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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

COPY

Taken before Anna L. Renken, a
Certified Shorthand Reporter in Travis
County for the State of Texas, on the 18th
day of July, 2003, between the hours of 9:04
p.m. and 5:07 o'clock p.m. at the Texas
Association of Broadcasters, 502 E. 11th
Street, Suite 200, Austin, Texas 78701.

1 CHAIRMAN BABCOCK: We're on the record
2 Friday morning. And I thought we made pretty good
3 progress yesterday; and I know Judge Brister was ecstatic
4 about how far we got and Judge Christopher who is not
09:04 5 here.

6 HONORABLE SCOTT BRISTER: Delighted.

7 CHAIRMAN BABCOCK: But I think she was on
8 her way, because I saw her waiting for Judge Bland.
9 Scott, can you get us going --

10 HONORABLE SCOTT BRISTER: Sure.

11 CHAIRMAN BABCOCK: -- until she gets here?

12 HONORABLE SCOTT BRISTER: Oh, brother.
13 13.4(b).

14 CHAIRMAN BABCOCK: Right.

09:05 15 HONORABLE SARAH B. DUNCAN: No.

16 CHAIRMAN BABCOCK: Yes, no? Where do you
17 think we are, Sarah?

18 HONORABLE SARAH DUNCAN: Where we left
19 yesterday was there were people who wanted to change the
09:05 20 language of (e).

21 CHAIRMAN BABCOCK: We voted on (e)
22 yesterday. That's the last thing we did.

23 HONORABLE SCOTT BRISTER: That's what I
24 thought.

09:05 25 HONORABLE SARAH DUNCAN: We voted...

1 CHAIRMAN BABCOCK: What do you think we left
2 on (e)? There was the last sentence they were going to
3 modify the language to make it go both ways.

4 HONORABLE SARAH B. DUNCAN: Right.

09:05 5 HONORABLE SCOTT BRISTER: To go both ways,
6 the appeal and abatement procedures to be drawn up by the
7 panel.

8 HONORABLE SARAH DUNCAN: Okay.

9 CHAIRMAN BABCOCK: Did you think there was a
09:05 10 loose string on (e) beyond that?

11 HONORABLE SARAH B. DUNCAN: (Nods
12 negatively.)

13 CHAIRMAN BABCOCK: Let the record reflect
14 Judge Duncan is indicating "no."

09:06 15 HONORABLE SCOTT BRISTER: We can do that.
16 We didn't have time to draw it up separately.

17 MR. ORSINGER: Chip, we were going to also
18 touch on (c) because of the decision yesterday that the
19 transferee court is going to essentially remand.

09:06 20 HONORABLE SCOTT BRISTER: (c) I'd rather
21 wait until Tracy gets here --

22 MR. ORSINGER: Okay.

23 HONORABLE SCOTT BRISTER: -- because she has
24 talked to the clerks on that.

09:06 25 CHAIRMAN BABCOCK: We're going to get to

1 (c). And the reason we got off on (e) was because you
2 can't make sense out of (b) until you decide the (e)
3 issue.

09:06 4 HONORABLE SCOTT BRISTER: Yes. It relates
5 closely to (a).

6 CHAIRMAN BABCOCK: Yes.

7 HONORABLE SCOTT BRISTER: (b) is just when
8 the notice of transfer is filed, you know, can the trial
9 court do anything? We suggested putting in the "except
09:06 10 for good cause stated in the order" is from the recusal
11 disqualification rules.

12 There you are (indicating).

13 HONORABLE TRACY CHRISTOPHER: Sorry.

14 HONORABLE SCOTT BRISTER: And obviously like
09:06 15 if the remand is the paradigm that, you know, once it's
16 gone it's gone even if the papers are still there for a
17 while; but because there might be some circumstance we
18 thought we'd just borrow the language from the recusal and
19 could cover some emergency that may arise.

09:07 20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: Are we anticipating that the
22 original court can go ahead and set the case for trial in
23 coordination with the pretrial judge?

24 HONORABLE SCOTT BRISTER: We'll get to trial
09:07 25 settings. That a difficult issue; but we'll get to that

1 later.

2 MR. ORSINGER: Okay.

3 CHAIRMAN BABCOCK: Any other?

4 MR. HAMILTON: Does this mean that if this
09:07 5 case gets transferred before the answer is due, that you
6 file your answer in the transferee court?

7 HONORABLE SCOTT BRISTER: Yes, sir. It
8 means if you need substituted service to get service, you
9 do that in the pretrial court. Everything. I mean,
09:08 10 otherwise you will -- we will be here endlessly deciding
11 which things don't go and which things do go, and the
12 coordination problems become a nightmare. So you just say
13 it's removed. It's gone.

14 MR. ORSINGER: Just remember that you're
09:08 15 saying --

16 MR. HAMILTON: As a practical matter though
17 if the case starts out in the 92nd District Court, and
18 then it gets transferred to the pretrial court and the
19 answer is filed, and I guess you put on that the 92nd
09:08 20 Court, but you don't file in the 92nd Court, but you file
21 in some other court.

22 CHAIRMAN BABCOCK: That's correct.

23 HONORABLE SCOTT BRISTER: I think so.

24 MR. ORSINGER: And if the citation is out
09:08 25 when the transfer occurs, --

1 HONORABLE SCOTT BRISTER: What careful
2 lawyers like you are going to do is you're going to file
3 it both places, aren't you, Carl?

4 MR. ORSINGER: Well, someone may not know
5 it's transferred, so they're going to file it in the wrong
6 court; and we certainly don't want to default them.

7 HONORABLE SCOTT BRISTER: Which would be
8 fine. And I can't imagine anybody would default them.

9 CHAIRMAN BABCOCK: Tommy.

09:09 10 MR. JACKS: I'd like to have us think about
11 this whole business of boxing up all the files and
12 transferring them and then boxing them all back up and
13 transferring them back.

14 HONORABLE SCOTT BRISTER: That's section
09:09 15 (c).

16 MR. JACKS: I know. But we're edging up on
17 it. So I'd like people to talk on that while we go.
18 Okay.

19 HONORABLE SCOTT BRISTER: Tracy is the one
09:09 20 on that.

21 CHAIRMAN BABCOCK: Judge Christopher, you're
22 apparently the one on boxing up the files.

23 HONORABLE TRACY CHRISTOPHER: Okay. When we
24 were here a month ago I asked Judge Phillips "Do you
09:09 25 anticipate a physical transfer of the files?" And he said

1 "Yes." So I wrote the Rule anticipating a physical
2 transfer of the files. Now if we don't want a physical
3 transfer of the files, we can rewrite the Rule. What I
4 tried to do here in (c) was to give the pretrial Court the
09:10 5 flexibility to establish as many files as they needed to
6 handle the case.

7 In a normal motion to transfer venue your file is
8 removed. It goes from the, you know, one court to the
9 other court. It's closed in the first court. It's opened
09:10 10 in the second court. It gets a new cause number. You pay
11 a new filing fee. That's a normal motion to transfer
12 venue. Okay.

13 What I anticipated here is that the trial court file is
14 closed because it is transferred and it was transferred to
09:10 15 the pretrial court. If we want to rewrite it so that
16 doesn't happen, that's okay; but the way I've written it
17 is that the trial court file does get closed similar to a
18 motion to transfer venue.

19 Then in the pretrial court the question is how many
09:10 20 files do you want to open up? Do you want to make it a
21 one-to-one opening and closing or opening just like you
22 would do in a motion to transfer venue, or do you want to
23 have only one file in the pretrial court, a master file in
24 the pretrial court. What I thought would give the
09:11 25 pretrial court the most flexibility is the way I tried to

1 write it here is that the pretrial court depending on the
2 size of the case would look at it, establish a master
3 file, and then decide how many other files they might need
4 after that.

09:11 5 One way that you might want to do it is, and we have
6 found this useful in dealing with mass torts is to group
7 cases by plaintiffs' attorney, because we generally like
8 to set them for trial by plaintiffs' attorney. So 10
9 cases of John O'Quinn get set for trial and 10 cases of
09:11 10 another plaintiffs' lawyer get set for trial. The parties
11 have found that it's easier to settle that way when you
12 set a certain number of cases per plaintiffs' lawyer
13 rather than, you know, one of O'Quinn and one of somebody
14 else, one of a third person. It just makes it easier that
09:12 15 way.

16 So I wanted to give the pretrial court the flexibility
17 to perhaps set up the files that way, that there would be
18 one file that would have all the pleadings from where the
19 plaintiffs' lawyer was, John O'Quinn out of Orange County
09:12 20 and one file that was another plaintiffs' lawyer out of
21 Orange County.

22 It would totally depend upon the complexity of the case
23 as to how many new files you think that you might need.
24 Of course creating a new file creates a new filing fee.
09:12 25 Some people think that that's unfair that the defendant

1 would have to pay a new filing fee for every one of these
2 files, because generally the defendant is moving for
3 consolidation. But you have to remember that by being
4 able to go to one court instead of 50 courts they have
09:13 5 saved more than \$250 in attorneys' fees on the very first
6 hearing. So I don't really think it's a burden generally
7 in these cases on the defendant; and that \$250 is
8 important for the pretrial court to be able to have the
9 staff and the manpower and the space and whatever we need
09:13 10 to deal with that case; but some people don't like that
11 idea. They want to keep the trial court file open, file
12 everything there and not really have a physical transfer.
13 So the way I have initially written it is to allow a
14 physical transfer to close the trial court file.

09:13 15 The trial court judges would probably like their file
16 closed too. You know, we're under these guidelines to get
17 cases tried within a certain period of time. They don't
18 like these cases that are not under their management and
19 control sitting on their docket getting older and older,
09:14 20 which they tend to do, and they feel like they don't have
21 control over those cases. So from a trial judges'
22 perspective closing the file is good. Getting it off
23 their docket is good.

24 Now perhaps there is some way to create statistics so
09:14 25 that we could keep the trial court file open, but not have

1 it show up as a statistic for the trial court, you know,
2 as an option. But the way I have originally written it is
3 a physical transfer of the files.

09:14 4 HONORABLE SCOTT BRISTER: Well, a part of
5 the file.

6 HONORABLE TRACY CHRISTOPHER: Right.

7 HONORABLE SCOTT BRISTER: You don't have to
8 send. Another concession is you have to send over the
9 live pleadings, because that's the easiest way to get
09:14 10 attorneys' names, phones numbers, bar numbers, et cetera
11 for Bonnie if they're all dumped on her, and the docket
12 sheet. And then the pretrial court or the parties
13 voluntarily could decide whether there is other stuff they
14 want to go too. But it's, you know, if you just want to
09:15 15 get the list of the parties, you start thinking "Well,
16 I'll just get the plaintiffs' petition. But then what
17 about some of them that have not been served? Well, then
18 we need the service returns. Well, but we need the
19 summary." Pretty soon all the circumstances by which
09:15 20 parties can fall out you just ask for the whole file
21 anyway. So but we thought that the default would be
22 better just the minimal; but then the cases where that
23 might be misleading people can add to it rather than just
24 saying we want the whole file copied and sent every time.

09:15 25 CHAIRMAN BABCOCK: Justice Hecht.

1 JUSTICE NATHAN HECHT: To be clear, it's
2 just a copy of the file? Not the original file? Is that
3 correct?

4 HONORABLE TRACY CHRISTOPHER: Under the
09:15 5 current rules like the motion to transfer venue clerks
6 never send originals without keeping a copy, so I mean, it
7 doesn't matter where the original goes, whether the
8 original stays with the trial court file or whether they
9 send a copy to the pretrial court; but they never let go
09:16 10 of an actual original without keeping a copy of it.

11 CHAIRMAN BABCOCK: Judge Peeples had his
12 hand up and then Bonnie.

13 HONORABLE DAVID PEEPLES: My main goal here
14 would be to minimize the flow of paperwork. And so I
09:16 15 think we ought not to require that anything be transferred
16 from the original county to the MDL to the pretrial court.
17 I would favor giving the pretrial judge the discretion to
18 hold an initial hearing and to decide what needs to be
19 transferred. And I think if it were me, I would say "Keep
09:16 20 those files in all these other original counties and you
21 all get me the copies of the papers that I'm going to need
22 to make rulings." And if I need to have some things
23 transferred, I think you ought to have the discretion to
24 order it. But to do it routinely I think would be I would
09:17 25 say "What do you gain by doing that?"

1 CHAIRMAN BABCOCK: Bonnie had her hand up.
2 Tommy next.

3 MS. WOLBRUECK: I agree with what Judge
4 Peeples just said. Of course the burden on the clerk, on
09:17 5 the pretrial court would be extensive; and to try to
6 lessen that burden as much as possible along with making
7 sure that matters continue in the court will be very
8 important.

9 But just as an explanation to Judge Christopher's
09:17 10 comment, the Family Code is where we transfer most of our
11 cases. The Family Code requires the clerk to keep a copy.
12 Rule 89 does not require it; but the Family Code does. So
13 that's the reason clerks are accustomed to keeping copies
14 of the files. The majority of cases we transfer are
09:18 15 family law cases.

16 CHAIRMAN BABCOCK: Tommy.

17 MR. JACKS: I'm of the same school and in
18 that connection wonder why we even need certified copies
19 if, you know, I don't think there's likely a problem of
09:18 20 people dummifying up stuff. And if there is, somebody is
21 going to catch them. And it -- there are times in the
22 venue transfer process that fairly significant delays
23 occur in clerk one boxing it up and doing what has to be
24 done and shipping it off to the next county. And if there
09:18 25 are 300 files being transferred at the same time from

1 County A to County B and you've got to certify all the
2 copies and so forth, I'm really afraid we will run into a
3 couple of months of needless delay just on that. And I
4 would also favor while the case is going on in the
09:19 5 pretrial court to just have people file whatever they file
6 in both places. And so when the case is transferred back
7 there is already a complete file there. You don't have to
8 go through this rigamarole again. And, you know, if the
9 case is settled and dismissed, you file the dismissal
09:19 10 papers in both courts. There ought to be a way in the
11 records, the stats in taking into account that there are
12 these cases on Judge Christopher's docket that aren't
13 going anywhere and aren't expected to go anywhere because
14 the case is active in another court. And surely the bean
09:19 15 counters could figure out a way to do that; but I think
16 we'll achieve savings in both expense and delay and time
17 savings if we can simplify this and be more flexible about
18 it.

19 CHAIRMAN BABCOCK: Frank and then Judge
09:20 20 Christopher.

21 MR. GILSTRAP: We have likened this to a
22 removal petition in federal court. A removal petition in
23 federal court you file your removal petition, you attach
24 your pleadings. The trial court, the original court, the
09:20 25 state court doesn't do anything. The clerk has absolutely

1 nothing to do there.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: In the removal
4 situation we do close our file and we don't accept any
09:20 5 more pleadings in that case when it gets removed. So I
6 mean, if you're anticipating -- the current Rule 11 works
7 the way Tommy is describing. You file in both places when
8 you want the pretrial court to be aware of whatever you're
9 filing in the trial court.

09:20 10 I thought Rule 13 was going to work differently. The
11 problems that I see in dealing with a master file and
12 doing it the way you described are for example when I rule
13 on case specific motions they have to file everything with
14 me. I rule on a case specific motion. Then I have to
09:21 15 send a copy of my order to the trial court so that that
16 order then gets into that trial court. If I have to then
17 give notice of my order to everybody, that puts a big
18 burden on me when it seems like it should be the trial
19 court's burden. I don't even have a service list for that
09:21 20 case in my court, so I don't even have, you know,
21 something, a screen for my clerks to pull up to be able to
22 say "Okay. This particular case there's five people that
23 I have to give notice that Judge Christopher signed an
24 order in the case." So either we're sending 50 notices,
09:21 25 because I'll have 50 people on my master service list

1 notice, or I send no notice, because I don't really have
2 the list for a particular case.

3 MR. JACKS: Can't you do the same kind of
4 cop out that the MDL panel is going to do and make the
09:22 5 lawyers make sure that the notice is disseminated?

6 HONORABLE TRACY CHRISTOPHER: Well, the
7 clerks have statutory requirements; and a lot of Rules
8 talk when the clerk gives notice to you in terms of, you
9 know, if you don't get notice of the order and you wanted
09:22 10 to appeal it.

11 I mean, right now I'm dealing with in a Rule 11
12 situation cases where plaintiffs are not doing their
13 discovery. All right. So we're about to go through a
14 process of filing motions to compel in individual cases.
09:22 15 If they still don't do their discovery because, you know,
16 sometimes plaintiffs' attorneys lose their clients, after
17 that we're going to have a notice of intent to dismiss for
18 want of prosecution. And if they still don't get their
19 answers in, I'm going to be dismissing that case for want
09:22 20 of prosecution. It is an extremely difficult paperwork
21 trail if you don't have separate files. It just is.

22 MR. JACKS: Well, is there not a way that
23 there can actually be an active clerk's file in each court
24 during the time?

09:23 25 HONORABLE TRACY CHRISTOPHER: I could. I

1 could have a separate file. But, you know, am I going to
2 open up? And truthfully it's the easiest way to keep
3 track of it if I opened them up. Right now my case file
4 is up to 500 in my court. It's probably going up to 1500
09:23 5 over the next few months, because that's my understanding
6 of how many are filed in Region 2.

7 MR. JACKS: Yes.

8 HONORABLE TRACY CHRISTOPHER: I could open
9 up 1500 files. But who is paying for the cost of opening
09:23 10 up 1500 files so I can keep track of it? And my clerks
11 who say "Okay. Well, here is this case. And I only need
12 to notify these five people in this case, you know, this
13 plaintiff's attorney and this, you know, subset of defense
14 attorney." I don't think so.

09:24 15 MR. JACKS: Isn't that the clerk's filing
16 fees to enable the clerks money?

17 HONORABLE TRACY CHRISTOPHER: Yes, if I open
18 up 1500 files. I didn't think you thought I should open
19 up 1500 files.

09:24 20 MR. JACKS: No. I mean, I'm sorry I wasn't
21 clear on that. I've got no problem with the filing fees
22 and the files being opened in the pretrial court. It just
23 seems to me that you don't have -- somebody has already
24 paid a filing fee in the original court. And it's to the
09:24 25 extent there is an additional.

1 HONORABLE TRACY CHRISTOPHER: That money
2 goes to that court, to that county.

3 MR. JACKS: I that's what I'm -- I guess my
4 point is you've already paid it. You file in both places.
09:24 5 I mean, you pay two filings fees. Someone has paid two
6 filing fees now on one case.

7 HONORABLE TRACY CHRISTOPHER: Yes.

8 MR. JACKS: And so you've got two clerks who
9 are presumably satisfied in that regard.

09:24 10 HONORABLE TRACY CHRISTOPHER: I
11 misunderstood you.

12 MR. JACKS: And so I think you could have an
13 active file in each of the -- each place; and then at a
14 point that the pretrial judge signs the remand order it
09:25 15 seems to me that there is a more seamless transition to
16 the original court.

17 HONORABLE TRACY CHRISTOPHER: That's true,
18 although I would anticipate that 75 percent of these cases
19 would settle before they were ever remanded.

09:25 20 MR. JACKS: I think that's probably so. And
21 in which case you file for dismissal.

22 HONORABLE TRACY CHRISTOPHER: Where?

23 HONORABLE SCOTT BRISTER: Bonnie, how are
24 you going to -- you're the pretrial court clerk. How are
09:25 25 you going to set up these 1500 files? Who is going to

1 tell you? And if I ask you "Is this case here or not,"
2 how are you going to know?

3 MS. WOLBRUECK: I've been trying to decide
4 that, how would we know? I mean, either I'm going to set
09:25 5 them each up. I was thinking about that yesterday. If
6 some of these will get transferred back, do I set up
7 separate files, 1500 separate files so that I can keep the
8 files together from a specific court, all of the records
9 from that court? My concern then would be --

09:26 10 HONORABLE SCOTT BRISTER: But if we're not
11 sending any paper, how are you going to set up any of
12 them?

13 MS. WOLBRUECK: Then I probably --

14 HONORABLE TRACY CHRISTOPHER: Couldn't.

15 MS. WOLBRUECK: -- couldn't.

16 HONORABLE TRACY CHRISTOPHER: I mean, she
17 needs at least the original petition to set up a file.

18 MS. WOLBRUECK: I don't have anything.

19 CHAIRMAN BABCOCK: Richard and then Judge
09:26 20 Peeples.

21 MR. ORSINGER: I don't want to cut off the
22 debate on the transfer; but I'm wondering about what is
23 going to happen when it comes back. You know, if it
24 doesn't settle while it's over there in the transferee
09:26 25 court, then it's going to come back for trial. And if we

1 don't have dual record that we're maintaining, then the
2 trial judge is going to go to trial without any of the
3 pretrial motions or orders or anything else.

4 So I don't see a section here about what gets
09:26 5 transferred back. If the only file with all the pretrial
6 proceedings in it is in the transferee court, then do we
7 make an entire copy of that when we come back for trial,
8 or do we let lawyers selectively file certified copies of
9 anything that's important? And then of course at the end
09:27 10 of the case if it's tried and appealed, then we're going
11 to have to cope with the idea if the only filing is in the
12 other county, --

13 HONORABLE SCOTT BRISTER: 13.7(b) is how the
14 files go back; and we will get to that.

09:27 15 MR. ORSINGER: Well, I think we're there
16 already, because my feeling about whether we have dual
17 filing, dual tracks kind of like Tommy is talking about,
18 affects on who is going to have what record when the case
19 goes to trial and when it goes up on appeal. Are you
09:27 20 going to be taking up the record that is back with the
21 original court, or are you going to be pulling records out
22 of the original court as well as out of the transferee
23 court? And another problem is that we definitely have to
24 maintain some kind of unified file in the transferee
09:28 25 court, because there will be a lot of shared orders,

1 shared motions, shared discovery, maybe only one set of
2 interrogatories generic for all plaintiffs or something
3 like that.

4 HONORABLE SCOTT BRISTER: Right. The idea
09:28 5 though is no judge is going to know what you want to
6 appeal. So 13.7(b) says if you're a party and you want
7 something from the pretrial court, get a copy of it and
8 take it back with you, because otherwise as trial judges
9 we would have to just say all or nothing. And if you-all
09:28 10 want something more than nothing and less than all, then
11 you-all are the ones who need to say what needs to go
12 back, which of course is exactly what you do on appeals.
13 You tell the clerk which part of the record you want for
14 the appeal.

09:28 15 CHAIRMAN BABCOCK: Well, let's not jump too
16 far ahead. Judge Peeples had something to say.

17 HONORABLE DAVID PEEPLES: I think this boils
18 down to whether we want to say in this Rule in every one
19 of these cases "You shall do it this way," or we're going
09:28 20 to give the pretrial court the discretion to decide "I
21 want 1500 files. I want just a few files lawyer by
22 lawyer." I just think it's almost -- I strongly favor
23 doing it that way. And I think we could drop the first
24 half of this paragraph and go to the last two sentences.
09:29 25 They come very close so doing exactly that.

1 I think it might make more sense to have the last
2 sentence be sentence number one, and then the second
3 sentence would be the one above it. And this way the
4 pretrial judge in consultation with the clerk of that
09:29 5 county would decide we're going to do it this way, 10
6 files, one for each law firm or 1500, and I'm going to
7 make the transfer. The movant would pay the filing fees
8 or whatever. I think it would work much better to give
9 the judges the discretion in consultation with their
09:29 10 clerks and the nature of the case how to do it.

11 CHAIRMAN BABCOCK: Was your view a minority
12 view in the subcommittee?

13 HONORABLE DAVID PEEPLES: I just don't
14 remember.

09:29 15 HONORABLE TRACY CHRISTOPHER: Not really.
16 We were still struggling with this issue and gave it our
17 best shot for here today.

18 CHAIRMAN BABCOCK: Okay. Justice Duncan.

19 HONORABLE SARAH DUNCAN: I just want to ask
09:30 20 Bonnie a question. When a case is abated can you still
21 file except for filing pleadings in that abated case?

22 MS. WOLBRUECK: I will always accept the
23 file tendered to me.

24 HONORABLE SARAH DUNCAN: That's what I
09:30 25 thought. And in the trial courts is -- I don't know how

1 much the trial court case management system is like or not
2 like the appellate court case management system. If a
3 case is abated, does that case show up on a trial judge's
4 docket of pending cases as a pending case, or is it shown
09:30 5 as a disposition?

6 HONORABLE TRACY CHRISTOPHER: Pending case.

7 HONORABLE SARAH B. DUNCAN: If it's abated,
8 it's still shown as a pending case?

9 HONORABLE TRACY CHRISTOPHER: Yes. All our
09:30 10 cases abated for arbitration are pending, pending forever
11 while they arbitrate.

12 CHAIRMAN BABCOCK: Chris you had a point?

13 MR. GRIESEL: Yes. I originally drafted
14 subsection (d) as an alternative. It turned into a case
09:31 15 management issue; but it was originally an alternative to
16 a trial court filing issue. We know that whatever we do
17 in the pretrial court has to be a big bucket of
18 information, and it's got to have some information at the
19 front end, and you're going to have to contain that all
09:31 20 the way through trial court and appeal. And it seems to
21 me that the lawyers need an ability to know exactly where
22 to file, to answer all Carl's questions about things like
23 where do you file the answer, where do you file all the
24 pretrial motions that you would normally ask to be
09:31 25 resolved by the initial court. And then you need a place

1 that everyone knows to file for the pretrial itself; and
2 you need the clerks that somehow have an ability to know
3 exactly what they have to keep and what they have to
4 input. And what (d) was done in the, to use Tommy Jacks'
09:32 5 language, "cop out," was this was another push downward
6 back to the people who were going to use the MDL system
7 the most and say "You tell us what the live, you agree
8 what the live pleadings are in this cases. You give us
9 the copies" just like the federal courts downward delegate
09:32 10 that in removal cases. And "You tell us where we are in
11 the lawsuit; and that's what we will set up in the master
12 file."

13 And if the question is are we more likely in these
14 cases to have a master file and 20, out of 100 cases 20
09:32 15 subset individual files, or to start with 20 individual
16 files or 100 individual files and a master file, I think
17 probably economy dictates we would want to go to the
18 smaller number. And so that's --

19 CHAIRMAN BABCOCK: Your proposed language in
09:33 20 (d) as in "dog," which is italicized --

21 MR. GRIESEL: Yes.

22 CHAIRMAN BABCOCK: -- would fall on the side
23 of some standardization, but the parties being able to
24 determine what goes on, what goes in the file.

09:33 25 MR. GRIESEL: Yes.

1 CHAIRMAN BABCOCK: And Judge Peeples on the
2 other side of the fence says that it ought to be the clerk
3 and the pretrial Court in consultation that decides what
4 happens. And so it would not be standardized. It would
09:33 5 be a case-by-case or MDL-by-MDL matter.

6 MR. GRIESEL: And there is no doubt that the
7 pretrial Court has to have the ability to go into the
8 initial filing court and pluck anything it wants out of
9 that; but as a default so it can be droll proof to the
09:33 10 lawyers that the concept is that this is what you file 10
11 days in line and/or 15 days out. This is what you'll have
12 before you. And Clerk, this is what you will have in the
13 master file.

14 In fact, one of the things to think about is in the
09:34 15 order from the MDL panel to the pretrial judge we assume
16 that the panel will have already picked the judge. They
17 probably ought to have a designation in their order of a
18 case number so that everyone who is following that MDL
19 order will know "If I go to Bonnie Wolbrueck, and I ask for
09:34 20 file number whatever, that's where it will be" so everyone
21 will have notice of that up front.

22 CHAIRMAN BABCOCK: Justice Duncan.

23 HONORABLE SARAH B. DUNCAN: David, wouldn't
24 you want copies of the live pleadings list of all parties
09:34 25 and counsels and summaries regarding the status of parties

1 and pleadings to begin with?

2 HONORABLE DAVID PEEPLES: You certainly need
3 to know who the lawyers are so you can schedule the first
4 hearing. Pleadings are amended so often, a lot of times
09:35 5 you don't need to look at them. You just know what is
6 involved. If you want them, you can certainly get them
7 from people.

8 I will say in cases like these it is a rare hearing at
9 which the lawyers don't show up with a notebook that has
09:35 10 everything they want you to read. They don't want to have
11 to make you look through the file and find it. It's just
12 customary to have a notebook for the hearing, and the
13 lawyers are going to do that at contested hearings. And I
14 just question, I just say we shouldn't make paper be
09:35 15 transferred unless the trial judge wants it transferred.

16 HONORABLE SCOTT BRISTER: I think all of us
17 agree with that, the way the pretrial hearings actually
18 work. The people who are interested show up. And the
19 judge makes an order. And they draw it up and get all the
09:35 20 attorneys to sign off and make sure it goes to everybody.

21 The problem is how does the clerk input it into the
22 computer, because the statistics, the OCA requires the
23 clerks to do stuff in the computer so they can gather it
24 up and spit it out into a state report that nobody reads.
09:36 25 It has to be done. It has to be done. Somebody has got

1 to put all of you people and all of your parties into a
2 computer.

3 And the second issue, the pretrial court who does that,
4 she is going to want some money to do that. So the way we
09:36 5 have set it up you give money to the clerk to do that as a
6 filing fee. And our concern was if you don't have a
7 filing fee, exactly what authority do we have to tell
8 people to pay stuff to the clerk and what do they do with
9 it and all those problems.

09:36 10 HONORABLE SARAH DUNCAN: What I was going to
11 suggest is that we begin the process with all or part of
12 the information that is in (d), that we then go to, as
13 David was saying, the last sentence in (c) and then the
14 next-to-last sentence in (c).

09:36 15 I'd also like to suggest though, I mean, in the
16 appellate courts when a case is abated it's treated as a
17 disposition, because we have no control when there is an
18 automatic stay for bankruptcy, for instance. We have no
19 control over that case anymore and whether it moves and
09:37 20 whether it doesn't move.

21 HONORABLE TRACY CHRISTOPHER: You must have
22 a better lobbyist that we do. Our bankruptcy stays are
23 still on our docket.

24 HONORABLE SARAH DUNCAN: Well, that's -- I
09:37 25 would suggest that, because I am sensitive to the trial

1 judge in the trial court not having any control over the
2 ability to move this file and being penalized for it in a
3 statistical sense. So I would suggest that that is
4 something that can be taken care of between the Supreme
09:37 5 Court and the Office of Court Administration that an
6 abatement should be treated as a disposition on the trial
7 Court's docket. But as far as, and that ought to be a
8 relatively simple thing given the close relationship
9 between the Supreme Court and the Office of Court
09:38 10 Administration.

11 But as far as what stays where and how do we get a
12 filing fee, there ought to be some piece of paper that
13 Bonnie gets to start a file; and that piece of paper has
14 to lift at least the attorneys. And from there, as Tommy
09:38 15 and David have been saying, it needs to be decided on a
16 case-by-case basis what actually, what more paper is
17 needed.

18 CHAIRMAN BABCOCK: Judge Christopher had her
19 hand up and then Bonnie.

09:38 20 HONORABLE TRACY CHRISTOPHER: While I agree
21 that the pretrial court needs flexibility, I think that we
22 need to give some heads up to the lawyers as to what may
23 be required. And I think maybe what the first vote we
24 should take is whether we anticipate keeping the trial
09:38 25 court file open and filing it at both locations. And once

1 we have that done, that concept, then we can move on from
2 there. Do we want filing in both locations or not, that's
3 the first question. Tommy thinks that that's the best
4 because it will make it simpler when the case is remanded.
09:39 5 The file is ready. We might have to send some copies of
6 the master file orders. We don't have to go through all
7 of the enclosing. We can fix the, perhaps somehow
8 designate that status of that case so it's off the docket;
9 but I think that's the first vote that we should decide as
09:39 10 a group, whether we want it that way or not, and then we
11 can kind of move on from that.

12 CHAIRMAN BABCOCK: Judge Peeples.

13 HONORABLE DAVID PEEPLES: What is the
14 alternative to the position you're stating, Tracy? When
09:39 15 you say "open at both locations" you mean if something
16 gets filed, it goes to the original county and the MDL
17 county?

18 HONORABLE TRACY CHRISTOPHER: Right.

19 HONORABLE DAVID PEEPLES: Everything?

09:39 20 HONORABLE TRACY CHRISTOPHER: Everything.
21 Everything that you would want the MDL judge to see.

22 HONORABLE DAVID PEEPLES: See, I would --

23 MR. SUSMAN: Why would you ever do that? 95
24 percent of the cases are never going back. Maybe 98
09:40 25 percent. I mean, I think that's a pretty good record for

1 the federal MDL panel. So why live with that for three or
2 four years, filing multiple papers in courts all over of
3 the state of Texas?

4 HONORABLE DAVID PEEPLES: I'm not in favor
09:40 5 of multiple filings unless the pretrial judge says "I want
6 multiple filings." If I ever get on one of these things,
7 I think what I'm going to do is have an initial hearing
8 and decide what I'm going to need to make my decisions;
9 and I guarantee you I wouldn't say "Please give me
09:40 10 everything that needs to be filed in 500 cases." I would
11 say "Go ahead and file it in the original venue where it
12 already is and we will decide as we go what needs to be
13 given to me for the hearings we're going to have." That
14 minimizes the problem.

09:40 15 HONORABLE TRACY CHRISTOPHER: So you would
16 keep the original trial file going?

17 HONORABLE DAVID PEEPLES: Pardon?

18 HONORABLE TRACY CHRISTOPHER: That's the
19 main issue.

09:41 20 CHAIRMAN BABCOCK: Yes. Bonnie, then
21 Richard then Kent.

22 MS. WOLBRUECK: One of the issues that also
23 needs to be decided is which clerk will be responsible for
24 the Rule 306 notices and so that that is clear, because if
09:41 25 the pretrial clerk is the one responsible for those

1 notices, then it's important that that clerk have all of
2 the information regarding all of the attorneys, all of the
3 parties. And all that has to be entered into their
4 computer system.

5 CHAIRMAN BABCOCK: Richard.

6 MR. MUNZINGER: Two points: It's unfair to
7 saddle a trial court with a case that he cannot move or
8 affect. When judges run for reelection very often the
9 first complaint you hear is "He is lazy. He doesn't do
09:41 10 his work. Look at the docket clog." You put political
11 pressure on the district judges if you have all these
12 cases they cannot affect. It seems to me to be unfair to
13 those judges to leave those cases in their docket. That's
14 one consideration.

09:41 15 The second consideration it seems to me is why would
16 you have two records? Only one record should be the
17 official record in the case. It's always a mistake to
18 split responsibility and authority, always. One record,
19 one record in the transferee court is the record. It is
09:42 20 the record and would be the record that would be utilized
21 by anyone who is seeking mandamus or any other relief.

22 I can see and envision cases where someone would say
23 "Well, gee, Judge, I filed that in Deaf Smith County for
24 God's sake." "But yes, you didn't file it here." And now
09:42 25 you have got this competing problem. Mr. Susman's comment

1 I think is correct as well. Most of these cases never
2 come back. And while I sympathize with Judge Peeples and
3 am anxious that things be done efficiently, we have to
4 remember we are dealing with peoples' rights, and peoples'
09:42 5 rights depend upon the integrity of records. And it would
6 seem to me a mistake to have two records and have a
7 question over which record is accurate.

8 CHAIRMAN BABCOCK: Kent.

9 MR. SULLIVAN: I agree with Richard's
09:43 10 comments. The prospect of more than one official file
11 seems to me like it has a potential of being a nightmare.
12 There could be a conflict theoretically whether something
13 was filed, i.e. one file or another or both and the time
14 or the conflict in the timing of when the documents were
09:43 15 filed. And it seems to me it has got to be one official
16 file.

17 CHAIRMAN BABCOCK: Tommy.

18 MR. JACKS: Well, I mean, the thing I'm
19 against is anything that causes delay in the process. And
09:43 20 I'm concerned that as written the Rule envisions a
21 transfer process that could result in delay. It's, I
22 mean, the system of filing in both courts is essentially
23 what we do now when there is a judge who is handling
24 coordinated pretrial matters under Rule, Administrative
09:44 25 Rule 11. I'm not wed to the idea that you have to file in

1 both places, although to me it makes a lot of sense. It's
2 not always the case that 90 -- I mean, Steve's statistic
3 applies in some MDLs within Texas, but not others.

09:44 4 In the Firestone cases that our firm handled, the cases
5 we settled, the lion's share were settled only after they
6 were released from the pretrial judge back to the trial
7 court, and then they settled, as most cases do, shortly
8 before things got geared up for trial.

9 And I'm -- I think in looking at (c) if you put a
09:45 10 period after the parenthetical in the fifth line, the
11 parenthetical that says "including filing fees and other
12 reasonable costs" and so you remove the obligatory
13 requirement that in every case "certified copies of the
14 live pleadings and the docket sheet be filed in the
09:45 15 pretrial court," and then in the next sentence remove the
16 word "additional," I think that accomplishes what David
17 was seeking to accomplish, which is that the pretrial
18 Court says what the pretrial Court wants filed in the
19 pretrial court. And you pay the fees to the pretrial
09:45 20 court so the pretrial court clerk isn't operating under a
21 disadvantage.

22 I think I probably still prefer to see anything that is
23 filed filed in both places as we do presently. If that is
24 thought to be a problem, then I'm not going to die on that
09:46 25 rock; but I think it is important then that when the

1 remand takes place that we come up with ways of doing that
2 as seamlessly as possible; and I think that means not
3 having a bottleneck in the court clerk's office on either
4 end.

09:46 5 CHAIRMAN BABCOCK: Bill, did you have a
6 comment?

7 PROFESSOR DORSANEO: I'm persuaded that
8 there needs to be one official file; and I'm not sure
9 where it needs to be. I don't see the need necessarily to
09:47 10 send it back and forth. Judge Peeples' point that, well,
11 he's going to have people bring in a notebook that are
12 filed in the official file and he's going to be confident
13 that the things in the notebook are or have been filed in
14 the official file and he's going to produce some other
09:47 15 kind of work product, an order, and that's going to need
16 to find its way back to the official file, where do the
17 people with the experience with this think the official
18 file needs to be would be my question?

19 CHAIRMAN BABCOCK: Judge Christopher.

09:47 20 HONORABLE TRACY CHRISTOPHER: The absolute
21 simplest way to do it is to close the trial court file,
22 and whether you obtain certified copies or not, have the
23 plaintiff's pleadings be filed in a new file created for
24 every case. That way everyone knows where things get
09:48 25 filed, we have a case specific record for an individual

1 case. We would still have a master file for an order that
2 applied to all 1500 cases; but that, I mean, if you want
3 the simplest situation, but it would require, you know,
4 1500 filing fees. But that way the clerk can set up each
09:48 5 one of the files, input the correct parties, correct
6 lawyers into each file; and when I make a case specific
7 ruling on that file they know specifically, my clerk would
8 know who it is they have to send notice to. I mean, that
9 is the simplest way to do it.

09:48 10 HONORABLE DAVID PEEPLES: Can I ask
11 something? Tracy, you have done more of these than I
12 have. How many of the, how much of the court time or the
13 rulings you make are case specific as opposed to generic
14 and apply to everything?

09:48 15 HONORABLE TRACY CHRISTOPHER: Currently it's
16 been about 25 percent case specific; but I'm about to get
17 into this round of plaintiffs who are not complying with
18 discovery, and so those are all going to be case specific
19 rulings and, you know, get dismissals without prejudice of
09:49 20 people who are not producing their fact sheets and
21 answering their interrogatories. And, you know, you need
22 a -- I'm going to have to rule on that, and then I'm going
23 to have to send it to the trial court. And we're not
24 really sure who is getting the notice out on those, to
09:49 25 tell you the truth. I mean, it's still a very difficult

1 situation under the current Rule 11.

2 CHAIRMAN BABCOCK: Richard. Then Steve.

3 MR. ORSINGER: I'm -- I would assume that
4 they'll be in some of these aggregate cases that there
09:49 5 will be a unified file where a standard set of
6 interrogatories for the defendant will be filed and then
7 it applies in all of the splinter cases?

8 HONORABLE TRACY CHRISTOPHER: Right.

9 MR. ORSINGER: So we have got to have a
09:49 10 official file in the transferee court for those unified
11 documents where it has been ruled you don't need to make
12 1500 copies. You just make one copy and file it there,
13 and that will be shared. And so we know for sure there
14 will be at least that official file. And it doesn't seem
09:50 15 logical to me that we should maintain official files back
16 in the original transferor courts when we know for sure at
17 least part of our official file is going to be in the
18 transferee court and that the better solution is to let on
19 remand it to go back and clean up everything that you want
09:50 20 brought. Part of it may be out of the shared file for all
21 of the joint cases, and part of it may be of the
22 individual orphan files that you create underneath that
23 and handle that cleanup on the way back. But it seems to
24 me like if we're going to have a unified official file in
09:50 25 the transferee court, that we really would create a

1 problem by having official files in the transferor courts
2 all over the place, and so both of them are official.

3 CHAIRMAN BABCOCK: Steve.

4 MR. SUSMAN: My view is that also there
09:51 5 should be one official file. It should be in the trial
6 court until transferred and after the transfer be in the
7 pretrial court and after remand it ought to be back in the
8 trial court; and there should be no need, no requirement
9 that you duplicate anything from the trial court and
09:51 10 refile it in the pretrial court. That should be done -- I
11 mean, it may be the entire pretrial can be handled by the
12 transferee court without ever looking at the original
13 pleadings. Why would you want to duplicate all of those
14 pleadings and docket sheets from a thousand cases and send
09:51 15 them to the clerk of the pretrial court? It doesn't make
16 any sense to me.

17 And I think if a motion is filed in the transferee
18 court that requires looking at the original live
19 pleadings, you'll get them then from the parties. So I
09:51 20 mean, that's my view, one official file, clear time lines
21 when it moves from the trial court to the pretrial court
22 and no need to transfer paper back and forth.

23 CHAIRMAN BABCOCK: Justice Hecht.

24 JUSTICE NATHAN HECHT: And that's the
09:52 25 federal system.

1 CHAIRMAN BABCOCK: Yes.

2 HONORABLE SCOTT BRISTER: And how does
3 Bonnie know --

4 MR. ORSINGER: She's got to have something
09:52 5 to open the file.

6 HONORABLE SCOTT BRISTER: How does Bonnie
7 know is this case here yet or not?

8 MR. ORSINGER: She has to know the
9 plaintiffs and the defendants and the lawyers to mail the
10 notices out to.

11 CHAIRMAN BABCOCK: Who is Bonnie?

12 MR. ORSINGER: Bonnie is the pretrial court
13 clerk. We either have to give her the petition and the
14 answer and let her figure it out, or we've got to instruct
09:52 15 the lawyers to fill out some information sheet that lists
16 that for her.

17 MS. WOLBRUECK: That's right.

18 HONORABLE DAVID GAULTNEY: What is wrong
19 with the joint report?

09:52 20 MR. ORSINGER: I think the joint report may
21 not get filed within 15 days.

22 HONORABLE SCOTT BRISTER: Impossible.

23 MR. ORSINGER: I think it ought to be on the
24 moving party on a filing. The moving party should within
09:52 25 15 days file that summary statement of the litigants and

1 their lawyers and names and addresses, fax numbers.

2 CHAIRMAN BABCOCK: File them with Bonnie?

3 MR. ORSINGER: With the pretrial court
4 clerk.

09:53 5 CHAIRMAN BABCOCK: Transferee court.

6 MR. ORSINGER: Otherwise she doesn't know
7 who to open the file under what name.

8 MS. WOLBRUECK: This is all hypothetical, of
9 course.

10 (LAUGHTER.)

11 CHAIRMAN BABCOCK: No, Bonnie, you're going
12 to be the clerk for all of the courts.

13 HONORABLE SARAH B. DUNCAN: That's basically
14 what we do in the courts of appeals is we require within X
09:53 15 number of days of the filing of a notice of appeal the
16 appellant has to file a docketing sheet that says parties,
17 counsel, issues, trial court, court reporter..

18 CHAIRMAN BABCOCK: Right. So Judge Peeples,
19 what is wrong with having one official record or one
09:53 20 official file and having it travel from the original court
21 to the MDL court and back when the MDL court is finished
22 with everything?

23 HONORABLE DAVID PEEPLES: I think you might
24 want to do that in some instances. To me, as I said a
09:53 25 minute ago, the issue really is do we try to spell it out

1 how it's going to be done all the time, or do we give the
2 pretrial court vast discretion to decide how he or she
3 wants it done in consultation with the clerk that they
4 work with?

09:54 5 CHAIRMAN BABCOCK: Justice Hecht, what do
6 you think?

7 HONORABLE NATHAN HECHT: Well, one
8 additional complicating factor, as Bonnie can tell you, is
9 that the clerks do not have a, the trial court clerks do
09:54 10 not have a standard numbering system; and a standard
11 numbering system is impossible because of they use
12 different computer stems. So I think you have to be
13 pragmatic. We have to realize that in the transferee
14 court, in the pretrial court the case may get a new number
09:54 15 there; but I think I agree that for appellate purposes and
16 it seems to me for trial court purposes you need to just
17 have one file.

18 And the federal system makes a lot of sense. The
19 transferor court sends it to the transferee court. They
09:55 20 handle it until it's done. If it goes back, it goes back.
21 If it doesn't, that's the end of that. And I think that's
22 the easiest way to do it. But I do think the pretrial
23 judge should have whatever discretion he or she needs to
24 set up a master docket, group, subgroup master dockets or
09:55 25 whatever to manage the individual files that have been

1 transferred.

2 CHAIRMAN BABCOCK: Justice Jefferson, do you
3 have any thoughts on this?

4 HONORABLE WALLACE JEFFERSON: I just like,
09:55 5 I like the concept of the docketing sheet, as Sarah was
6 talking about, for ease of reference to the clerk, but
7 also for the appellate courts.

8 HONORABLE SCOTT BRISTER: Let me ask. So
9 1500 cases go. There is 40 attorneys, you know, and let's
09:56 10 say 750 parties and 1500 style numbers. What exactly does
11 this docket sheet look like? Remember on appeal there is
12 one case that's coming up usually.

