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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

July 17, 2003

(AFTERNOON 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 1:20 p.m. and 5:12 p.m.,  
at the Texas Association of Broadcasters, 502 East 11th  
Street, Suite 200, Austin, Texas 78701.

**INDEX OF VOTES**

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1 Somebody must have wanted it.

2 HONORABLE SCOTT BRISTER: It was originally  
3 proposed when we thought the judges were going to be  
4 requesting transfer, and they didn't want them requesting  
5 transfer and lobbying for it.

6 HONORABLE SARAH DUNCAN: And we haven't  
7 resolved that issue.

8 CHAIRMAN BABCOCK: We haven't resolved that.  
9 Well, even if the justice did request it.

10 MR. ORSINGER: But the judge is not a party,  
11 so it wouldn't keep the judge from calling the MDL justice  
12 anyway, would it?

13 HONORABLE SARAH DUNCAN: Nope.

14 HONORABLE DAVID PEEPLES: Can I suggest this?  
15 Instead of saying it must be in the form of a brief, could  
16 we say "a motion, response, reply must conform to the  
17 requirements of that rule"? Just the idea of a brief  
18 sounds like it's got to be bound, and I just think we don't  
19 want to encourage that.

20 CHAIRMAN BABCOCK: Frank.

21 MR. GILSTRAP: You know, again, it strikes me  
22 that here we're hitching the MDL procedure requirements to  
23 the petition for review, and, you know, is that wise? I  
24 mean, again, this might be something we want the MDL panel  
25 to pass their own rule about. The form they want it in,

1 the page limits, all of that, seems to me could be handled  
2 by the MDL panel itself and maybe changed once they get  
3 some experience.

4 MR. ORSINGER: Yeah. I agree totally.  
5 Because it's flexible in that if they are getting 150 or  
6 350-page appendices they may want to change it. Why don't  
7 we move all of these details --

8 HONORABLE SCOTT BRISTER: Yes and no, but  
9 we're not in a very good position to send back  
10 nonconforming briefs. We're not in a very good position to  
11 publish what our internal rules are, because we don't have  
12 any secretaries or way to do that. So I like the idea of  
13 having something which everybody knows is in the rule, and  
14 frankly, I think we will probably just have to accept  
15 briefs that don't conform.

16 MR. ORSINGER: Well, in the area where you  
17 have instructions to the jury we have a rule that says the  
18 Supreme Court may adopt certain instructions to go to the  
19 jury and then those instructions have been adopted by  
20 miscellaneous order on the Supreme Court's docket. So they  
21 are published by West Publishing Company behind the rule,  
22 and probably you would think they were part of the rule,  
23 but they're not, and they're more flexible, and there's  
24 many more details that probably if we talked about it we  
25 could come up with. I hate to just lock you into this

1 because the process of modifying this rule will be slower  
2 than tweaking rules that affect only the MDL, and they  
3 ought to know it after they have been doing it for six  
4 months or a year and find out where the flaws are.

5 CHAIRMAN BABCOCK: Okay. Are we agreed that  
6 this parenthetical language doesn't need to be in there  
7 because it's --

8 HONORABLE SCOTT BRISTER: Last sentence.

9 CHAIRMAN BABCOCK: -- surplusage? Everybody  
10 agree on that? So that's gone.

11 Now, the issue of whether or not we want to  
12 tie it to the TRAP rules as we have here, how do people  
13 feel about that? Nina.

14 MS. CORTELL: I'm for clarifying the rules,  
15 but there's some problems with these references. For  
16 example, on the page limits, I have no problem with the  
17 15/15/8, but if you look at the rule, it excludes out  
18 things that you wouldn't have in this rule, and it could be  
19 confusing, and I don't see any reason why we can't just  
20 articulate that out. I don't think we need to work on the  
21 language today, sort of a conceptual provision that I would  
22 suggest.

23 HONORABLE SCOTT BRISTER: But doesn't that --  
24 I mean, on the one hand, we do have to work on the language  
25 today because we are just going to run out of time, and

1 that is why we set the page limits of 53.6, not what those  
2 items have to be.

3 MS. CORTELL: Well, when I hear page limits I  
4 understand that to be also what's not counted within the  
5 page limits, and there's some confusion when you look to  
6 what they've excluded and the categories of things we have  
7 in 13.2(b), and all I'm saying is I see that as opportunity  
8 for confusion, if we can clarify it.

9 CHAIRMAN BABCOCK: Well, we have a threshold  
10 issue, I guess, and that is whether or not the majority of  
11 the committee even thinks this paragraph should be included  
12 or is necessary. Stephen.

13 MR. YELENOSKY: Judge Brister, is your only  
14 concern promulgation of local rules, that that will be  
15 difficult without a budget?

16 HONORABLE SCOTT BRISTER: No. If we decide  
17 we want to go from 15 to 10, how do you get the message  
18 out?

19 MR. YELENOSKY: Why can't we have the MDL  
20 rules on the Supreme Court website?

21 MR. ORSINGER: They will be picked up in the  
22 West desk book.

23 JUSTICE HECHT: Actually, there may not be a  
24 website, if we don't have enough money.

25 MR. YELENOSKY: Oh.

1           HONORABLE SCOTT BRISTER: And there was a  
2 second purpose in this, is that, you know, people are not  
3 going to know is this a motion practice or is this a  
4 briefing practice; and referencing the TRAP rules  
5 communicates, which I think is important, that it's a  
6 briefing practice, because it -- yes, you consider motions,  
7 but it's not really -- I don't really care whether it's 350  
8 or 370 cases that are filed statewide. The main thing is  
9 how many cases are, and is it a good idea to coordinate,  
10 and it sounds to me that's something like the kind of thing  
11 I would want to talk to the attorneys and say, "Why do you  
12 think we ought to put them all together and why do you  
13 think not," which is better put in briefing.

14           And "motions" to me I think will suggest to  
15 attorneys they need to attach. You know, God forbid in  
16 Texas you should not have your evidence attached to the  
17 motion because then somebody might not consider a shred of  
18 it, so you are instantly going to get this instead of this,  
19 and I want this. (Indicating.)

20           CHAIRMAN BABCOCK: Okay. That's the case for  
21 tying it to the TRAP rules.

22           PROFESSOR ALBRIGHT: But, Scott, you're going  
23 to get this because you're not going to have anything else.  
24 (Indicating)

25           They're going to know that you're only going



1 to see what they send you, so you're going to get that if  
2 that's what they want you to see.

3 CHAIRMAN BABCOCK: Let the record reflect  
4 that Alex is holding her hands a foot apart.

5 All right. Anything else on this one? All  
6 right. Do we want to vote on whether we keep it or lose  
7 it? Is that an okay vote?

8 MR. ORSINGER: Can I be sure, is there  
9 somewhere in here I haven't found that says that the MDL  
10 panel has the right to promulgate its own administrative  
11 rules?

12 HONORABLE DAVID PEEPLES: It's in the  
13 statute.

14 MR. ORSINGER: It's in the statute?

15 HONORABLE DAVID PEEPLES: Yeah.

16 MR. ORSINGER: It seems like it ought to be  
17 in the rules, too, but okay.

18 MR. LOW: Would that include amending this  
19 page --

20 CHAIRMAN BABCOCK: Do what?

21 MR. LOW: Would that include amending the  
22 page numbers and so forth if they wanted to?

23 HONORABLE SCOTT BRISTER: The statute says,  
24 "The panel may prescribe additional rules for the conduct  
25 of its business not inconsistent with the rules or law

1 adopted by the Supreme Court."

2 MR. LOW: But we have this rule, and it says  
3 this many pages, and if you think that's not working, and  
4 then we have to amend that rule or could you -- okay.

5 HONORABLE SCOTT BRISTER: Well, only if you  
6 needed it shorter. If you want it longer, you can always  
7 ask for more briefing, and that's what this rule says. The  
8 only question is if we decide, gosh, 15 pages is too much.  
9 I insist on 10.

10 MR. LOW: What do you suggest we do?

11 HONORABLE DAVID PEEPLES: Chip, can I say  
12 this? I have seen probably 10 or 15 of these Rule 11  
13 motions. Firestone and these drug companies hire Baker  
14 Botts, Vinson Elkins, and whatever good law firm you want  
15 to name, and they really are pretty good at giving you a  
16 concise motion that doesn't go on and on and on page after  
17 page after page, and I think we can trust the lawyers hired  
18 by these movants to do a pretty good job and to lay it out  
19 in detail. I question whether it's worth it.

20 CHAIRMAN BABCOCK: Skip.

21 MR. WATSON: I really think we need one of  
22 those two-part votes or something to just say whether or  
23 not everything to do with form, size, length, you know,  
24 whatever we're talking about, be reserved to the local  
25 rules to be promulgated or to the rules to be promulgated

1 by the panel.

2 HONORABLE SCOTT BRISTER: Again, so you get  
3 one of these, what are you going to do? What's going to  
4 happen is you're going to call up my office. I mean, the  
5 Yahoo yellow pages lists me as the court of appeals in  
6 Houston, and I get constant calls from people, and it  
7 cannot be expunged I'm told by my clerk, so I'm going to  
8 get a hundred calls from people that want to file MDL  
9 motions saying, "Send me a copy of the local rules."

10 No, because where else are they going to look  
11 for it? They are going to call me up. There is no clerk  
12 for them to call. There is no number in the phone book for  
13 them to call, but I know Peebles is on it. I'll call him.

14 MR. ORSINGER: Why don't you attach it as an  
15 appendix to Rule 13 then? I mean, why do we want to have  
16 all of these detailed rules, which you may want to alter,  
17 to be part of the formal rule and just make it an Exhibit A  
18 on here?

19 HONORABLE SCOTT BRISTER: I can't imagine  
20 wanting to alter. Say, look, 15 pages just like you do for  
21 the petition. What's the big deal?

22 CHAIRMAN BABCOCK: Richard.

23 MR. MUNZINGER: Does the multidistrict panel  
24 exist? Has it been appointed?

25 HONORABLE SCOTT BRISTER: Yes.

1                   CHAIRMAN BABCOCK:  Yes.

2                   MR. MUNZINGER:  Do they understand the  
3 effective date of the law and are they working on rules?  
4 If you don't give the practitioner a rule today you delay  
5 the ultimately effective date of the rule.  No one knows  
6 what the heck to do.  You've got to put it in this rule.  
7 Live with it a year and then let the multidistrict panel  
8 experience teach you, but if you don't do it now you run  
9 afoul of the problem that we're supposed to have an  
10 effective rule September 1 of this year.

11                   CHAIRMAN BABCOCK:  Okay.  Bill.

12                   PROFESSOR DORSANEO:  I don't have an enormous  
13 problem with the cross-references, but I do have some  
14 question as to, Scott, what you mean by "in the form of a  
15 brief."  When I think in the form of a brief, I think of a  
16 brief having particular sections and subsections,  
17 components, and I'm not thinking that you mean that.  You  
18 mean argument and authorities.

19                   HONORABLE SCOTT BRISTER:  I meant as a brief  
20 rather than a motion.

21                   PROFESSOR DORSANEO:  Well, I know, but you  
22 have something in your mind going on there that I can't  
23 follow.

24                   HONORABLE SCOTT BRISTER:  Well, where we got  
25 here was the committee, we had motion, response, reply, and

1 you could attach a brief. We said, no, we don't want two.  
2 Let's just do one. Make your motion look like a brief,  
3 your response look like a brief. That's it.

4 CHAIRMAN BABCOCK: One document, motion and  
5 brief in support thereof.

6 HONORABLE SCOTT BRISTER: Not two. Whichever  
7 way you want to say that. I don't mind -- somebody had a  
8 good idea about dropping some of this and just say "make it  
9 conform to the requirements."

10 PROFESSOR DORSANEO: Yeah. I think that  
11 would be better, and I would say "substantially conform to  
12 the requirements of Appellate Rule 9.4" -- "Appellate Rules  
13 9.4 and 53.6" and that way people will know about how long  
14 they should be, and they won't put things in there that  
15 they think that you're demanding that don't make sense.

16 CHAIRMAN BABCOCK: On the threshold issue of  
17 whether we have this at all, we got anybody else that wants  
18 to say anything about that? Shouldn't we vote on that,  
19 whether we have this at all?

20 Okay. Everybody who is in favor of having a  
21 paragraph like this. We can tinker with it, but like this,  
22 raise your hand.

23 All those opposed? It carries by a vote of  
24 17 to 6. So we're going to have it, and now tinkering, you  
25 guys want to tinker any?

1 MR. ORSINGER: One proposal is to take the  
2 parts of the appellate rules out that you want and put them  
3 in this rule. That eliminates all the confusion of the  
4 cross-reference, and we can agree that --

5 HONORABLE SCOTT BRISTER: What are you  
6 confused about in the cross-reference?

7 MR. ORSINGER: Just that you have to go to  
8 two different rules to figure out how they fit together.

9 JUSTICE HECHT: I think the Court has the  
10 burden of this concern, and we really do have some issues  
11 in here that we are very puzzled about, and if I could  
12 suggest maybe we should move on to something else  
13 because --

14 HONORABLE SCOTT BRISTER: We didn't want to  
15 put type size and margins and all that in here.

16 JUSTICE HECHT: Well, you may or may not,  
17 but, you know, we understand the concern, but there is a  
18 lot of other big stuff in here.

19 CHAIRMAN BABCOCK: On subpart (c), Scott,  
20 what's the issue? Is it just the brackets?

21 HONORABLE SCOTT BRISTER: Yeah, and then  
22 whether you wanted to make it an original and five copies  
23 as Richard suggested.

24 MR. ORSINGER: Or do you want to make the  
25 burden be on the party to mail one to each commissioner or

1 whatever you call these justices so that you don't even  
2 have to have a Supreme Court clerk remailing it? I mean,  
3 their identity will be stable, public, so you could require  
4 that an original be filed with the clerk and one copy be  
5 mailed to each member of the panel.

6 HONORABLE TOM GRAY: Two copies mailed to  
7 each panel member, one they can write on, one they can  
8 keep.

9 PROFESSOR DORSANEO: And then do you want  
10 this to be served on everybody --

11 MR. GILSTRAP: All the related cases.

12 PROFESSOR DORSANEO: In all the related  
13 cases, or is it going to be parallel?

14 MR. GILSTRAP: Did we vote to require the  
15 related cases to be named in the motion?

16 CHAIRMAN BABCOCK: Yes.

17 MR. GILSTRAP: Okay.

18 JUSTICE HECHT: Is the service here  
19 contemplated to be service after a party has appeared, so  
20 that you're just sending it to the lawyer?

21 HONORABLE SCOTT BRISTER: Yes.

22 JUSTICE HECHT: Because this is a different  
23 proceeding, so I just want to make sure that --

24 HONORABLE DAVID B. GAULTNEY: And served on  
25 all attorneys of record.

1 MR. ORSINGER: Well, no, you only want the  
2 lead attorney. GM might be represented by a dozen law  
3 firms.

4 CHAIRMAN BABCOCK: Well, it doesn't say --

5 HONORABLE SCOTT BRISTER: Whenever the rules  
6 say serve a party they mean serve the party if they're pro  
7 se or serve the attorney if they --

8 PROFESSOR DORSANEO: Those rules don't apply  
9 to you unless somewhere it says they do.

10 HONORABLE SCOTT BRISTER: Well, I think they  
11 do.

12 PROFESSOR DORSANEO: Does it say it in the  
13 statute? You're not a county or a district court.

14 MR. ORSINGER: Well, you certainly want Rule  
15 21a to apply. Maybe we ought to say that the rules apply.

16 HONORABLE SCOTT BRISTER: Fine with me.

17 CHAIRMAN BABCOCK: You could easily have  
18 instances where parties have not been served yet and yet  
19 this proceeding is going on.

20 HONORABLE SCOTT BRISTER: Right.

21 PROFESSOR DORSANEO: I think "served in  
22 compliance with Civil Procedure Rule 21a" would satisfy any  
23 due process requirements. We use citation, but that's just  
24 because that's conventional.

25 PROFESSOR ALBRIGHT: If we're talking about



1 lessening the burden, 21a requires certified mail or fax,  
2 and then the appellate rules when we rewrote them you can  
3 use regular mail, and if we're having to include something  
4 here we might want it to be by regular mail. Certified  
5 mail is a real burden.

6 CHAIRMAN BABCOCK: Say that again, Alex.

7 PROFESSOR ALBRIGHT: Allow regular mail  
8 service instead of certified mail.

9 PROFESSOR DORSANEO: So that would be 9.2,  
10 right? Rule 9.2.

11 MR. WATSON: Just cite the TRAP rule instead  
12 of the Rule of Civil Procedure service.

13 CHAIRMAN BABCOCK: All right. All parties,  
14 are we serving only on parties for which transfer is  
15 sought, because we have limited here several of the rules  
16 in that way? So is that what we're doing?

17 PROFESSOR CARLSON: Would you repeat that?

18 CHAIRMAN BABCOCK: Yeah. Are we going to --  
19 it says here you've got to serve on all parties in related  
20 cases, and my question is, do we have to limit that to say  
21 "in related cases for which transfer is sought"?

22 MR. WATSON: Yes.

23 CHAIRMAN BABCOCK: Is everybody in favor of  
24 that? Richard.

25 MR. MUNZINGER: If the panel has the

1 authority, however, to transfer cases in addition to those  
2 for which transfer is sought, do you not have a due process  
3 issue if you're a party in a case that received no notice  
4 of the fact that the transfer was being sought?

5 MR. YELENOSKY: That was going to be my  
6 point.

7 CHAIRMAN BABCOCK: Okay. Bill.

8 PROFESSOR DORSANEO: I think we need to -- I  
9 doubt it, but I think we need to look at the tag-along  
10 provision in order to make that assessment.

11 CHAIRMAN BABCOCK: Alex.

12 PROFESSOR ALBRIGHT: I was just going to say,  
13 here we have just made it to where people are concerned  
14 with, you know, what they're trying -- the cases that  
15 they're trying to affect. If later on the Court wants to  
16 include additional cases, we can deal with that later.

17 MR. YELENOSKY: But it's not later. Bill,  
18 it's not just the tag-along because the MDL panel could in  
19 its initial order say, "Well, you brought in these 10  
20 cases. You told us that the related cases are all the ones  
21 involving tread separation and Bridgestone, and so we're  
22 going to issue an order that's all those separation cases,"  
23 so it's prior to any tag-along --

24 PROFESSOR ALBRIGHT: And at that point you  
25 notify those people. You don't have to notify them here.

1 MR. YELENOSKY: But there's -- I mean, at the  
2 point where the order is issued --

3 PROFESSOR ALBRIGHT: No. We're at the filing  
4 of the motion right now. So --

5 MR. YELENOSKY: Well, what mechanism --

6 PROFESSOR ALBRIGHT: Well, we'll get to that  
7 later.

8 MR. YELENOSKY: Well, I didn't see it,  
9 because I see the motion being filed, the replies from  
10 those who are intended to be tied and then the MDL panel  
11 with the authority to go beyond that, and I didn't see  
12 anything interim between those two.

13 PROFESSOR ALBRIGHT: If we're going to make  
14 you serve everybody in the world, you might as well list  
15 everybody in the world. There's no reason to limit it  
16 anyplace else here.

17 MR. YELENOSKY: I think that may be a good  
18 question about whether you can do that and set due process.

19 PROFESSOR DORSANEO: I was assuming that the  
20 order would be limited.

21 MR. YELENOSKY: But everything we have heard  
22 is it won't or it doesn't necessarily have to be. Isn't  
23 that right, Judge Brister?

24 HONORABLE SCOTT BRISTER: I'm sorry?

25 MR. YELENOSKY: That the order doesn't have

1 to be limited to what's sought?

2 HONORABLE SCOTT BRISTER: Right.

3 PROFESSOR DORSANEO: Well, I think that would  
4 be a problem, if it requires someone to post-order hearing.

5 HONORABLE SCOTT BRISTER: I'm not sure why.  
6 We're talking about the transfer. Cases are jerked out of  
7 state court to Federal court all the time with no previous  
8 notice or hearing of what they have done. You get your  
9 hearing after.

10 PROFESSOR DORSANEO: Right, but after you  
11 have to --

12 HONORABLE SCOTT BRISTER: Well, we've got an  
13 after.

14 CHAIRMAN BABCOCK: How about this?  
15 Subparagraph (c) if we say, "Filing and services. A copy  
16 of any motion, response, or reply must be filed with  
17 the MDL clerk, with two copies to each panel member,"  
18 comma, "and served in compliance with TRAP 9.2."

19 PROFESSOR DORSANEO: 5.

20 CHAIRMAN BABCOCK: 9.5. I thought you said  
21 9.2.

22 HONORABLE SCOTT BRISTER: He did, but he  
23 changed.

24 CHAIRMAN BABCOCK: "9.5 on all parties in  
25 related cases for which transfer is sought," period.

1 HONORABLE SCOTT BRISTER: 9.5 says, "The  
2 filing party must serve a copy on all parties to the  
3 proceedings." Well, it seems to me that would be all  
4 right, wouldn't it?

5 CHAIRMAN BABCOCK: Yeah. Yeah. And then the  
6 last sentence would remain the same. How does everybody  
7 feel about that?

8 HONORABLE TOM GRAY: One very minor thing you  
9 could change. We don't have an MDL clerk. We have an MDL  
10 panel clerk under the definition.

11 MR. LOW: Chip, let me ask one question  
12 that's really not of substance.

13 CHAIRMAN BABCOCK: MDL panel clerk, right?

14 HONORABLE SCOTT BRISTER: Yeah.

15 CHAIRMAN BABCOCK: Yeah, Buddy.

16 MR. LOW: I notice up here we say that any  
17 motion, request, or response and down here --

18 HONORABLE SCOTT BRISTER: That was a typo.  
19 It's motion, response, reply.

20 MR. LOW: -- we say "copy of any motion,  
21 response, or reply."

22 CHAIRMAN BABCOCK: We fixed that up above.

23 MR. TIPPS: It's fixed.

24 MR. LOW: Oh, has that been done?

25 CHAIRMAN BABCOCK: You were obviously

1 primping when we did that.

2 MR. LOW: Well, I was eating.

3 MR. YELENOSKY: Chip, can I follow up just a  
4 little bit more on the due process?

5 CHAIRMAN BABCOCK: Yeah, Stephen.

6 MR. YELENOSKY: Because I guess, I mean,  
7 maybe there isn't a due process concern, but I guess I  
8 don't see the distinction in due process rights of those  
9 whom you seek to join and those whom you may not seek but  
10 yet are going to be potentially subject to the Court's  
11 order. To the extent we think that those you seek to join  
12 in this have some right to respond before an order then why  
13 don't we think those who are potentially at the same risk  
14 have the same right, or conversely, that none of them have  
15 a right, and anybody can just go in and say, "join us and  
16 you'll get your post facto hearing"?

17 HONORABLE SCOTT BRISTER: Because the cases  
18 that haven't been filed yet and the plaintiffs who haven't  
19 been injured yet are also going to be subject to this  
20 order, and they cannot possibly have a due process right  
21 yet, and we can't -- if there's a due process right in one  
22 there's a due process right filed in the other.

23 MR. YELENOSKY: But how does that explain the  
24 distinction between those you know yet not intended to be?

25 HONORABLE SCOTT BRISTER: I mean, I disagree

1 that there is any due process problem. Garnishment,  
2 sequestration, et cetera, the whole Piralta line of cases  
3 says due process is satisfied if you get a quick hearing  
4 afterwards and a chance to get it back, though they jerked  
5 your refrigerator out without telling you earlier.

6 MR. YELENOSKY: Right. Well, then the notice  
7 of those you seek to join is gratuitous in this case.

8 HONORABLE SCOTT BRISTER: Correct.

9 MR. YELENOSKY: I just want to make sure  
10 we're comfortable with that.

11 CHAIRMAN BABCOCK: Stephen.

12 MR. TIPPS: I'm not sure why we should assume  
13 that the panel in its order has the right to transfer cases  
14 that have not been identified by cause number and a party  
15 has not sought to be transferred. I mean, it seems to me  
16 that -- I mean, it may well be that as a practical matter a  
17 panel's ruling on a particular motion is going to have the  
18 effect ultimately of transferring other cases because it  
19 makes all of those other cases tag-along cases, but  
20 whatever we decide about how to handle tag-along cases,  
21 there's always going to be some opportunity for a party to  
22 a tag-along case to be heard with regard to whether or not  
23 it belongs in the case or not.

24 CHAIRMAN BABCOCK: Right.

25 MR. TIPPS: So I hear Scott when he says,

1 well, the order is going to be broader than the cases in  
2 which this transfer is sought, but I'm not really sure  
3 that's right.

4 CHAIRMAN BABCOCK: Yeah. We're going to get  
5 to that. But I think you raised an important issue.

6 MR. TIPPS: Because, you know -- go ahead.

7 CHAIRMAN BABCOCK: Okay. Any other comments  
8 about subpart (c)? Alex.

9 MR. ORSINGER: My question is, is the  
10 original of the motion filed --

11 CHAIRMAN BABCOCK: Is your name Alex?

12 MR. ORSINGER: Oh, I'm sorry. I thought you  
13 were asking a global question.

14 PROFESSOR ALBRIGHT: Notice given to the  
15 trial court, you're not telling us what kind of notice. Is  
16 a telephone call to the trial court enough? I mean, it  
17 would seem easier to file a notice. You-all can deal with  
18 it, but you just need to -- you need something more  
19 definite than "notice."

20 HONORABLE SCOTT BRISTER: We had in mind --

21 PROFESSOR ALBRIGHT: It sounds like you had a  
22 one-page something.

23 HONORABLE SCOTT BRISTER: Right.

24 HONORABLE TRACY CHRISTOPHER: One-page notice  
25 of filing.



1 PROFESSOR ALBRIGHT: Yeah, but it still needs  
2 to be filed instead of "given."

3 HONORABLE TRACY CHRISTOPHER: Yes.

4 MR. ORSINGER: You could say "written  
5 notice."

6 CHAIRMAN BABCOCK: Richard, what did you say?

7 MR. ORSINGER: You could say "written notice  
8 must be given to each trial court."

9 PROFESSOR ALBRIGHT: You still file in a  
10 trial court.

11 HONORABLE SCOTT BRISTER: "Must be filed in  
12 each trial court." That's fine.

13 MR. GILSTRAP: You still file it.

14 PROFESSOR ALBRIGHT: But you-all can deal  
15 with that. We don't need to discuss it.

16 CHAIRMAN BABCOCK: All right. Richard.

17 MR. ORSINGER: Is the original of the motion  
18 filed in your own case and a copy is filed with the Supreme  
19 Court clerk?

