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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

July 17, 2003

(MORNING SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of Texas,
reported by machine shorthand method, on the 17th day of
July, 2003, between the hours of 9:09 a.m. and 12:35 p.m.,
at the Texas Association of Broadcasters, 502 East 11th
Street, Suite 200, Austin, Texas 78701.

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

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1 they would allow those kinds of decisions to be made by
2 this group.

3 The American Bar Association and Roscoe Pound
4 fought for this concept at the beginning of the 20th
5 century in reaction to legislative court rule-making all
6 through the 19th century, and that led to the Federal court
7 Rule-making Act and to the statute in Texas a few years
8 later, and our responsibility has sort of ebbed and waned
9 or ebbed and flowed over the years, and right now it's at a
10 flow, and I just viewed that as an opportunity for this
11 group to make a real contribution, a solid contribution to
12 the law of Texas, so that's good. Let me tell you, I think
13 you probably went over this last time, but the Court is
14 going to reconvene on --

15 MR. GRIESEL: The 25th.

16 JUSTICE HECHT: No, the 18th.

17 MR. GRIESEL: The 18th.

18 JUSTICE HECHT: We are going to meet on the
19 18th to talk about the law docket; and either the 19th or
20 the 26th or both, probably both, we're going to talk about
21 the work that has been done here with a view toward issuing
22 an order before September the 1st, putting the MDL rules in
23 place, and getting as much of the other work that has a
24 deadline on it to the *Bar Journal* for comment. The Court,
25 I think will take the position -- it has so far tentatively

1 -- that when the statute says this has to be done by a
2 certain date that that trumps the deadlines, the comment
3 periods and so on in the general statute in Chapter 22 of
4 the Government Code, and so we will proceed to meet the
5 deadlines that House Bill 4 imposes.

6 At the same time, however, the comment period
7 is not just a formality imposed by the statute, but it is
8 an opportunity to get good input from people who are not
9 here, and so we will encourage a period of comment on
10 the MDL rules and anything else, again, that has a deadline
11 on it, so that we can change those in the fall if there --
12 if we think we need to or if they're not working right.

13 Everything else that we can get done will go
14 in the October *Bar Journal* to be for a comment period
15 through the fall to be effective January 1st. So the Court
16 intends to meet all of the deadlines that are specific in
17 the statute, and I have talked to Frank that with respect
18 to the general charge to look over the class action rule,
19 that may take us a little more time in the fall to do that.
20 We will proceed on it as quickly as we can, but we don't
21 view that as having the same fixed deadline as the other
22 portions of the statute that say "Do this by December 31st
23 or January the 1st or September the 1st" or whatever.

24 So that's our -- that's the Court's meeting
25 schedule, and we will probably incorporate in the September

1 changes a lot of the rules changes that are pending that
2 the Court -- that the committee has talked about over the
3 last year or two and that have just been sitting there kind
4 of waiting for something like this to come along so we
5 would have more reason to change the rules than just other
6 things, less important things. So that's kind of our
7 schedule, Chip. If there are any questions, I will be
8 happy to try and answer them.

9 CHAIRMAN BABCOCK: Ralph.

10 MR. DUGGINS: What impact, if any, will the
11 September vote have on things?

12 JUSTICE HECHT: September what?

13 MR. DUGGINS: Isn't there a vote in September
14 on --

15 JUSTICE HECHT: The constitutional amendment
16 I don't think impacts our work. I will say, I forgot to
17 say that the Legislature has a bill pending that has passed
18 the House.

19 MR. GRIESEL: It has passed the House.

20 JUSTICE HECHT: And it's in the Senate, and
21 it's a vote or two short in the Senate, that would create
22 an inactive asbestos docket; and it asks us to -- asks the
23 Court to write rules to set that up; and if that passed, we
24 would have that on our plate as well. It's a virtual
25 docket. It has two components. There's a legal component

1 where you set up this so-called docket of cases. The more
2 important part of the concept is that to get off the docket
3 there has to be some sort of medical approval of taking a
4 case off the docket and moving it to trial, so it would
5 take working in conjunction with medical people, doctors,
6 clinicians, people who deal with this sort of thing to
7 decide how that would operate. I think -- I think that's
8 doable, too, although it would be a big piece of work, but
9 that may not happen.

10 CHAIRMAN BABCOCK: Okay. Well, thanks,
11 everybody, for being here on a Thursday, and our next
12 meeting is going to be on August 21, 22, and 23, which
13 falls between the Court's meetings of August 19th and
14 August 26th, and I know what a burden it is on everybody to
15 take an extra day out of your week to be here, and we
16 appreciate it.

17 The schedule for today, there may have been
18 an amended agenda but because the complex litigation rules
19 have the shortest fuse, the shortest time deadline, and
20 because that subcommittee has been working really, really
21 hard, we're going to start with that today and go with that
22 until we get finished; and then if I'm correct, Tommy and
23 Elaine, you-all just have a little bit of cleanup from our
24 last meeting on the offer of settlement rule; is that
25 right?

1 PROFESSOR CARLSON: We view it that way.

2 CHAIRMAN BABCOCK: Well, the Chair
3 characterizes it that way, and we'll try to get through
4 that, and then Richard's class actions, and that will
5 probably take the two and a half days, but we have other
6 agenda items if it doesn't. So Judge Brister has -- I know
7 has been meeting with his subcommittee extensively. So,
8 Judge, why don't you take us through complex litigation?

9 HONORABLE SCOTT BRISTER: The draft we have
10 is Rule 13 that you just referred to. This would be a
11 proposed amendment to the Rules of Judicial Administration;
12 and, first of all, I want to thank all the people that
13 participated. We had numerous e-mail conversations back
14 and forth sending drafts. We've had almost 10 hours of
15 teleconferences. I've never sat in on a five-hour
16 teleconference talking about a rule before, but we got a
17 lot done, had a lot of input, and I'm especially grateful
18 for all the subcommittee members as well as some others
19 that did a lot of drafting. Tracy Christopher, David
20 Peeples, Bob Pemberton, Steve Tipps, Harvey Brown, and
21 Chris Griesel all put in a lot of work not just in the
22 hours long teleconferences, but in between our meetings
23 doing research and drafting.

24 The background, of course, is House Bill 4.
25 For sometime we have had the Rule 11 in the Rules of

1 Judicial Administration, which leaves cases where they are,
2 but in each region assigns a judge to the cases. House
3 Bill 4 is set up to operate a different way. House Bill 4
4 transfers the cases to a judge, so it's a transfer of cases
5 to a district court for handling and then subsequently
6 transfer back to the case -- to the Court where the case
7 was filed for trial. We looked at what other states are
8 doing and the Federal MDL rules, and in just a second I
9 want Chris Griesel to talk some about how they differ with
10 what their experience is, what volume they've experienced,
11 and, as a matter of fact, why don't you go ahead and do
12 that, Chris, and some of what the Jamail committee's
13 research was?

14 MR. GRIESEL: The numbers can be
15 overwhelming, especially in the Federal MDL side. The most
16 recent statistics in the Federal MDL show about 16,000
17 cases per year being consolidated in some way, shape, or
18 form, being transferred or consolidated; and you can take
19 that down and look at Texas and average districting we're
20 talking about 30 or 40 cases going in and 30 or 40 cases
21 going out; and there would be hot spots. For instance, in
22 the Eastern District there's almost 3,000 cases going out
23 in the previous year, and I'm guessing most of those are
24 probably asbestos cases.

25 CHAIRMAN BABCOCK: Going out of the district?

1 MR. GRIESEL: Going out of the district,
2 being consolidated into the MDL system. So that's -- if
3 you look at the Federal system, that's a huge number. The
4 state cases, states have basically taken complex litigation
5 in two different methods. They have either set up panels,
6 and the two states that have done that are Kansas and
7 Colorado, where they actually will set up an MDL panel.
8 Colorado does that. Kansas uses the Supreme Court as also
9 their MDL panel, and they will set up a system of moving
10 cases from pretrial. In Kansas you can also do it for
11 trial on the agreement of parties.

12 The Colorado numbers are less overwhelming.
13 We're talking about roughly 15 to 30 cases a year, and
14 about two-thirds of those cases there's really no dispute.
15 The clerk says that the parties stipulate to the MDLness
16 and usually stipulate to an appropriate place for it to go.

17 So we're likely -- the parameters, I guess,
18 that are built in this system are somewhere between
19 Colorado's 30 cases and the Federal 16,000 cases. In
20 California and in Arizona are two states which have
21 recently moved to not looking at consolidation but looking
22 at complex case handling, and in California the state
23 thought that it was worthy enough to have a 4.4
24 million-dollar appropriation come along with it, and in
25 California the courts set out a set of factors for what

1 constituted a complex case, what types of cases deserve
2 extra supervision; and we will be talking about some of
3 those factors a little later. Arizona is doing the exact
4 same thing as a pilot in their two largest counties, and
5 we'll see some of the outcomes of that.

6 If you look at the California courts that
7 have complex case dockets, those mirror I think very
8 closely the stuff that's getting removed in MDL in the
9 Federal system. The Jamail committee I think looked at
10 those issues and came up with a mixture of MDL --
11 Federal MDL policy and state MDL policy. They have factors
12 for setting up a panel like the feds, but then identifying
13 cases that either had sufficient factors or sufficient
14 complexity that everyone would agree on that automatically
15 went into the MDL system, and I think you'll see some
16 echoes of both the Federal and state practice in the rule
17 drafted by that group.

18 HONORABLE SCOTT BRISTER: I want to just give
19 you a highlight of -- there's a lot of fascinating issues
20 of how this would work, but I want to make two general --
21 and I'm going to go through what the highlights are and
22 then start I guess just at the top and set these out for
23 your discussion. Two main things to keep in mind. No. 1,
24 these rules are for the operation of the MDL panel.
25 The MDL panel is the group of five judges, court of appeals

1 judges or regional presiding judges, who will transfer the
2 cases. These rules are not for what the pretrial judge
3 necessarily does. They are not for what the trial judge
4 necessarily does. Those will generally be covered by the
5 Rules of Civil Procedure, the idea being that the case is
6 transferred and it's your case as if it was filed in your
7 court.

8 The panel itself can draw its own internal
9 rules with -- and will probably need to since this
10 experience is going to be new for all of us, but our
11 subcommittee tried not to get into too many of the details
12 of what would be done by the pretrial court or internal
13 operations of the MDL panel itself, just to set up the
14 mechanism for transferring the cases, the motions and
15 orders and the appeals, transferring the cases to the
16 pretrial court and then back to the trial court for trial.

17 Second, it's important to keep in mind the --
18 while the Legislature ordered us to do this, they provided
19 no budget. To my knowledge I believe this is the only
20 official judicial organization -- this is an official
21 judicial body that makes official judicial decisions that
22 has no courtroom, no court reporter, no staff, doesn't have
23 phones or stationery. So every member of the panel, every
24 secretary, every phone call, somebody is going to volunteer
25 to do it. It's going to have to come from some other

1 place; and as I'm sure you're aware from the last budget
2 session, none of us really have a lot of extra money lying
3 around right now.

4 So it was foremost in our considerations to
5 keep in mind what is the practical effect and how is this
6 panel going to operate with no budget or not even any file
7 drawers. I mean, it is a little difficult. Exactly how
8 are you going to file these with an organization that has
9 no file drawer and no file clerk? So keep in mind this is
10 different from most Court things we've ever dealt with. We
11 have to figure out how this is going to be done with the
12 volunteering of services, space, et cetera, and in a lot of
13 instances, as you'll see, with shifting to the parties the
14 responsibility for making copies and sending notices that
15 you would normally have performed by the court clerk of
16 some kind, so keep that in mind.

17 With that in mind, let me just go through the
18 rule high points mentioning the main policy decisions for
19 this group to make as we discuss the rule. Generally
20 speaking, we have -- the rule as you see it in plain type
21 will be the recommendations of the subcommittee. From time
22 to time you'll see portions in brackets and italicized.
23 Those are -- our plan was to draft options that anybody
24 thought might be something the committee should consider or
25 came from other states or the Federal MDL. The ones in the

1 bracket with italics were not the majority of the
2 subcommittee, but our idea was to draft those as best we
3 could so we wouldn't have to do the drafting in this
4 meeting because of the time limits and provide those
5 options for the committee to consider and vote on.

6 13.1 is the definitions. 13.2 will be the
7 procedure for requesting the transfer, and following 13.2
8 is a large italicized section, and this is the issue of
9 what the House Bill 4 just says -- has a very limited
10 discussion of what the criteria are for transfers. States
11 and Federal and Jamail committee have lots more details
12 about what those might be for consideration as a possible
13 factors or comments.

14 13.3 is the issue of what happens while the
15 case is in the -- before the MDL panel. A lot of -- the
16 biggest concern, and I think, for consolidating these cases
17 is because discovery deadlines are running everywhere and
18 different forms of discovery coming and going between the
19 parties. Obviously the panel can't decide these things
20 instantly, so every day that goes by while it's before the
21 panel discovery deadlines are running that need to be
22 coordinated, and so there's an issue of what should happen
23 during the pendency of while the MDL is considering
24 transfer.

25 13.4 is the mechanics of transferring the

1 files, and 13.4(e), the very interesting issue of tag-along
2 cases. I'm informed by those that do these that this is a
3 term of custom and usage in the industry of multidistrict
4 litigation. Everybody knows what -- tag-along cases are
5 cases that nobody asked to transfer but they come along
6 eventually, so after you transfer all the breast implant
7 cases in the first thousand, then the next 5,000 that are
8 filed you don't want to keep having -- you want to set up a
9 process where they get transferred, too.

10 13.5 is the proceedings in the pretrial
11 court. We've got a long footnote with an issue we'll
12 discuss about to what extent can retired or former district
13 judges be included as a presiding judge in the pretrial
14 court and then what kind of things -- these are very
15 interesting issues. What kind of things does the pretrial
16 court do versus the trial court and how do you coordinate
17 the trial settings, who does that and, you know, can you
18 have a pretrial court telling judges and trial courts when
19 they're going to have trial settings and when not, and what
20 if they say "no," and that kind of thing.

21 13.6 has to do with disposing of the cases,
22 disposing of cases that are disposed by summary judgment at
23 the pretrial court, remanding individual cases for trial
24 early on in the litigation, remanding all the cases when
25 enough's enough, and they just go back to the trial courts.

1 13.7 is transfer back to the trial court and
2 the difficult issue of what can the trial court undo and
3 what can the trial court not undo that's been done by the
4 pretrial judge. 13.8, the issue of who do you appeal to,
5 who do you appeal the MDL's decision to transfer, who do
6 you appeal rulings by the pretrial court to, who do you
7 appeal rulings by the trial court to, and then some cleanup
8 matters at the bottom.

9 If you compare, if you have your rules with
10 you, we decided to follow the general format of Rule 11 of
11 the Rules of Judicial Administration, No. 1, because people
12 in Texas that handle these in state courts would already be
13 familiar with that; No. 2, because it fit well with what
14 Texas practice and procedure was anyway; and, No. 3, there
15 weren't that many complaints that we were aware of based on
16 how Rule 11 has operated to date. I have had zero
17 experience on these, but I know Tracy Christopher, Harvey
18 Brown, and others that were contributors to the committee
19 have had a lot of experience and other people on the full
20 committee, and then just other law professors and people
21 that were interested in the issue have given us some ideas
22 on those.

23 So if you have had experience on those,
24 please contribute those, but the general feeling was that
25 the Federal MDL and apparently California's are much better

1 funded, have much larger staffs, and end up being much more
2 complicated and to some degree cumbersome, so our idea was
3 to -- based on Rule of Judicial Administration 11, to
4 follow that, try to do where we could a simpler procedure
5 that like current Rule 11 is an adjunct to the job of
6 people who are already there, that can be done as an
7 adjunct rather than having full-time staff and judges do
8 it.

9 So unless there are any questions, proceed on
10 to 13.1, definition section. I think most of these are
11 straightforward. 13.1(a), that is just that the MDL panel
12 -- 74.161 is the section of the House Bill 4 that was set
13 up that requires this procedure and notes that the Chief
14 Justice -- HB 4 just says the Chief Justice appoints five
15 people. The only restrictions have to be active court of
16 appeals judges or regional presiding judge. The issue
17 comes up what if one or more of those are recused,
18 disqualified, unable to participate. HB 4 requires that
19 every order -- this is another distinction, I think most
20 other states and the feds that do this, every order that
21 the MDL panel ever issues of any kind has to have three
22 signatures on it. Remember that all five members, five
23 initial members, which includes Judge Peeples and I, Judge
24 Lang from Dallas --

25 MR. GRIESEL: Judge Castillo and Judge Kidd.

1 HONORABLE SCOTT BRISTER: Judge Kidd from
2 Austin and Judge Castillo from Corpus. We're all in
3 different cities and volunteering to send these orders
4 around to each other. No travel budget to meet anywhere,
5 so but remember, we can't do anything without three votes.
6 What happens if one or two are unavailable? It seemed to
7 us that the Chief Justice would simply appoint substitutes
8 since all of us serve at his discretion. Do you want me,
9 since this is just definitions, to run through all of these
10 and then open it for discussion, Chip?

11 CHAIRMAN BABCOCK: Yeah, I think so.

12 HONORABLE SCOTT BRISTER: Panel clerk, I'm
13 told the clerk of the Texas Supreme Court has volunteered
14 to do this since he obviously doesn't know what it's about
15 to entail. In any event, we accepted because there were no
16 other volunteers. Throughout this we have used the term
17 "trial court" for the case where the case is filed because
18 it's going to go back there for trial. The pretrial court
19 will be the court that does the pretrial stuff once --
20 after transfer, before sending it back for trial or
21 disposing of it.

22 Related cases is -- the HB 4 definition is
23 that this can apply -- you can transfer cases where there's
24 one or more common questions of fact, so we simply quoted
25 from that; and last, the definition of tag-along cases,

1 that these are cases that are going to fit -- they are
2 related cases, they are breast implant cases, they are
3 Bridgestone/Firestone tire tread separation cases, but they
4 were not a part of the motion and order because they were
5 filed later or overlooked or whatever the reason may be
6 that they were not included in the order, so Mr. Chairman,
7 the subcommittee suggests 13.1.

8 CHAIRMAN BABCOCK: Okay. Any comments on
9 13.1, or are we going to just zip right through this?
10 Yeah, Bill.

11 PROFESSOR DORSANEO: The only comment I have
12 is there may be more things that we want to define
13 depending upon what we do with the italics.

14 HONORABLE SCOTT BRISTER: Right. Right.

15 CHAIRMAN BABCOCK: Richard.

16 MR. ORSINGER: There's no common questions of
17 law, and that's a conscious decision that it's only matters
18 that share the same fact pattern and not maybe if there is
19 a uniform defense against all of these, something like
20 that? That's not important?

21 HONORABLE SCOTT BRISTER: HB 4 just says
22 common questions of -- one or more common questions of
23 fact.

24 MR. ORSINGER: Okay.

25 HONORABLE SCOTT BRISTER: Ostensibly you

1 could put all the car wreck cases, dump all the car wreck
2 cases in Texas on someone because they are all car wrecks,
3 but surely that will not happen, but that's all HB 4 says,
4 if there is a common question of fact. So that's the
5 reason that's all we put.

6 CHAIRMAN BABCOCK: All right. Any other
7 comments? Yeah. Judge Gray.

8 HONORABLE TOM GRAY: I will renew Justice
9 Duncan's comment that throughout the rules we use these
10 terms in lower case, and I think they should be in upper
11 case because they are defined terms, and then I found the
12 use of the term "pretrial court" confusing as opposed
13 to "MDL court," but that's maybe a gnat.

14 HONORABLE SCOTT BRISTER: We thought about,
15 well, you could call it whatever you want, MDL court, but
16 my thought was there would be some confusion between
17 the MDL panel and the MDL court. The MDL panel is the five
18 people that transfer the case. It would be better to say
19 that's the pretrial court because that's their function,
20 but --

21 CHAIRMAN BABCOCK: All right. Any other
22 comments? All right. Anybody want to move the adoption of
23 13.1?

24 HONORABLE SCOTT BRISTER: I suppose I should.

25 CHAIRMAN BABCOCK: Judge Brister, seconded by

1 Buddy Low. All in favor of the definitions in 13.1 raise
2 your hand.

3 Anybody opposed? Passes by a unanimous vote
4 of 26 to 0, the Chair not voting.

5 Okay. 13.2.

6 HONORABLE SCOTT BRISTER: A little more
7 substantive now. 13.2(a), and the subcommittee will
8 recognize I collapsed three sections, the motion, response,
9 and reply, into (a). Issue, primary issue here, is two
10 issues. One, time for our responses, and, two, who can
11 move. We -- let's see where is that? At the -- on the
12 next page, section (h) is an alternative. We put it down
13 here separately because the question is can a -- should
14 just a party be able to ask for transfer or should a trial
15 judge, a local administrative judge, a regional presiding
16 judge say "Get these things out of here" or I'm -- you
17 know, I think the sense of most of the subcommittee, and I
18 stand to be corrected, was that if none of the parties were
19 interested then don't fool with it; but there's certainly a
20 substantial minority that, you know, that the parties might
21 have different reasons, right or wrong, not to ask it to be
22 done, the burden and some of the difficulty of coordinating
23 the cases is on the trial judges and other judges, whether
24 they should be able to request it.

