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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 November 18, 2011
9 (FRIDAY SESSION)
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18 Taken before *D'Lois L. Jones*, Certified
19 Shorthand Reporter in and for the State of Texas, reported
20 by machine shorthand method, on the 18th day of November,
21 2011, between the hours of 8:57 a.m. and 4:58 p.m., at the
22 Texas Association of Broadcasters, 502 East 11th Street,
23 Suite 200, Austin, Texas 78701.
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1 **INDEX OF VOTES**

2

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

4

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5 HB 274-Proposed Rule 94a	23087
6 HB 274-Proposed Rule 94a	23155
7 HB 274-Proposed Rule 94a	23184

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12 **Documents referenced in this session**

13 11-26 HB 274 (Article I)

14 11-27 Letter from Tex-ABOTA with proposed rule (8-25-11)

15 11-28 Proposed Rule 13a from State Bar of Texas

16 11-29 Proposed Rule 94a from SCAC subcommittee

17 11-30 Memo from Frank Gilstrap (11-17-11)

18 11-31 Attachment commentary with SCAC revisions
(Ancillary Proceedings Task Force)

19

11-32 Sequestration commentary
20 (Ancillary Proceedings Task Force)

21 11-33 Garnishment commentary
(Ancillary Proceedings Task Force)

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2 CHAIRMAN BABCOCK: Good morning, everyone, a
3 full agenda today, and we will start off as usual with a
4 status report from Justice Hecht.
5 HONORABLE NATHAN HECHT: Just to say that
6 everything is moving along. We've gotten a number of
7 comments on the electronic service rule and also on the
8 foreclosure rules.
9 CHAIRMAN BABCOCK: I don't know if that was
10 cymbals or --
11 MR. LOW: Drum roll.
12 HONORABLE NATHAN HECHT: But they're on
13 target for being in effect January the 1st.
14 MS. SECCO: Right.
15 HONORABLE NATHAN HECHT: And then we're
16 working on Rule of Judicial Administration 16, which has
17 to do with additional funding for some cases, and also on
18 House Bill 906 rules, which have to do with parental
19 rights termination cases, and all of those are on the
20 Court's agenda, and we plan to talk about them at the
21 conference in December. The task force on small claims is
22 meeting diligently under the leadership of Justice Casey
23 in Fort Worth, and Chief Justice Phillips' group on
24 expedited cases has been meeting and is working on coming
25 up with their report, so we think all of those rules that

1 we've been charged by the Legislature with implementing
2 are in hand.
3 Then, lastly, we are undertaking to look at
4 changing the limitations on appellate briefs from pages
5 and font size to numbers of characters and similar to the
6 Federal rules; and the several people who are interested
7 in this, appellate lawyers, our clerk, Blake Hawthorne,
8 others, are working on a draft; and they plan to present
9 to it the Council of Chief Justices at their January 19th
10 meeting, so when we get through some of this legislative
11 material that we have to cover, we look forward to having
12 that rule, which will help us because page limits make
13 less sense with electronic filing and we need some other
14 way of measuring the length of briefs, so that's what the
15 Court is doing. I'll be happy to try to answer questions.
16 CHAIRMAN BABCOCK: Any questions from
17 anybody? Justice Christopher.
18 HONORABLE TRACY CHRISTOPHER: Are y'all
19 going to -- are you working on any forms in connection
20 with 736? Because the rule said that you might promulgate
21 forms.
22 HONORABLE NATHAN HECHT: We're not working
23 on them right this second. Tommy --
24 MS. SECCO: Bastian.
25 HONORABLE NATHAN HECHT: -- Bastian has

1 offered to do some, but we haven't -- we don't have a
2 target date on that.
3 HONORABLE TRACY CHRISTOPHER: I think
4 there's still concern about the homeowners association and
5 what the rule is actually going to look like --
6 HONORABLE NATHAN HECHT: Yeah.
7 HONORABLE TRACY CHRISTOPHER: -- in terms of
8 foreclosure, and when Tommy was here before he said there
9 were not any nonjudicial foreclosures of homeowners
10 association liens now, but we have heard that there are
11 some now, and I assume it's based on homeowners
12 associations that have been created more recently than the
13 old ones that would require a judicial foreclosure, and
14 the question is still whether you have one of those old
15 homeowners associations that require normal judicial
16 foreclosure, is 736 in place of that now, or do they still
17 have to do a regular judicial foreclosure?
18 HONORABLE NATHAN HECHT: I don't know.
19 HONORABLE TRACY CHRISTOPHER: That's the
20 question.
21 HONORABLE NATHAN HECHT: We'll have to look
22 at that.
23 CHAIRMAN BABCOCK: Okay. Any other
24 questions? All right. We're on to dismissal, House Bill
25 274, and Judge Peeples has led our subcommittee on this,

1 which has been meeting, and, Judge Peeples, take it away.
2 HONORABLE DAVID PEEPLES: Thank you. Let me
3 first tell you, you'll need to have five documents in
4 front of you. The major one is the subcommittee draft,
5 and it says that at the top. It's a little bit more than
6 a page, and we'll be going through that section by
7 section. That's the first thing. Also, you should have
8 the statute that mandates that -- and gives the Supreme
9 Court rule-making power and tells it to come up with a
10 dismissal rule, and there's also a section that talks
11 about attorney's fees, so you need the statute. Also we
12 had drafts from ABOTA and from the State Bar committee.
13 You ought to have those, and then fifth, Frank Gilstrap,
14 who is a member of the subcommittee, wrote a very good
15 memo that we'll be talking about a little bit, and I asked
16 him to get it in shape for the full committee here and
17 asked Angie to send it to you. So you'll need to have the
18 subcommittee draft, ABOTA, the State Bar draft, the
19 statute, and Frank Gilstrap's memo.
20 Let me say that -- I want to tell you who
21 was on this subcommittee. There were 11 of us. We had
22 three telephone conference calls, and nine of the members
23 were on all three of those calls, and two other members
24 were on some but not all, very well attended, and I feel
25 very good about our subcommittee, and those members are

1 Jeff Boyd, Elaine Carlson, Nina Cortell, Bill Dorsaneo,
2 who couldn't be here today. He's got a publication
3 project he's working on. Frank Gilstrap, Rusty Hardin,
4 and Rusty is in trial in Newark, New Jersey, and couldn't
5 be here. Lonny Hoffman, Richard Munzinger, Gene Storie,
6 and Marisa Secco.
7 Just one general statement. Some of the
8 things in this draft that are before you today are
9 straight out of the statute, just mandated by the statute,
10 and we just put them in. There are other provisions that
11 are not mandated by the statute but we think are within
12 the spirit of the statute, so there will be some
13 discussion about things that are straight out of the
14 statute and things that are maybe implicit but not
15 mandated expressly by the statute, and that may be an
16 issue on some of these. Now, what I want to do is take
17 the subcommittee draft and take it section by section and
18 move through it, and by far the most weighty part of this
19 draft is section (a), grounds and content of motion, and
20 I'll say just a few things by way of preface and then open
21 it up for discussion.
22 The Gilstrap memo has I think 11 different
23 shades and varieties of possible things that could be
24 meant by a claim for which there is no basis in law or
25 fact. That wording is out of a statute, and we have the

1 statute's wording here in our proposal A, but Frank's memo
2 has things like "failure to state a claim on which relief
3 could be granted," "failure to state a cause of action,"
4 and things like that, which are in the ballpark, and you
5 might want to look at those just to see what some of the
6 shades and varieties of this could be, but in the first
7 part of sub (a), sub (1), we have our proposal on that and
8 then the second subdivision of that section just has some
9 additional matters. We need to talk about all of this in
10 just a moment.
11 And let me say, take a look at sub (a),
12 lines five and six. That language is straight -- most of
13 it is straight out of the statute, and the committee was
14 divided on whether to have lines five and six and nothing
15 else. In other words, not have sub (a) and sub (b) or
16 whether to have lines five and six and in addition
17 subsections (a) and (b), which attempt to elaborate a
18 little bit on what it means to say a claim has no basis in
19 law and has no basis in fact; and the language that we
20 have there is substantially what was recommended by the
21 State Bar committee; and sub (a), lines 8 through 10,
22 comes from procedural Rule 13 and the Federal sanctions
23 rule. I think that's 11, and there's a provision in the
24 Civil Practice and Remedies Code, so this is substantially
25 based upon that but not entirely.

1 Let me flag for you that on line five, "upon
2 motion and hearing," those two words, "and hearing," are
3 intended to say that the court needs to hold a hearing on
4 this, that it should not be decided on submission. Now,
5 that may be an issue, but instead of having a standalone
6 provision that says there must be an oral hearing or the
7 court should hold an oral hearing we just put those two
8 words there, but that's the intent of those, and that
9 might be an issue, and with that said, I guess I'll open
10 it up.
11 CHAIRMAN BABCOCK: Okay. Stephen.
12 MR. TIPPS: I suggest a technical correction
13 or adjustment on line 10 to insert the word "for," f-o-r
14 after the word "or" and before (d) because I think the
15 intent is to say that a claim would have a basis in law if
16 "by a reasonable argument for either the extension,
17 modification, or reversal of existing law or for the
18 establishment of new law," but without the word "for" it's
19 not -- that's not entirely clear. So unless I'm
20 misunderstanding the committee's intent I think that the
21 intent would be furthered by adding "for" parallel to "for
22 the extension, modification, or reversal."
23 CHAIRMAN BABCOCK: Richard Munzinger.
24 MR. MUNZINGER: I was a member of the
25 subcommittee, and there was -- I wasn't the only person I

1 think who felt this way, but if others agree they can
2 speak up. I do not believe that subdivision (a) is
3 intended by the Legislature when it enacted the statute.
4 The Legislature does not make use of any language
5 concerning arguable claims or good faith arguments for the
6 extension, modification, et cetera, of existing law. This
7 language came from the State Bar's draft, and my personal
8 belief is that the State Bar's draft is defective for the
9 same reason, and I don't want to take a long time, but the
10 long and short of my position is if the state Legislature,
11 aware that Rule 13 and various sections of the Civil
12 Practice and Remedies Code use language such as "for the
13 extension, modification of existing law or the
14 establishment of new law," but does not include that in
15 its statute, it must under ordinary rules of statutory
16 interpretation be intended not to have used that language.
17 The language for the extension,
18 modification, et cetera, does appear in Rule 13. It does
19 appear in more than one statute, but it does not appear in
20 the statute that requires the Supreme Court to adopt a
21 rule concerning dismissal, and my personal belief is, is
22 that if you include something along the lines of
23 subdivision (a), you have the exception has swallowed the
24 rule; that is, it really makes the rule meaningless. My
25 personal belief is, is that the Legislature intended for

1 the Supreme Court to adopt a rule similar to Rule 12(b)(6)
2 of the Federal rules and Rule 12(c) of the Federal rules,
3 which is a motion for judgment on the pleadings, and I
4 believe that to be the case because the Supreme Court
5 among other things -- I mean the Legislature among other
6 things says, "No evidence is to be considered," but I did
7 not want this group to believe that all of the committee
8 believed that subdivision (a) should be part of the rule.
9 I do not.
10 CHAIRMAN BABCOCK: Elaine.
11 PROFESSOR CARLSON: I think it's fair to say
12 that the majority did think that --
13 MR. MUNZINGER: I agree with that.
14 PROFESSOR CARLSON: -- that it should be
15 included, and one of the things that we did not determine
16 definitively and the Court will wrestle with is really
17 what's the implication of the dismissal with a mandatory
18 imposition of attorney's fees? Is it with or without
19 prejudice? There's obviously extraordinary far-reaching
20 implications either way. Even without prejudice you have
21 the potential for res judicata problems on claims that
22 could have been asserted unless the court interprets it
23 some way.
24 The legislative intent is kind of hard to
25 glean because we've got three sentences. The first says,

1 "The Supreme Court shall adopt rules that provide for the
2 dismissal of actions that have no basis in law and fact on
3 motion without evidence," and I think the majority of the
4 subcommittee felt that this would be a proper standard for
5 the Supreme Court to consider in adopting the rule because
6 of the implications of dismissal and mandatory attorney's
7 fees.
8 CHAIRMAN BABCOCK: Okay. Yeah, Frank.
9 CHAIRMAN BABCOCK: Then Judge Christopher.
10 MR. GILSTRAP: The simplest approach would
11 be to do what Richard says and just say that the court
12 must dismiss the claim for leave, it has no basis in law
13 or fact. Then we could go ahead and work through all the
14 procedural aspects of the rule. It would be real neat,
15 real nifty, and real easy, and we would leave to the
16 courts the task of deciding what has no -- what does "no
17 basis in law or fact" mean. The problem is we would be
18 handing the courts a mess. We are not writing on a clean
19 slate. There's a lot of law under Chapter 13 and 14 of
20 the Civil Practice and Remedies Code. Chapter 13 deals
21 with suits by in forma pauperis, if I'm saying that right,
22 and Chapter 14 deals with subset, which is prisoner suits.
23 There's a lot of law there. None of us as practitioners
24 ever deal with it because we don't represent paupers or
25 prisoners. The people that deal with it are the people in

1 the DA's office, the Attorney General's office, and the
2 court of appeals judges. They're -- those statutes say
3 the suit shall be dismissed if it has no arguable basis in
4 law or fact.
5 Now, you can think for a while if there's
6 some difference between no arguable basis in law or fact
7 and no basis in law or fact and try to get your mind
8 wrapped around that. I really haven't had much luck
9 there. The problem is the courts are almost certainly
10 going to reach to this body of law to try to construe
11 these words, and the cases there are split. There's a
12 split in the court of appeals. There's even a case out of
13 the Fourteenth Court in Houston where there's a dissent
14 and a majority opinion on this very issue, and I've got it
15 cited in that little standards memo.
16 One group says it's based -- that it has no
17 arguable basis in law if it's based on -- first of all,
18 those cases say that it can't be dismissed for no arguable
19 basis in fact without a hearing, so all the cases involve
20 no arguable -- dismissal for no arguable basis in law, and
21 then there's two standards. One group says it means an
22 indisputably meritless legal theory or an irrational or
23 wholly incredible factual allegations, and they get those
24 out of some Federal cases. The other group says it means
25 it fails to state a cause of action, and they kind of draw

1 on Rule 12(b)(6). The Federal law underneath that is
2 equally convoluted, and if -- you know, if the Court wants
3 to adopt and simply say "no basis in law or fact" and let
4 the courts figure it out, that's fine, but the Court, the
5 Supreme Court, will ultimately wind up deciding that
6 issue.
7 And, secondly, but it's our job to at least
8 let the Court know that the problem is there and see if we
9 can come up with maybe a better, cleaner standard that
10 will avoid the problem, because that's -- that's what you
11 do when you make rules.
12 CHAIRMAN BABCOCK: Justice Christopher.
13 HONORABLE TRACY CHRISTOPHER: A couple of
14 just sort of technical things. If the subcommittee wanted
15 an oral hearing, you need to say "oral hearing," because
16 the summary judgment rule that contains the word "hearing"
17 has been construed by the courts to mean a submission,
18 without an oral hearing. So if you really want oral,
19 you've got to say it, and then my second sort of technical
20 question is the statute says it has to be granted within
21 45 days of the filing of the motion --
22 HONORABLE DAVID PEEPLES: Yeah.
23 HONORABLE TRACY CHRISTOPHER: -- and you-all
24 have within 45 days of the hearing.
25 HONORABLE DAVID PEEPLES: Let me just -- on

1 line 25, I goofed on that. I hate to say it, but I
2 goofed, and it needs to say at the end "must be decided
3 within 45 days of filing" instead of "of hearing," and I
4 just made a mistake.
5 CHAIRMAN BABCOCK: Alex, and then Judge
6 Yelenosky.
7 PROFESSOR ALBRIGHT: I have some questions
8 about the standard that you-all chose for no basis in
9 fact, so I don't know if y'all want to get into that now
10 or wait. Frank, this is really helpful, this memo of all
11 these standards. The statute says you can't consider
12 evidence, right?
13 HONORABLE STEPHEN YELENOSKY: Yes.
14 HONORABLE DAVID PEEPLES: Yes.
15 PROFESSOR ALBRIGHT: So what you-all chose
16 is a Keller's type statement of the no evidence standard,
17 but -- so I have two comments. One, I don't see how it
18 can be -- how you can -- you can make it a no evidence
19 standard without considering evidence because then it's
20 like a summary judgment, so I don't -- I don't see how we
21 can use the no evidence standard in this motion, because
22 then it becomes a summary judgment. Two, if we do decide
23 a no evidence standard, why don't we just say no evidence,
24 because this statement right here steps right in the
25 middle of the Keller issue as to whether is it no evidence

1 or is it factually insufficient evidence, so if we do want
2 it no evidence, I would prefer to have it clearer. I do
3 think it's problematic to have it no evidence.
4 It seems to me that what we're -- what the
5 Legislature was probably wanting us to do is do something
6 more like the Federal plausibility standard where you --
7 which is very problematic, but it's where you look at the
8 face of pleadings and make some kind of judgment
9 determination about whether you think that they really can
10 prove this, and I don't think that's what y'all are doing
11 here.
12 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.
13 HONORABLE STEPHEN YELENOSKY: Well, since
14 the statute came out I've been wondering about this, and
15 so I read the case law as best I could, and obviously I
16 haven't read as much as the committee has, and I also sent
17 an e-mail around to judges yesterday in Travis County and
18 got one response on one of my questions, and I'll probably
19 get some more while we're sitting here, but the first part
20 doesn't trouble me much, no basis in law. I'm not sure
21 what's going on in the dispute between the courts of
22 appeals, and I didn't really look at that carefully, but
23 it seems to me that's something we do everyday, and we do
24 it on -- you know, people phrase them as traditional
25 motions for summary judgment or special exceptions or no

1 evidence motions, but basically they're saying, "This
2 isn't a claim," or you can't make a claim like this,
3 whatever. That doesn't seem so new to me.
4 The part that Alex is talking about and
5 Frank alluded to so much troubles me a lot because you
6 mentioned court of appeals judges deal with 13 and 14.
7 Well, of course, the first judges who deal with it are
8 trial judges, and 13 and 14 say -- are for pauper's
9 affidavits and prisoners, and I've dealt with both of
10 those. I can't remember ever -- and I'm waiting for a
11 district judge in Travis County to tell me when he or she
12 has ever dismissed a pauper's affidavit -- I mean, a
13 petition filed with a pauper's affidavit or by a prisoner
14 and with a pauper's affidavit because -- specifically
15 because no arguable basis in fact. It's in my experience
16 always because they make some kind of claim that just
17 isn't a claim, and if I were to do that under the prior
18 statutes and case laws -- case law, as Frank alluded to, I
19 could only do that after a hearing.
20 The courts of appeals say if a judge under
21 13 or 14 has dismissed a case and just generically says,
22 "No arguable basis in law or fact," and yet did not hold a
23 hearing, and by that I take it as some kind of opportunity
24 to present evidence, if the judge did not give that
25 opportunity to present evidence, it can only be upheld if

1 there's no arguable basis in law. So this is a sea change
2 because this says you can't hold an evidentiary hearing,
3 and so since I can't hold an evidentiary hearing, then the
4 only basis -- the only way I could say there's no arguable
5 basis in fact -- I can't hear anything you have to say
6 about what facts you have for this -- is to read the
7 pleadings and decide that it is, as some of the Federal
8 case law says, incredible, delusional, whatever. The U.S.
9 Supreme Court case Frank cites is one in which -- again, a
10 prisoner case, almost all of these are prisoner cases --
11 said that he had been raped in prison in a particular
12 manner with the guards involved and allowing other
13 prisoners into his cell, and the lower court had said,
14 well, that in itself is not implausible, but he's coupled
15 that with claiming five other instances of something -- of
16 exactly the same sequence of rape in like three different
17 prisons, and the judge could properly say that just
18 couldn't have happened, but basically, that's the
19 standards -- kind of standard that we district judges will
20 be faced with. You say this happened. That just couldn't
21 have happened, and I can't think of an instance -- I think
22 the one in the U.S. Supreme Court case, there was actually
23 an affidavit from another prisoner saying, "Yeah, I saw
24 the guards let that person into his cell," but
25 nonetheless, the U.S. Supreme Court upheld that, but I

1 can't think of a petition, short of one that says
2 something like "I was taken to the moon," where I would
3 feel comfortable saying that there's no -- there's no
4 arguable basis in fact, or whatever you want to call it
5 semantically, just saying that, no, you can't go forward
6 with your case because I just don't believe it and nobody
7 could believe it.
8 So thankfully -- I mean, unfortunately the
9 statute requires no evidence. Thankfully as a district
10 judge I am not required to decide no arguable basis in
11 fact unless I'm comfortable with it, and I can't really
12 imagine that being applicable unless somebody says
13 something like "I was taken to the moon." So I guess we
14 can argue around and around about exactly what it ought to
15 say, whether it's no evidence or not, but whatever you
16 call it, it's got -- it's dangerous territory because
17 you're basically having a judge say, "I don't believe that
18 and nobody else could believe that, and I can't hear what
19 you have to say that might convince me to believe it."
20 CHAIRMAN BABCOCK: Alex, and then Justice
21 Pemberton.
22 PROFESSOR ALBRIGHT: Speaking about the moon
23 cases, I had a conversation with a Federal magistrate a
24 few months ago about the plausibility standard and how
25 that really worked for her, and she says what it really is

1 helpful for is all the cases she gets where there's a
2 claim that a Federal agent planted something in the brain
3 that lets the Federal government know everything and
4 martians taking them away and --
5 HONORABLE STEPHEN YELENOSKY: And I've had
6 one case in seven years like that.
7 PROFESSOR ALBRIGHT: So, I mean, so that's
8 the kind of case that it's helpful for, I guess, but
9 it's -- the plausibility standard is used in a lot more
10 cases than that is what I'm told.
11 HONORABLE STEPHEN YELENOSKY: Well, the
12 cases -- the first type of case, I've had one of those in
13 seven years, and the defendant didn't need a whole lot of
14 help in getting rid of that case. The other cases that
15 apply to a lot more things are the ones that I'm concerned
16 about.
17 PROFESSOR ALBRIGHT: Yeah, exactly.
18 CHAIRMAN BABCOCK: Justice Pemberton.
19 HONORABLE BOB PEMBERTON: Well, the
20 subcommittee I imagine plowed through this ground, but I
21 just want to throw this out there for whatever it's worth.
22 You know, we presume in construing a statute that the
23 Legislature is aware of the background law. "Cause of
24 action" is a term of art which means a set of facts which
25 give rise to a right of relief. In that context a cause

1 of action that has no basis in law or fact, we determine
2 facts in well-established practice. I know at least in
3 pleas to the jurisdiction we take facts as true. It may
4 lead to the conclusion that really what the Ledge is
5 getting at here is simply the legal sufficiency of the
6 facts pled; that is, due to the facts pled -- and maybe
7 this ties into what Richard said earlier, whether on the
8 face of the pleadings, the facts would support a cause of
9 action if taken as true, and it just seems like it could
10 be that simple, and we're wandering into these areas of
11 maybe -- I agree, it's a naughty problem where we're going
12 to have courts making some kind of qualitative judgment
13 about the truth of facts asserted in a pleading. I don't
14 know how you do that without having some opportunity for
15 the other party to confront and negate facts.
16 CHAIRMAN BABCOCK: Judge Peeples, let me --
17 Richard, I'll get to you in a second. What Richard
18 Orsinger said and what Justice Pemberton just said worries
19 me a little bit. Let me try a hypothetical on you. In
20 this state, unlike many states, we don't have a cause of
21 action for false light invasion of privacy. The Texas
22 Supreme Court has said that's too close to defamation, so
23 we're not going to recognize that. So Jeff Boyd files a
24 lawsuit with one cause of action for false light invasion
25 of privacy. That's all he says. I come back and I

1 say, "I want to move to dismiss this, because it is not
2 warranted by existing law. The Supreme Court has spoken,
3 and so this ought to go away," and further I say, "Jeff
4 ought to be sanctioned because that case has been on the
5 books forever and he knows it. He's a smart lawyer, and
6 my client shouldn't have to spend money responding to this
7 lawsuit that has no basis in law."
8 Jeff's response is "Yeah, I know, I can
9 read, *Cane vs. Hurst* says what Mr. Babcock says it says,
10 but it was a narrow vote. It was five-four, I think, or
11 close vote, long time ago, time marches on, and I in good
12 faith want to seek reversal of that decision. So, number
13 one, don't sanction me, and furthermore, don't dismiss it
14 under (a)(1)(A) because I am seeking the reversal of
15 existing law, and so you can't -- under this rule you
16 can't -- you can't grant this motion to dismiss. You've
17 got to let me go forward and do some evidence so I can
18 have a full record to go up to the Supreme Court and get
19 them to reverse what they've done before." Now, is that
20 what we intend?
21 HONORABLE DAVID PEEPLES: Well, that may be
22 one weakness of this language. On line nine the word
23 "reasonable" -- phrase "reasonable argument" is there, and
24 I think what you would argue is "What Jeff Boyd has
25 pleaded here, your Honor, is not a reasonable argument

1 because the law is well settled and so forth, and sanction
2 him." So but, I mean, some judges would not see it that
3 way, but I think that's the reason for the word
4 "reasonable argument" there, but let me just say several
5 things. It needs to be -- we need to remember that we
6 have a special exception practice, which is essentially
7 the same thing as Federal 12(b)(6). It's very similar,
8 and while the -- if all you're looking at is the wording
9 of the rule on special exceptions you might not know that,
10 but there's case law for a century, and so we have a
11 procedural mechanism already for saying, "This pleading
12 fails to state a cause of action," and you could do that
13 without this statute. This simply says the court can
14 sanction or grant attorney's fees to the prevailing party,
15 and I just wanted to say that.
16 Let me say two or three things, and I mean,
17 I'm willing to wait and let everybody else talk, but I've
18 got three or four questions and/or comments.
19 CHAIRMAN BABCOCK: No, go ahead. Go ahead.
20 HONORABLE DAVID PEEPLES: The special
21 exception practice is still there, and sometimes it
22 already happens with our special exception practice and it
23 will happen with this motion to dismiss, that things are
24 muddied and you have to file a motion for summary
25 judgment. I mean, sometimes that will happen, and that's

1 the only remedy that an unsuccessful movant will have. I
2 want to say this about the point that Alex made up, and
3 that is --
4 CHAIRMAN BABCOCK: She didn't make it up.
5 It's her point.
6 HONORABLE DAVID PEEPLES: Brought up,
7 brought up, I'm sorry. Brought up or made up.
8 PROFESSOR ALBRIGHT: Either one.
9 HONORABLE DAVID PEEPLES: Okay. You pointed
10 to lines 12 and 13 and said that that might -- you don't
11 know whether that's the no evidence standard or factual
12 insufficiency, but when you look at subsection (c), lines
13 27, 28, when you put those together, isn't it clear that
14 this is a no evidence standard, not legal sufficiency?
15 PROFESSOR ALBRIGHT: Well, I don't think you
16 can use no evidence, because no evidence is does the
17 plaintiff have any evidence, so you would have to have a
18 hearing like a summary judgment where the plaintiff would
19 have an opportunity to present affidavits, and I don't
20 think that's what this is going at. This is going at just
21 dismissal based upon the pleadings as opposed to does the
22 plaintiff have any evidence to support those pleadings.
23 HONORABLE DAVID PEEPLES: Well, whether the
24 plaintiff can prove something is a different matter, but
25 under this rule and under special exceptions and 12(b)(6)

1 you accept what is pleaded as true.
2 PROFESSOR ALBRIGHT: Yeah, but so what is
3 your standard?
4 HONORABLE DAVID PEEPLES: You can do that
5 without having --
6 PROFESSOR ALBRIGHT: So what's your
7 standard? If you're trying to state a no evidence
8 standard, a no evidence standard is, okay, here's your
9 pleadings, can you prove them.
10 HONORABLE DAVID PEEPLES: Okay, if a
11 prisoner said, "A guard abused me on a certain occasion,"
12 you've got to accept that as true.
13 PROFESSOR ALBRIGHT: Right.
14 HONORABLE DAVID PEEPLES: Now, something
15 that hasn't been brought up but I think is out there, it's
16 one thing when the pleader or a witness says, you know, A,
17 B, C happened as a matter of historical fact. That's one
18 thing. Sometimes there's no direct testimony as to what
19 happened, as to someone's state of mind or as to an event,
20 and it's all based on circumstantial evidence --
21 PROFESSOR ALBRIGHT: Right.
22 HONORABLE DAVID PEEPLES: -- and sometimes
23 the appellate courts say those circumstances are enough to
24 get you to the jury, and sometimes they say the
25 circumstances are not enough to get you to the jury, and I

1 think this sub (b) would encompass that kind of
2 allegation, too. It seems to me if somebody says, "I was
3 an eyewitness to something that happened" even if we all
4 are saying, "Oh, yeah, let's see you prove that," under
5 this standard and 12(b)(6) and special exceptions you've
6 got to accept it as true.
7 HONORABLE STEPHEN YELENOSKY: That's not
8 what it says.
9 PROFESSOR ALBRIGHT: That's not what this
10 says.
11 HONORABLE STEPHEN YELENOSKY: It says you
12 don't believe the material allegations.
13 PROFESSOR ALBRIGHT: This one says, "No
14 reasonable person could believe that the material
15 allegations are true."
16 HONORABLE DAVID PEEPLES: That's different
17 from "I personally don't believe it."
18 PROFESSOR ALBRIGHT: I know, but you still
19 are --
20 HONORABLE DAVID PEEPLES: Objective
21 standard, no reasonable person could believe this
22 allegation.
23 PROFESSOR ALBRIGHT: Well, except that are
24 you saying that those factual allegations aren't
25 plausible?

1 HONORABLE STEPHEN YELENOSKY: You're arguing
2 the ABOTA proposal, which is you presume that the facts
3 are true, but that's not what this says, and that's not
4 what the U.S. Supreme Court decision says where this kind
5 of language comes from. Those are the cases in which the
6 court says, "I'm not going to presume that's true. In
7 fact, it's not true, no rational person could believe it's
8 true." You're arguing what Justice Pemberton says this
9 ought to be written to say and what ABOTA says this ought
10 to be written to say, but that's not what you've written.
11 HONORABLE DAVID PEEPLES: Very quickly --
12 CHAIRMAN BABCOCK: Okay.
13 HONORABLE DAVID PEEPLES: I think the
14 committee was thinking that sub (b) is basically the City
15 of Keller standard, and so you may be quibbling with that.
16 PROFESSOR ALBRIGHT: No, I think -- yeah.
17 HONORABLE DAVID PEEPLES: Let me just say
18 this. I mean, we're here to put it before the committee,
19 and if this is bad, at some point somebody is going to
20 say, "Here's what you ought to say," and I'm eager to hear
21 that.
22 CHAIRMAN BABCOCK: Frank, and then Pete, and
23 then --
24 MR. GILSTRAP: I want to talk to what Judge
25 Yelenosky and Professor Albright said and then come back

1 to Chip's comment. With regard to no basis in law, I
2 think the proper approach is you take the facts as pleaded
3 and accept them as true. With regard to no basis in fact,
4 since we can't have a hearing I think the only way to look
5 at it is say that we're not -- you know, there are some
6 cases in which you can't accept the pleaded facts as true,
7 that I was taken to Mars or I'm the Governor of Texas or I
8 met with the Legislature of Texas and we seceded. Those
9 are simply implausible, they're impossible, and the courts
10 are going to have the power to go beyond the pleaded
11 statement of facts and say, "This is so improbable or
12 incredible that we're not going to believe it, and
13 therefore, there's no -- there can be no basis in fact for
14 this suit." Now --
15 PROFESSOR ALBRIGHT: It's not plausible.
16 MR. GILSTRAP: Yeah, although, I don't like
17 "plausible" because that gets you to the Iqbal standard,
18 and what's going on in the Federal courts is we've had the
19 Conley standard which says that you can't -- there's no
20 set of facts you can allege that will get you there, and
21 now they're making it even -- they're giving the court
22 even more discretion with Iqbal. The problem is in the
23 reality of the Federal courts they pour you out all the
24 time under that standard. I mean, you get 12(b)(6) in
25 every lawsuit. So I'm really hesitant to go in and try to

1 borrow the 12(b)(6) standard and bring it into this rule.
2 With regard to Chip's comment, if you look
3 at (a) and you change "a reasonable argument" and change
4 that to "nonfrivolous," that is verbatim out of Chapter 10
5 of the Civil Practice and Remedies Code or Federal Rule
6 11. That is the standard for sanctioning people. Now,
7 one thing, I don't know that the award of attorney's fees
8 in this case is a sanction. You could -- I guess you
9 could make an award of attorney's fees against you and you
10 could also be sanctioned, but that's another problem.
11 The suggestion -- the inference behind what
12 Chip's saying is that, well, the Legislature didn't say
13 that. They said no basis in law and fact, and that
14 doesn't allow you to go on and argue for the extension,
15 modification, or reversal or existing law or establishment
16 of new law. If the Legislature had said "no basis in
17 established law," I would agree, but it used this general
18 language, and I don't think we should infer from this
19 language that the Legislature meant to curtail the
20 historic power of the courts to apply the common law and
21 to develop new causes of action in response to changing
22 modern factors. That would be an incredible step. I
23 guess maybe the Legislature could do it, but I don't
24 believe that we should believe that the Legislature
25 intended that here.

1 CHAIRMAN BABCOCK: Well, okay. Jeff, and
2 then Judge Yelenosky. Wait a minute. Pete was in line
3 ahead of you. Pete, sorry.
4 MR. SCHENKKAN: Two questions that are a
5 little afield from the current discussion and then a third
6 one that goes to the current one. The rule draft uses
7 "claim for relief" and "claim," "claim," and "claim." The
8 statute says "cause of action." Is there a difference,
9 and if so, what is it and why are we using the "claim for
10 relief"? So that's the first question.
11 The second is on the idea of "upon motion
12 and hearing," having had my attention focused to the fact
13 that the statute requires in now corrected (B) to provide
14 the decision would be made within 45 days of the filing.
15 It seems to me a bad idea to require a hearing in every
16 case. There may well be many situations in which the
17 matter can be disposed of on the papers, and if they can
18 be, given everybody's schedule and busyness, that may be a
19 real good idea.
20 Now, third, as to what we've just been
21 talking about, it seems to me that we are -- that one
22 layer of this problem about the facts is not the only
23 layer. This is not a solution to the full problem
24 of Iqbal and all these other issues, but one layer of the
25 problem might be solvable if you provided in (A)(1)(a)

1 where we are talking about claims or causes of actions
2 that have no basis in law, if we said, "A claim or cause
3 of action has no basis in law when," comma, "taking the
4 facts pled as true," comma, "it is not warranted by
5 existing law or" -- and so forth, and then
6 when we get down to (c), no evidence, we take out the
7 words "accepting as true the facts pleaded," because it
8 seems to me that (A)(1)(b), "A claim or cause of action
9 has no basis in fact when no reasonable person could
10 believe that the material allegations are true" is
11 irreconcilable with accepting as true the facts pleaded.
12 You just really can't have it both ways, and I'm thinking
13 you no longer need it if you've got in the law category
14 when we're deciding that you don't have a cause of action
15 under the law, taking your fact pleadings as true, that's
16 different from this problem we're going to wrestle with
17 about what do you mean by "have no basis in fact." So
18 those are my three.
19 CHAIRMAN BABCOCK: Jeff Boyd. And then
20 Richard you had your hand up a long time ago, and then
21 Justice Christopher, and Alex.
22 MR. BOYD: I was on the subcommittee and in
23 the minority vote, and my strong position is that we ought
24 to have sub (a)(1) but should not have little (a) or
25 little (b), which the rule should simply say (a)(1); and

1 I'll also say that I was involved in the process that led
2 to the statute, although I tried real hard in the
3 subcommittee not -- to base my comments on what the
4 statute says rather than my own experience in how it got
5 there, and so I'll try and do the same here.
6 I think you have to start by recognizing
7 that this rule that allows for a motion to dismiss has to
8 be understood in the context of the rest of the statute,
9 House Bill 274, which says that the court must award
10 attorney's fees to the prevailing party on that motion.
11 So you have now a motion to dismiss with the loser pay or
12 prevailing party attorney's fees, mandatory attorney's
13 fees, provision. The statute does not do away with
14 special exceptions or motions for summary judgment or
15 pleas to the jurisdiction or sanction dismissals, other
16 methods to get rid of a case, so there has to be some
17 intent by the Legislature that this does something
18 different than all of those previously existing procedures
19 do. And so the question is we've got a rule now or the
20 statute says we need a rule that allows for the dismissal
21 and mandatory award of attorney's fees and then the issue
22 is, well, on what standard, and that was the issue the
23 Legislature had to decide.
24 As originally filed this bill had a Rule
25 12(b) standard, and I don't have that language in front of

1 me, but the original House Bill 274 said that the party
2 could come in and move to dismiss on a 12(b) standard, the
3 Federal Rule 12 standard, and if that motion is granted
4 the party shall be awarded their attorney's fees. It
5 ended up being enacted on this other standard, which is if
6 the claim has no basis in law or fact as opposed to
7 failure to state a claim. That language comes from our
8 Rule 13, but it comes from Rule 13 in the context of
9 defining the word "groundless," and Rule 13 talks about
10 sanctions for dismissal of groundless claims, and it says
11 that a claim is groundless for purposes of this rule means
12 no basis in law or fact and not warranted by good faith
13 argument for the extension, modification, or reversal of
14 existing law.
15 Had the Legislature intended what we've
16 proposed here as (A)(1)(a), it would have just said the
17 word "groundless" because that's already well-defined in
18 the law. It didn't. It picked one portion of that
19 definition of groundless, which is "no basis in law or
20 fact" without -- and so I think we have -- I think
21 statutory construction rules would say we have to presume
22 the Legislature intentionally omitted the second portion
23 of that definition, which is "and not warranted by good
24 faith argument for extension, modification, or reversal,"
25 which is what now the committee is suggesting we add back

1 in, what the Legislature, I think we have to presume,
2 intentionally chose not to include.
3 The effect of doing that is you're basically
4 saying that the trial courts when faced with this kind of
5 motion don't get to reverse or modify or change existing
6 law. They must dismiss if there's no basis in law or
7 fact. The party can then appeal and try and convince the
8 appellate courts to change the law, but for purposes of
9 this motion, if the moving party decides to file this
10 motion, which, by the way, they take a risk when they do
11 because if their motion to dismiss is denied, the court
12 shall award the claimant attorney's fees on that motion,
13 so they don't have to. The defendant or counter-defendant
14 can choose to file special exceptions instead or can
15 choose to file a motion for summary judgment instead or
16 whatever other procedure, a plea to the jurisdiction or
17 whatever, but if they choose to go under this rule they
18 bear the risk that motion is going to be denied. If it is
19 granted I think statutory construction says that had the
20 court wanted us to include (A)(1)(a) in here it would have
21 used the word "groundless." It didn't. It chose just the
22 phrase "no basis in law or fact."
23 Now, then you get to -- and so I don't think
24 we ought to be changing that policy decision. I think the
25 Legislature made that policy decision, and we need to

1 honor that. We may not think that's the right way to do
2 it, but we need to honor the policy decision they made.
3 Then you get to, okay, what does it mean to have no basis
4 in law or what does it mean to have no basis in fact, and
5 there are, I understand -- the other thing you've got to
6 add into this is the statute clearly says that the motion
7 shall be determined without evidence, that this is a
8 nonevidentiary motion, so it's based on the pleadings.
9 So then you get to -- so the simple -- I
10 mean, I think the example you gave about false light
11 invasion of privacy, the one I kept using in the
12 subcommittee was negative infliction of emotional
13 distress, whatever. That's easy. There's no basis in law
14 for this claim. There's just no basis in law. If there's
15 no basis in law, you may have all the arguments in the
16 world as to why the law ought to be changed. Under this
17 statute, the rule I think we're supposed to adopt under
18 this statute, sorry, you're out of luck. I'm going to
19 grant the motion to dismiss and award attorney's fees and
20 now you get to go to the appellate courts to create or
21 change law in Texas.
22 On no basis in fact I think first you deal
23 with the easy situations, which are those where basically
24 the person pleads themselves out of court, so you sue me
25 for some tort, and in your pleading you say it happened in

1 1952. Now, I can choose at that point to file a motion
2 for summary judgment based on statute of limitations, but
3 I've got to go through discovery, and so instead I just
4 file a motion to dismiss. There is no basis in fact.
5 Take all the factual pleadings as true. There's no basis
6 in fact, and so, "Judge, dismiss it and award my
7 attorney's fees." The other example would be a defamation
8 claim where the person pleads, "It is true that I did
9 these things, but it still hurts my feelings and my
10 reputation that you published that I did these things."
11 Well, I just pled, in fact, there's no basis for that.
12 HONORABLE STEPHEN YELENOSKY: Isn't that
13 just no basis in law?
14 MR. BOYD: Well, it's no basis in law based
15 on the facts pled, right? Now, clearly no basis in law
16 setting aside the facts pled would be the false light
17 invasion of privacy or negligent infliction claim where as
18 a matter of law you can plead all the gray facts in the
19 world, but it doesn't work. No basis in fact is when you
20 plead facts that your legal claim is recognizable but not
21 on the facts you've pled. Then you get into the harder
22 stuff. Well, what if you plead you've gone to Mars,
23 right, and there, I don't think (A)(1)(b)should be in
24 there because I do think the legislation is clear that the
25 decision has to be made without evidence, and so I think

