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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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COPY

Taken before Patricia Gonzalez, a
Certified Shorthand Reporter in Travis County for the
State of Texas, on the 19th day of July, 2003, between
the hours of 9:05 a.m. and 11:42 a.m. at the Texas
Association of Broadcasters, 502 11th Street, Austin,
Texas 78701.

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INDEX OF VOTES

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

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1 CHAIRMAN BABCOCK: Okay. Why don't we
2 get started. If that's okay, Nina.

3 We've got several proposed fixes to the
4 problem that we ended up with yesterday. And I know
5 Justice Duncan has got one, Judge Peeples. And Tommy,
6 maybe.

7 Yeah.

8 JUSTICE HECHT: And let me just report
9 that the manual for complex litigation says -- and I
10 quote, "Although the transferor court has the power to
11 vacate or modify rulings made by the transferee court,
12 subject to comity and the law of the case
13 considerations, doing so in the absence of a
14 significant change of circumstances would frustrate
15 the purposes of centralized pretrial proceedings."

16 PROFESSOR CARLSON: Stipulate to
17 frustration.

18 (Laughter)

19 MR. ORSINGER: That's like a comment
20 rather than -- but there's no expressed rule to
21 implement that.

22 CHAIRMAN BABCOCK: It's not a rule.

23 JUSTICE HECHT: That's just in the
24 manual.

25 CHAIRMAN BABCOCK: Okay. Sarah, do you

1 want to present your proposal?

2 HON. SARAH DUNCAN: Actually, I would --
3 sure. Why not.

4 CHAIRMAN BABCOCK: Unless you want to
5 withdraw it.

6 HON. SARAH DUNCAN: No.

7 There were several comments made
8 yesterday that have me concerned and -- had me
9 concerned. And Elaine and I were talking about it on
10 the way back to the hotel and we talked about, "Why
11 does this work so well in Bexar County?" With a
12 central docket, we very rarely see one trial judge --
13 a pretrial judge, effectively, changing -- orders
14 changed by the judge that actually tries the case.

15 Judge Peeples can tell us if they have
16 some unwritten agreements that I'm not privy to, but
17 it appears, from the outside, that if it's a matter
18 that is within the trial court's discretion -- there's
19 evidence going this way, evidence going that way -- a
20 reasonable person could rule either way. The person
21 that tries the case doesn't touch that ruling, but if
22 it's something that there wasn't room for discretion,
23 either because it's a question of law or because
24 there's evidence only going one way, they may revisit
25 it.

1 So I started thinking yesterday
2 afternoon, "What are the very limited circumstances?"
3 Because I'm a limit person. I really think the -- we
4 lose a lot of efficiencies in this whole system if the
5 trial court can revisit matters that the pretrial
6 court was within its discretion in deciding.

7 Then let me just say what part of my
8 concern is. There were too many comments and
9 questions yesterday about, "Well, if I as the trial
10 court change this pretrial court ruling but it doesn't
11 result in reversible error, that's okay. That
12 shouldn't get me in trouble." Well, it should,
13 because we can't be revisiting all these questions.

14 So what I came up with is: "The trial
15 court may not vacate, modify or amend a pretrial court
16 order [whether dispositive or not] unless the trial
17 court finds on the record [whether orally or in
18 writing] that since the date of the pretrial court
19 order: a material undisputed fact" -- it has to be an
20 undisputed fact, because if we're going to relitigate
21 what the facts are, we're back into that abusive
22 discretion standard and we can basically revisit
23 everything. "A material undisputed fact necessary to
24 the pretrial court's order has changed or the
25 governing laws enunciated by the Texas or United

1 States Supreme Court, the Texas Legislature, or the
2 United States Congress, has changed."

3 Somebody said something about, "Well,
4 what about court of appeals' ruling?" I've been
5 through this with the IBM case and we just can't, in
6 my opinion, go there. The 14 courts of appeals have
7 all the authority in the world to disagree, and they
8 do, and what they say -- what one or another of them
9 says isn't significant enough to me to cause a change
10 in the pretrial court's ruling.

11 Having said all that, I like what
12 Tommy's done, except for this manifest injustice
13 stuff. I don't know what it means. And as I said
14 yesterday, I think they're words that will just become
15 words that trial judges state so that they can change
16 something the pretrial court has done.

17 CHAIRMAN BABCOCK: Okay. Without
18 discussing this proposal, let's get the three
19 proposals on the table.

20 Judge Peoples has got another approach.
21 Do you want to tell us about that, Judge?

22 HON. DAVID PEEPLES: Yeah. Mine's the
23 one with the lines numbered on the side.

24 At the top, I just decided, you know, to
25 add a sentence to what we had yesterday in case people

1 wanted to do it that way, but I sort of rewrote it and
2 tried to make it read a little bit better down at the
3 bottom.

4 And, basically, mine has got two parts.
5 The first part is a rewrite of what we had yesterday,
6 the manifest injustice, Rule 166 and so forth. I
7 added, on Line 15, "for compelling reasons explained
8 fully on the record." And then the second half of
9 that sentence after the semicolon was my attempt to
10 limit this to what I think are really the most
11 important ones, which are summary judgments and expert
12 witness rulings and to say that those flat out can't
13 be changed -- over objection. You've got to object --
14 unless the trial court gets the approval of the
15 pretrial court. And I envision -- you know, most of
16 these, I think, would come up before trial, but if it
17 comes up in trial, you just get them on the phone.

18 And that's mine. It's a modest step
19 toward trying to deal with, in my opinion, the things
20 that are most important and I think of most concern.
21 And, frankly, I mean, obviously, jurisdiction and
22 joinder and all those things mentioned in Tommy's are
23 very important and I have no problem with mentioning
24 those. I just think it's unlikely that a court will
25 change that kind of thing right before trial, but I

1 think Tommy's is stronger than mine, frankly, if we
2 want to go that way.

3 CHAIRMAN BABCOCK: Okay. Tommy, do you
4 want to tell us about yours?

5 MR. JACKS: Sure. Mine is in three
6 parts. The first part sets out what I regard as big
7 picture elements of the case that are most likely to
8 be determined by the pretrial court, and those can't
9 be changed. And if a party wants to change them,
10 well, then it has to be referred back to the pretrial
11 court to determine. These are all also items that
12 would usually be brought to the trial court's
13 attention before the trial actually starts.

14 The second one deals with scheduling.
15 This is borrowed from, I think, Harvey Brown's
16 italicized language that we looked at yesterday, and
17 that is where the pretrial court has set, say, a trial
18 date or a date after which the trial can occur in an
19 effort to have a sequence of trials around the --
20 stayed and it only permits the trial courts advancing
21 the date where lawyers in one case say, "Well, we'd
22 really like to be the first one out even though the
23 pretrial judge didn't have us in mind. Would you give
24 us an earlier trial date?" If the date is pushed
25 back, no call to the pretrial judge is required. And

1 this one requires only the written concurrence of a
2 pretrial judge. So you could get the judge on the
3 phone, you know, "Is it all right? We ran into some
4 scheduling problems. We moved this date forward."
5 "Sure. Send me your order. I'll countersign it and
6 send it right back to you."

7 The last, then, category is other stuff.
8 And this would include -- not necessarily be limited
9 to, but it would include rulings on things that are
10 more likely to occur during trial having to do with
11 admissibility of exhibits; say, could have to do with
12 rulings of motions in limine.

13 I still carve out expert testimony as
14 something that the trial judge can't do alone and
15 the -- here the trial judge either can seek written
16 concurrence of the pretrial judge or, when necessary,
17 because of changed circumstances, and that could even
18 include, "Well, there's something that was limited
19 out, but it got opened up during trial by the other
20 side." It could also accommodate changes in the law
21 that had occurred since -- to correct an error of law
22 or to prevent manifest injustice, and, in which event,
23 detailed reasons stated on the record are in a written
24 order.

25 The idea was to establish a hierarchy.

1 Paragraph (3) should be things that are lower down the
2 order of importance.

3 CHAIRMAN BABCOCK: Does everybody have a
4 copy of these three proposals?

5 MR. MEADOWS: Yeah.

6 CHAIRMAN BABCOCK: Okay. Judge Peeples
7 and Justice Duncan, did you have any view of deferring
8 your proposals to Tommy's -- or actually, Tommy, do
9 you have any view of deferring yours to either the
10 Duncan or the Peeples' proposal?

11 MR. JACKS: I think David and I were
12 pretty parallel in what we did, with the exception of
13 what falls into "thou shalt not" category and I --
14 there are aspects of Sarah's proposal that -- I don't
15 know that the fact has to be undisputed. If there's a
16 changed set of circumstances but the parties don't
17 agree about it, I think that's what judges do, is
18 decide what really did happen. And I would think that
19 a trial judge here in Austin is bound by rulings of
20 the Third Court absent higher contrary authority.

21 So I guess I'm very comfortable with
22 David's.

23 HON. DAVID PEEPLES: Chip, once again,
24 I'm the moderate on this. Sarah's is -- Sarah's is
25 more liberal or permissive, it seems to me. I think

1 Sarah's would confine trial judges less. Tommy's
2 would confine them more than mine and mine is kind of
3 in the middle. I mean, I prefer Tommy's or mine.
4 Although I think Sarah's is good, too.

5 CHAIRMAN BABCOCK: Sarah, what do you
6 think?

7 HON. SARAH DUNCAN: I'm surprised that
8 he thinks it's more liberal. I think it's stricter.
9 My problem -- I like Tommy's, but the problem I have
10 with it is its squishiness.

11 CHAIRMAN BABCOCK: Okay. Any rule that
12 has manifest injustice in it, you don't like.

13 HON. SARAH DUNCAN: Well, I want
14 something more objective.

15 CHAIRMAN BABCOCK: Okay. Judge
16 Sullivan.

17 MR. SULLIVAN: I think we're writing the
18 rule to deal with a worst-case scenario or a lowest
19 common denominator scenario. So I like the
20 specificity of Tommy Jack's proposal. It may be that
21 we need to tinker with it on something like manifest
22 injustice, but he's been pretty careful to limit it so
23 that there are only certain circumstances where you
24 can exercise that discretion.

25 Really important things that I thought

1 we ought to be worried about are dealt with in the
2 first section.

3 CHAIRMAN BABCOCK: Yeah. Stephen.

4 MR. YELENOSKY: Well, if it is the
5 worst-case scenario, are all of these or any of these
6 enforceable by mandamus? Because I think there was
7 reference to that. Because that seems to be the only
8 effective way of enforcing that. Is that intended?
9 If so, do we need to say something about that?
10 Because Sarah's point -- I mean, I don't see how your
11 proposal, Sarah, without mandamus, avoids the problem
12 of allowing an errant trial judge to do whatever he or
13 she wants with -- essentially with impunity with
14 respect to the decision made as long as it's not -- it
15 doesn't, you know, cause harm.

16 CHAIRMAN BABCOCK: Frank. Then Richard.

17 MR. GILSTRAP: I think we're paying a
18 price with both proposals. I mean, we've got a
19 system, that, if we look at it and we leave out the
20 problem of the few judges who don't follow the law,
21 we've got something like the federal system, which
22 seems to work just fine with some type of exhortative
23 comment up there. But because we've got the idea --
24 and it may be true. I don't know -- that there are a
25 number of judges that simply will not follow the law,

1 we're paying a price.

2 With Justice Duncan's proposal, it looks
3 to me like, if it's going to work, we're changing the
4 reversible error rule. Even though it was tried
5 correctly under the law and the outcome was correct, I
6 think she would say, "We're going to reverse it anyway
7 because he violated the pretrial court's order." That
8 seems, to me, to be a really weighty step.

9 With regard to the Peeples/Jack's
10 proposal which have some things in common, in that
11 they want to go back to the trial court, we've got
12 jurisdictional problems. I mean, if it comes back to
13 the trial court, you know, do both courts have
14 jurisdiction? It seems to me, before we start doing
15 that type of thing, we need to think about it.

16 I'm also troubled by Judge Peeples'
17 proposal, because it formalizes this procedure and
18 puts in the rule where judges get on the phone to each
19 other. And I know that happens. I just don't know
20 that I want to formalize it into the rules.

21 So, you know, have we got the cart
22 before the horse? Are we really willing to pay this
23 price to build these kind of aberrations into our
24 system to deal with the problem of the errant -- the
25 recalcitrant judge or do we just go with the strongest

1 hortatory language we can, try to deal with it on
2 mandamus and maybe occasional complaints before the
3 Judicial Conduct Committee?

4 I don't know the answer. But I want
5 everybody to know where we're going before we go
6 there.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: I was just going to
9 raise the jurisdictional point that he raised. Unless
10 the rule, it seems to me, somehow would specify that
11 the pretrial court would maintain some form of
12 jurisdiction after transfer back to the trial courts,
13 you have a jurisdictional question, as well as the
14 record keeping and record question of how the pretrial
15 judge would handle this.

16 The stricter the better, regardless of
17 what we're doing to the system. Unfortunately, it's
18 not an aberration in Texas that judges ignore the law;
19 otherwise, you would not have had 16 people vote
20 yesterday that they wanted a rule with teeth in it.
21 The reason we want a rule with teeth in it is that
22 we've been bitten, and bad.

23 (Laughter)

24 CHAIRMAN BABCOCK: We want to be able to
25 bite back.

1 (Laughter)

2 CHAIRMAN BABCOCK: Yeah, Wendell.

3 MR. HALL: I would just add that I
4 agree. The majority of our practice in San Antonio --
5 not in Bexar County, but in our cases in South Texas,
6 this is not an aberration. This is what we deal with
7 on a daily basis. And it is the errant trial judge
8 and it is the very problem that we're talking about.
9 So I can't emphasize enough the depth of this problem
10 in a number of our trial courts.

11 CHAIRMAN BABCOCK: Yeah, Pete.

12 MR. SCHENKKAN: A response only on the
13 jurisdiction point. It seems to me that if that is an
14 issue, it's easily dealt with by backing up to the
15 prior rule about remand and providing that the remand
16 is subject to the provisions of -- whatever number
17 this is -- that says, "When these questions arise,
18 you've got to confer," because that's really what
19 we're talking about. We're establishing a process to
20 make the MDL thing work and we're saying right now
21 that some degree of continued oversight under
22 specified circumstances is required to make it work.
23 So I don't think we have a statutory problem. We may
24 have a little bit of a drafting problem.

25 On the substance -- I mean, I thought we

1 were -- I was surprised to find how large and clear
2 majority there was yesterday, the notion that the
3 minidraft wasn't strong enough. It seems to me that
4 Tommy's is the strongest of the three and quite a bit
5 stronger, and I'm wondering whether we could
6 expeditiously take a straw poll to see if we ought to
7 be working from that draft.

8 CHAIRMAN BABCOCK: Okay. Well, we will
9 just in a second, but Judge Christopher wants to say
10 something.

11 HON. TRACY CHRISTOPHER: I agree with
12 Richard Orsinger and am very troubled by Sarah's
13 comment that we're going to have a new standard of
14 review for changing a pretrial court's ruling and that
15 somehow, if I changed a ruling but I was correct, I
16 would be reversed. That strikes me as a ludicrous
17 result.

18 CHAIRMAN BABCOCK: Well, and Sarah can
19 respond to that herself, but I think I know her
20 answer.

21 HON. SARAH DUNCAN: Obviously, I'm not
22 creating a new standard of review, but I am very
23 concerned when a trial judge says, "I've got the
24 correct ruling." A lot of the stuff that we're
25 talking about here, there isn't one correct ruling.

1 There are as many correct rulings as there are -- as
2 there is evidence to support them and law to support
3 them, and I'm not advocating a new standard, but I am
4 stating my concern that trial judges know what the
5 standard is and are going to use it for cover to
6 change pretrial court rulings and relitigate in a very
7 inefficient way.

