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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 JANUARY 29, 2000
10 (SATURDAY SESSION)
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19 Taken before D'Lois L. Jones, a
20 Certified Shorthand Reporter in Travis County for the
21 State of Texas, on the 29th day of January, A.D., 2000,
22 between the hours of 8:30 o'clock a.m. and 11:50
23 o'clock a.m. at the Texas Association of Broadcasters,
24 502 East 11th Street, Suite 200, Austin, Texas 78701.
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2 INDEX OF VOTES
3
4 Votes taken by the Supreme Court Advisory Committee
5 during this session are reflected on the following
6 pages:
7 848
8 923 (3 votes)
9 923 (2 votes)
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1 *-*-*
2 CHAIRMAN BABCOCK: Okay. Let's get
3 going, if we can. Frank Branson called, who is -- who
4 had wanted to appear before us today on the issue of
5 whether or not the provision in the discovery rules
6 which allows a lawyer to instruct a witness not to
7 answer an abusive question, and he is in favor of
8 eliminating that provision of the discovery rules.
9 Frank came down with the flu, but was willing to appear
10 before us anyway, and I thought that would be a bad
11 idea both for Frank and for us, so I told him since
12 really this is something that he's interested in and
13 he's pushing and the Court asked us to consider his
14 proposal, I just told him that he could -- we would put
15 this over 'til some other time.
16 MR. LATTING: We'll vote it down later.
17 CHAIRMAN BABCOCK: Yeah. So Item No. 10
18 will be deferred to some later time, probably next
19 meeting, so we're back on recusal.
20 MR. MEADOWS: Chip, on this issue, which
21 I'm happy to put off as well, but I notice that in
22 Steve's letter to Frank he asked him for some empirical
23 information about whether or not this ability to
24 instruct the witness not to answer was causing problems
25 that could be demonstrated. Do you know whether or

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1 not -- I don't know whether Steve's --
2 MR. SUSMAN: I'm here. No, I've heard
3 nothing from him, and so when he comes, please urge him
4 to bring his evidence. I'm highly suspicious of people
5 who are complaining without evidence. I mean, I don't
6 know whether you-all have experienced a big problem
7 with that, but I haven't. I mean, I think lawyers --
8 there is a potential for abuse of the abusive question
9 instruction, but I haven't found it abused yet. So,
10 you know, it will be interesting to see what happens.
11 MR. LOW: I've had it where it was
12 sanctioned and you just instruct them not to answer --
13 MR. SUSMAN: Speak up. When you guys in
14 the middle talk that way there's no way we can hear
15 you.
16 MR. LOW: Well, wait, Steve. Give me
17 full instructions now. Okay. Now, that I believe if I
18 follow my instructions, the situation was where the
19 witness was not giving answers the lawyer liked, so
20 that was his objection, and he just, in fact, not only
21 instructed him not to answer, just told him "Let's go
22 home." So the judge sanctioned him, but it happens,
23 and it wouldn't happen under the Federal rule, so
24 that's it. Evidence, I have none in my pocket. It's a
25 personal experience.

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1 CHAIRMAN BABCOCK: well, I'll remind
2 Frank that the committee is looking for empirical
3 evidence as opposed to argument. Okay. Back to
4 Richard.
5 MS. SWEENEY: Buddy, why do you say that
6 would not happen under the Federal system?
7 MR. LOW: They don't have that
8 provision. The objection under -- I don't have the
9 Federal rules right before me, but that is not in the
10 Federal rules.
11 MS. SWEENEY: But, I mean, it happens,
12 doesn't it?
13 MR. LOW: It happens, and what you do,
14 you take that before the judge, and I had a judge that
15 then wouldn't let them read any portion of the
16 deposition and let me read what I wanted to. Bob
17 Parker let me, so there are ways to deal with it. You
18 just don't deal with it that way, but I'm not here to
19 argue that point. My knowledge apparently is in the
20 recusal area.
21 CHAIRMAN BABCOCK: Speaking of which,
22 well, Richard, we solved the problem yesterday of the
23 timing, right?
24 MR. ORSINGER: Well...
25 CHAIRMAN BABCOCK: So what's next in

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1 this?
2 MR. ORSINGER: On timing we have
3 eliminated the within 10 days of knowing, but we
4 haven't decided on the date before the hearing or trial
5 that will cause us to move to a parallel proceeding.
6 You'll see in the recusal packet that's the proposed
7 rule that Carl was going over yesterday that if the
8 motion is filed within three days of the day that a
9 case is set for trial or hearing then you go to the
10 parallel proceeding. Is everyone happy with three
11 days, or do we want five days or ten days?
12 MR. EDWARDS: Well, I had some
13 discussion about the parallel hearing in the first
14 place, and it seems to me that some kind of an
15 accelerated hearing on a recusal is better than the
16 parallel proceeding, because if you're doing a parallel
17 proceeding, you can't both try a case and handle a
18 recusal motion at the same time. So if you're going to
19 go ahead with the case, you necessarily put off the
20 recusal hearing until after the case.
21 I have a problem with that. It's a
22 terrible waste of time, and one of the reasons that we
23 have a recusal, you know, we're looking at the bad guys
24 now that are using recusal as a weapon to get a
25 continuance, delay the trial, and so forth. A lot of

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1 the recusal stuff is for the protection of the system
2 and the way the public perceives the judges. That part
3 of 18b which sets out the grounds of recusal that was
4 copied from 28 U.S.C. 455 that says a judge shall
5 recuse if his or her impartiality may reasonably be
6 questioned or however it reads is for the system, and
7 if we go ahead with the proceedings with the recusal
8 hanging out there, we lose all the benefit of 18b.

9 Under the Federal system 455 has been
10 very strict, and the Federal courts have been very
11 strict in the enforcement of section 455. We haven't
12 had much development of that in our state
13 jurisprudence, but the purpose I understand is for the
14 good of the courts and how the public perceives the
15 whole system. So I have a problem with the dual
16 system, the dual track.

17 CHAIRMAN BABCOCK: So you'd vote for
18 Option No. 1 here, a motion to disqualify may be filed
19 at any time?

20 MR. ORSINGER: No. It's a different
21 issue.

22 MR. EDWARDS: We're talking about a
23 parallel proceeding.

24 CHAIRMAN BABCOCK: Without a parallel
25 proceeding.

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1 MR. EDWARDS: I'm suggesting an
2 accelerated hearing. I'm saying don't let them off the
3 hook on the setting. You know, you get somebody that's
4 a bad apple, and if the judges will work together, the
5 administrative judges and the other judges, you can
6 take care of this that fast. We've seen it in the area
7 of removal. Somebody gets down and you've got a jury
8 getting ready to sit in the box and all of the sudden
9 there is a removal to Federal court filed. We've been
10 able to go to the Federal court and get a remand in 25
11 or 30 minutes. Just take a little break from the
12 trial, go over to the Federal courthouse, and come
13 back.

14 HONORABLE F. SCOTT MCCOWN: Chip?

15 CHAIRMAN BABCOCK: Yes. Yes, sir.

16 HONORABLE F. SCOTT MCCOWN: I want to
17 echo what Bill said for a slightly different reason. I
18 think we need an expedited proceeding rather than a
19 parallel proceeding because I don't want to be a judge
20 who somebody has moved to recuse and while that's
21 pending I'm presiding over the trial. That's very
22 awkward.

23 In addition, you don't want to be a
24 party in a case that I'm presiding over, particularly
25 if you're the nonmoving party. Imagine that they moved

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1 to recuse me, we set up a parallel proceeding. Now I'm
2 presiding. What better way for me to establish my
3 impartiality than to rule against the nonmoving party
4 on some big issues during the pretrial or the voir
5 dire. I think it puts the judge in a very difficult
6 position and potentially skews the litigation.

7 CHAIRMAN BABCOCK: What's the sense of
8 the room about that? Carl.

9 MR. HAMILTON: Well, I don't think we
10 envisioned, at least I didn't, this parallel proceeding
11 that you would have a trial going on at the same time
12 as the recusal hearing because normally the judge that
13 you're trying to recuse wants to be at the recusal
14 hearing, and so it would be -- if you're in trial, you
15 would stop the trial for a day or two, however long it
16 would take to do the recusal hearing.

17 Most of these recusal hearings I think
18 take place prior to trial, prior to some pretrial or
19 some motions that are going to be heard. That's when
20 they get filed. I think there's -- I don't know what
21 the statistics are, but from my personal experience
22 that's when they have all been filed, not during the
23 trial or right just before the trial. They're always
24 during the pretrial proceedings.

25 So I envisioned that the parallel

1 proceeding would be -- would take precedent over the
2 trial if it was in trial. If it wasn't then there's
3 nothing to conflict with it, but I also agree that we
4 need an expedited hearing, but at least down in our
5 district when you file a motion to recuse it goes to
6 the presiding judge. It usually takes him several days
7 to find a judge to hear it.

8 Now, Judge Peebles says he hears most of
9 his. Judge Hester doesn't. He finds a judge to hear
10 the recusal motion. That takes several days and then
11 he usually lets the judge who he's assigned to it set
12 the date for the hearing. So that's another thing we
13 might want to consider is whether we want the presiding
14 judge to set the date and then appoint some judge who
15 can fit into that date.

16 MR. EDWARDS: Well, see, I don't think
17 that the recusal motions that are filed well in advance
18 of trial are the ones that we're here worried about --

19 CHAIRMAN BABCOCK: Right.

20 MR. EDWARDS: -- on this tertiary motion
21 to recuse bit. We're talking about the bad guys that
22 are filing that thing just before the trial gets
23 started because they're not ready or they want a
24 continuance or they just want to delay, is my
25 understanding of what that was all about.

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1 CHAIRMAN BABCOCK: Yeah. That's the
2 harm I perceive we're trying to cure, but Richard.

3 MR. ORSINGER: Well, we didn't have this
4 problem if you had to file it ten days before trial
5 because that gave you ten days to rule on it. When we
6 eliminate the ten days before trial problem because of
7 things that come up that close to trial we've got to do
8 something to stop people from filing these on Friday
9 afternoon before you're supposed to show up and pick a
10 jury on Monday.

11 In some counties like Harris County and
12 others if you miss your Monday setting you're reset for
13 four to six months. In Dallas, too, in the cases that
14 I appear in. So the abuse is really great. For you to
15 say that we've got to rule on it within 72 hours or
16 three business days or whatever, in the courts that I
17 appear in in Houston and Dallas, you've just gotten
18 yourself a reset, and so we've got to do something to
19 stop people from using it as a motion for continuance
20 if we let the ten-day rule go.

21 And the tertiary motions in the statute
22 tells us that on a tertiary motion we're just not going
23 to let you interfere with the court proceeding, but I
24 think that's a good rule anyway, and I'm not too
25 troubled by a parallel proceeding because I would

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1 anticipate that the trial judge would go ahead and
2 impanel a jury on Monday morning and then recess that
3 afternoon like at 2:00 o'clock or after the jury is
4 sworn or whatever and then we will have the
5 administrative district judge either appear or have a
6 judge appear, and we'll go ahead and run the recusal
7 that afternoon. If we can't finish it in one afternoon
8 then maybe we have the jury come in at 11:00 o'clock
9 the next morning, but you keep your trial setting, and
10 if we don't do something to stop people from filing
11 these on the eve of trial and bringing the trial to a
12 halt then I think the ten-day rule we need to
13 re-evaluate.

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: I'm sitting here
16 listening, and where in your draft is the discussion of
17 the parallel proceeding? I can see an interim
18 proceeding in some circumstance that says, for example,
19 "If the motion alleges grounds listed in (b)(1),
20 (b)(2), or (b)(3) the judge may proceed with the case,"
21 so we have circumstances in which the judge may
22 proceed, including if the motion to recuse or
23 disqualify is filed within three days of the date the
24 case is set for trial. When you get down to the
25 hearing, the discussion of a parallel proceeding in the

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1 evening or whatever doesn't appear there, unless I
2 can't see it. Where is it?
3 MR. ORSINGER: We're not dictating that,
4 and we're not forcing judges like Scott McCown to go to
5 trial. If Scott's own ethic is that "I don't feel like
6 I could preside because someone has filed a motion to
7 recuse," Scott can stop what he's doing, but there will
8 be a lot of judges that are going to say, "This motion
9 is meritless and I'm not going to let you blow this
10 setting."
11 HONORABLE SCOTT BRISTER: Well, and it
12 depends on what it's about. You know, if it's, "You're
13 biased against me because I lost a bunch of things in
14 motion in limine" then you're inclined to go ahead. If
15 it's "We just found out that this contract we're
16 fighting about was drafted at your old firm while you
17 were there," then that's a, "Hey, wait a second." So,
18 I mean, it depends.
19 MR. ORSINGER: If you will, Bill, this
20 rule doesn't make you do it in the afternoon or the
21 morning or over the lunch hour. It just says that the
22 trial judge is not disabled from going forward, and it
23 follows logically that if the trial judge does go
24 forward and you still have your recusal hearing to take
25 care of, they're going to happen at the same time or

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1 somehow fit around each other, but we don't purport to
2 force you to do it in a particular way or we don't
3 purport to force the judge to continue.
4 PROFESSOR DORSANEO: The hearing
5 provisions themselves don't read as if some particular
6 speed is required, do they, Scott?
7 HONORABLE SCOTT BRISTER: No. I mean,
8 that would be a discussion when you get to the how fast
9 do you have to set the hearing, how fast does the judge
10 have to rule.
11 MR. ORSINGER: And I think it's a
12 different issue. I don't care if we rule on this thing
13 in 24 or 48 hours.
14 HONORABLE SCOTT BRISTER: Here, here.
15 MR. ORSINGER: But if you miss and you
16 screw up enough of the Monday or Tuesday opening for
17 that week or two weeks that the judge has set aside, in
18 a lot of courts you've bought yourself a six-month
19 continuance.
20 MR. EDWARDS: Well, then the answer is
21 to do change -- do something to make sure you haven't
22 bought yourself a continuance.
23 MR. ORSINGER: Well, in my view allowing
24 the judge to go ahead with the trial removes the
25 incentive to file your Friday afternoon recusals.

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1 MR. EDWARDS: It does that, but it can
2 completely emasculate the thought behind 18b. It can
3 completely -- as far as the perception of the public of
4 what's going on, that procedure can -- if you've got a
5 really bad apple judge that ought have taken himself
6 off and didn't, you have emasculated 18b, and you've
7 got a policy decision to make.
8 MR. ORSINGER: Okay. But if you've got
9 a good motion and it's ruled on on Monday afternoon at
10 5:00 o'clock, all you have to do is pick another jury
11 Tuesday morning if you lose your judge that day, but
12 most of these motions that are meritless, they're not
13 going to be granted.
14 CHAIRMAN BABCOCK: Anne McNamara.
15 MS. McNAMARA: I think the problem we're
16 dealing with is you have got the two situations, the
17 motion that's meritless made at the last minute and the
18 situation Luke was talking about yesterday where you
19 kind of get your intuition and your hunch right before
20 trial that you've got a good motion and a judge that
21 shouldn't proceed, and I would agree with Bill Edwards
22 that forcing someone into the trial when you've got a
23 good motion that just came too late really undermines
24 the integrity of the system, and you know, from a
25 litigant's perspective you really shouldn't have to go

1 to trial in that situation because if you end up with a
2 decision in the trial before you've got the recusal
3 motion decided you've caused all sorts of stuff to
4 happen that the system shouldn't be causing.
5 CHAIRMAN BABCOCK: Yeah, Ralph.
6 MR. DUGGINS: I agree with Anne, and my
7 question is would an effective sanctions rule cover the
8 situation where if the judge had the ability to -- if
9 he concluded the motion was filed in bad faith or just
10 for purposes of delay?
11 MR. ORSINGER: We've got a sanctions
12 rule right now, and I've only been involved in a
13 handful of recusals, but the conversations that we've
14 had at this committee, including the last cycle, were
15 that that doesn't stop it, and I would further ask,
16 just envision in terms of raw numbers how many
17 legitimate motions are we going to discover three days
18 before trial versus how many meritless motions are
19 going to be filed for purposes of continuances.
20 Because if it's a one to nine ratio then maybe that
21 cost that you pay on the valid ones that you file
22 within three days is not that great a cost to our
23 system compared to the cost to the system of Friday
24 afternoon filings on Monday settings.
25 CHAIRMAN BABCOCK: Nina then Alex.

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1 MS. CORTELL: I agree that we're
2 proposing through dual track proceedings a protocol
3 that's way over -- that's just a great overreaction to
4 the problem and disproportionate to it and creates
5 other problems like all the ones we have been talking
6 about. If you want to create a presumption that
7 something is perhaps not proper if brought three days
8 before, then what about strengthening the sanctions for
9 those particular motions? I don't know. You don't
10 want to write the rule that it's presumptively
11 frivolous, but you know, saying something to indicate
12 that those will be under higher scrutiny, but the dual
13 proceeding it seems to me creates more problems than
14 it's worth, and I agree with the sentiment that it
15 undermines the integrity of the whole system.
16 CHAIRMAN BABCOCK: Alex then Judge
17 Brister.
18 PROFESSOR ALBRIGHT: I feel the same way
19 that Nina does. What I'm hearing is that this parallel
20 proceeding is very difficult, and if I recall, that's
21 what we decided X number of years ago that this came
22 up. We decided that that was not a good idea, and I'm
23 wondering how big of a problem is this last-minute
24 recusal motion problem. Is it really something that we
25 should deal with, and again, is it an issue we deal

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1 with in writing the discovery rules? Are we writing
2 rules for bad lawyers or are we writing rules for good
3 lawyers? Are we writing rules for Houston and Dallas
4 or are we writing rules for the entire state? If this
5 is a problem in Houston and Dallas because they can't
6 get another setting, maybe the Houston and Dallas local
7 rules should have a method to take care of it.
8 CHAIRMAN BABCOCK: Judge Brister.
9 HONORABLE SCOTT BRISTER: I haven't kept
10 any statistics on it, maybe David has, but remember,
11 all we're asking, if the opponent has hired the judge's
12 son or anything other than bias, prejudice, et cetera,
13 that, you know, the judge has a financial interest in
14 the case or somebody residing in his household has, but
15 we're just saying, "Please raise that four days before
16 trial." That's all. If it's one of these "The judge
17 isn't being fair to me," you're going to have to raise
18 that -- you're not going to get a continuance for that.
19 And I can tell you statistically 99.9
20 percent of those are denied because they are based on
21 the judge's rulings that I don't like, and they are
22 done solely to continue, and we have a visiting judge
23 coming in every other week because we have that many
24 motions of just this kind, and they back up, and every
25 other week we hire somebody to come in and hear them,

1 hear those for those two weeks, hear those for the next
2 two weeks. And in between, me or Judge Rhea or
3 somebody else, hears the emergency ones. Those aren't
4 the emergency ones. Those are just the run of the mill
5 ones.

6 Now, to me the corrupt judge who is
7 willing to lose his or her bench by lying to you about
8 being on the take from the other side and we're
9 concerned about you being harmed because of that is
10 indeed making a rule for the one in a thousand case.
11 The routine is these are used to stop trials, and if
12 you think sanctions rules cure everything, you haven't
13 been watching Texas jurisprudence for the last 20 years
14 because, for you-all's information, we're elected, and
15 if we go around handing out sanctions people have a way
16 of getting back at us.

17 Second of all, if visiting judges are
18 hearing these, what do they care, as I explained
19 hopefully yesterday. Sanctions are simply not handed
20 out on these. The judges who tend to hear them --
21 Judge Peeples runs a different system because he does
22 them all himself, which I think I'd prefer, but when
23 you have just a one-judge shot coming in hearing a
24 couple of recusal motions their deal is, "Well, I want
25 to be above this fray, and I'm not going to get

1 involved in this fight," so they don't sanction them.
2 And it is a big problem, as Richard
3 said, getting you back on the docket once you're off.
4 We simply have too many cases to do it, and if the one
5 in a thousand case where you're not going to find
6 anything out about -- and your only ground is bias or
7 prejudice, but it's a good one, and you're not going to
8 find anything out about it until within three days of
9 trial, I think to shut down all the trials we would
10 have to shut down for that miniscule case wherever that
11 occurs is way out of balance.

12 CHAIRMAN BABCOCK: Judge Peeples then
13 Bill Dorsaneo.

14 HONORABLE DAVID PEEPLES: I think we
15 need to take on the mind-set reflected in this language
16 that says 10 days and 20 days and bring in somebody
17 every other week, and so what I want to talk about is
18 if we can say this: "If the motion is filed at a time
19 that will delay a hearing the presiding judge or his
20 designee shall immediately review the motion" -- you
21 can get it faxed to you -- "and consult the attorneys."
22 We've got telephone hearings and decide whether to hear
23 the matter immediately or at a later date, and that
24 would get a judge involved in it immediately, and
25 frequently you can just talk it out and rule on it

1 right there, and if it's the kind that Luke was talking
2 about, delay it. You know, at least you've got a judge
3 talking to the lawyers and reading the allegations,
4 making a preliminary decision. There's nothing to
5 this, let's hear it right now and move on; or on the
6 other hand, this justifies a little bit of thought and
7 consideration and further discussion.

