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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 26, 2009

(SATURDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 26th
day of September, 2009, between the hours of 9:06 a.m. and
12:04 p.m., at the Texas Association of Broadcasters, 502
E. 11th Street, Suite 200, Austin, Texas 78701.

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Documents referenced in this session

09-26 Recusal - memo from Mr. Orsinger, 8-24-09
09-27 Recusal - memo from Judge Peeples, 9-23-09
09-28 Recusal - Rule 18a strikeout version
09-29 Recusal - Rule 18a clean version
09-30 Recusal - Second region statistics

1 Now, some people say, well, I don't think we
2 can do that constitutionally. I'm not expressing an
3 opinion on that.

4 MR. GILSTRAP: Say what the reverse is
5 again, please.

6 HONORABLE TRACY CHRISTOPHER: The reverse
7 would be it would not be a basis for recusal, just like
8 under our case law, that if your -- the contributions that
9 you accepted were below the Campaign Fairness Act limits,
10 and the reason why I think that's important is that since
11 Caperton, although the little handout that we got from the
12 Second Judicial Region said that there were three cases
13 involving campaign contributions, I believe that there is
14 really five that I know of in the second region involving
15 campaign contributions, and they were all for motions in
16 connection with a campaign contribution that was less than
17 the statutory limit, the Campaign Finance Act limit, and
18 this is just bringing a lot of uncertainty into -- and
19 politics into judging, which, you know, maybe you say
20 that's the system we have, we're elected judges, we're
21 stuck with it, but from a point of view of getting ready
22 for a campaign season and, you know, you need to know, the
23 lawyers need to know is the money I give you going to be a
24 basis for a recusal against you? Is the money I take
25 going to be a basis of a recusal against me? You know, I

1 favor a bright line because that gives certainty to the
2 judges, the lawyers, the litigants. So that's the first
3 issue.

4 The second issue involved in Caperton were
5 the PACs, the PAC money. I don't really see how we can
6 write a rule involving the PAC money, and I think we just
7 have to do that -- that has to be considered on a case by
8 case basis. I mean, you know, the funny thing about it is
9 what if a plaintiff won a big verdict and what if the --
10 and say the plaintiff was a company and had a lot of
11 money, and they decided that they were going to support
12 all of the conservative Republican judges that were up,
13 okay, and then when they did and all those conservative
14 Republican judges won, you know, you've got to recuse,
15 because this PAC supported you. And so it would be the
16 opposite of Caperton. You'd have -- you'd definitely have
17 games playing going on, I think. So I don't think we can
18 write a rule about the PAC.

19 Then the third issue that kind of came up
20 was the bundling issue, as I call it. A lawyer goes out
21 and, you know, gets 10 contributors with a certain amount
22 of money on your behalf. Well, that is a time-honored
23 manner of campaigning, has been around forever, and the
24 question is whether it should be considered a ground for
25 recusal. Now, I understand that recusal in -- where was

1 that, David?

2 HONORABLE DAVID EVANS: Corpus.

3 HONORABLE TRACY CHRISTOPHER: In Corpus,
4 might have involved sort of that allegation, sort of the
5 bundling allegation, but, you know, as I start the
6 campaign season I've had friends say to me, you know, "I'd
7 like to throw you a fundraiser at my house," lawyer
8 friends. Obviously they tend to be the ones who actually
9 are interested in throwing you fundraisers, right, or "I
10 want to throw you a fundraiser at" -- "and you can use the
11 atrium of our building," and so he then would use his list
12 of friends, you know, send out an invitation, and say, you
13 know, "Come to Tracy's fundraiser at my building." All
14 right. Is that permissible anymore? Is that something
15 that should be a basis for recusal? I don't know.

16 And certainly Caperton and that decision
17 down there in Corpus has made us all a little nervous
18 about it, and that's just all there is to it, and then I
19 say, well, which is worse, really? I ask Harvey, "Harvey,
20 I really need another \$20,000 for this one last TV buy.
21 Can you help me?" and Harvey calls 20 people, okay, to get
22 that last bit of money for me. Is it really worse that
23 I've asked Harvey to call those 20 people than for a
24 sitting judge to make the phone call herself? I mean,
25 talk about -- and, you know, it's not wrong for a sitting

1 judge to do it, to make the phone calls themselves, to ask
2 for money themselves, but I know you lawyers that are on
3 this committee, when you get a phone call from the sitting
4 judge, you know, him or herself, it's much more coercive
5 than a letter or a phone call by Harvey to that lawyer
6 saying, you know, "Judge Christopher really needs this
7 extra money. Can you come up with that money?"

8 So, yes, maybe Harvey is bundling, you know,
9 because he's helping me get that last \$20,000, but is that
10 really a worse thing than me calling people myself in
11 terms of the electoral process and how we want to think
12 about encouraging or discouraging that idea, the bundling
13 idea, so and those are just sort of practical things that
14 you have to think about in connection with this rule.

15 CHAIRMAN BABCOCK: Okay. Yeah, Eduardo.

16 MR. RODRIGUEZ: And I agree that we have to
17 think about all those things; but your second point about
18 if you come within the amounts in the Judicial Fairness
19 Act that shouldn't be considered, my problem is, you know,
20 in an area like where we come from in South Texas, where,
21 you know, you can have a two- or three-man firm come
22 within the Campaign Fairness Act, but that's the
23 significant portion of a judicial candidate's
24 contributions; and, you know, I've been practicing down
25 there for forty some years and, you know, Roger and Carl

1 can tell you that, you know, it makes a significant
2 difference when you're on the other side of somebody who's
3 that way, or a bundler.

4 I mean, you know, we all know who the
5 bundlers are; and we all know, you know, if he's on the
6 other side with this particular judge, you know, it's --
7 you know, you're going uphill; and so from that
8 perspective from being where I come from, it is something
9 that I think we should consider and see if there can be
10 anything done. I don't know that there can under
11 everything that we've got, but I can tell you that reality
12 in South Texas -- and I'm sure that it's not just in South
13 Texas, it's in other parts of the state as well. You
14 know, we can -- we can name you a list of four or five
15 lawyers that if you're against them in a particular court,
16 you've got -- you know, you've got your work cut out for
17 you, and that's unfair to my client, and so how do we --
18 how do we make that -- how do we fix that situation? Or
19 can we ever?

20 HONORABLE TRACY CHRISTOPHER: In connection
21 with -- I mean, I know one of the -- I'm sorry I'm
22 speaking out of turn, but one of the facts in Caperton
23 was, you know, how much money was involved versus the
24 total campaign contributions. And, yes, I can understand,
25 you know, that idea, that idea. So even if you are within

1 the limits but say your law firm -- a law firm ended up
2 giving \$30,000, which in Harris County at least that's
3 possible, and -- or, you know, for the statewide, \$30,000,
4 and you only raise \$30,000. Okay. So a hundred percent
5 of your campaign contributions came from that law firm.
6 Well, you know, that looks bad in terms of a percentage, a
7 percentage rule, but are we going to recuse a judge for
8 six years or four years because of that one fact?

