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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 26, 2005

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 26th day of August, 2005, between the hours of 8:59 a.m. and 5:15 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:

Documents referenced in this session

05-14	July 11, 2005, draft of changes to TRAPs
05-15	August 9, 2005, draft of changes to TRAPs
05-16	TRAP 8.1 proposed changes
05-17	Proposed changes to RJA 13

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CHAIRMAN BABCOCK: Let's get on the record. Welcome, eveyone. It's nice to be back, and thanks to Buddy for pinch hitting for me last time in May. I read the transcript, and he did a masterful job. I don't have much job security here.

There is a black Mercedes parked in A-13 and A-14 downstairs. They tell us it will be towed if it's not moved, so if that's your car --

HONORABLE STEPHEN YELENOSKY: Just tow it to my house.

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: The lettering is not visible.

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: I don't think it's enforceable because the lettering is not visible.

CHAIRMAN BABCOCK: Okay. So we'll go to Justice Hecht, who will give us a report.

HONORABLE NATHAN HECHT: Well, it's been a while since we met, and quite a bit has happened on our Court. Justice Owen took her oath of office the first part of June and moved over to the post office, where she is now intuned and with Judge Higgenbotham, who has moved to Austin, and Judge Benavides and Judge Garwood, so I

think Austin now has the distinction of having more members of the circuit present than any other city in the circuit, so kind of an odd change of events, but in her place Governor Perry appointed Don Willett this week.

Don is 39. He's a graduate of the Baylor University and has a master's degree from Duke in political science and a graduate of the Duke Law School. He worked at Haynes & Boone for a couple of years, then in the Governor's office under the Bush administration, then in the White House, then in the Department of Justice, and most recently has been in the Office of Legal Policy for the Attorney General of Texas. So that's kind of the attorney general's lawyer basically or legal policy person. He took the oath Wednesday, and so he's on board, and we're glad to have nine members once again.

And I understand Allen Waldrop was appointed to the court of appeals here in Austin, and Allen has worked with us in the past on HB4 implementation issues a couple of years ago. So I think Allen will be a good hand over there with our member Justice Pemberton and others.

We forestalled the effective date of the process server rules to allow the principals to pursue legislation, and that was unsuccessful, so after the Legislature adjourned the regular session we got together with the process servers and the constables and worked out

language which I think was satisfactory to both. Lisa did that and took the part of the proposed rule that would have allowed process servers to serve writs, removed that from the rule, and then made some other minor changes in the language. So that rule is in effect, and the process server board has been appointed and has met, and so we'll see how that goes, but that rule now has been implemented.

And, finally, the Legislature in recognition of the hard work that this committee does has appropriated some money for our expenses. The court reporter will be pleased to hear that, as will those of you who travel to attend meetings here. Just a word of history on this, about 12 or 15 years ago, some good number of years ago, the State Bar of Texas agreed to fund the expenses of this committee, and they have done that ever since, and I think when you turn in your expense sheets that's where you turn them in, and so we've had that agreement with the Bar ever since then, although we have repeatedly asked the Legislature to fund this as a legitimate part of the operation of the Court.

So now they've done that, and we can relieve the Bar of that little bit of burden for the time that this funding remains in place. One never knows whether it will continue. It is limited, and so those of you -- I almost hate to say this, but those of you who can attend

without seeking reimbursement for your expenses, I -- as I say, I hesitate to say this because you do so much already, but I have to ask you to not turn those in or if you can charge them to someone else, your court or your institution or your employer, that helps make sure that there will be enough money for the biennium to fund the operations here.

But I'm -- please, please, however, feel free to do as you have been doing, and it worked pretty well for a long time, and there's no reason to change. However, the expense requests will be processed by the Court now and not by the Bar, and this is a requirement of the comptroller in overseeing these funds. So we'll -- it won't apply to this meeting because this meeting is still in the -- before the change takes place September 1st, but in future meetings we'll have a little different sheet that you'll have to fill out, and you'll have to submit it to the Court rather than to the Bar. But we're very pleased that the Legislature has provided us this funding, and it's appropriate and necessary for the good work that you do, and if you run into Representative Nixon or Representative Pitts or any of the leadership of the Legislature, you might thank them for this and the generally favorable way that the judiciary was treated during this last session. And I think that's it.

CHAIRMAN BABCOCK: I've got a lot of questions, Justice Hecht, about the proposal that we sent to the Court a couple of months ago on statewide rules with respect to access to court records over the internet.

HONORABLE NATHAN HECHT: And we are still studying those, and I hope the Court will take action in the next few weeks. We have been a little distracted this summer. We had argument at an unusual time in an extraordinary case, we lost Judge Owen, and so we've had some -- we've had some unexpected changes at the Court, but I think -- but the Court realizes that these are a top priority, and I hope we'll get something out by the early fall.

CHAIRMAN BABCOCK: Great.

HONORABLE NATHAN HECHT: And also on e-filing, the e-filing rules.

CHAIRMAN BABCOCK: Okay. Well, you can mail those to Mr. Bacarisse, e-mail the response to Mr. Bacarisse.

HONORABLE NATHAN HECHT: I guess if there are any questions --

CHAIRMAN BABCOCK: Yeah. Anybody else have any other questions about anything that we're doing or not doing?

Okay. Well, let's get to the agenda. We've

got a full slate here; and we were asked or Angie was asked by a number of people whether we think we're going to go into Saturday; and obviously if we get done today we won't have everybody come back tomorrow; but I don't see that we're going to get through this agenda today; and there are a number of issues, particularly the proposed amendment to Rule 13 that are time sensitive that we have to get through this meeting, so we'll just slug it out as best we can.

Bill Dorsaneo has got a number of appellate rule changes. Jim Worthen from Tyler is here to talk about one or more of those, so, Professor Dorsaneo, you want to lead us to it?

PROFESSOR DORSANEO: Do you care what the order is, Chip?

CHAIRMAN BABCOCK: I do not.

PROFESSOR DORSANEO: Let me start with (b) that's headed "permissive appeals," and what you need to have in front of you is a document entitled "Revised Draft of Proposed Appellate Rule 28 based on minutes of May 7, 2005." I'm going to be using the one that has 8-18-05 revisions attached to it. You also need to have or it would be good if you had a copy of the enrolled version of House Bill 1294, which amends section 51.014 of the Civil Practice and Remedies Code in some interesting ways.

I think probably the easiest way to start this would be to turn to page five of the revised draft, which has the comment, because that will be a good way to introduce the revised proposed rule and to jog your memories about what we've been doing on this rule since August of last year at a number of meetings.

The comment says, "28.1 is amended to provide a uniform timetable for all accelerated appeals, regardless of any statutory deadlines." I was instructed last time to put in the comment some reference to the more important statutes, the ones that cause more trouble than others; and the second sentence says, "Many statutes provide for accelerated or expedited appellate timetables," including the termination and other kinds of orders that are troublesome under the statutory provisions because people don't ordinarily understand that final orders or final judgments are subject to accelerated appeals by these statutes.

I didn't put in more than those two. More could be added. The word "including" is not an exclusive word under the Code of Construction Act and English generally, so the words "among others" really aren't necessary. You can correct the typo in the second line where it says "my." It should say, "regardless of any statutory deadlines," but that's what I propose with

respect to 28.1, consistent with what happened in May.

Section -- subsection 28.2 is amended to provide a procedural mechanism for seeking permission to appeal an interlocutory order that is not appealable as of right in accordance with section 51.014. Now, at the bottom there it needs to say "51.014(d)-(e)," because there is no (f) in the amended statute, which is an interesting thing in and of itself. Please look at House Bill 1294 and see what -- we were waiting on this to finish the 28.2 discussion, which actually we more or less finished last August, or maybe it was at the meeting after August, but last year.

If you look at the new statute, the first change is certainly a good one. This appeal provision, which I'll continue to call a permissive appeal provision, was amended to add county level courts. Previously it was applicable only to district courts, and that's the principal change in (d) and (e).

Perhaps more significantly, (f) was eliminated all together. (F) previously said, "If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under subsection (d) is entered, the appellate court may permit an appeal to be taken from that order." (F) was

eliminated, so the statute no longer expressly says that the appellate court may permit the appeal to be taken from that order, and I think there might be some controversy about what the amended statute means, since (f) was eliminated.

Our rule was drafted on the assumption that that part of the statute wouldn't be eliminated, that is to say the permission to appeal granting ability or denying ability of the court of appeals is in our draft rule, and I just wanted to point out to you that that -- that's the position that the draft takes, regardless of what the statute no longer clearly expresses. So that's kind of the introduction.

Please look at 28.1. We went through this at the last meeting fairly carefully, and my recollection is -- and Frank told me he read those transcripts yesterday, so he probably remembers everything. My recollection is that we had really no difficulties with (a) and (b) of the draft, that the principal problems that were raised about the draft concerned (c) and (d), and I think you can see that I broke out and eliminated a paragraph that tried to combine the information that's in (c) and (d) and did what the committee suggested, to have a separate (c) dealing with appeals of interlocutory orders and a separate (d) dealing with quo warranto

appeals. I think I made the corrections in those that the committee wanted.

The key issue remains, and I think we voted on this in May. The key issue remains whether we're going to actually do this in (b), saying, "Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, the accelerated appeal is perfected by notice of appeal in compliance with Rule 25 within the times in the appellate rules, the time allowed by 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines." We had a lot of discussion about it. I don't remember all of the discussion, but that seemed to me to be something that the committee wanted to do rather than to say what had been included in some drafts voted down, the opposite thing, "unless otherwise provided by statute accelerated appeals are perfected by filing the notice -- by the filing of a notice of appeal in compliance with Rule 25 within the time allowed by 26.1(b) or as extended." That would simply give notice to people that the statutes may provide for different timetables and different procedure.

This draft rule says unless the statute prohibits it the deadlines will be the deadlines provided for in the Rules of Appellate Procedure, regardless of any statutory deadlines. Maybe I should stop with 28.1 and

see what the committee's pleasure is.

CHAIRMAN BABCOCK: Any thoughts, comments, about 28.1? Looks okay to you, Richard?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Okay. Then we got a seal of approval there, Bill.

PROFESSOR DORSANEO: All right. Let's go to 28.2. Now, we spent a lot of time on this I believe it was August last year, as I said, and went through it with some care; and, again, we were waiting to see what the Legislature did to the statute in order to finish; and I identified what the Legislature did to the statute and the most -- again, the most interesting thing that they did was to eliminate subsection (f) from the statute, so now this 28.2 will be the only thing that talks about how this 51.014(d) and (e) permissive appeal is handled.

Now, subdivision (a), to refresh your recollection, takes the view that the proper thing to be filed in the court of appeals at the threshold is a petition for permission to appeal. That is the procedure that's followed under the Federal Rules of Appellate Procedure in connection with similar statutes that exist at the Federal level. Now, (a)(1) would need to be changed to eliminate (f) as well to say "(d)-(e)," but my recollection is that the committee more or less passed on

this language previously.

The one thing I will point out is that it says the petition must be filed not later than the -- in (a)(2), not later than the 10th day after the date the trial court signs the written order granting permission to appeal. That 10-day timetable previously was in the statute. It was in (f), and it's not in the statute anymore, so there is a potential question as to whether 10 days is the right number of days. It may be too short.

Other than that, this starts out by the filing of a petition, and it allows the appellate court to extend the time to file the petition if within 15 days after the deadline for filing the petitioner files a petition and files in the appellate court a motion complying with Rule 10.5(b). So this provides you can file the petition, and by mimicking 26.3 it provides expressly that the petition can be -- the petition deadline can be extended. (B) deals with the contents -- you want to talk about (a)? Anybody want to talk about (a)?

HONORABLE SARAH DUNCAN: Yeah. Let's talk about (a).

CHAIRMAN BABCOCK: Yeah. Justice Duncan.

HONORABLE SARAH DUNCAN: Will you put on the -- I'm not disagreeing with what you've done, but will you

put on the record what you believe the reasoning to be as to why there is discretion in the court of appeals to accept or reject one of these permissive appeals, given that the statute no longer incorporates that?

PROFESSOR DORSANEO: Well, I have no particular -- I have no understanding why the statute no longer says that.

HONORABLE SARAH DUNCAN: I understand that.

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: I understand.

PROFESSOR DORSANEO: And I have no idea why the Legislature eliminated (f). I haven't looked into the legislative history to ascertain whether they wanted to make this appeal mandatory. It seems unlikely to me based upon the history of the statute, but it -- I can't put anything better on the record than that.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: Let me follow up with Sarah's question. Without (f), if we just had the statute in front of us, what does the statute mean? Does it mean they have to take everything?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Is anybody here aware of whether anyone that was involved in amending the

statute to delete that was aware of the committee's efforts to draft rules for procedures to implement a permissive appeal?

MS. HOBBS: Yes, they were aware that this was going on.

HONORABLE SARAH DUNCAN: They were aware?

MS. HOBBS: Uh-huh.

HONORABLE SARAH DUNCAN: Well, that might be the reasoning.

CHAIRMAN BABCOCK: That they delete (f), take it out of the statute because they think we're going to have a rule requiring it?

HONORABLE SARAH DUNCAN: Exactly.

MS. HOBBS: And I don't think in the discussion that came up in any of the committee hearings. I don't think that it came up that they were removing the requirement that appellate court grant permission. They still referred to it as a permissive appeal; but it went through a number of drafts; and this was a Senate revision, too, because for a long time Patrick Rose's bill had a lot more involved in the amendment; and then on the Senate side they were like, no, let's just keep it simple, and then it came over and the House concurred on the Senate version.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: So your sense of the development is not that they were trying to remove our discretion to take or not take. In other words, as Frank pointed out, that without (f) that we were required to take this if the parties in the trial court wanted it? In other words, my question's -- and let me reframe it. Do I have under the statute the authority to say, "No, I don't want it anymore"?

MS. HOBBS: What's your view on legislative intent?

HONORABLE STEPHEN YELENOSKY: I think that's a question for a district court.

PROFESSOR DORSANEO: The statute doesn't say that it's not permissive. It just leaves that question open, and I think it's the Court's job to finish up. I mean, you can't take from legislative silence that they meant -- that they now mean the opposite of what it said before. That's not the way things are done.

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: I don't have an opinion on the ultimate answer, but I don't think the fact that they refer to it and continue to refer to it as a permissive appeal bears any weight, because it is permissive in the sense that you have to have the parties agreement at the trial court order. It's not otherwise like an appeal as

of right that once the judgment is entered certain things have been done, you can perfect the appeal, and nobody can tell you you can't.

So I don't know what the right answer is on whether this is intended. Once you have gotten the agreement of the other side and a trial court order to entitle you with no appellate court discretion to say, "I won't take this appeal," but the fact that they continue to refer to it as permissive is not dispositive.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: See, this was complicated by the question whether the parties should agree, should have to agree, before the trial judge certified the question; and there was -- the Court, as I reported to us in the spring, wrote the committee and asked for clarification of the issues that had been identified in our discussions here, whether it was confined to the district court or whether it also applied in the county court; and there were three or four issues, but there was going on at the same time a -- the question whether this should be more like 1292b, under the U.S. Code for Certified Appeals so that the parties -- there might be a certified appeal if the -- even if the parties didn't agree.

And, as Lisa says, that wound around so that

it's kind of hard to tell at the end of the day whether -- what they meant by this, whether they meant to be silent and still keep it permissive, whether it was somebody thought it was a trade-off that the parties still have to agree, but if they do agree then the court of appeals has no -- then they have to take the case. It's not clear.

CHAIRMAN BABCOCK: You know, I don't have (f) in front of me. Bill, what did (f) say that they deleted?

PROFESSOR DORSANEO: It said, "If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under subsection (d) is entered, the appellate court may permit an appeal to be taken from that order."

CHAIRMAN BABCOCK: And they deleted that?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Well, that's not silence. That's taking a requirement out of the statute that was there before, isn't it?

MS. HOBBS: I think the reason why (f) was originally taken out, I think, or the thought was we want to eliminate this 10-day requirement that we don't -- I mean, we operate under a 20-day requirement generally in interlocutory appeals, and that 10-day requirement sort of

throws a kink into it. So I think Representative Nixon was looking at eliminating that part of (f), and I'm not sure when it got over to the House -- I mean, when it got over to the Senate I honestly just have no idea what the discussions were about the elimination of this.

HONORABLE NATHAN HECHT: But, see, we asked the House committee to clarify to remove the time limits so that we could set those by rule, because we said nothing else in the -- nothing else in the rules or statutes that has so short a time period, so then, query, can it be extended; and the courts of appeals are already split up on that; and we've only had the statute a few years; and if it can't be extended, can the judge just -- can the trial judge just reissue the order or change two words and then the parties can take it up? The question being, why should you frustrate the agreement of the parties and the consent of the trial judge for no reason, and so would you clarify that?

And, but as I say, this got -- this became involved with the other discussions that were going on about the agreement of the parties being necessary, and so it's just not possible to say at the end of the day why they took (f) out, whether they were only aiming at the time periods or whether they were aiming at the discretionary nature of the appeal.

CHAIRMAN BABCOCK: Buddy, then Pete.

MR. LOW: I mean, it would have been a simple matter if they wanted it mandatory instead of saying "may," if they wanted it mandatory they would have just said "must." I mean, that would have been a very simple thing, unless there was other provisions in there they were dealing with.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Well, but they don't normally say the appellate court must take a case. It's implied if they establish a procedure that perfects an appeal. I'd make the flip side argument and say it's stronger that if all they were worried about was the 10 days, all they had to do was take out the phrase, comma, "not later than the 10th day after the date an interlocutory order under subsection (d) is entered," comma, and leave the rest of (f) in. And that's why I think Chip's point that it doesn't look entirely like silence -- it may be a confused statement, which I think is Lisa's point, but it doesn't look like silence.

CHAIRMAN BABCOCK: There we have it. Frank.

MR. GILSTRAP: If this was a court and we were evaluating which side had the best argument, I would say Pete has the best argument. It looks to me like the Legislature intended to remove the permissive feature, at

least the permission of the court of appeals feature, from the statute; and yet, does everybody agree that that's just an unacceptable result?

PROFESSOR DORSANEO: Isn't that a satisfactory legal argument in court?

MR. GILSTRAP: That may be.

CHAIRMAN BABCOCK: I'll consult my constituents back home and see what they think about it.

MR. GILSTRAP: Because if that's where we come down when we walk out of here, we amend the rule, and now the court of appeals doesn't have to give permission. It seems to me if there's confusion, it may be the Supreme Court's job with its rulemaking power to jump in here and fix the confusion caused by the Legislature and continue the permissive requirement.

HONORABLE NATHAN HECHT: Well, in response to that, I do think -- speaking for myself, but knowing what the Court has done in the past, that the Court would prefer to resolve the issue one way or the other rather than leave it to 14 courts of appeals to split up on. Because we're going to have to do it sooner or later, and as long as the issues have been thoroughly aired and everybody knows what's at stake, which this process helps do that, then it would be better to get a resolution rather than not have one, but what that should be I can't

tell you as I sit here yet.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: While I would relish discretion in what I have to decide, many times we might could actually reach agreement on the Waco court as to what we're going to decide, but it's -- this is the only area that that would be given to us; and it does not seem consistent with the rest of what the Legislature has been doing in compelling the intermediate appellate courts to decide issues earlier in the process, the number -- the growing number of interlocutory appeals; and I, for one, if the parties have gone through the process, the trial court agrees that this is critical to the case to get it resolved, we probably shouldn't have the opportunity to duck it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would like to speak in favor of the policy of requiring the court of appeals to accept it. I've had many cases where we couldn't settle the case because we didn't know how the law was going to be applied in a particular case and you couldn't get there with the summary judgment, particularly in the kind of issues that I litigate where everything would be partial; and we have just longed for the opportunity to get to the court of appeals to find out what the law is; and once we

know that then we can settle the case.

And so I have tried a lot of cases just so we could get a final judgment and then find out what the law is. This permits you to avoid that. In practice if the courts of appeals were very liberal about accepting these appeals then I wouldn't worry about leaving it discretionary; but I'm fearful with the dockets of the court of appeals being what they are and as many vacancies as we seem to have that go on for long periods of time, that courts are going to be reluctant to add this to their docket; and I would prefer to make it mandatory, because I think that will take cases out of the litigation system early on because people will settle once they find out the answer; and that's what this is all about.

CHAIRMAN BABCOCK: Bill, is it likely that there are going to be a lot of these appeals when you have to have agreement from both sides and the judge?

PROFESSOR DORSANEO: Probably not.

CHAIRMAN BABCOCK: I mean, I wouldn't think we would be talking about a huge volume.

HONORABLE STEPHEN YELENOSKY: We already know they're not happening very often now, right?

HONORABLE TERRY JENNINGS: I don't see that many of them. I mean, in the four years I have been on the court I haven't seen a permissive appeal, but that may

be because of, you know, I just happened to have -- I have not been on a panel that has been assigned one.

HONORABLE NATHAN HECHT: We looked -- the Legislature inquired whether there were any Federal statistics on 1292b appeals, and there aren't that anybody could find. But if you look at Westlaw, there's just -- there have only been a couple hundred cases since 1292b was passed in the late Fifties. So, as one member of the Legislature said, you wouldn't expect a trial judge very often to certify a question if he thought he knew -- he or she thought they knew the answer to it, so it does not seem to happen very often in the Federal system where the agreement of the parties is not required.

CHAIRMAN BABCOCK: Yeah. Stephen Tipps.

MR. TIPPS: In my experience these happen only when judges do what Judge Christopher did and get the parties to agree on an interlocutory appeal before they know what her ruling is.

CHAIRMAN BABCOCK: Very clever.

MR. TIPPS: It worked.

CHAIRMAN BABCOCK: Yeah. Okay. Frank.

MR. GILSTRAP: Well, it's starting to sound like to me that it is an acceptable result to remove the discretion from the court of appeals, and, frankly, I'm kind of shocked by that possibility. It strikes me that

that is -- I'm real concerned about that.

HONORABLE SARAH DUNCAN: Why?

MR. GILSTRAP: Well, because I think once the litigants figure out that this avenue is available and the court of appeals can't stop it, you may see more of these than you might expect now. Now you know the court of appeals isn't going to take it. And now the court of appeals has to take it. I mean, if the court of appeals judges around here aren't bothered by this, I don't guess I should be either.

CHAIRMAN BABCOCK: Yeah. Justice Gaultney.

HONORABLE DAVID GAULTNEY: No, I'd like to speak in support of Frank. I think, as I understand it, the Federal system is permissive; and so some of the reason that there are fewer cases -- at least I never had any success or very little success as a practitioner lawyer in getting the Fifth Circuit to take permissive appeals. Even if it was certified by the trial court they looked at it very carefully. So I'm not sure those statistics hold up.

We have had two permissive appeals in our court. We accepted both of them. I think Stephen's position is correct. The trial court applied the Judge Christopher procedure of getting them to agree to it before giving them the result, but my concern is that if

we set up a just you can get an answer from the court of appeals on an issue that you can get the trial court and your opposing counsel to agree that it would be nice to have an answer to, then I think you are creating a very heavy burden for the appellate courts.

CHAIRMAN BABCOCK: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: I hesitate to even weigh in, given the people I respect very much have come out on both sides, but I tend to agree with Richard. We had a case where what version of the Tort Claims Act was going to apply --

PROFESSOR ALBRIGHT: Sarah, can you speak up a little bit, please?

HONORABLE SARAH DUNCAN: I'll try. We had a case where what version of the Tort Claims Act applied was going to be dispositive of the case, and there was no way to get the court of appeals to decide that issue at the time, and as a result the case had to be tried, huge judgment. If what the judicial system is after is efficient, expedient decisions of disputes, it seems to me that we would be better off -- it's not just a question that somebody wants to get decided, it's that parties have to agree that it is a controlling question of law as to which there is a substantial ground for difference of opinion. The trial judge has to agree, and to me once

you -- if you can get that much agreement then the court of appeals ought to just decide it.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I agree with Sarah and Richard; and with all respect to David and Frank, it seems to me that the burden on the court should not even be a consideration. The only consideration is the burden on the parties or the litigants, and they need an answer. They need resolution. It's too costly as it is, and to require a party to go through trial and put a record together for appeal is just not an acceptable option, and so that's why I support Richard and Sarah.

PROFESSOR DORSANEO: What's your pleasure, Mr. --

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Actually, Lisa had her hand up first and I defer to her.

CHAIRMAN BABCOCK: Ooh, that was quick, a darting hand.

MS. HOBBS: Well, I just pose this question to the committee. If we're worried about a floodgate of appeals to the court of appeals, is maybe (d)(1) and (2) a stopper of some sort? In other words, if you were a court of appeals judge and you disagreed that this involved a controlling question of law and that maybe the trial court

shouldn't have agreed to give them permission to appeal, maybe that is kind of a stopper, that you would just summarily throw it out and say, "I don't think this is a controlling question of law."

HONORABLE TOM GRAY: I'm glad I let her go first because she articulated it much better than I could, which is exactly what I was thinking. We still have the -- like in a petition for a writ of mandamus to decide whether or not the criteria for granting a writ is -- to consider it is even there.

HONORABLE STEPHEN YELENOSKY: But that's not a -- the criteria is that they agree that it is, not that it is.

HONORABLE TOM GRAY: Well, maybe we need to tweak that a little bit.

HONORABLE STEPHEN YELENOSKY: Well, it says the parties agree that the order involves, so how can the court of appeals scrutinize that, an agreement?

HONORABLE TOM GRAY: We tweak it a little bit.

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE TOM GRAY: We say that it has to be.

HONORABLE BOB PEMBERTON: Well, just a question, is the trial judge making a finding that an

intermediate appeal -- immediate appeal may advance the litigation? If that's the case, it seems we could review that, but do we review that under abuse of discretion, do we review that as, you know, depending on the answer to that it may or may not be? Some may second-guess.

CHAIRMAN BABCOCK: I wouldn't think you could tweak the statute, but --

HONORABLE TOM GRAY: Sure we can. We do it all the time.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think there's something to what Lisa is saying in the sense that when you are looking to decide whether to take it you're looking at whether it's a controlling question, but what I understood the proposition or the proposal to be here is that because it's mandatory we wouldn't get to do that. In other words, we would have to take it, set up a briefing schedule, go through all of the process like you would treat any case, and do the research, dedicate the resources, find more than just, you know, 10 days of looking at the request to appeal.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You know, I think it's possible that that may be a part of the court of appeals jurisdiction, that the criteria for appealability are met,

and that if the court of appeals is not convinced that it's a dispositive legal question I think you could make a convincing argument that the jurisdiction doesn't exist under the statute for the appeal, and the court of appeals always has the right to evaluate whether the jurisdiction exists.

Following that through, I'm assuming that this would be appealable to the Supreme Court, even though we only talk about the court of appeals, but once it's been accepted it would be an interlocutory appeal which would then be subject to review by the Supreme Court. The Supreme Court has limited jurisdiction over interlocutory appeals, but I believe the Supreme Court has the authority to review the court of appeals decision about whether they have jurisdiction over the interlocutory appeal, so that if you-all are following my logic here, the Supreme Court would be able to review the court of appeals decision that there's no jurisdiction because it's not a controlling question of law.

HONORABLE STEPHEN YELENOSKY: But --

HONORABLE SARAH DUNCAN: Well, but --

MR. ORSINGER: No?

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: This feels all sort of strange. I feel like people -- we're all sort of

writing little bits and pieces of opinions, which makes me a little uncomfortable; but jurisdiction under this statute, as I'm reading it, perhaps incorrectly, depends upon the parties' agreement as to that which is set out in (d)(1) and (d)(2), materially advance the ultimate termination of litigation.

CHAIRMAN BABCOCK: "May materially." Not "will."

HONORABLE SARAH DUNCAN: Uh-huh, "may materially advance." I don't know how an appellate court is in a position to evaluate whether this is going to materially advance --

HONORABLE STEPHEN YELENOSKY: Well, what's required is the district judge's order, which is judged by, what, an abuse of discretion standard? I mean, the judge has to find these things, which is an agreement, and it may do that. I don't see how you can tweak this. I don't care whether it's permissive or mandatory, but I don't see how you can tweak this statute to put a jurisdictional requirement in it that's not there.

HONORABLE SARAH DUNCAN: I don't either. That's all I'm saying.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: And I will say that in the -- I think we have had a permissive appeal for four

years, I think, roundabout. I believe our court has had two and taken neither, and I know this has been talked about at numerous seminars. As interesting as this is to all of us, I don't think it's very interesting or appealing to practitioners, so I'm not sure it's really worth getting all that concerned about. I think people like Richard who truly do need a question answered so that they can settle a case, have a basis for settling a case, will use it; and otherwise, I think it's going to be yet another forgotten statute.

CHAIRMAN BABCOCK: Yeah. Bill.

PROFESSOR DORSANEO: Well, from a practical standpoint, those who would agree with Justice Duncan would say we don't need 28.2, what we need to do is to change 28.1 to take out the parenthetical in (a), "when allowed as of right by statute," because there is no permissive appeal that exists under Texas law otherwise.

I agree with what Richard said about the potential for the question to come up anyway given the fact that the statute was clearly copied from 28 United States Code 1292b, and I think there is something to be said for the argument that the court of appeals would have to make a determination at least about the ultimate -- advancing the ultimate termination of the litigation.

Frankly, "the parties agree" doesn't seem to

be that large a limitation to me on getting to the question as to whether there is a controlling question of law. The courts of appeals opinions under the current statute don't treat the parties' agreement as dispositive either. I raised that, you know, many meetings ago when I was concerned about what this language means; but more fundamentally, I think it ends up being a mess unless we have 28.2 that will get worked out ultimately in courts of appeals in different ways and get to the Supreme Court; and that's how we'll find out the -- that's how we'll find out the answer.

My recommendation would be to let the Court decide whether they want to have a 28.2 and have us finish it up and then just go onto something else that is more important.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Here, here.

CHAIRMAN BABCOCK: Yeah. I think we've had -- Carl, just two seconds. I think we've had a good discussion about whether 28.2 is necessary or not. The Court will have that record to look at, and if the Court decides that it does want to give the courts of appeals the discretion to accept or not a interlocutory appeal then 28.2 would be the language that we would recommend, that we have before us, we would recommend to the Court to

use to implement that.

If they say, no, the Legislature's deletion of subpart (f) means that we're not going to give the courts of appeals discretion, then we just stick with 28.1 and delete that parenthetical. Would that be pretty much where we are?

PROFESSOR DORSANEO: I think that's where we would be. Now, this is all happening today.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So it might be that something else would be required, but I don't think so.

CHAIRMAN BABCOCK: Okay. Carl, then Sarah, then Richard, then Judge Patterson.

MR. HAMILTON: Does the current statute require agreement by the parties, and is this House Bill 1294 that we have here -- we just ignore that? Because House Bill 1294 says on "on a party's own motion or the trial court's own initiative."

MS. HOBBS: You're looking at a version of 1294 that did not pass.

MR. HAMILTON: Okay.

MS. HOBBS: The page right before that is the version of 1294 that did pass.

MR. HAMILTON: Okay. Thank you.

CHAIRMAN BABCOCK: Where do we go? Justice

Duncan.

HONORABLE SARAH DUNCAN: I just want to expand a little bit on a comment that Richard made about how -- or maybe it was Judge Gray on the trend in the Legislature to get earlier resolution of questions. We now are going to have mandamus available to decide 4590 -- whether a 4590i affidavit ruling was correct, and I think that definitely shows the trend in the Legislature to get case dispositive questions decided early on.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: If we are, in fact, going to suggest 28.2 as the alternative for the Court to pick if it's going to continue to be permissive, I would propose that we give more than 10 days to file the petition, because we're --

PROFESSOR DORSANEO: That's the first issue I was going to get to, how many days.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Oh, I didn't know if we were wrapping this up in a package and sending it off or whether we were going to discuss it.

CHAIRMAN BABCOCK: We're still going to discuss it, but I was just trying to see if we finished the end of the debate about whether to have it or not. Judge Patterson.

HONORABLE JAN PATTERSON: I would like to speak in favor of reducing the discretion that trial courts have, because I think that this statute really is a -- a rule reflects a respect for lawyers and litigants and trial judges. I think the courts have had a tendency to cry wolf in the area of this is going to open the floodgates, and typically in my experience that hasn't happened in those circumstances.

I do think it's useful for the parties -- I think the usefulness of the rule outweighs its potential for abuse and that it could potentially in substantial cases save lawyers, litigants, and district courts a lot of time and effort. I also worry because it has been the topic of a lot of discussion in seminars, and there has emerged a certain cynicism about whether and why the courts of appeals aren't taking them, which is not entirely unjustified.

CHAIRMAN BABCOCK: Thank you. Okay. Bill, you want to raise the issue of how many days?

PROFESSOR DORSANEO: How many days?

CHAIRMAN BABCOCK: 10 days?

PROFESSOR DORSANEO: Normally the number of days is, you know, 30 or 20.

HONORABLE JAN PATTERSON: 10 days is pretty darn short.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If I understand this correctly, the petition is just to get the court of appeals to grant review, and once they do you have normal briefing; is that right?

PROFESSOR DORSANEO: It's to grant review. Then based upon what the committee did then you would have a notice of appeal.

MR. ORSINGER: Okay.

HONORABLE SARAH DUNCAN: And the court would set the briefing schedule, right?

MR. ORSINGER: But you would have a 50-page brief opportunity at that time, right?

PROFESSOR DORSANEO: At what time?

MR. ORSINGER: When the appeal is permitted or if it's --

PROFESSOR DORSANEO: Well, let's work through the engineering to get that. First, we would have the petition. Then you get over to (e), and after the grant of the petition, within 10 days after the signing of the appellate court's order granting permission to appeal in order to perfect an appeal any party could file a notice of accelerated appeal, so that would just put you on the normal track. After perfection of the appeal, the appeal, it says in (e)(2), "shall be prosecuted" -- change

that to "must," "must be prosecuted in the same manner as any other accelerated appeal."

MR. ORSINGER: Okay. So you will get your opportunity to file the 50-page brief eventually.

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: And what is the page limit on the petition?

PROFESSOR DORSANEO: I think we voted 10 pages, may not exceed 10 pages, exclusive of some.

MR. ORSINGER: And that's in what subdivision?

HONORABLE TOM GRAY: (c).

PROFESSOR DORSANEO: (c).

MR. ORSINGER: Okay. I would argue that there should be more than 10 days to file your petition because in the petition you have to state concisely the issues of points presented, the facts necessary. It really requires some analysis and some writing to get down to something short. Now, you may have done all this work in connection with your motion or your negotiations or in hearings in front of the trial judge, but 10 days is an awfully short period of time to get a document as serious as this petition must be, and I think it should be at least 20 days, if not 30 days.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I was just going to say, if under the statute the parties have already agreed to this and the judge has heard the parties out and the judge has agreed this is a controlling question and so forth, it seems to me that this all should be done during that process. I mean, why can't it be done then? Otherwise it seems like you're unnecessarily slowing down what should be a -- you know, the idea of getting a quick answer.

MR. ORSINGER: So you -- I'm sorry.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I want to put forward my minority view again, especially now that it's unclear whether or not the courts of appeals are going to be evaluating these things to decide whether to take them. Can't we just have it perfected like any other appeal with the filing of a notice of appeal, and if there is a jurisdictional issue associated with this particular kind of appeal it could be handled through the regular appellate process?

I've always thought that requiring this petition and responsive briefing before filing a notice requires a whole bunch of front end work that's really going to be duplicative of everything you're going to say in your briefing, and why should we add this second step

in? Especially now that we're not even sure that the second step is necessary, given the Legislature's removal of the permissive, you -- you know, the court of appeals giving permission to take these things.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: Just so I understand what we're doing, my understanding is we're working on the rule presuming that it is still discretionary with the court of appeals.

CHAIRMAN BABCOCK: Right. So what we're doing is giving the Court a version of the rule that, assuming the Court thinks it's still discretionary and they want it to be discretionary, they will have a rule to deal with it.

HONORABLE TOM GRAY: And, therefore, in response to Justice Bland's what -- I want the same type preliminary look at this thing like the Court does in a petition before the Supreme Court, the condensed version, Cliff Notes.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: They tend to -- these petitions tend to look like our petitions for review in the Supreme Court.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: They tend to look like

them.

CHAIRMAN BABCOCK: But unlike the Supreme Court, in this instance you're not going to get a response because everybody agrees. I mean, it's not like you're going to say, "Take this case." One guy says, "Take the case," and the other guy says, "No, don't take it," because in this instance everybody is agreeing. I think.

MR. ORSINGER: So you might have two petitions, but you won't have a petition and a response.

CHAIRMAN BABCOCK: Right. Wouldn't you expect that you'd get an agreed petition? I mean, you would get everybody signing off on it.

MR. ORSINGER: Well, the party that won in the trial court is in this schizophrenic position of wanting appellate determination, but not wanting to reverse the trial court. So theoretically they wouldn't -- would you file a petition in order to get an affirmance? That would be peculiar.

