The Multidistrict Litigation Act of 1968

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Abstract

Multidistrict litigation’s place in federal civil litigation continues to grow only more prominent. Although for a long time MDL took a back seat to its more famous cousin, the Rule 23(b)(3) class action, as such class actions have grown more difficult for plaintiffs to pursue, MDL is now in the spotlight as the most effective procedural tool for aggregating litigation in mass-tort cases. Although MDL has not escaped the notice—or criticism—of procedure scholars, one area that has been relatively unexplored is its history, both as a concept and as a statute. This paper draws on previously unexamined papers of the statute’s two principal drafters, Dean Philip C. Neal of the University of Chicago Law School, and U.S. District Judge William H. Becker of the Western District of Missouri. Neal and Becker’s papers tell the story of the MDL statute, from the concept stage through drafting and its path to becoming law—a path much rockier than its passage without a dissenting vote in either house of Congress would suggest.

The statute was a product of a strategy by only a few judges committed to the principles of pretrial management as a necessary tool to avoid crippling backlogs in the federal courts, and who understood well the central role their statute would eventually play in providing a mechanism for handling massive litigation spanning the entire nation. Their strategy for enacting the reform reflected their view that the statute was urgently needed and that its passage and effectiveness would be threatened by collaborating with the antitrust defense bar—which they considered to be an enemy of good judicial administration. The judges were deeply and actively involved in shepherding the bill through the Congress, by lobbying legislators, undermining opposition, and eventually actively attempting to lobby the bill’s opponents from the American Bar Association. Fifty years after the fact, the judges’ achievement—in a political context almost unrecognizable today—occupies the central role in federal civil litigation they predicted it would, as is actually favored by the sorts of corporate defendants who opposed it. More generally, the story of the MDL statute provides a window into a specific moment in the history of civil procedure—before it had become politicized to the extent it is now, when judges were active in lobbying for procedural-reform legislation, and when Congress was well disposed to providing the machinery necessary for private enforcement of the substantive law through civil litigation.

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“This proposed legislation appears to be a very minor matter, but I can assure you that it is truly of great importance.”

-- Letter from Judge William H. Becker to Sen. Edward V. Long, regarding the proposed statute establishing the Judicial Panel on Multidistrict Litigation, October 17, 1966.¹

No one today would contest the importance of the Multidistrict Litigation, or “MDL”, statute, 28 U.S.C. § 1407, to modern federal litigation. Indeed, as the Supreme Court and Congress persist in making multistate class actions brought under Federal Rule of Civil Procedure 23(b)(3) more difficult to maintain, MDL has filled the gap to become the “primary vehicle” for complex multistate litigation in numerous areas, including products liability, antitrust, securities, mass disasters, employment litigation, and unfair sales practices. The MDL process, which provides for transfer of individual cases pending in federal courts around the country to a single district judge for coordinated pretrial proceedings, is considered both more consistent with parties’ due-process rights and easier to manage for federal judges than a class action, and therefore more amenable to large-scale litigation.² Current statistics back these observers up—the number of MDL cases has grown by leaps and bounds over the last two decades.³

Despite MDL’s prominence, relatively little has been written about the history of the statute,⁴ even though there have been excellent histories of class actions and the development of judicial management of complex litigation.⁵ This is notable both because of MDL’s current importance but also because the procedural device at the heart of MDL—limited transfer for pretrial proceedings—was such an innovation, thought of by those who created it as without precedent and as a major advance in litigation procedure

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³ Emery G. Lee III, Catherine R. Borden, Margaret S. Williams, Kevin M. Scott, Multidistrict Centralization: An Empirical Analysis, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015) (suggesting that a reason for the rapid growth of MDL “may be due to the declining prospects of other forms of aggregate litigation, especially the class-action device”).

⁴ An exception is Professor Resnik’s From Cases to Litigation, 54 LAW & CONTEMP. PROBS. 5, 28-33 (1991), which contains most complete story of Section 1407 to date.

necessary for a modern, increasingly interconnected world. Nevertheless, the lack of attention to the history of MDL is unsurprising for several reasons. The first is that MDL long lived in the shadow of its more glamorous cousin, the 1966 version of Rule 23; unlike the class action, MDL has never achieved the transformation from “a mere joinder rule to a regulatory icon.” Nor has MDL ever generated nearly the same amount of controversy—compared to the brute force of the class action, MDL’s mechanism of transfer for pretrial proceedings seems comparatively modest. Second, the history of MDL, at first glance, seems to be relatively straightforward. It was drafted by the judges tapped by Chief Justice Warren for the ad hoc “Co-Ordinating Committee on Multiple Litigation,” which was created to figure out how to handle massive antitrust litigation against the electrical-equipment industry, which threatened to swamp the federal courts in 1962. And due to the success of the judges in rapidly resolving that litigation, the statute modeled on the methods they pioneered sailed through Congress, passing on the consent calendars of both Houses, with nary a dissenting vote. Often, articles discussing the MDL statute cite this sparse legislative history, feature a 1964 A.B.A. Journal article by two of the three primary drafters of the statute, and leave it there. Nothing these scholars say is inaccurate—the MDL statute did grow out of the success of the Co-Ordinating Committee in handling the electrical-equipment litigation, and the statute did not attract any stated opposition by any legislator. In fact, though it has been the subject of trenchant scholarly criticism, especially recently, MDL has remained relatively uncontroversial, especially relative to class actions. But now that MDL is having its moment in the sun, it is appropriate to dig deeper to learn where MDL actually came from—both as an idea and as a statute. From a purely present-day perspective, it seems striking that such an important element of federal

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6 Phil C. Neal, *Multi-district Coordination—The Antecedents of Sec. 1407, 14 ANTITRUST BULL.* 99, 106 (1969) (noting that the statute “was a somewhat radical suggestion and no close analogies for such a power were available”).

7 Marcus supra note 5, at 606.

8 Resnik, supra note 4, at 46 (noting that “the 1966 class action rules were greeted with controversy, while the 1968 MDL statute was met with warm praise”); see id. at 47 (referring to the MDL statute as a “sleeper”).


12 See, e.g., 90 CONG. REC. H4927–H4928 (March 4, 1968) (statement of Rep. Mathias) (“In our deliberations in both the Subcommittee and the full Committee on the Judiciary, we did not have a single voice raised in opposition to the bill. All of those present agreed that it was a necessary and desirable piece of legislation.”).


litigation was so uncontroversial. The story, however, is actually more complicated than the short narrative I have recited above. The statute was vigorously opposed by the antitrust-defense bar, and some judges expressed skepticism about its mandatory pretrial-transfer mechanism. In order to pass it, a few federal judges—Judges Alfred Murrah of the Tenth Circuit, William Becker of the Western District of Missouri, and Edwin Robson of the Northern District of Illinois—engaged in a concerted effort to pass the statute as quickly as possible in order to circumvent and overcome opposition by—or even collaboration with—the practicing bar. They believed this effort was critical to protect the federal courts against what they knew was coming: an onslaught of large-scale litigation brought on by developments in the substantive law giving plaintiffs more opportunities to recover and the interconnecting effects of modern technology. Unlike the 1966 amendments to Rule 23, which its drafters believed was a relatively minor and technical modification, the drafters of the MDL statute believed they were creating a mechanism that would have a major impact on litigation procedure in a wide array of cases.15

Several things stand out about this story, which I develop from the papers of the two primary drafters of the statute, Dean Philip C. Neal of the University of Chicago Law School and Judge William H. Becker of the Western District of Missouri: (1) the drafters of the statute acted to achieve rapid passage of their creation in the face of potential opposition from others on the bench and the bar; (2) the drafters wanted to ensure that, once created, the statute would be usable immediately, withstand legal challenge from the defense bar, and be free from future interference by judges unfriendly to their vision; and, (3) unlike the class action, the drafters of the statute predicted MDL’s prominence in federal litigation. The judges both intended that the statute would be used to process a wide range of claims in cases of national scope, and they had their doubts that class actions under Rule 23(b)(3) would be an effective vehicle for resolving most mass torts. They would not be surprised by the current prominence of the mechanism.

Moreover, the passage of the MDL statute occurred during a specific moment in the history of procedural lawmaking, and the judges took action to take advantage of the opportunity available to them. First, the moment in which the statute was passed was a friendly one for legislation to improve judicial machinery for private enforcement of the substantive law. Congress was generally supportive of private enforcement during the middle of the 1960s, and this was a moment before civil procedure had become politicized and before conservative forces began to seek retrenchment.16 Moreover, this

15 See Marcus, supra note 5, at 599 (explaining that the drafters of the amendments to Rule 23 “tackled class action reform primarily to correct technical flaws and bring a badly shopworn procedural rule in line with caselaw developments”); Charles Alan Wright, Recent Changes in the Federal Rules of Civil Procedure, 42 F.R.D. 552, 567 (1966) (predicting that the amendment to Rule 23 would have little effect).

16 Stephen B. Burbank & Sean Farhang, Litigation Reform: An Institutional Approach, 162 U. PA. L. REV. 1542, 1547 (2014); Stephen B. Burbank, Procedure, Politics & Power: The Role of Congress, 79 NOTRE DAME L. REV. 101, 132-33 (2004); see also Marcus, supra note 5, at 606 (noting that participants in the process of amending Rule 23 “did not anticipate . . . the dizzying array of substantive, political, and cultural changes that transformed Rule 23 from a mere joinder rule into a regulatory icon”).
was a moment of some influence of the Judicial Conference as a lobbying force, particularly when it came to legislation designed to improve judicial administration and mitigate what was perceived as a litigation crisis.

The judges behind the MDL statute took advantage of these conditions to pass a statute they believed was critical to prevent the federal courts from breaking down under an onslaught of forthcoming mass-tort litigation. To begin with, the judges crafted a bill designed to capitalize on their success administering the recent massive antitrust litigation involving the electrical-equipment industry but was limited in its approach, in order to avoid resistance from as much of the bar as possible. The judges devised a strategy for enactment that would bypass the lengthy rulemaking process but still achieve approval from the Judicial Conference and would eventually result in legislation, which would both achieve their goals and avoid challenges under the Rules Enabling Act. Once they achieved endorsement from the Judicial Conference, the judges sought Department of Justice backing and lobbied the Congress for the bill’s passage over opposition by the Antitrust Section of the A.B.A., whom the judges considered enemies of efficient judicial administration. The judges were exceptionally active in Congress—initiating a letter-writing campaign, testifying at hearings, and engaging in backchannel communication with Judiciary Committee that explicitly sought to undermine the bill’s opponents. Finally, when it appeared that the A.B.A. was the final roadblock to passage, the judges lobbied the prominent A.B.A. lawyers behind the opposition in person to persuade them to change their position. The judges’ need was urgent by that point because they had taken on the job of coordinating multidistrict litigation throughout the country with no source of funding or statutory authorization. The MDL statute provides an example of judges taking a lead role in the legislative process—a role that has diminished significantly over time—in a Congress far more open to making private enforcement easier than it is today.

In this paper, I describe the development of the statute in detail, drawing on Neal and Becker’s papers. First, the paper provides some abbreviated background of the growth pretrial case management and the electrical-equipment antitrust litigation that caused the creation of the Coordinating Committee. Then, the paper discusses the drafters’ development of the statute and its major innovation, limited transfer for pretrial proceedings to any federal district. This research reveals that this was a choice by the judges to avoid the resistance they feared would arise if the statute proposed complete

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transfer for trial. This part of the paper also reveals the origins of the decision to pursue the reform through legislation rather than through amendment of the Federal Rules of Civil Procedure and the decision to avoid the need to future rulemaking to implement the statute. In short, the judges felt that legislation was necessary to remove any legal doubts about the procedure, and they wanted to avoid the delays associated with the rulemaking process. Part of this strategy entailed a route to quick endorsement by the Judicial Conference as a whole, bypassing the Rules Committee entirely. I also describe the judges’ hostility toward the antitrust-defense bar, which they perceived as an enemy of the bill and of efficient judicial administration generally.

In the next part of the paper, I trace the bill’s progress through the Congress. The bill was held up in the House due to A.B.A. opposition, but, thanks to the efforts of Senator Joseph Tydings, Chairman of the Judiciary Committee’s Subcommittee on Improvements in Judicial Machinery, the bill moved quickly through the Senate—with a little help from Judge Becker, who took an active role in undermining the credibility of the opponents to the bill. Passage in the House, however, could not be accomplished without neutralizing the A.B.A. opposition, something the judges attempted to accomplish through a face-to-face meeting with the New York antitrust lawyers they considered the main roadblock to the bill’s passage. Ultimately, the A.B.A. did change its mind, and the last part of the paper examines the dynamics of that shift. The A.B.A.’s change of heart allowed the bill to pass the House without further debate, and just in the nick of time, because without the funding made possible by the bill, the Coordinating Committee would have been left without resources to continue its work, which had expanded to coordinating pretrial proceedings in numerous other massive litigations.

The judges’ single-minded desire to pass the legislation quickly, however, without engaging a full-throated debate may have resulted in a statute more vulnerable to criticism than it might otherwise have been if it had been developed with more participation with the practicing bar and in light of more experience with complex litigation. Nevertheless, one cannot deny that the judges successfully capitalized on the moment and achieved passage of a statute that is vitally important to processing civil litigation in the federal courts. Overall, the story of the MDL statute represents a particular moment in history, which made possible an aggressive legislative strategy by a small number of federal judges. Those judges were prescient—they recognized that their creation would become central to federal litigation in a world with a rapidly expanding set of potential claims for plaintiffs and a rapidly interconnecting economy. Their achievement stands at the center of federal civil litigation today.

I. The Biggest of the Big Cases

A. The “Big Case”
The roots of the MDL statute can be found in the response to concerns about the “big case,” which began in the 1940s. Due to the increase in complex antitrust actions in the ‘40s, brought both by the government and private plaintiffs, Chief Justice Vinson appointed in 1949 a committee of ten federal judges to study the problem of protracted litigation. The committee was chaired by Alfred Murrah, Chief Judge of the Tenth Circuit Court of Appeals, who would later chair the Co-Ordinating Committee on Multiple Litigation. Murrah was an evangelist for the use of the pre-trial conference, then a relatively little-used device. In Murrah’s view, the growing backlog of cases in the federal courts meant that “the judicial process was literally breaking down under the weight of these cases.” Murrah traveled widely, speaking often to judicial conferences and other groups, to expound on the importance of pretrial conferences and control of discovery in complex cases.

In 1951, the committee issued the “Prettyman Report,” named for E. Barrett Prettyman, Chief Judge of the D.C. Circuit. The Prettyman Report describes the growth of complex antitrust cases as an “acute, major problem in the current administration of justice,” both because of the complexity of those cases—in which the litigation was “less certain and less accurate”—but also the effect of those cases on the congestion of the district courts where they were proceeding. The Prettyman Report steadfastly refused to suggest legislation or new rules to respond to the “big case,” but instead offered suggestions based on the experiences of judges and lawyers in litigating these cases. Foremost among these suggestions was the prescription of “rigid control” by the trial judge at the outset of the litigation.

Such rigid control was a departure from normal procedure under the Federal Rules in several ways. First, at the time, though this was changing, most federal courts did not assign cases to a single judge from beginning to end. That meant that in lengthy, complicated cases as many as “seventeen or eighteen judges could wind up taking a

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23 Alfred P. Murrah, Seminar on Procedures Prior to Trial, 20 F.R.D. 485, 491 (1957) (“A judge must be willing to assume his role as the governor of a lawsuit. He can't be just an umpire.”).
27 Id. at 63.
28 Id. at 64.
29 Id. at 66.
The Prettyman Report, in contrast, recommended that “big cases” be identified at the outset of litigation and that the Chief Judge of the district assign the litigation to a single judge who would handle the case through trial. Second, the Report recommends that the judge hold an immediate pretrial conference to define the issues before discovery began, and then to exercise control over the discovery process. Third, as the case proceeded, the judge was to hold several “informal conferences” before trial in order to achieve “crystallization of the issues” and reduce the number of disputes to be tried.

The Prettyman Report was met with widespread praise. In 1955, Chief Justice Warren formed a new committee (with several of the same members as the 1949 committee, including Judge Murrah, who chaired) to continue to study the problem of protracted litigation and to “translate” the Prettyman Report “into courtroom action.” Numerous seminars were held with judges and lawyers to discuss reactions to the Prettyman Report and offer concrete suggestions based on experience. Several items of consensus emerge from these seminars. First, was the widespread dissatisfaction with notice pleading as a means for defining the issues in dispute. Second, were concerns about discovery as a weapon under the FRCP on the part of defense counsel. Third, was the felt need for cooperation at an early stage and intervention by the judge in order to avoid endless complexity.

Chief Justice Warren supported the project, lauding Judge Murrah specifically in a speech entitled, “The Problem of Delay: A Task for Bench and Bar Alike” at the Annual Meeting of the American Bar Association in 1958. In that speech he decried that “interminable and unjustifiable delay in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.” Among the solutions to this problem, Warren proposed, was the kind of pretrial procedure that “Judge Murrah has tried for ten years to demonstrate to our federal judges.”

The result of these discussions and “three years of intensive investigation” by the committee was eventually the Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States in March 1960. In his foreword, Judge Murrah notes the “full cooperation of the Antitrust

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31 13 F.R.D. at 83.
32 13 F.R.D. at 67.
33 See, e.g., REPORT BY THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION (1954); Leon Yankwich, *Short Cuts in Long Cases*, 13 F.R.D. 41 (1953); but see Philip Marcus, *The Big Antitrust Case in the Trial Courts*, 37 Ind. L.J. 51 (1961) (“It is major thesis of this paper that the courts, in their pursuit of expedition in ‘big cases,’ should not endanger more important objectives commonly associated with judicial proceedings.”).
35 *Id.* at 1045.
Section of the American Bar Association.” In an introductory note, Judge Prettyman noted that the Handbook primarily would respond to “lack of central control” of cases by trial judges and the need to eliminate lawyers’ “obstinate adherence to the use of surprise as a tactic.”

The main responses to these problems put forth by the Handbook were (1) early identification of protracted litigation, (2) assignment of the case to a single judge, (3) definition of the contested issues through use of pretrial conferences, confined discovery to prevent fishing expeditions, and (5) careful planning of trial procedure. In short, the Handbook endorses many of the tenets of what we would now consider typical case management.

The ink was barely dry on the Handbook when the federal courts would be confronted with the biggest “big case” in their history. In it, the tenets of rigid control would be put to an extreme test.

B. The Electrical-Equipment Litigation

The immediate precursor to the multidistrict-litigation statute was the massive antitrust litigation involving the electrical-equipment industry, which threatened to overwhelm the federal courts in 1961. While there had been protracted and complex antitrust litigation in the federal courts before—and indeed, it was this kind of litigation that inspired the Prettyman Report and the Handbook—the electrical-equipment cases were unprecedented. In fact, before the electrical-equipment cases began, by the numbers, civil antitrust actions amounted to a significant amount of business in the federal courts, but they were manageable.

