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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 18, 1995

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 18th day of November, A.D. 1995, between the hours of 8:10 o'clock a.m. and 12:00 o'clock noon, at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

NOVEMBER 18, 1995

MEMBERS PRESENT:

Charles L. Babcock
Pamela S. Baron
Hon. Scott A. Brister
Prof. Elaine A. Carlson
Hon. Sarah B. Duncan
Hon. Clarence A. Guittard
Gilbert I. Low
John H. Marks, Jr.
Russell H. McMains
Robert E. Meadows
Harriett E. Miers
Richard R. Orsinger
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alex Albright
David J. Beck
Ann T. Cochran
Prof. William Dorsaneo
Michael T. Gallagher
Anne L. Gardner
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Stephen Yelenosky

EX OFFICIO MEMBERS:

Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
O. C. Hamilton, Jr.
Paul N. Gold
David B. Jackson
Doris Lange

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(Meeting called to order at 8:10 a.m.)

CHAIRMAN SOULES: We can come to order now, and we'll go to work here. The first thing I want to do this morning is get these Sanctions Rules approved in their final form so we can send them to the Court. They were sent out on November the 8th, and there -- you'll see it says "Report to the Supreme Court Advisory Committee on Proposed Changes to the Sanctions Rules." It's got a Rule 13 and a Rule 166d not redlined, and then it's got the same two rules redlined behind it -- well, I don't think 166d is redlined. I think it's probably sort of a departure from 215 that we just didn't -- it's not done in redlines.

Anyway, the only thing that came to my mind here is this on page -- the second page of Rule 13, one, two, three, four paragraphs up where it starts with the paragraph "an order." And then on the first page of 166d, the paragraph in the middle that says "Order." They talk about "conduct meriting sanctions," and that just doesn't seem like it

connects to me. I thought merits were what you got for doing good things and -- I mean, should we say "conduct demeriting sanctions"? Can we find another word for that?

MR. BABCOCK: Warranting.

CHAIRMAN SOULES: Deserving or requiring sanctions?

MR. SUSMAN: How about deserving? Is "deserving" too English?

CHAIRMAN SOULES: What word? Warranting or requiring?

MR. BABCOCK: Warranting.

MR. SUSMAN: Expressly or implicitly.

HON. PAUL HEATH TILL: Never use one word where two will do.

CHAIRMAN SOULES: Okay. We'll change "meriting" to "warranting." And with those changes does the Committee approve these for forwarding to the Supreme Court with our recommendation to adopt them? Any dissent to that? No dissent. They will go forward then. They will go with my signature to the Court with the recommendation that they be promulgated.

Okay. Richard, let's proceed with whatever you think. Why don't you just give us what you think or how you think your report should be prioritized so as to flange it up with the discovery and other rules that we've worked on.

MR. ORSINGER: Let me say first of all that in all the correspondence this subcommittee was called Rules 15 through 165, but there is a Rule 165a for dismissals for want of prosecution that's not in Steve's area of 166, so I went ahead and added it to mine.

CHAIRMAN SOULES: It needs to be in yours. Thank you. 165a.

MR. ORSINGER: My original desire would be to have Bill Dorsaneo explain to everyone the Rules Revision Task Force recommendation about restructuring the rules, but he had to fly back to Dallas and promised me he would be in this morning. I don't know if he will or not. But I'm not going to get into that at length right now. I think what I propose that we do is see an example of how this works by taking -- well, I don't know. Luke, did you want to do just the discovery

related stuff first?

CHAIRMAN SOULES: It seems to me that we should concern ourselves first with the rules that are going to be essential to the proper operation of the Discovery Rules.

MR. ORSINGER: Okay. Well, I'm not sure we've written all of that.

CHAIRMAN SOULES: Do you agree with that?

MR. ORSINGER: I'll go along with that. The first one that probably touches on it is Rule 47, and you should have a single sheet that says "Subcommittee's Proposed Changes to Rule 47." And all of this material is on this table down here at the end. It's a single page.

HON. SCOTT A. BRISTER: These haven't been passed out?

MR. ORSINGER: No.

HON. SCOTT A. BRISTER: Why don't we -- I'll pass them out.

MR. ORSINGER: There's a lot to pass out there, Judge.

CHAIRMAN SOULES: Everybody line up and pick up a copy of each thing.

MR. ORSINGER: This first one is the one-page thing, "Rule 47, Claims for Relief." And this came up to the subcommittee in a dual proposal relating to Rule 45 and Rule 47, which was initially a proposal that I had made, and my proposal on Rule 45 was shot down.

It would have -- it was in response to the discovery limitations and the fact that a case's preparation was now going to be front-end loaded, as I saw it, rather than back-end loaded. And so I had proposed that we require that when a party relies upon a constitutional, statutory or regulatory provision, it shall be identified in the pleading. When a party relies upon a recognized cause of action or defense, it shall be identified in the pleading.

And then some examples were given which are now carried forward under 47: "Plaintiff sues Defendant for negligence in part for violating Revised Civil Statute Annotated 6701d, Section 35," or "Plaintiff was contributorily negligent, and Defendant invokes the comparative responsibility

provisions of Chapter 33," and similar.

And my thought was that we are going to have to force lawyers to understand their cases earlier on, because there are a lot of lawyers that file lawsuits and get down to the charge conference and still haven't figured out exactly what their cause of action is or how it's going to be expressed to the jury. And my desire was to have everyone see in the pleadings as early as possible what the theory of the case was and whether it was supported by a recognized tort, supported by a statute or whether it was new law. The subcommittee shot that down.

I had made also a proposal on Rule 47 for claims for relief, that we insert this underlined language "stating the legal basis for each claim and giving a general description of the factual circumstances." And I had proposed stating the specific legal basis, and the subcommittee shot that down too.

So what we're left with is this proposal here on Rule 47 that the pleadings filed by the parties contain "a short statement of the

causes of action, stating the legal basis for each claim and giving a general description of the factual circumstances sufficient to give fair notice of the claim involved."

And it was the subcommittee's view that that is in fact what the cases say your pleadings must do right now, but it's not what the rule says that your pleadings must do right now.

There was, however, support for some of these examples that had been used under Rule 45 in the proposal and have now been moved over to Rule 47. But the examples are something that are probably more intuitive. In other words, you may like the examples or you may dislike the examples that are under the "Notes and Comments." Obviously they are not required, but they give a form or an example of a pleading that, if people followed them, it would cause them to think through what their case is and it would allow the other party to see more evidently what the nature of the claim is without having to rely so much on the discovery process to figure that out.

So what the subcommittee ultimately recommended is no change to Rule 45 on definition and system, but under Rule 47, Claims for Relief, we insert this underlined language and then we have a note or comment here to explain what our goal is in terms of pleading requirements.

Now then, I'm a little uncertain as to whether this Committee recommends comments that go to the rule or whether there is such a thing as a comment to a rule or not, or whether this is just us talking to each other. Luke, can you enlighten me on that?

CHAIRMAN SOULES: Well, if we recommend to the Supreme Court that they publish a comment to a rule, they may or may not do that. If they do, then you will see that there are some Advisory Committee comments at places in the rules, in the published rules, not to the same extent that you find in the federal rules, though.

MR. ORSINGER: Okay. Well, the comments --

CHAIRMAN SOULES: But they may be notes and comments to communicate to the

Committee rather than to the bar.

MR. ORSINGER: Well, there are some of those in our proposals, but this is conceived of as a comment to the judges and the practicing bar. And it's by way of example that maybe people would emulate, but that is not -- we don't necessarily want to mandate it.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Are these -- is the language you've used here the exact language we've used in the interrogatory -- we've put some language to get rid of contention interrogatories but said you could use contention interrogatories for the purpose of obtaining the -- was this --

MR. ORSINGER: No.

MR. SUSMAN: Was this the source of that language?

MR. ORSINGER: No. If it's similar, I don't --

MR. SUSMAN: We ought to check that language and make sure that they are consistent. It sounds very close to the

language. Does someone have the Discovery Rules here, I mean the ones we -- the July 27th version of the Discovery Rules? I can find exactly where that place is.

CHAIRMAN SOULES: We probably have them here, Steve.

MR. SUSMAN: Oh, here they are. Thanks.

All right. It's close. "Contention interrogatories may only request another party to state the legal theories and to describe in general the factual basis for the claims or defenses of that party." And there is a footnote that reads, "Open-ended contention interrogatories may be used only to secure information that would be provided if the other party were required to plead more particularly."

I mean, that's -- I think it's good to have these consistent. Now, one of the questions one might ask is, I guess, do you need contention interrogatories at all if the pleading rule -- if a pleading rule is going to require in the first instance that you do that, maybe we just should can contention

interrogatories altogether, which is a possibility. Maybe we just eliminate contention interrogatories altogether.

HON. SARAH DUNCAN: Is that a motion?

CHAIRMAN SOULES: Well, we've already sent those rules to the Court, so we may revisit that later, but not today. We've got other business to do today. We're going to do Rule 47 today.

Now, what do you recommend, Richard?

MR. ORSINGER: I would be pleased to use the same language or not the identical language. I don't know. You know, this is a requirement that people plead in a certain way, but it's not self-enforcing. Obviously your solution is to file special exceptions. And it may be you would rather send an interrogatory than file special exceptions, but the hope is that lawyers will see this and that they will take it upon themselves to better identify what the nature of their claim is, and then we can -- Sarah is skeptical.

HON. SARAH DUNCAN: Extremely

skeptical.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Richard, let me ask you something. When you say "stating the legal basis," now, that's the added language, are lawyers going to interpret that to mean like now, as I understand it, like an Ibsen excuse, you know, they plead something and then you've got to plead to excuse? Does that mean that you don't have a statutory cause of action?

Let's say I plead negligence, per se negligence, general common law negligence, but I don't plead the statute itself. Do I have to -- is that making something different in that sense that you have to plead a specific statute, and then you get to submission and they don't do that? Are they going to be able to say, "Well, you didn't except to it." And they'll say, "No, you didn't put the basis. You didn't follow that rule."

Does "basis" mean this specific statute you're relying on, is the question I raise, and how are the lawyers going to interpret it and the judges, and are we getting into

pleading like an Ibsen excuse? I mean, I'm confused, but maybe somebody could straighten me out.

MR. ORSINGER: Well, I don't think that the subcommittee intended to require that the statute be plead, because that was the proposed change to Rule 45 that was rejected. The proposed change to Rule 45 was when a party relies upon a constitutional, statutory or regulatory provision, it shall be identified in the pleading. That proposal was rejected, so this is not meant to require you to plead the constitution, statute or regulation.

MR. LOW: I know. But what I'm saying is, people reading the rules, are they going to know that proposal was rejected and therefore this wasn't intended? Because they're going to take the language as written, and my question is, is the language as written going to create a problem?

MR. ORSINGER: Possibly.

HON. SCOTT A. BRISTER: Yeah.

CHAIRMAN SOULES: Judge Brister, and then I'll get to Justice Duncan.

HON. SCOTT A. BRISTER: The comment makes it even more likely they're going to do that. The example is, it pleads 6701d, Section 35, failure to yield right of way.

MR. LOW: Yeah.

HON. SCOTT A. BRISTER: And then they try their case and want to submit it on failure to signal or following too closely. They'll say, "Ah, but you didn't" -- I mean, the comment to me suggests the only thing we're going to the jury on is Section 35.

MR. LOW: That's right.

HON. PAUL HEATH TILL: Was it an attempt to limit pleadings to that point, to limit the cause of action to the pleadings only?

MR. ORSINGER: I think it was an attempt to make -- well, first of all, it was perceived by the subcommittee that this doesn't change existing law. But since we are writing new words, it's possible that it will be interpreted differently from what the current case law is. But I think it was an

attempt to make lawyers understand and disclose their case earlier in the process than they do right now under current practice.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: And I'll just go on the record, I think I said this a couple of years ago, that I think that would be laudatory. And I guess I join Richard's minority subcommittee report.

CHAIRMAN SOULES: Elaine.

PROFESSOR CARLSON: Well, the way I read current law, you have to give sufficient fair notice of the legal and factual basis of the claim.

MS. SWEENEY: Can you all speak up?

PROFESSOR CARLSON: I'm sorry. The way I read the current case law, it's necessary to give fair notice of the legal and factual basis of the claim. But are you attempting to codify that or go beyond that?

MR. ORSINGER: Well, I don't know. I mean, these words mean whatever they mean to whoever reads them. It was certainly

my personal desire to make people identify their cause of action and to know their case before they get in there to the jury charge conference. I think that would be helpful to everybody. It would help the cases settle. It would help you try the case better, and you wouldn't have everything in this huge meltdown at the end of the trial where people for the first time are asking themselves, "What is my cause of action," or "What is the defense?" That's not the current practice.

I think a lot of lawyers get into the charge conference before they really actually think through the process of what their tort is and how it's going to be given to the jury or what statutory violation they have. That was too severe a restriction for the subcommittee, so that's not the point of this. And if that's what these words suggest, then the words need to be changed or we need to put a comment on here that avoids that interpretation.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, as a practical matter, though, it's not going to have any

effect unless the lawyer -- because it's not going to change the law unless the lawyer files exceptions. I mean, you know, as a practical matter they can plead the same thing now. As a practical matter, they can amend their pleadings up to a certain point. So if the lawyer doesn't file exceptions, it's the same old thing. You're not going to get educated, and there's no requirement that you file exceptions.

A lot of times I don't do that. I don't want them thinking about their case too much, so lawyers are not going to do that. So if they file exceptions under the current law, they're entitled to what we give them right here, is my understanding.

And the courts are -- and good judges like we have here are making them give that information, so -- I mean, I'm not trying to be a fly in the ointment, but I don't see that it's needed and I don't know why you would change something if it's not needed.

CHAIRMAN SOULES: Justice Guittard.

HON. C. A. GUITTARD: I think

we need to focus on the underlying philosophy that we have of pleadings, which I'm not sure what that philosophy is. One philosophy is the older philosophy which says pleadings have to be specific, and if it's not specific enough, you file special exceptions and make them say what they're really claiming. The other philosophy is, well, let pleadings be general, and if you want to know what the other party is claiming, you proceed by interrogatories and things like that.

I don't know just how this fits into that scheme and whether we're going both ways or just what our approach is. And I think perhaps we ought to focus on the general scheme or purpose of pleadings in connection with this kind of a proposal, and I'm not sure just which way we come out by that kind of analysis.

CHAIRMAN SOULES: Steve, did you have your hand up?

MR. SUSMAN: Well, I mean, it seems -- I kind of agree with Richard. I mean, if you can get the information by an interrogatory or special exception, doesn't it

make sense to require that the lawyers give it to you in the first instance? I mean, it just kind of -- I mean, we all admit that the other side is entitled to that information at some point in time during the discovery process. Well, if you're entitled to it, it's so simple to provide it in the form he gives in the footnotes. What's the harm? I don't see the harm of asking people to provide that information in their pleadings. Maybe I'm just not -- I don't see the harm.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: Well, then I think that gets back to what Judge Guittard was saying about what is the theory underlying pleadings. And I'm sure there are a lot of people here that will disagree with me, but I think the system of pleadings works more efficiently in the federal court with 12(b)(6) motions. I think you get -- you find out what is the case up front, and everybody goes then to determine what discovery is needed to prove and disprove that case, and that just seems to me to be a lot less costly to the judicial

system and a lot let costly to the litigants.

CHAIRMAN SOULES: Of course, unless the fifth circuit wants to gig you, the pleadings don't really have anything to do with a federal trial either, because you roll into a federal pretrial order. If the fifth circuit wants to gig you, they'll say, "Oh, you failed to plead it. Tough." But other than that, pleadings don't make any difference.

And they certainly do, though, when we go to trial in state court without pretrial orders.

HON. SARAH DUNCAN: It might not make much difference in terms of trials, but a lot fewer cases get to trial because they're disposed of by pretrial motions.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Richard, you said something a minute ago to the effect that this change to the language is not meant to change the law as we currently have it for pleading in Texas, which is really almost the polar opposite of what Sarah was just saying about

this leading us more towards a federal pleading type of practice, if in fact it does. And my thought about this change is that it is eminently readable as a federalization of our pleading requirement, which is a dramatic change, obviously, in Texas pleading practice. And I think you would have to have one heck of a comment to, you know, make it clear that it does not mean what you can read it to mean, which is federalized pleadings.

It only means the interrogatory language that Steve read, that there is a general notice pleading or informational pleading sort of requirement, and not a factual pleading requirement, because what I see with this is that for each cause of action and each damage claim or each defensive position that's plead or asserted or going to be brought to trial, there is going to need to be a factual description of the underpinnings of that claim.

And you know, my four-page petition just became a 20-page petition depending on how this language is read, which is a monumental

change in Texas pleading practice. And your general denial with one small affirmative defense just got four pages longer because you had to plead a whole bunch of facts to support that, so, you know, there needs to be some concerted thought about that.

If in fact the subcommittee's proposal is not intended to change the law, I think this rule is going to be read incorrectly as written.

CHAIRMAN SOULES: This does not speak of pleading defensive matters. 47 is only as to claims, first of all.

Second, I'm curious, Richard, has your committee crossed the bridge about whether they're going to keep the special exceptions practice or if we're going to go to some other method of clarification for pleadings?

MR. ORSINGER: We've flirted with that, because Bill Dorsaneo thinks that the federal practice on the motion works well. But we've not considered a proposal to eliminate exceptions and go to a motion other than Bill's philosophy, which is that we ought to go away from -- well, I'm speaking for him,

and I may not understand him correctly, but I think that he feels like we ought to move away from a plea practice to a motion practice where possible, just as -- that's been the general trend of Texas law. And I would suspect that that proposal will come up, but it hasn't yet.

CHAIRMAN SOULES: Is the idea that in the absence of either a motion for more definite statement or special exceptions that the law would continue; that the pleadings would be construed as broadly as possible to support the pleader's contention?

MR. ORSINGER: Nobody has even mentioned changing that. If you look at the actual proposed change here, all this language does is it takes a phrase that says "a short statement of the causes of action sufficient to give fair notice" and it adds that in the short statement that you must state the legal basis for each claim and a general description of the factual circumstances.

CHAIRMAN SOULES: Okay. So if we carry forward the presumption of the broadest possible reading of the pleadings to

support the contention or the position of the pleading in the absence of any motion or special exception, then the adding of this language doesn't hurt a thing --

MR. ORSINGER: Except that it it's -- I'm sorry.

CHAIRMAN SOULES: -- if there's no complaint about the pleading. And if there is a complaint about the pleading, then the pleader becomes focused on whatever needs to be done to fix the pleading deficiency.

Now, the pleadings that I see, and actually I did see a pretty broad array of pleadings, usually set up what the cause of action is, negligence, gross negligence, fraud, DTPA. They usually state what the case -- what they think the case is about with some facts in the pleading as well.

It doesn't seem to me like this language is going to affect current practices. It just gives people -- if you raise a special exception and you want to know the legal basis for a claim, the judge is going to give you that, if he can't tell what's on the face of it already.

If you want a general description of the factual circumstances so that you can decide -- where there are just no facts stated whatsoever, you can't even identify the occurrences that are involved, the judge is going to give it to you. So the trap that I'm hearing that Buddy is concerned about, that's not, I think, going to be there as long as we have the presumption of the broadest possible reading of the pleading.

