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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 27, 2005

(SATURDAY SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 27th
day of August, 2005, between the hours of 8:57 a.m. and
12:05 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
TRCP 145/148	14430

Documents referenced in this session

05-17	Proposed changes to RJA 13
05-18	Proposed changes to TRCP 145/148
05-19	Proposed Evidence Rule 514, correspondence

1 yesterday that somebody used the phrase "death penalty"
2 because you've got a filing fee and then you've got to
3 certify all the pleadings that you're going to put into
4 it, so I guess that's what I was thinking, it was like not
5 an insignificant cost, but that that would be the thing
6 that you would split between the two sides, each side
7 would have to pay half of it.

8 HONORABLE STEPHEN YELENOSKY: If it's only
9 half, I mean, it's still half a death penalty. It still
10 could be a death penalty, in other words.

11 CHAIRMAN BABCOCK: A slower death, but
12 nevertheless.

13 HONORABLE STEPHEN YELENOSKY: Yeah.

14 MR. FULLER: Chip, Hays Fuller, and I'm here
15 for the court rules committee, but I am involved in some
16 of the same litigation that Bryan is involved in.
17 Listening to everybody yesterday, it seems like maybe --
18 maybe a good approach would be to allow the plaintiffs
19 first opportunity to sever out in the courts they now are
20 in those cases they know are cases that are unlikely to be
21 moved to MDL. We're talking mesotheliomas, lung cancer,
22 impaired cases that they know they've got good cases.
23 Secondly, once that has been done, the
24 defendants would then tag the cases that they want -- in
25 block, that they want to take to MDL, and it takes the

1 whole case. You know, if it's a 2,000-plaintiff case,
2 after the good cases have been severed out or the impaired
3 cases have been severed out, the defendants get a good
4 deal paying \$165 and moving it to MDL. There are a number
5 of single plaintiff cases in that category, there are a
6 number of 10-plaintiff cases in that category, but
7 basically the initial cost of moving the cases, not the
8 individual plaintiffs, but the cases remaining after
9 plaintiffs have severed out the impaired cases, to the MDL
10 would be born by the defendants. I think the defendants
11 could shoulder that. You know, defendants pay removal
12 fees or to remove cases to Federal court all the time.
13 It's a cost defendants are used to paying if they take the
14 case up.

15 Then once it's in MDL, it would be up to
16 each individual plaintiff's attorney to decide which cases
17 they want to move back through the MDL process to the
18 trial court for trial, and as Judge Christopher said
19 yesterday, I think there is a way that those cases can be
20 assigned a cause number as they come out of MDL to go back
21 to their home court, if you would.

22 The cost of severing those individual cases
23 would then be borne by the plaintiff, which would make
24 sense because those are cases that are going back to the
25 home court for trial, for settlement, to get money, quite

1 frankly; and most of those cases, as the judge pointed
2 out, do settle; and they settle for a significant amount
3 of money; and if you're doing a single plaintiff case,
4 that 100 -- whatever the cost of removing that one
5 plaintiff back to trial court, is going to be more than
6 made up in the settlements they receive for that case.

7 CHAIRMAN BABCOCK: So the initial -- under
8 your proposal the initial severance of the cases that are
9 good plaintiff cases not eligible for MDL, that would be a
10 plaintiff charge.

11 MR. FULLER: And plaintiff can control their
12 costs. They can sever none of them and incur no costs, in
13 which case the defendants bear all the cost of taking it,
14 you know, that group of cases, to MDL or they can sever as
15 many as they can find to keep their -- as working cases
16 that would be fee-generating cases for them --

17 CHAIRMAN BABCOCK: Right.

18 MR. FULLER: -- and let the defendants take
19 the rest.

20 CHAIRMAN BABCOCK: And so there will be a
21 disincentive under that proposal for the plaintiffs to
22 sever cases that they're not serious about because they're
23 going to have to pay.

24 MR. FULLER: Right.

25 CHAIRMAN BABCOCK: There would be a

1 disincentive for defendants to transfer cases because
2 they're going to have to pay.

3 MR. FULLER: Right.

4 CHAIRMAN BABCOCK: And there would be a
5 disincentive for plaintiffs to try to move it back because
6 they're going to have to pay.

7 HONORABLE JANE BLAND: The second one is not
8 right.

9 CHAIRMAN BABCOCK: Why is the second one not
10 right?

11 HONORABLE JANE BLAND: Because they pay one
12 transfer fee --

13 CHAIRMAN BABCOCK: Oh, okay.

14 HONORABLE JANE BLAND: -- and they pull
15 2,000 cases.

16 CHAIRMAN BABCOCK: Cases, right.

17 HONORABLE JANE BLAND: And under regular MDL
18 the defendant is charged the cost of transferring. So
19 that's no new -- that's nothing new.

20 CHAIRMAN BABCOCK: That doesn't do it, okay.
21 Justice Gray.

22 HONORABLE TOM GRAY: No, actually, Judge
23 Christopher has got the fix on that to incentivize the
24 defendant not to remove everything.

25 HONORABLE TRACY CHRISTOPHER: What we

1 anticipated was -- what we were tossing around last night
2 is that we would encourage the parties to work together in
3 the trial court level to sever and the -- like the file
4 would be necessary for those cases that were ready to go
5 to trial that would stay there, and basically, those
6 people who didn't have a complying report or no report at
7 all we wouldn't really even need the file. We would just
8 need to know who they are and maybe the petition to keep
9 track of where they're going. So that severance cost
10 would not be too expensive, and we could have the
11 defendant pay that cost in bulk.

12 To get -- our thought was then to get people
13 to work together, was that if the defendant pulled too
14 many cases up that the defendant would have to pay the
15 cost of a wrongful remand. It's kind of going back to my
16 loser pays, but it's not because it's just the cost of the
17 remand. And I also was persuaded by yesterday's comments
18 that we should probably eliminate the no report, bad
19 report distinction, because people seem to be confused
20 exactly as to what the distinction was --

21 CHAIRMAN BABCOCK: Uh-huh.

22 HONORABLE TRACY CHRISTOPHER: -- and I was
23 also thinking that perhaps what we should try to do is put
24 maybe a six-month deadline for parties to work together to
25 do this in the original initial attempt to work --

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE TRACY CHRISTOPHER: -- and figure
3 out what the cases are like.

4 CHAIRMAN BABCOCK: Measured from when? When
5 the rule becomes effective?

6 HONORABLE TRACY CHRISTOPHER: Well, I'd do
7 six months from December 1st, which would -- whatever date
8 that is, would then give people time -- we have to have a
9 rule effective by December 1st, in my opinion, because if
10 we don't, that's the date the defendant first can transfer
11 a file, and if we don't have some procedures in place, you
12 know, it's going to start happening.

13 CHAIRMAN BABCOCK: Yeah. Well, that
14 suggests then that we can't go the comment route, doesn't
15 it, because you can't get rules by December 1 if you go
16 the comment route?

17 HONORABLE TRACY CHRISTOPHER: I mean, at
18 least if we -- if we make a six-month deadline people will
19 look at the rule and it will give them some time to think
20 about it.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE TRACY CHRISTOPHER: Even though
23 it's effective as of December 1. Because otherwise, if we
24 have nothing effective as of December 1, things are just
25 going to get transferred under the old transfer rule,

1 files are going to get moved. It's going to be confusing.

2 CHAIRMAN BABCOCK: Yeah. Carl.

3 MR. HAMILTON: When the case goes back to
4 the district court is there another filing fee to be paid
5 at that time?

6 HONORABLE TRACY CHRISTOPHER: Well, I don't
7 know. I mean, that's a real question as to whether there
8 should be another filing fee.

9 MR. HAMILTON: Can we fashion a rule that
10 controls these costs?

11 HONORABLE TRACY CHRISTOPHER: I mean,
12 currently there is not --

13 MR. HAMILTON: Send it back and have no more
14 fee paid.

15 HONORABLE TRACY CHRISTOPHER: Currently
16 there is not a filing fee going back because the thought
17 was they had already paid the filing fee the first time
18 around. There is a filing fee in the MDL court, and the
19 only cost in going back -- well, if it's a single
20 plaintiff case there is no cost, which, you know, I just
21 shift the file back. If severance was necessary then
22 there would be a severance cost in shipping it back, but
23 the problem is from -- I think from a clerk's perspective,
24 and if we -- you know, this case got transferred two years
25 ago, as far as they're concerned or -- or maybe some of

1 them stayed there and now they've tried and there is final
2 judgments out of that cause number and all of the sudden
3 the other plaintiffs are going back and we're telling them
4 to open up the closed file.

5 I'm almost thinking it would be better to
6 have them start a new file and that you would have to pay
7 a new filing fee back at the trial court level.

8 MR. LOW: You know, like in Orange, they
9 were saying that they don't even know you were ever there.

10 CHAIRMAN BABCOCK: Yeah, Bonnie's got input
11 on this.

12 MS. WOLBRUECK: If a case is transferred
13 out, the assumption is that the court no longer has
14 continuing jurisdiction and the transfer order closes out
15 that case. That's the assumption now. If that case comes
16 back, if it does not go back into the same cause number by
17 the order, then a new cause number is set up and the cost
18 is actually there to cover all of the data entry costs and
19 all of the setup of that file, and so if you put it back
20 into the original cause number then that data entry has
21 already been completed and all of those parties are in
22 that case.

23 If you put it -- if it comes back and it's
24 set up into a new cause number, which would be the normal
25 fashion of receiving a case back, then all of the data

1 entry, the like, all of the clerk clerical duties are
2 required again, thus one of the reasons for the additional
3 filing fee. If that makes any sense.

4 CHAIRMAN BABCOCK: Buddy, did you have
5 something?

6 MR. LOW: No, I was just relating the Orange
7 situation they talked about where you come back and it's
8 going to be new because they don't even know you were ever
9 there.

10 CHAIRMAN BABCOCK: Yeah. Justice Gray, you
11 had your hand up.

12 HONORABLE TOM GRAY: Well, it was to make
13 sure that what we were talking about was -- as I
14 understood it, it would be considered that the removal in
15 effect was improper by the defendant and then that the
16 defendant when they -- because they grabbed more cases
17 than what they should have in the removal, and so when
18 they send it back to the trial court it would be set up as
19 a single plaintiff case at that time, severed from its
20 original case, and that the defendant would bear the cost
21 of that removal, or excuse me, the filing at the remand.

22 The incentive there then becomes for the
23 plaintiff and the defendant to work together before the
24 removal to get the cases out of the big case, the big
25 hopper cases, and get them severed at the plaintiff's cost

1 first so that they don't go to the MDL, and the
2 defendants' incentive is to not let a case be wrongfully
3 included in the batch that gets removed because if it gets
4 remanded they're going to have to pay the cost of the
5 severed case on remand instead of the plaintiff, and so
6 there is chips to be shared, if you will, through the
7 process that Judge Christopher explained.

8 And while the December 1 is the deadline,
9 it's the deadline for the plaintiff in a pre-9-1-03 case
10 to file their expert report. It would seem to me that it
11 would not necessarily be improper for the Court to put a
12 moratorium on filing removal actions to get them there
13 just because the plaintiff has had -- already had required
14 to file their report. In other words, it seems that the
15 Court to allow the comment period to work could put a
16 moratorium on defendants filing removal actions. I don't
17 see an impediment to that.

18 HONORABLE TRACY CHRISTOPHER: Well, but the
19 problem is the cases are set for trial and then, you know,
20 what do you do with -- unless you put a stay on all the
21 cases all across the whole state.

22 HONORABLE TOM GRAY: Okay. I had forgotten
23 that these are going to trial.

24 CHAIRMAN BABCOCK: So that would be a
25 reason. Yeah.

1 MR. FULLER: Chip?

2 CHAIRMAN BABCOCK: Yeah, Hays.

3 MR. FULLER: Couple of thoughts, number one,
4 the shorter the time period for implementing this
5 procedure, the more simple the procedure needs to be,
6 because those who are not involved in this litigation
7 really don't have a concept of how overwhelming it can be.

8 Secondly, most defendants do not have any
9 information on these cases. Most of that information
10 comes very late in the process. It comes 60 days before a
11 trial setting, 75 days before a trial setting before the
12 defendant even knows whether they're identified in the
13 case or really what the plaintiff's complaints are.

14 Under those circumstances, a case like Bryan
15 was talking about yesterday with 2,000 plaintiffs in it,
16 the Daniels case, we're -- I have a defendant in that
17 case. We have probably got discovery on about 10 percent
18 of those plaintiffs. It would be virtually impossible
19 under those circumstances to expect us to make an informed
20 decision as to whether the case ought to be removed or
21 not. Therefore, the first cut, in my opinion, has to be
22 made by the plaintiff, who in most instances, if not all
23 instances, is solely in control of the information as to
24 the merits of that case.

25 The plaintiff is going to have to decide

1 right off the bat this is a good case, this is a bad case.
2 If it's a good case, I need to sever it to make sure that
3 it's not in a position to be tagged. If it's a case that,
4 you know, I know is unimpaired and I'm going to leave it
5 out there for the defendants to pick, knowing that those
6 defendants probably have very little, if any, information
7 on those particular plaintiffs. I mean, I think that's
8 just a practicality of the --

9 CHAIRMAN BABCOCK: Does anybody disagree
10 with that first point, that in the first instance the
11 plaintiffs ought to be severing out the good cases that
12 are not going to go to the MDL? Does anybody see any
13 flaws in that argument or that thought?

14 Frank, you were about to say something?

15 MR. GILSTRAP: I just had a couple of
16 questions, but I don't have a comment on that.

17 CHAIRMAN BABCOCK: Okay. Judge Christopher,
18 do you?

19 HONORABLE TRACY CHRISTOPHER: No, but I was
20 just going to reply to the idea that the defendants don't
21 have any information. Well, if you don't have any
22 information, don't remove it.

23 MR. FULLER: But then the deadline is
24 running.

25 HONORABLE TRACY CHRISTOPHER: I mean, that

1 really is what I am trying to prevent and what is -- what,
2 you know, I'm afraid on December 1 will happen.

3 CHAIRMAN BABCOCK: Kay, you apparently --
4 your hand shot up like a pistol.

5 HONORABLE TRACY CHRISTOPHER: I mean, that's
6 the point.

7 MS. ANDREWS: During the legislative process
8 I think that point was made very clear, that one of the
9 benefits of the legislation was really to take all of
10 those cases that, if you will, have sat at the back of the
11 closet, where there is no information. They've just been
12 dormant, plaintiffs haven't done anything, no one knows
13 whether they in many instances there's even any contact
14 with the client, frankly. You know, some of these people
15 no longer live in the country, some of these people are
16 dead and their attorneys don't know it. Some of these
17 people are lost and have no contact.

18 So part of the benefit of the whole
19 legislation was if you can transfer all that stuff at the
20 back of the closet, so to speak, to the MDL, let it sit
21 over there, don't burden the district courts with all of
22 that. So it's exactly the cases on which we have no
23 information that everyone on December 2nd is most eager to
24 get --

25 HONORABLE TRACY CHRISTOPHER: No, but my

1 point is in the 2,000-plaintiff case you might have 1,500
2 or 1,800 that you have no information on, but what I don't
3 want you to do is to remove all 2,000. You know, what
4 we're trying to do is have you work with the plaintiff's
5 lawyer before you do that to figure out which are the
6 cases that need to stay and which need to come.

7 MR. FULLER: The problem with that is if you
8 impose deadlines on a window. If you have a window, a
9 hard window --

10 HONORABLE TRACY CHRISTOPHER: I'm taking
11 that deadline off. I've been persuaded that --

12 MR. FULLER: Well, no, but you're still
13 putting in a six-month deadline.

14 HONORABLE TRACY CHRISTOPHER: Well, six
15 months, you ought to be able to talk to everybody in six
16 months.

17 MR. FULLER: But if we leave those cases
18 pending in the trial courts right now, six months from now
19 we won't know any more than we know today.

20 HONORABLE TRACY CHRISTOPHER: Talk. Talk to
21 each other.

22 CHAIRMAN BABCOCK: Michael.

23 MR. FILLA: Mike Filla. If Bryan were here,
24 to be fair, I think his hand would have shot up the
25 fastest. I was in -- at your suggestion. I was in Judge

1 Sebesta's court this past week in a case with a hundred
2 and some-odd plaintiffs where the decision was there had
3 been motions filed to have separate trials, break them
4 into individual plaintiffs, and only one could be tried at
5 a time. Judge Sebesta asked, "All right, who is going to
6 pick the one plaintiff?" Plaintiffs' counsel absolutely
7 refused for ethical reasons.

8 A suggestion like that, you put them in an
9 ethical quandry. How do they look at their plaintiffs and
10 say, "Okay, I pick you to try. You're the good case, and
11 you people, I'm putting you in cold storage forever"?
12 That's a situation they won't want to be in.

13 HONORABLE STEPHEN YELENOSKY: It also -- I
14 was wondering. We didn't have him here. I was thinking
15 if the plaintiff has incomplete information about his
16 clients he risks malpractice in not doing whatever it is
17 that keeps it from getting sent to MDL.

18 HONORABLE TRACY CHRISTOPHER: No.

19 HONORABLE STEPHEN YELENOSKY: It's one thing
20 to say -- well, because, I mean, it's one thing to say
21 that somebody is going to move these things back. It's
22 another thing to say that the plaintiff's attorney is
23 going to, as he said, pick and choose among his many
24 clients.

25 CHAIRMAN BABCOCK: Yeah, Judge Christopher,

1 isn't the answer whatever the window is, whether it's a
2 short window or a long window, as that deadline
3 approaches, you know, perhaps Hays will attempt to talk to
4 the plaintiffs and say, "You know, hey, tell me," but that
5 if the window is about to shut and he doesn't have any
6 information, he's probably going to take it to your court?

7 HONORABLE TRACY CHRISTOPHER: But why? I
8 mean, if it's not going to trial, it can sit in the trial
9 court till they discuss and exchange information on which
10 cases need to stay and which cases need to come.

11 MR. FULLER: Not once the window is closed.

12 HONORABLE TRACY CHRISTOPHER: That's what
13 I'm saying. I'm saying six months. You know, the Bar
14 ought to be able to talk to each other.

15 CHAIRMAN BABCOCK: No, no. But there's
16 still a window.

17 MR. FULLER: There's still a window.

18 CHAIRMAN BABCOCK: There's a window. It may
19 be a bigger window, but the window is going to close on a
20 date certain.

21 HONORABLE TRACY CHRISTOPHER: Well, yeah,
22 and maybe at six months if they haven't talked to anybody
23 they will remove it to me.

24 CHAIRMAN BABCOCK: That's what I'm saying.
25 They will.

1 MR. FULLER: There is an alternative that we
2 haven't talked about, but it was suggested or mentioned
3 yesterday. The way these cases work, at least in many
4 instances, as I say, 60 to 75 days in advance there will a
5 trial setting, things will start happening, information
6 will start to be exchanged. At that point in time both
7 parties are in a position to make an informed decision.

8 Quite frankly, there are these trial
9 settings that come up every week, multiple settings,
10 multiple counties. Maybe at best 90 days out defendants
11 have an opportunity to see information that they can start
12 analyzing to make those informed decisions. You could
13 have a rolling removal date that perhaps says that within
14 a certain period of time following notice of a trial
15 setting the defendant has to remove it to MDL if they want
16 it to go through the pretrial workup or not. Not
17 necessarily my preferred alternative, but it would fit
18 what really goes on out there in the litigation to some
19 extent.