1 you've got to take that as true. I'm not going to dismiss
2 it. Now, you know, we can go through the discovery, and,
3 you know, that's when I as the defendant am going to file
4 as a motion for summary judgment, and then you get into
5 how do you take the affidavit and so forth in response to
6 it.
7 But for those reasons, I -- I think I was in
8 Munzinger's camp and voted that we should not include (a)
9 and (b) in this at all. There are a lot of standards the
10 court -- the Legislature could have chosen, and I can
11 assure you it was a hotly negotiated process that led to
12 this standard being picked as opposed to a 12(b) on the
13 one hand or a groundless frivolous standard on the other
14 end. This is the one that they picked, and I think we
15 should honor that rather than try and change that policy
16 compromise.
17 CHAIRMAN BABCOCK: Okay. Let me get the
18 lineup straight here. Orsinger is next for sure, and
19 then, Judge Christopher, do you still want to --
20 HONORABLE TRACY CHRISTOPHER: Yes, I do.
21 Thank you.
22 CHAIRMAN BABCOCK: Okay, so Justice
23 Christopher is next, and Alex had her hand up, and Judge
24 Yelenosky had his hand up.
25 HONORABLE STEPHEN YELENOSKY: You can put me

1 at the end.
2 CHAIRMAN BABCOCK: He'll pass, and then
3 Roger, and then Pete. Okay. So we'll go Orsinger,
4 Christopher, Albright, Hughes, and Schenkkan. There we
5 go.
6 MR. ORSINGER: Did you write that down?
7 CHAIRMAN BABCOCK: I'm going to try to
8 remember that.
9 MR. ORSINGER: Okay. The concern I have
10 about this approach is that it's overly analytical, and
11 that's not surprising considering the people that were on
12 the subcommittee.
13 CHAIRMAN BABCOCK: Overly analyzed.
14 MR. ORSINGER: I'm not criticizing analysis
15 because I'm overly analytical myself.
16 CHAIRMAN BABCOCK: Some have said.
17 MR. ORSINGER: Most of the people that plead
18 cases are not terribly analytical, and what I find is you
19 get a garbled factual description with no identified cause
20 of action or with a string of causes of action that they
21 claim apply to those poorly pled facts, and normally the
22 way you clean that up is through special exceptions, and
23 you make them eventually get the extraneous facts out and
24 the necessary facts in and identify a cause of action.
25 Now, the way (A)(1)(a) and (b) are set up, they assume

1 that you have a clearly stated claim that a judge can say
2 is either valid or invalid and clearly pled facts that the
3 judge can say either supports the clearly pled claim or
4 doesn't, but what I think is more realistic is the
5 problem, is that poorly pled facts don't support either
6 the pled claim or any claim, and it's the connection
7 between (b) and (a) that's the breakdown. It's not (a)
8 alone that's the breakdown or (b) that's the breakdown.
9 The way this is structured is that you have
10 an analysis of whether the claim is viable and, (b),
11 whether the facts are plausible and support the claim.
12 What you really need to do is tie the two together. You
13 need to evaluate whether the facts pled support a
14 recognized cause of action, and because of the way (a) and
15 (b) are evaluated independently, is the claim viable, (b),
16 are the facts believable. What if the claim is viable,
17 the facts are believable, but the believable facts don't
18 fit the claim? You should be able to dismiss, but under
19 this analytical approach you can't.
20 So an alternative approach, David, since you
21 were saying an alternative approach, is you could say that
22 "The facts, if believed, do not support a viable claim."
23 In other words, take the facts that were pled, assume
24 they're true, and see if they support a claim. If they
25 support a claim, they survive. If they don't support a

1 claim, they don't survive. Now, that's left out the
2 believability of the facts pled. That's the Keller issue,
3 which is a separate issue, but the point I would like to
4 make, whether we go all the way with Keller or not, it's
5 the linkage between the facts and the claim that's the
6 problem, not the claim and the abstract or the facts
7 measured against some no evidence standard. So because of
8 the way this is broken down analytically it makes perfect
9 sense, but I don't think it's going to address the usual
10 problem that poorly pled facts don't support a cause of
11 action.
12 CHAIRMAN BABCOCK: I don't know, to me that
13 sounds overly analytical.
14 MR. ORSINGER: It is overly analytical.
15 CHAIRMAN BABCOCK: Justice Christopher.
16 HONORABLE TRACY CHRISTOPHER: Well, actually
17 that was the point I was going to make. What if someone
18 pleads you have intentionally inflicted emotional distress
19 on me, and they make a series of facts that under our case
20 law do not rise to the level of intentional infliction of
21 emotional distress. There's a lot of case law that says
22 it's got to be really extreme before it rises to that
23 level. The statute itself says "no basis in law or fact."
24 It doesn't say "and fact." It doesn't actually say you
25 take the facts and see if it's that cause of action. So,

1 I mean, if we're going to stick with just the language of
2 the statute, it says "or."
3 CHAIRMAN BABCOCK: Well, but --
4 HONORABLE TRACY CHRISTOPHER: But there is a
5 basis in law that cause of action exists.
6 CHAIRMAN BABCOCK: It would have no basis in
7 fact, though, because you take the allegations as true,
8 and they're not extreme as a matter of law, and there are
9 15 cases that say that, so the claim is gone.
10 HONORABLE TRACY CHRISTOPHER: That's not
11 what (a) and (b) say. (a) and (b) never say you put them
12 together, and the statute itself doesn't say that. It
13 uses the word "or."
14 MR. ORSINGER: But we really need to do
15 that. If we're going to do a rule we have to link the
16 facts to the pleadings even if the Legislature didn't,
17 otherwise this isn't going to work in my opinion.
18 CHAIRMAN BABCOCK: Okay. Well, Professor
19 Albright in our laundry list is next. Then Roger.
20 PROFESSOR ALBRIGHT: Jeff Boyd is convincing
21 me we should just leave this -- the words the way they are
22 in the statute, because if we're having this much trouble
23 articulating it, I'm afraid we're going to create a bigger
24 mess than the statute already has, but I think the point I
25 wanted to make is that, Judge Peeples, I think in (b) I

1 was thinking you were trying to articulate a no evidence
2 standard, and I think you're maybe trying to articulate a
3 standard different from no evidence standard. Is that --
4 I guess I'm still confused as to what (b) is trying to be.
5 Is (b) trying to say plaintiff has no evidence, you know,
6 let's have a mini-summary judgment hearing, or is (b)
7 saying the judge looks at the pleadings and I can't -- I
8 just can't believe them?
9 HONORABLE DAVID PEEPLES: Just --
10 CHAIRMAN BABCOCK: Yeah, go ahead.
11 HONORABLE DAVID PEEPLES: How we got there,
12 Alex, in the State Bar proposal they had more than this,
13 and they talk about "more than a de minimis probability
14 exists" and so forth, and we thought that was not helpful,
15 and this we thought was more helpful.
16 PROFESSOR ALBRIGHT: Okay.
17 HONORABLE DAVID PEEPLES: And beyond that
18 I'm not sure I can say.
19 PROFESSOR ALBRIGHT: So you weren't
20 anticipating a -- I mean, a no evidence standard is does
21 the plaintiff have any evidence, and so this is taking the
22 pleadings and looking at the pleadings and saying that no
23 reasonable person could believe these allegations.
24 HONORABLE DAVID PEEPLES: Well, Chip, let me
25 just say, Pete Schenkkan raised three very good points,

1 and at some point I think we need to have some more
2 discussion about his third proposal or point, which was we
3 ought to on line eight add and have it say, "A claim has
4 no basis in law when," comma, "taking the allegations as
5 true," comma, "it is not warranted." And then strike
6 section (c), lines 27 and 28, and then we would need
7 something for (b), I think, but that might be one way
8 to --
9 PROFESSOR ALBRIGHT: Why would you strike
10 (c)?
11 HONORABLE DAVID PEEPLES: Because the
12 language that Pete suggested I think does the work that
13 (c) is doing, taking the allegations as true.
14 MR. TIPPS: You just need to strike the
15 phrase "accepting as true the facts pleaded." The rest of
16 it can stay because you need to make clear that you're not
17 going to have an evidentiary hearing.
18 HONORABLE DAVID PEEPLES: Could.
19 CHAIRMAN BABCOCK: Roger. You've been very
20 patient.
21 Yeah, you.
22 MR. HUGHES: Oh, I'm sorry. I didn't hear
23 you. I was -- the whole thing about trying to strike the
24 part of subsection (a) about "warranted by a reasonable
25 argument for extension," et cetera, I was a bit troubled

1 because part of the justification is, well, if the
2 appellate courts are going to recognize a cause of action
3 or extend the law in that direction it will just get
4 reversed on appeal. Well, looking at this statute and
5 that rule, on what basis? If I were the defendant I'd
6 argue the Legislature has commanded this case be dismissed
7 if existing law doesn't support it, and if you want to
8 announce a new cause of action that's prospective in
9 nature, go ahead and do it, but you still have to dismiss
10 it, it still has to stay affirmed, and I get my money for
11 attorney's fees.
12 It's a nice way of freezing the law, and I
13 suppose another way of saying it is simply that the first
14 person will -- to try to argue it is going to take the
15 hit. They're going to lose, and they're going to pay
16 attorney's fees, and only the subsequent people are going
17 to benefit from it, but if the -- if the trial court can't
18 deny the motion on the basis that there is a valid basis
19 for extending law or a good faith argument then I don't
20 understand on what basis the appellate court can reverse
21 the trial judge. The trial judge followed the statute,
22 committed no error.
23 The second thing is there was a question
24 about the linkage, what happens when the person has
25 alleged a plausible set of facts and a valid cause of

1 action, but the facts won't link up. In other words,
2 those facts won't support that cause of action, and all I
3 can think of is that perhaps the Legislature didn't intend
4 to address that particular evil, that if they did, they'd
5 have picked the 12(b) standard language at the beginning,
6 not the end, and what the evilness addressed is not the
7 misguided pleader who just can't get his facts married up
8 to this cause of action, but rather to address cases where
9 people are suing on delusional facts or nonexistent causes
10 of action, and that's all we can address.
11 CHAIRMAN BABCOCK: Okay. Pete, you're next
12 in line.
13 MR. SCHENKKAN: Two points this time. One
14 is a little technical but concrete and I hope will pass
15 Richard's not overly analytical test.
16 CHAIRMAN BABCOCK: Is that a test?
17 MR. SCHENKKAN: And the other goes to what
18 Roger was just talking about, but takes it a layer
19 further. The technical one is in capital letter B, not
20 (A)(1)(b), but capital letter B, the time provision. I've
21 got a significant problem with a motion to dismiss a claim
22 or cause of action that -- having to be filed within 60
23 days after the pleading containing the cause of action is
24 served if, as I now understand, this statute and rule are
25 not substitutes for special exceptions practice, but are

1 an additional layer on top of it. I would envision many
2 scenarios in which I first need to go through special
3 exceptions to get this person on the other side to tell me
4 what the heck it is, the cause of action being alleged is,
5 and once I get that nailed down then I'm going to file a
6 motion under this to say that's ridiculous, and I get my
7 attorney's fees, so I've got a problem with that one.
8 Now, on the substance, I think Roger is
9 exactly right, that on Jeff's theory proves way too much.
10 If Jeff's theory is the Legislature here, without saying
11 so, has passed a statute that says the Supreme Court of
12 Texas no longer has the power that it has always had over
13 the common law to extend, modify, or reverse it in light
14 of changed circumstances, the core common law power, if
15 Jeff is right that the trial courts no longer have this
16 under this language, it seems to me that Roger is right
17 that neither do the appellate courts, and that, of course,
18 is not the law.
19 The law is that the abrogation by the
20 Legislature of the common law is disfavored, and you don't
21 do it unless the Legislature has expressly said we're
22 doing it and has provided an adequate substitute for it,
23 generally speaking. And it's also not -- does not seem to
24 me to be the natural reading of the words. It seems to me
25 that the words, "a basis in law," include a reasonable

1 legal argument for extension, modification, reversal.
2 That is part of the legal system, a reasonable basis for
3 extending, modifying, or reversing an existing common law
4 rule is a valid kind of legal argument, and then finally,
5 why does this matter? It seems to me that in the trial
6 court sometimes your arguments that are reasonable for a
7 extension, modification, or reversal of the common law
8 need some trial court proceedings. They need some facts.
9 Not always, but sometimes they do, and again, I would not
10 lightly assume the Legislature meant to circumscribe the
11 Supreme Court's and the legal system's efficient way of
12 being able to process those things.
13 I'll end by saying the statute that -- the
14 sentence of the statute that contains this language, the
15 no basis in law or fact, is not a statute that says cases
16 that have no basis in law or fact shall be dismissed on
17 motion and with no evidence. Instead the sentence says,
18 "The Supreme Court shall adopt rules to provide for the
19 dismissal of such actions," and so it seems to me that in
20 addition to this fundamental theory that we don't like to
21 read in statutes to say the common law has been frozen by
22 the Legislature, that this one is especially unlikely to
23 have been intended that way since it is a grant of
24 rule-making power.
25 MR. GILSTRAP: Can I interject just a quick

1 note to what Pete just said?
2 CHAIRMAN BABCOCK: Anybody object to
3 Gilstrap butting in?
4 MR. GILSTRAP: The next sentence, the next
5 sentence in the statute says, "The rule shall provide that
6 the motion to dismiss shall be granted or denied within 45
7 days." There the Legislature said what shall be in the
8 rule. There's -- in the earlier sentence it just says
9 what the rule should accomplish. There's a difference
10 between provide for and provide that, and you know, we've
11 got to follow the orders of the Legislature. If they had
12 meant that it would -- had to be dismissed on -- if they
13 meant to use the words "no basis in law or fact," it would
14 say provide that. They didn't. That's all.
15 CHAIRMAN BABCOCK: Okay. Gene's had his
16 hand up, and then Richard, then Stephen, and then I'll
17 come around to Carl and Richard again.
18 MR. STORIE: I think the first fundamental
19 question we all wrestled with was what does the
20 Legislature mean, and I think we've pretty much all
21 decided we don't know. So the second question is at least
22 you have some delegation to the Court, so we know the
23 overall idea was get the garbage out of the system as
24 quickly as possible before people have to spend money and
25 award attorney's fees to parties who have to put up with

1 dealing with the junk. So that much we have, and I was
2 originally in the Munzinger and Boyd camp because I
3 thought, well, they have at least some standard that does
4 not appear to track anything we currently know exactly, so
5 it must mean something different, but I came around to the
6 majority camp because I think what the Court has done,
7 much as Frank said and as he said in our discussions, is
8 to delegate to the Court the opportunity to make rules to
9 identify the junk and go from there. So I guess the first
10 thing is, if you're wanting a vote, is to decide whether
11 we need any standard beyond the statutory language or some
12 standard and then we try to figure out what that is.
13 CHAIRMAN BABCOCK: Yeah. Yeah. Richard.
14 MR. MUNZINGER: We can get into a lot of --
15 we've had the same discussion generally in the
16 subcommittee that the group has had here, with some
17 differing insights obviously from the group here. One of
18 my thoughts was that you can make this more complicated
19 than, in fact, it has to be. The Supreme Court tells us
20 over and over that we apply statutory interpretation of
21 the rules, the Legislature has intended -- is presumed to
22 know the existing law, et cetera, and if it doesn't use a
23 phrase, that that was intentional. If you adopt A(1)(a)
24 as we have now, what is the Supreme Court going to do with
25 that line of authority? And because that clearly, it

1 seems to me at least, would violate the standard rules of
2 statutory interpretation. The Supreme Court would be
3 inserting a clause that the Legislature must be presumed
4 to have intentionally not intended. So you get into this
5 philosophical discussion.
6 Why isn't it correct to look at the statute
7 as being limited in scope and intent? As of today there
8 is no analog in the Texas Rules of Civil Procedure that
9 I'm aware of to Rule 12(c) of the Federal rules, a motion
10 for judgment on the pleadings, so-called as a motion for
11 judgment on the pleadings. In Rule 12(c) in the Federal
12 system you look at the pleadings, you take all allegations
13 as true, and you dismiss the case if you can get a
14 judgment on the pleadings. That would honor the
15 legislative command to adopt such a rule. We would be
16 obeying -- the Supreme Court would be obeying the
17 Legislature if it did that.
18 The problem about whether something is true
19 or not in fact, the Legislature has said there will be no
20 evidence, should be no evidence in connection with this
21 rule. I'm one of those who believes you don't need a
22 hearing. That's a separate point, but the point about no
23 evidence, some years ago there were lots -- there were
24 lots of litigation where people claimed the Republic of
25 Texas existed and that the Republic of Texas statutes and

1 this and that and so forth voided contracts and the
2 Uniform Commercial Code did not apply, et cetera. I was
3 involved in two or three of those cases with people.
4 Obviously you can file a special exception saying that
5 doesn't state a cause of action.
6 The Legislature has given a new rule here or
7 the opportunity for a new rule. If you face that, you've
8 got a motion for judgment on the pleadings. There is no
9 such thing as the Republic of Texas. It ended in whatever
10 it was, 1846, when we joined the union. We all know that.
11 We don't have to have hearings to that, and we darn sure
12 don't have to adopt a rule that ignores a decision of the
13 Legislature not to include language about reasonable
14 arguments for the extension, modification, et cetera, and
15 we don't have to implicate the Supreme Court in the
16 question of whether or not this little terse statute was
17 intended to stop the development of the common law.
18 It wasn't intended to stop the development
19 of the common law, in my opinion. It was intended to stop
20 the abuse of the court system by allowing courts to read a
21 judgment -- or a petition rather, or a claim or a
22 counterclaim and say, "This is nuts." Why should we force
23 Bank of America to spend a quarter of a million dollars in
24 attorney's fees to defend a claim which is saying that
25 someone has a 14th Amendment right to a free cash machine?

1 That doesn't make sense. If you view this rule as limited
2 in scope, I think you finesse a lot of the philosophical
3 questions that are raised in the discussion that we're
4 having, and you are loyal to the command of the
5 Legislature, which is the Legislature, and the Governor
6 signed it. It's our law. So let's obey the law, do
7 exactly what they said, adopt a rule that says in essence
8 we now have an analog to 12(c) under the state rules.
9 We've always had an analog to 12(b)(6) under the special
10 exceptions. We could even point that out to practitioners
11 in the comments to the rule, but we finesse all of this
12 discussion, and we don't get into this philosophical
13 struggle, which in my opinion is unnecessary if you avoid
14 the inclusion of this language and you view the thing as
15 being a limited effort to cure a limited problem.
16 CHAIRMAN BABCOCK: Okay. Skip.
17 MR. WATSON: To come in on what Pete was
18 saying, I think I get what the intent was here. I'm a
19 little disturbed by what Jeff was saying, that we should
20 give automatic deference to the Legislature's intent to
21 penalize somebody for daring to want to make a good faith
22 change in the law by having them pay attorney's fees
23 before they go to the court of appeals. That's what this
24 does. That's what the inclusion of the attorney's fees
25 provision does. I think Pete is absolutely correct that

1 whether that was the intent of the Legislature, that's the
2 effect. For the first time -- I mean, for years under
3 special exception practice I was able to go in and say,
4 "These facts don't fit this claim" or "There is no claim
5 under these facts, order them to replead. We have no
6 general demurrer, so just order them to replead. If they
7 can't replead facts that make a claim, dismiss." You have
8 that right. Beaucoups of cases saying that, but there
9 were no attorney's fees saying that. The person that
10 wanted to go on up and say, "Yes, but there should be a
11 claim under these facts," could without the state
12 penalizing that person for daring to have access to the
13 courts and asking the courts that are the sole arbiters of
14 the common law to change the common law. That's what this
15 does, and that's what I'm having a problem with.
16 CHAIRMAN BABCOCK: Okay. Stephen was next,
17 and then Carl and Richard, and then I'll move around.
18 MR. TIPPS: I'm in favor of having an (a)
19 and a (b) under (A)(1), and, frankly, I find the
20 committee's draft, subject to the suggestions that have
21 been made, to be perfectly satisfactory, but I want to
22 speak to why I think we should -- the Court should go
23 beyond promulgating a rule that simply says that the court
24 must dismiss a claim that has no basis in law or in fact,
25 for at least two reasons. The first is that I agree with

1 Pete and Frank and others who have pointed out that the
2 Legislature chose to implement its will by asking the
3 Supreme Court to promulgate a rule; and I think that
4 certainly is an indication that the Court is being asked
5 to exercise some judgment concerning how this objective of
6 making it possible to have a claim that has no basis in
7 law or fact be dismissed; and so I think it's perfectly
8 appropriate for the Court to go beyond A(1) and add an (a)
9 and (b).
10 And second, it seems to me that if we chose
11 the other course and simply parroted the language of the
12 statute and said that "Upon motion a court must dismiss a
13 claim for relief that has no basis in law or fact,"
14 period, that courts are going to feel obligated to
15 interpret that language; and what we're going to have is
16 four years of litigation in the appellate courts,
17 ultimately ending up in the Supreme Court, in which
18 lawyers are going to make the various arguments for what
19 those words mean that are set out in Frank's memorandum
20 because there are many different choices; and at the end
21 of the day after we've had a lot of litigation, the Court,
22 the Supreme Court, is ultimately going to have to tell us
23 what it meant or what the Legislature meant by "no basis
24 in law or fact"; and it just seems to me more appropriate
25 for the Court to go ahead and make that decision at this

1 young juncture rather than leaving it up to what would be
2 a fairly messy judicial process.
3 CHAIRMAN BABCOCK: Okay. Carl.
4 MR. HAMILTON: The ABOTA report indicates
5 that the Legislature did not intend to adopt 12(b)(6). I
6 don't know where they get that from, maybe the hearings or
7 something, but was there any discussion on the difference
8 between "failure to state a claim upon which relief can be
9 granted" under 12(b)(6) and "no basis in law or in fact"?
10 It seems to me like those are pretty much the same thing,
11 but I don't know.
12 MR. GILSTRAP: I can answer the question
13 about the legislative intent. The original version of the
14 statute said that the Court shall make a rule and shall
15 model it after Rules 12 and 9. Rule 9 is the one
16 involving particularized pleading of fraud of the Federal
17 rules. That was taken out when it went to the House
18 committee, and the current language wound up -- at the end
19 of the sausage making we wound up with the current
20 language that we have, but the 12 language was taken out
21 immediately. That's all.
22 CHAIRMAN BABCOCK: Okay. Richard Orsinger.
23 MR. ORSINGER: I'd like to echo what Steve
24 Tipps said but maybe a little bit differently. I think
25 that the Legislature is used to delegating implementation

1 to the courts and that they speak in broad terms and they
2 allow the court system to develop the way that the broadly
3 stated laws apply to individual situations. So I don't
4 think that there's anything wrong with the rule-making
5 process or the court system attempting to take these broad
6 principles and make them applicable to specific
7 litigation. We have a choice, as Stephen pointed out. We
8 can either have the Supreme Court through its rule-making
9 process decide now what all of these terms mean and how it
10 applies, or we can carry forward the broad language of the
11 statute and let the courts of appeals develop it over a
12 period of three to five or seven years, by which time it
13 eventually gets to the Supreme Court, and we get what is
14 tantamount to a rule handed down in a specific case.
15 Now, in some instances that ferment of all
16 the different court of appeals with all their different
17 perspectives coming up with all their solutions is good,
18 and it's worth it. It's like the Federal system at the
19 national level, but in some instances it's just a waste of
20 everybody's time and money for us to litigate our way
21 through the appellate system over a period of 5 to 10
22 years to the ultimate solution. We already have
23 paradigms. We have Federal paradigms, we have rule
24 sanction paradigms, we have statute sanction paradigms. I
25 think it's perfectly fine and I favor the Supreme Court

1 cutting out 3 to 5 to 7 to 10 years worth of court of
2 appeals differing opinions and then ultimately some
3 capstone Supreme Court case to just go ahead and
4 promulgate a rule right now that tells everybody of all of
5 these standards that are floating around out there that
6 you might find analogous these are the ones that we're
7 going to apply in Texas under this statute.
8 So I'm in favor of having (1)(a) and (b),
9 but I still go back to my previous comment, and David,
10 that we need to link (b) and (a) or (a) and (b), and I
11 would make a suggestion that we do it in this way. We
12 leave (a) exactly the way it is, which endorses an
13 argument for the reversal of existing law, which I think
14 is a policy that as a free country and a common law
15 jurisdiction we should encourage. In (b), though, I think
16 we should say, "A claim has no basis in fact when the
17 facts pled do not support the claim." Got to be a linkage
18 there between the facts pled and the claim that you're
19 asserting, and then follow that up with the statement,
20 "The court shall not consider facts pled that no
21 reasonable person could believe."
22 So you've got to have a linkage between the
23 facts pled and the claim asserted, but the facts have to
24 be plausible enough that at least one reasonable person
25 would believe it, and if that's your standard, an

1 objective standard about a reasonable person, it's going
2 to be reviewable all the way up to the Supreme Court of
3 Texas, and it is very important in my opinion that the
4 Supreme Court of Texas have jurisdiction to evaluate a
5 dismissal based on these pleadings. It has to be an
6 objective standard, and it has to be a no evidence
7 standard or else we're never going to get into the Supreme
8 Court, or at least arguably you can't. So, at any rate,
9 that's my contribution.
10 CHAIRMAN BABCOCK: Richard, your point,
11 using again the hypothetical I had, so somebody makes a
12 reasonable argument to the trial judge that the Supreme
13 Court will change its view on false light for A, B, and C
14 reasons. So the trial judge says, "Yeah, that's a
15 reasonable argument. That makes sense to me, so I'm going
16 to deny the motion and award attorney's fees against the
17 moving party," which is the defendant, who was relying on
18 existing law. That's the consequence, right?
19 MR. ORSINGER: Well, I think that that's an
20 unfortunate consequence if you have just one --
21 CHAIRMAN BABCOCK: But that's the
22 consequence?
23 MR. ORSINGER: Yes, but the consequence goes
24 the other way, which is any time that anyone arguing --
25 let's say, for example, that when the Texas Supreme Court

1 first addressed an issue only three other jurisdictions
2 had adopted it, and now 20 years later 37 have adopted it.
3 CHAIRMAN BABCOCK: Well, it would be a
4 reasonable argument to change it.
5 MR. ORSINGER: Right. So the question, if
6 you say nothing it isn't going to eliminate the problem.
7 The problem is created by the mandatory award of
8 attorney's fees if you win or lose.
9 CHAIRMAN BABCOCK: Right.
10 MR. ORSINGER: And when we get to this part
11 we'll discuss it, but how do you pick the prevailing party
12 if the defendant attacks three or two causes of action and
13 wins on one and loses on one?
14 CHAIRMAN BABCOCK: There's another issue.
15 MR. ORSINGER: Yeah.
16 CHAIRMAN BABCOCK: Okay. Now, Judge Peeples
17 next.
18 HONORABLE DAVID PEEPLES: The discussion is
19 wonderful, and I appreciate it. I want to say something
20 that's responsive to a bunch of points. There are some
21 boundary stretching cases that I personally wouldn't want
22 to see the person making the claim have to pay attorney's
23 fees. The Sabine Pilot case, where a person was allegedly
24 fired for reporting of a statutory violation, and you take
25 the El Chico case, a drunk driver, you know, is made more

1 drunk by a tavern and goes out and hurts someone; and so
2 as this is worded, that person who makes that claim,
3 unless that's rejected and maybe all the way up, would not
4 have to pay attorney's fees under this statute; but in
5 terms of changing the law and worrying about freezing the
6 law and tying the hands of the appellate courts, that
7 defendant ought to, and I think would, specially except or
8 bring it up by summary judgment.
9 There are procedural ways to tee that up for
10 the appellate court system, and their hands would not be
11 tied, but my view is there are also some cases that are
12 just, frankly, not good faith plausible attempts to
13 stretch the law. I'm just giving you an example, and I'm
14 going from memory of a case I -- and the subcommittee, I'm
15 sorry, they're going to have to hear this for the third
16 time. There were a couple of guys, oil field workers, and
17 they met a couple of girls at a bar, and I don't know what
18 happened, but they leave and the girls chase after them
19 and shoot at them, and the guys were injured.
20 MR. TIPPS: That's a movie.
21 MR. GILSTRAP: That's the Thelma and Louise
22 case.
23 HONORABLE DAVID PEEPLES: Now, there was a
24 suit against the girls, who don't have insurance for that
25 and who are judgment proof, and the tavern or the bar was

1 sued also, but the employer was sued for not warning these
2 guys to stay away from girls at bars. Okay.
3 CHAIRMAN BABCOCK: With guns.
4 HONORABLE DAVID PEEPLES: I dismissed that.
5 I dismissed that. I don't remember if it was on special
6 exceptions or summary judgment. It was never appealed,
7 and in my opinion that is a good candidate for the
8 defendant who had to hire a lawyer and attack that ought
9 to be able to use a rule like this and get attorney's
10 fees. That's not in the same case as Sabine Pilot and El
11 Chico and some other cases, and why would the plaintiff
12 make that claim?
13 Well, maybe the employer -- the judge will
14 say, no, let the jury decide this, and they'll pay some
15 money to settle it; but those kinds of things happen; and
16 they're never written up in the appellate courts because
17 if the court grants it, dismisses it, there's no appeal;
18 and if the court doesn't dismiss it, it's settled; and so
19 those things do happen; and what I'm looking for here is,
20 frankly, maybe at some point we want to tidy up the
21 special exception rule to make it explicit in the wording
22 of the rule that we've got a 12(b)(6) or a failure to
23 state a cause of action motion for which you don't get
24 attorney's fees, but you can attack a claim that's just
25 too far out and then also we would have this motion to

1 dismiss, which is not as potent. It's got to be a worse
2 claim asserted, but you can get attorney's fees against
3 you if --
4 CHAIRMAN BABCOCK: Jeff.
5 HONORABLE DAVID PEEPLES: -- you lose.
6 MR. BOYD: I have a question first and then
7 a comment. Under current existing law if -- and using
8 your hypothetical -- I sue you for false light invasion of
9 privacy, and that's the only cause of action or claim that
10 I assert and you file a motion for summary judgment in
11 Judge Yelenosky's court, does Judge Yelenosky have
12 discretion to deny the motion for summary judgment on the
13 ground that he's going to recognize that cause of action
14 in spite of what the Supreme Court has already said?
15 CHAIRMAN BABCOCK: I would think he would
16 get reversed by the intermediate court.
17 MR. BOYD: So he's going to say, "No, I'm
18 going to deny the motion for summary judgment. We're
19 going to trial to the jury on a false light invasion of
20 privacy cause of action because I think the law ought to
21 be changed." I don't think he can do that.
22 CHAIRMAN BABCOCK: Well, he can do it.
23 HONORABLE SARAH DUNCAN: Sure he can.
24 HONORABLE TRACY CHRISTOPHER: Sure he can.
25 CHAIRMAN BABCOCK: He can do it.

1 MR. BOYD: The trial court can change the
2 law to turn existing --
3 CHAIRMAN BABCOCK: Well, you could maybe
4 mandamus him or if there's an interlocutory appeal.
5 MR. BOYD: Yeah, no, you can't mandamus, but
6 you're right.
7 HONORABLE STEPHEN YELENOSKY: But the
8 alternative is the case that was just decided in Fort
9 Worth where the person sues saying they should be able to
10 get the sentimental value of their dog, and what I'm
11 supposed to do under your view of it is dismiss it and
12 award attorney's fees, and as everybody else says, the
13 court of appeals ought to uphold me on that because that's
14 not the law right now.
15 MR. BOYD: Yeah, and I don't agree with
16 that. I don't agree that the court of appeals or
17 ultimately the Supreme Court, that either this statute or
18 the rule contemplated by the statute prohibits an
19 appellate court from recognizing changes in the law.
20 HONORABLE STEPHEN YELENOSKY: But how would
21 they?
22 MR. BOYD: I think what it does is it
23 prohibits the trial court from doing so on a motion filed
24 under this rule.
25 HONORABLE STEPHEN YELENOSKY: How would they

1 reverse me? I haven't committed error. I did exactly
2 what I'm supposed to do.
3 CHAIRMAN BABCOCK: Yeah.
4 MR. BOYD: Same way they would reverse you
5 if you granted the summary judgment and then they decided
6 to change the law. That's why they reverse you in the
7 exact same way they do now.
8 HONORABLE HARVEY BROWN: Different question.
9 One is discretion.
10 CHAIRMAN BABCOCK: Yeah, but your point is
11 Judge Yelenosky has ignored the Supreme Court decision,
12 which clearly says there's no cause of action for false
13 light, and he's denied summary judgment, and he's taken
14 the defendant through trial. You know, I'm not sure he --
15 I guess he can do that.
16 MR. BOYD: And then he gets reversed on
17 appeal.
18 CHAIRMAN BABCOCK: Yeah, he gets reversed on
19 appeal.
20 MR. BOYD: Or alternatively he grants the
21 motion to dismiss because there is no such cause of
22 action.
23 CHAIRMAN BABCOCK: Right.
24 MR. BOYD: The claimant appeals, and the
25 court of appeals or -- and/or ultimately the Supreme Court

1 reverses because they change --

2 HONORABLE STEPHEN YELENOSKY: But they can't

3 reverse me because the question before me was what's

4 existing law, and I got that right.

5 MR. BOYD: They can reverse you now if you

6 --

7 HONORABLE STEPHEN YELENOSKY: Because --

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

9 HONORABLE STEPHEN YELENOSKY: Yeah, because

10 the question before them is different. The question

11 before me under your scenario is was this the existing

12 law, and I was right about that. If it goes through a

13 trial and then goes up on appeal, the question is what's

14 the common law?

15 MR. BOYD: I don't see that. Because if I

16 sue for the sentimental value of the pet and you say under

17 Texas law we don't recognize that claim and so I'm going

18 to dismiss. I appeal and get all the way to the Supreme

19 Court, and the Supreme Court says, "Well, historically

20 we've never recognized that claim, but we hereby do as a

21 matter of common law recognize that claim." They're going

22 to remand it just like they would now when they change the

23 law.

24 HONORABLE STEPHEN YELENOSKY: Well, that --

25 yeah, but -- well, that depends. I mean, I think

1 everybody else is saying, no, what they're going to do is
2 see if I was wrong when I applied the new statute, which
3 said for me to decide whether or not there was existing
4 law to support it, and I said there's no existing law to
5 support it, and I'm supposed to dismiss it. If everybody
6 else, Schenkkan and others are right, that goes all the
7 way to the Supreme Court and I get upheld because there
8 was no existing law to support it and the Supreme Court
9 has said that. Now, Justice Hecht is shaking his head, so
10 let's get an answer for him.
11 CHAIRMAN BABCOCK: Yeah, you got the answer?
12 HONORABLE NATHAN HECHT: Well, but, you
13 know, we have --
14 CHAIRMAN BABCOCK: Well, but you know.
15 HONORABLE NATHAN HECHT: We have this idea
16 in the -- that decisions ought to be fully retroactive, so
17 when the Supreme Court decides that although we've never
18 said it before this is the law, it's always been the law
19 back till God was two, and so while you thought you were
20 following existing law because the Supreme Court had said
21 it before, you were just mistaken, because really the law
22 was the other way. You just don't know it yet. You know,
23 but there is a -- you know, in applying the law
24 retrospectively, the idea is that it's always been that
25 way.

1 MR. BOYD: So --
2 HONORABLE NATHAN HECHT: And the other idea
3 is if you make it prospective, that's really legislation,
4 and courts shouldn't be legislating.
5 CHAIRMAN BABCOCK: Pete.
6 MR. SCHENKKAN: I want to follow-up that
7 thought and then tie it back to another comic relief from
8 our high jurisprudence in the technicality about the
9 rules. In that scenario, I'm Judge Yelenosky and I have
10 been presented with a claim that is in fact a -- an
11 assertion that there should -- a good faith and plausible,
12 let's assume, assertion or at least arguably plausible
13 assertion for an extension, modification, or reversal of
14 the law and then I'm presented with a motion from the
15 other side that says, "There's no basis in existing law, I
16 want my attorney's fees," and whichever way Judge
17 Yelenosky goes -- and I'm going to let y'all think about
18 if it makes a difference which way he goes, the other side
19 takes it up and wins, and wins. Now, do they get their
20 attorney's fees for the whole case all the way up and back
21 on a remand under this rule? I'm thinking they do. I'm
22 thinking that's a pretty significant constraint on abuse
23 of this scenario by either side, and we're probably going
24 to only have these ones go up where there is in fact a
25 reasonable argument for a extension, modification, or

1 reversal of the law, and in those cases, at least if I'm
2 on the defendant's side, I'm going to be very cherry about
3 invoking this rule.
4 CHAIRMAN BABCOCK: Buddy.
5 MR. LOW: Yeah, when it says "under law,"
6 does that mean just Texas law? What if the Supreme Court
7 of Texas has not ruled on a point, the courts of appeals
8 have. Florida, California, and the trend of the law now
9 is going another way, but there's no Texas law to support
10 that. The Supreme Court hadn't ruled on it. Does it mean
11 -- "under the law" mean no law or just means under
12 existing Texas law as it stands now? I don't know.
13 CHAIRMAN BABCOCK: Case of first impression
14 in Texas.
15 MR. LOW: Right.
16 CHAIRMAN BABCOCK: So the trial judge in the
17 first instance has to decide what the law is.
18 MR. LOW: Yeah. No, but the court of
19 appeals has ruled a certain way, and other courts in other
20 states, their high courts have gone differently. Does
21 that mean no -- do we construe that to mean that under
22 Texas law?
23 CHAIRMAN BABCOCK: Yeah. Yeah. Skip.
24 MR. WATSON: A couple of things. On the
25 point that the trial court is constrained to follow the

1 law, announcement of the Supreme Court, we know that's the
2 principle, the Supreme Court announces the law; and, you
3 know, I've had cases where even the courts of appeals have
4 said, "We would like to go this way, but we're bound by
5 the last pronouncement of the Supreme Court so we're going
6 this way" and, in effect, inviting the grant of a
7 petition; but part of my feelings, just to give you the
8 background, I have been fortunate enough to clerk at a
9 court with Mary Lou Robinson. She was Chief Justice at
10 the Amarillo court, and she told a story of the adoption
11 of 402a in Texas, which is an example like Chip was
12 talking about where we all knew it was coming, but it
13 hadn't happened yet; and, of course, my memory is fuzzy,
14 but -- and I'm not sure if the story was accurate, but the
15 way that she explained it was that as a district judge, I
16 think Wayne Barfield brought up a very, very small claim
17 that could barely afford to be presented, but it was a
18 402a claim; and I think that was Tungs. I think it was
19 *Diamond Shamrock vs. Tungs*, and it was her case, and
20 instead of following -- and we had this discussion, and
21 instead of following that that cause of action has never
22 been recognized in Texas, as you know, Mary Lou stepped
23 out and said, "It has been now and rather than go
24 through -- because Mr. Tungs can't afford to go up and
25 take this up, I'm going to deny the summary judgments.

1 I'm going to put this case to trial, and you're taking it
2 up." And, of course, it went up and we got 402a.
3 My point is, is that I wish we could fashion
4 a way, I wish the Court would fashion a way, so that the
5 Tungs of the world or the Diamond Shamrocks of the world
6 defending it did not have to pay a penalty for a judge
7 having to make that call, and I know we have in here that
8 it can't be converted to a summary judgment, but, boy, I
9 would think if I were a trial judge I would say, "Yeah,
10 but it doesn't say that I can't convert it to a special
11 exception," you know, and just get out of having to punish
12 somebody for advancing the judicial process by adopting
13 something that you know the rest of the nation has
14 adopted.
15 CHAIRMAN BABCOCK: Justice Gaultney, then
16 Roger.
17 HONORABLE DAVID GAULTNEY: I really just
18 have a question for the subcommittee that was working on
19 this rule, and really your comment about the practical
20 effect of the rule troubles me. So you have a -- you have
21 a defendant move for a dismissal under existing law
22 because an argument that there's a reasonable basis and
23 the motion was denied. That makes the person arguing for
24 new law the prevailing party entitled to attorney's fees,
25 as I understand it.