8 MR. MEADOWS: The presiding judge or the
9 administrative --

10 HONORABLE DAVID PEEPLES: Yeah. Or
11 somebody named by --

12 CHAIRMAN BABCOCK: Administrative judge.

13 MR. MEADOWS: I'm sorry. That seems to
14 work.

15 HONORABLE DAVID PEEPLES: But I think we
16 need to tell the presiding judges, "You need to get on
17 it right away," and by the way, five of the nine
18 presiding judges are retired. They ought to have the
19 time to do it.

20 CHAIRMAN BABCOCK: Bill.

21 PROFESSOR DORSANEO: Save Judge Peeples'
22 thought for a second, but I think we're -- because of
23 the time that's elapsed since we last talked about this
24 and the draft and not having the recodification draft
25 that our focus is not as clear as it ought to be. If

1 you look in this interim proceedings in (a), first of
2 all, that's what Scott was talking about, you know, I
3 think in general terms.

4 (A) says, if we're talking about certain
5 grounds that are not in this paperwork that you have
6 before you then under those circumstances the judge may
7 proceed with the case. Those grounds in (b)(1),
8 (b)(2), and (b)(3) as stated in the recodification
9 draft, you know, copied from 18a or b are these: the
10 judge's impartiality might reasonably be questioned,
11 that's (b)(1); the judge has a personal bias or
12 prejudice concerning the subject matter or a party,
13 that's (b)(2); and (3), the judge is a material
14 witness, formerly practiced law with a material
15 witness, or is related to a material witness or such
16 witness' spouse by consanguinity or affinity within the
17 third degree. That one is kind of a little bit
18 different from (b)(1) and (b)(2), and I really wonder
19 now after the fact why that one's in the list.

20 HONORABLE SCOTT BRISTER: Because what
21 happens is if you have somebody that wants to stop it,
22 they allege not only that you're biased but that the
23 judge needs to be a witness because the judge witnessed
24 what -- is a witness to my wanting to prove up what all
25 the bad things went on.

1 PROFESSOR DORSANEO: But the idea is in
2 the recodification draft and what we bought into the
3 first time we studied this in detail in 1997 is that if
4 the motion, regardless of when it's filed, just
5 basically says the judge is biased then that doesn't
6 stop the show. It says, you know, the judge may
7 proceed with the case. We didn't have anything in
8 there in the recodification draft about motions filed
9 on the eve of trial also stopping the case as a general
10 proposition. That's a completely different idea.
11 Okay. That's a completely distinct idea, and it may be
12 a bad idea if we're talking about, you know, all of the
13 grounds.

14 The -- let me make sure I'm getting that
15 right. The only grounds the judge may proceed. Okay.
16 Yeah. And I'm not sure we need that, you know, three
17 days thing, especially if we do something on the
18 hearing. Especially if we do something on the hearing
19 as David Peeples was talking about when there's a
20 motion made on the eve of trial, and I guess really it
21 was our committee that kind of added this (c) in as a
22 result of all of the additional material that was given
23 to us to evaluate on the timing issues, and I really
24 wonder whether we care whether it's made on the eve of
25 trial. Our focus before was, well, what is being

1 alleged in this motion? If it's just a freewheeling
2 challenge to the judge's impartiality, you know, maybe
3 that should be treated differently.

4 CHAIRMAN BABCOCK: Well, what kicked
5 this whole thing off was whether or not this parallel
6 proceeding idea was a good idea, and there has been an
7 alternative. I take it Judge Peeples has made an
8 alternative suggestion that we not have a parallel
9 proceeding but we have an expedited proceeding, really
10 expedited, at two levels. The first level being you
11 get on the telephone and the judge will say, "This
12 looks like it has some merit," thereby justifying delay
13 of the trial, or "it doesn't have any merit at all and
14 I'm either going to not delay the trial or deny it
15 outright." Isn't that where we are?

16 MR. ORSINGER: Yeah. The subcommittee
17 did make this up because when we did away with the
18 ten-day rule we opened a window for people to file
19 these on the eve of trial.

20 CHAIRMAN BABCOCK: Right.

21 MR. ORSINGER: And so how do you fix
22 that? Do you fix it by requiring an immediate hearing
23 but delay the court proceeding, or do you allow the
24 court proceeding to go forward if you file too close to
25 trial and just do it at lunch or in the evening?

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1 PROFESSOR DORSANEO: The idea was,
2 though, that when they file them on the eve of trial
3 they will be the (b)(1), (b)(2), and (b)(3) ones. They
4 will just say the judge has no integrity. They won't
5 say that the judge or the judge's spouse is related by
6 consanguinity or affinity within the third degree
7 because they won't have the courage to make that kind
8 of a flat false statement in the motion to recuse, and
9 that's the idea. That's the philosophy behind our
10 prior work product.

11 HONORABLE F. SCOTT MCCOWN: But I think
12 that the problem with trying to look at the categories
13 is twofold. No. 1, many of these motions are brought
14 by either pro se litigants or very marginal lawyers
15 who, in fact, do do exactly what Bill said they won't
16 do, which is lie under oath.

17 No. 2, you can have all kinds of
18 categorization problems. Well, which category does
19 this long rambling motion alleging many things fit
20 into, and you're asking the judge whom the party is
21 moving to recuse to make the categorization decision.
22 The simple way to do this is for our Supreme Court to
23 simply task the presiding judges with this expedited
24 proceeding by requiring it in the rules, which solves
25 all these problems.

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1 One last thing to point out about
2 sanctions. I think I'm just naturally more high and
3 mighty than my colleague, Judge Brister, because the
4 problem with sanctions is not that some of our judges
5 are elected and won't do it for that reason and some of
6 our judges visit and won't do it for that reason. The
7 problem with sanctions is twofold. Again, most of
8 these litigants are either pro se and marginal lawyers,
9 and it doesn't matter what the sanction order is it's
10 not ever going to be collectible; and No. 2, when you
11 are hearing a recusal motion somebody has alleged that
12 the system is corrupt, and it's just a natural tendency
13 if you're part of the system not to want to respond by
14 saying, "No, we're not corrupt, and for saying we were
15 corrupt you have to pay \$200,000." There is a look bad
16 to that that you don't want to do. You don't want to
17 punish in that kind of way, and so I don't think we can
18 look to sanctions. We just need a very simple, fast
19 procedure.

20 CHAIRMAN BABCOCK: What about taking a
21 little straw vote here real quick and see -- yeah,
22 Judge Medina.

23 HONORABLE SAMUEL MEDINA: I want to echo
24 something Scott said. It's been my experience as a
25 trial judge that that is exactly what happens. In

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1 reality you get a motion to recuse. Okay. Our
2 regional administrative judge, I call him is who I
3 call, and of course, and I'll say "Hey, I've got this.
4 Please look at this because if it's not valid I don't
5 want to grant a continuance."
6 I mean, it's immediate. They look at it
7 and say something to the effect of, "Well, here it is
8 Friday afternoon. I mean, I'm not adverse. Call them
9 and see if they want to come in on Saturday. We've got
10 a court reporter or let's do it early Monday morning
11 while the jury pool is gathering and let's start then."

12 CHAIRMAN BABCOCK: Yeah.

13 MR. MEADOWS: And we'll have the jury
14 come in at 1:00 or something, and it typically works.

15 CHAIRMAN BABCOCK: Bobby.

16 MR. MEADOWS: I think Bill's done a
17 really good job of keeping us focused on kind of the
18 dangers or the problems with this parallel proceeding,
19 but I thought it was discussed yesterday that if the
20 recusal judge was required to make a decision as to
21 whether or not the trial should go on as the first
22 order of business that that would take care of it, and
23 I was just wondering in light of what Scott and David
24 and others have said about having an immediate hearing,
25 you know, an emergency type hearing and the first order

1 of business with that being a decision about whether or
2 not the trial judge should continue to preside over
3 this parallel -- you know, the main case, if that
4 wouldn't get to it. In other words, you have to take
5 it up quickly, and the recusal judge has to make the
6 determination that based upon the nature of the
7 complaint should the trial judge continue with the
8 trial or shut it down.

9 HONORABLE F. SCOTT MCCOWN: But you
10 don't even have to do that. If you take it up quickly,
11 as Judge Peeples said, nine out of ten can be ruled on
12 and disposed of quickly. On that tenth one then I
13 guess you could make the decision as the recusal judge
14 this is going to require some discovery or this is
15 going to require a full evidentiary hearing. Do I want
16 to stop the original proceeding while we do that or do
17 I want it to go on? You know, my intuition is that if
18 it's serious enough that it's going to take a day and a
19 record and evidence and discovery that you're going to
20 stop the original proceeding, but you could give that
21 authority, but you'd rarely have to ask that question.

22 MR. MEADOWS: But wouldn't it be good --
23 and I'm really asking as much as anything -- to state
24 it in order for the public's appreciation of the
25 scrutiny that's going to be given to this kind of thing

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1 and to protect the integrity of the impartiality of our
2 judicial? In other words, somebody else is going to be
3 making a decision about whether -- I mean, the reason
4 for the parallel track, which makes a lot of sense,
5 that is most of the motions are bad, they're used to
6 obtain an continuance, we don't want it. So we don't
7 want to allow that to happen, but at the same time, I
8 mean, I think Luke did a very good job yesterday of
9 emphasizing what's really on Bill's mind, and that is,
10 you know, what about when you've really got a good
11 motion and a bad judge.

12 HONORABLE F. SCOTT MCCOWN: Then you
13 stop the original proceeding.

14 MR. MEADOWS: So maybe we would just say
15 that.

16 CHAIRMAN BABCOCK: Carl then Bill.

17 MR. HAMILTON: Two things. No. 1 is in
18 paragraph three, option two, we're talking about a
19 proceeding where if the motion is not procedurally
20 proper or the grounds are not alleged properly the
21 presiding judge can summarily dispose of it. That may
22 be a partial solution, but the idea that an expedited
23 hearing is going to solve the delay I think is wishful
24 thinking because it won't be long before lawyers wait
25 'til Monday morning to file the motion to recuse, and

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1 you're not going to have a judge that's going to just
2 stop everything and let juries sit around and do
3 nothing until the presiding judge can call a hearing or
4 get another judge to hear it. He's going on with the
5 next case. Some counties like Starr County, for
6 example, they apparently have enough money to pay
7 jurors, and they sure don't want to have a jury sitting
8 around there for even one day that they're not going to
9 be using. So I think it's wishful thinking that any
10 kind of an expedited hearing is going to solve the
11 problem of delaying the trial and putting off whatever
12 the judge had scheduled.

13 CHAIRMAN BABCOCK: Bill.

14 PROFESSOR DORSANEO: You know, as I see
15 it, and we're talking about a variety of things that
16 relate to different sections. We've got, you know, as
17 a first and, perhaps, primary issue as to whether 4(c)
18 is an appropriate way to handle this problem either by
19 itself or in connection with some revision of the
20 hearing rule. I think that, you know, required maybe
21 not separate discussion but, you know, separate vote.
22 You know, should we have a rule that says that the
23 judge shall or may proceed in the case if the motion to
24 recuse is filed on the eve of trial, whatever, you
25 know, whatever that's defined as being.

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1 4(a) just takes a completely different
2 approach, and what Scott McCown said about these
3 motions made a good deal of sense to me, that sometimes
4 you're not going to be able to tell, you know, whether
5 it's just restricted to (b)(1), (b)(2), and (b)(3), but
6 I'm inclined to think that in many cases or, you know,
7 a significant number of cases you may well be able to
8 tell. And anyway, this came from Judge Brister's own
9 experience, which would certainly be, you know, much
10 better of a guide than anything that I could look to in
11 my experience, never having been a judge, but still in
12 all, the (b)(1) -- the 4(a) approach, the 4(a) approach
13 is a distinct issue. Maybe that's not a good solution
14 either. Maybe that requires, you know, a separate
15 consideration.

16 And the third thing is the rewrite of
17 the hearing provisions, and as I said, it doesn't say
18 anything about an expedited or a parallel proceeding
19 now. I mean, it just says that the hearing is supposed
20 to be promptly and that there's a 10-day requirement
21 and then there's a 20-day requirement after that. And,
22 you know, I see those as the items that require perhaps
23 specific discussion and then perhaps a vote one by one.
24 MR. HAMILTON: This is hearing on
25 recusal.

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1 PROFESSOR DORSANEO: Uh-huh.
2 MR. HAMILTON: This is your hearing on
3 the parallel proceeding. The judge just goes on. This
4 is only the hearing on the recusal.
5 PROFESSOR DORSANEO: Well, I know, but
6 that's where the parallel would be.
7 MR. HAMILTON: Yeah, and then this is
8 the parallel proceeding. I mean, you're saying we need
9 a provision to describe what happens in the parallel
10 proceeding?
11 PROFESSOR DORSANEO: Well, isn't the
12 hearing part -- that's where the parallel proceeding
13 would be, right?
14 MR. HAMILTON: No. Well, the hearing
15 part is the hearing on the motion to recuse.
16 PROFESSOR DORSANEO: Right.
17 MR. HAMILTON: The parallel proceeding
18 is paragraph 4.
19 PROFESSOR DORSANEO: But all paragraph 4
20 says is you proceed with the case.
21 MR. HAMILTON: Right. That's what you
22 do.
23 PROFESSOR DORSANEO: And you proceed
24 with the case, you know, until you get the results of
25 this hearing.

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1 MR. HAMILTON: Correct.
2 PROFESSOR DORSANEO: And that's what
3 Bill doesn't like.
4 CHAIRMAN BABCOCK: Right. That's where
5 we are. Some people don't like it, and some people do,
6 and I think we ought to get a sense of the whole
7 committee right now who's winning this fight.
8 MR. ORSINGER: And also Bobby has thrown
9 out another suggestion, which is that maybe the recusal
10 judge should be given the discretion as to whether the
11 trial judge can go forward or not, pending resolution
12 of the recusal motion. That's an option that we
13 haven't written.
14 PROFESSOR DORSANEO: Well, that would be
15 something -- you know, I'm reading the recusal judge's
16 role in hearing. That's where it's talked about, in
17 the hearing. You get the referral, but you don't get
18 the recusal judge really -- and the referral is really
19 not referral so much.
20 HONORABLE SCOTT BRISTER: But isn't that
21 assuming that presiding judges are available 24/7? Is
22 that the case?
23 PROFESSOR DORSANEO: They might be
24 available in some regions but not in others.
25 HONORABLE DAVID PEEPLES: Chip?

1 CHAIRMAN BABCOCK: Yeah.
2 HONORABLE DAVID PEEPLES: I'm
3 persuaded -- you know, Carl made the point that, you
4 know, we can't let people do these on Monday morning.
5 CHAIRMAN BABCOCK: Right.
6 HONORABLE DAVID PEEPLES: And what I
7 argued for a few minutes ago would not eliminate that,
8 and so I'm kind of thinking I don't like the idea of
9 parallel proceedings, but I think at some point these
10 come so late that the judge ought to be able to ignore
11 them and move on and then get it in the pipeline for
12 the presiding judge to look at it, and maybe if it's
13 the kind that Luke was talking about, maybe have to
14 stop the proceeding, but the general rule ought to be
15 that at some point, and certainly Monday morning and
16 maybe three days before trial, it could be ignored.
17 HONORABLE SCOTT BRISTER: And what Luke
18 was arguing against was having to do it within ten
19 days --
20 HONORABLE DAVID PEEPLES: Yes.
21 HONORABLE SCOTT BRISTER: -- of when you
22 might have learned. He didn't file his motion three
23 days before trial.
24 CHAIRMAN BABCOCK: Right.
25 HONORABLE SCOTT BRISTER: I mean, my

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1 view is what's your harm if you have to go ahead? You
2 have a good motion. You have to go ahead but because
3 you filed it very late you have to go ahead. It's
4 good, you win. You know, are you faultless when you
5 filed it the morning of trial, you know, that you
6 really didn't learn about this until the morning of
7 trial? That was the earliest you could file it and so
8 you had to pick a jury that then is let go and we pick
9 another jury. I don't -- that was not the case Luke
10 was arguing.
11 MS. McNAMARA: But it could have been.
12 I mean, you're right it wasn't the case he was arguing,
13 but had he gotten the evidence --
14 HONORABLE SCOTT BRISTER: We've got
15 discovery cutoff periods before trial. How come you've
16 just learned about this two days before trial?
17 MS. GARCIA: You didn't learn about it
18 through discovery.
19 MS. McNAMARA: Luke's example hadn't
20 learned about the travel and the expense and all of
21 that close into trial, which you're right, he learned
22 about it sooner. If that had happened, proceeding to
23 an outcome in the trial could be very harmful because,
24 I mean, I don't have a problem so much with the
25 parallel proceeding if you can get to the result of the

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1 parallel proceeding before the jury comes back,
2 although you've got some waste and some expense and all
3 this other stuff. The risk is that you actually get a
4 verdict and then the parallel proceeding is still
5 unresolved. The verdict creates a dynamic of its own,
6 and it doesn't do you a lot of good to later learn that
7 the judge should have been recused.
8 HONORABLE SCOTT BRISTER: I don't
9 disagree that they need to be decided fast.
10 CHAIRMAN BABCOCK: Representative
11 Dunnam.
12 HONORABLE JIM DUNNAM: Just a question.
13 What does this do if I show up at voir dire and the
14 other guy has hired the judge's cousin as their local
15 counsel? Am I going to leave it up to that judge to
16 decide whether or not we proceed? And his comments
17 yesterday that judge he was dealing with, if he was
18 willing to lie about this party, well, he's just the
19 kind of judge that's going to say, "Let's go on with
20 this proceeding," and so I don't know if this deals
21 with that or not.
22 CHAIRMAN BABCOCK: Yeah. I had
23 thought --
24 HONORABLE JIM DUNNAM: That's all I can
25 foresee of, is something happening at the end is really

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1 when the other side shows up with the judge's brother
2 to help select a jury.

3 CHAIRMAN BABCOCK: I had thought that we
4 probably ought to consider writing into the rule when
5 events arise or when the facts are created within the
6 time period like that that then you can raise it at
7 that time. There's the situation you're talking about.
8 If the facts are created within whatever window we
9 create then all bets are off and you can still raise
10 that. Yeah, Bill.

11 PROFESSOR DORSANEO: What that suggests
12 is perhaps taking the concepts that are in 4(a) and
13 4(c) and marrying them to each other, such that if it's
14 a motion within three days and it's just because of
15 bias or impartiality --

16 HONORABLE SCOTT BRISTER: Bias and
17 impartiality is not something that usually happens
18 within three days of trial. I'll grant you that hiring
19 the son and that kind of stuff might or buying the
20 wrong stock or taking a trip, but, you know, the ones
21 we're talking about are the judge is unfair, and the
22 groundless ones are usually based on what just -- you
23 know, what happened in your rulings.

24 You know, let's be clear on this. I
25 mean, you all know, many of you are appellate lawyers,

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1 do appellate work, that your remedy for bad rulings is
2 to appeal. But a lot of people don't know that. They
3 don't do appeal. They think their remedy for bad
4 rulings is to go to another judge. As the
5 administrative judge in Harris County civil courts I
6 get these motions all the time, people wanting me to
7 straighten out my colleagues. I can't do that. They
8 won't let me.

9 HONORABLE JIM DUNNAM: I'm in favor of a
10 Harris County local rule on this issue.

11 HONORABLE SCOTT BRISTER: What's that?

12 HONORABLE JIM DUNNAM: I'm in favor of a
13 Harris County local rule on this issue.

14 HONORABLE SCOTT BRISTER: Well, you
15 know, I don't know whether if this never happens in
16 Harris County. That's not -- our lawyers tend to
17 travel and they're -- if they do it to me, they're
18 going to do it to you.

19 CHAIRMAN BABCOCK: Judge Schneider.

20 HONORABLE MICHAEL SCHNEIDER: Pardon?

21 MR. ORSINGER: That was Bill.

22 CHAIRMAN BABCOCK: Oh, Bill. Sorry.

23 PROFESSOR DORSANEO: I want to make
24 myself clear. What I was suggesting is if we could say
25 something like if the motion alleges only grounds

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1 listed in (b)(1), (b)(2), and (b)(3) and is made within
2 three days and that would keep your hypothetical out of
3 there where there is a more specific problem
4 identified, wouldn't it?

5 MR. MEADOWS: You know, using these
6 examples concerns me because showing up with the
7 judge's brother seems to me one kind of problem and,
8 yes, it needs to be dealt with, but I've been in a
9 situation where discovery was closed, I'm in trial, I
10 get an anonymous phone call about the judge and his
11 relationship with the other side, and I certainly would
12 have been very troubled if we had been precluded from
13 raising our recusal motion because we're past, you
14 know, three days into trial.

15 HONORABLE SCOTT BRISTER: You're not
16 precluded. You're absolutely not precluded.

17 MR. MEADOWS: What?

18 HONORABLE SCOTT BRISTER: You're not
19 precluded at all. You may raise it at any time. It's
20 just whether you can stop everything that's going on,
21 and, again, you know, I hate to bring the public into
22 this, but, you know, we have big problems with a lot of
23 judges who -- I've got letters from people who the
24 judge made them stand out in the hall for four hours,
25 and the bailiff told them not to move their right

1 shoulder off the wall.

