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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 28, 2000

(AFTERNOON SESSION)

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Taken before PATRICIA GONZALEZ, a Certified
Shorthand Reporter in Travis County for the State of
Texas, on the 28th day of January, A.D., 2000,
between the hours of 1:25 p.m. and 5:15 p.m. at the
Texas Association of Broadcasters, 502 E. 11th
Street, Suite 200, Austin, Texas 78701.

<p style="text-align: right;">Page 614</p> <p>1 INDEX OF VOTES</p> <p>2</p> <p>3</p> <p>4 Votes taken by the Supreme Court Advisory Committee</p> <p>5 during this session are reflected on the following</p> <p>6 pages:</p> <p>7 642</p> <p>8 651</p> <p>9 675</p> <p>10 678</p> <p>11 679</p> <p>12 676</p> <p>13 696</p> <p>14 748</p> <p>15 776</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 617</p> <p>1 much to say.</p> <p>2 MR. SOULES: We need an interpreter</p> <p>3 down here.</p> <p>4 (Laughter)</p> <p>5 MR. KUYKENDALL: I cover public safety</p> <p>6 issues, criminal justice issues, environmental</p> <p>7 safety, environmental issues, economic development,</p> <p>8 TNRCC, Parks & Wildlife. So if I can't answer your</p> <p>9 questions on this, ask me something about the park</p> <p>10 system. Maybe I can do that.</p> <p>11 But I think the motion for recusals were</p> <p>12 being used for other things that they weren't</p> <p>13 necessarily meant to be used for -- continuance,</p> <p>14 trial prep, things such as that -- and the Senator</p> <p>15 was working in the same direction, I think, that this</p> <p>16 committee has been working in, and that is to deal</p> <p>17 with the issue. And the bill is pretty</p> <p>18 straightforward.</p> <p>19 On the third motion for recusal, it can be</p> <p>20 delayed, I suppose, until there's a final judgment</p> <p>21 made on the case, just to expedite the case, to keep</p> <p>22 it going, to keep working on the case.</p> <p>23 And as I see it, the proposals that you</p> <p>24 will be looking at today and amending or adopting</p> <p>25 seem to complement the legislation, and I don't see</p>
<p style="text-align: right;">Page 615</p> <p>1 *****</p> <p>2 CHAIRMAN BABCOCK: Okay. We're going</p> <p>3 to get back on the record.</p> <p>4 Let me tell you where we are in our agenda</p> <p>5 and what we're going to do this afternoon. We have a</p> <p>6 representative from Senator Harris' office who's been</p> <p>7 gracious enough to come over and visit with us.</p> <p>8 Randal Kuykendall is going to talk about the</p> <p>9 Senator's views on Item No. 6 on our agenda. That</p> <p>10 was attentively put for Saturday morning, but we're</p> <p>11 doing so good that it has been moved up to this</p> <p>12 afternoon.</p> <p>13 And Judge Womack is back with the comment</p> <p>14 to Rule 42.2 and the revisions to Rule 73, and there</p> <p>15 may be a slight snafu on one of the rules we approved</p> <p>16 this morning, so we'll talk about that next.</p> <p>17 And then if we have time, which I think we</p> <p>18 will, we'll go to Item 7, and then finish the day --</p> <p>19 again, if we have time -- with Rule 166a that</p> <p>20 Judge Peoples is prepared to talk about.</p> <p>21 So starting -- and this is Tab 6 in</p> <p>22 everybody's materials, and it's amendments to</p> <p>23 Rule 18a, and there is a request that we make that</p> <p>24 rule consistent with Senate Bill 788, which was</p> <p>25 proposed by Senator Harris.</p>	<p style="text-align: right;">Page 618</p> <p>1 that it's anything contradictory to what we're trying</p> <p>2 to do. I think we're working in the same direction.</p> <p>3 I don't really have anything else to add,</p> <p>4 but I'd be happy to answer any questions.</p> <p>5 CHAIRMAN BABCOCK: Well, stick around.</p> <p>6 They'll probably ask you a bunch of questions.</p> <p>7 MR. KUYKENDALL: Okay.</p> <p>8 CHAIRMAN BABCOCK: Okay. Richard, your</p> <p>9 subcommittee has taken this one on.</p> <p>10 MR. ORSINGER: Okay.</p> <p>11 CHAIRMAN BABCOCK: Tell us where we</p> <p>12 are.</p> <p>13 MR. ORSINGER: For those of you who</p> <p>14 haven't, you need to get the disposition table for</p> <p>15 this subcommittee, and most especially, the recusal</p> <p>16 packet, which is on the table back there.</p> <p>17 And the disposition table covers more than</p> <p>18 just recusals. It covers the entire subcommittee</p> <p>19 activity, but you might want to see, succinctly</p> <p>20 stated, what our subcommittee's recommendations are</p> <p>21 on the recusal rules.</p> <p>22 Let me take you through the information</p> <p>23 that's in the recusal packet first because this is</p> <p>24 source information you may want to look at during the</p> <p>25 debate today, and then we'll have the three law</p>
<p style="text-align: right;">Page 616</p> <p>1 So, Randal, why don't you tell us, if you</p> <p>2 would, what the Senator's concerns are and anything</p> <p>3 in particular you'd like us to consider.</p> <p>4 MR. KUYKENDALL: My name is</p> <p>5 Randal Kuykendall. I'm a legislative aide for</p> <p>6 Senator Harris. I cover a few issues. Juris</p> <p>7 prudence, luckily, I cover.</p> <p>8 This bill, I think it came about from</p> <p>9 motions for recusals being used for --</p> <p>10 MS. SUSMAN: Could we ask the speaker</p> <p>11 to stand up? I mean, the acoustics in here are</p> <p>12 terrible and some of us down here --</p> <p>13 MR. KUYKENDALL: Sure.</p> <p>14 MR. SUSMAN: -- aren't hearing.</p> <p>15 CHAIRMAN BABCOCK: Could be your age,</p> <p>16 Steve.</p> <p>17 MR. KUYKENDALL: The bill seems pretty</p> <p>18 straightforward to me.</p> <p>19 MR. SUSMAN: I'm speaking for Luke.</p> <p>20 (Laughter)</p> <p>21 MR. SOULES: Yes. I whispered to him,</p> <p>22 I said, "Can you hear him?" Thank you very much. I</p> <p>23 appreciate that.</p> <p>24 (Laughter)</p> <p>25 MR. KUYKENDALL: I don't really have</p>	<p style="text-align: right;">Page 619</p> <p>1 professors on my committee correct me if I've</p> <p>2 misstated anything, and then we'll have Carl Hamilton</p> <p>3 explain the subcommittee proposal, which includes</p> <p>4 some but not all of the matters that have been raised</p> <p>5 relating to recusals.</p> <p>6 The first thing that's in the recusal</p> <p>7 packet is Carl's cover letter followed by the</p> <p>8 subcommittee's proposal of what the recusal rule</p> <p>9 should look like.</p> <p>10 Understand, however, that the subcommittee</p> <p>11 met twice and that Carl has produced this after the</p> <p>12 second meeting and we have not had a third meeting on</p> <p>13 Carl's proposal. So the subcommittee basically is</p> <p>14 seeing it for the first time today, although we did</p> <p>15 get a preview of it earlier this week.</p> <p>16 Behind Carl's proposal is a letter from</p> <p>17 Judge Pat McDowell, who's the presiding</p> <p>18 administrative judicial district judge -- I don't</p> <p>19 know how you call it, of the administrative region up</p> <p>20 there in Dallas -- and his letter talks about</p> <p>21 recusals and then talks about another problem, 48.1</p> <p>22 on appellate opinions.</p> <p>23 The letter is included for you to look at</p> <p>24 his proposal on recusals. Our subcommittee has not</p> <p>25 acted on that recommendation, but since we were going</p>

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1 to be debating today, I thought you should see it,
2 and perhaps anyone can defend or attack his proposal
3 on that.

4 Behind Judge McDowell's letter, you start
5 into the rules, constitution and statutes that
6 reflect on recusals and disqualifications. And
7 that's one of the problems with recusals and
8 disqualifications, is that it's regulated in so many
9 different ways and they're not all consistent.

10 Page 1 is the government code provision on
11 disqualification.

12 Page 2 is the constitutional provision on
13 disqualification. And then I apologize for this, but
14 the next thing, instead of being Page 3, starts over
15 at Page 1 again, and that's Rules of Civil Procedure
16 18a on recusal and disqualification of judges.

17 Behind that is 18b on Page 3, grounds for
18 disqualification and recusal of judges. Behind that,
19 on Page 5, are the rules of appellate procedure rule
20 governing disqualification or recusal of appellate
21 judges.

22 Behind that, on Page 6, is the civil
23 practice and remedies code provision that Randal was
24 just talking about, which is third motions for
25 recusal in the same matter.

1 something. And that was within ten days of trial,
2 and the rules did not permit you to file a motion to
3 recuse or disqualify within ten days of trial.

4 And so the recusal was denied and it got up
5 to the Texarkana Court of Appeals and they decided
6 that you just have an inherent right to complain
7 about something like that even if it occurs within
8 ten days of trial.

9 And then -- and I'm not sure I can
10 pronounce the name correctly -- Judge Blyle or
11 Blyle -- Blyle, who was on the Texarkana Court of
12 Appeals, got interested enough in it that he wrote a
13 Law Review article on it which examined a lot of this
14 in detail.

15 But the bottom line was that it pointed out
16 for this committee the last time that the ten-day
17 rule on recusals was a problem, especially for events
18 that occur within ten days of trial, but even for
19 events that occurred before ten days but that you
20 didn't know about until ten days before trial.

21 So in the last round, on several different
22 days, we debated the timing question and made
23 recommendations to the Supreme Court, which got
24 forwarded in the large mass of rules that have not
25 been acted on yet.

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1 And behind that is a provision out of the
2 Texas Probate Code about recusals and
3 disqualifications of statutory probate judges.

4 Okay. In the area of recusal and
5 disqualification, probably the most fundamental thing
6 to understand is that the constitution indicates when
7 judges are disqualified, but not when judges can be
8 recused. And the standards for recusal come out of
9 statutes or rules, and I believe that the
10 subcommittee has arrived at a consensus that the
11 constitution can neither be expanded nor narrowed by
12 statute or rule. So that if the constitution says
13 that a judge is disqualified for X, we can't do rules
14 or statutes to make it less than X or add Y and Z to
15 it.

16 There's also a view, I believe, on our
17 subcommittee that we can't in any way curtail the
18 filing of the motion to disqualify. Our rules or
19 procedure purport to do that by requiring them to be
20 filed ten days before hearing or trial.

21 It is our consensus that that is not true
22 for motions to disqualify, and the reason we say that
23 is that the case law appears to suggest that if a
24 judge is disqualified, his or her acts are void even
25 if it's not complained about and can be raised for

1 And when Bill Dorsaneo said this morning
2 that we ought to work on the basis of our last
3 committee product rather than on the basis of the
4 existing rule, I think what Bill was saying applies
5 in this situation, that we had a lot of debate and
6 analyses, and this committee voted out a Rule 18a on
7 recusals, which our subcommittee thought should be
8 our starting point for debate right now rather than
9 the existing rule.

10 And so when you look at Carl's work product
11 here, you're going to find that the foundation for
12 this was the advisory committee's recommendation to
13 the Supreme Court in the last committee cycle,
14 together with changes that our subcommittee is
15 recommending right now.

16 I don't in any way think that you should
17 assume that because the advisory committee before
18 voted it out that it's necessarily good, but I just
19 want you to know that our starting point was the
20 final product that this committee voted out the last
21 time.

22 And the timing issue, I might just touch on
23 briefly, is that you have issues regarding attempting
24 to curtail a constitutional right, but then you have
25 the issues of "What do you do, file within ten

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1 the first time on appeal without any predicate in the
2 trial court and can be raised sua sponte by the
3 appellate court. It's basically not waiveable. So
4 if you come along with the rule that requires that a
5 motion to disqualify be filed ten days before a
6 trial, it's our view that that's unconstitutional.

7 Now, recusals, which are not a creature of
8 the constitution, we think are subject to rule
9 authority or statutory authority on timing. And what
10 we need to concern ourselves with is that all of the
11 times that are in the statutes and the rules be
12 consistent, or if we can't make them consistent, that
13 at least our rule not purport to suggest that
14 something is true across the board when, for example,
15 it doesn't apply in probate cases, in the statutory
16 probate court.

17 Now, the issue of timing was debated by
18 this advisory committee in its last committee cycle,
19 and the initiative came from the Texarkana Court of
20 Appeals which was faced with a case where, within ten
21 days of trial, one's litigant went out and hired
22 someone who was -- I don't remember the exact
23 connection. It was --

24 HON. SCOTT BRISTER: Son of the judge.
25 MR. ORSINGER: Son or nephew or

1 days" -- says the ordinary rule, is that "when a
2 motion to recuse filed within ten days stops further
3 proceeding."

4 And as I recall, the last time the
5 committee met, we decided that if something came up
6 or was discovered within ten days of the trial or a
7 hearing that we would set up a parallel track so that
8 the court proceeding could go on during the day but
9 that the recusals would occur -- the recusal hearing
10 would occur in the afternoon or in the evening in
11 such a way as not to obstruct the ordinary trial
12 process.

13 And I believe it was our view, if I
14 remember the debate correctly, that if a motion was
15 filed that close to trial and it didn't get you a
16 continuance, all it got you was a parallel proceeding
17 on recusal, that lawyers would quit using recusals as
18 a disguised motion for continuance because they
19 didn't in fact continue the case if they were filed
20 so close to trial.

21 That idea of a parallel proceeding was
22 picked up in Senator Harris' statute, which is back
23 here on Page 6 of the attached materials, because, as
24 I understand this provision, the trial court, on a
25 third motion to recuse, can continue to preside over

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1 the case, sign orders and move the case to final
2 disposition.
3 That concept, that if it's a third recusal
4 in the same case that you go ahead with your
5 proceeding anyway regardless of the recusal, if you
6 will, is a legislative endorsement, at least at some
7 point, that a parallel proceeding is preferable to a
8 Bar against continuing with the case just because the
9 motion is filed.

10 Now, separate and apart from the timing
11 issue, last time this committee debated a lot on the
12 grounds. And Judge Briester got innervated in the
13 issue and came up with a proposed rule, and I believe
14 that it was folded into our ultimate proposal. But
15 at this point, I've lost memory of it, and I think,
16 Scott, you have, too, haven't you, lost -- as to
17 whether it was --

18 HON. SCOTT BRISTER: I found it on my
19 hard disk, actually, and the committee's deed
20 incorporates most of the important things. I was
21 going to ask what happened to (a), (b), (c) and
22 everything else, which is the current rule 18b,
23 because we had made some changes on that, too,
24 because, if you'll notice, it's one of those rules
25 that always refers to judges as (e) and needs some

1 is properly superseded."

2 How you would supersede a motion is unclear
3 to me because the motion is not appealable. The
4 denial of a tertiary recusal motion is only
5 reviewable on appeal from the final judgment.

6 MR. SOULES: Not reviewable.

7 MR. ORSINGER: Not reviewable on an
8 interlocutory basis is what I should say.

9 MR. SOULES: Not reviewable, period.

10 MR. ORSINGER: Not reviewable, period.

11 Okay. Well, you can appeal the denial of a
12 recusal with the final judgment both under the rules
13 and under this Senator Harris' statute.

14 I'm a little concerned about the fact that
15 there's no interlocutory appeal but you have to pay
16 within the 31st day after the order is rendered,
17 unless it's superseded, but I don't know how you
18 supersede an order that is not appealable.

19 Anyway, that's something we have to figure
20 out because the statute just simply may not work well
21 with our existing concept of appellate procedure.

22 But, be that as it may, what I'm pointing
23 out is that the issue of sanctions, there are
24 different ideas about when sanctions should be
25 imposed, whether they're mandatory, whether you

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1 attention.

2 MR. ORSINGER: Well, this time around,
3 this subcommittee has not debated grounds. We've
4 only debated timing issues. And I think that our
5 debate last time on grounds was very appropriate
6 because I think we all agree that the constitution,
7 the statutes and the rules are not consistent, and
8 they should be, especially since many practitioners
9 practice out of the rules of procedure and might be
10 led awry to what the statutes say or what the
11 constitution says.

12 But that's not part of our subcommittee
13 presentation today because we have not evaluated the
14 grounds for recusal or disqualification. We've only
15 been dealing with these timing issues, more or less.
16 So we've been dealing with 18a rather than 18b.

17 Now, the last separate matter, really, of
18 concern is the issue of sanctions, and there are
19 different concepts of sanctions that float through
20 these different provisions. And there are
21 suggestions that are made, like Judge McDowell's
22 letter, I believe, would like to invoke contempt
23 power and to order the payment of fees or costs.

24 Rule 18a itself, as it now exists, has a
25 sanction provision that cross refers to the discovery

1 should specify that they are binding on the lawyer as
2 well as the client or not.

3 And so those are principal issues that I
4 feel are open for discussion. Now, I would invite
5 anyone on the subcommittee, especially any of the law
6 professors, to either modify what I said or add to it
7 as you see fit. Anyone?

8 Bill?

9 PROFESSOR DORSANEO: Well, it's a
10 little off to the side, but I'm just sitting here
11 thinking that probably by the next meeting we ought
12 to make additional copies of the entire
13 recodification draft with side-by-side comparison and
14 give that to everybody. And, you know, I have that.
15 The court has it on its system.

16 Justice Hecht, would that be premature to
17 do that or would that be advisable to do that now?

18 JUSTICE HECHT: No. It's the work
19 product of the prior committee, and I think we ought
20 to -- people here ought to be aware of it.

21 MR. ORSINGER: Well, in support of
22 that, some of the materials that all of the
23 subcommittees are asked to look at this cycle were
24 looked at last cycle, and recommendations were drawn
25 from them and they were woven into our work product.

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1 sanctions, I believe. Somebody check me on that --
2 or Bill, do you know -- Carl, is that right?

3 There is -- even in the 18a, as it exists
4 in the current rules -- I believe that there is a
5 sanction rule that just cross refers to the discovery
6 sanctions.

7 Yes. "Sanctions would apply under the
8 existing rule if the judge is convinced that the
9 motion to recuse was brought solely for the purpose
10 of delay and without sufficient cause."

11 There's issues about whether that is the
12 proper measure of sanction and whether the sanctions
13 available ought to be the discovery sanctions or
14 whether it ought to be a different sanction.

15 Also, Senator Harris' bill, I believe,
16 contains its own sanction provision, does it not?

17 Yes.

18 You'll see on Page 6 of the materials. "If
19 you deny a tertiary motion" -- so it doesn't apply to
20 the first two -- "the court shall award reasonable
21 and necessary attorney's fees and costs to the
22 opposing party, and the attorney and the party are
23 jointly and severally liable for this award, and the
24 fees and costs have to be paid before the 31st day
25 after the order denying the motion unless the order

1 Perfect example is that we got assigned
2 Professor Hazel's proposal on the venue rules which
3 we used before and massaged into a set of rules that
4 this advisory committee thought was a good set and we
5 sent it to the Supreme Court, and now it shows up on
6 our agenda again.

7 And I don't even know that Pat Hazel
8 resubmitted it. It may have been someone else who
9 resubmitted it in the mistaken impression that it was
10 Carl Hamilton's committee's work product on the State
11 Bar Rules Committee -- or I may have misstated the
12 name of the committee.

13 But in anyway, you know, we can, on our
14 subcommittees and even at the general committee
15 level, we can really spend a lot of time rehashing
16 stuff that we've already hashed through, and I
17 certainly am not suggesting that any vote is binding,
18 but just that we've covered a lot of ground and that
19 we ought to know what that ground is so that our
20 debate is educated by what we learned from the
21 earlier debate.

22 Elaine, do you want to add anything?

23 PROFESSOR CARLSON: No.

24 MR. ORSINGER: Okay. And, Alex, are
25 you still with us? I think --

<p>Page 632</p> <p>1 PROFESSOR ALBRIGHT: I'm here. 2 MR. ORSINGER: Okay. 3 Then what I would propose that we do at 4 this point is go to Carl's proposed Rule 134 and take 5 a look at it line by line and paragraph by 6 paragraph. And then, unless it comes up in debate in 7 Carl's discussion, we'll look at Judge McDowell's 8 proposal and just kind of put these issues in play. 9 But I've asked Carl to basically go through 10 it on a line-by-line basis because these are not 11 amendments to the existing Rule 18. 12 This is really the last subcommittee -- the 13 last full committee's proposal to the Supreme Court 14 as an amendment to 18a with additional changes that 15 we're proposing now, and I feel like all of it ought 16 to be fair game. And so I really feel like we ought 17 to put all of these concepts in play and see what the 18 committee thinks. 19 Sarah? 20 HON. SARAH DUNCAN: Are the additional 21 changes noted on the public house? 22 MR. ORSINGER: No. We do not have a 23 redline that compares this to the existing Rule 18a. 24 CHAIRMAN BABCOCK: Richard, just let 25 me -- let me be clear about --</p>	<p>Page 633</p> <p>1 is Judge Womack who is back with the revisions to the 2 rule that we started this morning. And so if we're 3 going to talk about three things on Rule 18a, the 4 conforming with the senate bill, the implementing the 5 Judicial Campaign Finance Study Committee and other 6 stuff, that's going to take some time, don't you 7 think? 8 MR. ORSINGER: All of it will, yes. 9 CHAIRMAN BABCOCK: Yeah. So would you 10 be offended if we get -- 11 MR. ORSINGER: Not at all. 12 CHAIRMAN BABCOCK: -- Judge Womack out 13 of the way? 14 MR. ORSINGER: Absolutely not. 15 CHAIRMAN BABCOCK: Because I think 16 that's fairly -- 17 MR. ORSINGER: I'm here for the 18 duration, and so is Carl. 19 CHAIRMAN BABCOCK: Okay. I think 20 that's rather being respectful of his time, too. Is 21 that okay with you? 22 MR. ORSINGER: Yes. 23 CHAIRMAN BABCOCK: Is that okay with 24 you, sir? 25 MR. KUYKENDALL: Yes, sir.</p>
<p>Page 633</p> <p>1 HON. SARAH DUNCAN: To the existing 2 proposal that's before the Supreme Court? 3 MR. ORSINGER: We don't have a redline 4 as against this committee's proposal to the Supreme 5 Court either. 6 So in light of that, my suggestion was that 7 we go through it so that each concept is identified 8 and we're all familiar with what it is. 9 CHAIRMAN BABCOCK: Yeah. Let me just 10 be clear about what we're doing here. The matters 11 that the Court asked us to consider is, one, to 12 conform 18a to Senate Bill 788, and I take it that 13 Carl's proposal does that. It looks like it does 14 it. Right? 15 MR. ORSINGER: It was our attempt to 16 fold that into the rule -- 17 CHAIRMAN BABCOCK: Your intent was to 18 do it? 19 MR. ORSINGER: -- scratch it into the 20 rule. 21 CHAIRMAN BABCOCK: Okay. 22 MR. ORSINGER: Yes. 23 CHAIRMAN BABCOCK: And then the second 24 assignment was to modify 18a to reflect the 25 suggestions of the Judicial Campaign Finance Study</p>	<p>Page 636</p> <p>1 CHAIRMAN BABCOCK: Okay. Judge Womack, 2 can we turn to your -- because I think there was, 3 perhaps, a snafu on 42.2 -- not a snafu, but somebody 4 pointed out something. 5 HON. PAUL WOMACK: I think it's 6 technically known as a glitch -- 7 (Laughter) 8 HON. PAUL WOMACK: -- which I had 9 forgotten about after -- since the time that I wrote 10 the letter with the proposed rule changes to 11 Justice Recht. 12 The Tenth Court of Appeals has pointed out 13 that Rule 42.2(a), as it literally was written, says 14 that an appeal can be dismissed if the appellant 15 withdraws his or her notice of appeal. 16 And under Rule 3, the state is never the 17 appellant. Even when the state appeals, it's not the 18 appellant. But the term appellant and the term 19 appellee in criminal cases apply only to the person 20 who is charged with the crime. 21 And so the state's attempt to dismiss its 22 appeal in the State against Miles, which is cited at 23 the bottom of the page there, was held to be for 24 nothing. 25 So that seemed to be probably contrary to</p>
<p>Page 634</p> <p>1 Committee. 2 MR. ORSINGER: And we did that also. 3 CHAIRMAN BABCOCK: Okay. So that's -- 4 MR. ORSINGER: In doing those two 5 things, that naturally led us to discussions to do 6 other things. And so -- 7 CHAIRMAN BABCOCK: That's okay. 8 MR. ORSINGER: -- if you would like to 9 limit our focus just to those changes, we can. 10 CHAIRMAN BABCOCK: I'll tell you what 11 I'm trying to do, which is procedural. You did those 12 two things and then you did some other stuff. 13 MR. ORSINGER: True. 14 CHAIRMAN BABCOCK: Okay. 15 To the extent that Randal wants to stay and 16 hear the other stuff, he is more than welcome to 17 stay. But just in respect of his time, it appears to 18 me that although we'll probably talk about it, 19 certainly the rather mechanical effort of folding in 20 Senate Bill 788 into this rule has been done. You've 21 accomplished that. And we'll talk about the details, 22 but I'm just trying to be respectful of Randal's time 23 if he wants to -- if he wants to duck out at any 24 time. 25 The other thing I want to be respectful of</p>	<p>Page 637</p> <p>1 what we all intended to do, and it actually was just 2 a glitch. That's an intermediate change I made. 3 Everything else in here was an attempt to 4 try to write down the other things that we talked 5 about this morning. 6 CHAIRMAN BABCOCK: Okay. Let's deal 7 with 42.2 first. Does anybody have any problem? 8 Bill? 9 PROFESSOR DORSANEO: Judge, does it 10 say -- it says withdraws. What does it say now? Is 11 it "its notice of appeal"? 12 HON. PAUL WOMACK: It now says "his 13 notice of appeal or her notice of appeal." 14 PROFESSOR DORSANEO: No. I mean in 15 your corrected draft. 16 HON. PAUL WOMACK: Yeah. It would say 17 "its." 18 CHAIRMAN BABCOCK: Everybody should 19 have the redlined version. 20 PROFESSOR DORSANEO: And I don't know 21 enough about this to know whether it's always an it, 22 but I'm getting the impression that the party that 23 appeals could be an it or it would be a his or a 24 her. 25 HON. PAUL WOMACK: Uh-huh.</p>

