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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 20, 1996

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of July, A.D., 1996, between the hours of 8:00 o'clock a.m. and 12:00 o'clock noon at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JULY 20, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Joseph Latting
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Hon William Cornelius
Paul N. Gold
O.C. Hamilton

EX OFFICIO MEMBERS ABSENT:

Hon. Nathan L. Hecht
Hon. Sam Houston Clinton
W. Kenneth Law
David B. Jackson
Doris Lange
Michael Prince
Hon. Paul H. Till
Bonnie Wolbrueck

JULY 20, 1996

INDEX OF VOTES

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

CHAIRMAN SOULES: Okay. We have done Section 4, and we are on Section 3, right, of your 7-17-96 work, Bill? And this again is you and Richard's joint effort, so I will leave it to you-all how you alternate the presentation.

MR. ORSINGER: I think that giving credit where credit is due that it's Bill's effort primarily.

You guys are with us on Section 3 down there, Scott?

HONORABLE SCOTT BRISTER: Yeah.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Feel free to move forward and get cozy.

MR. ORSINGER: I think he likes to just sit down there and just throw rocks.

HONORABLE SCOTT BRISTER: I have got all of my stuff spread out.

MR. ORSINGER: All of those incoming SCUDs from that end of the table.

CHAIRMAN SOULES: Given the attendance this morning, we will be probably short on biscuits.

(Off-the-record.)

PROFESSOR DORSANEO: This proposed Section 3 is entitled "Pleadings and Motions." Under our existing Section 4 of the current Texas rule book we have a section called "Pleading." We have in Section 1 of part (2) some coverage of the subject of motions in Rule 21; but our current Texas rule book doesn't really tell us what pleadings are and how they compare to motion practice; and frankly, it is very difficult to be sure what a pleading is under the Texas scheme. It may include every paper filed, or it may include a limited class of instruments that can be identified by endorsement or title.

The Federal rule book begins its pleadings and motions section with a Rule 7 called, "Pleadings allowed," and this Rule 20 is somewhat modeled on that Federal Rule 7, although there are some significant differences between Texas practice and Federal practice that are being maintained.

The historic Texas statement of pleadings is a bit opaque. In current Rule 45 it says, "Pleadings in the district and county courts shall be by petition and answer." That is an

identification of a system, not just a selection of words. The plaintiff's pleadings are petitions, original petitions, that perform a particular function, and supplemental petitions that perform an entirely different function from original petitions. The defendant's answers are original answers and supplemental answers, and each of them, original answers and supplemental answers, have particular functions.

This first sentence attempts to capture the concept of the plaintiff's pleadings will be by petition in a more informative way, without changing anything. "The pleadings of the plaintiff shall consist of an original petition," and these words are added, "containing the plaintiff's claims for relief" to tell you what an original petition is for.

Claims for relief in this draft, as you can see on this same first page, are described in paragraph (a) of Rule 21, you know, what a claim for relief is; and we talked about that at our other meetings here for about a day; and then it says, "and such supplemental

petitions as may be necessary," which is what the supplemental petition rule says now, "as may be necessary," but it doesn't say necessary for what.

Okay. "As may be necessary to reply to the allegations made by the defendant or another party," seems to me to capture it, that an original petition is where you make your claims for relief, and that will be covered, and a supplemental petition is where you reply to allegations made by somebody else. Okay? And I thought if we were going to preserve our current scheme that that was a much clearer description of the plaintiff's pleadings than the current rule book has.

Going along, and I will say, at our committee meeting there was some sentiment for taking a more Federal approach in something like, "There shall be a complaint and an answer, a reply to a counterclaim," you know, calling a reply a reply rather than a supplemental petition; and, you know, a lot of people might, frankly, be in favor of embracing the whole Federal pleading scheme; but by the time we got through thinking about

it we thought that probably wouldn't fly and went too far and maybe we could do about as well using our familiar terminology.

The second sentence, "The pleadings of the defendant shall consist of an original answer," and I added really something that's in Rule 45, "containing the defendant's grounds of defense," which is what Rule 45 says a defendant answers with.

"And supplemental answers as may be necessary to reply to the allegations of the plaintiff," which is what the supplemental answer rule says; but then I said, "made in an amended or supplemental petition," because I think that's really what a supplemental answer is for. "Or to the allegations of another party," if there is a cross-claim. And I thought that kind of captured it, but then there are other pleadings, or at least other things that ought to be mentioned; and I tried to mention those, kind of modeling it on Rule 7.

"The answer may contain a cross-claim or a counterclaim. In addition, if a person who was not an original party is subject to

joinder under the provisions of Rule 27," the third party practice rule, "a third party complaint may be filed." Then you would say, well, you could say "by the defendant." That's the normal, but actually sometimes there will be a counterclaim against the plaintiff, and the plaintiff is allowed to third-party-in a third party under those circumstances.

The Federal rule then says, "No other pleadings shall be allowed, except that the court may order a reply to an answer or a third party answer." And I didn't think we were ready for that much precision, no other pleadings shall be allowed; but at least this is trying to say, you know, what pleadings -- you know, when we are talking about pleadings, we are talking about these things; and maybe something else should be added in here.

But it's certainly better in the sense of explaining what pleadings are and describing them than our current rule book, which in the general section says that pleadings are by petition and answer, and then in the pleadings of plaintiff/pleadings of defendant subparts

we have a lot of additional technical information kind of spread around.

So that's how 20(a) is done. 20(b) attempts to say what a motion is, and perhaps a little bit indirectly, by taking part of the first paragraph of current rule Texas Rule 21. "An application to the court for an order." Now, this is getting back to our confusion, "whether in the form of a motion, plea, application, or other form of request, unless made during a hearing or trial, shall be made in writing, state the grounds for the request, and set forth the relief or order sought."

I am not thrilled with this (b), although I think it is reflective of our current rule book and our current level of imprecise thinking, because this is not a forthright description of all of the pleadings in the first paragraph and then a statement of what a motion is, to be followed later in the rule book with a subsequent rule saying what you can do by motion. It still doesn't hang together all that well; but it, I believe, is organized better than our current thing, which is particularly difficult to follow.

There is an issue lurking here in the back that may be an issue that needs to be forthrightly considered before we even, you know, do any voting on any of this beginning rule here, because it has to do with the nature of the system and are we going to have a system that says you do certain things by pleadings, you do other things by motion. Some of the things you can do in pleadings you can do by motion. If you do it by motion, you will do it this way, right, which is the Federal rule book's level of precision; or are we are going to be kind of like we are thinking about pleadings? We have a pretty good idea what pleadings are, but we are not so technical that we would be that upset if something is done not really by a pleading but by another paper that doesn't have a pleadings name on it, like a notice of nonsuit.

MS. SWEENEY: For instance.

MR. ORSINGER: Or a special appearance.

PROFESSOR DORSANEO: When you are wanting to get rid of a claim. Huh?

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: And I almost would want to, you know, defer the complete consideration of this Rule 20 because it has to do with the system, until we work through the rest of it. Huh?

CHAIRMAN SOULES: Okay. Any objection to that?

MR. LATTING: No. And I have a question or two.

CHAIRMAN SOULES: Okay. Joe Latting has a question.

MR. LATTING: Well, it may be premature, but I was just going to ask you about the system, and I am usually wanting to leave things alone if they are working pretty well, but this is one area where I am wondering outloud if it's time for us to go to the more usual nomenclature around the country and call these things complaints rather than petitions, and I have a -- Judge Lowry, Pete Lowry, who is the former presiding judge here in Austin, this is the one thing he told me he hoped we would do on this committee, would be to change the terminology because of the lawyers coming in his court from all parts of

the country, and they are confused by what we call our pleadings down here. Now, I don't know if this is a big issue but --

PROFESSOR DORSANEO: There, at this point in time in my judgment, are not very many fundamental differences -- especially after our last vote on eliminating causes of action, you know, from the pleading requirement -- between the Federal pleading system and our pleading system.

MR. LATTING: Just more nomenclature than anything else.

PROFESSOR DORSANEO: It's more nomenclature than it is anything else. There are some differences. In our system you must answer an answer with a supplemental petition when you want to defend by avoiding an affirmative defense, and in the Federal system you don't. The affirmative defense is taken as denied or avoided when you're answering an answer; that is to say, you don't have to answer an answer unless it's a counterclaim denominated as such, "I am a counterclaim."

That's a big difference, and I don't think we would embrace that Federal idea

because it can be pretty surprising if somebody is going to, you know, introduce something that they didn't allege that it's an affirmative defense to an affirmative defense.

MR. LATTING: I am not suggesting that.

PROFESSOR DORSANEO: But beyond that there aren't that many differences. There really are not.

CHAIRMAN SOULES: If I am hearing what Joe is saying, he is not saying to change anything in your Rule 20 except instead of using the word "petition" we would use the word "complaint."

PROFESSOR DORSANEO: "Complaint."

MR. LATTING: Yeah. That's right.

CHAIRMAN SOULES: Otherwise keep it the same, go ahead and maintain the practical differences or functional differences between the two, but just call this a complaint because that's the word that's used throughout the country.

PROFESSOR DORSANEO: See, what

you would do if you did that, the next thing you would do is you would not call a reply to an answer a supplemental petition.

MR. LATTING: You call it a supplemental complaint.

PROFESSOR DORSANEO: No. You would call it a reply.

MR. LATTING: Okay. Call it a reply. Fewer words. I like that. Less ink.

PROFESSOR DORSANEO: And that would eliminate a lot of confusion because people don't know what a supplemental petition is.

CHAIRMAN SOULES: That's odd.

PROFESSOR DORSANEO: Huh?

CHAIRMAN SOULES: That's odd language. It's really not descriptive.

PROFESSOR DORSANEO: And it's historic language. It's a part of our heritage. We use that language because that's the way we talk, you-all.

CHAIRMAN SOULES: Now, may I ask you this question, Bill, to clarify something I guess I didn't know in the Federal practice? If the plaintiff files a complaint

and the defendant files an answer based on limitations, the plaintiff has to file some pleading to put the question of limitations at issue?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Or it's summary judgment?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: I thought you said you had to file something, and -- that the plaintiff had to file something in response to a defendant's affirmative defense in Federal court.

PROFESSOR DORSANEO: No. In our system you do.

CHAIRMAN SOULES: What?

PROFESSOR DORSANEO: In our system you do.

CHAIRMAN SOULES: In Texas?

PROFESSOR DORSANEO: Yes. If you want to avoid the affirmative defense, as opposed to simply denying it.

CHAIRMAN SOULES: Such as the discovery rules.

PROFESSOR DORSANEO: Yeah.

Yeah.

MR. LATTING: If you have got an affirmative defense to the affirmative defense.

PROFESSOR DORSANEO: Right. Right.

MR. LATTING: Sure.

PROFESSOR DORSANEO: You must plead affirmative defenses to affirmative defenses in our system. In the Federal system --

MR. LATTING: I am sure not suggesting we change that.

PROFESSOR DORSANEO: -- an affirmative defense and an answer is taken as denied and avoided.

CHAIRMAN SOULES: On any basis you can avoid it?

MR. LATTING: That's a bad idea.

CHAIRMAN SOULES: Without specificity. Okay.

HONORABLE C. A. GUITTARD: Why should we keep the requirement of affirmative pleadings in avoidance of an affirmative

defense?

PROFESSOR DORSANEO: Because it can come as a big surprise if your affirmative defense is release, and you come to trial, and somebody starts putting on evidence that the release was procured by fraud, and you didn't know about that. Now, maybe you would have known about it somehow during discovery, but affirmative defenses need to be affirmatively alleged because you wouldn't necessarily think that somebody is going to assert something like that. You know, it's too surprising.

MR. LATTING: That just seems clear to me. I don't know why.

CHAIRMAN SOULES: So if we intend to avoid the affirmative defense and release of plaintiff, the plaintiff has to plead duress or whatever to that.

PROFESSOR DORSANEO: In a supplemental petition. Yeah.

CHAIRMAN SOULES: In a supplemental petition.

PROFESSOR DORSANEO: You don't have to deny an affirmative defense, but you need to allege a defense to it, like duress or

fraud or --

MR. LATTING: Something that's affirmative.

CHAIRMAN SOULES: But I guess the reason it's preserved, Judge Guittard, in the draft is that the subcommittee felt it was better to do it that way than the other way.

HONORABLE C. A. GUITTARD: Well, I am inclined to agree. On the terminology as "complaint" against as the "petition," perhaps "complaint" would be better for us because there are other kinds of petitions we have in our rules, like a petition for a writ of error or review in the Supreme Court; and now the Supreme Court seems to have preserved the petition for writ of error and from the trial court; and so, therefore -- and we have petitions for mandamus and such, so maybe it would be better to avoid any possible confusion with those situations to say "complaint" in the pleadings.

CHAIRMAN SOULES: Anybody else on this issue of whether we call petitions supplemental petitions or whether we call them

complaints and replies? Okay. So do you want to get a consensus on that, Bill?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Okay. Those in favor of complaints and replies show by hands. 11.

Okay. Those who favor maintaining the petition and supplemental petition language? One.

MR. LATTING: I would like for the Chair to note that I was for changing something. I would like an affirmative on that.

CHAIRMAN SOULES: It's only a change in nomenclature, however. We are not suggesting by the Federal terminology that we are lining up or adopting or embracing in any way the Federal practice. We are maintaining the state practice, but just changing the nomenclature; is that correct?

Paula Sweeney.

PROFESSOR DORSANEO: Well, we do more than that, slightly more than that, but it is really all in the realm of nomenclature, because we will be talking about

something substantially more like Federal Rule 7 if we go there. In other words, it could say, "There shall be a complaint and an answer, a reply to a counterclaim."

Now, I don't think we would want to necessarily embrace the idea that you only need to reply to a counterclaim if it's denominated as such, if it says "counterclaim" in a heading in the answer. Now, I wouldn't recommend doing that, but we would say, "A reply to a counterclaim" and then we would say, "and answer to a cross-claim if the answer contains a cross-claim." Okay.

MR. LATTING: Yeah.

PROFESSOR DORSANEO: A third party answer if the third party complaint is served. I mean, it would be a lot more like Federal Rule 7, but we probably still wouldn't want to say here, although we might, "No other pleadings shall be allowed."

MR. LATTING: Why would we want to say that? I don't know what that's for anyway.

PROFESSOR DORSANEO: Well, what it does is it tells people that these are what

pleadings are when we are talking about pleadings. That let's you know what we are talking about.

CHAIRMAN SOULES: Right. I think we can get to that, get a pretty good consensus on that pretty quick; and that is, are we going to have zero tolerance for somebody calling something the wrong thing, or are we going to continue to tolerate somebody putting in petition and supplemental petitions and doing what they have always done because they are not tuned up for awhile?

PROFESSOR DORSANEO: Well, the Federal system doesn't go that far. It says, "No other pleadings are allowed," but then everything is construed to --

CHAIRMAN SOULES: Then they do allow them.

PROFESSOR DORSANEO: -- do substantial justice, and you know, then they are not -- it is what they want you to do, and then how they treat you when you don't do it depends on the Federal judge.

CHAIRMAN SOULES: Okay. "No other pleading will be allowed."

Those in favor of that language? One.

Those opposed? Seven. Seven to one it's not included.

MR. ORSINGER: I would like to comment that 45 percent of our docket won't even be affected by that decision because the family code determines what you call the pleadings in a family law case.

PROFESSOR DORSANEO: Well, as I said, when we get to the end of this, this rule on -- or this potential motion practice rule, we might change our mind.

CHAIRMAN SOULES: Now, we are going to maintain some expressed provision in this rule that there is a deemed general denial to any claim if a party has made an appearance.

MR. LATTING: Yes.

CHAIRMAN SOULES: Correct?

MR. ORSINGER: To any counterclaim.

CHAIRMAN SOULES: Any claim, cross-action, too. You don't have to answer a cross-action.

MR. ORSINGER: But you do have

to file -- you have to include a general denial in your original answer.

CHAIRMAN SOULES: Well, but that party is just appearing. Any party who has already appeared in the case --

MR. ORSINGER: I see what you're saying.

CHAIRMAN SOULES: -- is deemed to have a general denial to any claim made against that party.

MR. ORSINGER: Okay. Right.

MR. LATTING: Yes.

CHAIRMAN SOULES: Now, whatever its character.

MR. LATTING: Yes.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Justice Cornelius and then we will go around the table.

JUSTICE CORNELIUS: The case law is well-settled that what you call the pleadings doesn't matter. It's the substance of what's in the pleadings. Nomenclature is irrelevant. I think if we start changing things to complaints and replies, we are just

going to confuse a lot of people and create a lot of unnecessary trouble and difficulty. I don't see any reason to change, and I see lots of reasons not to. You are not going to get replies. If you change it to complaint, you are going to get supplemental complaints, not replies.

PROFESSOR DORSANEO: It will take a long time.

JUSTICE CORNELIUS: It definitely will take a long time.

MR. ORSINGER: In fact, we may all have to die off.

JUSTICE CORNELIUS: You will have to have a whole new generation.

CHAIRMAN SOULES: Paula, you had your hand up. This consensus that we took wasn't intended to be a dispositive vote rather than a direction to the draftsmen, and if anybody feels that they want to have a different input than that consensus demonstrated, please speak up.

Okay. Paula, you had your hand up. Did you want to speak to something?

MS. SWEENEY: I would like to

go back to something that Bill said a minute ago about our vote, and I was at the meeting, I think, that you are talking about.

MR. YELENOSKY: Paula, I can't hear you.

MS. SWEENEY: Sorry. I am not used to speaking in public.