Buddy Low.

MR. LOW: Yeah. But the way it reads now, that pleads just your general legal theory. It doesn't say you have to plead the facts. And if you don't plead your general legal theory, the pleadings objection at the charge is that there are not pleadings to support that claim. So will that raise a question in a trial of, say, "Wait a minute, now. You plead that, but you didn't follow the rule. You didn't plead the factual circumstances, so therefore there's not sufficient pleading to support submission of your issue"? I mean, is that issue going to be raised? Is that what we want to do?

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, I think the interjection of the "factual circumstances" language will give rise to dispute over whether you -- and we don't really have any guidance on what "factual circumstances" means, at least not to the extent that "factual basis" would. It seems to me that there's nothing wrong with requiring a statement of the legal and factual bases for a cause of action that you're suing somebody for. And so I was going to suggest that if we just couldn't shorten this to "a short statement of the legal and factual bases of each cause of action to give fair notice."

I agree with Steve that it doesn't make any sense to use the word "circumstances" here and "basis" in the contention interrogatories, and I don't -- I guess I just don't see anything wrong with requiring that.

CHAIRMAN SOULES: All right. Say again what you're proposing in words.

MS. MIERS: "A short statement of the legal and factual bases of each cause

of action to give fair notice."

MR. ORSINGER: You would want to say -- wouldn't you want to say "sufficient" still?

MS. MIERS: Well --

HON. C. A. GUITTARD: Do we want to say "cause of action" instead of "claim"? I thought we've been moving against that or away from that since about 1941.

MR. McMAINS: We've been trying.

MS. MIERS: What does "sufficient" add, Richard? Don't you have to give fair notice? I don't see what "sufficient" adds.

HON. C. A. GUITTARD: "Of the claim" or "of the cause of action"? Why, that's just a question of words. In other words, "cause of action" is and has been regarded as an obsolete term.

MR. ORSINGER: Well, we use both "cause of action" and "claim" in the same paragraph.

HON. C. A. GUITTARD: Yeah.

MR. McMAINS: In the same

sentence.

MR. ORSINGER: In the same sentence, correct.

HON. C. A. GUITTARD: And that's a problem.

CHAIRMAN SOULES: Okay. Well, Harriet is saying "A short statement of the legal and factual bases of each claim."

MR. PRINCE: Claim for relief.

MR. SUSMAN: Sufficient claim.

CHAIRMAN SOULES: What? And then I think "sufficient" does help. "Sufficient to give fair notice of the claim involved" or "to give fair notice," period, I guess.

HON. C. A. GUITTARD: "A short statement of each claim sufficient to give fair notice." That ought to do it.

MS. SWEENEY: It's the insertion of the word "factual" that's going to fall into the trap Buddy's worried about and also do what I'm concerned about, which is put us into fact pleading and pleading a fact which supports each claim or contention. So this is an enormous change.

CHAIRMAN SOULES: Justice Duncan, and then I'll get to Judge Brister.

HON. SARAH DUNCAN: I agree it's a big change. And I think that's the vote we need to have, is whether a majority of the Committee thinks that's a good change or not a good change.

MR. SUSMAN: Luke, could we take a straw vote on that very point?

CHAIRMAN SOULES: Yeah. Let me hear from Judge Brister, though, before we do that.

HON. SCOTT A. BRISTER: I would not propose to go to very specific -- I mean, the question is, at what point am I going to be stuck with what the words are that are in my pleading. The current law is only if somebody else has taken the trouble to do special exceptions or find out by interrogatories. If you plead 6701(d)(35) and not (37)(b), at what point am I going to be stuck with only (35), even though everybody knows this other thing is involved in the case but it wasn't plead? The current practice is only if we had an order from the court to

plead it specifically, and I think that's fine. I do think the ambiguity in this rule is that it would suggest that we're making that change.

If we intend to do that change, we need to say that. If we don't, then I would suggest not just what was said earlier, but the main thing you need to change, I think, is the last paragraph that says "upon special exception the court shall require the pleader to give the maximum amount."

What you want to signal there is on special exception the court can make you state all the statutes or all the specific facts you're relying on to signal to people that the language you added up front -- which I don't mind adding or encouraging people to do this more, but signal somewhere else in the rule that if you don't say that particular section, that doesn't mean you're out, unless we still go through the special exception practice that we currently have.

And I think we're changing enough other things with the rules. I would not propose to change this as well.

CHAIRMAN SOULES: Buddy Low, and then I'll get to Richard

MR. LOW: Luke, I'll just ask Richard this question. What would be the effect, or the Committee's interpretation of the effect, that we pass this rule and the other lawyer did not file exceptions? They just replied generally, no facts, just plead generally violations of law and so forth. Would it be then your interpretation that then all these things would be raised by the pleadings; in other words, that you wouldn't have an objection that it hasn't been properly plead or factually plead? So you waive it by not filing special exceptions if they say a violation of statutory, common law, and all that just generally?

What would be the effect with this rule when you get down to the charge conference and they object and say, "It's not properly plead, and therefore you can't submit it"? I mean, I'm just wondering.

MR. ORSINGER: I don't think this rule changes the fact that we have a -- as revised, we have the equivalent of a

Rule 301 that says that the judgment must be supported by the pleadings.

MR. LOW: All right.

MR. ORSINGER: If your pleadings say, "I'm suing for only traffic violation 23," you can't submit 30, 25a or whatever.

MR. LOW: That's not my question. My question is, I plead that you violated statutory law, you violated common law, you were negligent, negligent per se, broadly. It includes the Constitution. You violated the Constitution of the State of Texas. I don't say any specific provision. I get down and I want to submit the question of you violated the DTPA statutory law. And they say, "Oh, no. This says you've got to state the legal basis, the factual basis, and that's not the legal basis, so you're not entitled to submit that."

Is it the Committee's intent that that would be -- that you couldn't submit it --

MR. ORSINGER: No.

MR. LOW: -- if I don't except?

MR. ORSINGER: No. If you say

that you --

MR. LOW: Just generally. Statutory, common law, you know, all that. And then --

MR. ORSINGER: Well, you've plead the legal basis.

MR. LOW: Well, I've plead the legal basis, but it says here "giving a general description of the factual basis." I'm just asking a question. If that's the interpretation, if that wouldn't change, well, then it wouldn't really matter. I'm not going to be educated, or the plaintiff's lawyer is not going to be educated on his pleadings unless I except, because he's not going to -- do you know what I'm saying?

This is -- according to this, you want the lawyer to do this up front. Okay. And maybe they'll have them do that. I don't know. But as a practical matter, lawyers are reluctant to change unless you pinch their toes if they don't change. So things aren't probably going to change. They'll say, "Well, it doesn't make any difference because I can still submit it. I'm just going to throw it

out, and you're going to have to file special exceptions anyway."

Now, that's just my question. But you don't think that would change that, so if you plead generally all those, you could still submit it?

MR. ORSINGER: Just in my view --

MR. LOW: No, no, no. That's all I'm asking for.

MR. ORSINGER: But if you plead that there was a cause of action under Texas law --

MR. LOW: Right.

MR. ORSINGER: -- to me, you couldn't use that as a basis to preclude any theory on the grounds that it wasn't plead. But that's just my view.

MR. LOW: I know.

HON. SCOTT A. BRISTER: But the argument would be, what you've just said does not meet this rule.

MR. ORSINGER: I know. But the solution to that is to file special exceptions, not to say that you can't get a

jury submission of any kind, but that's -- again, if these words mean something different, let's hear it.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I got here a little late, but is the basic notion that if somebody files a pleading saying, "I was in a car accident, you hit me from behind, and I was injured," your position is that that's legally deficient under this rule because you haven't put any words in about negligence? I mean, I could even say it's your fault, but I don't have any claim, and legal pleading. I mean, this is a let's-plead-the-law notion in our practice.

MR. ORSINGER: I think it is.

MR. McMAINS: I mean, is that what you're trying to do? And what I see all of the time, in the federal courts in particular in their convoluted pleading practice, is that they will allege things for 37 pages and then they will incorporate by reference in each identifiable claim each and every allegation of every other point. Now, I do not understand why that makes any sense,

since 98 percent of what they're pleading doesn't relate to the new cause of action.

Now, there's no way in the world to require them to segregate any of that stuff out, and that's just -- that is nothing but an encumbrance. I don't see how that advances the ball one iota, particularly because this says -- and if this is intended to change federal law, I mean, the law as it applies in federal court, you know, especially in terms of giving a legal basis for each claim, meaning that I've got to say, okay, I have a claim here for violation of a statute; I have a claim for violation of -- or do I have to say I have a claim for violation of this statute, I have a claim for violation of that statute, so that I have to incorporate by reference in every one of those the factual and legal allegations that relate to that particular claim as to however I want to characterize it?

Then I have to redo it when I want to talk about negligence, I have to redo it when I want to talk about DTPA, and I have to redo it when I want to talk about the Insurance

Code. And I have to redo it all the time or else I haven't done it for each claim. If I just put in a general factual statement in the beginning, I havn't done it for each claim.

And so for you to tell me that no judge in this state is going to interpret it that way, I tell you you're wrong, and it will be argued that way. And it will ultimately result in a virtually unmanageable pleading practice, the way it already is in federal court, as I view it.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Luke, I would add that there's another alternative to any of this, and that is to put in this language in the paragraph under "upon special exception the court may require." I don't see why that's an advantage, frankly, because if they can be made to do it after a hearing or made to do it in their answers to interrogatories, why do we make them do it in their initial pleadings? But that may make some people feel better that it's the current practice, unless the judge makes them get more specific, and then they have to get real serious about

understanding and pleading their case. I'm not -- that's not the subcommittee's recommendation, but that is an alternative.

CHAIRMAN SOULES: Okay. So you're moving that we adopt Rule 47 as proposed by the subcommittee?

MR. ORSINGER: Separate and apart from the comments, because I think what you say in the comments, if anything, may affect a lot of the interpretation of the words, so I think maybe we ought to move just the rule change itself and then discuss the comments, if any, separately.

MR. PRINCE: Second.

CHAIRMAN SOULES: And then, Justice Duncan, you wanted a proposition going on in advance of the main vote. State the proposition.

HON. SARAH DUNCAN: Until we -- we don't even know what the proposed amendment will do, and it seems to me that we should first decide if a majority of the Committee is not in favor of federalizing the pleading practice, we know what the rule says now, and let's leave it alone. So what I would like to

vote on is whether a majority of the Committee thinks we should move towards a more particularized pleading as exists in federal court or not.

CHAIRMAN SOULES: Okay. Those who think we should show by hands.

MR. LOW: Luke, can I ask a question? I don't know how to vote, because are you talking about having a 12(b), including a 12(b) motion or a motion for more definite statement and all those things? Is that what you're talking about? We don't have exactly a 12(b) motion now, you know, just a basis for the pleading.

HON. SARAH DUNCAN: I realize that. I think the preliminary question is, do we want to move to a more particularized pleading. If we don't, it doesn't matter that we don't have a 12(b)(6) motion.

MR. LOW: But see, they don't. Every federal judge will tell you -- you know, they say, "Judge, he hasn't plead."

He says, "You get that through discovery." I mean, if I don't file a 12(b) motion, he'll say, "We don't worry about more

definite statements. You learn that through discovery." And I've tried before a lot of federal judges, and I never have had one that didn't laugh at a motion for more definite statement. He says, "You're a lawyer. You can get that through discovery."

So when you talk about the federal pleadings practice, to me, I interpret the federal pleadings practice as not telling you anything, or doing like Rusty was telling you, more that you can't find it, so maybe my interpretation is -- when you say, "Do we want to follow the federal pleading practice," I'm confused as to what it is and what we're voting on and what it means, and so I just can't vote.

CHAIRMAN SOULES: Well, let me see if I can answer your question. Are we trying to get at this: Whether we want to put something in the rule that articulates that facts have to be plead in pleadings. And the concern seems to be that if we do that and there are not any facts, then we may not be able to get a jury question. I'm getting the signal, but if somebody else has got a better

way to say it, let me hear it. David Perry.

MR. PERRY: One of the discussions in the Discovery Subcommittee was to limit contention interrogatories. And I think we ended up doing that, if I remember right, because we felt that the interrogatory practice was being abused by people trying to make folks be too specific in answer to interrogatories by going on and trying to get the contentions more specific than they really need to be.

Now, it seems to me that if you turn around and say, "Well, we're not going to let you abuse discovery, but we're going to let you demand that pleadings become infinitely more specific," then we may have just moved the abuse from one place to the other place.

CHAIRMAN SOULES: Paula, and then I'll come around the table.

MS. SWEENEY: It takes us back to the discussion that we had during the Discovery Subcommittee discussions about are we going to require people to script their cases for each other. And you know, there are gander rules that go with this goose rule,

which is, all of the defensive pleadings are going to have to -- for affirmative defenses, et cetera, et cetera, are going to have to presumably match, so we're going to have these extremely long scripted out pleadings from both parties that will detail the allegations and which fact goes with which one, and that's exactly the kind of abuse we were trying to get away from in the Discovery Rules. It seems like we're just hopping right back into it if we insert anything that connotes that factual support for claims or, when we get to it, defenses, have to be put into the pleadings.

CHAIRMAN SOULES: All right. Next, Mike Prince.

MR. PRINCE: I don't know how to say this. I did a little work on this on the subcommittee, but let me tell you my thought. I'm not trying to change this and turn this into federal court practice. I mean, that would not be my view in voting in favor of requiring a little bit more factual information in the pleadings, because there are aspects of that I don't like particularly,

and I don't think they fit particularly well.

And I don't how to articulate this, but it seems to me that the real question is, if you're satisfied with current practice, and that is, if you get a general pleading and you can, upon exception, get more or a judge will give you more specific information, either as to the legal basis for the claim or the facts underpinning the claim, and that happens every day, if you can simply move that to the -- whatever that level of specificity is, and however you articulate it, if you simply move that to the pleadings stage, rather than having -- making it happen after an exception, that's all I would be interested in doing, not something broader than that, not something, you know, more federalized than that. But it seems to me that that is a reasonable thing. That ought to be the question.

CHAIRMAN SOULES: Harriet.

MS. MIERS: Yeah. I think the setup now is -- well, what are we about? We're about trying to get this done more efficiently and fairly. So to say we're going to just make you plead a little bit and then

you, if you want more, then you have to go charge your client for doing special exceptions, that may be good for lawyers, but I don't think that's good for the system. I don't think there's anything wrong with at some level requiring a factual and legal basis for a claim that is filed.

And the concern seems to be centered around, well, if you say it will be factual at all, then you get into big disputes about how much factual. And maybe we ought to address that. But to set up a system that requires you to use special exceptions to get at a factual basis seems to me good for lawyers but not good for the system.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: One thing with special exceptions that is beneficial is that instead of putting this blanket rule for every pleading in every case that will script the case, with the exceptions you address the particular pleading in that case that is a cause for confusion. And that particular area gets replead with specificity. You don't get

into this federal nightmare that Rusty was describing where in cases where just some totally irrelevant, some new damage component to the claim or whatever, that you have to script out every fact that supports it or be at risk of not being able to use them at trial or talk about them later.

If you have an exception practice where there truly is something that somewhere needs clearing up, the judge in that case can tell you the pleading requirement for that case. I don't think we can make a rule that's going to require, without a big change, factual pleadings for all claims and contentions.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I'm kind of changing my mind here from what I originally thought. I mean, I kind of agree with the notion that people should have to be more specific in their pleadings. But I also agree with Rusty, that if someone says they're in an accident and no one asks about it, why should that be a trap for the unwary? Can't you really provide -- couldn't you solve the problem, though, by requiring more specificity

by saying that the only -- I mean, what we're all worried about is requiring it and then using it as a grounds to avoid a jury submission at the end of the case on behalf of -- at the behest of somebody who has done nothing about it. Can't you really do it by saying -- by requiring a -- what's it called, I mean, you require it. You tell the lawyers in this state to be a little more specific in their pleadings, but nothing is going to happen to you unless the other side brought on some special exceptions; that that's the only remedy, is to go to court to get the judge to make it more specific. Doesn't that really kind of solve both of our problems, I mean, with that kind of an approach?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: For the benefit of those that weren't here when this was read before, and David, listen to this, because I think it addresses your concern, we already have faced this concept on new Discovery Rule 12 on contention interrogatories, and Rule 12 says, "Provided that contention

interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims or defenses of that party."

Now, we can make this language comport with this discovery language. This is language we've already sent to the Supreme Court. And in terms of what happens at the charge conference, I would say you're going to have the same argument at the charge conference, that your contention interrogatory answer didn't disclose x, y and z or raise such and such a theory. The real effect of this rule, then, is to just move it forward in the process so that the parties put their cards on the table earlier. And really this doesn't revisit the abuse of contention interrogatories in pleadings if the language is the same. It's just a question of timing and whether it's more important that it's omitted from the pleadings than if it's omitted from answers to interrogatories.

MR. SUSMAN: Richard, the theory, one of the theories, is that there are a lot of cases where it doesn't, like on

standard requests for disclosure. You don't get it automatically. You've got to actually ask for it, because there are going to be a lot of cases where it's not even worth the other side even asking for that sort of stuff. That's just like it is here.

I mean, I agree that if someone asks a contention interrogatory to state the factual and legal basis and you don't answer it, or answer it incompletely, then some kind of sanctions should be invoked, I mean, maybe like from preventing you from submitting something to the jury.

But I'm concerned about the case that Rusty talks about, the simple case that no one really cares about. They know what the lawsuit is about. They do not ask a contention interrogatory, and they do not move for special exceptions. They just hang around and wait, and then they go back as the case gets submitted to the jury and begin reading the pleadings again and say, "Uh-oh, he used the wrong section number," or "He didn't put any facts in here," or "He didn't say whether this was negligence or statutory negligence,"

or something like that.

I mean, we have given, through the contention interrogatories and special exceptions, the bar the ability to find out very early what the other side's case is, and I think this pleadings thing is just a trap now, now that I think about it.

CHAIRMAN SOULES: Well, what is the standard? I mean, if a party goes in and says, "I specially except to Steve Susman's pleading," and the judge says, "Well, they're good enough. They say you torted him, so that's good enough," isn't that enough? Well, no.

MR. SUSMAN: People are saying no.

CHAIRMAN SOULES: Well, then what drives the judge other than some standard in the Pleading Rule 47 that says, "Well, you haven't met that standard." Maybe we just go to the case law, maybe we don't, or maybe we use what's in the Discovery Rules or whatever. But what is the judge looking to as the standard by which he proceeds to reach some level of detail or do nothing more in his

ruling on pleadings?

Judge Brister.

HON. SCOTT A. BRISTER: Well, I remember I talked with Bill about this, and apparently there's a different practice in Dallas. I think in Houston generally I've never heard of a special exception hardly ever not being granted because it's absolutely irreversible to grant a special exception. Something bad may happen if you deny it, but absolutely nothing bad can happen if you grant it, so that makes it easy for me. I just grant them all.