9 A couple of years I raised \$5,000 because
10 that covered my filing fee and a few miscellaneous
11 expenses. That's all I raised. I had like a thousand
12 dollars in the bank, and I raised \$5,000. So I, you know,
13 got, you know, 10, 15 law firms to give me between, you
14 know, 250, a hundred, 250, \$500. Well, a 500-dollar
15 contribution was 10 percent of my pot that I raised.
16 Okay. Is that too much in terms of a percentage? I mean,
17 yes, I can understand the fear and the worry, but to try
18 and write a rule like that where you've got that
19 percentages involved I think will be very difficult.

20 CHAIRMAN BABCOCK: Yeah, Roger.

21 MR. HUGHES: Well, right now I still am
22 inclined to -- I don't like the proposed ethical canon or
23 the ABA canon. The reason I start off not liking it is
24 when I went back and looked at the Caperton opinion the
25 majority was working from the premise as justice one

1 person should not be able to judge their own cause, that
2 violates due process. One person should not be able to
3 choose the judge for their own cause, that that somehow
4 violates due process, and so they articulated the standard
5 that there has to -- that due process violated when
6 there's a -- and I'm reading from the handout here. "A
7 serious risk of actual bias based on objective and
8 reasonable perception, when a person with a personal stake
9 in a particular case had a significant and
10 disproportionate influence in placing the judge on the
11 case by raising funds or directing the judge election
12 campaign when the case was pending or imminent."

13 So what you get tied up in that is someone
14 who knows that their case is probably going to be in front
15 of that candidate or that incumbent, and they get real
16 involved and they have a real significant influence in
17 getting that person's campaign successful, and so with
18 what we've got as a proposed rule here is, is now we're
19 going beyond that. We're not talking about someone with a
20 case that's probably going to be in front of that
21 particular judge or incumbent. We're talking about
22 someone who just happens to give money, even though they
23 may not have a case or even an imminent case, and we're
24 now talking about a bright line rule tied to a specific
25 amount of money, and I guess I'm troubled by that because

1 now you're not just focusing on a party choosing their
2 own -- the judge for their cause, which was I think the
3 extension that drove Caperton.

4 We're talking about what would in popular
5 vernacular be called buying influence. That is, I get
6 name recognition or the judge now knows who I am or my
7 firm or this particular -- you know, this particular
8 litigant who is a player in the system, and that's what
9 troubles me about this rule, is that we're taking another
10 step out into the void, which -- I don't want to say into
11 the void, but we're going beyond what Caperton is
12 addressing, which is a particular litigant with a
13 particular case trying to get a particular judge and tying
14 it to campaign -- I mean, to the minimum one troubles me,
15 because of just the -- what was articulated here, that
16 it's a very low level standard; whereas, Caperton talks
17 about a significant and disproportionate.

18 Now, that being said, I'm not sure the
19 public is going to let us get away with not doing
20 anything, and I think that, as they say, is to be seen.
21 There may be a feeling this is the tip of the iceberg and
22 we want something in place, and when I looked at the other
23 two states that have something in place, which were in
24 your -- in the packet, one of them -- what was it?

25 MR. ORSINGER: On page 52, Alabama and

1 Mississippi.

2 MR. HUGHES: Yeah, 50, Mississippi just
3 says, "The party is a major donor to the election campaign
4 of the judge." Well, what's going to be a major donor?
5 And the Alabama code, which is at 49, because a candidate
6 received a substantial contribution from a party in the
7 case. I -- the two things that concern me about this, and
8 I'm not sure I saw them, is once again the public may
9 demand something, but I think if we're going to set -- if
10 we're going to set a standard, the bar ought to be high
11 rather than -- I mean, we're not -- we're not talking
12 about just a campaign contribution that, you know, might
13 be above the statutory.

14 I think what's driving it here is that one
15 is, so to speak, getting influence, and that requires
16 something more than I think a campaign violation. I mean,
17 because those are deliberately set at, you know, as they
18 say, a minimum standard. If we're trying to implement
19 Caperton it ought to be the higher level. I mean, that --
20 but then this gets into the other thing. I mean, I'm a
21 little worried, and it was articulated yesterday, about
22 the discovery aspect of all of this, because now we're
23 beginning to see people want to do discovery against the
24 judge that's been recused, and that troubles me a great
25 deal, because first you're making a -- you're making the

1 trial judge a witness, and how's that -- and if the
2 recusal motion fails then the judge has become a witness
3 in the cause, a material witness perhaps, and most judges
4 don't -- would feel an obligation to step down for that
5 very reason, even if they win the motion. And the other
6 thing is that you're going to allow discovery into their
7 major campaign, I mean, into that. It could get pretty
8 dicey.

9 CHAIRMAN BABCOCK: Judge Christopher says,
10 Roger, that of the three issues on the first one, there
11 ought to be a bright line, and what I heard her saying was
12 that the bright line would be the campaign finance limits
13 in the act, which is what -- which is the approach our
14 committee took eight or nine years ago when we sent a
15 proposed rule to the Court. If I hear you right, you're
16 in favor of a bright line, but you say it ought to be more
17 rigorous than that.

18 MR. HUGHES: Well, I favor it at a higher
19 level because you're no longer talking about a Caperton
20 case where a person is getting so involved in the campaign
21 that they're trying to choose their own judge for a
22 particular case. You're talking about attorneys who will
23 frequently appear, or perhaps frequent -- you know,
24 litigators who may not have a case this month, but the
25 next time they know -- sometime in four years I'm going to

1 have some case, and it might go in front of that district
2 judge or that district judge; and in that case, if what
3 you're worried about is a Caperton situation, the bar
4 ought to be high.

5 CHAIRMAN BABCOCK: Okay. Carl.

6 MR. HAMILTON: Well, but that's exactly
7 what's happening, Roger, is that the high contributions to
8 judges are to buy influence in all the cases that that
9 lawyer has in that judge's court. That's exactly why they
10 do it and give the big contributions.

11 CHAIRMAN BABCOCK: I heard a choking noise
12 to my right. Sarah.

13 HONORABLE SARAH DUNCAN: I won't ascribe
14 that motive to all people who make contributions, large as
15 an absolute amount or large as a percentage. Some people
16 make contributions because they believe the person to
17 whose campaign they're contributing will be a good judge,
18 but I think we have to differentiate between problems that
19 are inherent in the system we have of elected judges with
20 lawyers being the primary contributors to any campaign.
21 Those are just problems in the system, and I'm as
22 antagonistic to elected judges on a partisan basis as
23 anybody at these tables, but I've given my testimony, and
24 the Legislature has not seen fit to make that change, and
25 so I think we need to decide what is our goal? Is our

1 goal to implement Caperton, in which case I agree with
2 Roger that the bar is extremely high? It's less rigorous
3 than the Judicial Campaign Fairness Act, which is to a
4 very large extent voluntary compliance with what the
5 Legislature has seen fit to decide is a big contribution.
6 We've got to distinguish between Caperton and the vices
7 inherent in an elected judiciary when lawyers are the
8 primary campaign contributions, contributors.

9 CHAIRMAN BABCOCK: Well, getting back to
10 Judge Christopher's first prong, would you favor some sort
11 of bright line, or would you leave it like Alabama and
12 Mississippi and just say have a standard like a
13 substantial contributor or whatever?