25 The problem, of course, is once you get

1 judges requesting it, judges are not really in the position
2 and probably shouldn't be to file motions and briefs and
3 argue. Just something unseemly about a judge arguing "Get
4 these cases out of my court," even though none of the
5 parties want to, so if the committee feels like that is an
6 option we need, we recommend putting it in a separate
7 section that does not put the motion, response, hearing,
8 and evidentiary requirements on judges, that the judge
9 would make a request; and then as you'll see in (h), the
10 concept would be that once receiving a request from a
11 judge, the MDL panel could issue show cause orders to the
12 parties, show cause why they should or should not be
13 transferred for coordinated proceedings.

14 So our recommendation is that it's the
15 parties from related cases with motions to be filed will
16 get into -- motion to be filed at any time. We have not
17 put a restriction on that, since that -- you know, perhaps
18 the first breast implant case has been on file for years
19 before the second and third hundred come along, so we
20 decided not to put a time limit when the first one should
21 be -- when they had to be -- initial motion, but did put
22 some time limits on responses, and we recommend 20 on those
23 and 10 for a reply, so that's the issues on those.

24 CHAIRMAN BABCOCK: Shouldn't this be called
25 "Motion, response, and reply"?

1 HONORABLE SCOTT BRISTER: Sure.

2 CHAIRMAN BABCOCK: Okay. Stephen.

3 MR. TIPPS: And while we're on the subject of
4 just technical changes, I think probably it ought to say
5 "any party in a related case."

6 HONORABLE SCOTT BRISTER: Yeah, the reason I
7 said that is because I defined "related cases" to be one or
8 more cases. You don't want to get into the situation where
9 you're -- "Well, the rule says related cases, so it has to
10 be two" or, you know, "It can't be one." So I intended to
11 use the term "related cases" throughout, understanding that
12 it could be just one or more.

13 HONORABLE TOM GRAY: Then we need to take the
14 parentheticals off the definition in (e) of cases.

15 MR. TIPPS: I guess my observation is that in
16 order for any case to qualify as a related case there must
17 be some other case to which it is related, and it is also
18 true that in all probability someone will be a party to
19 both of the related cases; however, I think theoretically
20 somebody who is a party to only one of the related cases
21 ought to have the right to file a motion to transfer his
22 related case along with some other one. So that's my
23 technical observation.

24 CHAIRMAN BABCOCK: You think that this rule
25 as written doesn't allow that, Steve?

1 MR. TIPPS: Well, I mean, the draft here says
2 "any party in related cases," which I think implies that in
3 order to qualify you've got to be a party in multiple
4 cases.

5 HONORABLE SCOTT BRISTER: Even if "related
6 cases" is defined to be just one of them?

7 CHAIRMAN BABCOCK: Yeah, that's what the
8 definition says.

9 PROFESSOR DORSANEO: Your definition does --
10 the parenthetical creates an ambiguity.

11 HONORABLE SCOTT BRISTER: The parenthetical
12 where?

13 PROFESSOR DORSANEO: In (e).

14 HONORABLE SCOTT BRISTER: Oh, make it
15 "related cases" rather than parentheses (s).

16 MR. ORSINGER: I would rather go the other
17 way. You can say "related case or related cases,"
18 depending on whether it's one or two.

19 HONORABLE SCOTT BRISTER: You're going to
20 have to say "any one or more" every time you say "related
21 cases" and I don't --

22 MR. ORSINGER: You can just say "any party in
23 a related case." That's okay with your definition, or you
24 could say "may consolidate related cases," because your
25 definition is singular or plural.

1 CHAIRMAN BABCOCK: So, Richard, you would
2 propose --

3 MR. ORSINGER: I would propose that we just
4 change 13.2(a) to "any party in a related case" because the
5 definition is both singular and plural.

6 CHAIRMAN BABCOCK: And drop the parenthetical
7 from the definition?

8 HONORABLE SARAH DUNCAN: No. No.

9 MR. ORSINGER: No. Leave it in there because
10 you're going to -- sometimes you will be talking about one
11 case, sometimes you will be talking about multiple cases.

12 CHAIRMAN BABCOCK: What do you think about
13 that, Judge?

14 HONORABLE SCOTT BRISTER: Oh, I don't
15 remember. I ran into this problem somewhere, but I don't
16 mind doing it till we run into that problem again, if I can
17 remember what it was.

18 CHAIRMAN BABCOCK: Pete.

19 MR. SCHENKKAN: I'm wondering if it might be
20 clearer if we left the definition of related cases as it
21 is, either with the parenthetical around the (s) or not,
22 but to have this provision of 13.2(a) defined so that any
23 party in any action in which the motion for transfer may be
24 appropriate can file it, because it sort of begs the
25 question, we don't have a determination yet that there are

1 related cases, and the formulation I'm using is the one
2 that comes out of the Federal MDL approach.

3 So once it's determined that we have related
4 cases then all the provisions that apply to the related
5 cases can use that term, but at this first one before
6 that's been determined we don't use that term. We use some
7 language that suggests in the case that may be suitable for
8 this procedure.

9 CHAIRMAN BABCOCK: I suppose that the party
10 filing the motion would argue that it would be a related
11 case and the party opposing it would say it's not. So that
12 would be determined by the MDL panel.

13 MR. SCHENKKAN: Quite right, and I'm just
14 saying that at that stage that hasn't been determined so
15 I'm not as comfortable with defining it as a related case.
16 I understand the concept. I just think the wording might
17 be a little easier if you did it this way.

18 PROFESSOR DORSANEO: I second Richard's
19 motion, which was Stephen's motion.

20 HONORABLE SCOTT BRISTER: Which was what?

21 PROFESSOR DORSANEO: "Any party in a related
22 case may file."

23 HONORABLE SCOTT BRISTER: If we take the
24 brackets off the (s), we don't -- "related case" is not
25 defined.

1 MR. ORSINGER: Don't take the brackets off
2 the (s).

3 PROFESSOR DORSANEO: Well, I think it is.
4 "Related case means any one of multiple cases involving one
5 or more common questions of fact." And "related cases"
6 means, you know, any one or more of multiple cases. Works
7 for me.

8 HONORABLE SCOTT BRISTER: Doesn't matter to
9 me.

10 HONORABLE SARAH DUNCAN: I third Bill's
11 suggestion.

12 CHAIRMAN BABCOCK: What, Sarah?

13 HONORABLE SARAH DUNCAN: I third Bill's
14 suggestion, Stephen's suggestion, and Richard's suggestion.

15 CHAIRMAN BABCOCK: Okay. Are we taking the
16 brackets off the (s) or not?

17 HONORABLE SARAH DUNCAN: No.

18 PROFESSOR DORSANEO: No. It's an excellent
19 definition.

20 CHAIRMAN BABCOCK: So "Any party in a related
21 case may file a motion." That's what we're going to say,
22 and we are going to leave the brackets where they are in
23 the definition. That's the proposal. Nina.

24 MS. CORTELL: I have a question. Is there
25 here or anywhere a sense of timing, a timing requirement

1 for the motion? Was that considered? Is that --

2 HONORABLE SCOTT BRISTER: We consider it
3 later and what effect it has on the trial court's ruling.
4 I was concerned that if you file it, you know, the day
5 before trial if it stays it, but as far as we decided
6 against any requirement that you file early for the reason
7 I said, that it may not be clear that you've got a problem
8 of coordination until the initial cases have been on file
9 for a long time, and you certainly don't want to leave two
10 cases or five cases out there separate and transfer 200
11 somewhere else.

12 MS. CORTELL: So it's within the court's
13 discretion or the panel's discretion not to consolidate
14 later if it's done too late? Is that how it's treated?

15 HONORABLE SCOTT BRISTER: Well, we did not
16 discuss the possibility that the panel would decide to
17 transfer two-thirds of the breast implant cases but not the
18 other third because I just think nobody can imagine the
19 panel would want -- any reason the panel would want to do
20 that. If you want to coordinate them, you coordinate them.
21 You coordinate them all.

22 So but the problem was if there's some time
23 limit then the ones that don't move fast enough you get --
24 in other words, should parties waive coordination; and our
25 sense was, no, the parties shouldn't waive coordination.

1 We're either going to coordinate them all or it will create
2 more headaches if we miss the deadline on a dozen cases to
3 have them still out there rattling around with different
4 scheduling orders and discovery plans while we consolidate
5 everything else in one place.

6 HONORABLE SARAH DUNCAN: We also discussed
7 pleading amendments.

8 HONORABLE SCOTT BRISTER: Why don't you --

9 HONORABLE SARAH DUNCAN: That if a party
10 amends to add a tread separation claim, it may be that
11 transfer to coordinate pretrial proceedings isn't
12 appropriate until that pleading amendment is made, and we
13 can't predict when that pleading amendment will be made, so
14 trying to put a deadline on when a motion to transfer can
15 be filed can't predict the pleading amendments.

16 CHAIRMAN BABCOCK: Okay. Let's get back to
17 this sentence. Don't you think we ought to get through
18 that first, Richard?

19 MR. ORSINGER: I would like to hear something
20 about this decision that only parties can request it. It
21 seems to me that the purpose of this rule is for, in a
22 sense, the convenience of the judicial system and that we
23 also want to encourage coordination in discovery if there's
24 three or four principal experts that have to be deposed 500
25 times and whatnot, and I'm a little bit -- I don't know.

1 Maybe the defendant is always going to move for
2 consolidation. If that's the practice then I don't care,
3 but maybe that's not the case.

4 I also am a little worried about the
5 assumption that it's always going to be in the same court.
6 I can imagine, for example, in a car manufacturer tire
7 rollover case you may have Ford tire -- Ford car with
8 Firestone tires, or you might have a GM car with Firestone
9 tires, and the lawsuit is going to be against the
10 manufacturer of the car and the tire. So if they're both
11 Firestone tires you have a common question of fact there,
12 but then the GM cars have a different design from the Ford
13 cars, and so you may have all the GM cases over in one area
14 and you may have all the Ford cases in another, and then
15 you have the Firestone cases that are in both, and is it
16 not possible that the MDL panel may want to carve up and
17 have different trial judges handling different things, and
18 should we always assume that it's always going to be one
19 court?

20 And then also, what about -- what about the
21 people that want the cases to be consolidated into their
22 proceeding rather than consolidated into another court?
23 Are people going to jockey or compete so that the
24 defendants are all trying to consolidate into their
25 proceeding? I don't know the answer to these questions,

1 and then at the Federal level who can do it? Can the judge
2 do it at the Federal level?

3 HONORABLE SCOTT BRISTER: The Federal MDL
4 Rule I believe allows the judge to request it.

5 HONORABLE SARAH DUNCAN: And existing state
6 Rule of Administration 11.

7 MR. ORSINGER: Okay. This is a real
8 significant step, and I'm not sure I see why it's wise
9 to --

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: Richard's argument
12 on judges being able to request transfer is exactly the
13 argument the minority voiced on Monday during our
14 conference call, and I don't -- I will preface any comments
15 I make in this. I have no experience with multidistrict
16 litigation either in state or Federal court and have not
17 figured out why I'm on this subcommittee, but --

18 CHAIRMAN BABCOCK: Fresh perspective.

19 HONORABLE SCOTT BRISTER: Right.

20 CHAIRMAN BABCOCK: Untainted by practice.

21 HONORABLE SARAH DUNCAN: It seems to me
22 apparent that at least some part of the motivation for a
23 multidistrict litigation process, procedure is efficiency,
24 and I don't think the parties should be able to determine
25 whether that efficiency is pursued or not by deciding

1 whether to file a motion to transfer. I think if a trial
2 judge in Luling has a tread separation case and is aware
3 that there has been a multidistrict litigation transfer to
4 Houston for tire separation cases, that judge shouldn't
5 have to sit there and decide and try to coordinate with his
6 docket or her docket with the judge in Houston who is
7 scheduling the same experts and the same company
8 representatives. It just doesn't make sense to me that the
9 parties get to determine whether the efficiencies of
10 consolidation or coordination are going to be pursued.

11 CHAIRMAN BABCOCK: Pete, then Buddy.

12 MR. SCHENKKAN: There's an intermediate
13 position, which is I think the one that's taken by the
14 Federal rules, which is that the proceedings can be
15 initiated by any party to any one of these potentially
16 related cases or by the MDL panel. That is, it's not -- it
17 doesn't provide that each individual trial court can do it,
18 but it does give one body that's supposed to be in charge
19 of the judicial efficiency issue the power to initiate it,
20 and I don't have any experience with this in Federal courts
21 to speak of, not substantial experience, so I'm not quite
22 sure how they get the word that this may be an issue, but I
23 assume it's informal.

24 MR. JACKS: Right.

25 MR. SCHENKKAN: I assume that would be what

1 would happen here.

2 HONORABLE SARAH DUNCAN: We have a completely
3 unfunded panel, so they're really not in a position to
4 figure out about -- find out about the case in Luling, it
5 seems to me.

6 CHAIRMAN BABCOCK: Buddy, then Alex.

7 MR. LOW: Scott, was there any discussion
8 about a trial judge under 166 can assign, you know,
9 pretrial and such other matters as may aid in that, whether
10 that rule entitles the judge to say, okay, we're going to
11 follow the same -- you know, you're going to join this
12 group?

13 HONORABLE SCOTT BRISTER: Well, certainly
14 Tracy might want to speak to that. As she points out, you
15 may not want to get MDL involved at all if all the cases
16 are in Harris County and the Harris County judges are
17 taking care of it, as they have with some mass tort cases
18 for a long time. Tracy, you want to --

19 HONORABLE TRACY CHRISTOPHER: Well, I was
20 actually just going to say under our current Rule 11 a
21 trial judge can request, and I'm pretty sure that hasn't
22 happened in my region. I mean, I haven't asked Underwood,
23 but I'm pretty sure that none of us would be requesting.
24 So I don't -- I mean, for most of us, requesting that kind
25 of consolidation or transfer means our case slows down. It

1 doesn't speed up. It slows down, and if we're worried
2 about our, you know, deadlines, we don't want it
3 consolidated with all the other tread separation cases. We
4 had just as soon try it.

5 CHAIRMAN BABCOCK: Alex, did you still --

6 PROFESSOR ALBRIGHT: Yeah. I just have kind
7 of a basic big picture kind of question. Can you get --
8 you get one of these motions filed in one breast implant
9 case in Luling. Then -- and presumably the person who
10 files that motion knows there's another breast implant case
11 somewhere that is a related case. If the MDL panel decides
12 that these should be MDL cases, are all the breast implants
13 all over the state automatically in the MDL case, and how
14 do you know what other cases are out there? And then I see
15 there's a -- there's the service. You have to serve on all
16 parties in all related cases, and how do you know? And,
17 geez, that's a bunch of cases.

18 HONORABLE SCOTT BRISTER: Well, yeah.

19 PROFESSOR ALBRIGHT: So I guess just the
20 mechanics of filing in one case, how does that affect the
21 whole state?

22 HONORABLE SCOTT BRISTER: In our discussions
23 we assumed the panel could issue an order saying, "The
24 following 27 cases and none others are transferred to the
25 pretrial court." On the other hand, it could issue an

1 order saying, "All Bridgestone/Firestone tire tread
2 separation cases filed or that may be filed in the future
3 are transferred to the pretrial court." Because of the
4 problem of getting three judges to sign every order
5 transferring them, as we'll discuss further later on, my
6 assumption will be the panel will do the latter type of
7 order rather than the former. And we have a mechanism we
8 will get to later discussing what happens when somebody
9 transfers one and it ain't a tire tread separation, it's a
10 something else, and we have got a mechanism for dealing
11 with that, but, I mean, that's an issue.

12 PROFESSOR ALBRIGHT: So we don't -- I mean,
13 whenever there's -- I guess it comes up because there's a
14 motion filed in one case and then I'm in another case, and
15 I feel real strongly that this shouldn't be an MDL case,
16 how am I going to get notice of this and --

17 HONORABLE SCOTT BRISTER: Of course, No. 1,
18 we assume in most of these mass tort cases a lot of the
19 players will be the same.

20 PROFESSOR ALBRIGHT: Right.

21 HONORABLE SCOTT BRISTER: And so by talking
22 about service and motions we incorporate the Rules of Civil
23 Procedure, and there are things that happen to you if you
24 don't send notice to somebody affected by a motion that you
25 knew or should have known about that we -- I would assume

1 the panel could do something about. We did discuss briefly
2 that we didn't want, -- as a matter of fact, I used Tommy
3 Jacks' name. You don't want a procedure where a defendant,
4 for instance, just in my hypothetical, can move to transfer
5 the breast implant cases and give -- and just the ones that
6 Mithoff & Jacks is not included in because we don't want to
7 fight with them at this stage and get them transferred and
8 then pull them along later.

9 My thought was the regular notice and
10 sanctions rules for not giving notice to people that are
11 affected, since in most cases you know who the major
12 players are in this thing, would be -- would give the panel
13 the opportunity to either reconsider, to re-allow a hearing
14 to be heard from people that were intentionally excluded,
15 but there's no question that certainly on the cases that
16 haven't even been filed yet they will, of course, not get
17 notice. Their case will be transferred before they get
18 such notice, but as we'll get into later, they will have a
19 recourse to say later on, "I shouldn't be here." And our
20 proposal is that they do that at the pretrial court and get
21 the pretrial court to say, "I agree. This is not a tire
22 tread separation. This is a Bridgestone/Firestone puncture
23 case. It's not with the MDL panel order. Send it back."

24 PROFESSOR ALBRIGHT: So I guess it really is
25 there's a lot of reliance on word of mouth and for key

1 players to make this work.

2 HONORABLE SCOTT BRISTER: Well, I think less
3 if you just -- I think there's more if the trial judges or
4 the MDL panel sua sponte can do it. I can't imagine how
5 the MDL panel sua sponte does this other than reading in
6 the papers that there's a bunch of these cases being filed
7 and just decides to do it. I think if you count on the
8 parties to do it, I assume the Tommy Jacks of the world
9 will know more about who the players are than any judge in
10 any case is going to know.

11 PROFESSOR ALBRIGHT: I guess it's more likely
12 that the repeat defendants are going to be filing these
13 motions.

14 HONORABLE SCOTT BRISTER: I don't know about
15 that, but --

16 MR. JACKS: That's what usually happens.

17 PROFESSOR ALBRIGHT: Like "I have been sued
18 in 4,000 cases."

19 MR. JACKS: As a practical matter it's
20 usually the manufacturer or whoever the defendant is who
21 seeks the transfer, and they know who all the parties are
22 to be served because they're the parties that sued them or
23 their codefendants, and they -- in Texas the plaintiffs Bar
24 is highly organized as well and that they're all talking to
25 one another, and so notice is not -- has never been, at

1 least as far as I know, a problem.

2 PROFESSOR ALBRIGHT: So you could have some
3 random lawyer that files a random motion, but it's unlikely
4 that that kind of thing is not going --

5 THE REPORTER: Speak up a little bit.

6 PROFESSOR ALBRIGHT: That probably wouldn't
7 get -- that could be sorted out in this motion and hearing
8 of it.

9 HONORABLE SCOTT BRISTER: Yeah. And surely
10 the panel is not going to grant these motions because we
11 have got two cases we need to coordinate.

12 CHAIRMAN BABCOCK: And the motion is going to
13 say what are the related cases, what the other related
14 cases are, and those people will have to get notice, so
15 there will be a lot of -- yeah, Justice Hecht.

16 JUSTICE HECHT: But don't -- I mean, this is
17 not just for huge numbers of cases. For example, our Court
18 about 15 years ago got a case, a request for mandamus,
19 because I'm trying to remember the facts, but I think it
20 was a plane crash at DFW; and there were about, I don't
21 know, 10 or 12 suits that got filed as a result of that
22 crash; and they were all filed in Federal and state court
23 in Dallas and Tarrant Counties, except for one; and I'm
24 rusty on the facts, but this would be an example anyway;
25 and the one was filed out in Hunt County or someplace; and

1 Judge Buckmeyer and the state judge in Dallas and whoever
2 the Federal and state judges were in Tarrant County got
3 together on a discovery schedule and pretrial and
4 everything and worked out with all of the lawyers involved
5 how this was going to proceed, but both parties, both
6 plaintiff and the defendant in the other case out in Hunt
7 County or wherever it was, were sort of mavericks and they
8 didn't -- the plaintiff's lawyer didn't get along with the
9 other plaintiffs' lawyers in the case, the defense lawyer
10 didn't want to get hooked up with the other defense lawyers
11 in the case.