20 HONORABLE SCOTT BRISTER: The idea would be  
21 none of this is filed in the trial court.

22 MR. ORSINGER: Then you ought to provide that  
23 the original of the motion is filed with the MDL panel  
24 clerk, right, and the trial court just gets notice, a  
25 one-page notice?

1                   CHAIRMAN BABCOCK: Okay. "An original and  
2 copy of any motion."

3                   MR. ORSINGER: The Supreme Court clerk needs  
4 a copy as well as the original or just the original? Just  
5 the original.

6                   MR. GILSTRAP: We decided that's what they  
7 were going to decide by local rule.

8                   MR. ORSINGER: No, we're not going to have a  
9 local rule.

10                  CHAIRMAN BABCOCK: Yeah. Just "any motion."  
11 We don't need to talk about rule.

12                  HONORABLE SCOTT BRISTER: That's fine.

13                  CHAIRMAN BABCOCK: What else? Okay. Anybody  
14 feel strongly they want to vote on any aspect of  
15 subparagraph (c) that we've --

16                  MR. MUNZINGER: Could you read subparagraph  
17 (c) as you now understand it, please?

18                  CHAIRMAN BABCOCK: You betcha. Subparagraph  
19 (c), "Filing and service. Any motion, response, or reply  
20 must be filed with the MDL panel clerk with two copies to  
21 each panel member and served in compliance with TRAP Rule  
22 9.5 on all parties in related cases for which transfer is  
23 sought. Notice of the filing must be filed in each trial  
24 court referenced in the motion. Copies of a motion,  
25 response, or reply need not be filed with the trial court."

1 Anybody --

2 HONORABLE DAVID PEEPLES: Do we really need  
3 two copies per member?

4 HONORABLE SCOTT BRISTER: I don't.

5 HONORABLE DAVID PEEPLES: I don't think so.

6 CHAIRMAN BABCOCK: I think that was Tom's --

7 HONORABLE TOM GRAY: I assumed that Judge  
8 Brister may want to have a law clerk or someone --

9 HONORABLE SCOTT BRISTER: I never write on  
10 briefs.

11 MR. GILSTRAP: Chip, do they send all the  
12 copies to the Supreme Court clerk or do they actually send  
13 it to Judge Peeples in San Antonio?

14 CHAIRMAN BABCOCK: Send to it Judge Peeples  
15 in San Antonio.

16 MR. GILSTRAP: That's how we're going to do  
17 it?

18 HONORABLE DAVID PEEPLES: One copy.

19 PROFESSOR ALBRIGHT: My problem is it's  
20 included in the service, it's kind of ambiguous the way you  
21 have it. You may want to say, "The reply must be filed and  
22 copies served on each MDL panel member and all parties."

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE SCOTT BRISTER: That's fine. We  
25 can do that.

1 CHAIRMAN BABCOCK: Anything else?

2 MS. CORTELL: I understand this is a minority  
3 view, but I believe service should be on all parties in  
4 related cases, and you can even note it on the record or  
5 whatever.

6 CHAIRMAN BABCOCK: How much of a minority  
7 view is that?

8 MR. YELENOSKY: Me. I'm a minority.

9 MS. CORTELL: I have one other minority  
10 member here.

11 PROFESSOR CARLSON: I think it depends on how  
12 the rest of the rule plays out.

13 MR. ORSINGER: Well, we're not going to give  
14 due process to the tag-alongs anyway, so you may as well  
15 just get adjusted to it.

16 CHAIRMAN BABCOCK: Now, now, Richard. Okay.  
17 Subparagraph (d), hearing.

18 HONORABLE SCOTT BRISTER: The change here is  
19 contra the -- we had a lot of complaints that the  
20 Federal MDL which requires everything to be by hearing  
21 requires people to show up from all over the place for no  
22 real purpose, and that this would be "The panel may decide  
23 any matter on written submission or may in its discretion  
24 conduct an oral hearing," and the oral hearing could be in  
25 front of one of the members designated by the panel and

1 that the panel could order one of the parties, one or more  
2 of the parties, to give notice to everybody else of the  
3 hearing if you're going to have one.

4 CHAIRMAN BABCOCK: Justice Duncan.

5 HONORABLE SARAH DUNCAN: As I said the other  
6 day, nowhere is the panel required to give the parties, any  
7 party, notice of the time and place of their choosing for a  
8 hearing.

9 HONORABLE SCOTT BRISTER: Exactly right.

10 MR. GILSTRAP: And that's the intent?

11 HONORABLE SCOTT BRISTER: The intent is the  
12 panel tells the movant, in all probability, "Give notice to  
13 everybody. We're going to have a hearing on this date and  
14 this time, and it's going to be this type of a hearing."

15 HONORABLE SARAH DUNCAN: Even that's not in  
16 the rule.

17 HONORABLE SCOTT BRISTER: I'm sorry?

18 HONORABLE SARAH DUNCAN: Even that's not in  
19 the rule.

20 MR. ORSINGER: Isn't that what the last  
21 sentence is?

22 MR. GRIESEL: "Shall" instead of "may"?

23 MR. GILSTRAP: Could you have an oral hearing  
24 and say, "Well, we're not going to give notice to  
25 everybody"? I mean, that's what it seems like it would

1 allow.

2 HONORABLE DAVID PEEPLES: Scott, I thought  
3 what we decided the other day was to say, "The panel shall  
4 cause notice to be given," which means that the panel can  
5 tell the movant "We're going to have this hearing at such  
6 and such time and place. Notify everybody." Doesn't that  
7 work?

8 HONORABLE SCOTT BRISTER: I don't matter one  
9 way or the other. I thought it was better to say "may  
10 order one of the parties." What if one of the parties  
11 says, "I don't want to give notice. That's the court's  
12 job." It says "shall cause" but it doesn't say "You shall  
13 cause the parties." It says you shall cause somebody to do  
14 it.

15 MR. ORSINGER: Then deny the motion.

16 HONORABLE SCOTT BRISTER: I want to make it  
17 clear that unlike what we normally do the court is not  
18 going to send notice because we don't have the money do it,  
19 and it seemed to me it needs to be clear that the panel can  
20 tell somebody or somebody, "You do it or else."

21 CHAIRMAN BABCOCK: Does that work for you?

22 HONORABLE DAVID PEEPLES: That's fine.

23 HONORABLE DAVID B. GAULTNEY: How is the  
24 panel going to do that? Are they going to pick up the  
25 phone and call the lawyer or send a letter out?

1 HONORABLE SCOTT BRISTER: We're going to have  
2 the Supreme Court clerk call the movant and tell them we  
3 want to have a hearing at this time and place. Again, I  
4 don't know, we don't know, but I'm not anticipating that  
5 we're going to have big, long knock-down drag-out arguments  
6 on this. Other state's experience is two-thirds of them  
7 are agreed, and the ones that aren't, I'm not sure, again,  
8 if you -- if there's a thousand cases and there's 48  
9 different courts, I'm not sure how much you need to know in  
10 an oral argument. That is a problem.

11 CHAIRMAN BABCOCK: Richard.

12 MR. MUNZINGER: Just you now have notice  
13 being given to all of the related cases as distinct from  
14 related cases sought to be transferred.

15 HONORABLE SCOTT BRISTER: We can go through  
16 this everywhere if that's the intent of the committee and  
17 make them "which is sought."

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE SCOTT BRISTER: Though, I frankly  
20 would like it the panel -- what if the panel says, "No, we  
21 want you to give notice to everybody, not just the ones  
22 you're seeking"? There might be reason for distinction  
23 here.

24 HONORABLE SARAH DUNCAN: We haven't even  
25 given them notice that the proceeding is ongoing, transfer

1 proceeding, so why would you give them notice of a hearing  
2 that they don't even know there's a proceeding, transfer  
3 proceeding?

4 HONORABLE SCOTT BRISTER: Who doesn't know?

5 HONORABLE SARAH DUNCAN: The people in the  
6 related cases in which transfer is not sought.

7 HONORABLE SCOTT BRISTER: Because they will  
8 get a notice in the mail if we think somebody or somebody  
9 has been excluded saying, "We're having a hearing on  
10 whether to consolidate all tire separation cases." It  
11 seems like they would want to get that.

12 HONORABLE SARAH DUNCAN: Well, they would  
13 also like the motion and the response and the reply, and  
14 particularly they would like it before they go to the  
15 hearing.

16 HONORABLE SCOTT BRISTER: Well, I mean, we --  
17 yeah, but you're just asking to revisit the thing back at  
18 the start.

19 HONORABLE SARAH DUNCAN: No. I'm saying I  
20 don't see a point for a distinction is what I'm saying.

21 HONORABLE SCOTT BRISTER: Either way,  
22 Mr. Chairman.

23 CHAIRMAN BABCOCK: Okay. So the sentence as  
24 written is not limited to cases sought to be transferred.

25 HONORABLE SCOTT BRISTER: Right.



1 CHAIRMAN BABCOCK: How many people think it  
2 should be?

3 MR. HAMILTON: Should be?

4 CHAIRMAN BABCOCK: Should be limited to cases  
5 sought to be transferred. That's the question. Judge  
6 Gray.

7 HONORABLE TOM GRAY: I was agreeing with the  
8 -- you said how many, and I was raising my hand.

9 CHAIRMAN BABCOCK: Everybody who thinks that  
10 it ought to be limited --

11 MR. GILSTRAP: And we've limited it that way  
12 before, right? We've limited it that way so far all the  
13 way?

14 CHAIRMAN BABCOCK: Yes. Everybody that  
15 thinks that, raise your hand.

16 HONORABLE DAVID B. GAULTNEY: The issue is  
17 whether the hearing --

18 CHAIRMAN BABCOCK: This last sentence here.  
19 "The MDL panel may order one or more parties to give notice  
20 of the time, place, and nature of any oral hearing to all  
21 parties in all related cases sought to be transferred."  
22 That's what we're voting on.

23 All against that? 12 to 12, so the Chair  
24 gets to vote on this one.

25 HONORABLE TOM GRAY: Chip, a comment that may

1 help resolve this that the public member made, he suggested  
2 -- and I know this steps slightly back to the previous  
3 issue, but he suggested that notice be given of the filing  
4 in the cases which the panel's intention is to consider  
5 transferring specific cases for coordinated or consolidated  
6 pretrial proceedings.

7           In other words, in the context he's saying if  
8 there are other cases that are not sought to be transferred  
9 that the panel intends to consolidate, let them be  
10 notified, and which may fix everybody's due process concern  
11 and Stephen and Nina's. I mean, if the panel intends to  
12 consolidate somebody else, notify them.

13           MR. YELENOSKY: And it certainly improves it  
14 when you have a hearing, but you're not always going to  
15 have a hearing.

16           HONORABLE TOM GRAY: Right.

17           CHAIRMAN BABCOCK: Well, I'm persuaded by the  
18 fact that Judge Brister is the chair of this subcommittee  
19 and believes that the limitation, while appropriate in  
20 other parts of the rule, is not appropriate here, so I  
21 break the tie on that matter, so we won't limit it in that  
22 fashion.

23           (e), evidence.

24           MR. ORSINGER: Well, before we go on, there  
25 is no official court reporter, but there is a potential for

1 a mandamus. Should we say something about the fact that  
2 the parties may make a record or something? I mean, can  
3 someone bring their own private court reporter to make a  
4 record for the mandamus review or not?

5 MR. LOW: No oral testimony is there?

6 CHAIRMAN BABCOCK: Not going to have  
7 testimony.

8 MR. LOW: You have to send depositions and  
9 affidavits.

10 CHAIRMAN BABCOCK: Well, if that point is  
11 going to be reached, it's going to be reached under (e),  
12 evidence.

13 MR. ORSINGER: So this is a nonevidentiary  
14 hearing then? And people have to make objections to  
15 affidavits that are inadmissible in writing like they do in  
16 a summary judgment or exactly what happens at this hearing?

17 HONORABLE SARAH DUNCAN: It's evidentiary.  
18 There will be evidence --

19 HONORABLE SCOTT BRISTER: Plenty of evidence.

20 HONORABLE SARAH DUNCAN: -- admitted, but no  
21 oral testimony.

22 CHAIRMAN BABCOCK: Yeah. Just like a summary  
23 judgment.

24 MR. ORSINGER: Okay.

25 HONORABLE SCOTT BRISTER: And (e) is to --

1 the panel has discretion to say how we want the evidence  
2 submitted, which I assume would also allow it to say, "Stop  
3 filing this stuff. We've got enough."

4 CHAIRMAN BABCOCK: Anybody have any concerns  
5 about the language of subparagraph (e)?

6 MR. ORSINGER: Can we just add in there  
7 something about objecting in writing then? Because if  
8 you're having evidence, shouldn't you -- or does it go  
9 without saying that you can make objections to them?

10 CHAIRMAN BABCOCK: Seems to me it goes  
11 without saying. Are you going to sit still while somebody  
12 submits an affidavit from a six-year-old who you know is  
13 mentally retarded and it says so in his affidavit?

14 HONORABLE SCOTT BRISTER: There was a  
15 proposal you have to do this 45 days before and that 7 days  
16 before, but again, our feeling, No. 1, the panel probably  
17 can do that if they want to in any case or all cases and  
18 that it would be easier to keep this part simple.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. ORSINGER: What are the parties' rights?  
21 I'm sorry. What are the parties' rights? Do they have the  
22 right to file evidence, or can they file evidence only when  
23 the panel directs them to file evidence?

24 HONORABLE SCOTT BRISTER: The idea would  
25 be you can -- there's nothing in the rule that says what

1 you can't file.

2 MR. ORSINGER: So we should infer from this  
3 that the parties can file evidence if they wish to.

4 HONORABLE SCOTT BRISTER: I'm hoping you will  
5 infer from this that this is a matter on briefs and if the  
6 panel needs evidence we'll ask for it, but I'm unwilling to  
7 be a part of a rule that says you always file this or you  
8 can never file that because it just varies. These cases  
9 are going to be all different.

10 CHAIRMAN BABCOCK: Yeah, and the example I  
11 used before where you might be trying to suggest that a  
12 particular court was an appropriate court, you might attach  
13 a portion of a hearing where this judge that dealt with the  
14 precise issue that is common to all these cases. You could  
15 see that happening, and nothing in here precludes that.

16 HONORABLE SCOTT BRISTER: I mean, this is in  
17 a way a lot like a discovery hearing, because that's what  
18 you're talking about, coordinating discovery, and those are  
19 not usually on the record, those are not usually -- you  
20 know, attorneys tell you what happened and what they want  
21 to happen. These -- perhaps it needs to be a little more  
22 formal than that.

23 MR. ORSINGER: But the bottom line is parties  
24 can file affidavits and depositions and copies of exhibits  
25 if they want to?

1 HONORABLE SCOTT BRISTER: Unless the panel by  
2 internal rules or particular order says otherwise.

3 CHAIRMAN BABCOCK: Yeah, Kent.

4 MR. SULLIVAN: Administratively wouldn't you  
5 want to think about giving some guidance on that point,  
6 because in the absence of some guidance, out of an  
7 abundance of caution wouldn't you almost automatically have  
8 many of the parties filing things?

9 HONORABLE SCOTT BRISTER: Do they normally do  
10 that, Tommy?

11 MR. JACKS: Not uncommon for there to be  
12 exhibits attached to whatever motion is filed.

13 MR. SCHENKKAN: But typically aren't they in  
14 the nature of these are the pleadings in these cases or  
15 this is, you know, one key document, like a regulatory  
16 order that's relevant to the issue, or the report of a  
17 safety investigation, something that is semi-factual?

18 MR. JACKS: Yeah. I would honestly have to  
19 go back and look. I just know I have seen Tabs A, B, C, D,  
20 but I --

21 MR. SULLIVAN: My point was directed to the  
22 issue of resources that's been raised several times. The  
23 Federal courts have more than adequate resources to sort  
24 things out in the face of this sort of uncertainty with the  
25 prospect that maybe in a high stakes case the parties are

1 filing everything that might conceivably be relevant to the  
2 decision. In the state court situation, as you put it  
3 several times, you have no filing cabinets, no pencils, no  
4 whatever. You might want to give some guidance saying you  
5 should in effect make it clear that really "X, Y, and Z is  
6 all we want unless you hear further from us," because it  
7 could create a real morass, given that this is a new  
8 procedure and, you know, certain -- just a thought.

9 HONORABLE SCOTT BRISTER: The problem is  
10 going to be saying what X, Y, and Z you want, because it's  
11 going to change in almost every case.

12 MR. SULLIVAN: But that's --

13 HONORABLE SCOTT BRISTER: But my sense is,  
14 without having looked at or been a part of any one of  
15 these, if somebody tells me there's 2,500 cases in 97  
16 district courts in Texas and the other side doesn't dispute  
17 it, and he's not -- and they say these 97 district courts  
18 are all issuing different discovery periods, and nobody  
19 disputes that in a response, what evidence do I want to  
20 look at?

21 MR. SULLIVAN: But that really is my --

22 HONORABLE SCOTT BRISTER: I may need to swear  
23 somebody in, but isn't that exactly what House Bill 4 is  
24 supposed to --

25 MR. SULLIVAN: All I'm arguing for is

1 certainty. I don't know exactly how we want to fashion the  
2 rule, but I guess what I'm saying is that if that's the  
3 direction you're trying to go then maybe you say that what  
4 you're asking for is a motion and a response and either  
5 party in those documents could say that they have a desire  
6 to file something else, whatever it might be, and that if  
7 you're concerned about this resource allocation issue then  
8 you say "and the parties are directed not to file those  
9 things without further direction or order from the MDL  
10 panel."

11 CHAIRMAN BABCOCK: Yeah, Ralph.

12 MR. DUGGINS: Scott, did you-all consider  
13 11(e), the evidence part?

14 HONORABLE SCOTT BRISTER: I'm sure we did.

15 MR. DUGGINS: For those who don't have the  
16 Rule 11 of the Judicial Administration Rules, it just says  
17 that you may consider all documents filed, all discovery  
18 conducted, all stipulations, affidavits, that sort of  
19 thing, or oral testimony. I'm not proposing. I'm just  
20 asking if you thought about whether to try to track some or  
21 all of that.

22 HONORABLE SCOTT BRISTER: Yeah. I mean,  
23 obviously the difference between 11 and this is this says  
24 the panel can in its discretion order discovery filed. The  
25 hope was that message conveys generally the rule that if we



1 want it we'll ask for it. But, again, I personally  
2 hesitate to say "never anything unless we ask for it,"  
3 "anything you want unless we say stop," because again, even  
4 to say 'stop' or to invite something, the argument could be  
5 made that it has to be signed by three of the judges.  
6 Every action.

7 CHAIRMAN BABCOCK: The argument, Kent's  
8 argument really is should we tell the practitioners, "You  
9 are precluded from filing this unless we ask for it"?

10 MR. SULLIVAN: My point was largely a  
11 prediction, and that is in the face of this uncertainty,  
12 what you are worried about is the onslaught of all sorts of  
13 materials that you don't have the resources to handle I  
14 will predict that with no guidance you will get them,  
15 because by the nature of things these are going to be  
16 higher stakes cases, people not only don't want to lose,  
17 but they don't want to be blamed in the event they lose, so  
18 people tend to overfile.

19 HONORABLE SCOTT BRISTER: You may be right,  
20 but there's also no statute saying we have to keep them a  
21 second after we finish the ruling on the order, is there,  
22 since we have no clerk or anything else?

23 HONORABLE SARAH DUNCAN: Well, it's a public  
24 record.

25 MR. ORSINGER: Surely the --

1                   CHAIRMAN BABCOCK: The common law right of  
2 access.

3                   MR. ORSINGER: -- Supreme Court clerk is  
4 going to keep these so the tag-along guys can go find out  
5 what happened to them before they even came into existence.

6                   HONORABLE SCOTT BRISTER: I don't know. We  
7 haven't talked about it.

8                   MR. ORSINGER: Okay.

9                   CHAIRMAN BABCOCK: All right. Carl.

10                  MR. HAMILTON: Are you-all not interested in  
11 the pleadings in these cases? It looks to me like these  
12 proceedings are all going to take place before discovery  
13 starts, and that's the whole purpose of consolidation.  
14 Looks to me like the pleadings would be important on  
15 whether there's common questions.

16                  HONORABLE SCOTT BRISTER: Yes, but if we  
17 get -- if the panel gets into having to look at 500 sets of  
18 pleadings, I mean, we're going to have to pretty much go on  
19 the -- again, the idea is like an appellate brief, your  
20 brief just makes representations. If you want to reference  
21 the record, do so, but don't put it in the brief; and the  
22 other side, as in a brief, if you contest something the  
23 other side says in their brief about the facts, you need to  
24 say so, because otherwise if it's not contested in the  
25 briefs, we assume that it's undisputed.

1 CHAIRMAN BABCOCK: Okay. Anybody have  
2 violent objection to this subparagraph (e)? That's the  
3 standard now, violent objection. Sarah, you'll have to be  
4 violent if you don't like it. Just kidding. You don't  
5 have to be violent.

6 HONORABLE DAVID B. GAULTNEY: She might be  
7 able to rise to that level.

8 CHAIRMAN BABCOCK: Stephen.

9 MR. TIPPS: I'm not violently opposed, but  
10 would it make sense in light of Kent's observation for us  
11 to say something like "parties need not file supporting  
12 evidence with their filings, but the panel in its  
13 discretion may order that to be submitted"? Does that send  
14 the right message?

15 CHAIRMAN BABCOCK: Maybe. The Type A guys  
16 are going to do it anyway.

17 MR. TIPPS: "Parties may not provide  
18 evidence."

19 CHAIRMAN BABCOCK: The lawyers who are Type A  
20 are going to do it anyway.

21 HONORABLE SCOTT BRISTER: Tell them you  
22 can't.

23 MR. TIPPS: But, I mean, I think that  
24 communicates even to me, who is a Type A lawyer, that they  
25 are not necessarily expecting me to present all of my

1 supporting evidence.

2 CHAIRMAN BABCOCK: Yeah. Well, I mean, this,  
3 the way it's written says that, it seems to me, but it  
4 seems to me that Kent's point is that --

5 MR. SULLIVAN: Maybe I could make the point  
6 by saying how many trial lawyers do you know that are not  
7 Type A?

8 CHAIRMAN BABCOCK: Yeah. There are probably  
9 none. So I guess the issue is whether or not we want to  
10 have a prohibition, right? Anybody want to vote on that?

11 Bill.

12 PROFESSOR DORSANEO: Well, I need to know  
13 what this hearing is going to be about, what factors are  
14 considered and all the rest of that. If it's just all read  
15 the pleadings --

16 HONORABLE SARAH DUNCAN: They're not going to  
17 read the pleadings, Bill.

18 MR. ORSINGER: This (f) (1) and (2) are the  
19 factors there, Bill.

20 HONORABLE DAVID B. GAULTNEY: I'm not sure we  
21 can have a blanket prohibition. All of these cases are  
22 going to be different. Some of them evidence is going to  
23 be different and parties are going to know that, and to  
24 present the issue to the MDL panel they're going to want to  
25 do that.

1                   CHAIRMAN BABCOCK: I mean, if the decision is  
2 -- if you jump ahead onto (f) and see what the decision is  
3 going to be based on, convenience of the parties and  
4 witnesses and promoting the just and efficient conduct of  
5 the related cases.

6                   PROFESSOR DORSANEO: "See attachment."

7                   CHAIRMAN BABCOCK: "See attachment." That's  
8 another issue, but I mean, just on convenience of parties  
9 and witnesses, if you have a 1404a motion in Federal court,  
10 you always have affidavits saying that, you know -- and in  
11 fact, the law requires you to say, "Okay, here are the  
12 nonparty witnesses. They all live in Dallas. Here's what  
13 they're going to say, and it would be more convenient for  
14 them if the case were in Dallas as opposed to Topeka." You  
15 always have an affidavit on that.

16                   And this is the same standard, and so that  
17 anybody who practices in Federal court will automatically  
18 be thinking, "Yeah, I've got to support this [by|buy]  
19 evidence," and if you don't support it by evidence then  
20 how's the court going to make a decision? I mean, how's  
21 the court going to know who the witnesses are or where they  
22 live or what's convenient for them or what's not convenient  
23 for them?

24                   MR. SULLIVAN: My only point was that if you  
25 don't tell them what you are looking for and circumscribe

1 it somehow, you're going to have people filing all kinds of  
2 things and maybe, you know, in a very voluminous way.  
3 There is simply, I think, no end to what you might end up  
4 with.

5 CHAIRMAN BABCOCK: Is that a bad thing?

6 MR. SULLIVAN: It is if you start from the  
7 presumption that you have no resources to support it, which  
8 is what I thought was a critical issue, because if there  
9 were plenty of money I would say absolutely let anyone file  
10 what they want.

11 HONORABLE SCOTT BRISTER: How about this?  
12 How about if evidence is filed with the MDL panel clerk,  
13 but not sent to all the judges? Does that send the message  
14 clearly enough?

15 HONORABLE SARAH DUNCAN: It certainly sends  
16 your message.

17 MR. ORSINGER: Why don't we have a proviso?

18 HONORABLE SCOTT BRISTER: If your concern is  
19 making a record, file everything you want so you can  
20 complain that it was in the record, but again, if the  
21 concept is not a trial court motion practice but an  
22 appellate briefing practice, the record is filed separate  
23 from the briefs, and the briefs refer to the record or make  
24 representations about the record that the parties may  
25 challenge, but if they don't challenge it, we don't fool

1 with it.