13 HONORABLE TRACY CHRISTOPHER: Exactly.

14 HONORABLE SCOTT BRISTER: If the point is
09:56 15 we're going to have, well, we need to break it down.
16 Okay. Here is Case Number 1479, and the attorneys and
17 parties on that one; this one here is 1480, and the
18 attorneys and parties, you may as well just file. It's
19 going to be quicker and easier to file a copy of the
09:56 20 pleadings. Or maybe an alternative is we're filing a
21 notice of removal with the MDL panel in the trial court
22 case that has the style and the number; and if you made
23 them put parties and the attorneys in that and file the
24 same thing in the trial court at the same time and just
09:56 25 say use that and forget about the pleadings, because I

1 agree the pleadings, pleadings does not exactly tell you
2 always everything you need. But if this is going to be an
3 agreed order with 1500 people lifting case by case who the
4 parties and attorneys are, it's going to take you-all,
09:57 5 nobody in this room, but some of the people who will be
6 affiliated with these cases, six months to get that filed
7 because somebody will need to check this, because if
8 somebody's name is not in there, they're out.

9 CHAIRMAN BABCOCK: Judge Christopher.

09:57 10 HONORABLE TRACY CHRISTOPHER: And I just
11 again, my example of if I dismiss a case for want of
12 prosecution, I dismiss a plaintiff's case for want of
13 prosecution and it's in a master file, you know, the only
14 people I have to give notice is the attorney for the
09:57 15 plaintiff. Okay. I don't have to give notice to 50
16 people.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE TRACY CHRISTOPHER: That is not a
19 final order if it's just sitting in a master file,
09:57 20 because --

21 HONORABLE SCOTT BRISTER: It's got to be
22 severed out.

23 HONORABLE TRACY CHRISTOPHER: -- it's got to
24 be severed out. If it's got to be severed out, we have to
09:57 25 create a new file to sever it out to open it and close it.

1 CHAIRMAN BABCOCK: Well, I've been wondering
2 about that, because you say 25 percent of your orders are
3 case specific.

4 HONORABLE TRACY CHRISTOPHER: (Nods
5 affirmatively.)

6 CHAIRMAN BABCOCK: With respect to those 25
7 percent of the orders or whatever percentage it is that
8 order need only go in that one file that you're dealing
9 with.

09:58 10 HONORABLE TRACY CHRISTOPHER: Right.

11 CHAIRMAN BABCOCK: But the other 75 percent
12 of the orders that you're dealing with with every case
13 that is in front of you, that, a copy of that order needs
14 to go in each one of those files. Right?

09:58 15 HONORABLE TRACY CHRISTOPHER: Well, I just
16 keep it in the master file; and then if anybody needs it
17 in a separate file on remand, then I think it would get
18 copied and put into that file on remand.

19 CHAIRMAN BABCOCK: Okay. See, that's the
09:58 20 problem, because when you're done and these cases go back
21 to the different counties unless there is some mechanism
22 to have your master file in that file, then you have an
23 incomplete record.

24 HONORABLE SCOTT BRISTER: We've already got
09:58 25 in the tag-along cases in (e) the tag-along cases are

1 transferred to the pretrial court when a notice of
2 transfer is filed in both the trial court and the pretrial
3 court with the copy of the applicable MDL transfer order.
4 If that notice which to be filed in the trial court is
09:59 5 going to already have to have the style, the cause number
6 and at least one of the attorneys in it, if we just make
7 it clear that the parties and the attorneys in that case
8 need to be listed in the notice of transfer, does Bonnie
9 need anything more than that? And then when she gets that
09:59 10 that's not necessarily requiring her to open a new file
11 for each one of those she gets. She can still make that
12 decision with the pretrial court; but that all you file is
13 this notice of transfer just as you do in removal. You
14 file something in both courts to say it's moved from here
09:59 15 to there. And if you have the stuff in (d), you said "I
16 don't like summaries of the status of the case," I think
17 the chances of getting everybody to agree on what the
18 status of the case is will take too long. But if the
19 notice itself, the one-page notice or two pages, however
10:00 20 many, would show parties, attorneys, bar numbers and
21 addresses, if you just file that both places with the MDL
22 order, doesn't that give Bonnie everything she needs?

23 MS. WOLBRUECK: My only question would be is
24 all of the parties that are still pending in the case. We
10:00 25 have many parties that have already been dismissed or

1 other issues happened on that.

2 HONORABLE SCOTT BRISTER: Right. But that
3 we could just say, if you have said the few things about
4 what the notice of transfer had to have in it, you would
10:00 5 still immediately have that on a case-by-case basis to
6 know who is on which one, which you wouldn't have in a
7 joint consolidated order unless it's just as long as doing
8 one in each case.

9 CHAIRMAN BABCOCK: Sarah and then Richard.

10:00 10 HONORABLE SARAH B. DUNCAN: I must have
11 missed something. When Judge Christopher signs a case
12 specific dismissal order does there have to be a
13 severance? These cases have only been transferred. They
14 haven't been consolidated. That's a final judgment in
10:01 15 that case.

16 HONORABLE TRACY CHRISTOPHER: Only if I have
17 a separate file number for it. I mean, if 10,000
18 plaintiffs are all smashed into my master file and they're
19 all listed, 10,000 plaintiffs are on the screen for my
10:01 20 master file, what is final about that?

21 HONORABLE SARAH B. DUNCAN: But if the cases
22 have only been transferred and not consolidated, your
23 master file has nothing to do with --

24 HONORABLE TRACY CHRISTOPHER: Then we have
10:01 25 to have separate files.

1 HONORABLE SARAH DUNCAN: -- the finality of
2 judgment in a particular case.

3 CHAIRMAN BABCOCK: Yes. The sense of what I
4 heard that Justice Hecht and Justice Jefferson were saying
10:01 5 was that there needs to be a separate file because there
6 needs to be an official record that starts out in one
7 county, the trial court, travels to the pretrial court and
8 may or may not travel back depending on what happens; but
9 it's one file and it has got to have a separate number.
10:02 10 Richard. Then Steve.

11 MR. ORSINGER: I totally agree with that.
12 I'm horrified to think that we're consolidating all of
13 these cases particularly after filed once. So each, we
14 ought to count on having individual files; but the Court
10:02 15 can require a master file and can designate that anything
16 filed in the master file is deemed in your original case;
17 and if you need a copy of it, you have to get a copy of it
18 if you want it in your individual file. If you don't do
19 that, then we've created a procedural nightmare we'll
10:02 20 never get out of.

21 CHAIRMAN BABCOCK: Steve Susman.

22 MR. SUSMAN: I think it's fine to have a
23 separate file. But the other question is what needs to go
24 in it, which is a totally different question? It could be
10:02 25 only the notice of transfer. That's a great idea. The

1 less paperwork that you require to be filed, the better
2 off we are. So you have a separate file created by this
3 notice of removal or transfer or whatever it is that gives
4 the new clerk, the transferee clerk all the information
10:03 5 she or he needs which allows the judge to enter an order
6 specific to that case because it has a number. Why
7 doesn't that do it? Why do you automatically get all the
8 pleadings, all the live pleadings, most of which is going
9 to tell you nothing?

10:03 10 HONORABLE SCOTT BRISTER: Right.

11 CHAIRMAN BABCOCK: Carl and then Bill.

12 MR. HAMILTON: On this tag-along after you
13 have all these cases filed in the pretrial court and then
14 a tag-along case comes along, you file that notice in that
10:03 15 trial court, which case does it get filed in in the
16 pretrial court?

17 HONORABLE TRACY CHRISTOPHER: The new file.

18 JUSTICE NATHAN HECHT: It's got a new
19 number. It would have a new number and it would be under
10:03 20 the master docket.

21 HONORABLE SARAH B. DUNCAN: What we are
22 basically talking about I think is an appeal. This is
23 what when you file a notice of appeal in the trial court
24 the court of appeals gets a copy; and that's how we open
10:04 25 our file. And then you have got X number of days to file

1 a docketing sheet that has all the information that we
2 need to affect service of orders.

3 CHAIRMAN BABCOCK: Justice Hecht.

4 JUSTICE NATHAN HECHT: I'll just raise this,
10:04 5 because it won't go anywhere.

6 (LAUGHTER.)

7 HONORABLE NATHAN HECHT: But the federal
8 courts have existed for a long time and managed to survive
9 transferring the original papers back and forth without
10:04 10 doing a lot of photocopying. And we can always consider
11 that, because under the MDL system the clerk of the
12 transferor court sends the original papers, puts them in
13 an envelope or box and does not keep a copy, does not make
14 copies, sends them to the transferee court. They keep
10:05 15 them until they're done with them; and then if they need
16 to send them back, they do, and if they don't, they put
17 them in a warehouse.

18 And I know the clerks of this state feel bound to make
19 copies of everything before it goes to the court of
10:05 20 appeals and before it goes anywhere; but I just question
21 whether we really need to do that.

22 HONORABLE SARAH DUNCAN: And that would
23 resolve Tommy's concern over delay.

24 CHAIRMAN BABCOCK: Yes. And then what would
10:05 25 happen, following up on that, is if the Smith vs. Jones

1 case in the 101st District Court of Dallas County, it
2 would have a cause number; and then if the MDL panel has
3 ordered that case transferred, then it would go to the
4 pretrial court, and either you give it the same number
10:05 5 because your computer is the same as Dallas County, or you
6 have to give it a new number and indicate that it was
7 formerly known as CO-3772, and henceforth that case has
8 that number; but the integrity of that file stays together
9 and it's always together. And the stuff that is filed
10:06 10 when it's in the pretrial court that goes into the file;
11 and then if it goes back to the 101st, then somebody boxes
12 that up and sends it back to the 101st.

13 HONORABLE SARAH B. DUNCAN: It needs a new
14 number. What I always did on removal petitions is my
10:06 15 state court number is top center, and just below that in
16 parentheses is the federal court's number; and that's the
17 way it was on every document that was filed in that case
18 regardless of whether it was remanded or not.

19 CHAIRMAN BABCOCK: Okay.

10:06 20 HONORABLE SCOTT BRISTER: That's sending
21 lots of paper, which is fine. I think it will still on
22 the pretrial court if they're going to still have a lot of
23 paper to look through to find out who really the parties
24 are, I still think it would be quicker just to get a
10:07 25 notice from somebody removing saying these are the parties

1 and the attorneys at the present. It's going to take
2 longer in a lot of these trials to try to figure that out.

3 The information the clerk uses to tell you who the
4 parties are is all electronic in most courts. They do not
10:07 5 look through the paper files to try to figure out who the
6 parties are. Electronic doesn't get transferred. If you
7 just transfer the paper, it's going to take a long time to
8 figure it out.

9 MR. BABCOCK: What if in 13.4(a), Scott, you
10:07 10 said in addition to what you're requiring here that the
11 notice of transfer has to include, and borrowing from
12 Chris' language, "a list of all parties and counsel"?

13 HONORABLE SCOTT BRISTER: I think that's all
14 you need. What do you think, Bonnie?

10:07 15 MS. WOLBRUECK: Yes. As long as I have all
16 parties and the attorneys related to those parties.

17 CHAIRMAN BABCOCK: What if you put that up
18 in (a), Scott? And so that Bonnie is going to get as the
19 pretrial clerk, she's the clerk of the pretrial court,
10:08 20 she's going to get that notice of transfer that's going to
21 have a copy of the MDL transfer order and it's going to
22 have a list of the parties and the counsel and the cause
23 number and the court that it's coming from.

24 HONORABLE SCOTT BRISTER: The MDL transfer
10:08 25 order will properly assign a case number as suggested so

1 that people will know where to put them.

2 MS. WOLBRUECK: I need to know if the
3 parties are still pending, any issues to any parties still
4 pending. As we start disposing of these parties we need
10:08 5 to know if there are any left that haven't been disposed
6 of.

7 MR. ORSINGER: So you need to know the
8 designation and whether they're a plaintiff or a defendant
9 or a third-party defendant and whether they're still in
10:08 10 the case or not.

11 MS. WOLBRUECK: That's right.

12 MR. ORSINGER: So shouldn't we say the
13 parties who are still in the case at the time of transfer
14 and then the designation?

10:08 15 CHAIRMAN BABCOCK: The file is going to
16 indicate if parties have been disposed of.

17 MS. WOLBRUECK: So that could mean this is
18 requiring the clerk to go through it.

19 CHAIRMAN BABCOCK: Oh, I know.

10:09 20 MR. ORSINGER: You're assuming we mail the
21 entire original file. There are some people here that
22 think --

23 CHAIRMAN BABCOCK: That's what Justice Hecht
24 said.

10:09 25 MR. ORSINGER: He said that that was what

1 happened in the federal system and that that system hasn't
2 broken down; but the state system hasn't broken down
3 either. And I really wonder if somebody, if the
4 certification or the consolidation occurs well into one
10:09 5 lawsuit, let's say the first 50 lawsuits got a long way
6 before there was ever any consolidation. We're talking
7 about sending a ton of useless, historically important
8 only information to the --

9 CHAIRMAN BABCOCK: Richard, it's not useless
10:09 10 because we're trying to keep the file together.

11 MR. ORSINGER: Why? Why not leave the old
12 file with the old court.

13 CHAIRMAN BABCOCK: Because some day
14 Munzinger's client thinks his rights have been affected
10:09 15 and he wants to complain to somebody about it.

16 MR. ORSINGER: Well, then --

17 CHAIRMAN BABCOCK: You're the guy that said
18 it was a nightmare.

19 MR. ORSINGER: -- the part of the -- I'm
20 against consolidation. But the part of the official file
21 that is created after the consolidation of all these cases
22 can be brought back.

23 HONORABLE SARAH DUNCAN: It's not.

24 MR. ORSINGER: Pardon me. After the cases
10:10 25 are all assigned to an MDL judge, you can bring that,

1 whatever you want out of that back or bring all of that
2 back. My only point is why are we, if there is a thousand
3 cases, some of which are very mature and some of which are
4 brand new, why are we shipping all that paperwork to the
10:10 5 pretrial court?

6 CHAIRMAN BABCOCK: Judge Peeples and Judge
7 Gaultney had their hands up.

8 HONORABLE DAVID PEEPLES: I think it might
9 be helpful just to step back a minute. Rule 11 talks in
10:10 10 terms of assigning a judge to these cases that are
11 scattered across the state. The cases stay where they
12 are; but you get consistency in the rulings because you've
13 got one judge making all the rulings. The legislature
14 however in HB4 talks in terms of transferring cases to a
10:10 15 court; but really the goal is to get one person making the
16 decision in all these cases so you'll have consistency.

17 And I think we need to keep our eye on the ball.
18 That's what we want to do and we're going to achieve that,
19 one judge making the rulings. I'm just -- I don't have a
10:11 20 dog in this fight. You know, it's between clerks and
21 lawyers and the litigants who pay their lawyers and pay
22 the fees as to how much paperwork.

23 CHAIRMAN BABCOCK: David, another way to do
24 it is to leave those files open in the district courts, in
10:11 25 the trial courts and let all the papers be filed there,

1 and then you as the MDL as the pretrial judge say what you
2 want; but there is one file that is maintained in by the
3 clerk of that court and it's not maintained by the MDL
4 clerk. That's another way of solving the problem. Judge
5 Gaultney.

6 HONORABLE DAVID GAULTNEY: I guess I realize
7 the paper shipping problem; but I like the concept of
8 transferring the entire file for the sake of maintaining
9 one file, one record. And I'm not sure all the files that
10:12 10 you're going to get transferred or to the MDL, to the
11 pretrial judge are going to be exactly alike.

12 For example, there might be cases where there are a
13 thousand plaintiffs in one cause number. Now are you
14 going to set up a thousand, are you going to break that
10:12 15 cause number up into a thousand cases, or are you going to
16 treat it as you got it from the original court? And I
17 think you're going to treat it as you got it from the
18 original court.

19 So I tend to go towards shipping the entire file there,
10:12 20 as cumbersome as that may be. For one thing you've got,
21 you're telling the attorneys where they need to file
22 things. You have a consistent record. Everybody knows
23 this is the record for appeal, which is going to happen in
24 some of these cases. And I don't know. I'm protecting
10:12 25 the record that is important from my perspective.

1 CHAIRMAN BABCOCK: Yes. Bill and then
2 Tommy.

3 PROFESSOR DORSANEO: I do think it's
4 important to have one record. But when do you get back to
10:13 5 an individual case? How does that happen? What causes
6 you to get to an individual case to make a specific ruling
7 that affects that case only?

8 CHAIRMAN BABCOCK: What Tracy was just
9 talking about.

10:13 10 HONORABLE TRACY CHRISTOPHER: A motion to
11 compel, answers to interrogatories.

12 PROFESSOR DORSANEO: Are the interrogatories
13 common interrogatories?

14 HONORABLE TRACY CHRISTOPHER: Right.
10:13 15 They're common interrogatories; but the plaintiff has not
16 replied to them.

17 PROFESSOR DORSANEO: So we get a common
18 activity resulting in noncompliance in a specific case;
19 and at that point you need to create or have a specific
10:13 20 case file of some kind, but not really before that.

21 HONORABLE SCOTT BRISTER: And that's one of
22 the biggest complaints I've heard from lawyers about the
23 federal MDL. If everything happens in this master file,
24 why does someone have to go fly somewhere and show up at a
10:13 25 hearing or a deposition that this person is not testifying

1 against my client, or that this is not applying to me?
2 But the federal judge with all these people according to
3 these folks doesn't care that it doesn't apply to you,
4 because it's easier just to enter everything in the main
10:14 5 case. And attorneys I talk to are very frustrated about
6 the waste of cost being included in stuff that it's
7 extremely unlikely to have anything to do with their case.

8 PROFESSOR DORSANEO: Let me pursue that
9 further. So when you get -- and that happens about 25
10:14 10 percent of the time?

11 HONORABLE TRACY CHRISTOPHER: It's getting
12 ready to be 25 percent of the time. I've ruled on a
13 master set of discovery, and I've ruled on three motions
14 to transfer venue in case specific cases; and I'm getting
10:14 15 ready to rule on about 100 motions to compel.

16 CHAIRMAN BABCOCK: A hundred out of how many
17 plaintiffs?

18 HONORABLE TRACY CHRISTOPHER: Well, I've got
19 500 right now. Out of 500 cases, some of which have
10:15 20 multiple plaintiffs.

21 CHAIRMAN BABCOCK: Twenty percent or so.

22 PROFESSOR DORSANEO: That indicates to me
23 that everything shouldn't be sent to her place in all of
24 these cases.

10:15 25 CHAIRMAN BABCOCK: It could be said to argue

1 the opposite. But Tommy.

2 MR. JACKS: Another practical problem with
3 actually transferring the original file and boxing them up
4 and sending them up as the feds do in our 254 counties the
10:15 5 clerks don't use the same kind of files.

6 CHAIRMAN BABCOCK: That's what Justice Hecht
7 said.

8 HONORABLE NATHAN HECHT: I think you'd have
9 to stick it in a -- physically put them in.

10:15 10 MR. JACKS: You might have to take it all
11 out of one file --

12 HONORABLE NATHAN HECHT: Stick it in there.

13 MR. JACKS: -- and put it in the file; and
14 then when it gets sent back that clerk has got to take the
10:15 15 300 files apart and put them back together.

16 MS. WOLBRUECK: I think there needs to be a
17 requirement in the Rule that if we're going to send the
18 originals or the files, then the clerks all need to send
19 them in the same manner, maybe bound the same way or in
10:16 20 the same filing system so where if I received 100, if I
21 were the pretrial clerk, I would have 500 cases
22 transferred to me, I would probably assign them an MDL
23 number, possibly a preassigned number from the panel which
24 may be extensions of one, two, three, four, five or
10:16 25 something all the way up to 500 that identify each one of

1 them, put all of the parties in each one of those
2 individual files into the computer in the case management
3 system. I would hope that the other clerk would have sent
4 it bound in a manner to where it could be placed into a
10:16 5 file cabinet and I would not have to re-go through that
6 file, do anything with that file except set it into a
7 filing system, and then from that point then the pretrial
8 judge make a decision on a master file and make a
9 determination of what goes into the master file. I would
10:17 10 assume that everything from the date after I received that
11 MDL file that there would be a master file that everything
12 would be filed in that unless it was filed into some case
13 specific, and that would have to have that case specific
14 cause number.

10:17 15 CHAIRMAN BABCOCK: So as I understand it
16 what you're saying let's say that this is MDL 1.

17 MS. WOLBRUECK: Yes.

18 CHAIRMAN BABCOCK: It's the first MDL.

19 MS. WOLBRUECK: Yes.

10:17 20 CHAIRMAN BABCOCK: So that would be the MDL
21 number. And then the Smith vs. Jones case in the 101st
22 District Court of Dallas County would be MDL 1-1.

23 MS. WOLBRUECK: That's right.

24 CHAIRMAN BABCOCK: And then the Brown vs.
25 Williams case --

1 MS. WOLBRUECK: Brown vs. Jones would be --

2 CHAIRMAN BABCOCK: -- from Austin would be

3 2.

4 MS. WOLBRUECK: -- 2. Yes. That's right.

5 CHAIRMAN BABCOCK: All right. And then --

6 MS. WOLBRUECK: Possibly with the court
7 extension to set some way to identify which county it came
8 from, which court it came from, something, some other
9 identifiers.

10:17 10 CHAIRMAN BABCOCK: Right. Okay. If I'm the
11 lawyer in the Smith vs. Jones case from the 101st District
12 Court and I have got a motion to compel now, I'm going to
13 file that in the MDL 1-1 formerly known as 03-2867.

14 MS. WOLBRUECK: Yes.

10:18 15 CHAIRMAN BABCOCK: So it's going to go into
16 that file. It's not going to go into the master file.

17 MS. WOLBRUECK: That's right. And then only
18 the pretrial judge will designate to the clerk what
19 actually goes into a master file.

10:18 20 CHAIRMAN BABCOCK: So when Judge Christopher
21 rules on MDL 1-1 she will enter that order and you will
22 put that in 1-1.

23 MS. WOLBRUECK: 1-1.

24 CHAIRMAN BABCOCK: And not in the master
10:18 25 file probably.

1 MS. WOLBRUECK: Probably, yes. And there is
2 a possibility at some point in time that that case would
3 be transferred back.

4 CHAIRMAN BABCOCK: And it will have the case
10:18 5 specific order in it.

6 MS. WOLBRUECK: Yes. That's right. You
7 will have it.

8 CHAIRMAN BABCOCK: Now if Judge Christopher
9 has made a ruling that applies to all the cases, when MDL
10:18 10 1-1 goes back to Dallas County is it going to have her
11 master orders in it?

12 MS. WOLBRUECK: It will need to have that,
13 yes.

14 HONORABLE SCOTT BRISTER: If to the extent
10:19 15 parties request it.

16 MR. ORSINGER: Yes. You shouldn't mandate
17 there be 15,000 copies of everything.

18 HONORABLE TRACY CHRISTOPHER: Whatever you
19 need out of MDL 1 would be designated as part of the
10:19 20 record to go back.

21 MR. ORSINGER: So you should cherry pick it
22 on the transfer.

23 HONORABLE SCOTT BRISTER: The same as we do
24 on severance. You don't sever everything in the severance
10:19 25 case. You tell parties which parts you need in a

1 severance case.

2 CHAIRMAN BABCOCK: Bill.

3 PROFESSOR DORSANEO: I gather most of the
4 time since the problem will have originated in a common
10:19 5 activity you won't need in that individual file all of the
6 things that are filed in the predecessor file of the
7 original trial court.

8 HONORABLE SCOTT BRISTER: That's right.

9 PROFESSOR DORSANEO: I'm persuaded that the
10:19 10 notice of transfer or the order and notice of transfer is
11 filed in both places and puts a stop to the activity in
12 the original trial court, and then these individual files
13 are created as they need to be created; but they're
14 essentially empty until you get around to doing something,
10:20 15 if you do, on one of the individual file numbers.

16 CHAIRMAN BABCOCK: Well, so Bill, what
17 you're saying is that the Smith vs. Jones case in the
18 101st District Court of Dallas County has got some stuff
19 in it. And when the MDL panel issues its order that that
10:20 20 case is going to the MDL then whatever is in that file
21 stays in that file and resides in Dallas County. And then
22 Bonnie creates MDL 1-1 which is the Smith vs. Jones file;
23 and the first thing that it has in it is the notice of
24 transfer, and then anything subsequently filed in that
10:20 25 case gets filed in MDL 1-1. Is that what you're

1 suggesting?

2 MR. ORSINGER: Right.

3 MR. GILSTRAP: Right.

4 PROFESSOR DORSANEO: That would work.

10:21 5 MR. ORSINGER: And then on remand it all
6 goes back. That whole file goes back.

7 MR. GILSTRAP: On remand the attorneys take
8 a copy back to the trial court and file it. You don't
9 have the clerk and the transferee court mess with that.
10 Just like the federal court, make the attorneys --

11 PROFESSOR DORSANEO: I don't like that.

12 MR. ORSINGER: Why shouldn't you just take
13 the original individual file in the transferee court and
14 send it back and that's part of your official file? It's
10:21 15 now reconsolidated in one clerk; and if you need anything
16 out of the master file, you cherry pick it.

17 PROFESSOR DORSANEO: Maybe the transferor
18 court's docket listing of all the things filed in there
19 could go; but maybe that's just not necessary. Maybe it's
10:21 20 not even necessary to have a table of contents from the
21 original file in the transferee file.

22 CHAIRMAN BABCOCK: Bill, your proposal is
23 different from what Justice Hecht says where the file
24 travels.

10:21 25 PROFESSOR DORSANEO: I don't want to send

1 all the files everywhere.

2 HONORABLE SARAH B. DUNCAN: And I think too
3 if you physically transfer all of these files, one, you're
4 going to put a tremendous strain on the pretrial court
10:22 5 clerk that accepts them both computer, in terms of
6 computerization, because you've got to have a docket. You
7 have got to have a docket of what has been filed in your
8 court; and if you physically transfer the court (SIC)
9 file, I think there is going to be some thought that you
10:22 10 need to enter all the pleading previously filed in the
11 trial court in the pretrial court. But two, I think you
12 may limit who is available to be able to be a pretrial
13 court, because not all of the clerks in the state of Texas
14 have the capacity, physical storage capacity for 1500 new
10:22 15 files.

16 MS. WOLBRUECK: Most clerks do not. Storage
17 capacity is always the issue.

18 HONORABLE SARAH DUNCAN: So I am very much
19 in favor of leaving what was filed in the trial court in
10:22 20 the trial court and let's start something new beginning
21 with a notice of transfer in the pretrial court.

22 MR. GILSTRAP: But you still require the
23 clerk in the transferee court to physically send the file
24 back to the trial court?

10:23 25 CHAIRMAN BABCOCK: Right.

1 MR. ORSINGER: At the conclusion of the
2 case?

3 HONORABLE SARAH DUNCAN: If that's
4 necessary.

10:23 5 MR. GILSTRAP: It works fine in the federal
6 court where the attorneys simply file the documents in the
7 trial court. It's never a problem.

8 HONORABLE NATHAN HECHT: On remand.

9 CHAIRMAN BABCOCK: Bobby.

10 MR. MEADOWS: This procedure sounds good to
11 me. But doesn't it bring us back to the question of
12 whether or not there is going to be a stay? Because to
13 take what Bill said, if things just stop in trial court
14 while the matter is pending in the pretrial court, that
10:23 15 would require an automatic stay.

16 CHAIRMAN BABCOCK: No, it wouldn't require a
17 stay; but it raises the problem that Judge Christopher
18 raises where she wants that closed and off her docket.

19 HONORABLE SCOTT BRISTER: Right. Just the
10:23 20 same as where you transfer a venue under any other thing.
21 That case is no longer in Harris County and that case is
22 somewhere else.

23 CHAIRMAN BABCOCK: But the problem with that
24 is that this is a little different, because --

25 HONORABLE SCOTT BRISTER: Right.

1 CHAIRMAN BABCOCK: -- it's not truly closed.

2 HONORABLE SARAH DUNCAN: No.

3 CHAIRMAN BABCOCK: It's not truly closed
4 until the case is settled, or --

10:24 5 HONORABLE SCOTT BRISTER: Right. We
6 discussed the option of that; but because of the concern
7 we don't, for sure we don't want a third filing fee being
8 paid when you send it back on remand.

9 CHAIRMAN BABCOCK: Right.

10:24 10 HONORABLE SCOTT BRISTER: You need to keep
11 something there and have that file reopened, which we
12 thought was the only way to get around having to pay a
13 third filing fee on remand.

14 MR. MEADOWS: Things can be happening in the
10:24 15 trial court, can they not?

16 HONORABLE SCOTT BRISTER: Not once you have
17 that notice of transfer.

18 HONORABLE SARAH B. DUNCAN: That is the
19 perfect situation for abatement.

20 MR. ORSINGER: Can we create a concept
21 called "administratively closed"? I have some judges in
22 cases that will quote "administratively close" the case,
23 quote, unquote until some impediment is removed.

24 HONORABLE SCOTT BRISTER: That's what we did
10:24 25 with the Johns Manville cases in Harris County.

1 MR. ORSINGER: And that gets them, from a
2 statistical standpoint that gets it off of your statistics
3 file.

4 HONORABLE SCOTT BRISTER: That's what David
10:24 5 West said. We never got an official Rule.

6 HONORABLE TRACY CHRISTOPHER: It's still on
7 our docket.

8 CHAIRMAN BABCOCK: Steve.

9 MR. SUSMAN: I mean, is there any way we can
10:25 10 vote on what you just? I mean, so there are a lot of
11 issues that are getting mixed up here. I mean, one issue
12 is whether anything is going on in the trial court while
13 it's pending before the pretrial court. Another issue is
14 how the judge is counted on their score card or record. I
10:25 15 mean, we're just talking about the files now; and you have
16 made a proposal or you've summarized the proposals. Could
17 we vote on that summary that you had?

18 CHAIRMAN BABCOCK: We can. Judge
19 Christopher wants to make a comment before we do that.

10:25 20 HONORABLE TRACY CHRISTOPHER: No, no. I was
21 also going to request that vote too. I think we've
22 reached a consensus that we need individual files in the
23 pretrial court. I think we need a vote on whether the
24 original file should be transferred from the trial court
10:25 25 to the pretrial court or just the notice of transfer. So

1 that would be the first vote that I would request.

2 CHAIRMAN BABCOCK: Okay. Do you want to
3 start with that?

4 HONORABLE SARAH DUNCAN: Can we leave the
10:25 5 notice of transfer out, because I think Bill was talking
6 about and I was talking about filing the notice of
7 transfer in both places?

8 HONORABLE SCOTT BRISTER: Our draft of the
9 Rule contemplates filing in both places.

10:26 10 CHAIRMAN BABCOCK: Yes. Hang on, Carl.

11 MR. HAMILTON: Let me ask a question. When
12 these cases normally get moved to a pretrial court has
13 there been a lot that has gone on in the case, or is it
14 basically just the pleadings that are there?

10:26 15 PROFESSOR DORSANEO: I don't know.

16 CHAIRMAN BABCOCK: It really varies a lot.
17 Sometimes there has been heavy motion practice in the
18 trial court in federal court like 12(V)(6).

19 MR. HAMILTON: I mean, if we're talking
10:26 20 about shipping the entire file, generally what are we
21 talking about volume wise?

22 CHAIRMAN BABCOCK: Tommy might be able to
23 answer that or Pete. Probably not a lot.

24 MR. GILSTRAP: If there's 1500 files, we're
10:26 25 talking about a lot.

1 CHAIRMAN BABCOCK: Individual files.

2 MR. ORSINGER: The older files will be
3 thicker than the new ones. The new ones will be very thin
4 because they will be nothing but a petition and then a
10:26 5 motion to transfer.

6 CHAIRMAN BABCOCK: Steve.

7 MR. SUSMAN: It could be a lot. In federal
8 practice it turns out it often is a lot, because one of
9 ways you try to argue against MDL consolidation or
10:27 10 transfer is by saying "I have done all this work in a
11 case. I'm way ahead of the game. Don't send me to some
12 transferee court that is going to make me do it again."
13 So when any, you know, when the lawyer doesn't want to be
14 transferred, particularly a plaintiff's lawyer, he does a
10:27 15 lot of work in the case to use that argument before the
16 panel. So it could be a lot.

17 CHAIRMAN BABCOCK: Okay. Tracy has got an
18 idea here; and that is that we're going to vote on whether
19 or not the file is going to migrate, it's going to move
10:27 20 from the trial court to the pretrial court upon the
21 issuance of the order by the MDL panel and the notices to
22 the two courts. So that, if you're in favor of that,
23 that's what we're going to vote on. The alternative to
24 that is that the file is going to stay where it is and
10:28 25 filings will occur up until the point of transfer; and

1 then in the pretrial court there will be a new parallel
2 file created which you file your stuff in. But the vote
3 you're going to take is are you in favor of the file
4 staying where it is, in other words, in the original trial
10:28 5 court? And what will be in it will be the material that
6 was filed up until the time of the MDL order. Right,
7 Judge Christopher? Is that faithful to what you want?

8 HONORABLE TRACY CHRISTOPHER: Right.

9 CHAIRMAN BABCOCK: Everybody in favor of
10 that raise your hand.

11 MR. JACKS: Which one?

12 CHAIRMAN BABCOCK: The first one, that the
13 file stays put. The file stays put, everybody in favor of
14 that raise your hand. Everybody opposed raise your hand.
10:29 15 By a vote of 27 to 2 that passes. And they're sitting
16 together (indicating).

17 HONORABLE TRACY CHRISTOPHER: Okay. So how
18 about then if maybe we move on to something else; and I'll
19 work on what we would want in the notice of transfer and
10:29 20 then directions to the Court to set up each file and come
21 back to that?

22 CHAIRMAN BABCOCK: That would be perfect.

23 HONORABLE TRACY CHRISTOPHER: Okay.

24 CHAIRMAN BABCOCK: And we're right at that
10:29 25 time for our morning break, so we'll take a break; and

1 then Tracy will figure out what we go to next.

2 (Recess 10:29 to 10:47 a.m.)

3 CHAIRMAN BABCOCK: Okay. David, you're on.

4 HONORABLE DAVID PEEPLES: Okay.

10:47 5 CHAIRMAN BABCOCK: All right, guys. Let's
6 get going.

7 HONORABLE DAVID PEEPLES: 13.5.

8 CHAIRMAN BABCOCK: Here we go on 13.5.

9 HONORABLE DAVID PEEPLES: What I want to do
10:48 10 is summarize (a) and then open it up for discussion. Then
11 Bob Pemberton is going to talk about his long footnote.
12 But 13.5 has three basic concepts in the three sentences.
13 The first one authorized the appointment, the
14 controversial part, which is the appointment of a visiting
10:48 15 judge; and I have a modification that I want to suggest on
16 that in just a minute, in addition to of course a district
17 judge.

18 The second sentence deals with can you object to a
19 visiting judge if one is assigned and if we authorize
10:48 20 that. And the third sentence says once a judge is
21 assigned or a judge in a court is assigned that judge has
22 exclusive jurisdiction. And that is to deal with the
23 exchange of bench issue, so that if one of the 57 I think
24 it is district judges in Harris County is assigned, all
10:48 25 the other 56 wouldn't have jurisdiction to tamper with

1 that case.

2 HONORABLE SCOTT BRISTER: Or a general
3 docket like San Antonio.

4 HONORABLE DAVID PEEPLES: Yes. Or a
10:48 5 visiting judge who happens to be sitting for that judge in
6 a given week. I want to come back to visiting judges
7 because I've got a proposal to make on that; but Bob, I
8 want to give you a chance to talk.

9 MR. PEMBERTON: I am sure the committee is
10:49 10 thrilled at the prospect of a two-page footnote after
11 yesterday's laborious session. But the short of it,
12 Section 74.164 of the provisions of the Government, the
13 new provisions of the Government Code governing MDL refer
14 to transferring a case to a quote "court" and for guidance
10:49 15 in what judges can preside in these proceedings.

16 We looked at that provision. If you read that as being
17 limited only to the panel transferring cases to a quote
18 "court," you leave open essentially a roulette wheel of
19 judges who can end up sitting in the proceeding in
10:49 20 addition to the active judge of the court for which the
21 cases are transferred. Judges can swap benches. You have
22 visiting judges. You have active judges who can be
23 assigned. Pursuant to local rule or Chapter 7 of the
24 Government Code any number of judges can end up in these
10:50 25 cases.

1 It's our view that really what is contemplated in the
2 MDL transfer process is probably some specified judge,
3 maybe one that has some specialized knowledge of hearing
4 these cases. And so we specified or contemplated the MDL
10:50 5 panel can assign, designate a judge.

6 As for visiting judges we thought it significant that
7 the legislature used the language "a judge qualified and
8 authorized to preside in the case" in designating which
9 judges are competent to hear these things; and that
10:50 10 includes visiting judges, all things being equal.

11 There are as far as the objections we were kind of back
12 and forth on whether the objection provisions if you read
13 everything literally would apply to bar a visiting judge,
14 a visiting judge from being assigned pursuant to the MDL
10:51 15 process, but regardless of our views believe that the
16 Court could certainly write a rule that would allow
17 assignment of visiting judges limiting or eliminating the
18 possibility to object, that essentially the visiting
19 judges ought to be used in this process. Allowing
10:51 20 objections would essentially preclude it whether you
21 allowed unlimited objections by all the parties in the
22 case or even one objection by all the parties in the case,
23 so that's why we have limited the objections in that way.
24 And so that's kind of the legal background on that.

10:51 25 HONORABLE DAVID PEEPLES: Okay. I want to

1 propose a sort of compromise or modification on the
2 visiting judges. I just recognize that the hostility to
3 visiting judges is just palpable. People just despise the
4 idea that a visiting judge can be assigned to their case
10:52 5 and they can't object. It's just out there.

6 And an additional problem here is that the legislature
7 drastically cut the appropriations for visiting judges to
8 one-third of what it was before. And so as a practical
9 matter they just can't be used like they have been in the
10:52 10 past. I think what we should do is change this to say
11 clearly that the panel needs to be able to appoint an
12 active district judge; but I think the panel ought to have
13 the discretion to assign a visiting judge or retired
14 senior former judge by agreement of the parties to the
10:52 15 initial matter that is being transferred or the case that
16 is being transferred; but then I think that any tag-along
17 cases there should be no objection, because if a tag-along
18 case has a right to oust the judge that is already there
19 or keep that case out, it just won't work.

10:52 20 It is said sometimes that if you have to get agreement,
21 you won't be able to get any of the visiting judges
22 assigned; and if that happens, I say so be it. But I do
23 think that there are some people who are good enough that
24 the lawyers can be reasoned with and they will take a
10:53 25 visiting judge; and if that doesn't prove to be true,

1 nothing ventured, nothing gained.

2 So I would propose a substitute. I don't have the
3 language; but it would be easy to say the panel can assign
4 any district judge or any retired and so forth judge by
10:53 5 agreement of the parties or it would have to be to the
6 initial cases that are involved in the initial transfer,
7 no objection in a tag-along situation. That is what I
8 would propose.

9 CHAIRMAN BABCOCK: Okay. Any comment about
10:53 10 that or any other aspect of 13.5(a)? Richard.

11 MR. ORSINGER: It seems like a very
12 reasonable compromise; but remember we've given the movant
13 the power to decide who is a named transferee in the
14 original motion to transfer. And so everyone who has an
10:54 15 existing case but who is not listed by the movant as a
16 transferee is a tag-along case; and that means that you're
17 giving the movant a tremendous amount of power on who to
18 name or include, and anyone they don't name or include
19 then has no power to object to a visiting judge.

20 CHAIRMAN BABCOCK: Alex.

21 PROFESSOR ALBRIGHT: But didn't we also give
22 the judge the power to include additional cases? Can't
23 you make -- I mean, the MDL panel has the power to include
24 additional cases.

10:54 25 MR. ORSINGER: They're tag-along cases if

1 they're not specified by the motion as the cases to be
2 moved, to be transferred.

3 PROFESSOR ALBRIGHT: I think you could make
4 it to where anybody, any case in the order of transfer
10:54 5 from the MDL panel would have the right to make an
6 objection.

7 HONORABLE SCOTT BRISTER: 13.2(d) we decided
8 yesterday to leave it the MDL panel can order you to give
9 notice of the hearing to all parties in all related case;
10:55 10 and we decided not to do parties in all related cases as
11 to which transfer is sought. So the panel could order you
12 to give notice of the hearing to more people than you're
13 actually asking to move.

14 CHAIRMAN BABCOCK: Richard states a good
10:55 15 point though, David. What he's saying is whoever is there
16 at the inception ought to have the right to object; but
17 subsequent cases ought not to. And that is your concept,
18 isn't it?

19 HONORABLE DAVID PEEPLES: I think it will
10:55 20 not work if you do it otherwise. What Richard says could
21 in theory happen. It could be somebody figures "I don't
22 want Tommy Jacks in there objecting. I'm going to notice
23 a bunch of lightweights and get my visiting judge and then
24 Tommy can't object." It could happen. In theory it could
10:55 25 happen.

1 CHAIRMAN BABCOCK: But what I'm saying is if
2 Tommy gets notice of this or gets wind of it or something
3 and he jumps into it at the inception, what do you feel,
4 what do you think about giving him the right to object?

10:55 5 HONORABLE DAVID PEEPLES: I certainly think
6 that if Tommy Jacks is out there, he ought to have the
7 right to get in and object. I don't know if you can draft
8 for that.

9 Let me just say this thing is going to work if we can
10:56 10 use only active judges. This will work if we're limited
11 to active judges. I think the panel ought to have the
12 discretion to find some of these retired judges who are
13 very good; and frankly I'm confident sometimes there will
14 be agreement. And I don't think the abuse that Richard
10:56 15 has told us with really happen. It is in theory possible;
16 but this thing works if we don't use visiting judges at
17 all.

18 CHAIRMAN BABCOCK: Steve.

19 MR. SUSMAN: I still don't understand why
10:56 20 should you have the right to object?

21 HONORABLE DAVID PEEPLES: To a visiting
22 judge?

23 MR. SUSMAN: To a visiting judge. Why
24 should you have that right?

10:56 25 HONORABLE DAVID PEEPLES: The legislature

1 has given it to you in '74. Arguably they changed that
2 here or maybe not. I didn't get into that. It's very
3 ambiguous as to whether they consciously decided to take
4 away the objection in this procedure.

5 CHAIRMAN BABCOCK: Justice Hecht.

6 HONORABLE DAVID PEEPLES: It's just so
7 unpopular. People hate them. They hate the idea having
8 one rammed down their throat.

9 MR. SUSMAN: But maybe in this case like
10:57 10 this the visiting judge would be the best person to handle
11 a complicated MDL pretrial, I mean, somebody who doesn't
12 have a regular docket who could come to a central location
13 and handle these cases. I mean, it seems to me this is
14 the ideal kind of case for a visiting or retired judge to
10:57 15 handle. And I mean, I think if you give parties the right
16 to object, there's no way you're going to get it. Parties
17 are not going to agree. Someone will always have a
18 strategic advantage in objecting to one judge or another.
19 So why shouldn't the panel have? I mean, there may be a
10:57 20 very good person, very competent and experienced in
21 handling cases like this. I don't know why you should not
22 use this as an opportunity to do away with this.

23 CHAIRMAN BABCOCK: Justice Hecht.

24 JUSTICE NATHAN HECHT: And you know, the
10:58 25 history of the objection is that in all fairness there

1 have been plenty of instances where there were legitimate
2 objections to judges who were being assigned; but the
3 chances that the panel is going to make such an assignment
4 in these kind of cases seems to me to be awfully slim. In
10:58 5 fact, I can't even imagine that the panel would consider
6 assigning a judge who wasn't fully able to do this kind of
7 work. I mean, it won't succeed otherwise.

8 CHAIRMAN BABCOCK: The objection to a
9 visiting judge is statutory in nature?

10:58 10 MR. ORSINGER: Yes.

11 HONORABLE DAVID PEEPLES: You have a right
12 to object in civil cases. You do not have a right in
13 criminal cases period.

14 JUSTICE NATHAN HECHT: Hitherto until
10:58 15 September 1st you can object to an assigned active judge.
16 You can't object to judges swapping benches in the
17 district in the county; but you can object to assigned
18 active district judges. But Rule 11, in Rule 11 the
19 Supreme Court took the position that those assignments
10:59 20 were not being made under Chapter 74 and therefore were
21 not subject to objection. After September 1st you can no
22 longer object to an assigned active district judge. Isn't
23 that correct?

24 HONORABLE DAVID PEEPLES: Correct.

10:59 25 JUSTICE NATHAN HECHT: And so that wouldn't

1 be an issue if this provided only for active district
2 judges. You would have no right, statutory right to
3 object. But under Rule 11 the Court took the view that
4 nobody who was assigned was subject to objection; but it
10:59 5 only provides for the assignment of active district
6 judges.

7 CHAIRMAN BABCOCK: But here is what I'm
8 thinking: If you say "visiting judges," and there is a
9 statute in place that gives litigants the right to make
11:00 10 one objection per party to a visiting judge, and if that
11 objection is lodged pursuant to statute, then the judge
12 would not meet the definition of HB4 because they would be
13 disqualified by virtue of statute.

14 JUSTICE NATHAN HECHT: Well, you could read
11:00 15 it that way, or you could say that the assignment was not
16 made under the Chapter 74 in the first place, and
17 therefore the objection provisions don't apply.

18 MR. ORSINGER: But this House Bill 4
19 amendment happens to be in Chapter 74, doesn't it?

20 HONORABLE NATHAN HECHT: Yes.

21 MR. ORSINGER: So that makes it more of a
22 stretch in this case than Chapter -- Rule 11?

23 JUSTICE NATHAN HECHT: I suppose again you
24 could make that argument.

11:00 25 CHAIRMAN BABCOCK: The operative language is

1 "a judge who is qualified and authorized by law to
2 preside." And if you have the statutory right to
3 disqualify a judge, then you wouldn't be qualified and
4 authorized by law to preside.

11:01 5 MR. ORSINGER: But see, that depends on
6 whether he is appointed pursuant to Chapter 74 or not.
7 And under Rule 11 you are okay because it was a different
8 statute. Actually it was just a Rule that did it. So it
9 really wasn't under a statute at all. Unfortunately this
11:01 10 authority is actually under that particular section of the
11 Government Code, so it's harder to argue that this
12 appointment is not under that chapter.

13 CHAIRMAN BABCOCK: Yes. This Bill is under
14 Chapter 74; and then our Rule right here says that your
11:01 15 objections under Chapter 74 don't make, aren't worth
16 anything.

17 MR. ORSINGER: The only advantage to that
18 argument is that the people who decide whether it's
19 credible are the same ones who adopt this rule.

11:01 20 (LAUGHTER.)

21 MR. GILSTRAP: There are different sections
22 of 74 at work. I mean, the MDL is under 74.161 and the
23 objection is under 74.054 and 74.053; and the fact they're
24 in same chapter doesn't seem...