1 I think there's a similar problem with (D).
2 In other words, before granting a motion the court must
3 allow the amendment, so you file a motion based on what is
4 a frivolous claim. You're in good faith, an opportunity
5 to amend, at which the trial court says, "Yes, that is a
6 good claim," and again, the moving party pays attorney's
7 fees, if I understand it. So my question is did the
8 committee consider a possible determination of who is the
9 prevailing party in (F) to include something other than
10 absolute victory and whether or not the court could have
11 authority under the statute or the rule to say under those
12 circumstances, either one of those two, either the
13 reasonable extension of law or the amendment of the
14 pleading, you don't get attorney's fees for the movant?
15 CHAIRMAN BABCOCK: Justice Christopher, then
16 Jeff.
17 HONORABLE TRACY CHRISTOPHER: I think if we
18 don't explain what the rule means and if we go with the
19 Jeff theory that we just put out number one there, no one
20 will use the rule for all of the reasons that we have
21 stated here today. They won't understand it. They're not
22 sure what the standard is, and they're going to be afraid
23 that they're going to be stuck with costs, and you know,
24 I'm not sure whether the costs include going up on appeal
25 or not, but that would be an interesting question as to

1 whether it did. I also think, as Justice Gaultney said,
2 that we have a real problem with the amendment and who
3 becomes the prevailing party at that point and that if
4 we're going to allow amendment, which, of course, I think
5 we should allow amendment, we should make it clear that
6 after the amendment you get to decide whether you want to
7 move forward with the motion to dismiss and the other side
8 doesn't get their fees for it.
9 I mean, an example on my intentional
10 infliction of emotional distress case, all right, I've
11 pled it very vaguely because I don't want to put the
12 really bad facts in my petition that become then, you
13 know, open to everyone. I'd rather have it in the
14 discovery process, in a deposition where those things are
15 not filed of record. So I don't put it in there. They
16 move to dismiss. Well, now I have to. Now I have to, you
17 know, put in some really nasty factual allegations. You
18 know, should there be a penalty at that point because I
19 didn't plead it to begin with, I amended.
20 CHAIRMAN BABCOCK: Yeah, good point. All
21 right. Jeff, and then we'll take a break.
22 MR. BOYD: Well, first, I also am in the
23 minority in voting against allowing the right to amend,
24 but we'll get to that point, I assume.
25 CHAIRMAN BABCOCK: Yeah, let's --

1 MR. BOYD: For the reason that Justice Hecht
2 described I still don't agree that if the trial court
3 can't change the law then the Supreme Court can't either
4 in a given case, but to me I think those who are arguing
5 in favor of (A)(1)(a), I think you have to ask yourself
6 from a matter of statutory construction then why didn't
7 the Legislature just say "groundless" in this statute?
8 There's a real important point I think I need to note,
9 which is section 102 of the statute which says that "The
10 prevailing party shall recover attorney's fees," the
11 Legislature did not ask or instruct the Court to adopt
12 rules on that. That's just statutory. Now, we as a
13 subcommittee talked about, well, they didn't tell us we
14 can't so maybe we should so that it is in the rule and
15 people will know about it, but I think we have to be very
16 careful making any kind of change to what the Legislature
17 said in the 102 about "shall award attorney's fees."
18 So I get back to that question, why didn't
19 they just use the word "groundless" if, in fact, the
20 Legislature meant for this rule to say what we say here in
21 (A)(1)(a), because that's what y'all are arguing. What I
22 can tell you is as filed it was 12(b).
23 CHAIRMAN BABCOCK: (6).
24 MR. BOYD: 12(b)(6), yes. Well, 12, and
25 what's the other Federal rule? Nine?

1 MR. GILSTRAP: Nine.
2 MR. BOYD: 12 and 9 as filed. Interested
3 parties in the legislation wanted it to say "groundless"
4 and through the negotiations the parties all -- and this
5 is all on record where you can go to the record of the
6 committee hearing that was held late that Saturday night.
7 Right before it got passed the committee met. Every party
8 that was involved in those negotiations, myself, TTLA,
9 TLR, ABOTA. Mike Gallagher was there for TTL. We all got
10 on record and said, "We have all agreed to this language."
11 The effect of what this proposal is, is to say in spite of
12 all of that now we, this committee, or the Court through
13 the rule-making process is going to say it doesn't matter,
14 we're going to pick what one of those parties wanted by
15 using the definition of the word "groundless" when the
16 Legislature did not use either the word "groundless" or
17 the definition of the word "groundless" in the statute,
18 and I just don't think this committee or the Court should
19 be making those policy choices to change what the
20 Legislature has done in the language they adopted.
21 CHAIRMAN BABCOCK: I promised we're going to
22 break, but one question of Judge Peeples. Did either the
23 Texas bar or ABOTA, either of those proposed rules, did
24 they use this language that we have in (A)(1)(a)?
25 HONORABLE DAVID PEEPLES: ABOTA did not, but

1 the State Bar proposal is roughly comparable.
2 CHAIRMAN BABCOCK: Okay.
3 HONORABLE DAVID PEEPLES: We changed it up,
4 but they made an effort to do what we have here.
5 CHAIRMAN BABCOCK: All right. We know who
6 ABOTA is. Who was on the State Bar committee?
7 HONORABLE DAVID PEEPLES: I don't know that.
8 MS. SECCO: It's chaired by --
9 CHAIRMAN BABCOCK: Russ Meyer.
10 MS. SECCO: Russ Meyer. And Jody Hughes was
11 on the committee, Kennon Peterson. I have a full list I
12 can send to you.
13 CHAIRMAN BABCOCK: All right. Great. Let's
14 take our morning break. Great discussion. Thank you.
15 (Recess from 10:38 a.m. to 11:00 a.m.)
16 CHAIRMAN BABCOCK: All right. We're back on
17 the record, and, Judge Peeples, do you think there would
18 be any benefit in having a show of hands with respect to
19 the controversy on (a)(1)?
20 HONORABLE DAVID PEEPLES: Absolutely. I
21 think we need to have a vote on whether to leave it
22 general in the language on lines five and six or whether
23 to add something along the lines of (a) and (b), and so we
24 need that vote, I think, and then second, I would like to
25 get the sense of the house on Richard Orsinger's fix for

1 (a) and (b), and we haven't talked about the requirement
2 of a hearing. I mean, I think that's probably all we need
3 a vote on, and I guess, also, I'm curious how much more
4 time we have. I think there will be discussion on
5 everything else we have except possibly the family law.
6 That's --
7 CHAIRMAN BABCOCK: We'll set aside the
8 afternoon for the family law thing.
9 HONORABLE DAVID PEEPLES: That will not get
10 discussion, but attorney's fees needs some discussion.
11 CHAIRMAN BABCOCK: Yeah, for sure.
12 HONORABLE DAVID PEEPLES: They all do, but
13 that one for sure.
14 CHAIRMAN BABCOCK: Are we in a position in
15 your mind to take a vote on the one hand just leaving it
16 with the language in lines five and six as opposed to
17 adding something, or does that need more discussion?
18 HONORABLE DAVID PEEPLES: I kind of liked
19 putting it do we want lines five or six or those lines
20 with something else and if the vote is for something else
21 we can talk about what else that would be a little bit
22 more.
23 CHAIRMAN BABCOCK: So we're ready to take
24 that.
25 HONORABLE DAVID PEEPLES: I think we are,

1 but maybe people want to say more.
2 CHAIRMAN BABCOCK: All right. Does anybody
3 want to say more on that topic?
4 MR. HAMILTON: I do.
5 CHAIRMAN BABCOCK: All right. Carl does.
6 MR. HAMILTON: Well, Chapter 10 of the Civil
7 Practice and Remedies Code pleadings uses the same
8 language in (a) and (b).
9 CHAIRMAN BABCOCK: Right.
10 MR. HAMILTON: So it's already in the
11 statute.
12 CHAIRMAN BABCOCK: Richard Orsinger.
13 MR. ORSINGER: I sympathize with Jeff's
14 point about maybe drifting away from the intent of the
15 negotiators when we start defining terms, but I think it's
16 unavoidable because if we don't do it at the rules stage
17 the courts are going to have to do it at the litigation
18 stage in the published appellate opinions, so there will
19 be a judicial interpretation of this. The question is, is
20 it going to be through the rule process or through the
21 appeal process.
22 CHAIRMAN BABCOCK: Justice Brown.
23 HONORABLE HARVEY BROWN: And related to
24 that, this is a rule that's designed to simplify things
25 and minimize expenses. If we don't define it, we're going

1 to have protracted litigation for years to come, and that
2 simple matter instead of being resolved quickly through
3 the rule is going to take years and lots of attorney's
4 fees, so it seems to me it's ironic that a simple rule
5 designed to save money costs more money for the litigants
6 in the short-term if we go with this one.
7 CHAIRMAN BABCOCK: Judge Yelenosky.
8 HONORABLE STEPHEN YELENOSKY: And we need to
9 know -- there's a fundamental difference on (b) and
10 whether it's worded that way or not. We trial judges need
11 to know whether we're supposed to assume the facts pled
12 are true or we're supposed to go into some kind of
13 plausibility analysis. ABOTA and Jeff say it's assume.
14 The subcommittee's proposal is we go into a plausibility
15 analysis, and that's fundamentally different.
16 CHAIRMAN BABCOCK: Okay. Jeff.
17 MR. BOYD: Quick, so to the reference to
18 Chapter 10, the question is the same thing as the
19 reference to Rule 13, which is if that's what the
20 Legislature intended why didn't they just use the word
21 "frivolous." They didn't, and I can tell you there's a
22 reason they didn't, and I do agree -- and let me say, as
23 is typical -- and I mean this as a compliment, not an
24 insult, as is typical with this committee, we have made
25 this much more complicated than it probably has to be

1 because we want to think ahead of all the possible
2 implications, and that's good, but I think here for the
3 most part when parties choose to use this rule it will be
4 simple, and the trial courts will recognize the simple.
5 When the difficult case comes up, I think it ought to
6 be -- these issues ought to be resolved by the courts in a
7 real case of controversy as opposed to by us in advance
8 through hypotheticals and what ifs.
9 CHAIRMAN BABCOCK: Okay. Yeah, I'm just --
10 if I can say something, I'm just reminded, no matter how
11 we vote on this vote, about how we took the offer of
12 settlement rule and recommended to the Court some changes
13 to it that have made it -- I mean, nobody uses it, and
14 that to me is not -- should not be our function, to amend
15 a rule and make it so complicated that nobody uses it.
16 Justice Christopher.
17 HONORABLE TRACY CHRISTOPHER: I think that's
18 true, but I think the opposite will happen here. If we
19 don't put information in the rule, no one will use it.
20 So --
21 CHAIRMAN BABCOCK: Maybe so. I'm not making
22 a judgment on that, but I think that's a -- something that
23 we need to keep in mind and try to avoid. Okay. Are we
24 ready to vote? Lisa. Lisa has been sitting in the corner
25 there. Are you part of this cavil of ABOTA/State Bar?

1 MS. HOBBS: No, I'm not, but I just want to
2 comment to Jeff's point, is I'm not sure what your rule
3 does apart from the statute if you don't define what it
4 means when they say "no basis in law or fact," because if
5 that was what the Legislature intended, they -- I'm not
6 sure what the Supreme Court is adding to the statute. Why
7 didn't they just say dismiss -- I mean, why didn't they
8 just track the language in lines five and six? I mean, it
9 seems like they wanted us or they wanted the Court to do
10 something with that, and I don't know what we would be
11 offering the Court if you don't define what that means.
12 CHAIRMAN BABCOCK: Okay. All right. We
13 ready to vote? All right. Judge Peeples, let's frame it
14 correctly. Would one camp be those who think that it
15 ought to be -- (a) ought to be grounds and content of
16 motion, (a)(1) should be just lines five and six, you
17 would vote for that, and then the people who are not in
18 favor of that would be in favor of something like what we
19 find in lines 8 through 13, proposed (a) and (b)? Would
20 that be the vote?
21 HONORABLE DAVID PEEPLES: Yes.
22 CHAIRMAN BABCOCK: Okay. Everybody that was
23 in favor of limiting (a)(1) to just lines five and six,
24 raise your hand. Geographic.
25 All right. Those who feel that something

1 should be added to lines five and six, raise your hand.
2 All right. The group that thinks it should
3 be limited to lines five and six, that had six votes, and
4 the group that thinks something should be added has 18
5 votes, and regardless of how that vote came out, we were
6 going to go talk about subparts (a) and (b) anyway, so,
7 Judge Peeples, where do you want to take the discussion
8 about what (a) and (b) should be?
9 HONORABLE DAVID PEEPLES: Well, number one,
10 I think that we ought -- the committee ought to get the
11 sense of the house, but without having our hands tied too
12 much, and I'm attracted to what Richard Orsinger said a
13 while back and he was kind enough to write it up for me,
14 and I think what I'd like to do is read it.
15 CHAIRMAN BABCOCK: Okay.
16 HONORABLE DAVID PEEPLES: And then we can
17 talk about it some more. So on lines 8 through 13, he has
18 sub (a), 8 through 10, just the way it is, and then (b)
19 would be changed as follows: "A claim has no basis in
20 fact when the facts pleaded do not support the claim,"
21 period. "The court shall not consider facts pleaded that
22 no reasonable person could believe," period.
23 CHAIRMAN BABCOCK: Okay.
24 PROFESSOR HOFFMAN: Can you reread the
25 second sentence?

1 HONORABLE DAVID PEEPLES: Yeah. (b), "A
2 claim has no basis in fact when the facts pleaded do not
3 support the claim. The court shall not consider facts
4 pleaded that no reasonable person could believe," period.
5 MR. GILSTRAP: Did Richard want to make
6 these two conjunctive?
7 MR. ORSINGER: I think that does.
8 MR. GILSTRAP: Okay. All right.
9 CHAIRMAN BABCOCK: Okay. Hang on. Okay.
10 Justice Gaultney.
11 HONORABLE DAVID GAULTNEY: Judge Peeples,
12 did you also accept Pete's suggestion about adding the
13 words "accepting the facts" in (a) as they are pleaded?
14 HONORABLE DAVID PEEPLES: So we would add on
15 line eight, "A claim has no basis in law when," comma,
16 "taking the allegations as true," comma, "it is not
17 warranted"?
18 MR. WATSON: Yes.
19 HONORABLE DAVID PEEPLES: Pete, is that what
20 you had?
21 MR. SCHENKKAN: Or "taking the true" --
22 "taking as true the facts pleaded," the same language --
23 CHAIRMAN BABCOCK: Stephen Tipps.
24 MR. SCHENKKAN: -- that you had down in
25 lines 27 and 28, just moving it up here.

1 MR. TIPPS: I am going to reurge my
2 suggestion that we include the preposition "for" in line
3 10.
4 HONORABLE DAVID PEEPLES: Yeah, and I'm fine
5 with that. I haven't heard an argument against it.
6 CHAIRMAN BABCOCK: So restate that, Stephen,
7 if you would.
8 MR. TIPPS: My proposal is in line 10 to
9 include the preposition "for," f-o-r between the word "or"
10 and the word "the" so as to make the establishment of new
11 law parallel with the extension, modification, or reversal
12 of existing law.
13 CHAIRMAN BABCOCK: Okay. Yeah, Jim.
14 MR. PERDUE: The proposed language that I
15 just heard read that I think came from Orsinger is
16 straight out of Iqbal and Twombly. I mean, that is
17 12(b)(6) Federal language, which is exactly the
18 legislative history that this was not supposed to do,
19 because now that makes this essentially a pleading
20 sufficiency motion, and you would then be going into the
21 facts of the pleading as the basis for the motion to
22 dismiss, which Jeff is absolutely correct. I mean, that
23 was the original language. That's 12 language, and that's
24 completely inconsistent with what the compromise was at
25 the final bill. I understand the challenge on no evidence

1 as far as the present language in lines 12 and 13, but
2 that proposed language I think is completely inconsistent
3 with the legislative intent of this statute.
4 CHAIRMAN BABCOCK: Pete Schenkkan.
5 MR. SCHENKKAN: I want to make a procedural
6 suggestion, which is that we have two separate votes, one
7 about (a) and one about (b). (a) is this issue of did the
8 Legislature not intend, but did they enact a statute that
9 freezes the common law, and the language that we have in
10 (a) would say that's -- we're making a rule that doesn't
11 do that, and that's one set of issues, and it's a
12 different issue from the Iqbal issue on (d), and it seems
13 to me they are, therefore, two separate votes.
14 CHAIRMAN BABCOCK: Okay. What do you mean,
15 it freezes the common law?
16 MR. SCHENKKAN: That if you have to dismiss
17 a -- under the statute you have to dismiss a cause of
18 action that has no basis in existing law, that that
19 precludes that no basis in law no longer -- a basis in law
20 no longer includes a good faith effort for extension,
21 modification, or reversal, that would be freezing the
22 common law, and I'm saying it didn't do that if it doesn't
23 require --
24 CHAIRMAN BABCOCK: Doesn't a trial judge
25 have to dismiss, if he's following a law, a claim that is

1 not recognized by our law?
2 MR. SCHENKKAN: No, I'm suggesting that it
3 depends on what you mean by "a reasonable argument for a
4 good faith extension" or whatever, maybe no.
5 CHAIRMAN BABCOCK: Yeah, but that's a
6 different issue. That's about who's going to pay for it.
7 But doesn't a trial judge or a court of appeal have to
8 follow the law?
9 MR. SCHENKKAN: Yes. And the law includes
10 good faith arguments for the extension, modification, and
11 reversal of the law. That's part of the law.
12 CHAIRMAN BABCOCK: But the trial judge can't
13 tell the Supreme Court that they're wrong.
14 MR. SCHENKKAN: No.
15 CHAIRMAN BABCOCK: A trial judge has got to
16 follow what the Supreme Court says the law is, the common
17 law. So you're only talking about who's going to pay for
18 it.
19 MR. SCHENKKAN: Which is exactly what the
20 purpose of this rule is; and it's the only rule-making
21 authority this Court, the Supreme Court, is exercising
22 here, is under this first sentence of this statute; and
23 I'm saying for this purpose, for the purpose of deciding
24 who has to pay for making such an argument, they get to
25 say, the Court gets to say, a basis in law includes a

1 reasonable argument for extension, modification, or
2 reversal of the law. They get to say that. They may be
3 wrong to say it. They may choose not to say it.
4 CHAIRMAN BABCOCK: Right.
5 MR. SCHENKKAN: But they get to say it, and
6 I'm saying we ought to take a vote on whether they ought
7 to choose to say it, and I'm saying they ought to choose
8 to say it.
9 CHAIRMAN BABCOCK: Richard Munzinger.
10 MR. MUNZINGER: Does the reasonable argument
11 for the extension, modification, or reversal of an
12 existing law have to be stated in the pleading attacked?
13 CHAIRMAN BABCOCK: What do you think?
14 MR. MUNZINGER: I'm just asking the
15 question. I mean, what's the sense of the committee?
16 Because if you file a motion to dismiss based on the
17 pleadings and the pleading says invasion -- the false
18 light invasion of privacy --
19 CHAIRMAN BABCOCK: Right.
20 MR. MUNZINGER: -- and that's all that it
21 says, and it doesn't give the reasonable argument for
22 extension. So now the defendant has to ask himself,
23 herself, do I file a motion under this rule and risk
24 attorney's fees, because they can come into court now and
25 make all these reasonable arguments that they don't make

1 in the pleading.
2 CHAIRMAN BABCOCK: Right. I see what you're
3 saying. Frank.
4 MR. GILSTRAP: I want to go back to Jim
5 Perdue's comment.
6 CHAIRMAN BABCOCK: Jim's got his hand up.
7 MR. GILSTRAP: Okay. Jim, are you saying
8 that the language in the proposed (A)(1)(b), you said that
9 that comes out of Iqbal. Are you saying it's verbatim
10 from Iqbal or it's just equivalent to the plausibility
11 standard in Iqbal?
12 MR. PERDUE: What I heard proposed by
13 Orsinger was the equivalent of the Iqbal standard.
14 MR. GILSTRAP: Okay. Yeah. Yeah.
15 MR. PERDUE: And we were just talking a
16 little bit, and I guess what the subcommittee got from
17 you, Frank, ended up being the Conley language, but I was
18 curious why the subcommittee didn't adopt either the State
19 Bar rules recommendation or the Chapter 13, 14 standard
20 that you identify.
21 MR. GILSTRAP: Let me respond here.
22 CHAIRMAN BABCOCK: Frank.
23 MR. GILSTRAP: I would be real disturbed if
24 the language itself came out of Iqbal because, you know,
25 we've all got a life-sized picture of where the Federal

1 courts are going with that --
2 MR. PERDUE: Thank you.
3 MR. GILSTRAP: -- and that's not where we
4 want the state courts to go, but at the same time if the
5 standard is no basis in fact, there has to be something
6 like a plausibility standard, you know, because we can't
7 hear facts. The court cannot hear facts in connection
8 with this motion, and yet "no basis in fact" has some
9 meaning. It must mean some statement of facts that simply
10 can't be sold, so we've got to have something in the
11 nature of a plausibility standard, but again, we sure
12 don't want to use language right out of Iqbal for the
13 reasons I stated.
14 CHAIRMAN BABCOCK: Well, according to your
15 memo, Iqbal is plausible on its face.
16 MR. GILSTRAP: Yes.
17 CHAIRMAN BABCOCK: And according to your
18 memo, *City of Keller vs. Wilson* is "A reasonable person
19 could not believe that the material allegations in the
20 pleadings are true."
21 MR. GILSTRAP: Yes. Yes. But --
22 CHAIRMAN BABCOCK: And I assume that you're
23 accurate because you always are.
24 MR. GILSTRAP: Well, I kind of winged it on
25 City of Keller, you know, because City of Keller really

1 isn't that clear, but in this regard --
2 CHAIRMAN BABCOCK: Oh, so you're putting it
3 on the Court.
4 MR. GILSTRAP: In this regard it's not that
5 clear. I'm just saying what I wanted to guard against
6 here is simply lifting language out of 12(b)(6) or the
7 12(b)(6) jurisprudence and bringing it into state court
8 because then we would be importing all of the Federal
9 jurisprudence, and I don't think we want to do that.
10 CHAIRMAN BABCOCK: Great. Judge Yelenosky.
11 HONORABLE STEPHEN YELENOSKY: Well,
12 neither Iqbal nor City of Keller is about facts that are
13 delusional or crazy. I mean, City of Keller is about a
14 drainage ditch, right, so -- and the -- so I don't know
15 how useful those are, but when you said that nobody could
16 say no basis in law or fact requires some kind of
17 plausibility determination, well, somebody did. In fact,
18 Jeff's telling us that's what they all thought that no
19 basis in fact or law meant, presuming the facts to be
20 true. I don't know. I can see if you just do a straight
21 statutory construction you could say, well, it has to mean
22 a plausibility, but apparently other people didn't think
23 that.
24 The last thing is, Chip, while you were
25 saying, "Well, the trial court can't do that," Judge

1 Christopher and I are over here shaking our heads. Well,
2 you know, I mean, years ago before the Supreme Court said
3 that sue or be sued is not a waiver of sovereign immunity
4 there was old Supreme Court case law that suggested it
5 was. In between those two I ruled in a case that's not a
6 waiver of sovereign immunity. All right. That is the law
7 now. That is not a waiver of sovereign immunity. What
8 you're saying is that what I did then was wrong.
9 CHAIRMAN BABCOCK: Well, I don't want to
10 comment on what you did then.
11 HONORABLE STEPHEN YELENOSKY: We figure out
12 what we think the law is based on everything that we've
13 seen, what trends might be happening, what the Supreme
14 Court might do, but to say that I couldn't determine
15 because there was a prior old Supreme Court decision that
16 suggested sue or be sued is a waiver of sovereign
17 immunity, I as a trial judge couldn't determine, no,
18 that's not right. This day and age the Supreme Court I
19 think is going to find that's not a waiver. You're saying
20 I couldn't do that.
21 CHAIRMAN BABCOCK: No, I wasn't saying that,
22 because obviously the hypothetical that I posited is as
23 black and white as I could make it because the Supreme
24 Court has said there is no cause of action for false light
25 invasion of privacy in this state despite the fact that

1 there are in many other states. Now, if you file a claim
2 against one of my clients, I would file something to try
3 to get rid of that claim, and I would think that you as a
4 trial judge would be duty bound to follow clear precedent
5 from the Texas Supreme Court. Now, if there was an
6 intermediate appellate decision or if the Court had later
7 in another case said, "Well, we said 20 years ago, no
8 false light, but we're not so sure about that anymore,"
9 that's different. I mean, if you've got a hook to hang
10 your hat on, that's different, but the hypothetical I was
11 trying to propose was a very clear there isn't any claim
12 here.
13 HONORABLE STEPHEN YELENOSKY: Right. But to
14 be clear --
15 CHAIRMAN BABCOCK: And not to criticize your
16 ruling that I didn't even know about.
17 HONORABLE STEPHEN YELENOSKY: No, I know. I
18 wasn't putting you in that box, but as Jeff is saying, you
19 can't even hang your hat on that. I mean, the trial court
20 would have been wrong in Jeff's view to rule like the
21 court of appeals did in the dog sentimental value, and so
22 the trial court would have been wrong even though the
23 court of appeals is right, and to me it seems that the
24 trial court should have been able to do what the court of
25 appeals did here, and retrospectively it would have been

1 right.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: We're arguing the simplest

4 case here, which is where we have clear Texas Supreme

5 Court authority that we're arguing to overturn. That's

6 fairly rare. What's usually going to happen is the law is

7 going to be changing in stages, and the example that comes

8 to mind to me is conflict of laws where the Texas Supreme

9 Court throughout all of the restatement first standards of

10 lex loci contractu and lex loci delicti, and they replaced

11 it in tort in one case, the most significant relationship

12 test. They did it in contract in another case, and they

13 haven't done it in family law. Only the court of appeals

14 have done it in family law, so some doctrines are

15 incrementally adopted rather than just adopting 402a of

16 the restatement of torts.

17 Secondly, and more significantly, is you're

18 going to have courts of appeals where there's only one

19 court of appeals that has ruled on something, and you're

20 in a different district, and so the question now is, is

21 that the law of Texas or is that not the law of Texas, and

22 we haven't debated that, and I don't know if we all agree

23 or not, but I discussed it with judges for 35 years, and

24 every judge has a different idea of what it means when one

25 court of appeals says that the law is a certain way.

1 CHAIRMAN BABCOCK: You are easily amused,
2 that's for sure.
3 MR. ORSINGER: And then the third category,
4 of course, is where there's no Texas law at all, Supreme
5 Court or court of appeals or statutory, and then you're
6 arguing that a recognized cause of action that's caught on
7 in 35 states should be recognized here or not, and I
8 think, you know, it's easy to say that a trial judge and
9 even a court of appeals doesn't overturn clear Texas
10 precedent from the Texas Supreme Court, but everything
11 else, is that a reasonable extension or if it's not -- if
12 there's no case saying that you can do it, does that mean
13 you can't do it without paying a price? I feel like this
14 definition is helpful because it says, yes, you can be the
15 first plaintiff to establish this cause of action, or,
16 yes, you can go to your court of appeals and have them
17 disagree with the Waco court of appeals or the Dallas
18 court of appeals. I think we should allow people to do
19 that because that's what makes the law expand.
20 CHAIRMAN BABCOCK: The problem is, in my
21 view, that you're taking language from a sanction rule and
22 importing it into this rule, which is designed to do
23 something different, and that may be appropriate because
24 there is a monetary aspect to this rule that the, quote,
25 loser pays. The problem is that, unlike the sanction rule

1 where only one party pays, here both parties are at risk
2 of paying, and so if you had this sanction rule imported
3 into this new Rule 94a you are likely by having this
4 language to emasculate the rule, because what person is
5 going to -- what defendant is going to take the risk of
6 using this rule when there's this giant loophole there.
7 MR. ORSINGER: Well, maybe that's the
8 appropriate use of this rule, is when somebody is coming
9 in and arguing a statute that's in plain language doesn't
10 mean what it says or a Supreme Court decision that's five
11 years old should be reversed. That's where you should
12 pay. But if there's one court of appeals and maybe they
13 have a dissenting opinion, so it's a two to one decision
14 out of that, why shouldn't you be able to go into another
15 court of appeals and say that's not the law; or if Arizona
16 and all these states around Texas have adopted a rule but
17 Texas never has why shouldn't you be able to go in and say
18 this is the law? It doesn't say the statutory law of
19 Texas. It doesn't say the Supreme Court law of Texas. It
20 doesn't say the court of appeals law. It says "the law,"
21 and so I think that if you pass this rule or evaluate this
22 rule on the simple case where a trial judge is being asked
23 to overrule clear Supreme Court precedent or go against
24 the clear language of the statute, they should pay, but in
25 all these other gray areas where the law is growing and

1 being imported and being changed, they shouldn't pay.
2 That's my view.
3 CHAIRMAN BABCOCK: Okay. I want to get back
4 to Jim's point and have any comments that people wish to
5 make about that, and that is whether or not -- whether
6 it's the subcommittee's language or Richard Orsinger's
7 proposal, whether that's not just importing Iqbal and
8 Twombly into our jurisprudence.
9 MR. ORSINGER: Can I clarify? I think the
10 attack was just on the second sentence and not the first;
11 is that right, Jim? The idea that the claim has no basis
12 in fact when the facts do not support the claim. Is it
13 the first sentence you think is objectionable or the
14 second?
15 MR. PERDUE: I don't remember what came
16 first or second, but I think when you tie the analysis to
17 whether the facts state a claim, if the analysis of this
18 motion to dismiss is whether these facts state a claim,
19 that's a 12(b)(6) analysis and then you get into Iqbal and
20 Twombly, whether the facts pled are sufficient to state a
21 claim, and that's not what this was supposed to do. It
22 specifically was supposed to stay out of that arena. I'm
23 trying to find any case that looks at Rule 13 interpreting
24 no basis in fact, but it seems to be kind of like
25 pornography, you know it when you see it. There's no

1 basis in fact, there's no basis in fact, but we've been
2 down here talking about plausibility, which I kind of
3 embrace as a concept in that you plead something that's
4 just completely unbelievable, it's a bad faith pleading.
5 It's, you know, a harassing pleading just making stuff up,
6 there's no way it's true. Well, that satisfies, I think,
7 the concept, the legislative concept of what was behind
8 the rule, but once you get into analyzing whether the
9 facts establish a cause of action and have pled it
10 properly, that's clearly 12(b)(6); and once you start
11 talking about whether the facts satisfy the pleading
12 requirement of a cause, now we're outside notice pleadings
13 of Texas rules, we're into a Federal system, and we've got
14 this analog which was rejected by the Legislature. So
15 when you got into the idea of facts satisfying a cause of
16 action, that's the thing that raised a red flag for me.
17 CHAIRMAN BABCOCK: Yeah, Jim, just so we're
18 clear, Richard's second sentence said, I think, Richard,
19 "The Court shall not consider facts pleaded that no
20 reasonable person could believe." And that's what --
21 that's what got your attention?
22 MR. PERDUE: No, the first sentence.
23 CHAIRMAN BABCOCK: Oh, okay.
24 HONORABLE TRACY CHRISTOPHER: The first
25 sentence.

1 CHAIRMAN BABCOCK: "A claim has no basis in
2 fact when the facts pleaded do not support the claim."
3 MR. PERDUE: That's what concerns me.
4 CHAIRMAN BABCOCK: Okay. That's what
5 concerns you. Okay. Professor Albright.
6 PROFESSOR ALBRIGHT: Well, when I asked Jim
7 that he said that both sentences troubled him.
8 CHAIRMAN BABCOCK: Okay.
9 PROFESSOR ALBRIGHT: So, and, I think the
10 facts pleaded do not support the claim are Justice
11 Christopher's issue about the pleading facts that don't
12 rise to intentional conduct because you don't want to make
13 them of a record kind of situation. I would like to put a
14 third proposal out there just to get it on the table as an
15 alternative that says, "The court shall dismiss" -- says
16 that "A claim has no basis in fact when the claim is based
17 on irrational or wholly incredible factual allegations."
18 HONORABLE STEPHEN YELENOSKY: And that's
19 pulled out of that Federal case.
20 PROFESSOR ALBRIGHT: It's -- there's that
21 Federal case, and it's also here in the memo as --
22 MR. PERDUE: Number 11.
23 PROFESSOR ALBRIGHT: -- number 11 from
24 Chapters 13 and 14.
25 CHAIRMAN BABCOCK: Judge Wallace.

1 HONORABLE R. H. WALLACE: Did our
2 subcommittee consider the language that's in the State Bar
3 committee's proposed rule, the subsection (c), "The cause
4 of action has no basis in fact when no reasonable person
5 from the face of the pleading could believe that more than
6 a de minimis probability exists that the factual
7 allegations that support the cause of action could be
8 proven true at trial" and if so --
9 HONORABLE STEPHEN YELENOSKY: It sounds like
10 the definition of preponderance of the evidence.
11 HONORABLE R. H. WALLACE: Yeah, what I -- I
12 mean, more than a de minimis -- well, anyway, there's some
13 things about that I like, but I just wondered if y'all
14 considered that and rejected it for any particular reason.
15 HONORABLE DAVID PEEPLES: Yes, we did
16 consider it. I, frankly, don't see how that's all that
17 different from what we came up with.
18 CHAIRMAN BABCOCK: Okay. Frank.
19 MR. GILSTRAP: You know, now that I've heard
20 Jim Perdue talk again and seen more clearly his concern, I
21 am, too, concerned that if we say -- if we say that no
22 basis in fact means the facts pleaded do not support the
23 claim, I mean, aren't we importing a general demurrer
24 standard here? Isn't that what that is? And I don't
25 think that's what we want to do.

1 CHAIRMAN BABCOCK: Some people could
2 certainly argue that.
3 MR. GILSTRAP: I don't think that's where we
4 want to go with this.
5 CHAIRMAN BABCOCK: Yeah. Elaine.
6 PROFESSOR CARLSON: I think there's a lot of
7 subcommittee discussion about the legislative intent and
8 what would be the appropriate standard. We're really
9 talking about under what circumstances should we dismiss a
10 claim, and I think most of us felt -- and everybody can
11 speak for themselves -- that the Legislature didn't mean
12 for pleading defects, as Jim Perdue said --
13 CHAIRMAN BABCOCK: Didn't mean for what?
14 PROFESSOR CARLSON: For pleading defects or
15 pleading deficiencies, but that for those state of facts
16 that are not credible that there should be and that the
17 Legislature probably wisely thought about fee shifting.
18 So I think the way the subcommittee ended up drafting
19 (A)(1) with (a) and (b) was to try and draw a line between
20 matter of law and pleading deficiency, and so for that
21 reason, Richard, I'm not keen on your language either,
22 that additional language in (b).
23 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.
24 HONORABLE STEPHEN YELENOSKY: Well, fee
25 shifting on implausibility is going to be meaningless. I

1 mean, it's the case with the prisoner, you know, or it's
2 the pro se on an affidavit of inability who is psychotic.
3 You're never going to collect fees on that. If that's
4 what we're talking about we're not really doing anything
5 here.
6 MR. GILSTRAP: That's the prisoner cases.
7 That's the prisoner cases.
8 HONORABLE STEPHEN YELENOSKY: Not just
9 prisoner cases.
10 HONORABLE TRACY CHRISTOPHER: Crazy people.
11 HONORABLE STEPHEN YELENOSKY: There are
12 people who will come in -- like she said, I had one
13 saying, "Something was put in my brain." Okay. I can
14 dismiss that. I can order fees, you know, but those get
15 dismissed now, and they're not going to pay the fees.
16 They're judgment proof.
17 CHAIRMAN BABCOCK: Okay. Roger.
18 MR. HUGHES: Well, if we take Orsinger's
19 proposal, what I'm afraid we're doing is in a rule
20 about -- under Rule 94a we're really changing the whole
21 standard of pleading sufficiency in Texas because now
22 we're saying you not only have to plead a general theory,
23 you have to plead facts supporting each element of that
24 theory, and I'm not sure we particularly want to go there
25 yet. Number two, if we talk about plausibility, I can see

1 in some product liability cases, especially drug adverse
2 reaction cases, the manufacturer is just going to say,
3 "I'm sorry, there is no reasonable person on the face of
4 the earth who believes that my drug A causes adverse side
5 effects B," and we'll end up having what we might politely
6 call Daubert motions on pleading sufficiency because the
7 manufacturer is going to stoutly contend that --
8 HONORABLE STEPHEN YELENOSKY: Can't consider
9 evidence, though.
10 MR. HUGHES: Well, yeah, but how would you
11 decide it's plausible that -- I mean, we just had a
12 presidential candidate openly assert that -- what was it,
13 the HPV vaccine might cause certain adverse reactions, and
14 of course, there was a storm of controversy over that, but
15 if we're going to entertain plausibility what are we going
16 to do when the defendant says, "My drug can't possibly
17 cause that adverse reaction."
18 HONORABLE STEPHEN YELENOSKY: Deny the
19 motion.
20 MR. PERDUE: What you said.
21 CHAIRMAN BABCOCK: Carl.
22 MR. HAMILTON: I'm reading this statute a
23 little bit differently than -- and it says that the cause
24 of action has no basis in fact. It doesn't say the
25 pleadings are wrong or there's no basis and the facts are

1 not plausible. It says, "The cause of action has no basis
2 in fact," so that's a legal concept, the cause of action.
3 So I think Richard's right, the facts have to relate to a
4 claim, and I don't think we need to even define what we
5 mean by whether we've got the right facts in the
6 pleadings. As ABOTA suggests, we ought to take the
7 pleadings on their face and assume that all those facts
8 are true, and if they're true, do they state a cause of
9 action. So I don't know that we really need to focus so
10 much on what the facts are, except as they're pleaded.
11 CHAIRMAN BABCOCK: Okay. Richard.
12 MR. ORSINGER: My original concern and what
13 my language was attempted to rectify is that there's no
14 requirement that the -- that plausible facts support the
15 claim, and so we have two independent tests that are
16 unrelated to each other. One is have they asserted a
17 claim that is recognized, and, number two, have they
18 stated facts that someone could believe. There's no
19 requirement that those facts relate to the claim that they
20 pled.
21 MR. GILSTRAP: What about material
22 allegations? See, that was -- that's why we put the word
23 "material" in there, was to relate it to the claims.
24 MR. ORSINGER: Well, if you are relating
25 them to the claims then you just have a less clear version

1 of the language I proposed, which is just to clarify that
2 if you've got a -- in this analysis we're determining
3 whether -- if you can prove what's in your pleadings do
4 you win, do have you a cause of action that's supported by
5 facts, and you may say that's a general demurrer. I don't
6 see that, but what good does it do to say they mentioned a
7 recognized tort and they have facts that someone could
8 believe, but they don't really relate to each other but
9 we're going to deny the motion anyway?
10 MR. GILSTRAP: When the facts that they
11 allege aren't material. That's the idea.
12 MR. ORSINGER: Well, if that's true, that
13 material allegations ties (b) and (a) then all I'm doing
14 is making clear what you're doing, and that means that
15 you're doing what you don't believe in, is the way I see
16 it.
17 CHAIRMAN BABCOCK: Buddy.
18 MR. LOW: You know, I was going to say, what
19 if they set forth, "I went to the moon, I did all of these
20 crazy things" and then the material facts tie in to the
21 cause of action? I think that's why they used the word
22 "material," and you don't use that word. I mean, just
23 because they don't believe one thing I said, does that
24 strike the whole thing? That's not plausible that I flew
25 to the moon, but then I gather my senses and I plead facts

1 that are correct, and you say, "Well, that's not plausible
2 either. He didn't go to the moon," gone. It would have
3 to be the material facts that I pled, doesn't it?
4 MR. ORSINGER: Yes, and in my view -- I
5 mean, and my language was a proposal --
6 MR. LOW: Yeah.
7 MR. ORSINGER: -- to try to make the goal
8 clearer, but if you have extraneous allegations but at
9 least you have some that support your claim, you should
10 survive.
11 MR. LOW: Yeah, that's what I'm saying, that
12 it shouldn't just --
13 CHAIRMAN BABCOCK: I'd like to go back to
14 Justice Christopher's example of this morning. I think we
15 have notice pleading in this state. In Federal court we
16 used to have notice pleading, and now I'm not so sure we
17 do anymore.
18 MR. GILSTRAP: Right.
19 CHAIRMAN BABCOCK: Probably don't, frankly,
20 under Twombly and Iqbal, and one issue is whether or not
21 we're going to retreat from notice pleading, which I think
22 that this implicates, which is what Jim raises, a good
23 point, and Judge Christopher raised a good point, too, on
24 the intentional infliction of emotional distress. You
25 know, if you plead and say, for all sorts of legitimate

1 reasons, the plaintiff engaged in a pattern of conduct
2 which was horrible, terrible, and you know, we'll get into
3 it at trial and discovery, but it's so bad that it rises
4 to a claim of intentional infliction. Now, is this rule
5 going to be intended to require the pleader to come back
6 and plead more facts in order to avoid a motion to
7 dismiss? That's a pretty interesting issue.
8 There's another -- there's another
9 circumstance. Let's suppose Justice Gaultney and Justice
10 Gray, God forbid, are running against each other for
11 judicial office and one of them sends out a two paragraph
12 campaign letter. Justice Gaultney sends it about Justice
13 Gray, and Justice Gray files a libel action, and as is
14 required, he sets out verbatim the language from the
15 letter that he says is defamatory. The language he sets
16 out says that he has been falsely accused of being a war
17 hero and a scholarship athlete at the University of Texas.
18 Now, that probably is not defamatory.
19 HONORABLE TOM GRAY: To an Aggie it would
20 be.
21 CHAIRMAN BABCOCK: Well, I was thinking more
22 Baylor based on where you were, but does this rule allow
23 somebody to say, you know, "Look, whether language is
24 defamatory is for the court in the first instance. He's
25 set it out in his pleading as he's required to. It's not

1 defamatory. This case ought to be gone." Judge Peeples.
2 HONORABLE DAVID PEEPLES: That example is
3 not helpful to me because the same thing can happen right
4 now with the special exception practice. If a defendant
5 wants to, it can say, you know, I've got this -- you know,
6 "The petition pleads the elements of intentional
7 infliction or defamation, but the facts are not there.
8 Your Honor, make them be more specific."
9 CHAIRMAN BABCOCK: There's no more
10 specificity that can be provided here.
11 HONORABLE DAVID PEEPLES: Pardon?
12 CHAIRMAN BABCOCK: I mean, it's a two
13 paragraph letter, and they've set out the letter in the
14 pleading, so you're saying go ahead and file a special
15 exception.
16 HONORABLE DAVID PEEPLES: I'm saying that
17 that example doesn't advance the ball here because it can
18 happen already under the law that we've got.
19 CHAIRMAN BABCOCK: Well, then why do we need
20 this rule at all if everything can happen under the rules
21 we already have?
22 HONORABLE DAVID PEEPLES: Because this
23 authorizes -- mandates attorney's fees.
24 HONORABLE TRACY CHRISTOPHER: Fees.
25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
2 think that's a hard one. That to me falls under the
3 statute no matter what way we define this, and you get
4 your fees.
5 CHAIRMAN BABCOCK: Okay. But isn't it
6 taking the facts and applying it to the law?
7 MR. GILSTRAP: Facts as pleaded.
8 CHAIRMAN BABCOCK: Facts as pled.
9 HONORABLE STEPHEN YELENOSKY: Facts as pled,
10 it is, but you've pled yourself out of the case.
11 CHAIRMAN BABCOCK: Okay. Lonny.
12 PROFESSOR HOFFMAN: So here's I think where
13 I come down on this discussion about facts, and it is that
14 I -- I don't favor Richard's revision, nor do I like,
15 after kind of hearing the discussion, the existing
16 language in (b) and why ultimately I think Alex is right
17 to favor the irrational or wholly incredible factual
18 allegations that frank has set out in 11 of his memo. So
19 let me just see if I can vet. I think that it's hard at
20 least for me in following the discussion to follow the
21 difference. It's sort of subtle, right? It's not so easy
22 to figure out which part -- Jim doesn't even know which
23 part he doesn't like, right?
24 CHAIRMAN BABCOCK: Yes, he does.
25 HONORABLE STEPHEN YELENOSKY: He just didn't

1 know whether it was first or last.