PROFESSOR DORSANEO: 10 days is very short. 20 days is not much longer, so why don't we get off the dime here and decide whether we're going to change it?

CHAIRMAN BABCOCK: Yeah. Who's in favor of 10? Paula, you're in favor of 10?

MS. SWEENEY: Uh-huh. I want to go to trial.

CHAIRMAN BABCOCK: Okay. Okay.

HONORABLE TRACY CHRISTOPHER: She won't agree.

CHAIRMAN BABCOCK: Yeah, you're not going to agree. How many people think 20 is better? Particularly since you're going to have to --

MR. ORSINGER: Are we going to offer up 30, or is it 10 or 20?

CHAIRMAN BABCOCK: So a substantial majority of our committee thinks 20. Anybody for 30?

HONORABLE TOM GRAY: Now, wait a minute. You said is 10 any better. 20 is better than 10. I think 30 is better than 20.

CHAIRMAN BABCOCK: How many people think 30 is better than 20?

Only the guys that do appellate work and have other clients.

PROFESSOR DORSANEO: We don't want to work on the weekends if we can help it.

MR. ORSINGER: We're already working on the weekends.

HONORABLE SARAH DUNCAN: I'm trying to figure out the timetable. We're talking about to file the brief?

CHAIRMAN BABCOCK: 28.2(a)(2) I think is

what we're talking about. Right, Bill?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: The straw vote seemed to indicate 20 days, notwithstanding the practitioners who have to work weekends, but get well paid for it in most instances. Sarah, do you have any comments about 20 versus 30?

HONORABLE SARAH DUNCAN: (a)(2), we're talking about --

CHAIRMAN BABCOCK: 28.2(a)(2), I think. And the current version says 10 days.

HONORABLE SARAH DUNCAN: Filing a petition for permission to appeal.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Then the question really -- I'm not sure we had an educated vote there, at least on my part, so I'm trying to work through it in my head.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: 10 days we have no appeal. 20 days would be an accelerated appeal. 30 days would be a regular appeal. Why should this be an accelerated appeal? I would ask those people, including myself, who seemed to indicate 20 days was the right amount of time, if the parties have agreed this is a

controlling issue of law that's going to materially advance the ultimate disposition of the case and they have agreed to go through this procedure, why should it be an accelerated appeal?

HONORABLE STEPHEN YELENOSKY: Why should it or should not?

HONORABLE SARAH DUNCAN: Why should it be an accelerated appeal?

CHAIRMAN BABCOCK: Well, we're not talking about the normal -- the briefing on the merits. We're only talking about a preliminary filing.

HONORABLE SARAH DUNCAN: I understand that.

CHAIRMAN BABCOCK: That's going to be not --

HONORABLE SARAH DUNCAN: I understand that.

CHAIRMAN BABCOCK: Okay. Justice Jennings.

HONORABLE TERRY JENNINGS: Wasn't it Lisa's point that the Legislature took out (f) to get rid of the 10 days? Is that correct?

MS. HOBBS: Yes. I think the 20-day reasoning is that interlocutory appeals are accelerated. This is an interlocutory appeal, and we think of interlocutory appeals as 20 days. I think that's the reasoning why people are defaulting to 20 days instead of 30.

PROFESSOR DORSANEO: Not a final judgment

for sure.

CHAIRMAN BABCOCK: Right. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think it needs to be -- as a policy deal interlocutory appeal needs to be accelerated. You've got a trial that's waiting to go forward. It needs to be processed quickly.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If I'm not mistaken, and I don't work on a court of appeals, but I think the only acceleration that occurs is the filing of the record in the appellate court and the briefing timetable, but the order in which the case is taken up and the time of disposition is the same as --

HONORABLE SARAH DUNCAN: That depends on the court.

MR. ORSINGER: So some courts treat accelerated appeals more quickly?

HONORABLE DAVID GAULTNEY: They accelerate them.

HONORABLE SARAH DUNCAN: Justice Gray's court I believe doesn't.

HONORABLE TOM GRAY: There is not a consensus on what we do.

HONORABLE SARAH DUNCAN: Oh, okay. Why does this not surprise me?

MR. ORSINGER: My experience is, is that you just run like crazy to get the case to the court of appeals and then you wait for months to find out what's going to happen.

HONORABLE SARAH DUNCAN: In fact, we just hired, yesterday, an original proceedings attorney who will just do original proceedings; and if they don't -- if she doesn't have original proceedings to do, she immediately turns to the oldest accelerated appeal in our court because we have a priority in getting them out.

CHAIRMAN BABCOCK: Okay. Any more discussion on 20 days as opposed to 10 or 30?

HONORABLE SARAH DUNCAN: I have a question. I may want to change my vote.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE SARAH DUNCAN: Do we all agree that the court can extend the 20 days on motion filed within 15 days after the date it's due?

CHAIRMAN BABCOCK: This rule as written I think does permit that.

HONORABLE SARAH DUNCAN: So really you have 35 days.

CHAIRMAN BABCOCK: Under the way it's written now. If you changed the 10 to 20.

HONORABLE SARAH DUNCAN: That's important.

That's really important.

CHAIRMAN BABCOCK: Okay. Any more discussion about this? All right. Everybody in favor of 20 days raise your hand.

Thank you. All those opposed to 20 days raise your hand. 26 to 1 the ayes in favor of 20 days have it, so we change 10 days in 28.2(a)(2) from 10 to 20.

Does that require a change anywhere else in the rule, Bill?

PROFESSOR DORSANEO: No. Can we get to (b), please?

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: All right. (B), and we have discussed this before, has a number of specific things in it. Maybe all of them aren't necessary. There's a little redundancy because there's going to be a notice of appeal later. It seemed to me and to us in an earlier meeting that it would be good to require the petition to have (a), (b), (c), (d), and (e). (F) is more problematic based upon our discussion today in contrast to our discussion last August, so over the course of a year I think it changed, even if the statute doesn't change in the respect that we're talking about.

If you look at (f), it says, "State concisely the issues or points presented, the facts

necessary to understand the issues and points presented," and now we're getting problematic. "The reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion." Some people today say that's not the way the statute works with respect to what the court of appeals can consider in deciding whether to grant permission. So if you think like that, you will want "the reasons why the order complained of involves a controlling question of law," blah-blah, to be deleted, and perhaps you'd want to delete "why an immediate appeal may materially advance the ultimate termination of the litigation as well." You get my point, everybody?

MR. GILSTRAP: No.

PROFESSOR DORSANEO: Look at the statute again. We had a discussion a little while ago, people saying, well, what does this statute allow the court of appeals to do and to consider? The cases that we have now, I don't think there's any case that says otherwise, suggest that in granting permission to appeal the court of appeals considers the reasons why the order complained of involves a controlling question of law and doesn't just say, "The parties agreed to that, what's the next issue?" Okay. That's what our current cases say.

People here today have said that the issue

is whether the parties agree, some people, not whether that's actually so.

HONORABLE STEPHEN YELENOSKY: Only because that's what the statute says, but I mean, if the court of appeals interpreted it differently, I don't care, but, you know, I mean, that's what the statute says. Parties agree.

PROFESSOR DORSANEO: Yes. Yes. It does say that, but it maybe doesn't exactly mean what it says. Okay.

HONORABLE SARAH DUNCAN: Tweak. Tweak. Tweak.

MR. ORSINGER: Statutory interpretation.

PROFESSOR DORSANEO: I mean, that's just standard statutory interpretation. Unless you're Justice Scalia, and even he will read something into the words that isn't necessarily there. Okay. So but that's the issue, should we take some of this stuff out of (f) or just leave it as it is or just let the Court figure it out, put a bracket around it?

CHAIRMAN BABCOCK: Okay. What's our feeling about that? Does the -- is the statute clear, or is it ambiguous, subject to our interpretation? I'm sort of with Yelenosky on this one. The statute looks pretty clear to me.

HONORABLE SARAH DUNCAN: We're talking as though this is still going to be a petition to get permission.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: And it seems to me that whether the court agrees with the reasons stated as to why it involves a controlling question of law or agrees with whether it may materially advance the ultimate termination of the litigation will affect whether the court wants to grant permission, so whether it's jurisdictional or not is sort of immaterial. It's just that it informs the court of factors to consider in determining whether to grant permission, so I would keep it in.

PROFESSOR DORSANEO: Would you put brackets around it to cue the Court that there might be an issue about leaving it in or taking it out or just leave it in?

HONORABLE SARAH DUNCAN: I would just leave it in. I figure the Court can put in brackets if it wants to.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: As I understand, we're talking about this is a permissive appeal, and I think if we think of it as a permissive appeal there are

four entities that must agree, and so what I read the statute as saying or what the statute could be read as saying is that at the trial level you get three of those agreements and then you've got to go to the appellate court and get that fourth agreement, and I think the statute would anticipate that if it's a permissive appeal that's being provided for, that that permission be based on the things that the other three entities have agreed to, that it's the same standards for determining whether it's an appropriate appeal.

CHAIRMAN BABCOCK: Yeah. Well, the only thought I had was that if you're trying to reconcile the statute, which deleted (f), with the concept of a permissive appeal, it seems to me that the statute, the only thing it has left for the court of appeals to look at is whether -- is (d)(2), whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. That's something that the court of appeals could look at independently and say, no, this is not going to materially advance the ultimate resolution of this case, and we're not going to take -- we're not going to take the case for that reason, and it seems to me that if you look at it that way that harmonizes the statute with the rule as best you can.

PROFESSOR DORSANEO: There are a number of

1292b cases that say that certain kinds of orders are not subject to 1292b because you don't need to get this figured out in order to materially advance the litigation.

CHAIRMAN BABCOCK: Right. Right. So that would argue in favor of in this (f) then, deleting the language that says, "the reasons why the order complained of involves a controlling question of law as to which there is a substantial ground for difference of opinion" because the statute in my reading has not committed that to the discretion of the appellate court. The statute just says the parties and the judge have to agree on it, so you would delete that but leave in "why an immediate appeal may materially advance the ultimate termination" --

HONORABLE JANE BLAND: But, Chip, doesn't the appellate court need to know why you agreed?

CHAIRMAN BABCOCK: Well, not if -- the statute just says you agree.

HONORABLE JANE BLAND: This is providing information to the appellate court about why you agree.

HONORABLE SARAH DUNCAN: And the whole basis of 28.2 is the assumption that there is discretion in the court of appeals to deny permission.

CHAIRMAN BABCOCK: Yeah. Yeah. My comment was I don't -- I guess I'm approaching this from the posture that 28.2 is probably not available, that the

Court probably ought to pick the option of not picking 28.2, but if you're going to have a 28.2, you ought to get as close to the statute as you can, and this would in my view get closer to the statute, but it's just a comment.

Yeah, Richard.

MR. ORSINGER: I know since we're debating whether the court of appeals ought to go along with the agreement out of the trial court, I don't see how a court of appeals is going to be able to decide whether they want to put their resources into this interlocutory appeal if they don't have an idea of what the controlling question of law is regarding which there's a substantial ground for disagreement. If I was on the court of appeals and somebody just said, "We have this agreement and obviously if you rule on this now, you know, then we don't have to try the case and appeal it," that doesn't help me distinguish the ones that are worthy from the ones that are not.

So I agree with you, I don't think that the statute requires that we tell the court of appeals what the controlling question of law is, but I think we should have a rule make the litigants do that if they have any prospect of the court of appeals consenting to the appeal.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Because if they leave it out

because it's not required, I think they're all going to get turned down because nobody knows what the heck the case is about.

CHAIRMAN BABCOCK: That could be the practical effect of it. Judge Yelenosky and then Carl.

HONORABLE STEPHEN YELENOSKY: This is just a small point but sort of a related point. (B)(1)(d), "state that all parties agree the trial court's order granting permission to appear," the trial court presumably found agreement in issuing its order. Does this mean that a party can withdraw their consent? Because, I mean, the trial court's order is based on their agreement. Are they then having to agree that they still agree?

PROFESSOR DORSANEO: You might change that to "agreed."

CHAIRMAN BABCOCK: Yeah, "have agreed" or "agreed."

MR. ORSINGER: We wouldn't want them to withdraw their consent after the order because then Judge Christopher couldn't do her thing of --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- getting a binding agreement on an order first and then a ruling second.

CHAIRMAN BABCOCK: We ought to write that into the rule, the Christopher procedure.

PROFESSOR DORSANEO: Good catch, Steve. Let's change that to "agreed."

MR. HAMILTON: I think we need to address what the trial court order says and not so much what the parties' reasons for it, because the statute says that "if the order involves a controlling question," so I think that we ought to provide that the trial court order should define what the controlling question is.

PROFESSOR DORSANEO: Well, but that's -- isn't that talking about the order that's subject to the trial court's order for interlocutory appeal? That's talking about the underlying order.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Well, I'm not sure.

PROFESSOR DORSANEO: Well, it could be written better, but -- and some courts have gotten that screwed up a little bit, but it seems that the order that we're talking about is the order that's going to be appealed.

CHAIRMAN BABCOCK: Okay. Somebody else have their hand up? Yeah, Justice Gray.

HONORABLE TOM GRAY: General question so that I understand the extent of my discretion here when I get one of these, if it's missing anything in (1) through (3) or any subpart, I get to refuse to decide it, right?

I mean, is this like the old procedural problems in a writ procedure where you just summarily deny it and don't tell the party why and --

HONORABLE SARAH DUNCAN: Only if you're that kind of judge.

PROFESSOR DORSANEO: You could cut them some slack if you want to.

HONORABLE TOM GRAY: I'm just asking as an interested citizen.

HONORABLE JAN PATTERSON: I was going to say, put it in his dissent.

CHAIRMAN BABCOCK: What else? Okay. On (f), is there a consensus that we ought to leave (f) in as written or do people want to modify it in some sense?

PROFESSOR DORSANEO: Mr. Chairman, I agree with your reading, would be a sensible reading, but I think the other one would be sensible, too. I would propose to put brackets around the reasons why, et cetera., down to the comma, and let the discussion -- the Court knows what the discussion is and they can decide.

CHAIRMAN BABCOCK: Yeah. We've -- I think we've framed that issue for the Court, so let's just send it to the Court with that --

MS. BARON: Chip, can I add one suggestion?

CHAIRMAN BABCOCK: Yeah.

MS. BARON: I'm Pam Baron. I don't have my --

CHAIRMAN BABCOCK: Yeah, everybody knows you.

MS. BARON: There may be a compromise position where we say they have to state concisely the reasons why the early appeal would materially advance and then say "in determining whether the appeal would materially advance the court may consider such," you know, "factors as" and then put the others in, which suggests that they need to do it, but it doesn't require them to do it.

CHAIRMAN BABCOCK: Yeah. That's a good -- that's a good idea. Yeah, Richard.

MR. ORSINGER: As this is going out the door, I just have a question that maybe somebody could answer, and that is if the court of appeals declines this appeal, is that nonreviewable by appeal, and is it reviewable by mandamus in the Supreme Court? We don't address any of that, but I'm assuming since the appeal never got off the ground you couldn't appeal it to the Supreme Court.

CHAIRMAN BABCOCK: Could you appeal the denial of the permission?

MR. ORSINGER: I don't -- since there is no

appeal I don't see how you could appeal the denial, and we don't need to worry about that in our rule, right?

PROFESSOR DORSANEO: Right.

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: But you might be able to mandamus it, and we don't have to have a rule for that.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: You have to worry about it now.

HONORABLE SARAH DUNCAN: I would like to put on the record that I'm not sure you can't appeal the denial.

MR. ORSINGER: You think you could? Even if your right to file an appeal is denied, you can appeal that denial? I mean, you haven't even filed a notice of appeal.

HONORABLE SARAH DUNCAN: You can't appeal the denial of a petition for a writ of mandamus because it's an original proceeding in the court of appeals. You file an original proceeding in the Supreme Court seeking to mandamus the court of appeals, but this isn't appeal. This isn't an original proceeding.

MR. ORSINGER: But it's not an appeal unless the court of appeals agrees it's an appeal, and they have refused to agree. Right?

HONORABLE SARAH DUNCAN: They have denied permission to appeal.

MR. ORSINGER: So you don't have a notice of appeal on file because you're not permitted to file one unless they permit you to file it. So there isn't an appeal, right? This is not an appeal if it's denied, and therefore, it's not subject to further appeal.

CHAIRMAN BABCOCK: Hatchell, you want to weigh in on this?

MR. HATCHELL: Not particularly, but there is a hidden appeal in Texas practice that many people forget that might be analogous to this situation where a court of appeals has refused to permit you to file an untimely motion for rehearing, and the Supreme Court just constructed a 30-day appeal from that order, so that's the only thing I can think that's analogous.

HONORABLE SARAH DUNCAN: Well, and in Verbert --

MR. HATCHELL: Verbert is one, yeah.

HONORABLE SARAH DUNCAN: -- you don't have a timely notice of appeal filed, and the court denies permission to file a notice after the 30 days. That was appealable. It was appealed. Whether it was appealable or not is a different question.

MR. ORSINGER: So we're going to create

another hidden appeal here rather than have a rule for it.

CHAIRMAN BABCOCK: Okay. Well, we are in favor of hidden appeals, but, okay, what about serving everything on all parties in the trial court? That doesn't seem controversial.

MR. ORSINGER: I would propose that we add serving the trial judge so that the trial judge can stay apprised of the progress. The filings are all going to be in the court of appeals from this point forward, and just as a matter of courtesy I think -- I mean, I think we should require that the trial court get copies.

CHAIRMAN BABCOCK: Okay. What's everybody feel about that? Justice Duncan looks bewildered by that suggestion.

HONORABLE SARAH DUNCAN: Not bewildered. I'm trying to think. I think the trial judge would get a copy, wouldn't --

MR. ORSINGER: The petition and all that is all filed in the court of appeals.

CHAIRMAN BABCOCK: Not necessarily.

MR. ORSINGER: And remember, this is all interlocutory, so the trial judge is still trying to conduct discovery and everything else.

HONORABLE SARAH DUNCAN: I'm sure it's different from court to court, but --

MR. HALL: Who would you serve in Bexar County?

HONORABLE SARAH DUNCAN: -- I think we would serve notice.

MR. ORSINGER: The trial court that signed the order.

HONORABLE SARAH DUNCAN: I think we would send notice to the court. I can check on it, but let's put it in there because I think the trial judge ought to know.

CHAIRMAN BABCOCK: Anybody disagree with that?

MR. GILSTRAP: Is the trial judge going to get everything, going to get the briefs?

CHAIRMAN BABCOCK: Judge Christopher disagrees.

MR. ORSINGER: You don't want to know about it?

HONORABLE TRACY CHRISTOPHER: I don't want it.

CHAIRMAN BABCOCK: After having created this by your skillful procedure.

HONORABLE TRACY CHRISTOPHER: I just want to wait and see what you do, and I'll deal with it later.

HONORABLE SARAH DUNCAN: Tracy, don't you

need a notice that it has been filed in the file? Well, you wouldn't because you-all have central docket, but in San Antonio I'm thinking that there would need to be notice to the clerk to put in the file that this has been filed so that the other judges are aware this is up in the court of appeals, we're not going to pretty much do anything with it.

HONORABLE TRACY CHRISTOPHER: Well, but it's discretionary as to whether the case is stayed while this appeal is going on, so presumably the trial judge would have said something in the original order that we're not going to do anything for the next, you know, six months, or, you know, that we're going to keep doing discovery while it's on appeal; and so, you know, I would know one way or the other what's happening with the case without having to get copies of everything.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: What if after reading the petition you decide that you improperly granted the order?

HONORABLE TRACY CHRISTOPHER: That's presuming I read it, you know. It's kind of like, you know, we're supposed to be served with mandamus petitions, which we get served with mandamus petitions maybe 25 percent of the time; and, you know, of that 25 percent I

might read, you know, just a few of them if I was really, you know, worried about my ruling; but if I had already agreed it was going up, you know, it's just more filing.

CHAIRMAN BABCOCK: Justice Gaultney, then Justice Duncan.

HONORABLE DAVID GAULTNEY: Yeah, if the trial judges don't want it I suggest we not do it. I think, first of all, if you copy them on everything you're going to create the feeling perhaps to a trial judge that maybe they should be doing something relating to an appeal that is, in fact, in the higher court.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: It seems to me that we've pretty much taken care of my concern in (e) on page four at the top of the page. The notice of appeal is going to be filed with the trial court clerk and the clerk of the appellate court. That's the way we do it in criminal cases. So there would be a -- something in the file to tell the world and the other trial judges in particular that this is on appeal.

CHAIRMAN BABCOCK: Okay. Anything else?

PROFESSOR DORSANEO: So you want me to -- I just wrote here in (b)(4) that's new, "The petition and any response or cross-petition must be filed with the trial court clerk." You want me to cross that out now?

CHAIRMAN BABCOCK: What's everybody think? Everybody in favor of that or not? Everybody in favor of that raise your hand.

MR. SCHENKKAN: Which is "that"?

CHAIRMAN BABCOCK: What he just read, what he just read, which is "serving the petition on the trial judge and the response, if any"?

PROFESSOR DORSANEO: And anything else.

CHAIRMAN BABCOCK: Yeah. All right. Everybody in favor of that raise your hand.

MR. HAMILTON: Of deleting it, you're talking about?

HONORABLE STEPHEN YELENOSKY: In favor of not serving it?

CHAIRMAN BABCOCK: In favor of serving the trial judge.

PROFESSOR DORSANEO: Well, I'm just filing with the clerk. I'm not going to hand it to him.

HONORABLE SARAH DUNCAN: Filing with the clerk is fine.

CHAIRMAN BABCOCK: Filing with the clerk so the trial judge gets it. Everybody against that?

It fails by 7 to 12; 7 in favor, 12 against. Okay. Let's go quickly to subparagraph (3), which is a seven-day response period; and before we get to that,

anybody who has a dark blue Chevy Cavalier is in jeopardy of having their car taken to a different parking lot by tow truck.

HONORABLE BOB PEMBERTON: It's in a real bad part of Travis County, too.

CHAIRMAN BABCOCK: In a bad part of Travis County.

HONORABLE STEPHEN YELENOSKY: And don't take the Cavalier to my house. Take the Mercedes.

CHAIRMAN BABCOCK: Seven days, is that okay? Everybody think that's all right? Any comments on that?

Okay. Yes, comment, Justice Duncan.

HONORABLE SARAH DUNCAN: If we're going to give somebody 20 days to file their petition, but as Professor Carlson said, they've already agreed, so what really do they have to say?

CHAIRMAN BABCOCK: So it would be rare that -- okay, Pete.

MR. SCHENKKAN: Yeah, I'm sorry to be -- this is now a special pleading by the appellate lawyers, but I'd like to have more time for that. The scenario under which this could arise, if it arose at all, is you've agreed there is a controlling issue of law and you've gotten the trial court to agree that getting that decided faster would materially advance, and we're under a

construction of the statute that says you now need the permission of the court of appeals for them to actually hear this appeal, and the other party is the one that lost on the merits, and they're drafting the petition, and they have correctly stated some aspects of the situation but taken full unfair advantage to say a little bit about the merits on their side, and you don't want to let that go undiscussed. You want to say, "I certainly agree, I still agree, I'm not revoking argument we need this decided, but they've slightly misstated the question in an important way." I think seven days for that is pretty tough given the service thing, and I don't see --

MR. SUSMAN: You need more than seven days to say that?

MR. SCHENKKAN: Beg your pardon?

MR. SUSMAN: You need more than seven days to say that?

MR. SCHENKKAN: It depends on how quickly I receive it and how subtle they've been. Now, Steve, if you were on the other side I think I might need 30 days, but most people I think maybe 10 or 20 would do.

CHAIRMAN BABCOCK: The Christopher procedure and the Susman response.

MR. SUSMAN: Just follow my briefs on the merits.

CHAIRMAN BABCOCK: Yeah, right. Pam.

MS. BARON: Most motions in the court of appeals have a 10-day window, so I wouldn't see a problem with changing it to 10. Just treat all motions similarly.

CHAIRMAN BABCOCK: Give Pete the weekend to work on it.

MR. SCHENKKAN: Thank you.

PROFESSOR DORSANEO: I don't know where the seven came from, so 10 is fine.

MR. ORSINGER: From the Bible, I think.

CHAIRMAN BABCOCK: We were divinely inspired for our rules. Okay. What about the form of the papers, number of copies? Any comments on that? Ten pages enough to do this?

PROFESSOR CARLSON: It was last meeting.

CHAIRMAN BABCOCK: Okay. What about the submission of the petition, the appellate court's order, subparagraph (d) of this proposed rule? Any comments on that?

Okay. Hearing none, how about subparagraph (e)? We've got two alternatives here.

PROFESSOR DORSANEO: Yeah. Let me point out here the differences between the alternatives, and I don't now remember exactly why I drafted it this way. It was a year ago, but the differences are in (e) it doesn't say

what it says -- in the first (e) it doesn't say what it says in the alternative (e) in (e)(1)(C), pay all required fees; and I have no recollection as to why I didn't put that in the first (e), so I think it wouldn't be a bad idea for it to be in whatever (e) ends up saying.

And also, the first (e) doesn't -- I mean, the first (e) says in the last sentence of (e)(1), "The provisions of Rule 26.3 apply to such a notice," and the second (e) doesn't say that, I don't think. I think it would be a good idea for whatever (e) we have to say that.

And the last thing I'll say is that (2), (e)(2) uses the word "shall," "the appeal shall be prosecuted," and I don't have any idea why I used that word rather than the word that I should have used, "must." That's all I had to say about (e).

CHAIRMAN BABCOCK: Okay. Which alternative do you prefer, Bill?

PROFESSOR DORSANEO: I actually prefer (e), alternative (e), with the addition of the sentence, "The provisions of Rule 26.3 apply to such a notice" to follow at the end of (e)(1)(B), and that would make -- that would do what I like. The iteration also is more digestible. So I would recommend the alternative (e) with that sentence added to (e)(1)(B), that sentence again being the last sentence of (e)(1), the first alternative; and I

guess there is one other issue as to whether within 10 days is too fast, huh, to do this?

CHAIRMAN BABCOCK: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: I agree we want an extension of time and we want them to pay their fees. I would suggest that the last sentence of (e)(1), the first part, "The provisions of Rule 26.3 apply to such notice" should actually be (2) under (e) since now we just have a (1).

CHAIRMAN BABCOCK: Maybe not.

PROFESSOR DORSANEO: No, there is a (2). It just kind of --

CHAIRMAN BABCOCK: There's a (2). It just doesn't get indented right.

HONORABLE SARAH DUNCAN: Oh, there's (2).

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: Then it should be (3). No, it should be (2).

CHAIRMAN BABCOCK: (2), and (2) should change to (3)? Pam.

MS. BARON: Does this mean, Bill, that if you don't get your check in there in 10 days that your appeal is automatically denied?

PROFESSOR DORSANEO: No. I wasn't thinking that at all. So I'm happy to make that to "pay all

required fees" and take the 10 days out of it and make (2) (3).

MS. BARON: Okay.

CHAIRMAN BABCOCK: So what are you doing to the 10-day period?

PROFESSOR DORSANEO: The 10 days only applies to filing the notice of the accelerated appeal --

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: -- and a copy of the notice of the accelerated appeal.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And we could actually make that (2) if you wanted to do that.

HONORABLE SARAH DUNCAN: Well, then the last sentence should be a (C).

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: Then "The provisions of Rule 26.3," that sentence should actually be (C).

PROFESSOR DORSANEO: Oh, yeah. I put that in the wrong place, didn't I? No, I didn't.

HONORABLE SARAH DUNCAN: And then (2) would be "pay all required fees" and (3) would be "after perfection."

PROFESSOR DORSANEO: Recapitulate for us,

Sarah.

HONORABLE SARAH DUNCAN: Okay. If we're going to go with alternative (e), second half of page four, I think the last sentence of "The provisions of Rule 26.3 apply to such a notice," should be (e)(1)(C); "Pay all required fees" should be (e)(2); and "After perfection of the appeal, the appeal shall be prosecuted in the same manner as any other accelerated appeal" should be (e)(3).

CHAIRMAN BABCOCK: "Shall" should be "must," but --

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: John Martin, did you have a comment?

PROFESSOR DORSANEO: Thank you.

CHAIRMAN BABCOCK: John, did you have a comment?

MR. MARTIN: No. Ralph has.

CHAIRMAN BABCOCK: Ralph made it look like it was your arm.

MR. MARTIN: He asked me before he told the whole group if I agree with him or not.

MR. DUGGINS: If you look at the first (e) it's "Any party may file" and alternative (e) it's "Any party must." To me that make no sense. If you're going to have a "must," shouldn't it be "petitioner" or "the

petitioner"? In (a)(1), or (e)(1), rather?

CHAIRMAN BABCOCK: Bill?

PROFESSOR DORSANEO: Yeah, it probably should say "may."

CHAIRMAN BABCOCK: Huh? "Must" to "may"? Somebody has got to do this, don't they?

HONORABLE SARAH DUNCAN: No.

MS. HOBBS: Yeah, somebody has to.

CHAIRMAN BABCOCK: Nobody has to?

MR. ORSINGER: Well, I mean, if nobody does then the remedy is never invoked.

HONORABLE SARAH DUNCAN: Right, and then we send a show cause order saying we're going to dismiss within 10 days unless -- actually, there's nothing to dismiss, is there?

MS. BARON: No. You don't know anything.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: You want to leave it as "must" because, you know, you get them buying into the Christopher method, "Sure, we agree to this." Then they get the ruling, they become the petitioner. "Oh, no, we don't like this game. We're not going to pay the fee." So the trial court's going through the exercise for nothing, so it ought to be "must" or "shall," or "must."

CHAIRMAN BABCOCK: "Must."

PROFESSOR DORSANEO: You want me to put in language that talks about "to perfect an appeal must" spell it out a little better?

MS. BARON: Yeah.

CHAIRMAN BABCOCK: I think so. Richard.

MR. ORSINGER: It shouldn't be -- it shouldn't in my opinion be restricted to "the petitioner must" because I'm still troubled by the idea that someone who won in a trial court and then may have petitioned for the review --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- is really not trying to reverse the court's judgment, and maybe it's just I'm hung up based on our normal practice.

The other thing I'd like to say is that because of the statutory amendment we have to change "district clerk" to "trial court clerk" or "clerk of the trial court" in both sides of the rule. It's in (1)(a) or in the fifth line of the first (e)(1).

CHAIRMAN BABCOCK: Okay. Thanks. That's a good catch. Justice Gray.

HONORABLE TOM GRAY: I would suggest that the fee schedule be modified by the Supreme Court and that the fee, whatever is required, is filed or paid at the time that the application is filed, not when the notice of

appeal is filed. We've already had to mess with it. We've already got the deal sitting there. That's what's going to trigger the assignment of an appeal number, and that's going to be what kind of gets the controller's interest in where did the fee for this docket number go, and then you don't have to worry about the fees being paid at the time the notice of appeal was filed.

MS. HOBBS: You could do what we do. You could do 75 at the petition and 75 at the --

HONORABLE TOM GRAY: No, charge them the whole thing up front.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I was going to say, I changed the second (e) a little bit to say "within 10 days after the signing of the order granting permission to appeal any party to the trial court proceeding" -- maybe it's in the wrong place -- "in order to perfect an appeal under these rules may..." What I was trying to do -- and maybe I started to speak too quickly. What I was trying to do was to make the point that's made in the first alternative that the notice of appeal is necessary to perfect an appeal under these rules and somebody, you know, may do that.

MR. BOYD: What if you change "any" to "a"? "A party to the trial court proceeding must file."

HONORABLE SARAH DUNCAN: Why would you do that?

MR. BOYD: Well, because we're saying it doesn't matter which party. It may turn out that a different party than you would expect to file would file, but somebody has to file.

HONORABLE SARAH DUNCAN: Why?

MR. BOYD: Because otherwise you have no appeal to proceed.

HONORABLE SARAH DUNCAN: Right. Imagine if -- and it's not hard to imagine -- you get the parties to agree with the trial court to sign this order, you get somebody to file a petition, somebody files a cross-petition, and the case settles. Why would anybody perfect that appeal by filing a notice?

MR. BOYD: Right. What you're saying is that the consequence of not complying with this is that you don't have an appeal.

HONORABLE SARAH DUNCAN: Right.

MR. BOYD: But that doesn't take away the necessity of complying with it in order to have an appeal.

HONORABLE SARAH DUNCAN: Right. But there may be instances in which after all this procedure, assume a simple case of two parties, both parties decide that we don't want to do that, right, we've settled this case, or

we've resolved this -- I read your cross-petition, Jeff, and it was so persuasive I completely agree with you now on this controlling issue of law. So why should anybody have to file a notice of appeal if they don't want to proceed with an appeal? Why should they have to pay the fee for filing a notice of appeal?

My only question is what administratively does the court do to close this out? If we have no appeal to -- we've got to close it out. We can't keep it on case management as an open proceeding forever. I guess we dismiss the -- we dismiss the petition.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: We send a show cause order saying we're going to dismiss your petition unless one of you, one party to this proceeding, files a notice of appeal within 10 days.

HONORABLE DAVID GAULTNEY: Dismiss for lack of jurisdiction. There's no notice on file, the time has run for filing the notice.

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE SARAH DUNCAN: What?

HONORABLE LEVI BENTON: You know, I said I was advocating "must" earlier, but it ought to be "may" so that the winning party can pay it, but the winning

party --

HONORABLE STEPHEN YELENOSKY: They won't know.

HONORABLE LEVI BENTON: -- may not know.

HONORABLE STEPHEN YELENOSKY: Because it's after 10 days.

HONORABLE LEVI BENTON: Yeah, that's the problem, because you want to permit the winning party to pay. They're going to recover their taxable costs perhaps, but so --

HONORABLE TOM GRAY: Who is the winning party on the petition when both of them want it?

HONORABLE LEVI BENTON: Well, I would define the winning party as the party who persuaded the trial court who is not likely to be the petitioner. I mean, there ought to be -- you can't permit a circumstance where those of us at the trial court spend hours and then somebody says, "Oh, I don't like this. I'm not going to pay the fee. I'm not going to take it up."

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: But why is that so hard?

HONORABLE LEVI BENTON: Why is that?

HONORABLE SARAH DUNCAN: I mean, you call at 4:00 o'clock the afternoon of the 10th day, and the party

that lost in the trial court hasn't filed a notice of appeal. You want this resolved.

HONORABLE LEVI BENTON: Where is Mr. Tipps?

HONORABLE SARAH DUNCAN: So you fax over a notice of appeal to the court of appeals and to the trial court clerk.

HONORABLE LEVI BENTON: I don't know. I mean, it shouldn't be so hard, but I never really did a lot of appellate work. Maybe one of the appellate lawyers might speak to that. I mean, you don't want to frustrate the efforts of a trial court to get a resolution on a material question of law.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Richard and I have both drafted language that says the "must" applies if you want to perfect an appeal under these rules. So that's all that's mandatory, is that to perfect an appeal you must file the notice within 10 days after the signing of the order granting permission to appeal.

Now, whether -- the order of the phrases doesn't seem to be worth the trouble to take the committee's time. You could start out by saying, "In order to perfect the appeal a party must within 10" -- you know, "must within 10 days after the signing of the order

granting permission to appeal, (a), file a notice"; or you could say "within 10 days after signing the order granting permission to appeal in order to perfect the appeal under these rules a party to the trial court proceeding must"; and either way it means the same thing.

CHAIRMAN BABCOCK: Okay.

HONORABLE LEVI BENTON: It's of no moment. I mean, I would never do it, but a judge like Sullivan might say, "You misled me. You're going to the end of line."

HONORABLE KENT SULLIVAN: I was sitting here, minding my own business.

CHAIRMAN BABCOCK: I sense some slander in the air. I'm not sure.

Okay. Let's go to the comment. Any comments on the comment? That's how we started out.

PROFESSOR DORSANEO: I have a comment on the comment.

CHAIRMAN BABCOCK: Should be "any" instead of "my" in the second line.

PROFESSOR DORSANEO: My good friend Pete next to me here said the comment is slightly inaccurate because it leaves out in the first sentence language softening "regardless of any statutory deadlines." It leaves out "unless a statute expressly prohibits

modification or extension of any statutory appellate deadline," and that needs to be put in the comment.

From an engineering standpoint I'm not exactly sure how that should be recrafted, but I think it should be in a separate -- in a separate sentence or perhaps the "unless" --

HONORABLE STEPHEN YELENOSKY: Did you catch the typo, "my statutory"?

PROFESSOR DORSANEO: Yeah. Yeah. That was caught several drafts ago, but I guess my secretary's computer wants to resurrect it occasionally because she doesn't throw away any drafts.

Or alternatively we could take out "regardless of any statutory deadlines" from the first sentence and leave it a little bit vague, but somehow or another I wanted to soften that.

HONORABLE SARAH DUNCAN: Just take it out.

PROFESSOR DORSANEO: Because this doesn't exactly match what it says in 28.1(b), and that's my only point.

CHAIRMAN BABCOCK: Okay. Any other comments about the comment? Frank?