2 The jurors are going to be sitting there
3 out in the hall reading for hours, and this is a waste
4 of their time, and I know how much it costs us for our
5 experts and our this, that, and the other, but how much
6 does it cost to put a bunch of people who have real
7 lives and jobs and just tell them to sit around, you
8 know, for however many days in the jury room while we
9 fool around with our recusal motions, with our legal
10 rulings. That's like doing a motion in limine for two
11 days while the jury sits out in the hall. That is
12 abusing the public for our convenience and we ought not
13 to do that.

14 CHAIRMAN BABCOCK: Carlyle has been
15 waiting to say something.

16 MR. CHAPMAN: I just think that we
17 should not lose sight of really what's important in
18 this discussion. It seems to me that if we have the
19 happenstance of a judge that needs to be recused
20 because of all the legitimate reasons that have been
21 given voice over the last two days then we really ought
22 to stop things, and that should happen. We shouldn't
23 lose sight of that.

24 I agree that we have to do something
25 about people who are seeking delay. It seems to me

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1 that what should happen is that there ought to be an
2 opportunity to bring these motions at any time,
3 including the day of trial, but we ought to exclude
4 stopping the trial if (b)(1), (b)(2), or (b)(3) motions
5 is the basis for the motion so that if you err on the
6 side of protecting the public and legitimizing the
7 system, but you exclude from your allowance those
8 motions that are going to be based on things that are
9 not going to be meritorious at any rate in all
10 likelihood. It's just a matter of whether or not the
11 judge can be fair, and those things are not likely
12 going to be a basis to stop the trial. So I would say
13 that what we should do is allow the motion to be filed
14 at any time but eliminate those which are going to be
15 based on prejudice as a basis for stopping the trial.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: Chip, it's not only the
18 situation that somebody comes up that the judge is
19 biased, but assume you're getting ready to go to trial
20 and a friend of yours faxes something, tells you this
21 judge made a statement. You know, "The timber company
22 sued my mother," you know, and we've had -- and shows
23 really bias against timber companies, and you're
24 representing a timber company. So it's not always
25 going to be just, you know, the thing that's fruitless

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1 or groundless, and it's going to be difficult to deal
2 with all of them.

3 I think we're going to have to just
4 divide it into you've got two different things. You've
5 got the case. You don't want it continued. You've got
6 this other proceeding, and you have to time them
7 together somehow. I haven't heard a solution, and I
8 certainly don't have one, and you might even want to
9 write the rule "Here's the case and here's what goes on
10 in the case. Here's the proceeding to disqualify and
11 here's when you have to file it and what goes on
12 there," and you have to do it maybe like Bill says,
13 they can't go on together. You might have to stop one
14 at a certain time so they're not, but I can't draw the
15 language.

16 CHAIRMAN BABCOCK: Well, it seems to me
17 that we ought to give Carl and Richard some direction
18 on this parallel proceeding issue. It seems to me we
19 can vote that up or down right now. So I propose
20 taking a vote on whether we want to keep the concept of
21 the parallel proceeding in the rules or not.

22 MR. MEADOWS: Well, but how, Chip? I
23 mean, with the idea that the recusal judge can shut
24 down the proceedings or just that there's --

25 CHAIRMAN BABCOCK: Yeah. What you're

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1 saying is what's the alternative.
 2 MR. MEADOWS: No. I'm just saying that
 3 there is a parallel proceeding, there's a parallel
 4 proceeding.
 5 HONORABLE SAMUEL MEDINA: Yeah. I'm not
 6 sure what we're deciding.
 7 MR. HAMILTON: I think the question is
 8 do we have a parallel proceeding or does the judge
 9 automatically have to stop once the recusal is filed?
 10 MR. ORSINGER: Yeah, but Bobby's saying
 11 there's a third choice, and that is we can let the
 12 presiding administrative district judge or the recusal
 13 judge decide whether the trial goes on or not, and
 14 that's a legitimate choice.
 15 CHAIRMAN BABCOCK: Yeah. That's the
 16 Peeples proposal.
 17 MR. ORSINGER: Was that David Peeples'
 18 proposal?
 19 HONORABLE SCOTT BRISTER: So you would
 20 stop it until the presiding judge says "Go forward."
 21 HONORABLE SAMUEL MEDINA: The recusal
 22 judge.
 23 MS. McNAMARA: I think you go forward --
 24 MR. MEADOWS: You go forward until he
 25 says "stop it."

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1 CHAIRMAN BABCOCK: Yeah.
 2 MR. MEADOWS: You have a parallel
 3 proceeding, anticipating that it's just a meritless
 4 case, but the judge comes in, finds out that -- I mean,
 5 the recusal judge finds out that the judge really did
 6 take a trip with the lawyer, really did make a
 7 statement at a party.
 8 HONORABLE SCOTT BRISTER: I'd feel
 9 better about that.
 10 MR. MEADOWS: And he says, "No, this is
 11 just too threatening to the judiciary as a whole.
 12 Stop."
 13 HONORABLE SCOTT BRISTER: Smells bad.
 14 MR. MEADOWS: Right, smells bad.
 15 CHAIRMAN BABCOCK: Bill, how do you feel
 16 about that? How do you feel about that?
 17 MR. EDWARDS: Well, I think that we're
 18 dealing with a basic policy decision of balancing the
 19 need of the judiciary to not have a bad image in the
 20 eyes of the public or the litigants or anybody else on
 21 one hand versus a problem of people that are abusing
 22 the system on the other hand, and the bottom line is if
 23 you've got people that are abusing the system, if they
 24 don't do it this way they will figure out some other
 25 way, and what you've got to do is figure out a way to

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1 stop them from abusing the system as opposed to
 2 changing the system to fit what they're doing, and I'm
 3 not sure I have a solution to it, but the basic policy
 4 is how do we as lawyers or as the system, as judges,
 5 how do we look on one hand versus the technical matter
 6 of keeping things rolling on the other hand.
 7 CHAIRMAN BABCOCK: Well, the rule as
 8 drafted has got sort of a wide open parallel
 9 proceeding, right? I mean, the trial is just going
 10 forward and --
 11 MR. ORSINGER: It can be parallel if the
 12 trial judges chooses to go forward.
 13 CHAIRMAN BABCOCK: Yeah. Right. The
 14 trial judge always has the discretion not to go
 15 forward.
 16 HONORABLE SAMUEL MEDINA: Yeah, but the
 17 third option seems to be saying, "Look, Judge, you're
 18 the trial judge. Let's not put that pressure on you
 19 either way. Let somebody else make a decision whether
 20 that goes on or not," if I'm not mistaken. I think
 21 that's what they're saying. I don't have much of a
 22 problem with that.
 23 CHAIRMAN BABCOCK: Judge Schneider.
 24 HONORABLE MICHAEL SCHNEIDER: Shouldn't
 25 we be voting on whether or not you should stop the

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1 proceeding or not first and then go to the remedy,
 2 whether or not it goes to the next level, whether or
 3 not it should be parallel, or whether it goes to
 4 another judge?
 5 CHAIRMAN BABCOCK: Yeah. That's
 6 probably right. That's probably right. That's
 7 probably what we ought to be voting on. Do you agree,
 8 Bill? We ought to be voting on whether you stop the
 9 proceeding and then once we get by that we'll see
 10 how --
 11 MR. EDWARDS: There is a -- there are
 12 things that lawyers know about, and they shouldn't be
 13 rewarded for delay in bringing them to the attention of
 14 the court. You know, you can go through a million
 15 different things. I may know something about this
 16 judge that you don't, and I'm not required to tell you
 17 particularly, under the rules at any rate, and then you
 18 find out about something that I knew for a month and
 19 you file it, but I get to go ahead with my trial.
 20 On the other hand, if somebody files a
 21 recusal motion in a case that I'm involved in, the
 22 other side, I don't know whether I want to go to trial
 23 with that recusal motion hanging over my head because
 24 if it's decided that the judge should have recused then
 25 no matter what I did I've lost, and my trial strategy

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1 is gone. Everything that I've planned in the case is
 2 gone. My jury is gone, and everything else, so there's
 3 all of those things floating around. It seems to me
 4 that there's got to be a cutoff on when you can file
 5 motions that are not disqualifications but simply
 6 recusals for things that you know about.
 7 CHAIRMAN BABCOCK: Okay.
 8 MR. EDWARDS: But then you have the
 9 problem of what happens after that.
 10 MR. ORSINGER: Well, and you also have
 11 the problem that Luke raised, is that it puts you on
 12 trial because they are going to put you on the witness
 13 stand and cross-examine you about when you knew X and
 14 when you knew Y and when you knew Z.
 15 MR. EDWARDS: Well, that happens all the
 16 time in different areas. "When did you mail the
 17 response? Did you get a green card back? Is that date
 18 that's on the green card one that was written on it --
 19 the real date or one that was written on it after the
 20 fact? Was the -- you know, that's nothing -- there's
 21 nothing new about that.
 22 CHAIRMAN BABCOCK: Well, but this is all
 23 a subset of the issue of whether we ought to stop the
 24 trial or not.
 25 HONORABLE DAVID PEEPLES: Well, Chip.

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1 CHAIRMAN BABCOCK: Yeah, David.
 2 HONORABLE DAVID PEEPLES: Okay. If we
 3 figure -- if we calculate timeliness from when the
 4 lawyer knew or should have known something, that does
 5 put the lawyer at risk for being a witness and so
 6 forth, but if we calculate it from the trial date or
 7 the hearing date --
 8 CHAIRMAN BABCOCK: Right.
 9 HONORABLE DAVID PEEPLES: -- that
 10 eliminates that problem, doesn't it?
 11 CHAIRMAN BABCOCK: That's right. Yeah.
 12 I thought we got beyond that point.
 13 HONORABLE DAVID PEEPLES: Yeah. So
 14 that's no longer an issue.
 15 HONORABLE MICHAEL SCHNEIDER: But how do
 16 you know what day's the trial date until you have the
 17 trial?
 18 CHAIRMAN BABCOCK: The day of the
 19 setting.
 20 MS. GARCIA: Setting.
 21 HONORABLE MICHAEL SCHNEIDER: Trial
 22 setting?
 23 CHAIRMAN BABCOCK: Yeah. Joe.
 24 MR. LATTING: Point of order. How do I
 25 vote for the Meadows proposal? What should I do?

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1 CHAIRMAN BABCOCK: The Meadows proposal?
 2 MR. YELENOSKY: Don't we have three
 3 things we can vote on? Stops automatically, it goes
 4 forward automatically, or there's some discretion,
 5 which people seem to think ought to reside with the
 6 recusal judge. Those seem to be the three things that
 7 people are proposing.
 8 MS. McNAMARA: There are actually four
 9 because Buddy proposed a fourth alternative, which is
 10 to put constraints on the parallel proceeding or to
 11 synchronize it with the trial.
 12 MR. LOW: Yeah. There could be a
 13 certain time when you might have, but you'd make that
 14 very few.
 15 MR. YELENOSKY: That's the third
 16 proposal.
 17 HONORABLE DAVID PEEPLES: I think the
 18 term "parallel proceeding" is very misleading.
 19 CHAIRMAN BABCOCK: Well, it's Richard's.
 20 HONORABLE DAVID PEEPLES: Yeah. It
 21 connotes that the trial's going forward and parallel to
 22 that there's a recusal proceeding, but in reality if
 23 the trial's going forward, the recusal motion is
 24 sitting there until somebody does something with it.
 25 So there's not two proceedings going on at the same

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1 time. There's a pending motion which did not stop the
 2 trial, and I think "parallel proceeding" is misleading
 3 terminology.
 4 CHAIRMAN BABCOCK: So there. What do
 5 you want to call it?
 6 HONORABLE DAVID PEEPLES: Well, the
 7 issue to me is whether -- you know, it seems to me that
 8 at some point it comes so late and so close to the
 9 trial or hearing and it would delay the trial or
 10 hearing that it shouldn't stop the trial or hearing.
 11 You know, and otherwise I think we will get a lot of
 12 last minute ones, and we cannot run a system that way.
 13 So I think my view is at some point -- and I don't know
 14 if it's the day of trial, three days before, or
 15 whatever, but at some point it's just so late and so
 16 close to the hearing date that it should not stop the
 17 hearing unless the recusal judge on a preliminary
 18 review says, "This justifies stopping that hearing."
 19 CHAIRMAN BABCOCK: I don't want to throw
 20 another complication, but isn't there a difference
 21 between a trial where you have jurors sitting out in
 22 the hallway and a hearing? I mean, it depends on what
 23 kind of hearing it is.
 24 HONORABLE DAVID PEEPLES: There's more
 25 at stake when you have got a jury panel waiting, but

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1 there are other hearings that are very important and
 2 shouldn't be delayed.
 3 MR. LATTING: Wouldn't that be taken
 4 care of by the Meadows proposal in any event? If you
 5 have something filed within three days of trial,
 6 doesn't the trial proceed presumably unless the
 7 presiding judge says, "Stop this trial," and it allows
 8 him to make that call or her to make that call? What's
 9 wrong with doing that?
 10 PROFESSOR DORSANEO: How's that going to
 11 work? I mean, is it going to work, and who's the --
 12 upon what basis is the presiding judge going to make
 13 that determination? Conversation with the trial judge?
 14 CHAIRMAN BABCOCK: Yeah. Bobby, you
 15 better state your proposal again.
 16 MR. MEADOWS: Well, I'm just trying to
 17 cobble together some kind of solution to this whole
 18 thing about whether you shut it down or you let it go
 19 forward, and it just strikes me that if we're going to
 20 have -- there's going to be somebody involved other
 21 than the trial judge obviously because it's going to be
 22 referred to the presiding judge or to a recusal judge
 23 for a hearing, and I do think it's certainly
 24 conceivable that you're going to end up with a parallel
 25 proceeding because you've got the motion filed.

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1 Something has got to happen to it. It
 2 can't just sit there, and if you're in trial or it's
 3 filed in connection with an important hearing, if it's
 4 filed within a certain time period with that, I mean,
 5 obviously it shouldn't stop it unless someone such as
 6 the presiding judge or the recusal judge says, "This
 7 doesn't smell right. This is wrong. We're going to
 8 stop it, resolve it," and so, I mean, that's the way I
 9 see it working. You've got this -- you're handling the
 10 recusal motion in the context of whatever is going on.
 11 If you filed it too late, whatever it is, the hearing
 12 or the trial goes on unless someone else says, "Stop.
 13 We're going to resolve this motion because it looks
 14 like there's something to it, and we're not going to do
 15 anything else. No other orders are going to be signed.
 16 The trial is going to be stayed until we resolve it."
 17 CHAIRMAN BABCOCK: Judge Medina.
 18 MR. MEADOWS: Assuming you do that, say
 19 Houston, Dallas, is there any way that you can write
 20 local rules, that we can write local rules, assuming
 21 that's the general concept that you have where you
 22 have -- much like in the parental notification cases
 23 you have duty judges, you have -- we're trying to get
 24 to it with speed. Can you conceive a way of us writing
 25 local rules pending that suggestion that would help

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1 solve this and expedite hearings?
 2 HONORABLE DAVID PEEPLES: Don't look at
 3 me. I think certainly a big county like Dallas or
 4 Harris could say if the presiding judge can't do this
 5 immediately the local administrative judge or civil,
 6 criminal, or visiting judge X who's there that week
 7 shall immediately look into it.
 8 HONORABLE SAMUEL MEDINA: The question
 9 being how do you do it, I guess, Bill, is can we write
 10 a local rule that takes care of that and that expedites
 11 it? I think we can.
 12 MR. MEADOWS: I don't really understand
 13 why it has a local flavor. If you've got a motion
 14 that's good or bad, it needs to be dealt with.
 15 HONORABLE SAMUEL MEDINA: Logistically
 16 the regional administrative judge is off doing a trial
 17 or helping out or he's sick or something else. The
 18 local administrative judge is in trial him or herself.
 19 Who does it?
 20 MR. MEADOWS: Who does it now?
 21 HONORABLE SAMUEL MEDINA: Pardon?
 22 MR. MEADOWS: Who does it now?
 23 HONORABLE SAMUEL MEDINA: Well,
 24 typically it's --
 25 HONORABLE DAVID PEEPLES: It varies all

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1 over the state.
 2 HONORABLE SCOTT BRISTER: Sometimes they
 3 sit around. Everything just stops, in my example for
 4 two months while we waited for the visiting judge to
 5 have a convenient date to come in and do the hearing.
 6 MR. LOW: Bobby, is your proposal that
 7 we just start out saying you can file this motion at
 8 any time. All right. Then that invokes two different
 9 things, a hearing or a trial over here and a motion to
 10 recuse or disqualify over here. Then what happens here
 11 in the trial or here? If it's within a certain time
 12 then it goes on unless the presiding judge says X, it
 13 was within so many days. Then what happens with the
 14 motion to disqualify? Then you can put a speedy
 15 disposition there. I mean, there is one proceeding,
 16 one trial with a parallel track, but is your proposal
 17 that within certain days the administrative judge can
 18 stop this trial?
 19 MR. MEADOWS: Let me say what I think it
 20 is because it's really not just my idea. It's been
 21 discussed in this room the last two days. As I
 22 understand it, you file a recusal motion now, it shuts
 23 down everything unless it tiers off, unless it's filed
 24 within three days of a hearing or trial, right?
 25 MR. LOW: Right. Right.

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1 MR. MEADOWS: Ten days or whatever it
 2 is. In which event that proceeding goes forward.
 3 MR. LOW: Right.
 4 MR. MEADOWS: I'm saying that that could
 5 stay the same, but if you file the motion within the
 6 cutoff period then the hearing or the trial will go
 7 forward unless the recusal judge or whomever we give
 8 this authority says "Stop," because this motion is not
 9 just run of the mill meritless motion. Something looks
 10 wrong here. We need to resolve it. We can't
 11 compromise the integrity of what's going on in the
 12 courthouse, whether it's a hearing or a trial with --
 13 you know, when this is hanging over its head, so we're
 14 going to finish it, and so that's the way I'm seeing it
 15 work, is that someone could look at it and say, "No,
 16 we're not shutting this trial down for this motion,"
 17 but someone has looked at it, someone has gotten a
 18 sense of it, taken a smell of it, and decided whether
 19 the proceeding would go on or be stopped.
 20 MR. LOW: I understand then. You just
 21 stated it better than I did.
 22 CHAIRMAN BABCOCK: Justice Duncan.
 23 HONORABLE SARAH DUNCAN: It seems like,
 24 two observations, one, the potential circumstances are
 25 unlimited. I mean, everybody has raised some things

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1 that could easily happen that would be a very good
 2 ground for a motion, and we all recognize that there
 3 could conceivably be a problem with frivolous motions,
 4 and what we're really talking about kind of
 5 fundamentally is a mandamus proceeding in the presiding
 6 judge's chambers.
 7 There's going to be -- I mean, we're not
 8 going to call it that, but there's going to be an
 9 automatic motion to stay, and the presiding judge is
 10 going to take a look at the motion or the petition
 11 analogy and make a gut determination of whether to
 12 grant the motion to stay, and you know, that's really
 13 not hard. Most of them pretty easily fall into one or
 14 the other camp, and it's not that difficult. So to me
 15 to have a presumption within -- if you file your motion
 16 within three days of trial there's not a presumption I
 17 think that it's frivolous, but there's a presumption
 18 that your motion to stay is going to be denied by the
 19 presiding administrative judge or whomever but that in
 20 any circumstances that is a rebuttable presumption and
 21 it would be decided by someone other than the judge
 22 trying the case.
 23 CHAIRMAN BABCOCK: Yeah, Steve.
 24 MR. YELENOSKY: Well, I just -- I agree
 25 with that except for I don't know if I would say it's a

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1 presumption. I mean, the standard may be high, but I
 2 don't know if it's a presumption.
 3 HONORABLE SARAH DUNCAN: Yeah, I don't
 4 mean a formal presumption.
 5 MR. YELENOSKY: Like a T.R.O. or
 6 something. I mean, because the example of you brought
 7 in the lawyer who's the judge's brother, you don't want
 8 to say the presumption is that's going to be denied.
 9 You'd want to say, you know, that that probably will be
 10 stayed, and the reason is that it meets like a T.R.O.
 11 standard, a likelihood of success on the merits once
 12 it's heard.
 13 CHAIRMAN BABCOCK: Judge McCown.
 14 HONORABLE SARAH DUNCAN: And to clarify,
 15 I don't mean a presumption in any individual case.
 16 This would be a systemic presumption because that's the
 17 way the rule would be written.
 18 CHAIRMAN BABCOCK: All right. Judge
 19 McCown.
 20 HONORABLE F. SCOTT MCCOWN: I move we
 21 recommit this to the subcommittee without further
 22 discussion or vote and let them come to us with
 23 something in writing we can look at.
 24 MR. ORSINGER: Well, I would like to
 25 have some direction as to which of the three

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1 alternatives.
 2 MR. LATTING: I'd rather get a sense of
 3 the committee on the three alternatives and still want
 4 to know how to vote for Meadows.
 5 CHAIRMAN BABCOCK: Okay. Well, we could
 6 just vote for Meadows.
 7 MR. LATTING: Okay.
 8 CHAIRMAN BABCOCK: That would be one way
 9 to do it. Not you personally, Bobby. Don't take this
 10 as a referendum. Anybody who's in favor of the Meadows
 11 proposal raise your hand.
 12 I got 26.
 13 MS. GAGNON: I got 27.
 14 CHAIRMAN BABCOCK: 27 for that. What's
 15 the other proposal? The way it is in this rule?
 16 HONORABLE F. SCOTT MCCOWN: An automatic
 17 stop.
 18 CHAIRMAN BABCOCK: Automatic stop.
 19 Okay. How many -- whoever is in favor of an automatic
 20 stop, stay of proceedings?
 21 MR. CHAPMAN: Automatic stop with
 22 expedited hearing.
 23 MR. EDWARDS: Yeah, I don't know that I
 24 have heard anything that really solves the problem.
 25 You know, if we're dealing with the stuff that's

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1 covered now by 18b, which are things of fairness and
 2 prejudice and so forth, I don't have any problem with
 3 requiring those things to be filed ten days out and a
 4 requirement that they be heard within the ten days. It
 5 stops all this business about losing trial settings, if
 6 ten days is a reasonable time for an administrative
 7 judge to get a recusal judge and have the thing
 8 disposed of. Maybe it's 20 days. Those are things you
 9 ought to be able to deal with, unless the facts arise
 10 during that period. Then we have to deal with that.
 11 I can give you for instances you
 12 wouldn't even believe except that a power company is
 13 getting ready to go to trial, and the judge is, unknown
 14 to anybody, having a fight with the power company over
 15 poles, utility poles on his ranch, and so he decides
 16 the way to solve the problem is burn down the utility
 17 poles, and that happens close to the time of trial.
 18 Now, if I'm representing the power company in that
 19 trial, I don't think I want to go in front of that
 20 judge.
 21 CHAIRMAN BABCOCK: Why not?
 22 MR. EDWARDS: I think maybe he's got
 23 some prejudice against me.
 24 HONORABLE DAVID PEEPLES: This is a true
 25 case he's talking about.