12 For whatever reason they wouldn't play along
13 with the discovery schedule, so it was derailing all of the
14 consolidated efforts in Dallas and Tarrant Counties to try
15 to proceed on -- according to a common plan that everybody
16 else in the cases, including the judges, had agreed to; and
17 the request was for mandamus to make these folks in Hunt
18 County do right with everybody else; and, of course, there
19 wasn't any basis for that.

20 It just, you know -- there was no way to stop
21 those people from proceeding on their own schedule if they
22 wanted to, and so we denied relief, but to point out the
23 problem that can exist if -- and the lawyers would know
24 more about this than I do -- but if people splinter off for
25 whatever reasons from the main organization of the case,

1 and this wouldn't -- this isn't like breast implant or tire
2 separation. This is more like a bus crash and there's, you
3 know, 15 people hurt or killed, but the cases get filed and
4 there are not a whole lot of them. Maybe there is 5 or 10
5 cases, but they still need some coordination to move the
6 cases along.

7 HONORABLE SCOTT BRISTER: And, of course,
8 under this rule any party in any of those cases could ask
9 for them all to be put together.

10 JUSTICE HECHT: Right.

11 CHAIRMAN BABCOCK: Okay. Pete and then Bill.

12 MR. SCHENKKAN: And one other situation at
13 least that I can imagine on the facts we can already see
14 where you could have such a motion filed without having a
15 large number of cases in different places, and that's one
16 where you have maybe as few as two rival proposed class
17 actions, you know, over some -- a case I'm familiar with,
18 agency rule interpretation issue where you have different
19 plaintiffs lawyers filing them with different designated
20 proposed class representatives, and it's likely a different
21 selection of target defendants. I could easily imagine
22 such a case arising involving a large number of cases and
23 with different tactical opinions about where it ought to be
24 handled.

25 CHAIRMAN BABCOCK: Bill.

1 PROFESSOR DORSANEO: Maybe people who know
2 more about this than I do think this is not a significant
3 issue, but it's perfectly clear that "related cases," the
4 definition covers all the so-called tag-along cases, so
5 when you're talking about filing and service, the language
6 in "related cases" there could mean cases identified in the
7 motion, perhaps only if it was clarified to say that, or
8 all of the cases that are out there. It seems to me that
9 we have to go with the cases identified in the motion or
10 make it clear that the motion does give the panel the
11 ability to pull in the remaining cases that it knows about
12 or learns about and to treat the cases that are discovered
13 later or that come up later as the tag-along cases, but
14 when I read the tag-along provision it seems a little too
15 automatic to me.

16 HONORABLE SCOTT BRISTER: We'll get to that.

17 PROFESSOR DORSANEO: And I think that's where
18 things need to be changed, but I also would suggest from
19 looking at all of this that it doesn't matter whether the
20 tag-along case, so called tag-along related case, was
21 subject to a motion. It would seem to be that the only
22 significant thing would seem to be whether there was an
23 order. In other words, defining a tag-along case as a
24 related case that hasn't been brought before the panel in
25 some way or another.

1 But all of those rule provisions, and I can
2 see why Pete was saying that probably why the Federal
3 definition is a little different in the motion thing
4 probably has something to do with that kind of an issue.
5 You get -- it's too ambiguous now as to when we're talking
6 about related cases but not tag-along cases and when we're
7 talking about all the cases; and to repeat, something needs
8 to be done to (e), or (c) rather, to make the motion
9 control or to make it perfectly plain that it's not the
10 motion that controls, it's the definition of related cases
11 that controls. Am I clear enough?

12 HONORABLE SCOTT BRISTER: Uh-huh.

13 PROFESSOR DORSANEO: I know Scott knows what
14 I'm talking about.

15 CHAIRMAN BABCOCK: Judge Gaultney, did you
16 have something?

17 HONORABLE DAVID B. GAULTNEY: I was just
18 wondering, I could see how adding a trial judge would not
19 really make a difference because the trial judge is usually
20 going to keep the cases for the definition of who can
21 request a transfer, and I kind of agree with the concept I
22 don't really want a trial judge involved in the advocacy
23 part of it. But what is the downside to having the MDL
24 panel having the ability -- I realize you don't have the
25 budget. I realize as a practical matter it may not come to

1 your attention, but it seems to me there might be a case in
2 which the MDL panel would want to raise it on its own, yet
3 it's not been asked to do it. I think perhaps it ought to
4 have the authority to say, "This group of cases looks like
5 this group of cases, and we want it briefed."

6 HONORABLE SCOTT BRISTER: David or somebody
7 want to answer that?

8 HONORABLE DAVID PEEPLES: Yeah. I will agree
9 with that and what Pete Schenkkan said a minute ago. The
10 Hunt County situation cries out for something like that,
11 and I can -- I hope this wouldn't happen, but it could be
12 that you have got a bunch of tread separation cases that
13 are before pretrial and then somebody files a collision
14 case against the driver of a car and they don't join
15 Firestone, but they get some third party discovery from
16 them which totally contradicts what the pretrial court was
17 trying to do, but nobody in this automobile collision case
18 has asked to be opted into this pretrial court. I think
19 that case somehow ought to come before the panel, and I can
20 see how the people in the cases pending before the pretrial
21 court might say to the panel, "We want this other case
22 brought in," or I can see how the third party discovery
23 entity might say, "We want the panel to bring these in,"
24 even though the parties in that case are not asking for it.
25 I think what Pete said the Federal rule allows probably

1 would solve this.

2 CHAIRMAN BABCOCK: Who was --

3 HONORABLE DAVID PEEPLES: Let the MDL do it
4 on its own. Issue a show cause order saying, "We're
5 thinking about bringing this case in. Tell us why we
6 shouldn't do it."

7 CHAIRMAN BABCOCK: Who was a proponent of
8 leaving the MDL panel out?

9 HONORABLE SCOTT BRISTER: I believe most of
10 the subcommittee voted that way. I don't think I voted,
11 but I mean, I'm in favor of just having the parties. I
12 just think there's something unseemly about me on the panel
13 being the judge deciding whether we're going to consolidate
14 them and being the prosecutor asking us to consolidate
15 them.

16 CHAIRMAN BABCOCK: Judge Gray, then Judge
17 Christopher.

18 HONORABLE TOM GRAY: One of the things we
19 were really struggling with at the point the decision was
20 made to take all of the judiciary out of who would file the
21 motion was just that, a judge filing a motion. That is why
22 the alternative, (h), is in here. It specifically
23 addresses when -- if that is the preference of a majority
24 of the entire committee where the judge, the panel, even
25 the administrative judge or the regional presiding judge,

1 could get involved in making a request; and I think it's in
2 Rule 11 that there's a concept of a motion or request; and
3 I had questioned why we needed a request because every
4 reference was made to a motion; and it led to this whole
5 conversation about the judges being in there.

6 And so in the context of filing a motion,
7 judges don't need to be in there. In the -- if you want a
8 judge to be able to make the request, then (h) seems to be
9 a more practical answer, because the one judge over in Hunt
10 County, if he wants his case over in this MDL panel
11 transfer order and it's not otherwise going to get there
12 unless he makes the request, he can make that request in a
13 much more informal manner to the panel and let the panel
14 order the parties to show cause why it shouldn't be
15 consolidated or something of that nature as opposed to
16 having the trial judge in one of these situations, a
17 maverick situation, have to go through the formalities of a
18 motion notifying all the parties and getting it over in
19 there, and so that's why there's kind of a dichotomy
20 between the motion for parties and a request under
21 alternative (h) for suggestions by judges.

22 CHAIRMAN BABCOCK: Judge Christopher.

23 HONORABLE TRACY CHRISTOPHER: My reason for
24 voting "no" on the judges, as I've already said, and with
25 respect to the MDL panel it's the same issue. I think

1 there's something unseemly about a panel reading in the
2 newspaper, "Oh, look, here's a hot new drug case. Let's
3 issue a show cause order and consolidate them all." You
4 know, I think we ought to wait for the parties to be
5 interested enough to follow this rule. I can't think of
6 another situation where a judge or a panel would be
7 exercising such authority, and I just don't think they
8 ought to have it.

9 CHAIRMAN BABCOCK: Yeah, you know, and having
10 been involved in a few of these things, there are a lot of
11 strategic -- a lot of strategic thinking about when you
12 request multidistrict on both sides of the docket, both the
13 plaintiffs and the defendants; and sometimes the thinking
14 is that you can solve the big picture more expeditiously
15 and for everybody by proceeding alone in a kind of a test
16 case, which when it's resolved then other cases will fall
17 behind. So if you automatically say that the multidistrict
18 panel ought to have this power and your rationale is
19 because that will always make it more efficient, sometimes
20 that may not be true. It may not make it more efficient.
21 It's just that the multidistrict panel doesn't know what
22 the parties are thinking and how they're collectively
23 trying to strategically pursue the litigation.

24 Judge Peeples.

25 HONORABLE DAVID PEEPLES: I agree that the

1 panel shouldn't be able to just reach out and start up a
2 pretrial court where there hasn't been one on any cases,
3 but where you have already got one, like the Hunt County
4 situation, it doesn't offend me for the panel to issue a
5 show cause order; and I mean, you know, the adversary
6 system has been modified a little bit by notions of
7 judicial management. It's kind of like some judges setting
8 time limits on voir dire even though the lawyers haven't
9 asked for it. That was aimed at you, Scott.

10 I think judicial management sometimes does
11 require a judge to do something even though the lawyers
12 didn't ask for it.

13 CHAIRMAN BABCOCK: John.

14 MR. MARTIN: David, I don't agree with that.
15 In the Hunt County situation I can assure you that the
16 airline involved would have moved to transfer it out of
17 there if there had been a procedure to do that. So that's
18 not a good example either.

19 HONORABLE DAVID PEEPLES: How about the
20 straight out automobile case where they're getting
21 discovery from the same people that are before the pretrial
22 court?

23 MR. MARTIN: The party being aggrieved by it
24 is going to ask for it.

25 HONORABLE DAVID PEEPLES: They don't have

1 standing here. Okay. A party in an existing pretrial case
2 can ask for another case to be brought in? If that's
3 clear, that's all I care about.

4 CHAIRMAN BABCOCK: Moving right along.

5 HONORABLE DAVID PEEPLES: So a party can file
6 a motion to bring in someone else's case?

7 HONORABLE SCOTT BRISTER: Clearly they can do
8 so at the outset. Whether they can do so as a tag-along is
9 a separate question we ought to get to when we get to
10 tag-alongs.

11 CHAIRMAN BABCOCK: Nina and then Richard.

12 MS. CORTELL: My feeling after thinking back
13 over lots of years of cases, there is the occasional case
14 for giving the judiciary the capability to act on its own
15 makes sense, but I think that's the exception; and we
16 normally try to craft rules that address the majority of
17 situations; and I think in the majority, great majority,
18 restricting the ability to transfer to the parties will
19 provide the remedy we're seeking.

20 CHAIRMAN BABCOCK: Yeah, Richard.

21 MR. ORSINGER: If I envision the tag-along
22 process correctly, there's no -- there's not going to be
23 any party control in the tag-along cases, so could -- if
24 there's two cases pending, theoretically, those two cases,
25 there could be motion to consolidate those two cases and it

1 will be decided and then every other case in the state,
2 even though they didn't have an opportunity to file any
3 kind of motion or anything else, they're automatically a
4 tag-along case.

5 HONORABLE SCOTT BRISTER: With an opportunity
6 to complain after transfer.

7 MR. ORSINGER: Well, the only complaint is,
8 is that you don't fall within the criteria of a common
9 issue of fact. So, in reality, we are not -- we do not
10 have party control most probably because the greater bulk
11 of these cases are going to be tag-along transfers that
12 operate by default; and you can't untransfer it because
13 you, in fact, have a common issue of fact, but you never
14 had an opportunity to argue consolidation or not; and in
15 reality I think it's illusory to think that we have party
16 control here, and -- I'm sorry.

17 HONORABLE SCOTT BRISTER: Tag-alongs, we're
18 going to get to tag-alongs. That's a special --

19 MR. ORSINGER: I know, but the argument now
20 as to whether we ought to have party-driven consolidation
21 or not, if that's the policy --

22 HONORABLE SCOTT BRISTER: Just at the start.
23 Just at the start.

24 MR. ORSINGER: Just on the first two cases
25 that are filed?

1 HONORABLE SCOTT BRISTER: Just on the
2 first -- tag-along, there's a lot of discussion. Just to
3 preview it, the problem is going to be if everybody --
4 currently under the tag-along system in Rule 11 you keep
5 asking the administrative judge and they conditionally
6 transfer them and then you have a chance to object to the
7 presiding judge and have a hearing with the presiding
8 judge. That's not going to work with the MDL panel.

9 No. 1, it's statewide, it's not just in your
10 region. No. 2, if every tag-along case has to be signed by
11 three judges in five different cities, that means, okay,
12 the first hundred breast implant case orders and the next
13 week you've got an order for 17 new ones and the next week
14 23 new ones and the next week 37 new ones, and for the next
15 five years we're going to have to continue transferring
16 orders by order of three judges in five different cities
17 with no budget.

18 We will get to that on tag-along, but I feel
19 strongly that ain't going to work. We're going to have to
20 have something more automatic than that, but we do
21 recognize the point that somebody who gets jerked out into
22 a pretrial court with no notice and no hearing needs notice
23 and a hearing and a chance for somebody to say "no" and
24 remand them, but that's really all a tag-along question.
25 This is --

1 MR. ORSINGER: No. Wait a minute. Wait a
2 minute. I understand that policy, and we can fight it when
3 we get there, but we're sitting around the table here
4 talking about it as if we have party control in this
5 system, and it seems to me like we have party control only
6 on the first two cases that are filed and then we have
7 default judicial control in all the rest of the cases, and
8 so I personally think the trial judge ought to be able to
9 initiate this process in addition to the parties, but all
10 I'm pointing out is, is that we're talking as if we're
11 allowing the lawyers to decide whether to play this game or
12 not. In reality we're only allowing the lawyers in the
13 first two lawsuits to decide and then everybody else
14 automatically goes along.

15 HONORABLE SCOTT BRISTER: I don't know how
16 the panel is going to operate, but I have difficulty
17 imagining normally if I'm going to spend a lot of time when
18 I get a brief saying there is two cases and we definitely
19 need these consolidated, I mean, the question is going to
20 be how many more are there out there? "Well, Judge, there
21 are probably thousands."

22 "Well, did you give any of those people
23 notice?"

24 "No. We just wanted you to decide on these
25 two."

1 I mean, you know, we're not suckers. We know
2 how this thing is going to work, and I would not think the
3 panel would be easily misled by two small-time folks
4 getting together to do this without claiming there are
5 thousands of cases who aren't here represented in any of
6 the motions. Surely somebody is going to say, "Well, can
7 we hear from those folks, too?"

8 CHAIRMAN BABCOCK: Who are you calling
9 small-time folks? Stephen.

10 MR. TIPPS: There is -- and I'm going back to
11 Alex's point, but I think it's relevant to what we were
12 just talking about. There is an inconsistency between
13 13.2(b)(1) in which we're asking that the party filing the
14 motion provide case information only for those of the
15 broadly defined related cases, quote, "for which transfer
16 is sought." So theoretically that could mean in the
17 example that was being thrown around identifying only the
18 two cases, even though there is knowledge that there are a
19 thousand more; and that's inconsistent with 13.2(c) with
20 regard to notice in which the obligation, it would appear,
21 as Bill points out, is to give notice to parties in all
22 related cases.

23 PROFESSOR DORSANEO: Except it doesn't say
24 "all."

25 MR. TIPPS: The broadly defined term just

1 says "related cases." I'm wondering if we need to consider
2 imposing an additional obligation on the movant to identify
3 by cause number not only those related cases for which
4 transfer is sought, but also to provide at least some
5 information or a description of other known related cases
6 in order to assure that the panel is not put in a position
7 in which it is called upon to make what could be a
8 far-reaching decision without full knowledge of what's
9 going on.

10 CHAIRMAN BABCOCK: And if there was such a
11 requirement, Stephen, would that influence your decision
12 about whether the MDL panel or the trial court had the
13 ability to transfer themselves?

14 MR. TIPPS: Had the ability to request a
15 transfer?

16 CHAIRMAN BABCOCK: Yeah.

17 MR. TIPPS: I really don't -- I think that's
18 a separate question, but I'm very sensitive to Scott's
19 concern about somebody trying to get the panel to make a
20 ruling that would -- you know, by picking the plaintiff's
21 lawyer whom he wants to deal with and leaving out Mithoff &
22 Jacks.

23 CHAIRMAN BABCOCK: Because nobody wants to
24 deal with them.

25 MR. TIPPS: I mean, before it makes a

1 widespread decision he needs to make sure that everybody
2 who has got a real interest in it weighs in.

3 CHAIRMAN BABCOCK: Yeah, but in practice --
4 and, Pete, maybe you know the answer to this -- isn't it
5 true that when you're trying to get MDL status the more
6 cases you can show, the better for you, because you're
7 going to win your motion because you can say, "There are a
8 whole bunch of cases, Judge." When you go in with only
9 two, whether you disclose that there are more or not, your
10 chances of success if you're a proponent of MDL are
11 decreased.

12 MR. TIPPS: I think that's right.

13 PROFESSOR DORSANEO: But there's going to be
14 nothing more tactical than this practice.

15 CHAIRMAN BABCOCK: Well, no question about
16 that.

17 PROFESSOR DORSANEO: So, I mean, I know what
18 I would do. If I had the opportunity I would evaluate
19 what's the best way to avoid difficulties, and that might
20 be by leaving some people out and just getting them be
21 surprised later that they're tagging along.

22 HONORABLE SCOTT BRISTER: Well, and the
23 question is what's the alternative? I had done the
24 original draft of this rule, and I had you have to have all
25 cases and cause number, attorneys of all related cases that

1 you had knowledge of. Nobody liked that because then you
2 turn, you know, what did he know, when did he know it; and
3 the thought was at our initial committee meeting that the
4 people involved in these cases know there's a downside to
5 excluding somebody and that something is going to happen if
6 somebody can show it was done for strategical purposes
7 that's going to get them in trouble and that the normal
8 notice and service rules -- this is a motion. We've got
9 lots of case law on who you have to serve motions on and
10 that that would take care of the, you know, should have
11 known.

12 And besides, what if you -- you know, do you
13 want to write a rule that not only do you give notice of
14 all the parties you want transferred but all of the parties
15 you think are going to be in these cases in the future but
16 haven't been filed? You know, it just becomes impossible
17 to talk about all -- giving service on people who aren't
18 currently but may someday be a party in this litigation.
19 It's just hard to draft an alternative, but if anybody has
20 got any ideas, I would be happy to hear it.

21 CHAIRMAN BABCOCK: If people have got MDL
22 experience, I would be interested in hearing because the
23 cases -- the MDL cases I've been involved in, once you make
24 the decision to ask for MDL, there is not much advantage to
25 leaving anybody out because you don't -- if you're going to

1 go MDL, you don't want a stray case here and there because
2 you have no control over what that trial judge is going to
3 do with pretrial, and it may mess up your whole idea about
4 what you want to do. Pete.

5 MR. SCHENKKAN: That's right, and then the
6 tag-along practice is that the fights of the tag-along are
7 few and far between, and the fights that occur are fights
8 that occur because there is a genuine question whether that
9 particular case belongs with the related case group or not,
10 and that's usually the same reason why it wasn't included
11 in the proponent's list the first time. A lot of times it
12 wasn't he didn't know about it at all, but it just wasn't
13 obvious enough that it had the same -- he knew about it,
14 looked at it, and made a conscious decision "This one is
15 not common. If I throw this one in my list I'm going to
16 impair my chance of getting the whole thing consolidated.
17 I'm going to draw one set of lawyers that are going to
18 argue my facts are different and my convenience of parties
19 and witnesses is different. This makes no sense."

20 So I think this is a separate question from
21 whether the MDL panel ought to have the sua sponte power to
22 deal with some situations, and on that I'm in favor of
23 giving them this power, however rare it is they may choose
24 to use it, but I don't think this problem of the tactical
25 practice by the proponents at this level, which ones they

1 include in their potential related cases, is going to be a
2 problem.

3 CHAIRMAN BABCOCK: Judge Christopher and then
4 Bill.

5 HONORABLE TRACY CHRISTOPHER: Well, I just
6 want to say that we used the format of the current Rule 11,
7 which has been in effect since 1997 and is working and
8 hasn't caused a lot of problems with respect to who you
9 give notice to. So no offense, but, you know, all these
10 would-be possibility, maybe going to happen, we have had
11 this rule for six years now in essentially this format,
12 tweaked slightly to cover the whole state, and it's okay.
13 No one is complaining that they're somehow not getting
14 notice, that they're being unfairly put into a regional
15 coordination.