In 1959, a total of 315 antitrust cases were filed in the federal courts, around one per federal district judge. That changed quickly in 1960, when virtually every significant American manufacturer of electrical equipment, from General Electric and Westinghouse on down, was indicted under the Sherman Act. The indictments alleged conspiracies to divide

37 Id. at 6 (citing Streamlining the Big Case—Report of the Special Committee of the Section on Antitrust Law, American Bar Association, September 15, 1958). Murrah cites Richard McLaren as a primary author of this report—McLaren figures prominently in the story of the passage of the MDL statute. McLaren was the chair of the committee that produced the report, which emphasizes the need of the judge to control “unbounded discovery” ABA 1958 Report at 184.

38 E. Barrett Prettyman, Preface, Handbook of Recommended Procedures for the Trial of Protracted Cases 10 (1960).

39 Handbook of Recommended Procedures for the Trial of Protracted Cases 23-24 (1960)


41 Warren Olney III, Impact of Antitrust Litigation in U.S. District Courts, 1960 CCH Antitrust Law Symposium 4 (speech delivered at Annual Dinner Meeting of the Section of Antitrust Law of the New York State Bar Association, New York, NY, Jan 27, 1960) (noting that “antitrust litigation does have a heavy impact on the business of the federal courts,” but “numerically, antitrust cases account for a small percentage of the total caseload in the federal courts”).

42 Id.

business and fix prices in twenty product lines of electrical equipment, implicating $6-7 billion in sales. The Chief Judge of the Eastern District of Pennsylvania, where the indictments issued and the criminal cases were ultimately resolved, called the conspiracies “a shocking indictment of a vast section of our economy.” Ultimately, the criminal cases were mostly resolved through a series of guilty and nolo contendere pleas in February 1961, resulting in nearly $2 million in fines and some short jail sentences for relatively low-level defendant employees, and consent decrees entered in September 1962. Congressional hearings held by Senator Estes Kefauver followed.

The litigation, however, was just beginning. As Charles Bane, a Chicago lawyer who represented plaintiff Commonwealth Edison in the ensuing civil litigation, noted, “it was clear to purchasers, which would include among others practically every investor-owned public utility in the United States, and to their counsel, that the convictions in themselves, together with the information (meager though it was) developed at the Kefauver hearings, established that there had been unlawful conspiracies to fix prices and allocate markets.” These investor-owned utilities were purchasers of all of the heavy equipment involved in the indictments and they organized among themselves a group of attorneys to study the extent of the damages they had suffered during the scope of the conspiracies, which had allegedly stretched back to the 1940s. Having concluded that the overcharges had amounted to up to 25% for some products, such as turbine generators, plaintiffs around the country began to file private treble-damage actions against the manufacturers, mostly in the plaintiffs’ home districts. As Bane puts it:

44 Charles A. Bane, The Electrical Equipment Conspiracies: The Treble Damage Actions 83 (“However, in light of the total sales that seemed to have been involved in the claims, it is clear that the claims for damages developed by the AITG studies and from other sources, it is clear that the claims for damages, after trebling, were in the hundreds of millions of dollars.”). Bane’s book provides a comprehensive history of the litigation, but it must be noted that Bane represented a major plaintiff in the cases and played a significant role in the national discovery phase of the litigation as the Chairman of the plaintiffs’ “Steering Committee.” Moreover, Bane was a public advocate of the multidistrict litigation bill who testified in favor of it at the Senate hearings. Nevertheless, Bane is certainly a reliable chronicler of that plaintiffs’ theory of the case.

45 Id. at 14. (quoting Chief Judge James Cullen Ganey).
46 Id. at 20.
48 Bane, supra note 44, at 50.
49 Id. The penalties were, at the time, “among the strongest ever levied for violations of the Sherman Antitrust Act”). Wayne E. Baker & Robert R. Faulkner, The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry, 58 AM. SOC. REV. 837, 839 (1993); see also Myron H. Watkins, Electrical Equipment Antitrust Cases—Their Implications for Government and for Business, 29 U. CHI. L. REV. 97, 100 (1961) (“The severity of these penalties exceeded those imposed in any previous case, or batch of cases dealing with a single industry, in the seventy-year record of antitrust enforcement.”). But see Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. CHI. L. REV. 423, 431 (1963) (noting that “the high policymakers of General Electric and other companies involved escaped personal accountability for a criminal conspiracy of lesser officials that extended over several years to the profit of the corporations, despite the belief of the trial judge and most observers that these higher officials either knew of an condoned the activities or were willfully ignorant of them”).
50 Bane, supra note 44, at 75. Personal jurisdiction could be had against the defendants under the federal antitrust statutes in any district in which they had an agent doing business.
“Toward the end of 1961, the filings for treble damages had swollen to a torrent.”\footnote{Id. at 81.} Over 1900 cases were filed in 35 federal districts—more than three times as many as had been filed in the earlier behemoth litigation involving the move industry.\footnote{Neal & Goldberg, supra note 43, at 622. (referring to the filings as an “avalanche”).} As Chief Judge Thomas Clary, of the Eastern District of Pennsylvania, noted, “In these cases, there were as many as 40 plaintiffs. There were actually 25,632 claims, in other words, individual cases involved in these 1912 cases.”\footnote{Proceedings of the Twenty-Eighth Annual Judicial Conference of the United States, The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure, 39 F.R.D. 375, 497 (1965) (statement of Chief Judge Thomas J. Clary, E.D. Pa.); see also Bane, supra note 44, at 82.}

This opening of the floodgates caught the attention of the Judicial Conference, which had already been worried about backlog before the electrical-equipment cases. As Chief Judge Clary put it, “[i]t concerned the Judicial Conference of the United States because that was about was about four times as many cases as had been filed in all of the district courts on an average of the over the preceding years.”\footnote{Id.} As a result, in February 1962, Chief Justice Warren set up an ad hoc committee—a subcommittee of the Committee on Pretrial Procedure—“for the purpose of considering the problems arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits,” such as “major air crashes and antitrust conspiracies.”\footnote{Press Release, Administrative Office of the United States Courts, February 7, 1962.} As Chief Justice Warren noted at the time: “A proper solution of these problems which are arising in many districts with increasing frequency is essential to the proper administration of our court system.”\footnote{Id. See also Edward Ranzal, Warren to Study Utility-Suit Jam, N.Y. Times, Feb. 7, 1962, at A1. (“Chief Justice Earl Warren has set up a subcommittee of Federal judges to formulate a plan for handling more than 1500 damage suits that have been filed against electrical equipment manufacturers. The case load threatens to overwhelm the federal courts.”).}

The new committee, christened the Co-Ordinating Committee on Multiple Litigation included seven judges: Alfred P. Murrah (10th Cir.), George H. Boldt (W.D. Wash.), Thomas J. Clary (E.D. Pa.), Joe E. Estes (N.D. Tex.), Edwin A. Robson (N.D. Ill.), Sylvester J. Ryan (S.D.N.Y.), and Roszel Thomsen (D. Md.). All of the district judges chosen for the Committee had electrical cases pending before them. In 1964, Robson would become Chairman, and in 1966, Judge William H. Becker of Kansas City (who was added to the Committee in 1962) became Chairman. Although the cases were scattered throughout the country (as plaintiff utilities tended to file at home), the courts with the most individual filings were in major cities, with New York, Chicago, Philadelphia, and Seattle leading the way.\footnote{The numbers of cases filed were: S.D.N.Y. (427), N.D. Ill. (226), E.D. Pa. (182), W.D. Wash. (141). See Neal & Goldberg, supra note 43, at 622.}

The Committee met for the first time in New York on February 21, 1962 and reported to the Judicial Conference in early March that:

A complete nation-wide analysis of this litigation has not as yet been made. However, it appears that there are many identical discovery problems arising from the fact that these suits have the ‘commonality’ of
being based on the same criminal antitrust proceedings. The Subcommittee is of the opinion that the principles enumerated in the Handbook are applicable and should be applied to these cases but the current litigation, with hundreds of cases filed in many different districts, requires further nationwide control and development, particularly in the realm of discovery beyond that specified in the handbook. With many different cases requiring the discovery of the same facts, it is vital that the development of this discovery must be regulated and, as far as possible, that results of discovery in one case be available to all. . . . Whatever plan is devised, it is the view of your Subcommittee that the litigation should be centered in the hands of as few judges as possible, who should carefully supervise and regulate all discovery procedures, and that these discovery matters should be coordinated among the various districts.  

At its March 1962 meeting, the Judicial Conference endorsed these plans, and the Committee was off and running. The Committee’s operations were centered in Chicago, in an office adjoining Judge Robson’s chambers. Dean Phil C. Neal of the University of Chicago Law School was named Executive Secretary, and he was assisted by Perry Goldberg, a 1960 graduate of the school. The Committee did not have the power to enter any orders or to require any judge assigned to any of the cases to do anything—the entire program depended on the voluntary cooperation of the district judges involved, and the degree of cooperation was remarkable. The key machinery of the coordination program was uniform pretrial

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58 Report of the Subcommittee on Pretrial Procedure for Considering Discovery Problems Arising in Multiple Litigation With Common Witnesses and Exhibits to the Judicial Conference of the United States, March 2, 1962, Becker Papers, Box 6, Folder 15, at 4-5. See also Bane, supra note 44, at 19 (“It had become clear to all the judges and practically all the parties concerned that discovery in the individual case was not the answer. . . . The situation called for a centralized, unified method of pretrial discovery.”).

59 Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, at 25-26 (resolving “That the Conference desires to express its approval an encouragement of the forthcoming meetings of judges aimed to effect voluntary coordinating procedures in the civil antitrust cases in the electrical equipment industry.”).

60 Neal & Goldberg, supra note 43, at 624-25.

61 See, e.g., Proceedings of the Twenty-Eighth Annual Judicial Conference of the Third Judicial Circuit of the United States, The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure, 39 F.R.D. 375, 515 (1965) (statement of Prof. Benjamin Kaplan) (“Now bear in mind that the Coordinating Committee can do nothing except by voluntary cooperation. . . . Unless the judges act with unanimity on these Orders, the plan would break down. . . . The judges and lawyers involved in the electrical cases have been very proud of this cooperation which is fundamental to the whole effort.” See also Phil C. Neal, Multi-district Coordination—The Antecedents of Sec. 1407, 14 ANTITRUST BULL. 99, 101 (1969) (“The Committee was of course operating without statutory authority or other formal authority. The success of its effort depended entirely on the willingness of all the judges responsible for the cases to follow the lead of the Committee. It also required counsel on both sides to engage in a huge joint venture in cooperation with the judges, an undertaking that was carried out with remarkable efficiency.”).

The level of cooperation by district judges was indeed remarkable, but not unanimous. For instance, in August 1963, Judge Sherrill Halbert of the Northern District of California, ceased cooperating with the national program, noting that:
orders, the first set of which were borrowed from the orders Judge Ryan had issued in the cases pending before him in the Southern District of New York. The orders were developed at national meetings—first by the Committee, then with all of the judges assigned to these cases, and then with attorneys for the parties, with attendance open to all. Following these hearings, the local judges entered the proposed pretrial orders in their own cases after “local” hearings, at which the parties could be heard on the orders (typically to no avail).\textsuperscript{62}

These orders followed the guidance of the Handbook by placing control of discovery within the hands of the judge. Moreover, these orders served to stay already issued discovery requests or scheduled depositions in order to coordinate discovery on a national level. Such national discovery consisted initially of uniform plaintiffs’ interrogatories issued by order on the defendants in cases involving major product lines. Other cases, involving products lines with less sales, were, by consent of the parties, placed on “back burner” status, so that national discovery could proceed on the largest sets of claims. The next major steps included establishing, at defendants’ expense, a national document depository in Chicago, at which all discovery of defendants’ materials would be housed and available to the lawyers. Later a similar depository was established in New York for plaintiffs’ documents.\textsuperscript{63} The Committee also created a schedule of national depositions—first by plaintiffs, then by defendants—presided over by a judge who would make legal rulings, and held around the country, so that common witnesses would only have to be deposed once.\textsuperscript{64} Plaintiffs and defendants agreed among themselves who would conduct the depositions, but the deposition would remain “open” for forty days after oral testimony concluded so any lawyers could ask additional questions.\textsuperscript{65} Ultimately, over 300 depositions were conducted.

By and large, after a year and a half of the national discovery program, the cases began to settle in droves in 1964. General Electric, the defendant to the plurality of the claims led the way, settling all claims against it for around $300 million by the end of

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Gentlemen, before you even start in on these matters here, I will tell you right now that I am not going to enter these Pre-trial Orders just like that. I have been following this thing; I have one whole shelf – in fact, a shelf and a half now in my library devoted to the material that has been sent out here, to so nothing of the fact that I have at least a third of a drawer of filing cabinets put out by this super-dooper Court that has been created to hear these matters. I may be wrong about the matter, but I have a strong feeling that a Court ought to be able to run its own affairs without shoving somebody back in Chicago or somewhere else telling it how to run its affairs.

He added, “I think I have been very patient with this national program. They just made it very plain to me that I better get in line. And that is why I did get in line, but I still don’t see any reason why the tail of the dog in Chicago should wag the whole dog. . . . I will tell you very candidly, I may be wrong, but I will tell you very candidly that I think these cases would have all been done and disposed of long ago had it not been for the intervention of this super-dooper Court.” Transcript of Hearing on Motion to Bring in Additional Parties; Motion to Enter National Pre-trial Orders, Sacramento Mun. Util Dist. v. Gen Elec. Co., No. 8380 (N.D. Cal. Aug. 12, 1963).

\textsuperscript{62} Neal & Goldberg, supra note 43, at 624.

\textsuperscript{63} Id. at 626-627.

\textsuperscript{64} Id. at 625-26.

\textsuperscript{65} Clary, 39 F.R.D. at 498 (noting that 180 lawyers attended the early depositions in the case).
1964.\textsuperscript{66} Although a few trials were held, the plaintiffs were successful in all of them, and settlements were ultimately reached in nearly all of the cases by the end of 1965.\textsuperscript{67} As Bane puts it, the pace of the national discovery program played a role in resolving the cases: “doubtless the pressure of the national discovery program contributed greatly to the defendants’ desire to be relieved of the burden of the electrical equipment cases.”\textsuperscript{68}

It is important to note, however, that the judges were making plans for trials in the cases that had not yet settled as the national discovery program wore down. Although settlements had been achieved in the major product lines, many cases involving several smaller product lines, which had been placed on the initial back burner, had not yet settled. The judges’ plan was to transfer these remaining cases for trial into one district court for each product line under 28 U.S.C. §1404(a). As Judge Feinberg, then of the Southern District of New York noted, “concentration of cases in a product line will confine to one district the multitude of procedural and substantive problems that might otherwise be posed in various districts.”\textsuperscript{69} A particular sticking point in this plan was the defendant I-T-E Circuit Breaker, primarily represented by the law firm, Dechert, Price & Rhoads. By the end of 1965, I-T-E still had 365 cases pending against it, and the judges determined that those cases should be tried in the Northern District of Illinois to be tried by Judge Robson. I-T-E objected to its cases being sent to Chicago, but judges overrode their objections and sent the cases to Chicago anyway, sometimes on their own motion.\textsuperscript{70} Among these judges was Judge Becker, who initially intended to transfer the cases \textit{sua sponte}, but the plaintiffs stepped in to move to transfer.\textsuperscript{71} I-T-E sought mandamus against Becker in the Eighth Circuit, which rejected their position in an opinion describing the success of the national program and noting that I-T-E “has not formulated any program, and indeed that it is without even a suggestion of any plan, for effecting termination of the litigation thus pending against it, either by way of desire to engage in trials, of intention to attempt settlements, or of basis to seek dismissals. What it seemingly wants done is simply to have all of the suits against it left alone.”\textsuperscript{72}

Ultimately, the cases were transferred to Chicago, where extensive pre-trial proceedings continued until trial began on May 2, 1966. The parties settled on the first day after the jury had been chosen, as Bane describes it, “a true courthouse settlement, and the trial never proceeded beyond the jury selection stage.”\textsuperscript{73} To that point, I-T-E was the defendant with the most claims against it yet to settle. Once it did, settlements of the

\begin{itemize}
  \item \textsuperscript{66} Bane, \textit{supra} note 44, at 250.
  \item \textsuperscript{67} Milton Handler, \textit{The Shift from Substantive to Procedural Innovations in Antitrust Suits}, 71 \textit{COLUM. L. REV.} 1, 9 (1971) (“After a mammoth national discovery program conducted by a panel of judges, the litigation was pared down by settlement to the point where, although a total of 1,912 cases had been filed, only nine trials were required.”).
  \item \textsuperscript{68} Bane, \textit{supra} note 44, at 266.
  \item \textsuperscript{70} Kansas City Power & Light Co. v. I-T-E Circuit Breaker Co., 240 F. Supp. 121 (W.D. Mo.) (Becker’s initial plan was to transfer the cases to Philadelphia, before Chicago was settled on as the best district for trial).
  \item \textsuperscript{71} I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361 (8th Cir. 1965) (per curiam).
  \item \textsuperscript{72} \textit{Id.} at 362.
  \item \textsuperscript{73} Bane, \textit{supra} note 43, at 378.
\end{itemize}
rest of the cases followed, and, per Bane, “by the end of 1966 practically all of the electrical equipment treble damage litigation had come to an end.”

This was a remarkable accomplishment, but the reaction to the Committee’s work was not universal praise. Lawyers on the defense side roundly criticized the Committee’s efforts. Defense counsel criticized the speed with which discovery proceeded, the judges’ lack of regard for their arguments, and the feeling that the hearings were for show, the Committee having decided on pretrial orders in advance of argument. Defense counsel complained that “it became clear that the national program of the Committee would move forward and ‘nothing’ would interfere with its progress,” particularly pleas for relief from the pace of discovery by the defendants. In a speech at the American Bar Association national meeting, defense lawyer John Logan O’Donnell also complained that the coordination of proceedings inured to the exclusive benefit of the plaintiffs, eliminating defendants’ best institutional advantages, their “advantage of numbers, which we all know has significance in any litigation such as antitrust which can be so time-consuming and complex as to tax the energy and perseverance of the best of lawyers.”

In multiple litigation, however, the differential is eliminated in large part. Plaintiffs pool their resources and generally designate their most experienced lawyers and skilled cross-examiners as lead counsel to conduct depositions and supervise and coordinate all phases of plaintiffs’ pretrial discovery. First, costs are lessened and in fact, there may be virtually no cost to a particular individual plaintiff. Like it or not, from the defendants’ standpoint, the potential cost to be incurred by plaintiffs in prosecuting a triple damage case is a factor which may lead to a favorable, reasonable, and satisfactory settlement, under ordinary circumstances. Second, and more important, each plaintiff is handed a ready-made case to

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74 Id. at 379.
75 See, e.g., John L. O’Donnell, Pretrial Discovery in Multiple Litigation from the Defendants’ Standpoint, 32 ANTITRUST L.J. 133, 137 (1966) (“Briefs will be submitted to the Committee, eloquent argument will be made before it, only to find that for all practical purposes the Coordinating Committee has already agreed upon a program from which it will not depart unless the most cogent and serious reasons therefor are shown.”). Typical of the allegations of a power grab by the judges are comments by Breck McAllister, of the Donovan Leisure firm, at the 1966 New York State Bar Association Antitrust Law Symposium:

The extraordinary point to be made about this Co-Ordinating Committee at the outset is this: without any mandate from statute or any other source, it was able to embark upon and carry out a program of action in discovery and pretrial in this mass of cases that was largely accepted, often only after vigorous argument and protest by the parties, and that was almost invariably carried out in many district courts in which these cases had been filed. This was surely an extraordinary exercise in the use of judicial prestige and persuasion.

