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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 9, 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 9th day of December, 2011, between the hours of 9:58 a.m. and 5:06 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:

Documents referenced in this session

11-35 Subcommittee draft of Rule 94a (12-7-11)

11-36 Additional proposed language - Rule 94a

11-37 Ancillary Rules - Distress warrants (annotated)

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

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CHAIRMAN BABCOCK: Good morning, and thanks to everybody for attending, including Justice Bland, who is usually -- as usual is right ready to go. Well, the last meeting of our three-year term, and thanks, everybody, for coming. As usual, we'll start with a status report from Justice Hecht.

HONORABLE NATHAN HECHT: I expect that the Court will approve publication of the rules on returns of service, expedited foreclosure, cases requiring additional resources, and parental rights termination cases on Monday, so those will be out next week sometime; and that will complete several of the assignments or come close to completing several of the assignments that the Legislature has given us; and I think that the task force on small claims is meeting. The task force on expedited actions is meeting, as Chief Justice Phillips will say in a few minutes, and so that's about all I have to report, unless there are questions.

CHAIRMAN BABCOCK: Anybody have any questions? I think, based on my conversations with Justice Hecht, the Court will move expeditiously to appoint the new committee, so unless you-all don't want to serve next time I expect most of us will be back together again soon after the first of the year. So with that, we are honored to

have Chief Justice Phillips here, and he is going to report on the progress of his task force on expedited actions. Shaking hands as he moves along the line just like he's back in campaign mode.

HONORABLE TOM PHILLIPS: Yeah, I've got some petitions in the car.

CHAIRMAN BABCOCK: You never had a hard campaign, did you, in all your elections?

HONORABLE TOM PHILLIPS: So I'm told. Does one stand or sit?

CHAIRMAN BABCOCK: Typically we sit, but --

HONORABLE TOM PHILLIPS: I'll sit then.

CHAIRMAN BABCOCK: But you're welcome to stand.

HONORABLE TOM PHILLIPS: Well, this will be a short report. A potential client instead of giving me any business recommended to the Court that I be appointed to head this task force, could have just sent a Christmas card or something, but anyway, we have a group of about 12 people, diverse types of practice and some of whom have actually tried a case in this millennium. We have had two full meetings; and the first meeting was largely war stories, which was good, because what's going on out there informs what type of rule might be passed to get somebody to return to the courthouse who otherwise would just go to

the mediator or let it slide or have a fist fight and then the second meeting we started making some preliminary decisions; and we knew the big buggabear in the whole dispute about these small under hundred thousand-dollar trials would be whether this is a mandatory rule or a voluntary rule; and as most of you know, the organized bar groups have largely weighed in for voluntary; and that fight still goes on and is still unresolved within this committee. There have not been a majority of the committee that's taken a position.

So we have split into two task forces, a mandatory rule and a voluntary rule, and they've each met and have drafts, and next Friday we will meet and try to hammer something out, but whether one side or the other will prevail or whether we will submit you a menu of two choices or whether we will propose a double rule with some mandatory and then a voluntary aspect that people can agree to that goes further in restrictions and streamlining and does not have a -- this very confusing hundred thousand-dollar cutoff, including interest and attorney's fees, which we've spent a lot of time speculating what if your post-judgment interest during the fourth year of your appeal puts the judgment over a hundred thousand dollars, or what if your contingent attorney's fees, should you take a writ of certiori to the U.S. Supreme Court, put it over a

hundred thousand dollars. The way the statute is written it's very difficult to know what to do with that and whether or not the Court would be called upon to make an expansive interpretation right now or whether that can await the case law, but obviously if it were voluntary, you would not have those restrictions.

You can also just say you're not going to claim a -- if you're in this, you won't get more than a hundred thousand dollars regardless. I mean, I don't know if you can trump post-judgment interest that way or not, but anyway, the cap has created a lot of discussion for us, particularly in line with the mandatory rule in a way that it doesn't exist on the voluntary side, and the players on the mandatory/voluntary, I'm sure you can guess who they are so I don't need to say, but our goal would be to vote out the major parameters of what our submission would look like at our December 16th meeting and then probably not meet again but handle everything else by e-mail and have some report to this group by the middle of January.

CHAIRMAN BABCOCK: Okay. Great. Perfect. Questions of the Chief about this? No questions. This is unusual.

HONORABLE TOM PHILLIPS: Excellent.

CHAIRMAN BABCOCK: You've cowed them into submission. Nothing -- not even Munzinger.

HONORABLE TOM PHILLIPS: If you want to write up a petition about how your particular area of the practice is exempt, please, you know, get in line and do that.

CHAIRMAN BABCOCK: Well, Orsinger probably already has one drafted, so --

MR. ORSINGER: I'm sure the Legislature already took care of that.

HONORABLE TOM PHILLIPS: Oh, no, you're -- well, we have a list of 17 types of cases that someone submitted that cannot come within this rule.

MR. ORSINGER: Let me ask you, is custody of kids worth more or less than a hundred thousand dollars?

HONORABLE TOM PHILLIPS: Well, exactly. The Legislature probably took care of that area, and we also have -- it's been the strong view of our committee that no judge should be able to submit one of these cases that's in this expedited mode to mediation, to force you to go to mediation. You can go if you want to, and that has drawn the ire of large groups of mediators, but not all of them. There's a group at UT that thinks that's a great idea. So we're hearing a lot about that particular -- that's just one of the kind of issues that maybe you wouldn't have thought of that we're hearing about. We're hearing about whether there should be restrictions on Daubert rules,

whether the summary judgment rules should be changed, whether or not maybe more things should be admissible like a denial of a request for admissions. So there's a bunch of interesting areas that you-all have a lot of fun talking about, and, of course, I wouldn't want to be here because that would hamper the discussion.

CHAIRMAN BABCOCK: No, you're required to be here. Okay, any other questions? Justice Phillips, thanks so much.

HONORABLE TOM PHILLIPS: Thank you. Good luck to all of you. Thank you for your service to the State.

CHAIRMAN BABCOCK: All right. We'll move forward on the dismissal rule, and Justice Peeples has met again with his subcommittee, and I know one member of his subcommittee, Rusty Hardin, is not here, following a six-week trial in Newark, and he promised that he would be here, but he asked for dispensation from the Chair and from Justice Hecht because he promised he would take his wife to Paris as soon as his trial was over. So he and Mark Lanear tried a case in Federal court in Newark, New Jersey, for six weeks, and Justice Hecht and I thought he was probably entitled to go to Paris today with his wife, so that's where he is. So up to you, David.

HONORABLE DAVID PEEPLES: Okay. I think we

have an hour, and I'd like for you to have two things in your hands. One is called "Subcommittee draft, December 7th," and the other is a half-page handout that says, "Additional language for proposed Rule 94a," from some members of the subcommittee. Since our last meeting here we met twice by telephone. There are 11 persons on this subcommittee. Ten were there for both of those teleconferences. Rusty Hardin, of course, was not able to, so we had excellent attendance. It's just been a fabulous subcommittee, and I appreciate them very, very much.

I want to point out that a reporter from the *Texas Lawyer* named Angela Morris is here over in the corner over there. Raise your hand so we can see you. Welcome. They published an article on this, I understand, a week or so ago, and I guess they'll do that again. Anyway, she's here, and we welcome her.

Before we talk about this, I want to break our discussions down into two categories. One will be anything having to do with attorney's fees, and we'll have in our hands the half-page handout for that. The other 30 minutes will be everything else, not attorney's fees, and I'd like to take the non-attorney's fees issues first and save the last half for attorney's fees, and let me point out two things. The previous draft that we had last time tried to -- said, "The Court must dismiss a case that has

no basis in law or fact," and then we defined or attempted to define what that meant. We took out the quotation of "no basis in law or fact," and on lines 5 through 10 we tried to summarize what that -- we think that means, and but the words "No basis in law or fact" are found only in the title of the rule, and if that's important to you, we might want to talk about it.

And just a second thing that I want to alert you to, there was some discussion about whether we ought to have a certificate of conference, which the State Bar draft had and that it also might be called the safe harbor provision so a movant, a defendant, would have to notify the other side, "I'm going to file this thing," and finally we decided not to do that, and instead we imposed a seven days' notice provision. That's on line 24 in sub (d), and the thinking basically was that's enough time, more than the three days' notice that you get on an ordinary motion. Seven days' notice would give the plaintiff time to think about it and so forth, so that is one change that we made, and I have some introductory remarks about attorney's fees, but I think I'd like to save them for when we get there.

CHAIRMAN BABCOCK: Okay. Very good. Let's talk about Rule 94a, subparagraph (a), grounds and content of the motion. Are there --

HONORABLE DAVID PEEPLES: Chip, could I say,

we did something I thought was very good. Since all of our discussions and in here too had started at the beginning and worked toward the end and then we kind of fizzled out, and the last meeting we started at the end and worked forward.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: And I think we probably ought to open it up for the whole rule except for attorney's fees instead of working our way through. Otherwise we're likely to get bogged down. I would open everything up except attorney's fees right now.

CHAIRMAN BABCOCK: That works for me, although, you know, if we go over 30, that's okay.

HONORABLE DAVID PEEPLES: You mean you didn't mean it when you said an hour?

CHAIRMAN BABCOCK: Well, I meant an hour in terms of our committee's times, which is sometimes elastic.

PROFESSOR CARLSON: That's seven hours.

HONORABLE DAVID PEEPLES: I still think we ought to open the whole thing up --

CHAIRMAN BABCOCK: Yeah, that's good.

HONORABLE DAVID PEEPLES: -- except for attorney's fees right now.

CHAIRMAN BABCOCK: That's fine, and we'll try to keep it to 30 minutes, but if we're -- people have

comments and they feel strongly about them and we're not repeating ourselves and we spill over, that's okay, too, a little bit. So the whole rule, where in the whole rule do you want to start? Carl has got a place to start.

MR. HAMILTON: Are we going to include the additional language?

HONORABLE DAVID PEEPLES: That's attorney's fees. That additional language, that deals with when a motion is filed and the plaintiff says, "I'm going to dismiss or nonsuit," or an amendment is made that cures the objection, should the movant be able to get attorney's fees, that kind of thing, and that we worked and worked and worked on that and just ran out of time, but that's what I want to save for the last half of our discussion, so let's don't go there yet.

CHAIRMAN BABCOCK: Yeah. That sounds good. Richard Orsinger.

MR. ORSINGER: This is late in the game to have this thought, but this would not apply to defenses that someone raises that are not supported by law. It's only if you're seeking affirmative relief like money damages that you will be held to this test?

HONORABLE DAVID PEEPLES: Well, it would apply to a claim or counterclaim, but I don't think it would to an affirmative defense, if that's your question.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: All right. Yeah, Jeff.

MR. BOYD: So I had raised -- and we did run out of time and didn't get to wrap up on the subcommittee -- but the issue that in my view this draft omits the lack of a basis in fact as a ground for dismissal. The statute says "shall dismiss if the claim has no basis in law or in fact," and that's what the title of this rule says; but then you look at subparagraph (a), grounds and content of motion; and sub (a)(1) states the grounds for a dismissal; and it only addresses a lack of a basis in law; and so I -- the recommendation I had made in an e-mail last night or the night before, I don't remember which, is that somehow we need to add that in; and I think Gene had come up with a way to do that that I think the committee should consider.

MR. STORIE: Yeah, I was going to -- if you want to take that up now, I was going to insert into (a), sub (1), after "dismiss a claim that" and then "has no basis in fact or that is not supported by existing law." So the whole sentence reads, "On motion a court must dismiss a claim that has no basis in fact or that is not supported by existing law or by a reasonable argument for extending, modifying, or reversing existing law."

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Doesn't (a)(2) take care of

the fact situation?

MR. GILSTRAP: Yeah, that's the intent.

CHAIRMAN BABCOCK: Did you get what Frank said, that that was the intent of the subcommittee to take care of that in subpart (2)?

MR. GILSTRAP: I think so.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Yeah, just to follow up on that point, so in other words, what David was saying -- Judge Peeples was saying earlier is the previous draft had actually defined that a claim has no basis in law when, and then we had the language in (1) and then it said, "A claim has no basis in fact when," and we had some of the language that was in (2), and what this draft does is it takes that out. Now, I think, Jeff, you're right. I think you were right in the sense that (2) is a little bit confusing because we also have in (2) in line 8 the business about not hearing evidence; and it may be that the more elegant solution here, consistent with the idea of not defining either what exactly law or fact, no basis is, is to sort of pull out the "not hear evidence" and place that either elsewhere or in another sentence so that something like (2) could sort of be revised to read, "On motion a court must dismiss a claim" -- I'm sorry, "a court must accept as true all allegations unless a reasonable person could not

believe them." So that -- the symmetry of not defining.

CHAIRMAN BABCOCK: Okay. Frank Gilstrap.

MR. GILSTRAP: The reasoning of the subcommittee -- and I think this was largely supported by the full committee last time -- was this: The Legislature said no basis in law or in fact, but when you start looking at the law there is a lot of confusing case law involving the phrase "no arguable basis in law or in fact" as used in 13 and 14 of the Civil Practice and Remedies Code. If you simply put in "no basis in law or fact," you're going to import all of that controversy into the rule, and the courts are going to take a while to sort it out. So what I think the committee last time voted to do was simply to use the definition that's in lines five and six. That comes out of the sanctions rule, and we've -- we've changed some of the words in that -- in that subparagraph (a)(1), but that's essentially the language out of the sanctions provision in Chapter 10 of the Civil Practice and Remedies Code. That's the standard that you apply.

Now, what does it mean, no basis in fact? Well, under the Chapter 13, 14 cases where they talk about no arguable basis in law or fact, they say, well, if you're going to decide on no basis in fact you've got to hear evidence, and the Legislature said you can't hear evidence. The only way to deal with the fact issues here is to take

the plaintiff's allegations as true, and that's what we've done in (a)(2). Now, we've got one carve out there. We say that you don't have to take the allegations as true if they're unreasonable. If the guy says that he's being controlled by Martians, you don't have to take that as true, but otherwise the only way to deal with the facts are -- if you're not going to hear evidence is to take the plaintiff's allegations as true. There's no other way to do it. So you take the allegations as true and then you apply (1) and "not supported by existing law or reasonable argument for extending, modifying, or reversing existing law." That's kind of the reasoning of the subcommittee, and I think that's the way the rule is intended to work.

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: On that point, I agree that we have to interpret no basis in fact as no basis in the facts alleged rather than no basis in the facts proven because there's no time or process to prove facts. So I agree totally with that distinction, but number (2) doesn't give you an independent ground to dismiss where you have a claim that's supported by legal theory but not by the pled facts. The dismissal instruction is in (a)(1), and (a)(2) tells you how to go about evaluating the dismissal under (a)(1), and it seems to me what this should say is number (2) should say, "On motion a court must dismiss a claim that is

not supported by facts alleged." And then carry on that you're not allowed to have a fact hearing and we're going to carve out the attorney's fees. The way this is written, it seems to me, that (2) is just an instruction on how you implement (1), and really (2) is supposed to be an alternate basis for dismissal independent from (1) that's based on facts pled, not facts proven.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I -- notwithstanding more than four hours of conference call discussions between and among all of us on the subcommittee, I do not have a problem adding "has no basis in fact or" in (1). I do not have a problem putting that in there. I'm not troubled by the potential for getting into all kinds of arguments about whether the allegations are sufficiently factual or not, just by the addition of that -- addition of that language.

Second, and this came up at our last meeting, and I think Richard Munzinger will probably agree with me on this, although he's not -- he didn't raise it himself. Maybe we should do something with (2) if (2) is just a mechanism for applying the standards in (1), and Richard recommended -- and I don't have a problem saying this either -- "and must accept all allegations as true, unless a reasonable person could not believe them or the allegations are contrary to law." Maybe that extra

language, "unless the allegations are contrary to law," is unnecessary because a reasonable person could not believe something that's contrary to law, but I don't -- I think it clears things up to put that language in and I hate to be a renegade with respect to the committee, but my thinking is -- continues to evolve on these complex things.

CHAIRMAN BABCOCK: You're not flip-flopping, are you?

PROFESSOR DORSANEO: Well, I'm not a politician, so I'm not susceptible to that problem.

CHAIRMAN BABCOCK: Justice Peeples, what do you think about adding that language to (a)(2)?

HONORABLE DAVID PEEPLES: I think that's harmless, and it gets us past this issue, and it probably ought to be done. Line five might be changed to read, "On motion a court must dismiss a claim that has no basis in fact or is not supported."

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Gene Storie, isn't that what you said basically?

MR. STORIE: Yeah, basically. I had a second "that" in there, but --

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: Wait, wait.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: I'd like -- somebody needs to give me an example of a situation where, you know, it has no basis in law -- I mean, what was the example you had, Richard? No basis in law, but the facts are -- no basis in fact, but the law supports it?

MR. ORSINGER: I mean, you have a valid claim, but the facts you pled don't bring you within that claim, so you can't say that it's no basis in law.

MR. GILSTRAP: Well, if the facts you pled don't bring you within the law, you don't have a basis in law. You see, I think we're --

MR. ORSINGER: I don't know. If your pleading doesn't state a cause of action and you just plead a bunch of facts, that may be true, but a lot of lawyers will plead recognized causes of action and then the facts that they plead don't bring them within the cause of action they claim to invoke.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Richard, what would happen if somebody pled that you were negligent in doing all of these things and inflicted emotional distress on me, and the law is it has to be intentional. Would that be a defect in fact or law? Which one is it?

MR. ORSINGER: To me it -- intentional infliction of emotional distress is recognized, negligence

is recognized, but if the facts that are pled don't bring them within either one of those causes of action then that's a fact problem, not a law problem.

MR. LOW: Well, the law doesn't support a claim for that, so to me it's dual.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Are we saying essentially you want to dismiss if the claim is not supported by existing law or by reasonable argument for extending, et cetera, or not supported by the facts pled or the facts pled do not meet belief by any reasonable person?

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I'm sorry, I'm a little unclear on exactly what we're doing. Is the consensus after hearing all of this that (1) is intended to apply to both claims that have no basis of fact and claims that have no basis in law and (2) is a means of deciding (1)? Or does (1) apply only to claims that have no basis in law and (2) applies only to claims that have no basis in fact? Just a simple answer to that question.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: The way you phrased it the time first time sounded better to me than the second time.

MR. WATSON: Okay. I just want to know what

we're voting on.

CHAIRMAN BABCOCK: Professor Hoffman, and then Professor Dorsaneo.

PROFESSOR HOFFMAN: Maybe I could follow up on that. So this is where I think -- this is sort of the point I was trying to make, and apparently not well, that the way (2) is written it does appear to be confusing, because it could be read as saying the committee felt -- I think I am correct in saying that everyone felt the statute authorizes a dismissal of a claim that has no basis in law and separately and independently also authorizes a dismissal of any claim that has no basis in fact. So there are two independent things.

Now, that said, where we -- just maybe it would be helpful to do this again. Where we were last time, we had a long discussion about this in the committee of the whole and certainly have had long discussions of this in the subcommittee, was what's the best way to operationalize the statutory language. So at one point there was a discussion about literally just saying, "A court shall dismiss a claim that has no basis in law" and then separately, "A court shall dismiss a claim that has no basis in fact." But our -- at least the majority of the subcommittee -- now, I think there was some disagreement, but I think at least the majority of the subcommittee felt

that it wasn't as helpful to practice to simply put into the rule what the statute says without further elaboration; and as Frank has said and as Frank's memo details, I think the majority of us were convinced by that that we ought to do more because there's so many different ways it could be interpreted; and so I think that what you have here is the effort by a majority of the subcommittee to try to define what each of those independent grounds could be. "A claim has no basis in law when" and that's lines five and six, and then "a claim has no basis in fact when no reasonable person could believe them."

Now, this does get right back to, though, what Judge Yelenosky just asked, which is -- and what Richard was talking about, which is it is also possible that we could put into the rule, "A claim has no basis in fact when the claim is not supported by the facts pled," independent of whether a reasonable person -- the reasonable person issue. Those are the "Aliens have taken over my brain" kind of case. And so just to sum up, the current draft doesn't address, at least expressly, a claim has no basis in fact when the claim is not supported by facts pled.

CHAIRMAN BABCOCK: Okay. Bill, do you still want --

PROFESSOR DORSANEO: Yeah. Well, I just want

to say that this distinction between law and fact just simply breaks down, the more you look at it. I mean, we could -- we can talk about it. We can say, okay, negligence is a recognized legal claim generally speaking, but certain kinds of things that can happen when you're driving a motor vehicle probably can't be negligence. But is that a fact problem or a law problem? And that's -- it depends on how you look at it. So this is a -- this adventure is doomed if we're going to try to draw the clear line between a factual problem and a legal problem, and it's really the Legislature's fault that they're trying to make us do that.

CHAIRMAN BABCOCK: Well, the Legislature gets to do that.

PROFESSOR DORSANEO: Right, they do. They get to do it.

CHAIRMAN BABCOCK: Skip, then Frank, and then Buddy.

MR. WATSON: Well, I really don't care how we got here. My problem is, is that we just need to be clear, because, you know, what I was hearing was that Lonny was saying one thing and David just when I tried to articulate it clearly was thinking it should be the other, and to me the first line either needs to say, "On motion a court must dismiss a claim as having no basis in law if" or "no basis

in law or fact if." We need to say which prong or prongs we're addressing in the first sentence, and then we need to know whether (3) goes only to fact or whether it modifies both or is the how-to on both, and unless we get that clear, the question I posed is going to be posed by everyone who confronts this, just what is to modify.

CHAIRMAN BABCOCK: Frank, Buddy, Jeff, Sarah.

MR. GILSTRAP: I think -- I think Bill hit the nail on the head. The statute proposed -- the statute proposed by the Legislature is really unworkable. If you go through this thing and try to parse out, okay, what does it mean no basis in law and what does it mean no basis in fact, you're getting it tangled up and you're going to get a rule that no one knows what it means and the proposals that are being made to amend this I think have that problem. You take that out of your mind. Look at (1). That's your standard. Then look at (2). This is how you interpret the pleadings. If, to use Richard Orsinger's example, the facts don't support an award, even though it's -- that you pled a recognized cause of action or a plausible cause of action, but the facts don't support it, then you lose. You can be thrown out of court. As a matter of law your case should be dismissed, and it has to be a matter of law because we're not hearing facts.

So if you'll just simply take (1) and look at

the pleadings as you're supposed to in (2) and apply the standard, you will have in effect -- you have effected the legislative goal in a simple way that lawyers can apply. I think another approach is going to lead to something that no one -- that we're going to take a lot of litigation to sort out what it means.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, they talk about the purpose of (1) and (2). Maybe I'm looking at it too simply, but the headnote says, "Grounds and contents." No. (1) tells you that the grounds for a motion, and No. 2 is simple and tells you what the motion must contain. I mean, I don't see mixing and mingling of the purpose, one is for fact and one is for law. (1) is telling you the grounds to file a motion. (2) is telling you what your motion must state. It's pretty simple, but maybe I think too simply.

CHAIRMAN BABCOCK: Jeff, and then Sarah, and then Judge Wallace.

MR. BOYD: I think the fact that we're proving that it is debatable, not quite clear whether a particular pleading lacks basis in fact or law, is the reason why the rule has to make it clear that either is a basis for dismissal under the statute. That's my point. So if -- if I adequately and thoroughly plead intentional infliction of emotional distress and I put in factual

allegations that on their face do not demonstrate, what's the word, extreme and --

MR. ORSINGER: Extreme and outrageous behavior.

MR. BOYD: -- outrageous conduct on the part of the defendant, but I plead that element but then the facts as described clearly do not demonstrate, now, is that -- is that lacking basis in fact, or is it lacking basis in law? And I understand Frank's point that ultimately it's lacking basis in law, but the fact that we can sit here and argue about it tells me that there's going to be a smart lawyer in court one day that says, "No, judge, that's just -- he's just complaining that my facts aren't good enough. I've pled the law, and the law is the law. He's just complaining my facts aren't good enough. That's no basis in fact, and under this rule you can't dismiss for that reason," and that's why I think the rule to avoid that has to say both either/or is a basis for dismissal.

CHAIRMAN BABCOCK: Sarah, and then Justice Pemberton.

HONORABLE SARAH DUNCAN: At the risk of being simplistic, I'm not quite as simple as Buddy because I don't think (1) states the grounds, it seems to me that the pleaded facts either can't be believed by a reasonable

person or they don't support the cause of action that's been pleaded.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: That's one ground. Two prongs, one ground. The other ground is that the facts pleaded establish the cause of action that's been pleaded, but that cause of action isn't recognized by Texas law. It's one or the other, and the first is fact problem, the second is law problem. I don't really care how you label them, but those are really the only three possibilities, and to me if we don't say it that clearly we're going to argue about this for the rest of our careers.

CHAIRMAN BABCOCK: Wow. Justice Pemberton. But you're right, Sarah.

HONORABLE BOB PEMBERTON: I was going to propose a possible way to clear up some of this. In sub (1), insert after "existing law," comma, "including not being supported by the facts alleged," comma, and just to clarify that not supported in existing law, that would embrace the, you know, negligent infliction of emotional distress and also make clear that the legal sufficiency of facts alleged is also a basis in law and a ground for dismissal.

Also, in sub (2) I don't know if it would help, but we see sometimes in certainly plea to the

jurisdiction context issues about the terms like "allegations," it being enough to just state a constitutional theory, for example. Would it help to insert the word "factual" before "allegations" to make clear what -- I think it's implicit in the discussion we've had that we're talking about allegation of facts as opposed to some kind of legal theory, but people confuse that sometimes.

CHAIRMAN BABCOCK: Judge Wallace, I'm sorry, I skipped over you.

HONORABLE R. H. WALLACE: I don't -- I see where this kind of bumps up against the special exception every now and then, and it seems to me that if you have the situation where you have pled a viable cause of action, like intentional infliction of emotional distress, but the factual basis you decide, you know, the other side challenges that because they haven't alleged a factual basis to support it, not that it's not unbelievable, it's just they haven't alleged enough. Wouldn't that be the subject of a special exception and not a dismissal? It seems to me it would.

CHAIRMAN BABCOCK: I think it could be, and that's what we said last meeting, that there's an overlap between the two, the difference being that you get attorney's fees in this procedure but in your example,

that's exactly what Sarah is talking about, because you could -- you could have a pleading that says, "I'm bringing a cause of action for intentional infliction of emotional distress, and the basis of that is that my husband was yelling at me for three straight days over who's going to take the garbage out, and I feel very distressed about that and have suffered damages, emotional distress, and therefore, I ought to have a claim"; and the defendant says, "No, we accept those facts as true," even though the husband says, "I didn't raise my voice to her ever," but "We'll accept that as true and that as a matter of law doesn't amount to intentional infliction of emotional distress."

And then Sarah says but there's another category where the pleading goes on to say, "Plus, you know, my husband is in league with the Martians, and the Martians are calling me every night at midnight, and they're inside my head, and they're messing with me, and I can't sleep, and they're banging on the door at 3:00 a.m." Now, those facts might amount to intentional infliction, but nobody would believe them, so in that case the motion is granted as well.

MR. GILSTRAP: Yeah, it's covered by the rule. That whole scenario is covered by the rule. You don't believe the facts that are not reasonable, and the

other facts, under the other facts the claim is not supported by existing law.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: We're assuming that facts are going to be pled. What if the allegation is that the defendant negligently injured me? Is that subject to dismissal, or do we need to say something in here that there have to be facts pled --

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: -- to support the claim?

CHAIRMAN BABCOCK: Orsinger, then Sarah.

MR. ORSINGER: After the debate I'm convinced that it's really impossible to distinguish something that's defective as from law as from facts. The example that comes to mind is, you know, we have a bystanders rule here that you can't -- if you're not injured by negligence and you're just a bystander then you can't recover. I may have not stated that correctly, so someone might plead a negligence case, but the facts pled might show that they're not within the zone of people who can sue. Now, is there defect that the law is not good because the law doesn't let them sue, or is it defect that they haven't pled themselves within the zone that the law does protect? You could look at it either way. I don't think you can distinguish it, and I think the best solutions is to make it clear in (1)

that a defect in pleadings, facts, or a defect in law is a grounds for dismissal and that in (2) we're not going to engage in the fact-finding process. We'll take the allegations as true unless no reasonable person could believe it, and that way we don't have to say whether it falls into the law area or the fact area.

PROFESSOR DORSANEO: We dodge the bullet.

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Isn't your no facts are pleaded, isn't that the purpose of the special exception?

MR. HAMILTON: Yes, it is --

MR. LOW: Right.

MR. HAMILTON: -- but this whole thing is sort of getting around special exceptions.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: That -- once you go down that road you are then traveling into an area that is inconsistent with the history of the statute because this was first brought as the potential of a 12(b)(6) in state practice, and through the negotiations you end up with this. They pulled that, and the stakeholders that were involved in the bill very specifically have a history that this is not supposed to be a 12(b)(6) corollary in state

practice. So remember this is a -- I mean, this is a fee-shifting rule. It's a sanction rule, so once you start going down the road of the idea of the failure to plead adequately that's a lawyer mistake results in dismissal and the sanctions of attorney's fees, you're taking it into in that instance a 12(b)(6) plus, which is completely inconsistent with the legislative history.

So I thought Gene's proposal was fine, but once you start talking about looking behind the pleadings and the adequacy of the facts pled, you're back in that strike zone of 12(b)(6), which is inconsistent with the legislative intent.

CHAIRMAN BABCOCK: Munzinger.

MR. MUNZINGER: We live with the language chosen by the Legislature and not by the interests of the stakeholders who sought or opposed the law before the Legislature. That's standard Texas law. Once the Legislature has spoken, unless it has spoken ambiguously, you are limited to the language in the statute. So I don't think we should draw a rule that's based upon the intentions of the stakeholders. The Court is limited to the language given it by the Legislature. It has a legislative command to adopt a rule in the language of the rule, which is, again, why I'm one of the lonely voices that opposes subsection (1) and the language "a reasonable

argument for extending," because I think that exception swallows the rule, and I think we voted on that last time and I lost, which is fine. I just want the record to reflect I haven't changed my mind on that issue, but I do want to raise a separate issue. I don't think the Legislature was telling the Supreme Court to change the history of pleading practice in Texas, which has allowed notice pleadings.

CHAIRMAN BABCOCK: Right, and that's what Jim was reacting to.

MR. MUNZINGER: I understand that, and I agree with him. I don't think that that's what the Legislature intended, was to have us -- I think what's happened is whatever compromise the Legislature reached it reached a compromise for its own reasons, but that compromise doesn't fit nicely into our rule-making and our existing rules, and so the task of the Court is to adopt a rule which limits itself to the language of the Legislature, which admittedly is terse. It's very terse. It's silent as to its intent, and I think you need to have a rule that is as limited in its effect as the language of the Legislature permits in order to avoid doing serious harm to the history of pleading practice that we have in our state.

And with that in mind I just want to point

out one thing that I've never raised in the committee, and I apologize to the committee for not doing that. We do say in number (1), assuming this committee approves number (1) as written, "or by a reasonable argument for extending, modifying, or reversing existing law." Must that argument be made in the pleadings? We don't say. And one of Sarah's examples was a person pleads a -- an alleged cause of action which is admittedly not recognized by Texas law. False privacy invasion --

CHAIRMAN BABCOCK: False light.

MR. MUNZINGER: I'm sorry, false light invasion of privacy.

CHAIRMAN BABCOCK: False light invasion of privacy.

MR. MUNZINGER: It's early in the morning. My gosh.

CHAIRMAN BABCOCK: We started late.

MR. MUNZINGER: False light invasion of privacy.

CHAIRMAN BABCOCK: Of course, he's from a different time zone, so yeah.

MR. MUNZINGER: You plead a false light invasion of privacy case. It is not recognized by Texas law. Must your reasonable argument for extending Texas law be stated in the pleadings in order to suffice under this

rule? We don't say that answer here. We do say there's no evidence. Later we say -- and I'm one of those who oppose it -- that there will be a hearing. The hearing then, assuming that that's in subsection (d) that there must be an oral hearing. I opposed that in the committee level, but we're not there yet, but again, that raises this question, where is this reasonable argument to be made?

If a judge -- and, by the way, I do not believe this is a sanctions rule. This rule does not talk about misbehavior of counsel. It doesn't talk about misbehavior of counsel at all. Sanctions is a sui generis action of the court which I must report on my malpractice policy. It raises my malpractice premiums. It raises questions of my integrity. If I were to ever run for public office, "Oh, my, he was sanctioned by judge so-and-so for filing a motion like this." This is not a sanctions rule, and it would be dangerous for us to allow that to be considered as part of the rule either expressly or by inference, in my opinion. In any event, I've said enough. I do think this is a problem here about the reasonable argument not being said where it has to be said.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Picking up on the beginning of that and on what Jim Perdue said, we have standards in our rules now in Rule 45 and 47. The original

advisory committee and the Supreme Court in 1940, effective 1941, replaced the existing standard for petitions that you had to state the facts constituting a cause of action and replaced it with the idea that you need to plead a cause of action and give fair notice of the claim involved. So when it says "allegations" in here, that's where you're sent to see whether the allegations are sufficiently factual and otherwise, you know, appropriate under the law. That was as good a job as they could manage to do in 1940, and they escape the dilemma about whether this is an allegation of fact or, in fact, something that would be bad, an evidentiary allegation, or is it a legal conclusion. All of that is replaced by fair notice of the claim involved.