MR. GILSTRAP: I just want to reiterate at least what I understand the purpose of the comment is. First of all, it's to alert the practitioner to the

existence of shortened statutes with shortened appellate deadlines even though it's a final judgment.

PROFESSOR DORSANEO: That is the essential purpose of it, yes. The rest of it is beside the point probably.

MR. GILSTRAP: And the second is to make clear that unless the Legislature has said you -- you know, you can't shorten it, that we are making -- we are setting an appellate deadline of what, 20 days, whatever it is. The point is that we are now -- we are now setting an appellate deadline that everybody can rely on except in those few cases in which the Legislature has said you can't do it.

CHAIRMAN BABCOCK: Okay. We're going to take our morning break for 10 minutes, but while we're on break, if there's anybody here -- I know Jim Worthen wants to talk about the appellate rules. If there is anybody else here who is desirous of speaking on any item in our agenda, could you let Angie, who is sitting to my right, know and what you want to speak on and what your time situation is, if there are any time constraints.

PROFESSOR DORSANEO: We can talk -- I was going to go to whatever they wanted to talk about next. I didn't know this would take so much time.

CHAIRMAN BABCOCK: Well, but you don't know

what they're all here for, though. There will be a recess for 10 minutes.

(Recess from 10:47 a.m. to 11:05 a.m.)

CHAIRMAN BABCOCK: All right. Can everybody get back to their seats?

PROFESSOR DORSANEO: All right. The next item will be consolidation of cross appeals. If you look on the agenda, which has disappeared from --

CHAIRMAN BABCOCK: It's 3(d) on the agenda.

PROFESSOR DORSANEO: 3(d), consolidation of cross appeals, and please turn to the last page of the appellate rules subcommittee members memo dated July 11th, 2005. There are a number of those on the table up here if you don't have one, and I'm going to turn this over to Mike Hatchell for discussion.

MR. HATCHELL: Thank you, Bill. Let me introduce Chief Justice James Worthen. He's a victim of the problem that we are going to talk about in this rule, and let me give you some historical background. For as long as I can remember there have been in Texas, largely in East Texas, what we call overlap counties, counties where you can appeal to one of two courts of appeals; and infrequently you would have cross appeals, both parties appealing, and they would notice appeals to different courts of appeals and get those appeals lodged in the

courts of appeals and then you have a split case, which, of course, is unacceptable; and in the 1940's, 50's, '60's, and 70's, the reconsolidation or the consolidation of the cross appeals was handled internally by the court in magical ways that none of us really knew, but it seemed to work. Chief Justices Calvert, Greenhill, Pope and Hill would just simply -- when they were petitioned by the Chief Justices of the courts of appeals just simply enter an order consolidating the appeals in one case or another.

In either the late 1980's or the early 1990's there was somewhat of a change of attitude on the court; and, first of all, the court wanted the parties to agree, and they would send out letters requesting the parties to agree. Of course, that was not going to occur, so the matter came back to the court; and in a case called Ford Motor Company vs. Miles the court promulgated a rule that says the first filed notice of appeal governed which court of appeals would have the case.

Well, it didn't take long for a considerable amount of gamesmanship to enter into that process. I know in East Texas after the verdict you can see people sprinting down to the clerk's office to file a notice of appeal. Mostly the winning party were filing notices of appeal complaining of some tiny portion of the judgment, and so everybody then started filing premature notices of

appeal. Well, once you started filing premature notices of appeal, arguably the first filed rule goes away because the premature notice rules basically deem the notices both filed at the same time and at the proper time, so the problem still remains as to how to effectively and with least amount of trouble to the courts reconsolidate appeals that have become split.

This has been a matter of concern for about the last four years, and this proposed rule has been on my computer for about that length of time, but what happened is we kept thinking that the Legislature was going to fix the problem by eliminating what we call overlap counties, and indeed it did do that to a limited extent, and I'm going to ask Judge Worthen if you could explain the current landscape in Texas because there are places outside of my knowledge that you know better than I do.

HONORABLE JAMES WORTHEN: Thank you very much, Mike. Mike has pretty well explained what the problem and the situation that has occurred since the 1995 Supreme Court case of Miles vs. Ford Motor, or I guess it's Ford Motor vs. Miles, but the Legislature has actually been dealing with overlaps a little bit, but they're doing it incrementally.

As of two years ago we had 10 overlap counties. Of course, the most -- I think what people

thought was the most egregious was between the First, Fourteenth, and the Tenth with Brazos County where you had three appellate courts that had an overlap. In 2003 the Legislature dealt with that, and then with the -- I'm sure most of you are familiar that the Legislature did do some redistricting of the appellate districts this year and has reduced the overlap counties from what was 10 two years ago now down to just five.

We have four overlap counties between the Tyler and the Texarkana courts of appeals and then there is one overlap between the Dallas and Texarkana courts of appeals. So this is becoming less and less of a problem, but we still do have the problem which Mike has explained. And again, I think that the rule that Mike has drafted here, you know, would help deal with this problem and basically would allow Andrew Weber to draw a slip of paper out of the hopper here in Austin, and that way it would put a little bit of randomness into the selection rather than having the sprints to the courthouse that we've had. It's been very minor, just in a few cases where this has happened, but where it happens it does present a problem that needs to be addressed.

MR. HATCHELL: Thank you very much, your Honor. At one time there was a bill before the Legislature, I think that came out of the Council of Chief

Justices. That bill required procedure to be set up in every district clerk and every county clerk's quarters to handle these problems, and because of the diminishing nature of this problem I felt that that was a little bit of overkill, so the rule that I drafted takes a slightly different approach.

Number one, it preserves the notion that parties should first agree. So the rule requires when the parties become aware of cross appeals that lead counsel for both parties should consult and attempt to agree on a court; and if they don't, then notify both courts, at which time the respective clerks of the courts would simply send a letter, as was done back in the old days, to the Supreme Court; and Andrew Weber would devise a random system, really at his own discretion, I think, or whoever the clerk of the Court is, a random system for just drawing something out of a hat; and that's where it goes.

So what we've done here is we have given the system the opportunity to work on the basis of the parties' agreement. If they cannot agree then the matter goes to an entirely random process, which takes the gamesmanship out of the situation.

HONORABLE STEPHEN YELENOSKY: Mike, you said it was at his discretion, but this seems to have a very specific --

MR. HATCHELL: Well, it does, but I mean --

HONORABLE STEPHEN YELENOSKY: I know it's four years ago, but they may just want to do it by computer, right?

MR. HATCHELL: Could. Sure. And certainly that could be -- you know, that could be tinkered with. So that's it.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: I think we ought to let him have discretion on how he randomizes. Since there are really only two, you could roll one die, go out, or even flip a coin, or use a computer; but if you have multiple you almost have to go to drawing straws.

The other thing I wanted to ask is do we have problem with people selectively applying for a mandamus early on in the case or if we have an interlocutory appeal under this statute we've been debating, does that fix the court for the appeal on the merits; and if so, do we need to randomize the earlier applications for relief?

MR. HATCHELL: That's a good question. As far as I know there is nothing that says that a court that has either entertained an earlier interlocutory appeal or a mandamus gets dibs on that.

MR. ORSINGER: How is that done in Houston?

You get random assignment each time?

HONORABLE JANE BLAND: Random assignment.

MR. ORSINGER: Or random assignment the first time and it's fixed --

HONORABLE JANE BLAND: No. A mandamus does not fix the court for the appeal.

MR. HATCHELL: Judge Worthen, did you want to speak?

HONORABLE JAMES WORTHEN: Yes. Richard, just to answer your question, Mike is correct. If somebody mandamuses one of the courts to decide a mandamus issue, that does not fix where the appeal will be filed or where it will be handled, so it's really not --

MR. ORSINGER: Well, do we want to randomize the selection of the court for the appeal or -- the mandamus or the interlocutory appeal?

HONORABLE JAMES WORTHEN: You only have one party that's interested in filing for a mandamus, so I think that's probably irrelevant.

MR. ORSINGER: But we could force it to be a random choice instead of allowing them to select. All I'm saying is if what we're trying to do is to take away the right to pick your court of appeals, and one of them probably has got a trivial complaint, which is not a genuine, and the other one has got a genuine complaint,

does the policy -- should the policy apply when you're applying --

HONORABLE JAMES WORTHEN: Well, Richard, I think in these counties, you know, the attorneys are used to picking their courts, and, you know, we're okay with that. I think all the courts in East Texas are okay with them picking their courts. We're just trying to address the problem that was created by the Ford vs. Miles Motor case where you have both parties kind of having a race to the courthouse, but you know, in 99 and 44/100 of the cases there isn't a problem. We don't have a problem with them picking their cases as long as the Legislature continues to have the overlap counties.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I think this is a great approach. It's complete. It's a fix. I move we recommend the concept.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: The First and the Fourteenth Court of Appeals have random assignment by the district court clerk before -- you know, upon the filing of a notice of appeal, and then it's assigned to either the First or the Fourteenth, and I think that's better than letting the parties race to the courthouse or fix, either by agreement or otherwise, the appellate court in

which their case is going to be heard. If we pass this, is this going to change the way the cases are currently assigned to the First and the Fourteenth Court of Appeals; and it is, of course, you know, a routine occurrence in our case because we have completely overlapping jurisdiction with each other.

HONORABLE JAMES WORTHEN: If I might address that, Justice Bland, you know, of course the First and Fourteenth is fixed by a statute. We don't have a statute in East Texas on our overlap counties in East Texas.

HONORABLE JANE BLAND: But why would we have a different way for assigning cases in two courts of appeals in the state and three others?

MR. GILSTRAP: Because one's Houston and one's East Texas.

HONORABLE JANE BLAND: I guess I'm trying to figure out why we would have two different ways of handling it.

HONORABLE JAMES WORTHEN: You know, that's just the way that it has evolved. And again, you know, if the Legislature saw fit to pass a law to apply to the counties in East Texas, you know, I guess they could; but we're just dealing with it as, you know, a problem which has come up; and Mike has addressed the problem that has come up, so we will address it that way. But there's --

but as I said, typically the Bar wants to keep the system as it is.

HONORABLE JAN PATTERSON: Well, and isn't that the answer, that you-all deal with it in a routine fashion and they deal with it in an abhorrent fashion?

HONORABLE JANE BLAND: If you're talking on a particular county basis, I mean, that particular county every time there is an appeal filed out of that county, you know, it's got to get assigned to one of two courts just like -- just like an appeal out of Harris County has to be assigned; and I guess, why wouldn't we use the statutory language that exists to have a statewide, you know, solution for handling the problem so that you don't have different ways of getting to courts of appeals depending on what part of the state you're in?

MR. HATCHELL: Well, this is a different problem than Houston. You don't have the problem of split. You can't give a notice to two different courts --

CHAIRMAN BABCOCK: Right.

MR. HATCHELL: -- in Houston, and the procedures are already set up, number one, by statute and, two, there is a very formal procedure for the assignment. The problem that I had with that is when you go to that system, that means that in every one of the counties in every district clerk's office and every county clerk's

office and every county court clerk's office you've got to set up a procedure, and they may not see one of these things in 10 years. So I don't understand why all this procedure needs to be sitting there for something that's almost never going to happen, and this is a very simple solution to a problem that comes up very, very infrequently.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Is the rule as proposed only going to apply to those situations that Ford Motor Company vs. Miles does not address, which would be when you have two prematurely filed notices of appeal and to different courts? Otherwise what you're going to have is you're going to have one party that files a notice of appeal, and the other party that didn't file first under Ford Motor Company vs. Miles is going to say, "Well, I don't like the court that the other side chose, if I go ahead and send my notice now at least I've got a 50/50 chance of going to the other court."

MR. HATCHELL: Sure. But they're doing that now.

HONORABLE TOM GRAY: But if they're doing it now under Miles vs. Ford, or Ford vs. Miles, the first filed controls.

MR. HATCHELL: No. Well, I don't know that

that's been addressed yet, because the problem is everybody has figured out if it's a prematurely filed motion, they're both filed at exactly the same time, so you would have to extend Ford vs. Miles to say, okay, really it's the first filed in real time. So that means the court system has got to get back into that again, so then you're going to have people start filing notices of appeal with their original petition.

HONORABLE TOM GRAY: Well, and all I'm suggesting is that this only apply to those in which there are two prematurely filed notices of appeal.

MR. HATCHELL: No. It applies to everything. It just supplants Ford Motor Company vs. Miles.

HONORABLE TOM GRAY: So I can wait until the deadline to decide -- for filing a notice of appeal and see if the other person is going to file, which court they file in, and then file mine in the other court --

MR. HATCHELL: Sure.

HONORABLE TOM GRAY: -- and trigger the application of this rule.

MR. HATCHELL: You bet.

HONORABLE TERRY JENNINGS: Well, then how are they ever going to agree if they strategically chose one court over another?

MR. HATCHELL: Well, that's the point. It very seldom happens, but that was the attitude of the Supreme Court back in late 1980's after Chief Justice Phillips began, at least I know that anecdotally because we began to get letters from the Court requesting the parties to agree, which, of course, couldn't happen.

CHAIRMAN BABCOCK: Okay. Judge Sullivan.

HONORABLE KENT SULLIVAN: I just wanted to briefly speak up in favor of Justice Bland's point. I acknowledge, of course, Mike Hatchell's point.

CHAIRMAN BABCOCK: Judge, could you speak up a little bit? The court reporter has admonished me over the break that she's having trouble hearing.

HONORABLE KENT SULLIVAN: I wanted to speak up briefly in favor of Justice Bland's point that she raised, while acknowledging Mike Hatchell's point that perhaps the burden outweighs the benefit here relative to the specific issue that we're addressing; but more generally, I had a concern of the unseemliness of lawyers and litigants picking their judges. I know that the analogy, of course, is not necessarily perfect; but I think particularly in a system that remains political, as ours does, it creates an overlay of an appearance of impropriety; and I think as a general matter it's important that we keep that in mind. I think randomness

is very important in the administration of justice generally, but it's particularly important in a political system that involves elected judges.

HONORABLE JAN PATTERSON: And why doesn't this rule achieve that?

HONORABLE KENT SULLIVAN: Because you can strategically pick one court over another, and it just gives me concern.

Did I miss something? He's nodding "no."

MR. HATCHELL: Well, ultimately it goes to a random selection. Nobody can choose one court over the other.

HONORABLE TOM GRAY: They can always choose one court or the other. They only have to give up the possibility of going to the court they select if the other side chooses to file a motion.

MR. HATCHELL: Oh, sure. Sure. Absolutely.

HONORABLE TOM GRAY: And I think what Judge Sullivan is saying, let's remove even the appearance of being able to select your court initially.

MR. HATCHELL: That may be a statutory change.

HONORABLE KENT SULLIVAN: I'm sorry?

MR. HATCHELL: That may be a statutory change. I'm not sure.

HONORABLE KENT SULLIVAN: My point was just I think that there is a salutary effect of trying to ultimately achieve -- and it may not be achievable or even worthwhile in this particular instance -- a statewide administration that ensures randomness whenever possible.

CHAIRMAN BABCOCK: Justice Duncan, did you have a comment?

HONORABLE SARAH DUNCAN: Just that by creating overlapping districts it seems to me the Legislature has inherently --

CHAIRMAN BABCOCK: Created that.

HONORABLE SARAH DUNCAN: -- approved. I mean, this keeps coming up, and Chief Justices with overlapping districts keep asking for a statute and keep not getting it, which indicates to me that the Legislature thinks it's perfectly fine for people to pick their own courts.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: May I ask the courts of appeals if this is a problem in criminal cases?

HONORABLE JAMES WORTHEN: No. If I might address that, Justice Hecht, in criminal cases we had -- the Legislature when they passed this -- and, remember, we've had -- we've had this particular situation I believe it's ever since like 1927 between Dallas and Texarkana in

Hunt County and then in 19 -- and that was the only overlap county, was Hunt County, until 1963 when the Tyler court of appeals was created, and when the Tyler court of appeals was created in 1963 we had two overlap counties with Dallas and we had eight overlap counties with Texarkana, and this was the system that was adopted by the Legislature in 1963, and it has stayed in there throughout.

But to respond to what Justice Hecht was mentioning, with regards to Hopkins County, for some reason the Legislature put in a statute which said that in criminal cases the clerk -- the two clerks, the county clerk and the district clerk, in Hopkins County would assign every other case, one to Texarkana and then the next one to Tyler. So that was statutory, but that was the only county that the Legislature ever did anything specifically with reference to criminal cases, but there has never been a problem on criminal cases because, of course, very rarely does the state appeal, so the -- it's always the criminal defendant who has the opportunity to appeal that; and to my knowledge, since I have been on the court of appeals six and a half years we've never had a problem, and I know of no problem that's ever occurred in a criminal case. This only arises in, as Mike said, in very limited civil matters; but the Legislature has not

chosen to do anything with this since 1963; and, of course, the Bar in East Texas likes this, and I think probably that may be why the Legislature hasn't done anything about it.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: The idea that it's somehow cumbersome for these district court and county court clerks to come up with a procedure to assign an appeal, with that in mind just looking at the rule that's crafted here involving the Chief Justice of the Texas Supreme Court in the procedure, it just occurs to me that it would be far easier to just say when the first party files the very first notice of appeal, the clerk will pick one of, you know, two or three or whatever, four, courts overlapping and that's where the appeal is going to go and that's where all the cross appeals are going to go. It seems to me we could say that in a sentence or two.

CHAIRMAN BABCOCK: Skeptical, Mike?

MR. HATCHELL: I don't see how you take away somebody's right to appeal to a court of appeals, which is what you're doing with that. Yeah, you can do that, I suppose. Again, I just say it's setting up machinery in every -- requiring it and then are we going to have to promulgate a set of, you know, guidelines for the random

selection in each one of the clerks offices that this applies to and they may never use it? They may use it once every five years, they may use it once every ten years, they may use it three times a year. We're just trying to get this done in as simple a way as possible.

HONORABLE SARAH DUNCAN: And if you were to do that you might have a law of unintended consequences. I mean, how would -- let's say that what the clerk is now doing in Hopkins County was done in every single county that was in an overlap situation. You could be changing courts' caseloads and changing significantly courts' caseloads and transfers of cases, and do we really want to get into all that here?

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE JAMES WORTHEN: And Justice Duncan has really hit on a key issue here because you would -- really would upset the way that the numbers are between the various courts of appeals right now, and I think that may be why the Legislature has not done anything to it.

You know, again, I really think it's a legislative matter to change the law as with reference to these five counties which remain as overlaps, and I think that that's the way that the Bar has approached it there.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: If you have three

courts and you put, you know, three balls in a hopper and you turn it, under the law of averages it's going to equalize the appeals. It seems to me the opposite is true. If you have the Plaintiffs Bar picking one particular appellate court and the Defense Bar picking another particular appellate court out of three or four courts, those two courts are going to get the business, and the other one or two courts that are kind of like the redheaded stepchild are not going to get as much business, and under the law of averages it's going to equal out.

HONORABLE SARAH DUNCAN: That's the problem, though.

HONORABLE TERRY JENNINGS: We don't want to equal it out?

HONORABLE SARAH DUNCAN: It's not what I want at all. It's by permitting attorneys to choose which court they're going to go to, there is an equilibrium right now. We take away that choice and we say every other case is going to be filed in Texarkana or whatever, we are imposing a system that's going to upset where that self-selection -- the equilibrium that has been achieved by self-selection. That's my only point, and I don't care one way or the other, but I think we need to be aware that this could affect caseloads, and that could be a problem.

HONORABLE TERRY JENNINGS: Well, these are

all three-member courts, right?

HONORABLE TOM GRAY: Dallas is not.

HONORABLE TERRY JENNINGS: Well, Dallas.

HONORABLE JAMES WORTHEN: Well, you know, again, remember, Dallas, the only overlap is between -- that Dallas and Texarkana has is Hunt County, and Hunt County has so few cases it really doesn't affect the problem. It's really the four counties between Tyler and Texarkana, as Justice Duncan has brought out, that would affect the equilibrium that has been established, and it would really create some problems.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JAMES WORTHEN: That may be why the Legislature has not done anything with it.

HONORABLE JANE BLAND: Jim, how many cases come out of these counties each year and where are these cases going? Like the 10 cases that come out each year, how many go to Tyler and how many go to Texarkana or does it vary?

HONORABLE JAMES WORTHEN: No, it's been a pretty good establishment in the four counties that are between Tyler and Texarkana, and probably about 75 percent of the cases go to Texarkana. The reason being is the majority of the cases that come out of these counties are criminal appeals. The Defense Bar in these four counties

has traditionally always thought that they would have a better shot at overturning the appeal in Texarkana because of the makeup of the courts, and so that's why you have such a heavy number going to Texarkana.

If we were to do it on a random basis it would go to 50/50; and, you know, Tyler has become an exporting court as far as cases are concerned, so we would become even more of an exporting case, and Texarkana would become more an importing court.

HONORABLE JANE BLAND: So they probably send your extra 25 percent back over to Texarkana anyway?

HONORABLE SARAH DUNCAN: No. No.

HONORABLE JAMES WORTHEN: Typically most of our cases we have to transfer do go to Texarkana, but I mean, we just sent 26 cases last year to Amarillo. So, you know, I think if we kept the system the way it is that it would allow that equilibrium to remain.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: It's also not true that the Legislature hasn't done anything in this area. They just took how many counties from El Paso and gave them to Eastland?

HONORABLE JAMES WORTHEN: Eastland, that was two years ago.

HONORABLE TOM GRAY: But that's not

overlapping jurisdictions.

HONORABLE JAMES WORTHEN: Yeah, but the overlapping jurisdictions, remember, this year when the Legislature did the redistricting they moved -- I think there were four overlapping counties that they changed to now just single jurisdiction counties.

CHAIRMAN BABCOCK: Yeah. Kaufman was one, wasn't it?

HONORABLE JAMES WORTHEN: Yes. Kaufman is now in Dallas. Van Zandt is now with just Tyler, and then Hopkins, Hopkins and Panola went to Texarkana.

CHAIRMAN BABCOCK: Yeah. Okay. Judge Bland.

HONORABLE JANE BLAND: And, Jim, the three counties that we gave up, did they go to Waco or Tyler?

HONORABLE JAMES WORTHEN: Well, Trinity, Trinity County you-all gave up went to Tyler and then I think the other two went to Justice Gray's court in Waco, I believe.

HONORABLE TOM GRAY: Walker and Burleson, but see, they're not overlapping jurisdictions, so that's --

HONORABLE JANE BLAND: No, I know. I was just curious about the workload.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: My only point is the Legislature --

HONORABLE JAMES WORTHEN: You get only one appeal out of Trinity each year.

HONORABLE SARAH DUNCAN: -- knows how to do these things.

CHAIRMAN BABCOCK: Go ahead and say it so she can get it.

HONORABLE SARAH DUNCAN: My only point is that the Legislature is not unaware of these situations, whether they're overlapping counties or too many counties or too few counties.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Let me ask a more basic question. Why do you call it cross appeal? You really have duplicate appeals, and there's nothing defines a cross appeal. That's not referred to in the appellate rules.

HONORABLE SARAH DUNCAN: It is now.

MR. LOW: But in ordinary actions a cross is where you cross against somebody else, counter is against the other. So why not call it duplicate appeals, because nobody -- each party appeals. Why are you calling it -- I mean, it's something I don't know.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I think it would be

better to say instead of using "cross appeals," just say "if appeals by two or more parties are noticed from the same judgment" --

MR. LOW: Yeah.

PROFESSOR DORSANEO: -- "or order," "or appealable order" and then just take "cross" out.

MR. HATCHELL: Okay with me.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: First, I'm going to need input from Jim. It was my understanding that the recommendation that the chiefs had on this from the Council of Chiefs was that there be a random assignment and is what we had kind of suggested that we were going to do to the Legislature when they were considering this, an absolute random.

I would -- could go with this concept if it only fixed the precise problem which is on the two or three cases, and that's those in which there are notices of appeal filed prematurely, and leave Miles vs. Ford in place to deal with those that are -- in other words, you go ahead and you have your race to the courthouse post-judgment, if that's what you're going to have, but let this only fix the problem, if you will, that currently exists, which is when you have duplicate premature notices of appeal.

MR. GILSTRAP: Why don't you want to eliminate the race to the courthouse?

HONORABLE TOM GRAY: Oh, I want to eliminate the overlaps. I want to eliminate the whole problem, but that gets much further. It gets into this whole concept of the appearance of problems. Right now the only problem that anybody has identified for me that needs to be fixed is if you have two prematurely filed notices of appeal we have no existing solution as to how to solve that, and let's fix that very, very narrow problem and leave the rest of it alone.

CHAIRMAN BABCOCK: Skip Watson.

MR. GILSTRAP: You're saying if we're going to fix more than that we need to fix the whole thing?

CHAIRMAN BABCOCK: Skip.

MR. WATSON: You may or may not want to address this, but to me the problem of the nonpremature notice of appeal that I have seen in one of these counties is that the winning party prepares the judgment. That judgment goes to the judge and is signed, and when it is signed it is picked up and filed in the clerk's office with a notice of appeal by the winning party. The losing party doesn't have an opportunity to pick the appeal that it's going to.

The appeal -- the notice of appeal that's

filed may be something like failure to award attorney's fees in a tort or failure to award an outvoted percentage of prejudgment interest, something that clearly is not appealable, but it is taking away the right of the true losing party to pick the court. You may not want to address that or you may want to address it, but at the -- the real problem is more than premature notices of appeal.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I've forgotten, did the resolution that the Legislature adopted speak to any of this?

MR. WATSON: I don't recall, Judge.

HONORABLE NATHAN HECHT: Or does anybody?

HONORABLE SARAH DUNCAN: Did that pass?

CHAIRMAN BABCOCK: If Lisa would quit bothering Judge Worthen then he might know.

MS. HOBBS: I'm sorry.

HONORABLE TOM GRAY: You know, Justice Hecht, I thought it did, now that you mention it. I hadn't thought about it. The Senate joint resolution or the Joint Resolution 15 or 19, something like that.

MS. HOBBS: That's what we were talking about. It's my recollection that it did address this problem, too.

HONORABLE TOM GRAY: And I was thinking it

was what the chiefs had proposed, the random assignment, and I think it -- because I had written down here in the margin "any generally recognized random manner of selection." I think that was language that may have gotten picked up and used in the resolution, but it applied to all appeals, not just these that were -- where it was split.

HONORABLE NATHAN HECHT: I thought -- I just have a dim recollection that the chiefs proposed something but then the Senate changed it. Or at least some of the language was specifically chosen by the Senate. Now, maybe that's wrong, but -- and I don't have it here, so I don't know.

HONORABLE TOM GRAY: I just don't have it right now.

HONORABLE SARAH DUNCAN: We don't have wi-fi?

CHAIRMAN BABCOCK: Maybe Lisa is going to get it. Okay. Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: We all know we're dealing with the political realities of the Legislature, and they're not solving this problem, which is there should be equal-sized appellate courts with equal-sized dockets. I would hope that most people would agree with that concept, but it's one thing for the Legislature to

duck a political issue. It's another thing for the Court, and in our advisory capacity to the Court I would recommend to the Court that they be very careful about how this appears, because, I mean, we're talking about crafting a rule that would institutionalize this procedure.

I know the procedure is going on now where people are picking their appellate courts, and I would urge the Supreme Court not to institutionalize that kind of procedure, that, you know, I would hope that the Supreme Court would want to -- if we can correct this problem, would want to make it random to avoid any appearance of impropriety, and I would urge the Court to do that. If we can solve that problem, if the Court can solve that problem now, I would urge it to, and I would urge the Court to think twice about adopting a rule that institutionalizes a race to the courthouse.

MR. HATCHELL: I don't know that I have anything else to say. I think that the rule that is before you is the one that I have worked with Judge Worthen on, that he and I think Judge Morris are in agreement is -- will solve the problem. I don't think we need to charge an open door with battery ram in trying to eliminate selection, you know, what the perceived vice is in forum selection, because they have existed virtually as

long as we have had overlapped counties; and having practiced there for over 35 years, I will tell you that there are some beneficial reasons to be able to choose your court of appeals, some of which you may have heard already.

One being that the court may have heard either an earlier mandamus or an earlier interlocutory appeal or even earlier appeal of the case, and they may have the expertise in this particular case, which they would lose if the case was just suddenly shipped off by some sort of random assignment at the moment of the notice of appeal, and that goes on a lot in East Texas, and there are also some geographical issues that oil and gas cases will sometimes have a greater cache in one area or another and there will be more experience with one court.

So I do think that there are some minor benefits to the ability to be able to choose in the standard situation where just one party gets to -- one party is appealing and files a notice of appeal and the appeal goes forward in the court of choice.

CHAIRMAN BABCOCK: Okay. Any further comments? Okay. Let's get a sense of our --

HONORABLE TOM GRAY: I think it will help you if you wait until Lisa gets back with that joint resolution. She found it, but she was having trouble

printing it.

CHAIRMAN BABCOCK: Oh, she was? Okay.

HONORABLE TOM GRAY: It is for randomness in the assignment to the court of appeals.

CHAIRMAN BABCOCK: Okay. And how do you think that's going to affect our decision on this rule?

HONORABLE SARAH DUNCAN: Collapse it.

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: Moots it.

CHAIRMAN BABCOCK: You think it might moot it?

HONORABLE SARAH DUNCAN: I think it does, yes. Don't you?

HONORABLE TOM GRAY: Yeah.

CHAIRMAN BABCOCK: And by mooting it, you mean no rule is necessary?

HONORABLE SARAH DUNCAN: A rule has been passed by the Legislature.

HONORABLE TOM GRAY: No. No, no. Not a rule has been. The Legislature has charged us with the responsibility of --

HONORABLE SARAH DUNCAN: That's right.

HONORABLE TOM GRAY: -- a rule for randomness in assignment of cases to appeals courts.

MR. ORSINGER: In other words, the

Legislature wants the Court to fix the problem since they can't.

HONORABLE SARAH DUNCAN: That's right.

CHAIRMAN BABCOCK: And, Justice Gray, does this proposal that Mike and Bill Dorsaneo have put together, does this --

HONORABLE TOM GRAY: I would characterize it as not being random assignments.

CHAIRMAN BABCOCK: Okay. You think this rule is --

HONORABLE TOM GRAY: I'll let her read it.

CHAIRMAN BABCOCK: -- not in compliance with the statutory --

HONORABLE TOM GRAY: I'm sorry, Lisa. They were fixing to vote, and so I --

MS. HOBBS: "The House Concurrent Resolution urges the Supreme Court of Texas and the Court of Criminal Appeals to adopt rules providing for the random assignment of cases pending in or appealed from counties lying within the jurisdiction of more than one court of appeals district to a court of appeals for appellate proceedings."

CHAIRMAN BABCOCK: Okay. And you think this rule is not random?

HONORABLE TOM GRAY: This rule is only random for a very, very limited number of cases. That's

what we've been told here this morning.

MR. GILSTRAP: This is a nonbinding resolution passed by the last Legislature.

HONORABLE NATHAN HECHT: But at the invitation of the Chief Justices, who were trying to get the problem solved at some encouragement by members of the Legislature, and in the end the chiefs were convinced that it would be better for this committee to work out those details than for the Legislature. So the -- as I understand it, the Legislature adopted this resolution at the invitation of the chiefs to solve this problem.

But I think they may have changed the words right at the end, which is why it was important to go get it, because if they did, it means they thought about it as opposed to just signing what somebody put in front of them. I think they really did -- I think there was some concern, and wasn't it Senator Duncan? But I think there was some concern in the Senate that it be the way it is.

CHAIRMAN BABCOCK: You want to read that again, Lisa?

MS. HOBBS: "The resolution urges the Supreme Court of Texas and the Court of Criminal Appeals of Texas to adopt rules providing for the random assignment of cases pending in or appealed from counties lying within the jurisdiction of more than one court of

appeals district to a court of appeals for appellate proceedings."

"Rules providing for the random assignment of cases."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that's a clear statement that the Legislature wants the Supreme Court to do a rule and that we should not, therefore, refuse to assist the Supreme Court in doing a rule.

Secondly, I don't read "appellate proceeding" to be limited to a formal appeal of a final judgment. It would apply to interlocutory appeals, and in my view it would also apply to mandamus proceedings.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: That's where we're headed with this. We're headed in all these overlap counties they've got to set up a random selection procedure for every appellate proceeding, and you know, it's not what the people who practice in those counties want. We haven't heard any real reason to change -- it's going to change some established ways of assigning cases. It's going to change caseload.

I mean, why don't we proceed gradually? We've got a problem here that everybody agrees needs to be fixed. We've got a way to fix it. Why do we have to go

on and try to rationalize the whole thing in one feld swoop and create a lot of unforeseen problems?

CHAIRMAN BABCOCK: Are you arguing in favor of the proposed rule?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, the Supreme Court can read the resolution and determine what they think the Legislature or those -- or some members of the Legislature think. It seems to me the most useful thing that we could do for the Court is say whether we think one or the other is a good idea without considering the resolution, because why should we filter the Court's interpretation of that resolution? I mean, I don't know that that adds anything. Why don't we just say whether we think it's a good idea or not based on that and give them two options?

CHAIRMAN BABCOCK: Is there not an element of randomness in the proposed rule?

MR. HATCHELL: Oh, yeah.

MR. GILSTRAP: It's a limited step toward randomness.

MR. HATCHELL: The argument is whether all appeals in these counties should be subject to the randomness, whether they go to two courts, whether --

CHAIRMAN BABCOCK: Right.

MR. HATCHELL: -- or not. You know, that's not anything that anybody has ever asked me to work on.

CHAIRMAN BABCOCK: We can fix that.

HONORABLE TOM GRAY: Chip, the Chiefs Council did have at the time that that resolution was proposed a draft rule that we were proposing. The Legislature had most of it in the form of a bill, but they had tweaked it, and we didn't like what was -- something about the -- Jim, do you remember what it was that wound up in the bill that none of the chiefs liked? And so we said, "Just give us a little bit of time and we will get a rule," and that was when they came back and did the joint resolution, but there was something the way the statute was headed that we as a committee did not like.

CHAIRMAN BABCOCK: Justice Gray, how do you feel about the proposed rule that's in front of us? Like it, dislike it?

HONORABLE TOM GRAY: I don't think the rule that is in front of us in any way, shape, or form addresses the joint resolution. It addresses a very narrow -- and I would make it more narrow than what it even was intended to do; but the joint resolution I think is much broader; and I think if we do this fix, which if this rule is going to apply to all -- every time there are

competing notices of appeal filed in two different courts of appeals, I do not support it. But it is still a very narrow rule and is not the joint resolution fix that is contemplated, I don't think. I just wish I had my materials from the Council of Chief Justices where we had this drafted.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Maybe we need those materials. Is that joint resolution what the chiefs wanted?

HONORABLE TOM GRAY: Yes. We asked them to not do the statute.

PROFESSOR DORSANEO: Well, I read the statute, and I, frankly, remember that I didn't understand it. But you want to have one clerk's office to deal with the notices of appeal that have overlapping jurisdiction?

HONORABLE TOM GRAY: I'm not sure I understand your question, Bill.

PROFESSOR DORSANEO: To actually not deal with the problem in this limited way, but to deal with all cases, to change the way cases are assigned?

HONORABLE TOM GRAY: My recollection is that's what we had gone to the Legislature with, was that all of the appeals in what remained overlapping counties would be randomly assigned to one or the other of the two

courts. Bear in mind, Justice Jennings was talking about two or three courts or three or four courts. These are overlapping now only between two courts of appeals. There are only five counties, so -- and none of these are major counties in the sense of the numbers of appeals that they generate in a year.

CHAIRMAN BABCOCK: You're excluding the First and the Fourteenth.

HONORABLE TOM GRAY: I am because they have a statutory system already in place, and whatever we do by rule is not -- it might change --

CHAIRMAN BABCOCK: Let me just ask Justice Bland to react to that.

HONORABLE JANE BLAND: We have a statutory system in place, and from what I can see, the random assignment of cases by the district clerks doesn't create a lot of problem. You know, we have a large county like Harris County, but we have lots of small counties like Austin County, Grimes County, and you know, I don't think it would be difficult to -- I think they use a ball and they roll a ball in a thing and it pops out, you know, like bingo, pops out First or Fourteenth, and they assign it. And so the mechanics of it, at least we've not heard that they are troublesome, so I guess I'm kind of confused about why this would be difficult for these other five

counties to do something similar.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would like to answer Frank Gilstrap's question about why we ought to undertake to do this, and the reason is because the Legislature was going to make this change and at the request of the Council of Chief Justices they backed off to allow the rulemaking process to do it instead; and having been on this committee and having been practicing law for 30 years, I would prefer to take a shot at it here first and if the Legislature likes it then they don't have to take their shot, because when we don't act or the Legislature is irritated with something and then they enact a rule of procedure, then we frequently will struggle to make it fit with the rest of our practice.

So I think it's a preferred method for us to make the change and offer it to the Legislature, and if they're happy then that's what it is.