And I think that, as I understand the appellate cases, if you deny it, and then you say, "They torted me," and then they show up and try the case on statutory, Business and Commerce Code, Section 26, fraud, rather than just common law fraud, and you didn't know that, you may object, but they can't submit the statutory fraud and they can't recover under statutory fraud because you did specially except. And so that definitely makes a difference.

And I think I don't have a problem with

the urging of people to be a little more specific, and I don't think there will be a problem if at the same time in that last paragraph we tell them you're not going to be stuck unless somebody has specially excepted and made you a list of everything particular.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think as a practical matter judges exercise a lot of discretion as to the degree of particularity that they require in pleadings. And I think as a practical matter that pleadings rules are not broke. We don't really have a problem as a result of the present pleadings rules. We get along fine with them.

The concern that I have is that I think the intent of the amendment is to enable people to use the pleadings rules for discovery, which I think is not the proper way to go about things. And I think that the Discovery Rules that we have sent to the Supreme Court solve the problem that needed to be solved of letting people get folks' contentions with reasonable particularity very early on if they feel like they need to.

So it seems to me that we end up making a change that nobody really knows very much what it would do to solve a problem that really isn't there in the pleadings rules and, if it was a problem before in the discovery area, it has already been solved.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, on the one hand, I don't think that the addition of this language is necessary, because I think that all the language does is provide something more meaningful about what the rule says already.

The history of our Pleading Rules with respect to this idea of the pleading of a cause of action, the recent history at least, is relatively straightforward, but complicated nonetheless. When the rules were promulgated, the new rules of 1940, Professor Staton wanted to stick with the state language, the code pleading language, requiring the pleader to plead a cause of action. That has meant a variety of different things to different people over time, with Professor Pomeroy's

view being that we're talking about identifying the duty breached; Professor McCaskell's view being that we're talking about remedies; and Professor Judge Clark's historic view that we're talking about facts, and cause of action involves all of that; it involves facts and law. Professor McDonald at SMU wanted to go with the federal language where we talk about pleading a claim, a fair and precise statement of a claim. And what we ended up with is a mixture mashing the two together that makes no historic sense except when you understand the background.

Now, if everybody is happy that they know what a short statement of a cause of action is, sufficient to give fair notice of the claim involved, then that's fine. To me, what it means is that you identify both the legal and, with some degree of factual specificity, the factual circumstances. You don't just say that on November 2nd the defendant negligently injured the plaintiff. You have to say something more about what the case is about. To me, this language is straightforward and helpful.

I don't necessarily like the detail in the notes and comments. However, it seems to me that -- and this isn't necessarily anything to be too greatly influenced by, but it seems to me that the Supreme Court has squarely held that when you're basing a claim on a statute that you're supposed to identify the statute, if not by number, by name. And that's just a decision that they made. Perhaps they won't stick with it, and perhaps it's not a good decision. So I don't care if you do any of this at all, but I don't see that it's harmful, and I don't see that it has anything really much to do with usurping the proper function of discovery. It has to do with making some sense out of this that doesn't make particularly good sense.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, first of all, I think that the change here does not solve your claimed historical concern between the connection of "cause of action" and "claim," since it uses both terms again, so this doesn't do anything about that. So if it were a problem now, it's still a problem under

this change. It says "a short statement of the causes of action," and then it says "stating the legal basis for each claim and giving a general description of it." So we still make a distinction between a "claim" and "cause of action," and there's a legal basis for a claim, and I'm not terrible sure what "cause of action" -- whether it's all embracing or what.

My concern primarily with this language is that this language, more than the contention interrogatory language, requires a segregation of claims and facts and an identification of those two things, which is a legal decision, one done by a lawyer as to what facts and what law and what category together, and appears to say that if you don't do that, then you haven't satisfied this rule.

And that's what I object to, is that any attempt to say that that's not -- that if you have plead sufficient facts and you have a general pleading of negligence, it doesn't happen to be in the same paragraph, it's in a conclusionary paragraph, that arguments will

be made that you have not coupled up the negligence with the facts. If you have made various and sundry claims -- I mean, if you make -- if in another paragraph you claim all your legal theories based on the facts that are all in the other but you haven't segregated them, have you complied with it stating the legal basis for each claim and giving a general description of the factual circumstances to give fair notice?

The truth of the matter is, do I have fair notice of exactly what this person's legal thinking is as to every fact that can be pigeonholed into a particular theory? No, I don't, by that pleading. Am I entitled to it? No, I'm not. That's silly. And we shouldn't be playing those kind of legal games. Because the argument otherwise is going to be, and it comes at the evidentiary stage and at the submission stage, "He didn't tell me that he was relying on fact A in claim A, and therefore, since he's now amended and abandoned claim B, I'm going to object to any attempt to prove anything that relates to his allegations as to claim B."

Now, those are silly games. They will be indulged in, and particularly, in my experience, in Dallas. And that's why I'm opposed to the segregation aspect.

CHAIRMAN SOULES: Okay. Judge Guittard.

HON. C. A. GUITTARD: There's been some discussion here of how we ought to move the specific specificity back from the exception stage back to the original pleading stage. It seems to me as a practical matter that it doesn't make any sense, because if you don't plead specifically enough, the only remedy is the special exception practice. So as a matter of fact, all we're really talking about is what standard should the judge look to when he's hearing special exceptions.

Do we need to give him a more definite standard as to how much facts shall be plead? I'm not sure that we need to tell the judges that they haven't been requiring enough specificity in the pleadings when they're hearing special exceptions. That seems to be the core problem to me, and I'm not sure that that needs to be done at this stage. I'm not

sufficiently up on the trial practice to know just what goes on, so I don't know whether that is necessary or not.

MR. McMAINS: Judge, frankly, from my experience, and Judge Brister and the other judges here may have a different experience, but most people that file -- if you file a very general and vague pleading and get special exceptions in return, 90 percent of those in my practice or better are handled by agreement.

HON. SCOTT A. BRISTER: That's right.

MR. McMAINS: They are done; they're fixed. People -- and you do it usually only once, and it's not problem. And frequently you don't even do it right away. Nobody is terribly concerned until you get later on into the discovery anyway. And so my real concern is that this doesn't really assist us that much in the special exception area.

But it is very different than the argument, for instance, for the language that is in the general contention interrogatories.

What we can ask in general contention interrogatories is a general factual basis. This wants a legal connection between the factual basis and the legal heading of a claim. And what I'm saying is it's that required legal effort here that is going to be used as a trap or used as an argument later on for reasons that we don't intend and may not even be able to contemplate, because most of the time the judges are going to assume that if you made a change, you made it for some purpose. At least that argument is going to be made. And then they're going to say, "And the purpose is, we are requiring a lawyer to connect up all of his pleaded facts with all of his pleaded theories in a segregated form."

And there are going to be in this context, it seems to me, judges who will say, "If you plead the facts in the first part of the pleading and the law in the second part of the pleading, you have screwed up."

And that's silly. And I do not think that we ought to interject even that possibility.

PROFESSOR DORSANEO:

Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: Well, listening to Judge Brister, and working a little further beyond what we did with the subcommittee, the problem really may -- and in listening to everyone -- really may be more properly located in Rules 90 and 91.

Despite the fact that the standard was relaxed in 1940, not requiring as much code-styled pleading as before, and despite the fact that a pleading defect was made waivable by the provision added into what is now Rule 90 by Chief Justice Alexander, making pleading defects waivable much earlier than had been the case before, Rule 91 still speaks about a special exception as if, in Judge Brister's conception, we're talking about every kind of a defect that you could imagine, even under, you know, previous thinking.

Even if the pleading gives fair notice of the claim involved, it is certainly arguable, if you specially except, that it is still not

technically perfect, that it's still defective in that it doesn't provide this or provide that or provide that. And that seems to me to be the disconnection, that the special exception should be something that's used to get fair notice, not something that's used to get an entirely different and more specific kind of recitation of the cause of action and claim of the type that frankly would be appropriate for contention interrogatories. And I'll just throw that out. Maybe it's Rule 91 that needs to match the modern philosophy about the relationship of pleadings to discovery.

CHAIRMAN SOULES: Okay. Where are we?

MR. SUSMAN: Let's vote.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I think we need to --

CHAIRMAN SOULES: Are we still wanting to have a poll, a straw poll, Richard?

MR. ORSINGER: I've been hearing kind of a drift of the Committee that this would be more popular as a response to a

special exception than a requirement of an initial pleading, so I would hate to have the only vote being whether the initial pleading should require this. Maybe we ought to have that vote, but let's follow it up shortly with should this then be the requirement upon exception.

CHAIRMAN SOULES: Okay.

HON. C. A. GUITTARD: What's the difference?

PROFESSOR DORSANEO: There isn't any.

CHAIRMAN SOULES: That's right.

HON. SARAH DUNCAN: I think the difference is a couple of hundred dollars at least or more for a hearing.

CHAIRMAN SOULES: Harris Miers.

MS. MIERS: Well, let me clear the air on one issue that no one was suggesting, that you have to plead a claim legally and then specify the facts that go with it. This segregation concept was -- I don't know where that came from because I don't know who was suggesting it. But the

requirement of an initial level of statement of facts and law seems to me to be what pleadings ought to be about, and there's got to be some standard that's stated. And so what is it? No facts?

CHAIRMAN SOULES: Buddy Low.

MR. LOW: All right. We now say -- we go with fair notice. I mean, you know, that's pretty broad, but yet it's fair notice of your cause of action. Okay. Your cause of action. You can't have a cause of action without facts. You can't have a cause of action without law. So as it reads now, the judge -- you can get fair notice. And basically instead of requiring people to type pages and pages, I agree with Rusty, that usually special exceptions are worked out. It's not like hearings, and $200 -- it would be $400 if I've got to prepare a pleading this broad to start with, which may never be needed. So I think we need to keep on fair notice, and we have fair notice and are entitled to get it under this practice.

CHAIRMAN SOULES: But my question was in response to this. Fair notice

of what?

MR. LOW: Of your cause of action.

CHAIRMAN SOULES: Any kind of fair notice of something, but we don't have to state any facts?

MR. LOW: No. It doesn't say so, Luke. "Cause of action" includes facts. You have no cause of action without facts. You have no cause of action without the law, so that's why they put it. There is no cause of action without the facts. The courts have interpreted that, so you can plead -- that's the way it's done now. And we are at fair notice of pleading. And when you start getting more specific and saying lawyers have got to do more than just give fair notice, that's all we're entitled to, is fair notice.

CHAIRMAN SOULES: Fair notice of what?

MR. LOW: Your facts and the law.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: Luke, the

suggestion that I have misinterpreted this rule may be accurate, because it's subject to misinterpretation. It says -- as I read the rule, the argument of trying to connect up claims or legal theories with facts is, it says, "A short statement of the causes of action stating the legal basis for each claim and giving a general description of the factual circumstances to give fair notice of the claim involved."

The "each" is going to be and is grammatically correct as being interpreted to "claim," and is going to require in my judgment this claim they've required that you have facts and an identifiable legal theory with each claim. That is the argument that will be made. That is not what the standard is in the contention interrogatories. And if you substitute the contention interrogatories language, I think a lot of this problem goes away.

Read the language again, Richard.

MR. ORSINGER: It says, "Provided that contention interrogatories may only request another party to state the legal

theories and to describe in general the factual bases for the claims or defenses of that party."

MR. McMAINS: Right. Now, the describing in general based on your identifiable legal theories in response to a special exception, that I don't think anybody has a problem with. But when you start out by saying that there is some requirement that you have to identify that for each claim, which appears to be synonymously "cause of action" in the context in which it is used, and that you then connect up the factual circumstances -- it says, "give a general description of the factual circumstances to give fair notice of the claim involved."

And the reason it is "the claim" is because you are using the term "each claim" when the requirement is that you plead it.

So you must put, in my judgment under this rule, a legal heading and a description of the factual circumstances that relate to that legal heading with the assumption, as most courts tend to do at the appellate level, if not before, that the failure to do that may

result in your having screwed up somewhere. And that possibility does not appeal to me.

MR. ORSINGER: I don't think that it's our intention that fact A has to be identified as going with theory A and fact B with theory B. And --

MR. McMAINS: Do you not see that --

MR. ORSINGER: -- I think it's smart to make the pleading requirement match the discovery requirement, and I don't have any problem if everyone wants to make the rules identical.

MR. McMAINS: But do you not see --

CHAIRMAN SOULES: Okay. Let's get -- let's try to get moving here. Somebody make a proposition we can vote on. We've debated this now for an hour and a half.

MR. ORSINGER: Well, I would move that we change this proposed language to match the discovery rule language that's already been approved and sent to the Supreme Court.

CHAIRMAN SOULES: Okay. Well,

we need to hear what it is and where it goes. Start with "A short statement."

MR. ORSINGER: "A short statement of the causes of action, stating the legal theories and describing in generally the factual bases for the claims."

Now, let me say --

CHAIRMAN SOULES: Wait a minute.

MS. SWEENEY: Say it again.

CHAIRMAN SOULES: Describing in general the what?

MR. ORSINGER: Stating the legal theories and describing in general the factual bases for the claims.

MS. MIERS: Don't you want to say the "fair notice" part?

MR. ORSINGER: Carrying on with that, say "sufficient to give fair notice."

CHAIRMAN SOULES: "Factual bases for the claims?"

MR. ORSINGER: Right.

CHAIRMAN SOULES: "Sufficient to give fair notice of the claims" or "sufficient to give fair notice," period.

Okay. Let me read it from my notes to see if we've got it right. "A short statement of the causes of action stating the legal theories and describing in general the factual bases for the claims sufficient to give fair notice." That's the motion.

MR. BABCOCK: "Of the claims," plural.

CHAIRMAN SOULES: "Of the claims." Is there a second?

MR. BABCOCK: Second.

CHAIRMAN SOULES: Any further discussion? David Perry.

MR. PERRY: I agree with the concept. But I would suggest that we vote on this as a concept rather than as the specific language, and send the specific language back to the subcommittee to be redrafted.

CHAIRMAN SOULES: Well, we're going to get a chance to look at it before it goes to the Supreme Court anyway to see if we've got some kind of language problem with it. Tony Sadberry.

MR. SADBERRY: Luke, I agree with the substitute language. I think, and I

don't know if this was made in the form of a proposal or not, but I think Judge Brister's concept that whatever this language ends up being, however it's interpreted, to the extent that it either adds to or increases some pleadings requirement, that it not be used as a trap at some stage such as jury sumbission or otherwise, unless the other side has made a special exception and the party has had a chance to respond to that. And I don't know if I -- to me, that needs to be in there anyway even with the substitute language.

CHAIRMAN SOULES: Okay. Is everybody ready to vote?

HON. SCOTT A. BRISTER: Yeah. That was my question.

MR. ORSINGER: We'll get to that in a minute. Right now we just want to get some language we like in there.

HON. SCOTT A. BRISTER: Yeah. Okay. I just wanted to make sure that -- okay. That's fine. I don't have any problem with this language. I do want to add that somewhere else, though.

CHAIRMAN SOULES: Okay. Any

opposition to 47a as stated?

MR. ORSINGER: Ooh. See, that's going to get us right into whether it ought to be after special exceptions. I think what we ought to do is, can we agree this is the language we're talking about? And then let's talk about where we're going to put it, because it may need to be in Rule 91, and then a bunch of people will support it.

CHAIRMAN SOULES: Let's put it in both places. It's the standard in both places.

MR. ORSINGER: Okay. But before we vote on place, let's vote on the language. Then we can eliminate this cross-debate about what the words mean and move on to where --

CHAIRMAN SOULES: Until you moaned, there was not a hand in the air.

MR. ORSINGER: I'm sorry.

MR. LOW: Don't say anything when the judge says you win.

CHAIRMAN SOULES: Any opposition to 47a? One.

Those in favor of 47a show by hands.

17. 17 to one it carries.

PROFESSOR DORSANEO: I move that the same concept be included in the special exception rule.

CHAIRMAN SOULES: Any objection to that? There being no objection, that should be written.

MR. ORSINGER: I would propose that we take "cause of action" in paragraph (a) and make that also "claim" to eliminate this internal conflict between "cause of action" and "claim."

HON. SCOTT A. BRISTER: Do what?

CHAIRMAN SOULES: Any opposition to that?

MR. ORSINGER: It says, "A short statement of the causes of action," and then the rest of it talks about claims. I think the whole thing ought to talk about claims.

HON. SCOTT A. BRISTER: Yeah. Okay.

CHAIRMAN SOULES: Any opposition to that? Okay. "A short statement

of the claims."

HON. C. A. GUITTARD: "Of each claim."

CHAIRMAN SOULES: No, not "each." That got us into trouble before.

MR. ORSINGER: Now then, I think it should be recognized that when we move this over to Rule 90 or 91, whatever happens to be the exceptions process, it's going to apply to both defenses and claims over there, whereas this only applies to claims.

CHAIRMAN SOULES: Now, when you say moving, you're talking about leaving it here and adding it someplace else?

MR. ORSINGER: That's right.

CHAIRMAN SOULES: Okay. What's next, Richard?

MR. ORSINGER: Well, we've got to decide whether we want to have any --

MR. PERRY: Wait a minute, excuse me. I heard something that I hadn't heard before, which was that what we voted on applied only to claims and not to defenses.

MR. ORSINGER: That's inherent

in Rule 47.

CHAIRMAN SOULES: That's because Rule 47 is only dealing with claims, David.

HON. SARAH DUNCAN: But by putting it in the special exception rule it will also apply to defenses.

MR. ORSINGER: If you want it to apply to both claims and defenses, David, it ought to be in Rule 45, which is the general rule for all pleadings. And our subcommittee voted not to change Rule 45 but to change Rule 47. But the implicit, perhaps even unrecognized effect of that is to make this apply only to affirmative relief and not defensive relief. It really should apply to both claims and defenses, and it really ought to be in Rule 45 as well as in Rule 91, rather than Rule 47 and Rule 91.

PROFESSOR DORSANEO: Put it in 45, 47 and 91 really.

CHAIRMAN SOULES: But you're going to retain the general denial practice, I assume?

PROFESSOR DORSANEO: Sure.

CHAIRMAN SOULES: So --

PROFESSOR DORSANEO: For contributory negligence you have to be given a little bit of factual information too, not just saying the legal --

CHAIRMAN SOULES: Well, maybe we could just debate that or not debate it and get a vote, get a show of hands. How many -- so long as we preserve the general denial practice, is there any opposition to having this same standard apply to defensive pleadings?

HON. SCOTT A. BRISTER: Well, isn't that just the opposite of the general denial?

MR. McMAINS: Not if you keep Rule 92.

CHAIRMAN SOULES: Not if you keep Rule 92.

HON. SARAH DUNCAN: But think about an affirmative defense.

CHAIRMAN SOULES: But if we don't -- as long as we preserve the general denial, is there any opposition to this same standard applying to defensive pleadings? No

opposition. So we'll put it in three places, or wherever is appropriate.

MR. PERRY: Luke, wouldn't you put it probably in Rule 94?

CHAIRMAN SOULES: Yeah. It would be the standard for ruling on special exceptions. It would be the standard for alleging claims. It would be the standard for alleging affirmative defenses to counterclaims.