8 CHAIRMAN BABCOCK: And I think what
9 you're saying is the appellate courts have got to say
10 to the trial judges, "If we adopt the manifest
11 injustice" -- or whatever standard we adopt -- that,
12 if you violate this standard, there will be
13 consequences, in that you will have to retry this
14 case, where, as you say, the ruling may not have been
15 incorrect in the sense that there are many correct
16 rulings that you normally wouldn't get reversed on,
17 but the appellate court is going to use the club of a
18 retrial to say, "Don't violate this standard."

19 HON. SARAH DUNCAN: If there aren't any
20 consequences, there's not a rule.

21 MR. YELENOSKY: Why shouldn't the
22 consequence be mandamus, because you deal with it
23 then? Rather than waiting until you try the whole
24 case and then have the result that Judge Christopher
25 said, that, "Well, maybe you were right, but because

1 you violated this, you're going have to try it again."
2 It seems to me that you want to deal with it at the
3 point where the errant trial judge is not doing what
4 he or she is supposed to do so that the pretrial order
5 is what gets considered -- whatever that pretrial
6 order was gets considered at the appellate level, not
7 the trial judge's.

8 So why can't we build in something that
9 makes mandamus a realistic way of enforcing this?

10 CHAIRMAN BABCOCK: Judge Gaultney and
11 then Tommy. And then Bill.

12 HON. DAVID GAULTNEY: Well, I'll just
13 make a note, what I was going to say on that.

14 I think putting language in there about
15 "This ruling is mandamusable" might be a good idea.
16 It raises the issue on the radar screen that this is
17 going to get -- plus, it gives the court -- but
18 another thing you said yesterday, Steve, I think
19 that's important is, I think what we're really talking
20 about is the relationship between the pretrial judge
21 and the trial judge. And on these issues, the
22 pretrial judge -- you know, I'll state my prejudice.
23 I like Tommy's rule. That's where I'm coming from.

24 I think that requiring rulings to go
25 back to the pretrial judge recognize that there's a

1 larger purpose being served here that we're trying to
2 protect, and that is the MDL process, and that in an
3 individual case, the trial judge needs to consider not
4 only the circumstances of that individual case but how
5 it might impact the rest of the MDL process. Even a
6 fair-minded judge doing an excellent job is going to
7 be focused on his or her particular case; not the MDL
8 process. And so by requiring rulings to go back to
9 the MDL judge in the pretrial court, you're saying,
10 "No. This has to be taken into account."

11 I guess where I would -- what I would
12 think about adding to -- I think about taking away
13 some on Tommy's and also adding to it. You know, I
14 think we really -- we can't do much better than
15 manifest injustice. I know it's bad in terms of being
16 vague, but I think if you add words like "changed
17 circumstances" or "to correct an error of law," you
18 are jeopardizing the MDL process. You're making it
19 too easy for the trial judge who's trying it to be --
20 who's focusing on his individual case, not the MDL
21 process, but that fair judge has his case/her case in
22 front of them looking to do right in that case and is
23 overlooking or not considering the MDL process.

24 So I would suggest taking those out,
25 leaving it to manifest injustice. But I would also

1 suggest adding a factor in (3), which is the language
2 that was at the end of what Justice Hecht read from
3 the federal process, which is some type of
4 consideration of to whether this is frustrating the
5 MDL process.

6 I think that does three things. One, it
7 requires the trial judge to focus on the MDL process
8 when he's making that ruling. Number two, it explains
9 why we've got the pretrial judge in these earlier
10 processes that he's got to go -- this trial judge in
11 charge of his or her case has got to consult, because
12 of that consideration. And the final thing is, I
13 think it gives the appellate court a broader standard
14 of review; that is, in looking at it, the appellate
15 court is not looking simply at manifest injustice in a
16 particular case but is looking at whether that ruling
17 frustrates the purpose of the MDL statute.

18 CHAIRMAN BABCOCK: Okay. Tommy.

19 MR. JACKS: Well, I actually was
20 intentionally trying to allow somewhat more
21 flexibility for the matters that aren't covered by (1)
22 and (2), because they are matters that seem to me more
23 integrally related with the trial of the case as it
24 unfolds in the trial court and it would accommodate
25 the situation in which the trial judge really thought

1 that to follow, say, a motion in limine item that the
2 pretrial court had ruled on would be, legally, an
3 error. It wouldn't upset the standard of review about
4 that. Either the trial judge was right or wrong and
5 either it was harmful or not. And so you don't upset
6 the balance there.

7 I mean, it makes no sense to me, in a
8 rule that's intended to achieve economy, that you're
9 going to retry cases that were correctly tried. That
10 seems to me to be following that. (1) and (2) are all
11 items that, it seems to me, are enforceable by
12 mandamus because they are all matters that are going
13 to come up before trial. And that's where you pull up
14 the -- pull the leash on the trial judge who's not
15 following the order of things.

16 And so far as the -- I do think that the
17 comment from the manual that Justice Hecht read would
18 be useful material to be reproduced in a comment to
19 accompany this rule, but I note that it, too, used the
20 term "changed circumstances." I don't think there's
21 anything wrong with as to these matters in Item (3),
22 which are a lot farther down the hierarchy of
23 importance, allowing trial judges the flexibility to
24 deal with changed circumstances, including things that
25 come up during trial.

1 CHAIRMAN BABCOCK: Okay. Bill.

2 PROFESSOR DORSANEO: Well, I think the
3 two most significant things that we're talking about
4 here that are likely to come up are partial summary
5 judgment orders, and whether we're talking about
6 granting or denying them, we'd normally be thinking
7 about somebody trying to get a summary judgment ruling
8 granted over -- you know, overturned so that issue can
9 be tried, but I've had cases where I thought I was
10 going to trial and to find out that we were going to a
11 summary judgment hearing instead at the date of the
12 trial, which is a very annoying experience.

13 CHAIRMAN BABCOCK: At least you're ready
14 for it.

15 PROFESSOR DORSANEO: Yeah.

16 (Laughter)

17 PROFESSOR DORSANEO: Most of those have
18 been federal experiences.

19 (Laughter)

20 PROFESSOR DORSANEO: Weren't very
21 enjoyable. And I guess both Tommy's draft and David's
22 draft treat those two important matters the same.
23 Don't they? You have to go back to the pretrial court
24 for determination or approval or consent or whatever.
25 The federal comment doesn't seem to be that strong to

1 me, although it puts significant brakes on the ability
2 of the transferor court to modify these rulings;
3 repeat that language "subject to comity and the law of
4 the case considerations, doing so in the absence of
5 significant change of circumstances would frustrate
6 the purposes of centralized pretrial proceedings."

7 I am not sure where I stand on --
8 whether I would want the transferor court to ever have
9 the ability to do that on its own, and I wonder what
10 everybody, you know, else thinks. I'm inclined to
11 think that there would be some circumstances under
12 which an adjustment would be appropriate or something
13 I would approve, but I'm -- I don't feel all that
14 strongly about it. But I think that's a real key
15 issue and a difference between Justice Duncan's draft
16 and these other drafts, too. Maybe not a huge
17 difference, but that's a key point for me. I wanted
18 to point that out.

19 CHAIRMAN BABCOCK: All right. Thank
20 you.

21 Judge Lawrence.

22 HON. TOM LAWRENCE: Tommy, on (C)(1),
23 the last line, "and any motion seeking such weight
24 must be referred to the pretrial court for
25 determination," does that mean that every motion that

1 comes in, even frivolous motions, must automatically
2 be referred or can the trial court decide that, "This
3 is frivolous, I'm not going to refer it," and can he
4 only refer those that have some merit?

5 MR. JACKS: Good point. I mean, I
6 suppose if someone files a motion to reconsider
7 pretrial court's ruling on summary judgment, the trial
8 judge shouldn't have to refer it to the pretrial court
9 to say "No." The trial court could say "No" without
10 any -- being referenced and so --

11 HON. TOM LAWRENCE: It seems like the
12 trial court should be the gatekeeper and only if it
13 finds some merit in the motion should it be referred.

14 MR. JACKS: The intent of this is, it's
15 only situations in which the trial court does say that
16 there's a real issue here about -- that might justify
17 modifying the pretrial court's order and so how you --

18 MR. YELENOSKY: You can just say "must
19 be denied or referred."

20 CHAIRMAN BABCOCK: Yeah. Good.
21 Sarah.

22 HON. SARAH DUNCAN: I would like to move
23 Pete's suggestion.

24 CHAIRMAN BABCOCK: Okay. Get a straw
25 vote? I think that that was a pretty good comment,

1 though, that was just made on Tommy's "must be denied
2 or referred."

3 HON. TRACY CHRISTOPHER: Could I ask a
4 question? What about agreed changes?

5 MR. SCHENKKAN: He's actually got that
6 marked in. He's got "over objection" which was the
7 suggestion from the others in there all three times.

8 MR. JACKS: Yeah. I picked this up from
9 David. There are three places where I would put the
10 words "over objection." After the words "trial court"
11 in the fourth line of (1), after the word "modified"
12 in the second line of (2) and after the words "trial
13 court" in the second line of (3), I would put the
14 words "over objection."

15 MR. GILSTRAP: Can I ask Tommy a
16 question about the wording?

17 CHAIRMAN BABCOCK: Yeah.

18 MR. GILSTRAP: In your first sentence,
19 you've listed certain orders.

20 MR. JACKS: Yes.

21 MR. GILSTRAP: Are you contemplating
22 that there's some orders of the pretrial court that
23 could be overturned without going through this
24 procedure? I mean, is there any reason to say that
25 there's any order?

1 MR. JACKS: Only under (3).

2 CHAIRMAN BABCOCK: Okay. Is everybody
3 comfortable with voting on something? And what do you
4 think -- should we vote on Tommy's proposal or yours
5 or how should we do it?

6 HON. SARAH DUNCAN: Vote on working from
7 Tommy's proposal.

8 CHAIRMAN BABCOCK: Is that acceptable to
9 everybody?

10 HON. TOM. GRAY: Conceptually Tommy's or
11 conceptually Duncan's?

12 CHAIRMAN BABCOCK: Sarah or -- yeah.

13 MR. GILSTRAP: Those are the choices.

14 CHAIRMAN BABCOCK: Yeah, because David's
15 is kind of subsumed by Tommy's.

16 All right. So everybody who is in --

17 HON. SCOTT BRISTER: So if I'm for
18 David's, I vote for Tommy's?

19 (Laughter)

20 HON. SCOTT BRISTER: I just need to know
21 which one.

22 CHAIRMAN BABCOCK: Yeah.

23 HON. DAVID PEEPLES: Rename mine "Tommy
24 light."

25 (Laughter)

1 MR. ORSINGER: Why don't we vote on
2 first choice for the three and see which one is the
3 most popular?

4 CHAIRMAN BABCOCK: We could do that.
5 You want to have a three-way beauty contest?

6 HON. DAVID PEEPLES: If people want
7 something as strong as Tommy's, I pull mine out.

8 MR. ORSINGER: Up or down on Tommy's I
9 think would get it.

10 CHAIRMAN BABCOCK: Okay. Up or down on
11 Tommy's. That seems to be the consensus.

12 HON. SCOTT BRISTER: Again, you know,
13 I'm still way back at manifest injustice. The more
14 things you put in that can't be -- that are written in
15 stone -- "Don't touch them and go ahead and waste your
16 trial because you know you're going to be reversed on
17 that point because some other court of appeals just
18 said it's wrong to do it that way but the pretrial
19 court hasn't changed it yet. Go ahead and try it that
20 way." The more things you put like that in it --
21 again, the longer we think of these, the more
22 exceptions you're going to think where you don't
23 really want these --

24 CHAIRMAN BABCOCK: So you'd be against
25 Tommy's?

1 HON. SCOTT BRISTER: Well, I'm willing
2 to go as far as David's. The fewer things -- I'll
3 concede, "Okay. Write a couple of things in stone."
4 All the rules written in stone, I'm not comfortable
5 with. So if I'm still going to be able to say -- to
6 vote for Tommy's and then argue for less things
7 written in stone, that's what I'll do.

8 CHAIRMAN BABCOCK: You know, we have got
9 to, Scott, get done with this rule today, and I was
10 hopeful that --

11 HON. SCOTT BRISTER: I agree, but, you
12 know --

13 CHAIRMAN BABCOCK: I know this is
14 important.

15 HON. SCOTT BRISTER: I think Tommy's and
16 David's are very different.

17 CHAIRMAN BABCOCK: Okay. Everybody that
18 is in favor of Tommy's --

19 HON. SARAH DUNCAN: Working from
20 Tommy's.

21 CHAIRMAN BABCOCK: Working from Tommy's.
22 Thank you. Is that okay with you, Tommy, everybody
23 who's in favor of working from your draft?

24 MR. JACKS: Now I'm getting really
25 nervous being to the right of Brister and Peeples.

1 (Laughter)

2 CHAIRMAN BABCOCK: Yeah. It is lonely
3 territory over there, I'll tell you that.

4 (Laughter)

5 CHAIRMAN BABCOCK: All right. Everybody
6 who is in favor of working from Tommy's, raise your
7 hand.

8 (Show of hands)

9 JUSTICE HECHT: Let the record show that
10 Tommy is a reluctant vote.

11 (Laughter)

12 CHAIRMAN BABCOCK: And everyone who is
13 not desirous of working from Tommy's, raise your hand.

14 (Show of hands)

15 MR. ORSINGER: You might let the record
16 note something about that vote.

17 (Laughter)

18 CHAIRMAN BABCOCK: Two of the trial
19 judges from Harris County have cast the only two votes
20 against.

21 HON. TRACY CHRISTOPHER: If Levi was
22 here, he'd be voting with us, too.

23 (Laughter)

24 CHAIRMAN BABCOCK: But there are 25
25 votes in favor of working from Tommy's draft and only

1 2 against. So I think we'll work from Tommy's draft.

2 Yeah, Bill.

3 PROFESSOR DORSANEO: If we're going to
4 work from that draft, it seems to me --

5 CHAIRMAN BABCOCK: Which we are.

6 PROFESSOR DORSANEO: -- in (1), that we
7 would have to worry about the things that are most
8 likely to come up once you get back to the transferor
9 court, because those things will require referral or
10 acquiescence or something, and I think we want to
11 limit the amount of activity under (1) to the smallest
12 amount of activity possible, because we don't want a
13 lot of interactions between the pretrial court and the
14 trial court. So I really wonder about, despite its
15 importance -- about expert testimony, for example, and
16 I wonder where that really needs to be finished.

17 CHAIRMAN BABCOCK: Okay. Tommy.

18 MR. JACKS: Well, David, I thought, in
19 saying whether an expert may or may not testify struck
20 a pretty good balance, and I think, with that
21 limitation -- in other words, if the order of the
22 pretrial court only said, "I'm going let your expert
23 testify about areas A, B and C, but I'm not going to
24 let him get into Area D," well, then, that's less
25 crucial -- and of overarching points to the case --

1 than if he said, "This guy ain't testifying at all."
2 So under David's draft, it's only the latter ruling
3 that would have to go back.

4 HON. SCOTT BRISTER: But all the time
5 the critical question the treating doctor -- you know,
6 say the plaintiff is hurt. The question is, "Was it
7 caused by the defendant?" All the time, the doctor is
8 willing to say that even though basically it's --
9 "because he told me his back didn't hurt before the
10 car wreck and did after. And that's why it must have
11 been caused by the car wreck." That's the critical --
12 the causation is the critical question and the
13 treating doctor is always going to be allowed to
14 testify.

15 MR. JACKS: And that's why it's not
16 broad enough to include that as something that had to
17 go back to the pretrial judge to be trifled with, but
18 if you want to go in Bill's direction and try to limit
19 the amount of traffic back and forth, then you could
20 go David's direction, and that would be a more rare
21 circumstance where there would have to be referral
22 back to the pretrial court.