20 CHAIRMAN BABCOCK: Stephen, and then Kay.

21 HONORABLE TRACY CHRISTOPHER: Can I just
22 make one point as to Stephen's comment?

23 CHAIRMAN BABCOCK: Yeah, sure.

24 HONORABLE TRACY CHRISTOPHER: There's no
25 down -- I mean, there is no malpractice in a plaintiff's

1 lawyer allowing his case to come to the MDL. The only
2 possible harm --

3 HONORABLE STEPHEN YELENOSKY: Delay.

4 HONORABLE TRACY CHRISTOPHER: -- is a slow
5 down.

6 HONORABLE STEPHEN YELENOSKY: But that can
7 be it, can't it?

8 HONORABLE TRACY CHRISTOPHER: Well, but, you
9 know, if he doesn't have medical on his client and he
10 hasn't sent him to a doctor or whatever, you know, to the
11 extent that's malpractice it's already occurred.

12 HONORABLE STEPHEN YELENOSKY: Well, isn't
13 there a shift in the burden, though? I mean, if he keeps
14 it there, if he severs it, then he doesn't have to make
15 the case to get it back. If it gets removed, if a case
16 that shouldn't have been removed gets removed with a bunch
17 of other cases, then with every one of those, including
18 the one he should have severed, he's got the burden of
19 getting it back.

20 HONORABLE TRACY CHRISTOPHER: Yeah, but I
21 mean, it's still, you know, other than a couple of months,
22 not malpractice, and I think we need to be --

23 HONORABLE STEPHEN YELENOSKY: Well, what
24 about the ethical concern?

25 HONORABLE TRACY CHRISTOPHER: Well, that I

1 don't know. You know, I can understand how a plaintiff
2 would be reluctant to pick among his plaintiffs as to
3 which case goes first, but that's --

4 MR. FULLER: Judge, as a matter of fact,
5 they did that already. All summer long we have been
6 trying cases and working up and settling cases that
7 plaintiffs severed out of these massive filings that were
8 impaired that they were trying to get through the window
9 before the rule started. That ethical decision they have
10 been making all summer long on the plaintiffs' side of the
11 docket.

12 CHAIRMAN BABCOCK: Yeah. Seems to me
13 inevitable, but, Kay, you had your hand up.

14 MS. ANDREWS: I think they covered it.
15 That's okay.

16 CHAIRMAN BABCOCK: Stephen, didn't you have
17 your hand up a minute ago?

18 MR. TIPPS: I did, but go ahead.

19 CHAIRMAN BABCOCK: Sure? Okay, Jeff.

20 MR. BOYD: I actually have a question
21 probably for Kay. I went back and reviewed the statute
22 after discussing yesterday, and there's that whole
23 business about motions to dismiss. I mean, really what
24 the defendant has is an option. If they don't give you a
25 report, you can either move it to MDL or notice of

1 transfer to MDL or you can just move to dismiss the case
2 outright.

3 HONORABLE TRACY CHRISTOPHER: No.

4 MR. BOYD: Now, I recognize in certain
5 jurisdictions it's probably not worth the time preparing
6 that motion, but is there some percentage of these thirty
7 to forty thousand cases that defendants plan to just move
8 to dismiss outright?

9 MS. ANDREWS: The motion to dismiss practice
10 is really only for those filed after 9-1-05, and there was
11 a deliberate decision made to -- with the pre-9-1-03 cases
12 the only remedy that the defendants have for those
13 unimpaired cases is to move them to the MDL where they
14 would sit in suspense basically.

15 HONORABLE TOM GRAY: The plaintiff can
16 choose to dismiss that case, that 9-1-03 case.

17 MS. ANDREWS: I'm sorry?

18 HONORABLE TOM GRAY: Can't the plaintiff
19 choose to dismiss without prejudice on a limitation?

20 MS. ANDREWS: Certainly. A plaintiff always
21 -- I mean, there is nothing that has changed in that
22 regard. A plaintiff can actually move to dismiss in the
23 trial court or in the MDL court any of these cases at any
24 time.

25 But I also just wanted to address briefly

1 this comment about the penalty of the MDL, and I agree
2 completely with Judge Christopher that there's not a -- it
3 shouldn't be malpractice to move it into the MDL. The
4 issue is if a plaintiff files a complying report by
5 December 1 then the case doesn't belong in the MDL for the
6 pre-9-1-03 cases. So like we're saying, it is solely
7 within the purview of the plaintiff and his attorney to
8 get things done and if, in fact, he's impaired to get
9 everything done by December 1st. If that doesn't happen,
10 everyone across the state knows that come December 2nd
11 that case is subject to removal.

12 HONORABLE STEPHEN YELENOSKY: But you would
13 have --

14 THE REPORTER: I can't hear. I can't hear.

15 CHAIRMAN BABCOCK: Whoa, whoa, whoa.
16 Stephen, you've got to speak up.

17 HONORABLE STEPHEN YELENOSKY: I mean, I was
18 just saying -- she's saying that's their burden to file a
19 complying report, but of course there can be differences
20 of opinion about whether it's complying or not, so it's
21 not so obvious.

22 CHAIRMAN BABCOCK: Okay.

23 MS. ANDREWS: And we'll see how that plays
24 out before the judges come December.

25 CHAIRMAN BABCOCK: Well, it sounds to me

1 like at least Hays' idea that to the extent we can write
2 it into a rule there ought to be a rule to say that the
3 plaintiffs ought to get -- sever out at their expense
4 cases -- and I don't know how you describe the cases, but
5 cases that they think ought to not go to MDL. Is that
6 fair?

7 HONORABLE TRACY CHRISTOPHER: They ought to
8 sever out the cases that do have a compliant report, that
9 they believe have a compliant report.

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE TRACY CHRISTOPHER: Or meet the
12 cancer exception.

13 CHAIRMAN BABCOCK: Yeah. So that body of
14 cases ought to be -- the burden ought to be put on
15 plaintiff to do that at their own expense.

16 HONORABLE TRACY CHRISTOPHER: Right.

17 CHAIRMAN BABCOCK: So we got that far
18 anyway.

19 HONORABLE TRACY CHRISTOPHER: Although, what
20 I would like, and I don't know if this is possible in
21 terms of the severed case, so say you have 50 cases and 10
22 of them the plaintiff wants to keep and they've got
23 compliant reports on it. The bulk of the file needs to
24 stay there without having to recopy it. Okay. The bulk
25 of the file needs to stay with that 10. The 40 need to be

1 in a suit with no pleadings or just the petition, and
2 normally it gets reversed when you try to sever your own
3 case out. You've got to pay the cost of all the copies.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE TRACY CHRISTOPHER: I guess the
6 plaintiff -- what we really want then is for the plaintiff
7 to sever out those people that they know at this point
8 don't have a compliant report. It should be written that
9 way so that they sever it out, and the only thing in there
10 is like an original petition. Because otherwise, you
11 basically will duplicate an entire file and all the
12 expense involved in that.

13 CHAIRMAN BABCOCK: Yeah, you've got a case
14 of a hundred plaintiffs and 10 of them don't have a
15 report. Are you saying that those 10 ought to be severed
16 into a separate --

17 HONORABLE TRACY CHRISTOPHER: Right.

18 CHAIRMAN BABCOCK: -- cause of action?

19 HONORABLE TRACY CHRISTOPHER: Right.

20 CHAIRMAN BABCOCK: And then the other 90 are
21 just --

22 HONORABLE TRACY CHRISTOPHER: Just stay
23 there and let the trial court deal with.

24 CHAIRMAN BABCOCK: Stay there. Okay.

25 HONORABLE TRACY CHRISTOPHER: And, as I

1 said, most of them will settle. If they had to go to
2 trial you had to sever them out at that point.

3 CHAIRMAN BABCOCK: The plaintiff, the
4 plaintiff says it may not be apparent from the file, but
5 all my guys either have or will have compliant reports, so
6 I'm not going to sever anything.

7 HONORABLE TRACY CHRISTOPHER: Well --

8 CHAIRMAN BABCOCK: And if I do, that's an
9 admission --

10 HONORABLE STEPHEN YELENOSKY: Yeah.

11 CHAIRMAN BABCOCK: -- by me that I don't
12 have a compliant report.

13 HONORABLE TRACY CHRISTOPHER: But they're
14 going to admit it. I mean, Bryan yesterday admitted he's
15 got -- it's going to be between 70 to 80 percent that they
16 all know that their clients don't meet the medical
17 criteria at this point. They may in a couple of years.

18 HONORABLE STEPHEN YELENOSKY: Does that mean
19 he's willing to identify them, though? He may be willing
20 to concede that that's going to happen, but that's not
21 necessarily the same as saying "These are the ones."

22 HONORABLE TRACY CHRISTOPHER: Well, if we
23 make it financially better for him to do that and still
24 put a disincentive on the defense side not to remove
25 everything, I mean, that's the idea, when Bryan was

1 talking yesterday that we need to put a little bit of
2 pressure on both parties financially to make the right
3 decision.

4 CHAIRMAN BABCOCK: Steve.

5 MR. TIPPS: I was just going to say, the
6 statute puts the burden on the plaintiff to identify the
7 cases because the statute obligates the plaintiff to file
8 a compliant report for those cases in which the claimant
9 is impaired, and so the plaintiff has to do that.

10 HONORABLE TRACY CHRISTOPHER: Right.
11 Because they do --

12 MR. TIPPS: If one doesn't do that, the
13 defendant under the statute has the right to transfer to
14 the MDL.

15 HONORABLE STEPHEN YELENOSKY: But if there
16 is a report, doesn't the plaintiff have an obligation if
17 you can't get a better report to argue that it is
18 compliant?

19 HONORABLE TRACY CHRISTOPHER: Well --

20 MR. TIPPS: Well, I mean, depends, if
21 there's a good faith argument that it is.

22 HONORABLE STEPHEN YELENOSKY: Right. Right.
23 So he may be saying there is a bunch he has a good faith
24 argument are compliant but he thinks they're probably
25 going to get thrown out. He's not going to say, "These

1 are the ones."

2 HONORABLE TRACY CHRISTOPHER: I think there
3 will be a large number of plaintiffs that do not meet the
4 impairment criteria or the x-ray criteria, and that is not
5 even something that's subject to dispute. I mean,
6 wouldn't you say that that's true?

7 MS. ANDREWS: That was the whole point, was
8 to make it fairly objective.

9 HONORABLE TRACY CHRISTOPHER: Yeah. I mean,
10 it's an objective standard. You have to have a special
11 B-reader who looks at this x-ray and has to give a certain
12 level of impairment; and if you don't have a B-reader and
13 you don't have that level of impairment, that's it; and
14 then your breathing test has to be a certain level, too;
15 and it has to be done by a qualified doctor. It has to be
16 done by a board certified doctor; and you don't have that
17 and you don't have that level, that's it. I mean, there
18 are some gray areas.

19 HONORABLE STEPHEN YELENOSKY: Yeah, maybe
20 it's cut and dried, but you could say the same thing about
21 DWI, I imagine.

22 HONORABLE TRACY CHRISTOPHER: No.

23 HONORABLE STEPHEN YELENOSKY: People get
24 past that all the time.

25 HONORABLE TRACY CHRISTOPHER: Because it

1 doesn't matter whether there is a competing issue.

2 HONORABLE STEPHEN YELENOSKY: Hmm.

3 HONORABLE TRACY CHRISTOPHER: Okay. So it's
4 not like -- if the plaintiff has a doctor that says this,
5 the plaintiff is good. It's not like you're weighing
6 competing people.

7 HONORABLE STEPHEN YELENOSKY: Okay.

8 CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: I was intrigued
10 by your comment that you don't want those cases removed in
11 which there's no -- nothing in the record on which a
12 decision could be made as to whether it's compliant.
13 That's the way I heard it.

14 HONORABLE TRACY CHRISTOPHER: No. What I
15 don't want them to do is to knee-jerk remove the entire
16 case. I mean, if there are a thousand plaintiffs that
17 they've never gotten any information from and they say to
18 plaintiffs' lawyer, "Hey, have I ever gotten any
19 information from you" and plaintiffs' lawyer says "no,"
20 well, that's sufficient basis to remove them.

21 HONORABLE DAVID GAULTNEY: Okay. Well, it
22 seems to me that -- and maybe I'm misunderstanding the
23 statute. I tried to read it last night, but it seems to
24 me that that may be the group of cases where both sides
25 think it's appropriate to go to MDL. In other words, the

1 case isn't which -- for whatever reason, there's
2 insufficient medical and they require additional pretrial
3 development.

4 HONORABLE TRACY CHRISTOPHER: Right.

5 HONORABLE DAVID GAULTNEY: Okay. So why
6 would it not be possible -- and let's just take a
7 hypothetical, a hundred-plaintiff case, for the defendant
8 to designate -- well, first of all, to have the plaintiffs
9 cut. The plaintiff says, "Okay, 10 percent of these are
10 these cases" and get them out of the -- sever them into
11 individual files at the trial court level because those
12 cases will support the severance. Okay. I mean, all
13 right. And whatever other cases will support the
14 severance.

15 Okay. Then you have a designation of the
16 defendant of the remaining 75 cases, say, of 50, just list
17 the name of plaintiffs within that file that are noticed
18 for removal. Then in response to that the plaintiffs
19 attorney could designate those that they're seeking to
20 remand, and it may not be the entire 50 because there may
21 be 30 that while he wouldn't say there's nothing in this
22 file, he wouldn't affirmatively say that, he would allow
23 to be taken to MDL because those are exactly the cases he
24 thinks ought to be there.

25 And then at that point the trial court has a

1 group of cases that's going to MDL that's really tacitly
2 agreed. It's that 25 percent or whatever. He has a group
3 of cases that has been severed out because they are the
4 cases that are going to get tried in six months and they
5 are individual files and they're likely not to be removed
6 and if they are going to be removed they are going to be
7 at the top of your list. And then he's got a group of the
8 contested cases in the middle on which motions to remand
9 have been filed. And if we set a deadline for this whole
10 process to go through, there will be a deadline at which
11 -- at the trial court level those cases in which there's a
12 motion to be remand has been filed can be severed into
13 individual cases.

14 Now, I'm not sure that that -- I think that
15 cost can be imposed then, because if a plaintiff's
16 attorney files a motion to remand, that means that case is
17 worth trying. It's ready. It can support a filing fee,
18 and at that point you could sever it. You will then have
19 a group of cases that is uncontested that will go to the
20 MDL, and whatever you're keeping these, until they're
21 ready. You will have a group of contested cases that are
22 in individual files that you're going to have to consider,
23 and you'll have a group of cases that aren't going to be
24 removed. And what's wrong with that process?

25 HONORABLE TRACY CHRISTOPHER: So we keep it

1 all -- you're keeping it all at the trial level?

2 HONORABLE DAVID GAULTNEY: No, the files can
3 stay there.

4 HONORABLE TRACY CHRISTOPHER: Right.

5 HONORABLE DAVID GAULTNEY: But they're
6 severing. You don't really need the files, right?

7 HONORABLE TRACY CHRISTOPHER: No, I --

8 HONORABLE DAVID GAULTNEY: I mean your --

9 HONORABLE TRACY CHRISTOPHER: No, no, no,
10 because I'm just trying to understand the idea. I think
11 it's good.

12 CHAIRMAN BABCOCK: But, as I heard it, he's
13 not agreeing with your idea that the plaintiffs' lawyers
14 have got to sever out their bad cases. He's saying that
15 in the first instance they sever out their good cases.

16 HONORABLE DAVID GAULTNEY: Absolutely, and
17 they file their motion to remand on their good cases.
18 Those are the ones that can support it, those are the ones
19 he's willing to pay the filing fee on.

20 CHAIRMAN BABCOCK: Well, before anything
21 gets to MDL --

22 HONORABLE DAVID GAULTNEY: Right.

23 CHAIRMAN BABCOCK: -- you say there ought to
24 be a deadline for the plaintiffs to sever out their good
25 cases into separate causes?

1 HONORABLE DAVID GAULTNEY: Well, I thought
2 we were setting up a deadline.

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE DAVID GAULTNEY: That is, a
5 deadline for a motion to remand to be filed, and if we're
6 going to do that, there will be a stage in which the trial
7 court has everything. He's got the notice of removal,
8 he's got the motion to remand.

9 CHAIRMAN BABCOCK: I maybe misunderstood
10 what you said because this is before the remand issue.
11 This is early in the process when -- and this is something
12 new, but it's born of what Hays has been saying and the
13 spin that Justice Christopher put on it was in the first
14 instance the plaintiffs have got to look at their whole --
15 all their plaintiffs and take some of them in the first
16 instance and sever them out of the case into either
17 individual files or maybe a larger file because they're
18 all the good cases.

19 HONORABLE DAVID GAULTNEY: Right.

20 CHAIRMAN BABCOCK: And they bear the cost of
21 that.

22 HONORABLE DAVID GAULTNEY: Right.

23 CHAIRMAN BABCOCK: And then the rest of them
24 are left for the defendants to remove to MDL.

25 HONORABLE DAVID GAULTNEY: And I'm saying of

1 that group, I'm saying the first group that you just
2 talked about that the plaintiffs sever are probably not
3 going to be contested by the defendant.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE DAVID GAULTNEY: They may, but
6 you're going to have probably diagnosed cancers and --

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE DAVID GAULTNEY: -- cases with
9 clearly compliant reports. There is going to be a group
10 of cases which the plaintiffs and defendants both agree
11 that belong in MDL, and instead of making the plaintiffs'
12 attorney say, "Those cases," allow the silence; that is,
13 the failure to file a motion to remand to put them there.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID GAULTNEY: Okay. Then
16 you're going to have a group of cases in the middle that
17 are contested. I'm saying those are the cases that on
18 motions to remand are filed and that can be determined at
19 the trial court before the MDL court ever gets involved
20 because you will have a notice of removal designation of
21 those, you'll have a motion of removal designation, so
22 you'll have a group of 25 or 50 percent or whatever of
23 contested cases. Sever those into individual files
24 because you're going to need to track them and you're
25 going to need to track them on appeal. There's going to

1 be an appeal from that, whatever the decision the MDL
2 trial court makes on compliant report probably. I think
3 there is an interlocutory appeal in the statute. I'm not
4 sure.

5 So at that -- and those are cases which the
6 plaintiffs' attorney when he files his motion or she files
7 her motion to remand has determined is a sufficient file
8 to support a filing fee.

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: I think that the
11 issue is that without some cost borne by the defendant on
12 creating a separate file upon remand, what is to prevent
13 the defendant from tagging everything, because there is a
14 benefit gained from tagging even the cases that they think
15 might qualify? It busts every trial setting, it delays
16 the resolution of the case, and you know, if you're a
17 defendant and you have a statute that allows you to tag
18 every pre-9-1-03, I mean, if I were representing a
19 defendant, you know, that doesn't seem unreasonable to me.

20 HONORABLE STEPHEN YELENOSKY: Doesn't that
21 contradict what Judge Christopher said, though, because
22 you're saying, no, it's just a delay of a couple of months
23 and you've just said that it's a significant impact on the
24 case?

25 HONORABLE JANE BLAND: She was saying it's

1 not malpractice to have a case moved to MDL.

2 HONORABLE DAVID GAULTNEY: No. No.

3 HONORABLE JANE BLAND: And I'm basically
4 saying in order to get people to work it out to leave some
5 cases in the trial court --

6 HONORABLE DAVID GAULTNEY: I agree.

7 HONORABLE JANE BLAND: -- you have to think
8 it through.

9 HONORABLE DAVID GAULTNEY: And here's the
10 way I would do it.

11 HONORABLE JANE BLAND: Because they are not
12 going to just agree, because they don't have to. They can
13 tag the entire -- every single asbestos case from day one.