PROFESSOR DORSANEO: Well, 45 is meant to work with 94 when it talks about grounds of defense. And denial defenses are just different when they're general denial defenses and when they're special denial defenses. I don't think it needs to be in 94 if it's in 45. And really 45 doesn't need much work, except to change "cause of action" to "claim," if that's what I understood Richard's suggestion to be.

MR. ORSINGER: Right.

PROFESSOR DORSANEO: And that really, with the change in 91, cures a whole host of problems that we've had for a long time. It's a great improvement.

MR. PERRY: I thought we were going to leave 45 alone. Maybe I just got lost.

MR. ORSINGER: Well, the subcommittee voted to leave 45 alone, and so we debated the change in 47, but then I made the comment that that change only applies to affirmative claims. And then you said wait a minute, what -- you know, and I came back by saying it ought to apply to defenses just like it applies to affirmative claims. But it can't if it's just in Rule 47, because 47 is only for affirmative claims.

MR. PERRY: And the way to make it apply to both is to put it in both 47 for claims and in 94 for affirmative defenses, isn't it, and can't we still leave 45 alone?

MR. ORSINGER: That would do it also.

MS. SWEENEY: Because we can tinker with 91. But if you read it the way it looks right now, 91 is special exceptions and is listed under pleadings of defendant, and even though I plead special exceptions and you just don't want to get into that, well, gosh,

you're not a defendant.

PROFESSOR DORSANEO: And in these pleadings rules things are not located properly, and I think they need to be reorganized. There are some things that are called "pleadings of defendant" that are not necessarily pleadings of defendant, and it's just organized in a very goofy fashion.

MR. ORSINGER: Furthermore, if I may add to that, an argument can be made that special exceptions should be a motion rather than a plea anyway. And I wouldn't be surprised if our subcommittee doesn't come back with a proposal we treat it as if it's a motion and not part of a pleading if you file it in response to another pleading.

CHAIRMAN SOULES: Okay. Well, we've got the standard agreed to in specific words, unless there's some alarm that rings and says it needs to be in different words somehow. And we're going to apply that to plaintiff pleadings, claims pleadings, and defensive pleadings. And your committee can work through where that needs to be done in order to make the rules work.

HON. C. A. GUITTARD: Do I understand then that a ruling on a special exception requiring more definite pleadings would be governed by the same principles and have the same result as a ruling on interrogatories requiring more definite information? Would that be the same sort of -- would the same standard apply to both cases, so you can proceed either way and have the same result? Is that the result, the conclusion?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Yes. And I think, Luke, we need to now ask whether we want to have any comments at all and whether they ought to look anything like this or like something entirely different.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Let me speak about comments.

CHAIRMAN SOULES: Okay. Bill Dorsaneo on comments.

PROFESSOR DORSANEO: This is also a debate that was conducted back in the 1940s. Professor McDonald wanted to have

comments. He thought that they were helpful. Professor Staton thought that they would influence how the rules are interpreted and that therefore they should not be included, which is not a completely senseless position, but it's not congenial to me.

I think we need to work hard on the comments. I suspect that Rusty's idea about matching legal claims to facts comes as much from the comments as it does from the language of the rule. But I don't have a problem with the idea of comments or even actually too much of a problem with this one.

MR. McMAINS: Well, one thing that's intriguing is that this comment, even though it's only devoted to the plaintiffs, starts talking about the defendants at the end, which I find to be particularly amusing.

MR. ORSINGER: That's why I said it must have been inadvertent.

HON. SCOTT A. BRISTER: Luke?

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: I want to move to amend the last paragraph of the

rule to be "Relief in the alternative or of several different types may be demanded," period, because the next section is not provided further on anything in the first section. Drop that. So drop "provided, further, that." Start a new sentence. "Upon special exception, the court shall require the pleader to," then insert "plead more specifically, including," pick up from the comment, fourth line, "any constitutional, statutory or regulatory provision upon which a claim is founded," and then back to the end of that, "and the maximum amount of damages claimed."

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, the only problem I have with that is that once again this is the plaintiff's rule. This rule is to provide plaintiff's pleadings. What you're suggesting actually belongs in the special exception rule because it applies to both sides. If they want to claim negligence per se, if they want to claim violation of regulatory statute, if they want to claim failure to give notice or something pursuant

to that, that needs to be specifically plead. And they can be made to do that. This rule is not universal.

PROFESSOR DORSANEO: It could be, though, after Rule 45 is --

MR. McMAINS: Yeah. It could be with 45.

HON. SCOTT A. BRISTER: Then I would propose we do it both places for the reasons described earlier. If not, the new language we put in needs to signal in this rule. And we don't mean that if you didn't name the statute that that is such a failure to state the legal basis that you may not submit an issue on it. We need to signal that in this rule that that language change earlier does not mean we changed the requirement for special exceptions before you're going to be stuck with the words you used. So if you have to put it in two or three places, that's fine.

CHAIRMAN SOULES: Okay. Any opposition to what Judge Brister suggested?

Do you have notes on it?

MR. ORSINGER: I wasn't able to get it down enough to read it that well.

Maybe, Judge, you could write it on a piece of paper for us.

HON. SCOTT A. BRISTER: I'll write it down. Surely.

HON. SARAH DUNCAN: Well, if I could point out that that formulation only deals with the legal theories. You didn't say anything about pleadings facts more specifically.

HON. SCOTT A. BRISTER: Well, that's why I said "including." I said "including but not limited to." That's the main problem. The main problem is you didn't name the statutory section or regulation.

PROFESSOR DORSANEO: Making the statutory section or regulation identification the same as the maximum amount claimed makes good sense to me, because you get a warning. And someone could plead the facts that would indicate a violation of the statute yet run into trouble with our Supreme Court opinions. And that's probably not exactly in the spirit of things.

CHAIRMAN SOULES: Okay. Anything else on Rule 47?

MR. ORSINGER: I would like to raise something that comes up in our disposition table only in a different light. The disposition table was concerned about unliquidated damages without a dollar amount being manipulated in order to get jurisdiction in a county court, and then amend when you get damages in excess of their jurisdictional limit.

The second question has arisen under our Discovery Rules. Suits for 50,000 or less, or is it suits for under 50,000, are Tier 1. But since you can't plead in your initial pleading what damages you're seeking, how are we going to know what tier they're in?

Should we do something about this not putting a dollar figure in here so that we know which suits are Tier 1 and which suits are not, or do we wait for special exceptions to decide that? And our subcommittee doesn't have a proposal on that yet, but I'm throwing that out right now because it's kind of a problem created by our discovery concept now.

CHAIRMAN SOULES: In other words, do we still need the Joe Jamail rule?

Because that's what this is. There was an outcry from the public that Joe kept filing cases for a billion dollars.

MR. ORSINGER: Then he finally recovered on one.

CHAIRMAN SOULES: Yeah. It was one of those lawyer bashing things. So then they passed this rule to take that away from the plaintiffs so that they wouldn't be filing these lawsuits and getting a bunch of publicity over these huge dollar amounts and so forth. I don't know if we even need it any more. Anyway, that's the genesis of it.

MR. LOW: Well, you do, because of insurance coverages. Yeah, I think you do need the rule still.

CHAIRMAN SOULES: The rule that says you can't state the unliquidated damages in your opening petition?

MR. LOW: No, no, I'm sorry. I misinterpreted. Okay.

CHAIRMAN SOULES: I'm talking about the rule that says you cannot state the amount of your unliquidated damages claim in your opening petition.

MR. LOW: I don't think we need that. Let them plead 10 billion. I don't care.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: How do you read this? "In all claims for unliquidated damages only," or "In all claims for unliquidated damages, only the statement that" --

PROFESSOR DORSANEO: The second one.

HON. SCOTT A. BRISTER: Second.

MR. SUSMAN: The second way? It's not clear from the language.

PROFESSOR DORSANEO: That's right.

HON. SCOTT A. BRISTER: That's the way it's always been.

CHAIRMAN SOULES: Okay. David Perry.

MR. PERRY: I don't see it as a real problem. I know that we have begun to plead that damages are not only within the jurisdictional limit of the court you're filing in, but also whether they are or are not within the jurisdictional limit of the

federal courts, because there are some rules that say that governs the time for removal. I don't think the rules prohibit that. And I think a person could plead that their claim is within whatever rule number it is of the Discovery Rules.

HON. SCOTT A. BRISTER: Yeah.

MR. SUSMAN: Rule 1.

MR. PERRY: So I think you can get around it within the present rule.

HON. SCOTT A. BRISTER: Within the jurisdictional limits of the court or of rule blank? What? Rule 1?

MR. SUSMAN: Rule 1.

CHAIRMAN SOULES: Okay. Anything else on Rule 47? Rusty.

MR. McMAINS: Well, related to that, assuming that we keep the rule about pleading the unliquidated damages, and assuming also that this is a plaintiff opt-in limited discovery notion, is there a way that you can integrate under this rule or under Rule 47 or one of the rules basically saying that you can -- if you wish to plead into this theory, that all you have to do is state

the -- you know, put that in your petition? I mean, is there any reason not to do that if you're going to be going to this process, so that -- in other words, so that the defendant is on notice right off the bat that you have plead yourself into this end of the limited discovery? I mean, that's part of the fair notice issue, it seems to me, even though it does have material impact.

MR. ORSINGER: What if we said, "In all claims for unliquidated damages exceeding $50,000, only the statement that"? And that would permit anyone to plead within the Tier 1 discovery limit and stay there.

PROFESSOR DORSANEO: Second the motion.

MR. McMAINS: Okay. And put a comment in there as to why we're doing it.

MR. ORSINGER: Is the discovery Tier 1 --

CHAIRMAN SOULES: Any opposition to that? No opposition.

MR. ORSINGER: Is the discovery tier 50 and under, or is it under 50?

MR. McMAINS: I think it's less

than, but not counting fees and costs.

CHAIRMAN SOULES: Where is the rule?

MR. ORSINGER: If it's Rule 1, I'll look it up here.

MR. SUSMAN: It's Rule 1(1).

MR. ORSINGER: 50,000 or less. So it would be -- we would say "exceeding 50,000."

MR. McMAINS: Right.

CHAIRMAN SOULES: Any opposition to that? So it would be --

HONORABLE C. A. GUITTARD: More than 50?

MR. ORSINGER: More than, yes.

CHAIRMAN SOULES: So it would be "In all claim for unliquidated damages more than $50,000, only the statement that the damages are within the jurisdictional limits of the court."

All right. Anything else on 47?

MR. ORSINGER: Well, are we supposed to rewrite some new comments now and just come back later with what it says?

CHAIRMAN SOULES: Uh-huh.

MR. ORSINGER: All right.

CHAIRMAN SOULES: I mean, what do we want to do about the comments? Keep it? Modify it? Drop it?

MR. SUSMAN: I think I like the comments because they really -- it demonstrates on the legal side at least how little you need to say, so I do like those illustrations. The problem is the way it's kind of worded here. It gives you no example of the factual specificity that you have to include.

PROFESSOR DORSANEO: Based on what was done, I'm going to propose the addition of an example taken from Federal Form 9 about somebody being negligently injured in a motor vehicle collision when a car was driven, which is the claim language. And the federal rules do use the forms to give meaning to Federal Rule 8a with respect to what is a fair and concise statement of a claim.

CHAIRMAN SOULES: Okay. Anything else on Rule 47 before we take a break? Go ahead, Rusty.

MR. McMAINS: I have just one about the location or the locus of the comment. It seems to me that the comment, especially the one that's here, does talk about claims and defenses. Therefore, it either belongs under the special exception rule or it belongs under Rule 45. And then you can refer -- then your comment would be adjusted everwhere else you make it. You just need the comment back at 45, which actually is the general standard rule anyway, so maybe it's best done there.

CHAIRMAN SOULES: Is there any problem with putting the standard in Rule 45, now that we've decided what the standard is?

MR. ORSINGER: No, not at all.

CHAIRMAN SOULES: All right. Does anyone see a problem with that? No one has their hand up. Okay.

MR. ORSINGER: Well, if you put it in 45, you don't have to put it in 47 or 94.

CHAIRMAN SOULES: You've got the discretion to put it where you think it should go, because we don't -- we're not

opposing it being in Rule 45. The Committee is giving you license to do that.

Is there anything else on Rule 47? Okay. Let's take about a 10-minute break, give the court reporter a break, and then we'll come and we'll work through until noon.

(At this time there was a recess.)

CHAIRMAN SOULES: All right. Rule 90. We're back on the record and back at work. Rule 90. This is --

HON. SCOTT A. BRISTER: Do we have something on this?

CHAIRMAN SOULES: It says at the top, To the Members from William Dorsaneo. It's dated November 16, 1995. It's in a little bit smaller print than some of these others that were on the table. It looks like this, if that helps (indicating). It starts out "As a result of discussions" and so forth. In the middle of the page it says Civil Procedure Rule 90 (Waiver of Defects in Pleading). There may be some more up here. Yeah. Here are some more, if anybody needs them. Has everybody got one? Okay. Who

wants to present this, Richard or Bill?

MR. ORSINGER: No, I'm going to ask Bill to present it.

PROFESSOR DORSANEO: Okay. As I understand my history, and maybe Judge Guittard can help me on this because he probably was involved in this part of the history, Chief Justice Alexander was the one who resolved or drafted this provision to resolve the issue of when there would be a waiver of pleading defects and what would be waivable.

As I understand it, the practice in the early part of this century was that pleading defects could be raised for the first time on appeal, and that caused a lot of reversals. And that was uniformly thought to be a bad thing, or pretty uniformly; I'm sure it wasn't uniformly thought to be a bad thing, but it was generally thought to be a bad thing. And so this was drafted.

The way that it's drafted reflects the practice of the time, where it originally spoke about every defect not specifically pointed out by motion or exception -- okay,

the "motion or" got taken out in the mid '80s -- "before the instruction or the charge to the jury," which is late, okay, later than the pleading stage probably because that was much earlier than the time for waiver at the time. We get waiver of pleading defects at that point in time.

The first issue is whether that's what the rule should say, or should it say what local rules of court tend to say and what local practice tends to be; that there is waiver at the pretrial pleading stage, waiver before the trial commences of the pleading defect, unless there is an exception. So that's the first change.

Now, I put it here in the draft in a way that may not be the best way, by reference to at least blank days before trial. It may be that somehow needs to be linked up with the discovery period or something other than the trial date. I'm not sure. But it seems pretty clear to me that it shouldn't be what it says now.

The second issue, which is kind of while we're at it as the basis for wanting to do it,

is to eliminate, if you want to, what has seemed to me and others to be a very curious provision of the rule indicating that there is waiver by the party seeking reversal on such account, rather than waiver by the person who didn't except. You don't know who waives until you know how the thing turned out under this formulation, and not all cases approach the matter that way. But that has always struck me -- and commentators Deffenbach and Brown, while they were students at The University of Texas Law School, probably articulating the viewpoint of some unspecified professor, point out that this is at least odd; that the waiver analysis is not completed until you know who is seeking reversal, who won and who lost. That's strange, if not wrong.

The third thing is related to what we were talking about a little while ago. And I think the idea is to make Rule 90 do exactly what you've decided Rules 45 and 47 and perhaps 94 should do in the default judgment context.

Right now it is arguable in cases -- and

Professor Carlson can help me on this since she's probably as tuned in to this as anyone, if I don't say it right. The cases are a little bit unclear about what happens if there is a general pleading of negligence in the operation, let's say, of a motor vehicle, and there's a default judgment, because if it's a default judgment, the rule has said "provided this rule shall not apply as to any party against whom default judgment is rendered."

That means that the pleadings -- or could mean that the pleadings should be analyzed as under the old general demurrer standards. And under the old general demurrer standards, that pleading wouldn't be good enough to survive a general demurrer. And our idea is that if it's good enough to try the case, it's good enough for a default judgment, to sustain a default judgment, too, and more technical detail than that is unnecessary.

That's the whole thing in three parts.

MR. LOW: Bill, could I ask a question?

PROFESSOR DORSANEO: Okay. But I'd say, as the last thing, we would probably

plan on tailoring the language of the proviso to tune it in with the standard the way it was articulated a while ago, rather than "claimant's cause of action" or "claimant's legal claim" or "claim involved." I'm not sure exactly what the language would read, but it would be consistent with what had already been done.

CHAIRMAN SOULES: As in 47?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Okay. Did you have a question, Buddy?

MR. LOW: Yes.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Okay. I find mostly that when you get down to submission they object on the basis that this has not been plead, and not a question of something I specially except to in the sense of -- well, now, you said statutory negligence. Now, I haven't specially excepted, and if there's statutory negligence, and that has been plead within that realm, what kind of defect in pleadings are you talking about are waived if you don't raise it before then?

PROFESSOR DORSANEO: Well, for example, there is a -- well, there would be two kinds that would be the classic kind. One kind would be where there is a pleading that is general such that a number of factual claims would be subsumed under it, just a general pleading of negligence that doesn't provide the right amount of factual detail, whatever that level would be. Now, that is what a special exception is for. And at the charge stage, the objection should not be that the pleadings are insufficient. It should be that there's no pleading; no pleading of this cause of action or this element of damages.

Now, perhaps in terms of damages, if there's a general pleading of damages, that might be a better way to say it, a special exception would be appropriate. And if you waited until the charge stage to say that your general pleading of damages or your pleading of injuries, you know, is not specific enough, that -- you would put yourself at risk, because there is some kind of a pleading of injury.

MR. LOW: I know. But --

PROFESSOR DORSANEO: Those cases involving -- wrongful death cases involving loss of inheritance, I think, kind of come to mind, where somebody pleaded generally that as a result of the death of the decedent they suffered an economic injury. No special exception. The Supreme Court says, well, that pleading without a special exception is good enough to be a pleading to get a charge part on loss of inheritance. So you know, it's that kind of a thing.

MR. LOW: But --

PROFESSOR DORSANEO: But at the charge stage, it would be that there's no pleading. All right. There's no pleading to cover this claim, this element of damage. If the pleadings were bad and vague, the response will be, "Well, no, Judge. It does have this right here." And the judge's responsibility clearly in the absence of a special exception now is to look at that liberally.

CHAIRMAN SOULES: State your question, Buddy.

MR. LOW: No. My question is this, that right now, I mean, it's pretty

clear and I know that if I want more information, I've got to specially except. I know that when I get to the charge I can't say that he hasn't plead that. He said it in maybe one word, and therefore I shouldn't be objecting on the basis that -- objecting, saying, well, it's not plead.

I don't understand how it comes up still after your explanation in context because I see it where you just haven't plead it at all. I'm not talking about where you haven't plead it properly.

PROFESSOR DORSANEO: Well, I gave you a long-winded answer, then, to a different question. This rule as currently written is not consistent with your understanding of the law.

MR. LOW: Well, a lot of rules aren't that. But let's just focus on this one.

PROFESSOR DORSANEO: This rule does say to me as currently drafted that you can at the charge stage, you know, before the instruction or charge to the jury, you know, specially except to the pleading, although the

pleading of something is insufficient.

CHAIRMAN SOULES: No. It's not -- oh, the current rule. Oh, I agree. I think that's right.