23 CHAIRMAN BABCOCK: Judge Peeples.

24 HON. DAVID PEEPLES: I would suggest
25 that we change Tommy's last sentence of (1). You

1 know, to refer it to the pretrial court is different
2 from making the trial judge consult with and get the
3 concurrence of the pretrial court. I mean, if you're
4 in the middle of trial --

5 MR. JACKS: I'm fine with that. I
6 thought of that in (2) and (3).

7 HON. DAVID PEEPLES: You get to the same
8 place and it's so much easier to do and it's just
9 smoother.

10 HON. SCOTT BRISTER: So what happens?

11 HON. DAVID PEEPLES: Well, okay. We're
12 having the -- you know, the jury panel hasn't been
13 brought over. We've got this issue and I kind of want
14 to change a ruling. The way Tommy's is written, the
15 lawyers have to go to the pretrial court. The way
16 mine is written -- I'm not proud of authorship, but
17 you just get on the phone and call and say, "I want to
18 do this" and the pretrial judge says yes or no.

19 MR. JACKS: Well, if you change it to
20 say "Such relief may be granted only with the written
21 concurrence of the pretrial judge" --

22 HON. SCOTT BRISTER: And the pretrial
23 judge faxes you a --

24 HON. DAVID PEEPLES: If I'm the pretrial
25 judge and I get this phone call and decide to do it,

1 I'll say, "Go ahead. I'll fax you something," and it
2 will be a one-liner that says we talked about it; go
3 ahead and keep going.

4 MR. JACKS: "You fax me your order.
5 I'll sign and fax it right back to you. It will have
6 both our signatures on it."

7 I think that's a friendly amendment I
8 would accept.

9 HON. SCOTT BRISTER: Tracy and Jane, is
10 that going to work?

11 HON. TRACY CHRISTOPHER: Unless the
12 pretrial court is on vacation.

13 HON. JANE BLAND: I got decaf this
14 morning, so I'm --

15 (Laughter)

16 CHAIRMAN BABCOCK: Not quite as chatty
17 as yesterday.

18 (Laughter)

19 HON. JANE BLAND: I'm mellow today.

20 (Laughter)

21 HON. JANE BLAND: Here's the deal. If
22 the pretrial judge says, "I'm not going to strike this
23 expert. Your motion to strike is denied," the expert
24 comes to testify at trial and Opinions 1, 2 and 3 are
25 fine. You know, there's no problem with those

1 opinions, but, you know, you're two hours into the
2 expert witness' testimony and Opinion 4 comes out that
3 there's absolutely no foundation laid for Opinion 4 in
4 the case. And so, you know, if you have to stop, call
5 the pretrial judge -- I mean, at least calling the
6 pretrial -- I mean, I know the train has left the
7 station. So I prefer David's where at least, you
8 know, I could call the pretrial judge, say, "When you
9 said he may testify," you know, "What about this,"
10 and try to get an order -- I mean, if we have to have
11 somebody file a motion and they refer it to the
12 pretrial judge then --

13 (Simultaneous discussion)

14 THE REPORTER: Hold on. One at a time.

15 HON. TRACY CHRISTOPHER: Jane is
16 absolutely right. What about something that was never
17 brought up to the pretrial?

18 (Simultaneous discussion)

19 MR. JACKS: Wouldn't be covered by his
20 orders.

21 HON. JANE BLAND: Okay. A motion to
22 strike expert testimony, all the time, I'll deny those
23 motions, but that doesn't mean that everything that
24 expert says, to me, is admissible. And when I get an
25 objection at trial, "Judge, no foundation."

1 "Sustained."

2 And so if I have a pretrial order that
3 says, "The motion to strike this expert is denied."
4 It's handed up to me by counsel and, "Judge, according
5 to the rule, you may not reverse decisions on expert
6 testimony."

7 CHAIRMAN BABCOCK: Who was up? I
8 think, maybe, Judge Lawrence was next.

9 HON. TOM LAWRENCE: The fundamental flaw
10 in both David's and Tommy's proposal is, "What happens
11 if the pretrial judge is not available?" You've got
12 to have some default if that occurs. There's got to
13 be somewhere to go if the pretrial judge is not there.
14 Either he's dead, he's out of the country, he's on
15 vacation, you can't reach him. So you've got to have
16 a back-up.

17 CHAIRMAN BABCOCK: But these things in
18 Subparagraph (1) are all -- I mean, Tommy's idea is
19 that they're all major issues, summary judgment and
20 jurisdiction, and what you all are talking about are
21 spur of the moment type things that are more properly
22 in (3). Right?

23 MR. JACKS: I think so.

24 HON. TRACY CHRISTOPHER: This is expert
25 testimony.

1 HON. SCOTT BRISTER: It's hard to define
2 what -- I mean, the circumstances on, you know, what
3 you ruled on expert is -- there's a huge continuum.
4 "Well, this one is but that one is not," and it's hard
5 to go through all the "Well, I meant around here
6 somewhere."

7 CHAIRMAN BABCOCK: Yeah. Pete.

8 MR. SCHENKKAN: Well, but what it says
9 is "orders of the pretrial court relating to" -- in
10 this case expert testimony -- "shall govern." In the
11 hypothetical you give where the motion to strike this
12 expert's testimony has been denied, I can't imagine
13 that order saying "And that means that the expert can
14 say anything the expert wants." And I cannot imagine
15 that a ruling -- proper ruling by Judge Bland that
16 this testimony is wholly without foundation could
17 reasonably be argued to violate the order of the
18 pretrial court and thus I could hardly imagine it
19 increasing the already vanishingly small possibility
20 of a reversal of the verdict of judgment at the end of
21 that trial. So, I mean, I'm not saying we don't have
22 a problem, but I don't see that one as the problem.

23 Now, I do think that the question of,
24 "What do you do if the pretrial judge is not around
25 during the trial for the ones that you really want to

1 deal with" is an issue that we will need to focus on,
2 but I had understood our discussion yesterday as
3 being, basically, to the effect that we're going to
4 have to choose to some degree or another to pay the
5 price of having trial judges' hands -- good, honest
6 trial judges' hands tied more than we would otherwise
7 like them tied on one hand or risking some trial
8 judges that people are worried about making the MDL
9 process not work, despite all the efforts to make it
10 work. And I do appreciate that as a real trade-off,
11 and a hard one, but at the end of the day, if this is
12 the place at which it is felt, then that's the
13 decision we're making.

14 We're saying that the trial judge who
15 goes to trial at a time when the lawyer who's going to
16 benefit by getting the pretrial judge's order
17 overturned knows that the pretrial judge is on
18 vacation; that's a problem for your side. You ought
19 to have thought about that ahead of that trial and
20 moved enough days ahead of that trial and ahead of the
21 vacation to get your gatekeeper judge to say, "This
22 one really needs to be reconsidered. Let's get him on
23 the telephone and see if he's going to change his
24 mind." And if you can't, tough. That'd be where I
25 come out on that one.

1 MR. GILSTRAP: That is tough.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HON. TRACY CHRISTOPHER: Well, I would
4 like to know how a motion in limine works in these
5 rules. I mean, a motion in limine does not exclude
6 evidence. It only says, "Don't bring it up until you
7 approach the Bench and ask me whether you can bring it
8 up." Okay?

9 So a pretrial judge grants a motion in
10 limine on a point. What do I do as a trial judge?
11 They approach the Bench. They ask me, "Judge, I want
12 to get into this now." Am I allowed to? Do I have to
13 call the pretrial court?

14 MR. YELENOSKY: You haven't violated the
15 order. All the order said is it had to be brought up
16 to you.

17 HON. TRACY CHRISTOPHER: Okay. As long
18 as I know that, I'm happy.

19 CHAIRMAN BABCOCK: You don't sound
20 happy.

21 (Laughter)

22 HON. TRACY CHRISTOPHER: I would like
23 the record to reflect that I am laughing.

24 (Laughter)

25 CHAIRMAN BABCOCK: Orsinger.

1 MR. ORSINGER: Tommy, why did you put
2 special exceptions in here?

3 MR. JACKS: Special exceptions?

4 MR. ORSINGER: Yes.

5 MR. JACKS: Because they sometimes
6 involve ruling on pieces of law that affect the case
7 in important ways.

8 MR. ORSINGER: I mean, are you talking
9 about special exceptions for failure to state a claim?

10 MR. JACKS: Yeah. I'm really talking
11 about substantive special exceptions --

12 MR. ORSINGER: Then could we amend
13 that --

14 MR. JACKS: -- that get to the heart of
15 an important legal issue.

16 MR. ORSINGER: I would propose that we
17 amend that to allow the freedom to require more
18 specificity in pleadings but not revisit a ruling that
19 you haven't stated a claim recognized under Texas law,
20 which is where -- by the way, it's been my experience,
21 most people do them by summary judgment anyway, even
22 though they're not supposed to, but could we modify it
23 "special exceptions granted for failure to state a
24 claim" or something.

25 MR. JACKS: Sure. I'm --

1 PROFESSOR DORSANEO: I don't think it's
2 necessary to do that.

3 MR. ORSINGER: You don't?

4 HON. DAVID PEEPLES: I don't either.

5 MR. ORSINGER: So you're ruling out all
6 special exceptions, then. Right?

7 So you've got an amended pleading that's
8 filed in a district court of Harris County that's got
9 new allegations in it and nobody can -- what do you do
10 then? You got a new round of special exceptions to
11 make?

12 (Simultaneous discussion)

13 CHAIRMAN BABCOCK: Hey, guys. Don't
14 interrupt, because the court reporter can't get it.

15 Alex.

16 PROFESSOR ALBRIGHT: Richard, what you
17 have to realize is, this is saying you can't violate
18 any -- you can't undo any prior order. If they rule
19 on prior special exceptions and there's a new motion
20 for special exceptions on the new pleading, it hasn't
21 been ruled on.

22 MR. ORSINGER: Okay. Then why do we
23 even need it in here? If all you got to do is amend a
24 pleading --

25 PROFESSOR ALBRIGHT: Because what it is

1 is, you're saying you don't want them to undo the
2 order that was made before. If they replead it
3 exactly like it was before, that might be a different
4 issue.

5 CHAIRMAN BABCOCK: Sometimes your
6 pleading keeps the language that you don't like so
7 that you can preserve the appeal.

8 MR. ORSINGER: I never take that out. I
9 just admit that it's not supposed to be in there.

10 CHAIRMAN BABCOCK: All right. Skip.

11 MR. WATSON: Well, I was just going to
12 say exactly what you did. I mean, there may be the
13 circumstances --

14 CHAIRMAN BABCOCK: Great minds.

15 MR. WATSON: -- where they stand on
16 their pleadings to take it up and it would be a shock
17 when suddenly the cause of action is in the case that
18 was previously out and simply left in the pleading to
19 take it up on a motion to reconsider special
20 exception.

21 CHAIRMAN BABCOCK: Alex.

22 PROFESSOR ALBRIGHT: I have one more
23 thing. What we're worried about in this -- you know,
24 what happens if the pretrial judge is on vacation?
25 That's on the rulings on admissibility of exhibits and

1 stuff. We do have an out here because it's -- you
2 have to call, get concurrence with the pretrial judge,
3 except when the modification is necessary because of
4 changed circumstances, et cetera, which then the judge
5 can change it with the detailed written order,
6 apparently, without calling the judge. The way this
7 is written now, if you can't get the judge and you
8 think that this is a situation that you think needs to
9 be -- the evidence needs to be admitted to prevent
10 manifest injustice, you can do that.

11 HON. SCOTT BRISTER: Less than that. If
12 you just think it's wrong.

13 MR. GILSTRAP: Under (3), you don't have
14 to call the judge.

15 HON. SCOTT BRISTER: You just think it's
16 wrong, you switch it, which I'm not sure you need a
17 rule saying that. The deal is just, you can switch it
18 whenever you think it's wrong.

19 PROFESSOR ALBRIGHT: So if the judge
20 happens to be there and you can get the agreement,
21 that's fine, but if not, go for it.

22 CHAIRMAN BABCOCK: Justice Duncan.

23 HON. SARAH DUNCAN: Okay. Can we just
24 do one section at a time?

25 CHAIRMAN BABCOCK: We can try.

1 (Laughter)

2 CHAIRMAN BABCOCK: Anne.

3 MS. McNAMARA: Is it understood that
4 when the trial judge calls the pretrial judge, the
5 counselor is on the call as well? Is that a given?
6 Because if not, we're kind of undermining what we're
7 trying to accomplish, I think. Because, I mean,
8 what -- we've already sort of set up a situation where
9 perhaps the trial judge is trying to undo some of the
10 good work of the pretrial court.

11 HON. SCOTT BRISTER: You don't even
12 trust the trial judge to accurately report the
13 conversation?

14 (Laughter)

15 MS. McNAMARA: I'd just as soon not
16 choose him as my advocate.

17 (Laughter)

18 MS. McNAMARA: I'd like to have --

19 HON. SCOTT BRISTER: That may be. I
20 don't know.

21 MS. McNAMARA: I mean, otherwise, if
22 that isn't a concern, then maybe we're making a lot
23 to-do about something that's not a problem.

24 CHAIRMAN BABCOCK: Well, this concept of
25 picking up the phone is not really in Tommy's

1 language.

2 MS. McNAMARA: I know.

3 CHAIRMAN BABCOCK: That's just how some
4 people --

5 MR. JACKS: It does say "written
6 concurrence." So the trial judge can't say, "Oh,
7 yeah. He said it was fine."

8 (Laughter)

9 MS. McNAMARA: How the trial judge tees
10 up the issue and the pros and cons of the issue may
11 help the pretrial judge come to his or her decision on
12 what to do.

13 CHAIRMAN BABCOCK: Yeah. I mean, yeah,
14 you could envision the situation where the trial judge
15 gets on the phone just between him and the pretrial
16 judge and says, "You're not going to believe what just
17 happened. Tommy Jacks was just here and he was
18 jacking around and" --

19 (Laughter)

20 MR. YELENOSKY: Well, and the judge
21 isn't going to be calling unless he wants to change
22 the decision, because he can deny it without calling.
23 So every time the judge calls, it's going to be to get
24 the decision changed. And I would imagine the other
25 lawyer wants to hear that.

1 CHAIRMAN BABCOCK: Skip.

2 MR. WATSON: Well, that's a real
3 problem. I mean, Anne has put a finger on it. The
4 judges in this room aren't going to do that, but in a
5 smaller courthouse, it's going to be more than a phone
6 call. And it doesn't have to be, you know, a judge
7 from the part of the state that people would be
8 concerned about. It could be just a judge who, you
9 know, really likes, obsessively, to control what's
10 going on in the courtroom and just walks down the hall
11 and sits down and says, "Clyde, let's think about this
12 a little bit." And it's amazing what happens over a
13 cup of coffee of just talking through something.

14 There needs to be some protection in
15 there, because Anne is right. I don't want the
16 pretrial judge to necessarily assume my role as an
17 advocate. Hopefully, he or she will, but I'd sure
18 like to be in the loop.

19 CHAIRMAN BABCOCK: Well, the way that
20 Subsection (1) is currently written with the friendly
21 Peoples amendment, as I see it is, you can't
22 reconsider, vacate, set aside or modify by the trial
23 court, over objection, and any motion seeking such a
24 relief may not be granted without the written
25 concurrence of the pretrial court.

1 Now, to me, that is suggestive of there
2 being a motion seeking reconsideration, a response and
3 some involvement by the pretrial judge who has got to
4 sign something. Now, the pretrial judge, I guess,
5 could have a hearing or he could do it on the papers
6 or he could do it over coffee with the trial judge.
7 And if that happens -- I mean, that's permitted to
8 happen. Can it? Judicial Conduct, the judges can
9 talk to each other. Right?