CHAIRMAN BABCOCK: When did our special exceptions come into being?

PROFESSOR DORSANEO: Well, there were special exceptions that existed from -- I don't know when they came into being, but long before under Texas rules -- I think it was Texas Rule 17. I don't have a rule book here for the derivation, but, you know, the big changes from a pleading standpoint were the change of the standard, okay, you have to plead a cause of action and give fair notice of the claim involved, and the elimination of the general demurrer and the adoption of a waiver of pleading standard. And as I understand it, the committee and this committee as a

whole -- I wasn't here last time -- doesn't really want to change all of that and we don't think the Legislature wanted us to change it, but -- this is responding to what Carl said -- I don't think we need to say anything other than "allegations." Okay. Because we've already got the sufficiency of allegations covered by the rules that talk about that.

CHAIRMAN BABCOCK: Skip, you had something?

MR. WATSON: It sounded to me like that Jeff and Jim both agreed on Gene's language, that that would work. I would like to hear that language again and then hear if David, Lonny, Frank, Richard, Sarah, and Bill, and the rest of us can coalesce on that. If we can, we can move on.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: I've got a couple of responses to comments that were made before we get to Skip's discussion. One, on what Carl Hamilton was talking about, the special exception, the situation where I can't -- you know, he inflicted -- he negligently inflicted emotional distress on me and that's all it says. I think there you would have to go in and file a special exception and when the guy pled that, "Well, he inflicted negligent -- he negligently inflicted emotional distress on me by texting all the time while we were riding to work everyday,"

something like that, clearly doesn't have a claim, then he's amended and under part (d) you have -- -- let's see, excuse me. You have -- under part (b) you have another 60 days to file you're motion. Any time there's an amendment you have 60 more days, so there you file your special exception. Then you could file your motion to dismiss.

On Richard's comment, do we have to plead the argument for existing -- for extending existing law? No. You don't have to plead the -- you don't have to plead the law. You just -- if you're alleging a cause of action, you don't have to say that "And this is also a violation of the Deceptive Trade Practices Act." Either it is or it isn't. You don't have to plead the law, and you shouldn't have to plead the argument for extending existing law. If you have a hearing you're going to have to make that argument, but it shouldn't have to be in your pleadings.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Well, as I read the rule and the statute, this sort of replaces the special exceptions, and if you don't plead it right and allege it right, you don't have to go through the special exception procedure, you just file the motion to dismiss.

MR. GILSTRAP: But if it's unclear you have to have your special exceptions.

MR. HAMILTON: Well, we need to say that

then, because otherwise we're going --

MR. ORSINGER: I don't get that at all.

MR. HAMILTON: -- to be having -- huh?

MR. ORSINGER: I don't get that out of this at all.

MR. HAMILTON: We're going to have to be having motions to dismiss all the time rather than special exceptions.

CHAIRMAN BABCOCK: Well, the statute certainly doesn't override --

MR. HAMILTON: No.

CHAIRMAN BABCOCK: -- special exceptions.

MR. HAMILTON: I know it doesn't.

CHAIRMAN BABCOCK: No question about that.

MR. HAMILTON: But it does implicitly.

CHAIRMAN BABCOCK: But with the time limit we've got here of 60 days it might be hard to get a special exception in some counties heard and decided, move to amend, and then I guess 60 days would run again from your amendment, so that would be okay. Judge Peeples.

HONORABLE DAVID PEEPLES: Subsection (f) is intended to deal with what Carl just said.

CHAIRMAN BABCOCK: Okay. Good point. Richard.

MR. MUNZINGER: I'm a defendant. I get a

pleading which is, in my opinion, defective because it does not state a cause of action under existing Texas law. I face a quandary. I file a motion to dismiss. If I file the motion to dismiss and I lose it, I know that I'm going to have to pay the plaintiff's attorney's fees. The plaintiff's petition is silent about the reasonable argument for extending, modifying, or reversing existing law. He can make that argument at an oral hearing, and if he is successful in making an argument I now have to pay his attorney's fees. Is that fair?

MR. GILSTRAP: Blame the Legislature.

MR. MUNZINGER: No, blame us if we write the rule that doesn't set that problem out.

CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: Okay, so if I could I'll make a couple of short comments. I'm going to start with I think that I agree with Jeff. We may disagree about the -- how we define it, but I think I agree that we need to define it in a way that the current draft doesn't and that the earlier draft got a little bit better at.

CHAIRMAN BABCOCK: I'm sorry, Lonny, define what --

PROFESSOR HOFFMAN: What it means for a claim to have no basis in law, what it means for a claim to have no basis in fact, and so if I could -- I think it may be

helpful for the Court, at least it is for me. I have sort of two overarching principles that I'm thinking about when I think about language. One, define it, and so I've just said that already. I think we need to define it better than we do; and two, I think we need to limit; and by limit it what I mean is I think following what Bill and many others have said it would be great if we could simply exclude sufficiency of factual allegations, except for those instances when the factual allegations are wholly unreasonable; and so what I would support is -- what I think the cleanest way to do this is have (a)(1) say, "A claim has no basis in law when, taking the allegations as true, it is not supported by existing law or the reasonable argument," which, by the law, largely tracks what we did in our earlier draft, a couple of small language changes, but essentially it's the second draft you had on November 27th.

And then (a)(2) I would say, "A claim has no basis in fact when no reasonable person could believe them." Now, I want to be clear. In making that choice I am cutting off -- I'm making -- in my own view, it's better to exclude from the conversation, from the scope of this rule, the kinds of things that we normally think special exceptions are usually appropriate for, things like you left an essential fact out, and I think it is well within our rule-making authority to do that. We're interpreting

what the statute says, and I think we're getting pretty darn close, as Jim was talking about, to what they actually meant, but as Richard said, we've got to live with what the statute says, but there's nothing inconsistent with the statute in what I just described.

So, Justice Hecht, in terms of your five categories that you sent to us, some of those would not be touched by this rule. You know, so, for instance, they aren't credible, you asked -- you could have facts that aren't credible or you could have facts that are insufficient that don't support it. The special exceptions handles it. Those would cover those two scenarios.

CHAIRMAN BABCOCK: Yeah, Nina, and then Frank.

MS. CORTELL: Picking up on something that Richard was saying about existing law; and I know we did vote on it, so as I said in the subcommittee, I don't know whether the operational of estoppel occurs here or not, but I did run this by a couple of clients; and they had the same reaction to our going into the other category, a reasonable argument for extending, modifying, or reversing, and whether it doesn't swallow the rule. I just want to posit perhaps considering "not supported by law," leaving it there, and if the person pleading, the plaintiff, or I guess in a counterclaim, wants to come back and say, you

know, it is supportable by law because of these reasons, they might have that opportunity but not to write it in the rule so as to so broaden it here.

CHAIRMAN BABCOCK: Yeah. I think, just for the record, we did vote on that last time, and the vote for your position and Richard Munzinger's was six in favor of not including the language "reasonable argument for extending, modifying, or reversing existing law" and 18 for including it. Richard Munzinger has raised an additional issue today of notice, that if we don't require that language to be stated in the petition then a defendant could, you know, merrily go into court and face that for the first time in court and then get attorney's fees, so that's another issue. We did vote on it. I don't want to vote again, but to me it's a serious issue trying to measure up the statute against the rule. Frank.

MR. GILSTRAP: I have a comment on Lonny's suggestion, and on its face it seems attractive. We have one standard, no basis in law, another no basis in fact, and the standard for no basis in fact is a claim has no basis in fact if a reasonable person couldn't believe the allegations, but you get into a naughty problem there, and that is one of materiality of the allegations. For example, if I say that Richard Orsinger is in league with the Martians, and he is intentionally inflicting emotional

distress on me by, you know, bugging my house with a -- you know, bugging my house.

CHAIRMAN BABCOCK: With a space thingy.

MR. GILSTRAP: Yeah, you know, putting a listening device in my house. Well, the part that he's in league with the Martians, no one would believe that, but -- and that is unreasonable, but the remaining parts, the part that he bugged my house is not unreasonable. So if the standard is the allegations are unreasonable, under Lonny's standard my case would be thrown out. You've got to parse out which unreasonable allegations are material and which are not. You avoid that with the rule -- the way the rule is drawn. You simply look at the -- you simply look at the pleadings. You disregard the ones that are unreasonable and then you say does this claim -- is it supported by existing law or by the argument for extension of or modification of the existing law?

You don't get into that materiality problem that comes if you parse out no basis in law on the one hand and no basis in fact on the other and make them some alternative basis for dismissing the lawsuit. I think we're hung up on no basis in law or fact, the Legislative language. I think we ought to keep the existing rule and simply in its title strike out the words "claim having no basis in law or fact." It's a motion to dismiss. Here's

the standard, and lawyers will not then be able to go back to the legislative rule that support -- that mandated -- the legislative enactment that mandated enactment of this rule and argue that that is the basis. The basis is in the rule.

CHAIRMAN BABCOCK: Okay. Richard Orsinger. Seen any Martians lately?

MR. ORSINGER: It seems to me that Frank and Lonny are suggesting the same thing, but Frank says that the current language does it, and Lonny is saying it would be better if we made it clear what constitutes insufficient facts, and I like Lonny's suggestion that we ignore the sufficiency of the pleadings, which is addressed through special exceptions and which is governed by our fair notice rule, which I think we're too invested in to change and abandon; and so it seems to me that the clearest way -- because it was 30 minutes before I understood Frank's interpretation of (1) is really a fact application folded into what looks like nothing but a list of legal theories. I'm not sure that that's going to be clear to anybody out there, and they're not going to have the benefit of this discussion, which is why I think Lonny's approach is better, is this will make it clear that we're not talking about that your facts are sufficiently pled. We're talking about whether you've pled a cause of action, and if you

have not pled a recognized cause of action, you're out; and if you have pleadings that are plausible, that's irrelevant. It's the only issue on pleadings of facts is whether the facts are so fantastic that they can't be believed, and let's let special exceptions and the fair notice rule handle the sufficiency of the facts pled to support the cause of action claimed.

If I thought (1) was clear enough I would be okay with it, Frank, but I think that (1) to me, and probably not to me alone, suggests you just do a pure analysis of whether you've pled a recognized cause of action or not, and I don't see the fact component of that at all, so --

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: I want to second that because I do think it's probably clear that it is covered by the phrase "not supported by existing law," but we are so wedded to the term "as a matter of law" that that's become somewhat of a term of art and has been overinterpreted; and so if we left it as it is now I think it would be misunderstood; and so I speak in favor of Gene's language, "has no basis in fact or that." I think that clarifies it adequately and that does what we need to do.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: The way I read the two drafts, that's basically the only difference, and they accomplish -- both drafts accomplish the same thing, except the new draft doesn't say "fact or law," as I see it. I mean, it's worded differently, but it looks like to me that the same thing is accomplished, but number (1) may be confusing for litigants as stated.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: My concern, Chip, is kind of falling off a statement that you made about the special exceptions and the amendment that would be made if a special exception was granted and whether or not your 60 days starts over when the pleadings are amended with regard to everything that's in those amended pleadings, every claim, or only the ones that were -- that were, in fact, changed, and I mean, we've had a real nice discussion here about pleadings, but y'all have some concepts about the way cases are pled that are a lot different than the cases or the pleadings that I'm seeing in the records when they come up on a no evidence motion for summary judgment. It's very difficult to track through what the litigants were -- were actually pleading, what claims, and what was the no evidence motion for summary judgment, which element it was focused upon; and I think it's going to be difficult under the timing of this rule to do a special exception within

the 60 days, get it amended, and know whether or not you want to do a motion to dismiss unless it does extend; and then if you don't get the trial judge's requirement to do -- you don't get the special exception granted, you're not going to get that new 60-day period running.

So I'm really concerned about that 60-day time period because we are all sort of assuming that the special exception practice is going to help clarify the pleadings before you fire off one of these motions and do some type of fee-shifting thing, and I don't know if we were going to go with David's proposal of kind of open everything up, but I've got one comment that I want to make when we get to the Family Code exception that, if I may, I'd just go ahead and make it now.

CHAIRMAN BABCOCK: Just make it now.

HONORABLE TOM GRAY: In the title to this draft and the eight sections, barely more than a page, we reference grounds, claims, allegations, actions, and cases. That in and of itself creates a bit of confusion, and in the subsection (h) it says, "This rule does not apply to cases brought under the Family Code." It's my understanding that under the Family Code -- and I think there was something that happened about this in the Legislature this time that sort of sent the family law section kind of ballistic, but if claims for waste on the

community or claims for fraud on the community, because they are brought within a divorce proceeding, is considered a claim, or, excuse me, is considered a case brought under the Family Code, you're going to have a very rife area of cases and claims that might be appropriate for this rule excluded because of the breadth of the term "cases brought under the Family Code." But if that's what y'all intend, that's fine. I just want to point out that potential problem. In other words, almost any case or almost any claim that exists could be brought under one of these cases in the Family Code, under the broad definition of cases under the Family Code.

CHAIRMAN BABCOCK: Judge Peeples, do you get what he's saying?

HONORABLE DAVID PEEPLES: I think so. Two responses. Number one, the statute says, quote, "The Rules," that we mandate, "shall not apply to actions under the Family Code."

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE DAVID PEEPLES: We're stuck with that. And number two, if a claim is brought in a family law case, waste, fraud on the community, whatever, that is legally insufficient and that needs to be challenged on that basis, the person can file a special exception. They can do that right now, and they can do that if this rule is

passed.

MR. ORSINGER: Can I add to that?

HONORABLE DAVID PEEPLES: Pardon?

MR. ORSINGER: Can I add something to that?

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN BABCOCK: Sure.

MR. ORSINGER: Fee shifting in a family law case, first of all, these claims will only appear in a divorce-related litigation. Fee shifting is a very abstract concept because the fees are awarded at the end of the case based on the overall property division of what is just and right. So we don't have punitive fee shifting in family law. We have the award of attorney's fees at the end, and virtually every case the court has the discretion, so it doesn't make a lot of sense to drop fee shifting rule on a pretrial procedure in the middle of a family law case when fees are assessed at the end of the case no matter what the pretrial award was anyway.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: I would suggest then in subsection (h) that if the statute says "action," let's use "action" instead of "cases" in the rule.

CHAIRMAN BABCOCK: Okay. Nina.

MS. CORTELL: On the law fact issue, I would agree with either going with Gene's addition or Lonny's

approach. I do think there's going to be a public expectation that since this -- you know, given the title of the rule and what the mandate was from the legislation that we have some reference to "in fact." When I first saw the rewrite I wondered, too, where was it. I read through it. I think this was a legitimate attempt to address it, but on further reflection I do think we need to provide further guidance and have that language either in the (a)(1) as amended to include "has no basis in fact" or, maybe even better, go with Lonny's approach of providing further guidance on the two standards.

CHAIRMAN BABCOCK: Justice Christopher, and then Judge Peeples.

HONORABLE TRACY CHRISTOPHER: A couple of just sort of housekeeping things. In (b), instead of saying it "must be decided within 45 days after the motion was filed," I would suggest that we would say "granted or denied," which is the language of the statute; and then the attorney's fees could actually take place after that 45-day time frame because we are getting into sort of a tight time frame on the case.

On (c), I know this sort of gets into the additional language that the subcommittee proposed, but I think you ought to put in, if we keep it simple, like (c), I think you ought to put in that you have the right to

withdraw the motion. If we don't have timetables, I can see someone showing up on the day of the hearing with an amended petition. The movant looks at the amended petition and says, "Oh, well, this is good. I want to withdraw my motion," and it could be just as simple as that, and they walk away from the court and don't have to, you know, go through the whole process.

In (d) I think you should say, "Upon request by either party the court must hold an oral hearing." I'm also opposed to the idea that you have to have one, but I think you need the language "by either party" in there because some courts take the position that whosever motion it is gets to decide whether it's an oral hearing or by submission. That's it.

CHAIRMAN BABCOCK: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: I don't want to cut off discussion, but I want to make a motion.

CHAIRMAN BABCOCK: Fine.

HONORABLE DAVID PEEPLES: On line five I propose to add the following language: "On motion, a court must dismiss a claim that has no basis in fact or that is not supported."

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I like that -- with all deference to Lonny, I like that a lot better than

Lonny's proposal. I think that will handle all of the problems that have been talked about today, and that's the fix here.

CHAIRMAN BABCOCK: Okay. Let's vote on that. Everybody in favor of Judge Peeples' additional language to Rule 94a, subpart (a)(1), raise your hand.

All right. Everybody opposed? Lonny reluctantly raises his hand. That carries by 27 to 3. So we got the -- we got that behind us. Any more motions, Justice Peeples?

HONORABLE DAVID PEEPLES: I like the draft. I move we approve it.

CHAIRMAN BABCOCK: Pete.

HONORABLE DAVID PEEPLES: No, we need to keep talking.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: The topic that I had been waiting patiently while we talked about this important issue got raised a moment ago but only in one context, and I want to offer it more generally. We talked about this at the last meeting. I don't understand why we use "must dismiss a claim" when the statute says "a cause of action." I don't think the terms are equivalent. I don't think we can know -- can confidently predict what the implications of choosing "claim" rather than "cause of action" as stated

in the statute are, and I'm unwilling to risk it. I would like to go through systematically and have it say "must dismiss a cause of action" rather than say "a claim," unless in the time since the last meeting the committee has come up with some answers to those questions, which perhaps they have, but I haven't heard them mentioned this morning.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Can I turn that back on Pete? Give me a case where that would make a difference.

MR. SCHENKKAN: Well, often -- it's partly that difficulty. I'm not sure I can anticipate what they might be, but I often hear a cause of action as being the fact that you have a lawsuit and the claim as being for one remedy rather than another remedy, and I believe the Legislature is talking about pouring you out and making you pay attorney's fees for pleading something that isn't a cause of action, not for saying, "I have a cause of action for breach of contract and I want restitution" when you can't get restitution. I don't know that, and it seems to me unwise for us to dig into that deeply here today and then try to anticipate every conceivable variant of that when we might think they meant a claim instead of meant a cause of action. Last time I think, David, you referred me to some other rule.

HONORABLE DAVID PEEPLES: Rule 47.

MR. SCHENKKAN: And we looked at it, and it looks to me like it has some things that are about claims and some things that are about causes of actions.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I had the same thought Pete did, and because it seems to me you could have a claim for an incorrect measure of damages, although you have a perfectly good cause of action, so I would prefer "cause of action."

CHAIRMAN BABCOCK: Okay. Carl, and then Professor Dorsaneo.

MR. HAMILTON: Unless -- for what Pete says, but the way this is worded it seems to me that when you give a party -- to back up, I think the Legislature's intent was to get frivolous lawsuits dismissed that don't state claims and don't have any basis for the claim of the cause of action, and if we allow the plaintiff to amend, we're doing nothing more than creating another type of special exception, so why would anybody do this where you can file a special exception and not be subject to attorney's fees? I don't think that was the idea of the Legislature. That's the reason I think we have to eliminate this idea that you have to do special exceptions first and then follow-up with a motion to dismiss later. I

think the idea is to get rid of the case at its outset without going through all of these other procedures, and to allow amendments creates just another type of special exceptions.

CHAIRMAN BABCOCK: Professor Dorsaneo, then Buddy.

PROFESSOR DORSANEO: I would prefer to use the more modern term "claim" than "cause of action." I could -- you know, we could go through and talk about all of the ways causes of action have been defined over time, what Texas used among the professorial definitions in its early cases, why the term "cause of action" is in Rule 45 and 47 now, in addition to "claim involved," but it ends up being just a history lesson that doesn't accomplish very much of anything. We're still talking duty, breach, causation, damages in order for there to be a legally cognizable claim, and everybody would probably come to that same conclusion, and this -- let's just use the term that everybody else uses and that we should have changed to back in 1940 under the influence of Roy McDonald, professor of practice and procedure at Southern Methodist University School of Law.

CHAIRMAN BABCOCK: Well, Buddy was there, so, Buddy, what do you think?

MR. LOW: That -- I was already gone past

that. I was there before that. But to me, I mean, what if you filed a lawsuit for a products liability and you also said express warranty, but there was no really legal cause of action for one or the other and but the other there is? Wouldn't that all come within one claim, and the Legislature is not trying to punish you because you alleged one cause of action but you have other valid causes of action, so I think we need to distinguish, and maybe "claim" means a whole lawsuit, but that claim may have different causes of action. Is that what you're getting at or --

PROFESSOR DORSANEO: No, I'm saying for all purposes that make any difference those two things should be thought of as synonymous.

MR. LOW: Synonymous?

PROFESSOR DORSANEO: Cause of action before meant that not only legal elements but factual contentions alleged in the right way, and you know, that's probably -- I think where we've gotten is the fair notice standard has become the standard, not the technical pleading of a cause of action like in the old days with all of the right factual detail.

MR. LOW: But what if I didn't buy the car, somebody else bought it. I'm driving it. General Motors, it's defective. I've got a cause of action for defective

vehicle products liability, but I don't have a cause of action for warranty. There's no privity, so wouldn't that be two different causes of action? But --

PROFESSOR DORSANEO: Well, it depends on whose definition. I think under the duty, breach, causation, damages, you would be talking about different rights and wrongs, so I think that it would be two causes of action, warranty and whatever the other one is.

MR. LOW: But would I be stuck because I alleged the wrong one and kicked out when I've got one that's proper, the products liability claim?

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: With respect to Professor Dorsaneo, I think that 45 and 47 explain exactly why we should use "cause of action" and not "claim." 45 says, "Pleadings shall consist of" -- "shall be by petition and answer and shall consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's ground."

PROFESSOR DORSANEO: Keep reading.

MR. SCHENKKAN: 47 -- I will. 47 says, "An original pleading which sets forth a claim for relief shall contain, (a), a short statement of the cause of action," and, "(b), in claims for unliquidated damages only the statement that the damages are sought within the

jurisdictional limits of the court," and "(c), a demand for judgment for all the other relief to which a party deems itself entitled" and --

PROFESSOR DORSANEO: In both of your readings you left out fair notice of the claim involved.

MR. SCHENKKAN: Yes. Yes.

PROFESSOR DORSANEO: And that is a bit of schizophrenia in the drafting process that occurred in 1940 where Judge Staton from UT wanted to require pleading of a cause of action rather than the Federal standard for claim, and the committee compromised by saying you have to plead a cause of action, not the facts constituting a cause of action, plead a cause of action to give fair notice of the claim involved. In 45 it's in a separate sentence. Okay. In 47 it's right there in 47, you know, (a), I believe, and that's been a tension, but over time, over time the technical meaning of pleading a cause of action has kind of faded, and we're talking about a fair notice standard, fair notice of the claim involved, from the standpoint of what a reasonable lawyer would understand from reading the -- reading the petition.

CHAIRMAN BABCOCK: Well, Pete's got a counterpoint to that obviously.

MR. SCHENKKAN: May I finish? It's clear from both 45 and 47 that you can have a cause of action and

still not have pled or -- or to use the words pled various other things about your claims for relief which are part of the claim involved, it is clear they are not the same concepts here. It may well be that people have slid into treating them as the same concepts. It may well be that it is a good idea to make that official, but it is not the case in Rules 45 and 47, and it is not the case in the statute under which we are trying to help the Court make a new rule today, so I'm saying it's an argument to have about the history, and it may be an argument to have about going forward, but not in this rule under this statute.

CHAIRMAN BABCOCK: Justice Bland.

PROFESSOR DORSANEO: I think the cases now take fair notice of the claim involved as the standard.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Three practical examples of Pete's concern: Attorney's fees, prejudgment interest, exemplary damages. People refer to those as claims all the time. They're not causes of action, so when we use the word "claim" it can -- it can be synonymous with "cause of action," but it also can be a word used in connection with a remedy. So if we change the Legislature's phrase, "cause of action," to "claim" it's possible that we're going to see motions for pieces of relief instead of for causes of action, because the word

"claim" takes in a broader sort of thinking. At least in 2011 that's how we use the word. We use it to refer to claims for attorney's fees, claims for punitive damages, so I think I support Pete's suggestion that we use "cause of action," as arcane though it might be, because that's what the Legislature used, and I think if we use a different word we might connote some meaning that we don't mean to.

CHAIRMAN BABCOCK: I sense a vote coming on, but Carl.

MR. HAMILTON: Do we know from those that were involved in the legislation of this whether the term "cause of action" is meant to be the lawsuit, or are we talking about individual claims within the lawsuit to be dismissed?

MR. SCHENKKAN: Well, we know the answer to that from the statute. It says "in whole or in part," so you can have two causes of action and have one of them poured out and fees awarded for that and still have a lawsuit in the other cause of action under the statute.

CHAIRMAN BABCOCK: All right. Everybody that thinks the language in the rule of the subcommittee as proposed using the word "claim" should be carried forward as opposed to "cause of action," so if you're a "claim" person, now's the time to raise your hand.

If you're a "cause of action" person, raise

your hand. Well, the claims got six votes and the causes of action got 26 votes, so that's a fairly decisive -- yeah, Judge Evans.

HONORABLE DAVID EVANS: I just wanted to suggest that maybe line eight the word "consider" be substituted for the word "hear" so it would be "consider evidence." The motion to dismiss I have no doubt will have attachments to it, which will be factual and evidentiary, and I think it should be clear to the trial judge that he just can't hear any or she can't hear any evidence whatsoever or consider any evidence, and I don't want to hear somebody tell me that if it's attached I can somehow hear it. I know it's small, but it's just the kind of thing you're going to get into.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: That actually was one of the points I wanted to bring up to the committee that I wasn't sure -- I would do probably I think the opposite of what you're saying, and I would recommend that the committee make clear that the prohibition against considering evidence does not prohibit the court from looking at a contract or some other note or something that is attached to and referenced by the pleadings, that Rule 59 makes those part of the pleadings, and they should be considered the pleading and not other evidence. And so I would

actually -- I think we may be taking different views on that.

HONORABLE DAVID EVANS: Well, I went back to the -- I'm not sure, but I thought that it just says that "The court will not consider any evidence" in the actual act that's passed, is what I understood. "Without evidence," and decide the fact on the motion without evidence, and I don't know what the Legislature meant, "motion without evidence," except to say that the motion couldn't have evidence attached to it.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: First, I agree with the judge that the word ought to be "considered" rather than "hear." Second, pardon me, the statute says "without evidence," so the -- or the Supreme Court's rule should, in my opinion, not allow the consideration of evidence in any form. If you attach a contract, for example, to a pleading and incorporate it by reference it becomes part of the pleading obviously. Does it become evidence? Not for trial purpose and not for a motion for summary judgment purpose and shouldn't become evidence in a hearing under this motion, but it does become part of the pleadings; and so it would fill up any factual gap, for example, that the pleading doesn't have because if you incorporate it by reference you now have a contract, so I don't believe that

the inclusion of attachments to a pleading necessarily become evidence; but the rule, to be faithful to the Legislature's command, should make it clear that the court may not consider evidence of anything except attorney's fees.

MR. GILSTRAP: You wouldn't allow him to consider the attached contract?

MR. MUNZINGER: Not as evidence. It's part of the pleading. I think they're different things.

MR. GILSTRAP: Would you allow him to consider the attached contract in deciding whether to dismiss the case?

MR. MUNZINGER: Well, if the allegation is you didn't plead consideration for the contract but the written contract imports consideration, so, yeah, I would. That's part of the pleading.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The way I understood the rule or the intention of the Legislature would have been that the cause of action, the pleading that pleads a cause of action seeking to be dismissed, would be the one that would be considered; and if that pleading incorporates certain documents to fulfill the factual allegations the court would have to consider those and see if they were reasonable and as a matter of law supported the

allegations. What I don't -- would not like to see us do is what's happened in the medical malpractice expert report area where the challenge to the expert contains additional evidence trying to sway the trial judge that this is just medically impossible, this theory that the expert has come up with. The appellate courts haven't approved of that, but it is a method of advocacy that is used, and I don't think it's the way the Legislature intended this motion, which is going to have to be heard within 105 days of the claim being filed. It's a 60-day time limit, plus 45, with no discovery, and I can't imagine that the movant can defeat it when they couldn't get a summary judgment in that fashion.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Are you suggesting that if there's a cause of action pled for contract, they allege in the petition there was a contract that required such and such, it was -- there was a duty under that contract, it was breached, and I had damages that if they attach the contract I'm supposed to read that and consider that in the motion to dismiss?

HONORABLE DAVID EVANS: Well, as I recall, the pleading rule is that there's a rule that says -- and I may not have it correct, and I know I'll be corrected, but it says that if it's attached it will be presumed to be

authentic, and someone may come in and say, "I never signed that. I have an affirmative defense to this," et cetera, et cetera, and I think that when you take the pleading and try to move to dismiss the cause of action you're going to have to take what's incorporated with it.

HONORABLE STEPHEN YELENOSKY: Well, I don't think so, and I think that would be wrong to do, because if the pleading without -- without the document attached would not cause me to dismiss the lawsuit because they say everything they need to say in the pleading and it's not fantastic and unbelievable, I can't dismiss it because I read the contract. To me that's considering evidence. I mean, suppose the contract is oral. Are we going to say, well, we take the evidence on what the oral contract was? That seems to go beyond the line.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: What if the pleading says there was a duty to do X in the contract, incorporated by reference and attached, and you look at the attached contract, you read it top to bottom, and there's no such duty stated?

HONORABLE STEPHEN YELENOSKY: Okay. That's a summary judgment to me. We're going way too far with this.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I couldn't agree more than

possible with what Steve Yelenosky is saying. This whole conversation is taking the turn --

CHAIRMAN BABCOCK: Wait a minute. You couldn't agree more than possible?

MR. ORSINGER: Yeah. I couldn't agree more with -- it's not possible for me to agree more with what he's saying.

CHAIRMAN BABCOCK: So you way agree with him.

MR. ORSINGER: This is the fear I had when we had this discussion between Frank's language of leaving (1) the way it was and what Lonny was suggesting that we make it clear that the factual analysis is just limited to the fantastic and unbelievable accusations, because now whether somebody gets dismissed or not depends on whether they attach the contract to the pleading or don't attach the contract to the pleading. This is substituting for a summary judgment, and maybe more so than many of the people in this room I get to litigate contracts every day of the week. That's what happened to family law, is that we're all interpreting contracts of some kind, and contracts are not usually disputes about whether somebody had to deliver so many widgets on a certain date. They're usually interpretation problems because clauses are not written correctly and contracts don't anticipate certain contingencies, and you can't easily say who wins in many

contract suits.

I don't think you should be deciding who wins in a contract suit in this motion. That should be a motion for summary judgment, and the judge may decide it's ambiguous and requires a trial. There's a long history of the way we properly handle contract disputes, and so I would like to go back and speak in favor of what Lonny suggested, which I think is implied in what Steve is saying, is that we should make it clear that we're not evaluating whether the facts pled, including what you attach as Exhibits A through Z to your petition, it's not our job to see whether those facts pled support the cause of action, because if we do, if we allow this to do that, then we're eliminating special exceptions, we're eliminating summary judgments, and we are conducting trials on the evidence on the basis of who attaches what to their pleading. So the second we realize that anything is attached to the pleading is evidence then people are going to be attaching 20 or 30 or 40 or 50 exhibits to their pleading so that it will be considered in one of these dismissal hearings.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, on a contract, say, for instance, you sue and say you had a contract to do such-and-such, but you didn't really. The contract didn't

even address that. It addressed something else.

CHAIRMAN BABCOCK: That's Sarah's point.

MR. LOW: That would come within Rule 13, attorney or party is who filed such a thing or subject to sanctions. That's already addressed. We don't need to address it here.

CHAIRMAN BABCOCK: Judge Peeples, you had your hand up.

HONORABLE DAVID PEEPLES: The draft sought to leave, you know, attachments to pleadings and so forth to the existing law on that. If I can plead -- if I can quote a contract in my petition, which is obviously okay, I ought to be able to attach the contract and have the court consider it. That's the thinking.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So you just replaced summary judgments in contracts suits with motions to dismiss.

HONORABLE DAVID PEEPLES: I can refer the court to the language that I'm suing on so it will know what the contract says. I can quote it in my pleading. No one, I think, would disagree with that; and it's a lot of times better just to attach the contract, the note, and, I think, consider -- I'm not sure about the language on line eight. I think "consider" is fine, but is anybody objecting to attachments that are the basis of the lawsuit?

HONORABLE STEPHEN YELENOSKY: I am.

HONORABLE DAVID PEEPLES: That the court can consider that?

HONORABLE STEPHEN YELENOSKY: I am.

HONORABLE DAVID PEEPLES: If you can quote it in a pleading why can't it be considered?

