and
22 it's more than 60 days after the very first petition was
23 filed, the plaintiff, no matter how badly it was pled the
24 first go around, it's going to be, "Well, I pled that in
25 the very first petition," and it's like nailing Jell-O to

1 the wall. You cannot pin these down, and so there needs to
2 be some way of once that special exception process has run
3 its course or you've gotten some clarification of what the
4 claim is, that's when your clock starts running. That
5 would be my suggestion.

6 CHAIRMAN BABCOCK: What if you added a clause
7 that said, on line 25, line 25, "containing the claim was
8 served," and add this language, "or within 30 days an
9 amended pleading," comma, "if permitted under Rule 94a(d),"
10 comma, "was served." So, in other words, give them 30 days
11 if there's an amended pleading. Carl.

12 MR. HAMILTON: I like what Tom said. I think
13 it ought to be 60 days or 60 days after rulings on special
14 exceptions if they're filed.

15 CHAIRMAN BABCOCK: Yeah. Okay. Any other
16 comments? All right. Let's go to -- yeah, sorry, Justice
17 Brown.

18 HONORABLE HARVEY BROWN: On a different time
19 issue, I think there should be a time like the summary
20 judgment rule that a party has more than three days to
21 respond to a motion like this. I don't know if it's 21
22 days, but I think there should be some minimum amount of
23 time that you have to give the other side to respond and
24 probably some amount of time before the hearing as to the
25 response was filed. I don't know if the committee -- I

1 don't think the committee discussed that, but I'd like to
2 discuss it.

3 MR. SCHENKKAN: Wouldn't it be covered under
4 the general rule about minimum time for motions?

5 HONORABLE HARVEY BROWN: That's three days.

6 HONORABLE TRACY CHRISTOPHER: That's three
7 days.

8 HONORABLE HARVEY BROWN: Right, and I think
9 three days for something like this is not enough.

10 CHAIRMAN BABCOCK: Any other thoughts about
11 that? Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, I liked
13 the way Jeff's sort of solution on the amendment was
14 basically to say, no, the judge doesn't get the -- give
15 permission to amend at the hearing, but that the party can
16 choose to amend before the hearing.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE TRACY CHRISTOPHER: So if you allow
19 that, you've got to give at least 21 days notice and put in
20 there you can amend your pleading, at which point, you
21 know, they can pull down the motion to dismiss, and no
22 harm, no foul, no fees incurred.

23 CHAIRMAN BABCOCK: Right. Of course, you've
24 got this 45-day limitation in there that you're going to
25 have to deal with.

1 HONORABLE TRACY CHRISTOPHER: Well, you file
2 it, you set it for 21 days notice. I mean, the judge ought
3 to be able to decide it in two weeks.

4 CHAIRMAN BABCOCK: Yeah, except that you call
5 up and you say, "I want a hearing in three weeks," and they
6 say, "We've got nothing that week. You know, you're going
7 to have to do something the following week," or "We've got
8 nothing that week either." Anyway.

9 HONORABLE HARVEY BROWN: It doesn't have to
10 be 21 days, but it should be more than three days.

11 CHAIRMAN BABCOCK: Yeah. Buddy says four
12 days.

13 HONORABLE TRACY CHRISTOPHER: And then you
14 put it on submission.

15 CHAIRMAN BABCOCK: Richard.

16 MR. MUNZINGER: The rule could provide that
17 if an amendment is filed that there's no need for the
18 hearing. In other words, you could say "and must be
19 decided within 45 days of the hearing unless previously" --
20 "unless the claim is previously amended," which tells you
21 A, you have the right to amend and, B, finesses the problem
22 of a hearing set for 45 days. Now you've got -- a pleading
23 no longer exists. Why are you worried about motion to
24 dismiss? That pleading went away.

25 CHAIRMAN BABCOCK: Yeah, that's what I had

1 thought, but -- okay, any other comments? Going once. All
2 right. No evidence.

3 HONORABLE DAVID PEEPLES: I'm kind of
4 thinking we've heard enough on that.

5 CHAIRMAN BABCOCK: Anybody want to say
6 anything else? Carl.

7 MR. HAMILTON: Well, as ABOTA points out,
8 there may be evidence attached to the pleading, such as
9 sworn account or something like that, that the court will
10 consider. It's part of the pleadings, and that's evidence.

11 CHAIRMAN BABCOCK: Yeah. And in the Federal
12 practice in 12(b)(6), if there is a document that is
13 essential for the cause of action, the court can still rule
14 as a 12(b)(6) matter, but considering the document or
15 whatever it is is essential for the claim, so --

16 MR. HAMILTON: I think we need to say
17 something about that in the rule.

18 CHAIRMAN BABCOCK: Yeah. Justice
19 Christopher.

20 HONORABLE TRACY CHRISTOPHER: It seems to me
21 that you're going to have to have evidence of attorney's
22 fees on both sides, so I just think we need to kind of
23 reword it to make sure that there has to be evidence of
24 attorney's fees. Now, whether it's just going to be
25 affidavit versus oral hearing and raising their hand and

1 swearing to something, I don't know.

2 CHAIRMAN BABCOCK: Nina.

3 MS. CORTELL: It's the first part of the
4 statute that contemplates no evidence. That caveat is not
5 included in the fee part, so we probably just need to
6 clarify that in the rule.

7 CHAIRMAN BABCOCK: Yeah. Yeah. Yeah, Roger.

8 MR. HUGHES: Well, the other clarification
9 may be as to whether or not you're going to have to
10 litigate the attorney's fees by the 45th day. I mean,
11 section two of the statute, in one or two, seems to imply
12 that the order granting or deny may must also make the
13 award of attorney's fees. Now, that was my first reading.
14 It may not necessarily be that way. It may be that the
15 order determines it and then tells the parties to submit
16 affidavits, but it does seem to me implied that the order
17 should contain the attorney's fees, you know, for whoever
18 the prevailing party is, in which case I don't know how
19 you're going to handle that other than to say it has to be
20 part of the motion or there has to be some submission or
21 unless -- unless you're going to put in there the only
22 evidence received would be concerning the amount of
23 attorney's fees at the time of the hearing.

24 CHAIRMAN BABCOCK: There are a number of
25 different ways you can handle it. I mean, the motion I

1 would think would always ask for attorney's fees.

2 MR. HUGHES: I'm sure the motion would. The
3 question is whether your affidavit has to be attached to
4 it.

5 CHAIRMAN BABCOCK: Right, and there are a
6 couple of different ways you could do it. One way, you
7 could attach an affidavit and say, you know, "Up to now
8 we've incurred X number of attorney's fees. We think we're
9 going to incur Y for going through the hearing process."
10 Second way you could do it, which I think is some danger to
11 it for the litigants, but you can wait until the hearing
12 and when the judge makes his ruling you could say, "Okay,
13 Judge, now I want to put on evidence of attorney's fees,"
14 and that's kind of hard on the losing party because, you
15 know, they don't -- they don't have any access to your
16 documents, they don't know, you know -- and it could be --
17 it could be a fair amount of money, depending on the kind
18 of case.

19 MR. HUGHES: I mean, I would like to think
20 that these will not be high rolling cases considering we
21 are limiting attorney's fees to making them responding to
22 that particular motion as opposed to everything else in the
23 world.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. HUGHES: But still I can see some people

1 wanting to load up and somebody wanting to do some
2 effective cross-examination.

3 CHAIRMAN BABCOCK: Right. Judge Wallace.

4 HONORABLE R. H. WALLACE: Well, whatever we
5 come up with for language for determining when a claim has
6 no basis in fact, I don't see how you can reconcile that
7 with saying that we must accept as true the facts pleaded.
8 I think we talked about that earlier, but how can you say
9 that we're going to accept -- if the guy says he went to
10 the moon and back, we accept that as true, but we don't
11 waive it. I mean, it seems inconsistent to me.

12 CHAIRMAN BABCOCK: Yeah. Good point. All
13 right, Pete.

14 HONORABLE R. H. WALLACE: Contradictory.

15 MR. SCHENKKAN: I mean, isn't this a
16 discussion we need to have when we get to the attorney's
17 fees section? We need to decide what kind of process do
18 you want to have for the determination of the amount of
19 reasonable and necessary attorney's fees, and it's not
20 answered by saying that the statute says that the dismissal
21 will be on motion and without evidence. The statute
22 doesn't say that the determination of the reasonable and
23 necessary attorney's fees will be without evidence. The
24 Court is free to make a sensible rule that allows for the
25 dismissal to be without evidence or denial of a dismissal.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. SCHENKKAN: But to provide for whatever
3 amount and degree and timing of evidence is appropriate and
4 necessary in the fee role. So I guess what I'm saying is
5 isn't this a problem for when we get to discussing the
6 attorney's fees section and not for now?

7 CHAIRMAN BABCOCK: Yeah. I agree. Okay,
8 what about right to amend? We've already talked about that
9 a fair amount. Any other additional comments?

10 HONORABLE TOM GRAY: The word "granting"
11 should probably be "ruling on" so it doesn't make that
12 inference that Judge Christopher was referring to earlier.

13 CHAIRMAN BABCOCK: Okay. Justice Brown.

14 HONORABLE HARVEY BROWN: I was just going to
15 raise a question. I don't know the answer, and that is
16 what if there's a pleading cutoff and the plaintiff has
17 amended right on the cutoff date? Are we going to let them
18 amend again after the cutoff date in response to the
19 motion?

20 CHAIRMAN BABCOCK: Carl.

21 MR. HAMILTON: I don't like the words "at
22 least once" in there. It sort of implies they can amend
23 again, and I don't think they ought to be able to amend but
24 one time.

25 CHAIRMAN BABCOCK: Okay. Richard.

1 MR. MUNZINGER: I would point out that that
2 constitutes a defacto amendment of the rule that allows the
3 party to amend their pleadings at any time they want
4 because it says here "allow the party" -- "on request to
5 allow the party asserting the claim to amend at least
6 once." Right now we don't require permission of a court
7 for a pleader to amend a pleading. So obviously we're
8 treating that differently if we adopt this language in the
9 rule.

10 CHAIRMAN BABCOCK: Well, special exceptions,
11 don't we allow people to amend?

12 MR. MUNZINGER: Yes, but we don't have a
13 requirement that I have to have leave of court to amend my
14 pleading, and this section says, "Before granting a motion
15 to dismiss the court must, upon request, allow the party
16 asserting the claim to amend." Is that a tacit amendment
17 of our rule that you can amend whenever you want, and is
18 that what we want the Court to do?

19 CHAIRMAN BABCOCK: Well, but you're at a
20 hearing, the judge says, "I'm going to dismiss this.
21 You're gone," and the party says, "Hey, Judge, let me
22 amend. Before you rule let me amend." That's how it's
23 going to happen, isn't it?

24 MR. MUNZINGER: It could. I don't like the
25 idea of putting the language in there "on request" to allow

1 them to amend at least once. I don't think you want to
2 amend -- I mean, you're setting up a separate rule and a
3 separate proceeding when you do that, in my opinion.

4 CHAIRMAN BABCOCK: Well, but, Richard, if
5 you're at the hearing, it's going badly, and the judge
6 says, "Okay, I'm about to rule," and he's got his gavel
7 halfway up and you go, bop, "Here's an amendment." Is that
8 what you're thinking we should allow?

9 MR. MUNZINGER: I think it's what the rules
10 allow now.

11 CHAIRMAN BABCOCK: Okay. Gene.

12 MR. STORIE: It just occurs to me do we want
13 to say anything about amending the motion? We're talking
14 about the party asserting the claim amending, but maybe if
15 you rethink your motion you want to amend.

16 CHAIRMAN BABCOCK: Yeah. Well, like Richard
17 says, you know, what would be to prevent you right now from
18 doing that if you wanted?

19 MR. STORIE: Right.

20 CHAIRMAN BABCOCK: Except if we have a 21-day
21 thing or something. Justice Christopher.

22 HONORABLE TRACY CHRISTOPHER: Well, one other
23 thing on the timing, when it has to be filed within 60 days
24 after the pleading containing the claim was served --
25 perhaps we've changed that to "cause of action," I don't

1 know -- what if they allege a cause of action in the
2 original petition and it's the same cause of action, you
3 know, three petitions later? Is the 60 days gone?

4 CHAIRMAN BABCOCK: Yeah, and that's an
5 offshoot of the what if they do an amended pleading that
6 they're permitted to do.

7 HONORABLE TRACY CHRISTOPHER: Right.

8 CHAIRMAN BABCOCK: You know, does that start
9 the 60 days rolling again?

10 HONORABLE STEPHEN YELENOSKY: First time
11 alleged.

12 CHAIRMAN BABCOCK: Yeah. Okay. Well, all of
13 these problems, no answers. Roger.

14 MR. HUGHES: Well, what I've run into in
15 Federal court where I've had what I call the persistent
16 problem with a particular pleading that goes to the -- not
17 to the factual merits, but to the legal merits of the
18 claim, I've seen some judges say, "Look, before I reach the
19 substance of your objection that there's just no law to
20 support this claim at all, I'm going to let them amend just
21 because we have a policy to let them amend once before we
22 throw them out, but when they amend I'm going to deem that
23 you will file another 12(b) motion to the pleading and take
24 your old one up and apply it against this one."

25 Using that perhaps as some kind of template,

1 I don't like the idea of people amending ad nauseam to keep
2 starting the 60-day over and over again; and they're also
3 in the spirit of the rule it simply says if you file one of
4 these motions and you lose you may end up paying the other
5 side fee; and simply to have a rule that a person can amend
6 while the motion is pending, the motion will be deemed to
7 apply to the amended pleading at the time of the hearing
8 and then we'll have to consider whether we're willing to
9 allow the movant to withdraw the pleading to avoid an
10 adverse ruling; and if you've moved to amend once to get
11 around the motion, maybe the judge should be able to say,
12 "Okay, you've had your bite at the apple. You lost.
13 That's it, no more," but then I think if a person wants to
14 test it, probably they ought to get one more bite to amend;
15 but I don't know what to deal with it -- how you're going
16 to deal with that and still comply with the time limits,
17 that the person stands on their pleading and says, "I think
18 it's good, but I want one more if you rule against me"; and
19 the judge says, "Fine, I would rule against you, but
20 instead I'll give you another crack at it." Does that mean
21 that the 60 days is going to start over again, or do we
22 give them a short fuse and once again apply the objection
23 to it and then have the judge rule?

24 CHAIRMAN BABCOCK: Yeah. Yeah. And, you
25 know, Richard, Munzinger, your concern about how we're

1 overriding the right to file an amended pleading, this
2 subpart (d) says, "The court must allow the party to
3 amend," so that's not inconsistent with your right to amend
4 up to seven days before trial. The "at least once" part
5 may implicate it, but otherwise it's consistent with --

6 HONORABLE TOM GRAY: Actually, Chip, I would
7 argue that the "upon request" is what would change it
8 because you don't have to request.

9 CHAIRMAN BABCOCK: Yeah, that's right. Good
10 point.

11 MR. MUNZINGER: And that was my point. It
12 says "upon request."

13 CHAIRMAN BABCOCK: But it doesn't give the
14 judge any discretion. It says the judge must allow you to
15 do it.

16 MR. MUNZINGER: I did some briefing while I
17 was on the subcommittee, and I looked at some cases that
18 held that at least when you have a motion to dismiss for
19 want of jurisdiction you must give the party a right to
20 replead, and there's language in other cases saying the
21 same thing, and I drew the conclusion that there is largely
22 a presumption at least that we have a right to replead in
23 response to a special exception, for example.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. MUNZINGER: And we do. Okay, I grant you

1 a special exception, so I can either live with that or I
2 can amend my pleading. If I amend my pleading then
3 somebody has got to come back and file another special
4 exception against me or live with it and seek relief
5 elsewhere.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. MUNZINGER: And that's how I viewed this,
8 that there seems to be at least a tacit recognition of
9 right to amend as a matter of right.

10 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: Well, I guess I
12 was reading it differently, and I thought from what Jeff
13 said that perhaps I was reading it correctly. I thought
14 this only applied to whether or not you get another bite
15 once you're at the hearing as you were saying, Chip. This
16 doesn't have anything to do with your right to amend prior
17 to the hearing. In other words, maybe the wording is
18 wrong, but you have an absolute right to amend at any time
19 as many times as you want up until the hearing --

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE STEPHEN YELENOSKY: -- under
22 current law, and that's the way I read this. All I read
23 this to mean is once you get to the hearing, before the
24 judge rules he or she has to give you another opportunity,
25 and if that's what's intended and it's not clear from how

1 it's written then maybe we need to redraft it. Is that the
2 issue, Richard?

3 MR. MUNZINGER: That's part of the issue.
4 It's the "upon request." Your explanation cures the
5 problem.

6 HONORABLE STEPHEN YELENOSKY: Okay.

7 MR. MUNZINGER: If the judge has indicated
8 he's going to grant it at the hearing and you say, "Well,
9 let me amend."

10 HONORABLE STEPHEN YELENOSKY: Well, then I
11 think what it needs to say then is "At the hearing before
12 granting a motion to dismiss the court must, upon
13 request" --

14 MR. MUNZINGER: And the problem with that is
15 it frustrates the Legislature's intent that you allow a
16 defendant or a party who is seeking relief under this rule
17 to recover their attorney's fees because of the other
18 person's incompetence, whatever it might be, the other
19 person's having filed a spurious or meritless claim, and so
20 if you give them a right to amend what do you do about the
21 attorney's fees there? "Hey, Judge, I spent eight hours
22 briefing this thing. I traced the law in California and
23 this and that. I'm entitled to my money." No, you get a
24 right to amend. So I spent all of this money. That's a
25 problem.

1 CHAIRMAN BABCOCK: Jeff.

2 MR. BOYD: Yeah, we have to presume the
3 Legislature meant to do something with this statute. If
4 the statute allows a judge to grant a right to amend then
5 we've not changed the law at all. So if you sue me and I
6 think this is a bad claim, has no merit, under current law
7 I can file a special exception, and the judge -- we have a
8 hearing. I incur the fees to file special exceptions. We
9 have a hearing, and the judge says, "Yeah, I agree, this
10 pleading is insufficient, has no merit, so I'm going to
11 give you seven days to amend." Well, we can do that now,
12 and if we can do that now, then allowing the judge to allow
13 for amendments in this rule doesn't change what we can
14 already do now.

15 The -- I'm going to argue that the rule
16 should specifically not allow judges to allow them to amend
17 once it's been submitted, whether oral hearing or not,
18 because the language is mandatory. It must provide for the
19 dismissal. The motion must be granted or denied within 45
20 days, and you must award attorney's fees and costs. It's
21 an alternative to special exceptions not -- it's not
22 supposed to be identical to special exceptions, and the
23 case -- the analogy case that we haven't talked about,
24 which I think was in the mind of a lot of people in this
25 legislative process is the multiple defendant case where

1 deep pocket defendants are named because the primary
2 defendant doesn't have deep pockets, and the example is the
3 Ford rollover, so you sue Ford and was it Goodyear or who
4 made those tires?