2 HONORABLE DAVID PEEPLES: Chip, that's a  
3 great idea. You know, the idea of several inches thick of  
4 exhibits being sent to all these related cases is just  
5 outlandish, and I think that everybody is covered if we go  
6 with Scott's suggestion. File the big stuff with the clerk  
7 and then just the pleadings go to everyone else. That's  
8 what you're saying?

9 HONORABLE SCOTT BRISTER: Right.

10 MR. GILSTRAP: But everybody is covered if  
11 you just say, "Don't file anything." I mean, if you're  
12 just worried about covering people then stick with petition  
13 for review paradigm. You know, here is the 15-page  
14 document. You say what you say. You say, "Well, yes,  
15 we've got evidence, we've got affidavits," and if the court  
16 wants to look at it, they can look at it.

17 HONORABLE DAVID PEEPLES: But the reason,  
18 Frank, I think that might not be good is a lot of these I  
19 think are going to be decided on submission, and you don't  
20 want people to think, "Well, they've already denied my  
21 motion or granted it, and I didn't get to send all my stuff  
22 in," and so I think they need to be able to send it to  
23 Austin.

24 PROFESSOR ALBRIGHT: But nobody is going to  
25 look at it.

1 HONORABLE DAVID PEEPLES: If it needs to be  
2 looked at it, it will be looked at, Alex.

3 PROFESSOR ALBRIGHT: Okay.

4 MR. GILSTRAP: That happens in the Supreme  
5 Court all the time. They deny your petition for review and  
6 they didn't look --

7 PROFESSOR CARLSON: But you've been heard  
8 before on the issues.

9 HONORABLE SARAH DUNCAN: There are a couple  
10 of really fundamental differences between this process and  
11 an appeal or a petition for review.

12 HONORABLE SCOTT BRISTER: Sure.

13 HONORABLE SARAH DUNCAN: One is the record  
14 has already been made. Two is the issues have already been  
15 heard. Three is the issues have already been cited by  
16 somebody.

17 I don't know if anybody else is just a little  
18 concerned about the cavalier way we all just kind of  
19 accepted that the --

20 HONORABLE SCOTT BRISTER: Wait a second.  
21 This is not cavalier. I have spent hours. I have let all  
22 of my dockets be shut down for two weeks. This is not  
23 cavalier. Yes, it's an important decision; but the problem  
24 is, unlike a trial court, we have no court reporter. We  
25 cannot make a record. I mean, decide that, but let's



1 decide that and then stop harping about the details. I'm  
2 sorry we can't make it perfect, but this is a decision  
3 that's unlike anything else. We have got to pick one to  
4 go, and it's not going to be exactly like one.

5 HONORABLE SARAH DUNCAN: If I could just  
6 finish my sentence, I wasn't trying to say, Scott, that you  
7 were cavalier. I was trying to say that we cavalierly just  
8 kind of skipped over the fact that the pleadings aren't  
9 even going to be a part of anything we're talking about  
10 filing at this point, and I thought what we were trying to  
11 determine, even more than the convenience of the witnesses  
12 and the parties and whether the just and efficient conduct  
13 of the related cases requires this, is there a common  
14 question of fact. How are you going to do that without the  
15 pleadings?

16 HONORABLE DAVID PEEPLES: I'll tell you how.  
17 If a motion says the pleadings in every one of these 500  
18 cases alleges a tread separation by a Firestone tire, I can  
19 be pretty sure that they all say it or the other side is  
20 going to point out that that statement is wrong, but I  
21 don't need to see 500 15-page pleadings to do it. If  
22 they're on file in Austin, that's good enough; and if the  
23 motions say what the pleadings say, we can count on the  
24 advocates to either let that go and not contest it; or if  
25 it's wrong, they will contest the heck out of it; and you

1 don't need exhibits to go out to all these related cases or  
2 to all the panel.

3 CHAIRMAN BABCOCK: Elaine.

4 PROFESSOR CARLSON: It seems to me if we're  
5 going in a direction of deciding this on written  
6 submission, which it sounds like you are, because the way  
7 I'm reading this -- and I agree with what Kent said -- the  
8 panel can decide this on written submission and oral  
9 hearing, and we'll let you know if we're going to have an  
10 oral hearing. It doesn't say it's going to let you know  
11 it's going to be taken on written submission. You have no  
12 time limit to get the notice.

13 So I think Kent's right. Any good trial  
14 lawyer is going to load up everything they've got as far as  
15 proof. Maybe you ought to just give the lawyers a heads up  
16 here and say, "This is going to be decided on written  
17 submission," kind of like we have in the venue practice.  
18 "Statements made will be taken as true unless contested."  
19 And just put in issue what's at issue because of the  
20 financial and resource constraints, but let the lawyers  
21 know that.

22 MR. SULLIVAN: My point was simply to create  
23 more certainty. I'm not trying to advocate one outcome or  
24 another. I just think we ought to be clear about what's  
25 going to happen and what you really want.

1                   PROFESSOR CARLSON: And don't make people  
2 think if they're sending evidence to Austin it's being  
3 looked at. I find that offensive.

4                   CHAIRMAN BABCOCK: Judge Bland.

5                   HONORABLE JANE BLAND: Well, you know, I  
6 think it absolutely has to be evidence because you can't  
7 rule on it without evidence to support it, but I don't see  
8 why it has to be sent to every judge. It can be sent to  
9 Austin. You can do like the Fifth Circuit does. The Fifth  
10 Circuit, the record is in New Orleans; and any judge who  
11 wants to see the record and makes a request, the whole  
12 record or the part of the record that the judge is  
13 interested in is sent to their individual chambers wherever  
14 they are, but don't make multiple copies of the record and  
15 have each judge -- I mean, I think it's workable to have  
16 one central filing location and have, you know, individual  
17 judges request the record to the extent that they need to  
18 review it for disputes between the parties in their  
19 briefing about the record.

20                   PROFESSOR CARLSON: We don't even have  
21 postage money.

22                   HONORABLE SARAH DUNCAN: But what you do in  
23 the Fifth Circuit is you do have an appendix that has those  
24 parts of the record that are critical to your case, and  
25 we're saying "Don't do that."

1 HONORABLE JANE BLAND: Well, and I think if  
2 this panel decides they need an appendix to get that record  
3 in front of them then they can do that and that's the local  
4 rule, and I guess now it's in the TRAP, but, I mean,  
5 originally that was -- that wasn't how it used to be. I  
6 mean, it used to be anybody who wanted the record would  
7 order it from New Orleans, and you know, I know money is  
8 tight, but I guess you could charge the -- you know, tax  
9 the postage as costs.

10 CHAIRMAN BABCOCK: Buddy.

11 HONORABLE JANE BLAND: But it seems that's a  
12 lot cheaper than making a copy of the record for every  
13 single judge.

14 MR. LOW: Just to point out that it is not  
15 correct that the panel could make a decision without full  
16 evidence. Many of the cases come within Rule 15 where  
17 there's an accident someplace, three different plaintiffs,  
18 and they file in three different counties. Now, what else  
19 do you need to know besides that? What evidence? You  
20 don't need evidence. We're all envisioning these 600,  
21 700-man cases, but there there are smaller ones. They  
22 don't need it. So if they file a motion that the court  
23 thinks they need some evidence then they can call for it.  
24 It's a simple procedure, and that's going to be the case  
25 most of the times. Rule 15, how many times does 15 involve

1 nothing but cases in two or three different counties and  
2 one accident? So you don't have to call for evidence every  
3 time.

4 CHAIRMAN BABCOCK: Tommy.

5 MR. JACKS: I join with Kent in thinking that  
6 you need to let lawyers know what they should and shouldn't  
7 do. I would suggest that at the end of (e) we add a  
8 sentence which says, "Absent such an order, such material  
9 shall not be filed with the motion," period. And then  
10 leave it to the panel whether they want to hear or know  
11 more. The idea of sending it to the clerk doesn't strike  
12 me as a very good idea other than as a palative measure to  
13 make lawyers feel better that they have been able to at  
14 least inundate someone, and so I would say make it a bright  
15 line rule this is the rule, and if there's an exception to  
16 the rule, it will be at the behest of the panel.

17 MR. LOW: Yeah.

18 CHAIRMAN BABCOCK: Bill Dorsaneo.

19 PROFESSOR DORSANEO: It sounds to me  
20 listening to Scott and David that they want to basically  
21 decide this by reading the motion and the response and the  
22 reply and hope that there won't be a problem, a factual  
23 dispute that will arise. I think that what Tommy said  
24 makes good sense, but I really think the paradigm of this  
25 is more like an original proceeding, and I wondered if are

1 you worried about lawyers not being careful enough with  
2 their statements in the motion or the reply? Why not have  
3 them -- I realize verification is not something that adds  
4 very much, but it does add that type of thinking to the  
5 process. You could say even in the evidence section that  
6 the motion -- the factual statements contained in the  
7 motion, the reply, or response, or response and reply, you  
8 know, must be verified. It's under some standard.

9 HONORABLE SCOTT BRISTER: I guess the idea of  
10 having one record somewhere is, No. 1, it does -- I do  
11 think it does put some brakes on what some people might  
12 say. No. 2, until I get the response and the reply, I may  
13 not know what should have been filed evidentiarywise with  
14 the motion. I would -- with appellate briefs people make  
15 representations and they cite the record, and we do not  
16 look those up normally unless it's a critical issue in the  
17 case or somebody contests it, suggests that it's wrong.

18 HONORABLE SARAH DUNCAN: Scott is speaking  
19 for his own court here.

20 HONORABLE SCOTT BRISTER: I'm speaking for  
21 myself, nobody but me.

22 HONORABLE SARAH DUNCAN: Oh, sorry.

23 HONORABLE SCOTT BRISTER: The fact of the  
24 matter is that no appellate judge in Texas reads up every  
25 one of your record cites in every one of your briefs

1 because we have too much to do. That's a fact. So we rely  
2 on the other party, as David said, to point out something  
3 that's wrong, a misrepresentation; and if nobody points it  
4 out as a misrepresentation, we assume it's true and it's  
5 not a problem. But I think it is better to have a record  
6 somewhere because I think it exercises a restraint, and if  
7 it develops after getting all the briefs in that there's a  
8 conflict then we don't have to issue an order, wait for the  
9 evidence to get filed then and look at it.

10 PROFESSOR DORSANEO: There will be some  
11 things that are not in any -- I think there is more  
12 protection in the appeal process than in the process that's  
13 to a certain extent --

14 HONORABLE SCOTT BRISTER: Right.

15 PROFESSOR DORSANEO: -- a factual  
16 determination.

17 HONORABLE SCOTT BRISTER: But then again, in  
18 the MDL we're not deciding who wins or loses or how much.  
19 It's not a court of last resort. It's a court that just  
20 decides where this thing is going to take place. So it's  
21 not nearly so final as to the parties' substantive rights.

22 HONORABLE SARAH DUNCAN: Chip?

23 CHAIRMAN BABCOCK: Yes?

24 HONORABLE SARAH DUNCAN: How are we going to  
25 have the original proceeding contemplated by 13.8 to review

1 the order granting or denying a motion to transfer of  
2 related cases if we don't have a record?

3 HONORABLE DAVID PEEPLES: You will have a  
4 record. What's lacking? What do you need that we haven't  
5 provided for here? You've got the motion, the response and  
6 all that, and you've got the exhibits that people wanted to  
7 file, and you've either got them in every office in the  
8 state or you've got them in Austin.

9 CHAIRMAN BABCOCK: One place.

10 HONORABLE DAVID PEEPLES: I mean, what's  
11 lacking?

12 HONORABLE SARAH DUNCAN: That's only if you  
13 tell the parties to submit evidence.

14 MR. ORSINGER: Well, under Tommy Jacks'  
15 proposal, which has, you know, a lot of merit to it, he's  
16 saying you can't file unless the panel requests it. Under  
17 the current writing, as interpreted by Chief Justice  
18 Brister, you're not permitted to, but you can file evidence  
19 if you want.

20 CHAIRMAN BABCOCK: Right.

21 MR. ORSINGER: We just don't say. And Kent's  
22 response is, well, if you don't say, everyone is going to  
23 file tons of evidence, more evidence than anybody wants.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: Scott, how do you feel about



1 Richard's adding the sentence?

2 CHAIRMAN BABCOCK: That was Tommy's.

3 MR. LOW: Tommy, I'm sorry, not Richard.  
4 What Tommy suggested.

5 HONORABLE SCOTT BRISTER: That you can't  
6 unless we order otherwise?

7 MR. LOW: Yeah.

8 HONORABLE SCOTT BRISTER: As long as you're  
9 not sending it to me unless I ask for it, I don't mind  
10 what's filed in Austin. Now, Austin may mind, but that's  
11 up to them, but I do think it's going to be cumbersome to  
12 issue that order; and, again, also, remember, things are  
13 happening. The longer this takes to go on -- so now we get  
14 a motion, response, reply. We decide we need some  
15 discovery filed. We send out an order. Discovery gets  
16 filed. Meanwhile, discovery deadlines and depositions are  
17 happening, which people are asking us to stop making them  
18 happen everywhere at once, so the faster we get this  
19 process done, the better.

20 My feeling is from the discussions that I've  
21 heard in 75 or 80 percent of these cases there's not going  
22 to be a ton of discovery filed. It's going to be largely  
23 agreed to, and it's going to largely point out that there  
24 are a ton of cases and they are spread all over the place.  
25 You just don't need a bunch of depositions to prove that.

1 MR. LOW: So you would vote to leave the rule  
2 as-is?

3 HONORABLE SCOTT BRISTER: Right.

4 MR. GILSTRAP: So you're okay with not having  
5 evidence filed in the end, right, unless you ask for it?

6 HONORABLE SCOTT BRISTER: Unless we ask for  
7 it.

8 HONORABLE DAVID PEEPLES: Okay. Let me --

9 HONORABLE SCOTT BRISTER: Or if it's from --  
10 which we always ask -- I assume you would have to ask for  
11 it if it's contested, if the parties disagree about  
12 something.

13 CHAIRMAN BABCOCK: One of the factors is for  
14 the convenience of the parties and witnesses, and the  
15 opening motion is going to say something like -- if there's  
16 no evidence it's going to say, "This case ought to be  
17 consolidated in Dallas because most of the nonparty  
18 witnesses and a third of the defense witnesses reside in  
19 Dallas County"; and the reply is going to say, "We don't  
20 know who he's talking about. We -- until he tells us who  
21 he's talking about we can't agree that all the nonparty  
22 witnesses are in Dallas, and we certainly don't know how  
23 material they are to the dispute. We don't know from what  
24 he said in his brief what they're going to say, and we  
25 dispute that a third of the party witnesses are going to be

1 there."

2 HONORABLE SCOTT BRISTER: Possible, but then  
3 what evidence are you going to submit to me to settle that  
4 conflict?

5 CHAIRMAN BABCOCK: Well, then you're going to  
6 do it like you do in 1404a, like you do in Federal court.

7 MR. LOW: Yeah.

8 MR. GILSTRAP: But you'll call for it.  
9 You'll ask for the affidavits at that point, right?

10 CHAIRMAN BABCOCK: But that's going to delay  
11 things.

12 HONORABLE DAVID PEEPLES: I want to point out  
13 a problem here. I have a problem if the panel rules by  
14 written submission and then the people in the case think,  
15 "Well, I didn't get to submit my back-up evidence." I  
16 mean, that, it seems to me, would be unpalatable, and  
17 therefore, I think they need to be able to file it  
18 somewhere.

19 CHAIRMAN BABCOCK: If they want to.

20 HONORABLE DAVID PEEPLES: Yeah. And I don't  
21 know if the language is right or not, but just to lull  
22 people into thinking I'm going to get -- "They'll ask me if  
23 they want my evidence later on" and all of the sudden they  
24 get a ruling in the mail, I think that shouldn't happen.  
25 So I say they need to be able to file whatever they want to

1 somewhere. It shouldn't go to every -- you know, a bunch  
2 of recipients if we're going to have this written  
3 submission, which I think is just essential.

4 CHAIRMAN BABCOCK: Judge Christopher.

5 HONORABLE TRACY CHRISTOPHER: Well, Rule 11  
6 doesn't have this provision of be for the convenience of  
7 the parties and witnesses. It only has just and efficient  
8 conduct of the related cases. My feeling of that sentence  
9 was not the way you were describing it, but instead was I  
10 have a witness and there are 98 cases and they're all  
11 getting deposition notices at different times and places  
12 for that witness. So it's for the convenience of my  
13 witness that he's only deposed once in cases. It's not a  
14 matter of where he lives and where the case -- the pretrial  
15 judge would be. Now, perhaps I'm in the minority, but that  
16 is the argument that I would expect to see with respect to  
17 the 98 cases across the state. "I don't want to present  
18 him 98 times." That doesn't need evidence.

19 HONORABLE SCOTT BRISTER: Right.

20 CHAIRMAN BABCOCK: Tommy.

21 MR. JACKS: I just wanted to comment on  
22 David's statement that it shouldn't go to a lot of  
23 recipients. Whatever you send to anybody, whether it be  
24 the clerk or panel members, you're going to have to send to  
25 every lawyer to whom you're planning service or you're

1 going to have all sorts of people squawking.

2 HONORABLE DAVID PEEPLES: All the exhibits go  
3 to everybody?

4 MR. JACKS: Absolutely.

5 HONORABLE DAVID PEEPLES: The pleadings that  
6 they've already got? The pleadings that they've already  
7 got in their files?

8 MR. GILSTRAP: They may not have them in  
9 another case, though.

10 MR. JACKS: And I guarantee you will have the  
11 phone lines humming if something got filed and sent to the  
12 court that didn't get sent to each of the lawyers who  
13 deserve notice.

14 HONORABLE SARAH DUNCAN: I mean, even the  
15 example that Judge Christopher gives of one witness and 98  
16 notices of deposition, if you're going to review that in a  
17 mandamus proceeding you do need evidence. You need  
18 evidence that that witness has been noticed 98 times in 98  
19 cases. Somebody has got a burden here, and I assume it's  
20 the person that's moving to transfer, consolidate,  
21 whatever, the cases. You've got to decide who's got the  
22 burden to figure out how to review it in an original  
23 proceeding, and if those 98 deposition notices aren't in a  
24 record somewhere, there's no evidence that that witness has  
25 been noticed for deposition 98 times in 98 different cases.

1 CHAIRMAN BABCOCK: Judge Brister says that it  
2 is there because it's in a brief and it's not challenged.

3 HONORABLE SARAH DUNCAN: That doesn't make it  
4 evidence.

5 HONORABLE DAVID PEEPLES: Or it's in an  
6 affidavit somewhere.

7 CHAIRMAN BABCOCK: Huh?

8 HONORABLE DAVID PEEPLES: It's in an  
9 affidavit somewhere.

10 CHAIRMAN BABCOCK: That would be evidence.

11 HONORABLE DAVID PEEPLES: A lawyer says "My  
12 witness has been noticed 98 times in 98 different courts."

13 HONORABLE SARAH DUNCAN: And that's fine.  
14 That's evidence. That would support it.

15 HONORABLE DAVID PEEPLES: Takes one page.

16 CHAIRMAN BABCOCK: But you can't even file it  
17 under one of these proposals.

18 HONORABLE SARAH DUNCAN: Right.

19 PROFESSOR DORSANEO: So verify the motion.

20 CHAIRMAN BABCOCK: Pete.

21 MR. SCHENKKAN: Is it appropriate to call the  
22 question on (e) at this point? We have had an awfully  
23 lengthy discussion of it for -- concerns have been stated  
24 in either direction, and I think there are some very  
25 important and difficult topics that we are going to be

1 hard-pressed to get to today and leave us still time to go  
2 back through offer of settlement and class action with the  
3 rest of this time.

4 CHAIRMAN BABCOCK: The first sentence does  
5 not seem to be controversial, the sentence as written,  
6 subpart (e), right? Do we all agree with that?

7 HONORABLE SCOTT BRISTER: Right.

8 CHAIRMAN BABCOCK: Okay. So the question is  
9 whether or not we're going to add a sentence, and if so,  
10 what it's going to say. How many people think we should  
11 add some language one way or the other about either banning  
12 evidence or regulating evidence in some way? How many  
13 people think we need another sentence? Okay. That's the  
14 vote.

15 Okay. How many people think we do not need  
16 another sentence? 15 to 5 we need another sentence.

17 Now, what is the consensus of everybody that  
18 we need? Do we need Kent's rule that says absent such an  
19 order such material shall not be filed with the motion?  
20 And that's one way to go. Then there's another way to go,  
21 which says "File evidence if you want to, but just file it  
22 with the MDL panel clerk. "

23 HONORABLE TOM GRAY: A possible preliminary  
24 vote would be whether or not -- as I understand it, there's  
25 some disagreement as to whether or not this can be evidence

1 -- needs to be some evidence in a record somewhere or not.  
2 And maybe that would be the first vote as to whether or not  
3 this has to be evidentiary based, based upon the --

4 MR. GILSTRAP: Without the court's order.  
5 There has to be some evidence filed without the court's  
6 order.

7 HONORABLE TOM GRAY: Well, the court's order  
8 that is the ultimate issue has to be based on some  
9 evidence, whether it's requested by the panel or  
10 volunteered. What's the matter?

11 HONORABLE SARAH DUNCAN: It's Elaine's fault.  
12 It's not me.

13 CHAIRMAN BABCOCK: It seems to me, Judge  
14 Gray, that if Kent's proposal, if I can call it his, will  
15 resolve the question because if his proposal prevails then  
16 there's just not going to be any evidence unless the panel  
17 wants it.

18 HONORABLE TOM GRAY: But I might vote against  
19 his proposal because I don't think it needs to be  
20 circumscribed as far as limited, but I think there needs to  
21 be evidence.

22 CHAIRMAN BABCOCK: Yeah, you would vote  
23 against his proposal then for sure, if you think there  
24 needs to be evidence, because his proposal is suggestive of  
25 that there would be many cases where there's no evidence.



1 So you would vote against that. Yeah, Judge.

2 HONORABLE DAVID B. GAULTNEY: I would argue  
3 in favor of -- I don't think we should preclude the filing  
4 of evidence in every case. I actually like the concept of  
5 creating a record at the MDL clerk that the parties can  
6 cite in their briefs that they send to the panel members if  
7 they need to, and they will cite the relevant portions of  
8 the record that they're filing with the court.

9 I also like the concept we have in our  
10 appellate rules that the court can rely -- the panel  
11 members can rely on statements in the motion as fact unless  
12 controverted, and I might even consider adding a  
13 verification requirement, but I'm not offended by the  
14 concept of building a record in the clerk's office. I  
15 suspect you do have to send copies to all the -- you're  
16 going to have to send a copy of that to every attorney, but  
17 that doesn't create a budget problem for the court. It  
18 creates a cost for the attorneys.

19 I'm not really offended -- I mean, I'm not on  
20 the panel, so I can say this -- with having the panel  
21 members each get a copy of the evidence, too, but I see no  
22 absolute requirement of that because I think as one of  
23 the -- someone said, I think we have to -- you should not  
24 underestimate the skill of the attorneys who are going to  
25 be handling this, and they are going to be realizing that

1 they are dealing with busy panel members, and they are  
2 going to rifleshoot their motion and highlight the evidence  
3 that they think is relevant, and, yes, they'll have it on  
4 file wherever you tell them to file it, so I kind of like  
5 that concept. I'm not offended by it.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: I just was going to say what  
8 David just said. I don't think that the concept of having  
9 a record is bad as long as it's in one place, that it  
10 doesn't cover up the judges, that everybody has, you know,  
11 numbers or pages they can cite to in their cases if there  
12 is -- in their briefs if there is a controversy.

13 But second, I also think that there is great  
14 merit to the idea of Bill or whoever first thought it up of  
15 verification. I think that will cut down on the number of  
16 fights where anyone needs to reference the record; and  
17 clearly both sides, if there is a fight, are going to be  
18 filing a record if there's something that's been left out  
19 of the first; but to me that just makes everything a lot  
20 simpler, is to have it sworn, cut down on the number of  
21 fights, but to have one filing one place of something  
22 everybody can refer to.

23 CHAIRMAN BABCOCK: Kent.

24 MR. SULLIVAN: My proposal really was  
25 certainty, that it is not to be silent on the issue and not

1 to leave ambiguous such as, "Gee, if you want to file  
2 something, file it," because I think my instincts tell me  
3 that's troublesome. I think that you ought to specify what  
4 you desire in the way of evidence if you want a record, and  
5 I think there's a good argument in favor of allowing a  
6 record, but I wouldn't have a standard that it's either  
7 completely unstated or totally amorphous about what you  
8 want the parties to do. I think you ought to tell them,  
9 you know, if you want affidavits, we ought to say  
10 "affidavits," and maybe there ought to be a limit as to the  
11 number without leave of court or something like that,  
12 something that gives some guidance so that parties have a  
13 reasonable expectation of what they're supposed to do.

14                   CHAIRMAN BABCOCK: Well, you won that motion  
15 because we're going to add another sentence to say  
16 something. We're worried about the something now. Justice  
17 Duncan.

18                   HONORABLE SARAH DUNCAN: I was just going to  
19 say, I'm not opposed to a verification requirement, but our  
20 court at least's experience with the verification  
21 requirement on, for instance, motions for extension of  
22 time, is that most of our clerk's time was spent returning  
23 unverified motions and getting amended motions. It didn't  
24 work very well.

25                   CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: But also there is some question, if  
2 I'm representing General Motors, they will tell me certain  
3 things, "This is in Amarillo" and so forth. I can't swear  
4 to that on my own knowledge.

5 HONORABLE SARAH DUNCAN: Right. Right.

6 MR. LOW: So there's a problem of what I can  
7 swear to, and so I believe you have to presume that it's on  
8 information -- I can't swear on information and belief, so  
9 I don't think you should require verification.

10 PROFESSOR DORSANEO: Unless it's information  
11 and belief.

12 MR. HAMILTON: The statute requires that the  
13 panel make findings, so there has to be some evidence; and  
14 if under (e) they don't ask for any evidence then where is  
15 the evidence to support the findings? It's going to have  
16 to be an affidavit or a sworn motion or something.