About our vote that we go to a more Federal pleading practice and that there would substantially now not be a difference between our pleading practice and the Federal practice. I am not remembering exactly that same sort of gestalt to the vote. Can you tell me -- can somebody elaborate on what you think we voted? Because I don't remember us voting to go to fact pleading and the same kind of Federal nonsense that you have to do on a point by point.

PROFESSOR DORSANEO: Well, Federal pleading is not fact pleading. Our pleading is fact pleading, but we adopted the language that's in (a)(1) of Rule 21.

MS. SWEENEY: Right.

PROFESSOR DORSANEO: That talks about claims rather than causes of action, and

the cause of action language in our current rules is what imposes a substantial burden on claimants to allege things with a larger degree of factual detail than is required under Federal pleading practice; but we just said "a short statement of the claims," which is the standard national language, "stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice," which is what we did vote on after a long discussion.

And I think that is the same as Federal pleading, which is very kind to plaintiffs. You could say, "I was subjected to numerous and onerous acts of employment discrimination" without putting down, you know, the speed brakes and "look out" allegations.

MR. LATTING: My boss tried to run over me.

MR. GOLD: Paul Gold. The way the Federal practice is changing, though -- and I guess it doesn't impact on our discussion -- is through disclosure because tacitly the court forces you to plead more specifically in order to obtain more

disclosure.

PROFESSOR DORSANEO: Uh-huh.

MR. GOLD: More specifically plead, so that that --

PROFESSOR DORSANEO: Well, we are not buying into that. We are talking about the original Federal choice, the 1937 Federal rules, and I realize that there are RECO claims and there are civil rights claims that are treated more harshly under the Federal scheme and that they are getting away from simple and straightforward pleading in a number of instances.

MR. GOLD: So are we doing away with special exceptions?

PROFESSOR DORSANEO: No.

MR. ORSINGER: No.

CHAIRMAN SOULES: No. And nor are we doing away with general denial. So we are not at all walking into the lock step of the Federal practice, and that was part of the discussion, whether we go to Federal pleadings. Most everyone, I think everyone, wanted to preserve general denial because all that does is put you in the case so you get

notice.

MS. SWEENEY: Well, that's what scares me about what Bill said because it sounded like I had missed something. So I'm okay now on that.

CHAIRMAN SOULES: Maybe we ought to go forward into these papers because I think a lot of these questions are going to get answered when we get into the specifics of the following rules after the general rule about what's the system going to be called.

PROFESSOR DORSANEO: Well, this Rule 21, claims for relief, is a rule that, you know, Richard, the draft of it embraces our prior discussion of about a day.

CHAIRMAN SOULES: Okay. Let's get beyond Rule 20 as quickly as we can. Anyone else have something on Rule 20?

MR. LATTING: Yeah. Real brief.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Two brief things. How would our rule suffer if we took out (b) and (c) altogether? Are there any annotations under these rules that have occurred in the

last 15 years?

MR. ORSINGER: We have to leave (b) in because this is where we define what you can file; and you can file pleadings, but then you can file other things, too, and we have to call the other things something.

PROFESSOR DORSANEO: Right. We call them separate pleas and motions, motions and pleas.

MR. LATTING: Well, we don't have a rule that says you can walk in the door of the clerk's office, but everybody knows you can. I mean, it's just -- why do you have to tell people that you can file motions? Everybody knows that.

MR. ORSINGER: So that they will instead of putting it in pleadings.

MR. LATTING: Okay. All right.

CHAIRMAN SOULES: Okay. Anything else on 20?

MR. LATTING: Well, why do we have to have general demurrers talked about?

MR. ORSINGER: I have a comment about (b).

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: I really don't know that pleas appear anywhere but in pleadings, and I am really wondering why we have pleas in (b).

PROFESSOR DORSANEO: Well, it's the idea of separate. I mean, I agree that a pleading -- if you said, "What's a pleading," I would say that it is something that contains a plea, and it may contain a number of pleas.

MR. ORSINGER: Well, in current Rule 85 --

PROFESSOR DORSANEO: But people think about a plea and a pleading, they think about, well, I am going to file a plea; you know, a plea in abatement, that's a plea. They don't think about when they are doing a pleading that they are putting pleas in pleadings. They just don't. That was one of those things years ago that all people knew, Joe, and that everybody forgot, except a few people, because it wasn't ever said that a pleading consists of pleas. So that's why.

It's the idea of separateness; and there perhaps is one other thing I ought to mention,

that we have in our Texas rules right now a kind of a split personality on this question of separateness. There is a Rule 46, which we haven't carried forward, which says, "The original petition," skipping some words, "shall be contained in one instrument of writing, and so with the original answer."

Now, what that says in English, since an original answer contains pleas and can contain special appearance motions, motions to transfer venue, pleas in abatement, special exceptions, et cetera, is that these are all to be in one piece of paper. Now, we have other rules that contradict this Rule 46, and we have practice that contradicts Rule 46.

Once upon a time you filed one original answer or one original petition, and that was supposed to be complete. You know, you didn't file a separate plea in abatement. That was part of your answer. That was a requirement, one writing. Then we developed plea of privilege practice and, you know, before we ever had any special appearance, right, plea of privilege practice to replace abatement practice in the venue context. And somebody

created this plea of privilege, and it's like somebody says, oh, well, a plea of privilege, that is a separate thing; but it has a separate name. It's a separate pleading distinct from the answer.

So we went from, okay, well, by practice we have one instrument of pleading, except pleas of privilege can be separate. Okay. And then at some later point we adopted that strange special appearance rule which says that you make a special appearance by motion; but then it acts like perhaps the special appearance is the thing, not the circumstance; and we file a special appearance.

CHAIRMAN SOULES: So we don't do 46 anymore, and it's gone.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: That's the bottom line on this, right?

PROFESSOR DORSANEO: I think that's right.

CHAIRMAN SOULES: Any disagreement on that?

Okay. No disagreement on that. With Joe's thought back here somewhere that maybe

(c) is unnecessary --

PROFESSOR DORSANEO: It might be.

CHAIRMAN SOULES: And could be, but let's go on to the more specific rules and try to make some progress. We are now 45 minutes into the morning meeting of a four-hour meeting, and we need to try to get through all of these pleadings rules if possible so that these people can work because they are working hard.

PROFESSOR DORSANEO: Well, the first rule is the tough -- takes most of the time every time we do this.

MR. YELENOSKY: I have something on 21. I don't know if that --

CHAIRMAN SOULES: 21. Okay. Anything else on 20?

21.

PROFESSOR DORSANEO: You know, 21, I don't have to say very much. It is what we voted on in terms of the specific language.

Instead of saying, "a short statement of the cause of action," we have, "a short statement of the claims," but then some

elaboration on what that means. "Stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice."

The other change that the committee recommends from Rule 47, which has the analogous language to (1) and then goes on in two separate paragraphs talking about the relief that you are requesting. I just thought that it would be clearer to say that we have the statement of the claims and then a demand for judgment for all of the relief sought with a proviso, provided that in all claims for unliquidated damages.

And we have the 50,000 number in here to match up to the discovery system. "The demand must state only that the damages sought are within the jurisdictional limits of the court." The committee believes that's a more straightforward way of saying what Rule 47 is saying right now.

Finishing up with the language, "Upon special exception, the court shall require the pleader to amend and to specify the maximum amount claimed."

CHAIRMAN SOULES: Okay. Steve, now your comment.

MR. YELENOSKY: Yeah. Well, it's further on in the rule. So if it's appropriate, it's on the bottom of page three. Do you want to get to that now, or do you want me to hold?

PROFESSOR DORSANEO: Any comments on 21? We have talked about it a lot already.

CHAIRMAN SOULES: On (a)? Anything else on 21(a)? Justice Duncan.

HONORABLE SARAH DUNCAN: I would like to ask why people like special exceptions so much.

CHAIRMAN SOULES: Well, don't we have a special exception rule written? Can we wait on that 'til we get to the rule on special exceptions? Just try to focus on 21(a) right now.

Paul Gold, and then I will get to Chief Justice Cornelius.

MR. GOLD: Has there been any discussion about adding to the comment any guidance about this last sentence of 21(a),

the "specify the maximum amount claimed"? It seems to me -- and I don't know if the trial judges are here. Judge Brister may be able to address this because it seems like all the loonies are filing in his court there, but it seems like there is a lot of special exception on this basis alone, and it seems like there is a lot of misconception.

You get people who demand that each element of the pleading you have to set out a specific amount. There is a controversy about whether you have to set out a separate amount for actuals, another amount for gross or punitive. There is the whole issue about whether you have to -- the dichotomy between special damages and nonspecial damages. I don't want to add anything to the rule, but has there been any discussion about adding anything in the commentary in that regard?

PROFESSOR DORSANEO: What would you want to say? You want to say you just give them the whole number, you don't have to break it down?

MR. GOLD: Yeah. Yeah.

PROFESSOR DORSANEO: Which I

think is probably the law.

MR. GOLD: I think there is one case that's like a zillion years old that everybody cites in response, but it seems like a lot of time is wasted because people go, okay, I am going to file special exceptions.

Sarah, you were asking why people file it. Most of the time when I get special exceptions the dispute is over -- that in a personal injury case, it's over making the plaintiff set out a maximum amount on each element of damages.

MS. SWEENEY: Which isn't the law.

CHAIRMAN SOULES: Do we even need this?

MR. ORSINGER: What's "this"?

CHAIRMAN SOULES: This is -- I think maybe I have said this before. This was a reaction of this committee and the Supreme Court to Joe Jamail's filing cases in Houston with astronomical damage claims and then getting them to the newspaper and "Jamail sues Monsanto for $100 million."

PROFESSOR DORSANEO: That's

also in the Medical Liability Act.

MR. GOLD: Well, it's different in the Medical Liability Act.

CHAIRMAN SOULES: And people didn't like that. So we got this where you can't say how much you are suing for in your original petition unless -- and the defendant can special except it if they want to and then you do so. And then the discussion -- I don't know if it's even recorded because it may be before we even had the transcripts -- was that the press never reads the amended complaints. They only read the original complaint, and so it doesn't get any publicity. So this is really a defensive rule to too much publicity about big lawsuits being filed against their clients, and I don't know whether we still need this or not.

MR. GOLD: Well, does -- where is the rule that says that you cannot set out a large ad-dam?

CHAIRMAN SOULES: It says, "The demand must state only that the damages sought are within the jurisdictional limits of the courts," and that's exactly what it means, and

that was the reason it was passed. Only that, not how much. You cannot say how much.

MR. GOLD: You know, the interesting thing is in 4590(i) you don't put out the amount in the pleading. You set it out in the letter.

PROFESSOR DORSANEO: 4590(i) does not talk about special exception practice. It talks about sending a letter.

MR. GOLD: Right.

MS. SWEENEY: Well, 4590(i) makes it clear you are not allowed to plead it, and you have to do it by letter and then only if they ask you for it; and that was the doctors being even more hyperactive than the people reacting to Joe Jamail, saying, you know, the newspaper never picks it up when they settle it for a buck and a half three years later, but they do pick up the three million-dollar demand.

MR. GOLD: Luke, from a substantive standpoint, because I know plaintiffs attorneys often talk about what is the purpose of this, and sometimes I have thought, well, somebody needs to know that for

purposes of limits of liability, other insurance policy or whatever, whether you are making a claim within the policy or whatever; but it seems to me like the main purpose for this sentence is merely to be able to beat up the plaintiff in voir dire to say, look, they have asked for a "kazillion" dollars. I can't -- I don't know what the purpose of the sentence is.

CHAIRMAN SOULES: If this were out --

MR. GOLD: I am talking about the last sentence.

CHAIRMAN SOULES: Well, okay, but even if you take it out, under the special exception -- and I don't want to get to that yet -- you still have the right to get to specificity, if we maintain special exception practice. You still have the right to get the information.

PROFESSOR DORSANEO: That's right. If you take it out then if you plead a whole number, somebody will special except and say, "Break it down."

CHAIRMAN SOULES: Or if you

plead jurisdictional limits, they can special except and get a number.

MR. GOLD: I don't think they can make you break it down.

CHAIRMAN SOULES: With or without it.

HONORABLE SCOTT BRISTER: I mean, there are some circumstances where you need to break it out. Contract cases, for instance, where you have got hard damage claims. I understand the problem with breaking out disfigurement from emotional anguish; but you know, in contract cases especially, and especially now on DTPA where you have got a difference between economic damages versus other stuff, you have got to break some damages out.

MR. GOLD: Aren't those what's called special damages, though, the ones that you have to break out?

HONORABLE SCOTT BRISTER: I don't know that the DTPA ones would be. You know, that's economic versus noneconomic.

PROFESSOR DORSANEO: Paul, why don't you write some suggested language up,

and see if people want to put it in the comment or have a comment? But, I mean, that's an issue -- the committee did not consider that at all. We were just trying to retain the same pleading practice.

CHAIRMAN SOULES: Okay. Without trying to get to the wisdom of special exceptions at all, anything else on 21(a)?

Richard -- Justice Cornelius. Excuse me. Chief Justice Cornelius.

JUSTICE CORNELIUS: I have a problem with the comment under that rule. As I understand it, the rule is being changed now to require the plaintiff to plead the legal theories. Right now the law is that you don't have to plead the law, and I don't think we ought to change that.

PROFESSOR DORSANEO: Well, you have to plead the duty.

JUSTICE CORNELIUS: The rule speaks only to legal theories, but the comment goes further and gives the legal theory plus the statutes. I would think it would be inappropriate for us to suggest that lawyers would have to plead the statute, and that's

okay with me if they have to plead the legal theory, the general legal theory; but I don't think we ought to make them plead the law.

PROFESSOR DORSANEO: Uh-huh. Under our current practice we have to plead a cause of action. One line of cases, the main line, the Christie Vs. Hamilton line, says that that means you must, in order to plead a cause of action, plead the duty that was breached as well as the breach, causation of damages when damages are a part of the claim.

In my thinking when you are pleading the duty that was breached and also, frankly, the breach of it, is you are pleading the legal theory, saying that someone under the relationship that's alleged had a duty to exercise ordinary care and that they were negligent, for example. That is, to me, pleading the law, although it's in factual context.

JUSTICE CORNELIUS: But you don't plead the specific statutes.

PROFESSOR DORSANEO: The Supreme Court has said in the Murray case that when it's negligence per se they want you to

plead the statute. They want you to even give the number and that that could be obtained by special exception, Murray Vs. O&A Express, and it's certainly probably good practice if you are pleading a DTPA claim or any other kind of a statutory claim to identify the statute.

MR. GOLD: Do you have to do that in negligence per se? Per se you have to allege the statute, don't you?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: That's what Bill just said. Now, Chief Justice, the second and third sentences are not mandatory in the comment. The basis for a claim could identify the cause of action by name and so forth. The factual circumstances may be described generally.

MR. YELENOSKY: But that's ambiguous, too.

JUSTICE CORNELIUS: Where is that?

CHAIRMAN SOULES: In the comment. I think it's the comment.

JUSTICE CORNELIUS: Those are factual, but get down here to the examples of

stating the legal theory, would include, "Plaintiff sues defendant for negligence, in part for violating statute 6701d, section 35."

MR. YELENOSKY: Yeah. All the examples have specific statutory references. So if you are going to use "could" up above, you need to give an example where you don't have a specific statutory reference, because the "could" language is ambiguous when followed by examples that all include statutory references.

CHAIRMAN SOULES: Okay. Well, help us with that, Paul, so that we are clear that "could" means could, and it's suggestive only and not mandatory.

PROFESSOR DORSANEO: Richard, wasn't that -- we could revisit that. Wasn't all that discussed for a whole day and voted on?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Actually, the examples were supported because they show how little you have to do in order to meet the requirement of identifying your legal theory.

Now, if you are concerned about the

statute, you could just take that first example and scratch out "in part for violating revised civil statute"; but you don't even need to do that really because it says plaintiff sues defendant for negligence in part for violating the statute, but obviously the rest of it is just general theory, general negligence theory; but you could make it entirely a nonstatutory example just by saying, "Plaintiff sues defendant for negligence."

JUSTICE CORNELIUS: Well, look at the other one, though, about comparative negligence. "Invokes the comparative responsibility provision of Chapter 33."

Now, it seems to me that all of those comments are suggesting to the reader that you must plead the specific statute.

MR. ORSINGER: I don't agree with your word "must." I think they definitely suggest to the reader that they plead the statute, and I think that's salutory because I think the lawyers ought to know what statute they are suing under. They ought to go read it when they do the pleadings.

JUSTICE CORNELIUS: They should, but lots of times statutes change in the interim and new legal theories of recovery arise.

MS. SWEENEY: Oh, lots of them.

JUSTICE CORNELIUS: And there is a lot of law out there saying that under our broad pleading practice if you just plead the general theory of your cause of action, it is sufficient without specifying the underlying statute or case law which supports that.

MR. ORSINGER: Well, are you saying we should remove all examples of a statute, or can we include one example that has no statute and some examples that do have statutes?

JUSTICE CORNELIUS: That would be all right. I think that would be a good comment.

MR. ORSINGER: If we strike "in part for violating Revised Civil Statute 6701d," then the first example is "Plaintiff sues defendant for negligence.

MR. YELENOSKY: But you still

need to change the "could" language. I mean, you could do anything. What does the comment mean to say, that it's preferable practice?

You know, if you want to say "description of legal basis for a claim should" or "preferably should identify the cause of action," that's one thing; but to say "could" leaves the lawyers thinking, well, yeah, I could do that. Are they saying that I have to?

MR. ORSINGER: I don't see how it possibly could be interpreted that you have to with the use of the word "could."