MR. LOW: And then I've found that as a practical matter if something is not -- you can even after trial amend, and the judge can grant it after verdict. Now, I won't say any more, because apparently I'm confused. But it doesn't look like a problem to me.

HON. SCOTT A. BRISTER: I just have a quick question.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: If you plead negligent infliction of emotional distress, is that a defect in pleading? Because I do have that arise. People still believe that this exists or may exist by the time the case gets up to the Supreme Court, and nobody objects to it. I agree with moving it to before trial, because I do have people that raise special exceptions right in the motions in limine right before trial. And

look, we are -- it is -- okay. Fine. Granted. And they replead within 30 days. How's that? After which it will be after the trial is done. You know, people still do raise these special exceptions late, and it's a big problem. It's a problem; it's not a big problem. It's a problem, but what do you do with -- obviously, you don't want to waive an objection to a negligent infliction of emotional distress and have to submit something that doesn't exist under Texas law because they didn't wake up and specially except to it.

PROFESSOR DORSANEO: You grant a motion for judgment as a matter of law. I mean, that would be one way to put it. We always run into kind of an intellectual problem where we say that this pleading is defective because it doesn't state a legal claim. Now, many times it's arguable that it's trying to state a legal claim, and that's the point.

In one case, Castleberry vs. Goolsby, where a worker -- a worker/survivor attempts to bring a gross negligence claim against an

employer, when you look at it, they say it's gross negligence or willful negligence. And the Supreme Court said that that's not any kind of a pleading of a legally cognizable claim, because the gross negligence is not intentional injury, but, you know, that kind of depends on how you look at it.

If it really is just a claim that's not legally viable, it's defective as a matter of substance. And the fact that that also makes it defective as a matter of form is kind of beside the point, because you have another reason for dispatching it or dealing with it.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think Judge Brister's question points up the fact, Luke, that special exceptions really do double duty. They are a way to eliminate a lawsuit that isn't recognized under law, and then they are a way of cleaning up pleadings that are probably -- I mean, that assert claims or defenses that are recognized but just not with sufficient specificity.

And perhaps we ought to recognize the

difference, because I'm not in favor of any concept that you waive your right to complain that the cause of action doesn't exist just because you don't file special exceptions or have them heard before you pick the jury.

PROFESSOR DORSANEO: That's not merely a pleading defect, is what I'm trying to say. I mean, that's -- the pleading defect part of that is extra.

MR. ORSINGER: Yeah. But the problem, I guess, is that the rule talks only as if special exceptions are for defects, and defects are waived; and therefore, if special exceptions were not filed or heard, they can be -- they can't complain at the time of jury submission that the cause of action doesn't exist.

Maybe we ought to speak of them separately, and the ones that are waived are the true defective pleadings and not exceptions that knock claims out.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I think what Bill is saying is that if you don't specially except, you waive the obligation to

require them to plead it differently. But it doesn't mean that you have waived any kind of legal determination that there is in fact a breach of duty cognizable in law. I mean, you can still make it under the aegis of the no-evidence objection to the charge. That is enough to get you to an argument that this submission doesn't exist as a matter of law.

I don't have -- it has nothing to do with the fact that they plead it one way or another or the fact that you didn't specially except to it. Yes, there's a pleading to support the submission, but there also must be a legal theory that is viable to support the submission. And you don't have to give somebody an issue on something that doesn't exist as a cause of action, even if you don't have a right to require them to replead it.

MR. ORSINGER: Well, we still -- shouldn't we tell people that an exception can be used for this purpose? Because we don't. All we tell them is that you can point out the particular pleading is unintelligible and the defect/omission duplicity. It seems to me like all of that

relates to valid claims that have been poorly pleaded; and that you're really violating our fundamental rule here of telling people that there is a procedural remedy available called special exceptions that can be used for defective pleadings, but it can also be used to test whether the claimant has failed to state a claim recognized under law.

MR. McMAINS: Well, I mean, our historical practice, of course, is that you must give somebody an opportunity to replead. You can't just -- you do not dismiss, and it differs from the demurrer practice in that regard. You can strike the claim, and only if the person refuses to replead are you entitled to strike the claim and strike the pleading. Now, that is a different practice than any kind of utilization of the demurrer practice.

Now, whether or not our rules actually kind of say that's what goes on, and they probably don't, but I -- that is, if you can even find it in TexJur, you can figure out that's what it's for and that's how it works.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: Well, what about in the situation the judge described where there's a claim of negligent infliction of emotional distress or false light invasion of privacy, things that are not recognized by the Supreme Court? You don't give the guy the right to replead there, do you, under our current practice?

HON. SCOTT A. BRISTER: Yeah.

MR. McMAINS: Yes. I think you do.

MR. BABCOCK: So he pleads it again?

MR. McMAINS: No, no, no.

HON. SCOTT A. BRISTER: A lot of them do.

MR. McMAINS: It's the same thing. I mean, if he does not alter the pleading, I don't think there's any problem with striking it then, if it's the identical pleading.

PROFESSOR DORSANEO: The problem is it's never that clear or it's frequently not that clear that that's only what it is. Okay. I mean, sometimes it's not

clear when it's clear. And I don't think under those circumstances there would be any kind of reversible error to violate the -- well, you have a right to replead this in the special exception rule. But if you plead yourself out of court, a number of courts of appeals have said that the opportunity to replead is not part of it. That may be going too far.

CHAIRMAN SOULES: But if the party is pleading something that cannot be fixed, the judge does not have to permit leave to amend before the pleading is stricken. Now, that's the case law.

MR. SADBERRY: And that's the exception of the case law, too.

CHAIRMAN SOULES: So if they plead false light, and you say there's no false light, the judge says that's right, then you're gone. You're history. You don't get a chance to replead that.

MR. McMAINS: But my point is that that's not true in terms of that, if you dismiss the lawsuit, if in fact you have three or four different grounds.

CHAIRMAN SOULES: Well, if that's the only ground, you dismiss the lawsuit then and there. But if there are other grounds, then you just strike that claim.

MR. McMAINS: Right.

CHAIRMAN SOULES: Okay. David Perry.

MR. PERRY: I don't entirely agree. I've had cases where I've had a lawsuit dismissed where I was not given the opportunity to replead, and it was reversed because I was entitled to an opportunity to replead.

CHAIRMAN SOULES: But you're not entitled to an opportunity to replead false light.

MR. PERRY: Well, I think the way -- what I understand is that it's not clear that you cannot plead in such a way as to plead a valid cause of action until you have had at least one opportunity to replead if you want to.

Now, if the judge says, "Well, this pleading is no good," and you say, "Well,

that's the best I can do, Judge. I'm not going to amend," then certainly it can be dismissed.

But if you say, "Well, Judge, if that's not good enough, I want to try again," as I understand the case law, you're entitled to try again.

I think it would be very desirable to incorporate that in the rule, because I don't think it is in the rules. I think it's in the case law. And I think people ought to have a chance to amend.

I also wanted to ask, in the redraft here, the initial sentence which says, "General Demurrers should not be used," is not repeated here.

PROFESSOR DORSANEO: Because I think that should go in Rule 91, is why I didn't put it there.

MR. PERRY: Then is it the intent --

PROFESSOR DORSANEO: No. I didn't mean to take that sentence out.

MR. PERRY: It is our intent to keep that sentence in the rules?

PROFESSOR DORSANEO: Yes. Yes. It just struck me that it didn't have much to do with waiver of pleadings. It seems to me it has more to do with special exceptions.

See, if you look at 91, Special Exceptions, it seemed to me it would go in the front of that. You know, "General Demurrers should not be used," you know, "as special exceptions," because a special exception is a special demurrer. I mean, that's what it is.

CHAIRMAN SOULES: Okay. Richard and then Rusty.

MR. ORSINGER: I would suggest that the subcommittee come back with a revised Rule 91 that defines what the proper role of the special exception is, including the fact that it's not a general demurrer, and then maybe put that in front of Rule 90, which is when they're waived if they're not heard; and then perhaps even consider making this a motion rather than a plea, because I think technically exceptions are considered part of pleadings.

But I'm the only lawyer I know of that

actually files supplemental answers or petitions to assert them. Maybe there are others here that do that, but most people just file them as if they're a motion, so I think we probably should do that.

CHAIRMAN SOULES: Okay. Well, you put several things into play here. Rusty.

MR. McMAINS: What I wanted to suggest too was that if we're going to start trying to identify more specifically really what the auspice of special exceptions is, the easiest way around them now, because they are treated as pleadings, and what inevitably happens, and I'm sure Judge Brister has had this happen, is the day that you go in to have a special exception hearing they've amended their pleadings.

HON. SCOTT A. BRISTER: Sure.

MR. McMAINS: And the requirement in this rule is that it specifically identify the pleading addressed to it. And rule basically is that you're not entitled to grant a special exception to a pleading that has been amended; that is to

say, you need to ask for a new special exception.

It seems to me that it makes perfect sense that a special exception that is not fixed by amended pleading ought to be one that the court can take notice of without having to chop down more trees and file a new pleading that -- a new special exception to the same pleading. And that isn't fixed anywhere, and that is where we are now.

And there are a number of cases that have held that, yes, they do have special exceptions, but it's to the previous pleading, and there are no special exceptions to this pleading, and so you're out. I don't know whether or not you want to fix that by being a motion.

And so long as the pleading issue that you are challenging, whether you're a plaintiff, a defendant, or whether it's to a defense or a claim, is still in the live pleading at the time the motion is heard, then that ought to be sufficient. And that I think is a significant improvement in our current practice, because for those people who don't

want to answer special exceptions, inevitably that's what happens. They just file a new pleading. It may be identical. But the special exception, it's erroneous to grant it if it's addressed to the wrong pleading.

MR. ORSINGER: If I may, Luke. It may improve your situation, Rusty, when we find out that the subcommittee is proposing that pleadings deadlines be 45 days before the close of the discovery period, because our current discovery rules now permit you to reopen discovery if pleadings are made after the close of the discovery period, blah, blah, blah. And we have to coordinate discovery and pleadings amendments, and we may need to even revisit the question of when you must present your exceptions, because if your exceptions are sustained after the close of the discovery period and you have to replead, then all of a sudden you're back into reopening discovery for the new pleadings again. And let's remember that, because we're going to be addressing that in just a minute.

CHAIRMAN SOULES: Okay. So what guidance does your committee need on 91

in order to bring it back for us to pass on at the next meeting?

HON. SCOTT A. BRISTER: 90 or 91?

CHAIRMAN SOULES: Well, what is this?

MR. McMAINS: 91 is special exceptions.

MR. ORSINGER: We haven't undertaken to do 91.

CHAIRMAN SOULES: 90. Excuse me, 90.

MR. ORSINGER: I think that we probably shouldn't revolve the time for raising the defect until we discuss the pleadings amendment deadline.

CHAIRMAN SOULES: Okay. Well, mark that.

MR. ORSINGER: We'll do that in five minutes.

And number two is, let's look at Bill's complaint number two, as to should it only be the person who seeks to reverse that is waived, or should we say that anybody waives. Even for purposes of the charge conference,

you've waived it. In other words, you don't have to wait and see who appeals and then say your point of error was not preserved. If you've waived something, you've waived it even for purposes of the rest of the trial.

CHAIRMAN SOULES: A cutoff time at which all pleadings defects are waived by all parties?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Should there be a cutoff time at which all pleadings defects are waived by all parties? Okay. Those who say yes show by hands. 14.

Those opposed. No opposition -- one. I'm sorry, Rusty.

MR. LOW: I've got a question, and I can't vote until I know one thing.

CHAIRMAN SOULES: Okay.

MR. LOW: I don't understand the difference between "defect" and "failure to plead." I mean, it's not clear to me what a defect is, a defect in the pleading. Is a defect this: If they plead facts and they type up a laundry list that could come within the DTPA but they don't actually plead that,

they gave notice and they don't actually say DTPA, I'm not going to want to waive that, but can they submit that? Do I have to accept that? Is that a defect, or is that a failure to plead? I'm just not smart enough to know.

MR. ORSINGER: Okay. In my view, the failure to plead a cause of action should not be waived by your failure to file exceptions or your failure to get them heard. That's why I think if we define the proper function of exceptions, the waiver part in my view should waive pleading defects, but not the failure to state a cause of action.

MR. LOW: Right. Because, see, my malpractice carrier is interested in waivers. I mean, I don't want to do any of that until I know what I'm waiving. And it reads real well, and again, I'm going to agree, but a lot of these rules I don't understand. But I truly don't understand, and I've heard all the discussions, and I haven't heard anybody tell me what's the difference in a defect and --

CHAIRMAN SOULES: What we're really talking about, and if I'm understanding

Buddy, we're talking about a defect in a pleading of a claim or a defense that's been plead.

MR. LOW: I understand that. But see, I don't know, has that been plead in my situation? I gave the example. They didn't just say DTPA, but over here they've got -- it's kind of been concealed, and I can't conceal objections, but maybe in their pleadings they had "intentional" here and there, and then they said, "Well, it was plead." See, I don't know if they've plead it or if that's a defect. That's just a problem I have. I don't want to waive. A waiver is an intentionally relinquishment of a known right. I mean, that's what waiver is.

CHAIRMAN SOULES: Not in the appellate or trial practice.

MR. LOW: Well, that's the way it's defined in the books. That's the way it's defined in the books, if you submit it to a jury.

CHAIRMAN SOULES: That's for everybody but lawyers.

MR. LOW: Well, I want a

standard.

PROFESSOR DORSANEO: You presume to know the answer to your own question. That's all.

CHAIRMAN SOULES: Buddy, go ahead and finish your question.

MR. LOW: No. I'm through. I just don't know the difference between those two.

CHAIRMAN SOULES: Okay. Rusty, and then I'll go around the table.

MR. McMAINS: Luke, the reason for the discussion you had was this thing that waiver only operates against the party who is complaining. All right. I believe that the intent and the reason why it is written that way is precisely so that Buddy can make the arguments he wants to make and the judge can grant them and doesn't have to worry about it being a waiver.

MR. LOW: See, I just don't want to waive something that's --

MR. McMAINS: Because if you -- the point is, if you say that both sides have waived all defects as to form or substance of

the pleadings, have you changed the practice as opposed to now? What it now says is, you haven't waived anything if the judge says you didn't plead DTPA. I don't think he -- and he doesn't need to specially except to that. It's not in the pleadings, and I ain't going to submit it. And the party who is trying to submit it doesn't have an argument of waiver if the judge doesn't submit it. He absolutely doesn't have an argument under this rule.

But if you say that it is waived, then he may have an argument under this rule. When you -- that's the whole purpose of why it says that it's to the complaining -- that you treat the waiver issue only as to a party who is complaining on appeal, because it allows the trial judge -- suppose Buddy doesn't even notice that it's not a DTPA. The judge can still on his own say, "This is not a DTPA claim. It isn't plead as a DTPA claim, and I don't care that anybody didn't. I'm not going to submit it." And there's no problem.

But if you put in that you've got to have -- that you've waived all complaints as to defects and form or substance as to

everybody, everybody is pleading, you know, that they haven't done their own special exceptions and all defects to form or substance are waived, you raise that issue now for the first time, it seems to me. And the judge doesn't even have -- arguably doesn't have the power to notice it on his own.

And I think that's why that looks to be strange in terms of when you decide that there's a waiver or who you decide waives it. It's to let the trial judge have some input into this and make his own decisions without being burdened with these arguments that it's waived and therefore it's there.

MR. LOW: If I could just tell what -- I mean, you know, because trial judges don't take that good care of me, and so I've got to try to do it on my own. And I don't disagree with what they're saying that, you know, you shouldn't except right up until the date and all that. I'm not disagreeing with any of that. I mean, I'm not arguing with that. That's fine. It's just that there might be some other lawyers out there without any more knowledge than I have that don't know

what a defect is. And if you don't know what a defect is as distinguished from failure to plead, then you don't know what's waived. And the judge may not know it. That's my whole argument. Now, if I knew that, I wouldn't have a bit of trouble.

And my example is one, and I bet you I get three different answers if I ask three different people, of my DTPA. Is that a defect in pleading, or is that a failure to plead DTPA? And we'll get three different answers. That same situation should not come up where the judge would give three different answers to that. I mean, it just doesn't serve a good purpose.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: I'm a little bit confused by this proposal insofar as it introduces the concept of fair notice. Now, my question is, is that a different kind of fair notice than is in the case of default? Is that a different kind of a fair notice that is required by Rule 47? Is there some different standard of fairness there, or

what's the difference? If a pleading gives fair notice with respect to a default, why is it subject to special exceptions if it already gives fair notice? I'm not -- I would like to be cleared up on that point.

PROFESSOR DORSANEO: Well, the problem is the proviso, "provided that this rule shall not apply as to any party against whom default judgment is rendered." The way that the cases have all interpreted that, although they've come out somewhat inconsistently, is that general demurrers should not be used; that that concept of how you would evaluate a pleading, as if a general demurrer has been made, is the way you do it if there's a default judgment.

HON. C. A. GUITTARD: But is that what this says?

PROFESSOR DORSANEO: Well, what the current -- I don't think the current rule says it clearly. But as I understand what it's been interpreted to mean is that if you have a default judgment situation, then you evaluate the pleading under the former general demurrer standard to see if there's any

defect, and that's --

HONORABLE C. A. GUITTARD: But we're not -- we don't want to go back to that.

PROFESSOR DORSANEO: And that's way more specific than fair notice. Now, there are cases struggling with this. And maybe what I really should say is that the case law is susceptible or fairly susceptible to that interpretation. But the idea here is that there really shouldn't be a different rule with respect to fair notice for default judgment cases and other cases; that if it gives fair notice, it's good enough for a default judgment, just as it's good enough for trial.

HON. C. A. GUITTARD: Well, then why -- if it gives fair notice, then what's waived?

CHAIRMAN SOULES: Judge, I think the issue here is that there can be a pleading that does not give fair notice on which the parties go to trial. Now, they've waived their right to fair notice if they do that.

HON. C. A. GUITTARD: In other

words, there's no waiver if fair notice is given?

CHAIRMAN SOULES: There is waiver if there's no fair notice given, if the case goes to trial. But in a default situation they're saying that if a pleading does not give fair notice, then...

HON. C. A. GUITTARD: Then there's no waiver?

CHAIRMAN SOULES: Then there's no waiver, right.

PROFESSOR DORSANEO: A significant part of the case law suggests that if it's a default judgment case, then you analyze the pleading when the default is challenged on whatever basis under the old, more technical approach. Now, maybe not all of the cases do that, and maybe some of the cases say that that's not --

CHAIRMAN SOULES: Do you understand I'm talking about your draft?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: I'm not talking about history. Your draft says "fair notice," and you're changing the standard from

the old --

PROFESSOR DORSANEO: I'm either changing the standard or I'm codifying what should be the standard.

CHAIRMAN SOULES: Well, here we're saying there's no waiver by a defaulted party on a pleading that does not give fair notice. There is waiver by a party that goes to trial.

HONORABLE C. A. GUITTARD: If it doesn't give fair notice?

CHAIRMAN SOULES: If it doesn't give fair notice. Okay. And that's what Bill is writing here. There's no waiver by a defaulted party if the pleading does not give fair notice.