17 CHAIRMAN BABCOCK: Buddy doesn't agree with  
18 that.

19 MR. LOW: No. If you get like the example I  
20 gave where everybody says they all happened, one accident,  
21 three different plaintiffs in three different counties,  
22 they all agree to that. Just stipulate. I mean, it's  
23 agreed to. What evidence do you need? If you get somebody  
24 that said these are 500 Firestone tire separation, you know  
25 they have a common question of fact. The only question you

1 need evidence on is whether it meets the convenience and  
2 those kind of things. So you don't need it in every case.

3 MR. HAMILTON: I guess you could say that the  
4 statements in the motion are taken as true evidence unless  
5 controverted.

6 CHAIRMAN BABCOCK: Yeah. Richard Orsinger.

7 MR. ORSINGER: We could use as a model the  
8 recusal rule which requires verification and particularity  
9 of the grounds and says that the assertions have to be on  
10 personal knowledge, except provided that facts may be  
11 stated on information and belief if the grounds for the  
12 belief are specifically stated. So, in other words, if you  
13 required verification but allowed the lawyer to say, "I  
14 have no personal knowledge, but based on what I was told by  
15 so-and-so or based on the public record" and that allows  
16 you to get some evidentiary basis for things that are  
17 personally known. You can also get in stuff you have no  
18 personal knowledge of, and the other side then can -- then  
19 the panel can rely on the verification unless someone comes  
20 up and says, "That's flawed information and here's my  
21 counterevidence."

22 MR. LOW: But what's the difference in  
23 presuming under the rule when you put something in your  
24 pleadings that you know what you're talking about and it's  
25 true? What is the difference?

1 MR. ORSINGER: I'm not offended by requiring  
2 someone that wants to do this to verify their assertions  
3 and then you have --

4 CHAIRMAN BABCOCK: If it's on information and  
5 belief what have you gained?

6 MR. LOW: What have you gained, except just  
7 giving notice?

8 CHAIRMAN BABCOCK: Alex.

9 PROFESSOR ALBRIGHT: I'm wondering how many  
10 little true fact controversies you're going to have in  
11 these. I mean, the issues are going to be are there common  
12 issues, and I guess I'm being persuaded with the kind of  
13 venue practice. I think you presume true unless it's  
14 controverted. Then you start affidavits and controverting  
15 it, but as I think -- I've never been involved in one of  
16 these, but it's going to be the issues are going to be  
17 arguments about whether these are related enough or is this  
18 really a good idea and not about where the witness lives,  
19 like you said.

20 I mean, it's not that sort of thing. It's  
21 like, okay, these are Bridgestone/Firestone cases. Are  
22 they really all trial separation cases or are they not, and  
23 I just don't see that they're real evidentiary issues, but  
24 by allowing all this evidence people are going to pile up  
25 all sorts of papers that are really unneeded but they're

1 afraid not to file it because they may have to have it  
2 because they didn't file enough. So if you say everything  
3 is true unless it's controverted then you can at least  
4 narrow those issues.

5 CHAIRMAN BABCOCK: Judge Brister, having  
6 heard all of this, what do you say this second sentence  
7 should say?

8 HONORABLE SCOTT BRISTER: I still go with the  
9 evidence filed with the clerk in Austin but not sent to the  
10 parties. I personally am against verification. I just  
11 don't think it adds anything.

12 HONORABLE SARAH DUNCAN: You mean panel  
13 members, not parties.

14 HONORABLE SCOTT BRISTER: Yeah. I mean panel  
15 members.

16 MR. LOW: But, Scott, if we did this, I mean,  
17 if you have something that's privileged and you require  
18 them to give it, they have got all kind of things they  
19 file, wouldn't you want to even tell the other lawyers what  
20 they were?

21 HONORABLE SCOTT BRISTER: I assumed that if  
22 you're filing something with the court you're going to need  
23 to send it to the other parties.

24 MR. LOW: Okay. I'm sorry. I thought you  
25 meant --

1 HONORABLE SCOTT BRISTER: Just not me unless  
2 I ask for it.

3 MR. LOW: Unless you have to file it you  
4 wouldn't have to send it to the other parties.

5 HONORABLE SCOTT BRISTER: I mean, I'm  
6 counting on you-all to object if you don't want to send  
7 them to each other. I don't care whether you-all make a  
8 million copies to send to each other or file.

9 MR. LOW: Okay.

10 HONORABLE SCOTT BRISTER: I just don't have  
11 any place for them. And I do think it would be a good idea  
12 to pull from 38.1(f) the court will -- the panel will  
13 accept as true the facts stated unless another party  
14 contradicts them. That would be fine. Or something like  
15 that.

16 HONORABLE SARAH DUNCAN: I hate to be so  
17 picky, but that still doesn't make it evidence. The reason  
18 it works in an appeal, in an appellate brief, is because  
19 presumably that's what the record establishes.

20 HONORABLE SCOTT BRISTER: Well, it does work  
21 in venue. You've got to controvert it.

22 PROFESSOR CARLSON: Rule 87.3.

23 MS. CORTELL: I think there's two other rules  
24 to look at --

25 CHAIRMAN BABCOCK: All right. If you --



1 sorry. Can I just suggest something, Tommy?

2 MR. JACKS: Sure. I've got some language,  
3 too.

4 CHAIRMAN BABCOCK: Okay. You've got the  
5 first sentence, which we've agreed on. The second sentence  
6 could be "Any such evidence shall only be filed with  
7 the MDL panel clerk and the parties to all related cases  
8 for which transfer is sought."

9 MR. GILSTRAP: And this is the evidence  
10 that's been requested, right?

11 CHAIRMAN BABCOCK: This is the evidence  
12 that's been requested.

13 HONORABLE SARAH DUNCAN: You mean served on  
14 the other parties?

15 MR. JACKS: Well, I took a little bit broader  
16 approach to make clear that you could file it even if it's  
17 not asked for. It seems to me that the sentence that Scott  
18 just read from Rule 38 actually could go at the beginning  
19 of paragraph (e) so we know, all right, if we've said it  
20 and it's not contradicted then it's going to be accepted.

21 The next sentence would then be what is now  
22 the first sentence, and then I have as follows: "The  
23 parties may, without such an order, submit any such  
24 materials with a motion, response, or reply," period.  
25 "Unless the MDL panel orders otherwise, such materials

1 shall be filed with the MDL clerk and served upon the  
2 parties to the cases for which transfer is sought, but  
3 shall not be sent to the members of the MDL panel."

4 CHAIRMAN BABCOCK: Bill.

5 PROFESSOR DORSANEO: The way I would read all  
6 of this, including what Tommy said, in light of the  
7 reference, which I think is still talking about these  
8 documents being in the form of a brief, would actually be  
9 -- since to be in the form of a brief there needs to be a  
10 citation of authority and record references that you  
11 actually have to make this record and put in your motion  
12 the record references --

13 HONORABLE SCOTT BRISTER: Actually, I dropped  
14 the sentence -- I did not read outloud the next sentence in  
15 38.1(f), which is "The statement must be supported by  
16 record references," so if you don't pull that in I think  
17 the inference would be the opposite.

18 PROFESSOR DORSANEO: Well, I didn't get -- I  
19 think you have to be here at this meeting to know that.

20 CHAIRMAN BABCOCK: Nina. So we got a leg up  
21 on everybody.

22 MS. CORTELL: To some great extent we have  
23 worked through a lot of these issues, and we have made  
24 reference to prior rules. The two I would suggest we look  
25 at are 10.2, the evidence on motions, and also the mandamus

1 records rule which is 52.7. But I think in terms of  
2 streamlining this, I really like 10.2 because the basic  
3 facts should be fairly straight-up and things a lawyer can  
4 say that will constitute evidence under 10.2, and if you  
5 can't do it then you put a little affidavit at the back. I  
6 think we're making it more complicated than it probably  
7 would need to be.

8 CHAIRMAN BABCOCK: Yeah, Judge Bland.

9 HONORABLE JANE BLAND: I move that we adopt  
10 Tommy's proposed changes to the section (e). Just vote on  
11 it.

12 CHAIRMAN BABCOCK: Is there a second to that?

13 MR. LOW: Second.

14 CHAIRMAN BABCOCK: Buddy seconds it. Okay.  
15 Tommy, why don't you read it one more time?

16 MR. JACKS: All right. The first sentence  
17 would be the sentence that Scott read from Rule 38. The  
18 second sentence would be the present first sentence. The  
19 third sentence would be "The parties may without such an  
20 order submit any such materials with a motion, response, or  
21 reply"; and then the last sentence would be "Unless the MDL  
22 panel orders otherwise, such materials shall be filed with  
23 the MDL clerk and served upon the parties to the cases for  
24 which transfer is sought, but shall not be sent to the  
25 members of the MDL panel."

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE SCOTT BRISTER: Can we collapse  
3 those two?

4 MR. JACKS: I'm sure you could.

5 HONORABLE SCOTT BRISTER: In other words,  
6 make it the parties -- if you say they can submit them with  
7 the motion, response, reply then when they send me the  
8 motion, response, reply I'm going to get them. Just say  
9 "The parties may file with the MDL panel clerk evidence in  
10 support of the motion, response, or reply, but shall not  
11 send them to the panel."

12 MR. JACKS: That works.

13 CHAIRMAN BABCOCK: All right. Everybody  
14 that's in favor of that raise your hand.

15 Everybody against? 28 to 0. Tommy, you're a  
16 genius. Let's go onto --

17 MR. JACKS: Timing is everything.

18 CHAIRMAN BABCOCK: Let's go onto (f),  
19 decision.

20 HONORABLE SCOTT BRISTER: In this we've just  
21 incorporated two requirements from the statute that to  
22 grant a motion you've got to have three panel members  
23 concur in a written order and then it's for the two factors  
24 noted in the statute. The "see attachment" refers to the  
25 Jamail committee and other states' MDL statutes that are on

1 the following two pages; and I'll let Chris Griesel, since  
2 he did all of the work on that, describe those briefly.

3 HONORABLE DAVID PEEPLES: Before we do that,  
4 I don't concede that there have to be three signatures on a  
5 written order. The statute says, "The concurrence of three  
6 panel members is necessary to any action" and then it says  
7 they can transfer a case on the panel's written finding  
8 that it's for the convenience and so forth. Can't we in  
9 this rule say that there have to be three votes to do  
10 something but that one person can sign if the three people  
11 have agreed? That's the way appellate opinions -- of  
12 course, you sign off on those, but you have a telephone  
13 conference, everybody agrees, one person can't sign for the  
14 whole panel? I just don't think we ought to ought to hem  
15 ourselves in with unworkable rules like this when the  
16 statute doesn't command it.

17 MR. JACKS: It just says they concur in a  
18 written order. It doesn't say they have to sign it.

19 MR. LOW: Yeah, sign it.

20 HONORABLE DAVID PEEPLES: Well, then let's be  
21 sure we're not saying that. I mean, I would say if three  
22 panel members conclude that related case is involved, why  
23 do we have to talk about --

24 PROFESSOR DORSANEO: Or decide.

25 HONORABLE DAVID PEEPLES: I think there needs

1 to be a written order, of course, but you could have e-mail  
2 concurrence, couldn't you?

3 CHAIRMAN BABCOCK: Justice Hecht.

4 JUSTICE HECHT: I mean, is there opposition  
5 to having the clerk issue the order like --

6 HONORABLE SARAH DUNCAN: The Supreme Court  
7 does.

8 JUSTICE HECHT: -- the Federal court does?  
9 You just note on the order who concurs since that would cut  
10 down on the paperwork. I mean, they could call up Andrew  
11 -- if our clerk continues to do this, they could just call  
12 up Andrew and say, "Four of us agree to this. We'll send  
13 you a note to that effect to put in the file," and he  
14 issues an order that says, "The case is transferred. These  
15 judges concur."

16 CHAIRMAN BABCOCK: What do you think about  
17 that, Scott?

18 HONORABLE SCOTT BRISTER: I like it. In my  
19 court they always make them sign, so it never crossed my  
20 mind, but it's fine with me.

21 HONORABLE DAVID PEEPLES: I've just been  
22 hearing talk about getting three people to sign something  
23 all morning long, and I just don't think we've got to do  
24 that.

25 MR. LOW: That was a misstatement.

1                   CHAIRMAN BABCOCK:  So everywhere in the  
2 record where that appears, court reporter, note the  
3 modification.  (Laughter.)

4                   Richard Orsinger.

5                   MR. ORSINGER:  I would prefer some other  
6 language beside "grant the motion" because it may be that  
7 you're granting part of the motion and not part of it or  
8 maybe you have a dozen different motions, all of which want  
9 different relief.  Could we not say something like "The  
10 panel may" --

11                   HONORABLE SCOTT BRISTER:  How about "grant  
12 the transfer"?

13                   MR. ORSINGER:  Yes.  And you may be granting  
14 two or three motions or parts of any one, or you see what  
15 I'm saying?

16                   HONORABLE TOM GRAY:  How about "an order  
17 transferring"?

18                   HONORABLE DAVID PEEPLES:  "May act"?

19                   MR. GILSTRAP:  "May transfer if."

20                   MR. ORSINGER:  And should that say "may"  
21 there or should it say "shall"?

22                   HONORABLE SCOTT BRISTER:  The statute says  
23 "may."

24                   MR. ORSINGER:  So, in other words, even if  
25 the grounds are met and all five of you agree, you might

1 still decline to consolidate?

2 HONORABLE SCOTT BRISTER: And the classic  
3 case would be where there's two people in a car wreck with  
4 two separate suits. Should the panel have discretion --  
5 with certain common questions of fact, does the panel have  
6 to put them together?

7 MR. ORSINGER: Okay. Okay.

8 CHAIRMAN BABCOCK: How are you going to work  
9 in the concept of the MDL panel clerk issuing the order?

10 HONORABLE SCOTT BRISTER: Why can't we just  
11 say, "The MDL panel may order transfer if three panel  
12 members concur in finding that related cases," et cetera?  
13 Do we have to say whether the -- do we have to say in the  
14 rule whether it can be signed by the panel members or just  
15 issued by the clerk?

16 CHAIRMAN BABCOCK: No.

17 MR. MUNZINGER: HB 4 says "written findings."

18 HONORABLE SCOTT BRISTER: "Concur in a  
19 written finding." How about that?

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE SARAH DUNCAN: You can just say  
22 "concur in a written order finding." It's just that you  
23 don't necessarily each have to sign one piece of paper.

24 CHAIRMAN BABCOCK: Right. Yeah. You could  
25 just leave the language the way it was, "the written order



1 finding."

2 HONORABLE SCOTT BRISTER: "Concur in a  
3 written order finding"?

4 CHAIRMAN BABCOCK: Okay. Anything else  
5 before we get to the attachment?

6 HONORABLE SARAH DUNCAN: Should "specified  
7 district court" be "pretrial court"? A specified --

8 HONORABLE SCOTT BRISTER: A pretrial court  
9 can only be a district court.

10 PROFESSOR ALBRIGHT: So this goes to are you  
11 sending it to a court or to a judge?

12 HONORABLE SCOTT BRISTER: We'll get to that  
13 later.

14 PROFESSOR ALBRIGHT: Okay.

15 HONORABLE SCOTT BRISTER: Everybody agrees  
16 you've got to send it to a court at least. The dispute is  
17 whether you can also designate a specific judge for that  
18 court or not.

19 CHAIRMAN BABCOCK: Okay. Chris, what about  
20 our attachment here?

21 MR. GRIESEL: The question is, in Justice  
22 Gaultney's analogy to are we giving the lawyers a  
23 riflshot, something to shoot at, is the target of one or  
24 more common questions of fact for the convenience of the  
25 parties and promote the just and efficient conduct enough

1 of a target without further explanation. In a large number  
2 of states and in the commentary to the Federal MDL panels  
3 we have, in fact, had an explanation of what is a just and  
4 efficient conduct of related cases, and it's been  
5 accomplished any number of ways, and you will see one, two,  
6 three, four different possibilities.

7           Either courts have set out factors to  
8 consider. Either the courts, like in California and the  
9 Jamail committee recommendation, said that there are types  
10 of cases that presumptively trigger referral, and we have  
11 the weakest of all, a possible kind of namby-pamby comment  
12 that I've added at the end. If you look at the factors,  
13 which is the first section, Arizona, California, and  
14 Colorado have the best annunciation, and they all have  
15 slightly different concepts that they're trying to push in  
16 just and efficient.

17           Arizona and California, which are modeled on  
18 each other really push a concept of parties and judicial  
19 management, and you'll see provisions (a) through (c)  
20 really deal with how many parties do we have, what's the  
21 size of the litigation, how many witnesses, how many  
22 separately represented parties. Concepts (d) through (f)  
23 are really judicial management issues, realizing, like Chip  
24 talked about, that there are going to be special judges and  
25 recognizing I think the universal that there are not an

1 infinite supply of Christopher/Bland people, Sullivan type  
2 trial court judges out there. These all talk about people  
3 who have the skills to coordinate related actions, who have  
4 a substantial body of knowledge, and can handle inherently  
5 complex legal issues.

6 (g), (h), and (i) are what I call weasel  
7 issues. These are the everything else that you can think  
8 of, all the other reasons why that we're not stating but  
9 we're going to think of to make the case fit sometime  
10 later. And then Colorado, (k) through (o), has issues  
11 which really focus on utilization of judicial resources,  
12 how many courts are we going to be taking stuff out of, how  
13 badly are we going to jam up the docket, how many  
14 inconsistent rulings are we going to show that are going to  
15 jam up our appellate system, are we going to move this off  
16 our case.

17 Jamail committee on the second page and  
18 California take a different approach. They take the  
19 approach that we know from past experience that certain  
20 types of cases always, because lawyers don't get along or  
21 because of the complexity of them, trigger the need for  
22 better supervision to ensure the just and efficient conduct  
23 of related cases. Jamail suggests that all mass torts --  
24 most mass torts and most mass disaster cases do.  
25 California goes on to include an issue that was raised in

1 the committee, which is should class actions, a single  
2 class action suit, be treated as an MDL, and they set out  
3 those classes.

4           The last one is a comment that I wrote that's  
5 probably the weakest of all of these in terms of guidance,  
6 and it says something like, well, think about -- you know,  
7 the first sentence is just the statute. The second says  
8 the panel may consider anything that the interests of  
9 justice warrant including some things, but they can also  
10 consider the effect of not consolidating the case.

11           So these are three different approaches for  
12 this, and I guess the initial question is, as a pragmatic  
13 lawyer I would think that there are going to be factors by  
14 January 1st, 2004; and the question is are we going to have  
15 them in the rule, is the panel going to write them in their  
16 very first opinion, or is the Supreme Court going to  
17 explain them in their very first writ of mandamus opinion?

18           HONORABLE SCOTT BRISTER: Wait a second. The  
19 panel is going to have to write opinions? They didn't tell  
20 me about that part.

21           MR. GRIESEL: Well, in their findings. In  
22 their written findings. So I think that kind of lays out  
23 the issues.

24           HONORABLE SCOTT BRISTER: And the majority  
25 vote of the subcommittee was not to include them. No. 1,

1 we weren't sure which ones we would include and which ones  
2 not at this point. No. 2, unlike most rules that are going  
3 out to lots of trial judges and appeals courts who aren't  
4 represented here, the actual decision is going to be made  
5 by five people, two of whom are here, and there's only one  
6 court you can appeal it to, one of whom is here, two of  
7 whom are here. So it probably doesn't need to be as  
8 spelled out as if these motions are going to be heard by  
9 trial judges or appellate judges all over the state.

10 CHAIRMAN BABCOCK: Yeah, Pete.

11 MR. SCHENKKAN: And from a practitioner's  
12 standpoint in deciding what arguments to make to you-all,  
13 the two substantive issues that are in the statute are the  
14 same ones that are in the Federal MDL statute, which is the  
15 only one of these statutes in which a lawyer can get that,  
16 because it's all reported, and in which there is a whole  
17 bunch of treatises. That's what's going to happen. You're  
18 going to buy a copy of some treatise on Federal MDL, and  
19 you're going to -- when you need to you're going to look up  
20 some cases and you're going to cite those to Justice  
21 Brister and his colleagues if you get in one of these. So  
22 I'm in favor for that additional reason of the subcommittee  
23 majority position, just cutting it off here for now.

24 CHAIRMAN BABCOCK: Chris, you kind of like  
25 these factor things. Why?

1 MR. GRIESEL: I think that for the exact  
2 reason that Pete said. If my choice is to craft a set of  
3 factors in which a Texas court should consider it and my  
4 choice is to have a guidance that's been considered by  
5 Texas lawyers versus buying the manual on complex  
6 litigation in the Federal system, I don't think these are  
7 uniform factors. I think the feds look at one set of  
8 things. I think Colorado courts look at other sets of  
9 things. I think Arizona and California courts look at  
10 other sets of things.

11 I think it also gives guidance. If the main  
12 factor that we're going to look at is some sort of  
13 commonality of anything, parties, witnesses, are we saving  
14 a lot of money, are we not saving a lot of money, we ought  
15 to -- that's a policy I think that we can look at here.  
16 And if we're not going to ever consolidate Buddy's cases in  
17 the three -- the auto accidents in three different counties  
18 then we ought to tell lawyers early on that those probably  
19 aren't the cases we're talking about. We're talking about  
20 the 20,000 asbestos cases in East Texas.

21 CHAIRMAN BABCOCK: Okay. Alex.

22 PROFESSOR ALBRIGHT: I agree with Pete. I  
23 think we should leave it simple. I also think we have a  
24 duty to get this thing out by the 1st of September; and if  
25 this group has to sit through factors, we may never leave.

1 MR. GRIESEL: That's true.

2 CHAIRMAN BABCOCK: Bill.

3 PROFESSOR DORSANEO: Treatises will pick this  
4 up pretty fast.

5 CHAIRMAN BABCOCK: I notice those authors of  
6 treatises don't want this in the rule for sure.

7 Okay. Here's the vote. Here's the vote.  
8 How many people think we should not have any factors, and  
9 the flip side of that is we should have some, and then if  
10 that carries then we'll talk about what those factors  
11 should be.

12 MR. GILSTRAP: You're saying not even the  
13 factors in (f)?

14 CHAIRMAN BABCOCK: What?

15 MR. GILSTRAP: Not even the factors that are  
16 already in (f)?

17 PROFESSOR CARLSON: Just (f).

18 HONORABLE SCOTT BRISTER: Yeah. I guess, I  
19 move the committee factors, which is those two.

20 MR. DUGGINS: Second.

21 MR. MUNZINGER: (f) as written.

22 CHAIRMAN BABCOCK: All right. Let's do it  
23 that way. How many people are for (f) as written?

24 How many against that? By a vote of 26 to 2,  
25 the Chair not voting, it's (f) as written. You picked up

1 two votes from San Antonio.

2 MR. GRIESEL: I know.

3 CHAIRMAN BABCOCK: Okay. (g), retransfer.

4 HONORABLE SCOTT BRISTER: (g) is what happens  
5 when the trial -- pretrial court judge, God forbid, dies,  
6 resigns, or is replaced in an election, and it simply  
7 provides that the MDL panel can then switch to a new  
8 pretrial judge.

9 CHAIRMAN BABCOCK: How much on this? Judge  
10 Peeples.

11 HONORABLE DAVID PEEPLES: I think that the  
12 way this is written does not give the panel enough  
13 discretion just to remove someone who is not getting the  
14 job done, and I think the panel ought to have that  
15 discretion. The last couple of lines say it's got to be  
16 necessary and so forth. I think that's too confining.  
17 There may be instances in which the work is just not  
18 getting done and an appointment was a mistake.

19 HONORABLE SCOTT BRISTER: Wouldn't it then be  
20 still necessary for the convenience of --

21 HONORABLE DAVID PEEPLES: Why not just say in  
22 its discretion can do it?

23 HONORABLE TRACY CHRISTOPHER: My original  
24 proposal was "in the interest of justice" other than the  
25 rest of it.



1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TRACY CHRISTOPHER: Just that there  
3 was some standard for doing it.

4 CHAIRMAN BABCOCK: So you would say, Judge  
5 Christopher, "or in other circumstances in the interest of  
6 justice"?

7 HONORABLE SCOTT BRISTER: Right.

8 CHAIRMAN BABCOCK: And delete that last  
9 language?

10 HONORABLE DAVID PEEPLES: That's fine.

11 CHAIRMAN BABCOCK: Scott, you don't like that  
12 because?

13 HONORABLE SCOTT BRISTER: Because, being a  
14 slave of the statute, the Legislature said this is when you  
15 can do it, and that applies to the second time as well as  
16 the first time.

17 CHAIRMAN BABCOCK: What about that, Judge  
18 Christopher?

19 HONORABLE TRACY CHRISTOPHER: Well, I don't  
20 think the panel's choice of a judge is based on those two  
21 factors. I think the consolidation is, but the choice of  
22 the judge is based on, you know, what judge they think is  
23 qualified to handle it.

24 HONORABLE DAVID PEEPLES: "Or in other  
25 appropriate circumstances"?

1 HONORABLE SCOTT BRISTER: I'm not going to  
2 get in an argument with Judge Christopher.

3 CHAIRMAN BABCOCK: Probably wise. Orsinger.

4 MR. ORSINGER: We need to be sure that the  
5 last category includes when a judge is recused or  
6 disqualified, and let me ask this. If the judge is recused  
7 or disqualified only as to one litigant, does that just  
8 mean that that one case gets unconsolidated?

9 HONORABLE SCOTT BRISTER: We talked about  
10 that and decided not to address it. Our feeling was if --  
11 almost any mass tort, if you were recused because you were  
12 later disqualified with one of the parties, you shouldn't  
13 be on any of them, you ought to get off the whole thing.  
14 So our decision was just to leave that up to the current  
15 recusal and disqualification rules.

16 MR. ORSINGER: Then I would urge that we  
17 include it on the list of things, because recusal or  
18 disqualification is not just convenience of the parties.  
19 Maybe it's promoting justice, but to me it's just as  
20 important as the death of the judge or the judge going out  
21 of office because they were unelected. So it seems to  
22 me that -- I don't agree that you should disqualify a judge  
23 from a thousand cases because he -- somebody on a tag-along  
24 case lives down the street, but if that's true then it  
25 seems to me that's as important as being unelected.