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

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

1 we've been debating, like the language in here, has the
2 possibility of being interpreted that way.
3 It could be intended that they intended to
4 adopt Twombly and Iqbal, although as Jim and others have
5 said, that feels unlikely given what the earlier version
6 of the statute did and then expressly didn't do, but some
7 of our language could suggest that. Indeed if we don't
8 say anything, that might lead some people to think that.
9 So for all those reasons, because it's confusing, my vote
10 would be that the best way to interpret what the
11 Legislature intended is they were trying to get rid of or
12 maybe deter in the first instance wholly incredible or
13 irrational allegations, not to import Twombly and Iqbal
14 into Federal practice, not to get rid of notice pleading;
15 and instead, therefore, going with that language is really
16 a useful use and is one way to explain what the
17 Legislature maybe was doing that was different than
18 current law. So anyway, I'll stop, but those are some
19 thoughts on it.
20 CHAIRMAN BABCOCK: You know, and Buddy
21 brought up with me earlier off the record the impact that
22 what we do here will have on other rules, and, Buddy, go
23 ahead, you can speak to that.
24 MR. LOW: For instance, and fair notice is
25 still in Rule 45.

1 CHAIRMAN BABCOCK: Right.
2 MR. LOW: On fair notice and then in 90, it
3 says general demurrer is not to be used, but it also says
4 there's a waiver of a defect in the pleading if you don't
5 file special exceptions and so forth. It doesn't say
6 that. So we have to adjust that because this is not a
7 special exception.
8 CHAIRMAN BABCOCK: Okay.
9 MR. LOW: So we need to look at Rule 90 or
10 put something in there that this is not a waiver under
11 Rule 90.
12 CHAIRMAN BABCOCK: I think we have consensus
13 on this point, but maybe we don't; and if we don't, we
14 should let the Court know; but does anybody have the sense
15 that the Legislature intended for us to import
16 Federal Iqbal/Twombly pleading requirements into our
17 rules? Does anybody want to make a case for that?
18 MR. LOW: No, not that, but I think the only
19 thing we can agree on, the Legislature knew about our
20 special exceptions. All right. That sometimes is lengthy
21 because you file exceptions, they have so much to amend,
22 and they can keep amending. They wanted something quick
23 if it's outrageous. I mean, I think nobody could disagree
24 with that, and then the pleadings and exceptions don't
25 provide for a penalty. They wanted something to deter and

1 to cost, so now what else they intended I don't know, but
2 I think those things are fairly clear, and what we're
3 doing so far I think is not inconsistent with those
4 theories.
5 CHAIRMAN BABCOCK: Okay. But does -- yeah,
6 Justice Hecht.
7 HONORABLE NATHAN HECHT: I'm trying to be
8 overly analytical.
9 CHAIRMAN BABCOCK: It's catching.
10 MR. ORSINGER: That's what we do best.
11 HONORABLE NATHAN HECHT: So on no basis in
12 fact, what could it mean? It could mean the facts pleaded
13 are implausible in the sense that they're irrational or
14 wholly incredible, the chip planted in the brain, being
15 taken to Mars, that sort of thing, which it seems to me I
16 haven't heard anybody say it couldn't mean that, and I
17 can't think of an argument why it wouldn't. I just don't
18 know why the Legislature would pass a statute to call for
19 dismissal of those cases when we don't have many of them,
20 I wouldn't think, outside the prisoner context or maybe
21 informa pauper's cases.
22 Then the second thing I've heard people say
23 is it could mean the facts taken as true don't state a
24 cause of action. For example, IIED, and they say
25 something that really doesn't amount to anything more than

1 your feelings were hurt, and it's not anywhere near the
2 kind of outrageous conduct that there has to be and you
3 can tell that as a matter of law, and so you assume --
4 several people have said this, you just take the facts as
5 true, as alleged, and they just don't get there.
6 CHAIRMAN BABCOCK: Right.
7 HONORABLE NATHAN HECHT: And I can't tell if
8 we think it means that or not, and then there's sort of
9 the Iqbal/Twombly. I'm not sure exactly what those cases
10 mean in the detail we're talking about here, but it might
11 mean that something in Twombly, it means that you can say
12 it's true, but unless you've got something to really back
13 it up we're not going to take it as true, so it involves
14 kind of a pleading element. You could say unfair pricing,
15 but you've got to have some more detailed reason. You
16 can't just say the words, which we talk about in our
17 jurisprudence is conclusory or unsupported, and I guess
18 that would be a question, and I'm just wondering if those
19 are the three we're talking about or if there's anything
20 else.
21 CHAIRMAN BABCOCK: Well, the example I've
22 pointed out where you know you've got the -- it could be a
23 contract or it could be a -- an allegedly defamatory
24 publication, but it's right there in the pleading.
25 HONORABLE NATHAN HECHT: Right.

1 CHAIRMAN BABCOCK: Or the contract might be
2 attached to the pleading.
3 HONORABLE NATHAN HECHT: Right. But that's
4 the facts taken as true don't state a cause of action. So
5 you say, "This is what was said and it's defamation," but
6 it just isn't.
7 CHAIRMAN BABCOCK: It isn't, right.
8 HONORABLE NATHAN HECHT: "This is what was
9 done, and it was IIED," but it just isn't. I mean, you
10 assume. But that's different from the Twombly situation
11 where you say, "This is unfair pricing," and you can't
12 really tell if you don't know more than that. You know,
13 it might be, it might not be.
14 CHAIRMAN BABCOCK: Yeah. Okay. Anything
15 else other than that? Judge Yelenosky.
16 HONORABLE STEPHEN YELENOSKY: Well, Justice
17 Hecht, you said you didn't hear anybody say that this
18 wouldn't include the taking to Mars. Actually, I heard
19 Jeff say exactly that, that he thought this statute would
20 require the trial judge to assume the facts are true, even
21 if they're that wild. Isn't that what you said, Jeff?
22 MR. BOYD: Uh-huh.
23 HONORABLE STEPHEN YELENOSKY: So we are
24 hearing that, and there is a proposal on the table -- it's
25 the ABOTA proposal, and some other people have endorsed it

1 -- that we presume the facts to be true however irrational
2 or wholly unbelievable, so I just did want to make that
3 point.
4 HONORABLE NATHAN HECHT: Thank you.
5 CHAIRMAN BABCOCK: Justice Christopher.
6 HONORABLE TRACY CHRISTOPHER: Well, I would
7 like to make the point that on the libel where you might
8 be required to put in the pleading the specific libel, I'm
9 not sure that we have a requirement even after special
10 exceptions are filed that you put in every specific
11 allegation that you contend rises to the level of
12 intentional infliction of emotional distress.
13 CHAIRMAN BABCOCK: That's true.
14 HONORABLE TRACY CHRISTOPHER: And without
15 that requirement we can still have very general notice
16 pleadings.
17 CHAIRMAN BABCOCK: Roger, and then Professor
18 Hoffman.
19 MR. HUGHES: Well, I can understand why from
20 the language the Legislature enacted it might be possible
21 to argue that the -- a claim that has no basis in fact
22 when the alleged facts don't add up to a cause of action.
23 You know, that's going to cause a real change in our
24 pleading practice. If we're going to borrow from the Feds
25 then I think we ought to also borrow in some manner their

1 12(b)(6) rule that the cutting edge is whether the
2 plaintiff could prove a set of facts consistent with their
3 allegations that will support a claim; and that is when
4 the claim has no basis, and so frequently this -- I mean,
5 this gives the judge latitude to say, "Look, maybe not
6 everything they need is there, but consistent with what
7 they have said they could plausibly prove facts which
8 would fill in the gaps or the holes, therefore I deny the
9 motion"; and so if we're going to go that -- to that
10 length, I mean, we have to build something into the rule
11 to say, "Judge, when you're trying to decide whether the
12 facts alleged get them to home base, you have to consider
13 can they prove things consistent with those facts, or is
14 there -- are there plausible things that they prove
15 consistent with them, which will get them to home base."
16 Otherwise we're converting ourselves to fact-based
17 pleading, which in some commercial cases could get really
18 sticky.
19 CHAIRMAN BABCOCK: Professor Hoffman.
20 PROFESSOR HOFFMAN: So I'm glad Roger said
21 that because that sort of builds on what I was going to
22 say. So, Justice Hecht, in talking about your list, I
23 guess one way that I would suggest it needs to be modified
24 a little bit is I think that Twombly is actually an
25 example of number two, and I think one of the places where

1 the law gets a little confused is because Iqbal has gone
2 on and made this confusing. So, in other words, Iqbal is
3 really category three.
4 Let me see if I can explain the difference.
5 In Twombly what happens is they allege generally that
6 there was a conspiracy; but they don't say who conspired,
7 what products were covered, what geographic markets were
8 covered, et cetera; and so the court says, "I can use my
9 red pen and I can scratch out the conspiracy words because
10 they don't actually say anything that I have to take as
11 true"; and then it's what you had left after conspiracy
12 was taken out, which was only parallel pricing, prices
13 went up and down at the same time; and the substantive law
14 of antitrust said you can't get to a jury if all you have
15 is prices going up and down at the same time. In other
16 words, the facts don't state a cause of action. Twombly,
17 therefore, is actually really not too much to be terribly
18 bothered by. It's really an example of just legal
19 insufficiency. It's just that you needed your red pen to
20 scratch out the conclusory allegations in order to see
21 that it was really just legal insufficiency.
22 Iqbal, the reason Iqbal is more bothersome
23 to many of us, and by the way, it's not just the crazy
24 lefties like me. Bob Bone, who is here at Texas and
25 certainly wouldn't fall under that category, has written

1 the same thing. It's that Iqbal seems to invite more of
2 what Roger was just talking about. It's that, okay, I've
3 alleged that Ashcroft and Mueller discriminated against me
4 for a -- or that they did these things to me for a bad
5 reason, and now the court is perhaps being given the power
6 under one interpretation of Iqbal; and, Justice Hecht,
7 you're right, we don't know actually if this is the right
8 interpretation, and it's way too early to say, which is
9 yet another reason we shouldn't dive into that swimming
10 pool just yet; but, anyway, at least one interpretation
11 of Iqbal is that the court does have the power to actually
12 make that decision to decide whether or not those are
13 really believable or not; and of course, that raises the
14 question, okay, if you can do that in that kind of a case,
15 which maybe we want them to do but we don't want Ashcroft
16 involved, can you do it in an employment discrimination
17 case, can you do it in a tort case, can you do it in a
18 typical slip and fall case, you know, whatever it is.
19 And so that's where -- and that sort of is
20 your category number three; and at the end of the day my
21 point earlier was just that while I have not as much
22 problem with number two, the facts don't state a cause of
23 action, writing a rule to that effect, the worry is can
24 you write the language such that it doesn't bleed into
25 number three; and because I worry that we can't and indeed

1 our discussion today suggests I think a lot that we can't,
2 it seems to me a better interpretation of what the
3 Legislature intended and a much cleaner one for our
4 practice would be to just end up with one. But could I
5 live with another two? Of course. It's just a question
6 of can you write good language.
7 CHAIRMAN BABCOCK: Okay. Yeah, Judge
8 Wallace, sorry.
9 HONORABLE R. H. WALLACE: Well, I mean, I
10 think the Legislature intended to create a rule that would
11 get rid of frivolous cases in a hurry and not create a new
12 level of pleading litigation like we have in Federal
13 court, and for that reason I like Professor Albright's
14 definition. It's simple, straightforward. You can look
15 at the pleading, you look at the facts and say, "You're
16 out of here." Now, that won't affect that many cases. I
17 agree with that, but it will make -- it will get rid -- I
18 think it will get rid of what the Legislature probably was
19 mainly trying to get rid of. As for the others, we've got
20 special exceptions, we've got summary judgments, but for
21 just the incredible, ridiculous, you know, why are we
22 wasting our time with this, I think that definition would
23 be good.
24 CHAIRMAN BABCOCK: Judge Yelenosky.
25 HONORABLE STEPHEN YELENOSKY: Except that

1 the Legislature shot itself in the foot because it
2 excepted all cases against the state, so the people who
3 sue because there has been an implant in their head
4 usually by some state entity are not subject to this
5 motion.
6 MR. STORIE: Just on attorney's fees.
7 HONORABLE STEPHEN YELENOSKY: Is it only the
8 fee shifting?
9 PROFESSOR HOFFMAN: That's just about fee
10 shifting.
11 MR. SCHENKKAN: Two different sections.
12 CHAIRMAN BABCOCK: Gene. Did you hear what
13 Gene said?
14 MR. STORIE: Yeah, the state is excepted
15 just on attorney's fees and costs.
16 HONORABLE STEPHEN YELENOSKY: Yeah, no, I
17 heard it from him.
18 CHAIRMAN BABCOCK: Okay. All right. Good.
19 Yeah, Jim.
20 MR. PERDUE: If I could add, remember, this
21 is -- another rationale is you do have fee shifting in
22 this rule as far as if you don't prevail. You don't have
23 that in 12(b)(6).
24 CHAIRMAN BABCOCK: Right.
25 MR. PERDUE: So this is -- it's very

1 reasonable to interpret this as something more narrow, to
2 interpret it as something that was supposed to be a
3 limited universe, as Alex has defined it, and not open it
4 up to -- if you say facts taken as true don't state a
5 claim, which is a pleading dismissal, the equivalent of
6 12(b)(6), but that's not the universe it's supposed to be
7 because of the penalty that's in it that you don't have in
8 12(b)(6).
9 CHAIRMAN BABCOCK: Yeah, and to follow that
10 point up, I've always thought that because of that this
11 rule will not be over used like it is in Federal court.
12 Federal court 12(b)(6) motions are filed all the time
13 which get denied because they just probably never should
14 have been filed in the first place.
15 MR. GILSTRAP: Yeah, but it puts off your
16 pleading.
17 CHAIRMAN BABCOCK: What's that?
18 MR. GILSTRAP: It puts off filing your
19 answer. That's why you file it.
20 CHAIRMAN BABCOCK: Well, but that doesn't
21 always help. I mean, judges routinely say, "Let's do
22 discovery while this motion is pending," if you've done
23 anything in the Eastern District.
24 Okay. What other comments? Because I'm
25 about to move on to (a)(2). Justice Gray.

1 HONORABLE TOM GRAY: Well, I mean, we've
2 kind of skipped over Pete's initial comments that -- on
3 the discussion of the hearing and whether or not there is
4 intended definitional or distinction, I guess, between a
5 claim for relief that's used in the rule versus cause of
6 action as used in the statute, and, you know, I -- and
7 maybe everybody agrees that the hearing, it doesn't need
8 to be oral, that hearing implies something that's on
9 submission and can be done in chambers, because, you know,
10 that's going to be a real problem as I see it for these
11 cases, even under this narrow -- more narrow discussion
12 that y'all were having about the -- I guess you would say
13 the psychosis cases, if that's all it's going to reach,
14 but if these get applied to the inmate litigation cases
15 and other pro se cases, having -- particularly in the
16 inmate because then you have to, you know, get them back
17 to the courtroom and -- you don't have to, but that's
18 normally what you're going to wind up doing, and so that's
19 a problem, and then I kind of see a distinction between
20 claims for relief and causes of action.
21 I mean, last legislative session I was asked
22 to try to bring some terminology and standard, I guess,
23 parity using the same type terminology and standards to
24 Chapters 11, 13, and 14 of the Civil Practice and Remedies
25 Code, and, I mean, that's just a minefield, and they use

1 cause of action, they use claim, they use, you know,
2 different, you know, proceedings. I mean, there's just a
3 litany of words that get used and so use of different
4 words have meaning, so --
5 CHAIRMAN BABCOCK: Okay. And the two points
6 on this (a)(1) would be "Upon motion," and maybe it should
7 be "an oral hearing," Justice Christopher's point. We
8 want it to be an oral hearing, we probably ought to say
9 so.
10 HONORABLE STEPHEN YELENOSKY: But we don't.
11 CHAIRMAN BABCOCK: And then you say we ought
12 to parallel the statute by saying "must dismiss a cause of
13 action for relief," right?
14 HONORABLE TOM GRAY: Yeah. That's what the
15 statute says, and all I was looking for, I know that
16 justice -- or Peeples had said that there was a reason and
17 we hadn't talked about it, and I just wanted to talk about
18 it.
19 CHAIRMAN BABCOCK: And the reason --
20 HONORABLE DAVID PEEPLES: Let me talk about
21 both of those.
22 CHAIRMAN BABCOCK: Yeah.
23 HONORABLE DAVID PEEPLES: We used "claim"
24 and "claim for relief" because Rule 47 uses that
25 terminology instead of cause of action, I know the statute

1 said cause of action, but we said claim for that reason.
2 I think that's enough. I think oral hearing was intended
3 by me, and I was the main advocate for it for this reason:
4 If you lawyers want to be sure that the judge considered
5 your motion to dismiss, you want an oral hearing. I mean,
6 if you don't have a hearing in court you will never know
7 whether the judge read it or just denied it. And second,
8 I just will say from experience, oral argument helps. It
9 helps you understand things a lot. Now, if it's just a
10 slam dunk, easy, simple thing it might not be helpful, but
11 oral argument I find is very helpful beyond the written
12 documents in any kind of significant case of difficulty,
13 and for those two reasons I was in favor of oral hearing.
14 It's a pretty serious thing, and if it's granted there's
15 going to be an attorney's fees issue. If you don't have
16 an oral hearing, it will all be done on affidavits, and
17 maybe that's good, but that was the thinking by me on
18 hearing.
19 CHAIRMAN BABCOCK: Okay. Hayes, and then
20 Pete.
21 MR. FULLER: Is "claim for relief" intended
22 to include an affirmative defense? Because I know a lot
23 of really thin affirmative defenses that may not get pled
24 in this rule if it does.
25 MR. GILSTRAP: I don't think it was intended

1 to.

2 HONORABLE DAVID PEEPLES: No. We intended

3 this to cover counterclaims and third party claims, but I

4 don't think affirmative defenses would fit.

5 CHAIRMAN BABCOCK: Pete.

6 MR. FULLER: If they did, I want a cause of

7 action.

8 MR. SCHENKKAN: I don't think Rule 47 is an

9 answer to why you need to use claims for relief because

10 what Rule 47 says is "An original pleading that sets forth

11 a claim of relief, whether original petition,

12 counterclaim, cross-claim, or third party claim," doesn't

13 say affirmative defense, "shall contain, (a), a short

14 statement of the cause of action sufficient to give" their

15 notice and then it goes on and talks about other

16 components of the claim for relief. So I think Rule 47

17 itself recognizes that a cause of action is a part of or

18 involved with a claim for relief but is not identical to a

19 claim for relief.

20 You know, there are a lot of smart people in

21 this room, and it may well be that many of them feel like

22 they know all the differences that there might be between

23 a claim for relief and a cause of action and are perfectly

24 comfortable that by making our rule go from cause of

25 action to claim for relief we have not caused a problem.

1 I am not among them.
2 CHAIRMAN BABCOCK: Gene.
3 MR. SCHENKKAN: I think that's an unwise
4 risk. Now, if I may respond to the second part of the
5 comment about the hearing.
6 CHAIRMAN BABCOCK: Certainly.
7 MR. SCHENKKAN: We can have two different
8 provisions for hearing. We can say you don't get an oral
9 hearing on the motion but you do get a hearing on the
10 attorney's fees. We're not obligated to recommend that
11 the court have the same rule on both, and I think it is a
12 whole separate question, which I hope we were going to put
13 off until we got to talking about the attorney's fees,
14 whether and under what circumstances we're going to have
15 an oral hearing, including possibly evidence on reasonable
16 and necessary attorney's fees. That's got a separate set
17 of issues in it. I'm in the camp that says for the motion
18 itself we should not make such a flat rule that that
19 creates a bunch of problems we don't need and that are not
20 worth the problems we get.
21 CHAIRMAN BABCOCK: Gene, and then Justice
22 Christopher.
23 MR. STORIE: Yeah, I was in the minority on
24 both of these because I think it should be cause of action
25 since that's what the statute says, and that helps to

1 eliminate the potential problem Hayes mentioned or
2 something else like maybe a wrong measure of damages where
3 you've got a cause of action that you're asking for relief
4 that you're not entitled to, and secondly, I think most
5 people would want a hearing because I completely agree
6 with Judge Peeples. That's where you would make your best
7 pitch for why you should win or not, but I don't think it
8 should be mandatory. Even though people may ask for them
9 99 percent of the time, they can get that without
10 requiring it.
11 CHAIRMAN BABCOCK: Okay. Justice
12 Christopher.
13 HONORABLE TRACY CHRISTOPHER: I do not want
14 to have a requirement of an oral hearing, especially if we
15 think this will involve a lot of prisoner litigation
16 because it's very costly to bring them into court for an
17 oral hearing.
18 CHAIRMAN BABCOCK: Good point. Yeah.
19 Frank.
20 MR. GILSTRAP: I hadn't thought about
21 prisoner litigation. I think the way they dealt with that
22 in Chapter 14 is they said you may have a hearing, and the
23 courts construe that to say it's optional so we don't have
24 to bring the prisoner to court, and I agree that bringing
25 prisoners to court is a problem. However, the question of

1 having a hearing is part of a larger issue. I come from a
2 part of the state where you get a hearing on everything,
3 you know, even special exceptions. You get a hearing in
4 the trial court, you get a hearing in the court of
5 appeals. Apparently that -- where you actually see the
6 judge face-to-face, and apparently that's not true in some
7 parts of the state.
8 It's not true in Federal court, and I've had
9 cases in which people's entire livelihood, their business,
10 everything they have is at stake; and they lose it; and
11 they never even go to the courthouse, in a court of
12 appeals or in the Fifth Circuit; and that appears to be
13 happening in Texas. Do we really want that? I feel that
14 if you're going to die my case, I have a right at least to
15 look the judge in the eye at some point, and now we're
16 heading in a direction where you don't have that right.
17 CHAIRMAN BABCOCK: Richard Munzinger.
18 MR. MUNZINGER: I'm very sympathetic with
19 Frank's point of view and agree with it, except that we're
20 dealing with a legislative mandate that says you are to
21 adopt a rule that forbids the consideration of evidence.
22 So now I'm dealing with whether or not my adversary has
23 pled a sufficient cause of action. Presumptively I am
24 limited in that determination as to what the person has
25 said in the paper that has been filed, which raised --

1 prompted my question earlier of does the reasonable
2 argument for the extension of law have to be pled? Why
3 shouldn't it be pled if it's going to pass muster?
4 So now I'm in a situation where I have a
5 bare bones pleading which passes muster under our
6 pleadings. I understand that, but I'm filing a motion,
7 and the argument that is made is not included in the -- in
8 the piece of paper that I am attacking with this rule,
9 which brings me back to my original point that I really
10 think the safest way to deal with this rule is to deal
11 with it as if it's a 12(b), 12(c) motion. It's just a
12 motion for judgment on the pleading, and you adopt the
13 Federal standards for that, which I recognize impacts our
14 pleading system, but I don't know what the solution to it
15 is.
16 CHAIRMAN BABCOCK: Okay. Yeah, Stephen.
17 Then Elaine.
18 MR. TIPPS: Just to go to that point, it
19 would seem to me that the argument that a claim represents
20 a reasonable extension, modification, or expansion of the
21 law would be something that the plaintiff would make in
22 his response to the motion to dismiss.
23 CHAIRMAN BABCOCK: Right.
24 MR. TIPPS: I don't think you would ever put
25 that in your pleading, but if there's going to be a motion

1 to dismiss then surely the plaintiff has a right to
2 respond to that, and that's where you would make the legal
3 arguments for why the case shouldn't be dismissed.
4 CHAIRMAN BABCOCK: Elaine.
5 PROFESSOR CARLSON: Yeah, Judge Christopher
6 points out that if we use the word "hearing" that the
7 court has the election to have an oral hearing or to do it
8 as a question of law based on submission. It troubles me
9 that we have a lot of safeguards in our summary judgment
10 practice for that very thing, and you're required to
11 notify the litigants when you're going to take the matter
12 up, and we have a lot of safeguards in that rule that
13 aren't included in this rule, and that's, I think, because
14 we really couldn't determine what was the -- what was the
15 end of the story here. Is this a dismissal with or
16 without prejudice? I come out very different procedurally
17 on whether it's one or the other, and so until I know the
18 answer to that I guess I'm sort of leaning more toward
19 more protection than not.
20 CHAIRMAN BABCOCK: Okay. Anything else on
21 that? Let's go to (A)(2), and, Judge Peeples, any issues
22 on this or can we just blow right through this?
23 HONORABLE DAVID PEEPLES: I hope we don't
24 spend much time on it. This is basically taken from a
25 paragraph in the State Bar proposal, and it's just to be

1 sure that it's not a general demurrer by another name, and
2 it's fair to make the person who wants something dismissed
3 and to get attorney's fees to say why -- to point out the
4 claim or cause of action and say why.
5 CHAIRMAN BABCOCK: Okay. Any comments about
6 this? Justice Gray.
7 HONORABLE TOM GRAY: This is sort of back to
8 the claim for relief and cause of action question, and
9 I'll just say that in regard to the use of putting the
10 burden on the movant in the kind of time frame that you're
11 talking about to do this, having read several hundred or
12 not hundreds of these petitions and trying to figure out
13 whether or not there was anything in there upon which
14 relief could be granted under primarily prisoner cases,
15 but where the trial judge dismissed them under one of the
16 existing chapters in the Texas Civil Practice and Remedies
17 Code. Trying to get the movant to identify the claim
18 is -- that in and of itself is a challenge, so I don't
19 know how the motion can identify the claim if the claimant
20 didn't identify it.
21 CHAIRMAN BABCOCK: Okay. Frank.
22 MR. GILSTRAP: The purpose of this is to
23 prevent the defendant from going to court and saying, "I
24 move to dismiss because there's no basis in law and fact,"
25 period; and then, you know, maybe you have a hearing and

1 the first time the plaintiff hears the argument is at that
2 hearing; and he has no idea why his petition was
3 defective; and it's like a general demurrer, where, you
4 know, you said, you know, "Fails to state cause of
5 action," end of story; and the court can pour you out for
6 any reason it wanted to. The idea is to require the
7 movant to at least articulate some basis other than simply
8 stating the statutory language and sitting down.
9 CHAIRMAN BABCOCK: So do you like this
10 language, or do you think it should be amplified?
11 MR. GILSTRAP: I think we need something
12 like (2). I sure do.
13 CHAIRMAN BABCOCK: Okay. All right. Any
14 other comments about this? Okay, well, good, we exhausted
15 everybody on (A)(1). You want to move forward to (b)?
16 Yeah, Orsinger.
17 MR. ORSINGER: I'm troubled -- I know that
18 the statute requires that we have this ruled on in a
19 certain specified period of time, 45 days, but I'm
20 troubled by the fact that people may amend in response to
21 seeing one of these motions and realize their pleading is
22 defective, or they may get into court and the judge says,
23 "I'm going to grant this motion."
24 "Well, your Honor, I'd like the opportunity
25 to amend." Does amending reset the clock, and if you

1 amend is the original motion successful and you get fees
2 up to that point? Or we've got to discuss the role of
3 amendments, because amendments will always happen, always;
4 and we don't say what we do with amendments either on the
5 timing or the fee question; and we need to or else I don't
6 know how anyone can make this statute apply.
7 CHAIRMAN BABCOCK: Well, in (D) we do talk
8 about amendments, but --
9 MR. ORSINGER: No, but the problem is, is
10 that if you've got to decide the motion within 45 days of
11 when it's filed, I file the motion, the plaintiff amends
12 their pleading. Okay. Now, maybe they amended the
13 pleading and it didn't do any good and they're still going
14 to lose, but what if they fix the problem or created a new
15 problem?
16 CHAIRMAN BABCOCK: Well, would a reasonable
17 construction of this be that if you amend and the -- and
18 the opponent still believes that the claim, even as
19 amended, is subject to dismissal, wouldn't he have 60 days
20 to bring that renewed motion to dismiss under this (B)?
21 MR. ORSINGER: If it was clear that that's
22 what that meant. Boy, this doesn't say that to me. And
23 also look at (D), Chip, because it says you have a right
24 to amend on the day -- probably the day of the hearing
25 when you find out that you're going to lose.

1 CHAIRMAN BABCOCK: Right.
2 MR. ORSINGER: So has that motion been ruled
3 on? Yes, it's dismissed, but you can amend and then --
4 and it's not dismissed?
5 CHAIRMAN BABCOCK: Okay.
6 MR. ORSINGER: I think we've got to be
7 really careful how we handle that one.
8 CHAIRMAN BABCOCK: Yeah, good points.
9 Richard. I don't mean Richard. I mean Frank. Frank,
10 you're starting to look like Richard.
11 MR. GILSTRAP: Well, you complimented me.
12 CHAIRMAN BABCOCK: No, I meant Munzinger,
13 not Orsinger.
14 MR. GILSTRAP: One of the things we were
15 trying to deal with was where you have a lawsuit and the
16 claim, you know, they file, you know, four claims and
17 they're not subject to dismissal and then they amend later
18 on, and so we wanted to give them at least -- you know, we
19 wanted to give them a new chance to file the motion at
20 that point. The idea behind the 60 days, which is not in
21 the rule --
22 CHAIRMAN BABCOCK: Right.
23 MR. GILSTRAP: -- not in the statute, was
24 the idea that people needed to do this out front, early on
25 in the litigation, just like rule -- you know, just like

1 Rule 12 in the Federal rules that you need -- we don't
2 want people going on for three or four years and then
3 filing a motion to dismiss under this statute, because
4 among other things it really confuses the issue of
5 attorney's fees.
6 CHAIRMAN BABCOCK: Yeah. Richard Munzinger,
7 then Pete.
8 MR. MUNZINGER: Under current law I have a
9 right to amend my pleading at any time up to seven days
10 prior to trial unless the trial court sets another date
11 under its pretrial powers. Nothing in the statute
12 suggests that that has been changed. Nothing in this rule
13 should suggest that that has been changed. Admittedly
14 this is a new motion, but I don't know that you have to
15 say anything in here. I do believe it's salutary to say
16 that there ought to be a right to amend. We've said --
17 the Supreme Court has said that in motions attacking
18 jurisdiction. They've said there is a right to amend the
19 pleading and I -- unless the pleading, you can't amend,
20 and they've done it, but I do think that this statute does
21 not affect the right to amend; and under all this
22 discussion, Richard's fact situation, the plaintiff files
23 a complaint or petition. The defendant within 60 days
24 files a motion to dismiss. The plaintiff amends. That
25 pleading is gone. It's available now for judicial

1 admission purposes, but it is no longer a live pleading.
2 It's not before the court. There's nothing to bring to
3 the court under those circumstances. If I were a trial
4 judge, I would say, "Well, you want me to do what, give
5 you attorney's fees? I didn't dismiss this case. The
6 plaintiff amended. He has a right to amend, so go home,
7 leave me alone."
8 CHAIRMAN BABCOCK: Pete.
9 MR. SCHENKKAN: I want to -- this may result
10 in a waste of time and may not be productive, but I want
11 to suggest that we've been talking a lot as if the analogy
12 to Federal Rule 12 could stop by saying Federal Rule 12.
13 Federal Rule 12 actually has for our purposes today two
14 different parts, (b) and (c), and they have different
15 rules about timing, very different rules about timing. In
16 (b) the rule is a motion asserting any of these defenses
17 must be made before a pleading if a responsive pleading is
18 allowed; but in (c), motion for judgment on the pleadings,
19 which Richard has been calling our attention to several
20 times, says after the pleadings are closed, but early
21 enough not to delay trial the party may move for judgment
22 on the pleadings.
23 It seems to me that the Court, the Texas
24 Supreme Court, in adopting this rule is free to go in
25 either direction, and, of course, they're not limited to

1 those two choices, but they're very much free to go in
2 either direction. Do we want to make this something that
3 you have to, you know, fire before you answer, first shot
4 out of the box, or in the current draft, 60 days after the
5 thing has appeared in paper; or do we want to push it the
6 other direction? I think the analogy to 12(c) would be --
7 to after the pleadings are closed would be after you've
8 used special exceptions to make the person say what the
9 heck it is they are trying to say, and you now know
10 they've taken their best shot at amending it. "This is
11 what they're left with, Judge. I say it has no basis in
12 law or fact, and I want it dismissed, and I want my fees."
13 CHAIRMAN BABCOCK: Well -- okay.
14 MR. SCHENKKAN: And I would offer for
15 discussion, maybe to frame it as a discussion, wouldn't
16 that be the better approach here for what we're talking
17 about, 12(c) approach?
18 CHAIRMAN BABCOCK: Well, but if you're
19 saying that, you know, I file special exceptions, I don't
20 know how you're going to attack my pleading yet, so I do
21 my best and then I got a motion to dismiss, and I say,
22 "Oh, that's what you're talking about," but based on your
23 proposal I wouldn't get a chance to amend that. So that
24 would be an issue to discuss. Justice Christopher.
25 HONORABLE TRACY CHRISTOPHER: I think we

1 should spell out clearly whether or not allowing an
2 amendment is the same thing as denying a motion to
3 dismiss.
4 MR. STORIE: Right.
5 HONORABLE TRACY CHRISTOPHER: And the way
6 (D) is written here it says, "Before granting a motion to
7 dismiss the court must allow the party to amend," so that
8 kind of sounds like I'm holding the motion in abeyance,
9 they're going to amend, and then I'm going to rule; and to
10 me that puts the movant in a bad light if after the
11 amendment they don't want to go forward with the motion to
12 dismiss anymore.
13 CHAIRMAN BABCOCK: Yeah.
14 HONORABLE TRACY CHRISTOPHER: It kind of
15 appears like the judge still has to rule on that original
16 motion based on the -- you know, even with an amended
17 pleading, which could lead to the nonmovant getting their
18 fees, so I think we need to make sure we know which way we
19 want to go on that.
20 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.
21 PROFESSOR HOFFMAN: That's it.
22 CHAIRMAN BABCOCK: No? Gene.
23 MR. STORIE: I had some thoughts similar to
24 Richard Orsinger's, too. If you've got the day of hearing
25 amendment, and my feeling would be maybe it's like a

1 nonsuit where, yes, you can nonsuit, but if a defendant
2 has claimed affirmative relief you don't necessarily get
3 out of that. So I would be inclined to grant the motion
4 in part maybe for attorney's fees, even if an amendment
5 cures the original problem.
6 CHAIRMAN BABCOCK: Okay. I had a thought,
7 Judge Peeples, about this provision that says "must be
8 decided within 45 days of the filing."
9 HONORABLE DAVID PEEPLES: Yes.
10 CHAIRMAN BABCOCK: It says "hearing," but I
11 think you were going to change that to be "filing."
12 HONORABLE DAVID PEEPLES: Right.
13 CHAIRMAN BABCOCK: What if the judge does
14 not rule within that period of time? You know, Chapter 27
15 of the Civil Practice and Remedies Code was amended to add
16 a motion to dismiss procedure, that Citizens Participation
17 Act, and that has the motion being denied by operation of
18 law if there is no ruling within the 30 days in that
19 statute. What do you think about that feature here?
20 MR. ORSINGER: Well, you're going to get
21 automatic fees that way, though. Fees go with the
22 overruling as a matter of law.
23 CHAIRMAN BABCOCK: Well, yeah.
24 MR. ORSINGER: That's pretty scary.
25 CHAIRMAN BABCOCK: What happens if the judge

1 doesn't rule within 45 days? That would be one
2 implication if you make it -- Justice Gray.
3 HONORABLE TOM GRAY: We get a mandamus.
4 CHAIRMAN BABCOCK: Yeah, you get a mandamus.
5 HONORABLE TOM GRAY: And so I'm begging you
6 to put in a default ruling so that we don't get the
7 mandamus, but that's exactly what I was going to ask,
8 what's the consequence.
9 CHAIRMAN BABCOCK: Buddy.
10 MR. LOW: Chip, the State Bar rule does
11 address the party nonsuiting or amending. It says, "Cause
12 of action is amended before motion was filed and a moving
13 party may serve an amended notice," and they address that.
14 I'm not saying we should, but in (c) -- no, in (e) of the
15 State Bar rule they talk about that, and in (d) they talk
16 about a nonsuit. I don't know that we need to address it,
17 but I just point out that is addressed by them.
18 CHAIRMAN BABCOCK: Okay. Frank.
19 MR. GILSTRAP: And the statute you're
20 talking about was the slap suit statute, as I understand.
21 CHAIRMAN BABCOCK: Right.
22 MR. GILSTRAP: There's an interlocutory
23 appeal available.
24 CHAIRMAN BABCOCK: That's true.
25 MR. GILSTRAP: Okay. And there's not one

1 here, right? Okay. Okay. You know, the problem with a
2 default is, I mean, I would do it kind of like findings of
3 fact and conclusions of law. The judge didn't do it, but
4 he did it late, so it's okay, you know, I mean, and yes,
5 maybe you could mandamus in some case, but in most cases
6 the judge is probably going to decide it before the
7 mandamus is done. If the judge is just sitting on it, he
8 ought to be mandamusable.
9 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.
10 HONORABLE STEPHEN YELENOSKY: Yeah, I think
11 most of the statutes that tell judges to do things within
12 a particular time are determined to be -- I forget whether
13 directory or the opposite of that, but they're determined
14 to be requirements that we're supposed to try to follow,
15 but it doesn't deprive the court of jurisdiction or
16 anything like that if we miss the deadline, so why
17 wouldn't this be interpreted that same way? And on Gene's
18 comment you're saying you would award fees even if they
19 amended and fixed the problem and then so you're saying
20 you could be a prevailing party essentially on a catalyst
21 theory?
22 MR. STORIE: Sort of, I mean, because I
23 think otherwise you still face the abuse of people filing
24 junk and then, you know, they admit it at the last minute,
25 the prevailing party who really in fact is the prevailing

1 party still had to go through the cost without getting any
2 recovery.
3 HONORABLE STEPHEN YELENOSKY: Well, that may
4 be a good policy reason, but where do we get the authority
5 to do that? I mean, the catalyst theory has pretty much
6 been rejected in plaintiffs cases, hasn't it?
7 CHAIRMAN BABCOCK: Okay. Yeah, Jeff.
8 MR. BOYD: We covered a few topics. I want
9 to make sure I get on record on each of them. First, on
10 the 60 days, the rule's requirement that the motion be
11 filed within 60 days after the cause of action is pled,
12 and I want to argue that that should not be included. The
13 statute doesn't address that either way. I do think
14 that's the appropriate kind of procedural thing that
15 this -- the Court ought to be adopting a rule for, if
16 it's -- ought to be considering adopting a rule for, but I
17 think there can and will be circumstances where there is
18 good reason for the motion not being filed within 60 days,
19 and the one that is most obvious that comes to mind is you
20 sue me for false light invasion of privacy, and we're
21 engaged in discovery over that, and six months later the
22 court comes out with its decision saying in Texas there is
23 no such cause of action in a completely separate case. I
24 ought to now have the right to say, "Hey, you better
25 dismiss this because here's what the court said, you can't

1 sue me for this." If we put this language in there I
2 can't use this method to get rid of that -- I can use
3 other ones still, summary judgment, special exceptions, so
4 on, but I can't use this one, and so I would not -- I
5 would vote against including 60-day requirement in there.
6 The second issue is about whether we allow
7 amendment, whether the rule should specifically allow the
8 judge to allow amendments, and my position on that is a
9 mixture, which is I think the parties -- the plaintiffs
10 should be allowed to freely amend in response to my motion
11 to dismiss. If I file the motion to dismiss and pay the
12 attorney's fees, the whole purpose is to get rid of these
13 things quickly; and so the claimant ought to be able to
14 move to dismiss; and, yeah, I'm afraid I don't get my
15 attorney's fees that way; but at least I got out of it.
16 You can't solve every single problem in the judicial
17 system; but the judge should not be granted the power to
18 deny the motion in order to allow amendment because,
19 remember, the motion shall be granted if there's no basis
20 in law or fact, nor to defer the motion for that purpose
21 because what the statute says is that the rules shall
22 provide that the motion to dismiss shall be granted or
23 denied within 45 days; and I think if you allow a judge to
24 say, "You know what, I ought to grant this motion because
25 there's no basis in law or fact, but I'm not going to, I'm

1 going to give you seven days to amend," then number one,
2 you've taken out the intended effect of the statute as
3 expressed in the language, "You shall grant or deny," and
4 number two, you've really made this so much like special
5 exceptions that you don't need this to begin with.
6 I mean, all the Legislature should have
7 done, if that's what they meant, was just say, okay, from
8 now on if you grant special exceptions, allow an
9 opportunity to amend and then after amending they still --
10 then you dismiss. In other words, they could have just
11 made a loser pay component applicable to special exception
12 practice. That's not what they did. They created a
13 motion to -- they charged the Court with creating a motion
14 to dismiss practice, which Texas courts have never had
15 before. So I argue against allowing the judge to allow
16 amendment once it is either comes on oral argument or
17 submission without oral argument.
18 CHAIRMAN BABCOCK: Hayes.
19 MR. FULLER: I want to throw this in as kind
20 of tag along to this issue of amendment. Motions for
21 sanction survive a voluntary nonsuit. What about a motion
22 to dismiss under this rule? Will it survive a voluntary
23 nonsuit, or the guy says, "Whoops, I'm about to get hit
24 for attorney's fees, I'm done"?
25 CHAIRMAN BABCOCK: Yeah. Professor

1 Albright, and then we're going to take a break for lunch.
2 PROFESSOR ALBRIGHT: I had a question about
3 your example of, okay, we go through this case and then
4 suddenly the Supreme Court comes down with an opinion that
5 says you have no cause of action anymore, so you file this
6 motion to dismiss. Why should I now have to pay your
7 attorney's fees because this case came down from the
8 Supreme Court?
9 MR. BOYD: You don't, and we do say in this
10 proposed rule, which I do -- I think we were unanimously
11 in agreement with this, is that the attorney's fees that
12 are recoverable are those fees incurred in either the
13 preparation of prosecution of the motion to dismiss or the
14 preparation and defense -- of the response to the motion
15 to defense. So you don't get all your attorney's fees in
16 the case.
17 PROFESSOR ALBRIGHT: Right. Okay, but
18 should you at least have to call me and say, "Hey, I'm
19 about to file a motion to dismiss" and --
20 MR. BOYD: Well, what I would argue is --
21 and I think, was it State Bar, or someone proposed that
22 kind of language and sort of --
23 HONORABLE STEPHEN YELENOSKY: State Bar.
24 MR. BOYD: Yeah, a confer kind of
25 requirement. I don't -- I don't support that because I

1 think instead if I don't call you, yeah, I should call you
2 and say, "Hey, look, they just came out with *Boils V.*
3 *Curvey*. You can't sue me for negligent infliction," but
4 if I don't then I file the motion to dismiss and you don't
5 even know it's coming. All you've got to do then is go
6 look at it, see the basis for it, and go "Oops, I'm
7 amending my pleading and I'm dropping that," before the
8 oral hearing or the submission without oral hearing, and
9 you avoid attorney's fees at that point.
10 HONORABLE STEPHEN YELENOSKY: Assuming it
11 doesn't survive --
12 MR. BOYD: And that's why I say I don't
13 agree it should survive. I don't agree with the catalyst
14 theory approach. I mean, maybe in a perfect world that
15 would be a part of it, but I don't think anybody in the
16 process intended for that to happen. I think it gives the
17 easy out. Look, I'm moving to dismiss this case and you
18 better dismiss it; and if you don't, if you're going to
19 stand on it, then the judge has to either grant or deny
20 and award attorney's fees, but if you choose to amend or
21 dismiss then you get away from the attorney's fees
22 requirement.
23 CHAIRMAN BABCOCK: Okay. Let's break for
24 lunch.
25 PROFESSOR ALBRIGHT: So you are allowing an

1 amendment then.