<p style="text-align: right;">Page 638</p> <p>1 MR. SOULES: "The." 2 PROFESSOR DORSANEO: "The notice of 3 appeal." 4 HON. PAUL WOMACK: Okay. 5 PROFESSOR DORSANEO: And is it possible 6 to have more than one appellant? 7 HON. PAUL WOMACK: Sure. Yeah. 8 PROFESSOR DORSANEO: Then I'd say "and 9 appellant withdraws the notice of appeal." 10 MR. EDWARDS: The other appellant might 11 not like that. 12 HON. SARAH DUNCAN: If you have 13 multiple defendants, there may be more than one 14 notice. 15 CHAIRMAN BABCOCK: Speak up, Sarah. 16 HON. SARAH DUNCAN: If you've got 17 multiple defendants, there may be more than one 18 notice of appeal. So to say "the notice of appeal" 19 doesn't seem right. 20 PROFESSOR DORSANEO: Why don't we just 21 say if -- okay. "If a party that appeals withdraws 22 notice of appeal." 23 HON. SARAH DUNCAN: I like "its." I 24 started using it in opinions just because it's -- 25 CHAIRMAN BABCOCK: Ralph Duggins.</p>	<p style="text-align: right;">Page 641</p> <p>1 right. 2 MR. SOULES: Subject to somebody 3 writing better grammar, if they want to. 4 CHAIRMAN BABCOCK: Bill, are you all 5 right with that? 6 PROFESSOR DORSANEO: Well, I'm happy 7 with "party that appealed." It seems that that could 8 be, you know, individuals plus the state. I have a 9 little trouble with -- I don't like "its notice of 10 appeal" if it's an individual. I just don't like 11 that. I can't get up to that level yet. But "the 12 notice of appeal" is clear enough to me. "If a party 13 that appealed withdraws" -- you know, or just "notice 14 of appeal." 15 HON. SARAH DUNCAN: The more 16 androgenous our society gets, Bill... 17 PROFESSOR DORSANEO: I don't know if I 18 agree with that at all. 19 CHAIRMAN BABCOCK: Okay. Any other 20 comments to this rule? 21 (No response) 22 CHAIRMAN BABCOCK: All right. I'll 23 second Luke's motion that subject to the grammar, 24 whether it's who or that or its or his or her or 25 their, everybody in favor of this rule as redrafted?</p>
<p style="text-align: right;">Page 639</p> <p>1 MR. DUGGINS: Okay. 2 CHAIRMAN BABCOCK: Hang on. 3 HON. SARAH DUNCAN: It gets too 4 complicated. 5 CHAIRMAN BABCOCK: Ralph Duggins. 6 MR. DUGGINS: Who signs this if it's 7 the state? 8 HON. PAUL WOMACK: Who signs the motion 9 to dismiss? 10 MR. DUGGINS: You say that the 11 appellant must personally sign the withdrawal. What 12 happens in the event it's the state that seeks -- 13 HON. PAUL WOMACK: The state is not an 14 appellant. The state is -- 15 MR. DUGGINS: I thought that's what 16 you're making it on your comment, says that this is 17 being replaced by a party that appeals. To reflect 18 that the rule applies to the state, I'm just asking: 19 What happens when the state seeks to withdraw -- 20 HON. PAUL WOMACK: When the state 21 seeks -- 22 MR. DUGGINS: -- notice of appeal? 23 HON. PAUL WOMACK: -- to withdraw, I 24 suppose that the attorney representing the state -- 25 MR. DUGGINS: Well, I'm just</p>	<p style="text-align: right;">Page 642</p> <p>1 Everybody raise their hand. 2 Anybody opposed? 3 (No response) 4 By acclamation, 42.2, with grammar revised, 5 is recommended. 6 So now we're going to 73 and the form that 7 the court has -- and Judge or Bill, either one, do 8 you have additional language you'd like us to look at 9 or talk about? 10 (Discussions off the record) 11 CHAIRMAN BABCOCK: Judges -- 12 MR. SOULES: I've been talking with the 13 Judge here. And we're going to put, "with a copy of 14 the official form" at the very end so that it's 15 parallel to first sentence. There's a typo. 16 THE REPORTER: Can you speak up? I'm 17 sorry. 18 CHAIRMAN BABCOCK: Yeah, speak up, 19 Luke. 20 MR. SOULES: All right. 73.2, 21 noncompliance, in the first line after the word 22 application is not. "That" would be inserted there. 23 Just a typo. 24 MR. YELENOSKY: And the comma in that 25 sentence.</p>
<p style="text-align: right;">Page 640</p> <p>1 clarifying: The attorney can sign it? 2 HON. PAUL WOMACK: Uh-huh. Yeah. But 3 in the last sentence that's been added there where it 4 says "an appellate," that can only refer to a 5 defendant in a criminal case. It can't be the 6 state. It's Rule 3.2. 7 HON. TOM LAWRENCE: This is just a 8 matter of grammar. Should it be "a party who 9 appeals" instead of "that"? 10 MR. ORSINGER: Judge Womack, can't the 11 state appeal if there's like a suppression hearing 12 granted and the prosecution is dismissed early on? 13 HON. PAUL WOMACK: The state can 14 appeal, but the term appellant doesn't apply to the 15 state. 16 MR. ORSINGER: Okay. Okay. 17 HON. MICHAEL SCHNEIDER: How does the 18 state get out of it, that's what's his question. 19 CHAIRMAN BABCOCK: Okay. Where are 20 we? 21 MR. SOULES: I move we recommend the 22 changes reflected on 42.2. 23 CHAIRMAN BABCOCK: Okay. There's been 24 some suggestions of language. Carl says it ought to 25 be "the party who appealed." I think that's probably</p>	<p style="text-align: right;">Page 643</p> <p>1 MR. SOULES: In the third line it 2 says, "with a copy of the official form," which is 3 what we talked about, but in the last sentence -- in 4 the second sentence, those words are not present, and 5 they should be. And he's willing to put them in, 6 too, at the end of the second sentence as well as the 7 first sentence. 8 CHAIRMAN BABCOCK: Okay. Luke, you're 9 talking about 73.2, noncompliance? 10 MR. SOULES: Right. 11 CHAIRMAN BABCOCK: Okay. 12 MR. SOULES: So that after the Court of 13 Criminal Appeals clerk doesn't file it and return it 14 to the clerk of the convicting court, and the clerk 15 of the convicting court will return the application 16 to the person who filed it with a copy of the 17 official form. 18 CHAIRMAN BABCOCK: And so you're 19 suggesting adding "with a copy"? 20 MR. YELENOSKY: But the defect may not 21 be that it's on the form. It may be that they put it 22 on the form and the Court of Criminal Appeals has 23 said, "There's some crucial information missing," so 24 don't we need to repeat "with notation of the defect 25 and instruction to remedy the defect and return it</p>

<p>Page 644</p> <p>1 for -- return the application." 2 HON. SARAH DUNCAN: I thought we 3 changed the language to "not on the form" on the 4 first sentence to address -- 5 MR. YELENOSKY: But the first 6 sentence -- 7 HON. SARAH DUNCAN: -- precisely that. 8 Why wouldn't we just change it on the -- 9 MR. YELENOSKY: Well, we kibitz a 10 little bit afterwards because I had suggested 11 something on that line. And the second sentence 12 allows broader latitude for the Court of Criminal 13 Appeals to send it back even if it is on the correct 14 form, but if there's some other defect -- 15 MR. SOULES: Let me try this, Steve. 16 Even if it is on the correct form and it's messed up 17 somehow, why not go ahead and send them another 18 form? 19 MR. YELENOSKY: Well, sure, but -- 20 MR. SOULES: So -- 21 MR. YELENOSKY: I don't know. I get 22 letters from prisoners sometimes, too. But if you're 23 sending -- if you get it and it's defective and you 24 just send them a form, I don't know -- 25 MR. SOULES: That was the first -- I</p>	<p>Page 647</p> <p>1 by couching it in terms of the defect, I wouldn't 2 think that that would be the intent of this rule nor 3 the intent of the court promulgating the rule. 4 MR. JEFFERSON: Oh. I don't think 5 that's the intent, but -- 6 CHAIRMAN BABCOCK: And as long as the 7 prisoner is given notice of what the defect is so 8 that he or she can cure it, it seems to me like that 9 would solve the problem. And I suppose if there were 10 multiple, you know, "This is right. This is right," 11 and there were five or six of those, then the 12 prisoner could raise that as an additional basis for 13 relief from some court. 14 I don't know. That would be my thinking. 15 Judge, would you have any reaction to that? 16 HON. PAUL WOMACK: Yes. The last thing 17 we want to do is to have to deal with any writ 18 twice. We want to get rid of it, one way or the 19 other, as soon as we can. 20 So I have not really envisioned, until 21 today, that there would be any return of any 22 petitions to any prisoners other than for the reason 23 than it was not on the form. 24 In my opinion, if prisoners fail to give 25 the information that they need, the burden of</p>
<p>Page 645</p> <p>1 just wanted to get that first piece out of it. So we 2 would add at the end of the second sentence the 3 words "with the notation of the defect and a copy of 4 the official form." 5 Okay. So the trial clerk forwards the 6 Court of Criminal Appeals clerk's notation of the 7 defects and then sends another form. Does that close 8 it up? Is that okay with you, Judge? 9 HON. PAUL WOMACK: (No verbal 10 response.) 11 MR. SOULES: Okay. With that, I move 12 that we adopt 73.2, and the Judge has successfully 13 agreed with that. 14 CHAIRMAN BABCOCK: Okay. I'll second 15 that. Any comment -- any discussion about 73.2? 16 MR. EDWARDS: Did anybody say anything 17 about the grammar, or whatever it is, on that first 18 line? 19 MR. CHAPMAN: They put "that" after 20 the -- 21 MR. EDWARDS: Oh, "that." Okay. 22 Thanks. 23 CHAIRMAN BABCOCK: Any other comments? 24 Yes, sir? 25 MR. JEFFERSON: I'll tell you, the one</p>	<p>Page 648</p> <p>1 pleading the proof is on them, and they are always 2 subject to just have the relief denied. The last 3 thing we want to do is to keep at them until they 4 perfect their pleading. 5 (Laughter) 6 HON. PAUL WOMACK: I understand what 7 you're saying, and I see that it would be a 8 possibility for an ill-motivated court to do that, 9 but it certainly is not in our institutional interest 10 to keep this ball in the air any longer than we have 11 to. 12 MR. EDWARDS: What would happen if you 13 put the word "substantially" in front of "comply"? 14 CHAIRMAN BABCOCK: Judge, the 15 suggestion is made that "without filing an 16 application does not substantially comply." 17 HON. PAUL WOMACK: That's fine. 18 CHAIRMAN BABCOCK: Any other? 19 Yes, sir? Steve. 20 HON. JAN PATTERSON: We may have 21 crossed this bridge already, but I don't think the 22 federal form is an exclusive form. Do you not want 23 discretion at all to be able to file something that's 24 shorter than this? 25 HON. PAUL WOMACK: Oh, yeah. I'm sure</p>
<p>Page 646</p> <p>1 reservation I would have is that if I'm sitting on 2 the Court of Criminal Appeals and I am thinking most 3 habeas corpus petitions are frivolous, it seems to me 4 I would have an incentive each time one came up, 5 whether it's on the form or not, to find some defect 6 and send it back down as often as possible until the 7 prisoner gives up. And I just wonder whether that's 8 a good policy to take. 9 MR. SOULES: I don't think we can fix 10 that if it's a problem. 11 MR. JEFFERSON: Well, what if the 12 prisoner sends up a form that is not on this form but 13 it contains everything proper for complaining about 14 some confinement, then wouldn't that prisoner have a 15 constitutional right to have the habeas corpus 16 reviewed? Even if it's not on this form and even if 17 there's a minor -- or if it's on this form and 18 there's a minor defect, wouldn't there be some right 19 of constitutional review? 20 I don't know. I'm just putting that out 21 there. I think there's some problem with the rule, 22 in my opinion. 23 CHAIRMAN BABCOCK: Well, I think maybe 24 what you're saying is: If the court took this rule 25 as an opportunity to deny habeas corpus on the merits</p>	<p>Page 649</p> <p>1 that the -- that if -- 2 HON. JAN PATTERSON: I mean, you don't 3 want to say "in its discretion will not file 4 something that's not on this form," so that if a 5 two-page comes in or if an interim or this -- I 6 mean -- 7 HON. PAUL WOMACK: Well, to be honest 8 about that, the two-page form, I'd hate to put the 9 clerks of the convicting courts in the position of 10 having to decide when to send them back and when to 11 send them to us, for them to require that the form be 12 used. 13 CHAIRMAN BABCOCK: Okay. 14 Steve? 15 MR. YELENOSKY: Well, I guess I'm 16 hearing something a little different from earlier and 17 I'm wondering whether what I suggested makes sense 18 now based on what you said. 19 If the Court of Criminal Appeals really 20 doesn't contemplate sending it back except when it's 21 not on the form, then maybe we're wrong to leave more 22 latitude in that second sentence as we have. 23 And if, on the other hand, 24 Justice Patterson's suggestion was right, that maybe 25 you don't want to reject everyone that is not on the</p>

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1 form, then the first sentence is wrong because we've
2 made that automatic on the part of the clerk.
3 I think your answer to that was, do you
4 want something automatic for the clerk. Maybe we
5 ought to decide that.
6 But then are you suggesting now on the
7 second sentence that maybe that should also read
8 simply that the Court of Criminal Appeals would send
9 it back if it's not on the form.
10 If that's true, we've already taken care of
11 it in the first -- second sentence because it will
12 never get to the Court of Criminal Appeals.
13 HON. PAUL WOMACK: Well, I kind of like
14 it the way it is because it gives the court the
15 option either to dismiss the petition or to send it
16 back for correction.
17 CHAIRMAN BABCOCK: Okay. And it looks
18 to me like the two-tiered system that you have is all
19 the clerk does is look and say, "Is this their form?
20 Yeah. It's their form." And the court of appeals,
21 the burden they've undertaken for themselves is to
22 say, "Well, wait a minute, but, you know, Item C and
23 D isn't filled out," and so send it back because
24 they've got to fill out Item C or D, or whatever it
25 may be, which would be reasonable -- or Items 13 or

1 CHAIRMAN BABCOCK: Okay.
2 MS. SWEENEY: I thought we were going
3 to delay the discussion until this afternoon, so I
4 apologize for not having been here, but I'll read the
5 minutes and get caught up.
6 HON. PHIL HARDBERGER: I suggest
7 recusal. We go back and do the recusal.
8 CHAIRMAN BABCOCK: Okay. Everybody
9 happy with getting back to recusal?
10 (Simultaneous responses)
11 CHAIRMAN BABCOCK: All right. You're
12 back up, Richard.
13 MR. ORSINGER: We want to focus on
14 Senator Harris' bill as it's reflected in here
15 first. Then we want to go to the recommendation of
16 recusal for excessive campaign contributions.
17 CHAIRMAN BABCOCK: Yes.
18 MR. ORSINGER: That latter one is going
19 to be easy to distinguish because that task force
20 actually proposed a Rule 18c, which we have not yet
21 proposed any changes to, but the first one is going
22 to fold into some decisions we made because we didn't
23 have a stand-alone provision relating to
24 Senator Harris' statute. We actually denigrated it
25 into the way the rule operates. So there's going to

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1 whatever it may be, so...
2 Okay. Any other?
3 Yeah.
4 HON. SAMUEL MEDINA: "Substantially
5 complies" was suggested to give them leeway to either
6 send it back or not.
7 CHAIRMAN BABCOCK: Right. I think so.
8 Yeah, which is what Bill's point was.
9 It gives the court discretion, if they
10 didn't fill out Item No. 16, but the court has got a
11 good enough handle on the petition, they don't
12 necessarily have to send it back. Makes sense to
13 me.
14 Any other comments?
15 (No response)
16 CHAIRMAN BABCOCK: Okay. There's been
17 a motion seconded. All in favor of 73.2, as amended,
18 raise your hand?
19 All opposed?
20 Passes by acclamation.
21 What's next?
22 MR. SOULES: Okay. The form itself is
23 not going to be in the rule book, right? It's just
24 going to be -- okay. Okay. Never mind.
25 (Discussion off the record)

1 be some crossover to other subcommittee activities.
2 But I guess what I'll do is to ask Carl to
3 focus on those areas where Senator Harris' bill shows
4 up, even though I think that's going to lead us into
5 some jumbled discussions.
6 CHAIRMAN BABCOCK: Justice Hecht.
7 JUSTICE HECHT: Senator Harris' bill
8 only deals with the tertiary problem, right?
9 MR. ORSINGER: That's right.
10 JUSTICE HECHT: But the proposed
11 legislation, which we responded to, that addresses
12 the timing problem, and that's been worked into the
13 proposal also. So Senator Harris' concerns are
14 really twofold, the timing problem and the tertiary
15 recusal.
16 MR. ORSINGER: Well, and we made a
17 decision about timing based on discussion and vote,
18 so --
19 JUSTICE HECHT: Yeah. But I'm just
20 saying as we talk about --
21 MR. ORSINGER: We can talk about
22 timing, too.
23 JUSTICE HECHT: As we talk about
24 Senator Harris' legislation, there are really two --
25 the part that passed is just the tertiary part, but

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1 CHAIRMAN BABCOCK: Anything else?
2 HON. PAUL WOMACK: Thanks for
3 entertaining my troubles.
4 CHAIRMAN BABCOCK: Oh, thank you.
5 Bye-bye.
6 Okay. We have a choice to make here.
7 Judge Peeples indicated at lunch that he thought
8 perhaps there was some additional discussion that
9 could be had with respect to the voir dire
10 discussion, and Paula, who's the chair of that
11 subcommittee, has arrived from ice-bound Dallas. So
12 we can take that up now or we can return to the
13 recusal matters. And so what's everybody's
14 pleasure?
15 Paula?
16 MS. SWEENEY: Oh, no. I was waving at
17 Carl. I'm sorry.
18 CHAIRMAN BABCOCK: Oh, okay.
19 MR. SOULES: Next time. Next time.
20 CHAIRMAN BABCOCK: What next time?
21 MR. SOULES: Voir dire.
22 MS. SWEENEY: I'd like the minutes of
23 what happened this morning. And I apologize. I
24 wasn't in Dallas. You were notified I had a board
25 meeting in Houston this morning.