1           CHAIRMAN BABCOCK: Here's the proposal. "On  
2 its own motion or motion by a party the MDL panel may in  
3 its discretion order transfer from one pretrial court to  
4 another pretrial court upon the death, resignation,  
5 replacement at an election, or request of the judge of the  
6 pretrial court or in other circumstances in the interest of  
7 justice," period, deleting the rest of the language.

8           MR. HAMILTON: Chip?

9           CHAIRMAN BABCOCK: Yeah.

10          MR. HAMILTON: I don't like "in the interest  
11 of justice" because that's the problem we have now with  
12 motions for new trial. I think we would just be lending  
13 support for that.

14          CHAIRMAN BABCOCK: So you would prefer the --

15          MR. ORSINGER: That makes it unmandamusable,  
16 too.

17          CHAIRMAN BABCOCK: -- statutory language  
18 "convenience of the parties and witnesses to promote the  
19 just and efficient conduct of the actions"?

20          MR. HAMILTON: Something like that. That's  
21 what the statute says.

22          CHAIRMAN BABCOCK: Bill.

23          PROFESSOR DORSANEO: I like the last half of  
24 that. I don't know whether we need "the convenience of  
25 parties and witnesses," but if somebody is not getting the

1 job done to promote the just and efficient conduct of the  
2 cases seems to be a little more informative than "in the  
3 interest of justice."

4 HONORABLE TRACY CHRISTOPHER: I'll take that.

5 CHAIRMAN BABCOCK: Judge Christopher, what do  
6 you think about that?

7 HONORABLE TRACY CHRISTOPHER: I'll take that.

8 CHAIRMAN BABCOCK: Okay. So we'll strike  
9 about the convenience of the parties, but it would say "or  
10 in other circumstances when transfer is" -- "retransfer is  
11 necessary to promote the just and efficient conduct of the  
12 cases."

13 HONORABLE SCOTT BRISTER: Well, I still want  
14 to vote for what the statute says, but -- for the record.

15 CHAIRMAN BABCOCK: Right. Well, we'll get a  
16 vote on that. Richard.

17 MR. MUNZINGER: I agree with Justice Brister.  
18 I think the statute itself requires that you have both  
19 considerations. 74.162 mentions both in HB 4, and I think  
20 the justice's point is if the original transfer requires  
21 that standard, so would a retransfer, and I tend to agree.  
22 I think you're safer and within the language of the  
23 statute. You don't create ambiguities and things to argue  
24 about for the practitioners who are looking for reasons to  
25 delay or appeal or do whatever.

1 CHAIRMAN BABCOCK: Pete.

2 MR. SCHENKKAN: I agree with that, but I  
3 think it needs a slightly different approach which is  
4 consistent with Justice Brister's views and Judge Peeples',  
5 and that is the words "is necessary for" are not found in  
6 the statute. It just says "if transfer is for these  
7 things." It doesn't say it's necessary for, and I took the  
8 thrust of Judge Peeples' remark to mean it could be helpful  
9 to the just and efficient conduct of the action but not  
10 necessary, and so I would say take (g) just as it is --

11 HONORABLE SCOTT BRISTER: Drop the four  
12 words, "when transfer is necessary"?

13 MR. SCHENKKAN: Yes.

14 HONORABLE SCOTT BRISTER: I don't disagree  
15 with that.

16 CHAIRMAN BABCOCK: Judge Christopher, how  
17 does that sound to you?

18 HONORABLE TRACY CHRISTOPHER: I'm okay with  
19 that.

20 HONORABLE SARAH DUNCAN: Since the MDL panel  
21 I assume is not going to make motions, I would say "on its  
22 own initiative."

23 MR. ORSINGER: Yeah.

24 HONORABLE SCOTT BRISTER: Is that what we  
25 normally say, Sarah?

1 HONORABLE SARAH DUNCAN: Uh-huh.

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE DAVID PEEPLES: Are we going to add  
4 recusal and disqualification the way Richard asked?

5 PROFESSOR CARLSON: Sure.

6 HONORABLE DAVID PEEPLES: Why not.

7 HONORABLE SCOTT BRISTER: That's fine.

8 MR. HAMILTON: Could we just eliminate "at an  
9 election," just "replacement" and that would include  
10 recusal or disqualification and election?

11 HONORABLE SCOTT BRISTER: When else would a  
12 judge be replaced except by election or resignation?

13 HONORABLE TOM LAWRENCE: If the Judicial  
14 Conduct Commission removes.

15 MR. HAMILTON: If he's recused, he's replaced  
16 by another judge.

17 HONORABLE SCOTT BRISTER: I see. You want  
18 "replacement" instead of "resignation, election, or  
19 recusal"?

20 MR. HAMILTON: No. "Upon death, resignation,  
21 replacement, or request of the judge."

22 CHAIRMAN BABCOCK: Take out "at an election."

23 HONORABLE SARAH DUNCAN: Why do we need to  
24 list them at all? Why don't we just say --

25 HONORABLE SCOTT BRISTER: We had that

1 discussion at the subcommittee, and the vote, my notes were  
2 unclear as to what the vote was, so I e-mailed a couple of  
3 the subcommittee members, and in our general recollection  
4 we thought we approved it because if you don't have this in  
5 there people will wonder when the judge gets beat in an  
6 election and you've transferred them to the court a lot of  
7 people will assume it stays at that court and the new  
8 elected judge takes over unless you tell them, no, of  
9 course not, we don't mean that.

10 CHAIRMAN BABCOCK: Ralph.

11 MR. DUGGINS: That's a question I had. When  
12 we say "one pretrial court to another," does that actually  
13 mean from one district court to another or one judge to a  
14 new judge or in the same district court? They may not want  
15 to remove it from the 116th District Court. It may be fine  
16 with the replacement judge.

17 HONORABLE SCOTT BRISTER: Right.

18 MR. DUGGINS: And I think we said in the  
19 definition it's court.

20 HONORABLE SCOTT BRISTER: If you wanted to do  
21 nothing, "may" allows you to do that. The panel has  
22 discretion to do nothing. There is an argument, which  
23 we'll get to, that one could perhaps under the statute  
24 appoint a retired judge as long as you also transferred it  
25 and assigned that judge to a court. There's no question

1 the statute requires you to transfer cases to a district  
2 court. There is some feeling that perhaps also you could  
3 assign a judge at the same time to that who is not the real  
4 active judge, but we'll get to that.

5 CHAIRMAN BABCOCK: Steve.

6 MR. TIPPS: I think we ought to specify but  
7 include reference to recusal or disqualification because  
8 the replacement that you want to have occur in the event  
9 there's a recusal or disqualification I think is  
10 replacement under this provision. You don't want to imply  
11 that that judge then needs to be replaced under the general  
12 recusal rules and then the MDL panel acts, and so I think  
13 in that way that is different from replacement by an  
14 election.

15 HONORABLE SCOTT BRISTER: I don't have any  
16 problem with that.

17 CHAIRMAN BABCOCK: And so it would say, "On  
18 its own initiative or motion by a party the MDL panel may  
19 in its discretion order transfer from one pretrial court to  
20 another pretrial court upon the death, resignation,  
21 recusal, disqualification, replacement at an election, or  
22 request of the judge of the pretrial court or in other  
23 circumstances when" -- "in other circumstances for the  
24 convenience of the parties and witnesses and to promote the  
25 just and efficient conduct of the cases," period.



1 HONORABLE SCOTT BRISTER: Exactly.

2 HONORABLE SARAH DUNCAN: Just a matter of  
3 form, the "request of the judge of the pretrial court"  
4 ought to go up in the introductory clause. "On its own  
5 initiative or motion by a party or at the request of the  
6 judge of the pretrial court."

7 CHAIRMAN BABCOCK: Okay.

8 MR. ORSINGER: Now, the replacement in an  
9 election is when the successor is sworn in, right, not just  
10 when the results are certified?

11 CHAIRMAN BABCOCK: It's whenever the MDL  
12 panel decides to make the switch.

13 MR. ORSINGER: So it could be. In other  
14 words, when the results of the election are certified it  
15 could be the time even though --

16 CHAIRMAN BABCOCK: Could be. Yeah. Because  
17 the defeated judge might say, "Hey, I've got some vacation  
18 coming."

19 MR. ORSINGER: Okay.

20 CHAIRMAN BABCOCK: Okay. So we've got (g)  
21 knocked down. Now, for some fun....

22 HONORABLE SCOTT BRISTER: This is my last  
23 one, I'm happy to say. Somebody else can take my chair.  
24 Which is the --

25 CHAIRMAN BABCOCK: Who's happier about that,

1 us or you?

2 HONORABLE SCOTT BRISTER: Oh, I'm delighted,  
3 believe me, and this is whether -- the issue we started  
4 with, which is whether the trial court or administrative  
5 judges or the MDL panel sua sponte may request transfer;  
6 and then the second sentence, I think, assuming that is the  
7 case, our feeling and recommendation was that different --  
8 you're going to have to do something other than the motion,  
9 response, request stuff; and then the last sentence would  
10 allow flexibility to do that, assuming it is, of course,  
11 very rare cases that that issue would even arise.

12 CHAIRMAN BABCOCK: Okay. Now, we've had a  
13 lot of discussion about this earlier, which we don't need  
14 to repeat, but, Justice Brister, your subcommittee  
15 recommendation was not to include this.

16 HONORABLE SCOTT BRISTER: Right.

17 CHAIRMAN BABCOCK: Which is why it's in  
18 brackets.

19 HONORABLE SCOTT BRISTER: The vote was to  
20 just have the parties do it.

21 CHAIRMAN BABCOCK: And was there a dissent?

22 HONORABLE SARAH DUNCAN: Yes.

23 HONORABLE SCOTT BRISTER: I believe there  
24 was.

25 CHAIRMAN BABCOCK: And that would have been

1 Justice Duncan?

2 HONORABLE SARAH DUNCAN: I don't know that I  
3 was alone, though.

4 HONORABLE SCOTT BRISTER: I don't think she  
5 was the only one. I don't recall. It was a fairly close  
6 issue. People went back and forth, kind of like this  
7 committee.

8 CHAIRMAN BABCOCK: All right. So it wasn't  
9 like one of these votes we sometimes have like --

10 HONORABLE SCOTT BRISTER: Oh, absolutely not.  
11 No.

12 CHAIRMAN BABCOCK: -- 27 to 2.

13 HONORABLE SCOTT BRISTER: No.

14 CHAIRMAN BABCOCK: All right. With that in  
15 mind and not repeating what we've said before, what do  
16 people want to say about this? Bill.

17 PROFESSOR DORSANEO: I feel differently  
18 depending upon whether we're talking about the panel or the  
19 trial court. Personally I don't like anybody other than  
20 the trial judge being involved with this, and I'm not  
21 absolutely sure why except it seems like interference from  
22 above is something that troubles me in many circumstances,  
23 even when it's for the good of all.

24 CHAIRMAN BABCOCK: The way this is written a  
25 lot of crooks get to put their fingers in.

1 HONORABLE SCOTT BRISTER: Could I ask those  
2 of who you have done this if you have ever been involved in  
3 one that wasn't requested by one of the parties and why?

4 HONORABLE DAVID PEEPLES: I think you can  
5 count on the parties to ask for it, although there may be a  
6 Hunt County type case. Back on the previous page I think  
7 we agreed, 13.2(a), that if any party in an existing case  
8 can say there's a case out there that ought to be brought  
9 in, if that can happen, I think that's adequate and all  
10 these others don't need to be given the authority to bring  
11 in --

12 JUSTICE HECHT: Pete, what was your  
13 experience?

14 MR. SCHENKKAN: The one circumstance, I  
15 really wasn't that close to it, so I'm not sure I'm going  
16 to get these facts exactly right, but there were a series  
17 of different lawsuits that involved California Electric,  
18 and it seems like there were two different types of cases.  
19 Some of them were regular class actions and some of them  
20 were suing -- and there are some things out in California  
21 that are different, but some of them were gas side cases  
22 that were about the fuel and using the electricity but also  
23 about the burning of gas itself, and then there were sort  
24 of a third -- in each of those first two categories there  
25 was a separate party-filed MDL request and an MDL decision

1 made, and the only real dispute was about where the cases  
2 would go, and the Federal judges sent them each to a  
3 different -- they sent the gas cases to one and electricity  
4 to another judge.

5           Then there was a third category of cases,  
6 which is really hard to say whether they were electricity  
7 or gas or both electricity and gas or something else; but  
8 they were all sort of related to the underlying debacle,  
9 and nobody moved to put those in with either of those two;  
10 and the MDL panel said, "We're going to put them in," and  
11 I've forgotten which one they put them in with. They put  
12 them in with one of the two others.

13           I think their thinking was -- again, this is  
14 pretty distant secondhand, but I think their thinking was  
15 at the end of the day all of these cases, whether they're  
16 in one category or the other category or this third not as  
17 clear category are all going to be decided under the same  
18 sort of legal principles, which had to do with preemption  
19 and filing rate documents and had to do with the Federal  
20 regulatory energy commission, so I think their thinking was  
21 what sense does it make to have three or four or five  
22 different Federal district judges reading briefs about  
23 preemption and filing rates when two will do.

24           HONORABLE SCOTT BRISTER: But why did no  
25 party in those cases --

1 MR. SCHENKKAN: I don't really know, but the  
2 only thing you can conclude is everybody looked at their  
3 own hold cards and concluded tactically they didn't want  
4 those people in there with them or they didn't want  
5 somebody on the other side of that one in there against  
6 them.

7 PROFESSOR DORSANEO: Enjoined us, enjoined  
8 us.

9 MR. SCHENKKAN: I don't know, Tommy, have you  
10 encountered any sua sponte --

11 MR. JACKS: No.

12 HONORABLE DAVID PEEPLES: Under this rule any  
13 party in the gas cases or the electric cases could move and  
14 get it before the panel. The panel wouldn't need to assist  
15 on that, right?

16 MR. SCHENKKAN: They could move and ask that  
17 it be done, and they just didn't do it, which is a fair  
18 question which I don't really know the answer to.

19 CHAIRMAN BABCOCK: Justice Duncan, why do you  
20 think we ought to have this rule?

21 HONORABLE SARAH DUNCAN: I don't see the  
22 impropriety that some members on the committee perceived,  
23 and I don't see a downside. I can foresee that there may  
24 have been, and in the case that Pete was talking about,  
25 pure self-interest that would cause the parties not to want

1 consolidation when the whole purpose of the rule is -- or  
2 at least as I understand it, one of the purposes of the  
3 rule is judicial efficiency, and I don't think the parties  
4 and their attorneys should get to decide whether we're  
5 going to be efficient or not.

6           It's like to me it's sort of like -- and I  
7 know I'm in the minority on this, too -- if both parties in  
8 a case request oral argument, I don't think that's a reason  
9 to give oral argument. And I think that the rule in our  
10 TRAP rules expressly recognizes that's not the reason to  
11 give oral argument, and the reason to give oral argument is  
12 for if it will aid in the disposition of the case, and  
13 that's what I think the justice system is about.

14           CHAIRMAN BABCOCK: Yeah. This would be more  
15 analogous to the situation where neither side has requested  
16 oral argument but the court feels the oral argument would  
17 be helpful.

18           HONORABLE SARAH DUNCAN: That's right, and I  
19 think the court always has the right to order parties to  
20 oral argument.

21           MR. LOW: Sometimes parties don't request it.  
22 It might be maybe a court has appointed a particular lawyer  
23 as lead counsel and plaintiff doesn't want to have any  
24 association with him, and defendant, "I don't want to deal  
25 with him either," and so, therefore, we just want to have

1 our own little thing. Well, the court might be able to  
2 say, "Well, look, you boys can cure your little dispute."  
3 If that happens where the court appoints a lead counsel in  
4 a mass litigation and the plaintiff's lawyer says, "Man, I  
5 don't want to be bound by him. I don't want to deal with  
6 him, so here we go."

7                   So should the court have a right in that case  
8 to do it when the administration of justice probably  
9 wouldn't require it, but it sure would hurt my feelings?

10                   HONORABLE SARAH DUNCAN: And that's where I  
11 guess maybe I differ with some other members on the  
12 committee is I do believe in that circumstance the MDL  
13 panel ought to be able to say, "Buddy, we hate to hurt your  
14 feelings, but" --

15                   MR. LOW: I'm not involved, so I agree with  
16 you here.

17                   HONORABLE SARAH DUNCAN: -- "the just and  
18 efficient conduct of the related cases and the convenience  
19 of the parties and witnesses indicates these should all be  
20 in the same pretrial court."

21                   CHAIRMAN BABCOCK: But in Buddy's little  
22 hypothetical, his hurt feeling hypothetical, the lawyer  
23 that everybody hates, if he saw an advantage to having you  
24 guys in there, he would move and he would have a right to.

25                   MR. LOW: Well, he might feel the same about



1 us.

2 CHAIRMAN BABCOCK: We can't have all these  
3 hurt feelings running around.

4 MR. TIPPS: I agree with Sarah, in part  
5 because I want to agree with Sarah.

6 HONORABLE SARAH DUNCAN: Thank you.

7 MR. TIPPS: But my stance is that this will  
8 not be used very often, and it's probably not critical, but  
9 in an effort to achieve the efforts of the Legislature it  
10 seems to me that it makes sense for us to give this power  
11 to judges, emphasizing that all we're saying is that they  
12 can make the request. That in no way obligates the panel  
13 to grant the request, but I think it would be helpful, and  
14 obviously we need to change the title to be "request by  
15 judges," not "transfer by judges."

16 HONORABLE SCOTT BRISTER: Yep. Sorry.

17 CHAIRMAN BABCOCK: Well, let's vote first on  
18 whether we think this is a good idea and then get down to  
19 whether or not it's too inclusive, because it's got the  
20 trial courts, local administrative judge, regional  
21 presiding judge, the MDL panel. I mean, that's a large  
22 universe of judges, so let's vote first on whether we  
23 should have it at all, and then we'll talk about which of  
24 these -- if that passes, which of these judges or all of  
25 them should have that power.

1                   So everybody that thinks with the slender  
2 majority of the subcommittee that this should not be  
3 included in the rule, raise your hand.

4                   MR. HAMILTON: That this should not be?

5                   CHAIRMAN BABCOCK: Not be. All right.  
6 Everybody that wants to vote this way.

7                   Everybody that thinks it should be included?

8                   MR. GILSTRAP: Or something like it, you  
9 mean?

10                  CHAIRMAN BABCOCK: Or something like it. So  
11 inclusion by a vote of 15 to 12. So it will be included.

12                  Now, is everybody happy with the universe of  
13 judges that we have here, or is it overbroad? Stephen.

14                  MR. TIPPS: I would move that we strike  
15 the MDL panel on the theory that the MDL panel ought not to  
16 be an advocate before itself.

17                  CHAIRMAN BABCOCK: Okay. Judge Gray.

18                  HONORABLE TOM GRAY: I was going to suggest  
19 that you might want to include the pretrial court if you're  
20 going to deal with tag-along cases later. I would also  
21 limit the trial court, local administrative judge, or  
22 regional presiding judge to one in which a related case is  
23 pending. So it needs to include, if you're going to have  
24 this, include a pretrial court and only include those  
25 courts in which a related case is pending.

1           CHAIRMAN BABCOCK: Okay. Let's take these  
2 things in order. The MDL panel, I heard a lot of talk this  
3 morning that people think that they should not have this  
4 power. Ralph.

5           MR. DUGGINS: I have a question before you  
6 get to that. Is this going to be a request that complies  
7 with 13.2, and then how is this decision reviewable? I  
8 think that this opens -- I'm not asking to revote because  
9 the vote is what it is, but I think it really does open a  
10 number of issues that are problematic in trying to  
11 implement something like this.

12           HONORABLE SCOTT BRISTER: No, it would be --  
13 our idea was it would not include the 13.2(a), (b), (c)'s.  
14 It would be a request that went to the panel and then the  
15 panel would figure out how to get people to do briefing and  
16 stuff in such a rare circumstance.

17           CHAIRMAN BABCOCK: Okay. How many people  
18 think that the panel should be excluded from this  
19 subparagraph (h)? Raise your hand.

20                       How many people think that the MDL panel  
21 should be included? By a vote of 19 to 7, the Chair not  
22 voting, the panel will be excluded.

23           HONORABLE SCOTT BRISTER: Record reflect I  
24 think David Peebles and I have voted opposite on every vote  
25 so far today. This is going to be trouble for the MDL

1 panel.

2 MR. ORSINGER: Well, it only takes three to  
3 win on the panel.

4 HONORABLE SCOTT BRISTER: We're in trouble.

5 CHAIRMAN BABCOCK: Lots of dissents. All  
6 right. How about the trial court? Does everybody pretty  
7 much think the trial court ought to have that power?

8 HONORABLE TOM GRAY: Only if they have a  
9 pretrial case pending. I mean a related case pending.

10 MR. HAMILTON: Well, that's defined.

11 CHAIRMAN BABCOCK: That's defined, isn't it?

12 HONORABLE SCOTT BRISTER: That is the  
13 definition.

14 CHAIRMAN BABCOCK: Okay. How about a local  
15 administrative judge? How does everybody feel about that?  
16 Orsinger is a --

17 MR. ORSINGER: I don't like that.

18 CHAIRMAN BABCOCK: -- "no."

19 MR. ORSINGER: We have had some problems --

20 CHAIRMAN BABCOCK: Does that mean it's going  
21 to be 27 to 1 again?

22 MR. ORSINGER: Oh, no. I mean, we had some  
23 problems with the reassignments out of the Valley, and in  
24 San Antonio, if I'm not mistaken, David, this would be our  
25 presiding judge, would be our local administrative judge?

1                   Who's our local -- is that every six months  
2 that they change?

3                   HONORABLE DAVID PEEPLES: Two years.

4                   MR. ORSINGER: Okay. That's not as bad.

5                   CHAIRMAN BABCOCK: People feel strongly about  
6 the local administrative judge one way or the other?

7                   Carl.

8                   MR. HAMILTON: Why would we want to have him  
9 involved in it at all?

10                  CHAIRMAN BABCOCK: I don't know.

11                  MR. HAMILTON: He wouldn't know anything  
12 about it.

13                  MR. ORSINGER: You know, it's a court of  
14 equal stature to the trial court. It's not like the  
15 presiding regional judge that's been appointed by the  
16 Governor, and, you know, in my county it's half Democrats,  
17 half Republicans. I don't know how it goes on  
18 conservative/liberal. I don't like the idea of somebody  
19 that's just got kind of an administrative position  
20 temporarily just yanking a case from a judge that he  
21 doesn't like and sending it up to the state for review. It  
22 just doesn't feel right to me.

23                  HONORABLE TOM LAWRENCE: Can this be any  
24 local administrative judge or just one that handles civil?

25                  HONORABLE SCOTT BRISTER: It's supposed to be

1 the ones where -- I just couldn't find a way to stick it  
2 in, where one of these related cases is.

3 HONORABLE TOM LAWRENCE: Because it really  
4 wouldn't exclude a criminal administrative judge.

5 JUSTICE HECHT: A lot of local administrative  
6 judges have authority under local rules, I think, to  
7 consolidate cases in the county without the permission of  
8 the assigned judge. I think that's right. Maybe I should  
9 look that up, but I seem to recall some consternation in  
10 Harris County from time to time, not recently, but 5 or 10  
11 years ago, about the local administrative judge taking  
12 cases from somebody and assigning them to other people.

13 HONORABLE TRACY CHRISTOPHER: We do have that  
14 right under our local rules. The local administrative  
15 judge can transfer cases between courts, for whatever  
16 reason, and sometimes that's controversial.

17 JUSTICE HECHT: Yeah.

18 CHAIRMAN BABCOCK: Yeah, Bob.

19 MR. PEMBERTON: Chip, I was just going to  
20 comment, I think some of the thinking behind putting the  
21 administrative judges in there flowed from policies or the  
22 reasons why we put the MDL panel in there is that if you're  
23 going to allow transfer of cases based on these judicial --  
24 you know, sound judicial administrative policies, the  
25 Government Code does give these two categories of

1 administrative judges certain powers to manage their courts  
2 and, therefore, looking at it from that perspective, it  
3 would be appropriate to give them the power to request or  
4 transfer. So if you knocked the MDL panel out it seems  
5 like the --

6 PROFESSOR DORSANEO: It probably is  
7 indelicate, but why? Obviously it would be controversial,  
8 but why is it controversial? Why would you want to do  
9 that?

10 JUSTICE HECHT: Transfer?

11 HONORABLE TRACY CHRISTOPHER: Why would I  
12 want to do that?

13 PROFESSOR DORSANEO: You know, or why would  
14 somebody want to do it?

15 HONORABLE TRACY CHRISTOPHER: Well, I have  
16 argued that we should take that provision out of our local  
17 rules for the past six years, but it's in our local rules.  
18 We have definite times when, you know, by the local rules  
19 that we do transfer cases; and you always -- almost always  
20 on the basis of a vote by the board, but the thinking of  
21 the judges was that you wanted to give the administrative  
22 judge power to do something just to save another judge from  
23 folly.

24 HONORABLE SCOTT BRISTER: Further  
25 embarrassment.

1 HONORABLE TRACY CHRISTOPHER: I guess was  
2 sort of the thinking, kind of a catchall.

3 MR. TIPPS: I obviously can't speak for  
4 judges, but it seems to me that you can imagine a situation  
5 in which Tracy as the administrative judge is aware of the  
6 fact that cases suitable for consolidation pending in three  
7 other courts in Harris County and she knows that there are  
8 also some pending in Jefferson County and Dallas, and she  
9 has a better perspective on the need for a transfer than  
10 does any one of the trial judges.

11 HONORABLE TRACY CHRISTOPHER: Well, but how  
12 would I know that cases were pending in these other  
13 counties unless some lawyer came up to me and said, "Hey,  
14 Judge, we've got these cases pending in three different  
15 counties," you know, at a cocktail party or something?