25 CHAIRMAN BABCOCK: Robert.

1 MR. PEMBERTON: In that footnote is a
2 citation of a case Mitchell Energy from '97. The Court
3 surveyed the history of the objection, the right to object
4 and identified it as being tied to a policy interest the
11:02 5 legislature considered in people being able to have the
6 right to go before an elected local judge they have a say
7 in picking. I'm not sure how that helps with people from
8 out of town; but that was the interest they identified
9 behind that provision.

11:02 10 Obviously in creating the MDL process the legislature
11 had in fact abrogated that. It envisions judges being
12 assigned, cases being assigned all over the state and
13 maybe to the vast majority of voters in all the cases have
14 no say. We thought there might be some more wiggle room
11:03 15 for the Court to write a Rule taking that assignment
16 mechanism like Rule 11 independent of Chapter 74 to get
17 around the objection.

18 CHAIRMAN BABCOCK: Luke, what is your
19 prediction of how the Bar would react to this language
11:03 20 where we just say "Chapter 74 doesn't apply? You can't
21 object, no objections to visiting judges "?

22 MR. SOULES: I'm sorry. I'm not quite
23 caught up on what we're talking about. The assignment of
24 a visiting judge who is an active sitting judge in another
11:03 25 county or a present county or a former judge or a retired

1 judge?

2 CHAIRMAN BABCOCK: We're talking about the
3 latter.

4 JUSTICE NATHAN HECHT: The latter.

11:03 5 MR. SOULES: There is an array of ways,
6 objections that are available to you depending on what the
7 status of this is, of this judge is. If you're talk about
8 the assignment of an active sitting judge from a
9 different, the same or a different county --

11:03 10 CHAIRMAN BABCOCK: That's not what we're
11 talking about.

12 MR. SOULES: That's not what you're talking
13 about? You're talking about the assignment of a retired
14 judge or a former judge?

11:04 15 CHAIRMAN BABCOCK: Retired or a senior
16 district judge, former.

17 MR. SOULES: Or former. I think they'll go
18 bazookas if you allow, that if you say they can't object
19 to a former judge. Some of those judges sit for six
11:04 20 months and they're gone because they ought to be gone.

21 CHAIRMAN BABCOCK: Justice Hecht's point is
22 that the MDL panel wouldn't appoint the guy who ought to
23 be gone.

24 HONORABLE SCOTT BRISTER: But the people in
11:04 25 these cases don't know who we are and may not trust us to

1 do so.

2 CHAIRMAN BABCOCK: That's right. Judge
3 Benton.

4 HONORABLE LEVI BENTON: David said it would
11:04 5 work if we use only actual judges. If there is any
6 concern about having enough judges, we ought to write the
7 Rule to provide that an appellate judge can sit as the
8 district judge; and I would oppose the Rule if it would
9 permit a visiting judge to sit.

11:05 10 MR. SOULES: A visiting judge who is an
11 active sitting judge from another county?

12 HONORABLE LEVI BENTON: Well, a former
13 judge.

14 MR. SOULES: A former judge.

11:05 15 HONORABLE TOM GRAY: I likewise would oppose
16 the Rule if it can be an appellate judge.

17 (LAUGHTER.)

18 CHAIRMAN BABCOCK: Carl.

19 MR. HAMILTON: Under that new legislation
11:05 20 it not only eliminated for active judges; but it requires
21 presiding judges now to align the parties so that each
22 side gets one instead of each party getting one.

23 MR. SOULES: For former judges or retired
24 judges?

11:05 25 MR. HAMILTON: Both.

1 HONORABLE DAVID PEEPLES: Everybody.

2 CHAIRMAN BABCOCK: Steve's point is that
3 there are a pool of retired judges who would be terrific
4 for this exercise.

11:05 5 MR. SOULES: No question.

6 CHAIRMAN BABCOCK: And you may not want to
7 exclude them, which is why Judge Peeples is trying to come
8 up with a compromise between I think you accurately
9 predicted how the Bar would react to the abrogation of the
11:06 10 objection by the Rule.

11 MR. SOULES: For a former judge.

12 CHAIRMAN BABCOCK: For a former judge,
13 right. That's why David has come up with a compromise.

14 MR. SOULES: The concept is different than a
11:06 15 retired judge.

16 CHAIRMAN BABCOCK: Alex.

17 PROFESSOR ALBRIGHT: If each side now gets
18 only one strike, it's not the problem with each party
19 getting a strike. In this MDL thing could you say that
11:06 20 each side, all plaintiffs and all the defendants, so that
21 way, I mean, if you have somebody who seriously wants to
22 strike somebody, they can strike, get one strike; but
23 you're not going to have the problem with the serial
24 strikes that you would otherwise?

11:06 25 CHAIRMAN BABCOCK: Well, but Alex, the

1 problem is it's one per side per case.

2 PROFESSOR ALBRIGHT: But is it?

3 HONORABLE SCOTT BRISTER: No. Our bracketed
4 language of one per side was intended to be one per side
11:07 5 per MDL.

6 PROFESSOR ALBRIGHT: Yes.

7 CHAIRMAN BABCOCK: That's not what the
8 statute says.

9 PROFESSOR ALBRIGHT: The question is do we
11:07 10 have the power to do that?

11 HONORABLE SCOTT BRISTER: Right.

12 PROFESSOR ALBRIGHT: And, you know, it seems
13 to me that you should have the ability to assign the
14 perfect visiting judge when that situation comes up and
11:07 15 then see what happens with the strikes. You probably
16 aren't going to do it if you think this person is going to
17 be stricken. Right?

18 CHAIRMAN BABCOCK: Richard.

19 MR. ORSINGER: Well, two things, is that I
11:07 20 don't know that all the lawyers are going to be striking
21 just judges they think are competent. I think that some
22 lawyers may feel that some judges who are well competent
23 are either more or less inclined to grant summary
24 judgments or are broader about discovery or narrower; and
11:07 25 so even judges we would all acknowledge are excellent

1 judges may still draw strikes.

2 Number two, I don't see how you could possibly tell 500
3 different plaintiff's lawyers that they get to exercise
4 one strike. I mean, are they going to have a committee
5 and is it going to go by --

6 HONORABLE SCOTT BRISTER: Put them in a
7 room. Lock it.

8 (LAUGHTER.)

9 CHAIRMAN BABCOCK: You have 15 minutes to
10 make your strike.

11 (LAUGHTER.)

12 MR. ORSINGER: I mean, we better think that
13 through if we're only going to have one strike per side.

14 CHAIRMAN BABCOCK: Justice Duncan.

11:08 15 HONORABLE SARAH B. DUNCAN: And to restate
16 what I've stated before in line with that, these cases
17 aren't consolidated. They are simply transferred.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE SARAH B. DUNCAN: That's a big
11:08 20 point with respect to Scott's comment in the bracketed
21 language.

22 CHAIRMAN BABCOCK: Agreed. Agreed. All
23 right. Yes, Judge Gray.

24 HONORABLE TOM GRAY: I was just going to
11:08 25 suggest that an initial vote could be do we want to add

1 anybody other than elected judges and then decide which
2 ones?

3 CHAIRMAN BABCOCK: Well, that's one vote.
4 And I'll defer to Judge Peeples; but I sort of would like
11:09 5 a vote on the "Peeples Compromise." I think it should be
6 referred to that in the Rule as the "Peeples Compromise."

7 (LAUGHTER.)

8 HONORABLE DAVID PEEPLES: The "Peeples
9 Compromise."

11:09 10 MR. MUNZINGER: Could you state your
11 understanding of the Peeples Compromise before we vote on
12 it?

13 CHAIRMAN BABCOCK: All right. Yes. And
14 I'll let the Judge restate it.

11:09 15 HONORABLE DAVID PEEPLES: Clearly appoint
16 any active district judge or any retired or senior judge
17 by agreement. I'm not sure we need to get the signatures
18 of 500 people. There needs to be some way that if they
19 don't object within a week or so; but the concept would be
11:09 20 by agreement. And again, if it never happens, nothing
21 ventured, nothing gained.

22 CHAIRMAN BABCOCK: Steve.

23 MR. SUSMAN: I suggest we vote on the more
24 extreme position first, because if you vote favorable to
11:09 25 the Peeples Compromise, that doesn't mean you wouldn't

1 also be in favor of allowing the panel to assign a
2 visiting judge. I think the first vote has got to be do
3 we want to give the panel the power to assign a visiting
4 judge without the lawyers having a right to object,
11:10 5 assuming it can be done constitutionally?

6 MR. SOULES: What kind of judge?

7 MR. SUSMAN: Would we like to do it if we
8 could do it?

9 HONORABLE DAVID PEEPLES: Senior or retired,
11:10 10 but not former. As written right here it does not include
11 former.

12 CHAIRMAN BABCOCK: Richard.

13 MR. MUNZINGER: I have a question about this
14 Government Code, Section 74. That gives the right to a
11:10 15 litigant to peremptorily challenge any visiting judge
16 which by definition would include a retired or active
17 judge from another jurisdiction.

18 HONORABLE DAVID PEEPLES: The legislature
19 effective September 1st has taken away the right to object
11:10 20 to an active district judge from a different county. You
21 used to have it. No longer after September 1st.

22 MR. MUNZINGER: The only concern I would
23 have about a vote would be that I would wonder why the
24 Supreme Court is enacting a Rule to erase a statute. And
11:11 25 wouldn't we be causing problems regarding that power in

1 the appeals maneuvering that might arise from that if we
2 go beyond and include judges who would be subject to
3 Section 74 challenges? To me I think that would be
4 counterproductive to the purpose of the law and to have
11:11 5 the MDL panel up and running promptly with certainty.
6 That's the only point I would make.

7 CHAIRMAN BABCOCK: Pete.

8 MR. SCHENKKAN: I don't have strong views
9 what the right answer is; but the answer made back the
11:11 10 other way, Richard, is two-part. One is if that is a
11 problem, they've already done it once with Rule 11 where
12 they just said "We're not doing it under this." The other
13 is that they said "Well, this time we're doing it under
14 Chapter 74, the section of Chapter 74 that they will be
11:11 15 doing these Rules under says that notwithstanding any
16 other law they could do this. And the footnote comment
17 indicates there is no reported legislative history, no
18 documentary basis to saying that doesn't, for precluding
19 the ability to argue that that truly means withstanding
11:12 20 any other law including the other 74.053 part of Chapter
21 74 that would cause the problem.

22 JUSTICE NATHAN HECHT: I think the Court --
23 the legal issue is a legitimate one. But the Court would
24 like to know as a matter of policy who should sit on
11:12 25 the -- if the Court could do it, is this a good idea or

1 not to assign some visiting judges, some strikes, strikes
2 per side? What is the view of that if you were writing on
3 a clean slate?

4 CHAIRMAN BABCOCK: Good point, because there
11:12 5 is additional language in that provision that Pete just
6 read that may go the other way; but anyway. Well, should
7 we vote? And if so, what should we vote on, Sarah?

8 HONORABLE SARAH DUNCAN: Well, I just have a
9 question first. As I understand, David, what you're
11:13 10 saying, active judges for whom there will no longer be an
11 objection and retired and senior judges, not former judges
12 by agreement, so there wouldn't be an objection since it
13 was by agreement. So by doing it your way we don't
14 involve the objection statute at all.

11:13 15 HONORABLE DAVID PEEPLES: Correct.

16 HONORABLE DAVID GAULTNEY: Except I thought
17 the problem was if somebody comes along later in a
18 different case that would be involved, would have a
19 statutory objection. Wouldn't that be the concern?

11:13 20 CHAIRMAN BABCOCK: Right.

21 HONORABLE SARAH B. DUNCAN: Right.

22 HONORABLE DAVID GAULTNEY: So I'm not sure
23 that by agreement you resolve that problem. But I
24 understand what Justice Hecht is saying is he wants input
11:13 25 as to whether it's a good idea if it could be done. Is

1 that correct?

2 CHAIRMAN BABCOCK: I think that's what
3 Justice Hecht just said. So there are three ways we could
4 vote it seems to me. We can vote up or down on whether it
11:14 5 should be limited to active district judges is one way we
6 could vote. We could vote on whether or not it should be
7 the panel should have the power to appoint not only active
8 district judges, but also retired or senior district
9 judges and abrogate the objection that otherwise would be
11:14 10 applicable to those judges in Chapter 74, or the third
11 vote we could take would be the Peoples Compromise, which
12 is that they can appoint retired or senior district judges
13 with the agreement of the parties. Is that the three ways
14 we could vote? Okay. Does anybody care what order we
11:14 15 vote in? Pete.

16 MR. SCHENKKAN: I'm with Steve. I think we
17 take number two first, because it is the one that gives
18 the Court a sense of the group's policy, which is if the
19 Court is the one that's going to have to make this
11:15 20 decision anyway and thinks they can do it, should they do
21 it? Do we think it's a good idea to override that in this
22 context in the interest of giving this panel, who I do
23 trust, to not pick the ones that were likely to be
24 susceptible to a lot of legitimate objections, to have the
11:15 25 option.

1 CHAIRMAN BABCOCK: You've only seen 40
2 percent of the panel here. Only two. It takes three.
3 Yes, Richard.

4 MR. ORSINGER: I just want to be sure that
11:15 5 everyone understands that the Peoples Compromise is really
6 a compromise only for people that are in the lawsuit at
7 the time of the assignment, that if you are offended by
8 forcing a retired judge on somebody, by voting for that,
9 for the compromise, you're forcing it on all tag-along
11:15 10 cases.

11 CHAIRMAN BABCOCK: It sounds like we're
12 going to vote for the compromise maybe even second or
13 third. So let's vote first on whether the MDL panel
14 should have the power to appoint not only active district
11:16 15 judges, but also retired or senior district judges and
16 that the objections otherwise available under Chapter 74
17 be abrogated. Is that okay, Ralph?

18 MR. DUGGINS: I have a question. Is there a
19 difference between a retired and senior district judge?
11:16 20 What is it?

21 HONORABLE DAVID PEEPLES: It has to do with
22 whether they're drawing retirement, that they have to have
23 been in office for a while.

24 MR. ORSINGER: And not defeated.

11:16 25 HONORABLE DAVID PEEPLES: Yes. And the

1 defeated judges can't be done.

2 Chip, this is a policy question: Not which of these
3 three you like. But do you think as a matter of policy if
4 the Supreme Court wants to do it or thinks it can, whether
5 we would recommend it?

6 CHAIRMAN BABCOCK: Whether this is a good
7 idea, we are recommending this, we are recommending this
8 proposal. Okay. So everybody who is in favor of that
9 raise your hand. All those who think it is not a good
11:17 10 idea raise your hand.

11 MR. SOULES: In your last statement the
12 proposition you didn't say "by agreement." I guess you
13 intended to leave that out.

14 CHAIRMAN BABCOCK: Yes, because that's the
11:17 15 Peeples Compromise. This is something else. Okay. Here
16 is the vote. Seventeen people think that the MDL panel
17 should have this power and the Court should do this if
18 they think they can. So as a matter of policy 17 people
19 are in favor and 14 are against. Is that pretty clear?

11:17 20 (LAUGHTER.)

21 JUSTICE NATHAN HECHT: Let me ask another
22 question. I don't want to muddy this up any further with
23 ideas; but I am just trying to anticipate what our
24 colleagues might ask. What if the Supreme Court said
11:17 25 "You," to the panel, "You can appoint a former judge, by

1 which I mean all of these people, only if, only from a
2 list of people who have applied to us for to be qualified
3 to serve in these cases and have demonstrated to the Court
4 that they're capable of doing this, they have the time,
11:18 5 they have the interest, and we put them on a list, and not
6 just anybody that the panel came up with"?

7 MR. DUGGINS: That's a great idea.

8 MR. SOULES: It makes it easier.

9 HONORABLE NATHAN HECHT: I'm just
11:18 10 remembering, and I don't have much experience with this
11 either; but in Dallas years and years ago we had a huge
12 case involving a nuclear power plant. And they came to
13 Dallas for the trial, and we were not very happy to see
14 them. And they wanted an active judge to try the case,
11:19 15 and it was going to take months; and we had a couple of
16 reluctant people say that they might do it, but they
17 cabbaged onto Chief Justice Guittard who was retired and
18 had the energy and the interest in trying the case and
19 presiding over it.

11:19 20 So that was really a good solution to the problem
21 because everybody else could keep doing their business and
22 we had a perfectly good trial judge in former Chief
23 Justice to hear the case.

24 CHAIRMAN BABCOCK: Richard.

11:19 25 MR. ORSINGER: I'm curious. Do you think

1 the Supreme Court would be selective and there might be
2 occasions in which they wouldn't approve someone who
3 applied to be on the list?

4 JUSTICE NATHAN HECHT: Oh, yes.

5 MR. ORSINGER: Okay.

6 HONORABLE NATHAN HECHT: And I think we
7 already have to do some investigation of judges who want
8 to do certain things; and I think we can just make it
9 clear at the outset that this is going to be a selective
11:20 10 group of people. And I don't think you'll get a lot of
11 takers actually, because I'm just trying to run over the
12 list in my mind the retired judges who want to take this
13 on, and there's not a whole lot of them, but there might
14 be a few.

11:20 15 CHAIRMAN BABCOCK: And so the idea would be
16 you would propose a list and nobody -- let's say it would
17 be five or 10 names on it. And nobody would object to the
18 list?

19 HONORABLE NATHAN HECHT: Right.

11:20 20 MR. ORSINGER: And by the way, by mentioning
21 Justice Guittard, this proposal is only retired district
22 judges. You would open that up to permit retired court of
23 appeals judges?

24 PROFESSOR DORSANEO: He was a district judge
25 too.

1 MR. ORSINGER: Oh, okay.

2 MR. SOULES: Right now you can appoint a
3 judge at his level, the level of service or below. For
4 example, Hardberger was never a trial judge, but he could
11:21 5 be appointed to try cases.

6 MR. ORSINGER: Then maybe we ought to make
7 this language broad enough to include someone who was only
8 a court of appeals judge who is retired, but who is well
9 respected.

11:21 10 HONORABLE SCOTT BRISTER: Don't you think it
11 would be better to have a little trial judge experience?

12 CHAIRMAN BABCOCK: Bill.

13 PROFESSOR DORSANEO: Years ago we had the
14 idea that all the local rules would be sent to the Court
11:21 15 and the Court would go through a process of evaluating and
16 pick the good ones and take the bad ones; and somehow that
17 just kind of never worked out. Some of the bad ones got
18 approved, because it's kind of hard not to approve them.
19 So I wonder how well you would do in this process.

11:21 20 HONORABLE NATHAN HECHT: Well, let's don't
21 bring up the local rules.

22 (LAUGHTER.)

23 PROFESSOR DORSANEO: You brought up the late
24 great friend Clarence Guittard.

11:21 25 CHAIRMAN BABCOCK: You opened the door to

1 this historical moment.

2 (LAUGHTER.)

3 CHAIRMAN BABCOCK: Stephen Yelenosky.

4 MR. YELENOSKY: Well, I was feeling
11:22 5 comfortable with the idea, Justice Hecht, until you said
6 not many, you didn't think many judges would want to do
7 it. So that to me argues against the notion that you
8 could be selective. And so how would the Court be
9 selective if it doesn't have many who want to do it?

11:22 10 JUSTICE NATHAN HECHT: I'm just assuming.
11 Well, if somebody just said "Well, I'm not doing anything
12 right now and I could do it."

13 MR. ORSINGER: "I can't get a job anywhere
14 else."

11:22 15 JUSTICE NATHAN HECHT: And demonstrated no
16 expertise, we wouldn't want to do that and if the Court
17 felt like that was just not a procedure that it could
18 police effectively given all of the circumstances.

19 CHAIRMAN BABCOCK: Buddy.

11:22 20 MR. LOW: I was thinking about creating a
21 pool; but not necessarily applying, the Court knowing.
22 Don't put it on the basis that you've got to apply to the
23 Court. The Court could feel free and be able to agree to
24 a pool and get agreement of those people, because the
11:22 25 Court can find out information.

1 MR. YELENOSKY: Buddy, could you repeat
2 everything you just said?

3 MR. LOW: I say have a pool, not that
4 everybody has to apply. The Court knows certain judges.
11:23 5 And they might not, they might be bashful, not brag about
6 their skills; and say "Would you agree to be in this
7 pool?" "Yes, I would." So I wouldn't put it just on
8 those who quote "apply," because a lot of times you don't
9 get the best applicant.

11:23 10 CHAIRMAN BABCOCK: Kent, did you have
11 something?

12 MR. SULLIVAN: Just as a philosophical
13 matter, I voted to give the MDL panel maximum discretion
14 because I think whether you want to or not, you have to
11:23 15 have confidence in the discretion of the panel given the
16 circumstances. They have extraordinary power and
17 extraordinary discretion as it is now. If you want to
18 limit their discretion because you have some fear they're
19 going to do something inappropriate, with all due respect
11:24 20 they've got plenty of opportunity even under the narrowest
21 of circumstances. You could restrict it to only active
22 district judges, and if the fear is "Oh, gosh. They're
23 going to, you know, they might pick the wrong person,"
24 there are plenty of wrong people to pick from. So given
11:24 25 that you are dependent for that system to work upon their

1 exercise of proper discretion it seems to me you may as
2 well go the whole nine yards and give them the added
3 discretion. It might allow them to pick the very best
4 person available under the circumstances.

11:24 5 CHAIRMAN BABCOCK: What about giving some
6 reaction to Justice Hecht about his concept squeezing the
7 number down to a defined group? Would that make it any,
8 for the 14 people that voted against giving them the
9 discretion would that make it any more palatable?

11:24 10 MR. SOULES: It would for me.

11 CHAIRMAN BABCOCK: Good for you.

12 PROFESSOR DORSANEO: (Nods affirmatively.)

13 CHAIRMAN BABCOCK: Bill, you as well.

14 PROFESSOR DORSANEO: (Nods affirmatively.)

11:25 15 MR. ORSINGER: And you wouldn't solicit
16 active judges for your list. Any active judge plus
17 retired judges that you feel are qualified?

18 HONORABLE NATHAN HECHT: Well, I just think
19 as a practical matter you can't send these cases to
11:25 20 somebody who doesn't want to do them.

21 HONORABLE SCOTT BRISTER: Right. I think
22 even the panel is going to have some way to find out
23 before we transfer cases do you want it.

24 HONORABLE NATHAN HECHT: And can you handle
11:25 25 it? There are going to be a lot of judges that just say,

1 you know, particularly out in the country, and we have
2 talked about this some; but judges with criminal
3 jurisdiction and civil jurisdiction are going to have to
4 wonder, you know, can they do the kind of pretrial this is
11:25 5 calling for and still manage a criminal docket? I don't
6 know.

7 CHAIRMAN BABCOCK: Judge Peeples.

8 HONORABLE DAVID PEEPLES: The group of
9 people we're talking about, these retired judges,
11:25 10 generally have a high level of self confidence. Okay.
11 Judge, I think a lot of them would be interested. And
12 number two, with the drastic cutback on the money
13 available there is not as much work available, and they
14 all know there won't be as many assignments. I think
11:26 15 there will be a good many people willing to do it who in
16 the era of plenty that we just left might have been more
17 selective; but they'll take on this hard work. I think
18 there will be a lot of them who would be willing in this
19 new era we're going into.

20 CHAIRMAN BABCOCK: Judge Gray.

21 HONORABLE TOM GRAY: David, you raised an
22 issue that I have been loath to address in this context.
23 If you're one of these retired or senior judges on one of
24 these, are you going to give the as I understand it the
11:26 25 administrative judge that controls the purse strings on

1 the payments for these visiting judges are you going to
2 give them veto power over who might otherwise be assigned
3 because they don't have the budget for it?

4 HONORABLE DAVID PEEPLES: That's a great
11:26 5 point. The prospect of having your own little pot of
6 money used up by a judge assigned by someone else I think
7 would not go down well with presiding judges. I think it
8 needs to meet with their consent, with the consent of
9 whoever has that judge in his or her region.

11:27 10 MR. SUSMAN: So we can move on the process,
11 can we take a vote on, the same vote we just took except
12 add the Hecht clause that it can only be assigned to a
13 pool of judges who have been prescreened by the Supreme
14 Court and see if you can pick up instead of a 17 to 14
11:27 15 vote, see if you get an overwhelming majority?

16 CHAIRMAN BABCOCK: Did you hear that?

17 MR. SUSMAN: Because you were going around
18 the table and people were changing their votes, and I
19 think that may be the direction.

20 CHAIRMAN BABCOCK: Nina.

21 MS. CORTELL: I would like to understand the
22 economics of this, because I think a number of us, if not
23 many, have seen abuses when there have been appointed
24 judges, maybe a sense of too much time spent or things
11:27 25 done for economic reasons. So I would like to understand

1 the economic particulars of using a visiting judge in this
2 context. Does that make sense?

3 CHAIRMAN BABCOCK: I think your question
4 makes sense. I don't know the answer.

11:28 5 MR. ORSINGER: It's a per diem. They get
6 paid by the day even it's a 30-minute day or a 12-hour
7 day. Isn't that right?

8 HONORABLE SCOTT BRISTER: At least on the
9 appellate level the current discussions are the old
11:28 10 practice of appointing a judge and just approving their
11 chits how long my court told me to send a letter to people
12 for next year that it basically will be a flat rate. If
13 you want assignments to appeals courts, you work on it
14 three days. After that you're volunteering and you have
11:28 15 to agree that if you want to be a visiting judge. There
16 will be some of that; but nobody knows what that is going
17 to work out to.

18 CHAIRMAN BABCOCK: Judge Benton, do you have
19 something?

11:28 20 HONORABLE LEVI BENTON: I was going to say
21 regarding whether or not it changes any of our votes if we
22 have this panel, I think it's bad policy and unfair to the
23 taxpayers of the state when we have 400 plus district
24 judges, you have appellate judges now who are in rural
11:29 25 counties with a lack of work to do, with all due respect

1 to Justice Gray I don't understand why we can't use some
2 of these appellate judges to sit on the panel.

3 CHAIRMAN BABCOCK: He was just kidding you.
4 He would love to do it.

11:29 5 HONORABLE LEVI BENTON: I think it's unfair
6 to the taxpayers of the county, of the state.

7 CHAIRMAN BABCOCK: Okay. We'll go down the
8 table. Skip and then Judge Christopher and then Sarah.

9 MR. WATSON: I had voted "no" because of
11:29 10 really what Nina articulated. I have seen abuses of the
11 visiting judge system; and with that amount of money being
12 drastically shrunk back those judges who have been relying
13 on that, both good and bad judges, but who have been
14 relying on that pocketbook are going to gravitate toward
11:30 15 this system. And you're going to have good ones and bad
16 once gravitating. And Bill I think raised a legitimate
17 point, because everyone is a friend of everyone, how
18 selective can the Supreme Court be of saying "Your
19 next-door neighbor is going to be on the list; but you're
11:30 20 not on the list. And now let's shake hands and everything
21 is going to be fine." And it's going to come down to
22 that, because that's where the people are going to
23 gravitate.

24 And our experience has been that the selectivity that
11:30 25 is supposed to be going on is not necessarily occurring,

1 and that there are some bad ones who are slipping in
2 because they really need the work.

3 CHAIRMAN BABCOCK: Judge Christopher and
4 then Justice Duncan.

11:30 5 HONORABLE TRACY CHRISTOPHER: There are
6 several layers of costs involved with the visiting judge.
7 You have the salary which is paid by the State, which is
8 now allowed to be paid on a half-day basis if they only
9 work a half day; but for retirement purposes if a judge
11:31 10 works one day a month, they get a certain credit for
11 retirement towards getting either their 12 years or their
12 20 years, which makes a difference how much money they get
13 when they retire. So there's a retirement cost. And if
14 you work as many as 15 days a month, you get an extra
11:31 15 benefit in terms of how much the visiting judge has to pay
16 into the retirement system. So there is an incentive for
17 people to work 15 days a month if they can get it, because
18 it helps them in their retirement.

19 And then there is a cost to the county if the person is
11:31 20 out of the county. The county pays for the housing and
21 for meals and generally the court reporter and a courtroom
22 assuming we have to hire a separate court reporter and not
23 use the court reporter of the trial court. So that's the
24 cost involved.

11:32 25 CHAIRMAN BABCOCK: Justice Duncan.

1 HONORABLE SARAH B. DUNCAN: And who pays,
2 Tracy, for a court clerk and a bailiff?

3 HONORABLE TRACY CHRISTOPHER: The county
4 does.

11:32 5 HONORABLE SARAH B. DUNCAN: I mean, the
6 ordinary visiting judge system I can understand if the
7 visiting judge is moved into the judge who is on
8 vacation's court and sort of inherits a bailiff and court
9 clerk.

11:32 10 HONORABLE TRACY CHRISTOPHER: We have, we
11 had a judge called and impact court judge; and we would
12 hire a separate court reporter for the day, and we didn't
13 hire a separate bailiff. We usually made due with the
14 bailiffs; but we had to hire a separate court reporter for
11:32 15 the day, and we used one of the empty courtrooms.

16 HONORABLE SARAH B. DUNCAN: And the court
17 clerk?

18 HONORABLE TRACY CHRISTOPHER: The court
19 clerk?

11:32 20 HONORABLE SARAH B. DUNCAN: Or coordinator,
21 whatever you call it?

22 HONORABLE TRACY CHRISTOPHER: No, we didn't
23 hire a separate clerk for that case. But if you had a
24 visiting judge here, I'm wondering whose clerk court is
11:33 25 going to want to be responsible for it.

1 HONORABLE SARAH B. DUNCAN: I am too. I
2 mean, that's one of the problems in the appellate courts
3 that we had with visiting judges is it's one thing to go
4 get yourself a visiting judge in the appellate court. But
11:33 5 who's staff attorney and briefing attorney are going to be
6 drafting opinions or handling motions and orders? And
7 David, what is your view? Where is the staff for this
8 retired or senior judge going to come from?

9 HONORABLE DAVID PEEPLES: I think, I mean,
11:33 10 the clerk and the court reporter? Ideally if you appoint
11 somebody let's say from Austin, you would hope that that
12 retired judge would talk with the people here and say
13 "What is a good day for me to have a half-day hearing?"
14 And they would say "Friday afternoon."

15 (LAUGHTER.)

16 HONORABLE DAVID PEEPLES: And the staff is
17 already there.

18 HONORABLE SARAH B. DUNCAN: So they could
19 just slip in.

11:34 20 HONORABLE DAVID PEEPLES: I would hope that
21 people have the sense to do that.

22 HONORABLE SARAH B. DUNCAN: I see. It was
23 just a question. I wasn't...

24 HONORABLE DAVID PEEPLES: No.

11:34 25 HONORABLE SCOTT BRISTER: And considering

1 convenience to the parties, you're not, and that this
2 visiting judge can be anywhere, you're not going to -- you
3 still have to transfer to a court, district court, you're
4 not going to do the Eagle Pass court. It's going to be a
11:34 5 metropolitan area and say to the Bexar County court pick a
6 number with this visiting judge as being the exclusive
7 judge and then work it out, because the metropolitan areas
8 are easier to get to.

9 HONORABLE DAVID PEEPLES: It would be in the
11:34 10 county where that judge lives. I would think somebody who
11 lives in the county they used to be a judge in has rapport
12 with the courthouse people and will get it done.

13 CHAIRMAN BABCOCK: Tommy.

14 MR. JACKS: I was less concerned about all
11:34 15 these fiscal consideration; and I guess I'm one of the
16 lawyers David had in mind when he talked about the lawyers
17 who just hate visiting judges. You lost me when you took
18 "agreement" out and no right to object; and my mind is not
19 changed if there is a pool that the Supreme Court had
11:35 20 invented in some way. I can see use of such a pool where
21 if both sides were to agree to someone drawn from a pool
22 by both sides, I mean those that are the players at the
23 time that the matter is before the panel because they have
24 existing cases; but I'm loath to see a system that imposes
11:35 25 visiting judges on the process where the lawyers are,

1 don't have any right to say anything about it.

2 CHAIRMAN BABCOCK: Judge Gaultney.

3 HONORABLE DAVID GAULTNEY: I thought there
4 was some concern about perhaps or someone about maybe, if
11:35 5 I heard if right, a visiting judge doing things that don't
6 need to be done in the case because it's financially their
7 incentive to do it. I don't know if I heard that or not.
8 We gave the MDL panel authority to remove someone who is
9 not working; and I wonder if that is sufficient control.

11:36 10 MR. JACKS: I think the concern is they work
11 too much.

12 HONORABLE DAVID GAULTNEY: That's what I
13 meant. They were working too much on a file.

14 CHAIRMAN BABCOCK: Churning.

11:36 15 (LAUGHTER.)

16 HONORABLE DAVID GAULTNEY: Would that be
17 within the MDL panel's ability to control? I don't know.

18 HONORABLE SCOTT BRISTER: No.

19 HONORABLE DAVID GAULTNEY: Probably not.

20 CHAIRMAN BABCOCK: Okay. Yes, Bob.

21 MR. PEMBERTON: A quick observation: If the
22 Court does go down the road with some kind of
23 certification process, there is a little known draft of a
24 visiting judge peer review somewhere that might provide a
11:36 25 good framework for that.

1 CHAIRMAN BABCOCK: Okay. The vote last time
2 was 17 to 14. Yes, Richard.

3 MR. ORSINGER: Something that Judge Brister
4 said had me curious; and something you said follow-up is
11:37 5 that you're going to pick a judge who is going to be in
6 the county and is going to hear these hearings in the
7 county where the judge lives. In other words, you
8 couldn't pick a judge from a rural county or say from Fort
9 Bend County or Conroe, but tell them to go meet in Houston
11:37 10 where everybody is flying in and out of Hobby Airport.

11 HONORABLE SCOTT BRISTER: I think you could.

12 MR. ORSINGER: Okay. So we may be picking
13 somebody from West Texas to have hearings in Houston.

14 HONORABLE SCOTT BRISTER: Right. But then
11:37 15 you get into travel expense. But if it's somebody from
16 Conroe who drives to Houston, you don't.

17 MR. ORSINGER: Okay. But I mean, we need
18 to --

19 HONORABLE SCOTT BRISTER: Or Kerrville to
11:37 20 drive to San Antonio.

21 MR. ORSINGER: I think you should have the
22 flexibility to take a judge from North Texas who may
23 decide to hear the case in Houston. I think you need that
24 flexibility. Otherwise you're limited to retired judges
11:37 25 who live in Houston.

1 CHAIRMAN BABCOCK: You have the flexibility.

2 MR. ORSINGER: Okay. I just wanted to be
3 sure.

11:38

4 CHAIRMAN BABCOCK: It's just a matter of
5 whether you use it. Justice Duncan.

6 HONORABLE SARAH B. DUNCAN: I just want to
7 ask Tommy a question. How would you feel or how do you
8 feel if you were the attorney in a tag-along case and the
9 Rule says you no longer have an objection?

11:38

10 MR. JACKS: Well, I don't see a practical
11 way to do it otherwise. I don't see how you could come
12 along later and remove the judge who is already in the
13 midst of things. I don't see a workable way to do that.
14 I think the lawyers on both sides who are going through
15 the stage in litigation before the panel ought to have
16 input into the process.

11:38

17 CHAIRMAN BABCOCK: Okay. We've got the vote
18 was 17/14 last time. Let's change the hypothetical
19 slightly. And now the MDL panel can assign active
20 district judges and retired or senior district judges from
21 a list supplied to them by the Texas Supreme Court, but
22 again abrogating the right to object to those retired or
23 senior district judges. So with that, with the Hecht
24 Compromise grafted onto this, how many people are in favor
25 of that? And how many are opposed? You picked up a few

11:39

1 votes, four exactly. It's 21 to 10, so you picked up four
2 votes with your silly compromise.

3 (LAUGHTER.)

4 JUSTICE NATHAN HECHT: That's better than I
11:40 5 can do on my own court.

6 (LAUGHTER.)

7 CHAIRMAN BABCOCK: Okay. So that sounds
8 like a policy, from a policy standpoint that's where we
9 are telling you to go. And Judge Peeples, does that mean
11:40 10 that we should skip over this never ending footnote and go
11 to (b), Authority of Pretrial Court?

12 HONORABLE DAVID PEEPLES: We need to nail
13 down the last sentence of (a).

14 HONORABLE SCOTT BRISTER: Surely everybody
11:40 15 agrees that when the panel has in mind the panel picks a
16 judge and that judge is nobody is sitting in their court
17 for a week ought to be fooling with it.

18 HONORABLE SARAH B. DUNCAN: Are we not going
19 to vote on the Peeples Compromise?

11:40 20 CHAIRMAN BABCOCK: We can if you want; but
21 it seems to me that it would be inconsistent with what we
22 just voted on.

23 HONORABLE DAVID PEEPLES: We could give the
24 Supreme Court the option of going with what Justice Hecht
11:41 25 suggested or going with the compromise.

1 CHAIRMAN BABCOCK: Right.

2 MR. GILSTRAP: Especially if the Court
3 concludes that it can't, that 74 is a problem.

4 JUSTICE NATHAN HECHT: I am not sure we are
11:41 5 going to do this. I was just trying to get feedback for
6 the Court.

7 CHAIRMAN BABCOCK: That last vote is based
8 on the assumption that you could do this. Should we have
9 a vote on Judge Peeples'?

11:41 10 HONORABLE SARAH B. DUNCAN: I think so.

11 CHAIRMAN BABCOCK: Judge Peeples, do you
12 want to have a vote on your proposal? Are you strong
13 enough to withstand the scrutiny?

14 HONORABLE DAVID PEEPLES: I think the
11:41 15 alternative of having a vote on mine is to just give the
16 Supreme Court only the Hecht Compromise or policy or
17 whatever we call it, and what happens if they don't want
18 to do that? Give them an alternative.

19 CHAIRMAN BABCOCK: Let's vote on the Peeples
20 Choice.

21 (LAUGHTER.)

22 CHAIRMAN BABCOCK: So this would be the MDL
23 panel has the authority to appoint active district judges
24 and retired or senior district judges, but only with the
11:42 25 agreement of the parties who are present at the time of

1 the decision. Okay. So everybody -- Carl.

2 MR. HAMILTON: The fact of the matter, how
3 is the MDL panel going to get the consent of everybody?

4 CHAIRMAN BABCOCK: Well, I think we talked
11:42 5 about that. One way would be to send a letter out saying
6 "We're planning on appointing Justice Guittard," bad
7 example, somebody of that stature, "Anybody object?" And
8 if nobody objects within seven days, then he's it.

9 HONORABLE DAVID PEEPLES: I think you would
11:42 10 have a conference call with the leaders on both sides
11 saying "We'd like to go with Judge Jones. Do you think
12 that's all right?" "Yes. We think that's okay." And
13 then a letter would go out I think to everybody saying
14 Judge Jones is appointed. If you have objection, you've
11:43 15 got seven days to say so," something like that. I think
16 to get a bunch of signatures on a page would be
17 prohibitively complicated.

18 CHAIRMAN BABCOCK: Steve.

19 MR. SUSMAN: If the parties agree, could it
11:43 20 be a non-judge? I mean, that's a stupid question. I
21 mean, if the parties agree, suppose we want to use a
22 former federal judge to supervise this MDL procedure. Can
23 that by agreement be done?

24 MR. ORSINGER: That's arbitration.

11:43 25 MR. SUSMAN: Would his decision be

1 appealable, or does it have to be a retired judge?

2 MR. GILSTRAP: How would they be paid?

3 CHAIRMAN BABCOCK: The statute says "A judge
4 qualified and authorized by law to preside in the district
5 court" --

6 MR. SUSMAN: Okay. That's right.

7 MR. LOW: You are assuming. If the Court
8 decides they don't have that authority, then would we go
9 with this?

11:44 10 CHAIRMAN BABCOCK: Right. If they decide
11 they don't have the authority under Government Code
12 Section 74 to abrogate the objection, --

13 MR. LOW: Right.

14 CHAIRMAN BABCOCK: -- do we think this would
11:44 15 be a good idea? So everybody in favor of the Peeples
16 Choice raise your hand. All those opposed? It looks like
17 29 to 1. 29 to 2. Judge Benton, sorry.

18 HONORABLE DAVID PEEPLES: Just for the
19 record, that includes no objection by a tag-along case;
11:44 20 and you have got to have that.

21 MR. ORSINGER: That's right.

22 CHAIRMAN BABCOCK: You have got to be
23 present at the time of the decision. Judge Bland.

24 HONORABLE JANE BLAND: On the language
11:45 25 should we remove "district judge" from "retired or senior

1 district judge" to clarify it could be a retired appellate
2 judge who was also a retired district judge who at one
3 point sat on a district bench? I don't know. I just
4 foresee that the statutory language is broader than what
11:45 5 this is. So why don't we? That way we won't have an
6 argument if we have an appellate judge who is appointed,
7 retired appellate judge who is appointed, their last
8 position was in the appellate court.

9 CHAIRMAN BABCOCK: What do you think about
11:45 10 that, David?

11 HONORABLE DAVID PEEPLES: Frankly, I can
12 think of some retired appellate justices that never were
13 trial court judges who would be very good.

14 HONORABLE JANE BLAND: Right. That, and let
11:45 15 me just, because I'm not sure we wouldn't get an argument
16 where somebody who actually was a district judge and then
17 went on wouldn't be able to do it.

18 HONORABLE DAVID PEEPLES: Right. And as it
19 stands right now a retired appellate justice who never was
11:46 20 a trial judge can be assigned to sit in a trial court.

21 MS. BLAND: Right.

22 HONORABLE DAVID PEEPLES: I think that's
23 probably a good suggestion. Take out "district"?

24 CHAIRMAN BABCOCK: Right.

11:46 25 MR. SOULES: As long as we know he's sitting

1 in a court not higher on which the judge sat in practice.

2 HONORABLE JANE BLAND: Well, sometimes we
3 like to think so; but I don't think the district courts
4 are higher than the appellate courts.

11:46 5 MR. SOULES: County Courts at Law?

6 HONORABLE SCOTT BRISTER: I mean, the
7 legislature could transfer him to a district court; and
8 that includes county court judges.

9 HONORABLE NATHAN HECHT: Well, no. Some
11:46 10 county judges can sit in district courts, I think.

11 HONORABLE DAVID PEEPLES: The statutes --
12 this is pretty incredible. The statutes do allow a
13 retired county court judge to be assigned to do district
14 court work. I just think that it's inconceivable that
11:46 15 would happen here.

16 CHAIRMAN BABCOCK: Richard.

17 MR. ORSINGER: Since we are going to
18 bifurcate the possible assignment of a judge from a court,
19 we probably need to include in our original assignment
11:47 20 language if you pick a retired judge, you're going to also
21 have to pick an active court to assign the judge to so
22 they have a clerk and a courtroom and a place.

23 HONORABLE SCOTT BRISTER: We know that.

24 MR. ORSINGER: Okay. It had never been
11:47 25 mentioned.

1 HONORABLE SCOTT BRISTER: Right.

2 MR. ORSINGER: So I just thought.

3 CHAIRMAN BABCOCK: Good to bring it up.

4 Steve.

11:47 5 MR. YELENOSKY: Yes. I just wanted to ask.
6 I understand the tag-along cases; but I think I'm still
7 unclear about the situation where you have identified
8 related cases; but you are asking for a transfer of a
9 subset of those cases, which we contemplated as possible
11:47 10 here. Right? You could say you identify a number of
11 cases, but we're only asking for a transfer of some cases.
12 Right, Judge Brister?

13 HONORABLE SCOTT BRISTER: Right.

14 MR. YELENOSKY: So in that situation we've
11:47 15 also said or Judge Brister has said that the MDL panel
16 would have authority to nonetheless transfer the whole
17 set, not just the subset. And my question is what about
18 those who were not asked to be transferred but the MDL
19 panel is going to transfer? What right, if any, and what
11:48 20 is the mechanism for them to object or be involved in the
21 appointment of a visiting judge?

22 HONORABLE SCOTT BRISTER: If we know about
23 them before the hearing, we can send them notice of the
24 hearing and they can come and object; but otherwise if we
11:48 25 don't know about them, it's the same as tag-along cases.

1 They're out of luck.

2 MR. ORSINGER: Maybe we should require that
3 rather than leave it discretionary with the panel since we
4 are talking about something that's pretty fundamental.

11:48 5 HONORABLE SCOTT BRISTER: The problem is
6 it's one common question of fact. So if it's a bus wreck,
7 do you send notice to everybody that was in a bus wreck
8 anywhere? It's impossible to define I believe how far you
9 want to go and no further in a Rule, because it's as
11:48 10 unlimited as the number of possible fact situations.

11 CHAIRMAN BABCOCK: Yes. And remember, the
12 panel, the MDL panel is going to have a list of cases,
13 both the ones that are sought to be transferred and other
14 related cases at the time that they make this decision;
11:49 15 and that's the best they can possibly hope to do.

16 MR. ORSINGER: But we could require that
17 somebody give notice to everyone on the list if there is
18 going to be a retired judge so that this vote which is
19 premised on the idea that all the players get a chance to
11:49 20 strike is actually meaningful.

21 CHAIRMAN BABCOCK: But that's what Judge
22 Brister just said, that if the decision is going to be to
23 appoint a retired or a senior district judge or a
24 appellate judge or whatever, then there may be something
11:49 25 like a telephone call; but then there is going to be a

1 letter sent out that says you have seven days to object to
2 this case.

3 MR. ORSINGER: And will the letter go out to
4 all the people who are listed even if there is no motion
11:49 5 to transfer them?

6 CHAIRMAN BABCOCK: That's what Judge Brister
7 just said.

8 MR. ORSINGER: Well, I thought he said that,
9 I thought he said, number one, "may," "the panel may do
11:50 10 it." And number two, the panel probably doesn't know who
11 they all are, where their addresses are. So I'm hearing
12 him say that that's not going to happen.

13 HONORABLE SCOTT BRISTER: I would think if
14 we have at least a hint that somebody is being
11:50 15 intentionally excluded, that we're going to ask about it.
16 I mean, you know, we can revisit what we did yesterday.
17 Do you want to make it "all related cases," or do you want
18 to make it "all related cases that somebody wants a
19 remove"?

11:50 20 MR. ORSINGER: I just want to be realistic
21 about it.

22 HONORABLE SCOTT BRISTER: That's the same
23 thing we talked about yesterday.

24 MR. ORSINGER: We're giving this choice to
11:50 25 strike to people that the movant essentially selects.

1 CHAIRMAN BABCOCK: Hold on. Yesterday we
2 decided in (b)(1) that the motion would state the cause
3 number, style and the trial court of related cases and
4 those for which transfer was sought.