5 MR. STORIE: Firestone.

6 MR. BOYD: Whoever it was that made those
7 tires, you sue both of them, but you also sue the
8 manufacturer of the wheels, and the manufacturer of the
9 wheels may look at it and say, "All you've done is pled
10 that I made the wheels, but you didn't plead how that had
11 anything to do with it," but I'm a little worried that if I
12 move to dismiss it may be denied, so instead I'm going to
13 specially except. But if you also named the manufacturer
14 of the taillights, well, that one may say, "I'm moving to
15 dismiss because you've not pled anything that in any way
16 connects me to what happened here." If you let that
17 person -- if you let the judge then let that person replead
18 or amend then you've taken away anything different out of
19 this statute than what that defendant already had through
20 the special exception process.

21 Now, then you get to the question of should
22 they be allowed to amend before the motion to submit it on
23 oral hearing or otherwise, and I agree that you should. I
24 agree they have the right to freely amend and by doing so
25 have freed themselves from the risk of attorney's fees.

1 That way the parties are working it out, and you don't have
2 to involve the court, but once you involve the court, the
3 court needs "shall grant or deny and shall award attorney's
4 fees to the prevailing party."

5 CHAIRMAN BABCOCK: Richard.

6 MR. MUNZINGER: The Legislature used the
7 phrase -- the words "motion to dismiss." They knew that we
8 had a special exception practice. They knew that we had a
9 practice now that people can amend at any time up to seven
10 days before trial unless the judge in the exercise of his
11 power to control the cases in his own court orders
12 otherwise, so they meant this to be a sui generis motion.

13 CHAIRMAN BABCOCK: A what kind of motion?

14 MR. MUNZINGER: Sir? That's an Orsinger
15 word. He's left. That's an Orsinger word. But they meant
16 it to be some kind of a specific special process. There is
17 nothing that would keep a trial judge from saying, "All
18 right, I'm going to allow you to amend this motion, but you
19 get one bite at the apple, don't do this again now." No
20 order has been entered on the motion; therefore, no
21 attorney's fees can be awarded, denying or granting. No
22 order has been entered, so the defendant who has filed the
23 motion no longer has the risk of getting stung with
24 attorney's fees, nor does the plaintiff. The plaintiff now
25 has to make up his or her mind, do I amend, and if I do and

1 they do amend, now I have to make up my mind do I come back
2 with a motion and face the risk that I'll pay that person's
3 attorney's fees? I think that you need to allow people to
4 amend. The rule needs to allow them to amend as freely as
5 our rules do today because we now know that our trial
6 courts can tell us, "No more amendments, guys, this is it.
7 You do this in 10 days, Smith or Munzinger, and this is the
8 last one, make it good."

9 "Yes, Judge."

10 CHAIRMAN BABCOCK: Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: But this
12 statute says it doesn't go away. I have to rule on it, so
13 I allow you to amend, I still have to rule.

14 MR. MUNZINGER: This statute doesn't say that
15 a motion can't be withdrawn. What's the difference
16 between --

17 HONORABLE STEPHEN YELENOSKY: Well, what if
18 they don't withdraw?

19 MR. MUNZINGER: If I don't withdraw and the
20 pleading has been amended, under rules today if I filed a
21 special exception, for example, to the original petition,
22 plaintiff files an amended petition, my special exceptions
23 are mooted. If I file a motion to dismiss the original
24 petition, the petition is amended, under current law today
25 the motion is mooted, by reason of the amendment.

1 HONORABLE STEPHEN YELENOSKY: Well, if you
2 analogize to special exceptions, but do we know that's the
3 law for this?

4 MR. MUNZINGER: Whether you do or you don't
5 it seems to be because the rule is a pleading when amended
6 is no longer live. Its only value to anybody in the case
7 is it's in the record, I can use to it make a judicial --
8 it's not even a judicial admission. It's a statement
9 that's in admission against interest now. It's no longer a
10 judicial administration because it's amended, so why would
11 that be different if you have a motion to dismiss? "That
12 pleading doesn't exist anymore, your Honor. I amended
13 that." It's abandoned under current rules, so my motion is
14 no longer in existence.

15 CHAIRMAN BABCOCK: Yeah, I think that's
16 right. Anybody disagree with that? Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: I don't agree
18 that that correctly reflects the way the courts of appeals
19 have interpreted special exceptions, and -- but I'm not
20 sure that that's the most efficient way to do things. You
21 file a special exception to the original petition. They
22 amend. You still have the same complaint to the amended
23 petition, but under our rules you're required to file
24 another special exception, a second special exception to
25 the, you know, first amended; and to me that's a very

1 inefficient system if what you complained about the first
2 time still exists.

3 CHAIRMAN BABCOCK: Yeah. Roger.

4 MR. HUGHES: Well, one thing that was in the
5 State Bar committee's proposed rule that I kind of -- now I
6 kind of like is requiring a certificate of conference.
7 When I read this statute again what I see is that it
8 requires a dismissal of cause of action that has no basis
9 in law and fact, not as alleged has no basis in law -- in
10 law or fact. If a person's pleading could be tidied up by
11 alleging just a few more facts which they could allege in
12 good faith, or, gee, they forgot to allege proximate cause
13 when they alleged negligence and that's why it's defective,
14 I'm not sure that's really the kind of case that this is
15 talking about. I think they were looking at a case where,
16 you know, you could add more adverbs and adjectives, all
17 day you like, but all day long this cause of action doesn't
18 exist, or this is -- you can't recover based on factual
19 allegations concerning a unicorn.

20 So I think maybe a certificate of conference
21 might allow people to cure the problems I was talking about
22 where all you have to do is add a few more allegations that
23 you can do in good faith. After that I think it's a
24 question of policy whether we're going to let someone amend
25 while the motion is pending, and that avoids the problem

1 altogether. I think we're going to have to provide some
2 mechanism that if it's amended while the motion is pending
3 the movant can withdraw without penalty. I mean, I would
4 favor that. Otherwise it's pretty hard core. Once you've
5 put down your motion, if it turns out they can clean it up
6 with a few good faith more allegations, too bad, you
7 shouldn't have filed it. You should anticipate what they
8 could plead to meet your objection.

9 CHAIRMAN BABCOCK: Uh-huh.

10 MR. HUGHES: So that's my observation.

11 MR. MUNZINGER: That interpretation of the
12 rule would be kind of crazy. Defendant, you have a right,
13 but you can't exercise it because if you do the -- you
14 should have known this guy was going to cure this problem.
15 You shouldn't have filed the motion, and so the problem
16 that the plaintiff created by not pleading properly is now
17 yours and you pay for it. That's justice? That's nuts.

18 CHAIRMAN BABCOCK: Buddy.

19 MR. LOW: Chip, I'm getting ready to get shot
20 down like Jeff, but I think the Legislature really intended
21 not to mess around with this. Unlike the health care bill,
22 it's pretty to the point, brief, and says -- tells you
23 don't mess with this frivolous litigation. They don't use
24 that term. So I would be for you better watch out what
25 you're doing. Once you file it -- and I don't disagree,

1 you should have the conference requirement. Once you file
2 it then your remedy is to take -- to dismiss. Otherwise,
3 you should have known what you were doing. I wouldn't even
4 give them a right to amend, so I go down with you, Jeff.

5 CHAIRMAN BABCOCK: Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: Well, it -- you
7 know, I guess probably they weren't fooling around, but
8 what we're talking about being worried about are those
9 cases that although when filed should have been dismissed
10 and were frivolous, turn out not to be frivolous because
11 they've amended, and we're arguing about whether somebody
12 should get attorney's fees for originally having a
13 frivolous lawsuit filed against them and being forced to
14 file a nonfrivolous lawsuit, and I really doubt that's what
15 the Legislature had in mind anyway. I think they were
16 thinking about lawsuits that from day one were frivolous,
17 all the way into -- ad infinitum were frivolous, never
18 should have been filed and couldn't morph into something
19 that was nonfrivolous.

20 So when we talk about legislative intent, I
21 think the Legislature had in mind something that really is
22 a very, very, very small percentage of what we see, and
23 they didn't really have in mind at all that somebody would
24 file a frivolous lawsuit and it would be amended to become
25 a nonfrivolous lawsuit and somebody should get attorney's

1 fees for that.

2 CHAIRMAN BABCOCK: Jeff, are you hankering
3 for another vote?

4 MR. BOYD: Only if that's what's required to,
5 you know, convince Justice Hecht to go my way.

6 CHAIRMAN BABCOCK: Well, and you're a no
7 amendment guy, right?

8 HONORABLE R. H. WALLACE: No.

9 MR. BOYD: I think there's two time periods.
10 From the date of filing the motion to dismiss prior to
11 submission to the judge, I'm fine with amendment, but once
12 it's submitted to the judge, the judge shall grant or deny
13 and shall award attorney's fees.

14 CHAIRMAN BABCOCK: Okay. No amendment after
15 submission.

16 MR. BOYD: That's right.

17 CHAIRMAN BABCOCK: Okay. That's what you're
18 in favor of. Carl.

19 MR. HAMILTON: Before we vote on that it
20 seems to me like we need to know whether or not this
21 dismissal, if it occurs, is going to be with or without
22 prejudice. If it's without prejudice then I'm okay with
23 that because they can fix it up and refile it, but if it's
24 going to be with prejudice that's got a whole lot more
25 problems with it.

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: Yeah, I mean, my vote not to amend
3 goes with the conference, the giving notice and so forth,
4 so that's -- so that they then know and they have a chance
5 to dismiss, not that there's no notice that you can just
6 file that, and that's it.

7 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

8 PROFESSOR HOFFMAN: What is -- could you
9 describe what is this moment of submission that you're
10 talking about, and let me just make sure I'm clear? In the
11 Federal side it may be sort of what you're talking about.
12 So like under Rule 11 now there's the 21-day what's called
13 the safe harbor provision that before you file it you have
14 to give them notice that this is your plan and they've got
15 21 days to come to Jesus, and if they do then it's all
16 gone, it can't be in sanctions, but if they play chicken
17 with you, you file your thing 21 days later. Is that sort
18 of what you're talking about or --

19 MR. BOYD: Well, have we decided whether
20 we're requiring an oral hearing or not?

21 CHAIRMAN BABCOCK: I thought the consensus
22 was that we would not require an oral hearing.

23 MR. BOYD: It would be easy if we were
24 requiring an oral hearing, which by the way, I agree we
25 shouldn't require. I think trial judges should have

1 discretion because of prisoners, but if we were requiring
2 it then once that oral hearing happened that's when it's
3 submitted.

4 PROFESSOR HOFFMAN: Notice of hearing.

5 MR. BOYD: Yeah, once it's submitted. If
6 you're not requiring oral hearing, and the judge is going
7 to take it up then that's where I think we may have to look
8 at -- who was it was talking about imposing some kind of
9 deadline to respond by a certain day and it ought to be
10 more than three days or whatever? Okay. So once you
11 respond then you've stood on your pleading instead of
12 voluntarily making a dismissal.

13 PROFESSOR HOFFMAN: Okay. So I hadn't
14 thought about it either, but I will say that sounds a
15 little bit like how I understand the safe harbor process.
16 So, in other words, you're giving them three weeks to
17 decide whether or not you were right. If you were right,
18 they amend or they quit. If they don't think you're right,
19 they stand on their pleading, and then we can debate
20 whether 21 days is the right number or not, but that may be
21 similar to what you're saying.

22 CHAIRMAN BABCOCK: All right. How many
23 people think that after the date of submission no amendment
24 should be permitted?

25 MR. SCHENKKAN: We picked up another vote

1 after you started counting.

2 CHAIRMAN BABCOCK: Was it Judge Peeples? I
3 counted him. I saw it out of the corner of my eye. I saw
4 that hand flit up.

5 Okay. How many people think after submission
6 there should be the right to amend?

7 HONORABLE STEPHEN YELENOSKY: There's one
8 over there.

9 CHAIRMAN BABCOCK: Okay. Well, Jeff, you're
10 on a roll, man. 19 in favor of your proposition and only
11 seven opposed.

12 HONORABLE DAVID PEEPLES: Chip?

13 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

14 HONORABLE DAVID PEEPLES: I think the
15 subcommittee is going to benefit greatly from this very,
16 very good discussion, and I just question the wisdom of
17 having a whole lot of votes that will tie our hands. Now,
18 that was fine, but I think we need to --

19 MR. LOW: Don't do it again.

20 HONORABLE DAVID PEEPLES: We need to move
21 through the --

22 MR. BOYD: Chip, I agree that one's fine.
23 Let's throw out the prior two.

24 MR. SCHENKKAN: David, you waited until after
25 submission. You're too late.

1 CHAIRMAN BABCOCK: We'll toss the other two
2 votes. We'll leave that one.

3 MR. BOYD: Thank you.

4 MR. GILSTRAP: Is this going back to the
5 subcommittee?

6 CHAIRMAN BABCOCK: Huh?

7 MR. GILSTRAP: Is this going back to the
8 subcommittee?

9 CHAIRMAN BABCOCK: Well, we'll see.

10 MR. GILSTRAP: Okay.

11 CHAIRMAN BABCOCK: Okay. Anything more on
12 right to amend? We've voted, perhaps precipitously, but
13 Justice Gaultney.

14 HONORABLE DAVID GAULTNEY: Well, I was just
15 wondering if the subcommittee considered the use of the
16 word "may" instead of "must." In other words, instead of
17 having it one way or the other, give the trial court some
18 discretion.

19 CHAIRMAN BABCOCK: Okay. All right. Justice
20 Bland.

21 HONORABLE JANE BLAND: When you're talking
22 about submission versus order, so you're saying that if you
23 have the hearing then the right to amendment disappears?

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE JANE BLAND: But what if at the

1 hearing the judge would say -- give some inclination of
2 ruling? Why wouldn't that be helpful to the parties if
3 they can go out and resolve it through amendment, fix the
4 case, which we do all the time as trial judges? That's why
5 I like "may" instead of "must," and it -- I think the
6 bigger problem with amendment is after the judge has ruled.
7 I now say your case does not have merit and then you say,
8 "But, Judge, let me amend." That's where the inefficiency
9 comes in, not from amending during the submission process
10 or the hearing, but from amending after the judge has ruled
11 to avoid paying fees or just because I'm not going to amend
12 until somebody orders it.

13 CHAIRMAN BABCOCK: You want us to amend the
14 vote?

15 HONORABLE JANE BLAND: No, I want to amend my
16 vote, I think. I think we need to let trial judges have
17 more discretion about how to manage the process until the
18 time they rule.

19 CHAIRMAN BABCOCK: Okay. What about no
20 waiver of motion to transfer venue or special appearance?
21 Surely this is not controversial.

22 MR. GILSTRAP: It was on the subcommittee.

23 CHAIRMAN BABCOCK: Was it?

24 MR. MUNZINGER: Section two of Rule 120a
25 specifically provides that a 120a motion must be ruled upon

1 before any other motion, and so this motion procedure would
2 contravene 120a, section (2), unless you speak to it in
3 this rule.

4 CHAIRMAN BABCOCK: Okay.

5 MR. MUNZINGER: And I'm not sure this is the
6 best way of speaking to it, but that was the point, and
7 then, of course, the case law says -- talks about venue
8 motions as well.

9 CHAIRMAN BABCOCK: All right. Buddy.

10 MR. LOW: But you want to know first whether
11 the court even had jurisdiction. I mean, why go through
12 all this process if the --

13 MR. MUNZINGER: Jurisdiction of the person.

14 MR. LOW: Yeah.

15 MR. GILSTRAP: Because it's -- because there
16 may be cases in which the defendant could show up and knock
17 the case out quickly without having to go to all the
18 expense of filing a motion to transfer venue or a special
19 appearance.

20 CHAIRMAN BABCOCK: Right.

21 MR. GILSTRAP: There may be some cases like
22 that. That was the idea behind it.

23 MR. LOW: Okay.

24 CHAIRMAN BABCOCK: And in Federal court it
25 happens all the time where you combine -- you know, a party

1 will say, "Look, you don't have jurisdiction over me," and
2 file a 12(b)(2); but in any event, they don't stay the
3 claim; and I've had Federal judges say, "I'm not going to
4 rule on the personal jurisdiction motion, they don't state
5 a claim," in which case your client is delighted because
6 now you've got a decision on the merits.

7 MR. LOW: Personal jurisdiction often
8 requires a lot of discovery, and I understand that.

9 CHAIRMAN BABCOCK: Yeah. Justice
10 Christopher.

11 HONORABLE TRACY CHRISTOPHER: I don't think
12 we ought to change our longstanding law that if you get an
13 affirmative ruling that you -- on a matter of substance
14 that you waive your special appearance, and it seems to me
15 that if you choose this you waive your special appearance.

16 CHAIRMAN BABCOCK: Okay. Professor Carlson.

17 PROFESSOR CARLSON: That was the argument I
18 made unsuccessfully at the subcommittee, that traditionally
19 -- and there's no reason the law couldn't change, but
20 traditionally we have not allowed a litigant to test drive
21 the court. You go in for an affirmative ruling, you are in
22 that court. You can't turn around after you get a ruling
23 you don't like and say, "Well, you don't have jurisdiction
24 over me."

25 HONORABLE TRACY CHRISTOPHER: Yeah.

1 CHAIRMAN BABCOCK: Test drive the courts.
2 Richard.

3 MR. MUNZINGER: Traditionally we didn't have
4 the Legislature pass a law telling us to adopt a rule that
5 does what this one does. Traditionally the Legislature
6 didn't tell us how to write the rules. Now they've told us
7 write a rule. How can you have the Legislature tell you to
8 write a motion to dismiss rule that has to be resolved and
9 not amend Rule 120a or the case law that says you've waived
10 your 120a motion unless your motion seeks the
11 jurisdictional relief? And I agree with that. Obviously
12 your point is correct, but this isn't traditional. You've
13 got a statute now that says it. So I think you need to
14 protect rights under the motion to transfer venue and
15 special appearance rights against this rule.

16 CHAIRMAN BABCOCK: Fiddler on the Munzinger,
17 tradition. Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: Well, again,
19 because of the arbitrary 60 days after filing of the
20 pleading we've put ourself in a position where you have to
21 almost get a ruling on this first before you went to a
22 special appearance, but the Legislature knows we have
23 special appearances. They know the law is if you get an
24 affirmative ruling from the court you've waived your
25 special appearance. I can make the same argument that

1 you've been making all morning, so --

2 CHAIRMAN BABCOCK: Judge Wallace.

3 HONORABLE R. H. WALLACE: Well, I think it
4 seems to me by requiring the ruling within 45 days from the
5 time the motion was filed is just not -- in a lot of cases
6 wouldn't be feasible to fight the special appearance
7 battle --

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE R. H. WALLACE: -- and get that
10 done within 45 days. I mean, I think I tend to agree with
11 Richard.

12 HONORABLE TRACY CHRISTOPHER: You don't file
13 it.

14 HONORABLE STEPHEN YELENOSKY: You don't file
15 it.

16 HONORABLE TRACY CHRISTOPHER: You don't file
17 it until after you've had your special appearance.

18 HONORABLE R. H. WALLACE: You don't file the
19 special appearance?

20 HONORABLE STEPHEN YELENOSKY: No, the motion
21 to dismiss. You wait until the special appearance.

22 HONORABLE R. H. WALLACE: Yeah, well, you're
23 right. You're right. But still then to me that still sort
24 of defeats the purpose of the statute.

25 CHAIRMAN BABCOCK: Well, according to this

1 rule you've still got to file it in 60 days.