Breck P. McAllister, Judicial Administration of Multiple-District Treble Damage Administration, 1966 CCH New York State Bar Association Antitrust Law Symposium, 55, 58.
76 McAllister, supra note 75, at 60.
77 O’Donnell, supra note 75, at 138-139.
the extent that expert lead counsel can establish it, and, in any event a far better case than most plaintiffs’ counsel could ever establish without the coordinated program. 78

Defendants also decried the pressure they felt to settle due to the fast pace of discovery. As William M. Sayre, Vice Chairman of the New York State Bar Section on Antitrust, noted in a meeting of his group in 1966,

The defendants litigated, but it was all uphill. The courts had little sympathy for their plight, and it must have been obvious to the courts that their burden would be relieved if enough pressure were put upon the defendants to force them to settle. And pressure there was. The judges put into the game a series of new and unprecedented rules . . . and greatly accelerated the discovery and trial timetables. . . . Settlements came in most of the cases, and they were expensive. 79

For their part, at least according to Charles Bane, plaintiffs, perhaps recognizing the benefits, were generally in favor of coordinated proceedings. 80

Despite these voices of complaint on the defense side, most commenters considered the resolution of the electrical-equipment litigation a resounding success. At a speech before the American Law Institute on May 16, 1967, Chief Justice Warren remarked: “If it had not been for the monumental effort of the nine judges on this Committee of the Judicial Conference and the remarkable cooperation of the 35 district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down.” 81 Federal judges were so impressed by the work of the Committee that as new multidistrict cases arose in the 1960s, they sought out the Committee’s help. By the middle of the 1960s, the Committee was assisting judges in coordinating cases in the fields of patent and airplane crashes, as well as in additional antitrust cases involving the Concrete Pipe, Children’s Schoolbooks, and Rock Salt industries—despite having no permanent staff or source of funding (an issue which would be central to the urgency with which the judges sought passage of the MDL statute). 82

78 Id. at 138-139.
80 Bane, supra note 44, at 131. See also Charles A. Bane, Pretrial Discovery in Multiple Litigation from the Plaintiffs’ Standpoint, 32 ANTITRUST L.J. 116, 129 (1966) (describing the defendants’ arguments as “not a valid criticism of the national discovery program”).
81 Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, quoted in MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 6 (1969). See also, e.g., S. Rep. No. 90-454, at 4 (observing that the Committee’s “procedures worked exceptionally well”); Resnik, From Cases to Litigation, supra note 4, at 32 (“Much legal commentary describes the work of the Committee as successful.”).
82 Phil C. Neal, Multi-district Coordination—The Antecedents of Sec. 1407, 14 ANTITRUST BULL. 99 (1969) (noting that “by the end of its formal existence the Committee had taken under its wing several other sets of cases and was keeping itself closely informed of developments in a variety of others. The cases included a number of antitrust situations involving suits by purchasers of widely distributed products,
II. Developing the MDL Statute and Gaining the Support of the Judicial Conference

A. The Idea of Limited Transfer

It was not long after the inception of the Co-Ordinating Committee that its members began to consider more permanent mechanisms for the type of coordination that it had begun in the electrical-equipment cases. Indeed, as early as September 1962 the Judicial Conference endorsed the development by the Committee of “general principles applicable to the handling of discovery problems in multiple litigation . . . in the light of the methods developed in processing the cases presently under consideration.”83 This is unsurprising, in part because of the enthusiasm of both Chief Justice Warren and the Committee’s members for the innovations of the Handbook, especially strong judicial control over discovery and early definition of issues for trial. Moreover, the members of the committee were pleased with how the electrical-equipment consolidation had gone in its first year. Discovery was proceeding rapidly, settlement talks were underway, and by and large judges were cooperating with the national program. Buoyed by their success, while they were handling the electrical cases, some of the members of the committee began to formulate ideas for a new statute or rule of civil procedure to make coordination of multidistrict litigation a permanent part of the federal judicial machinery. In support of this effort, the Committee began studying consolidation mechanisms in federal courts around the country, including the early experimentation with rules assigning related cases filed in a single district to a single judge.84

This effort picked up momentum in the spring of 1963. Dean Neal, the executive secretary of the Co-Ordinating Committee, floated his inchoate ideas for such reform during a speech to the Seventh Circuit Judicial Conference in Chicago on May 14, 1963:

Important as the accomplishments of the this committee have been, it would be regrettable if its experience did not lead to some better ways of dealing with these problems than the ones the committee has been compelled to use. Assuming that similar batches of related litigation will continue to be part of the business of the federal courts (hopefully not as large batches as the electrical equipment cases, to be sure), attention should be given to providing more permanent management devices for reducing the burdens of such a multiplicity of suits. An ad hoc cartel of judges, necessary and wise as it may be in the immediate situation, is hardly the most satisfactory arrangement for the efficient conduct of a complex set of lawsuits. Surely at least a part of the answer lies in making

84 Report of the Co-Ordinating Committee for Multiple Litigation of the United States District Courts, a Sub-Committee of the Committee on Pre-trial Procedure and Practice of the Judicial Conference of the United States, March 7, 1963, Becker Papers, Box 23, Folder 51.
a fuller use of the potential unity of the federal judicial system, and allowing ourselves of some of the advantages which would be available if the federal district courts were parts of one court rather than many courts.

Specifically, would it not be desirable to recognize a class of cases in which much greater flexibility in the transfer of cases would be permitted, so that cases could be brought within the control of a single district judge simply to obtain the advantages of consolidation or partial consolidation which would be available if the cases had all been brought in a single district? To implement this suggestion would require broadening of the principle of Section 1404(a) in three respects: (1) making the pendency of related litigation in another district a ground for transfer; (2) permitting transfer to a district other than a district where jurisdiction and venue would have been proper initially; and (3) permitted transfer for limited purposes, for example, for discovery only.

Even this expansion of Section 1404(a) might not go far enough, however. A further and perhaps more difficult question is whether it should be left in the discretion of a judge responsible for only one piece of the total complex of related litigation to decide whether the pieces shall be brought together. The interests at stake are not simply those of the parties to the isolated piece of the litigation. There are also to be considered the interests of the other related litigants, the interest of the public in the efficient administration of justice, and the interest of all the other litigants in clearing the docket of the courts. Arguably, therefore, what is needed is some supervisory mechanism in the federal judicial system for identifying related cases filed in different districts as soon as they are filed, reviewing such cases to determine whether justice requires that they be brought together, and directing transfer to the proper district in those instances where unified handling is appropriate. This is perhaps a radical proposal, and I am unable to suggest any close analogy for such a power.85

In a speech to the American Law Institute the following week, Chief Justice Warren endorsed the Co-Ordinating Committee’s efforts at extrapolating its budding experience in the electrical-equipment cases into “general principles applicable to the handling of discovery problems in all multiple litigation.”86

By the beginning of summer 1963, Neal, Judges Becker and Robson, and the Co-Ordinating Committee’s law clerk, Perry Goldberg, began turning their attention to possible legislative or rule-based reform. This exploration included Neal reaching out to Professors Albert Sacks and Benjamin Kaplan of the Civil Rules Committee, and Kaplan

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85 Phil C. Neal, Speech to Seventh Circuit Judicial Conference, Chicago, IL, May 14, 1963, Becker Papers Box 17, Folder 39.
reciprocated by sending a draft of proposed changes to Rule 23. By June, Goldberg and Neal began collaborating on memoranda laying out options for the proposed reform, which they shared with Judge Becker. The primary initial concern of the drafters was the problem of identifying multiple litigation. Although “the immensity and resultant publicity” of the electrical-equipment litigation made the need for action apparent, in most cases, litigation involving common questions would often be pending in multiple districts without the assigned judges being aware. But “identification is clearly only a first step, and quite possibly not of itself very meaningful . . . leaving for judicial determination the basic question of whether coordination, consolidation, or some combination technique would have net utility.” Beyond the problem of identifying multiple litigation, the memo notes the problem of asserting judicial control of the litigation, a concept consistent with the Handbook, but “clearly in conflict with the basis of the Federal Discovery Rules where party governed pre-trial is an overriding object.” As a result, according to this early memo:

A broad outline of positive action for the handling of multiple litigation (as seen from this early vantage point) might encompass the following:

A. A new rule or new rules to permit unified judicially controlled discovery in situations of multiple litigation – this would not necessarily involve consolidation of all cases in one district which might present problems with due process overtones, but merely centralization of the power to make decisions, and

B. The development of a handbook or handbooks of formulae analogous to the Handbook to treat multiple litigation.

By the fall, the general outlines of the drafters’ approach had begun to take shape. In a memorandum, Goldberg highlights “assignment of cases to one judge and consolidation for pre-trial purposes,” “stay of proceedings in all districts involved other than one selected to proceed with pre-trial procedures,” and “consolidation before a panel of Judges.”

The Co-Ordinating Committee’s next meeting was scheduled for New York City on November 17-18, 1963. At this meeting, the Committee, in both its private meeting and its meeting with all other electrical-equipment judges intended to take up the topic of a permanent multiple-litigation provision. Prior to the meeting, Judge Robson communicated to the rest of the Committee that “[i]t is important that we coordinate our

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87 Letter from Benjamin Kaplan to Philip C. Neal, May 28, 1963, Box 4, Folder XYZ, Papers of Philip C. Neal, University of Chicago, Chicago, Ill. [hereinafter, Neal Papers].
88 Memorandum, “Discovering Instances of Multiple Litigation – A Clue to the Need for Manually Operated Rules,” June 7, 1963, Becker Papers, Box 17, Folder 39.
89 Id.
90 Id.
91 Id.
activities on multiple litigation with those of the Advisory Committee on Civil Rules,” which was then considering the proposed amendments to the class-action rule. As a result, at the suggestion of Chief Judge Roszel Thomsen of the District of Maryland (a member of both the Civil Rules Advisory Committee and the Co-Ordinating Committee), Robson invited Benjamin Kaplan to attend the upcoming New York meeting, where Kaplan could both get up to speed on the Committee’s activities in the electrical-equipment cases and its early efforts at more permanent procedural reform. Kaplan agreed to attend, noting in a letter to Neal:

With respect to the class suit problem it seems to me that our interests intersect at perhaps two points. Recent experience may have indicated that the class action device for handling ‘multiple litigation’ should be limited or expanded in some particular way that is not already reflected in our proposed Rule 23. Second, at a certain point in our draft we refer to the judge’s considering what procedures are available as alternatives to a class action. The point will be elaborated in the note to accompany the rule. We could draw on your committee’s experience in describing the alternative procedures. There may be other points of contact; we shall see.

On November 17, the Co-Ordinating Committee met with Professors Kaplan and Sacks. According to the official minutes of the meeting, distributed to all electrical-equipment judges, “the assembled group explored the effects of the proposed revamping of class actions on the processing of multiple litigation. The consensus was that the proposed Rule 23 changes would be most beneficial for resolving certain existing ambiguities of class actions, but that a general solution of the problems of multiple litigation will require more comprehensive treatment.” Becker’s notes reflect the same conclusion, stating that Professor Sacks opined that the class action and other consolidation methods “should be viewed as continuing alternatives, not an exclusive approach.” Judge Becker opined that the “primary problem in the electrical suits is one of management,” adding that “the problem cannot be handled under the rule making power . . . who’s going to say where the cases should go? . . . Create a new package for multiple litigation.”

93 Letter from Judge Edwin A. Robson to the Co-Ordinating Committee on Multiple Litigation, November 4, 1963, Becker Papers, Box 18, Folder 19.
94 Id.
95 Letter from Benjamin Kaplan to Philip Neal, November 6, 1963, Neal Papers, Box 4, Folder XYZ.
96 Co-Ordinating Committee for Multiple Litigation Bulletin No. 20, November 27, 1963, Becker Papers, Box 8, Folder 19.
97 Id. In advance of this meeting, Perry Goldberg circulated a memo to Dean Neal and Judge Becker entitled “Suggested Discussion Questions – Problems of Multiple Litigation,” which listed several questions, including “Should limited purpose transfers be employed?,” and “Should one district proceed with discovery while proceedings are stayed in other districts?” Memorandum, Suggested Discussion Questions – Problems of Multiple Litigation, November 4, 1963, Becker Papers, Box 17, Folder 39.
98 Minutes of Meeting of Co-Ordinating Committee Held on Sunday, November 17, 1963, at 3:00 p.m., Becker Papers, Box 10, Folder 23. The notes also reflect that Judge Robson stated that the
The following day, November 18, 1963, there was a meeting in New York of all of the judges before whom electrical-equipment cases were pending. During that meeting, also attended by Professor Kaplan, Dean Neal “outlined the problems generally presented by multiple litigation and suggested three alternative approaches towards a solution (1) coordination, (2) transfer, and (3) unified actions, e.g., class actions.” At the meeting Judge George Boldt of the Western District of Washington, a Co-Ordinating Committee member, noted the resistance of defense lawyers and judges in the electrical cases and impressed upon the judges the need for permanent coordination machinery, noting that, “Cooperation in the future cannot be expected. Can’t be left to voluntary good will.”

By March of 1964, with the electrical-equipment cases proceeding apace, the Judicial Conference affirmed its support for the Committee’s efforts at reform, resolving that the Committee “develop . . . general principles and guidelines for use in other multiple litigation, including any recommendations for statutory change; and further that the subcommittee is authorized to consult and cooperate with the Advisory Committee on the Federal Rules of Civil Procedure in the development of any desirable rules of procedure for multiple litigation.” Neal and Goldberg picked up where the November 1963 New York meeting left off, considering numerous alternatives for handling multiple litigation, which they recognized was likely to occur in an increasing variety of cases, including “contract, fraud, negligence, antitrust, and civil rights. Products liability cases with absolute liability may be another category.” Among the alternatives they considered was transfer and consolidation under 28 U.S.C. § 1404(a), limited transfer for discovery and “other aspects of pre-trial,” voluntary coordination of judges involved in multiple litigation, and expansion of the use of class actions.

The Committee engaged with the question of general reform at its next meeting in New York on June 5, 1964. At this meeting, Judge Becker “presented a paper on the problems of multiple litigation and outlined the alternatives available.” According to the minutes of the meeting, Becker “laid stress on the bars’ propriety [sic] notion of their cases,” “minimum legislation – maximum emphasis on rules,” and “the need to remove Committee’s work went beyond antitrust cases and included “Disaster (cases), Products Liability” cases as well.

99 Co-Ordinating Committee for Multiple Litigation Bulletin No. 20, supra.
100 Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 a.m., New York, NY, Becker Papers, Box 17, Folder 39.
102 Memorandum, “Outline of Alternatives for Processing Multiple Litigation,” May 19, 1964, Becker Papers, Box 17, Folder 39.
103 Id. The memo also considers the question, “Should there be some expansion of Federal Jurisdiction where Problems are Initially Presented in both Federal and State Courts,” recognizing that may of the claims involved in future complex litigation will arise under state law, where federal jurisdiction might exist only through the accident of diversity of citizenship.
104 Minutes of the Co-Ordinating Committee in the United States Courthouse in New York City, June 5, 1964, Becker Papers, Chronological Files, Box 1, Folder 1, at 8.
Becker’s paper bears these concerns out. He begins:

Transfer of multiple litigation (change of venue) for pre-trial purposes seems to be the maximum practical objective that is attainable. However, the procedure should invest the transferee Judge, Judges, or Court with plenary pre-trial powers, including among other things powers to render summary judgments, to invoke sanctions for violation of pre-trial orders and other pre-trial powers ordinarily reposed in the District Court (and derivatively in the Appellate Courts) in which a suit is pending.

Becker then turned to the methods suggested for achieving this reform:

It is suggested that a minimum amount of legislation be sought, and that rule making power be employed to the maximum. This approach should tend to reduce the burden of securing legislation, and allow greater flexibility for amendment and supplement of the procedures.

Indeed, although earlier memoranda suggest that Goldberg and Neal considered the possibility of pretrial transfer using the rulemaking authority alone, Judge Becker notes in his paper that he is sensitive to both the political and legal implications of this strategy:

At the least it is suggested that statutory authority for the transfer (change of venue) for pre-trial purposes be sought first. (A substantial case could be made for the rule making authority on the theory that venue is procedural, but the subject has been preempted by legislation before and after the Rules of Civil Procedure. So no chance should be taken here if it can be avoided.)

Becker’s initial proposal—in line with both his recognition of the need for legislation and his desire to minimize the detail in such legislation—provided for transfer to a judge or judges of a single district, “and pretrial proceedings therein shall be conducted as shall be directed by Rules of Civil Procedure or by Special Order of the Supreme Court.”

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105 Id. Although the text of the minutes uses the word “propriety,” I believe this is a typo and the intended language is “proprietary.” Aside from the observation that “propriety” makes no sense here, use of the word “proprietary” would be consistent with reservations about the transfer proposal expressed at the November 18, 1963 New York meeting of the judges involved in the electrical-equipment cases with the Co-Ordinating Committee and Professors Kaplan and Sacks. In discussing the possibility of formalizing change of venue in multiple litigation, Chief Judge Roy W. Harper of the Eastern District of Missouri expressed the concern that local bars would oppose any such reform for fear of losing control over their cases in a national litigation. See Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 a.m., Becker Papers, Box 17, Folder 39 (“Venue will be fought by the practicing Bar.”).

106 Proposal for Legislation and Rules for Multiple Litigation, June 3, 1964, Becker Papers, Box 1, Folder 1.

107 Id. at 2.

108 Id.

109 Id. at 3.
Becker noted concerns that such a barebones statute “proposal raises legal questions, including: (1) Is this an unconstitutional or otherwise illegal delegation of power of Congress to create a special Court?, and (2) Can the Supreme Court be given special powers to make ad hoc orders in multiple litigation?” He therefore added that, “If, as a matter of policy or legality, it is decided to amplify the statutory provisions, this can be done by providing in the statute in addition to the transfer (venue) provision: (1) a definition of multiple litigation; (2) provision for convening a special multiple litigation court; (3) detailed provisions for power of such a court. These provisions would satisfy most legal objections. But they would increase the number of legislative actions required.”

Becker’s suggestions were warmly received by the Committee at the New York meeting. The judges agreed to a set of “general objectives,” including creating a “panel to manage and transfer multiple litigation” that would be “named by the Chief Justice, perhaps with staggered terms,” and that “the proposal should require a minimum of legislation and employ the rule making power to the maximum.” Judge Murrah informed Third Circuit Judge Albert Maris of the Committee’s work in a June 15, 1964 letter describing the outlines of the proposed legislation and confirming the political motivations of limiting the procedure to pretrial transfer: “We also felt that it was desirable from a practical standpoint to return the cases to the jurisdiction in which they arose for local discovery and for trial. One reason for this is to allay massive resistance to the new legislation and new rules.”