2 MR. BOYD: I don't think the Rule should

3 allow --

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

5 MR. BOYD: Once it comes to the judge, the

6 judge can't allow amendment, but before --

7 PROFESSOR ALBRIGHT: You can have a

8 prehearing. You can have a prehearing amendment.

9 MR. BOYD: In response to my motion you can

10 amend or dismiss before it gets to the judge, but once it

11 gets to the judge the judge has to either grant or deny

12 and award attorney's fees.

13 CHAIRMAN BABCOCK: Let's break for lunch.

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

15 CHAIRMAN BABCOCK: Judge Peeples, is there

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

17 HONORABLE DAVID PEEPLES: We should move on.

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

19 We've already talked about it a little bit, but do people

20 have additional comments about no evidence? Jeff Boyd.

21 MR. BOYD: I'm sorry. Did we want to vote

22 on whether the rule should impose a deadline for filing a

23 motion to dismiss?

24 CHAIRMAN BABCOCK: We can.

25 MR. BOYD: I mean, I know I'm going to lose

1 the vote, but we may as well vote.
2 CHAIRMAN BABCOCK: I was going to say, if
3 you want to get hammered again by a vote.
4 MR. BOYD: Yeah. I'm having a great day,
5 Chip.
6 CHAIRMAN BABCOCK: We can do it. All people
7 who think we should have a deadline, raise your hand.
8 HONORABLE HARVEY BROWN: Chip? Chip?
9 PROFESSOR CARLSON: For filing it?
10 CHAIRMAN BABCOCK: Yeah, deadline for filing
11 it. Raise your hand.
12 HONORABLE HARVEY BROWN: Chip?
13 CHAIRMAN BABCOCK: Yes, Harvey, sorry.
14 HONORABLE HARVEY BROWN: I thought Jeff's
15 point about the law might change, therefore you have a
16 good reason to file it that you didn't have originally was
17 worth thinking about. I was thinking we could have a
18 deadline like the 60 days but have a good cause provision,
19 allow a party to come forward with good cause to why they
20 didn't file it originally.
21 CHAIRMAN BABCOCK: Frank.
22 MR. GILSTRAP: The problem is that's a
23 loophole you can drive a lot through. There's a lot of
24 reasons for good cause. My feeling is that there's a lot
25 of good reasons for requiring a short fuse on filing the

1 motion. We are going to drop -- we are going to lose the
2 cases that Jeff is talking about where the Supreme Court
3 changes the law, but that's a small price to pay. Those
4 people still can file a summary judgment motion. They
5 just can't proceed under this.
6 CHAIRMAN BABCOCK: Yeah. And if the Supreme
7 Court changes the law, should there be an automatic
8 attorney's fees kind of thing?
9 MR. WATSON: Yeah, I mean --
10 MR. BOYD: But the fees --
11 CHAIRMAN BABCOCK: Jeff.
12 MR. BOYD: But the fees only cover the costs
13 I incur in preparing and pursuing my motion to dismiss.
14 CHAIRMAN BABCOCK: Right.
15 MR. BOYD: It's not the two years worth of
16 discovery fees that I incurred before the Court changed
17 the law, but once the Court changed the law I shouldn't
18 have to deal with that cause of action anymore.
19 MR. MUNZINGER: At the committee level I
20 suggested the rule include a provision that the rule
21 should state that it is filed under this new rule.
22 CHAIRMAN BABCOCK: Right.
23 MR. MUNZINGER: And secondly, that it not be
24 joined with any other pleading seeking dismissal or
25 changes to the exceptions. The reason for that being you

1 don't want trial courts to be awarding fees in situations
2 of an ordinary special exception or a motion to dismiss.
3 I don't remember that we voted on that suggestion, but I
4 did want to bring it up.
5 HONORABLE DAVID PEEPLES: It's on line 17.
6 MR. MUNZINGER: Yeah, but that doesn't have
7 that it's not joined with other motions or special
8 exceptions seeking the same or similar relief.
9 CHAIRMAN BABCOCK: Aha. Gene.
10 MR. STORIE: I think it's hard to have the
11 rule apply to changes that occur in the law during the
12 pendency of the suit because where would the change occur?
13 Is it going to be in the same court of appeals, or is it
14 another court of appeals? And even if it's at the Supreme
15 Court I think we've all heard of the court either granting
16 a writ after originally denying the petition or changing
17 its position on rehearing, and what are you going to do
18 with those cases? Because you've got people on this
19 45-day window for the judge to decide, and I think you
20 could have some kind of confusion created in the meantime
21 if any change in law that's not truly permanent is going
22 to trigger this attorney fee provision.
23 CHAIRMAN BABCOCK: Yeah, good point. Just
24 to satisfy Jeff's need for getting beaten, maybe we could
25 just have a quick vote, and the people who would be

1 proponents of having some deadline -- we can talk later
2 about whether it ought to be good cause or something, but
3 some deadline to file as opposed to no deadline to file.
4 So everybody who is in favor of a deadline to file, raise
5 your hand.
6 All right. And those who think there should
7 be no deadline? Closer than I would have thought. 16 say
8 there should be a deadline, 7 said --
9 MR. BOYD: I did better on that one than I
10 did on the --
11 CHAIRMAN BABCOCK: You did. You did. So,
12 anyway, now the Court's got that sense of the committee.
13 Let's move on to no evidence.
14 MR. SCHENKKAN: Could we have a little
15 conversation about the nature of a deadline if there's
16 going to be one? That's the comment I wanted to make and
17 talk about that.
18 CHAIRMAN BABCOCK: Okay. Pete. Sure,
19 sorry.
20 MR. SCHENKKAN: I'm not so concerned about
21 the Supreme Court changing the law or declaring law that
22 we didn't know.
23 CHAIRMAN BABCOCK: Right.
24 MR. SCHENKKAN: I think that's a legitimate
25 point, but I agree it's a small one and there are other

1 ways of dealing with it. I'm much more concerned about
2 the situation in which somebody is conscientiously using
3 the special exceptions approach to get the person to say
4 what the heck the claim means, and that's why I'm not in
5 favor of this one. It might be -- that's why I voted with
6 Jeff on this one. It might be that that is a solvable
7 problem with certain words, but the words that would solve
8 it are not the words -- not always the words "must be
9 filed within 60 days after the pleading containing the
10 claim was served."
11 The claim might have been at least arguably
12 contained in the pleading that I successfully specially
13 excepted to and also contained in the one after the
14 amendment after my special exception is granted, and I may
15 or may not be in a situation in which I should be held to
16 that first 60 days, so that's why I at least want to slow
17 the train down and talk about whether we wanted to have a
18 deadline at all, and if so, what it should be. So maybe
19 the committee goes back and thinks about what it should be
20 if the consensus is there should be one, but that's the
21 problem I'm worried about.
22 CHAIRMAN BABCOCK: Okay. Yes, Justice
23 Christopher.
24 HONORABLE TRACY CHRISTOPHER: Especially if
25 we're going to -- if this rule is going to morph more into

1 a 12(b)(6) motion, it seems to me that people ought to be
2 able to have the ability to have some discovery before
3 they finally make their pleading that has all the facts
4 necessary on it to survive this kind of a motion. I'm not
5 saying it shouldn't morph into it. I'm just saying if
6 we're going to decide, if that's what it's turning into,
7 you ought to be able to have some discovery before you
8 have to replead before you're subject to this dismissal.
9 CHAIRMAN BABCOCK: Yeah, Roger.
10 MR. HUGHES: Well, I mean, I'm sympathetic
11 if we're going to confer this into some sort of thing
12 where you say your facts are plausible, but they don't add
13 up to a cause of action and you're going to have to plead
14 more facts. I know in Federal court when you plead
15 qualified immunity for a public official, the courts have
16 limited discretion to say, look, before I tell this
17 plaintiff he's washed out of court because he hasn't pled
18 enough facts to get around the defense of qualified
19 immunity, he or she gets to take a little bit of discovery
20 targeted to that way, and at first I thought that was
21 horribly unnecessary and terribly burdensome, but I've
22 learned to live with it, and many Federal judges have
23 learned to live with it.
24 So I think whatever time period has to be
25 adjusted so that if the defendant needs time -- pardon me,

1 the plaintiff needs time in order to come up with
2 something that's going to get past the Rule 13 sanction
3 for pleading facts in bad faith, maybe there ought to be
4 some leeway for that.
5 CHAIRMAN BABCOCK: Okay. Yeah, Justice
6 Gray.
7 HONORABLE TOM GRAY: And I don't know if my
8 concern would be covered by the one that Frank is
9 uncomfortable with that says "good cause," but I'm still
10 very concerned about the inability to identify the claim
11 that is the target of the motion that the movant has to
12 specify, and I can just tell you from dealing with some of
13 the pro se litigants that my court's dealt with, is their
14 response is always going to be -- when the movant finally
15 gets it nailed down to a claim and files the motion and
16 it's more than 60 days after the very first petition was
17 filed, the plaintiff, no matter how badly it was pled the
18 first go around, it's going to be, "Well, I pled that in
19 the very first petition," and it's like nailing Jell-O to
20 the wall. You cannot pin these down, and so there needs
21 to be some way of once that special exception process has
22 run its course or you've gotten some clarification of what
23 the claim is, that's when your clock starts running. That
24 would be my suggestion.
25 CHAIRMAN BABCOCK: What if you added a

1 clause that said, on line 25, line 25, "containing the
2 claim was served," and add this language, "or within 30
3 days an amended pleading," comma, "if permitted under Rule
4 94a(d)," comma, "was served." So, in other words, give
5 them 30 days if there's an amended pleading. Carl.
6 MR. HAMILTON: I like what Tom said. I
7 think it ought to be 60 days or 60 days after rulings on
8 special exceptions if they're filed.
9 CHAIRMAN BABCOCK: Yeah. Okay. Any other
10 comments? All right. Let's go to -- yeah, sorry, Justice
11 Brown.
12 HONORABLE HARVEY BROWN: On a different time
13 issue, I think there should be a time like the summary
14 judgment rule that a party has more than three days to
15 respond to a motion like this. I don't know if it's 21
16 days, but I think there should be some minimum amount of
17 time that you have to give the other side to respond and
18 probably some amount of time before the hearing as to the
19 response was filed. I don't know if the committee -- I
20 don't think the committee discussed that, but I'd like to
21 discuss it.
22 MR. SCHENKKAN: Wouldn't it be covered under
23 the general rule about minimum time for motions?
24 HONORABLE HARVEY BROWN: That's three days.
25 HONORABLE TRACY CHRISTOPHER: That's three

1 days.

2 HONORABLE HARVEY BROWN: Right, and I think

3 three days for something like this is not enough.

4 CHAIRMAN BABCOCK: Any other thoughts about

5 that? Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: Well, I liked

7 the way Jeff's sort of solution on the amendment was

8 basically to say, no, the judge doesn't get the -- give

9 permission to amend at the hearing, but that the party can

10 choose to amend before the hearing.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE TRACY CHRISTOPHER: So if you

13 allow that, you've got to give at least 21 days notice and

14 put in there you can amend your pleading, at which point,

15 you know, they can pull down the motion to dismiss, and no

16 harm, no foul, no fees incurred.

17 CHAIRMAN BABCOCK: Right. Of course, you've

18 got this 45-day limitation in there that you're going to

19 have to deal with.

20 HONORABLE TRACY CHRISTOPHER: Well, you file

21 it, you set it for 21 days notice. I mean, the judge

22 ought to be able to decide it in two weeks.

23 CHAIRMAN BABCOCK: Yeah, except that you

24 call up and you say, "I want a hearing in three weeks,"

25 and they say, "We've got nothing that week. You know,

1 you're going to have to do something the following week,"
2 or "We've got nothing that week either." Anyway.
3 HONORABLE HARVEY BROWN: It doesn't have to
4 be 21 days, but it should be more than three days.
5 CHAIRMAN BABCOCK: Yeah. Buddy says four
6 days.
7 HONORABLE TRACY CHRISTOPHER: And then you
8 put it on submission.
9 CHAIRMAN BABCOCK: Richard.
10 MR. MUNZINGER: The rule could provide that
11 if an amendment is filed that there's no need for the
12 hearing. In other words, you could say "and must be
13 decided within 45 days of the hearing unless
14 previously" -- "unless the claim is previously amended,"
15 which tells you A, you have the right to amend and, B,
16 finesses the problem of a hearing set for 45 days. Now
17 you've got -- a pleading no longer exists. Why are you
18 worried about motion to dismiss? That pleading went away.
19 CHAIRMAN BABCOCK: Yeah, that's what I had
20 thought, but -- okay, any other comments? Going once.
21 All right. No evidence.
22 HONORABLE DAVID PEEPLES: I'm kind of
23 thinking we've heard enough on that.
24 CHAIRMAN BABCOCK: Anybody want to say
25 anything else? Carl.

1 MR. HAMILTON: Well, as ABOTA points out,
2 there may be evidence attached to the pleading, such as
3 sworn account or something like that, that the court will
4 consider. It's part of the pleadings, and that's
5 evidence.
6 CHAIRMAN BABCOCK: Yeah. And in the Federal
7 practice in 12(b)(6), if there is a document that is
8 essential for the cause of action, the court can still
9 rule as a 12(b)(6) matter, but considering the document or
10 whatever it is is essential for the claim, so --
11 MR. HAMILTON: I think we need to say
12 something about that in the rule.
13 CHAIRMAN BABCOCK: Yeah. Justice
14 Christopher.
15 HONORABLE TRACY CHRISTOPHER: It seems to me
16 that you're going to have to have evidence of attorney's
17 fees on both sides, so I just think we need to kind of
18 reword it to make sure that there has to be evidence of
19 attorney's fees. Now, whether it's just going to be
20 affidavit versus oral hearing and raising their hand and
21 swearing to something, I don't know.
22 CHAIRMAN BABCOCK: Nina.
23 MS. CORTELL: It's the first part of the
24 statute that contemplates no evidence. That caveat is not
25 included in the fee part, so we probably just need to

1 clarify that in the rule.
2 CHAIRMAN BABCOCK: Yeah. Yeah. Yeah,
3 Roger.
4 MR. HUGHES: Well, the other clarification
5 may be as to whether or not you're going to have to
6 litigate the attorney's fees by the 45th day. I mean,
7 section two of the statute, in one or two, seems to imply
8 that the order granting or deny may must also make the
9 award of attorney's fees. Now, that was my first reading.
10 It may not necessarily be that way. It may be that the
11 order determines it and then tells the parties to submit
12 affidavits, but it does seem to me implied that the order
13 should contain the attorney's fees, you know, for whoever
14 the prevailing party is, in which case I don't know how
15 you're going to handle that other than to say it has to be
16 part of the motion or there has to be some submission or
17 unless -- unless you're going to put in there the only
18 evidence received would be concerning the amount of
19 attorney's fees at the time of the hearing.
20 CHAIRMAN BABCOCK: There are a number of
21 different ways you can handle it. I mean, the motion I
22 would think would always ask for attorney's fees.
23 MR. HUGHES: I'm sure the motion would. The
24 question is whether your affidavit has to be attached to
25 it.

1 CHAIRMAN BABCOCK: Right, and there are a
2 couple of different ways you could do it. One way, you
3 could attach an affidavit and say, you know, "Up to now
4 we've incurred X number of attorney's fees. We think
5 we're going to incur Y for going through the hearing
6 process." Second way you could do it, which I think is
7 some danger to it for the litigants, but you can wait
8 until the hearing and when the judge makes his ruling you
9 could say, "Okay, Judge, now I want to put on evidence of
10 attorney's fees," and that's kind of hard on the losing
11 party because, you know, they don't -- they don't have any
12 access to your documents, they don't know, you know -- and
13 it could be -- it could be a fair amount of money,
14 depending on the kind of case.
15 MR. HUGHES: I mean, I would like to think
16 that these will not be high rolling cases considering we
17 are limiting attorney's fees to making them responding to
18 that particular motion as opposed to everything else in
19 the world.
20 CHAIRMAN BABCOCK: Yeah.
21 MR. HUGHES: But still I can see some people
22 wanting to load up and somebody wanting to do some
23 effective cross-examination.
24 CHAIRMAN BABCOCK: Right. Judge Wallace.
25 HONORABLE R. H. WALLACE: Well, whatever we

1 come up with for language for determining when a claim has
2 no basis in fact, I don't see how you can reconcile that
3 with saying that we must accept as true the facts pleaded.
4 I think we talked about that earlier, but how can you say
5 that we're going to accept -- if the guy says he went to
6 the moon and back, we accept that as true, but we don't
7 waive it. I mean, it seems inconsistent to me.
8 CHAIRMAN BABCOCK: Yeah. Good point. All
9 right, Pete.
10 HONORABLE R. H. WALLACE: Contradictory.
11 MR. SCHENKKAN: I mean, isn't this a
12 discussion we need to have when we get to the attorney's
13 fees section? We need to decide what kind of process do
14 you want to have for the determination of the amount of
15 reasonable and necessary attorney's fees, and it's not
16 answered by saying that the statute says that the
17 dismissal will be on motion and without evidence. The
18 statute doesn't say that the determination of the
19 reasonable and necessary attorney's fees will be without
20 evidence. The Court is free to make a sensible rule that
21 allows for the dismissal to be without evidence or denial
22 of a dismissal.
23 CHAIRMAN BABCOCK: Yeah.
24 MR. SCHENKKAN: But to provide for whatever
25 amount and degree and timing of evidence is appropriate

1 and necessary in the fee role. So I guess what I'm saying
2 is isn't this a problem for when we get to discussing the
3 attorney's fees section and not for now?
4 CHAIRMAN BABCOCK: Yeah. I agree. Okay,
5 what about right to amend? We've already talked about
6 that a fair amount. Any other additional comments?
7 HONORABLE TOM GRAY: The word "granting"
8 should probably be "ruling on" so it doesn't make that
9 inference that Judge Christopher was referring to earlier.
10 CHAIRMAN BABCOCK: Okay. Justice Brown.
11 HONORABLE HARVEY BROWN: I was just going to
12 raise a question. I don't know the answer, and that is
13 what if there's a pleading cutoff and the plaintiff has
14 amended right on the cutoff date? Are we going to let
15 them amend again after the cutoff date in response to the
16 motion?
17 CHAIRMAN BABCOCK: Carl.
18 MR. HAMILTON: I don't like the words "at
19 least once" in there. It sort of implies they can amend
20 again, and I don't think they ought to be able to amend
21 but one time.
22 CHAIRMAN BABCOCK: Okay. Richard.
23 MR. MUNZINGER: I would point out that that
24 constitutes a defacto amendment of the rule that allows
25 the party to amend their pleadings at any time they want

1 because it says here "allow the party" -- "on request to
2 allow the party asserting the claim to amend at least
3 once." Right now we don't require permission of a court
4 for a pleader to amend a pleading. So obviously we're
5 treating that differently if we adopt this language in the
6 rule.
7 CHAIRMAN BABCOCK: Well, special exceptions,
8 don't we allow people to amend?
9 MR. MUNZINGER: Yes, but we don't have a
10 requirement that I have to have leave of court to amend my
11 pleading, and this section says, "Before granting a motion
12 to dismiss the court must, upon request, allow the party
13 asserting the claim to amend." Is that a tacit amendment
14 of our rule that you can amend whenever you want, and is
15 that what we want the Court to do?
16 CHAIRMAN BABCOCK: Well, but you're at a
17 hearing, the judge says, "I'm going to dismiss this.
18 You're gone," and the party says, "Hey, Judge, let me
19 amend. Before you rule let me amend." That's how it's
20 going to happen, isn't it?
21 MR. MUNZINGER: It could. I don't like the
22 idea of putting the language in there "on request" to
23 allow them to amend at least once. I don't think you want
24 to amend -- I mean, you're setting up a separate rule and
25 a separate proceeding when you do that, in my opinion.

1 CHAIRMAN BABCOCK: Well, but, Richard, if
2 you're at the hearing, it's going badly, and the judge
3 says, "Okay, I'm about to rule," and he's got his gavel
4 halfway up and you go, bop, "Here's an amendment." Is
5 that what you're thinking we should allow?
6 MR. MUNZINGER: I think it's what the rules
7 allow now.
8 CHAIRMAN BABCOCK: Okay. Gene.
9 MR. STORIE: It just occurs to me do we want
10 to say anything about amending the motion? We're talking
11 about the party asserting the claim amending, but maybe if
12 you rethink your motion you want to amend.
13 CHAIRMAN BABCOCK: Yeah. Well, like Richard
14 says, you know, what would be to prevent you right now
15 from doing that if you wanted?
16 MR. STORIE: Right.
17 CHAIRMAN BABCOCK: Except if we have a
18 21-day thing or something. Justice Christopher.
19 HONORABLE TRACY CHRISTOPHER: Well, one
20 other thing on the timing, when it has to be filed within
21 60 days after the pleading containing the claim was served
22 -- perhaps we've changed that to "cause of action," I
23 don't know -- what if they allege a cause of action in the
24 original petition and it's the same cause of action, you
25 know, three petitions later? Is the 60 days gone?

1 CHAIRMAN BABCOCK: Yeah, and that's an
2 offshoot of the what if they do an amended pleading that
3 they're permitted to do.
4 HONORABLE TRACY CHRISTOPHER: Right.
5 CHAIRMAN BABCOCK: You know, does that start
6 the 60 days rolling again?
7 HONORABLE STEPHEN YELENOSKY: First time
8 alleged.
9 CHAIRMAN BABCOCK: Yeah. Okay. Well, all
10 of these problems, no answers. Roger.
11 MR. HUGHES: Well, what I've run into in
12 Federal court where I've had what I call the persistent
13 problem with a particular pleading that goes to the -- not
14 to the factual merits, but to the legal merits of the
15 claim, I've seen some judges say, "Look, before I reach
16 the substance of your objection that there's just no law
17 to support this claim at all, I'm going to let them amend
18 just because we have a policy to let them amend once
19 before we throw them out, but when they amend I'm going to
20 deem that you will file another 12(b) motion to the
21 pleading and take your old one up and apply it against
22 this one."
23 Using that perhaps as some kind of template,
24 I don't like the idea of people amending ad nauseam to
25 keep starting the 60-day over and over again; and they're

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

1 subpart (d) says, "The court must allow the party to
2 amend," so that's not inconsistent with your right to
3 amend up to seven days before trial. The "at least once"
4 part may implicate it, but otherwise it's consistent
5 with --
6 HONORABLE TOM GRAY: Actually, Chip, I would
7 argue that the "upon request" is what would change it
8 because you don't have to request.
9 CHAIRMAN BABCOCK: Yeah, that's right. Good
10 point.
11 MR. MUNZINGER: And that was my point. It
12 says "upon request."
13 CHAIRMAN BABCOCK: But it doesn't give the
14 judge any discretion. It says the judge must allow you to
15 do it.
16 MR. MUNZINGER: I did some briefing while I
17 was on the subcommittee, and I looked at some cases that
18 held that at least when you have a motion to dismiss for
19 want of jurisdiction you must give the party a right to
20 replead, and there's language in other cases saying the
21 same thing, and I drew the conclusion that there is
22 largely a presumption at least that we have a right to
23 replead in response to a special exception, for example.
24 CHAIRMAN BABCOCK: Yeah.
25 MR. MUNZINGER: And we do. Okay, I grant

1 you a special exception, so I can either live with that or
2 I can amend my pleading. If I amend my pleading then
3 somebody has got to come back and file another special
4 exception against me or live with it and seek relief
5 elsewhere.
6 CHAIRMAN BABCOCK: Yeah.
7 MR. MUNZINGER: And that's how I viewed
8 this, that there seems to be at least a tacit recognition
9 of right to amend as a matter of right.
10 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.
11 HONORABLE STEPHEN YELENOSKY: Well, I guess
12 I was reading it differently, and I thought from what Jeff
13 said that perhaps I was reading it correctly. I thought
14 this only applied to whether or not you get another bite
15 once you're at the hearing as you were saying, Chip. This
16 doesn't have anything to do with your right to amend prior
17 to the hearing. In other words, maybe the wording is
18 wrong, but you have an absolute right to amend at any time
19 as many times as you want up until the hearing --
20 CHAIRMAN BABCOCK: Yeah.
21 HONORABLE STEPHEN YELENOSKY: -- under
22 current law, and that's the way I read this. All I read
23 this to mean is once you get to the hearing, before the
24 judge rules he or she has to give you another opportunity,
25 and if that's what's intended and it's not clear from how

1 it's written then maybe we need to redraft it. Is that
2 the issue, Richard?
3 MR. MUNZINGER: That's part of the issue.
4 It's the "upon request." Your explanation cures the
5 problem.
6 HONORABLE STEPHEN YELENOSKY: Okay.
7 MR. MUNZINGER: If the judge has indicated
8 he's going to grant it at the hearing and you say, "Well,
9 let me amend."
10 HONORABLE STEPHEN YELENOSKY: Well, then I
11 think what it needs to say then is "At the hearing before
12 granting a motion to dismiss the court must, upon
13 request" --
14 MR. MUNZINGER: And the problem with that is
15 it frustrates the Legislature's intent that you allow a
16 defendant or a party who is seeking relief under this rule
17 to recover their attorney's fees because of the other
18 person's incompetence, whatever it might be, the other
19 person's having filed a spurious or meritless claim, and
20 so if you give them a right to amend what do you do about
21 the attorney's fees there? "Hey, Judge, I spent eight
22 hours briefing this thing. I traced the law in California
23 and this and that. I'm entitled to my money." No, you
24 get a right to amend. So I spent all of this money.
25 That's a problem.

1 CHAIRMAN BABCOCK: Jeff.
2 MR. BOYD: Yeah, we have to presume the
3 Legislature meant to do something with this statute. If
4 the statute allows a judge to grant a right to amend then
5 we've not changed the law at all. So if you sue me and I
6 think this is a bad claim, has no merit, under current law
7 I can file a special exception, and the judge -- we have a
8 hearing. I incur the fees to file special exceptions. We
9 have a hearing, and the judge says, "Yeah, I agree, this
10 pleading is insufficient, has no merit, so I'm going to
11 give you seven days to amend." Well, we can do that now,
12 and if we can do that now, then allowing the judge to
13 allow for amendments in this rule doesn't change what we
14 can already do now.
15 The -- I'm going to argue that the rule
16 should specifically not allow judges to allow them to
17 amend once it's been submitted, whether oral hearing or
18 not, because the language is mandatory. It must provide
19 for the dismissal. The motion must be granted or denied
20 within 45 days, and you must award attorney's fees and
21 costs. It's an alternative to special exceptions not --
22 it's not supposed to be identical to special exceptions,
23 and the case -- the analogy case that we haven't talked
24 about, which I think was in the mind of a lot of people in
25 this legislative process is the multiple defendant case

1 where deep pocket defendants are named because the primary
2 defendant doesn't have deep pockets, and the example is
3 the Ford rollover, so you sue Ford and was it Goodyear or
4 who made those tires?
5 MR. STORIE: Firestone.
6 MR. BOYD: Whoever it was that made those
7 tires, you sue both of them, but you also sue the
8 manufacturer of the wheels, and the manufacturer of the
9 wheels may look at it and say, "All you've done is pled
10 that I made the wheels, but you didn't plead how that had
11 anything to do with it," but I'm a little worried that if
12 I move to dismiss it may be denied, so instead I'm going
13 to specially except. But if you also named the
14 manufacturer of the taillights, well, that one may say,
15 "I'm moving to dismiss because you've not pled anything
16 that in any way connects me to what happened here." If
17 you let that person -- if you let the judge then let that
18 person replead or amend then you've taken away anything
19 different out of this statute than what that defendant
20 already had through the special exception process.
21 Now, then you get to the question of should
22 they be allowed to amend before the motion to submit it on
23 oral hearing or otherwise, and I agree that you should. I
24 agree they have the right to freely amend and by doing so
25 have freed themselves from the risk of attorney's fees.

1 That way the parties are working it out, and you don't
2 have to involve the court, but once you involve the court,
3 the court needs "shall grant or deny and shall award
4 attorney's fees to the prevailing party."
5 CHAIRMAN BABCOCK: Richard.
6 MR. MUNZINGER: The Legislature used the
7 phrase -- the words "motion to dismiss." They knew that
8 we had a special exception practice. They knew that we
9 had a practice now that people can amend at any time up to
10 seven days before trial unless the judge in the exercise
11 of his power to control the cases in his own court orders
12 otherwise, so they meant this to be a sui generis motion.
13 CHAIRMAN BABCOCK: A what kind of motion?
14 MR. MUNZINGER: Sir? That's an Orsinger
15 word. He's left. That's an Orsinger word. But they
16 meant it to be some kind of a specific special process.
17 There is nothing that would keep a trial judge from
18 saying, "All right, I'm going to allow you to amend this
19 motion, but you get one bite at the apple, don't do this
20 again now." No order has been entered on the motion;
21 therefore, no attorney's fees can be awarded, denying or
22 granting. No order has been entered, so the defendant who
23 has filed the motion no longer has the risk of getting
24 stung with attorney's fees, nor does the plaintiff. The
25 plaintiff now has to make up his or her mind, do I amend,

1 and if I do and they do amend, now I have to make up my
2 mind do I come back with a motion and face the risk that
3 I'll pay that person's attorney's fees? I think that you
4 need to allow people to amend. The rule needs to allow
5 them to amend as freely as our rules do today because we
6 now know that our trial courts can tell us, "No more
7 amendments, guys, this is it. You do this in 10 days,
8 Smith or Munzinger, and this is the last one, make it
9 good."
10 "Yes, Judge."
11 CHAIRMAN BABCOCK: Judge Yelenosky.
12 HONORABLE STEPHEN YELENOSKY: But this
13 statute says it doesn't go away. I have to rule on it, so
14 I allow you to amend, I still have to rule.
15 MR. MUNZINGER: This statute doesn't say
16 that a motion can't be withdrawn. What's the difference
17 between --
18 HONORABLE STEPHEN YELENOSKY: Well, what if
19 they don't withdraw?
20 MR. MUNZINGER: If I don't withdraw and the
21 pleading has been amended, under rules today if I filed a
22 special exception, for example, to the original petition,
23 plaintiff files an amended petition, my special exceptions
24 are mooted. If I file a motion to dismiss the original
25 petition, the petition is amended, under current law today

1 the motion is mooted, by reason of the amendment.
2 HONORABLE STEPHEN YELENOSKY: Well, if you
3 analogize to special exceptions, but do we know that's the
4 law for this?
5 MR. MUNZINGER: Whether you do or you don't
6 it seems to be because the rule is a pleading when amended
7 is no longer live. Its only value to anybody in the case
8 is it's in the record, I can use to it make a judicial --
9 it's not even a judicial admission. It's a statement
10 that's in admission against interest now. It's no longer
11 a judicial administration because it's amended, so why
12 would that be different if you have a motion to dismiss?
13 "That pleading doesn't exist anymore, your Honor. I
14 amended that." It's abandoned under current rules, so my
15 motion is no longer in existence.
16 CHAIRMAN BABCOCK: Yeah, I think that's
17 right. Anybody disagree with that? Justice Christopher.
18 HONORABLE TRACY CHRISTOPHER: I don't agree
19 that that correctly reflects the way the courts of appeals
20 have interpreted special exceptions, and -- but I'm not
21 sure that that's the most efficient way to do things. You
22 file a special exception to the original petition. They
23 amend. You still have the same complaint to the amended
24 petition, but under our rules you're required to file
25 another special exception, a second special exception to

1 the, you know, first amended; and to me that's a very
2 inefficient system if what you complained about the first
3 time still exists.
4 CHAIRMAN BABCOCK: Yeah. Roger.
5 MR. HUGHES: Well, one thing that was in the
6 State Bar committee's proposed rule that I kind of -- now
7 I kind of like is requiring a certificate of conference.
8 When I read this statute again what I see is that it
9 requires a dismissal of cause of action that has no basis
10 in law and fact, not as alleged has no basis in law -- in
11 law or fact. If a person's pleading could be tidied up by
12 alleging just a few more facts which they could allege in
13 good faith, or, gee, they forgot to allege proximate cause
14 when they alleged negligence and that's why it's
15 defective, I'm not sure that's really the kind of case
16 that this is talking about. I think they were looking at
17 a case where, you know, you could add more adverbs and
18 adjectives, all day you like, but all day long this cause
19 of action doesn't exist, or this is -- you can't recover
20 based on factual allegations concerning a unicorn.
21 So I think maybe a certificate of conference
22 might allow people to cure the problems I was talking
23 about where all you have to do is add a few more
24 allegations that you can do in good faith. After that I
25 think it's a question of policy whether we're going to let

1 someone amend while the motion is pending, and that avoids
2 the problem altogether. I think we're going to have to
3 provide some mechanism that if it's amended while the
4 motion is pending the movant can withdraw without penalty.
5 I mean, I would favor that. Otherwise it's pretty hard
6 core. Once you've put down your motion, if it turns out
7 they can clean it up with a few good faith more
8 allegations, too bad, you shouldn't have filed it. You
9 should anticipate what they could plead to meet your
10 objection.
11 CHAIRMAN BABCOCK: Uh-huh.
12 MR. HUGHES: So that's my observation.
13 MR. MUNZINGER: That interpretation of the
14 rule would be kind of crazy. Defendant, you have a right,
15 but you can't exercise it because if you do the -- you
16 should have known this guy was going to cure this problem.
17 You shouldn't have filed the motion, and so the problem
18 that the plaintiff created by not pleading properly is now
19 yours and you pay for it. That's justice? That's nuts.
20 CHAIRMAN BABCOCK: Buddy.
21 MR. LOW: Chip, I'm getting ready to get
22 shot down like Jeff, but I think the Legislature really
23 intended not to mess around with this. Unlike the health
24 care bill, it's pretty to the point, brief, and says --
25 tells you don't mess with this frivolous litigation. They

1 don't use that term. So I would be for you better watch
2 out what you're doing. Once you file it -- and I don't
3 disagree, you should have the conference requirement.
4 Once you file it then your remedy is to take -- to
5 dismiss. Otherwise, you should have known what you were
6 doing. I wouldn't even give them a right to amend, so I
7 go down with you, Jeff.
8 CHAIRMAN BABCOCK: Judge Yelenosky.
9 HONORABLE STEPHEN YELENOSKY: Well, it --
10 you know, I guess probably they weren't fooling around,
11 but what we're talking about being worried about are those
12 cases that although when filed should have been dismissed
13 and were frivolous, turn out not to be frivolous because
14 they've amended, and we're arguing about whether somebody
15 should get attorney's fees for originally having a
16 frivolous lawsuit filed against them and being forced to
17 file a nonfrivolous lawsuit, and I really doubt that's
18 what the Legislature had in mind anyway. I think they
19 were thinking about lawsuits that from day one were
20 frivolous, all the way into -- ad infinitum were
21 frivolous, never should have been filed and couldn't morph
22 into something that was nonfrivolous.
23 So when we talk about legislative intent, I
24 think the Legislature had in mind something that really is
25 a very, very, very small percentage of what we see, and

1 they didn't really have in mind at all that somebody would
2 file a frivolous lawsuit and it would be amended to become
3 a nonfrivolous lawsuit and somebody should get attorney's
4 fees for that.
5 CHAIRMAN BABCOCK: Jeff, are you hankering
6 for another vote?
7 MR. BOYD: Only if that's what's required
8 to, you know, convince Justice Hecht to go my way.
9 CHAIRMAN BABCOCK: Well, and you're a no
10 amendment guy, right?
11 HONORABLE R. H. WALLACE: No.
12 MR. BOYD: I think there's two time periods.
13 From the date of filing the motion to dismiss prior to
14 submission to the judge, I'm fine with amendment, but once
15 it's submitted to the judge, the judge shall grant or deny
16 and shall award attorney's fees.
17 CHAIRMAN BABCOCK: Okay. No amendment after
18 submission.
19 MR. BOYD: That's right.
20 CHAIRMAN BABCOCK: Okay. That's what you're
21 in favor of. Carl.
22 MR. HAMILTON: Before we vote on that it
23 seems to me like we need to know whether or not this
24 dismissal, if it occurs, is going to be with or without
25 prejudice. If it's without prejudice then I'm okay with

1 that because they can fix it up and refile it, but if it's
2 going to be with prejudice that's got a whole lot more
3 problems with it.
4 CHAIRMAN BABCOCK: Buddy.
5 MR. LOW: Yeah, I mean, my vote not to amend
6 goes with the conference, the giving notice and so forth,
7 so that's -- so that they then know and they have a chance
8 to dismiss, not that there's no notice that you can just
9 file that, and that's it.
10 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.
11 PROFESSOR HOFFMAN: What is -- could you
12 describe what is this moment of submission that you're
13 talking about, and let me just make sure I'm clear? In
14 the Federal side it may be sort of what you're talking
15 about. So like under Rule 11 now there's the 21-day
16 what's called the safe harbor provision that before you
17 file it you have to give them notice that this is your
18 plan and they've got 21 days to come to Jesus, and if they
19 do then it's all gone, it can't be in sanctions, but if
20 they play chicken with you, you file your thing 21 days
21 later. Is that sort of what you're talking about or --
22 MR. BOYD: Well, have we decided whether
23 we're requiring an oral hearing or not?
24 CHAIRMAN BABCOCK: I thought the consensus
25 was that we would not require an oral hearing.

1 MR. BOYD: It would be easy if we were
2 requiring an oral hearing, which by the way, I agree we
3 shouldn't require. I think trial judges should have
4 discretion because of prisoners, but if we were requiring
5 it then once that oral hearing happened that's when it's
6 submitted.
7 PROFESSOR HOFFMAN: Notice of hearing.
8 MR. BOYD: Yeah, once it's submitted. If
9 you're not requiring oral hearing, and the judge is going
10 to take it up then that's where I think we may have to
11 look at -- who was it was talking about imposing some kind
12 of deadline to respond by a certain day and it ought to be
13 more than three days or whatever? Okay. So once you
14 respond then you've stood on your pleading instead of
15 voluntarily making a dismissal.
16 PROFESSOR HOFFMAN: Okay. So I hadn't
17 thought about it either, but I will say that sounds a
18 little bit like how I understand the safe harbor process.
19 So, in other words, you're giving them three weeks to
20 decide whether or not you were right. If you were right,
21 they amend or they quit. If they don't think you're
22 right, they stand on their pleading, and then we can
23 debate whether 21 days is the right number or not, but
24 that may be similar to what you're saying.
25 CHAIRMAN BABCOCK: All right. How many

1 people think that after the date of submission no
2 amendment should be permitted?
3 MR. SCHENKKAN: We picked up another vote
4 after you started counting.
5 CHAIRMAN BABCOCK: Was it Judge Peeples? I
6 counted him. I saw it out of the corner of my eye. I saw
7 that hand flit up.
8 Okay. How many people think after
9 submission there should be the right to amend?
10 HONORABLE STEPHEN YELENOSKY: There's one
11 over there.
12 CHAIRMAN BABCOCK: Okay. Well, Jeff, you're
13 on a roll, man. 19 in favor of your proposition and only
14 seven opposed.
15 HONORABLE DAVID PEEPLES: Chip?
16 CHAIRMAN BABCOCK: Yeah, Judge Peeples.
17 HONORABLE DAVID PEEPLES: I think the
18 subcommittee is going to benefit greatly from this very,
19 very good discussion, and I just question the wisdom of
20 having a whole lot of votes that will tie our hands. Now,
21 that was fine, but I think we need to --
22 MR. LOW: Don't do it again.
23 HONORABLE DAVID PEEPLES: We need to move
24 through the --
25 MR. BOYD: Chip, I agree that one's fine.