2 HONORABLE R. H. WALLACE: Right. Well,
3 according to the rule, but we can change that, but even
4 then, some of these special appearance battles can involve
5 discovery and drag on and on. It seems to me that -- I
6 agree with Richard. I think we ought to do whatever we
7 need to do to wade this out of that.

8 CHAIRMAN BABCOCK: Buddy.

9 MR. LOW: There is no order of pleadings.
10 Why couldn't you file both and ask that this be -- proceed
11 first or something? There is no order that you file -- you
12 file your motion -- plea to the jurisdiction and then you
13 turn around and you file that. There's no order of
14 pleading.

15 CHAIRMAN BABCOCK: Well, because of the
16 60-day thing there may be a problem.

17 MR. LOW: Okay. Okay.

18 CHAIRMAN BABCOCK: Judge Peeples.

19 HONORABLE DAVID PEEPLES: The arguments that
20 there ought to be waiver it seems to me are formalistic and
21 are not supported by policy reasons that I'm aware of, and
22 therefore, the -- you know, it's expensive to do a special
23 appearance, and this needs to be done up front. Those are
24 good policy arguments, and I don't think they're outweighed
25 by the formalism that supports all the waiver business

1 we've got.

2 CHAIRMAN BABCOCK: Okay. Jim.

3 MR. PERDUE: I might have a contrary take on
4 this given my practice, but the bill is titled "Early
5 Dismissal of Cases," so if the intent was to try to get
6 frivolous cases teed up and out of the system early, the 60
7 days within the pleading is completely consistent with what
8 was in the discussion. If the rule is going to be
9 converted into a way to allow an attorney's fees dismissal
10 motion at any time in the case and capture somebody for a
11 pleading deficiency which has traditionally been handled as
12 special exceptions, that's not even consistent with the
13 caption of the bill; but I would say that because the 60
14 days is in here I do think that you can have the language
15 in (e) regarding the waiver of a special appearance because
16 you satisfy the policy goal of being able to tee up an
17 effort to get out a frivolous claim early; and I would
18 again, contrary to probably a lot of rights of some people
19 I represent, I would think if you really think you've got a
20 shot at that and you really think you've got a frivolous
21 case then that shouldn't act to waive your special
22 appearance, right, because it has to be filed within 60
23 days of the claim going in; but if you take that out and
24 you're going to say two years down the road you can make
25 this pleading motion and it's -- you know, now I say you've

1 got a frivolous case, which I think is inconsistent with
2 the bill, then I would say you need to take out (e). Those
3 are two different paths.

4 CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Yeah,
5 Tom.

6 MR. RINEY: If a defendant files a motion
7 under this rule and there's not a waiver and the defendant
8 loses the motion and the attorney's fees are awarded
9 against the defendant then could a defendant come in and
10 say, "I don't have to pay the attorney's fees because this
11 court didn't have jurisdiction"? I mean, that seems to me
12 to be a problem to come in and ask for affirmative relief
13 from the court, which is contrary to everything that we say
14 with respect to waiver of jurisdiction in the current law;
15 secondly, to say but if you lose that gamble and relief is
16 awarded against you then you can go back and say the court
17 didn't have jurisdiction to do what you asked them to do to
18 begin with. All right. That doesn't make much sense to
19 me.

20 CHAIRMAN BABCOCK: Richard.

21 MR. MUNZINGER: The court would have subject
22 matter jurisdiction theoretically, but not jurisdiction of
23 the person, so a court with subject matter jurisdiction it
24 seems to me would have the authority to enter an order on
25 attorney's fees, even though it may not have --

1 HONORABLE STEPHEN YELENOSKY: No.

2 MR. MUNZINGER: -- had jurisdiction of the
3 person.

4 HONORABLE TERRY JENNINGS: No.

5 HONORABLE STEPHEN YELENOSKY: No, we can't
6 make them pay if we don't have jurisdiction over them.

7 PROFESSOR HOFFMAN: Correct.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: Rather than try to
10 deal with the conflict between the 60 days and the waiver
11 of special appearance, why couldn't we say in the 60-day
12 requirement unless there is a pending challenge to the
13 personal jurisdiction or a challenge to the venue then the
14 claim must be filed within 60 days. So it makes it clear
15 that your 60-day time doesn't run if you've got a personal
16 jurisdiction or venue challenge.

17 CHAIRMAN BABCOCK: Yeah. Okay.

18 HONORABLE TOM GRAY: But, Chip, because of
19 the jurisdiction is over -- the issue seems to be over the
20 person because, as Richard Munzinger said, you've got
21 subject matter jurisdiction. Why isn't it that, like in
22 the discovery that you're conducting and for the 120a
23 special appearance motion, you've got in effect limited
24 jurisdiction over the person to do and order that
25 discovery? It's sort of like a limited waiver of the

1 jurisdiction. You can proceed on very limited issues in
2 connection with a 120a motion and conduct discovery and
3 that kind of stuff. So it seems like you could give
4 limited discovery to have this hearing, and I think Jim was
5 right that you've got a problem of taking this -- the
6 piecemeal part of it, it's got to be either the get it in
7 there and get it done and then get on with your special
8 appearances or not or take out that 60-day part.

9 CHAIRMAN BABCOCK: Skip.

10 MR. WATSON: Well, just conceptually my
11 problem with that is that whereas if you're proceeding on a
12 special appearance or discovery on a special appearance,
13 that's to resist the jurisdiction of the court being
14 exercised over you, but here you're coming into court, as
15 Elaine was saying, and affirmatively invoking the
16 jurisdiction of the court over me for this purpose. I
17 mean, I see it exactly the way Tom does. Tom Riney. You
18 know, I have a problem with that.

19 CHAIRMAN BABCOCK: Okay. A couple more
20 comments and then we'll move onto attorney's fees. Judge
21 Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Justice Gray,
23 are you saying that we exercise jurisdiction in the process
24 of discovery on special appearance, and, therefore, we
25 should be able to do this?

1 HONORABLE TOM GRAY: That was my
2 understanding.

3 HONORABLE STEPHEN YELENOSKY: Well, but we
4 exercise jurisdiction -- we always have -- we always have
5 jurisdiction to determine jurisdiction.

6 HONORABLE TOM GRAY: Right.

7 HONORABLE STEPHEN YELENOSKY: And so that's
8 what I think I'm operating under when I order discovery of
9 a special appearance, but that then doesn't by analogy
10 allow me to exercise in persona jurisdiction over somebody
11 in order to pay something.

12 MS. BARON: Or receive something.

13 HONORABLE STEPHEN YELENOSKY: Or receive
14 something.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, yeah,
17 and, I mean, like in the special appearance, I was just
18 wondering, and I don't know what the answer to this
19 question is, if you order discovery to proceed and the
20 person with the special appearance says, "I'm not coming to
21 Texas for the deposition. You have to come to Florida,"
22 and usually everybody goes to Florida to take their
23 deposition because, you know, you don't have jurisdiction
24 over the person, so it's a -- I don't know what would
25 happen if they didn't show up then.

1 CHAIRMAN BABCOCK: Okay. Really, really
2 final comment. Lonny.

3 PROFESSOR HOFFMAN: So my comment is I'm
4 against the idea that we should put a defendant in a catch
5 22. If a defendant has a challenge to jurisdiction, we
6 should write a rule that permits them to preserve that
7 challenge and then the question is only is it possible to
8 do this and also still do it early. What's wrong with a
9 rule that says if you have a special appearance challenge
10 you have to file this new motion -- you know, file it at
11 the same time you file your special appearance, make it
12 subject to, and in the due order we say you've got to do
13 the dismissal motion first, Judge, for the obvious reason
14 the special appearance may take too long.

15 CHAIRMAN BABCOCK: You have to -- because of
16 the 45-day rule.

17 PROFESSOR HOFFMAN: No, that's what I'm
18 saying, you have to do the dismissal motion first.

19 HONORABLE STEPHEN YELENOSKY: But what if I
20 do the motion and I order attorney's fees, and then you
21 convince me I don't have in persona jurisdiction?

22 PROFESSOR HOFFMAN: That's the Tom question.

23 HONORABLE STEPHEN YELENOSKY: Yeah. So it
24 seems to me you have to say you do the in persona
25 jurisdiction first, and you have to file your motion to

1 dismiss within X number of days of the ruling on that.

2 CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Let's
3 talk about attorney's fees. Noncontroversial, right?

4 HONORABLE DAVID PEEPLES: Okay. Section (F),
5 the first sentence is straight out of the statute, except
6 for the last six or eight words. We did say to limit the
7 attorney's fees recoverable to the time spent in either
8 presenting or responding to the motion. In other words,
9 not attorney's fees to date. And that goes a little beyond
10 the statute but that seems important to do.

11 MR. HAMILTON: Or on appeal.

12 HONORABLE DAVID PEEPLES: Well, we haven't
13 talked about appeal. There are several attorney's fees
14 issues that we just decided not to tackle, and I wanted to
15 alert you to what those were. What happens if there's
16 several claims, several grounds asserted and so forth.
17 Some are granted, some are denied. Do we give guidance to
18 the Court in deciding who prevailed in a partial victory or
19 partial defeat? Motion filed and an amendment cures the
20 defect. We've alluded to that already, but that's
21 something that we don't deal with in this part.

22 A very important thing is do we want the
23 trial court to have the discretion to say to the loser,
24 "You pay them now," as opposed to it rides until the case
25 is finished. That's a pretty big thing. We didn't deal

1 with appellate, and those are the main ones. The State Bar
2 draft, you know, had several provisions on this, including
3 the court can decide what was important. If part is
4 granted and part denied, the court can assess the relative
5 importance of those, but we just decided not to tackle
6 this, and I don't know if that was because time was running
7 out before this meeting or what, but we didn't do it, and
8 then I guess the question is do we leave it more general as
9 it is and let the courts work out these issues or do we try
10 to tackle those issues.

11 CHAIRMAN BABCOCK: Okay. Frank.

12 MR. GILSTRAP: I just want to point out, you
13 know, the attorney's fees portion of House Bill 274,
14 section 102, doesn't require rule making. It's the law,
15 and it does not have this carve out for attorney's fees
16 related to the motion. It just says, "The court shall
17 award costs of reasonable and necessary attorney's fees to
18 the prevailing party." I'm in favor of the carve out. I
19 think that it should only apply to the attorney's fees that
20 related to the preparing and defending the motion, but
21 that's not required by the statute.

22 HONORABLE DAVID PEEPLES: And very quickly,
23 the heading of that attorney's fees statute says "Award of
24 attorney's fees in relation to certain motions to dismiss."
25 So it in effect says to focus on the motion, not attorney's

1 fees to date.

2 CHAIRMAN BABCOCK: Okay. Carl.

3 MR. HAMILTON: One other issue the State Bar
4 brought up was whether the attorney's fees were assessed
5 against the lawyer or the party or both.

6 HONORABLE DAVID PEEPLES: They make a very
7 good point that if it's dismissed because it's not -- that
8 has no basis in law, that's a mistake the lawyer made and
9 not a factual mistake that maybe the client made, and
10 therefore, it ought to be assessed against the lawyer, not
11 the client. Yeah.

12 MR. GILSTRAP: Chip, on that --

13 CHAIRMAN BABCOCK: Yes.

14 MR. GILSTRAP: -- of course, that's -- that
15 would be a real -- a real step to award attorney's fees
16 against the attorney. In House Bill 274 there were
17 provisions in there that on the original loser pays
18 provision, which said that the losing party in any tort
19 suit pays attorney's fees, and if the plaintiff -- if one
20 party's attorney had a right and interest in the claim,
21 namely the plaintiff, you could hit him for attorney's
22 fees, too, and that was taken out, so at least you could
23 say that maybe the Legislature backed off from the idea of
24 requiring attorney's fees to be paid by the attorneys.

25 CHAIRMAN BABCOCK: Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: I could make an
2 argument that if this is truly going to be an expedited
3 motion and it's going to be heard within 60 days from
4 filing of the pleading that the attorney's fees should be
5 all of your attorney's fees, not just presenting the
6 motion. Somebody has filed a frivolous lawsuit against
7 your client. You have to investigate, talk to them, file
8 an answer within the 60-day time period, file a motion to
9 dismiss, get that heard. I could certainly make the
10 argument that the intent of the Legislature was to capture
11 all of that and not just the motion.

12 CHAIRMAN BABCOCK: Richard.

13 MR. MUNZINGER: There's a risk to that. I
14 file an original petition that alleges a meritorious cause
15 of action that will survive this motion or special
16 exceptions. The parties embark on discovery, extensive
17 discovery, even motions. Then an amended petition is filed
18 a year into the lawsuit or nine months into the lawsuit in
19 which the plaintiff asserts a spurious cause of action. My
20 motion to dismiss now must be filed to that pleading
21 because there is a spurious cause of action. Do I pay the
22 attorney's fees of the plaintiff for the last year?

23 HONORABLE TRACY CHRISTOPHER: No, you've only
24 dismissed one cause of action, not the others that you've
25 been working on for a year.

1 HONORABLE STEPHEN YELENOSKY: That can be
2 segregated.

3 MR. MUNZINGER: It's at least a drafting
4 problem that you have to be careful of, obviously.

5 MR. LOW: Yeah.

6 CHAIRMAN BABCOCK: Yeah, Roger.

7 MR. HUGHES: Well, as much as I would like a
8 rule to shift all of the legal fees from one side to the
9 other, it seems to me that the rule ends up -- if you want
10 to say if the defendant wins then he gets all of his
11 attorney's fees, what do you do when the plaintiff wins,
12 the person who filed the petition? Does he get all of his
13 legal fees incurred from the moment the client walked in
14 the door? I mean, a lot of -- I mean, some very fine
15 attorneys do a lot of prep work before they go to trial,
16 spend a lot of time writing their petition. All of the
17 sudden somebody frivolously challenges their petition, then
18 I can make the argument, okay, you rolled that dice and
19 lost, so I want all of my attorney's fees since the client
20 walked in the door.

21 CHAIRMAN BABCOCK: Skip.

22 MR. WATSON: I'm sure this is obvious, but
23 the people that were involved in the bill, I don't get this
24 "in whole or in part" business, both in the bill and in the
25 rule. I mean, let's say there are three cause of actions

1 alleged, and motion to dismiss challenges two, and it's
2 granted on one and denied on one. Where are we? Who is
3 the prevailing party? I just -- I don't get it, and that's
4 going to happen.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE R. H. WALLACE: But don't we have
7 that -- is it the declaratory judgment statute that
8 provides that the court may award attorney's fees to the
9 prevailing party? That's all it says, "prevailing party."

10 MR. BOYD: That's Chapter 38, I think.

11 HONORABLE R. H. WALLACE: Judge has to decide
12 who the prevailing party is.

13 MR. WATSON: But that's a "may." This is a
14 "shall."

15 HONORABLE R. H. WALLACE: Yeah.

16 MR. BOYD: Well --

17 CHAIRMAN BABCOCK: Jeff.

18 MR. BOYD: I think Chapter 37, declaratory
19 judgment, is "may award as is equitable and just," but 38
20 on contracts is "shall award to the prevailing party," and
21 I think the thinking here was there was already case law
22 that governs the obligation to segregate fees and expenses
23 incurred when you seek the recovery of fees and expenses,
24 and I won't claim that a lot of time was spent talking
25 about this, but my personal impression coming out of it was

1 that was the intent, was that that case law would govern.
2 So if you sue me and assert five causes of action and I
3 move to dismiss one cause of action and win, I get my
4 attorney's fees connected with that motion. If I move to
5 dismiss all five and I win on two but lose on three, then
6 the court is going to have to have the parties segregate
7 and determine who recovers how much.

8 CHAIRMAN BABCOCK: Tom, then Carl.

9 MR. RINEY: I just want to say I think Judge
10 Christopher's statement makes sense, but I think it could
11 be subject to abuse. That is, someone could get in and run
12 up a whole lot of attorney's fees very quickly, and perhaps
13 Jeff has got a good point, if it's under existing case law
14 and it should be segregated out, that may take care of it,
15 because if a suit meets these provisions, there is no basis
16 in law or in fact, the idea is to try to get rid of it
17 quickly. The defendant ought to file whatever motions they
18 need to file. If we're going to have waiver all they need
19 to do is file a general denial and a motion, and it's
20 resolved in 45 days. There ought not to be a lot of
21 attorney's fees there.

22 CHAIRMAN BABCOCK: Yeah, Carl.

23 MR. HAMILTON: The caption says "early
24 dismissal of actions." I think the intent of the
25 Legislature is dismissing the lawsuit and not separate

1 parts of it. If the lawsuit gets dismissed, the defendant
2 is the prevailing party. If it doesn't, the plaintiff is
3 the prevailing party.

4 CHAIRMAN BABCOCK: Yeah. Yeah, Judge
5 Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: Doesn't current
7 law give us enough guidance on this? I mean, if a
8 defendant manages to get it dismissed very quickly and in
9 the meantime that defendant has run up a bunch of
10 unnecessary fees, are those not unreasonable and
11 unnecessary fees and I don't award them? And if a
12 defendant knocks out one claim, one cause of action, don't
13 I look for the fees associated with that cause of action;
14 and if a plaintiff wins, don't I look at what the plaintiff
15 had to do that they wouldn't otherwise have had to do
16 without the motion to dismiss that was defeated? The
17 plaintiff still would have had to work up the case, file
18 the petition, do the discovery, but they wouldn't have had
19 to fight the motion to dismiss and all the things
20 associated with that. So doesn't a reasonable and
21 necessary fees occasioned by the thing that got knocked out
22 tell the trial court what to do?

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: I just want to lead us a
25 little astray from the current focus of the attorney's fee

1 discussion, but I'm most interested in knowing what, if
2 anything, we think the Court ought to include in a rule
3 about how we're going -- how the trial court is going to
4 determine the amount of reasonable and necessary fees to
5 the prevailing party, and you know, there are concerns here
6 that cut in two different directions. One concern people
7 have is that a rule that says, you know, "I'm the trial
8 judge, I know these people, I know the situation, I just
9 get to make it up and pick a number out of the air" is
10 subject to some abuse, and it makes it very hard to police
11 the abuse on appeal.

12 The opposite rule that says, you know, this
13 is a fact question, it ought to be determined by a jury,
14 comes at an extremely high cost; and those are the polar
15 opposite tensions; and then there's various efforts and
16 ways to try to compromise them and come up with something
17 sensible; and I'm thinking here that don't we want to
18 require -- and I think it would be in (f) so that we don't
19 get people thinking we're being inconsistent with the part
20 that says there's no evidence in the motion to dismiss
21 itself. We ought to say in filing a motion to dismiss
22 under this rule you must attach an affidavit with your
23 attorney's fees and -- your claimed attorney's fees and to
24 the extent it's for time you already incurred, your time
25 sheets or whatever it is, and then the party filing the

1 opposition to the motion has to do the same when they file
2 theirs and then -- and then now I'm a little less clear who
3 gets to call the question on when you need something more
4 than just looking at these two pieces of paper, and that's
5 where it gets -- gets nervous as to whether we're going to
6 make a lot of work, or we don't make a lot of work but
7 we're going to run a lot of risk of abuse.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: I think as long as we're
10 looking at all the angles on this I think we need to think
11 about when the attorney's fees are paid. The conventional
12 wisdom I'm hearing is people aren't going to file these
13 things unless they're just dead certain because loser pays,
14 but let's suppose plaintiff files lawsuit, defendant files
15 motion to dismiss, and the defendant prevails. The case is
16 dismissed. Plaintiff, I guess, has a judgment for
17 attorney's fees right then, right, but let's suppose the
18 defendant loses and he's got to now -- he's looking at a
19 two-year lawsuit. Well, at the end of that he may have to
20 pay the attorney's fees, but so what? He may get hit
21 anyway?