11:50 5 HONORABLE SCOTT BRISTER: Right.

6 CHAIRMAN BABCOCK: So the MDL panel is going
7 to have a list of the movant's view of what the related
8 cases are, which could be broader than those cases that
9 they seek to transfer. Okay. So that's what they are
11:51 10 going to have.

11 MR. ORSINGER: Okay. And is there any
12 requirement of notice to those other cases? Or if the
13 Supreme Court goes with the Peoples consensus of 10 days
14 to file your objection or it's waived, is there any
11:51 15 guarantee anywhere that these other people who are not
16 selected by the movant to be players will have notice and
17 an opportunity to exercise their strike?

18 CHAIRMAN BABCOCK: What I heard -- well,
19 I'll let Justice Brister speak for himself. What I heard
11:51 20 him saying is yes, if they get a motion that says "We want
21 to transfer 10 cases. Here they are"; but there are also
22 10 other cases that are related cases, but we don't seek
23 to transfer them, then they are going to give notice to
24 all 20 cases that a visiting judge is about to be
11:51 25 appointed. That's what I heard him say.

1 MR. ORSINGER: Okay. I sure would like to
2 see that in some kind of Rule so that when Justice Brister
3 retired from that panel we know that the same thing will
4 happen afterward.

5 CHAIRMAN BABCOCK: Alex.

6 PROFESSOR ALBRIGHT: Couldn't this be solved
7 pretty easily if you're going to draft the Peeples
8 Compromise by agreement?

9 CHAIRMAN BABCOCK: We're calling this the
10 "Peeples Choice" and the "Hecht Compromise."

11 PROFESSOR ALBRIGHT: Okay, the "Hecht
12 Compromise." I think this would apply only to the Peeples
13 Choice. If you've got to get agreement from people, then
14 it's agreement by the people in the case, the cases that
15 are subject to the transfer order. That's the only time
16 it's going to matter. If we're killing strikes, then they
17 don't get to strike anyway.

18 MR. YELENOSKY: But what you said is
19 important. You said people who are subject to the
20 transfer order, which isn't clear from our prior
21 discussion, as opposed to people who are sought to be
22 transferred.

23 PROFESSOR ALBRIGHT: Because at this
24 point --

25 HONORABLE SCOTT BRISTER: Mr. Chair, I am

1 going to change. Can I change my vote and say if this is
2 that complicated, we ought to just forget about it,
3 because there are more important issues we're never going
4 to get to unless we do this. I'd like a re vote. If
11:53 5 we're going to have to go into all this, forget it. No
6 visiting judges, because it's too much trouble with other
7 important things we do need guidance on.

8 CHAIRMAN BABCOCK: Well, we do need to move
9 on; but I think the Court wants the benefit of our views
11:53 10 on this, because they may not throw up their hands,
11 although they may.

12 HONORABLE SCOTT BRISTER: I bet the Court is
13 not going to try to draft who we should send notice to
14 before we decide whether to strike or not. I bet
11:53 15 that's -- they're going to want to know what can the trial
16 judge undo when it goes back down; and we haven't even
17 gotten close to that.

18 CHAIRMAN BABCOCK: We've got to get to that
19 for sure. But Justice Orsinger would definitely want to
11:53 20 include that.

21 MR. ORSINGER: I think that's well
22 documented in the record.

23 (LAUGHTER.)

24 CHAIRMAN BABCOCK: Yes, Bobby.

11:53 25 MR. MEADOWS: Judge Brister made the same

1 point yesterday; and I really just want to raise a
2 question, if rather than taking this matter up point by
3 point in order why don't we take up the most difficult
4 issues first, let Scott identify what they are rather than
11:54 5 just kind of working our way through the Rule?

6 CHAIRMAN BABCOCK: Because I think, Bobby,
7 for example, the decision that we made yesterday on
8 13.1(b)(1) is a building block to how we decide this
9 issue.

11:54 10 MR. MEADOWS: All right.

11 CHAIRMAN BABCOCK: And I don't think we
12 could have framed this issue if we had not already decided
13 that the motion is going to have --

14 HONORABLE SCOTT BRISTER: I think we've got
11:54 15 to get through all of them this weekend, because time has
16 run out.

17 CHAIRMAN BABCOCK: Right. And we will. We
18 will. Let's go to the last sentence here. Judge Peeples
19 said, and I agree surely nobody objects to this.

11:54 20 HONORABLE DAVID PEEPLES: The judge who gets
21 the case has exclusive jurisdiction and other judges can't
22 tamper with it.

23 MR. MEADOWS: Agreed.

24 CHAIRMAN BABCOCK: Did everybody hear that?
25 Okay.

1 HONORABLE DAVID PEEPLES: (b), Authority of
2 the pretrial Court, the first sentence gives the pretrial
3 judge the authority to change interlocutory rulings that
4 have been made by the trial court from whom the case was
11:55 5 transferred, and I would say "may modify or set aside any
6 pretrial ruling," the word "modify."

7 MR. SOULES: 13 point what?

8 HONORABLE DAVID PEEPLES: 13.5(b).

9 HONORABLE SCOTT BRISTER: 13.5(b).

10 HONORABLE DAVID PEEPLES: Except for the
11 long footnote.

12 HONORABLE SCOTT BRISTER: Sorry. I didn't
13 number these.

14 HONORABLE DAVID PEEPLES: And then the
11:55 15 second long sentence just elaborates --

16 MR. TIPPS: "May modify" --

17 HONORABLE DAVID PEEPLES: Pardon?

18 MR. TIPPS: "May modify or set aside".

19 HONORABLE DAVID PEEPLES: Yes. That's what
11:55 20 I would say. The second sentence just spells out with
21 some particularity the various things that the pretrial
22 Court can do. Present Rule 11 and the statute mention
23 summary judgment and dispositive motions. It seems to me
24 that, it seemed to the subcommittee that it was helpful to
11:56 25 specify all these powers just to let lawyers and judges

1 know it's pretty expansive what this pretrial court can
2 do.

3 HONORABLE SCOTT BRISTER: The main thing I
4 had in mind was we found on the asbestos cases, and again
11:56 5 I think the one that probably troubles most lawyers is the
6 preadmission of exhibits and motions in limine because
7 that sounds like trial; but our experience in the asbestos
8 cases, boy, that was the best thing one judge could do was
9 get to the issue of whether in a specific document or not
11:56 10 you wanted to undo it, especially if it's a case with 300
11 documents and, you know, on the asbestos cases with 37
12 motions in limine on each side, boy, it sure would save
13 time to have them work through them all. And then when it
14 came to me for trial if they -- you know, they knew my
11:57 15 patience limit. If they had two or three they wanted to
16 fight over, we fought about those; but we didn't have to
17 do all 37 motions in limine again.

18 So the subcommittee's thought was, you know, to spell
19 these out, not an exclusive list, because otherwise people
11:57 20 are going to wonder whether you can or can't.

21 HONORABLE DAVID PEEPLES: The powers are
22 there.

23 HONORABLE SCOTT BRISTER: Right.

24 HONORABLE DAVID PEEPLES: This just spells
11:57 25 them out.

1 CHAIRMAN BABCOCK: And the motion in limine
2 is probably the one that we're going to have to get to
3 later when we talk about whether a trial judge --

4 HONORABLE SCOTT BRISTER: Can undo.

11:57 5 CHAIRMAN BABCOCK: -- can undo or not.

6 HONORABLE SCOTT BRISTER: But the concept
7 here would be just does anybody disagree that,
8 understanding we'll have to fight about what parts of it
9 they can undo, there will be at least some parts of the
11:57 10 motion in limine we could dispose of at once for all 1500.

11 CHAIRMAN BABCOCK: Judge Gray.

12 HONORABLE TOM GRAY: I think we've got the
13 cart before the horse, because this is talking about what
14 the pretrial court can do.

11:57 15 CHAIRMAN BABCOCK: Right.

16 HONORABLE TOM GRAY: And I guess in a way
17 it's not, because Scott is moving through what they can
18 undo on remand; but this is just as, whether or not the
19 pretrial Court can, one, undo what the trial Court did
11:58 20 before the transfer and the scope of what they can do
21 while they have it.

22 CHAIRMAN BABCOCK: Right. But --

23 HONORABLE TOM GRAY: I was the advocate of
24 leaving out all the details and say "may set aside or
11:58 25 modify any or all pretrial ruling made by the trial court

1 before the transfer" and not limit it and then let the
2 parties decide what that scope -- not the parties, but the
3 Rule.

4 CHAIRMAN BABCOCK: Buddy and then Bill.

11:58 5 MR. LOW: I think if we talk about what they
6 can do, summary judgments, stuff like that, I would leave
7 it where he has sole and exclusive authority to modify,
8 correct and enter such orders as he would have as any
9 other district judge with exclusive jurisdiction, and that
11:58 10 means everything other than trial.

11 HONORABLE SCOTT BRISTER: Let me ask you, if
12 that's all it says generally, then what if somebody moves
13 to exclude on a Daubert motion? Is that part of trial or
14 is that pretrial?

11:59 15 MR. LOW: No. I mean, doesn't he have
16 jurisdiction?

17 CHAIRMAN BABCOCK: It depends.

18 MR. LOW: The original court, ordinarily
19 just any district judge can say it's not here. Wouldn't
11:59 20 you as a district judge have jurisdiction to do that?

21 HONORABLE SCOTT BRISTER: My bet is the
22 pretrial courts are going to rule differently on that one.
23 Some are going to say "Nope. That's a trial thing," and
24 some are going to say "Nope. That's a pretrial thing."

11:59 25 CHAIRMAN BABCOCK: Bill and then Steve.

1 PROFESSOR DORSANEO: I think you can tell
2 what is a trial thing by reference to when the trial has
3 started which is when, perhaps slightly earlier, when the
4 first witness is called to testify. I don't agree with
11:59 5 that. I like the idea of the first sentence. I don't
6 think it needs to say in place of the trial court in the
7 sentence; but that's just wording.

8 But I also wonder whether it's wise to make it that
9 broad. I mean, why would the pretrial court be wanting to
12:00 10 redetermine special appearance motions or venue questions
11 that have been handled? I don't understand going that
12 far; but maybe I'm misguided.

13 CHAIRMAN BABCOCK: A tacet admission.
14 Steve. Steve, did you have your hand up?

12:00 15 MR. SUSMAN: No. I mean, why wouldn't you?
16 I mean, I just don't understand why you wouldn't allow the
17 pretrial court to undo anything that's been done before.

18 PROFESSOR DORSANEO: Because then the
19 pretrial court will be asked to undo everything, and you
12:00 20 will revisit everything; and I don't see the point in that
21 just for the sake of doing things over again.

22 MR. SUSMAN: But the problem is, I mean, how
23 are you going to make a list of what they can? Isn't that
24 going to be really complicated to come up with a list of
12:01 25 what they can redo and what they can't redo?

1 PROFESSOR DORSANEO: I would make the list
2 by reference to specific dilatory pleas like a special
3 appearance motion, venue ruling. I might stop there.
4 Joinder of parties, a determination of whether somebody is
12:01 5 needed for just adjudication, that might be one.

6 MR. SUSMAN: Okay.

7 PROFESSOR DORSANEO: But I wouldn't go very
8 far. But some of these things that are already done and
9 in a complete package, to do them over again would seem to
12:01 10 me to be a bad idea unless there is some good reason to do
11 them over again.

12 CHAIRMAN BABCOCK: Judge Bland and then
13 Kent.

14 HONORABLE JANE BLAND: I think there is a
12:01 15 general reticence among trial judges to undo the rulings
16 of their predecessors on a given case; but I think if I
17 were the pretrial judge, you know, and in one of the cases
18 that a judge had granted a special appearance and in the
19 other 500 that I had I thought the special appearance
12:02 20 ought to be denied, I would want the ability to say "This
21 case is just like my other 500 cases. I think it ought to
22 be denied." I'm the one that, you know, that pretrial
23 ruling is going to be appealed from. It should be my call
24 about whether or not I can undo it.

12:02 25 PROFESSOR DORSANEO: It's already been

1 appealed.

2 HONORABLE JANE BLAND: With the motions in
3 limine and all that if I'm the trial judge that's getting
4 the case back from the pretrial Court, I would like the
12:02 5 pretrial Court to have done every single thing pretrial so
6 that I don't have to have three weeks of pretrial on top
7 of all the pretrial stuff that the pretrial Court has
8 done; and then like Scott said, to the extent that, you
9 know, on those rare occasions when you feel it's necessary
12:02 10 to revisit one of your predecessor's rulings you could
11 focus on those; but most of the work has been done by the
12 judge who had all the pretrial experience with it. So I
13 would favor leaving this in so the pretrial judges know
14 that they can do everything that they wanted with it and
12:03 15 that they won't have to worry about an inconsistent ruling
16 on a pretrial matter from another judge out hanging around
17 out there unless they would like to have the inconsistent
18 ruling. And maybe if the special appearance has gone so
19 far that and that's already up on interlocutory appeal and
12:03 20 the pretrial judge says "Well, I disagree with it," you
21 know, let that one go up, you know, and I won't reverse
22 the ruling in that case; but just give the pretrial judge
23 the discretion to reverse the call if he or she wants to.
24 CHAIRMAN BABCOCK: Pete had his hand up next
12:03 25 and then Judge Brister.

1 MR. SCHENKKAN: I think that it's a good
2 idea to have the pretrial Court to be able to reassess
3 almost everything, because it's hard to know which of the
4 things that has been decided by one individual trial Court
12:04 5 may actually be material to the MDL efficiency task, so I
6 think it's necessary. However having started there, I
7 think there needs to be at least one exception, and there
8 may be other people who have knowledge who would suggest
9 another; and that would be venue. We do have a present
12:04 10 Rule that says you don't reassess venue decisions. Once a
11 venue decision has been made that's it. And I think we
12 can afford to carve that one out because with venue what
13 we're talking about is the venue of the trial after
14 remand, so I don't think we're paying any MDL price by
12:04 15 saying that the trial judge before it has been MDL'd who
16 had said "I'm denying the venue transfer motion, this case
17 stays here for trial," I don't see any real need for the
18 MDL pretrial judge to be able to reassess when it goes to
19 trial it's going to some other county.

12:04 20 MR. JACKS: Yes.

21 MR. SCHENKKAN: So I would break it into two
22 parts. I would say I agree with this as written except as
23 to venue.

24 CHAIRMAN BABCOCK: Luke.

12:05 25 MR. SOULES: It seems to me like it also

1 ought to be limited to the rulings that the original trial
2 court still had plenary power over, for example, if the
3 original trial court had special appearance and nobody
4 appealed and it's a final order.

12:05 5 PROFESSOR DORSANEO: Thirty days later.

6 COURT REPORTER: I can't hear you, Luke. I'm
7 sorry.

8 MR. SOULES: And now MDL comes up. If the
9 trial court, if the original trial court no longer has
10 plenary power, are we revesting the transferee court with
11 plenary power to go back into things that the original
12 trial court could not go into?

13 CHAIRMAN BABCOCK: Give us an example.

14 MR. SOULES: Just what I said.

15 CHAIRMAN BABCOCK: She didn't get that.

16 MR. SOULES: An example might be where the
17 trial court has granted a special appearance and there was
18 no appeal and it's a final order, 30 days has passed,
19 whatever. The plenary power trial court to review that
12:06 20 special appearance has expired. It's been on appeal. Or
21 maybe there hasn't been an appeal; but the trial judge has
22 lost its plenary power over that decision, so it's now in
23 a different court.

24 PROFESSOR ALBRIGHT: But it's not final
12:06 25 unless that has been severed out by a defendant or movant

1 in the case.

2 MR. SOULES: If it's one defendant and they
3 grant a special appearance and no appeal is taken.

12:06 4 PROFESSOR ALBRIGHT: I don't think it's a
5 final order.

6 MR. ORSINGER: You can't sever it anyway, I
7 don't think.

8 CHAIRMAN BABCOCK: I'm with Luke on this.
9 Why wouldn't it be?

12:06 10 MR. SOULES: I mean, they grant special
11 appearance. I have no jurisdiction. The case is
12 dismissed for want of jurisdiction. It's dismissed for
13 want of jurisdiction.

14 MR. ORSINGER: I thought you were thinking
12:07 15 the special appearance was denied. You're thinking it's
16 granted?

17 MR. SOULES: It's granted.

18 MR. ORSINGER: It's on appeal; and
19 now --

12:07 20 HONORABLE TRACY CHRISTOPHER: We aren't
21 going to transfer a case on appeal.

22 MR. ORSINGER: Oh, it's over?

23 HONORABLE TRACY CHRISTOPHER: If it's over,
24 it's over.

12:07 25 CHAIRMAN BABCOCK: Yes. But Luke's point is

1 that the MDL panel gets a list of cases. They don't
2 really look at all the pleadings. We're going backwards
3 now. But that the MDL panel is convinced that all these
4 cases have common issues of fact, and so they're going to
12:07 5 send them all to a pretrial judge. But one of these cases
6 on the list has already been finally adjudicated such that
7 the district court has lost plenary power. Luke says
8 "Wait a minute. Now can the plaintiff come into the MDL
9 court and say "You know, Judge Jones really was not having
12:07 10 a good day. But thank goodness now I'm in front of you,
11 and you can do anything. You can set aside, modify, do
12 whatever you want." And Luke says "That can't be right,
13 because the original court lost plenary power." And I
14 don't know who is next. Who is next?

12:08 15 PROFESSOR DORSANEO: Me.

16 CHAIRMAN BABCOCK: Bill. Mr. Plenary Power,
17 Professor Plenary.

18 PROFESSOR DORSANEO: In the before time when
19 we used to appeal venue orders it was true that if you
12:08 20 didn't appeal them, then you couldn't appeal them after
21 final judgment because they became final 30 days after
22 they were made. Now it's not clear to me whether that
23 principle that people don't remember mostly applies to the
24 special appearance practice.

12:08 25 CHAIRMAN BABCOCK: Are you talking about me?

1 PROFESSOR DORSANEO: I'm talking about a lot
2 of people. But the fact of the matter is it doesn't seem
3 sensible to me to revisit the special appearance matter
4 notwithstanding Judge Bland's view that she probably
12:08 5 thinks she's more right than the last judge who made a
6 different ruling.

7 CHAIRMAN BABCOCK: Judge Bland is taking
8 strong exception to that.

9 PROFESSOR DORSANEO: Yes. I'm sure she
12:08 10 would. But I feel that way more because there is another
11 tribunal that is involved in it; and it just seems to me
12 to be unseemly to be requesting relief from the new judge
13 when there is an appropriate way to be dealing with that
14 problem in the court of appeals. And then you get into
12:09 15 the additional complexity of if it's in the court of
16 appeals, well, then can you ask the pretrial judge to
17 revisit it, or is that interference with jurisdiction of
18 the court of appeals?

19 HONORABLE SCOTT BRISTER: If you don't have
12:09 20 jurisdiction, you don't have jurisdiction. How does this
21 Rule change this?

22 HONORABLE JANE BLAND: And if the appellate
23 court had the case, I wouldn't dream of tossing the case.
24 I mean, those are both things that we weren't even
12:09 25 considering.

1 MR. ORSINGER: You shouldn't transfer a case
2 that's not pending if it's closed --

3 HONORABLE SCOTT BRISTER: Maybe we are going
4 to write the alternative. Start down the road of listing
12:09 5 things that are not. Number one, Bonnie has got to see
6 the whole file and every paper in it before she knows.
7 Isn't the best thing to do, Luke, transfer them all; and
8 if we have no jurisdiction, go tell the pretrial court "By
9 the way, you don't have any jurisdiction"?

12:09 10 HONORABLE TRACY CHRISTOPHER: Right.

11 CHAIRMAN BABCOCK: One of your reasons to
12 oppose modification would be "Judge, there's no plenary
13 power in this case."

14 HONORABLE SARAH B. DUNCAN: Correct.

12:10 15 MR. SOULES: And what if he says "Yes, there
16 is" and he gives it to me, "because it doesn't limit my
17 authority to look at this case after transfer to things
18 over which the transferor court lost its plenary power."
19 All you have to do is add the words in the third
20 sentence --

21 CHAIRMAN BABCOCK: Tommy, then Steven, then
22 Sarah.

23 MR. SOULES: -- "ruling made by the trial
24 court before transfer over which the trial court continues
12:10 25 to have plenary power." That's all you have to do.

1 MR. JACKS: It seems to me that the Rule
2 120(a) decision made by the trial court is one of those
3 things like venue that shouldn't be revisited anyhow,
4 however it came out. I mean, this shouldn't be used as a
12:10 5 a second bite at the apple at things that don't really
6 have anything to do with the real purpose of the pretrial.

7 HONORABLE SCOTT BRISTER: How about venue
8 that depends on joinder? Because you have got to give the
9 pretrial judge joinder authority to look at it. And some
12:11 10 of our venue rules depend upon that joinder.

11 PROFESSOR ALBRIGHT: And there are some
12 cases that have allowed you to change a venue ruling when
13 there was a summary judgment.

14 HONORABLE SCOTT BRISTER: If you say you
12:11 15 were mistaken.

16 CHAIRMAN BABCOCK: Steve.

17 MR. SUSMAN: Couldn't you start off by just
18 saying that the pretrial court has the same power as the
19 trial court would have to modify or set aside his prior
12:11 20 rulings, and then that solves it? I mean, why doesn't
21 that solve the whole situation? It's the same power as
22 the trial court judge.

23 CHAIRMAN BABCOCK: Hatchell, do you have
24 your hand up, or were you just stretching?

12:11 25 MR. SOULES: I think that gets at the same

1 thing, Steve, so I agree with you on that.

2 MR. HATCHELL: This has been a pretty
3 serious problem. We have been continuing to expand the
4 nature of interlocutory appeals in Texas. Some of the
12:12 5 statutes provide that the case stops in its track and some
6 don't. Then you have a further complicating matter that
7 if you get a case with an interlocutory order up on appeal
8 and a trial judge, let's assume that sits on the MDL panel
9 enters an order into that, the appealing party has the
12:12 10 right to join that issue into the appeal. So you
11 basically suck it out, and maybe you suck it out to
12 everybody. I don't know. So I think this concept of just
13 quote "the pretrial rulings" really needs to accommodate
14 the notion of the interlocutory appeal.

12:12 15 CHAIRMAN BABCOCK: Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: One other
17 wrinkle for the 1st Court of Appeal's mandamus law, and we
18 have run into this problem with some of the vacancies on
19 our bench, someone is mandamusing a judge's order, but the
12:12 20 judge is no longer on the bench. They won't rule on it.
21 They remand it back for the new judge to rule on.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE TRACY CHRISTOPHER: So you know,
24 it seems to me that if something is on mandamus, it is
12:13 25 going to get bumped back to the pretrial court anyway. So

1 that's, you know, got that wrinkle.

2 CHAIRMAN BABCOCK: The 1st Court has that.
3 Does the 14th?

4 HONORABLE SCOTT BRISTER: I don't know.

12:13 5 HONORABLE JANE BLAND: I think there is a
6 Texas Supreme Court case that says if the judge is
7 replaced while a mandamus is pending, the appropriate
8 thing to do is remand it to the new judge to look at it.

9 HONORABLE NATHAN HECHT: We wrote a Rule on
10 that.

11 HONORABLE JANE BLAND: A Rule.

12 MR. JEFFERSON: And a case.

13 HONORABLE JANE BLAND: And a case.

14 CHAIRMAN BABCOCK: A Rule and a case.

12:13 15 HONORABLE TRACY CHRISTOPHER: Of course,
16 that was back when it was, you know, Exxon --

17 (LAUGHTER.)

18 HONORABLE SCOTT BRISTER: We didn't hear
19 that.

12:13 20 COURT REPORTER: I didn't hear you. That
21 was back?

22 HONORABLE TRACY CHRISTOPHER: That was back
23 when it was Exxon vs. Judge Christopher. Now it's just In
24 Re: Exxon.

12:13 25 HONORABLE JANE BLAND: That's how it's

1 styled. But still...

2 CHAIRMAN BABCOCK: Judge Peeples.

3 HONORABLE DAVID PEEPLES: I support what

4 Steve Susman and Luke said, which is leave it that the
12:14 5 pretrial judge has the same discretion to set aside and
6 modify that the original judge does for two reasons. The
7 first is it's simple, you can understand it, and we'll get
8 through this today.

9 But a policy reason, the second reason is this: If we
12:14 10 start limiting what the pretrial judge can do, especially
11 on important things like venue and the other, you will
12 just tell the persons who want to get before the pretrial
13 court you'd better do it in a hurry before you get rulings
14 get made that you don't like. And then what Richard
12:14 15 Orsinger was saying, we've got problems of the little
16 bitty group of cases and all the tag-along cases as a big
17 group because we have made people be quick on the trigger.
18 You're just giving people an incentive to do that. So I
19 think we ought to at some point enact what Luke and Steve
20 said.

21 JUSTICE WALLACE JEFFERSON: Chip, I can't
22 find in the federal Rule where they defined what the
23 pretrial court can do. Why are we doing that here? Why
24 do we have to do that here? And I mean, the court has the
12:15 25 power it has. So why do you have to?

1 MR. SOULES: Because the federal courts have
2 a lot different, they have a lot different standards on
3 plenary power and what they can do forever. A circuit
4 court can recall it's mandate 10 years after it issues a
12:15 5 mandate and add post judgment interest.

6 CHAIRMAN BABCOCK: Yes. But the MDL panel
7 can't do it.

8 HONORABLE SCOTT BRISTER: The short answer
9 is because it's in 11.3(b) and now we're taking 11.

10 HONORABLE WALLACE JEFFERSON: But I'm just
11 saying if we put a period after -- well, number one, what
12 if you didn't have (b) at all, Authority of the Trial
13 Court? Most trial courts know what authority they have.
14 And then number two, but if you didn't and they could keep
12:15 15 that in there, what if you put a period after "transfer"?
16 What is the problem with that?

17 HONORABLE SCOTT BRISTER: That is certainly
18 one option. Our feeling was, especially on things like
19 motions in limine, pretrial courts are going to decide
12:16 20 that issue differently unless you tell them, tell them
21 we're going to say "No. That sounds like trial to me and
22 Daubert." The (b) things that would save you tons of time
23 some pretrial judges without guidance are going to say "I
24 don't think I have to do that."

12:16 25 CHAIRMAN BABCOCK: Okay. Because I'm

1 thinking that it's probably not going to make much
2 practical effect, because the ones that don't want to do
3 it aren't going to do it anyway. I mean, this is Justice
4 Hecht's --

12:16 5 HONORABLE SCOTT BRISTER: No. I mean, a lot
6 of us are concerned about following the Rules and the
7 statutes, and we would like to do things --

8 CHAIRMAN BABCOCK: Well, this --

9 HONORABLE SCOTT BRISTER: And we would like
12:16 10 to do things; but we don't think we can and so we don't
11 until somebody tells us we can.

12 CHAIRMAN BABCOCK: Steve.

13 MR. SUSMAN: I think Scott's point is great,
14 because when I first looked at this before I began reading
12:16 15 it carefully my impression was that's huge power to give.
16 You're giving the pretrial judge power that you would
17 normally think would be the trial court's. So I was
18 thinking maybe the whole scheme here was that the pretrial
19 judge would just try the whole case.

12:16 20 But I think you're right, Scott. If you don't set
21 it out, there's a huge amount of argument that that's part
22 of the trial. We don't want this MDL judge ruling on
23 motions in limine, Daubert motions or admission of
24 evidence, things like that.

12:17 25 MR. SOULES: The feds have a manual on

1 complex multiligtant litigation that's about that thick
2 (indicating.)

3 HONORABLE SCOTT BRISTER: But it's been no
4 problem on the exhibits in asbestos cases, which are
12:17 5 hundreds of exhibits and scores of motions in limine, and
6 it saved all of us time not doing it. Do it once.
7 Everybody put all your, because of course the problem is,
8 you know, people want to object to every one of the other
9 side's motions in limine on the record; but if you ask
12:17 10 "Which ones of these do you really have a problem?" "I'm
11 really only worried about two." But they want a record
12 somewhere where they objected to all of them, and somebody
13 rules on it, and they got a ruling. Goodness sake don't
14 do it 30 times. Do it just once.

15 CHAIRMAN BABCOCK: John Martin.

16 MR. MARTIN: One answer to Justice
17 Jefferson's question is that in the federal system there's
18 not a lot of guidance as to what the MDL court can do; and
19 as a result there have been a lot of litigated cases about
12:18 20 that including a Supreme Court case that came out about
21 two years called Lexicon on the issue of whether they can
22 transfer cases to themself or not, and that was a much
23 litigated issue. So I think of the best thing for us to
24 do is give as much guidance to the pretrial judge as we
12:18 25 possibly can.

1 The second point I want to make is that on
2 some of these pretrial rulings people keep referring to
3 Daubert rulings. Well, there can be a Daubert ruling
4 that's common to a whole lot of cases, or there can be a
12:18 5 Daubert ruling that might only apply to one individual
6 plaintiff's damage case and that probably ought to be
7 ruled on by the judge who is going to try that case
8 whereas the common issue might ought to be ruled on by the
9 pretrial judge. So I agree with those who said the
12:18 10 pretrial judge needs to have some discretion about where
11 that line ought to be drawn.

12 CHAIRMAN BABCOCK: Bill.

13 PROFESSOR DORSANEO: Well, then at least
14 change the sentence to eliminate the first parenthetical,
12:19 15 take "joinder" out and put it in the sentence, not in the
16 parenthetical, "joinder is not jurisdiction, but joinder
17 is pretrial." And I don't know why you need the second
18 parenthetical, although I don't think it's wrong like the
19 first one is; but that's a matter of taste. The latter
12:19 20 part of it I really do understand what you're saying.
21 That's where you're really talking about people being in a
22 quandary about whether they're getting into the trial, and
23 that makes good sense to me now.

24 CHAIRMAN BABCOCK: Okay. So you say "The
12:19 25 pretrial court may enter orders regarding jurisdiction

1 (such as special appearances)"?

2 PROFESSOR DORSANEO: Everybody knows what
3 jurisdiction, there is subject matter.

4 CHAIRMAN BABCOCK: So you would --

12:19 5 PROFESSOR DORSANEO: I don't think people
6 need it.

7 CHAIRMAN BABCOCK: -- take the paren out?

8 PROFESSOR DORSANEO: Yes, I would take it
9 out. But I would put "joinder" in.

10 CHAIRMAN BABCOCK: Right.

11 PROFESSOR DORSANEO: Just put "joinder" as a
12 separate word.

13 CHAIRMAN BABCOCK: Okay. "Jurisdiction,
14 joinder, venue, discovery (such as discovery control plans
12:19 15 and disputes)," and then everything else is okay. Right?

16 PROFESSOR DORSAENO: I think so.

17 HONORABLE SCOTT BRISTER: That's fine with
18 me.

19 CHAIRMAN BABCOCK: All right. And is
12:20 20 everybody satisfied with adding language that says that
21 the --

22 PROFESSOR DORSANEO: That would also change
23 the first sentence.

24 CHAIRMAN BABCOCK: That's what I'm saying.
12:20 25 That's what I was about to say. The pretrial court has

1 the same as, coextensive jurisdiction with the
2 transferring court or trial court.

3 HONORABLE SCOTT BRISTER: The concept being
4 the pretrial court can set aside any ruling by the trial
12:20 5 court made before the transfer that the trial court itself
6 could.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE SCOTT BRISTER: I don't have any
9 problem with that.

10 CHAIRMAN BABCOCK: Does that work, Luke?

11 MR. SOULES: That will work. Mike Hatchell.

12 MR. HATCHELL: Well, it's better.

13 CHAIRMAN BABCOCK: Good.

14 MR. HATCHELL: Steve's suggestion solves a
12:20 15 lot of problems.

16 CHAIRMAN BABCOCK: Well, when we achieve
17 perfection ring the bell.

18 (LAUGHTER.)

19 HONORABLE SARAH B. DUNCAN: We just said in
12:20 20 the last sentence of 13.5(a) that "Upon assignment and
21 transfer the judge assigned as judge of the pretrial court
22 has exclusive jurisdiction over related cases transferred
23 pursuant to this Rule until disposed or remanded to the
24 pretrial court." Well, if the pretrial court has
12:21 25 exclusive jurisdiction, that means the trial court judge

1 has no jurisdiction. So if their jurisdiction is
2 coextensive, it's none.

3 CHAIRMAN BABCOCK: Yes. That's a matter of
4 language.

12:21 5 HONORABLE SARAH B. DUNCAN: Well, language
6 is important.

7 MR. SOULES: You're not going to use
8 "coextensive" anyway.

9 CHAIRMAN BABCOCK: Right. Yes. I was using
12:21 10 it as shorthand. We know what Luke has in mind, and we're
11 going to draft it that way. Right?

12 HONORABLE SCOTT BRISTER: Yes.

13 CHAIRMAN BABCOCK: Okay. Let's go to trial
14 settings, Judge Brister, I mean, Judge Peeples.

12:21 15 HONORABLE DAVID PEEPLES: The issue here is,
16 you know, if you say that the pretrial court sends it back
17 to the trial court for trial settings, then you're going
18 to have conflicting trial settings where one judge says
19 "I'm going to set 40 of these and put people to trial,"
12:21 20 and another judge is doing the same thing; and that
21 undermines one of the main purposes for this Rule. So the
22 pretrial court needs to be able to make the major
23 decisions on when cases are set for trial. It can be very
24 hard and very complicated; but that's what (c) says.

12:22 25 HONORABLE SCOTT BRISTER: Judge Christopher

1 has some experience with this.

2 HONORABLE DAVID PEEPLES: Yes, she does.

3 HONORABLE TRACY CHRISTOPHER: Well, here is
4 the main issue when you have multiparty cases. One of the
12:22 5 main reasons is the defendant asks for this consolidation
6 is to protect them from having 20 different trial settings
7 in 20 different courts that they can't possibly get
8 prepared for. So it's generally -- sometimes the
9 plaintiffs need it too. But it's generally the defendants
12:22 10 that want to have sort of an orderly schedule of how many
11 cases that they're going to have to be prepared to try at
12 any given time, how many sets of attorneys they are going
13 to need to have ready to try cases. Once a case gets
14 mature like in our asbestos cases in Harris County we set
12:22 15 asbestos cases in four different courts on any given month
16 and the defense attorneys if they're the same need to have
17 four sets of attorneys geared up ready to defend them.

18 So when it's an immature tort you don't set that many
19 cases at one time trying to get it lined up. And it is
12:23 20 difficult just even on a region wide basis because I'm
21 dealing with counties that are not civil jurisdiction
22 judges. They'll be general jurisdiction judges so they
23 don't have jury trials every week like we do. You have to
24 coordinate with them; and I've actually had the parties
12:23 25 coordinate with the trial judge too and discuss with them.

1 So that's why we added this language "or order the parties
2 to confer with the trial court" so that there is a
3 coordination back and forth. It is a benefit of the MDL
4 process for witnesses and attorneys, because if they're
12:23 5 set in, you know, 50 cases across the state all at the
6 same time, how do they run around getting their key
7 witness everywhere at one?

8 CHAIRMAN BABCOCK: Steve.

9 MR. SUSMAN: Well, I mean I'm a little
12:24 10 surprised at this. I mean, is that what the legislature
11 really wanted, to create a single case setting czar, trial
12 setting czar? I mean, a lot can be accomplished at
13 coordinated pretrial discovery before one court. And then
14 when the pretrial discovery is done, you know, let it fall
12:24 15 where they may. But what you're suggesting now is that
16 this pretrial judge who has done all this should also be
17 the one who kind of picks the cases that are going to
18 trial, in which order and where and how many go at one
19 time. Was that what the legislature, is that what HB4 is
12:24 20 all about?

21 HONORABLE SCOTT BRISTER: We thought so.

22 HONORABLE TRACY CHRISTOPHER: Well, and it's
23 already currently Rule 11. The pretrial judge and the
24 regular judge must confer in setting a trial date.

12:24 25 HONORABLE SCOTT BRISTER: And the reason we

1 thought so is, number one, the coordination problem with
2 judges competing. That happens right now where you have a
3 judge in one city in trial and a judge somewhere else says
4 you're going to trial and this exact experience. Judge A
12:25 5 calls up and says "Don't put him in trial. The attorney
6 is here." Judge B defaults him because he didn't show up
7 for trial. There is no question there are trial judges in
8 Texas who do exactly that. "You're not here. I told you
9 to be here. You're defaulted. That \$10,000,000." That
12:25 10 happens right now today. So, yes, I think somebody needs
11 to be able to say "No. We're not doing things that way."

12 Second, all the writing that I have read on
13 handling these mass torts is especially within the mature
14 torts it makes a difference in whether these cases settle
12:25 15 or not where the first few cases are tried. Of course,
16 that is ticklish to some degree; but that apparently to
17 attorneys and these parties the validity of a verdict
18 depends on who it was and where it was and that it's
19 better to, you know, get several different, you know, try
12:26 20 one in The Valley and try one in Dallas and try one in
21 Amarillo helps me settle it where trying the first 30 in
22 Harris County or Eagle Pass does not help me settle it
23 because that doesn't tell me much as far as what these
24 cases are worth.

12:26 25 So our Rule contemplated a two-step procedure. The

1 first step was for the first cases, some number
2 unspecified, you pick and choose. At some point you do
3 like asbestos, which you say if we really are done with
4 pretrial, "Here. You can have them all, and you'll figure
12:26 5 out where to go from this point." But it was a two-stage
6 process where individual trials would be dribbled down for
7 trial at first, and at some point we would shut operations
8 down and dump them all.

9 CHAIRMAN BABCOCK: Justice Hecht.

12:27 10 HONORABLE NATHAN HECHT: And there is
11 another practical problem, which is you don't want to
12 delay the trial setting to the conclusion of the pretrial
13 process, because that can be -- if you complete the
14 process, release jurisdiction, send them back to the trial
12:27 15 court, then you may wait a year to get on his trial
16 docket. And the idea is that you will anticipate that and
17 say "Well, judge we're going to be done with this in six
18 months, so we want to get on the agenda for trial now so
19 we don't have to wait a long time when we get released."

12:27 20 CHAIRMAN BABCOCK: Bill.

21 PROFESSOR DORSANEO: Well, the first
22 sentence is probably normally going to mean that there is
23 going to be a proposal for when these cases will be
24 tried. At the very least I'd like to make the second
12:27 25 sentence mandatory. And if I have to confer with

1 disagreeable people, why should not the judges have to do
2 the same thing? As a practical matter the first --
3 there's going to be a proposal, and then there is going to
4 be a conference, and that's going to work out or it's not.
12:28 5 And if it doesn't work out, I guess I'm happy with the
6 pretrial judge being the boss if that's what makes good
7 sense. Give me a "must" in the second sentence.

8 CHAIRMAN BABCOCK: Anybody for a "must" in
9 the second sentence? Judge Peeples.

12:28 10 HONORABLE DAVID PEEPLES: That's what Rule
11 11 says. How did that slip by us?

12 MR. ORSINGER: As a practicality you can't
13 have this transferee judge setting jury trials all over
14 the state. I mean, in San Antonio that would work and in
12:28 15 Austin that would because we have a central docket and the
16 first judge that comes up is fine. But you may have, you
17 may set this three-week or four-month trial in the middle
18 of some other three-month or four-month trial or during
19 the judge's vacation. You've got to coordinate
20 practically.

21 HONORABLE SCOTT BRISTER: I don't have any
22 problem with "must."

23 HONORABLE DAVID PEEPLES: "Must" is fine.

24 CHAIRMAN BABCOCK: We got that change. Any
12:29 25 other problems? What about the parenthetical, "(When

1 pretrial proceedings are completed the pretrial court much
2 remand related cases...)"?

3 HONORABLE SCOTT BRISTER: Yes. That was the
4 alternative. If you just have a stage two where you do
12:29 5 all the pretrial, nothing goes back until you're done with
6 all of it, then all of it will go back at once.

7 CHAIRMAN BABCOCK: Steve.

8 MR. SCHENKKAN: Just one minor technical
9 issue: In the first sentence the word "related" should be
12:29 10 "transferred."

11 HONORABLE SCOTT BRISTER: That's fine.

12 CHAIRMAN BABCOCK: Yes. That's fine.

13 MR. ORSINGER: I think that that
14 parenthetical is it recommended that it be included?

12:29 15 HONORABLE SCOTT BRISTER: No.

16 MR. ORSINGER: Okay. I'm a little bit
17 concerned --

18 MR. SUSMAN: The parenthetical was
19 alternative language. You didn't go that way.

12:29 20 HONORABLE SCOTT BRISTER: Correct.

21 MR. ORSINGER: Well, let me ask you this:
22 Is there not some time in which we should force the
23 pretrial judge to turn loose? I mean, the pretrial judge
24 might selectively turn loose of cases and hold other cases
12:29 25 back even though they're --

1 CHAIRMAN BABCOCK: That's what Judge
2 Christopher said.

3 MR. ORSINGER: -- full with discovery, even
4 though discovery is complete in the ones they're holding
12:30 5 back. At some point should we say since pretrial is truly
6 over, "You're out. These guys go back to where they came
7 from and get their justice." Shouldn't we have some kind
8 of clock on there?

9 HONORABLE SCOTT BRISTER: Right. That's in
12:30 10 13.6(c). We need to work on that; but it's --

11 CHAIRMAN BABCOCK: Judge Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, I don't
13 think a judge would want to keep them if they were done
14 with them. That's first. But secondly, these cases don't
12:30 15 finish discovery, because I mean, they really don't.
16 You'll have a certain set of liability witnesses that get
17 taken, and you'll have a certain set of expert witnesses
18 that apply say in a personal injury case. Now in
19 securities cases maybe discovery really does get finished.
12:30 20 But in an ongoing personal injury case. And then you
21 might have some generic experts that are all deposed.
22 Those are done. But then each individual case has its own
23 set of experts that have to be deposed, doctors. You
24 might have a specific causation expert on each individual
12:31 25 case. So there is not really a time for me to be able to

1 say all pretrial proceedings are completed. So I'm
2 opposed to that language.

3 CHAIRMAN BABCOCK: Okay. Who else? John.

4 MR. MARTIN: That may be true in a
12:31 5 continuing tort type situation. A single accident,
6 airplane accident it does finish. They do finish.

7 HONORABLE TRACY CHRISTOPHER: Right. It
8 does finish. But not in the case where, you know, not in
9 asbestos, not in a drug case. It doesn't.

12:31 10 MR. ORSINGER: So what you're saying is it
11 will never been remanded?

12 HONORABLE TRACY CHRISTOPHER: Oh, no. I'm,
13 you know, sending them back already for trial.

14 MR. ORSINGER: Even before the discovery is
15 complete?

16 HONORABLE TRACY CHRISTOPHER: Yes.
17 Absolutely. We're giving them trial dates.

18 MR. ORSINGER: Yes. When the unified
19 discovery is complete then you turn loose of it and send
12:31 20 it back for individual treatment?

21 HONORABLE TRACY CHRISTOPHER: Once the case
22 is mature enough, like Scott was talking about, because
23 the advantage of the MDL is not having a thousand
24 competing trial settings at the same time.

25 CHAIRMAN BABCOCK: John.

1 MR. MARTIN: Scott, this is really a
2 question. I don't quite understand how you envision this
3 working in here. But it's certainly possible if you have
4 an assigned judge who is a regular sitting judge, not a
12:32 5 retired judge, that there may be cases originally filed in
6 that judge's court and so that judge can conduct trials of
7 those cases. Does the Rule recognize that?

8 HONORABLE SCOTT BRISTER: Yes. If the
9 pretrial and trial court were the same, the pretrial would
12:32 10 remand to him or herself for trial.

11 MR. MARTIN: Right.

12 CHAIRMAN BABCOCK: Steve.

13 MR. SUSMAN: Scott, do you know what the
14 experience is with the federal MDL? I mean, are they
12:32 15 setting cases for trial? Are they doing what you are
16 proposing here where you give the pretrial judge authority
17 to handle, coordinate trials to avoid trial conflict?

18 HONORABLE SCOTT BRISTER: I don't know
19 specifically about trial setting.

12:33 20 PROFESSOR DORSANEO: I would tend to doubt
21 it very seriously given the nature of federal judges.

22 CHAIRMAN BABCOCK: Richard Munzinger.

23 MR. MUNZINGER: You have to qualify that.
24 My limited experience in MDL is you had one attorney
12:33 25 representing one defendant. You had a core of maybe 12

1 persons, maybe less whose testimony was crucial to every
2 case because they were alleged conspirators in a fraud,
3 and you had 90 some odd cases. Now in the MDL case, that
4 case settled. If the MDL case had not, the MDL court had
12:33 5 not governed the trial and just said "I wash my hands.
6 You all go back to your courts," you're now back to the
7 same problem that Judge Christopher was talking about.
8 You have got 90 courts saying "You be here mister
9 president or mister sales manager on Tuesday, the 4th; and
12:33 10 if you don't, I'll enter judgment against you." "Hell, I
11 can't. I'm in South Carolina." And that was the benefit
12 of having the MDL court.

13 A Rule which says to the MDL, the Texas MDL court
14 that once unified discovery is complete you must send it
12:34 15 back will not take into consideration the problem that
16 defendants may have or plaintiffs may have in commercial
17 cases or other cases where you have a core of witnesses
18 who are necessary to the disposition of the case and they
19 can't be in both places, two places at one time.

12:34 20 CHAIRMAN BABCOCK: Ralph, did you have a
21 comment?

22 MR. DUGGINS: It seems to me that the
23 bracketed sentence could conflict with 13.6(c).

24 CHAIRMAN BABCOCK: I think the idea was to
12:34 25 keep the bracketed sentence out. Right, Scott?

1 HONORABLE SCOTT BRISTER: Yes. We voted
2 against the bracketed sentence; but that's the alternative
3 that is being discussed. It would be a substitute for
4 what is otherwise in (c).

12:34 5 CHAIRMAN BABCOCK: Okay. Let's bring this
6 particular discussion to a close. You have got subpart
7 (c), and you're going to switch the word in the first
8 sentence "related" to "transferred." "The pretrial court
9 may set the transferred cases for trial."

12:35 10 And then the second sentence says "The pretrial
11 court must" instead of "may" "confer." And we're going to
12 strike the parenthetical. That's the vote. So if the
13 language here is with those two modifications and striking
14 the bracketed sentence, how many people are in favor of
12:35 15 subpart (c)? How many are against? Well, Orsinger has
16 left the room; but it's 30 to nothing.

17 (LAUGHTER.)