10 HON. TOM LAWRENCE: Yeah.

11 MR. YELENOSKY: Yeah.

12 HON. SCOTT BRISTER: No question about
13 that.

14 CHAIRMAN BABCOCK: Yeah. So if that's
15 going to happen, Skip, it's just going to happen.

16 MR. WATSON: Okay.

17 CHAIRMAN BABCOCK: But maybe -- I'm not
18 prejudging the issue. Maybe we ought to have a rule
19 about it. I don't know. That's going to involve
20 modifying the Canons, probably, which we're going to
21 do.

22 HON. SCOTT BRISTER: Great. I can't
23 wait.

24 (Laughter)

25 HON. DAVID PEEPLES: You've got to trust

1 the pretrial court to not be flimflammed by the trial
2 judge.

3 CHAIRMAN BABCOCK: Apparently this Clyde
4 guy is --

5 (Laughter)

6 HON. DAVID PEEPLES: Move on to more
7 important things. This is esoteric.

8 CHAIRMAN BABCOCK: Yeah. Richard.

9 MR. ORSINGER: This discussion has
10 pointed out that we don't specifically say, "You can't
11 file your motion back with the pretrial judge." And
12 if Anne's concern is, she doesn't want the trial judge
13 advocating the change, which I think is a fair
14 concern, do we contemplate that someone could go back
15 to the pretrial judge to try to argue their changed
16 circumstances on their own behalf or is the pretrial
17 judge forever out of the case unless the trial judge
18 brings him back in?

19 HON. SCOTT BRISTER: How would you do
20 that? I mean, this is not -- there aren't several
21 judges assigned to this case. This is a case being
22 transferred to one court, transferred back to another
23 court. What jurisdiction -- once it's transferred
24 back, what is the pretrial judge's jurisdiction over
25 that case? This is just a third party.

1 MR. ORSINGER: Okay. So then,
2 basically, there's no judicial officer that you can go
3 directly -- there's no way to go directly in front of
4 the controlling person to present your claim?

5 HON. SCOTT BRISTER: I don't see how,
6 unless you transfer the case back again.

7 CHAIRMAN BABCOCK: Judge Christopher.

8 HON. TRACY CHRISTOPHER: In Paragraph
9 (1), I think you should put a period after "over
10 objection." And then say, "Any motion seeking such
11 relief must be presented to the pretrial court for
12 determination." That just makes it clear that I don't
13 have to do anything with respect to that category of
14 rulings.

15 CHAIRMAN BABCOCK: How do you like
16 that --

17 HON. TRACY CHRISTOPHER: And that way,
18 they don't even have to present it to me. I mean, if
19 I can't do anything about it, there's no point to it.
20 Let's refer it immediately to the pretrial court with
21 Category (1); different with respect to Category (3).

22 CHAIRMAN BABCOCK: Tommy, how do you
23 like that?

24 MR. JACKS: Functionally, it achieves
25 the same purpose as my original draft. It doesn't

1 provide the flexibility of David's consultant/concur
2 process. I could take it either way.

3 CHAIRMAN BABCOCK: Okay. Stephen.

4 MR. TIPPS: Well, I have an alternative,
5 which I think is easier, but maybe different. First
6 of all, I'd strike the word "reconsider," because one
7 can reconsider without changing. And what I would
8 suggest that sentence read is, "Such orders may not be
9 vacated, set aside or modified by the trial court
10 without the written concurrence of the pretrial
11 judge," so that any decision that was made will be
12 made by the trial court who is the court who has
13 jurisdiction, but you've got to involve the pretrial
14 judge in the process.

15 CHAIRMAN BABCOCK: Did you mean to take
16 out "over objection"?

17 MR. TIPPS: No. I did not mean to take
18 out "over objection."

19 CHAIRMAN BABCOCK: Okay. But you did
20 mean to take out "reconsidered"?

21 MR. TIPPS: I would suggest we say,
22 "Such orders may not be vacated, set aside or modified
23 by the trial court, over objection, without the
24 written concurrence of the pretrial judge."

25 MR. YELENOSKY: You have to take out

1 "reconsidered," because you can deny. And how do you
2 get to deny without taking it up?

3 MR. ORSINGER: I agree with that.

4 CHAIRMAN BABCOCK: Tommy, what do you
5 think about that?

6 MR. JACKS: I agree. I mean, I think
7 you should take out "reconsidered." And if we're
8 going to go with the Peeples' model rather than the
9 model that my original draft, per Tracy's suggestion,
10 then I think Stephen's wording is more succinct.

11 CHAIRMAN BABCOCK: Yeah. Except if you
12 take out "any motion seeking such relief," then you
13 leave it somewhat ambiguous about whether this has to
14 occur by motion. And that leads into the problem that
15 Anne and Skip and Richard are concerned about.

16 MR. JACKS: Even with the language of
17 "any motion," et cetera, being in there, I think the
18 concern that the judges are going to get on the phone
19 and talk to each other is still present to the extent
20 people worry about that.

21 CHAIRMAN BABCOCK: Okay. Carl.

22 MR. HAMILTON: I'm concerned about the
23 phrase "over objection." Does that mean that if the
24 parties don't object the trial judge can change any of
25 the pretrial court orders? That doesn't seem to --

1 CHAIRMAN BABCOCK: I think that's what
2 Tommy's --

3 MR. JACKS: For that specific case,
4 yeah.

5 MR. HAMILTON: That would seem to
6 frustrate the whole purpose of the MDL proceeding, if
7 you're going to let the parties agree, "We don't like
8 this MDL decision. So we won't object if the trial
9 court wants to change it."

10 CHAIRMAN BABCOCK: Well, it's only for
11 that case.

12 Sarah.

13 HON. SARAH DUNCAN: I'm concerned about
14 all this talking on the phone and judges advocating
15 parties' positions. And I would like to just stick
16 with Tommy's original language that you refer it back
17 to the pretrial court. And I would not say "denied."

18 There may be -- I can foresee
19 circumstances in which there has been a change in the
20 law on the issue in a partial summary judgment handed
21 down by the supreme court. No ambiguity. It applies
22 to this case. The partial summary judgment is wrong.
23 And the pretrial court would be the first to admit
24 that, "Given this new opinion by the supreme court,
25 that partial summary judgment is now wrong." That is

1 significant enough in the history of this case, in my
2 opinion, that it needs to go back to the pretrial
3 court. The parties need to present their arguments
4 and get a new partial summary judgment reflecting that
5 new opinion.

6 I guess it's premature to move, but I
7 will state my preference for the original language
8 without the "denied," because it may be that that new
9 opinion is contrary to the position taken by the
10 judge's biggest supporter in South Texas, and I don't
11 want that judge to have the freedom to just deny it,
12 because denying it is going to do precisely what
13 shouldn't happen. So I like the original language
14 with the addition of "over objection."

15 CHAIRMAN BABCOCK: Okay. It's a little
16 after 10:00 and there are a couple more sections and a
17 rewritten section from yesterday. How do we want to
18 spend the next hour and 45 minutes?

19 MR. YELENOSKY: Taking votes.

20 HON. SCOTT BRISTER: We've got to spend
21 some time on the last remaining stuff.

22 CHAIRMAN BABCOCK: Right.

23 HON. TOM. GRAY: I mean, I think the
24 members of the Court that are here, they have had the
25 benefit of a lot of communication one way or the

1 other. They know the tentative draft that had
2 overwhelming support from this committee. And I would
3 vote that we leave the discussion and the record where
4 it is and move on to another topic without any further
5 votes.

6 CHAIRMAN BABCOCK: Judge Brister, what
7 do you think about that?

8 HON. SCOTT BRISTER: I agree.

9 CHAIRMAN BABCOCK: Justices Hecht and
10 Jefferson?

11 JUSTICE HECHT: We're for moving on.

12 CHAIRMAN BABCOCK: Yeah.

13 JUSTICE HECHT: We're going to talk on
14 the phone, but --

15 (Laughter)

16 CHAIRMAN BABCOCK: Should we break so
17 you could do that?

18 (Laughter)

19 CHAIRMAN BABCOCK: Okay. What section
20 do we take up next? I think it's 13.8, isn't it,
21 Judge Brister? Review?

22 HON. SCOTT BRISTER: Yes, details.

23 MR. TIPPS: I've got 13.8 which relates
24 to review of decisions -- appellate review of
25 decisions by the MDL panel for the pretrial court and

1 the trial court. In this draft, we basically address
2 two different issues. The first issue is, "How are
3 orders of the MDL panel reviewed?" And then the
4 second general issue is, "What court of appeals
5 reviews decisions of the pretrial court and the trial
6 court?"

7 13.8(a) deals with the first issue. The
8 statute in 74.163(a)(4) specifically provides that the
9 supreme court is to promulgate rules concerning review
10 by extraordinary writ of decisions of the MDL panel,
11 and we, essentially, have simply tried to implement
12 that statutory directive by providing that any such
13 review would be performed only by the supreme court,
14 not by any intermediate court of appeals and in an
15 original mandamus proceeding.

16 Upon reviewing this this morning, I
17 realized that we have really addressed only orders of
18 the MDL panel granting or denying a motion for
19 transfer. And it may well be that there are other
20 decisions of the MDL panel, for example, with regard
21 to remand and that kind of thing. And so my personal
22 suggestion, without discussing it with the
23 subcommittee, would be to change 13.8(a) to read
24 something like "Orders of the MDL panel, including
25 those granting or denying a motion for transfer of

1 related cases," comma, "may be reviewed only by the
2 supreme court in an original mandamus proceeding,"
3 which I think will catch all orders of the MDL panel.

4 I think the only issues here are whether
5 they need to be reviewed through some mechanism other
6 than a mandamus and whether any court other than the
7 supreme court should have the authority to do that.

8 CHAIRMAN BABCOCK: Okay. Bill.

9 PROFESSOR DORSANEO: Well, what is this
10 meant to mean? Is it meant to mean that mandamus is
11 always available or that the only thing that's
12 available is mandamus under normal mandamus standards?

13 MR. TIPPS: I think, probably, it's
14 meant to suggest that the supreme court, I guess in
15 this rule, has indicated a predisposition to grant
16 mandamus with regard to any abuses of discretion that
17 the MDL panel may commit, but I would admit it's a
18 little ambiguous on that question.

19 HON. SCOTT BRISTER: HB 4 says, "The
20 rules adopted by the supreme court must provide for
21 appellate review of certain or all panel orders by
22 extraordinary writ."

23 PROFESSOR DORSANEO: What do you think
24 that means?

25 HON. SCOTT BRISTER: Well, we decide

1 whether certain of them get extraordinary writ or all
2 of them do.

3 CHAIRMAN BABCOCK: Pete.

4 MR. SCHENKKAN: But we're not changing
5 the standards for extraordinary writs. I don't see
6 how we have the ability to do that -- not we. I don't
7 believe that the court will take the view that it has
8 the power to do that by rule, implementing these here.

9 PROFESSOR DORSANEO: I'm not so sure
10 about that.

11 MR. SCHENKKAN: And if there is some
12 possibility that they do, it seems to me a very
13 ill-advised course for us to get deeply into, changing
14 the standards for extraordinary writs for one
15 particular set of cases through Texas Supreme Court
16 rulemaking. That's an awfully -- given the long
17 history of extraordinary writ -- six centuries of
18 it -- it seems to me very risky to take it on in this
19 time frame.

20 I want to, quickly, while I have the
21 floor, just cover a couple other points related to
22 this one. One is, "Why do we shift from extraordinary
23 writs to mandamus?" I'm not enough of an
24 extraordinary writ practitioner to know, but perhaps
25 there are some circumstances in which one of the other

1 extraordinary writs is --

2 MR. TIPPS: Habeas corpus might be
3 appropriate.

4 (Laughter)

5 MR. SCHENKKAN: It may be. Certainly if
6 you're a lawyer who feels like you've been victimized
7 in one of these forums, and the question whether
8 the -- only by the supreme court is something that the
9 court would want or whether the court is going to want
10 to have these taken first to the intermediate
11 courts -- I know that existing systems generally --

12 MR. TIPPS: One very practical reason
13 for vesting this appellate jurisdiction only in the
14 supreme court is that you have a very complicated
15 question with regard to which of the 14 courts of
16 appeals should be reviewing decisions of the MDL
17 panel. I get into that decision in parts (b) and (c),
18 but I don't know who it will be for the panel.

19 CHAIRMAN BABCOCK: Richard, did you have
20 something?

21 MR. ORSINGER: Yeah. I wanted to
22 comment on Peter's assessment about the mandamus. The
23 jurisdictional statutes are very vague and primarily
24 just tell you who the court can and can't issue
25 mandamus against certain government officials.

1 In my concept, the standards for
2 mandamus have developed out of the common law. They
3 were, to some extent, inherited from England and
4 they've been, obviously, changed in the last 20 years.
5 All of us know that. But I don't think we should
6 concern ourselves about this rule changing the supreme
7 court's inclination to grant mandamus, because they
8 will issue the rule and they will decide -- for
9 example, traditionally, mandamus won't issue when
10 there's a fact dispute that could be resolved by the
11 lower body, and I would expect that would probably
12 continue here. And there are many others. You know,
13 you'd have to study it for a long time. So I wouldn't
14 worry about it, because the supreme court is writing
15 the rules. The supreme court controls what their own
16 standards for the issuance of mandamus are.

17 CHAIRMAN BABCOCK: Justice Duncan.

18 HON. SARAH DUNCAN: I would also strike
19 the word "mandamus." I can't imagine a renegade MDL
20 panel, but you just never know. And since they serve
21 at the pleasure of the chief justice, it would seem to
22 be much easier to just get rid of one of them than to
23 foro endo (phonetic) or writ of prohibition one of
24 them.

25 On the court of appeals' jurisdiction, I

1 don't see how any court of appeals would have
2 jurisdiction to issue an extraordinary writ against
3 the MDL panel.

4 MR. TIPPS: I don't understand, Sarah.
5 You would strike "mandamus," but replace it with
6 something else --

7 (Simultaneous discussion)

8 MR. ORSINGER: Original proceeding.

9 HON. SARAH DUNCAN: I would just say
10 "original proceeding."

11 MR. ORSINGER: In my view, the mandamus
12 is the only one anyone will ever see.

13 HON. SARAH DUNCAN: I mean --

14 CHAIRMAN BABCOCK: But, Sarah, you
15 weren't suggesting -- I mean, the MDL panel might
16 grant MDL status to a group of cases and the
17 parties -- some of the parties to that may disagree
18 with that, and they should have the right to go to the
19 supreme court to get it reviewed. Right?

20 HON. SARAH DUNCAN: I think that's the
21 only place they can --

22 MR. ORSINGER: She's just saying --

23 HON. SARAH DUNCAN: -- that's what I'm
24 saying.

25 MR. ORSINGER: -- you shouldn't limit it

1 to mandamus. You could issue a writ of prohibition,
2 conceivably. Maybe even if someone is not properly
3 appointed, there might be a writ you could bring --

4 CHAIRMAN BABCOCK: Okay. Do you agree
5 with that?

6 MR. TIPPS: I have no problem with "an
7 original proceeding," or Justice Gray suggests we
8 could track the statutory language and simply say
9 "extraordinary writ." I don't know. I agree, though,
10 that mandamus is probably too limited and we should --
11 there's no particular reason to exclude the
12 possibility of prohibition.

13 MR. ORSINGER: Rules of Appellate
14 Procedure talk in terms of original proceedings, and I
15 think that would be good to tag onto that.