MR. YELENOSKY: Then I don't think the word "could" is helpful. I don't think the sentence is helpful if it's not prescriptive. If it's not prescriptive, the sentence ought to come out. If it's meant to suggest what preferable practice is then it ought to say that.

CHAIRMAN SOULES: Justice Guittard.

HONORABLE C. A. GUITTARD: I want to raise a fundamental question as to the function of the comment. I had thought that

comments were mainly directed to explaining what a particular amendment had done and similar formal sort of things. I am concerned that if we get into interpreting the rule or applying the rule, that we are getting into some areas that perhaps we ought to leave for the courts to develop.

It's uncertain as to the extent of the authority that the comments provide. It might in cases that we don't foresee restrict the development of the law along certain lines, and I wonder whether the Supreme Court wants to make this kind of comment in just what our general policy is toward comments and the scope of it.

MR. ORSINGER: I would like to respond that this entire language has been adopted and around for a long time after a long debate, but there were some people that voted in favor of this language because the comment was there. They were worried about a requirement that we specify the legal theory and that they felt comfortable supporting that with examples showing how imprecise the allegation could be and still be acceptable.

CHAIRMAN SOULES: That's right. That was debated here.

MR. ORSINGER: If we come back now and take the comment out, I think we are jeopardizing the integrity of the original vote.

HONORABLE C. A. GUITTARD: Do we have any direction from the Supreme Court concerning comments and what they do?

CHAIRMAN SOULES: No. And we have injected them into this process for a whole array of reasons, what we meant, what we didn't mean, in a lot of cases.

HONORABLE C. A. GUITTARD: I am inclined to think that we ought to leave it to the professor in his book to make the comment.

PROFESSOR DORSANEO: Well, the Federal rules in the pleading context contain an appendix of forms, and really the only way to understand in 1937 the way to plead a negligence claim when you read Federal Rule 8a is to go read Federal Form 9, which is a two-paragraph negligence claim, you know, that says the degree of specificity; and I view the Federal forms as a type of commentary that was

a very good idea because you otherwise can't tell really what these words mean, you know, what is a claim, how do you state a claim, and that's what this comment does.

I mean, the comment is kind of a poor person's set of examples, and I think it's helpful in this context, although generally I agree with you, Justice Guittard, that it's not a good idea to be going into a whole big discussion about what the proper interpretation of the word should be.

CHAIRMAN SOULES: Whether the comment is written the way the committee as a whole intended it, I'm not sure; but I know that the committee as a whole debated this.

They were concerned about the legal basis for a claim, and there was a consensus to have a comment that made it clear that you can do that in a general way, and this is an effort to do that. Maybe it can be improved, but the committee directed the subcommittee to do this. I mean, you could just say, "Plaintiff sues the defendant for negligence," period.

MR. ORSINGER: But beyond that, Luke, this comment --

CHAIRMAN SOULES: Excuse me just a moment.

MR. ORSINGER: Oh, pardon me.

CHAIRMAN SOULES: And then the second one could be, "Plaintiff sues defendant for negligence per se for violating," and the very first example could be "Plaintiff sues the defendant for negligence," and then you have got one that's not attached to a statute as the lead one.

Okay. Chip Babcock.

MR. BABCOCK: Yeah. The other thing is that I don't think this comment was intended to suggest that you couldn't specially except later to a pleading if you felt there wasn't enough specificity.

CHAIRMAN SOULES: We are going to get there.

MR. BABCOCK: I understand that, but somebody shouldn't be against the comment because they think that special exceptions were foreclosed, unless we later foreclose them; but that was -- I voted for it because it was clear that you could still specially except to the pleading that you

thought inadequately informed you as to what the acts of negligence were.

CHAIRMAN SOULES: Right. Okay. Richard. And let's try to move on this.

MR. ORSINGER: This comment as written has been approved by a vote of this full committee. So this is not the subcommittee coming back with instructions.

CHAIRMAN SOULES: That's right.

MR. ORSINGER: We are now redebating and rewriting something that we have already adopted. Your comment made it -- I thought someone might think, perhaps, that this is something we did at our last subcommittee meeting, but we have actually approved this.

CHAIRMAN SOULES: Well, I said the committee, not the subcommittee. This committee as a whole wanted this comment there to give direction about what was meant by the rules so that we weren't taking it to some level where you, I guess, get a summary judgment because you left out a particular element of some sometimes complex cause of action.

Okay. Anything else on this? Paul Gold.

MR. GOLD: I just want to get one understanding here. On -- and it may just be grammatical. When it says, "stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice," is sufficient to give fair notice modifying "legal theories" as well, or is it just intended to the factual bases sufficient to give fair notice?

PROFESSOR DORSANEO: Both.

CHAIRMAN SOULES: Both.

MR. ORSINGER: The whole pleading as a whole has to give fair notice.

MR. GOLD: All right. So that's the only requirement, is to state a legal theory with sufficient clarity as to give fair notice?

CHAIRMAN SOULES: Right.

MR. GOLD: Okay.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I respect the fact that a vote has been made on this, and I don't object to the comment. I am just

arguing that maybe the way that we worded it and passed it upon reflection isn't the best wording and that for that reason it ought to be reworded slightly and/or the examples changed, but I am not arguing for elimination of the comment.

PROFESSOR DORSANEO: Can we go to (b)?

CHAIRMAN SOULES: 21(b).

PROFESSOR DORSANEO: (B) consists of three paragraphs that are in the current Texas rule book. The general denial paragraph is the first paragraph of current Rule 92.

CHAIRMAN SOULES: Any problem with that? Anybody see any problem with that? No problem. Two.

PROFESSOR DORSANEO: I will mention that this "not required to be denied under oath" language in (b)(1) is something that would need to be changed if this committee follows the subcommittee's recommendation in alternative draft Rule 22 to eliminate verified pleadings, but not to eliminate specific allegations.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: (B)(2) is the second paragraph of Rule 92, which is perhaps --

MR. LATTING: Whoa, whoa. Excuse me.

PROFESSOR DORSANEO: -- mislocated in the current rule book.

MR. LATTING: Can I ask you a question about what you just said about (b)(1)?

PROFESSOR DORSANEO: You really don't want to. You want to wait.

MR. LATTING: Okay. All right.

PROFESSOR DORSANEO: All right?

MR. LATTING: All right.

PROFESSOR DORSANEO: Because it isn't changed right now. It is the first paragraph of Rule 92 as is right now, and it will require a change if we make another change that we are not talking about yet. The second paragraph of Rule 92 I believe in verbatim form is the (b)(2) paragraph. "When a counterclaim or cross-claim is served," et cetera.

CHAIRMAN SOULES: Any problem with (b)(2)? No hands, no problem.

(B)(3).

PROFESSOR DORSANEO: (B)(3) is a slightly modified version of Rule 82, and the modification is not essential. Rule 82, which is entitled "Special Defenses" now says, "The plaintiff need not deny any special matter of defense," and it isn't exactly clear what a special matter of defense is. An affirmative defense is clearly a special matter of defense.

I guess it's possible to say that a denial, a specific denial of execution, under Rule 93, paragraph (7), is a special matter of defense, too; but denying denials is something that wouldn't even really occur to me. I mean, if there was a special matter of defense, a denial of execution, and then an answer, it wouldn't even occur to me as a plaintiff that I had to deny the denial. I mean, we are already at issue.

So this has changed a little bit. "When a party pleads an affirmative defense, the adverse party is not required to deny such

defense, but the affirmative defense shall be regarded as denied unless expressly admitted." So the first change is to say what a special matter of defense is, and an affirmative defense covers, I think, all of it and is more informative.

MS. SWEENEY: Can you explain the last clause?

PROFESSOR DORSANEO: Now, the last part, "but shall not be regarded as avoided by an affirmative defense" --

MR. YELENOSKY: Is our earlier discussion.

PROFESSOR DORSANEO: -- is to say what we discussed earlier. It's implicit in our rules of procedure that you have to answer an answer when you want to avoid the defense by setting up a competing affirmative defense. Now, if the defendant pleads release, you must plead, you know, the release is procured by fraud in order to avoid the affirmative defense; and Rule 82 as written now could suggest to people that our practice is the same as the Federal practice where you don't have to answer the affirmative defenses

in any way, shape, or form.

They are under Federal Rule 8(c) -- no, (d), pardon me, "averments in a pleading to which no response of pleading is required," an answer without a counterclaim denominated as such, "or permitted" -- that's the way the Federal thing is, they allow them and limit you to them -- "shall be taken as denied or avoided." That's what it says in the Federal rule.

Now, this is saying it's taken as denied, but not taken as avoided. Now, we don't need that in there. We have got -- we have not had it in there all along. It's a question of whether anybody thinks it's helpful or just puzzling.

CHAIRMAN SOULES: Okay. Let me get Paul Gold, and we will go around the table here.

MR. GOLD: Let me see if I understand what you are saying about avoided because that case about having to plead an affirmative defense to an affirmative defense was my case, Woods V. Mercer, and the court said that was a case of first impression on

that point; and one of the things that's troubling me about this provision is it doesn't make clear that someone can raise statute of limitations, that you have to affirmatively raise the discovery rule or fraudulent concealment as a defense in order to preserve that defense on appeal, because if you don't plead it, you could have waived it.

PROFESSOR DORSANEO: It is trying to at least make that statement.

MS. SWEENEY: With the "but shall" language.

PROFESSOR DORSANEO: With the "but shall" language. The current rule is just completely silent on it.

MR. GOLD: Right.

PROFESSOR DORSANEO: Except when you read the affirmative defenses rule it's not restricted to a requirement imposed on defendants. It's imposed on any pleader who pled affirmative defenses.

CHAIRMAN SOULES: This sentence has got too much in it. There needs to be a break after "shall be regarded as denied unless expressly admitted," and then that last

clause needs to be a separate sentence that more clearly sets out what you are talking about. And really, the Mercer, they said it was a case of first impression, but Southern Pacific V. Castro was a place where this started swimming back in the early Seventies, and that was a charge case.

They never got to the pleadings aspect when they wrote the charge case, but you are not entitled to a submission of an instruction or a question unless you have something in your pleadings. So you don't get a discovery instruction or fraudulent concealment question or all of those other things unless you have filed some affirmative avoidance type of a pleading to an affirmative defense.

MR. GOLD: It was a difficult thing because we -- you had a summary judgment issue which we won without any pleading because the defense didn't prove -- wasn't able to dispose of the statute of limitations question, but then when we got to the charge conference we were always under the impression that statute of limitations would have been the defense's issue to submit, and we were

unconcerned because the defense never submitted statute of limitations when, in fact, the burden had shifted to us to affirmatively deny the statute of limitations. We were the ones responsible for the issue submission. We lost because we hadn't pled or submitted the issue. So it's a scary deal.

CHAIRMAN SOULES: It really is.

MR. GOLD: We lost a bunch of money on that.

PROFESSOR DORSANEO: And part of the reason why this is confusing is because the rules are talking about special matters of defense and then not saying what you have to do, but leaving it to something said between the lines.

MR. GOLD: I think it needs to be made clear.

CHAIRMAN SOULES: Well, we voted by, I think, a vote of seven to one to at least get drafting back to use complaint, answer, reply. Assume that that holds. Then that reply language could be used in the second sentence that we are now talking about under this paragraph (3), because you have got

"affirmative defense" used in two different ways in the same sentence right now.

You are talking -- I think the last two words, affirmative defense is talking about something the plaintiff does.

MR. ORSINGER: Sure. Sure it is.

CHAIRMAN SOULES: But I am convinced everywhere else it's talking about something the defendant does.

MR. ORSINGER: You're right.

MR. GOLD: Right.

CHAIRMAN SOULES: Now, if we call this a reply -- it's hard to write it with supplemental petition language, but with reply language that sentence can be recrafted to make it clear that the plaintiff needs to do something to avoid an affirmative defense.

PROFESSOR DORSANEO: I had it drafted a number of ways. I had it "shall not be regarded as avoided," and that is perfectly clear to any proceduralist "avoided" means, you know, an independent reason why the thing you are avoiding won't do what the other side wants it to do, but it is a bit opaque for,

you know...

CHAIRMAN SOULES: Let me get around the table. I will get Steve and Justice Guittard and then Justice Duncan.

MR. YELENOSKY: Yeah. Not the content, but the language, I mean, the first problem with the sentence other than it dealing with affirmative defense in two different ways is it has two but's in it, and I think that that's because you have redundant language here.

You could say, "When a party pleads an affirmative defense" and then strike everything through that first "but."

"The affirmative defense shall be regarded as denied unless expressly admitted," period, and then do your next sentence to address the issue of avoidance.

PROFESSOR DORSANEO: It all could -- if you vote to have the two thoughts in there, I could put them in two sentences, and it can be simplified, even that whole beginning part. One wonders why you even need that, you know.

CHAIRMAN SOULES: Justice

Guittard.

HONORABLE C. A. GUITTARD: It seems like to me the proposal lacks clarity because of perhaps too many words in it. I would suggest something like this: "An affirmative defense need not be denied, but avoidance of an affirmative defense must be affirmatively pleaded."

PROFESSOR DORSANEO: Yes. That will work.

HONORABLE C. A. GUITTARD: What's the matter with that?

MR. YELENOSKY: Very good.

CHAIRMAN SOULES: All right. We have got a couple of ideas on the record for the subcommittee to consider and bring back to us, and Holly can send this transcript to you. It may take a few days, so you may want to get Justice Guittard to make a note on that, too, before we leave.

Justice Duncan.

HONORABLE SARAH DUNCAN: I think the problem is we are putting the cart before the horse. To me Mercer made perfect sense, and the reason it makes perfect

sense is because --

MR. GOLD: Go ahead. Rub it in.

HONORABLE SARAH DUNCAN: I know, I wasn't involved. It helps.

Is because 94 is not -- affirmative defenses are not restricted to one or another type of party. Anybody, either party, any party, can avoid something with an affirmative defense; and the reason I say I think we are putting the cart before the horse is we need to say, as the Federal rules do, that some types of pleas need to be affirmatively stated. Then we need to say -- and tell people what those are.

Right now we have got that in subsection (c). We are telling them what an affirmative defense is when we have already used the phrase "affirmative defense" in saying what the reply has to contain; and if we changed -- if we moved (c) and changed it and said, "In pleading to a preceding pleading, a party must set forth affirmatively any matter constituting an avoidance of affirmative defense, including, but not limited to,"

blah-blah-blah.

Then say your reply has to -- will be deemed to deny but not avoid and reference the previous rule.

PROFESSOR DORSANEO: It could be done like that. What you are saying is just to put the reply to affirmative defense in the affirmative defense paragraph, and it could be "affirmative defenses," semicolon, "replies to affirmative defenses," and it might read better. Probably would.

HONORABLE SARAH DUNCAN: What I am suggesting is that we tell people there are such things as affirmative defenses and they apply regardless of which side of the docket you are on.

PROFESSOR DORSANEO: See, our current rule book is actually less clear than you say because the affirmative defense rule, although it applies to all parties, is in the section called, "Pleadings of Defendant."

CHAIRMAN SOULES: Well, and every example that's in Rule 94 is a defensive pleading. They have no examples of replies to defensive pleadings.

PROFESSOR DORSANEO: Well, yeah, they do.

CHAIRMAN SOULES: Where?

PROFESSOR DORSANEO: Fraud.

CHAIRMAN SOULES: Fraud. I guess fraud could be.

PROFESSOR DORSANEO: Want of consideration or, I mean, failure of consideration.

HONORABLE SARAH DUNCAN: Estoppel, waiver.

PROFESSOR DORSANEO: Duress, estoppel.

HONORABLE SARAH DUNCAN: Island Rec. was a waiver claim asserted by the plaintiff.

CHAIRMAN SOULES: True.

MR. ORSINGER: I would like to make a suggestion that --

CHAIRMAN SOULES: There is no discovery, fraudulent concealment, none of the responses to limitations that are clearly one-sided.

MR. ORSINGER: Let's put one of them in. When we get to (c) let's put in the

discovery rule for limitations, which unmistakably is the plaintiff's answer to the defendant's work.

PROFESSOR DORSANEO: I like Justice Duncan's suggestion to put it in the next paragraph. I will embrace that, if the committee wants, but combine the two paragraphs and have it ordered the way she said. I think it will be clearer.

CHAIRMAN SOULES: Okay. Any other drafting recommendations then for -- we are to the end now, I guess, of Rule 21. Any other comments?

PROFESSOR DORSANEO: Let's do the affirmative defense thing. Let me tell you what we did there. Now, Justice Duncan suggested that we change the order of it, and I agree with that, too, and I am going to do that, to talk about, you know, "any matter constituting an avoidance or an affirmative defense, including..."

This language is taken from Federal Rule 8(c), and when the Federal drafters in 1937 wrote Federal Rule 8(c) they wanted to provide more specific information about, you know,

what they are talking about, what's an affirmative defense. It's a new term. "Matter" and "avoidance," too opaque, but being in a Federal system where they apply the substantive law of states, which, of course, is just happening at about that same time, okay, the Eerie case.

They pick up and continue to articulate in the Federal rule a series of things that may or may not be affirmative defenses in Texas; but our current rule model on the 1937 version of the Federal rule contains within it arguably some things that are not affirmative defenses in Texas, like assumption of risk, okay, which is only an affirmative defense in Texas in the limited circumstance of express contractual assumption of risk, rather than in its common law form.

And it doesn't contain some things that are matters in avoidance in Texas. Perhaps the most typical one where the states differ from one another is want or lack of consideration. In Texas that's an affirmative defense and not something that is just part of the plaintiff's claim to prove consideration.