14 HONORABLE DAVID GAULTNEY: Here's the way I
15 would do it. Okay. I'm not saying I would do it this
16 way. Here is a proposal. The first thing that gets done
17 is instead of having notices of each individual case, you
18 have got a hundred-plaintiff case, you file a list, notice
19 of removal. You've got the list of whichever ones. The
20 plaintiff filed in response, instead of a hundred
21 different motions, a list. These are the ones that get to
22 stay on motion to remand. Okay. So now you've got your
23 contested cases.

24 What I'm saying is, is that that's going to
25 be a subset. There's going to be a group that by default

1 is going to be agreed, there's going to be a group that
2 gets severed. Now, how do you shift some of that cost on
3 remand, because your severance cost is going to be
4 initial? Okay. That's going to be -- the proposal I'm
5 suggesting is in order to track it you're going to set up
6 individual files, and those files will be paid
7 immediately. Okay.

8 HONORABLE JANE BLAND: For the ones that the
9 plaintiff wants to keep.

10 HONORABLE DAVID GAULTNEY: Right.

11 HONORABLE JANE BLAND: And the plaintiff
12 bears the cost for those.

13 HONORABLE DAVID GAULTNEY: Right. Now, they
14 go back to the MDL. Okay. At that point when Judge
15 Christopher is going through these files, I guess she's
16 going to have to address them on an individual basis, and
17 at that point I think you could have cost shifting. Okay.
18 So if a motion to remand, a separate file has been set up
19 and the thing has been removed, then perhaps you can shift
20 that cost to the defendant.

21 HONORABLE TRACY CHRISTOPHER: Hang on.
22 Here's one thing that the defendants -- I mean, I kind of
23 like where we're going with that, if we can sort of think
24 it through a little bit. So the defendant, of course,
25 wants to pay one 165 removal fee, but if we maybe can

1 develop a system where they tag the file, okay, then the
2 plaintiff says, "Okay, these are the ones I want severed
3 into individual cases and I'm severing them because I
4 think their cases are worth it and I've got a good
5 report," and they pay those costs. If the defendant wants
6 to contest those they're going to have to pay the 165 fee
7 for each one of those to bring up to me. So that would, I
8 think, perhaps provide a good shifting so that people
9 would actually look at it before they --

10 HONORABLE DAVID GAULTNEY: Make the decision
11 to burden you with it.

12 HONORABLE TRACY CHRISTOPHER: Right.

13 CHAIRMAN BABCOCK: Buddy.

14 MR. LOW: If you want a system that both
15 sides would hate, would be -- and Russian roulette is a
16 Rule 141 cost that you may provide costs as otherwise, and
17 you and Judge Davidson are going to see who is dragging
18 their feet and who's doing what and give the judge the
19 power to shift the cost as required -- as they saw fit.
20 The Rule 141 says you can do it now for good cause, but it
21 would be some type thing. We've got a number of cost
22 rules.

23 That way if people say, "Well, wait a minute
24 I'm afraid to do this. I don't know. I might get
25 tagged," and they don't know exactly until finally you

1 start a pattern, but once you start a pattern then they're
2 going to know what they can do and they're going to follow
3 it, but you don't know who is going to take the costs.
4 Both sides are going to hate that. So that's about the
5 best I can do, where both sides would hate it.

6 HONORABLE NATHAN HECHT: Let me see if I
7 understand this. If you have a case with a hundred
8 plaintiffs, plaintiff says -- plaintiffs' attorney says,
9 "I want to sever out these 10 because I think they should
10 go to trial," so now you've got a case with 90 plaintiffs
11 and 10 cases, and the plaintiff pays the filing fee for
12 the severance. Then the defendant comes along and he
13 says, "Well, I don't agree that the 10 are ready, so I'm
14 going to remove those 10 and the other one," but then he
15 has to pay for that.

16 HONORABLE TRACY CHRISTOPHER: Right.

17 HONORABLE NATHAN HECHT: The filing fee in
18 your court --

19 HONORABLE TRACY CHRISTOPHER: Right.

20 HONORABLE NATHAN HECHT: -- for the MDL.
21 Then it gets there and you agree with the plaintiff, you
22 think the 10 cases should have stayed where they were.
23 But then is there some penalty on the defendant at that
24 point?

25 HONORABLE TRACY CHRISTOPHER: No. Other

1 than the fact that they pay the 190 -- or 165 to have me
2 rule on it. Other than that there's no penalty.

3 HONORABLE NATHAN HECHT: I suppose they
4 could be taxed with the cost of severing them in the first
5 place just as a penalty.

6 HONORABLE TRACY CHRISTOPHER: Well, that
7 would be an idea.

8 HONORABLE NATHAN HECHT: So it means not a
9 lot of money, but it would just be some additional
10 disincentive to remove the 10 if you really didn't think
11 the 10 should be removed.

12 HONORABLE TRACY CHRISTOPHER: Right.

13 HONORABLE TOM GRAY: Or if the plaintiff
14 severs them out into 10 individual cases, there would be
15 10 that went up and 10 that go back because the plaintiff
16 is going to ultimately have to try that case individually.

17 HONORABLE NATHAN HECHT: Right.

18 HONORABLE TOM GRAY: Or get it settled and
19 severed anyway, so this is the point in time that the
20 plaintiff is most likely to go ahead and break those good
21 cases out into individual filings anyway.

22 CHAIRMAN BABCOCK: Hays.

23 MR. FULLER: On this group of cases that
24 we're talking about, we're really, I think -- I want to
25 follow up on something Justice Gaultney said. When these

1 cases, these cases that we're moving, we're really talking
2 about cases that are either impaired or not impaired,
3 compliant or noncompliant. Assuming plaintiff severs out
4 cases initially in trial court and said, "These cases are
5 compliant cases, impaired cases that are ready for trial,"
6 leaving the remainder of those plaintiffs sitting in a
7 group, and the defendants choose to tag that case and
8 remove that case to MDL.

9 At that point in time it seems to me that if
10 there are disputed plaintiffs in that group, cases the
11 plaintiff thinks should have stayed and the defendants
12 removed simply because they had no information, perhaps at
13 that point in time we could have an expedited procedure.
14 You know, right now with cases that are properly in MDL
15 where compliance/noncompliance, impaired/unimpaired is not
16 an issue, there is a certification process that the
17 plaintiffs have to go through to make sure that certain
18 information has been applied to the case and then worked
19 up to a level that you can certify it for remand to the
20 trial court in obtaining a trial setting; but with these
21 new cases, these cases that have already been in a trial
22 court where an issue of compliance/noncompliance,
23 impaired/unimpaired is important, it seems to me that
24 following Justice Gaultney's idea, if at that point in
25 time the plaintiff filed a notice of remand and simply

1 attached to that notice all they needed to show
2 compliance, the compliant report, you know, the complying
3 report, at that point in time the defendants have really
4 all the information they're entitled to under the statute
5 to decide whether or not that is a compliant case; and
6 they can either at that point challenge the report and
7 risk cost shifting at that point or they can not oppose
8 the motion to remand and that case immediately goes back.

9 HONORABLE NATHAN HECHT: And my only
10 question is, why wouldn't -- why wouldn't the plaintiff
11 want to break those cases out before they even leave the
12 trial court?

13 CHAIRMAN BABCOCK: Right.

14 MR. FULLER: Well, for cases where the
15 plaintiffs are -- the clients are impaired and compliant,
16 I think the plaintiff has every incentive and has been, in
17 fact, doing that all summer to keep those plaintiffs in
18 the trial court.

19 HONORABLE NATHAN HECHT: Right.

20 MR. FULLER: As to the remainder there may
21 be some -- as to the ones that would then be removed, in
22 many instances the plaintiff doesn't know any more than
23 the defendant and may not take a closer look at those in
24 fact until they are removed. At that point in time, you
25 know, I think the plaintiff will have a certain of those

1 that, you know, those are clearly the 80 percent I'm not
2 going to bother to go find reports for those people. They
3 can sit in MDL just as easily as they can sit, you know,
4 in Jefferson County; but for the group that is arguable
5 the plaintiff can then go ahead and provide the bare, you
6 know, prima facie statutory proof of compliance, and the
7 defendants can either oppose it or not. If they oppose
8 it, they risk cost shifting. If they don't oppose it, it
9 goes back.

10 HONORABLE TRACY CHRISTOPHER: Well, the
11 plaintiff should have already provided that medical to you
12 by the November 30th deadline.

13 MR. FULLER: But as a practical matter,
14 Judge, they aren't and they won't --

15 HONORABLE TRACY CHRISTOPHER: Well, if they
16 don't then the case belongs in the MDL, and even if they
17 get the report later the case stays in the MDL and follows
18 the MDL procedures. The only time it immediately goes
19 back is if they got the report done by the November 30th
20 deadline, because if they subsequently get a report after
21 that deadline the case just stays in the MDL, gets worked
22 up under the MDL rules before it goes back.

23 MR. FULLER: So we're really talking about
24 the inadequate reports.

25 HONORABLE TRACY CHRISTOPHER: Right.

1 MR. FULLER: Which, again, I think would fit
2 within that procedure. If we look at it and we really
3 feel strongly that it doesn't comply, we challenge it, we
4 risk cost shifting. If we think it's okay, we --

5 HONORABLE TRACY CHRISTOPHER: Right. We're
6 just trying to figure out where all the costs go in
7 connection with each one of those steps.

8 CHAIRMAN BABCOCK: Kay, did you have a
9 comment?

10 MS. ANDREWS: To the issue of cost shifting,
11 if, in fact, there is some kind of cost, I think we're all
12 agreed that there has to be some -- the judge has to look
13 at it because there are just too many gray issues.
14 There's too many things that may or may not have been the
15 reason why something got transferred if, in fact, it
16 really belonged in the trial court and should not have
17 been transferred in the first place.

18 The other thing I was going to suggest, I
19 don't know how this committee feels about certificates of
20 conference, but if I understand what you're saying, when a
21 motion to remand is filed if, in fact, when you say when a
22 motion to remand is filed there is an obligation to have a
23 certificate of conference, that gets the opportunity for
24 at least some conversation about "I don't have your
25 report."

1 "Oh, I thought we served it last week."

2 "No, you didn't." I mean, that kind of
3 conversation would be required before you could actually
4 file the motion.

5 CHAIRMAN BABCOCK: Yeah, Jeff.

6 MR. BOYD: Does anyone know why the
7 Legislature did not build into the procedure of the
8 statute the idea of the plaintiffs first severing out
9 their cases?

10 CHAIRMAN BABCOCK: Stephen.

11 MR. TIPPS: The Legislature did. Because
12 under the statute the defendant has the right to transfer
13 an entire case.

14 MR. BOYD: Well, the statute --

15 MR. TIPPS: And, therefore, that creates an
16 incentive on the part of the plaintiffs to protect their
17 good cases from being transferred along with all these
18 others, which is exactly why, according to Hays,
19 plaintiffs have been severing all summer.

20 MR. BOYD: I thought the statute used the
21 word "claimant" --

22 MR. TIPPS: It does.

23 MR. BOYD: -- rather than "case." But I
24 thought the Legislature sort of contemplated a
25 plaintiff-by-plaintiff process; and we're talking about

1 how to turn that into, based on our vote yesterday, a
2 group-by-group basis if they're already sitting in one
3 case in order to minimize the financial burden; but
4 anyway, the statute appears to me to talk
5 claimant-by-claimant; and so I'm wondering, the idea that
6 we're all talking about now of actually letting the
7 plaintiffs first decide and protect, does that issue only
8 arise because we're now thinking in terms of transferring
9 group-by-group; and because the Legislature wasn't
10 thinking group transfers, they didn't think about that?

11 HONORABLE TRACY CHRISTOPHER: I don't think
12 they thought about it.

13 MR. TIPPS: I think you're right.

14 HONORABLE TRACY CHRISTOPHER: I mean, and
15 it --

16 MR. BOYD: I mean, I want to make sure we're
17 not messing up something. If there were a bunch of --
18 it's not likely, but if there were a bunch of plaintiffs
19 lawyers who were saying, "No, Legislature, don't do that,
20 don't do that to us, don't put the burden on us first"
21 during the legislative process and the Legislature agreed
22 with them, I want to make sure we're not undoing something
23 that was carefully vetted through the Leg.

24 HONORABLE TRACY CHRISTOPHER: Not that I
25 know, not that I've seen in the legislative history.

1 MR. BOYD: And Kay may know.

2 MS. ANDREWS: Yeah, I think really to the
3 extent that that was discussed, the issue was the
4 malignants would be -- exactly as Stephen was saying,
5 certainly the malignants would be identified, and the
6 incentive was to get those severed, and if a plaintiffs'
7 attorney had a 500-plaintiff case with 10 malignants in
8 it, the understanding was you're going to know those
9 because they want to protect those and not let the
10 defendant transfer those. So that was not articulated in
11 the legislation but certainly discussed, but I think it
12 was fully contemplated by everyone that these bulk cases
13 were going in bulk to the MDL.

14 MR. BOYD: And I was not involved in this in
15 any way in the Legislature, so I don't know all the
16 reasoning.

17 CHAIRMAN BABCOCK: Au contraire.

18 MR. BOYD: But when I read this it seems to
19 me that the way the plaintiffs protect themselves is to
20 serve a good report. That's all they've got to do, and if
21 they do that then they -- and I guess the Leg. didn't
22 build in any penalty, loser pays rules, into the statute
23 in order to prevent you from removing one where they just
24 sent you a really good report and you say, "I don't want
25 to face this. I'm going to go ahead and remove it and

1 hope they don't catch me." I mean, that's what it
2 would -- it seems like that's the problem we're trying to
3 address. Is that really a problem? I mean, are there
4 enough defendants out there that are going to remove cases
5 that clearly shouldn't be removed?

6 MS. ANDREWS: I would hope not, but we don't
7 know. And also we haven't received one report. So, I
8 mean, September 1st hasn't come yet, so we don't know what
9 the reports are going to look like. And, you know, as
10 Bryan mentioned yesterday, too, there is a lot of gray.
11 For example, in the -- the statute requires this 2000 form
12 and very few of the reports will have a 2000 form. To
13 what extent is that going to be the basis on which the
14 report is noncompliant, that kind of thing has yet to be
15 decided, so there are a lot of issues that are going to be
16 decided in the court come December.

17 CHAIRMAN BABCOCK: Jeff, I'm sensitive to
18 undoing what the Legislature tried to do, but I didn't
19 hear anybody yesterday, including Bryan, say that there
20 was anything wrong with having the plaintiffs make the
21 first cut to try to get their good cases out of the big
22 cases that might have varying degrees of problems.

23 MR. BOYD: Yeah, I didn't either, but I'm
24 not sure we talked yesterday about actually writing into
25 the rule a requirement that they do so.

1 CHAIRMAN BABCOCK: No, that's true.

2 MR. BOYD: That's different than saying,
3 "You know, if I were you I would go home and send an
4 e-mail out to all your buddies and advise them that
5 strategically that is a wise thing to do."

6 CHAIRMAN BABCOCK: If he was here today he
7 would say, "I really, really think you should do that."

8 HONORABLE TRACY CHRISTOPHER: Well, maybe,
9 maybe what we could do is instead of -- to put into the
10 rule, okay, that the defendant could file some sort of a
11 notice, you know, "I'm getting ready to transfer this
12 case, and I'm going to transfer the whole case unless you,
13 plaintiff, sever out the cases that you want to keep"; and
14 then after the plaintiff has severed out the ones they
15 want to keep then the defendant would have the opportunity
16 to look at those on a case-by-case basis and decide
17 whether they want to tag those for review.

18 So we have to build some kind of a waiting
19 period so that the defendant can't just pull the whole
20 case on December 1, but that they would file a notice,
21 "I'm going to do it, and I'm going to pull every
22 plaintiff." You know, "Plaintiff, you identify the cases
23 you want to keep individually and we'll sever those out."

24 CHAIRMAN BABCOCK: What does everybody think
25 about that?

1 HONORABLE TOM GRAY: I thought she argued
2 against me while ago and said that these cases are going
3 to trial.

4 HONORABLE TRACY CHRISTOPHER: Well --

5 CHAIRMAN BABCOCK: She did.

6 HONORABLE TRACY CHRISTOPHER: I did. That's
7 a good point.

8 CHAIRMAN BABCOCK: You caught her.

9 HONORABLE TOM GRAY: I hate it when I do
10 that.

11 HONORABLE TRACY CHRISTOPHER: I guess, I
12 don't know how we would --

13 HONORABLE TOM GRAY: Unless we can put a
14 moratorium on the trial settings. I mean, that seems to
15 be the roadblock that both directions we've come at this
16 that we're running into. There's 105 days between now and
17 the time the drop-dead date for the plaintiffs' reports on
18 these cases to keep them from having the MDL rules apply,
19 and the problem is they're out there getting trial
20 settings now in early December, and the defendant has no
21 alternative when that day gets there.

22 HONORABLE NATHAN HECHT: But to fix your
23 proposal, wouldn't you just say that the filing of the
24 notice stays the trial?

25 HONORABLE TRACY CHRISTOPHER: Until the

1 severance?

2 HONORABLE NATHAN HECHT: Because, I mean,
3 you have invoked this process at that point.

4 HONORABLE TRACY CHRISTOPHER: Right. Right.

5 HONORABLE NATHAN HECHT: So you really
6 wouldn't want to go have the trial setting, and it's going
7 to wind its way through in the course of weeks and months.

8 HONORABLE TRACY CHRISTOPHER: Right.

9 HONORABLE NATHAN HECHT: So you're not
10 delaying it.

11 HONORABLE TRACY CHRISTOPHER: Let me ask the
12 clerk, like how long does it take to sever a 500-plaintiff
13 case? A week, two weeks?

14 MS. WOLBRUECK: Probably.

15 CHAIRMAN BABCOCK: Trial setting is a pretty
16 precious thing to a plaintiff.

17 HONORABLE TRACY CHRISTOPHER: Right.

18 CHAIRMAN BABCOCK: And so if you can stay a
19 trial setting merely by filing this preliminary "I'm
20 thinking about sending this thing up to MDL unless you can
21 persuade me otherwise" and in the meantime the setting
22 goes by, that's kind of harsh for plaintiffs. Stephen.

23 MR. TIPPS: I'm not sure that we would not
24 be messing with the statute if we did that when the
25 statute says that the defendant has a right to file a

1 notice of transfer, and I would infer from that that means
2 to transfer the case to the MDL court if a report has not
3 been filed by November the 30th, so I'm not really sure
4 that we're at liberty to build in --

5 HONORABLE TRACY CHRISTOPHER: Well, it
6 doesn't say you have a right to transfer the case.

7 MR. TIPPS: Well, and I spoke too quickly in
8 response to Jeff's comment, but the statute says the MDL
9 rules are made to apply to these pre-September 1 cases
10 under these circumstances, and the MDL rules talk about
11 transferring cases, and I think that's where you get to
12 the right -- the defendant has the right to transfer the
13 entire case.

14 CHAIRMAN BABCOCK: Justice Gaultney, then
15 Kay.

16 HONORABLE DAVID GAULTNEY: Well, we transfer
17 the entire case, but what if a defendant recognizes that
18 10 percent of those are cancer cases that if there's a
19 cost shifting they're eventually going to get hit with --
20 in other words, would they designate the entire case or
21 would they designate the 90 cases within it, 90
22 plaintiffs? And then the rule could have an automatic
23 severance of those cases not designated that just are
24 severed into a separate case and stay at trial, and if the
25 defendant does designate within the case those cancer

1 cases then perhaps we could have some type of cost
2 shifting or something else that would discourage that.