22 Now, if he had to pay the attorney's fees
23 right then it might make a big difference. But if you
24 don't -- if you say that the defendant can put off paying
25 his attorney's fees until the end of the lawsuit, it seems

1 to me you've really tilted the balance here. It's going to
2 be a lot easier and a lot more justifiable on the part of
3 the defendant to come in and file a motion to dismiss
4 because he loses, so what, I'm going to get hit anyway.

5 CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

6 PROFESSOR HOFFMAN: Frank's comment made me
7 think of something else that may be in the Chair's mind a
8 little out of turn, but in thinking about that last point
9 he just made reminds me of the last part of the
10 conversation. If you file a motion under this rule aren't
11 you submitting to the jurisdiction of the court for
12 purposes of ruling on the motion? In other words, the
13 court's got authority even if it hasn't decided a special
14 appearance to decide whether to award attorney's fees, and
15 so, thus, the Tom problem that you raised before, Tom,
16 seems to be resolved. As long as we require that you file
17 it with the special appearance but make the judge do the
18 motion to dismiss first, even if the judge rules you have
19 attorney's fees and later rules he doesn't have
20 jurisdiction, you still took -- you submitted to the
21 jurisdiction of the court for purposes of getting a ruling
22 and, thus, a potential risk of attorney's fees.

23 CHAIRMAN BABCOCK: That's right, and if you
24 win, you know, it's well worth it to submit to the
25 jurisdiction because --

1 PROFESSOR HOFFMAN: But even then you don't
2 have to submit to the jurisdiction. You're just submitting
3 for the purposes of getting this ruling on dismissal. So,
4 for example, what happens if you get one claim dismissed,
5 but not the others? You might still care about your
6 special appearance, and as I was saying before, I don't
7 think it's fair to put the defendant in a catch 22 on that.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE STEPHEN YELENOSKY: Hasn't the law
10 been you're in or you're out? You don't get to come in
11 just for purposes of one motion.

12 MR. GILSTRAP: Unless we say it's different.
13 I mean, that's what we're saying here, is we're saying it's
14 different.

15 HONORABLE STEPHEN YELENOSKY: It's a
16 jurisdictional issue. I don't know that we can easily do
17 that.

18 MR. GILSTRAP: It's metaphysical.

19 CHAIRMAN BABCOCK: Carl raised a point a
20 minute ago that probably merits a little bit of discussion
21 before we take our afternoon break and then move on to
22 ancillary, but that is the issue of is it with prejudice or
23 without.

24 HONORABLE R. H. WALLACE: Yeah.

25 CHAIRMAN BABCOCK: And, Judge Wallace, what

1 do you think?

2 HONORABLE R. H. WALLACE: Well, no, I
3 wondered if we were ever going to talk about that. That's
4 a pretty important point.

5 CHAIRMAN BABCOCK: Yeah, it would be.

6 HONORABLE R. H. WALLACE: I would tend to --
7 well, I don't know. I saw a case come across my desk
8 yesterday, an inmate filed a 1983 case, a civil rights
9 case, against his lawyer who represented him in trial
10 claiming he was negligent. Okay. Now, he doesn't have a
11 1983. He might have a common law negligence case that
12 would be very hard to prove, but if I dismiss that with
13 prejudice, he's done, I guess. So I don't know, but it
14 seems to me that's a big issue of whether or not -- but if
15 you don't dismiss them with prejudice then you've got some
16 kook that's going to just keep on.

17 CHAIRMAN BABCOCK: Well, it's not even a
18 matter of kookiness. I mean, isn't at least in the Federal
19 system -- Frank, help me out on this, but in the Federal
20 system if I file a 12(b)(6) motion saying that the
21 plaintiff doesn't have a claim and it's granted, that's
22 with prejudice. It's not without prejudice.

23 HONORABLE R. H. WALLACE: The court can --
24 I've seen the court give them leave to amend.

25 CHAIRMAN BABCOCK: Yeah, leave to amend is

1 different, but, I mean, I just had a case, it wasn't in
2 Texas, but where the plaintiff presented a claim, we moved
3 to dismiss; the judge granted our motion; it went up on
4 appeal; the appeal affirmed the order; and then the same
5 plaintiff filed a similar, not identical, similar motion;
6 and they said, "No, you've already lost on the merits.
7 It's with prejudice. You're out." I mean, I thought that
8 was standard, but maybe not. Buddy.

9 MR. LOW: Doesn't that depend on which
10 situation? We have to decide now whether it's with
11 prejudice or without, and the courts don't always agree.
12 What if I file a lawsuit January 1st on, say, contract, and
13 then I'm suing these people and I could -- well, not join
14 contract with tort, but is that res judicata, anything I
15 could have filed against that person?

16 CHAIRMAN BABCOCK: Res judicata is a little
17 different, isn't it?

18 MR. LOW: Well, is it with --

19 MR. GILSTRAP: It's out of the same
20 transaction. I mean, it is.

21 CHAIRMAN BABCOCK: Yeah, but --

22 PROFESSOR CARLSON: Within the subject matter
23 jurisdiction.

24 CHAIRMAN BABCOCK: Yeah, but if the dismissal
25 is with prejudice then res judicata either subsequently

1 apply or it won't. I mean, if the parties are the same,
2 the same transaction or occurrence.

3 PROFESSOR CARLSON: Yeah.

4 MR. GILSTRAP: Yeah, you're right.

5 MR. LOW: They dismiss. They don't say
6 dismissal. They talk about dismissing, and it's a question
7 of law whether it's with prejudice or without.

8 CHAIRMAN BABCOCK: Well, let me put it a
9 different way. When would it be without prejudice? I
10 mean, jurisdiction, personal jurisdiction, obviously.
11 That's without prejudice.

12 MR. LOW: Without prejudice to do what?
13 File --

14 CHAIRMAN BABCOCK: To refile.

15 MR. LOW: The same thing against the same
16 parties, yeah, but where it's the same party but a
17 different thing that you might not even could have brought.
18 Joining contract and tort.

19 CHAIRMAN BABCOCK: Well, Carl, you raised
20 this problem, solve it.

21 MR. HAMILTON: Well, I'm not sure, but I
22 think on special exceptions if the plaintiff doesn't
23 replead and the court dismisses, I think that's without
24 prejudice.

25 MR. LOW: That's true.

1 MR. HAMILTON: Isn't it?

2 MR. LOW: And it is a dismissal, so you have
3 that, depends on the law.

4 CHAIRMAN BABCOCK: Pete.

5 MR. SCHENKKAN: I guess I'm a little puzzled
6 about the practical concern here. Why can't we just have
7 it be without prejudice so we don't run any risks of
8 sometimes -- if it's with prejudice, sometimes being
9 unfairly with prejudice and then the practical protection
10 is a guy does it again he's going to get hit again, and
11 this time we know he's going to get hit because he already
12 has been. I mean, we've already been down this road.
13 You're re-filing the same thing again, and I don't have to
14 re-research my motion. I just have to file it again,
15 change the date.

16 CHAIRMAN BABCOCK: But the rule in Federal
17 court is if a 12(b)(6) motion is granted it's with
18 prejudice.

19 MR. SCHENKKAN: I understand, but I'm saying
20 I don't understand the practical problem.

21 CHAIRMAN BABCOCK: Richard.

22 MR. MUNZINGER: If I'm to assume what Buddy
23 just said, plaintiff files a suit; defendant specially
24 excepts; plaintiff refuses to amend; the court dismisses.
25 Did you say that was a dismissal without prejudice?

1 MR. LOW: That's what -- the courts hold -- I
2 think that's --

3 MR. MUNZINGER: Is that what the current
4 understanding of the law is?

5 CHAIRMAN BABCOCK: That's what Judge Hamilton
6 says.

7 MR. MUNZINGER: Because if it is, it points
8 out another reason why this rule, a motion under this rule,
9 should not be joined with any other kind of relief, and the
10 rule should so specify. This -- if you're going to have a
11 dismissal with prejudice arising under this rule but not
12 under special exceptions, you don't want to have the
13 confusion as to which it was granted under.

14 MR. LOW: But, see, they talk about Federal
15 court. They enter judgment then on that, so there is a
16 judgment entered. The clerk enters a judgment. It's not
17 that way in state court, so they do consider that because
18 judgment is entered, and it is with prejudice.

19 CHAIRMAN BABCOCK: Marisa has got the answer.

20 MS. SECCO: I don't have the answer, but --

21 CHAIRMAN BABCOCK: Oh, yes, you do.

22 MS. SECCO: But I just want to say that in my
23 very limited experience in Federal court a 12(b)(6) is not
24 always with prejudice. For example, if you file a 12(b)(6)
25 on preemption grounds under Ariza and the person can refile

1 an Ariza claim, the court will dismiss without prejudice.
2 Also, a court will dismiss with leave to amend, will grant
3 a motion to dismiss but also include leave to amend so the
4 lawsuit actually stays open --

5 CHAIRMAN BABCOCK: Right.

6 MS. SECCO: -- during that period, so it's
7 not always with prejudice.

8 CHAIRMAN BABCOCK: Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: Do we have the
10 option to make it with prejudice as to what was actually
11 claimed but not with prejudice as to things that weren't
12 actually litigated? I'm looking for it now, but there is a
13 statute that pertains to county courts and district courts
14 and -- Elaine, you know?

15 PROFESSOR CARLSON: I don't know the number.
16 It's in the civil practice --

17 HONORABLE STEPHEN YELENOSKY: There's
18 concurrent jurisdiction of a county court and a district
19 court, I believe. If you choose to go in county court on
20 claim one it is not res judicata as related to claim two,
21 and she's nodding, so I believe it's true. Do we have that
22 option here? Because, again, as I said before, I think the
23 Legislature was thinking about crazy lawsuits that got no
24 claim -- I mean, that aren't possibly going to have any
25 claim, not people who, prisoner or otherwise, bring a claim

1 as you said, Judge, which doesn't have a prayer and has no
2 basis in law, but they might have a related claim that
3 does. Did the Legislature really mean to knock all of
4 those out because a pro se litigant got it wrong the first
5 time?

6 CHAIRMAN BABCOCK: Justice Hecht has
7 something to add.

8 HONORABLE NATHAN HECHT: If you won't amend
9 satisfactorily after special exceptions have been sustained
10 the dismissal is with prejudice.

11 CHAIRMAN BABCOCK: So there. Justice Bland.

12 HONORABLE JANE BLAND: I think that we should
13 not say whether the case must be dismissed with or without
14 prejudice within the rule because it's going to depend on
15 the case. They don't say it in the Federal rules.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE JANE BLAND: And a couple of the
18 grounds, I think as Marisa pointed out, in the Federal
19 rules clearly are things without prejudice, like subject
20 matter jurisdiction and venue are two 12(b)(6) motions you
21 can bring, and that contemplates that you're going to go
22 file somewhere else, and the same thing I think holds true
23 for attorney's fees. We have several Rules of Civil
24 Procedures that contemplate the imposition of attorney's
25 fees, like Rule 215 sanctions, bad faith affidavits in

1 summary judgment practice, ad litem fees.

2 We've got attorney's fees kind of throughout,
3 scattered throughout, and in none of those rules do we put
4 forth a procedure for proving up attorney's fees. We have
5 a big body of case law about attorney's fees, so we ought
6 to let these things develop as they can, as they come
7 through, because one of the -- and we keep talking about
8 the prevailing party, but one of the things that occurred
9 to me is that, you know, everybody walk away. You won
10 some, you won some, everybody bear their own costs, and I
11 don't know that it would be unreasonable for a trial judge
12 to rule that in a case where they fought to a draw.

13 CHAIRMAN BABCOCK: Yeah, what happens -- this
14 is analogous, not the same thing, but with these anti-SLAPP
15 statutes like we now have, what happens is the defendant
16 files one, and it's granted, and then the judge says,
17 "Okay, come back in a week and we'll do attorney's fees,"
18 and the plaintiff nine times out of ten says, "Hey, if
19 you'll waive attorney's fees, let's just forget this ever
20 happened," and the defendant nine times out of time says,
21 "Hey, cool, we're done," and that's that. Buddy.

22 MR. LOW: There's one thing I pointed out to
23 David, and it's not a big deal, but the statute says "shall
24 award attorney's fees," and we put "must," and I point out
25 that "will," "shall," and "must" has different meanings of

1 first party, second party, third party; and I say, "I
2 will," that's definite. "You shall," and "must," I've
3 forgotten how that ties in. I wonder if there is a reason
4 why, and Carl seems to think that "must" has some
5 discretionary function maybe.

6 MR. HAMILTON: "Shall."

7 CHAIRMAN BABCOCK: Dorsaneo has some thought
8 about those.

9 PROFESSOR CARLSON: Well, that stems from the
10 venue law where trying to determine whether the Legislature
11 intended the venue statute to be permissible or mandatory
12 before they were listed under a hearing, and there are
13 cases that said the legislative intent on "shall" is not
14 mandatory with some discretion. "Must" is a must, and
15 "may" is a may.

16 MR. BOYD: Which if I remember -- and
17 Dorsaneo is not here, but I think on one of our conference
18 calls didn't we discuss and decide that this was intended
19 to be mandatory in light of all the shalls that are in
20 there, and Dorsaneo said if that's the case then the rule
21 ought to say "must," not just "shall," because using the
22 word "shall" under some of this older case law gives
23 parties a chance to argue that the judge doesn't really
24 have to.

25 MR. LOW: On the verse of Dorsaneo.

1 CHAIRMAN BABCOCK: Judge Peeples, we've got
2 two alternatives here. One is we could have a series of
3 votes on every single little thing we've talked about
4 today, or your subcommittee could maybe study this again
5 and then come back next time for a discussion on a
6 revised -- on a revision, the discussion to last no longer
7 than 60 minutes. Your choice.

8 HONORABLE DAVID PEEPLES: I think Justice
9 Hecht needs to give us guidance, but --

10 CHAIRMAN BABCOCK: I am speaking for Justice
11 Hecht.

12 HONORABLE DAVID PEEPLES: I think the
13 subcommittee needs to work on it again and come back to the
14 full committee.

15 CHAIRMAN BABCOCK: Yeah, that's what we'll
16 do.

17 MR. BOYD: Can I ask a question, though, that
18 will be helpful to -- at least to me on the subcommittee?
19 Because I'm sitting here trying to remember, what is the
20 effect of with prejudice? Is it claim preclusion? Is it
21 issue preclusion? Is it res judicata, any and all claims
22 that could have been asserted arising out of the same
23 transaction or occurrence? Does anyone know?

24 HONORABLE TRACY CHRISTOPHER: Any and all
25 claims.

1 MR. BOYD: Any and all claims, so with
2 prejudice is any and all claims arising out of the same
3 transaction.

4 PROFESSOR CARLSON: Within the jurisdiction.

5 CHAIRMAN BABCOCK: Yeah. I think that's
6 right. Okay. Let's take our afternoon break, and when we
7 come back we will get back to the ancillary rules. And the
8 next meeting is only three weeks away.

9 (Recess from 2:58 p.m. to 3:17 p.m.)

10 CHAIRMAN BABCOCK: Okay. Elaine, catch us
11 up, where are we and what are we doing?

12 PROFESSOR CARLSON: All right. Our ancillary
13 task force completed its report, and now the matter is
14 coming before this committee. We've substantially reviewed
15 injunctions, and Dulcie Wink presented that; and we return
16 next session, time permitting, with a few tweaks, I
17 believe, in light of the last suggestions from this group;
18 and in the September meeting we substantially completed
19 attachment; and the good news is, is that attachment,
20 garnishment, sequestration, and distress warrants are all
21 modeled or were modeled whenever feasible to have mirror
22 provisions. So many of the provisions we'll look at in
23 these other ancillary proceedings, sequestration,
24 garnishment, and eventually distress warrants, you've
25 looked at before in the context of attachment, except to

1 the extent they had to be unique because of the type of
2 relief that's being sought. That is the good news.

3 We still have left to review from the
4 ancillary task force turnovers and receivers at some point,
5 execution, trial of right of property, and distress
6 warrants, I guess. Yeah. So today we're going to pick up
7 with attachment where we left off at the last meeting, and
8 Pat Dyer is going to lead our discussion.

9 MR. DYER: Okay.

10 CHAIRMAN BABCOCK: Okay, Pat.

11 MR. DYER: First off, we discussed a number
12 of editorial changes. Those have been made in attachment.
13 Parallel changes have also been made in sequestration and
14 garnishment, but if you look at page one of attachment
15 you'll see the strike-through on Rule 1(a), the pending
16 suit required for, that was one of the editorial comments.
17 So in this revision when you see a strike-through, that
18 strike-through is one of the editorial changes that we made
19 at the last session. Substantively, if we move to the
20 third page, and I apologize that these are not paginated,
21 but dealing with the applicant's bond, one of the questions
22 raised was whether the -- the amount of the applicant's
23 attachment bond would cover continually increasing storage
24 costs; and the answer to that is, yes, if you prove
25 wrongful attachment, because the rule specifically allows

1 for damages and costs to be recovered by the respondent if
2 they win on a wrongful attachment.

3 The rule does not address the recovery of
4 costs if wrongful attachment is not established.
5 Therefore, it would not cover increasing storage costs in
6 all instances. So there's no provision under the current
7 rule that permits a respondent to recover costs under the
8 bond without proving wrongful attachment, and that's
9 because the attachment bond is there only to be recovered
10 against if wrongful attachment is proven.

11 If we look at -- the next substantive change
12 is in Rule 3(c), contents of writ, time for return. We
13 had -- the subcommittee had proposed changing the language
14 from what it currently reads, "At or before 10:00 o'clock
15 a.m. on a Monday next after the expiration of 15 days."
16 The subcommittee recommended changing it to the 30, 60,
17 90-day return that's used in execution. The question was
18 asked whether or not we're affecting substantive rights.
19 I've not found any case law or commentary specifically
20 addressing that issue, but effective September 1 of 1942,
21 the language that we currently have, the "at or before
22 10:00 o'clock a.m." language replaced the next session of
23 court language.

24 So the issue was raised, what about filing
25 your return after the date it's supposed to be, a late

1 return, and whether or not that affects anything. We all
2 agreed that levy of a writ after its expiration or return
3 date was void. The question was what if the levy was
4 timely but the return is late, what effect does that have?
5 There's nothing of recent origin addressing it, but I went
6 back to 1883 and found a Texas Supreme Court case. The
7 writ was returned more than one year after the levy. The
8 allegation was made the levy was void. Court said, "No, at
9 least not in these circumstances." It suggested there
10 might be a different change if an intervening party
11 attached the same property or if someone else claimed a
12 lien in the interim period or if the timing of the late
13 filing was the fault of the applicant. So the general rule
14 is, no, under the case law it doesn't generally affect it.
15 So overall the subcommittee still believes that the
16 proposed change does not affect any substantive rights.