HONORABLE STEPHEN YELENOSKY: Well, if you want to quote it in the pleading and then I can take that as true unless it's fantastic and unbelievable, but, I mean, as Richard said, I mean, a contract is not just something you can look at and say, "Oh, here are the facts" or "Here's the duty." I just think it's going too far.

HONORABLE DAVID EVANS: Rule 59 provides that you can attach notes, bonds, records, written estimates or assessments, in whole or in part claimed suit upon, either attach it or you quote it. So, I mean, it's out there.

MS. HOBBS: And it becomes part of the pleading.

HONORABLE DAVID EVANS: And it becomes part of the pleading. I think that's the problem.

HONORABLE STEPHEN YELENOSKY: Well, it's authentic. You say it's authenticated.

HONORABLE DAVID EVANS: No, it becomes part of the pleading. 59 says it's part of the pleading.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Yeah, 59 says exactly that. It has to be something -- you can only attach things that are the basis for the claim. You can't attach just any -- you know, your electric bills or any other -- you know, some letter or -- that might be good evidence in the case. I mean, it's just a way to make it easier to plead something. It's not some sort of an open door to attach all kinds of evidence like you might use in a summary judgment or a trial. It is misused a lot. People attach all kinds of stuff, but that's not what's authorized.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: But if I -- if my pleaded fact against Bill for breach of contract, "He said in our contract that he would pay me $50,000 and he didn't," now, we're going to take that as true for purposes of this motion unless no reasonable person could believe it.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Well, if I attach our one-page contract and in it Bill says, "I will pay you $5," not 50,000, how can a reasonable person believe that pleaded fact when it's expressly disproved by the attached contract? It's a -- it's a legal sufficiency question, and I don't know how --

HONORABLE STEPHEN YELENOSKY: Mutual mistake.

HONORABLE SARAH DUNCAN: I don't know, Steve -- I don't know how you expect to get away from that.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Mutual mistake or something. That's the number we wrote down, but everybody understood it was 50,000.

CHAIRMAN BABCOCK: All right. How about this one, Judge? There's a claim, lawsuit filed. There's a claim, or a cause of action if you prefer, for a defamation, and they attach the newspaper article, and the motion to dismiss says, "That is not defamatory. What was said in that article is not defamatory to the plaintiff as a matter of law."

HONORABLE SARAH DUNCAN: On its face.

CHAIRMAN BABCOCK: Can you consider the newspaper article?

HONORABLE STEPHEN YELENOSKY: Why should you be able to do that on a motion to dismiss when we're expressly talking about frivolous lawsuits? File your motion for summary judgment.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The answer to Judge Yelenosky's question is the Legislature told us to do so.

HONORABLE STEPHEN YELENOSKY: Well, it told us not to consider evidence, and you know, you can say it's

pleading, but in every other context that's evidence.

MR. MUNZINGER: I disagree that it's evidence. As I think it was Bill Dorsaneo just pointed out, Rule 59 specifically says relevant matters can be attached to the pleading, and they cure pleading defects, not evidentiary defects. Rule 59, "by copying the same in the body of a pleading in aid and estimation of the allegations of the petition or answer made in reference to that shall be deemed a part thereof for all purposes. Such pleading shall not be deemed defective because of a lack of any allegations which can be supplied from said exhibit." It doesn't speak to evidence.

HONORABLE STEPHEN YELENOSKY: Well, but what you're saying is that the plaintiff can attach written documents and the court can consider that, but if there's any spoken testimony that would pertain to that document I cannot consider that.

MR. MUNZINGER: That was my point about using the word "consider." I agree with you, Judge. All I'm saying is that the Legislature has said to the Supreme Court, "Adopt a rule that allows a judgment to be entered based upon the pleadings, but don't consider evidence, if the pleading itself fails to support the cause of action." That's what the Supreme Court wants. They don't want a defendant to have to go through the discovery or the courts

to be burdened by spurious claims. I agree with you a hundred percent. We ought not to be taking people's rights away from them when there is a fact question or a law question that precludes judgment, but this rule wouldn't do that.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: Well, wouldn't it be a fact question if the defendant -- the alleged defamation was or was not defamatory?

CHAIRMAN BABCOCK: Well --

MR. PERDUE: I mean, that seems to me a classic summary judgment proposition.

CHAIRMAN BABCOCK: No, it can be as a matter of law.

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: I mean, there's a Supreme Court, *Munson vs. Smith,* that says you look at the defamatory publication and you determine -- the judge determines in the first instance if it can -- if a reasonable person could construe it as being defamatory. So it could be as a matter of law.

MR. PERDUE: On as a matter of law.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: But not as a matter of fact.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: Which is back to what Orsinger was talking about, which was the idea of going behind the pleading and whether the pleading essentially satisfies the rule.

CHAIRMAN BABCOCK: Yeah, you raise a good point, because say the pleading is on April 17th of 2007 the *Fort Worth Star Telegram* published an article about the plaintiff that was defamatory, and they don't attach the article. They just reference it and then go on and plead the elements of the cause of action. Now, what do you do? You know, can the defendant say, "Well, here's the article we're talking about. You ought to dismiss it." Sarah.

HONORABLE SARAH DUNCAN: And that's part of my point, is that if something that's attached is incorporated by reference into the pleading then if my contract with Bill says $5, the contract that's attached, but I pleaded 50,000 --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- that pleading is internally inconsistent, and no reasonable person could believe -- now, if somebody wants to -- if I plead mutual mistake, the written contract says $5, but we all know that was wrong, it was 50,000, that's different, but that's not the example I gave.

CHAIRMAN BABCOCK: Right. Right. Yeah,

Jeff.

MR. BOYD: I'm not sure I've thought through this before, but doesn't it make a difference whether the attachment is to the pleading that is being challenged versus whether the -- the question being whether the court can or should consider an attachment to the motion to dismiss?

CHAIRMAN BABCOCK: Sure.

MR. BOYD: I don't -- I mean, does anybody think that under the statute the court should be allowed to consider attachments to the motion to dismiss?

HONORABLE DAVID PEEPLES: No.

HONORABLE SARAH DUNCAN: Depends on whether they were previously incorporated in a pleading.

MR. BOYD: So if you plead, "He promised to pay me $50," I can't move to dismiss that and in support of the motion attach a copy of the contract showing that what he really promised was $5.

HONORABLE SARAH DUNCAN: No, because we're going to take as true the allegation in his pleading.

MR. BOYD: That's right. Okay.

CHAIRMAN BABCOCK: In Federal court, under 12(b)(6) you can provide a document even in your motion to dismiss that is central to the claim, like a contract claim or, you know, a defamatory publication. You can do that,

but maybe not here, under this statute. Gene.

MR. STORIE: Yeah, I had a similar thought, and I wonder if it helps to put in line nine, "must accept the nonmovant's allegations as true."

MR. BOYD: Or "the claimant's."

MR. STORIE: Yeah, whichever. In other words, all allegations. You're not talking about the movant's allegations. You're talking about the nonmovant's allegations.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: I think historically demurrers can't speak. You know, whether this is a successor of a historic general demurrer or not is, you know, I guess arguably debatable, but that's what it looks like, or a summary judgment motion certainly can speak, so I wouldn't think you would -- unless we wanted to just make our rule like Federal Rule 12 I wouldn't think you would allow anything to be added to the motion to dismiss and if you did then it would just turn itself into a summary judgment practice.

CHAIRMAN BABCOCK: Are you saying even if the plaintiff attached the -- Sarah's five-dollar contract that you say is 50?

PROFESSOR DORSANEO: No, I think Sarah's hypothetical is a hard one, if there's an inconsistency in

the pleading. Okay. I don't exactly know how that case comes out.

CHAIRMAN BABCOCK: But the court could consider it.

PROFESSOR DORSANEO: Well, if there's an inconsistency and the written contract wouldn't somehow be controlling under the law --

CHAIRMAN BABCOCK: No, no, no, that's --

PROFESSOR DORSANEO: -- as a matter of law, then, you know, I guess there couldn't wouldn't be a basis for dismissal, but I'm talking about adding things to the motion, not adding things under Rule 59 to the petition.

CHAIRMAN BABCOCK: Would the contract that is attached in your view be evidence and, therefore, like Judge Yelenosky says, not eligible to be considered, or would you say because it's attached and it is a proper attachment that it could be considered on this motion?

PROFESSOR DORSANEO: Could be considered, not because it's evidence, but because it's part of the pleading.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: It just so happens that things can be part of the pleading and also be evidence.

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Very good.

HONORABLE STEPHEN YELENOSKY: Well, if they're also evidence then the statute says I can't consider them because it says "without evidence," so if they're both pleading and evidence then I can't consider it.

PROFESSOR DORSANEO: Well, you're only considering it as pleading.

HONORABLE SARAH DUNCAN: Right.

PROFESSOR DORSANEO: You're not considering it as evidence.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Two things. First, when we say "all allegations," I think it would be wise to have that restricted to allegations in the challenged pleadings. The reason I say that is that I know some Federal judges and there is some case law out there that in determining whether the pleading -- the petition is sufficient, the plaintiff will make statements in their response to the motion to dismiss and the judge will treat those as new allegations and consider the two of them together to determine the sufficiency, and I -- I'm not sure whether we want that. I mean, maybe we do.

The other thing of it is, is that, you know, we have a rule that says you can attach exhibits, and I think I tend to favor is if it is attached as an exhibit

you get to consider that as part of the allegations, and part of the reason is given today's technology you don't need to attach the document anymore. You can just make a PDF image of it, put it in your Word document, and if you tell people, "If you attach it you can't use it to defend yourself," so, okay, fine, we're just going to make a PDF image or a photo image and stick that right in the middle of the page, and then what have we accomplished?

CHAIRMAN BABCOCK: I hate it when you bring technology into it. Buddy.

MR. LOW: So from what I gather, it's the question of I attach a contract to my original pleading that is attacked, but I can't attack it by attaching the contract. In other words, if it's a part of the pleading, it should be considered, because the rule gives it that right, but if you attach it to the motion then it's not a part as evidence, is the way I understand it.

CHAIRMAN BABCOCK: That's -- I think that's sort of the consensus here.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Which is different than the Federal practice.

MR. LOW: Right. That's the simplest way I can put it.

CHAIRMAN BABCOCK: Okay. We're making great

progress. Pete.

MR. SCHENKKAN: I want to talk a little bit more about this attaching contracts and whether they can be considered. Isn't the reason they can be considered if they're attached to the challenged pleading that you could just as well plead what the *Fort Worth Star Telegram* said without attaching the article as by attaching it? They're just two different ways of saying, "This is what they said that I contend is defamatory."

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: And if you do that, you aren't considering it as evidence. You're considering if that's what they published as a matter of law, is that there's no basis in law for saying that's defamatory. So you're not considering it as evidence, and you could perfectly well have pled it the other way; whereas conversely if it's attached to the motion challenging the pleading, what you're saying is he's alleged that it said X, but it actually said Y, and that is a fight about evidence, and we don't get to do that in this vehicle. We do perhaps get to do it in a motion for summary judgment, and if it's that frivolous we may have a different kind of motion, a sanctions motion that goes with the summary judgment motion.

HONORABLE STEPHEN YELENOSKY: I understand

that, but what if what you say in your pleading outside of what you've attached conflicts with it? Am I to resolve that conflict by saying the attachment supercedes the other words? If it's all pleading, I just have a conflict within the pleading.

MR. SCHENKKAN: I guess I'm thinking that when there's a conflict in the pleading that's a special exceptions matter, and I would urge you to treat it that way, but, I mean, that was just a -- that's a half thought out response. I don't know if that's right.

CHAIRMAN BABCOCK: Okay. Richard, something new?

MR. ORSINGER: I hope so. What concerns me is that the general drift has been away from pleadings that allege claims that we know are not recognized or facts that are so fantastical that no one could believe them, and now, just based on this discussion, we are going to have in a motion to dismiss a judge is going to decide whether or not the defendant owed a duty to the plaintiff based on the pled facts, and if not then you get to pay the defendant's fees. Where you have a confusing contract with terms that are not easy to understand, we're going to have a judge on a motion to dismiss interpreting the contract and deciding whether there was a duty and whether it was breached or not. We're going to have defamation cases that on a motion

to dismiss are going to decide whether in the court's mind as a matter of law this was defamatory or not, or in intentional infliction cases we're going to have on a motion to dismiss the judge is going to decide whether the behavior was extreme and outrageous or not.

CHAIRMAN BABCOCK: As a matter of law.

MR. ORSINGER: As a matter of law. Now, what we've done is we've left this domain of fringe allegations and fringe lawsuits that have no place in the court system and should be gotten rid of immediately and some compensatory fees paid, and we're now taking sophisticated, complicated litigation where you might get a dissenting opinion on the court of appeals or on the Supreme Court, and we're now deciding them within 60 days with no summary judgment protections. We're in the wrong place. This whole conversation, in my opinion, proves what's wrong with the idea of all these broad concepts that are just unrestrained, because now the merits of many complicated cases are going to be dismissed on a motion at the beginning of a lawsuit with no discovery and fees paid, and if some people have their chance around here, there's not even going to be a hearing where the plaintiff can go into court and look the judge in the eye. It's really -- we're in the wrong place.

HONORABLE STEPHEN YELENOSKY: I couldn't

agree with Richard more.

MR. BOYD: Impossible.

CHAIRMAN BABCOCK: The only counterbalance to what you said is that the defendant runs the risk if they file a motion that doesn't get granted of having attorney's fees, so you would think that the rule wouldn't be overused for that reason. When I first read this, I thought, not having the benefit of this discussion, that this was really an attempt for a 12(b)(6) rule, but with the helpful feature of having the defendant -- defendant's client having a skin in the game about filing a motion that didn't get granted because people who are in Federal practice know that 12(b)(6) is way overused, and it's overused for reasons that may be tactical rather than having to do with the merits, and if there was a rule in Federal court that the defendant paid if they lost, half of those motions would go away, and so I thought that's what this statute was all about, but I understand the argument that you're making and others make that the Legislature may have only been intending something for very fringe kind of cases and not the kind of things that you just described, the contracts that Sarah is talking about, the defamation case that I'm talking about, the intentional infliction case that Richard Munzinger is talking about, which would all go out on 12(b)(6) motions under appropriate circumstances,

but what you're saying is, Legislature may not have intended that here and rather only was looking for real fringe kind of stuff.

MR. ORSINGER: If not then we're supplanting summary judgment practice as well as special exception practice, and let me point out that usually the plaintiff has one lawyer and the defendant has four or five, in my experience. Now, admittedly, I don't litigate at the level of a lot of people, but the individual plaintiff having to pay for the Houston law firm and all the briefing and the five lawyers that show up for the hearing and all of that versus the big corporation paying for the single plaintiff's lawyer, I'm not sure that that disincentive is balanced.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I think that some of the discussion is overcomplicating what the Legislature intended to do and what the Court can do in the rule. At least from my perspective it seems clear that the Legislature is telling the Court adopt some procedure that allows for the dismissal of cases on the pleadings, with consideration of the pleadings only, no evidence. That's Rule 12(b)(6) and Rule 12c in the Federal practice, and if the Court limits the rule to doing that, the Court has honored its obligation to the Legislature, has preserved

the history of our pleadings, whatever it might be, has preserved notice pleadings, which is important, hasn't really in my opinion done much because as a defendant if you think I'm going to file a motion under this rule and pay the attorney's fees when I lose it, I'm not stupid. I'm not -- a defendant is not going to win very many of these motions.

I think it's much ado about nothing from the defense standpoint, because I'm not going to take the chance that I am going to lose a motion to dismiss and have to pay the plaintiff's attorney's fees. If there is anything in the petition that resembles a valid cause of action I would much rather either do it with a special exception saying you failed to state a cause of action. Then I'm risk free on attorney's fees, and the rule as drafted preserves the distinction between this motion and special exceptions, as it must because of Rules 128 and 86.

CHAIRMAN BABCOCK: Can I just ask a question? And I agree, Richard, with what you said earlier, we've got to look at the statute for guidance, but, Jim, the stakeholders, was the rule supposed to be just kind of fringe, outlying kind of stuff, just like wacky Martian cause of actions that don't exist?

MR. PERDUE: I wasn't in the room at the end of the process, but there's somebody who was.

CHAIRMAN BABCOCK: Yeah, I know, but we'll ask Jeff here in a minute.

MR. BOYD: I was in the room at the end of the process.

MR. PERDUE: But I've talked to some people.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: That certainly was the -- I mean, at least from our side of the take was that this was not supposed to be as Richard just described it.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: That this was not supposed to do that, and there was a concern of exactly that, that it started out and the compromise that it would not do that. That's my voice. I mean, anecdotally, let me say, medical malpractice is a good -- is a good lesson in this. I mean, I testified in favor of the 2003 provision on expert report, saying if you want to get frivolous lawsuits out of the system early, have an expert report requirement. Unfortunately now, there is a challenge to every expert report in every medical malpractice case that is filed that is oftentimes taken up on interlocutory appeal, of which I can tell you even if there was a mutual fee shifting provision --

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: -- they would still, my friends

in the defense bar, they are mandated to file those. They are required to file them by their client regardless of their own personal thought of the value of the report. So if you broaden this rule, I mean, there is a very good corollary of something that was supposed to only capture frivolous cases that very easily morphed in something that was used in all instances with total disregard of its intent. That's my concern of the slippery slope from personal experience.

CHAIRMAN BABCOCK: Yeah, good. Jeff.

MR. BOYD: Well, certainly as filed the intent was to provide for the early dismissal and award of attorney's fees on a 12(b)(6) standard. In the negotiations the plaintiff's bar and ABOTA I think argued, no, it should be only on a frivolous standard, only what you've described, the real fringe cases that clearly are frivolous. There was not agreement in the room. In the end what was to be the final draft that the parties -- the interested parties in negotiations would all sign because the committee, before it voted to approve the bill, wanted to see the signatures of TLR, TTLA, ABOTA, the Governor's office, everybody else, had no standard in it. It just said "provide for the dismissal of cases." Mike Gallagher noticed that as we were signing and said, "Whoa, whoa, wait, wait. It was supposed to say 'groundless or

frivolous,'" and we said, "No, we've been over that two days ago." 20 minutes later we compromised and agreed to insert the language "having no basis in law or fact," which we selected out of Rule -- or chapter -- the definition of the word "groundless," Chapter 10, right?

MR. PERDUE: Right.

MR. BOYD: Which is why I argued at our last meeting to now add in the rest of the definition of the word "groundless" defeats the compromise that was reached because we reached a compromise that we thought was going to be in the middle. It's not 12(b)(6), but it's also not frivolous or groundless. It's if there is no basis in law or fact. Now, we may have in doing so -- and I think we knew we were creating a new standard in between the two, and by doing so we may have presented a bigger challenge to the courts and to this committee than we knew we were presenting, and I think if Mike were here he would say the same thing. I have no doubt he would confirm that.

MR. PERDUE: All I would say is that the genesis of the language -- and at least I think everybody agreed -- came out of the concept of groundless.

MR. BOYD: Yeah. The "no basis in law or fact" came out when he came back and said, "No, no, it's got to say 'groundless and frivolous.'"

"No, we've already agreed not to do

that." The compromise was to pick a -- that portion of the definition of "groundless" or "frivolous," which goes back to what I argued at the last meeting that got outvoted on.

CHAIRMAN BABCOCK: Jim, from your perspective is the language as we voted to modify it in Rule 94a, subpart (a), does that get to where you think the statute leads us?

MR. PERDUE: I'm -- you know, I go back and forth on the definition that Lonny offered. I'm personally -- I mean, I get -- I should speak solely for myself. Personally I'm more comfortable with the language that we've got now in as-amended (1) and (2), with using "cause of action," "no basis in fact or that is not supported" and then the "not consider evidence" and "the claimant's allegations as true."

CHAIRMAN BABCOCK: Yeah, okay. Jeff, are you -- recognizing the votes that have been taken, are you comfortable with, maybe not -- maybe it's not fair to ask you on the record, but what do you think?

MR. BOYD: No, I mean, recognizing the vote that was taken that this committee thinks the Court should build into the concept of no basis in law, should add into that concept the concept of the trial court being able to decide if there's a reasonable basis for the extending, modifying, or reversing.

CHAIRMAN BABCOCK: Yeah.

MR. BOYD: I don't agree with that, but I got outvoted on that, recognizing, yeah, "cause of action" instead of "claim" and the language that's here, I do think we need to add in, which I guess we already voted to do, "no basis in fact."

CHAIRMAN BABCOCK: Yeah. Right. We voted to do that. Yeah. Good. Professor Dorsaneo.

MR. BOYD: Can I make one point, though, based on a comment that was made two or three times, which is this was not intended to supplant special exceptions or motions for summary judgment. I think everybody in the room, Legislature and interest groups, will tell you that. It was intended to give the defendant the -- an alternative to either of those when the defendant feels strongly enough that this thing ought to be dismissed that they're willing to risk their own liability for attorney's fees in order to get the early dismissal with the recovery of attorney's fees.

CHAIRMAN BABCOCK: Yeah. Yeah. Gene.

MR. STORIE: I just want to remind people, too, we do have the ability to amend, so if the contract shows $5 and the agreed price was actually 50,000, presumably that's going to be part of your pleadings, and if it's not, presumably you would want to amend in the face

of a motion that you get. The same thing for your article. If that's all there is, maybe it should be dismissed, but if they say, "Here's just one example of the times I was defamed," I think that works.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think, as I often point out, we forget that the kind of litigation that most of you-all do is not all of the litigation and that these rules apply to pro se litigants as well, and so to add to Richard's list or litany of things that we would be dismissing would be the lawsuit filed by the pro se litigant in which he or she attaches the contract and, as Sarah says, fails to plead mutual mistake. So now we've turned it into a dismissal essentially because they failed to plead mutual mistake on a pro se litigant.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: I think Gene is right. The amendment issue is really where the thing goes as to where if you amend and cure the problem, you know, does anybody get attorney's fees, and that seems to me to be the place where the argument is going to immediately go on all of these --

MR. BOYD: That's --

PROFESSOR DORSANEO: -- typical hypotheticals.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: That's the alternative language that Lonny and I provided as a separate attachment that we haven't gotten to yet.

CHAIRMAN BABCOCK: Yeah, we're going to talk about that in a minute, because we're just coming up on our half hour. Buddy.

MR. LOW: Would we get around the situation of considering the contract and analyzing the contract if we put pleadings, but -- but Rule 59, attachments under Rule 59 do not apply, or something excepting, because 59 says you may attach writings that are a part of it, and you take the chance. You know, if you're on the borderline you ought to know you're close, you can't consider those as pleadings for this purpose only, not for any other purpose.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: But for purpose of this rule, you can't consider the attachments.

CHAIRMAN BABCOCK: Do we need that, given the fact that 59 is fairly clear that it's part of the pleadings?

MR. LOW: I don't know what we need. I'm just raising the question. I have no answers.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Did you say you're going to

get to the amendment section later? Is that what you just said?

CHAIRMAN BABCOCK: We're going to get to the attorney's fees section later.

MR. MUNZINGER: I'd like to raise a point about amendment, and I apologize to my subcommittee members, fellow subcommittee members, because this didn't occur to me until just this moment. Justice Bland a moment ago said what I have frequently said. A plaintiff has the right to amend a pleading at any time until seven days before the trial, so you could come in the morning of the hearing, for example, and hand an amended petition to the judge and trump the motion to dismiss or make it moot, et cetera, and because this -- the order that is entered in this case is potentially dispositive, it's either going to grant or deny a motion to dismiss the case, we may want to give consideration to putting a time limit on the right to amend to seven days prior to the hearing. There is no such time limit in the rule as it now exists. We didn't discuss it at the subcommittee, and I am sorry for that, but --

CHAIRMAN BABCOCK: Well, there is sort of a time limit. It says "before the date of the hearing or submission."

MR. GILSTRAP: Right.

CHAIRMAN BABCOCK: And, by the way, you've

got submission in (c), but you've got -- I guess (d) says there has to be a request. It's okay.

MR. GILSTRAP: Yeah, the intent was that you could amend -- you could amend the day before, but you couldn't amend the morning -- the morning before if you have an afternoon hearing.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: You couldn't walk into the courtroom and hand them an amendment.

CHAIRMAN BABCOCK: You had to do it before the date of the hearing or submission.

MR. PERDUE: And Justice Christopher had the thing about withdrawal.

CHAIRMAN BABCOCK: Justice Gaultney, and then Justice Christopher.

HONORABLE DAVID GAULTNEY: This is on a little bit different issue, but there was a question about adequate notice of an argument, a reasonable argument for extending the law, so has that been dealt with in the rule? That is, if there is a motion based on existing law that is filed and then at the -- at the hearing an argument is made for a good faith extension, and so the motion is denied. I think Richard raised a notice issue, and that is the defendant is not on notice of that unless it's in the pleading, and I'm wondering if the committee considered

adding on line six, "a reasonable pleaded argument."

MR. GILSTRAP: Well, the movant has to give the specific reasons supporting the motion. That's in (a)(3). I don't know if that solves the problem.

CHAIRMAN BABCOCK: Well, yeah, but Munzinger's point was the cause of action is for false light invasion of privacy, which we know the Supreme Court says doesn't exist. So the motion to dismiss says, "No basis in law because," you know, "see *Cane vs. Hurst"* and then the response comes back, "Yeah, but I have a reasonable basis for reversing that law, so don't dismiss my case." And Munzinger says, "But I didn't know that, I didn't know that was going to be your position."

MR. GILSTRAP: Well, we've never required that in the pleadings before, and that would really be a sharp departure.

CHAIRMAN BABCOCK: And, Richard, not to speak for you, but most defense lawyers are going to know that this is -- this is a bit of a loophole in the rule, and they're going to take that into account when they decide whether to file the -- file the motion under this rule or not, because you could always, you know, have a reasonable basis for reversing existing law. I mean, if the statute of limitations has run, that might be something different.

MR. MUNZINGER: But the statute of

limitations is an affirmative defense waived if not pled. It's not part of the plaintiff's petition.

CHAIRMAN BABCOCK: It's not part of the plaintiff's petition. Well, then I can't think of any, so Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, in most cases isn't that a false dichotomy between existing law and a reasonable basis for changing? You can give examples where there's Supreme Court decision on point, but there are a lot of cases in which people come in and argue this is an informal fiduciary relationship, and the other side will say, "No, the law has always been you can't create an informal fiduciary relationship that way," and I read the case law, and there's no -- perhaps in that particular fact situation we have the common law. I rule with one side or the other. Am I ruling on existing law or an extension of existing law, if that fact pattern hasn't ever been presented to the Supreme Court before?

And then add to that the existential point that Justice Hecht made last time, which is once the Supreme Court finally decides that case that was the law when I heard it --

CHAIRMAN BABCOCK: All the time.

HONORABLE STEPHEN YELENOSKY: -- retroactively. So I think it's a false dichotomy, and

unless the case is one in which someone is head on saying -- perhaps the example of the dog case, I don't even know if that was a Supreme Court case or just a court of appeals case saying that you could not get some sort of damages for the lost affection from the death of a dog. Was that a reversal of a Supreme Court case or a court of appeals case, and did somebody have to plead that was a change in the law? I think the court of appeals there did recognize it as a change in the law, but I think most of the time that's just a false dichotomy, and so it becomes a game as to whether you have to plead that or not. I guess everybody could just plead it all the time.

CHAIRMAN BABCOCK: Yeah. Okay. Anything else? Yeah, Kent.

HONORABLE KENT SULLIVAN: One quick question, and this may be a little bit off point, but someone brought up the amendment process earlier, and maybe this has been touched on, but it's not clear to me how you have some barrier to the possibility of a potentially endless loop that is shooting at a constantly moving target here, because there's no limit as far as I can see on the ability to amend. In other words, take a quick hypothetical, suppose I file a pleading that we all acknowledge is in the most extreme case we've discussed. It's completely frivolous. Someone files the motion to dismiss, but I have

a right to amend. I look at it, and I say, "I'm going to lose," so before the -- you know, day before the hearing I file an amended pleading, but let's say in this hypothetical it is, again, a completely frivolous claim, albeit a different frivolous claim. Someone then turns around and files another motion to dismiss. There's nothing to prevent me from amending yet again in a timely fashion, and given sort of the natural course of things, the fact that this takes time, this can go on for a very substantial period of time, at least as far as I can see. Am I missing something?

PROFESSOR DORSANEO: Well, this thing we haven't gotten to yet says amend once.

HONORABLE KENT SULLIVAN: Oh, I'm sorry. Okay.

PROFESSOR DORSANEO: But we haven't gotten to it. But that's a nice issue, you know, how many bites at the apple.

HONORABLE KENT SULLIVAN: I should have read ahead.

CHAIRMAN BABCOCK: But, yeah, and in conjunction with that, Bill, if you have a motion that's filed within 60 days and then there's a hearing set, but there's amendment the day before, what about the requirement that the judge must grant or deny within 45

days after the motion was filed? Does the amendment moot that requirement and start the clock again?

PROFESSOR DORSANEO: Jeff and Lonny work -- I'll defer to them for more detailed thinking about that issue.

MR. BOYD: If you want to go to that alternate language, I think I can shortcut this, or Lonny can, by just sort of highlighting the issues that we were trying to address and the way we chose to address them.

CHAIRMAN BABCOCK: But did you address that in the context --

MR. BOYD: Yes.

CHAIRMAN BABCOCK: -- of attorney's fees?

MR. BOYD: Yes. Well, but it also governs that issue of whether the court should then go on to grant or deny the motion, because under the statute, if the court goes on to grant or deny the motion then it shall award attorney's fees, and so what we've said is the court should not go on to grant or deny the motion if there's an amendment. Now, that's kind of a practical policy.

CHAIRMAN BABCOCK: Okay. Well, let's see if we're going to go to that in a second. Do we have anything else on the non-attorney's fees aspect of this rule that people want to talk about? Justice Gaultney.

HONORABLE DAVID GAULTNEY: We talked about

this a little bit last time, and I don't want to go over the same ground, but on (e), no waiver of venue motion or special appearance, I mean, it seems to me to be one thing to say that, you know, the determination of a motion doesn't waive a special appearance, but it's another question of, well, what is the effect if the trial court later determines the special appearance should be granted and there is no jurisdiction over that party? I mean, what is the effect of the prior determination, and should the rule say what the effect is? And I think perhaps it should say that the determination is of no effect because you have no jurisdiction over the party. But, you know, in the absence of a statement in the rule, someone might construe it as saying it has effect against a defendant over which the court has no jurisdiction.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Against a defendant over which the court has no jurisdiction, but you wouldn't -- the court would always have jurisdiction over the plaintiff because they've voluntarily appeared in court.

HONORABLE DAVID GAULTNEY: Okay. Here's the hypothetical. This says that it -- I'm a defendant. I file a motion to dismiss under this rule. I file a special appearance also. I get a ruling on my motion -- I try to

get -- I get a hearing on my motion to dismiss because this says asking for that determination doesn't waive my special appearance, so I ask for that determination. I think I'm going to win. The plaintiff comes in, makes an argument for a good faith extension of law. I lose my motion to the Smiths. The judge then takes up my special -- and assesses attorney's fees against me because I lost my motion to dismiss. He then takes up the special appearance at some point and decides that he doesn't have jurisdiction over me in the first place, so there's an award of attorney's fees against a party over which the court doesn't have jurisdiction.

The rule (e) says that there's no waiver, and I think that is an easy thing to apply of -- that deals with waiver, but it seems to me a separate issue of what is the effect of the prior determination, and the rule could I suppose say, depending on due process ground considerations, that it remains in effect. You still owe attorney's fees. There might be due process considerations that say, no, it doesn't, because you don't have jurisdiction over that individual. Now, you could say, well, you have invoked the jurisdiction of the court, and, therefore, you have -- you have jurisdiction for that limited purpose. All I'm saying is perhaps the rule should spell out not just that there's no waiver, but what we

intend the effect to be because I could see an argument made either way.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Yeah, I lost that argument on the subcommittee, and the sense of the subcommittee -- I think I'm saying this -- correct me if I'm wrong -- was that the defendant by filing the motion submits to the jurisdiction of the court for the extent of the motion.

HONORABLE DAVID GAULTNEY: Well, but could you see a court in the absence of a rule saying that, holding the other way? And my only point is why shouldn't we say in the rule what the effect we intend is?

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Part of the problem is that the Legislature has said that a motion under this rule must be determined within 45 days. Rule 120a specifically states that the court may not rule on any other motion other than a Rule 120a appearance prior to granting the Rule 120a appearance. Rule 120a also allows discovery, so you have conflict and tension between the two rules, and I don't know how you resolve it unless you do it in the way that we've attempted to do it. The subcommittee I mean.

CHAIRMAN BABCOCK: Yeah, fair point. Okay. Richard Orsinger.

MR. ORSINGER: On a slightly different topic, and it hasn't been discussed today, but I don't know where the Supreme Court's thinking will go, under (d) there's a requirement that the court hold an oral hearing upon request, and I understand there may have been some dissent about that. I'm in favor of requiring an oral hearing. I think it creates a real negative impression among the public and maybe even among the lawyers that a lawsuit is dismissed anonymously without a hearing and the right to go into court and be heard --

CHAIRMAN BABCOCK: Well, it's not anonymous.