16 CHAIRMAN BABCOCK: So basically "chill out."

17 HONORABLE TRACY CHRISTOPHER: Yes. That's my
18 suggestion.

19 CHAIRMAN BABCOCK: Bill, a noted mellow
20 chiller.

21 PROFESSOR DORSANEO: I think what Stephen
22 Tipps said about (b)(1), you know, why does it say "for
23 which transfer is sought"?

24 HONORABLE TRACY CHRISTOPHER: Because Stephen
25 Tipps asked for that in our meeting.

1 MR. TIPPS: I wanted it down in (c), too.

2 PROFESSOR DORSANEO: It has to be -- you have
3 to go one way or the other, talk about the cases in the
4 motion or talk about all the cases, which, of course, would
5 mean all of the cases you know about, not, you know, all
6 the cases in some larger cosmic sense.

7 HONORABLE SCOTT BRISTER: Mr. Chairman, I
8 might suggest, you know, we do (a) first and then --

9 CHAIRMAN BABCOCK: I was just getting ready
10 to get to that same point.

11 HONORABLE SCOTT BRISTER: And then the (h) is
12 a separate, because I don't think anybody on our
13 subcommittee wanted -- if the panel or the judges can ask
14 for it, I don't think anybody wanted them filing motions
15 and briefs and requesting hearings, so that's -- we put
16 that in (h). We might address (a), then see who wants to
17 do (h) and then move onto the other.

18 CHAIRMAN BABCOCK: I think that's a good way
19 to proceed. So far we have changed (a) to say "motion,"
20 comma, "response and reply."

21 HONORABLE SCOTT BRISTER: Right.

22 CHAIRMAN BABCOCK: And we have also had a
23 proposal that has been not only seconded but thirded to say
24 "any party in a related case may file," and that's on the
25 table.

1 HONORABLE SCOTT BRISTER: And our proposal
2 was for 20 and 10 and to omit the two bracketed italicized
3 parts.

4 CHAIRMAN BABCOCK: Right. So those are the
5 three issues that we have on this subpart. Judge Gray.

6 HONORABLE TOM GRAY: I would like to deal
7 with only the pending motion.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE TOM GRAY: And it goes back to
10 something Pete said maybe 45 minutes ago that caused me
11 some concern about predefining related cases and what cases
12 are in here. Actually if we dropped out the term "related"
13 almost throughout this entire rule, or excuse me, this
14 entire subsection, it cleans up the problem of allegedly
15 related or who can -- the context in filing a motion where
16 you've already predecided that it's a related case.

17 Taking Stephen's suggestion and modifying it
18 slightly, it would simply read, "Any party in a case may
19 file a motion for transfer." Further down as to who can
20 file a reply it would be "any party" -- I suggest "or
21 interested person."

22 HONORABLE SCOTT BRISTER: Tom, don't you
23 think you will get amici?

24 HONORABLE TOM GRAY: Pardon?

25 HONORABLE SCOTT BRISTER: You know, what if

1 I, just activist lawyer, I'm a lawyer in a case but I've
2 never been in a breast implant, but I think they ought to
3 put all of these breast implant ones together?

4 JUSTICE HECHT: No. What you --

5 HONORABLE TOM GRAY: Well, when you get to
6 the definition of the motion you're going to deal with
7 limitations on what's got to be in the motion and --

8 JUSTICE HECHT: What you would say is a party
9 -- "any party in a case may file a motion to transfer to
10 pretrial court for consolidated or coordinated pretrial
11 proceedings with a related case pursuant to this rule."

12 HONORABLE TOM GRAY: Well, even that
13 prejudices that the other case is --

14 MR. LOW: Related.

15 HONORABLE TOM GRAY: -- a related case.

16 JUSTICE HECHT: "A case claimed to be."

17 HONORABLE TOM GRAY: Well, in the alternative
18 you could put "allegedly" in front of each of these in the
19 first part of the rule or something of that nature. I was
20 just trying to point out that I think Pete's right,
21 because, for example, as currently drafted, anybody who
22 files a response, you could argue has judicially admitted
23 theirs is a related case by the way it's actually worded.

24 CHAIRMAN BABCOCK: Well, but what you're
25 saying is that because of this language because I am a

1 party in a -- what I think is a related case, therefore, if
2 I move under this rule, that the game is over.

3 HONORABLE TOM GRAY: No. You're alleging
4 it's a related case. You've made that determination, so
5 you filed the motion. Where it really hit home with me
6 after Pete's comment was reading who gets to do the
7 response, and it's any party in a related case.

8 CHAIRMAN BABCOCK: But their response is
9 going to be, you know, "This is not a related case and it
10 ought not to be consolidated." Just because of this rule
11 they're not going to be estopped from making that argument.
12 That's why they're filing the response.

13 HONORABLE TOM GRAY: Okay.

14 CHAIRMAN BABCOCK: I mean, to me we're
15 solving a problem that is not there in the rule as drafted.
16 I mean, for the sake of some purity, but -- Pete.

17 MR. SCHENKKAN: Well, some of us are bothered
18 by it, and it does seem easily solvable. "Any party in the
19 case may file a motion to transfer specified cases to a
20 pretrial court for consolidated or coordinated
21 proceedings." "Within 20 days," or 30, "any party in any
22 such case may file a response," which is easily listed.
23 Then the motion must state the cause number of the cases,
24 just drop "related" out. "For which the transfer is
25 sought."

1 In the filing and service, "A copy of the
2 motion must be filed with the MDL clerk and served on all
3 parties in the specified cases for which transfer is
4 sought." It's only once you get down to the actual order
5 where the MDL panel has determined which cases are, in
6 fact, related and aren't just related but are such that it
7 also meets the standards that you need to move to "related
8 cases" I think.

9 CHAIRMAN BABCOCK: Okay. Bill, then Stephen.

10 PROFESSOR DORSANEO: Maybe this was a problem
11 with approving the definitions to begin with, but I need to
12 know whether we're going to have more to it than just a
13 common question of fact by reference to these factors that
14 are on the, you know, back of the second page, the fourth
15 page, or some of these other claims. I don't know enough
16 to know what to do about the motion.

17 CHAIRMAN BABCOCK: Yeah. We've got to start
18 somewhere, you know. I mean, we can go back if we change
19 our mind.

20 PROFESSOR DORSANEO: But I think this is a
21 particularly tough spot because I don't know what's
22 involved in deciding whether to grant or deny the motion.

23 HONORABLE SARAH DUNCAN: What kinds of cases
24 are going to be subject to transfer.

25 CHAIRMAN BABCOCK: Stephen.

1 MR. YELENOSKY: I would just offer some
2 wordsmithing for Judge Brister's problem. If you said,
3 "Any party in a case may file a motion for transfer of that
4 case and related cases," and that would prevent the amici
5 problem, wouldn't it, for somebody who is not in a case
6 they even purport to be related to a party in some other
7 case, as Judge Brister said, saying, well, you know -- as
8 Judge Brister said, "I have an interest in consolidating
9 these breast implant cases. I think I do, although I'm not
10 involved in that case." If you said "a motion to transfer
11 of that case."

12 CHAIRMAN BABCOCK: Okay. "Any party in a
13 case" --

14 MR. YELENOSKY: "May file a motion."

15 CHAIRMAN BABCOCK: "May file a motion for
16 transfer."

17 MR. YELENOSKY: "Of that case and related
18 cases."

19 CHAIRMAN BABCOCK: "Of that case and related
20 cases to a pretrial court for consolidated or coordinated
21 pretrial proceedings pursuant to this rule." That's how
22 you would do it?

23 MR. YELENOSKY: That's my suggestion. I
24 don't know whether it works or not.

25 PROFESSOR DORSANEO: I think it's better.

1 CHAIRMAN BABCOCK: What do you think, Judge
2 Brister?

3 HONORABLE SCOTT BRISTER: Well, I like what
4 we have here because I think if we look at that, we'll
5 start --

6 CHAIRMAN BABCOCK: Here's what we'll --

7 HONORABLE SCOTT BRISTER: What if I'm -- you
8 know, there's 12 defendants but we've served 11, but we've
9 got an agreement to hold off serving the 12th? So they are
10 not officially a party. Shouldn't they be able to ask?
11 I'm just -- I mean, I think we're trying to address
12 imaginary situations. Everybody knows who these are.
13 You're a party in one of the related cases. You're a party
14 in the breast implant, tire tread separation cases, those
15 are people that ask for it. That's pretty straightforward,
16 and while one could draw up a law school exam question that
17 might make it difficult, it's not going to be difficult in
18 fact.

19 CHAIRMAN BABCOCK: How about this? What if
20 we do this, because obviously Pete and some others are
21 troubled by this language, but maybe not everybody is. Why
22 don't we just get a sense of the committee about how people
23 feel about the sentence as drafted with one amendment.
24 "Any party in a related case may file a motion for transfer
25 to a pretrial court for consolidated or coordinated

1 pretrial proceedings pursuant to this rule." What if we
2 have a show of hands of who is in favor of that sentence?
3 That work for you, Judge?

4 HONORABLE SCOTT BRISTER: Sure.

5 CHAIRMAN BABCOCK: Everybody who is in favor
6 of that first sentence, which we have modified just
7 slightly. "Any party in a related case may file a motion
8 for transfer to a pretrial court for consolidated or
9 coordinated pretrial proceedings pursuant to this rule."
10 Everybody in favor of that raise your hand.

11 Are you up, Judge Gray, or not?

12 HONORABLE TOM GRAY: I'm trying to figure out
13 what the alternative is, what's there or --

14 JUSTICE HECHT: More like Pete's. The
15 alternative's more like Pete's.

16 MR. LOW: You never know what the alternative
17 is.

18 CHAIRMAN BABCOCK: Everybody who doesn't like
19 the language raise your hand. Are you up, Anne?

20 MS. McNAMARA: I'm up.

21 PROFESSOR DORSANEO: I'd vote for it if I
22 liked it better.

23 CHAIRMAN BABCOCK: The committee has voted 14
24 to 7 in favor of the language that's there.

25 HONORABLE TOM GRAY: The modified language

1 that's there.

2 CHAIRMAN BABCOCK: Yeah. With -- yeah.

3 HONORABLE SCOTT BRISTER: Right.

4 CHAIRMAN BABCOCK: Inserting the word "a" and
5 taking it into case singular. I think the Court probably
6 has enough of a benefit of the seven dissenters to know
7 whether they want to accept the dissent on this. Don't you
8 think?

9 JUSTICE HECHT: I think so.

10 CHAIRMAN BABCOCK: So let's move on to the
11 time limits real quickly and then we'll take our morning
12 break.

13 HONORABLE SCOTT BRISTER: I propose we drop
14 "30" and "or the trial court."

15 CHAIRMAN BABCOCK: Okay. What's everybody
16 think about that? Richard, you feel strongly about that?

17 MR. ORSINGER: I'd like to say several
18 things. One is, instead of --

19 CHAIRMAN BABCOCK: Why doesn't that surprise
20 anybody?

21 MR. YELENOSKY: Take us right up to the
22 break, Richard.

23 MR. ORSINGER: I think instead of the word
24 "transfer" we should use the word "assignment" because
25 people may want their court where it's pending to be the

1 place where it's consolidated, and so I'm proposing that
2 throughout we change "transfer" to "assignment."

3 Secondly, I don't care about 20 or 30, but I
4 do care that I think we ought to discuss whether a trial
5 judge, even if they can't file a motion, whether they can
6 file a response. It seems to me like the trial judge might
7 want to say that "This is on the trial docket and I'm
8 planning to get it tried within 60 days and I prefer not to
9 have it consolidated so I can get it off my docket" or
10 whatever. Just give them an opportunity to have some input
11 to the MDL panel.

12 CHAIRMAN BABCOCK: Let's confine this to the
13 issue of 30 days versus 20 and whether we add the trial
14 court as somebody who can file a response.

15 Justice Duncan.

16 HONORABLE SARAH DUNCAN: Does the bracketed
17 "or the trial court" vote also decide the subsection (h)
18 vote?

19 HONORABLE SCOTT BRISTER: No. I hope not.

20 CHAIRMAN BABCOCK: No.

21 HONORABLE SCOTT BRISTER: We ought to
22 consider it separately.

23 HONORABLE SARAH DUNCAN: Okay. That's a
24 separate --

25 CHAIRMAN BABCOCK: Separate issue. Judge

1 Gray.

2 HONORABLE TOM GRAY: There was actually an
3 alternative suggested by a public member, Steve Stokes, in
4 an e-mail that I had not considered, frankly, until I
5 received his e-mail; and that's that no response is
6 required until after requested by the panel; and, Scott, I
7 would suggest that given the cost constraints and the cost
8 of filing response and all of the persons who may be
9 involved, this may be an appropriate suggestion, much like
10 a mandamus. If the panel thinks there's something there
11 then maybe we ask for a response, but otherwise, let
12 the MDL panel deny the motion on the motion and then do a
13 very abbreviated period for response, maybe 10 days, but
14 that's drastically different than what's drafted.

15 HONORABLE SCOTT BRISTER: I certainly could
16 take that. I mean, I'm a slave to the statute, and it
17 says, "The concurrence of three panel members is necessary
18 to any action taken by the panel." I think there's an
19 argument that even to ask for briefs you've got have three
20 people sign it, so my ax in drafting this rule was to make
21 everything as automatic as humanly possible except in
22 extraordinary critical junctures, and just for asking for a
23 response, even if it's an issue that we have to get three
24 judges to sign it to ask for a response, forget about it.
25 Just file a response.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HONORABLE SARAH DUNCAN: I don't understand
3 why this is such an impediment, this getting three judges
4 to sign something in a digital age. You're very facile
5 with e-mail. I think --

6 HONORABLE SCOTT BRISTER: You should see how
7 long it takes in my court to get three judges to sign a
8 dismissal in a case because people are on vacations and
9 people have on their desk a stack of stuff to be signed
10 this high, and it can take weeks. That's why -- maybe all
11 the other courts of appeals are faster than that, but you
12 know, there's always going to be somebody on the committee
13 that loses the mail and --

14 HONORABLE SARAH DUNCAN: Well, are you not
15 planning on using e-mail and digital signatures for these
16 orders? No?

17 HONORABLE SCOTT BRISTER: I mean, the same
18 thing could be said about people and their e-mails perhaps.
19 Not any current members of the MDL panel, of course.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: Given the magnitude of the
22 number of cases that may be involved, requiring or
23 expecting everyone to file a response may overwhelm you
24 with paperwork which the clerk has then got to get out to
25 the MDL panel and they have got to store until they can

1 read. The Supreme Court on its application for a petition
2 for writ of -- petition for review has assured the
3 appellate Bar that it's okay if you don't file a response
4 and just sit around and see if we're going to dismiss it,
5 and we promise you that if we are not going to dismiss it
6 we'll advise you we want you to file a response before we
7 do, and I think that a lot of appellate lawyers, myself
8 included, in a lot of cases just won't file a response
9 until we figure out if the Supreme Court cares, and it may
10 require you to have some standing orders that maybe you
11 could have a signing party every 90 days or something where
12 you sign a bunch of these in blank or something, but you
13 can save yourself a lot of paperwork --

14 (Laughter.)

15 CHAIRMAN BABCOCK: A signing party. Where
16 does that go in the rule?

17 MR. ORSINGER: You can save yourself a lot of
18 paperwork if you don't have 30 or 80 or 400 replies filed
19 every time someone files a motion.

20 CHAIRMAN BABCOCK: Okay. Anybody feel
21 strongly about 20 versus 30 days? Bill.

22 PROFESSOR DORSANEO: Well, I don't feel
23 strongly about it, but in the recodification we tried to
24 get away from 20 days and talk about 30 days as our normal
25 number of days, so if anybody is influenced by 20 days

1 being kind of a part of our answer day practice, I don't
2 think that's a permanent condition.

3 CHAIRMAN BABCOCK: Anybody else feel strongly
4 about -- or even moderately strongly about 30 days versus
5 20? Let's vote on that. How many people want 20? Raise
6 your hands. Kent, you up?

7 MR. SULLIVAN: (Shakes head.)

8 CHAIRMAN BABCOCK: Okay. How many people
9 want 30?

10 20 has it by the narrow vote of 13 to 11, the
11 Chair not voting.

12 Okay. Now, the trial court, the trial court
13 getting to file a response. Any more discussion on that?

14 All right. How many people want to take the
15 trial court out of this rule?

16 How many people want to leave the trial court
17 in the rule? By a vote of 22 to 2 --

18 PROFESSOR CARLSON: Three.

19 CHAIRMAN BABCOCK: Three. Oh, Gilstrap, a
20 late hand.

21 MR. GILSTRAP: I was right on time. I was
22 right on time.

23 CHAIRMAN BABCOCK: By 22 to 3, the Chair not
24 voting, the "trial court" language will be deleted, and
25 that should finish our work on subparagraph (a), subject to

1 the fact that this is a big complicated rule. If we change
2 something later, we may have to go back --

3 HONORABLE SCOTT BRISTER: Right.

4 CHAIRMAN BABCOCK: -- and fix something here.
5 So let's take our morning break.

6 (Recess from 10:49 a.m. to 11:05 a.m.)

7 CHAIRMAN BABCOCK: All right. We're back on
8 the record, and we've made substantial progress all the way
9 to 13.2(b).

10 MR. SCHENKKAN: Mr. Chairman?

11 CHAIRMAN BABCOCK: Yes.

12 MR. SCHENKKAN: Before we leave (a), there
13 was one item that wasn't flagged.

14 CHAIRMAN BABCOCK: Silly me.

15 MR. SCHENKKAN: The last sentence "Within 10
16 days of service of a response, any party supporting
17 transfer may file a reply." Given the way the response
18 thing is set up, some of the responses may be supporting
19 the transfer and some of the replies, therefore, may be
20 people opposing the transfer. I would simply say "Within
21 10 days of service of a response, any party may file a
22 reply."

23 CHAIRMAN BABCOCK: What do you think about
24 that, Scott?

25 HONORABLE SCOTT BRISTER: I think that's

1 fine.

2 CHAIRMAN BABCOCK: Okay. Anybody object to
3 that?

4 HONORABLE SARAH DUNCAN: Mr. Chairman?

5 CHAIRMAN BABCOCK: Yes.

6 HONORABLE SARAH DUNCAN: I have belatedly
7 figured out what my role on the subcommittee was to have
8 been. I think.

9 CHAIRMAN BABCOCK: Gadfly.

10 HONORABLE SARAH DUNCAN: But I just would
11 like to point out that, particularly in light of what
12 Justice Hecht said, that he at least is envisioning that
13 this might apply to five related cases, that we simply
14 can't make the same assumptions for a statewide
15 multidistrict litigation system that might apply to five
16 cases that we would make in Houston for thousands of cases.
17 We're not necessarily talking about just the more
18 sophisticated practitioners at Mithoff & Jacks and Baker
19 Botts. We could be talking about a recent South Texas
20 graduate practicing as a solo practitioner in Longview who
21 might not be connected with the plaintiff's Bar or the
22 defense Bar, who might not know that all these other
23 thousands of cases are pending or that her case is not
24 unique. And I want to make this comment before we get to
25 (b), because to assume that a movant or a respondent knows

1 that there are a lot of related cases or where they're
2 pending I think is a very dangerous assumption when you're
3 talking about projecting multidistrict litigation statewide
4 to as little -- as few as five related cases.

5 CHAIRMAN BABCOCK: Justice Hecht, your name
6 was invoked while you were out.

7 JUSTICE HECHT: I didn't do it.

8 CHAIRMAN BABCOCK: Okay. Subparagraph (b).

9 JUSTICE HECHT: Yes.

10 HONORABLE SCOTT BRISTER: The -- two things.
11 First on the brackets, No. (6), is the issue of whether the
12 movant or anybody else should suggest the court to which
13 transfer is sought. The committee recommended not, No. 1,
14 because the appearance of handpicking your judge and forum
15 shopping and I think also a subsidiary idea that the idea
16 behind HB 4 may not be so much, "Gosh, it's terrible having
17 all these cases in Del Rio, it's easier to fly into San
18 Antonio," but that wherever the cases are, Del Rio or
19 Plainview, that they need to be coordinated by somebody who
20 can handle and coordinate a bunch of schedules, that it may
21 not be a -- it may be the assignment will be more of a
22 personal assignment based on the qualities of the district
23 judge to which they're transferred rather than the location
24 of the district judge, and that makes it especially
25 unseemly if the movants and respondents say "and the only

1 person in the state that can handle this is Judge
2 Christopher," that it just looks bad when you, in fact, do
3 transfer that.

4 HONORABLE TRACY CHRISTOPHER: I want to file
5 a response. "No."

6 HONORABLE SCOTT BRISTER: Then there is a
7 typo. Following (6) it should be -- instead of "any
8 motion, request, or response" it should be "any motion,
9 response, or reply." Sorry about that.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE SCOTT BRISTER: And the last issue
12 then is the incorporating from the TRAP rules the form and
13 time limits, and the committee recommends -- everybody
14 recommended to follow the form, which is the, you know,
15 what typeface size and don't cheat the page limits by
16 shrinking the margins, and the page limits would be similar
17 to those of a petition to the Supreme Court.