CHAIRMAN BABCOCK: Okay. Mike.

MR. HATCHELL: I don't want to speak for him, but I think one reason that Chief Justice Worthen is here today is to -- not to make sure that we don't go down this road, but to be wary if we do. I assured him that this committee would not jump from the proposed rule to a total random system without substantial input from both he

and Chief Justice Morris, because I think if we're going that way -- and that's just fine, that's not a task that anybody has been assigned to do yet -- it does not need to be done today. They really need to have a lot of input into the process.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Was the Legislature addressing this problem of competing notices of appeal, or were they concerned about just the people picking their -- picking and choosing their courts in five East Texas counties? What was driving the Legislature?

HONORABLE NATHAN HECHT: What was driving the Legislature was that the chiefs had gotten together and come up with a proposal to solve this problem, and when I say "this problem," I don't remember how broad it was in the discussion; but I know there were a lot of e-mails going back and forth and they were trying to work through all this when it occurred to -- and I think there was some interest in the Legislature that was provoking this, but I don't remember how strong it was.

This was just this last session, and it has to do with the choice of law in cases that are transferred from one court to the other, and that's in the resolution, too, and when the -- both of those initiatives were sort of getting started in the Legislature, then the chiefs, as

I recall, were persuaded among themselves that this process would be better suited for the detailed kind of discussions that we're having now rather than go to the Legislature, and the Legislature agreed with that. Hence, the resolution.

And the only part I don't remember is -- the two parts I don't remember is what were the hassles that the chiefs were worrying about before this got started, number one, but there were a lot -- there were lots of e-mails going back and forth; and, number two, I just have some recollection that somebody at the very end thought this language ought to be the way it is; and I can't remember if that's really true or if I'm making that up; but I thought it was like Senator Duncan or somebody said, "No, I want it to say this."

CHAIRMAN BABCOCK: Justice Bland, then Justice Patterson.

HONORABLE JANE BLAND: I agree with Mike that we should not make a big change without a lot more input and thought and a proposed rule from your subcommittee; but in my view, aren't we better off with the common law and what's going on right now and letting the courts of appeals hash out this idea of the premature notice of appeal than codifying a rule that really -- what did you say, Frank, was a step toward randomness? But

it's not really -- it's codifying something that's not really random, and if the legislative resolution suggests that we should be looking at randomness then let's not put a rule in that's not really random and defer the specific problem until we can get input and look at it on a more global basis.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Just a question to put this in context. Were they dealing with five overlapping counties? And how many courts can an appeal go to from these five counties?

CHAIRMAN BABCOCK: Two.

HONORABLE JAMES WORTHEN: Well, yeah, you've got four between Tyler and Texarkana and one between Dallas and Texarkana.

HONORABLE TERRY JENNINGS: So it could possibly go to -- an appeal in one county could possibly go to four courts or two courts?

HONORABLE JAMES WORTHEN: No, no. Only two courts.

HONORABLE TERRY JENNINGS: So at any given time an appeal is going to go from one of these five counties to one of two courts.

HONORABLE JAMES WORTHEN: Right.

HONORABLE TERRY JENNINGS: Theoretically one

of these courts a civil defendant might feel, "I'd rather have my appeal in this court" or a plaintiff might feel they might want to have their appeal in another court. Then why not just do the ball system where you let the clerk of this county figure out which appeal it's going to rather than involve the Chief Justice of the State of Texas to make this decision?

Why can't the clerk just roll a ball, figure out which one of these two counties this appeal is going to go to? Why does it have to be the defendant gets to pick "I want to go to this county," the plaintiff gets to pick "I want to go to the other county"?

"Well, we'll let the Chief Justice decide." Why can't the clerk of the district or county court figure that out by rolling a ball rather than involve the Chief Justice and the clerk of the Supreme Court of the State of Texas?

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: My comment, in Smith County do parties at the trial court level have the right to pick their trial court, or is it done by randomness?

MR. HATCHELL: They can file in -- yeah, in a particular trial court.

HONORABLE LEVI BENTON: They can pick them. Huh. Wow.

HONORABLE TOM GRAY: Levi, it's East Texas.

HONORABLE LEVI BENTON: Lord, help us all.

MR. GILSTRAP: That's the way it was. A while ago that was the way it was in most places. You picked your court.

HONORABLE LEVI BENTON: Any part of the administration of justice that permits parties to pick a trial court or an appellate court, I could go with the shuffle before justice per curiam. Geez.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Would it be appropriate that we at least discuss tabling this and having another committee answer the broader problem posed by the Legislature rather than this little bitty problem? It seems that events have overtaken the assignment, and we should deal with the bigger problem because we've been asked to do it.

HONORABLE TOM GRAY: If that's a motion, I'd second it.

MR. SUSMAN: And Nathan is shaking his head, and I think he wants us to do it, so --

HONORABLE NATHAN HECHT: Well, I think we definitely need to involve the two chiefs that are affected, the three chiefs.

MR. SUSMAN: Sure.

HONORABLE NATHAN HECHT: But we do need to

root out this, whatever this interest is like it's expressed, because it's pretty strong.

CHAIRMAN BABCOCK: Yeah. Well, and I think that's a good suggestion. Why don't we -- why don't we see whether there is any sentiment on our committee for this small step towards a randomness and then take a vote on the motion that's been seconded as to whether or not it's our view that we should continue to study the larger programs. Is that -- Justice Worthen, is that acceptable to you?

HONORABLE JAMES WORTHEN: I think absolutely. You know, I think that, as Justice Hecht has said, we should definitely involve Chief Justice Morris and Chief Justice Thomas, you know, since their two courts would also be affected.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: This may be a small step for randomness, but this is a giant leap for East Texas.

CHAIRMAN BABCOCK: You know, I'm sick of being your straight man.

Okay. Let's see what the sentiment is for this rule as drafted, although I think there's been a friendly amendment to take the word "cross" --

MR. HATCHELL: Sure.

CHAIRMAN BABCOCK: -- out in front of

"appeals." Everybody in favor of this rule as drafted raise your hand.

MR. HAMILTON: As drafted to solve the problem or just --

CHAIRMAN BABCOCK: First step.

MR. GILSTRAP: Small step.

CHAIRMAN BABCOCK: Let me just count one more time because there are some more hands going up.

All right. All opposed? There were 11 in favor and 14 opposed. So the Court will have that sense of our committee.

Now, on Steve's motion, seconded by Justice Gray, is it our -- how many people were in favor of telling the Court that it's our sense that we should continue with the Chief Justices that are affected to work on a broader rule following the Legislature's --

HONORABLE JANE BLAND: Chip, would you also include Chief Justice Hedges and Chief Justice Radack, because I want to be sure that -- I know there is a statute, but I want to be sure that there's no problem with whatever is created. You know, they ought to have input if there's anything having to do with overlapping jurisdictions since they've got overlapping jurisdiction as well.

CHAIRMAN BABCOCK: Do you accept that

friendly amendment?

MR. SUSMAN: (Nods head.)

CHAIRMAN BABCOCK: All right. Everybody that's in favor of advising the Court that we think it needs more study for a broader rule in light of the legislative directive.

MR. GILSTRAP: Needs more study.

CHAIRMAN BABCOCK: Everybody that's in favor of that raise your hand.

Everybody opposed?

HONORABLE STEPHEN YELENOSKY: We could all agree to punt.

CHAIRMAN BABCOCK: 27 to 1 in favor, so if the Court wants us to we will refer that to Bill and Mike's subcommittee.

PROFESSOR DORSANEO: Is this an appellate rule subcommittee item?

CHAIRMAN BABCOCK: Excuse me?

PROFESSOR DORSANEO: An appellate rules subcommittee action item for the next meeting?

CHAIRMAN BABCOCK: Justice Hecht?

PROFESSOR DORSANEO: We'll have to --

CHAIRMAN BABCOCK: Yeah. So it's now been officially referred.

MR. HATCHELL: By the nod of the head.

CHAIRMAN BABCOCK: Okay, great. Bill, what's next?

PROFESSOR DORSANEO: Well, I'm looking at your agenda, and I would like to accommodate anybody who is here to talk on particular items on the agenda first.

CHAIRMAN BABCOCK: Well, let's see before lunch if we can get as much through the appellate stuff as possible.

PROFESSOR DORSANEO: Oh, I meant on the appellate stuff. I didn't know whether anybody else was here on appellate items.

CHAIRMAN BABCOCK: Not that we've been advised.

PROFESSOR DORSANEO: Okay. Well, the first thing I'd like to do, which I think will just take a second, is to ask you -- is to note -- and first I need to ask whether everyone has the August 9, 2005, version of the memo concerning the appellate rules. I sent it to everybody, and it was copied at the beginning of the meeting this morning, but the agenda notes an earlier memorandum of July 11, 2005, and here they are. They're right here. There are some slight differences between them.

One of the things that's not a difference is the need to amend appellate Rule 12.1 to include a

reference to the petition for permission to appeal, assuming that we have a 28.2. Now, that all -- all that does is to include in 12.1 a reference -- 12.1 is docketing the case -- to the petition for permission to appeal. The 12.1 now says, "On receiving a copy of the notice of appeal the petition for review, the petition for discretionary review, the appellate clerk must..."

So just for neatness sake, if we have a 28.2 it will be necessary to add into 12.1 a reference to the petition for permission to appeal. I think Chief Justice Gray pointed this out the first time we discussed this matter a year ago, and I suppose we could take a vote on that, but I can't imagine anybody being opposed to doing that if we do 28.2.

CHAIRMAN BABCOCK: Yeah, I think we just note that. Ralph.

MR. DUGGINS: What's the difference between that and petition for a discretionary review?

PROFESSOR DORSANEO: Petition for discretionary review goes to the Supreme Court.

CHAIRMAN BABCOCK: Okay. All right. What's next, Bill?

PROFESSOR DORSANEO: The next item, is there any particular reason, Mr. Chairman, why the agenda includes some specific things that my memo covered and did

not include others?

CHAIRMAN BABCOCK: Not that I'm aware of.

PROFESSOR DORSANEO: Okay. Well, regardless, let's take the agenda. Carl, could you do proposed change to TRAP 8.1?

MR. HAMILTON: Sure.

PROFESSOR DORSANEO: And Angie handed that out, walked around the table just a while ago and handed that out.

MR. HAMILTON: 8.1 is a rule that requires that the court of appeals be given notice of a bankruptcy proceeding, and 8.1(e) requires the filing of an authenticated copy from the bankruptcy petition, but the problem is that at least in the Southern District everything is filed electronically now so you can't get authenticated copies of everything, and some courts of appeals have refused to file the electronic type documents on the grounds that they're not authenticated copies. So we have proposed -- Court Rules Committee proposed a change in (e) to delete the word "authenticated" and provide that a copy of the page or pages of the bankruptcy petition, if such exists, or a document prepared by the bankruptcy court showing when the petition was filed, and you can get these filings off of the internet. I think the program is called Pacer, but it doesn't have file

dates or anything else on it, but that's all you can get now from the bankruptcy court to file in the court of appeals.

CHAIRMAN BABCOCK: Okay. Any comment about this proposal?

MR. LOW: Would you want to have the parties certify that that is a copy? I mean, you know, not just -- you know, you can't get the clerk to certify it, but would you want, I mean, when you file it to say, "I tell you this is a copy"? Do you want somebody saying this is is a true copy, the person that files it?

PROFESSOR DORSANEO: The word "authenticated" doesn't necessarily mean authenticated by a court clerk. That would cover an examined copy. You might just want to say "a genuine copy."

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Justice Hecht.

MR. HAMILTON: "True and correct copy"?

PROFESSOR DORSANEO: "Genuine" is the word we use in other contexts.

MR. LOW: Right.

HONORABLE NATHAN HECHT: Well, (d) requires that you state the date.

MR. LOW: The date.

HONORABLE NATHAN HECHT: And (e) just

requires that you offer some proof that you're not lying. So do you even need (e)?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE NATHAN HECHT: I mean, the world is not going to turn on this.

MR. LOW: Right.

HONORABLE NATHAN HECHT: This is just kind of are we going to abate it or not. If somebody misstates the date, surely somebody will say "It wasn't August 12th, it was August 14th" or something.

CHAIRMAN BABCOCK: Good point.

HONORABLE TOM GRAY: I'd make a motion that (e) be dropped entirely and move the word "and" up to the end of (c).

CHAIRMAN BABCOCK: Carl, what do you think about that?

MR. HAMILTON: That's fine. That's even simpler.

CHAIRMAN BABCOCK: Okay. Anybody disagree? Done.

Okay. Now, Carl, that's what we're talking about, get through these things like that.

(Applause.)

MR. LOW: Give Carl the next item.

CHAIRMAN BABCOCK: All right. Next, Bill.

PROFESSOR DORSANEO: On the agenda we have certificate of service/conference. Do we really want to talk about that again? I think we've already voted on it two times, and we spent about a morning at the last meeting.

CHAIRMAN BABCOCK: If we voted on it we don't need to talk about it.

PROFESSOR DORSANEO: Okay. Let's take that off the list. Then on the list, proposed amendments to TRAPs 52 and 53, the memorandum, I think both of them, both versions, but the August memorandum mentions TRAPs 52 and 53 at Item 6 on page three; and looking at 52, let me read you the exact language that probably needs to be changed in some way.

It's 52.3(d)(5)(D), and I think the language is the same in the other rule. "A petition in an original proceeding" -- and for 53 we would be talking about a petition for review -- needs to say or identify (D) says, "the citation of the court's opinion if available" and then it adds "or a statement that the opinion was unpublished." It was -- it's been recommended because of the change in TRAP 47 that instead of saying "or a statement that the opinion was unpublished," that different language be added saying "whether the court of appeals designated its opinion as a memorandum opinion."

Now, the appellate rules committee did not vote on this, but I frankly don't know why it's not sufficient to just remove the language "or a statement that the opinion was unpublished," and that would be my recommendation, because "the citation of the court's opinion if available" would seem to be always available, maybe just -- maybe a citation. Maybe the citation to the court's opinion would be adequate, and "if available" would deal with those rare cases when it might not be available.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: So if I'm permitted to make that motion I'll so move.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Make that change to both these rules.

CHAIRMAN BABCOCK: And Lisa points out that West is not publishing all memorandum opinions, although, they're doing it online, aren't they? I mean, they may not be putting it in a book but --

HONORABLE SARAH DUNCAN: Yeah. They're on Westlaw. They're not on Premise, and they're not in the books.

CHAIRMAN BABCOCK: Right. So there could be a Westlaw cite.

PROFESSOR DORSANEO: And don't forget Lexis, my Lexis.

CHAIRMAN BABCOCK: Right. Sorry. Didn't mean to offend any Lexis aficionados.

MR. ORSINGER: Well, some lawyers are using the State Bar's free case research system. I know some don't subscribe to either Westlaw or Lexis. So as a practical matter we may be requiring them to go to one of those two providers to get a copy of an opinion that's . not --

CHAIRMAN BABCOCK: Well, we just say we cite it if available. That's what Bill's proposal was.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And you can get them on the individual courts of appeals websites.

MR. ORSINGER: Old ones?

HONORABLE NATHAN HECHT: Well, back a ways. Probably back as far as -- well, maybe not quite as far as Westlaw goes, but for the last several years.

HONORABLE TOM GRAY: We just started putting ours online in September. That was a year ago, and we're working backwards, but we don't know how far our word processing technology is going to let us shift them over to HTML, so we've got some problems with it.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: In your proposal, Bill, that we take out --

PROFESSOR DORSANEO: Right.

HONORABLE SARAH DUNCAN: That (8) just say "the citation for the court of appeals" and delete the rest of the --

PROFESSOR DORSANEO: Well, I want to leave "if available" in there because it might not be available and just for some odd reason.

HONORABLE SARAH DUNCAN: A cite is always available. It may not be a reporter cite --

MR. ORSINGER: A slip opinion cite.

HONORABLE SARAH DUNCAN: -- but a citation is always available.

PROFESSOR DORSANEO: If everybody thinks that then we can leave out "if available."

CHAIRMAN BABCOCK: Okay. Are you all right with that, Richard?

MR. ORSINGER: Yes, sir.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: Does the cite being available mean the case is available?

CHAIRMAN BABCOCK: Paula, speak up.

HONORABLE SARAH DUNCAN: If there's an opinion, it can be cited, whether it's got a reporter cite

or not.

MS. SWEENEY: But I mean can it be found without subscribing to one of the paid services? Because there are a lot of lawyers that don't and --

MR. ORSINGER: You can always get it from the court of appeals, but if it's -- many of these -- I think the State Bar has contracted with an operation that doesn't have a complete database.

MS. SWEENEY: Right.

MR. ORSINGER: They just have the published opinions. I haven't used that recently, unless it's been changed, but in the last analysis you may have to write the clerk of the court of appeals to mail you a copy, and they may charge you so much a page for that.

HONORABLE SARAH DUNCAN: All we're talking about is the contents of a petition for review. We're not talking about when you cite a memorandum opinion in a brief. We're just talking about what has to be in your petition for review.

CHAIRMAN BABCOCK: Okay. Anything else? Any violent objection to Bill's proposal? That's the standard here, is violent objection now.

HONORABLE SARAH DUNCAN: The opinion has to be in the appendix anyway.

MR. ORSINGER: Only of the case you're

appealing, right?

HONORABLE SARAH DUNCAN: That's all we're talking about.

MS. BARON: That's what this is talking about.

MR. ORSINGER: Excuse me. Okay.

CHAIRMAN BABCOCK: Okay. What's next, Bill?

PROFESSOR DORSANEO: Look at the -- please look at the August memorandum, August 9, 2005, memorandum. 29.5 is on page two at the top of the page. This isn't related to the 28 topic, although it is related to 51.014 of the Civil Practice and Remedies Code. Sometime back we amended 29.5 to make it correspond to section 51.014 because 51.014 stayed proceedings in a limited way such that the rule's prior statement that the court -- the court could proceed with the case, you know, became somewhat inaccurate.

51.014(b) was amended more significantly in 2003, I believe, and it expressly says now, although I did not bring a copy, that all proceedings in the trial court are stayed pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees, and grants or denials of pleas to the jurisdiction by governmental units.

The subcommittee believed 29.5 needed to be tweaked some more to correspond with the statute, and hence, the proposal. Beyond that, this seems to be a trend. 51.014 seems to want to regulate what trial courts can do under complicated circumstances, and this is just a cleanup to make them correspond, frankly.

CHAIRMAN BABCOCK: Any comments? Judge Benton.

HONORABLE LEVI BENTON: I know this is required from the statute, but what does provision (b) mean?

HONORABLE TOM GRAY: It's intended to create a conflict with the middle sentence of the opening paragraph that says "including one dissolving the order complained of on an appeal," because if you can dissolve that order you can interfere with my jurisdiction. Because -- I'm being facetious, Levi.

HONORABLE LEVI BENTON: Okay.

HONORABLE TOM GRAY: Just to make sure you -- that is a real problem.

CHAIRMAN BABCOCK: Well, but --

PROFESSOR DORSANEO: That is the Holloway case, yes, from years ago out of Dallas County, D. Brown Walker cases.

CHAIRMAN BABCOCK: Suppose that somebody

files a motion for summary judgment in a libel case where the press is a party and the motion is denied. That's appealable as an interlocutory order. While it's on appeal the trial judge dissolves his or her order denying summary judgment and says, "Okay, now we're ready to go to trial." Can that happen?

HONORABLE TOM GRAY: If I understood that fact pattern, yes, but --

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, this carries forward an ambiguity in the rule that had been there since 1939 or '41 or whenever we wrote the rule, and probably before that; and basically this rule, apart from the change that Bill is talking about in the first part, the -- what this rule says is the trial court can go ahead except when he shouldn't go ahead, basically is what it says; and sometimes we want the trial court to go ahead in temporary injunction cases because even if the temporary injunction is on appeal, if the trial court can try the whole thing and we've got a final judgment, then almost always that's better than --

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: -- not. So our Court has even reversed the court of appeals for trying to stay proceedings moving toward a permanent injunction

because we said, "No, it would be better to know the answer finally rather than taking two appeals," but in answer to your question, I think that poses a different set of problems. And at least when we were working on these rules the last time, the people that were working on them did not -- were not able to come up from -- with a definitive statement of when you could or when you could not go forward, and the cases are all over -- there are not very many cases, and the ones that there are are all over the map, and none of them as far as I know involve these more recent developments about when you could have interlocutory appeals. So, I mean, it's a problem in the rule, but not one that I've ever heard a suggested solution for.

HONORABLE TOM GRAY: And I will say, Levi, if you go ahead and take that order out so I don't have to deal with it, I'm not particularly concerned about it. I'll go ahead and hold that it's moot.

HONORABLE LEVI BENTON: I gotcha. I just want to make sure I got Justice Hecht. Did you say at the end of the day you're not sure what it means either?

HONORABLE NATHAN HECHT: Right.

HONORABLE LEVI BENTON: I just wanted to make sure.

HONORABLE NATHAN HECHT: But if we have a

case then I will know.

HONORABLE LEVI BENTON: All right.

PROFESSOR DORSANEO: Next?

CHAIRMAN BABCOCK: Yeah. So how do people feel about this -- and I think there's a typo there, Bill, isn't there? It should be "complained of on appeal" as opposed to "complained of an appeal." Isn't that right?

MR. TIPPS: Uh-huh.

PROFESSOR DORSANEO: Yes. Thank you.

CHAIRMAN BABCOCK: Uh-huh. Okay. Is everybody okay with this language change? Any dissent from this? Hearing none, we'll go forward.

HONORABLE TOM GRAY: Stephen has his hand up.

MR. TIPPS: I'd put commas on either side of "unless prohibited by statute."

CHAIRMAN BABCOCK: Bill?

PROFESSOR DORSANEO: All right, fine.

CHAIRMAN BABCOCK: Couple of commas? Couple of commas and a typo. Any other suggestion?

PROFESSOR DORSANEO: I try to make sure that everybody is paying attention along the way here.

HONORABLE SARAH DUNCAN: If we're going to get to that level --

CHAIRMAN BABCOCK: You never pull one by

Tipps.

HONORABLE SARAH DUNCAN: If we're going to get to that level in (b), I think it ought to be "interferes with or impairs."

CHAIRMAN BABCOCK: "Interferes or impairs with"?

HONORABLE SARAH DUNCAN: "Interferes with or impairs."

CHAIRMAN BABCOCK: "Interferes with or impairs."

PROFESSOR DORSANEO: Yes. That's what it says. This proves that my secretary has to work for too many faculty members.

CHAIRMAN BABCOCK: Okay. What else?

PROFESSOR DORSANEO: Four on the list, certificate of conference on motions for rehearing, we voted at the last meeting approving Chief Justice Radack's recommendation that a certificate of conference on a motion for rehearing is unnecessary to change both appellate Rule 49 and 10.1. I'm happy with the draft of new subdivision or Rule 49.11.

I'm less happy with the inclusion of the same language in 10.1. I haven't yet figured out a better way to amend 10.1 to make an exception for motions for rehearing, et cetera, in 10.1. If somebody has a better

way, I'd be happy to hear it, but this is reporting to the committee on how the vote at a prior meeting is implemented.

CHAIRMAN BABCOCK: Yeah. What's the cause of your unhappiness about 10.1(a)(5)?

PROFESSOR DORSANEO: It's just not a very felicitous way to state the matter.

HONORABLE SARAH DUNCAN: Because "other" doesn't refer to cases, "other" refers to motion.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Would it work if we just put at the end where there's a period, put "except for motions for rehearing, further motions for rehearing, motions for en banc"?

PROFESSOR DORSANEO: You think that would be better?

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: All right.

CHAIRMAN BABCOCK: Any other comments about this? Mike.

MR. HATCHELL: Well, I've said this before and I obviously haven't convinced anybody yet, but the very first sentence is "unless these rules prescribe another form." You've prescribed another form in 49.11,

and all of this in italics is unnecessary.

PROFESSOR DORSANEO: I think that's true, too, but I'm trying to do what you wanted me to do.

CHAIRMAN BABCOCK: So you continue to be unpersuasive, Hatchell.

CHAIRMAN BABCOCK: Anybody else? Okay. Great. Let's go to the next one, Bill.

PROFESSOR DORSANEO: All right. The next one is back to the agenda, item (a), court of appeals transfers, precedent from transferee court. What you need to address that is "Revised draft of proposed administrative rule concerning transferred cases based on minutes of May 6th, 2005, meeting." It looks like this.

HONORABLE STEPHEN YELENOSKY: A piece of paper.

HONORABLE TERRY JENNINGS: Which memo was that attached to?

HONORABLE JAN PATTERSON: July 11th.

PROFESSOR DORSANEO: It was attached to both the July memo and the August 9th memo, or the July memo.

HONORABLE TERRY JENNINGS: What page?

MR. HALL: Fifth page.

CHAIRMAN BABCOCK: Hey, Bill, do we need -- Bill, do we need food to talk about this?

PROFESSOR DORSANEO: What?

CHAIRMAN BABCOCK: Do we need food to talk about this or is this going to be short?

PROFESSOR DORSANEO: I think we probably need food and maybe a drink, I don't know.

HONORABLE STEPHEN YELENOSKY: If we get food it will go a lot faster.

CHAIRMAN BABCOCK: Let's take our lunch break right now and then we'll come back to this, which will finish up the appellate, and then we'll get to asbestos and silicosis.

PROFESSOR DORSANEO: I left it until last for a reason.

(Recess from 12:29 p.m. to 1:21 p.m.)

CHAIRMAN BABCOCK: Okay. Back on the record, well-fed and ready to talk about precedent from transferee courts of appeal.

PROFESSOR DORSANEO: To refresh your recollection --

MR. GILSTRAP: Are we really ready?

CHAIRMAN BABCOCK: Yes. Yeah. We are ready.

PROFESSOR DORSANEO: We spent a lot of time at the last meeting discussing this. To recapitulate briefly, this probably should not be an administrative rule. It probably should be put in the Rules of Appellate

Procedure. Second point, .1, .2, .3, and .4 are substantially verbatim restatements of statutory language that might need further modification if we have a rule like this. The main thing that we need to talk about today that we talked about last time is .5 on page -- beginning on page two, precedent of transferred cases.

At the last meeting we had two alternatives, and you basically sent me back to the drawing board, and this is the interim result. Alternative one chooses the option that requires the court of appeals to apply the law of the court from which the case was transferred. Well, at the last meeting we were trying to decide what set of principles would be used by the transferee court in performing that function. I don't remember exactly who said it, I think it was Pete Schenkkan, that we ought to only follow the clear precedent. That's why the bracket is in alternative one saying, bracket, "the clear precedent," end of bracket.

More significantly, I think, the committee decided that the principles of stare decisis should be used such that we're only applying precedent in that sense, and that's incorporated in this draft. Perhaps we would want to apply something beyond principles of stare decisis; and beyond that, I'm not exactly sure what that means under principles of stare decisis. If we look at

the entire body of law it probably gives more latitude to the transferee court than might be first thought.

The second paragraph of alternative one talks about what the Supreme Court would do, and now that I look at it here today I actually don't like the language beginning in the second line of that second paragraph, "that alleges error because precedent of the transferor court was not applied." I'd almost rather just leave that out or go back to the drawing board again because the language doesn't necessarily seem to me to be sufficient, and it may just be a bad idea to put it in there to begin with. I don't know whether I put it in there to begin with or I worked from another draft.

Turning the page to alternative two, alternative two really may not need to be in a rule if we decide to go with alternative two, because it's meant to say that the transferee court will just decide the case in accordance with the law generally and to follow the law generally. The bracketed second sentence of that first paragraph needs some adjustment. "Will" on the second line needs to say "would"; instead of "is transferred" in the last line, it probably should say "was transferred"; but beyond that I'm not sure whether that bracketed language is necessary if this option is choseen or, frankly, whether it's necessary to put this option in the

rule book.

Similar to what I said about alternative one, the language in the next paragraph, beginning in the second line "that alleges error because precedent of the transferor court was applied" probably should be eliminated. If it's retained it should say "was not applied," rather than "was applied." And I did the best that I could do, on the day that I did it at least.

CHAIRMAN BABCOCK: Well, how was your game that day? Was that your A game that day or was that your B game?

PROFESSOR DORSANEO: Well, I have good days and bad days. The difficulty of this subject, the difficulty of trying to ascertain what the committee was telling me to do from the transcript may have yielded a not ready for primetime result at this stage of the game, but this is where we are, and this is the process we go through.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I didn't understand, Bill, what about the second paragraph you were having second thoughts about.

PROFESSOR DORSANEO: The "alleges," I'm particularly concerned with the special language that says "the petition for a review alleges" this or that. I'm not

sure whether that language is helpful or whether I've gotten it right, and I just would just rather -- I don't think that's exactly a side show, but it's not the main issue. I'd just rather leave that out, and Carl Hamilton pointed out to me during the break that it has flaws.

MR. TIPPS: You would leave out the entire paragraph?

PROFESSOR DORSANEO: No. Just leave out the words "that alleges error because precedent of the transferor court was applied" on page three. Just say, "The Supreme Court may take the following action on a petition for review to resolve the case."

MR. TIPPS: Okay. Okay.

PROFESSOR DORSANEO: Just don't worry about what the petition for review says.

CHAIRMAN BABCOCK: Okay. Steve.

MR. SUSMAN: Could you explain for me, are you trying to say that the law of the transferor court governs or the law of the transferee court governs?

PROFESSOR DORSANEO: Well, alternative one says the law of the transferor court governs to the extent stare decisis principles requires that result.

MR. SUSMAN: When the hell was that meeting? Why wouldn't you just say the law of the transferor court governs? Why the extra language?

PROFESSOR DORSANEO: You wouldn't want to bind the transferee court more than the transferor court was bound, to the extent they're bound in some hypothetical sense.

MR. SUSMAN: Well, why wouldn't you just say that it would be decided as if it were the transferor court?

PROFESSOR DORSANEO: I think that's what it says. I think that's what those words mean.

MR. SUSMAN: Yeah, but it's really -- I mean, they didn't mean that to me. I wasn't exactly sure what it meant. I mean, the transferee court, your notion is the transferee court should decide it as if it were the transferor court. If that's the case, why don't you just say it that way when it's that simple rather than in accordance with the law of stare decisis or whatever the hell that means?

PROFESSOR DORSANEO: Well, I think stare decisis might give -- stare decisis -- I don't know what we use -- I don't what your formulation means or how you would no know that, unless you called them up.

MR. SUSMAN: The notion is you're supposed -- the transfer, the mere transfer of the case doesn't change the outcome, okay; and the best way to say that, I would think, is the transferee court decides the case as

if it were the transferor court. Now, whether it considers stare decisis or law of the case or whatever other principle it considers, or none of the above, doesn't matter as long as the transferee court steps into the shoes of the transferor court, if that's what we're trying to say.

PROFESSOR DORSANEO: Yeah, I think --

MR. SUSMAN: Which I think that is proposal one, right?

PROFESSOR DORSANEO: That may be a better way to say it. I'm not sure that's a better way. I know some of the courts of appeal haves a rule of some kind where they follow their own precedent as a tiebreaker or under some set of principles without regard to what another court of appeals has held and where the opinions read like, "Well, that's what the Dallas court says ought to be done in these kinds of cases, but we have our own case and we have already decided that that case resolves the issue in question, and that's all the reasoning we're using." Okay? Matter already decided.

I don't know what the -- I don't know whether that's some form of stare decisis or whatever principle that's applied, and I think that the transferee court would have more latitude under rules of stare decisis perhaps to not do what the transferor court said,

because I'm sure there are many limitations under stare decisis that would allow any court to do something different from what they did the last time.

CHAIRMAN BABCOCK: Frank, then Skip.

MR. GILSTRAP: Have we -- have we decided the crucial issue, which court's law is going to apply? Has that ever been decided?

HONORABLE SARAH DUNCAN: Several times.

HONORABLE JAN PATTERSON: Yes.

MR. GILSTRAP: From the transcript that I read of the last meeting it's still open.

CHAIRMAN BABCOCK: I think so.

PROFESSOR DORSANEO: No, it wasn't decided. I read the transcript, and I thought it was decided, but it wasn't. The way it read --

CHAIRMAN BABCOCK: I know, I was agreeing.

MR. GILSTRAP: That's the first issue we've got to deal with, regardless of --

MR. SUSMAN: Yeah, how you word it.

MR. GILSTRAP: Well, it's not how you word it. It's which court applies.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And so I guess the first thing we need to do is get into that issue.

CHAIRMAN BABCOCK: Right. Okay.

MR. GILSTRAP: Okay. Well, I'll --

CHAIRMAN BABCOCK: Skip, do you have a question?

MR. WATSON: To me -- this comes off of what both Steve and Frank are saying. To me what we're trying to do is say what was basically already said in th Erie ruling, that we are trying to say, one -- assuming it goes version one, what we're really trying to say is that we are deciding the case the way we think the transferor court would have decided, I mean the proverbial Erie guess.

The question that needs to be decided on that one before you can decide between which law it is, to me is, are we going to do it on an Erie guess; that is, go the second step, apply the law of the first court, or if that law is not entirely clear then decide the way we think the transferor court would decide, or do it the way we think it ought to be done. To me that first one has two distinct steps.

CHAIRMAN BABCOCK: Okay. Steve.

MR. SUSMAN: Well, I guess the first vote that the group has to take is whether the transferor -- the law of the transferor court ought to have any impact at all. I mean, if we say "yes" then we've got to figure out what impact, but we may say "no," which makes it

pretty easy. If people say "no," that's real easy. Right?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Our --

PROFESSOR DORSANEO: I don't know how they could say that you can't consider the law of another coordinate court, and I have real trouble with that because --

MR. SUSMAN: How you can't what?

PROFESSOR DORSANEO: If there is a case law precedent from Beaumont, it can't be ignored just because the case is in Dallas.

MR. SUSMAN: No, but you don't need to say anything about it. You decide the case just like a case that wasn't transferred. You don't need a special rule to say don't ignore precedent of some other.

PROFESSOR DORSANEO: We don't need that rule unless that is going on occasionally, and I think it is -- I think it does go on. The biggest problem, Steve, that I have with using the term "stare decisis" here is that we don't have across the courts of appeals and across the state a clear understanding of what that means, with respect to the precedent from another court particularly.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, the resolution was for us to

adopt rules for determining which court of appeals precedent will be applied, not to determine how the court would decide it, but where there is a conflict in precedent. So that's what -- if we want to address what the Legislature told us to address then that's what we address.

CHAIRMAN BABCOCK: Yeah. And I think the issue is, isn't it, that if the case is coming from Houston to Amarillo, whether the Amarillo court is going to apply the Houston court's precedent or its own precedent?

MR. LOW: That's the thing, and so as to whether we have a rule or not, I mean, maybe one may not be considered a rule, we are requested to adopt a rule.

CHAIRMAN BABCOCK: Right.

MR. LOW: No matter what it says.

CHAIRMAN BABCOCK: Yeah. And in my hypothetical alternative one, Bill's language --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- the Amarillo court would apply Houston law.

MR. LOW: Right.

CHAIRMAN BABCOCK: And under alternative two Amarillo court would be free to apply its own law.

MR. LOW: Right.

CHAIRMAN BABCOCK: Richard, then Judge Patterson. Sorry.

MR. ORSINGER: I like alternative one. I don't like the word "clear" with "precedent," because I think it's an invitation for someone to disregard precedent because they believe it's not clear, and it may be they may do that anyway, but I think we ought to just say "in accordance with the precedent," whether it's clear or not clear.

And I think "under the principles of stare decisis" is a necessary safeguard, which we discussed I believe last meeting, that the originating court has the authority to overturn its own precedent, and there are standards for that. It's not just purely arbitrary. You look at statutory changes, you look and see what's happened at the Federal level, you look and see what other states are doing, and the passage of time. If the last time you ruled on this was 75 years ago it's really time to relook at it.

Those standards are not -- those standards are available, and in fact, if you're not familiar with them, you want to study them, there's a chapter in the book *Practice Before the Supreme Court* that the State Bar has published. It has a whole chapter on stare decisis. It's not a precise meaning, but there is an understanding

around the country on what principles of stare decisis are, and they basically influence you to carry on as was done before, but you're given the freedom to disregard precedent under the proper circumstances.

If you say the transferee court is required to apply the precedent of the transferor court and you don't mitigate that by applying standards of stare decisis, you may be taking away their freedom to say, "I would overturn that 50-year-old case if I were on that court."

And additionally, stare decisis excludes dicta, and I think that that's important. I'm not sure if the term "precedent" excludes dicta. Maybe it does. I don't know. Maybe Justice Hecht or some of the court of appeals judges have an opinion, but clearly stare decisis excludes dicta, and we would want to exclude dicta, so maybe we ought to have a report at the next meeting on what the principles of stare decisis are, but I think it's an important distinction --

CHAIRMAN BABCOCK: Oh, surely not. Judge Patterson had her hand up.