MR. ORSINGER: Well, you know, nobody is in court, nobody is saying anything, nobody is hearing the answers to what they say. The judge isn't seeing the parties, the parties aren't seeing the judge. The lawsuit is dismissed, and fees are ordered paid.

MR. GILSTRAP: How about faceless?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: There we go.

MR. ORSINGER: I think that even though it's a pain in the whatever to have to have a hearing on everything, this is a -- this is throwing somebody out of court on their ear and making them pay money without ever getting their day in court in any kind of practical down to earth street sense, and I think that's a real bad policy.

I don't know -- I haven't heard anybody argue about it here, but I just think even if it is a pain to hear these things I think that a plaintiff deserves the opportunity to walk into the courthouse before they're thrown out and have to pay the defendant's fees.

CHAIRMAN BABCOCK: You agree with the proposal that "upon a request by either party"?

MR. ORSINGER: I agree, and I -- I don't even know how this would work in Austin and San Antonio, and David Peeples may know. What happens if you don't have a hearing in San Antonio, and you just have a motion? Does it get assigned out randomly in the docket or does it just never get ruled on?

HONORABLE DAVID PEEPLES: It wouldn't be random, but it would go to somebody for submission.

MR. ORSINGER: Okay. So what's happening in San Antonio and Austin then is that the judge that signs this thing, the lawyers don't know who it is. There's no understanding as to why they ruled.

CHAIRMAN BABCOCK: So it's anonymous in that sense.

MR. ORSINGER: That would be truly anonymous. I don't know --

HONORABLE DAVID PEEPLES: There would be a signature on the order.

MR. ORSINGER: If you can read it. A lot of times it's hard to figure out who signed the order.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think I said this the last time, but I just want to put it in the record again. Some prisoners file lawsuits for the sole purpose of getting an oral hearing to get them out of jail or out of state prison to come to county jail for a few days and see their friends and family, so I'm against the requirement of the oral hearing.

HONORABLE STEPHEN YELENOSKY: But it's not evidentiary. You could do that by phone. We do that all the time on Chapter 14.

HONORABLE DAVID PEEPLES: He's right about that, and how many defendants are going to try to get attorney's fees from a prisoner? I mean, subject themselves to the risk of losing, but they're going nowhere with their claim for attorney's fees, so why do they do it?

HONORABLE TRACY CHRISTOPHER: If they want to get rid of the case and have this potential threat of attorney's fees, why not? I mean, if it's a frivolous case that the prisoner has filed, why not? They don't have to do the whole 21 days' notice, summary judgment, you know.

HONORABLE DAVID PEEPLES: I think that's an

argument for making the special exception procedure explicit in the rules, so people would know about it, and so judges would know that it's legit.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Just a quick comment. I think Justice Gaultney is right, and I would suggest that maybe we ought to add language so that there isn't any confusion at the end of (e) that says, "but does constitute submission to the court's jurisdiction for the limited purpose of deciding the motion." That would just avoid any doubt on that question.

HONORABLE STEPHEN YELENOSKY: And you think that resolves the question of whether we could enforce an attorney's fees award against them and then find that the special appearance is granted? Can the Court resolve that by that rule? I guess so, but --

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

MR. MUNZINGER: I was just going to make a motion to adopt Lonny's suggestion if you believe that necessary. If you don't believe a vote is necessary, I don't care one way or the other.

CHAIRMAN BABCOCK: Well, I don't think it's necessary in the sense that if the Court thinks that's a good idea they'll put it in there, but if you think we

ought to have a sense of our committee --

MR. MUNZINGER: It's immaterial to me.

CHAIRMAN BABCOCK: -- then we can vote on it.

MR. MUNZINGER: No, I don't want to take the time unless others do.

CHAIRMAN BABCOCK: Very good. What else on this non-attorney's fees aspect of it? Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I mean, I would just like to have it set at a hearing, if no other reason, on the central docket the only things that are driven through the court without a hearing are some defaults, that kind of thing, and we don't really have a mechanism that's a demand driven system. We don't really have a mechanism for -- I guess we would have to set one up for considering something like this without a hearing, and at least in the central docket getting a hearing quickly is not a problem, and it's very efficient, plus it adds to the comfort of having the people in front of you when you're looking at something like this. As a judge I would like to have a hearing, and I guess without evidence, and I guess even though one's not required, would the trial judge have the discretion to say, "I want you-all to come in and argue it"? If I have that discretion, I guess I'm okay, and I imagine that's probably what we would do, pursuant to the

Supreme Court's approval in our local rules, say motions to dismiss shall be set on the central docket.

CHAIRMAN BABCOCK: Okay. Anything else on the non-attorney's fees aspect of it? Okay. Well --

MR. GILSTRAP: Based upon what Judge Christopher said, I am a bit concerned about the prisoner cases. I mean, the whole way that Chapter 14 is set up is that they say that if you -- if you're challenging the factual basis you have to have a hearing, and I think Judge Christopher is right, there are plenty of prisoners who file the lawsuit so they can get out of jail, and I think we need -- before we put this rule to bed I think we need to at least think about that, and I haven't really thought it out. It's of concern to me.

CHAIRMAN BABCOCK: Okay. Anything else on the non-attorney's fees aspect of the rule? Well, Judge Peeples, don't you think we ought to tackle the attorney's fees on a full stomach?

HONORABLE DAVID PEEPLES: Yes, sir.

CHAIRMAN BABCOCK: Let's take a -- let's take our lunch break.

(Recess from 12:20 p.m. to 1:21 p.m.)

CHAIRMAN BABCOCK: Okay. We're on Rule 94a, and now we're moving to the attorney's fees part of it, and, Judge Peeples, do you want to talk about it, or do you

want Lonny?

HONORABLE DAVID PEEPLES: I'd like to say two or three things before we start talking about it. You'll need this half-page handout that says "Additional language for proposed Rule 94a." This deals with attorney's fees when there's been a motion filed and the plaintiff has cured it by amendment, or dismissed a claim, excuse me, a cause of action or a party or the case and also when the movant, defendant, has dismissed a motion. Do we want to say that the attorney's fees are recoverable or not, and that's what this handout deals with.

Now, I want to make two or three points. The statute that talks about attorney's fees says nothing about rule-making. It does not invite or tell the Supreme Court to make a rule on attorney's fees, but the subcommittee decided to go ahead and say something about attorney's fees for two reasons. One was that it's helpful to practitioners who look at this rule to see in the rule that attorney's fees are in play because some people might not know that there's a statute on this, so we did it in part for that reason, and for a second reason, the second reason was that we wanted to make clear, as the statute does not, that the attorney's fees that are in play are attorney's fees on the motion and not attorney's fees in the case to date, and so for those two reasons we put in section (g) on

attorney's fees.

Now, I think it's fair to say that we talked about a bunch of subsidiary attorney's fees issues and basically decided it just wasn't worth trying to draft for, and we just didn't draft for several issues. We just ran out of time, for one thing, we decided not to, and here are some of the issues that we did not draft for. Attorney's fees on appeal, we just don't say anything about that. Who prevailed when a motion was granted in part and denied in part? Who is the prevailing party when that happens, and also can the judge order a party "pay them now" as opposed to pay them later? We just didn't go there.

Those are three issues we didn't tackle, and then in this additional handout are some issues that we talked about a good bit, but finally when all was said and done we just didn't have time and decided not to go there, and so the draft of the rule does not go beyond and take on any of these other issues on attorney's fees. It just doesn't do it, but I guess Wednesday afternoon, two days ago, there was a flurry of e-mails. I'm going to say maybe 15 e-mails back and forth where the drafting was done and proposals and counterproposals and several members, not all, came up with some language here, and I'm going to let, you know, the -- those who advocate this language talk about it. But that is their effort to come up with some

rules on what happens when the motion is filed and the plaintiff amends and cures or does not cure the objection or dismisses and also what happens when the defendant has filed it and then just backs off and dismisses the motion. Should there be attorney's fees or not, and do we deal with it? Those are the issues, and I guess I just open it up to discussion with that.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: And the proposed language doesn't mention scheduling orders, and I would be interested in what the proponents of the language think about how this interplays with routine scheduling orders that cut off pleading amendments at certain times and that kind of thing.

CHAIRMAN BABCOCK: Okay, Frank.

MR. GILSTRAP: Judge Peeples, I think, am I correct that the language on the -- the additional language is meant to go between the first and last sentence in part (g)? That's an insert there? We're keeping the first and the last sentence no matter what?

HONORABLE DAVID PEEPLES: I'm not sure if they intend it to go there or in (c) or (d).

MR. BOYD: Can I address --

HONORABLE DAVID PEEPLES: I'm going to let the advocates go there.

MR. BOYD: And, by the way, this was the result of really a continuing flurry of e-mails just between Lonny and I going late into Wednesday night and even early Thursday morning Lonny was still at it; but and I'm not sure that either of us are strenuously advocating for it; but we thought it was at least worth trying to come with some language if the committee wanted to address some of the unaddressed issues; and there's really more than just the two that were mentioned; and I think I can -- and the idea, by the way, to answer your question, Frank, is where this language goes in the rule, we didn't try to state a position on that; and, in fact, we talked about how some sentences from here may go in -- may fit better in some subsection than the other; but first let's decide whether we want them at all.

MR. GILSTRAP: Okay.

MR. BOYD: So the first issue is how quickly can the court rule on the motion, and we talked about how under the general rule it's three days, and we talked about whether the rule should say that the court has to wait longer than the general three days before ruling on a motion to dismiss.

PROFESSOR DORSANEO: That's already in our draft anyway. That's in there anyway.

MR. BOYD: The seven days is in the draft.

PROFESSOR DORSANEO: That's in "Each party must be given at least seven days' notice."

MR. BOYD: Okay.

PROFESSOR DORSANEO: So that first notice issue is not an issue.

MR. BOYD: All right. And the second -- the second is -- and third are the two that were mentioned. Can the claimant avoid risk of attorney's fees by amending or nonsuiting, and what this language proposes is yes. Now, the committee did not -- subcommittee did not reach agreement on that. There were members of the subcommittee that felt like what I call the catalyst rule should apply, which is if my motion to dismiss is the catalyst for your decision to dismiss or amend then I ought to recover my attorney's fees for a variety of reasons, but what this language proposes is that the catalyst theory should not apply so that the claimant can avoid liability by amending or nonsuiting.

Next issue, can the movant avoid liability for attorney's fees by withdrawing the motion either in response to an amendment or nonsuit or unilaterally, even though the claimant has not amended or nonsuited. Next is if the plaintiff amends can the movant still proceed with that motion as filed when amended. In other words, I don't think your amendment fixed the problem, so my motion

stands, and if so there's really two -- we figure there's two ways to do that. One is to say, yes, unless the movant withdraws the motion. The other is to say, no, unless the movant reasserts the motion and affirmatively takes the step to say, "No, I still want to go forward," and what this proposes is yes, but the movant -- no, unless the movant reasserts the motion, unless the movant files and serves a notice of intent to proceed with the motion.

And then the next issue is if the plaintiff amends can the movant file a brand new motion, and the answer we've suggested here is yes, but then gets to the question that was raised earlier, which is then how many times can you play this game? If I move to dismiss and then you wait until the day before and you amend and then I have to move to dismiss again and then you amend, and so we talked about one way to do it is to have language to give the court sort of discretion to put a stop to the abuse in whatever way, either by dismissing and awarding attorney's fees or just a semi-scheduling order saying, okay, no more amendments after this point. What we did instead was just because it was really late Wednesday night, I think Lonny stuck the word "once" in there to say, okay, you can amend once in response to the motion to dismiss and no more, and if we go that route I think we've got to tinker with the language a little bit because if you amend once and I file

a motion to dismiss, do you get to amend once on that motion as well? I'm not sure that necessarily solves the problems. So those are the issues we tried to address in this language and the ways in which we tried to address them.

CHAIRMAN BABCOCK: Okay, thanks, Jeff. Anybody have any thoughts about it? Yeah, Judge Evans.

HONORABLE DAVID EVANS: I just suggest that the issue of the amendment and then how you proceed after that is that you might want to think about whether you want to go on the original motion to dismiss. I think you should consider requiring a supplemental pleading or an amended pleading, because in the body of the rule as approved right now, in lines 12 through 14 it states that you will identify the specific reasons supporting the motion. What's going to happen in the oral argument is that the movant is going to come in and explain orally why the amendment fails, and it's going to be an add-on to the pleading and the motion to dismiss, and the person whose lawsuit is being dismissed won't have notice as to why the amendment is insufficient, and so I don't think you should proceed on the original motion because it should -- the new pleading should add something to it, and then there should be a specific reason why the amendment is not good.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I agree, but I'd like to add another reason why I think that's a good idea. The way this is written right now, the movant has to withdraw the motion in order to avoid losing and paying fees, and then later on here on lines five or six of Jeff's proposal it talks about a notice of intent to proceed with the motion after an amendment, so I think it's implicit that an amendment moots the original motion. I think that's a good policy. I think it should be assumed that an amendment moots it and that the movant doesn't need to affirmatively withdraw the motion and then if they want to stand on their motion then they can give notice of their intent to stand on their motion, but the way this is written right now, if there's an amendment you have to affirmatively withdraw your motion or you'll have to pay fees, even though you essentially won by making them replead.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Richard's issue ought to be addressed by the court in my opinion because the statute says the court must move within 45 days of filing of the motion, but the statute doesn't address the effect of an amended pleading on the motion and would suggest that the trial court is required to rule within 45 days of the filing of the original motion, notwithstanding an amended petition. So I agree that the issue needs to be addressed.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: The one little twist that you have to consider is if -- what happens if the plaintiff amends and believes that by doing so they've solved the problem, but the defendant believes that the amendment does not alter the basis for the original motion. So you still haven't pled that I had a legal right of control. All you've pled is that I had ownership of the land, and therefore, even though you've amended, you haven't changed that part, and so my motion is still good in court, and it's not moot automatically.

MR. ORSINGER: But, see, you talk here about filing a notice of intent to proceed.

MR. BOYD: Right.

MR. ORSINGER: If you just have a base rule that an amendment moots it unless the movant gives notice that they don't think it moots it and they want to go forward then the movant can give notice that they want to go forward, but I don't like the idea that a movant has to affirmatively withdraw a motion that was -- that led to an amendment or else they get sanctioned with fees.

PROFESSOR HOFFMAN: So, Richard, we do that here. The end of (4), the sentence that says -- we intended to do exactly what you said. "At any time prior to the date of the hearing or submission, the claimant may

amend the challenge claim once, and the court may not decide the motion to award attorney's fees to either party." So it has the effect of doing exactly what you said. Now, that language may not work for everyone, but that's what we were trying to do, to make a presumptive it's off the table unless, as Jeff pointed out in the next sentence, the movant files a notice of intent to proceed.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Just one wrinkle. I don't know whether you-all thought about this. If someone is actually nonsuiting a claim in response to this motion, I would assume they're going to nonsuit without prejudice, but, in fact, if the motion to dismiss had been granted, that would be a res judicata event in my opinion. I mean, I assume, you know, that you've made -- you've granted his motion to dismiss saying it has no basis in law or fact, so, you know, nonsuiting a whole claim without prejudice is different from getting the motion to dismiss granted, so I don't know whether you want to take that into account on a nonsuit.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: This is sort of a global comment over all of this, and we may have gone beyond it, but I'm still going to stake out my position.

We're talking about amending pleadings and everything to state claims or whatever. I think the statute -- I think the Legislature's intent was to get rid of frivolous, groundless lawsuits, and if somebody is pleading that they're suffering -- or emotional distress because the Martians are planting things in their brain, they can't replead that to -- you know, what is there to replead? I think they ought to be given a chance if this is going to address the kind of cases that I think we want to address and use it in a way we want to use it, they ought to be given a chance to withdraw the pleading or nonsuit it, but this -- all of this repleading, we're just getting into a special exceptions practice.

PROFESSOR HOFFMAN: How would you write a rule that encompasses cases that aren't just Martians?

HONORABLE R. H. WALLACE: By the way, NASA scientists found another planet.

MR. ORSINGER: Quit picking on Mars.

CHAIRMAN BABCOCK: Yeah, Martians are taking a beating today. Nina.

MS. CORTELL: Well, to Justice Christopher's point, let me ask her for a point of clarification. Is it everyone's understanding that this dismissal is with or without prejudice? I thought from the last meeting that the understanding was it was without prejudice.

MR. BOYD: I think we punted.
MS. CORTELL: Huh?
MR. BOYD: I think we punted.
MS. CORTELL: Oh, we punted. Oh, that's helpful. That's really helpful.
CHAIRMAN BABCOCK: Judge Yelenosky.
HONORABLE STEPHEN YELENOSKY: We talked about whether it be with prejudice, and I suggested it should be with prejudice as to that particular claim but not to any other claims that could have been brought at the same time because it didn't seem fair, but we didn't -- I don't think we ever took a vote on that.
MS. CORTELL: I think it's a fairly important issue that the practitioners would need guidance on. I had thought the sense of the committee was it was without prejudice, so if we're going to talk about res judicata then that's with prejudice.
HONORABLE TRACY CHRISTOPHER: I mean, if we're talking about a cause of action that has no basis in law or fact, that strikes me as res judicata.
MS. CORTELL: I'm not disagreeing. For some reason I had formed the thought that this committee had thought it was without prejudice.
CHAIRMAN BABCOCK: Judge Yelenosky.
HONORABLE STEPHEN YELENOSKY: I think, right,

just as Justice Christopher said, if you found it's frivolous, just from the perspective of being the judge I don't want to have to decide the same Martian case next week, so that ought to be with prejudice. At the same time, we're writing a rule, as Lonny said, for the cases that aren't the Martian cases; and if somebody pleads in a clumsy manner and that is dismissed because they don't amend or anything, I don't think they should be barred from filing a nonfrivolous suit simply because they filed one claim that was. So I don't know if we need to take a vote or not, but we didn't.

CHAIRMAN BABCOCK: Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: As I recall, the last meeting Justice Hecht looked up and found in a matter of minutes I think he said 15 cases that held a special exception that is sustained and the pleader stands his ground, that's res judicata or with prejudice. And if that's the law on special exceptions, why wouldn't it be the law on this motion to dismiss?

CHAIRMAN BABCOCK: It would be, but we're talking about nonsuiting.

MR. ORSINGER: They didn't stand their ground. They nonsuited.

HONORABLE DAVID PEEPLES: And that's what Justice Christopher said. I thought that the rest of you

were talking about if there's a dismissal.

HONORABLE STEPHEN YELENOSKY: I was, and --

MS. CORTELL: I am. I am. I think that's an issue we should clarify.

HONORABLE R. H. WALLACE: Well, you can't stop them from filing a nonsuit.

CHAIRMAN BABCOCK: No.

HONORABLE STEPHEN YELENOSKY: No.

CHAIRMAN BABCOCK: But, Nina, if you're saying that the dismissal, so you go through this whole thing, motion to dismiss is granted, attorney's fees awarded to the defendant, and you're suggesting that's without prejudice?

MS. CORTELL: No, I'm not suggesting. I'm asking that the point be clarified. I had understood from our prior discussion, apparently inappropriately, that the sense of the committee was it was without prejudice, so I had accepted that. If it's up for discussion then I think we should discuss it. I think it should be clear. As it's written I don't think it's clear right now whether it's with or without prejudice.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: When Justice Christopher made her point I thought what she was saying was if a ruling would be with prejudice and a nonsuit or

dismissal would be without, at least you ought to have attorney's fees if somebody nonsuits at the last minute. Now, that's what I thought you were saying.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Yeah. So that -- yeah, Richard.

MR. MUNZINGER: But what would be the authority for attorney's fees under that circumstance? No order is entered, and the statute only allows an award of attorney's fees when the trial court grants or denies the motion, and standard Texas law is we don't get attorney's fees unless there is a statute or other rule authorizing them. So a nonsuit would not allow an award of attorney's fees.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Well, except that pending motions survive nonsuits in certain circumstances. I know you don't want to use the sanctions rule, but a pending motion for sanctions survives a nonsuit and can still be ruled on.

MR. MUNZINGER: Which, again, raises the problem. The State Bar subcommittee viewed this as a sanctions rule. Insofar as I know the Legislature didn't. Sanctions are a punishment. They're a punishment for attorney misconduct or party misconduct. You didn't do

discovery properly, you didn't answer the questions, you didn't produce the documents and you should have, you've dragged this out unnecessarily and spuriously. Those are sanctions. That's not what we expect of lawyers. We don't expect lawyers to be perfect in the drafting of an original petition or of a motion. This cannot be considered a sanction in fairness to the bar. My good god, what kind of law would it be if the Legislature can adopt a statute as terse as this and have it be considered sanctions for an attorney? What an amazing rule that would be.

CHAIRMAN BABCOCK: I knew we should have had lunch. He has got fire in his belly, doesn't he? Judge Christopher, and then Richard.

HONORABLE TRACY CHRISTOPHER: I agree with you. This shouldn't be considered a sanctions motion, and sanctions, if someone gets an award of attorney's fees under this for all of the reasons said, but I was just using that as an example where sometimes a pending motion can survive a nonsuit; and, you know, as best I know that's court made law that a pending motion for -- can survive a nonsuit.

HONORABLE TOM GRAY: It's actually Rule 162, second paragraph, "Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse

the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees, or other costs." So under the dismissal rule if there's already one of these motions pending, motion to dismiss --

HONORABLE STEPHEN YELENOSKY: If it's a motion for sanctions.

HONORABLE TOM GRAY: Pardon?

HONORABLE STEPHEN YELENOSKY: If it's a motion for sanctions.

HONORABLE TOM GRAY: No. It says specifically attorney's fees, a motion for attorney's fees, so it differentiated it from sanctions in the rule.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: This is a very important point, because in my view the context of the discussion has always been that either side would have an opportunity to back down before the hearing --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: -- and we would step out of all of this fee-shifting process, and now what's going to happen is that by simply filing a pleading you may be committing yourself to paying the defendant's attorney's fees if they file a motion to dismiss and you think better of it and nonsuit your lawsuit, and first of all, that's

going to discourage people from nonsuiting because you're going to lose for sure if you nonsuit and pay fees; whereas if you hang in for the hearing there's a chance you might win and not pay fees.

It seems to me like we ought to encourage the dismissal of bad lawsuits after someone is faced with a motion to dismiss. But if this basically has become a rule that if you file a pleading then you may have to pay attorney's fees even if you nonsuit after seeing a defense that's pled or something like that, then we've just abrogated the American rule for attorney's fees, and it's very disturbing to me because especially at this scope of the kinds of claims that we're now going to be disposing of here, which to me were traditionally summary judgment claims but now motion to dismiss claims, and so I really -- I think there's some salutary effect to having an opportunity to take a second look and get out of it without paying a penalty.

CHAIRMAN BABCOCK: Buddy, and then Professor Dorsaneo.

MR. LOW: Historically back in '87 we went through a similar argument. Remember the Legislature passed an act that if you sued the wrong defendant -- I'm stating it exactly the way the act was -- that then you were sanctioned, and the Court and the committee felt that

you should be able to dismiss that lawsuit and then avoid that, and that's the argument we had with the Legislature and declared their act unconstitutional, and it upset them somewhat, but this committee was unanimous on that and the court to give you a chance to do right.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, some clients probably would be dissuaded from filing these motions if they thought they were going to potentially have to pay the other side's plaintiff's lawyer's attorney's fees, but some clients will not be concerned about that relatively insignificant amount of money from their standpoint, but they will be dissuaded from filing these motions if they think that, well, it will just get amended and we won't get attorney's fees, so there's no real point in using this procedural vehicle.

I think if plaintiffs have to pay attorney's fees when they nonsuit or dismiss claims, that that will -- that that would be a bad thing, you know, because we'll have more motions, and we'll have people having to pay attorney's fees when they're fixing problems that they didn't really intend to create in the first place.

CHAIRMAN BABCOCK: Frank, then Richard Munzinger.

MR. GILSTRAP: I think the Legislature has

decided this point. Section 102 of the bill says that "The court shall award costs and reasonable attorney's fees on a trial court's granting or denial of a motion to dismiss." By inference, if the court does not grant or deny the motion to dismiss it shouldn't award attorney's fees. However, Justice Gray's reading of Rule 162 gives me pause, and while I think this legislative provision should trump the language of Rule 162, I think we ought to make it clear.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: Along with what Frank just said, the Court and maybe this committee wants to address the question of whether or not it wants to resolve the argument if there is an argument as to whether an award of attorney's fees under this rule is a sanction or not a sanction. A lot of very good lawyers at the State Bar committee apparently unanimously concluded that it was a sanctions rule, and that was the basis of their recommendation for all of the procedures that were outlined in the State Bar's committee as to how this rule be written, and if people of that intellect and that experience are concerned or believe that it's a sanctions rule, I think maybe either this committee or the Court should tell the bar it is or it isn't a sanctions rule, because you're going to have litigation over the issue.

The plaintiff nonsuits, and I say, "Wait a minute, Judge, I had a claim for affirmative relief pending. Under a claim for affirmative relief you dismiss this case, this is a sanctions rule, I'm entitled to my attorney's fees." That issue is raised. It ought to be resolved by the court in the drafting of the rule. I don't -- I believe the committee should address the question of whether it is a sanctions rule if the Court cares for the committee's thoughts on it.

CHAIRMAN BABCOCK: If it's nonsuited isn't your motion moot?

PROFESSOR DORSANEO: Only if you say it is.

MR. MUNZINGER: I would think it -- I would think it would be, but again, if you look at the nonsuit rule and the cases that interpret the nonsuit rule, if a party has a sanctions motions pending, nonsuit doesn't trump the sanction motion.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: The court is required to hear the sanction motion, rule on it, and if the person seeking sanctions wins, grant the sanctions, whatever the court determines them to be.

CHAIRMAN BABCOCK: But this, the statute says that the attorney's fees can only be awarded pursuant to the motion, and if the motion is moot, how can you have

attorney's fees awarded?

MR. MUNZINGER: Well, I don't know, but Bill was arguing the direct contrary to what you just said, and I have to assume --

CHAIRMAN BABCOCK: Well, I'll ask Bill then.

MR. MUNZINGER: There must be some concern over whether the court does or doesn't have the authority to do that, and again, here's the State Bar that said it's a sanctions rule. I'm very concerned that you sanction people who draft a bad petition, and that's not where my heart lies politically or philosophically with the plaintiff generally, but we're addressing citizens' rights to come to court and seek relief for claims that they may or may not believe in good faith have merit, and for those that believe they have merit, even if they're poor pleaders or they have a marginal claim, we ought not to be keeping them from coming to our courts and seeking relief in a free society and punishing them if they make a judgment mistake.

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: So the first thing I want to say is I just think it would be helpful to focus back on Jeff's, by my count, five different issues and just point out we're only talking about the second of them. So just as a quick repeat, one, how quickly can the court rule was an issue. Our rule says seven days. I, frankly, think it

should be a little longer, but, I mean, seven is better than three in my view, but that's a question.

The second one, the only one we've been talking about, which is what happens if you nonsuit or amend, should we say anything, and if we say anything, what should we say. The third one, again, as Jeff pointed out, was does the movant have the right to withdraw the motion. I think our entire committee felt that something -- that we felt that was appropriate for them to have that, and that just takes attorney's fees off the table. Fourth, if you amend can the movant continue and/or file a new motion, and then there's the related issue that was raised of whether it would be better to have them file a whole new motion. So I guess that's related, and then, finally, if there's an amendment how often would we let them do it, and maybe related to that, as Jeff points out, does the language about "once" actually get us there.

And then the last thing I'll say and then I'll stop is as to the second issue, the only one we've talked about so far, my own view is it is better to say something than not because if not courts are going to be debating this. One of the ways they're going to debate it is trying to figure out whether or not the movant should be called the prevailing party if the amendment was made or whether or not we should reward the pleader for doing the

right thing. I mean, so litigation if we don't answer this question; and also the merits of it on the policy, boy, I thought Richard raised a point I hadn't thought of, which is if you're going to allow attorney's fees after a nonsuit, you totally discourage people from doing the right thing. That's a funny rule to have here, so and my own view is this rule hits it in the right place, and Richard has added yet another reason in my thinking as to why.

CHAIRMAN BABCOCK: Bill, you look amused.

PROFESSOR DORSANEO: Well, I'm not -- I'm amused, I suppose.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, if this motion is akin to a summary judgment, currently you can file a motion for summary judgment and a request for sanctions and a plaintiff can nonsuit and you can still proceed with your sanctions. So, I mean, that's the current law, even though the plaintiff's done the right thing in response to your motion for summary judgment in dismissing their claim, but as to timing, I would prefer -- I don't like the way it's written here in terms of the day of the hearing because too many things have to happen at 5:00 o'clock the day before the hearing. So I would prefer like a 10-day rule, 10-day notice, and you've got to amend

at, you know, day seven, and so that the movant then has three days to decide to either get an amended motion on file or withdraw their motion, and I agree that we have to worry about oral statements made at the hearing to support an argument with respect to the amended motion. That's why I would prefer that they actually file a written amendment in that three-day time period if they want to go forward.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Timingwise.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, with a motion for sanctions you don't have to award attorney's fees.

HONORABLE TRACY CHRISTOPHER: No, you don't but --

HONORABLE STEPHEN YELENOSKY: And so to me that's an important distinction, because you say attorney's fees claims or motion for sanction survives a nonsuit, and they can go ahead and proceed on their motion for sanctions, but they might or might not get attorney's fees. If they can proceed on their motion for attorney's fees after a nonsuit under this rule then I've got to award fees. To me that's a difference that deserves some attention.

CHAIRMAN BABCOCK: Okay. Yeah, Nina.

MS. CORTELL: There's always the analysis of reasonable and necessary, however, and I think that gives the trial court discretion, you know, to do what's right in a particular circumstance.

HONORABLE STEPHEN YELENOSKY: Well, we had a conversation about that, Lonny and I did, I think. I think I have latitude on reasonable and necessary to say you shouldn't have taken those depositions before you filed your motion to dismiss, but I don't think it's an equity determination like the Declaratory Judgment Act or family law, and I don't think it would be appropriate for me to say, "Yeah, you needed to file the motion and spend two hours to do it, and your attorney's fees for $300 an hour are reasonable, but I'm just not going to award them." I think that would be abuse of discretion.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Chip, I think any time you get into saying so many days before that then you run into conflict with other things pertaining to days, and I think the beauty of the way it's drafted is at any time prior to the hearing. That prevents me from going down and let me see what you got and then I can dismiss it right during the hearing and we've gone through all that. So I think the beauty of it is the way they put it, at any time prior to the hearing.

HONORABLE TRACY CHRISTOPHER: But you can amend at 5:00 o'clock the day before and then that would foreclose the movant from being able to withdraw, because, you know, it would be 5:01, which is the next day.

MR. LOW: Then but don't you run into amendment problems and dates and this must be done with this many days if you say seven days?

HONORABLE TRACY CHRISTOPHER: Yes, but having two things that have to happen by 5:00 p.m. on the same day is troublesome.

MR. LOW: Well, what's wrong with what they have done?

HONORABLE TRACY CHRISTOPHER: That's what's wrong with what they've done. Both things have to happen at 5:00 p.m. the day before the hearing.

MR. LOW: Not bad.

HONORABLE TRACY CHRISTOPHER: But if you were the movant and somebody nonsuited at 5:00 p.m., you wouldn't have time to withdraw, and then you would be the loser the next day.

PROFESSOR HOFFMAN: You don't have to withdraw. It's off the table.

MR. LOW: There are no losers. The court hadn't ruled.

HONORABLE TRACY CHRISTOPHER: Well, if we

pass that.

MR. LOW: There's no loser.

CHAIRMAN BABCOCK: Pete, then Carl.

MR. SCHENKKAN: I wanted to call attention to a missing part of the discussion, and maybe this has been covered by someone else and maybe voted down, perhaps unanimously, but --

PROFESSOR HOFFMAN: And took your name in vain while doing it.

MR. SCHENKKAN: Yes. I'm interested in exploring the possibility that we just not have (c) at all, that whatever happens on attempted amendments or nonsuits or whatever happens and it is factored in to the attorney's fees on the motion. The motion stays on the table, and it is granted or denied in whole or in part. Part of what the judge takes into account is, well, the only thing you had to do was get your motion on file, and the next day he nonsuited. The next day he pled a real cause of action or whatever, and just -- I mean, it seems to me we're creating all of these other complications by trying to figure out how we're going to micromanage this deal from the rule, and I'm not sure we're gaining any net ground, and we do have some room for the trial judge to deal with this in a way that's consistent with the statute, which says we're going to have these motions and they have to be granted or denied

within 45 days and the prevailing -- in whole or in part, and the prevailing party gets their attorney's fees, and it seems to me that kind of captures the rest of it enough for the purposes of the rule.

CHAIRMAN BABCOCK: Carl, then Roger.