1 the part he proposed that we responded to was the
2 timing part, and it's worked in here too, and I just
3 want to make sure we cover them both.
4 MR. ORSINGER: Okay. We'll be
5 consciously aware of that.
6 JUSTICE HECHT: Yeah.
7 MR. ORSINGER: So Carl, can I --
8 HON. DAVID PEEPLES: Yeah. Could I --
9 CHAIRMAN BABCOCK: Yeah.
10 HON. DAVID PEEPLES: Have we decided
11 that we want to do a total rewrite as opposed
12 to "Here's a problem, and here's the way to fix it.
13 Here's another problem, and here's the way to fix
14 that," with the existing rule.
15 CHAIRMAN BABCOCK: I don't think the
16 full committee has decided that. I sense that
17 that's -- well, I don't know.
18 HON. DAVID PEEPLES: So my related
19 question would be: If the Supreme Court has had the
20 total rewrite pending before and has not adopted it,
21 can we conclude that you-all didn't like it?
22 JUSTICE HECHT: No. We hadn't talked
23 about it. We got waylaid by Senator Harris'
24 legislation.
25 HON. SCOTT BRISTER: And there are

<p>Page 656</p> <p>1 several things, I think, when we have to rewrite the 2 whole rule, number one, because it always refers to 3 judges as "he." 4 No. 2, as Richard pointed out, because it 5 directly conflicts with the constitution in a couple 6 of places and in other places with existing case -- 7 with 50 years of existing case law, and that's 8 pervasive in the whole rule. 9 And No. 3, there's no good reason to have a 10 rule on the same subject in three or four different 11 places. 12 CHAIRMAN BABCOCK: That's probably 13 overriding. So I think the answer to that, then, 14 Judge Peeples, is that we ought to go through the big 15 exercise. 16 Why don't you do that, Carl. 17 MR. HAMILTON: We started out with 18 Rule 135 or 134 of the recodified rules, and I'll 19 just tell you that Section (a) is grounds for 20 disqualification; (b) is grounds for recusal; and (c) 21 is waiver. 22 Procedure starts with Section (d), and 23 that's what we addressed. That's why we start with 24 Section (d) now. 25 To address the Senator Harris' bill, the</p>	<p>Page 659</p> <p>1 being filed. 2 The other parallel proceeding was already 3 in the rules, and that was 14a. And that is if the 4 grounds were only (b) (1), (b) (2) or (b) (3), the 5 court could proceed. 6 Now, (b) (1), (b) (2) and (b) (3), under 7 the grounds, are impartiality, bias and if the judge 8 is a material witness. That was already in the 9 recodification. So what we've added as parallel 10 proceedings are when the third motion is filed or if 11 a motion is filed within three days of a trial or 12 hearing. 13 Under time to file on disqualification, we 14 have two options. 15 One is a motion to disqualify, can be filed 16 at any time or it has to be filed as soon as 17 practical after learning of the grounds for 18 disqualification. 19 We had discussion about that, and because 20 disqualification can be really raised at any time, 21 that may be the better choice, but there's also some 22 thought that it ought to be raised as soon as 23 practical after learning of it, but if it isn't, then 24 query, "Is it waived?" And if it can't be waived, 25 then probably the better choice is that a motion to</p>
<p>Page 657</p> <p>1 one that I had talked about, the third motion, we 2 want to address that first. 3 We did try to incorporate in this rule the 4 suggestions in Judge Hecht's letter to 5 Senator Harris, the suggestions in Bob Pemberton's 6 memo, which you have in your materials, and the 7 provisions of Article 30.0016. 8 30.0016, to the extent that it has any 9 procedure in it, is dealt with in the rest of the 10 rule, but the guts of 30.0016 is in Subparagraphs (4) 11 (b) and (5), which provides that if a third motion is 12 filed, the judge continues as though no motion had 13 been filed. 14 And that, (5), if the judge signs any 15 orders during that proceeding and is later recused or 16 disqualified, then the judge assigned to the case 17 shall vacate such orders. 18 That's basically the guts of 30.0016. 19 To go back, though, to the beginning on the 20 motion part, the old recodified rule is basically 21 that same thing with the following exceptions. 22 We provided for after the word judge "as 23 defined herein," because we do have a definition of 24 judge. Otherwise -- and we also added Judge Hecht's 25 suggestions, that the grounds have to be asserted</p>	<p>Page 660</p> <p>1 disqualify can be filed at any time. 2 Down to the next paragraph, the referral 3 paragraph was also in the recodification. 4 HON. SCOTT BRISTER: Carl, are we going 5 to discuss these one by one? 6 MR. HAMILTON: Yeah. I'm just giving 7 you an overview. 8 And then the first four lines of that are 9 the same as in the recodification. We're down to 10 Option 2. 11 Option 2 is put in there because 12 Judge Hedges over in Houston, when she was on Court 13 Rules Committee, thought that there were too many 14 frivolous motions to recuse being filed. 15 So she suggested a procedure whereby the 16 presiding judge could decide, initially, whether the 17 motion was procedurally proper and whether it alleged 18 grounds. And if it did not, then the presiding judge 19 could summarily deny the motion. 20 That's an option that we've discussed, but 21 the subcommittee really hasn't come to any consensus 22 opinion on. 23 Then the interim proceedings, I basically 24 discussed already, there are three situations where 25 the judge can continue on -- Paragraph (a), (b), (c),</p>
<p>Page 658</p> <p>1 when the party learned of the grounds of recusal or 2 disqualification. 3 So those are the two basic changes in the 4 motion part of the recodification of those rules. 5 The time to file -- we'll just go over this 6 as an overview first and then we can back up. The 7 time to file, in the recodification, we had "could be 8 filed at any time." We changed that to comply with 9 some of the suggestions that it be filed no later 10 than ten days after actual knowledge is obtained, and 11 we also added the part in there about, "If not, it's 12 waived." This is on the recusal. 13 Then we talked about having a parallel 14 proceeding, that if a motion was untimely filed in 15 order to delay a particular proceeding, that we'd go 16 on with a parallel proceeding where the judge would 17 continue to act as though no motion had been filed, 18 and we've provided there that "a timely motion to 19 recuse filed within three days." 20 Now, that's arbitrary. We really hadn't 21 decided on the number of days, but if it's filed 22 within blank number of days of the date the case is 23 set for trial or hearing, then it's governed by 24 Paragraph (d) (4) (c) which is a parallel proceeding 25 that goes on just like in the case of a third motion</p>	<p>Page 661</p> <p>1 that's self-explanatory. 2 (5), if the judge signs any orders and is 3 later disqualified or recused, those have to be 4 vacated. 5 Then on the hearing, the hearing part, that 6 first sentence in there would have to be taken out if 7 we abandon the idea about this summary proceeding 8 before the presiding judge. 9 Otherwise, he has to assign it, has to be 10 set for a hearing within ten days of the referral. 11 All the rest of that is the same as 12 recodification. 13 The last sentence gives me some problem 14 about the judge who hears the motion has to rule 15 within 20 days or it's deemed granted. I put, in 16 brackets, "denied," but I guess my problem with that 17 is, I think the motion for new trial is about the 18 only thing we have that has some automatic ruling, 19 and I don't know the reasoning why there should be 20 some kind of an automatic ruling either way once the 21 motion is -- even if it isn't ruled on within 20 22 days, I would think that the relief would be by way 23 of mandamus or something else if the judge didn't 24 rule, but I guess I don't favor any kind of a default 25 there at all.</p>

<p style="text-align: right;">Page 662</p> <p>1 Disposition is basically the same. 2 Appeal is the same. 3 Chief justices and Supreme Court is the 4 same. 5 Sanctions, we've added into the sanctions 6 section the sanctions in 30.0016 which says that the 7 party and the attorney have to pay the reasonable 8 cost if the third motion is denied. 9 We've also changed the discovery rule of 10 sanctions which used to be 215.2(b), and we've just 11 made it any sanctions under Rule 215.2. I think that 12 was suggested in Bob Pemberton's letter. 13 And then we defined judge, because in the 14 recodification, for some reason or another, it does 15 not contain what's now in 18a, which exempts the 16 appellate court judges from this rule, and so we've 17 added that to define judge as being judge or master 18 except in the Supreme Court, Court of Criminal 19 Appeals, court of appeals, probate and commissioners 20 courts. 21 I don't know. There may be some others 22 that we've missed, but that's the definition of 23 judge. 24 And then there's two comments, failure to 25 file within three days, only waives the right to seek</p>	<p style="text-align: right;">Page 663</p> <p>1 different -- 2 MR. LOW: Yeah. That's Paragraph -- 3 HON. SCOTT BRISTER: First draft, it 4 was a -- 5 MR. LOW: -- (e). 6 HON. SCOTT BRISTER: Paragraph (e), it 7 follows this -- 8 CHAIRMAN BABCOCK: Let's see if we 9 can -- 10 MR. LOW: It's not in the materials. 11 CHAIRMAN BABCOCK: Let's see if we can 12 clear out some things first. The first thing is 13 whether or not we have conformed 18a, which is in 14 this draft as 134 to section 30.016. And looking 15 through this, it appears to me that you have, but 16 Alex has got a comment on that. 17 PROFESSOR ALBRIGHT: There's just one 18 comment I just want to make, and I'm going to have to 19 leave in a second, but it's about this issue. 20 On No. 10, sanctions, it says the party 21 filing the motion and everybody is jointly liable and 22 the fees and costs must be paid before the 31st day 23 after the date of the order denying the motion unless 24 the order is properly superseded. 25 Since it's not an appealable motion,</p>
<p style="text-align: right;">Page 663</p> <p>1 recusal for disqualification as to that hearing. 2 Now, it does not have a prejudiced party's 3 right to seek recusal in disqualification. So that 4 would be done later. And the motion to recuse 5 statutory probate court judge is governed by that 6 section of the government code. 7 Now, that's basically the overview of what 8 was done. 9 PROFESSOR DORSANEO: Can I ask Scott 10 one question? 11 Scott, did you have in your draft from your 12 hard drive a paragraph on sanctions? 13 HON. SCOTT BRISTER: No. I don't think 14 so. 15 PROFESSOR DORSANEO: I was kind of 16 curious as to why not, because I carried your draft 17 into the recodification draft and didn't include a 18 paragraph on sanctions myself, and I don't know why. 19 HON. SCOTT BRISTER: Because the idea 20 was that the Sanctions Task Force was going to take 21 sanctions from the ten different rules that it's in 22 now and put into one sanction rule rather than 23 having, "Oops, that's not a discovery sanction, 24 that's a pleading sanction," or "That's not a 25 pleading sanction or discovery sanction, that's a</p>	<p style="text-align: right;">Page 666</p> <p>1 there's no interlocutory appeal. Is there any way to 2 supersede it? 3 The statute says "supersede," but I'm 4 wondering, since there's no procedure for 5 superseding, if we should just say unless the parties 6 and the lawyers file a bond or, you know, give a 7 supersedeas bond, but put it into this Section 10 so 8 that we have a supersedeas procedure instead of 9 trying to rely on the appellate procedure. 10 CHAIRMAN BABCOCK: Maybe Randal can 11 answer that. But I would assume that what the 12 legislation was intending was that there be some bond 13 that you could put up. I guess it's 10 percent. I 14 don't know. It would just be a premium on the bond 15 or whatever the -- 16 MR. KUYKENDALL: I wish I could 17 answer. 18 CHAIRMAN BABCOCK: -- that's what the 19 idea was. 20 The problem is -- what Alex is saying 21 is, since this is not an appealable order at the 22 time, there wouldn't be a supersedeas, as we all 23 think of it. 24 Of course, Carl tracked the language of the 25 statute, so...</p>
<p style="text-align: right;">Page 664</p> <p>1 trial sanction," you know, because you have different 2 rules. 3 PROFESSOR DORSANEO: How about a 4 definition of the term "financial interest"? 5 HON. SCOTT BRISTER: That was because 6 the constitution says "interest," but the cases have 7 all determined that to be a financial interest. And 8 the parallel provision in the definition in the Code 9 of Judicial Conduct uses the term "economic 10 interest." 11 And so I think my draft, at least, was that 12 we refer to it as economic interests rather than 13 financial so that it would be the same term. 14 The same duty I'm supposed to do in the 15 code as to what's ethical or not is the one that gets 16 me recused rather than is there a difference between 17 economic and financial. 18 PROFESSOR DORSANEO: Carl, what I'm 19 saying is, there was another term that we talked 20 about putting into the definition of sanctions of 21 whatever this rule would become, and that's the 22 term "financial interest." 23 MR. LOW: Well, that's in the 24 recodification draft? 25 HON. SCOTT BRISTER: Yeah. That's a</p>	<p style="text-align: right;">Page 667</p> <p>1 MR. HAMILTON: Alex is right. We 2 didn't know what that meant, so we really haven't 3 addressed how to supersede anything. 4 MR. ORSINGER: We have two choices. We 5 can either follow the statutory language, which 6 doesn't fit the rules of procedure, or we can try to 7 gloss over the statutory language by adapting the 8 rules of procedure to create a new animal, it seems 9 to me. 10 What Alex is saying is: "Well, let's not 11 buy into the ordinary supersedeas process" because 12 that obviously doesn't apply. "Let's create an 13 artificial supersedeas process for this one problem 14 and finesse the statute." 15 CHAIRMAN BABCOCK: Okay. And so that 16 would require additional language. 17 MR. ORSINGER: We'd have to change this 18 because there's no way to properly supersede this 19 order because it's not appealable and supersedeable. 20 CHAIRMAN BABCOCK: Sarah. 21 HON. SARAH DUNCAN: I don't understand 22 why not. If you have a final judgment subsequent to 23 the judgment you have a sanctions order, you've 24 already superseded the judgment. 25 I would think that a sanctions order would</p>

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1 come within the other money judgments provision of
2 Rule 24 and you can supersede the sanctions order.
3 MR. ORSINGER: But the problem is that
4 you're required to pay within 31 days of when the
5 sanction is levied, and that will almost inevitably
6 be before there's an appealable judgment.

7 And so if you've got to pay within 31 days
8 but it's not appealable for another month or two or
9 six months or a year, how do you supersede it?

10 HON. SARAH DUNCAN: But it's
11 immediately appealable if you're already on appeal.

12 MR. ORSINGER: It won't be already on
13 appeal. Ordinarily --

14 HON. SARAH DUNCAN: It will be if
15 there's a judgment rendered before the sanction.

16 MR. HALL: But that's not right. If
17 you have a six-week trial, it's due within 31 days,
18 the payment on the sanctions.

19 MR. ORSINGER: At least you have to
20 account for the great number of cases where the
21 sanction will be levied before there's a trial, and
22 then you have a problem. We may not have a problem
23 in every case, but we'll have a problem in most
24 cases.

25 CHAIRMAN BABCOCK: Buddy.

1 bonds, and the judge can approve alternative
2 security. All those things get swept into about a
3 dozen words or so, and we pick up the benefit of a
4 whole lot of work that we did on the TRAP rule.
5 CHAIRMAN BABCOCK: Bill?
6 PROFESSOR DORSANEO: The only problem
7 is that I'm not sure that when this statute is
8 talking about, unless the order is properly
9 superseded, it's talking about any of that appellate
10 procedure at all.

11 MR. SOULES: I don't think it is.

12 PROFESSOR DORSANEO: Why wouldn't it
13 just be meant unless somebody says you don't have
14 to?

15 MR. SOULES: Because once you pay it,
16 it may not be recoverable, if you get it reversed on
17 appeal. That's why you have supersedeas anyway.

18 CHAIRMAN BABCOCK: Right.

19 MR. SOULES: I mean, it's true that
20 this is an order. Rule 24 has to do with the
21 judgment, but if we say this order can be suspended
22 in the same manner that judgments can be suspended
23 under Rule 24 -- he had something in mind by
24 superseding. It's not spelled out. That should give
25 us an open field to discuss what we think is proper

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1 MR. LOW: I know a case where the judge
2 made him do community service, and I said, "Wait a
3 minute. That might not be upheld. You can't take
4 that back." Do they treat a money fine differently?
5 I thought you couldn't really -- you could set it,
6 but you couldn't impose it until they had a right to
7 appeal, that's my understanding.

8 CHAIRMAN BABCOCK: Judge McCown.

9 HON. SCOTT MCCOWN: Does this statute
10 prohibit the Supreme Court from doing a repealer?
11 Well, then what I'm wondering is whether we ought
12 to --

13 JUSTICE HECHT: Well --

14 HON. SCOTT MCCOWN: But you might not
15 want to do that.

16 JUSTICE HECHT: As a practical matter,
17 we're not going to repeal it without consulting
18 with --

19 (Laughter)

20 HON. SCOTT MCCOWN: Well, that was the
21 point I was going to get to, which is, wouldn't it be
22 worth our time to have a group meet with the
23 interested legislators and do what they want to do
24 but do it in a way that solves this appellate
25 problem.

1 superseding and for the Supreme Court to declare what
2 that is, and a ruling, I think.

3 CHAIRMAN BABCOCK: Judge Rhea.

4 HON. BILL RHEA: Along that line, I
5 think you can add something at the end of this
6 paragraph after the language, "unless the order is
7 properly superseded," comma, "as the conditions of
8 that supersedeas are determined by the judge."

9 That could make that clear that we're not
10 really talking about the appellate context; we're
11 talking about what the judge --

12 HON. SCOTT MCCOWN: Well, but --

13 HON. BILL RHEA: -- and there might be
14 other circumstances.

15 CHAIRMAN BABCOCK: Judge McCown.

16 HON. SCOTT MCCOWN: The problem is not
17 in making it possible to supersede it. The problem
18 is in the reverse, which is: "Okay. It's the 31st
19 day. I haven't superseded it. I want my appeal, but
20 we're in the middle of the case."

21 And so, in essence, it would be a back door
22 way to get an interlocutory appeal on the issue of
23 whether the judge should have been recused or not,
24 which we don't want.

25 See what I'm saying?

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1 So that rather than try to write a special
2 appellate procedure for this alone, we come up with a
3 solution that does what they want to do inside our
4 present appellate rules.

5 And then if they buy off on it, do a
6 repealer and adopt the new rule.

7 CHAIRMAN BABCOCK: Makes some sense.

8 HON. SCOTT MCCOWN: Well, then, could I
9 suggest that we refer this to the subcommittee for
10 detailed meetings with the interested parties, and,
11 you know, approach them respectfully and just figure
12 out exactly what they want done and then propose a
13 way to do that that satisfies them but is within
14 inside our rules of procedure.

15 CHAIRMAN BABCOCK: Anybody got a
16 problem with that?

17 Luke?

18 MR. SOULES: Well, I just think it's
19 easy to do, if we want to do it, to fix this. We can
20 say, "Unless the enforcement of the order is
21 suspended by any methods permitted to suspend
22 enforcement of judgment of the TRAP Rule 24."

23 Then you pick up all of what you did on the
24 TRAP Rule 24 to get suspension of judgment. There's
25 cash, bonds, requirements for bonds, bonds in lieu of

1 And so if it's a final judgment that needs
2 to be superseded, then it can be appealed. If it can
3 be appealed before the case is really over, then it's
4 a back door way to get an interlocutory appeal on the
5 question of whether the recusal was proper or
6 improper --

7 CHAIRMAN BABCOCK: Justice Hecht.

8 HON. SCOTT MCCOWN: -- which is why I
9 would urge referral back to the subcommittee.

10 CHAIRMAN BABCOCK: Justice Hecht.

11 JUSTICE HECHT: I'm just not clear why
12 this sanction should be treated differently from any
13 other permanent discovery sanction that's
14 interlocutory.

15 It seems to me like it ought to be the
16 same, which, as I understand it, is immediately
17 payable unless it threatens the ability of the party
18 to proceed, or maybe if it's against the attorney, it
19 might be.

20 HON. SCOTT BRISTER: Yeah. But then I
21 have to state in an order written findings or oral
22 findings of a record and why. Ta-tada-tada.

23 CHAIRMAN BABCOCK: Who made you do
24 that?

25 (Laughter)

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1 HON. SCOTT BRISTER: Well, I mean, it
2 doesn't come up very often, and this might be
3 different since it's jointly and severally with the
4 attorney as well as the client, as opposed to the
5 sanctions, which is usually one or the other.
6 CHAIRMAN BABCOCK: Well, the other
7 problem is, it's in the statute.
8 HON. SCOTT BRISTER: Right.
9 HON. SCOTT MCCOWN: Judge, I think the
10 difference in this in discovery would be that if I go
11 up on a discovery sanction and I win, that's one
12 thing. But here, if I go up on this sanction, the
13 underlying issue would be, "Should the recusal have
14 been granted?"
15 So it would be an oddity that the only
16 place you got an interlocutory appeal for recusal
17 would be in the tertiary motion which is the very
18 place we don't want any additional procedure.
19 MR. LOW: If we don't --
20 CHAIRMAN BABCOCK: Buddy.
21 MR. LOW: -- follow Luke's method, the
22 judge might just say, "Okay. That's not properly
23 suspended." Judge says, "I'm just not recognizing
24 that." What does he have to recognize? And then you
25 impose the sanctions then, unless we follow something

1 CHAIRMAN BABCOCK: Yeah. We're not to
2 that yet.
3 Are you going to leave your proposal on the
4 table?
5 MR. SOULES: I think it fixes that
6 piece of it, but it doesn't fix the whole thing. And
7 I think some of this does require going back to the
8 man and saying, "Can we change this to pay to -- if
9 it's not paid within 31 days, execution can issue
10 unless superseded."
11 CHAIRMAN BABCOCK: Okay.
12 MR. SOULES: That's probably a little
13 more orderly way to do it. Then you know what the
14 sanction is for not paying because it's execution,
15 they go after your assets.
16 CHAIRMAN BABCOCK: Okay.
17 MR. SOULES: Now we may have the loop
18 closed. But in order to do that, we've got to get
19 Senator Harris' acceptance that issuing execution is
20 okay rather than forcing us to pay, because some of
21 that -- there's going to have to be a reason for
22 us -- we're going to have to reason through, "What
23 are we going to talk to Senator Harris about," and
24 then go and make peace with him.
25 CHAIRMAN BABCOCK: Okay.

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1 definite like what Luke's talking about.
2 CHAIRMAN BABCOCK: Well, whatever we
3 do, we're going to have to have some language, and
4 we've got three suggested proposals.
5 We've got Judge McCown's proposal that we
6 resubmit it to the subcommittee for consultation with
7 the interested legislator.
8 We've got Luke's proposal that we have
9 language that references Rule 24 of the TRAP rules.
10 And we've got Judge Rhea's proposal that we
11 add some language that allows the trial judge to
12 determine the conditions of the supersedeas, I guess
13 recognizing that there would be some form of
14 supersedeas or way to supersede the decision.
15 Those are all three proposals that the
16 subcommittee is going to have to determine anyway.
17 Would it be appropriate to give an expression of this
18 larger committee to the subcommittee about which way
19 we think it ought to be done?
20 Does that make sense?
21 So why don't we -- everybody who's in
22 favor -- you can only vote once. Everybody who's in
23 favor of Judge McCown's idea to send it to the
24 subcommittee to consult with the interested
25 legislator, Senator Harris, raise your hand.

1 Judge McCown.
2 MR. SOULES: I guess both. That's why
3 I want to vote twice, but you told us we could only
4 vote once.
5 (Laughter)
6 HON. SCOTT MCCOWN: Are we trying to
7 send something final to the Supreme Court out of this
8 meeting --
9 MR. ORSINGER: No. No.
10 HON. SCOTT MCCOWN: -- today?
11 Well, then, what would hurt taking all
12 three of these ideas back to the subcommittee and
13 letting us come next time?
14 CHAIRMAN BABCOCK: There's no question
15 that all three of these ideas are going to come back
16 to the subcommittee.
17 HON. SCOTT MCCOWN: Okay.
18 CHAIRMAN BABCOCK: What I was trying to
19 vote on was to give them a sense of what's the
20 preference of the bigger committee.
21 Okay. So we're back to Luke's draft Rule
22 24 proposal, which is still on the table. Everybody
23 raise your hand, who's in favor of that?
24 I got 15 votes on that.
25 Okay. Judge Rhea's proposal that the

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1 I've got 14. Is that what you got?
2 Okay. Fourteen.
3 Everybody's who's in favor of Luke's idea
4 that we add language referencing TRAP Rule 24, raise
5 your hand.
6 HON. DAVID PEEPLES: He abandoned his
7 own proposal.
8 CHAIRMAN BABCOCK: Excuse me?
9 MR. SOULES: Well, it's got so many
10 things screwed up that what I said won't fix it.
11 That's why.
12 MR. MCCOWN: Why didn't you tell me
13 that before?
14 (Laughter)
15 (Simultaneous talking)
16 CHAIRMAN BABCOCK: If you'll put your
17 hands down for a minute while Luke withdraws his
18 proposal.
19 (Laughter)
20 MR. SOULES: Trial judge imposes
21 sanctions. They've got to be paid within 31 days. I
22 don't pay. What's the sanction?
23 MR. HAMILTON: That's another
24 question. We haven't gotten to that question yet.
25 MR. ORSINGER: It may be contempt.