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1 MR. EDWARDS: That's for real.
 2 CHAIRMAN BABCOCK: Okay. Your
 3 subcommittee probably has a sense of this larger
 4 committee, but just for the sake of the record, how
 5 many people want to have an automatic stop when the
 6 motion is filed? Raise your hand.
 7 HONORABLE SAMUEL MEDINA: What is the
 8 question again?
 9 CHAIRMAN BABCOCK: Automatic stop.
 10 HONORABLE DAVID PEEPLES: Is there a
 11 time frame on that, Chip?
 12 CHAIRMAN BABCOCK: No. Just it stops
 13 it.
 14 HONORABLE DAVID PEEPLES: It's the
 15 converse of the Meadows motion, right?
 16 CHAIRMAN BABCOCK: The converse of the
 17 Meadows motion. Right.
 18 HONORABLE SARAH DUNCAN: We are only
 19 talking about motions filed within X days of trial.
 20 CHAIRMAN BABCOCK: Within certain days
 21 of trial. Okay. Judge Schneider and Bill Edwards.
 22 MR. EDWARDS: See, I'm ambivalent when
 23 it comes to something that's filed real close in. I
 24 think you have on these nondisqualification but simply
 25 recusal motions that it makes sense to put a -- you

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1 waive it if you haven't filed it by a particular time.
 2 It isn't even a matter of you get anything. I don't
 3 have any problem with that.
 4 CHAIRMAN BABCOCK: Yeah. Richard, you
 5 and Carl probably have a sense of this committee. I
 6 think that if Bill or Judge Schneider or anybody else
 7 is interested in coming up with an alternative to the
 8 Meadows proposal then they can contact you and get some
 9 language together so we can consider it at our next
 10 meeting. How's that?
 11 MR. ORSINGER: That's fine. I think we
 12 ought to toss out the cutoff date of being three days
 13 versus ten. We used to have a ten-day cutoff date. We
 14 moved it to three. Is everybody happy with three or
 15 are there some people that want to move it back to ten?
 16 MR. EDWARDS: Three makes it awfully
 17 difficult from a pragmatic standpoint to have any hope
 18 of getting the matter disposed of and solve the problem
 19 of using it as a weapon to get a continuance.
 20 HONORABLE SAMUEL MEDINA: Three working
 21 days?
 22 MR. EDWARDS: Even three working days.
 23 HONORABLE SAMUEL MEDINA: I mean, I'm
 24 asking.
 25 MR. EDWARDS: Yeah. I think you -- I

1 HONORABLE SCOTT BRISTER: For the state.
 2 PROFESSOR DORSANEO: And you've
 3 convinced me that having somebody do it who doesn't
 4 want to do it and who wants to take a long -- or who
 5 wants to take a long time doing it and who has no stake
 6 in anything is not a good idea.
 7 HONORABLE F. SCOTT MCCOWN: But that's
 8 just the nature of judging. I mean, you can't write a
 9 rule that says only good judges can hear this motion.
 10 I mean, presiding judges have a whole lot of different
 11 duties. Some of them are active district judges. I
 12 mean, you have to leave them to do their business. If
 13 they pick bad people, there's no solution to that.
 14 HONORABLE DAVID PEEPLES: And another
 15 thing we haven't even talked about is there's a Supreme
 16 Court decision which says when the judge who's assigned
 17 to hear the recusal -- the facts of that case was it
 18 was a former judge, you have a right to object. Just
 19 an absolute right to object, no reason given, which is
 20 just further delay, and I think we need to try to deal
 21 with that at some point. I realize we're taking --
 22 CHAIRMAN BABCOCK: well, Richard's
 23 question was ten days or three. What you're saying is
 24 ten days is preferable. Judge Brister is nodding his
 25 head up and down "yes," so is Judge McCown. All right.

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1 don't know, because I'm not an administrative judge,
 2 what it really takes to get it done if you mandate an
 3 expedited proceeding.
 4 CHAIRMAN BABCOCK: Judge Peeples.
 5 HONORABLE DAVID PEEPLES: Ten days has
 6 worked pretty well, except in those areas where you
 7 don't know who your judge is until sometimes Monday or
 8 Friday and, you know, I think the way that's worked is
 9 everybody has held that, you know, when you didn't find
 10 out until today who your judge was you didn't waive it
 11 by not filing your motion ten days ago.
 12 PROFESSOR DORSANEO: Well, the rule says
 13 that, too.
 14 HONORABLE DAVID PEEPLES: Does it say
 15 that?
 16 PROFESSOR DORSANEO: The current rule
 17 says that, yes. The Rule 18b says that now.
 18 MR. EDWARDS: And that deals with what
 19 I'm saying. The facts that give rise to the recusal
 20 motion occur within the cutoff period, which is if
 21 you've only now got your judge, obviously the facts
 22 have occurred within the cutoff period.
 23 CHAIRMAN BABCOCK: Well, and that's
 24 really Bexar and Travis County, right? Those are the
 25 two counties where you wouldn't know your judge.

1 Let me put it another way. How many people want three
 2 days? Raise your hand. There are no hands raised, so
 3 does that mean that everybody wants ten?
 4 MR. ORSINGER: Not necessarily.
 5 MR. LATTING: Is ten -- ten puts it
 6 back. What about seven, which is -- I don't mean to
 7 complicate things, but there's a reason for that, and
 8 that is that that's within a week of trial, is what
 9 we're talking about, so that if you file something the
 10 week before trial it falls into this category, but when
 11 you start getting ten days out you're just -- is there
 12 a reason for ten days as opposed to --
 13 CHAIRMAN BABCOCK: How do people feel
 14 about seven days?
 15 HONORABLE SCOTT BRISTER: It's been ten
 16 days for 25 years.
 17 MR. LATTING: Okay. Sorry.
 18 MR. EDWARDS: Don't forget the mailbox
 19 rule.
 20 MR. ORSINGER: Well, why don't we just
 21 all go home because all the rules have been in place
 22 for a long time?
 23 HONORABLE DAVID PEEPLES: Two Fridays
 24 before a Monday setting.
 25 CHAIRMAN BABCOCK: what, David?

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1 HONORABLE DAVID PEEPLES: Or it could be
 2 that you show up for trial and there's a visiting judge
 3 there.
 4 CHAIRMAN BABCOCK: Yeah. That's true.
 5 Yeah. Bill.
 6 PROFESSOR DORSANEO: But Bill's point is
 7 a good one. What's really -- you know, to say this
 8 problem is going to be solved if we put it in -- if we
 9 make it somebody else's problem, which is what I
 10 perceive this vote to be, okay, that, okay, we're going
 11 to let the presiding judge handle this and the problem
 12 will go away. That will work fine. Trust me. Is that
 13 going to really work? Does ten days -- you know, is
 14 there enough time to do what needs to be done in the
 15 ten days?
 16 HONORABLE DAVID PEEPLES: I think so.
 17 PROFESSOR DORSANEO: And the other thing
 18 that I'm -- after listening to Judge Brister talk, I'm
 19 kind of skeptical about presiding judges assigning just
 20 anybody to do this. Okay. I mean, it says you can
 21 assign anybody in all these drafts.
 22 HONORABLE SCOTT BRISTER: We ought to
 23 make David Peeples do them all.
 24 PROFESSOR DORSANEO: Well, that's what
 25 I'm wondering. Should the presiding judge do it or --

1 HONORABLE DAVID PEEPLES: Two Fridays
 2 before a Monday trial setting.
 3 MR. EDWARDS: And don't forget the
 4 mailbox rule.
 5 CHAIRMAN BABCOCK: Okay. Richard, does
 6 that give you some direction on ten versus seven versus
 7 three?
 8 MR. ORSINGER: No.
 9 CHAIRMAN BABCOCK: All right. How many
 10 people think ten days is appropriate? Raise your hand.
 11 Does that help?
 12 MR. ORSINGER: Yes. That helps a lot.
 13 CHAIRMAN BABCOCK: Record reflect that
 14 everybody put their hand up. Okay.
 15 PROFESSOR DORSANEO: I have one other --
 16 CHAIRMAN BABCOCK: Yeah, Bill.
 17 PROFESSOR DORSANEO: Maybe we want
 18 guidance on, you know, whether it should be, you know,
 19 "may" or "shall." Maybe that doesn't matter. You
 20 know, in your draft you have within three days you will
 21 stop. Maybe that doesn't matter if we're loading it
 22 into the presiding judge to make that determination,
 23 but what do you think, Richard? We're going to be
 24 sitting discussing this trying to decide what kind of
 25 guidance we've got. I want to make sure that we've

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1 gotten some.
 2 MR. ORSINGER: Well, under the current
 3 rule a motion to recuse stops the court from doing
 4 anything except they can issue orders for good cause.
 5 I believe that's the way that Rule 18a reads right now.
 6 We've altered that, and we're now proposing that if
 7 it's on the grounds of impartiality, bias, or judge is
 8 a material witness and it's filed within ten days of a
 9 trial or hearing, that it's going to be up to the
 10 presiding district judge, the regional judge, or the
 11 recusal judge. It will go -- the trial judge can go
 12 forward unless the presiding judge or the recusal judge
 13 says it cannot. Okay. Now, you're concerned that if
 14 we move it back to ten days -- what is your concern,
 15 Bill?
 16 PROFESSOR DORSANEO: Well, I just want
 17 to make sure you have enough guidance, and what you
 18 just said is you've loaded in two variables. You know,
 19 it's the timing plus the grounds plus adding in the
 20 presiding judge. I'm not sure that's what everybody
 21 was talking about here altogether.
 22 MR. ORSINGER: Well, perhaps it's not.
 23 I thought that the, quote, Meadows proposal would apply
 24 when the grounds were impartiality, bias, or judge is a
 25 material witness, otherwise proceedings would stop.

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1 CHAIRMAN BABCOCK: Justice Duncan.
 2 HONORABLE SARAH DUNCAN: Speaking only
 3 for myself, I didn't think I voted on that. I thought
 4 I voted on any motion filed within ten days.
 5 PROFESSOR DORSANEO: I thought it was
 6 regardless of grounds.
 7 HONORABLE SARAH DUNCAN: And I thought
 8 what we voted on was --
 9 MR. ORSINGER: Okay. Then the grounds
 10 are out.
 11 HONORABLE SARAH DUNCAN: -- that the
 12 trial would continue unless stopped by --
 13 MR. ORSINGER: I'm glad you clarified
 14 that.
 15 HONORABLE SARAH DUNCAN: -- by a higher
 16 court.
 17 PROFESSOR DORSANEO: That's all I'm
 18 trying to do is make sure we understand.
 19 CHAIRMAN BABCOCK: Carl.
 20 MR. HAMILTON: Is the consensus that we
 21 want the presiding judge only to decide this, or are we
 22 still going to have him assign another judge to hear
 23 it?
 24 MR. ORSINGER: I think it should be
 25 either one. I think the presiding administrative judge

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1 ought to have the first call on whether to stop the
 2 proceedings, and if he or she doesn't want to then let
 3 him assign it out to another judge.
 4 HONORABLE SAMUEL MEDINA: And that's
 5 what I'm saying. Surely we can come up with some kind
 6 of a local rule that gets that done and gets it done
 7 timely.
 8 MR. TIPPS: When you're say "presiding
 9 judge" are you saying "presiding administrative
 10 judge" --
 11 MR. ORSINGER: Yes.
 12 MR. TIPPS: -- or presiding over the
 13 case at issue?
 14 HONORABLE DAVID PEEPLES: The regional
 15 presiding judge.
 16 CHAIRMAN BABCOCK: Yeah. Using the term
 17 "presiding judge" is confusing.
 18 MR. ORSINGER: And let's all remember
 19 and understand we will keep this language for the
 20 tertiary motion because it's required by the statute.
 21 CHAIRMAN BABCOCK: All right. Now --
 22 MR. EDWARDS: Well, there's some
 23 indication that if we come up with a reasonable
 24 solution that the legislative people involved in that
 25 tertiary motion business are not going to be unhappy

1 with us doing that and that we can override that, and,
 2 you know, the tertiary thing is pretty strong because
 3 you've got two real legitimate recusals and then you
 4 have -- you've won both of them, the notion -- if
 5 you've really won both of them, the notion that you've
 6 got, you know, another one that you're penalized more
 7 than somebody that's making the first one and loses,
 8 well, you've made two and one is not very good, and we
 9 had the discussion yesterday about does that mean three
 10 motions against the same judge, or does it mean three
 11 motions against different judges or a combination of
 12 three motions against the same judge and another judge?
 13 CHAIRMAN BABCOCK: Yeah. We resolved
 14 that yesterday.
 15 MR. EDWARDS: I know we did, but it's
 16 still there. We resolved it, but the Court didn't
 17 resolve it.
 18 CHAIRMAN BABCOCK: Yeah. That's right,
 19 but the Court will resolve it when they pass this rule.
 20 MR. EDWARDS: One way or the other.
 21 CHAIRMAN BABCOCK: Right. One way or
 22 the other that's right.
 23 MR. ORSINGER: Well, so what Bill's
 24 proposal is is that we fold the tertiary motion into
 25 our solution and see if we can sell it to the

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1 legislators?
 2 MR. EDWARDS: That's what I think.
 3 MR. ORSINGER: If we can't then we back
 4 off of it and continue to handle the tertiary in a
 5 unique way.
 6 MR. EDWARDS: That's what I think we
 7 ought to do.
 8 MR. ORSINGER: Okay.
 9 PROFESSOR DORSANEO: I think so, too.
 10 CHAIRMAN BABCOCK: Everybody okay with
 11 that? Okay. Well, in that event, do you have all the
 12 guidance you need on these issues?
 13 MR. ORSINGER: Yeah.
 14 CHAIRMAN BABCOCK: well, why don't we
 15 take a break?
 16 (A recess was taken.)
 17 CHAIRMAN BABCOCK: Okay. We're back on
 18 the record. What we're doing now is talking about the
 19 recusal motion insofar as it is to be modified to
 20 reflect the suggestion of the Judicial Campaign Finance
 21 Study Committee. So Richard.
 22 MR. ORSINGER: To discuss this you need
 23 to go to your original packet of Bates stamped
 24 materials, which you picked up at the last meeting
 25 hopefully, and it starts on page 66 with the Supreme

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1 Court's order off of the miscellaneous docket more or
 2 less receiving the recommendations of the task force
 3 and essentially saying that the recommendations are
 4 globally accepted and their proposal on a recusal
 5 provision is being referred to the Supreme Court
 6 Advisory Committee.
 7 The actual report itself starts on page
 8 74 of the Bates numbered materials, and as you can see
 9 from the -- on page 75, it's a blue ribbon task force
 10 that came up with these recommendations. The rationale
 11 is explained in the pages leading up to page 895 and
 12 then if you look on page 895 you will see a stand-alone
 13 recusal rule that has been drafted by this task force
 14 and forwarded to us for consideration.
 15 Our subcommittee did not attempt to
 16 rewrite this in any way since it had already received
 17 the imprimatur of the Texas Supreme Court, but in light
 18 of our discussions that we've had here in the last two
 19 days there may be some things about this rule that we
 20 want to consider, and so I'm going to turn it over to
 21 Carl and ask Carl to take us through this Rule 18c on
 22 Bates page 95 to point out some of the highlights.
 23 Yes, sir.
 24 MR. TIPPS: We don't have 95 in our
 25 packet.

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<p>1 MR. ORSINGER: Well, not the packet that 2 was handed out today. This was the packet that was 3 handed out at the last meeting. That's a thick packet 4 that's --</p> <p>5 MS. McNAMARA: It ends at like 72.</p> <p>6 MR. TIPPS: The package that we got in 7 the mail ends at 73.</p> <p>8 HONORABLE SAMUEL MEDINA: I think this 9 was handed out at the last meeting.</p> <p>10 MS. CORTELL: It's the original packet 11 from the last meeting.</p> <p>12 MS. SWEENEY: It's 295 pages long.</p> <p>13 MR. TIPPS: This side of the table 14 didn't bring it.</p> <p>15 MR. ORSINGER: Let me clarify. At the 16 first meeting there was stacks of this so-called agenda 17 is what we call it, even though I don't know that 18 that's what it is.</p> <p>19 CHAIRMAN BABCOCK: The point is nobody 20 has got it. I mean --</p> <p>21 MR. ORSINGER: Okay. Well, then I'm 22 sorry I don't have copies for you to look at today.</p> <p>23 MS. SWEENEY: Yeah, we have ours down 24 here.</p> <p>25 CHAIRMAN BABCOCK: Okay. Well, then you</p>	<p>1 limits that have no punitive sanction. Now, the 2 concept here is that we're going to by rule of 3 procedure impose, if you will, a punitive sanction, and 4 that is that if your adversary or your adversary's 5 counsel has made contributions in excess of the 6 statutory limit you can recuse that judge. I think 7 I've said that fairly. So it's just a question then of 8 how you work those details out.</p> <p>9 Some of the complications are with 10 people that work in large law firms you've got 11 aggregate contributions, you've got lawyers switching 12 between law firms, and you might have -- you have 13 issues here about discovery, about lawyers, spouses. I 14 mean, there are a lot of details in here that are 15 pretty complicated. And, you know, one thing, for 16 example, no discovery is permitted concerning a motion 17 to recuse, but the rule doesn't say you can't subpoena 18 witnesses and bring them to the courthouse and force 19 them to testify.</p> <p>20 So we have to ask ourselves, you know, 21 if we're going to create this recusal ground, where are 22 we going to get the baseline information? Is it all 23 going to be from public records? Are we going to be 24 able to subpoena people to come testify about private 25 arrangements or what? I mean, these are weighted</p>
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<p>1 guys can vote.</p> <p>2 MR. ORSINGER: I should have photocopied 3 it and brought it to the meeting for everyone, but just 4 in the future it's probably wise if you got this, and 5 they ran out at the first meeting. I know there's some 6 people that didn't get their stack, but all of the 7 subcommittees are working from this 295-page packet of 8 documents that was handed out at the first meeting, and 9 I'll just apologize. In the future I'll be sure that 10 for our subcommittee proposals that I bring new copies 11 of what we're working from. Those of you who don't 12 have it are just going to have to listen.</p> <p>13 CHAIRMAN BABCOCK: Yeah. We're going to 14 make some compies right now. So go ahead.</p> <p>15 MR. ORSINGER: Okay. So, Carl, can you 16 carry us through in kind of an overview.</p> <p>17 MR. HAMILTON: Those of you who have --</p> <p>18 CHAIRMAN BABCOCK: Carl, hang on.</p> <p>19 JUSTICE HECHT: Before you start, can I 20 just say that this idea was proposed first at a meeting 21 of this committee a couple of years ago, and I think 22 it -- I think the Court asked you to think about it, 23 and the committee talked about it for 30 or 40 minutes 24 and thought, "Boy, what a great idea," but then as you 25 got to thinking about the details we got to thinking</p>	<p>1 questions, and that's not all of them.</p> <p>2 Representative Dunnam.</p> <p>3 HONORABLE JIM DUNNAM: I don't want to 4 comment on the appropriateness of or the content of 5 this rule, but I do want to comment a little bit on how 6 this rule would be perceived by the Legislature. The 7 Judicial Campaign Fairness Act is a voluntary act that 8 judges can't -- cannot go under -- but it's voluntary, 9 and the Legislature made a deliberate -- I wasn't there 10 at the time, but I think they made a deliberate 11 decision that this would be a voluntary act.</p> <p>12 Now, the last session many of you are 13 aware that the House passed fairly comfortably a 14 restriction on the Supreme Court's rule-making 15 authority that it have to be timed with the legislative 16 session. One of the primary reasons -- and I authored 17 that bill, and one of the primary -- I think one of the 18 primary reasons that the majority of House members 19 voted for that bill is they saw this type of rule as 20 legislative process, because what this rule is doing, 21 in my opinion, and I think I can speak for the majority 22 of the people that voted for it, what this rule does is 23 tends to make the voluntary Judicial Campaign Fairness 24 Act a more mandatory act, which is something the 25 Legislature consciously decided not to do, and the</p>
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<p>1 this is going to take some work. So we -- as I recall, 2 we postponed further consideration of it. Then this 3 task force did some work on it also and reported back 4 to us, but we looked it over and had the same problems 5 with their work product that we had with the idea 6 before, which is there are just a lot of intricacies in 7 this rule that are not -- we don't have a lot of -- we 8 would like to have more advice on before we go down 9 that road.</p> <p>10 So even though Richard says it has the 11 Court's imprimatur, it doesn't really. The Court is 12 just blessing it as a good idea, but you shouldn't take 13 from that that we've studied it and we like the 14 language or anything else about it.</p> <p>15 PROFESSOR ALBRIGHT: Can you restate 16 what the concept is?</p> <p>17 MR. ORSINGER: The basic concept is that 18 there's a statutory provision that sets maximum 19 contributions that judges can receive in political 20 campaigns, and there is no punishment really for 21 exceeding those limits other than your adversary can 22 use it against you in the campaign. Would you agree 23 with that?</p> <p>24 JUSTICE HECHT: Uh-huh.</p> <p>25 MR. ORSINGER: Okay. So basically it's</p>	<p>1 reaction from the floor members to the report of the 2 committee that came up with these -- and there was more 3 than one. This was just one aspect of it, was that the 4 Court was involved in campaign finance limits by rule.</p> <p>5 It was in the province of the 6 Legislature, and I think that is why the bill that I 7 authored last session passed the House. I would show 8 the committee report on the finance -- I forgot the 9 name of the committee, but the committee, I would show 10 it to House members, and they were struck by it that 11 that was legislative turf, and so I just want to throw 12 that out. I'm not saying that the Legislature should 13 not enforce or make the voluntary act mandatory. I 14 would vote for campaign finance limits for myself and 15 lots of other people, but I do think that this area is 16 a legislative area.</p> <p>17 MR. ORSINGER: Well, if I may respond to 18 that, I see our role here as, if you will, scribes 19 or workmen who are building something according to a 20 design that we didn't create. To me the political 21 issue about whether making this a grounds of recusal is 22 legislation or not or the tripartite branches of 23 government and whether the judiciary is controlled by 24 the Legislature or it's controlled by the Supreme 25 Court, you know, I don't see how we can debate that</p>