B. Drafting the New Statute.

Judges Becker and Robson, Dean Neal, and Perry Goldberg met in Chicago to begin drafting the new statute on June 24, 1964. All four agreed at the meeting that the reform must be accomplished by statute rather than amendment of the Federal Rules. The first draft of the statute, styled as a subsection (d) of 28 U.S.C. § 1404, reflects the general outline agreed to by the Committee in New York and resembles in key respect the final product. It is different, however, in interesting ways. First, it is much shorter than what would eventually become 28 U.S.C. § 1407, reflecting the initial plan to provide for most details through rulemaking. Indeed, the initial draft delegates to the Supreme Court the “power to prescribe general rules” through the process created by the Rules Enabling Act regarding “the method and criteria by which the determination to

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110 Id.
111 Id. at 3-4.
112 Minutes of the Co-Ordinating Committee in the United States Courthouse in New York City, June 5, 1964, Becker Papers, Chronological Files, Box 1, Folder 1, at 9-10.
113 Letter from Judge Alfred P. Murrah to Judge Albert Maris, June 15, 1964, Becker Papers, Box 16, Folder 14.
114 Letter from Judge William H. Becker to Judge Alfred P. Murrah, June 26, 1964, Becker Papers, Box 16, Folder 4 (“All of us agreed that adequate procedures for the identification of multiple litigation, and the management of pre-trial procedures therein, could not be provided by amendement of the Rules of Civil Procedure under existing rule-making powers. Further, we agreed that the first step necessary to establish such a procedure should be the enactment of a statute, preferably a supplement to Section 1404 of Title 28, U.S.C.”).
transfer shall be made, the district to which the actions shall be transferred, the District Judges who shall conduct pre-trial proceedings, the places where pre-trial proceedings shall be conducted, and the practice and procedure in such actions following transfer.”

Moreover, the original draft provided only for creation of the Panel by rulemaking.

Second, the original draft’s remand provision reads: “Every trial on controverted issues of fact shall be conducted in the District where in the action was originally pending.” Becker’s handwritten annotations on the statute change this final remand provision to “Every trial on controverted issues of fact shall be conducted in the district where in the action would be triable except for the provisions of this paragraph.” The following day, Goldberg wrote Becker, noting that Neal thought the suggested revision “may create difficulties” because “the language . . . may be misleading in suggesting that the statute changed the district in which the action would be tried. In place thereof, Dean Neal suggested the following: ‘to the district from which the action was transferred under this section.’” This language, however, remained in flux over the next several months—one wonders whether Becker, one of the judges most enthusiastic about transfers of the I-T-E cases for trial, intended a more flexible approach.

Becker, Neal, and Goldberg continually revised the proposed statute throughout July and August of 1964, with an eye toward presenting the proposal at the meeting of the Judicial Conference scheduled for that September. The specifics of what we are now familiar with began to take shape during this period; for instance, a draft of a proposed rule to be promulgated under the statute includes a provision for a “standing Panel on Multi-District Litigation” appointed by the Chief Justice, and transfer for consolidated pre-trial proceedings in any district when “common elements may be present in the action.

C. Strategizing the Route to Passage

Judges Robson, Becker, Boldt, Estes, and Murrah met to consider the proposed draft in Chicago on July 28, 1964. The topic of whether the reform must be achieved by statute rather than rule amendment arose again. Although Judge Murrah noted the “difficulties and delay involved with securing legislative passage,” the judges again agreed that “such a provision must take the form of legislation. Historically, venue is a statutory field.” Having agreed, however, that a statute would be necessary, the judges

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115 Draft of § 1404. Change of Venue, June 24, 1964, Becker Papers, Box 16, Folder 1.
116 Id.
117 Handwritten Notes on Draft of § 1404, June 24, 1964, Becker Papers, Box 16, Folder 1.
118 Letter from Perry Goldberg to Judge William H. Becker, Becker Papers, Box 16, Folder 4.
119 There are two subsequent drafts, entitled “First Revision” and “Second Revision,” dated July 27, 1964 in both Judge Becker’s and Dean Neal’s papers, each with different versions of this language. Given the content of the meeting among the judges on July 28, describe infra, my sense is that both versions were presented at that meeting.
121 Meeting of Co-Ordinating Committee Judges in Chicago, July 28, 1964, Becker Papers, Box 8, Folder 19, at 3. Judge Becker’s handwritten notes of the meeting provide additional color. Chief Judge Murrah is noted as remarking “difficulties because of opposition” to the legislation. But Judge Becker is
strategized on how to achieve passage as quickly as possible—as Judge Becker’s notes state, “don’t have proposal rise through rules committee.” Instead, according to the minutes:

It was decided that the strategy employed in seeking passage should be an initial attempt to avoid the usual procedure by which proposals rise through the Judicial Conference. Rather, Chief Judge Murrah should attempt to take the proposal straight to the top and achieve approval of the Committee on Revision of the Laws at its meeting in August. In doing this, he should attempt to enlist the support of Judge Maris, Professor Kaplan, and Dean Atcheson [sic]. It was felt that with the endorsement of these three people the provision would stand a good chance of winning widespread support.

The judges also noted “the problems that are likely to be encountered in seeking passage of this legislation.” The major problem the judges cited—mentioned by Judge Becker at the June meeting in New York—was “that great opposition would arise from local lawyers fearful that all their business is about to be seized by the city attorneys.” The judges’ proposed solution to this problem was a “note drafted to accompany the proposal” to be drafted by Dean Neal and Judge Becker that would “stress that transfer is only for pre-trial purposes. The fact that any rule drafted to implement the statutory provision would probably have to go through the rule-making procedure, with everyone having his say, was also felt to be a modifying factor.” Moreover: “Note was also taken of (1) the strong economy argument which can be built, (2) some sympathetic members of the Bar (and the prospects of a new specialty), and (3) some recorded testimony by members of the Bar praising the work done in the electrical equipment cases, all points of use as strategic weapons.” Urgency was also on at least Judge Becker’s mind—in his handwritten notes of the meeting, he writes: “never be able to do this again as in antitrust cases.”

The group left the meeting intending to submit a draft noted as saying “venue is a substantial right – not for the rules.” Notes of Co-Ordinating Committee Meeting, July 28, 1964, Becker Papers, Box 8, Folder 19. See also Letter from Phil C. Neal to Judge Edwin A. Robson, July 31, 1964, Becker Papers, Box 9, Folder 22 (“Judge Murrah again raised the question of whether there was any possibility of proceeding by way of amendment to the Rules and avoiding the need for legislation. I think everyone present, including Judge Murrah, was persuaded that legislation is indeed necessary, but it was agreed that Judge Murrah would discuss the matter informally with Judge Maris to see that the Rules Committee shares this view.” Although the July 28 meeting took place in Judge Robson’s Chicago chambers, Judge Robson was not present because he was traveling overseas. Id. at 4.

Id. at 6.

Id.

Id. at 7.

Id. Interestingly, one additional concern was noted: “The final point of concern discussed was the possibility that granting this power to the Supreme Court would cause opposition because of present attitudes toward the Court. Alternative methods of wording this part of the proposal were discussed. Chief Judge Murrah also suggested that perhaps another body should be granted the rule-making authority, for instance the Judicial Conference. While it was decided to leave the proposal as drafted, it was felt necessary that no suggested rule be published, though work continue along this line.” Id. at 7.
of the statute along the lines of what had been presented to the August meeting of the Committee on Pre-trial Practices and Procedures and the September meeting of the Judicial Conference.\textsuperscript{128}

Throughout the beginning of August, Becker, Neal, and Goldberg continued to revise the statute, but the form and substance changed little. The judges presented the proposed statute to the Pre-Trial Committee at its August 1964 meeting on Cape Cod, and the statute was approved in principle for presentation to the Judicial Conference in September. Chief Judge Murrah and Judge Maris, the Chairman of both the Committee on Revision of the Law and the Standing Committee on Rules of Practice and Procedure, agreed to meet later in the year. The statute provided for transfer of related cases pending in multiple districts to any district for pre-trial proceedings and granted the Supreme Court rulemaking power to determine when transfer would be appropriate, where the cases would be transferred, and the procedure applicable to transferred cases.\textsuperscript{129}

Accompanying the statute was the explanatory commentary drafted by Judge Becker and Dean Neal. The language of the comment is consistent with the strategy devised by the judges in Chicago. It notes at the outset the “experience of the national coordination program” and “that significant overlap and duplication of judicial effort can be avoided...\textsuperscript{128}

\textsuperscript{128} Letter from Phil C. Neal to Judge Edwin A. Robson, July 31, 1964, Becker Papers, Box 9, Folder 22.

\textsuperscript{129} Report to the Judicial Conference of the Sub Committee on Coordinated Multiple Litigation, September 1964. The draft of the statute submitted to the Pre-Trial Committee and the Judicial Conference reads as follows:

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§ 1404. Change of Venue

(e) When numerous related civil actions are pending in different districts, and their fair, orderly, and efficient determination may be promoted by coordinated, common or consolidated proceedings, they may be transferred for pre-trial proceedings to any district. The Supreme Court of the United States shall have the power to prescribe by general rules the method and criteria by which the following shall be determined:

(1) Whether transfer hereunder shall be made;
(2) The district to which any transfer hereunder shall be made;
(3) The assignment and designation of a judge or judges who shall conduct pre-trial proceedings in such related civil actions, including the inter-circuit assignment and designation of such judge or judges;
(4) The place or places where pre-trial proceedings in such related civil actions shall be conducted; and
(5) The practice and procedure in such related civil actions following transfer hereunder, including procedure for remand to the districts in which such related civil actions are triable at the conclusion of coordinated, common, or consolidated pre-trial proceedings.

Such rules may include provision for the designation of a special panel or panels of circuit and district judges to determine questions relating to the transfer of such multiple related civil actions and the conduct of pre-trial proceedings in such actions, and for the inter-circuit assignment and designation of the circuit and district judges designated to the panel. Every trial on controverted issues of fact shall be conducted in the district in which the actions would be triable under provisions of law other than this subsection. This subsection shall not affect the power to transfer for any or all purposes under any other statutory provision or rule.
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through unified pre-trial procedures in related cases.” At numerous points, it emphasizes the modest aims of the statute—in particular the fact that the transfer if for pretrial proceedings and not trial and that the statute would not be self-executing, that is, it “would not require that any case be transferred for pre-trial purposes unless the Supreme Court exercises the power to prescribe general rules for such transfers.”

That said, the comment is not shy about its “major innovation,” “the technique of transferring cases to a single district solely for pre-trial purposes.” Indeed, such a provision was necessary because the general transfer provisions, Sections 1404(a) and 1406(a) provided only for transfer to a district where the case might otherwise have been brought—significantly limiting the possibility of transfer of all related cases to a single district (if jurisdiction venue would not lie against the defendant in that district). The Judicial Conference responded favorably to the proposed statute and “authorized the subcommittee to work toward the development of this proposal.”

D. Engaging Judges and the Bar (Sort Of)

The draft was then circulated to the judges participating in the electrical-equipment litigation at a meeting in Chicago on October 2, at which “[t]here was unanimous consent that the Coordinating Committee continue its work on the legislative proposal along the form outlined.” At the meeting, Judge Alfonso Zirpoli of the Northern District of California reaffirmed that “the feature of return of the cases for trial where filed is important in getting support from the Bar.” The following day, the judges held a hearing with lawyers in the electrical-equipment cases. At that hearing, Judge Becker outlined the statute and asked that the plaintiffs and defendants name representatives to survey lawyers’ on their respective sides and seek commentary on the proposed statute.

Charles Bane, the lawyer representing Consolidated Edison in the Northern District of Illinois, responded, explaining that he, William Ferguson of Seattle, and Harold Kohn of Philadelphia would represent the plaintiffs. Steven E. Keane of Foley, Sammond & Larnder in Milwaukee responded on behalf of the defendants, noting that he, Ralph L. McAfée of Cravath, Swaine & Moore in New York, and Edward L. Mullinx of Schnader, Harrison,Segal & Lewis in Philadelphia, would represent the defendants. But

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130 Id. at 23.
132 Minutes of Meeting of all the Judges Before whom Electrical Equipment Antitrust Cases are Pending, October 2, 1964, Becker Papers, Box 9, Folder 22. “Chief Judge Murrah discussed the proposed amendment to Title 28, U.S.C., § 1404. He emphasized the following points: (1) Legislation is necessary. (2) The problem of identifying multiple litigation. (3) Transfer is only for discovery, and the case is tried where filed. He then recounted the Conference’s consideration of the proposed amendment. The Judicial Conference approved the amendment in principle. Chief Judge Murrah will work with Chief Judge Maris on the form of the legislation and on having it sponsored in Congress. There was unanimous consent that the Co-Ordinating Committee continue its work on the legislative proposal along the form outlined.”
133 Id.
134 Letter from Charles Bane to Judge Edwin A. Robson, October 9, 1964, Becker Papers, Box 16, Folder 4 (“We are communicating with all plaintiffs’ counsel who have shown an active interest in the electrical equipment litigation to solicit comments that they may wish to make, and their approval and support for the proposed §1404(e). We would like to pass these comments on to you and Judge Becker as soon as we have received them and put them together.”)
Keane’s letter also noted that “[]here is substantial unanimity of opinion that it may well be regarded as inappropriate for a committee composed only of counsel actively engaged in the pending litigation to serve the purposes you have in mind.”¹³⁵ He added,

Furthermore, since the scope of the proposed legislation extends far beyond the area encompassed by the electrical equipment cases and is of such great importance to the overall administration of justice, it seems to use that you Committee of Judges would want to obtain the views of the Bar general. We therefore respectfully request that these views be solicited from the appropriate sections or committees of the American Bar Association. Many of the lawyers who have been actively engaged in the electrical equipment litigation are giving thoughtful consideration to the proposed legislation, and we are certain that they will be prepared to present their individual views to any appropriate committee of the Bar.¹³⁶

Judges Becker and Robson did not take kindly to the defendants’ suggestion. In a letter to Becker, Robson stated, “It is apparent that defendants want to kick the ball around.” He added,

In my opinion we should proceed to discuss this with Roszel Thomsen, Al Murrah, and Albert Maris, and that after we have obtained their ideas, I think we should meet with members of the committee at a place mutually convenient, so that we can ascertain any objections that they have and determine exactly what their ideas are. We can then judge the next steps to be taken. In my opinion certainly some of the defendants, if not a substantial number of them, are trying to do all they can to block this amendment.¹³⁷

Judge Becker responded by letter to Robson:

Underlying the action of some of the defendants’ counsel throughout this litigation must have been the hope that this electrical equipment antitrust litigation would overwhelm the Courts and demonstrate the unworkability of the antitrust laws allowing treble damage recoveries in civil suits. Every measure proposed which would make multiple civil antitrust litigation manageable impairs that hope. Yet we must deal with the defendants’ counsel who are inspired by this hope.¹³⁸

Not long thereafter, Judge Robson reaffirmed his concerns that the defendants would act to block the bill in a letter to Chief Judge Murrah, in which he noted:

¹³⁵ Letter from Steven E. Keane to Judge Edwin A. Robson, October 19, 1964, Becker Papers, Box 16, Folder 4.
¹³⁶ Id.
¹³⁷ Letter from Judge Edwin A. Robson to Judge William H. Becker, October 21, 1964, Becker Papers, Box 16, Folder 4.
¹³⁸ Letter from Judge William H. Becker to Judge Edwin A. Robson, October 26, 1964, Becker Papers, Box 16, Folder 4.
We, of course, have to keep in mind the problem presented primarily by the defendants in that they are not overly enthusiastic about this proposed legislation. After our meeting with Albert Maris, I think a meeting should be held with the respective members of the committee to ascertain their attitude, and determine then whether to enlarge the committee, place others in it, or thank them and just forget about their assistance. This is something that can only be decided after the conference in Washington.\footnote{Letter from Judge Edwin A. Robson to Judge Alfred P. Murrah, October 28, 1964, Becker Papers, Box 7, Folder 18.}

In early November 1964, the attorneys for each side submitted memoranda containing comments on the proposed statute. The plaintiffs expressed “general, if not unanimous support for enactment of the basic provisions of the Proposed Amendment, and the comments received deal largely with implementing details that would be covered by whatever rules are adopted by the Supreme Court.”\footnote{Letter from Charles Bane, William Ferguson, and Harold Kohn to Judge Edwin A. Robson, November 11, 1964, Becker Papers, Box 16, Folder 3.} The defendants, on the other hand, reaffirmed their view that the legislation should be presented to the American Bar Association for reactions of lawyers across a wide range of fields, and that “we are not authorized to, and indeed could not accurately, represent the views of counsel with whom we are associated in the defense of the electrical litigation.”\footnote{Letter from Steven Keane to Judge Edwin Robson, November 6, 1964, Becker Papers, Box 16, Folder 3.}

On November 13, Judges Becker and Robson met with lawyers representing the plaintiffs and defendants offering views on the proposed legislation. At the outset of the meeting,

Counsel were informed that the purpose of this meeting was not to obtain their endorsement for the proposal, but to receive and discuss their suggestions and criticisms of the draft; that they were invited to participate not as advocates in the electrical cases but as distinguished lawyers; and that any views expressed on the proposed statute would not be considered in relation to or affect their positions in the electrical cases.\footnote{Summary of Meetings Held in Washington, D.C., November 13 and 14, 1964, re: Proposed Amendment to 28 U.S.C. § 1404, Neal Papers, Box 7, Folder on C.O.C. Documents.}

Keane and Mullinix again represented that defendants’ views diverged significantly and urged submission of the proposed statute to concerned bar associations, while Bane expressed support for the proposal.\footnote{Id.} Judge Becker, however, made clear that any
reference to bar associations would not be entertained because “the length of time required for meaningful study by an outside group, reference to a Bar committee would be inappropriate and would unduly delay implementation.”

On the following day, Judges Robson Becker, and Boldt, and Dean Neal, met with Judge Maris in Washington. At the meeting, Judge Becker expressed that there was an “extreme need for central management” in multidistrict cases, and that the proposed statute was an “alternative to [a] radical forum non conveniens statute.” Maris asked whether the same result could “be accomplished without formal transfer.” Becker responded that this would be unsatisfactory because then the “litigants would run cases.” Judge Boldt, for his part expressed the urgent need for action. Maris expressed general support for the legislation, agreeing that legislation was necessary to accomplish the reform, and suggesting that the method of appointing the panel appear in the text of the statute rather than in an implementing rule. All involved agreed to implement Judge Maris’s suggestions and meet again to discuss further.

Judge Maris’s support, however, cooled over the following month, due apparently to comments by defense counsel in the electrical-equipment cases. Following the November meeting in Washington, John Collins of the Foley, Sammond & Lardner firm sent comments about the proposed statute to Judge Robson, who transmitted them to Judge Maris. Having apparently abandoned the strategy of not commenting at all on the proposed statute, defendants now issued a series of objections. In essence, the defendants took the position that litigation of the same scale as the electrical-equipment cases would be a “rare occurrence,” and that adoption of a statute based on that experience alone would be hasty. Instead, the defendants suggested that “[t]here may be an advantage in adopting ad hoc procedures for each of the few times when national discovery and pretrial procedures are called for, rather than trying to anticipate all of the problems that might arise and cover them by so-called general rules.” The defendants also drew on the electrical-equipment litigation, suggesting that it achieved its aims without resort to transfer of cases to a single district, meaning the statute is not immediately necessary. Beyond this general idea, the defendants noted numerous other issues with the statute, mostly revolving around the vagueness of the concepts of pretrial proceedings and related litigation.