1 supersedeas would be as determined by the trial
2 judge, everybody in favor of that raise your hand.
3 Since you're one of my oldest friends.
4 (Laughter)
5 MR. SOULES: If he'll put cash deposit
6 or as determined by the trial judge, I'll vote for
7 that one, too.
8 CHAIRMAN BABCOCK: Okay. So I think
9 there's a pretty even split between going back to
10 Senator Harris and the TRAP Rule 24, which are not
11 mutually exclusive, as Luke points out.
12 So that takes care of that. Any other --
13 yes, Judge?
14 HON. SCOTT MCCOWN: I have a second
15 issue on the legislation if you're ready for --
16 CHAIRMAN BABCOCK: That -- boy, you
17 took the words out of my mouth. What else about the
18 legislation --
19 HON. SCOTT MCCOWN: Okay.
20 CHAIRMAN BABCOCK: -- do we have issues
21 with?
22 HON. SCOTT MCCOWN: If you look at (d)
23 (5) here, orders to be vacated, that comes out of the
24 legislation. I think it's Section 30.016 (e) which
25 says, "If a tertiary recusal motion is finally

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1 sustained, the new judge shall vacate all orders,
2 signed by the sitting judge."
3 That's a change in our procedure which
4 under the legislation applies only to tertiary
5 proceedings but which under the proposed rule would
6 apply to all proceedings.
7 And there's a huge problem with that, and
8 that is: Right now under our rules, if I'm hearing a
9 case and a party comes in to recuse me and it's an
10 emergency matter and I enter a TRO, that order is in
11 effect.
12 But if I'm ultimately recused, this would
13 have that TRO being vacated and, I guess, being a
14 void order, but a whole bunch of things may have been
15 relied upon under that TRO. This is particularly
16 true in family law.
17 For example, if I make the state the
18 managing conservator of a child, we draw down federal
19 funds based upon that order. If I make Grandma the
20 conservator of the child, she signs up for her
21 insurance and the child gets a \$50,000 medical
22 operation and then the order is vacated and it's a
23 void order yet she relied on it.
24 If we have to do it for the tertiary motion
25 because it's in the legislation, we have to do it,

1 judge that authority, but whatever the judge does is
2 at peril of the process. We're going to go back to
3 ground zero if that judge" --
4 CHAIRMAN BABCOCK: Carl. Oh. I'm
5 sorry.
6 MR. SOULES: -- frankly, this may or
7 may not be good as tertiary stuff. Maybe -- but
8 anyway, I prefer to just say what happens in the
9 tertiary case since we've got that mandated by
10 legislation, not to talk about the others. But
11 that's just me.
12 CHAIRMAN BABCOCK: Carl.
13 MR. HAMILTON: Well, I think we may
14 have a difference in the recusal and
15 disqualification, though. Because if it's
16 disqualification, aren't the orders void?
17 MR. SOULES: They are void.
18 HON. SCOTT MCCOWN: They're void if
19 it's disqualification.
20 MR. HAMILTON: So we have to make two
21 separate sections, one for disqualifications, one for
22 recusals.
23 MR. SOULES: Well, not in the tertiary
24 sense because they're all going to be vacated --
25 MR. HAMILTON: That's right.

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1 but we ought not expand the problem beyond where it
2 is legislatively required.
3 And so I would think that (5) should be
4 limited to tertiary motions, and then the decision
5 whether you vacate or don't vacate any other order
6 would be made by the judge based on his judgment of
7 whether he likes the order or doesn't like the order.
8 MR. SOULES: So moved.
9 CHAIRMAN BABCOCK: Carl, what's your
10 reaction to that?
11 MR. HAMILTON: I think that's a good
12 point.
13 CHAIRMAN BABCOCK: I think so, too.
14 PROFESSOR DORSANEO: That wasn't in the
15 recodification draft. That does come right from the
16 statute.
17 CHAIRMAN BABCOCK: Yeah. Okay.
18 HON. SCOTT BRISTER: So make it "shall"
19 in the case of (b), and "may" in the case of (a) and
20 (c).
21 HON. SCOTT MCCOWN: Yeah.
22 MR. SOULES: I don't know whether to
23 put even "may" in the case of those others. The
24 orders that are signed by a judge when the judge
25 should be -- even without the situation that Scott

1 MR. SOULES: -- in either case.
2 MR. HAMILTON: In that sense, they're
3 all the same. But otherwise, they are going to have
4 to be two paragraphs, one dealing with recusal and
5 one for disqualification.
6 MR. SOULES: If we say anything, we'll
7 have to get all of that law collected up.
8 CHAIRMAN BABCOCK: Okay. So when it
9 goes back to the subcommittee, there's going to be
10 language drafted to cover the disqualification
11 scenario and language along the lines of Subparagraph
12 (5) here that deals with the tertiary problem because
13 that's mandated by statute.
14 MR. SOULES: I think we ought to let
15 the void void this disqualification and recusal, just
16 leave that to the case law and only talk about
17 vacating the orders of the judge who continues to act
18 in the face of a tertiary motion.
19 CHAIRMAN BABCOCK: Right.
20 MR. SOULES: Just that one thing.
21 CHAIRMAN BABCOCK: That's what we were
22 saying. Yeah.
23 Nina.
24 MS. CORTELL: I don't know if it's been
25 stated yet or not, but the reason we tie the vacating

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1 just gave where the trial judge has followed the rule
2 and made his findings and orders and set it for RNC
3 and all that sort of thing, if a judge signs an order
4 after the motion to recuse has been filed, first
5 motion, and the judge should not have done that,
6 doesn't put any of that stuff in his orders, the
7 orders that that judge signs thereafter are just
8 voidable. They are not void. And they are
9 voidable -- I don't know what the standard is, but
10 I'm going to say some words -- "at the discretion of
11 the successor judge."
12 So there's a judicial authority on how to
13 deal with those orders, and it may be important that
14 they not be changed. It may be important that they
15 be changed. So if we say they may be set aside, I
16 guess so, but, you know, this is common law case law
17 that's out there that governs these things, and I
18 don't know whether we necessarily want to try to
19 write that.
20 If it's a tertiary motion, you've got a
21 different situation because you're authorizing the
22 judge to go forward, no matter how bad that judge may
23 be.
24 And the trade-off, it appears to me and the
25 legislation was, "Yes. We're going to give that

1 procedure to (c) was so that to provide a
2 disincentive to filing the motion around the heels of
3 a hearing to get rid of the judge and avoid the
4 hearing, and that's the reason we did that, went
5 beyond the statute. I mean, that was the thinking of
6 the subcommittee.
7 I can't remember why it was. I'm not
8 sure. But we were trying to also address a different
9 issue, which was people filing these just to
10 obliterate the hearing.
11 CHAIRMAN BABCOCK: Judge Brister.
12 HON. SCOTT BRISTER: Do we need to have
13 disqualification on interim proceedings? The only
14 grounds you can disqualify are: You were a lawyer --
15 I was the judge who was trying to be disqualified --
16 I was a lawyer in the this matter or I have an
17 interest in this matter or somebody in one of the
18 parties is related to me.
19 Now, as we've discussed before, if that's
20 filed one day before the proceeding, anything I do is
21 void, period. And I'm not sure you can make -- you
22 can't change that because that's in the
23 constitution.
24 Shouldn't this allow the judge to go on,
25 just deal with recusal situations because there is no

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1 voidable in a disqualification, found later or
2 anything else?

3 CHAIRMAN BABCOCK: Yeah. I think so.
4 HON. SCOTT BRISTER: And my experience
5 has been, the last-minute filing to try to, you know,
6 stop the trial -- remember, you've got to file this
7 under oath. "Under oath, I have grounds to believe
8 that the judge is related to one of the parties."

9 Well, you can't be too confused about that,
10 I mean, or that the judge has a financial interest.
11 I mean, you just can make that up under oath. It's
12 not like bias or prejudice that you can
13 just, "Because he ruled against me last time, I think
14 he's biased."

15 These three are hard facts that you're
16 swearing exist. I'm not so sure that's easy to --
17 that's assuming perjury is still a crime -- is
18 something that people are going to use just to get a
19 continuance.

20 CHAIRMAN BABCOCK: Any reaction to
21 that, Carl?

22 MR. HAMILTON: Well, it doesn't really
23 matter I guess if the whole idea here is if they're
24 using it for delay only. The proceeding goes
25 forward, then they get their hearing later on. And

1 I'll guarantee it there aren't 80 percent -- aren't
2 20 percent of those lawyers that know the difference
3 between a disqualification under the constitution and
4 ground for recusal under 18a or b or whatever, and I
5 think it would be helpful to the courts because it
6 would educate the lawyers if we made it real clear in
7 these rules that there is a difference and that they
8 mean different things.

9 HON. SARAH DUNCAN: And pull in the
10 statutory disqualification with the objection of --
11 120(a), objection to assigned judge.

12 MR. EDWARDS: The other thing is, with
13 the disqualification, because of the fact that if
14 there is in fact a disqualification, the orders are
15 void, and because the grounds for disqualification
16 under the constitution are so narrow, I don't see any
17 real reason for a judge doing anything if there's an
18 allegation of disqualification than getting a hearing
19 on it and finding out in advance.

20 Even if it is still founded, you get to the
21 sanction real quick that way and --

22 HON. SCOTT MCCOWN: Well, but suppose
23 you need to make emergency orders, and we have a lot
24 of pretty litigious pro se litigants who just move to
25 recuse, and to give them an automatic bump...

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1 if they're right, the order is void. If they're
2 wrong, why, let's go on.

3 CHAIRMAN BABCOCK: Judge McCown.

4 HON. SCOTT MCCOWN: I think I would
5 turn Judge Brister's observation around on him,
6 thinking about it. Because where we have problems
7 with these is with the pro se litigants, and it's
8 easy for a judge to know whether he's related to
9 anybody, whether he has an economic incentive --
10 what's the third one?

11 HON. SCOTT BRISTER: Related to one of
12 the parties.

13 HON. SCOTT MCCOWN: Yeah. And --

14 HON. SCOTT BRISTER: Or been a lawyer.

15 HON. SCOTT MCCOWN: -- or whether he
16 was a lawyer in the case. And so if a judge
17 says, "I'm not disqualified. I moving forward," just
18 because a pro se litigant has alleged one of those
19 grounds, it shouldn't mean that the judge is deprived
20 of authority to enter emergency orders or move on,
21 under Subdivision (4), with interim proceedings.

22 That's the motion that the judge is the
23 least likely to make the mistake about in declining
24 to step aside.

25 So if he declines and moves forward, I

1 MR. EDWARDS: Well, we've got a problem
2 because I'm thinking more in terms of the case that
3 goes through a trial as opposed to what you're
4 talking about, which is the emergency order, and
5 there's a difference as I see it.

6 CHAIRMAN BABCOCK: Richard Orsinger.

7 MR. ORSINGER: One of the reasons that
8 we decided to go with the parallel proceeding is to
9 take away the incentive to file a motion as a
10 disguised motion for continuance. If you can get a
11 mandated continuance with an allegation of
12 disqualification, you will see some of them, even not
13 well-founded, especially if they're pro se litigants
14 who don't have to worry about their future career in
15 front of the court.

16 It seems to me that one way we can
17 eliminate the use of these as continuances is to
18 say, "If you file it too close to trial, it doesn't
19 get you a continuance."

20 And if it never gets you a continuance,
21 then there's no point in filing it if your goal is to
22 get a continuance.

23 It seems to me that if you allow a
24 disqualification accusation to provide a continuance,
25 then you're going to attract those.

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1 don't see any problem with that, rather than just
2 have him automatically have to get out just because
3 it's been alleged.

4 HON. SCOTT BRISTER: I'm just thinking,
5 we're going to talk about vacating, disqualified
6 cannot be vacated. So this rule is going to get
7 wordy, because you've got to say -- everywhere you're
8 saying all this stuff, you're going to have to
9 say "except disqualification."

10 HON. SCOTT MCCOWN: I think we can do
11 that in a non-wordy way.

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HON. SARAH DUNCAN: Which suggests to
14 me that -- which I've always thought that it would be
15 helpful just to have a separate disqualification
16 section and then recusal section.

17 I don't think that distinction -- that
18 there is a distinction, has ever really come through
19 in a rule, and a lot of people miss it.

20 But if you had a separate section for
21 disqualification, maybe they would tip to the fact
22 that it's a whole different animal than the recusal.

23 CHAIRMAN BABCOCK: Bill Edwards.

24 MR. EDWARDS: I'm in agreement because
25 in dealing with lawyers out there practicing law,

1 MR. EDWARDS: Does anybody have any
2 statistics on how many pro se parties we have doing
3 those kind of things?

4 MR. ORSINGER: No.

5 MR. EDWARDS: I mean, is it anecdotal
6 and very seldom or is it anecdotal and a lot of
7 the time --

8 HON. SCOTT BRISTER: I mean, you've got
9 to swear to it. You go to jail if you swear the
10 judge is related and it's wrong, pro se or not.

11 HON. SCOTT MCCOWN: Maybe Johnny Holmes
12 prosecutes those, but I can guarantee you Ronnie Earl
13 doesn't.

(Laughter)

14 CHAIRMAN BABCOCK: Bill Dorsaneo.

15 PROFESSOR DORSANEO: Aren't we ready to
16 go to the timing question? Didn't we get past the
17 statute now and all those --

18 CHAIRMAN BABCOCK: Well, we're very
19 close.

20 MR. ORSINGER: On constitutional
21 disqualification in any case wherein he may be
22 interested has a special meaning to those of us who
23 have spent hours talking to law professors about what
24 that means, but to the rest of us, they're not going

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1 to know and they're not going to go to jail for
2 filing something under oath that says the judge is
3 interested because we probably couldn't agree on how
4 to define "interested" even just here on this
5 committee.

6 So I just don't think you can leave this
7 window open.

8 CHAIRMAN BABCOCK: Yeah, Ralph.

9 MR. DUGGINS: May I make an observation
10 on Subsection (1)?

11 It speaks of the date on which the party
12 learns the grounds. I think that we should include
13 some reference to the party's attorney because I can
14 envision a situation where the attorney learns of it
15 and then skirts the rule by not disclosing it to his
16 client.

17 PROFESSOR DORSANEO: We're having
18 trouble hearing down here.

19 MR. DUGGINS: I was suggesting that
20 subsection (1) include with the word party on the
21 first knowledge of the grounds, that it also include
22 the party's attorney. The party or its attorney,
23 first -- the date on which the party or its attorney
24 first learned of the grounds.

25 HON. SCOTT BRISTER: We need to discuss

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1 that in detail. I think that's a bad idea. And the
2 rule doesn't say who decides that. Do I decide
3 whether it was within ten days? And second, whoever
4 decides it, this is going to be another one of those
5 hearings where we say, "Okay. Both you lawyers raise
6 your hands." You know, "Uhh." I mean, this is
7 just --

8 MR. DUGGINS: Maybe you don't make any
9 distinction.

10 HON. SCOTT BRISTER: We've got too much
11 of that already, and we don't --

12 CHAIRMAN BABCOCK: I just got through
13 litigating that last week about when an attorney knew
14 something, and this attorney took the position that
15 while he had a suspicion that something had happened,
16 he didn't have a firm belief in it until eight months
17 later.

18 So I agree, there are problems with that
19 that maybe we want to avoid.

20 The timing thing, I think, we're ready to
21 come to, if I'm not mistaken, Richard, you --

22 MR. ORSINGER: Can I call one attention
23 before we leave Paragraph 1?

24 The subcommittee has redefined "judge" from
25 anything that we've ever seen before to include

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1 court -- regular associate judges or masters, of
2 which there are many in the family law arena.
3 That's a step that we took because the
4 associate judges have been -- of the most recent
5 legislative session, have been empowered to handle
6 jury trials, and in many respects, you don't have to
7 have their signatures countersigned.

8 As a practical matter, they're functioning
9 as fully elected judges, and we feel like they should
10 be subject to the same disqualification and recusal
11 provisions. But everyone on the committee needs to
12 know that this is a first-time thing.

13 CHAIRMAN BABCOCK: We're not leaving --
14 we're not leaving that area. Just, I want to say, I
15 closed the door on one area that I want to leave.

16 MR. ORSINGER: Okay.

17 CHAIRMAN BABCOCK: All right.

18 MR. ORSINGER: Well, "judge" is in the
19 first paragraph. I didn't know --

20 CHAIRMAN BABCOCK: Yeah. I know, but
21 we've wandered into the first paragraph.

22 Is the subcommittee -- are you and Carl up
23 to speed on what we want to do in terms of
24 harmonizing Section 30.016?

25 MR. ORSINGER: Yes.

1 MR. HAMILTON: I'd like to have, I
2 guess, a strong vote or something as to whether or
3 not we want to have the orders vacated under (4) (a)
4 and (c). Luke suggested we do nothing, just be
5 silent about that and leave it up to the judge who --
6 or the next judge that comes on as to whether he
7 wants to vacate any order that may have been issued
8 by the recused judge.

9 CHAIRMAN BABCOCK: Well, under (c), we
10 don't have a choice.

11 MR. HAMILTON: No. I'm talking about
12 (a) and (c). Under (b), we don't have a choice.

13 CHAIRMAN BABCOCK: Wait a minute.

14 MR. HAMILTON: Under (4) (b) is the
15 third motion.

16 CHAIRMAN BABCOCK: Yeah. That's
17 right. It's (b).

18 MR. HAMILTON: (a) and (c) is whether
19 or not we want to include them in the orders that
20 have to be vacated.

21 CHAIRMAN BABCOCK: Okay. And I thought
22 we had a consensus that we did not. But that's a
23 good point.

24 All in favor of including in (a) and (c) a
25 provision that if it turns out the judge should have

1 been recused -- recused, not disqualified, but
2 recused, that that means that all his orders must be
3 vacated.

4 All in favor of that, raise your hands.

5 There are no hands. Can I assume that
6 everybody disagrees with that notion?

7 (Simultaneous responses)

8 CHAIRMAN BABCOCK: Okay. I thought we
9 had a consensus on that. Okay. Does that help you?

10 MR. HAMILTON: Yes.

11 CHAIRMAN BABCOCK: Okay. Anything else
12 in terms of harmonizing 30.016 with this rule? You
13 guys up to speed? You know everything you're going
14 to do drafting wise?

15 MR. ORSINGER: Yes.

16 CHAIRMAN BABCOCK: Okay.

17 MR. SOULES: Is the definition of judge
18 involved in that?

19 CHAIRMAN BABCOCK: No.

20 MR. EDWARDS: We're looking at (a).
21 It's still (a) under (4)?

22 CHAIRMAN BABCOCK: (4) (a).

23 MR. EDWARDS: I think it has to be
24 clear that they may proceed with the case as though
25 no motion had been filed, but that they've got to

1 comply with the referral.

2 CHAIRMAN BABCOCK: Right.

3 MR. EDWARDS: To proceed as though no
4 motion would be filed would be no referral, right?

5 MR. HAMILTON: The referral paragraph
6 requires the judge to do that first before he does
7 anything else. If he refuses to recuse, he must
8 refer it to the presiding judge.

9 MR. EDWARDS: I know, but it says that
10 if the motion alleges the grounds in (b) (1), (b)
11 (2), or (b) (3), that he goes on as though no recusal
12 motion had been filed, which means he doesn't have to
13 do anything but go on.

14 CHAIRMAN BABCOCK: Yeah. Bill's point
15 is that he could just ignore it and say "Ha-ha. This
16 was never filed."

17 MR. SOULES: That's because this rule
18 changes what's in the statute. The statute doesn't
19 say that.

20 The statute says the judge shall preside
21 over the case, sign orders in the case, move the case
22 to final disposition as though the tertiary recusal
23 motion had never been filed. It doesn't say he
24 doesn't have to do the other two.

25 MR. EDWARDS: I understand. That's

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1 what I'm saying. It just ought to clarify here
 2 that --
 3 CHAIRMAN BABCOCK: Yeah.
 4 MR. SOULES: So probably, in an effort
 5 to capture all three of those things, words are used
 6 that reach a broader universe than those three
 7 things. I don't know what to do about it, but 30.016
 8 does say "move the case to final disposition as
 9 though a tertiary recusal motion had not been
 10 filed."
 11 I don't know whether that causes the same
 12 concern, Bill, that you have about the words in the
 13 rule or not.
 14 MR. HAMILTON: I think what Bill says
 15 is, all we need to add to that is "except for
 16 referral."
 17 MR. EDWARDS: Yeah.
 18 MR. HAMILTON: "To proceed in the case
 19 as though the motion had not been filed except for
 20 referral," something like that.
 21 CHAIRMAN BABCOCK: Yeah. That would
 22 cure that.
 23 Okay. Now, we need to go to the timing
 24 issue.
 25 MR. SOULES: How about

1 should assume that that's what it means.
 2 CHAIRMAN BABCOCK: What if somebody
 3 violated the TRO between the time the first judge
 4 granted it and the time the new judge comes along and
 5 vacates it.
 6 MR. SOULES: If it's voidable only,
 7 then the prohibition is in place until the order is
 8 voided. So it's still a valid order until it's
 9 voided.
 10 CHAIRMAN BABCOCK: Right. So?
 11 MR. SOULES: So it would be subject to
 12 punishment for contempt.
 13 CHAIRMAN BABCOCK: But is it only
 14 voidable or is it void?
 15 MR. SOULES: If the judge is
 16 disqualified, it's void. If the judge is
 17 subsequently recused, the orders are only voidable.
 18 CHAIRMAN BABCOCK: Even if it's a
 19 tertiary motion?
 20 MR. SOULES: Yes.
 21 CHAIRMAN BABCOCK: I think that's
 22 probably right. Okay. Do you want to go on to
 23 timing. Yeah. Judge Brown.
 24 HON. HARVEY BROWN: Yeah. I have a
 25 point about the timing.

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1 recuse -- "disqualification, recusal or referral once
 2 the judge decides he's recused"?
 3 HON. SCOTT BRISTER: Are you going to
 4 take no further action anyway?
 5 CHAIRMAN BABCOCK: Yeah. Bill.
 6 PROFESSOR DORSANEO: I have one final
 7 thought about the statute, and I, of course, don't
 8 think that we can know what the statute means, and I
 9 don't think we can know what it means after
 10 consultation either.
 11 But when it says "with a tertiary motion
 12 that the judge assigned to the case shall vacate such
 13 order," pondering what that might mean. You know,
 14 that -- that doesn't mean that the new judge can't
 15 make another order to the same effect, does it? It
 16 shouldn't.
 17 MR. LOW: It shouldn't.
 18 PROFESSOR DORSANEO: So it has more to
 19 do with the effect, I suppose, of violating that
 20 prior order than anything else.
 21 HON. SCOTT MCCOWN: Or reliance upon
 22 the prior order.
 23 PROFESSOR DORSANEO: Yes. All of that
 24 is quite misleading in the statutory language, it
 25 seems to me, when you do considerable drafting. I

1 MR. ORSINGER: But before we do that,
 2 I'd like to raise one issue about --
 3 CHAIRMAN BABCOCK: Okay.
 4 MR. ORSINGER: I'm not sure that we all
 5 know what tertiary recusal motion means, and I think
 6 we probably ought to ask ourselves that question
 7 before we move off of the statute.
 8 And I would ask the following question: If
 9 a motion to recuse the district judge is filed and he
 10 or she refuses and the presiding administrative judge
 11 appoints a judge to hear the recusal motion and a
 12 motion to recuse is filed against that judge, and
 13 then the presiding administrative district judge
 14 appoints another one, is that your third tertiary?
 15 Is that a third motion against a district
 16 court, or are all the other judges that come in, are
 17 they not against the district court?
 18 MR. SOULES: No. It says district
 19 court judge.
 20 MR. ORSINGER: No. The statute says --
 21 CHAIRMAN BABCOCK: The statute
 22 doesn't.
 23 MR. ORSINGER: -- a district court.
 24 MR. SOULES: It does say that.
 25 District court --

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1 could see how someone would think, "Well, I have to
 2 vacate this and that's the end of the matter." That
 3 would be bad.
 4 I mean, the sentence in the statute is bad
 5 probably already, but it would be worse if it could,
 6 mean more than it actually, literally says.
 7 CHAIRMAN BABCOCK: Are you talking
 8 about (e), Subparagraph (e)?
 9 PROFESSOR DORSANEO: Yes.
 10 MR. SOULES: I hope that that means
 11 that in the case of voidable orders that does not
 12 nullify them to the time they were first signed, and
 13 I don't think it does. Because voidable orders are
 14 still orders until they're voided, so they're still
 15 in effect.
 16 So the judge could, with two strokes of the
 17 judge's hand, vacate a TRO and grant another TRO
 18 exactly like the first one if the successor judge
 19 likes the first one, and the relief and the
 20 protection would be enforced continuously.
 21 And there's nothing anybody can do about
 22 the judge signing a void order. It's void
 23 initially.
 24 So hopefully, that's what's meant here,
 25 and we can't change the statute, so I think that we

1 MR. ORSINGER: You think the judge at
 2 the end --
 3 MR. SOULES: -- statutory probate or
 4 the statutory county court judge.
 5 MR. ORSINGER: So the judge modifies
 6 all of those.
 7 MR. SOULES: It's one judge.
 8 MR. ORSINGER: Okay. In my experience,
 9 you don't have people coming and attacking the same
 10 judge over and over again as much as you do -- as the
 11 people are trying to stop every judge.
 12 CHAIRMAN BABCOCK: Right.
 13 MR. ORSINGER: And so I just want to
 14 know on the record whether we're talking about the --
 15 an attempt to recuse the judge appointed to rule on
 16 the recusal process or not, and maybe we haven't
 17 answered that question, but it seems to me like we
 18 ought to.
 19 MR. SOULES: The enforcement of the
 20 statute has to do with the tertiary motion, whatever
 21 that is. Judge.
 22 MR. EDWARDS: It's defined in 30.016.
 23 MR. SOULES: See, judge is the one,
 24 two, three, four, five, six, seventh -- eighth word
 25 from the end of the Section (a).