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1 issue. It's too philosophical, and I don't think that
2 it's really within our scope. I mean, I'm prepared to
3 debate it. I have my own opinions on that, too, but I
4 kind of feel like as members of the Supreme Court
5 Advisory Committee it's a decision of the Supreme Court
6 whether to venture into these waters. If they want to,
7 we need to write a rule that the Supreme Court wants
8 help on and then if they decide never to implement it
9 or to implement it or something, it seems to me that
10 that should be a decision by the Court rather than a
11 decision by this committee.

12 CHAIRMAN BABCOCK: Bob.

13 MR. PEMBERTON: I had a question, and
14 I've had some prior involvement in this issue. I was
15 basically the staff to this Judicial Campaign Fairness
16 Committee, and I think Richard mentioned or made some
17 reference to this having the, quote, imprimatur of the
18 Court. It is a -- just as proposals of this committee,
19 it's a study that followed on the heels of an ABA study
20 that came out last summer recommending a variety of
21 changes to codes of judicial conduct across the
22 country, procedural rules to eliminate what tinct there
23 may be from -- or perception from financing of judicial
24 campaigns where judges are elected.

25 I guess I ought to just pose a question

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1 to Representative Dunnam. The understanding of the
2 committee was the statutory provisions in the Judicial
3 Campaign Fairness Act upon which this recusal rule was
4 based were made mandatory a couple of years ago.
5 Originally they were voluntary limits. The spending
6 limits by judges in their campaigns are still
7 voluntary. Their belief was -- and I guess we can
8 refer to the statute and see this for ourselves -- was
9 this was already something that the Legislature had
10 made -- had forbidden, exceeding these contribution
11 limits. They were merely taking what the limits that
12 the Legislature properly on their side of the fence had
13 decided, made those policy judgments on what's proper
14 and improper in saying, well, where a judge has
15 violated the law the Legislature passed in accepting
16 these contributions a judge should not be sitting in a
17 case. That's how the committee perceived their role.

18 HONORABLE F. SCOTT MCCOWN: Bob, maybe
19 the law has changed, but I thought they were voluntary,
20 that you opted in or opted out. If you opted in, you
21 could put that you had opted in, but if you opted out,
22 you were required to put you had opted out. I didn't
23 think that they were mandatory. But we can check on
24 that.

25 MR. PEMBERTON: I believe so. It was

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1 the '97 session. Now, what's voluntary, what you opt
2 in or out on, is how much the judge is spending in
3 their campaign. There were civil penalties of -- I
4 think the penalty was returning or disgorging three
5 times the amount or two times the amount of the excess
6 contribution.

7 HONORABLE F. SCOTT MCCOWN: Well, I'm
8 not sure how I feel about this, but setting aside
9 whether philosophically the Court should or shouldn't
10 write a rule in terms of power, here's my problem. As
11 I understand the law right now, the mere fact that you
12 took a campaign contribution is not a ground for
13 recusal.

14 MR. PEMBERTON: That's correct.

15 HONORABLE F. SCOTT MCCOWN: It can be a
16 ground for recusal if you have taken what the law
17 doesn't define, what the case law doesn't define, but
18 gives credence to as some kind of excessive
19 contribution. I think the law right now says that if
20 you took way too much from somebody, that that could
21 create an appearance of impropriety and someone could
22 move for recusal, and it's undefined where that
23 boundary is.

24 My hesitation about having a rule that
25 sets it out and defines it is that for so many lawyers

1 the Rules of Civil Procedure are a cookbook, and if
2 you've got a motion for summary judgment rule then you
3 make one, and if you've got a motion for recusal
4 because of excessive contributions, you make one.
5 Well, the question is, well, what would be wrong with
6 that when we have these limits, and so if you're
7 outside the limits why shouldn't there be a motion that
8 you're recused on.

9 And that's a hard point to argue against
10 except to say that when you're running campaigns and
11 you're taking these contributions and you're filing
12 these C&E's, it is a hard thing to do to get it on the
13 money, and it involves a lot of paperwork, and if we
14 actually went through and audited all that paperwork,
15 it would be just like the IRS. Some people's returns
16 would be easier and clearer than others, and if we have
17 a written rule, we're going to invite a lot of
18 litigation potentially over these C&E's and over these
19 contributions, and if anybody runs afoul of it, they're
20 going to be afoul of it by a few dollars if they're
21 afoul of it at all, but they're going to have all kinds
22 of bookkeeping problems about who's married to whom and
23 who was in which firm whom and, boy, it's a nightmare.

24 CHAIRMAN BABCOCK: well, I think
25 Representative Dunnam raises an important point, and I

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1 hope you'll keep raising these things.

2 HONORABLE JIM DUNNAM: Again, this is
3 something that I would vote for in the House, for lots
4 of limits on campaign finance. I just want to reflect
5 to the committee that because I think my involvement in
6 that bill, this is my penance, having to serve on this
7 committee, and so I guess that's what I'm here to say.
8 I think that -- and we spent hours yesterday because
9 Chris Harris had something -- I can tell you that the
10 majority of the House of Representatives felt like this
11 was campaign finance reform. They felt like -- and
12 that is such a heated issue in the Legislature. I
13 mean, that's one of the hottest issues there is, and
14 that was what the House of Representatives felt, and I
15 think if the vote had been taken in the Senate that's
16 what the Senate would have thought, and I'm just -- I
17 want to relate that. You-all can do what you want.

18 CHAIRMAN BABCOCK: well, and what I was
19 leading up to say was I think your presence in this
20 committee is extraordinarily helpful for just -- the
21 comment you just made because I think the Court needs
22 to know when the Legislature, at least some members of
23 it, feel that the Court is treading on their turf. It
24 needs to know it early in the process rather than
25 after, you know, we spend, you know, six months working

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1 on this, and then in terms of what Richard said,
2 though, is absolutely right.

3 This committee gets its assignments from
4 the Court, and one of the assignments we got that was
5 to be discussed today was to see whether we could take
6 this Judicial Campaign Finance Study Committee and put
7 it into a rule. I think that, you know, now that the
8 Court through Justice Hecht being here is aware of this
9 concern, you know, maybe we will change direction in
10 what we do, but for today I think we've got to plow
11 ahead and try --

12 HONORABLE JIM DUNNAM: Oh, I think the
13 Court knew from last session what the Legislature, or
14 at least the House, thought about this; and so, I mean,
15 I don't think there's anything new to what I've said
16 today.

17 CHAIRMAN BABCOCK: Okay. Well --

18 HONORABLE DAVID PEEPLES: Chip, there is
19 an issue that's not going away. It does seem to me
20 that if the Legislature didn't like what the Court did
21 on a certain issue, they could just set aside that rule
22 on that issue instead of trying to strip away the
23 rule-making authority generally, and this may be the
24 kind of thing that needs to have some public discussion
25 by people like those here as to what's proper for the

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1 Court and for the Legislature and what's proper in
2 terms of campaign contributions. I can't believe that
3 the Legislature is in favor of excessive contributions
4 and so forth.

5 HONORABLE JIM DUNNAM: I can take
6 \$100,000 from one contributor today. When I ran last
7 time one of my opponents got \$70,000 in one check.
8 That's what the Legislature thinks about it right now.
9 I disagree with that, but it's a very divisive issue in
10 the Legislature, campaign finance reform at all levels
11 and --

12 HONORABLE DAVID PEEPLES: Yeah, I just
13 don't think this is an issue on which the Legislature
14 would look good taking on the Court, excessive
15 contributions to judges, and I don't know how the Court
16 feels about it, but I as a public citizen feel that at
17 some point people need to take up for the Court when
18 it's attacked, and I hope we don't get there, but we
19 may get to that point, and I think all of us as
20 citizens and lawyers may need at some point to take up
21 for the Supreme Court when the Legislature tries to
22 intimidate it.

23 HONORABLE JIM DUNNAM: I don't think
24 there was any intimidation. You made the comment that
25 the Legislature had made an attempt to take away the

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1 Court's rule-making power. The bill that passed the
2 House last session was purely along the lines of what
3 you just said. You said that you don't know why the
4 Legislature couldn't specifically overrule specific
5 things rather than taking away the power.

6 Well, all the bill did last session was
7 set up a time frame, and what it said was unless the
8 Court found there was an emergency that all rules that
9 this committee puts out should be proposed before the
10 bill deadline filing, which is like March of each
11 session so that any House member or Senate member would
12 have the opportunity to file a bill and then that this
13 committee could not propose a rule, absent an
14 emergency, that would take effect until the session was
15 over, and basically all the bill the House passed last
16 session did was set up a time window where the
17 Legislature could look at rules and have an opportunity
18 to -- it wasn't an approval -- the Legislature did not
19 have to approve the bills.

20 They simply had a time window within
21 which to look at them before they went into effect
22 because some of the frustration has been some of the
23 rules come out near the end of session. It's too late
24 to file a bill. It's two years until the next session,
25 and so as a practical matter there's nothing we can do,

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1 that the Legislature can do. So that's all the bill
2 did. It did not take away any power, at least in my
3 opinion. It just was a timing deal, and so I think the
4 committee needs to know what the bill did last session.

5 MR. LATTING: I have a question, and
6 it's only informational, and that is do we know -- and
7 I don't mean to imply anything in the question, but
8 what is the law about whether the Legislature has any
9 power or what the extent of its power is to be telling
10 the judicial branch of government how and when it may
11 make its rules? Do we know any -- is there any
12 learning on that?

13 HONORABLE JIM DUNNAM: I think the
14 rule-making power of the Court is conferred upon the
15 Court by means of statute and Constitution. So I think
16 that the Legislature -- it's similar to the Federal
17 system in some ways. I mean, the Legislature has
18 delegated some of the power, but it has not given up
19 its right to say things about it.

20 MR. LATTING: Well, I guess my question
21 is from a constitutional point of view what is the --
22 maybe this isn't the place to discuss that. I'm just
23 asking for information.

24 HONORABLE JIM DUNNAM: Well, for
25 example, the time limit bill last session --

1 MR. LATTING: Uh-huh.

2 HONORABLE JIM DUNNAM: -- that was very
3 similar to what the Federal courts do. Congress has
4 basically a veto window, and at least the legislative
5 counsel and the Legislature felt like that type of
6 a time window situation was clearly constitutional.

7 MR. LATTING: I see.

8 MR. ORSINGER: But to get to Joe's
9 point, if you read the Constitution, at least when I
10 read the Constitution, it suggests to me that the
11 Legislature has the final authority on rule making, but
12 it's not clear. I can see how people of good will can
13 maybe dispute that interpretation of the Constitution,
14 and at the Federal level I think it's real clear that
15 the Legislature -- or that Congress has rule-making
16 authority.

17 MS. EADS: Actually, it's not, you know.

18 MR. ORSINGER: It's not?

19 MS. EADS: No. At the Federal level the
20 Court has sort of closed its eyes to that by suggesting
21 to Congress and acceding to the congressional statute
22 that says we have authority to veto, but if you look
23 back in the 1940's Justice Douglas and Justice Black
24 vehemently opposed that as an usurpation of the Court's
25 power to issue rules that govern court behavior rather

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1 than trying to get congressional approval for it. So
2 even there it's never really been decided what exactly
3 is the limit and where is the separation.

4 MR. LATTING: So it is a little vague.

5 HONORABLE JIM DUNNAM: And I'm not
6 suggesting and I don't think and I don't want the
7 Legislature to write the Court's rules. My initial
8 comment is simply to state that there are certain areas
9 where I think a lot of members feel strongly that rule
10 making can act as legislation. For example, and again,
11 a lot of these things the dispute is not necessarily in
12 the content. It is in what is the proper way to do it.
13 For example, the Court has passed a rule that says that
14 a judge cannot run for a nonjudicial position unless
15 the judge resigns. So if I'm a judge and I want to run
16 for Attorney General, I have to resign. That is
17 probably a good idea.

18 In the eyes of a lot of legislators,
19 that is legislation because by rule the Court has
20 suddenly said that the qualifications for office have
21 been changed. If you want to run for Attorney General,
22 you have to be a Texas resident, you have to be an
23 attorney, et cetera, et cetera, and you can't be a
24 judge. So the rule has in effect changed the statute
25 and changed the qualifications to run for Attorney

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1 General.

2 A lot of legislators, including myself,
3 feel like that is legislation, and if that's something
4 that ought to happen, for example, if you should have
5 tougher judicial campaign finance laws, then what ought
6 to happen is the Legislature should be approached by
7 the judges, and we should pass a bill on it. It has
8 more to do with the process and what is legislation.
9 Clearly the Supreme -- the summary judgment rule is a
10 rule that the Legislature I think thinks is within the
11 province of this Court, but the qualifications to run
12 for Attorney General are I think more legislative type
13 matters and is not a rule.

14 Surely it makes the judges -- it makes
15 the judicial branch appear better to not have those
16 conflicts, but the way to address it in the eyes of a
17 lot of us is through the legislative process and
18 lobbying the legislative process as opposed to doing it
19 by rule because it's a good idea.

20 CHAIRMAN BABCOCK: Judge McCown.

21 HONORABLE F. SCOTT MCCOWN: Well, the
22 question of where one branch's authority begins and the
23 other ends is vague right there where they butt up
24 together or they overlap, and you also have a larger
25 question besides the theoretical, which is the

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1 practical. How does each branch feel about how the
2 other is doing, and one thing that the Legislature
3 absolutely controls is the purse strings, so you want
4 to make sure you're not getting in too big a battle,
5 but on this particular issue we already have a rule in
6 the common law about campaign contributions and when
7 you should sit in a case or not sit in a case.

8 On this particular issue the question is
9 whether a judge should sit or not sit, and it seems to
10 me that that's an appropriate place for us to recommend
11 to the Court a rule and for the Court to consider it if
12 it's a wise rule, and that to me is the question that's
13 a difficult one, which is how do you write this rule in
14 a way that makes things better and not worse, but I
15 think it's an appropriate area for consideration.

16 CHAIRMAN BABCOCK: Judge Brister.

17 HONORABLE SCOTT BRISTER: I agree with
18 that. I mean, the rule is because we've denied -- not
19 me. You know, but because in Pennzoil vs. Texaco they
20 said giving 10,000 to the trial judge, even though
21 nobody in Harris County had ever given 10,000 to any
22 trial judge ever born in the history of the world, is
23 just fine. You know, that's not my fault. That's the
24 court of appeals' fault. I think they wrote a wrong
25 rule and the Texas Supreme Court dodged it, and I'm not

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1 sure I want to take on responsibility for fixing that.
2 Isn't that something that just the next
3 time it comes up ought to depend on the facts of the
4 case because it's one thing to say, okay, if somebody
5 gives 50,000 to both candidates in a judicial election
6 or if both parties in a litigation gave 50,000 to the
7 judge then one of them, whoever loses the summary
8 judgment, gets automatic right of recusal? That looks
9 different from when only one side did, and it looks to
10 me like something that ought to be handled by the
11 normal recusal rules, which is if it smells bad in the
12 circumstances of this case, you file a motion for
13 recusal under the rules we've got and say appearance of
14 impropriety, and people address that properly depending
15 on the facts of the case, but to just say it's
16 automatic in circumstances like the one where I posit,
17 there's nothing that looks that much worse to the
18 public. If both sides are giving you money why are
19 you -- what grounds do you have to complain?

20 CHAIRMAN BABCOCK: Judge Peeples.

21 HONORABLE DAVID PEEPLES: Does anybody
22 in the room know of an instance in which a judge or a
23 challenger has taken more than the limits and opted out
24 since this came into effect? The three of us here from
25 Harris, Travis, and Bexar don't know of any instances,

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1 and I just wonder if this is something that hasn't
2 happened. In other words, if the threat of being
3 labeled during a campaign as somebody who opted out of
4 the law of contribution limits has been so scary to
5 judges and challengers that it's working, do we need to
6 spend the time -- it sounds like it's going to be a
7 hard fine-tuning job if we decide to do it, and if it's
8 not a problem, do we want to do it.

9 HONORABLE SAMUEL MEDINA: Seems like the
10 opposite is true. Some judge is talking about, "Well,
11 I didn't get anything from you," you know, not so much
12 excessiveness, but --

13 HONORABLE DAVID PEEPLES: Surely
14 no one's said that.

15 PROFESSOR DORSANEO: Not in so many
16 words.

17 HONORABLE SCOTT BRISTER: Oh, you'd --
18 don't be surprised.

19 CHAIRMAN BABCOCK: Let me say something,
20 David, before I forget it. We all bring different
21 expertise to this committee and different points of
22 view, and the objective, the goal line, is to try to
23 give the Court the best advice we possibly can. I
24 think one area where we need to advise the Court is
25 exactly the area that Representative Dunnam is talking

1 about.

2 If we think -- if this group thinks that
3 it is a bad idea for a number of reasons to fold this
4 judicial campaign finance study into a rule because
5 there's no problem and we don't -- you know, it's
6 working fine the way it is or because we've looked at
7 it and we say, "Yeah, the Legislature's got a point.
8 It's our collective judgment that we ought not to be
9 passing rules like this because it's their turf and not
10 the Court's," that's advice that we give to the Court,
11 and they either accept it or they reject it as is their
12 ability, but it's a very important point that was
13 raised, and I think we ought to talk about it not just
14 in this context but any other time that it comes up.
15 Does that make sense?

16 MR. ORSINGER: It does, and I'll step

17 out there. I had the pleasure of testifying twice in
18 the last session on the Supreme Court rule-making
19 authority.

20 CHAIRMAN BABCOCK: You haven't gotten
21 your voice back yet.

22 MR. ORSINGER: And I think that there is
23 some sensitivity over there to the Supreme Court ruling
24 in areas that the Legislature thinks should be theirs,
25 and I think that there's room for different points of

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1 view on the issue, but I think that if we get into an
2 area where there are hard feelings or high emotions
3 that we should tread very carefully in the rule-making
4 area. There are some areas where we can freely pass
5 rules and no legislator will care, and there are other
6 areas where they feel like the Court is moving the
7 people of this state to a place where the Legislature
8 was not willing to move them and, therefore, feels like
9 it's legislation.