MR. HAMILTON: Well, the (d) rule says each party has to be given seven days' notice of the hearing, but the amendment over here says the hearing must not occur until at least seven days after the motion is filed. One is based on the file time, one is on the notice. I don't know if that's intended, but -- and I guess it would work that you could still have the notice has to go out and give everybody at least seven days' notice of the hearing, but the hearing still couldn't be for seven days after it was filed, but I don't know if that's the way it was intended or whether it should both be based upon the notice rather than the filing.

CHAIRMAN BABCOCK: Uh-huh. Okay. Roger.

MR. HUGHES: Well, when I was struggling with this whole issue about amendment I finally decided that maybe, as was suggested earlier, that ought to be just part of the mix about when the judge decides who prevails and who didn't. Well, yeah, you had to amend to cure the defect, but, movant, you should have known he was going to do that. I mean, it was obvious, big as Dallas, that that

was something that could be easily taken care of or -- and, I mean, you can look at all these different ways. It's like the plaintiff could say, "Why did you put me through all of this maneuvering me because you knew I could in good faith cure all of these allegations? So why should you be deemed the winner?" On the other hand, I could see the legislative intent was, you know, you should have thought about -- if your claim is frivolous you should have thought about that when you filed it. It's a little too late.

So I thought maybe one way to deal with it is just say, yeah, you can amend, but that may not -- that's just part of the mix. The only thing is that I ran into, you can't consider evidence for -- and the only way then to, so to speak, allow the judge to weigh all of this out is to consider the former pleading and the amended pleading together in order to decide the motion, but then the general rule is a former pleading is no longer a live pleading, and it would have to be treated as evidence as opposed to the live pleading. That was what stopped me on that one.

CHAIRMAN BABCOCK: Okay. Pete.

MR. SCHENKKAN: But it's evidence only for purposes of attorney's fees, and that's okay under the statute.

CHAIRMAN BABCOCK: Okay. Anything else?

What about -- what about the movant withdrawing the motion? We got any complaints about that? Everybody think that that should be permitted? No comments about that? Okay.

PROFESSOR DORSANEO: I think it should be permitted.

MR. ORSINGER: I'd like to ask a question about that. We're not talking about withdrawing the motion after an amended pleading because this assumes that an amended pleading exonerates the movant. We're talking about someone files a motion and then there is no amendment and no nonsuit and then they withdraw it before the hearing. I'm not sure I understand what public policy is advanced by that. In other words, doesn't that just encourage these guys -- whoever is -- whoever wants to just out spin then drive the other side into exhaustion to just file these things and then withdraw them, and there's an amended pleading, so they file another one, and they withdraw it, and I don't know, I'm not seeing -- I don't see necessarily the public policy.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But if somebody continued to do that they could be sanctioned. There doesn't have to be a rule on that.

CHAIRMAN BABCOCK: Okay. What about the language about how often amendments can be done? We say

here once, "may amend the challenge claim once." Is that sufficient? Yeah, Roger.

MR. HUGHES: I was of two minds about this. My feeling was either you put a limit on amending, which I think ought to be once, or you say this is a dispositive motion. It's like a motion for summary judgment, and you're cut-off for filing pleadings seven days before the submission or the hearing, one of the two.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: I think most of the special exception law gives you one amendment --

MR. LOW: Right.

PROFESSOR DORSANEO: -- rather than consecutive amendments, but I'm not sure all of the cases are following that pattern.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I think there's a drafting issue here. I may be wrong, but because it's in the sentence, "At any time prior to the date of the hearing or submission the claimant may amend the challenge claim once," by tying those two things together, if there's a second hearing, it may seem that they can amend again. Is that a problem, because it wasn't intended? In other words, if somebody amends the day before the first hearing,

then that goes away, right, and you don't have a hearing the next day, but they file a new motion to dismiss based on the amended claim. Now you've got a new hearing, and does that mean the plaintiff can amend again? This would seem to allow that. Because now there's a new hearing --

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: -- and the way it's written, I think if you mean you can only amend for one time and only one time, it probably needs to be a standalone statement. "The claimant may amend the challenge claim once," period, and then have you a second sentence on the timing thereof.

MR. LOW: Right.

CHAIRMAN BABCOCK: "Claimant may only amend"?

HONORABLE STEPHEN YELENOSKY: "The claimant may amend the challenge claim once," period, is fine. It's just that when it's coupled with the timing phrase it actually may get more than that.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: While we're on that same sentence, "At any time prior to the date of the hearing claimant may amend, and the court may not decide the motion or award attorney's fees." That doesn't seem to follow. Doesn't the movant have to do something based on the amendment? Shouldn't it say that the movant may decide not

to pursue the motion or something, in which event the court may not decide the motion or award attorney's fees, but just because there's an amendment does that automatically deprive the court --

CHAIRMAN BABCOCK: Uh-huh.

MR. HAMILTON: -- from doing anything, or does the movant have to do anything with it?

PROFESSOR HOFFMAN: That was the idea. That was the idea, was to make it presumptive, the filing of an amendment presumptively withdraws the motion.

MR. HAMILTON: Any kind of an amendment? If I change the word "a" to "the," that's an amendment. That deprives the court from doing anything.

PROFESSOR HOFFMAN: Yes.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I had a thought very much like Carl's, and I wonder about adding something like "amend the challenge claim once in response to the reasons identified in the motion," so it's clear your amendment has to try to address the objections raised in the motion.

MR. BOYD: We thought we addressed that with the next sentence that says, "Nevertheless, the movant can file and serve a notice of intent to proceed," which then takes away the presumptive withdrawal, so it leaves it up to the movant to decide.

HONORABLE STEPHEN YELENOSKY: And if you tie the "once" again with that then it seems like again you can amend because different reasons are given on the amended claim, so I still think it needs to be a standalone sentence.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: There may still be some potential for abuse, though. So suppose there are two failed objections and a defendant only gets one and then holds the other one back so they can kill them after they get their one shot.

MR. LOW: Well, he shouldn't do it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I just want to be sure that the record reflects that this is only -- this limitation on limit only applies to the sanction process of the fee award process, that if you survive dismissal you are free to amend the claim as many times as you want. This limitation on one amendment is only for purpose of this ruling, and I'm not entirely sure that that's clear, but I would like -- that is surely what everyone means, isn't it?

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I'm concerned that a one amendment rule may without any discretion of the trial judge for good cause shown lead to the dismissal of

meritorious claims. The object is to get rid of frivolous claims; and eventually you will exhaust the pleader of frivolous claims; and you will be able to sanction them, award attorney's fees, and dismiss a case; but I don't think pleading limitations without some sort of good cause exception ought to exist because we shouldn't be in the business of getting rid of meritorious claims because of somebody's lack of skill as an attorney or as a pro se person pleading a claim, and I just would think that the trial court should have some discretion to consider it, especially on an amended process where the complaint is amended or there is some game playing going on and some back pocket material being held out and then come into the oral hearing and they say, "Well, Judge, I can cure that, I'll plead that."

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think that can be cured if the motion can only be granted based upon what's stated in the motion, so if you claim that there's a defect in the petition on a ground, that's the only thing that you could grant the motion to dismiss on. You couldn't come after an amendment on B grounds; but, you know, I think that we don't want to get into this sort of endless refiling and re-amending; and, you know, I think we

should do it more like the summary judgment practice. Motion to dismiss should be filed and served 10 days before the hearing. Respondent, nonmovant, claimant, however you want to say it, may amend or nonsuit no later than three days before the hearing. After an amendment the movant can, A, withdraw the motion, or, B, proceed with the motion on the original grounds in the motion or upon supplemental written ground.

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: I agree with Nina. It has troubled me since the beginning of working on this rule in the subcommittee that we don't have a clear idea of if it's dismissed with and without prejudice and to the extent of res judicata, which, of course, implicates due process; and, Justice Christopher, if this is a summary judgment on pleadings with no evidence then I agree with you that we need a lot more safeguards and time frames than we maybe have worked into the rule.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: There's been some discussion or there was at least a mention of the judge hearing an argument, saying, "I'm going to allow you to replead that," but the way this rule is written I think you have to replead before the hearing or else the court is required to dismiss. So if you get into court and you are able to

articulate a legitimate cause of action and the judge says, "Well, if you'll plead that then the motion to dismiss will be denied," is the way this is written, allow that dialogue to go on or do you have to -- does the judge have to dismiss based on the pleading as it existed at 5:00 p.m. on the day before the hearing?

MR. LOW: Isn't the judge impliedly saying you don't state it, but you can, so you've lost?

MR. ORSINGER: I read this to say that you can't go into court and walk out of there with an understanding that if you amend the pleading in the following way you won't get dismissed. The way I read this, if it's not changed before 5:00 o'clock on the day before the hearing then you must be dismissed no matter what the dialogue is with the judge, and I don't think that's smart because a judge may be able to figure out in the discussion that they actually meant to plead something that's legit and just didn't do it effectively, and yet the way I read this the judge doesn't have the power at that point to say, "If you'll amend, I won't dismiss." That's the way I'm reading this.

CHAIRMAN BABCOCK: Well, because doesn't the statute and the rule say that he must rule within 45 days?

MR. ORSINGER: Well, you know, I think that's fine. I mean, if a judge has a conversation with a lawyer

and realizes there's a -- and the lawyer both, they both realize there was a legitimate claim, it just wasn't pled properly, why shouldn't the judge be able to deny the dismissal? Even if you allow the award of fees, I don't care, but forcing a dismissal when a judge and the lawyer both agree this could be pled properly if given a chance, I don't see that.

CHAIRMAN BABCOCK: Well, the rule that you've got here on (b) says it must be granted or it must be decided, but we agree to amend that to "must be granted or denied within 45 days." Does that give him the discretion not to do one of those two things?

MR. ORSINGER: Well, surely the whole thing has to be dismissed within 45 days if there's no amendment as made, but I may not understand this correctly; and I haven't studied it as closely as the people on the subcommittee; but it does seem to me the decision to amend or not must be made before you go into the courtroom; and if you stand on your pleadings and you haven't pled it, you lose, even though you might have pled it correctly; and the judge is convinced you could plead it correctly; and a judge may be able to say, "Well, I'm going to recess the hearing," or there may be some game you can play; but I'm not sure I'm getting the way this rule works.

MR. LOW: But is the judge supposed to tell

you how to plead? I mean, is he supposed to do that, or is he supposed to rule on the pleadings and what y'all have before him?

MR. ORSINGER: Well, you've got some messy pleadings here where you can't tell for sure what the cause of action is or something. So you're in court, the lawyers are arguing with each other. I have stated a claim; they say I haven't; and through the dialogue you understand that, yes, well, actually they haven't pled this correctly, but they could; and so do they have the -- does the judge have the opportunity even to say, "I'm going to give you the chance to plead this correctly based on our discussion"?

CHAIRMAN BABCOCK: Marisa has got the answer.

MS. SECCO: Well, I think I can tell you what the subcommittee was thinking, which is, no, the judge cannot at the hearing say, "I'm going to allow the claimant to amend their pleading and not grant or deny the motion to dismiss based on whatever the pleading is at the hearing." The judge has to decide based on whatever the pleading is at the hearing, should the motion be granted or denied. But I do think that this sort of plays into what Nina was talking about on whether or not the dismissal should be with prejudice or not, because if the judge is left with the discretion to dismiss without prejudice at that point

the claimant could come back in and refile their claim, and so if a judge thinks you've just -- you didn't amend, you should have amended, you can't amend to fix this claim, but I have to grant this motion to dismiss, I'll grant it without prejudice and you can come back and refile. I don't know if that's something the subcommittee was really thinking, but I think if you don't address whether or not the dismissal is with or without prejudice, that is left open.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Well, I feel like we're rehashing ground from last time, and I may not have stated it as well as I thought I did, but the point I tried to make last month was it was not the intent of the Legislature to just simply provide for an award of attorney's fees on the grant or denial -- in the context of our pre-existing special exception practice, that this creates a different basis for dismissal, different than the currently existing special exception practice, and that it's intended to bribe for the early prompt dismissal so that there would be no basis for a court once it's submitted, that was the phrase I kept saying last time, whether or not there's a hearing. Once the claimant decides to let it go before the judge, there's no amendment allowed. The judge doesn't have that discretion. The judge has to either grant or deny, the

language of the statute.

CHAIRMAN BABCOCK: Judge -- Justice Gaultney, sorry, you had your hand up before.

HONORABLE DAVID GAULTNEY: What about the concept of giving the trial court some discretion on good cause to dismiss without prejudice? I mean, it seems to me that it's a with prejudice rule because it has no basis in fact or law, but it's early on, it's an early motion, and perhaps -- you know, we have right now the nonsuit without prejudice. You can elect to do that, or you can go to the hearing and it's with prejudice. Maybe there needs to be a middle ground option that the trial court can exercise for good cause.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, when we discussed the prejudice thing earlier I was reminded that with special exceptions it is with prejudice, but I'm not required when I decide a special exception to dismiss, and I can do that any number of times to replead, can't I, right? So I'm not constrained in that way, and so are we saying that we can't write this rule to allow it without prejudice because it differs from special exceptions in that way? Because if we can write this rule without prejudice, shouldn't we do that? It seems to save a lot if -- eliminate a lot of problems, and it doesn't really

take away anything.

If the person files the same lawsuit again, they can file the same lawsuit again whether it's res judicata or not; and, in fact, if they file it again and you can file a motion to dismiss again, well, then theoretically you can get fees again; whereas, I don't think you would with res judicata, would you? I mean, I guess you could under 13 that it's frivolous or whatever, and if the person is filing these suits because they have a mental illness, it doesn't really matter. I mean, they're going to file them again, you're going to dismiss them again under this rule or under res judicata, and no way is the other side going to get fees anyway. So I don't really see a downside unless we are saying that as a matter of law it would be improper to do this without prejudice, because if we can do it without prejudice I think there has been a number of things pointed out that would make this a lot easier.

CHAIRMAN BABCOCK: Pete, then Justice Christopher, then Nina.

MR. SCHENKKAN: I'm a little confused as to the problem here. If this were a dismissal with prejudice because the lawsuit as pled has no basis in law or fact, that still doesn't stop the same person from filing a new lawsuit that does have a basis in law and fact, and that

wouldn't be barred by the prejudice.

HONORABLE STEPHEN YELENOSKY: If it could have been brought in the same lawsuit. If it could have been brought, it's cleared out.

HONORABLE DAVID PEEPLES: Same transactions.

MR. SCHENKKAN: Okay. Yeah. Yeah. Okay.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I would like to speak in favor of it being with prejudice and not have the without prejudice option. One of the things in order to declare someone a vexatious litigant, you have to have five adverse findings against a plaintiff; and I would certainly think that if -- my idea of this rule is to get rid of truly frivolous cases; and, you know, if it's not going to be with prejudice I'm not sure that would be a final determination adverse to the plaintiff under our vexatious litigant rule; and, you know, I think it should be.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: If it is -- we haven't talked much about it. If it is, it would be like the dismissal of a health care liability claim when there's not an adequate expert report, and a nonsuit does not moot that motion. You could even raise it on appeal. So we would have to think why should this procedure allow for a

nonsuit to moot the motion and the, what is it, Chapter 74 of the Civil Practice and Remedies Code does not.

CHAIRMAN BABCOCK: Nina, then Jeff.

MS. CORTELL: I was just wondering if there was any legislative intent that we could bring to the conversation, and I would maybe ask Jeff and Jim that, what's you-all's sense of that? I mean, it's a pretty important question.

MR. BOYD: Well, to answer Justice Hecht's question, because here the statute says that the court must award attorney's fees upon granting or denying the motion to dismiss, and if the nonsuit moots the motion to dismiss, the court can't grant or deny the motion to dismiss, so the statutory issue of whether the motion is still alive after a nonsuit is different here under this statute than it is under --

HONORABLE NATHAN HECHT: Why is that, because you move to dismiss a health care liability claim the claimant nonsuits. The movant is still entitled to a ruling on the motion and if it's denied can appeal that and insist that it was right, that the dismissal be with prejudice, and that he be awarded attorney fees.

MR. BOYD: So I guess the question then is if I move to dismiss your cause of action for negligent infliction and you amend your petition to drop that cause

of action, is there still a -- "right" is not the word -- a nonmooted motion that the trial court can rule on?

HONORABLE NATHAN HECHT: Well, again, if you sue two doctors and one of them moves to dismiss or both of them and you decide after you see the motion and think about it some more maybe you shouldn't have sued doctor two, so you nonsuit doctor two, that doctor can still insist on a ruling on the motion to dismiss and make sure that it's with prejudice and get attorney fees.

CHAIRMAN BABCOCK: And why is he entitled to that? Is that judge made law or a statute or what?

HONORABLE NATHAN HECHT: No, it's a combination of the statutory right to dismissal with prejudice and attorney fees and Rule 162 that says a nonsuit was not prejudice pending claims or affirming relief.

MR. BOYD: And I guess what I'm saying, I don't know the language of that medical liability act, but here and what I think -- and, by the way, I'm arguing in favor of the plaintiff's case here, but I'm just telling you how I think through it is 162 doesn't apply here because the statute, section 102 of the House bill, says that upon granting or denying the motion the court shall -- or must award attorney's fees to the prevailing party; whereas, here, once there's a nonsuit there's no motion to

grant or deny anymore because that motion is mooted by the nonsuit.

HONORABLE NATHAN HECHT: Why is it true here but not with health care liability claims?

MR. BOYD: Well, again, I have to look at that act to see if that is the basis on which -- the point at which the court awards attorney's fees or if the statutory language allows the award of attorney's fees in spite of the mooting of the motion.

HONORABLE NATHAN HECHT: No, it's like Richard was saying earlier. If you've -- if the defendant in a health care liability claim files the motion, he's entitled to a ruling on the -- whether the expert report is adequate at that point. Now, maybe there's been a -- maybe there will be a time to fix the report, but whenever the motion is ready to be ruled on, you can't -- you can't afford the ruling by nonsuiting the case; and so you can't say, well, you nonsuit the claim, maybe you nonsuit the entire lawsuit, but there's still a motion to say the claim should have been dismissed, not nonsuited, and therefore, it should be with prejudice and I should recover my attorney fees; and if this is going to be different, I guess you would want to know why; and if you can't nonsuit and avoid the consequences of the motion then it's hard to see why you should be able to withdraw the motion and avoid

the consequences.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: See, and there's more protection here because once it's filed you have a right to amend that they don't have I guess under the health care, so if you can't amend and correct it, why let you file it later? I mean, you know, if you can't get it -- you're already put on notice that it's defective, and you can amend, and if you can't state it in an amendment, why shouldn't it be with prejudice so they can't file it again?

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: And maybe that's the answer, the fact that it's a -- it works both ways, that you ought to -- you ought to permit the withdrawal of the motion just like you ought to permit the withdrawal of the lawsuit, and in that sense it's different from the health care liability statutes. It's a different scheme because it allows you to withdraw the motion and avoid the effect. I would argue that it ought to be with prejudice and -- but that there might be circumstances under which for good cause the trial court decides to dismiss it without prejudice, even though it wasn't nonsuited, but that there be some showing or some reason, some -- that in general, though, it ought to be with prejudice because the basis for it is it has no basis in fact or law.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: A motion to dismiss in a health care liability case is not based on the pleading. It's based on the expert report, so you're not -- you're not asking the same question in a Chapter 74 context as you are here, so amending the petition will not cure an expert report defect in a health care liability case. Dismissing the case doesn't cure the defect in an expert report. That, as I interpret the logic of that line of cases, you've got 120-day deadline to get a qualifying report. That's an absolute requirement. It is not tied to the pleading, the appropriateness of the pleading, or whether it's a frivolous pleading. It's a question of weather the report satisfies the standard.

So, I mean, you're kind of talking about two different things, and, therefore, you can I think very much rationalize the concept that a nonsuit of a claim that doesn't satisfy the standard in this rule moots the motion, but you cannot cure a challenge to an expert report in a health care liability case by nonsuiting your lawsuit because you've still got a deficient report. So you've got to either fix the report or not. Dismissing the case doesn't make that failure go away; whereas, in here, if you -- I mean, the idea of disincentivizing good conduct, that is you've got a litigant who files a bad case, they

get notice you've filed a poor case, why would you want to disincentivize them from wanting to nonsuit the case and make it go away?

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I just would like to -- I think that when the Legislature adopted this it didn't speak to any pleading deadlines. There is nothing in the act that states that, and they were aware of the current rules on pleading deadlines and the Court's case law on amended pleadings, and I would think that the Legislature would have -- be interpreted to intended that those pleading rules would prevail, and if it's anything it would be Rule, I believe, 63 on seven days before trial and that leave can be granted upon good cause shown within that time period if it's appropriate.

Now, I would go so far as to tell you that that motion in my reading could be made at the hearing, maybe on a Big Chief tablet if someone could still find one, and but it could be made after the trial judge hears the argument between two lawyers who are intellectually honest and they just simply disagree and the trial judge says, "You know, close call, but I think that has to be pled." Person says, "I move to amend." Now, I would go that far, but I would certainly not set up new pleading rules for this that we don't have in summary judgment or

final trials.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I just note I looked at the statute on expert reports, and it does require that the dismissal expressly be with prejudice of the claim. So that differentiates the health care statute from the statute we're dealing with where it doesn't specify --

CHAIRMAN BABCOCK: Richard.

MS. BARON: -- whether the dismissal is with or without prejudice.

MR. MUNZINGER: And that same statute requires an award of attorney's fees. It's 74.351 whatever, (b)(1) and (2), so that that does distinguish it, and as he said, it applies to the filing of an expert report as distinct from an attorney drafting a pleading. That goes to the merits of the claim really and not to the merits or the sufficiency of the pleading.

As to Judge Evans' point about not amending or talking about amending, the Legislature was silent on amending. It seemed to me when I first read the statute that they were asking the Court to adopt a rule similar to 12(b)(6) and 12c, the Federal rule for judgment on the pleadings; and the Federal Rule 12c says, "After the close of the pleadings" -- and of course, in Federal court, as we all know, you can amend within 20 days of the preceding

pleading, et cetera, and once that last 20-day period has expired the pleadings are arguably closed unless a motion under Rule 15 is filed.

We don't have that in the state court proceedings. We have amendment of pleadings up to seven days before trial, but if the Court is adopting a new rule that allows for dismissal on the pleadings, there should be nothing that would prevent the Court from imposing a reasonable time limit that addresses that issue. I would be far more concerned if you didn't do something like that because of the argument that you've done something to change our standard rule that pleadings can be amended within seven days of trial and our standing rules that you can plead notice pleadings and what have you. I don't think they intended to work a revolution in our practice except for adopting some limited rule that allows for judgment -- disposition for judgment.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So I may be mischaracterizing some of the conversation, but it sounds to me a little bit like we may be confusing the right to amend and what the rules provide there with the question of what is the effect of an amendment or a nonsuit and whether the rule should address it, and I want to suggest that I think that some of this may be -- whoops, sorry. Some of

this may be our fault by putting in the word "once" that maybe -- again, I didn't totally think we needed it. I was sort of convinced by evil forces -- I'm sorry, by others.

HONORABLE DAVID EVANS: Forced by Martians.

PROFESSOR HOFFMAN: It may be that we could take out the word "once" would fix it, but just to kind of get to the nub of what I'm saying, I think what mostly Jeff and I were focused on when we were trading back and forth drafts was the question if you amend or if you nonsuit, should there be an opportunity for the court to rule on the motion, have to decide who won, and then necessarily have to decide attorney's fees, and we came down on the same side. We both felt that it was better to say, no, the court doesn't decide and thus doesn't have to either pick a winner and a loser or pick attorney's fees, and so maybe it would clean everything up if you just took out the word "once," and then we can debate about the whole issue of whether we need that or not or whether we should have it, and if you just have the language essentially that's in (2) and (3) about a nonsuit and had it be basically identical as to an amendment.

So basically if at any time prior to the hearing or submission the pleader nonsuits, that's it, the motion is off the table. If at any time prior to the hearing or submission the pleader amends, that's it, the

motion's off the table, with the proviso in the very next sentence that Jeff has pointed to several times that the movant is certainly free to say, "No, I want to urge my motion," and so, again, the concept would be we just set the rule there.

Now, why set the rule there? Why is that a better place to set the rule than a rule that says give attorney's fees? We've articulated, but just to repeat, I think, one, it avoids litigation over who won and who lost. Sometimes we're going to argue that you amended, you should be rewarded for amending and you should be the prevailing party. The movant is going to see themselves as a catalyst, so we just avoid all of that litigation related.

Number two, we facilitate a statutory purpose, which is within a very short time of filing a lawsuit the movant got what they wanted. They didn't also get attorney's fees, but we don't always gild everybody's lily, and that's okay. So the statute is doing what the Legislature wanted to do, and then finally, you still have Richard's point which remains unanswered and is very persuasive to me, which is if the rule says you can nonsuit and still have attorney's fees against you, why would you ever nonsuit? Then you lose and potentially lose twice or almost certainly lose twice.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: That last point is not as clear to me as Richard and Lonny think. If I'm going to nonsuit, that means I know I'm going to lose in a hearing, but I also run up attorney's fees if I take it to hearing, so I'm exposing myself to more. So it's not all --

PROFESSOR HOFFMAN: Cut your losses.

HONORABLE DAVID PEEPLES: -- clear, it seems to me.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Well, I think I agree with what -- the direction that Lonny is moving in, and what it does to this draft is it just adds to the sentence that begins on line two, "to the claim of nonsuits" just the words "or amends."

PROFESSOR HOFFMAN: Correct.

PROFESSOR DORSANEO: And then the second sentence, which is the hardest sentence to follow, just goes away. Right, Lonny?

PROFESSOR HOFFMAN: The third sentence. The third sentence.

PROFESSOR DORSANEO: Well, yeah, I guess it is. I've already crossed out the first sentence, so it's my second sentence. So it is the third sentence. It is the third sentence.

PROFESSOR HOFFMAN: Beginning at the end of line four is what he's talking about.

PROFESSOR DORSANEO: And then the sentence that begins on line seven, which is probably a little bit too cumbersome, you know, is fine for me, but then I would add Stephen's language at the end, "A claimant may amend the challenge claim," you know," once," or I would add it somewhere.

MR. LOW: But doesn't that raise the problem that Richard -- I haven't heard an answer to his problem of you can amend our pleadings, you know, you're allowed an amendment. Should it be that you can amend only once during the pendency?

PROFESSOR DORSANEO: Well, I meant, you know, in connection --

MR. LOW: So you have to put you can only amend once during the pendency of this motion, but we don't want to limit them later on if it goes through and they want to amend their pleadings. You say, "Oh, no, it says -- I filed a motion. You can only amend once." No.

PROFESSOR DORSANEO: Well, I agree with that. That language needs to be clear for the purposes of these motion.

MR. LOW: It needs to be limited just to this motion.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: But I agree with the intent there, but the effect is -- if you say only during the pendency of the motion, then I move to dismiss, you amend and address that issue, but I still think you've got a problem. I file another motion to dismiss, you amend.

MR. LOW: I can't amend.

MR. BOYD: Okay. So you can amend even though my original motion is gone?

MR. LOW: That's my intent.

MR. BOYD: But only once.

MR. LOW: That's right.

MR. BOYD: And then if I file a new motion to dismiss your first amended petition, you cannot amend any further?

MR. LOW: Amend once.

CHAIRMAN BABCOCK: Carl. And then judge --

MR. HAMILTON: I like Judge Christopher's suggestion of how to outline it with the times, but also if the first amendment is filed but then there's still time later on for that to be amended before the time runs out, the "once" would prevent that from happening. So someone might amend and then a day later decide they left something out, so they've got to amend it again. As long as they do it within the time period they should be able to amend as

many times as they want to.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just don't want us to get -- to write the rule in such a way that we end up just having serial motions to dismiss and amendments, and I don't know exactly how to correct that, but you can see it -- you've seen it happen in the special exceptions practice where, you know, it's basically a motion to dismiss that this cause of action doesn't exist, but they keep amending and they keep amending and then, you know, "Well, that was your old special exceptions. I've amended. That one's off the table. I have to have a new special exceptions," and so I don't know that that's the best way to write it, but there needs to be some sort of an ending.

CHAIRMAN BABCOCK: Okay. Richard, and then Bill.

MR. ORSINGER: I'm sensitive to what Judge Christopher just said, but I'm wondering if the one amendment rule is necessary, or isn't it self-regulating in the sense that if somebody is just amending to change the image but not the substance, can't you go ahead and file a notice saying, "I want to stand on my motion that these amendments are not really changing the merits of it, and I want a ruling on it," and then that's the end of it? You

don't always have to agree that an amendment resets the clock. Some of these amendments are going to move the words around but not really change the fact there's no cause of action, and if that's going on and somebody is just moving the words around, can't you stand on your motion and stop that process, and do we need to have a one amendment rule to do that, or can we let the litigants solve the problem?

HONORABLE DAVID EVANS: Well, in the special exception practice, you know, if somebody comes in and files an amended pleading on the morning of the special exception, most judges will then issue an order that new exceptions will be filed within a certain deadline and there will be no amendments to them before the special exception hearing, because then you gain control of the parties right there and you enter whatever order is responsive to their conduct, and I could imagine in these type of cases on somebody that has a frivolous lawsuit the trial judge is going to gain control of it, say, "You've made one amendment. You're frozen except on good cause, and I'm going to take this up right now in that fashion." I just think that we could override it -- I know what you're talking about, serial special exceptions, but I can't imagine anybody got any more than one serial with you as a trial judge. They are one-time shooters as far as I

can tell.

CHAIRMAN BABCOCK: Bill, did you have something before Richard jumps back in?

PROFESSOR DORSANEO: Well, we keep having serial conversations here, but talking about different issues, so I was just going to make a point that's probably obvious to everybody, that, you know, this new thing is a substitute for everything else; and maybe it does need, you know, more procedural timetables and more complexity than we've managed to accomplish so far because it -- in many respects it supersedes the entire rest of the rule book with respect to the litigation process; and I was thinking back when summary judgment was -- which didn't become part of Texas practice until 1950, okay, the idea was -- I remember Judge Fred Red Harris telling me when I filed a motion for summary judgment, he said, "Well, if it's good enough for summary judgment, it's good enough for trial"; and that was the attitude, is that the trial contains all of these procedural safeguards; and we're kind of -- we go to summary judgment, you say, okay, we've got that kind of worked out to where we can kind of stand it, but then here, let's just -- let's just proceed without even that much complexity or procedural protection; and I think that's an obvious point, but we're making an entirely new way to resolve disputes that maybe is a little bit unengineered at

this point.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I agree with what Bill just said. It does seem to me -- I'm seeing this is going to subsume a lot of summary judgment practice, and I don't really think that's what the Legislature intended, but to go back to Judge Christopher's and Judge Evans' previous point, I think this is right, but I think if you elect to stand on your original motion notwithstanding an amended pleading the 45-day clock will have already been running from that last motion, and so there's going to be -- if you stand on it, they're running out of time to amend. Not only is the amendment not going to make any difference, but they're going to -- at the end of the 45th day they can't amend any more. They're in court. It has to be ruled on, and that's the end of it, so I really -- the idea that you can only amend once, I think I don't like that. Why don't we just let the process control the amendments and then it will be over in 45 days if they're not making any progress in their amendments.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray, and then Justice Patterson, then Gene.

HONORABLE TOM GRAY: This is a throwback to a conversation with Judge Christopher and Pete while ago, and there was a lot of concern about the amendment process, and

in the appellate rules we have a conference requirement on all motions. It's not consistently followed, but at least the conference requirement is there. The only conference requirement offhand that I could find in the Rules of Civil Procedure was on the discovery issues of 191.2, but I would think that this would be a rule that is ripe for a conference requirement before such a motion is filed, because I think it's going to catch the kind of lawyer slips that Jim was referring to earlier where a lawyer just missed an element of a claim or missed an allegation that needed to be made, and it's not going to be the "oops," "gotcha" kind of motion that you file, a good motion when it's filed but everybody recognizes it can be easily cured, so just a conference requirement would seem to be appropriate.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: May I ask Justice Gray a question about that? Do you know of any problem that's ever been cured by conference?

HONORABLE TOM GRAY: Yes.

HONORABLE JAN PATTERSON: Because it seems to me to add a layer that's very real and helpful. I do like Richard's notion of this being self-enforcing and self-effectuating and to be ruled by the time, because to the extent that we include a labyrinth of numbers of times

in rules then everybody is going to go that route; whereas, the time element might very well take care of it, and the simpler that we can make it, the better I would think.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I think Nina had asked about legislative history, and I did print out some of it, and it's not all that helpful, and some people may not think it really means anything, but the engrossed bill analysis says that "The Supreme Court shall adopt rules to provide for the dismissal of certain causes of action and defenses" -- which, of course, that's not there anymore -- "that the Supreme Court determined should be disposed of as a matter of law on motion and without evidence." So if you read that, I think they're just kind of dumping it in the Court's lap, and part of the problem we have is we're trying to on one hand address the cases that really are frivolous and on the others not get rid of cases where there's something there and the people have just kind of bungled it. On attorney's fees it also says they're authorized and "attorney's fees to the prevailing party that the court determines are equitable and just," so that's not in the statute.