14 HONORABLE SARAH DUNCAN: I don't know how
15 the candidate or the incumbent complies with anything
16 other than a bright line.

17 CHAIRMAN BABCOCK: Judge Patterson.

18 HONORABLE JAN PATTERSON: The problem with
19 the bright line is that it generally is designed to
20 address a smaller category of problems, and I think given
21 the variety of circumstances in our state and the
22 disparity of whether it's the courts or judging situation
23 or wealth, I don't think that you can have a bright line
24 system or that you necessarily want it because that may
25 lead to gaming and circumvention in a variety of ways.

1 I do have greater confidence in our system
2 of justice than to think that all lawyers really want to
3 buy a case or buy a judge, because I do think that judges
4 over a period of time make it clear that that's not
5 happening, and so really lawyers, I think, come to learn
6 that sometimes they win and sometimes they lose of the
7 judges to whom they have contributed. I do think that
8 there's a greater problem of purchasing with the large
9 contributions, and another reason I don't favor a bright
10 line is that I think you give large contributions -- maybe
11 the motive is different with those contributions, or at
12 least they're more suspect, and I think you give those
13 large amounts at your peril, but we may have circumstances
14 where we have a small jurisdiction -- we're not always
15 talking about the Supreme Court. We may have a smaller
16 jurisdiction where the lawyer comes from the only firm in
17 town, and the only firm in town or nearby has given him
18 money to run, and that's his only source of funds, and
19 that may or may not lead to problems.

20 So I really don't see how we can draw a rule
21 that has a bright line. I just don't think it would
22 address the situations. I think there has to be some give
23 and some judgment in evaluating the problem. I do think
24 it's a good point to talk about. I mean, certainly you
25 would much rather have others calling than the judge, but

1 I don't think our only choice is between the judge calling
2 or bundling. I mean, you've got a wide range of
3 activities between that that certainly somebody else
4 raising money, but presumably it's well-intentioned. I
5 mean, they can make calls, and it's -- but it does not
6 necessarily result in bundling. So I think that's a
7 little bit of -- you know, I think we've got other choices
8 here, but I think it is an important time to address this
9 issue and to revisit what we have done in the past, and I
10 think it's an important time to do that.

11 CHAIRMAN BABCOCK: Frank, and then Carl.

12 MR. GILSTRAP: Certainly there are problems
13 that are inherent in the system. There's problems
14 inherent with partisan election of judges, but as Justice
15 Hecht, you know, sagely pointed out, we're going to have
16 that forever. We've got to assume that's going to be our
17 system, and any way to address this is not going to be
18 perfect. The problem I have -- I mean, this idea of a
19 substantial contribution and we're going to look at it and
20 say, well, there were only \$4,000 given in the race and
21 4,000 came from one person and that's within the limits,
22 but still we're going to -- that judge is going to be
23 recused when the person who gave 4,000 has a case. The
24 problem with that is it really has a Russian roulette
25 quality.

1 Sarah's right, and I give money to judges
2 because I think that's a good judge. The better the judge
3 is, the more I tend to give, and I wind up with a person
4 that I think is a good judge being disqualified on my
5 case, I've really shot myself in the foot. I'm not sure
6 that there's any -- I mean, let's look at the bright line.
7 You know, are we going to say that, well, the limit is
8 \$2,500, that's what the Legislature has set that, you
9 know, you can't give more than \$2,500, and yes, this
10 person gave \$5,000, but we're not going to recuse. I
11 mean, I don't know how that's going to play, I really
12 don't. You know, generally, you know, and I guess there's
13 one more problem, and I'll mention this, and maybe this is
14 just too Machiavellian, but if there's some limit that if
15 I go past I'm going to get recused and I don't like the
16 judge and he's going to be there for the next six years or
17 four years, I may just go ahead and give it.

18 HONORABLE SARAH DUNCAN: I don't think
19 that's too Machiavellian at all.

20 MR. GILSTRAP: I mean, I could see that
21 happening.

22 CHAIRMAN BABCOCK: Carl, and then Justice
23 Bland.

24 MR. HAMILTON: We had this same discussion
25 eight years ago, and that's why we elected to go with the

1 bright line test of the legislative line of that maximum
2 contribution, and, I mean, that was the best we could do.
3 Anything over that would be subject to recusal, and I
4 think by implication, Tracy, anything less than that would
5 not be subject to recusal. So that would be okay. That's
6 why we did that bright line test based on the Election
7 Code.

8 CHAIRMAN BABCOCK: Yeah. It was also a
9 little different because, as I recall, we were facing the
10 issue of legislating in the absence of legislation from
11 the Legislature, and we also were operating under the
12 assumption that the law was that campaign contributions
13 would not generally be an issue in recusal and that there
14 was no due process issue, and so the landscape has changed
15 a little bit since then because of those things, but
16 Justice Bland.

17 HONORABLE JANE BLAND: I had a question for
18 Roger. Is the instructive language from Caperton
19 "significant and disproportionate" or "significant or
20 disproportionate"?

21 MR. HUGHES: Just a second. "Significant
22 and disproportionate influence in placing the judge on the
23 case."

24 HONORABLE JANE BLAND: Okay. So a
25 discussion about the fairness act limits seems to address

1 the significant aspect of it, and then I'm not sure what
2 it does about the disproportionate aspect of it, but since
3 you have to have both, if you don't have significant, I
4 guess then it doesn't -- it could take care of the
5 problem.

6 CHAIRMAN BABCOCK: Justice Gaultney, then
7 Justice Gray.

8 HONORABLE DAVID GAULTNEY: My worry is about
9 unintended consequences. You know, I listened to Buddy's
10 comment the other day or yesterday about a judge who was
11 called to testify, whose records were subpoenaed. You
12 know, the problem I've got with tying a -- I understand
13 the advantages of a bright line. It allows some
14 certainty. My concern is that if you tie a bright line
15 recusal issue to whether or not a contribution -- whether
16 or not there was compliance of the Campaign Finance Act
17 you then have returned turned your recusal motion into a
18 compliance, a compliance hearing, whether or not the
19 definition of "contribution" -- you know, you reported a
20 certain amount of contributions when, in fact, you know,
21 you did -- this should have been reported, and the way I'm
22 going to establish that, I shouldn't have to take your
23 filings as face value for that, because the implication is
24 if you have a bright line, if you get over it by any
25 amount, you should be recused. \$50, \$100. What if you

1 mistakenly did not report a 50-dollar contribution? Now
2 you've turned a compliance -- you've turned a recusal
3 hearing into a compliance hearing, if there is that
4 compliance with the CFA as being the bright line. That's
5 my concern.

6 I also think it doesn't address -- I mean,
7 the 40 questions that the chief justice raises in his
8 dissent are great questions. One is should we assume --
9 this is 18 -- that elected judges fill a debt of hostility
10 towards major opponents of their candidacies. Okay. So
11 here's the way that works. What if Massey -- Massey's
12 candidate had lost? He spent \$3 million trying to defeat
13 a judge. Can he then recuse the judge he wanted off the
14 case in the first place? I mean, he has now had a win-win
15 situation. Okay.