HONORABLE JAN PATTERSON: Do we know what the category of cases are that are excluded from transfer? I think there are some --

HONORABLE NATHAN HECHT: I don't.

HONORABLE JAN PATTERSON: -- categories of cases that are excluded.

HONORABLE NATHAN HECHT: I don't.

HONORABLE TOM GRAY: Original proceedings are not transferred, related cases have to either all be transferred or none be transferred, and there's no definition of related cases, and right off the top of my head I can't remember if there is a third category, but I was thinking there was.

PROFESSOR DORSANEO: That's pretty good, though.

HONORABLE DAVID GAULTNEY: I think accelerated proceedings.

HONORABLE JAN PATTERSON: Accelerated and habeas cases, and I think administrative cases.

HONORABLE DAVID GAULTNEY: Hopefully.

HONORABLE JAN PATTERSON: They have been bounced back to us, I know.

MR. ORSINGER: Well, there are statutes that the Austin court has exclusive jurisdiction on certain administrative appeals, so that would be one.

CHAIRMAN BABCOCK: Another way of saying you can't transfer them.

MR. ORSINGER: I think that's right.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: No, I was just going to add accelerated.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, we're still trying to weigh these two competing alternatives. What the discussion so far has proved is that the first alternative transfer -- precedent of the transferor court is a hard concept to get our hands around and a hard concept to articulate. Basically there is two approaches here, and I think there is the practical approach that seemed to be carrying the day during the last meeting in which people said, well, look, you know, this doesn't come up very often. Let's go -- and the Supreme Court probably won't take it anyway, so give the courts a rule whereby we can decide the case and get on down the road, and that's probably going to be the precedent of the transferor court, but properly it shouldn't work that way.

Properly when there's a conflict, especially if the court of appeals says there is a conflict or is perplexed over the conflict, the Supreme Court ought to take the case and decide it, and I think the thing that's driving this is kind of a real -- a belief that maybe the Supreme Court won't take the case, they've got other fish to fry, and we've had 50 years of cases in which the Supreme Court has said, you know, the concept -- the

standard for conflict jurisdiction is very narrow.

So we all kind of despair of the idea that the Supreme Court will really get in there and fix this problem, and I want to suggest that maybe that's not right. You know, that's what a court of last resort is supposed to do. I think Justice Hecht wrote a dissent which said that's one of the most important things that a court of last resort does, is deal with the conflict among the various courts.

CHAIRMAN BABCOCK: Anybody join him in that?

HONORABLE NATHAN HECHT: Or was it like usual?

CHAIRMAN BABCOCK: Was it the lonely dissenter?

MR. GILSTRAP: I'll let that pass, but, in fact, you know, it may be the Supreme Court, they decide we're not interested in conflict cases and we're going to ignore these cases; but you know, we are not passing a rule and saying this is the rule. We're sending a rule to the Supreme Court, and they're going to decide the rule, and maybe we need to consider alternative two.

Alternative two is the best result if the Supreme Court will pay attention to conflict. You'd say you apply your own law, you flag the case by noting the conflict, and then that tells the Supreme Court to take

the case. Well, maybe the Court will look at that rule and decide we're going to pass this rule and we ought to take those cases.

Just remember, we're at a real watershed point on conflict jurisdiction. In House Bill 4, the basis for conflict jurisdiction was changed completely. It's now a very, very loose standard. If the cases are inconsistent, there's a conflict, and the Supreme Court is probably going to be addressing that fairly shortly, so why don't we -- why don't we give them the better rule, the better rule if it -- in a system that really works, and that is alternative two, the court applies its own precedent. It says, "We note that there is a conflict with the Dallas court of appeals, we think it ought to be resolved," and the Supreme Court -- "and maybe the Supreme Court ought to hear this case."

If the Supreme Court adopts that rule then it's looked at the problem, it's decided maybe we should deal with these conflict cases, and this is the rule we want. I just think when we say the precedent of the transferor court we're just saying -- we're just kind of taking this kind of a cynical view that the Supreme Court is not going to do what it should do in this area and resolve conflict.

CHAIRMAN BABCOCK: Judge Yelenosky, then

Steve, then Bill.

HONORABLE STEPHEN YELENOSKY: I agree with that, and I think alternative one sort of institutionalizes this parochialism that there's going to be precedents of different circuits, not Texas law, but different circuit law.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Isn't there an analogy? I mean, don't we have a problem on the Federal level, too? And I don't know whether it's dealt with by rule or case law or statute, but when cases get transferred from one circuit to another circuit, either through the MDL panel or through a motion --

PROFESSOR DORSANEO: Transferor court's law applies.

MR. SUSMAN: Huh?

PROFESSOR DORSANEO: The transferor court's law applies.

MR. SUSMAN: Okay. And how is that -- is that articulated in a rule or case law?

PROFESSOR DORSANEO: Case law.

MR. SUSMAN: And is there an articulation in the case law that works reasonably well that we might consider, if we want that to be the rule here, adopting? That's my only question. It's not a new problem, because

the Federal courts have this problem all the time.

PROFESSOR DORSANEO: But you have to recognize that the Federal system is really fundamentally different from the Texas system. In the Federal system it's believed that it's okay for the rules to be different in different places, for there to be conflicts.

MR. SUSMAN: It is?

PROFESSOR DORSANEO: Among the circuits. That's institutionalized, and the Supreme Court will resolve them if it thinks it wants to, but frequently it doesn't.

HONORABLE STEPHEN YELENOSKY: You know, the Ninth Circuit, Fifth Circuit.

PROFESSOR DORSANEO: Huh? And whether that's a good or a bad thing nationally, it would seem to be a particularly bad thing within the state of Texas. In other words, I agree with Judge Yelenosky. This kind of perpetuates something that's not a good idea if we can avoid it.

MR. SUSMAN: Then in response to the question that the Legislature said, which precedent applies, that was their exact question, Buddy, I mean which precedent applies? The answer should be that's a stupid question, because it's the same. I mean, we should answer it and say that's a -- you're answering the wrong

question, because they're not two different precedences. It's the same.

I mean, they clearly had in mind whatever words they used, a problem that they perceived; and the problem was do you decide the case -- does a transfer of the case to a different court cause a different result? I think that's got to be the problem they had in mind, right?

PROFESSOR DORSANEO: Uh-huh.

MR. SUSMAN: And so isn't that what we ought to be answering? You know, there are some people here that say it shouldn't cause a different result and some people say, yeah, fine, it's okay if it causes a different result, and other people that say theoretically it's impossible because the law's got to be the same.

PROFESSOR DORSANEO: Well, alternative one that we worked through last time does try to give the transferee court a lot of ability not to follow the precedent of the transferor court if there is good reason not to do so. I think Richard explained that, you know, much better than my answer to your question, and that would be the answer.

Now, there is some question as to whether, well, let's say -- in my mind at least, if the decision of the Dallas court was somehow clearly erroneous in the view

of the transferee court in San Antonio, would stare decisis principles be serviceable enough in those circumstances, in that circumstance, to avoid following the law of the Dallas court under alternative A? I think the answer to that is probably "yes," but I certainly am not saying that that's the answer.

HONORABLE SARAH DUNCAN: Richard is our expert on stare decisis now.

MR. ORSINGER: Nobody wants to do that.

PROFESSOR DORSANEO: Alternative two is not following the precedent of the transferee court because it's just -- I mean, that could be done. It's following Texas law as reflected in the transferee court's own precedent, which it thinks is accurate or -- and just their view of Texas law in general.

HONORABLE STEPHEN YELENOSKY: And, Bill, shouldn't that second paragraph rather than saying "alleges error because precedent of the transferor court was applied" but rather just that the court of appeals has noted that the decision would have been otherwise?

PROFESSOR DORSANEO: Well, I already took out -- I already suggested to take out the "that alleges" language because it's not satisfactory.

HONORABLE STEPHEN YELENOSKY: All right.

PROFESSOR DORSANEO: Probably for a host of

reasons.

CHAIRMAN BABCOCK: Okay. Justice Gray and then Justice Bland.

HONORABLE TOM GRAY: I was just going to say, when we were talking about institutionalizing the concept of different courts deciding the same issue different ways, that is already institutionalized in the conflict jurisdiction of the Supreme Court, that we recognize that that does exist in Texas; and all we are trying to deal with in this little narrow area is in those cases in which they originate by an appeal to one jurisdiction and they're transferred to another and not have the litigants adversely impacted as a result of an administrative transfer.

CHAIRMAN BABCOCK: Justice Bland, then Steve.

HONORABLE JANE BLAND: I would propose eliminating the second paragraph because I think our task is to decide this issue about which court's law to apply, but I don't think we need to tinker with the Supreme Court's jurisdiction. They can review any appeal that they want to review, and they have a statute that allows them to do that.

PROFESSOR DORSANEO: I agree with that.

HONORABLE JANE BLAND: And we put this in

the rule and then we run the risk of having, like we did with the interlocutory appeal, bits and pieces of Supreme Court jurisdiction scattered through rules and statutes.

PROFESSOR DORSANEO: I agree with that. I think that comes from earlier drafts, and I don't see the reason for -- well, really, for saying in "grant petition for review and decide the issues," I don't see the reason for that. I don't see the reason for the (b) procedure, so then you just get back to the normal rules.

CHAIRMAN BABCOCK: Steve and then Justice Duncan.

MR. SUSMAN: I think as a practical matter you've got to admit, as Justice Gray said, that the result could be different in different courts of appeals. That's life. I think it is important for us to be able to tell our clients when a case gets transferred, because that's always the first question they ask, "Who caused that? Who's screwing around moving my case somewhere else?" First question they want.

I mean, I think it's important to assure them that it doesn't matter. It's an administrative thing. It doesn't matter because you're going to get -- the law is so that the result is going to be the same as if it went to the court of appeals in Houston. Although now you're in Texarkana, the result is going to be the

same, and I just think the clearest we can say that the better we would be, that moving the case is not going to change the law that's applied in any way and that the transferee court should try to get the same result that the transferor court would.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I was going to defend the idea that it's actually healthy for the courts of appeals to have different opinions. You can see Mexico from the El Paso court of appeals, and you can see Canada from the Amarillo court of appeals, and there are differences in different parts of the state. I think, can't you? Amarillo court is pretty high up.

But anyway, it's not healthy to say that the first three judges that decide a question will make the decision for all the other judges. We have, what, 108 sitting appellate judges the last I counted in this state, and just because the first three got it doesn't -- shouldn't tie the hands of all the other courts of coordinate jurisdiction, so I'm not bothered by the fact that we're admitting that there may be different outcomes depending on which court's law you're applying.

That's reality, and that's probably healthy anyway, but I concur with what Steve and everyone else is saying that the litigants should not have their

expectations be frustrated if they try the case in a court of appeals district in compliance with precedent, which the trial judge is required to do, and then it gets transferred to someone else and it gets reversed because that precedent was followed. That doesn't make any sense at all. It doesn't make anyone feel like it was fair.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: And I think that's the important expectation that needs to be satisfied by this, because the transfer comes in at a late point in a case; but litigants have gone through years of litigation and considering litigation and filing litigation with a certain forum in mind and the law of that forum, which in a perfect world it would be we would all read it alike; but -- and for 90 percent of the cases it really doesn't matter and it would be all alike; but for a certain types of cases, for a while summary judgments in Waco and other types of cases, I mean, there are some unique aspects of law of the various circuits; and when people file their cases they file with that expectation and they go through the process with that expectation; and lo and behold, if it gets kicked back from a court of appeals, it goes back to that same court and to those expectations; and those are the litigants' expectations that I think are important, not what happens with this little odd

administrative numbers thing that we have kicked in because we're trying to tinker with the numbers.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And those expectations are very hard to protect, if they should be protected, by high court supervision because I don't think the Supreme Court is unsympathetic to resolving conflicts where the conflict is as clear as A or B. There is a conflict in the courts of appeals over whether the interest rate on child support payments changed as a result -- how that changed as a result of an amendment to the statute, and some courts say it should be this rate, and some courts say that rate. Well, that's a very clear conflict. It's easy to make a call.

Then there are conflicts that are more -- that are broader and more difficult to define, and then there are conflicts in just the jurisprudence of adjudication where some courts and judges are more skeptical of summary judgments than others are, and they all state and restate the same rule a million times, but then you look at the results, and an affidavit that's conclusory in one court of appeals is not conclusory in another court of appeals, and those kinds of conflicts are almost impossible to resolve and may -- you know, I'm not -- I wonder even if they could be, whether it would be

a good idea to do it. Sometimes it would, but other times it wouldn't.

But anyway, with respect to the oversight by the Supreme Court, that can -- I think that's useful and the Court would be amenable to that use of its jurisdiction almost every time there is a clear conflict, but when -- but I think the bigger problem is just that you're going to -- the Court is going to apply the same rules, but the case is not going to come out the same.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: In response to Justice Bland's suggestion that we delete the second paragraph, what authority -- I'm not aware of any authority and I'm asking the committee. What authority is there for the Supreme Court to transfer the case to the transferor court for decision on the merits after setting aside the transferee court's decision? I mean, the transfer process among the courts of appeals is pretty strict about how -- what's going to get transferred, what can get transferred.

Is there authority for the Court to set aside the judgment of the court of appeals without reference to the merits and in the interest of justice transfer the case to the transferor court for decision on the merits?

HONORABLE NATHAN HECHT: Well, I don't know of any authority other than --

CHAIRMAN BABCOCK: Inherent.

HONORABLE NATHAN HECHT: -- what would be put in place by a rule.

HONORABLE SARAH DUNCAN: So if we were to delete the second paragraph there is no authority. That's sort of my point, there is no authority to do that.

HONORABLE JAN PATTERSON: And there would soon be lots of authority all over the place about that second paragraph. I also agree that we ought to delete that. I don't think it's necessary. I think it creates problems.

HONORABLE SARAH DUNCAN: I'm saying just the opposite.

HONORABLE JAN PATTERSON: Oh, the second? Delete it?

HONORABLE SARAH DUNCAN: The paragraph that starts "The Supreme Court may," if that entire paragraph is deleted then there is no authority to do --

HONORABLE JAN PATTERSON: Oh.

HONORABLE SARAH DUNCAN: -- what's set forth in (b).

CHAIRMAN BABCOCK: If they have authority --

PROFESSOR DORSANEO: Would it be a good

idea, you think?

HONORABLE SARAH DUNCAN: That's a whole separate question.

CHAIRMAN BABCOCK: If the Supreme Court has authority to transfer it from one court to another, why don't they have authority to transfer it back?

MR. GILSTRAP: Because they have to set the judgment aside, and they can't set the judgment aside without error. That's what it says, it says, "set the judgment aside."

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Yeah, there's statutory authority for blind assignment, meaning not outcome determinative assignments to equalize the load. This is suggesting that the Supreme Court can reassign a case after it's been decided because they know if it's reassigned it will reverse the result.

MS. HOBBS: It's not just blind. There's two choices. I mean, we can transfer for -- or I'm sorry, the Court can transfer for good cause.

CHAIRMAN BABCOCK: Yeah, "we."

MS. HOBBS: The Court can transfer for good cause under a Government Code statute. The random docket equalization transfers, that comes from a mandate in a -- it's a rider in an appropriations bill.

MR. ORSINGER: Well, do we know what constitutes good cause?

MS. HOBBS: No, but --

MR. ORSINGER: Like disagreeing with the outcome?

MS. HOBBS: Good cause, this could constitute good cause if the Court thought this did.

MR. ORSINGER: Well, the problem I have with that is that that would be a transfer based on attempting to alter the outcome or reverse the outcome of the case, which then makes it look like the Supreme Court is influencing the outcome of the case in a manner other than by the exercise of their appellate jurisdiction, and I think that raises a whole lot of jurisdictional issues as well as public policy issues.

CHAIRMAN BABCOCK: Yeah. Let's get back on the question at hand, whether we want the law of the transferor or the transferee court to apply. Buddy.

MR. LOW: No, I was just saying "amen."

HONORABLE TOM GRAY: Hallelujah.

HONORABLE STEPHEN YELENOSKY: I'm kind of intrigued by the part in the brackets that says that the court would say whether or not the decision would have been different had it applied the other law, because that, that thing alone would clearly signal to the Supreme Court

that there is a conflict in a way that we don't now have that signal, right? And if the court of appeals isn't willing to say that then it's probably unwilling to think that precedent really is the issue. So if you say send it to the transferor court and it decides it under Texas law and then says, "but the transferor court would have decided it differently," the Supreme Court would seem to want to take those cases.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Well, then you're giving someone who gets a case transferred a much bigger right than the normal schmo who goes up the --

HONORABLE STEPHEN YELENOSKY: No, I said random. I said random.

MR. SUSMAN: Huh?

HONORABLE STEPHEN YELENOSKY: But, yeah, it's a much greater right at random.

MR. SUSMAN: Yeah, but why should he have a different right? I mean, why shouldn't you make the court of appeals say that in any case that there is a different court of appeals that would have decided that -- the only reason to say that, to make a court say that, is if we think there's something important about the transferor court law.

HONORABLE STEPHEN YELENOSKY: Yes, because

the expectations of the litigants are different in those cases, and therefore, you put an extra burden and maybe give them a greater right to get to the Supreme Court and get the issue resolved.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID GAULTNEY: I am in favor of not including the bracketed -- not including the bracketed information. I think if the court feels it necessary to address the conflict in that way, that's fine, but to require them to say that the result is -- would be different, I think -- I mean, I think it just emphasizes the very problem we've got. The court is looking for the just result in that case, and if we make them say, "This is an injust result but we've got to do it," it's -- I think it's bad policy.

HONORABLE STEPHEN YELENOSKY: But if you do it in two, which is they apply their conscience and their own circuit's law and then say "but the other court would have done it differently."

HONORABLE DAVID GAULTNEY: I like alternative two with deleting the "but" clause at the end and just say "must consider and give due regard to the decisions of the transferor court under the principles of stare decisis." Now, what you have done is you have said, "Look, there are interests involved in a transfer of a

case, and those are the precedents out of the transferor court," but you're not tying the hands of the transferee court more than you would tie the hands of a transferor court to look at and resolve the case according to Texas law and not necessarily some incorrect precedent in their own case law.

CHAIRMAN BABCOCK: You're -- Judge, you're suggesting strike the language in alternative two after the word "but"?

HONORABLE DAVID GAULTNEY: Yeah. Just end with "decisis" and then strike everything else in alternative two. I don't think it's a good idea -- I know you probably don't want to revisit this, but I don't think (b) is a good idea.

CHAIRMAN BABCOCK: Well, if you put a period after that and strike the "but" language, aren't you turning alternative two into alternative one?

PROFESSOR DORSANEO: No. No, it's not quite.

HONORABLE DAVID GAULTNEY: It's a weaker version of alternative one.

PROFESSOR DORSANEO: They become more similar.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Could we get a vote at least on

whether people think the transferor forum law ought to govern or the transferee forum ought to govern? Isn't that the first issue? Then we can deal with how to word it in the best way.

CHAIRMAN BABCOCK: Yeah, that is a threshold issue that we're winding up to. Have you got anything else to say about that, Frank?

MR. GILSTRAP: (Shakes head.)

HONORABLE STEPHEN YELENOSKY: Like a lot of things, shouldn't we give both versions because the Supreme Court could go either way?

CHAIRMAN BABCOCK: It could. They will have the benefit of this discussion and the two versions in any event, but, Bill.

PROFESSOR DORSANEO: The two versions do really get closer together taking Justice Gaultney's view of what should be omitted from alternative two. The omission of that language really doesn't change anything in alternative two, but what it says to a court of appeals, a transferee court, is that they have to read the decisions of the transferor court and pay attention to them because it's a coordinate court, not just because it's a transferor court, but because it's a coordinate court, and it's particularly important when it's a transfer case that that be done. I think it should always

be done, but maybe we don't need to say it all the time or the courts of appeals are unwilling to buy that notion across the state, you know, for all of the time.

CHAIRMAN BABCOCK: Well, the difference --

PROFESSOR DORSANEO: It is different from saying that you're meant to follow the precedent. It's operationally different, but maybe sufficient.

CHAIRMAN BABCOCK: Well, if you take the "but" language out of there, Bill, your difference is in alternative one they must decide the case. In alternative two they must consider and give due regard to the decisions. That's the difference.

PROFESSOR DORSANEO: Yeah.

HONORABLE STEPHEN YELENOSKY: Shouldn't the period be after "transferor court," because "under principles of stare decisis," none of us know what that means and all we want them to do is read and consider the transferor court's decision.

PROFESSOR DORSANEO: Well, I'll stick with Richard's very good answer on that, and I think we do know what stare decisis means or know where to go to look to find out what accepted principles of stare decisis are. We may be a little bit confused about how that works in our system, but I think it's a good thing to put it in there. I don't think it's going to cause any trouble.

CHAIRMAN BABCOCK: Why don't we vote on kind of the stark difference, which is the law of the transferor court applies or, alternatively, the transferee court is entitled to decide the case the way it wants to decide it.

HONORABLE SARAH DUNCAN: How many times are we going to vote on this?

CHAIRMAN BABCOCK: Huh?

HONORABLE SARAH DUNCAN: How many times are we going to vote on this?

CHAIRMAN BABCOCK: Just once I hope.

HONORABLE SARAH DUNCAN: We have voted on it at least twice before.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: I think the last -- I'm told at the last meeting we did not vote on it.

HONORABLE SARAH DUNCAN: We voted on it before that, twice.

CHAIRMAN BABCOCK: Well, how did we vote?

HONORABLE SARAH DUNCAN: Both times we voted to apply the law of the transferor court.

HONORABLE TRACY CHRISTOPHER: Yeah, and then the question was to what extent.

PROFESSOR CARLSON: Right.

HONORABLE TRACY CHRISTOPHER: Was it

alternative one, totally bound, or alternative two, due regard to it. Everyone agreed that the transferor court's opinions should be considered.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: The reason I like alternative -- alternative one restricts the hands of the transferee court beyond what the transferor court would be restricted. It says you apply that precedent, good, bad or indifferent, the way I read it. It says you will apply that precedent even if the transferor court would not apply it, even if faced with the same issue the transferor court would not apply it.

Now, I think alternative two, what it does is it says you have to give due consideration to it. Well, that's what the transferor court is going to do. They're going to look at their own precedent.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID GAULTNEY: And as the transferee court under alternative two you look at it as though it were in your court, but you're not lockstep, despite the justice of the case, going to have to follow it.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I don't think that's what it says, with all due respect, and I think

maybe as much as people laughed at Richard earlier maybe we do need a small mini-lecture on principles of stare decisis.

MR. ORSINGER: Next time.

CHAIRMAN BABCOCK: We weren't laughing at Richard. We were laughing with him. Justice Jennings and Yelenosky and Steve.

HONORABLE TERRY JENNINGS: I just wanted to say, my objection last time to this whole principle was what Judge Gaultney just articulated, which was the idea that the transferee court would be bound by the law of the transferor court when the transferor courts would not be so bound if it decided to overrule, you know, prior holding.

But after hearing what Richard said and what Bill said, I want to make sure I understand what you-all are saying correctly. It seems to me that that language addressed my criticism or my concern and that maybe I shouldn't be so concerned about that anymore, because really the transferor court is going to follow its own decision unless under the principles of stare decisis it is decided that, one, they were in error and, two, this case is important enough to overrule their previous decision, which is what I understand stare decisis is. You're going to stand by your decision even if you were in

error, but still it has to be an important enough case where, okay, not only were we in error, but we were really in error and now we need to correct it and not follow that previous decision.

It seems to me -- I was just mentioning this to Pam -- that I don't really have a grounds to object anymore. It seems to me alternative number one has taken care of that criticism. Is that what your intention was when you put in that phrase?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Can I amplify?

CHAIRMAN BABCOCK: Let Judge Yelenosky and then Steve and then you can amplify.

HONORABLE STEPHEN YELENOSKY: I like Judge Gaultney's approach, but I see a problem here, as Bill Dorsaneo was saying, well, we're just telling them something they should do anyway. Are we? Because if we're telling them something they should do anyway then nothing has changed. If we're telling them, well, when it's a transferred case you need to look more closely at the other jurisdiction, then we not only have a split between the circuits, we have -- now we have an opinion that is somehow different from either circuit. It's a circuit looking at the other circuits.

Now, does that become the precedent of the

transferee circuit, or do the lawyers get to say, "Well, that was when they were deciding under the rule that they had to look at the transferor court." So now we've got three things, and if the Supreme Court is not going to resolve that, it seems to complicate it.

PROFESSOR DORSANEO: One of the big concerns, as I understand it, of the transferee courts is that they will be making bad precedent for their own --

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: -- selves.

HONORABLE STEPHEN YELENOSKY: Under alternative one if they would just say, "Well, we were acting like them, that isn't our precedent" --

PROFESSOR DORSANEO: Alternative one would --

HONORABLE STEPHEN YELENOSKY: Solve it.

PROFESSOR DORSANEO: Would be more amenable to solving that.

HONORABLE STEPHEN YELENOSKY: And alternative two would either be as it is now, which is that's what we want to do and we look at everybody else's anyway and no more due regard is given to the transferor court, or it means more due regard is given to the transferor court and now you have a third opinion.

PROFESSOR DORSANEO: Alternative two, would

-- in my view alternative two would change or would be the law for the court that handed down the opinion, or their view of the law, their express view, that they would themselves have to follow under principles of stare decisis.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: If the group really feels, which apparently it does from these prior votes, that the transferor law should control because of the expectations of the parties in which the case was tried, isn't it just easy to say the transferee court should decide the case as if it were the transferor court? Forget the rest of the portrait, because the rest of it is just -- that gives them -- if the transferor court is free to change because of stare decisis or any other reason, they're free to change.

If the transferor court would follow its own precedent for whatever reason, it will follow its own precedent, but the point is I don't see anything difficult for the transferee court to say -- for the judges to say, "On this one we have to put ourselves in the shoes of our colleagues on the transferor court" and just say it in that way rather than try to lay down --

HONORABLE STEPHEN YELENOSKY: And "By the way, we disagree with it entirely" is sort of what they

are going to do.

MR. SUSMAN: Huh?

HONORABLE STEPHEN YELENOSKY: "Put ourselves in the shoes of the other court, which by the way, we disagree with entirely on this point."

MR. SUSMAN: So what?

HONORABLE SARAH DUNCAN: So fine.

MR. SUSMAN: I mean, that's the point, if the result is -- if you want to assure litigants that the result is going to be the same regardless of the transfer, the transfer is not going to change the result, the best way to do it is to say that the transferee court of appeals must act as if it were the -- must decide as if it were the transferor court.

HONORABLE STEPHEN YELENOSKY: Or to make sure they get to the Supreme Court and there is no longer two answers.

MR. SUSMAN: But that's up to the Supreme Court.

CHAIRMAN BABCOCK: Richard, how do you feel about that?

MR. ORSINGER: I'm concerned about unintended consequences. Our goal here is to make the precedent carry over. Steve's proposal may involve you in local practices of the court, like what is their practice

on how you go en banc review, what is their practice in that court about whether a panel opinion is binding on another panel opinion, and I'm a little nervous if we just say pretend like this court of appeals is that court of appeals whether we're really invoking more than just precedent. I'd prefer to say that the precedent should be followed by the transferee court just like the transferor court would follow its own precedent.

MR. SUSMAN: Richard --

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: Whatever you say, if it changes the outcome, I don't know whether it's precedent or procedure or some other rule you're talking about, but your instruction to the transferee court is act as if the transferor court so that the outcome is the same. You want the outcome to be the same. And what difference -- I mean, whether it's stare decisis precedent or some procedural rule that would change the outcome --

MR. ORSINGER: Well the different --

MR. SUSMAN: -- that, in fact --

MR. ORSINGER: Different courts of appeals have different procedures, the multi-judge courts, about how they handle each other's panel opinions and who's entitled to take an en banc, and do they do that in response to a motion or do they do that internally, at

least the last I checked there is quite a diversity about that. We don't want to be transporting internal procedures.

We want to be taking the precedent, is all we want to take, and I think if you want to take the precedent you better say that it's as required by stare decisis because stare decisis gives you a lot of flexibility to overturn your precedent if it's necessary, and it's not just, "Justice Jennings, we knew you were wrong." Sometimes the statute has been amended since you made the previous decision and so you have to interpret slightly different language. Sometimes the United States Supreme Court has now come down with an interpretation of a Federal constitutional right that's different from what was existing at the time we made our prior decision.

Sometimes the decision that's precedential is 50 years old and we're not dominated by railroads anymore, now we're dominated by airplanes. There's lots of reasons why precedent needs to be changed under stare decisis, so I'm -- Steve's solution, which sounds simple, scares me because it may invoke local procedures, and I just wanted to say that I think stare decisis is quite a broad freedom to deviate from precedent, but there are standards. It's not purely arbitrary.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But Steve's, it does sound simple, but this would be invoked every time there is a case transferred. Ten cases transferred to Waco, Judge Gray has got to think, well, how would a Beaumont court analyze that or how -- and we started out with just where there is a conflict, and now it looks like -- and you don't know what the result is going to be until you get there, really, and you try to analyze it the way the Beaumont court would, and you follow those things.

And one other point that we were talking about, changing the law, the Supreme Court, judge -- oh, I've forgotten. Any rate, a couple of years ago on the law of the case where it's the very same case and they say that under the law of the case a court of appeals is ordinarily bound to follow its initial decisions. Well, parties expect them to. But then they go down and say it's long been recognized that if it's clearly erroneous we don't want to follow something that's erroneous, so in other words, stare decisis would probably do the same thing. If it's clearly erroneous, no court should follow even their own decision in that case.

HONORABLE TERRY JENNINGS: Well, and another thing I like about alternative one is before I was concerned that if have you this blanket rule that the transferee court must follow the transferor court's

precedent, well, that to me means that every single judge on the transferee court must follow it, that you wouldn't be able to write a dissent. Under this alternative one, it seems, you know, you could have two judges agree, "Well, the other court wouldn't overrule this or whatever," but you could still have a dissent that would say, "Okay, here are the compelling reasons why that precedent should be overruled," and so you've freed up the justice at least in my mind to write a dissent; whereas, before under a blanket rule they would be stuck with the transferor court's precedent no matter what.

HONORABLE STEPHEN YELENOSKY: Where's the language that does that? I'm sorry, in alternative one?

HONORABLE TERRY JENNINGS: "Must decide the case in accordance with the precedent of the transferor court under the principles of stare decisis."

HONORABLE STEPHEN YELENOSKY: Okay, "under the principles," gotcha.

HONORABLE TERRY JENNINGS: That's what wins me over. And so now it looks like you could get that dissent; whereas, before if you were just blindly following, well, every judge would be stuck to blindly follow that law.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: This is so -- I mean, it goes

on with the Federal courts following in a diversity case, the Erie kind of deal. They've got to follow the law. A change in the courthouse from state court to Federal does not change the result. I mean, this is not any magic. Federal courts have been doing it forever, looking at state law and applying state law. Now, whether it's -- I don't know how they exactly do it, whether they psychologically put themselves in the head of a state court judge, or whether they --

HONORABLE STEPHEN YELENOSKY: Certify a question.

MR. SUSMAN: -- look at procedural rules, but to me it's not anything real special. I mean, courts are at because -- and the Federal judges say, "The reason we do it is we don't want the change of the courthouse to change the result." That seems to me like a court of appeals judge could follow that kind of notion.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: But in an Erie case the change of the courthouse does change the result because you apply Federal procedure. I mean, you don't -- you only follow state law on substantive points, so if you go to Federal court, for example, you've got different rules on summary judgment. It changes the outcome.

HONORABLE JANE BLAND: So we get closer here

than they get.

HONORABLE SARAH DUNCAN: Actually, the procedural rules --

THE REPORTER: I'm sorry. I can't hear.

HONORABLE SARAH DUNCAN: I'm sorry. If the procedural rule is going to be dispositive, for instance, Texas's summary judgment rule on a malpractice case, the defendant files a motion for summary judgment on limitations, plaintiff then under Texas procedure has the burden to plead fraudulent inducement, burden shifts back to defendant to negate fraudulent concealment.

When you're in Federal court they're going to apply Federal procedure -- no, you're right. I'm sorry. They do. They apply Federal procedure, so you lose that shifting of the burden.

MR. SUSMAN: You can solve that by putting the word "substantive" in this. "Follow the substantive law of the transferor" --

PROFESSOR DORSANEO: Anybody that thinks the Erie Doctrine is a simple, easy to apply doctrine hasn't been involved with it lately. It is very difficult to even figure out what the Supreme Court's current position is on the doctrine and how they apply it. Frankly, to say that they're meant to act like the state court is just -- is something that's impossible. It's just not possible.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Let me ask Bill, do Federal courts making an Erie guess, say that, "Well, we think the law is thus and so, but our Erie guess is that if the right court got a hold of it or it ever got to the high court they would do the opposite," or do they say, "Well, as far as we can tell this is the rule, and so that's what we're going to do"?

PROFESSOR DORSANEO: The latter.

MR. GILSTRAP: They apply the former.

MS. BARON: The latter.

MR. GILSTRAP: The former.

MR. ORSINGER: The latter.

Case in point.

MR. SUSMAN: Four latters and one former.

HONORABLE STEPHEN YELENOSKY: The irony in Susman's comment is he said the Federal court is supposed to apply the law of the state, where Steve's position is that there is the law of the Third Court of Appeals and there's the law of the Fourteenth Court of Appeals, so now the Federal court has got to decide which of those.

PROFESSOR DORSANEO: Sometimes Federal courts say, "We think this is what the Supreme Court of Texas would say, but we think it's a very stupid thing and wish they would change it."

MR. GILSTRAP: That's true. They do say --

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Sometimes they just ignore it. Like we've got Rule 509 in evidence that we're going to be talking about, and there's no privileges in Federal court, you know, under the evidence rules and such, so they follow the Texas, and they ruled that ex parte is out. The courts of appeals in Texas said they're in. They just rule the way they want to and say they're wrong. I mean, so they don't even always try to follow.

CHAIRMAN BABCOCK: All right. In order to move this along, at the risk of trying to move it along, should we think about whether we like alternative one better than we like alternative two and then see if we need to tweak whatever alternative we like?

MR. GILSTRAP: Sure.

CHAIRMAN BABCOCK: Is that the best way to do it? Sarah, no?

HONORABLE SARAH DUNCAN: I'm thinking about all those criminal cases.

CHAIRMAN BABCOCK: All of the what?

HONORABLE SARAH DUNCAN: My civil background causes me to think civil until I start thinking about all those criminal cases, and my professor friend over here has just reminded me that what I'm thinking of is Hanna

vs. Plummer, and the phrase was "outcome determinative."

PROFESSOR DORSANEO: That's Guaranty vs. York.

HONORABLE SARAH DUNCAN: It's what?

CHAIRMAN BABCOCK: Ida versus -- you really don't want to talk about all this.

HONORABLE SARAH DUNCAN: I really don't, but what I do want to say is I don't think anybody would have a problem with a court of appeals using its cites from its own court on a proposition of law that is agreed to among the 14 courts, and there is a great deal of agreement on criminal cases. There is a little bit of disagreement, but on criminal cases there tends to be a lot of agreement, and it's the outcome determinative precedent that we're all concerned with. It's not just every little precedent.

So maybe that's a tweak to alternative one that I would suggest, is that it's the outcome determinative precedent of the transferor court under principles of stare decisis.

CHAIRMAN BABCOCK: Bill, how do you feel about that?

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: I recollect six weeks discussing Hanna vs. Plummer in procedure class.

PROFESSOR DORSANEO: If you were back in law school now they would tell you that maybe what Hanna vs. Plummer meant when we went to law school it doesn't mean after Gasperini, so --

HONORABLE SARAH DUNCAN: That's fine. But outcome determinative is what I think we want to say.

PROFESSOR DORSANEO: Well, what we're talking about, we're talking about a different thing here than from Erie. In the Erie context we're mostly talking about many of the cases whether a Federal rule needs to give way or whether the Federal rule will be controlling, and what you're -- and outcome determinative might make more sense here, because we're really more talking about substantive principles under statutes or common law, which is what Erie was about to begin with, but what it's really mostly not about in subsequent case law.

I'm hostile to the term "outcome determinative" because it makes me think about how difficult it is to figure out what that means in the Erie context. I think what you're really saying is something close to "clear precedent." Maybe some kind of adjective is necessary. Maybe it isn't.

HONORABLE SARAH DUNCAN: No, that's precisely what I don't want to do, Bill. When I'm writing a criminal opinion, a two-page criminal opinion, and all

14 courts of appeals agree that the amount of cash you have on you at the time that you were arrested is a possible factor that could affirmatively link you to the cocaine in the trunk of your car, I don't want to have to go find a Waco case that says that just because this case originated in Waco. Why can't I just cite my opinion from last week that says that and move on down the road?

PROFESSOR DORSANEO: I see what you're saying. Yeah. Some kind of an adjective would be nice.

CHAIRMAN BABCOCK: Carl had his hand up, Judge Patterson, then you.