PROFESSOR DORSANEO: Right. But there is waiver if it does, because that's all you're entitled to.

MR. McMAINS: It's not a question of waiver. You're just not --

CHAIRMAN SOULES: A party can -- a defaulted party can complain on appeal of lack of fair notice. That's what it means.

PROFESSOR DORSANEO: But not that there's technically some kind of a failure to allege a missing element --

CHAIRMAN SOULES: Exactly.

PROFESSOR DORSANEO: -- like proximate causation. You still have fair notice that it's a negligence case.

HON. C. A. GUITTARD: But then you have a different standard, right?

CHAIRMAN SOULES: Yeah. This is a different standard from current Rule 91.

HON. C. A. GUITTARD: So fair notice is different with respect to a default defendant than with anybody else?

PROFESSOR DORSANEO: No. It's the same. It's the same. It's the same.

CHAIRMAN SOULES: In today's law there is a difference. It's the general demurrer test that's put to a defaulted party's pleading, the pleadings against a defualted party, rather than fair notice assessments.

PROFESSOR DORSANEO: I think that's right. There are some cases where the courts don't want to reverse a default

judgment because they think the pleadings were good enough, so they kind of nod at that, and we're saying that they're right to nod at that, because anything more strict than that is stupid.

CHAIRMAN SOULES: And that's what this rule says.

PROFESSOR DORSANEO: Or silly, as Rusty likes to say.

CHAIRMAN SOULES: That's right. Okay. What else have we got now, Richard? If you're going to try to wrap up Rule 91, what else do you need to know?

MR. ORSINGER: I would like to address this problem that Rusty has raised. It seems to get back to Buddy's concern. It seems to me that this waiver concept doesn't preclude you from saying that the pleadings don't plead a certain claim. I don't see why you're precluded from arguing that at the charge conference.

MR. McMAINS: Because I think that's a defect.

MR. LOW: Yeah. But it goes further and says that either in form or

substance. It's pretty broad.

And I just think of my example of the DTPA. Is that a defect in form or substance, or has he -- am I to call it to his attention? I mean, he hasn't even thought about it maybe.

CHAIRMAN SOULES: Let me see if I can get at it this way: In the Charge Rules traditionally and continuing on into our new Charge Rules, we differentiate between the failure to plead an element of a cause of action and the failure to plead a ground.

MR. LOW: Ground, right.

CHAIRMAN SOULES: Can't we just move those same concepts into here so that we define that you're not waiving the absence of a pleading of a ground?

MR. LOW: That would appear to me to be a better way to do it, so you would define what you're waiving. I mean, parties ought to know.

CHAIRMAN SOULES: Just try the traditional language from the old Rule 278 in this. I mean, 279.

MR. ORSINGER: But that's not

all you're waiving. I mean, you're waiving any complaint about generality, about -- I mean, there's --

CHAIRMAN SOULES: No. What we're going to say, or what I'm suggesting that we put in there is that no waiver -- there's no waiver if no ground of an independent recovery or defense -- or no element of an independent ground of recovery or defense is plead.

MR. ORSINGER: I think that that's a Band-aid on a wound that needs to be dressed with a bandage. I mean, we've got our -- if our new pleadings rule requires you under -- after exception -- I believe that our vote was after exception, wasn't it, that you state the legal theory and describe the general and factual bases? Now, I would --

CHAIRMAN SOULES: No. That's the standard. That's the standard.

MR. ORSINGER: Before or after?

CHAIRMAN SOULES: Before or after.

MR. ORSINGER: Okay. All

right. So that's the standard. Now then, let's assume that somebody doesn't identify any legal theory at all. You have waived your right to complain that they're entitled to a submission on the grounds that they didn't plead a legal theory unless you file an exception and get it heard. Now, the way I understand the way these interface, in other words --

MR. McMAINS: Correct. If you're saying that the failure to plead is what -- if you didn't specially except, then we're back to the pleading. If they can't plead it, that is, if it doesn't exist, you don't waive your right to challenge --

MR. ORSINGER: And I think we're going to address that when --

MR. McMAINS: -- a legal ground.

MR. ORSINGER: -- we describe the different function of exceptions to knock out a claim that doesn't exist from a claim that's poorly plead that does exist.

MR. McMAINS: Yeah. Buddy's problem is he's saying, "Okay, I have fair

notice of what their facts are, and their facts could well fit into a different legal theory than the one that appears to be plead." And I don't specially except.

Can I keep the judge from submitting the other theory if I don't specially except?

MR. LOW: That's right.

MR. McMAINS: That's what he wants to know. And I don't think our rules tell him right now.

MR. LOW: And see, like, for instance --

MR. McMAINS: And I think that is a defect. I think that is quite arguably a defect in the form or substance of the pleading.

MR. LOW: And another --

MR. ORSINGER: Well, the whole concept of our pleading requirement is that you should identify your legal theory.

MR. LOW: But what I meant was --

MR. ORSINGER: And if you say your claim is fraud and not DTPA, I would think you should be bound by your own

allegation whether or not an exception is filed.

MR. LOW: Well, but it's not that simple. For instance, in some case -- and I don't know these cases like all you other people do -- but in some case where there was a pleading, you know, if you pay -- if you take the premiums out for your employees -- it's an old comp law. I'm going back to the old days. That's where I grew up. And they just plead, you know, took premiums, but there's a statute which took away all your defenses, and they just threw it in with a whole bunch of stuff, and that's -- you could argue not fair notice on that if you're going to rely that comp is not a defense.

I mean, I just think you ought not to be able to throw elements out and say, "This is an element of that and now I've waived it because that's just a defect in the pleading." I just think what you're waiving ought to be a little bit clearer. I don't have an answer; I have a problem. That's all.

CHAIRMAN SOULES: Well, I mean,

special exceptions are there to be used. When there's that much confusion or question, that's what they're there for.

MR. LOW: I know, Luke. But see, I'm not going to file special exceptions, say, "Wait a minute" -- because I might not know -- "Wait a minute, I except. You haven't really plead DTPA."

And he says, "Oh, well, I haven't? I better do that."

I mean, I just -- if one element of it is new --

CHAIRMAN SOULES: But you don't have to do that. You can say, "I don't understand what you're pleading here. I want more specificity."

MR. LOW: Well, I think I do. That's the problem, see? I think I do understand. I think he's pleading negligence.

CHAIRMAN SOULES: Well, that's strategy. When you decide to roll the dice, you roll the dice.

MR. LOW: No. It's a question of -- it's not rolling the dice. It's a question of recognizing what I interpret the

pleadings to say, and it looks like I'm giving fair notice of this, but it would be one element of DTPA, but it's not three other elements. Am I on notice? I don't know. Under this he had plead an element of it. It said that would be a defect in substance. All right. That is a defect, and it's waived. And I just don't think you ought to be able to waive to put a whole bunch of things into your pleadings that aren't there to start with.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I think you do have a waiver. I think the case law is if there's cause of action 1 with elements A, B and C, and cause of action 2 with A, B and X, and somebody pleads just A and B, you've got to specially except to figure whether you've got cause of action 1 or 2 or both.

MR. LOW: I understand. But can you tell me what is the definition of a defect in pleading? How do you define that? What is the definition of it?

PROFESSOR CARLSON: I think a defective pleading is that if you have notice

of a potential claim, but it's defective notice, you didn't get all the elements, that's a defect.

MR. LOW: If you define it that way, I can live with it. But I just want to know what it is. Whatever you define it as, I'll live with it. But I just want to know what I'm waiving. That's all.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: In the context of what we've done to these pleading rules, you can -- you have a duty to plead or you can get on special exceptions a requirement that they state the legal theory they're suing under.

Now, in a situation like Buddy's where he's not sure whether they're suing for negligence or DTPA, and he doesn't want to tip them off that they might have a DTPA case, then he files a special exception saying, "I want them to be forced to specify the legal theory they're suing under."

And then the judge says, "Specify."

And then they come back and they say, "Negligence."

And then Buddy should be able to go to trial knowing that he's not going to get a DTPA submission.

On the other hand, if he gets that ruling and he does nothing, because it could support either a negligence or a DTPA claim, he can't show up at the charge conference and say, "Wait a minute, this to me meant negligence, not DTPA."

And the judge says, "I agree with you. That means negligence, not DTPA, so DTPA is out."

I don't think that's fair to the pleader whose pleadings were sufficient to support the submission. Do you see what I'm saying? And so there should be a waiver. If you're in an area where you could force them to specify a theory and you don't, then you ought to take the risk that the judge may go with them.

MR. LOW: I don't disagree. I don't agree with laying behind the log. That's not my purpose. But I don't want to get laid behind the log either, and so, I mean, you know, that's the only thing I'm worried about, because I've been -- I've

objected -- I don't file special exceptions.

I haven't filed special objections since I don't know when. I just call the other lawyer, so I don't like just a lot of special exceptions.

So as long as I know that -- I mean, I don't want to tell him what to plead, but I just don't want to have to look through a pleading and try to figure out all -- and so maybe if I change my theory and say, "Well, the only way I can protect myself is I'm going to file special exceptions because I don't know what your legal theory is," maybe I need to go to doing that. And if that's it, I guess I will.

But traditionally we just objected. We would say, "Look, this was not raised in the pleadings." I've made that objection so many times, not raised by the pleadings. And you know, it was either -- and it wasn't a real big problem. But my problem is defining "defect in pleading." If you define "defect in pleading," I can live with it if I know what I'm waiving.

CHAIRMAN SOULES: Okay.

MR. LOW: But I won't say any more, because I'll just live with whatever you all do.

CHAIRMAN SOULES: So are we going to define what a defect in pleading is?

PROFESSOR DORSANEO: That's impossible.

MR. LOW: It is impossible.

CHAIRMAN SOULES: That's a pretty big charge.

PROFESSOR DORSANEO: I think it's very difficult to tell the difference between a defective statement of a claim or defense or the failure to state the claim or defense altogether in the context of something that you can't really tell exactly what it says.

The rule of interpretation that's applied to pleadings, as distinguished from a rule of strict construction that's applied to a number of things, is a rule of reasonable intendments. So that's what you're living with.

MR. LOW: So you're saying if I had fair notice of this, a defect in pleading

is if I had fair notice of a cause of action, if I had fair notice and don't object because of some defect, well, then I can live with that. But the way it's drawn, I don't understand it.

PROFESSOR DORSANEO: Well, the rule of reasonable intendments, I don't know if it helps at all, it's what the cases talk about, that's how a pleading is meant to be interpreted. It's meant to be interpreted liberally in favor of the statement of the claim or defense that you're ultimately going to say was not -- going to say was not stated, and that's the way it's interpreted, instead of a strict construction approach, which I believe to have once been the approach. But it's not been the modern approach for a long time, so you are at risk. If you think they might have stated it, you are at risk.

MR. LOW: Okay. I've wasted enough time on this.

MR. ORSINGER: Well, if I may, Luke, I don't know if we -- excuse me.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I don't know if

this would cure it or not, but could we add something maybe to Rule 47 about --

CHAIRMAN SOULES: Speak up, John. We can't hear you.

MR. MARKS: -- something that says something like "Any pleading which does not give fair notice as required by this rule shall not form the basis for recovery," something like that? Would that help maybe?

MR. LOW: Yeah. That would make me -- you know, just "fair notice" --

MR. ORSINGER: That would be just horrible. You would get down with no complaint to your pleadings to the charge conference, and then the judge would refuse to submit on the grounds that you didn't give fair notice.

MR. LOW: I'll go along with it, and let's just see how it works; and I'll just say, "I told you so."

MR. ORSINGER: Why can't this problem be cured with our amendments that require you to state a legal claim if you're requested to? Why does that -- why do we have to worry about whether certain facts

constitute some or all of the cause of action, if you can simply make them identify the cause of action in the pleading?

MR. LOW: Simply because, and what is going to throw me every time, I've got to take care of myself, I'm going to file special exceptions. I don't understand what you're talking about, and I'm going to do it in every case. In every case I'm going to file one. I haven't filed one since the liquor case when they claimed he didn't plead a cause of action. That's it. That's why. I will just file special exceptions, and if you want -- so that's going to mean that the lawyers, the defense lawyers, are going to file special exceptions every time. And maybe that will be a form of smoking you out. I don't know.

MR. ORSINGER: And the result of that is going to be that the plaintiff's lawyer and the defense lawyer are going to know early in the case what lawsuit they're litigating so that when they go through this discovery period they'll do the right discovery.

MR. LOW: No. It's going to mean that they already know. I mean, you know, generally in most cases you're already going to know. But out of an abundance of precaution, you're going to file a protect-yourself motion. In most cases you know.

CHAIRMAN SOULES: But this doesn't change existing waiver.

MR. LOW: Luke, I'm not saying I don't have some problem with the existing ones. Why, most of my interpretation of existing law is bad, and I agree with that too.

HON. SCOTT A. BRISTER: The thing that it does change is the time. And as long as you're doing it anytime up to the charge conference, it doesn't matter whether it's a special defect or the whole cause of action, because I can throw out the negligent infliction at the charge conference, because you make it then. If it's got to be before trial and everybody is just assuming negligent infliction doesn't exist, then the question arises, is it waived because I didn't do it

then? So the waiver has more of an effect when it's pushed back beyond the charge conference, which is a good idea. But it's going to require separating some of these things out when you move that back.

MR. LOW: But you can allow a trial amendment if you word it --

HON. SCOTT A. BRISTER: But that was the whole point of having them done by up to the charge conference. You know, they object at the charge conference. You allow a trial amendment or don't allow a trial amendment.

MR. LOW: If it's fair.

CHAIRMAN SOULES: Okay.

MR. LOW: Go ahead and vote. I'm ready.

CHAIRMAN SOULES: As I'm listening to Buddy and Judge Brister, I'm hearing two different problems. You're talking about somebody who -- I think Judge Brister is talking about somebody that alleges a cause of action that doesn't exist.

HON. SCOTT A. BRISTER: That's the most stark one. It could be that they

didn't put the word "interest" in. It could be a hundred things. They plead past medical but not future medical. Then you get into the question of is that a defect or is that a matter of law.

MR. LOW: And like in the Santa Fe case, your pleadings or your prayer may be general enough to include that -- you know, the general prayer for relief includes certain things, and...

CHAIRMAN SOULES: Okay. Richard, what do you need?

MR. ORSINGER: Well, I think that we need to definitely differentiate the waiver concept about failure to state any cause of action at all from other pleading defects.

Bill, do we have any principle on which to redraft this at this point?

PROFESSOR DORSANEO: I don't know if we need anything else, unless somebody wants to make the timing different, because -- I mean, we can put in there, and I didn't notice any real disagreement on it, something about the failure to state a legal claim for

special exceptions, to make it clear that they can be used for that. I mean, that doesn't mean that that couldn't be asserted earlier or in some different -- or later or in some different form.

Buddy's point is that he's not sure whether they stated this legal claim or that legal claim or not, and that's a different issue than whether they -- you know, than in the case where the judge has concluded that they did not. You know, if the judge has concluded that they did not, then the judge can conclude that in ruling on a special exception or in drafting the charge.

MR. LOW: See, that's it. And we've got problems when we're talking about drafting, you know, charges, the one side drafting the other person's charge, and lawyers just don't like to do that. That's...

PROFESSOR DORSANEO: Well, that's what I was trained to do.

MR. LOW: Pardon?

PROFESSOR DORSANEO: That's what I was trained to do. I'm supposed to draft your charge. I like mine better, even

if it's your case.

MR. LOW: Well, I know. But some lawyers are not as energetic as you, and they don't like to do the other person's work.

PROFESSOR DORSANEO: I think we need to draft what we've gotten so far and then see if that's sufficient.

CHAIRMAN SOULES: But what would be wrong with putting in a sentence that says, "The failure to plead an independent cause of action" -- maybe that's "The failure to please a cause of action on which recovery may be based is not waived."

PROFESSOR DORSANEO: We can put that in there. I mean, I think that's current law. The question is, when is that the case as opposed to when there is a defective statement of claim?

MR. LOW: That would do it. Because I shouldn't be able -- now, I'm not saying I should be able to say, "Wait a minute, Judge. I didn't have fair notice." If he plead -- if it smells like DTPA, the facts are DTPA, and then they need that DTPA and he just didn't brand it DTPA, then I

shouldn't be able to come in and say, "Oh, Judge, wait a minute. That wasn't plead." I mean, I understand that's a defect.

But what you're saying, Luke, may take care of the situation. I just don't want something that's just you've got to use your imagination to figure out that he's plead a cause of action and have it submitted.

CHAIRMAN SOULES: And what I was saying is narrower than that, because I was just saying a failure to state a cause of action on which a recovery may be based.

PROFESSOR DORSANEO: Or a defense too.

CHAIRMAN SOULES: Or a defense too. This is false light and negligent infliction and that sort of thing.

MR. LOW: Right. I understand. Okay. But failure to state -- okay. Failure to state a cause of action on which -- okay. I see what you're saying. You're putting "to which relief could be granted"?

CHAIRMAN SOULES: Right.

MR. LOW: That would take care of that situation of false light.

CHAIRMAN SOULES: It still doesn't take care of your problem.

MR. LOW: Well, maybe it can't be taken care of. And maybe I'm the only one that's got a problem.

CHAIRMAN SOULES: Okay. Let me start over here, and then I'll get around to the judge. David.

MR. PERRY: My practice may be a little different from Buddy's, but in my practice it is almost universal that special exceptions are filed, and almost universal that pleadings are amended to meet the special exceptions. And it is essentially universal that the court enters pretrial orders that set pleadings deadlines. And if there are no special exceptions filed before then, you generally know.

A lot of our orders say that by the pleading deadline you ought to amend your pleadings so that they will not be subject to special exceptions. If you don't do a good job of that, then the other side is going to file special exceptions. And we know that, and we kind of work in that atmosphere.

I believe that special exceptions perform a very important function of preventing misunderstandings and clearing them up before you get down into trial. And I think that the system, as it works now, works well. And I think that if we start trying to change -- one of the reasons that it works well is that if you don't file special exceptions, there is lots of stuff that you can waive, and people file the special exceptions because they don't want to waive a defective pleading.

Now, if we start changing the rules to where people have to start guessing about what's waivable and not waivable, or we start changing, saying some things are waivable and some things are not, what we're doing is opening the door to people laying behind the log or playing games or upsetting the system in one way or another that we have now that really works pretty well.

I think that it is almost universal that problems about pleading defects under our present system get resolved before you get to trial, at least in cases that involve good lawyers. Frankly, in cases that don't involve

good lawyers, you can't write a set of rules that's going to solve all the problems.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I agree with what David said, except that I don't think that you should preclude someone from raising a point that the law does not recognize a certain cause of action unless you have done that by special exception before the discovery window closes. Everything else I agree with what he says. And Buddy's problem, I think, is a problem that's created if you don't file special exceptions.

MR. LOW: Right. Yeah.

MR. ORSINGER: And I don't think that -- I mean, that may be a strategy that works. But I think that we're overall benefited more by forcing people to have the issues defined in the pleadings before the discovery window closes, so that the discovery is done on the correct theory of the case, and not have somebody realize that the case was developed improperly only when they go to the charge conference after the evidence is closed.