We took out assumption of risk and put in want of consideration. We also put in usury. Now, obviously we could put in some more things. Without doing a lot of trouble we could put in fraudulent concealment, and we could put in the discovery rule without, I think, causing any harm to anybody.

If we put the discovery rule in, I might worry about that summary judgment aspect of Mercer, because it's kind of something you have to set forth affirmatively by the time of trial, and that's a complication; but the point is we could make our affirmative defense rule a little better for Texas by tinkering with the language that we had previously embraced at the Federal level, which is goofy language in the Federal rule because it only means that if it means that in the place where you are.

CHAIRMAN SOULES: Okay. But you are never going to exhaust the list of affirmative defenses.

PROFESSOR DORSANEO: No. But the question is, could we make a better list?

CHAIRMAN SOULES: Because new

ones come up in the cases. They just pop up.

PROFESSOR DORSANEO: That's why it's good, as Justice Duncan said, to start it out by saying, "Any matter constituting an avoidance or an affirmative defense, including, but without limitation, the following examples" or whatever.

CHAIRMAN SOULES: And the reply or avoidance that you specifically pled affirmative defenses, in my mind, ought to be in a separate section because affirmative defenses to me strongly suggest that's a defendant's pleading.

MR. ORSINGER: Maybe we ought to say "matters of avoidance."

"Affirmative defenses and matters of avoidance" because we don't have a long list of the second category. We only have one or two.

CHAIRMAN SOULES: I don't know how many there may be. Justice Duncan.

HONORABLE SARAH DUNCAN: It has recently been brought forcefully to my attention that while most of the people around the table understand affirmative defenses and

matters of avoidance, a lot of other people don't. They don't understand the basic theory of an affirmative defense or an affirmative defense to an affirmative defense.

I think that was demonstrated in Island Recreational -- I mean, it just kind of pops to mind -- when waiver was being used as an element of the plaintiff's claim, but it was treated by the court as an affirmative defense because it's in the affirmative defense rule; and actually, virtually any affirmative defense from a defendant's perspective can also be an affirmative defense to an affirmative defense or an element of the plaintiff's claim, depending on how you look at it.

So what I would suggest is that we begin whatever the rule or the subsection is on affirmative defenses and matters of avoidance or whatever you want to call it by explaining what that is. There really isn't anything in the rule right now that explains what it means to avoid something.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Well, one of

the longest -- and Bill and I have worked on this. One of the longest sections of annotations in this book is under Rule 94 because there is so little guidance, and we have labored to try to get it there. Like, for example, Federal French, and the Supreme Court said, well, that's an affirmative defense. You have to plead it.

And we have got here, what, from 83 to 117. We have got 34 pages of annotations just in this little book here on Rule 94, but we are never going to get that all into the rule.

HONORABLE SARAH DUNCAN: But that's what I am suggesting, is it doesn't do people a whole lot of good to keep listing things when that thing may or may not be an affirmative defense in a particular set of circumstances; that the key is, it seems to me, to teach people to clarify in the rule what an affirmative defense or an affirmative defense to an affirmative defense is, what are it's fundamental characteristics.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would propose

that we put the reply to affirmative defense after affirmative defense. We have got denials of claims or defenses, which is category (b), and I can see the logic in putting reply to affirmative defense there, but affirmative defenses themselves are discussed in (c).

PROFESSOR DORSANEO: I am going to put it there.

MR. ORSINGER: And so what if we did -- what if we have the rule as Sarah proposed, which would be, "Any other matter constituting an avoidance or affirmative defense, including without limitation," and so-and-so and then follow that up with the section, "Reply to Affirmative Defense. When a party pleads an affirmative defense not required," and so-and-so, "but it shall not be regarded as avoided by an affirmative defense."

And then you could say -- then you could list your examples. You say, "Pleas and avoidance of affirmative defense, including without limitation, the discovery rule," or so-and-so, "must be specifically set out in

the pleading," or use the exact same parallel structure. So that what you have is your affirmative defenses, and some are listed; and then your replies, your avoidance to affirmative defenses, and some of them listed. That ought to make it crystal clear.

CHAIRMAN SOULES: That sounds like that might work. What do you think, Justice Duncan?

HONORABLE SARAH DUNCAN: I still think you need to start with an explanation.

MR. ORSINGER: I don't have a problem with that.

PROFESSOR DORSANEO: The difficulty with it, the explanation would also not help these people, you know, to say that an affirmative defense is an independent reason.

HONORABLE SARAH DUNCAN: I think it would.

PROFESSOR DORSANEO: You think it would?

HONORABLE SARAH DUNCAN: Uh-huh.

MR. GOLD: It's actually an excuse. It's like entrapment. It's where you say, "Okay. Yeah. I did it, but there is a reason why."

MR. LATTING: It's a "yes, but" pleading.

MR. GOLD: Yeah. It's an excuse.

HONORABLE SARAH DUNCAN: To me the shorthand is "yes, but," and I think that if we explained that and if -- I don't think it's a difficult explanation.

HONORABLE C. A. GUITTARD: The old term "confession and avoidance" has some clarity in this respect.

CHAIRMAN SOULES: Except "confession" is not used in 94. The word "avoidance" is, but "confession" is not.

HONORABLE C. A. GUITTARD: Well, it means we admit the fact, but it has no effect because of such-and-such. In other words, it does have an element of assuming the truth of the pleading it seeks to avoid.

PROFESSOR DORSANEO: It was a bad idea for the Federal drafters to come up

with this term "affirmative defense." It is not a good term.

CHAIRMAN SOULES: Just in reply to Judge Guittard, the word "confession" has some sensitivity attached to it.

HONORABLE C. A. GUITTARD: Well, I am not saying that that particular thing should be used. I was suggesting only that the idea of an admission of the truth of the -- or an assumption of the truth of the plea that's to be avoided is an element of this concept.

CHAIRMAN SOULES: And that's why they use the word "avoidance," but anyway, we have got a record here to be thought about and --

PROFESSOR DORSANEO: I have got all the guidance I need to do another draft.

CHAIRMAN SOULES: And Justice Duncan has got some input on that, too, and if you want to --

PROFESSOR DORSANEO: Justice Duncan is on the committee.

CHAIRMAN SOULES: She's on the committee. Okay.

HONORABLE SARAH DUNCAN: I am not.

PROFESSOR DORSANEO: No, you're not.

HONORABLE SARAH DUNCAN: No, I am not.

PROFESSOR DORSANEO: You want to be on it? You want to be on it?

HONORABLE SARAH DUNCAN: For affirmative defenses, sure.

MR. ORSINGER: Can you come to our next meeting?

CHAIRMAN SOULES: Justice Duncan is on the subcommittee at least for purposes of the series of affirmative defenses and replies to affirmative defenses.

PROFESSOR DORSANEO: The next paragraph in (c), the unlettered or numbered paragraph, which probably is going to get some structural treatment when we change the rest of this, is a slightly revised Rule 95. The Rule 95 now says, "When a defendant shall desire to prove payment he shall file with his plea an account stating distinctly the nature of such payment," et cetera.

I am not sure whether it should be -- I guess we are talking about defendants mostly, but I am not sure it should say "defendant"; and instead of saying "he" I said "the defendant," and I said "the plea of payment."

CHAIRMAN SOULES: The source of this rule is Article 2014 of the statutes that existed in 1937. It's never been amended. It was before any concept of discovery had ever been exercised and used in Texas. I think it's a relic.

PROFESSOR DORSANEO: Yes. The committee wondered whether it should be in here.

CHAIRMAN SOULES: It may be a relic that ought to be gone, because if the defendant pleads payment, there is a lot of ways to get it other than trapping the defendant by not giving a detailed accounting in his pleadings --

MR. LATTING: Out.

CHAIRMAN SOULES: -- which we have tried to change already somewhat in Rule 20. Do we even need this rule?

MR. ORSINGER: I move we delete

it.

MR. LATTING: Second.

CHAIRMAN SOULES: Moved and seconded to delete. Any opposition to that?

No opposition. That will be deleted.

PROFESSOR DORSANEO: All right. "(D), Waiver of Pleading Defects; Special Exceptions." The first paragraph was the subject of about a half a day's discussion.

CHAIRMAN SOULES: May I ask before we leave that, when you do your affirmative defenses, please put payment as one of them.

PROFESSOR DORSANEO: It's in there.

CHAIRMAN SOULES: It's in there now. Okay. Good. Very good. Pardon my interruption, please.

PROFESSOR DORSANEO: This first paragraph, waiver of pleading defects, we discussed for a whole morning or a whole afternoon or maybe longer than that. I read the transcript trying to redraft this and received very little guidance from the transcript, and I think this is the gist of

what we decided already.

And you know, my recollection is that we wanted to change the special exception rule to make it part of, you know, the pretrial behavior rather than the way it's worded now, which is that you can make a special exception during the trial, contrary to many local rules. We wanted to broaden the waiver concept to have it apply to all parties.

We wanted to preserve a limitation on waiver in default judgment cases, but to make the rule subject to a fair notice requirement rather than to let a defaulted party argue that the technical pleading requirements of yesteryear need to have been satisfied, which probably matches up to our discussion of claims anyway. It probably matches now completely, and I don't know whether we need to revisit that first paragraph; although, as I said, when you read the transcript you get a sense that we weren't feeling completely sure-footed about the final pathway.

The next one is -- the next paragraph does get to the special exception idea, and this is a little bit indecisive because it

begins, "A special exception may be used to object to a pleading defect." We get to a rule later that suggests you may, or that might be worded to suggest that it's just one way to object to it, one of a number of ways to object to a pleading defect.

There is no rule now that says this, a special exception may or must be used to object to a pleading defect. The special exception rule now just talks about how, kind of, you would do a special exception; and it marries up to the waiver of pleading defects rule, which begins, "General demurrers shall not be used." But then we have a rule on special exceptions, which implies that they are used but doesn't say what they are used for, but then it says, "A special exception shall not only point out the particular pleading excepted to," suggesting that it's to point out an except to pleadings.

A sentence that says, "A special exception may or must be used to object to a pleading defect" is a good addition, in my view. It says what it's for, and then we simplified the language in the current rule to

say, "A special exception shall point out the particular pleading excepted to, be specific enough to notify the pleader of the defect or omission," and we discussed defect or omission last time, "and set forth the bases for the exception."

It's kind of like three things, "I special except to plaintiff's original petition, particularly paragraph -- particularly the first sentence of paragraph three where it says thus and so because..." Okay? It doesn't tell me in what respect the defendant was negligent.

Now, and that's how we dealt with the special exception thing. We put it in here. I am not sure whether it's in here in the right place. Maybe it should have a separate paragraph from waiver of pleading defects, and this raises the issue about whether we ought to have a special exception anyway.

CHAIRMAN SOULES: Justice Duncan, I think we are getting to a concern of yours raised earlier.

HONORABLE SARAH DUNCAN: Well, no, it's not really a concern. I just think

special exception -- special exception, just the phrase, has always sounded really strange to me, and it doesn't really say, at least to me, what a special -- what it does. It's sort of a nondescriptive phrase to me since we don't really have exceptions much anymore.

PROFESSOR DORSANEO: Really, it's a special demurrer, is what it is, and historically -- and how it ever got to be called a special exception, I don't know. I don't know who made that language up.

It's a type of demurrer. General demurrers are abolished, but special demurrers are appropriate, and in order to be special they have to specify what the pleading defect is.

HONORABLE SARAH DUNCAN: But isn't it really just an objection to the form or substance of a pleading?

MR. LATTING: Yes. Yeah.

MR. BABCOCK: Not necessarily.

HONORABLE SARAH DUNCAN: Isn't that all it really is?

MR. BABCOCK: Not necessarily. I mean, there is a lot of case law that's

built up around special exceptions, and they have multiple functions. Some of it is a special demurrer. For example, if somebody pleads a claim of false light invasion of privacy, you special except to that. It's gone. Because the Supreme Court has said there is no false light cause of action in Texas.

But you also have a pleading that says -- you know, a ten-page pleading that says that the defendant has been negligent, and that's all it says, and then it goes on to a bunch of other things; and you specially except to that and say, "You haven't told me," I mean, "I have just been driving down the street. I didn't hit anybody. How was I negligent?" And that special exception is granted, and they have to plead that, and that's in the nature of a motion for more definite statement in the Federal court, and that's different than a special demurrer.

HONORABLE SARAH DUNCAN: I understand that, but it seems to me the fundamental nature of a special exception, regardless of what purpose it is used for, is

to object to something about the preceding pleading.

MR. BABCOCK: That's true.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: And, you know, maybe -- and I guess that was the reason for my question, is why is it that people seem to be so wedded to the nomenclature, the phrase, "special exception," when it's really a fairly antiquated and nondescriptive term.

CHAIRMAN SOULES: Well, it is an odd term, but it certainly spreads across a lot of decisions.

HONORABLE SARAH DUNCAN: Well, but so do a lot of things we are doing.

CHAIRMAN SOULES: Well, a lot of things we are doing do; but, for example, the Massey cases, you can't resolve pleading defects by summary judgment. You have to do them by special exception, and there are specific cases that really elevate special exceptions in the defamation area, libel and slander.

They say, "Defendant called me a crook

and a lot of other things," and you try to get a summary judgment. "He is a crook, and we can prove that, so it's true, and we want a summary judgment." And they say, "Well, but there is 'a lot of other things' here, too, and you can't get a summary judgment on all of those other things."

And in order to set that up, particularly in the defamation area, there is case law that really drives special exceptions to force pleadings to say what was said by -- what the plaintiff claims was said by the defendant, and then you set up your summary judgment by it, and so, I mean, we have got a lot of law that's -- if we change the terminology then I don't know how that law comes forward or does it or should it.

PROFESSOR DORSANEO: If we change the terminology to talk about it being done by something else then we need to make it clear that you don't get the case dismissed if a special exception is sustained, you know, that you get to amend your pleadings and --

MR. BABCOCK: But you don't always.

PROFESSOR DORSANEO: No. But that's what I am saying. We have to say a lot of things.

CHAIRMAN SOULES: And maybe we should. I am not necessarily disagreeing with what Justice Duncan was saying. I am just sort of looking at this from the global way, and maybe that will help the discussion, maybe not. I don't know.

Paula, and then we will get around the table and back to Chip.

MS. SWEENEY: For what's been alluded to, I am not a big enthusiast of special exceptions; but I think that if we decide to abolish that language, we are going to have to recreate either an enormous body of commentary in the rule or an enormous body of case law. I mean, right now we know what it means. We know how it works. People may or may not, you know, abuse it, file too many of them or whatever in a given situation; but you know, you know that if, as you said, one is granted, ordinarily it's without any sort of prejudice and you can refile. We know the effect of them.

We know when they -- there are so much law built up around what is now called the special exception that I think we would end up creating a heck of a tangle if we tried to depart from it, unless we put something in there and made it very clear this equals a special exception and all case law applying to special exceptions applies to this, in which case all we are doing is changing some words, and I don't see that we have done anything other than some cosmetic tinkering. So I would suggest that we not take that step.

CHAIRMAN SOULES: No question it's an odd term. Anyway. Paul Gold.

MR. GOLD: I was going to say, I haven't heard another term that is more enlightening or more helpful than "special exception." Objection really doesn't add much and could also be confusing because you have got objection in the discovery context, and you have got a whole body of law with regard to what has to be done there, and saying it's a special objection or just an objection doesn't seem to add any much more direction than "special exception." And I agree it's a

curious term, but surprisingly I have never met anybody who didn't know what a special exception was and what it was supposed to do. So are we tinkering with something that really doesn't need to be fixed right here?

CHAIRMAN SOULES: Anyone else down Paul's side of the table there? Okay. Judge Brister.

HONORABLE SCOTT BRISTER: The problem is it does several things. We have combined the motion for more definite statement, the failure to state a claim, all into something called special exception, and that leads to confusion, for instance, about whether you have to be given an opportunity to replead.

You know, there is cases that say, no, you don't have to be given an opportunity to replead if you can't replead, if you can't, you know, and -- but I don't know that you want to jump to the Federal practice because in that suggests we need to file hundred-page petitions and hundred-page answers, and I do not want that. So, you know, it does different functions is why it's hard to pick a

name that matches all of them.

CHAIRMAN SOULES: Justice Guittard.

HONORABLE C. A. GUITTARD: I have no problem with the term "special exception." Historically when the rules were originally adopted, a crucial decision was to abolish the general demurrer, which clever lawyers used to defeat a valid claim that hadn't been properly pleaded without telling them why they hadn't pleaded it properly, and a special exception as distinguished from a general exception was required, as it states here, to state the reason; and that was the origin of the term "special exception."

But special exceptions, of course, were in existence before that because they were demurrers, which stated reasons. And, of course, we have the case law that says you can't allege facts or make denials in special exceptions, and I don't think we want to change any of that.

PROFESSOR DORSANEO: No.

HONORABLE C. A. GUITTARD: Now, one thing that I am concerned about is this

language about waiver. Suppose, as Chuck says, the petition on its face doesn't state a cause of action. Now, we don't have a plea that the petition fails to state a claim on which relief can be had, like they do in the Federal courts, without saying why. We have a special exception which requires that to be specified, but I am concerned about the waiver rule. If a pleading is insufficient on its face and no special exception is filed, does it nevertheless support a judgment?

In a default case can a defendant come in and say, "Well, the pleading doesn't state any legal reason why it should pay anything; and therefore, the default judgment is ineffective"? Why should -- and my concern is, what is the effect of this waiver rule with respect to pleadings that obviously are insufficient to state any valid claim.

CHAIRMAN SOULES: There is an old LAW REVIEW article by Gus Hodges, I think, and it may be Albert Jones joined him, where he lines up what Rule 60 and -- the pleadings rules and the evidence rules and the charge rules and talks about how these waivers occur.