PROFESSOR CARLSON: In alternative one we use the word "precedent," "decide the case in accordance with precedent," and in alternative two we're talking about due regard to the decisions. Is that done purposefully or should "decisions" be "precedent" in alternative two?

CHAIRMAN BABCOCK: I don't know. I don't know if Bill -- where he came down on that.

PROFESSOR DORSANEO: It probably should be "precedent" in two. It wasn't -- "decisions" wasn't put in there to mean something different, and frankly, I didn't put in "precedent" in one the first time I drafted it. That came up when Pete said "the clear precedent," and I added it in the bracket for that reason. What Buddy

read earlier, it should say "precedent" from what the Legislature wants us to resolve.

CHAIRMAN BABCOCK: Speaking of precedent, at the May 6th meeting we had a vote on whether we would have the transferor court law apply or the transferee court, and we had two votes, in fact. The first was 17 to 8 in favor of the transferor vote, and then Chairman Low allowed another vote, and it got a little closer. It was 14 to 8, but nevertheless, the transferor court prevailed. So Judge Christopher is correct when she says we've --

HONORABLE JAN PATTERSON: As I recall, he invoked the South Texas rule, that we would vote twice.

MR. LOW: Usually I don't even allow one vote. I don't know why two.

PROFESSOR DORSANEO: Mr. Chairman, but then we kept talking about it and a number of the court of appeals justices got to be thinking, "Well, what does that really mean, does that really mean that I can't do the right thing" and started talking about due regard and the rest of it.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And that's why the two alternatives came back.

CHAIRMAN BABCOCK: I agree. So we're down to two alternatives. So let's see if we can focus on one

or the other. Is that okay with everybody?

MR. ORSINGER: The second alternative is just the losing part of the last two votes. So, I mean --

HONORABLE SARAH DUNCAN: There was actually a vote before the May 6th vote.

MR. ORSINGER: The last three votes then. Alternative two is revisiting the vote again, because alternative two just says, you know, "Pay some attention to what the other courts said, but do what you want."

CHAIRMAN BABCOCK: Yeah. So you're against voting again?

MR. ORSINGER: Well, you know, we're going to have the same problem -- oh, I'm sorry.

HONORABLE STEPHEN YELENOSKY: He's for stare decisis.

MR. ORSINGER: We're going to have the same problem when we try to shuffle the jury shuffle again, which is on our agenda.

CHAIRMAN BABCOCK: So you don't want this to be precedent for the jury shuffle vote. Justice Gray.

HONORABLE TOM GRAY: I don't know if this is the appropriate place to insert this, and I have said a whole lot on this at prior meetings and so I'm trying to be quiet, but remember that we are dealing with a very finite group of cases. It will come up from the point in

time in a particular case that the Supreme Court signs a transfer order, and it only applies to those cases.

So the first argument I will make is that a rule is the wrong place to put whatever we're doing. It should be in the transfer order. I hadn't thought about wording it as Steve worded it until today. I thought that was a good suggestion, and what I'm suggesting -- and then I'm going to try to stay out of the rest of the conversation -- is a simple one sentence inserted in the transfer order that says something like, "To the extent possible the transferee court should decide the case as the transferor court would, noting disagreement therewith as the court may deem appropriate in its opinion," and that tells the judges of the transferee court, "Decide it like they would, these are the cases involved." The parties know it, the court knows it, and we don't mess up a rule book with it.

CHAIRMAN BABCOCK: Justice Duncan and then Professor Carlson.

HONORABLE SARAH DUNCAN: You say the parties know it, but --

HONORABLE TOM GRAY: Steve's going to make sure the parties know.

HONORABLE SARAH DUNCAN: The lawyers don't get copies of the transfer orders, right? I mean, I

remember always being surprised to have briefed my case under "Houston law" -- and that is in quotes -- and then find out that actually I was going to be in Corpus and they didn't take kindly to all of my citations to the Texas Reports and a lot of other things.

CHAIRMAN BABCOCK: It was just your badmouthing the Corpus decisions.

HONORABLE SARAH DUNCAN: That is a real risk, depending on where you are in the state. So if you're going to give the lawyers a copy of this transfer order, of course, that might tell them more than they want to know, but if you'll just give them a copy of that sentence, fine.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: I just want to go on the record to say that I think alternative two is best for Texas jurisprudence. I think alternative one is best for the lawyers and their individual clients, and we do give due regard for certainty in the outcome of litigation, but I think that should be balanced against what is best for our overall judicial system. So I'm going on record as an alternative two chic.

CHAIRMAN BABCOCK: How did you vote in the other three votes. Were you a transferee chic?

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: Mr. Chairman, the alternatives looked different at the last -- on those last -- those votes anyway. This is considerably redrafted, so I don't know whether those votes are really anything other than general votes.

MR. ORSINGER: You can tell who the losers are, can't you?

PROFESSOR CARLSON: Richard, are you giving me an L sign up there?

CHAIRMAN BABCOCK: Well, just -- don't go away, Justice Gray. Just for the sake of amusement, if no other reason, why don't we see how many votes alternative one gets today? Everybody in favor of alternative one raise your hand.

Judge Christopher, where are you on this?

HONORABLE TRACY CHRISTOPHER: I'm an alternative two person, always have been.

HONORABLE JANE BLAND: Can we have what you're going to call alternative one, what it says?

CHAIRMAN BABCOCK: Just generally.

HONORABLE SARAH DUNCAN: Justice Bland.

MR. ORSINGER: Justice Bland finally raised her hand.

CHAIRMAN BABCOCK: Yes, I got her. I got her. How many against alternative one?

So roughly the same in proportion. 15 to 11.

HONORABLE SARAH DUNCAN: Can we take this vote next month?

MR. SUSMAN: It's getting closer every vote.

MR. ORSINGER: Can we establish that as precedent and move on?

CHAIRMAN BABCOCK: That's precedent, so let's focus on alternative one. The Court has got the benefit of a full, full discussion about alternative two, including its sore losers who keep trying to --

PROFESSOR DORSANEO: Alternative one is not that much different from alternative two the way these are drafted, so I don't feel badly about being in the minority.

CHAIRMAN BABCOCK: And we've got Steve's suggestion about simplifying the language to make it as if it were the transferee -- transferor court.

HONORABLE JAN PATTERSON: And just for the record, the record speaks for itself, I think, as they say.

CHAIRMAN BABCOCK: Do we need to talk about this much more? So I think the Court feels the record is sufficient, so why don't we --

MR. ORSINGER: That was a vote of closure.

CHAIRMAN BABCOCK: Huh?

MR. ORSINGER: That was a vote of closure.

CHAIRMAN BABCOCK: So why don't we -- we're done with appellate rules now.

PROFESSOR DORSANEO: I'm very happy to be done with this subject.

CHAIRMAN BABCOCK: Great. Well, thanks. Terrific job, as always.

So now we go on to the MDL asbestos and silica litigation, and, Judge Christopher, are you the lead on this or is Mike?

HONORABLE TRACY CHRISTOPHER: Mike is.

CHAIRMAN BABCOCK: Mike? Okay, Mike.

You guys aren't leaving, are you?

PROFESSOR CARLSON: I'm a sore loser. No, we have to go to another meeting.

MR. HATCHELL: Up for consideration is an amendment to Rule of Judicial Administration 13 having to do with the MDL pretrial court. By way of background, the subcommittee report that you have in front of you is really the result of a very thoughtful letter from Judges Christopher and Davidson, who, being gluttons for punishment, I guess, have volunteered to be the silica and asbestos judges in -- statewide, and the present MDL rules apply only to cases filed after 9-1-2003.

As a result of legislation passed by the Legislature dealing with both silica and asbestos cases requiring certain medical reports and providing for transfers in certain situations to the MDL courts, it occurs or it's almost essential that RJA 13 be amended to accommodate that. We received on a somewhat expedited basis a draft rule from Judges Christopher and Davidson, which candidly was quite good. It was referred to our subcommittee, which considered it in one very lengthy meeting and then by e-mail after that.

Let me try to set the context for you and then I won't speak very long because there are a number of people in the audience who want to speak, and Judge Christopher certainly needs to have the floor, but essentially what you have as a result of the legislation is two categories of cases. One, cases filed -- well, they're both cases filed before 9-1-2003 in which, number one, no medical report of the type now required by the statute, which is quite extensive, has been filed or where it is contended that a noncompliant report was filed; and in both instances, defendants have the right to remove these cases to the MDL court.

The first removal is just called the no report cases, and that's called as to transfer, done by a notice of transfer. The second is called a conditional

transfer because there has to be a determination at the MDL level as to whether or not the report -- the medical report satisfies statutory criteria.

The statute sets deadlines for when the initial report, or an amended report I suppose could also be involved, needs to be filed; and when you sort out all the statutory language, it's November 31, 2005. It is then predicted that there will be if not an avalanche, at least a flood of these cases coming to Judges Christopher and Davidson, and they need some help, some procedural help in dealing with this.

Our subcommittee, as it has I think with virtually everything we've done, managed to get a suggested rule, slightly revised from the Christopher and Davidson rule, to you one week in advance, so I'm going to assume that everybody has read our report and our rule.

What I think I should do is simply identify four areas that we think are worthy of discussion. The first of those areas is whether or not the MDL rule should impose a deadline for the transfer. There were no deadlines specified in the underlying statute, but Judges Christopher and Davidson proposed deadlines I believe of December 31 in no report cases, and I can't remember, was it January 31, in conditional transfer noncompliant report cases? Our subcommittee believed that those deadlines

were too short. We were cognizant of the fact that December is not a realistic month as viewed as a month, that probably you're only going to have about 20 days, and we just felt like that was too short, and we felt like both deadlines should be extended.

When you're talking about the reports themselves on the conditional transfers, we perceived that there would be a very difficulty -- a great difficulty in determining whether or not a report is or is not compliant and, therefore, counsel needed more time also to do the conditional transfers. What we did not have was enough anecdotal evidence to know the makeup of these cases. In other words, do these cases have -- are they predominantly one plaintiff cases or are they predominantly a hundred plaintiff cases or a thousand plaintiff cases; and if they are multi-claimant cases, how many of those are no report cases, how many of those are potential noncompliant cases, how many of those are cases that could never be transferred.

We just didn't have that information, so all I'm attempting to say is that we are not hard and fast about the -- even the deadlines, the extended deadlines that we have proposed. I think that that's a matter that people close to the action, Judges Christopher and Davidson, but also members of the Plaintiff and Defendant

Bar should be heard very seriously on.

The second issue is one of severance. The procedures are going to require the necessity to sever out those cases in multi-claimant cases that are subject either to a conditional transfer or to a transfer as a matter of right in no report cases, and so the question then becomes as to how should that be accommodated, and there is some suggestion that the rule that we have proposed was going to be very, very expensive because the severance is required to be done in the trial court as opposed to picking up the whole case and taking it to the MDL, letting the MDL sort it out and send it back down. That's a matter that you should pay some attention to, although, again, we did not have enough anecdotal information to know if the entire case goes up to the MDL without severances how does that affect those claimants who are really in all good faith are not subject to transfer.

The third area would be the physical handling of the files, and Judges Christopher and Davidson proposed a somewhat detailed scenario as to how the actual, you know, physical files would be transferred from one court to the other. We felt that the judges closest to the action ought to have just sort of -- maybe unfettered discussion is not the right word, but they

ought to be able to fashion their own remedies as time progresses, and we didn't feel like that the level of detail that was in the proposal should be in a rule.

And the fourth and final category is that of attorney's fees, which the proposal that we received would have awarded attorney's fees to the losing party in those situations where there is a debate over whether or not the report is compliant, and I suppose there could be a debate as to whether or not no report was filed at all. We felt like that the Plaintiff and Defendant Bar are working very constructively to deal with the legislation and that imposing sanctions in this very complicated process would do nothing more than ratchet up the level of controversy and exacerbate conflict, and we didn't see any need of it. We fully recognize that abuse of the system could, we think, be handled by the inherent power of the judges themselves.

And, Mr. Chairman, I think with that I ought to step off the stage and let the fun begin. I do want to say -- everybody on the subcommittee, please raise your hand. I just want to say that this is the most diligent and the smartest group that I have worked with in a long time. It's very rare for them, anybody, to miss a meeting, and if they do it's only because they're either in the hospital or in jail or in trial usually, but they

spend hours and hours working on these things, and I think the work product they do is very high caliber, and Lisa Hobbs has just been a miracle worker in pulling all this together, and so you see what you got, and with that I think I'm through.

CHAIRMAN BABCOCK: Great. Thanks, Mike, and thanks everyone on the subcommittee. This is obviously a terrific work product. We have two people here who have asked to be heard on this issue. Mike, is it appropriate for them to talk now or should we get into the discussion a little bit longer?

MR. HATCHELL: I would think Judge Christopher ought to say some things, frankly.

CHAIRMAN BABCOCK: Yeah. I think that's probably appropriate.

HONORABLE TRACY CHRISTOPHER: Okay. We have decided to totally punt the attorney's fees sanctions. Most lawyers didn't want it, so Judge Davidson and I said "fine," so we don't care about our original proposal on that issue. The subcommittee report is fine on that. We like the way they've handled the physical handling of the files provision, so we're happy with that.

The two main issues that I see left are the deadlines and the severance question, and in our -- in my initial letter we indicated that there were going to be

about 4,300 silica and 28,000 asbestos plaintiffs, and the asbestos people have increased that to 44,000, is what they believe is an accurate count of how many pre-9-1-03 plaintiffs that there are. Well, as accurate as they can get. The silica number remains the same. So just the mechanics of considering that many plaintiffs' cases and what we're going to do with them, and it's absolutely true, we are pretty much anecdotal as to whether most of these cases are multi-plaintiff cases or single plaintiff cases.

We believe most of them are multi-plaintiff. Certainly in the cases that I have now, I only have 150 cases, but it's 800 plaintiffs. So -- and I'm pretty sure the 4,300 pre-9-1-03 silica cases are going to be very similar sort of statistics in terms of being multi-plaintiff cases. So we have to figure out how to deal with plaintiffs that have filed a report, plaintiffs that haven't filed -- or not filed. I keep saying filed, but it's really just served, haven't served a report or where the report isn't any good.

The severance question is hotly contested between the Plaintiffs Bar and the Defense Bar because it's such an expensive procedure, and I mean, that's really sort of a big issue. In some counties as a matter of practice, like in Harris County, we didn't let them

file multi-plaintiff asbestos cases. So in Harris County all our pre-9-1-03s were single plaintiff or we made them sever, but that's not the case in other counties. So in Harris County the plaintiffs have already paid a filing fee for each and every one of their plaintiffs.

In these other counties the plaintiff might have just paid one filing fee for, you know, a thousand plaintiffs; and the draft that the subcommittee came up with on the severance required the defendants to pay the severance costs; and if you're going to sever a thousand plaintiff case into a thousand cases, it's at least $165 per case just to set up a new file; and then the question is how many -- what pieces of paper do you put in the new file at a dollar a page, because most of the district clerks require certified copies of any pleading to be put into the new file. I don't know a clerk that doesn't require that, and I don't know whether we have the option to tell them that's not important, but so you've got that additional cost when you're dealing with the severances.

Severances are also very time-consuming, just in terms of getting the certified copies down, getting the file jackets, getting everything done to -- at whatever level, either our level, the MDL level, or at the trial court level. So the severance issue is a real problem for us. There's even -- I think it's Orange where

they charge a per plaintiff filing fee, even though it's only one case. So some plaintiffs have already, you know, had to pay a per plaintiff fee in that county, but it's still just one case. So the plaintiffs are like, "Well, I shouldn't have to pay." The defendants say, "No, I shouldn't have to pay to get these all severed down into individual cases." And so it's really a difficult proceeding.

What I have done in my MDL on this issue -- and at first I thought I should require all 800 plaintiffs to have a separate lawsuit, but then Senate Bill 15 came about and the lawyers were talking to me and said, "Well, we're not sure a whole lot of our plaintiffs are going to meet this medical criteria." So what we've decided is that we are going to wait and when -- and this is for the post-9-1-03 cases in the current MDL in the silica. Once a person files the compliant report we're going to sever that case out and start a new file with the compliant person. Otherwise, if it's a 200-plaintiff case, they can all just sit in one case until they become compliant.

The medical report requires a certain class of x-ray showing a certain level of physical findings on the x-ray, and you also have to have a certain level of medical impairment, which relates to basically a breathing test, so your breathing is impaired. So if you don't meet

those medical criteria, your case just sits and you don't go to trial. And the lawyers have told me that most of these diseases are -- both silica and asbestos can be progressive so that maybe every three years or so they're going to send their clients back for a new x-ray to see if maybe they've met the new medical criteria. So they're not really sure how many cases, for example, just even in my 800 plaintiffs are meeting the medical criteria.

They're running around madly, the plaintiffs are, trying to get medical reports on all their pre-9-1-03 cases to prevent the horror of being dragged into the MDL, but everyone's best estimate is that there will be a large number -- we're not exactly sure what number that is, but a large number of both asbestos and silica plaintiffs that do not meet that medical criteria. So those people are automatically transferred to the MDL where they just sit and wait under the terms of the statute; and if they ever do become compliant, they file the report and their case starts to go forward.

So we've got the people for sure that don't meet the medical criteria. No one is going to contest them. That's why we have the idea of a no report. It just automatically comes. If we had a thousand-plaintiff case and 400 of them filed no report, there would be no reason in my mind to have 400 separate cases. I had just

as soon have it all come in one pot and sit up there under one cause number in my court, so I'm opposed to requiring a severance on a case-by-case-by-case basis or a person-by-person basis. But I don't know what to do mechanically if we don't make that requirement; and perhaps the committee will think that, you know, just we have to mechanically break these cases down case-by-case, you know, plaintiff-by-plaintiff, so we can see how to deal with them. So it's just that is a real thorny thing, and who is going to pay the costs and how the severance is going to get done and at what level the severance should be done is where we need help from.

On the deadline for transfer, we didn't have any problem with the extension that the subcommittee requested. I know that the Defense Bar wants even more time than what the subcommittee has recommended. I've gotten several comments from the Defense Bar. The Plaintiffs Bar thinks, well, we have been scrambling around for the last couple of months trying to do these medical reports, time for the defense to have to do that, put a little pressure on them to get things going, too; but you have to remember these are cases that were filed before September 1, '03, so they probably all have trial settings in place, you know, pretty soon. So I hate to put the deadline so far down the road that we run into

getting set for trial, people think they're going to trial, then the day before the case goes to trial they remove them to the MDL. So that was sort of our thought on the deadline issues.

And I, you know -- we've -- Judge Davidson and I finally thought that maybe we should just bring the whole case up to us, every single one of these cases, because, you know, my guess is there will be a lot of mixed cases where some were compliant and some aren't compliant or some have a report and some don't. We could bring the whole case up to us and then it would be almost easier for us to sever somebody to go back, you know, so -- and because we also have this new law that says you can only try cases one plaintiff at a time.

So if, you know, if the thousand case Jefferson County case got brought up to me and the plaintiff's lawyer said, "Well, Judge, I've got a trial setting and, you know, Joe Blow has got a compliant medical report, send him back," it would be easier for me to sever Joe and send him back than to have to split up the thousand-plaintiff case to begin with down there in Jefferson County. So that was -- you know, after we kept sort of thinking it over in our head what would be the best way to do it, we thought that might be an easier way.

And we also didn't want the files coming to

Harris County, which is how we had done it under the post-9-1-03, and that's also kind of an issue just because we have no room for them, and it's been my -- we haven't had any need -- I have not had any need to go back and look at anything that was filed before it came to my court, and so to the extent you do, people can always give you copies. I had just as soon keep the files where they are until we decide we might need them. I think some of the lawyers think for appellate purposes that could be a real mess, which is one of the things we discussed when we first did Rule 13 and how to transfer the files and things like that. So I know there is appellate, you know, what is the actual record, what needs to be put together for a record, but I still think that we could probably do that on a case-by-case basis.

CHAIRMAN BABCOCK: Lisa, did you have something?

MS. HOBBS: Just in response to the severance issue. What I thought the subcommittee was doing here was not severing out on a plaintiff-by-plaintiff basis but more categorizing into two or three, each of -- so it's a thousand plaintiffs, say 300 of them need to go to MDL. Let's sever that out into one cause and have one filing fee and then sever out the ones who didn't file -- well, I guess that would be

the ones who didn't file a report, and then sever out the ones we think there are compliant reports, and that's one cause of action that will then have to be multiple plaintiffs for when they go to trial, and then maybe a separate one for these are iffy or maybe they're in the first case, section two. But I didn't consider this would be multiple, oh, let's do a thousand different cases with a thousand different case numbers. I was thinking that it would be like two for that thousand, but I don't know if that's workable.

HONORABLE TRACY CHRISTOPHER: Well, that would certainly be better than individual plaintiff cases, but even then -- so say a thousand plaintiff case turns into three cases, so you have an A case that's the no reports and you have a B case is a list of people that we want the MDL judge to review the reports on.

MS. HOBBS: Right.

HONORABLE TRACY CHRISTOPHER: That could be doable, but I didn't think the rule --

MS. HOBBS: Said that.

HONORABLE TRACY CHRISTOPHER: -- said that.

MS. HOBBS: Right. If it's a drafting error, that's easy to fix if we can agree on the concept, hopefully.

HONORABLE TRACY CHRISTOPHER: Yeah. And

again, as long as we don't have to bring a whole bunch of files up in terms of the severance cost I don't think -- if the Defense Bar just had to pay two severance costs, you know, this is the A group that's no reports and this is the B group that we want you to review the reports on, they probably wouldn't, you know, have a problem with paying those costs. Although, once the group that we have to review the reports to see if they're compliant, at some point those would have to go back on a case-by-case basis, some of which we would keep, some of which wouldn't keep, depending on whether the reports are compliant. So those are the thorny issues.

MR. LOW: Let me ask you a question. The prohibition against were they only one plaintiff for trial, that applies to any trial after September 1, doesn't it? I mean, that's not just --

HONORABLE TRACY CHRISTOPHER: Right. Any trial, no matter when the case was filed.

MR. LOW: It doesn't matter when the case was filed.

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOW: That's what I thought.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. Kay Andrews from Brown McCarroll is here and Bryan Blevins from Provost

Humphrey. Do you guys care which order you go in?

MR. BLEVINS: I feel fairly confident that Kay has done a more detailed analysis from the defense side than the plaintiffs have done, so I'm happy to follow her.

CHAIRMAN BABCOCK: Okay.

MR. BLEVINS: I'm a better sniper than a leader.

CHAIRMAN BABCOCK: I was thinking of ways to do this, and plaintiff usually goes first, but then the gentlemanly thing to do would be to let the woman go first, so, Kay, it's your floor. Thank you for being here.

MS. ANDREWS: Thank you very much, and thank you-all for giving me the opportunity to talk to you today. Before I talk about the idea of the deadlines and the severance, let me just say with regard to the very opening part of the proposed rule change in 13.1, in 13.1(c) at the end of that paragraph where it now says that the sections will apply, blah-blah, "to cases filed before September 1, 2003, to the extent authorized by that chapter," referring back to Chapter 90, I would propose that if you say "to the extent authorized by Chapter 90" and refer then to the actual language of the legislation, what the legislation says is it refers to Rule 13, so

you've essentially just created a circle.

I would recommend maybe a change that says something to the effect of rather than "to the extent authorized by that chapter" something like "subject to the provisions and conditions of that chapter" so that it's not simply whatever the bill says, and the rule says look at the bill, I don't know that you've really solved the extension of the scope of authority that was intended by the statute. Did I make that clear?

CHAIRMAN BABCOCK: Yeah, Kay, can you speak up a little bit, if you can? The court reporter is having a hard time hearing you, or maybe move down here.

MS. ANDREWS: No problem. The second comment, in that same paragraph it makes a reference to cases filed before September 1, 2003. We have a little bit of an issue with regard to what I'll call bridge cases. Those are the cases filed between September 1, 2003, and September 1, 2005, and I think SB15 fully intended to pick up those cases as well, so unless there is some reason to put there, "filed before September 1, 2003," you might just delete that entire clause. But those are my preliminary remarks. Let me talk then --

MS. HOBBS: Can I get you to repeat the language one more time you said on the second part or that last little line where it says "to the extent authorized

by the statute" you would recommend "subject to" --

MS. ANDREWS: "Subject to the provisions and conditions of that chapter."

MS. HOBBS: Thank you.

MS. ANDREWS: Certainly. With regard to deadlines and severance, I think those two issues kind of work with each other, frankly. As has been mentioned, there was a question about whether there was really a need for deadlines and whether, in fact, there was some compelling reason to include a deadline. There are no deadlines in the statute itself. In other words, there is no deadline that requires that a case be transferred. There is no deadline that requires that a report be filed really. Or a report be served. So if we put a deadline in there, again, I think, you know, you need to give everybody plenty of time, but I also would say that we've got to have some kind of a good faith exception because there will be stragglers; and because some of these cases are thousand-plaintiff cases, because some of these cases literally have been filed since 1993, '94, identifying the universe of the cases is challenging in and of itself. So I think some kind of good faith exception regardless of what deadline is imposed if any is important.

But like I said earlier, I think it dovetails with the severance issue because if, in fact,

there is a large case sitting in Nueces County and it is all noncomplying nonmalignant cases that won't meet the medical criteria, I guess just as a policy consideration, does it make sense to force somebody to transfer all those to the MDL where they're going to sit just like they would sit in Nueces County and pay that fee, particularly if it's going to be $165,000. Somebody has to pay that fee to get it into the MDL, where it's just going to sit again. So, frankly, I'm not sure what the answer is, but I think those two issues need to go together, because if there is no deadline and it's going to be frozen somewhere in the state anyway, does it really matter where it's frozen. And then if some rumblings start or somebody starts discovery or somebody sets a trial date or something in Corpus Christi then you transfer it.

I don't really know, but it's -- because it is such a high cost to transfer that file, as we have been discussing in the severance issue, I just don't know whether if the deadline is forcing that expenditure, do you really need the deadline. I don't know.

Also, there has been an effort in the rule to separate those where no report was filed at all from those where a noncomplying report was filed. Frankly, I don't know that we need that distinction at all. As a defendant if I transfer a case and style it "notice of

transfer because no report" and, guess what, it got put on my associate's desk and I just didn't see it, do I have to go back then and file one and say, "No, they may have done one, but it was noncompliant"? I don't think that's significant. In other words, I think it's a notice of transfer regardless of whether it's because there's no report or it's a noncomplying report, and I would have the same deadline for both of those, if you have a deadline, and I would just call it notice of transfer.

The whole idea of the loser pays attorney's fees provision, I think if I understand correctly has been abandoned, but obviously I do think that the court has inherent powers to assess appropriate sanctions if there is an abuse of the system. This is so new to all of this I think we're going to work through this a lot. And, you know, and as we said earlier, the plaintiffs and defendants have worked well together. Both Bryan and I are on the liaison committee of the asbestos MDL with Judge Davidson, and we do work well together, and we are all going to work through this process for the next 90 to 120 days and see how it all plays out. You know, I think the court will have inherent powers to assess sanctions if, in fact, there is abuse, but let us see how it all works as we work through it.

The whole severance issue, of course, is the

-- it's tricky. It's expensive. Does it make sense to split the cost between plaintiffs and defendants? I don't know. Does it make sense to have no deadline? I really don't know. I'm not sure what the answers are there again, but, you know, if there's a way to avoid paying those big expenditures until there is some action in the case, that seems to make the most sense, but I'm not sure how you make that work.

Also, in the motion for severance section of the proposed rule it requires a verified statement by the defendant. I would say there is no reason for a verified statement from the defendant. The statute doesn't require the defendant to verify a statement that they weren't served with a report; and if that, in fact, survives this version, I would recommend deleting the verification requirement.

Also, just a couple other minor recommendations. I would say that somewhere it should make it clear that the transfer of the case by any party is good for all parties. In other words, once that case has been transferred into the MDL by a defendant, that no one else needs to do it, that administratively good for one is good for all, so to speak. And finally, there's a -- in both (a) and (b) there is reference that the notice of transfer must list all the parties. It is,

frankly, not unusual in asbestos cases for us not always to know who all the parties are.

You know, if the case was originally filed in '97 with 120 defendants, some of which are bankrupt now, some are gone, some are settled, and I may not have any idea who's in there, so either insert the word "known," or better yet, just require that it be filed and served electronically, which is exactly how I think both MDLs are now doing it, that is both the silica and the asbestos MDL. We e-serve everything through Lexis/Nexis. So rather than making somebody go try and figure out a service list, once you put it on the Lexis/Nexis everybody knows about it. I just would delete the requirement that somebody has to go and investigate all the known parties before they actually file a notice of transfer, and I think those are basically my comments.

Your turn.

CHAIRMAN BABCOCK: Bryan.

MR. BLEVINS: First thing is I think Judge Christopher has set the picture fairly well. There are certain counties that require individual filing. Transfer and dealing with those cases is not going to be a significant issue. There are counties where the size of filings has been limited over time, so depending upon the age of the consolidation -- and, again, these are pretrial

consolidations typically. They are not, quote, cases that are going to be tried together, but they are pretrial consolidations. They can range anywhere from a normal -- 10 or 15 cases is a normal limit for some counties and then some counties have no limits and the number of cases has grown over the years to thousand to several thousand case groups.

So clearly the problem of severance is a significant one, and I think the first thing this group has got to do is decide do you have to have or is it desirable to have individual severances, or can you break that up into groupings of some sort to reduce the number of severances that have to be made. Again, that determination is going to depend because it's going to dramatically affect costs.

I think that there are, from a plaintiff's perspective, from someone who has cases in these groupings, I would say that there is an advantage to having it done as a whole or a group of nonqualifying report cases or no report cases going over in a whole. However, I'm not sure that is practically doable, and I think having listened through the morning to you-all's very detailed discussion of appellate issues I see some real problems because there are going to be determinations by Judge Christopher and Judge Davidson on is this a

qualifying report, why and why not, is that appealable by either party. There is also a provision in the bill for exceptions, which clearly the MDL court is going to have to rule on, where a case doesn't meet the A, B, C, D, but it has other criteria that make it equally physically impaired as a person who meets A, B, C, and D. So there, again, could be appellate decisions from that.

If that individual case -- because once we get to the MDL they will be transferred in bulk, but they're going to be dealt with individually; and when that happens, how will we track that case, how will we track it up an appellate chain, how will we track it back to the trial court, where is a cause number to refer to, where do we put the documents that relate to those decisions. That would be my concern.

If the trial court -- and again, I don't use the nomenclature that's really in the bill. I tend to think of the trial court and I think of the MDL court, so my apologies if I mischaracterize, but if the trial court does not have a cause number then where does my plaintiff come home to if and when he gets remanded? Where does he go, because he doesn't have a cause number there? Does Harris County where both these MDLs -- do we burden the Harris County court with the responsibility of each and every individual cause number, and then what is the

binding effect or even applicable effect of that cause number back in Beaumont at Jefferson County courthouse when the case reappears?

So I leave it to what I -- I bow to the cumulative wisdom on appellate issues in this room as to how big a problem that is, but at least in my personal experience I had under the existing rules a consolidation of cases of approximately a hundred cases transferred from Orange County to the MDL. What happened in that instance was that Harris County -- I mean, Orange County boxed up the entire thing, "We're done. We are done. Right now closed off. Do not say 'boo' to us." And the Harris County court, "Oh, we just have Mr. Parrot." That was the name of the consolidation. It took us a long time because it turned out there were -- and, again, as I explained on bended knee to Judge Davidson, that it was not intentional, there were three cases out of that hundred that were added to consolidation after September 1st, 2003, but before Rule 13 asbestos MDL was created, yet not knowing this is where we were going.

So consequently the whole case got removed. There were only three cases that should stay. The court there severed the three cases out and then had to send it back, but it was a procedural nightmare to get either court to figure out what had actually happened and who was

there and who wasn't. So, again, I just throw that out for your consideration.

The attorney's fees issue. Understanding the proposal, understanding the court's reflection on that, from a plaintiff's perspective there is tremendous opportunity for abuse of this transfer process, by both sides. The defendant wins the day merely by tagging the case for transfer because off it goes into someplace that's going to be 4,000, 5,000 to in the asbestos deal 26 to 30,000 cases strong. That's a win already for day one.

On the plaintiff's side, if the plaintiffs haven't done their homework, sending remand motions back and tying up the court's time and the parties' time fighting off remands can be an abuse of the process. So while I agree that there is a lot of gray and it's not something that I would order as a matter of course, I think it would be helpful and instructive to the parties to have some statement which says that abuse of this process brings in the court's sanctioning power, and I think that sanctioning power ought to be at both the MDL level and at the trial court level, because if that case should not have been remanded it was that judge's case and that judge should have some authority and not simply imply that it's at the MDL level. Just my comment there.

Deadlines. I strongly take a different

position on the issue of deadlines. I think we have to have deadlines for the very point that Judge Christopher raised, and that is these cases are already well along in the system. If we don't have deadlines then effectively defendants can play the game of "Oh, I am going to trial?" "No, I'm not." And off you go to the MDL, and that's I think -- and if we don't have these deadlines and we don't have that commitment to the process then these cases will continue to meander in the normal judge's context, stay on their docket where they have an obligation to move them when, in fact, they can't be moved because of the nature of the law; and I think that, therefore, it would only serve both the trial judges and the MDL judge to know what they have to work with. So, therefore, I think deadlines are important.

I think that the issue of a no report, which I think is somewhat -- I don't know if that's an appropriate term or not, because most of the cases in the system have a report that has been served pursuant to Rule 21a, because most of the cases will have medical reports that were attached to their answers to interrogatories and served on the parties. So arguably -- especially in the case of malignancy where it's really simply a statement by a qualified physician, as identified in the bill, that this is an asbestos malignancy or this is a silica

malignancy, that's all that's necessary. It is certainly going to be arguable that the reports already in the system, already provided pursuant to Rule 21a attached to interrogatories, that those reports satisfy this.

But again, so I'm not sure that no report is really the term. It may be a nonqualifying report, because certainly I know from my system I have plenty of reports that have been served that are not going to meet the criteria because my folks are not impaired, so they're not going to meet it.

But putting the issue of no report aside, I think that there needs to be some distinction between when the parties are contesting that a report does or doesn't qualify, which is going to generate a remand situation, a potential for remand, versus those where nobody should be contesting that there is a qualifying report; and that's where it's just going into the inactive docket. So I'm not sure that there's not a reason to have it. I'm not sure the nomenclature of no report versus qualifying report is actually how you say it.

I do agree that whatever deadlines should probably be the same. We all have plenty of deadlines. Having one more to trip us up just doesn't seem to be necessary, so I would make them the same amount of time to both transfer and file a motion to remand.

The issue of the severance, going back then, as to cost, you know, because obviously I'm from the plaintiffs side. I don't want to pay more money for the fact that my cases are on file. I understand the defense does not want to pay money to sever them to get them moved. However, the plaintiffs each have to pay their own costs a hundred percent, whereas the defendants at least have the opportunity to share that cost among each other; and in most of these cases there can be anywhere from twenty to a hundred defendants to share that cost in transferring.

Also, there is nothing to say that these cases as they are filed today is wrong. The cases were all properly filed, properly consolidated in courts that agreed they were proper; and, therefore, they are simply being penalized because of a subsequent change in the law based upon a new and perhaps arbitrary standard. So consequently, the benefit of the law is going to the party that is requesting the transfer; therefore, the party requesting the transfer and getting the benefit, my humble opinion, should pay the cost.

I will say this. It is not a simple one-sided street. If the rule says that the party requesting the transfer pays the cost, plaintiffs will pay some costs. There are cases that I have -- I can give you

an example. There is a client, he hasn't gone to have his IME, hasn't gone to get the necessary information. If that client hasn't gone and I'm facing a trial setting in November, for instance, then my best solution for that client may be transfer you to the MDL. If you won't respond to me, you won't go get your report, I'm going to transfer you to the MDL, because otherwise I'm risking getting your case DWOPed. Again, I pay the cost for that severance. So I think paying the cost based on who is requesting the transfer, it makes sense and would be fair and appropriate.

Now, I will say that in relationship to that I am strongly hopeful that this group will not suggest that we take the whole case up and then let the MDL court sever and sort this out. It is out of no sense of disrespect to Judge Christopher or Judge Davidson, who are all working very hard, but the realities are that with 18 to 25,000 cases being transferred up to the MDL, no one man or woman can do that, and too many people will be held up in the MDL process for no other reason than the log jam created to get them all back out, because I think that there is going to have to be some decisions and questions made about whether or not the remand of a case based upon a qualifying report is simply an administerial act, does it require a hearing, is there some form of testimony or

dispute or argument. All those things are going to have to be determined, and so, consequently, moving everyone up there is going to mean that it's going to take an awful long time for all those people who don't deserve to go up there to come back, and I don't think that was the intent because you're really talking about cancer victims predominantly.