10 And I think that David Peeples' point,
11 which is that if this is a sensitive issue at the
12 Legislature and if we're not having a problem with
13 excessive campaign contributions, then why should we
14 tread into this area? If we do have a really serious
15 problem then maybe work with the Legislature about -- I
16 don't know exactly what you work with the Legislature
17 about, but that we would make proposals and see how it
18 looks and see what different legislators think about
19 it, and I don't know, maybe that involves the
20 Legislature too much in rule making, but I would prefer
21 that we get into the danger zones on stuff that's
22 really important and then if it's not really important
23 then let's stay out of it.

24 CHAIRMAN BABCOCK: That's what I took
25 Judge Peeples to be saying.

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1 MR. LATTING: Well, I'm confused. I
2 thought a few minutes ago you said we were scriveners
3 and the Court had asked us to help them write a rule so
4 we ought to scriven it down.

5 MR. ORSINGER: Well, that was my view
6 and it's still my view, but --

7 HONORABLE F. SCOTT MCCOWN: Consistency
8 is the hobgobble --

9 MR. ORSINGER: Chip has opened the record
10 up to the debate on whether we ought to --

11 HONORABLE F. SCOTT MCCOWN: -- of little
12 minds.

13 MR. ORSINGER: Chip has said that this
14 committee should make known its views about whether or
15 not the Supreme Court ought to exercise rule making on
16 this subject. You put that on the floor. I have an
17 opinion about that. I thought I'd share it.

18 MR. LATTING: Okay. All right.

19 CHAIRMAN BABCOCK: Yeah. Alex.

20 PROFESSOR ALBRIGHT: Well, I just want
21 to second both of those comments. First of all, I feel
22 real strongly about judicial rule-making power, but I
23 don't think this is the one that we want to fight the
24 fight on; and, second, I think that we also ought to
25 always think about is writing a rule the way to correct

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1 whatever the perceived problem is, and I think what
 2 Scott Brister said is if there is a problem with people
 3 exceeding these limits, maybe the way to do it is
 4 through the common law when people file motions for
 5 bias or prejudice or appearance of impropriety and
 6 revisit *Texaco vs. Pennzoil*. Writing a rule that is in
 7 everybody's rule book I don't think is the best way to
 8 solve the problem that we're talking about today.
 9 CHAIRMAN BABCOCK: Carl.
 10 MR. HAMILTON: According to this report
 11 the people who looked into all of these problems, they
 12 did see the need for this. They also point out that
 13 there is a Judicial Campaign Fairness Act which has
 14 been passed by the Legislature, adopted and made a part
 15 of the Election Code, and it does place limits on what
 16 people can give and what judges can receive, and that's
 17 what this rule is designed to correct, is that where
 18 there are situations where there are excessive campaign
 19 contributions then that makes the judge subject to
 20 recusal.
 21 In answer to Scott's question, it does
 22 provide that the motion can be filed only by a party on
 23 the side other than the party lawyer or law firm whose
 24 actions constitute grounds for recusal. So in the
 25 situation where the law firm gives \$50,000 each then

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1 neither one of them could be the party that files the
 2 motion because that would be violative of the rule, so
 3 all I'm saying is, is that there is a statute. It's
 4 not something that we're assuming. There is a statute,
 5 and that's what the rule is designed to address, is
 6 violations of that statute.
 7 CHAIRMAN BABCOCK: Well, I'm confused
 8 about something because I heard at the beginning of
 9 this debate that these -- that it was voluntary, so
 10 that you're basically having a recusal motion --
 11 MS. SWEENEY: It is voluntary. It is
 12 voluntary.
 13 MR. YELENOSKY: It is voluntary.
 14 According to this REPORTER.
 15 MS. SWEENEY: The candidate has to agree
 16 that he or she is going to be bound by the limits and
 17 then the theory is if they're not you can beat them up
 18 with that, but there's no statewide rule that says you
 19 can only take X from --
 20 MR. YELENOSKY: Right. It's on page 12
 21 of footnote 41 that says if you've opted in there are
 22 civil penalties if you accept more, but it's contingent
 23 on opting in.
 24 HONORABLE DAVID PEEPLES: And what I was
 25 raising, I'm not aware of -- is anybody aware of

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1 anybody who has opted out of these limits in a
 2 campaign?
 3 CHAIRMAN BABCOCK: Judge McCown.
 4 HONORABLE F. SCOTT MCCOWN: And, of
 5 course, part of the reason nobody has opted out of the
 6 limits is because you couldn't possibly reach them. I
 7 mean, they're pretty high and, you know, the truth is
 8 other than the rare case, you're just not going to have
 9 an excessive contribution, and I guess my feeling about
 10 it is you have to run for office, you have to raise
 11 money to run for office, you raise the money, you
 12 comply with the law, you file your C&E, and you forget
 13 about it, and I guess I just would rather not have
 14 money talked about in the rule book. I'd like to
 15 forget about money as much as possible and not have it
 16 in the rule book and not be having motions about it.
 17 Unless it's a problem that needs fixing, I think it's
 18 just an ugly part of the system that's best not talked
 19 about, looked at, or emphasized.
 20 MR. LATTING: I wish they would make it
 21 secret so nobody would know about it.
 22 CHAIRMAN BABCOCK: Let's say that a
 23 contribution was made by a party or an attorney
 24 representing a party shortly before trial that exceeded
 25 the limits that -- the very high limits that have been

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1 set.
 2 MS. SWEENEY: They're not that high.
 3 CHAIRMAN BABCOCK: All right. The low
 4 limits that have been set. Is our current rule --
 5 would there be grounds for recusal based on our current
 6 rule?
 7 HONORABLE SCOTT BRISTER: If it appears
 8 improper, yes. If, for instance, the 10,000 came to
 9 the trial judge immediately after the case was
 10 transferred to that trial judge, you know, and after
 11 the election and this trial judge has no opponent,
 12 yeah, that looks improper.
 13 CHAIRMAN BABCOCK: And if there is a
 14 limit that has been -- whether it's voluntary and
 15 you've opted in or it's mandatory, it doesn't matter.
 16 If there is a limit imposed by the Legislature --
 17 HONORABLE SCOTT BRISTER: By the
 18 Legislature that --
 19 CHAIRMAN BABCOCK: -- and it is exceeded
 20 both by the judge accepting it and by the party or the
 21 attorney for the party giving it.
 22 HONORABLE SCOTT BRISTER: It makes it
 23 easy.
 24 CHAIRMAN BABCOCK: Wouldn't that be a
 25 basis under our current rule?

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1 HONORABLE F. SCOTT MCCOWN: Not only is
 2 there a limit on how much, there's a limit on when.
 3 You can't take money --
 4 HONORABLE SAMUEL MEDINA: Right.
 5 HONORABLE F. SCOTT MCCOWN: -- all the
 6 time like you used to could. You've got very limited
 7 windows.
 8 MR. ORSINGER: Chip, to answer your
 9 question, I think that there are opinions that have
 10 been handed down by courts of appeals saying that
 11 campaign contributions are not a basis for
 12 disqualification, whether it's the opposing lawyer or
 13 the opposing party. Now, you guys can correct me if
 14 I'm wrong, but I know the San Antonio Court of Appeals
 15 has --
 16 HONORABLE SCOTT BRISTER: I don't think
 17 the Supreme Court has ever said so.
 18 MR. ORSINGER: I'm saying courts of
 19 appeals.
 20 HONORABLE SCOTT BRISTER: A bunch of the
 21 courts of appeals have.
 22 MR. ORSINGER: Under the existing case
 23 law even a sizable contribution on the day you pick a
 24 jury isn't grounds.
 25 CHAIRMAN BABCOCK: But I would guess

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1 that none of those cases deal with the interplay
 2 between the statute --
 3 HONORABLE SCOTT BRISTER: No.
 4 MR. ORSINGER: That's true.
 5 CHAIRMAN BABCOCK: -- and the limit.
 6 MR. ORSINGER: That's true.
 7 CHAIRMAN BABCOCK: And exceeding the
 8 limit imposed by the statute.
 9 MR. ORSINGER: None of them do that.
 10 MS. SWEENEY: The limit, as I recall it,
 11 and I'm happy to be corrected, but I think it's 5,000
 12 per lawyer and 30,000 per firm, and I think your spouse
 13 counts as you.
 14 MR. ORSINGER: Well, it depends on your
 15 county.
 16 HONORABLE F. SCOTT MCCOWN: Depends on
 17 your jurisdiction.
 18 MS. SWEENEY: Sorry. That would be
 19 Dallas County.
 20 CHAIRMAN BABCOCK: Justice Duncan.
 21 HONORABLE SARAH DUNCAN: To add one more
 22 complication into the mix and something that has
 23 concerned me ever since I decided to run and was
 24 asked -- before we had this particular act we had
 25 another version of an act that would restrict the

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1 contributor rather than their recipient, and it is at
 2 this point not constitutional under the Federal
 3 Constitution to restrict the giver. You can only
 4 restrict the recipient, and I have some hesitancy about
 5 going down a rule-making process that recuses a judge
 6 for a contributor's exercise of his or her
 7 constitutional rights.
 8 MR. YELENOSKY: Is that still true after
 9 the most recent Supreme Court?
 10 HONORABLE SARAH DUNCAN: Oh, did they
 11 change that?
 12 HONORABLE JAN PATTERSON: This week.
 13 HONORABLE SARAH DUNCAN: Oh, this week?
 14 MR. YELENOSKY: The U.S. Supreme Court
 15 just ruled on campaign contributions. I haven't read
 16 the opinion, but the summaries of that would contradict
 17 that.
 18 HONORABLE SARAH DUNCAN: Spending limits
 19 are fine.
 20 HONORABLE F. SCOTT MCCOWN: But there's
 21 no constitutional right to give me something I won't
 22 accept. It's not that -- it's the judge accepting it
 23 that you're looking at, not the contributor giving it.
 24 HONORABLE SARAH DUNCAN: That's what
 25 I'm -- and under Buckley the spending limits I think

1 contributions.
 2 HONORABLE SARAH DUNCAN: It was
 3 required -- we are required by statute. If we are
 4 given notice of direct campaign contribution on our
 5 behalf we have to include that in our contribution
 6 expenditure reports.
 7 MR. HAMILTON: For expenditures.
 8 MS. SWEENEY: Can I make --
 9 CHAIRMAN BABCOCK: Yes, Paula.
 10 MS. SWEENEY: We're sort of discussing
 11 some policy questions here. We are discussing them and
 12 I don't think -- well, I certainly don't think we're
 13 prepared to discuss, and I'm not sure that they are
 14 within our province as rule writers. I mean, whether
 15 or not we think there ought to be campaign
 16 contributions, whether or not we think we ought to have
 17 an elected judiciary, whether or not we think there
 18 ought to be limits, all of those things are -- we
 19 could, you know, sit down and talk about and probably
 20 most of us have 'til we're blue in the face, but I
 21 don't think that is getting us down the road that we
 22 need to go down on the committee. Now, I'd like to see
 23 us move on.
 24 CHAIRMAN BABCOCK: Well, in fact, you
 25 read my mind because we're going to in a second, but,

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1 would have been fine. The problem is from the giver's
 2 perspective, but what we're talking about doing is
 3 automatic recusal if a giver has given and it's
 4 accepted, and I have some hesitancy about that.
 5 CHAIRMAN BABCOCK: Okay. Wendell, did
 6 you want to --
 7 MR. HALL: Well, I just wanted to
 8 underscore one thing Judge Medina said earlier, and
 9 that is that I was involved in an appeal in a court of
 10 appeals I don't appear in very much, and it was during
 11 an election season, and right after I filed my brief I
 12 got a request for a contribution from one of the judges
 13 on that court.
 14 HONORABLE SAMUEL MEDINA: Not me. It
 15 wasn't my case.
 16 MR. HALL: No. The court of appeals,
 17 and then 30 days later that judge was also on my panel,
 18 and, you know, I just want to underscore that there is
 19 an issue with noticing who hasn't contributed as well
 20 as those who have contributed, and obviously those of
 21 us on our brief felt like we had no option and that we
 22 needed to contribute, and so it's not something that
 23 doesn't happen, and I don't want to forget about that
 24 side of the equation either.
 25 HONORABLE F. SCOTT MCCOWN: So you're

1 Carl, would you just briefly give us an overview of
 2 what the proposed rule that you and Richard are talking
 3 about to implement the Judicial Campaign Finance Study
 4 Committee, and what I'm talking about is are you
 5 proposing that, for example, if somebody catches
 6 Judge McCown receiving more money than is allowed under
 7 the statute then that he's automatically out, no
 8 questions asked? Is that what -- where you guys are
 9 coming from?
 10 MR. HAMILTON: No. That's not what the
 11 rule says, and this is, of course, not our rule. This
 12 is the rule that was drafted by this study group, and,
 13 you know, it's a fairly good rule. It may need some
 14 work here and there, but what it provides is the
 15 grounds for recusal are if the judge has accepted
 16 excessive campaign contributions or expenditures,
 17 either one, and it has a provision for the duration for
 18 the grounds for recusal, and it continues until the
 19 judge returns the excessive campaign contributions or
 20 completes the term of his judicial office or ceases to
 21 serve in that term.
 22 It provides for who can file. It's only
 23 the innocent party that can file, not anybody who has
 24 made the contribution that violates the statute. The
 25 motion has to be as provided for in Rule 18a, and that

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1 proposing a rule that every lawyer must contribute?
 2 HONORABLE JIM DUNNAM: How about a rule
 3 that no lawyers can't contribute?
 4 MR. HAMILTON: According to this report
 5 there's campaign contributions which are regulated by
 6 the statute and even impose civil -- I'm sorry,
 7 criminal penalties on the judge that accepts excessive
 8 contributions, but there's apparently a loophole in
 9 direct campaign expenditures, which are such things as
 10 paying for billboards and not contributing directly to
 11 the candidate, and this points out that the United
 12 States Supreme Court has upheld the regulation on
 13 contributions to candidates but not on the direct
 14 expenditures, and the Supreme Court has struck down
 15 attempts to regulate direct expenditures, but this rule
 16 does apply to both direct contributions and direct
 17 expenditures.
 18 Now, you know, I don't know how the
 19 direct expenditures are reported if they are. There is
 20 a reference here to disclosures of the grounds for
 21 recusal and reports filed in accordance with canon
 22 blank, and I don't know whether they anticipated that a
 23 new canon would have to be drafted for that. As I read
 24 this, there's not now a canon that would require any
 25 disclosures of the direct expenditures as opposed to

1 governs the motion. Time for filing is 21 days after
 2 the assignment of the judge in the case, the appearance
 3 of a party who creates the grounds for recusal,
 4 disclosure of the grounds, recusal and reports filed in
 5 accordance with the Canons of Ethics, but if the party
 6 seeking recusal first appears in an action after the
 7 events triggering these deadlines, there's 21 days
 8 after that to file a motion.
 9 No discovery can be had. Then there are
 10 definitions of campaign contributions and direct
 11 campaign expenditures, which are right out of the
 12 Election Code, and "excessive," which means if a
 13 party -- if made by a party who's a natural person or a
 14 lawyer, those exceeding the ethical contribution limits
 15 under Section 253.155b of the Election Code and then it
 16 provides that if it's made by a law firm in six times
 17 that as provided in the Election Code.
 18 If it's by a natural person, that can
 19 include their spouse or minor children, and if it's a
 20 law firm, it talks about that, who's included,
 21 partners, associates, and so forth. Contributions
 22 direct or direct campaign expenditures by a party not a
 23 natural person include all contributions by any person
 24 with equity ownership of five percent or more in the
 25 non-natural person's officers and directors. It has

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1 these definitions. That's basically it.
 2 CHAIRMAN BABCOCK: All right. Now, if
 3 you show a violation, is the judge automatically out?
 4 MR. ORSINGER: Yes. Must recuse.
 5 CHAIRMAN BABCOCK: Must recuse?
 6 MR. HAMILTON: Yes.
 7 CHAIRMAN BABCOCK: Okay. All right.
 8 Everybody got a sense of what this rule is?
 9 HONORABLE SAMUEL MEDINA: If I'm not
 10 mistaken, they also said, "Look, it's not just this
 11 rule, but it's so multifaceted that we don't have
 12 time -- we're not going to fix all the problems." Soft
 13 money, for example, you know, where do we go from
 14 there? I think we're biting into something here that
 15 we may not want to do.
 16 CHAIRMAN BABCOCK: Yeah. We're going to
 17 take a straw vote on this in a minute, but Bob.
 18 MR. PEMBERTON: Just following up on the
 19 issue raised earlier, I did manage to pull out a copy
 20 of the act off the internet. Thank goodness it's
 21 available, and, yes, the contribution limits upon which
 22 the recusal rule is based -- and I'll get copies to
 23 everyone in a second -- are mandatory now. It's the
 24 expenditure limits, how much a candidate can spend out
 25 of their war chest in a campaign, that's voluntary

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1 where they opt in or opt out. I've got that here to --
 2 HONORABLE JIM DUNNAM: Then if you
 3 accept too high of contributions are you subject to
 4 criminal penalties? I would assume so.
 5 MR. PEMBERTON: In the act it
 6 provides -- I believe there are civil penalties where
 7 you have to return. I think it's a penalty of two or
 8 three times the excess.
 9 HONORABLE JIM DUNNAM: Is there any
 10 criminal penalty?
 11 MR. PEMBERTON: I didn't see any in
 12 here. I think there might be, but I'm not sure.
 13 HONORABLE JIM DUNNAM: I imagine there
 14 is if it's mandatory because Ronnie Earle could go
 15 after you.
 16 MR. PEMBERTON: Right.
 17 MR. HAMILTON: Well, it says it imposes
 18 civil penalties on candidates for accepting outside the
 19 limit.
 20 CHAIRMAN BABCOCK: Steve.
 21 MR. YELENOSKY: Well, I mean, if that's
 22 correct, and I'd like to see that, because this report
 23 cites it differently, but if that's correct then
 24 essentially we would be writing a rule that says if you
 25 violate the law you have to recuse, which seems to me

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1 to be an understatement of what ought to happen. You
 2 ought not to be a judge if you're violating the law.
 3 So if, in fact, it is voluntary then I
 4 think what we're saying is that if you accept what is
 5 legal to accept you cannot be impartial, and I think
 6 that that would be an indictment of the system if, in
 7 fact, that's what we want to say, and maybe that's what
 8 we want to say, but I do think that that is a
 9 political, maybe a constitutional statement, and does
 10 perhaps implicate the separation of powers, and I would
 11 be very interested in more scholarly information about
 12 that. But if, in fact, it's not illegal to accept what
 13 the rules say is excessive, then I think that
 14 highlights the tension and the debate that's going on
 15 right now about whether this is an appropriate or even
 16 constitutional system.
 17 CHAIRMAN BABCOCK: All right. Go ahead,
 18 Bob.
 19 MR. PEMBERTON: I'm not trying to pick
 20 sides on this whole issue.
 21 CHAIRMAN BABCOCK: Oh, yes, you are.
 22 MR. PEMBERTON: I'm just conveying what
 23 the subcommittee thought. The perception was that,
 24 yes, there are civil penalties, but the likelihood of
 25 anything happening to violators was remote. This

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1 proposal to have a recusal rule based on the concept of
 2 excessive campaign contributions came originally out
 3 of -- in addition to the ABA study, out of a study of
 4 the -- it was either the Ethics Commission study or the
 5 Commission on Judicial Efficiency, which was appointed,
 6 a big blue ribbon task force about five years ago, that
 7 recommended a recusal rule based on this act. At the
 8 time the limits, the contribution limits, were
 9 voluntary. Now they're mandatory and, again, I didn't
 10 mean to open up a can of worms earlier, but simply to
 11 make the point that the task force on this particular
 12 rule perceived that, you know, there is some benefit in
 13 terms of people's perception of the system in having a
 14 rule that says, yes, if the judge busts the -- accepts
 15 excessive contributions they ought not to be presiding
 16 in the case, and there ought to be a mechanism to get
 17 them out of there.
 18 CHAIRMAN BABCOCK: Alex.
 19 PROFESSOR ALBRIGHT: I have a question
 20 for Representative Dunnam. If, in fact, these are
 21 mandatory that the judge is subject to criminal or
 22 civil penalties for accepting more than the act allows,
 23 do you see it as infringing upon the legislative
 24 process for the Supreme Court to pass a rule that says
 25 a judge who violates that law should be recused, that

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1 violating a law is --
 2 HONORABLE JIM DUNNAM: If it's criminal,
 3 they ought to be removed. I think that takes care of
 4 it. They ought to just be removed altogether.
 5 PROFESSOR ALBRIGHT: So maybe you say it
 6 should also be sent to -- notice should be sent to the
 7 district attorney, but what about for that particular
 8 case?
 9 HONORABLE JIM DUNNAM: Does this also
 10 apply -- this also applies to expenditures, too.
 11 MR. PEMBERTON: I'm sorry. The rule as
 12 drafted I don't think applied to expenditures.
 13 HONORABLE JIM DUNNAM: The rule that I
 14 read, I read the committee report.
 15 MR. PEMBERTON: Okay.
 16 MR. HAMILTON: The statute doesn't.
 17 HONORABLE JIM DUNNAM: My thought on it
 18 is that the ramifications of not following the act was
 19 debated in the Legislature, and one of the
 20 ramifications is you can use it in political
 21 advertising and so forth, and that's what they decided
 22 ought to happen, and I think that to expand on that and
 23 create more penalties or rewards, et cetera, was
 24 something that -- I was not in the session when this
 25 happened, and so I wasn't part of that debate. If it

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1 was like all of our other campaign finance debates, it
 2 was pretty hot and heavy, and they made a deliberate
 3 decision that the ramifications were going to be X and
 4 Y, and I don't think it's in the province -- I think
 5 that any change in that is basically a statutory change
 6 by rule.
 7 PROFESSOR ALBRIGHT: But, Representative
 8 Dunnam, I mean, there are grounds for recusal in the
 9 rule that are not statute, so I mean, the judges -- the
 10 Supreme Court has the power to determine what grounds
 11 for recusal are, including violation of the law could
 12 be grounds for recusal.
 13 HONORABLE JIM DUNNAM: I don't have any
 14 problem with violations of the law being grounds for
 15 recusal.
 16 CHAIRMAN BABCOCK: That's to me -- you
 17 know, I wonder why we're going through this whole
 18 effort because I could certainly see that the Court
 19 could hold that a motion for recusal is appropriate and
 20 proper and granting it would be affirmed if there was a
 21 showing that the trial judge had violated the law,
 22 regardless of what other penalties there may be, in
 23 terms of accepting excessive money from one side of the
 24 case. I mean, I can't imagine that the Court would not
 25 have the power to make that ruling and hold in that way

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1 under the current rule.
 2 PROFESSOR ALBRIGHT: Yeah. It seems
 3 rather ridiculous to say that you can't recuse a judge
 4 who is violating the law.
 5 CHAIRMAN BABCOCK: Right. Okay. That
 6 put another way. Yeah, Carl.
 7 MR. HAMILTON: Just to clarify,
 8 according to this report it is says the act imposes
 9 civil penalties if the candidate has agreed to be
 10 governed by those restrictions.
 11 MR. YELENOSKY: That was written in
 12 February of '99, so unless something happened in the
 13 Legislature in '99 or unless this is wrong, what is the
 14 date on what you have?
 15 MR. PEMBERTON: This here, this came
 16 right off the internet, and it incorporates -- I don't
 17 know about the last session's amendments, but certainly
 18 the '97. That provision in the report was referring, I
 19 think, to -- I just looked over it briefly -- was
 20 referring to a series of the various restrictions and
 21 then referred -- the bit about it being voluntary
 22 referred only to the expenditure limits.
 23 MR. YELENOSKY: Can you read us what you
 24 have?
 25 MR. PEMBERTON: What I have here?