PROFESSOR DORSANEO: That's by Diffenbach and Brown, two students.

CHAIRMAN SOULES: Is that where it is?

PROFESSOR DORSANEO: Yeah. And it's kind of an okay article, although it has some confusion in it.

On the default judgment thing, maybe that requires some additional thought, but the default judgment will be vulnerable to direct attack if there is a pleading defect, and that's pointed out on ordinary appeal or writ of error. That is meant to be preserved, but maybe using the term "claim involved" -- "may be a fair notice of the claim involved" -- is not good enough there. Huh?

HONORABLE C. A. GUITTARD: If the case is tried and --

PROFESSOR DORSANEO: If the case is tried, all that's waived is a pleading defect. There still have to be proof, and then there is some confusion about whether somebody can move for a judgment NOV on the basis that they could have moved for an instructed verdict, because the instructed

verdict rules talk about insufficient pleadings or no evidence. There is some confusion on that basis, but I don't know that we can --

CHAIRMAN SOULES: Well, that's where the trial amendment -- I mean, the answer to that, somebody moves for directed verdict because you don't have the pleading on --

PROFESSOR DORSANEO: Well, that should be the next step. Somebody should then --

CHAIRMAN SOULES: You didn't plead foreseeability. You pled all the elements; but you didn't plead foreseeability, and you have got some evidence on foreseeability, and somebody says, "Directed verdict, no pleading."

"Move for trial amendment. I want to plead foreseeability." The judge has no discretion but to grant that because it's been tried by consent. It's not a surprise. So then you have got pleadings, and you go forward with the trial and with the jury submission, is the way it lines up now.

HONORABLE C. A. GUITTARD: Well, so you have the false light petition, and there is no objection to it, no special exception. You go all through the trial. You have a judgment for damages for false light. Is that a good judgment?

CHAIRMAN SOULES: You bet. Isn't it?

MR. BABCOCK: It might be.

PROFESSOR DORSANEO: You know, Judge Guittard, I will say that this language in the first paragraph was taken from your notes.

CHAIRMAN SOULES: It's an erroneous judgment, but there is no error preserved.

Chip, you had your hand up and then I will get to Richard Orsinger. I'm sorry. I didn't mean to --

HONORABLE SARAH DUNCAN: I just don't want to let the record stand that that is Texas law because I think there is a great deal of question. I don't think Texas law is that you can get a judgment on a cause of action that does not exist under Texas law and

that not be --

MS. SWEENEY: Sure you can.

HONORABLE SARAH DUNCAN: -- subject to being set aside on JNOV.

CHAIRMAN SOULES: Right. And I didn't intend that.

HONORABLE SARAH DUNCAN: Regardless of whether you have preserved any error during the trial or not.

CHAIRMAN SOULES: And you could preserve it by JNOV, but if it goes final, it's certainly executed --

JUSTICE CORNELIUS: If you let it go final, it's not void. It's erroneous, but not void.

MR. ORSINGER: What about by default? Default on a cause of action that doesn't exist, is that sustainable on appeal?

JUSTICE CORNELIUS: If you don't set it aside by a bill of review.

MR. ORSINGER: You can't appeal it on the grounds that they got a judgment against me on a --

JUSTICE CORNELIUS: Oh, yes, you can appeal it, within the time.

MR. ORSINGER: -- cause of action that doesn't exist?

CHAIRMAN SOULES: Motion for new trial should have that ground in it.

JUSTICE CORNELIUS: If you let it become final then you have to set it aside.

CHAIRMAN SOULES: You have got to preserve something in the trial court to have it appealed, I would guess.

Chip, you had --

MR. BABCOCK: Again, I don't have much to add other than obviously I think the sense of the room is we are not going to get rid of special exceptions, and I think our committee sometimes changes things that doesn't need to be changed when there is no problem out there in the community. I don't think there is currently a problem with special exceptions. That's the bottom line for me.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would suggest that we add a paragraph at the bottom here that's like the second paragraph, setting out

the other use of a special exception.

Something along the lines of, "A special exception also may be used to complain that the petition or complaint fails to state a cause of action recognized under law," and then further specify that the suit cannot be dismissed without giving the plaintiff an opportunity to replead, and then lastly specify Justice Guittard's concern that the failure to file special exceptions does not constitute a waiver of a complaint, that there was a failure to state a cause of action.

So then we are telling everybody about this other use. We are making it clear that you have got an opportunity to amend before you are dismissed and making clear that if you fail to file special exceptions, you haven't waived your right to complain about no cause of action.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I would also like to suggest that the two paragraphs be switched. It seems to me that we should tell people what a special exception

is and what it can be used for and what the procedure is and then say, "If you don't do that, here are the consequences."

I can't -- I don't understand starting off with waiver of something that we haven't really even defined yet.

PROFESSOR DORSANEO: Let me redraft that with all of those suggestions, you know, and come back to you.

CHAIRMAN SOULES: Then Richard's second thought about waiver would be a part of the first paragraph. In other words, every pleading defect not objected to is waived, but obviously a pleading defect in the nature of failure to state a cause of action is not waived.

MR. ORSINGER: But couldn't you put the exception down on the paragraph relating to that use of the special exception, and that would override?

CHAIRMAN SOULES: Wherever you draft it, we will take a look at it.

HONORABLE C. A. GUITTARD: Do we also want to put in there something -- the state of the present law that allegations of

fact in the special exceptions are inappropriate and ineffective?

PROFESSOR DORSANEO: There aren't that many speaking -- I think a lot of lawyers file speaking demurrers, but there aren't many speaking demurrer cases.

HONORABLE C. A. GUITTARD: That's right. It's improper, and they should know by the terms of the rules that that is improper.

PROFESSOR DORSANEO: You know, I don't want to get the whole law of special exceptions in here, but it may be good to say that it shouldn't speak.

HONORABLE C. A. GUITTARD: Yes. That's right.

MR. McMAINS: It must be mute.

MR. GOLD: Silent special exception.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: I have some problem with -- if what Richard is suggesting is that the rule be drafted to specifically say that you can raise a general special

exception that there is a failure to state a claim upon which relief will be granted, that is a revival of the general demurrer practice.

PROFESSOR DORSANEO: He's not saying that. He's saying that it still has to be specific, but that it can specifically do that. Right?

MR. ORSINGER: Well, I mean, until you came in, Rusty, there wasn't anyone in the room that felt that a special exception couldn't be used to complain about a failure to state a cause of action.

MR. McMAINS: I am not saying that you can't. I am saying you can use it for that, but you can't do it in terms of just like saying, "This petition fails to state a claim upon which relief can be granted." When you start putting those kind of words in there then you are going to import the Federal practice, basically, which just shifts everything.

HONORABLE C. A. GUITTARD: Well, this doesn't do that.

MR. McMAINS: And this is not supposed to be doing that.

PROFESSOR DORSANEO: Let me consider this a continuation of the last less than completely clear record, and I have a better feeling about rewriting it now.

CHAIRMAN SOULES: Okay. Anything else on (d)?

Okay. Let's take about a ten-minute recess here and get back to work.

(At this time there was a recess, after which time the proceedings continued as follows:)

CHAIRMAN SOULES: Let's go to work and try to get this pleadings stuff completed. Bill, are we now to (e)?

PROFESSOR DORSANEO: (E).

CHAIRMAN SOULES: Okay. We are now at Rule 21(e).

PROFESSOR DORSANEO: All right. Paragraphs -- which I am going to have to teach myself to call subdivisions in light of the modern convention about rule subparts, subdivisions (e) and (f) of the rule entitled "General Rules of Pleading" are modeled on paragraphs (e) and (f) of Federal Rule 8 entitled "General Rules of Pleading." All of

this language is contained in our current rules now.

All of the language was either taken from the Federal rules to begin with and spread around in our rules in 1939, particularly paragraphs (e)(2) and (f), and have just been put back in the order that they were in to begin with.

(E)(1) is a little bit different from the Federal rule. (E)(1) of the Federal rule is entitled, "Pleading to be Concise and Direct," semicolon, "Consistency." It says, "Each averment of a pleading shall be simple, concise, and direct," and then says, "No technical forms of pleadings or motions are required."

This Texas language taken from Rule 45 is similar but different from the first sentence of Federal Rule 8(e)(1) saying, "Each allegation must be made in plain and concise language and be sufficient to give fair notice of the plaintiff's claim or the defendant's ground or defense," which is a little bit repetitive, but it's the Texas language that's comparable to the Federal language.

The sentence, "No technical forms of pleading or motions are required" is not embraced because we do have technical forms required in some circumstances, particularly trespass to try title. So that sentence won't do, but basically (e) and (f) are in here without change, without much change.

CHAIRMAN SOULES: Okay. Any comments on 21(e)? Steve Yelenosky.

MR. YELENOSKY: How does this mesh with 21(a), I guess?

CHAIRMAN SOULES: 21(a), the service rule?

PROFESSOR DORSANEO: No. He means 21 -- it's repetitive.

MR. YELENOSKY: Yeah. I guess that was my question. Why do we do that?

PROFESSOR DORSANEO: It's, to be candid, to have a subdivision called, "Pleading to be plain and concise." Perhaps one could say that this covers more than just claims for relief. This is about all pleadings, including defense of pleadings, as a more general, general rule.

MR. YELENOSKY: Well, yeah. It

only covers claims and grounds of defense. It doesn't appear to cover motions, which aren't pleadings -- which are pleadings, I guess, but not -- I don't know.

PROFESSOR DORSANEO: Well, we don't know what a pleading is.

MR. YELENOSKY: I guess I don't know what it adds to 21(a).

PROFESSOR DORSANEO: It covers defenses. 21(a) does not cover defenses.

MR. YELENOSKY: All right.

PROFESSOR DORSANEO: It covers at least that. I must say that I was motivated to put it in here as much by a monkey-see-monkey-do approach to the organization as by anything else, but it covers defenses; and if it's a little bit repetitive, it adds defenses; and somebody reading a pleading book would kind of expect to see it there.

CHAIRMAN SOULES: Any other comments on 21(e)?

Justice Duncan.

HONORABLE SARAH DUNCAN: I wouldn't expect to see it there. To me this

is a really general rule. It encompasses all pleadings, and I would expect it to -- I would actually expect to see it in 20. (A) would be -- 20(a) would be, pleadings allowed, whatever.

PROFESSOR DORSANEO: But 20 is not about how you plead. It's about what you plead; but I agree. It says what these things contain a little bit, you know, and to describe them, but that will go away when we go to complaint and reply. I mean, that's --

CHAIRMAN SOULES: Richard Orsinger.

PROFESSOR DORSANEO: The best answer I can give is that the Federal Rule 8, "General Rules of Pleading" covers these two subjects, pleading to be concise and direct and construction of pleadings, (e) and (f) at the end, and I am following that same pattern.

CHAIRMAN SOULES: Richard Orsinger.

PROFESSOR DORSANEO: So in that sense you would expect to see them there because you want to have read the other rule book first.

HONORABLE SARAH DUNCAN: I understand that, with a laugh.

MR. ORSINGER: Okay. Do we want to add here plaintiff's avoidance of defendant's defense as a third category, if things need to be said plainly?

HONORABLE SARAH DUNCAN: No.

MR. ORSINGER: No?

HONORABLE SARAH DUNCAN: To me an affirmative defense or an affirmative defense to an affirmative defense are subsets of defenses.

MR. ORSINGER: But then we don't give them the choice. There is two choices, a plaintiff's claim or a defendant's defense. We don't give them the choice of a plaintiff's avoidance of a defendant's defense.

HONORABLE SARAH DUNCAN: The way I read it is it says a party's claims or defenses.

MR. ORSINGER: I am looking at (e)(1).

PROFESSOR DORSANEO: Why don't we just stop (e)(1), if you are worried about

that, after "language." Instead say, "Each allegation must be made in plain and concise language," period.

CHAIRMAN SOULES: "And be sufficient to give fair notice"?

PROFESSOR DORSANEO: No. I guess maybe that comes from -- 45 continues with that same thought, but the Federal thing really is more simple, "Each averment shall be simple, concise, and direct." We say, "Each allegation must be made in plain and concise language." It's the same thought but using Texas word formulation.

MR. ORSINGER: But, see, I mean, the thing I don't like about the phraseology is it leads you to believe that there are only two kinds of allegations, plaintiff's claims and defendant's defenses, and we have just spent this morning discovering that we also have another category that we have mostly neglected, which is avoidance of defenses, to the point where we didn't really even identify them in the rules.

PROFESSOR DORSANEO: I want to take out the words after "language" and just

say, "Each allegation must be made in plain and concise language."

HONORABLE SARAH DUNCAN: Because you have already got fair notice in 21(a).

CHAIRMAN SOULES: Any opposition to that?

No opposition. No hands. Okay. Take it out.

PROFESSOR DORSANEO: And the rest of it is -- the rest of what's on page 5 and the top of page 6 is verbatim in the Texas Rules of Civil Procedure and was taken verbatim from the Federal Rules of Civil Procedure when placed in the Texas rules.

MR. ORSINGER: One suggestion, that you change the "he" to "the party" in the second to last line. "State as many separate claims or defenses as the party has."

PROFESSOR DORSANEO: Yeah.

HONORABLE C. A. GUITTARD: Do we want to retain this word "hypothetically"? That's sort of strange. I think after I think about it I know what it means, but it bothers me a little bit.

PROFESSOR DORSANEO: It's in the Federal rules still, and I think it should come out unless we are just going to think it doesn't mean very much. To me it meant that you could, well, you know, kind of theorize, hypothesize, you know, what likely happened; and before you can go out and conduct an investigation to check your hypothesis, that you would file a pleading.

HONORABLE C. A. GUITTARD: Well, it's uncertain what it means.

PROFESSOR DORSANEO: Well, that's what it says in English, and I think it's a hangover from the prior days when there was no Federal Rule 11 and there was no Texas Rule 13.

HONORABLE C. A. GUITTARD: Well, it could be this, that, in effect, that the defendant is in effect saying if plaintiff proves so-and-so, then my answer is so-and-so.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: Hypothesize about what the pleading is.

HONORABLE C. A. GUITTARD: But the alternative probably takes care of that.

CHAIRMAN SOULES: Well, what's the alternative?

PROFESSOR DORSANEO: Just take out "or hypothetically."

MR. ORSINGER: The first one is, you weren't bitten by the dog; but if you were bitten by the dog, it wasn't my dog; but if it was my dog, it really didn't hurt. To me that's a hypothetical pleading as well as alternative pleading. They are really the same.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I would like to suggest that the second sentence, the structure be reversed. "A pleading is not made insufficient by the insufficiency of one or more alternative statements. If two or more statements are made in the alternative, and one of them, if made independently, would be sufficient." It just seems to me to read more clearly, but that's just a suggestion.

PROFESSOR DORSANEO: I will tell you how I feel about that. I think

you're right; but at some point, as somebody who teaches in both systems, I don't like them to be different even if the one would be slightly better because it just takes time in realizing that there is no real difference between the two, even though the wording is different.

HONORABLE SARAH DUNCAN: But my understanding from Friday is that Brian Garner is also rewriting in plain English all the rules of Federal procedure as well. Is that not true?

PROFESSOR DORSANEO: He might be and then --

MR. ORSINGER: According to this little booklet here --

PROFESSOR DORSANEO: -- will monkey-see-monkey-do that part of it.

MR. ORSINGER: According to this booklet he is a consultant to several of those rules writing committees.

HONORABLE SARAH DUNCAN: I don't think we get past it anyway, so it doesn't make any difference.

CHAIRMAN SOULES: Okay.

Anything else on (e)?

Chief Justice Cornelius.

JUSTICE CORNELIUS: Did we agree to take out "hypothetical"?

CHAIRMAN SOULES: Are we going to have an unintended consequence by taking that out?

JUSTICE CORNELIUS: I think you are going to have an unintended consequence if you leave it in. Because, you know, we have so many hypothetical questions to expert witnesses which are just questions like, well, suppose this and suppose that, then what would happen? And it seems to me that leaving "hypothetical" in here is going to lead some people to believe that they can allege a truly hypothetical cause of action, which would be ridiculous, but that's the common meaning now.

Now, the true meaning of hypothetical is what Bill Dorsaneo said awhile ago, but the common usage of it is something else today.

PROFESSOR DORSANEO: I think the true meaning is not --

JUSTICE CORNELIUS: It means something that might be, but is not.

PROFESSOR DORSANEO: I think, you know, once upon a time if you sat down and thought without really having the facts that this -- if this happened, then this probably happened and this probably happened and they probably committed this entire fraud by this chain of deals, and that's how the Sharpstown bank scandal ended up hurting people, that you were allowed to allege that and without getting into any real trouble, you know, under Rule 11 or Rule 13, and not now.

JUSTICE CORNELIUS: But under the common usage of the terms, I believe that would be covered under alternative pleadings, and I think "hypothetical" is liable to get us in trouble.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, what you are describing, it sounds to me it also could be described as contingently, and I don't know that you want to use that word either; but "hypothetically" doesn't sound to me as an accurate description of "if this, then that" as "contingent" does. I mean,

"hypothetically" does sound like it can be less rooted in fact than what we really intend.

CHAIRMAN SOULES: Okay. In (e)(2), those who would delete in the second sentence the words "or hypothetically," show by hands. 13.

Those who would keep it? One. It comes out, 13 to 1.

PROFESSOR DORSANEO: Every Federal procedure person with whom I have spoken about the meaning of that has been concerned about it being in there as something that's left over from a former era, "or hypothetically."