A couple of other issues that were raised in the report, I don't know if they're relevant now. The question of a nonparty transfer, I think in the current rule there is some discussion of the court being able to do that. I'm not in favor of that for the simple purpose of finality. If the parties, defense parties, do not take advantage of the law that's in front of them, then I don't think that case six months later headed to trial should get bumped to the MDL. There is a specific provision, specific opportunity, and we would expect people to take advantage of that.

I think that Judge Christopher's point, even in the 90 days there are going to be some cases that are set for trial within this 90-day period, and I think the trial court should have the option to have some communication with the MDL court and say, "Wait a minute, this case has been on my docket for six months. People have been working hard on it. Why did somebody wait until

the day before trial to transfer it? I'd like you to consider letting us keep it." So I think there was a discussion of good cause.

And then as to the issue of the post-9-03 cases, make sure that we understand the context. Obviously every case after September 1st of 2003 was subject to MDL transfer. The courts put in CMO provisions, and there are cases that were not voluntarily transferred. This basically, under the proposal that was made, is a second bite of the apple. They didn't transfer them to begin with, but now they get a second opportunity to transfer them when they passed on that opportunity the first time. From my perspective that's a second bite of the apple, but at the same time I could also argue that there's been an intervening treatment, the new law, and perhaps that's a good faith reason to give them that second bite. Again, I think it could be decided either way.

Those were all the comments that I had. I'm happy to answer any questions.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Is there any thought that cases that can't comply, can't file a compliant report, would be nonsuited rather than go through all of this, or does that affect limitations, or

do people know?

MR. BLEVINS: There is an argument to be made that under the new law if they were dismissed voluntarily then they would then gain the benefit of the new statute of limitations. I would tell you that personally I find that very hard to believe that someone will do that because they are a pre-9-1-03 case, which means they also have the benefit of prejoinder, pre-responsible third party issues that were changed in September of 2003. I'm not going to give those rights up. I'd rather have them send me MDL.

CHAIRMAN BABCOCK: Okay. Any other questions? Justice Bland.

HONORABLE JANE BLAND: Did you say that you -- at the end of the day you would prefer these individuals to have the individual cause numbers or not? You started out -- I thought you started out saying that they needed to have individual cause numbers and then at the end I heard something different. I was wondering which --

MR. BLEVINS: As a nonappellate lawyer I would prefer to have my nonqualifying cases removed to the MDL in bulk, and I'd like my qualifying cases to stay where they are, as they are. However, in all honesty, I have to say that I think that creates some very

significant problems.

HONORABLE JANE BLAND: Tracking problems.

MR. BLEVINS: Tracking problems, because once they are in the MDL I know from Judge Davidson, and have no reason to believe it will change, they are going to be dealt with individually. Individual motions, individual hearings, individual rulings, individual outcomes; and now I don't know what happens to those people because they aren't -- nobody knows anything about them back in Jefferson County.

HONORABLE JANE BLAND: Yeah, apparently not all the time do you know who the parties are, and that gives me some -- I think that's why Harris County went back a few years ago to the one plaintiff, one cause number, because we were having the same problem figuring out who the parties were to these cases.

MR. BLEVINS: And it raised a lot of money from the filing fees.

HONORABLE JANE BLAND: That's true, and there was a lot of work that the clerk's office did to keep track of all those people, so, you know --

MR. BLEVINS: It's a very thorny problem, and again, if you don't do it at the trial court level then effectively you've dumped that individual allocation cause number for the entire state on the Harris County

district clerk's office.

MS. ANDREWS: And if, in fact, what you do is you transfer that case, that hundred plaintiff case goes to Harris County, only two of them were qualifying, so two get severed, and then you've got 98 plaintiffs, and the decision hypothetically is to keep them as a cluster case in Harris County. So that goes on, and then like we're saying, as Judge Christopher was saying earlier, maybe three years down the road there are a couple of those who now turn into cancers, so those become qualifying cases and potentially are then remanded. What's the cause number two or three years later when those go back? They haven't turned into single plaintiff cases along the way. It's obviously an issue, but it may just be that when they turn into cancers you just give them a new cause number and they go back and you leave the other 96 then to still sit in one cluster, so to speak, at Harris County. I'm not sure.

MR. BLEVINS: But I do want to point out, at least from the plaintiffs' perspective, we don't perceive the inactive docket as a dead zone from the standpoint that I think there is going to be a lot of activity over the next several years on this inactive docket, and, you know, there's a -- the constitutional issues aside, there is an exception to the criteria. There is going to be

questions about how the criteria are applied, what do the criteria mean. There is an opportunity for Judge Christopher and Judge Davidson to say, "Well, I think this is an equally impaired case, even though it doesn't meet the very technical A, B, C, D, E." And that's all going to get hammered out. So there is going to be a lot of activity on individual cases in that regard.

CHAIRMAN BABCOCK: Great. Any other questions? Yeah, Steve.

MR. TIPPS: Bryan, with regard to the reports that are required under the statute in order to avoid having a case transferred to the MDL, those are pretty detailed reports for medical and employment history and all sorts of stuff. Is it accurate to say that in virtually every pre-September 1, 2003, case that's currently pending the plaintiffs have served a report that is at least partially responsive to those requirements?

MR. BLEVINS: I think it's fair to say that every case on file has some level of medical report, but they vary widely in how close or how far they are from that which is now required.

MR. TIPPS: So that it's possible that there are some reports that were served last year that comply with the directive of this new statute, but there are many more that don't?

MR. BLEVINS: Yes. There are -- in the cancer context, I think there are a substantial percentage of the cancer cases already have a qualifying report; and if you served it with interrogatories pursuant to 21a, I mean, I think you've already satisfied your exception in the statute.

MR. TIPPS: And typically then plaintiffs would not undertake to file something more during this 90-day period, or do you know?

MR. BLEVINS: Well, I'm going to tell you that's not my choice, only because I -- I'm going to do it, but only because I want to be able to swack somebody for transferring me, and I don't want there to be any doubt about it that they shouldn't have done it. So consequently, yes, I'm going to re-serve my reports, but I don't think it's technically required under the bill.

I think in the nonmalignant case -- and we were talking about this earlier. Again, it's all going to come down to how Judge Christopher and Judge Davidson review some of the very technical -- I mean, I'll give you this one example. There is an ILO form. 95 percent of the cases have all been completed based on the 1980 ILO form. The bill says you've got to have the 2000 ILO form. I will tell you the testimony from defense and plaintiff experts will be there is virtually no substantive

difference, but depending on how Judge Davidson and Judge Christopher rule, that could be a reason why 98 percent of the existing reports don't qualify. That's part of the fights we're going to have.

MS. ANDREWS: And we have discussed this. I mean, I think the defendants by and large are going to argue that the existing reports do not qualify in substance, procedure, and also just for the sheer reason that we have a bill effective September 1 that says now you serve reports under this statute, and obviously no one has done that since September 1st.

So I think, though, we are in agreement that the cancers are different. If there is an asbestos or a silica related malignancy and that report has already been served, why would a defendant transfer that case and go through a meaningless procedural nightmare to get that case into the MDL knowing it's coming right back. So for the malignancies it really makes no sense at all. So I do think there is a bright line in that regard between the malignancies and the nonmalignancy.

MR. BLEVINS: I think that there are some defendants that are going to transfer every case they can into the MDL for the sole purpose that once it gets there you've got to slog your way out, and with 18,000 people lined up to do it, it's just -- but again, that's why I'm

going to serve my reports ahead of time.

CHAIRMAN BABCOCK: Yeah. Nobody in this room, but maybe there's some people out there.

MR. BLEVINS: Somebody somewhere. There's always someone.

CHAIRMAN BABCOCK: Okay. Any other questions?

MS. SWEENEY: What are we being asked to do?

CHAIRMAN BABCOCK: Excuse me?

MS. SWEENEY: What are we being asked to do?

CHAIRMAN BABCOCK: Right after the afternoon break we're going to go through the subcommittee's proposed rule, as we always do, and beat it to death and talk about it endlessly and take multiple votes on the same issue.

MR. BLEVINS: Would you say you won't need any further assistance from the active Plaintiff and Defense Bar?

CHAIRMAN BABCOCK: Well, no, that would not be fair to say. You're not prisoners here, but if you want to stay and comment we welcome your comment.

HONORABLE JAN PATTERSON: You are free to go, as they say in --

CHAIRMAN BABCOCK: Let's take a 10-minute break.

(Recess from 3:33 p.m. to 3:48 p.m.)

CHAIRMAN BABCOCK: We are talking about the existing provisions of Rule 13.1, and there is a redlined version of 13.1, and Tracy better listen to this because it's her deal. We're starting.

HONORABLE TRACY CHRISTOPHER: Oh, sorry. I apologize.

MR. LOW: Tracy said she's going to do what she wants to.

CHAIRMAN BABCOCK: Judge Christopher, we're talk being 13.1, and there are some proposed revisions. We've already had a suggestion made as to 13.1(c). Is there any discussion beyond the comments we've already received about changing the language at the end of 13.1(c) with respect to these proposed changes?

HONORABLE TRACY CHRISTOPHER: Well, we are keeping the "filed before September 1" in there?

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Yeah. All right. If there are no comments on that then let's move to additional provisions to Rule 13, and this is I think is all new drafting, right, Mike?

MR. HATCHELL: Yes.

CHAIRMAN BABCOCK: All right. Should we

just take it subsection by subsection? I think that's the only way to do it.

HONORABLE TRACY CHRISTOPHER: Chip, can I just --

CHAIRMAN BABCOCK: Yes.

HONORABLE TRACY CHRISTOPHER: I think in the interest of time that maybe what we should first do is kind of discuss globally the severance issue --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: -- and kind of get a feel of the committee on the best way to deal with it. And then, you know, because you'd have to rewrite it, you know, if you did things individually, so I think the severance issue would probably be the most important thing to discuss and get a sense of the committee as to where we need to go on that and then maybe the deadline, or maybe the deadline first.

CHAIRMAN BABCOCK: Deadline first?

HONORABLE TRACY CHRISTOPHER: I know that Justice Hecht was worried about that because just in terms of getting enough notice to the Bar if we do impose a deadline. So maybe the deadline should be first, whether we should put deadlines in here for filing these transfers.

CHAIRMAN BABCOCK: Right. Okay. Well,

let's talk about the deadline issue first then. Justice Hecht, what was your view on deadlines?

HONORABLE NATHAN HECHT: Well, I don't have one as to what they ought to be. I was just concerned that we have enough time to adopt something and publish it to the Bar and get some comments on it.

CHAIRMAN BABCOCK: Well, if we approve this rule today you'll have it done by Monday, right?

HONORABLE NATHAN HECHT: Right. Before in House Bill 4 we put some rules out without comment, other than what had been received here, because we thought that House Bill 4 required that, and the leaders of the Legislature confirmed that and so then that's what we did. We took the view that the specific provisions of House Bill 4 that said "the Court shall adopt rules" to trump the general rulemaking statutes, but I think the comment period for Rules of Judicial Administration is 90 days?

MS. HOBBS: 120 days.

HONORABLE NATHAN HECHT: It's 120 days, so it's going to be a long time. I mean, if we made the October *Bar Journal*, which would mean we have to be done in two weeks, then the earliest they could take effect ordinarily would be February the 1st, which --

CHAIRMAN BABCOCK: Day after the first deadline.

HONORABLE NATHAN HECHT: Yeah, right. Which I gather -- well, I mean, I think we need to factor that into our discussions. I understand some thought that the deadline should be sooner and some questioned should there be any at all, but if we're going to -- we're either going to have to say that this statute requires -- just requires us to act more quickly than the Government Code and go ahead and do it or wait and make the deadlines consistent with that waiting, which would make them probably May or -- May or June.

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: Which I take it a lot of people think would be too long, so we have to keep in -- we have to consider how important it is to comply with the usual rulemaking procedures versus getting something going.

CHAIRMAN BABCOCK: When you implemented the House Bill 4 changes did you get a lot of --

HONORABLE NATHAN HECHT: No, we got no comments.

CHAIRMAN BABCOCK: No comments. No criticisms for doing that?

HONORABLE NATHAN HECHT: No, we didn't get any criticism, and we didn't get any comments on the rules particularly, and we didn't change any of them, but

because it was the first time I think ever that we had done that we did confirm with the Lieutenant Governor and the Speaker and the committee chairs that that's what they anticipated would happen, and they all said "yes," and we had -- we got a lot of comment out of this committee, so we felt pretty secure in doing it that way.

Some of these issues are a little more troublesome than the ones that we dealt with in House Bill 4, so I don't know what the Court will think about it, but I would like to hear among the comments how important it is to have something like a November 30, December 31 deadline versus should the Court go through its usual process.

CHAIRMAN BABCOCK: Okay. Well, let's talk about that. It think it's -- in the proposal it's November 30, 2005, and then January 31, 2006.

MR. TIPPS: November 30 is in the statute.

CHAIRMAN BABCOCK: November 30 is in the statute.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: And then the January 31, 2006, is in the rule and then February 28th, 2006, those are the two. What are people's views on how important it is to have some deadline and, secondarily, how important it is to have that deadline? Yeah, Justice Gray.

HONORABLE TOM GRAY: Since I feel relatively certain I will end up in the minority on the next vote --

CHAIRMAN BABCOCK: Have you won anything today yet?

HONORABLE TOM GRAY: Oh, yeah, I think one or two. But, no, I am an advocate of not requiring the two additional deadlines at all; and the two deadlines that are not in the statute that are in the rule, as I understand it, is the removal of a case from a trial court where a compliant report is not -- not served and then the motion to remand that case back to the trial court, what time period that has to be filed in. Is that generally correct, Lisa?

Okay. So those are the two deadlines that are not in the statute that would be in the rule. The reason I don't think that a deadline is necessary nor advisable is that if some of these get removed, the MDL trial court rules on the report, they work their way on up through the system. What is the harm with a case that is sitting in a trial court somewhere in the state, sitting there as opposed to the MDL trial court waiting to be processed?

My only concern in that is that these cases, if they get active or if somebody tries to get a trial setting, I understand that there may be some gamesmanship

of wait until the last minute to file a removal because you didn't file the report and test whether or not the report is compliant on the eve of trial; and to me we can fix that by requiring that a report, or excuse me, a removal be undertaken a certain period of time before a trial setting is obtained; and there would be a -- some requirement in that to communicate to the other side that you're about to request a trial setting.

But if you -- basically these cases that don't have the reports are just going to sit there, and they're going to sit somewhere, and you avoid the severance issue, you avoid the cost issue, if you just let them sit in the trial court and then take the ones that you want to, whether, you know, the defendant wants to test the -- or whether or not the report is compliant, and then those that -- you know, if you want to warehouse them in Beaumont, leave them in Beaumont, I mean, until they get active and something needs to be done about the report.

And I think the concept of the statute is that, yes, ultimately they will all get to the MDL court if they are not able to file the report, and if we set these deadlines, to me there's the critical question of, well, what happens if the defendant doesn't remove it? Later there's not the compliant report, but they can't

remove it to test it or they can't -- you know, they can't do anything with it at a later date, so I just don't think you need those two deadlines in the rule.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, these cases are pretty much set on a weekly basis throughout the state, so in any given time you will have a trial setting, and if you don't have some -- so I think -- I kind of toyed with the idea that it has to be a certain number of days before the trial setting, but I didn't really think that would be a very workable situation either and would probably be even harder for the defendants to keep track of than to require something in the future.

Plus, if the defendant doesn't remove and asks me whether the report is compliant, the case goes to trial. So that is the potential harm. I mean, if no one brings it to me and says -- you know, or the potential danger. So these cases are set, the defendants will be in that position, or the plaintiffs will be in the position of thinking, well, they're not going to contest it, day of trial they remove it. I mean, there is nothing in the statute that stops the trial court. The only thing that stops the trial court is bringing it up to the MDL. So, I mean, that's why we thought a deadline was necessary.

MS. HOBBS: Then if you miss your deadline

then your next trial setting is going to be, what, a year later or more if it was improperly removed to the MDL?

HONORABLE TRACY CHRISTOPHER: Well, in Harris County it is, but that's not true in other counties.

MR. TIPPS: Chip?

CHAIRMAN BABCOCK: Yeah, Steve.

MR. TIPPS: For the reasons that Tracy states I tend to think that probably defendants are going to get these cases transferred whether there is a deadline or not, but I would also point out that House Bill 4, which authorized the MDL, did not contain any deadlines on -- or I guess Rule 13 currently doesn't contain any deadlines on transfers, but in Judge Davidson's case management order in the asbestos litigation he has imposed deadlines, even though they're not authorized by the statute, and I would predict that if we choose not to put deadlines in the amended Rule 13 that at least Judge Davidson and perhaps Judge Christopher as well are going to come up with deadlines themselves.

HONORABLE TOM GRAY: My response to that on the subcommittee was then we need to impose a rule that they can't do that. And I didn't make reference to this and I intended to, under the deadlines for -- excuse me, under the 4590i procedure where it's somewhat similar

where you have to file a medical malpractice report, we had a case come through our court that the Supreme Court then ruled in where a plaintiff argued that they should -- that the defendant should be estopped from arguing a late -- a report was filed late, and they made an estoppel argument.

The Supreme Court said that there were no deadlines in the statute by which the report had to be contested and, therefore, there were no deadlines by which the report had to be contested. Now, this was under the original one, not the current version, which does have the deadlines. So I'm a little bit leery to venture off into setting deadlines in a statute that did not set deadlines for that type testing of the compliancy of the report; but like I say, because of the persuasiveness of Judge Christopher on the issue, I just think that you don't need them and there are some real benefits to not having them because you're going to drag this -- or let this law develop over a longer period of time if you don't cram it all into the first 90 days or 120 days.

CHAIRMAN BABCOCK: Bryan, where were you on this? Are you a pro-deadlines person or an anti-deadlines person?

MR. BLEVINS: I'm an extremely pro-deadlines person, and it really goes because of the very technical

nature of the bill. There is a lot of room for disagreement among the parties as to whether or not a case qualifies or doesn't, and I think it will be very disruptive to cases that are qualifying to have to continuely compete out in the court system with cases that may or may not be. The whole point of the statute was to clear nonqualifying cases out of the way of the qualifying ones so that the qualifying ones could get to trial and get appropriate compensation, and now they're going to have to continue to compete in the dockets and on the courts' dockets over time until someone says, "Oh, we're going to trial. We're going to shoot you over to the MDL." Very difficult.

CHAIRMAN BABCOCK: Kay, what about you, pro or con?

MS. ANDREWS: I don't know that I have a strong feeling. I think whatever the deadline is it needs to be at least March, April time period, and I do feel strongly there must be some kind of a good faith exception. There are just too many unknowns.

CHAIRMAN BABCOCK: I'm sorry. I couldn't hear it. Maybe she could, but I couldn't hear you.

MS. ANDREWS: I'm sorry. I was saying that I don't know that I'm that strongly against a deadline, but I think if there is, in fact, a deadline imposed it

needs to be further out than what's in the proposed rule and there should be a good faith exception or some kind of not a bright line. You can come in with your stragglers with some kind of good cause exception or some such and say, "Here's a late one."

CHAIRMAN BABCOCK: Okay. Thank you. Yeah, Judge Bland.

HONORABLE JANE BLAND: I think if we were talking about a new MDL or something, you know, this idea that it needs time to develop might make sense; but we're talking about asbestos and silica cases that have been hanging around for 20 years; and some of these -- I mean, the type of case has been hanging around for that long, and some of these particular cases have been on file since -- you know, for 10 years; and the whole idea behind an MDL is to get a handle on these cases and, like Mr. Blevins said, prioritize them; and so it doesn't make any sense to me at least to have a rolling series of events that occur and not a deadline where then at that point the MDL judge can get a handle on what is existing out there before, you know, September 1, 2003 --

CHAIRMAN BABCOCK: Bryan, how do you --

HONORABLE JANE BLAND: -- and get them under control.

CHAIRMAN BABCOCK: Bryan, how do you feel

about the good faith exception?

MR. BLEVINS: I would like finality, but I understand why it might be suggested that there should be a good faith exception. I would prefer for that good faith to be vested in the judge rather than in the parties, but generally speaking, I would like to see finality.

CHAIRMAN BABCOCK: And what about the current deadlines? Are they too tight, too loose, just right?

MR. BLEVINS: Well, putting aside the issue of notice --

CHAIRMAN BABCOCK: Yeah, right.

MR. BLEVINS: -- on the rules that would impact that, my suggestion was that I would make the deadlines the same whether it's for a nonqualifying report or a no report, and I would probably go out to the nonqualifying report of 90 days. Again, in theory, I think as the committee proposed, we had from September 1st to December 1st, 90 days, to get our qualifying reports filed. They have 90 days to transfer us and then we have 60 days, I believe, to rebut.

CHAIRMAN BABCOCK: Okay. And, Kay, you say you think that maybe the deadlines are a little too tight. How much more time would you think it would need?

MS. ANDREWS: Oh, March, April, something like that would be just fine, but I agree completely that we should just have one for whether there is a report or a noncomplying report, no report or noncomplying report.

CHAIRMAN BABCOCK: Okay. All right. Yeah, Judge Bland.

HONORABLE JANE BLAND: Why don't we try for the comment period and then do -- you know, allow the comment period so we don't have to worry about, you know, not complying with the Government Code and then add 90 days to that, and that will put us about to where you guys think it's about right? No?

MS. ANDREWS: Okay.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: It said 120 days and 90 days.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Did you say that you had a bunch of the asbestos cases?

MR. BLEVINS: That I have some?

MR. DUGGINS: Yeah.

MR. BLEVINS: Yes, sir.

MR. DUGGINS: I mean, out of the 40,000 how many do you think you have?

MR. BLEVINS: That's a good question.

Roughly, again, total picture as opposed to qualifying versus nonqualifying?

MR. DUGGINS: Right.

MR. BLEVINS: 9,000.

MR. DUGGINS: Have you spoken to the other people who have got -- any of the other attorneys who are prosecuting the remaining asbestos cases, and do they share your views generally that you've given today?

MR. BLEVINS: Well, unfortunately I wasn't invited to come today until like yesterday or the day before. I sent out an e-mail to the people that I normally communicate with, other plaintiffs' attorneys on the liaison committee. I did not get any other responses back to my e-mail that I was going to be here today.

I know that several people made comments through TTLA, and actually, none of them addressed the timeline/deadline issue, but I can't -- I can't imagine why -- I'm not saying that I can think of every reason, but it's hard for me to understand why you wouldn't want a deadline from the plaintiff's perspective because that's the only point where you're going to know which cases you're fighting in and out of the MDL versus which cases you go to trial on. Until we have that deadline we will continuously be in that limbo of will I be actually able to get to trial on this case or do I need to be preparing

to fight it out of the MDL? I think most plaintiff's attorneys want to know what do they have to work on versus what do they not have to work on.

MR. DUGGINS: Well, is it possible to set a deadline after the trial request is made so that if you're ready to go in and seek a trial setting the defendant then has so many days to act or they waive the right to go to Tracy or the other judge?

MR. BLEVINS: The concern I have with that is a couple. One is, is, for instance in Harris County, I'm not sure this is going to continue in Harris County, but in Harris County we don't actually seek trial settings. On a given trial month, the docket -- the judge tells you you're going to trial on your asbestos cases in that month. Sometimes we don't get docket notices -- I've gotten docket notices inside of 45 days of cases going to trial in that particular month. That's one issue.

Of course, as we know, all of the courts, I mean, why would the judges, the trial court judges, want to have these cases sitting on their docket that they can't try? They have an obligation under the Supreme Court rules to move those cases. We're not always going to know whether that judge is going to give us three months notice, four months notice, six months notice, or a year notice of the fact that he intends for those cases to

move.

So although there are places we control when the cases go to trial, there are other cases where we don't. That I think -- and, again, we're not -- we're not fundamentally doing what I think that the Legislature intended, which is you can look at the legislative history, you can look at all the materials for why this was supposedly necessarily, and that was with all these cases competing for the courts' time and interest and resources and they don't need to be here anymore. We're going to legislatively say, "Nope, we're going to put you over here where you don't get to do that," and that way we know where you are, and that way the people who deserve to be in the court system have a free run at it, and that's why I think a deadline is important. I mean, if that's what we wanted then that's what we ought to get, and we ought to have those cancer cases shooting right to the top of that docket.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Chip, can I say this for the record, too?

CHAIRMAN BABCOCK: Sure.

HONORABLE TRACY CHRISTOPHER: Judge Davidson and I both sent our drafts to the asbestos steering committee and the silica steering committee back when we

first -- when I first did that, which was --

CHAIRMAN BABCOCK: July 25th?

HONORABLE TRACY CHRISTOPHER: Yes. And asked them for comments, and I've also sent them -- and we've also both sent them the subcommittee report as soon as we obtained that and asked for comments, and from the plaintiffs' point of view the deadlines are fine, and from the defendants' point of view they want them extended, but no one really talked about no deadlines at all; and most people thought that, you know, maybe the end of March would be a better deadline or maybe the end of April, something like that. So I want the Court to know that we are soliciting comment from the lawyers that would be most affected by this particular rule.

CHAIRMAN BABCOCK: Okay. It looks like you got a letter from Thompson & Coe representing 3M --

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: -- that talked about a March/April type deadline.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: But didn't say there should be no deadlines. Okay. Any other comments about deadlines?

Okay. Let's talk about severance. Judge Christopher, what are the competing positions on

severance, if you can articulate that?

HONORABLE TRACY CHRISTOPHER: If I can articulate them. The first and most expensive way to do it would be to have every multi-plaintiff case severed into individual plaintiff cases so that we could keep track of them from an appellate viewpoint or any other viewpoint in a logical manner, but that would be an extremely expensive way to do it, but that way they would have a trial court cause number, and so they wouldn't get lost down there in the trial court in terms of when they come up to the MDL court. They would have a new MDL court number so they wouldn't get lost when they were up in the MDL, and if they got remanded back we've got the trial court number to refer to.

But it's -- as you've heard and you can imagine, it would be a very expensive proposition, and I don't know who should pay the costs associated with that, because not only do you have to pay the cost of severance but then you have to pay the cost to transfer each, so it's basically 165 here, 165 there, plus the cost of certified copies, times 40,000 potential plaintiffs. So that's one option.

The second option would be what Lisa said, which I didn't understand from the rule but might be a way to do it, would be to sever at the trial court level into

ones who haven't filed a report, would be like the A case --

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TRACY CHRISTOPHER: -- and ones that they want to contest the validity of the report, a B case, and then there would only be two extra costs at the trial court level and then they remove just those two cases to the MDL. So there would be two filing fees then at the MDL level. We would still have a little bit of question about what papers would need to be in the severed cases.

CHAIRMAN BABCOCK: Uh-huh.

MR. HATCHELL: But you couldn't do that, could you, if you didn't have deadlines?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: Right. Bonnie, on that proposal, is that -- the clerks think that's okay?

MS. WOLBRUECK: Well, I have been giving this some thought. It's either severing out a thousand plaintiffs and setting up a thousand files in severed cases, which is a very time-intensive, step-intensive issue, except we're getting the filing fee, would certainly assist that matter.

CHAIRMAN BABCOCK: That helps.

MS. WOLBRUECK: That would certainly help,

but the other issue then is on if I were sending a case with a thousand plaintiffs to Harris County, then Harris County has to deal with getting one case that has, you know, 500 of those plaintiffs in it, and that's an issue then for Harris County to have one filing fee and setting up all 500 plaintiffs and defendants.

So to answer your question, we haven't worked out that solution either. Either way it causes a problem on either clerk.

CHAIRMAN BABCOCK: Okay. Any other alternatives to severance then?

HONORABLE TRACY CHRISTOPHER: Well, the alternative that I think the Plaintiffs Bar doesn't like is to bring the whole case up and then let us sever the ones back who do qualify and are ready for trial.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Which --

CHAIRMAN BABCOCK: How do you feel about that option?

HONORABLE TRACY CHRISTOPHER: It might be the easiest, frankly, but I can understand how the plaintiffs wouldn't want that to happen because they're afraid all of these cases are going to get up here and it's going to be really hard for them to -- you know, it would kind of reverse the burden --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- if we did that because then it would put the burden on them to say, no, these are all complying people who never should have been brought up here to begin with, so I can see why the Plaintiffs Bar wouldn't like that solution.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: Do we have any idea, from Bryan possibly, how many -- what percentage of the 40,000 actually might be these that are ready to go to trial?

MR. BLEVINS: Well, I mean, I think our projections are substantially fewer than 40,000. Our projections number in the eighteen to twenty-five thousand. What you can pretty much count on, whether the number is 25 or the number is 40, is that roughly 75 percent to 80 percent are going to be nonqualifying or contested as nonqualifying. Is that a fair statement?

MS. ANDREWS: Of the nonmalignants, right.

MR. BLEVINS: And actually if you went all the way to where you just assumed that the defense will just contest every nonmalignant then the percentages goes to 90. About 10 percent of the cases will be malignancies. Rough numbers. So take your 40, take 25. It's a big number.

HONORABLE TOM GRAY: What I'm trying to figure out in light of what she's saying, is there a way that the Plaintiffs and Defendants Bar can reasonably identify that 10 percent of the cases that need to stay in the trial court, or not so much under this proposal stay in the trial court but immediately be remanded back to the trial court because we know that those are malignant and those are going to be the ones that we need out of the MDL like that.

MR. BLEVINS: I would have thought so before getting involved in just a discussion a few minutes ago because I think the statute is clear that if you have a qualified physician who provides a link letter that this is an asbestos-related cancer then that's the end of the discussion and it goes back.

If the defense decides to argue that, no, you have to have a Robinson hearing, you have to have a Havner hearing, you have to challenge the actual validity of the opinion, then the answer is, no, there is no way we're ever going to agree on which cases come back and which cases stay.

MS. ANDREWS: I don't think that that's the issue. I think really what the issue is -- I think you're exactly right. If you look at the malignancies and the nonmalignancies, on malignancy cases, those, like I was

saying earlier, it doesn't make any sense for me to undertake the time and the effort to get it to the MDL knowing they're coming back. The only time -- and if, in fact, there were a way prior to December 1st to say, "Plaintiffs, identify all your malignancies that are out there" and then those you have the opportunity to decide, you know, if for some reason they really don't have a compliant report, fight about that, but we'll all agree that those are going to be severed and stay where they are.

If there was a way to address that, it really would take care of the problem, but part of the problem is we discussed earlier today, if you've got a 30-plaintiff case, as a defendant, on some of those I may not have a diagnosis. I may not know what the diagnosis is because I haven't received diagnosis. There is no requirement that it go in the petition; and if I don't have a discovery answer, discovery responses on that plaintiff, I may not know what the disease is. So that plaintiff may be transferred, and then once it gets into the MDL then the complying report is filed and they say, "Oh, but hang on. He's really a malignant." Okay. Then he goes back.

MR. BLEVINS: If I could, the problem is, again, I'm not -- I don't really like the idea of severing

all these cases in Jefferson, Orange, Nueces, wherever you might be, but if you move a block or if you move the whole, it doesn't solve the problem. Once it's to the MDL every case is going to have to be dealt with individually. I'm going to have to file an individual motion for remand to get each of my individual cases back that shouldn't have been transferred in the first place. Under what number do I transfer that, and then when I do get it back, where does it go?

The Daniels consolidation got moved to Harris County. Where does Mr. Williams go back to? He has no home anymore. This is what happened to me in that other example I gave you. I didn't have a place to go home to, and that's part of the problem, so I just -- you're going to have to have an individual opportunity in Harris County and then you're going to have to have an individual place to go back to or you're going to have to have a consolidation to go back to, but that may not always be the case because in some of these instances you're only dealing with a 10-case group. The Williams 10-case group, but Mr. Rogers in the Williams group gets to come back, but Mr. Williams doesn't get to come back. Does Mr. Rogers go back to the Williams case group and Mr. Williams is still stuck in the MDL?

HONORABLE TOM GRAY: Can you identify now

Mr. Rogers and get him severed out of Mr. Williams' case before that group gets transferred?

MR. BLEVINS: I can clearly identify my malignants. That's the easiest step.

HONORABLE TOM GRAY: And get them severed out?

MR. BLEVINS: And get them severed out from the other consolidations. That still leaves the argument of qualified nonmalignant versus the clearly not qualified nonmalignants, and those people -- and within that group you've got, again, people who might meet the criteria of the bill versus those people that we would argue meet an exception that has to be ruled on by Judge Christopher or Judge Davidson. So once that group gets to the MDL they still have to be treated individually.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Section 90.009 says that "Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial." Okay. Is it the thought that -- to take an easy case, if there were five plaintiffs in a single case and they were all malignancies but the defendant would not agree to a single trial, that the other four would have to be severed out or that there would just be separate trials under Rule 174?

MR. BLEVINS: I think that -- and I have this situation currently right now in Jefferson County where we had a group of cases that were set for trial for August 22nd, and only a small part of those cases actually went to trial and were resolved in voir dire, and then the judge agreed that we would set the remainder of the cases at a certain point in the year, and I think the defense perspective was that each of those cases has to be severed out and given its own cause number and then called to trial. That was the position they took.

HONORABLE NATHAN HECHT: And, well, would there be -- other than the filing fee would there be any reason not to sever the claims, the plaintiffs, as opposed to just trying them separately in the same cause of action?

MR. BLEVINS: Other than the filing fee and then this copy cost, there's the fee and then there is this copy, which gets to be fairly significant. When you had a consolidation in play for a number of years there may be quite a bit of paper relative to that, and so that becomes an issue. As we have done it in the past, at least, what has happened is that if a group that's ethyl consistent has been brought out for trial then that is presented to the court, the court severs that group of cases, gives them their own cause number such as ab, bb,

cb, whatever it is of the original cause number, and then tries that after an ethyl consideration.

HONORABLE NATHAN HECHT: And with respect to the paper problem, can counsel agree that these are the papers that go in the severed filed and save any certification expense just by duplicating them at commercial rates?

MR. BLEVINS: I'd like to say that we could agree, and I think Kay and I could agree, but I'm not sure I could agree with --

HONORABLE NATHAN HECHT: Some.

MR. BLEVINS: You know, everybody has a slightly different philosophy about this stuff, and there are some that are easier to agree with than others. It's really going to depend on whose cost it is.

HONORABLE NATHAN HECHT: Yeah.

MR. BLEVINS: If it's my cost then I'm going to have a lot more trouble getting the defendants to agree.

HONORABLE NATHAN HECHT: Yeah.

MR. BLEVINS: If it's the defendant cost they might have more trouble with me at certain times getting me to agree. It's unfortunate, it's reality.

HONORABLE NATHAN HECHT: Is there any -- do there turn out to be any significant reasons not to agree?

I mean, surely you can agree that this motion or this order or whatever was part of this case and ought to be in it.

MR. BLEVINS: I think that the parties can generally agree to some relate back to, or papers filed in such and such apply equally, such as there is a master Jefferson County docket, there is a master Daniels docket. I think those things can be done, but I will tell you that there are certain firms, plaintiff and defense, where agreements are harder to come by than others. Fair statement?

HONORABLE TRACY CHRISTOPHER: Well, and can I just say that recordkeeping in these cases is always very difficult, and I think we were talking about at the break, you know, somebody will be nonsuited, somebody won't be nonsuited, one plaintiff will nonsuit one defendant, defendant will go into bankruptcy. So, you know, figuring out what the record is truthfully is a hard thing in these cases.

HONORABLE NATHAN HECHT: From the clerk's point of view, if the parties can agree that this is the record in the severed case, this stack of papers, please file them, is there any problem with that?

MS. WOLBRUECK: Probably not. I'd have to think through that a little bit more, but as long as

there's something in writing that the parties agree.

HONORABLE TRACY CHRISTOPHER: I know it's our practice in Harris County only to do certified. I don't know whether there's some statute that they think requires that.

MS. WOLBRUECK: Probably Rule 89, the transfer rule, actually. If the clerk transfers a record it shall be -- either you send the originals, and if not, just send the certified copies.

MR. BLEVINS: If it's going to be the parties agree then please consider that the plaintiff counsel typically can agree for all of the plaintiffs, but there could be 60 plus defendants counsel that we have to get to agree.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. TIPPS: Bryan, do you have any idea how many pre-September 1, 2003, multi-plaintiff cases are pending?

MR. BLEVINS: I know we had this discussion a little bit. We know that Harris County, which is I think the second or first largest filing county, has severed all of their cases and required individual filings. I know that Dallas County at a point in time went to all future filings, but they didn't require a severance of past filings, and that's part of the problem.

Different counties assimilated group limitations, but I think Harris County is the only one that actually went back in time and whacked everything up that was there.

So the answer is "no." I'm going to guess that probably 60 percent to 70 percent of the pre-9-03 cases are in some form of group consolidation. Again, between ten and thousands.

MR. TIPPS: So -- and when you use a number, 40,000, are you talking about 40,000 plaintiffs?

MR. BLEVINS: I'm sorry. I didn't use 40,000, but whatever it is the -- 40,000 individual cases I think is the highest estimate that I've heard.

MS. ANDREWS: Plaintiffs.

MR. TIPPS: And that's cases, not plaintiffs?