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144 *Id.*
145 Notes on Meeting of November 14, 1964, Washington, DC, Becker Papers, Box 17, Folder 39.
146 *Id.*
147 *Id.*
149 Letter from John R. Collins to Judge Albert Maris, December 7, 1964, Neal Papers, Box 4, Folder XYZ. Collins apparently took over for Steven Keane after Keane “became seriously ill and was hospitalized with a hemorrhaging ulcer” following the Washington meeting.
150 *Id.*
151 *Id.*
152 *Id.*
Judge Maris was apparently persuaded by the defendants’ comments. In a letter to Chief Judge Murrah, dated December 15, 1964, he noted that he was “much impressed by the points made in the memoranda. I am particularly impressed by the suggestion that it will probably be rarely that a national discovery program will be needed and accordingly it may be unwise to attempt to establish elaborate general rules and statutory procedures for such programs.”153 Maris endorsed the wait-and-see approach of the defendants:

I can understand and sympathize with the desire to build for the future on the basis of the remarkable accomplishment in the electrical cases but I am wondering whether we should not have further experience in different types of cases before going into an extensive legislative and rule-making program. I suggest that in the meantime we should merely content ourselves with seeking the barest minimum of basic authority by statute or rule which is needed to enable such procedures to be worked out on an ad hoc basis for multiple cases which may arise in the near future. Further experience along these lines may give us much more light on the shape permanent procedural provisions should take.154

Judge Murrah reacted with apparent alarm. Noting that he thought Judge Maris had agreed in principle with the need for legislation at the November meeting, Murrah noted that, “On rereading your letter, however, I gather that you would not favor any statutory authority to prescribe by general rules the method and criteria for transferring multiple litigation for the sole purpose of pretrial. If this is your view, I would beg you to grant us a rehearing for I can certainly see no reason for not granting rule-making power to deal with situations of this kind.”155 Murrah also cast aspersions on the motivations of defense counsel, in line with the observations of Judges Robson and Becker earlier in the summer:

The memorandum submitted by certain lawyers in the so-called electrical equipment cases is admitted colored by their experience in these cases which, as we know, has not been to their liking. They frankly admit their inability to be entirely objective in their approach to this problem. I do believe that the judges who have had the responsibility of these cases are in a position to be objective. They want nothing more than a codification of the procedures that have been followed in the cases. But our experience in these cases has taught us that it ought not be left to an ad hoc treatment.156

153 Letter from Judge Albert Maris to Chief Judge Alfred Murrah, December 15, 1964, Neal Papers, Box 4, Folder XYZ.
154 Id.
155 Letter from Judge Alfred Murrah to Judge Albert Maris, December 24, 1964, Neal Papers, Box 4, Folder XYZ.
156 Id.
Judge Maris responded with skepticism, adhering to the view that ad hoc reaction by the Judicial Conference to cases as they arose would be adequate, but he promised he was “keeping his mind completely open on the subject of the legislation,” and that “I shall await a copy of the redraft with interest.”

E. The Statutory Structure Takes Shape

In the meantime, throughout November and December, Judge Becker and Dean Neal were hard at work revising the statute—and they made two significant changes. As noted in a memo by law clerk Perry Goldberg, this would require “lengthy consideration and review by the standing Committee on Federal Rules of Procedure and its Subcommittee on Federal Rules of Civil Procedure, to be followed subsequently by further consideration and/or review in the Supreme Court and the Congress.” Goldberg noted the “considerable sentiment for eliminating or short-cutting these steps where possible” due to the “undesired or probable result that lengthy steps will be required before the Court will approve any procedural changes.”

The drafters made three changes in the statute to solve the problem: (1) put the standard for when cases should be transferred for coordinated pretrial proceedings in the text of the statute, (2) provided for the appointment of the panel by the Chief Justice, and (3) eliminating the provision for Supreme Court rulemaking and allowing the newly created multidistrict-litigation panel to promulgate its own rules of procedure. Not only would such changes eliminate the need for follow-on rulemaking for the statute to be implemented, it would assuage Judge Maris’s concerns about rigidly codifying one-size-fits-all procedures in all kinds of multidistrict litigation. This assured the drafters both an easier route to judicial approval of the statute, but, ironically, less judicial interference with its eventual implementation. From this point forward, all drafts eliminated the rulemaking provisions and provide only for consolidated pretrial proceedings.

The Co-Ordinating Committee next met in New Orleans in February 1965 to consider this new draft and its potential presentation to the Judicial Conference in March. For the most, the judges in attendance were in support of the new draft, though they suggested that some clarifications of the statute’s intent be put into the accompanying content. There was a slight snag, however. Chief Judge Sylvester Ryan, a member of the Committee and the Chief Judge of the Southern District of New York, was not in

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157 Letter from Judge Albert Maris to Judge Alfred Murrah, December 29, 1964, Neal Papers, Box 4, Folder XYZ.
158 Memorandum, Two Suggestions on the Draft Venue Statute, November 10, 1964, Becker Papers, Box 16, Folder 1.
159 Id.
161 Both strategies are implicit in a draft report for submission to the Judicial Conference dated December 28, 1965. The draft highlights the need for “rapid and flexible procedures” to respond to the variety of cases which may be amenable to coordination. See Comment on Proposed Title 28, U.S.C. § 1404(e), December 28, 1964, Becker Papers, Box 16, Folder 1.
attendance, but expressed reservations about the statute’s invasion of authority of transferor judges, who would have no say in whether their cases would be transferred.\(^{162}\)

The drafters of the statute met the following day with Judge Maris, who “observed that the draft of the proposed statute was greatly improved over the one he considered previously.”\(^{163}\) (It was at this meeting that the statute was re-styled as an independent Section 1407, rather than subsection (e) of Section 1404.)\(^{164}\) The drafters of the statute also agreed that they would meet with Judge Ryan in New York in February to discuss his objections.\(^{165}\)

It was to accommodate Judge Ryan that a previously unseen provision was added to the proposed statute. For the first time, the language appears stating that “provided, however, no action shall be transferred without consent of the District Court in which it is pending.”\(^{166}\) Only handwritten notes survive of the New York meeting with Judge Ryan, but the telling comment by Judge Ryan is listed as “not desirable to set up permanent institution with power to invade jurisdiction of district court.”\(^{167}\) Apparently, as a result of this meeting, this language, later referred to as the “Ryan Amendment” was inserted into the text. It would not be a part of the statute eventually signed into law.

With Judge Ryan at least temporarily mollified, the Committee submitted the draft § 1407 to the Judicial Conference for final approval at its meeting on March 18, 1965. The report submitted by the Committee trumpets its consultation with “judges and various representative counsel who have been involved in the electrical equipment antitrust cases,” and notes its decision to “revise the draft to permit for a largely self-implementing statutory procedure.”\(^{168}\) Such modifications made the statute more “limited and specific.”\(^{169}\) The commentary also notes the limited scope of the statute in

\(^{162}\) Minutes of Co-Ordinating Committee, New Orleans, LA, February 7, 1965, Becker Papers, Box 9, Folder 21.

\(^{163}\) Minutes of the Legislative Committee at New Orleans, February 9, 1965, Becker Papers, Box 9, Jacket 21. A draft of the statute with Judge Becker’s handwritten annotations survives, with “J. Maris” written at the top. Most of the changes are minor, though, consistent with earlier statements by Judge Maris, language was included to make it explicit that the Panel could assign judges to perform activities in any district without an intercircuit assignment by a Chief Judge under the intercircuit-transfer statute, 28 U.S.C. § 295. See Proposed Title, 28 U.S.C. 1404(e), Becker Papers, Box 16, Folder 1.

\(^{164}\) Id.

\(^{165}\) Id.


\(^{167}\) Notes of February 18, 1965 N.Y. Meetings, Becker Papers, Box 17, Jacket 39.

\(^{168}\) Report of the Co-Ordinating Committee for Multiple Litigation of the United States District Courts, a Sub-Committee of the Committee on Pre-Trial Procedure and Practice of the Judicial Conference of the United States, March 2, 1965, Becker Papers, Box 16, Folder 1, at 13.

\(^{169}\) Id. at 17-18. The report notes that the “Committee considered whether the necessary procedural changes could be accomplishes under existing rule-making authority. Study led to the conclusion that venue, historically a matter of legislative concern, would be affected by any appropriate solution of the problems. An earlier draft of a similar proposed statute would have provided necessary statutory authority but would have required substantial implementation by the panel.
that it “affects on the pretrial stages in multi-district litigation. It would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pretrial proceedings.”170 Indeed, the limited nature of pretrial transfer is considered an “advantage” over the proposed amendment to Rule 23 because “each action remains an individual suit with the litigants retaining control over their separate interests. . . . Proposed § 1407 would maximize the litigant’s traditional privileges of selecting where, when, and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials.”171 Moreover, because the statute would apply only to cases sharing common questions pending in multiple districts, and in which “coordinated or consolidated pretrial proceedings would promote the just and efficient conduct of such actions,” the statute would only be applicable to “litigation in which significant economy and efficiency in judicial administration may be obtained.”172

The Judicial Conference approved the statute for submission to the Congress—through both Judge Maris’s Committee on Revision of the Laws and Judge Murrah’s Pretrial Committee.173

III. The Bumpy Road to Congressional Passage

The statute was then formally submitted by the Judicial Conference to the House and Senate Judiciary Committees on April 12, 1965.174 Congressman Celler introduced the bill, H.R. 8276, in the House on May 9, 1965. To this point, the judges’ strategy had worked. It had managed to draft a statute to which all judges on the Co-Ordinating

under specifically delegated flexible rule-making authority. After considering the comments received on an earlier draft, the Committee has concluded that its objectives can be achieved by the more limited and specific statute now proposed which authorizes only implementing rules not inconsistent with any Act of Congress or the Federal Rules of Civil Procedure.”

170 Id. at 19.
171 Id. at 20
172 Id. at 19-20. The commentary also highlights its limited nature by analogizing to consolidating related cases within a single district before one judge. Id. at 20-21


The Committee reported that the proposal has grown out of the practical experience of the Committee on Multiple Litigation in conducting pretrial proceedings in the electrical equipment private antitrust litigation. The proposed legislation would establish a procedure to meet the problems involved in conducting efficiently and economically the pretrial deposition and discovery proceedings in litigation of this type and would be invoked only if the judicial panel determined its use would promote the just and efficient conduct of the litigation. Upon recommendation of the Committee, the Conference approved the draft bill submitted by the subcommittee.

174 Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts to John W. McCormack, Speaker, House of Representatives, April 12, 1965, Becker Papers, Box 15, Folder 34; Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts to Hubert H. Humphrey, President, United States Senate, April 12, 1965, Becker Papers, Box 15, Folder 34.
Committee had agreed, with the support of the judges participating in the still-ongoing electrical-equipment litigation. Moreover, it had achieved Judge Murrah’s objective of avoiding the rulemaking process by “going straight to the top” and achieving the support of Judge Maris. And the statute achieved the support of the Judicial Conference without opposition, emphasizing its limited aims and its provenance in the successful handling of the electrical cases and the Handbook. All seemed to be going according to plan. At the June 25 meeting of the Co-Ordinating Committee in Denver, Judge Robson was optimistic, reporting that “the proposed legislation has been introduced into the House and that hearings will be conducted before the House Judiciary Committee in July. After passage in the House, the bill will be introduced in the Senate where no problems are anticipated.” In the meantime, the Committee continued in its work on the antitrust cases, but also fielding requests to coordinate pretrial proceedings in a variety of other cases, including antitrust cases involving Rock Salt and Concrete Pipe, air crashes, and patent litigation.

A. Roadblocks: The Department of Justice and the American Bar Association

1. Delay in the DOJ

Any possibility of quick action hit two snags. First, the House Judiciary Committee deferred action on the statute pending the views of the Department of Justice. Judge Robson and Dean Neal set up a meeting with Donald Turner, the Assistant Attorney General for Antitrust, in Washington, DC on August 4, 1964 to discuss the statute. Turner was non-committal; though he expressed general support for the statute, he believed there should be an exemption from consolidation for government civil antitrust enforcement actions. Neal expressed the hope that the Department would nevertheless “affirmatively support the bill in principle.” Turner, however, was unwilling to move quickly, citing “running from one crisis to another” and the need to “take some time” to consider the proposal. Beyond his disinclination to move quickly, Turner reported that he had a staffer “check with a committee staff member to ask whether or not there was any prospect at all of getting the legislation through this session of Congress. Our particular information said the chances were probably zero even if we were able to everything within one day.” Turner reported that he would not be able to

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175 Letter from Judge Edwin A. Robson to Judges of Co-Ordinating Committee on Multiple Litigation, May 26, 1965, Becker Papers, Box 15, Folder 34 (“Our suggested amendment to the venue statute has been introduced. Through the good offices of Chief Judge Campbell of the Northern District of Illinois, we have been successful in getting the cooperation of Congressman Emanuel Celler. It is expected that this will be set for hearing before the House Judiciary Committee in the near future. You will be kept posted.”).

176 Minutes of the Meeting of the Co-Ordinating Committee on Multiple Litigation, Denver, CO, June 25, 1965, Becker Papers, Box 9, Folder 21.

177 Letter from Phil C. Neal to Donald F. Turner, August 5, 1965, Becker Papers, Box 15, Folder 34.

178 Id.

179 Id.

180 Id.
comment on the legislation until September, but he wished to assure Judges Murrah and Robson that "the delay reflects only the pressure of circumstances."  

Radio silence from the Justice Department persisted throughout the fall of 1965, as the Committee continued to wait for a response, eventually authorizing Judge Murrah to "take all necessary steps to secure action by the Department." Judge Murrah eventually intervened and was able to procure a meeting with Deputy Attorney General Ramsey Clark in the late evening of December 13, at which he reported, "the judges are perfectly willing to except the Government to the extent you deem advisable and feasible. In the next few days I will send you a statement concerning the position of the judges on this particular point." The following week, Neal informed Murrah by letter that the Co-Ordinating Committee had agreed to allow an exemption for all civil suits brought on behalf of the United States. But Clark had also apparently suggested removal of the Ryan Amendment requiring consent by a transferor judge. Neal reported that the "Committee has not taken any position on the suggested deletion." Although the Committee took no official position, in a letter to Clark on December 27, 1965, Murrah seemed to make clear that he wouldn’t let the Ryan Amendment get in the way of passage of the bill, stating that "[i]t would be unfortunate, however, if the legislation was so restricted to nullify its intended salutary purposes."  

Clark apparently took the hint and sent a letter to the Judiciary Committee responding to its request for the Department’s views on the proposed legislation on January 7, 1966. Clark reported that the “Department of Justice favors its enactment but suggests it be amended in two respects.” First, Clark requested that suits brought by the government be exempted so that they would not be delayed by discovery in

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181 Id.  
182 Minutes of the Meeting of the Co-Ordinating Committee on Multiple Litigation, Chicago, IL, December 9, 1965, Becker Papers, Box 9, Folder 21 (“Judge Robson reported on proposed Title 28, U.S.C. Sec. 1407. Congressional action remains delayed pending the Justice Department’s recommendations. Through repeated efforts have been made to determine the Department’s position, no report has been received.”); see also Minutes of the Meeting of the Co-Ordinating Committee on Multiple Litigation, New York, NY, September 29, 1965, Becker Papers, Box 9, Folder 21 (“Judge Robson reported that Congressional action on proposed Title 28, U.S.C. Sec. 1407 has been deferred pending recommendations from the Justice Department.”).  
183 Letter from Judge Alfred Murrah to Ramsey Clark, Deputy Attorney General, December 16, 1965, Neal Papers, Box 4, Folder XYZ (“It was so typically fine and cooperative of you to see me late Monday evening concerning the proposed venue legislation. I am sure all agree that the legislation is needful.”). At the 1967, Senate hearings, Judge Murrah implied that he went around Turner directly to Clark when he could not get a response from the Antitrust Division. By the time the bill became law, Clark had been appointed Attorney General. Senate Hearings, at 58-59.  
184 Letter from Phil Neal to Judge Alfred Murrah, December 20, 1965, Neal Papers, Box 4, Folder XYZ.  
185 Id.  
186 Letter from Alfred Murrah to Ramsey Clark, December 27, 1965, Neal Papers, Box 4, Folder XYZ.  
188 Id.
pending private actions. Second, Clark suggested deletion of the Ryan Amendment, noting that “[t]o require such consent seems superfluous” given the need for the panel to approve the transfers, and because “[r]equiring the consent of the transferor district judge would give a veto power and in essence require voluntary cooperation of all in order to consolidate discovery proceedings.”\textsuperscript{189}

The proposed deletion of the Ryan Amendment sparked a suggestion by Judge Becker that the drafters rework the draft and go back to the Judicial Conference for a recommendation of the revised version and approval of the Department of Justice’s amendments.\textsuperscript{190} Judge Murrah rejected that suggestion, stating: “The proposed statute on multiple litigation should of course be as broad as we can make it, but I hesitate to go back to the Judicial Conference with it since it has been approved in principle, and since it must undergo Congressional scrutiny, and may be further amended there. I doubt the advisability of going back to the Conference or the Department.”\textsuperscript{191} As a result, the Committee began preparations for its regular report to the Judicial Conference for its March 1966 meeting, at which it planned to reference Clark’s support and his suggested amendments.

This piqued Judge Ryan, who demanded redaction in the report of the Committee’s work on other cases as a “a reference to an assumption of authority by the Committee which was never conferred or intended by the Conference to be exercised by the Committee.”\textsuperscript{192} Ryan also objected to reference to Clark’s suggestions “particularly since it presents but one view which is opposed to the specific approval by the Conference and this Committee of legislation which has already been introduced. Concerning Mr. Clark’s suggested two amendments, I would observe that since the Committee has not considered or voted on these suggested amendments, there is no occasion to refer to them at this time.” Ryan added, “If it is intended to file the proposed report as presently worded, I request that my dissent be recorded as outlined in this letter.”\textsuperscript{193} Judge Robson attempted to smooth things over in a letter to the whole Committee, with Judge Ryan’s letter attached, and putting the question of the content of the report to the Judicial Conference to a majority vote.\textsuperscript{194} The majority favored

\textsuperscript{189} Id.
\textsuperscript{190} Letter from Judge William H. Becker to Alfred P. Murrah, February 9, 1965, Becker Papers, Box 15, Folder 34 (“It occurs to me that a new draft should be prepared of our proposed statute on multidistrict litigation to conform to the suggestions of the Department of Justice contained in Hon. Ramsey Clark’s letter of January 7, 1966. With very few changes, the New Orleans draft to which the Ryan amendment was added could be reworked with a minimum of effort. I am sending copies of this letter only to those who have been engaged in drafting for the Co-ordinating committee. The Judicial Conference approved the draft with the Ryan amendment. Perhaps consideration should be given to the time available and the desirability of securing some sort of an expression of approval of the suggestions of the Department of Justice.”).
\textsuperscript{191} Letter from Judge Alfred Murrah to Judge William Becker, February 15, 1966, Becker Papers, Box 15, Folder 34.
\textsuperscript{192} Letter from Judge Sylvester Ryan to Judge Edwin Robson, February 16, 1966, Neal Papers, Box 4, Folder XYZ.
\textsuperscript{193} Id.
\textsuperscript{194} Letter from Judge Edwin A. Robson to Judges of the Co-Ordinating Committee on Multiple Litigation, February 21, 1966, Becker Papers, Box 15, Folder 34.
including both the references to other litigation and the Clark amendments, and the
dissent of Judge Ryan was recorded. The Judicial Conference approved of the
Committee’s continuing activities, but over the dissents of five judges, including Judge
Ryan. Judge Robson reported the success at the Judicial Conference to the Committee
at a meeting in Philadelphia on March 31. Anticipating future hearings on the bill, the
Committee authorized Judge Robson to designate members of the Committee to appear at
any such hearings, and “[o]ver Chief Judge Ryan’s objection the designated judges were
authorized to express their personal objections on suggested changes.”