MR. ORSINGER: I would like to raise for consideration whether we need the second sentence at all. I am not sure what it means to say that a pleading is insufficient, but don't we have general requirements and special exceptions, and do we even need this thing about alternative pleadings and if one is sufficient then the pleading is sufficient?

It's a meaningless sentence to me. I have no idea what an insufficient pleading is,

nor do I care. You know, I know what special exceptions are. I know what my duty to plead is. Why do we need this sentence?

PROFESSOR DORSANEO: This sentence is no doubt a reaction to some former rule of law.

HONORABLE SARAH DUNCAN: Or case.

MR. ORSINGER: What is a sufficient pleading and what is an insufficient pleading? Our standards don't have anything to do with that. They have to do with fair notice, plain statement of claims. We have already been through that.

PROFESSOR DORSANEO: And it was originally copied from the Federal draft verbatim.

MR. ORSINGER: I would suggest we take it out because it just doesn't have anything to do with Texas practice.

JUSTICE CORNELIUS: Second sentence under where?

MR. ORSINGER: That would be (e)(2).

JUSTICE CORNELIUS: Of 21?

CHAIRMAN SOULES: What I think it says is that if a defendant has sued for false light and libel or false light and slander, then false light is no good, but the case still goes on because libel and slander is probably -- is raised.

MR. ORSINGER: Do we need to say that?

CHAIRMAN SOULES: I don't know. That's what it says.

MR. ORSINGER: Is that what "insufficient" means? Insufficient means that you are not stating a cause of action?

CHAIRMAN SOULES: Could be.

MR. BABCOCK: That could be one of the things. It could be factually insufficient.

MR. ORSINGER: Well, I mean, I guess my problem with this is, is that if we have a problem that one alternative allegation is too vague, we special except it. If we have one alternative allegation that doesn't state a cause of action, we special except to it. I don't see what the sentence adds to our knowledge about procedure.

PROFESSOR DORSANEO: It may be that it should go over in the special exception part, what you are talking about. It could be -- and I am hypothesizing here, if you will pardon me -- that the rule that exists in a lot of other contexts was once applicable in this context as well, as in if something is partially defective then the judge can ignore the entire thing on the basis of a kind of rotten apple approach. I don't think it's causing us any real trouble to have it in here.

CHAIRMAN SOULES: Okay. In or out, the second sentence? Those who vote to leave it in show by hands. Nine.

Those who want to take it out? Five. Nine to five it stays in.

HONORABLE C. A. GUITTARD: We use the term "count." Do we use that anywhere else? Do we define what a count is?

PROFESSOR DORSANEO: Well --

MR. ORSINGER: We use paragraphs. We require that they be set out in separate paragraphs. Is that different?

PROFESSOR DORSANEO: Over in

Rule 23(b) we do have a rule, which we borrowed from the Federal rules, talking about paragraphs; and I don't know. I don't think "count" is used anywhere else.

CHAIRMAN SOULES: Bill, what would you think about just stopping the first sentence after the word "alternatively"?

"A party must set forth two or more statements of a claim or defense alternatively."

PROFESSOR DORSANEO: I think that would be fine with me. I think this "count" stuff is -- it reminds me of Sesame Street.

MR. LATTING: That's what I was thinking about. I didn't say it. "Good evening."

CHAIRMAN SOULES: Those in favor of deleting all of the first sentence after the word "alternatively" show by hands.

Anyone opposed? No opposition, so it will be deleted.

Anything else on (e)(2)? Don Hunt.

MR. HUNT: Luke, why don't we rephrase the first sentence a little bit and

make it read, "A party may state two or more claims or defenses alternatively," and that will match it with the last sentence, "A party may also state," et cetera.

PROFESSOR DORSANEO: Done.

CHAIRMAN SOULES: Any opposition? No opposition. Done.

Okay. Anything else on (e)? Bill, do you need any other assistance on (e)?

PROFESSOR DORSANEO: No. I got a lot more than I thought I needed, actually.

CHAIRMAN SOULES: (F), construction of pleadings, if there is any comment at all on that? Anyone opposed to (f)?

(F) passes. No opposition.

PROFESSOR DORSANEO: That sentence is now hidden in Rule 45.

CHAIRMAN SOULES: Yeah. 22.

PROFESSOR DORSANEO: 22, "Pleading Special Matters," following the Federal pattern, which is Rule 9 by the same name. I took from the Texas rule book the special matters, and we have a rule on special act or law, which is verbatim in the first

paragraph.

We have a rule on conditions precedent. Hmmm. The reason I'm "Hmmm-ing" is that I noticed a special rule that I didn't put in here, which is Rule 52, alleging a corporation in Rule 52, but we can deal with that in a moment.

Conditions precedent, which is current Rule 54; judgment, which is current Rule 55; special damage, which is current Rule 56; all of those paragraphs, (a), (b), and (c), are verbatim. Special damage is verbatim except a sentence has been added, a descriptive sentence saying what special damages are. "Special damages are those damages that arise naturally but not necessarily from another's wrongful conduct." The sentence is not necessary if it causes any difficulty.

Then the rule goes forward and embraces verified pleas, which are placed in here in the same order that they are located in current Texas Rule 93 and, with the exception of the subparagraph (13) dealing with worker's compensation cases, are in here without any change whatsoever. That is a summary of the

whole rule.

If you will pick up the alternative draft of Rule 22, you will see that it does not contain the certain pleas to be verified, subdivision (e). In place of that subdivision (e) we have three or four specific paragraphs dealing with the special matters of capacity, which includes legal existence, execution of written instruments, endorsement, an incomplete section on worker's compensation cases, and a section on insurance contracts.

The committee voted to do away with verified pleas in the sense of eliminating the need for a verification, the subcommittee; and once that's -- if that choice is made then it is easier to deal with the subjects covered by Rule 93 in a more economical fashion. I might add at the beginning, although I may be saying too much, that worker's compensation cases are dealt with in Rule 93.

And my preliminary review of the current worker's compensation law in the labor code suggested to me that perhaps that part of Rule 93 is inoperative right now, given the fact that the '89 law says that the court shall

make no rules varying the statute concerning matters of pleading and burden of proof, and I don't know whether that means make any rules in the future or that current rules are inoperative. We would have to ask somebody who would know something about that, and I asked Mike Gallagher yesterday, and he thought maybe that was right, that it's not operative at the moment. So the first thing is, you know, (a), (b), (c), and then (d), and then the choice about the verified plea or not, or whatever order you want to take it, Mr. Chairman.

CHAIRMAN SOULES: All right. Why don't we just take them a paragraph at a time, and my question to you is, what is the need to preserve (a), Bill?

PROFESSOR DORSANEO: I just preserved it because it's in there. There is a comparable provision, but not really that comparable, in the Federal rules, official document or act, paragraph 9(d), "In pleading an official document or official act." I am not sure that means capital A, Act.

"It is sufficient to aver that the

document was issued or the act done in compliance with law." I think it does not mean special act or law. So I don't know whether we need this or not. I have no --

HONORABLE C. A. GUITTARD: Well, the question is whether the opposing party needs information as to the special act that may be relied on.

PROFESSOR DORSANEO: Or whether it's available in libraries; and I think that, you know, the special act or law of this state, assuming that that means an act or law of the state, I think that all of that information is readily available.

HONORABLE C. A. GUITTARD: Well, but --

CHAIRMAN SOULES: In addition to that the issue is does Rule 20 --

PROFESSOR DORSANEO: (1)(a) require it.

CHAIRMAN SOULES: -- cover this particular piece of 22.

PROFESSOR DORSANEO: Well, it doesn't because it says you could plead it by just referring to the statute without

repeating the whole thing. This says it's so much they have to set out the substance as may be pertinent to the cause of action or defense, which may be contradicting our current case law.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, I asked Holly if I could look at Luke's annotated rule book. There was one case from 1887 or '89. It seems that it was initially designed as a shortcut. You didn't have to set forth in your pleading the entire private or special act or law, but you could just put forth that part that was pertinent to your cause of action, and then the entire act, special or private, law or act, was before the court.

PROFESSOR DORSANEO: We don't need it.

HONORABLE SARAH DUNCAN: I don't think we need it, but it does raise a question I have had for some time in municipal law cases. There is a body of law that seems to be developing rather rapidly about the need

to plead and prove, like, a municipal ordinance; and that is a modern concern; and in the context of deciding whether we need this, I think we also need to perhaps address that.

CHAIRMAN SOULES: Can you put together some language that you think we should use for that?

HONORABLE SARAH DUNCAN: Well, I don't know what the committee wants to do about having to plead a municipal ordinance or prove it. There are cases that say if the municipal ordinance -- a certified copy of the ordinance is not in evidence, the court can't consider the terms of the municipal ordinance, which just to me seems crazy. It is the same as a statute really, and the fact that it's not in evidence doesn't make it any less the law.

CHAIRMAN SOULES: Okay. Well, let's get to 22(a) and then we will pick up with that. Does anyone see any need to preserve 22(a)? No one.

HONORABLE C. A. GUITTARD: I do.

CHAIRMAN SOULES: Okay. Justice Guittard does. What is it, Judge? What's the reason, the need?

HONORABLE C. A. GUITTARD: Well, it would seem to me that if a person is relying on a special act of the legislature, that ought to be identified so that the other party can look at it and tell and determine what his defense should be. He shouldn't go down -- just go down to trial and bring this special act out, which might change the situation altogether without some proper notice.

PROFESSOR DORSANEO: What is a special act? Isn't it just an act?

JUSTICE CORNELIUS: Yeah. What is a special act?

HONORABLE C. A. GUITTARD: Well, you have general laws, and you have special laws. Special laws are -- under the state constitution have to have certain requirements that general laws don't have. They are not published in the general laws.

JUSTICE CORNELIUS: Those are private laws.

HONORABLE C. A. GUITTARD: Well, special or private, that's the same thing.

MR. McMAINS: An example, you can get -- there are examples of where there have been specific permissions to sue the state, for instance --

HONORABLE C. A. GUITTARD: Yeah.

MR. McMAINS: -- that are in essence special laws.

CHAIRMAN SOULES: Okay.

MR. McMAINS: That are permitted.

CHAIRMAN SOULES: Well, I withdraw. 22(a).

MR. McMAINS: That make it, you know, so that governmental immunity is no longer an issue.

CHAIRMAN SOULES: Okay. There is a reason, so let's keep it.

MR. ORSINGER: Can we take out the Republic of Texas since they are not passing special laws anymore?

MS. SWEENEY: Yeah, they are.

MR. McMAINS: The new one is.

MS. SWEENEY: The new one. Right.

HONORABLE C. A. GUITTARD: In that litigation it might be some special act back there in the 1840's that might --

CHAIRMAN SOULES: Okay. Everybody get rowdy for a minute, and we will be off the record for a minute and then settle down and get back to work again.

Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: Well, but under that same reasoning it seems to me if you are going to use a municipal ordinance then maybe you should have to plead it.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. "Any pleading founded wholly or in part on any" -- all right. I think, what are you suggesting? We add municipal ordinance after "any private"?

HONORABLE SARAH DUNCAN: Well, I'm not sure that it ends with municipal ordinance.

MR. ORSINGER: Well, counties have ordinances, too.

CHAIRMAN SOULES: Well, we can't do that here today, put as many things as you want in there. You are suggesting that where there may be some other obscure law or some impediment to review, unless there is an identification of the legislation, that it should be included here, 22(a)?

HONORABLE SARAH DUNCAN: I am suggesting that if there is something akin to a special or private law, that maybe you should have to plead it as well, and the section should be broader.

CHAIRMAN SOULES: Okay. Will you assume the role of identifying what you think that it is so we can put it in here next time?

HONORABLE SARAH DUNCAN: Sure.

CHAIRMAN SOULES: Give it to Bill or bring it to the committee. Is there any opposition to putting that where there is going to be some obscure legislation, be it by ordinance or otherwise?

MR. YELENOSKY: Isn't it

everything that is not readily accessible? I mean, essentially that's not published in Vernon's or something like that? I mean, it's everything but what we all are used to using, rather than listing what it is.

CHAIRMAN SOULES: Okay. You may provide input language as well. Judge Guittard, if you wish...

HONORABLE C. A. GUITTARD: What about administrative regulations?

HONORABLE SARAH DUNCAN: Well, and I was thinking about a board order, which is a similar type of thing.

CHAIRMAN SOULES: Well, the three of you, Judge Guittard, Steve, and Sarah, talk and come up with what you think is -- what you recommend, whatever it is, and then get that to Bill in a suggestion, and the committee will look at it next time. 22(b).

PROFESSOR DORSANEO: This is taken from Federal Rule 54. The first sentence is -- I mean, Federal Rule 9(c). The second sentence is worded in a cumbersome fashion, obviously.

HONORABLE C. A. GUITTARD: So

is the first.

MR. LATTING: You were consistent in that respect.

PROFESSOR DORSANEO: Well, but the second one is different from Federal Rule 9(c), which merely has this as its second sentence: "A denial of performance or occurrence shall be made specifically and with particularity."

HONORABLE C. A. GUITTARD: In (b) and (c), for instance, (b) could be started, "A pleading of condition precedent shall be sufficient to aver" and so forth; and in (c), "A pleading of a judgment of a domestic or a foreign court shall be sufficient to aver" and so forth.

CHAIRMAN SOULES: That's not the function of it, Judge.

PROFESSOR DORSANEO: I would recommend the Federal language, which was obviously redrafted after this language that we copied from the original Federal rule.

CHAIRMAN SOULES: Read the second sentence again on the Federal rule.

PROFESSOR DORSANEO: A denial

of performance or occurrence shall be made specifically and with particularity.

CHAIRMAN SOULES: I think I do not like that. I think the second sentence, however awkward, says a lot more than that.

MR. McMAINS: Yeah.

CHAIRMAN SOULES: And it is used in commercial litigation daily, this (b). You have got a --

PROFESSOR DORSANEO: I am confident that the Federal language means the same thing as our language.

CHAIRMAN SOULES: But this says more, and if you have a complicated or an extensive contract where a lot of things have to happen before you are entitled to payment, you can just allege as a plaintiff that all conditions precedent to payment have occurred; and if the defendant thinks that the constructor or whatever it is has not done certain things, they have to specify those things; and once they do, the plaintiff doesn't have to prove anything else; and this expressly says that. The only thing plaintiff has to prove is that the conditions precedent

to payment that have been raised by the defendant has not had occurred have, in fact, occurred.

PROFESSOR DORSANEO: It actually looks like the history is this: It looks like we adopted Federal Rule 9(c), which was amended shortly after adoption on March 31, 1941, in this manner, according to the comment: "The practice on failure of specific denial is made clearer by changes in the wording of the last sentence."

CHAIRMAN SOULES: That's what the Feds say.

PROFESSOR DORSANEO: No. That's what the Texas Supreme Court said in 1941 about our second sentence.

CHAIRMAN SOULES: You don't have to --

PROFESSOR DORSANEO: So I had the history backwards.

CHAIRMAN SOULES: Not only does the defendant have to plead specifically, but the plaintiff doesn't have to prove anything about anything else, and both of those concepts are in our rule, and I think they

ought to be continued that way.

MR. ORSINGER: Agreed.

CHAIRMAN SOULES: Any disagreement about that? Any other discussion about 22(b)? Okay. 22(b) is okay. No dissent from 22(b)? No hands.

PROFESSOR DORSANEO: Now, I will say about 22(b), we are getting a little bit ahead of schedule, is that there are other specific provisions that duplicate this conditions precedent requirement in the verified denial, Rule 93, that don't need to be in 93 if the verification concept is eliminated.

CHAIRMAN SOULES: Okay. We are going to get to that, right? 22(c).

PROFESSOR DORSANEO: Let me look at my book, but I believe that's verbatim Texas Rule 55.

CHAIRMAN SOULES: Any opposition to 22(c)? No opposition to 22(c), so that's okay.

22(d).

PROFESSOR DORSANEO: Which is verbatim Texas Rule 56, copied from Federal

Rule 9(g), which is only the first sentence of this draft. The second sentence is unnecessary, other than perhaps removing the word "wrongful," which is unnecessary, although not harmful. That is an accurate general statement of what special damages are.

MS. SWEENEY: Is that a new sentence?

PROFESSOR DORSANEO: Yes, a new sentence.

MS. SWEENEY: And why are we adding it?

PROFESSOR DORSANEO: Because people don't know what special damages are, and the case law is not clear.

MR. LATTING: I still don't.

MR. ORSINGER: I don't, either.

MR. LATTING: That's the trouble with the sentence.

CHAIRMAN SOULES: Well, let him respond. Bill, you were answering Paula's question.

PROFESSOR DORSANEO: Well, if I hit you in the head with a ball-peen hammer, naturally and necessarily your head is going

to hurt, but at least under former conceptions you might not go get treated by a doctor. That might not necessarily happen, but it would be a natural thing.

MS. SWEENEY: So you're saying the medical is a special, but the hurting isn't?

PROFESSOR DORSANEO: For your head to hurt, yeah.

MR. ORSINGER: Is this a valid distinction that we need to preserve?

PROFESSOR DORSANEO: Well, that's why they need to be specially stated, because you don't have fair notice of them unless they necessarily arise from the conduct that's described.

MR. LATTING: Okay. I see. All right. I get it. I get it.

PROFESSOR DORSANEO: When people think about special damages, they kind of think about them that there is a list of special damages in some book, unrelated to the rest of the claim; and you can generally classify things that are likely to be special, but, you know, they might be general in a

given case.

MR. McMAINS: The only problem I have with -- and I don't know whether you took this from a specific case or just kind of a summary of it, but I don't consider the term "natural" or "naturally arising" to be necessarily a legal term, and my immediate reaction is, well, what if it's rather unnatural? If you can characterize it as unnatural, does that mean it's not any kind of damage?