16 MR. TIPPS: I think that's fine.

17 CHAIRMAN BABCOCK: Okay. Any other
18 comments in (a)?

19 (No response)

20 CHAIRMAN BABCOCK: Okay. Let's move on
21 to (b).

22 MR. TIPPS: Okay. Let me talk about (b)
23 and (c) together, because I think they both implicate
24 the same issue, and that issue is, "What court of
25 appeals should review orders of the pretrial court and

1 orders of the trial court?" And we, essentially,
2 considered three possibilities.

3 The first possibility, which is the one
4 that we recommend, is that orders of the pretrial
5 court and the trial court be reviewed by the court of
6 appeals that normally reviews decisions of those
7 courts. And that's the way we've written the rule.

8 The two other alternatives would be,
9 second, to pick out a particular court of appeals and
10 let that court of appeals be responsible for reviewing
11 these decisions. And we've set out two different ways
12 to do that in the alternative (b), which, if we wanted
13 to, could also be applied to -- could be turned into
14 an alternative (c) with regard to the trial court, but
15 we have not recommended that approach.

16 And then the third approach would be to
17 try to deal directly with the fact that we're -- we
18 have a case in which we have decisions made by two
19 different courts that, quite likely, are going to be
20 in different judicial districts, and we could come up
21 with a relatively complicated fine-tuning kind of
22 approach in which some decisions in that case will be
23 reviewed by one court of appeals and some in another.
24 We did not even try to write that, though we could
25 talk about it, but, basically, we didn't because we

1 concluded that it was just too complicated.

2 And so what we are recommending is what
3 struck us as the simplest, most practical way to do
4 it. Even though we recognized that doing it that way
5 can create some situations that some might think are a
6 little odd, but with what we, basically, are
7 providing, (b) and (c), is that review of orders in
8 judgments by these two different courts are reviewed
9 under the normal rules. And in that regard, we've
10 used the term "review to the extent otherwise
11 permitted by law." The point being that if
12 interlocutory appeal is available normally, it's
13 available here. If mandamus is available normally,
14 it's available here.

15 And we've provided that, while the case
16 is in the pretrial court, that whatever appellate
17 review alternatives exist can be sought from the court
18 of appeals that has jurisdiction over that particular
19 pretrial court normally. And then, similarly, with
20 regard to orders that are issued by the trial court
21 after the case is remanded to the trial court,
22 whatever normal appellate review alternatives are
23 available are also available with regard to the
24 decisions of the trial court, and that would include
25 review of the final judgment of the trial court, even

1 if someone wanted to complain about, in connection
2 with a review of final judgment, decisions that were
3 made earlier by the pretrial court.

4 We can all think of oddities that result
5 from that approach, and I'll mention two, just so
6 you'll know that we've thought about these issues as
7 well. But, for example, assume that you have a
8 pretrial court in Bexar County. A case is transferred
9 to that pretrial court from McLennan County and
10 Jefferson County -- and I picked those counties
11 deliberately.

12 (Laughter)

13 MR. TIPPS: If you have a situation in
14 which the pretrial court makes the decision on a
15 grouping of cases as to which cases should be put
16 together for trial, that's a decision that might be
17 subject to review by mandamus. And if somebody took
18 advantage of that opportunity, they could seek
19 mandamus from the San Antonio Court of Appeals. If,
20 however, they decided not to seek mandamus and just
21 simply complain about that at the end of the case,
22 then the complaint is not going to be to the
23 San Antonio Court of Appeals, but it's going to be
24 either to the Waco Court of Appeals or the Beaumont
25 Court of Appeals. So that's a bit of a discontinuity.

1 The other one that maybe is more obvious
2 is, if you have this case in which the pretrial court
3 has made a decision, for example, with regard to
4 exclusion of expert witnesses. Cases get remanded
5 back to McLennan County and Jefferson County and
6 there's then an appeal. The Beaumont Court of Appeals
7 is going to end up reviewing that issue with regard to
8 expert witnesses and the Waco Court of Appeals is
9 going to end up reviewing the very same issue, and
10 they could come out totally differently, in which
11 case, you've got a pretty clear conflict which the
12 supreme court could probably have jurisdiction over,
13 even under the old rules, and it certainly has
14 jurisdiction under the new rules.

15 But our recommendation is that we follow
16 what we think is the simplest and most straightforward
17 approach and let orders and judgments of the pretrial
18 court be reviewed by its court of appeals and orders
19 and judgments of the trial court, including final
20 judgments, be reviewed by its court of appeals.

21 CHAIRMAN BABCOCK: Okay. Great.
22 Thanks.

23 Bill.

24 PROFESSOR DORSANEO: That's how we
25 handle cases that are transferred from one court of

1 appeals' district to another for an interim appeal and
2 then the final judgment -- the appeal from the final
3 judgment is not transferred now. Right?

4 JUSTICE HECHT: It could go both ways.
5 I mean, you could have --

6 HON. SCOTT BRISTER: Or vice versa.

7 JUSTICE HECHT: Yeah. I mean, you could
8 have an appeal from a final judgment and then the
9 Dallas court reverses and remands. There are further
10 proceedings, and the next time up, on assignment, it
11 goes to the Texarkana Court or something. So, I mean,
12 that can happen.

13 CHAIRMAN BABCOCK: Richard, Frank and
14 then Judge Gray.

15 MR. ORSINGER: I'd like to make two
16 comments. One is that I think that the jurisdiction
17 statutes of the courts of appeals may require this
18 geographical base thing anyway. I'm not sure that we
19 have the power here to reach out outside, because they
20 are geographically based.

21 MR. TIPPS: I agree. And I think that
22 the alternative that we set out in (b) raises serious
23 questions concerning whether the supreme court's
24 rulemaking authority allows them, basically, to impose
25 different geographic restrictions.

1 MR. ORSINGER: Right. My second point
2 is that I don't think we add anything by saying
3 appellate court or courts and we just say -- that we
4 say appellate courts. And it's my understanding the
5 legislature cleaned up the overlapping court of
6 appeals' districts in the last session. Did that bill
7 get through?

8 HON. TOM GRAY: Incorrect.

9 MR. ORSINGER: Okay. So we still --
10 (Laughter)

11 MR. ORSINGER: We ought to say "courts,"
12 because there will be some counties where there are
13 three courts of appeals and one supreme court. And
14 there's one county where there's three courts of
15 appeals. So that --

16 HON. TOM. GRAY: They did fix that.
17 Triple overlap was fixed.

18 MR. TIPPS: I don't have any --

19 MR. ORSINGER: Let's just say "courts."

20 MR. TIPPS: I think that's fine. I
21 mean, there are always two courts, the court of
22 appeals and the supreme court, so --

23 CHAIRMAN BABCOCK: Frank had his hand up
24 first, Sarah, and then Judge Gray did. And then you
25 can go.

1 MR. GILSTRAP: I want to make sure we
2 have this straight. We've got a number of tire
3 separation cases and they're all transferred to a
4 court in Dallas and that court issues -- it's a
5 pretrial court. It issues some rulings. Those either
6 can go up by interlocutory appeal or mandamus; they go
7 to the Fifth Court in Dallas.

8 MR. TIPPS: Right.

9 MR. GILSTRAP: One of the cases gets
10 transferred back to the Panhandle and rulings of that
11 trial court thereafter go to Amarillo. Okay?

12 Now, we just posited this procedure
13 whereby you get on the phone and you refer a question
14 back to the pretrial court. Now, what do we do with
15 those? It seems like those ought to go to Amarillo
16 for continuity, but, I mean, I do have some problems
17 with the jurisdictional statute, but it seems like
18 what you do is, you say, "All rulings of pretrial
19 court after transfer and before remand are appealed to
20 the court of appeals dealing with the pretrial court
21 and all rulings in the case of the pretrial or trial
22 court" -- maybe you don't want to say pretrial
23 court -- "after the remand go to the court that has
24 jurisdiction over the trial court."

25 CHAIRMAN BABCOCK: Subpart (c) seems to

1 say that.

2 MR. TIPPS: That's what we've tried to
3 say in (c). And the alternative language in brackets,
4 "remanded to the trial court and" was proposed by
5 someone to try to emphasize that point. Frankly, I
6 don't think it's necessary and I think it may be more
7 confusing.

8 MR. GILSTRAP: Say, "Rulings of the
9 pretrial court otherwise reviewable as part of the
10 final judgment." But you don't -- you're not dealing
11 with the situation whereby you've referred something
12 to the pretrial judge and that might be reviewable by
13 mandamus or something.

14 HON. SCOTT BRISTER: See, I think my
15 argument would be because of the jurisdictional
16 problem that the case is transferred back and the
17 pretrial judge is not on it again. Really, the trial
18 judge is making that ruling, but we need a "mother may
19 I" sheet from the pretrial court just to be in the
20 record, not that the pretrial court is actually making
21 that ruling. The pretrial court is just consenting to
22 it because there's jurisdictional problems if it's
23 really a pretrial court order.

24 MR. TIPPS: That would be another
25 reason, it seems to me, with regard to what we were

1 talking about earlier this morning, to avoid a
2 situation in which the responsibility for the final
3 decision is referred back to the pretrial judge. That
4 would create that complication.

5 MR. GILSTRAP: With that clarification,
6 I think I understand.

7 CHAIRMAN BABCOCK: Pete, did you have
8 your hand up?

9 MR. SCHENKKAN: Well, I'm not -- I don't
10 want to cut ahead if there were prior --

11 CHAIRMAN BABCOCK: Justice Duncan was
12 next.

13 HON. SARAH DUNCAN: I don't like this
14 having jurisdiction concerning orders or judgments of
15 the pretrial court. A court of appeals has
16 jurisdiction over cases, not over orders and judgments
17 and not of particular trial courts. That's the only
18 way the docket equalization system works.

19 Judge Christopher's court is certainly
20 not within the 32 counties that comprise the court --
21 the Fourth Court of Appeals' district, but if the
22 supreme court transfers a case to our court, I've got
23 jurisdiction -- we've got jurisdiction to handle that
24 appeal. So I find this having jurisdiction concerning
25 orders or judgments of the pretrial court to be

1 incredibly confusing.

2 MR. ORSINGER: Why don't we just put a
3 period after "jurisdiction"? "The appellate court
4 having jurisdiction," period.

5 MR. TIPPS: Well, those were words
6 intended to say, in a somewhat artful way, what we
7 meant, which is "that trial court's court of appeals,"
8 and so whatever words we need to use in order to
9 capture that concept are the words that we need to
10 use. And if these are the wrong words, then we need
11 to figure out exactly --

12 HON. SARAH DUNCAN: And I thought about
13 just saying "to the extent otherwise permitted by
14 law," period, but I think there is the possibility
15 that some people will be confused about, "Which court
16 of appeals do I go to?"

17 MR. TIPPS: I think that probably just
18 saying "having jurisdiction," is that we would then
19 create the possibility that someone might think that
20 we're trying to change something here.

21 HON. SCOTT BRISTER: It's circular.
22 Just say, "The court of appeals with jurisdiction is
23 the one that has jurisdiction." "Oh. Well, that
24 clears it up."

25 HON. DAVID GAULTNEY: The case is filed

1 and the transferred case -- it's filed in Jefferson
2 County and transferred to your court -- I mean, filed
3 in the Beaumont Court of Appeals and transferred to
4 your court. So you're right, you have jurisdiction
5 over cases under the statutory grant of Jurisdiction
6 Equalization Statute, but the practical thing, I
7 think, we need to consider is the practicing lawyer,
8 "Where do you file it initially before it gets
9 transferred?"

10 HON. SARAH DUNCAN: Right. And my
11 suggestion is that it be language more like "by the
12 appellate court to which an appeal or an order or
13 judgment of the pretrial court would normally be
14 filed." Something like that, that it's just, "We're
15 under the usual rules here, guys." If it's Judge
16 Christopher's court, you're going to go to the First
17 and Fourteenth. So however Stephen -- his artful way,
18 as always, can put that.

19 CHAIRMAN BABCOCK: Somewhat artful
20 language.

21 Pete.

22 MR. SCHENKKAN: I'm wondering if it
23 wouldn't be better just to provide in 13.8 for the
24 rule of the MDL panel orders. It seems to me that the
25 discussion we're having about the appeals of the

1 pretrial court and trial court orders is repeatedly
2 taking us back to, "What is it that's actually going
3 to happen under the law that governs appellate
4 jurisdiction of trial court orders?" And we have not
5 got any statute that changes that nor any statute that
6 gives the Texas Supreme Court, by rule, the authority
7 to change it, and we're not thinking that any -- we
8 haven't identified any changes that we would think
9 were appropriate, even if we thought there was
10 authority to do that. So why don't we just leave it
11 out altogether?

12 MR. TIPPS: Well, I think we need to
13 address it, because I think that it is almost certain
14 that someone would be confused -- would find the fact
15 that a single case -- decisions in a single case are
16 being made by judges who are working in two different
17 appellate jurisdictional districts to be confusing and
18 create uncertainty. And if we're going to opt for,
19 "No. It's just the regular rules," then I think we
20 need to say that -- sort of repeat the regular rules.

21 CHAIRMAN BABCOCK: Yeah.
22 Judge Christopher.

23 HON. TRACY CHRISTOPHER: I think we
24 ought to put it in there just to make it clear, like
25 Stephen said. I mean, if the pretrial court grants a

1 summary judgment and the pretrial court is in Harris
2 County but the case that they created a summary
3 judgment in was, you know, from Orange County, I just
4 think we ought to put it in there to make sure that
5 they understand that they're supposed to go to the
6 First and Fourteen to appeal that order. Otherwise,
7 you're just going to have questions and they're going
8 to file both places and they won't know what to do,
9 because it's only transferred for pretrial.

10 CHAIRMAN BABCOCK: Bill. Then Sarah.

11 PROFESSOR DORSANEO: I think the hard
12 one is the one where the pretrial court decides the
13 entire individual case by a pretrial order, and
14 although I think that that's the way we've suggested
15 to the court that the rules should read, is something
16 that happens in the pretrial court and is memorialized
17 in a document that's ultimately sent to the trial
18 court. There could be some confusion there.

19 MR. GILSTRAP: I get confused when you
20 say "memorialized in the trial court." I get confused
21 at that point where I appeal to.

22 PROFESSOR DORSANEO: Dismissal for want
23 of prosecution signed by Judge Christopher that
24 ends --

25 MR. GILSTRAP: As the pretrial judge?

1 PROFESSOR DORSANEO: -- as the pretrial
2 judge that ends one of these cases ends it.

3 MR. GILSTRAP: Is that a final judgment?

4 PROFESSOR DORSANEO: Seems so to me.

5 MR. GILSTRAP: Then you appeal it from
6 the pretrial court.

7 PROFESSOR DORSANEO: That's what I
8 think. But that's what I say is the hard one, because
9 she signs the order but it finds its way back to
10 Jefferson County or wherever.

11 HON. SARAH DUNCAN: No.

12 PROFESSOR CARLSON: No.

13 CHAIRMAN BABCOCK: No, it doesn't. It
14 was transferred.

15 MR. ORSINGER: There's no remand at that
16 point.

17 PROFESSOR DORSANEO: It's not remanded,
18 but the order is sent back.

19 MR. WATSON: Why would it be sent back?

20 HON. TRACY CHRISTOPHER: We have the
21 file; we close it in Harris County.

22 PROFESSOR DORSANEO: What happens to the
23 file that's not reopened in the other counties?

24 HON. TRACY CHRISTOPHER: Right. It's
25 already been closed. It's gone.

1 MR. TIPPS: While it was away, a final
2 judgment was rendered and they died in that county.
3 That's where the death certificate is.

4 (Laughter)

5 CHAIRMAN BABCOCK: By the way, that's
6 the way the federal system works. If the MDL judge
7 grants a case's dispositive motion, then it goes to
8 the court of appeal of that district court.