Despite the approval of the Department of Justice and continuing approval of the
Judicial Conference as a whole, the bill remained bogged down in the House.
Apparently, due to higher priorities, Congressman Celler did not schedule hearings,
though he apparently hoped to in the future. As the summer wore on and nothing
happened, the judges agreed to turn to an attempt to lobby the Senate to hold hearings on
the bill first. Judge Becker personally reached out to Senator Edward Long, who was
from his home state of Missouri. Long responded—inquiring about the Ryan
Amendment, which Becker assertively undermined, claiming that “I believe that I can say
that practically all of the judges who have reviewed this proposed bill would consider
the bill to be a great advance if adopted in the form suggested by the Attorney General. . .
This included Judge Ryan of New York, who is the judge adhering to the view that there
should be a veto power in the bill.” With things apparently moving forward in the

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reports that “After full consideration the Conference voted to approve the concept of the subcommittee’s
work, as expressed in its report, including the recommendation of appropriate legislation in this field.
Chief Judges Chambers, Lumbard, Harper, Madden, and Ryan were recorded in opposition to this motion.”
196 Minutes of Meeting of Judges of Co-Ordination Committee on Multiple Litigation,
Philadelphia, PA, March 31, 1966, Becker Papers, Box 9, Folder 21.
197 Letter from William E. Foley, Deputy Director of the Administrative Office of the United
States Courts to Judge Edwin A. Robson, April 12, 1966 (noting that Rep. Celler “will set the bill for
hearing but must dispose of certain other matters first. . . . I believe they have several administration bills
which now have priority anf this explains the delay. I regret that I do not have any worthwhile suggestions
as to how we can move this any faster unless someone has direct access to the congressman and can urge it
on him.”); Letter from William E. Foley, Deputy Director of the Administrative Office of the United States
Courts to Judge Edwin A. Robson, May 26, 1966, Becker Papers, Box 15, Folder 34 (noting that “it was the
Chairman’s firm intention to hold hearings on the bill during the present session”).
198 See, e.g., Letter from Judge Edwin A. Robson to Sen. Everett M. Dirksen, August 16, 1966,
Becker Papers, Box 15, Folder 34 (“The bill was introduced in the House but has become bogged down in
Congressman Celler’s committee. Although the judges had been promised a hearing in Congressman
Celler’s committee, we have been unable to secure one. . . . At a recent meeting, some of the members of
this Co-Ordinating Committee agreed to seek help from the members of the Senate Judiciary Committee to
see if the bill could not be passed by the Senate.”).
199 Letter from Judge William H. Becker to Sen. Edward V. Long, August 1, 1966, Becker Papers,
Box 15, Folder 34 (using same pertinent language as Robson’s letter to Dirksen).
200 Letter from Judge William H. Becker to Sen. Edward V. Long, August 9, 1966, Becker Papers,
Box 15, Folder 34 (“One judge on the drafting committee wished to give the district court from which the
action was transferred a veto power by requiring consent of the court from which the action was
transferred. From my discussions with the Judicial Conference Committee which approved and presented
the bill to the Judicial Conference, I believe that I can say that practically all of the judges who have
reviewed this proposed bull would consider the bill to be a great advance if adopted in the form suggested
Senate, the bill was given a hearing before a subcommittee of the House Judiciary Committee on August 31, 1966. Unbeknownst to the judges, however, a much larger roadblock than they had yet encountered was developing—in the American Bar Association.

2. Opposition by the A.B.A.

As discussed earlier in this paper, the A.B.A. Antitrust Section was a full partner in the creation of the 1950s Handbook. Things changed by the time the MDL statute came around—perhaps because defendants’ experience with the Handbook’s recommendations in their harshest form turned out not to be to their advantage. In any event, when the Committee asked for comments from defense counsel in November 1964, the lawyers’ main contention was that the proposal should be referred to the American Bar Association and other bar committees for review. The Committee roundly rejected this proposal, citing the delay such consultation would create. The backchannel communications between Judges Murrah, Robson, and Becker demonstrate also that the judges believed that the antitrust defendants were opposed to the proposal because it was against their clients’ interests, based on their experience with the electrical-equipment litigation. In short, the judges believed that the defendants sought delay to mount opposition to the legislation. Having been rebuffed by the judges, some lawyers took it upon themselves to bring the bill to the attention of the antitrust section of the American Bar Association. At the meeting of the Antitrust Section of the ABA, whose executive council contained numerous defense lawyers from the electrical cases, on April 8, 1965, it was announced that an ad hoc committee had been formed to study the legislation chaired by William Simon.201 On April 13, 1966, this committee recommended to the executive session of the council that it adopt a resolution opposing the legislation, and the council agreed.202 On August 10, at its meeting of the House of Delegates, the ABA as a whole adopted the resolution opposing the bill without debate, following a statement by lawyer Richard McLaren of Chicago.203

The judges on the Committee were blindsided by the A.B.A.’s action. As Judge Robson described in a letter to Judge Becker on August 16, 1965:

In the interim we have had a roadblock in that the American Bar Association Antitrust Section, unbeknownst to anybody, voted to oppose the legislation. Both Perry [Goldberg] and [Judge] Joe Estes were in

by the Attorney General. . . . This included Judge Ryan of New York, who is the judge adhering to the view that there should be a veto power in the bill.”)

201 27 A.B.A. Section on Antitrust Law x (1965).
202 30 A.B.A. Section on Antitrust Law ix (1966).
Montreal as members of the section, and received no notice that this was coming up for discussion. We are investigating it and will give you a report later on. It is apparent from the sessions that Perry and Joe attended that the cards were stacked against us by the defendants. The path to success is not an easy one, as we have learned in the past.204

The A.B.A. report reads like a laundry list of criticisms of the statute, some of which are more persuasive than others. The main thrust of the report is that the statute goes too far, too fast, without the benefit of additional experience, and that the electrical-equipment cases demonstrate that regular procedures are adequate to meet the demands of a crisis.205 Judge Becker did not see a copy of the report until August 30, the night before the House Subcommittee hearing; Becker and Robson dictated their responses to the criticisms the night before the hearing in Washington.206

B. A Hearing in the House

The Hearings in the House commenced on the morning of August 31, 1966. The MDL statute was one of four statutes the subcommittee was considering that day.207 Judges Robson and Becker appeared on behalf of the Committee, as did Dean Neal. Neal went first, describing the history and successes of the electrical-equipment cases, but then turned to the “different theory” underlying the MDL statute.208 The procedure followed in the electrical cases was “cumbersome” and “fragile . . . because it is dependent on the unanimous agreement of the judges involved for it to work.”209 Moreover, 28 U.S.C. § 1404(a), the general transfer statute, was limited because (1) it only allows transfer to districts in which the cases could have originally been brought, (2) it allows only for complete and not pretrial transfer, and (3) “perhaps most important, section 1404(a) is inadequate because it leaves the question of transfer to the determination of the court in a particular case and to the initiative of the parties in that case.”210 The bill would respond by providing “some machinery in the Federal judiciary which can determine what ought to be done from the standpoint of the judiciary as a whole, and the interests not only of

204 Letter from Judge Edwin A. Robson to Judge William H. Becker, August 16, 1965, Becker Papers,


206 Letter from Judge William H. Becker to Sen. Edward V. Long, September 6, 1966, Becker Papers, Box 15, Folder 34; Multidistrict Litigation: Hearings Before Subcomm. on Improvements of Judicial Machinery of the Comm. On the Judiciary, 89th Cong (1966) at 24 [hereinafter “Senate Hearings”] (Becker notes: “We discovered the existence of this document only the day before we were to appear before the House committee on H.R. 8276.”).

207 Judicial Administration: Hearing Before the Committee on the Judiciary, 89th Cong. (1966) [hereinafter “House Hearings”]. The other legislation considered by the committee that day involved the retirement of judges of the territorial courts, amendment to the judicial-recusal statute, and appointment of U.S. Marshals by the Attorney General.

208 House Hearings at 22.

209 Id.

210 Id.
the parties in a single case in a single district but of the parties affected by the entire mass of litigation.” 211

Judge Becker testified next and amplified the need for the bill:

We feel that there is a litigation explosion occurring in the Federal courts along with the population explosion and the technological revolution; that even with the addition of many new judges, the caseload, the backlog of cases pending, is growing; and that some new tools are needed by the judges in order to process the litigation which results from the matters which I have mentioned, as well as from extensions of the jurisdiction of the Federal courts by acts of Congress, and this is a method which we think will work. 212

Becker then turned to the two amendments suggested by Deputy Attorney General Clark, whose January 6, 1966 letter was entered into the record. Becker noted the Committee’s endorsement of the first proposed amendment, exempting suits brought on behalf of the government. With respect to the second suggestion, the deletion of the Ryan Amendment allowing for a transferor-court veto, Becker stated that “I am authorized to state that this suggested amendment has the approval of a majority of the Committee and I feel and the majority of the Committee feel that this change should be made, so we are in agreement with the Department of Justice on this matter.” 213 Becker also noted the criticisms of the A.B.A. and offered to present a paper responding to them. 214 Becker closed by again stressing the apparently limited nature of the proposal—that it would not require the creation of a new court or the appointment of any new judges, that there was a “mandatory duty” to remand the case when pretrial proceedings are concluded.

Although no witnesses appeared in opposition to the bill, the report of the A.B.A. recommending against its adoption was entered into the record, as was Judges Becker and Robson’s point-by-point refutation of it. The Becker/Robson rejoinder is remarkable for its force. Apparently written the night before the hearing, the judges respond pointedly to each of the criticisms offered in the A.B.A. report. The thrust of the judges’ response is that massive litigation is on the horizon, and that current procedure is plainly inadequate to deal with it. Without this statute there will be massive duplication of effort in discovery and a threat to the efficient operation of the courts. The judges also appealed to process—if somewhat disingenuously:

211 Id. at 23
212 House Hearings, 27
213 Id. at 27. In response to a question, Judge Becker added, “I personally feel is would be a good thing to do what General Clark says about it.” Judge Murrah testified even more forcefully along these lines in the Senate hearings, responding to Sen. Tydings’ question about the veto provision: “I suppose it is fair to say, of course, that when you are hammering out proposed legislation of this kind, especially with hardheaded federal judges, you have to make some concessions along the way, sometimes even to the point of emasculation. I think it is appropriate to say that I never did approve of the provision which allowed veto power to one judge. My argument was that if you do that, you almost completely render the legislation impotent.” Senate hearings, at 55-56.
214 Id. at 29.
The Coordinating Committee wishes to inform your Committee that before final drafts of H.R. 8276 were submitted to the Judicial Conference, conferences were held with lawyers representing both the plaintiffs and defendants in the electrical equipment antitrust cases. The lawyers consulted represented the major portion of the antitrust bar of the United States and many of their suggestions were incorporated in what is now H.R. 8276. On the other hand, no opportunity was given by the Council of the Section of Antitrust Law for discussion or hearing of objections to the report discussed hereinafter.

C. Trying Out the Senate

Once the hearings were concluded, the judges turned their attention to lobbying the Senate Judiciary Committee, which would be holding hearings on the bill in October in Chicago. As Judge Becker indicated to his home-state Senator Edward Long on September 1, he had “no reason for any confidence that any affirmative action will be taken” in the House Committee. The Senate, however, proved to be a more promising avenue. Senator Long and Senator Joseph Tydings of Maryland, the Chairman of the Subcommittee on Improvements in Judicial Machinery introduced the bill in the Senate on September 9, 1966—with both of Ramsey Clark’s amendments.

A hearing was held in Chicago on the Senate bill on October 20-21, 1966. Although it was a much more elaborate affair than the House hearing, focusing exclusively on the MDL bill, the only Senator in attendance was Sen. Tydings, and only witnesses in favor of the statute testified. But nearly the entire Co-Ordinating Committee was present, with only Judges Murrah and Byrne absent, and Murrah joining on the second day. As in the House hearing, Judges Robson and Becker, and Dean Neal, expressed their support for the bill on the merits—presenting the success of the electrical-equipment actions but pressing the need for machinery in the future that did not rely on the voluntary cooperation of every judge involved in a given case. They were joined by an additional witness, Charles Bane, the lawyer for plaintiff Commonwealth Edison in the Chicago litigation and a booster of the Committee’s efforts.

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215 House Hearings, at 32.
216 Letter from Judge William H. Becker to Sen. Edward V. Long, September 6, 1966, Becker Papers, Box 15, Folder 34.
217 In a subsequent letter to Sen. Long, Judge Becker thanked him for introducing the bill, noting that “This proposed legislation appears to be a very minor matter, but I can assure you that it is truly of great importance.” Letter from Judge William Becker to Sen. Edward Long, October 17, 1966, Becker Papers, Box 15, Folder 34.
218 Senate Hearings at 3. Tydings explained that “the Senate is winding up; today may be the last day of the session, and a number of members of this subcommittee are in Washington. That is why our ranks are depleted for this particular hearing.” One reason Tydings was interested in this statute is disclosed in the hearing—the interest of Co-Ordinating Committee member, Judge Roszel Thomsen of the District of Maryland, whom Tydings refers to as his “former mentor . . . who taught me most of the law I know, not only when I was a U.S. Attorney but even earlier when I was in law school at the University of Maryland.” Id. at 4.
Aside from their defense of the bill on its merits, Becker and Bane trained their fire on the A.B.A. Becker raised the A.B.A.’s opposition as a matter “we may as well lay on the table.” Both Bane and Becker attacked the A.B.A.’s process and substance. On process, they emphasized the means by which the Report was drafted—through an ad hoc committee report, approved by the executive council of the Antitrust Section, and then presented to the House of Delegates in Montreal and approved without debate. In Becker’s view, “this recommendation of the American bar loses a great deal of its value and influence under the circumstances.” Becker, though, goes further. Although Becker states that he believes the process was not nefarious and was more of a creature of the ABA’s enormous membership generally, and of the antitrust section in particular, he implies that the process was somewhat shady in his testimony when he notes that:

Several members of the Coordinating Committee are members of the Antitrust section of the American Bar Association. Meetings of the section have been attended by our judges to hear what was going to be said about this proposal. Nothing was ever said at the meeting they attended. I undertook recently, therefore, to find out how this could happen and I learned on reliable information from a person intimately connected with this recommendation opposing H.R. 8276 was never made known to the membership of the Antitrust Section of the American Bar Association.

Bane fully attributed the A.B.A.’s recommendation to the influence of antitrust defense lawyers on the executive council, contending that “there is a substantial influence in this report by parties who defend electrical equipment antitrust cases and very ably defend them. But at not time did they abandon the advocacy of their clients’ causes.” Bane added to his view that the A.B.A. report was the product of a defense cabal his observation that he was present at the Montreal meeting and “despite the circumstance that I am a chairman of a committee of the antitrust law section, at no time did I have any indication, nor did any other member of the section, that the council of the antitrust section was presenting to the house of delegates this type of a resolution with respect to

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219 Senate Hearings, at 24.
220 Senate Hearings, at 24 (Becker: “The recommendation was prepared by a special committee which had been appointed and, which, so far as I know, never granted a hearing to anyone. The recommendation was never read at any meeting of the antitrust section and discussed. The recommendation was never printed and circulated among the several thousand members of the antitrust section. The judges said members of the Coordinating Committee and lawyers who were supporting this proposal for new section 1407 were never given an opportunity to discuss it with persons who prepared the recommendation.”).
221 Id. at 24.
222 Senate Hearings, at 24.
223 Senate Hearings, at 38. Bane added his view that defense counsel were opposed to the bill, noting that the kind of cooperation achieved in the antitrust cases was unlikely to recur: “I am not sure that that spirit would be duplicated in the future, and I do not want to be unfair about this, but I think that defense counsel are quite likely in the future, in the event that this this were tried on a voluntary basis, to be more sophisticated and experienced in their opposition than they were about the electrical equipment litigation, and I am just not at all certain that they might not in some quarters be effective in their opposition.” Id. at 37.
the bill.” Bane also noted the judges’ offer to counsel to comment on the bill, noting that “the defendants did not comment, but the plaintiffs did. . . . I can say that plaintiffs’ counsel by and large were wholeheartedly in favor of these proposals.”

The witnesses on the second day of hearings repeated the key themes of the first day: the urgent need for the legislation, the success of the electrical-equipment cases, the limited nature of transfer for pretrial proceedings, the unlikely success of future attempts at voluntary coordination, and the unrepresentative and biased nature of the A.B.A. report. Two lawyers in the electrical-equipment cases joined Bane in support of the bill, Ronald W. Olson, who represented plaintiffs, but also Edward R. Johnston, who represented defendant McGraw-Edison Company, and who, at the time, was the senior partner at Raymond, Mayer, Jenner & Block. Johnston recognized the value of coordinated proceedings for a defendant—and a defense firm at the center of the litigation. He noted the “distinct advantage” of “uniformity of action, and recognized that without coordination before a single judge,

It becomes necessary for counsel charged with the representation of a defendant nationally to either attend the hearings in the different districts or to spend a great amount of time with local counsel apprising them of the facts and the legal questions involved. This is both cumbersome and extremely expensive and frequently results in conflicting rulings in the several districts with respect to these preliminary matters.

For his part, Johnston also undermined the A.B.A. recommendation, albeit more diplomatically, noting that there was “no debate on any of these resolutions,” and he “therefore cannot attach great importance to the resolution. I have the greatest respect for the members who are on the council—some of them are very close friends of mine—and yet I know that there were at least one or two members on the council who did not favor this type of pretrial proceeding.”