MR. ORSINGER: Whoa, that's very different.

HONORABLE JAN PATTERSON: Isn't one of our goals also to avoid a lot of satellite litigation and pain

on everybody's part? That has to be a part of this.

CHAIRMAN BABCOCK: Unless it's with Martians. Then it's okay.

MR. STORIE: And just one final thought, too, it is a statute, so it needs to be construed according to legislative intent, and it also needs to recognize constitutional limitations like due process, which we've discussed, and open courts. So --

CHAIRMAN BABCOCK: Professor Hoffman, and then Carl.

PROFESSOR HOFFMAN: So, Justice Gray, on the certificate of conference, two thoughts. We talked about this in the subcommittee. So the feeling was is that the idea that the setup is essentially the same thing. It's doing the same thing. It's giving this time period to realize the error of your ways in between the filing and the submission hearing. So the idea was it was the same, and in those cases where it makes no difference because you're accusing the other side of filing a frivolous thing, as Jan says, no one is going -- we're not going to be able to reach an agreement on that one. It's only in the places where there's something that, "Oh, yeah, thanks for pointing that out." So either that happened courteously even before a motion or at least it could happen in the period, so just a point I guess I would say is where it

will work that was exactly what the design was, and I think Jeff gets most of the credit for this design. I think the design we ultimately lighted on --

MR. BOYD: Blame?

PROFESSOR HOFFMAN: -- which was at one point a certificate of conference and at one point a safe harbor, this format which we think was essentially the same, was I think largely an idea that Jeff promoted.

CHAIRMAN BABCOCK: Okay. I think we've discussed at some greater length than I thought what the issues are with this rule, and if anybody has got any further thoughts or hopes for the rule, just shoot me and -- shoot me an e-mail or Justice Hecht or Marisa or all three of us, and I know the Court is going to be working on this in the next few weeks, and so I think we're going to -- I feel some distress warrants coming on. So why don't we move to distress warrants? Bill, that doesn't mean you can leave.

PROFESSOR DORSANEO: I have to. I'm in distress.

MR. LOW: We have a warrant for you to stay here.

CHAIRMAN BABCOCK: That's right. We may have a distress warrant for you. Okay, Pat, are you up to bat or is Elaine or David?

PROFESSOR CARLSON: David.

CHAIRMAN BABCOCK: David's up to bat.

MR. FRITSCHE: I am.

CHAIRMAN BABCOCK: Okay.

MR. FRITSCHE: I know y'all began distress warrants last session and got through I think DW 1(c)(2), but just let me recap very quickly what a distress warrant and the purpose of it is, and it's solely used by a landlord in the context of enforcing a statutory lien that arises under Chapter 54 of the Property Code, which is primarily either an agricultural lien or a commercial building landlord's lien. It differs from the contractual lien, the Article 9 lien, which may appear in a contract between a landlord and a tenant, but the sole purpose of the distress warrant was basically to create a summary method of enforcing the statutory lien that is allowed by chapter -- Chapter 54. The landlord with the lien or an assignee of that lien has the right to distraint, and primarily the grounds for any application statutorily or if the tenant own owes rent, is about to abandon the building, or is about to remove the tenant's property form the building.

The other thing, recall, that's unique about the statutory commercial building landlord's lien is it is for rent that is due on an annual calendar year basis, and

it rotates every calendar year into a new lien period of 12 months, so that's -- again, that's a little background on the basis for a distress warrant, which is always filed in the justice of the peace court where the personal property is actually located. With that background, I guess we jump right back to where I think Pat left off, DW 1(c)(2).

CHAIRMAN BABCOCK: Right, and there was some confusion last time because of our copying what the highlighting amounted to, and I now have a version that's got two different colors, yellow and blue.

MR. FRITSCHE: If you look at the top, what I tried to do with the version that came out this week, the yellow is new language that was proposed from the task force to be added. The teal, green, however, came out the darker, is actual language that this committee has added in the prior sets of rules --

CHAIRMAN BABCOCK: Okay.

MR. FRITSCHE: -- whether it be attachments, garnishments, sequestration. It is wording that has been debated and inserted in harmonized areas of the prior rules.

CHAIRMAN BABCOCK: Okay.

MR. FRITSCHE: And I think it may differ from what you were used to last session, but I apologize for that.

CHAIRMAN BABCOCK: Not at all, this makes it clearer. Thank you.

MR. FRITSCHE: Okay. So I think where y'all left off was DW 1(c)(2), and I think that Justice Christopher had raised an issue about the underlying suit language. Recall that the JP court has the jurisdiction for distraint, but the underlying suit to foreclose the statutory lien which has to be filed could be in county court or could be in district court. So the underlying suit that appears throughout this set of rules as amended by the task force is it tries to always reflect that there are potentially bifurcated proceedings, one suit to foreclose the lien, the statutory lien, and the distraint, which was filed in the justice of the peace court to allow the constable or the sheriff to seize the property, subject to completion of that lawsuit in the county or district court.

One thing that I do want to point out, and it's an area that's already been covered, but if you look at my Footnote 2, there is an internal inconsistency between Rule 610 and 620 currently. 610 says that at the commencement of a suit or at any time before final judgment an application for a distress warrant may be filed, but if you look back at 620, 620 in Footnote 2 provides that when the warrant is made returnable to the district or county

court, the plaintiff must file the petition within 10 days of the date of issuance of the writ. So there is some discrepancy in the current rules, some inconsistency, and the task force decided that we would use language similar to the other harmonized rules, and that is "The application may be filed at the initiation of a suit or at any time before final judgment," but I wanted to bring up to the committee this internal inconsistency to see if there was any discussion or any question about how -- the direction we moved in the task force.

CHAIRMAN BABCOCK: Okay. Any comments about that?

MR. FRITSCHE: Again, continuing on (c)(3), I've footnoted in Footnote 6 what the original language was in Rule 610, that being "Specific facts relied upon by the plaintiff to warrant the required findings by the justice of the peace," we've changed that to "Specific facts justifying issuance of the warrant," and then sub (4), identifying the underlying suit by court, cause number, and style.

CHAIRMAN BABCOCK: Okay. Any comments about that? All right.

MR. FRITSCHE: (d), the verification section is the wording that we've used from other rules as approved by this committee.

CHAIRMAN BABCOCK: Now, David, if it's in blue or teal, as you say, a much more civilized color, I don't think we need to talk about it again.

MR. FRITSCHE: Very good.

CHAIRMAN BABCOCK: Unless somebody spots something.

MR. FRITSCHE: Then moving down to (5) and (6) on the next page, there's a difference between the task force language and the current rule. The current rule original language with regard to dollar amount, instead of "dollar amount" it stated "the value of property." We thought it was more clear to state that we're talking about the dollar amount to be seized, and one of the interesting things about distress warrants, it can be wrongfully sued out if the verified application misstates the amount of rent due at the time the application is filed, so we felt it necessary that the order state the maximum dollar amount to be seized so that there's a clarification or it makes it clear as to what the constable and sheriff must seize.

MR. MUNZINGER: Could you help me understand that a little bit better?

MR. FRITSCHE: Yes, sir.

MR. MUNZINGER: The amount of past due rent is a thousand dollars, let's pretend, so under this No. (5) is it going to say a thousand dollars?

MR. FRITSCHE: Yes. It will say whatever the order -- this is the contents of the order in sub (e) that the JP has to state in the order that the amount of property -- the dollar amount of property to be seized is to be X, and in your case a thousand dollars.

MR. MUNZINGER: But that means you have to seize property having a value of a thousand dollars. I don't have any cash, but I've got six HDTV sets, one in each of my -- two in each of my three bedroom apartment or whatever it might be. So three of those TVs is going to be a thousand dollars. Two, or what have you. I don't think that's clear. I don't quite understand it. When I read it I was still thrown by it.

MR. FRITSCHE: Well, recall that this is only specific to personal property that is subject to a landlord's lien in a commercial building. So it's going to be fairly identifiable because of the relationship between the landlord and tenant, or it could be crops in the context of an agricultural lien. It is going to be the best estimate of the constable as to the value of that property.

MR. MUNZINGER: Well, I'm the only person having the problem, so I must wrong. Thank you.

MR. DYER: Are you asking why does it not say the value of the property --

MR. MUNZINGER: Yes.

MR. DYER: -- seized instead of the dollar amount?

MR. MUNZINGER: Yeah.

MR. DYER: We wanted the court to have a dollar amount rather than have either the plaintiff or the court determine the value of the property because you wouldn't necessarily know. So we thought it was clear to the court to link it to the demand. So if it's rent, you can go out there and get a thousand dollars worth of property rather than have the judge or the plaintiff determine the value of the property because you don't know at the time what property necessarily is there, so we just thought this was clearer. Apparently you don't.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Is that the same -- is that the same figure as would be in (c)(2)?

MR. FRITSCHE: Not necessarily. Not necessarily, because there could be a situation where the value of property subject to a landlord's lien is going to differ from the amount that a landlord may be suing for in the underlying suit, so it's not -- it's not necessarily going to be exactly the same amount.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You can also detain property

based on future rent up to the end of the year.

MR. FRITSCHE: Correct.

MR. ORSINGER: So it's not just the rent in arrears. So if you think someone is going to move out and not pay future rent, you can include in the amount to be seized the amount of rent that will come due between then and the end of the year.

MR. FRITSCHE: Correct.

MR. ORSINGER: Plus the amount of arrearages, and the amount that you're putting in there is what you claim is your entitlement to the rent, right?

MR. FRITSCHE: Yes.

MR. ORSINGER: Why is that number ever going to be different from what you're suing for? I guess you might be suing for five years' worth of rent, but you can only distress or detain only one year's worth of rent or --

MR. FRITSCHE: That is all you can -- your statutory lien is limited to that calendar year of rent.

MR. ORSINGER: You might be suing for the present value of for future rules, but you can only detain up to December 31st the amount that's due.

MR. FRITSCHE: Correct.

MR. DYER: Or you could also be suing the tenant for damage to the premise that isn't covered by the distress warrant.

MR. ORSINGER: It's not?
MR. FRITSCHE: Rent only.
MR. ORSINGER: Okay.
MR. FRITSCHE: Solely rent.
CHAIRMAN BABCOCK: Okay. Anything else on this? All right, David, keep going. No, it's Gene. I'm sorry. Gene had a comment.
MR. STORIE: Yeah, actually I did. Maybe I'm having the same problem Richard Munzinger did, but is it the dollar amount of the property, or is it the dollar amount to be satisfied by the property?
MR. FRITSCHE: The dollar amount. The value of the property, the dollar amount of the property to be seized. Because we don't know -- you know, until the foreclosure sale occurs, after an order of sale issues from the district court we're not going to know how much the property is actually going to bring to the landlord.
MR. STORIE: Right. So it's the dollar amount to be satisfied. You're not trying to predict what the actual value of the property is.
MR. FRITSCHE: Because you cannot.
MR. STORIE: Right, so --
CHAIRMAN BABCOCK: Okay.
MR. FRITSCHE: The next change was in DW 2(a)(1).

MR. ORSINGER: Whoa, before we skip to -- can I ask a question about (6), the very next section, subsection, seizure and safekeeping. I'm not clear on how you could be issuing a distress warrant to a sheriff in another county or even a constable in another precinct when your lien is on the personal property that's in the leasehold premises.

MR. FRITSCHE: Here's the interesting quirk. It is a lien on the property in the leasehold premises at the moment the lien attaches. If that property is moved into a different precinct or into a different county the lien has still attached and the landlord may still seize property that's out of the county in a different county as long as it is property to which the lien attached at the moment the lease was signed or at any time during the lease that the lien attaches.

CHAIRMAN BABCOCK: Anything else, Richard?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay. Let's keep going onto DW 2.

MR. FRITSCHE: DW 2(a)(1), we have a slight difference in the language from the current rule to our proposed language. The original language was the amount approved by the justice of the peace, and we tried to have a convention. I think throughout the rules there was the

word "fixed," the word "approved," and I think we settled on the convention of trying to be consistent with the word "set by the court" throughout the rules.

DW 2(a)(2) is self-explanatory. In (b) we've added the 14c language. In (c), in the review of the applicant's bond section, we had to add this sentence because there is a possibility that because of the bifurcated proceedings a motion to review the applicant's bond may actually need to be heard by the court where the underlying suit is pending, so we have a dichotomy between if the warrant had not been issued and there is a motion to review the applicant's bond, it remains with the justice of the peace, but after issuance of the warrant the return has to go to either the JP or the county or the district court, so the motion to review that bond we felt should be in the underlying court. Because the return will then be filed with the underlying court where the underlying suit is pending.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Why does this have to be initiated in the justice court?

MR. FRITSCHE: Jurisdiction. It is absolute jurisdiction under the statute.

HONORABLE NATHAN HECHT: Under the statute.

MR. FRITSCHE: Yes.

HONORABLE NATHAN HECHT: But jurisprudentially is there any reason for it to be in the justice court as opposed to the court that has got the underlying suit?

MR. FRITSCHE: Well, I think the theory is that suits for possession, whether it be for real property or personal property, have always had original jurisdiction in the JP court, like an eviction or forcible detainer suit. It seems that those issues of possession, that type of ultimate possession, have always, you know, begun in the JP court. Now, I don't know if there's something in the constitution that directed that at one point or not. I don't know.

HONORABLE NATHAN HECHT: But if the -- there's an underlying suit for rent, you go to the justice court and get the distress warrant. The warrant is returnable to the court with the underlying suit, and then if there are other problems or issues with it they're handled by that court.

MR. FRITSCHE: By that court.

HONORABLE NATHAN HECHT: So the only thing the justice court does is issue the writ. The warrant.

MR. FRITSCHE: The warrant is issued, that's correct. Unless the underlying suit is pending in the JP court.

Moving on to DW 3, contents of the distress warrant, we've expanded what was in Rule 612 to try to be consistent with the other rules to clarify exactly what all needed to be included in the warrant. We added in (c) that the return needed to occur within five days from the date the service of the warrant is completed.

CHAIRMAN BABCOCK: Any comments about any of that? Okay. Keep going.

MR. FRITSCHE: Top of the next page, the notice language has been revised consistent with the other -- with the other rules, and that's pretty much the same as what we discussed in attachments, garnishments, and sequestration.

CHAIRMAN BABCOCK: So it should have been teal, not yellow?

MR. FRITSCHE: I apologize, yes, it should.

CHAIRMAN BABCOCK: So we need to keep our colors coordinated.

MR. DYER: I told you, you cannot get anything by him.

MR. FRITSCHE: DW 4 is completely new, relative to the distress warrant rules. It's consistent with our other harmonized rules; however, there -- I want to see where I want to bring up this citation issue. Hold on one second. The one thing I want to bring up on DW 4 is

really something that we need to talk about whether it should be added as a sub (e) or somewhere else, and that is if you look at Footnote 19 as to what current Rule 619 provides, Rule 619 currently provides that a citation must issue at the time that the warrant issues. In our proposed rules we do not have the citation language.

In preparing for the presentation today there is -- there are two cases out there, a Supreme Court case from 1890 and a court of appeals case out of Fort Worth from 1911, that would indicate that a failure to issue the citation at the time of the distress warrant, which citation is served upon the defendant, would make the ultimate order of foreclosure sale that issues in the underlying suit void. Those cases were decided under an 1879 -- the sales statutes, and I haven't been able to obtain a copy yet today. I'm waiting on an e-mail from my office, but it appeared that those two cases were decided under prior statutory pronouncements and -- and, you know, obviously there's a due process issue here, and there's this prior case law that exists, and I think we would like to have the committee's thoughts on whether a citation would issue at the time of a distress warrant be served in light of these two prior cases.

MR. DYER: And related to that, it appears that the older cases relied on the statutes and that the

language of those statutes was later more or less imported into the rules, so the proposed rules change it and do not require citation on the issuance of the warrant. Trying to figure out why that might be required, under the existing rules you clearly can file an application for distress warrant without first filing a lawsuit, and it would seem to make sense that if you can do that then the defendant ought to be served by citation, but the rules seem to require it whether you have a suit or not, but it appears to us to be unnecessary, and we conformed this writ practice to the same as that for attachment, sequestration, and garnishment. The defendant still gets notice.

CHAIRMAN BABCOCK: So are you saying that you left something out of DW 4? In other words, there's no citation required?

MR. DYER: No, we've completely eliminated the requirement.

CHAIRMAN BABCOCK: Right.

MR. DYER: And we've also eliminated the rule that says you can file your application 5 days or 10 days after you file the writ.

CHAIRMAN BABCOCK: Okay.

MR. DYER: So we've conformed it to the practice of the other writs.

CHAIRMAN BABCOCK: Anybody have any thoughts

about dropping the citation?

MR. ORSINGER: I have a question.

CHAIRMAN BABCOCK: Yes, sir.

MR. ORSINGER: If the underlying proceeding is in the JP court that's issuing the distress warrant, would there be any parallel requirement to serve citation at the same time or not?

MR. FRITSCHE: Well --

MR. DYER: You get -- you do get a copy of it. You get your citation for the writ and a citation for the lawsuit. You could certainly serve them at the same time.

MR. ORSINGER: Well, like I can see that there's an issue if you have a lawsuit in a county court somewhere or a district court and that citation hasn't issued but you want to be able to get your distress warrant just the same because it's an emergency warrant, but are you asking whether there should be a citation out of the JP court in addition to the distress warrant out of the JP court when you have a lawsuit really pending in another court?

MR. FRITSCHE: Yes.

MR. ORSINGER: Yeah, that seems to me to be a waste, but if the underlying lawsuit for rent is in the JP court, there's more logic in saying that there should be

service of citation in the lawsuit that gives rise to the rent claim at the same time the distress warrant is served. Does that make any sense what I'm saying?

MR. DYER: Well, yes, but you wouldn't do that necessarily with a TRO or an attachment. I mean, you do have to subsequent to the levy of the writ serve them with copies of that, but you're not required to serve them with citation at the same time.

MR. FRITSCHE: But there would be citation of the suit from the original petition.

MR. DYER: Yes.

MR. FRITSCHE: There would still be citation on the original petition.

MR. ORSINGER: But you don't have to serve it at the same time, so you can get your distress warrant out and executed and notice given to the tenant before he ever gets citation on the underlying suit, whether it's in the JP court or another court.

MR. FRITSCHE: Correct.

MR. ORSINGER: Okay. So the question is do you just need another citation to go along with the distress warrant?

MR. DYER: Yes. And Judge Tom Lawrence also wanted to do away with the requirement that the defendant have to file a formal answer to the writ -- to the distress

warrant. We'll get to that in a little bit.

MR. GILSTRAP: Question. In DW 3 it says what the notice should contain. Where does it say how the notice goes to the respondent?

MR. DYER: DW 5.

MR. GILSTRAP: Serve a copy, okay, thank you.

CHAIRMAN BABCOCK: Okay. Any other comments?

MR. ORSINGER: I've got a comment on (d). I don't know if we're skipping to 5 yet or not, are we?

CHAIRMAN BABCOCK: No, we're not, if you have a comment on (d).

MR. ORSINGER: We put some -- there was a statute -- Frank can remember the details better than I can -- that tried to ease the filing of the returns on citation, spent a lot of time talking about the electronic filing and everything, and this seems to be according to the old process where they have to actually subscribe the return that gets filed and all that. I'm wondering if it would be convenient or smart for us to conform this process of returning the -- of filing the return to permit it to be electronically filed and not notarized and --

MR. DYER: Okay. (d)(2), that first sentence where it says "action must be endorsed on or attached to the warrant," that should be stricken, as it was in the others, because -- no, hold it, I take that back.

MR. ORSINGER: What about in (d)(1)?
MR. DYER: Yeah, it should be stricken. It should just say, "The sheriff or constable's return must state what action," so --
MR. ORSINGER: But look at (d)(1). "The sheriff or constable's return must be in writing and must be signed by the sheriff or constable, executing" -- no, "signed by the sheriff or constable."
MR. DYER: I think we require that in all of them. That's in all of them.
MR. ORSINGER: Well, I guess what I'm saying, though, and I haven't read the statute. I don't remember. I guess it doesn't apply to these proceedings, but in the other proceedings we were required to eliminate the necessary of a true subscription, true handwritten signing.
CHAIRMAN BABCOCK: Go ahead, Marisa.
MR. ORSINGER: Isn't that right?
MS. SECCO: No. For no returns. The requirement is not that it doesn't have to be signed.
MR. ORSINGER: It doesn't.
MS. SECCO: All returns still have to be signed under the new rules.
MR. ORSINGER: They're just filed electronically?
MS. SECCO: Yes.

MR. DYER: I think you're talking about whether or not if the return had to be endorsed on --

MR. ORSINGER: Yeah, and this is different from that.

MS. SECCO: Not notarized.

MR. DYER: It should be eliminated -- I think I see the cross through on the second line, but in the teal part on the first line that should also be X'ed out.

MR. FRITSCHE: Or it should say just "the return"?

MR. DYER: It should say, "The sheriff or constable's return must state," so if you X out the teal in the first two lines then it conforms to the other rules.

MR. GILSTRAP: It doesn't have to be notarized because of the sheriff or constable, right?

MR. DYER: Correct.

MR. FRITSCHE: Then backing up to DW 4(a), (b), and (c), again we've used language that was similar to sequestration, garnishment, and attachment to come up with clarifying language because the current rules were not clear about the delivery, execution, and return of the warrant.

CHAIRMAN BABCOCK: Okay. Any comments on that? All right. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just have one

more question on the citation and the elimination of Rule 619. I can certainly understand that you shouldn't have to serve citation separately on the distress warrant, but is there something in the rule that would require the defendant to be served citation in the underlying lawsuit before the property was sold?

MR. DYER: No. In the same way there's no prerequisite for attachment, sequestration, or garnishment.

HONORABLE TRACY CHRISTOPHER: Okay.

MR. ORSINGER: She said before the property was sold, not seized.

MR. DYER: Oh, I'm sorry.

HONORABLE TRACY CHRISTOPHER: Before the property is sold.

MR. ORSINGER: She said "sold," yeah.

HONORABLE TRACY CHRISTOPHER: They can seize and hold.

MR. FRITSCHE: In the underlying suit? They must be.

MR. DYER: Because it's a foreclosure, so they would have to be notified of it.

MR. FRITSCHE: They will receive citation.

HONORABLE TRACY CHRISTOPHER: Same thing here under the distress warrants, before the actual order issued from the underlying lawsuit they would have to be served

and --

MR. FRITSCHE: The only way the statutory lien can be enforced through sale is through a final judgment in a court of competent jurisdiction.

MR. ORSINGER: I think the distress warrant is just a seizure of the asset, and you get your sale order out of the underlying suit for damages.

HONORABLE TRACY CHRISTOPHER: That covers everything. What happens if they don't go forward with the underlying lawsuit?

MR. DYER: The plaintiff?

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. DYER: That's the failure to prosecute to effect. That would call into effect the distress warrant bond.

HONORABLE TRACY CHRISTOPHER: Okay, but how -- I guess the question is then if they don't serve -- they go out, they take my property, they don't serve me with citation in the underlying lawsuit. How do I know then to -- and where do I go to get my property back?

MR. FRITSCHE: The judgment on DW 12 addresses what occurs with the judgments and it, I think, let's see --

MR. ORSINGER: Well, her question doesn't go as far as the judgment. She's been saying, "Look, my

property's been seized, nobody has served me with a citation. I don't even know about the lawsuit that was filed. What do I do to get my property back?"

MR. DYER: You could intervene and file wrongful distress warrant in this suit. You could also file an independent suit for conversion. That doesn't necessarily get you paid or get your property back, but those would be your options.

MR. ORSINGER: Is there any way to tell from the distress warrant whether there is a lawsuit pending for damages and if so which court that is?

MR. DYER: Yes, the notice is to state if you're going to file an answer or otherwise respond to this distress warrant you must file it in this court in this cause number, you know, so it gives them that.

MR. ORSINGER: So they're given notice of the lawsuit even though they're not served with citation of the lawsuit.

MR. DYER: Yes.

MR. ORSINGER: So that tells them where to go if they want to file a motion of some kind.

HONORABLE TRACY CHRISTOPHER: Okay. I'm good.

CHAIRMAN BABCOCK: Okay.

MR. FRITSCHE: We added DW 6 that somewhat

follows 619, but if there is going to be an answer filed -- and this is in deference to Judge Lawrence's concerns, if there will be an answer, response, or motion related to the distress warrant after issuance it is in the court where the underlying suit is pending, and that court maintains control pursuant to the warrant until final judgment.

MR. DYER: And Judge Lawrence did not want to require that there be a formal answer filed or a formal response, and I cannot for the life of me remember why. I think it was he said most people just come in and argue orally anyway, why have to go through this process, why have to consider, you know, entering a default on it or whatever. He just preferred to eliminate the requirement altogether.

MR. FRITSCHE: But I think that was before House Bill 74 as well.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: But what he's also done is he's moved the venue from his court to the county court or the district court fight. The after the seizure fight is now out of his court, right?

MR. DYER: Well, it could still be in his court.

MS. WINK: If it was filed there originally, if the suit was filed there originally.

MR. ORSINGER: But he's saying if you want me to seize this property in connection with a county court lawsuit I'll seize it for you, but if you want to fight about it you go to county court to fight about it.

MR. FRITSCHE: But that's partly governed because if the JP court issues a warrant to seize a million dollars worth of personal property then that fight has to occur in the district court where the underlying suit is pending.

MR. ORSINGER: Even the replevy process wouldn't? No?

MR. FRITSCHE: That's a good question. Let me -- even the replevy process, that is correct.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I'm still trying to find where it says that the defendant gets served with the distress warrant.

MR. FRITSCHE: DW --

MR. DYER: 5.

MR. FRITSCHE: -- 5.

MR. HAMILTON: Okay.

MR. STORIE: This is pretty petty, but --

CHAIRMAN BABCOCK: Gene, sorry.

MR. STORIE: Yeah, thanks. I was going to

suggest a semicolon after "warrant" instead of a comma at the beginning of line two.

MR. FRITSCHE: Got it. And there is -- there's also a typo in the first line. After the word "relating" the word "to" should be added.

MR. ORSINGER: Can I ask another procedure question?

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Based on the notice that's served on the respondent it appears to me that there must be an underlying lawsuit pending before the distress warrant can be issued. For sure. They just don't have to get served it, right?

MR. FRITSCHE: And that's one of the things we wanted to change which is now inconsistent with the current rules because we in DW 1(a) provide that the filing must be at the initiation of a suit or at any time before final judgment, referring to the underlying suit.

CHAIRMAN BABCOCK: Richard, anything else on that? Okay. Anything else on DW 6? Now, it looks to me like DW 7 through 13 there's no new language; am I right?

MR. FRITSCHE: That is mostly the case. We've added language to where you have to refer to underlying suit with the bifurcated proceedings. Yeah, if you would look, I mean, at DW 8, and this is for

discussion, there is no applicant's replevy right currently in the rules, and --

MR. DYER: This goes along with the same majority/minority position David and I presented with regard to importing an applicant's replevy right in attachment.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The filing of the replevy bond needs to be in the underlying court suit, right?

MR. DYER: Yes.

MR. FRITSCHE: Correct.

HONORABLE TRACY CHRISTOPHER: Should we say that here in 7? Because it's a little confusing that we're going -- we're in JP court and now with the replevy bond we're in the underlying court.

MR. ORSINGER: Yeah, where it says "with replevy bond filed with the court" you need to say which court.

MR. DYER: Yeah, "with the court in the underlying action."

MR. FRITSCHE: Yes, we do. We do. "With the underlying court."

MR. ORSINGER: But that's been struck.

"Where the underlying suit is pending" has been stricken.

MR. FRITSCHE: Well, that was actually moved down to sub (2), Richard.

MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: Oh, that's not struck. I'm sorry. I'm having a hard time with the dark blue.

MR. DYER: Yeah. That's why I didn't use teal.

MR. MUNZINGER: Isn't replevy bond a motion?

CHAIRMAN BABCOCK: Color criticism here late in the day.

MR. FRITSCHE: "By filing a replevy bond with the underlying court" or "the court where the underlying suit is pending."

MR. MUNZINGER: But you can also file it with the sheriff or constable.

MR. FRITSCHE: And that's in current rule. That's a good catch.

CHAIRMAN BABCOCK: You guys got it figured out?

MR. DYER: Yes.

MR. FRITSCHE: Got it.

CHAIRMAN BABCOCK: You wanted to discuss something on 8?

MR. FRITSCHE: DW 8, whether or not an applicant should have a replevy right in the context of a distress warrant. It is more akin to sequestration because there is a security interest --

CHAIRMAN BABCOCK: Uh-huh.

MR. FRITSCHE: -- in which the landlord, you know, may assert his rights, but it's not currently in the rules.

CHAIRMAN BABCOCK: Anybody have any thoughts about it? Judge Christopher?

HONORABLE TRACY CHRISTOPHER: No, I really don't.

CHAIRMAN BABCOCK: Okay. Anybody else?

HONORABLE TRACY CHRISTOPHER: What did the task force think?

MR. DYER: What?

CHAIRMAN BABCOCK: What does the task force say about it?

MR. FRITSCHE: Let me just point out there is one case, there is a Supreme Court case that says replevy in the context of distress warrants is exclusive to the defendant to prevent excessive expenses of storage or damage while in custody of the sheriff and to prevent the sale even when perishable and subject to sale. That is -- there's one case that basically says replevy rights in

distress warrants are really exclusive to the defendant. Now, I mean, we have the same issues, as Pat said, with attachment and the appropriateness.

MR. DYER: The reason why the task force wanted it in sequestration and then it was imported into distress warrant is that in attachment, without an applicant's right to replevy, the storage costs ultimately exceed the amount of the claim, and the property just stays there. They wanted to be able to get it out of the bonded warehouse where they're being charged storage fees so they could put it someplace else and reduce the amount of fees so ultimately they would have property on which they could realize part of the judgment.

MR. MUNZINGER: Does that possibility not exist under Rule 8?

MR. DYER: Well, no, we're adding it here. It does not currently exist for either distress warrant or attachment in the current rules.

MR. MUNZINGER: So the recommendation is --

MR. DYER: Add it.

MR. MUNZINGER: -- that a rule be added?

MR. DYER: Yes.

MR. MUNZINGER: And the comment would note that the addition of this rule overrules or qualifies that Supreme Court opinion.

PROFESSOR CARLSON: Right.

MR. FRITSCHE: Correct.

MR. MUNZINGER: I would think there would be some comment that would alert practitioners to the fact that if you're reading a Supreme Court case that's been modified by rule, it's been modified by rule.

MR. FRITSCHE: We'll add that comment.

CHAIRMAN BABCOCK: Okay, good. Richard Orsinger.

MR. ORSINGER: It seems to me like a replevy right would be very sensible because this may be income-producing property or something, and all we're trying to do is secure the claimant for the ability to collect their judgment in a monetary amount, so it would be better for them if they had money rather than equipment, so why wouldn't we want a replevy to be available.

MR. FRITSCHE: And they have a security interest already. They have the pre-existing property right.

MR. ORSINGER: Right. So we would be moving -- for those whose the equipment is really important, it's better to have cash than equipment anyway if you're not the owner of the equipment, so it seems to me like -- I can't imagine an argument against a replevy right. As long as they're getting the value of the property that's being

released, why aren't they ahead? I can't see even an argument against it.

CHAIRMAN BABCOCK: So a replevy right is all right with you?

MR. ORSINGER: I love that. I mean --

HONORABLE NATHAN HECHT: He couldn't agree more.

MR. ORSINGER: Everybody should like it.

CHAIRMAN BABCOCK: All right, let's hear it for replevy.

MR. DYER: He actually sounded excited about distress warrants.

MR. ORSINGER: We're making a major improvement in the practice here, guys.

CHAIRMAN BABCOCK: The blood is rising here. Anything else in the remainder of the distress warrant rules that you think merits discussion?

MR. FRITSCHE: They're pretty much consistent with what you have already discussed.

CHAIRMAN BABCOCK: All right. Here, let me ask you a question before we take our afternoon break. Dee Dee, who's been typing for two hours. What have we got left, the statutory authority for trial of right of property?

MR. DYER: Yes.

CHAIRMAN BABCOCK: And is that it?
MR. DYER: No. Execution, turnovers, and --
MR. ORSINGER: Oh, execution.
CHAIRMAN BABCOCK: Do we have colored documents on them?
MR. FRITSCHE: We have trial of right of property, which is next.
PROFESSOR CARLSON: We have documents for execution and turnover, but, sorry, they're not color-coded.
CHAIRMAN BABCOCK: They're not color-coded?
PROFESSOR CARLSON: They're different folks that are going to be presenting those.
CHAIRMAN BABCOCK: Okay. And we're going to do that tomorrow?
PROFESSOR CARLSON: Standby, oh, yeah. Or today.
CHAIRMAN BABCOCK: Okay. All right, let's take our afternoon break.
(Recess from 3:29 p.m. to 3:47 p.m.)
CHAIRMAN BABCOCK: We are on TRP 1, the trial of right of property. Want to tell us --
MR. FRITSCHE: Are you ready for this?
CHAIRMAN BABCOCK: Not really. Want to tell us what this is?