3 I mean, isn't there -- is it likely that if
4 the defendant is required to designate them by name that
5 they're going to designate the 10 cancer cases in addition
6 to the 90 others in removing them? Because my
7 understanding is that you would have to -- even if we're
8 going to remove the entire case perhaps this should be an
9 individual designation of plaintiffs within that removal.

10 HONORABLE TRACY CHRISTOPHER: Right. I
11 mean, that is how we have contemplated, that we would have
12 a list of people within the removal.

13 HONORABLE DAVID GAULTNEY: Right, so --

14 HONORABLE TRACY CHRISTOPHER: It was just
15 the mechanics of does it remove the whole thing, does it
16 remove -- do we sever or how do we sever.

17 HONORABLE DAVID GAULTNEY: Well, let's say
18 the defendant designates 90 within that hundred. Couldn't
19 we have that just be an automatic severance of those 10
20 that were not removed, which would be the cancer cases or
21 what are the compliant reports? And then if you
22 designated as a defendant a cancer who has got a trial
23 setting, there actually could be a consequence to that.

24 CHAIRMAN BABCOCK: Judge Bland.

25 HONORABLE JANE BLAND: What do you think

1 about Buddy's idea of just allowing the trial court to
2 share cost -- to determine costs upon remand and just
3 leaving it a little more vague and basically just say that
4 -- you know, say nothing about severance, and that would
5 leave it right now with the plaintiff paying for severing
6 anything before removal, the defendant being able to pay
7 the \$165 for the large case to remove everything, and then
8 letting the trial judge -- I'm sorry, the MDL judge
9 determine if the defendant, you know, improperly removed
10 the case and shift costs then. Shift -- you know, or
11 assess severance costs then.

12 HONORABLE DAVID GAULTNEY: I like the
13 concept of letting the MDL judge, who will be at that time
14 reviewing an individual case, have an individual file
15 before them, and can determine whether, in fact, this was
16 a good faith or was just, you know, wrongly done.

17 HONORABLE JANE BLAND: And just have a
18 general provision, the MDL judge, you know, can award
19 costs for improper removal.

20 MR. LOW: Just have a Rule 141 --

21 HONORABLE JANE BLAND: Or improper transfer.

22 MR. LOW: -- for good cause. Just give this
23 discretion.

24 HONORABLE DAVID GAULTNEY: I wouldn't make
25 it a sanction.

1 MR. LOW: No.

2 HONORABLE DAVID GAULTNEY: I don't think it
3 should be a sanction because I think what you've got is
4 you've got a legitimate dispute that somebody loses.

5 HONORABLE JANE BLAND: No, just costs and
6 improper transfer, not, you know, bad faith -- you know,
7 just basically, "Look, it got up here, it shouldn't have,
8 you know, pay the \$165 to sever it out and send it back."
9 Otherwise the plaintiff can pay the \$165 to sever it out
10 at the outset in the hope of preserving their trial
11 setting, and then it goes to the MDL, the MDL judge can
12 decide it should have been sent back. The MDL judge can
13 award costs associated with the improper transfer of the
14 case and just leave it that simple.

15 CHAIRMAN BABCOCK: Judge Patterson.

16 HONORABLE JAN PATTERSON: But I think that
17 this rule contemplates having some standard against which
18 you can measure it, so if you don't have a standard at all
19 and this gets you into a notion of whether it was
20 wrongful, improper, excessive, and without a standard by
21 which to measure that I don't see how a judge can make a
22 proper determination.

23 HONORABLE JANE BLAND: Well, it would be
24 like any other time a judge might assess costs
25 differently. The standard would be the plaintiff had a

1 report on file or, you know, made you aware of the
2 malignancy and it got transferred somehow and it needs to
3 be severed out into a single case because you -- really
4 it's the defendant's benefit of getting to pay one fee for
5 the transfer of 2,000 cases, and if they were individual
6 they would be paying 2,000 transfer fees. So basically on
7 the back end when you end up having to pull one out and
8 send it back, you say, "Okay, you know, a thousand of
9 these are staying in cold storage but this one has to go
10 back. You didn't have to pay the transfer fee coming in,
11 but you need to pay the severance cost now, because this
12 one needs to go back, and it's about equivalent to the
13 transfer fee you would have been paying had it been
14 severed in the first place, but you got the benefit of
15 being able to bulk transfer these cases."

16 MR. LOW: Rule 141 provides that "The court
17 may for good cause stated on the record adjudge the costs
18 otherwise than as provided by law or these rules." So
19 even though it's really never used, the rule is there.
20 And then as far as payment, 125 says, "Each party will be
21 responsible for the costs incurred," but ultimately then
22 the costs are adjudged under Rule 141.

23 CHAIRMAN BABCOCK: Judge Sullivan.

24 Speak up.

25 HONORABLE KENT SULLIVAN: As I listen to it

1 it sounds like there are two levels of concern. One
2 Justice Bland has just spoken to, and that is the
3 incentives and disincentives and limiting the incentive, I
4 guess, to the taxing of costs in the event that you make
5 the wrong decision and impose a burden either on the other
6 side or relative to the MDL court or what.

7 There's another level that I think people
8 have at least talked about fleetingly, and that is the
9 possibility that there would be bad faith involved, and I
10 do wonder -- maybe I'm circling all the way back to where
11 Judge Davidson and Judge Christopher were -- if there
12 shouldn't be an acknowledgement that that is something
13 that should be evaluated and subject to an award of
14 attorney's fees.

15 I raise it in the context of I don't know
16 whether the Civil Practice and Remedies Code and the Rules
17 of Civil Procedure are entirely adequate for this sort of
18 situation, but those are two -- two levels of concern, and
19 they are -- they are different, and I do wonder at the end
20 of the day if we don't have to leave it largely to the
21 discretion of the person who is chosen as the MDL judge to
22 set up a system that's going to work and a system that can
23 evolve as circumstances either change or more information
24 comes to light.

25 CHAIRMAN BABCOCK: Pete.

1 MR. SCHENKKAN: And I would wonder on that
2 concern that separate and apart from just the costs there
3 are going to be some that are shifting that it turns out
4 they shouldn't have been; and Buddy is right that Rule 141
5 gives a mechanism for putting those costs wherever they
6 are thought to belong; but at the attorney fee level I'm
7 wondering where the authority comes from to do something
8 other than what's in the inherent authority of the courts
9 for bad faith as the case law has described it, which
10 certainly could catch some cases that have been thrown out
11 here hypothetically; but we all know courts are reluctant
12 to issue such sanctions and it doesn't happen a lot; and
13 maybe that's because the threat of it is enough most of
14 the time; or under Chapter 10 of the Civil Practice and
15 Remedies Code, which is at least disjunctive and allows
16 you to either have it be for an improper purpose or
17 because it doesn't have good faith basis in the law or the
18 facts; and those tools already exist; and so I have, I
19 guess, a double barrel question. Aren't those enough, and
20 if they aren't enough, isn't that all there is anyway
21 because there isn't statutory authority to add anything
22 else but a fee issue, separate and apart from the cost
23 issue which I think is covered under 141?

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: Chip, one of the things that --

1 and maybe there is another provision, but the only real --
2 the only provision I remember seeing is section 90.012,
3 Supreme Court rulemaking, and that addresses -- says
4 Supreme Court may promulgate amendments to Texas Rules of
5 Civil Procedure regarding the joinder of claimants in
6 these cases. I mean, it doesn't give you just broad
7 rulemaking, but joinder, and then it said as -- and then
8 they say you can't join, so it doesn't leave you a lot of
9 room. I mean, there may be other provisions in there.
10 I'm not that familiar with the act, but that's the only
11 one I've seen that specifically invited us or invited the
12 Court to make a rule, was just pertaining to joinder. Is
13 there some other provision, Tracy?

14 HONORABLE TRACY CHRISTOPHER: Not that I can
15 think of, no.

16 CHAIRMAN BABCOCK: There's no prohibition,
17 though, and the Court has general rulemaking authority.

18 MR. LOW: No, I understand, but Stephen's
19 comment about don't do something inconsistent with the
20 statute --

21 CHAIRMAN BABCOCK: Oh, yeah, I agree with
22 that.

23 MR. LOW: Okay.

24 CHAIRMAN BABCOCK: Yeah, Judge Sullivan.

25 HONORABLE KENT SULLIVAN: Just a brief

1 follow-up. I think this is very difficult to do
2 prospectively and fairly; that is, for us to try and
3 contemplate all of the potential entanglements; and I
4 don't know how we're going to do better than giving broad
5 discretion to the MDL judge and then on a retrospective
6 basis try and react to the extent that actual rule changes
7 are necessary. I mean, some of the comments and some of
8 my own thoughts are -- you know, were all subject to
9 fighting the last war. The reality is, is that I think
10 the mass torts arena is the Achilles heel of the legal
11 system because our rules and our procedures really do not
12 contemplate handling mass torts. Our discussions
13 regarding severance, our discussions regarding fees, I
14 really think that our system is either outmoded or just
15 not proficient in dealing with the mass torts arena, and I
16 think to some extent we have to acknowledge that.

17 One other brief comment that I wanted to
18 make just to note in passing, not to divert the
19 conversation here, but I've also been concerned about the
20 issue of the resources available to support the MDL in
21 this sense. When I was involved in some of the initial
22 discussions we talked about fees that would be paid and
23 funds generated; and there was an underlying assumption,
24 at least on my part, that those would be readily available
25 to support the MDL; and some quick back-of-the-envelope

1 math suggested that the resources could be more than
2 adequate to support the MDL process that was contemplated,
3 the infrastructure and personnel that would be needed to
4 do this on a high quality basis.

5 After doing a little bit of investigation,
6 talking with Bonnie, talking with the Harris County
7 clerk's office, I find that that is not true at all, that
8 these are not dedicated funds in any sense, and that, in
9 fact, most, if not all, of the filing fees such as they
10 are end up in the general fund of the counties involved,
11 and the district clerks do not have direct access to those
12 funds. They have to in turn turn around and ask for funds
13 for some or all of these fees to come back to support the
14 process, and I'll try and cut to the end here.

15 I mean, the thing that struck me, from my
16 point of view of looking at this as a model and whether or
17 not this will work on a repetitive basis as opposed to
18 some patchwork quilt basis, is you now have the situation
19 where individual counties and arguably individual county
20 commissioners will decide on the efficacy and level of
21 support of what are intended to be statewide MDLs and
22 significant issues relative to the statewide
23 administration of justice, and I question whether that is
24 a good model where arguably in individual counties,
25 subject to whatever parochial issues and intracounty

1 politics or intracounty economic issues might exist, that
2 will drive the level of support potentially of an MDL. I
3 just wanted to note that in passing. Did I get close,
4 Bonnie?

5 MS. WOLBRUECK: You got it.

6 HONORABLE NATHAN HECHT: And what's
7 happening in Harris County now? I mean --

8 CHAIRMAN BABCOCK: Speak up, Judge, because
9 they can't hear you.

10 HONORABLE NATHAN HECHT: Yeah. What's
11 happening in Harris County now? Is that a problem or some
12 of a problem or don't want to talk about it or --

13 HONORABLE TRACY CHRISTOPHER: I'd really
14 rather not talk about it. The clerk's office is working
15 with us to get us the support that we need, but the
16 clerk's office tells us that they don't have the money to
17 give us the full support that we would like to have.

18 MR. BILLINGSLEY: It is just what Judge
19 Sullivan says is correct --

20 THE REPORTER: Speak up.

21 CHAIRMAN BABCOCK: Could you do two things,
22 speak up and identify yourself?

23 MR. BILLINGSLEY: I'm Paul Billingsley with
24 the Harris County District Clerk's office. It is what
25 Judge Christopher says, it's a matter of access to the

1 funds that's causing us problems to hire temporary help.
2 The MDL situation has cost us approximately \$300,000 to
3 date, and going that over our target budget becomes a
4 political situation for us.

5 HONORABLE NATHAN HECHT: And is the -- you
6 say over 300,000. Is that more than you've taken in in
7 filing fees or --

8 MR. BILLINGSLEY: I don't have the exact
9 number we have taken in in filing fees. I just have
10 access to the expenses that's above our target budget.

11 HONORABLE NATHAN HECHT: So you don't
12 know -- if you could keep all of the money that you take
13 in as filing fees on MDL cases, would that -- would there
14 be a shortfall or how would that relate to the cost of the
15 cases?

16 MR. BILLINGSLEY: I don't think there would
17 be a shortfall, but because of the current situation it
18 would be irrelevant because it's still outside of our
19 target budget.

20 HONORABLE NATHAN HECHT: Yeah.

21 MS. WOLBRUECK: I have a comment.

22 CHAIRMAN BABCOCK: Yeah, Bonnie.

23 MS. WOLBRUECK: Regarding the filing fee, so
24 that everyone understands, in the \$165 probably only about
25 \$50 of that actually goes to the fees of offices of the

1 clerk. There are law library fees, there are appellate
2 fees, there are ADR fees, there is state fees. All of
3 that goes somewhere else. So whenever you're talking
4 about assisting the clerk, \$50 of it is all that's fees of
5 office for the clerk.

6 CHAIRMAN BABCOCK: Okay. Judge Sullivan.

7 HONORABLE KENT SULLIVAN: One other brief
8 point, and that is, only in looking at this in terms of a
9 model, I really wonder if it should even be left up
10 unilaterally to the district clerk, not because we don't
11 have very good relations, you know, in Harris County and
12 elsewhere. In most cases I think the district clerk and
13 the MDL judge, through the process they're all going to be
14 on the same page and work together, but in terms of a
15 model, the district clerk is an independently elected
16 political figure in individual counties. The district
17 clerk could have a different political issue or different
18 economic issue that's not consistent with using all of the
19 money or at least having it available to support the MDL,
20 and perhaps that's only theoretical, but it seems to me
21 that MDL-generated funds ought to be available to support
22 these significant increased needs of infrastructure and
23 personnel associated with most of these MDLs, and they
24 shouldn't be subject to having the judiciary be
25 supplicants for the resources that they need to do a first

1 rate job.

2 HONORABLE STEPHEN YELENOSKY: Well, even
3 though we are on a county-by-county basis, I mean, that
4 problem is replicated if you don't see eye-to-eye with
5 your district clerk.

6 HONORABLE KENT SULLIVAN: But here's what's
7 different: This is a statewide decision that's been made.
8 The MDL judge is not just another county judge in that
9 regard. They have been chosen by way of a statewide
10 process that relates back to the Supreme Court and the
11 Legislature, so this shouldn't be subject to intracounty
12 dynamics.

13 CHAIRMAN BABCOCK: Yes, Judge Christopher.

14 HONORABLE TRACY CHRISTOPHER: Getting back
15 to Stephen's point that, you know, he doesn't think that
16 we would have the right to stay the case or require the
17 severances --

18 CHAIRMAN BABCOCK: That's not quite what he
19 said, is it?

20 MR. TIPPS: Not quite, but go ahead.

21 HONORABLE TRACY CHRISTOPHER: I mean, it
22 seems to me the statute only talks about claimants and
23 that you can move a claimant's case to the MDL if they
24 don't have the report filed, so I think with that kind of
25 language we have the ability to work on rules that deal

1 with how we identify specific claimants in a case, I
2 think, and, you know, I -- I don't have a problem with if
3 you want to give the MDL judge some discretion on cost
4 shifting, but I think it would be better for the lawyers
5 to have an idea up front what we're expecting from them so
6 that it's not, you know, some horrendous shock that, you
7 know, at the end of the day I think, well, he better pay
8 all these costs.

9 CHAIRMAN BABCOCK: Yeah, are you kidding me?

10 HONORABLE TRACY CHRISTOPHER: So you know --

11 MS. HOBBS: Because the whole point of
12 shifting costs is to incentivize them at the beginning.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TRACY CHRISTOPHER: At the
15 beginning, so but I can understand that there might be
16 sometimes when the MDL judge would want some discretion,
17 but as you can tell by just the sheer number of cases and
18 the fact that we don't have complete information perhaps
19 on everybody and perhaps the only person that is in the
20 best position to know who's got the -- you know, who's got
21 a good case is the plaintiff's lawyer, that, yes, we ought
22 to put a little bit of a burden on the plaintiff's lawyer
23 to separate out their good cases, but I think we ought to
24 tell them that in a rule now, because otherwise some of
25 them will be asleep at the wheel and then the whole case

1 will get transferred to the MDL and then we'll have this
2 whole problem of, you know, who's paying the costs now,
3 you know, "This isn't fair; they removed this whole case
4 when they knew I had a meso person here." You know, "They
5 acted in bad faith."

6 So, you know, I would like to get as much as
7 possible some instructions, suggestions. If Stephen
8 thinks we can't make it a rule, I -- you know, I think we
9 could make it a rule under sort of our inherent rulemaking
10 authority with respect to the handling of these joined
11 cases, which is included in the statute that the Supreme
12 Court is to make rules about the joined cases and the
13 joinder of cases.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: Does anybody know why -- usually
16 when the Legislature passes something, like the parental
17 consent and a number of things, they say the Supreme Court
18 shall pass procedural rules to implement this and, you
19 know, just broad rules with regard to the act, and for
20 some reason they put just for joinder. I mean, was there
21 a reason? Was that discussed? Does anybody know why they
22 didn't do -- this is the first act I've seen where they
23 didn't just give us rulemaking authority to rules -- to
24 implement fully the statute.

25 CHAIRMAN BABCOCK: Well, I mean, it's not

1 necessarily so from reading that provision, because they
2 can tell us specifically to make rules on joinder.

3 MR. LOW: Right.

4 CHAIRMAN BABCOCK: I mean, "You will make
5 rules on joinder." That does not say, "and you will not
6 make rules on anything else."

7 MR. LOW: I didn't -- my question was why
8 they did that --

9 CHAIRMAN BABCOCK: Right.

10 MR. LOW: -- here rather than the broad
11 language they usually use.

12 MS. HOBBS: Well, what they did say is the
13 MDL rules apply to these cases, and they know that the
14 Supreme Court created the MDL rules and can modify the MDL
15 rules.

16 MR. LOW: Okay. That answers it.

17 MS. HOBBS: So I think they did contemplate
18 us trying to figure this out.

19 CHAIRMAN BABCOCK: They maybe overestimated
20 our ability.

21 MR. LOW: Yeah. Okay. That answers my
22 question, because it just seemed unusual that they talk
23 about joinder and then in the next section say you can't
24 join.

25 CHAIRMAN BABCOCK: Yeah. Yeah. Well,

1 Justice Hecht.

2 HONORABLE NATHAN HECHT: I've got a question
3 about a slightly different subject.

4 CHAIRMAN BABCOCK: Sure.

5 HONORABLE NATHAN HECHT: What do the MDL
6 judges want to have physically on the premises by way of a
7 file?

8 HONORABLE TRACY CHRISTOPHER: On these
9 cases?

10 HONORABLE NATHAN HECHT: Uh-huh.

11 HONORABLE TRACY CHRISTOPHER: Okay. As
12 little as possible.

13 HONORABLE NATHAN HECHT: Like a summary?
14 Would just a praecie or a summary of these are the
15 parties, these are the lawyers, this was the number in
16 Jefferson County when the case was filed, and this was the
17 day it was filed or something?