Chief Judge Murrah ended the testimony with a statement describing the natural evolution from the principles developed for handling protracted litigation in a single court to the MDL statute. He also stated in stark terms the urgent need for the legislation:

I think it is very important to say that this multiple-district litigation can very well break our backs out of sheer weight of numbers unless we do have an orderly procedure for it. This proposed legislation is the product of the best thinking of the judiciary, the best thinking of the judges who

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224 Senate Hearings, at 38.
225 Id. at 39.
226 Johnston testimony, Senate Hearings, at 43. Johnston got it: “Looking at this bill from the standpoint of a defendant’s lawyer, particularly, I favor its passage because I believe it presents some very practical considerations which are of benefit to the defendants as well as to the litigants generally.” Id. at 44. He added, “from the standpoint of the defendants, they are much better off, in my opinion, to have the pretrial proceedings conducted in one district where they can concentrate upon the handling of their client’s interests.”
227 Senate Hearing at 47.
have worked with these cases, and have worked with the problem for 4 years.\textsuperscript{228}

In a bulletin to all judges involved in multidistrict litigation, the Co-Ordinating Committee reported on the hearings and implored the judges for their support.\textsuperscript{229}

The subcommittee scheduled a third day of hearings in Washington for January 24, 1967. This hearing would feature witnesses testifying in opposition to the bill— including Phillip Price of Dechert, Price & Rhoads in Philadelphia, who had represented defendant I-T-E Circuit Breakers in the electrical cases, and William Simon of Howrey & Simon in Washington, who had chaired the A.B.A. ad hoc committee that produced the report in opposition to the bill. Judge Becker was proactive when it came to Price’s testimony.\textsuperscript{230} Upon learning that Price would appear, Becker sent a letter to George Trubow, counsel to the subcommittee attaching documents from the electrical equipment litigation to “show the unsound and uncooperative tactics of I-T-E Circuit Breaker in the processing of the electrical equipment litigation.”\textsuperscript{231} Becker added, I-T-E resisted going to trial and did not undertake a settlement program until it was in the early processes of a jury trial in Chicago. The object of the committee was to terminate the cases by trial or settlement or both. Until the Chicago trial, I-T-E expressed an unwillingness to do either. If the Judges had not co-ordinated their efforts these cases would probably still be clogging the dockets in many districts. Mr. Price’s testimony should be evaluated in light of the actions of his firm in representing I-T-E Circuit Breaker in the electrical equipment litigation.\textsuperscript{232}

The hearing commenced on January 24, 1967, again with Tydings the only Senator in attendance. For his part, Price did not mince words at the hearing. Still upset by the handling of the I-T-E cases, Price excoriated both the judges and their bill as an imperial power grab by federal judges against the interest of litigants. He stated plainly

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\textsuperscript{228} Senate Hearing at 54.  \\
\textsuperscript{229} Bulletin No. 51, Co-Ordinating Committee for Multiple Litigation, November 3, 1966, Becker Papers, Box 8, Folder 19 (“The support of all judges who participated in the electrical equipment litigation is earnestly requested. . . . Suggested rough drafts of letters for use by those judges who are willing to express themselves in support of the Bill which are addressed to Senator Tydings and Congressman Celler (the related House Bill is numbered 8276) are also enclosed.”).  \\
\textsuperscript{230} Minutes of the Meeting of the Co-Ordinating Committee, Chicago, IL, January 20, 1967, Becker Papers Chronological Files, Box 11, Folder 1 (“The Senate Subcommittee on Improvements in Judicial Machinery will hold additional hearings on proposed §1407 to be held in Washington, D.C. on January 24. It was reported that Mr. Phillip Price of Dechert, Price & Rhoads (Philadelphia) and a Mr. Simon, representing the American Bar Association, are expected to testify. . . . Judge Becker said it should be noted for the record that portions of Mr. Price’s statement (distributed to member of the Committee) were inaccurate.”).  \\
\textsuperscript{231} Letter from Judge William Becker to George Trubow, Deputy Counsel to the Senate Judiciary Committee, January 12, 1967, Becker Papers, Box 15, Folder 34.  \\
\textsuperscript{232} Id.
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that the bill “would lead to the same kind of abuses which have grown up and which appeared during the course of the electrical cases.”\textsuperscript{233} He added, of the electrical cases:

After the judges have had the pleasurable experience of being able to toss cases all over the United States without any supervision or adequate review of their actions, transfers became more and more frequent, and they found it so easy that many cases were transferred to the great disadvantage and enormous expense of the litigants, and without any corresponding advantages.\textsuperscript{234}

Although Price made his point forcefully, he didn’t really get anywhere with Tydings, who took up Becker’s critique that Price’s opposition to the bill was motivated by the defendants’ interest in increasing delay.\textsuperscript{235}

Simon appeared in an attempt to defend and rehabilitate the A.B.A. Report. He defended the A.B.A.’s conclusion, arguing that the electrical cases prove that existing procedures were adequate to deal with massive litigation and casting coordinated proceedings as “a conflict between justice and efficiency.”\textsuperscript{236} Tydings took the bait, characterizing the A.B.A.’s stance as opposed to fair administration of justice:

Well, as I gather, basically the American Bar Association has taken the position that if they have a hundred or 200 cases, and each one with the same set of facts, the same pretrial for each different district, that if they want to take up the taxpayer’s dollar and the court’s time and make it a hundred times as long and more difficult for the judiciary of the United States, that is fine, because the interests of the attorneys and the litigations is the most important.\textsuperscript{237}

Simon also attempted to defend the process by which the A.B.A. report was written against Tydings’ attacks. Simon noted that the ad hoc committee was composed entirely of lawyers who had not been involved in the electrical-equipment cases, in an attempt to insulate the committee from allegations of bias. Simon also defended the procedure of submitting the report to the executive council and then to the house of delegates, claiming that that’s standard procedure for an organization as large as the A.B.A.\textsuperscript{238}

\textsuperscript{233} Price, Senate hearings, at 107. Price added, in barely veiled criticism of Judge Becker, that the transfers in the electrical cases there was “no suggestion that it was going to be for anybody’s real convenience but the judges, who wanted to get everything to Chicago for some reasons of their own.” \textit{Id.} at 114.

\textsuperscript{234} \textit{Id.} at 108.

\textsuperscript{235} Senate hearings, at 115 (responding to Price’s testimony by noting: “As a matter of fact, in many instances, it is to the benefit of the counsel to delay the trial, if necessary, to postpone it and drag it out for years. In the electrical equipment cases, they could have been dragged out for 20 years, if they hadn’t been consolidated for pretrial as they were.”).

\textsuperscript{236} Senate hearings, at 121.

\textsuperscript{237} Senate hearings, at 124. \textit{See also id.} at 128 (“Well, this bill seeks to improve the efficiency of our court system and save the taxpayers, depending on the case involved, some hundreds of thousands of dollars and judges’ time, which is a matter of some concern to the Congress.”).

\textsuperscript{238} \textit{Id.} at 126-128.
Judge Clary attended the hearing on behalf of the Committee and reported back to his colleagues in a letter dated January 27, 1967. Clary felt good about it: “I left the hearing with the feeling that it had gone rather well and that the Bill would be reported by the Subcommittee to the full Committee with a recommendation of passage.” Clary also noted that he had a conversation with subcommittee counsel George Trubow after the hearing. Clary learned from Simon’s testimony that the ad hoc committee of the A.B.A. antitrust section was appointed by the section’s chair Edgar Barton, of White & Case in New York, who had represented General Electric in the electrical cases. Clary reported that the A.B.A.’s position “was consistent with the position always taken by the Section on Antitrust of the American Bar Association, which position is to oppose any legislation looking toward improvement in expediting antitrust cases and supporting vigorously an extension of loopholes which would avoid responsibility for antitrust violation.”

D. Continuing the Momentum in the Senate

During the spring of 1967, following the hearings, the judges intensified their letter-writing campaign to individual Senators. In a letter to the electrical equipment judges, Judge Boldt argued that “[i]t is unthinkable that the lessons learned in the electrical litigation should not result in permanent means of more effectively dealing with multi-district litigation in the future.” In the meantime, Judge Becker liaised with Senator Tydings’ office to respond to supplemental statements offered by Price and Cravath, Swaine & Moore (which had represented Westinghouse in the electrical cases) submitted to the committee offering amendments to the bill. Perhaps recognizing

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239 Letter from Judge Thomas Clary to Judges of the Co-Ordinating Committee on Multiple Litigation, January 27, 1967, Neal Papers, Box 4, Folder XYZ.
240 Id. (noting that “most of us will remember his active participation in all proceedings before the Co-Ordinating Committee.)
241 Id.
242 Letter from William H. Becker to Judges Before Whom Multiple Litigation Is or Has Been Pending, April 3, 1967, Becker Papers, Box 15, Folder 34 (“It is suggested that, if you approve of the bill, you support its passage by writing members of the Senate who represent your state or whom you know.”). Becker’s papers contain numerous letters from judges indicating that they will contact their Senators. See, e.g., Letter from Judge Roy M. Shelbourne to William H. Becker, April 19, 1967, Becker Papers, Box 15, Folder 34 (“I have received your letter of April 17, with enclosures. I, of course, will write to the Honorable John S. Cooper and the Honorable Thurston B. Morton, United States Senators from Kentucky, urging the passage of S. 159.”); Letter from Judge Bailey Brown to Judge William H. Becker, April 19, 1967, Becker Papers, Box 15, Folder 34 (“In response to your letter of April 17 I have written to Senator Gore.”); Letter from Judge William Becker to Judge Adrian Spears, April 26, 1967, Becker Papers, Box 15, Folder 34 (thanking Spears for his letters to Senators Tydings, Yarborough, and Tower in support of the bill); Letter from Judge William Becker to Judge A. Sherman Christensen, April 27, 1967, Becker Papers, Box 15, Folder 34 (thanking Christensen for his letter to his Senators).
243 Letter from Judge George Boldt to Judges Involved in Electrical Equipment Litigation, April 3, 1967, Becker Papers, Box 15, Folder 34.
244 Trubow reached out to Becker for comments on these statements. Letter from George Trubow to William Becker, February 10, 1967, Becker Papers, Box 15, Folder 34 (re Price statement); Letter from George Trubow to William Becker, February 13, 1967, Becker Papers, Box 15, Folder 34 (re Cravath statement).
Tydings’ commitment to the legislation from the tenor of his testimony, Price encouraged several amendments, all of which tended to make consolidation more difficult—in particular, allowing transfer only on a showing that there is a “substantial number” of civil actions in which “common questions of fact and law predominate” and only to the district “most convenient to the parties and witnesses.”\textsuperscript{245} The memorandum from Cravath essentially agreed with the need for legislation, but only under rare circumstances, and suggested amendments such that only a party (and not a court) could move for transfer and when doing so it must provide a list of all related litigation in any district, that transfer be for trial as well as pretrial proceedings, and that any transfer orders be immediately appealable to the Supreme Court.\textsuperscript{246} The Cravath memo also reiterates the request for a predominance requirement.\textsuperscript{247}

Becker responded forcefully to both memoranda.\textsuperscript{248} He referred to Price’s suggestion of a predominance requirement as “undesirable and crippling,” and he objected that the requirement of common questions of “law” would preclude use of the procedure in product-liability cases in which the law to be applied would be that of multiple states.\textsuperscript{249} Becker again sought to undermine Price’s credibility: “It is difficult for me to believe that the author here has a genuine concern in view of past attitudes in the electrical equipment cases . . . wherein I proposed to transfer the cases of the client of the author to its home state [and] local counsel objected.”\textsuperscript{250} Becker stated, simply that the proposed amendments “are calculated to cripple the bill.”\textsuperscript{251}

With respect to the Cravath memo, Becker rejected the idea that massive litigation would be rare: “All I can say on this is that prophesy is a risky business. I can imagine future developments which will make the electrical equipment cases seem to be a relatively regular phenomenon.”\textsuperscript{252} Becker hypothesized actions which would be at home

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\item Supplemental Statement of Phillip Price on S. 159, Becker Papers, Box 15, Folder 34. Price also recommended making the transfer available only on a showing that it would be convenient to the parties and after a hearing requiring findings of fact.
\item Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary of the United States Senate by Cravath, Swaine & Moore, February 10, 1967, Becker Papers, Box 15, Folder 34. In my view, the Cravath memo is canny. It recognizes that by transferring the case both for pretrial and trial it allows them to neutralize the plaintiff’s venue privilege.
\item Letter from William Becker to George Trubow, March 28, 1967, Becker Papers, Box 15, Folder 34.
\item Comments on Supplemental Statements of Mr. Phillip Price on Senate Bill 159, March 18, 1967, Becker Papers, Box 15, Folder 34 (“But the words ‘of law’ should not used at all because of obvious reasons. Suppose the United States Courts are flooded with hundreds of thousands of diversity damage actions arising in 50 states as must result if a drug (such as a birth control pill) was alleged to have side effects injurious to women generally. The principal issue of fact would be the issue of alleged injurious effects of the drug. Nevertheless the law applicable to the facts could be different in some respect in each state. The suggested amendment would exclude use of the efficient and economical procedures of the bill.”).
\item Id.
\item Id.
\item Comments on Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary of the United States Senate by Cravath, Swaine & Moore, Dated February 10, 1967, March 18, 1967, Becker Papers Box 15, Folder 34.
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in a modern MDL: a products liability action related to “injurious effects of a birth-control drug,” or an “automobile manufacturer sells millions of a model of an automobile with an obviously unsafe feature in violation of federal law, and massive litigation results. Only the future can answer questions about the future.”

With respect to the Cravath suggestion that the transfer be for trial as well as pretrial, Becker argued that this would “defeat the purpose of the bill” because it would be an “intolerable burden” if one district had been required to try all of the cases. Finally, with respect to the rest of the suggestions, Becker stated that they were “vague and unconvincing” and would “render the bill worthless from a judicial standpoint.” In particular, with respect to the request that only a party be able to move for consolidation and that such motions must be accompanied by a list of all related actions, Becker noted that only the panel would have a knowledge of all litigation pending nationwide and requiring submission of such a list by a party “will make relief of the bill practically unavailable to the local lawyer unconnected with national industry” and “would make the bill useful only to the well informed parties, principally the defendants.” Finally, Becker took aim at Cravath’s credibility as well:

In making these comments, I recognize the reputation and standing of the firm submitting the memorandum. In no sense is the good faith of the firm questioned. Advocates necessarily must in appraising a judicial reform take into account the interests of their clients and of their own practice. Judges necessarily must consider only the interests of the administration of justice.

Trubow acknowledged receipt of Becker’s “careful analysis and observations” and noted that the letters from judges were “undoubtedly helpful,” noting that “[w]hen and if the bill passes the Senate, correspondence with members of the House Judiciary Committee will be the next step.”

On May 26, 1967, Tydings reported to Judge Robson that the Subcommittee was preparing a report of the bill with three amendments intended to “clarify certain provisions of the bill, but make no substantial changes.” The amendments were limited, though two of them do address somewhat some of the objections to the bill: (1) adding that “convenience of the parties and witnesses” should be a factor in the decision to transfer alongside the “just and efficient conduct of the action”; (2) allowing parties to initiate a motion for consolidation; and (3) allowing appeal of a panel order to transfer only by extraordinary writ. The Senate Judiciary Committee endorsed the bill as

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253 Id. at 2.
254 Id.
255 Id.
256 Id.
257 Letter from George Trubow to William Becker, May 1, 1967, Becker Papers, Box 15, Folder 34.
258 Letter from Sen. Joseph Tydings to Judge Edwin Robson, May 25, 1967, Neal Papers, Box 4, Folder XYZ.
259 Senate Report at 3. The Report notes that the “amendments suggested in this report were the result of recommendations by members of the bar acquiesced in by the coordinating committee.” Id. at 6.
amended on July 27, 1967, and the Senate passed it on the consent calendar—with no roll-call vote—on August 9, 1967. The short report from the Judiciary Committee highlights all of the judges’ tactics: emphasis on the urgent need for the legislation in light of demands on the federal courts, the limited nature of the bill due to its application only to pretrial proceedings, and the unlikelihood of the cooperation of the electrical cases ever occurring again. The Report does not mention the A.B.A.’s opposition to the bill.

E. Back to the House – and the A.B.A.

Having achieved passage in the Senate, the judges still faced an uphill climb in the House Judiciary Committee, where the bill had languished for over two years. On August 21, 1967, Judges Robson and Becker met in Kansas City to determine “how to proceed to gather support for passage of Sec. 1407 in the House.” The judges again reached out to all multidistrict-litigation judges notifying them of Senate passage of the bill and stating that the “Co-Ordinating Committee believes that the favorable action by the Senate on S. 159 resulted largely from its approval by the Judicial Conference and the strong and continuing support of the judges before whom multidistrict litigation is and has been pending.” The letter added that “[y]ou will be advised when it is appropriate to launch a similar campaign to secure passage of proposed §1407 in the House of Representatives.”

During this period, the demands of Judge Becker arising from his work on the Co-Ordinating Committee began to take their toll. Due to the end of the electrical-equipment litigation, there was no longer any source of funding for the Committee. Nevertheless, the Committee continued to meet and coordinate pretrial proceedings in a variety of cases. As a result, the Committee reported to the Judicial Conference in September 1967 the urgent need for passage of the legislation to provide for a permanent staff. The Committee began to increase its efforts to pass the bill in the House. The Steering Committee of the Coordinating Committee (Judges Murrah, Becker, Estes, and Robson)

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260 Cong. Rec.
261 S. Rep. 4-7.
262 Meeting of Judges Becker and Robson, Kansas City, Important Items for Discussion, August 21, 1967, Becker Chronological Files, Box 18, File 1.
263 Bulletin No. 53, Co-Ordinating Committee for Multiple Litigation, August 23, 1967, Becker Chronological Files, Box 20, Folder 1.
264 Id.
265 Report of the Co-Ordinating Committee on Multiple Litigation to the Judicial Conference, September 6, 1967, Becker Chronological Files, Box 20, Folder 4, at 21 (“As a result of the loss of services of its staff the Sub Committee has been severely hampered in meeting the urgent and continuing need and requests for co-ordination of multidistrict litigation. For this reason the Sub-Committee has not been able to service the many requests for assistance in co-ordination of multidistrict litigation. The growing load of multidistrict litigation cannot be efficiently borne by the courts unless some judicial facility is maintained for coordination of judicial administration in the field of multidistrict litigation. Is the new proposed Sec 1407 is enacted into law, some relief will be provided by the panel on multiple litigation. Whether such a panel, if created will be given the continuing services of a staff sufficient to meet the needs of the federal judiciary remains to be seen. In the meantime, every effort has been made by the judges who are members of the Sub-Committee to maintain without a staff the momentum gained by the COC before it was deprived the services of a staff.”).
met in Chicago on September 8, 1967 and, according to minutes of the meeting labeled “Personal and Confidential,” developed a plan. First, the judges would undertake a letter-writing campaign in the House similar to that accomplished in the Senate. Second, rather than attempt to overcome resistance by the A.B.A., the judges would seek to defuse it. According to the minutes:

Judge Murrah described a discussion which he recently had with a Washington lawyer, Leonard J. Emmerglick, regarding the suspected subtle opposition to [the legislation]. Emmerglick informed Judge Murrah that the opposition is based on certain fears, entertained by lawyers (particularly some New York lawyers) who make a career of handling antitrust cases.

Judge Murrah said he would like to initiate an informal meeting with some of the leading members of the bar to speak frankly with them about S. 159 for the purpose of allaying some of the misapprehensions upon which the opposition is based. Judge Murrah said that unless such a meeting is held, various members of the bar (especially those residing in New York) may be able to prevent the passage of S. 159. Others present agreed with Judge Murrah’s proposal.266

Judge Murrah perhaps recognized the sensitivity of this strategy, when, upon receipt of a copy of the minutes, he wrote to Judge Becker’s law clerk, William Levi, noting:

Your proposed minutes certainly do reflect what was said and done at the breakfast session re S. 159.