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1 CHAIRMAN BABCOCK: Well, it's too long
 2 to read.
 3 MR. PEMBERTON: I'll copy it and get it
 4 around to you.
 5 CHAIRMAN BABCOCK: Here's where I think
 6 we ought to go with this. I'd like to take a vote and
 7 along these lines. If a majority of this committee
 8 thinks that this rule in a broad sense, not the details
 9 of it, but in a broad sense is a bad idea, I would
 10 propose reporting to the Court that -- just that, that
 11 we think it's a bad idea. If the Court wants us to go
 12 ahead anyway and come up with language then we'll send
 13 it back to Richard and Carl, which we're going to do
 14 anyway, and next meeting we'll talk about the
 15 nitty-gritty of it. Sarah, you don't like that idea.
 16 HONORABLE SARAH DUNCAN: Doesn't that
 17 depend -- I would think some people's vote would depend
 18 on whether it's mandatory. I do have a vague
 19 recollection now of the Ethics Commission coming and
 20 doing our -- I wasn't running for election, so I figure
 21 now is the time I will have to figure out what that
 22 particular law is going to be, but I do have a vague
 23 memory that there was a big change in the law two years
 24 ago, but my vote, for one, would -- I would like to
 25 consider whether it's mandatory or not on whether I

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1 think the rule is a good idea.
 2 CHAIRMAN BABCOCK: Okay. Yeah, Tom.
 3 MR. LAWRENCE: There is a public
 4 perception, whether we like it or not, that the giving
 5 of campaign contributions to judges sometimes affects
 6 the quality of justice one receives and affects the
 7 outcome of cases. I don't think that we should just,
 8 given the work of this committee that Carl is referring
 9 to, given the press coverage that this issue has
 10 received, I don't think we should just summarily
 11 dismiss the idea of going forward with this. Perhaps
 12 we need to have a better idea of what the law is and
 13 the rules, but I don't think we should just summarily
 14 dismiss it and choose to take no action. I think we
 15 have an obligation to go forward.
 16 CHAIRMAN BABCOCK: Okay. Yeah. Judge
 17 Patterson.
 18 HONORABLE JAN PATTERSON: I also just
 19 don't want an up or down vote because I don't think
 20 there is a separation of powers question here. I do
 21 think there is a question of is there an existing
 22 mechanism for dealing with this problem, and so I think
 23 people might be voting for different reasons and that
 24 we have insufficient information.
 25 JUSTICE HECHT: And the Court does need

1 to know why.
 2 HONORABLE JAN PATTERSON: Exactly.
 3 Exactly.
 4 JUSTICE HECHT: Just we're in the habit
 5 of explaining ourselves, and just because people think
 6 it's not the thing to do may not be enough help. I
 7 have no idea how my colleagues feel about this rule
 8 other than that when the campaign finance reform
 9 committee reported in and said, "We think this would be
 10 a good idea," there were some pretty savvy people on
 11 that committee, and so their judgment, which was
 12 consistent with an earlier indication of this group,
 13 but it was just a very preliminary one, certainly
 14 nothing that was binding or even -- we didn't even have
 15 a chance to think it through, was enough for us to say
 16 we need to take a look at it.
 17 Whether -- I think it's helpful to know
 18 whether the group thinks that this is more a
 19 legislative matter than a rule-making matter, but
 20 ultimately that, too, is a decision the Court will have
 21 to make because whatever happens in the continuing
 22 debate that we have with the Legislature on the proper
 23 scope of each other's powers, we can't simply not do
 24 our job because we don't -- we're worried about that
 25 debate or how it's going to come out. So I think the

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1 Court will -- and it may be a bad idea for a lot of the
 2 reasons that you have expressed, not the least of which
 3 is if it ain't broke, don't fix it, or there are plenty
 4 of other mechanisms to address it, but I think that's
 5 the kind of -- I'll have to tell my colleagues
 6 something.
 7 CHAIRMAN BABCOCK: Well, how about if we
 8 do this? What if we just go around the room and get
 9 everybody's individual view of -- you don't want to put
 10 that on the record?
 11 HONORABLE DAVID PEEPLES: It will take
 12 'til noon to do that.
 13 HONORABLE F. SCOTT MCCOWN: It's already
 14 11:15.
 15 CHAIRMAN BABCOCK: Yeah. Well --
 16 MR. ORSINGER: Can I throw something
 17 out, too, and it may be if this statute makes these
 18 limits mandatory then perhaps the fix for this is
 19 through case law and not rule making because the
 20 existing -- the previous opinions all occurred when
 21 there were no limits on contributions, and now we have
 22 a law which apparently provides at least civil
 23 sanctions and maybe somebody's criminal sanctions, I
 24 don't know.
 25 CHAIRMAN BABCOCK: But what Judge Hecht

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1 just said was that that's, you know -- I mean, that's
 2 not helpful. We need to either tell the Court --
 3 MR. ORSINGER: What I'm saying is that
 4 if this is a sensitive issue for rule-making authority,
 5 maybe a more appropriate way to address it is through
 6 case decisions.
 7 CHAIRMAN BABCOCK: So --
 8 MR. ORSINGER: In other words, take the
 9 existing Rule 18a and read into it that if somebody
 10 accepts a campaign violation in excess of the limits,
 11 mandatory limits in the statute, that's a ground, and
 12 we don't need to say that in a rule if a court of
 13 appeals or a Supreme Court says it.
 14 CHAIRMAN BABCOCK: Yeah.
 15 MR. ORSINGER: In a case.
 16 CHAIRMAN BABCOCK: So that would be a
 17 reason why we shouldn't -- we would tell the Court that
 18 would be a reason why they shouldn't -- or we shouldn't
 19 and they shouldn't develop a rule in that regard. So
 20 that would be guidance to the Court. Judge Patterson.
 21 HONORABLE JAN PATTERSON: I thought
 22 maybe we ought to take this a bite at a time, and I
 23 would like to suggest that we conclude that it's within
 24 the Court's province to consider this issue. There
 25 seems to be a question in several of us's mind, and I

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1 think there is not a question.
 2 CHAIRMAN BABCOCK: Okay. Yes. Hey,
 3 Skip. I'm sorry.
 4 MR. WATSON: That's okay. I'm new at
 5 this, but you know, I'm looking at this miscellaneous
 6 order kicking this to us back -- you know, signed June
 7 21 of '99. It has five different, you know, identified
 8 by letter areas that this covers, and it only -- the
 9 only thing I see is in the Bates stamped page 69 that
 10 comes to us is a very narrow issue, and that's
 11 recommendation B, promulgation of rules extending and
 12 strengthening the contribution limits of the Judicial
 13 Campaign Fairness Act, and the only thing that I see
 14 that's been punted to us is the committee's proposal
 15 for new procedural rules requiring judges to recuse
 16 themselves.
 17 Surely it doesn't mean "themselves," but
 18 that's what it says, you know, for any violation and
 19 then you drop to the first sentence of the next
 20 paragraph, "The Court accepts the committee's
 21 recommendation and refers the recusal proposal to the
 22 Supreme Court Advisory Committee for assistance in
 23 drafting appropriate amendments to 18a, 18b, and 16,
 24 TRAPS."
 25 Now, I don't know, how often do we get

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1 a miscellaneous order directing us to consider this,
 2 and we come back and say, "No. We think there's a
 3 separation of powers issue, and we're taking the side
 4 of the Legislature in this." For the Court to be -- I
 5 mean, you know, the next part of that concerns, you
 6 know, that if a judge violates it it's a problem for
 7 the judicial -- it's a violation of the Code of
 8 Judicial Conduct, goes to that commission. I mean, we
 9 have the narrowest sliver of this thing to work on
 10 recusal rules, and I'm sorry. I mean, I don't care if
 11 the Legislature is offended if we work on a recusal
 12 rule that affects lawyers, parties, and judges. That's
 13 been our assigned task. We need to do it.
 14 CHAIRMAN BABCOCK: Yeah. No. 1, we are
 15 doing exactly what the Court told us to. That's the
 16 rule that Carl just read. So we're taking the sliver,
 17 and we're talking about it, and I don't think the issue
 18 is whether we care what the Legislature thinks. I
 19 think we do have the duty to advise the Court if it's
 20 the collective wisdom of this group, all lawyers and
 21 all understand generally what separation of powers is
 22 all about, if there is a separation of powers issue.
 23 Now, the Court doesn't have to accept our
 24 recommendation on that or anything else that we tell
 25 them, but that to me is a legitimate issue to discuss.

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1 MR. WATSON: Chip, I'm not saying it's
 2 not. I'm just pointing out that in three or four of
 3 the other five references that are in this order the
 4 Court recognizes the separation of powers issue and
 5 says, "We're punting that to the Judicial Council for
 6 consideration of legislation in this area."
 7 CHAIRMAN BABCOCK: Yeah.
 8 MR. WATSON: And I'm not saying that we
 9 don't give the Court our consensus on how we feel on
 10 how that applies on this sliver. I'm just saying it's
 11 hard for me to imagine not enacting a recusal rule that
 12 they have instructed us to enact or to propose for them
 13 in this miscellaneous order.
 14 CHAIRMAN BABCOCK: Yeah.
 15 MR. WATSON: Perhaps we can do that. I
 16 don't know.
 17 JUSTICE HECHT: Well, let me -- so you
 18 won't feel too confined, it does say "appropriate," and
 19 I have to say this order was negotiated fairly
 20 carefully, and so it is within the committee's purview
 21 to say -- as opposed to what we have said sometimes,
 22 Skip, when we said, "We want your best judgment on this
 23 language. How can it be fixed to accomplish it's
 24 purpose?" Within the purview of this order is whether
 25 the committee thinks it's an appropriate rule.

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1 MR. WATSON: That clears it up. Thanks.
 2 CHAIRMAN BABCOCK: And there are all
 3 sorts of issues, and I've probably done a bad job in
 4 terms of separating them, but the separation of powers
 5 issue is one, and that's how we got started. Another
 6 issue, as Richard just said, is whether or not it's
 7 already covered by the existing rule. That's another
 8 issue, and then the -- and those are almost threshold
 9 issues to me, and then if you cross over those two then
 10 you get to the point where, well, what are we going to
 11 do with the nitty-gritty language of the rule, and
 12 we're not near ready to talk about that today.
 13 I just thought that maybe as a threshold
 14 matter if we had consensus -- and from what I'm
 15 hearing, is I would guess that this committee would say
 16 no separation of powers problem or if there is one, we
 17 don't recommend that the Court dodge it, and No. 2, I
 18 don't know where we are on whether or not as a
 19 threshold matter we feel this is unnecessary because
 20 it's not broke and it's already covered by existing
 21 rules.
 22 MR. WATSON: Justice Hecht cleared it
 23 up. I'm sorry.
 24 CHAIRMAN BABCOCK: Huh?
 25 MR. WATSON: I'm sorry. Justice Hecht

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1 cleared up my question.
 2 CHAIRMAN BABCOCK: Okay.
 3 MR. LAWRENCE: Let me add one thing. If
 4 this is, in fact, a mandatory spending limit then
 5 that's the law, and if the judge violates the law then
 6 he's violated Canon 2 in Article Canon 1 of the Code of
 7 Judicial Conduct, which means that ultimately the
 8 Supreme Court could remove him from office if they
 9 chose to do so.
 10 JUSTICE HECHT: The Judicial Conduct
 11 Commission, not the Supreme Court.
 12 MR. LAWRENCE: Well, the Judicial
 13 Conduct Commission would recommend, but ultimately the
 14 Supreme Court would make that decision. To suggest
 15 that the Supreme Court could remove the judge from
 16 office for violating this but not have a say-so as to
 17 whether or not he should recuse himself would seem to
 18 me to not follow.
 19 CHAIRMAN BABCOCK: Judge McCown.
 20 HONORABLE F. SCOTT MCCOWN: We're not
 21 talking about whether a judge can or can't be recused
 22 for taking an excessive campaign contribution. My
 23 position would be that under the law right now today,
 24 under the rules right now today, that if a judge took a
 25 campaign contribution in excess of the limits that a

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1 party could file a motion under the procedure we have
 2 and get him recused. What we're talking about is
 3 whether it's wise to put into the rule a specific rule
 4 about campaign contributions, and I'd like to make one
 5 last pitch for why I think that's not a good idea.
 6 Judges get beat up about this, because
 7 to be a good judge, step one is you have to be a judge.
 8 You have to get elected. You have to take campaign
 9 contributions. You comply with the law. You file your
 10 C&E. You forget about it, and you move on. That's
 11 what we should do. I think by and large that's what we
 12 do do. To put into the rule a provision about campaign
 13 contributions when there is no evidence of a problem
 14 suggests to the public, suggests to the judges that you
 15 have to be regulated because of this. Why don't we
 16 have a rule in the book that judges should be recused
 17 and have a special procedure for it when they're having
 18 sex with one of the parties? What's the difference?
 19 Why are we having a specific rule about campaign
 20 contributions?
 21 CHAIRMAN BABCOCK: I could see a lot of
 22 difference, personally, but --
 23 HONORABLE F. SCOTT MCCOWN: I think
 24 symbolically, just symbolically, it shouldn't be there.
 25 CHAIRMAN BABCOCK: Okay. Paula, will

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1 you help me out with this?
 2 MS. SWEENEY: With what?
 3 CHAIRMAN BABCOCK: Not the sex part. I
 4 think we ought to -- to move this thing along we ought
 5 to have two votes. One vote would be whether this
 6 committee feels that the separation of powers is so
 7 clear-cut that it's our recommendation to the Court
 8 that they ought to -- they ought to forget about this
 9 problem on separation of powers grounds. So that's --
 10 PROFESSOR ALBRIGHT: Chip, has it been
 11 resolved that it is mandatory?
 12 MR. YELENOSKY: We're looking at that.
 13 MR. PEMBERTON: We are in the process of
 14 making copies of the internet printout of the statute.
 15 The formatting is really goofy. I've tried to divide
 16 out the sections with just lining through there.
 17 CHAIRMAN BABCOCK: Is it mandatory?
 18 MR. PEMBERTON: Based on my reading,
 19 yeah.
 20 CHAIRMAN BABCOCK: Okay. Based on
 21 Pemberton, who is a very bright guy, it's mandatory.
 22 MR. PEMBERTON: Well, Yelenosky may have
 23 another view.
 24 MR. YELENOSKY: Well, I don't know. I
 25 mean, it's hard because of the way it's printed out,

1 your hand on that?
 2 MR. ORSINGER: Yes.
 3 CHAIRMAN BABCOCK: Okay. Anybody else?
 4 Okay. Now, the next issue, and this is maybe a closer
 5 call. Do we -- how many people think that because the
 6 existing rules take care of it or because there is not
 7 a demonstrated problem, as Judge McCown just said, we
 8 shouldn't go any -- we should recommend to the Court
 9 that they not go any further with this? Okay.
 10 Everybody got that? Everybody who wants to vote for
 11 that, raise your hand.
 12 MR. LAWRENCE: Wouldn't it be nice to
 13 know if this was mandatory or not?
 14 MR. EDWARDS: I'd like to have an
 15 opportunity to -- since it's some question about that
 16 statute I'd like to have an opportunity to review it.
 17 CHAIRMAN BABCOCK: This is just
 18 preliminary.
 19 HONORABLE JAN PATTERSON: There are some
 20 parts of it that are mandatory because, for example,
 21 you cannot accept contributions within a certain period
 22 of time. So there are aspects of it that are
 23 mandatory. It may be that the total amounts of
 24 contributions are voluntary, but there are aspects of
 25 it that are not voluntary.

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1 but if you look at page five of nine --
 2 CHAIRMAN BABCOCK: We don't need to look
 3 at it. Is it mandatory or not?
 4 MR. YELENOSKY: Based on this I don't
 5 think it is.
 6 HONORABLE SCOTT BRISTER: The judges all
 7 thought it wasn't, but --
 8 MR. YELENOSKY: The limits on
 9 contributions it says and on -- on contributions and on
 10 reimbursements.
 11 CHAIRMAN BABCOCK: Okay. So, Alex, the
 12 answer is it's unclear. So if that informs your vote
 13 then --
 14 PROFESSOR ALBRIGHT: I just find it very
 15 difficult to vote on that issue.
 16 CHAIRMAN BABCOCK: -- that informs your
 17 vote, but No. 1, separation of powers. If the sense of
 18 this committee is that that's such a clear-cut issue
 19 that the Court ought to stay out of this then raise
 20 your hand.
 21 MR. ORSINGER: But, Chip, before you say
 22 that...
 23 CHAIRMAN BABCOCK: Yeah.
 24 MR. ORSINGER: I don't think that this
 25 is a genuine separation of powers issue, but I --

1 MR. EDWARDS: I'd like to have an
 2 opportunity to review the statute, and I would also
 3 like to know empirically whether there have been any
 4 reported violations of the statute since it's been
 5 enacted.
 6 CHAIRMAN BABCOCK: Okay. This is a
 7 straw vote. We're not going to do anything. I'm just
 8 interested. So how many people want to raise their
 9 hand?
 10 MR. LAWRENCE: Would you restate it?
 11 CHAIRMAN BABCOCK: Yeah. How many
 12 people think either for the reason that the current
 13 recusal rule is sufficient to cover violations, whether
 14 they be mandatory or not, whether the statute is
 15 mandatory or not, or because there's no demonstrated
 16 problem that our collective --
 17 HONORABLE JAN PATTERSON: Would you
 18 divide that into two parts? Can we vote on both of
 19 those?
 20 CHAIRMAN BABCOCK: Separately?
 21 HONORABLE JAN PATTERSON: Yeah, because
 22 I don't ever want to suggest that there's not a problem
 23 with it.
 24 CHAIRMAN BABCOCK: Okay. All right.
 25 Let's vote on the first one. How many people think

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1 CHAIRMAN BABCOCK: Then don't raise your
 2 hand.
 3 MR. ORSINGER: -- think it's a political
 4 issue that involves separation of powers perceptions.
 5 So I'm prepared to vote for Proposal No. 1, which is to
 6 stay out of it, not because of what I think the
 7 Constitution says, but because of what I think
 8 legislators think. Now, that's an important
 9 distinction to me.
 10 CHAIRMAN BABCOCK: Okay. Yeah, Bill.
 11 PROFESSOR DORSANEO: Now, the Rules
 12 Enabling Act talks about the relationship between the
 13 Court and the Legislature and the Legislature's ability
 14 to disapprove rules, and I see it as a question of
 15 process, not as a question of some sort of who's the
 16 biggest kid.
 17 CHAIRMAN BABCOCK: Okay. So don't raise
 18 your hand. Anybody think that -- anybody want to tell
 19 the Court to stay out of this because of the separation
 20 of powers issue or the political issue? Richard, I'll
 21 accept a friendly amendment.
 22 MR. ORSINGER: Okay.
 23 CHAIRMAN BABCOCK: Is so severe that
 24 they just ought to stay out of it, that we ought not to
 25 consider the rule. Okay. Richard, you want to raise

1 that the rule as it exists is sufficient to cover any
 2 violation of this statute?
 3 18. How many people think that the
 4 current rule is insufficient to cover a violation?
 5 HONORABLE F. SCOTT MCCOWN: Wait a
 6 minute. I'm not sure I understood what we were voting
 7 on. You mean the --
 8 CHAIRMAN BABCOCK: The current rule.
 9 HONORABLE F. SCOTT MCCOWN: Not the
 10 proposed rule.
 11 CHAIRMAN BABCOCK: Not the proposed
 12 rule.
 13 HONORABLE F. SCOTT MCCOWN: Present law?
 14 CHAIRMAN BABCOCK: Present law.
 15 HONORABLE F. SCOTT MCCOWN: Is
 16 insufficient. Okay.
 17 CHAIRMAN BABCOCK: Yeah. How many
 18 people think it's insufficient?
 19 Six. Okay. Now, how many people think
 20 there is no demonstrated problem that needs to be cured
 21 here? Raise your hand.
 22 PROFESSOR DORSANEO: I don't have that
 23 problem.
 24 HONORABLE SAMUEL MEDINA: Does that
 25 count "I don't know"?