17 If we move now to return of writ, which is
18 Rule 4(d) in subsection (2), we've taken out the language
19 that required that the return had to be endorsed on or
20 attached to the writ. That's to comply with the new
21 statute on -- that deals with the endorsement. The next
22 substantive area that we addressed, that there was a
23 question, is on Rule 8, dissolution or modification of
24 order or writ, and it's subpart (f), dealing with a third
25 party claimant. The current rule refers to an intervening

1 party being able to file a motion to dissolve the writ, but
2 then it doesn't address anything else about that
3 intervening party.

4 This is overall a new rule to give an
5 expedited procedure rather than having to go through the
6 trial of right of property, and the best example I can
7 give, let's say 10 copiers are attached under a writ of
8 attachment, and an equipment lessor comes in and says,
9 "That's my property. That doesn't belong to this debtor,"
10 and no one disputes it. That party ought to be able to use
11 an expedited procedure to get the copier back. Our current
12 rules basically say you would have to file a trial of right
13 of property. So the change has been made. The two
14 highlighted changes is that the third party claimant does
15 have to comply with the motion requirements under Rule 8.
16 That was not clear in the previous iteration.

17 Secondly, the question was asked whether or
18 not an order of the court on the third party's claim would
19 be res judicata of possession or ownership. To make it
20 clear that it's not we've added that the court may order
21 the release of the property to the third party claimant
22 pending further order of the court, so it will be an
23 interlocutory order.

24 MR. MUNZINGER: I've got a question.

25 CHAIRMAN BABCOCK: Okay.

1 MR. MUNZINGER: Would it be better if you
2 said "subject to further order of the court"?

3 MR. DYER: I can go with that. I don't have
4 a problem with that. Does that make it more clear that
5 it's interlocutory?

6 MR. MUNZINGER: It seems to me that it does.
7 If it's saying "subject to further order of the court" it
8 makes it clear that that's not a final order.

9 CHAIRMAN BABCOCK: Okay. Keep going then.

10 MR. DYER: I'm okay with that.

11 CHAIRMAN BABCOCK: Okay. Keep going.

12 MR. DYER: Now we move to Rule 10, which is
13 where we left off last session, and Rule 10 and Rule 12 are
14 virtually identical in sequestration, distress warrant, and
15 garnishment. They deal with perishable property and the
16 amendment of heirs. So I think we can knock them all out
17 here with regard to this four. The perishable property
18 rules right now are all over the place, and even though
19 we're using identical rules for four sets of writs, we
20 wanted a practitioner to go to one set of rules to find out
21 all that that practitioner needed to know from the start to
22 the beginning, so we have repeated provisions, almost
23 identical, in each of the four sets for perishable property
24 and amendment of errors.

25 The language in your copy, the highlighted

1 provisions are substantively the same. They come straight
2 out of the rules. The unhighlighted, regular print, those
3 are new. So if we look at the definition of perishable
4 property, it comes out of the existing rules. We've added
5 one clarification just to make sure that no one thinks it
6 applies to real property, and that is in the second two --
7 or the last sentence, it says, "For the purpose of this
8 rule the word 'property' refers to personal property." (b)
9 is straight out of the existing rules. (c) is a little bit
10 different. We have changed it to provide for a motion
11 practice with regard to perishable property as opposed to
12 reports by the officer in possession or the court. We
13 wanted to make it more clear that this needs to be
14 presented to the court even if it's on a very, very
15 expedited basis. (d) provides for a hearing on the motion,
16 but does still allow the judge or justice of the peace to
17 order this on a very, very short notice, and the example
18 we're talking about are your tomatoes that are already one
19 day overripe.

20 If we move now to (e), a bond is typically
21 going to be required unless it's a motion that's filed by
22 the applicant or respondent, and the reason we have there
23 is because under the proposed rules both of those parties
24 may seek to replevy, so if they replevy, a bond is already
25 going to be posted, but if they're moving for the sale of

1 the property, another bond is not required. (f) is a
2 substantially -- well, it's basically new because we've
3 provided a provision -- provided a provision, that's
4 articulate.

5 MR. MUNZINGER: May I ask a question?

6 MR. DYER: Yes.

7 MR. MUNZINGER: Where do you provide for the
8 setting of the amount of the movant's bond?

9 MR. DYER: It's in (e). It just says "as
10 ordered by the court." "A bond payable to the applicant or
11 respondent, as ordered by the court." Now, this is an
12 additional bond that we're talking about. By this time
13 property has already been attached, so there's an
14 attachment bond, and one or the other party may have also
15 filed a replevy bond, so this doesn't speak to another
16 separate amount other than to give the court discretion "as
17 ordered by the court," but the applicant and the respondent
18 have already had to file one or more bonds. They don't
19 have to file another one.

20 MR. MUNZINGER: So the amount of the bond has
21 already been set?

22 MR. DYER: The amount of the attachment bond
23 and the replevy bond has already been set, but there is not
24 a third bond required unless there would be an intervening
25 party, someone else to come claim in who has not been

1 subject to a bonding requirement.

2 MR. MUNZINGER: Well, when I read this the
3 first time when it said "as ordered by the court" I
4 interpreted that as meaning the court determines whether
5 the bond would be payable to the applicant or the
6 respondent as distinct from its amount. Do you see my --

7 MR. DYER: Yeah.

8 MR. MUNZINGER: -- why I was thrown off by
9 it?

10 MR. DYER: Yes.

11 MR. MUNZINGER: And I don't know if anybody
12 else has that same concern or not. It just didn't seem
13 perfectly clear to me that the amount of the bond would be
14 set by the judge. Obviously he's going to have to do it,
15 but the rule doesn't seem to say that as clearly as it
16 might.

17 MR. DYER: Okay. If we were to say, "Unless
18 the movant files with the court a bond set by the court
19 payable to the applicant or respondent, as ordered by the
20 court"?

21 MR. MUNZINGER: Yeah, I think that does both.
22 Other people may disagree with me, but --

23 MR. DYER: "Files with the court a bond in
24 the amount set by the court."

25 CHAIRMAN BABCOCK: "In an amount set by the

1 court."

2 MR. DYER: Okay.

3 CHAIRMAN BABCOCK: Okay.

4 MR. DYER: Our review of the rules indicated
5 that in certain instances a judge might not be required to
6 sign a written order with regard to this. In (f) we wanted
7 to clarify that a written order is required. Subparts (g)
8 and (h) are taken straight out of the existing rules.

9 MR. HAMILTON: I have a question.

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: On this motion, under the --
12 that's not required under the current rules, and if you're
13 going to require service under Rule 21a, does that mean
14 that the court can't even hear that motion for three days
15 or four days or --

16 MR. DYER: No. We address that I think in
17 (d). "The judge or JP must hear the motion with or without
18 notice as the urgency of the case may require." We wanted
19 to allow there even to be instances effectively where the
20 court decides even without notice something has got to be
21 done with this property. The example given was the sheriff
22 comes to the judge and says, "Judge, this stuff is rotting
23 away. Half of it's already gone." We wanted to allow the
24 judge to actually be able to order a sale, even if they
25 could not provide notice to the parties at that point.

1 MR. HAMILTON: So the motion really is not --
2 the motion and the service are really not required before
3 the judge can act then?

4 MR. DYER: Well, our intent was to require
5 that a motion be filed but to recognize that there would be
6 instances where the court might have to act alone.

7 CHAIRMAN BABCOCK: Carl, are you talking
8 about (f) now?

9 MR. HAMILTON: No, I'm talking about (c) and
10 (d).

11 CHAIRMAN BABCOCK: Okay.

12 MR. DYER: If you look at (d), the second
13 part, "The judge or justice of the peace may, based on
14 affidavits or oral testimony, order the sale of perishable
15 property." Okay. And actually that's where we address the
16 amount of the bond.

17 MR. HAMILTON: But (c) requires a copy of the
18 motion be delivered to the person in possession and served
19 on all other parties, so like citation is served -- I sort
20 of read that to mean that you're going to be giving them
21 notice you've got to give them notice several days before
22 the hearing, and a lot of times the perishable commodities
23 are going to be gone by then.

24 CHAIRMAN BABCOCK: Well, the hearing could be
25 without notice according to this, right?

1 MR. DYER: Right. That's what we wanted to
2 have, but I think he's raising a rule that the reference to
3 Rule 21a may import the three-day requirement.

4 MR. HAMILTON: Yeah. Why do we have (c)
5 giving then of giving everybody notice under 21a if we're
6 going to do it without notice?

7 MR. DYER: Well, you're going to have
8 situations where it's the rotten tomato scenario, but you
9 may also have -- and I think a lot of practitioners are
10 picking up on this now -- where you've got market
11 depreciation, which isn't the same as the rotten tomatoes
12 where you're going to lose everything, but the value of the
13 property is depreciating so quickly that you make the
14 argument it's perishable property, and therefore, I want to
15 move the court to sell it, and that can actually solve a
16 lot of problems with posting a replevy bond, but we wanted
17 to allow discretion for those emergent circumstances like
18 the rotten tomatoes where the judge could rule without a
19 hearing, as the urgency of the case may require.

20 CHAIRMAN BABCOCK: Justice Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, are you
22 anticipating that the sheriff will file a motion?

23 MR. DYER: No, the sheriff is included in the
24 oral testimony. I think Judge Lawrence actually recounted
25 an instant where the constable came up to him and says,

1 "We've got to get rid of this stuff. We've got to sell
2 it," and he did not have enough time to notify any parties,
3 and they just made the executive decision to do it.

4 HONORABLE TRACY CHRISTOPHER: But it say --
5 (d) says "must hear the motion." So you haven't allowed
6 the judge to make this order without motion or essentially
7 on its own motion, based on the testimony of the sheriff.

8 MR. DYER: Yeah. Yeah.

9 HONORABLE TRACY CHRISTOPHER: I think he
10 ought to be able to act on his own motion, but that's not
11 in here right now.

12 MR. DYER: Okay. Let me recommend that I
13 revisit that. I think if we add language into (d) we can
14 address that concern.

15 CHAIRMAN BABCOCK: Great.

16 MR. DYER: That's all I have on 10.

17 CHAIRMAN BABCOCK: Okay. Any other comments
18 on 10, besides what we have? Keep going, Pat.

19 MR. DYER: Rule 11, most of that comes out of
20 the existing rule that the sheriff or constable has custody
21 of the property, must sign a report describing the
22 disposition of the property when it's claimed, replevied,
23 or sold. We also wanted to make sure that the report
24 describes the condition of the property as well as the
25 disposition of it on the date and time of replevy. That's

1 to avoid arguments over what the condition of the property
2 was on those dates.

3 MR. MUNZINGER: I have a question.

4 MR. DYER: That's all I have on 11.

5 CHAIRMAN BABCOCK: Okay. Richard.

6 MR. MUNZINGER: Is there any need that the
7 report be filed promptly? I don't -- because you have here
8 that "The sheriff or constable who had custody of the
9 property must immediately complete and sign a report," but
10 there's nothing concerning when it must be filed, and I
11 don't know what the report is used for or whether there is
12 or isn't any kind of urgent necessity that it be filed
13 promptly, but if it is, the rule is silent on the need for
14 filing the report promptly.

15 MR. DYER: Yeah. Yeah. Well, I guess we
16 have two options. We could use the adverb "immediately" in
17 the last sentence, or we could change both of them to "as
18 soon as practicable," which we have done in some of the
19 other rules.

20 CHAIRMAN BABCOCK: You could say, "The report
21 must be promptly filed" --

22 MR. DYER: Right.

23 CHAIRMAN BABCOCK: -- "with the clerk or
24 justice of the peace."

25 MR. DYER: Okay.

1 MR. MUNZINGER: "Immediately complete and
2 sign and promptly file a report," which would distinguish
3 between "prompt" and "immediate."

4 CHAIRMAN BABCOCK: Uh-huh.

5 MR. DYER: Well, but it also has to pick up
6 that second to the last sentence with regard to describing
7 the condition, so we could just change the last sentence to
8 "The report must be promptly filed with the clerk or
9 justice of the peace."

10 CHAIRMAN BABCOCK: Okay. What about Rule 12?

11 MR. DYER: Okay. Rule 12, the current rule
12 on amendment of errors, there's case law out there that
13 distinguishes between a clerical error and a
14 judicial error, and ordinarily a return can be amended for
15 a clerical error. If it's anything else, there's a motion
16 procedure with the court. All of the subcommittees in
17 these rules said we need to break these out into three
18 different time frames. The first is you file your
19 application and you have not yet gotten your court order
20 and you notice that your application contains something
21 that's wrong. The wrong VIN number of a vehicle, for
22 example. We see no harm to the respondent to allow free
23 amendment without having to go to the court to change that
24 application or to change a description in the application,
25 and the -- we've made it clear that that doesn't require

1 leave of court or notice to the respondent because no order
2 has yet been issued and the writ has not yet been issued,
3 but I've included the last part, the last clause, which is
4 consistent with the existing rule, "must be filed with the
5 clerk at a time that will not operate as a surprise to the
6 respondent."

7 If it's before the order has ever even been
8 signed, that's not going to be a problem. Subsection (b)
9 is you've now -- yes.

10 MR. MUNZINGER: What happens if the
11 respondent receives your order, sees a description of the
12 property, is not concerned with the property described, but
13 the error that you now discover, you go to the court, you
14 change it, and this person is concerned with the error
15 of the -- an error in the description of the property? The
16 VIN number of the automobile. I don't care what they do
17 with that car that sold, but this one here is a real jewel,
18 and I want this one. Is the fellow prejudiced or person
19 prejudiced at all by the change? Is there a possibility
20 that a person could be prejudiced in their property right
21 or right to defend or appear their property and protect
22 their property by an amendment to an error of the
23 application in which they're not given notice.

24 MR. DYER: Well, at this stage you filed an
25 application, and you have not yet obtained either the order

1 or the writ. You've got an application that says "blue
2 sedan, VIN #123," and it's a red sedan VIN 123 or the VIN
3 is different. The defendant has not yet even been served,
4 and all you're doing is correcting a truly clerical error.
5 Now, you cannot change the substantive basis of the
6 application if it turns out, for example, you're trying to
7 change it from a wrongful attachment to a good attachment.
8 That's a little bit different and is addressed in
9 subsection (c).

10 MR. MUNZINGER: But the person who would be
11 affected and whose property will be affected by attachment
12 will have been given the correct description when those
13 papers are served on that person?

14 MR. DYER: That's what (a) seeks to do, is to
15 allow for the applicant to change the application so that
16 the order and the writ reflect the correct information, and
17 that's what's served on the respondent.

18 MR. MUNZINGER: Thank you.

19 MR. DYER: In part (b) you've gotten your
20 order from the court, but you have not yet gotten the writ
21 levied. Because the writ has not yet been levied, the
22 committee felt still at this point the rights of the
23 respondent have not been harmed, and free amendment ought
24 to be allowed at this stage also, but -- okay. It's
25 treated the same basically as (a), because the writ has

1 still not yet been levied, so let's say the order now
2 contains the same information that was in an inaccurate
3 application, but the writ has not yet been prepared and
4 served. We still think you ought to be entitled to free
5 amendment to correct that type of clerical error without
6 having to move the court or notify the respondent.

7 MR. MUNZINGER: Does this take into
8 consideration the possibility that someone might not choose
9 to resist, contest, or appear the writ because of the
10 property description, but that decision would be different
11 if the proper property were described?

12 MR. DYER: But at this stage the property has
13 not yet been attached. You've got an application, and
14 you've got an order. The order and writ have not yet been
15 served.

16 MR. MUNZINGER: And is attachment always
17 without the right to appear and contest it?

18 MR. DYER: Well, most of the time it's ex
19 parte, but let's say you file an original petition and you
20 don't seek attachment. You seek attachment later, but your
21 application still contains an error. Because the defendant
22 has been served at that point, that party would be entitled
23 to receive notice of a change in the application, but we're
24 still saying it ought to be freely amended. There's no
25 requirement at this stage that the court have to grant

1 leave.

2 CHAIRMAN BABCOCK: Is that okay, Richard?

3 MR. MUNZINGER: You know, I just -- I'm
4 obviously concerned about a person losing a right to
5 contest or do something because of -- I wouldn't call it
6 inadvertence, but I'm not going to go to a hearing on that.
7 It doesn't make any difference to me. They only want two
8 of my chickens. Hell, I've got two million, and so the
9 number is changed from 2 to 20,000, or whatever it might
10 be. It can be a substantive change that could affect a
11 person's decision to defend or not defend or appear or not
12 to appear, and it could have substantive effects on the
13 citizen, and that is troubling to me.

14 MR. DYER: The writ of attachment has not yet
15 been levied at this stage, so none of the respondent's
16 property has been attached. So let's say your order says
17 two chickens, but your application said 20,000 chickens.

18 MR. MUNZINGER: But what if I went to the
19 judge and wanted to argue about the issuance of the order
20 in the first place? Do I not have that right to go and
21 contest the issuance of the writ?

22 MR. DYER: Yes, you would have that right.
23 You would have that right if it's not an ex parte
24 application at the institution of the lawsuit. But at the
25 ex parte stage when you've just filed your lawsuit, no, you

1 have not given the respondent any notice at all. So if you
2 want to equate that with no right, well, yeah, because the
3 defendant hasn't been notified. If you file an application
4 after the lawsuit has been filed and the defendant has
5 filed an answer, then the defendant has appeared and
6 anything you file would under the regular rules of
7 procedure have to be served on the defendant.

8 If at that stage the order is inaccurate and
9 you want to amend the order to reflect your true -- you
10 know, to reflect what was in the application, then, yes,
11 the respondent could come in and argue. I don't know how
12 that behooves the respondent because the writ has not yet
13 been levied, and if I'm the applicant and say, "Well, your
14 Honor, I'm entitled to amend. The order does not reflect
15 the facts as stated in the application. I'm entitled to
16 amend." So the court now amends the order. What has the
17 defendant lost in that regard? The property has not yet
18 been attached.

19 Now, once the property is attached then
20 that's different. Then you have to go to the court and ask
21 for leave to amend clerical errors. Now, keep in mind,
22 substantive errors can't be fixed this way, even with leave
23 of court. Let's say I file a writ of attachment and I
24 claim that I've got a debt that's due, and it's false. You
25 can't go back and amend the substantive grounds for the

1 attachment to avoid a wrongful attachment claim.

2 MR. MUNZINGER: Well, I'm looking at
3 subsection (c) of attachment Rule 12. It has no changes on
4 it, and it says, "After order and levy of the writ" --
5 "after levy of a writ of attachment," et cetera, "the court
6 in which the suit is filed may grant leave to amend
7 clerical errors in the application. Any supporting
8 affidavits," et cetera, et cetera. That does not say that
9 the other party is given notice of these, and that's after
10 the order and writ have been issued.

11 MR. DYER: It says "on motion, notice and
12 hearing."

13 MR. MUNZINGER: You're correct. I apologize.
14 Thank you.

15 MR. DYER: That's all I have.

16 CHAIRMAN BABCOCK: Okay. What else? Any
17 other comments about Rule 12? Going once. Okay. Does
18 that mean we can get to sequestration?