9 MR. TIPPS: Right. Because that's the
10 court of appeals that has jurisdiction over that
11 judge.

12 CHAIRMAN BABCOCK: Right. If a judge in
13 the district of Maryland grants summary judgment, then
14 the appeal of that goes to the Fourth Circuit.

15 Mike.

16 MR. HATCHELL: I would like to join
17 David's comments to the extent that I believe (c) is
18 totally superfluous. I'm of the school that believes
19 that when you make new rules or amend the rules people
20 strain at gnats to try to figure out, you know, why
21 you have changed this and to read esoteric meaning
22 into it. And all I see (c) saying is that, you know,
23 "Orders by the trial court, after remand, are appealed
24 in the normal way." This spin to me is just virtually
25 inscrutable.

1 I just think you ought to just let the
2 existing rules take their course. Otherwise, we're
3 just going to be -- people are going to be trying to
4 read meaning into this when I think that the intent is
5 that, you know, they just go.

6 CHAIRMAN BABCOCK: Except for the
7 situation that Frank brought up, which is, when the
8 pretrial court has made a ruling that was not
9 appealed, the case is then set back to its home county
10 for trial, to the trial court, and one or more of the
11 parties want to change that pretrial ruling which can
12 only be done with the concurrence of the pretrial
13 judge.

14 MR. YELENOSKY: But it's with the
15 concurrence of the pretrial judge, not by order of the
16 pretrial judge.

17 CHAIRMAN BABCOCK: I understand that,
18 but --

19 MR. SCHENKKAN: And it's going to be a
20 ruling that's going to be part of that case which has
21 been remanded and the case is in that district again.
22 I think the more we try to write about this in the
23 rule the more we create the -- we're not removing
24 confusion in the practitioners. We're encouraging it.
25 We're saying, "Gosh. They must have intended to

1 change something or they wouldn't" --

2 MR. YELENOSKY: Why don't we write about
3 it in a comment.

4 MR. SCHENKKAN: -- "What is it?"

5 CHAIRMAN BABCOCK: Hang on for a second.
6 Let me finish my point, because if you have (b)
7 without (c) and you say in (b) that orders by the
8 pretrial court may be reviewed to the extent otherwise
9 permitted by law but if the appellate court is having
10 jurisdiction over the pretrial court and you have this
11 written document that has concurrence, there may be
12 confusion about which court of appeals you go to on
13 that order unless you have (c), or maybe not.

14 MR. SCHENKKAN: I'm saying there will be
15 some confusion, but we are not reducing it by having
16 either (b) or (c). We are contributing to it.

17 MR. YELENOSKY: Why don't we do the
18 whole thing by comment, because I do think if you do
19 (a), (b) and (c) -- if you do (a) and (b), you do get
20 into a problem without putting in (c). But if you do
21 the whole thing by comment, you're basically
22 reassuring the practitioner in that comment without
23 creating verbiage that, as you said, they can strain
24 at.

25 MR. SCHENKKAN: Have to do (a), because

1 the statute says so.

2 MR. YELENOSKY: Okay. We'll do (a).
3 You don't have to do (b) or (c). That's what I meant.

4 CHAIRMAN BABCOCK: Judge Brister.

5 HON. SCOTT BRISTER: I assume we'll have
6 100 percent agreement.

7 (Laughter)

8 HON. SCOTT BRISTER: The pretrial court
9 says -- I could be wrong. The pretrial court says,
10 "This expert ain't testifying." Defendant doesn't
11 like it. Defendant's expert is struck. Doesn't
12 testify, but tough. You go to trial. You try the
13 case. You appeal. That's a pretrial court's ruling,
14 but everybody agrees that ought to be appealed with
15 the whole trial record at the trial court. Why don't
16 we -- shouldn't we say that? That is a ruling by the
17 pretrial court and people are going to be confused.
18 And if we're not going to tell them in the rule that
19 it's -- which appeals court to go to --

20 MR. YELENOSKY: Why can't we do it in a
21 comment?

22 HON. SCOTT BRISTER: Because it's unlike
23 anything else. This is new. You assume everybody
24 just knows what it's going to do. Are you kidding?
25 This is the MDL. We haven't had this before.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HON. SARAH DUNCAN: It's not been my
3 experience that we write rules to reflect what the law
4 is. We write rules to create some law and I -- was
5 that a motion, Steve?

6 MR. YELENOSKY: Yeah. That's a motion.

7 HON. SARAH DUNCAN: I second it.

8 HON. SCOTT BRISTER: Let's vote on it.

9 CHAIRMAN BABCOCK: Mike, did you have a
10 comment?

11 MR. HATCHELL: No. I just want to say,
12 in response to Judge Brister is, again, we always seem
13 to forget, we do not appeal rulings. We appeal
14 judgments. Rulings are encompassed in the judgment.
15 So that's it. It's that simple.

16 CHAIRMAN BABCOCK: Richard.

17 MR. ORSINGER: I probably differ from
18 the prevailing views just stated, but I don't think
19 you can have (b) without having (c). And I don't
20 think you could have this rule without having (b),
21 because I think there might be some severe doubt in
22 peoples' minds whether you ought to go back to the
23 court of appeals' district of the originating case for
24 interim review of the MDL court's order, and that, of
25 course, would be a disaster.

1 And I'm sure that the first time this
2 mandamus goes to the supreme court, they would say
3 that, but why do we have to let everybody find that
4 out through mandamus. Why don't we just say that the
5 orders of the pretrial court are reviewed in that
6 court of appeals' district? And then when the case is
7 sent back to the original trial court, anything that
8 gets appellate review from that point forward goes to
9 the court of appeals' district of the trial court,
10 even if it was an order of the pretrial court.

11 CHAIRMAN BABCOCK: That's what (c) says.

12 MR. ORSINGER: I know that. And I don't
13 see how you can say -- if you don't have (c) on there,
14 then (b) suggests, even at the conclusion of the
15 trial, that an order or judgment of the pretrial court
16 can be reviewed by the court of appeals' district
17 where the pretrial court was. So I think someone
18 could legitimately say, "Well, wait a minute. Since
19 I'm not attacking the judgment. Really, I'm attacking
20 an order that preceded the trial, then there's
21 confusion in my mind as to whether I can take that
22 issue to that other court."

23 CHAIRMAN BABCOCK: Okay. Hang on,
24 Steve. You made a motion that was seconded that we
25 treat (b) and (c) as a comment and take it out of the

1 rule. Do you still want to move that?

2 MR. YELENOSKY: I do. And if I can add,
3 there is doubt, Richard, but it's not because you have
4 any question about what the law is, as Sarah Duncan
5 says. I think we're all sort of agreeing about where
6 these things go. We're just acknowledging that other
7 lawyers are going to be confused about it. And the
8 difference between a rule and a comment is, as Sarah
9 said, a rule would say, "Here's some new law," and a
10 comment would say, "Okay. You're confused about this,
11 but if you really think about it, it's quite clear,
12 and this is what it is."

13 CHAIRMAN BABCOCK: Sarah, do you still
14 want to second it?

15 HON. SARAH DUNCAN: Yes. I still want
16 to second it.

17 I would like to add this comment to my
18 previous comments. There's still going to be docket
19 equalization. So who's to say that -- when we try to
20 encapsulate the law of the court of appeals'
21 jurisdiction in one sentence, we fail miserably, even
22 though it's not all that complicated.

23 Yes. I second Steve's motion. It ought
24 to be in a comment. We shouldn't be trying to write
25 the law of the court of appeals' jurisdiction in the

1 rules.

2 CHAIRMAN BABCOCK: Okay. So we've got a
3 motion that has been seconded to put (b) and (c) into
4 a comment. And everybody in favor of that raise your
5 hand.

6 (Show of hands)

7 CHAIRMAN BABCOCK: All opposed?

8 (Show of hands)

9 CHAIRMAN BABCOCK: The people opposed
10 are numbered 15 and the people in favor of putting it
11 in a comment number 11; the Chair not voting. And so
12 we'll leave it in the rule.

13 And Judge Bland.

14 HON. JANE BLAND: So it doesn't focus on
15 appellate jurisdiction but rather on what the parties
16 should do. Do we say "Before remand to the trial
17 court," coma, "to the extent permitted by law," comma,
18 "a party may seek review of orders and judgments of
19 the pretrial court to the appellate court which
20 reviews orders and judgments from that court"? Then
21 you --

22 MR. ORSINGER: Yeah, but you may be
23 authorizing someone to seek relief that they're not
24 otherwise entitled to seek.

25 HON. JANE BLAND: Well, I put in the

1 parenthetical comment, "to the extent permitted by
2 law." I'm just telling them, "This is where you go
3 file." I think we're going to have -- you know,
4 people -- you may even have somebody saying, "Well,
5 I'm going to file" -- if it's a pretrial judge, "I'm
6 going to file an original proceeding in all courts
7 we've got handling cases" -- you know, from all 14
8 appellate courts, go file one in every court, you
9 know, and I just think it would be good if we could
10 clarify what our intent is.

11 HON. SARAH DUNCAN: And isn't the only
12 question, "Where do you file your notice of appeal?"

13 MR. ORSINGER: Could be a mandamus also.

14 HON. SARAH DUNCAN: Or your petition for
15 mandamus. But it's a question of, "Where do you
16 file," not where you seek review. You're going to
17 seek review wherever you can get it. Wherever you end
18 up.

19 HON. JANE BLAND: I was just trying to
20 encompass --

21 HON. SARAH DUNCAN: Wherever you end up.

22 HON. JANE BLAND: I was just trying to
23 encompass original proceeding and appeals, and
24 interlocutory appeals for that matter, and, you know,
25 anything else that the appellate court might need to

1 look at.

2 HON. SARAH DUNCAN: Right. And I think
3 that's better than what we were talking about before.

4 CHAIRMAN BABCOCK: All right. Is
5 anybody in the mood for a little short break?

6 (Laughter)

7 CHAIRMAN BABCOCK: Judge Gray seconds
8 it. So let's keep it to ten minutes if we can.

9 (Break: 10:43 a.m. to 11:00 a.m.)

10 CHAIRMAN BABCOCK: Let's go back on the
11 record. The Court thinks it has enough input on 13.8,
12 so we're going to move to 13.9.

13 Scott, you're doing that.

14 HON. SCOTT BRISTER: Right. 13.9 and
15 11.3 are related. HB 4 says it applies to cases filed
16 after September 1st, 2003. The subcommittee draft
17 says that specifically. And then, in the comment, it
18 says that when there's cases filed before September
19 1st, 2003, the pretrial court should confer and
20 coordinate proceedings with judges appointed under
21 current Rule 11 and then suggest in Rule 11 adding
22 language that the presiding judges -- you transferred
23 the cases to Judge Christopher's court that are filed
24 after September 1; cases that filed before September 1
25 encourage the regional judges to assign Judge

1 Christopher to all the same cases.

2 Now, there is a counter argument, and
3 I'll let Justice Hecht make that, that Rule 11 could
4 actually be rolled into this Rule 13.

5 JUSTICE HECHT: I think the Court would
6 at least like to explore whether we can't end Rule 11
7 at this point. I think the argument can be made that
8 this part of House Bill 4 is procedural and could have
9 been made retroactive, but the legislature clearly
10 didn't make it retroactive. So that seems to be the
11 end of that.

12 I think Rule 11 is almost certainly
13 procedural and there's no reason why the Court
14 couldn't say, if it wanted to, that the -- "Any
15 proceedings that are being conducted under Rule 11
16 after September 1st will be transferred to the judge
17 selected by the MDL panel."

18 Now, the MDL panel might want to leave
19 everything where it is or it might want to move cases
20 that are being pretried in different regions into one
21 region, which Rule 11 permits. Although, I don't
22 think it's ever happened. I'd hate for --
23 particularly for what we call "tag-along cases,"
24 new cases to come up, some of which would be under the
25 MDL jurisdiction and all these rules and some of which

1 will be under Rule 11.

2 So what does the committee think about
3 whether the Court could just say, "Whatever is being
4 done under Rule 11 will be reviewed by the MDL panel
5 at this point and they'll do whatever they can with
6 it." We could -- as a procedural rule, not as an
7 increase of the -- or change in the effective date of
8 the statute.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: I don't see why the
11 Court couldn't do anything it wants to do with
12 Rule 11, regardless of whether this is procedural or
13 not. I mean, that would seem to be within the Court's
14 purview. And it seems like, to me, that that would
15 make good sense rather than having two interlocking --
16 with slightly different MDL procedures.

17 CHAIRMAN BABCOCK: Richard.

18 MR. ORSINGER: Why was Rule 11
19 originally limited to administrative regions as
20 opposed to statewide?

21 JUSTICE HECHT: Because the structure of
22 Rule 11 is to assign a judge to the case rather than
23 the case to the judge, and under the statute that
24 allows judges to be assigned, that goes -- the
25 presiding judges to do that --

1 HON. SCOTT BRISTER: On a regional
2 basis.

3 JUSTICE HECHT: -- on a regional basis.
4 Judges can't be assigned out of region except by the
5 chief justice on the request of the presiding judges.
6 So there wasn't any other way to do it, basically.

7 CHAIRMAN BABCOCK: Under the statute.

8 JUSTICE HECHT: Under the statute. Rule
9 11 was working within some very difficult constraints.
10 One of them is that a district judge can't rule
11 outside the county. One of them is, the assignment
12 system that's set up by statute limits assignments
13 outside a region. And so we were just trying to take
14 advantage of those structures, but we couldn't get
15 outside of those.

16 MR. ORSINGER: But what's happened is
17 that there's been kind of a breakthrough in thinking,
18 in the sense that now we're assigning a case to a
19 judge rather than a judge to a case and so all these
20 constraints are no longer there?

21 JUSTICE HECHT: Well, I think we would
22 have done that -- I don't know if there's been a
23 breakthrough in thinking. We would have done that in
24 Rule 11. There just wasn't any authority to do it.

25 CHAIRMAN BABCOCK: And now we have the

1 authority under House Bill 4.

2 MR. ORSINGER: But we only have the
3 authority on a going-forward basis. I think the cases
4 that are filed after the effective date, I -- if there
5 was a statutory barrier to statewide application of
6 Rule 11 for cases that were filed before September 1
7 of 2003, isn't it still there?

8 JUSTICE HECHT: Well, not if it's
9 procedural.

10 MR. ORSINGER: Well, you know,
11 retroactivity is --

12 JUSTICE HECHT: I mean, arguably not --

13 MR. ORSINGER: -- a question of the
14 intent of the legislature. I mean, if the legislature
15 had said nothing --

16 HON. TOM. GRAY: Arguably, the
17 legislature did say something in House Bill 3386.
18 They said that the supreme court may consider the
19 adoption of rules relating to the conducting of
20 proceedings under Rule 11 by a district court outside
21 the court in which the case is pending. So that,
22 arguably, fixed the problem under the prior statute.

23 I had argued for leaving the current --
24 what we are doing as Rule 11 and having an additional
25 provision specifically incorporating this provision

1 under House Bill 3386 to allow the -- either the
2 supreme court under prior Rule 11 or the
3 administrative judges to actually use and transfer
4 cases under prior Rule 11 to the MDL trial court, but
5 I think this fixed any problem of transferring prior
6 Rule 11 cases to the new court selected by the MDL
7 panel. It's just that, under the House Bill 4, it's
8 not done under the House Bill 4 judicial panel
9 multidistrict litigation. The panel doesn't do it.
10 The administrative judges would do it under former
11 Rule 11.

12 CHAIRMAN BABCOCK: Pete.

13 MR. SCHENKKAN: As I hear it, there are
14 two questions here. One is the authority to do this
15 and the other is the policy desirability. If the
16 authority is there, is there any disagreement that it
17 would be a good idea to at least have the opportunity
18 to transfer these existing Rule 11 cases in multiple
19 regions to one MDL judge?