16 CHAIRMAN BABCOCK: Could have done it
17 cheaper, too.

18 HONORABLE DAVID GAULTNEY: It didn't end up
19 that way, but you see the way that could be calculated,
20 and so I'm just throwing that out as the concept that I
21 don't think simply addressing it as a CFA compliance issue
22 answers all the questions or provides the type of -- lack
23 of litigiousness or certainty that we might hope for.
24 That's my concern, unintended consequences.

25 CHAIRMAN BABCOCK: Okay. Justice Gray.

1 HONORABLE TOM GRAY: Until David spoke I was
2 more in favor of bright lines for an absolute point at
3 which a judge can be recused. Now, a little bit more
4 eye-opening, I have some more reservations about that, but
5 I'm very concerned that simply compliance -- if I
6 understand Judge Christopher's bright line test, you are
7 creating essentially a safe harbor if you fall below that
8 bright line, and I don't think we can do that. I
9 respectfully think that the problems are greater than
10 simply did I not receive as much as the campaign laws
11 would have allowed. It has to be what is fairly common in
12 the criminal area where you look at the totality of the
13 circumstances. The amount that you got that was within
14 the campaign finance guidelines is a factor, but if the
15 same person that gave the maximum to your campaign or
16 maybe didn't give a dollar to your campaign, but was also
17 the leader of the PAC that contributed \$3 million and the
18 bundler that brought to you another \$3 million even if
19 they didn't contribute a dollar to your campaign and would
20 fall within the safe harbor.

21 That's why I think that whatever we do it
22 has to be from a purview of -- I mean, obviously if the --
23 and I do agree with Sarah and those that have expressed it
24 that we're dealing with a very small part of the judiciary
25 that when they have a real bias in a case do not

1 voluntarily recuse without being asked, without a motion
2 being filed. They just -- they know what's right, and
3 they do it, and I think that that is by far the majority.
4 But to try to pigeonhole everything you're going to test
5 that judge's actions against, you will -- if you create a
6 safe harbor, you will have created a situation in which
7 you cannot remove or recuse a judge that actually does
8 have a bias, and you need to be looking at the totality of
9 the circumstances of contributions, issue preclusion, you
10 know, all the things that are going to impact the fairness
11 of the decision that the judge is acting on.

12 CHAIRMAN BABCOCK: Okay. Judge Yelenosky,
13 and then Justice --

14 HONORABLE STEPHEN YELENOSKY: At the
15 beginning Tracy I think alluded to some people may think
16 we can't do that, and that's the first question for me,
17 and since Pete's so shy, I'll just say Pete's convinced me
18 and he hasn't said it, but this is -- Pete's convinced me
19 that you cannot consistent with Caperton and due process
20 create a safe harbor, and if you cannot do that then the
21 policy debate is superfluous. So I guess the first
22 question is what do people think about that, and, you
23 know, people have alluded to that.

24 The second thing that I wanted to say is
25 it's a bit surprising, I guess, that we hadn't gotten to

1 this point sooner, given the fact that we elect judges and
2 they receive contributions from the attorneys who practice
3 before them very often. That just seems odd even to us
4 who have had it for so many years. To people who look at
5 us from other states or other countries, they just really
6 can't fathom it, and I would just say that that's a
7 situation that I don't think we can resolve. I remember
8 when I started hearing family law cases, more senior
9 judges always said, "Well, always remember that however
10 bad the situation is, you didn't create it. These people
11 decided to get married and decided to have kids, and
12 there's only so much you can do."

13 So the same is true here. We're put in a
14 situation where I don't think we can resolve it by a
15 bright line consistent with due process, which obviously
16 is a fairness issue, so we have a fairness problem built
17 into the system that we have. I don't think we can try to
18 gloss over that problem and make everything okay. It's
19 part of -- it's part of the issue that legislators and
20 people through their Constitution have to consider when
21 they decide to elect judges.

22 CHAIRMAN BABCOCK: Sarah and then Judge
23 Christopher and then Pete and Carl.

24 HONORABLE SARAH DUNCAN: I agree, Steve, and
25 Pete. I don't think that a bright line necessarily

1 complies with due process, but what we did the last time
2 we did this was say -- without regard to due process
3 because we didn't have Caperton at that point -- this is a
4 mandatory basis for recusal. Beyond that, the situation
5 of Tracy getting all of her campaign finance from one law
6 firm, let's say, that is something above and beyond
7 Caperton that can be taken up on an individual motion
8 basis, the totality of circumstances. Yeah, in the
9 totality of circumstances, it may not be a mandatory
10 recusal, but it may be mandatory under Caperton, but
11 that's two different ways of analyzing a problem that, I
12 agree, we can't -- we can't fix the system around this
13 table, but we can say that if -- and I agree with David.

14 It will use -- turn a recusal motion into a
15 compliance tool, but I don't think that's a bad thing, if
16 that's what the Court decides to do, but it's two
17 different things to say that there are -- under totality
18 of the circumstances, this would be a due process
19 violation, and then the Court saying without regard to due
20 process, this is a mandatory basis for recusal, and I
21 think we should distinguish those two because they're very
22 different.

23 HONORABLE STEPHEN YELENOSKY: Well, just to
24 be clear, I don't think a bright line is a problem if it's
25 a mandatory basis for recusal. I think a bright line safe

1 harbor is a problem.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: If Caperton
4 says that the contribution has to be significant and
5 disproportionate and our Legislature has said that, you
6 know, \$5,000 for a county of over 2 million people is an
7 okay contribution, it seems to me that that \$5,000 by the
8 Legislature, they have found that that is not significant
9 and would not have a significant impact on a judge, so I
10 think we could clearly say that those campaign limits are
11 what we consider to be significant. Otherwise, we write a
12 rule -- we write a rule that says "The judge shall recuse
13 if the campaign contributions were significant and
14 disproportionate." Talk about discovery, oh, my gosh. I
15 mean, that would be a huge amount of discovery involved in
16 terms of more than just your financial records.

17 You'd have to have -- you know, okay, say I
18 took \$5,000, and it's all I raised. Well, it is
19 disproportionate, but was that significant? Well, it was
20 the only way you could have paid your filing fee. Well,
21 no, I probably could have dug into my own pocket and paid
22 my own filing fee if I had wanted to, you know. I mean,
23 we're going to have discovery on whether I had the ability
24 to, you know, pay the 2,500-dollar filing fee out of my
25 own pocket versus campaign funds, I mean, you know, we'll

1 just -- if we don't have something definite, discovery
2 will be huge.

3 CHAIRMAN BABCOCK: Pete and then Carl and
4 then Skip.

5 MR. SCHENKKAN: I would like us to turn and
6 look at this from the other end and ask the question are
7 we going to allow discovery and under what circumstances
8 and with what consequences, because I don't think we can
9 solve it by picking our bright line standard. Now, I will
10 back up and say, again, I don't think we can pick a bright
11 line standard, and the essence of due process is the
12 totality of the circumstances, and Massey is a good
13 illustration. Massey could perfectly well have given only
14 -- or whichever one, yeah, Massey, the coal company, could
15 have given only \$5,000 or 4,999, and under the Supreme
16 Court majority's holding it's still -- recusal was still
17 mandatory under due process because he gave 2,500,000 to
18 the PAC, which is not touched by our rules. I'd really
19 like us to not waste the opportunity to look and see if
20 there's anything useful, protective, helpful, constructive
21 that can be done on the procedure because I don't think we
22 can solve this.