But I doubt the efficacy of perpetuating it in the minutes lest they get in the hands of those who would misunderstand and misuse them. I would suggest that we refrain from perpetuating our session, but if the other judges think it would serve a useful purpose, I shall not object.267

Becker responded, noting that the minutes were marked personal and confidential and were circulated only to those in attendance, but offered to “have them recalled and amended.”268

In any event, Judge Murrah reported that a meeting with the New York antitrust lawyers had been scheduled for October 19, 1967 at the Bar Association of New York

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266 Minutes of the Steering Committee Meeting, Chicago, IL, September 8, 1967, Becker Chronological Files, Box 11, Folder 7.
268 Letter from William Becker to Alfred Murrah, October 3, 1967, Becker Chronological Files, Box 11, Folder 7.
City. The meeting would be attended by the judges of the Coordinating Committee and numerous lawyers who were involved in the electrical-equipment cases, as well as lawyers who had been on the executive council of the A.B.A. Antitrust Section when it opposed the bill. Judge Becker’s handwritten notes of the meeting survive. Judge Ryan, apparently over his amendment to the statute being unceremoniously disowned, began by noting the history and need for the legislation in cases other than antitrust, such as products liability, securities, and patent suits. Ryan noted that the bill had been opposed by the A.B.A., defense attorneys, and many local bar associations—but that the Committee did not “want to force [the] bill down [the] throat of the bar—we want the support of [the] bar.” As a result, the purpose of the meeting was to see if the judges could get the endorsement of the A.B.A. Ryan hoped that if the bar recognized the need for the bill, then it would support it. But he added: “If [the] Bar doesn’t agree judges owe it to courts to push [the] bill as it is.” Whitney North Seymour, of Simpson Thacher & Bartlett, responded that the situation had gotten “off track” but believed that with further consultation with the bar agreement might be reached. The notes—albeit difficult to read—seem to suggest that the Antitrust Section will look anew at the legislation, as amended by the Senate.

In the meantime, the judges stepped up their correspondence campaign with members of the House, especially in light of the fact that the Committee was proceeding in its work without a staff or source of funding. As a result, the Committee divided the cases it was overseeing among its members—the Technograph patent litigation, antitrust actions in the Concrete Pipe, Rock Salt, and Schoolbook industries, and litigation involving helicopter and airplane crashes. At a meeting to which all judges involved in multidistrict litigation were invited in Kansas City, and which 28 judges attended, on November 4, 1967, Judge Becker described the development of the legislation and the need for it:

Judge Becker emphasized that the multidistrict litigation experienced thus far in the federal courts is only a beginning of what may be expected in the future; that the multidistrict litigation that can be imagined and in all likelihood will arise in the future will create intolerable burdens upon the federal judiciary unless new procedures adequate for the tasks are developed and employed.

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269 Letter from Alfred Murrah to the Co-Ordinating Committee, October 3, 1967, Becker Chronological Files, Box 16, Folder 1; Letter from Alfred Murrah to the Co-Ordinating Committee, October 11, 1967, Becker Chronological Files, Box 12, Folder 10.
270 Among these lawyers were Bethuel Webster and Marcus Mattson, who represented a plaintiff in the electrical cases, but who signed the A.B.A. report in opposition to H.R. 8276.
271 The material in this paragraph is from Becker’s Chronological Files, Box 12, Folder 1.
272 Minutes of the Special Preliminary Meeting of the Co-Ordinating Committee on Multiple Litigation, Kansas City, MO, November 3, 1967, Becker Chronological Files, Box 11, Folder 8 (“It was agreed that the Co-Ordinating Committee should urge the judges attending the Kansas City meetings, and other judges with whom the Committee has had contact, to write members of Congress requesting their support of the passage by the House of Representatives of S. 159 passed by the Senate without a dissenting vote on August 9, 1967.”).
273 Id. (noting that due to lack of resources the judges must “delegate continuing detailed supervision of the co-ordination of particular related litigation to individual members of the Committee”).
Speaking again of the need for new tools to cope with future multidistrict litigation, Judge Becker urged the judges to study the distributed materials concerning S. 159 and to write members of Congress, including members of the House Judiciary Committee, to advance S. 159 for passage in the House of Representatives. Judge Pierson Hall pointed out that the person possessing the power to cause S. 159 to be reported out of the House Judiciary Committee and onto the floor of the House is Congressman Emanuel Celler who is the Chairman of the House Committee on the Judiciary and of its Subcommittee Number 5 wherein S. 159 is presently under consideration.\textsuperscript{274}

Judge Murrah added that the Committee was under significant strain due to its lack of funding, noting that “the improvised present staff is now furnished by the courts by making use of Judge Becker’s law clerk furnished for disposition of Judge Becker’s individual calendar.”\textsuperscript{275} The judges pressed those present at the meeting to reach out Congressmen, and they followed up with such a request to all MDL judges by letter.\textsuperscript{276}

For the time being, though, the Bill remained held up in the House, due in part to ABA opposition.\textsuperscript{277} And pleas from Becker for relief from his workload became stronger, noting that “Bill Levi and I are barely able to keep the work of the Co-Ordinating Committee from coming to a complete halt.”\textsuperscript{278} He continued,

The demand for services of the COC is growing by leaps and bounds, but these services cannot be continued without an adequate staff. It would be very detrimental to the effort of the judiciary of the United States to meet the increasing burden of the litigation explosion if the efforts of this Committee were terminated. It is simply beyond the capacity of an active judge and a law clerk to carry on this extra burden for any protracted length of time.\textsuperscript{279}

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\item[274] Minutes of Meeting of Co-Ordinating Committee on Multiple Litigation with Judges Before Whom Major Multidistrict Litigation is Pending, Kansas City, MO, November 4, 1967, Becker Chronological Files, Box 11, Folder 8.
\item[275] \textit{Id.}
\item[276] Bulletin to All Multidistrict Litigation Judges, November 17, 1967, Becker Papers, Chronological Files, Box 20, Folder 1 (“You will be requested by Chief Judge Murrah to write members of the House Committee on the Judiciary and of the House of Representatives whom you know to urge the passage of S. 159 by the House.”). Becker had written to Murrah earlier that week suggesting: “The letters soliciting support of S.159 should go out promptly. I think they should be sent by you as Chairman. I have drafted a form of proposed letter which is enclosed.” Letter from William Becker to Alfred Murrah, November 15, 1967, Becker Chronological Files, Box 16, Folder 1.
\item[277] Judge Robson had reached out to Rep. Robert McClory of Illinois, who had reached out to Rep. Celler, the chair of the Committee. McClory reported to Robson that Celler had written him, noting that the “matter is a very involved one and the American Bar Association, through its Antitrust Section, has issued criticism of the bill.” Letter from Hon. Robert McClory to Judge Edwin Robson, November 8, 1967, Neil Papers, Box 4, Folder XYZ.
\item[278] Letter from William Becker to Alfred Murrah, November 20, 1967, Becker Chronological Files, Box 16, Folder 1.
\item[279] \textit{Id.}
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The dam broke in January 1968, when the A.B.A. suddenly changed its position. Richard McLaren notified Judge Murrah that the ad hoc committee of the antitrust section had issued a report in favor of the bill. McLaren noted that the “basic reasons for a change in position are the changes in the bill itself, the assurances contained in the Senate Report, and, most particularly, the need for legislation demonstrated by the representatives of the Judicial Conference.” McLaren added:

I think we both understand that there was a breakdown in communications between our Section and the Judicial Conference prior to our earlier adverse report on H.R. 8276. This was particularly regrettable in the light of the fine cooperation and understanding we had in connection with the development of the Handbook and other matters in the past, and I am particularly pleased that the air has now been cleared.

The A.B.A.’s new report, to be submitted to the upcoming House of Delegates meeting scheduled for February in Chicago, cites the amendments to the bill by the Senate Judiciary Committee as desirable and the assurances in the Senate Report that the transfer procedure will be used only in exceptional cases. The report also cites a greater understanding of the need for the bill, which was “brought to our attention by members of the Judicial Conference,” including the need for the legislation in many cases “outside the antitrust field.” Soon after the A.B.A. issued its report, on February 20, 1968, the A.B.A. House of Delegates adopted a resolution in support of the bill.

It is not entirely clear why the A.B.A. made this 180-degree turn. One explanation could be just to take McLaren at his word—that the Committee was persuaded by the amendments and convinced of the need for the legislation. This is possible, but would be surprising in light of its prior vociferous opposition and the fact that the amendments to the statutory language (adding “convenience of the parties and

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280 Letter from Richard W. McLaren to Alfred P. Murrah, January 11, 1968, Neal Papers, Box 4, Folder XYZ.
281 Id.
282 Id.
283 Report of Section of Antitrust Law to the House of Delegates of the American Bar Association on S. 159, 90th Congress, January 19, 1968, Neal Papers, Box 4, Folder XYZ (“The Report makes clear that only in the ‘few exceptional cases’ which ‘share unusually complex questions of fact’ or in the situation of ‘many complex cases’ which ‘share a few questions of fact,’ will consolidation be ordered in the absence of many cases with many common issues of fact. We would have preferred this standard to have been written into the bill, but we recognize the difficulty of drafting appropriate legislative language to accomplish this result, but are confident that it will have the intended effect.”
284 Id.
285 Proceedings of the House of Delegates: Chicago, Illinois, February 19-20, 1968, 54 A.B.A. J. 510, 521 (1968) (“Whereas, since that action by the ABA, hearings by a subcommittee of the Committee on the judiciary of the United States Senate have revealed a need for such legislation and have resulted in significant changes in the proposed legislation . . . and assurances against abuses which it previously was thought might arise . . . and whereas S.159, as amended, has been passed by the United States Senate, be it resolved that the ABA recommends to the House of Representatives that it pass S.159 in the form in which it was passed by the Senate.”).
witnesses as a standard” and allowing a party to a litigation to move for consolidation) were marginal and only barely responsive to their earlier criticisms.

A different theory is that the lawyers may simply have mellowed in their opposition. With the benefit of hindsight, perhaps some defense counsel came to recognize the potential benefits of the bill to their clients and had come to the conclusion that their clients had not come out so badly in the electrical-equipment cases. After all, their clients were able to settle the entire litigation fairly promptly and move on. One of the great benefits of consolidated litigation for defendants is the opportunity to achieve closure through a global settlement. It is possible that the defendants realized that, with the dust now settled, that the coordinated proceedings worked in their favor. At least Mr. Johnston, the Chicago defense attorney who had testified in the Chicago Senate hearings, understood this well. Current MDL defendants understand well the benefits of MDL consolidation for their clients.286

Another possibility is that the October 1967 New York meeting had an effect. McLaren seems to allude to the meeting in his letter, and the judges may have been especially convincing about the need for the legislation in areas beyond antitrust. Moreover, at least based on Becker’s notes, the judges appear to have leaned on the lawyers, claiming that they would push the bill with or without their support. It is unclear, though, how effective this brute-force approach would have been. Although the bill had passed in the Senate it still appeared that the lawyers’ opposition was keeping the bill bottled up in the Judiciary Committee in the House.

One additional hypothesis is that there was another reason for the lawyers present at the meeting to be interested in warmer relations with the Committee. As noted above, Judge Becker was taking the lead in the first draft of what would become the Manual for Complex and Multidistrict Litigation.287 As Professor Miller remembers it, “the lawyers were fighting the manual as it was then drafted tooth and nail.”288 In his letter informing Judge Murrah of the A.B.A.’s change of heart, McLaren mentions the manual specifically, noting that “I am concerned a new misunderstanding may be abuilding.”289 McLaren asks for a seat at the table, seeking the opportunity for the bar to formally comment, suggesting that “I believe the path will be much smoother in the long run, and far greater progress will be made in the long run if time and opportunity are allowed for

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288 Id.

289 Letter from Richard W. McLaren to Alfred P. Murrah, January 11, 1968, Neal Papers, Box 4, Folder XYZ.
the organized bar to study, comment upon, and get used to the ‘Outline’ before it is formally adopted.”

In fact such a meeting between many of the lawyers at the New York meeting and the judges drafting the Manual did, in fact, come about, on June 4, 1968. A transcript of this meeting survives in Judge Becker’s papers. At the meeting, lawyer Cyrus Anderson—who was the Chair of the Antitrust Section at the time the unfavorable report on proposed § 1407 was issued, and who was present at the October 1967 New York meeting—spoke first, on behalf of the newly formed ABA Special Committee on Complex and Multi-district Litigation. Anderson noted the meeting Judge Murrah had set up “between the Judicial Conference Coordinating Committee and our ABA antitrust section group.”

Anderson continues:

Last fall when S-159 became hot, the Coordinating Committee asked the anti-trust section to reconsider its former adverse position respecting an earlier version of that Bill. That we did, and I think the rest is now history.

To make a long story short, a new ABA report came out recommending adoption of the S-159 in light of various changes that were made in committee and the Bill was recently enacted into law, as you know. Now, at our October, 1967 meeting with the Coordinating Committee, the draft outline of the proposed Manual came up for discussion. Our ABA committee promised to study it, and at our joint meeting on April 6th of this year, we learned of your need to have this outline in final form to recommend to the full Judicial Conference in September of this year. . . which would create exceedingly difficult problems if the ABA were to try to obtain reasoned comments from a representative cross-section of the affected segments of the Bar, and it was apparent to us, therefore, that urgency was the keynote if the Bar was to have any voice at all in the project. Thanks to Judge Murrah and his recommendation, and those of others . . . our committee was formed.

At the meeting, Anderson, joined by several others who were present at the New York meeting, and Richard McLaren, who wrote the report endorsing the MDL statute, gave “a preliminary identification of some of the problem areas in the revised outline.” There

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290 Id.
291 Transcript of Proceedings of United States Judicial Conference Committee on Complex and Multi-district Litigation, Denver CO, June 4, 1968, Becker Chronological Files, Box 13, Folder 2.
292 Id. at 5.
293 Id. at 5-6.
294 McLaren also opines: “I was awfully sorry that that relationship between our group, well, the organized Bar and the Judicial Conference Committee sort of lapsed after 1960. In fact, I think it got worse than that. We ended up on opposite sides of some different matters working more or less at cross purposes separately. In fact, the judges ended up opposing out proposal to amend the expediting act, and we ended up opposing the judges’ proposal to pass S-159. I am delighted that contact has been reestablished and
57 were several additional meetings between the Coordinating Committee and the ABA Committee throughout the course of 1968, and the Manual was developed further.

In any event, Anderson’s description of events was reasonably accurate: the bill did pass in the House quickly once the A.B.A. reversed itself. At a meeting of the Coordinating Committee in Philadelphia on January 18, the judges discussed the need to capitalize on the A.B.A.’s new position. According to minutes of this meeting, William E. Foley, Acting Director of the Administrative Office, reported at that meeting that “an executive session of the House Judiciary Subcommittee No. 5 had been schedule for the following Wednesday, January 24, 1968, to consider the priority of advancement of bills, including S. 159.”

This was critical to the Committee because Judge Becker had observed that without additional staff “the day-to-day operations of the Committee could not continue for long,” and Judge Murrah “wanted to go on record as saying that despite the chaos in the federal judicial system which would result from a discontinuance of the Co-ordinating Committee’s services, he had exhausted what he felt to be ‘all available resources’ in obtaining additional staff assistance.” Mr. Foley noted that “action upon S. 159 by the House could provide an additional alternative for obtaining staff assistance in the future since, as Mr. Foley pointed out, funds could be released from the Administrative Office if S. 159 were to be passed and became a law.”

As a result, at a meeting of the Committee with nine judges involved in the Schoolbook Industry Antitrust Litigation the following day, Becker urged the judges to contact Congressmen and “suggested that [the A.B.A.’s] reversal of position should also be brought to the immediate attention of the chairman and members of House Judiciary Subcommittee No. 5, particularly because the prospect of opposition by members of the American Bar Association was thought to be a cause for delay of the progress of S. 159 before the Subcommittee in the Fall of 1967.”

There was little debate from then on in the Congress. The Bill was reported the Judiciary Committee on February 28, 1968. According to Rep. Mathias, of Maryland, who spoke on the House floor, “In our deliberations in both the Subcommittee and the full Committee on the Judiciary, we did not have a single voice raised in opposition to the bill. All of those present agreed that it was a necessary and desirable piece of legislation.” The bill passed on March 4, 1968, with no dissent. President Johnson

more than pleased that we were able to change our position on the new S-159 and see it go through, and I am delighted that we are working on this very worthwhile project.”  

Minutes of Special Preliminary Meeting of the Co-Ordinating Committee on Multiple Litigation, Philadelphia, PA, January 18, 1968, Becker Chronological Files, Box 11, Folder 6, at 6.

Minutes of Meeting of the Co-Ordinating Committee With Judges Before whom School and Children’s Book Antitrust Multidistrict Litigation is Pending, Philadelphia, PA, January 18, 1968, Becker Chronological Files, Box 11, Folder 6, at 2-3.

H.R. REP. NO. 90-1130 (1968)

90 CONG. REC. H4927-4928 (March 4, 1968) (statement of Rep. Mathias). Rep. Mathias added, that he had “discussed [the bill] personally with several of the distinguished Federal judges who have firsthand knowledge and experience with this kind of problem. I know how urgently they feel the bill is needed in order to make the administration of justice more expeditious and more efficient.”  

Id. at 4927.
signed the bill on April 29, and Chief Justice Warren appointed the first Judicial Panel on Multidistrict Litigation on May 29. Over three years after it was introduced in the House and Senate, the Multidistrict Litigation Act was now law. After the House passed the legislation, the Wall Street Journal reported, tersely, “Congress has just passed without fanfare a bill likely to result in a substantial speedup in the handling of basically similar court suits.”

The era of multidistrict litigation had begun.

IV. Conclusion

Judge Becker’s vision had become reality. It was not long after the MDL statute had passed that the Manual for Complex and Multi-District Litigation had been published, and the Judicial Panel on Multidistrict Litigation had opened for business. The Panel was active, and coordinated pretrial proceedings were becoming commonplace. Judge Becker commented on these events.

From a perspective it seems to me that the most significant and least noted event in the history of the electrical equipment litigation was the sudden and inescapable realization that in these times we cannot afford the concept of a provincial bar and a provincial judiciary. . . . Under the same pressures the federal judges were treated as a national, rather than provincial, resource to be deployed and employed where and when needed. This was a quiet, largely unopposed revolution in the national administration of civil justice, accomplished without a single change in federal procedural statutes and rules. As we now know, this was not a sterile experience.

But even Becker gave pride of place in 1971 to the class action—something he didn’t anticipate in 1964.

The effect of the litigation explosion on federal practice has been greatly magnified by two simultaneous developments. One is the increasingly complex nature of most civil actions, caused by the current revolution of science, economics, technology, and population patterns. The other is the largely unanticipated startling impact of the new class action device provided by the amended Rule 23, F.R. Civ. P., effective July 1, 1966.

As the Supreme Court continues to whittle away at the class action, however, it may be fair to say that the Judge Becker of 1964 was proven right. As they expected, the judges’ hard-won achievement in passing the MDL statute has made a lasting contribution to federal civil litigation.

301 Id at 4928. The House corrected two typographical and one spelling error in the bill, as passed by the Senate. Senator Tydings had to return to the Senate floor on April 10, 1968 to move to amend the Bill. His motion was not opposed. 90 Cong. Rec. S9448 (April 10, 1968) (statement of Sen. Tydings).
302 Congress Passes Bill to Speed Up Handling of Similar Civil Suits, WALL ST. J., Mar. 20, 1968.
304 Id. at 586.