19 MR. DYER: Yes.

20 CHAIRMAN BABCOCK: Cool.

21 MR. DYER: You want me to proceed through
22 each rule or each subsection of each rule?

23 CHAIRMAN BABCOCK: Let's go through each
24 rule.

25 MR. DYER: Okay. First off, the format is as

1 close to identical as the format for attachment. One thing
2 that we did note in a harmonizing committee is that some of
3 these rules --

4 CHAIRMAN BABCOCK: Wait a minute, you had a
5 harmonizing committee?

6 PROFESSOR CARLSON: Harmonization.

7 CHAIRMAN BABCOCK: Was that a subcommittee of
8 the bigger subcommittee?

9 MR. DYER: Well, basically the editorial
10 committee.

11 CHAIRMAN BABCOCK: Okay, good. I could feel
12 harmony.

13 MR. DYER: Well, there was sometimes
14 cacophony.

15 CHAIRMAN BABCOCK: Oh, gee.

16 MR. DYER: All four of these writs are so
17 close in what they seek to do, it amazed me that they
18 didn't all have exactly the same provisions, and it looks
19 like four different committees worked on each one of them,
20 and the left hand didn't know what the right hand was
21 doing, so where appropriate we tried to include what we
22 thought should have been included as applicable.

23 We go to 1(a). That's taken out of the
24 existing rules in Civil Practice and Remedies Code.
25 Subpart (b), the same. The addition we made in (b) is the

1 same as we made to attachment. We've added "to the
2 property" to clarify that the relevant claim isn't the
3 cause of action, but the basis for the claim to the
4 property. Part (2), that's out of the statute, except we
5 have made a specific reference to "as provided in Chapter
6 62." That was to parallel what we had in attachment.
7 Subpart (3) is different. (4) is -- the only change we
8 made in (4) says, "It states the amount in controversy."
9 We added to clarify "of the underlying suit." Subpart (5)
10 is out of the statute. Subpart (c) is out of the statute.

11 One change, and perhaps this is addressed in
12 the law that says you can use a declaration instead of an
13 affidavit. The CPRC requires that an application be under
14 oath, so I assume that the declaration under the new
15 statute would satisfy that also because I believe it
16 substitutes any requirement for an affidavit or an oath.
17 Subpart (d) is straight out of the statute. Subpart (e),
18 it's mostly out of the statute, but (e)(1) just makes --
19 the "returnable to the court that issued the writ" was a
20 clause that was in a rule that had a lot of other concepts
21 in it. We broke that out just to make sure it's as clear
22 in the way the order is returned. Subparts (2) and (3) are
23 straight out of the existing rules.

24 Subpart (4) is new. In attachment and
25 garnishment I believe the rules command the sheriff to levy

1 on the property and keep it safe and preserved subject to
2 further order of the court. We concluded that ought to be
3 the same here in sequestration. By the way, you'll also
4 note, in sequestration, as opposed to what we'll be
5 discussing later on in garnishment. Sequestration
6 addresses only sheriffs or constables because of the
7 seizure of property is involved, and other authorized
8 officers aren't allowed to seize property, so that's why
9 they're not referenced here. We only reference sheriffs
10 and constables.

11 Subpart (5) is straight out of the current
12 rule except for the last phrasing. We have added "wrongful
13 sequestration," where instead the current language uses
14 "wrongfully suing out such writ of sequestration," to
15 clarify what that is. The current rule has two specific
16 references to damages that are recoverable under 62.044 and
17 62.045. We removed those references. It's not a
18 substantive change. It's just to get out a specific
19 reference to a statute. Subpart (6) is -- it's out of the
20 existing rule and statute, but we have broken it out to
21 clarify that in sequestration the amount of the replevy
22 bond depends on the type of suit that's been filed. If a
23 respondent wants to file a replevy bond and the plaintiff's
24 lawsuit seeks to enforce a lien or mortgage on the
25 property, the defendant does not have to account for the

1 fruits, hire, or revenue or rent of the property; and the
2 reason for that is suit for enforcement of lien or mortgage
3 does not entitle the creditor to immediate possession. The
4 debtor still has possession and, therefore, would be
5 entitled to use that property while it's still in its
6 possession, just like it would under the lien without a
7 default. So to make that clear, we broke it out. The
8 current rule was a little bit difficult and cumbersome, so
9 we broke it up.

10 (6)(a) deals with the situation where the
11 suit is for the enforcement of a mortgage or lien, and the
12 replevy bond is set equal to the lesser of the value of the
13 property or the amount of the plaintiff's claim. Subpart
14 (b) is if the suit is other than for enforcement of a
15 mortgage or lien, and in this situation you'll see that the
16 replevy bond does have to include the value of the fruits,
17 hire, revenue, or rent.

18 If we go to subpart (c), this is what we have
19 added in all four of these sets to make it more clear when
20 multiple writs can issue, to make it clear that a second
21 writ can issue before the first one has been returned, and
22 that they may be sent to different counties and, finally,
23 to impose a duty on the applicant that if multiple writs
24 have been issued the applicant must inform the officers to
25 whom the writs are delivered that multiple writs are

1 outstanding. That's to reduce the chance for excessive
2 levy.

3 CHAIRMAN BABCOCK: You're talking about
4 (c)(7), right?

5 MR. DYER: Yes.

6 HONORABLE HARVEY BROWN: And what happens if
7 they don't?

8 MR. DYER: If they don't?

9 HONORABLE HARVEY BROWN: Inform the constable
10 of the other writs.

11 MR. DYER: We don't have anything that
12 specifically addresses that. The duty is new. The duty
13 has not been in there, but we've not provided anything for
14 a violation of that duty.

15 CHAIRMAN BABCOCK: Okay. Any comments on --
16 that have not already been made on sequestration Rule No.
17 1? Okay. Let's go to 2.

18 MR. DYER: Okay. 2(a) is taken straight out
19 of the rule with -- well, with the exception that the bond
20 is filed with and approved by the clerk or the justice of
21 the peace rather than the officer. Subpart (b), we've
22 added to all of the sets so that Rule 14c can be used with
23 regard to posting a bond. Subpart (c) deals with review of
24 the applicant's bond. We have taken the language straight
25 out of what we had for attachment and brought it into here.

1 Substantively there's no change from the rule. It just
2 clarifies how the court may determine the issue. That's
3 all of 2.

4 CHAIRMAN BABCOCK: Any comments on 2?
5 Richard.

6 MR. MUNZINGER: Does an evidentiary hearing
7 as contemplated in subsection (c) require oral testimony or
8 may affidavits be considered?

9 MR. DYER: At the last session we decided
10 evidentiary hearing required an oral hearing. You could
11 submit affidavits, but if the facts are controverted then
12 you have to go to the oral hearing, and this was the
13 language we agreed to at the last session.

14 CHAIRMAN BABCOCK: Okay. Justice Brown.

15 HONORABLE HARVEY BROWN: How do you
16 controvert the facts? Do you have to have an affidavit?
17 Do you just say, "I controvert"?

18 MR. DYER: Well, we actually had this
19 discussion last session, but --

20 HONORABLE HARVEY BROWN: Oh, I'm sorry.
21 Never mind.

22 MR. DYER: We decided that the language as it
23 existed was uncontroverted facts. We decided
24 file affidavits -- excuse me, uncontroverted affidavits.
25 We decided to change it to "affidavits that controvert the

1 facts" to make it clear that there has to be an affidavit,
2 but it actually has to controvert a fact. The mere fact
3 that you filed an affidavit stating "I controvert" would
4 not be sufficient.

5 CHAIRMAN BABCOCK: Judge Wallace, did you
6 have your hand up or you're just stretching? Anything else
7 on 2? Let's go to 3.

8 MR. DYER: Part (a), this is one of those
9 instances where the rule did not provide that the writ had
10 to be dated and signed by the district or county clerk or
11 bear the seal of the court. We just applied that across
12 the board to all of the writs. Subpart (b), essentially
13 it's the same as what's in the current rule, but we've
14 changed the language to make it clear that the language has
15 to equal the language that's in the order and command the
16 sheriff or constable to levy on it, keep it safe, and
17 preserve subject to further order of the court.

18 Time of the return, we've changed --
19 sequestration does not have any language in there regarding
20 when it's supposed to be returned. We changed it to the
21 30, 60, 90-day rule that's used for execution and that
22 we've recommended to be used by attachment. Notice to
23 respondent, the sequestration statute requires that the
24 notice be in 10-point type. The attachment statute did
25 not. In attachment we changed to it to 12-point type.

1 Given the fact that we've got the requirement of 10-point
2 type, we suggested adding in "not less than" in front of
3 that to stay attuned to the statute without necessarily
4 violating it.

5 In the notice itself the only part required
6 by the statute is the highlighted part. We have added the
7 first paragraph to parallel the language that's used in
8 attachment. The second paragraph was added, also to
9 parallel attachment, but in sequestration as well as the
10 other writs to alert the debtor that there may be
11 exemptions that can be claimed under Federal or state law.
12 Subpart (e), there is no existing form of writ in the
13 rules. There is an existing form of writ for attachment.
14 We've just added this to make it parallel. And that's the
15 end of 3.

16 CHAIRMAN BABCOCK: Okay. Anything on 3? Any
17 comments on 3?

18 MS. SECCO: I've got one comment.

19 CHAIRMAN BABCOCK: Marisa.

20 MS. SECCO: I mentioned this earlier, but if
21 you're going to -- and it plays into 4, but if you're going
22 to remove the requirement that the return be attached to
23 the original writ, it might not -- you might want to use
24 language other than "The writ is returnable," if the writ
25 is not actually being returned to the court. I don't know

1 if --

2 MR. DYER: No, the writ has to be returned to
3 the court.

4 MS. SECCO: Okay. Okay.

5 MR. DYER: It doesn't -- hold on. Hold on.
6 All right. Which section are you looking at?

7 MS. SECCO: I'm just looking at section (c)
8 of Rule 3, but this question might be better suited to when
9 we get to section (d) of Rule 4, so maybe I should --

10 MR. DYER: Yes, I agree. I agree.

11 CHAIRMAN BABCOCK: Okay. Any other comments
12 on 3? Moving right along to 4.

13 MR. DYER: Okay. 4 is new for sequestration,
14 but it parallels methods of levy that are in attachment
15 that we discussed the last time, how it's delivered, how
16 you make a levy. We do have one perhaps substantive
17 problem, method of levy on real property, and this is
18 something that Professor Dorsaneo and I have discussed.
19 Under current case law, to serve a writ of sequestration on
20 real property requires the eviction of anybody living on
21 the property. I did not know that until we went back and
22 looked at some pretty old law, but we have not provided for
23 that nor specifically addressed it in the real property
24 section on sequestration. We've just said that you can
25 levy on it the same way you can with attachment.

1 Our thought was we would prefer that there
2 not be eviction of people by a levy of sequestration, but
3 we thought that it was unnecessary. Nonetheless, the case
4 law being out there, I don't know necessarily if it will
5 still apply. Other than that --

6 MR. MUNZINGER: Could you point me to the
7 rule that you were addressing just now?

8 MR. DYER: It's method of levy, (c)(1), on
9 Rule 4. In attachment, to levy on a piece of real property
10 all you do is file a copy of the writ with the county
11 clerk, and that's it. The writ's levied. Case law under
12 sequestration says, no, you also have to evict the people
13 on the property.

14 MR. MUNZINGER: The reason I asked you to
15 point to the rule is it would seem to me that if the rule
16 has not changed in substance you have not affected the
17 preexisting case law at all, and the rule remains that you
18 must evict them from the property.

19 MR. DYER: You may be right.

20 MR. MUNZINGER: Well, the substance of the
21 rule is unchanged. Do you agree?

22 MR. DYER: No. There is no method of levy in
23 existing sequestration rules. There's only case law. In
24 attachment -- well, execution has existing rules for how
25 you levy on personal property and real property. We

1 imported those into attachment, but had no problem because
2 attachment has always been levied on real property by
3 recording a copy of the writ. Sequestration doesn't have
4 any language with regard to how a writ is levied on
5 personal property or real property. There's only that case
6 law out there on real property dealing with eviction, so if
7 you add a rule on how to levy, would it overturn the case
8 law? I'd have to go back and look at the case law to see
9 if it was rule based or based on some existing statute. I
10 don't think that it was.

11 CHAIRMAN BABCOCK: Roger.

12 MR. HUGHES: Well, along the same line, the
13 writ -- the terms of the writ is that you're supposed to
14 keep the property that you've levied on safe. Now, if the
15 sheriff doesn't evict the tenants, how is he keeping the
16 property safe?

17 MR. DYER: Well, the same would apply to
18 attachment.

19 MR. HUGHES: Well, I guess then, so if the
20 tenants commit waste on the property, as they're likely to
21 do under the circumstances, or it's possible they're doing
22 under the circumstances, the sheriff is not liable for
23 that. I mean, I ask out of ignorance. I don't know.

24 MR. DYER: Okay. Well, I know that the
25 sheriff has a statutory duty to take care of personal

1 property. I don't know if that extends to real property
2 levied on by writ of attachment or sequestration, but you
3 do raise the issue that the case law could have discussed
4 that duty with regard to real property. I would need to
5 research that more.

6 MR. HUGHES: Well, I mean, I was thinking
7 more about the tenants who were liable to vandalize the
8 property or, you know, but then I think, well, the idea of
9 waste would include not only them but maybe vagrants
10 vandalizing empty property, and then I guess the next
11 question, you know, might be, you know, what about land,
12 you know, farmland? Does that require the sheriff to farm
13 it? I don't think so.

14 MR. DYER: On attachment it does, so I would
15 think sequestration would be the same.

16 MR. HUGHES: Okay.

17 MR. DYER: You can't allow the crops to go
18 fallow in the field, but now the court also has discretion
19 to enter such orders as are necessary to protect and
20 preserve the property. But just looking at the levy stage,
21 our preference was to insert this rather than not to
22 mention levy and leave it to the case law with regard
23 to eviction because we wanted to avoid the eviction.

24 MR. HUGHES: Well, I mean, at this point my
25 concern is not so much for the preservation of the property

1 generally because I would think if somebody is involved in
2 the litigation it's going to want to take care of it. My
3 thought really is for the sheriff so the sheriff will know
4 what the sheriff must do and need not do.

5 MR. DYER: Well, that I think is a matter of
6 research and whether the duty that pertains to personal
7 property pertains to the real property, but one of the
8 other things we discussed is let's say you've levied this
9 way and then you learn that the tenant is burning the crops
10 or otherwise harming the property. I think at that point a
11 TRO is the most appropriate and effective remedy.

12 CHAIRMAN BABCOCK: Okay. Anymore on 4? It
13 looks like 5 is without change. Anything to talk about on
14 5?

15 MR. DYER: No. 5 is the same, straight out of
16 the rule.

17 CHAIRMAN BABCOCK: Okay. 6.

18 MR. DYER: Respondent's replevy rights, we
19 broke out subsections (1) and (2). That was based on what
20 we did with attachment, so that's essentially the same from
21 the last. Subpart (b), that's essentially the same as what
22 we used in attachment with regard to the replevy bond. The
23 only difference here is we've added that the court may also
24 approve the sureties, which the previous rule didn't
25 include. Subpart (1) are the conditions that must be in a

1 replevy bond for personal property, and these are the
2 conditions that you won't remove it from the county, waste,
3 ill treat it, injure it, et cetera. That all comes out of
4 the existing statute.

5 One other thing that I wanted to make note
6 of, you'll see that in subsection (1)(e) these are
7 conditions of the bond, and the first is if the property is
8 not returned then you must pay the value of the property,
9 along with the fruits, hire, or revenue derived from it.
10 Subpart (e)(2), if the property is returned but it's not in
11 the same condition, let's say that it's damaged, you have
12 to pay the difference between the value of the property as
13 of the date of replevy and the date of judgment along with
14 the value of the fruits, hire, or revenue therefrom. There
15 is case law that says the provision that says you must
16 return the property in the same condition has been
17 interpreted to exclude ordinary depreciation in market
18 value. The theory being if the sheriff sequesters your
19 property and you replevy it, that property is going to
20 depreciate in value whether it's in the possession of the
21 sheriff or in your own possession.

22 We'll look at a later rule on the applicant's
23 right to replevy. The applicant does have to pay for the
24 depreciation in value. The exact reasoning behind that, I
25 don't know, but it comes straight out of the statutes, and

1 I haven't been able to find anything particularly
2 enlightening.

3 Subpart (2), we've added -- it comes mainly
4 out of the existing rule except we've added "fruits and
5 revenues of the property if the underlying suit is decided
6 against the respondent to cover all instances with regard
7 to real property." Subpart (4), this comes straight out of
8 the statute where it makes an exception for a respondent in
9 a situation where it's for enforcement of a mortgage or
10 lien that we discussed earlier. In that situation the bond
11 would not include a condition that the respondent has to
12 account for fruits, hire, revenue, or rent.

13 Subpart (5) is new. It requires that the
14 sheriff or constable to deliver the replevy bond to the
15 clerk of the justice of the peace so it can be filed with
16 the court. Subpart (c) applies Rule 14c. Subpart (d), the
17 only change we've made to the existing rule is to say that
18 "any party" shall have the right to prompt judicial review.
19 Subpart (e) is a parallel provision from attachment.
20 Sequestration rules currently do not speak of the
21 respondent's right to possession after filing a proper
22 replevy bond that has not been challenged. We thought that
23 the same right and privilege ought to pertain to
24 sequestration and have broken out the two sections like we
25 did for attachment from the last session. That's all I

1 have on 6.

2 CHAIRMAN BABCOCK: Okay. Any comments on 6?

3 Yeah, Stephen Tipps.

4 MR. TIPPS: Yeah, I think you left out
5 subsection (b)(3). It jumps from (2) to (4).

6 MR. DYER: Oh, that's only for the
7 subcommittee eyes only. I'm kidding. So noted. We will
8 make that change.

9 CHAIRMAN BABCOCK: Any other comments? Okay.
10 Let's do 7.

11 MR. DYER: Okay. No. 7, applicant's replevy
12 rights. Sequestration does give the applicant a replevy
13 right. As we discussed last session, the subcommittee
14 thought it would be appropriate to give the applicant
15 replevy rights in attachment as well, and we discussed the
16 extension on the committee about doing that, but the rules
17 currently provide it for an applicant in sequestration
18 because they have a preexisting lien.

19 Subpart (a), the motion is substantially the
20 same as the current rules with one major difference. The
21 current rules allow an applicant to replevy based on
22 providing the officer in possession with a bond. The
23 subcommittee felt that it would be better if we required
24 that the applicant move the court rather than go just by
25 presenting the bond to the officer to take the officer out

1 of the equation, and the sheriffs and constables we talked
2 to said, yes, we would prefer that.

3 Subpart (b), because we've now changed to a
4 motion practice requires that there be notice and hearing.
5 Subpart (e) is the order that the court has to enter based
6 on the motion that's been filed and states that it has to
7 contain the conditions of the replevy bond that are later
8 provided for here in subpart (d), and those are all out of
9 the existing rule. If you'll look at subpart (d)(1)(E),
10 too, you'll see that for the applicant in a sequestration
11 bond the condition is pay the difference between the value
12 of property as of the date of replevy and the date of
13 judgment. That part's the same for the respondent's
14 replevy, but this part's different, "regardless of the
15 cause of difference in the value." So the applicant gets
16 stuck with ordinary depreciation while the respondent does
17 not.