18 HONORABLE TRACY CHRISTOPHER: Well, a copy
19 of the latest petition I thought would be most useful
20 because the clerk's office always uses the petition to
21 enter the names of the parties and, you know, to get
22 things going, so we would have a list of plaintiffs and
23 defendants, and if we had a -- so, you know, we know who's
24 in there, and as I indicated before, if the cases are just
25 going to sit, these are noncompliant cases or no report

1 cases and they're just going to sit. I don't want
2 anything from the trial court's file other than that to
3 keep track of it so I know I have a hundred cases that,
4 you know, if they get sick enough at some point we'll go
5 back to Brazoria.

6 Because the way we've -- once they're in the
7 MDL then they're subject to all the MDL rules, which
8 means, at least in silica -- and I think they're going to
9 do this in asbestos, too -- you don't start answering
10 discovery, you don't do anything until you file that
11 compliant report. So those cases will just sit until
12 they're ready to file a report, and at that point the
13 lawyers and I have talked about that we would sever that
14 case, that person, into a separate case within the MDL and
15 then build the case up and then that bulk of material
16 would go back to the trial court when the case was ready
17 for trial, because, you know, maybe there is some stuff in
18 the old file that would be pertinent, but maybe they
19 answered interrogatories five years ago, but you know, at
20 some point they're still going to have to answer this new
21 set of stuff that we've mandated in the MDL.

22 HONORABLE NATHAN HECHT: And I wonder if I
23 could get the lawyers' reaction to that. Hays, if there's
24 just a single plaintiff and as many defendants as are
25 commonly joined in these cases, is there any usual length

1 to the petition? Is it 50 pages long or a hundred or 10?

2 MR. FULLER: Let me give you the extremes.

3 There are some firms that use the same petition with every
4 filing whether it involves a hundred plaintiffs or one
5 plaintiff. They will simply attach an Appendix A and list
6 the plaintiffs' names, petition is the same. That's not a
7 problem.

8 The other extreme, the Daniels case that
9 we've talked about on several occasions, I think at last
10 count that had an original petition in excess of 130
11 interventions, each being a separate pleading, that totals
12 up to 2,000 whatever number of plaintiffs, and those are
13 indexed on a separate appendix that would show when they
14 were filed or when kind of for limitations purposes
15 because you bring in certain defendants after limitations
16 has run on the initial pleading and that works, but that's
17 -- I think most of the cases now you'll have a 50-page
18 initial pleading in most instances, thereabouts.

19 Some of those are shorter. In Harris County
20 there is a short form petition that is used that will be
21 significantly shorter, but that's what we're talking about
22 I think in terms of pleadings.

23 HONORABLE NATHAN HECHT: Would it be better
24 in lieu of copying papers from the original file and
25 sending those in the mail to Harris County to have the

1 lawyers abstract off the information and just send a
2 five-page or two- or 10-page abstract to Harris County, or
3 if you're talking about 40,000 cases is that not doable?

4 MR. FULLER: It kind of depends on what the
5 MDL court wants. What is done now when you file a notice
6 of transfer, generally it's a one-page notice with the
7 pleading attached and some evidence that you filed a
8 similar copy with the clerk of the court. That really
9 gives you in many instances the abstract that you need. It
10 will identify the defendants, it will identify the
11 plaintiffs, and identify the basic information, depending
12 on what other information you would want at least it
13 identifies the plaintiff -- the parties that have been
14 named. It doesn't necessarily identify the parties that
15 have been served or who are still remaining in the case or
16 not, but depending on what other information you needed I
17 think it would be -- could do some sort of a summary or an
18 abstract.

19 HONORABLE TRACY CHRISTOPHER: The transfer
20 notice under our original MDL rules have not been entirely
21 useful in setting up a new file because often the
22 defendants don't know who all is in the lawsuit, and one
23 defendant will file the notice of transfer, and they will
24 put down everybody they think is in the lawsuit and who
25 the counsel are, but it hasn't been sufficient. We've had

1 to go back. Once we got the original file, we've had to
2 go back, we had to dig through, we had to find people,
3 we've had to figure out who the defendants are, we've had
4 to figure out who the plaintiffs are.

5 We'll get in substitutions of attorneys, and
6 we have no indication that that defendant had ever
7 answered the lawsuit, and so we will have to input the old
8 lawyer, show the old lawyer as the attorney for that
9 defendant, and then input the new lawyer. It has been
10 sort of a paperwork nightmare, even with the amount of
11 information required under the old MDL notices.

12 MR. LOW: Doesn't the plaintiff's lawyer
13 know, though? I mean, he knows.

14 HONORABLE TRACY CHRISTOPHER: Yeah, but he's
15 not filing the notices.

16 MR. LOW: No, but if you gave notice, you
17 have to let him know, and then the next step he's got a
18 right to say these ones shouldn't go and what should, and
19 then the next, the ones that go, then he has to prepare a
20 form to show this certain essential information that are
21 needed -- that's needed, and then the file stays back so
22 there's always a home for that file, and then they would
23 have to, you know, sever it for trial or something like
24 that, and then you only get what information you want, but
25 it wouldn't be a big burden for somebody to -- that's

1 supposed to know. The plaintiff's lawyer ought to know
2 who all he sued and who all he's suing for and to give you
3 a summary, would it?

4 HONORABLE TRACY CHRISTOPHER: You would
5 think that the plaintiff's lawyer should know that, but
6 sometimes they don't.

7 MR. FULLER: I have to agree with Judge
8 Christopher, and recently, as things have hurried up, you
9 may find 150 defendants named in these suits. Some of
10 those defendants are simply thrown in there, even though
11 citation is never issued or served. Some of those
12 companies the plaintiffs' attorneys don't know whether
13 they exist or don't exist. It's a very fluid situation.

14 CHAIRMAN BABCOCK: Fluid.

15 HONORABLE SARAH DUNCAN: To say the least.

16 MR. LOW: If they're in the pleadings, at
17 least you'd have the same -- you'd be consistent with
18 what --

19 HONORABLE TRACY CHRISTOPHER: Well, that's
20 why I actually thought attaching a copy of the petition
21 would be the most useful thing, because at least the --
22 the latest petition. At least at that point we would have
23 a list of all of the plaintiffs and all of the defendants.
24 We wouldn't know exactly which plaintiffs were suing which
25 defendants, but it would give us a start in setting up a

1 file and figuring out who we had to give notices to
2 somewhere down the line.

3 HONORABLE NATHAN HECHT: But I'm just
4 wondering if it wouldn't be more helpful to the clerical
5 process to make the lawyers agree to that at some point
6 shortly after the case is filed and submit it in a 10-page
7 document as opposed to digging through interventions and
8 wondering if people have been nonsuited and all that.

9 HONORABLE TRACY CHRISTOPHER: That would be
10 okay. I mean, we actually -- I got a paralegal from one
11 of the defense firms to come over and she sat down and
12 worked for several weeks with my clerks to go through the
13 files to identify -- to help us identify who all the
14 plaintiffs were and, you know, who all the parties were
15 and who we need to get inputted into the system and who
16 didn't, and it gets complicated by the fact that, you
17 know, plaintiff one will nonsuit defendant one and then
18 plaintiff two will nonsuit defendant ten, and so you're
19 never sure at any given time who plaintiff one is really
20 suing, which, of course, is the complication of these
21 multi-plaintiff cases, which is why in Harris County we
22 decided unilaterally that we would require the severance
23 into single plaintiffs, just from a bookkeeping kind of
24 keeping track of people nightmare.

25 CHAIRMAN BABCOCK: In terms of the rule that

1 we've been talking about on severance, would it make sense
2 to require in the rule that this first cut that we've been
3 talking about that the plaintiffs sever a single claimant
4 or plaintiff into one case?

5 HONORABLE TRACY CHRISTOPHER: For the ones
6 they want to keep down there --

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TRACY CHRISTOPHER: -- I think
9 it's a good idea.

10 CHAIRMAN BABCOCK: Judge Bland is nodding
11 her head. Let the record reflect that Justice Bland is
12 nodding her head "yes." How does everybody feel about
13 that?

14 HONORABLE TRACY CHRISTOPHER: We don't have
15 our plaintiff's lawyer here, but I think it's fair to say
16 that if they think it's a legitimate case it can bear the
17 cost of the severance. I don't mean to say these other
18 cases aren't legitimate, but under the statute at this
19 point they're not ill enough to sue.

20 HONORABLE STEPHEN YELENOSKY: Maybe we
21 should refer to them as ripe and unripe instead of good
22 and bad.

23 HONORABLE TRACY CHRISTOPHER: Right. I
24 don't mean to say that. The Legislature just said --

25 HONORABLE STEPHEN YELENOSKY: Well, it would

1 be a lot more palatable for the plaintiffs' attorneys also
2 to be saying "This case is ripe and this one isn't" --

3 HONORABLE TRACY CHRISTOPHER: Right.

4 HONORABLE STEPHEN YELENOSKY: -- than to be
5 saying "This is a good case and that's a bad one," you
6 know.

7 HONORABLE TRACY CHRISTOPHER: Right.

8 MR. TIPPS: Well, the proper reference is
9 impaired and unimpaired. I think that's what the whole
10 concept of the statute is, that there's a statutory
11 determination with regard to impairment.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE NATHAN HECHT: Let me just ask one
14 more question.

15 CHAIRMAN BABCOCK: Yeah. Yeah.

16 HONORABLE NATHAN HECHT: And that is, are we
17 just forestalling the inevitable here and we really are
18 going to have to split these up sooner or later and it
19 might as well be sooner and we ought to just bite the
20 bullet and decide who ought to pay for it, because I'm
21 worried that if we get five years down the road and
22 somebody shows up with a report and now it's good enough
23 and they show impairment, there's going to be argument,
24 "Well, yes, but you never served Jones" and --

25 HONORABLE TRACY CHRISTOPHER: There is going

1 to be that argument.

2 HONORABLE NATHAN HECHT: And "You nonsuited
3 Edwards."

4 "Well, no, I didn't nonsuit Edwards,
5 somebody else nonsuited Edwards." And it just seems to me
6 you're going to be digging around through papers forever
7 trying to figure out now who is in the suit and maybe we
8 should just go ahead and split these up and be done with
9 it.

10 CHAIRMAN BABCOCK: Okay. Justice Gray.

11 HONORABLE TOM GRAY: My understanding, and
12 maybe Hays can clarify this, that a -- at least the
13 perception is that of these 40,000 cases there will be
14 many of them that never reach an impairment rating that is
15 compensable.

16 CHAIRMAN BABCOCK: 40,000 claimants, not
17 cases, right?

18 HONORABLE TOM GRAY: Excuse me, yes, 40,000
19 claimants. And I --

20 HONORABLE TRACY CHRISTOPHER: Well, I think
21 that's contested by the Plaintiffs Bar.

22 HONORABLE TOM GRAY: Okay.

23 HONORABLE TRACY CHRISTOPHER: I mean,
24 most -- I think that a lot of them believe that silicosis
25 or asbestosis are progressive and that if enough time

1 passes everyone will get to that level of impairment at
2 some point. Now, I think that some of the defense think
3 that won't happen, but I think the plaintiffs think that
4 it will.

5 HONORABLE TOM GRAY: And so I guess my
6 response to your inquiry, Justice Hecht, is if there's
7 some number, substantial number of those cases that may
8 never reach that level of impairment, then you would be
9 creating a system in which they had to go ahead and set up
10 a case that ultimately would wind up just being dismissed,
11 I guess, upon death at the MDL court.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: Under that theory, I mean, if you
14 take the plaintiffs' theory that every one of these are
15 going to ultimate -- you know, that's the theory behind
16 the lawsuit, that they are going to get there sometime,
17 then when they do get there it's going to have to be split
18 up because they can't try but one at a time.

19 CHAIRMAN BABCOCK: Right.

20 MR. LOW: So at some point, I mean, if the
21 cases are good in the sense are going to be good they are
22 going to have to be split up sometime.

23 CHAIRMAN BABCOCK: The fact that Harris
24 County has required this from the beginning really, have
25 you received complaints from anybody that's created some

1 sort of burden or death penalty?

2 HONORABLE TRACY CHRISTOPHER: No, but you
3 have to remember at the time we required it there was no
4 statutory impairment to these people going to trial, so
5 people went to trial and received money without having the
6 statutory level of impairment that is in place now.

7 CHAIRMAN BABCOCK: Gotcha. So that maybe
8 makes it different now.

9 HONORABLE TRACY CHRISTOPHER: So that makes
10 it very different.

11 CHAIRMAN BABCOCK: Justice Gray.

12 HONORABLE TOM GRAY: This is kind of
13 following up on both Justice Hecht's and Judge Sullivan's
14 comments, and has anybody asked Charles Bacarisse if he is
15 going to accept a multi-plaintiff transferred case? Or
16 multi-claimant, excuse me.

17 HONORABLE TRACY CHRISTOPHER: I mean, he
18 does now. We do now.

19 HONORABLE TOM GRAY: On the transfers under
20 MDL?

21 HONORABLE TRACY CHRISTOPHER: Uh-huh.

22 HONORABLE TOM GRAY: Okay. I just thought
23 maybe this may all be moot if Charles says "no."

24 HONORABLE TRACY CHRISTOPHER: No. He
25 hasn't -- he hasn't.

1 HONORABLE TOM GRAY: On the MDL --

2 HONORABLE TRACY CHRISTOPHER: Right.

3 HONORABLE TOM GRAY: -- he doesn't make that
4 requirement to split them.

5 HONORABLE TRACY CHRISTOPHER: And he didn't
6 make the requirement on the asbestos. That was a
7 judge-imposed --

8 HONORABLE TOM GRAY: Oh, okay.

9 HONORABLE TRACY CHRISTOPHER: We're
10 requiring as part of our standing order that everybody
11 file their cases individually.

12 HONORABLE TOM GRAY: Okay.

13 CHAIRMAN BABCOCK: Yeah, Kay.

14 MS. ANDREWS: Just to follow up on that, in
15 the MDL right now it's my understanding that if a
16 10-plaintiff case gets transferred into the MDL, that the
17 district clerk in Harris County is now taking that cause
18 number and then saying name plaintiff-a, -b, -c, giving
19 each of them a unique cause number. So that raises the
20 issue if, in fact, what we're talking about is the
21 transfer of some of these huge cases of the pre-September
22 1, '03, if we're going to put that burden on Bacarisse's
23 office to go through and give those each unique cause
24 numbers. Or I really think what we're talking about is
25 when those are transferred in bulk, leaving them in bulk

1 and exactly as Judge Christopher said. If, in fact, on a
2 one-by-one basis those are eventually worked up, at that
3 time they would be severed, given a new cause number,
4 worked up and remanded, but I think that's the way it has
5 to work.

6 HONORABLE TRACY CHRISTOPHER: Well, asbestos
7 is running differently from the silica because Judge
8 Davidson requires the severance and I don't, because we
9 are about a year apart in terms of setting up how the
10 docket worked, and during the time period of mine everyone
11 was telling me, "Oh, SB15 is coming and things are going
12 to change, so don't require severance until we know what's
13 going to happen." So my cases are just all kind of the
14 traditional -- I have 800 plaintiffs in 150 cases, and
15 they just, you know, sit that way.

16 CHAIRMAN BABCOCK: Can we talk just briefly
17 about, assuming there's going to be -- somebody is going
18 to bite the bullet, who ought to pay for all the
19 individual files being set up? I mean, I assume we're
20 going to bite the bullet and do that.

21 HONORABLE TRACY CHRISTOPHER: And when we do
22 that, you've got to remember that if we set up individual
23 files at the trial court level then we're also imposing
24 another 165 fee per person on the defendant when they
25 transfer them.

1 CHAIRMAN BABCOCK: Uh-huh.

2 MR. FULLER: To follow up on Justice Hecht's
3 inquiry, if you required individual cases at the trial
4 court level now, that will impose a significant financial
5 burden on the plaintiffs because they will be paying in
6 essence the individual filing fee now that they avoided
7 paying in the past. That might incentivize the
8 plaintiffs' attorneys to say -- you know, to use the safe
9 harbor provisions of Senate Bill 15, don't they have the
10 ability now to nonsuit their case without fear of being
11 barred by limitations and coming back when they have got a
12 compliant report under Senate Bill 15?

13 HONORABLE TRACY CHRISTOPHER: They do, but
14 plaintiff's lawyers are not going to nonsuit now unless
15 there has been a final constitutionality determination of
16 this issue.

17 MR. FULLER: Yeah. And that's important,
18 because if you don't want to pay \$165 per 2,000
19 plaintiffs, 80 percent of which aren't going to generate
20 income for a number of years, you might be inclined to
21 nonsuit those to avoid that cost, if, in fact, you had a
22 safe harbor.

23 On the other hand, the good news is for the
24 defendants is if all of those are nonsuited there will be
25 fewer cases to look at and remove, and defendants are used

1 to paying \$165 a plaintiff to remove a case now, but I
2 don't know if that's workable as long as that
3 constitutional -- I mean, as long as plaintiffs aren't
4 sure they don't have a safe harbor they're not going to
5 nonsuit, and I think that imposes a very almost killer
6 burden on the plaintiffs.

7 HONORABLE TRACY CHRISTOPHER: Another thing
8 I hadn't even thought of is the pre-9-1-03 cases don't
9 have the same responsible third party law, which is a huge
10 issue in these cases. So they would not want to nonsuit
11 and then have a new, you know -- and not have the benefit
12 of that.

13 MR. FULLER: They would want to relate back
14 to the time the cases --

15 CHAIRMAN BABCOCK: How is that usually done,
16 Tracy?

17 HONORABLE TRACY CHRISTOPHER: Well, let's
18 take your usual asbestos case. The responsible third
19 parties in an asbestos case include all of the old
20 bankrupt defendants that were never allowed to be a
21 responsible third party until after 9-1-03, so people like
22 Johns Manville --

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE TRACY CHRISTOPHER: -- that have
25 all the really bad documents --

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE TRACY CHRISTOPHER: -- are
3 suddenly going to be submitted, and the percentage that
4 the plaintiff recovers will be reduced by the percentage
5 put against, you know --

6 CHAIRMAN BABCOCK: A bankrupt.

7 HONORABLE TRACY CHRISTOPHER: -- a bankrupt
8 defendant.

9 CHAIRMAN BABCOCK: Got it. Okay.

10 HONORABLE TRACY CHRISTOPHER: So it's a big,
11 big issue for them.

12 CHAIRMAN BABCOCK: Pete.

13 MR. SCHENKKAN: But why isn't the fact that
14 the plaintiff's lawyer has to weigh these things, weigh
15 his or her confidence in the constitutionality question,
16 which they would be approaching as zero, the desirability
17 of keeping a case on file to preserve the old
18 proportionate responsibility law applicability, which is
19 clearly an economic asset to that case, against the cost,
20 cost of my keeping that case on file because I think I
21 might win the constitutional challenge, because I want to
22 keep the proportionate challenges I've got to pay this
23 severance cost. To me that doesn't seem at all unfair or
24 unrealistic.

25 It's not going to keep the system from

1 working. It's going to put the responsibility for making
2 that decision where it belongs, and I don't see anything
3 unjust about it given that the justice decisions are the
4 policy decisions that were made in a statute that we don't
5 get a vote on and neither does the plaintiff's lawyer.

6 CHAIRMAN BABCOCK: Kay.

7 HONORABLE TERRY JENNINGS: It is the
8 plaintiff's burden to prosecute their suit, and they make
9 these decisions all the time whether their suit is worth
10 pursuing or not.