1 Let's throw out the prior two.
2 MR. SCHENKKAN: David, you waited until
3 after submission. You're too late.
4 CHAIRMAN BABCOCK: We'll toss the other two
5 votes. We'll leave that one.
6 MR. BOYD: Thank you.
7 MR. GILSTRAP: Is this going back to the
8 subcommittee?
9 CHAIRMAN BABCOCK: Huh?
10 MR. GILSTRAP: Is this going back to the
11 subcommittee?
12 CHAIRMAN BABCOCK: Well, we'll see.
13 MR. GILSTRAP: Okay.
14 CHAIRMAN BABCOCK: Okay. Anything more on
15 right to amend? We've voted, perhaps precipitously, but
16 Justice Gaultney.
17 HONORABLE DAVID GAULTNEY: Well, I was just
18 wondering if the subcommittee considered the use of the
19 word "may" instead of "must." In other words, instead of
20 having it one way or the other, give the trial court some
21 discretion.
22 CHAIRMAN BABCOCK: Okay. All right.
23 Justice Bland.
24 HONORABLE JANE BLAND: When you're talking
25 about submission versus order, so you're saying that if

1 you have the hearing then the right to amendment
2 disappears?
3 CHAIRMAN BABCOCK: Yeah.
4 HONORABLE JANE BLAND: But what if at the
5 hearing the judge would say -- give some inclination of
6 ruling? Why wouldn't that be helpful to the parties if
7 they can go out and resolve it through amendment, fix the
8 case, which we do all the time as trial judges? That's
9 why I like "may" instead of "must," and it -- I think the
10 bigger problem with amendment is after the judge has
11 ruled. I now say your case does not have merit and then
12 you say, "But, Judge, let me amend." That's where the
13 inefficiency comes in, not from amending during the
14 submission process or the hearing, but from amending after
15 the judge has ruled to avoid paying fees or just because
16 I'm not going to amend until somebody orders it.
17 CHAIRMAN BABCOCK: You want us to amend the
18 vote?
19 HONORABLE JANE BLAND: No, I want to amend
20 my vote, I think. I think we need to let trial judges
21 have more discretion about how to manage the process until
22 the time they rule.
23 CHAIRMAN BABCOCK: Okay. What about no
24 waiver of motion to transfer venue or special appearance?
25 Surely this is not controversial.

1 MR. GILSTRAP: It was on the subcommittee.
2 CHAIRMAN BABCOCK: Was it?
3 MR. MUNZINGER: Section two of Rule 120a
4 specifically provides that a 120a motion must be ruled
5 upon before any other motion, and so this motion procedure
6 would contravene 120a, section (2), unless you speak to it
7 in this rule.
8 CHAIRMAN BABCOCK: Okay.
9 MR. MUNZINGER: And I'm not sure this is the
10 best way of speaking to it, but that was the point, and
11 then, of course, the case law says -- talks about venue
12 motions as well.
13 CHAIRMAN BABCOCK: All right. Buddy.
14 MR. LOW: But you want to know first whether
15 the court even had jurisdiction. I mean, why go through
16 all this process if the --
17 MR. MUNZINGER: Jurisdiction of the person.
18 MR. LOW: Yeah.
19 MR. GILSTRAP: Because it's -- because there
20 may be cases in which the defendant could show up and
21 knock the case out quickly without having to go to all the
22 expense of filing a motion to transfer venue or a special
23 appearance.
24 CHAIRMAN BABCOCK: Right.
25 MR. GILSTRAP: There may be some cases like

1 that. That was the idea behind it.
2 MR. LOW: Okay.
3 CHAIRMAN BABCOCK: And in Federal court it
4 happens all the time where you combine -- you know, a
5 party will say, "Look, you don't have jurisdiction over
6 me," and file a 12(b)(2); but in any event, they don't
7 stay the claim; and I've had Federal judges say, "I'm not
8 going to rule on the personal jurisdiction motion, they
9 don't state a claim," in which case your client is
10 delighted because now you've got a decision on the merits.
11 MR. LOW: Personal jurisdiction often
12 requires a lot of discovery, and I understand that.
13 CHAIRMAN BABCOCK: Yeah. Justice
14 Christopher.
15 HONORABLE TRACY CHRISTOPHER: I don't think
16 we ought to change our longstanding law that if you get an
17 affirmative ruling that you -- on a matter of substance
18 that you waive your special appearance, and it seems to me
19 that if you choose this you waive your special appearance.
20 CHAIRMAN BABCOCK: Okay. Professor Carlson.
21 PROFESSOR CARLSON: That was the argument I
22 made unsuccessfully at the subcommittee, that
23 traditionally -- and there's no reason the law couldn't
24 change, but traditionally we have not allowed a litigant
25 to test drive the court. You go in for an affirmative

1 ruling, you are in that court. You can't turn around
2 after you get a ruling you don't like and say, "Well, you
3 don't have jurisdiction over me."
4 HONORABLE TRACY CHRISTOPHER: Yeah.
5 CHAIRMAN BABCOCK: Test drive the courts.
6 Richard.
7 MR. MUNZINGER: Traditionally we didn't have
8 the Legislature pass a law telling us to adopt a rule that
9 does what this one does. Traditionally the Legislature
10 didn't tell us how to write the rules. Now they've told
11 us write a rule. How can you have the Legislature tell
12 you to write a motion to dismiss rule that has to be
13 resolved and not amend Rule 120a or the case law that says
14 you've waived your 120a motion unless your motion seeks
15 the jurisdictional relief? And I agree with that.
16 Obviously your point is correct, but this isn't
17 traditional. You've got a statute now that says it. So I
18 think you need to protect rights under the motion to
19 transfer venue and special appearance rights against this
20 rule.
21 CHAIRMAN BABCOCK: Fiddler on the Munzinger,
22 tradition. Justice Christopher.
23 HONORABLE TRACY CHRISTOPHER: Well, again,
24 because of the arbitrary 60 days after filing of the
25 pleading we've put ourself in a position where you have to

1 almost get a ruling on this first before you went to a
2 special appearance, but the Legislature knows we have
3 special appearances. They know the law is if you get an
4 affirmative ruling from the court you've waived your
5 special appearance. I can make the same argument that
6 you've been making all morning, so --
7 CHAIRMAN BABCOCK: Judge Wallace.
8 HONORABLE R. H. WALLACE: Well, I think it
9 seems to me by requiring the ruling within 45 days from
10 the time the motion was filed is just not -- in a lot of
11 cases wouldn't be feasible to fight the special appearance
12 battle --
13 CHAIRMAN BABCOCK: Right.
14 HONORABLE R. H. WALLACE: -- and get that
15 done within 45 days. I mean, I think I tend to agree with
16 Richard.
17 HONORABLE TRACY CHRISTOPHER: You don't file
18 it.
19 HONORABLE STEPHEN YELENOSKY: You don't file
20 it.
21 HONORABLE TRACY CHRISTOPHER: You don't file
22 it until after you've had your special appearance.
23 HONORABLE R. H. WALLACE: You don't file the
24 special appearance?
25 HONORABLE STEPHEN YELENOSKY: No, the motion

1 to dismiss. You wait until the special appearance.
2 HONORABLE R. H. WALLACE: Yeah, well, you're
3 right. You're right. But still then to me that still
4 sort of defeats the purpose of the statute.
5 CHAIRMAN BABCOCK: Well, according to this
6 rule you've still got to file it in 60 days.
7 HONORABLE R. H. WALLACE: Right. Well,
8 according to the rule, but we can change that, but even
9 then, some of these special appearance battles can involve
10 discovery and drag on and on. It seems to me that -- I
11 agree with Richard. I think we ought to do whatever we
12 need to do to wade this out of that.
13 CHAIRMAN BABCOCK: Buddy.
14 MR. LOW: There is no order of pleadings.
15 Why couldn't you file both and ask that this be -- proceed
16 first or something? There is no order that you file --
17 you file your motion -- plea to the jurisdiction and then
18 you turn around and you file that. There's no order of
19 pleading.
20 CHAIRMAN BABCOCK: Well, because of the
21 60-day thing there may be a problem.
22 MR. LOW: Okay. Okay.
23 CHAIRMAN BABCOCK: Judge Peeples.
24 HONORABLE DAVID PEEPLES: The arguments that
25 there ought to be waiver it seems to me are formalistic

1 and are not supported by policy reasons that I'm aware of,
2 and therefore, the -- you know, it's expensive to do a
3 special appearance, and this needs to be done up front.
4 Those are good policy arguments, and I don't think they're
5 outweighed by the formalism that supports all the waiver
6 business we've got.
7 CHAIRMAN BABCOCK: Okay. Jim.
8 MR. PERDUE: I might have a contrary take on
9 this given my practice, but the bill is titled "Early
10 Dismissal of Cases," so if the intent was to try to get
11 frivolous cases teed up and out of the system early, the
12 60 days within the pleading is completely consistent with
13 what was in the discussion. If the rule is going to be
14 converted into a way to allow an attorney's fees dismissal
15 motion at any time in the case and capture somebody for a
16 pleading deficiency which has traditionally been handled
17 as special exceptions, that's not even consistent with the
18 caption of the bill; but I would say that because the 60
19 days is in here. I do think that you can have the language
20 in (e) regarding the waiver of a special appearance
21 because you satisfy the policy goal of being able to tee
22 up an effort to get out a frivolous claim early; and I
23 would again, contrary to probably a lot of rights of some
24 people I represent, I would think if you really think
25 you've got a shot at that and you really think you've got

1 a frivolous case then that shouldn't act to waive your
2 special appearance, right, because it has to be filed
3 within 60 days of the claim going in; but if you take that
4 out and you're going to say two years down the road you
5 can make this pleading motion and it's -- you know, now I
6 say you've got a frivolous case, which I think is
7 inconsistent with the bill, then I would say you need to
8 take out (e). Those are two different paths.
9 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.
10 Yeah, Tom.
11 MR. RINEY: If a defendant files a motion
12 under this rule and there's not a waiver and the defendant
13 loses the motion and the attorney's fees are awarded
14 against the defendant then could a defendant come in and
15 say, "I don't have to pay the attorney's fees because this
16 court didn't have jurisdiction"? I mean, that seems to me
17 to be a problem to come in and ask for affirmative relief
18 from the court, which is contrary to everything that we
19 say with respect to waiver of jurisdiction in the current
20 law; secondly, to say but if you lose that gamble and
21 relief is awarded against you then you can go back and say
22 the court didn't have jurisdiction to do what you asked
23 them to do to begin with. All right. That doesn't make
24 much sense to me.
25 CHAIRMAN BABCOCK: Richard.

1 MR. MUNZINGER: The court would have subject
2 matter jurisdiction theoretically, but not jurisdiction of
3 the person, so a court with subject matter jurisdiction it
4 seems to me would have the authority to enter an order on
5 attorney's fees, even though it may not have --
6 HONORABLE STEPHEN YELENOSKY: No.
7 MR. MUNZINGER: -- had jurisdiction of the
8 person.
9 HONORABLE TERRY JENNINGS: No.
10 HONORABLE STEPHEN YELENOSKY: No, we can't
11 make them pay if we don't have jurisdiction over them.
12 PROFESSOR HOFFMAN: Correct.
13 CHAIRMAN BABCOCK: Justice Gaultney.
14 HONORABLE DAVID GAULTNEY: Rather than try
15 to deal with the conflict between the 60 days and the
16 waiver of special appearance, why couldn't we say in the
17 60-day requirement unless there is a pending challenge to
18 the personal jurisdiction or a challenge to the venue then
19 the claim must be filed within 60 days. So it makes it
20 clear that your 60-day time doesn't run if you've got a
21 personal jurisdiction or venue challenge.
22 CHAIRMAN BABCOCK: Yeah. Okay.
23 HONORABLE TOM GRAY: But, Chip, because of
24 the jurisdiction is over -- the issue seems to be over the
25 person because, as Richard Munzinger said, you've got

1 subject matter jurisdiction. Why isn't it that, like in
2 the discovery that you're conducting and for the 120a
3 special appearance motion, you've got in effect limited
4 jurisdiction over the person to do and order that
5 discovery? It's sort of like a limited waiver of the
6 jurisdiction. You can proceed on very limited issues in
7 connection with a 120a motion and conduct discovery and
8 that kind of stuff. So it seems like you could give
9 limited discovery to have this hearing, and I think Jim
10 was right that you've got a problem of taking this -- the
11 piecemeal part of it, it's got to be either the get it in
12 there and get it done and then get on with your special
13 appearances or not or take out that 60-day part.
14 CHAIRMAN BABCOCK: Skip.
15 MR. WATSON: Well, just conceptually my
16 problem with that is that whereas if you're proceeding on
17 a special appearance or discovery on a special appearance,
18 that's to resist the jurisdiction of the court being
19 exercised over you, but here you're coming into court, as
20 Elaine was saying, and affirmatively invoking the
21 jurisdiction of the court over me for this purpose. I
22 mean, I see it exactly the way Tom does. Tom Riney. You
23 know, I have a problem with that.
24 CHAIRMAN BABCOCK: Okay. A couple more
25 comments and then we'll move onto attorney's fees. Judge

1 Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Justice Gray,

3 are you saying that we exercise jurisdiction in the

4 process of discovery on special appearance, and,

5 therefore, we should be able to do this?

6 HONORABLE TOM GRAY: That was my

7 understanding.

8 HONORABLE STEPHEN YELENOSKY: Well, but we

9 exercise jurisdiction -- we always have -- we always have

10 jurisdiction to determine jurisdiction.

11 HONORABLE TOM GRAY: Right.

12 HONORABLE STEPHEN YELENOSKY: And so that's

13 what I think I'm operating under when I order discovery of

14 a special appearance, but that then doesn't by analogy

15 allow me to exercise in persona jurisdiction over somebody

16 in order to pay something.

17 MS. BARON: Or receive something.

18 HONORABLE STEPHEN YELENOSKY: Or receive

19 something.

20 CHAIRMAN BABCOCK: Justice Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, yeah,

22 and, I mean, like in the special appearance, I was just

23 wondering, and I don't know what the answer to this

24 question is, if you order discovery to proceed and the

25 person with the special appearance says, "I'm not coming

1 to Texas for the deposition. You have to come to
2 Florida," and usually everybody goes to Florida to take
3 their deposition because, you know, you don't have
4 jurisdiction over the person, so it's a -- I don't know
5 what would happen if they didn't show up then.
6 CHAIRMAN BABCOCK: Okay. Really, really
7 final comment. Lonny.
8 PROFESSOR HOFFMAN: So my comment is I'm
9 against the idea that we should put a defendant in a catch
10 22. If a defendant has a challenge to jurisdiction, we
11 should write a rule that permits them to preserve that
12 challenge and then the question is only is it possible to
13 do this and also still do it early. What's wrong with a
14 rule that says if you have a special appearance challenge
15 you have to file this new motion -- you know, file it at
16 the same time you file your special appearance, make it
17 subject to, and in the due order we say you've got to do
18 the dismissal motion first, Judge, for the obvious reason
19 the special appearance may take too long.
20 CHAIRMAN BABCOCK: You have to -- because of
21 the 45-day rule.
22 PROFESSOR HOFFMAN: No, that's what I'm
23 saying, you have to do the dismissal motion first.
24 HONORABLE STEPHEN YELENOSKY: But what if I
25 do the motion and I order attorney's fees, and then you

1 convince me I don't have in persona jurisdiction?
2 PROFESSOR HOFFMAN: That's the Tom question.
3 HONORABLE STEPHEN YELENOSKY: Yeah. So it
4 seems to me you have to say you do the in persona
5 jurisdiction first, and you have to file your motion to
6 dismiss within X number of days of the ruling on that.
7 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.
8 Let's talk about attorney's fees. Noncontroversial,
9 right?
10 HONORABLE DAVID PEEPLES: Okay. Section
11 (F), the first sentence is straight out of the statute,
12 except for the last six or eight words. We did say to
13 limit the attorney's fees recoverable to the time spent in
14 either presenting or responding to the motion. In other
15 words, not attorney's fees to date. And that goes a
16 little beyond the statute but that seems important to do.
17 MR. HAMILTON: Or on appeal.
18 HONORABLE DAVID PEEPLES: Well, we haven't
19 talked about appeal. There are several attorney's fees
20 issues that we just decided not to tackle, and I wanted to
21 alert you to what those were. What happens if there's
22 several claims, several grounds asserted and so forth.
23 Some are granted, some are denied. Do we give guidance to
24 the Court in deciding who prevailed in a partial victory
25 or partial defeat? Motion filed and an amendment cures

1 the defect. We've alluded to that already, but that's
2 something that we don't deal with in this part.
3 A very important thing is do we want the
4 trial court to have the discretion to say to the loser,
5 "You pay them now," as opposed to it rides until the case
6 is finished. That's a pretty big thing. We didn't deal
7 with appellate, and those are the main ones. The State
8 Bar draft, you know, had several provisions on this,
9 including the court can decide what was important. If
10 part is granted and part denied, the court can assess the
11 relative importance of those, but we just decided not to
12 tackle this, and I don't know if that was because time was
13 running out before this meeting or what, but we didn't do
14 it, and then I guess the question is do we leave it more
15 general as it is and let the courts work out these issues
16 or do we try to tackle those issues.
17 CHAIRMAN BABCOCK: Okay. Frank.
18 MR. GILSTRAP: I just want to point out, you
19 know, the attorney's fees portion of House Bill 274,
20 section 102, doesn't require rule making. It's the law,
21 and it does not have this carve out for attorney's fees
22 related to the motion. It just says, "The court shall
23 award costs of reasonable and necessary attorney's fees to
24 the prevailing party." I'm in favor of the carve out. I
25 think that it should only apply to the attorney's fees

1 that related to the preparing and defending the motion,
2 but that's not required by the statute.
3 HONORABLE DAVID PEEPLES: And very quickly,
4 the heading of that attorney's fees statute says "Award of
5 attorney's fees in relation to certain motions to
6 dismiss." So it in effect says to focus on the motion,
7 not attorney's fees to date.
8 CHAIRMAN BABCOCK: Okay. Carl.
9 MR. HAMILTON: One other issue the State Bar
10 brought up was whether the attorney's fees were assessed
11 against the lawyer or the party or both.
12 HONORABLE DAVID PEEPLES: They make a very
13 good point that if it's dismissed because it's not -- that
14 has no basis in law, that's a mistake the lawyer made and
15 not a factual mistake that maybe the client made, and
16 therefore, it ought to be assessed against the lawyer, not
17 the client. Yeah.
18 MR. GILSTRAP: Chip, on that --
19 CHAIRMAN BABCOCK: Yes.
20 MR. GILSTRAP: -- of course, that's -- that
21 would be a real -- a real step to award attorney's fees
22 against the attorney. In House Bill 274 there were
23 provisions in there that on the original loser pays
24 provision, which said that the losing party in any tort
25 suit pays attorney's fees, and if the plaintiff -- if one

1 party's attorney had a right and interest in the claim,
2 namely the plaintiff, you could hit him for attorney's
3 fees, too, and that was taken out, so at least you could
4 say that maybe the Legislature backed off from the idea of
5 requiring attorney's fees to be paid by the attorneys.
6 CHAIRMAN BABCOCK: Justice Christopher.
7 HONORABLE TRACY CHRISTOPHER: I could make
8 an argument that if this is truly going to be an expedited
9 motion and it's going to be heard within 60 days from
10 filing of the pleading that the attorney's fees should be
11 all of your attorney's fees, not just presenting the
12 motion. Somebody has filed a frivolous lawsuit against
13 your client. You have to investigate, talk to them, file
14 an answer within the 60-day time period, file a motion to
15 dismiss, get that heard. I could certainly make the
16 argument that the intent of the Legislature was to capture
17 all of that and not just the motion.
18 CHAIRMAN BABCOCK: Richard.
19 MR. MUNZINGER: There's a risk to that. I
20 file an original petition that alleges a meritorious cause
21 of action that will survive this motion or special
22 exceptions. The parties embark on discovery, extensive
23 discovery, even motions. Then an amended petition is
24 filed a year into the lawsuit or nine months into the
25 lawsuit in which the plaintiff asserts a spurious cause of

1 action. My motion to dismiss now must be filed to that
2 pleading because there is a spurious cause of action. Do
3 I pay the attorney's fees of the plaintiff for the last
4 year?
5 HONORABLE TRACY CHRISTOPHER: No, you've
6 only dismissed one cause of action, not the others that
7 you've been working on for a year.
8 HONORABLE STEPHEN YELENOSKY: That can be
9 segregated.
10 MR. MUNZINGER: It's at least a drafting
11 problem that you have to be careful of, obviously.
12 MR. LOW: Yeah.
13 CHAIRMAN BABCOCK: Yeah, Roger.
14 MR. HUGHES: Well, as much as I would like a
15 rule to shift all of the legal fees from one side to the
16 other, it seems to me that the rule ends up -- if you want
17 to say if the defendant wins then he gets all of his
18 attorney's fees, what do you do when the plaintiff wins,
19 the person who filed the petition? Does he get all of his
20 legal fees incurred from the moment the client walked in
21 the door? I mean, a lot of -- I mean, some very fine
22 attorneys do a lot of prep work before they go to trial,
23 spend a lot of time writing their petition. All of the
24 sudden somebody frivolously challenges their petition,
25 then I can make the argument, okay, you rolled that dice

1 and lost, so I want all of my attorney's fees since the
2 client walked in the door.
3 CHAIRMAN BABCOCK: Skip.
4 MR. WATSON: I'm sure this is obvious, but
5 the people that were involved in the bill, I don't get
6 this "in whole or in part" business, both in the bill and
7 in the rule. I mean, let's say there are three cause of
8 actions alleged, and motion to dismiss challenges two, and
9 it's granted on one and denied on one. Where are we? Who
10 is the prevailing party? I just -- I don't get it, and
11 that's going to happen.
12 CHAIRMAN BABCOCK: Yeah.
13 HONORABLE R. H. WALLACE: But don't we have
14 that -- is it the declaratory judgment statute that
15 provides that the court may award attorney's fees to the
16 prevailing party? That's all it says, "prevailing party."
17 MR. BOYD: That's Chapter 38, I think.
18 HONORABLE R. H. WALLACE: Judge has to
19 decide who the prevailing party is.
20 MR. WATSON: But that's a "may." This is a
21 "shall."
22 HONORABLE R. H. WALLACE: Yeah.
23 MR. BOYD: Well --
24 CHAIRMAN BABCOCK: Jeff.
25 MR. BOYD: I think Chapter 37, declaratory

1 judgment, is "may award as is equitable and just," but 38
2 on contracts is "shall award to the prevailing party," and
3 I think the thinking here was there was already case law
4 that governs the obligation to segregate fees and expenses
5 incurred when you seek the recovery of fees and expenses,
6 and I won't claim that a lot of time was spent talking
7 about this, but my personal impression coming out of it
8 was that was the intent, was that that case law would
9 govern. So if you sue me and assert five causes of action
10 and I move to dismiss one cause of action and win, I get
11 my attorney's fees connected with that motion. If I move
12 to dismiss all five and I win on two but lose on three,
13 then the court is going to have to have the parties
14 segregate and determine who recovers how much.
15 CHAIRMAN BABCOCK: Tom, then Carl.
16 MR. RINEY: I just want to say I think Judge
17 Christopher's statement makes sense, but I think it could
18 be subject to abuse. That is, someone could get in and
19 run up a whole lot of attorney's fees very quickly, and
20 perhaps Jeff has got a good point, if it's under existing
21 case law and it should be segregated out, that may take
22 care of it, because if a suit meets these provisions,
23 there is no basis in law or in fact, the idea is to try to
24 get rid of it quickly. The defendant ought to file
25 whatever motions they need to file. If we're going to

1 have waiver all they need to do is file a general denial
2 and a motion, and it's resolved in 45 days. There ought
3 not to be a lot of attorney's fees there.
4 CHAIRMAN BABCOCK: Yeah, Carl.
5 MR. HAMILTON: The caption says "early
6 dismissal of actions." I think the intent of the
7 Legislature is dismissing the lawsuit and not separate
8 parts of it. If the lawsuit gets dismissed, the defendant
9 is the prevailing party. If it doesn't, the plaintiff is
10 the prevailing party.
11 CHAIRMAN BABCOCK: Yeah. Yeah, Judge
12 Yelenosky.
13 HONORABLE STEPHEN YELENOSKY: Doesn't
14 current law give us enough guidance on this? I mean, if a
15 defendant manages to get it dismissed very quickly and in
16 the meantime that defendant has run up a bunch of
17 unnecessary fees, are those not unreasonable and
18 unnecessary fees and I don't award them? And if a
19 defendant knocks out one claim, one cause of action, don't
20 I look for the fees associated with that cause of action;
21 and if a plaintiff wins, don't I look at what the
22 plaintiff had to do that they wouldn't otherwise have had
23 to do without the motion to dismiss that was defeated?
24 The plaintiff still would have had to work up the case,
25 file the petition, do the discovery, but they wouldn't

1 have had to fight the motion to dismiss and all the things
2 associated with that. So doesn't a reasonable and
3 necessary fees occasioned by the thing that got knocked
4 out tell the trial court what to do?
5 CHAIRMAN BABCOCK: Pete.
6 MR. SCHENKKAN: I just want to lead us a
7 little astray from the current focus of the attorney's fee
8 discussion, but I'm most interested in knowing what, if
9 anything, we think the Court ought to include in a rule
10 about how we're going -- how the trial court is going to
11 determine the amount of reasonable and necessary fees to
12 the prevailing party, and you know, there are concerns
13 here that cut in two different directions. One concern
14 people have is that a rule that says, you know, "I'm the
15 trial judge, I know these people, I know the situation, I
16 just get to make it up and pick a number out of the air"
17 is subject to some abuse, and it makes it very hard to
18 police the abuse on appeal.
19 The opposite rule that says, you know, this
20 is a fact question, it ought to be determined by a jury,
21 comes at an extremely high cost; and those are the polar
22 opposite tensions; and then there's various efforts and
23 ways to try to compromise them and come up with something
24 sensible; and I'm thinking here that don't we want to
25 require -- and I think it would be in (f) so that we don't

1 get people thinking we're being inconsistent with the part
2 that says there's no evidence in the motion to dismiss
3 itself. We ought to say in filing a motion to dismiss
4 under this rule you must attach an affidavit with your
5 attorney's fees and -- your claimed attorney's fees and to
6 the extent it's for time you already incurred, your time
7 sheets or whatever it is, and then the party filing the
8 opposition to the motion has to do the same when they file
9 theirs and then -- and then now I'm a little less clear
10 who gets to call the question on when you need something
11 more than just looking at these two pieces of paper, and
12 that's where it gets -- gets nervous as to whether we're
13 going to make a lot of work, or we don't make a lot of
14 work but we're going to run a lot of risk of abuse.
15 CHAIRMAN BABCOCK: Frank.
16 MR. GILSTRAP: I think as long as we're
17 looking at all the angles on this I think we need to think
18 about when the attorney's fees are paid. The conventional
19 wisdom I'm hearing is people aren't going to file these
20 things unless they're just dead certain because loser
21 pays, but let's suppose plaintiff files lawsuit, defendant
22 files motion to dismiss, and the defendant prevails. The
23 case is dismissed. Plaintiff, I guess, has a judgment for
24 attorney's fees right then, right, but let's suppose the
25 defendant loses and he's got to now -- he's looking at a

1 two-year lawsuit. Well, at the end of that he may have to
2 pay the attorney's fees, but so what? He may get hit
3 anyway?
4 Now, if he had to pay the attorney's fees
5 right then it might make a big difference. But if you
6 don't -- if you say that the defendant can put off paying
7 his attorney's fees until the end of the lawsuit, it seems
8 to me you've really tilted the balance here. It's going
9 to be a lot easier and a lot more justifiable on the part
10 of the defendant to come in and file a motion to dismiss
11 because he loses, so what, I'm going to get hit anyway.
12 CHAIRMAN BABCOCK: Yeah, Professor Hoffman.
13 PROFESSOR HOFFMAN: Frank's comment made me
14 think of something else that may be in the Chair's mind a
15 little out of turn, but in thinking about that last point
16 he just made reminds me of the last part of the
17 conversation. If you file a motion under this rule aren't
18 you submitting to the jurisdiction of the court for
19 purposes of ruling on the motion? In other words, the
20 court's got authority even if it hasn't decided a special
21 appearance to decide whether to award attorney's fees, and
22 so, thus, the Tom problem that you raised before, Tom,
23 seems to be resolved. As long as we require that you file
24 it with the special appearance but make the judge do the
25 motion to dismiss first, even if the judge rules you have

1 attorney's fees and later rules he doesn't have
2 jurisdiction, you still took -- you submitted to the
3 jurisdiction of the court for purposes of getting a ruling
4 and, thus, a potential risk of attorney's fees.
5 CHAIRMAN BABCOCK: That's right, and if you
6 win, you know, it's well worth it to submit to the
7 jurisdiction because --
8 PROFESSOR HOFFMAN: But even then you don't
9 have to submit to the jurisdiction. You're just
10 submitting for the purposes of getting this ruling on
11 dismissal. So, for example, what happens if you get one
12 claim dismissed, but not the others? You might still care
13 about your special appearance, and as I was saying before,
14 I don't think it's fair to put the defendant in a catch 22
15 on that.
16 CHAIRMAN BABCOCK: Yeah.
17 HONORABLE STEPHEN YELENOSKY: Hasn't the law
18 been you're in or you're out? You don't get to come in
19 just for purposes of one motion.
20 MR. GILSTRAP: Unless we say it's different.
21 I mean, that's what we're saying here, is we're saying
22 it's different.
23 HONORABLE STEPHEN YELENOSKY: It's a
24 jurisdictional issue. I don't know that we can easily do
25 that.

1 MR. GILSTRAP: It's metaphysical.
2 CHAIRMAN BABCOCK: Carl raised a point a
3 minute ago that probably merits a little bit of discussion
4 before we take our afternoon break and then move on to
5 ancillary, but that is the issue of is it with prejudice
6 or without.
7 HONORABLE R. H. WALLACE: Yeah.
8 CHAIRMAN BABCOCK: And, Judge Wallace, what
9 do you think?
10 HONORABLE R. H. WALLACE: Well, no, I
11 wondered if we were ever going to talk about that. That's
12 a pretty important point.
13 CHAIRMAN BABCOCK: Yeah, it would be.
14 HONORABLE R. H. WALLACE: I would tend to --
15 well, I don't know. I saw a case come across my desk
16 yesterday, an inmate filed a 1983 case, a civil rights
17 case, against his lawyer who represented him in trial
18 claiming he was negligent. Okay. Now, he doesn't have a
19 1983. He might have a common law negligence case that
20 would be very hard to prove, but if I dismiss that with
21 prejudice, he's done, I guess. So I don't know, but it
22 seems to me that's a big issue of whether or not -- but if
23 you don't dismiss them with prejudice then you've got some
24 kook that's going to just keep on.
25 CHAIRMAN BABCOCK: Well, it's not even a

1 matter of kookiness. I mean, isn't at least in the
2 Federal system -- Frank, help me out on this, but in the
3 Federal system if I file a 12(b)(6) motion saying that the
4 plaintiff doesn't have a claim and it's granted, that's
5 with prejudice. It's not without prejudice.
6 HONORABLE R. H. WALLACE: The court can --
7 I've seen the court give them leave to amend.
8 CHAIRMAN BABCOCK: Yeah, leave to amend is
9 different, but, I mean, I just had a case, it wasn't in
10 Texas, but where the plaintiff presented a claim, we moved
11 to dismiss; the judge granted our motion; it went up on
12 appeal; the appeal affirmed the order; and then the same
13 plaintiff filed a similar, not identical, similar motion;
14 and they said, "No, you've already lost on the merits.
15 It's with prejudice. You're out." I mean, I thought that
16 was standard, but maybe not. Buddy.
17 MR. LOW: Doesn't that depend on which
18 situation? We have to decide now whether it's with
19 prejudice or without, and the courts don't always agree.
20 What if I file a lawsuit January 1st on, say, contract,
21 and then I'm suing these people and I could -- well, not
22 join contract with tort, but is that res judicata,
23 anything I could have filed against that person?
24 CHAIRMAN BABCOCK: Res judicata is a little
25 different, isn't it?

1 MR. LOW: Well, is it with --
2 MR. GILSTRAP: It's out of the same
3 transaction. I mean, it is.
4 CHAIRMAN BABCOCK: Yeah, but --
5 PROFESSOR CARLSON: Within the subject
6 matter jurisdiction.
7 CHAIRMAN BABCOCK: Yeah, but if the
8 dismissal is with prejudice then res judicata either
9 subsequently apply or it won't. I mean, if the parties
10 are the same, the same transaction or occurrence.
11 PROFESSOR CARLSON: Yeah.
12 MR. GILSTRAP: Yeah, you're right.
13 MR. LOW: They dismiss. They don't say
14 dismissal. They talk about dismissing, and it's a
15 question of law whether it's with prejudice or without.
16 CHAIRMAN BABCOCK: Well, let me put it a
17 different way. When would it be without prejudice? I
18 mean, jurisdiction, personal jurisdiction, obviously.
19 That's without prejudice.
20 MR. LOW: Without prejudice to do what?
21 File --
22 CHAIRMAN BABCOCK: To refile.
23 MR. LOW: The same thing against the same
24 parties, yeah, but where it's the same party but a
25 different thing that you might not even could have

1 brought. Joining contract and tort.
2 CHAIRMAN BABCOCK: Well, Carl, you raised
3 this problem, solve it.
4 MR. HAMILTON: Well, I'm not sure, but I
5 think on special exceptions if the plaintiff doesn't
6 replead and the court dismisses, I think that's without
7 prejudice.
8 MR. LOW: That's true.
9 MR. HAMILTON: Isn't it?
10 MR. LOW: And it is a dismissal, so you have
11 that, depends on the law.
12 CHAIRMAN BABCOCK: Pete.
13 MR. SCHENKKAN: I guess I'm a little puzzled
14 about the practical concern here. Why can't we just have
15 it be without prejudice so we don't run any risks of
16 sometimes -- if it's with prejudice, sometimes being
17 unfairly with prejudice and then the practical protection
18 is a guy does it again he's going to get hit again, and
19 this time we know he's going to get hit because he already
20 has been. I mean, we've already been down this road.
21 You're refiling the same thing again, and I don't have to
22 re-research my motion. I just have to file it again,
23 change the date.
24 CHAIRMAN BABCOCK: But the rule in Federal
25 court is if a 12(b)(6) motion is granted it's with

1 prejudice.

2 MR. SCHENKKAN: I understand, but I'm saying

3 I don't understand the practical problem.

4 CHAIRMAN BABCOCK: Richard.

5 MR. MUNZINGER: If I'm to assume what Buddy

6 just said, plaintiff files a suit; defendant specially

7 excepts; plaintiff refuses to amend; the court dismisses.

8 Did you say that was a dismissal without prejudice?

9 MR. LOW: That's what -- the courts hold --

10 I think that's --

11 MR. MUNZINGER: Is that what the current

12 understanding of the law is?

13 CHAIRMAN BABCOCK: That's what Judge

14 Hamilton says.

15 MR. MUNZINGER: Because if it is, it points

16 out another reason why this rule, a motion under this

17 rule, should not be joined with any other kind of relief,

18 and the rule should so specify. This -- if you're going

19 to have a dismissal with prejudice arising under this rule

20 but not under special exceptions, you don't want to have

21 the confusion as to which it was granted under.

22 MR. LOW: But, see, they talk about Federal

23 court. They enter judgment then on that, so there is a

24 judgment entered. The clerk enters a judgment. It's not

25 that way in state court, so they do consider that because

1 judgment is entered, and it is with prejudice.
2 CHAIRMAN BABCOCK: Marisa has got the
3 answer.
4 MS. SECCO: I don't have the answer, but --
5 CHAIRMAN BABCOCK: Oh, yes, you do.
6 MS. SECCO: But I just want to say that in
7 my very limited experience in Federal court a 12(b)(6) is
8 not always with prejudice. For example, if you file a
9 12(b)(6) on preemption grounds under Ariza and the person
10 can refile an Ariza claim, the court will dismiss without
11 prejudice. Also, a court will dismiss with leave to
12 amend, will grant a motion to dismiss but also include
13 leave to amend so the lawsuit actually stays open --
14 CHAIRMAN BABCOCK: Right.
15 MS. SECCO: -- during that period, so it's
16 not always with prejudice.
17 CHAIRMAN BABCOCK: Judge Yelenosky.
18 HONORABLE STEPHEN YELENOSKY: Do we have the
19 option to make it with prejudice as to what was actually
20 claimed but not with prejudice as to things that weren't
21 actually litigated? I'm looking for it now, but there is
22 a statute that pertains to county courts and district
23 courts and -- Elaine, you know?
24 PROFESSOR CARLSON: I don't know the number.
25 It's in the civil practice --

1 HONORABLE STEPHEN YELENOSKY: There's
2 concurrent jurisdiction of a county court and a district
3 court, I believe. If you choose to go in county court on
4 claim one it is not res judicata as related to claim two,
5 and she's nodding, so I believe it's true. Do we have
6 that option here? Because, again, as I said before, I
7 think the Legislature was thinking about crazy lawsuits
8 that got no claim -- I mean, that aren't possibly going to
9 have any claim, not people who, prisoner or otherwise,
10 bring a claim as you said, Judge, which doesn't have a
11 prayer and has no basis in law, but they might have a
12 related claim that does. Did the Legislature really mean
13 to knock all of those out because a pro se litigant got it
14 wrong the first time?
15 CHAIRMAN BABCOCK: Justice Hecht has
16 something to add.
17 HONORABLE NATHAN HECHT: If you won't amend
18 satisfactorily after special exceptions have been
19 sustained the dismissal is with prejudice.
20 CHAIRMAN BABCOCK: So there. Justice Bland.
21 HONORABLE JANE BLAND: I think that we
22 should not say whether the case must be dismissed with or
23 without prejudice within the rule because it's going to
24 depend on the case. They don't say it in the Federal
25 rules.

1 CHAIRMAN BABCOCK: Right.
2 HONORABLE JANE BLAND: And a couple of the
3 grounds, I think as Marisa pointed out, in the Federal
4 rules clearly are things without prejudice, like subject
5 matter jurisdiction and venue are two 12(b)(6) motions you
6 can bring, and that contemplates that you're going to go
7 file somewhere else, and the same thing I think holds true
8 for attorney's fees. We have several Rules of Civil
9 Procedures that contemplate the imposition of attorney's
10 fees, like Rule 215 sanctions, bad faith affidavits in
11 summary judgment practice, ad litem fees.
12 We've got attorney's fees kind of
13 throughout, scattered throughout, and in none of those
14 rules do we put forth a procedure for proving up
15 attorney's fees. We have a big body of case law about
16 attorney's fees, so we ought to let these things develop
17 as they can, as they come through, because one of the --
18 and we keep talking about the prevailing party, but one of
19 the things that occurred to me is that, you know,
20 everybody walk away. You won some, you won some,
21 everybody bear their own costs, and I don't know that it
22 would be unreasonable for a trial judge to rule that in a
23 case where they fought to a draw.
24 CHAIRMAN BABCOCK: Yeah, what happens --
25 this is analogous, not the same thing, but with these

1 anti-SLAPP statutes like we now have, what happens is the
2 defendant files one, and it's granted, and then the judge
3 says, "Okay, come back in a week and we'll do attorney's
4 fees," and the plaintiff nine times out of ten says, "Hey,
5 if you'll waive attorney's fees, let's just forget this
6 ever happened," and the defendant nine times out of time
7 says, "Hey, cool, we're done," and that's that. Buddy.
8 MR. LOW: There's one thing I pointed out to
9 David, and it's not a big deal, but the statute says
10 "shall award attorney's fees," and we put "must," and I
11 point out that "will," "shall," and "must" has different
12 meanings of first party, second party, third party; and I
13 say, "I will," that's definite. "You shall," and "must,"
14 I've forgotten how that ties in. I wonder if there is a
15 reason why, and Carl seems to think that "must" has some
16 discretionary function maybe.
17 MR. HAMILTON: "Shall."
18 CHAIRMAN BABCOCK: Dorsaneo has some thought
19 about those.
20 PROFESSOR CARLSON: Well, that stems from
21 the venue law where trying to determine whether the
22 Legislature intended the venue statute to be permissible
23 or mandatory before they were listed under a hearing, and
24 there are cases that said the legislative intent on
25 "shall" is not mandatory with some discretion. "Must" is

1 a must, and "may" is a may.
2 MR. BOYD: Which if I remember -- and
3 Dorsaneo is not here, but I think on one of our conference
4 calls didn't we discuss and decide that this was intended
5 to be mandatory in light of all the shalls that are in
6 there, and Dorsaneo said if that's the case then the rule
7 ought to say "must," not just "shall," because using the
8 word "shall" under some of this older case law gives
9 parties a chance to argue that the judge doesn't really
10 have to.
11 MR. LOW: On the verse of Dorsaneo.
12 CHAIRMAN BABCOCK: Judge Peeples, we've got
13 two alternatives here. One is we could have a series of
14 votes on every single little thing we've talked about
15 today, or your subcommittee could maybe study this again
16 and then come back next time for a discussion on a
17 revised -- on a revision, the discussion to last no longer
18 than 60 minutes. Your choice.
19 HONORABLE DAVID PEEPLES: I think Justice
20 Hecht needs to give us guidance, but --
21 CHAIRMAN BABCOCK: I am speaking for Justice
22 Hecht.
23 HONORABLE DAVID PEEPLES: I think the
24 subcommittee needs to work on it again and come back to
25 the full committee.