1 MR. ORSINGER: Well, if that answers it
2 to you, can you tell me what the answer you have is,
3 because it doesn't --
4 MR. SOULES: The answer is that it's
5 the third motion against the same judge.
6 MR. SOULES: Even though it's a
7 different person who's playing a different role?
8 MR. SOULES: Yeah. A judge is a
9 judge. The court may have several judges.
10 CHAIRMAN BABCOCK: Justice Hecht.
11 JUSTICE HECHT: I'm not sure -- I mean,
12 I see that it can be read that way, but I'm not sure
13 that's what was intended.
14 MR. EDWARDS: I don't think that's what
15 was intended.
16 JUSTICE HECHT: So if you move to
17 recuse the judge in the court and a new judge is
18 assigned to that court -- to that case and you move
19 to recuse that judge, I think Senator Harris intended
20 that that would be the second motion.
21 It's an unusual case, that you would file
22 three motions against the same judge. It's not an
23 unusual case that you -- I mean, it is unusual, but
24 the problem had come up that the party kept moving to
25 recuse judge after judge after judge after judge in

1 case law called it a disqualification because the
2 orders are void?
3 HON. SCOTT MCCOWN: But it's not
4 covered by this rule.
5 HON. SARAH DUNCAN: Okay.
6 HON. BILL RHEA: I made the same
7 assumption, that it was the same judge, mainly
8 because of my experience, ten years on the bench.
9 I've never had the circumstance you're describing
10 with -- the common circumstance is you get one
11 litigant who's unhappy with you --
12 CHAIRMAN BABCOCK: Right.
13 HON. BILL RHEA: -- and they keep
14 coming back and filing recusals.
15 CHAIRMAN BABCOCK: Judge Peeples.
16 HON. DAVID PEEPLES: What I thought I
17 heard --
18 CHAIRMAN BABCOCK: He's not finished
19 yet. I'm sorry.
20 HON. DAVID PEEPLES: I'm sorry.
21 HON. BILL RHEA: No. That's all.
22 HON. DAVID PEEPLES: What I thought
23 Richard was bringing up with this situation, which is
24 abusive, there's a motion to recuse Judge No. 1 who's
25 on the case; another judge, I'm going to call the

1 the process, and there was some discussion -- and I
2 don't know -- there was some preliminary discussion
3 about this problem that Richard raises, which is,
4 after you start up the chain, the party starts
5 removing to recuse the judge assigned by the
6 presiding judge, the presiding judge himself, the
7 chief justice of the Supreme Court. I mean, he just
8 moves to recuse everybody.
9 And I think there was some idea that this
10 ought to address that problem. Whether it does or
11 not is another matter.
12 CHAIRMAN BABCOCK: But under your first
13 scenario, if I move to recuse District Judge 1, I
14 win; I move to recuse District Judge 2 and I win; but
15 then I move to recuse District Judge 3 and I lose,
16 and I get sanctions against me --
17 JUSTICE HECHT: I think that there was
18 thought given to that, yes. I mean, that may not be
19 a good idea, but I think that's --
20 CHAIRMAN BABCOCK: You know, that the
21 three -- I thought -- I read it the way Luke did,
22 that this is the three strikes and you're out rule
23 against the same judge because that does seem
24 abusive. The scenario I just put out does not seem
25 abusive. I mean --

1 recusal judge, is assigned to hear that motion, not
2 to hear the case but that motion; and then there's a
3 recusal motion against him or her, does that count as
4 the second recusal motion, that --
5 CHAIRMAN BABCOCK: Yeah. That's
6 another scenario.
7 HON. DAVID PEEPLES: Does that happen
8 to start counting toward the tertiary? I thought
9 that's what Richard was saying, and I think it
10 would --
11 MR. ORSINGER: And I have seen that
12 happen.
13 HON. DAVID PEEPLES: And that's the
14 real abuse that we've seen a lot of times.
15 MR. HAMILTON: Where you have multiple
16 parties, 15, 20 parties, each party can recuse.
17 MR. CHAPMAN: But this says "by the
18 same party in the case."
19 CHAIRMAN BABCOCK: Right.
20 MR. CHAPMAN: It says "by the same
21 party."
22 MR. HAMILTON: It has to be by the same
23 party. So you have 15 parties, theoretically, you
24 get 15 recusals times 3 is --
25 CHAIRMAN BABCOCK: But that's a

1 HON. SCOTT MCCOWN: Well, it does if
2 you're a judge.
3 (Laughter)
4 CHAIRMAN BABCOCK: Okay.
5 HON. BROWN: It doesn't because they
6 succeeded the first two times.
7 CHAIRMAN BABCOCK: Right.
8 HON. BROWN: If it's the third time
9 against three different judges, you know...
10 CHAIRMAN BABCOCK: If you're a
11 three-time loser, I can see it, yeah. If you're a
12 three-time loser, I can see it. But the construction
13 I just heard -- potentially put on it is: You can
14 win twice and only lose once. But you happen to pick
15 the wrong time to lose because it was the third time,
16 and then you get sanctioned.
17 Justice Duncan.
18 HON. SARAH DUNCAN: What if you have a
19 series of appointments of defeated former judges?
20 CHAIRMAN BABCOCK: What if -- I'm
21 sorry. I couldn't hear.
22 HON. SCOTT MCCOWN: That's not
23 recusal. That's rejection. That wouldn't be
24 covered.
25 HON. SARAH DUNCAN: Hasn't some of the

1 different problem. The statute doesn't cover that.
2 MR. CHAPMAN: The statute wouldn't
3 address that.
4 MR. ORSINGER: But neither this statute
5 nor this rule provide for a procedure when the
6 recusal judge is recused, right?
7 CHAIRMAN BABCOCK: Right. Well,
8 maybe.
9 JUSTICE HECHT: It depends on how you
10 read it.
11 CHAIRMAN BABCOCK: It depends on how
12 you read it.
13 MR. ORSINGER: Well, can we read all of
14 this to mean that the judge who's appointed to recuse
15 has to stop the recusal action, but then if another
16 one is appointed to recuse, so that's your third
17 recusal motion, they can go ahead with the recusal?
18 You stop it there.
19 The second time you send a recusal judge
20 down, they get to go forward with their recusal on
21 the first judge.
22 CHAIRMAN BABCOCK: Right.
23 MR. ORSINGER: Is that covered by
24 this?
25 MR. CHAPMAN: It's unclear. It's

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1 poorly drafted. We don't know whether or not it's
2 the same judge as has been assumed or whether it's in
3 the same court. That's the problem.

4 MR. HAMILTON: Shall we write the rule
5 or fix it?

6 MR. ORSINGER: Well, we can talk to
7 Senator Harris. If he's willing to let us rewrite
8 the statute through a rule that repeals the
9 statute --

10 CHAIRMAN BABCOCK: Well, I wouldn't
11 characterize it that way. I would characterize it as
12 amplifying.

13 MR. ORSINGER: Extend -- in Congress,
14 amplifying and extending the statute.

15 CHAIRMAN BABCOCK: Bill.

16 PROFESSOR DORSANELO: Well, one of the
17 things we do on occasion -- and I really don't think
18 that we can tell what this means with respect if it's
19 the same judge or, you know, another judge, same
20 court, and I wonder why it says, "If a tertiary
21 recusal motion is finally sustained" in (a) kind of
22 suggests the same judge to me, but I don't think
23 we'll ever know what this means.

24 Sometimes when that's the case, we simply
25 in the rule say, "Go read that piece of the statute

1 been aired out twice already in a contested hearing,
2 and now he's going back for a third bias of the same
3 judge.

4 I can see that's enough. It may be too
5 much. But it certainly gives the party fairness,
6 because they've already had two opportunities of
7 contested hearings for recusal judges, a recusal
8 judge that they didn't challenge. See?

9 If you let them recuse all the string, now
10 they've got a recusal judge who they didn't challenge
11 who's already cited the judges on it.

12 I just think that the policy is essential
13 that our rule be focused on the third motion against
14 the same judge. Are we going to take away a
15 fundamental right for a party not to have a judge
16 adjudicating important matters in that party's case,
17 which judge is in violation of the code of judicial
18 conduct when he does it -- he or she does it.

19 CHAIRMAN BABCOCK: Justice Duncan.

20 HON. SARAH DUNCAN: It seems to me
21 that's the only way 30.016 makes sense, because it's
22 effectively creating a presumption that this probably
23 isn't a good recusal motion for disqualification.

24 CHAIRMAN BABCOCK: Right.

25 HON. SARAH DUNCAN: And that makes

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1 which is pertinent to what it's about," and good luck
2 on figuring it out, what it means. And, you know, I
3 have made that proposal at our committee level to
4 maybe do that in the context of this statute, and I'm
5 coming back to the view that that might be the most
6 sensible way to embrace the statute.

7 CHAIRMAN BABCOCK: Luke.

8 MR. SOULES: Well, I guess what I
9 wanted to move to was what policy -- if this is
10 ambiguous, then we should have the ability to write
11 it either way. I don't think it is. I agree with
12 you, it's the judge -- same judge by the same party.

13 But getting to more fundamental or
14 substantive issues, suppose a party has a valid
15 ground to recuse the judge who is the sitting judge
16 in the court, and that party doesn't know who the
17 recusal judge is going to be until the recusal judge
18 is named by the regional judge.

19 And some, perhaps all of the regional
20 judges, don't ask the parties often who they think
21 should hear the recusal motion. Sometimes they do
22 ask the sitting judge who he thinks -- "What do you
23 think about that?"

24 So the regional judge sends a judge down to
25 hear the recusal and the party has got a similar

1 perfect sense when you've already had two motions
2 against that same judge and both have been denied,
3 otherwise the judge wouldn't be sitting. I don't see
4 how it's ambiguous, but...

5 CHAIRMAN BABCOCK: Judge Rhea.

6 HON. BILL RHEA: I want to say amen to
7 both those last two comments and point out, too,
8 Section (b), if the scenario -- this other scenario
9 you're talking about were applicable at all, then
10 you'd be saying (b) would say, that "the recusal
11 judge," and going on down, "shall continue to preside
12 over the case, sign orders, move the case to final
13 disposition."

14 That's just not the role of the recusal
15 judge.

16 CHAIRMAN BABCOCK: Yeah.

17 HON. BILL RHEA: Obviously, this
18 section is intended for the trial judge.

19 CHAIRMAN BABCOCK: That's a good
20 point.

21 Buddy.

22 HON. BILL RHEA: It's clear they're
23 talking about the same judge.

24 MR. LOW: Let's look at what really
25 happens.

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1 problem -- or has a different problem but still has
2 got a real problem with that judge hearing the
3 recusal because of bias or prejudice. Maybe it's
4 beyond the appearance. Maybe it's there.

5 So he files his motion to recuse, and the
6 regional judge, by now getting tired of all this
7 stuff, and he says, "I'll fix Oscar. I'll send this
8 judge down and he can't do anything about that."

9 When the cascade winds up, he's going to
10 have the same old sitting judge now trying the
11 party's case because he's obstreperous.

12 Is that what we want, or are we going to
13 worry about the fact that a few people abuse the
14 recusal system? They do.

15 But what's more important, to say we're
16 going to have a system so that when a person really
17 has grounds to recuse a string of judges, one after
18 another after another, but valid grounds to do that,
19 are we going to let that party do it or not?

20 Now, I can see after that same party has
21 filed a motion to recuse against the same judge, and
22 loses; another effort, and loses; a third effort.
23 That's enough.

24 This is the same judge who's bias or
25 prejudice, relationships, whatever they are, has now

1 CHAIRMAN BABCOCK: Oh, everybody listen
2 up.

3 (Laughter)

4 MR. LOW: They move that he's
5 disqualified for some reason, or that he's biased or
6 prejudiced or something. All right.

7 Stoval used to, and Judge Mack Rogers, I
8 know, they would call this judge and they would
9 say, "Okay. Here are the problems. Who is somebody
10 that doesn't have problems with these lawyers? Here
11 are the parties, here are the lawyers, here are the
12 issues," and as a practical matter, get somebody that
13 had nothing to do with it.

14 I mean, they don't just point, just
15 say, "Well, I've got to pick you." You'd have
16 trouble in my district picking three bad judges.

17 I mean, it just doesn't operate that way.
18 It's just not practical that that's going to happen,
19 that you're going to just catch -- because the
20 presiding judge has the duty to determine the proper
21 person, and he can find out about the case. He finds
22 out about the parties and what the claims are, and
23 ask this other person, "Do you have any problems in
24 this situation, this kind of case, these parties,
25 these facts?"

<p>Page 716</p> <p>1 So I think we're more theoretical than 2 practical, what we're talking about. 3 CHAIRMAN BABCOCK: In just a sec you 4 ought to bless this, but can we instruct or inform 5 the subcommittee that it's at least the view of this 6 committee that the statute is intended to cover only 7 multiple recusals of the same judge? 8 HON. SARAH DUNCAN: It's written. It 9 may not be intended. There may be a difference 10 between what was intended and what was written. 11 MR. YELENOSKY: Right. 12 HON. SARAH DUNCAN: But we don't know 13 what the intent was. 14 CHAIRMAN BABCOCK: But I think 15 Judge Rhea makes an excellent point that the 16 Subparagraph (b) doesn't make any sense if you read 17 it any other way. Okay. Is that a consensus -- 18 Justice Hecht, is that -- 19 JUSTICE HECHT: Well, that -- 20 CHAIRMAN BABCOCK: For purposes of us 21 moving forward anyway. 22 JUSTICE HECHT: No. That's fine. 23 But if we're going to inquire of 24 Senator Harris what his views are about repealing 25 30.016, I think you have to lay on the table whether</p>	<p>Page 719</p> <p>1 trying to harmonize these things, which is what this 2 whole exercise is about, that we can probably get his 3 views on it. 4 I wouldn't say we're bound by it. I 5 wouldn't say whatever he says binds the rest of the 6 legislature, because, obviously, it doesn't, but one 7 of the geniuses of this state, as opposed to some 8 other states, is that there is this kind of informal 9 dialogue that moves the state forward in a proper way 10 and a way that works, so... 11 JUSTICE HECHT: Well, and to add -- 12 just to add to that, the issue is not, "What does 13 30.016(a) mean?" If it stays in the books, of 14 course, we'll have to decide that, and they'll decide 15 whatever they decide, and they'll try to ascertain 16 its meaning the way they always go about trying to 17 ascertain the meaning of a statute. 18 But the question really here is: If we 19 write a rule that says this, are you satisfied -- are 20 you going to feel -- are you going to object to a 21 repealer of the statute, or would your position 22 be, "Write whatever rule you want, but I want my 23 statute in the book?" That's a little different 24 twist on it. 25 I mean, he could say, "I am going to object</p>
<p>Page 717</p> <p>1 (a) -- even if we think what (a) means, does he mean 2 for it to mean something else. Because otherwise, I 3 think he would say, "Just leave the statute in the 4 books and I'll take my chances." I don't know. 5 CHAIRMAN BABCOCK: Well, yeah. I think 6 since one of the proposals is we're going to talk to 7 him, I think, you know, that's a good thing to talk 8 to him about, and I frankly wouldn't think that he'd 9 disagree much with what's been said today. I'd be 10 surprised if he did. But nevertheless, that's -- 11 MR. YELENOSKY: And does he speak for 12 the whole legislature? 13 CHAIRMAN BABCOCK: Well, that's the 14 other thing. As dangerous -- as we found out with 15 Senator Shapiro, I mean, she's got a view of what 16 happened on the parental notification, which may or 17 may not be shared by the people. 18 Yeah. Linda Eads. 19 MS. EADS: In fact, there's case law 20 that says one legislature can't govern the 21 interpretation of -- 22 MR. YELENOSKY: Even if it's the 23 sponsor. 24 MS. EADS: Even if it's the sponsor. I 25 mean, that's, you know --</p>	<p>Page 720</p> <p>1 no matter what rule is in the rule book," well, then, 2 we can decide what we're going to do about that. 3 CHAIRMAN BABCOCK: Yeah. 4 JUSTICE HECHT: If anything. 5 CHAIRMAN BABCOCK: Well, Richard, 6 thanks for raising this problem. 7 (Laughter) 8 MR. ORSINGER: Well -- okay. 9 CHAIRMAN BABCOCK: Why don't we take 10 about a ten-minute break and then come back and talk 11 about timing. 12 (Break) 13 CHAIRMAN BABCOCK: All right. We had a 14 request that before we get to timing, we talk about 15 the fun issue of who is a judge. Right, Richard? 16 MR. ORSINGER: Right. 17 CHAIRMAN BABCOCK: Okay. At Luke's 18 request. 19 MR. SOULES: The only recommendation I 20 had on that was that there's been a lot of thinking 21 that has been done on this subject in terms of the 22 conflict of interest rule, particularly 111, which is 23 judicatory officials, and that term is defined in the 24 terminology of the disciplinary rules of professional 25 conduct as a person who serves on a tribunal.</p>
<p>Page 718</p> <p>1 MR. ORSINGER: But this is not a 2 question of legislative history. This is a question 3 of political reality. 4 If Senator Harris is comfortable with it, 5 then likely, the people who voted for it, because he 6 was the sponsor, will be comfortable with it. And if 7 he thinks that -- I mean, I think we ought to be 8 plain and ask him: Do you think that other senators 9 or representatives will be upset -- 10 MS. EADS: I think that's a very 11 dangerous thing for this committee to do, just to let 12 one senator tell us what other senators think the 13 statute meant. That's what legislative history is 14 about, and I think that gives a power to somebody who 15 sponsors legislation way beyond what the courts have 16 allowed and what I think we should be inclined to do. 17 CHAIRMAN BABCOCK: Well, to me, it's 18 two branches of government -- two separate branches 19 of government, who apparently have overlapping 20 authority, just kind of trying to get along. 21 And I wouldn't propose going to 22 Senator Harris saying, "Hey, you can tell the Supreme 23 Court what to do," because I don't think, in a broad 24 sense, that Senator Harris can do that. 25 But I do think, as a matter of courtesy in</p>	<p>Page 721</p> <p>1 Then the tribunal is defined -- in an 2 extensive definition, includes judges, magistrates, 3 special masters, referees, hearing officers, 4 incomparable persons empowered to resolve or 5 recommend resolutions in a particular matter. And 6 then there's a lot more words here, too, that they 7 can consider. 8 It's a very broad definition, and it may 9 give some guidance to the writing of the definition 10 of judge here. It's in the terminology, which is in 11 a strange place because it's before Rule 1.01 in the 12 preamble, and a lot of people don't pick up that it's 13 even there. 14 But I recommend that you might consider 15 some of that language because it has been given a lot 16 of thought to try to make it as encompassing as 17 possible. 18 CHAIRMAN BABCOCK: Okay. 19 Richard, you and Carl used, in 20 Paragraph 11, under definitions, the term judge means 21 the judge, associate judge or master of any court 22 except the Supreme Court, Court of Criminal Appeals, 23 court of appeals, statutory probate courts as defined 24 by the probate code, and commissioners court. Why do 25 you use that definition?</p>

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1 MR. ORSINGER: Well, we excluded all
2 the appellate judges because they have an appellate
3 recusal rule.
4 MR. HAMILTON: That's in the old rule.
5 MR. ORSINGER: And we didn't want to
6 interfere with that. And we excluded statutory
7 probate judges because the statutory probate courts
8 are governed by Probate Code 25.00255, which has a
9 minimum ten days before trial provision in it which
10 we're not complying with.
11 So since we don't have a minimum ten days
12 before trial in our proposal, we had to write them
13 out of the rule, and we decided to just not treat
14 them as a judge, and then put them in the comment,
15 which you'll see Comment 2, "A motion to recuse or
16 disqualify a statutory probate judge is governed
17 by" -- pardon me. I said a probate court. I meant
18 to say Section 25.00255 of the government code.
19 CHAIRMAN BABCOCK: Okay.
20 MR. ORSINGER: And then we decided,
21 specifically, to add associate judges or masters.
22 And in our discussion, we considered master
23 to be a full-time employee of the state, not a
24 special master appointed for a specific case to
25 govern discovery disputes, or what have you, but Luke

1 MR. SOULES: Well, I don't want to have
2 a -- most people probably will never see this
3 problem. But those that do are going to have,
4 probably, a concern.
5 I don't know how it works in Travis County,
6 but in San Antonio, the presiding judge will not
7 assign a matter to an associate judge, or whatever
8 they call these family law people, unless I waive my
9 right to a district court appeal.
10 I can go to the court of appeals, but I
11 can't take it back to the district judge. So I do
12 that, and I go down to Richard Garcia, great judge.
13 But then I find out that there's a problem
14 here and that my client is concerned about that.
15 Maybe they didn't find out until they got home that
16 night to who this guy really is, and I'm already in
17 the throes of a problem.
18 So what I better do is just decline and
19 have the district judge hear my case because I may be
20 getting myself and my client into a situation that I
21 can't cure.
22 HON. SCOTT MCCOWN: You couldn't go
23 back to that district judge and say that we've
24 discovered Judge whoever is the brother of the wife
25 in the divorce?

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1 Soule's attention to the definition of tribunal at
2 the beginning of the Texas Rules of Disciplinary
3 Conduct specifically lists masters, special masters
4 and --
5 MR. SOULES: Referees.
6 MR. ORSINGER: -- referees.
7 And so that's an important policy concept
8 that Luke has just introduced because you can argue
9 that special masters ought to be just as fair as
10 judges. And if they're not, you should be able to
11 challenge their appointment, but that will be an
12 extension of this rule-making authority. We'll reach
13 out and touch more people than we had previously.
14 CHAIRMAN BABCOCK: Judge McCown.
15 HON. SCOTT MCCOWN: Well, I would
16 hesitate to include associate judges and masters in
17 this rule for two reasons.
18 One is that associate judges in family law,
19 everything can be reviewed de novo by the judge. If
20 you don't want to go through the proceeding before
21 the associate judge, you can object and raise that
22 with the judge. And the ground for objection could
23 be whatever you're arguing with regard to their
24 disqualification or refusal, and this just adds
25 another layer on top of a procedure we already have.