16 MR. TIPPS: Read it in the newspaper.

17 HONORABLE TRACY CHRISTOPHER: That's sort of  
18 the danger of giving the panel that power or the local  
19 administrative judge that power or the presiding regional  
20 judge that power. It just can tend to problems.

21 HONORABLE SARAH DUNCAN: Always out of step.  
22 To me that's sort of an advantage. If the local  
23 administrative judge is the more high profile or more  
24 accessible or, more responsive to this type of request, if  
25 the whole point is to get related cases consolidated for



1 pretrial purposes, I don't much care who it comes from.

2 HONORABLE DAVID PEEPLES: This is going to  
3 almost never happen.

4 HONORABLE SARAH DUNCAN: Right.

5 HONORABLE DAVID PEEPLES: I think we ought to  
6 vote on something and move on. Almost never or never.

7 MR. GILSTRAP: And we're just talking about  
8 making the request.

9 CHAIRMAN BABCOCK: Yeah, right. They're not  
10 making the decision. Okay. So let's vote on something  
11 that will probably never happen. The local administrative  
12 judge and regional presiding judge, there's no reason to  
13 split those two out, are there?

14 MR. ORSINGER: I think there's a big reason.  
15 The politics are entirely different. The regional  
16 presiding judge is picked by the Governor. There's about  
17 eight of them, or how many?

18 HONORABLE DAVID PEEPLES: Nine.

19 MR. ORSINGER: Nine of them. They are  
20 entrusted by our statutes with administrative authority.  
21 The local administrative judge is not politically superior  
22 to the judges that he or she is jockeying with, and I think  
23 the politics of this are just really offensive.

24 CHAIRMAN BABCOCK: Okay. So we'll split them  
25 out. Let's vote first on the local administrative judge.

1 How many people think that should be in this rule? Raise  
2 your hand if you think it ought to be in.

3 Raise your hand if you think it ought to be  
4 out. By a vote of 21 to 6, the Chair not voting, it's out.

5 How about the regional presiding judge? How  
6 many people think that should be in?

7 HONORABLE SCOTT BRISTER: Well, one  
8 additional matter. Regional presiding judge is the one  
9 right now who does Rule 11 decisions and can request from  
10 the Chief a statewide, even though my understanding is it's  
11 never been successful. There's some question about whether  
12 Rule 11 could be rolled into Rule 13 or not. Obviously if  
13 it is, if it could be, it might very well be that a  
14 regional presiding judge rather than wanting to do this on  
15 a region-by-region basis would prefer the MDL panel to do  
16 it statewide.

17 So they are already -- on the other hand, if  
18 you believe regional -- if you believe HB 4 means the only  
19 thing the MDL panel can put together is cases filed after  
20 September 1st then regional presiding judges probably will  
21 continue being the ones who make this decision on a local  
22 basis and might agree among themselves or one of them might  
23 agree if we get the MDL panel on a pretrial court doing  
24 that, then we can assign the pretrial judge to our cases,  
25 the regional presiding judge may be a person who smoothes a

1 transition between current Rule 11 and this proposed a  
2 rule.

3 CHAIRMAN BABCOCK: So does that argue in  
4 favor of keeping them in or putting them out?

5 HONORABLE SCOTT BRISTER: I'm not a regional  
6 presiding judge. I don't know if that's something they  
7 want or not.

8 CHAIRMAN BABCOCK: So if you say keep it out  
9 then Peeples will say put it in?

10 PROFESSOR DORSANEO: Did I understand -- I  
11 thought I understood what you said is that there is kind of  
12 an overlap and if we leave them in then the regional  
13 presiding judge can use this rather than Rule 11?

14 HONORABLE SCOTT BRISTER: I think there's  
15 going to be an overlap period where you have Rule 11 cases  
16 continuing on because they were filed before September 1  
17 and then these Rule 13 cases for after September 1.

18 Regional presiding judge assigns a judge to  
19 cases under 11 and arguably if the MDL panel picks a post  
20 9-1 pretrial court then the regional presiding judges could  
21 assign that pretrial -- maybe not transfer the cases to  
22 them, but could assign that pretrial judge or could ask the  
23 Chief Justice on a statewide basis to assign that pretrial  
24 judge to all my regional cases.

25 PROFESSOR DORSANEO: I think that was a

1 "yes," but you could use this or do that?

2 HONORABLE SCOTT BRISTER: Yes.

3 PROFESSOR DORSANEO: Which one would you do,  
4 Judge Peeples, more likely than not, if this was in here,  
5 if you were in this one?

6 HONORABLE DAVID PEEPLES: To be honest, I'm  
7 not sure I understand the facts that were stated there. I  
8 can see happening -- I could see the regional judges maybe  
9 taking the statewide judge appointed after 9-1 and putting  
10 him or her on some existing cases. I can see that  
11 happening. I can also see the MDL panel maybe choosing one  
12 of the judges already on some cases and putting him or her  
13 on future cases. I think both of those might happen.

14 PROFESSOR DORSANEO: What's the best way for  
15 these two things that are going to exist side-by-side to  
16 work together?

17 HONORABLE SCOTT BRISTER: That's a lot bigger  
18 question.

19 JUSTICE HECHT: Yeah.

20 HONORABLE DAVID PEEPLES: Well, all this does  
21 is give the regional presiding judge the power to ask the  
22 MDL panel to put a case in. Isn't that all we're doing  
23 right here?

24 CHAIRMAN BABCOCK: That's right. So, David,  
25 are you in favor of that? Are you in favor of that?

1 HONORABLE DAVID PEEPLES: I guess so.

2 CHAIRMAN BABCOCK: Okay. Everybody who is in  
3 favor of putting the regional presiding judge in the rule  
4 raise your hand.

5 All opposed, raise your hand. By a vote of  
6 22 to 0 the regional presiding judge is in, the Chair not  
7 voting. Having done that --

8 HONORABLE SCOTT BRISTER: And the trial  
9 court, right?

10 CHAIRMAN BABCOCK: So we've got the trial  
11 court and you've got the regional presiding judge, and  
12 those are the two judges or courts that can sua sponte  
13 request a transfer.

14 MR. ORSINGER: Did we vote to include the MDL  
15 panel also?

16 CHAIRMAN BABCOCK: Nope. We excluded that.

17 PROFESSOR ALBRIGHT: Somebody suggested the  
18 pretrial court.

19 CHAIRMAN BABCOCK: Excuse me?

20 PROFESSOR ALBRIGHT: Somebody suggested the  
21 pretrial court.

22 CHAIRMAN BABCOCK: Okay. Now we're going to  
23 talk about whether or not the pretrial court can make a  
24 request.

25 HONORABLE SCOTT BRISTER: I don't think -- I

1 think that will by definition be a tag-along case and won't  
2 be necessary.

3 CHAIRMAN BABCOCK: Would be just surplusage,  
4 which we can't have. Okay. Anybody else? Anything else?  
5 And no controversy about the last sentence, I assume.

6 MR. ORSINGER: Well, I guess if a judicial  
7 officer initiates the proceeding then there's no right to  
8 notice or to file a response. Is that what this means?  
9 There's no right to, no right to notice and no right to  
10 respond?

11 CHAIRMAN BABCOCK: It says, "The MDL panel  
12 may employ such procedures including show cause orders and  
13 the procedures in (f) and (h) as may be necessary for its  
14 decision," but it's discretionary.

15 HONORABLE SCOTT BRISTER: Richard, we talked  
16 briefly about it, but we started thinking, again, this is  
17 going to be such a rare number of cases, you would have to  
18 draft such a long rule for what exactly has to be done and  
19 not done when none of the parties asked for it. It would  
20 be better just to leave that to internal planning by  
21 the MDL panel.

22 MR. ORSINGER: And so basically if a judge  
23 initiates it, I might not even know it until after I've  
24 been consolidated?

25 HONORABLE SCOTT BRISTER: It is conceivable

1 that someone -- it is conceivable that a panel could decide  
2 to consolidate these cases without anybody else knowing  
3 about it, but it is inconceivable that the current panel  
4 would ever do such a thing.

5 MR. ORSINGER: Okay. Okay. That gives me  
6 some reassurance. I don't have the right to it, but --

7 MR. HAMILTON: Is that subparts (f) through  
8 (h), correct?

9 HONORABLE SCOTT BRISTER: No. It should be  
10 -- we dropped a few.

11 CHAIRMAN BABCOCK: That's what it says.

12 HONORABLE SCOTT BRISTER: It should be (a)  
13 through --

14 MR. ORSINGER: (f).

15 HONORABLE SCOTT BRISTER: (a) through (e) or  
16 (f).

17 MR. ORSINGER: Or (g) even, because of the  
18 retransfer.

19 HONORABLE SCOTT BRISTER: (g) is it's already  
20 gone and what do you do to send it a second time.

21 MR. HAMILTON: (a) through (e).

22 HONORABLE SCOTT BRISTER: We're just talking  
23 about what procedures do you use to make the first  
24 decision, and so that's going to be (a) through (e) or (a)  
25 through (f). (a) through (e).

1 CHAIRMAN BABCOCK: (a) through (e).

2 MR. TIPPS: Comma. Comma after (e).

3 HONORABLE SCOTT BRISTER: Thank you, Steve.

4 MR. MUNZINGER: Am I understanding this  
5 correctly that a public official can order my case  
6 transferred without me knowing about it, and I don't have a  
7 right to respond or reply to the panel that is going to  
8 make the decision? There's a reason why we have a joke,  
9 "Trust me, I'm from the government," and with all due  
10 respect to all the public officials here, I can't imagine  
11 such a thing, that an elected judge in a politically  
12 elected judiciary has the right to dispose or seek to  
13 dispose of my rights, my client's rights, before a panel,  
14 and I can't say anything about it and I'm not even told  
15 about it.

16 CHAIRMAN BABCOCK: Well, is the reason you  
17 can't say anything about it because you haven't been told  
18 about it?

19 HONORABLE SCOTT BRISTER: No. Let me say  
20 again. There's lots of things that one could imagine  
21 putting in these rules for situations that might come up,  
22 but with a September 1st deadline we focused on the ones we  
23 thought we could write before then. We can write a rule  
24 that covers cases where the trial judge asks that, but  
25 No. 1, we didn't want the trial judge to ask for it anyway,



1 and No. 2, you're going to have to write another rule like  
2 this just for those. Be my guest, but we didn't have time  
3 to do it.

4 MR. TIPPS: What if we added to the very end  
5 of that the words "and consistent with due process," "as  
6 may be necessary for its decision and consistent with due  
7 process."

8 MR. ORSINGER: I think that establishes a bad  
9 precedent for this rule.

10 HONORABLE DAVID PEEPLES: Scott, do the  
11 tag-along procedures kick in here? It's about four or five  
12 pages over. Just a minute, Richard. That gives you, if it  
13 happens to you, the right to say "I want a hearing."

14 PROFESSOR ALBRIGHT: What about just adding  
15 procedures for notice and hearing or something?

16 HONORABLE SARAH DUNCAN: Why don't -- why  
17 don't you just say, "The trial court must serve parties in  
18 related cases" -- I mean, if they are going to go to this  
19 unusual step of requesting transfer as a public official I  
20 can't imagine not requiring whoever makes the request to  
21 give notice to the parties that they may be affecting by  
22 their request.

23 HONORABLE SCOTT BRISTER: We all agree on  
24 that.

25 HONORABLE SARAH DUNCAN: And I'm --

1 HONORABLE SCOTT BRISTER: Chris suggests we  
2 could say, "The MDL panel must adopt procedures" --

3 HONORABLE TRACY CHRISTOPHER: That will work.

4 HONORABLE SCOTT BRISTER: -- "as may be  
5 necessary for this decision." We'll just do it internally  
6 when --

7 HONORABLE SARAH DUNCAN: Yeah, that still  
8 doesn't do what I think Richard is asking for, which is  
9 require a procedure that requires the elected official to  
10 give notice.

11 MR. MUNZINGER: I don't know the difficulty  
12 in just simply saying, "In such event the panel shall give  
13 notice to the parties who are included in the request and  
14 an opportunity to be heard before rendering a decision."

15 HONORABLE SCOTT BRISTER: How do we find out  
16 who they are? How do we --

17 CHAIRMAN BABCOCK: Hang on. There's a way to  
18 do this maybe. If you just say, "The trial court or  
19 regional presiding judge sua sponte may request a transfer  
20 of related cases to a pretrial court for consolidated or  
21 coordinated pretrial proceedings pursuant to this rule,  
22 with notice to the parties in cases for which transfer is  
23 sought."

24 MR. MUNZINGER: I don't have a problem with  
25 that so long as I can address the multidistrict panel and

1 say "Judge X is not being fair."

2 CHAIRMAN BABCOCK: If that happens, of  
3 course, you will be able to.

4 HONORABLE DAVID B. GAULTNEY: Why can't you  
5 just say, "The request will be treated as a motion under  
6 this rule"?

7 MR. MUNZINGER: I agree with that.

8 HONORABLE DAVID B. GAULTNEY: And then it  
9 just folds it in.

10 MR. LOW: We are just looking for things.  
11 Can you imagine a trial judge --

12 HONORABLE SCOTT BRISTER: No.

13 MR. LOW: I mean, can you imagine him just  
14 saying, "I'm not going to tell you boys about it, but" --

15 MR. MUNZINGER: Yes, I can. Yes I can.

16 MR. LOW: "But you boys," or anybody just  
17 doing that without telling you. I can't even imagine that.

18 CHAIRMAN BABCOCK: Okay. There's two  
19 competing proposals, one, the words I just read, and the  
20 other one is Justice Gaultney says let's just treat it like  
21 a motion under the rule.

22 HONORABLE DAVID B. GAULTNEY: What was yours?

23 CHAIRMAN BABCOCK: Mine just said "with  
24 notice to the parties in cases for which transfer is  
25 sought."

1 HONORABLE SCOTT BRISTER: We can't really  
2 treat it like a notice.

3 HONORABLE DAVID B. GAULTNEY: I think they're  
4 consistent. I think with notice, and that could address  
5 the trial judge giving notice and then at that point I  
6 think it's treated as a motion.

7 CHAIRMAN BABCOCK: Yeah, and then everything  
8 else kicks in, I would think.

9 HONORABLE SCOTT BRISTER: It's not going to  
10 include anything that motions must include.

11 CHAIRMAN BABCOCK: But that's okay because  
12 Munzinger, if he knows about it, can take whatever steps he  
13 thinks is appropriate.

14 MR. MUNZINGER: Presumptively the judge is  
15 going to identify the cause of action by a docket number,  
16 style, et cetera, and if he gives notice to the parties in  
17 the litigation, my objection is satisfied.

18 CHAIRMAN BABCOCK: Right. How do people like  
19 that? Is that okay? And then we can take a break.

20 All right. Let's take a break because  
21 everybody is satisfied with that.

22 HONORABLE SCOTT BRISTER: What were we  
23 satisfied with?

24 CHAIRMAN BABCOCK: With what I just said.

25 HONORABLE SCOTT BRISTER: Oh, okay. As long

1 as you know what that is.

2 CHAIRMAN BABCOCK: No, Scott, after the -- in  
3 the fourth line after "this rule" it would say "with notice  
4 to the parties in cases for which transfer is sought,"  
5 period.

6 HONORABLE SCOTT BRISTER: But, I mean, you  
7 know, the trial judge is not wanting to get rid of his or  
8 her one case. The trial judge is wanting somebody to take  
9 all the tire tread separation cases, and the trial judge  
10 can't any more find out who all the parties are than the  
11 panel can.

12 CHAIRMAN BABCOCK: Which is going to be an  
13 added reason why this isn't going to be used. Which is  
14 what you want all along.

15 HONORABLE SCOTT BRISTER: That's true.  
16 That's true.

17 (Recess from 3:47 p.m. to 4:10 p.m.)

18 CHAIRMAN BABCOCK: We're back on the record,  
19 having zipped through 13.1 and 13.2 in record time and now  
20 we're on to 13.3, and as I understand it, Judge Brister is  
21 going to pass the gavel or the mantle for the court --

22 HONORABLE SCOTT BRISTER: With glee.

23 CHAIRMAN BABCOCK: -- happily to Judge  
24 Christopher.

25 HONORABLE TRACY CHRISTOPHER: Okay. On 13.3

1 the subcommittee voted to have no stay upon the filing of a  
2 motion under this rule, which is what we have put down  
3 here. That is what the procedure is in Federal court. We  
4 proposed as an option an automatic stay for motions filed  
5 within 30 days after a party's appearance date, and the  
6 reason behind the idea of the automatic stay is that the  
7 parties are going to have to be responding to different  
8 discovery in cases all over the state and if the cases are  
9 all going to get consolidated and there's going to be one  
10 set of discovery, it makes sense to stay it. So that's the  
11 first vote, either no stay or automatic stay.

12 CHAIRMAN BABCOCK: To stay or not to stay.

13 HONORABLE SCOTT BRISTER: And we talked about  
14 some other alternatives, whether, you know, one stay for 30  
15 or 60 days or whether it should be tied to the trial date  
16 or not, but these were the two most popular.

17 MR. GILSTRAP: So it's no automatic stay or  
18 automatic stay? That's what the concern is. We still have  
19 to reach the question of whether the panel can order a  
20 stay, right?

21 HONORABLE TRACY CHRISTOPHER: Yeah.

22 CHAIRMAN BABCOCK: But the way you have it  
23 drafted it's not an automatic stay, but there could be an  
24 application to either the trial court or the MDL panel --

25 HONORABLE SCOTT BRISTER: Right.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 CHAIRMAN BABCOCK: -- to do a stay in their  
3 discretion.

4 HONORABLE SARAH DUNCAN: But the title of (a)  
5 really should be "No automatic stay."

6 HONORABLE TRACY CHRISTOPHER: Okay.

7 CHAIRMAN BABCOCK: Does that mean that you  
8 like the subcommittee recommendation?

9 HONORABLE SARAH DUNCAN: Uh-huh.

10 MR. GILSTRAP: Chip, before we get to -- you  
11 know, maybe our vote might depend on whether or not the MDL  
12 panel has an appetite to deal with orders, motions for  
13 stay. I mean, if this is something that they're not going  
14 to be able to deal with and it's an administrative burden,  
15 you know, then I may want to say we have an automatic stay.

16 CHAIRMAN BABCOCK: Well, we have got 40  
17 percent of the MDL panel who were on the subcommittee, and  
18 obviously they have a voracious appetite for self-inflicted  
19 pain.

20 HONORABLE SCOTT BRISTER: Well, I'm feeling  
21 better now that we don't have to sign things three times.

22 CHAIRMAN BABCOCK: Yeah, once we get over  
23 that hurdle, it's way downhill from there.

24 HONORABLE TRACY CHRISTOPHER: But we do give  
25 the option in (b) of filing a motion in front of the trial

1 court to take the pressure off the MDL panel.

2 CHAIRMAN BABCOCK: And that's what happens a  
3 lot of the times is that you get one of many cases is  
4 obstreperous because the plaintiff's lawyer wants to push  
5 it as a test or for whatever reason, and you go to that  
6 judge and you say, "Judge, we're about to get an MDL  
7 decision, please stay everything until we get that," and  
8 more often than not they do. So....

9 MR. GILSTRAP: Well, if the court -- if we  
10 get a provision saying that there can be an order of stay  
11 then I think, you know, the sentiment will be not to have  
12 any automatic stay. I mean, I think that's likely.

13 HONORABLE SCOTT BRISTER: But the question  
14 was whether you will get a request for automatic stay with  
15 every motion.

16 MR. GILSTRAP: Or discretionary stay?

17 HONORABLE SCOTT BRISTER: Request for stay  
18 with every motion. Who made that argument? Was that you,  
19 Tracy?

20 HONORABLE TRACY CHRISTOPHER: Right. You  
21 will.

22 CHAIRMAN BABCOCK: Tommy.

23 MR. JACKS: I'm not sure of that. I mean,  
24 the -- in the present operation of Rule 11 we don't get  
25 knee-jerk motions to stay stuff and stuff still goes on



1 while in the various reasons, decisions being made about  
2 whether to consolidate or not, I mean, obviously there's  
3 the ability of the trial court, of course, for somebody to  
4 point out it's a problem and ask for a stay, but I don't  
5 recall it having been a problem under our current practice.

6 CHAIRMAN BABCOCK: Richard Orsinger.

7 MR. ORSINGER: How long do we anticipate that  
8 a proceeding might take to resolve from the first filing to  
9 the end? Are we talking here a matter of weeks or a matter  
10 of months?

11 HONORABLE DAVID PEEPLES: Weeks.

12 HONORABLE SCOTT BRISTER: Weeks. Days  
13 hopefully.

14 MR. ORSINGER: So then you've got -- I mean,  
15 there's a lot of complications associated with stays,  
16 especially on no record and no evidence and no notice and  
17 everything else. If it's just a matter of weeks anyway,  
18 why don't we just let it go?

19 CHAIRMAN BABCOCK: Well, but you would -- I  
20 mean, you would want to have the option or the discretion  
21 to move for a stay because a lot of mischief could be done  
22 if there's a trial judge who, you know --

23 MR. ORSINGER: In just a matter of weeks  
24 we're talking about a resolution of this thing?

25 MR. LOW: What if they give you notice --

1 you've got about seven plaintiffs and they give you notice  
2 your key defense deposition is going to be taken tomorrow  
3 and another the next day and the next day and next day.  
4 Wouldn't you go before the panel and ask for relief?

5 HONORABLE SCOTT BRISTER: Or a request for  
6 admissions gets out --

7 MR. ORSINGER: My first thought would be to  
8 go to the trial judge and ask for relief.

9 HONORABLE DAVID PEEPLES: Eight trial judges.

10 MR. LOW: Yeah. You've got eight different  
11 trial judges. How is a trial judge in Beaumont going to  
12 give you relief in San Antonio?

13 CHAIRMAN BABCOCK: Kent.

14 MR. SULLIVAN: It's not clear to me how you  
15 would effectively use individual motions to stay. Maybe I  
16 just don't understand this.

17 CHAIRMAN BABCOCK: Because you've got a whole  
18 bunch of cases.

19 MR. SULLIVAN: And that's the essence of the  
20 problem, right?

21 CHAIRMAN BABCOCK: Yeah, but that's not the  
22 problem. The problem is you just have one case where  
23 people are being obstreperous.

24 MR. LOW: Right.

25 CHAIRMAN BABCOCK: Buddy's lawyer, whatever

1 side of the docket he's on, is saying, "Hey, I see this MDL  
2 thing coming. I don't like this, so I'm going to send out  
3 notices for eight days of depositions and" --

4 MR. LOW: Somebody else will do it and  
5 then --

6 MR. SULLIVAN: But that presumes that there  
7 aren't similar problems, maybe even coordinated problems by  
8 the same lawyers or related lawyers in other courts, which  
9 to me is the issue that needs to be addressed, is sort of  
10 what the worst case scenario is, because it would seem to  
11 me to get certainty in this process you would have to get a  
12 uniform ruling for -- or be in a position to get -- perhaps  
13 I should say a uniform ruling from all the trial judges  
14 that have jurisdiction.

15 CHAIRMAN BABCOCK: No. Because that's why  
16 you have the alternative here of going to the MDL panel,  
17 and they have the authority while -- you know, it's almost  
18 protecting your jurisdiction. While they're considering  
19 this they can order all the other judges to quit it or the  
20 parties to quit it. They can grant a stay.

21 So you take care of both problems. You take  
22 care of the problem where you just have one or maybe two  
23 cases where somebody is being obstreperous. You don't have  
24 to bother the MDL panel, but you also take care of the  
25 situation where there are a whole bunch of cases that are

1 causing trouble and are going to effectively deprive the  
2 MDL panel of its jurisdiction and then you go to the MDL  
3 panel.

4 MR. JACKS: The other thing I point out is  
5 that there has been a healthy practice that's developed in  
6 the statewide mass tort litigation already in which there  
7 is a lot of voluntary coordination that goes on, and I  
8 think that's one reason why it hasn't been a problem, and  
9 it happened with the Sulzer hip and knee implants  
10 litigation where lawyers from around the state on both  
11 sides got together, and Bill Book had all -- had the  
12 defense and, you know, a number of plaintiffs firms  
13 involved around the state set up a schedule so that Book  
14 only had to present his witnesses one time, and then there  
15 was -- I guess what I'm saying is the problem with the  
16 automatic stay is you may have a process that's already  
17 been developed even before the MDL panel gets involved, and  
18 there's really no need for an automatic stay to stop all  
19 that where no harm is being done, and so I'd really like to  
20 urge that we leave the flexibility of having trial judges  
21 and the MDL panel able to stay stuff, but yet you not make  
22 it something that applies whether you need it or not.

23 CHAIRMAN BABCOCK: Yeah. I think with an  
24 automatic stay we're going to create an evil where there's  
25 nothing to fix it, don't you, Buddy?

1 MR. LOW: But there's some people, though,  
2 that say that if we don't give the authority to the other  
3 judge then they may have to resort to an evil one. In  
4 other words, that's why I think some people over there  
5 wanted to vote on the second thing first. Is that what you  
6 were suggesting, Richard?

7 MR. ORSINGER: Well, I'm a little concerned  
8 that I don't -- the statute doesn't particularly authorize  
9 the MDL panel to make decisions about the conduct of the  
10 litigation. They just make a decision about whether to  
11 consolidate these decisions in front of a sitting judge,  
12 and now all of the sudden we're saying we're going to give  
13 these guys the opportunity to make what's essentially --

14 MR. LOW: They can preserve their  
15 jurisdiction or authority.

16 MR. ORSINGER: They don't lose any  
17 jurisdiction.

18 MR. LOW: Yeah, they do.

19 MR. ORSINGER: You know, the multidistrict  
20 panel does not have the authority to make decisions about  
21 consolidating depositions or anything else. That's not in  
22 the statute. Their only authority is to give it to some  
23 one judge who then has the authority to make those  
24 decisions. If this panel has the ability to issue stay  
25 orders and stop some depositions and allow others to go

1 ahead, this, that, and the other, they are now adjudicating  
2 the matters that they are not by statute given the  
3 authority to do, and I just really am uncomfortable with  
4 that.