18 Subpart (e) applies 14c. Subpart (f) is new.
19 It requires that the respondent be served with a copy of
20 the order and replevy bond. Subpart (g) is a parallel to
21 the respondent's right to possession upon the filing of a
22 proper unchallenged replevy bond. The applicant should
23 also be entitled to possession if its bond is proper and
24 has not been challenged, and that's all for 7.

25 CHAIRMAN BABCOCK: Okay. Any more comments

1 on 7? All right. Let's go to 8.

2 MR. DYER: 8 is exactly the same as that in
3 attachment, with the exception of subpart (h). The statute
4 for sequestration requires that a wrongful sequestration
5 suit is a compulsory counterclaim in the underlying suit.
6 We thought about doing that with attachment and
7 garnishment, and it did not work. I'm not real sure it
8 works for sequestration, but (h) addresses that. That's
9 the only difference between the motion to dissolve
10 procedure that we used for attachment and the one we used
11 for sequestration. The motion is the same, time for
12 hearing, stay of proceedings, conduct of hearing and burden
13 of proof, orders, and the rights of third party claimants
14 are all identical to attachment. That's all for --

15 CHAIRMAN BABCOCK: For 8. Okay, any
16 comments? You said that compulsory counterclaim may not
17 work for sequestration?

18 MR. DYER: No, no. For attachment. I
19 haven't yet really figured out why it works for attachment,
20 but doesn't -- I mean, why it works for sequestration but
21 doesn't for attachment, but we came out with some scenarios
22 that made no sense in requiring a compulsory counterclaim
23 attachment.

24 CHAIRMAN BABCOCK: All right. Carl.

25 MR. HAMILTON: Back to this bond where you

1 said if the property was returned not in the same condition
2 he has to pay the difference in value. On the applicant's
3 replevy, regardless of the cause of the difference, which
4 is different, as you say, from the respondent's replevy,
5 and why is that -- do we know why that's in there or what
6 it's supposed to mean?

7 MR. DYER: No, I don't. Well, the only thing
8 that it can mean is that the applicant bears the difference
9 in value without regard to anything, so that would exclude
10 ordinary depreciation. That language has been there, best
11 I can tell, since 1941. There's no case law interpreting
12 what "regardless of difference in value" means. I have
13 found some commentaries that say because that language does
14 not appear with regard to the respondent's replevy bond and
15 the case law says the respondent does not have to account
16 for ordinary depreciation, that this language means the
17 applicant must account for ordinary depreciation.

18 MR. HAMILTON: So when on the respondent's it
19 says "difference in value" before -- from the date of
20 replevy and the date of judgment, what would that
21 difference be if you didn't consider depreciation?

22 MR. DYER: Damage to the property.

23 MR. HAMILTON: Just damage?

24 MR. DYER: Yeah, damage to the property.

25 Ordinary depreciation is out, but anything else, the damage

1 to the property or something that the person in possession
2 of the property did to the property, just excludes ordinary
3 depreciation. So let's say it was a bushel of corn and the
4 market price for corn was two bucks on the date that it was
5 levied on, but it's one buck by the time that they have to
6 account under the bond. That's not going to be -- that's
7 not going to work against the respondent. The respondent
8 can say, "I don't have to account for that difference in
9 value. It's ordinary depreciation." The applicant would
10 have to account for the difference in value.

11 HONORABLE JANE BLAND: On the compulsory
12 counterclaim, is it the Civil Practice and Remedies Code
13 that requires that the writ of garnishment be dissolved?

14 MR. DYER: The writ of sequestration?

15 HONORABLE JANE BLAND: I mean, yeah, the writ
16 of sequestration.

17 MR. DYER: Yes.

18 HONORABLE JANE BLAND: Because why, why, why,
19 because once the writ is dissolved then that sort of --
20 what's left to be -- why couldn't you move to dissolve the
21 writ and move for wrongful sequestration at the same time?

22 MR. DYER: Well, you can, and the statute
23 requires that you do that or you give up your wrongful
24 sequestration claim.

25 HONORABLE JANE BLAND: But this contemplates

1 some kind of ruling dissolving the writ.

2 MR. DYER: Yes. You can only succeed in
3 wrongful sequestration if the writ is dissolved.

4 HONORABLE JANE BLAND: Right, but the way
5 that this reads, it says to me that I can't even file my
6 claim for wrongful sequestration. So what I would envision
7 doing if I were bringing one of these would be I would move
8 to dissolve the writ of sequestration and together file a
9 claim for wrongful sequestration, and I understand that I
10 couldn't prevail on my claim for wrongful sequestration
11 unless the trial court dissolved the writ and found merit,
12 you know, found that the writ shouldn't have been granted,
13 but why would we make a claimant wait to file their claim
14 until after the writ is dissolved?

15 MR. DYER: Okay. Okay. I've got what you're
16 saying. I agree with you.

17 CHAIRMAN BABCOCK: You're too easy.

18 MR. DYER: No, I agree with you. Actually,
19 that does not come out of the statute. Okay.

20 CHAIRMAN BABCOCK: So we need to fix that?

21 MR. DYER: Yeah. Let me take a shot at
22 fixing that.

23 CHAIRMAN BABCOCK: Because if the writ hadn't
24 been dissolved and you filed a compulsory counterclaim, it
25 would be subject to dismissal because there's no basis in

1 fact.

2 MR. DYER: Yes.

3 MR. STORIE: Way to loop back.

4 MR. MUNZINGER: And attorney's fees.

5 HONORABLE TRACY CHRISTOPHER: Attorney's
6 fees.

7 CHAIRMAN BABCOCK: And attorney's fees.

8 HONORABLE JANE BLAND: It's all coming back
9 to me now.

10 PROFESSOR CARLSON: Here's what the statute
11 says.

12 MR. DYER: Yeah, I've got it. It's "If a
13 writ is dissolved, any action for damages for wrongful
14 sequestration must be brought as a compulsory counterclaim.
15 In addition to damages, parties sought this solution may
16 recover reasonable attorney fees incurred in dissolution of
17 the writ." Yes, it does mean that you can't recover on
18 wrongful sequestration until the writ is dissolved, but for
19 filing purposes you should be allowed to file your motion
20 to dissolve and your counterclaim for wrongful
21 sequestration so that you don't forget it later on.

22 HONORABLE JANE BLAND: Right, and you
23 don't -- the trial court doesn't lose jurisdiction.

24 MR. DYER: Right.

25 HONORABLE JANE BLAND: Because I think that

1 there's the possibility that the trial court dissolves the
2 writ, end of case. So and if you haven't gotten the claim
3 on file, the counterclaim on file, it's just it makes more
4 sense from a timing perspective to file those two things
5 together.

6 MR. DYER: Yes, I agree. Okay. I'll work on
7 that language.

8 CHAIRMAN BABCOCK: Anything else on 8? 9.

9 MR. DYER: Okay. 9, 9(1) and (2) are
10 substantively out of the existing rules.

11 CHAIRMAN BABCOCK: 9(a) and (b) you mean?

12 MR. DYER: Yeah. 9(a)(1) and (2).

13 CHAIRMAN BABCOCK: 9(a)(1) and (a)(2).

14 MR. DYER: Yes, 9(a)(1) and (a)(2). Yes.

15 But we broke it out because current language is cumbersome,
16 so we distinguish, once again, the suit where it's for the
17 enforcement for a mortgage or lien from a suit that is not
18 for the enforcement of mortgage or lien.

19 CHAIRMAN BABCOCK: Okay.

20 MR. DYER: (b) is straight out of the
21 statute. (c) is new, and it addresses that the judgment
22 needs to tax costs. That's all I have for 9.

23 CHAIRMAN BABCOCK: Anybody else with comments
24 on 9? Richard.

25 MR. MUNZINGER: I just wonder why we say "all

1 judgments" and then we say "in any judgment"? The title
2 kind of throws me off a little bit. The subject matter is
3 an award of expenses in connection with transfer and
4 storage of property as distinct from the judgment. Do you
5 agree?

6 MR. DYER: Uh-huh.

7 MR. MUNZINGER: It's part of the judgment,
8 but the real subject matter of that section of the rule is
9 to award those expenses as distinct from the judgment
10 itself.

11 MR. DYER: Should we change it to "expenses"
12 or "award of expenses"?

13 MR. MUNZINGER: I think it would make more
14 sense, but I'm the lonely voice very often.

15 MR. DYER: Crying out in the wilderness, I
16 know. I have no problem changing it to "award of
17 expenses." That makes sense.

18 HONORABLE TOM GRAY: You would probably award
19 the expenses to the prevailing party as opposed to awarding
20 them against the nonprevailing.

21 MR. DYER: Well, isn't this the typical
22 language, though, when you tax costs you tax them against
23 the nonprevailing party?

24 HONORABLE TOM GRAY: Going through a template
25 project at our court on judgments, I have found that the

1 rules and statutes are all over the place on taxing versus
2 assessing versus awarding. The language that I personally
3 prefer is awarding the costs to the prevailing party,
4 because then your judgment is complete in its form and will
5 specify who the prevailing party is, and they're awarded
6 their costs, and they have a motive to go get them.

7 The other thing that I was curious about is
8 it says "may be taxed." Is it -- do we intend to make it
9 discretionary that these storage fees can be discretionary
10 in being awarded?

11 MR. DYER: Yes. Yes. Because there may be
12 instances where one of the parties does something that
13 increases the costs, so the court ought to have the
14 discretion to say, "These costs are awarded here, these
15 costs are awarded here," so your language was "may be
16 awarded as costs to the prevailing party"?

17 MR. MUNZINGER: Are they really costs in the
18 sense of court costs? They're not. They're expenses that
19 were incurred by somebody in -- well, maybe they would be
20 court costs.

21 MR. DYER: Well you raise a good point,
22 though. What we have referred to previously throughout
23 attachment and these rules are "all expenses incurred in
24 connection with the transfer and storage of the property
25 may be taxed as costs to the" -- and then we add whatever

1 party. So we haven't -- we call them expenses and then we
2 say they may be taxed as costs.

3 HONORABLE TOM GRAY: You could just take out
4 the word "costs."

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: Particularly who has already
7 paid those costs, the sheriff?

8 MR. DYER: It depends on what time. If it's
9 the applicant, it's going to be the -- if it's at the
10 initiation of the suit and the sheriff goes out and levies,
11 the applicant has those costs, but the storage and transfer
12 costs have not yet started accruing. Once the sheriff gets
13 it then they start accruing. No one has to pay those at
14 that particular time unless they try to shift possession.
15 If the respondent comes in and says, "I want to replevy
16 that property," one of the conditions is that the
17 respondent pay all existing transfer and storage costs at
18 that time, and they may be later assessed as costs at the
19 end of the suit.

20 MR. HAMILTON: But if the respondent doesn't
21 do that, when are those transfer costs paid and by whom?

22 MR. DYER: We talked a little bit about this
23 on attachment last session also. If neither the applicant
24 nor the respondent replevies, those costs accrue throughout
25 the lawsuit. Whoever wins that lawsuit, if they want to

1 get that property, you're going to have to pay those costs.
2 That's why I think a lot of the practitioners now move to
3 sell the property as perishable property so that they can
4 cut their losses, because frequently the amount of storage
5 costs dwarfs the amount of the value of property.

6 CHAIRMAN BABCOCK: Okay. Any more comments
7 on this? All right. 10.

8 MR. DYER: Okay. Sequestration has a rule
9 that allows property that was sequestered to be returned to
10 the sheriff and ultimately to the applicant within 10 days
11 after final judgment. So this is a post-judgment procedure
12 mainly designed to protect the sureties on the bond. Well,
13 let's say you sequester the property, plaintiff wins the
14 lawsuit. Within 10 days after the final judgment is signed
15 property can be brought back for a credit. Actually, it's
16 treated as a credit on the judgment. If the property
17 hasn't been damaged then, you know, all you may be looking
18 at -- or you may have to pay some interest. It depends on
19 what the value of the property is. If the property is
20 damaged then this also provides for how that's supposed to
21 be addressed post-judgment. The substance comes out of the
22 existing rules if the judgment is against the respondent.

23 Subpart (b) is new. There is no corollary
24 rule if the judgment is against the applicant and the
25 applicant has replevied. We thought there should be that

1 same right to return the property as a credit on the
2 judgment. And you'll note subpart (c) is also out of
3 the -- subpart (c) and (d) are out of the existing --
4 excuse me, subpart (c) is out of the existing rule. The
5 return of the property does not prejudice your rights under
6 the surety bond. Okay. So you say, well, why do we have
7 this return provision? It's to give you a credit on the
8 judgment, but that credit does not necessarily make you
9 whole under the terms of whatever bond was filed, because
10 bond can sometimes pick up interest on the claim for a
11 year.

12 Subpart (d) was added to parallel the
13 attachment rules. What happens if the personal property
14 isn't returned? Then it's execution as in any other case.
15 That's all on 10.

16 CHAIRMAN BABCOCK: Okay. Any other comments
17 on 10? Let's go to 11.

18 MR. DYER: 11, 12, and 13 are identical to
19 attachment except the word "sequestered" has been
20 substituted for "attached."

21 CHAIRMAN BABCOCK: So if we've talked about
22 attachment, we've talked about this.

23 MR. DYER: Yes.

24 CHAIRMAN BABCOCK: Any other comments? All
25 right. Let's move right on to this next rule, garnishment.

1 MR. HAMILTON: I have a question.

2 CHAIRMAN BABCOCK: Huh-oh.

3 MR. HAMILTON: On that (d) part --

4 CHAIRMAN BABCOCK: What part, Carl?

5 MR. HAMILTON: 10(d).

6 CHAIRMAN BABCOCK: Oh, you're backsliding on
7 us.

8 MR. HAMILTON: The suit for sequestration is
9 to recover property, right?

10 MR. DYER: Yes.

11 MR. HAMILTON: And so if that property is not
12 returned, you say, "Execution can be issued on the
13 judgment." What judgment? The judgment is going to be for
14 the return of the property.

15 MR. DYER: No.

16 MR. HAMILTON: So what judgment are you going
17 to have an execution on?

18 MR. DYER: This is -- this is the judgment in
19 the underlying case.

20 MR. HAMILTON: The underlying case is a suit
21 to recover property.

22 MR. DYER: No, not necessarily. It may be
23 for the enforcement of a lien or mortgage. It may be for a
24 trespass to try title. It can be different things, but I
25 go out and I try to sequester property because let's say it

1 is for enforcement of a lien, because I want that property
2 available as soon as I get my judgment so I can sell that
3 property and apply the proceeds to my debt. Okay. But the
4 respondent has a right to replevy, and if they replevy,
5 they put up a bond and they get possession of that
6 property. So I win my underlying suit, and I want my
7 property, and the defendant or respondent says, "Sorry, I
8 haven't got it." Well, now I no longer have that property
9 to foreclose on, but I do have my judgment. I can pursue
10 the replevy bond, and hopefully that's going to cover a lot
11 of my damages, but if it doesn't then I execute as I would
12 in any other case.

13 CHAIRMAN BABCOCK: Okay. All right. Onto
14 garnishment.

15 MR. DYER: Okay. You'll see the format is
16 the same. We -- you know, garnishment can be either
17 prejudgment or post-judgment. The other writs -- well, and
18 certainly with attachment and sequestration, although there
19 is some old case law out there saying you can do it
20 post-judgment, that doesn't make any sense because
21 attachment is in the nature of a prejudgment execution
22 anyway, but garnishment you clearly can do both. You get a
23 judgment and then you go collect by garnishing an account,
24 but the way the rules are currently written it's really not
25 that clear what differences there are between a prejudgment

1 and post-judgment, so we decided to break them out into
2 separate sections.

3 So garnishment Rules 1 and 2 deal with the
4 application and bonding requirements for a prejudgment
5 writ. 3 and 4 deal with a post-judgment writ, and the
6 primary difference is the rules don't say that a
7 post-judgment writ of garnishment has to be bonded, but the
8 practice is it does not have to be bonded. There's no harm
9 that can happen to the respondent because judgment has
10 already been entered. So we wanted to make that clear.
11 Okay. So subsection (a) essentially is the same as the
12 substance of the existing rule dealing with an --

13 MR. MUNZINGER: Question.

14 MR. DYER: Yes.

15 MR. MUNZINGER: What is the distinction
16 between the judgment and an order in the title and why?

17 MR. DYER: The order that's referred to is
18 the order granting the application for writ of garnishment.
19 The judgment is whether this is a prejudgment application
20 versus a post-judgment application.

21 MR. MUNZINGER: You get garnishment without a
22 judgment?

23 MR. DYER: Yes.

24 PROFESSOR CARLSON: An order.

25 MR. DYER: But you have to have an order.

1 HONORABLE TRACY CHRISTOPHER: Well, shouldn't
2 you say "Application and order for writ of garnishment
3 before judgment" just so you don't have that "and order"
4 hanging out there?

5 MR. DYER: If that makes it clear, I have no
6 problem with that. "Application and order"?

7 Subpart (b), (b)(1) is actually new. That's
8 not required in the existing rules, but we thought it would
9 provide the trial court with basic context of the
10 application. Subpart (2), the language that says "and the
11 specific facts supporting the statutory grounds for
12 garnishment," that parallels attachment, and we thought it
13 made sense to require an attach -- excuse me, in
14 garnishment just like in attachment and sequestration that
15 your specific facts be alleged.

16 Subpart (3) -- oh, okay, now I know why. I'm
17 confused here. I changed my highlighting on garnishment.
18 Okay. And just to be ornery. In garnishment the
19 highlighted language is new. The nonhighlighted language
20 comes out of the rules or statute. My previous one I think
21 I had -- well, it was different.

22 CHAIRMAN BABCOCK: It was flip-flopped.

23 MR. DYER: Yeah, it was flip-flopped. Okay.
24 So the yellow is new. Subpart (3), "State the maximum
25 dollar amount sought to be satisfied by garnishment." It's

1 not required in the current rules, but the current rules do
2 require that the judge order the maximum dollar amount to
3 be satisfied, so we thought it makes more sense to include
4 that in the application itself. Verification is the same
5 as in the other writs, the same with effective pleading.
6 The order, garnishment does not provide -- the current
7 rules do not provide that the writ is returnable to the
8 court that issued it, but that's, in fact, what happens.

9 Subsection (4) with regard to safekeeping,
10 that's been adapted from the other rules. The garnishment
11 is also different from attachment, sequestration, in that
12 the officer does not normally gain possession of the
13 property. The garnishee usually keeps the property and
14 cannot give it to the respondent, but we have found
15 instances where garnishees say, "Look, I don't want this
16 property. I don't want to be involved in this mess," and
17 they give it to the sheriff or constable. I know that
18 that's not the way that you would think that it would
19 happen, but that's what's been reported, so they wanted
20 rules that would address what the sheriff is to do if that
21 happens. So here it is. They've got to preserve and
22 protect that property.

23 Subpart (6), and this also we covered with
24 attachment, sequestration. The current rules allow a
25 respondent to go to the sheriff or officer and say, "Here's

1 the amount" -- "Here's what I want to do. I want to post a
2 replevy bond. You determine the value of this property and
3 you tell me how much I have to bond." The constables and
4 sheriffs didn't want to be involved in that valuation
5 process, so now it's contained within the order of the
6 court who sets the bond.