23 CHAIRMAN BABCOCK: Yeah, but Judge Peeples
24 has spent a lot of time working on the procedural end
25 which we're going to get to in a minute.

1 MR. SCHENKKAN: I was hoping we could. I'm
2 nervous about our using all our time striving for what I
3 think is --

4 CHAIRMAN BABCOCK: We're not going to finish
5 this topic today. We're going to continue it next
6 meeting, but I do think we should spend time today on the
7 procedural aspects of it for sure. So Carl. And then
8 Skip.

9 MR. HAMILTON: I agree with what Sarah said.
10 We're talking about two separate things here. Eight years
11 ago when we worked on this we already had the provision in
12 there about impartiality might reasonably be questioned,
13 so a motion could be filed under that for campaign
14 contributions at that time. We just decided to add to
15 that a separate ground for recusal with a bright line test
16 so that if campaign contribution exceeded that amount that
17 would be a separate ground, but if it didn't exceed that
18 amount but it was still unreasonable or disproportionate
19 or however the language in that case is, you could bring
20 that under the impartiality provision, so there are two
21 different things.

22 CHAIRMAN BABCOCK: Yeah, good point.

23 MR. HAMILTON: And it's not a safe harbor,
24 doesn't give anybody a safe harbor.

25 CHAIRMAN BABCOCK: Skip.

1 MR. WATSON: My memory of my first days on
2 this committee was this topic. The Legislature had just
3 passed a statute. A legislator and aides were attending
4 every meeting to see how we were going to react to it, but
5 the message was very clear to me that if we didn't do
6 something out of this committee, it would be done for us.
7 I'm not at all unsure that that climate does not still
8 exist. I think that's an overlay of reality we need to be
9 very cognizant of. In that context, we have a bright
10 line, whether there should be a bright line to me is -- I
11 mean, I like talking about it, but we have a bright line
12 that's been drawn. The question is going to be do we
13 match it or not.

14 It goes against every instinct I have to say
15 that I should be hobbled in supporting a good judge, and,
16 you know, this is one of those things where we're killing
17 the fly with a sledgehammer. I understand how bad it can
18 be in some parts of the state. I've experienced it. I
19 also understand that the people in this room, the majority
20 of the people that judges get their money from, give money
21 because they want the best possible judiciary in place
22 regardless of party affiliation.

23 To take -- to hobble that, it's not taking
24 away, but to hobble that galls me, but the realist in me
25 says that that's where I am, and how do I deal with it? I

1 don't think that matching the Legislature -- what the
2 Legislature has done necessarily solves the problem. I
3 don't think it does. I also don't think it needs to be
4 done in a way that creates a safe harbor, that you're safe
5 if you're within the limit, but my instincts tell me we
6 better do that, that needs to be done as a first step.
7 I'm not saying I'm advocating it or that I like it. I
8 don't. My instincts tell me it needs to be done, that
9 line needs to be matched. Whether we make it presumptive
10 where somebody can -- you know, it's clear that there's an
11 uphill battle with a big burden going beyond that, I don't
12 know, but I definitely think people should be able to go
13 beyond that and probe.

14 The third and last thing I would say is, is
15 that I -- again, my instinct tells me that at the end of
16 the day where we may end up in this, not necessarily this
17 committee but perhaps legislatively, is that we may go to
18 a much more detailed reporting system in which the records
19 are there and are public records of what I would call
20 in-kind contributions where the donating the lobby of a
21 law firm for the reception is assigned a value in
22 reporting and where there is reporting of, you know, not
23 just the line on the card that says, "Are you a member of
24 the law firm? "If so, what firm are you in?" but it may
25 be "Were you contacted by somebody to give this? If so,

1 who is that person?" That stuff is just entered into a
2 database, and that's there for anybody to print out, and I
3 just think the reality is the information is going to be
4 there, and I think we need to view this with that overlay
5 as well. It's possible to get the relevant information
6 about the gatherers of what I used to call the bag men,
7 you know, to --

8 CHAIRMAN BABCOCK: The bag men. I'm sorry.

9 MR. WATSON: That are gathering or the folks
10 that are -- the PACs, you know, did you contribute to a
11 PAC, and if so, how much? That's all.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: I would like to
14 reemphasize something that Carl brought up. The Citizens
15 Watch People or whoever they were that monitor
16 contributions was very critical because I apparently am a
17 tool of the trucking industry, and --

18 CHAIRMAN BABCOCK: We've always thought
19 that.

20 HONORABLE SARAH DUNCAN: Yeah.

21 HONORABLE STEPHEN YELENOSKY: I thought you
22 just drove one.

23 HONORABLE SARAH DUNCAN: That would be
24 Justice Hecht. And the truth is that my father was a
25 truck dealer and my brother was a truck dealer and my

1 father's next door neighbor was in the trucking industry,
2 and so if you just look at where the money came from, yes,
3 I received a great deal of money from the trucking
4 industry, but of course I'm recused in my brother's cases
5 and I'm recused in my father's cases and I would never sit
6 on Tom Clough's cases.

7 There's got to be room in the rule to
8 explore the totality of the circumstances. At the same
9 time Frank needs to be able to know that he can in most
10 cases give -- barring other circumstances, give the
11 maximum under the Campaign Fairness Act to the judge he
12 wants elected, and I should be able to receive it,
13 assuming I would be one of those judges, without fear that
14 I'm going to have to recuse in Frank's cases, but that
15 would just be a presumption; and if we looked at the
16 totality of circumstances, if, in fact, I am a tool of the
17 trucking industry I should recuse in truck cases, and
18 somebody ought to be able to make that point.

19 But we're talking two -- apples and oranges
20 if we're talking about a safe harbor for due process and
21 the Campaign Fairness Act. Those are two different
22 things, and just because -- and the Campaign Fairness Act
23 doesn't talk about the trucking industry, right? It talks
24 about a person or a lawyer or a law firm or a special
25 purpose committee. That's a really bare bottom line.

1 CHAIRMAN BABCOCK: Okay. Frank and then
2 Pete and then Judge Evans and then Judge Christopher.

3 MR. GILSTRAP: Let me see if I can
4 summarize. One approach is do we or do we not have a
5 bright line, and the approach of the bright line are
6 mandatory recusal if you exceed the bright line. Another
7 approach is a safe harbor if you don't exceed the bright
8 line, and I guess the third approach could be both. If we
9 have a bright line, what is it and is there some exception
10 to it. In other words, can you still go behind the bright
11 line under some circumstances.

12 If we don't have a bright line, do we have
13 simply some type of generalized Caperton test, that's
14 significant and disproportionate, that type thing, or do
15 we just tighten up the recusal rule? I mean, we do have
16 the fact that, you know, unlike Caperton, the judge
17 doesn't decide whether he's recused, or do we do both
18 those.