1 MR. SOULES: Sure. Suppose I couldn't
2 get relief?
3 HON. SCOTT MCCOWN: Well, but that's
4 true of a recusal motion, too. Relief wouldn't be
5 guaranteed, but we already have a procedure in the
6 law to have it reviewed by a district judge. It's
7 just changing who reviews it.
8 MR. SOULES: And there's no process
9 spelled out for the review by the judge under whom
10 the associate judge works, but --
11 CHAIRMAN BABCOCK: Judge Lawrence.
12 MR. SOULES: -- I just see that as a
13 problem. Maybe no one else does.
14 CHAIRMAN BABCOCK: Yeah.
15 Judge Lawrence.
16 HON. TOM LAWRENCE: There's another
17 problem with the definition. It currently would
18 include a justice of the peace, but there is a case
19 out of the Fourth Court of Appeals that says that
20 Rule 18a does not apply to JPs; you have to apply to
21 Rule 528, which I think we're going to talk about
22 tomorrow.
23 There also is no mechanism at all for any
24 communication between a JP and a presiding judge of
25 administrative judicial district. I don't know how,

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1 The second problem, which applies to both
2 associate judge and masters is this:
3 This procedure, if you had an associate
4 judge disqualified or you had a master disqualified,
5 you would have another appointing authority replace
6 that associate judge or that master.
7 Well, there's two problems with that.
8 One is, I'm the judge. The law is that for
9 an associate judge to serve in my court I have to
10 approve them. And if I pick an associate judge or I
11 pick a special master, they're working for me and I'm
12 the judge, and I don't want a presiding judge or any
13 other judge to tell me, "No, I have to work with some
14 other associate judge or some other master."
15 And the second problem is more practical,
16 which is funding. There isn't any money to be
17 bringing in other associate judges or other masters.
18 If my associate judge is disqualified or
19 recused, then what that really means is, I'm going to
20 have to hear the case as a practical matter.
21 And, to me, this falls under the category
22 of, "If it ain't broke, don't fix it." We're
23 including people in a procedure that we don't need to
24 have that has all kinds of unintended consequences.
25 CHAIRMAN BABCOCK: Luke.

1 mechanically, it would even work with the justice
2 court. But there is a case on point that's been
3 around since the early '90s out of Judge Snyder's
4 court that talks about this particular situation.
5 HON. SCOTT BRISTER: So if you don't
6 like the JP, you just appeal de novo to the county
7 court or --
8 HON. TOM LAWRENCE: No. What you do --
9 and we're going to talk about this later, but 528
10 says you file an affidavit of two people that says
11 that you can't get a fair trial, and it's an
12 automatic exclusion.
13 We had a guy do that 12 times in Harris
14 County until someone finally said, "Enough of this
15 nonsense," otherwise, he'd probably be in Amarillo
16 still filing his motion.
17 It's not really a recusal. It's just an
18 automatic strike. But that's the only -- according
19 to the case law -- that's the only mechanism that you
20 can recuse a JP, is 528, and it specifically
21 addressed Rule 18a and said it did not apply.
22 CHAIRMAN BABCOCK: Bill Dorsaneo.
23 PROFESSOR DORSANEO: You know, of
24 course Rule 18 is in the rules for district and
25 county level court section of the rule book, not in

<p>Page 728</p> <p>1 the JP court section.</p> <p>2 In terms of ultimate recodification, I</p> <p>3 don't guess we have actually decided if there's going</p> <p>4 to be a JP court section in the rule book or not.</p> <p>5 That's, you know, a lingering issue, and I don't</p> <p>6 remember if the recodification draft restricts all of</p> <p>7 these rules to district and county level courts,</p> <p>8 myself, you know, either, whether all of that is, you</p> <p>9 know, related, you know, related to that.</p> <p>10 HON. TOM LAWRENCE: Well, except we</p> <p>11 have Rule 523 that says you have to apply the</p> <p>12 district and county rules insofar as you can if</p> <p>13 there's nothing specific on point of the justice</p> <p>14 rules. So it gets a little confusing sometimes, you</p> <p>15 know.</p> <p>16 CHAIRMAN BABCOCK: Okay.</p> <p>17 Judge Brister.</p> <p>18 HON. SCOTT BRISTER: I was just going</p> <p>19 to suggest, could we draft this in terms of rather</p> <p>20 than defining judge, which when you define a term, it</p> <p>21 tends to bleed over into other things that may not</p> <p>22 intend it to apply to, but just say, you</p> <p>23 know, "Applicability, this section only applies to</p> <p>24 these judges and not these others," rather than</p> <p>25 making a definition of judge.</p>	<p>Page 731</p> <p>1 your right to force that issue. You're then at the</p> <p>2 mercy of the district judge, who may or may not set</p> <p>3 aside what the master did.</p> <p>4 HON. SCOTT MCCOWN: No. What you've</p> <p>5 waived is your de novo proceeding. But you're going</p> <p>6 to the judge before the proceeding, before there's</p> <p>7 anything to de novo and saying that you should be</p> <p>8 assigned a different associate or that the case</p> <p>9 should be referred to the district judge because of</p> <p>10 some problem with the associate.</p> <p>11 And I just wonder, if we poll the family</p> <p>12 Bar, and maybe we should do that, whether this is a</p> <p>13 real problem that needs to be addressed and perhaps</p> <p>14 gives us all kinds of unintended consequences or</p> <p>15 whether it's just something --</p> <p>16 MR. ORSINGER: I'd like to ask</p> <p>17 Joan Jenkins who practices family law in Houston</p> <p>18 with, you know, a dozen family law masters and get</p> <p>19 her perspective on this issue.</p> <p>20 MS. JENKINS: I think you and Luke,</p> <p>21 Richard, have hit the nail on the head.</p> <p>22 The problem is, Judge, if you do what</p> <p>23 you're suggesting, it's exactly what they said. If I</p> <p>24 go in and I waive the right -- first of all, the</p> <p>25 right of appeal to a referring court, then I go back</p>
<p>Page 729</p> <p>1 CHAIRMAN BABCOCK: Yeah. But you avoid</p> <p>2 the problem, because Orsinger would say that this</p> <p>3 section applies to associate judge and masters.</p> <p>4 Judge McCown says that's a mistake.</p> <p>5 HON. SCOTT MCCOWN: Well, does Richard</p> <p>6 say that? Because --</p> <p>7 CHAIRMAN BABCOCK: He says it loudly.</p> <p>8 HON. SCOTT MCCOWN: As a family lawyer,</p> <p>9 do you think the family Bar really sees any need to</p> <p>10 have a recusal rule for associate judges?</p> <p>11 MR. ORSINGER: I'll have to ask</p> <p>12 around. I may ask Joan Jenkins back here who</p> <p>13 practices in Houston.</p> <p>14 In San Antonio, we just have one family law</p> <p>15 master, and you are not assigned to him unless you</p> <p>16 agree to waive. But if you go to Ft. Worth, Dallas,</p> <p>17 Houston, places like that, each judge has their own</p> <p>18 master and you are required to take all of your</p> <p>19 temporary matters to them. And in the last session,</p> <p>20 they were are empowered to do jury trials, but I</p> <p>21 suspect that they probably won't give you a jury</p> <p>22 trial in front of a master unless you waive an</p> <p>23 appeal, but I don't know that that's true.</p> <p>24 And if I had to go through a two-week jury</p> <p>25 trial in order to disqualify somebody, I wouldn't be</p>	<p>Page 732</p> <p>1 and tell my client that as many times we go down for</p> <p>2 a setting and they say, "I'll give you a setting in</p> <p>3 two months before the judge. You can have it in two</p> <p>4 days if you want to go to the associate judge."</p> <p>5 I then go back. I call my client. I waive</p> <p>6 the right to have the trial judge hear it, and then</p> <p>7 my client says "Oh, no. That's a problem for me.</p> <p>8 There's a conflict there. There's an issue there."</p> <p>9 If I go back to my judge and present that and my</p> <p>10 judge says, "No. You waived it. You're going</p> <p>11 forward," then I have no remedy.</p> <p>12 HON. SCOTT MCCOWN: How many times has</p> <p>13 that ever happened in the juris prudence in the</p> <p>14 state?</p> <p>15 MS. JENKINS: Well, I can think of two</p> <p>16 occasions where I've had lawyers discuss that with me</p> <p>17 in Harris County. I mean, I can't tell you how often</p> <p>18 it happens.</p> <p>19 But, I mean, it just seems to me, if you're</p> <p>20 going to address the issues that we're addressing</p> <p>21 here today, you need to at least look at that issue</p> <p>22 because that's a real issue.</p> <p>23 Also, what Richard said is true. In Harris</p> <p>24 County, we have no ability to reject, on a temporary</p> <p>25 basis, our assignment to the associate judge.</p>
<p>Page 730</p> <p>1 happy with that.</p> <p>2 HON. SCOTT MCCOWN: I guess my thinking</p> <p>3 about it is that if -- and we require for long</p> <p>4 matters that you waive as well, but you're not going</p> <p>5 to have to make a decision about waiving.</p> <p>6 You know who the associate judge is that</p> <p>7 you're going to before you have to make a decision</p> <p>8 about waiving. But even if somehow you got caught</p> <p>9 there, having waived your de novo, you can still go</p> <p>10 to the district judge and say, "We either need you to</p> <p>11 hear this or we need you to find a different</p> <p>12 associate judge because this one has a problem."</p> <p>13 And the district judge for whom the</p> <p>14 associate works is going to review your request and</p> <p>15 either grant it or deny it, which to me is the</p> <p>16 functional equivalent of a recusal proceeding.</p> <p>17 MR. ORSINGER: Except you have no right</p> <p>18 at that point. You've waived it. But I -- I don't</p> <p>19 know if that's --</p> <p>20 HON. SCOTT MCCOWN: No. What you've</p> <p>21 waived is your de novo, but you haven't waived going</p> <p>22 to the district judge and saying that there's some</p> <p>23 fundamental problem with the associate hearing the</p> <p>24 case.</p> <p>25 MR. ORSINGER: No, but you've waived</p>	<p>Page 733</p> <p>1 If I go in and I'm contemplating, as I</p> <p>2 often do, a three- or four-day show cause hearing on</p> <p>3 the issue of custody and I'm assigned to the</p> <p>4 associate judge, I'm stuck. I don't have the ability</p> <p>5 to object the assignment to the associate judge. And</p> <p>6 if I lose my ability to try and recuse the associate</p> <p>7 judge because of conflict, I think that could be a</p> <p>8 significant problem.</p> <p>9 We're not talking about some ten- or</p> <p>10 fifteen-minute hearing that then has to be retried.</p> <p>11 We're talking about something that requires</p> <p>12 expenditures of thousands of dollars, and then you've</p> <p>13 got to go back and emphasize your right for de novo.</p> <p>14 HON. SCOTT MCCOWN: But what --</p> <p>15 MS. JENKINS: So I think, under certain</p> <p>16 circumstances, that could be significant.</p> <p>17 HON. SCOTT MCCOWN: But what do people</p> <p>18 do right now?</p> <p>19 MS. JENKINS: Well, sometimes they have</p> <p>20 no choice and sometimes they spend 5, \$10,000 on a</p> <p>21 temporary custody hearing and retry it.</p> <p>22 HON. SCOTT MCCOWN: They don't go to</p> <p>23 the district judge and point out the problem and get</p> <p>24 a ruling?</p> <p>25 MS. JENKINS: Well, but the issue is,</p>

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1 if you get a ruling that you don't like, you have no
2 remedy. That's the point.
3 HON. SCOTT MCCOWN: But that's true of
4 recusal as well. See, to me, it's the same
5 proceeding. It's just how you get there.
6 MS. JENKINS: But with a recusal you
7 have -- I mean -- well, you know...
8 CHAIRMAN BABCOCK: Buddy.
9 MR. LOW: In these situations, do you
10 not have time to call your client? Don't you -- I
11 mean, you know, my client thinks I'm before judge so
12 and so. I'm not going to agree to go before somebody
13 else. I call my client and the judges will, you
14 know, give me a little time. Do you not have time to
15 do that?
16 MS. JENKINS: Sometimes you do.
17 Sometimes you don't. I mean, sometimes --
18 MR. LOW: Boy, that's a fast-moving
19 judge.
20 (Laughter)
21 CHAIRMAN BABCOCK: Richard.
22 PROFESSOR DORSANEO: I know in Dallas
23 some classes of cases are allocated to associate
24 judges as if that judge was just a regular, old
25 district judge with child support enforcement, which

1 district judge, so that if somebody finds out after
2 they have already waived and they're stuck with this
3 judge, they know they can still file for recusal but
4 it's with you.
5 CHAIRMAN BABCOCK: Justice Duncan.
6 HON. SARAH DUNCAN: I have a question.
7 Is there case law establishing that 18a does not
8 apply to associate judges?
9 CHAIRMAN BABCOCK: That was sort of my
10 question.
11 MR. ORSINGER: I'm not aware of it, and
12 I would point out that under the current rule, the
13 term "judge" is not refined.
14 So the rules don't purport to say "an
15 associate judge is or is not subject to recusal," and
16 I don't know of any case that's litigated the
17 question.
18 CHAIRMAN BABCOCK: It says you can file
19 a motion stating why the judge before whom the case
20 is pending, and Judge McCown's --
21 HON. SCOTT BRISTER: Any court other
22 than --
23 CHAIRMAN BABCOCK: -- point would be
24 that a master or an associate judge would be
25 derivative of the judge who the case is pending in

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1 the state is involved. That's handled by an
2 associate judge. Those cases are referred, but
3 they're not referred in the way you're talking about
4 referring a case, an associate judge. That's just
5 the way the system works.
6 HON. SCOTT MCCOWN: But there is a
7 district judge to whom to go if you've got a problem
8 with being in front of that child support associate
9 judge or before any master and --
10 PROFESSOR DORSANEO: I don't know how
11 receptive they would be. They'd say, "That's not my
12 problem. That's how we do these cases."
13 CHAIRMAN BABCOCK: Do these rules -- do
14 the Texas Rules of Civil Procedure apply generally to
15 associate judges and to magistrates, masters?
16 MR. ORSINGER: Yes. Rules of Evidence,
17 too.
18 CHAIRMAN BABCOCK: Are we talking about
19 exempting this particular rule for those people, is
20 that what the issue is? We're going to make all the
21 rules apply to them except for this one?
22 HON. SCOTT MCCOWN: No. That's not
23 what we're saying at all. The way the rule is
24 written now, it applies to the judge. It doesn't
25 apply to them.

1 front of. Derivative and subordinate to the judge
2 before whom the case is pending before.
3 MR. LOW: Could you then file a motion
4 to recuse that judge because he's relying on this
5 person who's so bad?
6 CHAIRMAN BABCOCK: Yeah.
7 MR. LOW: I mean, I don't know. I
8 guess there are a lot of different grounds,
9 apparently, for recusal.
10 MR. ORSINGER: Well, I don't think --
11 CHAIRMAN BABCOCK: That would be one
12 theory.
13 MR. ORSINGER: I think we need to
14 differentiate Scott's concern, which is, what's the
15 appropriate authority to go to in the event of
16 recusal from the issue of whether you can recuse.
17 We have now given these associate judges
18 what is tantamount to district court authority in
19 almost all respects, including empaneling and trying
20 jury trials. So they are district judges in almost
21 all respects.
22 And if Scott is concerned that he doesn't
23 want a presiding administrative district judge
24 replacing an associate judge, let's debate that
25 separately from whether or not somebody, before they

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1 And if you have a problem with the
2 associate judge, you handle it by the statutory
3 provisions of either objecting to the referral or
4 taking a de novo. What we would be doing is, we
5 would be introducing a procedure that we haven't had
6 up to this point, which is the recusal of associate
7 judges.
8 And let me point out, too. I think it's
9 important that we separate out associate judges from
10 masters because, you know, if push comes to shove and
11 the family law Bar thinks they need the ability to
12 recuse associate judges, that's one thing.
13 But a master is somebody picked by the
14 judge responsible for the case to do something for
15 that judge. And if the parties don't like the
16 master, they ought to argue that out in front of the
17 judge who picked him, and if the judge who picked him
18 is going to remove him, then the judge who picked him
19 ought to get his own choice of another master. To
20 bring in the recusal proceedings into masters, it
21 seems to me, is pretty problematic.
22 MR. YELENOSKY: Well, Judge McCown, can
23 you just write it so that you don't eliminate the
24 recusal procedure for associate judges or masters but
25 say that that is correct, just that particular

1 pick their jury in front of an associate judge, can
2 or cannot raise a valid ground for disqualification
3 or recusal, because those are actually two separate
4 debates.
5 MR. LOW: But isn't that pending in a
6 district judge's court? It is a docket number in
7 152nd District Court of Harris County, or some
8 county, isn't it?
9 MR. ORSINGER: Right.
10 MR. LOW: And there is only one judge
11 in that court, isn't it? So then --
12 MR. ORSINGER: In a literal sense,
13 yes.
14 MR. LOW: Well, I --
15 MR. ORSINGER: But in a practical
16 sense, no.
17 MR. LOW: Well, let's talk literally,
18 then.
19 (Laughter)
20 CHAIRMAN BABCOCK: It depends what
21 county you're in, too. In Bexar County, you may be
22 in one court, but you may be moving all around.
23 MR. LOW: So that judge, then, is
24 responsible for that case. Now, he may just turn it
25 all over to so and so. And if that's what happens,

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1 then why can't you recuse him because he's going to
 2 listen to this person that's so bad? Why wouldn't
 3 there have to be a ground to disqualify him?
 4 HON. SCOTT MCCOWN: Well, I agree with
 5 Richard's last comment, that if you want to have a
 6 procedure to move to disqualify or recuse an
 7 associate judge, fine, but let's have it be a
 8 different procedure and have the rule written so that
 9 that's a subdivision with its own procedure.
 10 And maybe the subcommittee could take a
 11 stab at coming up with a version of that.
 12 HON. DAVID PEEPLES: I want to say that
 13 I don't think that's worth -- what you gain by doing
 14 that is not worth the effort and confusion that
 15 would --
 16 HON. SCOTT BRISTER: Then we'll have
 17 four recusal rules, probate court, district and
 18 county court, associate judges, and JPs.
 19 CHAIRMAN BABCOCK: Judge Peeples, where
 20 do you come out on this? I mean, do you think that
 21 associate judges and masters ought to be at the same
 22 level as the district judge or county judge?
 23 HON. DAVID PEEPLES: Well, yeah. And I
 24 think they have been for however many ever years
 25 we've been doing this, and it has not been a

1 float it to the family Bar and the family bench.
 2 CHAIRMAN BABCOCK: But I think you're
 3 going -- you're seeing masters in Dallas County for
 4 sure, and, I mean, that's the wave of the future.
 5 And I -- the issue --
 6 MR. CHAPMAN: And it's certainly not
 7 limited to family law court.
 8 CHAIRMAN BABCOCK: The issue -- excuse
 9 me?
 10 MR. CHAPMAN: It's certainly not
 11 limited to family law courts in Dallas County.
 12 CHAIRMAN BABCOCK: Oh. No, not at
 13 all. Dallas County.
 14 HON. DAVID PEEPLES: Chip?
 15 CHAIRMAN BABCOCK: Yes, sir.
 16 HON. DAVID PEEPLES: I'm a little
 17 reluctant to cut off the date, but I'm prepared to
 18 move that we accept it as is, although the
 19 commissioners court reference at the end of it is a
 20 little bit unclear to me.
 21 MR. LOW: I would second that.
 22 HON. DAVID PEEPLES: But I just don't
 23 think this is a problem or will be a problem that
 24 justifies the time and effort that we would spend on
 25 it to --

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1 problem. I don't think it will be a problem. And I
 2 think to try to fine tune and draft for that -- and I
 3 understand what you're saying -- it's just not worth
 4 it.
 5 CHAIRMAN BABCOCK: Judge Brister, where
 6 do you come out on it?
 7 HON. SCOTT BRISTER: No idea.
 8 (Laughter)
 9 HON. SCOTT MCCOWN: Let me point out --
 10 CHAIRMAN BABCOCK: Seriously confused.
 11 HON. SCOTT MCCOWN: -- that's being
 12 said by a presiding judge, not by a district judge.
 13 And the --
 14 (Laughter)
 15 CHAIRMAN BABCOCK: Let's find us a
 16 district judge.
 17 HON. SCOTT MCCOWN: The statute says
 18 that no associate judge can work in my court unless I
 19 appoint them, and I don't think district judges would
 20 want the presiding judge sending in an associate that
 21 they didn't appoint but have to sign the orders for
 22 and have to have confidence in.
 23 HON. DAVID PEEPLES: Do you think that
 24 would really happen, though?
 25 HON. SCOTT MCCOWN: I don't think --

1 CHAIRMAN BABCOCK: Okay.
 2 HON. DAVID PEEPLES: -- take it
 3 further.
 4 CHAIRMAN BABCOCK: Judge Lawrence.
 5 HON. TOM LAWRENCE: If we leave it as
 6 is, then justice of the peace would be covered by
 7 this, which would be in conflict with the case law
 8 and in conflict with Rule 528.
 9 HON. SCOTT BRISTER: Well, but the
 10 current rule just says "any court other than courts
 11 of appeal." So apparently the first court doesn't
 12 believe that current rule covered it.
 13 PROFESSOR DORSANEO: Again, the 18b is
 14 not in that part of the rule book.
 15 HON. SCOTT BRISTER: Right. It's in
 16 the wrong part, wrong subject.
 17 CHAIRMAN BABCOCK: Justice Duncan.
 18 HON. SARAH DUNCAN: I don't see what's
 19 wrong with it. Supreme Court wants to write a rule
 20 that's in conflict with the court of appeals, I would
 21 assume they would do so. And I don't understand why
 22 a venue rule is a recusal rule, and that's what 528
 23 is entitled, as venue.
 24 HON. TOM LAWRENCE: It may say venue,
 25 but it -- in essence, it's a recusal rule, and that's

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1 HON. DAVID PEEPLES: Really, would it
 2 happen?
 3 HON. SCOTT MCCOWN: I don't think any
 4 of this would really happen. But if we're going to
 5 start down that path, these family lawyers will be
 6 filing these motions and --
 7 (Laughter)
 8 CHAIRMAN BABCOCK: Oh-oh. Judge Rhea,
 9 what do you think?
 10 HON. BILL RHEA: If I heard him right,
 11 I support Judge Peeples' position on it. I think
 12 it's fine the way it is.
 13 CHAIRMAN BABCOCK: Well, but there's
 14 ambiguity about how it is. I mean, if judge -- if
 15 the current rule applies to associate judges or
 16 masters, I think that's what Judge Peeples' view
 17 was. Judge McCown disagrees with that.
 18 HON. SCOTT MCCOWN: Well, and let me
 19 point out, the other district judges you're asking
 20 don't do family law. This is a family law issue and
 21 we need to float it --
 22 HON. BILL RHEA: Well, we do have
 23 masters, though. We do have masters that are subject
 24 to the same kind of issues that you're talking about.
 25 HON. SCOTT MCCOWN: And we need to

1 the way the case talks about it. There's really no
 2 mechanism for justice of the peace and the presiding
 3 judge in an administrative district, there's no
 4 communication, no mechanism.
 5 Someone is going to have to create some
 6 procedure for the justice of the peace to come within
 7 Rule 18a.
 8 I'm not fundamentally opposed to Rule 18a.
 9 I don't like Rule 528. It's an automatic
 10 strike where you don't have to have grounds, you just
 11 say, "I can't get a fair trial," and he's out. That
 12 judge is out. And there's no limit on it. So I've
 13 always hated Rule 528.
 14 Rule 18a would be fine, but we need to have
 15 some mechanism for the JPs to communicate with the
 16 administrative judge, because there is none now.
 17 There's no communication at all.
 18 CHAIRMAN BABCOCK: Justice Duncan.
 19 HON. SARAH DUNCAN: That's, to me, why
 20 it is a venue rule. It's like our change of venue
 21 rule, which is a fair and impartial trial issue.
 22 That is, the issue on a change of venue.
 23 That's really not the issue on a recusal.
 24 It's much more limited. And that is whether you can
 25 get a -- as the rule defines -- the code defines it,

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1 a fair and impartial decision-maker.
2 I guess I don't really understand the
3 hesitancy of making anyone who acts as a
4 decision-maker subject to a disqualification rule. I
5 can't believe that we would want people making
6 decisions and not be subject to a recusal for bias or
7 prejudice or disqualification.