MR. LOW: Richard, I can't disagree with that. You may be right.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: It seems to me we have sort of the same problem with this rule that we had with the Charge Rules under broad submission. And Bill's rewrite focuses it. Every defect in a pleading, form or substance, regardless of whether you win or lose, is going to be waived. And the problem, I think, is what Richard was talking about earlier, which is when does a defect become an omission, which is the same problem we've had with the Charge Rules.

And I don't see why we don't say when a defect becomes an omission. Now, maybe we want to say the failure to plead all elements of a cause of action in which fair notice is given is waived; whereas, the failure to plead -- you know, but just go ahead and put it in the rule and tell people what the rule is, so that all of the counties in Texas and all of the trial judges in Texas and all of the lawyers in Texas and all of the litigants

in Texas, regardless of what court of appeals they get transferred to, have the same rule.

And it ought to be something that we can state. If pleadings A and B, but not X, waive your right to complain of submission of that cause of action, fine. Put it in the rule.

MR. LOW: I agree.

HON. SARAH DUNCAN: If it doesn't, say that it doesn't.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: The problem I have with trying to insert this exception that Richard just talked about is precisely the problem that Sarah has articulated, which is when you say every defect in form or substance is waived unless it's specially excepted to. That's fine. We know what that means in the sense that you're going to claim that a pleading is defective.

And all that Buddy, it seems to me, is talking about is that it's defective by virtue of something that's there or not there. I mean, if you put that in there, because it's there or not there, it is defective. It is --

something happens to your claim legally. That's what your position is.

If you try and say -- but that doesn't matter if it's -- if there is an omission, which is suggesting if there's an omission to state the claim upon which relief can be granted, an attempt to incorporate the general demurrer practice back in, then you don't waive the right to make that complaint.

Again, the issue here is not whether or not you have waived the right of the party to submit it in the sense -- or waive the objection to the party's submission of it, but rather whether or not you've waived the right to complain that he needs to say it differently in order to submit it.

There is a -- and it seems to me it's inappropriate to put in the pleading rules that if there is a legal impediment to recovery that is not obviable by pleading that you don't have to plead around it, because you can't. That's the whole point. That is the argument. It doesn't exist, not going to exist, doesn't matter how you say it, it's not going to exist.

And if you start embellishing it by saying, though, that this is, you know, a claim that relief cannot be granted upon, if you do it that generally or anything like that, you're going to continue to have the same argument, and say, "Well, see, he didn't plead all of the elements. He's got to have duty, breach, damages and so on, and he didn't plead duty, or he didn't plead breach."

And we don't need to be dealing with that, it seems to me, in the Pleading Rules when we're talking about the Charge Rules, when our Charge Rules say also every defect in form or substance that is not objected to is waived.

And clearly if you don't object when it's submitted, that's a different problem.

MR. LOW: That's right.

MR. McMAINS: But this pleading rule doesn't have anything to do with the submission, other than the fact there's got to be a pleading to support a submission. And the question of whether there is a pleading is a question of fair notice, it seems to me.

But you do not want to encumber this

about, well, he omitted an element and therefore failed to state a claim. And I can raise that right now, and he can't submit the issue to the jury because there is a pleading defect in the stating of the cause of action, because everybody knows that you don't recover just because there's a duty and a breach. You've got to have damages and you've got to have causation. And if you didn't plead causation, you don't -- then you're not entitled it, and I didn't ever have to complain about the fact that you didn't plead it.

Now, that's -- and arguments like that will be made if you put that kind of language in there. And I don't think that has anything to do with the precise issues that we're concerned about.

CHAIRMAN SOULES: There may be some guidance in the Greenhall and Kilpatrick cases under trial amendments too. I mean, we can certainly carve out waiver doesn't apply to some things. And this is contrary to what David is suggesting, which David -- if we say it doesn't apply here, then it makes it by

implication apply to everything else. We might be having that problem. But we could say Greenhall and Kilpatrick deal with the trial amendments to assert a new cause of action or defense at a late stage, basically meaning an independent cause of action not previously entered in the pleadings. It shouldn't waive that, the failure to --

MR. LOW: It shouldn't waive anything you've got fair notice of. I mean, if you've got -- you can't just leave -- I mean, you know, if you take one little element --

CHAIRMAN SOULES: So it's really --

MR. LOW: I think the rest of it is right. I'm sorry, Luke. I interrupted you. Excuse me.

CHAIRMAN SOULES: No. I'm just thinking and talking. I want to hear what you have to say too.

MR. LOW: No, go ahead. I'm sorry.

CHAIRMAN SOULES: You know, the reason that you give trial amendments so

freely is to clear these technical defects. When you get to the charge stage, somebody says, "Wait a minute, that's not fair."

And the judge says, "Well, I think he had fair notice. It's not a prejudicial amendment. And if you're going to object to the lack of pleadings, that's a valid objection to submission, but I'm going to permit a trial amendment, and we're going to fix that right now."

MR. LOW: Right.

CHAIRMAN SOULES: And that's why I'm thinking there may be some guidance in those cases about -- because they're talking about some tolerance to fix something during the trial; you know, an objection to evidence, which, of course, could be granted in pleadings, or submission of a question or instruction that has to be granted in pleadings. The trial judge says, "Well, move for a trial amendment, I'll grant it, and we'll go on with trial."

And those are the kinds of things that we do waive. Anything basically that can be fixed by trial amendment gets waived, unless

you raise it sometime later and the judge says, "I'll let you have a trial amendment."

MR. LOW: But what if we said, "Special exceptions when appropriate have to be filed in so many days," and we don't talk about what's waived? What's waived is up to the -- as Rusty said, you know, the charge, when you get to the charge, instead of putting waiver here, put it where it is, but also use a special exceptions rule so that it's up front.

CHAIRMAN SOULES: Whenever we did the Grammar case, we had extensive special exceptions early, you know, broaching them close to trial, and we told the trial judge, you know, "We just want a strict construction of the pleadings at the time the charge is submitted. You can overrule every one of them, if you wish. We just want to change the -- we want to switch the -- we don't want inferences from these pleadings that support submission of jury questions in the trial, so I've raised them."

That's their function here today, is to protect me at the charge conference. You can

review them, do whatever you want to with them.

MR. LOW: I understand. But a lot of lawyers still think of special exceptions in the traditional sense of "Wait a minute, you don't tell me enough or you don't say enough," and not a protect-my-rear-end type of thing. I mean, that's what...

CHAIRMAN SOULES: Judge Duncan.

HON. SARAH DUNCAN: But one of the reasons we did that in Grammar is because it was pending in a San Antonio district court. And the Fourth Court of Appeals has one of the more liberal reasonable intendment rules of the other 14 courts. And that's why I'm suggesting that it ought to be -- at least we ought to, you know, sort of be starting from the same point.

And I think the language as it's written now leaves it up to the trial courts and the courts of appeals to determine what a defect in form or substance is and when does an error of omission become a defect in form or substance.

And if we mean that it is an error of --

any error of omission or any error of commission, let's just say that.

CHAIRMAN SOULES: Well, okay. Let's try to just get some bullet points on this and see if we can help Richard on the drafting of it. We're not intending, are we, that a failure to make a special exception waives the assertion of a new cause of action or defense?

MR. ORSINGER: "New" meaning unrecognized in law?

CHAIRMAN SOULES: No. "New" meaning independent cause of action or defense.

MR. McMAINS: Well, that's a circular argument.

CHAIRMAN SOULES: Well, I realize that, because somebody has got to decide whether it's independent or not.

HON. SARAH DUNCAN: But let's say that independent or no element of which has -- I mean, it's a necessarily referable question. If any -- if one element of a cause of action has been pleaded, do you waive the fact that no other element has been pleaded by

not specially excepting?

CHAIRMAN SOULES: Well, that really only works if you've plead a cause of action, if you've said what your cause of action is. I mean, suppose the pleadings do come in and they allege all the facts, and those facts will support DTPA, strict liability and negligence. But the pleader doesn't articulate any of those three, but the factual allegations in the petition will support any of those three. I think you can get all three of those submitted at the charge stage, because what -- even though all of the allegations are necessarily referable to negligence, the pleader didn't say negligence.

PROFESSOR DORSANEO: Well, they're not all necessarily referable to negligence. They're referable to negligence, but not necessarily, not only.

MR. McMAINS: Yeah. There's a different nexus requirement when you're talking about deemed findings. I mean, the necessarily referable is a different animal. When you're talking about fair notice, you're talking about a lot of different -- "fair

notice" is might it be there, or do I know enough to know. Just like you said, they've got three ways to go. I mean, if you know enough to know they've got three ways to go, frankly you've got fair notice.

CHAIRMAN SOULES: Well, not everybody may know that.

MR. McMAINS: Now, you may claim that there's a defect there somewhere in terms of how it is they pleaded. But if anybody can look at that, you know, or two out of three people can look at that and say, "Well, they've got three ways to go," I think you've got fair notice.

PROFESSOR DORSANEO: Well, "a reasonable lawyer under the circumstances" is the way to talk about it.

MR. McMAINS: Right.

PROFESSOR DORSANEO: But it's hard for you to argue that you're not one.

MR. ORSINGER: If you plead the facts that would support three different causes of action and your pleadings don't tie you down to any one or two of them, you can submit any of them. They can't complain about

it. Now, that's not inconsistent with this rule at all.

CHAIRMAN SOULES: No. That's consistent with this rule.

MR. ORSINGER: Right.

CHAIRMAN SOULES: So some trial judge at the charge stage or some other stage, evidence or whatever, is going to have to sort through this pleading and say, "I think that cause of action is in the case or out of the case."

If it's out of the case because it's an independent cause of action and the trial judge doesn't think it's encompassed in the four corners of the pleadings, then there should be no waiver.

MR. ORSINGER: That's right. And I don't think there would be.

CHAIRMAN SOULES: Or if there's -- if it's a false light case or allegation, there should be no waiver; in other words, a groundless cause of action or groundless assertion of a claim. So we've got those two things.

What else can we say that will help give

definition? Because we'll never be able to define what the four corners of all the pleadings that are going to get filed in the state of Texas, how they're going to look and how we're going to be able to draw definitions of the pleadings.

MR. McMAINS: Looking at the two rules, the way that the current rule is in Rule 90 and the way that Bill has drafted it, one of the problems, I think, generated by Buddy is that Bill assumes that a defect in pleading encompasses an omission or a fault in the pleading. Our current rule says every defect, omission or fault in a pleading is waived. Bill's rule says every defect in a pleading, either in form or substance.

Now, I agree that sometimes -- this may be redundant to just take the position that a defect or an omission or whatever is -- that maybe those all mean roughly the same things. But I think it's important, frankly, that they all be in the revised rule, because there will be people who will compare this rule to the old rule, and they will say that "Ah-hah, an omission is no longer waived, because it's not

in the new one." We used "defect" in the new one, but not "omission."

PROFESSOR DORSANEO: I'll accept "or omission," but I can't stand "fault."

MR. McMAINS: You don't like pleading malpractice then?

CHAIRMAN SOULES: Let me see, I've tried this before, and I think there's problems with it, but I haven't been able to pick up what it is. Suppose we say, "Every defect or omission, either of form or substance, in pleading a claim or defense asserted in the cause," so that it assumes the claim or defense is asserted in the cause, but there's a defect or omission in the form or substance.

HON. SCOTT A. BRISTER: Can I just ask real quickly there, let's say you have always just plead past medical. Failure to plead future medical is an omission, but that's not the kind of defect we're talking about, that all of a sudden at trial you can throw in future medical. And then they'll say, "Well, I never heard of future medical."

"Well, you waived your objection to it."

I mean, am I supposed to object? What if they really only were pleading past medical, am I supposed to object and say, "No, no. I want you to plead future medical"? That's not that's an omission, but that doesn't really say anything.

CHAIRMAN SOULES: Yeah. This doesn't fix that.

HON. SARAH DUNCAN: Judge Brister has brought up the problem that I would like clarified, whichever way it's clarified, in the rule. And I'm not smart enough to tell you how to fix it.

Elaine says that she is, and I hope that she will.

CHAIRMAN SOULES: Help.

PROFESSOR CARLSON: Aren't we really talking about the omission to fully state a claim, to fully state it?

PROFESSOR DORSANEO: It's -- I'm speculating about when this was drafted by Chief Justice Alexander, and I imagine there was a conversation like this. People said,

"Well, you can't just say defect. You have to say omission." They have to say "fault," because everybody wants -- everybody is big on waiver. We need to have waiver because we're getting too many cases reversed. And so we all went back to "defect."

And it seems to me that the law is relatively clear that if you particularize one of those things, past, that you've left out, you know, future. But if you don't particularize in your pleading, then it might be past, future or both. And that's relatively clear.

We have a little problem with Rule 56 which talks about you need to plead special injuries. You know, it's a specialized fair notice rule. And that kind of doesn't fit neatly into this package.

I guess my overall point would be we could write a few additional sentences to make this clearer about what's waived and what isn't, and move the point of confusion and lack of certainty to another analytical plane. We could do that.

I can find the cases where it's clear

Supreme Court authority that the incomplete statement of a cause of action or leaving something out is not a failure to give fair notice, you know, when fair notice is given. And there are things that you could say that would be helpful for people to read. But beyond that you can't deal with every case.

The damage cases are particularly difficult, partially because of Rule 56, and because there are rules of construction that have been kind of forgotten that aren't talked about by the Supreme Court in its recent opinions, like the idea -- like on injuries; that if you plead injuries or specified damages, you are treated as limiting yourself to the specific, and the general is just mere surplusage and doesn't account for anything. That's a traditional rule. I'm not certain that rule is still as well, if it's alive at all, as it used to be.

CHAIRMAN SOULES: Let me try something else here. "Every defect or omission, either in form or substance, in stating a claim of defense asserted in the cause."

PROFESSOR DORSANEO: Say "every pleading defect." You want to say "pleading defect." You don't want it to be a defect in some larger sense that --

CHAIRMAN SOULES: Okay. "Every pleading defect or omission, either in form or substance, in stating a claim or defense asserted in the cause."

PROFESSOR DORSANEO: If you want to talk about omission, you can talk about omission to plead an element of a claim or defense.

MR. LOW: And Luke, that would take care of it, because if you haven't stated a claim --

HON. C. A. GUITTARD: Luke, let me suggest some language.

CHAIRMAN SOULES: Okay. Judge Guittard.

HON. C. A. GUITTARD: Add to the language previously discussed this sentence: "No waiver applies with respect to a ground of recovery or defense, no element of which has been alleged."

MR. LOW: I like what Luke

said.

CHAIRMAN SOULES: Well, that's the converse. I don't mind stating it both ways.

MR. LOW: I like what you said, if we're going to have just one.

CHAIRMAN SOULES: We're talking about every pleading defect, so we're talking pleading defects or omissions.

MR. LOW: Right.

CHAIRMAN SOULES: Whether in form or substance. We're only talking about those -- that only plays where we are stating a claim or defense that is asserted in the cause.

MR. LOW: If we don't state it at all -- okay. I agree with that.

CHAIRMAN SOULES: And it doesn't reach damages cases, so you don't waive objections to the failure to plead some element of damages.

It seems to me when you get like in med mal cases or injury cases, if you get somebody who is pleading as to the level of detail of past medical, they've got to be thinking

something. Maybe I guess they could really stub their toe, but they're already -- but they could have just said, "And I was damaged," period. And they get a trial of every conceivable type of damage that they can raise by the evidence.

PROFESSOR DORSANEO: Where it will come up is where someone says, "I broke my leg and was otherwise injured." Okay. Now, under conventional historic rules "otherwise injured" doesn't mean squat. Okay. Now, I'm not sure that's still so.

CHAIRMAN SOULES: Probably not under this language. Judge Brister.

HON. SCOTT A. BRISTER: Back to your idea of the connection with trial amendments, isn't the idea -- if you had fair notice of it, it's a defect. Where you still had fair notice of the claim, that one is waived. If it's a defect or omission or whatever else you want to call it and you didn't have fair notice of the claim, that is not waived.

MR. LOW: That's right.

HON. SCOTT A. BRISTER: And so

it seems to me that's the best way that you could write a rule with that concept, which would cover the default judgment rule as well. That wouldn't have to be excepted out as different, because that's the same thing.

But if by defects where you have fair notice of the claim -- and for instance, there's differences in -- like past medical with no future medical is one thing. But the cases say interest, you always have fair notice that they're going to claim interest, because the statute says they get prejudgment and postjudgment interest. There are cases suggesting that that can never be, to an ordinarily prudent lawyer, a surprise that they're going to claim interest; so that the test on all of these things is the fair notice question.

And we're just talking about waiving defects where you had fair notice of the claim. That might be a different structural way to go after the definition.

CHAIRMAN SOULES: Judge, I think this is a waiver of your right to fair notice. That's what this is about. In other

words, you stand up and say --

HON. SCOTT A. BRISTER: No. That's back to Buddy's case. "I had no idea you were going to claim an intentional infliction of emotional distress. I thought this was a contract case." And that's not something that then is waived by anything up until charge conference.

CHAIRMAN SOULES: Okay. Justice Duncan.

HON. SARAH DUNCAN: But what if I very specifically plead my damages for my breach of contract and my fraud claims. Isn't that an element of an intentional infliction claim? And once I've pleaded those damages, under Judge Guittard's sentence, wouldn't I be entitled to an intentional infliction submission?

HON. SCOTT A. BRISTER: No. If it's a new cause of action -- the Greenhall --

HON. SARAH DUNCAN: There's no way that if it's --

HON. SCOTT A. BRISTER: -- Service Lloyd's says if it's a new cause of action, it is not fair notice to surprise you

with that --

HON. SARAH DUNCAN: No. But I'm talking about the sentence that Judge Guittard suggested, "No waiver with respect to a ground of recovery or defense, no element of which has been alleged." If I allege my damages for A, B and C causes of action, is that not an element for purposes of other causes of action? It's maybe a dumb question, but I would just like to know the answer.

MR. ORSINGER: Could you generalize that and say that any allegation of damage supports any theory of liability because the damages are the result of the wrongful act?

HON. SARAH DUNCAN: That's my question.

MR. ORSINGER: Surely it can't be that --

HON. SARAH DUNCAN: The same with respect to proximate cause or producing cause. Once I've alleged --

MR. ORSINGER: It can't be that broad, or else it would be -- because then there's no reason to have pleadings at all.

HON. SARAH DUNCAN: I agree, Richard. I agree.

PROFESSOR DORSANEO: But it's still helpful to say that if it's not in there at all, then, you know, you don't need to specially except that someone didn't assert something that they didn't assert. It's still helpful. It's just as helpful in the pleading context as it would be in the Charge Rules. And just instead of "necessarily referable" you have "fair notice," which means the same thing as "necessarily referable" to me.

HON. SARAH DUNCAN: I guess that's my question, is maybe it means the same thing. I think it should be a necessarily referable kind of concept. And I guess that's my question. Okay. It means that to Bill Dorsaneo. But is that what we're saying in this rule, and does the majority of the Committee think that? Because I haven't gotten that impression.

CHAIRMAN SOULES: I don't think that necessarily referable is at play at this stage.