5 CHAIRMAN BABCOCK: Richard, I don't think  
6 that's right.

7 MR. ORSINGER: Why?

8 CHAIRMAN BABCOCK: Because they are not  
9 deciding anything on the merits.

10 MR. ORSINGER: Yeah, but they are staying a  
11 proceeding. The statute doesn't say that the multidistrict  
12 panel can stop or start a deposition. It just says that  
13 they can refer it to one judge to decide whether to stop or  
14 start a deposition.

15 CHAIRMAN BABCOCK: But they've got a  
16 proceeding in front of them, and now because of the actions  
17 of one or more of the litigants the question is going to be  
18 moot by the time they get to it.

19 MR. ORSINGER: No, it won't be moot.

20 CHAIRMAN BABCOCK: Well, it could be.

21 MR. ORSINGER: If it's a matter of a couple  
22 of weeks here I just can't believe this --

23 CHAIRMAN BABCOCK: Well, then what's the  
24 problem with the stay?

25 MR. MUNZINGER: I agree with you, Chip. All

1 courts it seems have the power to issue such orders as are  
2 necessary to maintain the jurisdiction of proceedings in  
3 their court, and while the MDL is not a court, it ought to  
4 have the same powers to preserve the effect of its order to  
5 accomplish the purpose that the Legislature intended, to  
6 issue such orders preserving the status quo, and so I don't  
7 believe it's dealing with the merits at all, but I do think  
8 the question raised in subsection (b) where it says "may  
9 stay all or any part of any trial court proceedings," does  
10 that mean all related cases or just related cases for which  
11 transfer is sought?

12 CHAIRMAN BABCOCK: Yeah. That's a good  
13 point.

14 MR. ORSINGER: Can it stay a trial? Can this  
15 panel stay a trial under this language, and if so then how  
16 can we possibly justify staying a trial?

17 CHAIRMAN BABCOCK: "Any trial court  
18 proceedings" strikes me as broad enough to capture trial.

19 MR. ORSINGER: But the statute is just  
20 designed to capture pretrial proceedings.

21 MR. LOW: Would you wait 'til after a trial  
22 and then they are going to consolidate?

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: In terms of the authority of  
25 the Texas Supreme Court here to adopt rules that give

1 the MDL panel the authority to stay a statute, the MDL  
2 statute says that the judicial panel on MDL must operate  
3 according to rules of practice and procedure adopted by the  
4 Supreme Court under section 74.024, and I don't have 74.024  
5 with me here today, but I imagine somebody does and we  
6 could reasonably quickly see, but I would assume that that  
7 authority is broad enough to let the Supreme Court provide  
8 for stay orders in suitable cases. So there's a separate  
9 question, Richard, from the policy of whether it's a good  
10 idea, but I'm reasonably confident that the Court has the  
11 authority to allow the MDL panel to do this.

12 CHAIRMAN BABCOCK: I get a sense that nobody  
13 is -- but tell me if I'm wrong -- nobody is in favor of the  
14 automatic stay.

15 HONORABLE TRACY CHRISTOPHER: All right.

16 CHAIRMAN BABCOCK: Fair enough? So now we're  
17 just talking about whether or not whether (b) -- I mean  
18 (a), no automatic stay, that language is okay.

19 MR. GILSTRAP: We really don't even need  
20 that.

21 CHAIRMAN BABCOCK: Huh?

22 MR. GILSTRAP: You don't need (a). I mean,  
23 if you have (b), and no one is suggesting there is an  
24 automatic stay if it's not in the rule.

25 HONORABLE TRACY CHRISTOPHER: It's in



1 most MDL rules. That's why we put it in there, so that it  
2 was clear. It's in the Federal MDL rule. It's in the  
3 Colorado one.

4 CHAIRMAN BABCOCK: If you leave it out  
5 somebody will say, "Ooh, there must have been a reason for  
6 that," so now we're on down to (b) and "Upon motion and  
7 order the trial court or the MDL panel may stay all or part  
8 of any trial court proceedings until a ruling by the MDL  
9 panel." Sarah.

10 HONORABLE SARAH DUNCAN: I don't think we  
11 mean that the trial court in a case can stay part of the  
12 proceedings in another trial court, but that's what we've  
13 written, so I think that needs to be clarified.

14 CHAIRMAN BABCOCK: Yeah. That's a good  
15 point. Don't you think, Judge Christopher?

16 HONORABLE TRACY CHRISTOPHER: Okay. We could  
17 say, "The trial court may stay all or part of its  
18 proceedings." And then leave the second question as to  
19 the MDL panel.

20 MR. YELENOSKY: This is just wordsmithing,  
21 but we don't really mean "upon motion and order," do we?  
22 Is it "upon motion the trial court may order"?

23 CHAIRMAN BABCOCK: Yeah.

24 MR. YELENOSKY: If you're going to use  
25 "order" at all.

1 HONORABLE TRACY CHRISTOPHER: Okay. "Upon  
2 motion the trial court may stay all or part of its  
3 proceedings until a ruling by the MDL panel" and then the  
4 main vote is whether the MDL panel should be given that  
5 option also.

6 CHAIRMAN BABCOCK: And it should be "any  
7 trial court proceedings in cases that are the subject of  
8 the transfer," right?

9 HONORABLE DAVID PEEPLES: "In which transfer  
10 is sought."

11 HONORABLE TRACY CHRISTOPHER: Don't you think  
12 that's obvious?

13 CHAIRMAN BABCOCK: "Cases for which transfer  
14 is sought."

15 MR. ORSINGER: But the panel has the  
16 discretion to transfer more cases than just the one that's  
17 sought, but only the ones that are named by the movant as  
18 being sought are the ones that are subject to this interim  
19 relief stay order?

20 CHAIRMAN BABCOCK: Well, sure, because nobody  
21 is going to come in and move for a stay if they are not  
22 moving for MDL as well.

23 HONORABLE TRACY CHRISTOPHER: Perhaps we  
24 could take a vote on whether we think the MDL panel should  
25 have a stay and then we will write the sentence.

1 CHAIRMAN BABCOCK: Because we don't have to  
2 write the sentence if we don't think the MDL should try it.  
3 Justice Duncan. I think that's a good idea.

4 HONORABLE SARAH DUNCAN: This is somewhat  
5 facetious, but consistent with our earlier votes I assume  
6 we're not going to have a hearing?

7 MR. ORSINGER: Or evidence.

8 HONORABLE SARAH DUNCAN: Or evidence.

9 MR. ORSINGER: Yeah. And they can stay a  
10 temporary injunction, I suppose.

11 CHAIRMAN BABCOCK: I think they can have a  
12 hearing if they want, I guess.

13 HONORABLE SCOTT BRISTER: Right. If ordered.

14 CHAIRMAN BABCOCK: If they want to have a  
15 hearing.

16 MR. ORSINGER: And the panel could stay -- I  
17 mean, clearly they can't stay a trial. Are we saying they  
18 can stay a trial?

19 CHAIRMAN BABCOCK: Sure they can.

20 MR. ORSINGER: And they can stay a temporary  
21 injunction hearing, too, with no evidence? This is  
22 really --

23 HONORABLE TRACY CHRISTOPHER: Well, we had  
24 accepted --

25 HONORABLE SCOTT BRISTER: The Supreme Court

1 does it all the time, right?

2 CHAIRMAN BABCOCK: Not all the time.

3 MR. ORSINGER: No, the Supreme Court doesn't  
4 stay temporary injunction hearings.

5 HONORABLE SCOTT BRISTER: Maybe not all the  
6 time, but they --

7 CHAIRMAN BABCOCK: Occasionally.

8 HONORABLE SCOTT BRISTER: -- do it when it's  
9 necessary.

10 MR. ORSINGER: Yes, but the ultimate  
11 jurisdiction of the whole transfer doesn't apply to final  
12 trials. It only applies to pretrial, right? I mean, we  
13 all know that it has to go back to the real court, to the  
14 original court, for trial, so why would we be able to stay  
15 at trial when it's not even within our scope of our  
16 legislative mandate?

17 HONORABLE SCOTT BRISTER: Because the  
18 pretrial court can't conduct the trial.

19 MR. TIPPS: If there needed to be coordinated  
20 pretrial proceedings before the trial occurred and that was  
21 at issue in the motion then the MDL panel ought to be able  
22 to stay the trial in order to have the time to decide  
23 whether or not there should be a pretrial proceeding.

24 CHAIRMAN BABCOCK: Exactly. Let's have a  
25 vote on whether or not to include the MDL panel in the stay

1 because I think Judge Christopher is right. We don't have  
2 to muck around with the language if we don't think that's a  
3 good idea. So everybody that thinks it's a good idea that  
4 the MDL panel have the ability to stay all or part of any  
5 trial court proceedings until a ruling by the MDL panel,  
6 raise your hand.

7 All those opposed? All right. By a vote of  
8 25 to 2 --

9 HONORABLE SARAH DUNCAN: Three.

10 CHAIRMAN BABCOCK: Where's that third hand?

11 HONORABLE SARAH DUNCAN: You have to look  
12 around the room, Chip.

13 CHAIRMAN BABCOCK: I just assumed that the  
14 dissent is going to be over here.

15 MR. YELENOSKY: Make Ralph sit over there.

16 MR. DUGGINS: No, no. I take it back.

17 CHAIRMAN BABCOCK: 25 to 3, the Chair not  
18 voting, so we're going to have the MDL panel in here, and  
19 the language will be "The trial court may stay all or part  
20 of any of its proceedings" and then "The MDL panel may stay  
21 all or part of any trial court proceedings in cases where  
22 transfer is sought until a ruling by the MDL panel." Is  
23 that --

24 HONORABLE TRACY CHRISTOPHER: Right.

25 CHAIRMAN BABCOCK: Does that work?

1                   PROFESSOR DORSANEO: We're going to have no  
2 standards in there at all?

3                   HONORABLE SARAH DUNCAN: No standards, no  
4 hearing, and no evidence.

5                   MR. ORSINGER: If there's no evidence, why do  
6 you need standards?

7                   CHAIRMAN BABCOCK: Obviously the MDL panel  
8 will apply standards. I mean, they are not going to just  
9 flip a coin, I don't think.

10                  HONORABLE DAVID PEEPLES: Chip, can I say,  
11 the only -- Sarah, the only alternative to this is for the  
12 panel to hurry up and make a decision, maybe rashly because  
13 something is getting ready to happen that it can't stop. I  
14 mean, you encourage rational decisions, deliberative  
15 decisions by giving this power.

16                  HONORABLE SARAH DUNCAN: I'm not opposed to a  
17 stay.

18                  HONORABLE DAVID PEEPLES: You voted --

19                  HONORABLE SARAH DUNCAN: No, I didn't.

20                  HONORABLE DAVID PEEPLES: Okay.

21                  CHAIRMAN BABCOCK: No, Sarah didn't vote  
22 against this. It's her colleagues to her left.

23                  Okay. Anything else? Any language we want  
24 to add to this? Chris, maybe some factors?

25                  MR. GRIESEL: I'm already -- they're only

1 getting Christmas presents, so....

2 CHAIRMAN BABCOCK: All right. Anything else?  
3 Ralph.

4 MR. DUGGINS: Do we need to state the obvious  
5 that the trial court has the inherent power to stay its own  
6 proceedings? Aren't we really trying to focus on just what  
7 the MDL panel can do? I think that's redundant. I would  
8 prefer not to have that and just focus on whatever the  
9 committee wants in terms of --

10 MR. LOW: Well, but the question is --

11 CHAIRMAN BABCOCK: Judge Bland.

12 HONORABLE JANE BLAND: I agree that the trial  
13 court probably already has the power, but I think it's a  
14 gentle encouragement to go see the trial judge first before  
15 you bother the MDL panel. If you can get what you need  
16 from the trial judge, just stay with the trial judge.

17 CHAIRMAN BABCOCK: Yeah. I mean, and if you  
18 exclude them, exclude the trial judge from this part of the  
19 rule, then there may be an implication that you've got to  
20 go to the MDL panel because of the unique procedure, so I  
21 agree. I think it's redundant, but Richard.

22 MR. MUNZINGER: The question is whether the  
23 trial court sua sponte could stay the proceedings. If the  
24 answer is "yes," the way this is drafted, it says he may do  
25 so only upon motion. So my question would be it seems to

1 me a trial court should have the authority to sua sponte  
2 stay proceedings, and we wouldn't want to say something in  
3 this rule that would suggest that he not have that power.

4 CHAIRMAN BABCOCK: You added a word, though,  
5 Richard. It doesn't say "upon motion only." It just says  
6 "upon motion."

7 MR. MUNZINGER: I understand.

8 MR. YELENOSKY: Well, what about a comment  
9 that just says that this doesn't affect the trial court's  
10 power to get to 13.4, and there's actually a transcript?

11 CHAIRMAN BABCOCK: I sort of agree with Ralph  
12 on that, that does take care of it, but if people think we  
13 need a comment.

14 HONORABLE TRACY CHRISTOPHER: We could delete  
15 the words "upon motion" and just say "The trial court may  
16 stay all or part of its proceedings until a ruling by  
17 the MDL panel" and that would cover both circumstances.

18 CHAIRMAN BABCOCK: And that would satisfy  
19 Judge Brister's lust for fewer words.

20 HONORABLE SCOTT BRISTER: Absolutely.

21 HONORABLE SARAH DUNCAN: No motion, no  
22 hearing, no evidence.

23 MR. ORSINGER: No more temporary injunctions,  
24 no more trials.

25 PROFESSOR CARLSON: This will be efficient.



1 MR. LOW: You happy with this, Richard?

2 CHAIRMAN BABCOCK: Okay. What else?

3 Okay. Good job, Judge Christopher, on 13.3.

4 Let's tackle 13.4.

5 HONORABLE SCOTT BRISTER: She's not done.

6 HONORABLE TRACY CHRISTOPHER: All right.

7 13.4, transfer to the pretrial court. What we've  
8 envisioned here is (a), "Transferred upon notice," where  
9 the original MDL transfer order, which I think will have a  
10 list of cases, is filed with the trial court and then that  
11 transfers it, so that's what provision (a) is intended to  
12 capture, "Transferred upon notice."

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE TRACY CHRISTOPHER: Any questions  
15 about (a)?

16 MR. HAMILTON: How is the trial court going  
17 to stay anything if his case has been transferred already?

18 HONORABLE SCOTT BRISTER: This is after  
19 the MDL --

20 HONORABLE TRACY CHRISTOPHER: After the MDL  
21 has ruled.

22 HONORABLE SCOTT BRISTER: -- decides it's  
23 going.

24 MR. HAMILTON: Okay.

25 CHAIRMAN BABCOCK: Justice Hecht.

1 JUSTICE HECHT: Why do you need a notice?

2 MR. ORSINGER: Yeah.

3 HONORABLE TRACY CHRISTOPHER: That's just to  
4 tell the trial court that they're going to close their  
5 file.

6 MR. ORSINGER: Why not just an order, though?  
7 Why a notice plus an order?

8 HONORABLE TRACY CHRISTOPHER: It's kind of  
9 like a notice of removal when I think we're -- we put that  
10 language in because of the way we did the tag-along cases,  
11 too.

12 HONORABLE SCOTT BRISTER: If a party has to  
13 file a notice then the service rules apply automatically.  
14 If the party has to file an order from the panel, arguably  
15 they don't. Since it's normally the court's duty to send  
16 its order to people, and we don't have any money to do  
17 that. The second -- and the concept is that this is like a  
18 removal, that it's removal by notice rather than the order  
19 because I think there will be -- my view is the order can  
20 be general without listing the particular cases, and so  
21 somebody will need -- there may be cases -- certainly that  
22 will be true in tag-along cases, that somebody needs to  
23 attach a notice saying, in effect, I think this falls  
24 within the order and, therefore, I'm giving you notice that  
25 I'm removing it to the pretrial court.

1 MR. ORSINGER: And the notice is prepared by  
2 one of the litigants, presumably the winning litigant?

3 HONORABLE SCOTT BRISTER: Probably.

4 MR. ORSINGER: And if they file an order  
5 without a notice then it's not transferred?

6 HONORABLE SCOTT BRISTER: I would think you  
7 would want them to do a notice because of the service rule.

8 CHAIRMAN BABCOCK: Okay. Any other comments  
9 on 13.4(a)?

10 MR. YELENOSKY: Well, it's not clear that  
11 that notice will be filed with --

12 CHAIRMAN BABCOCK: Yeah, Richard.

13 MR. MUNZINGER: I just have a question that  
14 was triggered by the judge's comment that she believes that  
15 the order is going to presumably identify the locations for  
16 transfers. Is the order going to be required to specify by  
17 docket number those cases that are transferred or not?

18 CHAIRMAN BABCOCK: Yeah. I think the -- I  
19 don't want to speak for the Court, but I think -- well,  
20 I'll let the Court speak for the Court. What does the  
21 Court think about that?

22 JUSTICE HECHT: Well, the Court's not here.

23 CHAIRMAN BABCOCK: Yeah, but the important  
24 members are here.

25 JUSTICE HECHT: Obviously we don't always

1 speak for the Court. I suspect that I see Scott's concerns  
2 here, but I think at least the rule should be that it lists  
3 the case numbers, so I think we need to explore that  
4 further. Maybe when we get to tag-along cases. I think  
5 that's the concern.

6 HONORABLE SCOTT BRISTER: Right. I mean,  
7 what if it's asbestos and there are not 30 or 500 but  
8 50,000?

9 CHAIRMAN BABCOCK: A lot of cause numbers.

10 JUSTICE HECHT: I just don't know. I mean, I  
11 see the problem.

12 HONORABLE SCOTT BRISTER: I just think about  
13 the hearing, the judge -- the panel is going to say, "We're  
14 going to transfer tire tread separation cases. You-all go  
15 figure out which ones those are," because the panel has no  
16 idea which cause numbers these are.

17 CHAIRMAN BABCOCK: Well, yeah.

18 HONORABLE SCOTT BRISTER: And if the deal is  
19 we're going to end up signing an order that you give us  
20 that says, "We think these are all the cases," what's the  
21 difference in just having you file the order with the  
22 notice and what you think are all the cases. In either  
23 event we're taking your word for it that those are all the  
24 cases, because we're not going to know.

25 CHAIRMAN BABCOCK: Bonnie has got the answer

1 to that.

2 MS. WOLBRUECK: No. I would assume that the  
3 notice then would tell me, the clerk, which cases to  
4 transfer?

5 HONORABLE SCOTT BRISTER: Right. That's a  
6 good point. That's another point. The notice would have  
7 the case number and the court and your county on the front  
8 that would be attached to the front of an order which will  
9 not necessarily specify the case.

10 HONORABLE TRACY CHRISTOPHER: And it would  
11 say where the case is getting transferred to.

12 MS. WOLBRUECK: That was my second question.  
13 I assume then the order would say to what -- I know there  
14 was a discussion of judge, but what court specifically it  
15 will be filed in.

16 CHAIRMAN BABCOCK: You can't get away, I  
17 don't think -- you can't get away from having a cause  
18 number on some document.

19 MS. WOLBRUECK: You have to.

20 CHAIRMAN BABCOCK: And if it's going to be on  
21 some document, why wouldn't it be on the order?

22 HONORABLE SCOTT BRISTER: It's not going to  
23 be on any order for the tag-along.

24 MR. ORSINGER: Well, because the order is  
25 what Judge Brister and his colleagues have to sign, but if

1 they sign a generic order that all lawsuits involving  
2 such-and-such a tire by such-and-such a manufacturer are  
3 consolidated into such-and-such court then it's up to the  
4 individual litigants to decide whether they fall within or  
5 without of that order. And if they do, they put the cause  
6 number of their case on the notice and say, "Here's the  
7 consolidation order. I claim that it applies to my case."

8 MR. GILSTRAP: But the keyword is --

9 CHAIRMAN BABCOCK: Bonnie.

10 MS. WOLBRUECK: Will the clerk have any  
11 responsibility in noting that an asbestos case was filed  
12 with the clerk and the clerk had been given notice that  
13 it's a tag-along case and should be transferred?

14 HONORABLE SCOTT BRISTER: No. The way we've  
15 drafted it is nothing -- the clerk doesn't do anything  
16 until you get a notice from a party saying it's  
17 transferred, and "I'm attaching the order that transfers  
18 it."

19 MS. WOLBRUECK: Okay.

20 CHAIRMAN BABCOCK: Richard.

21 MR. MUNZINGER: I'm very confused, and I  
22 apologize for my stupidity.

23 CHAIRMAN BABCOCK: You get that?

24 MR. MUNZINGER: It seems to me that what I'm  
25 hearing here is that the motion is filed with the

1 multidistrict panel. It says it consolidates all cases  
2 involving tire tread separation in the state of Texas  
3 involving Bridgestone and Firestone to Judge Smith in Deaf  
4 Smith County, period, order entered. It's now up to the  
5 litigants in all of those cases, who may or may not receive  
6 a copy of this order, to then file a notice saying, "Oh,  
7 boy. I'm one of those cases. I get transferred."

8           It seems to me if that is what we are  
9 contemplating, we are asking for mass confusion. People's  
10 rights are implicated by these orders. People  
11 presumptively are going to have a right or claim a right to  
12 file a mandamus, people's right to take a deposition,  
13 discovery in these cases, all kind of procedural and  
14 substantive rights are going to be affected by whatever  
15 happens here; and we're saying that the order doesn't  
16 specify the case to be transferred?

17           And I know Judge Brister doesn't want to or  
18 doesn't believe that it's possible for a lawyer to know all  
19 the cases in the state, and I agree with you, it isn't.  
20 But it is possible for that lawyer to say, "These are the  
21 cases that I know of," and it is possible, and in my  
22 opinion mandatory, that the multidistrict panel identify  
23 those cases which are the subject of its order.

24           This is judicial action, affecting the rights  
25 of litigants. How can you leave that to, "Oh, boy, I'm one

1 of those guys"? And he files his notice and now the local  
2 trial court in El Paso or Laredo, he doesn't know whether  
3 in the hell his case has been transferred or hasn't been  
4 transferred because it isn't identified in the  
5 multidistrict case other than that it's a  
6 Bridgestone/Firestone tire separation case, and the good  
7 lawyer says, "Wait a minute, judge, but mine is different  
8 from that case."

9 HONORABLE SCOTT BRISTER: Which we've set up  
10 that hearing, but how is that any different from a notice  
11 of removal in Federal court? Somebody claims there's  
12 Federal parameters. You don't get a hearing on that before  
13 it goes. It goes. So you get a hearing on whether it  
14 comes back.

15 MR. MUNZINGER: But the problem with that is  
16 that the judge who is now hearing the remand motion is the  
17 pretrial court, and the law gives the power of transfer to  
18 the multidistrict panel.

19 HONORABLE SCOTT BRISTER: And we've got the  
20 provision. Maybe we should go on to it so everybody -- it  
21 is absolutely true in the final analysis that needs to be  
22 the MDL panel's report. Again, you've got all volunteers.  
23 We cannot have a hearing even by written submission on  
24 every one of these tag-along transfers. It will be more  
25 than we can do. We have to find some way to transfer these



1 cases, 20 this week, 37 the next week, 7 that, 44 after  
2 that, and on and on for years. We have to find some way to  
3 do that without the panel, three members of the panel,  
4 getting together and making a decision about every one of  
5 them forever.

6 CHAIRMAN BABCOCK: But isn't it in the  
7 Federal system the tag-along cases, they are identified by  
8 number, and the MDL panel sends them --

9 HONORABLE SCOTT BRISTER: Right. But the  
10 difference in my understanding is the MDL panel is people  
11 who are mostly retired judges who get paid to do this.  
12 Now, I mean, if you-all will give me a little bit of a  
13 raise, I'll do this full-time, but I'm getting nothing to  
14 do this in my spare time.

15 CHAIRMAN BABCOCK: Well, we're going to pass  
16 the hat.

17 (Laughter.)

18 HONORABLE SCOTT BRISTER: So if I can be a  
19 retired judge and do nothing but this and have the hearings  
20 in somewhere nice at a nice hotel, I'll do it full-time,  
21 and I'll sign every one of those orders. But as long as  
22 I've got to do this for nothing in my spare time, it ain't  
23 going to work.

24 CHAIRMAN BABCOCK: Judge Jefferson.

25 JUSTICE JEFFERSON: Why can't you make the

1 parties identify all related cases that they're aware of?

2 HONORABLE SCOTT BRISTER: You certainly can,  
3 but it seems to me that's doing two steps to do what I do  
4 in one. You're having them say, "Okay, this is what I want  
5 to transfer." And they get together and come up with a  
6 list, give it to me. We get it signed. If they know what  
7 it is, just have them file the notice and have it be gone.  
8 Skip the second step because all -- I am not going to  
9 verify that all 5,000 of these are tire tread separation  
10 cases. I'm going to take their word for it. What's the  
11 difference with them just having a notice of removal?

12 CHAIRMAN BABCOCK: Justice Hecht.

13 HONORABLE SCOTT BRISTER: I'll shut up.

14 CHAIRMAN BABCOCK: Other than that, you don't  
15 feel strongly, though.

16 HONORABLE SCOTT BRISTER: Well, I mean, it's  
17 -- you know, this is -- to me, if we've got to make a  
18 decision on all those that's a deal breaker. I was an  
19 administrative judge and I am an administrative, and it is  
20 a lot of time, and I still have to do all of my opinions,  
21 like a hundred a year, and, you know, at some point it gets  
22 to be a deal breaker.

23 CHAIRMAN BABCOCK: Justice Hecht.

24 JUSTICE HECHT: Well, as I see the process  
25 working here and reading through the Federal rule, which

1 seems to work sort of, the motion will identify the cases  
2 that the movant wants the panel to consolidate, to  
3 transfer, and so there's no reason why those can't be  
4 listed in the order and that be sent to the respective  
5 clerks of those cases, saying "These are the cases that are  
6 going to be transferred," and there will be certainty  
7 there.

8                   So I think the problem, as I understand it,  
9 that we're talking about is then what happens if after that  
10 another case is filed or arises that should be part of the  
11 transfer and consolidation but was not there when the  
12 decision was made, and the question then becomes, well, who  
13 should make that decision? Should you go back to the MDL  
14 panel or should somebody else make the decision?