1 CHAIRMAN BABCOCK: Yeah, that's what we'll
2 do.
3 MR. BOYD: Can I ask a question, though,
4 that will be helpful to -- at least to me on the
5 subcommittee? Because I'm sitting here trying to
6 remember, what is the effect of with prejudice? Is it
7 claim preclusion? Is it issue preclusion? Is it res
8 judicata, any and all claims that could have been asserted
9 arising out of the same transaction or occurrence? Does
10 anyone know?
11 HONORABLE TRACY CHRISTOPHER: Any and all
12 claims.
13 MR. BOYD: Any and all claims, so with
14 prejudice is any and all claims arising out of the same
15 transaction.
16 PROFESSOR CARLSON: Within the jurisdiction.
17 CHAIRMAN BABCOCK: Yeah. I think that's
18 right. Okay. Let's take our afternoon break, and when we
19 come back we will get back to the ancillary rules. And
20 the next meeting is only three weeks away.
21 (Recess from 2:58 p.m. to 3:17 p.m.)
22 CHAIRMAN BABCOCK: Okay. Elaine, catch us
23 up, where are we and what are we doing?
24 PROFESSOR CARLSON: All right. Our
25 ancillary task force completed its report, and now the

1 matter is coming before this committee. We've
2 substantially reviewed injunctions, and Dulcie Wink
3 presented that; and we return next session, time
4 permitting, with a few tweaks, I believe, in light of the
5 last suggestions from this group; and in the September
6 meeting we substantially completed attachment; and the
7 good news is, is that attachment, garnishment,
8 sequestration, and distress warrants are all modeled or
9 were modeled whenever feasible to have mirror provisions.
10 So many of the provisions we'll look at in these other
11 ancillary proceedings, sequestration, garnishment, and
12 eventually distress warrants, you've looked at before in
13 the context of attachment, except to the extent they had
14 to be unique because of the type of relief that's being
15 sought. That is the good news.
16 We still have left to review from the
17 ancillary task force turnovers and receivers at some
18 point, execution, trial of right of property, and distress
19 warrants, I guess. Yeah. So today we're going to pick up
20 with attachment where we left off at the last meeting, and
21 Pat Dyer is going to lead our discussion.
22 MR. DYER: Okay.
23 CHAIRMAN BABCOCK: Okay, Pat.
24 MR. DYER: First off, we discussed a number
25 of editorial changes. Those have been made in attachment.

1 Parallel changes have also been made in sequestration and
2 garnishment, but if you look at page one of attachment
3 you'll see the strike-through on Rule 1(a), the pending
4 suit required for, that was one of the editorial comments.
5 So in this revision when you see a strike-through, that
6 strike-through is one of the editorial changes that we
7 made at the last session. Substantively, if we move to
8 the third page, and I apologize that these are not
9 paginated, but dealing with the applicant's bond, one of
10 the questions raised was whether the -- the amount of the
11 applicant's attachment bond would cover continually
12 increasing storage costs; and the answer to that is, yes,
13 if you prove wrongful attachment, because the rule
14 specifically allows for damages and costs to be recovered
15 by the respondent if they win on a wrongful attachment.
16 The rule does not address the recovery of
17 costs if wrongful attachment is not established.
18 Therefore, it would not cover increasing storage costs in
19 all instances. So there's no provision under the current
20 rule that permits a respondent to recover costs under the
21 bond without proving wrongful attachment, and that's
22 because the attachment bond is there only to be recovered
23 against if wrongful attachment is proven.
24 If we look at -- the next substantive change
25 is in Rule 3(c), contents of writ, time for return. We

1 had -- the subcommittee had proposed changing the language
2 from what it currently reads, "At or before 10:00 o'clock
3 a.m. on a Monday next after the expiration of 15 days."
4 The subcommittee recommended changing it to the 30, 60,
5 90-day return that's used in execution. The question was
6 asked whether or not we're affecting substantive rights.
7 I've not found any case law or commentary specifically
8 addressing that issue, but effective September 1 of 1942,
9 the language that we currently have, the "at or before
10 10:00 o'clock a.m." language replaced the next session of
11 court language.
12 So the issue was raised, what about filing
13 your return after the date it's supposed to be, a late
14 return, and whether or not that affects anything. We all
15 agreed that levy of a writ after its expiration or return
16 date was void. The question was what if the levy was
17 timely but the return is late, what effect does that have?
18 There's nothing of recent origin addressing it, but I went
19 back to 1883 and found a Texas Supreme Court case. The
20 writ was returned more than one year after the levy. The
21 allegation was made the levy was void. Court said, "No,
22 at least not in these circumstances." It suggested there
23 might be a different change if an intervening party
24 attached the same property or if someone else claimed a
25 lien in the interim period or if the timing of the late

1 filing was the fault of the applicant. So the general
2 rule is, no, under the case law it doesn't generally
3 affect it. So overall the subcommittee still believes
4 that the proposed change does not affect any substantive
5 rights.
6 If we move now to return of writ, which is
7 Rule 4(d) in subsection (2), we've taken out the language
8 that required that the return had to be endorsed on or
9 attached to the writ. That's to comply with the new
10 statute on -- that deals with the endorsement. The next
11 substantive area that we addressed, that there was a
12 question, is on Rule 8, dissolution or modification of
13 order or writ, and it's subpart (f), dealing with a third
14 party claimant. The current rule refers to an intervening
15 party being able to file a motion to dissolve the writ,
16 but then it doesn't address anything else about that
17 intervening party.
18 This is overall a new rule to give an
19 expedited procedure rather than having to go through the
20 trial of right of property, and the best example I can
21 give, let's say 10 copiers are attached under a writ of
22 attachment, and an equipment lessor comes in and says,
23 "That's my property. That doesn't belong to this debtor,"
24 and no one disputes it. That party ought to be able to
25 use an expedited procedure to get the copier back. Our

1 current rules basically say you would have to file a trial
2 of right of property. So the change has been made. The
3 two highlighted changes is that the third party claimant
4 does have to comply with the motion requirements under
5 Rule 8. That was not clear in the previous iteration.
6 Secondly, the question was asked whether or
7 not an order of the court on the third party's claim would
8 be res judicata of possession or ownership. To make it
9 clear that it's not we've added that the court may order
10 the release of the property to the third party claimant
11 pending further order of the court, so it will be an
12 interlocutory order.
13 MR. MUNZINGER: I've got a question.
14 CHAIRMAN BABCOCK: Okay.
15 MR. MUNZINGER: Would it be better if you
16 said "subject to further order of the court"?
17 MR. DYER: I can go with that. I don't have
18 a problem with that. Does that make it more clear that
19 it's interlocutory?
20 MR. MUNZINGER: It seems to me that it does.
21 If it's saying "subject to further order of the court" it
22 makes it clear that that's not a final order.
23 CHAIRMAN BABCOCK: Okay. Keep going then.
24 MR. DYER: I'm okay with that.
25 CHAIRMAN BABCOCK: Okay. Keep going.

1 MR. DYER: Now we move to Rule 10, which is
2 where we left off last session, and Rule 10 and Rule 12
3 are virtually identical in sequestration, distress
4 warrant, and garnishment. They deal with perishable
5 property and the amendment of heirs. So I think we can
6 knock them all out here with regard to this four. The
7 perishable property rules right now are all over the
8 place, and even though we're using identical rules for
9 four sets of writs, we wanted a practitioner to go to one
10 set of rules to find out all that that practitioner needed
11 to know from the start to the beginning, so we have
12 repeated provisions, almost identical, in each of the four
13 sets for perishable property and amendment of errors.
14 The language in your copy, the highlighted
15 provisions are substantively the same. They come straight
16 out of the rules. The unhighlighted, regular print, those
17 are new. So if we look at the definition of perishable
18 property, it comes out of the existing rules. We've added
19 one clarification just to make sure that no one thinks it
20 applies to real property, and that is in the second two --
21 or the last sentence, it says, "For the purpose of this
22 rule the word 'property' refers to personal property."
23 (b) is straight out of the existing rules. (c) is a
24 little bit different. We have changed it to provide for a
25 motion practice with regard to perishable property as

1 opposed to reports by the officer in possession or the
2 court. We wanted to make it more clear that this needs to
3 be presented to the court even if it's on a very, very
4 expedited basis. (d) provides for a hearing on the
5 motion, but does still allow the judge or justice of the
6 peace to order this on a very, very short notice, and the
7 example we're talking about are your tomatoes that are
8 already one day overripe.
9 If we move now to (e), a bond is typically
10 going to be required unless it's a motion that's filed by
11 the applicant or respondent, and the reason we have there
12 is because under the proposed rules both of those parties
13 may seek to replevy, so if they replevy, a bond is already
14 going to be posted, but if they're moving for the sale of
15 the property, another bond is not required. (f) is a
16 substantially -- well, it's basically new because we've
17 provided a provision -- provided a provision, that's
18 articulate.
19 MR. MUNZINGER: May I ask a question?
20 MR. DYER: Yes.
21 MR. MUNZINGER: Where do you provide for the
22 setting of the amount of the movant's bond?
23 MR. DYER: It's in (e). It just says "as
24 ordered by the court." "A bond payable to the applicant
25 or respondent, as ordered by the court." Now, this is an

1 additional bond that we're talking about. By this time
2 property has already been attached, so there's an
3 attachment bond, and one or the other party may have also
4 filed a replevy bond, so this doesn't speak to another
5 separate amount other than to give the court discretion
6 "as ordered by the court," but the applicant and the
7 respondent have already had to file one or more bonds.
8 They don't have to file another one.
9 MR. MUNZINGER: So the amount of the bond
10 has already been set?
11 MR. DYER: The amount of the attachment bond
12 and the replevy bond has already been set, but there is
13 not a third bond required unless there would be an
14 intervening party, someone else to come claim in who has
15 not been subject to a bonding requirement.
16 MR. MUNZINGER: Well, when I read this the
17 first time when it said "as ordered by the court" I
18 interpreted that as meaning the court determines whether
19 the bond would be payable to the applicant or the
20 respondent as distinct from its amount. Do you see my --
21 MR. DYER: Yeah.
22 MR. MUNZINGER: -- why I was thrown off by
23 it?
24 MR. DYER: Yes.
25 MR. MUNZINGER: And I don't know if anybody

1 else has that same concern or not. It just didn't seem
2 perfectly clear to me that the amount of the bond would be
3 set by the judge. Obviously he's going to have to do it,
4 but the rule doesn't seem to say that as clearly as it
5 might.
6 MR. DYER: Okay. If we were to say, "Unless
7 the movant files with the court a bond set by the court
8 payable to the applicant or respondent, as ordered by the
9 court"?
10 MR. MUNZINGER: Yeah, I think that does
11 both. Other people may disagree with me, but --
12 MR. DYER: "Files with the court a bond in
13 the amount set by the court."
14 CHAIRMAN BABCOCK: "In an amount set by the
15 court."
16 MR. DYER: Okay.
17 CHAIRMAN BABCOCK: Okay.
18 MR. DYER: Our review of the rules indicated
19 that in certain instances a judge might not be required to
20 sign a written order with regard to this. In (f) we
21 wanted to clarify that a written order is required.
22 Subparts (g) and (h) are taken straight out of the
23 existing rules.
24 MR. HAMILTON: I have a question.
25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: On this motion, under the --
2 that's not required under the current rules, and if you're
3 going to require service under Rule 21a, does that mean
4 that the court can't even hear that motion for three days
5 or four days or --
6 MR. DYER: No. We address that I think in
7 (d). "The judge or JP must hear the motion with or
8 without notice as the urgency of the case may require."
9 We wanted to allow there even to be instances effectively
10 where the court decides even without notice something has
11 got to be done with this property. The example given was
12 the sheriff comes to the judge and says, "Judge, this
13 stuff is rotting away. Half of it's already gone." We
14 wanted to allow the judge to actually be able to order a
15 sale, even if they could not provide notice to the parties
16 at that point.
17 MR. HAMILTON: So the motion really is
18 not -- the motion and the service are really not required
19 before the judge can act then?
20 MR. DYER: Well, our intent was to require
21 that a motion be filed but to recognize that there would
22 be instances where the court might have to act alone.
23 CHAIRMAN BABCOCK: Carl, are you talking
24 about (f) now?
25 MR. HAMILTON: No, I'm talking about (c) and

1 (d).

2 CHAIRMAN BABCOCK: Okay.

3 MR. DYER: If you look at (d), the second

4 part, "The judge or justice of the peace may, based on

5 affidavits or oral testimony, order the sale of perishable

6 property." Okay. And actually that's where we address

7 the amount of the bond.

8 MR. HAMILTON: But (c) requires a copy of

9 the motion be delivered to the person in possession and

10 served on all other parties, so like citation is served --

11 I sort of read that to mean that you're going to be giving

12 them notice you've got to give them notice several days

13 before the hearing, and a lot of times the perishable

14 commodities are going to be gone by then.

15 CHAIRMAN BABCOCK: Well, the hearing could

16 be without notice according to this, right?

17 MR. DYER: Right. That's what we wanted to

18 have, but I think he's raising a rule that the reference

19 to Rule 21a may import the three-day requirement.

20 MR. HAMILTON: Yeah. Why do we have (c)

21 giving then of giving everybody notice under 21a if we're

22 going to do it without notice?

23 MR. DYER: Well, you're going to have

24 situations where it's the rotten tomato scenario, but you

25 may also have -- and I think a lot of practitioners are

1 picking up on this now -- where you've got market
2 depreciation, which isn't the same as the rotten tomatoes
3 where you're going to lose everything, but the value of
4 the property is depreciating so quickly that you make the
5 argument it's perishable property, and therefore, I want
6 to move the court to sell it, and that can actually solve
7 a lot of problems with posting a replevy bond, but we
8 wanted to allow discretion for those emergent
9 circumstances like the rotten tomatoes where the judge
10 could rule without a hearing, as the urgency of the case
11 may require.
12 CHAIRMAN BABCOCK: Justice Christopher.
13 HONORABLE TRACY CHRISTOPHER: Well, are you
14 anticipating that the sheriff will file a motion?
15 MR. DYER: No, the sheriff is included in
16 the oral testimony. I think Judge Lawrence actually
17 recounted an instant where the constable came up to him
18 and says, "We've got to get rid of this stuff. We've got
19 to sell it," and he did not have enough time to notify any
20 parties, and they just made the executive decision to do
21 it.
22 HONORABLE TRACY CHRISTOPHER: But it say --
23 (d) says "must hear the motion." So you haven't allowed
24 the judge to make this order without motion or essentially
25 on its own motion, based on the testimony of the sheriff.

1 MR. DYER: Yeah. Yeah.
2 HONORABLE TRACY CHRISTOPHER: I think he
3 ought to be able to act on his own motion, but that's not
4 in here right now.
5 MR. DYER: Okay. Let me recommend that I
6 revisit that. I think if we add language into (d) we can
7 address that concern.
8 CHAIRMAN BABCOCK: Great.
9 MR. DYER: That's all I have on 10.
10 CHAIRMAN BABCOCK: Okay. Any other comments
11 on 10, besides what we have? Keep going, Pat.
12 MR. DYER: Rule 11, most of that comes out
13 of the existing rule that the sheriff or constable has
14 custody of the property, must sign a report describing the
15 disposition of the property when it's claimed, replevied,
16 or sold. We also wanted to make sure that the report
17 describes the condition of the property as well as the
18 disposition of it on the date and time of replevy. That's
19 to avoid arguments over what the condition of the property
20 was on those dates.
21 MR. MUNZINGER: I have a question.
22 MR. DYER: That's all I have on 11.
23 CHAIRMAN BABCOCK: Okay. Richard.
24 MR. MUNZINGER: Is there any need that the
25 report be filed promptly? I don't -- because you have

1 here that "The sheriff or constable who had custody of the
2 property must immediately complete and sign a report," but
3 there's nothing concerning when it must be filed, and I
4 don't know what the report is used for or whether there is
5 or isn't any kind of urgent necessity that it be filed
6 promptly, but if it is, the rule is silent on the need for
7 filing the report promptly.
8 MR. DYER: Yeah. Yeah. Well, I guess we
9 have two options. We could use the adverb "immediately"
10 in the last sentence, or we could change both of them to
11 "as soon as practicable," which we have done in some of
12 the other rules.
13 CHAIRMAN BABCOCK: You could say, "The
14 report must be promptly filed" --
15 MR. DYER: Right.
16 CHAIRMAN BABCOCK: -- "with the clerk or
17 justice of the peace."
18 MR. DYER: Okay.
19 MR. MUNZINGER: "Immediately complete and
20 sign and promptly file a report," which would distinguish
21 between "prompt" and "immediate."
22 CHAIRMAN BABCOCK: Uh-huh.
23 MR. DYER: Well, but it also has to pick up
24 that second to the last sentence with regard to describing
25 the condition, so we could just change the last sentence

1 to "The report must be promptly filed with the clerk or
2 justice of the peace."
3 CHAIRMAN BABCOCK: Okay. What about Rule
4 12?
5 MR. DYER: Okay. Rule 12, the current rule
6 on amendment of errors, there's case law out there that
7 distinguishes between a clerical error and a
8 judicial error, and ordinarily a return can be amended for
9 a clerical error. If it's anything else, there's a motion
10 procedure with the court. All of the subcommittees in
11 these rules said we need to break these out into three
12 different time frames. The first is you file your
13 application and you have not yet gotten your court order
14 and you notice that your application contains something
15 that's wrong. The wrong VIN number of a vehicle, for
16 example. We see no harm to the respondent to allow free
17 amendment without having to go to the court to change that
18 application or to change a description in the application,
19 and the -- we've made it clear that that doesn't require
20 leave of court or notice to the respondent because no
21 order has yet been issued and the writ has not yet been
22 issued, but I've included the last part, the last clause,
23 which is consistent with the existing rule, "must be filed
24 with the clerk at a time that will not operate as a
25 surprise to the respondent."

1 If it's before the order has ever even been
2 signed, that's not going to be a problem. Subsection (b)
3 is you've now -- yes.
4 MR. MUNZINGER: What happens if the
5 respondent receives your order, sees a description of the
6 property, is not concerned with the property described,
7 but the error that you now discover, you go to the court,
8 you change it, and this person is concerned with the error
9 of the -- an error in the description of the property?
10 The VIN number of the automobile. I don't care what they
11 do with that car that sold, but this one here is a real
12 jewel, and I want this one. Is the fellow prejudiced or
13 person prejudiced at all by the change? Is there a
14 possibility that a person could be prejudiced in their
15 property right or right to defend or appear their property
16 and protect their property by an amendment to an error of
17 the application in which they're not given notice.
18 MR. DYER: Well, at this stage you filed an
19 application, and you have not yet obtained either the
20 order or the writ. You've got an application that says
21 "blue sedan, VIN #123," and it's a red sedan VIN 123 or
22 the VIN is different. The defendant has not yet even been
23 served, and all you're doing is correcting a truly
24 clerical error. Now, you cannot change the substantive
25 basis of the application if it turns out, for example,

1 you're trying to change it from a wrongful attachment to a
2 good attachment. That's a little bit different and is
3 addressed in subsection (c).
4 MR. MUNZINGER: But the person who would be
5 affected and whose property will be affected by attachment
6 will have been given the correct description when those
7 papers are served on that person?
8 MR. DYER: That's what (a) seeks to do, is
9 to allow for the applicant to change the application so
10 that the order and the writ reflect the correct
11 information, and that's what's served on the respondent.
12 MR. MUNZINGER: Thank you.
13 MR. DYER: In part (b) you've gotten your
14 order from the court, but you have not yet gotten the writ
15 levied. Because the writ has not yet been levied, the
16 committee felt still at this point the rights of the
17 respondent have not been harmed, and free amendment ought
18 to be allowed at this stage also, but -- okay. It's
19 treated the same basically as (a), because the writ has
20 still not yet been levied, so let's say the order now
21 contains the same information that was in an inaccurate
22 application, but the writ has not yet been prepared and
23 served. We still think you ought to be entitled to free
24 amendment to correct that type of clerical error without
25 having to move the court or notify the respondent.

1 MR. MUNZINGER: Does this take into
2 consideration the possibility that someone might not
3 choose to resist, contest, or appear the writ because of
4 the property description, but that decision would be
5 different if the proper property were described?
6 MR. DYER: But at this stage the property
7 has not yet been attached. You've got an application, and
8 you've got an order. The order and writ have not yet been
9 served.
10 MR. MUNZINGER: And is attachment always
11 without the right to appear and contest it?
12 MR. DYER: Well, most of the time it's ex
13 parte, but let's say you file an original petition and you
14 don't seek attachment. You seek attachment later, but
15 your application still contains an error. Because the
16 defendant has been served at that point, that party would
17 be entitled to receive notice of a change in the
18 application, but we're still saying it ought to be freely
19 amended. There's no requirement at this stage that the
20 court have to grant leave.
21 CHAIRMAN BABCOCK: Is that okay, Richard?
22 MR. MUNZINGER: You know, I just -- I'm
23 obviously concerned about a person losing a right to
24 contest or do something because of -- I wouldn't call it
25 inadvertence, but I'm not going to go to a hearing on

1 that. It doesn't make any difference to me. They only
2 want two of my chickens. Hell, I've got two million, and
3 so the number is changed from 2 to 20,000, or whatever it
4 might be. It can be a substantive change that could
5 affect a person's decision to defend or not defend or
6 appear or not to appear, and it could have substantive
7 effects on the citizen, and that is troubling to me.
8 MR. DYER: The writ of attachment has not
9 yet been levied at this stage, so none of the respondent's
10 property has been attached. So let's say your order says
11 two chickens, but your application said 20,000 chickens.
12 MR. MUNZINGER: But what if I went to the
13 judge and wanted to argue about the issuance of the order
14 in the first place? Do I not have that right to go and
15 contest the issuance of the writ?
16 MR. DYER: Yes, you would have that right.
17 You would have that right if it's not an ex parte
18 application at the institution of the lawsuit. But at the
19 ex parte stage when you've just filed your lawsuit, no,
20 you have not given the respondent any notice at all. So
21 if you want to equate that with no right, well, yeah,
22 because the defendant hasn't been notified. If you file
23 an application after the lawsuit has been filed and the
24 defendant has filed an answer, then the defendant has
25 appeared and anything you file would under the regular

1 rules of procedure have to be served on the defendant.
2 If at that stage the order is inaccurate and
3 you want to amend the order to reflect your true -- you
4 know, to reflect what was in the application, then, yes,
5 the respondent could come in and argue. I don't know how
6 that behooves the respondent because the writ has not yet
7 been levied, and if I'm the applicant and say, "Well, your
8 Honor, I'm entitled to amend. The order does not reflect
9 the facts as stated in the application. I'm entitled to
10 amend." So the court now amends the order. What has the
11 defendant lost in that regard? The property has not yet
12 been attached.
13 Now, once the property is attached then
14 that's different. Then you have to go to the court and
15 ask for leave to amend clerical errors. Now, keep in
16 mind, substantive errors can't be fixed this way, even
17 with leave of court. Let's say I file a writ of
18 attachment and I claim that I've got a debt that's due,
19 and it's false. You can't go back and amend the
20 substantive grounds for the attachment to avoid a wrongful
21 attachment claim.
22 MR. MUNZINGER: Well, I'm looking at
23 subsection (c) of attachment Rule 12. It has no changes
24 on it, and it says, "After order and levy of the writ" --
25 "after levy of a writ of attachment," et cetera, "the

1 court in which the suit is filed may grant leave to amend
2 clerical errors in the application. Any supporting
3 affidavits," et cetera, et cetera. That does not say that
4 the other party is given notice of these, and that's after
5 the order and writ have been issued.
6 MR. DYER: It says "on motion, notice and
7 hearing."
8 MR. MUNZINGER: You're correct. I
9 apologize. Thank you.
10 MR. DYER: That's all I have.
11 CHAIRMAN BABCOCK: Okay. What else? Any
12 other comments about Rule 12? Going once. Okay. Does
13 that mean we can get to sequestration?
14 MR. DYER: Yes.
15 CHAIRMAN BABCOCK: Cool.
16 MR. DYER: You want me to proceed through
17 each rule or each subsection of each rule?
18 CHAIRMAN BABCOCK: Let's go through each
19 rule.
20 MR. DYER: Okay. First off, the format is
21 as close to identical as the format for attachment. One
22 thing that we did note in a harmonizing committee is that
23 some of these rules --
24 CHAIRMAN BABCOCK: Wait a minute, you had a
25 harmonizing committee?

1 PROFESSOR CARLSON: Harmonization.
2 CHAIRMAN BABCOCK: Was that a subcommittee
3 of the bigger subcommittee?
4 MR. DYER: Well, basically the editorial
5 committee.
6 CHAIRMAN BABCOCK: Okay, good. I could feel
7 harmony.
8 MR. DYER: Well, there was sometimes
9 cacophony.
10 CHAIRMAN BABCOCK: Oh, gee.
11 MR. DYER: All four of these writs are so
12 close in what they seek to do, it amazed me that they
13 didn't all have exactly the same provisions, and it looks
14 like four different committees worked on each one of them,
15 and the left hand didn't know what the right hand was
16 doing, so where appropriate we tried to include what we
17 thought should have been included as applicable.
18 We go to 1(a). That's taken out of the
19 existing rules in Civil Practice and Remedies Code.
20 Subpart (b), the same. The addition we made in (b) is the
21 same as we made to attachment. We've added "to the
22 property" to clarify that the relevant claim isn't the
23 cause of action, but the basis for the claim to the
24 property. Part (2), that's out of the statute, except we
25 have made a specific reference to "as provided in Chapter

1 62." That was to parallel what we had in attachment.
2 Subpart (3) is different. (4) is -- the only change we
3 made in (4) says, "It states the amount in controversy."
4 We added to clarify "of the underlying suit." Subpart (5)
5 is out of the statute. Subpart (c) is out of the statute.
6 One change, and perhaps this is addressed in
7 the law that says you can use a declaration instead of an
8 affidavit. The CPRC requires that an application be under
9 oath, so I assume that the declaration under the new
10 statute would satisfy that also because I believe it
11 substitutes any requirement for an affidavit or an oath.
12 Subpart (d) is straight out of the statute. Subpart (e),
13 it's mostly out of the statute, but (e)(1) just makes --
14 the "returnable to the court that issued the writ" was a
15 clause that was in a rule that had a lot of other concepts
16 in it. We broke that out just to make sure it's as clear
17 in the way the order is returned. Subparts (2) and (3)
18 are straight out of the existing rules.
19 Subpart (4) is new. In attachment and
20 garnishment I believe the rules command the sheriff to
21 levy on the property and keep it safe and preserved
22 subject to further order of the court. We concluded that
23 ought to be the same here in sequestration. By the way,
24 you'll also note, in sequestration, as opposed to what
25 we'll be discussing later on in garnishment.

1 Sequestration addresses only sheriffs or constables
2 because of the seizure of property is involved, and other
3 authorized officers aren't allowed to seize property, so
4 that's why they're not referenced here. We only reference
5 sheriffs and constables.
6 Subpart (5) is straight out of the current
7 rule except for the last phrasing. We have added
8 "wrongful sequestration," where instead the current
9 language uses "wrongfully suing out such writ of
10 sequestration," to clarify what that is. The current rule
11 has two specific references to damages that are
12 recoverable under 62.044 and 62.045. We removed those
13 references. It's not a substantive change. It's just to
14 get out a specific reference to a statute. Subpart (6)
15 is -- it's out of the existing rule and statute, but we
16 have broken it out to clarify that in sequestration the
17 amount of the replevy bond depends on the type of suit
18 that's been filed. If a respondent wants to file a
19 replevy bond and the plaintiff's lawsuit seeks to enforce
20 a lien or mortgage on the property, the defendant does not
21 have to account for the fruits, hire, or revenue or rent
22 of the property; and the reason for that is suit for
23 enforcement of lien or mortgage does not entitle the
24 creditor to immediate possession. The debtor still has
25 possession and, therefore, would be entitled to use that

1 property while it's still in its possession, just like it
2 would under the lien without a default. So to make that
3 clear, we broke it out. The current rule was a little bit
4 difficult and cumbersome, so we broke it up.
5 (6)(a) deals with the situation where the
6 suit is for the enforcement of a mortgage or lien, and the
7 replevy bond is set equal to the lessor of the value of
8 the property or the amount of the plaintiff's claim.
9 Subpart (b) is if the suit is other than for enforcement
10 of a mortgage or lien, and in this situation you'll see
11 that the replevy bond does have to include the value of
12 the fruits, hire, revenue, or rent.
13 If we go to subpart (c), this is what we
14 have added in all four of these sets to make it more clear
15 when multiple writs can issue, to make it clear that a
16 second writ can issue before the first one has been
17 returned, and that they may be sent to different counties
18 and, finally, to impose a duty on the applicant that if
19 multiple writs have been issued the applicant must inform
20 the officers to whom the writs are delivered that multiple
21 writs are outstanding. That's to reduce the chance for
22 excessive levy.
23 CHAIRMAN BABCOCK: You're talking about
24 (c)(7), right?
25 MR. DYER: Yes.

1 HONORABLE HARVEY BROWN: And what happens if
2 they don't?
3 MR. DYER: If they don't?
4 HONORABLE HARVEY BROWN: Inform the
5 constable of the other writs.
6 MR. DYER: We don't have anything that
7 specifically addresses that. The duty is new. The duty
8 has not been in there, but we've not provided anything for
9 a violation of that duty.
10 CHAIRMAN BABCOCK: Okay. Any comments on --
11 that have not already been made on sequestration Rule No.
12 1? Okay. Let's go to 2.
13 MR. DYER: Okay. 2(a) is taken straight out
14 of the rule with -- well, with the exception that the bond
15 is filed with and approved by the clerk or the justice of
16 the peace rather than the officer. Subpart (b), we've
17 added to all of the sets so that Rule 14c can be used with
18 regard to posting a bond. Subpart (c) deals with review
19 of the applicant's bond. We have taken the language
20 straight out of what we had for attachment and brought it
21 into here. Substantively there's no change from the rule.
22 It just clarifies how the court may determine the issue.
23 That's all of 2.
24 CHAIRMAN BABCOCK: Any comments on 2?
25 Richard.

1 MR. MUNZINGER: Does an evidentiary hearing
2 as contemplated in subsection (c) require oral testimony
3 or may affidavits be considered?
4 MR. DYER: At the last session we decided
5 evidentiary hearing required an oral hearing. You could
6 submit affidavits, but if the facts are controverted then
7 you have to go to the oral hearing, and this was the
8 language we agreed to at the last session.
9 CHAIRMAN BABCOCK: Okay. Justice Brown.
10 HONORABLE HARVEY BROWN: How do you
11 controvert the facts? Do you have to have an affidavit?
12 Do you just say, "I controvert"?
13 MR. DYER: Well, we actually had this
14 discussion last session, but --
15 HONORABLE HARVEY BROWN: Oh, I'm sorry.
16 Never mind.
17 MR. DYER: We decided that the language as
18 it existed was uncontroverted facts. We decided
19 file affidavits -- excuse me, uncontroverted affidavits.
20 We decided to change it to "affidavits that controvert the
21 facts" to make it clear that there has to be an affidavit,
22 but it actually has to controvert a fact. The mere fact
23 that you filed an affidavit stating "I controvert" would
24 not be sufficient.
25 CHAIRMAN BABCOCK: Judge Wallace, did you

1 have your hand up or you're just stretching? Anything
2 else on 2? Let's go to 3.
3 MR. DYER: Part (a), this is one of those
4 instances where the rule did not provide that the writ had
5 to be dated and signed by the district or county clerk or
6 bear the seal of the court. We just applied that across
7 the board to all of the writs. Subpart (b), essentially
8 it's the same as what's in the current rule, but we've
9 changed the language to make it clear that the language
10 has to equal the language that's in the order and command
11 the sheriff or constable to levy on it, keep it safe, and
12 preserve subject to further order of the court.
13 Time of the return, we've changed --
14 sequestration does not have any language in there
15 regarding when it's supposed to be returned. We changed
16 it to the 30, 60, 90-day rule that's used for execution
17 and that we've recommended to be used by attachment.
18 Notice to respondent, the sequestration statute requires
19 that the notice be in 10-point type. The attachment
20 statute did not. In attachment we changed to it to
21 12-point type. Given the fact that we've got the
22 requirement of 10-point type, we suggested adding in "not
23 less than" in front of that to stay attuned to the statute
24 without necessarily violating it.
25 In the notice itself the only part required

1 by the statute is the highlighted part. We have added the
2 first paragraph to parallel the language that's used in
3 attachment. The second paragraph was added, also to
4 parallel attachment, but in sequestration as well as the
5 other writs to alert the debtor that there may be
6 exemptions that can be claimed under Federal or state law.
7 Subpart (e), there is no existing form of writ in the
8 rules. There is an existing form of writ for attachment.
9 We've just added this to make it parallel. And that's the
10 end of 3.
11 CHAIRMAN BABCOCK: Okay. Anything on 3?
12 Any comments on 3?
13 MS. SECCO: I've got one comment.
14 CHAIRMAN BABCOCK: Marisa.
15 MS. SECCO: I mentioned this earlier, but if
16 you're going to -- and it plays into 4, but if you're
17 going to remove the requirement that the return be
18 attached to the original writ, it might not -- you might
19 want to use language other than "The writ is returnable,"
20 if the writ is not actually being returned to the court.
21 I don't know if --
22 MR. DYER: No, the writ has to be returned
23 to the court.
24 MS. SECCO: Okay. Okay.
25 MR. DYER: It doesn't -- hold on. Hold on.

1 All right. Which section are you looking at?
2 MS. SECCO: I'm just looking at section (c)
3 of Rule 3, but this question might be better suited to
4 when we get to section (d) of Rule 4, so maybe I should --
5 MR. DYER: Yes, I agree. I agree.
6 CHAIRMAN BABCOCK: Okay. Any other comments
7 on 3? Moving right along to 4.
8 MR. DYER: Okay. 4 is new for
9 sequestration, but it parallels methods of levy that are
10 in attachment that we discussed the last time, how it's
11 delivered, how you make a levy. We do have one perhaps
12 substantive problem, method of levy on real property, and
13 this is something that Professor Dorsaneo and I have
14 discussed. Under current case law, to serve a writ of
15 sequestration on real property requires the eviction of
16 anybody living on the property. I did not know that until
17 we went back and looked at some pretty old law, but we
18 have not provided for that nor specifically addressed it
19 in the real property section on sequestration. We've just
20 said that you can levy on it the same way you can with
21 attachment.
22 Our thought was we would prefer that there
23 not be eviction of people by a levy of sequestration, but
24 we thought that it was unnecessary. Nonetheless, the case
25 law being out there, I don't know necessarily if it will

1 still apply. Other than that --
2 MR. MUNZINGER: Could you point me to the
3 rule that you were addressing just now?
4 MR. DYER: It's method of levy, (c)(1), on
5 Rule 4. In attachment, to levy on a piece of real
6 property all you do is file a copy of the writ with the
7 county clerk, and that's it. The writ's levied. Case law
8 under sequestration says, no, you also have to evict the
9 people on the property.
10 MR. MUNZINGER: The reason I asked you to
11 point to the rule is it would seem to me that if the rule
12 has not changed in substance you have not affected the
13 preexisting case law at all, and the rule remains that you
14 must evict them from the property.
15 MR. DYER: You may be right.
16 MR. MUNZINGER: Well, the substance of the
17 rule is unchanged. Do you agree?
18 MR. DYER: No. There is no method of levy
19 in existing sequestration rules. There's only case law.
20 In attachment -- well, execution has existing rules for
21 how you levy on personal property and real property. We
22 imported those into attachment, but had no problem because
23 attachment has always been levied on real property by
24 recording a copy of the writ. Sequestration doesn't have
25 any language with regard to how a writ is levied on

1 personal property or real property. There's only that
2 case law out there on real property dealing with eviction,
3 so if you add a rule on how to levy, would it overturn the
4 case law? I'd have to go back and look at the case law to
5 see if it was rule based or based on some existing
6 statute. I don't think that it was.
7 CHAIRMAN BABCOCK: Roger.
8 MR. HUGHES: Well, along the same line, the
9 writ -- the terms of the writ is that you're supposed to
10 keep the property that you've levied on safe. Now, if the
11 sheriff doesn't evict the tenants, how is he keeping the
12 property safe?
13 MR. DYER: Well, the same would apply to
14 attachment.
15 MR. HUGHES: Well, I guess then, so if the
16 tenants commit waste on the property, as they're likely to
17 do under the circumstances, or it's possible they're doing
18 under the circumstances, the sheriff is not liable for
19 that. I mean, I ask out of ignorance. I don't know.
20 MR. DYER: Okay. Well, I know that the
21 sheriff has a statutory duty to take care of personal
22 property. I don't know if that extends to real property
23 levied on by writ of attachment or sequestration, but you
24 do raise the issue that the case law could have discussed
25 that duty with regard to real property. I would need to

1 research that more.
2 MR. HUGHES: Well, I mean, I was thinking
3 more about the tenants who were liable to vandalize the
4 property or, you know, but then I think, well, the idea of
5 waste would include not only them but maybe vagrants
6 vandalizing empty property, and then I guess the next
7 question, you know, might be, you know, what about land,
8 you know, farmland? Does that require the sheriff to farm
9 it? I don't think so.
10 MR. DYER: On attachment it does, so I would
11 think sequestration would be the same.
12 MR. HUGHES: Okay.
13 MR. DYER: You can't allow the crops to go
14 fallow in the field, but now the court also has discretion
15 to enter such orders as are necessary to protect and
16 preserve the property. But just looking at the levy
17 stage, our preference was to insert this rather than not
18 to mention levy and leave it to the case law with regard
19 to eviction because we wanted to avoid the eviction.
20 MR. HUGHES: Well, I mean, at this point my
21 concern is not so much for the preservation of the
22 property generally because I would think if somebody is
23 involved in the litigation it's going to want to take care
24 of it. My thought really is for the sheriff so the
25 sheriff will know what the sheriff must do and need not

1 do.

2 MR. DYER: Well, that I think is a matter of
3 research and whether the duty that pertains to personal
4 property pertains to the real property, but one of the
5 other things we discussed is let's say you've levied this
6 way and then you learn that the tenant is burning the
7 crops or otherwise harming the property. I think at that
8 point a TRO is the most appropriate and effective remedy.

9 CHAIRMAN BABCOCK: Okay. Anymore on 4? It
10 looks like 5 is without change. Anything to talk about on
11 5?

12 MR. DYER: No. 5 is the same, straight out
13 of the rule.

14 CHAIRMAN BABCOCK: Okay. 6.

15 MR. DYER: Respondent's replevy rights, we
16 broke out subsections (1) and (2). That was based on what
17 we did with attachment, so that's essentially the same
18 from the last. Subpart (b), that's essentially the same
19 as what we used in attachment with regard to the replevy
20 bond. The only difference here is we've added that the
21 court may also approve the sureties, which the previous
22 rule didn't include. Subpart (1) are the conditions that
23 must be in a replevy bond for personal property, and these
24 are the conditions that you won't remove it from the
25 county, waste, ill treat it, injure it, et cetera. That

1 all comes out of the existing statute.
2 One other thing that I wanted to make note
3 of, you'll see that in subsection (1)(e) these are
4 conditions of the bond, and the first is if the property
5 is not returned then you must pay the value of the
6 property, along with the fruits, hire, or revenue derived
7 from it. Subpart (e)(2), if the property is returned but
8 it's not in the same condition, let's say that it's
9 damaged, you have to pay the difference between the value
10 of the property as of the date of replevy and the date of
11 judgment along with the value of the fruits, hire, or
12 revenue therefrom. There is case law that says the
13 provision that says you must return the property in the
14 same condition has been interpreted to exclude ordinary
15 depreciation in market value. The theory being if the
16 sheriff sequesters your property and you replevy it, that
17 property is going to depreciate in value whether it's in
18 the possession of the sheriff or in your own possession.
19 We'll look at a later rule on the
20 applicant's right to replevy. The applicant does have to
21 pay for the depreciation in value. The exact reasoning
22 behind that, I don't know, but it comes straight out of
23 the statutes, and I haven't been able to find anything
24 particularly enlightening.
25 Subpart (2), we've added -- it comes mainly

1 out of the existing rule except we've added "fruits and
2 revenues of the property if the underlying suit is decided
3 against the respondent to cover all instances with regard
4 to real property." Subpart (4), this comes straight out
5 of the statute where it makes an exception for a
6 respondent in a situation where it's for enforcement of a
7 mortgage or lien that we discussed earlier. In that
8 situation the bond would not include a condition that the
9 respondent has to account for fruits, hire, revenue, or
10 rent.
11 Subpart (5) is new. It requires that the
12 sheriff or constable to deliver the replevy bond to the
13 clerk of the justice of the peace so it can be filed with
14 the court. Subpart (c) applies Rule 14c. Subpart (d),
15 the only change we've made to the existing rule is to say
16 that "any party" shall have the right to prompt judicial
17 review. Subpart (e) is a parallel provision from
18 attachment. Sequestration rules currently do not speak of
19 the respondent's right to possession after filing a proper
20 replevy bond that has not been challenged. We thought
21 that the same right and privilege ought to pertain to
22 sequestration and have broken out the two sections like we
23 did for attachment from the last session. That's all I
24 have on 6.
25 CHAIRMAN BABCOCK: Okay. Any comments on 6?