18 Our model here was the form of appellate
19 briefing, rather than trial court motion practice, thinking
20 that that would -- again, the less paper the better, that
21 it's more of a -- this is more of the kind of thing you
22 would want to discuss with lawyers, how are we going to
23 handle this many cases, rather than something you're going
24 to want to decide based on testimony. How hard is this
25 really for these witnesses to travel for deposition in such

1 and such a place, and that it might suggest more of the
2 brief where all the evidence is in the record that may or
3 may not be filed as opposed to a motion where you give us
4 the motion and all the attached stuff, which may be much
5 more voluminous.

6 CHAIRMAN BABCOCK: Okay. Is it correct that
7 in the Federal practice it is customary to suggest a judge
8 to transfer the case to? I think that's true.

9 MR. JACKS: Yeah. In fact, there's usually
10 competing suggestions for judges that different lawyers or
11 parties favor, and there's a lot of politics involved.

12 CHAIRMAN BABCOCK: And strategy.

13 MR. JACKS: Yeah, that, too. I mean, it's
14 really a process that it would be hard to be proud of.

15 CHAIRMAN BABCOCK: John.

16 MR. MARTIN: Yeah, well, in the airline MDL
17 litigation, which is about the only MDL litigation I know
18 about, that's not been my experience. I don't think I've
19 ever seen a motion filed by plaintiff's lawyer or defense
20 lawyer that asks for MDL transfer to a particular judge,
21 but what does happen and what is usually a fairly hotly
22 contested issue is what location, what locale the MDL
23 should go to, and I do think the parties -- I agree, the
24 parties should not be able to ask for a particular judge,
25 but I do think the parties should have the right to at

1 least suggest or ask for a location for the multidistrict
2 proceedings to take place because there may be -- the
3 parties may know things about where the witnesses are or
4 where huge numbers of documents are or that sort of thing.

5 HONORABLE SCOTT BRISTER: And we did not mean
6 to ban them. I would expect it would be perfectly
7 appropriate to say that all the lawyers are from Houston or
8 Dallas or from out of state and we need a place we can fly
9 into. The question is just whether it should be something
10 you have to say in your brief, and we did not go that far.

11 CHAIRMAN BABCOCK: Pete.

12 MR. SCHENKKAN: I think there's some value to
13 requiring it, because what the process of making
14 recommendations about where the case should go does, is it
15 does two things of great value. One is it gives the MDL
16 panel some information about at least what one side, and if
17 it's opposed then at least one other side, thinks are the
18 places that it might ought to go and why; and, two, the
19 process of having to state your reasons why it ought to go
20 to that place is a real good reality check on your claim
21 that it's an MDL case at all.

22 CHAIRMAN BABCOCK: Uh-huh. Yeah.

23 MR. SCHENKKAN: So I'm in favor of it,
24 although I agree that I think it could be unseemly if
25 you're asking for specific judges. You can get some way

1 away of that in at least cases where you're asking that it
2 go to some major metropolitan area.

3 CHAIRMAN BABCOCK: Well, you have to be
4 somewhat clever about how you ask for a particular judge,
5 because if your petition says, "By the way, send it to
6 Judge Jones because Judge Jones always rules for defendants
7 in these cases," that's not going to be persuasive, but I
8 just saw one that was granted where the petitioners said
9 "Send it to a particular judge because the central issue
10 here is going to be the epidemiology of a particular
11 product and what it causes, and she has had a case for two
12 years where there have been 10 epidemiologists who have
13 testified before her. She's done Daubert hearings, and she
14 is an appropriate judge for that reason," and they granted
15 it and sent it to that judge. So there can be instances
16 where it's not unseemly and there's good reason to do it.

17 Bill.

18 PROFESSOR DORSANEO: Well, this -- you know,
19 in our Administrative Rule 11 it doesn't say to where the
20 transfer is sought and it seems kind of odd to file a
21 motion to transfer to somewhere, so I would say we could
22 put (6) in, and I've seen motions where people don't have
23 that in there, and I would wonder how you deal with those
24 motions, and if you leave it out and suggest to people that
25 maybe there's something wrong with requesting a particular

1 court or particular locale, which I think means the same
2 thing in the way our system is set up with one judge
3 courts.

4 CHAIRMAN BABCOCK: Stephen and then Alex.

5 MR. TIPPS: I think the advantage of limiting
6 the context to (1) through (5) is that those are basically
7 the criterion that the statute suggests should be the basis
8 for the MDL panel's decision, and I think we're
9 underestimating the quality of the lawyers who are going to
10 be filing these. If we start trying to suggest what they
11 ought to include in their argument with regard to (4),
12 which is where the gist of the argument is always going to
13 be, and it seems to me that there are going to be cases in
14 which the primary argument is going to be all these cases
15 need to be in Dallas, and if that's the case then that
16 argument will be made.

17 And there may well be the somewhat unusual
18 case like yours or like what you mentioned in which it all
19 needs to be before a particular judge, but I think (4)
20 basically creates the opportunity for lawyers to make
21 whatever argument needs to be made, and I don't think we
22 ought to draw attention to the idea that you ought to be
23 picking a court, so I would be in favor of leaving those
24 things out.

25 CHAIRMAN BABCOCK: Yeah, good. Richard.

1 MR. ORSINGER: Let me ask a question. Is it
2 anticipated the MDL panel would pick a specific court, or
3 would they refer to a locale like Harris County and allow
4 the local presiding judge system to assign the case?

5 HONORABLE SCOTT BRISTER: Our assumption was
6 that we would pick a judge.

7 MR. ORSINGER: Okay. Now, pick a judge and
8 pick a court are two different things.

9 HONORABLE SCOTT BRISTER: Right. And an
10 issue we'll get to, because the question is can under the
11 statute you have retired or former judges, and we've got
12 that we'll get to.

13 MR. ORSINGER: Well, what do you do in a
14 multiple judge county like Harris, Bexar, Dallas, where
15 they can sit in each other's courts all the time?

16 HONORABLE SCOTT BRISTER: I think everybody
17 -- we have that addressed here. Everybody on our committee
18 agreed it is assigned to Judge Christopher of the 295th
19 District Court, and we mean Judge Christopher and not a
20 visiting judge who's there for a week.

21 MR. ORSINGER: And not another sitting in the
22 the same county?

23 HONORABLE SCOTT BRISTER: Or somebody trading
24 in for them, or in San Antonio somebody rotating in on the
25 case.

1 CHAIRMAN BABCOCK: As much as Judge Bland
2 would want it, she doesn't get that case.

3 MR. ORSINGER: Okay. I would also suggest we
4 require the motion to set out the name and address of the
5 counsel or at least the lead counsel for every party so
6 that --

7 CHAIRMAN BABCOCK: Let's work on (6) first,
8 Richard.

9 MR. ORSINGER: Oh, just (6)? Excuse me.

10 CHAIRMAN BABCOCK: Let's work on that and
11 then you can come in with some other stuff. Anything more
12 on (6)? David Peeples.

13 HONORABLE DAVID PEEPLES: Well, I'm opposed
14 to (6). I think it would be embarrassing to be a judge
15 that wanted -- to single out to go to, but the point is
16 not --

17 CHAIRMAN BABCOCK: "Because Judge Peeples is
18 fair and judicious and always rules properly in cases, we
19 want Judge Peeples."

20 HONORABLE DAVID PEEPLES: The point of these
21 motions is not --

22 HONORABLE SCOTT BRISTER: Or the defendants
23 want Judge Peeples or the plaintiffs want Judge Peeples or
24 something like that. That's what --

25 HONORABLE DAVID PEEPLES: The point is not

1 that the case ought to go somewhere, but that it shouldn't
2 be everywhere with the cases. So we don't need to be told
3 give us a certain court.

4 CHAIRMAN BABCOCK: Okay. Anything else on
5 (6)? Okay. Frank.

6 MR. GILSTRAP: Why don't we just say for (1)
7 through (5), begin each one with "must state" and then on
8 (6) put "may state the location, court, or judge to which
9 transfer is sought" and just leave it optional. If they
10 want to put it in, they can.

11 CHAIRMAN BABCOCK: Well, Stephen said that
12 really you can put that in under (4) and this is not
13 exclusionary. When we vote on this it's not going to be
14 that you can never say that.

15 HONORABLE SCOTT BRISTER: Right.

16 CHAIRMAN BABCOCK: If you want to take the
17 risk.

18 MR. GILSTRAP: We are talking about what must
19 be in the motion.

20 CHAIRMAN BABCOCK: Right.

21 MR. GILSTRAP: Okay.

22 CHAIRMAN BABCOCK: If you want to take the
23 risk of embarrassing Judge Peeples, you say, "We want it to
24 go to him."

25 MR. GILSTRAP: I can't imagine that you would

1 require them always to state the court to which transfer is
2 sought.

3 CHAIRMAN BABCOCK: So you're against it?

4 MR. GILSTRAP: Sure, the way it is.

5 CHAIRMAN BABCOCK: Well, we know one vote
6 anyway. Anybody else?

7 All right. Let's vote on this. Everybody
8 that is in favor of excluding the bracketed italicized
9 subpart (6), "the court to which transfer is sought," raise
10 your hand.

11 Everybody in favor of putting it in? By a
12 vote of 22 to 3, the Chair not voting, it is out. So,
13 Judge Brister, let's go to the next --

14 HONORABLE DAVID PEEPLES: One more thing. Do
15 we really need to require that the parties be named? I
16 mean, you've got the style of the cases. Do we gain
17 anything by requiring all the parties to be listed?

18 MR. LOW: But wouldn't the panel want to know
19 that?

20 HONORABLE SCOTT BRISTER: It's always the
21 first page of briefs on appeal.

22 HONORABLE DAVID PEEPLES: So you can recuse
23 or something?

24 HONORABLE SCOTT BRISTER: Right.

25 HONORABLE DAVID PEEPLES: Okay.

1 CHAIRMAN BABCOCK: Ralph, then Bill.

2 MR. DUGGINS: What do we mean when we say
3 "parties in those cases"? Does that mean they have to have
4 appeared or just what you're saying, we're talking about
5 named in the pleadings? That's a question I have.

6 HONORABLE SCOTT BRISTER: We mean to leave it
7 open. I can imagine the situations where they've not yet
8 been served but fairness would indicate you ought to let
9 them know, and, again, if you want to draw those lines we
10 can. Our difficulty here and other places like that was
11 all the alternatives look worse than just saying "Let all
12 the parties know" and letting it be governed by the general
13 Civil Rules of Procedure of what a party is and your own
14 sense of professionalism of who ought to get notice, but it
15 is -- you know, if you want to draft something.

16 CHAIRMAN BABCOCK: Ralph.

17 MR. DUGGINS: One other observation on (5) is
18 in the -- not to reopen the issue of whether the trial
19 court should be permitted to file a written response, but
20 should the certificate of conference state whether or not
21 the trial court opposes the transfer? Question.

22 HONORABLE SCOTT BRISTER: We didn't discuss
23 it. When you start talking about the trial court
24 requesting of stuff you see the last sentence of (b)
25 bracketed, people immediately became concerned about the

1 trial judge calling up and talking to the MDL panel. Now,
2 that occurs. I mean, in Harris County on the asbestos
3 cases we all got together and talked about how to handle
4 these and who should try the first one and stuff like that,
5 so we haven't recommended it, but there is a place for
6 coordination between judges, pretrial court, trial court,
7 et cetera, but the more the trial judge gets involved on
8 the decision of whether or not to transfer in the first
9 place, I think the more the attorneys were getting
10 concerned that some conversations were going on that were
11 going to affect that decision that they didn't even know
12 were taking place.

13 CHAIRMAN BABCOCK: Bill.

14 PROFESSOR DORSANEO: I don't like "for which
15 transfer is sought" in (b)(1). I'm not sure I like just to
16 delete it, but I think we need to address the issue as to
17 whether we're going to be talking about all of the related
18 cases or maybe all of the related cases known to the
19 movant --

20 HONORABLE SCOTT BRISTER: Right.

21 PROFESSOR DORSANEO: -- or just the ones that
22 the movant wants to identify. If there is a kind of an
23 implicit requirement you're supposed to identify all of the
24 cases, I think the lawyers ought to know that explicitly
25 rather than find out later that they've done something that

1 is regarded as sneaky and inappropriate.

2 HONORABLE SCOTT BRISTER: I think -- I assume
3 everybody will probably agree with that. None of us
4 anticipated this would be a deal where you could transfer
5 the tire tread separation cases out of El Paso but none
6 others. You know, this was intended to be all, but there
7 was a concern with putting it in terms of all related cases
8 that the movant's attorney knows about because of -- that
9 suggests another kettle of worms. Kettle of worms?

10 CHAIRMAN BABCOCK: Kettle of fish. Can of
11 worms.

12 HONORABLE SCOTT BRISTER: Kettle of fish.
13 Thank you.

14 PROFESSOR DORSANEO: The deux prans are
15 there, the missing metaphors.

16 CHAIRMAN BABCOCK: Yeah. It's all smoke and
17 daggers.

18 HONORABLE TOM GRAY: The concept that is
19 raised there is whether or not you can have multiple MDL
20 panels across the state on the same related question. If
21 there are 15 cases in the Panhandle related to it and 15 in
22 the Valley, do you contemplate under this rule one MDL
23 case, or can you have multiple MDL cases on a related
24 question? I think the general consensus is that the
25 purpose of the statute contemplated a single MDL case, but

1 that discussion should not be foreclosed just because we
2 thought that generally. So...

3 CHAIRMAN BABCOCK: Okay. Good point.

4 HONORABLE TOM GRAY: And that really does
5 revolve exactly around this question about whether --

6 HONORABLE SCOTT BRISTER: Let me just
7 suggest, you know, if you just put the semicolon after
8 "related cases for which transfer is sought," and same as
9 in (2) "all parties in those cases," it's ambiguous, yes,
10 but the advantage of having it be ambiguous is that
11 attorneys will worry, "Gosh, that seems -- maybe I'm
12 supposed to do it to all of them."

13 I don't mind saying in all of them. The
14 problem is then their worry is going to be, "All of them?
15 How can I be sure I'm not going to be sanctioned because I
16 missed one," which we don't intend to happen either. So I
17 kind of favor leaving it ambiguous, saying, "Look, you're
18 supposed to let people in related cases know," and I
19 believe that's maybe safer than trying to define more
20 specifically do you mean this case to be in or out.

21 Because what are you going to do -- when in
22 doubt what are you going to do? Let them know. List them.

23 CHAIRMAN BABCOCK: So are you proposing
24 amending (b) (1)?

25 HONORABLE SCOTT BRISTER: I guess I would

1 drop "for which transfer is sought" because of the reason
2 Bill said is that it does suggest you can pick and choose
3 which ones you want to transfer.

4 CHAIRMAN BABCOCK: But the MDL panel is going
5 to need to know what you want transferred, aren't they?

6 Alex.

7 PROFESSOR ALBRIGHT: What about having
8 something about the response including related cases that
9 aren't listed? Then you might be able to catch more of
10 these related cases if that's a worry. You know, it seems
11 like the response, if I know there's another thousand cases
12 in South Texas that aren't listed maybe, shouldn't I have
13 an obligation to list those?

14 HONORABLE SCOTT BRISTER: It depends on
15 whether you see the panel as transferring -- making an
16 order that transfers individual cases listed or the order
17 as a general one that transfers these kind of cases.

18 PROFESSOR ALBRIGHT: Right.

19 HONORABLE SCOTT BRISTER: I think generally
20 it's going to be the latter.

21 PROFESSOR ALBRIGHT: But as the MDL panel
22 aren't you interested in knowing how many cases?

23 HONORABLE SCOTT BRISTER: No question about
24 that.

25 PROFESSOR ALBRIGHT: So the more information,

1 the better, right?

2 HONORABLE SCOTT BRISTER: I don't want to
3 know the cases. If there are 500 I definitely don't want
4 to know the cases.

5 PROFESSOR ALBRIGHT: Well, you're having them
6 here, and you're going to have it in the motion. I imagine
7 it will be an appendix that's just going to be a big, old
8 list of cases.

9 CHAIRMAN BABCOCK: Is the order really not
10 going to transfer that? If you've got an asbestos case
11 you're going to MDL.

12 HONORABLE SCOTT BRISTER: We don't address
13 that in the rule, and I don't propose to address that
14 because I could imagine circumstances where the panel would
15 want to do either one.

16 CHAIRMAN BABCOCK: Well, you do address it
17 because (b) (1) says "the cause number, style, and trial
18 court of related cases for which transfer is sought" so
19 that the motion is seeking the transfer of specific cases,
20 and you're either going to grant or deny or grant and
21 modify for them in the motion. So the way this is set up,
22 you are --

23 HONORABLE SCOTT BRISTER: Not exactly,
24 because once we get to the tag-along -- you know, the
25 problem is going to be if you say "Transfer these 27 cases,

1 which are breast implant, but that's all we're reaching
2 today," then the next 27 you're going to have to have
3 another order. If every case transferred has to be listed
4 in an MDL panel order, I think we're going to end up in
5 endless paperwork because you have to have an -- again, I
6 think this is a tag-along question. We can get into that,
7 but that's not really what this -- this is just the first
8 motion.

9 CHAIRMAN BABCOCK: Pete.

10 MR. SCHENKKAN: I think it's a tag-along
11 question, too, and I draw the the opposite conclusion. I
12 think if we said "the cause number, style, and trial court
13 of the cases for which the transfer is sought" then the MDL
14 makes its decision based on the motion and response, which
15 may say, "and here are, you know, 10 more that involve the
16 same common question of law and fact," but change the
17 answer as to whether they ought to be transferred at all or
18 where they ought to be transferred to, then you-all make a
19 decision; and if your decision is to make a transfer at all
20 then the rest of the problem is taken care of as far as it
21 humanly can be by tag-along; and I don't like the idea of
22 even suggesting that the lawyer is supposed to be in a
23 position to know what all the related cases may be in the
24 entire state of Texas. That's just not realistic. Maybe
25 it is for Tommy or Baker Botts, but I doubt it, and I don't

1 think it is for the rest of us.

2 So I would much rather have the burden be,
3 "These are the ones I want transferred and why," and all
4 the parties to that case get notice from me of the fact
5 that I've said that, and they have a chance to say one of
6 the reasons I'm wrong is because there is 300 more in some
7 other county that, you know, are proceeding in some other
8 way and that wouldn't make any sense to have these two
9 things. And then once you-all enter an order, your order
10 says, "We're transferring whichever the list is because
11 they've got these common questions of law" or your order
12 says, "We're transferring all cases that have this common
13 question of law" and then the tag-along comes in and you
14 have fights individually on which tag-along cases were
15 proper tag-along cases.

16 CHAIRMAN BABCOCK: Justice Duncan and then
17 Skip.

18 HONORABLE SARAH DUNCAN: I completely agree,
19 and one of the things I want to mention is I think I heard
20 the other day during our conference call that Chief Justice
21 Phillips is talking about an actual transfer off the docket
22 of the trial court, and I don't see how, Scott, you can
23 prospectively transfer off the docket of the trial court a
24 case that doesn't exist and isn't named. I just -- I
25 cannot conceive of a system in which that will work.

1 HONORABLE SCOTT BRISTER: Well, that's what
2 happens in removals. I mean, there is no Federal order
3 signed by a Federal judge removing it from a state case.
4 You file the notice of removal and it's gone, and that was
5 our concept.

6 HONORABLE SARAH DUNCAN: But you do that --

7 HONORABLE SCOTT BRISTER: Because the
8 advantage -- now, again, this is the tag-along question,
9 and maybe we ought to jump to that if it answers all the
10 questions about the original proceeding, but that's
11 definitely what happened in removal; and the thing, the
12 advantage of it is, is that it preserves the panel from
13 having to enter an order naming every -- I mean, again,
14 yes, there's going to be small ones. There's going to be
15 cases with thousands of these. If every one of those
16 thousands has to be in an order, it has to be signed three
17 times by an organization that has no filing, no budget, no
18 postage, and all the other problems I've previously
19 addressed.

20 CHAIRMAN BABCOCK: Yeah, but I'm very
21 sympathetic to the getting three signatures argument, but
22 this is the core of what the MDL is doing. This order is
23 at the very core of what you're doing.

24 HONORABLE SCOTT BRISTER: Right. But maybe
25 in the Federal. I mean, is anybody confused when you say

1 "Bridgestone/Firestone tire tread separation cases"? I
2 mean, you-all know which ones those are. Why do I have to
3 decide? I mean, there is a panel -- if you have a dispute
4 about one in particular when we get to tag-along there will
5 be a place where you can have that dispute, but it's going
6 to be a lot easier for an outfit with no secretaries to say
7 "Bridgestone/Firestone tire tread separation cases" when
8 that's what the judge said at the hearing. That's what the
9 judge intends to transfer and the judge, especially in this
10 case, has got to count on you to know exactly which ones
11 those are and come back to us if you've got a difference of
12 opinion about it.