7 (f) is the same as the multiple writ
8 provision in the other rules. 2, requirement of the bond
9 -- oh, I'm sorry. Do we have any comments?

10 CHAIRMAN BABCOCK: Yeah, do we have any
11 comments on 1? Yeah, Judge Christopher.

12 HONORABLE TRACY CHRISTOPHER: Is there a
13 reason that we decided to put the specific chapter of the
14 CPRC in here instead of just stating "statutory grounds"?
15 I mean, it seems to me the Legislature could add new
16 statutory grounds somewhere, and you seem to have limited
17 it to this particular chapter.

18 CHAIRMAN BABCOCK: Where are you talking?

19 MR. DYER: 1(b)(2).

20 HONORABLE TRACY CHRISTOPHER: 1(b)(2).

21 MR. DYER: We discussed that, and one of our
22 guidelines was to the extent possible remove any specific
23 references to statutes because they can change. We decided
24 we wanted to alert the practitioner at least to the chapter
25 to go look to, and either include it in the language or

1 include it as a comment. But, yes, we could -- we could
2 just state -- say, "State one or more of the statutory
3 grounds for issuing the writ." We wouldn't have to refer
4 to the specific chapter.

5 CHAIRMAN BABCOCK: Justice Bland.

6 HONORABLE JANE BLAND: My only comment is
7 when you decided to break out prejudgment garnishment from
8 post-judgment garnishment did you give any consideration to
9 drafting the prejudgment section to encompass the idea that
10 this is extraordinary relief? I mean, prejudgment
11 garnishment is not typical.

12 MR. DYER: Agreed. I mean --

13 HONORABLE JANE BLAND: And my only concern is
14 by putting this out separately and putting it first you're
15 saying that it could -- I mean, you're not saying it, but
16 I'm just wondering would a practitioner think that they
17 could go in and garnish in any case that they don't have a
18 judgment in yet, and that --

19 MR. DYER: Well, but that's what the current
20 rules allow --

21 HONORABLE JANE BLAND: I understand the rule
22 allows it, but the way that the rule has been interpreted,
23 and rightly so, is that only in extraordinary circumstances
24 are we going to garnish people's money prior to the entry
25 of a judgment against them.

1 HONORABLE SARAH DUNCAN: Or property.

2 MR. DYER: Yeah, or property.

3 HONORABLE JANE BLAND: Or property, but, I
4 mean, garnishment is usually money, and that's why I'm --

5 MR. DYER: Well, the purpose was to clarify
6 for the practitioner, but the existing law is the same.
7 The breaking out of it has made it more clear, and I think
8 your concern is by making it more clear are we going to
9 make it more often or is someone going to say, "Oh, wow, I
10 didn't know you could do this." My thought is no, and if
11 they do then they're looking at a wrongful garnishment. I
12 mean, I think that the law is still there, and I'm not sure
13 how I would go about to cure that concern.

14 CHAIRMAN BABCOCK: Judge.

15 HONORABLE SARAH DUNCAN: I think Jane is
16 right. It's -- most people don't know that there is such a
17 thing as prejudgment garnishment. Most people don't
18 understand that it has constitutional ramifications even if
19 they know it exists, and it seems like it would be an easy
20 thing just to have a sentence saying it's an extraordinary
21 remedy, "see Fuentes," or something so that the
22 practitioner who is not familiar with this will -- you
23 know, if they see a United States Supreme Court decision
24 cited in a comment or something saying that it's
25 extraordinary remedy, that will give them pause.

1 MR. DYER: I certainly don't have a problem
2 with a comment. That way we may have to comment more with
3 regard to garnishment because we're also going to have to
4 address the exempt property and the changes in the law with
5 regard to that.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: I think Justice Bland is
8 referring to is because the property is in the hands of a
9 third party and you're doing this prejudgment, there's
10 additional constitutional concerns and practical concerns
11 than attachment and sequestration where you're seizing the
12 property from a debtor as opposed to a bank or some other
13 third party holding the funds.

14 HONORABLE JANE BLAND: That's exactly what
15 I'm trying to --

16 PROFESSOR CARLSON: I speak Bland.

17 HONORABLE JANE BLAND: -- trying to say.
18 Elaine said it better, but yes.

19 PROFESSOR CARLSON: But, you know, the
20 *Fuentes vs. Shevin* and North Georgia Fishing versus --

21 HONORABLE SARAH DUNCAN: That was
22 sequestration, wasn't it?

23 PROFESSOR CARLSON: Well, there's those three
24 U.S. Supreme Court cases dealt with the different remedies.
25 One was I believe attachment, one was garnishment.

1 CHAIRMAN BABCOCK: Fuentes was garnishment.

2 PROFESSOR CARLSON: Yeah.

3 CHAIRMAN BABCOCK: Prejudgment garnishment.

4 PROFESSOR CARLSON: Right. So each one of
5 them kind of go -- but I don't think they said that one
6 is -- that garnishment is not available, but that there are
7 additional protections that should be --

8 HONORABLE SARAH DUNCAN: Right.

9 PROFESSOR CARLSON: -- afforded because the
10 property is in the hands of a third party and you're
11 forcing the third party to come into a lawsuit that they
12 really don't have anything to do with.

13 MR. DYER: Okay. But are we suggesting by
14 referring back to *Fuentes vs. Shevin* that the current
15 statutes or current rules have not addressed those
16 concerns?

17 HONORABLE SARAH DUNCAN: But they have. They
18 amended to address them.

19 MR. DYER: Yes. So if we refer them back to
20 *Fuentes vs. Shevin*, what are we referring them back to that
21 case for?

22 HONORABLE SARAH DUNCAN: I'm not saying
23 specifically the comment should refer them back to Fuentes.
24 All I'm saying is that there can easily be something in
25 there that says, "Prejudgment garnishment is an

1 extraordinary relief. Go find out what the law is before
2 you do it."

3 MR. DYER: Okay.

4 CHAIRMAN BABCOCK: Why don't we say
5 "dipstick" on top of it?

6 MR. DYER: But we shouldn't say that with
7 regard to prejudgment ex parte attachment?

8 HONORABLE SARAH DUNCAN: I think we should.
9 That's just me.

10 MR. GILSTRAP: We could alleviate some
11 concerns if you flip-flopped and you put post-judgment
12 first. The first thing the practitioner wouldn't see would
13 be prejudgment garnishment.

14 MR. DYER: Because they don't read the entire
15 set of rules?

16 MR. GILSTRAP: No. No. No. It's a question
17 of prominence.

18 HONORABLE SARAH DUNCAN: And frequency of
19 use, Frank.

20 CHAIRMAN BABCOCK: Okay. Let's keep moving
21 through this rule.

22 HONORABLE JANE BLAND: Well, just to wrap
23 this up, I mean, I think there's a big difference between
24 doing anything, attachment or garnishment prejudgment; but
25 with respect to garnishment, you're freezing assets in a

1 bank somewhere; and if you do that prejudgment, you know,
2 all hell can break loose; and it ought to be the very
3 extraordinary case where we're doing that before there's a
4 judgment against somebody, and by -- and if somebody waves
5 this in front of a trial court judge and says, "Judge, I
6 can do it, it's in the rule," there's no warning that, yes,
7 the rule provides the process, but in 99.999 percent of the
8 cases it's improper.

9 MR. DYER: Well, let me throw this out. We
10 had -- earlier we had an extended discussion about whether
11 we ought to tell the attorneys that the law's changed and
12 you can now use a declaration instead of an affidavit or a
13 verification, and the comment was, well, why not put that
14 in the rules, and the -- really the overwhelming response
15 was, no, we don't have to educate lawyers. They ought to
16 know what the law is, so we don't have to tell them that
17 they can now use a declaration. It sounds to me like
18 you're saying because prejudgment garnishment can really
19 wipe somebody out we need to tell lawyers that. Why isn't
20 that already covered by existing law?

21 HONORABLE JANE BLAND: Well, there's a lot
22 of -- I mean, I think there's existing case law, but what
23 this rule says is here is -- if you file a suit, you can at
24 any point after filing the suit start garnishing stuff, but
25 the reality is that's not the case. So what we've said in

1 a rule is you can go and garnish stuff and here's how, but
2 only if you go out and look some more will you figure out
3 that you're going to be in a lot of trouble if you do that,
4 and then not to mention the fact that the person that has
5 no judgment against them and sometimes no notice starts
6 bouncing checks all over the place, can't draw down on a
7 letter of credit. I mean, lots of things happen because
8 assets are frozen.

9 MR. DYER: A big warning sign?

10 HONORABLE JANE BLAND: Yeah, like they show
11 you on the computer, "Are you sure you want to delete?"

12 CHAIRMAN BABCOCK: Elaine.

13 PROFESSOR CARLSON: Justice Bland, on page
14 four we do that for the post-judgment writ. We've set
15 forth -- there's some things you have to satisfy before
16 you're going to get the post-judgment writ of garnishment,
17 and you're refreshing my memory. Is it that the statute
18 has -- does it say that before you can seek a prejudgment
19 writ of garnishment you have to show that you have
20 attempted to attach and it's unsatisfied? Isn't there some
21 condition precedent? I think that's what you are --

22 HONORABLE JANE BLAND: You are the expert,
23 but I just know that when somebody came in to me wanting to
24 do a prejudgment garnishment every bit of my antenna went
25 up, and you have to really -- there's a lot you need to

1 show, because there's no judgment against the person and
2 you're taking their -- you're seizing their property --

3 PROFESSOR CARLSON: Well, yeah.

4 HONORABLE JANE BLAND: -- from a third party,
5 you know, that it's in the hands of a third party.

6 PROFESSOR CARLSON: Of course, that's true
7 for attachment, too. Well, it's not in the hands of a
8 third party, no.

9 HONORABLE JANE BLAND: But you go through the
10 debtor for the attachment.

11 PROFESSOR CARLSON: Right.

12 HONORABLE JANE BLAND: And the difference is
13 here you go tell a bank, "I want you to look and find out
14 whatever accounts Joe Smith has and freeze them all," and
15 the bank will do it because the bank is concerned that if
16 they don't, you know, they're violating some kind of a
17 court order.

18 CHAIRMAN BABCOCK: Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, the
20 current rule starts out "Either at the commencement of a
21 suit or at any time during its progress the plaintiff may
22 file an application for a writ of garnishment." So I don't
23 really think this is different from the current rule that
24 allows it.

25 CHAIRMAN BABCOCK: So are you disagreeing

1 with Jane?

2 HONORABLE TRACY CHRISTOPHER: I am.

3 HONORABLE JANE BLAND: Oh, it happens all the
4 time. It's the heightened visibility of the availability
5 of this process.

6 HONORABLE SARAH DUNCAN: It's also the
7 permissive terms. I mean, when the rules were amended
8 after the Fuentes decisions came down -- because I don't
9 remember either reading that meeting, the transcript of
10 that meeting or being there for some reason --

11 CHAIRMAN BABCOCK: Fuentes was like 1970.

12 HONORABLE SARAH DUNCAN: I know, which was
13 before I went to law school, so I'm saying I must have read
14 it.

15 CHAIRMAN BABCOCK: You read it.

16 HONORABLE SARAH DUNCAN: But it was a -- or
17 maybe Luke told me about it. It was like an emergency
18 meeting, we've got to amend the rules to address these
19 decisions, and that was the last time they were amended,
20 and that was in --

21 PROFESSOR CARLSON: Seventy --

22 HONORABLE SARAH DUNCAN: -- '72. It was
23 right after they came down, I think.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE SARAH DUNCAN: And that doesn't

1 mean we can't do a better job now of writing the rules to
2 address the concerns that the United States Supreme Court
3 expressed with respect to prejudgment remedies.

4 PROFESSOR CARLSON: And that section of the
5 Civil Practice and Remedies Code where all of these
6 attachment, garnishment, sequestration, the title of it is
7 "Extraordinary Remedies." I think what you're thinking of
8 is in garnishment when you look at the grounds it's
9 available if an original attachment has been issued,
10 plaintiff sues for a debt, and makes an affidavit stating
11 that, and then they go on -- I don't know, stating that,
12 sorry.

13 MR. DYER: "Debt is just due and unpaid
14 within plaintiff's knowledge defendant does not possess
15 property in Texas subject to execution."

16 PROFESSOR CARLSON: "Property in Texas
17 subject to execution." That's what you're thinking of,
18 isn't it, Jane? Plaintiff has --

19 CHAIRMAN BABCOCK: Her antenna is just
20 twitching. She's not quite sure.

21 MR. DYER: That's what she's addressing, but
22 she's addressing that even if we include that language here
23 that that's not going to be enough.

24 PROFESSOR CARLSON: Oh.

25 MR. DYER: That if the practitioners out

1 there -- your concern is, "Wow, I didn't know you could do
2 this and just follow this checklist, that's all I have to
3 do. Now I can get my writ of garnishment." So you're
4 thinking it's going to cause more prejudgment writ
5 applications.

6 HONORABLE JANE BLAND: Well, it's a little
7 bit of a concern because it's just so heightened
8 visibility.

9 MR. DYER: Now, a judge does have to rule on
10 the application.

11 HONORABLE JANE BLAND: Right.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: All of which -- this
14 is really off the wall and I think y'all have done a
15 phenomenal work, and I've been concerned about these rules
16 for a long time, but all of this is leading me to conclude
17 what was always the most confusing I think about
18 particularly the garnishment rules, because I think they're
19 used the most often, is that they did pre- and
20 post-judgment garnishment in the same set of rules and not
21 consistently using terms for the same people or the same
22 thing, all of which leads me to think I would like these
23 rules a lot better if they were divided into prejudgment
24 and post-judgment remedies, whatever the remedy might be,
25 because the same concerns are present whether you're trying

1 to sequester, garnish, or attach property before there's
2 been a judgment; and those same concerns are not present
3 once you've got a judgment to the same extent.

4 So it's just -- it's a reordering that to me
5 would enable us to have a sort of a preamble in the
6 prejudgment remedies that says basically, "These are
7 extraordinary remedies, but if you want garnishment,
8 sequestration, attachment, here's how you go do it," and
9 then post-judgment it's a whole different set of concerns.

10 CHAIRMAN BABCOCK: Okay. Elaine.

11 PROFESSOR CARLSON: So, Pat, to satisfy a
12 judgment post-judgment, satisfy a judgment post-judgment,
13 the remedies that are available are execution, garnishment,
14 turnover, receivership.

15 MR. DYER: Uh-huh.

16 PROFESSOR CARLSON: It doesn't include any
17 more -- it wouldn't include attachment or sequestration.

18 MR. DYER: Right.

19 HONORABLE SARAH DUNCAN: Oh, it doesn't?

20 PROFESSOR CARLSON: No.

21 MR. DYER: No. There is some real old case
22 law out there --

23 HONORABLE SARAH DUNCAN: Yeah.

24 MR. DYER: -- but attachment is essentially
25 prejudgment execution. You don't need attachment or all of

1 the strictures of the application for attachment
2 post-judgment. You go get a writ of execution. They go
3 seize whatever property there is. With sequestration you
4 probably make an election if you sue on the debt and don't
5 sue to foreclose your interest, your lien, so you get the
6 judgment, you don't have anything to sequester. Again, you
7 either foreclose it in the existing lawsuit or you go
8 execute or garnish after.

9 HONORABLE SARAH DUNCAN: Well, what if we
10 took prejudgment garnishment out of this Section 3 and put
11 it with prejudgment -- the other prejudgment remedies in
12 the previous sections?

13 MR. DYER: We could, but I guess --

14 HONORABLE SARAH DUNCAN: But you don't like
15 that.

16 MR. DYER: I look at it and I say what have
17 we accomplished by doing that?

18 HONORABLE SARAH DUNCAN: Well, we've
19 gotten out of Rule 1 of Section 3.

20 MR. DYER: Oh, okay. I see what you're
21 saying.

22 HONORABLE SARAH DUNCAN: It's not highlighted
23 quite the same way, and it's with kindred spirits.
24 Post-judgment garnishment is not a kindred spirit to any
25 prejudgment remedy because you've already got a judgment.

1 MR. DYER: True, but it is still an
2 extraordinary remedy. You can't just go garnish. If you
3 know that they've got property out there that you can
4 execute on to satisfy your judgment, you cannot garnish
5 post-judgment.

6 PROFESSOR CARLSON: You've got to go to the
7 debtor first.

8 MR. DYER: Right. Not that you always have
9 to execute first, but if you know -- I mean, and you have
10 to know, and it has to be objectively demonstrated, you
11 know they've got property sufficient to satisfy your
12 judgment you can execute on, you are not entitled to
13 post-judgment writ of garnishment, and it would be wrongful
14 garnishment if you can prove it.

15 CHAIRMAN BABCOCK: Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, not only
17 that. In the post-judgment garnishment, I mean, just like
18 in the prejudgment garnishment, you have questions about
19 whether the property is actually the property of the
20 debtor. I've actually had a trial involving whether the
21 property that the garnishee had actually belonged to the
22 judgment debtor or not. So, I mean, it is trickier because
23 it's in somebody else's hands, but you've got that whether
24 it's pre- or post.

25 CHAIRMAN BABCOCK: Elaine or Pat, after

1 garnishment we have what to finish?

2 MR. DYER: Distress warrants would be the
3 most logical to follow next, then execution, trial of right
4 of property, and turnovers, although we could put trial of
5 right of property at the very end because everyone is going
6 to love to find out what that is.

7 PROFESSOR CARLSON: That's what's going to
8 keep you coming back.

9 CHAIRMAN BABCOCK: Huh? Yeah, right.

10 MR. DYER: Yeah, if we leave it to the end it
11 will keep everybody coming back.

12 CHAIRMAN BABCOCK: Now, my notebook ends with
13 garnishment. Are we going to be prepared to talk about
14 distress warrants tomorrow?

15 MR. DYER: No.

16 CHAIRMAN BABCOCK: Are we going to be
17 prepared to talk about any of these things beyond
18 garnishments tomorrow?

19 MR. DYER: No. Actually, I didn't think we
20 would move this quickly.

21 PROFESSOR CARLSON: Well, we have the report,
22 but --

23 MR. DYER: I mean, if someone is -- if we've
24 got the capability of printing it, I could probably wing
25 through a lot to where we would only need maybe to hit a

1 few other things with Judge Tom Lawrence.

2 PROFESSOR CARLSON: Yeah.

3 MR. DYER: I mean, he's the real expert on
4 that.

5 CHAIRMAN BABCOCK: That would be a good thing
6 to do because I think we'll get -- I'm hoping that we'll
7 get through garnishment tomorrow morning by, you know,
8 10:00, 10:30, something like that.

9 PROFESSOR CARLSON: And go on to distress
10 warrants.

11 CHAIRMAN BABCOCK: And I'd like not to waste
12 that hour and a half.

13 PROFESSOR CARLSON: All right. We'll see
14 what we can do.

15 CHAIRMAN BABCOCK: So if you can do
16 something, that would be great. All right. It's 5:00. I
17 can sense -- Pam is bundled up ready to go, so let's be in
18 recess until tomorrow morning at 9:00 o'clock. Thanks,
19 everybody.

20 (Adjourned at 4:58 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 18th day of November, 2011, and the same was thereafter reduced to computer transcription by me.

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

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Given under my hand and seal of office on this the _____ day of _____, 2011.

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