18 CHAIRMAN BABCOCK: We'll break for lunch.

19 HONORABLE TRACY CHRISTOPHER: Chip, I have
12:35 20 drafted the changes and Deb has them. Hopefully everyone
21 can read my handwriting, so if you want to look at it.

22 CHAIRMAN BABCOCK: She'll pass them out, and
23 we'll look at them over lunch.

24 (LUNCH RECESS 12:35 TO 1:37 P.M.)

01:27 25 CHAIRMAN BABCOCK: Okay. Does everybody

1 want to get back at it? Judges Benton and Bland, do you
2 want to get back to it?

3 HONORABLE JANE BLAND: We think it is a girl
4 thing.

01:28 5 CHAIRMAN BABCOCK: No. No. It must be a
6 Harris County judge thing.

7 PROFESSOR CARLSON: "Trial Judges Gone
8 Wild."

9 CHAIRMAN BABCOCK: "Trial Judges Gone Wild."
01:28 10 Okay. We could go to 13.6 and keep making progress, or we
11 could regress and go to the handwritten 13.4. What is
12 everybody's pleasure? Judge Brister, Judge Peebles, Judge
13 Christopher?

14 HONORABLE SCOTT BRISTER: Well, we still
01:28 15 need to decide whether to enter or to cut the 13.5(d). We
16 recommended not including it; but...

17 CHAIRMAN BABCOCK: Okay. Let's talk about
18 that. Chris.

19 MR. GRIESEL: 13.5.

01:28 20 CHAIRMAN BABCOCK: This looks like factors to
21 me. I don't know.

22 HONORABLE SCOTT BRISTER: It is.

23 MR. GRIESEL: 13.5(d), the case management
24 order is one of the few places we've talked about in this
01:28 25 about what will actually go on in the pretrial proceeding

1 in some way, shape or form. The largest criticism on
2 multidistrict litigation that appears is the time to
3 resolve multidistrict litigation; and it's clear from the
4 National Center of State Court's review of complex
01:29 5 litigation management in courts that two of the most
6 important things are early and active judicial involvement
7 and use of appropriate technology early on along with
8 early application of ADR in single assignment of judges.

9 This would, this tracks a California system and
01:29 10 an Arizona system which requires with all deliberate speed
11 at the first chance possible that the judge take control
12 in some meaningful way of the case and by that setting out
13 an order considering these 12 things.

14 I recognize that there is already a Rule 166
01:30 15 order which may or may not be partially in place in some
16 of those cases that are going to be consolidated; but I
17 think we have to -- I think the example of California,
18 North Carolina, Arizona, all the courts that have looked
19 at complex litigation management before early, often,
01:30 20 high-profile judicial intervention specifically setting
21 time deadlines, specifically scheduling within the first
22 five, 10 days of the case are keys to making it work in
23 some way, shape or form; and this is an outline of
24 something that would do that.

01:30 25 CHAIRMAN BABCOCK: Chris, why didn't the

1 committee adopt it?

2 MR. GRIESEL: Force of personality.

3 (LAUGHTER.)

4 CHAIRMAN BABCOCK: Or lack thereof.

01:31 5 MR. GRIESEL: Or lack thereof. I went to
6 Tech. I don't know.

7 CHAIRMAN BABCOCK: Any other reason?

8 MR. GRIESEL: No. I think there is a
9 feeling that the pretrial -- and this is not, I want to
01:31 10 make it clear, this is in addition to anything else the
11 pretrial judge can do. And I think the general thought is
12 the pretrial judge has wide discretion to do whatever that
13 pretrial judge would like to do. And the pretrial judges
14 again, you know, a pretrial judge in the Peeples/Bland/
01:31 15 Christopher/Sullivan model is going to do this
16 immediately. It's going to be the first thing they roll
17 out on top of you. You won't even get a chance to
18 respond. But there is a possibility that of the hundred
19 MDL cases next year in the State of Texas that those four
01:31 20 judges may not be assigned to all of them. And this would
21 be a method for reminding the other judges this is
22 something we need to go immediately, this is something you
23 need to focus on. And it is a different set of factors
24 than what they need to consider in 166.

25 CHAIRMAN BABCOCK: Steve.

1 MR. SUSMAN: Couldn't that really be handled
2 by some kind of system of communication between the panel
3 and the judge who you select? I mean, so like where you
4 select a judge and you say "We're going to send you a memo
01:32 5 to give you suggestions of things you might do." And then
6 this could be kind of not in the Rule, but kind of an
7 evergreen, improving constantly, just standard operating
8 procedure that the panel will send out to a judge "Now
9 that you've been selected to be the pretrial judge here
01:32 10 are some things we recommend. Also consult the manual for
11 complex litigation or whatever, to look at these cases."
12 I mean, it's like training. But I just wondered whether
13 putting this all in the Rule, which is lengthy, for a
14 small number of judges who would be involved in the
01:32 15 process is worthwhile.

16 CHAIRMAN BABCOCK: Judge Brister, why don't
17 we need this?

18 HONORABLE SCOTT BRISTER: For the reasons
19 Steve just said. It goes without saying we agree with all
01:33 20 of this; but that there will be ways to make that clear in
21 circumstances where it's needed without putting it all in
22 the Rules.

23 MR. SOULES: I move we eliminate the Florida
24 factors this time.

25 CHAIRMAN BABCOCK: Judge Gray.

1 HONORABLE TOM GRAY: I was going to make a
2 quick pitch for them from the sense that it will give the
3 practicing Bar in this area a heads up of things to come.
4 I know that there are a lot of people that repeat that are
01:33 5 in this area all the time, and for those practitioners
6 this is unnecessary; but those that need to sit down with
7 their client and explain to them what is about to happen
8 for their case it might be a useful tool for them to do
9 that. It is in effect redundant. They know that they
01:34 10 have these powers; but I think it does provide a useful
11 resource not just for the trial judge that this has been
12 assigned to, but for that trial attorney who has one of
13 these cases to have kind of a heads up, "Here is what is
14 about to happen to your case" so that you can sit down and
01:34 15 go over it with your client.

16 CHAIRMAN BABCOCK: Okay. Yes, Ann.

17 MS. MCNAMARA: I think this is a good idea.
18 We spent a lot of time yesterday talking about how the
19 panel doesn't have the time or the resources to really
01:34 20 manage individually these large complex cases that the
21 judge is going to do or not. And for the occasional judge
22 who doesn't grab hold of the case and manage it there is a
23 lot at stake for the litigants. Even though it is wordy,
24 I think it's worth including. No offense, Chris. You
01:34 25 said a lot of stuff here.

1 MR. GRIESEL: That's all right.

2 CHAIRMAN BABCOCK: I guess Skip, Steve and
3 then Judge Gaultney.

4 MR. WATSON: For whatever it's worth, this
01:35 5 is pretty much out of the complex litigation manual in
6 federal court; and their experience on the federal level
7 was that it really wasn't implemented and needed to be
8 done and needed to be expanded. And to emphasize that,
9 the Civil Justice Reform Act of 1990 actually said "If you
01:35 10 want more money, you know, for judges' pay and if you want
11 more district judges, each of the federal districts is
12 going to have to do the study of the reasons for the cost
13 and delay in civil litigation across the board, not just
14 in the complex or multidistrict litigation, and you're
01:35 15 going to have to write a report and you're going to have
16 to actually implement a plan." And this early, active
17 intervention by the Article 3 judge to accomplish each of
18 these things that are specified was part of the Act. I
19 mean, each plan to be implemented had to include most of
01:36 20 this because it either worked in the multidistrict
21 litigation, the complex litigation manual or where it was
22 not being utilized it wasn't working; and they thought it
23 needed to be in all cases.

24 So I, the gist of that is to say that the track
01:36 25 record in multidistrict litigation federally says this

1 needs to be spelled out. And I agree with Ann. It should
2 be in the Rule and not up to Scott to send out a notice
3 saying you should be doing this.

4 CHAIRMAN BABCOCK: Steve and then Judge
01:36 5 Gaultney.

6 MR. SUSMAN: I think all these things are
7 appropriate. But let me ask this question: Appointing
8 liaison counsel, does that include the ability to appoint
9 lead counsel? I mean, liaison counsel it's usually my
01:36 10 experience is the guy who handles, shovels the papers back
11 and forth. Does the trial judge have the authority to
12 organize, for example, plaintiffs' counsel or defense
13 counsel and set down rules? "There is going to be a
14 three-person steering committee, and there is going to be
01:37 15 one lead counsel, and that all pleadings, you know,
16 anything filed here has got to be," whatever they do. I
17 mean, my typical experience in MDL cases as soon as a case
18 is MDLed for organization the transferring judge organizes
19 the counsel and confers a lot of powers on counsel.

01:37 20 Well, my only question is appointing liaison
21 counsel does that mean that's going to be used by lawyers
22 to say "That's all you can do. You can't made him lead
23 counsel. You can't create an executive committee."

24 CHAIRMAN BABCOCK: Subsection 11 would seem
01:37 25 to give the Court ample power to do lead counsel if they

1 chose, I would think. Judge Sullivan.

2 MR. SULLIVAN: I think this is a good idea,
3 because what I really read this portion of the new Rule to
4 do is to tell the trial court that it does need to
01:38 5 communicate, at least at a big-picture level, how it's
6 going to manage the case. And it also of course implies I
7 think that something would go out in writing, because it
8 contemplates an order. And I think that's useful too,
9 because you can't expect given how large a group might be
01:38 10 involved that everything can be done on that informal
11 basis, that you do it in perhaps a more routine case with
12 just a handful of people involved. I just think it's a
13 good idea to get the level of consistency that you really
14 need by way of MDL.

01:38 15 CHAIRMAN BABCOCK: Is there a consensus that
16 this is a good idea? Anybody opposed? Judge Christopher?

17 HONORABLE TRACY CHRISTOPHER: I just think
18 it's unnecessary and should not be in the Rule.

19 CHAIRMAN BABCOCK: Do you want to have a
01:39 20 vote on it? Okay. Let's have a vote. Everybody that
21 thinks this should be in the Rule raise your hand.

22 HONORABLE SARAH B. DUNCAN: Or some version
23 like this?

24 CHAIRMAN BABCOCK: Yes. Some version of it,
01:39 25 yes. All those who think it should not be? 18 to 8 for

1 inclusion.

2 Now is there something? Steve brought up the
3 point that touched on some of the liaison counsel. But is
4 it clear enough that judge has the ability to appoint lead
01:39 5 counsel or do whatever appointing he or she needs to do
6 given the fact that there is Subsection 11?

7 MR. SUSMAN: Why don't we just change the
8 name to "organizing counsel."

9 CHAIRMAN BABCOCK: "Liaison or"?

01:40 10 MR. SUSMAN: "Organizing counsel."

11 CHAIRMAN BABCOCK: All right. Yes, Pete.

12 MR. SCHENKKAN: Since these are only things
13 that the judge should consider, I propose we not redraft
14 this in committee of a whole on Friday afternoon with
01:40 15 other things we need to try to do. I don't think it's
16 important enough for us to use our spare time.

17 CHAIRMAN BABCOCK: Bill.

18 PROFESSOR DORSANEO: This probably goes
19 beyond this section: But the opening wording talking
01:40 20 about "consolidating," how does it read again?

21 MR. ORSINGER: "Consolidated or
22 coordinated."

23 PROFESSOR DORSANEO: "Once a case is
24 consolidated or coordinated" I think we're not talking
01:40 25 about --

1 HONORABLE SCOTT BRISTER: "Transferred"?

2 PROFESSOR DORSANEO: Yes. I think we are
3 talking about transferring cases that are consolidated;
4 and I really don't even like using the word "consolidated"
01:41 5 there.

6 CHAIRMAN BABCOCK: Sarah particularly hates
7 that word.

8 PROFESSOR DORSANEO: They're pretrial
9 proceedings. We're going to get in to hear people talk.
01:41 10 And I do think like Justice Duncan that these cases are
11 separate; and if there is some sort of an order that
12 finally disposes of one of the separate cases, it's over.

13 HONORABLE TOM GRAY: I think it would work
14 if we drop everything before the first comma and just
01:41 15 start with "The pretrial court shall."

16 PROFESSOR DORSANEO: Yes. I'm speaking
17 about this; and I was also speaking more generally about
18 confusion as to whether these cases are consolidated into
19 one case or are they just transferred for pretrial
01:41 20 procedures.

21 CHAIRMAN BABCOCK: What does the
22 "thereafter" refer to if you drop the first clause?

23 MR. YELENOSKY: Drop that too.

24 CHAIRMAN BABCOCK: Drop that as well?

01:41 25 MR. YELENOSKY: Yes.

1 CHAIRMAN BABCOCK: Put a period after
2 "promptly."

3 PROFESSOR ALBRIGHT: Doesn't' the
4 "thereafter" refer to the hearing?

01:42 5 CHAIRMAN BABCOCK: Yes. I see. Yes.

6 MR. ORSINGER: In other words, one of them
7 requires a hearing at the earliest practical date; and the
8 other one requires a ruling promptly thereafter.

9 CHAIRMAN BABCOCK: Got you. That makes
01:42 10 sense. All right. Anything else?

11 HONORABLE TRACY CHRISTOPHER: Both of those
12 things are burdensome.

13 MR. TIPPS: I agree with Pete. I don't
14 think we should spend a lost time on this.

01:42 15 CHAIRMAN BABCOCK: However.

16 (LAUGHTER.)

17 MR. TIPPS: However I don't think we have in
18 Texas a motion to dismiss. And so this reads like a
19 federal document, which I guess it is; but that attention
01:42 20 needs to be given to it.

21 PROFESSOR DORSANEO: We're inching up
22 towards that.

23 CHAIRMAN BABCOCK: What are you suggesting,
24 Steve? I'm sorry.

01:42 25 MR. TIPPS: I don't know how state court

1 will schedule a motion to dismiss since that particular
2 motion is not generally recognized under Texas procedures
3 and practice. So this needs to be refined then to make
4 sure that it's consistent with the state court Rules.

5 HONORABLE TRACY CHRISTOPHER: Why would you
6 say "Among the subjects that should be considered at such
7 a conference are (4) Issuing protective orders"? Why
8 should I be considering that if nobody is bringing it up
9 and it's not an issue? Why do I have to go through this
01:43 10 checklist? "Okay. Do we need any protective orders here
11 in this case?"

12 PROFESSOR ALBRIGHT: How about if we send
13 this back to you all to talk about and you-all decide what
14 you need and then?

01:43 15 HONORABLE SCOTT BRISTER: Nobody on our
16 committee except Chris wanted it is why.

17 (LAUGHTER.)

18 PROFESSOR DORSANEO: That's probably a good
19 reason for not doing it.

01:43 20 MR. SCHENKKAN: Another attempt to short
21 circuit this whole matter, among the matters that should
22 be considered are all matters discussed in Rule 166.

23 HONORABLE TRACY CHRISTOPHER: Why don't we
24 need a Rule for that? That's a judge's job.

01:43 25 MR. SCHENKKAN: Because we've already voted

1 on it.

2 MR. SULLIVAN: This is an interesting point;
3 and maybe you can reconcile us to part of the two points
4 of view. And that is I didn't really see this as a
01:43 5 checklist the way Tracy was characterizing it. I really
6 saw it as a -- well, but I saw it as a requirement that
7 there needs to be a hearing where the parties will have an
8 opportunity to bring forward whatever their, you know,
9 concerns or whatever their exigent circumstances are,
01:44 10 because I can at least see some, you know, situation where
11 absent some guidance like this things might languish.
12 There might be some, you know...

13 CHAIRMAN BABCOCK: Well, and even with Judge
14 Christopher's example the parties appear before you and
01:44 15 they haven't brought up the issue of protective order
16 because they are not thinking that far down the road
17 because, you know, that in 60 days a defendant most likely
18 is going to say "Hey, I would love to give you these
19 documents; but I'm not going to do it without a protective
01:44 20 order." And then there is a big fight about what the
21 protective order is going to say. Whereas if at the
22 initial conference you said "Hey, is anybody going to
23 claim that they have confidential documents?" "Well, yes,
24 Your Honor. We may have some." "Well, okay. Let's see
01:45 25 what we can do about a protective order" and you short

1 circuit things. So even under that example it would seem
2 you could bring it up. I don't know. Just a thought.
3 Buddy.

4 MR. LOW: One of the problems is that on 166
01:45 5 it does not mention anything about assignment of counsel
6 or assigning lead counsel or anything like that. So 166
7 wasn't contemplating mass tort. So when Steve talked
8 about "organizing counsel," well, it might be a job for a
9 judge to organize me; but he could assign me duties, you
01:45 10 know, assigning duties and things like that; but we don't
11 need to get into detail.

12 CHAIRMAN BABCOCK: Yes. I agree. And I
13 think, Chris, since this is your baby and you've managed
14 miraculously to get 18 votes in this committee why don't
01:45 15 you scrub it out and, for example, on these motions to
16 dismiss --

17 MR. GRIESEL: Right.

18 CHAIRMAN BABCOCK: -- is probably
19 inappropriate since we don't have such an animal.

01:46 20 MR. GRIESEL: That's the next page.

21 CHAIRMAN BABCOCK: And the good thing is
22 that you have the support on this so that maybe when the
23 judges laugh you out of chambers.

24 MR. GRIESEL: Well, the Supreme Court of a
01:46 25 California specifically when they adopted their manual on

1 complex litigation which explained why they put this in
2 their Rules of Judicial Administration specifically said
3 it was because, even though in the California Rules they
4 do have something like 166, it wasn't used very often.
01:46 5 And they wanted this not to be a checklist, but a tool box
6 for the trial court judge to use; and they were suggesting
7 some tools, not all the tools they could use.

8 CHAIRMAN BABCOCK: Which one is the hammer?

9 (LAUGHTER.)

10 MR. GRISEL: Yes.

11 CHAIRMAN BABCOCK: Okay. Let's go to 13.6.

12 MR. TIPPS: I think I have got 13.6, if I
13 can speak up with this voice. These Rules relate to what
14 happens to the case when the pretrial court for whatever
01:47 15 reason is done with it and it needs to be sent back to the
16 trial court. 13.6(a) deals with what happens when the
17 cases are finally disposed of and basically addresses two
18 concepts, one of which I would not think would be
19 controversial, but with this group you never know, the
01:47 20 other which probably is.

21 But the first concept has to do with the situation
22 in which the pretrial court enters a final order, as it
23 clearly is allowed to do under the statute. And the
24 objective is to provide that when that happens that the
01:47 25 case is over and that there is nothing that needs to be

1 remanded to the trial court. We used the term here "Such
2 orders are not to be remanded to the trial court." That
3 may well read better if we talk about cases are not
4 remanded to the trial court; but that's the basic concept.

01:48 5 MR. ORSINGER: Let me ask you does that mean
6 the appeal would be out of the pretrial court into that
7 court, the court of appeals district and not out of the
8 original court of appeals district?

9 MR. TIPPS: Yes. And we address that in
01:48 10 13.8. The other concept is included in 13.6(a), which is
11 certainly something that could be controversial, is the
12 possibility that the court, pretrial court might enter an
13 order with regard to only a portion of a case including
14 any part of a claim or defense that this proposal
01:48 15 contemplates could also be final and appealable.

16 For example, in a case of a products liability case
17 with common fact issues the pretrial court might conclude
18 that summary judgment is appropriate with regard to a
19 claim of design defect; but there are fact issues with
01:49 20 regard to the marketing defect. And the proposal here is
21 that by virtue of this Rule parties could appeal the
22 pretrial court's determination with regard to the design
23 defect claim. That would be a final and appealable order.

24 PROFESSOR DORSANEO: What?

25 COURT REPORTER: "That would be a final and

1 appealable order."

2 MR. ORSINGER: If it's severed, it would be
3 final.

01:49 4 PROFESSOR DORSANEO: I understood what he
5 said. I didn't understand why he said it.

6 HONORABLE SCOTT BRISTER: Because if it was
7 one case and we decided, and the trial judge decided no
8 design defect with marketing, no question he would not let
9 you appeal just the design defect ruling. It's a partial
01:49 10 summary judgment. If he had to deal with 1500 cases, it
11 was our view that the trial judge might want the option,
12 not has to, but might want the option to sever it and get
13 a ruling on appeal before we start trying all these cases
14 to see if that's right or wrong for two reasons.

01:50 15 You could do this under current law if everybody
16 agreed to it. The problem of course is in this there's too
17 many people to agree to it. It's different from a
18 Plaintiff A vs. Defendant B. You cannot get agreement
19 from all 1500. Second, that there is not that much time
01:50 20 to be saved in one trial by eliminating just the design
21 defect in the case. You still are going to have to do all
22 the same stuff; but in 30 trials there would be enough
23 time involved that it might justify, if the pretrial court
24 wanted to, making that partial summary judgment
01:50 25 appealable.

1 CHAIRMAN BABCOCK: A permissive
2 interlocutory appeal.

3 MR. GILSTRAP: Chip.

4 CHAIRMAN BABCOCK: Yes.

01:50 5 MR. GILSTRAP: Are we contemplating doing
6 that without a severance?

7 HONORABLE SCOTT BRISTER: No.

8 MR. GILSTRAP: You would sever it, and then
9 it would go up as a final judgment?

01:51 10 HONORABLE SCOTT BRISTER: It would be the
11 same as Lehmann, and "I mean this to be appealable. This
12 is a final order," et cetera.

13 MR. GILSTRAP: You might want to say
14 "severance" in it, because it looks like you're trying to
01:51 15 say that the interlocutory order is somehow final and
16 appealable.

17 MR. SOULES: You can't sever a part of a
18 claim or a defense. You sever a cause of action or a
19 defense.

01:51 20 HONORABLE SCOTT BRISTER: What Rule says
21 that? Only Iley vs. Hughes. All, my view is when you
22 read the Rules there is no Rule that says that. It was
23 only Iley vs. Hughes and subsequent court cases that say
24 you can't do it for pragmatic reasons about whether you're
01:51 25 saving time or not, which we think changes. If you look

1 at the Rules 40 or 41, it does say you can sever a claim
2 or defense.

3 MR. SOULES: You can sever a claim or
4 defense; but you can't sever a part of a claim or defense.

01:51 5 HONORABLE SARAH DUNCAN: Theory. You're
6 talking about severing a theory of a claim or defense; and
7 there's just no --

8 HONORABLE SCOTT BRISTER: I disagree. I
9 mean, a marketing claim is a claim.

01:52 10 MR. SOULE: But your Rule says part of a
11 claim or defense.

12 HONORABLE SCOTT BRISTER: Right.

13 PROFESSOR ALBRIGHT: The statute gives the
14 Supreme Court the power. It says "The Rules adopted by
01:52 15 the Supreme Court must provide for appellate review of
16 certain or all past orders by extraordinary writ." But I
17 guess that's the MDL panel. That's not the pretrial
18 court.

19 CHAIRMAN BABCOCK: Not the pretrial judge.
01:52 20 Bill.

21 PROFESSOR DORSANEO: Well, I'm kind of
22 sympathetic to what you're saying is that it is the
23 prudential thing that you could possibly do; but for the
24 longest time we've had, I think it almost appears right at
01:52 25 the beginning of the old Hodge, Jones & Elliott casebooks

1 the clear distinction between severing causes of action
2 and not, splitting them. And it's not just Iley vs.
3 Hughes. There's a fair amount of jurisprudence. Whether
4 the State of Texas Supreme Court is still proud of that
01:53 5 case law I don't know; but it's pretty substantial. And
6 we could rewrite it.

7 HONORABLE SCOTT BRISTER: Let me give you
8 another one. What if the pretrial court decided as a
9 matter of law the defendant was liable in a securities
01:53 10 fraud case or a contract fraud case. "Look. You charged
11 a documentary fee that under state law you can't charge.
12 You are liable." But I can't figure out the damages for
13 all 1550, so I'm remanding for damages." The question is
14 could the pretrial judge before you remand all 1500 for
01:53 15 all these damage trials get a ruling on liability, make a
16 ruling, sever it out, get it appealed before you remand
17 them back?

18 Iley vs. Hughes definitely says "no." So yes,
19 this a change in law because it's a changed procedure was
01:54 20 our thought.

21 CHAIRMAN BABCOCK: Judge Bland has got the
22 answer.

23 HONORABLE JANE BLAND: Well, I think that
24 instead of worrying about severance I don't think severing
01:54 25 is a good idea for the reason that Sarah and Bill are

1 talking about. But we should try to go within the
2 existing framework for appeals of this nature, which is in
3 51.014 of the Civil Practices & Remedies Code which
4 provides that a district court can issue a written order
01:54 5 for interlocutory appeal if the parties agree that the
6 court. And I understand there are two issues here,
7 whether we want to make the parties have to sign on to
8 this, and then whether or not we're going to allow the
9 appellate court to say "No, we don't want to take it."

01:54 10 But at a minimum I think we would want these two
11 things: That the pretrial judge could find that the order
12 involves a controlling question of law as to which there
13 is substantial ground for a difference of opinion and that
14 an immediate appeal may materially advance the ultimate
01:55 15 termination of the litigation. Absent those two things I
16 don't think we should be appealing nonfinal,
17 nondispositive orders. And that's what the federal law
18 does and what we already have in the state court.

19 And then what we should try to think about is
01:55 20 whether or not we want to include number three which is
21 the interlocutory appeal provision we already have which
22 is that the parties, in Texas practice the parties have to
23 agree to such an order; and you may or may not want that
24 in the MDL for the reasons that you-all have been talking
01:55 25 about, and then in addition whether or not in subsection

1 (f) whether or not the appellate court can say "yes" or
2 "no," "yes, we'll take the appeal" or "no, we will not."
3 But I would think that we'd be smart to refer our Rule,
4 our Rule 13 to that framework; and then to the extent that
01:56 5 we disagree with there having to be an agreement of the
6 parties for this to be done then just take that part of it
7 out. But as far as, you know, trying to rewrite a special
8 appellate provision just for this Rule I think we would be
9 better to stick with what we have.

01:56 10 CHAIRMAN BABCOCK: If we do that, aren't we
11 rewriting the statute?

12 HONORABLE JANE BLAND: We have.

13 HONORABLE SCOTT BRISTER: The argument is --

14 HONORABLE JANE BLADE: But not withstanding
01:56 15 other law. We could do our own appellate proceeding; but
16 it would make sense to me to fold what law we have on the
17 books for interlocutory appeal.

18 HONORABLE SCOTT BRISTER: I agree with --

19 HONORABLE JANE BLAND: And, you know, to the
01:56 20 extent you think it's incompatible with an MDL proceeding
21 we can discuss it; but I don't think we should permit, I
22 don't think we should sever partial claims or partial
23 theories, and I don't think we should be appealing
24 pretrial orders unless such an appeal is really going to
01:57 25 materially advance litigation. And I think the appellate

1 court probably should have some say so on whether or not
2 they agree that it will materially advance the litigation.

3 CHAIRMAN BABCOCK: Justice Hecht had a
4 thought.

01:57 5 JUSTICE NATHAN HECHT: Well, keep in mind in
6 the broader scheme of things that you're going to get,
7 you're going to be entitled to the same kind of mandamus
8 review like discovery rulings, privilege rulings that you
9 would have otherwise. This doesn't change or limit that.

01:57 10 And there is a case in our court that says "And if you
11 have a ruling that affects a whole lot of cases even
12 though it's an interlocutory ruling in a venue case or
13 something" -- I have forgotten what it is. Bill would
14 know --

01:57 15 PROFESSOR DORSANEO: Special appearance case
16 first.

17 JUSTICE NATHAN HECHT: -- "you can." And
18 that's an exception to the adequate remedy by appeal
19 restriction on mandamus relief.

01:58 20 So I guess in the jurisprudential scheme of things
21 is the fact that there are a huge number of cases being
22 ruled on at the same time a consideration in getting an
23 appellate court ruling whether you did it by some
24 restructured interlocutory appeal along the lines of what
01:58 25 Judge Bland suggests or by mandamus or some other way,

1 clearly it seems to me the appellate courts would resist
2 wholesale --

3 HONORABLE SCOTT BRISTER: Every little
4 thing.

01:58 5 JUSTICE NATHAN HECHT: -- mandamus review of
6 interlocutory rulings by this pretrial judge. Otherwise
7 we have created an efficiency in the trial court and a
8 huge inefficiency in the appellate court. We don't want
9 to do that. But would there be some kinds of rulings that
01:58 10 ordinarily you've just got to wait until the final
11 judgment to appeal that you would want to get an
12 interlocutory review of some way? I just pose the
13 question.

14 HONORABLE JANE BLAND: As a trial judge I'd
01:59 15 rather it be by a regular appeal with a real record than
16 by mandamus, because I don't think that, you know, -- I
17 think that mandamuses are usually hurried procedures; and
18 I'm not sure that the appellate courts always get the best
19 briefing and work by the lawyers that they can get. And
01:59 20 if you're talking about an issue that materially advances
21 the outcome of the litigation, and I guess it could be,
22 you know, a Daubert ruling that would take out one whole
23 theory of the case or something like that, you know, I
24 would rather it be an interlocutory appeal where everybody
01:59 25 gets to brief it and, you know, rather than, because if

1 it's reviewable by mandamus, then it's, you know, and
2 we've erred, then we have abused our discretion by making
3 an error of law. But, you know, really all we've done is
4 issued this written order on a motion for summary judgment
02:00 5 or something. To me I'd rather the order get looked at in
6 the proper time with the proper amount of briefing instead
7 of just piecemeal taking up partial records and partial
8 hearings.

9 CHAIRMAN BABCOCK: Judge Gray, then Richard,
02:00 10 then Bill.

11 HONORABLE TOM GRAY: Well, of course I can't
12 speak for all of the appellate judges; but I would beg you
13 not to do this in the context of pieces of causes of
14 action or pieces of defense. And while to address it
02:00 15 specifically there are two examples that have been given.
16 If it's a securities case, liability is determined and you
17 want that issue reviewed first or quickly, it seems like
18 the ability of the pretrial court to remand certain cases
19 and let those go on to trial on damages and then get that
02:01 20 before a court of appeals you can do that fairly quickly
21 through that. If you give it the interlocutory route or
22 some type of other appeal, the whole case may come to a
23 stop while you're waiting for the appellate court to do
24 something.

02:01 25 HONORABLE JANE BLAND: No, it doesn't.

1 HONORABLE TOM GRAY: I know it doesn't have
2 to; but I'm saying it might. And because what you have
3 said is this is something that is going to materially
4 advance the case. Well, if it's going to materially
02:01 5 advance, the trial judge is going to be kind of inclined
6 to wait.

7 HONORABLE JANE BLAND: That's up to the
8 trial judge or the appellate court. We have a Rule on the
9 books.

10 HONORABLE TOM GRAY: It's not up to me.

11 HONORABLE JANE BLAND: We have a Rule right
12 now that basically for any case a trial judge can certify
13 the issue; and the federal courts have it too. And it is
14 an existing rule. We wouldn't have to write a new
02:02 15 appellate scheme.

16 HONORABLE SARAH B. DUNCAN: Jane, it's a
17 statute.

18 HONORABLE JANE BLAND: Or a statute. I'm
19 sorry.

02:02 20 HONORABLE SARAH B. DUNCAN: And the reason
21 we got this statute --

22 HONORABLE JANE BLAND: I agree.

23 HONORABLE SARAH B. DUNCAN: -- is because of
24 hundreds of years of law that says you can only appeal a
25 final judgment.

1 HONORABLE JANE BLAND: A final judgment.
2 And I agree. I'm sorry. I'm with you. I think we should
3 follow what that statute says.

4 HONORABLE SARAH B. DUNCAN: But we can't.
02:02 5 We can't. The reason we got the statute is because you
6 can only appeal a final judgment. And I'm a big advocate
7 of interlocutory appeals. And I'm sorry about the
8 provision in the statute that says everybody has got to
9 agree; but that's what it is.

02:02 10 HONORABLE JANE BLAND: Right. Okay.

11 HONORABLE SCOTT BRISTER: But what part of
12 the statute --

13 HONORABLE JANE BLAND: And I'm saying
14 that --

15 HONORABLE SCOTT BRISTER: -- says it's not a
16 final --

17 COURT REPORTER: Wait. Wait. One at a
18 time.

19 HONORABLE SCOTT BRISTER: What part of the
02:02 20 statute says it's not a final judgment if you sever it out
21 and say it's final? That's the difference. I agree this
22 committee or the Court probably cannot create a right to
23 interlocutory appeal since that is the subject of the
24 statute; but the interlocutory appeal statute does not
02:03 25 define interlocutory appeals to include a severed out

1 complete claim that is declared to be final. You can get
2 around the statute by doing it that way.

3 HONORABLE TOM GRAY: May I finish? Item
4 two, the example that was given of the design defect was
02:03 5 that here is somebody that's got the design defect claim
6 in, and everybody else is proceeding along on a
7 manufacturing defect or something of that nature. If that
8 is a small part of the case, one, it may not meet the
9 definition in the first place of "materially advance."
02:03 10 But if you take out that one piece, all of the, I mean,
11 everything I've heard discussed in the last two days is
12 that most of these cases are resolved short of remand and
13 trial. If this is such a substantial piece of it, that is
14 not going to happen -- excuse me -- if this is such a
02:03 15 small piece of it, that is still going to happen because
16 the real crux of the entire dispute is over the
17 manufacturing defect and not the design defect to begin
18 with.

19 So I think you are asking for a tremendous delay
02:04 20 in the ultimate resolution of a lot of lawsuits if you
21 incorporate some provision like this. I think the
22 reference that Justice Hecht made to mandamus, if it's of
23 that magnitude, mandamus already exists and it can be
24 reviewed and dealt with in that context.

02:04 25 CHAIRMAN BABCOCK: Judge Benton.

1 HONORABLE LEVI BENTON: I think Brister's
2 proposal is right. And if the spirit of the Rule says
3 "efficient resolution of the dispute," we ought to have
4 the severance. But we ought to go further in my view. We
02:04 5 ought to require that the court of appeals and the Supreme
6 Court expeditiously rule on the appeal, because and you
7 are right also, Tommy, that you might go up there and
8 there will be a black hole and sit there forever.

9 JUSTICE NATHAN HECHT: There is no chance in
02:05 10 hell that's going to happen.

11 (LAUGHTER.)

12 HONORABLE LEVI BENTON: I'm sorry.

13 HONORABLE NATHAN HECHT: I was just joking.

14 HONORABLE LEVI BENTON: I think the contract
02:05 15 example he used to not permit the severance to deny the
16 right to take that up just delays things. I mean, that
17 might be dispositive of all these cases.

18 HONORABLE TOM GRAY: Right now there is a
19 hierarchy of issues that we need to take up. Do I take
02:05 20 this case involving simple money up before the guy who is
21 in jail on habeas pretrial? Do I take it up before the
22 termination of parental rights of poor children whose
23 adoption is pending.

24 I mean, let me tell you there are so many different
02:05 25 statutes that tell us that cases have priorities and in

1 what rank that we should take them in that it is you
2 cannot get them all together in one place and figure out
3 what the hierarchy is. I mean, it's just it's not there.
4 And to use judgment, and let me tell you money judgments
02:06 5 in all the listings are last.

6 And so, you know, I'm telling you that this is a
7 real burden on the intermediate appellate courts if you
8 decide to do this. If you decide to do it, I make the
9 motion that it ought to go to the Supreme Court.

02:06 10 (LAUGHTER.)

11 CHAIRMAN BABCOCK: Nina.

12 JUSTICE NATHAN HECHT: The same ruling as
13 with Judge Benton.

14 MS. CORTELL: I'm very much in favor of a
02:06 15 mechanism to get sort of an interlocutory review. I think
16 that that would really move a lot of cases along if we
17 have a single defense or a single issue. And I'm not sure
18 that severance is the way to do it.

19 Mike and I actually had a case a couple of years
02:06 20 ago where there was a severance; but it was a very tricky
21 deal. You severed your liability issue. You come back
22 just for damages. And in terms of our current system I'm
23 not sure if you really shouldn't think about this, that
24 severance for most cases is really the solution. I'm
02:07 25 afraid that the solution is legislative and we have to

1 have a broadening of our current statute, statutory right
2 of interlocutory appeal. That's my concern. And I'm
3 certainly conceptually in favor of it.

02:07 4 CHAIRMAN BABCOCK: I think the order was
5 Pete, Bill, Alex and Judge Bland.

6 MR. SCHENKKAN: I think the question whether
7 the interlocutory appeal mechanism is a good idea needs to
8 be distinguished with whether or not it is a mechanism
9 that can be provided for by the Rules to implement in the
02:07 10 MDL statute. I don't see anything in the MDL statute that
11 provides anything new about review except for the review
12 of the panel's orders. I think we are stuck with existing
13 law on appeals, whatever it is, whether it's interlocutory
14 appeals, appealingings of final judgments or extraordinary
02:08 15 risk.

16 So I would urge us for purposes of the MDL Rule to take
17 advantage of whatever extent we fairly can of what is in
18 there and not talk about what we'd like to have. That's
19 discussion we need to have before the next regular session
02:08 20 of the legislature.

21 With regard to what is under the existing law
22 I think the safe thing to do in 13.6(a) would be to say
23 "The pretrial court may enter final and nonappealable
24 dispositive orders in one or more of transferred cases"
02:08 25 period; and then that leaves the question whether or not

1 it's possible to sever some liability issue out and enter
2 a judgment on that and have somebody try to take that one
3 up. And I would gather from listening to the conversation
4 there's a difference of opinion about that. And if there
02:08 5 is a difference of opinion, I don't think we ought to try
6 to resolve it. Just say that, whatever kind of final
7 appealable dispositive order the trial courts can enter,
8 the pretrial court can enter. Those, if we can set up the
9 ones where something will be taken up, then great. And if
02:09 10 one of those whether or not it's a final and appealable
11 order; but if it's an order that might be a subject of a
12 mandamus, if somebody wants to take up mandamus, can do
13 it.

14 My problem with Judge Bland's suggestion, that I
02:09 15 like very much in principle, is the statute has that third
16 category that says the parties have to agree. And if we
17 can get the parties to agree, then we can certainly use
18 the statute; but if we can't get the parties to agree, I
19 don't see how we can rewrite the statute and say in these
02:09 20 kind of cases the parties don't have to.

21 HONORABLE JANE BLAND: I agree. I'm just
22 saying I don't think we should invent. I think we should
23 go with what we have. If there is no way to change the
24 agreement issue, then we should stick with it. I agree
02:09 25 with you. I don't think that we should invent through

1 severance an interlocutory appeal that we can't get to
2 otherwise.

3 CHAIRMAN BABCOCK: Justice Hecht.

4 JUSTICE NATHAN HECHT: Let me just interject
02:10 5 a caveat or an addendum to Pete's comment, that again
6 there is some jurisprudence that you can get, you could
7 get mandamus relief, relief by extraordinary writ of a
8 pretrial ruling in a case like this where it was going to
9 affect a large number of people.

02:10 10 PROFESSOR DORSANEO: CSR vs. Lincoln.

11 HONORABLE NATHAN HECHT: That's it, CSR vs.
12 Lincoln. Or at least some jurisprudence that says that
13 the fact that it's going to influence a lot of cases and a
14 lot of parties satisfies the "no adequate remedy by
02:10 15 appeal" portion of the mandamus standard. So I guess on
16 the one hand we could wait for a dispositive case to come
17 out of one of these, or we could think about addressing it
18 by Rule. So I mean, it still is kind of out there whether
19 this is a good idea to disrupt these proceedings this way
02:11 20 and burden the appellate courts or not.

21 CHAIRMAN BABCOCK: Bill and then Alex.

22 PROFESSOR DORSANEO: I think I agree with
23 everybody.

24 (LAUGHTER.)

02:11 25 PROFESSOR DORSANEO: The most likely way for

1 us at this stage of development, notwithstanding the fact
2 that this severance cause of action idea is a judicial
3 construct, it's not in the Rules and not really in the
4 statutes, is by reference to the mandamus, "extraordinary
02:11 5 circumstances" root. I'm not -- that might be simply --
6 it might be simple to put that in the Rule by going and
7 looking at the language in CSR vs. Lincoln in the case
8 that Mike and I had where he used that against me not too
9 long ago. But I think Pete may be right. It may be
02:12 10 desirable at least to stop in related cases and not try to
11 do it the way it's done here. It really does look like
12 it's asking to discard a lot of things that people have
13 learned and are proud of knowing about.

14 (LAUGHTER.)

02:12 15 CHAIRMAN BABCOCK: Alex.

16 PROFESSOR ALBRIGHT: I was going to suggest
17 maybe somehow encouraging the Court to make the findings
18 that you were talking about in these important orders, the
19 findings that come out of that statute so that it's kind
02:12 20 of front and center to move it on here and this is one of
21 those orders, and maybe it would be easier to get the
22 agreement. I don't know. And you know, the legislature
23 is in session. Maybe we need to go down there and see
24 what they'll do.

02:12 25 CHAIRMAN BABCOCK: Let's all recess --

1 HONORABLE SCOTT BRISTER: Good luck.

2 CHAIRMAN BABCOCK: -- and march on the
3 capitol.

4 (LAUGHTER.)

02:13 5 CHAIRMAN BABCOCK: Yes, Stephen.

6 MR. TIPPS: I do think that, I know that
7 this permissive interlocutory appeal statute has not been
8 used very much largely because it does require agreement;
9 but it does seem to me that in the context of what we're
02:13 10 going to be asking the pretrial courts to do and when you
11 think about the examples that Scott poses that the
12 likelihood that parties might agree to the permissive
13 interlocutory appeal in these situations may be higher
14 than they otherwise might be in which case we do have
02:13 15 available in the statute a vehicle that would allow this
16 efficiency.

17 CHAIRMAN BABCOCK: Richard.

18 MR. MUNZINGER: I think Pete's suggested
19 language solves all the problem and puts an end to the
02:13 20 discussion if the consensus is the present law allows
21 interlocutory appeals in certain instances. We're not
22 attempting to change the law her, because we have
23 questioned our authority to do so. If you just adopt
24 Pete's language, what you have done is say you can enter
02:14 25 whatever order you can. If there is an interlocutory

1 appeal from it, go for it, and you don't have to have a
2 Law Review article to support this ruling.

3 CHAIRMAN BABCOCK: Richard Orsinger.

4 MR. ORSINGER: It may not be as hard to get
02:14 5 consent if you have, if you still maintain them as
6 individual cases. If you can just get one defendant and
7 one plaintiff in an individual case to be your test case
8 on appeal, that won't have res judicata or law of the case
9 effect; but it would have stare decisis effect. So we may
02:14 10 be able to get advisory opinions out of two cooperative --

11 HONORABLE SCOTT BRISTER: Shhhhh.

12 MR. ORSINGER: Well, --

13 HONORABLE SCOTT BRISTER: Strike that part.

14 (LAUGHTER.)

02:14 15 MR. ORSINGER: It's not advisory in the case
16 that's it actually on appeal. But if you go to the
17 controlling court of appeals and they rule that such and
18 such is correct, then you can expect this judge to go back
19 and change his ruling if he or she is wrong. I mean,
02:14 20 maybe a defendant can agree to pay a plaintiff to appeal.

21 HONORABLE SCOTT BRISTER: Stop while you're
22 ahead, Richard.

23 HONORABLE JANE BLAND: And you can always
24 say "No," Tom, so we're not putting more work on you.

02:15 25 HONORABLE TOM GRAY: Yes. But I always wind

1 up in the dissent; and the other two may agree to take it.

2 CHAIRMAN BABCOCK: Oh, you can say "no"?

3 MR. GILSTRAP: Yes. It's under the
4 appellate court.

02:15 5 HONORABLE JANE BLAND: I'm okay with Pete's
6 language. I guess I move that we do that instead of what
7 we have in there.

8 CHAIRMAN BABCOCK: There is one problem with
9 Pete's language; and that is that the pretrial court might
02:15 10 enter an order that is final, and it could dispose of the
11 whole case, so we don't want to conclude it from doing
12 that.

13 MR. ORSINGER: No. He just said put a
14 period after "thereof."

02:15 15 MR. SCHENKKAN: No. I said put a period
16 after "related cases." I mean, I do want the friendly
17 amendment every time you see the language of "transferred
18 cases." Not "related cases."

19 CHAIRMAN BABCOCK: Okay.

02:15 20 MR. ORSINGER: But you still need the last
21 sentence. If truly final, you wouldn't remand it to the
22 trial court.

23 MR. SCHENKKAN: I agree with that.

24 HONORABLE SARAH B. DUNCAN: But on the last
25 sentence --

1 HONORABLE JANE BLAND: Including any part of
2 the claim or defense.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE SARAH B. DUNCAN: We don't remand
02:16 5 orders. We are either going to remand a case or we're
6 not.

7 MR. SOULES: That sentence has got to go.

8 MR. TIPPS: I think that should read "cases
9 in which final orders are entered are not to be remanded
02:16 10 to the trial court." I agree with you.

11 HONORABLE SARAH B. DUNCAN: That's fine.
12 However you want to say it.

13 MR. TIPPS: Right.

14 MR. ORSINGER: Or could you say "such
02:16 15 cases"?

16 PROFESSOR DORSANEO: They're not going to be
17 remanded at all for any purpose? To get the files in
18 shape. We don't want to reconsider.

19 MR. SOULES: Final judgments are --

02:16 20 MR. ORSINGER: Why can't you just say "Such
21 cases are not to be remanded"?

22 MR. TIPPS: That would be fine. But the
23 concept I'm trying to capture here is that when the
24 pretrial court makes a final dispositive ruling that the
02:16 25 case is over and the trial court never sees it or hears

1 about it again.

2 CHAIRMAN BABCOCK: That takes care of (a).

3 How about (b)?

4 MR. SOULES: That doesn't take care of (a).

02:16 5 CHAIRMAN BABCOCK: Why doesn't it take care
6 of (a)?

7 MR. SOULES: In the first place it should
8 say "The pretrial order may render final and
9 appealable" --

02:17 10 MR. ORSINGER: -- "judgments."

11 MR. SOULES: -- dispositive judgments."

12 PROFESSOR DORSANEO: We don't need
13 "dispositive" either.

14 MR. SOULES: Right. I don't care whether
02:17 15 you have that in there or not. But anyway, you render
16 judgments. The clerk enters them in the minutes. So you
17 render judgments. I don't know about "in related cases."

18 CHAIRMAN BABCOCK: It's "transferred cases."

19 MR. SOULES: What?

02:17 20 HONORABLE TRACY CHRISTOPHER: "In
21 transferred cases."

22 CHAIRMAN BABCOCK: "In transferred cases."

23 MR. SOULES: "In transferred cases" or "in
24 transferred cases" period.

02:17 25 PROFESSOR DORSANEO: "In one or more of the

1 transferred cases."