13 CHAIRMAN BABCOCK: Pete.

14 MR. SCHENKKAN: I agree with that, but I
15 think that is true for (f), decision. That in the MDL's
16 panel's decision you may well want to, and I would think in
17 the Bridgestone/Firestone case you would want to, describe
18 it that way, describe the related cases as
19 Bridgestone/Firestone tread separation cases rather than
20 describe them as the 1,335 presently known ones listed on
21 Exhibit 1.

22 But back on (b), I'm a lawyer with one of
23 these or 35 of these or whatever, and I don't know where
24 they all are, and I don't like the idea that I need to
25 know, and I don't see why to start this process I do need

1 to know. So -- and then there's a third stage, the
2 tag-along, which I agree with you, seems to me largely
3 solves the practical problem.

4 CHAIRMAN BABCOCK: But the order that's going
5 to be submitted with the motion presumably is going to say
6 that the motion is granted and the following cases, which
7 the motion has sought transfer of, are hereby transferred
8 to Judge Peeples, the preferred judge of the defendants and
9 the plaintiffs.

10 HONORABLE SCOTT BRISTER: Well, maybe or
11 maybe not. I mean, I'm assuming it won't. I'm assuming it
12 can, but I'm assuming it doesn't have to.

13 MR. SCHENKKAN: Sure. And sometimes it can
14 and will, and sometimes it won't, and sometimes the
15 proposed order in the motion will be somewhat different
16 from the panel's order after they've heard the responses
17 and replies.

18 CHAIRMAN BABCOCK: Skip Watson.

19 MR. WATSON: At the beginning of this I
20 thought I understood, and what made sense to me was that in
21 both types of cases, the common event case such as the
22 airplane crash or the bus crash and, second, the common set
23 of circumstances case such as the bad medicine or the
24 Bridgestone/Firestone cases that stretch out over time,
25 that at least the common defendant in those is going to

1 know what cases have been filed and is going to know those
2 cases.

3 Now, that doesn't mean that the individual
4 lawyers spread around the country are going to know, but
5 the legal department of the common defendant is going to
6 know. The two things that bother me, and I'm sure I've
7 missed it, but I haven't seen addressed, is in the second
8 class of cases where it's a common set of circumstances,
9 tread separation, a Baycol, whatever it is, is, first,
10 those cases are -- you know, and I know this is the
11 tag-along, but those cases are going to be filed over a
12 potentially long period of time; and it bothers me, you
13 know, say an attorney in Lazbuddie or someplace gets a
14 Baycol case and is told, "Okay, those were removed -- those
15 were put into the multidistrict stuff three years, nine
16 months ago, and for efficiency purposes all of the
17 discovery has been done. The experts have been designated.
18 No, you don't have the authority in representing your
19 client to say, 'That expert, you know, couldn't sell
20 fireplaces to eskimos. I don't like that person, you know,
21 I want someone else.'" That's the part that really bothers
22 me is the tag-alongs not in the common event but in the,
23 you know, the multipart.

24 The second thing that bothers me is the
25 potential for there to be -- and I don't think this would

1 happen, but for there to be all tread separations
2 transferred into this, so that we've got the Goodyear
3 separations in with the Bridgestone/Firestone separations
4 on the assumption that a separation is a separation when
5 the operative defect may well not be the same, and you've
6 got two legal departments involved there.

7 And I didn't see any way to discriminate -- I
8 mean, your example of all car wrecks is, you know, taking
9 something to the logical extreme where it's illogical, but
10 I can see the temptation to put generic types of cases that
11 are reasonably specific in themselves like that, and I
12 don't see any way for a consistent dealing with that other
13 than a one-shot response saying, "No, no, you know, don't
14 throw me into the briar patch with the other people."
15 Anyway, for whatever that's worth.

16 HONORABLE SCOTT BRISTER: I think we've got a
17 mechanism we'll get to where you can get back in front of
18 -- obviously that's up to the MDL panel. If they want to
19 put all tire tread separations regardless of who it is
20 together and you think that's wrong then at some point you
21 mandamus with the Supreme Court, but there is -- if it's
22 something they may well have overlooked or has developed
23 subsequently, that's always going to be a problem. There's
24 always going to be the potential that a consolidation --
25 that the pretrial court probably after handling these cases

1 for a while will decide these should not all be
2 consolidated, and we've got a mechanism then of trying to
3 get that back to the MDL panel because it's probably in
4 their decision rather than in the pretrial court's.

5 MR. WATSON: Scott, what about the first
6 thing of where is the cutoff on saying, "Okay, the
7 tag-along is just too late for this set and we're going to
8 have a" -- you know, I foresee a follow-up set.

9 HONORABLE SCOTT BRISTER: Seems to me if you
10 transferred them to the pretrial judge and the pretrial
11 judge has entered all the orders and frozen discovery and
12 nothing else can happen and now you're just getting added
13 then you need to take that up with the pretrial judge and
14 say why you should or shouldn't be excluded from those
15 orders, and if the pretrial judge is right or wrong then
16 you have an appeal from that; and separate question, when
17 the pretrial court is done with all the pretrial
18 proceedings, at some point for trial you send them back to
19 the pretrial judges, and in some circumstances the trial
20 judge may change things, and that's addressed when we get
21 down to the remand section.

22 CHAIRMAN BABCOCK: Buddy had his hand up and
23 Richard. So who wants to go? Buddy. Seniority, age, and
24 beauty.

25 MR. LOW: Wait. What did you say? Go ahead,

1 Richard. I'm sorry. Let him speak, please.

2 CHAIRMAN BABCOCK: Okay. Richard, what do
3 you have to say for yourself?

4 MR. ORSINGER: I think that we probably ought
5 to use this initial filing more like a bankruptcy paradigm
6 than an --

7 CHAIRMAN BABCOCK: Oh, I don't think so.

8 MR. ORSINGER: -- appellate paradigm, and I
9 would suggest that all of the identifying information of
10 the related cases be in an appendix. If you truly have a
11 large number then you could spend 50 pages just identifying
12 parties and their counsel, and you certainly don't want to
13 read through all of that until you get down to the meat.
14 So I'm suggesting that No. (1) and (2) should only be the
15 identifying information in the case that the motion is
16 being filed in and then all of the related cases would be
17 an appendix.

18 Secondly, in the rule we ought to segregate
19 parties in the case where the motion is filed from parties
20 in the related cases. For example, when you say "confer
21 with all other parties about the merits of the motion"
22 surely you don't mean all of the parties that you have
23 listed in your motion as being related cases, because that
24 might be thousands.

25 CHAIRMAN BABCOCK: Hang on. I think that's

1 what --

2 HONORABLE SCOTT BRISTER: That's what we do
3 mean.

4 MR. ORSINGER: You do mean that they have to
5 consult with all -- well, then we definitely better --

6 HONORABLE SCOTT BRISTER: I mean,
7 realistically there's usually not thousands of attorneys.
8 If there is a case with thousands of attorneys, it's going
9 to take a lot of work anyway. Usually in these cases there
10 may be 20, 30, 50 attorneys, but you know, the alternatives
11 are do the parties have to let them all know and figure out
12 who that is or does the nonexistent court clerk of the
13 panel figure it out or one of the panel members in our
14 spare time. Somebody has got to do it, and we thought it
15 would be better if you-all did it than us.

16 MR. ORSINGER: Okay. So, I mean, the lawyer
17 who's filing this thing has got to physically communicate
18 by telephone or letter with everyone and if it's just the
19 people --

20 HONORABLE SCOTT BRISTER: Right. There is
21 some serious costs, and that's not all bad. There is some
22 serious costs and work that has to go into the person who
23 decides they want to do this, but who else better is there
24 to have to do the work?

25 CHAIRMAN BABCOCK: Because he's the one that

1 wants it.

2 MR. ORSINGER: Okay. There's going to be a
3 lot of finger pointing when somebody is off the list and
4 they say, "You know, they didn't contact me and they told
5 you that they contacted everybody."

6 HONORABLE SCOTT BRISTER: We have not
7 addressed what happens there, but I assume that's, you
8 know, the same options that would be if on your summary
9 judgment you didn't let one of the parties know you were
10 having a hearing on it.

11 MR. ORSINGER: The problem is, is that -- is
12 if you're only talking about the ones you designate is the
13 transfer and which transfer is sought, that's fine, but if
14 you have a duty or an implicit duty on the moving party to
15 go out and find out who all has a pending case like this
16 then you're going to end up I think with some severe
17 arguments about someone maybe left off the list. Let me go
18 on.

19 MR. GILSTRAP: Don't forget your point on
20 addresses, Richard.

21 MR. ORSINGER: It seems to me 50 pages is
22 probably more than you need if you're just going to argue
23 common questions of fact, but I'm wondering are not people
24 going to want to attach exhibits, either affidavits as to
25 why their case is different or excerpts of deposition

1 testimony or even copies of exhibits that are marked, and
2 are you permitting that, in which event you may get three
3 feet worth of stuff?

4 HONORABLE SCOTT BRISTER: I like your
5 appendix idea.

6 MR. ORSINGER: Are you going to permit people
7 to submit documentary evidence, affidavits, and deposition
8 excerpts?

9 HONORABLE SCOTT BRISTER: The way that it's
10 set up with the last -- the idea would be, our concept,
11 like the petition to the Supreme Court, that we don't get
12 all that. We get the 15-page briefs back and forth and
13 then the MDL panel can request additional briefing, and
14 down in (e) the MDL panel can order the parties to submit
15 evidence by affidavits and deposition. So the idea was not
16 to get those with the first filing.

17 MR. ORSINGER: Well, you better make that
18 clear, because that's not clear to me. I would assume that
19 a lot of these --

20 HONORABLE SCOTT BRISTER: The problem is do
21 you say, "Okay, you can't do it." I'm hesitant to say
22 that, too. I mean, you know, our thought was we say, you
23 know, "This is what you must file" and just leave it at
24 what you must file, suggesting that probably in most of
25 these cases, as Chris pointed out to me in --

1 MR. GRIESEL: Colorado, two-thirds of the
2 cases are agreed.

3 HONORABLE SCOTT BRISTER: Right. So if it's
4 an agreed case, all we're going to get is a motion joined
5 by plaintiffs and defense counsel, saying "Please do it."
6 We certainly don't want any affidavits on that. We will
7 give people a chance for response, but I like your idea of
8 moving the lists of people to an appendix.

9 MR. ORSINGER: And then shorten. I don't
10 think you need 50 pages to make this point, frankly, and my
11 last point is I don't think that any party should ever be
12 contacting an individual panel of the MDL panel either by
13 mail or otherwise, and the appellate court paradigm is that
14 you communicate only with the clerk, and then there's all
15 kinds of statutes out there that make ex parte
16 communications with appellate judges criminal.

17 I just think it's a lot nicer, smoother, and
18 better organized if all communications go to the clerk, and
19 then some of those will be forwarded, and some that are
20 improper will not be. You may get individual litigants who
21 are trying to write letters to members of the MDL committee
22 or whatever, so I would make that suggestion also.

23 CHAIRMAN BABCOCK: Buddy, sorry you deferred.

24 MR. LOW: No. I was going to suggest that
25 what Skip said, I have never known of a plaintiff asking to

1 go to the multidistrict in Federal court. It's always the
2 defendant. They know -- that defendant knows their cases.
3 I guarantee you General Motors knows how many cases they've
4 got in Texas, and they know those cases. So the defendant
5 is able to give that. I believe that we should go -- on
6 No. (1) we should go to Richard's idea of an appendix if
7 the number of cases or something, and we should strike out
8 "for which transfer is sought" because basically you're
9 asking that all related cases be transferred.

10 CHAIRMAN BABCOCK: Yeah. That's out. That's
11 out.

12 PROFESSOR DORSANEO: It's out?

13 CHAIRMAN BABCOCK: (6) is.

14 MR. LOW: So I would do that and allow an
15 appendix in that.

16 HONORABLE SCOTT BRISTER: No. He's saying in
17 (1), (b) (1) --

18 MR. LOW: Right.

19 HONORABLE SCOTT BRISTER: -- "related cases
20 for which transfer is sought." That's still on the table.

21 MR. LOW: Right.

22 CHAIRMAN BABCOCK: Oh, I'm sorry. That's
23 still on the table.

24 PROFESSOR DORSANEO: I need to know whether
25 that's in or out before we can move forward it seems to me.

1 I don't care if it's in or it's out, but it affects what we
2 do in all the other places.

3 CHAIRMAN BABCOCK: Sure. And I don't see how
4 you can file a motion and not tell the court what cases you
5 want them to move. I mean, that's basic, it seems to me.

6 MR. LOW: And it should be all of them that
7 are related.

8 CHAIRMAN BABCOCK: Alex and then Richard.

9 PROFESSOR ALBRIGHT: It seems like in your
10 motion you need to say which cases that you want transfer
11 to happen for, and if there are other cases that you know
12 about that you don't want transferred, you need to tell the
13 court about those, too. So why -- you know, you-all need
14 to know what's going on here, so you can say you have to
15 have "the cause number, style, trial court for related
16 cases for which the transfer is sought, any other related
17 cases for which transfer may not be sought."

18 And then the other party, you know, if I am
19 responding I may want to say, you know, if you're going to
20 go this direction there may be these other cases that we
21 need to put into this, but it seems like you have to leave
22 your options open. It seems to me like nobody -- that
23 we're leaving it open, these rules leave it open as to
24 whether the court can bring in every case or some cases,
25 and there may be circumstances where you want some, and

1 there may be circumstances where you want all, but your
2 motion and your response need to make clear what it is you
3 want and what it is that's still out there.

4 CHAIRMAN BABCOCK: Richard had his hand up
5 and then Bill and then Stephen.

6 MR. MUNZINGER: My point was going to be the
7 same as hers. What's the problem in saying to the lawyer,
8 "Tell me which cases you want transferred and identify
9 those cases known to you now which you believe have these
10 common questions in fact," and then in the response
11 requiring the responding party to do the same, to set forth
12 their knowledge at the time of filing as to those cases
13 that have or are believed to have the same common question
14 of fact.

15 If the point is to use judicial economy, this
16 panel itself is going to make the decision as to which
17 cases should or shouldn't be transferred and ought to. The
18 one experience I've had in a Federal MDL case it was the
19 plaintiffs were the parties who sought transfer. The
20 defendant did not. The defendant opposed it. There were
21 90 cases nationwide and two class actions. The panel
22 transferred every dadgum case that was identified to
23 the MDL court in Baltimore, Maryland, and that isn't what
24 either of the parties wanted, but that's what the MDL panel
25 did.

1 And if the point here -- and I think the
2 Legislature passed the law to encourage judicial economy.
3 If the point is let's get them all in one place, why not
4 let that court know what the cases are, and I don't share
5 Judge Brister's concern that there is some sanction or
6 something that can be imposed upon an attorney who fails to
7 identify a party, if I have understood you correctly, sir.
8 All the time we are required to make statements to the
9 court as officers of the court, signing our pleadings
10 saying "This is my best knowledge at the time." I don't
11 think it's a problem personally.

12 CHAIRMAN BABCOCK: Bill.

13 PROFESSOR DORSANEO: I was going to say it's
14 covered.

15 CHAIRMAN BABCOCK: Okay. Judge Bland.

16 HONORABLE JANE BLAND: Could we just add "and
17 those" in between "cases" and "for which" and that way if
18 there is a different subset they could identify the cause
19 number, style, and trial court of related cases and those
20 for which transfer is sought. That way if they are seeking
21 transfer for all of them, it's identified. If they are
22 seeking transfer for less than all, they can say the ones
23 that they are seeking and explain why the others they are
24 not seeking transfer for, and the MDL can evaluate it.

25 CHAIRMAN BABCOCK: Yeah. That's an elegant

1 solution to the problem.

2 HONORABLE SCOTT BRISTER: I like that.

3 CHAIRMAN BABCOCK: Do you like that, Judge
4 Brister?

5 HONORABLE SCOTT BRISTER: I do. Two words,
6 boy. Take care of the problem with two words.

7 PROFESSOR ALBRIGHT: In the words of Scott
8 McCown, an elegant rule.

9 CHAIRMAN BABCOCK: Yeah. Judge Bland is a
10 woman of few words, but --

11 HONORABLE SCOTT BRISTER: That's great.

12 HONORABLE JANE BLAND: My husband wouldn't
13 agree with you.

14 CHAIRMAN BABCOCK: Stephen Tipps.

15 MR. TIPPS: Jane's solution may be superior
16 to this, but let me just throw this out. I wrote this down
17 while Alex was talking, to consider appending to (1) the
18 words -- I mean after we say, "identify by cause number the
19 related cases for which transfer is sought, together with a
20 general description of any other related cases and an
21 explanation for why transfer of those cases is not being
22 sought." That's many more words, and maybe it's not as --
23 maybe it doesn't achieve --

24 HONORABLE SCOTT BRISTER: I think Jane's
25 solution plus No. (4) would probably --

1 PROFESSOR ALBRIGHT: Yeah.

2 HONORABLE SCOTT BRISTER: -- have the same
3 effect.

4 CHAIRMAN BABCOCK: Right. Right.

5 MR. YELENOSKY: This is, I guess, first a
6 question for Judge Brister. Based on what you have said an
7 order might read, which is transferring all
8 Bridgestone/Firestone separation cases, is it conceivable
9 that that's what someone would move for, simply that you
10 transfer all by description these cases; and if the answer
11 to that is "yes," you still would want for purposes of
12 information an enumeration of the cases known.

13 HONORABLE SCOTT BRISTER: Right.

14 MR. YELENOSKY: So don't we need to separate
15 those two issues out, what you're requesting and the
16 enumeration of cases known?

17 HONORABLE SCOTT BRISTER: Well, by putting it
18 in here we wanted you to list the ones -- the idea being
19 every one you knew about, but I would anticipate the
20 motions would also say "and any to be filed that are of the
21 same kind."

22 CHAIRMAN BABCOCK: Okay. John.

23 MR. MARTIN: I agree with Judge Bland's
24 solution. I would point out the definition of related
25 cases probably includes Federal court cases and cases

1 pending in state courts in other states and --

2 HONORABLE SCOTT BRISTER: Right.

3 MR. MARTIN: I don't really have any
4 objection to disclosing that information, but I suppose in
5 some types of litigation that might be pretty burdensome.

6 HONORABLE SCOTT BRISTER: The problem is that
7 the statute says that it has to be one common question of
8 fact. Now, how do you -- the problem is it's impossible to
9 draft what we all know we're talking about.

10 MR. MARTIN: Yeah.

11 HONORABLE SCOTT BRISTER: Because all the
12 cases against Bridgestone, including about their
13 transmissions and their axles and everything else has a
14 common question of fact, but we all know that's not
15 included, so now draft the rule that includes the thing
16 that we're talking about but not all the other things we're
17 talking about, and I believe it to be impossible.

18 MR. MARTIN: Yeah.

19 HONORABLE SCOTT BRISTER: I believe that has
20 to be what the panel decides and says, describes in the
21 order, but as far as describing it in a definition to apply
22 to all cases, I believe it to be impossible to say which
23 ones you mean and which ones you don't mean, but I think
24 everybody knows what we mean.

25 CHAIRMAN BABCOCK: Let's see what the

1 committee thinks about this (b)(1). That would now read
2 "the cause number, style, and trial court of related cases,
3 and those for which transfer is sought."

4 PROFESSOR DORSANEO: "Those cases."

5 CHAIRMAN BABCOCK: Yeah. "Related cases."

6 HONORABLE SCOTT BRISTER: No, just "and
7 those." The "those" clearly relates to related cases.

8 PROFESSOR DORSANEO: It reads better if you
9 put "cases" after "those."

10 HONORABLE SCOTT BRISTER: But then you have
11 to put "related cases."

12 HONORABLE DAVID B. GAULTNEY: But it suggests
13 that it might not be related, and so I think just "those."

14 CHAIRMAN BABCOCK: "And those." So that's
15 the proposal, unless Judge Bland wants to add a couple of
16 words to her spare language.

17 So "the cause number, style, and trial court
18 of related cases and those for which transfer is sought."
19 How many people are in favor of that?

20 How many are opposed? By a vote of 24 to 1,
21 the Chair not voting, and Richard Orsinger being the one,
22 that passes.