19 And then the third thing is, in any event
20 and kind of a separate problem, what do we do about
21 discovery of these cases? It seems like regardless of
22 what you do you're going to have to address that.

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: I think that's a helpful
25 summary. I've got a stupid question that relates to the

1 first issue, the bright line question, that maybe people
2 here could easily answer. Under the rule that was adopted
3 X years ago when this came up that ties to the Campaign
4 Finance Act, what happens if the judge's opponent in that
5 election does not abide by the Campaign Finance Act and
6 so, as I understand it, the limit does not apply? Is the
7 way our rule is presently set up, is the judge still
8 supposed to recuse himself if he took more than the amount
9 even though he had to do it to prevent unilateral
10 disarmament in the election campaign?

11 HONORABLE NATHAN HECHT: We should clarify
12 that the contribution limits apply no matter what. It's
13 the expenditure limits that you can opt out of.

14 MR. SCHENKKAN: Okay.

15 CHAIRMAN BABCOCK: Okay.

16 MR. SCHENKKAN: Okay. So the contribution
17 limit still applies.

18 HONORABLE NATHAN HECHT: You don't have --
19 they're not voluntary. You're stuck -- for the
20 candidates, those are mandatory, but there are expenditure
21 limits, and those are voluntary. You don't have to abide
22 by -- you can elect to abide or not to abide by those.

23 MR. SCHENKKAN: So you just keep on raising
24 more of the 5,000-dollar contributions that your opponent
25 has not.

1 HONORABLE NATHAN HECHT: Right.

2 MR. SCHENKKAN: But we are now making the
3 5,000 a bright line recusal in a situation in which it's
4 less and less significant, in fact, in that election
5 because you've had to raise that many more. Okay.

6 On the second point Frank raised about if
7 you -- you're not a fan of a bright line rule, and I
8 remain not one, though I like the suggestion that Skip has
9 if we're going to do it, we try to do it as a presumption,
10 not as a true bright line. If we were going to work with
11 some language, it seems logical to use the Caperton
12 language, and the Caperton language has more in it than I
13 think we might ought to look at using if we're going to go
14 that direction. It does have the "significant and
15 disproportionate," that's -- with both words being
16 important, "significant and disproportionate," but it also
17 has -- and I don't have it up in front of me on the
18 computer, but it also has in the same sentence,
19 "significant and disproportionate" and something about
20 picking the judge in a case that is pending or imminent,
21 and I think if we're going to go this direction we ought
22 to use that as well.

23 Here it is, "had a significant and
24 disproportionate influence in placing the judge on the
25 case by raising funds or directing the judge's election

1 campaign when the case was pending or imminent." And if
2 we're going to try to use some generic language, I would
3 rather try to draw that line in that way and not invite
4 this notion that any time you have given to one side or
5 the other of one of the great issue divides or party
6 divides or something like that that you are automatically
7 subject to this rule. That's it.

8 I still think we have the due process
9 problem, which none of this can prevent somebody from
10 saying I have a case on the facts that does -- and, again,
11 I would say that leads us to the third question, what are
12 we really going to do about the process, especially the
13 discovery, which is really where the burden is, where the
14 mischief is, where the bad publicity is.

15 CHAIRMAN BABCOCK: Yeah, we're going to get
16 to that. Judge Evans, then Judge Christopher, and then
17 Justice Gaultney.

18 HONORABLE DAVID EVANS: The adoption of a
19 bright line would be helpful, of course, to anybody that's
20 in judicial politics, but it would have to be written in a
21 way that it trumps the standard that was used down in
22 Corpus and that Judge Peeples referred to, and that's
23 where most of the discretion comes to the presiding judge
24 in hearing recusals, is that the impartiality might be
25 reasonably questioned. There's ethics opinions out there,

1 for instance, about judges who have notes or barrings or
2 business dealings with litigants and how that might affect
3 their stock ownership. So you would have to write it to
4 say that that question overrides your impartiality
5 couldn't be reasonably questioned based upon a
6 contribution.

7 I'm really worried about the discovery war
8 going back into, well, how many times has this firm
9 appeared in front of you, how many times have you ruled in
10 their favor, and relitigation of all the prior cases.
11 It's a -- you can come up with nightmare scenarios, and
12 just for the record, I'd like to just point out that if
13 you try to get advisory opinions on ethics right now in
14 the state if you're a lawyer you go to a Supreme Court
15 committee. If you want to get it on campaign financing,
16 you have to go to Texas Ethics Commission, and if you want
17 judicial ethics, according to the website of the
18 Commission on Judicial Conduct, there's a State Bar
19 committee that handles judicial ethics opinions.

20 Now, those are printed and on that website.
21 I was just looking at some of them while we were talking,
22 but I couldn't find that the Bar still had a standing
23 committee on judicial ethics, but must be one because
24 there's a recent opinion out there. So I'm not sure if
25 I'm right about the source of that comment or not, but

1 there's going to be advisory opinions sought at some point
2 by somebody on some of these issues raised by Caperton.
3 I'd hate to see -- I don't know if I want them published
4 or not, but sometimes you're better off not knowing, but
5 just for the record, there seems to be some need to look
6 at that. These are a lot of hypotheticals we're dealing
7 with that just can't be answered by rule-making.

8 CHAIRMAN BABCOCK: Judge, do you know if the
9 Corpus case or, Judge Peeples, do you know, was that post
10 Caperton?

11 HONORABLE DAVID PEEPLES: Yes.

12 CHAIRMAN BABCOCK: It was post-Caperton.

13 HONORABLE DAVID EVANS: It was
14 post-Caperton.

15 CHAIRMAN BABCOCK: Anybody know the name or
16 cite of it?

17 HONORABLE DAVID PEEPLES: All I know is what
18 I read in the newspaper, which may or may not be good.

19 HONORABLE TRACY CHRISTOPHER: I mean, it's
20 just -- the judge who heard it just did a written order,
21 so it's not at the appellate level. There is no appellate
22 decision on it, and it's not reviewable.

23 HONORABLE DAVID PEEPLES: Right.

24 HONORABLE TRACY CHRISTOPHER: Which is
25 another thing that's, you know, difficult from a judge's

1 point of view, you get sort of this little truncated thing
2 in the newspaper, the *Texas Lawyer* newspaper, and all of
3 the sudden you're just like, well, does that mean I can do
4 this, does that mean I can do that --

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: -- you know,
7 is it okay for you to hold a fundraiser for me anymore? I
8 don't know.

9 CHAIRMAN BABCOCK: Did you have anything --
10 you were next being called on.

11 HONORABLE DAVID EVANS: The problem is on
12 the opinion in Corpus is the reports indicate it was just
13 not a Caperton decision. They looked at a lot of history
14 and relationship between the judge who was the object of
15 the recusal motion and the lawyers in the case, and so as
16 it stands right now, for whatever value, it is certainly
17 within the bar, and I would think any good advocate would
18 be advocating it -- would be reviewing it now to see if
19 the risk of bringing a recusal motion was worth the
20 benefit that might come to the client.