1 Yeah, Stephen Tipps.
2 MR. TIPPS: Yeah, I think you left out
3 subsection (b)(3). It jumps from (2) to (4).
4 MR. DYER: Oh, that's only for the
5 subcommittee eyes only. I'm kidding. So noted. We will
6 make that change.
7 CHAIRMAN BABCOCK: Any other comments?
8 Okay. Let's do 7.
9 MR. DYER: Okay. No. 7, applicant's replevy
10 rights. Sequestration does give the applicant a replevy
11 right. As we discussed last session, the subcommittee
12 thought it would be appropriate to give the applicant
13 replevy rights in attachment as well, and we discussed the
14 extension on the committee about doing that, but the rules
15 currently provide it for an applicant in sequestration
16 because they have a preexisting lien.
17 Subpart (a), the motion is substantially the
18 same as the current rules with one major difference. The
19 current rules allow an applicant to replevy based on
20 providing the officer in possession with a bond. The
21 subcommittee felt that it would be better if we required
22 that the applicant move the court rather than go just by
23 presenting the bond to the officer to take the officer out
24 of the equation, and the sheriffs and constables we talked
25 to said, yes, we would prefer that.

1 Subpart (b), because we've now changed to a
2 motion practice requires that there be notice and hearing.
3 Subpart (e) is the order that the court has to enter based
4 on the motion that's been filed and states that it has to
5 contain the conditions of the replevy bond that are later
6 provided for here in subpart (d), and those are all out of
7 the existing rule. If you'll look at subpart (d)(1)(E),
8 too, you'll see that for the applicant in a sequestration
9 bond the condition is pay the difference between the value
10 of property as of the date of replevy and the date of
11 judgment. That part's the same for the respondent's
12 replevy, but this part's different, "regardless of the
13 cause of difference in the value." So the applicant gets
14 stuck with ordinary depreciation while the respondent does
15 not.
16 Subpart (e) applies 14c. Subpart (f) is
17 new. It requires that the respondent be served with a
18 copy of the order and replevy bond. Subpart (g) is a
19 parallel to the respondent's right to possession upon the
20 filing of a proper unchallenged replevy bond. The
21 applicant should also be entitled to possession if its
22 bond is proper and has not been challenged, and that's all
23 for 7.
24 CHAIRMAN BABCOCK: Okay. Any more comments
25 on 7? All right. Let's go to 8.

1 MR. DYER: 8 is exactly the same as that in
2 attachment, with the exception of subpart (h). The
3 statute for sequestration requires that a wrongful
4 sequestration suit is a compulsory counterclaim in the
5 underlying suit. We thought about doing that with
6 attachment and garnishment, and it did not work. I'm not
7 real sure it works for sequestration, but (h) addresses
8 that. That's the only difference between the motion to
9 dissolve procedure that we used for attachment and the one
10 we used for sequestration. The motion is the same, time
11 for hearing, stay of proceedings, conduct of hearing and
12 burden of proof, orders, and the rights of third party
13 claimants are all identical to attachment. That's all for
14 --
15 CHAIRMAN BABCOCK: For 8. Okay, any
16 comments? You said that compulsory counterclaim may not
17 work for sequestration?
18 MR. DYER: No, no. For attachment. I
19 haven't yet really figured out why it works for
20 attachment, but doesn't -- I mean, why it works for
21 sequestration but doesn't for attachment, but we came out
22 with some scenarios that made no sense in requiring a
23 compulsory counterclaim attachment.
24 CHAIRMAN BABCOCK: All right. Carl.
25 MR. HAMILTON: Back to this bond where you

1 said if the property was returned not in the same
2 condition he has to pay the difference in value. On the
3 applicant's replevy, regardless of the cause of the
4 difference, which is different, as you say, from the
5 respondent's replevy, and why is that -- do we know why
6 that's in there or what it's supposed to mean?
7 MR. DYER: No, I don't. Well, the only
8 thing that it can mean is that the applicant bears the
9 difference in value without regard to anything, so that
10 would exclude ordinary depreciation. That language has
11 been there, best I can tell, since 1941. There's no case
12 law interpreting what "regardless of difference in value"
13 means. I have found some commentaries that say because
14 that language does not appear with regard to the
15 respondent's replevy bond and the case law says the
16 respondent does not have to account for ordinary
17 depreciation, that this language means the applicant must
18 account for ordinary depreciation.
19 MR. HAMILTON: So when on the respondent's
20 it says "difference in value" before -- from the date of
21 replevy and the date of judgment, what would that
22 difference be if you didn't consider depreciation?
23 MR. DYER: Damage to the property.
24 MR. HAMILTON: Just damage?
25 MR. DYER: Yeah, damage to the property.

1 Ordinary depreciation is out, but anything else, the
2 damage to the property or something that the person in
3 possession of the property did to the property, just
4 excludes ordinary depreciation. So let's say it was a
5 bushel of corn and the market price for corn was two bucks
6 on the date that it was levied on, but it's one buck by
7 the time that they have to account under the bond. That's
8 not going to be -- that's not going to work against the
9 respondent. The respondent can say, "I don't have to
10 account for that difference in value. It's ordinary
11 depreciation." The applicant would have to account for
12 the difference in value.
13 HONORABLE JANE BLAND: On the compulsory
14 counterclaim, is it the Civil Practice and Remedies Code
15 that requires that the writ of garnishment be dissolved?
16 MR. DYER: The writ of sequestration?
17 HONORABLE JANE BLAND: I mean, yeah, the
18 writ of sequestration.
19 MR. DYER: Yes.
20 HONORABLE JANE BLAND: Because why, why,
21 why, because once the writ is dissolved then that sort
22 of -- what's left to be -- why couldn't you move to
23 dissolve the writ and move for wrongful sequestration at
24 the same time?
25 MR. DYER: Well, you can, and the statute

1 requires that you do that or you give up your wrongful
2 sequestration claim.
3 HONORABLE JANE BLAND: But this contemplates
4 some kind of ruling dissolving the writ.
5 MR. DYER: Yes. You can only succeed in
6 wrongful sequestration if the writ is dissolved.
7 HONORABLE JANE BLAND: Right, but the way
8 that this reads, it says to me that I can't even file my
9 claim for wrongful sequestration. So what I would
10 envision doing if I were bringing one of these would be I
11 would move to dissolve the writ of sequestration and
12 together file a claim for wrongful sequestration, and I
13 understand that I couldn't prevail on my claim for
14 wrongful sequestration unless the trial court dissolved
15 the writ and found merit, you know, found that the writ
16 shouldn't have been granted, but why would we make a
17 claimant wait to file their claim until after the writ is
18 dissolved?
19 MR. DYER: Okay. Okay. I've got what
20 you're saying. I agree with you.
21 CHAIRMAN BABCOCK: You're too easy.
22 MR. DYER: No, I agree with you. Actually,
23 that does not come out of the statute. Okay.
24 CHAIRMAN BABCOCK: So we need to fix that?
25 MR. DYER: Yeah. Let me take a shot at

1 fixing that.

2 CHAIRMAN BABCOCK: Because if the writ

3 hadn't been dissolved and you filed a compulsory

4 counterclaim, it would be subject to dismissal because

5 there's no basis in fact.

6 MR. DYER: Yes.

7 MR. STORIE: Way to loop back.

8 MR. MUNZINGER: And attorney's fees.

9 HONORABLE TRACY CHRISTOPHER: Attorney's

10 fees.

11 CHAIRMAN BABCOCK: And attorney's fees.

12 HONORABLE JANE BLAND: It's all coming back

13 to me now.

14 PROFESSOR CARLSON: Here's what the statute

15 says.

16 MR. DYER: Yeah, I've got it. It's "If a

17 writ is dissolved, any action for damages for wrongful

18 sequestration must be brought as a compulsory

19 counterclaim. In addition to damages, parties sought this

20 solution may recover reasonable attorney fees incurred in

21 dissolution of the writ." Yes, it does mean that you

22 can't recover on wrongful sequestration until the writ is

23 dissolved, but for filing purposes you should be allowed

24 to file your motion to dissolve and your counterclaim for

25 wrongful sequestration so that you don't forget it later

1 on.

2 HONORABLE JANE BLAND: Right, and you

3 don't -- the trial court doesn't lose jurisdiction.

4 MR. DYER: Right.

5 HONORABLE JANE BLAND: Because I think that

6 there's the possibility that the trial court dissolves the

7 writ, end of case. So and if you haven't gotten the claim

8 on file, the counterclaim on file, it's just it makes more

9 sense from a timing perspective to file those two things

10 together.

11 MR. DYER: Yes, I agree. Okay. I'll work

12 on that language.

13 CHAIRMAN BABCOCK: Anything else on 8? 9.

14 MR. DYER: Okay. 9, 9(1) and (2) are

15 substantively out of the existing rules.

16 CHAIRMAN BABCOCK: 9(a) and (b) you mean?

17 MR. DYER: Yeah. 9(a)(1) and (2).

18 CHAIRMAN BABCOCK: 9(a)(1) and (a)(2).

19 MR. DYER: Yes, 9(a)(1) and (a)(2). Yes.

20 But we broke it out because current language is

21 cumbersome, so we distinguish, once again, the suit where

22 it's for the enforcement for a mortgage or lien from a

23 suit that is not for the enforcement of mortgage or lien.

24 CHAIRMAN BABCOCK: Okay.

25 MR. DYER: (b) is straight out of the

1 statute. (c) is new, and it addresses that the judgment
2 needs to tax costs. That's all I have for 9.
3 CHAIRMAN BABCOCK: Anybody else with
4 comments on 9? Richard.
5 MR. MUNZINGER: I just wonder why we say
6 "all judgments" and then we say "in any judgment"? The
7 title kind of throws me off a little bit. The subject
8 matter is an award of expenses in connection with transfer
9 and storage of property as distinct from the judgment. Do
10 you agree?
11 MR. DYER: Uh-huh.
12 MR. MUNZINGER: It's part of the judgment,
13 but the real subject matter of that section of the rule is
14 to award those expenses as distinct from the judgment
15 itself.
16 MR. DYER: Should we change it to "expenses"
17 or "award of expenses"?
18 MR. MUNZINGER: I think it would make more
19 sense, but I'm the lonely voice very often.
20 MR. DYER: Crying out in the wilderness, I
21 know. I have no problem changing it to "award of
22 expenses." That makes sense.
23 HONORABLE TOM GRAY: You would probably
24 award the expenses to the prevailing party as opposed to
25 awarding them against the nonprevailing.

1 MR. DYER: Well, isn't this the typical
2 language, though, when you tax costs you tax them against
3 the nonprevailing party?
4 HONORABLE TOM GRAY: Going through a
5 template project at our court on judgments, I have found
6 that the rules and statutes are all over the place on
7 taxing versus assessing versus awarding. The language
8 that I personally prefer is awarding the costs to the
9 prevailing party, because then your judgment is complete
10 in its form and will specify who the prevailing party is,
11 and they're awarded their costs, and they have a motive to
12 go get them.
13 The other thing that I was curious about is
14 it says "may be taxed." Is it -- do we intend to make it
15 discretionary that these storage fees can be discretionary
16 in being awarded?
17 MR. DYER: Yes. Yes. Because there may be
18 instances where one of the parties does something that
19 increases the costs, so the court ought to have the
20 discretion to say, "These costs are awarded here, these
21 costs are awarded here," so your language was "may be
22 awarded as costs to the prevailing party"?
23 MR. MUNZINGER: Are they really costs in the
24 sense of court costs? They're not. They're expenses that
25 were incurred by somebody in -- well, maybe they would be

1 court costs.
2 MR. DYER: Well you raise a good point,
3 though. What we have referred to previously throughout
4 attachment and these rules are "all expenses incurred in
5 connection with the transfer and storage of the property
6 may be taxed as costs to the" -- and then we add whatever
7 party. So we haven't -- we call them expenses and then we
8 say they may be taxed as costs.
9 HONORABLE TOM GRAY: You could just take out
10 the word "costs."
11 CHAIRMAN BABCOCK: Carl.
12 MR. HAMILTON: Particularly who has already
13 paid those costs, the sheriff?
14 MR. DYER: It depends on what time. If it's
15 the applicant, it's going to be the -- if it's at the
16 initiation of the suit and the sheriff goes out and
17 levies, the applicant has those costs, but the storage and
18 transfer costs have not yet started accruing. Once the
19 sheriff gets it then they start accruing. No one has to
20 pay those at that particular time unless they try to shift
21 possession. If the respondent comes in and says, "I want
22 to replevy that property," one of the conditions is that
23 the respondent pay all existing transfer and storage costs
24 at that time, and they may be later assessed as costs at
25 the end of the suit.

1 MR. HAMILTON: But if the respondent doesn't
2 do that, when are those transfer costs paid and by whom?
3 MR. DYER: We talked a little bit about this
4 on attachment last session also. If neither the applicant
5 nor the respondent replevies, those costs accrue
6 throughout the lawsuit. Whoever wins that lawsuit, if
7 they want to get that property, you're going to have to
8 pay those costs. That's why I think a lot of the
9 practitioners now move to sell the property as perishable
10 property so that they can cut their losses, because
11 frequently the amount of storage costs dwarfs the amount
12 of the value of property.
13 CHAIRMAN BABCOCK: Okay. Any more comments
14 on this? All right. 10.
15 MR. DYER: Okay. Sequestration has a rule
16 that allows property that was sequestered to be returned
17 to the sheriff and ultimately to the applicant within 10
18 days after final judgment. So this is a post-judgment
19 procedure mainly designed to protect the sureties on the
20 bond. Well, let's say you sequester the property,
21 plaintiff wins the lawsuit. Within 10 days after the
22 final judgment is signed property can be brought back for
23 a credit. Actually, it's treated as a credit on the
24 judgment. If the property hasn't been damaged then, you
25 know, all you may be looking at -- or you may have to pay

1 some interest. It depends on what the value of the
2 property is. If the property is damaged then this also
3 provides for how that's supposed to be addressed
4 post-judgment. The substance comes out of the existing
5 rules if the judgment is against the respondent.
6 Subpart (b) is new. There is no corollary
7 rule if the judgment is against the applicant and the
8 applicant has replevied. We thought there should be that
9 same right to return the property as a credit on the
10 judgment. And you'll note subpart (c) is also out of
11 the -- subpart (c) and (d) are out of the existing --
12 excuse me, subpart (c) is out of the existing rule. The
13 return of the property does not prejudice your rights
14 under the surety bond. Okay. So you say, well, why do we
15 have this return provision? It's to give you a credit on
16 the judgment, but that credit does not necessarily make
17 you whole under the terms of whatever bond was filed,
18 because bond can sometimes pick up interest on the claim
19 for a year.
20 Subpart (d) was added to parallel the
21 attachment rules. What happens if the personal property
22 isn't returned? Then it's execution as in any other case.
23 That's all on 10.
24 CHAIRMAN BABCOCK: Okay. Any other comments
25 on 10? Let's go to 11.

1 MR. DYER: 11, 12, and 13 are identical to
2 attachment except the word "sequestered" has been
3 substituted for "attached."
4 CHAIRMAN BABCOCK: So if we've talked about
5 attachment, we've talked about this.
6 MR. DYER: Yes.
7 CHAIRMAN BABCOCK: Any other comments? All
8 right. Let's move right on to this next rule,
9 garnishment.
10 MR. HAMILTON: I have a question.
11 CHAIRMAN BABCOCK: Huh-oh.
12 MR. HAMILTON: On that (d) part --
13 CHAIRMAN BABCOCK: What part, Carl?
14 MR. HAMILTON: 10(d).
15 CHAIRMAN BABCOCK: Oh, you're backsliding on
16 us.
17 MR. HAMILTON: The suit for sequestration is
18 to recover property, right?
19 MR. DYER: Yes.
20 MR. HAMILTON: And so if that property is
21 not returned, you say, "Execution can be issued on the
22 judgment." What judgment? The judgment is going to be
23 for the return of the property.
24 MR. DYER: No.
25 MR. HAMILTON: So what judgment are you

1 going to have an execution on?
2 MR. DYER: This is -- this is the judgment
3 in the underlying case.
4 MR. HAMILTON: The underlying case is a suit
5 to recover property.
6 MR. DYER: No, not necessarily. It may be
7 for the enforcement of a lien or mortgage. It may be for
8 a trespass to try title. It can be different things, but
9 I go out and I try to sequester property because let's say
10 it is for enforcement of a lien, because I want that
11 property available as soon as I get my judgment so I can
12 sell that property and apply the proceeds to my debt.
13 Okay. But the respondent has a right to replevy, and if
14 they replevy, they put up a bond and they get possession
15 of that property. So I win my underlying suit, and I want
16 my property, and the defendant or respondent says, "Sorry,
17 I haven't got it." Well, now I no longer have that
18 property to foreclose on, but I do have my judgment. I
19 can pursue the replevy bond, and hopefully that's going to
20 cover a lot of my damages, but if it doesn't then I
21 execute as I would in any other case.
22 CHAIRMAN BABCOCK: Okay. All right. Onto
23 garnishment.
24 MR. DYER: Okay. You'll see the format is
25 the same. We -- you know, garnishment can be either

1 prejudgment or post-judgment. The other writs -- well,
2 and certainly with attachment and sequestration, although
3 there is some old case law out there saying you can do it
4 post-judgment, that doesn't make any sense because
5 attachment is in the nature of a prejudgment execution
6 anyway, but garnishment you clearly can do both. You get
7 a judgment and then you go collect by garnishing an
8 account, but the way the rules are currently written it's
9 really not that clear what differences there are between a
10 prejudgment and post-judgment, so we decided to break them
11 out into separate sections.
12 So garnishment Rules 1 and 2 deal with the
13 application and bonding requirements for a prejudgment
14 writ. 3 and 4 deal with a post-judgment writ, and the
15 primary difference is the rules don't say that a
16 post-judgment writ of garnishment has to be bonded, but
17 the practice is it does not have to be bonded. There's no
18 harm that can happen to the respondent because judgment
19 has already been entered. So we wanted to make that
20 clear. Okay. So subsection (a) essentially is the same
21 as the substance of the existing rule dealing with an --
22 MR. MUNZINGER: Question.
23 MR. DYER: Yes.
24 MR. MUNZINGER: What is the distinction
25 between the judgment and an order in the title and why?

1 MR. DYER: The order that's referred to is
2 the order granting the application for writ of
3 garnishment. The judgment is whether this is a
4 prejudgment application versus a post-judgment
5 application.
6 MR. MUNZINGER: You get garnishment without
7 a judgment?
8 MR. DYER: Yes.
9 PROFESSOR CARLSON: An order.
10 MR. DYER: But you have to have an order.
11 HONORABLE TRACY CHRISTOPHER: Well,
12 shouldn't you say "Application and order for writ of
13 garnishment before judgment" just so you don't have that
14 "and order" hanging out there?
15 MR. DYER: If that makes it clear, I have no
16 problem with that. "Application and order"?
17 Subpart (b), (b)(1) is actually new. That's
18 not required in the existing rules, but we thought it
19 would provide the trial court with basic context of the
20 application. Subpart (2), the language that says "and the
21 specific facts supporting the statutory grounds for
22 garnishment," that parallels attachment, and we thought it
23 made sense to require an attach -- excuse me, in
24 garnishment just like in attachment and sequestration that
25 your specific facts be alleged.

1 Subpart (3) -- oh, okay, now I know why.
2 I'm confused here. I changed my highlighting on
3 garnishment. Okay. And just to be ornery. In
4 garnishment the highlighted language is new. The
5 nonhighlighted language comes out of the rules or statute.
6 My previous one I think I had -- well, it was different.
7 CHAIRMAN BABCOCK: It was flip-flopped.
8 MR. DYER: Yeah, it was flip-flopped. Okay.
9 So the yellow is new. Subpart (3), "State the maximum
10 dollar amount sought to be satisfied by garnishment."
11 It's not required in the current rules, but the current
12 rules do require that the judge order the maximum dollar
13 amount to be satisfied, so we thought it makes more sense
14 to include that in the application itself. Verification
15 is the same as in the other writs, the same with effective
16 pleading. The order, garnishment does not provide -- the
17 current rules do not provide that the writ is returnable
18 to the court that issued it, but that's, in fact, what
19 happens.
20 Subsection (4) with regard to safekeeping,
21 that's been adapted from the other rules. The garnishment
22 is also different from attachment, sequestration, in that
23 the officer does not normally gain possession of the
24 property. The garnishee usually keeps the property and
25 cannot give it to the respondent, but we have found

1 instances where garnishees say, "Look, I don't want this
2 property. I don't want to be involved in this mess," and
3 they give it to the sheriff or constable. I know that
4 that's not the way that you would think that it would
5 happen, but that's what's been reported, so they wanted
6 rules that would address what the sheriff is to do if that
7 happens. So here it is. They've got to preserve and
8 protect that property.
9 Subpart (6), and this also we covered with
10 attachment, sequestration. The current rules allow a
11 respondent to go to the sheriff or officer and say,
12 "Here's the amount" -- "Here's what I want to do. I want
13 to post a replevy bond. You determine the value of this
14 property and you tell me how much I have to bond." The
15 constables and sheriffs didn't want to be involved in that
16 valuation process, so now it's contained within the order
17 of the court who sets the bond.
18 (f) is the same as the multiple writ
19 provision in the other rules. 2, requirement of the bond
20 -- oh, I'm sorry. Do we have any comments?
21 CHAIRMAN BABCOCK: Yeah, do we have any
22 comments on 1? Yeah, Judge Christopher.
23 HONORABLE TRACY CHRISTOPHER: Is there a
24 reason that we decided to put the specific chapter of the
25 CPRC in here instead of just stating "statutory grounds"?

1 I mean, it seems to me the Legislature could add new
2 statutory grounds somewhere, and you seem to have limited
3 it to this particular chapter.
4 CHAIRMAN BABCOCK: Where are you talking?
5 MR. DYER: 1(b)(2).
6 HONORABLE TRACY CHRISTOPHER: 1(b)(2).
7 MR. DYER: We discussed that, and one of our
8 guidelines was to the extent possible remove any specific
9 references to statutes because they can change. We
10 decided we wanted to alert the practitioner at least to
11 the chapter to go look to, and either include it in the
12 language or include it as a comment. But, yes, we
13 could -- we could just state -- say, "State one or more of
14 the statutory grounds for issuing the writ." We wouldn't
15 have to refer to the specific chapter.
16 CHAIRMAN BABCOCK: Justice Bland.
17 HONORABLE JANE BLAND: My only comment is
18 when you decided to break out prejudgment garnishment from
19 post-judgment garnishment did you give any consideration
20 to drafting the prejudgment section to encompass the idea
21 that this is extraordinary relief? I mean, prejudgment
22 garnishment is not typical.
23 MR. DYER: Agreed. I mean --
24 HONORABLE JANE BLAND: And my only concern
25 is by putting this out separately and putting it first

1 you're saying that it could -- I mean, you're not saying
2 it, but I'm just wondering would a practitioner think that
3 they could go in and garnish in any case that they don't
4 have a judgment in yet, and that --
5 MR. DYER: Well, but that's what the current
6 rules allow --
7 HONORABLE JANE BLAND: I understand the rule
8 allows it, but the way that the rule has been interpreted,
9 and rightly so, is that only in extraordinary
10 circumstances are we going to garnish people's money prior
11 to the entry of a judgment against them.
12 HONORABLE SARAH DUNCAN: Or property.
13 MR. DYER: Yeah, or property.
14 HONORABLE JANE BLAND: Or property, but, I
15 mean, garnishment is usually money, and that's why I'm --
16 MR. DYER: Well, the purpose was to clarify
17 for the practitioner, but the existing law is the same.
18 The breaking out of it has made it more clear, and I think
19 your concern is by making it more clear are we going to
20 make it more often or is someone going to say, "Oh, wow, I
21 didn't know you could do this." My thought is no, and if
22 they do then they're looking at a wrongful garnishment. I
23 mean, I think that the law is still there, and I'm not
24 sure how I would go about to cure that concern.
25 CHAIRMAN BABCOCK: Judge.

1 HONORABLE SARAH DUNCAN: I think Jane is
2 right. It's -- most people don't know that there is such
3 a thing as prejudgment garnishment. Most people don't
4 understand that it has constitutional ramifications even
5 if they know it exists, and it seems like it would be an
6 easy thing just to have a sentence saying it's an
7 extraordinary remedy, "see Fuentes," or something so that
8 the practitioner who is not familiar with this will -- you
9 know, if they see a United States Supreme Court decision
10 cited in a comment or something saying that it's
11 extraordinary remedy, that will give them pause.
12 MR. DYER: I certainly don't have a problem
13 with a comment. That way we may have to comment more with
14 regard to garnishment because we're also going to have to
15 address the exempt property and the changes in the law
16 with regard to that.
17 CHAIRMAN BABCOCK: Elaine.
18 PROFESSOR CARLSON: I think Justice Bland is
19 referring to is because the property is in the hands of a
20 third party and you're doing this prejudgment, there's
21 additional constitutional concerns and practical concerns
22 than attachment and sequestration where you're seizing the
23 property from a debtor as opposed to a bank or some other
24 third party holding the funds.
25 HONORABLE JANE BLAND: That's exactly what

1 I'm trying to --
2 PROFESSOR CARLSON: I speak Bland.
3 HONORABLE JANE BLAND: -- trying to say.
4 Elaine said it better, but yes.
5 PROFESSOR CARLSON: But, you know, the
6 *Fuentes vs. Shevin* and North Georgia Fishing versus --
7 HONORABLE SARAH DUNCAN: That was
8 sequestration, wasn't it?
9 PROFESSOR CARLSON: Well, there's those
10 three U.S. Supreme Court cases dealt with the different
11 remedies. One was I believe attachment, one was
12 garnishment.
13 CHAIRMAN BABCOCK: Fuentes was garnishment.
14 PROFESSOR CARLSON: Yeah.
15 CHAIRMAN BABCOCK: Prejudgment garnishment.
16 PROFESSOR CARLSON: Right. So each one of
17 them kind of go -- but I don't think they said that one
18 is -- that garnishment is not available, but that there
19 are additional protections that should be --
20 HONORABLE SARAH DUNCAN: Right.
21 PROFESSOR CARLSON: -- afforded because the
22 property is in the hands of a third party and you're
23 forcing the third party to come into a lawsuit that they
24 really don't have anything to do with.
25 MR. DYER: Okay. But are we suggesting by

1 referring back to *Fuentes vs. Shevin* that the current
2 statutes or current rules have not addressed those
3 concerns?
4 HONORABLE SARAH DUNCAN: But they have.
5 They amended to address them.
6 MR. DYER: Yes. So if we refer them back to
7 *Fuentes vs. Shevin*, what are we referring them back to
8 that case for?
9 HONORABLE SARAH DUNCAN: I'm not saying
10 specifically the comment should refer them back to
11 Fuentes. All I'm saying is that there can easily be
12 something in there that says, "Prejudgment garnishment is
13 an extraordinary relief. Go find out what the law is
14 before you do it."
15 MR. DYER: Okay.
16 CHAIRMAN BABCOCK: Why don't we say
17 "dipstick" on top of it?
18 MR. DYER: But we shouldn't say that with
19 regard to prejudgment ex parte attachment?
20 HONORABLE SARAH DUNCAN: I think we should.
21 That's just me.
22 MR. GILSTRAP: We could alleviate some
23 concerns if you flip-flopped and you put post-judgment
24 first. The first thing the practitioner wouldn't see
25 would be prejudgment garnishment.

1 MR. DYER: Because they don't read the
2 entire set of rules?
3 MR. GILSTRAP: No. No. No. It's a
4 question of prominence.
5 HONORABLE SARAH DUNCAN: And frequency of
6 use, Frank.
7 CHAIRMAN BABCOCK: Okay. Let's keep moving
8 through this rule.
9 HONORABLE JANE BLAND: Well, just to wrap
10 this up, I mean, I think there's a big difference between
11 doing anything, attachment or garnishment prejudgment; but
12 with respect to garnishment, you're freezing assets in a
13 bank somewhere; and if you do that prejudgment, you know,
14 all hell can break loose; and it ought to be the very
15 extraordinary case where we're doing that before there's a
16 judgment against somebody, and by -- and if somebody waves
17 this in front of a trial court judge and says, "Judge, I
18 can do it, it's in the rule," there's no warning that,
19 yes, the rule provides the process, but in 99.999 percent
20 of the cases it's improper.
21 MR. DYER: Well, let me throw this out. We
22 had -- earlier we had an extended discussion about whether
23 we ought to tell the attorneys that the law's changed and
24 you can now use a declaration instead of an affidavit or a
25 verification, and the comment was, well, why not put that

1 in the rules, and the -- really the overwhelming response
2 was, no, we don't have to educate lawyers. They ought to
3 know what the law is, so we don't have to tell them that
4 they can now use a declaration. It sounds to me like
5 you're saying because prejudgment garnishment can really
6 wipe somebody out we need to tell lawyers that. Why isn't
7 that already covered by existing law?
8 HONORABLE JANE BLAND: Well, there's a lot
9 of -- I mean, I think there's existing case law, but what
10 this rule says is here is -- if you file a suit, you can
11 at any point after filing the suit start garnishing stuff,
12 but the reality is that's not the case. So what we've
13 said in a rule is you can go and garnish stuff and here's
14 how, but only if you go out and look some more will you
15 figure out that you're going to be in a lot of trouble if
16 you do that, and then not to mention the fact that the
17 person that has no judgment against them and sometimes no
18 notice starts bouncing checks all over the place, can't
19 draw down on a letter of credit. I mean, lots of things
20 happen because assets are frozen.
21 MR. DYER: A big warning sign?
22 HONORABLE JANE BLAND: Yeah, like they show
23 you on the computer, "Are you sure you want to delete?"
24 CHAIRMAN BABCOCK: Elaine.
25 PROFESSOR CARLSON: Justice Bland, on page

1 four we do that for the post-judgment writ. We've set
2 forth -- there's some things you have to satisfy before
3 you're going to get the post-judgment writ of garnishment,
4 and you're refreshing my memory. Is it that the statute
5 has -- does it say that before you can seek a prejudgment
6 writ of garnishment you have to show that you have
7 attempted to attach and it's unsatisfied? Isn't there
8 some condition precedent? I think that's what you are --
9 HONORABLE JANE BLAND: You are the expert,
10 but I just know that when somebody came in to me wanting
11 to do a prejudgment garnishment every bit of my antenna
12 went up, and you have to really -- there's a lot you need
13 to show, because there's no judgment against the person
14 and you're taking their -- you're seizing their property
15 --
16 PROFESSOR CARLSON: Well, yeah.
17 HONORABLE JANE BLAND: -- from a third
18 party, you know, that it's in the hands of a third party.
19 PROFESSOR CARLSON: Of course, that's true
20 for attachment, too. Well, it's not in the hands of a
21 third party, no.
22 HONORABLE JANE BLAND: But you go through
23 the debtor for the attachment.
24 PROFESSOR CARLSON: Right.
25 HONORABLE JANE BLAND: And the difference is

1 here you go tell a bank, "I want you to look and find out
2 whatever accounts Joe Smith has and freeze them all," and
3 the bank will do it because the bank is concerned that if
4 they don't, you know, they're violating some kind of a
5 court order.
6 CHAIRMAN BABCOCK: Justice Christopher.
7 HONORABLE TRACY CHRISTOPHER: Well, the
8 current rule starts out "Either at the commencement of a
9 suit or at any time during its progress the plaintiff may
10 file an application for a writ of garnishment." So I
11 don't really think this is different from the current rule
12 that allows it.
13 CHAIRMAN BABCOCK: So are you disagreeing
14 with Jane?
15 HONORABLE TRACY CHRISTOPHER: I am.
16 HONORABLE JANE BLAND: Oh, it happens all
17 the time. It's the heightened visibility of the
18 availability of this process.
19 HONORABLE SARAH DUNCAN: It's also the
20 permissive terms. I mean, when the rules were amended
21 after the Fuentes decisions came down -- because I don't
22 remember either reading that meeting, the transcript of
23 that meeting or being there for some reason --
24 CHAIRMAN BABCOCK: Fuentes was like 1970.
25 HONORABLE SARAH DUNCAN: I know, which was

1 before I went to law school, so I'm saying I must have
2 read it.
3 CHAIRMAN BABCOCK: You read it.
4 HONORABLE SARAH DUNCAN: But it was a -- or
5 maybe Luke told me about it. It was like an emergency
6 meeting, we've got to amend the rules to address these
7 decisions, and that was the last time they were amended,
8 and that was in --
9 PROFESSOR CARLSON: Seventy --
10 HONORABLE SARAH DUNCAN: -- '72. It was
11 right after they came down, I think.
12 CHAIRMAN BABCOCK: Yeah.
13 HONORABLE SARAH DUNCAN: And that doesn't
14 mean we can't do a better job now of writing the rules to
15 address the concerns that the United States Supreme Court
16 expressed with respect to prejudgment remedies.
17 PROFESSOR CARLSON: And that section of the
18 Civil Practice and Remedies Code where all of these
19 attachment, garnishment, sequestration, the title of it is
20 "Extraordinary Remedies." I think what you're thinking of
21 is in garnishment when you look at the grounds it's
22 available if an original attachment has been issued,
23 plaintiff sues for a debt, and makes an affidavit stating
24 that, and then they go on -- I don't know, stating that,
25 sorry.

1 MR. DYER: "Debt is just due and unpaid
2 within plaintiff's knowledge defendant does not possess
3 property in Texas subject to execution."
4 PROFESSOR CARLSON: "Property in Texas
5 subject to execution." That's what you're thinking of,
6 isn't it, Jane? Plaintiff has --
7 CHAIRMAN BABCOCK: Her antenna is just
8 twitching. She's not quite sure.
9 MR. DYER: That's what she's addressing, but
10 she's addressing that even if we include that language
11 here that that's not going to be enough.
12 PROFESSOR CARLSON: Oh.
13 MR. DYER: That if the practitioners out
14 there -- your concern is, "Wow, I didn't know you could do
15 this and just follow this checklist, that's all I have to
16 do. Now I can get my writ of garnishment." So you're
17 thinking it's going to cause more prejudgment writ
18 applications.
19 HONORABLE JANE BLAND: Well, it's a little
20 bit of a concern because it's just so heightened
21 visibility.
22 MR. DYER: Now, a judge does have to rule on
23 the application.
24 HONORABLE JANE BLAND: Right.
25 CHAIRMAN BABCOCK: Sarah.

1 HONORABLE SARAH DUNCAN: All of which --
2 this is really off the wall and I think y'all have done a
3 phenomenal work, and I've been concerned about these rules
4 for a long time, but all of this is leading me to conclude
5 what was always the most confusing I think about
6 particularly the garnishment rules, because I think
7 they're used the most often, is that they did pre- and
8 post-judgment garnishment in the same set of rules and not
9 consistently using terms for the same people or the same
10 thing, all of which leads me to think I would like these
11 rules a lot better if they were divided into prejudgment
12 and post-judgment remedies, whatever the remedy might be,
13 because the same concerns are present whether you're
14 trying to sequester, garnish, or attach property before
15 there's been a judgment; and those same concerns are not
16 present once you've got a judgment to the same extent.
17 So it's just -- it's a reordering that to me
18 would enable us to have a sort of a preamble in the
19 prejudgment remedies that says basically, "These are
20 extraordinary remedies, but if you want garnishment,
21 sequestration, attachment, here's how you go do it," and
22 then post-judgment it's a whole different set of concerns.
23 CHAIRMAN BABCOCK: Okay. Elaine.
24 PROFESSOR CARLSON: So, Pat, to satisfy a
25 judgment post-judgment, satisfy a judgment post-judgment,

1 the remedies that are available are execution,
2 garnishment, turnover, receivership.
3 MR. DYER: Uh-huh.
4 PROFESSOR CARLSON: It doesn't include any
5 more -- it wouldn't include attachment or sequestration.
6 MR. DYER: Right.
7 HONORABLE SARAH DUNCAN: Oh, it doesn't?
8 PROFESSOR CARLSON: No.
9 MR. DYER: No. There is some real old case
10 law out there --
11 HONORABLE SARAH DUNCAN: Yeah.
12 MR. DYER: -- but attachment is essentially
13 prejudgment execution. You don't need attachment or all
14 of the strictures of the application for attachment
15 post-judgment. You go get a writ of execution. They go
16 seize whatever property there is. With sequestration you
17 probably make an election if you sue on the debt and don't
18 sue to foreclose your interest, your lien, so you get the
19 judgment, you don't have anything to sequester. Again,
20 you either foreclose it in the existing lawsuit or you go
21 execute or garnish after.
22 HONORABLE SARAH DUNCAN: Well, what if we
23 took prejudgment garnishment out of this Section 3 and put
24 it with prejudgment -- the other prejudgment remedies in
25 the previous sections?

1 MR. DYER: We could, but I guess --
2 HONORABLE SARAH DUNCAN: But you don't like
3 that.
4 MR. DYER: I look at it and I say what have
5 we accomplished by doing that?
6 HONORABLE SARAH DUNCAN: Well, we've
7 gotten out of Rule 1 of Section 3.
8 MR. DYER: Oh, okay. I see what you're
9 saying.
10 HONORABLE SARAH DUNCAN: It's not
11 highlighted quite the same way, and it's with kindred
12 spirits. Post-judgment garnishment is not a kindred
13 spirit to any prejudgment remedy because you've already
14 got a judgment.
15 MR. DYER: True, but it is still an
16 extraordinary remedy. You can't just go garnish. If you
17 know that they've got property out there that you can
18 execute on to satisfy your judgment, you cannot garnish
19 post-judgment.
20 PROFESSOR CARLSON: You've got to go to the
21 debtor first.
22 MR. DYER: Right. Not that you always have
23 to execute first, but if you know -- I mean, and you have
24 to know, and it has to be objectively demonstrated, you
25 know they've got property sufficient to satisfy your

1 judgment you can execute on, you are not entitled to
2 post-judgment writ of garnishment, and it would be
3 wrongful garnishment if you can prove it.
4 CHAIRMAN BABCOCK: Judge Christopher.
5 HONORABLE TRACY CHRISTOPHER: Well, not only
6 that. In the post-judgment garnishment, I mean, just like
7 in the prejudgment garnishment, you have questions about
8 whether the property is actually the property of the
9 debtor. I've actually had a trial involving whether the
10 property that the garnishee had actually belonged to the
11 judgment debtor or not. So, I mean, it is trickier
12 because it's in somebody else's hands, but you've got that
13 whether it's pre- or post.
14 CHAIRMAN BABCOCK: Elaine or Pat, after
15 garnishment we have what to finish?
16 MR. DYER: Distress warrants would be the
17 most logical to follow next, then execution, trial of
18 right of property, and turnovers, although we could put
19 trial of right of property at the very end because
20 everyone is going to love to find out what that is.
21 PROFESSOR CARLSON: That's what's going to
22 keep you coming back.
23 CHAIRMAN BABCOCK: Huh? Yeah, right.
24 MR. DYER: Yeah, if we leave it to the end
25 it will keep everybody coming back.

1 CHAIRMAN BABCOCK: Now, my notebook ends
2 with garnishment. Are we going to be prepared to talk
3 about distress warrants tomorrow?
4 MR. DYER: No.
5 CHAIRMAN BABCOCK: Are we going to be
6 prepared to talk about any of these things beyond
7 garnishments tomorrow?
8 MR. DYER: No. Actually, I didn't think we
9 would move this quickly.
10 PROFESSOR CARLSON: Well, we have the
11 report, but --
12 MR. DYER: I mean, if someone is -- if we've
13 got the capability of printing it, I could probably wing
14 through a lot to where we would only need maybe to hit a
15 few other things with Judge Tom Lawrence.
16 PROFESSOR CARLSON: Yeah.
17 MR. DYER: I mean, he's the real expert on
18 that.
19 CHAIRMAN BABCOCK: That would be a good
20 thing to do because I think we'll get -- I'm hoping that
21 we'll get through garnishment tomorrow morning by, you
22 know, 10:00, 10:30, something like that.
23 PROFESSOR CARLSON: And go on to distress
24 warrants.
25 CHAIRMAN BABCOCK: And I'd like not to waste

1 that hour and a half.
2 PROFESSOR CARLSON: All right. We'll see
3 what we can do.
4 CHAIRMAN BABCOCK: So if you can do
5 something, that would be great. All right. It's 5:00. I
6 can sense -- Pam is bundled up ready to go, so let's be in
7 recess until tomorrow morning at 9:00 o'clock. Thanks,
8 everybody.
9 (Adjourned at 4:58 p.m.)
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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 18th day of November, 2011, and the same was
12 thereafter reduced to computer transcription by me.
13 I further certify that the costs for my
14 services in the matter are $1,915.00.
15 Charged to: The State Bar of Texas.
16 Given under my hand and seal of office on
17 this the 4th day of December, 2011.

18

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