8 And as far as the district judge having the
9 authority to try the case de novo without being
10 critical at all, from what I have seen, my limited
11 experience with it, it's fairly rubberstamped. And
12 that doesn't give me great comfort, that impartiality
13 of the master or the associate judge is really being
14 aired -- or that there is a mechanism for airing that
15 particular complaint.

16 CHAIRMAN BABCOCK: Judge McCown.
17 HON. MCCOWN: I would agree with
18 Judge Duncan on that. I've already given up on
19 whether associate judges ought to have recusal
20 scrutiny. The question is: What's the procedure and
21 who's the appointing authority?

22 And I do not think that it is lawful for
23 the Supreme Court to adopt this rule because the
24 statute that empowers the associate judge makes the
25 appointing authority the district judge of that

1 Judge McCown, is that your hand up?
2 HON. SCOTT MCCOWN: I'm not going to
3 vote against it because I just want something in the
4 middle.

5 (Laughter)
6 CHAIRMAN BABCOCK: Okay. Two.
7 Thirty-one to two with one in the middle. So there's
8 your sense of the committee, Richard.

9 HON. SCOTT BRISTER: What's the sense
10 of the subcommittee on whether it should be "This
11 rule just applies to" as opposed to a definition of
12 judge?

13 MR. ORSINGER: I like that suggestion
14 because we don't need to define judge.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. ORSINGER: If it's going to cause a
17 problem somewhere else.

18 CHAIRMAN BABCOCK: And I think that's
19 within your broad mandate to come up with that
20 language. This is going to be Agenda Item No. 2 next
21 time. So we'll be talking about this again.

22 MR. ORSINGER: Chip, can we get a sense
23 of the committee on what we ought to do with Luke's
24 suggestion that it would be broad enough to include
25 special masters and referees which would be

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1 court.

2 And with all deference, the presiding judge
3 cannot send an associate judge to work in my court
4 that I didn't appoint because I'm the appointing
5 authority. And I don't think it's legal.

6 CHAIRMAN BABCOCK: Well, I suppose that
7 maybe they could recuse one and then say, "Go appoint
8 another one."

9 HON. SCOTT MCCOWN: They could do that,
10 which is why I think the idea that Richard had of
11 having a short section that covers associate judges
12 that was a little bit different from the rest of this
13 would be the way to do it.

14 The presiding judge, I suppose, could
15 recuse one and say, "Either try it yourself or
16 appoint another one."

17 CHAIRMAN BABCOCK: Yeah.

18 HON. SCOTT MCCOWN: But if we go with
19 this procedure, I don't think it comports with the
20 statute that authorizes associate judges to exercise
21 authority.

22 CHAIRMAN BABCOCK: Okay. Judge -- last
23 comment from Judge Rhea. Then we're going to vote on
24 Judge Peeples' motion, which is only to give the
25 subcommittee a sense of this larger committee. It's

1 individually appointed by the court --

2 HON. SCOTT BRISTER: Let me just point
3 out on that.

4 171 on masters and chanceries specifically
5 says it can't be a person that is a lawyer in the
6 case or -- it has two of the three, which suggests
7 that it is -- was not, when 171 was put in, intended
8 that it was the same as the recusal rule.

9 CHAIRMAN BABCOCK: So what do you think
10 about that?

11 HON. SCOTT BRISTER: It says you can't
12 be an attorney for either party in the action or
13 related to either party, in 171.

14 MR. ORSINGER: So what's left out is
15 interest, whatever that means.

16 HON. SCOTT BRISTER: Right. Or bias,
17 prejudice, et cetera, et cetera, on down the list.

18 So again, you know, my sense is, if you
19 thought the person was biased, you'd speak up,
20 probably, when it comes up to approval.

21 CHAIRMAN BABCOCK: Okay. Let's go to
22 timing. Okay. I think we fully discussed this for
23 now, without prejudice to discussing it further
24 later.

25 MR. ORSINGER: Okay. On the timing

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1 not a vote on any particular language; just to give
2 them a sense of where we are.

3 Judge Rhea.

4 HON. BILL RHEA: Well, under the
5 circumstances, I can think of where I would
6 absolutely want the presiding judge to appoint
7 somebody to hear a recusal filed against my master
8 is, just has to do with the integrity of the system,
9 who I appointed. "I think this guy is good. I don't
10 think there's a valid basis for the recusal." He's
11 going to come to me and talk to me about that. We
12 want to test the recusal and have somebody appointed
13 to hear that. It's part of the normal process. I
14 would want that to happen.

15 CHAIRMAN BABCOCK: Okay. All right.
16 Here's the vote. Judge Peeples says we should give a
17 sense of this larger committee as to whether or not
18 we generally like the language in Subparagraph 11
19 which defines judge in the way that it's done.

20 So everybody who wants to give a message to
21 the subcommittee that they're generally in favor of
22 the definition of judge in Subparagraph 11, raise
23 your hand.

24 Thirty-one.

25 Everybody against?

1 issue, the whole snowball started rolling last time
2 because of a problem that arose within ten days of
3 trial.

4 The committee's reaction to that was to
5 say, "If it arose within ten days of trial, then you
6 ought to be able to raise it within ten days of
7 trial." But we ultimately, I believe, ended up with
8 the parallel proceeding which Senator Harris picked
9 up and used for his tertiary motions.

10 So our subcommittee has picked up the idea
11 that we've eliminated the requirement to be ten days
12 before the trial or hearing -- which, by the way, is
13 required by statute for statutory probate judges, so
14 we have to define them out of this rule -- and we've
15 substituted for that "within ten days of when the
16 party obtains actual knowledge of the grounds."

17 And then we made a separate decision that
18 if you obtain actual knowledge of the grounds and you
19 file within ten days, but it's within three days of
20 the trial or hearing, then you have your parallel
21 proceeding.

22 And as Carl said, that three days is an
23 arbitrary number. We played around with different
24 ones, like ten days or whatever. But the bottom line
25 is that ten days before trial is not the cutoff

1 anymore.
 2 Now it's ten days when you acquire
 3 knowledge of the problem. And if it happens to be
 4 that you file within ten days but that's within three
 5 days, then you have your parallel proceeding.
 6 Luke.
 7 MR. SOULES: I'm going to need a few
 8 minutes of your time here on this. There's a lot of
 9 reaction to the abuses in the recusal process. And
 10 those abuses were expected, although hopefully they
 11 would have been minimized when we did 18a. I don't
 12 know what year it was. 1980 or something.
 13 PROFESSOR DORSANEO: 1980, yeah.
 14 MR. SOULES: So we're now, what, thirty
 15 years -- twenty years into that.
 16 HON. SARAH DUNCAN: Rather depressing.
 17 (Laughter)
 18 MR. SOULES: And I wrote the first
 19 draft, so that shows you. I don't have a vested
 20 interest in this though. There are abuses.
 21 I come at this from a different
 22 perspective. I have handled five contested recusal
 23 hearings, one of which was before we did 18a, which
 24 sort of was a launching for 18a, and then four
 25 others. I never lost one, and they were heavily

1 could be the reason for that?" And you start
 2 developing a couple of reasons. "Did I know then
 3 when I got the first or second reason, or do I go
 4 on?" Well, I'm going to move to recuse the judge,
 5 and I don't care whether my record remains 100
 6 percent or not. If this needs to be done, I'm going
 7 to try to do it.
 8 But you tend to wait until you know if you
 9 feel that you can develop the evidence. And before
 10 you take this serious step of challenging a judge,
 11 who is offended, because a judge is not going to step
 12 down. They're going to make you prove it to another
 13 judge. Before you challenge that person, you need to
 14 know a lot. If you can know a lot.
 15 I had one case where, in open court, after
 16 I discovered a record that the lawyers had
 17 entertained the judge with airplane tickets, hotel,
 18 et cetera, the judge, in open court, lied about it.
 19 And the lawyer that did it lied about it. Did I
 20 know?
 21 All I had was a piece of paper that they
 22 said was an erroneous record. But it said what it
 23 said. It didn't say very much. What I said it
 24 ultimately showed to me -- I learned later, when the
 25 recusal judge took the bench and in a very fair

1 contested proceedings.
 2 So I don't come at this from a person who
 3 has abused it -- or particularly with much sympathy
 4 that rights -- legitimate rights of parties need to
 5 be curtailed because others are abusing some of the
 6 system.
 7 It may be that those who have abused the
 8 system have so prejudiced the system that the system
 9 is not going to tolerate fairness to those who have
 10 legitimate complaints. If that has happened, it's
 11 tragic. But if it's happened, it's happened.
 12 Now, what does that have to do with the
 13 timing issue? What we are doing to -- or suggesting
 14 to do to eliminate this problem of abuse is transfer
 15 to a different point in time and to different
 16 circumstances the decision about whether a party,
 17 legitimately entitled to recuse the judge, gets to do
 18 so.
 19 Because now a part of that hearing --
 20 somewhere, I don't know whether it occurs with the
 21 judge you're trying to recuse or whether it occurs
 22 with the regional judge or whether it takes place
 23 when the recusal judge comes to take the bench.
 24 A part of that process, though, is me
 25 having to testify -- or at least represent under my

1 ruling let us take the deposition of the lawyer's
 2 staff, and that's when we got the truth.
 3 We had to take -- the lawyer didn't even
 4 own up. After the judge recused, the judge said, "We
 5 can take the deposition of the lawyers," but the
 6 lawyer put his staff through depositions for us to
 7 prove that this little one-liner was in fact what it
 8 was.
 9 And I think the recusing judge recused the
 10 judge -- sitting judge, not because he was
 11 entertained during his campaign but because he came
 12 to court and lied about it. And then you get to
 13 really wondering, "Why is a judge doing that in this
 14 case?"
 15 So by then, you know, finally after I got
 16 the depositions, I knew. Or did I know when I saw
 17 the record the first time? I don't know. I guess
 18 you could -- Judge Brister or Judge Peoples or
 19 anybody in this room could decide that.
 20 We had to pull the trigger a little bit
 21 early there because we felt we were going to find out
 22 more information, and did, as far as filing our
 23 motion was concerned.
 24 I think that the rule, the timing in the
 25 rule, the way it is right now -- and that was not

1 oath as a lawyer to the court, "When did I know?"
 2 And that quickly transfers to "What did I
 3 know?" And that quickly transfers to somebody else
 4 deciding as facts were known or so obvious that I'm
 5 deemed to know -- I'm not talking about should or
 6 should have known. I'm just saying, "I can't believe
 7 you didn't know that," or "I don't believe you didn't
 8 know that," not "You should have known it." I mean,
 9 I know the standard.
 10 And if somebody -- some judge decides that
 11 I knew -- and the other lawyers are going to be
 12 fighting like hell that I knew, then I've waived my
 13 client's right to have this hearing ten days after
 14 the day somebody else decides I knew, and I just
 15 think that's a tragic way to move this process.
 16 Maybe at some -- maybe there are other
 17 arenas where what a lawyer knows or what a party
 18 knows should preclude them from doing things after a
 19 certain period of time, but these recusal things
 20 often develop. It's not as clear-cut as "The judge
 21 is a brother of the lawyer." That's a pretty easy
 22 one.
 23 You start seeing things happening, and
 24 they're untoward. They don't make sense. They're
 25 not fair. And then you start probing into, "What

1 something that was just arbitrarily decided 20 years
 2 ago. It's been looked at a lot time since. It
 3 wasn't just arbitrarily reaffirmed. I think that's
 4 the only way to leave this rule fair to people who
 5 really need it. And to change that because some
 6 people are abusing it, I think would be a disservice
 7 to our judicial system. Thank you, sir.
 8 (Applause)
 9 CHAIRMAN BABCOCK: Carl, you had your
 10 hand up first. Then Tommy.
 11 MR. HAMILTON: I was going to agree
 12 with Luke before he even started, but...
 13 (Laughter)
 14 MR. SOULES: I wasted a lot of time.
 15 MR. LOW: He might change his vote.
 16 MR. HAMILTON: One of the ways that,
 17 you know, this can be fixed is to provide that you
 18 can file a motion at any time, period. And then the
 19 three-day requirement takes care of if you file it
 20 just for purposes of delay or something, parallel
 21 proceeding.
 22 Now, the only thing that this doesn't solve
 23 is someone laying behind a log and waiting until the
 24 trial is over and they get a bad result so then they
 25 file a motion to recuse, and I suppose we're just

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1 going to have to provide that it's just too late at
2 that point.
3 I don't know of any reason why we have to
4 let a judge be recused after the case has been
5 tried.
6 CHAIRMAN BABCOCK: It has happened.
7 Tommy.
8 MR. JACKS: Just one post grip to what
9 Luke said, and I agree with the things that Luke
10 said, and one of those motions that Luke talked about
11 he tried for me and the judge was disqualified in
12 that proceeding.
13 And that was a case where while there was
14 plenty of argument we should have known, what we
15 later found out, we didn't, and we started figuring
16 it out about the time the judge struck our experts
17 and put us to trial, and we -- but there's nothing
18 that -- we talk as we should, about how the public
19 views the courts and how those citizens can bring
20 their problems to the courts -- view the courts, and
21 I guarantee you, there is absolutely nothing that
22 poisons the reputation of the courts like seeing a
23 judge who's leaning on the scales heavily in one
24 direction and for reasons that are grounds for
25 recusal and disqualification.

1 to disqualify. There is no lying behind the log on
2 that. You wait and you wait and you wait, but, you
3 know, everything is voided anyway.
4 Now you have nothing to gain because
5 everything is undone in other, you know -- I don't
6 want to say delay, but again, if it's one of those
7 disqualification things, for crying out loud, anybody
8 ought to be able to figure that out.
9 It doesn't apply, again, to the ones that
10 are usually used 99 percent of the time for trial
11 continuances, which is bias, impartiality.
12 That's the (4) (a) there, the (b) (1), (2)
13 and (3) -- "The judge is clearly not impartial
14 because she's ruling against me all the time," and
15 that doesn't -- if you lay behind the log and you
16 raise that at the last minute, under the subcommittee
17 draft, tough, you go on to trial. So you gain
18 nothing by lying.
19 So the only way you gain by lying behind
20 the log is if you allege one of the others, which is,
21 you were a material witness in the matter, or you
22 were a government lawyer, you were involved in the
23 case, or your spouse or somebody in your house is
24 involved in the case, and you wait until the fourth
25 day, because if you wait until the third day, again,

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1 I think it's a mistake to try, in an effort
2 to cure abuses, to do so in a way that could, simply
3 because of the timing of the filing of the motion,
4 result in those kinds of truly unjust circumstances,
5 and it won't take more than one or two or three of
6 those stories over the course of years being talked
7 about and publicized and so forth to make all of us,
8 judges, lawyers, courts held -- and not
9 unjustifiably, in contempt by the public.
10 CHAIRMAN BABCOCK: Buddy and then
11 Judge Brister.
12 MR. LOW: I agree with Luke. We should
13 leave it the same, but I had also tried to work on
14 some language that should set some deadlines.
15 In Luke's case, you file a motion at some
16 time. You gained additional facts. But you felt
17 like when you filed it that you had all of the facts
18 and information, really, that you needed to support
19 your motion when you filed it.
20 MR. SOULES: No.
21 MR. LOW: You really didn't? You just
22 had to file?
23 MR. SOULES: Yes.
24 MR. LOW: So even if you had that,
25 because it's unusual that you're going to be able to

1 nothing happens.
2 If you wait until the fourth day, and, you
3 know, I'm not sure -- I'm a little bit offended --
4 let's say you have a defendant who's just trying to
5 put off a day of trial and they know that the judge's
6 wife is involved in this case so they wait until the
7 last minute to raise that.
8 But again, balancing that -- my view --
9 remote possibility with, "Sorry. You're trying this
10 case to the witness", you know, cousin -- or the
11 party's cousin because you didn't raise it fast
12 enough," that's not just not a right of the party,
13 that just looks bad to the public that we're deciding
14 things that way.
15 So I would -- as long as we keep in that it
16 doesn't delay the trial, I'd file it, you know, after
17 the trial, as far as I'm concerned. I just don't see
18 what you have to gain from it.
19 CHAIRMAN BABCOCK: Justice Hecht.
20 JUSTICE HECHT: And I wish the
21 committee would consider that.
22 The history -- some of the history of this,
23 as I was telling Luke at the break, is that
24 Senator Harris proposed this time deadline that has
25 been incorporated into the rule as legislation and

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1 take the deposition before you file it, so, I mean --
2 MR. SOULES: I took the deposition
3 after I filed it.
4 MR. LOW: That's what I said.
5 So you gained information after, but you
6 filed it before and you felt like you had sufficient
7 facts and so forth, and basically you had all of the
8 facts and information other than information you got
9 in deposition.
10 MR. SOULES: Good faith belief, yes.
11 Knowledge, no.
12 CHAIRMAN BABCOCK: Judge Brister.
13 HON. SCOTT BRISTER: Yeah. Okay.
14 Current rule is, if you don't file it ten
15 days before your motion -- your hearing or your
16 trial, it's no good.
17 And as the Texarkana case points out, a lot
18 of people don't hire the judge's son until -- or the
19 local counsel that's in a partnership, or whatever it
20 is -- until less than ten days, and that doesn't
21 smell right.
22 What I've got in here is that we reached
23 the at-any-time conclusion. You can file it any
24 time. Well, what's the problem with that? Well,
25 people lie behind the log. But who? Not on motion

1 asked the Court whether it should -- the Court was
2 willing to put it in the rule. The Court instructed
3 me -- and I did write Senator Harris back, and you've
4 got the letter before you somewhere, I think.
5 It says, "The court is inclined to make the
6 change that has been put into the rule, the ten-day,
7 the soon-as-you-know and the before the --
8 before-trial-deadline, subject to running it through
9 the advisory process."
10 Of course, we always learn something from
11 this process. That's how come we've got it. And
12 your comments today are very instructive.
13 On the other hand, as we are pursuing this
14 in other regard with Senator Harris, I think the
15 practicality is that we should try to make these
16 arguments to him and see if he's persuaded, because
17 if he's not, I think it's almost a certainty that he
18 will introduce this as legislation next session, and
19 I'd be surprised if it didn't pass.
20 Certainly there's no assurance over there,
21 but I think if he felt as strongly -- after he heard
22 what the committee thought -- as he did when he came
23 to us in January of last year, then I think he will
24 try to see that it becomes the law.
25 So there may be some middle ground here,

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1 and Scott's last comment, which is at least making
2 no -- not made solely for purposes of delay exception
3 or something to the rule.

4 CHAIRMAN BABCOCK: Is it the sense of
5 our large committee here that the sentiments
6 expressed by Luke and others following up his
7 comments is the correct one, or do people have other
8 views more in line with what Senator Harris has
9 suggested to the court?

10 MR. CHAPMAN: Chip, I have a question.

11 CHAIRMAN BABCOCK: Let Judge McCown go
12 first. Then you, Carlyle.

13 HON. SCOTT MCCOWN: I think I agree
14 with Luke and with Tommy, but I did want to share one
15 concern and ask if there's not a way to present a
16 middle ground -- and I don't have a middle ground.

17 But the flip side of what happens when
18 you're a judge is that, the truth is, judges,
19 particularly in smaller communities, are connected
20 with lawyers in lots of different ways that, from the
21 judge's point of view, could be pretty innocuous,
22 like, "I was an usher at his wedding 20 years ago."

23 And whereas the judge might be happy to
24 stand aside if people want to ask for another judge
25 at the beginning than when they've gotten pretty deep

1 one is delay and reporting a valid ground for recusal
2 until after you see if the trial is going your way.
3 And if it is, you never mention it. And if it isn't,
4 then you pull it out after everybody has \$50,000
5 invested in the process, and then you recuse the
6 judge.

7 So when we talk about delay now, as long as
8 we bought into the parallel proceeding, we're
9 probably not talking about delaying the trial. We're
10 talking about somebody knowing they've got good
11 grounds for recusal and hiding behind the log until
12 late in the process and then springing out with
13 that.

14 And that's what the ten days within
15 knowledge is supposed to do, and it doesn't matter
16 how close you are to trial. Within ten days of when
17 you knew could be six months before trial or it could
18 be after you got your verdict back. So those are two
19 different concepts of timing there.

20 CHAIRMAN BABCOCK: Paula Sweeney.

21 MS. SWEENEY: I don't know if this was
22 discussed this morning or not, but there are several
23 hundred years of experience in this room and I'd like
24 to know of lawyers -- not the judges, the lawyers,
25 because you-all have a different experience, but I

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1 into the case and the parties have spent a lot of
2 money and the court has spent a lot of time and
3 somebody wants to raise a frivolous ground, then it
4 gets pretty hard to stand aside. Or if you do stand
5 aside, the innocent party suffers a lot.

6 And there's a lot of -- there's just -- and
7 maybe Judge Peeples could speak to this, but I know
8 I've heard Judge McDowell speak about it, is that
9 recusals are growing and it's just become a little
10 bit more of a problem than it ever was in the past.
11 And I don't know if there's a middle ground, and
12 maybe it can't be around timing. Maybe the middle
13 ground has to be a strong sanctions section.

14 But there is a flip side to this story that
15 the presiding judges are faced with and a flip side
16 to the story that some litigants are faced with when
17 they have, in good faith, proceeded a long way into a
18 case and something is raised which the judge thought
19 was innocuous and now here we are.

20 CHAIRMAN BABCOCK: Carlyle had his hand
21 up, Buddy.

22 MR. CHAPMAN: I just want to inquire
23 whether or not we are clear as a committee that the
24 predominant and overriding interest that is presented
25 through this legislation or proposed legislation is

1 want to know from the lawyers, "Who has actually been
2 involved in a case where the bad motion was filed?"

3 HON. SARAH DUNCAN: Can we speak as a
4 judge as we used to be a lawyer?

5 (Laughter)

6 MS. SWEENEY: Yes.

7 HON. SARAH DUNCAN: Both experiences
8 count.

9 MS. SWEENEY: Yeah. Anybody? Filing
10 one that was either frivolous or truly for delay, or
11 whatever the problem was you were trying to
12 encounter.

13 We're hearing that this is exponentially
14 growing as a problem, and I'm just wondering how many
15 folks have actually had it. You're a judge. I mean,
16 I'm speaking from the litigant's standpoint.

17 How big -- how bad a problem can this be?
18 I mean, judges --

19 HON. SCOTT BRISTER: This is a
20 sleazy-lawyer case. The cases you-all have against
21 each other, I wouldn't expect to have --

22 HON. DAVID PEEPLES: The lawyers in
23 this room don't handle the run of the mine litigation
24 that gets the abuses.

25 MS. SWEENEY: Well --

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1 the question of delay.