21 CHAIRMAN BABCOCK: Justice Gaultney and then
22 Harvey and then R. H.

23 MR. WALLACE: Well, I hate to see us have to
24 inject this whole thing of campaign contributions
25 specifically into the rule because nothing good is going

1 to come of that, I don't think, but maybe that's where we
2 are and that's what we have to do. One thing that the
3 judge just mentioned, Judge Evans, was what's best for the
4 client. You know, we as lawyers and judges look at this
5 one way. Laypeople don't quite understand as we do that
6 lawyers give judges money to get them elected and that
7 some lawyers give more than others, and in my 25 years of
8 private practice I've filed one recusal motion and
9 succeeded. I've had dozens of clients say, "Well, don't
10 we have a grounds to get this judge recused? He doesn't
11 like us, he doesn't like this, maybe some lawyer in town
12 is known to be a heavy contributor or supporter of his,"
13 and you can always say, "No, there's no grounds for that."

14 Now we're going to put something
15 specifically in the rule that that client can point to and
16 says -- or well, maybe there is. And I just -- if we're
17 going to do it, it seems like we need to do some kind of a
18 bright line rule to give lawyers the guidance to say to
19 their clients, look, we don't have a basis to recuse this
20 judge or else somewhere down the line that lawyer is going
21 to end up getting sued when the things come out bad for
22 the -- for them in court, and he says, "Well, Wallace told
23 me I didn't have grounds to recuse this lawyer, and I
24 did."

25 The -- I wonder if we could do some kind of

1 a bright line rule, a presumptive bright line rule, that
2 could be overcome by showing the type of relationship in
3 the language that's in the Supreme Court opinion. That's
4 just a thought. I don't like the whole thing, but if
5 we've got to do it, I think I would prefer some kind of a
6 bright line rule other than just leaving it out there in
7 gray area.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: Well, of course,
10 compliance with the Campaign Finance Act is absolutely
11 required. You know, of course it's a good thing, of
12 course we have to insist on it. The judicial conduct
13 rules require it. My only concern is that we be careful
14 and we not shift compliance with the disclosure
15 requirement into what is a different issue so that an
16 inadvertent non-report of an in-kind contribution, which
17 are reportable, an inadvertent becomes a ground for
18 recusal. Because if it doesn't address the Caperton
19 standard, what are we adding? If it doesn't address the
20 impartiality of the judge, why are we requiring recusal?
21 And if we're going to establish a way of litigating
22 whether every in-kind contribution is adequately
23 disclosed, that's my concern. That's my concern.

24 Now, that having been said, I'm very
25 sympathetic to the concept of having a -- I also think

1 that the Campaign Finance Act doesn't make any sense to
2 set different standards. I understand that. I understand
3 that. But -- and I also understand that the Legislature
4 is going to expect us to do something with Caperton, and
5 I'm sympathetic to the concept of there being a safe area.
6 I also think there ought to be -- ought to be I guess a
7 presumption to comply with Caperton rather than a bright
8 line deal, but I'm just extremely concerned that we not
9 turn this into something it's really not intended to be,
10 and that's my concern.

11 CHAIRMAN BABCOCK: Harvey, then Kennon.

12 HONORABLE HARVEY BROWN: Well, I was just
13 curious as to what Tracy thought about the presumption
14 idea.

15 HONORABLE TRACY CHRISTOPHER: Well, I like
16 it. I kind of drafted something, but I'm not sure whether
17 it addresses some of the other issues, so my idea was the
18 judge receives -- you know, "As a ground for recusal, the
19 judge receives campaign contributions from a party,
20 lawyer, or a law firm representing a party that was
21 significant and disproportionate in the judge's campaign
22 when the case was pending" and, you know, the language
23 from Caperton. "A contribution that complies with the CFA
24 is presumed to be not significant." And then if we want
25 to say, "This presumption can be rebutted" and have a list

1 of things on when the presumption can be rebutted, but
2 it's -- are we really saying that that dollar amount is
3 rebuttable, or are we really saying that there are other
4 factors --

5 HONORABLE STEPHEN YELENOSKY: The latter.

6 HONORABLE TRACY CHRISTOPHER: -- plus that
7 dollar amount that's important? I mean, because, you
8 know, it seems to me that, you know, the 5,000-dollar or
9 the 2,500-dollar, depending on the size of your county,
10 that contribution itself should not be significant, but if
11 there were other factors that might require a recusal is
12 what we've been talking about.

13 CHAIRMAN BABCOCK: Okay. Kennon, then Tom,
14 then Carl, then Richard. Somebody over there. Judge
15 Yelenosky.

16 MS. PETERSON: I just have a question, and
17 that is to what extent, if at all, are campaign
18 contributions considered currently when determining
19 recusal and disqualification?

20 HONORABLE SARAH DUNCAN: Considered what?

21 MS. PETERSON: To what extent are campaign
22 contributions considered currently? In other words, if
23 this were incorporated into the rules, would that be a
24 sweeping change in practice, or are people currently
25 looking at campaign contributions when determining

1 recusal?

2 CHAIRMAN BABCOCK: Well, that was the --

3 HONORABLE TRACY CHRISTOPHER: Well, the law
4 always was that it wasn't a basis for recusal. Then
5 Caperton came down, and at least in region two we've had
6 at least three, maybe five, I believe, recusal motions now
7 where they're basing it on -- in part on campaign
8 contributions. So it's going to happen.

9 MS. PETERSON: Uh-huh.

10 HONORABLE TRACY CHRISTOPHER: I mean, it's
11 going to -- it's -- you know, the due process opinion is
12 out there, and people are starting to use it.

13 CHAIRMAN BABCOCK: Tom.

14 MR. RINEY: Well, Judge Christopher has
15 answered part of my question, because my question is how
16 much impact has this had. We have this Corpus Christi
17 decision. I tend to agree with this memo from Judge
18 Peeples with the administrative judges saying maybe change
19 is not needed. If there's a lot of these then maybe we
20 need to address it, but for the most part for the last
21 several years recusals have sort of calmed down. It's not
22 near the problem that it was years ago, and if we make a
23 rule change, I think that tells the lawyers something has
24 changed, and I fear that we might cause even more of them
25 than we're having now. I think our rule is adequate to

1 address it.

2 I don't understand this Corpus Christi
3 decision, although it apparently says -- it deals with,
4 quote, "the timing of the fundraising event in addition to
5 contributions," and that's -- I don't think that's
6 particularly helpful in deciding what should occur in a
7 particular circumstance, but I think there is a real
8 danger that if we change the rule we may make the problem
9 worse as opposed to just kind of letting some decisions --

10 CHAIRMAN BABCOCK: And the problem is what?
11 What problem are we making worse?

12 MR. RINEY: That there might be more recusal
13 motions. I think most of my objections to recusal motions
14 is that they're used unfairly when someone simply doesn't
15 like the ruling of the judge, and that's what I have seen
16 in the last 10 years. That's about the only problem I
17 have seen with it, and I think if we give people by a rule
18 change perhaps more incentive to file those types of
19 motions we're wasting a lot of time. In my experience
20 recusal motions are seldom valid, and they're seldom
21 granted, and I don't think we ought to encourage more of
22 that.