11 CHAIRMAN BABCOCK: Kay.

12 MS. ANDREWS: For whatever it's worth, I do
13 think that it is contemplated by the Plaintiffs Bar around
14 the state that huge numbers of these cases are going to
15 get transferred in bulk, and they're going to on the front
16 end sever and identify their malignancies. Yesterday I
17 got served in a case with a plaintiff's motion to
18 transfer. I mean, the plaintiff is now sending their
19 cases to MDL. Plaintiffs are saying, "I know it's not
20 going to meet the criteria. I want all these guys to be
21 in the MDL."

22 I think, you know, maybe we should look at
23 it, as Bryan said yesterday, he'll send out an e-mail.
24 The idea that he would send an e-mail and I would send an
25 e-mail, we may be able to work through some of this

1 getting plaintiffs to sever the malignancies on the front
2 end, and I'll let you know without -- I don't pretend to
3 know the rulemaking authority, but let the MDL judges,
4 both Judge Christopher and Judge Davidson, within their
5 own courts fashion through the CMO's whatever discretion
6 they need at that point to deal with the cases once they
7 get there.

8 But I do think there is not a reason for
9 fashioning a severance of all of the cases in a single
10 case at the trial court level. I don't think that's
11 necessary nor contemplated, nor does it incentivize a
12 system that is needed. The plaintiffs' attorneys will
13 sever and pay that cost on their good malignancy cases.
14 Let the rest of them go to the MDL, let the MDL judges
15 figure out what to do with them once they're there.

16 HONORABLE TRACY CHRISTOPHER: I think Bryan
17 will and I think some other plaintiffs lawyers who are
18 sort of on top of things will, but you know, he said he
19 had 9,000 out of the --

20 CHAIRMAN BABCOCK: Forty.

21 MR. FULLER: That's 25 percent.

22 HONORABLE TRACY CHRISTOPHER: He thinks
23 there's more like 28,000, but everybody is unclear because
24 there could be another 10,000 out there represented by
25 kind of, you know, plaintiff's lawyers that just got

1 themselves a few asbestos cases that aren't really paying
2 much attention --

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE TRACY CHRISTOPHER: -- to this
5 whole thing.

6 CHAIRMAN BABCOCK: Yeah. Yeah.

7 HONORABLE STEPHEN YELENOSKY: Are you
8 confident the statute is all we need and provides all we
9 need to require severance prior to trial? I'm not -- I
10 don't know the statute. I mean, does it just say that
11 they can't go to trial joined?

12 MR. TIPPS: Right.

13 HONORABLE TRACY CHRISTOPHER: Well, I mean,
14 it doesn't actually require severance. You could
15 theoretically just have a separate trial per plaintiff.
16 You just wouldn't have a final judgment until everybody
17 had been tried.

18 HONORABLE STEPHEN YELENOSKY: So what's the
19 authority, if there need be authority, to require
20 severance where the plaintiff has chosen to file it with
21 multiple plaintiffs?

22 HONORABLE TRACY CHRISTOPHER: Well, when we
23 looked at that, you know, as I indicated, the case law --
24 to sever it you would sort of have to say it was improper
25 joinder to begin with, if you were severing it without

1 agreement of everyone.

2 HONORABLE STEPHEN YELENOSKY: Well, isn't
3 that an issue here? I mean, unless it's concluded that
4 there's no impediment to requiring it by rule, I mean, it
5 seems to me there's a question there. I mean, plaintiffs
6 make choices, as everybody is saying, about their case,
7 and one of their cases -- one of their choices was to join
8 them. So are we taking away that choice, and do we have
9 the authority to do that?

10 HONORABLE TRACY CHRISTOPHER: 90.012
11 specifically says we can address joinder questions.

12 HONORABLE STEPHEN YELENOSKY: When?

13 HONORABLE TRACY CHRISTOPHER: They might
14 have been thinking about that issue.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE STEPHEN YELENOSKY: Prospectively
17 or in respect --

18 CHAIRMAN BABCOCK: We need to let our court
19 reporter take a little break, so let's just take 10
20 minutes, but we'll start up right at 11:00.

21 (Recess from 10:44 a.m. to 11:01 a.m.)

22 CHAIRMAN BABCOCK: Okay. Well, we have
23 reached consensus, and the consensus is we've talked this
24 issue out, but I think Justice Hecht and Lisa and Judge
25 Christopher have a plan. It's a secret plan, but, no, I

1 think this discussion has been really helpful, and I think
2 the Court will come up with a rule, probably send it out
3 to comment but on an expedited basis, not the full 120
4 days, and then we'll see what happens, and hopefully it
5 will all work smoothly, but terrific discussion. Thanks,
6 everybody, for participating in it.

7 The other items on the agenda I think will
8 not be difficult, I hope, but let's run them through
9 quickly. The court reporter's record and admitted
10 exhibits, it has been stated by Mr. Orsinger, who is not
11 here, that this was all decided at the last meeting, the
12 May meeting which I unfortunately missed, and Richard has
13 handed me the language and the cites to the record, but,
14 David Jackson, is that right?

15 MR. JACKSON: Yes.

16 CHAIRMAN BABCOCK: We've pretty much
17 resolved that? So I am tendering Richard's language to
18 Ms. Hobbs, so now that's out of my hands and we don't have
19 to deal with it, so Item 5 is done with.

20 There has been some post-May meeting
21 conversation about the electronic jury shuffling, and
22 that's Paula Sweeney's issue, and she couldn't be here
23 today, and it's probably fair that Judge Benton is also
24 not here, so they would cancel each other out. But it
25 sounds like what is left from the votes that we took last

1 time, unless somebody wants to revisit things, is that
2 there has been a proposal to try to add something to the
3 rule that says that if the shuffle is in violation of the
4 law or unauthorized by law or something of that nature,
5 that that language could profitably be added, and the
6 concept is that if the shuffle is being done for Batson
7 type reasons, prohibited reasons under Batson, then it
8 shouldn't be -- it shouldn't be permitted, it shouldn't
9 happen, there should be some additional state-created
10 prohibition beyond the constitutional issue that Batson
11 raises.

12 So according to Paula that's basically the
13 only issue we have left to discuss. Anybody have views on
14 it? Buddy.

15 MR. LOW: And in connection with that, the
16 Court of Criminal Appeals has held that it's not error to
17 refuse just for no reason a shuffle, and so has the
18 Supreme Court of Texas.

19 CHAIRMAN BABCOCK: Say that again, Buddy.

20 MR. LOW: Both the Supreme Court of Texas
21 and the Court of Criminal Appeals have held that it's
22 not error. The Supreme Court held it back when Judge
23 Denton was on the Court, the predecessor to Justice Hecht,
24 and the case is still the law. It's not error to refuse.
25 In Denton's case they just -- they didn't even have the

1 jury wheel, even though it's required, and they just took
2 them as they came in from the mail, and they said that's
3 not harmful error.

4 So in keeping with that, the judge can deny
5 it and certainly could and should deny it if he thinks
6 it's used for Batson purposes, and he won't be reversed.

7 HONORABLE STEPHEN YELENOSKY: I'm sorry.
8 Only for Batson purposes or are you saying for any reason?

9 MR. LOW: No, no. I mean, they talk about a
10 Batson amendment. I'm saying he has the power to do it
11 now.

12 HONORABLE STEPHEN YELENOSKY: Well, that
13 will be news to the trial court judges who don't want to
14 suffer shuffles but are now.

15 CHAIRMAN BABCOCK: Elaine.

16 MR. LOW: I can give you the citation to the
17 cases if you'd like, but --

18 CHAIRMAN BABCOCK: Elaine.

19 PROFESSOR CARLSON: There are court of
20 appeals cases, pretty recent -- I know we have one in our
21 textbook -- that have held it is reversible error to deny
22 a shuffle.

23 MR. LOW: Well, okay.

24 PROFESSOR CARLSON: Maybe they just were
25 misguided, Buddy, but --

1 MR. LOW: No, the case of Rivas, R-i-v-a-s,
2 vs. Liberty Mutual, 480, 610, all right, and it says that
3 there was a degree of randomness and that's all you need,
4 and that case has not been overruled. Supreme Court of
5 Texas, written by Judge Denton, and then the case of --

6 HONORABLE TOM GRAY: Buddy, that's an old
7 case. I don't have to follow it.

8 MR. LOW: It's not that old.

9 CHAIRMAN BABCOCK: That's how long it's been
10 the law.

11 MR. LOW: And then the case the Court of
12 Criminal Appeals held that, there was some dissent. They
13 held that in Ford vs. State, 73 3d 923. So I've never
14 seen a Supreme Court case that said that it wasn't error.
15 That's the only one I found, and it says that it's not
16 harmful error.

17 HONORABLE DAVID GAULTNEY: They're saying
18 it's not harmful in that case?

19 MR. LOW: Basically they just didn't
20 reverse.

21 CHAIRMAN BABCOCK: It's error, but not
22 harmful.

23 MR. LOW: I don't even remember if they
24 called it error, Judge. It was not yesterday that I read
25 it, so I'm not going to tell you I remember, but I do know

1 that the case held that.

2 CHAIRMAN BABCOCK: Carl.

3 MR. HAMILTON: I have to disagree with
4 Buddy, because there is a case in 95 SW 3d 473, Railsback,
5 a review refused where the courts held that 35.11 of the
6 Criminal Code required a mandatory shuffle before voir
7 dire began. That's on the criminal side, but what we're
8 talking about now is just the Batson rule, and the
9 question is whether or not we ought to add something to
10 the proposed rule which would say something like, "A
11 shuffle may be requested for any reason other than an
12 improper reason," but that language is not in the
13 peremptory challenge rule, and our subcommittee has not
14 really discussed fully one way or another whether we
15 should have it, but I think we just need to have some
16 feeling of the full committee as to whether we need
17 anything or don't need anything, since that's the law
18 anyway.

19 CHAIRMAN BABCOCK: Yeah, Elaine.

20 PROFESSOR CARLSON: Did your subcommittee
21 look at the recent U.S. Supreme Court case of Miller-El,
22 which was reviewing the use of a Texas jury shuffle in the
23 criminal context, and the United States Supreme Court was
24 very unimpressed with the use of the jury shuffle, but
25 ultimately I think they -- and discussed it being

1 improperly used for Batson, but ended up deciding there
2 were other improper procedures that required reversal.

3 MR. HAMILTON: We did look at the case, but
4 as I say, we haven't decided one way or the other on it.

5 CHAIRMAN BABCOCK: Well, you know, the
6 Constitution is what it is.

7 HONORABLE STEPHEN YELENOSKY: Yeah.

8 CHAIRMAN BABCOCK: So it's going to impose
9 whatever requirements it does separate and apart from what
10 we would say in a rule; but we could, if we wanted to,
11 give another basis for somebody to object to a shuffle
12 which doesn't exist now under state law, you know, if that
13 was thought to be wise.

14 There was -- I don't know how many of
15 you-all saw it, but the *Dallas Morning News* just did a
16 multipart series about discriminatory picking of juries,
17 and they had a whole deal on the shuffle and were very
18 critical in terms of their findings about how the shuffle
19 is used for illegal purposes and --

20 HONORABLE STEPHEN YELENOSKY: They started
21 with the array, didn't they, and went all the way back? I
22 haven't seen it yet, but I heard the whole issue whether
23 the array is even --

24 CHAIRMAN BABCOCK: Yeah. It wasn't confined
25 to the shuffle, but there was -- and you can see

1 legitimate reasons for the shuffle in that you walk into
2 the courtroom in a small county and you see that the
3 plaintiff -- you're a defense lawyer and you see that the
4 plaintiff has got all his cousins on the first row and you
5 might want to try to mix that up a little bit and that
6 would be okay; but on the other hand, if you walk into a
7 courtroom and you see all the African-Americans are on the
8 first row and you say, "Well, I don't like that" and you
9 want to shuffle for that reason, that wouldn't be
10 permissible, I don't think.

11 HONORABLE JANE BLAND: Well, I disagree with
12 your first statement when you walk in and see the cousins
13 that's a justification for a shuffle because the cousins
14 would be excused for cause. We're the only state in the
15 country that has this shuffle, and Judge Benton makes a
16 persuasive argument that we created this shuffle at a time
17 when its primary purpose was a discriminatory one.

18 CHAIRMAN BABCOCK: Uh-huh.

19 HONORABLE JANE BLAND: The *Dallas Morning*
20 *News* has made a persuasive argument that that purpose
21 continues today. What is the compelling basis for the
22 other side of the argument to be the only state in the
23 union that allows the randomness of voir dire to become
24 unrandom once 50 jurors reach the courtroom?

25 CHAIRMAN BABCOCK: I wasn't here last

1 meeting, but I understand that somebody made an argument
2 that it was okay. Apparently it didn't persuade you, did
3 it? Carl.

4 MR. HAMILTON: Well, one of the arguments
5 that David Peeples has been talking about is that if we
6 are to consider ever doing away with the jury shuffle then
7 we're going to have to examine the process by which the
8 initial panel is put in that order because there is
9 suggestion that in some counties that that's less than
10 fair and that there are ways to manipulate the order in
11 which those jurors are seated, so it's not really random
12 in some counties.

13 CHAIRMAN BABCOCK: Buddy, then Kent.

14 MR. LOW: I disagree with what Judge Benton
15 said because this rule existed before blacks served on
16 juries in state court, and it's been -- I'm not arguing
17 for it. I'm just saying it was a basis, like you're
18 talking about, where you see -- you get a jury stacked and
19 you say --

20 CHAIRMAN BABCOCK: Business associates, not
21 cousins. All the business associates are in the front
22 row.

23 MR. LOW: But it had nothing to do with
24 that, and I understand and I don't disagree that it
25 shouldn't be used, you know, for Batson reasons and so

1 forth. That's wrong.

2 CHAIRMAN BABCOCK: Well, let me tell you, I
3 bet I'm the only guy in this room that ever made a Batson
4 challenge based on a jury shuffle, and I am absolutely
5 convinced that my opponent shuffled the jury because --
6 for racial reasons, but there is no way --

7 MR. LOW: It's hard to --

8 CHAIRMAN BABCOCK: There was no way for me
9 to prevail on that really because I didn't have a record.
10 I mean, think about it. Think how you create a record on
11 that. I mean, what, do you take a snapshot when you walk
12 in before the shuffle and then you take a snapshot
13 afterwards of the jury? You wouldn't do that.

14 HONORABLE TRACY CHRISTOPHER: Well, you
15 would have a record now because the race is on the jury
16 cards.

17 CHAIRMAN BABCOCK: The what?

18 HONORABLE TRACY CHRISTOPHER: The race is on
19 the juror cards now.

20 CHAIRMAN BABCOCK: Yeah. And if the clerk
21 keeps the preshuffle card in the order that they were,
22 which at the time of this trial they didn't, I don't know
23 if they do now, and then you have a record of the
24 post-shuffle order, then that would do it. But, yeah,
25 Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: I know I'm on
2 the losing end of doing away with it, and we had a long
3 discussion the last time and a close vote on it, and I
4 think what the committee was tasked with was, okay, we
5 don't want to get rid of it at this point but perhaps we
6 wanted to add some language to it that it shouldn't be
7 done for discriminatory reasons or something to that
8 effect, and I will have to admit I haven't done the
9 research on this point, but I just remember when Batson
10 first sort of came to the forefront there were questions
11 as to whether or not our jury shuffle could violate
12 Batson, and most experts thought that it couldn't because
13 you weren't actually excluding people from the jury
14 panel --

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE TRACY CHRISTOPHER: -- like you do
17 in a challenge, and just moving them didn't rise to the
18 constitutional level. Now, I don't know if there's any
19 case law to that effect, but I just remember that that was
20 sort of the experts' feeling that it wouldn't technically
21 meet Batson. So if we are drafting some language and we
22 just say, you know, you can't shuffle for an
23 unconstitutional reason, that might not be enough, and I
24 just think we ought to be more specific that you can't
25 shuffle to change the racial or sexual or, you know,

1 whatever, array, if that's your purpose.

2 CHAIRMAN BABCOCK: Yeah. The way it -- the
3 way it worked in this case that I'm discussing, and it's
4 over now, I mean, it's not pending or anything, but I said
5 that the shuffle was part of the evidence that tied into
6 the fact that -- we had a questionnaire that all of the
7 jurors of one race who had answered Question 18 a
8 particular way were excluded by the plaintiff, and that
9 was his justification for excluding those jurors, but the
10 jurors of the other race who had answered the Question 18
11 the exact same way were kept. So I said those two things
12 together demonstrated that there was a Batson violation,
13 but I agree, in and of itself a shuffle may not get you
14 there.

15 PROFESSOR CARLSON: Read that case. Read
16 Miller-El.

17 HONORABLE TRACY CHRISTOPHER: Well, I have
18 read Miller-El, Miller-El --

19 CHAIRMAN BABCOCK: Easy for you to say.

20 HONORABLE TRACY CHRISTOPHER: -- on it and
21 they were obviously very critical of it.

22 CHAIRMAN BABCOCK: Judge Sullivan.

23 HONORABLE TRACY CHRISTOPHER: But they only
24 talked like -- it's like four points in the opinion, so
25 you have to kind of dig through and find where they talked

1 about it, but I just think if we're going to make a rule
2 we ought to be clear that that's what we mean rather than,
3 you know, you can't do it for unconstitutional reasons.

4 CHAIRMAN BABCOCK: Yeah. Yeah. Judge
5 Sullivan.

6 HONORABLE KENT SULLIVAN: I was on this
7 subcommittee, and I'm sorry that Judge Peeples is not here
8 to make this point, but I think he and I shared this
9 concern, and that was when you do some of the research, at
10 least what we were able to do, you find that the
11 randomness of the summoning process is fairly well
12 regulated by whatever the Government Code and the like.

13 So the process of getting people to the
14 courthouse, so to speak, seems to be subject to a fairly
15 specific regulatory overlay, but getting them into the
16 courtroom is a different matter, and the hypothetical case
17 of administrative personnel or other personnel who some --
18 for whatever reason would decide to manipulate the seating
19 of jurors seems to be completely unregulated, or at least
20 we could not find any specific regulation of that process,
21 and that gave us pause.

22 In fact, it's interesting, we could not find
23 that someone intentionally manipulating that for specific
24 ends or even -- we couldn't find any prohibition relative
25 to that.

1 HONORABLE STEPHEN YELENOSKY: Other than
2 constitutional?

3 HONORABLE KENT SULLIVAN: Well, what
4 constitutional prohibition would that be?

5 HONORABLE STEPHEN YELENOSKY: Well, I
6 mean --

7 MR. GILSTRAP: Only race.

8 HONORABLE KENT SULLIVAN: What? I'm sorry.

9 MR. GILSTRAP: Only race.

10 HONORABLE KENT SULLIVAN: Well, no, I'm not
11 talking about with some racial impact. I'm talking about
12 someone was effectively the arm of one of the litigants
13 and was simply trying to handpick jurors that would be
14 favorable to one side or the other. Let's assume that
15 it's benign as to race or as to protected classes. We
16 just found that to be extremely disconcerting, and I don't
17 know that that's remedied very well by way of something
18 like the shuffle, because I share Judge Christopher's
19 concern. I would prefer to see the shuffle done away
20 with.

21 If you could simply translate the random
22 summoning process -- and in Harris County, as I understand
23 it, you have a numerical identifier that's part of the
24 random summoning process. That identifier stays with you,
25 and then people are numerically put into groups based on

1 how they showed up, but it's done numerically in sequence,
2 and they are also seated in that same numerical sequence,
3 so when they are seated in the courtroom and given numbers
4 one through whatever it is, it's truly random. And if
5 that became something that was a statewide mandate,
6 something like that, then I really do question how you
7 could justify anything like the jury shuffle. At that
8 point it's purely for strategic manipulation.