2 Because if that's so, then it seems that
3 that indeed could be taken care of by an exception to
4 the rule that would provide that it could be raised
5 at any time. And that would be a matter of proof.
6 That would be a matter to be shown in the course of
7 the hearing.

8 If there's another concern, however, then
9 I'd like to hear it. If there's another overriding
10 concern as far as the timing goes.

11 MR. LOW: Chip, I think that we need to
12 be prepared to meet the argument, and maybe the
13 present rule does, that for every case that Luke gave
14 us an example of, there are fifteen where they're
15 used for delay.

16 In other words, so we need to answer both.
17 In other words, I'm assuming that's probably one of
18 the problems the Senator had. So we need something
19 that will address both of those, and maybe the
20 present rule does.

21 MR. ORSINGER: I think we need to
22 clarify. There's two senses of delay we're talking
23 about.

24 One is a delay of the trial, which we think
25 we've cured with the parallel proceeding. The other

1 HON. SCOTT MCCOWN: I mean, your
2 question is a little bit like asking, "Let's figure
3 out if murder is a problem by asking how many people
4 in this room have been murdered." I mean --

5 MS. SWEENEY: No. I'm sorry. The
6 reason I ask it is that I -- you know, we keep
7 using -- we keep creating memories for problems that
8 penalize folks who are not causing the problem, and
9 clients, such as Luke was discussing, will come
10 across this over and over here. And I think it's
11 something that we're doomed to confront over and over
12 again.

13 But I'd hate to see us going down the road
14 enacting a cure for sleazy lawyers that's going to
15 penalize all of the non-sleazy clients out there and
16 take away a substantive right from them because
17 somebody in the legislature had a bad experience,
18 and -- whether it be Senator Harris or someone else.

19 So I just have a lot of trouble with this
20 concept when none of us have seen the real life
21 experience of the problem when we're talking about
22 giving up a lot of our client's rights.

23 CHAIRMAN BABCOCK: Ms. Jenkins.

24 MS. JENKINS: I agree with Ms. Baron.
25 I mean, first of all, the problem as I see it in

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1 Harris County is primarily from pro se litigants.
 2 And I have seen situations there multiple
 3 times in the last few years where recusal has been
 4 filed time and time again in the same case, but my
 5 feeling is that Luke's right. You should not be
 6 trying to change the system for the majority of
 7 people because of those nuts, to be blunt, because I
 8 think they're going to find another way to create a
 9 problem.

10 You're going to block up one issue for
 11 them. But if they're determined to throw a bomb into
 12 the litigation process, if you plug the hole on this
 13 side of the dike, they're just going to find another
 14 avenue of attack.

15 And I think Luke is correct. We need to
 16 move forward with the idea that we're protecting the
 17 majority of decent people as opposed to trying to
 18 plug up the hole for the nuts that are going to find
 19 a way to create havoc, especially in situations such
 20 as the family district courts, regardless of what we
 21 do.

22 CHAIRMAN BABCOCK: Sarah.

23 HON. SARAH DUNCAN: One of my
 24 experiences -- I had two experiences with recusal
 25 disqualification, Texaco with Judge Casseb and

1 Senator Harris. And I did not -- we never spoke to
 2 him directly about the subject. He simply wrote and
 3 said that this was his legislation and he was going
 4 to pass it and he felt confident it would pass --
 5 which the other bill didn't pass -- and what was our
 6 view about whether it was a good idea or not.

7 And so I don't -- it was mentioned to us,
 8 wasn't it, Bob, that he had some bad experiences in
 9 Dallas County or a judge there had or something?

10 MR. PEMBERTON: As I recall, it was
 11 folks filing last-second recusal motions simply to
 12 blow trial settings. That was the problem.

13 JUSTICE HECHT: His concern was not
 14 that a month after the case was filed they knew about
 15 it and they waited four more months before trial
 16 setting a year later. His concern was that it was
 17 blowing trial settings.

18 And so that's why I said earlier, if -- I
 19 think that is perhaps some middle ground, because
 20 that was the concern that was expressed, but the way
 21 he proposed to address it was by a period of time
 22 after the grounds were known.

23 So I think that's all we know about it.

24 And obviously neither he nor us -- we at the time had
 25 the benefit of this discussion.

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1 Metzger vs. Metzger with Judge West in Houston. It's
 2 written up in the case if anybody wants to read it.

3 We ended up -- the court ended up affirming
 4 the denial of the recusal motion but then it held
 5 that we couldn't get any sanctions because we
 6 proceeded under a motion that named every rule on the
 7 face of the earth but the order didn't have the right
 8 rule in it. And it seems to me that if we're talking
 9 about frivolous motions for recusal, let's punish the
 10 people who file frivolous motions for recusal.

11 The current draft has the old language, the
 12 language we used to have in the capital rules for
 13 sanctions. It has to be both, solely for delay and
 14 frivolous. Well, to me, if it's frivolous, I don't
 15 care if it was solely for delay. You shouldn't be
 16 filing frivolous motions.

17 I mean, I agree with Luke. If you've got a
 18 good recusal motion, you ought to be able to file it
 19 no matter when you learn. And I also don't like
 20 putting a lawyer on the stand and asking them, "When
 21 did you learn this and how did you learn it?" I
 22 think we are really, really intruding on what may be
 23 very confidential communications.

24 CHAIRMAN BABCOCK: And if the ruling
 25 goes against the lawyer and he has therefore waived

1 CHAIRMAN BABCOCK: Tommy.

2 MR. JACKS: I think Justice Hecht's
 3 suggestion a little earlier, that there be some
 4 dialogue with Senator Harris, is a good suggestion.

5 I think that there probably are some other
 6 people in this room or at least among the membership
 7 of the committee who might usefully participate in
 8 that kind of dialogue and would suggest that some
 9 combination of people at the head table decide who
 10 might fruitfully participate in such discussion, and
 11 we tried to accomplish that.

12 Clearly, Senator Harris had some things in
 13 mind that he thought made this a good idea, and we
 14 ought to probe that and also tell him about some of
 15 the concerns raised here and just talk to him about
 16 it and see how that comes out.

17 CHAIRMAN BABCOCK: Yeah. I, frankly,
 18 can't believe that if we talk to him and raise these
 19 issues that he would disagree, because, to me, this
 20 doesn't seem like a close question, but...

21 HON. SCOTT BRISTER: And point out also
 22 the administrative problem of, there's going to be a
 23 hearing. There's going to be cross-examination.
 24 Surely you can't have the judge being recused
 25 deciding whether you knew this within ten days or

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1 an important right that his client has, the lawyer is
 2 in big trouble.

3 But it strikes me as odd -- and I wonder if
 4 Justice Hecht would comment on this. It strikes me
 5 as odd that Senator Harris would be so revved up
 6 about this, because, frankly, it looks to me like the
 7 delay side of the argument is dealing with process,
 8 whereas the other side of the argument is dealing
 9 with fundamental fairness, the integrity of the
 10 judicial process. And to me that doesn't seem like a
 11 close question.

12 It seems to me that Luke's side of this
 13 argument is not only persuasive, it's overwhelmingly
 14 persuasive. So what has gotten the legislative
 15 branch revved up about it on the process side?

16 JUSTICE HECHT: Well --

17 HON. SCOTT BRISTER: And will it be
 18 cured by a dual process if it doesn't delay the trial
 19 or hearing?

20 JUSTICE HECHT: Well, I don't know that
 21 the legislative branch is riled up about it, but all
 22 I know is --

23 CHAIRMAN BABCOCK: It sounds like
 24 somebody is.

25 JUSTICE HECHT: All I know is about

1 not.

2 So then we assign a visiting judge or
 3 somebody, and they have to hold that hearing before
 4 we ever get into the underlying issue. It's a lot
 5 quicker to just say, "What's the grounds for your
 6 recusal? Oh, you don't -- you think they're biased
 7 because they ruled against you twice," and you're
 8 going to have to go through a two-day hearing before
 9 you do that on who knew what when.

10 You know, the practicalities of doing that
 11 satellite litigation, to me, is substantial.

12 CHAIRMAN BABCOCK: Yeah. Could we
 13 represent to Senator Harris that it is the unanimous
 14 view of this committee, that this is a very -- that
 15 this is a bad idea or is there --

16 JUSTICE HECHT: We might want to
 17 sugarcoat it.

(Laughter)

18 CHAIRMAN BABCOCK: "This is the most
 19 ignorant proposal we have ever seen in 30 years."

(Laughter)

20 MR. ORSINGER: Can you suggest --

21 JUSTICE HECHT: Do you want to go off
 22 the record?

(Laughter)

1 CHAIRMAN BABCOCK: Showing laughter.
 2 MR. ORSINGER: Can you suggest that the
 3 parallel proceeding process we think will eliminate
 4 the abuses without requiring ten days of notice?
 5 CHAIRMAN BABCOCK: Yeah. Well, you and
 6 Luke are going to have to be on this visit.
 7 HON. DAVID PEEPLES: You know, I want
 8 to make two unrelated points.
 9 CHAIRMAN BABCOCK: Can I just get an
 10 answer to that question? Is there any dissent from
 11 that? And if there is, that's fine. I just sense
 12 that people don't think that this is a good idea, but
 13 if there's a dissent, then we ought to talk about
 14 it.
 15 Anybody disagree?
 16 MS. CORTELL: You need to clarify what
 17 you're saying, that you shouldn't go ten days from
 18 notice or --
 19 CHAIRMAN BABCOCK: That the
 20 knowledge -- that limiting it -- that waiving it,
 21 unless you bring it within ten days of when you know
 22 it. Is there anybody that is in support of that? To
 23 put it another way.
 24 Okay. There are no hands raised, and we
 25 have almost the full committee here, so...

1 parties see it, and we had to find some way to get
 2 the judge to rule. And actually, we tried to file a
 3 motion of recusal.
 4 But what happens in a circumstance like
 5 where -- not based on trial rulings but based on
 6 conduct that clearly calls the judge's impartiality
 7 into question? Shouldn't you have a right right then
 8 to file a motion to recuse?
 9 MR. ORSINGER: You do have a right?
 10 The question is: Does it stop the trial proceeding?
 11 And the answer is, under this rule, no. If
 12 you're within three days of trial or in trial, then
 13 filing the recusal doesn't stop it. It just requires
 14 a parallel proceeding that it be ruled on quickly.
 15 CHAIRMAN BABCOCK: And, Bill, are --
 16 MR. JEFFERSON: In a case where -- I
 17 mean, where the proceedings ought to be stopped. I
 18 mean, where the damage to the system of justice is so
 19 great that it should be right then and there.
 20 MR. ORSINGER: How are you going to
 21 write that into a rule where it applies to your
 22 situation and not every situation?
 23 MR. EDWARDS: You write it by applying
 24 it to every situation.
 25 MR. ORSINGER: Well, that's exactly the

1 By the way, there's a taxi outside if
 2 anyone wants one.
 3 MS. GAGNANO: Not anymore.
 4 CHAIRMAN BABCOCK: Not anymore.
 5 Sorry.
 6 MR. LOW: He was ready to get away from
 7 here.
 8 (Simultaneous talking)
 9 CHAIRMAN BABCOCK: Okay. We'll try to
 10 do something about that.
 11 MR. EDWARDS: You know, we keep
 12 forgetting that one of the main things that's
 13 bothering with the recusal process, particularly as
 14 it's set forth in 18b, which was adopted after the
 15 justice for sale bit hit the screens and so forth, is
 16 the public's perception of the judiciary. And, you
 17 know, we can't throw that down the drain just because
 18 some people are abusing the process.
 19 And when we look at it from the standpoint
 20 of the public's perception of the judiciary, this
 21 parallel proceeding, if you've really got to,
 22 disqualification stinks. I have a real problem with
 23 the dual or the parallel proceeding.
 24 CHAIRMAN BABCOCK: Richard, do you want
 25 to respond to that?

1 problem, because then you can use these as a motion
 2 for continuance and then we're right back --
 3 MR. EDWARDS: But then you're back to
 4 sanctions. And if you're using -- if you're filing a
 5 frivolous deal, you get sanctioned. And if you want
 6 to get a continuance with a -- get busted with a big
 7 sanction or get your ticket jerked or whatever it
 8 comes to, if it's going to be one after another, so
 9 be it.
 10 But I think that the integrity of the
 11 system is more important than allowing us to be
 12 overrun by some sleazy practicing lawyers, and the
 13 judge -- it's just going to be up to the judges to
 14 sit down on them.
 15 CHAIRMAN BABCOCK: Bill, you're opposed
 16 to the dual-track thing.
 17 MR. EDWARDS: You got that into the
 18 motion, did you?
 19 (Laughter)
 20 CHAIRMAN BABCOCK: Luke was next and
 21 then you guys. Yeah.
 22 MR. SOULES: I think in most of these
 23 cases where there's a risk of a serious injustice,
 24 the facts are going to probably develop before ten
 25 days from trial. Maybe not.

1 HON. SARAH DUNCAN: Can I ask a
 2 question first?
 3 CHAIRMAN BABCOCK: Yes. Sarah.
 4 HON. SARAH DUNCAN: Are you proposing
 5 that the dual-track system apply only to motions
 6 filed within x number of days before trial?
 7 MR. ORSINGER: Yes.
 8 CHAIRMAN BABCOCK: Within x number of
 9 days of the trial.
 10 MR. ORSINGER: And that three is thrown
 11 out there. We didn't start out with three. We
 12 kicked it around and decided three was okay, but it
 13 ought to be wide open. You could argue ten days.
 14 MR. JEFFERSON: What happens when the
 15 grounds develop during trial?
 16 There was one case that somebody may be
 17 familiar with that I was involved in where the judge
 18 got wind of what the verdict was going to be and then
 19 deemed an impromptu settlement conference and tried
 20 to urge the plaintiffs to settle for an amount that
 21 was offered before, and the plaintiffs didn't want to
 22 settle.
 23 And then a defense verdict came and the
 24 judge then held that verdict in his chambers for
 25 weeks and wouldn't release it, wouldn't let the

1 But that was debated a long time when the
 2 ten days was put in the rule to begin with. And
 3 there are some court of appeal cases that have given
 4 relief to where the facts developed actually after
 5 trial. In one case, it was after verdict. They're
 6 annotated here.
 7 There needs to be, I think, some balance to
 8 take care of real misuse, if that balance can be
 9 achieved with little built-in possibility of
 10 injustice.
 11 And I think that the last-minute motion
 12 that triggers a parallel proceeding is probably a
 13 good way to do that.
 14 Many times judges face the recusal motion
 15 with a skewed system, and say, "I didn't see that
 16 issue, but I see it now. And I'm out of here. We'll
 17 get another judge in here."
 18 So I think the cost of the system of the
 19 parallel track being triggered by last-minute motions
 20 is, in terms of possible injustice, is not very
 21 much.
 22 And for that to be there to discourage or
 23 eliminate the delayed consequences of last-minute
 24 motions is probably supportive of a better system of
 25 the justice.

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1 So I think the way this is balancing really
2 takes care of -- hopefully takes care of, at least
3 our perception, of Senator Harris' concern and, on
4 the whole, is the best arrangement to take care of
5 all of the problems.

6 HON. SCOTT MCCOWN: Chip.

7 CHAIRMAN BABCOCK: Yes, sir.

8 HON. SCOTT MCCOWN: How about a
9 parallel proceeding but you give the recusing judge
10 or the judge in the recusal proceeding the authority
11 to stop the original proceeding if in his judgment
12 the original proceeding should stop until the recusal
13 is heard?

14 And that would accomplish what Bill's
15 concerned about, but still, I think, achieve the
16 balance that Luke was pointing out.

17 MR. SOULES: I think that would make
18 sense.

19 CHAIRMAN BABCOCK: What do you think
20 about that, Bill?

21 MR. EDWARDS: Well, I think that if
22 it -- you know, if continuing the trial is subject to
23 a decision of somebody who's not being sought to be
24 recused, I think my problem is, in large part,
25 alleviated. Not maybe taken care of, but...

1 legislature is, these are used to stop the trial and
2 they are never sanctioned because the visiting judge,
3 same reason, visiting judge didn't lose anything by
4 having -- a visiting judge got paid an extra day by
5 having this thing filed.

6 It's only me and the jury and everybody
7 else who was there ready to go that lost, and we're
8 not involved in that procedure.

9 MR. EDWARDS: Okay.

10 What do you if you've tried this case to
11 the verdict and this thing has gone to the visiting
12 judge? You've got your verdict. You got a motion
13 for judgment pending and the visiting judge does to
14 you what this one did? There's no --

15 HON. SCOTT BRISTER: Grants the --

16 MR. EDWARDS: There's no record on the
17 recusal motion that can be taken on appeal until it's
18 heard. What do you do?

19 HON. SCOTT BRISTER: Well --

20 MR. EDWARDS: You've finished the
21 trial. You've gone through two more weeks of trial,
22 \$150,000 worth of expert testimony, \$300,000 worth of
23 lawyer time, and now the visiting judge won't hear
24 the motion or won't rule on it. What do you do?

25 HON. SCOTT BRISTER: Well, that's

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1 CHAIRMAN BABCOCK: Judge Brister.
2 HON. SCOTT BRISTER: My problem with
3 that is, I'm the one that wanted the -- Carl alluded
4 to earlier, that the judge recusal referred to has to
5 decide within 20 days because in our region these are
6 uniformly heard by visiting judges.

7 People have different feelings about
8 visiting judges. One of my problems with visiting
9 judges is a lot of visiting judges are not in a rush
10 to do anything. They are paid by how long things
11 last, indeed.

12 And I had an actual case, five years old,
13 goes up on appeal, for erroneous reasons is reversed
14 to come back.

15 (Laughter)

16 HON. SCOTT BRISTER: And it comes
17 back. The side, of course, who lost in trial -- in
18 the jury trial but won on appeal moves to recuse.
19 That's fine.

20 The administrative judge appoints a
21 visiting judge who schedules the hearing for two
22 months out, and at the hearing to -- this is a
23 five-year-old case now -- two months -- it's already
24 been tried once.

25 Two months out, has a nice hearing, plenty

1 certainly a waste.

2 MR. EDWARDS: Yes. It sure is. It
3 makes the judiciary look terrible.

4 HON. SCOTT BRISTER: But it does not
5 helped -- it's not helped by him also having the
6 power to stop everything.

7 MR. EDWARDS: I agree with that, too.

8 CHAIRMAN BABCOCK: Judge Peoples,

9 last -- final comment.

10 HON. DAVID PEEPLES: Two points, this
11 discussion has helped remind me of something I needed
12 to be reminded of, which is, the situation is
13 different all across the state. The abuse of the
14 situation is different.

15 I think the abuse happens, I think, in
16 Dallas and Houston and not very much anywhere else.
17 The integrity level of our courts varies across the
18 state.

19 And so just because I think that everybody
20 is fine in my area or Buddy does in his, doesn't mean
21 there are other parts of the state, what Luke
22 describes, does not happen, because it does.

23 And I think we just need to remember that
24 we're writing rules for a big state, not for our own
25 area which seems to be working well.

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1 of time, two-day hearing, and says, "You-all give me
2 briefs within four months and I'll try to rule on it
3 after Christmas."

4 Now, you know, you say, "Well, get rid of
5 that visiting judge," but there's no time limit in
6 the rule book, and, you know, from a visiting judge's
7 perspective, what do they care if everything shuts
8 down and stops. I'm the one that feels the pressure
9 from all the other people wanting to come in at
10 trial.

11 This person has no pressure from anything.
12 You know, they get to grant a new trial in the case
13 to try it over again. They're not going to have to
14 try it. That's why I don't like visiting judges.
15 They don't have to live with the consequences.

16 HON. PATTERSON: A five-year case, is
17 that a new case or old case in Houston?

18 HON. SCOTT BRISTER: In my court,
19 that's the oldest case there was.

20 Again, what's your harm to have to go to a
21 parallel proceeding? If you win, then it can be done
22 that night or, you know, something like that.

23 If you win, of course, it's stopped. Not
24 only that, but undone. But the pressure, I
25 understand it and I agree with it from the

1 Now, I think we could solve a lot of our
2 problems if we would require quick hearings on this,
3 and I think to say that the judge has 20 days to take
4 this under advisement is the most ridiculous thing I
5 have ever seen in a proposed statute, and ten days to
6 schedule the hearing.

7 It seems to me that, you know, we had these
8 abortion hearings, legislature said, "Get them done
9 in 48 hours."

10 I think this rule ought to tell the
11 presiding judges, "You have to schedule a hearing and
12 get it done very, very quickly." You can talk about
13 how long. It's easy to do. And if it's an
14 out-of-town case, you can do by telephone and fax.

15 There is really no excuse for what happens
16 in some places. And this horror story about the
17 visiting judge is something I hadn't heard.

18 But to think that these can just drag on
19 and on and be postponed and gotten around to later,
20 that is ridiculous, and we ought to draft language
21 that requires them to be heard quickly so that
22 there's no delay problem.

23 HON. SARAH DUNCAN: And ruled on.

24 HON. DAVID PEEPLES: And frankly, I
25 think that once that starts to happen, you don't get

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1 as many of them filed.
2 CHAIRMAN BABCOCK: Yeah.
3 HON. DAVID PEEPLES: If they know it's
4 going to be heard. And frankly, what I do -- I try
5 to get them -- I interrupt what I'm doing to hear
6 them. I want to give them a hearing so fast, they
7 beg me to wait.
8 (Laughter)
9 HON. DAVID PEEPLES: And that's the bottom
10 line cure for this.
11 CHAIRMAN BABCOCK: I tell you, I think,
12 not just this last discussion, but our discussions
13 all day have been extraordinary, and it's a measure
14 of the group that the Court has assembled that we can
15 have discussions like this.
16 I don't know if the Court appreciates it,
17 but I think it should, because this is great advice
18 and great discussion. I think, anyway.
19 There was a question about whether we
20 really needed to meet at 8:00 in the morning, and the
21 chair thinks that we don't, but I'm going to split
22 the difference between the proposal of 9:00. Why
23 don't we meet at 8:30.
24 We'll continue the discussion of this rule
25 and take up the other matters on our agenda.

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1 There is an event at six o'clock at 100
2 Congress Avenue, Suite 1100, which happens to be
3 Jackson Walker's office here, and that is built as a
4 tribute to Luke Soules. Let's see if he can get
5 another round of applause in an hour or two.
6 And Justice Phillips -- have we heard --
7 may or may not be there.
8 JUSTICE HECHT: He will be there.
9 CHAIRMAN BABCOCK: He will be there.
10 And he has to leave early. So his remarks will be at
11 the beginning of this 6:00 p.m. period. So if
12 anybody wants to hear his remarks, be there at the
13 beginning.
14 Thanks everybody.
15
16 (At this time there was a recess, and the
17 proceedings continued as reflected in the next
18 volume.)
19
20
21
22
23
24
25

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1 -----
2 CERTIFICATION OF THE HEARING OF
3 SUPREME COURT ADVISORY COMMITTEE
4 -----
5
6 I, PATRICIA GONZALEZ, Certified Shorthand
7 Reporter, State of Texas, hereby certify that I
8 reported the above hearing of the Supreme Court
9 Advisory Committee on January 28, 2000, and the same
10 were thereafter reduced to computer transcription by
11 me.
12 I further certify that the costs for my
13 services in this matter are \$_____.
14 CHARGED TO CHARLES L. BABCOCK.
15
16 Given under my hand and seal of office on this
17 the ____ day of _____, 2000.
18
19
20 ANNA RENKEN & ASSOCIATES
21 1906-B West 37th Street
22 Austin, Texas 78731
23 (512) 223-8828
24 PATRICIA GONZALEZ, CSR
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