HONORABLE TRACY CHRISTOPHER: No, plaintiffs.

MR. BLEVINS: Plaintiffs.

MR. TIPPS: And you're saying that 70 percent of those plaintiffs are members of a multi-plaintiff group?

MR. BLEVINS: Yes. 70 percent of whatever number it is, but yes, they are part of some consolidation ranging from ten to a thousand. Kay, do you agree or disagree?

MS. ANDREWS: I would say higher than that when you're talking pre-9-1-03. Dallas' practice was 10-plaintiff cases and elsewhere in the state other than Harris County it's 10 plus cases. So I'm going to say it's higher than 70 percent of the old cases are multi-plaintiff cases.

MR. BLEVINS: I can't figure out how much Harris County that is. That's what I can't figure out.

MR. TIPPS: But there are thousands of multi-plaintiff cases?

MR. BLEVINS: Absolutely.

MR. DUGGINS: And who paid the severance fee on the Harris County?

MR. BLEVINS: Plaintiffs did.

MR. BOYD: I have another numbers question on a little different topic. Earlier you said that 80 percent of them you thought would be taken to the MDL, 70 to 80 percent of the pre-9-1-03 cases. Is that assuming that defendants are correct that you have to re-serve any old report? In other words, if the statute had said that a report, an ILO form, or whatever report served back in '97 was adequate, would you still think the number would be that high?

MR. BLEVINS: My percentages are really based on historical disease mix percentages, and roughly

10 percent of the filed cases are malignancies, roughly 10 to 15 percent of the nonmalignant cases are impaired. Whether they have a qualifying report under the bill or not, they are impaired and, therefore, at least have an opportunity to have a qualifying report. So that's why I generally perceive that 75 to 80 percent are going to get transferred, more for the fact that they are unimpaired and they are going into the inactive docket.

MR. BOYD: So you're sort of agreeing they would be rightfully transferred under the purpose of this statute, not just transferred because of the gotcha that could occur with the report filing?

MR. BLEVINS: I agree that's true. 70 percent plus are going to be correctly transferred for purposes of the statute in the inactive docket, but keeping in mind that even then we are going to be fighting them out under exceptions and so forth and so on. It's the defense full employment act.

CHAIRMAN BABCOCK: Kay, did you have anything to add to that?

MS. ANDREWS: No, not really. I think it's important, though, to make the distinction between what gets transferred. I mean, it's unclear to either of us what percentage will be transferred. Potentially 99 percent will be transferred, but I think the point that

Bryan is trying to make is that of those it's reasonable to expect that 10 percent will go back because they are malignancies and another 10 to 15 percent will meet the impairment criteria and then will go back to the trial court for trials.

MR. BOYD: I thought they could only be transferred if they either did not have a qualifying report or -- let me back up. If they did not have a report or the report that they did have was not qualifying under the new statute, but you're saying you're going to transfer all of them and they --

MS. ANDREWS: I'm not saying I'm necessarily going to transfer them, but like I said earlier, I can certainly foresee that there will be cases that my office may transfer because I don't have a report and then find out that some report may have been filed that I don't have or that it's a malignancy and I didn't know it was a malignancy. Those issues are going to come up.

HONORABLE STEPHEN YELENOSKY: But he's asking the converse. Will you transfer something knowing it's a malignancy or will another attorney allow the transfer knowing it's a malignancy?

MS. ANDREWS: If it's a malignancy that already has a qualifying report I don't intend to transfer it.

MR. BOYD: But you think that's a very, very, very small percentage, not 10 or 12 percent?

MS. ANDREWS: It's just shy of the 10 percent probably.

MR. BOYD: Okay.

CHAIRMAN BABCOCK: Any other comment about -- or discussion about the severance? Tracy, how do you think we ought to try to get the sense of the committee on the various proposals?

HONORABLE TRACY CHRISTOPHER: I guess the first thing I would ask is whether people think each case ought to be severed into individual plaintiffs, you know, just as that would be the right rule to do.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And then figure out who does it and who pays for it.

HONORABLE NATHAN HECHT: And let me just ask, I mean, is there any other very practical way to do it? It looks to me like we're so worried about the costs that there's probably just no other way to do it.

HONORABLE TRACY CHRISTOPHER: Well, now, maybe the asbestos docket is different, but I think that we can certainly group a whole bunch of people in one case, and nothing is going to happen to those people forever. They're never going to come out of cold storage,

and there's really no reason to make them 2,000 separate cases. But the question is how do we find those people and how do we put them in one case; and, you know, not that Harris County wouldn't like all the new fees, because I'm sure they would if they were separate plaintiff cases.

MR. LOW: But when would you sever them, because Administrative Rule 13 only pertains to the multidistrict? If they're back in the district court and they're sitting there, are we telling the district court that he must then sever all of them?

HONORABLE TRACY CHRISTOPHER: Right. I think that was --

MR. LOW: That would be more than Rule 13. That would be some other rule.

HONORABLE TRACY CHRISTOPHER: I think that was the idea of the Rule 13, that the severance would occur, in the committee draft, at the trial court level.

HONORABLE TOM GRAY: Chip, in answer to Justice Hecht's question, it seemed to me based upon the answers of the folks that are most familiar with these cases that they have the ability, if we give them enough time before implementation -- I guess I'll choose that word. In other words, they can identify those that really don't need to go to the MDL court, and if they know that time frame to get that done and they don't get it done,

then they know that case is going to wind up over at MDL, and as Bryan says, they're going to have to fight it out of the MDL back to the trial court.

Based on what Judge Christopher has said, it seems like then the best thing to do is to transfer the blocks of cases, the entire cases, and then recognizing that those that can be identified and severed because they are the malignancies have already been done so at the trial court level and then transfer the rest of them up to the MDL and kick them back one at a time. Does that make sense at all, Judge Christopher?

HONORABLE TRACY CHRISTOPHER: Kind of. The one thing I was thinking about from Brian's point of view in terms of how you get it back to Orange, let's say, when as far as Orange is concerned this case is gone. I mean, we could adopt some mechanism where Orange just gives it a new cause number --

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TRACY CHRISTOPHER: -- in this rule, and that as long as we keep track of the fact that it was in Orange and in a particular district court, we can send it back, and Orange can just open up a new file in that particular court and give it a new number. I mean, because that's the only thing we really have to keep track of, is the county and court. You know, the original

number is kind of meaningless, although I suppose at some point we would want to know what the original file date was in case the substance of law differed. So, I mean, I think there's ways to deal with the remand issue.

MR. LOW: Tracy, in Federal court on the multidistrict if they send it back, they send it back to the court it came from, don't they?

HONORABLE TRACY CHRISTOPHER: Right. Right. No, that's why I'm saying.

MR. LOW: So why don't we just do the same thing? I mean, Bryan talked about not having a home. I'd say home is where you started out.

HONORABLE TRACY CHRISTOPHER: But the problem is Orange would say, "Well, Cause No. 12345 is closed. We have a final judgment in Cause No. 12345, so who are you that now is coming back?"

CHAIRMAN BABCOCK: Well, and part of 12345 may still be at the MDL and only part of it is going back.

HONORABLE TRACY CHRISTOPHER: Right. Right.

CHAIRMAN BABCOCK: They say Rogers is Rogers.

HONORABLE TRACY CHRISTOPHER: But I think mechanically we could do some sort of --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- tell the

trial court what to do with it when it goes back. It just wouldn't follow the usual sort of numbering system that we had before.

CHAIRMAN BABCOCK: Yeah. Ralph had his hand up and then Carl.

MR. DUGGINS: Well, I was going to ask Justice Hecht again about that provision you just read a few minutes ago. I mean, doesn't that impact this question?

HONORABLE NATHAN HECHT: Well, I think it impacts it some, because the response is, well, we're going to have to sever those cases, but as Tracy says, then there's still going to be a whole lot of cases that might be kept together and nobody would ever care and it wouldn't cost a lot of money. If you're going to try them then it sounds to me like they've got to be severed.

CHAIRMAN BABCOCK: Carl. Sorry.

MR. HAMILTON: From the clerk's standpoint, do they -- I assume when they transfer a case they send copies, or do they send their original papers?

HONORABLE TRACY CHRISTOPHER: Right now they're sending the originals in the MDL.

MR. HAMILTON: They are?

HONORABLE TRACY CHRISTOPHER: Uh-huh.

MR. HAMILTON: They're keeping nothing?

HONORABLE TRACY CHRISTOPHER: They're keeping nothing. We did that to cut down on costs to begin with, so that's why they sent the original to us.

MR. TIPPS: And the reason for that is that under the rule the case gets transferred, just as it -- so it leaves the court just like it would if it were removed.

CHAIRMAN BABCOCK: Or a change of venue or something.

MR. TIPPS: Or a change of venue.

MR. LOW: They don't even keep a docket sheet?

HONORABLE TRACY CHRISTOPHER: No. They don't keep anything, and as far as they're concerned it's gone.

CHAIRMAN BABCOCK: Which is why Bryan is saying there is no home for the file or part of the file to go back to.

HONORABLE TRACY CHRISTOPHER: To go back to, right.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: Only because you're talking about court costs, just as a note, after December 1st there is an additional 37-dollar fee that goes into the judicial fund under House Bill 11 that was passed in the second full session.

HONORABLE TOM GRAY: On second thought I want to change that concept.

MS. WOLBRUECK: Just thought I would note it for the judges around the room.

CHAIRMAN BABCOCK: Yeah, Bryan.

MR. BLEVINS: I just had a question. Personally I would be thrilled to have the concept of a block of cases because I do agree that a large number of them are not going to move on any expedited time frame. Does the -- Judge, do you perceive then that as part of this rule there would be some instruction as to how the MDL court will handle individual case matters, or would that be something that you would anticipate being done in the CMO and between your court and the district court? Because once that group gets there, there is clearly going to be cases on an expedited basis where you have to file a motion to remand or a motion to remand based on the exception.

HONORABLE TRACY CHRISTOPHER: Right. No, I would think that you bring it up to the MDL and let the MDL work it out, figure out how to sever and send it back, but it sounds like you had a hard problem when that happened trying to go back to what county?

MR. BLEVINS: Back to Orange. Really it had more to do with the fact that -- I think it had more to do

with the earliness of the process and the fact that they weren't expecting to get a consolidation. Harris County had only dealt with individual cases for so long, and so there just was a confusion that I think if we handled the CMO -- I mean, I think it can be handled.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: You know, I guess the first vote would be whether people think we ought to have individual cases or not, or whether that cost is just not --

CHAIRMAN BABCOCK: Yeah, we'll do that. Ralph, last comment.

MR. DUGGINS: No, it's a question.

CHAIRMAN BABCOCK: Last question.

MR. DUGGINS: The Harris County rule that requires separate cases, was that a rule the courts came up with or where did that come from?

HONORABLE TRACY CHRISTOPHER: We just did it, and the plaintiffs paid it, and no one appealed us, and so that's kind of how it happened. Then from then on we had a standing order that required single plaintiff asbestos cases going forward.

CHAIRMAN BABCOCK: Okay. So everybody that is in favor --

MR. GILSTRAP: Chip, can I ask one question?

CHAIRMAN BABCOCK: Yes, even though I said Ralph's was the last question.

MR. GILSTRAP: Is the requirement to pay costs a death penalty for certain numbers of cases? Is it just going to end the case? "You pay the costs." "I give up."

HONORABLE TRACY CHRISTOPHER: It might. For some of these plaintiffs' cases that are inactive and, you know, who knows whether they will become active, and if the plaintiff had to pay that cost of -- I mean, it might be. I don't know.

CHAIRMAN BABCOCK: But the death penalty, it sounds like somebody is pulling the trigger, would it be the case would end for economic reasons that the case isn't worth 165 bucks?

HONORABLE TRACY CHRISTOPHER: Well, plus, you know, certified copies of pleadings can run you in the thousands of dollars.

MR. GILSTRAP: Sounds likes we're about to pull the trigger.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: Sounds like we're about to pull the trigger. That's my problem.

HONORABLE TRACY CHRISTOPHER: I mean, it's an issue.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: You know, for somebody right now who doesn't meet the statutory requirement, so his case is worth nothing at this point, and maybe in three years it will be worth something, maybe in 20 years it will be worth something. That's a lot of money for plaintiffs' attorneys to be fronting.

CHAIRMAN BABCOCK: Yeah, a couple thousand-dollar bet on the bet that maybe in three years the case might be worth something.

MR. ORSINGER: 20 years maybe.

CHAIRMAN BABCOCK: Or 20 years. Okay. Well, let's get a sense of our full committee on this. How many people think that despite the costs there should be individual filings? Is that the way to word it, Tracy?

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. TIPPS: In the trial court.

HONORABLE TRACY CHRISTOPHER: In the trial court. They would have to be severed in the trial court.

MR. TIPPS: My understanding is that the question is whether or not we should have a rule that requires --

HONORABLE TRACY CHRISTOPHER: Individual severances.

MR. TIPPS: -- trial judges, judges in whose court the case was filed in the first instance, to require severance of all the multiple plaintiff cases.

HONORABLE TRACY CHRISTOPHER: Right.

MR. TIPPS: Before it ever sees the MDL.

CHAIRMAN BABCOCK: Right. So that's what we're voting on.

HONORABLE TRACY CHRISTOPHER: Well, and/or severance of every case that someone wants transferred into individual cases. So it might not be necessary to sever absolutely every plaintiff. Say we have a hundred-plaintiff case and the defendants have looked at it and 75, you know, need to come up or they want to transfer 75. The other 25 could sit together pursuant to the local rule, I guess.

CHAIRMAN BABCOCK: It's going to be a second issue as to who is going to pay for it.

HONORABLE TRACY CHRISTOPHER: Right.

MR. BOYD: But is it a given that if that happens that there will be a separate filing fee for every one that gets filed in the MDL court?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Yeah.

MR. BOYD: We don't have any option of changing that in any way?

MR. LOW: And remember, the ones that stay there are going to be severed anyway because they have to be a trial, you know, there is a trial. So they will be separate. Every one of them will be separate as a practical matter.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Well, as a practical matter 90 percent of these cases settle.

MR. LOW: Yeah.

HONORABLE TRACY CHRISTOPHER: And you wouldn't need a -- you wouldn't need to sever if they all settled.

MR. LOW: No, I understand, but under the rule, the legislative act, you can only have one claimant.

HONORABLE TRACY CHRISTOPHER: For a trial.

MR. LOW: Per trial, and that's unless the parties agree.

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOW: And so you're looking at about 100 percent severance.

CHAIRMAN BABCOCK: Okay. So what we're voting on, just so we're clear, would be severance of every case -- severance in the trial court of every case that is sought to be transferred to the MDL, and we're -- and we're not voting on who's going to pay for that.

HONORABLE TRACY CHRISTOPHER: Person by person.

CHAIRMAN BABCOCK: Because it's going to be expensive. All right. So that's the vote. Severance in the trial court of every case where the defendant wants transfer to the MDL. How many people are in favor of that?

How many people are opposed to that? There was one person in favor and 24 opposed.

MR. TIPPS: And the clerks across Texas just smiled collectively.

HONORABLE SARAH DUNCAN: Feeling well represented.

CHAIRMAN BABCOCK: Or grimaced. Okay. So what's our next solution to this?

MR. HAMILTON: Can I ask a question?

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Based on what Tracy said, does that mean now that if out of the hundred plaintiffs you're just complaining about 75 you still transfer the whole hundred?

HONORABLE TRACY CHRISTOPHER: Well, that's the next question. What do we do if we have a hundred-plaintiff case and we're only complaining about 75? Do we sever at the trial court level, and do we sever

them into just like one case, or do we attempt to make a distinction between no report versus noncompliant report, which I would like to see, although it seemed like from our attorneys that perhaps that distinction is not as clear as I would think it is.

I mean, because I've already told my silica people that every medical report that I have looked at that was old is noncompliant. So, you know, I haven't made any rulings. I'm just giving them some advisory opinions in terms of what they need to get done by November 30th, and absolutely every preexisting report that they showed me didn't meet the statutory requirements. So, you know, I firmly suggested that they get themselves a new report.

CHAIRMAN BABCOCK: So the proposal would be to sever at some level into A, B, and C cases, being no reports, noncompliant reports, and compliant reports.

MS. HOBBS: Or some categorical severance.

CHAIRMAN BABCOCK: Or a categorical severance of some way.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Is that precise enough to vote on?

MR. TIPPS: Well --

CHAIRMAN BABCOCK: Steve.

MR. TIPPS: Are we still talking about this taking place in the trial court as opposed to the MDL pretrial court?

CHAIRMAN BABCOCK: That's why I asked the precision question.

MR. TIPPS: Because I think that's a big issue.

CHAIRMAN BABCOCK: Which would be better, Judge Christopher? Would it be better at the trial court level or the MDL level?

HONORABLE TRACY CHRISTOPHER: Well, you know, it's just really hard for me to say which one would work most efficiently, to tell you the truth, because I don't know how many multi-plaintiff cases we're talking about, I don't know how many people are really ready to go back for trial. I mean, the malignancy estimates in the asbestos is 10 percent, so they know they're ready.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: We have no malignancies in the silica.

CHAIRMAN BABCOCK: And who is going to make the decision about whether the report is compliant or noncompliant?

HONORABLE TRACY CHRISTOPHER: That's the MDL judge's job.

CHAIRMAN BABCOCK: Okay. So you would have a bin. A case would come up to you from Williamson County that would have 75 people in it and you would throw -- the no reports would be easy to throw into the A bin.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: And then you would physically have to look at the other, you know, say, 60 and say, "Well, this one goes in the B bin, this one goes in the C bin."

HONORABLE TRACY CHRISTOPHER: Right. I mean, to a certain extent having the trial judge -- having the whole case go up and having the MDL judge do it makes a little more sense because that way if I do decide somebody is compliant I just put them back in the group that's going back, and you don't have to have all separate numbers until you've got your kind of defined group. Okay. This group is going back, this group is staying in cold storage, but if I really have to look at and Mark Davidson really has to look at 20,000 reports, it's going to take forever.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Which from the plaintiff's point of view would be a disaster because they'll have some legitimate people, you know, ready to go and, you know, how do we -- there's really not a real

dispute about.

CHAIRMAN BABCOCK: Are the parties going to be able to help you a little bit by saying, "Okay, we agree that, you know, plaintiff 1 through 20, you know, the parties agree that the report is compliant or noncompliant" or whatever?

HONORABLE TRACY CHRISTOPHER: I think they could, but --

CHAIRMAN BABCOCK: Will they?

HONORABLE TRACY CHRISTOPHER: Yeah. And, I mean, I think -- and, you know, somebody had mentioned this would be a smart way to do it, is if the plaintiffs' lawyers were proactive and severed out their malignant cases now, you know, before this December 1 transfer starts happening and, you know, say to the -- say to the defense, "Look, I've got these 10 people. They've all got cancers, and you know, I've already produced a medical report to you showing they've got cancers, and, you know, don't touch them."

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I just -- I really am struggling with the best way to do it.

CHAIRMAN BABCOCK: Well, in response to -- sorry, Ralph, I'll get to you in a second. In response to Stephen's point, as between the trial judge and the MDL

judge, you wouldn't want the trial judge, you know, tossing these things into different bins because the MDL is going to have to redo that.

MR. TIPPS: Right.

MR. LOW: May have different results, too. One trial judge -- it wouldn't be uniform like --

CHAIRMAN BABCOCK: Right. Yeah.

MR. LOW: Trial judge kicks it out, it gets up to Tracy and she says, "No, wait a minute. This one is okay."

CHAIRMAN BABCOCK: Yeah. So that doesn't work. Ralph, then Lisa, then Mike.

MR. DUGGINS: Couldn't we set a date and say that by a certain date all nonreports go into the file to make your job and Judge Davidson's job easier where we know there is no report as a cold storage case and put that burden on the plaintiff's lawyer and the defense lawyer, give them both a certain period of time to segregate those?

HONORABLE TRACY CHRISTOPHER: I don't know if we can do that by a rule, but I mean, it would be a good way to do it if we could --

CHAIRMAN BABCOCK: If we could do it by rule. Lisa.

MS. HOBBS: Well, I in drafting the

severance provision had thought about the idea that we didn't want this fight in the trial court and that we didn't want the trial court putting everything in bins, and so we basically -- that's why we came up with that verified statement. If the defendant will say, "Look these cases don't have a report" or "These cases we think in good faith that these -- we should challenge these reports," then it kind of makes that pretty ministerial on the part of the trial court. If there is a verified statement that says this is the way it is then he orders a severance without trying to put it into the bins themselves and looking at the reports themselves. That was kind of the point in the draft.

CHAIRMAN BABCOCK: Yeah, but doesn't that require then separate filing? I mean, you get the defendant will say, "Yeah, I in good faith think that there is no report or doesn't comply," and so then there is a severance with all the costs attendant to that.

MS. HOBBS: Well, I would think that -- the way I envisioned it the defendant would say, "These plaintiffs have not filed a report. These plaintiffs have filed a report that we want to challenge," and then --

CHAIRMAN BABCOCK: Somebody is going to have to put them all in a bin or else they are all going to be separate.

MS. HOBBS: And the defendant would.

CHAIRMAN BABCOCK: The defendant would do that.

MS. HOBBS: Under this.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I think the idea of the bins is a good idea, but if the defendant takes the first cut at that sorting and you've got an A, B, and C and then you go up to the MDL judge, and the MDL judge re-sorts then you've got this tracking problem. We've already said the expense involved in doing individual cases is high, but we have to have some way to be able to say Mr. Williams can be traced back, you know, through a chart of somehow to the Daniels case; and if we do this sorting and then re-sorting we're going to make that complicated.

CHAIRMAN BABCOCK: Hatchell, Tipps, and then --

MR. HATCHELL: I think before we vote I would like to have a clear understanding by what we mean by no report cases because at the subcommitte level we took that at face value, meaning you open up the file and there's nothing there. What I think I'm hearing, and maybe Bryan confirmed this, is that do we mean by no report no report ever filed, no report filed after

9-1-2005, and do we mean no report filed after 9-1-2005, does that really require a legal ruling by the MDL judges that nothing prior to 9-1-2005 counts or as a matter of law they're all no good? I don't think we can decide how many bins we have until we have an answer to that question.

HONORABLE TRACY CHRISTOPHER: Yeah. I don't think we have an answer to that question. I mean, I think there are cases out there where the plaintiff has done absolutely nothing.

MR. HATCHELL: I understood Bryan to say that that's going to be like, what, teeny tiny?

HONORABLE TRACY CHRISTOPHER: It's pretty high on the silica docket. You-all are talking about the asbestos. It's pretty high on the silica docket.

MR. BLEVINS: And again, it depends on how you define nothing. Again, I think that there is a vast majority of the cases have at a minimum a x-ray with a B-reader report and what we call a short narrative, and that narrative says, "Based on what I see here it's consistent with silicosis or asbestosis." There are those properly who say that is nothing, but it's still a report. It's a diagnosisic report, and that's what I mean to say, that it isn't the absence of a report. It's the absence of a qualifying report.

The legal question that Kay raised is simply this: Does the mere passage of the law as written require the filing of a new report if, in fact, there has been a previous report that was served on the defendants consistent with Rule 21a that meets the requirements. My position in my looking at it is that I have reports that have been served consistent with 21a through interrogatories. Whether or not they meet the requirements is the question.

CHAIRMAN BABCOCK: Kay.

MS. ANDREWS: Let me say, Brian's firm typically serves the medical pretty early in the game, but there are other plaintiffs firms, who, just as in the silica docket, there are a huge percentage of the plaintiffs that I really don't have anything on, so --

HONORABLE TRACY CHRISTOPHER: You're at the cream of the crop here with Bryan and his firm in terms of preparing their cases and providing information and keeping track and --

MR. BLEVINS: How do I get a copy?

CHAIRMAN BABCOCK: Order a copy here.

MR. ORSINGER: It's now permanent government record.

HONORABLE TRACY CHRISTOPHER: But there is a large number that are not quite so well done.

MR. BLEVINS: If I could, you know, what I really think you-all are struggling with is which cases the parties agree. I think that's what you're struggling with, because I don't think Judge Christopher -- regardless of whether it is or isn't true, I don't think the MDL judges are taking the position that the trial court has any role to play in the evaluation of whether there's a compliant report.

So really what you're struggling with is, is there a system that you can impose that says the parties agree, bin 1, bin 2, bin 3. The reality to that is, again, Kay and I can probably agree. I doubt very seriously that I can agree with every defendant as to which cases are or are not. I mean, that's simply because there are some defendants that win by getting the case transferred in the first place regardless, and that's just the reality of it, but beyond that, I think that whatever rules you do -- and this is my response to whatever you-all do here, whatever you do, I feel fairly certain the Plaintiffs Bar will respond to it. You come up with a series of rules that says you're going to do A, B, and C, and that's simply going to say that I'm going to go out there and I'm going to sever my malignancies and serve all my reports. I will respond to whatever it is that you create here --

CHAIRMAN BABCOCK: Okay.

MR. BLEVINS: -- to try to enhance our position to keep as many cases as we can from the very competent and diligent hands of the --

HONORABLE TRACY CHRISTOPHER: I mean, just realistically, I mean, you're very kind, but when you're talking about 30,000 plaintiffs landing in -- I mean, I'm only going to have 5,000 and that still, if I spent 20 minutes, 30 minutes a report, would take me all year to look at those reports. And it would take Mark five years if he had to actually look at all those reports at 30 minutes a pop.

CHAIRMAN BABCOCK: Kay disagrees, and Stephen has had his hand up for about an hour. He's getting tired, so go ahead.

MR. TIPPS: Well, I've got multiple points to make, but with regard to Tracy's last observation, isn't it true that what will happen is that you and Judge Davidson will review a discrete number of reports and issue some kind of ruling in which you say, "Okay, I've looked at" however many you look at, a hundred or 50 or whatever, and "Here are the standards. These are the standards that I would apply to every other report. Now, I want the parties to go through their files and tell me which of their reports meet the standard and which of

their reports don't meet the standard."

HONORABLE TRACY CHRISTOPHER: Yeah, but, you think you'd ever get an agreement on that, when we're talking about if it's a noncompliant report it just sits there, if it's a compliant report it gets remanded back? And the defendant, if they disagree with my interpretation of the report, they're going to want a way to be able to challenge it on appeal. You know, it just becomes more and more of a nightmare as I think about it.

MR. TIPPS: Just two other points. I think, in response to Mike's question, I think we're drawing an artificial distinction between no report and a noncompliant report because I think when we drafted this we were all thinking that in order to have a noncompliant report issued we would have to have a report filed after September 1, 2005, and that would put it in one bucket, but I now hear from Bryan that the plaintiffs' lawyers may well rely on preexisting reports, that in almost every case there's some kind of report, and so I think that -- again, and the statute itself doesn't draw that distinction. I mean 90.010(b) simply talks about if a claimant fails to serve a report complying with the early reception.

HONORABLE TRACY CHRISTOPHER: I don't think you have to file a new report.

MR. TIPPS: But I think we're setting up an artificial distinction between no report and a noncomplying report that's simply going to cause confusion, and defendants are going to end up either filing notice of transfer because of no report or, in the alternative, noncomplying report, and it makes more sense just to have a single kind of notice.

HONORABLE TRACY CHRISTOPHER: Okay.

MR. TIPPS: And my other comment with regard to dealing with the severance issue, and Bryan may scream when I say this, but it seems to me that since we're assuming that 20 percent of the plaintiffs cases need to stay in the trial court because there's either a malignancy or a complying report and 80 percent are going to get transferred and just sit in the MDL pretrial court, that the way to incentivize the Plaintiffs Bar to avoid a situation in which their good cases are stuck for an inordinate amount of time in the MDL pretrial court is to give defendants the right to transfer the entire multi-plaintiff case to the MDL pretrial court, which will cause the Plaintiffs Bar before that transfer can occur to sever out their good cases. And if they're in a county where you don't have to have single plaintiff cases they could sever them out into multiple plaintiff cases.

MR. BLEVINS: I'm screaming silently.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: The real problem, although I think that's an elegant solution, the real problem is we don't have enough time to give them notice that they need to get that done, because the December 1st deadline -- or the defendants on December 1st can start transferring these cases if they want to.

MR. TIPPS: Uh-huh.

HONORABLE TRACY CHRISTOPHER: And there's just not enough time to get the information out to the Plaintiffs Bar --

MR. GILSTRAP: Can I ask a question?

HONORABLE TRACY CHRISTOPHER: -- that that would be the really smart thing to do is to sever out your good cases before December 1st.

HONORABLE SARAH DUNCAN: Chip? Frank was first.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Let me just ask a question. We're dealing with a problem. The problem is we need to track these cases; and the only way to track the cases is to sever them; and to sever the case you have to copy everything, copy all the papers, you have to punch them with holes, you have to put them in a yellow folder, you have to stamp them with an official seal, and you have to

charge $300. Is there any better way to track the case than that? Come on. There's got to be. I mean, I can put, you know, thousands of cases on a disk that big. There has got to be a better way.

HONORABLE TRACY CHRISTOPHER: I don't know what you suggest.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Is there not a roster of the plaintiffs' attorneys who are handling asbestos and silica cases?

MR. BLEVINS: I think both of the MDLs have a master service list of the plaintiffs firms, but there are some very small one and two case type deals, but they're pretty rare, but there's master lists.

HONORABLE SARAH DUNCAN: And I'm assuming you-all talk with one another on occasion. Why couldn't an e-mail notice be sent out saying this rule is coming down, sever out the cases that are ready to go to trial?

HONORABLE TOM GRAY: I'd bet that e-mail goes out this afternoon.

HONORABLE SARAH DUNCAN: I bet it does, too. That's why I'm saying it.

CHAIRMAN BABCOCK: Is there a consensus or should we have a vote on at least this much, that severance by the MDL judge into bins when there is no

agreement -- yeah, go ahead, Kay.

MS. ANDREWS: I'm sorry. It sounds like the answer is probably to transfer the whole case to the MDL, but be conscious of the fact that in a hundred-plaintiff case there, of course, are many defendants who aren't defendants as to all plaintiffs. So when you say sever them out, if I transferred the case, I could only, of course, have transferred as to those plaintiffs in the case who had a claim against me or my client, so that I might only have transferred a part of a multiple plaintiff case; and then when you start doing the severance, to talk about putting them in bins, it could get very complicated.

I think the only way to do it is to put them all in the MDL, let the MDL judge deal with severing and viewing those reports that are allegedly compliant or noncompliant on an individual basis. I think it's important to remember, too, that although, you know, exactly what you said, Judge Davidson could spend the next five years doing this, he will only be reviewing those where the plaintiffs file a motion to remand and say, "I think it needs to come out of cold storage," and we're basically saying that's 10 to 15 percent.

MR. BLEVINS: Of apparently 40,000 people, so that's -- now we've got 6,000, 8,000 remand motions. I mean, this is kill them all and let God sort them out, and

that's just -- that is just not what was intended here.

MS. ANDREWS: We'll see. We'll see.

MR. BLEVINS: It's just not.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: I have a question for Kay based on the comment made here about whether it's an artificial distinction between the no reports and the additional transfers. I think you were proposing different deadlines for the notice for those two different categories?

MS. ANDREWS: No. I was proposing a single deadline. Basically consolidation of those two is fine.

MR. BOYD: It was --

MR. HATCHELL: Subcommittee was.

MR. BOYD: It was just the subcommittee. So from the defense perspective is there a reason to use two separate categories rather than one?

MS. ANDREWS: Not necessarily, no.

MR. BOYD: From the plaintiff's perspective you would rather see one?

MR. BLEVINS: I'd rather -- I think the only difference is perhaps for the court's benefit to know which cases they may be required or asked to see on remand, but quite honestly, the plaintiffs are going to tee the remand up out of whatever group gets transferred.

MR. BOYD: Yeah. Why doesn't it just work

-- why doesn't it just work that the defense says, "In Cause No. 2 the following plaintiffs we hereby give notice of transfer of these plaintiffs," and that's not all the plaintiffs, but the ones that are specifically identified; and under the rule, which can be tinkered with about severance, that notice could have attached to it the verified statement that would be required; and it would be automatic that those plaintiffs are severed as a group and automatically go to MDL; and the ones that you don't name never go to MDL?

HONORABLE TRACY CHRISTOPHER: Well, that's the way the subcommittee drafted it.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Was severance at the trial court level.

MR. BOYD: And why doesn't that work, though?

HONORABLE TRACY CHRISTOPHER: Because, you know, I don't think it will get done.

MR. BOYD: Meaning what?

HONORABLE TRACY CHRISTOPHER: Because it will be so expensive and it will take a long time and --

MR. BOYD: No. I'm sorry. I don't mean severing each one of them individually into individual plaintiffs. I mean "Out of Cause No. 2, which has 20

plaintiffs we hereby designate these 15 and give notice of transfer and severance, and we attach our verified" -- so it's a ministerial act that the court enters an order saying these 15 are severed into Cause 2b or 2a, which is hereby transferred to MDL.

CHAIRMAN BABCOCK: That was Lisa's idea.

HONORABLE TRACY CHRISTOPHER: Right.

MR. BOYD: Good idea.

MR. HATCHELL: That's what we did.

HONORABLE TOM GRAY: Chip, one of the problems is going to be with that, now that Kay has explained that some of the defendants are not the defendants for every plaintiff, is you may have three different defendants that file that notice, and you may not be able to sort out on the -- I mean, 15 of those plaintiffs may appear in all of them, but, you know, there may be different plaintiffs that are getting transferred on notice by the different defendants, and then I could see under that scenario that you'd wind up with the same plaintiff transferred three times.

MR. BOYD: Well, yeah, but once he's gone, he's gone. So if you file your notice today and I file mine tomorrow and mine includes some of the same people, well, they're already gone.

HONORABLE TOM GRAY: They're already gone,

but you're going to be -- there's going to be a tracking issue, which takes me back to the concept that, you know, let the plaintiffs get their malignancy cases out and then transfer what's left and get that e-mail notice that Sarah was talking about out to the Plaintiffs Bar and get those cases out and transfer the whole thing.

CHAIRMAN BABCOCK: Well, we're not going to solve this today, Bryan, but we are going to be back hard at work tomorrow morning at 9:00 o'clock.

MR. BLEVINS: Could I -- with all due apologies, could I please make this statement now? The only -- my belief is, is that -- and again, if the cost of this is placed on the plaintiffs then the chance of getting agreement between the plaintiffs and the defendants becomes virtually nil. I'll just say that, because defendants will not agree if that cost is going to be borne by the plaintiffs, so there is not going to be a cooperative environment if the cost is on the plaintiff.

If the cost is on the defendant then they can do things to make our life miserable, and they don't -- they come to the table and say, "Look, we won't do those things because we don't want to have this cost." You create an environment where perhaps we can work some things out. I think if the rule provides for both individual severance in those instance where there's not

agreement and yet also allows for groups to be transferred when there is agreement then you create the environment where perhaps the parties can find the middle ground.

Now, I sever people out that I don't want to go and I don't want to go through individual severances on by agreement, and I agree to transfer in big bulks people who I know don't reach agreement because that means they don't come and try to individual sever the cases that we did reach agreement on. I would -- I might try to consider what's the environment that's going to allow -- create incentive on both sides to agree what should be transferred, so that what we end up with is a block transfer, but it's done by agreement.

CHAIRMAN BABCOCK: Okay. Two more comments. Judge Benton and then Justice Bland, and then we'll be in recess.

HONORABLE LEVI BENTON: Perhaps someone has already reminded of this while I was out, but at the end of the day it's a taxable cost and Provost Humphrey and Brown McCarroll are well able to finance in the interim the cost associated with the severance.

MR. BLEVINS: The only problem, Judge -- this was raised a minute ago -- is that you start talking about a couple thousand dollars in potential file fees and certification fees, I mean, you're asking the plaintiff

and/or the firm to pay that cost when that case is going to be transferred in MDL and can't go anywhere, won't be receiving any settlement funds, will not be eligible to go to trial.

Again, the cases are properly filed. They're being transferred by operation of a new retroactive law that then impales a cost on them that they can't afford because now they're out of the tort system and can't get compensation.

HONORABLE LEVI BENTON: Okay, but when you challenge the constitutionality of the law and maybe win that cost will be recoverable.

MR. BLEVINS: Then you're asking us to make that bet. I'd rather put it on the go.

HONORABLE LEVI BENTON: Okay.

CHAIRMAN BABCOCK: Justice Bland, did you have anything? Okay, we're in recess.

HONORABLE JAN PATTERSON: Chip, would you make sure they have their last opportunity to say anything? Kay as well as the others.

CHAIRMAN BABCOCK: I think Bryan said that was his final statement.

HONORABLE JAN PATTERSON: What about Kay?

CHAIRMAN BABCOCK: Kay can have a final statement, but she'll be back tomorrow.

HONORABLE JAN PATTERSON: Oh, she will, okay.

(Recessed at 5:15 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 26th day of August, 2005, Friday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $2,356.00.

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

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

D'Lois L. Jones

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