9 CHAIRMAN BABCOCK: I guess I was concerned
10 somewhat by this study by the *Morning News*, by the *Dallas*
11 *Morning News*, and wonder if the fact that there has been a
12 scientific or at least an attempt at a scientific look at
13 the shuffle justifies -- I don't like to revisit things
14 we've already done, and we're not here just to endlessly
15 debate things, and we don't want to do anything that the
16 Court doesn't want us to do, so is this something that we
17 ought to step back and look at again, or have we just
18 talked about it enough?

19 HONORABLE TERRY JENNINGS: What was our last
20 vote on it?

21 HONORABLE TRACY CHRISTOPHER: It was very
22 close.

23 MR. LOW: Yeah. It was a close vote. As I
24 remember the vote, it basically -- somebody said it broke
25 down to the judges and the lawyers.

1 CHAIRMAN BABCOCK: Judges were against it,
2 and the lawyers were in favor it.

3 MR. LOW: And Bob Pemberton says, "No,
4 that's not true because I'm for it," so he was, and I
5 remember that. So it was close, and I heard every
6 argument for and against. Richard was -- Richard and
7 Judge Benton --

8 CHAIRMAN BABCOCK: Orsinger or Munzinger?

9 MR. LOW: Munzinger, were the most just --
10 there is no question how they believe, and so -- and if
11 the Court hasn't heard that day everything they could hear
12 for and against, I can't believe it. Now, if we want to
13 reconsider adding something to it or changing it or
14 something, I believe we did say electronic. Didn't we
15 vote on that?

16 MR. HAMILTON: We voted on that, yeah.

17 CHAIRMAN BABCOCK: Yeah. Yeah. We did.

18 MR. LOW: And if we want to add something to
19 it then we would need to get somebody to look at the
20 language or something, but I truly believe on the question
21 of doing away with it, it was a close vote and the Court
22 can do what they think is right, and they have heard every
23 argument to be given.

24 CHAIRMAN BABCOCK: Good point. Bonnie.

25 MS. WOLBRUECK: I was just telling Judge

1 Sullivan that he is exactly right regarding not having any
2 specific procedural statutory provision on how whenever
3 you bring the big panel in and then exactly how that big
4 panel is seated into the individual courtrooms.
5 Occasionally that's done by the jury plan and the judges
6 have directed that through the jury plan.

7 Sometime it is not, and I told Judge
8 Sullivan that, actually, the clerk can probably manipulate
9 which courtroom gets what set of jurors. I mean, that's
10 -- because there are no -- there is no procedures in the
11 statute regarding what happens once you've called in the
12 random panel, the large panel.

13 CHAIRMAN BABCOCK: Well, in Harris County,
14 correct me if I'm wrong, but in Harris County a judge
15 calls up a panel and then the clerk just takes people from
16 the central jury room and sends them up to your courtroom.
17 Isn't that how it works?

18 HONORABLE TRACY CHRISTOPHER: The bailiff
19 goes over and helps them, yeah.

20 CHAIRMAN BABCOCK: Yeah. Bailiff helps. "I
21 want that guy."

22 HONORABLE TOM LAWRENCE: No. No, not
23 entirely. That may work in the district and county
24 courts. In the JP courts, which there is 16 of those, and
25 this is the case throughout Texas in the other thousand,

1 you have in some cases the constable summoning in jurors,
2 and some cases like in Harris County the district clerk
3 does do that for us. Now they summons them in. But once
4 they arrive at the courthouse it is the clerk of that JP
5 court that puts them in some order. Now, I would say that
6 generally that would be done in the order they arrive, but
7 there is no guarantee that's the way it will always be.

8 MS. WOLBRUECK: And what I'm saying here is
9 like in Williamson County we have seven courts, and I call
10 in the large panel and then we assign it to whichever
11 courts are having jury panels on that date, and actually,
12 we make a determination on which court gets the first set
13 of jurors out of that panel.

14 The first 50 jurors is assigned to the first
15 court sometime that's ready, you know. The other ones are
16 still hearing pretrial matters, so we'll send it to the
17 first one that's ready and then the next one or whichever
18 order that my staff seems to pull it up and determine in
19 which order, but understanding that if they look at the
20 large panel and know that these are coming up, if they
21 know what cases are to be handled in which court, they
22 could actually possibly manipulate which jurors go to
23 which courtroom as far as the voir dire panel.

24 CHAIRMAN BABCOCK: Judge Sullivan.

25 HONORABLE KENT SULLIVAN: And my point was

1 this threshold issue must be resolved. It must be
2 regulated before we do away with the shuffle. I would
3 very much like to do away with the shuffle, but we can't
4 ignore this issue, because in some counties it may be that
5 this would be the only remedy that some litigant would
6 have for this unfortunate possibility, or at least I'm not
7 aware of any other remedy.

8 CHAIRMAN BABCOCK: Yeah, Buddy, then Pete.

9 MR. LOW: Like in Beaumont, the same thing
10 happens that Bonnie is talking about, but if you get -- I
11 always say I don't want a Wednesday panel because you're
12 going to get people -- you are not going to get the people
13 that have been excused. You are going to get people that
14 have been struck by other sides. I always ask let me pick
15 -- if we're not going to trial till Wednesday let me pick
16 a jury Monday because some people get a Wednesday panel,
17 and I can tell you, you don't want one.

18 MR. HAMILTON: Depends on which side you're
19 on.

20 MR. LOW: Well, either way.

21 CHAIRMAN BABCOCK: Pete, you had something.
22 Then John Martin.

23 MR. SCHENKKAN: Yeah, focusing on what Judge
24 Sullivan is focusing on, I would go one step further and
25 say that this may be a good reason until we get our arms

1 around this and get a solution for it you don't want to do
2 away with the shuffle even if you're in the camp that
3 would like to.

4 HONORABLE KENT SULLIVAN: Agreed.

5 MR. SCHENKKAN: But even before -- even
6 while you have the shuffle don't we need to go ahead and
7 say what can be done about this, and that would lead to
8 two questions. One is does the Supreme Court have the
9 power to make a rule on that that is in effect binding on
10 all the counties that says -- at least at a minimum I
11 assume the rule would say something like it shall be
12 random starting from that first stage all the way to the
13 stage where they're seated in the courtroom.

14 And then the second is, if the Court has the
15 authority to do it, do we know enough about it to say what
16 that rule -- how that should read? Is it as simple as
17 that? You could say it has to be random and the details
18 on how it's random are something each --

19 HONORABLE NATHAN HECHT: Judge Davidson and
20 Judge Benton -- it may have just been Judge Benton, but
21 Davidson was a promoter -- wrote several months ago and
22 suggested in a lengthy letter detailing some of the
23 experience in Harris County that we don't know enough to
24 know how to remedy the problem, but suggesting fairly
25 strongly that there is a problem and asking that we put

1 together some sort of group that would study this over the
2 course of a year or so in all 254 counties and see just
3 what's going on, because to a large extent we have no idea
4 really what's going on and then, secondly, determining
5 after we get that information whether it can be fixed by a
6 rule or whether it would have to be accommodated by
7 statute or some combination of the two, and we got the
8 letter during the session, toward the end of the session,
9 and told Judge Benton we'd get back to him this fall.

10 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

11 HONORABLE TOM LAWRENCE: If you have a group
12 sitting in a jury assembly room and some of those go to
13 civil courts and some to criminal courts, how is this
14 going to work? Because you have a jury shuffle mechanism
15 in the Code of Criminal Procedure. I'm just wondering how
16 -- how would a rule that we would devise affect those
17 jurors that would go to a criminal panel?

18 HONORABLE NATHAN HECHT: Well, I think
19 that's one of the concerns that they had about whether
20 there would have to be some statutory implementation, and
21 but you -- the Court of Criminal Appeals can't do anything
22 about the Code of Criminal Procedure, and of course,
23 neither can we. You would get one in criminal cases and
24 you wouldn't get one in civil cases, but with respect to
25 the summoning of jurors and the arrangement of them

1 before they go to the trial courts, I think our Court
2 could probably do most of that by rule. Whether the Court
3 of Criminal Appeals could or not I just don't know.

4 CHAIRMAN BABCOCK: Okay. John Martin,
5 sorry.

6 MR. MARTIN: Several points. I agree with
7 Judge Sullivan and the point that Judge Peoples made last
8 time that we need to solve that problem before we decide
9 whether to do away with the shuffle. I would come a lot
10 closer to supporting doing away with the shuffle if I was
11 convinced that there was true randomness in how the
12 assignments are made, but there's other issues.

13 For example, I learned recently in Dallas
14 County that if a juror -- I was summoned as a juror, and,
15 you know, you're assigned to either the civil courthouse
16 or the criminal courthouse. If you show up at the wrong
17 one they don't make you go to the other. Now, that's
18 subject to manipulation by people who are summoned. As a
19 lawyer who practices in civil cases, if I want to get
20 struck and I get summoned to the criminal courthouse, I
21 could just show up at the civil courthouse, which I didn't
22 do. I went to the criminal courthouse because that's
23 where I was supposed to go, and I got struck there, too,
24 but I don't think that's right. I think it ought to be
25 more random than that, and I think if somebody shows up at

1 the wrong courthouse they ought to be sent to the right
2 courthouse.

3 On the *Dallas Morning News* story, I read
4 every word of it. I thought it was very compelling, very
5 fascinating, but it was limited to criminal cases where I
6 think the use of the shuffle is somewhat different than it
7 is in civil cases, and it seemed to be operating under the
8 assumption that the only thing the prosecution and the
9 defense lawyers know is they go in and look at the faces
10 of the people, and I don't know how it works in criminal
11 cases, but in civil cases we do have more information than
12 that because we have the information card that they fill
13 out and in some cases a questionnaire.

14 CHAIRMAN BABCOCK: Not always.

15 MR. MARTIN: But not always, but you at
16 least have the juror information.

17 CHAIRMAN BABCOCK: Not always.

18 MR. MARTIN: Well, that's been my
19 experience. In Dallas County you do.

20 CHAIRMAN BABCOCK: Yeah.

21 MR. MARTIN: In Dallas County you do.

22 CHAIRMAN BABCOCK: Yeah. You know,
23 anecdotally, but this is true, and you probably remember
24 these days, it used to be in Dallas County if you got
25 summoned for jury duty and you were a lawyer, you could

1 get on the first panel out. I once served on a panel with
2 like eight lawyers. Carl.

3 MR. HAMILTON: Can we get back to the
4 question about whether we need to add something to this
5 rule or just leave it? Batson. Batson question.

6 CHAIRMAN BABCOCK: Yeah. And I think with
7 everybody's permission I'll just get with Justice Hecht
8 and with Lisa and see whether the Court feels it has
9 enough of a record; and if we want to come back and talk
10 about anything for any reason, including Judge Benton's
11 and Judge Davidson's remarks, then we'll put it on the
12 agenda and assign it to a subcommittee and we'll start the
13 file all over again.

14 MR. HAMILTON: There is one other thing.
15 One of our jobs was to see why there is a difference in
16 Rules 223 and 224, and we don't think there should be any
17 difference. 224 seems to be a situation where you don't
18 have two or more district courts in the same county, so
19 you're not sharing from a jury panel, but in the 224
20 situation, the way that it's worded is it's sort of got a
21 built-in shuffle that's automatic, whether a lawyer asked
22 for it or not.

23 In 223 the lawyer has to ask for the
24 shuffle, but practically speaking I don't think it works
25 that way. It doesn't in Starr County, for example. There

1 is no automatic shuffle like is required under 224 unless
2 a lawyer asks for it. So as a practical matter it may not
3 be working that way, but we don't think there ought to be
4 any distinction, and so the plan is to rewrite Rule 224
5 also to make it -- or put both in the same rule and don't
6 make any distinction in the counties and give the lawyer
7 the opportunity to ask for the shuffle or not.

8 MR. LOW: The shuffle is operated so that
9 they just -- they haven't treated 223 and 224 as -- all
10 the courts have treated them the same.

11 MR. HAMILTON: Pretty much the same, right.

12 MR. LOW: And Carl is right. I don't know
13 -- I don't know why they are written different. I just
14 know for a long time they haven't been treated different.
15 I don't know.

16 CHAIRMAN BABCOCK: Okay. Any other comments
17 about this? Okay. Well, if it doesn't meet with
18 anybody's disapproval, and even if it does, I think I'll
19 just talk to the Court and we'll see where we go with this
20 from now.

21 The next issue is Orsinger's, and it is
22 regarding Rule 145, defining indigency, and did somebody
23 other than me volunteer to pinch hit for Richard on this?

24 Apparently not. Jim Sales wrote to Justice
25 O'Neill, and there is a letter that -- a letter in your

1 package that sought a change to Rule 145 to more clearly
2 define what constitutes indigency and articulate standards
3 that would establish a prima facie case of indigency, and
4 Richard has drafted a -- actually borrowed from the
5 recodification draft back in December of 1997, which did
6 attempt to recodify Rule 145 with a -- with some new
7 language, and has anybody had a chance to look at this?
8 Yeah, Stephen.

9 MR. LOW: Has Jim Sales looked at it? Does
10 Jim think that would solve the problem?

11 CHAIRMAN BABCOCK: I don't know.

12 MR. LOW: I mean, he's the one having the
13 problem, and I think we should submit -- let Jim take a
14 look at whatever we do to see that that will solve the
15 problem, because we do something and it doesn't solve the
16 problem --

17 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Well, I
19 actually thought this had been done sometime ago. Does
20 145 not now make an IOLTA certificate incontestable?

21 It doesn't? Okay. Well, then this solves
22 that problem in my opinion. This is -- and my opinion is
23 actually worth something here since I practiced in legal
24 services for 10 years, unlike everything else I say. The
25 problem is that not -- speaking only of the filing fee

1 issue, to have IOLTA and the attorneys having to deal with
2 contests to whether or not their client is indigent is,
3 frankly, a waste of IOLTA funds because those people are
4 screened, and there is an incentive to screen out people
5 who aren't indigent, and the opposing party has no special
6 interest distinct from any other taxpayer as a matter of
7 standing or legitimate interest to keep somebody from
8 proceeding in court without paying the filing fee.

9 It's merely a taxpayer standing issue, so
10 it's a policy decision to be made. Do we want
11 IOLTA-funded attorneys to have to deal with contests that
12 focus solely on whether or not the person who has been
13 screened through the IOLTA program is meeting IOLTA
14 eligibility is, in fact, poor; and this takes care of that
15 problem by making it incontestable.

16 CHAIRMAN BABCOCK: Okay. Bonnie.

17 MS. WOLBRUECK: I just want the committee to
18 understand that, number one, I wasn't sure I'd live long
19 enough to see this issue come back up, although we have
20 discussed it many, many times. The clerks would really
21 favor the adoption of this proposed draft. This is one
22 that came out of the recodification draft, and we had
23 hoped that it would have been adopted. The discussion
24 continues throughout the state from all of the clerks.

25 There is rampant abuse of Rule 145 as far as

1 affidavits being filed by people that make ten and fifteen
2 thousand dollars a month. There are attorneys that every
3 single case that they file they file an affidavit of
4 indigency, and that's the reason that the clerks flag
5 these files, so that the judges know that this is
6 happening so that at a hearing the judge may be able to
7 address it, and so not knowing exactly, you know, through
8 the affidavits and the like clearly what is -- what the
9 income level is, I think that requiring this in the
10 affidavit then would assist the clerk and the court in
11 understanding better if somebody is actually indigent or
12 not.

13 CHAIRMAN BABCOCK: Okay. Justice Gray.

14 HONORABLE TOM GRAY: Well, for a minute
15 there -- she finished up there and connected the two
16 because there's -- section (b) is the contents of an
17 affidavit for somebody that's not the IOLTA certificate,
18 so Steve and Bonnie were addressing two different --

19 HONORABLE STEPHEN YELENOSKY: Yes.

20 MS. WOLBRUECK: Yes.

21 HONORABLE TOM GRAY: -- issues. And my
22 principal request where there is some mechanical things in
23 it is we also have a separate procedure in the appellate
24 court to do indigency, and what I would like to see is
25 some way that this presumption of indigency once

1 established continues for appellate purposes unless the
2 situation changes and the person successfully challenges.

3 HONORABLE STEPHEN YELENOSKY: There's one
4 hitch in that, which is for appellate purposes if you mean
5 filing fees there and all, but if you're talking about a
6 free transcript, that procedure has to allow the court
7 reporter to contest because they do have obviously an
8 individual financial interest, and they're not part of
9 this process, so they haven't been heard until the person
10 wants to appeal and says, "Give me a free transcript."

11 HONORABLE NATHAN HECHT: Well, so I'm not
12 sure I understand then. Would the IOLTA certificate apply
13 to the court reporter's challenge, too, or not?

14 HONORABLE STEPHEN YELENOSKY: Well, I guess
15 that's a question, and actually, Lisa and I were talking
16 about that earlier. I guess if -- I think it should as
17 long as there's an opportunity at -- perhaps with the
18 passage of time there ought to be an opportunity for the
19 court reporter to ask them to renew that, because the case
20 could go on a long period of time and the IOLTA attorney
21 isn't going to drop the case because somebody is no longer
22 indigent, but it may very well be. I guess it's possible
23 that by the time they get to an appeal they are no longer
24 IOLTA eligible and they need to renew the attestation that
25 they are, but that would be the only consideration.

1 HONORABLE NATHAN HECHT: So just to be
2 clear, that if there were this certificate or some similar
3 process then it would be the answer to a challenge by both
4 the clerk and the court reporter unless some -- something
5 had changed in the meantime. David.

6 MR. JACKSON: Going in, if the court
7 reporter knew that they had been certified as indigent,
8 you would know that up front, you wouldn't have to debate
9 it. The issue comes when somebody loses it and decides
10 that now they're indigent and they want to file indigency
11 papers then. The court reporter never gets notice of that
12 in the time that he has, she has, to file for a hearing,
13 and that's the problem that the court reporters have, that
14 they find out too late that they're preparing a free
15 transcript.

16 HONORABLE STEPHEN YELENOSKY: Yeah, and
17 that's a different issue, and we can speak to that, but it
18 is a different issue because obviously in those cases
19 there is no prior determination of indigency, so there's
20 no question of deeming them indigent.

21 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

22 HONORABLE TOM LAWRENCE: This causes a
23 problem with the JP courts because of Senate Bill 1425.
24 We've got justice court suits which are filed under the
25 Rules of Procedure and we've got small claims court suits

1 which are filed under the Government Code. There is a
2 provision under the Government Code that says if you
3 appeal a small claims suit -- and that is 28.052 of the
4 Government Code -- you do it in the same manner that you
5 appeal a justice court suit.

6 That has not been a problem up until now.
7 We have had a provision, Rule 572, that talks about an
8 affidavit of inability or the pauper's affidavit for a
9 justice court appeal, but the Legislature in Senate Bill
10 1425 has amended the Government Code, and they have added
11 a provision (c) to 28.052 which says, "A person determined
12 by the court to be indigent may in making an appeal under
13 this section file an affidavit of inability to pay as
14 provided for in Rule 145, Texas Rules of Civil Procedure."

15 So effective September 1st if you appeal a
16 small claims court rule, you've got to file a Rule 145
17 affidavit of inability. If you appeal a justice court
18 suit you've got to file an affidavit of inability under
19 Rule 572, and the Rule 572 is just something where the
20 defendant or the appellant says, "I'm indigent," and
21 that's all they have to do, and if it's not contested it's
22 presumed to be the facts. If it is contested, the burden
23 shifts to the appellant to prove that they're indigent.
24 Then there is a separate appeal procedure for that.