PROFESSOR CARLSON: Does everybody feel like they're in Final Jeopardy?

MR. ORSINGER: I'll take trial of right of property for 200.

MR. FRITSCHE: The good thing is Pat Dyer has actually tried a trial of right of property case.

MR. DYER: But not correctly I found out.

MS. WINK: But he convinced the judge he was right.

MR. FRITSCHE: All right. We've provided to you the only two Property Code sections that deal with trial of right of property, which appear at the top of the materials, the most recent materials, and we had the same highlighting convention from distress warrants.

CHAIRMAN BABCOCK: Right.

MR. FRITSCHE: Moving forward, a trial of right of property -- can I have a show of hands of anybody who has tried one or heard one?

HONORABLE STEPHEN YELENOSKY: Or heard of one?

MR. FRITSCHE: Okay. This is a very --

CHAIRMAN BABCOCK: How about handled an appeal from one?

MR. ORSINGER: I don't think you can appeal from these, can you?

MR. FRITSCHE: Actually, you can.

MS. WINK: Yeah.

CHAIRMAN BABCOCK: Sarah, you've done one?

HONORABLE SARAH DUNCAN: (Shakes head.)

MR. DYER: Yeah, you're entitled to a jury trial.

MR. FRITSCHE: You're entitled to a jury trial. A trial of right of property is really fairly straightforward. It is the right of an entity or a person who has a property interest in other property, in personal property, that has been seized or levied upon or is under levy of execution. So if a distress warrant, writ of execution, writ of attachment, or sequestration is levied on personal property that is owned by Pat Dyer, but I'm the judgment debtor, Pat has the right to bring a trial of right of property in the court from where the writ issued to ask for a summary proceeding to give him title or possession of the property that he believes he owns, even though it is under a levy.

Randy Wilson, Judge Wilson, chaired the subcommittee, and he sat there one day and actually closed his eyes and thought for about two minutes and realized what the rules were supposed to do, and from his, you know, brilliant thought process we were able to put together this procedure, which the editing subcommittee reworked

substantially because what Judge Wilson realized is that the trial of right of property procedure is much like a TRO with a preliminary hearing and then a final trial. The rules provided that somewhat, the case law filled in the blanks, and what we tried to do was end up with a product for the rules that created this, again, a bifurcated process, a preliminary hearing and then a final trial, and that's what we are presenting to you.

CHAIRMAN BABCOCK: Okay.

MR. FRITSCHE: And, again, the yellow indicates language that was added by the task force, and these rules pretty much follow what the existing rules are, and what you will see that we have added is the preliminary hearing process and the final trial process. We've added it in such a way that it should be clear to the practitioner and to the court that it is a bifurcated process. Basically TRP 1(a) basically says that if one of these extraordinary writs has been levied upon property, somebody who is not a party to the writ has the right to file their application for determination of whether they have the right to title or possession.

MR. ORSINGER: Can I ask a question? We know from the discussion of distress warrants that any such trial has to be in the court where the damage suit is pending, even though the distress warrant came out of the

JP court, so in this situation they might be going over to county court or district court to try the right to property even though the distress warrant was issued by the JP?

MR. FRITSCHE: That is correct. That is correct.

MR. ORSINGER: Okay.

MR. MUNZINGER: Is there ever a possibility that a party could be a party to the writ but not to the underlying litigation?

MR. ORSINGER: The writ goes to the party in possession who is not necessarily the party that owes the rent, right?

MR. FRITSCHE: Well, okay, are we talking only in the context of distress warrants, or are we talking about in the context of levy of any writ?

MR. MUNZINGER: Well, I'm looking at this subsection (a), and as I read it it says claimed by any claimant who is not a party to the writ, which I know was intentional, but that's what prompted the question, just out of curiosity because I suspect that later we talk about notice to parties and what have you, and I wanted to -- we normally talk about parties to the litigation. Here we're talking about a party to the writ, but are they always the same? They wouldn't be because the person in possession of the property would be a party to the writ because he or she

is named in the writ.

MR. FRITSCHE: Not necessarily. A party in possession of property may be the claimant because a levy occurred improperly on the property that they own. In other words, you may have a levy of execution that is -- or execution that is levied upon property in my possession that I own and it's an improper levy, so I have this summary procedure to go to the issuing court and say, "Wait a minute, you don't have a right to levy on property that I have title to the right to possession to."

MR. MUNZINGER: What would prompt my curiosity really is protection of the interest of all the parties to the litigation and the writ. It would seem to me that parties to the litigation have an interest. Would they be ordinarily receiving whatever notice?

MR. FRITSCHE: They will. They will.

MR. MUNZINGER: Thank you. Sorry for the delay.

MR. FRITSCHE: And they have some duties to further respond.

MR. MUNZINGER: Thank you.

MR. ORSINGER: Question also. Does the personal property include intangibles like money on deposit in a bank or a debt? Like in a garnishment.

MR. DYER: Yeah. It would apply in a

garnishment.

MR. ORSINGER: So we're not just talking about physical property here.

MR. FRITSCHE: No.

CHAIRMAN BABCOCK: You've got here that "who is not a party to the," and you highlighted "the," and you changed from the rule. The rule says "such writ," and you changed it to "the writ."

MS. WINK: We did that throughout. Got rid of --

CHAIRMAN BABCOCK: Okay. So stylistically.

MS. WINK: -- "saids" and "such."

HONORABLE STEPHEN YELENOSKY: They've moved into the 20th century. In another hundred years we'll move into the 21st.

CHAIRMAN BABCOCK: Hey, but it's progress.

HONORABLE DAVID GAULTNEY: Could we change "such suit" to "the suit"?

MS. WINK: Did we miss one?

MR. DYER: Oh, man.

MS. WINK: We forgot to do a global search, man.

MR. FRITSCHE: Did I miss that?

HONORABLE TOM GRAY: Is a distress warrant considered a writ?

MR. DYER: Yes.
CHAIRMAN BABCOCK: Okay. Carl.
MR. HAMILTON: Just scratching my head.
CHAIRMAN BABCOCK: Okay. Nina.
MS. CORTELL: No.
CHAIRMAN BABCOCK: Scratching your head, too?
MS. CORTELL: Yes. Yes.
CHAIRMAN BABCOCK: Must be a lot of bugs in here. All right. Any comments on TRP 1? Yeah.
MR. HUGHES: I understand that they've included the part about verification because that's in the current rule, but I guess I'm a little puzzled why someone who hasn't been a party to these proceedings at all who doesn't have a judgment against them has to swear to the pleadings in order to trigger all of this. I mean, I'm wondering what the value of requiring someone who is otherwise a stranger to the entire proceeding, require them to verify their applications.
MS. WINK: I think it's really important for a stranger to the proceedings to verify things. Again, this is one of the extraordinary writs where we're stepping out of the usual course of conduct, and we're having a stranger to the litigation step in. That's to me the most important time to say, "Swear you've got this right before we go into this tailspin of extraordinary relief."

MR. DYER: Not to mention your applicant has usually filed a sworn application, so they've taken a position under oath. The defendant may take another. Why would we not require someone who is trying to use a summary procedure to get that property on the basis of not even -- I mean, just saying something, none of it under oath?

CHAIRMAN BABCOCK: Okay. Yes, Justice Gray, then Carl, who is not scratching his head anymore.

HONORABLE TOM GRAY: Since you answered my question in the affirmative that a distress warrant is considered a writ, which then leads me to subsection (b)(1), why do we have the "or" there, "the writ or distress warrant" when we don't have it in (a) in the third line, "who is not a party to the writ"?

MR. DYER: It should be to make it parallel, and the reason why we have "writ or warrant" is because it's not -- most people don't call it a writ of distress warrant. It's just called a distress warrant. The warrant takes the place of a writ. So, but, yeah, it should be added in (a) to make it parallel.

CHAIRMAN BABCOCK: All right. Carl, then --

MR. HAMILTON: I notice we've done this on others, taken out "verified." We used to have verified pleadings where at the end of the pleading a person would say, "I verify I read the above and foregoing."

CHAIRMAN BABCOCK: That's the good ol' days.
MR. HAMILTON: Huh?
CHAIRMAN BABCOCK: Good ol' days.
MR. DYER: Actually, "verified" is not in the current rules. The task force added it so it would make it clear you could just verify instead of having affidavits. Usually the rules require affidavits. We inserted "verified." Then after the passage of that new statute or the --
CHAIRMAN BABCOCK: Declaration.
MR. DYER: -- one that allows a declaration under penalty of perjury we decided to eliminate it, there's no need to have verified.
MR. HAMILTON: So now we can't do that, we have to a have a full affidavit --
MR. DYER: No.
MR. HAMILTON: -- that restates all the facts that are already in the application?
MR. DYER: No. The declaration allows you to skip the notary, so you don't have to have it verified. You can do it under declaration of penalty, and at an earlier session we discussed whether we ought to alert the practitioner by comments on that rule change, and the consensus was no.
MR. HAMILTON: But my question is not whether

it's signed before a notary. It's whether or not we have to have an affidavit that restates all the facts that are already stated in the application and say that those are all true under declaration of perjury or sign it before a notary or whether we can just have a short sentence at the end of the pleading which says, "All these facts are true and correct." Because that's what we used to call a verification.

MR. DYER: I don't see that it changes the practice. This is the same language in the current rules, and if verified pleadings are used in current practice, even though the rules say "affidavit," that continues.

CHAIRMAN BABCOCK: He's saying you can still do it.

MR. DYER: Yes.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Since I'm the claimant, I'm claiming that that's really my personal property rather than the other person's personal property, in 2(c)(2), the order by the court has to describe the property to be released with such certainty that it may be identified and distinguished from property of like kind. It seems to me that that should also be in the application and not just the value of the property so that everyone has notice that I'm claiming that those 10 bushels of corn were

really mine, so we know what the dispute is about rather than it's about a thousand dollars.

MR. DYER: Which rule number was that, Judge?

HONORABLE TRACY CHRISTOPHER: Rule 2(c)(1)(C), the order is supposed to describe the property to be released with such certainty that it may be identified and distinguished from property of like kind. It seems to me that the claimant in their application should describe the property to be released so everyone knows what property they're claiming.

MR. FRITSCHE: I think that's a good revision. That is a good revision.

CHAIRMAN BABCOCK: Anybody else have a good revision? Richard.

MR. MUNZINGER: I don't know if it's good, but I have a question about Rule 1(d), as in delta. The filing of the application stays any further proceedings under the writ or distress warrant except for any orders concerning the care, preservation, or sale of any perishable property until the claim is tried. The phrase "care, preservation, or sale," is that broad enough to include the replevy by applicant and replevy by anybody? In your opinions.

MR. DYER: No, because it has to be an order. Basically what it relates to is perishable property and the

orders that a court may issue either to sell that property or otherwise protect it during the pendency of the proceeding.

MR. MUNZINGER: Well, in this situation if I want to be nasty it seems to me I could destroy all the value of the perishable property by doing whatever it is that I do to raise issue under this, and the way this rule is written the court can't do anything. The property rots --

MR. DYER: No.

MR. MUNZINGER: -- because I'm arguing about title.

MR. DYER: No, that's excepted.

MR. MUNZINGER: Where is it excepted?

MR. DYER: "Except for any orders concerning care, preservation, or sale of any perishable property."

MR. MUNZINGER: That was my question earlier, was whether or not that phrase, "except for orders concerning care, preservation, or sale," would allow someone to -- the applicant, for example, to replevy the property. In your opinion it does.

MS. WINK: We've written in specific rules for requesting the court to provide an order to deal with perishable property differently, quickly, et cetera, so this is saying other than those types of issues we're going

to stay proceedings. Perishable property issues that can be addressed by the judge and issued by order, those take precedence over this.

MR. DYER: There's also no right of replevy in trial of right of property. The property has already been seized and someone already has it pursuant to either the applicant's bond, the respondent's replevy bond, or the applicant's replevy bond already. The trial of right is that property is already in the court, I want to make my claim to it, but there's no procedure for a replevy bond. There is a procedure for a bond in possession following the temporary order.

MR. MUNZINGER: Thank you.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: On that same paragraph, stay of the proceedings and the writ of distress warrant, what about the other writs? Sequestration and levy of execution, it doesn't stay any of those?

MS. WINK: Well, those are writs. Those are writs. They're covered under the word "writ."

MR. HAMILTON: Under the writ? The writ covers anything?

MR. DYER: What you're asking is if it -- if you file this application it stays any further proceedings of the writ that seized the property, but you're asking

does it stop any proceedings from someone going out and getting another writ?

MR. HAMILTON: No. I think she answered my question, but the word "writ" covers everything, sequestration and levy of execution and --

MR. FRITSCHE: Attachment.

MR. HAMILTON: Everything, okay.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: But not distress warrant?

MS. WINK: No, it says "writ or distress warrant."

MR. MUNZINGER: Yeah.

MS. WINK: You're right.

CHAIRMAN BABCOCK: Anything else on 1? All right. TRP 2.

MR. FRITSCHE: TRP --

CHAIRMAN BABCOCK: Orsinger is going to jump the gun here.

MR. ORSINGER: I'm sorry. You can go ahead and say whatever you want.

MR. FRITSCHE: No, go ahead.

MR. ORSINGER: On 2(a)(2) you talk about the amount in controversy, which I suppose is important because that's the way jurisdiction is determined, the amount in controversy, but when we were talking about the distress

warrant we required them to set out the maximum dollar amount of the property to be seized, and I'm wondering if the logic of that setting out the dollar amount of the property is a more specific and accurate way to describe rather than the amount in controversy, because what we're talking about here is the value of the detained property, right?

MR. DYER: It's the value of the property subject to the claim. You may not -- claim may not be for a hundred percent of that property. It may be only 50 percent or less.

MR. ORSINGER: But I -- okay. So it's the value of my interest in the detained property?

MS. WINK: Or perhaps only some of the detained property. What if you were in a situation where a tractor trailer and two alternative trailers were seized and are under writ and then I have a property interest in half of one of those trailers.

MR. ORSINGER: Okay.

MS. WINK: So once we get to the preliminary order we're looking for the value of my interest because I'm the one who said, "I've got a trial of right of property. I want to try my right of property."

MR. ORSINGER: Well, it just seems to me that the concept "amount in controversy" could easily be

confused with the total amount of the judgment or some other things rather than the value of my interest in what I'm trying to get back, and I throw that out there. It doesn't really matter to me. I'm sure that this has a meaning to the people that practice it, but we tried to get a more accurate concept over here on the distress warrant that we're looking really for the claimed value of the property that I'm trying to get back, and if that means amount in controversy to you, that's fine, but to me amount in controversy might just as easily mean in the lawsuit for which the distress warrant or the sequestration or whatever was issued.

HONORABLE JAN PATTERSON: I think the confusion is the word "based upon" because there's an amount in controversy and then there's a value of the property right, but the amount in controversy is not necessarily based upon. Is "based upon" not the correct word there?

MR. DYER: I don't know. Maybe -- it seems to me to be clear, that it's the amount in controversy based upon the value of the property subject to the claim, so if my claim is only 50 percent of the 10,000-dollar tractor then it's 5,000, and I think the purpose of this is for the court to be able to set a bond.

MR. ORSINGER: The purpose is not to

determine jurisdiction.

MR. DYER: No, that's already been decided. By the time you get to this stage --

MR. ORSINGER: Are you sure, because you have a transfer proceeding associated with this preliminary hearing? If you find out that the amount in controversy is over your jurisdictional limit you've got to transfer it to the court that has jurisdiction. So you won't have your jurisdictional finding until you're part way through this hearing.

MS. BARON: Richard, I think the way jurisdiction works is it's determined at the time the suit is filed and that if the change of, you know, claim over time or interest or fees or whatever on top of that doesn't mean that the court loses jurisdiction. I don't know if this is different, if this is treated differently.

MS. WINK: Actually, you might have the -- the overall case might be in the district court, but like Pat just said, we might be talking about only one trailer out of three that's been taken, the total value of that trailer being $10,000, my interest in it being only 50 percent of that $10,000, so we've got a 5,000-dollar claim. We have to determine the amount in controversy of that claim because we have to figure out if we have to take it out and move it over to the JP court and try it there, and

that's why you're seeing that ahead of time, the transfer issue. So that's what we're trying to fix here, is what court has the right to try the claim, and that's what it's for.

MR. ORSINGER: And if it's the same as the court that has the underlying lawsuit?

MS. WINK: Then we stay there.

MR. FRITSCHE: Well, here's another -- if I may, Carl, here's another example, Richard. If the execution occurs on a judgment for $5,000 and my hundred thousand-dollar trailer is seized because of a judgment that issued out of JP court, the JP court should not be determining my right to that property because I have a hundred thousand-dollar trailer that's beyond the jurisdictional limit of the JP court.

MR. ORSINGER: Sure.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: TRP 1(a) talks about filing the claim in the court where the suit is pending.

MS. WINK: Originally, yes, sir.

MR. HAMILTON: Original suit, and yet the Property Code says it has to be in the court that has jurisdiction of the amount in controversy. So --

MR. FRITSCHE: That's --

MS. WINK: Right.

MR. ORSINGER: That's why you transfer it if you end up in the wrong court.

MS. WINK: Yes, sir. That's why we have the Rule TRP 2(b) for transfer. We just haven't gotten there.

MR. ORSINGER: So you file it where it's pending, but let's say it's pending in county court, but your collateral that they've seized is worth 2 million bucks. You have to file it in county court, but they have to transfer it to district court.

MS. WINK: Just the trial of right of property gets tried over in the district court and then you come back.

MR. ORSINGER: I have another question.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On 2(a)(4) it says that the claimant must show a superior right to possession or title, and I'm wondering what is everyone's intention about that showing. Is it more -- it's more than a prima facie showing, but it's less than a preponderance of the evidence, or are you basically trying your case to the judge that you're eventually going to try to the jury? Do you have a lesser showing, like on an injunction you only have to show a probable right of recovery, for a lot of things you only need to show a prima facie right, and I can't tell whether this is a low standard of showing or the

same standard you would have in jury trial.

MR. DYER: It's contested. It's not prima facie. It's contested.

MR. ORSINGER: So you have to convince the judge basically on a preponderance of the affidavits or whatever that you have some kind of legitimate claim to title or possession?

MR. DYER: A superior title of possession, not just some kind, but superior to the other claims.

MR. ORSINGER: Okay. And if you can't convince the judge of that then you can't get a bond, but you can still get a jury trial, can't you?

MR. FRITSCHE: That's correct.

MR. DYER: Yes.

MR. ORSINGER: Okay. So it only affects -- this preliminary determination, which is on a preponderance of the evidence, only affects your right to a bond. It doesn't determine the outcome of the proceeding, correct?

MR. DYER: Right.

CHAIRMAN BABCOCK: Justice Gray, then Gene, and --

HONORABLE TOM GRAY: I just want to make sure that I understood that (a)(2), that is the -- in your example that you gave, it's the 10,000-dollar trailer or the hundred thousand-dollar piece of property. That's the

value you're looking at, not the claimant's interest.

MR. DYER: No.

MR. FRITSCHE: No. It is the value of the claimant's interest in the property on which the levy occurred. If -- and I'll give my JP court example again. If JP court issued a judgment for $5,000, the clerk issued the writ of execution, and my hundred thousand-dollar trailer was levied upon, I want to be able to get my trailer back, but that trial of right of property cannot occur in JP court. It has to be transferred to the district court or the county court with jurisdiction.

HONORABLE TOM GRAY: So if there's a 5,000-dollar claim on it, but your interest is 95,000 -- I'm having trouble. This is not clear to me. I go with Carl and the others that it's not clear what you're trying to determine here, whether it's the claimant's interest or the value of the property that the claimant's interest is in.

MR. FRITSCHE: It's the value of the property under levy.

HONORABLE TOM GRAY: Okay.

MR. ORSINGER: Why don't you say that, "the value of claimant's interest in the property under levy"? If you said that, we would probably all be okay. "The value of the claimant's interest in the property under

levy."

MR. MUNZINGER: That's twice that issue has arisen in two separate rules.

CHAIRMAN BABCOCK: Hey, guys, one at a time. Whoa, Carl. She can't get it. Gene.

MR. STORIE: Yeah, in (a)(4), property claimed against the parties to the writ or the distress warrant, but in Rule 1(b)(1) you have to state the grounds as against the plaintiff in the writ or distress warrant, so should it be just the plaintiff there, or should it be all the parties? See what I'm saying? In one you just have one party, in the other you have all it seems like.

MR. FRITSCHE: Well, again, 13, or Footnote 13, I mean, again, this came straight out of 718. I think what the original rules intended there is remember you may be dealing with a situation where it's a writ of attachment that, you know, neither party has established -- there's no final judgment, the applicant in the writ of attachment has asked the court to levy upon certain property of a defendant to hold and seize until I reduce my claim to final judgment. So I think what was originally intended here is there still may be disputes between that original plaintiff and applicant on the writ of attachment and the defendant in the other suit that haven't been resolved, so all of those parties may need to appear or there may need

to be a determination as to those two parties, which hasn't been resolved yet in the district court.

MR. STORIE: So why would that not be part of the application if that's the situation?

MR. DYER: What he's saying is in (a)(4) the burden of proof is on a claimant to show it against both parties, the parties to the writ, whereas in the application you only have to state with regard to the claimant. I mean, the plaintiff.

MR. STORIE: Right. Right.

MR. DYER: Is that out of the existing rule?

MR. FRITSCHE: That's the existing rule, and I think the reason is, is because the applicant -- what TRP 1(a) meant is that you allege as against the original applicant that obtained the writ or the judgment creditor, because it's either a judgment creditor or a writ of execution or an applicant under a writ of sequestration, garnishment, attachment, or whatever.

MR. DYER: Okay, but --

CHAIRMAN BABCOCK: I'm sorry. Go ahead, Pat.

MR. DYER: But you do have to prove it against everybody.

MR. FRITSCHE: You have to prove it against everybody, but at the application level it's irrelevant who the defendant is because the proponent of the writ in the

other ancillary proceeding is the applicant.

CHAIRMAN BABCOCK: Perfect. Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: There's no requirement that you serve the application on anyone in No. 1 and that would probably help if we knew we had to serve it on -- on who we had to serve it on, and it seems to me that if a plaintiff has sequestered some defendant property, that the defendant would also be interested in the idea that someone else was claiming part of that property as theirs.

MR. STORIE: Yeah.

HONORABLE TRACY CHRISTOPHER: Not just the plaintiff. Seems like both parties would need to know that.

MR. FRITSCHE: 2(a)(1) requires the reasonable notice.

HONORABLE TRACY CHRISTOPHER: Well, but I mean, you should require the applicant to serve people in some way, shape, or manner. This is like another lawsuit. Right? It's going to be docketed as a separate lawsuit.

MR. DYER: No, it's a lawsuit within a lawsuit.

HONORABLE TRACY CHRISTOPHER: Well, that's not what it says. In 1(e), it's docketing it like a

separate lawsuit like we do with our garnishments that, you know, have an A or a B attached to it.

MR. FRITSCHE: It's being docketed as an intervention in that underlying suit.

MR. ORSINGER: So then you have a 21a obligation to give notice to all of the parties in the underlying lawsuit then under the Rules of Civil Procedure?

MR. FRITSCHE: Well, again, it is not in here because it was not in the existing rules.

MS. WINK: Yeah.

MR. ORSINGER: That's a good reason to put it in there, because the existing rule is a hundred years old.

HONORABLE TRACY CHRISTOPHER: Well, fix it.

CHAIRMAN BABCOCK: Is it really a hundred years old?

MS. SECCO: 30.

MR. ORSINGER: That's not very old at all.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: If it's an underlying lawsuit, why would anyone file their claim in JP court when the overall case is in district court?

MS. WINK: They don't.

MR. FRITSCHE: They wouldn't.

MR. ORSINGER: Unless it was a distress warrant, because the distress warrant has to come out of

the JP court.

MR. FRITSCHE: But it's returnable to the court that has jurisdiction --

MS. WINK: And the rest goes to --

MR. FRITSCHE: -- over the value of property.

MR. ORSINGER: So even with the distress warrant you would file it in the court with the underlying lawsuit.

MR. DYER: Yes.

MR. FRITSCHE: Correct.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Back to this jurisdiction thing, it was suggested while ago that it should say "the value of the claimant's property," but that's not, I don't think, correct. It's not the value of the claimant's property. It's whatever the claimant alleges that it is, isn't it, that determines the jurisdiction. It's not the value of the claimant's property. It's whatever the claimant says my property is.

CHAIRMAN BABCOCK: Judge Yelenosky, then Sarah.

HONORABLE STEPHEN YELENOSKY: At best this is a drafting thing and I'm just probably overlooking it, but (c)(1) says, "Following the preliminary hearing the court

must issue a written order that" and then it goes to down. It seems to give me only the option of granting.

MR. ORSINGER: Right, in support of.

HONORABLE STEPHEN YELENOSKY: Shouldn't it say, "Following the preliminary hearing if the court finds that the movant applicant has met its burden" or something like that?

MR. ORSINGER: I have a fix for that, "include specific findings of fact regarding the legal grounds for the application," so you could deny it as well as grant it.

HONORABLE STEPHEN YELENOSKY: Well, it still needs to say something other than following a preliminary hearing I must issue a written order.

MR. FRITSCHE: So if the claimant meets its burden of proof.

HONORABLE STEPHEN YELENOSKY: I mean, because if they don't meet their burden I don't have to meet any specificity requirement. I just say "denied." Why would I have to have specificity?

MR. ORSINGER: You wouldn't.

CHAIRMAN BABCOCK: Yeah. All right, Sarah.

HONORABLE SARAH DUNCAN: I started thinking about -- I don't think we're to -- up to 2(b) on transfer, but that's what started me down this road. My

understanding has always been that a court that doesn't have jurisdiction has only one option, and that's to dismiss. I don't understand the validity of a court that doesn't have jurisdiction having an effective transfer order, but then I started thinking, well, wait a minute, if the court has jurisdiction of the original suit, whether it's garnishment or whatever, then it has jurisdiction to enforce whatever judgment it issues in that original suit.

It does -- subject matter jurisdiction is not going to be implicated, I don't think. I haven't researched this, but subject matter jurisdiction isn't going to be implicated because a method of enforcement involves a piece of property that would in and of itself exceed the jurisdictional limit of the court. That may not have been clear, but the court either has jurisdiction of the initial lawsuit or it doesn't. If it doesn't, all it can do is dismiss. It can't be transferring to a court of competent jurisdiction; and if it has jurisdiction of the original suit, however it's titled, then it will have jurisdiction of this enforcement mechanism.

MS. WINK: I think the problem goes back to David's earlier example where if you're in JP court, which is a court of very limited amount in controversy jurisdiction, and a writ is served -- levied, property is taken pursuant to the levy that is worth more than $10,000.

HONORABLE SARAH DUNCAN: It doesn't change the amount in controversy.

MS. WINK: For that -- for that -- you're right.

HONORABLE SARAH DUNCAN: This is just an enforcement mechanism.

MR. DYER: But it brings in a party who was not involved in that original suit.

HONORABLE SARAH DUNCAN: So.

MR. DYER: It's kind of like a new lawsuit against that party, and the claim there is higher than the jurisdictional limits of the JP court.

MS. WINK: This third party --

HONORABLE SARAH DUNCAN: It can't be.

MS. WINK: It is.

HONORABLE SARAH DUNCAN: The claim can't be more than the original claim. The property can be -- the property against which that claim is going to be satisfied can be more, but the claim can't be.

MR. FRITSCHE: Well, but when you go back to the jurisdictional statement in --

MS. WINK: Actually, it can be, though. Before you do that, it can be. My claim can be to a hundred thousand-dollar vehicle, so the value of my claim, if I have a hundred percent right to a hundred

thousand-dollar used Lamborghini, my claim is a hundred thousand dollars.

HONORABLE SARAH DUNCAN: But that's not what's in controversy.

MS. WINK: Yes, it is.

MR. DYER: Yes, it is because I'm claiming that's mine, that should not have been seized under --

HONORABLE SARAH DUNCAN: No, you're claiming that 5,000 of it --

MS. WINK: No, no, no.

MR. DYER: No, I'm the third party. The one with the 5,000 is the one who has the 5,000-dollar judgment. They're the plaintiff. They've gone out, gotten a writ of execution to seize my car. I have nothing to do with this lawsuit.

MS. WINK: Yeah, I was just renting.

MR. DYER: That's my car, and I come in and say it's worth a hundred thousand dollars. I'm not a party to your JP suit. This is brand new against me. It goes into a higher jurisdiction court.

MR. FRITSCHE: This --

MS. WINK: This is a weird deal.

MR. FRITSCHE: This is a weird deal because it only applies once there has been a levy --

HONORABLE SARAH DUNCAN: I understand that.

MR. FRITSCHE: -- under a writ, and there is always the possibility that levy may be upon property owned by a third party that is valued way in excess.

HONORABLE SARAH DUNCAN: I understand that, but even -- even if it's a Lamborghini, it's a used Lamborghini, a hundred thousand dollars. I have a 5,000-dollar claim. Even if I prevail and the Lamborghini is sold and I get my $5,000 out of the proceeds, the other $95,000 was never at issue.

MS. WINK: That's the problem. You don't get to sell my Lamborghini. I have a superior right, and I get to under this trial of right of property have the right of possession determined immediately and now before anything else is decided because, by golly, nobody is selling my Lamborghini.

MR. DYER: The statute conveys jurisdiction only in the court with jurisdiction of the amount in controversy, and there the amount in controversy is the value of the property that's been seized.

CHAIRMAN BABCOCK: Sarah remains skeptical however.

MS. WINK: We drink a lot of Kool Aid ourselves.

CHAIRMAN BABCOCK: And my only request is tomorrow when we're done if we can take a ride in your

Lamborghini.

HONORABLE SARAH DUNCAN: Wait, can I have my question answered about how does a court -- if you're right, I'll give you that, if you're right and the court does not have subject matter jurisdiction over the Lamborghini, how does it have jurisdiction to transfer a suit over which it doesn't have jurisdiction?

MS. WINK: It doesn't transfer the whole suit.

HONORABLE SARAH DUNCAN: It's transferring --

MR. FRITSCHE: The trial of right.

MS. WINK: Only the claim.

HONORABLE SARAH DUNCAN: A claim over which it does not have jurisdiction.

MS. WINK: Well, a court can transfer -- if I don't have jurisdiction I can certainly --

HONORABLE SARAH DUNCAN: No, you can't. All you can do is dismiss.

MS. WINK: But what seems to have happened here is that courts realized we're either going to have somebody like Dulcie with that Lamborghini she's going to earn somebody busting out the JP's jurisdiction and dragging somebody with a 5,000-dollar case into a whole new lawsuit that's far more complicated, or we're going to create this little critter called trial of right of

property, and we're going to let that --

CHAIRMAN BABCOCK: Who's creating a critter?

MR. ORSINGER: Do we have the authority to create a critter?

CHAIRMAN BABCOCK: I don't think so.

HONORABLE SARAH DUNCAN: I don't think you can create a critter.

MS. WINK: I think critters are historical in Texas.

HONORABLE SARAH DUNCAN: Just for the record, I don't think you can create a critter that asserts jurisdiction that it doesn't have.

MR. DYER: I understand what you're saying, you're saying if a court doesn't have jurisdiction then it has no jurisdiction to do anything, it can't transfer, it just has to dismiss.

MR. FRITSCHE: But the problem is the court may have a pending suit.

HONORABLE SARAH DUNCAN: Over which it does have jurisdiction.

MR. FRITSCHE: Over which it does have jurisdiction. The problem is the court's act in issuing a writ, whether it's prejudgment or post-judgment has effectively created a situation where that court had no jurisdiction to effect value of that property.

HONORABLE SARAH DUNCAN: But it did. Once a court has jurisdiction it has jurisdiction to do whatever.

MR. DYER: What makes this unusual is that in attachment, why is your writ of attachment out of a JP court judgment for five grand and I hit a hundred thousand dollars, JP court still has jurisdiction over that claim, so distress -- or the trial of right of property is different in that regard.

HONORABLE SARAH DUNCAN: There is no -- and even with your used Lamborghini there is no principled reason I can see for distinguishing this type of suit from any other. It's still an enforcement mechanism. The amount in controversy in the suit is whatever it is, and if you have a superior right to the used Lamborghini, it doesn't matter if it's worth a dollar or a million dollars. You have a superior right. The claimant has no right.

MR. FRITSCHE: There are --

HONORABLE SARAH DUNCAN: And the amount in controversy has nothing to do with it.

MR. FRITSCHE: There are always two amounts in controversy in a trial of right of property. Yes. There's the trial of right -- or there's the amount in controversy of the underlying suit, and there is the amount in controversy based upon the claimant's request to have possession of their property.

HONORABLE SARAH DUNCAN: I don't think so. There's only one.

CHAIRMAN BABCOCK: You guys take this outside. Richard.

MR. MUNZINGER: Some of us critters can't hear everything that's going on down there.