15                   Now, in the Federal rule the clerk makes the  
16 decision. As I read the rule, it says, "Upon learning of  
17 the pendency of a potential tag-along action, an order may  
18 be entered by the clerk of the panel transferring the  
19 action to the previously designated transferee court." So  
20 I suppose you just write the clerk and say, "We think this  
21 is a tag-along action," and the clerk sends it to the other  
22 -- to the new judge, but it says then but the notice of  
23 this will not be sent to the original clerk, the clerk of  
24 the original court, until the parties have had a chance to  
25 complain about this.

1                   And the question is should they get to  
2 complain to the assigned -- the new assigned pretrial judge  
3 or should they have to go back to the panel, MDL panel that  
4 made the decision in the first place; and I guess the  
5 concern is if they go back to the MDL panel in the first  
6 place there will just be too much work, but they should get  
7 to complain to somebody, and why not to the pretrial judge  
8 who now has all of the other cases together and is really  
9 in the best position to know at this point whether these  
10 cases are in or out, subject to some appeal either to  
11 the MDL panel or the court or something.

12                   CHAIRMAN BABCOCK: And the way that this  
13 tag-along rule reads now it's unclear, to me anyway,  
14 talking about subpart (e), it's unclear to me where the  
15 party objecting to the tag-along, whether he files with  
16 the MDL panel or whether he files with the pretrial court.

17                   HONORABLE SCOTT BRISTER: That's probably my  
18 typo. It's with the pretrial court.

19                   MR. TIPPS: Those are the two alternatives.

20                   CHAIRMAN BABCOCK: Those are the two  
21 alternatives. And it seems to me it is a matter of timing,  
22 but the Federal system, and maybe because they have more  
23 resources, will not make you undo something. I mean,  
24 they'll let you object before the thing happens, and that  
25 makes a certain sense in terms of the issues that Richard

1 raises.

2 I suppose it's okay if they can object at the  
3 pretrial court, but some things have already happened.  
4 Files have moved, the proceedings in your county have  
5 stopped, and all because of some amorphous language that  
6 said, you know, this is a Firestone tire case, and you may  
7 not think it's a Firestone tire case at all, and yet you're  
8 now having to undo something, and that to me is the issue.  
9 You know, where -- whether you have to undo it or whether  
10 you can object it before it's done.

11 JUSTICE HECHT: Well, and that's one of the  
12 issues, and the other issue is to whom, and I think the  
13 panel just doesn't want people -- the panel would rather be  
14 in the position of hearing appeals from those decisions  
15 because it thinks there won't be very many as opposed to --  
16 am I right?

17 HONORABLE SCOTT BRISTER: Right. No, that's  
18 right.

19 CHAIRMAN BABCOCK: You can't?

20 JUSTICE HECHT: He said that's a typo. Oh,  
21 there's no appeal at all.

22 CHAIRMAN BABCOCK: No appeal.

23 HONORABLE SCOTT BRISTER: No, who said "no"?

24 CHAIRMAN BABCOCK: "A pretrial court's order  
25 under this subsection is not reviewable by appeal or

1 original proceeding."

2 HONORABLE SCOTT BRISTER: Yeah, but --

3 CHAIRMAN BABCOCK: But you can file a new  
4 motion for transfer with the MDL panel.

5 HONORABLE SCOTT BRISTER: Right. That's --

6 CHAIRMAN BABCOCK: That's if --

7 MR. ORSINGER: If it's granted.

8 CHAIRMAN BABCOCK: If the pretrial court  
9 grants.

10 HONORABLE SCOTT BRISTER: I intended the  
11 bracket to mean that some take the position that only the  
12 remand order can go back to the MDL, but the majority was  
13 that either the order to remand or not to remand, either  
14 one could be appealed to the MDL, but I see it didn't work  
15 out that way.

16 HONORABLE JANE BLAND: And you were going to  
17 have -- that wasn't going to preclude an original  
18 proceeding from the MDL panel's decision --

19 HONORABLE SCOTT BRISTER: Right.

20 HONORABLE JANE BLAND: -- in the Texas  
21 Supreme Court.

22 CHAIRMAN BABCOCK: Stephen.

23 MR. TIPPS: Let me footnote one thing to what  
24 Judge Hecht said, because I think possibly with this one  
25 exception he accurately framed the issue, and the only

1 additional point I would make is that once the order is  
2 issued by the panel and the cases that were the subject of  
3 the motion are listed, then you have two potential types of  
4 cases, both of which I think would properly qualify as  
5 tag-along cases.

6           One are the cases that have not yet been  
7 filed and are filed subsequently or, as you said, weren't  
8 out there at the time. The other group of cases are the  
9 cases that are related cases within the definition adopted  
10 by the MDL panel in this issue, but they are not among  
11 those listed, and I think Scott's been saying those need to  
12 be captured as well. But in my mind those get captured as  
13 tag-along cases just as would the cases that are filed  
14 subsequently, and the issue with regard to both is whether  
15 or not the procedure for getting them to the pretrial court  
16 is simply filing a notice like you do a notice of removal  
17 and they go automatically and you file a motion to remand  
18 with the pretrial court, or if you do something like the  
19 Federal procedure and there's some sort of hearing  
20 conducted by the MDL panel. But I think both of those  
21 categories of cases should properly be described as  
22 tag-along cases and treated that way.

23           JUSTICE HECHT: And then just to follow up on  
24 that, so the issues are really -- I mean, Richard's point  
25 is well-taken, and everybody needs a chance to complain

1 before files get shipped and things start happening, but do  
2 you -- is the default that it's transferred and you have to  
3 undo it or is -- or do you have to move to get it done, and  
4 who makes the decision? And the MDL court doesn't want to  
5 do it.

6 MR. TIPPS: And the committee addressed or  
7 attempted to address both alternatives in 13.4(e). The  
8 italicized version of 13.4(e) pretty closely parallels the  
9 Federal MDL procedure with the issuance of a conditional  
10 order that is then effectively stayed if there's an  
11 objection, and there's some sort of process that the MDL  
12 panel goes through before finally making a decision that  
13 this is a tag-along case and it should go to the pretrial  
14 court. That's what's in italics, and the committee's  
15 recommendation, which is at the top of the page, is a more  
16 automatic procedure roughly paralleled on the Federal  
17 removal procedure in which you can effect a transfer merely  
18 by filing a notice and essentially claiming that this case  
19 fits the definition of a prior MDL ruling, in which case  
20 the right to complain about that is in the form of a motion  
21 to remand that you file with the pretrial court.

22 CHAIRMAN BABCOCK: But the difference is in  
23 the removal procedure the party effecting the removal wants  
24 it to happen. Here the party effecting the transfer --

25 HONORABLE SCOTT BRISTER: Wants it to happen,



1 otherwise they wouldn't have filed it, filed the notice.

2 CHAIRMAN BABCOCK: Richard.

3 MR. MUNZINGER: Section 74.024 of House Bill  
4 4, "The rules adopted by the Supreme Court must,"  
5 subcategory (2), "allow transfer of civil actions only on  
6 the panel's written finding that transfer is for the  
7 convenience of the parties and witnesses and will promote  
8 the just and efficient conduct of the actions"; and the  
9 scheme that is being discussed at the moment allows the  
10 transfer to be accomplished by my filing a notice, shifting  
11 the decision from the multidistrict panel to the pretrial  
12 court, who rules upon it, with no relief from the panel.  
13 If I'm screwed by this order, you-all are going to have to  
14 decide whether this rule you adopted met the language of  
15 the Legislature, and you can't say that it did, because it  
16 says the only people who can order a transfer is the dadgum  
17 panel.

18 HONORABLE SCOTT BRISTER: But that's -- I  
19 disagree with that. Unless when you say we transfer in  
20 asbestos cases here that means asbestos cases in the past  
21 and asbestos cases in the future. None of them get  
22 transferred unless there's an order and decision by the  
23 panel that transfers asbestos cases, including those not  
24 filed yet get transferred; and so, yes, the alternative, if  
25 what you say is correct, that nothing is transferred

1 without an order, then we will have to sign an order on  
2 every one of these cases.

3           Let me point out, in the Harris County  
4 experience we transferred all the breast implant cases. I  
5 guess we left the asbestos cases where they were, but in  
6 breast implant we transferred them all, and we did not do  
7 an order that listed all the cause numbers, and it was not  
8 a problem. You just tell the clerk, "These are the" -- you  
9 know, "transfer the breast implant cases to Mike  
10 Schneider's court," signed an order that said not much more  
11 than that, and it happened. And there wasn't any dispute  
12 about it because, not surprisingly, everybody knew which  
13 ones were the breast implant cases and which weren't.

14           CHAIRMAN BABCOCK: But if that's true, you're  
15 not going to have any dispute either if you have an order  
16 transferring specific cases.

17           HONORABLE SCOTT BRISTER: I believe that if  
18 you transfer the Bridgestone/Firestone tire tread  
19 separation cases, it will be one out of 100,000 you will  
20 have a dispute about. Does anybody disagree with that?  
21 Anybody confused about which ones those are?

22           CHAIRMAN BABCOCK: But if that's true then  
23 the -- we're going to be inundated with motions argument  
24 falls away, doesn't it? If that's true, if there's only  
25 going to be one out of 100,000 where there's a dispute then

1 your argument about how, you know, we're doing this for  
2 free doesn't have as much force.

3 HONORABLE DAVID PEEPLES: Chip, can I speak  
4 to that?

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE DAVID PEEPLES: I respectfully  
7 disagree. The default rule here needs to be with what  
8 usually happens; and what I have seen happen is, you know,  
9 you've got this pretrial judge appointed; and then a  
10 tag-along case comes along; and under Rule 11 the burden is  
11 on who wants it included to get it included, just the  
12 opposite of what's proposed here.

13 And what usually happens is a motion is filed  
14 to put these other cases in. There's an objection to it.  
15 I set a hearing. I put it on my calendar. Everybody gets  
16 their plane reservations, and I get a phone call, usually,  
17 a day or two before saying, "We've worked it out. Agreed  
18 order putting these cases in."

19 Now, so what we're really talking about here  
20 is who has got the burden to schedule a hearing; and I  
21 think the burden, you know, the default rule ought to be  
22 that the case that someone says is related ought to be in  
23 because that's usually what's really going to happen; and  
24 whoever says, "No, no, no. This is not like those others"  
25 has a hearing; and that's why I think the default rule

1 ought to be what is proposed in this right here.

2           The next question is who hears it; and the  
3 decision the subcommittee made was the pretrial judge may  
4 have been working on this for 6, 8, 10 months and knows the  
5 case and is much better equipped to decide whether this new  
6 case or set of cases belongs in or not; and so that's why  
7 we said the pretrial court ought to hear these motions to  
8 keep the case out. The panel can reconsider that if the  
9 person doesn't like it.

10           CHAIRMAN BABCOCK: Richard.

11           MR. ORSINGER: I agree that the pretrial  
12 court ought to make that decision, and I think that it's  
13 unlikely that a newly filed case can persuade anyone that  
14 the policy of having consolidated cases is inappropriate,  
15 but they may well be able to persuade someone that they  
16 don't fit within the category.

17           CHAIRMAN BABCOCK: Right.

18           MR. ORSINGER: And I think that the  
19 transferee judge is going to be better equipped because he  
20 will be familiar with who the witnesses were, what the  
21 claims are, the fact that this tire is really entirely  
22 different from this tire and really doesn't have the same  
23 experts and what have you; and it seems to me like the  
24 multidistrict panel would be the least qualified to decide  
25 if someone fits within the scope of the order because they

1 have no evidence.

2           And so it seems to me inevitably if your  
3 choice is between the court where it's filed and the court  
4 who is experienced with it, you ought to let the court who  
5 is experienced with it decide it.

6           But then I have another question. Some of  
7 these Firestone tires have never been -- have never blown  
8 up yet. And so we consolidate everything, and all of the  
9 depositions are consolidated and the motions for summary  
10 judgment are ruled on and everybody has gone to trial now  
11 except for three or four or five and then someone files  
12 their case. So now they want to take their first  
13 deposition, but all the consolidated cases have already  
14 taken all their depositions. So are they automatically  
15 stuck into the consolidated process even though the  
16 consolidated process is mostly over and then it's no longer  
17 an aggregate going through the system, or what happens  
18 there?

19           HONORABLE SCOTT BRISTER: Well, the best  
20 example we've got for that is asbestos, which, of course,  
21 are being filed right and left today, even though in Harris  
22 County the asbestos standing orders about when you have to  
23 have your motions in limine filed and everything is  
24 transferred to the master file were back my first year, you  
25 know, 12, 13 years ago. Because, of course, most of those

1 orders say rather generic things like "Here's the  
2 deadlines" and you can file a petition, a one-line petition  
3 that says, "We adopt the master plaintiff's asbestos  
4 petition" and the defense can file a one-line answer, "We  
5 adopt the master defendant's answer with all 1170  
6 affirmative defenses."

7           And so then it falls right in the general  
8 rules that were applied by the standing orders, you know,  
9 different questions about -- of course, that was set up in  
10 the days before discovery control plans, but most of those  
11 of what you trade as far as names and documents and stuff  
12 were worked out, and as long as it's the same asbestos  
13 attorneys filing the new ones, there's not a problem with  
14 them fitting under it. I would assume in a case that if it  
15 was a problem, you know, the deadlines had gone for  
16 designating experts if you don't like the ones that Buddy  
17 did and you want your own, then you would need to go to the  
18 pretrial judge and say, "Hey, I'm new and I need a new  
19 scheduling order for new cases."

20           MR. ORSINGER: Or maybe just "Don't make me  
21 litigate this in your court."

22           HONORABLE SCOTT BRISTER: Or, you know,  
23 "Enough is enough. This is a mature tort. We don't need  
24 coordinated proceedings. We can remand the whole thing and  
25 let trial judges deal with them as they will."

1 HONORABLE SARAH DUNCAN: That's not in here  
2 as a basis for remand.

3 HONORABLE DAVID PEEPLES: I was just going to  
4 say in the case that Richard put where it was all over  
5 except a few cases and a new one comes up, the issue is  
6 which trial judge is going to decide whether you reopen the  
7 discovery, whether you can use the stuff that's already  
8 there, the pretrial court who's been working for it for two  
9 years or one of other 420 judges that happen to get that  
10 case, and I think the better thing to do is let the  
11 experienced judge do it.

12 CHAIRMAN BABCOCK: Okay. Well, we've got a  
13 pretty -- yeah, Judge Gray.

14 HONORABLE TOM GRAY: Well, I argued against  
15 Scott in the subcommittee discussion about this, arguing  
16 exactly what you were arguing, Chip, that you had to  
17 identify all the cases, everything had to be identified by  
18 number, and I held that position until literally just a  
19 little while ago. Thinking to myself, all of the sudden it  
20 occurred to me there is a pattern that the Supreme Court  
21 has currently used that transfers unidentified not yet  
22 filed cases, and it's in the appellate system where they  
23 transfer appellate cases from one court to another court  
24 under a docket equalization plan, and it does work.

25 HONORABLE SCOTT BRISTER: That's true.

1 That's true.

2 HONORABLE TOM GRAY: I have to say it does --  
3 I mean, there is -- you can identify them ultimately based  
4 upon some standard, and if they fit within the standard  
5 there's -- sometimes, you know, we see they identify the  
6 criteria under which the next 25 cases filed in say the  
7 Dallas Court of Appeals are to be transferred. They are  
8 not necessarily the next 25 in order. Original proceedings  
9 are excepted, so you can structure the order, and I have to  
10 say that I have probably within the last hour of hearing  
11 everybody's arguments have switched that you could probably  
12 craft an order that identifies the case to be transferred  
13 without specifying a file number, the case number.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: Then somebody has to accumulate the  
16 numbers and they are transferred by number.

17 HONORABLE TOM GRAY: Oh, no question, and I  
18 think that's what --

19 HONORABLE SCOTT BRISTER: That's Bonnie's job  
20 when it gets to her.

21 HONORABLE TRACY CHRISTOPHER: That's the idea  
22 behind the notice.

23 MR. LOW: Like all the Firestone cases and  
24 somebody knows if there have been a bunch of them in Harris  
25 County and they see it and recognize Firestone, but what if



1 it's the first one filed in Van Zandt County? The clerk  
2 might not know, so there are other factors involved. If  
3 every clerk knew, but they're not always filed in the same  
4 courts. If they were, the clerks in that court can handle  
5 them easily.

6 CHAIRMAN BABCOCK: I can see a distinction  
7 with the docket equalization because that proceeds on the  
8 assumption that all the appellate judges are fungible, not  
9 in a bad way, but that if you get one panel in Amarillo  
10 it's just as good as a panel in Harris County, and the  
11 briefing is going to be the same, and it's probably going  
12 to be a little quicker because if you go to Eastland you're  
13 going to get a quicker decision than if you're in Harris  
14 County or Dallas.

15 HONORABLE SCOTT BRISTER: You sure don't get  
16 to object.

17 MR. YELENOSKY: But you get a beginning of  
18 the case, too.

19 HONORABLE SCOTT BRISTER: Or move for a  
20 remand.

21 CHAIRMAN BABCOCK: Right, the point is,  
22 though, that that's not affecting the party's substantive  
23 rights like an MDL does.

24 HONORABLE TOM GRAY: You ought to read  
25 Jaubert, because it can affect substantive rights.

1 MR. YELENOSKY: But it's not an ongoing case.

2 CHAIRMAN BABCOCK: Sure, but you can't argue  
3 that it affects you because then you've got to say, "Well,  
4 the judges in Amarillo are" --

5 HONORABLE SCOTT BRISTER: For sure the  
6 concept behind MDL is that trial judges are fungible, too.

7 CHAIRMAN BABCOCK: No.

8 HONORABLE SCOTT BRISTER: I mean, I don't  
9 accept the idea that HB 4 is just a way to try to get more  
10 defense-oriented judges to decide these cases. I don't  
11 read it that way, and I don't think that was the intent  
12 that we ought to ever read it into the legislative statute.  
13 Summary judgment ought to be granted the same -- I mean, if  
14 a product is unreasonably defective, it's not reasonably  
15 safe in Dallas and unreasonably defective in Fort Worth.

16 Now, leave that up to juries, but as far as  
17 summary judgment and rulings of law, they ought to be the  
18 same everywhere, and that is transferring them here. I'm  
19 not going to do it so I try to affect anybody's substantive  
20 rights. If I'm voting for a transfer of cases anywhere  
21 it's so you won't get 27 different orders from 27 district  
22 judges. It has nothing to do with me wanting the case to  
23 come out different.

24 CHAIRMAN BABCOCK: No, no, no. I wasn't  
25 suggesting that it was, but when you go into an MDL you are

1 now forced to associate with people that you -- it was your  
2 choice not to associate with. When I filed the case as a  
3 plaintiff's lawyer I filed it in Beaumont where my -- you  
4 know, where I know the judges and where I don't have to  
5 deal with a bunch of lawyers from Dallas; and when you  
6 disrupt that, you put people together, that's different  
7 than docket equalization.

8 HONORABLE SCOTT BRISTER: I think it's  
9 procedural. I don't see it as substantive rights at all.

10 MR. LOW: And you go to a different appellate  
11 court, you get your own lawyer, you get your own brief.  
12 You don't have decisions about depositions and things like  
13 that, but when you go into a multidistrict you don't. They  
14 appoint lawyers to do different things, so you don't have  
15 -- it's a totally different -- it's a totally different  
16 thing. It's just like the court of appeals doesn't find  
17 facts. They may find something else. Well, here, when you  
18 start dealing with facts then that's a different thing than  
19 dealing with a brief.

20 CHAIRMAN BABCOCK: It's a small point. I  
21 just don't agree with the docket equalization analogy.

22 HONORABLE TOM GRAY: Well, the point is that  
23 you can draft an order that identifies a case without  
24 knowing the file number. That's the point I'm trying to  
25 make; and if you can do that, I think it answers the

1 statutory question that was challenged, which is what I was  
2 challenging exactly, that it is the panel that's making the  
3 transfer. That was the analogy that I was trying to make.

4 CHAIRMAN BABCOCK: Right. Gotcha. Tommy.

5 MR. JACKS: It's five after 5:00 --

6 CHAIRMAN BABCOCK: Oh, you want to go?

7 MR. JACKS: And I do want to go. My daughter  
8 has offered to buy me a beer, and I'm going to take her up  
9 on it.

10 CHAIRMAN BABCOCK: So if we see you with a  
11 young girl, it's your daughter? Drinking with a young  
12 girl?

13 MR. JACKS: You got it. But, look, I mean,  
14 what we're talking about, if there's a problem, if somebody  
15 perceives a problem with the transfer of a tag-along case,  
16 who's got to say there's a problem, who rules on whether  
17 there is a problem or not, and is there or isn't there some  
18 right of appeal to the MDL panel?

19 JUSTICE HECHT: Yes.

20 MR. JACKS: And do I understand that Scott  
21 intended for the last sentence of (c) to be a two-way, not  
22 a one-way deal, that is either side who is disappointed by  
23 the ruling of the pretrial court --

24 HONORABLE SCOTT BRISTER: Yeah.

25 MR. JACKS: -- can take it up to the panel?

1                   CHAIRMAN BABCOCK: You said (c). You meant  
2 (e).

3                   MR. JACKS: Yeah, I did mean (e). And with  
4 the -- I'd like to go ahead and bring this interesting  
5 discussion to a close, and my motion would be that we adopt  
6 (e) with the revision of the last sentence so that either  
7 party who is disappointed, that is, whichever way the  
8 pretrial court's ruling goes, can take it up to the panel;  
9 and then I'd also say that if you have that then you don't  
10 need this -- or not don't need, but shouldn't have this  
11 clause about a party in a remanded case can file a new  
12 motion to transfer. I mean, it seems to me you need to  
13 have some finality to the thing or you keep bouncing it  
14 back up.

15                   HONORABLE SCOTT BRISTER: Yeah. That was  
16 just trying to avoid what drafting a rule about what an  
17 appeal to the panel looked like by saying "appeal by filing  
18 a new motion, see 3.2," but if people -- you know, or you  
19 could do it to say "with procedures to be set up by the  
20 panel."

21                   MR. JACKS: Yeah. I'd rather do the latter  
22 and just somehow say that either party who is unhappy with  
23 what the pretrial court does can bring it to the attention  
24 of the panel and the panel will dispose of it. But I would  
25 leave the drafting of that to be done on somebody's time

1 other than this collective body.

2 CHAIRMAN BABCOCK: Well, we're going to have  
3 to look at the language, but in the spirit of moving you  
4 towards cocktail hour, what if we vote, as you say, on the  
5 recommended language in subparagraph (e), subject to  
6 revision on the appeal point, which the subcommittee  
7 recognizes needs some work?

8 MR. JACKS: That's well said.

9 CHAIRMAN BABCOCK: So everybody who wants  
10 to --

11 MR. GILSTRAP: Just a second. So what we're  
12 saying is that tag-along cases are automatically  
13 transferred by notice, and then you can cure the problem if  
14 you object to it by a remand. That's the procedure?

15 CHAIRMAN BABCOCK: Yeah. That's what you're  
16 voting for or against.

17 MR. GILSTRAP: Okay.

18 CHAIRMAN BABCOCK: Nina, one final thought.

19 MS. CORTELL: I just had one question. When  
20 does it go from a concept of a tag-along case to an actual  
21 case number? How do we know that this generic description  
22 -- let's even concede for the moment that it's very clear.  
23 When do we know for certain it pertains to the cases 1, 2,  
24 and 3?

25 HONORABLE TRACY CHRISTOPHER: You have to

1 file the actual notice.

2 CHAIRMAN BABCOCK: Yeah, I think, frankly,  
3 we're going to have to fix that tomorrow.

4 MR. GILSTRAP: You know it when it's not -- I  
5 mean, based on the decision of the remand. If it's not  
6 remanded, it's there. If a motion to remand is filed and  
7 it's decided at that point, that's how you decide.

8 MR. ORSINGER: Or if the time for remand  
9 passes and a motion is not filed.

10 CHAIRMAN BABCOCK: But there's going to have  
11 to be a piece of paper that's going to have to have a  
12 docket number on it, otherwise Bonnie's not going to --

13 MR. GILSTRAP: That's the notice. It's the  
14 notice of removal in Federal court. That gets you into  
15 Federal court.

16 CHAIRMAN BABCOCK: Right. Right. That's the  
17 point. There is a piece of paper that's got that. All  
18 right. So with that said, and Tommy's motion I'm sure  
19 would be seconded by Judge Peeples. I thought I heard him  
20 second it, so everybody that's in favor of Tommy's motion  
21 regarding subparagraph (e) raise your hand.

22 All those opposed, raise your hand. By a  
23 vote of 24 to 1 that passes.

24 MR. TIPPS: It's amazing what you can  
25 accomplish at 5:10 in the evening.

1 MR. ORSINGER: We need to talk about when  
2 we're going to transfer the file. We haven't taken a vote  
3 on that in light of this vote.

4 HONORABLE SCOTT BRISTER: That will be in  
5 (c).

6 MR. ORSINGER: Yeah. We need to come back  
7 and see that tomorrow.

8 MR. GILSTRAP: I think this vote solves  
9 another problem. Once we accept that there's a remand  
10 procedure then there's no problem with Judge Brister's  
11 generic order, because even if you have an order that names  
12 cases that are before the MDL panel it become a generic  
13 order for tag-along cases. So why not allow them to file a  
14 generic order, let it be removed, and if people want to  
15 object, it can be sent back just like a tag-along case.

16 CHAIRMAN BABCOCK: Yeah.

17 MR. GILSTRAP: I think that solves that  
18 problem.

19 CHAIRMAN BABCOCK: Yeah. I'm very optimistic  
20 in light of what we just did that we will speed along  
21 tomorrow. Justice Hecht is equally optimistic, as is  
22 Justice Jefferson. So we will be back at 9:00.

23 (The meeting was adjourned at 5:12 p.m. and  
24 resumed the following day as reflected in the  
25 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, Afternoon 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 \$ 1,514.00.

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

Given under my hand and seal of office on this the 21st day of July, 2003.

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