23 MR. ORSINGER: Are you attempting to
24 intimidate me?

25 CHAIRMAN BABCOCK: I know that's impossible.

1 PROFESSOR DORSANEO: You have to change (2)
2 then because "those" is --

3 HONORABLE SARAH DUNCAN: I think I'm going to
4 join Richard, so change that to 23 to 2.

5 CHAIRMAN BABCOCK: So 23 to 2, Richard having
6 some company from his colleague from San Antonio.

7 MR. DUGGINS: Chip, can I ask a question? I
8 want to follow up on John's comment. When we say the
9 motion must state the items in (1) for all related cases,
10 does that mean the motion does have to list all related
11 cases from other jurisdictions?

12 MR. GRIESEL: We can only consolidate the
13 ones in Texas.

14 PROFESSOR CARLSON: Even the Texas
15 Legislature can't get that far.

16 HONORABLE SCOTT BRISTER: It might not be a
17 bad idea to define "related cases" as those pending in
18 Texas state courts.

19 PROFESSOR CARLSON: Yes.

20 CHAIRMAN BABCOCK: So we want to do that,
21 "pending in Texas"?

22 HONORABLE SCOTT BRISTER: You don't want to
23 say "pending" because it's also to be filed.

24 PROFESSOR ALBRIGHT: But you can't identify
25 those to be filed.

1 HONORABLE SCOTT BRISTER: Let me think about
2 it. Give me 60 seconds. We'll figure out something to put
3 in there.

4 PROFESSOR DORSANEO: It will be pending when
5 it's filed.

6 HONORABLE SCOTT BRISTER: We know what we
7 mean. It's the ones in Texas state court, right?

8 MR. ORSINGER: Why don't we just call it
9 Texas cases?

10 MR. LOW: Well, it could be related in
11 Federal court.

12 PROFESSOR DORSANEO: I don't think so. I
13 don't think that's Texas cases.

14 MR. HAMILTON: Say "one or more cases in
15 Texas courts involving."

16 MR. WATSON: You could just say "cases
17 subject to these rules."

18 CHAIRMAN BABCOCK: Skip says "subject to
19 these rules."

20 MR. MARTIN: How about "multiple Texas state
21 court cases"?

22 HONORABLE SCOTT BRISTER: It doesn't have to
23 be in multiple courts, though. The statute says "same or
24 different constitutional courts," whatever our
25 constitutional court is. We assume they mean

1 constitutional county courts, county courts at law, probate
2 courts, or district courts.

3 HONORABLE TRACY CHRISTOPHER: Still that
4 doesn't say one or more multiple Texas state court cases.
5 It could be two in Harris County.

6 HONORABLE SCOTT BRISTER: Or we could -- I
7 suppose I would propose just copying the language from the
8 statute. "Common questions," because that's what the rest
9 of it is. "One or more multiple cases involving one or
10 more common questions of fact pending in the same or
11 different constitutional county courts, courts at law,
12 probate courts, or district courts."

13 CHAIRMAN BABCOCK: "Of the state of Texas."

14 MR. ORSINGER: How about "pending in a state
15 court" or "pending in a Texas state court"?

16 PROFESSOR ALBRIGHT: How about we table this
17 and let you-all work on it and move on?

18 HONORABLE SCOTT BRISTER: Thanks.

19 HONORABLE TOM GRAY: Seconded.

20 CHAIRMAN BABCOCK: That makes some sense.
21 All right. Now, somebody said that subpart (2) has got to
22 be changed in light of our change to subpart (1)?

23 PROFESSOR DORSANEO: I think it does. I
24 think those -- it's unclear as to whether it's those cases
25 for which transfer is sought or those --

1 MR. GILSTRAP: Related cases.

2 PROFESSOR DORSANEO: Those cases mentioned in
3 (1).

4 MR. ORSINGER: Let me ask, why are we asking
5 this? Why do we care who the parties are?

6 MR. GILSTRAP: Recusal.

7 HONORABLE SCOTT BRISTER: One, so the judges
8 will know if you're recused, same as on the front of the
9 appellate brief; and then two, to know -- you know, it
10 makes a difference, I think, whether there is one defendant
11 or 20 defendants.

12 MR. ORSINGER: So you're going to ask them to
13 be segregated by case? You don't want a list of 150
14 parties attached in Appendix B. You want to know which
15 parties are in which case in which court?

16 HONORABLE SCOTT BRISTER: I want to know all
17 the parties, period. I don't want to know -- I don't want
18 150 lists of the parties in each one.

19 MR. ORSINGER: And you don't care if you know
20 which proceeding they're in. You just want a list of
21 parties?

22 HONORABLE SCOTT BRISTER: I think that's
23 probably right. If I want it broken down, I can ask for it
24 later, right?

25 PROFESSOR ALBRIGHT: You want all plaintiffs

1 and all defendants, the idea being there may be 150,000
2 plaintiffs and five defendants.

3 HONORABLE SCOTT BRISTER: Now, back on the
4 appendix versus in the motion, we've incorporated TRAP
5 53.6, which provides that -- when you're counting the 15
6 pages it's exclusive of pages containing the identity of
7 parties and counsel, table of contents, index of
8 authorities, statement of the cases, statement of
9 jurisdiction.

10 MR. ORSINGER: Yeah, the problem is a
11 practical one, though, because when you pick up one of
12 those briefs you would rather just start reading on page
13 one and have it be useful instead of having to leaf through
14 20 pages of nothing but identifying information.

15 HONORABLE SCOTT BRISTER: Yeah. The
16 alternative would be the motion -- Chris suggests "the
17 motion must also contain an appendix filed at the same time
18 that states cause number, style, trial court of all related
19 cases and a complete list of all parties in the cases,
20 names and addresses of trial counsel."

21 MR. GILSTRAP: Names and addresses of the
22 attorneys?

23 HONORABLE SCOTT BRISTER: Right.

24 MR. ORSINGER: Yeah, but what you need in
25 there for the other people to file a response, and that's

1 their list of people who to mail it to.

2 PROFESSOR ALBRIGHT: Scott, doesn't -- okay.
3 If 53.6 requires as part of the brief the identity of the
4 parties and the lawyers then you don't need No. (2).

5 HONORABLE SCOTT BRISTER: Well, actually 53.6
6 doesn't require it. 53.6 says those things are not
7 counted. That would be 53.2. But 53.2 requires table of
8 contents, index of authorities, issues presented, and other
9 things that --

10 PROFESSOR ALBRIGHT: That you don't want.

11 HONORABLE SCOTT BRISTER: -- I don't want.

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HONORABLE SARAH DUNCAN: Well, and there's no
14 requirement in the appellate rules that you name people who
15 aren't parties to the case that you're filing, whatever it
16 is you're filing.

17 HONORABLE SCOTT BRISTER: Right.

18 CHAIRMAN BABCOCK: What if you said in
19 subpart (b), "The motion must state," and the first thing
20 you would list would be the common questions of fact
21 involved and the reasons why and then the filing party
22 conferred and then you could have a --

23 HONORABLE SCOTT BRISTER: Appendix.

24 CHAIRMAN BABCOCK: And then you say, "And the
25 motion must also include an appendix with the cause number,

1 style, et cetera, and, two, all parties in those cases."

2 HONORABLE SCOTT BRISTER: David, what do you
3 think?

4 HONORABLE DAVID PEEPLES: I like that.

5 HONORABLE TOM GRAY: The reason in the
6 appellate rules that their identification of parties and
7 the caption was listed up front is so you think to do the
8 recusal issue first before you get involved in it.

9 CHAIRMAN BABCOCK: Uh-huh.

10 HONORABLE SCOTT BRISTER: But there's usually
11 not hundreds of them in most appeals. That's what's going
12 to be different about these.

13 HONORABLE SARAH DUNCAN: But the necessity
14 that you determine whether you recuse --

15 HONORABLE SCOTT BRISTER: But you still need
16 to know.

17 HONORABLE SARAH DUNCAN: -- still has to be
18 made before you get into the merits of the case.

19 HONORABLE SCOTT BRISTER: Yeah, but it's
20 going to be there. It's going to be in the appendix rather
21 than at the front, and I would frankly prefer not to flip
22 through 40 pages of lists of parties to find out --

23 HONORABLE SARAH DUNCAN: But have you to.

24 HONORABLE SCOTT BRISTER: I mean, that's one
25 of the most frustrating things to me about appellate

1. briefs, is the first 20 pages I'm still flipping through
2. cases, and --

3. MR. YELENOSKY: The recusal question has to
4. come through it.

5. CHAIRMAN BABCOCK: You must be frustrated a
6. lot.

7. HONORABLE SCOTT BRISTER: But Judge Duncan
8. won't let me change it.

9. HONORABLE SARAH DUNCAN: But that's what you
10. have to do first. It doesn't make any difference whether
11. you put it in the first 20 pages or an appendix.

12. HONORABLE SCOTT BRISTER: It doesn't make any
13. sense to put the appendix first. You want it as a part of
14. the motion.

15. HONORABLE SARAH DUNCAN: I think you have to
16. make the recusal determination before you can proceed to
17. the merits of the case. Whether you put it in an appendix
18. or the first 20 pages of the motion, that's what you have
19. to read first.

20. HONORABLE SCOTT BRISTER: Well, we don't
21. disagree on that.

22. PROFESSOR ALBRIGHT: Can I invoke the can
23. you-all work this out later?

24. HONORABLE SCOTT BRISTER: We agree. All
25. Sarah is saying is you have to decide whether you recuse

1 before you decide the case.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: It seems to me like we ought
4 to provide for the number of copies the MDL panel is going
5 to be needing, that the party will file that rather than --
6 since you don't have anybody, you don't have a photocopying
7 machine.

8 HONORABLE SCOTT BRISTER: You're right.
9 You're right.

10 MR. ORSINGER: And so how many do you need?
11 You need one original, which is going to remain with the
12 Supreme Court clerk presumably forever, or at least --

13 MR. GRIESEL: On our server. Yeah.

14 MR. ORSINGER: Then you've got five justices
15 or judges on the panel.

16 PROFESSOR DORSANEO: That's (c), though.
17 We're not in (c).

18 MR. ORSINGER: We don't know how many there
19 are. Okay. Well, however many there are we ought to have
20 that plus one unless there's something --

21 HONORABLE SCOTT BRISTER: You're right.

22 MR. ORSINGER: -- more on top of that.

23 MR. GILSTRAP: Can't we deal with a lot of
24 these with the local rules passed by the MDL panel? I
25 mean, it does at some point have the right to write its own

1 rules and maybe at some point we just ought to cutoff and
2 say, "Well, we'll leave this up to them."

3 CHAIRMAN BABCOCK: How many copies they want.

4 MR. ORSINGER: And we ought to give them
5 rule-making authority.

6 MR. GILSTRAP: They have it.

7 MR. ORSINGER: It is?

8 MR. GILSTRAP: It's in there. Yeah.

9 MR. ORSINGER: Okay.

10 HONORABLE SCOTT BRISTER: It's in the
11 statute.

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HONORABLE SARAH DUNCAN: Do the members of
14 the MDL panel need to know the parties in all related cases
15 or only those related cases for which transfer is sought?
16 I would think it's only those related cases for which
17 transfer is sought, because that's --

18 MR. LOW: Right, but what if one of the
19 related cases, the judge's neighbor or his daughter?

20 MR. ORSINGER: Well, they won't know it.

21 MR. LOW: I mean, will they know all the
22 parties?

23 MR. ORSINGER: Well, I mean if the judge
24 doesn't know that there's a connection then why do we care?
25 Obviously it can't influence their proceeding.

1 MR. LOW: You don't know until somebody hits
2 you over the head with it.

3 HONORABLE SARAH DUNCAN: The reason we
4 care --

5 MR. LOW: I mean, you see it.

6 HONORABLE SARAH DUNCAN: The reason we care
7 is because of what's written now, the automatic tag-along.
8 There will never be --

9 MR. LOW: Right. Well, no, you can't.

10 HONORABLE SARAH DUNCAN: -- a point at which
11 the judge -- there will not necessarily be a point at which
12 the judge knows that it's her next door neighbor --

13 PROFESSOR CARLSON: On the MDL panel.

14 HONORABLE SARAH DUNCAN: -- who is the party.

15 MR. LOW: Even the trial judge or the judge
16 assigned.

17 HONORABLE SARAH DUNCAN: Right.

18 MR. LOW: His neighbor may come right along,
19 and he's in the middle of it and what happens, or his
20 daughter?

21 HONORABLE SARAH DUNCAN: So it needs to be
22 all the parties in the related cases.

23 MR. LOW: Yeah.

24 MR. ORSINGER: And the tag-along cases you're
25 deciding before you even know who they are.

1 MR. LOW: Well, you can't.

2 MR. ORSINGER: I know, but just to point out,
3 it doesn't matter. I mean, you're making a decision for
4 people you don't know who they are. Does it matter whether
5 their case is filed before your decision or after your
6 decision?

7 HONORABLE SARAH DUNCAN: Yes.

8 MR. LOW: I'm saying, well, what happens,
9 though, if you're the judge? It's assigned to you and
10 then, I mean, you don't have anything -- and your daughter
11 is involved in a Firestone separation and you think she has
12 a cause. I mean, I guess then you have to recuse yourself
13 and reassign back to the panel then.

14 MR. ORSINGER: But you're talking about the
15 trial court judge that's picked as the consolidated court.

16 MR. LOW: That's right.

17 MR. ORSINGER: We're talking about the
18 members of the multidistrict panel, which is going to be
19 five justices.

20 MR. LOW: Absolutely, but if you don't tell
21 those judges, they might not know about it. It might be
22 something you don't know what your neighbor's doing. It
23 might be a case -- one of them might have a case, and you
24 need to know whether your neighbor is one of those cases
25 that's already out there. It might not be the one that's

1 moved to be consolidated. Don't you want to know?

2 CHAIRMAN BABCOCK: Justice Duncan.

3 HONORABLE SARAH DUNCAN: And where it really
4 makes a difference is not recusal but disqualification.

5 MR. LOW: Right. Right.

6 HONORABLE SARAH DUNCAN: Because then the
7 order is void, period.

8 MR. LOW: That is true.

9 HONORABLE SARAH DUNCAN: And if that's a
10 risk, the members of the MDL panel need to know that up
11 front.

12 MR. ORSINGER: You know, we're doing an
13 enormous amount of work here of information that we
14 probably would all agree is almost never going to apply
15 because it may occur occasionally if you look through a
16 list of all these people and it's the Paul Smith that
17 happens to live on your block as opposed to the Paul Smith
18 that lives in another city. Why don't we let the
19 litigants, who feel like they have a ground for recusal or
20 disqualification after they get consolidated, let them come
21 forward and say, "You may be able to hear all these other
22 cases, but you can't hear mine."

23 CHAIRMAN BABCOCK: There's some sandbagging
24 there that could go on.

25 HONORABLE SARAH DUNCAN: That doesn't work.

1 I mean, it takes both the litigants acting upon the
2 knowledge that they and their lawyers have --

3 MR. LOW: Right.

4 HONORABLE SARAH DUNCAN: -- and the judges
5 acting upon the knowledge of who the parties are, and even
6 that's not a perfect fit.

7 HONORABLE SCOTT BRISTER: Mr. Chairman?

8 CHAIRMAN BABCOCK: Yes?

9 HONORABLE SCOTT BRISTER: Let me just point
10 out, there are a lot more difficult issues in these rules
11 than the list of who the parties are.

12 MR. LOW: Yeah.

13 HONORABLE SCOTT BRISTER: We can talk about
14 this a long time, but boy, there's some tough questions
15 that we haven't gotten close to yet.

16 CHAIRMAN BABCOCK: Yeah. So let's move
17 forward.

18 HONORABLE TOM GRAY: Since the issue was
19 about splitting -- identifying the related cases from those
20 that transfer is sought and that seems to have become then
21 a stumbling block on (b) (2) because we don't know which
22 those cases are, we went back to the original language
23 of (b) (1), added a item (6), something along -- because we
24 really, if I understand it correctly, we don't expect there
25 to be many related cases that we know about that we don't

1 want transferred, so what if the item (6) was "a
2 certification that the movant is not aware of any other
3 case which would qualify as a related case" or "identify
4 the cases for which transfer is not sought"?

5 And you don't expect that to be very many
6 cases, if any, but then there is an affirmative duty to
7 certify that you don't know that there's anything else out
8 there, and that takes the burden off the problem of where
9 you just -- there's six or eight cases scattered around the
10 state. You know about six of them. Two of them is not
11 listed. There's no danger there. Does that fix what we're
12 trying to differentiate here, Scott?

13 CHAIRMAN BABCOCK: It seems to me like that's
14 a different problem from the subpart (b) problem.

15 HONORABLE TOM GRAY: Well, the (b) problem is
16 referring back to those cases. We don't know whether we're
17 identifying all the parties in all the related cases or the
18 cases in which the transfer is sought. If you go back to
19 the way it was, the motion includes "the related cases for
20 which transfer is sought" and then you certify that you
21 don't know of any other cases that you're not seeking
22 transfer on or you specifically identify those in a
23 separate part of the motion.

24 MR. GILSTRAP: And you don't identify those
25 parties. That's what you're saying?

1 CHAIRMAN BABCOCK: No. You do.

2 HONORABLE TOM GRAY: You would identify them,
3 but in a separate part of the motion.

4 MR. GILSTRAP: Okay.

5 CHAIRMAN BABCOCK: Your subpart (2), if you
6 want to pick up everybody, which is Justice Duncan's point,
7 that you need to, your subpart (2) would say "all parties
8 in those cases identified in response to (b)(1)."

9 MR. LOW: Right.

10 HONORABLE JANE BLAND: How about "all
11 parties" --

12 CHAIRMAN BABCOCK: Ah. I see a solution on
13 the horizon.

14 HONORABLE JANE BLAND: "All parties in all
15 related cases."

16 HONORABLE SCOTT BRISTER: Right.

17 CHAIRMAN BABCOCK: Makes sense to me.

18 PROFESSOR DORSANEO: Let's do something and
19 go forward. We all know what we want to do.

20 CHAIRMAN BABCOCK: Why do you take so long?
21 Why don't you save us all this?

22 HONORABLE SCOTT BRISTER: Does anybody
23 disagree with putting it in an appendix, (1) and (2)?

24 HONORABLE SARAH DUNCAN: I do, actually.

25 HONORABLE DÁVID PEEPLES: Chip, can I point

1 out, this requirement is not in Rule 11 right now. I'm not
2 aware that it's ever been a problem. I do think judges
3 generally know when their relatives are involved in
4 litigation or close enough we know it, and I think we need
5 to be sensitive to what Richard pointed out a few minutes
6 ago. You know, every layer of paperwork and every added
7 burden, it has a cumulative effect, and I think it's very
8 unwise to lay it -- we need to always be thinking is the
9 requirement that we're laying on people worth it, and I
10 question whether this is.

11 HONORABLE SCOTT BRISTER: (1) and (2), or
12 just (2)?

13 HONORABLE DAVID PEEPLES: (2).

14 MR. GRIESEL: (2).

15 HONORABLE DAVID PEEPLES: You know, if my
16 neighbor is involved and I don't already know it, it's not
17 going to affect my decision. Now, you may have an
18 appearance of impropriety issue, but I just question
19 whether the gain is worth the candle here. "All parties in
20 all related cases," man, that's a bunch of people, can be.

21 CHAIRMAN BABCOCK: Okay. Well, we probably
22 ought to vote on that, in light of Judge Peeples' concerns.

23 HONORABLE DAVID B. GAULTNEY: You would have
24 notice of extra parties?

25 HONORABLE DAVID PEEPLES: We don't have it

1 now. And, again, I just -- I think judges know when their
2 loved ones are involved in a lawsuit; and again, if it's
3 somebody that goes to church with me, if I know it and I've
4 got an obligation to bring it up or deal with it; and if I
5 don't know it, it cannot influence my decision on the case.
6 So I just question whether this is worth the added burden
7 to the people involved.

8 CHAIRMAN BABCOCK: That's a good point and
9 worthy of a vote. So why don't we vote on whether we amend
10 (2) to say "all parties in all related cases" or the
11 alternative to that would be "all parties in those cases
12 for which transfer is sought."

13 HONORABLE SARAH DUNCAN: No, David is saying
14 none.

15 HONORABLE DAVID PEEPLES: Well, yeah.

16 HONORABLE TRACY CHRISTOPHER: That doesn't
17 really solve Judge Peeples' problem.

18 CHAIRMAN BABCOCK: David, is your proposal
19 that we just not have to list any of the parties?

20 HONORABLE SCOTT BRISTER: Cut (2).

21 HONORABLE DAVID PEEPLES: Life goes on for
22 me. Okay. This is not worth spending a whole lot of time
23 on, but I just -- we need to be thinking about whether
24 every added requirement is really going to advance the ball
25 very much, and I just question whether this one is.

1 CHAIRMAN BABCOCK: Okay. So you would cut
2 (2) altogether?

3 HONORABLE DAVID PEEPLES: I would cut (2) all
4 the way.

5 CHAIRMAN BABCOCK: Okay. So the vote we're
6 going to take now is whether or not we say "all parties in
7 all related cases." That's one vote, and the alternative
8 that Judge Peeples proposes is to cut (2) altogether, and
9 there's got to be a third option, of course, which would be
10 "all parties in all cases for which transfer is sought."
11 Those would be the three options that we have. Bill.