20 CHAIRMAN BABCOCK: John, did you have
21 your hand up?

22 MR. MARTIN: No, but I think it's a good
23 idea.

24 CHAIRMAN BABCOCK: You looked
25 interested.

1 (Laughter)

2 CHAIRMAN BABCOCK: Tracy, what do you
3 think about that?

4 HON. TRACY CHRISTOPHER: Well, I'm sort
5 of two minds on it. Texas is so large that I think
6 that the MDL judge or the -- our pretrial court judge
7 is going to have a heck of a job. I mean, Texas is
8 larger than, you know, five other states.

9 CHAIRMAN BABCOCK: France.

10 (Laughter)

11 HON. TRACY CHRISTOPHER: So, I mean, I
12 think, under the MDL, this rule, there was a
13 possibility that they might want to split it up and
14 have several judges for a county. And I think we
15 allowed that flexibility in the rule, didn't we,
16 Scott?

17 HON. SCOTT BRISTER: Let me think.

18 HON. TRACY CHRISTOPHER: Didn't we say
19 judge or judge, court or courts, or that's in the
20 statute to begin with?

21 Whatever this group wants to do is fine
22 with me. You know, I'm just kind of -- it is going to
23 be a very hard thing when you put everything together.

24 MR. SCHENKKAN: That's a third question,
25 whether they always will want to combine into one Rule

1 13 MDL pretrial judge all existing multiregion Rule
2 11, and the answer may be, "In some cases, no, you
3 wouldn't." And I could well see the reasons would
4 have to do with the investment of human capital we've
5 got in a set of cases in a particular region and the
6 judge associated with that. You know, there might be
7 a number of them we wouldn't want to mess with, but if
8 you have the power to, in an appropriate case where
9 you think it is appropriate to put them into one, we
10 want to be free to exercise that power.

11 JUSTICE HECHT: I'm not -- I mean,
12 that's one question, but a greater concern might be
13 whether you just want two sets of rules applied. I
14 mean, assuming that the MDL panel just left everything
15 that was functioning in place, as far as personalities
16 are concerned, wouldn't it make more sense -- or
17 not -- to transfer cases that are now being considered
18 by one judge under Rule 11 to that judge under this
19 new Rule 13 which couldn't be done before rather than
20 having the judge -- you know, the judge has
21 got -- if the pretrial judge has tag-along cases, some
22 of them have been transferred to the pretrial judge
23 under Rule 13. The pretrial judge is sitting there
24 working on those cases, set up a filing system, is
25 going by the rule, but some of the other cases were

1 assigned under Rule 11, and so that pretrial judge is
2 still going out different places doing all that under
3 Rule 11. It seems to me that it might be very
4 advantageous to just have one system working.

5 MR. SCHENKKAN: So you would say we just
6 amend Rule 11 to provide that Rule 11 now provides
7 what Rule 13 provides?

8 JUSTICE HECHT: Right.

9 MR. ORSINGER: I don't think you can
10 invest the MDL panel with authority under Rule 11. I
11 think you still have to use your presiding
12 administrative judges, but just allow them to
13 consolidate -- pardon me. Bad choice of words -- to
14 organize these cases in one court. But wouldn't that
15 have to be done administratively by the administrative
16 regional judges and not the MDL panel?

17 JUSTICE HECHT: They can't.

18 MR. ORSINGER: They can't? Even under
19 the authority of the statute that Justice Gray read?

20 JUSTICE HECHT: You'd still be assigning
21 the judge, not transferring the case. Right? Maybe
22 you could read that statute.

23 MR. ORSINGER: I'm a little troubled by
24 the idea that you can use the MDL panel structure to
25 reach cases that are not under the scope of the

1 statute, but if we could somehow use our existing
2 authority of administrative judges to organize all
3 those in a like manner in one court in one region,
4 even if it's just kind of fictional, that we're not
5 really assigning the case. We're just assigning that
6 one judge to all of these but allow him or her to hear
7 it out of one courtroom, you know, that seems to me to
8 be good policy.

9 HON. DAVID GAULTNEY: Statute, it says,
10 "by a district court outside the county." So, I mean,
11 that's statewide, any district court.

12 JUSTICE HECHT: But it says what now?

13 HON. TOM. GRAY: "The supreme court may
14 consider the adoption of rules relating to the
15 conducting of proceedings under Rule 11, Rules of
16 Judicial Administration, by a district court outside
17 the county in which the case is pending." You're
18 right. It doesn't say "transferred." It's "conducted
19 by a court outside the county," but I think that does
20 create the situation where the administrative judge of
21 a judicial region of a Rule 11 case would have to say,
22 "The case is not transferred, but that court that the
23 MDL panel selected is going to make all the pretrial
24 rulings in these Rule 11 cases."

25 MR. ORSINGER: And can they hold the

1 hearing in that other county? That seems to allow
2 them to hold the hearing in the other county, too. So
3 you have the functional equivalent of the --

4 HON. SCOTT BRISTER: It looks a lot like
5 a transfer.

6 MR. ORSINGER: Yeah. Maybe you send a
7 copy of the file instead of the original of the file
8 or maybe we just ignore that. I mean, in the last
9 analysis, it's a mandamus in your court that you get
10 to reject if --

11 (Laughter)

12 MR. ORSINGER: Isn't it?

13 JUSTICE HECHT: I was just -- I think
14 Pete put the issue well. Do people think it's a good
15 idea that from henceforth we only have one system
16 rather than two?

17 MR. ORSINGER: Yes. I think so.

18 HON. SCOTT BRISTER: Yes.

19 CHAIRMAN BABCOCK: Absolutely.

20 JUSTICE HECHT: And then I guess we just
21 have to agonize about the legal authority to do it.

22 HON. TRACY CHRISTOPHER: Chip, the only
23 reason you might want to consider having two is, there
24 has been a huge influx of filing of cases to get in
25 before the change in the law in House Bill 4. So

1 cases that are going to be filed after September 1st
2 are going to have a different law applied to them than
3 the cases filed before September 1st. So rulings
4 would be different with respect to evidence, for
5 example. Like subsequent remedial measures, whenever
6 that takes effect, you know, it's going to be
7 different. I think there's something in House Bill 4
8 about drug cases and a presumption with respect to the
9 FDA, so --

10 HON. SCOTT BRISTER: Venue.

11 HON. TRACY CHRISTOPHER: That will be
12 different in the new cases versus the old cases. That
13 would be a reason to keep them separate, just so you
14 know what law was applying.

15 CHAIRMAN BABCOCK: Anybody else?

16 Judge Brister.

17 HON. SCOTT BRISTER: It seems if you do
18 keep two separate, then there's going to be a lot more
19 judicial telephone calls back and forth, just as a
20 practical matter, to set up scheduling -- everything
21 the MDL pretrial court is going to do, set up
22 discovery schedules, trial settings, has got to be, to
23 some degree, coordinated with any remaining Rule 11
24 judges, because, otherwise, they'll be stepping on
25 each other's toes.

1 HON. TRACY CHRISTOPHER: Whatever the
2 group wants to do. I don't feel strongly about it.

3 CHAIRMAN BABCOCK: Judge Peeples.

4 HON. DAVID PEEPLES: It seems to me that
5 even if you would want to have one judge on a group of
6 cases after September 1st and a different regime for
7 the existing cases, it will be better to have one
8 judge on the existing cases than nine or seven or
9 whatever it is right now. That will be an
10 advancement. Even if you didn't have the same judge
11 on all of them, you wouldn't have to have multiple
12 judges on the same kinds of cases in different
13 regions, which you've got right now.

14 JUSTICE HECHT: And I think -- again,
15 for informational purposes, even though there have
16 been -- even though there are related cases that are
17 assigned to different pretrial judges in different
18 regions, it not infrequently happens that they just
19 designate one to have the hearing and make the
20 decision and then they all agree to it. And so they
21 haven't been -- in some of the litigation -- I can't
22 remember if it was breast implant or Phen Phen. There
23 was a panel of judges in Houston -- like three judges
24 that were assigned -- and all the rest of them in the
25 state just agreed to go along with whatever they

1 decided.

2 CHAIRMAN BABCOCK: Okay. Scott,
3 anything else on this?

4 HON. SCOTT BRISTER: No.

5 CHAIRMAN BABCOCK: Okay. I noticed that
6 there was a couple of -- Rule 6(e), is that something
7 we need to discuss?

8 MR. GRIESEL: This is an amendment to
9 the Rules of Judicial Administration. Rule 6(e) as it
10 currently stands now is the first sentence not in
11 italics and not in brackets. It says that the normal
12 time limits for civil cases, which in a jury is 18
13 months and in a nonjury 12 months from start to
14 finish. It is recognized that in complex cases, there
15 are special circumstances; it may not be possible to
16 adhere to these time standards.

17 A number of new courts that have adopted
18 complex case handling methods have also changed Rules
19 of Judicial Administration, and I think the major
20 reason is to make clear an expectation to the parties,
21 to the pretrial judge, to the panels monitoring them
22 of some idea what they want in terms of case handling.
23 It gives the attorneys a clear guidance on the length
24 of the litigation. It gives the panel an idea of the
25 amount of time, under Rule 13.2(g), when they ought to

1 be looking to see a case being remanded back to the
2 trial courts or maybe they ought to think about
3 retransfer.

4 So what I did was take the California
5 Rules of Judicial Administration and note that, yes,
6 all these cases under Rule 13 or Rule 11 are going to
7 be complex cases and have special circumstances and
8 we're probably going to not conclude them all in 18
9 months, but that we ought to be doing certain things,
10 that everyone ought to expect the trial court judge to
11 be stepping on their necks fairly early, continuously
12 and actively; that they ought to be planning on
13 receiving pretty strict time limits early on in the
14 case and that they can expect enforcement of those
15 time limits; and that the pretrial court -- and I
16 picked 18 months just to pick a time -- ought to be
17 planning on discharging its duties within that time
18 period, recognizing that there are, obviously, going
19 to be types of cases where you're going to far exceed
20 it. And this kind of puts, along with the -- this is
21 the only other place where we talk about how we expect
22 that pretrial court to do certain things within a
23 certain set time.

24 CHAIRMAN BABCOCK: You only mentioned
25 Rule 11. You mean to include --

1 MR. GRIESEL: I mean 13.

2 CHAIRMAN BABCOCK: -- 13.

3 HON. SCOTT BRISTER: Change those

4 numbers later.

5 CHAIRMAN BABCOCK: All right. Any

6 comments on this?

7 (No response)

8 CHAIRMAN BABCOCK: We've beaten them

9 down.

10 (Laughter)

11 CHAIRMAN BABCOCK: Judge Christopher.

12 HON. TRACY CHRISTOPHER: I'm opposed to

13 it. I like the first sentence that we have there, and

14 I wouldn't put the rest of it in it. Although I

15 understand Chris' point of view, we sometimes get

16 criticized in Texas for pushing our complex cases too

17 fast and causing discovery to have not matured,

18 creating the defendant's -- because the defendants are

19 forced with a thousand cases that are -- you know,

20 have to go to trial within this time period where they

21 can't possibly defend the thousand cases; so they

22 settle them all.

23 I mean, that is a criticism we get. So

24 I wouldn't put this in the rule. I wouldn't put this

25 18-month time limit in there.

1 CHAIRMAN BABCOCK: Any other comments?

2 MR. ORSINGER: Can I ask a question?

3 CHAIRMAN BABCOCK: Not beaten down.

4 Richard.

5 MR. ORSINGER: This is just
6 communication directly to the judges who are running
7 these cases to be mindful of the time? No party has
8 any right as a result of this. Right?

9 MR. GRIESEL: No. I mean, it follows
10 the rest of Rule 6, which says "District and statutory
11 courts should try to ensure that all cases are brought
12 to a trial and final disposition in times with these
13 time standards."

14 MR. ORSINGER: I would suggest that we
15 keep it, but cut the (3) out, because the policy in
16 (1) and (2) is certainly good, but I think that it's
17 debatable whether a case of this complexity can be
18 done in 18 months, if we're expecting the average case
19 to be done in 18 months.

20 MR. GRIESEL: Well, remember, this is
21 just an exhortion to the pretrial court to finish the
22 pretrial section of the case, not the whole case.
23 Just the assignment to it.

24 MR. ORSINGER: Okay.

25 CHAIRMAN BABCOCK: Judge Bland.

1 HON. JANE BLAND: A lot of times with
2 these cases you're going to be coordinating with the
3 federal MDL or class action to other places.

4 Like right now, I'm on the Sulzer hip
5 implant panel, and they're all settled -- I mean,
6 they're not yet, but they're about to be settled and
7 go away, but during the pretrial phases, you know, we
8 were actually -- not just us, but all state courts
9 were enjoined by a judge in Chicago from connecting
10 any proceedings -- any state court proceedings, and, I
11 mean, that was appealed and basically everything came
12 to a standstill in state court while that was going
13 on. And I just don't think -- you know, I think,
14 practically, if you're going to invest the trust of
15 these cases to a judge that's been looked over by a
16 panel of five people and that everybody has a right of
17 appeal to go to and you're saying you're going to get,
18 you know, a really good judge, then you have to count
19 on the really good judge to do what he or she thinks
20 is best to advance the litigation. And sometimes, you
21 know, establishing time limits early does not advance
22 the litigation, you know, and I think you just have to
23 leave it up to that judge so say, you know, "What can
24 we do to get these cases ready for trial? What's the
25 best use of our time?" And, "Should I follow a

1 federal injunction to" -- you know, "Do I even want to
2 test whether that is, you know, applicable to state
3 courts," which we did not, but --

4 CHAIRMAN BABCOCK: Judge Christopher.

5 HON. TRACY CHRISTOPHER: Well, there's
6 another specific factual thing in the Phen Phen cases.
7 We delayed the first hearing with respect to whether
8 the science was there, because there were ongoing
9 studies that still had to be completed and had to be
10 published and peer reviewed. I mean, there's a lot
11 that goes into complex cases, and, you know, I just --
12 I just hate to see us put that kind of time pressure
13 on the pretrial judge.

14 MR. GRIESEL: The 18 months was picked
15 arbitrarily. I looked at what the normal time to try
16 a civil case from start to finish was and said, "Okay.
17 The discovery period ought to be that length of time,
18 but it shouldn't be much longer." Again, it's a
19 general rule. Just like abatement of asbestos cases
20 or abatement of any cases, you take that into
21 consideration in the general civil suits; you would
22 take that into consideration in this.

23 I think if we're talking about ensuring
24 just and efficient conduct of actions, I think there
25 is, under the -- well, maybe a factor under efficient

1 conduct of actions is timeliness; maybe it's not. But
2 this does set out, I think, an expectation or makes
3 clear an expectation of some set of time for everyone
4 in the case to take a look at. And it may be that
5 it's inappropriate in cases.

6 I think the first half of that -- the
7 first sentence recognizes that -- as ongoing asbestos
8 cases may take 12 years to dispose of, but the
9 three-car crash in three different counties arising
10 out of a single incident may not, and I think it -- I
11 don't think anyone worried about the cases going to
12 the trial court judges here. I think it's more of a,
13 "What does someone who isn't privy to these
14 discussions, what are their expectations?"

15 CHAIRMAN BABCOCK: Anne McNamara.

16 MS. McNAMARA: Yeah. I would support
17 taking it out, too. I think the arbitrariness of 18
18 months could do a real disservice in certain cases.
19 And I think, in 13.5, we voted -- in the case
20 management stuff that was in italics, we sort of sent
21 a fairly strong signal to the pretrial judge to
22 move -- you know, to have schedules, move things
23 along, not let the thing just languish for a while.
24 So the first two paragraphs or sentences don't do any
25 harm, but I think (3) does.