PROFESSOR DORSANEO: No. This is taken from standard articulation of it, and natural means, you know, in the ordinary course of events, you know.

MR. McMAINS: I know, but you could have extraordinary course of events that lead to damages that are recoverable, and I am just saying the inference suggests that if, in fact, it is an extraordinary event in terms of damages, that somehow you may not therefore be able to plead it as damages at all, and that isn't what we are doing or it's not what's intended.

CHAIRMAN SOULES: Well, the

Supreme Court writes that "General allegations damages are sufficient to allow the claimant to prove and recover those damages that naturally and necessarily result from the alleged wrong."

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: "Because such damages are implied by law. When damages sustained do not necessarily result," is what they say. "When damages sustained do not necessarily result from the alleged wrong, the claimant must plead such damages with particularity."

PROFESSOR DORSANEO: That's why the sentence is in there to say that. Maybe it's not necessary if it's in the, you know, annotations right there in our own deal.

CHAIRMAN SOULES: Well, you could say, "Special damages are those damages that do not necessarily result from the alleged wrong," if you follow Railroad V. Kirby.

PROFESSOR DORSANEO: That's what this says.

CHAIRMAN SOULES: No. It says

"naturally."

PROFESSOR DORSANEO: Well, but they have -- hmmm.

CHAIRMAN SOULES: The word "naturally" --

MR. McMAINS: It almost sounds like an oxymoron. These are damages that don't necessarily result from the occurrence, but we want them anyway.

PROFESSOR DORSANEO: We could take the sentence out. I am happy to take it out.

MR. ORSINGER: I am against taking it out. I think we ought to just modernize it. Why don't we use some causal concept rather than "arising naturally," which is some nonlegalistic thing?

MR. LATTING: Why don't we just say "arising from"?

MR. ORSINGER: Well, as the Supreme Court case said, "resulting from," is what they said, which to me is meaningful.

CHAIRMAN SOULES: "When damages sustained do not necessarily result from the alleged..."

PROFESSOR DORSANEO: I am confident the reason there is no description beyond the first sentence in any of our two rule books is that these discussions make it very difficult to come up with something that people would be happy with.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I defy anyone to take this concept and make it harmonious and cogent with the whole concept of damages in a commercial case. You just get into terrible arguments about what's natural and what's necessary versus what's foreseeable and what's not foreseeable, and it just -- I mean, I don't -- with all due respect to the Supreme Court, an 1885 case is not terribly persuasive to me as to why we should continue --

MR. ORSINGER: To require it.

HONORABLE SARAH DUNCAN: -- to draw this distinction. It seems to me that if you want an element of damages, you ought to tell the other party you want that element of damages, whether it's natural or unnatural or

whatever it is.

HONORABLE SCOTT BRISTER: But you can get into the problem of, "Oh, well, they didn't say" -- you know, standard personal injury case, "They didn't say disfigurement" or "They didn't say lost earning capacity; therefore, they can't return it."

You look at the attorney. "You knew they were suing..."

"Well, yeah, but they didn't say it. So therefore, they can't recover it." You know, that's kind of a silly objection.

Do we have to have the right words in the pleading to get each element that you want listed in the damage jury question?

MR. McMAINS: If it's special damages, yes, if there is an objection and if there is no trial amendment, which is what a lot of stupid people are --

CHAIRMAN SOULES: What was that, Rusty?

Given the retention of the special exception practice that we just reviewed, is this still a modern need, or is it arcane?

Where are we on this section (d)? Is it still needed?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: I raised that to (a) and got convinced very quickly that it was. I am raising it again on (d), and if so, why?

Justice Cornelius.

JUSTICE CORNELIUS: Not on that point specifically, but I think what we are really talking about here are what some people call consequential damages, which are damages that do not necessarily arise from the wrong, but may arise from the wrong. Like in a contract case if you have a breach of contract, there are certain damages that flow from that; but then if there are other damages that occur to you because of that breach then those are what some people call consequential or special damages.

I do not favor, though, a rule requiring that they be specifically pleaded.

MR. ORSINGER: I would like to second that. I don't see why in this time with the discovery that we have that you can't

just allege damages and rely on interrogatories and depositions to find out what they are. I can understand this before you had depositions and interrogatories.

HONORABLE SCOTT BRISTER: Because the standard answer when you send the interrogatory, "What are your damages" is "We will tell you later." That's why.

MR. LATTING: That's right.

MR. ORSINGER: Well, as a district judge you can decide that they didn't supplement sufficiently in advance of trial.

HONORABLE SCOTT BRISTER: Yeah. But it would be iffy, and that's a lot messier. I like having it, and I think you ought to have special damages pled. I mean, I do agree. I just have some difficulty with the way it's defined.

CHAIRMAN SOULES: Well, how about this language, "Special damages are those damages that may not necessarily arise from another's wrongful conduct."

JUSTICE CORNELIUS: "That may, but not necessarily."

CHAIRMAN SOULES: "That may not

necessarily."

JUSTICE CORNELIUS: No. Not "may not."

"May, but do not necessarily, arise from the wrong."

PROFESSOR DORSANEO: Well, the cases describe it, you know, "naturally" does have this notion of foreseeability in it, and there are other cases that speak in a similar statement that would be applicable to business contacts. Now, to say that they may arise, but they do not necessarily arise probably works fine.

JUSTICE CORNELIUS: But still I think the whole concept conflicts with the other rule that says you shall not specifically plead your damages unless requested by the other party to do so. You are going to have the same hill. Somebody is going to be able to file a lawsuit alleging $100 million of special damages.

CHAIRMAN SOULES: This is items of damages, not dollars of damages.

JUSTICE CORNELIUS: Not the amount.

MR. ORSINGER: Can we do a showing of hands on who wants to keep the provision? Because some of us would, I think, like to get rid of it.

CHAIRMAN SOULES: Well, have we had all of the discussion that anyone feels we need and vote on whether to delete the second sentence altogether as opposed to trying to modify it?

MR. ORSINGER: No. We are talking about deleting (d) altogether.

CHAIRMAN SOULES: Deleting (d) altogether. Judge Brister.

HONORABLE SCOTT BRISTER: Another point, if our discovery window is the rule versus special exceptions, special exceptions you can get the specifics of the damage types. Are we talking about a lost profits case? Are we talking about out-of-pocket versus a specialty fraud case?

Without opening the discovery window and within 30 days on special exceptions, if you have got to do it by discovery and you just opened the discovery window and you have got a nine month time limit, and as far as

supplementation you have just got to supplement by the end of the discovery window or 30 days before trial. So I think you need -- I would hate to change the rule and then special damages can just be hidden in the pleadings, and you have got to carry it out in discovery.

CHAIRMAN SOULES: Anyone else on this? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, this is part of the fair notice of the claim involved concept. It is the damage part. If you look at Federal Form 9, it begins in the first paragraph about the claim and the factual specificity on Boylston Street, you know, on such and so date the defendant negligently operated the motor vehicle and ran over the plaintiff, in effect. And the second paragraph talks about, you know, as a result of the accident the plaintiff's leg was broken, and it says in that, "and he was otherwise injured."

You know, what you are saying arguably is that you do not include that second paragraph if you take this out. I think that's a bad

idea. If you wanted to say it notwithstanding the fact that the injuries and damages allegations in plaintiff's petitions are a nuisance and tend to be boiler plate in many respects; but if you take this out, you are going to need to replace it with a statement that you do not have to plead your damages except by making a general statement that the injuries and damages within the jurisdictional limits of the court resulted from the misconduct described in the preceding paragraphs, and nobody does it like that.

I mean, the fair notice thing applies to injuries and claims of damage. It's not hard for a plaintiff to draft these things. It may be hard to get it -- you may have to amend your pleadings to get everything in there as events change and you get more information, but to take it out I think would put us in a very unusual category of one jurisdiction that doesn't require this type of information to be alleged in order to give fair notice of the claim.

MS. SWEENEY: Mr. Chairman?

CHAIRMAN SOULES: Paula

Sweeney.

MS. SWEENEY: You know, this is another situation that isn't broke. There is no big problem right now with how we handle our damage pleadings. I know what to say. You know what it means. If you want more information, you know how to get it. I know what I don't have to give you. I mean, it's not -- you know, I think we are looking at, again, jettisoning something we ought not to jettison that is not causing a lot of friction cost or other expense and building in instead the opposite, and I think that would be a mistake. There is nothing wrong with what we are doing. People from out of state come in, read the rule, and they can figure it out, and those of us that live here and do this all the time know what it says. So I think we ought to just leave it be and, you know, tinker with things that do need tinkering with.

HONORABLE SARAH DUNCAN: I am not sure that I agree with that statement that everything is all fine. One of the reasons so many plaintiffs lost so much prejudgment interest for so many years was because it was

classified as an item of special damage and had to be specifically pleaded, when it seems to me that when you have an injury or a loss you necessarily and naturally have a loss of the time value of that money; but it was classified as special, and that's the way it was.

I am not suggesting -- I guess I am not going the way Bill is going, that we don't have to plead special damages. I am in favor of not drawing the distinction between special and general because I don't think a lot of people know what the difference is between special and general.

MS. SWEENEY: That's fine.

HONORABLE SARAH DUNCAN: Chief Justice Cornelius believes that consequential damages are special damages. In my view consequential damages to be recoverable in contract have to be reasonably foreseeable. I think they are very natural. Are they necessary? Well, they may be necessary in a particular situation. They may not be a necessarily incurred item of damage in another situation.

So all I am suggesting is not that we delete it entirely, Bill, but that as phrased it really doesn't tell anybody very much or resolve the confusion in people's minds and, I think, in the case law as to what is special and what is general.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. I don't have any problem with that concept so long as it is clear that what the rule is requiring is a statement about the nature of the damage being requested and not the specific amount for each. Because right now I take some solace in the fact that the -- that there are some judges that say, "Well, I read this to mean that with regard to special damages you have to delineate what the amount is that you are seeking for that particular element," and the only solace that I have for that is no one really understands what a special damage is, and so it falls by the wayside.

MR. McMAINS: There are cases saying otherwise.

MR. GOLD: About what special damages --

MR. McMAINS: No. That say that you do not have to plead by --

MR. GOLD: I know, but it's an argument. Notwithstanding the cases, whenever I have special exceptions this is always one of the arguments, and I am merely afraid that if we eliminated the dichotomy between special damages and all the other damages and didn't make a comment that just said all you have to do is either state the nature -- all we are talking about is state the nature, not the amount, we might be causing an area for mischief; but I would -- I think this special damage issue is just confusing. It should be eliminated, but I think it should be clarified that all you have to do is state the nature.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I agree with what Sarah Duncan said; and, Bill, I wonder if it wouldn't be better to address this back in 21(e) when we are talking about the fair notice of the claims.

PROFESSOR DORSANEO: Well, you know, anybody who teaches this or has

otherwise thought about it would say that this is a fair notice rule, and it's separated as if it's something like pleading a judgment, but that's the way it's done, and that's the conventional way things are organized.

CHAIRMAN SOULES: Well, everything in Rule 22 is a supplement to the general concept of fair notice. It's just a specific directive.

PROFESSOR DORSANEO: If you go in the direction of saying, you know, a provision on damages, whether it's here or somewhere else, and say, you know, "When damages are claimed, each type" -- I don't like the word "item" in the rule here now as it is. "Each type of damage," or some other description, "must be specifically stated."

That may be the rule that a plaintiff follows now when you want a particular type of damage, whether it's a general damage, you know, pretrial pain and suffering, and you put it in your pleadings anyway. Nobody would feel that bad about it, but then you are just having it as a requirement, though, even though it's obvious that the person was

otherwise injured. Okay? You follow me?

I mean, to assume the burden of pleading, all of the damages and articulating that each type of damage and perhaps each injury in your pleadings, you may be assuming too much because you -- if it's just a rule, then you can't leave anything out unless you say "and was otherwise injured" would be sufficient, and I don't see what's wrong -- I don't have a problem just differentiating between special damages and general damages conceptually. I may have a problem in a given case. Then I know what to do. If it might be an item of special damage rather than general damage, put it in.

PROFESSOR CARLSON: So in your ball-peen hammer example you are not going to plead pain and suffering?

PROFESSOR DORSANEO: I probably am.

PROFESSOR CARLSON: I know you are.

PROFESSOR DORSANEO: But I may not plead that the skull was fractured and that that caused a particular manifestation,

and I may actually leave out that this caused a person's mental condition to deteriorate, or I may leave out some things that are obvious, and maybe that's why I left them out.

CHAIRMAN SOULES: Let's get to this. "Items" is the word that's in the rule now. Rusty says there is some case law that you don't have to plead the dollars because it says "the items." So we have got that resolved, as Paula pointed out.

So can we get a consensus, are we ready to at least get a consensus on whether we keep the first sentence exactly the way it is? Those in favor show by hands.

JUSTICE CORNELIUS: Of keeping it?

CHAIRMAN SOULES: Of keeping the first sentence.

PROFESSOR DORSANEO: The first sentence.

CHAIRMAN SOULES: At least the first sentence exactly the way it is. Eight.

Those who would do otherwise? Four. So it stays in exactly the way it is.

Now, we are to do we define special

damages somehow? And eventually we can probably come to a consensus on what the words are if we decide to do it. So without worrying about what the words are, those who favor defining special damages in the second sentence of (d) show by hands. Defining it.

One more time. We have got different counts. Seven. Okay. Seven for that.

Opposed? Nine. That fails by a vote of nine to seven. So we keep the first sentence as it is. We don't have a second sentence. That takes care of (d).

Now (e).

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Justice Guittard.

HONORABLE C. A. GUITTARD: If we are going to write our Rule 93, I think maybe that's a good idea; however, I have problems with this language in (c) where it says, "A party desiring to" -- "a party desiring" and so forth. I would suggest that all the rules, all specific denials required ought to be included in a rule saying

something like this, headed, "Specific Denials Required. A denial of any of the following matters shall be specifically alleged:

"(1), the capacity of a party to sue or be sued. Second, the authority of a party to sue or be sued in a representative capacity. (3), that a party is doing business under an assumed or trade name. (4), an execution of a corporate" -- "that the existence of a corporation, partnership, or other legal entity," then add and touch some of those other items there.

CHAIRMAN SOULES: If I am understanding what you are saying, Justice Guittard, and I may not, you are taking the burden of pleading under (e) and switching it to the plaintiff instead of the defendant.

HONORABLE C. A. GUITTARD: No.

PROFESSOR DORSANEO: No. Judge, you are looking at the alternative draft, right?

HONORABLE C. A. GUITTARD: Yes. I am looking at the alternative draft, and my draft is a substitute for the alternative, and it has only to do with denial and the denial

that needs to be specifically alleged and --

PROFESSOR DORSANEO: Why don't we deal with the issues about whether pleadings need to be verified first?

MR. ORSINGER: I think Justice Guittard's proposal is that we keep the list, take away the verification, and modernize the language according to what he's just been reading.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: And it sounds good. In other words, it's implicit in your proposal that we no longer require verification but that we continue the list but state it in a more positive way.

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: Which I agree totally with what that suggestion is.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: And I think it ought to be added also that "unless so denied, the matter shall be taken as established."

CHAIRMAN SOULES: Justice

Duncan.

HONORABLE SARAH DUNCAN: I have a question before we get too far down this road. When I was reading the Supreme Court's rewrite of the appellate rules this committee recommended that motions no longer be required to be verified in the appellate courts. There now appears to be an alternative to that rule in the Supreme Court's rewrite that doesn't say motions need not be verified, and I was going to ask -- wanted to ask Lee if the Supreme Court is going to require verification after we have recommended that no verification be required, there is not much point in our recommending no verification.

MR. PARSLEY: Well, in answer to your question, the Court did not change that recommendation. The Court does not want things verified any more than this committee does, and if we did that in the appellate rules, it was inadvertent. So if you will tell me where we did that, we will fix it. We have adopted this committee's recommendation.

HONORABLE SARAH DUNCAN: Then there is a point in us going down this no

verification road.

CHAIRMAN SOULES: Okay. Verified, should there be any requirement to verify pleadings of a nature that we see in (e)?

MS. SWEENEY: Can somebody explain? Could I have a little short law school course on how this began? Short, very short.

PROFESSOR CARLSON: It was in the statute, so they stuck it in the rules.

PROFESSOR DORSANEO: How it began is hard, but how it got in this shape was that there were statutes, primarily Article 2010, that required things to be verified, and that was moved over to the procedural rules along with other statutes, and where it got started I don't really know.

MS. SWEENEY: Okay.

CHAIRMAN SOULES: It shows it was in one, two, three, four, five, six different statutes originally. The basic statute was Article 2010. There is a little bit of history in the West book, Paula, under Rule 93.

PROFESSOR DORSANEO: It's in our book, too.

CHAIRMAN SOULES: Under notes and comments. Is it?

PROFESSOR DORSANEO: Yeah. And it's better in our book because it's in our book.

CHAIRMAN SOULES: It's better in our book.

MR. LATTING: How is that? Why is it better?

PROFESSOR DORSANEO: It's a nice blue color.

CHAIRMAN SOULES: Rusty, you have had your hand up for some time.

MR. McMAINS: Let me say, if you identify the categories of things that we require a verified denial on, I honestly believe that there is a service to be gained by requiring a verified denial, but in these limited -- in more or less the limited context here. Because you create a lot of trouble for a party to prove something or put something at issue, when in reality there should be some potential penalty for somebody just having

to -- just doing a pleading just in order to impose some problem on the other party.