2 MR. SOULES: "In one or more of the
3 transferred cases." Okay.

4 MR. GILSTRAP: "Such cases are not to be
5 remanded."

6 MR. SOULES: "Such judgments are final."

7 MR. ORSINGER: You already said they're
8 final.

9 CHAIRMAN BABCOCK: You said they're final.

02:17 10 MR. SOULES: "Such judgments are not to be
11 remanded to the trial judge."

12 MR. ORSINGER: That's the "case" that
13 doesn't get remanded.

14 CHAIRMAN BABCOCK: It's the case that
15 doesn't get remanded.

16 MR. SOULES: Pardon?

17 MR. ORSINGER: It's the case that doesn't
18 get remanded, not the judgment.

19 CHAIRMAN BABCOCK: Okay. "The pretrial
02:18 20 court may render final judgments in one or more of the
21 transferred cases. Such cases are not to be remanded to
22 the trial court."

23 MR. SOULES: All right. I can live with
24 that.

02:18 25 MR. ORSINGER: By doing that you've

1 inferentially knocked out a bona fide severance, a stand
2 alone claim, because that's not a final judgment in the
3 case; but if you dismiss a DTPA claim that leaves
4 something else there, you ought to be able to sever and
02:18 5 have that go up. And I don't agree taking "any portion
6 thereof" if that's going to imply you can't have a
7 bona fide severance.

8 CHAIRMAN BABCOCK: Then you're right back to
9 that language everybody is mad about.

02:18 10 MR. ORSINGER: No, because you can't sever
11 claims or defense.

12 MR. SOULES: I don't mind you saying "or any
13 severed portion thereof."

14 MR. SCHENKKAN: I thought when you severed
02:18 15 it maybe what "severance" meant it then became its own
16 action. Maybe I need --

17 MR. ORSINGER: No. After it is severed it
18 does become a different cause.

19 MR. SOULES: You could say "or any
02:18 20 severance." -- "or any severed portion thereof" period.
21 And then leave what can be severed to the law that exists.

22 CHAIRMAN BABCOCK: Okay. We're not talking
23 about "severance."

24 MR. GILSTRAP: Yes. He can sever it before
02:19 25 he signs the judgment.

1 HONORABLE TRACY CHRISTOPHER: Right. Then
2 you have final judgment.

3 CHAIRMAN BABCOCK: Justice Hecht, do you-all
4 have a good enough sense of what the issues are in subpart
5 (a)?

6 HONORABLE NATHAN HECHT: Yes.

7 MR. SOULES: The main thing that we're
8 taking is "any part of the claim or defense" and cleaning
9 up the language.

02:19 10 JUSTICE NATHAN HECHT: We got it.

11 CHAIRMAN BABCOCK: You got it?

12 JUSTICE NATHAN HECHT: We got it.

13 CHAIRMAN BABCOCK: Subpart (b).

14 HONORABLE JANE BLAND: He's just going to
02:19 15 take it all by mandamus?

16 CHAIRMAN BABCOCK: Huh?

17 HONORABLE JANE BLAND: He's just going to
18 take it all by mandamus.

19 MR. TIPPS: Subpart (b) is a situation in
02:19 20 which a case is not finally resolved by the pretrial
21 court, but needs to be remanded to the trial court for
22 trial; and it simply says that when a case or a portion of
23 a case that is properly severed is ready to be tried then
24 the pretrial court should remand on the one hand the
02:20 25 entire case for trial or on the other hand remand the

1 severed claim or party.

2 CHAIRMAN BABCOCK: Richard Orsinger.

3 MR. ORSINGER: I think it's too restrictive.

4 There may be instances in which the collective discovery

02:20 5 is concluded and the parties can go their own way and

6 finish up their own case like Judge Christopher was

7 talking about. And this --

8 HONORABLE SCOTT BRISTER: We intended to

9 separate those between (b) and (c).

02:20 10 MR. ORSINGER: Okay.

11 HONORABLE TRACY CHRISTOPHER: (c) is general

12 remand.

13 MR. ORSINGER: Okay. I'm okay with that.

14 CHAIRMAN BABCOCK: Okay. Anything else on

02:20 15 (b)? Any?

16 CHAIRMAN BABCOCK: The comment on (b),

17 enlighten me.

18 PROFESSOR CARLSON: You're taking out "any

19 portion thereof" and putting in the language of "properly

02:21 20 severed."

21 MR. SOULES: That should be "Or any cases

22 severed therefrom." Then "such cases" works.

23 MR. TIPPS: I think we probably should

24 include the language we've referenced as "severs" rather

02:21 25 than "any portion thereof."

1 CHAIRMAN BABCOCK: What are you reading now,
2 Stephen? What are you reading now, Stephen?

3 MR. TIPPS: I haven't.

4 MR. ORSINGER: We need to say "any severed
02:21 5 portion thereof," "when related cases or any severed
6 portion thereof," comma.

7 MR. SOULES: Why not "severed cases
8 therefrom"? I mean, they're all cases and then "such
9 cases."

02:21 10 MR. GILSTRAP: Why don't you start with "The
11 pretrial court" and see how it is. "The pretrial
12 court" --

13 MR. SOULES: See what I'm saying, Richard?

14 MR. ORSINGER: Yes. The question is whether
02:21 15 you look at it before or after the severance.

16 MR. GILSTRAP: Why don't you say "The
17 pretrial court may sever any claim or party from a
18 transferred case and remand for trial or may remand the
19 entire case to the trial court for trial"? That solves
02:22 20 the problem.

21 MR. TIPPS: I think that's fine.

22 MR. SOULES: Repeat, please.

23 MR. GILSTRAP: Just delete the phrase "when
24 related cases or any portion thereof related for trial"
02:22 25 and start with "The pretrial court."

1 CHAIRMAN BABCOCK: What is wrong with that?

2 HONORABLE TRACY CHRISTOPHER: Perfect.

3 CHAIRMAN BABCOCK: It started with "The
4 pretrial court may sever."

02:22 5 HONORABLE SCOTT BRISTER: That's all right
6 with me.

7 CHAIRMAN BABCOCK: Okay with you, Bill?

8 PROFESSOR DORSANEO: I have no great
9 complaint. But using the word "sever" you're imposing the
02:22 10 limitations that are inherent in severance.

11 MR. SOULES: Yes.

12 PROFESSOR DORSANEO: Which are not
13 necessarily required to be imposed in this context, going
14 down. Or back.

02:22 15 MR. ORSINGER: You could send damages back
16 even though you're still holding onto liability? Or what
17 would you do other than send an entire claim?

18 PROFESSOR DORSANEO: You'd send an issue. A
19 damage issue has separate constraints.

02:23 20 HONORABLE SCOTT BRISTER: You'd send the
21 contract claim, but not the bad faith claim.

22 PROFESSOR DORSANEO: You could also send the
23 causation issue in whatever claim for separate trial. We
24 don't have a problem with separately trying issues. We do
02:23 25 have a problem of severing issues.

1 MR. ORSINGER: As long as the same jury.
2 Doesn't it have to be the same jury? You do have a
3 problem trying damages to a different jury from liability,
4 don't you?

02:23 5 PROFESSOR DORSANEO: No. Actually it's not
6 as clear on that.

7 MR. ORSINGER: The Seventh Amendment is
8 pretty clear on that.

9 PROFESSOR DORSANEO: It doesn't apply to
10 this.

11 MR. ORSINGER: Okay.

12 HONORABLE SCOTT BRISTER: Pete, sorry.

13 MR. SCHENKKAN: It is a problem, because
14 there is a dispute as to the extent which you can do it
02:24 15 and the circumstances under which you might want to. The
16 solution is similar to what we looked at in 13.6(a) with
17 regard to appeal or appellate review appeal. Isn't the
18 solution just to skip (b) entirely and go to what is now
19 (c) and just say "The pretrial court may order a remand of
02:24 20 one or more transferred cases when the pretrial
21 proceedings have been completed to such a degree as the
22 purposes of the transfer have been fulfilled"? That
23 leaves entirely open whether that is because somebody
24 thinks we have gotten an issue to the point to which it
02:24 25 can be sent back to trial and there is or is not agreement

1 that it's possible to carve that issue out and send that
2 back to trial without the writ. We can just fight about
3 all that later when it comes up.

4 CHAIRMAN BABCOCK: Just Brister.

02:25 5 HONORABLE SCOTT BRISTER: That is true,
6 except it seems to me it's far more important to tell the
7 pretrial courts to try a few cases individually first
8 before dumping them all back than it is to tell them to
9 try to have a hearing and settle the pleadings or appoint
02:25 10 liaison counsel. And it's not going to be anywhere in
11 this Rule that does that unless you separate (b) and (c)
12 to show we have in mind two entirely different remand
13 periods of time, one where we are dribbling a few back to
14 the initial trials, and second, when we're done and we're
02:25 15 sending them all back.

16 MR. SCHENKKAN: I had maybe too cryptically
17 proposed to solve that by inserting after the words "The
18 pretrial court may order remand of and transfer cases in
19 one or more."

02:25 20 HONORABLE SCOTT BRISTER: Right. But that
21 doesn't give me the message. You just say you can remand
22 when you're done and you can remand one or more. Again,
23 one of the most critical aspects is that the first few
24 trials are not dumped on everybody all at once.

02:26 25 CHAIRMAN BABCOCK: Tommy.

1 MR. JACKS: Sometimes and sometimes not. It
2 does seem to me to be redundant. I think if you didn't
3 have (b), and all you had was (c), a judge who thought
4 there ought to be some bellwether trials could still
02:26 5 dribble them out that way. I agree with Pete. I don't
6 really see a need for (b) at all.

7 CHAIRMAN BABCOCK: Judge Bland.

8 HONORABLE JANE BLAND: I'm not sure that
9 (b) really sends that message that you just stated. I
02:26 10 think it's confusing. I think when you read it you think
11 you're sending a part of one trial back, not one complete
12 case for trial. And so I'm not sure that this says send
13 10 back individually before you send the 500.

14 MR. SCHENKKAN: To that I would urge that we
02:27 15 go to the suggestion I made about (c) and then add in a
16 sentence after that that is very explicitly to perform the
17 function that Scott has focused us on, which is a good
18 one. Let everybody know the intent was to allow the MDL
19 judge and whatever the MDL judge considers to be a
02:27 20 suitable case to say "In this case we're going to have
21 three or five or 15 bellwether trials."

22 CHAIRMAN BABCOCK: How would you say that,
23 Pete?

24 MR. SCHENKKAN: "This may include remand of
02:27 25 selected trials for," "suitable" for the formality of the

1 Rule. I don't know what the term is; but I like the term
2 "bellwether" because I know what it means. "Bellwether"
3 is what I'm talking about.

4 CHAIRMAN BABCOCK: What is the consensus on
02:28 5 this? Do we want (b) to go or not?

6 MR. TIPPS: Scott, wasn't the concept that
7 (c) was to deal with remand of all of the cases, because
8 we have a provision here --

9 HONORABLE SCOTT BRISTER: Yes. If nothing
02:28 10 else, I can work on the words. The title will tell you
11 that these are trial-ready ones and they are at a point
12 where you quit. Not always, but...

13 CHAIRMAN BABCOCK: I must say I agree with
14 Judge Bland that I didn't get the messages you were trying
02:28 15 to send with (b) and (c), Judge.

16 HONORABLE JANE BLAND: We could take out
17 "General," call it "Remand" and say "The pretrial court
18 may order remand of one case" --

19 MR. SOULES: "One or more"?

02:28 20 HONORABLE JANE BLAND: "One or more," you
21 know, if you want to add in like a grouping of cases; and
22 that way then if the grouping is bad, the parties
23 presumably could under CSR vs. Lincoln talk to the
24 appellate court about it. You know, "may order remand of
02:29 25 one case or a group of cases for trial under this Rule."

1 CHAIRMAN BABCOCK: Nina.

2 MS. CORTELL: Are we deciding to forego the
3 option of partial trials, which I thought was part of the
4 concept of (b)?

02:29 5 CHAIRMAN BABCOCK: Judge Bland, are you
6 foregoing that?

7 HONORABLE JANE BLAND: I think remanding an
8 individual case back for trial makes sense. I don't think
9 remanding an individual claim back for trial makes sense
02:30 10 unless for some reason the rest of the claims, if the
11 other ones are disposed off or something. We don't
12 normally -- you know, we normally try the case or
13 controversy unless, you know.

14 CHAIRMAN BABCOCK: Orsinger and then Pete.

02:30 15 MR. ORSINGER: I can see why, especially if
16 this court were handling the trials, that they might want
17 to try everybody's liability before they start trying
18 anybody's damages; but there is some substantial case law
19 there you can't try liability from damages. And the idea
02:30 20 you send it back for a jury trial, that we're going to
21 write a rule where you can send it back for a jury trial
22 on liability and then send it back for a jury trial later
23 on damages it may collapse the whole rule when it runs
24 into that case law. I'm not a procedure professor; but I
02:30 25 assume that there are other people around here that have

1 read the same law I have.

2 CHAIRMAN BABCOCK: Sitting right next to
3 you.

4 PROFESSOR CARLSON: He got it right.

02:30 5 MR. ORSINGER: Okay. I got it right.

6 (LAUGHTER.)

7 MR. ORSINGER: How come I didn't have you in
8 law school?

9 CHAIRMAN BABCOCK: John and then Nina.

02:30 10 MR. MARTIN: That's true under Texas law.

11 It is under Texas law, but not under the law of all
12 states. I happen to know in Arkansas you can try
13 liability and damages separately and that you could have a
14 case in Texas where the law of another state applies.

02:31 15 CHAIRMAN BABCOCK: Okay. Nina.

16 MS. CORTELL: There is the issue of
17 obviously what Richard is talking about; but there is also
18 separate trials and separate claims which I understand we
19 can do. And if there may be circumstances where we want
02:31 20 the MDL judge to have that latitude, I don't know why we
21 would be circumscribing the particular discretion of the
22 MDL than we do with others.

23 MR. ORSINGER: Well, (b) would permit a
24 severance and you could send an entire severed claim back
25 for trial under (b).

1 MS. CORTELL: It had been suggested to take
2 (b) out.

3 MR. ORSINGER: Oh.

4 MS. CORTELL: That's why I raised the issue.

02:31 5 CHAIRMAN BABCOCK: Well, and the reason that
6 Judge Bland said take (b) out is because it didn't in her
7 view fulfill the purpose of what Scott articulated was the
8 reason for it being there, which was to dribble a few
9 cases out and then see what happens. And it seems to me
02:32 10 that what (b) is talking about by it's terms is that
11 you -- it's giving the court authority to send a claim
12 back, because that might advance the ball, that might be
13 helpful, or you can send the whole case back; but it
14 doesn't address the concern, which is we want to send a
02:32 15 few cases back and keep all the rest in the bull pen until
16 we see what happens with a few cases. So if the purpose
17 of (b) is the bull pen rule, then it fails, because it
18 doesn't say that.

19 So if we want to do that, we have got to write in my
02:32 20 view new language to say that the court has authority to
21 dribble some cases out there because that would make a lot
22 of sense. It seems to me the Court also ought to have
23 authority to sever cases, to sever a claim, sever a claim
24 if he wants to, because that might make some sense. And
02:32 25 then it also makes sense that on remand they ought to be

1 able to remand one or more cases transferred under the
2 Rule. Tommy.

3 MR. JACKS: Well, would it help if in Chris'
4 case management paragraph (d) that had 1 through 12,
02:33 5 things that the court could take up with the parties, to
6 include in that list whether bellwether trials or
7 something of the kind or trials of specific issues seem
8 appropriate to the litigation.

9 And then the second thought is that I think you
02:33 10 could collapse (b) and (c) into a single paragraph on
11 remand; and I think you could shorten (b) even more to say
12 "The pretrial court may remand the entire case or any
13 substantial triable part of the case to the trial court
14 for trial" and include that sentence in your remand
02:34 15 paragraph to make it clear that among the range of options
16 is that option.

17 CHAIRMAN BABCOCK: Bill.

18 PROFESSOR DORSANEO: Here is as far as just
19 a snapshot of where our procedural rules and case law are,
02:34 20 Rule 174(b) which is copied verbatim from a Federal Rule
21 says that you can separately try any issue and doesn't
22 distinguish between liability and damages. And Iley vs.
23 Hughes before I started law school the --

24 CHAIRMAN BABCOCK: That's how long it's been
02:34 25 the law.

1 PROFESSOR DORSANEO: Yes. The Supreme Court
2 held that you can't, that the court's authority under Rule
3 174(b) is broad, but not broad enough to separate
4 liability and damage issues in personal injury cases.

02:35 5 We have Rule 320 which is the product of Jack --
6 it's current incarnation is the product of Jack Pope's
7 work in an article called "Try, Try, Try Again" limiting
8 the scope, et cetera of new trials on remand. He got 320
9 changed to say that you could remand a separable issue
02:35 10 that could be tried without unfairness to the parties,
11 which is federal language; but then it says except if
12 liability issues are contested, you can't separate
13 liability from unliquidated damages.

14 Now we're back to that same game. I don't see any
02:35 15 reason why Iley vs. Hughes should be some sort of a huge
16 constraint if the Court doesn't want it to be. And the
17 more sensible thing would be to see whether these separate
18 issues could be tried, you know, without unfairness to the
19 parties, it seems to me. And that's what I would use as
02:36 20 tools to craft whatever we want to do.

21 CHAIRMAN BABCOCK: Judge Bland.

22 HONORABLE JANE BLAND: If I'm the trial
23 judge that is hearing this case that has been sent to the
24 MDL and then it gets remanded back to me, when it gets
02:36 25 remanded to me I want to sign a file judgment and get the

1 case off my docket. If I get a partial remand and panel a
2 jury and spend, you know, time conducting a trial on one
3 issue, and then it would go back whatever the jury
4 findings we would contemplate that going back to the
02:36 5 pretrial judge?

6 PROFESSOR DORSANEO: I don't know how it
7 works after we get started.

8 HONORABLE JANE BLAND: I agree that we have
9 to either -- we have to remand a case. And then the trial
02:37 10 judge, whoever it gets remanded to, should I guess follow
11 the pretrial court's orders with respect to the conduct of
12 the proceedings of that trial, you know, to the extent
13 that that trial judge has entered any; but at the end of
14 the day that trial judge should then enter a final
02:37 15 judgment in that case. And the idea of sending back a
16 piece of my case to me for a trial that doesn't result in
17 a final judgment, you know, I think the parties need some
18 cases to actually get tried to verdict.

19 HONORABLE SCOTT BRISTER: We do that already
02:37 20 in Bill of Review. You try the Bill Of Review first; and
21 if it's disputed, then you can try the other trial later.
22 There are so many circumstances. For instance, one that
23 just comes immediately to mind, what if it's a million
24 asbestos cases, but the real issue as to whether this is
02:37 25 going to go away or not is the indemnity claim against

1 their insurers? Shouldn't the pretrial court be able to
2 remand the indemnity issues for trial because that will
3 determine what pot of money we have to divide up among all
4 the plaintiffs? I mean, if we sat around here long
02:38 5 enough, we can all come up with fact situations where you
6 want to get part of the case tried before you get the
7 whole case tried.

8 MR. SCHENKKAN: So I want to again urge that
9 we skip (b), go to (c), and say "The pretrial court may
02:38 10 order remand of one or more transferred cases or separate
11 triable parts thereof," because it's clear that under
12 existing law there are some; but there is not a complete
13 consensus in this room over which ones they are. But
14 there are some. It's not a null set. And then leave the
02:38 15 rest of it to be decided in the specific cases. And then
16 at that point is when people have a fight about each one
17 of those cases rather than fighting about it before that
18 judge.

19 CHAIRMAN BABCOCK: Tommy, do you like that?

20 MR. JACKS: I do.

21 HONORABLE SARAH B. DUNCAN: I do too.

22 CHAIRMAN BABCOCK: And Sarah likes it, and
23 Stephen Tipps likes it.

24 MR. ORSINGER: I like it too.

25 CHAIRMAN BABCOCK: Orsinger likes it.

1 (LAUGHTER.)

2 CHAIRMAN BABCOCK: Judge Peeples, I bet you
3 like it.

4 MR. TIPPS: I think the question is whether
02:39 5 we want the Rule to address the distinction that Scott has
6 thrown out between remanding cases initially for trial in
7 an effort to get some cases tried and further the ultimate
8 resolution of all of these controversies with a general
9 remand of all the cases.

02:39 10 CHAIRMAN BABCOCK: Pete's language where he
11 says "one or more" gives the court discretion to do that.

12 HONORABLE TRACY CHRISTOPHER: Scratch out
13 "general."

14 MR. TIPPS: Then we end up not having a Rule
02:39 15 that addresses a general remand, and maybe we don't need
16 that.

17 CHAIRMAN BABCOCK: No. We're just going to
18 call it "Remand."

19 MR. TIPPS: We can do that.

02:39 20 PROFESSOR DORSANEO: I'm not familiar enough
21 to know how dispositive these so-called test cases or
22 early cases would be. The strongest thing would be a kind
23 of a very weak form of stare decisis in a great number of
24 these circumstances.

02:40 25 CHAIRMAN BABCOCK: Yes. But that's not our

1 job. Our job is just to give the trial judge or the
2 pretrial judge some tools that we think are appropriate to
3 give to them. And if one of the tools which Judge Brister
4 thinks is appropriate is that he can dribble some cases
02:40 5 out there and see what happens, he has got that tool. Now
6 the pretrial judge may not think in any given scenario
7 that that's a good idea. But we're just providing rules,
8 so he can do it if he wants.

9 PROFESSOR DORSANEO: I don't quarrel with
02:40 10 the language. I'm quarreling with this whole idea that if
11 we get one case over with, that it's going to solve the
12 problem.

13 CHAIRMAN BABCOCK: Yes. And we don't really
14 care about that. This committee doesn't care about that.
02:40 15 All we want to do is provide Rules and procedures so that
16 if some other judge, Judge Dorsaneo thinks that that's a
17 good idea, then he can do it.

18 PROFESSOR DORSANEO: I never passed the
19 physical.

02:41 20 CHAIRMAN BABCOCK: And he can do it. All.
21 Right. Final comment on this, Judge Bland.

22 HONORABLE JANE BLAND: I think you need a
23 bright line test as to when the pretrial judge turns loose
24 of the case and when the trial judge takes it.

25 CHAIRMAN BABCOCK: You're insulting.

1 HONORABLE JANE BLAND: I think the statute
2 is --

3 CHAIRMAN BABCOCK: I wouldn't have
4 recognized you if I knew you were going to say that.

5 (LAUGHTER.)

6 HONORABLE JANE BLAND: I think the statute
7 is when it's remanded for trial; and I think it will be up
8 to that trial judge to then conduct "the trial." And if
9 all that is left in the case As an indemnity issue or if,
02:41 10 you know, a single party has only an indemnity issue and
11 you want to sever them into a separate case and remand it
12 that way. But I don't think you can send back a case for
13 trial on Issue A, and then have it go back to the pretrial
14 judge for more proceedings not inconsistent presumably
02:41 15 with the jury's verdict in Issue A, and then send it back
16 to the trial judge saying "Now it's time for you to try
17 Issue B to a separate jury."

18 I think at some point you have to let the trial
19 judge who is supposed to have it for trial conduct the
02:42 20 trial proceedings. And if there are supposed to be
21 separate juries or separate trials, then you know, take it
22 up with judge; but I mean, you can't, the pretrial judge
23 can't keep coming back in and grabbing the case back and
24 forth. It doesn't work, I don't think. I think you need
02:42 25 to have a time when the pretrial judge knows "I've turned

1 loose of this case. The trial judge now has it."

2 HONORABLE SARAH B. DUNCAN: I agree.

3 HONORABLE SCOTT BRISTER: Chip.

4 CHAIRMAN BABCOCK: Judge Brister.

02:42 5 HONORABLE SCOTT BRISTER: Surely nobody
6 wants them to bounce back and forth. That's I don't think
7 that's what we're talking about.

8 MR. JACKS: I mean, it seems to me that
9 Pete's suggested language gives the flexibility to let
02:42 10 that happen. And as a practical matter the pretrial judge
11 and the trial judge talk about these things; and if the
12 pretrial judge thinks it's a good idea to get an issue
13 teed up, there is a dialogue that takes place. And I
14 don't -- I think we've got a paragraph here that will give
02:43 15 all the flexibility that is needed to do whatever makes
16 sense for the day.

17 CHAIRMAN BABCOCK: Well, it seems to me --

18 HONORABLE SARAH B. DUNCAN: Well, --

19 CHAIRMAN BABCOCK: Go ahead.

02:43 20 HONORABLE SARAH B. DUNCAN: If I understand
21 what Jane is saying, and I'm pretty sure I agree with you,
22 your concern is the "or separately triable parts thereof."

23 HONORABLE JANE BLAND: Yes.

24 HONORABLE SARAH B. DUNCAN: If it just says
02:43 25 "The pretrial court may remand one or more transferred

1 cases when pretrial proceedings have been completed to
2 such degree the purposes of the transfer have been
3 fulfilled" you're okay.

4 HONORABLE JANE BLAND: Yes.

02:43 5 HONORABLE SARAH B. DUNCAN: It's "the
6 separately tried parts thereof."

7 HONORABLE JANE BLAND: Yes.

8 HONORABLE SARAH. B. DUNCAN: Which is also
9 my problem with it.

02:43 10 CHAIRMAN BABCOCK: Richard,

11 MR. MUNZINGER: Section 74.162 of House Bill
12 4 says that you can send these cases to any district court
13 for consolidated or coordinated pretrial proceedings
14 including summary judgments and other trial submissions,
02:44 15 but not for trial on the merits. If you have piecemeal
16 trial on the merits of an issue, have you violated that
17 section of House Bill 4? I think the answer is "Yes."

18 HONORABLE SCOTT BRISTER: But that means
19 then if the plaintiff filed for 173 plaintiffs, the only
02:44 20 way you can send it back is all 173 at once. That can't
21 be right. You have got to be able. I mean, that's the
22 way a lot of these cases are filed in some places. Right?
23 No secret about that. And isn't it proper that the
24 pretrial court can decide no, we're not going to send all?
02:44 25 Some choice between not sending them back and sending back

1 all 173 for one trial.

2 MR. MUNZINGER: I think a trial court can
3 sever certain plaintiffs from the case and send some
4 plaintiffs back. All I'm saying is I may have
02:44 5 misinterpreted the Rule; but I have a question about it.
6 I'm not sure you can do it.

7 CHAIRMAN BABCOCK: Tommy.

8 MR. JACKS: All the statutes says is that
9 the pretrial court can't try the case on the merits.

02:45 10 HONORABLE SCOTT BRISTER: Do the trial.

11 MR. JACKS: But I mean, if there were no
12 transfer, I mean, the judge in the court in which the
13 case is originally filed could certainly separately try
14 some issues. We can argue about which ones they are. But
02:45 15 if that judge can do that, why can't the pretrial judge
16 accomplish the same thing?

17 CHAIRMAN BABCOCK: Okay. Let's --

18 MR. JACKS: I think "separately triable"
19 ought to stay.

02:45 20 CHAIRMAN BABCOCK: What did you say, Tommy?

21 MR. JACKS: I think the phrase "separately
22 triable" should stay in and I support Pete.

23 CHAIRMAN BABCOCK: Okay. That's what we are
24 going to vote on. We are collapsing (b) into (c) and we
02:45 25 are retitling (c) from "General Remand" to just plain old

1 "Remand" and we're adding the language from Pete and Tommy
2 that more or less says "The pretrial court may order
3 remand of one or more cases."

4 MR. SOULES: Can we change the 13.6 title to
02:45 5 "Remand on Appeal"? If you go under (a), you appeal.

6 CHAIRMAN BABCOCK: Say that again.

7 MR. SOULES: Can we change the title to
8 "Remand on Appeal"? If you go, on 13.6(a) you appeal.
9 You don't remand,

02:46 10 MR. TIPPS: But I think the purpose that we
11 did with appealing in 13.8. And the purpose of 13.6(a)
12 was to address the question of whether or not remand.

13 MR. SOULES: Okay.

14 MR. SCHENKKAN: 13.6 is really disposition
02:46 15 or remand.

16 MR. TIPPS: That's probably better.

17 MR. SCHENKKAN: It's pretrial court
18 disposition or remand to the trial court.

19 MR. SOULES: That's okay too.

02:46 20 MR. TIPPS: And Chip, I think with Pete's
21 suggested change in 13.6(c) we are really changing the
22 whole intent of that section and we probably don't need
23 all of this stuff about applying to the MDL panel for an
24 order setting aside the remand, because this was drafted,
02:46 25 and correct me if I'm wrong, Scott; but this was drafted

1 in contemplation of addressing the remand of the entire
2 set of cases.

3 HONORABLE SCOTT BRISTER: We thought the
4 issue was can the pretrial court remand the cases, or do
02:47 5 you have to get an order from the MDL panel every time you
6 want to transfer them back, which is the way the federal
7 MDL, and as per my comments yesterday, is the last thing I
8 want to be doing, signing, you know. But the counter
9 argument is only the MDL panel can transfer cases.

02:47 10 Therefore the pretrial court can't remand them, though
11 interestingly the statute uses the word "remand," which
12 suggests to me that you are doing something different
13 other than transferring it again, so you don't need the
14 MDL panel involved this time.

02:47 15 CHAIRMAN BABCOCK: Well, Stephen maybe I
16 just don't understand it; but I don't see why this is
17 surplusage with Pete's language, because the first
18 sentence --

19 HONORABLE SCOTT BRISTER: Because of the
02:47 20 idea you don't want to be flooded by all, every
21 plaintiff's attorney asking to try my case first. The
22 federal just has this motion and response practice when
23 people are tired of being in this remand and they're ready
24 to stop and you want to force the pretrial court to stop
02:48 25 you do a motion and a response and a hearing and an

1 appeal. But if you get. I wouldn't think, especially in
2 the early cases, you want motions from everybody saying
3 "Let me be the first one." Maybe you do.

02:48 4 MR. SCHENKKAN: I didn't mean to -- I think
5 that is a separate issue; and I think it is worth
6 discussing whether this decision of a pretrial judge to
7 remand for trial one or more cases or separately triable
8 parts thereof, whether that kind of an order ought to
9 be, pardon my use of the word, "appealable" to the MDL
02:48 10 panel, which is the issue raised by the last sentence of
11 (c). I didn't mean at this time to be getting into that
12 issue.

13 CHAIRMAN BABCOCK: Right.

14 MR. SCHENKKAN: I'm only trying to get into
02:49 15 this question of what it is that is remanded.

16 CHAIRMAN BABCOCK: Right. But Stephen's
17 point I think was that you're getting into that issue for
18 some reason makes the other issue moot or go away.

19 MR. TIPPS: I agree with Pete. It's a
02:49 20 separate question that we need to address as to whether or
21 not a party can object to the remand of a case for trial
22 and take that objection all the way to the MDL.

23 CHAIRMAN BABCOCK: Okay. Let's stick with
24 the language that Pete and Tommy like and Judge Bland
02:49 25 doesn't like.

1 HONORABLE JANE BLAND: I like all of it but
2 the separate trials.

3 CHAIRMAN BABCOCK: Except for the
4 "separately triable parts thereof"?

02:49 5 HONORABLE JANE BLAND: "Separately triable
6 parts," yes.

7 CHAIRMAN BABCOCK: She doesn't like that.
8 So everybody that does like this "separately triable parts
9 thereof" language and wants to include that raise your
02:50 10 hand. Everybody that is opposed to that raise your hand.
11 It passes by a vote of 18 to 9. Okay.

12 Let's talk real quickly about whether the party who
13 opposes the remand may apply to the MDL panel for an
14 order.

02:50 15 HONORABLE SARAH B. DUNCAN: Why should they
16 be able to?

17 CHAIRMAN BABCOCK: That's what we're talking
18 about.

19 HONORABLE SARAH B. DUNCAN: That's my
02:50 20 question. Why should a party that has gotten remanded for
21 trial be able to have an appeal to the MDL panel aside and
22 apart from any other appeals that they may have later on?

23 HONORABLE SCOTT BRISTER: We certainly
24 didn't want that with the trial ready individual cases.
02:51 25 The question is if the pretrial court has gotten tired of

1 this, and "I'm through with you-all, and you're out of
2 here," and somebody with 200 cases says "Wait a second. I
3 still need some coordination." So it only was in
4 connection with a general dump of cases, which since we've
02:51 5 collapsed those two it was never intended to apply to the
6 decision of which ones to try first.

7 CHAIRMAN BABCOCK: Tommy.

8 MR. JACKS: As a practical matter, at least
9 the way Administrative Rule 11 works, it is just kind of a
02:51 10 rolling remand anyway, because cases come in and cases go
11 out. And I can't recall one I've been involved in in
12 which there has been, you know, "Let's pull the rip chord"
13 and everything floods out.

14 HONORABLE SCOTT BRISTER: I wouldn't mind
02:51 15 dropping this all, because the thing you could do if you
16 were at that later, you know, "We've been suing the makers
17 of asbestos; but now we're suing all the people who were
18 the installers." "We just got in and need some
19 coordination" and the trial judge dumps you. Fine. Have
02:52 20 the installers start with a new motion, MDL order to do an
21 installers asbestos. I think we could just do that way.

22 CHAIRMAN BABCOCK: So you want to lose the
23 last sentence, "any party who opposes remand may apply"?

24 HONORABLE SCOTT BRISTER: Or last three.

02:52 25 CHAIRMAN BABCOCK: The last three?

1 HONORABLE SCOTT BRISTER: The last two.

2 CHAIRMAN BABCOCK: "Any party may file a
3 response"?

02:52

4 HONORABLE TRACY CHRISTOPHER: Lose the whole
5 thing.

6 HONORABLE SCOTT BRISTER: Yes, lose all of
7 it.

8 HONORABLE TRACY CHRISTOPHER: If we remand,
9 we remand.

10 HONORABLE SARAH B. DUNCAN: Right.

11 CHAIRMAN BABCOCK: Okay. Is everybody happy
12 with that?

13 MR. ORSINGER: Are we taking out the
14 sua sponte sentence also?

02:52

15 CHAIRMAN BABCOCK: That's the proposal, to
16 take the sua sponte sentence out too. Judge Bland.

02:52

17 HONORABLE JANE BLAND: I would like to leave
18 in "any party may file a response" and either before the
19 court issues the order of remand or at some point, because
20 I think that these trial groupings there is a whole bunch
21 of case law that says that's reviewable by mandamus by
22 original proceeding. So I think it's good for the
23 pretrial judge to get the benefit of whatever thoughts
24 there are about the pretrial groups and briefing on that;
02:53 25 and then I think we don't need that last sentence, because

1 I think there is case law that would let somebody file
2 original proceeding.

3 CHAIRMAN BABCOCK: Yes. That makes some
4 sense. Frank.

02:53 5 MR. GILSTRAP: But implicit in all this is
6 the trial court -- the pretrial court can do it on its own
7 motion.

8 CHAIRMAN BABCOCK: Right.

9 MR. GILSTRAP: That's what I'm hearing. And
02:53 10 whether we need to say it can do it sua sponte or not, we
11 don't need a Rule that says he can't do. I mean, most of
12 this stuff as I understand will be done sua sponte by the
13 trial court -- by the pretrial court.

14 HONORABLE JANE BLAND: I would like an
02:53 15 opportunity. If I were the pretrial judge, I would want a
16 procedure where somebody who is opposing remand of cases
17 would have an opportunity to bring argument to me to look
18 at before I signed the order of remand.

19 MR. ORSINGER: But you can do that by
02:54 20 issuing an order saying that "The Court is contemplating
21 this; file a response," since you have all this power.

22 HONORABLE JANE BLAND: Yes.. Why don't we
23 leave it in the --

24 HONORABLE SARAH B. DUNCAN: Even if we
02:54 25 don't, it's a question of whether we formalize a motion

1 response reply practice with deadlines and everything.

2 HONORABLE SCOTT BRISTER: Right.

3 HONORABLE SARAH B. DUNCAN: Or whether you
4 as the pretrial court just take care of it however you
02:54 5 want to take care of it.

6 HONORABLE JANE BLAND: I mean, that's what I
7 would do. But I mean, for some other I guess not me; but
8 some other pretrial judge so they would know there is a
9 lot of case law about trial groupings and you better be
02:54 10 sure that you're grouping them appropriately and remanding
11 them appropriately and all of that for trial.

12 CHAIRMAN BABCOCK: If I were a district
13 judge, I wouldn't get near one of these things. Tommy.

14 MR. JACKS: Well, in practice it's very
02:54 15 common that there are motions to remand in individual
16 cases, because a lot of this common discovery that goes on
17 you reach the point where, "No, I don't need all that.
18 I'm ready for trial with what I've got and so I want out
19 of here." And I don't know that the Rule has to say you
02:55 20 can file a motion; but if it does, then somebody ought to
21 be able to respond to it.

22 HONORABLE JANE BLAND: Did we take out the
23 sua sponte? I don't care.

24 MR. JACKS: Yes. I don't have strong
02:55 25 feelings about whether it's in there or not.

1 CHAIRMAN BABCOCK: Scott, don't you think we
2 ought to just take it out?

3 HONORABLE SCOTT BRISTER: That's my leaning.

4 CHAIRMAN BABCOCK: What about you, David?

02:55 5 HONORABLE DAVID PEEPLES: Fine.

6 CHAIRMAN BABCOCK: Take it out?

7 MR. MEADOWS: When you say "take it out"
8 what are you talking about?

9 MR. TIPPS: The sentence that begins "The
02:55 10 order may be entered."

11 HONORABLE SCOTT BRISTER: Right. The new
12 (b) will be one sentence.

13 CHAIRMAN BABCOCK: Right.

14 MR. TIPPS: It does not address that whole
02:55 15 procedural issue?

16 HONORABLE SARAH B. DUNCAN: Right.

17 CHAIRMAN BABCOCK: Right. Everybody okay
18 with that? Tommy?

19 MR. JACKS: Yes. I've got -- if you're
02:55 20 through with that one, I've got one other suggestion.

21 CHAIRMAN BABCOCK: Right. What is it?

22 MR. JACKS: And that is after the word
23 "fulfill" add the words "or no longer apply" so that "such
24 purposes of the transfer have been fulfilled or no longer
02:56 25 apply." What I have got in mind is again in individual

1 cases you reach a point where, say, "I settled with
2 Firestone. I've still got a live claim against Sears who
3 sold the tire and negligently repaired it; but that's not
4 a part of this. So there is no longer any need to be
02:56 5 here. Let me go."

6 MR. SOULES: And that's the end of it. The
7 new (b) is "or no longer apply"?

8 MR. ORSINGER: That's (c), Luke?

9 HONORABLE SARAH B. DUNCAN: No. That's (b)
10 now.

11 MR. SOULES: (b) is gone, new (c).

12 MR. ORSINGER: Take it out all together?

13 PROFESSOR ALBRIGHT: I thought we cut it off
14 way before that.

02:56 15 MR. GILSTRAP: Somebody read the whole Rule.

16 HONORABLE SCOTT BRISTER: Here is what I
17 have got: Do you want to do it, Chip?

18 CHAIRMAN BABCOCK: No, no. Go ahead.

19 HONORABLE SCOTT BRISTER: "Remand, (b), the
02:56 20 pretrial court may order remand of one or more cases
21 transferred under this Rule or separately triable parts
22 thereof" -- I may need to move that clause up a little
23 bit -- "when pretrial proceedings have been completed to
24 such a degree that the purpose of the transfer have been
02:57 25 fulfilled or no longer apply."

1 CHAIRMAN BABCOCK: Period. Okay. Pete, is
2 that good with you?

3 MR. SCHENKKAN: Great.

4 CHAIRMAN BABCOCK: Judge Bland, you can live
02:57 5 with that even though you lost the vote?

6 HONORABLE JANE BLAND: Yes. I mean, I --

7 CHAIRMAN BABCOCK: Loser.

8 (LAUGHTER.)

9 CHAIRMAN BABCOCK: Okay. Let's go to --

10 MR. ORSINGER: That will teach her to speak
11 out.

12 CHAIRMAN BABCOCK: Yes. Let the rookie --

13 HONORABLE TRACY CHRISTOPHER: Chip.

14 HONORABLE SCOTT BRISTER: Yes, Judge
15 Christopher.

16 HONORABLE TRACY CHRISTOPHER: My handwritten
17 13.6 sheet of paper I think it really belongs here rather
18 than in 13.7. So I guess it would be section (c) in
19 transferring the files.

02:57 20 CHAIRMAN BABCOCK: Let's look at the
21 handwritten sheet 13.6(d) as in "dog," although it may be
22 now (c) as in "Charlie."

23 HONORABLE TRACY CHRISTOPHER: (c). And I
24 hoped to do what we had discussed earlier was and
02:58 25 incorporated what Justice Hecht suggested, that the clerk

1 of the pretrial court would send the original file back to
2 the trial court without retaining a copy, that the parties
3 can also obtain certified copies of any pleading or orders
4 in the master file for inclusion in the remanded file, and
02:58 5 the clerk of the trial court will reopen the trial court
6 file under the old cause number of the trial court without
7 any filing fee. If we order them to reopen it, my
8 understanding is they won't have to charge another filing
9 fee.

02:58 10 CHAIRMAN BABCOCK: Okay.

11 MR. SOULES: Okay. Except take out
12 "certified."

13 HONORABLE SCOTT BRISTER: Bonnie, if
14 somebody walks into your court with a sheet of paper and
02:58 15 says "Reopen this file that you have closed and put this
16 in it," will you do it?

17 MS. WOLBRUECK: No, I would not without a
18 Court order.

19 HONORABLE TRACY CHRISTOPHER: Put in a Court
02:58 20 order a remand.

21 HONORABLE SCOTT BRISTER: If a clerk of
22 another court sent to you a sheet of paper and said "Put
23 this back into your file," would you do it?

24 MS. WOLBRUECK: I don't know what I would do
02:59 25 with that piece of paper other than put it in the file.

1 CHAIRMAN BABCOCK: There should be a remand
2 order.

3 HONORABLE TRACY CHRISTOPHER: You've got to
4 have a remand order.

02:59 5 HONORABLE SCOTT BRISTER: There will be a
6 remand order from the pretrial.

7 MS. WOLBRUECK: As long as there is a remand
8 it should clarify it.

9 HONORABLE SCOTT BRISTER: So if somebody
02:59 10 shows up at your window with a remand order, is that going
11 to have to be certified?

12 MS. WOLBRUECK: I don't think so. I would
13 prefer it be certified, because then that's the official
14 document you had me reopen that file.

02:59 15 HONORABLE SCOTT BRISTER: So how about if
16 they just certify the remand order; but everything else is
17 not certified, it's just copies?

18 HONORABLE TRACY CHRISTOPHER: No. My
19 thought was to send the original file back.

02:59 20 HONORABLE SCOTT BRISTER: It's the original.

21 MR. GILSTRAP: But the original file never
22 went up.

23 HONORABLE SCOTT BRISTER: The clerk is not
24 going to give the original file to one of the parties.

02:59 25 HONORABLE TRACY CHRISTOPHER: The clerk is

1 going to send it. The pretrial clerk is going to send it
2 to the trial court.

3 HONORABLE SCOTT BRISTER: I'm talking about
4 other stuff. In most cases all that's going to be in
03:00 5 there is two sheets of paper, a notice of removal and the
6 original MDL panel order. So all the other stuff --

7 HONORABLE TRACY CHRISTOPHER: Any other
8 individual orders you make in the case.

9 HONORABLE SCOTT BRISTER: Right. But most
03:00 10 of the stuff, the general pretrial master file stuff,
11 somebody has got to get. And the question is if somebody
12 just gives you regular copies, not certified, of that, but
13 has a remand order saying it's remanded, will you accept
14 all the other papers that they bring with them?

03:00 15 MS. WOLBRUECK: Yes, I will accept them.
16 It's up to the trial clerk to make the determination if
17 those are true pleadings or not. Not the clerk.

18 MR. SOULES: That would save a lot of money.

19 HONORABLE DAVID GAULTNEY: But on the appeal
03:00 20 of that is the clerk going to be able to certify that
21 those are certified copies for appeal?

22 MR. SOULES: They've been in the court
23 system. Why wouldn't she?

24 MR. ORSINGER: Except that you've got an
25 unauthenticated copy. But, you know, in the Rules of

1 Evidence anyone who has compared a copy to the original
2 can authenticate even a government record, so a lawyer
3 could authenticate it with an affidavit. It doesn't have
4 to be certified in the Rules of Evidence.

03:01 5 MR. SOULES: Everything that happened in the
6 transferor court has been certified.

7 MR. ORSINGER: If you're bringing copies out
8 of the master file that are just photocopies, there is no
9 one's assurance that they're accurate copies. If they're
03:01 10 certified, that means the pretrial clerk is assuring it.
11 And if they're not, then the lawyer could file an
12 affidavit on the whole stack; and it's at least
13 admissible. I don't know if that's good enough for
14 appeal; but it's admissible into evidence.

15 HONORABLE SCOTT BRISTER: I sure hate to
16 have to make 1500 copies of the one master pretrial order
17 and remand order and get 1500 of them certified if you get
18 one and copy it at your office 1500 times to give to
19 everybody. That's my question. Will that work?

03:01 20 MR. ORSINGER: My inclination is to let it,
21 bring in an unauthenticated copy and then let any opposing
22 party who feels like they have been defrauded to call it
23 to the attention of the court.

24 MR. SOULES: Yes.

03:02 25 MR. ORSINGER: Otherwise just kind of

1 presume that the lawyer was honest.

2 MR. GILSTRAP: So we're not going to really
3 be sending the file back.

4 MR. ORSINGER: The individual file --

5 HONORABLE SCOTT BRISTER: Individual, yes.

6 MR. ORSINGER: -- will be sent back; but
7 uncertified copies of the master file, selectively
8 documents out of that will also be sent back.

9 HONORABLE TRACY CHRISTOPHER: You're not
03:02 10 going to get a copy of a signed court order without paying
11 your dollar certification fee per page.

12 HONORABLE SCOTT BRISTER: Yes. But can you
13 get one and then go make the copies back at your own
14 office? Because you're going to have to -- the general
03:02 15 pretrial order that says "These exhibits are admitted and
16 this has been ruled on" you're going to need that in lots
17 of the cases. Can you make your own copies?