HON. SARAH DUNCAN: To me,

"necessarily referable" means -- I mean, that's what fair notice is, because if all you do is plead damages, that doesn't give me a clue that you've limited yourself to common law fraud versus statutory fraud versus DTPA.

CHAIRMAN SOULES: Well, that's right. But if you let me go to trial on that pleading, I get the array of questions that the judge will give me.

HON. SARAH DUNCAN: I have already specially excepted to your pleading.

CHAIRMAN SOULES: And I'll admit you didn't fair notice that I was pleading DTPA. You didn't get fair notice I was pleading fraud, but look at what I've got. Here are these facts, and here is my evidence and nobody objected, and we've had a trial, and the jury is waiting out there for you to give them a charge, and this is what I think they're entitled to. You know, it's obviously a sloppy job, you know, but that's -- they didn't complain and they didn't fuss until now. We need to get a charge to the jury and get some questions answered, and I hope I get some money, I mean, which is what

I was saying, is that is a waiver of the fair notice rule about some things.

HON. SARAH DUNCAN: My example assumed that special exceptions had been filed and granted.

MR. ORSINGER: Then this sentence doesn't apply, because it only applies if you haven't complained by special exception.

CHAIRMAN SOULES: That's all we're talking about, is what happens if you do not file special exceptions.

MR. ORSINGER: If you file a special exception and the judge says, "State your legal theories," then they damn well better identify their causes of action, because if they don't, they can't say, "Well, I alleged damages, so every known theory in tort law is available."

HON. SARAH DUNCAN: But I didn't say that.

MR. McMAINS: And if he overrules it, you still haven't waived it.

CHAIRMAN SOULES: That's right. Either way.

HON. SARAH DUNCAN: But that's still not what --

CHAIRMAN SOULES: Okay. Well, let's try to get past this and give Richard as much information as we can so he can work on it during the next two months.

Do we want to express that the groundless cause of action is not waived? I think so. Any objection to that?

MR. ORSINGER: "Groundless" means nonexistent?

CHAIRMAN SOULES: Nonexistent cause of action, right; that a new and independent cause of action is not waived. And I realize that writing the words in a rule is going to be more difficult than saying them here. But should we express that?

HON. SARAH DUNCAN: Well, it could be in a comment.

PROFESSOR DORSANEO: The best that we're going to be able to do is to look at the cases and say what the Supreme Court has said.

MR. ORSINGER: No. We can really write our own rule. We're not bound to

that, are we?

PROFESSOR DORSANEO: Well, we can make up stuff, but I want it to be consistent with what the rules really are. I mean, we're just recasting them in more familiar -- I won't say more careless, but more familiar language without the benefit of exactly looking at how they're cast in the case law.

I think all these things we're saying are really there. You know, it's really there, and we can go try to bring that into the rule. We can try to bring those things into the rule. And we can be aided by looking at Rule 279, the necessarily referable and independent ground of recovery, this, that and the other or whatever.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: But I don't think we can do better than that.

CHAIRMAN SOULES: Okay. Does anybody have anything else to give as assistance to Richard in his work?

MS. GARDNER: When you say --

CHAIRMAN SOULES: Anne

Gardner.

MS. GARDNER: Excuse me. When you say as a totally -- I forgot what you said now. Your suggestion of a new and independent cause of action, is that the same thing as saying a total failure to state a cause of action?

CHAIRMAN SOULES: Well, that --

MS. GARDNER: Or is that an additional thing?

CHAIRMAN SOULES: That would be a third one, I think.

MS. GARDNER: Okay. The other comment I was going to make is that I've been involved in a case where the issue of whether a -- a jury question regarding whether the damages resulted from the occurrence in question was necessarily referable to any particular cause of action. And there is case law saying it's not.

HON. SARAH DUNCAN: And that --

MS. GARDNER: So if you only have a general damages issue, you can't deem some other findings and come up with a cause of action maybe that didn't submit some other

element of -- it's not necessarily referable, in other words.

CHAIRMAN SOULES: And then do we want the waived defect to only apply to the stating of the claim or defense, or should it extend to damages as well?

PROFESSOR DORSANEO: The more we're thinking about it, I think that the injuries and damages part of this are frequently overlooked and need not be overlooked. And Judge Brister's comments made me, you know, realize that, which is the same thing I realize in teaching this every time, is that that's overlooked and essentially the same rules need to apply.

And what that would mean is that if you plead something very generally, "He damaged me," or like "He torted me," then everything goes. If you plead something specifically, then the other specific things need to be added, because the assumption would be that something specific is something specific, and not specific and everything else you can think of. The problem is on the deal of "and was otherwise injured." That's the problem. And

my view would be that that ought to be surplusage. That ought to be.

Now, I could see how reasonable persons could differ on that, but I think if you specify, then you ought to specify; namely, I'm influenced by the cases that say that if you particularize, then the particularization is appropriate as to what you're dealing with, rather than some including but not limited to approach to the articulation of injuries and damages.

HON. C. A. GUITTARD: Would this language help? "No waiver occurs with reference to -- with respect to a ground of recovery or defense not cognizable in law."

CHAIRMAN SOULES: Something like that. I mean, that's what needs to be written, something like that.

Okay. Let's work then on what is or is not waived based on the discussion, today's discussion.

What about timing?

MR. ORSINGER: Let's not do timing until we look at Rule 63.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: But let's find out if the proposal on default judgment language is acceptable. That's paragraph 3 in this --

CHAIRMAN SOULES: You don't even want to know whether we want to cut these off before the pleading deadline?

MR. ORSINGER: Yes. But we need to discuss what the pleading deadlines are.

CHAIRMAN SOULES: Okay. But do we --

MR. ORSINGER: Well, then let's look at Rule 63.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Rule 63 has to do with the deadline for amending pleadings. This has got to be interfaced with that, doesn't it?

CHAIRMAN SOULES: Okay. Do we want special exceptions, though, to be required before the pleading deadline?

MR. ORSINGER: Well, let me tell people about the pleading deadline then.

But before we ask that, Luke, can we just

find out if this default judgment language on paragraph 3 is okay or not? If it is --

CHAIRMAN SOULES: Well, you're saying something that's quite -- that seems like in the abstract the answer is yes.

MR. ORSINGER: Well, we've debated this already. We just never took a vote on it.

CHAIRMAN SOULES: Okay. We'll go to fair notice to a defaulted party. Any problem with that, "provided that this rule shall not apply to any party against whom a default judgment is rendered"?

What if we put "Fair notice to a defaulted party has not been given by the allegations as a whole"?

HON. C. A. GUITTARD: I suggest alternative language, which I think means the same thing. Start a new sentence. "This rule does not apply when a judgment has been rendered by default if reasonable notice is given by the pleading as a whole."

CHAIRMAN SOULES: No. That's when it does apply.

HON. C. A. GUITTARD: In other

words, there's no waiver if the judgment has been rendered by a default and reasonable notice is given.

CHAIRMAN SOULES: There is a waiver.

PROFESSOR CARLSON: There is a waiver.

CHAIRMAN SOULES: If the defaulted party had reasonable notice, he waives the pleading defect.

HON. SARAH DUNCAN: I think the way this rule is written is really confusing because the rule won't apply. If the rule doesn't apply, what happens? We don't have any defects that are waived. So as to any party who suffered a default with fair notice, there is no waiver. Is that what it says?

PROFESSOR DORSANEO: Well, I'm getting tired. I know what it meant to say. I'm not sure that it says that now.

HON. SARAH DUNCAN: What does it mean to say?

PROFESSOR DORSANEO: Maybe I need an opportunity to say what we're talking about.

MR. ORSINGER: What we mean is that this idea that you waive certain complaints if they're not raised and ruled on by a certain time doesn't apply when you are defaulted and you have adequate notice or fair notice in the pleadings.

CHAIRMAN SOULES: Justice Duncan, it's a double negative. It does not apply if the defaulted party did not have fair notice.

MR. ORSINGER: And that's not good construction.

HON. SARAH DUNCAN: But it also has an embedded negative in it in the sense of the waiver. "This rule shall not apply." Now, "this rule" has to do with waiver. So --

CHAIRMAN SOULES: No waiver applies if the defaulted party did not have fair notice.

PROFESSOR CARLSON: Why not just say --

HON. SARAH DUNCAN: Isn't what we want to say that a party who has fair notice of a claim against him but permits a default judgment be rendered against him does

waive defects in form and substance in the pleading? I mean, I think if we start over and take it -- I mean, I think there's a more eloquent sentence that can be written. But if that's the concept, I think we need to say it positively.

PROFESSOR DORSANEO: I agree.

CHAIRMAN SOULES: I don't. It doesn't make any difference. I think what we're doing is we're saying some parties are exempt from waiver.

HON. SARAH DUNCAN: No. I think what we're saying is that some parties do waive.

CHAIRMAN SOULES: And some are exempt.

HON. SARAH DUNCAN: Right. The parties who've suffered a default is the general class of people. Now, the parties who've suffered a default who had fair notice, they waive defects in form and substance. The parties who've suffered a default and didn't have fair notice, they don't waive defects in form and substance.

CHAIRMAN SOULES: Say it both

ways. I've got no problem.

MR. McMAINS: Well, Luke?

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, with regards specifically to the default issue, now, one of the problems I have is that our Supreme Court case law is pretty clear that you have to make -- you have to have pleadings that will be sufficient to support substituted service, various types of service.

Now, embedded in those cases frequently is reference to this rule as it currently exists. And I think that if you're going to say that if you have fair notice of the claim, that that has anything to do with whether or not you waive a defect in the pleaded form of service, that is a humongous change in the law and should not be allowed.

CHAIRMAN SOULES: Well, we're not -- there's no waiver here. There's no waiver of defective service. This is a waiver of defective pleading.

MR. McMAINS: But in McKenna and in other cases it is the pleading that is the defect; it is the failure to plead your

entitlement to the substituted service that is defective. That's what's defective. That's why the case is reversed. The citation is fine in terms of complying with the statute, but you do not have the pleaded grounds sufficient to use the statute. You cannot put a pleading defect waiver on a defaulted party when you're talking about mechanisms for service.

That's simply -- you know, whatever you do as to default -- stating a cause of action I have no problem with, all the other stuff, but not any kind of general concept of waiver, and certainly an affirmative statement about waiver of pleading defects or defects in form or substance of pleadings, because there are a lot of defaults that are reversed precisely on pleading defects in the form of service.

HON. SARAH DUNCAN: But I think that is the point, is that when we state it affirmatively, we begin to see the scope of what we're doing. And if that's not the intended scope, we need to write it better.

MR. ORSINGER: What if we did this: What if we say "except as to pleading

substitute service, pleadings" -- "a default judgment may be supported by pleadings which are sufficient to give fair notice," or something like that?

CHAIRMAN SOULES: Can I ask a question about that?

MR. McMAINS: But it's not just that.

CHAIRMAN SOULES: Let me ask a question about this, if you don't mind. If there's no pleading for substitute service but substitute service is used, are you also assuming that there's no order for substitute service, no pleading and no order?

MR. McMAINS: No.

CHAIRMAN SOULES: There isn't?

MR. McMAINS: The cases say that if you do not have the pleaded grounds -- one of the cases says if you don't have the pleaded grounds for the substitute -- now, I'm talking about in terms of pleading into the 2031b or what used to be 20 or whatever it is now.

MR. PERRY: Well, see, McKenna vs. Edgar is a long-arm statute --

MR. McMAINS: Yeah, long-arm statute.

MR. PERRY: -- that didn't need an order.

MR. McMAINS: Right. You don't need an order, but you've got to plead it.

MR. PERRY: But the case -- the reversal was because they did not plead all the elements of the long-arm statute.

MR. McMAINS: Right. And that's the point. It's an omission to plead an element. That's what it's based on. That's what a lot of those cases are based on.

PROFESSOR DORSANEO: I don't know why defendants should get that. I don't know why we're so solicitous of defendants who come up and claim that they didn't plead it right, I mean, or they didn't get served right. I don't want to hear about it.

MR. PERRY: Yeah. Why should -- if a defendant lets a default be taken against him, why shouldn't they have to suffer defects and waiver of pleading just like anybody else?

CHAIRMAN SOULES: Just as long

as they get fair notice.

PROFESSOR DORSANEO: As long as you serve them.

MR. PERRY: If you serve somebody with a pleading, why should they get special consideration because they failed to respond and come and file a response and plead in like responsible people do? What you're doing is you are granting special consideration to people who are irresponsible.

Now, what happens a lot of times is this comes into play when you have people that are affirmatively trying to avoid service. And you can't get personal service, so you have to go with substituted service, and every time you come up with a new way that you think you can get substituted service you have to file a new pleading. Well, all of that is just gamesmanship.

I would suggest that we take out the sentence that gives special consideration to people who allow default judgments to be taken against them, and let's treat them like everybody else.

CHAIRMAN SOULES: Let me try this: I get sued on a note. The bank sues me on a note. I owe them money. I know the lawsuit is coming. They're probably going to get some legal fees, but I'm busted, and I don't even go talk to them about it. I've just got a complaint here. "Soules owes us $200. We want $200 and we want interest and we want postjudgment interest and we want $200 in legal fees." I say okay.

But then I get a notice of a judgment, and it's for fraud. And it's a $20,000 judgment with a $200,000 punitive damages award. I say, "Hey, wait a minute. That's not what I got served with."

I had no fair notice that I was going to get hit with a $20,000 fraud judgment and $200,000 in punitive damages. Now, is that okay with you?

MR. PERRY: That's a different issue. That's not a defective pleading. That's where a judgment is taken on a different cause of action other than the one that was plead.

But suppose the same situation, you owe

the bank a bunch of money. Somebody files a real simple pleading, and it's defective for some reason. You look at it, and your lawyer looks at it and says, "You know, you don't have a good defense and you don't have the money. Let's just let them take a judgment against you. They've got a defective pleading. We're going to wait a period of time, and we'll file a bill of review. And maybe in a year or two by the time this all gets resolved, maybe you'll have the money."

Now, why should somebody be able to do that?

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: I agree with those circumstances. I do see cases where you've got a Swiss corporation and the plaintiff's attorney sends them a letter registered mail, and then so if they waive -- you know, no compliance with any Hague Conventions or rules of procedure or anything, and they assert jurisdiction is proper, and some of those defendants don't come in, not just because they're lazy or don't care, but

because they're Swiss and feel like their sovereignty has been invaded. And they've got truthfully some arguments on that kind of case, which doesn't apply to local defendants, et cetera, but there's constitutional and other kinds of questions that shouldn't be waived and ought to be plead specifically, you know. There's lazy defendants and lazy plaintiffs.

And I agree with your circumstance, though, the people that just don't --

MR. PERRY: Of course, in your circumstance, if there's not proper service, there's not proper service, and the default is no good regardless of the pleadings.

HON. SCOTT A. BRISTER: But in the propriety of service, you've got to come in and quash the service, which means you appear.

CHAIRMAN SOULES: Okay. Anyone else on this? Rusty.

MR. McMAINS: Well, we have all kinds of other rules relating to service and citation and strict construction. So all of this notion about we shouldn't treat default

judgments differently is, you know, contrary to everything else that we have in our rules that we've already voted on by and large. And in fact, it's directly contrary to why everybody is trying to reinstitute the ones with the aegis of the motion for new trial rule and the 6:00 o'clock writ of error practice.

I mean, it's just -- it does not require that much ingenuity to plead properly into a statute, if you can, in order to get service. And if you don't even use it at all, if you just file a pleading and send it to the secretary of state and ask him to serve somebody, you don't deserve any more respect than the guy who ignores it. So if you want to take a default judgment on that, good luck.

CHAIRMAN SOULES: Well, let's just -- there seems to be a division in the house on this as to whether a defaulted party should be deemed to have waived defects in pleadings that do not give that party fair notice of a claim.

Okay. How many feel that a defaulted party should be charged with waiver of

pleading defects when the pleading does not give fair notice of the claim?

PROFESSOR DORSANEO: And that's not about the service stuff, that's about just about fair notice of the claim?

CHAIRMAN SOULES: No. We're not talking about that concept, whether it's absolutely right, affirmative or negative.

How many feel that the defaulted party should be charged with that waiver?

MR. McMAINS: I can't understand what you've said.

CHAIRMAN SOULES: Okay.

MR. McMAINS: I thought you said he doesn't waive -- or he does waive?

CHAIRMAN SOULES: How many feel that a -- the proposition is that a defaulted party will be charged with waiver of pleading defects when the pleading does not give fair notice of the claim.

PROFESSOR DORSANEO: No, when the pleading does.

MR. McMAINS: That's not what he said.

MR. ORSINGER: No. Luke is

posing a question that we vote on. It doesn't matter what you wrote. Just listen to his question. We're going to vote on it, and then you've got another question after that.

CHAIRMAN SOULES: Proposition: A defaulted party will be charged with waiver of pleading defects when the pleading does not give fair notice of the claim.

Those who say yes hold your hand up.

Those who are opposed. Okay. A thousand to nothing.

HON. SARAH DUNCAN: That's easy. Now ask the next question.

CHAIRMAN SOULES: The next question is --

HON. SARAH DUNCAN: Just add the "not."

MR. PERRY: What happens when it does give fair notice of the claim.

CHAIRMAN SOULES: Okay. That's not even an issue in this rule, is it?

PROFESSOR DORSANEO: I may have said it inside out. I didn't mean to be in favor of what we just voted on. I'm against that.

CHAIRMAN SOULES: Yeah. I think that's not what's here, what I just said. How many feel that a defaulted party should be charged with waiver of pleading defects if the pleading gives a defaulted party fair notice of the claim. Any opposition to that?

MR. McMAINS: Well, it depends on what you mean by -- if you're just talking about a distinct cause of action, I don't have any problem.

PROFESSOR DORSANEO: Just the claim, not the service.

MR. McMAINS: But there are other things like the service and allegations such that I do think -- which maybe they are actually pleading defects, so that's why I --

CHAIRMAN SOULES: Well, maybe that militates back to this concept of restricting this waiver to --

MR. McMAINS: -- to stating of the claim. The way you had your language initially when you talked about it as stating the claim, I don't have that much of a problem problem with it in temrs of stating the claim.

CHAIRMAN SOULES: Okay. Should we restrict this waiver to pleading defects or omissions in form or substance in stating a claim or defense asserted in the cause? Those in favor show by hands.

MR. BABCOCK: What was that again, Luke? I'm sorry.

MR. McMAINS: Stating a claim.

CHAIRMAN SOULES: The pleading defects that would be waived or omissions that would be waived would be those that are made to state or that attempt to state a claim or defense that's asserted in the cause.

HON. SCOTT A. BRISTER: Sure.

CHAIRMAN SOULES: Okay. Those in favor. Nine.

Those opposed. Three. Okay. Nine to three. That's nine to three.

Okay. It's about noon.

HON. SARAH DUNCAN: Are you saying restricted only to the stating of the claim? We're not going to add any exceptions to that? Because I agree with David's example, and I don't think that defect should not be waived.

Elaine says she will do some research on that.

(MEETING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 18, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,113.25.

CHARGED TO: Soules & Wallace, P.C..

Given under my hand and seal of office on this the 30th day of November, 1995.

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