Like the execution of an instrument, I want to deny that there was an execution of an instrument. Just say that you can just deny it, and you just specifically deny it, not a problem. When, in fact, I mean, then you have to go to the problem of proving signature and so on and so on. I mean, are these people -- whereas, if they say it under oath, then you figure, okay, there is a real bona fide dispute here. This person has some genuine claim that they didn't do it or that the person that did it didn't have authority to do it.

To just make it a mere pleading, it will become a matter of course denial of capacity. It will become a matter of course denial that this is a partnership, and a lot of these things are not so susceptible, ready to prove, even though people have been conducting business that way for a long time, particularly in terms of partnerships, and a lot of them are loose partnerships or oral partnerships, and I think there is good reason

to know whether or not that is a bona fide issue, and the bona fides in part are established by the requirement of verification, and they have that burden to kind of establish that.

These are things basically that should be well-known to the other party. That's really all these things by and large are. You ought to know what you are. You ought to know what your relationship to the transaction pled is, and if you don't then it's because probably the other side's pleadings are defective to give you notice what the transaction is, and you can fix that with special exceptions. When you finally identify what it is that this is about you should know what your relationship is and be able to tell the other side what your position is about that relationship.

I think verification serves a purpose in these limited circumstances, and I am not opposed if somebody thinks there are one or two of them that are too burdensome or that are too routine, but it just seems to me that things like executing signature in contract,

capacity to sue or be sued, I mean, they are going to challenge the capacity of a plaintiff to sue, period. Defendant will do that just automatically because it's right here. They don't have to verify it. They have no reason whatsoever to suspect that there is any reason in the world why you don't have the authority to sue, but they can just file a pleading, and all of the sudden you are supposed to somehow establish that.

PROFESSOR DORSANEO: Why wouldn't Chapter 10 of the Civil Practice and Remedies Code provide a sufficient disincentive to just making --

MR. McMAINS: Because I don't think it will or has been or even should encourage to be applied to that because I don't think a specific denial -- I do not think it is the attitude of the courts of this state to treat a specific denial in a lawsuit that's a multimillion-dollar lawsuit as a basis for any kind of imposition of penalties. It's never happened, in my experience, for instance, when they deny request for admissions on the same thing and which were

supposed to be verified. They won't impose sanctions on somebody for refusing to admit something.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I concur with Rusty's analogy.

MR. LATTING: Yes. I agree with Rusty, too.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I think I disagree with Rusty. No. 1, it is a trap for the unwary because it will be specifically denied, but not under oath. Of course, you can ask for a trial amendment and do it under oath, but then the other side is going to allege surprise. I don't have any luck on these things anyway.

I agree on the signature thing; but, for instance, I had a case where the guy that owed the FDIC the money swore out on summary judgment affidavit, "I don't think that's my signature because I don't remember some of those paragraphs being in my note." I said, "That ain't good enough. You got to say, 'It

ain't my signature,'" and I was reversed on appeal; but that creates a fact question to just swear, "I don't think that's my signature."

So I don't think this adds, unfortunately, sadly. If the world was different, I wish that was the way the world worked, but I don't think requiring people to swear to it deters them at all and especially the ones that are going to lie about it or not be careful about it, and then you have the question, can the attorney swear to it? Lots of them do on just these issues.

CHAIRMAN SOULES: Well, it's a very small trap because under Chapin, Supreme Court 1992, it is an abuse of discretion to deny a trial amendment to add a verification. Every time it is an abuse of discretion.

PROFESSOR DORSANEO: And you-all can thank me for that.

MR. LATTING: Thank you, Bill.

PROFESSOR DORSANEO: You're welcome.

CHAIRMAN SOULES: That piece of it. I am not trying to take the position on

keeping it or refusing it, but as far as the trap is concerned, it's a pretty narrow trap.

Anyone else? Okay. Those who favor retaining verified pleadings, not necessarily this entire list because, as Rusty said, some of them may be -- if we look through them, we may decide that some of them are unworthy of that dignity, or we may decide they are all worthy of that dignity. So I am not getting to that issue. It's just do we have any verified pleadings, what it says here?

Those who think we maintain verification in some of these circumstances show by hands. Eight.

Those opposed? Seven. Eight to seven we keep it.

PROFESSOR DORSANEO: Well, I think we need to go on to the next rule so I can get some guidance, especially eight to seven. We need to save some time for the next rule in this discussion.

MR. ORSINGER: We ought to do it then.

CHAIRMAN SOULES: Okay. The next rule is which rule?

HONORABLE C. A. GUITTARD: That's quite apart from my suggestion, which had nothing to do with verification.

MR. McMAINS: Right.

PROFESSOR DORSANEO: Well, I think ultimately when we go back to work on this, whether we do it one way or the other, that we will decide that there are things in our current Rule 93 that need to come out, but to use up all of our time doing that now won't be helpful to me in knowing --

CHAIRMAN SOULES: Okay. We have got 20 minutes. How do you want to use it?

PROFESSOR DORSANEO: Here is the larger issue. There is a rule in the Federal rule book, Rule 12, that contains a lot of information, but it's entitled "Presentation of Defenses," and to state it very simply, it says that --

CHAIRMAN SOULES: Do you have any writing we could be looking at?

PROFESSOR DORSANEO: Yes. Rule 25 of this draft.

CHAIRMAN SOULES: Okay. We are

turning to Rule 25 on page 13 of the big draft. Okay. Thank you.

PROFESSOR DORSANEO: No. It's --

CHAIRMAN SOULES: Is that right?

PROFESSOR DORSANEO: Yes. Yeah. I think 23 and 24 of this draft will not be much of a problem.

25, presentation of defenses. Right now we present defenses in terms of what are referred to generically as dilatory pleas in case-specific ways. We have specific rules some of the time, but not all of the time. If you can look in (b)(1), we present a defense of lack of jurisdiction of the subject matter in a plea to the jurisdiction. Sometimes people call that a plea in abatement, and maybe that's okay, but probably it's not.

A plea to the jurisdiction is determined in a particular way. It is tried in a particular way and dealt with in the way that the case law indicates that it should be for that type of plea, but it is conventional to file a separate instrument called a plea to

the jurisdiction. It's conventional to verify it, and it's not something that happens with great frequency, but that's the way you would do it.

Lack of jurisdiction of the person, we have a special appearance rule, and many people call a challenge to the court's jurisdiction over the defendant's person, call the -- endorse the instrument and call it special appearance, you know, rather than motion; although when you read the special appearance rule you realize it's a kind of motion where you are appearing specially rather than generally. Without criticizing people that are no longer here, to a modern proceduralist it looks like it was drafted by someone who didn't really quite understand what they were doing.

Improper venue, used to be plea of privilege. Now, it's a motion to transfer venue. We have a rule on that, and then we have rules on how those are determined. In the 120a we have special rules on, you know, how that's determined and a variety of things.

Insufficiency of citation or

insufficiency of service of process, well, we have got a motion to quash rule that's called "constructive appearance" that doesn't even really say when you move to quash. It just says if you move to quash and it's sustained, the consequences are constructive appearance.

In trying to make sense out of our rules, one way to do it would be to try to write a rule like this where you put the entire subject in one package. Another way to do it is to take our specific rules for specific kinds of things and work on them. By way of example, it would be possible to take the special appearance rule and to clean it up such that it would be looking intelligent rather than stupid; and I think the natural tendency would be to clean it up when anybody would be working on it would be better.

Or we could try to go further and say that these defenses of this type, lack of jurisdiction of the subject matter, lack of jurisdiction of the person, improper venue, insufficiency of citation, are done by motion, okay, and then talk about the specific problem areas, subject areas, one by one. If we did

talk about the specific subject areas in one combined rule, we would if you look over here on hearings, because of statutes and other problems, build in a little more complexity here.

Like the general rule for a hearing would be that it would be done under the rules of evidence; you know, that is, not by affidavits, but under the rules of evidence. For special appearance hearings, we would say you could use affidavits, but affidavits -- and you could use live testimony and affidavits the way it says now, I mean, but you would make it clear that one kind of hearing is done this way, a special appearance hearing and special requirements. Venue hearings we have additional special requirements. You see?

So what I need to know from a drafting standpoint is do you want me to do these one by one and just try to make our rules a little smoother, or do we take this kind of an approach and try to make the practice more uniform, to the extent I can, and I can't because of statutes that there be no oral

testimony in a venue hearing. Okay. And which way do you want to go? Now, maybe that's just something you need to think about and advise me on. It is possible to draft it either way.

MR. LATTING: Which way do you want to do it?

PROFESSOR DORSANEO: I really want to do a third thing. I really want to harmonize all of these things and do it all by motion, but I can't get there. So I would rather do it in this proposed Rule 25 rule way, but I want to continue to try to do it this way, but I am not sure that it will work.

CHAIRMAN SOULES: On special appearance, that to me is an exception to this, because conceptually it's something very different in my mind. I am not there to file a motion. I am not there to do anything in this court except to specially appear before that court to contest that court's jurisdiction over me, and I am just there for that. I am not going to answer, and I am not going to move.

I am not going to do anything except, "I

am here, your Honor, and you don't have jurisdiction over me, and the laws of the state of Texas say I can come here and show you that and leave, and I have not submitted to your jurisdiction by doing that." I can leave and get out of here, and I'm gone, and I think that's just conceptually something that happens before you ever enter the case, and that's what it's designed to do.

PROFESSOR DORSANEO: See, well, I don't like that type of thinking. I like it you're allowed to come in here without making a general appearance and make this motion to dismiss for lack of jurisdiction, and there are certain requirements that it must contain, you know, must satisfy. It has to attack amenability of process and not talk about citation or pleadings or anything like that, but what you're doing is you are making a special appearance.

It's not what you are filing. You are filing a request to the court for an order that there is no jurisdiction, and I think we really look bad, and I think it's confusing. Maybe it's just confusing to lawyers from

other states. I think we know what to do, but...

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, one of the problems I have with the approach that Bill is trying, and I think it's admirable to try and kind of amalgamate all of the defensive pleadings and motions as a general proposition; but the problem is that even these are not anywhere near all of them. I mean, we have pleas in bar, you know, pleas in abatement, that are all of the kinds of things that are in Rule 12 that are scattered out. We have already dealt with them in other places. So we haven't put everything in. I mean, you give res judicata, collateral estoppel, arguments.

PROFESSOR DORSANEO: Well, the pleas in bar are going to be denial defenses or affirmative defenses, and we have dealt with them elsewhere. The only pleas that are allowed to be -- the only things that are allowed to be dealt with by motion under the Federal practice are the same things that we deal with, other than in the merits part of an

answer, and it's like -- it is these things. You know, lack of jurisdiction over the subject matter, which is not a big deal; you know, over the person; improper venue; and then insufficiency of citation and then service, they are not a big deal either; failure to join a party under Rule 32, you know, a party needed for just adjudication.

We could do it like this, and we could cover it, Rusty, where pleas in abatement would be, I won't say -- that's a separate issue, you know. Does it have to say that it can be done by a motion? I mean, I would like to eliminate a plea in abatement. I would like to say you do it by motion, see. If prior pending action -- well, maybe there are some additional things, huh? Prior pending action.

MS. SWEENEY: Failure to give statutory notice.

PROFESSOR DORSANEO: Uh-huh. Failure to give statutory notice. Well, maybe you're right. Maybe it's just too big.

MR. McMAINS: I mean, I am just saying we have a lot of defenses scattered

around the rules kind of dealing with it. Like my observation about the verified pleas, for instance, earlier in terms of not necessarily all of them is -- like, there is a defect in parties in there, and I don't think that's necessarily something we should be having to verify. I think that's one of the ones that ought to pull out, but you have to deal with it somewhere.

I mean, what is it if you have a claim of a defect in parties, or is it a plea in abatement? You know, is it a motion relating either to join the party, dismiss the action? What is it? But I am not confident that without reorganizing what we have already voted on in a lot of respects that we can do something that's really a comprehensive rule.

PROFESSOR DORSANEO: Well, the next question, another question that I would have, is should we -- in the task force rule there is a plea in abatement rule. We have no rule that tells you how to do a plea in abatement, and there are specific requirements for pleas in abatement, and we have no such rule, and there is one in the task force

report that is a partial student draft that could be put in here; but if you want to have or you think it's desirable to have each of these separate things done in a separate rule, then I would recommend adding one for pleas in abatement, too.

CHAIRMAN SOULES: Well, I don't have any problem with a motion to abate instead of a plea in abatement. I mean, I think plea in abatement is, again, just arcane, but a motion to abate should be just as good.

PROFESSOR DORSANEO: Well, then maybe you would add in this paragraph, you know, "abatement to the action."

CHAIRMAN SOULES: Yes. Okay.

PROFESSOR DORSANEO: For good cause.

CHAIRMAN SOULES: I think we ought to eliminate this so-called pleas every place we can because they are just -- is the motion not as good a vehicle to get the issue to the court as a plea?

MR. LATTING: Yes, it is.

MS. SWEENEY: Yeah. Pleas

should go with demurrers, wherever it is demurrers went.

MR. LATTING: Yeah.

CHAIRMAN SOULES: So no plea, and I realize that as you scrub through these there could be exceptions and that you will bring back to us and say, "I think this plea still has to be a plea because of the other things we are retaining"; but subject to some discovery of that nature, let's take a vote on whether to eliminate the concept of plea and to substitute motion as a vehicle to raise the same issue.

Those in favor show by hands. 12.

Those opposed? No opposition -- one in opposition.

HONORABLE SARAH DUNCAN: No. I am not in opposition, but I am voting in favor of eliminating the terminology with one reservation. It's sort of like confession and avoidance. That has meaning, if you know what it means. I mean, I confess it, but I avoid it. Well, pleas in bar and pleas in abatement are the same way. Plea in bar, it has a meaning that if -- I'm not suggesting we use

pleas instead of motions, but I am suggesting that we explain to people that there are motions to dismiss for something that can't be fixed and there are motions to abate for things that can be fixed, and here are some of these examples of a motion of plea in bars, as it's been known, and a plea in abatement.

PROFESSOR DORSANEO: Well, plea in bar are merits claims. I mean, I hear what everybody is saying, but we use these old terms without defining them in the rules, and people have forgotten what they mean, and then somebody will file a thing called a plea in bar. Well, that's just -- and I have done it in my practice career, right, but that's just stupid. I mean, because a plea in bar is an answer that includes denials and affirmative defenses, and there aren't other pleas in bar.

MR. McMAINS: But, once again, there is a procedural distinction in that -- that have been recognized. I mean, you have in -- there are a few examples in our books of a plea in bar having been set and heard at an evidentiary level resulting in a dismissal. That doesn't have anything to do with

following the summary judgment practice.

PROFESSOR DORSANEO: That is a separate trial. What people did when they did that is they went to a separate trial procedure, and they didn't know that that's what they were doing.

MR. McMAINS: And they didn't know that's what was happening. That's right. And all I'm saying is I think there are issues as to whether we want to treat those differently or whether we want to merge them into the summary judgment. Should it be done by way of a summary judgment practice, for instance, as opposed to should you --

PROFESSOR DORSANEO: It can be.

MR. McMAINS: You know, yeah. Because I think most people when they are moving for summary judgment on res judicata grounds, that's what they are thinking of, but you could actually -- you can, of course, go to the cases and put on evidence, have an evidentiary hearing, and then you don't seem to have any of these burdens that you -- and the same problems you have in the summary judgment area. I am not sure that that's what

anybody really contemplated.

PROFESSOR DORSANEO: I think based on the vote, if I heard it right, you want me to keep trying to draft this rule as one rule, and I would add a section on abatement -- and I have abatement, you know, special appearance, venue -- to talk about these specific requirements. And I would add in (6), (b)(6), you know, failure to join a party under Rule 32 needed for just adjudication, that's a basis for abatement; and I would just say, "and other basis for abatement," and I might even add "prior pending action," because it's the most common one, right, in this rule as a specific item.

But I have a -- if you want me to go forward, I am happy to, and I feel that I made enough progress to be able to write something that at least is less confusing than our current material.

CHAIRMAN SOULES: Well, what's the sense of the committee? Should he proceed with his work, because it's going to be a lot of work, and everyone who feels he should show by hands. Anyone disagree?

MS. SWEENEY: We are all in favor of you doing a lot of work.

MR. McMAINS: We are all in favor of him butting his head against the wall.

CHAIRMAN SOULES: We are very, very fortunate to have Bill's attention to these matters. He's doing a great job, and so is everybody that worked on all the committees. Particularly on his committee, Richard Orsinger. We really appreciate it.

It looks like it's about -- okay. Our next session is September 20th. Friday, September the 20th. We will work 8:30 to 5:30, and then Saturday, September the 21st from 8:00 until noon, and if no one has anything else to raise today, it's about noon, and we will adjourn.

MR. ORSINGER: I was informed that that's Notre Dame day in Austin, so you better get your hotel rooms if you can find them.

MS. SWEENEY: It's already too late.

MR. LATTING: I have got a

question. Have we talked about this before about the notion of answers being filed by 10:00 a.m. on Monday?

PROFESSOR DORSANEO: Our committee talked about it, and that's in that one paragraph, and the committee believed that that is not necessary anymore. I think the original reason for it is that the appearance docket actually was called.

JUSTICE CORNELIUS: Yeah. Yeah.

MR. LATTING: Well, it's a problem for a number of reasons, and however I should raise it I would like for us to get rid of it in the rules.

JUSTICE CORNELIUS: I think we should get rid of it.

CHAIRMAN SOULES: We are adjourned and off the record.

(Proceedings adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 20, 1996, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,032.50.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 31st day of July, 1996.

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