18 CHAIRMAN BABCOCK: You should be able to.

19 MR. SOULES: In Bexar County you can get a
03:02 20 copy of a signed court order uncertified.

21 MR. ORSINGER: The certification is a
22 separate fee for a separate process.

23 MS. WOLBRUECK: I think the Rule needs to
24 state that the clerk may reopen with just a copy of that,
03:02 25 if that was your preference to do so, the remand order.

1 HONORABLE TRACY CHRISTOPHER: Okay. Take
2 out "certified" if you-all are comfortable with that.

3 CHAIRMAN BABCOCK: Take "certified" out?
4 Any other problems with this?

03:03 5 MR. GILSTRAP: Yes. The word "original"
6 that seems like you're talking about, you're implying that
7 a file came from the trial court; and that doesn't happen.
8 We don't send a file from the trial court. It ought to
9 just say "the file."

03:03 10 CHAIRMAN BABCOCK: Okay. Isn't the word
11 that creates the confusion "back," because the file that
12 you're sending has never been in the trial court?

13 MR. GILSTRAP: Right. So "the original file
14 to." Strike out "original" and "back." Send the file to
03:03 15 the trial court.

16 PROFESSOR ALBRIGHT: I think what you're
17 trying to say is he's supposed to send "the file" and not
18 the copy. "Its original file," there are two original
19 files.

20 MR. GILSTRAP: I see.

21 PROFESSOR ALBRIGHT: Why don't we say "The
22 pretrial will send its original file."

23 CHAIRMAN BABCOCK: How is that? Does that
24 work for everybody? Frank, does that work for you?

03:03 25 MR. GILSTRAP: Yes. Except we don't need

1 the word "back." "To it's original trial court."

2 HONORABLE TRACY CHRISTOPHER: "The party may
3 also file copies of any pleadings or orders from the
4 master file for inclusion in the remanded file."

03:04 5 PROFESSOR DORSANEO: Mr. Chairman.

6 CHAIRMAN BABCOCK: Yes.

7 PROFESSOR DORSANEO: I think this should say
8 "After the pretrial court remands a case to the trial
9 court the clerk of the pretrial court will send the case
10 file" --

11 HONORABLE SARAH B. DUNCAN: "Must."

12 PROFESSOR DORSANEO: -- "back to the trial
13 court without retaining" I guess it could say "a copy."

14 PROFESSOR ALBRIGHT: Couldn't it be "its
03:04 15 case file"? Because I think it is confusing that you have
16 two files.

17 CHAIRMAN BABCOCK: Yes. "Will send its
18 original case file." How about that?

19 PROFESSOR DORSANEO: "Original" doesn't add
03:04 20 much to me.

21 MR. ORSINGER: But "original" means you
22 don't send a copy, because the inclination of the pretrial
23 clerk is going to be to retain the original and send a
24 copy; and we're saying get rid of --

03:05 25 PROFESSOR DORSANEO: It says "without

1 retaining a copy."

2 CHAIRMAN BABCOCK: Yes. So you send the
3 original file and you don't retain a copy, so the file
4 leaves.

03:05 5 PROFESSOR DORSANEO: Mr. Chairman, do these
6 files, this "reopen language" down here, do these files
7 actually physically get closed in the 1st Court?

8 HONORABLE TRACY CHRISTOPHER: Yes.

9 PROFESSOR DORSANEO: And sent to storage?

03:05 10 CHAIRMAN BABCOCK: Yes.

11 HONORABLE TRACY CHRISTOPHER: Yes.

12 CHAIRMAN BABCOCK: Okay. What else? David.

13 MR. GAULTNEY: Chip, it may be myopic; but
14 it seems to me that the first term "after" implies that
03:05 15 there is going to be a remand in every case; and it just
16 seems like maybe "if" would be a better way to start.

17 PROFESSOR DORSANEO: "If" is always better
18 than "after."

19 HONORABLE TRACY CHRISTOPHER: "If" is better
03:05 20 than "after."

21 CHAIRMAN BABCOCK: "If the pretrial court
22 remands a case to the trial court, the clerk of the trial
23 will send its original case file to the trial court
24 without obtaining a copy." Okay. Everybody good with
03:05 25 that?

1 HONORABLE TRACY CHRISTOPHER: "The parties
2 may also file copies of any pleadings or orders from the
3 master file in the remanded file."

4 CHAIRMAN BABCOCK: Yes. Richard.

03:06 5 MR. ORSINGER: How is this going to work if
6 we sever and send a claim back, but don't turn loose of
7 the whole case? Do we retain the original in the pretrial
8 court, or do we send it back for the trial and then send
9 it back to the pretrial court for the rest of the case and
03:06 10 then later on send it back when it's all over?

11 CHAIRMAN BABCOCK: Do you want to say that
12 again?

13 MR. ORSINGER: We've agreed that you can
14 sever a claim and send it for trial to the original court.

03:06 15 CHAIRMAN BABCOCK: Right.

16 MR. ORSINGER: So who is going to retain the
17 original pretrial file during that phase?

18 MR. SOULES: We can just take a piece that
19 could be separately tried. It doesn't have to be
03:06 20 severable and sent back.

21 MR. ORSINGER: Okay. A separate trial.
22 That's a good clarification. So let's say that you have
23 agreed to a separate trial. Then who retains the
24 original? Don't you have to send the file back to the
03:06 25 trial judge who is going to try it so all the stuff is

1 there? And then when they're finished trying that then
2 they've got to ship it back to the pretrial court to
3 finish up the rest of the business, and then later on it
4 will get sent back.

03:07 5 CHAIRMAN BABCOCK: Are there things going on
6 in both cases?

7 HONORABLE TRACY CHRISTOPHER: I think we
8 need to just let that get worked out if that happens and
9 not write a Rule to deal with it.

03:07 10 MR. GILSTRAP: This Rule deals with it.
11 That's the problem.

12 HONORABLE TRACY CHRISTOPHER: On the
13 transferring of the files let people figure it out whether
14 you have to sever it down at the trial level or at the
03:07 15 pretrial level.

16 CHAIRMAN BABCOCK: Do you have stuff going
17 on in both courts? Do you have stuff? If you separate --

18 MR. ORSINGER: Sure, you would. There will
19 be discovery ongoing on those other claims.

03:07 20 HONORABLE SARAH B. DUNCAN: As Judge Bland,
21 this separately tried part is --

22 PROFESSOR DORSANEO: Yes. I'm ready to vote
23 with Judge Bland on that at this point.

24 MR. ORSINGER: Why don't we put in "the
03:07 25 original or a copy" so that the pretrial judge could say

1 "I want to keep the original here, so let's just ship a
2 copy back to the trial court."

3 HONORABLE TRACY CHRISTOPHER: Somebody has
4 got to pay for the copy, \$1 a page.

03:08 5 (LAUGHTER.)

6 HONORABLE SCOTT BRISTER: It's true. It's
7 true.

8 HONORABLE TRACY CHRISTOPHER: It's just
9 realistic.

03:08 10 MR. SCHENKKAN: No free lunch.

11 CHAIRMAN BABCOCK: I think the solution to
12 this problem resides with Justice Jefferson. Do you have
13 any bright ideas?

14 MR. JEFFERSON: No.

15 HONORABLE SCOTT BRISTER: Chris will do it.

16 CHAIRMAN BABCOCK: Chris will do it. Where
17 did he go?

18 HONORABLE SCOTT BRISTER: He's not here.
19 Assign it to him.

20 CHAIRMAN BABCOCK: He's way in the back.
21 Oh, hi. Stephen.

22 MR. TIPPS: How about putting in some
23 language sending the original back to the trial court, or
24 if the original needs to remain in the pretrial court for
03:08 25 purposes of further proceedings, a copy, so that there is

1 sort of a presumption that the original goes?

2 HONORABLE SCOTT BRISTER: How about "or its
3 original file back to the trial court without retaining a
4 copy unless the pretrial court orders otherwise."

03:09 5 CHAIRMAN BABCOCK: "Unless otherwise
6 ordered," something like that. One of these guys had the
7 answer. "Unless otherwise ordered." And Judge
8 Christopher, that will take care of your -- that is the
9 solution, that you say it will happen.

03:09 10 HONORABLE TRACY CHRISTOPHER: Right. It
11 will happen.

12 CHAIRMAN BABCOCK: But now our Rule allows
13 it to happen.

14 HONORABLE TRACY CHRISTOPHER: It will
15 happen.

16 CHAIRMAN BABCOCK: Right, Sarah? Is that
17 okay?

18 HONORABLE SARAH B. DUNCAN: No response.

19 CHAIRMAN BABCOCK: Is this okay?

03:09 20 HONORABLE SARAH DUNCAN: No.

21 CHAIRMAN BABCOCK: No?

22 MR. ORSINGER: Let's move on.

23 HONORABLE TRACY CHRISTOPHER: Let's move on.

24 CHAIRMAN BABCOCK: Okay.

03:09 25 HONORABLE TOM GRAY: Judge Christopher, at

1 the end you say "In the remanded file." Would it do
2 violence to your intention if it said "in the file of the
3 remanded case"?

4 HONORABLE TRACY CHRISTOPHER: That's fine.

03:10 5 CHAIRMAN BABCOCK: Okay. Now we can go to
6 13.7; and we've got a leg up on it because we're going to
7 delete (a) and (b). Right?

8 HONORABLE TRACY CHRISTOPHER: Right.

9 HONORABLE SCOTT BRISTER: When is it back in
03:10 10 the trial court then?

11 HONORABLE TRACY CHRISTOPHER: The remand
12 order.

13 MR. TIPPS: Why do we not still need
14 13.7(a)?

03:10 15 HONORABLE TRACY CHRISTOPHER: Because we've
16 remanded it in 13.6(b). We have ordered the remand and
17 the file has been transferred.

18 MR. TIPPS: Okay.

19 HONORABLE TRACY CHRISTOPHER: Now it's in
03:10 20 the trial court.

21 MR. ORSINGER: But this is essentially
22 telling everyone when the original trial court has
23 jurisdiction back.

24 HONORABLE SARAH B. DUNCAN: This is timing
03:10 25 thing.

1 MR. ORSINGER: Don't we need an official
2 event prior to which there is no jurisdiction and after
3 which there clearly is?

4 HONORABLE SCOTT BRISTER: Yes, unlike A.

5 MR. ORSINGER: Kind of like a remand from an
6 appeal. You know, you --

7 HONORABLE TRACY CHRISTOPHER: That you have
8 an order and you have the file. It's yours now. Your
9 file is open. It's yours.

03:11 10 HONORABLE SCOTT BRISTER: So but you would
11 say transfer switches when the files arrive.

12 MR. ORSINGER: No. She is saying it is when
13 the order is signed.

14 HONORABLE TRACY CHRISTOPHER: When it's
03:11 15 remanded.

16 MR. ORSINGER: It seems to me like --

17 HONORABLE TRACY CHRISTOPHER: Just like a
18 federal court remand.

19 MR. ORSINGER: You know, in the appeal area
03:11 20 if you remand it to the trial court, the trial court
21 requires jurisdiction when the official notice of the
22 reversal and remand is received which is called a mandate.
23 And it doesn't matter when it's mailed by the clerk, by
24 the appellate clerk. It matters when it's received by the
03:11 25 trial clerk, because that's their official notice that the

1 ball is back in their court. And it seems to me like we
2 ought to have an official notice that is required,
3 necessary, sufficient.

4 CHAIRMAN BABCOCK: We can leave (a) in.

03:11 5 MS. WOLBRUECK: Today there is case law that
6 if somebody just gives me an order of transfer from
7 another court, you can set up that file with that. There
8 is case law that states that today even if the file has
9 not reached there.

03:12 10 HONORABLE SCOTT BRISTER: See, but (d)
11 doesn't have anything about order of transfer in it.

12 MS. WOLBRUECK: I wonder if a remand would
13 be applicable.

14 CHAIRMAN BABCOCK: Okay. Let's leave (a)
03:12 15 then. Judge Christopher, is that okay if we leave (a)?

16 HONORABLE TRACY CHRISTOPHER: Well, I don't
17 know why you need it if it's a remand.

18 CHAIRMAN BABCOCK: You don't.

19 HONORABLE TRACY CHRISTOPHER: You have the
20 remand order and the case has been opened.

21 HONORABLE SCOTT BRISTER: Where is the
22 remand order?

23 MR. ORSINGER: Why don't you just say "When
24 the order is filed."

25 HONORABLE SCOTT BRISTER: The remand order

1 is not in here.

2 HONORABLE TRACY CHRISTOPHER: The remand
3 order goes with his file for the clerk.

4 HONORABLE SCOTT BRISTER: We need to say
03:12 5 that if that's, because it doesn't say it.

6 MR. ORSINGER: Why don't we forget the
7 notice of remand --

8 HONORABLE TRACY CHRISTOPHER: Because the
9 remand order --

03:12 10 MR. ORSINGER: -- and just say when the
11 order is filed.

12 CHAIRMAN BABCOCK: Hold on. One person at a
13 time. Richard.

14 MR. ORSINGER: Why don't we just forget the
03:12 15 notice and just say "remanded when a copy of the remand
16 order is filed in the trial court."

17 HONORABLE SARAH B. DUNCAN: That's going to
18 be when the file in the remanded case is received by the
19 trial court clerk.

03:13 20 MR. ORSINGER: Or if I'm in a hurry, I get a
21 copy of it, and I hand walk it over there, and it happens
22 the next morning. What is wrong with that? As long as
23 the official document is received by the government
24 functionary haven't we covered all our bases?

03:13 25 CHAIRMAN BABCOCK: What about this? "A

1 transferred case is deemed remanded from the pretrial
2 court to the trial court when a notice of remand with a
3 copy attached to the pretrial court's order is filed in
4 the trial court."

03:13 5 MR. ORSINGER: Why do you need the notice?
6 It's just an extra piece of paper that means nothing.

7 CHAIRMAN BABCOCK: Scott.

8 HONORABLE SCOTT BRISTER: Again, because if
9 the pretrial court's order, fine if the pretrial court's
03:13 10 order just has one case listed in it. But if it's a
11 general remand and it's done --

12 MR. ORSINGER: A general remand means all
13 tire tread cases are now reassigned to their original
14 court? This judge shouldn't be signing those kind of
03:14 15 orders, should he?

16 HONORABLE SCOTT BRISTER: It's fine with me.
17 I'm not going to be the pretrial judges. Somebody is
18 going to have to list all those cases.

19 HONORABLE TRACY CHRISTOPHER: I think we
03:14 20 need separate orders to send those files back. And if I
21 have to sign a thousand orders to get it done, I sign a
22 thousand orders.

23 MR. ORSINGER: Or get a stamp.

24 HONORABLE SCOTT BRISTER: Then you don't
03:14 25 need a notice of remand.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 MS. WOLBRUECK: Will the trial court clerk
3 know of any parties that have been disposed of?

4 MR. SOULES: It should say "received," not
03:14 5 "filed."

6 HONORABLE SCOTT BRISTER: Just make it with
7 (a) you could just switch notice to be the "pretrial
8 court's order or remand."

9 CHAIRMAN BABCOCK: Yes. Okay. Let's try it
03:14 10 this way: "A transferred case is deemed remanded from the
11 pretrial court to the trial court when the pretrial
12 court's order of remand is filed in the trial court."

13 MR. SOULES: "Is received in the trial
14 court."

03:15 15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE SCOTT BRISTER: No, because then
17 you get into received one day and filed the next. It's
18 filed when it's filed.

19 MR. SOULES: Do you file orders? Who files
03:15 20 orders?

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE TRACY CHRISTOPHER: With a federal
23 order of remand your case is just opened up. Nobody
24 worries about when it was received or filed or whatever.
03:15 25 It just that order shows up and our file gets opened.

1 This should work the same way.

2 CHAIRMAN BABCOCK: Bill.

3 PROFESSOR DORSANEO: Why do we need
4 "deemed"? I know we say "deemed" a lot when we mean it
03:15 5 has happened; but I don't think "deemed" is --

6 CHAIRMAN BABCOCK: "Deemed" is not my word;
7 but Richard seemed to want some magic moment when this
8 happened.

9 (LAUGHTER.)

03:16 10 MR. ORSINGER: I don't care about deemed.
11 If it's remanded, it's the same as if it's deemed
12 remanded.

13 HONORABLE DAVID PEEPLES: Do we mean that a
14 remand takes effect?

03:16 15 MR. ORSINGER: Yes.

16 HONORABLE SARAH B. DUNCAN: Yes.

17 MR. ORSINGER: Becomes effective.

18 CHAIRMAN BABCOCK: "Deemed" is gone. Judge
19 Benton.

03:16 20 HONORABLE LEVI BENTON: Why is it not
21 remanded the date of the pretrial court's order period,
22 end of statement?

23 HONORABLE SARAH B. DUNCAN: Because the case
24 is closed.

03:16 25 HONORABLE SCOT BRISTER: Bonnie is going to

1 get a case file, and somebody is going to say "Reopen that
2 file"; and she is going to say "Huh-uh. Who are you?"

3 HONORABLE TRACY CHRISTOPHER: She is going
4 to have the order with it. That happens --

5 HONORABLE SCOTT BRISTER: It doesn't say
6 that.

7 HONORABLE TRACY CHRISTOPHER: -- when stayed
8 cases are transferred.

9 HONORABLE SCOTT BRISTER: If she is going to
03:16 10 have the order, it is because somebody filed it, which is
11 all (a) says.

12 HONORABLE TRACY CHRISTOPHER: Our clerk, our
13 pretrial clerk sends that file with that order to the
14 trial court.

03:16 15 HONORABLE SCOTT BRISTER: And if we put that
16 into (d), I don't mind.

17 HONORABLE TRACY CHRISTOPHER: Okay. Let's
18 do that.

19 CHAIRMAN BABCOCK: Put it into (d)? Judge
03:17 20 Christopher, can you put that into (d)?

21 HONORABLE TRACY CHRISTOPHER: Yes, somehow
22 (c).

23 MR. SOULES: The clerk has to file it? They
24 will never get a case started again in Hidalgo County.

25 (LAUGHTER.)

1 HONORABLE TRACY CHRISTOPHER: It's the same
2 way a motion to transfer venue works. Okay. The order of
3 transfer is attached to the file, and it shows up in the
4 new court, and they open a file. And now the motion, the
03:17 5 order of remand will be attached to the file, and it will
6 show up in the trial court, and it will say "Order of
7 Remand, reopen old cause number B-25-62."

8 CHAIRMAN BABCOCK: Judge Bland.

9 HONORABLE JANE BLAND: From my experience I
03:17 10 know that Scott and Tracy are not going to change each
11 other's minds. Can we vote?

12 HONORABLE SCOTT BRISTER: No. We just
13 agreed.

14 CHAIRMAN BABCOCK: Yes. That was good. We
03:17 15 are going to put it in (d).

16 HONORABLE JANE BLAND: In (d). Let's go.

17 CHAIRMAN BABCOCK: So 13.7(a) is gone.
18 13.7(b) is gone. And now we're talking, because we're at
19 the 13.7(c) which will become (a), Effect of pretrial
03:18 20 orders." And this is an issue that apparently evokes
21 passion.

22 HONORABLE DAVID PEEPLES: Do you want to do
23 this before we take a break?

24 CHAIRMAN BABCOCK: Yes. Let's just get this
03:18 25 fight started. We'll take a break in 15 minutes.

1 HONORABLE DAVID PEEPLES: The pretrial judge
2 has done all these things that we listed earlier handling
3 these cases, and now they're going back to trial court;
4 and the issue in (c) is how free do we want the trial
03:18 5 court to be to set aside or modify what the pretrial judge
6 has done? That is the issue here. And the way this is
7 written it tilts things toward respecting the rulings that
8 have been made by the pretrial judge by using virtually
9 identical language to that that is contained in the Rule
03:19 10 166 after a pretrial order. In other words, the way this
11 is written it wants to enhance the respect that is given
12 to the pretrial judge's rulings. The trial judge can
13 change things to prevent manifest injustice; but can't
14 just willy-nilly make changes in what the pretrial judge
03:19 15 has done. In a nutshell that's what it is about.

16 CHAIRMAN BABCOCK: Steve.

17 MR. SUSMAN: Something like the Law in the
18 Case Doctrine in Texas?

19 PROFESSOR DORSANEO: Yes. It's the same
03:19 20 standard, although it doesn't apply in this context.

21 HONORABLE SCOTT BRISTER: The exception is
22 it doesn't apply in manifest injustice.

23 CHAIRMAN BABCOCK: Judge Benton.

24 HONORABLE SCOTT BRISTER: It's useless in my
25 view.

1 HONORABLE DAVID GAULTNEY: The Law in the
2 Case Doctrine is discretionary.

3 HONORABLE SCOTT BRISTER: Right. It's
4 discretionary that you follow it.

03:19 5 HONORABLE LEVI BENTON: Yes. I would just
6 change it and say "After a finding of manifest injustice
7 reported on the record."

8 MR. SUSMAN: Boy, you-all sure don't trust
9 those judges, do you, the trial judges?

03:20 10 HONORABLE SCOTT BRISTER: No. To the
11 contrary. This is an exact quote from 166. 166 is where
12 the trial judge, him or herself entered a pretrial order.
13 According to 166 they only change it to prevent a
14 manifest injustice. So even if it's the same person,
03:20 15 that's what 166 says.

16 MR. SUSMAN: Couldn't that be, wouldn't that
17 be a little nicer to say it's "remanded," I mean just word
18 the Rule in a way to say that in ruling, in reconsidering
19 something that the pretrial judge did the trial judge
03:20 20 should be governed by Rule 166 or that the trial judge can
21 reconsider to the same extent he can reconsider his own
22 pretrial ruling.

23 HONORABLE DAVID PEEPLES: It mentions 116 in
24 there.

03:21 25 CHAIRMAN BABCOCK: Bill and then Judge

1 Benton.

2 PROFESSOR DORSANEO: In the 166 context the
3 party is arguing manifest injustice to the judge who made
4 a prior order that thinks it was just fine. This is more
03:21 5 like the Law of the Case thinking where everybody can kind
6 of, look at it and say "Well, something has happened here
7 either to the circumstances of this case or to the law or
8 somewhere that makes this legal ruling not something that
9 we should go by at this point."

03:21 10 CHAIRMAN BABCOCK: This happens every day in
11 Travis and Bexar County. You go to trial and you've had
12 one or more judges who have done pretrial rulings; and my
13 experience, although it's limited, is that your litigation
14 opponent will try to retread some of those prior rulings.

03:21 15 PROFESSOR DORSANEO: What I'm getting to is
16 I think the wording works fine because it's flexible.

17 CHAIRMAN BABCOCK: Judge Benton, then Carl.

18 HONORABLE LEVI BENTON: The problem with
19 Steve's proposal is you'll have a motion by the party
03:22 20 affected adversely at the trial court to go back to the
21 panel judge; and so it will never end. That's what is
22 unworkable with your proposal in my view, battling
23 district judges.

24 CHAIRMAN BABCOCK: Carl.

03:22 25 MR. HAMILTON: 13.8 seems to allow it. But

1 is it intended that if the trial court changes the
2 pretrial court order, that the pretrial court order would
3 be appealable?

03:22 4 HONORABLE SCOTT BRISTER: Whether the trial
5 judge changes it or not, it will be appealable from the
6 trial court.

7 CHAIRMAN BABCOCK: Right. Okay. Richard
8 Orsinger.

03:22 9 MR. ORSINGER: I think this is too much
10 power to give to the trial judge. I think what this means
11 is when the case gets back down to Brownsville all the
12 interlocutory summary judgments are set aside and the
13 Daubert motions are all denied.

14 CHAIRMAN BABCOCK: Judge Brister.

03:23 15 HONORABLE SCOTT BRISTER: This one, we came
16 up with this because we gave up.

17 CHAIRMAN BABCOCK: Did you get that?

18 COURT REPORTER: Yes.

03:23 19 HONORABLE SCOTT BRISTER: It's a great idea.
20 The tendency is to want to say "No, never. The pretrial
21 judge said it. That's it" period. And Harvey Brown tried
22 to do that in the second rule; and as you can see in the
23 first five or six words in the final analysis he gave up
24 and did the same thing, because there is just so many
03:23 25 circumstances that arise.

1 My favorite example is the Daubert hearing. Do you
2 want the trial judge revisiting Daubert? If it's
3 epidemiology, it seems to me the answer is "absolutely
4 not." Epidemiology studies are the same whatever
03:24 5 jurisdiction you're in. If it's whether the plaintiff can
6 call a psychiatrist about mental anguish, it depends
7 entirely on the case you're trying and to a large degree
8 with what the plaintiff actually says in trial. If they
9 say certain words, they can do it; and if they say certain
03:24 10 words, they can't. And on almost every one of these rules
11 Harvey tried to separate them out. And we talked about it
12 a long time; but the problem is these are so varied that
13 you can -- our experience was on every one of them you
14 could imagine a circumstances where the law changes or the
03:24 15 parties have changed; and at that point you want to say
16 "No. We don't want it to be absolutely binding."

17 And we talked about "Well, how about good cause?"
18 Good cause depends on what you're talking about. Good
19 cause for designating less than 30 days is different from
03:24 20 good cause about why you didn't get your requests for
21 admissions on time.

22 Boy, if you can come up with a right rule, that's
23 great; but we decided we couldn't. And we already had
24 this standard in 166. It just looked so much like it. We
03:25 25 thought, well, this may be the best we can do with a

1 30-day time limit of when we have to decide this.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: What happens if your pretrial
4 judge enters a scheduling order and in that order he said
03:25 5 "Any motions set aside or changes must be filed by such
6 and such, filed by that" and then he keeps it until that
7 deadline passes?

8 HONORABLE SCOTT BRISTER: For instance, you
9 have got the situation. Of course, 166 I think was set up
03:25 10 for that situation, look, if you said everybody has got to
11 have their experts designated by this date, and then your
12 expert dies two days before trial, can you set it aside?
13 Yes, you can set it aside. But according to Alvarado
14 you've also got to continue the trial. You can't switch
03:26 15 the expert two days before trial and say "Yes. We're
16 going to trial; and you don't get to hear it." I mean,
17 there is some law on 166 what that means; but the
18 circumstances is so varied.

19 And again, as David said, we clearly want to say if
03:26 20 there is somebody from Brownsville who doesn't care what
21 the pretrial courts say, we want to change. And I don't
22 want to get into standards of review. My committee will
23 kill me. But we want to change -- we don't want it to be
24 the trial court can just change these and we have to
03:26 25 review it for abuse of discretion. We all agreed on that.

1 It has got to be something more than that; but what more
2 it is has just proved beyond us to draft except in these
3 general terms.

03:26 4 MR. LOW: What if it's like, I mean, the
5 trial judge does set that schedule; and then nothing
6 really changes. I mean, you could say "Well, it's
7 manifestly unjust." It was then. And that ought to be
8 like newly discovered evidence. I mean, it must be
9 something drastic that has happened since that before you
03:27 10 ever interfere with it. I don't think that "manifest."
11 Every time anything wrong has happened to me I call it
12 manifest.

13 (LAUGHTER.)

14 MR. ORSINGER: Unjust.

03:27 15 CHAIRMAN BABCOCK: Judge Gray.

16 HONORABLE TOM GRAY: Scott gave up on
17 drafting language; but I didn't. And I proposed some at
18 the subcommittee and was basically barked at by everyone
19 including Justice Duncan's dog. But I proffered the
03:27 20 following proposal; and forgive my use of the term "MDL
21 court's order," because that's what I was using in my
22 drafting: "Unless after a motion and hearing it is shown
23 that due to circumstances which change after the MDL
24 court's order a manifest injustice will result by
03:28 25 continued enforcement of the MDL court's order, the trial

1 court may not reconsider, set aside, vacate or modify any
2 ruling of the MDL court. If the trial court determines
3 that a manifest injustice will occur as a result of
4 circumstances which change after the MDL court's order,
03:28 5 the trial court must state in a finding related thereto
6 in a written order and modify the order only as necessary
7 and only to the extent necessary to prevent the manifest
8 injustice which would otherwise occur."

9 MR. ORSINGER: I love that.

03:28 10 MR. LOW: I would vote for that.

11 HONORABLE SCOTT BRISTER: Summarize what the
12 difference is besides written order.

13 MR. ORSINGER: It requires changed
14 circumstances; and then it makes it clear. Hopefully it's
03:28 15 a hint to the appellate court that this is not an abuse of
16 discretion statute.

17 CHAIRMAN BABCOCK: Yes. And it's tony too.

18 MR. LOW: And authoritative.

19 CHAIRMAN BABCOCK: It has got a tone to it.
20 Judge Bland.

21 HONORABLE JANE BLAND: Okay. I'm the trial
22 court that this case gets remanded to. And because of the
23 testimony of the witnesses and there was no foundation
24 before, you know, an exhibit that was excluded by the
03:29 25 trial court ought to come in and/or a motion in limine.

1 And motion in limine is probably a better example.

2 Motion in limine is not a definitive ruling, a motion in
3 limine that was granted. I routinely grant motions in
4 limine and then reverse during trial if --

03:29 5 MR. LOW: But you say "Approach the bench."

6 HONORABLE JANE BLAND: Yes. But you-all
7 aren't talking about "approach the bench" or even if the
8 parties agree, you know, that --

9 MR. LOW: But the order on the motion in
03:29 10 limine wouldn't be that. It wouldn't be you can't ever go
11 into that order without approaching the bench. I've never
12 seen a motion in limine said that in an order.

13 HONORABLE JANE BLAND: I'm sorry. I'm not
14 articulating. I'm saying if you order in limine that you
03:30 15 cannot get into X subject, that's not really an order and
16 that's not really, you know. So I, the trial judge says
17 "I want to go into X," or something has happened. I mean,
18 I just think that I'm okay with "manifest injustice,"
19 because I think that you want to tilt, I agree with Judge
03:30 20 Brister you want to tilt the trial judge toward obeying
21 those rulings.

22 If I have to sit and write a written order and make
23 findings in a written order because of a change in the
24 ruling, you know, that is a lot of work for the trial
03:30 25 judge. And there may be, you know, I think that the

1 appellate court is capable of reviewing on the record
2 whether or not changing that ruling, you know, affected
3 the rights of the parties and did anything other than just
4 corrected something that needed to be corrected.

03:31 5 MR. LOW: Somebody opens the door with a
6 motion in limine. So therefore that is certainly a change
7 if you order him not to go into something.

8 HONORABLE JANE BLAND: That's right.

9 MR. LOW: It doesn't take a brain to figure
03:31 10 that out.

11 HONORABLE JANE BLAND: And I agree with you
12 that's a change; and I agree with you about the changed
13 circumstances. I just don't want to have to write a
14 written order stating my reasons every time that --

03:31 15 MR. WATSON: Why?

16 HONORABLE JANE BLAND: Because I'm in the
17 middle of trial and a witness has just, you know, laid the
18 foundation to --

19 MR. MUNZINGER: Why not just have the Rule
03:31 20 say either in the written order or even stated in the
21 record on the record.

22 HONORABLE JANE BLAND: I'm okay with that.

23 CHAIRMAN BABCOCK: You got that, Judge Gray?

24 HONORABLE JANE BLAND: But, you know, the
03:31 25 appellate court just held that legal error, an error of

1 law is abuse of discretion. And you are trying a case;
2 and you know the law as it was maybe given to you by the
3 pretrial judge. I just see, you know.

4 CHAIRMAN BABCOCK: Bill Dorsaneo.

03:32 5 PROFESSOR DORSANEO: The Law of the Case
6 cases do talk about -- they talk about changed
7 circumstances, they talk about changed controlling legal
8 authority, and then they finish up with using manifest or
9 to prevent a manifest injustice of some other
03:32 10 unidentifiable variety. I think if we took a look at some
11 of that Law of the Case law we would get a little more
12 help and find some things that really ought to make a
13 difference. Changing controlling legal authority is
14 something that really ought to make a difference.

03:32 15 CHAIRMAN BABCOCK: Kent Sullivan.

16 MR. SULLIVAN: I think I agree with Judge
17 Bland's point; and I think some of this is a question of
18 how you view the purpose of the proceeding as a whole.
19 What I have interpreted her comments to be in several
03:32 20 points today to be a concern about the possibility that
21 the pretrial judge issues an order that is so detailed
22 perhaps that it micromanages, if you will, the trial
23 judge's role. And I think it's a legitimate concern. I
24 mean, again trying to step back, I've always viewed the
03:33 25 process, I'm talking about the MDL process, as something

1 where you're trying to deal with those core issues that
2 are necessary for basic uniformity, consistency and
3 fairness. And what I was hearing Judge Bland say is that,
4 you know, you have got something that is more incidental
03:33 5 perhaps and you see that there has been a mistake made and
6 you want to change it and fix it. And there is a concern
7 by trying to create some clear understanding. This is
8 kind of going back to comment an hour or so ago about
9 where the trial, excuse me, where the pretrial judge's
03:34 10 role really is supposed to end and the trial judge's role
11 is supposed to begin; and I think clarity is very
12 desirable.

13 CHAIRMAN BABCOCK: Richard and then Sara and
14 Judge Bland.

03:34 15 MR. ORSINGER: I'm not as concerned about
16 that as I am about interlocutory summary judgments being
17 set aside or Daubert motions that are sustained being
18 overturned. And the purpose of having the pretrial judge
19 decide all that is because that's the judge that is well
03:34 20 educated on these topics. He has been through it with all
21 the experts, sees the big picture, has heard the very best
22 the plaintiffs and the defendants have to offer; and then
23 when we send them down to The Valley they all get
24 overturned, and if you send them up to Dallas, they all go
03:34 25 the opposite way.

1 And we're losing a lot of our uniformity, which is
2 part of the desire. I mean, part of the desire is to get
3 uniform rulings on the same litigable issues no matter
4 what part of the state they're tried in or what court
03:35 5 they're tried in. And I'm sensitive about over or
6 micromanaging the retrial; but we don't want to give so
7 much power that somebody can fundamentally undo the value
8 of the uniformity of the transferee court. And maybe
9 that's the difficulty you guys were having writing; but
03:35 10 frankly I would rather constrict the trial court's power
11 and then let them do only what is necessary in order to
12 get their trial finished.

13 And then let me also ask this: If a Daubert motion
14 is denied, would the trial court still have the power to
03:35 15 sustain a Daubert objection during the trial, or would
16 that be considered overturning the Daubert motion? In my
17 view if it is an objection during trial, the trial judge
18 has a shot at it based on the predicate that has been laid
19 during the trial regardless of the motion before. But if
03:35 20 the Daubert motion was sustained, I don't think that
21 somebody ought to be able to come back and put a predicate
22 on in the million of the trial and get the testimony in.

23 MR. SULLIVAN: Mr. Chairman, is the nature
24 of the problem, back to Judge Brister's comment, the fact
03:36 25 that the circumstances are so varied that it's impossible

1 to write a bright line rule? So is it possible what we
2 want to do is to do something by way of a comment perhaps
3 where you can provide some narrative guidance and suggest
4 the types of rulings that you would expect would almost
03:36 5 never be changed on the one hand, and then maybe some
6 suggestions like Judge Bland's on the other where you're
7 talking about essentially minor evidentiary issues that
8 are not core to the purpose of the MDL proceeding and
9 suggest, you know, those might be more apt to be revisited
03:36 10 by the trial judge?

11 CHAIRMAN BABCOCK: Justice Duncan and then
12 Skip and then Judge Bland.

13 HONORABLE SARAH B. DUNCAN: That won't work
14 in my district; and I think there is -- I'm of two views
03:36 15 on this. One, just looking at the number of calls we get
16 from trial judges where the trial judge has signed the
17 judgment, but had nothing else to do with the case and
18 absolutely no responsibility for the order that is
19 reversed on appeal they are very sensitive to us dropping
03:37 20 a footnote and saying, you know, while David Peeples
21 signed the judgment in this case it was Frank Montalvo
22 that signed the order on appeal. And I can understand
23 that sensitivity. I would not want to be held responsible
24 in print for something I didn't do. If I'm supposed to
03:37 25 try the case, tell me to try the case.

1 I'm also though concerned that manifest -- I don't
2 remember manifest injustice in the Law of the Case. I'm
3 not saying it's not there; but I don't remember it in Law
4 of the Case jurisprudence. What I do remember is "clearly
03:38 5 erroneous." "Clearly erroneous" of course is in the eye
6 of the beholder frequently, which is why there are so many
7 complaints about Law of the Case jurisprudence.

8 But just to use an example that occurred to me when
9 Judge Bland was talking, Rule 609 of the Evidence Rules,
03:38 10 you know, a conviction if it's more than 10 years old,
11 can't come into impeach somebody. Convictions for
12 impeachment purposes are frequently the subject of a
13 notion in limine. Well, that 10 years may be met between
14 the time that the pretrial court rules on a motion in
03:38 15 limine and the time the trial court gets the case to be
16 tried, so that the pretrial court's ruling which may have
17 been perfectly proper at the time it was made by the time
18 of trial isn't proper, and then the trial court is going
19 to have to make the finding of basically a 403 kind of
03:39 20 finding. So I'm of two views. But on the one hand I
21 think "manifest injustice" is too limited; but I'm
22 concerned that "clearly erroneous" is too amorphous.

23 CHAIRMAN BABCOCK: Why don't we do this, if
24 I could suggest it in the interest of moving along: Let's
03:39 25 just take Judge Gray's language and see what the committee

1 thinks about it up or down. And if it's down, then we'll
2 take a short break and continue to talk about it. Okay?

3 MR. JACKS: Can we hear it one more time,
4 Judge?

03:39 5 CHAIRMAN BABCOCK: Judge Gray.

6 HONORABLE TOM GRAY: "Unless after motion
7 and hearing it is shown that due to circumstances which
8 change after the MDL court orders a manifest injustice
9 will result by continued enforcement of the MDL court's
03:39 10 order, the trial court may not reconsider, set aside,
11 vacate or modify any ruling by the MDL court. If the
12 trial court determines that a manifest injustice will
13 occur as a result of the circumstances which change after
14 the MDL court order, the trial court must state its
03:40 15 findings related thereto in a written order or stated on
16 the record and modify the order only as necessary and only
17 to the extent necessary to prevent the manifest injustice
18 would otherwise occur."

19 CHAIRMAN BABCOCK: Everybody that in favor
03:40 20 of that raise your hand.

21 HONORABLE SCOTT BRISTER: Wait, wait, wait.
22 We haven't even. Changed circumstances? So it's a
23 manifest injustice; but I have to affirm it because none
24 of the circumstances remain changed? We need to at least
03:40 25 talk about that. Number two, there is a couple of other

1 principles. "Changed circumstances" is a lot of stuff to
2 be trucking in here without anybody thinking about it.
3 Number two, there is another objection, which is the
4 legislature said the trial judge is going to try the case.

03:41 5 So, yes, on the one hand we don't want to undo all
6 the stuff the pretrial court said; but on the other hand,
7 the pretrial court cannot try the case. And I'm an
8 advocate for the pretrial court admitting and not
9 admitting exhibits; but I am not an advocate to say the
03:41 10 court can't change one ruling on one exhibit. I think
11 the whole idea of having bellwether trials before
12 different people is so that trials aren't all exactly
13 alike so that maybe one trial judge let's the Buckner
14 Simpson papers in asbestos, the Buckner Simpson papers in
03:41 15 because it's state of the art and one doesn't. But now
16 those circumstances are going to change. I think Buckner
17 Simpson died 60 years ago or something like that.

18 CHAIRMAN BABCOCK: And he's still dead.

19 HONORABLE SCOTT BRISTER: But I mean, the
03:41 20 trial judge is supposed to try the case; and if the trial
21 judge, generally the circumstances are not going to have
22 changed. I think it's easy to revisit if the appeals
23 court changes the law somewhere.

24 CHAIRMAN BABCOCK: Would you rather vote on
03:42 25 your language?

1 HONORABLE SARAH B. DUNCAN: Can I ask a
2 question?

3 CHAIRMAN BABCOCK: Hang on. I just want to
4 ask Judge Brister. Do you think is more appropriate to
03:42 5 vote on?

6 HONORABLE SCOTT BRISTER: To me we spent
7 hours talking about the motion. This is the critical
8 issue. I am not ready to stop the discussion now after 30
9 minutes. I do believe firmly that after talking about
03:42 10 this for a sufficient amount of time we will end up with
11 "manifest injustice" because what else is there; but for
12 goodness sakes, we ought to look. This is the issue.
13 This is the one we ought to spend talking about and
14 looking at rather than just voting it up or down.

03:42 15 CHAIRMAN BABCOCK: Judge Bland.

16 HONORABLE JANE BLAND: I'm okay with the
17 language that the committee proposes, because I think that
18 it does encourage the trial judge to follow the pretrial
19 court's orders; and if something happens and a trial court
03:43 20 should absolutely disregard, you know, special orders of
21 the pretrial court and move the case to trial, there is,
22 you know, that would constitute probably, you know, an
23 abuse of discretion if it really did create a manifest
24 injustice. And if it led to such a degree that people
03:43 25 felt like they were not going to have an adequate remedy

1 by appeal, they could take it up and say "Look, you've
2 just gutted 18 months of work that occurred." And the
3 appellate courts are very capable of handling whether or
4 not that is in fact the case.

03:43 5 On the other hand, if the trial court changed an
6 order and none of the parties believe it's significant
7 enough to try to get some sort of review of that change
8 until final judgment, then the appellate court has the
9 benefit of the entire record, and they can determine A,
03:44 10 whether it was manifest injustice and under whatever
11 standard they want to apply for that particular ruling;
12 and I'm sure it would vary with some, you know, according
13 to the degree of the importance of the ruling, and they
14 can also decide whether or not the modification, you know,
03:44 15 caused the rendition of an improper verdict, whether the
16 error was harmless or not.

17 So I feel like this encourages the trial court to
18 stick by the earlier rulings, and then we can let when we
19 get real cases and real judges who have changed an order,
03:44 20 and we can evaluate it based on those particular orders,
21 because I think it's very difficult to know right now, you
22 know, what orders the trial judges may change.

23 CHAIRMAN BABCOCK: Richard Munzinger.

24 MR. MUNZINGER: I share Richard Orsinger's
03:44 25 experience about The Valley. I recently was representing

1 an interpleader in a case against a lawyer seeking to move
2 a case on a motion to transfer of venue from Houston to
3 Laredo. He said "I don't care what the law is. Just let
4 me get to Laredo." And as it turned out he got to Laredo,
03:45 5 and as it turned out the case was settled very promptly
6 thereafter to his benefit. But we need to be honest with
7 ourselves. We need to be honest with the elected judges
8 and the jurisdictions in this entire state; and not all
9 254 counties are blessed with honest, smart judges who are
03:45 10 blind to the people who are in front of them and to their
11 own self interest.

12 And with all due respect, the committee that wrote
13 the Rule, the Rule is insufficiently strict in suggesting
14 to the trial courts that they ought to honor these orders.
03:45 15 I have, my experience is the same at Richard's. I'll sit
16 there and say I don't give a dadgum what this fellow is
17 doing and how the briefs are written and how the oral
18 argument are. "Just let me get back a Edinburg; let me
19 get back to Laredo; let me get to El Paso, and we'll take
03:46 20 care of it at that time point in time." They laugh all
21 the way to the final brief.

22 MR. ORSINGER: The reverse is "Let me get
23 back to Collin County."

24 MR. MUNZINGER: "If I file a brief, if it is
03:46 25 going to get back to Judge, I don't worry about it."

1 CHAIRMAN BABCOCK: Pete.

2 MR. SCHENKKAN: I hear two different kinds
3 of concern, a concern very vigorously stated that unless
4 we write in here that you won't undo it at all, we haven't
03:46 5 accomplished anything in at least some cases that are
6 transferred back to some places. And I hear, and I've had
7 some bad experiences too. I don't mean to mock that. And
8 I also hear on the other side Judge Bland pointing out
9 there are lots of circumstances. You can envisage any one
03:47 10 standard whether manifest injustice or clearly erroneous
11 or make a written finding or don't make a written finding
12 could be a unrealistic burden.

13 So in terms of trying to vote on this or whether
14 it's by vote or otherwise it gets to the point at which
03:47 15 Justice Hecht and Jefferson have as much value as they're
16 going to get out of this discussion. I'd like to see us
17 organize around two propositions. One, first should we
18 have anything at all in this Rule about this or simply
19 take the actual practical value which is going to in fact
03:47 20 be coming, whatever it was and may not be complete in all
21 cases, but whatever it was of having the MDL panel taking
22 this case away from a whole bunch of pretrial attorneys
23 and giving it to one judge and that judge worked really
24 hard with lots of lawyers in front of him and for a really
03:47 25 long time and has done the best he can, has entered a

1 whole bunch of orders and some cases are sent back to
2 trial because they haven't been fully disposed of or set,
3 and leave that wide open to the differences that are going
4 to be differences between the summary judgments that have
03:48 5 been hard fought or everything and a motion in limine over
6 somebody you think you've heard the name of something or
7 you know some individual lawyer's prior sports career.

8 CHAIRMAN BABCOCK: Let's take a break.

9 (RECESS 3:48 TO 4:13 P.M.)

04:13 10 CHAIRMAN BABCOCK: Are we ready to go?
11 Nina, are you ready? Chip.

12 MS. CORTELL: We're ready.

13 CHAIRMAN BABCOCK: The court reporter has
14 informed me that she is very excited about Judge Brister's
04:13 15 latest proposal, which is we're going to stay here until
16 we get it done, and we're going to lock the doors if it
17 takes us until midnight.

18 (LAUGHTER.)

19 MR. LOW: You might be the only one here.

04:13 20 CHAIRMAN BABCOCK: Judge Brister will be
21 talking to himself.

22 HONORABLE SCOTT BRISTER: I don't recall
23 saying that.

24 MR. MEADOWS: He predicted his language will
25 survive.

1 CHAIRMAN BABCOCK: And Hatchell has got
2 something to say; but I promised Skip that he would be the
3 first guy to talk.

4 MR. HATCHELL: Well, and I'm going to
04:13 5 counter what you just said, and this is off the record.

6 (BRIEF OFF RECORD DISCUSSION.)

7 CHAIRMAN BABCOCK: Okay. Now back on the
8 record now. Skip, the first substantive comment after the
9 break. It better be good.

04:14 10 MR. WATSON: I can't promise this is
11 substantive; but let me tell you where my mind is on this.
12 Part of our problem is twofold. First, there is
13 inevitably going to be conflict of just the turf war
14 between what the pretrial court does and what the trial
04:15 15 court does. That is inevitable. What we're trying to do
16 is define when the trial court can undo what the pretrial
17 court has done. We've made the conscious decision that
18 that's going to be rare. The problem is and the reason I
19 support what Judge Gray has said is that we need to know
04:15 20 when and we need to know why.