1 HON. SCOTT BRISTER: That's a good
2 point. You could move (1) and (2) into 13.5 --

3 MS. McNAMARA: Well, you sort of have
4 them already.

5 HON. SCOTT BRISTER: -- (d).

6 MS. McNAMARA: It's already there.

7 HON. SCOTT BRISTER: To a large degree,
8 they're there already.

9 CHAIRMAN BABCOCK: Judge Gaultney.

10 HON. DAVID GAULTNEY: I join in that. I
11 like Richard's comment of adopting it but deleting
12 (3), because I understand the need for people outside
13 the system understanding how quickly, but I don't
14 think we want to create unreasonable expectations.
15 And I think 18 months, in many cases, is probably not
16 going to happen. I may be wrong, but I'm thinking in
17 a lot of these cases that it's going to take a little
18 bit more time. And I think if we set any time, we're
19 probably going to be wrong in -- I would favor just
20 (1) and (2).

21 CHAIRMAN BABCOCK: Is this something
22 that we need to vote on? Is there consensus on this?

23 PROFESSOR CARLSON: On taking out (3) or
24 leaving it --

25 CHAIRMAN BABCOCK: Taking out (3).

1 Yeah.

2 HON. TOM. GRAY: What if I just move to
3 include the language suggested by Chris, less (3),
4 change Rule 11 to whatever it's going to be. Leave it
5 Rule 11 if it is. I would also suggest take out
6 "consolidated or coordinated," just -- especially a
7 pretrial court handling cases under whatever, but --
8 and add that to the rule. In other words, lose (3)
9 and include the context of what Chris has otherwise
10 drafted.

11 HON. SCOTT BRISTER: In 13.5(d)?

12 HON. TOM. GRAY: My understanding is --

13 HON. SCOTT BRISTER: It seems to me we
14 ought to put it all in one place. 13.5(d), we're
15 encouraging the pretrial courts to do this, that and
16 the other, a dozen different things. If this is
17 mainly aimed at pretrial court MDL cases, it shouldn't
18 be over in another rule somewhere else.

19 HON. TRACY CHRISTOPHER: Right.

20 CHAIRMAN BABCOCK: That makes sense.
21 Okay. We'll do that.

22 HON. TOM. GRAY: I thought the purpose
23 was that it was more in the context of judicial
24 administration and you were looking to see what judges
25 were supposed to be doing with cases and that's why it

1 was over in 6(e), but maybe I'm missing the point.

2 HON. SCOTT BRISTER: They're both Rules
3 of Judicial Administration. They're both going to be
4 that.

5 HON. TOM. GRAY: But my understanding
6 was, we already had most of this in Rule 13. The
7 question was whether or not we wanted to put something
8 of the same ilk over in 6(e). And if we don't, then
9 we probably don't need to change Rule 13.

10 HON. DAVID GAULTNEY: What exactly is
11 Rule 6?

12 MR. GRIESEL: Rule 6 is a set of time --
13 suggested time tables that the supreme court
14 promulgated within the last ten years, which is just,
15 for various types of cases, a disposal time period.
16 In civil jury cases, it's 18 months from the date of
17 filing. The civil nonjury cases, it's 12 months from
18 the date of filing.

19 HON. DAVID GAULTNEY: So what this is
20 really doing is creating an exception to what Rule
21 6 --

22 MR. GRIESEL: There already is an
23 exception in 6(e). As it stands now, the first
24 sentence is the exception and it says to trial court
25 judges that it's recognizing you may have a complex

1 case; and, therefore, the provisions of 6 dealing with
2 18 months and 12 months may not apply to you. And
3 then what this was meant to do was to say, "Yes, but
4 it's not out there" -- "Take 12 years, 24 years."
5 It's, "Take as much time as you need to do this, but
6 step on the gas, a little at least."

7 HON. DAVID PEEPLES: Chip, if we want
8 pretrial judges to read this, we need to put it in
9 13.5(d). Is that --

10 CHAIRMAN BABCOCK: Boy, that makes sense
11 to me.

12 Scott, what do you think about that?
13 Chris?

14 HON. SCOTT BRISTER: Yes.

15 HON. TRACY CHRISTOPHER: That's fine.

16 CHAIRMAN BABCOCK: All right. What
17 else? Anything on this?

18 HON. SCOTT BRISTER: That's it.

19 CHAIRMAN BABCOCK: Okay. Well, I had
20 really hoped that we could get into offer of
21 settlement in this session, but I don't think it makes
22 any sense to try to dive into that right now. But if
23 somebody disagrees --

24 MR. SCHENKKAN: I do not disagree about
25 that at all, but before we --

1 (Laughter)

2 MR. SCHENKKAN: One last thing before we
3 leave MDL. I'm very concerned that an awful lot of
4 practicing lawyers in this state have almost literally
5 never heard of the Rules of Judicial Administration
6 but are aware of the Rules of Civil Procedure. I
7 would think it would be extremely helpful if we could
8 get something in the Rules of Civil Procedure that
9 cross-references this MDL practice, some allusion to a
10 motion for MDL transfer or something that says,
11 "Pursuant to Rule 13 of the Rules of Judicial
12 Administration." I think that all by itself will be
13 the single greatest contribution we can make to one of
14 the biggest problems I foresee, which is the learning
15 curve problem for 60,000 lawyers in the state -- or
16 whatever we're up to at this point, in learning about
17 this -- the change.

18 CHAIRMAN BABCOCK: I'm sure there will
19 be seminars on this.

20 MR. SCHENKKAN: I'm sure there will be
21 seminars, but not everybody who needs to goes to the
22 seminars.

23 CHAIRMAN BABCOCK: Yeah. That's true.
24 Alex.

25 PROFESSOR ALBRIGHT: I have to admit, I

1 thought these whole three days we were amending the
2 Rules of Civil Procedure.

3 MR. YELENOSKY: And if not, we need to
4 start over.

5 (Laughter)

6 PROFESSOR ALBRIGHT: Now, that changes
7 everything. Why are we not putting it in the Rules of
8 Civil Procedure?

9 HON. SCOTT BRISTER: Well, a large part
10 of it is what the MDL panel should do in transferring
11 cases. So it looks a little more administrative than
12 in actually procedure of the cases, would be the
13 argument. I'm going to assume that's why Rule 11 is
14 in the Rules of Administration rather than in the
15 Rules of Procedure.

16 PROFESSOR DORSANEO: Well, maybe not.

17 MR. ORSINGER: I thought this was in the
18 Rules of Procedure, too, because we're talking about
19 what goes in motions and where you file things and
20 stuff. There's so much procedure in here, that if
21 this isn't in the rules -- I think it ought to be in
22 the Rules of Civil Procedure, personally.

23 HON. SCOTT BRISTER: What happens to the
24 statutory deadlines and getting it done by September
25 1st, Judge Hecht?

1 JUSTICE HECHT: Well, I think you have
2 the problem either way. I mean, there's no compelling
3 reason to put them in the Rules of Judicial
4 Administration. Rule 11 was there, so we just put it
5 there. The MDL rules -- the Federal MDL rules were
6 separate from the Federal Rules of Civil Procedure. I
7 think, on timing, we'll have assurance from
8 Senator Ratliff and probably from -- and I assume from
9 Representative Nixon that the deadline was intended to
10 trump our ordinary comment periods under the
11 rulemaking statute.

12 When we put these out, we're going to
13 invite comment on them, but it will have to be changed
14 after they're already in place. So, I mean, I think
15 it's -- it could go either way.

16 HON. SCOTT BRISTER: How about putting
17 it in the Rules of Judicial Administration for now and
18 referring to the recodification draft --

19 (Laughter)

20 PROFESSOR ALBRIGHT: Geez. That's
21 already been two years.

22 HON. SCOTT BRISTER: -- who is going to
23 organize all these Rules of Civil Procedure, anyway,
24 exactly where to put it in the Rules of Procedure.

25 PROFESSOR ALBRIGHT: I think there are

1 lots -- there are some rule books that don't have the
2 Rules of Judicial Procedure and are --

3 (Simultaneous discussion)

4 HON. DAVIS PEEPLES: Don't buy them.

5 (Laughter)

6 PROFESSOR ALBRIGHT: Well, I have no
7 control over which ones my students buy, and so, you
8 know, it's -- I mean, to me, there's a lot of stuff in
9 here that lawyers need to know and it's difficult --
10 it's more difficult to find the Rules of Judicial
11 Procedure.

12 CHAIRMAN BABCOCK: Good point.

13 Richard. Then Bill.

14 MR. MUNZINGER: If you're going to put
15 them in the Rules of Civil Procedure, you need to look
16 at scope in Rule 1 as well as in the Rules of
17 Appellate Procedure which are limited to courts, and a
18 multidistrict panel is not a court. And so to the
19 extent that these governed procedures are for the
20 multidistrict panels, it would not be a court.
21 Obviously, the trial court and pretrial court are, but
22 there is that hiatus.

23 CHAIRMAN BABCOCK: Yeah. Good point.
24 Bill, and then Tracy.

25 PROFESSOR DORSANEO: Well, I agree with

1 Scott, really, ultimately, that it's not a good idea
2 to have all these separate rule books. And the reason
3 why things are separate has very little to do with
4 anything other than historical developments and
5 organizational schemes. If we put them in one place,
6 it would make considerably more sense than having the
7 Rules of Judicial Administration just generally off to
8 the side somewhere.

9 I personally think the reason that
10 they're separate has little to do with some principle
11 difference between civil procedure rules and those
12 rules and more to do with just the way things
13 developed.

14 HON. SCOTT BRISTER: But I would sure
15 feel more comfortable -- we did not have a lot of time
16 to look through all the Rules of Civil Procedure to
17 see what conflicts we might be creating. I would sure
18 feel more comfortable if a recodification committee
19 did that before they stuck them all in.

20 CHAIRMAN BABCOCK: Good point.
21 Pete.

22 MR. SCHENKKAN: The modest suggestion I
23 have for the short run, which I would hope would not
24 run the Court afoul of any comment obligations is, in
25 Section 8, pretrial procedure, take advantage of one

1 of the repealed section numbers and say, "For the
2 procedures governing MDL motions, see Judicial Rule of
3 Administration 13," or maybe "See Judicial Rule of
4 Administration 11 and 13," if we're continuing forward
5 with 11 for a while as well, just so everybody knows,
6 when they're looking at pretrial procedure and they're
7 holding a book that only has the Rules of Civil
8 Procedure in it, that there is such a thing and that
9 if they want to know more about it, they'd better go
10 buy a book that has the other one in it.

11 HON. SCOTT BRISTER: I think we need a
12 Rule 166 A-F. We've only got three or four Rule 166's
13 now.

14 (Laughter)

15 HON. SCOTT BRISTER: I think we need
16 some more.

17 (Laughter)

18 CHAIRMAN BABCOCK: Justice Hecht has got
19 a question about offer of settlement.

20 JUSTICE HECHT: Where are we? Has the
21 subcommittee finished a draft?

22 CHAIRMAN BABCOCK: Yeah. There's a new
23 draft in the materials for today.

24 JUSTICE HECHT: I'm just nervous about
25 us getting enough stuff from the committee in time to

1 think about it and work on it. So I think what the
2 Court will probably do is take the subcommittee's
3 draft and start working on that, pending your further
4 review in August. And if you've got comments
5 regarding that draft now, particularly subcommittee
6 members, but anybody, go ahead and send them to Chris
7 or me, Wallace, anybody, but get them to us so that we
8 can start -- so that we can put that on the agenda at
9 our August meeting.

10 CHAIRMAN BABCOCK: And let me just say,
11 Justice Hecht, that we got through the entire rule
12 last time, and there were just a few sections that the
13 full committee thought should be worked on. So there
14 wasn't a whole lot to do this session. So the draft
15 that we had to consider today is a pretty fully vetted
16 draft, although there are several sections that we
17 were going to have the full committee look at.

18 Don't you agree, Tommy and Elaine?

19 MR. JACKS: Yeah. There really were
20 only three issues, I think, that the subcommittee
21 thought needed any discussion here.

22 CHAIRMAN BABCOCK: Yeah.

23 JUSTICE HECHT: And also is -- Richard,
24 have you circulated your subcommittee's work?

25 MR. ORSINGER: We have circulated it by

1 e-mail, and it's been on the table over there also.

2 JUSTICE HECHT: So we're going to do the
3 same thing with it. With respect to the stuff in
4 House Bill 4 that has to be in there, we're going to
5 go ahead -- the Court is going to go ahead and put it
6 on its own agenda, realizing that you-all are going to
7 talk about it next time, but we just need to make sure
8 we're moving toward the deadline.

9 CHAIRMAN BABCOCK: Yeah. And our next
10 meeting is August 21 through 23rd. So that's the same
11 format, Thursday, Friday and half a day Saturday, and
12 we'll maybe not even have to polish up offer of
13 settlement, but we'll talk about that and we'll for
14 sure talk about class actions at that meeting.

15 Richard.

16 MR. ORSINGER: Yeah. Justice Hecht, let
17 me inquire. There's been some conversation during the
18 last three days about whether the class action rule
19 should be in any way altered as a result of the Texas
20 Supreme Court's decision in Banales and some of the
21 recent cases. An argument for that is that there may
22 been some clarification of procedures that we could
23 now codify. The argument against that is that the
24 court was interpreting the existing rule, and for us
25 to change the language now might bring into confusion

1 the holding in those cases.

2 Should our subcommittee spend -- we have
3 not. Should we spend any time whatsoever looking at
4 the trilogy of important supreme court cases and
5 trying to alter the rule if we think that it would be
6 appropriate or should we leave the rule the way it is
7 and let the cases say what they say?

8 PROFESSOR DORSANEO: Specially on the
9 trial plan issue, in my view.

10 JUSTICE HECHT: Yeah. I think maybe
11 you'd better look at them and see.

12 MR. ORSINGER: Okay. Then we'll do
13 that. Our subcommittee will do that.

14 So what's on the table over there does
15 not include any changes of that nature.

16 MR. GRIESEL: Just the fee section, I
17 think, is -- the rules that we need in place are the
18 ones dealing with the lodestar and the coupon fees.

19 MR. GILSTRAP: That's the last section.
20 We also have the two sections out of the federal rule
21 and Jamail Committee proposal that are almost
22 identical that deal with the procedures for assigning
23 class counsel and determining attorney's fees, but
24 they're all a package having to do with attorney's
25 fees.

1 MR. ORSINGER: But the deadline on that
2 rule -- I mean, the deadline on the class action rule
3 is 12/31.

4 CHAIRMAN BABCOCK: Yeah, but they got to
5 get it --

6 JUSTICE HECHT: We're trying to meet the
7 comment period whenever we can.

8 MR. ORSINGER: Okay. Well, let me ask
9 you this: Should we -- we have not had the
10 opportunity to offer to the entire committee changes
11 that we would recommend based on the federal rule
12 changes, which are going into effect December 1,
13 unless Congress countermands them. Part of those are
14 in our draft; part are not. So what you work with is
15 going to include some subcommittee suggestions that
16 don't have the blessing of the entire committee. So
17 just be aware of that.

18 CHAIRMAN BABCOCK: They understand that.

19 MR. ORSINGER: Okay.

20 CHAIRMAN BABCOCK: I've got to catch a
21 plane. So we're in recess. Thanks.

22 (Proceedings concluded at 11:42 a.m.)

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2 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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6 I, Patricia Gonzalez, Certified

7 Shorthand Reporter, State of Texas, hereby certify

8 that I reported the above hearing of the Supreme Court

9 Advisory Committee on the 19th day of July, 2003, and

10 the same were thereafter reduced to computer

11 transcription by me. I further certify that the costs

12 for my services in the matter are \$ 1095.00 charged to

13 Charles L. Babcock.

14 Given under my hand and seal of office

15 on this the 21ST day of July, 2003.

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17

18

19

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