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1 MR. EDWARDS: How about "I don't know"?
 2 CHAIRMAN BABCOCK: Okay. Seven. How
 3 many people don't know?
 4 PROFESSOR DORSANEO: No demonstrated
 5 problem, and I don't know.
 6 MR. CHAPMAN: If the rule is sufficient
 7 to take care of it what difference does it make if
 8 there's a demonstrated problem?
 9 MS. SWEENEY: Is there a third option?
 10 HONORABLE JAN PATTERSON: We know
 11 there's a problem. How about that?
 12 CHAIRMAN BABCOCK: Okay. How many
 13 people know there is a problem?
 14 MR. HAMILTON: I think we have to assume
 15 there is a problem from this report from the public
 16 perception.
 17 MS. SWEENEY: With what?
 18 HONORABLE SAMUEL MEDINA: That's public
 19 perception. Yeah.
 20 MS. SWEENEY: I'm not voting on public
 21 perception.
 22 HONORABLE SAMUEL MEDINA: I wasn't
 23 talking about public perception.
 24 CHAIRMAN BABCOCK: Yeah. I know. I
 25 know. I know.

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1 HONORABLE SAMUEL MEDINA: Okay.
 2 CHAIRMAN BABCOCK: That wasn't the vote.
 3 That wasn't the vote. Okay. I think this is helpful,
 4 and what I propose to do is get with Richard and Carl
 5 and Justice Hecht and see where we want to go with
 6 this. The recusal rule is going to be on the agenda
 7 for next meeting anyway, and it's just a question of
 8 whether or not this piece of it is going to -- is going
 9 to continue. We only had 24 people voting on the issue
 10 of whether or not the current rule is sufficient, and
 11 24 out of a committee of how many, Bob?
 12 MR. PEMBERTON: This entire committee?
 13 JUSTICE HECHT: 53.
 14 CHAIRMAN BABCOCK: Out of 53, and I have
 15 always been concerned about these Saturday votes when
 16 only half the committee is here, so --
 17 HONORABLE F. SCOTT MCCOWN: It's the
 18 smarter half, though.
 19 CHAIRMAN BABCOCK: Huh? It's the what?
 20 HONORABLE F. SCOTT MCCOWN: The smarter
 21 half.
 22 CHAIRMAN BABCOCK: The smarter half.
 23 They're weighted.
 24 MR. LATTING: well, I don't know. If
 25 we're here on Saturday morning, it might be the dumber

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1 half.
 2 CHAIRMAN BABCOCK: Yeah, right. So,
 3 yeah, Richard, last comment.
 4 MR. ORSINGER: Should the
 5 subcommittee -- well, first of all, if we go forward
 6 with the rule I understood Justice Hecht to be saying
 7 that we shouldn't take this language as a given, that
 8 we as a subcommittee ought to craft something that we
 9 think is a better design.
 10 JUSTICE HECHT: Absolutely. The Court
 11 does not have -- has not looked at the language and
 12 wants your opinion.
 13 MR. ORSINGER: Okay. We didn't
 14 undertake to do that because we thought perhaps this
 15 language was acceptable, but then should we do that
 16 over the next two months or should we wait to hear back
 17 from you, Justice Hecht, about the Court's --
 18 CHAIRMAN BABCOCK: We're going to talk
 19 about it. Yeah. Wait.
 20 MR. ORSINGER: But do not wait -- wait
 21 one month or wait two months?
 22 CHAIRMAN BABCOCK: Wait a couple of
 23 days.
 24 MR. ORSINGER: Okay.
 25 CHAIRMAN BABCOCK: Okay. In 15 minutes

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1 or less, Judge Peeples, tell us why these overworked
 2 judges, district judges, ought to now have to state
 3 what their reasons are for granting summary judgment.
 4 HONORABLE DAVID PEEPLES: Yesterday
 5 afternoon a two-page handout was given to you. The
 6 first page says "Rule 166a, summary judgment," and some
 7 proposed changes are on page two. And while you're
 8 looking for that, the background on this is that the
 9 Legislature passed a statute that said judges have to
 10 give their reasons when they grant summary judgment
 11 basically. The governor vetoed it, and the Supreme
 12 Court asked us to take a look at it, which my
 13 subcommittee did.
 14 HONORABLE F. SCOTT MCCOWN: well, if the
 15 governor vetoed it, that's good enough for me.
 16 JUSTICE HECHT: This is on the record,
 17 Scott.
 18 HONORABLE F. SCOTT MCCOWN: That's fine.
 19 HONORABLE DAVID PEEPLES: This is
 20 presented, you know, not as a final solution or
 21 anything, but if we want to do this, this is language
 22 to talk about. Now, just two or three points. As I
 23 see it, the problem is -- okay, first of all, this only
 24 happens when a summary judgment is filed that has
 25 several grounds and the judge grants it. If the judge

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1 does not specify, "I granted that on ground A and B"
 2 then the appellant has to challenge every ground that
 3 was urged, otherwise the judgment will be affirmed on a
 4 separate and independent ground.
 5 So the theory behind this proposal here
 6 is judges ought to say, "I granted it on ground A" or
 7 "I granted it on all the grounds," or under Comment 3
 8 the judge can, as is the law now, simply not say; but
 9 this urges judges to specify the grounds, and when they
 10 do then the appellant only has to challenge the grounds
 11 that are specified. If the appellee who got the
 12 summary judgment wants to urge to the appellate court
 13 to affirm on other grounds, the appellee would have to
 14 cross-assign or have cross-points in its brief that
 15 raise those issues and then the appellant would know
 16 "I've got to deal with these issues."
 17 I want to highlight in Comment 2 that
 18 this proposed rule does not require findings of fact,
 19 reasoning, or anything else. It simply envisions the
 20 judgment is granted on limitations or the judgment is
 21 granted because there was no evidence of an element of
 22 a cause of action and that -- you know, that's not an
 23 explanation of reasoning. It's not findings of fact
 24 and conclusions of law. It's just the designation of a
 25 ground.

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1 Comment 3, I just think that it's a
 2 concession to reality. I think we must accept the fact
 3 that some judges may want to say, "Well, look, I'm
 4 going to make you appeal every ground and, therefore,
 5 I'm going to say that I granted it on 15 grounds," even
 6 if the reality is it was just on a few. I don't know
 7 how you can prevent a judge from doing that if a judge
 8 wants to do it. So I say let them do it if they want
 9 to. I think this would nudge us in the direction of
 10 specifying grounds so it's pretty clear we granted it
 11 on one or two grounds and not on the other grounds.
 12 CHAIRMAN BABCOCK: Okay. Bill, Paula,
 13 and then Judge Brister.
 14 PROFESSOR DORSANEO: well, the important
 15 sentence is the second one, because, you know, just the
 16 suggestion that the judge should state the grounds, you
 17 know, isn't meaningful unless something bad happens if
 18 the judge doesn't. So it's the second sentence that
 19 talks about the requirement of the appellee to
 20 cross-point or to raise the matter in the court of
 21 appeals. Our cross-point rule is something that needs
 22 to be considered in TRAP 38.6 in this connection. It
 23 doesn't say very much about cross-points. At this
 24 point in time I've always thought that that probably
 25 was bad, that it ought to say that you can or should

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1 cross-point if there is an independent basis for
2 affirmance.
3 There's a separate question, a separate
4 question as to whether you must, which I think under
5 current law the answer to that is "no," that you could
6 at least raise the matter in a motion for rehearing,
7 and that's really what we're talking about here, and,
8 you know, I don't think it's going to end up being the
9 case that the courts of appeals will say that if the
10 trial judge, you know, stated the ground and it's the
11 wrong ground that the summary judgment will be reversed
12 if there is a right ground that's, you know, raised by
13 cross-point or in a motion for rehearing.
14 So, you know, I think our appellate
15 subcommittee needs to look at this and to supplement,
16 you know, supplement your report. All of this may
17 make, you know, good sense, but it has to kind of
18 connect up and then go further. What happens, you
19 know, when you say, "No judgment may be affirmed on
20 other grounds unless they are asserted by cross-point
21 in the appellate court as alternative grounds for
22 affirmance," now, do you mean in the appellee's brief?
23 Do you mean in the court of appeals at some point in
24 time? And then we get to the ultimate question as to
25 whether, you know, the Supreme Court would be willing

1 the litigant to do that, but then you're going to have
2 to have rehearings and rehearings because, just like
3 findings of fact, nobody drafts the findings of fact
4 strictly the way they think the judge wanted to rule.
5 You draft those the way you want it to be for your
6 appeal, and the same thing is going to happen in these
7 drafts, and so the effect is going to be in many cases
8 the judge must type the summary judgment order himself
9 or herself.
10 Finally, the same judges who go to judge
11 school, take the message, and decide, in my view,
12 unconscionably and unfairly just to tell you, "Why are
13 you granting the motion, judge?" "All grounds. I'm
14 not going to tell you." This rule is not going to help
15 with them because what are they going to say? "All
16 grounds. I'm signing an order on all grounds." They
17 are not going to give you any more help than they are
18 now. Those of us who write seven page orders are going
19 to be the ones who are penalized by this. I'm sure you
20 as litigants have sometimes been surprised -- I know
21 I -- by the grounds on which courts of appeals, maybe
22 even the Supreme Court sometimes, decide cases. I
23 mean, any of you ever really been -- had --
24 HONORABLE JAN PATTERSON: I don't think
25 that's a problem.

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1 to reverse a reversal if there was a basis for
2 affirmance and there wasn't a motion for rehearing
3 raising the independent basis for affirmance, which is,
4 you know, I think the next question down -- you know,
5 next question down the line.
6 CHAIRMAN BABCOCK: Paula.
7 MS. SWEENEY: I will hold myself in
8 check until some other meeting.
9 CHAIRMAN BABCOCK: Did the court
10 reporter get that? Judge Brister and then Anne
11 McNamara.
12 HONORABLE SCOTT BRISTER: Let me just
13 state a couple of things. My colleagues will be
14 furious about this, and it is not because they will
15 have to state their reasons. I and several of the
16 others on numerous occasions have written ten -- I know
17 some of them 20-page orders explaining their reasons.
18 But the problem with this, our view, is the unintended
19 consequences. No. 1, it's misleading to say "the judge
20 should state." What you're saying is the order, the
21 summary judgment order, it must be stated in writing.
22 Nobody has -- I don't know think there would be any
23 problem if we say the judge has to say it at the
24 hearing, but the second sentence doesn't follow it
25 unless the first sentence means you have to say it in

1 HONORABLE SCOTT BRISTER: I can't
2 imagine I lost on that ground. Like I say, as a
3 litigant maybe, you know, you have a right to be
4 shocked because, of course, you're -- as a judge just
5 trying to follow the law, I don't care who wins, don't
6 have any money, any say. About 50 percent of the time
7 I am shocked, really shocked, at why it came out this
8 way. It -- had no idea, maybe it was buried in some --
9 that's not what we talked about at the hearing. I
10 mean, it really is a surprise.
11 HONORABLE JAN PATTERSON: I don't think
12 Judge McCown agrees with that.
13 HONORABLE SCOTT BRISTER: That's
14 especially frustrating when you've had a long trial and
15 then you get the court of appeals pages, "Oh, there's
16 an easy limitations issue here. You shouldn't have" --
17 and that's what this will end up in when I write my
18 long opinion and go to a lot of trouble. Again, I
19 think most attorneys will file cross-appeals. Why are
20 we making me type up all the orders if it's going -- if
21 it's going to end up the same thing, everybody files
22 cross-appeals. Why do I have to type up all these
23 orders so we can do the same thing what we're doing
24 now, which is address all the points?
25 And in the few cases where somebody

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1 the order. Now, if we're going to write that, the way
2 that will come out in some case is the district judge,
3 district --
4 HONORABLE DAVID PEEPLES: That says
5 "order." You have a previous draft.
6 HONORABLE SCOTT BRISTER: Okay. I do.
7 Okay. Then what it actually should state is the
8 district judge must type the order him or herself
9 because some litigants do not. The attorneys in many
10 cases in Harris County will not do that, and I do not
11 have a secretary, and most of the judges do not have a
12 secretary, and we're not going to get secretaries, and
13 so my colleagues when they read this order they mean --
14 they read this to say the judge must type the -- all
15 summary judgment orders himself or herself. Naturally
16 they would prefer to be doing other things than taking
17 time off from court, typing up these orders because
18 that's what it will be.
19 You can say, well, it only applies to
20 cases where there are at least several grounds. There
21 are no summary judgment cases -- motions these days
22 that don't have more than one ground because they all
23 have a no evidence ground and then they have got
24 whatever other grounds they have got in them, and
25 second, you can -- you say, well, of course, you tell

1 doesn't raise the points by cross-appeal and the court
2 of appeals might have affirmed on that ground, who
3 knows. It comes back. I've got to go through the
4 trial and then find out on this something that was
5 raised on cross-appeal wasted all this time, so that
6 the only people who will be punished by this -- the
7 perfect example of the law of unintended consequences,
8 the good judges are already doing this. The only
9 people who will be punished by this are the ones who
10 are already doing it. That's our view.
11 CHAIRMAN BABCOCK: Anne, would you yield
12 to Justice Hecht here for a second?
13 MS. MCNAMARA: I'm sorry?
14 CHAIRMAN BABCOCK: Would you yield to
15 Justice Hecht?
16 JUSTICE HECHT: As I understood from
17 Representative Dutton and Representative Bosse,
18 although we have not talked directly, but in visiting
19 with their staffs, that the problem was really one in
20 trying to limit issues on appeal more than getting the
21 trial judge to do more work or different work, and so
22 that's a little different twist on this.
23 PROFESSOR DORSANEO: Right.
24 JUSTICE HECHT: And we need to talk
25 about that, too, which is even if the judge, trial

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1 judge, doesn't say, should the court of appeals be
2 authorized to affirm the trial court's judgment on an
3 issue that is not raised in a cross-point? In other
4 words, can the appellant say, "Well, I think, court of
5 appeals, these are the three best reasons they have
6 got, and they're no good, and there's ten others, and I
7 don't think they're any good either" and you then put
8 the onus on the appellee to come in and say, "Well,
9 yes, there are ten others, and five of them aren't any
10 good, but five of them are good." The concern seemed
11 to be trying to limit issues on appeal.
12 CHAIRMAN BABCOCK: Okay. Anne McNamara.
13 MS. McNAMARA: I just wanted to ask a
14 question or clarification of Judge Peeples, and what
15 does this "should" mean? If you move on --
16 HONORABLE DAVID PEEPLES: Well, "should"
17 is a concession to you can't make people do it.
18 MS. McNAMARA: But what if the judge
19 doesn't -- say you've got two grounds for summary
20 judgment and the order just says the motion is granted.
21 What are the consequences of that?
22 HONORABLE DAVID PEEPLES: Well, no
23 consequences. The appellant has to challenge all those
24 grounds, both of them.
25 MS. McNAMARA: Okay.

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1 HONORABLE DAVID PEEPLES: And just
2 briefly, see, what's at stake here, I think, is this:
3 If I'm the appellant I don't want -- if I brief a
4 couple of issues and then I get the opinion back and
5 they affirmed on an unbriefed issue that I didn't think
6 was an issue, that's unfair. And so what I will do
7 next time is brief everything, and then the appellee if
8 he's smart will brief everything, too, even though a
9 lot of it won't matter. I think this helps shape the
10 appellate process so that the lawyers can decide what's
11 really at issue and they know what's going to be
12 briefed and they won't get a decision on an unbriefed
13 issue.
14 CHAIRMAN BABCOCK: We're not going to
15 decide this today. It's going to be on the agenda for
16 next time.
17 PROFESSOR DORSANEO: It needs to be on
18 the appellate subcommittee's agenda.
19 CHAIRMAN BABCOCK: Will you take care of
20 that? Okay. So, Bill, can we move on or do you --
21 MR. EDWARDS: One, it's a different --
22 attacking from a different place a little earlier on.
23 I think part of the problem is -- and I'm usually the
24 gettee on these summary judgments. A lot of the
25 problem is you can't tell from the motion that's filed,

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1 inartfully drawn, really what are the points, and it
2 may be that if we require a list of the points from the
3 beginning by number and one item per point that it will
4 be easier to tell the court what the opposing side is
5 and easier for the court to rule on it because you've
6 got 8, 10, 15, however many numbers, just like special
7 exceptions or motions in limine or anything else,
8 granted, denied, granted, denied, and it's a matter of
9 a checklist, and people know what to brief and what not
10 to brief.
11 CHAIRMAN BABCOCK: Justice Hecht has got
12 an administrative comment about just our expense
13 reports and everything.
14 JUSTICE HECHT: Yes. For a lot of you
15 who are new, some years ago back in the Eighties and
16 before, committee members had to bear their own
17 expenses, which those of you who come from that era
18 remember that, and it was kind of a hardship. In the
19 early Nineties we prevailed on the Bar to reimburse the
20 expenses of this committee, but we have always
21 encouraged members who could to consider your travel
22 here and your expenses here a donation to the work
23 rather than to saddle the Bar with this, but you are
24 nevertheless entitled to put in for reimbursement just
25 like you would a CLE course or anything else.

1 We've never had guidelines on what was
2 reimbursable, but it needs to be said that your
3 expenses should be kept to a minimum because the Bar
4 already underwrites the cost of copies and the court
5 reporter and the transcribed record, and the expenses
6 are pretty hefty. So if your court will pay for it or
7 if you can afford it, please consider it a donation.
8 If you can't, put into the Bar for it, but do try to
9 keep the expenses reasonable or else we'll have to come
10 up with some guidelines.
11 CHAIRMAN BABCOCK: Two other quick
12 points. Do you want to say something about the summary
13 judgment thing?
14 MR. CHICK: Yeah. First of all, I'd
15 like to introduce myself. My name is Craig Chick and
16 I'm with Representative Frank Bosse's office and the
17 Committee on Civil Practices, which the summary
18 judgment was heard in our committee, and I'd just like
19 to notify you-all and let you know and request any
20 comments that you-all might could give to the committee
21 throughout this interim. We're in the process --
22 probably in the second week of December, the Speaker
23 issued interim charges on the rules, and they also
24 issued another charge on the summary judgment, and
25 we're in the process of trying to have a committee

1 hearing at the State Bar convention in I think it's
2 June, and we just encourage you-all's input before the
3 committee if you-all are interested at any of the
4 topics that we have.
5 CHAIRMAN BABCOCK: Great. Yeah, Steve.
6 MR. YELENOSKY: I just wanted to say now
7 that Bob's back, as best I can work through this now I
8 think Bob's right and I was wrong, and that may be
9 news, but it does seem contribution limits are
10 mandatory on everyone and only expenditure limits are
11 optional.
12 MS. SWEENEY: When's our next meeting?
13 CHAIRMAN BABCOCK: What's the next date
14 of the meeting, Carrie?
15 MS. GAGNON: April 7th.
16 CHAIRMAN BABCOCK: April 7th. I just
17 want to thank everybody, and Sarah Duncan said
18 something that I will echo, extraordinary coming
19 together to reach consensus on difficult issues.
20 Really, really a lot of fun. I was telling people
21 yesterday I'm on a high at the end of these things.
22 HONORABLE DAVID PEEPLES: We passed
23 around an e-mail list and if you didn't sign that,
24 please do and then I assume that you will get that and
25 send it to everybody.

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I
reported the above hearing of the Supreme Court
Advisory Committee on January 29, 2000, and the same
were thereafter reduced to computer transcription by
me.

I further certify that the costs for my
services in this matter are \$_____.

CHARGED TO: Charles L. Babcock.

Given under my hand and seal of office
on this the _____ day of _____, 2000.

ANNA RENKEN & ASSOCIATES
1906-B West 37th Street
Austin, Texas 78731
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D'LOIS L. JONES, CSR
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24 #005,034DJ

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