CHAIRMAN BABCOCK: I know it's -- but I can, so that's good.

HONORABLE SARAH DUNCAN: It's because we're old, Richard.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If Sarah's point is taken that you have to dismiss, I'm troubled by forcing us to file in a court that doesn't have jurisdiction to begin with, so I'm okay with this transfer. I mean, filing in the court where the underlying lawsuit is pending so that the judge gets the first shot at whether he has jurisdiction or not, but it makes no sense if you're going to dismiss, which is what Sarah says you have to do, it makes no sense to file in a court you know you don't have jurisdiction in as a prerequisite to filing in a court that you do have jurisdiction in. You ought to just be able to go ahead and file in a court --

MR. DYER: And what happens to the writ of execution? It's not dissolved. Your property still's been

seized, and you've got no effective mechanism, unless you enter -- remember, you're a nonparty.

MR. ORSINGER: My preference would be that you not require that this trial of right of property be initially filed in the court where the underlying litigation is going on. If somebody has an 80,000-dollar, a hundred thousand-dollar claim, they ought to be able to go into a court that can give them relief immediately and not worry about mail notice and other things, which we'll talk about in a minute.

CHAIRMAN BABCOCK: David.

MR. FRITSCHE: Well, I think that's what the intent, the original intent, of the drafters was, was to avoid that because you want to immediately effect a stay under the levy that has occurred; and if you don't have an immediate right to affect the levy, stop the levy, until your right is heard, there's the potential that your property right could be damaged or disappear.

MR. ORSINGER: I agree, but forcing them to file in a court that doesn't have jurisdiction does nothing but delay this about two weeks.

MR. FRITSCHE: It -- you don't have any choice.

MR. ORSINGER: Sure you do.

MR. FRITSCHE: No, you don't. When your

hundred thousand-dollar Lamborghini has been levied upon on a JP court judgment for $5,000, what you're suggesting is we have to go to county or district court to obtain basically a TRO to --

MR. DYER: You would have to file a new lawsuit.

MR. FRITSCHE: A new lawsuit.

MR. ORSINGER: Well, sure, but what you're telling me is that I have to file a lawsuit in a court that I know has no jurisdiction so that they can mail it over to somebody else who will then mail notice, and a couple of weeks later I finally get into a court that does have jurisdiction.

HONORABLE SARAH DUNCAN: So you can get a void order of transfer.

MR. ORSINGER: This is require -- let's just say that my right of claim is a hundred thousand dollars and everybody agrees to that, so we all -- and the judgment is out of the JP court.

MR. FRITSCHE: Well, what's going to -- give me the example of what's going on with the underlying writ. Start with the -- let's start with the writ that is under levy. What writ do you have?

MR. ORSINGER: It's been executed.

MR. FRITSCHE: Okay. What type of writ?

MR. ORSINGER: To me it doesn't matter, but it could be a garnishment or it could be a writ of execution.

MR. FRITSCHE: Okay. Writ of execution has been levied upon.

MR. ORSINGER: So the property is now in the possession of the state.

MR. FRITSCHE: Okay.

MR. ORSINGER: So your rule --

MR. FRITSCHE: Your judgment is for how much?

MR. ORSINGER: Let's say the judgment is for something underneath the district court's jurisdiction. $50,000.

MR. FRITSCHE: 50,000.

MR. ORSINGER: Okay. And somebody has just seized something worth a hundred.

MR. ORSINGER: 500 dollars.

MR. DYER: Do I hear six, do I hear seven?

(Multiple simultaneous speakers)

THE REPORTER: Wait, wait, wait.

CHAIRMAN BABCOCK: Guys, she can't --

THE REPORTER: Stop, please.

CHAIRMAN BABCOCK: One at a time.

MR. ORSINGER: What's the top of the county court at law's jurisdiction?

MR. FRITSCHE: Currently 100.

MS. WINK: Oh, he said county? Depends on the county.

CHAIRMAN BABCOCK: One at a time, guys.

MS. WINK: Sorry. County court jurisdictions are by statute, and they have different maximums, so --

MR. ORSINGER: Oh, each one is different?

MS. WINK: Yes.

MR. ORSINGER: Well, can we just have a hypothetical in which we have a judgment out of a county court at law and we have a seizure of an asset that exceeds that court's jurisdiction? Your rule is going to make me file in the county court, even though you and I and everybody in this room but Sarah, or maybe even Sarah agrees, they don't have jurisdiction, and then you're doing that so that it can then be transferred to the court that has jurisdiction where we can now legitimately litigate it. Why are we requiring that it be filed in a court that doesn't have jurisdiction first so that that court can transfer it to a court that does have jurisdiction?

MR. FRITSCHE: Because the court that had original jurisdiction acted properly in issuing the writ. The problem is the levy has occurred on property that does not belong to the judgment debtor, that does not belong to the judgment creditor, is merely subject to levy, and there

has to be a summary procedure for a third party to step in and say, "Wait a minute, that's mine."

MR. ORSINGER: I don't think I make myself clear. My summary procedure is to go directly to district court and say, "They have levied on property that belongs to me, and I want relief today," not a week from now, not transfer it somewhere across the state.

MR. DYER: You've got to file a new suit, though.

MS. WINK: Yeah.

MR. ORSINGER: What's wrong with that? You've got a hundred thousand dollars here. I want my property. Why should I file a lawsuit in a court that doesn't have jurisdiction so it can be transferred to a court that does have jurisdiction?

MR. DYER: That's the issue. That's the issue is whether or not --

MR. ORSINGER: Name one good reason --

MR. DYER: -- the court can transfer.

CHAIRMAN BABCOCK: Hey, hey, hey, Richard.

MR. ORSINGER: Pardon me.

CHAIRMAN BABCOCK: Wait until he finishes.

MR. ORSINGER: Name one policy reason that's advanced by requiring this process to be filed in a court that has no jurisdiction so that it can be transferred to a

court that does have jurisdiction.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: It issued the writ.

MR. ORSINGER: But what's the policy in going to them first? They don't have the power to lift the writ.

HONORABLE NATHAN HECHT: You don't know that yet. It hadn't been established. That's just what you say.

MR. ORSINGER: Okay.

MS. WINK: And if I'm a detective --

HONORABLE NATHAN HECHT: So you go back to the court that issued writ, and you say, "Judge, this shouldn't -- the writ was fine, but it shouldn't have been levied on me," say, "Well, you're wrong. You lose."

MR. ORSINGER: Well, the court can't say that if the value of the asset exceeds their jurisdiction.

HONORABLE NATHAN HECHT: Well, I mean, maybe, maybe not, but if -- it seems to me you've got some supervisory power to determine a challenge to the levy of your writ.

MR. ORSINGER: Even if it's beyond your jurisdictional authority to litigate that claim?

HONORABLE NATHAN HECHT: I just don't know if you know. I mean, that's what somebody says. I mean, I'm not sure that I'm convinced by that, but it seems to me

that the obvious reason for the rule is you go back to the court that issued the writ. Now, maybe that's not good enough. I'm not saying it's not -- you shouldn't go someplace else first, but I'm just saying if we're looking for why it is written the way it is, I think that must be the way it's written that way -- must be why it's written that way.

CHAIRMAN BABCOCK: Could I ask a question? Is this transfer rule that you have here, TRP 2(b), as in boy, is this derived from something or have you made this up out of whole --

MR. FRITSCHE: No.

HONORABLE SARAH DUNCAN: Whole cloth.

MR. FRITSCHE: Whole cloth.

CHAIRMAN BABCOCK: Original drafting.

MS. WINK: See, part of the problem was --

CHAIRMAN BABCOCK: Wait a minute. So it's original drafting, not derived from any other rule, right?

MR. FRITSCHE: Correct.

MR. DYER: Well, that's not exactly correct.

MS. WINK: No, not exactly.

MR. DYER: I think it was derived from the transfer rule on venue in a garnishment action where you have -- that's the derivation of the language, not support for its use jurisdictionally.

CHAIRMAN BABCOCK: Okay. Has the task force done any research on this jurisdictional question? Dulcie is nodding yes.

MS. WINK: Yes.

CHAIRMAN BABCOCK: All right. And what research have you done?

MS. WINK: Well, Judge Wilson did it from the beginning, and the problem was this is -- has been used so rarely since it was created that there are no cases to tell us anything, nothing. There were a couple of cases out there, and they didn't go to any points of how to procedurally deal with --

CHAIRMAN BABCOCK: Okay. So the research was unhelpful.

MS. WINK: Good answer. Yes, sir.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: Well, if I can -- to research and try to find a case that's exactly like yours, I can see how that would not be fruitful, but to research and understand principles of jurisdiction it seems to me would be fruitful, and I would propose that Pam do it because she won where I was just a dissent, but principles of jurisdiction are not being integrated here. This is anti-jurisdictional, anti-matter.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Let me ask this of the drafters, in the 5,000, 100,000-dollar example, and I'm the owner of the hundred thousand-dollar vehicle, can the JP grant me relief if I have to go to the JP?

MS. WINK: No.

HONORABLE DAVID PEEPLES: Or am I doomed to have to ultimately get relief from the district court?

MS. WINK: You must get relief from district court for two reasons. One, the Property Code tells us that the trial of right of property is tried in the court with jurisdiction of the amount in controversy, and the amount in controversy of your claim is a hundred thousand.

HONORABLE DAVID PEEPLES: But can the JP decide, "Hmm, I didn't know I was doing that. I'm going to withdraw that writ of execution" or whatever it is?

MS. WINK: No, actually, in our example, the levy is correct. The levy is proper. The decisions made by the JP have been correct. It's just that you have -- there are multiple people who have rights to the property that's been executed on or levied upon.

HONORABLE DAVID PEEPLES: Okay. Now -- I'm sorry.

MS. WINK: Your right just happens to be greater than the court's maximum amount in controversy jurisdiction.

HONORABLE DAVID PEEPLES: Okay. Now, if I'm the owner of the hundred thousand-dollar vehicle, if I can't get any relief from the JP, what is the policy reason for making me go there, which is futile, instead of going straight to district court where I have to go ultimately?

MS. WINK: I have two answers for that, too. First of all, the JP is the one who can stop the current ongoing execution pursuant to the writ procedures. He can stop the for sale, stop the sale, stop the publishing, all that. So that's immediate, and that's something that you might not get at all from the district court. You might be going to a district court, and this, of course, is going to be the second jurisdiction, is going to say, "You're asking me to stop another judge from executing his or her authority"?

HONORABLE DAVID PEEPLES: So it's kind of like I've got to exhaust my remedies with the JP before I can go to district court, and I might get relief from the JP who might back off?

MS. WINK: Yes. Yes. And --

HONORABLE DAVID PEEPLES: Richard, isn't that an answer to your question?

MR. ORSINGER: Maybe. Maybe.

CHAIRMAN BABCOCK: Hang on, guys. Roger has had his hand up for a long time. Then Gene.

MR. HUGHES: I was just going to say, I mean, there's already provisions in the Government Code that allow transfers between county courts and county courts at law and district court. I think the big problem is how you transfer it from a JP court. I'm not sure if there's any statutes that allow that, but it just doesn't trouble me. I mean, we have a jurisdictional statute that says it's to be tried in the court with jurisdiction of the amount in controversy, and it sure seems to me that Justice Hecht nailed it on the head. Why do we want a district court interfering with the execution of the JP or county court at law judgment if there's any possibility simply to transfer it rather than have the two of them fighting over it?

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I thought there was a statute that allowed transfer from a court without jurisdiction to a court with jurisdiction, and secondly, if you're in JP court, in the first instance they should have jurisdiction to determine their jurisdiction, which is basically what you're getting with a preliminary hearing.

HONORABLE SARAH DUNCAN: Except they're deciding they don't --

CHAIRMAN BABCOCK: Marisa may have some helpful research.

MS. SECCO: Oh, well, this is --

CHAIRMAN BABCOCK: Never mind. Richard.

MR. ORSINGER: Okay. If I understand it, the JP -- you have -- as the holder of the third party interest you have the right to go to the JP and ask the JP to unwind what the JP has been doing, but you don't have the right to get a ruling on a replevy, but you could go into court and say, "You've grabbed my hundred thousand-dollar asset and we're asking you to ungrab it."

MR. DYER: Yes. We have added a third party motion practice in all of these writs that did not exist -- well, it existed very cryptically under the rules. It said, "An intervening claimant can file a motion to dissolve," but that was it. We added a little more detail to say a third party can come in, file a sworn motion to dissolve this writ, and if it's uncontroverted, it's all done.

CHAIRMAN BABCOCK: All right. Stop the presses. Now we have the answer.

MS. SECCO: Oh, well, this was just an issue that was brought up about the justice court being able to transfer. There's a rule, Rule 575, that allows a justice court to transfer to a district court for jurisdictional reasons.

CHAIRMAN BABCOCK: Even when it doesn't have jurisdiction?

MS. SECCO: I'm not exactly sure. It's called a -- a writ of certiori, but I'm not sure why --

MR. DYER: That's an appeal, isn't it?

MS. WINK: Huh-uh. It's a -- go ahead.

MS. SECCO: Well, it's referred to as transferred to the district court for, you know --

MR. ORSINGER: For a de novo trial probably.

MS. SECCO: I don't know all the specifics, but in the JP task force meetings that we've been having they always refer to this as the mechanism for taking a case from the justice court to the district court. But I don't know the specifics.

CHAIRMAN BABCOCK: Is that what you had in mind?

MS. WINK: Yes, but I would be -- it's just in the back of my memory, and I'm afraid to say anything else about it.

CHAIRMAN BABCOCK: Sarah's still not convinced. Who else has got comments? Richard.

MR. MUNZINGER: I think that the rule as they have drafted it protects the property owner better than a rule that would require the property owner to go to the court having jurisdiction because it's immediate. If I go to a district court I have to have citation issued, 20 days pass. I then get the answer filed or I seek a temporary

injunction or a temporary restraining order, and the district judge says to me, "Well, wait a minute, I'm not going to interfere with Judge so-and-so, the county court of so-and-so." This is I think the most logical procedure that you have, is to go back to the court that issued the writ. People that have interest in this are the parties to the lawsuit, the court that issued the writ, and the owner of the property. All of those persons have immediate relief at the level of the justice of the peace who can preserve the property and issue the appropriate orders.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, maybe I'm not understanding. Why would the district court judge think he or she is interfering when the JP court has never adjudicated this third party's ownership? The JP court hasn't done that, as I understand it, so what I would be saying is, "Oh, JP court issued this order that allowed them to take your property. Now you're claiming it's yours and it's worth this much, and because it's worth this much, that JP court doesn't have jurisdiction and I do." I don't know that I would see that as stepping on the JP.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Would you-all consider a provision that in the event the JP court determines that they don't have jurisdiction and are going to transfer it

to the district court that they would automatically stay further process of the JP's writ?

MS. WINK: It already does that.

MR. ORSINGER: It does? It automatically stays it?

MS. WINK: Right. In fact, that was the provision we just --

MR. FRITSCHE: (d).

MS. WINK: 1(d)?

MR. FRITSCHE: TRP 1(d).

MS. WINK: Right.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: It seems to me that this all goes back to 25.001. I tried to find when that was enacted, but amount in controversy has a definite meaning. I assume we're going to have the same discussion with turnover orders.

MR. DYER: Uh-huh.

HONORABLE SARAH DUNCAN: So if a county court -- if execution is attempted against an asset, a piece of property over which the county court wouldn't have jurisdiction if it were brought as an initial suit because of this sentence in 25.001, and I don't know of authority for the turnover order specifically.

MS. WINK: Statutorily.

PROFESSOR CARLSON: Statutorily.

HONORABLE SARAH DUNCAN: I know there's statutory order for a turnover order. Is there statutory order like a trial of the right of property must be tried in the court with jurisdiction --

MR. DYER: No.

HONORABLE SARAH DUNCAN: -- of the amount in controversy, because in my opinion the Legislature has misunderstood what "amount in controversy" means. It has a definite legal meaning, and it's not the amount -- the value of an asset against which execution is sought.

MS. WINK: I don't disagree with that. Here is the problem. That -- the execution is separate from the third party's claim. My claim is valued at that property that's been taken. I have a hundred thousand-dollar claim. You know, it just happens to have been -- you know, that property just happened to get dragged into proceedings that I wasn't a party to.

HONORABLE SARAH DUNCAN: It doesn't -- that can happen with a turnover order. It can happen with all -- it can happen with any type of writ, but that -- if you have a problem with that, go file a lawsuit. If we're talking about whether the court that issued the writ has jurisdiction to determine whether you have a superior right of possession of your Lamborghini, to me that's --

CHAIRMAN BABCOCK: Okay. It's obvious we've spotted a jurisdictional issue here that we're going to have to resolve at some point. But for the rest of today let's see if we can get through at least this rule, TRP 2, and go to subsection (c) and talk about that. Anybody, comments on that? Richard.

MR. ORSINGER: On 2(a)(5) where it says -- and I know this is carried forward from the existing rule. It says, "The evidence, if tendered, may be received and considered." Does that mean the judge has authority to reject evidence offered at this hearing, or is the judge required to listen to it if it's offered?

MR. DYER: No, we need to change this to match the language in the other writs.

MR. ORSINGER: So it will say "shall," "shall consider"?

MS. WINK: No, this preliminary. They can do it on affidavits, or they can --

MR. DYER: Oh, okay, you're right. It is different.

MR. ORSINGER: So it's optional with the trial judge whether the judge will consider live testimony?

MS. WINK: Yes. At the preliminary hearing only, not at the actual trial of right of property.

MR. ORSINGER: And this is where jurisdiction

of the court is determined?

MS. WINK: Correct.

MR. ORSINGER: So, in other words, if somebody has evidence that the court doesn't have jurisdiction and it's not in an affidavit then they can't offer it.

MS. WINK: No, they can offer it. The judge just doesn't have to take it.

MR. ORSINGER: Okay. I have a problem with that. I think the judge ought to be required to hear evidence that they don't have jurisdiction, even if you're not going to make them listen to evidence that they should hold their writ or something.

CHAIRMAN BABCOCK: Okay. We're not going to say the J word anymore today. Let's go to TRP 2(c). Roger.

MR. HUGHES: My question was, and I wasn't clear from hearing section (b) and (c) whether the temporary -- whether this temporary order is issued in addition to a transfer order or whether a finding that the case should be transferred precludes issuing any temporary order under subsection (c).

MR. ORSINGER: It has to preclude it. The court doesn't have jurisdiction to issue an order under (c).

CHAIRMAN BABCOCK: Now, now.

MR. ORSINGER: Oh, I can't say that.

HONORABLE SARAH DUNCAN: Shh, shh.

MR. HUGHES: I'm just saying it wasn't clear to me, you know, what was the intent of the rule, disregarding questions of jurisdiction.

HONORABLE SARAH DUNCAN: Shh.

CHAIRMAN BABCOCK: Anybody got any response to that?

MR. DYER: He's saying it doesn't blend in with the order to transfer, so if there's a transfer there's no need for --

CHAIRMAN BABCOCK: So the comment is that there's a blending problem between (b) and (c), so we'll note that. Any other problems with (c)?

All right. How about (d)? Any comments on (d)? Why don't we talk a little bit about TRP 3, the bond?

MR. ORSINGER: If we can, before we leave (d) --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: The transferee court may be the one that's modifying the order or writ, so I don't think we should say "its order." It should say "the order." "If the court modifies the order," because it may be a district court modifying a JP writ.

CHAIRMAN BABCOCK: Good point.

MR. ORSINGER: You see what I'm saying?

CHAIRMAN BABCOCK: I do.

MR. DYER: I'm sorry. Could you read what part?

MR. FRITSCHE: Right here.

MR. ORSINGER: It's the very last, 2(d). "If the court modifies its order or writ," that's assuming there's no transfer. If there's a transfer, they'll be modifying a writ of another court.

CHAIRMAN BABCOCK: So it should be "the order or writ," not "its." Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm trying to -- I'm looking at trial, which is 6, and it seems kind of -- we've got some discovery issues in this Rule 2 and then you've got trial in Rule 6. Is the intent that the temporary order will set the trial date just like a temporary injunction does so that we have a trial date set in the order and so we know what to do after that?

MR. FRITSCHE: Yes.

HONORABLE TRACY CHRISTOPHER: So we should probably put that in the requirements of what should be in the order. Oh, I see it's in there. Okay. Never mind.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And this

written statement that's in (e), what is that? Is that like an answer?

MR. DYER: No.

MR. FRITSCHE: That came out of the old rules, and what apparently the procedure was, the parties to the writ needed to outline for the court with the jurisdiction to hear the trial of right of property their positions. We -- I mean, we were -- that's another area where there was no case law on what these written statements and what these pleadings were supposed to say or do, but there needed to be some methodology for a party to the writ, whether it be a judgment creditor or debtor or any of the other writs, to assert their position because if they don't say anything and you get to a final trial and the claimant's claim is uncontroverted, then the writ is dissolved, the property is returned. If it's not already returned under bond, it's returned by judgment to the claimant.

HONORABLE TRACY CHRISTOPHER: Well, the -- that was another thing I was going to ask about here in 6, trial, these written statements or appear. So, I mean, just because it was in there before doesn't mean we can't change it to make it seem more normal to us. Especially if there's no case law saying, "Oh, written statements are really important." So what's supposed to be in a written

statement? We don't have any -- everyone knows what an answer is. You know, I agree, I deny it, it's really mine, but a written statement?

MR. DYER: And should it be sworn to?

MR. ORSINGER: You already required the application to be sworn to. Would you be adding anything by requiring this statement to be sworn to?

HONORABLE TRACY CHRISTOPHER: I mean, if we want the defendant to say, "I agree, it's the claimant's property," we should have a rule that says whether or not the defendant agrees or not and then the fight is really between the person who got the writ and the claimant at that point.

MR. FRITSCHE: So if we changed it to say the parties are to file statement -- written statements of interest in the property at issue.

HONORABLE TRACY CHRISTOPHER: Or I'd say an answer. I mean, I'd just call it an answer, and then people understand I think.

CHAIRMAN BABCOCK: How about their answer under oath? Roger.

MR. HUGHES: Well, it seems to me by looking at the Rule 6 and it talks about defaulting people if they don't file a written statement by the deadline signed by the court or if the claimant -- or if they failed to

appear, and so it would seem to me that there has to be some provision to set a deadline for people to file the statements of their position. It seems to me that the claimant has already filed something saying, "This is what I claim my rights are." Then it seems to me that either we should require the court hearing the matter to set a deadline that the opponents file their statements or answers, if you will, or that we set one by rule. I'm not sure which would be better under the circumstances.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Yeah, I don't understand why the claimant would have to file another statement after they've filed the application. I mean, they should just show up for trial just like a normal plaintiff does who's filed a request for something.

MR. DYER: Well, if you had discovery, which you are entitled to, you may want to address in your statement things that you've learned in discovery. I mean, I admit it may not be required, but it at least ought to be allowed.

HONORABLE TRACY CHRISTOPHER: But I -- what is required in a statement, and if it's not in the statement, what effect is it? I mean, that's why I'm just objecting to the use of "statement" without more definition as to what you have to put in it. We all know what an

answer is.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, getting back to this, it seems to me that the intent of these proposed rules is to create its own world of discovery in civil procedure for handling this one matter rather than to throw the parties back on the general Rules of Civil Procedure that would prevail in county and district court. In that case, just as we have a rule -- just as the proposal is that the trial court set the boundaries of discovery, et cetera, et cetera, for this proceeding, either the trial court should set a deadline for the other parties to file an answer or amended pleadings or we provide it by a rule. I'm just not sure which makes more sense under the circumstances.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: (a) -- rather (b)(1) requires the applicant to state the legal and factual grounds on which the claimant asserts the superior -- I'm sorry, the claimant is required to state the legal and factual grounds on which the claimant asserts the superior right to title. Why shouldn't the other parties be required to file a written document in the same language setting out their reasons as well and then trigger all these default positions and what have you when they fail to do so. Written statement is insufficiently specific and it ought

to be "Tell us the legal and factual grounds on which you say you can have my Lamborghini, you son of a gun."

CHAIRMAN BABCOCK: Great. Yeah, Judge.

HONORABLE STEPHEN YELENOSKY: Marisa, I've looked at those rules, and my reading of them is it's the higher court that acts, not the lower court.

MS. SECCO: Right. I agree.

HONORABLE STEPHEN YELENOSKY: And, therefore, you don't have the problem of a transfer by a court without -- without J, in any event.

CHAIRMAN BABCOCK: Without that thing.

HONORABLE STEPHEN YELENOSKY: I know you didn't want to go there, but the rule doesn't say that that court can do it. It's the higher court.

MS. SECCO: I agree. I just reread the rule during our discussion, and it is the order where you file an application for the writ in the county or district court.

CHAIRMAN BABCOCK: Okay. We've made the point that "written statement" maybe should be called something else like an answer or something else, but "written statement" is too vague. What other comments do we have? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: If they're entitled to a jury trial, you're entitled to 45 days'

notice of the trial setting, so, you know, I don't know whether we're trying to do something different here with this 21 days after the deadline for the answer for the trial. I don't know how could anybody get their jury fee paid.

CHAIRMAN BABCOCK: Where are you referring to?

MR. ORSINGER: (c)(e) at the very bottom of the page.

HONORABLE TRACY CHRISTOPHER: (c)(1)(E) at Rule 2.

CHAIRMAN BABCOCK: Got it. All right. What else? Richard.

MR. MUNZINGER: Should a claimant be required to timely file a jury demand?

CHAIRMAN BABCOCK: If he wants a jury trial I would think he would.

MR. MUNZINGER: But the rule is silent on the date or time of filing a jury demand by a claimant.

MR. FRITSCHE: I don't have the rules in front of me, but I think that the way that the jury demand operates is it has to be -- it can be within a reasonable time prior to the trial setting. It doesn't have a specified deadline.

HONORABLE TRACY CHRISTOPHER: No, 45 days.

MR. FRITSCHE: Well, look at the --

HONORABLE TRACY CHRISTOPHER: For the notice of the trial.

HONORABLE DAVID EVANS: 30 on payment of the fee.

HONORABLE STEPHEN YELENOSKY: Well, on presumption, but you can ask for a jury trial, and if it doesn't disrupt things you have a right to one.

HONORABLE TRACY CHRISTOPHER: But the other side has a right to a continuance.

MR. MUNZINGER: But the point here is all of these procedures are, quote, "summary," or expedited, that's a better word. They're moving very quickly, and lawsuits don't generally move that quickly, so the rule relating to the timing of filing a jury demand for an ordinary lawsuit may or may not be prudent for this context.

CHAIRMAN BABCOCK: Judge Christopher, your 45-day thing, what's the --

HONORABLE TRACY CHRISTOPHER: I'm sorry. 45-day was notice of trial, 30 days is payment of the jury fee.

MR. ORSINGER: You could very easily put in here --

HONORABLE DAVID EVANS: On first trial --

CHAIRMAN BABCOCK: Hang on. Hang on. 216a says, "No jury trial shall be had in any civil suit unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the nonjury docket, but not less than 30 days in advance."

MR. ORSINGER: Why not put in subdivision (e) that the court should set the deadline for filing a jury demand? Because we're trying to accelerate this whole process, and we don't want to incorporate a 30-day rule into a trial that's 21 days out.

CHAIRMAN BABCOCK: That's Judge Christopher's point, I think. Right. Okay. We got that. What else? Anything on the bond?

MR. ORSINGER: I have two quick things on the bond.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Does the bond have to be set in the amount of the judgment? It just says here "an amount set by the court." It doesn't give any guidance on the amount set by the court, but the bond -- can the bond be less than the amount of the judgment or more than the amount of judgment?

MS. WINK: There hasn't been a judgment yet. Are you talking about the value of the writ?

MR. ORSINGER: Oh, so this is -- well, what if -- if it's post-judgment, you know the judgment. What is the standard for the bond being set? Is it in the rules how the bond is set, or is it just up to the judge, it can be $10?

MR. DYER: I don't think that the current rules address the bond. They just say "bond in an amount set by the court," and I think we just incorporated that here, but to respond to your question, a bond could be higher or lower than the amount of the judgment because it's based on the value of the property.

MR. ORSINGER: What does it mean under subdivision (c) that it's subject to prompt judicial review? If this bond is set, say, by a district judge does that mean that it's subject to immediate review by court of appeals?

MR. DYER: We've addressed this one, I think, in prior --

MS. WINK: In injunctions --

MR. DYER: -- sessions.

MS. WINK: -- we took that out.

CHAIRMAN BABCOCK: Don't talk at the same time because Dee Dee can't do that.

MS. WINK: Sorry.

MR. DYER: All right. I think we may have

taken it out on injunctions. We did not take it out on the other writs, so the other writs have that same provision, prompt judicial review.

MR. ORSINGER: Well, I think there's nothing wrong with prompt judicial review, but if it's a district court -- I assume if it's a JP court you would go to a district court and if it's a district court you would go to the court of appeals?

MR. DYER: No. This is talking about the trial court. Whether it's a JP court, county court, or district court, you're going to ask that court to review the bond and increase it or challenge the --

MR. ORSINGER: Wait a minute. We're saying that we go to the judge to set the bond, the judge sets the bond too low, so we have the right to prompt judicial review by going back to the same judge and ask him to raise the bond?

MR. DYER: Yes. The applicant comes in and says, "Judge, this is why the bond needs to be so high." The defendant hasn't had any opportunity to address the issue at all, so the defendant comes in and says, "Judge, no, there's no way it should be that high, lower it," or perhaps the applicant asks for the wrong amount. The applicant also ought to be able to come in and get a lower bond.

MR. ORSINGER: So judicial review just means a hearing in front of the judge that set the bond to change the bond?

MR. DYER: Yes. This does not address appellate review.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Any other comments on the bond? Richard? No?

MR. ORSINGER: You know, it bothers me, and it may be a nonissue because of case law, but if there's a judgment and we know the amount or if there's a claimed amount of recovery, it seems to me like there ought to be some limits. If there's a judgment, the bond should never be less or more than the judgment plus the interest it will accrue, and if it's prejudgment, it should never be more than the claimed damages or something, but I guess you can get some kind of judicial review for this bond with some other judge or no?

MR. DYER: You mean appellate review?

MR. ORSINGER: Yeah.

MR. DYER: Not on the amount of the bond, not that I'm aware of.

MR. ORSINGER: Really?

MR. DYER: I think that's interlocutory.

CHAIRMAN BABCOCK: Anything else on the bond,

Richard?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Anybody else on the bond? Justice Patterson.

HONORABLE JAN PATTERSON: It seems to be a reference in 1 to 3 to "the property," but at the beginning it's just general "property." Do you mean "the property may not be released"?

MR. DYER: Did you say Rules 1 through 3?

HONORABLE JAN PATTERSON: Well, yes, and 3(a) and (b) refer to "the property." It looks like specific property, but at the beginning in (a) it just says "property may not be released." Do you mean the property that is the subject of that?

MR. DYER: Okay, so it's inconsistent. Sometimes it has the definite article, sometimes it's not.

HONORABLE JAN PATTERSON: Right. Sometimes it looks as though you're talking about specific property that is the subject of the proceeding and sometimes generalized property, but it looks like you're meaning "the property."

CHAIRMAN BABCOCK: All right. Anything else about the bond?

MR. ORSINGER: I'm afraid I have one more thing.

CHAIRMAN BABCOCK: Don't be afraid, Richard.

MR. ORSINGER: Carl just pointed out to me, on 3(a)(3)(B), which is the bottom of that page, if the bond is supposed to be good for the promise that the claimant will pay the plaintiff the value of the property, which suggests strongly to me that the bond should be in the amount of the value of the property and not less or more. I wish that this said that.

MR. DYER: That's basically what it should be, because the bond actually takes the place of the property.

MR. ORSINGER: Well, I would feel so much more comfortable there being no judicial review of this poor person that's had their 100,000-dollar car taken from them, and let's have the bond set in the amount of the property and not more or less.

MR. DYER: Okay. The claimant says a hundred thousand. You say, "There's no way you would ever be able to sell that for more than 20." You know, so the judge may set the bond to 20, and someone else comes in and says, "Judge, no way. That's worth a hundred." Now, I think the trial court is entitled to have all the facts presented if the parties want to present them so he can make changes on the amount of the bond.

MR. ORSINGER: Well, are these bonds

typically set at $500, or do they make an effort to value the collateral or seized property?

MR. DYER: I can't speak from experience on this. I've only been involved in one of these, but I would bet it's the same way most bonds go. Plaintiff gets the lowest possible bond they can. The judge has no reason to think otherwise. The other parties come in, and they're the ones who say, no, you've got to increase the bond.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Anything more on the bond?

MR. ORSINGER: Let's see how it works.

CHAIRMAN BABCOCK: I dare you. Go ahead.

All right. We'll be back at 9:00 in the morning. We'll start with TRP No. 4, and we will finish these ancillary rules tomorrow morning.

MR. DYER: We will. So noted.

(Adjourned at 5:06 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 9th day of December, 2011, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2011.

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D'LOIS L. JONES, CSR
Certification No. 4546
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3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-320