12 PROFESSOR DORSANEO: And there's an
13 assumption I guess in this that when somebody is
14 identifying the style that they can abbreviate the style.

15 CHAIRMAN BABCOCK: William Dorsaneo, et al
16 versus --

17 PROFESSOR DORSANEO: Yeah. Because no
18 original petition should ever say "et al" unless Al is one
19 of the parties.

20 HONORABLE DAVID PEEPLES: Otherwise the
21 parties are in the style of the case, and you can look at
22 it there.

23 CHAIRMAN BABCOCK: Right. Right. Okay. So
24 the first vote will be all those in favor of subpart (2)
25 saying "all parties in all related cases." How many will

1 vote for that?

2 MR. TIPPS: What's the alternative?

3 CHAIRMAN BABCOCK: There's two alternatives.
4 One is to cut (2) altogether and the third alternative is
5 to put "all parties in those cases for which transfer is
6 sought."

7 HONORABLE SARAH DUNCAN: Chip, flip the
8 votes. Vote this time on whether (2) should be deleted.

9 CHAIRMAN BABCOCK: Okay. Yeah. That
10 probably makes sense. All right. So the vote will be to
11 delete (2), and Justice Peeples will not resign the
12 committee no matter how that comes out. All right.
13 Everybody who is in favor of deleting (2) altogether raise
14 your hand.

15 All those in favor of retaining (2) in one of
16 two forms raise your hand.

17 MR. GILSTRAP: Yeah, the two forms.

18 CHAIRMAN BABCOCK: All right. The votes are
19 16 for retaining subpart (2) in some form and 7 against
20 retaining it. So now we'll vote on the two options for
21 subpart (2), the first of which is "all parties in all
22 related cases." That would be one vote and then the second
23 vote would be "all parties in those cases for which
24 transfer is sought."

25 PROFESSOR DORSANEO: May I make one comment

1 before we vote?

2 CHAIRMAN BABCOCK: Sure. Yeah.

3 PROFESSOR DORSANEO: I think mechanically one
4 way to make this a lot easier would be to recognize that
5 the movant could Xerox the original petition, the first
6 page or the first two pages, if that included the style and
7 all of that information, you know, ought to do that.

8 CHAIRMAN BABCOCK: Sure.

9 PROFESSOR DORSANEO: So it wouldn't
10 necessarily require a ton of clerical work. In fact, it
11 would be stupid to do the clerical work because mistakes
12 would creep in.

13 CHAIRMAN BABCOCK: Good point. All right.
14 Everybody in favor of subpart (2) saying "all parties in
15 all related cases," raise your hand.

16 And all of those in favor of subpart (2)
17 saying "all parties in those cases for which transfer is
18 sought," raise your hand.

19 So subpart (b) will be "all parties in those
20 cases for which transfer is sought" by a vote of 14 to 7.

21 MR. YELENOSKY: Chip, a question. Would
22 the MDL panel have authority to issue an order transferring
23 more cases than those sought, for a broader definition of
24 cases?

25 CHAIRMAN BABCOCK: Sure.

1 MR. YELENOSKY: They would? So they have no
2 opportunity then if it is important to judge
3 disqualification or recusal issues respective to the
4 ultimate order.

5 HONORABLE SARAH DUNCAN: And if it's
6 disqualification, the order will have been void ab officio.

7 CHAIRMAN BABCOCK: Okay. Any issue on
8 subpart (3), "the common questions of fact involved"?
9 Anybody want to talk about that?

10 Subpart (4), "the reasons why transfer would
11 be for the convenience of the parties and witnesses and
12 promote the just and efficient conduct" and apparently
13 there is a dispute about whether we call it "actions" or
14 "cases."

15 HONORABLE SCOTT BRISTER: The statute says
16 "actions," but some people wanted to say "cases."

17 PROFESSOR DORSANEO: They are cases.

18 CHAIRMAN BABCOCK: Huh?

19 PROFESSOR DORSANEO: It's cases.

20 HONORABLE SCOTT BRISTER: Some people think
21 the Legislature is wrong like that.

22 CHAIRMAN BABCOCK: What did the majority of
23 the subcommittee think?

24 HONORABLE SCOTT BRISTER: I believe the
25 majority -- did we vote on that?

1 HONORABLE DAVID PEEPLES: I hope not.

2 HONORABLE SCOTT BRISTER: I don't think we
3 did.

4 HONORABLE DAVID PEEPLES: We don't have to
5 use every word the Legislature used.

6 CHAIRMAN BABCOCK: And we have used "cases"
7 before.

8 HONORABLE DAVID PEEPLES: Let's be activists
9 here.

10 HONORABLE SCOTT BRISTER: Wait a second.

11 HONORABLE DAVID PEEPLES: Change. Change a
12 word or two.

13 PROFESSOR DORSANEO: Did the reporter get
14 that?

15 HONORABLE SCOTT BRISTER: I don't have any
16 objection to "cases."

17 CHAIRMAN BABCOCK: Okay. "Cases" it is.

18 HONORABLE SARAH DUNCAN: In the first line of
19 subsection (4) can we take out "why"?

20 CHAIRMAN BABCOCK: "The reasons why"?

21 HONORABLE SCOTT BRISTER: That's fine with
22 me.

23 CHAIRMAN BABCOCK: Okay. "Why" is history,
24 on the unopposed motion of Justice Duncan.

25 HONORABLE SARAH DUNCAN: It just drives me

1 nuts.

2 CHAIRMAN BABCOCK: Okay. Anything else on
3 subpart (4)?

4 Subpart (5), that the filing party conferred
5 or made a reasonable attempt to confer with all other
6 parties about the merits of the motion and whether they
7 agree or oppose it. Justice Duncan.

8 HONORABLE SARAH DUNCAN: I did not understand
9 during our five-hour conference call that there was going
10 to have to be a conference with all parties, and I assume
11 we mean their counsel, in all related cases. So if that's
12 what's meant, I really think we better put it in.

13 HONORABLE SCOTT BRISTER: Well, first, it's a
14 reasonable attempt. Second, it's just a quote from the
15 current rule. If you want to change it, that's fine, but
16 every change you make will be different from the current
17 rules, appellate rules.

18 HONORABLE SARAH DUNCAN: Well, the current
19 appellate rules in no way anticipate having to confer with
20 someone who's not a party in the case that you're in and on
21 appeal.

22 HONORABLE TRACY CHRISTOPHER: Well, since
23 we've done No. (2) to say "all parties in the cases for
24 which transfer is sought," when we're talking about
25 "parties" in (5) that's what we're talking about.

1 HONORABLE SARAH DUNCAN: And that's fine. We
2 just need to say is it all parties in all related cases,
3 all parties in all related cases for which transfer is
4 sought, or all parties to the case in which you are
5 effectively filing the motion?

6 CHAIRMAN BABCOCK: So, Tracy, you would say
7 after "parties," "in cases for which transfer is sought"?

8 HONORABLE TRACY CHRISTOPHER: I think it's
9 defined sufficiently in (2), but otherwise that would be
10 fine. You could add that in.

11 CHAIRMAN BABCOCK: What do you think about
12 that, Scott?

13 HONORABLE SCOTT BRISTER: Either way is fine.

14 MR. HAMILTON: Why does the committee care if
15 the parties -- if one of the parties says "I have conferred
16 and they all agree," does that mean you're automatically
17 going to grant it?

18 HONORABLE SCOTT BRISTER: It came from the
19 Federal and the other states that require you to say in the
20 motion which parties are for it and which parties are
21 against transfer.

22 MR. HAMILTON: You're going to know that when
23 you get the responses or no responses, so why does the
24 lawyer have to go through all this exercise of finding out?

25 HONORABLE SCOTT BRISTER: Well, you know, a

1 lot of people -- you know, it's required for everything
2 else you file with us; and if it's an agreed motion I
3 assume the panel is going to treat it one way, where if
4 it's a contested motion they're not.

5 But, again, the -- this makes it the
6 responsibility of the moving party to say who agrees with
7 it and who doesn't. The panel can eventually figure that
8 out when we go through the stacks of what's been filed, but
9 the idea was to shift stuff to somebody else, and why not
10 the moving party?

11 HONORABLE SARAH DUNCAN: Scott, the way this
12 is written I'm not required to state whether -- what each
13 party I talked to thinks. I'm only required to state
14 whether the other parties in the cases for which transfer
15 are sought agree or oppose it, which is one statement, not
16 one statement for each party with whom I've conferred.

17 HONORABLE SCOTT BRISTER: So you read this to
18 say the group agrees or opposes it without --

19 HONORABLE SARAH DUNCAN: Uh-huh. They agree
20 or oppose it. If one of the group opposes it, they oppose
21 it.

22 HONORABLE SCOTT BRISTER: I suppose if many
23 people are reading this as just to say, "Well, everybody
24 agrees or opposes it," we might need to redraft it, but
25 again, that's exactly what the TRAP rules say, and nobody

1 thinks that about the TRAP rules I hope.

2 CHAIRMAN BABCOCK: And it wouldn't be in your
3 interest to do that if you're a proponent of the motion
4 because you would say, "I've talked to a thousand people,
5 and 999 of those people agree to it, and then there's this
6 one guy who doesn't," and you'd tell the court.

7 MR. ORSINGER: (5) doesn't require that you
8 report what they said on the telephone, does it? I mean,
9 (5) doesn't require that, does it?

10 HONORABLE SARAH DUNCAN: Nope.

11 CHAIRMAN BABCOCK: Well, but you're going to
12 do that. I mean, you're going to --

13 MR. ORSINGER: I tell you what. As bad as
14 lawyers are about returning phone calls, most of these are
15 just going to be a bulk mailing of letters saying, "I'm
16 filing this motion, and if you have something to say about
17 it, call me."

18 CHAIRMAN BABCOCK: Stephen.

19 MR. YELENOSKY: Yeah. Why isn't Carl right
20 about that? Because in other instances in which we're
21 required to certify that you conferred the purpose is that
22 because the conference might have obviated the need for the
23 court's intervention, and here it's not going to obviate.
24 The court is going to have to be involved regardless; and
25 if, in fact, you have the agreement of all the parties it's

1 going to be in your interest to say that in the motion.

2 You don't have to be made to say that.

3 CHAIRMAN BABCOCK: Uh-huh.

4 MR. YELENOSKY: So you only have to be made
5 to say something that's going to be totally
6 inconsequential.

7 CHAIRMAN BABCOCK: Judge Bland maybe has
8 another solution. Although the last one got voted down.

9 HONORABLE JANE BLAND: The conference
10 requirement will alleviate some, if not all, of the
11 conflict between the party in the sense that, well, maybe
12 you all agree it ought to be an MDL but some of you think
13 it ought to be in Dallas and some of you think it ought to
14 be in Houston. And if you can lay all that out among each
15 other before you have to present it to the court then
16 everybody has had an opportunity to discuss and narrow the
17 issues to what they really need to bring to the MDL panel
18 to decide.

19 And it may be that, you know, there's a
20 disagreement about whether or not factually these ought to
21 be an MDL, but whatever the basis for the disagreement is,
22 you know, you've had an opportunity to figure out what you
23 do agree on so that if you agree that it ought to be an MDL
24 but you disagree as to the location, you can focus on that.
25 If you don't believe it ought to be an MDL at all, but you

1 think if the court orders it to be an MDL, everyone agrees
2 it ought to be in Houston, and that's the whole purpose for
3 conference requirements, and we do them all the time with
4 every motion that gets filed, and we never have anybody,
5 you know, misunderstand the nature of the requirement.
6 They may not always execute it to our satisfaction because
7 they haven't been able to get somebody to return a phone
8 call or something like that, a communication problem, but
9 nobody seems to ever have a problem with the idea of, you
10 know, what is a conference. It's usually a communication
11 problem. So I think it's worth putting in the rule.

12 CHAIRMAN BABCOCK: Richard Munzinger.

13 MR. MUNZINGER: I think you ought to delete
14 it. I think it causes delay, confusion. It's an
15 opportunity to fight over something that's unimportant.
16 You know, "Wait a second. He didn't call me, Judge, and I
17 didn't get his letter. I move to strike his motion. His
18 certificate is not made in good faith." So now you've got
19 people backing and filling in front of the MDL panel
20 preventing the issue from coming to the court. Just fight
21 it, forget conferring.

22 The reason you confer in cases is what the
23 judge just said, to advance a particular case. Let's take
24 the case where you have 60 or 70 or 80 cases statewide with
25 multiple parties. I'm the person who wants to MDL the

1 case. I have got to write 200, 300 letters. I've got to
2 go out and find out who all those parties are. I've got to
3 write two or three hundred letters. I have to wait 30, 40,
4 60 days, whatever. I've got to colate the letters, do this
5 before I can get to the MDL panel. I don't think it
6 advances the basic issue, which is judicial economy. I
7 would delete the whole thing.

8 CHAIRMAN BABCOCK: Buddy, then Skip.

9 MR. LOW: But they put in there "made a
10 reasonable attempt." I mean, it's not just that you have
11 to confer, and this panel is not going to have a lot of
12 resources at their hand, so the more information you give
13 them, I would think would be a better decision, and I think
14 that panel is entitled to that information.

15 CHAIRMAN BABCOCK: Skip, then Bill.

16 MR. WATSON: As written, all this is trying
17 to do is say is there agreement on the motion or not? It's
18 not agreement on specific subparts, and I personally agree
19 with Richard. What this basically functioning as in this
20 context is, is a notice, not conferring to obtain
21 agreement; and with deference to what Judge Bland has said,
22 I think what we're going to get is a certificate of
23 conference that looks like a Supreme Court opinion. I
24 mean, it's going to be these 50 people agree with paragraph
25 one of the motion. These 30 people agree with paragraph

1 two of the motion, et cetera, et cetera, like that, but
2 it's going to take a clerk to put it together.

3 CHAIRMAN BABCOCK: Yeah. Bill, and then
4 Sarah, if you've still got something, Bill.

5 PROFESSOR DORSANEO: Well, the last time we
6 took one of these out the Court put it back in.

7 HONORABLE SARAH DUNCAN: Twice. Twice.

8 PROFESSOR DORSANEO: So they like it, whether
9 we like doing it or not.

10 JUSTICE HECHT: But we wrote what's in
11 11.4(b)(5), too. So....

12 HONORABLE SCOTT BRISTER: Yeah, I stole this
13 from TRAP 10.1(a)(5), which is the TRAP requirements for
14 motions.

15 CHAIRMAN BABCOCK: Judge Bland.

16 HONORABLE JANE BLAND: Well, I just don't
17 think it's as difficult as you-all are making it out to be.
18 With the modern technology we have you can say, "We're
19 going to have a call to discuss the MDL, and, you know,
20 here's the conference number and call in"; and, you know,
21 if we can get the 45 of us to sit here and parse through
22 every sentence of every rule, I don't know why we can't get
23 the main lead counsel in this MDL to sit down and talk
24 about what areas they agree and disagree on.

25 CHAIRMAN BABCOCK: Because we're sick.

1 HONORABLE JANE BLAND: And every motion, to
2 the extent you can narrow the issues for decision, it's
3 less work for the judge. I mean, if you have a discovery
4 dispute that's got 35 outstanding issues, that's a lot more
5 difficult to handle than one where they've resolved 33 of
6 them and here are the two we need your ruling on. If you
7 don't need us to rule on it then there's no sense, you
8 know, wasting a lot of time and paper presenting it.

9 CHAIRMAN BABCOCK: Okay. We need to vote on
10 this.

11 HONORABLE DAVID PEEPLES: Yes.

12 HONORABLE SARAH DUNCAN: Can we --

13 CHAIRMAN BABCOCK: So, Sarah, what's the last
14 word?

15 HONORABLE SARAH DUNCAN: As Justice Hecht
16 points out, there is an alternative, whether all parties
17 agree on the motion, as in existing Rule 11.

18 HONORABLE SCOTT BRISTER: But then don't you
19 just get saying "and I can tell you all parties don't agree
20 to it"?

21 HONORABLE SARAH DUNCAN: Yeah. That's right.

22 HONORABLE SCOTT BRISTER: That's not very
23 helpful. If we're going to have that, I vote to leave it
24 out. If all it's going to be is the -- the only time it's
25 going to be in is when everybody agrees with the motion, I

1 guess that's worth something.

2 MR. YELENOSKY: But you're going to hear that
3 anyway.

4 MR. WATSON: Yeah. It's going to be an
5 agreed motion.

6 MR. YELENOSKY: It's going to be an agreed
7 motion.

8 HONORABLE SARAH DUNCAN: Right.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: Well, I would -- if
11 you're going to leave it in, I do think it makes sense to
12 eliminate the last word "it" and say something more
13 informative, like maybe "the relief requested in the
14 motion."

15 HONORABLE SARAH DUNCAN: "Transfer."

16 PROFESSOR DORSANEO: Well, I wanted to make
17 it broad enough for somebody to say, "I don't mind
18 consolidation or coordination, but I don't" --

19 CHAIRMAN BABCOCK: Even with the prospect of
20 food on the horizon people are not willing to let this one
21 go. Buddy.

22 MR. LOW: What are you going to say if they
23 say, "Okay, I will agree if you'll agree that we suggest
24 Houston, but if we don't do that then I won't." Then do
25 they agree to the motion or do they oppose it?

1 CHAIRMAN BABCOCK: To be honest with the
2 court, you'd have to say they agree to the motion but not
3 where the motion wants to bet on it.

4 HONORABLE SARAH DUNCAN: So is this
5 certificate going to be excluded from the page limits? I
6 think that's where we're going here.

7 HONORABLE SCOTT BRISTER: It is. 53.6
8 specifically excludes it.

9 CHAIRMAN BABCOCK: Stephen.

10 MR. YELENOSKY: Well, to get back, too, on
11 that, I mean, if there are enough parties who have an
12 interest, and they will have an interest in conferring if
13 they can resolve things with certainty by agreement so they
14 don't have to go to the uncertainty of a judge, then they
15 will agree to that stuff. All this is going to do is
16 require them to do the perfunctory conference where it's
17 not in their interest because they're not going to reach an
18 agreement, and if it is an agreed judgment, you're going to
19 know that.

20 MR. LOW: But in Federal court you have to
21 certify that you conferred and so forth, and a lot of times
22 you do agree. If you don't certify that then you don't
23 talk and you get to court and you agree, so they don't want
24 to waste their time.

25 CHAIRMAN BABCOCK: Okay. Here's the vote.

1 First vote, like we did with subpart (2), we'll vote people
2 who want to delete subpart (5). That will be the first
3 vote, and then people who want to keep it as-is, which
4 is -- and we may be able to take it out if you want, but
5 the issue of whether they agree or oppose it for the people
6 that want -- if we're going to have the rule, people that
7 want it to say more than what it says now. So the first
8 vote is going --

9 HONORABLE SARAH DUNCAN: Now as in Rule 11,
10 or now as in this subsection (5)?

11 HONORABLE SCOTT BRISTER: Either.

12 HONORABLE DAVID PEEPLES: The proposal that's
13 before us.

14 CHAIRMAN BABCOCK: All right. So the first
15 vote is going to be do we lose subsection (5), do we delete
16 it. That will be the first vote. So let's vote on that.
17 How many people want to delete subsection (5)? Are you up
18 or down?

19 HONORABLE SCOTT BRISTER: I'm down.

20 CHAIRMAN BABCOCK: How many people want to
21 keep subsection (5) in some form?

22 CHAIRMAN BABCOCK: We're going to keep it by
23 a vote of 16 to 7.

24 Now, there was a proposal made earlier, and I
25 think it had consensus, but that was to take the language

1 that we have and limit it to "in cases for which transfer
2 is sought."

3 HONORABLE SCOTT BRISTER: Right.

4 CHAIRMAN BABCOCK: So it would read that "The
5 filing party conferred or made a reasonable attempt to
6 confer with all other parties in cases for which transfer
7 is sought about the merits of the motion and whether they
8 agree or oppose it."

9 HONORABLE SCOTT BRISTER: I like "it" because
10 I do think it's relevant to know everybody agrees we need
11 an MDL, but some say it should be Dallas and some say it
12 should be Houston. I think that saves me a lot of time.

13 CHAIRMAN BABCOCK: Everybody in favor of that
14 language, raise your hand.

15 HONORABLE SCOTT BRISTER: "It" refers to
16 merits of the motion, which could include where you're
17 asking for it to be transferred to.

18 CHAIRMAN BABCOCK: All parties that are or
19 all people that are opposed to that language, raise your
20 hand.

21 19 to 1 it passes. Let's eat.

22 (A recess was taken at 12:35 p.m., after
23 which the meeting continued as reflected in
24 the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of July, 2003, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,279.00.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 24th day of July, 2003.

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