21 Now the idea of "manifest injustice," you know, it
22 sounds like a punt of "I know it when I'll see it." And
23 may be it -- it may simply mean it's an injustice, and
24 it's manifest. Any fool can see it. But the first point
04:15 25 I want to make is that if that's it, and it better be that

1 clear, it is easy to articulate. It is not a burden on
2 the trial court to in writing or on the record say "This
3 is the injustice, this is the reason it's manifest."
4 That's almost certainly going to be changed circumstances
04:16 5 of some kind that anybody can identify with; but that
6 we've got to have the reasons underlying this amorphous
7 term to take up or this thing is not going to work.
8 Whether it's in The Valley or West Texas or where ever
9 there is going to be carte blanche to change it.

04:16 10 The second thing that I think is probably more
11 substantive is that Judge Bland was working into it part
12 of the abuse of discretion standard of there is an error
13 of law. That's not necessarily manifest injustice unless
14 in my feeble mind the error of law that's been committed
04:17 15 and she is going to be busted for because it's her case
16 that's going to go up to the court unless that error of
17 law probably affects the outcome of the case. And I
18 realize, and I'm reaching out to the reversible error
19 standard and pulling that in; but it ain't going to work
04:17 20 just saying we're weighting this in favor of the pretrial
21 rulings if it doesn't have teeth in it and it doesn't have
22 an articulable standard of review that people can test and
23 everybody knows that it's there. Otherwise every trial
24 judge that has any sense of self worth in their own
04:17 25 rulings is going to say "I disagree with these rulings,

1 and it's now my trial, and I want to change them." And
2 the question is are they going to do it? And to me if
3 it's to work, we've got to get beyond manifest injustice
4 and say if it's changed circumstances, articulate them and
04:18 5 say why it's unjust. But then second, I'm not against
6 making all errors of law out of that, you know, not part
7 of manifest injustice; but they better say what the error
8 of law is and why that error of law probably would cause a
9 cause a different outcome of the case. Otherwise it is
04:18 10 not a manifest injustice. It's just an error; and as long
11 as there are human beings doing trials the pretrial judge
12 is going to make errors that the trial judge would catch.
13 That's all I have got to say.

14 CHAIRMAN BABCOCK: Well, Skip, are you
04:18 15 saying you would go further than Judge Gray's proposal?
16 You'd make it tougher? You'd make it more weighted
17 against change?

18 MR. WATSON: I don't think I'm saying that.
19 Again, I don't have the benefit of his proposal to look at
04:19 20 to see what it says; but I would say they have to
21 articulate. Is it here? That's what this thing is
22 (indicating)?

23 I would say, one, that it needs to say, the factors
24 need to be articulated that make the injustice manifest.
04:19 25 If it's changed circumstances, say what they have changed

1 and say what makes that unjust.

2 CHAIRMAN BABCOCK: That's in his.

3 MR. WATSON: Okay.

04:19

4 CHAIRMAN BABCOCK: But what was different
5 about yours is this business about error.

04:19

6 MR. WATSON: Yes. The error of law. That's
7 what we've got to discuss. That's what has been flowing
8 in and out of this discussion. And I'm just saying up
9 front most errors of law I would say would not create a
10 manifest injustice unless the trial court articulates not
11 only that it's an error of law and happens to be right on
12 that, but also says why it probably would affect the
13 outcome of the case.

04:20

14 CHAIRMAN BABCOCK: So you're taking it
15 further than Judge Gray?

16 MR. WATSON: Yes.

17 CHAIRMAN BABCOCK: Bobby and then Judge
18 Christopher.

04:20

19 MR. MEADOWS: I thought actually you were
20 saying or stating the position that I hold, which is I
21 think we should take Scott's language which Judge Bland is
22 interested in; but I would add to it this clarification
23 about what establishes manifest injustice that brought
24 about the change in the ruling. In other words, take a
04:20 25 lot of what was just in the discussion we heard from Skip

1 about, you know, why it's manifest and why it's unjust and
2 just have that either stated in a written order or on the
3 record so it's clear what brought about the change in the
4 ruling. So I thought what he was saying goes with Scott's
04:20 5 language. So anyway.

6 CHAIRMAN BABCOCK: Apparently Stephen had
7 written this.

8 MR. MEADOWS: But that's the point that I
9 would make, that Scott's language that we're talking about
04:20 10 with this additional requirement that the judge states the
11 reason in an order or on the record for the judge.

12 CHAIRMAN BABCOCK: Okay. Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: What I'm
14 hearing, and I'm a little afraid of, and we talked about
04:21 15 this in or phone conference, is what is the standard of
16 review that I'm going to be judged on appeal? It seems to
17 me that if my evidentiary ruling is correct, I would be
18 judged that it's correct regardless of whether I have
19 reversed the pretrial court's evidentiary ruling and the
04:21 20 retrial court's evidentiary ruling has been given some
21 special status. Either I'm right or I'm wrong on appeal.
22 And I ought to be -- and if I change somebody else's
23 ruling and I'm wrong, I should be wrong. But to give the
24 pretrial court's ruling more weight before it has been
04:21 25 judged to be correct by any appellate court versus my

1 ruling as the trial court is wrong. We should not be
2 doing that.

3 CHAIRMAN BABCOCK: Well, then you would want
4 it de novo. You would want us to put everything in play.

04:22 5 HONORABLE TRACY CHRISTOPHER: Well, I live
6 with "manifest injustice." I'll live with what we in the
7 committee came up with.

8 CHAIRMAN BABCOCK: Well, we all live with
9 it.

04:22 10 (LAUGHTER.)

11 HONORABLE SCOTT BRISTER: I wanted to put
12 something like that in about the standard of review; but
13 then Tracy convinced me that -- well, I see. So it comes
14 up to you. It was a manifest injustice that you switched
04:22 15 it; but it didn't make any difference in the trial, so
16 because you switched it and shouldn't have, it was
17 manifest injustice. I'm going to reverse it and order you
18 to try it again. That is tough.

19 HONORABLE TRACY CHRISTOPHER: No. I mean, I
04:22 20 would be just judged on did I make an error? Was it
21 reversible error?

22 HONORABLE SCOTT BRISTER: Of course, we
23 will. The harmless error standard is going to come in
24 when we look at it on appeal. I don't see, unless we make
04:22 25 an exception to the harmless error rule, even if the trial

1 judge switches something, isn't the harmless error rule
2 going to apply?

3 HONORABLE TRACY CHRISTOPHER: But the
4 appellate point is going to be, you know, the trial judge
04:23 5 violated this rule when it changed it's ruling, whatever
6 rule that we're coming up with here; and that's going to
7 be the point of error on appeal. Not that my ruling was
8 ultimately, even if it was wrong, that it was harmful.

9 CHAIRMAN BABCOCK: See, the reason I sort of
04:23 10 like what Judge Gray has done is because it, as I said
11 right away, is because it has a tone to it and it has a
12 burdensomeness to it. And that is --

13 HONORABLE SCOTT BRISTER: Which part of it?
14 Because, I mean, as I read it it's basically a Manifest
04:23 15 Injustice Rule II right there in the middle of it.

16 CHAIRMAN BABCOCK: Yes. But it also he has
17 got to state findings in a written order.

18 HONORABLE SCOTT BRISTER: And I'm not
19 opposed to requiring the trial judge to say why. That's
04:24 20 really a separate question. That's not a different
21 standard. That's how hard should it be and what the
22 procedure should be; and I don't necessarily disagree with
23 that.

24 CHAIRMAN BABCOCK: I think that what Judge
04:24 25 Christopher says is absolutely right, that from an

1 appellate standpoint, I mean, this is really never going
2 to result probably in much reversal; but you nevertheless
3 really, really, really want to encourage the judges on
4 remand not to just undo everything that has happened. And
04:24 5 so how do you encourage that behavior? Well, you
6 encourage it the only way you can, which is language and
7 the tone of the language and burdensomeness, how
8 burdensome you make it to change the ruling. And if you
9 have a lot of bells and whistles in there that they have
04:24 10 got to do, then maybe they're going to be less likely
11 unless it's really, really important to make a change in
12 the pretrial court's ruling.

13 HONORABLE TRACY CHRISTOPHER: If I don't do
14 the bells and whistles, is that a grounds for appeal?

15 CHAIRMAN BABCOCK: Excuse me?

16 HONORABLE TRACY CHRISTOPHER: If I don't do
17 the bells and whistles, is that a grounds for appeal?

18 MR. GILSTRAP: Not if you're right, not if
19 you're right in the ruling.

04:25 20 CHAIRMAN BABCOCK: That's probably right.

21 HONORABLE TRACY CHRISTOPHER: But even if
22 I'm wrong and it's not harmful error, I shouldn't be
23 doubly penalized because I didn't follow these. You know,
24 it shouldn't create error because I didn't follow these
04:25 25 requirements when it would otherwise be harmless error.

1 CHAIRMAN BABCOCK: Why would you not follow
2 those rules? The reason you would not follow it I guess
3 is that, well, "The Supreme Court told me to do this; but
4 I do care. And they'll never reverse me on it, so I won't
04:25 5 do it."

6 MR. YELENOSKY: Or "The Supreme Court told
7 me to do this" balanced against "If I do this, in my
8 opinion it's wrong."

9 HONORABLE TRACY CHRISTOPHER: Right. Maybe
04:25 10 the pretrial court was wrong. We're giving more authority
11 to the pretrial court ruling without any appellate review
12 of it.

13 MR. LOW: How can a judge decide that they
14 just don't believe they ought to follow the Supreme Court
04:26 15 rules they are sworn to? I don't care. If the Supreme
16 Court says it's a Rule, you do it. You do it.

17 HONORABLE TRACY CHRISTOPHER: Okay. "For
18 all of the reasons that the plaintiff's lawyer just said I
19 have determined it's a manifest injustice. I've made my
04:26 20 findings on the record."

21 MR. LOW: That's not what they tell you to
22 say. They tell you to say what has changed and things
23 like that. All the Rules, I mean, you might violate a
24 number of Rules. Well, is it harmful error and appeal?
04:26 25 You don't look at it that way. You look at it here are

1 guidelines that you as a judge should follow and you as a
2 judge are obligated to follow.

3 HONORABLE TRACY CHRISTOPHER: I don't think
4 I should have to follow that guideline on an evidentiary
04:26 5 ruling.

6 MR. LOW: Maybe you're an exception.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: Just in response to Judge
9 Christopher, it's small solace to the person who is
04:26 10 looking at a multimillion dollar verdict to say "Take it
11 to the court of appeals." You've got the problem of the
12 supersedeas bond. Can your client set it up? Does he
13 want to? The whole problem is that most -- bad word --
14 many judges in many jurisdictions are not loyal to their
04:27 15 oath like Judge Christopher or like the judges that you
16 practice in front of.

17 You have got a lot of people. A lot of times
18 effort has gone into hopefully a few number of issues that
19 a pretrial court is going to address, a lot of briefing.
04:27 20 She disagrees with the pretrial judge's ruling. None of
21 us know what the law is until the Supreme Court tells us
22 what the law is; but the sad truth of the matter is that
23 if you don't do something that makes it extremely
24 difficult to have local judges not set aside a pretrial
04:27 25 ruling, you have frustrated the purpose of the law in the

1 first place, because you're going to send all these cases
2 to whoever it is. The judge chosen with the wisdom of
3 this panel that says this judge is honest and smart, knows
4 what he or she is doing, has got lots of experience, has
04:28 5 spent all this time, they've got liaison counsel that read
6 briefs, have briefs, and enter an order in good faith; and
7 then it comes back to whatever jurisdiction it is and it
8 is ignored completely.

9 And you say to me "Well, go ahead and appeal it."
04:28 10 My client may not have the money to appeal it. My client
11 may not want to take the risk of appealing. And have you
12 not frustrated the whole purpose?

13 MR. GILSTRAP: Or the trial judge may be
14 right in the ruling.

04:28 15 MR. MUNZINGER: They may be. That's right.
16 Somebody may be right.

17 HONORABLE TRACY CHRISTOPHER: Then you
18 should just call a spade a spade and say "Trial judge, you
19 cannot change this pretrial court ruling" period.

04:28 20 HONORABLE LEVI BENTON: What about just
21 adding a footnote to this or adding to the rule a
22 statement that says that "Trial court's failure to abide
23 by this rule is not in and of itself reversible error and
24 all rulings of the trial court are going to be evaluated
04:28 25 under existing rules of law"?

1 HONORABLE SCOTT BRISTER: That makes it
2 worse. That encourages them to forget about it.

3 HONORABLE LEVI BENTON: No, it doesn't. I
4 don't see how. You just can't go down to Scott Brister
04:29 5 and say this is on its face reversible error because
6 Benton didn't do this. It encourages me. I'm encouraged
7 to set up my findings; but my failure to do so isn't
8 reversible error, because you're going to still evaluate
9 the admission or exclusion of evidence based on existing
10 rules.

11 CHAIRMAN BABCOCK: Tommy.

12 MR. JACKS: The problems I have with the
13 wording in Judge Gray's proposal are, well, one, that I
14 think it's too restrictive in that it limits consideration
04:29 15 to manifest injustice that are due to changed
16 circumstances, but would appear to tie the hands of the
17 trial court to manifest injustices that are due to
18 something else. I also think the idea of a motion and a
19 hearing is a little unworkable if you're in the middle of
04:30 20 a trial.

21 On balance I prefer what the subcommittee proposed.
22 You know, you've got changed circumstances that would
23 warrant a change in whatever the pretrial court did
24 whether they amounted to manifest injustice or not. You
04:30 25 have got manifest injustices that would I'd say always

1 warrant a change. You've got times when the pretrial
2 judge just got it wrong and the trial judge is in the
3 position, has been put in the position of having to, say,
4 exclude evidence that the law says you must admit, and
04:30 5 then run the risk of retrying the whole case. How does
6 that serve the interest of justice and economy and
7 efficiency and all that? I'd say we say as little as we
8 can; and I wouldn't say any more than Judge Brister and
9 the subcommittee already said.

04:31 10 CHAIRMAN BABCOCK: Frank and then Bill and
11 then Judge Lawrence and the Carl.

12 MR. GILSTRAP: If we're talking about
13 reversible error, anything we draw is going to be, as
14 Richard sometimes says, oratory. I mean, it's just going
04:31 15 to be an exhortation to the trial court judges this is how
16 you want, this is how we want you to do it; and most trial
17 court judges are going to follow that. But if we get the
18 Maverick judge who says "I don't care. He's wrong. The
19 pretrial judge is wrong" and it turns out that and it
04:31 20 wasn't a manifest injustice to, you know, to make the
21 ruling, then still when you go up on appeal he's going to
22 be upheld if he's right on the law.

23 The only way -- however this could play a part in a
24 mandamus proceeding, for example. Let's suppose that the
04:31 25 trial court judge made the ruling, didn't satisfy the

1 manifest injustice procedure and the trial hadn't started.
2 You might be able to get a mandamus out of that; but
3 otherwise this language is just going to be an
4 exhortation, which may be helpful, but it's not going to
04:32 5 be any more than that.

6 CHAIRMAN BABCOCK: Bill.

7 PROFESSOR DORSANEO: I'm losing a little bit
8 of track here. When we're talking about the committees
9 proposal we're talking about this first (c), right, which
04:32 10 only has to do with all nondispositive orders?

11 CHAIRMAN BABCOCK: Correct.

12 PROFESSOR DORSANEO: So where I have --
13 maybe I am out of order here. But where I have, if we're
14 ever going to be talking about the parenthetical, I have
04:32 15 trouble after hearing Judge Christopher saying some very
16 sensible things that and understanding what it means by
17 dispositive motions or expert challenges that are case
18 dispositive and in what sense are they case dispositive if
19 we're still working on this case, because I do think it
04:32 20 doesn't make sense to say to the trial judge that
21 something that's legally inaccurate and can't be
22 corrected, because all you're doing is putting the shoe on
23 the other foot. The trial judge would say "Well, I can't
24 change that, so you have to appeal that"; and then the
04:33 25 court of appeals says that the pretrial judge was wrong,

1 so we're back to the trial court. Granted there is no
2 million dollar judgment in that case in all likelihood;
3 but it's a similar problem.

4 CHAIRMAN BABCOCK: Judge Brister.

04:33 5 HONORABLE SCOTT BRISTER: I don't want to
6 put too fine a point on it; but the idea of dribbling
7 cases out individually, the time to object to a trial
8 judge who is going to pay no attention to what the
9 pretrial court ordered is when the cases or being dribbled
04:33 10 out. Not on appeal after you have had a 10 million dollar
11 judgment. That when if you're too embarrassed to speak up
12 then and say "Judge, please don't send one of the first
13 cases to this judge because of the following problems
14 we've had with this judge ever following the rules." And
04:34 15 if I'm a pretrial court surely that's not where you're
16 going to send one of the bellwether cases. Right?

17 CHAIRMAN BABCOCK: Is this going to be in
18 chambers when you say this?

19 MR. ORSINGER: We're going to put this on
04:34 20 the record.

21 HONORABLE SCOTT BRISTER: I don't know
22 anything about The Valley; but everybody, you know,
23 everybody bandies around "Oh, the people in The Valley --

24 MR. ORSINGER: Don't go there.

04:34 25 HONORABLE SCOTT BRISTER: If that's fine,

1 then let's say that on the record; but let's don't screw
2 up an entire rule so we can try to fix something in The
3 Valley without saying it.

4 CHAIRMAN BABCOCK: Judge Lawrence.

04:34 5 HONORABLE TOM LAWRENCE: We have got a
6 legislative mandate to establish this pretrial system.
7 The legislature clearly wants us to try to dispose of all
8 the pretrial matters we can; but the Rule that we
9 formulate should be designed to make sure that there is a
04:34 10 level playing field and that the proper rulings are made
11 in accordance with the law so the trial is fair and you're
12 not going on the basis of some improper ruling by a
13 pretrial court. So I don't think it would be a good idea
14 to prevent the trial judge from being able to change a
04:35 15 pretrial ruling.

16 I like the "manifest injustice," for want of a
17 better phraseology to use; but I like Judge Grave's motion
18 of shifting the burden to make the trial judge justify
19 that in writing or on the record; but I'm not sure I like
04:35 20 the "changed circumstances." I think that's too
21 restrictive. I think the best we can do is just send a
22 message that we don't want these changed unless there is
23 some good reason to change it. I don't think we can craft
24 a rule to cover all of the possibilities that we would
04:35 25 want to try to cover. So I think we just need to -- I'm

1 in favor of keeping it simple, shifting the burden to the
2 trial judge to try to make them justify it on the record
3 and then moving on.

04:35 4 CHAIRMAN BABCOCK: Carl and then Judge
5 Benton and then Richard and then Alex.

04:36 6 MR. HAMILTON: I think the legislature has
7 in mind that the pretrial proceedings will do something.
8 And if we allow the trial court to undo that, then we
9 haven't really done anything. So it may be unfair to let
10 everything go that the pretrial proceeding does. On the
11 other hand it may be unfair to let the trial court change
12 everything.

04:36 13 I sort of like the other (c) part. I mean, there
14 are certain things that Bill says are dispositive of like
15 parties' claims, experts and venue that if the pretrial
16 court decides those, perhaps ought not to be changed; but
17 maybe there are more minor things like exhibits or in
18 limine rulings or something like that that the trial court
19 ought to have some leeway at the time of the trial; but
04:36 20 there ought to be some things up there that the pretrial
21 court does that cannot be undone.

22 CHAIRMAN BABCOCK: Justice Hecht.

04:37 23 HONORABLE NATHAN HECHT: And let me say in
24 that regard that I have read a lot of cases; and I don't
25 read many where the trial judge changes his own mind.

1 Most of the time when the motion for reconsideration is
2 filed it gets pretty short shrift. I suppose if I thought
3 hard about it, I could remember a case where somebody
4 granted one that says "Yes. You're right. I was wrong
04:37 5 and I'll do it the other way." In this system we have got
6 a handpicked panel. We are handpicking the best judge in
7 the state to handle these cases, and they're going to
8 listen to the best lawyers in the state argue in a whole
9 bunch of cases "This is how this is going to impact these
04:37 10 cases, and we're thinking that it's going to happen often
11 enough to be a concern that the trial judge is going to
12 say "Well, I need, we need to revisit that" except for bad
13 reasons. That's the part I'm unclear about.

14 CHAIRMAN BABCOCK: Judge Benton.

04:38 15 HONORABLE LEVI BENTON: If I can get Justice
16 Brister to concede here. I'm not going to give up. Would
17 you agree that if the trial court judge didn't find
18 manifest injustice, but changed the pretrial court's
19 rulings, that alone in and of itself would not constitute,
04:38 20 it might be a violation of the judge's oath, but it would
21 not constitute reversible error?

22 HONORABLE SCOTT BRISTER: It depends on the
23 circumstances.

24 HONORABLE LEVI BENTON: Okay. Now at the
04:38 25 end of the day what we want the trial court judge to do is

1 to admit the evidence that ought to be admitted and
2 exclude the evidence that ought to be excluded. That's
3 why I think my earlier proposal is what we should do, is
4 simply expressly say the trial court's failure to abide by
04:39 5 this clear directive in and of itself is not reversible
6 error. The rulings on evidence in any other matter are
7 going to be evaluated by existing case law or rules or
8 whatever the case may be. It is indeed a violation of the
9 oath we took, because we have directives that we should
04:39 10 find manifest injustice and do these things in the Rule;
11 but it's not reversible error. And so any judge that
12 takes their oath seriously would do the things they are
13 required to do whether we use your language or Tom's
14 language; but at the end of the day the evidence that
04:39 15 should be admitted will be admitted even if it is contrary
16 to what the pretrial judge held. And the evidence that
17 should be excluded will be excluded.

18 CHAIRMAN BABCOCK: Richard Munzinger, you
19 had your hand up earlier.

04:40 20 MR. MUNZINGER: Mine is probably repetitive.
21 But the whole dynamics of the lawsuit changes overnight
22 if you don't put some restrictions on the trial court.
23 You make a tactical judgment. The judge has ruled X
24 expert is not going to testify. You make a summary
04:40 25 judgment and the judge has granted a partial summary

1 judgment disposing of Party A. And here you have lived
2 with this set of circumstances now for many months. The
3 case is now sent back to the trial court and set for trial
4 60, 90, 120 days, whatever it might be and it's possible
04:40 5 overnight that the entire dynamics of the case changes
6 because of the personality of the trial court ruling. I
7 think that you have again frustrated the purposes of the
8 whole Rule.

9 CHAIRMAN BABCOCK: Alex.

04:40 10 PROFESSOR ALBRIGHT: Mine is on a little
11 different issue. This applies to all nondispositive
12 orders. What happens to dispositive orders if a partial
13 summary judgment is not a final order, but it disposes of
14 something? It seems to me this should be "all orders,"
04:41 15 should it not?

16 HONORABLE SCOTT BRISTER: We were trying to
17 reach the disposed cases. So you entered a summary
18 judgment as to some people severed out. It is on appeal
19 from the pretrial court. You certainly don't want the
20 trial court reopening that.

21 PROFESSOR ALBRIGHT: Those haven't been
22 remanded. They are severed out on separate cause.

23 HONORABLE SCOTT BRISTER: Some people might.

24 PROFESSOR ALBRIGHT: But then if you make a
25 partial summary judgment --

1 HONORABLE SCOTT BRISTER: We all understand
2 that.

3 PROFESSOR ALBRIGHT: I guess the problem is
4 you have if it's only nondispositive, then what happens to
04:41 5 the dispositive?

6 HONORABLE SCOTT BRISTER: All the time -- I
7 mean, I've seen several cases where usually one trial
8 judge has said "These parties are gone," and a new trial
9 judge will come in and say "No. You're back in" and don't
04:42 10 even tell them and default judgment. There are several
11 cases like that on the books. I mean, I do believe unless
12 you say something like this with "nondispositive," if you
13 granted summary judgment as to one defendant and remanded
14 the case and severed it, it's gone, remanded the case,
04:42 15 there's a risk of the trial judge saying "I'm setting that
16 aside," which I think we all agree you can't do.

17 PROFESSOR ALBRIGHT: Dispositive motions you
18 say you can't touch. Right? So it kind of appears that
19 it says all nondispositive motions shall control and can't
04:42 20 be modified, so maybe you can modify the dispositive ones.
21 That's the problem I have.

22 HONORABLE DAVID GAULTNEY: I think she makes
23 a good point. It could be read that way.

24 PROFESSOR DORSANEO: We need to take them
04:42 25 one by one in a second list.

1 CHAIRMAN BABCOCK: Who had their hand up
2 next? Richard is asleep.

3 MR. ORSINGER: No. I'm listening. And I
4 had my hand up; but I gave up.

5 CHAIRMAN BABCOCK: Okay. Richard. You had
6 your hand up for a long time.

7 MR. ORSINGER: Well, you know, if Party A
8 has been dismissed from the suit and then they're brought
9 back in about three weeks before they pick a jury, but
04:43 10 they haven't been doing any of the discovery or anything,
11 I could see a problem. On the other hand, Party A's
12 lawyer is probably smart enough to get that summary
13 judgment severed and final. And so if they are not asleep
14 at the wheel, they can probably protect themselves from
04:43 15 that.

16 But surely we wouldn't want litigants to be
17 prejudiced by thinking they're out of the lawsuit and then
18 finding out later on they're back in.

19 CHAIRMAN BABCOCK: Judge Bland.

04:43 20 HONORABLE JANE BLAND: Could we just add to
21 the committee's language "and for reasons stated on the
22 record"? Would that give everybody the comfort that the
23 trial judge didn't do this without some thought and that
24 would give the appellate court something to look at, but
04:43 25 wouldn't have to have a separate motion and hearing; but

1 at the end of the day after you've been in trial for, you
2 know, two weeks and they approach you about an issue.

3 And my view on it is it is going to be rare,
4 because the judge is not going to revisit 500 exhibits.
04:44 5 They may have five they want you to revisit. And say "for
6 reasons stated on the record" and then leave it to the
7 appellate courts to determine whether or not what you have
8 done A, is error; B, is reversible for not following
9 either the pretrial court and C, is harmless.

04:44 10 CHAIRMAN BABCOCK: I had a thought in that
11 regard. What if you took part of Judge Gray's language
12 and at the end of Judge Brister's or the committee's,
13 subcommittee's language you added "If the trial court
14 determines that a manifest injustice will occur, that
04:44 15 trial court must state its findings related thereto in a
16 written order or stated on the record and modify the order
17 only as necessary and only to the extent necessary to
18 prevent the manifest injustice which would otherwise
19 occur"? Scott, what do you think about that?

04:45 20 HONORABLE SCOTT BRISTER: I'm not sure it
21 adds anything; but if it makes it sound harder to do, I
22 don't object to it.

23 CHAIRMAN BABCOCK: It adds two things, I
24 think. One, it adds a hoop that you have got to get
04:45 25 through that your language doesn't add. And two, it says

1 what may be self evident; but that is that you only modify
2 it to the extent that you have to, and that is suggestive
3 to the trial court that you are very careful about
4 crafting orders that overturn pretrial orders.

04:45 5 HONORABLE SCOTT BRISTER: Do people feel
6 more comfortable? I don't have any objection.

7 MR. LOW: It doesn't change. I'm saying
8 you have to show what has changed. It doesn't say that.

9 CHAIRMAN BABCOCK: We took that out.

04:45 10 MR. LOW: It's just an erroneous rule.
11 That's why it's unjust. Because it's wrong? What else?
12 That's all he has got to say?

13 HONORABLE SCOTT BRISTER: His language is
14 he's going to have to say why just because it's wrong it
04:46 15 is a manifest injustice.

16 CHAIRMAN BABCOCK: Justice Duncan.

17 MR. LOW: But if the way the language read
18 it says why, you could say "I feel that that's an
19 incorrect ruling."

04:46 20 CHAIRMAN BABCOCK: Justice Duncan.

21 HONORABLE SARAH B. DUNCAN: Well, one, we're
22 throwing around the term of "manifest injustice" as though
23 it has some meaning. And I spent the break asking people
24 what does manifest injustice mean; and I got as many
25 answers as --

1 HONORABLE NATHAN HECHT: I have a
2 definition.

3 CHAIRMAN BABCOCK: We got it from on high.

04:46 4 HONORABLE NATHAN HECHT: "It offends
5 traditional notions of fair play and substantial justice."

6 MR. JACKS: That nails it down.

7 (LAUGHTER.)

8 HONORABLE NATHAN HECHT: And not only that;
9 but it's obscene.

04:46 10 (LAUGHTER.)

11 HONORABLE SARAH B. DUNCAN: Two, in talking
12 with Steve Susman he actually had something helpful to
13 say, I thought, which was --

14 CHAIRMAN BABCOCK: Implying that?

04:46 15 HONORABLE SARAH B. DUNCAN: No. When you
16 don't know what "manifest injustice" means and you don't
17 know whether it encompasses an error of law or not, that's
18 not particularly helpful in terms of this discussion.

19 CHAIRMAN BABCOCK: What does Steve say?

04:47 20 HONORABLE SCOTT BRISTER: Let me concede
21 there are a lot of darts thrown at "manifest injustice."
22 You shouldn't be able to throw darts unless like what?
23 Good cause, all error? I mean, you're right. I think the
24 subcommittee will concede that "manifest injustice" is a
04:47 25 broad term and we're not sure what it means and we concede

1 that's a problem; but only concede you can criticize if
2 you can come up with a better one.

3 CHAIRMAN BABCOCK: Justice Duncan.

4 HONORABLE SARAH B. DUNCAN: I'm sorry Steve
04:47 5 isn't here. He actually had something helpful to say,
6 which is -- I hope I'm stating this correctly; but that in
7 federal MDL litigation it's a more objective standard and
8 it's not limited to changed circumstances. It's that you
9 were not able to or didn't argue what you're arguing now
04:48 10 before the pretrial court. And I can't tell you what it
11 is; but that resonated with me, because I do think it
12 needs to be more objective than "manifest injustice."

13 If I'm right and "manifest injustice" has no
14 defined meaning, then it's just words. And I promise you
04:48 15 there are trial judges in the state, if it's just words,
16 that can say those words. And they can say it on the
17 record. They can say it in written findings. However you
18 want them to say them, they can say them.

19 And three, I have to disagree with some of
04:48 20 the comments that have been made, "But all that really
21 matters is whether the trial judge's evidentiary ruling is
22 correct or not." Even under an abuse of discretion
23 standard, which is another phrase that sometimes has more
24 or less meaning, if there is a requirement that there be a
04:49 25 finding of manifest injustice before the trial court when

1 changing a ruling by the pretrial court, then I think the
2 error on appeal is the trial court erred in finding
3 manifest injustice. That's a whole different question
4 than the trial court erred in admitting this piece of
04:49 5 evidence.

6 MR. GILSTRAP: But is it reversible?

7 HONORABLE DAVID GAULTNEY: Do a harm
8 analysis. If the evidence was properly admitted, where
9 are you?

04:49 10 HONORABLE SARAH B. DUNCAN: I don't know if
11 you do a harm analysis if the question is whether or not
12 the trial court erred in finding a manifest injustice. We
13 don't know that.

14 CHAIRMAN BABCOCK: Okay. Pete and then
04:50 15 Judge Christopher then Mike. And who over here
16 (indicating)?

17 PROFESSOR DORSANEO: Me.

18 MR. SCHENKKAN: I'm thinking we're starting
19 to repeat ourselves and getting no new thoughts how to do
04:50 20 it. It's about time to get a kind of sense of the group.
21 And my own personal suggestion would be take that sense
22 based on the committee's proposal with the chairman's
23 addition that said "manifest injustice as stated in a
24 written order or on the record" and see if that's, you
04:50 25 know, one of these 16 to 15 deals or if it has some

1 relatively strong either support or relatively strong
2 objection and just kind of get a feel for where we stand.
3 I'm afraid we're not making much headway.

4 MR. JACKS: Second.

04:50 5 CHAIRMAN BABCOCK: I like that thought. A
6 couple more comments and maybe we will do that. Judge
7 Christopher.

8 HONORABLE TRACY CHRISTOPHER: I would prefer
9 a bright line test. I would prefer a rule that said "The
04:51 10 trial court may not overturn, change whatever ruling by
11 the pretrial court on the following matters: Rulings on
12 summary judgment or partial summary judgment, rulings on
13 jurisdiction, joinder, venue, rulings on privileged
14 documents and scope of discovery." The big one is
04:51 15 "exclusion of an expert." You want a bright line "If the
16 pretrial court said the expert is included, I have to
17 follow that," because that is probably going to be the
18 most important issue for a trial. But I'd just as soon
19 have that. And everything else, you know, I get to make
04:51 20 my own ruling on evidence. I'm the trial judge.

21 HONORABLE SARAH B. DUNCAN: That's an
22 objective standard.

23 CHAIRMAN BABCOCK: Mike Hatchell.

24 MR. HATCHELL: I actually think this is a
04:51 25 very good discussion; and I think this group does some of

1 its best work in these kinds of discussions. The problem
2 is really we're dodging the big issue, and that is the
3 relationship between the MDL court and the trial court.
4 Do we view the MDL court as a superior court so to speak
04:52 5 or an inferior court? That's really I think where the
6 problem comes in. We keep talking about the orders of the
7 MDL court being a suggestion. What a suggestion implies
8 most is applying the polite rules for trying a case, which
9 have been disregarded. And you want to, you really have
04:52 10 got to come to grips with whether or not we treat this
11 like the relationship between two courts in which the
12 doctrine of law the court of appeals is speaking to the
13 trial court. If you do that, then it seems to me like the
14 law of the case rules really do have a lot of merit.

04:52 15 Judge Christopher comes close with the list and
16 actually comes to grips with the notion we're going to say
17 you can't change this except in certain circumstances.
18 When Judge Christopher speaks very eloquently about the
19 problems she has with "manifest injustice," and I think it
04:53 20 is entirely too abstract, we keep talking about rulings on
21 evidence. And I really think it would be a shame to say
22 that the trial judges could be hamstrung by the MDL court
23 and cannot meet the flexibility of current issues.
24 Admission and exclusion of evidence; but the dispositive
04:53 25 rulings, yes. I think if we were to restate it and take a

1 look at the principles by which law of the case is
2 pronounced for an inferior court, we could get the few
3 words out of those cases that would be helpful. I don't
4 think we can do it now today; but I think again it all
04:53 5 depends on what we view the relationship to be, and that's
6 why I think we just head off in all directions.

7 PROFESSOR DORSANEO: Well, I think the same
8 thing Judge Christopher does. It was really the same
9 thing when dealing with the order of transfer. I don't
04:54 10 see why matters of jurisdiction, joinder and motions to
11 transfer venue, venue, discovery rulings, at least certain
12 special exception rulings that aren't in dismissing your
13 case because of a pleading defect need to be revisited at
14 all by the trial court.

04:54 15 HONORABLE SCOTT BRISTER: How long have you
16 thought about that?

17 PROFESSOR DORSANEO: I've thought about it.

18 HONORABLE SCOTT BRISTER: Take discovery
19 rulings. Every one of those, if you want to take about 30
04:54 20 minutes, I bet I could come up with an exception to it.

21 With discovery my initial impression of course was
22 no, that's what the pretrial court was for. What if an
23 expert dies and so you designate a new one? "Sorry. The
24 expert's deposition date is gone. You can't change that,"
04:54 25 trial judge. "The case is remanded. It's over."

1 You can -- this is human life and behavior. It is
2 impossible to predict what will happen. If you want to
3 say "no," say "no"; but understand in a year or two we're
4 going to come back with an exceptional case and say "Boy,
04:55 5 that was a mess." That's the argument against listing the
6 ones. You don't, because you and I cannot figure it out.
7 It's going to sure as the world whatever we put in a Rule
8 a case is going to happen now or 10 years from now and
9 people are going to look at it and go "That ought to be an
10 exception."

11 PROFESSOR DORSANEO: So you're saying that
12 the rules on identifying who the experts are, that that's
13 a discovery rule and maybe; but discovery rules is too
14 vague. But and I obviously don't mean to deal with that.
04:55 15 Maybe back up some. I certainly don't think regardless of
16 whether the pretrial judge entertains whether a special
17 appearance motion was right or wrong that it needs to be
18 done over again by the trial judge. It's packaged and
19 ready to be determined.

04:56 20 HONORABLE SCOTT BRISTER: I bet you dinner
21 and give me 30 minutes, I bet you I can come up with one
22 if it meant a free meal.

23 PROFESSOR DORSANEO: But you're a very smart
24 man.

04:56 25 CHAIRMAN BABCOCK: And not to mention a

1 sporting one.

2 (LAUGHTER.)

3 PROFESSOR DORSANEO: On partial summary
4 judgments that is a precedential call as to whether you're
04:56 5 going to let that be reevaluated as to whether there's an
6 issue of fact or there isn't; but you can make that call
7 and say -- I wouldn't mind saying that's the pretrial
8 judge for precedential reasons.

9 HONORABLE SCOTT BRISTER: All I'm saying is
04:56 10 before we have each one of those in the one list of things
11 you can't touch you need to think about it. We need to do
12 what this committee does best, which is think 15 minutes
13 and all of a sudden start coming up with an "Oh, boy.
14 Wait a second."

04:57 15 PROFESSOR DORSANEO: It's easier for me one
16 by one.

17 MR. JACKS: I think Justice Brister is
18 absolutely right. And I can see where the author of this
19 laundry list might be forced to go back and say absent
04:57 20 showing manifest injustice, Daubert ruling, excluding or
21 limiting the opinions of experts. And then you get three
22 new epidemiological studies out. Well, --

23 MR. ORSINGER: A motion for partial summary
24 judgment that relied on a court of appeals decision, and
04:57 25 then the Supreme Court comes out reversing that line along

1 with a new line of law. Well, you know, it's time to
2 change what the pretrial judge did. I think the bright
3 line doesn't do us any good because every one of them is
4 going to end up in some case leading you in the wrong
04:57 5 direction.

6 MS. CORTELL: I guess, and the recent
7 discussion sort of changed my view.

8 COURT REPORTER: Could you speak up, Nina?

9 CHAIRMAN BABCOCK: Yes, Nina.

04:58 10 MS. CORTELL: I was saying the recent
11 discussion has pretty much changed my view. I was just
12 sitting back here having the benefit of not getting a seat
13 at the table today. There's one now. But I have a
14 concern about the current committee proposal. Though if a
04:58 15 vote had been taken when Pete's was read, I might have
16 voted for it.

17 We eviscerate the whole purpose of the whole MDL
18 procedure if the whole idea is to avoid a streamlining
19 mechanism where we're going for best jurisdiction over the
04:58 20 case or in one forum in order to speed this along. One
21 gets remanded back to trial court. Everybody is fairly
22 free to start over, albeit having to meet a manifest
23 injustice standard, which I think from discussion doesn't
24 have reviewable upon appeal teeth to it.

04:59 25 I have concern with the current rule; and I would

1 like for the committee to think about at least a
2 definition that would be "presumptively," maybe "rebuttal
3 of presumption." "Presumptively" would have to remain in
4 place. Otherwise we eviscerate the very purpose for the
04:59 5 whole protocol that we're dealing with today.

6 CHAIRMAN BABCOCK: Richard and Carl.

7 MR. MUNZINGER: I wanted to ask the
8 committee, did they study the federal standard? If so,
9 why reject it? If they didn't, shouldn't we?

04:59 10 CHAIRMAN BABCOCK: I'm advised it's not in
11 the rules.

12 MR. MUNZINGER: But in the cases.

13 HONORABLE SCOTT BRISTER: I don't know.

14 CHAIRMAN BABCOCK: Tipps was in charge of
15 federal.

16 (LAUGHTER.)

17 MR. TIPPS: Thanks a lot. If I was -- I
18 don't know.

19 MR. HAMILTON: I suppose that most of these
05:00 20 problems will arise if someone files a motion with the
21 trial court and changes something.

22 CHAIRMAN BABCOCK: Right.

23 MR. HAMILTON: It would be cumbersome; but
24 there may be a way just to refer it back to the pretrial
05:00 25 judge and let him decide. It kinds of like a motion for

1 rehearing or something. We get rid of the whole problem.
2 Let him decide.

3 CHAIRMAN BABCOCK: Stephen.

4 MR. YELENOSKY: I think that's the only real
05:00 5 solution, because the whole concept of what folks want to
6 do here is allow a change in a prior ruling if the
7 original judge who made that ruling, the pretrial judge,
8 would under the changed circumstances be willing to
9 entertain a change in his or her ruling and to avoid a
05:00 10 trial judge from changing it when the pretrial judge would
11 not. So unless you're going to send it back to the
12 pretrial judge, I don't know how to write that; and I
13 don't think we've been able to come up with a way to write
14 that.

05:01 15 CHAIRMAN BABCOCK: All cumbersome if you've
16 got to send it back.

17 MR. JACKS: Yes. And it's unworkable. Some
18 of this stuff is going to come up during trial and if the
19 pretrial judge is on vacation, what are you going to do?
05:01 20 It's, I mean, all this hand wringing about how we're
21 eviscerating the whole Rule I think is silly. I think at
22 least nine trial judges out of 10 are happy that this
23 stuff is being done by somebody else and are going to take
24 it as a gift from heaven, and it just makes their job
25 easier.

1 CHAIRMAN BABCOCK: Judge Peeples.

2 HONORABLE DAVID PEEPLES: At the risk of
3 being silly, we've been focusing, a lot of us, on how we
4 as trial judges would look at it. It is a miniscule
05:01 5 number of cases like these that will get tried. I think
6 there is a danger, as Nina said, of the thing being
7 eviscerated. We need to look at the big picture, what is
8 this going to do for the MDL system?

9 Now I don't need to reinforce what others have said
05:02 10 about the integrity of some judges in Texas; but I will
11 tell you I've been a judge for almost 22 years and I've
12 rubbed shoulders and reviewed, been privy to a lot of
13 things, and there is an integrity problem. I'm on the
14 record and I know it. There is an integrity problem in
05:02 15 some parts of this state. And we're thinking about Tracy
16 Christopher and Kent Sullivan. We have to keep in mind
17 that there is a real problem in some places.

18 Now, another point: The mind set of a trial judge
19 trying a case is "I can do almost anything, because I've
05:02 20 got discretion and the court of appeals is going to turn
21 handsprings to find a reason to affirm my rulings." Right
22 or wrong that is the mind set of a trial judge, "I can do
23 just about anything because there is so much discretion,
24 and they're going to just bend over backwards to affirm
05:03 25 me." That's the mind set that we work with.

1 Now as far as the system I think there is a great
2 danger that if we give people who lost the ruling with the
3 pretrial court hope that they can get it turned around
4 with their judge, we've done great damage to settlement,
05:03 5 because we have injected uncertainty.

6 What we want is stability. We want people to know
7 where they stand when the case is going back, not to have
8 hope that they can get the judge to change it. So I think
9 we need to really hit judges up at the side of the head
05:03 10 and let them know "You just can't go around changing this
11 except for very, very good reasons stated on the record."
12 I don't know if I'm in favor of the "changed
13 circumstances"; but we need to really lay it out clearly
14 that you just don't change these things.

05:03 15 CHAIRMAN BABCOCK: Here is something we're
16 going to vote on and then we're going to go let Hatchell
17 buy everybody a drink; but here is the language: It comes
18 from the subcommittee proposal with some language from
19 some, but not all of Judge Gray's language. "Effect of
05:04 20 pretrial orders. All nondispositive orders by the
21 pretrial court must be considered pretrial orders pursuant
22 to Rule 166 and shall control the subsequent course of the
23 trial unless modified by the trial court to prevent
24 manifest injustice. If the trial court determines that a
05:04 25 manifest injustice will occur, the trial court must state

1 its findings related thereto in a written order or stated
2 on the record and modify the order only as necessary and
3 only to the extent necessary to prevent the manifest
4 injustice which would otherwise occur." And everybody in
05:04 5 favor of that raise your hand.

6 MR. HAMILTON: Do we have any alternative?

7 HONORABLE DAVID PEEPLES: Yes. What is the
8 alternative?

9 CHAIRMAN BABCOCK: The alternative is
05:04 10 something else. Raise your hand if you're in favor of
11 that. And if you're against that, raise your hand. So
12 that fails by a fairly substantial margin of 19 to 9, the
13 Chair not voting.

14 So here is what I propose we do. We --

05:05 15 HONORABLE SCOTT BRISTER: Don't send it back
16 to the subcommittee.

17 CHAIRMAN BABCOCK: We remand it immediately
18 to the subcommittee.

19 (LAUGHTER.)

05:05 20 CHAIRMAN BABCOCK: We spend whatever time
21 tonight thinking about how to fix this. And I heard some
22 concrete proposals. One is Judge Gray's full language,
23 which you all should have a copy of. Another is Judge
24 Christopher's bright line approach that some things you
05:06 25 can't change. And Judge Brister will spend all night

1 thinking of why there would be, examples of why you should
2 be able to change that. And there may be something else;
3 but we're going to have to be quick about it tomorrow when
4 we, because we can't spend all morning on this.

05:06 5 MR. SCHENKKAN: Well, but for the sake of
6 helping those of us who voted, I voted with the nine; but
7 for the sake of trying to come up with something that will
8 command a majority or work, could we get just a straw poll
9 out of the 19 of how many thought it was because the
05:06 10 proposition stated wasn't tough enough --

11 CHAIRMAN BABCOCK: Yes. How many of the 19
12 thought it wasn't tough enough.

13 MR. MUNZINGER: -- as opposed to how many
14 thought this was too tough?

05:06 15 CHAIRMAN BABCOCK: How many thought it was
16 not tough enough?

17 MR. SCHENKKAN: Two very different products.

18 MR. GILSTRAP: Not tough enough?

19 CHAIRMAN BABCOCK: Not tough enough. So 16
05:07 20 of the 19 thought it wasn't tough enough.

21 MR. SCHENKKAN: That's what I needed to
22 know.

23 PROFESSOR DORSANEO: It was because of the
24 word "nondispositive" in my case.

05:07 25 CHAIRMAN BABCOCK: You hair splitter. We're

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in recess.

(ADJOURNED 5:07 P.M.)

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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand
Reporter, State of Texas, hereby certify that I
reported the above hearing of the Supreme Court
Advisory Committee on the 18th day of July, 2003,
and the same were thereafter reduced to computer
transcription by me. I further certify that the
costs for my services in the matter are
\$ 2685.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this
the 21st day of JULY, 2003.

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Anna Renken

ANNA RENKEN, CSR
Certification 2343
Cert. Expires 12/31/03