25 145 is, you know, a considerable more of a

1 paperwork burden, so I guess the question and the point to
2 all this is do we want to amend 572 so that it's
3 consistent with 145?

4 HONORABLE NATHAN HECHT: Or do we want to
5 abolish the small claims court?

6 HONORABLE TOM LAWRENCE: And, frankly, that
7 would be my preference, is just to do away with small
8 claims court and have everything under justice court and
9 relax those rules a little bit. That would by far be the
10 better solution, and if you could do that, that would be
11 great, Judge.

12 CHAIRMAN BABCOCK: By a rule?

13 HONORABLE NATHAN HECHT: I'm trying, but --

14 HONORABLE TOM LAWRENCE: But in the
15 interim --

16 CHAIRMAN BABCOCK: Yeah, in the interim.

17 HONORABLE TOM LAWRENCE: -- do we want to
18 amend 572 so that it is consistent with 145? Otherwise,
19 we're going to have two separate mechanisms to appeal an
20 inability in small claims and justice court, which is
21 going to cause a lot of confusion.

22 CHAIRMAN BABCOCK: As I take it, the
23 proposal that Richard and his subcommittee suggest is
24 taking the recodification draft, which is Rule 148, and
25 taking the language from that, which has subparagraphs (a)

1 through (e), and replacing 145? Is that how you perceive
2 it, or is it just paragraph (c) that he is proposing?

3 MS. HOBBS: Well, we just wanted to put
4 something on the table to have a discussion draft with the
5 full committee.

6 HONORABLE TOM LAWRENCE: If we're going to
7 get to the specifics, I would point out in (d) where it
8 says "the defendant or the clerk may contest it," the
9 county clerk, which is where the appeals from JP court go,
10 will never know anything about this under the current
11 appeal mechanism. It is the clerk of the JP court that
12 processes all of this. Only after the appeal has been
13 perfected and sent up to the county clerk would the county
14 clerk have any idea that any of this is going on so that
15 the county clerk, who would have an interest in this, is
16 never going to know about this until it's already been
17 approved and sent up to them.

18 CHAIRMAN BABCOCK: And is that something we
19 need to worry about, and if so, how do you fix it?

20 HONORABLE TOM LAWRENCE: Well, I guess you
21 could put -- I think, Elaine, if I'm not mistaken, that we
22 put something in the eviction rules that there would have
23 to be some notice given, or at least we talked about that,
24 that you would have to put a notice, that the county clerk
25 would have to be given some notice of this so that they

1 could contest it; otherwise, they wouldn't know anything
2 about it.

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE STEPHEN YELENOSKY: Defendant
5 could still contest it.

6 CHAIRMAN BABCOCK: If we are trying to solve
7 the problem that Jim Sales communicated with Justice
8 O'Neill about, which is that the legal service providers
9 are being tied up unnecessarily in court with all these
10 routine contests as to indigency, that the subparagraph
11 (c) of the proposal that Richard has come up with solved
12 that problem by making the certificate make the indigency
13 issue not contestable. So that would solve that. Is that
14 a good idea or not, Buddy?

15 MR. LOW: Could we just go ahead and solve
16 that and then let the committee look at the other
17 associated problems with it? Because I think we need to
18 give Jim help. I mean, you know, it's a great job he's
19 doing, and I think we need to solve that if we can today.

20 CHAIRMAN BABCOCK: Yeah. Yeah, Bonnie.

21 MS. WOLBRUECK: Please also give the clerks
22 and the counties help on the part to where the affidavits
23 that are not good affidavits that there's some way to
24 contest them.

25 CHAIRMAN BABCOCK: And how do you need --

1 how could you be helped?

2 MS. WOLBRUECK: I think (b) takes care of
3 that.

4 CHAIRMAN BABCOCK: (B) does or does not?

5 MS. WOLBRUECK: I think that it does. Isn't
6 that the one that does?

7 HONORABLE STEPHEN YELENOSKY: Yes, and I
8 move adoption of this because it certainly doesn't regress
9 any with respect to what the county clerk knows or doesn't
10 know, doesn't make it any worse than it is now, and it
11 makes it better in two respects, one that Bonnie is
12 speaking to and one that I'm speaking to; and I think what
13 else has been pointed out is a problem with the current
14 rule; and maybe it needs to be fixed, but I wouldn't want
15 to hold up the other two because that would --

16 MS. WOLBRUECK: I'm sorry. It is (d) and
17 has to do with the contest that would assist us. I
18 apologize.

19 HONORABLE STEPHEN YELENOSKY: Well, and (b)
20 also gives you more information than you have now.

21 MS. WOLBRUECK: Yes.

22 CHAIRMAN BABCOCK: When you say you move
23 this, you're talking about moving the recodification draft
24 in its entirety, not just subparagraph (c)?

25 HONORABLE STEPHEN YELENOSKY: Yes. And

1 there was something I had talked to Lisa about, but the
2 wording isn't so important that I would want to hold up
3 the adoption of this based on some wording issues.

4 HONORABLE TOM LAWRENCE: All I would ask is
5 that if we pass it that we hold open the possibility of
6 coming back and giving under (d) the provision that if
7 it's a JP court that the county court, county clerk, be
8 given some notice of that so they can contest it.

9 CHAIRMAN BABCOCK: Okay.

10 MS. HOBBS: What was the bill number again?

11 HONORABLE TOM LAWRENCE: Pardon me?

12 HONORABLE SARAH DUNCAN: I'm looking at TRAP
13 Rule 20, which is the appellate court equivalent, and
14 there are some provisions in TRAP 20 that might should be
15 included in any amendment of 145, and there are certainly
16 provisions that have been put in here at Mr. Sales'
17 instance that need to be incorporated into TRAP 20, so
18 it's --

19 HONORABLE STEPHEN YELENOSKY: What out of
20 TRAP 20?

21 HONORABLE SARAH DUNCAN: Well, for instance,
22 subsection (1), "If a party who has proceeded in the
23 appellate court without having to pay all of the costs is
24 later able to pay some or all of the costs the appellate
25 court may order the party to pay costs to the extent of

1 the party's ability." That might need to be incorporated
2 in 145.

3 We've had a problem with TRAP 20 frequently
4 -- not infrequently notice is not given to the court
5 reporter or the clerk. The clerk does not forward this
6 notice to the court reporter.

7 HONORABLE STEPHEN YELENOSKY: That's the
8 other issue we're talking about that is an issue, and
9 there's more at stake for an individual, who is the court
10 reporter.

11 HONORABLE SARAH DUNCAN: Right. But my
12 point is there's nothing in TRAP 20 that enables -- that
13 explicitly enables the court of appeals to say, "Well, the
14 court reporter didn't get notice. It's not fair to go
15 forward on this affidavit of inability without notice and
16 a hearing." There is nothing in 20 that lets us do that.

17 HONORABLE STEPHEN YELENOSKY: Well, and I
18 agree there are some issues to be fixed there, and the one
19 thing you said to import into 148 is basically changed
20 circumstances. I don't really see a problem with that;
21 but the problems with TRAP 20, to the extent it needs to
22 be different because it involves the court reporter, are
23 ones that were -- are not going to affect this rule; and I
24 wouldn't, therefore, want to hold up this rule because of
25 those problems. I mean, this is all about filing fee.

1 Generally the only issue here is going to be the filing
2 fee, and that's it.

3 MR. JACKSON: Functionally we're covered in
4 20, but it doesn't always happen the way the rule says
5 it's supposed to happen, and that's something that doesn't
6 affect that, but something that we'll need to address
7 someday.

8 HONORABLE SARAH DUNCAN: That's my only
9 point, is that there are more problems with affidavits of
10 inability than just this discrete problem.

11 CHAIRMAN BABCOCK: Okay. Any other comments
12 about this? Lisa, do you have enough or --

13 MS. HOBBS: Yes.

14 HONORABLE STEPHEN YELENOSKY: Do we need a
15 vote on it or not?

16 CHAIRMAN BABCOCK: I don't know that we need
17 a vote on it. Do we need a vote on it? Anybody opposed
18 to this?

19 HONORABLE SARAH DUNCAN: Justice Hecht shook
20 his head that we do not need a vote.

21 CHAIRMAN BABCOCK: Okay. The last thing we
22 had, something that's been on the agenda many times
23 before, but John Martin and Buddy Low's correspondence
24 with each other about HIPAA, and is there anything as we
25 close out the meeting that we need to advise the Court on

1 with respect to HIPAA?

2 MR. LOW: Well, let's say this. First John
3 Martin has worked extremely hard on this and has spent a
4 good bit of time on it. He has met with the State Bar
5 committee, and the State Bar committee has worked on this
6 over three years, haven't they, John?

7 MR. MARTIN: Yeah.

8 MR. LOW: We have had five, six, or seven
9 personal meetings on this in Houston. Maybe not that
10 many, but a lot, probably have had that many, and we've
11 worked hand-in-hand with the State Bar, and they would --
12 and they were unanimous for it.

13 In our committee, a majority felt we needed
14 a rule. John and others on the committee that I greatly
15 respect, one or two I can't remember, felt we didn't need
16 a rule, so that's the first thing. The argument for the
17 rule is that HIPAA is now in; and I'm still hearing from
18 people that they're doing the ex parte, which you can't
19 do; and the other argument for it is some people believe
20 that HIPAA did away with the 509 waiver; and that's not
21 true. The 509 waiver is still there. You waive. It's
22 just a question of how you get the information, so it
23 makes it clear.

24 HIPAA says anything that's inconsistent --
25 or I've forgotten the language, John, with HIPAA is not

1 good, but you can be more strict than HIPAA, so that's
2 basically the argument. This thing has been drafted and
3 redrafted. John has worked with the State Bar. They
4 finally approved the very language, and what we're trying
5 to do by the rule if we adopt a rule is make it clear that
6 you can't have these ex parte conferences.

7 CHAIRMAN BABCOCK: Okay.

8 MR. LOW: Is that basic -- go ahead, John.

9 MR. MARTIN: Yeah. This whole process
10 started back when there was a dispute between some Texas
11 cases and some Federal cases in Texas about whether
12 defense lawyers could go out and talk to plaintiffs'
13 doctors, and this primarily comes up in the medical
14 malpractice cases, although also in other cases.

15 HIPAA has made it clear. There is now two
16 or three Federal district court cases and a Seventh
17 Circuit case that discuss in depth what you can and cannot
18 do, and under HIPAA and under these cases it's very clear
19 procedurally that a lawyer must have either a court order
20 that specifically authorizes the lawyer to go talk to the
21 other side's doctor or a consent that expressly authorizes
22 the lawyer to go talk to the other side's doctor.

23 And so we've -- we've gone back and forth
24 with the Rules of Evidence committee; and we have our
25 draft in here with the comment that Stephen Tipps wrote;

1 and frankly, I think the comment is a lot more important
2 than the rule because the whole goal of having a rule like
3 this would be to tell the members of the Bar, "You better
4 know about HIPAA and you better comply with HIPAA if
5 you're thinking about going and talking to the other
6 side's doctor," and then the State Bar has a more simple
7 version. I think they're basically okay with ours and
8 we're basically --

9 MR. LOW: They are. Your latest version
10 they've approved. Everybody -- they have got about a
11 25-man committee, you know.

12 MR. MARTIN: Yeah. There is one issue
13 that's out there that we didn't address that, frankly, is
14 probably the biggest remaining issue in this area, and
15 that is in medical malpractice cases filed under House
16 Bill 4 there is a required consent form that's actually
17 written into the statute, and it does not come directly
18 out of HIPAA, but it purports to comply with the Privacy
19 Rule regulations that were promulgated under HIPAA, and it
20 has a sentence in there -- and I've got a copy, got
21 several copies here if you want me to leave with you-all,
22 and when a plaintiff files a med mal case they have to
23 provide this authorization. It's got a sentence in here
24 that says, "The health information to be obtained, used,
25 or disclosed, extends to and includes the verbal as well

1 as the written," includes the verbal as well as the
2 written, whatever that means, "and is specifically
3 described as follows" and then it's got some subparagraphs
4 under that.

5 Nobody on our subcommittee, the last meeting
6 we had at Stephen Tipps' office, nobody on the
7 subcommittee thought this authorization allowed a defense
8 lawyer with this authorization to go talk to a plaintiff's
9 doctor. However, I have been told that there are some
10 lawyers out there, including some I respect, who are
11 advocating that this does allow you to go talk to the
12 doctor. I will tell you if I were defending a med mal
13 case I would not use this and go talk to a doctor. I
14 think anybody who did does so at their peril in spite of
15 the very specific requirements of HIPAA that the
16 authorization has to specifically authorize you to go do
17 it or the court order has to specifically authorize you to
18 go do it.

19 We did not feel like -- since this is part
20 of the statute we didn't think that in a rule we could
21 engage in statutory interpretation, that that issue would
22 probably have to be sorted out by the courts. So we
23 haven't touched that, and yet I feel kind of bad about
24 that because that's probably the biggest area of dispute
25 out there now, and this rule doesn't really -- doesn't

1 really address that.

2 Just one other comment, and Buddy said
3 correctly I'm still -- I'm still not totally convinced
4 this belongs in either the Rules of Evidence or the Rules
5 of Procedure. I really don't think it belongs in the
6 Rules of Evidence. I mean, it's just not an evidence
7 rule. It's a rule about how you get information, which is
8 a lot closer to a procedural rule than it is to an
9 evidence rule. So I think if it goes anywhere it ought to
10 go in the Rules of Procedure, and, frankly, I think at
11 least my goal and I think the goal of the rest of us was
12 to try to draft a rule that did not have any unintended
13 consequences on the delivery of health care, because some
14 of the early drafts from the AREC committee would have
15 prevented peer review investigations and things like that.

16 And the HIPAA regulations go on for pages
17 and pages about what is expressly allowed under HIPAA, and
18 we -- so, you know, we've got some general statements in
19 here under the exceptions section that health care
20 providers can engage in activities to carry out treatment,
21 payment, and health care operations activities. "Health
22 care operations activities" is a term right out of HIPAA,
23 and it's defined, and it's this long. We didn't feel like
24 we could incorporate all that into a Rule of Procedure.
25 I'm still not -- I think communication needs to be made to

1 lawyers that are handling particularly medical malpractice
2 cases that you need to know about HIPAA.

3 HONORABLE STEPHEN YELENOSKY: It's a CLE
4 issue. It is.

5 MR. MARTIN: I think it's more of a CLE
6 issue than a rule issue, but we were asked to draft a
7 rule, so we did. I think if we could just put out the
8 comment and not the rule I'm for that, but I don't think
9 there is any procedure for that.

10 CHAIRMAN BABCOCK: Rule 514, "see the
11 comment."

12 MR. LOW: Let me explain why the State Bar
13 felt it should be in the Rules of Evidence, because 509 is
14 a Rule of Evidence and 509 is the waiver, and they wanted
15 it in the Rules of Evidence so it would show that waiver,
16 that 509 waiver, does not authorize this. I agree with
17 John. Substantively it would belong in how you get
18 information, but that's why they made it a new rule.

19 Now, if we amend 509 we have to amend 510.
20 So it's better to have -- if you're going to have a rule,
21 it's better to have a rule explaining it, and that's why
22 it was placed in the Rules of Evidence, because we didn't
23 know exactly how to fit it in with the other, and we were
24 trying to key it to let people know that the 509 waiver
25 did not allow that.

1 HONORABLE STEPHEN YELENOSKY: Maybe that
2 belongs in the the Rules of Civil Procedure.

3 MR. LOW: Well, maybe it does, but it's
4 under privileges, and like in Federal court they don't
5 have privileges. I mean, there's no other -- I mean, it
6 may. We just did the best we could, and we didn't have
7 but three and a half years to work on this.

8 CHAIRMAN BABCOCK: Pete.

9 MR. SCHENKKAN: Sensitive to the concerns
10 about unintended consequences and consistent with the
11 question about whether we ought to have this in the Rules
12 of Evidence, I'm worried that this would be read as
13 authorizing trial courts to issue discovery orders, the
14 formal order that is referred to here, that expand access
15 beyond laws other than HIPAA and the privacy rule.

16 There are other laws that limit access to
17 people's medical information in addition to HIPAA and the
18 privacy rule, such as a provision of the Labor Code that
19 applies to all worker's compensation health care
20 treatments; and there is an ongoing debate and some case
21 law, the case law is pretty strong so far, that people
22 can't get access to other patients' doctor's information
23 about those patients when they don't represent that
24 patient; but the argument on the other side, "Well, it's a
25 discovery order. I need it for my class action."

1 And this as worded -- maybe it's only back
2 to the comment itself is where all the action is, but it's
3 not intended to make access to health information be more
4 restrictive than permitted by HIPAA and privacy laws, nor
5 more expansive than provided by any other applicable laws
6 that might even help get health care information, but even
7 that, that will help. That will help say we're not trying
8 to expand anything; but also, having it only in the
9 evidence rules, I'm afraid a lot of people are going to
10 look at that when they're in there on a motion to compel
11 on discovery and neither do the discovery rules.

12 MR. MARTIN: I think that language would be
13 a good addition to the comment.

14 MR. LOW: But you're right, because like the
15 Occupation Code --

16 MR. SCHENKKAN: Yes.

17 MR. LOW: They talk about 6611.001, mental
18 health, drug and alcohol abuse, and there are certain
19 penalties. Then there are other provisions of -- that you
20 can't -- you can't get information; and one of them, a
21 lawsuit is a waiver and one it's not; and John and I were
22 concerned about peer review, which that's the thing we
23 didn't want to cut out; and that's why we drafted it or
24 John drafted it the way he did; and it's very difficult
25 for us to know what Federal and state statutes are on

1 that.

2 There is a National Uniform Policy of
3 Privacy and Protection of Health Records in the UCC. It's
4 a pretty complicated area; and, you know, where it
5 belongs, I think John did a good job of drafting a rule.
6 Now, whether it takes care of everything, I don't know.

7 MR. MARTIN: Of course, the way HIPAA works
8 is it preempts state law --

9 MR. LOW: Right.

10 MR. MARTIN: -- unless the state law is even
11 more restrictive than HIPAA, in which case the more
12 restrictive would also apply, and we wanted to make it
13 clear in the comment that we were not trying to make Texas
14 law more restrictive than HIPAA. Nobody was advocating
15 that.

16 MR. LOW: Right.

17 MR. SCHENKKAN: But where it already is I
18 want to make sure we are not saying we're either trying
19 to, or even could, relax it.

20 MR. MARTIN: Yeah. Again, I don't have any
21 problem adding the sentence that clarifies that.

22 CHAIRMAN BABCOCK: Okay. Anything else from
23 anybody?

24 It's been a tough, long meeting, but I think
25 very productive. Thanks, everybody, and we will be back

1 on November 4th and 5th.

2 MR. LOW: What are John and I supposed to do
3 now? We've worked on this three and a half years.

4 HONORABLE NATHAN HECHT: Two more years,
5 Buddy.

6 CHAIRMAN BABCOCK: November 4th and 5th here
7 at the TAB.

8 (Adjourned at 12:05 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 27th day of August, 2005, Saturday Session, and the
12 same was thereafter reduced to computer transcription by
13 me.

14 I further certify that the costs for my
15 services in the matter are \$ 4,057.00 .

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

17 Given under my hand and seal of office on
18 this the 12th day of September, 2005.

19

20

D'Lois L. Jones
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