23 CHAIRMAN BABCOCK: Tom, you weren't here,
24 but we had an interesting debate eight years or nine years
25 ago on that very point of can you use the judge's rulings

1 as some evidence in your recusal, and I think the
2 consensus was you cannot, but the minority view of that
3 perhaps was that there are rulings that are so
4 inexplicable that you could put it up in front of 50
5 judges and lawyers and say, "There is no way you can get
6 to that result and so there must be something else going
7 on," and we had a lengthy discussion about it, so it's --

8 HONORABLE STEPHEN YELENOSKY: Could be
9 incompetence.

10 CHAIRMAN BABCOCK: Huh?

11 HONORABLE STEPHEN YELENOSKY: Could be
12 incompetence as opposed to bias.

13 CHAIRMAN BABCOCK: That's right.

14 MR. ORSINGER: Which is not a grounds for
15 recusal.

16 HONORABLE STEPHEN YELENOSKY: It's not,
17 that's right.

18 HONORABLE NATHAN HECHT: Since we're talking
19 about practice, let me ask Judge Peeples, if he knows,
20 what percentage or how many recusal motions are decided by
21 the regional judges themselves and how many are farmed
22 out?

23 HONORABLE DAVID PEEPLES: It varies. I
24 decide 99 percent of my own, and only when I just can't do
25 it do I assign someone else. I think the heavily

1 populated regions, which are East Texas, Dallas, and
2 Houston, I think Underwood does a lot of his but can't do
3 them all. I don't know what the percentage would be. I
4 think in other parts of the -- generally the presiding
5 judges try to do it themselves and do a lot of them by
6 telephone and do a lot of them quickly because they are
7 filed in the middle of a trial or something, but it varies
8 from almost all of them to most of them.

9 HONORABLE STEPHEN YELENOSKY: I can answer
10 for our region it's typically a retired judge, like Paul
11 Davis, that B. B. Schraub will appoint.

12 CHAIRMAN BABCOCK: Carl, Richard, and then
13 Harvey.

14 MR. HAMILTON: Well, as the Caperton case
15 points out, what we're trying to do here is we're trying
16 to establish an objective standard for recusal that, as
17 they say here, doesn't require any proof of actual bias.
18 So, again, we don't want to mix the two up. We've got a
19 provision for actual bias. What we're talking about here
20 is just an objective standard that is a bright line test.
21 They fit it, well, they can be recused.

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: Just a couple of comments.
24 The Caperton case establishes the limit of what's so
25 outrageous that it's unconstitutional, and I don't think

1 we should articulate our operative standard to be the
2 absolute limit of the most intolerable situation that the
3 U.S. Supreme Court can contemplate. I think our standard
4 ought to be less extreme than that. So I wouldn't favor
5 that the standard be expressed in Caperton terms.

6 In terms of the campaign contribution
7 limits, in the materials on page 43 the ABA has a slightly
8 different approach. They have very similar grounds for
9 recusal, but they have an overriding subdivision (a) about
10 recusing when impartiality might reasonably be questioned,
11 and then they list -- "such as the following" --
12 "including but not limited to the following
13 circumstances," and you could, for example, reformat our
14 rule from absolute recusal to "the impartiality might
15 reasonably be questioned" with a list of things where
16 their impartiality might reasonably be questioned.

17 And you can phrase the campaign contribution
18 rule as "whether or not the party or the party's lawyer
19 has made contributions exceeding the maximum amount
20 specified in the Judicial Campaign Fairness Act," so that
21 whether the contribution is less or more is a factor that
22 can be considered on whether they can be considered
23 whether their impartiality might reasonably be questioned.
24 It's kind of a bright line in the sense that it's a stated
25 factor. If you're under, that's a factor to consider. If

1 you're over, that's a factor to consider, but it's not the
2 only factor to consider.

3 But in the Corpus case, I wasn't there, but
4 I'll bet you -- because I've done a recusal in Corpus
5 myself. I'll bet you that there's lots of other factors
6 including campaign contributions that contributed to that,
7 including the common knowledge that certain lawyers always
8 win when they go in that court or whatever. I mean, I
9 don't know what they were. I mean, I know what my own
10 experiences are down there, but that would be a way maybe
11 to meet a lot of these different needs because it would
12 give us -- it would give us a sense of what's right and
13 what's wrong, but it wouldn't be a mindless test that if
14 you're one penny under you're always safe and if you're
15 one penny over you're always dead suggestion.

16 CHAIRMAN BABCOCK: Harvey, then Judge
17 Yelenosky.

18 HONORABLE HARVEY BROWN: I was going to ask
19 Judge Peeples, right now in a recusal hearing if somebody
20 wants to offer evidence somebody made a contribution of
21 \$5,000, do you find that irrelevant and inadmissible, or
22 is that one fact that you consider that by itself would
23 not be determinative but is one of many facts?

24 HONORABLE DAVID PEEPLES: I think what I
25 would do would be to consider that evidence along with

1 everything else that was submitted.

2 HONORABLE HARVEY BROWN: All right. And
3 before Caperton would you have considered that evidence?

4 HONORABLE DAVID PEEPLES: Yes. It's been my
5 experience that there's usually more than one thing
6 alleged and offered.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Tracy asked a
9 question, and actually, Carl I think pointed this out
10 earlier on, the difference between a safe harbor, which I
11 was saying I thought would be a problem with due process,
12 and stating whether or not a particular amount is
13 significant or presumptively significant, because a safe
14 harbor, if that's what somebody means, would cover all the
15 factors or more than one factor in any event. I don't
16 know that there's a due process problem with saying that
17 presumptively an amount within the Campaign Finance Act is
18 not significant, and even if we didn't say it in a rule, I
19 would be surprised if any decisions coming down failed to
20 de facto by those decisions, by case law, establish that
21 to be true. So I don't know that it needs to be said, and
22 normally I guess the good argument against saying it is
23 the unintended consequences of addressing it at all in the
24 rule.

25 CHAIRMAN BABCOCK: Pete Schenkkan, and then

1 Eduardo.

2 MR. SCHENKKAN: I'm going to have to step
3 out for the rest of this morning in order to attend a
4 campaign fundraiser.

5 HONORABLE STEPHEN YELENOSKY: You might as
6 well get it all on the record.

7 MR. SCHENKKAN: But it's not for a judicial
8 candidate. My contribution will be insignificant and not
9 disproportionate in any way to the election, but it is
10 important that I accompany my wife to this event. I just
11 offered that fact as some illustration of the fact that
12 this totality of the circumstances sweeps very broadly.
13 You can have many motives for attending campaign
14 fundraisers.

15 CHAIRMAN BABCOCK: Okay. Thanks, Pete.
16 Eduardo.

17 MR. RODRIGUEZ: I think one of the things
18 that may be -- and I don't know that it has anything to do
19 with the rule, but if there was some way to capture on a
20 statewide basis the filings of motions and the granting or
21 refusal of motions, it could go a long ways to help
22 Wallace in terms of being able to tell our clients, "Well,
23 this has been tried in so-and-so and the court held that
24 it wasn't grounds." Right now, there's no way of anybody
25 short of going to each county to find out whether or not

1 the motion has been filed, and I just throw that out there
2 to see if we can come up with some system that we would
3 recommend to the Court involving recusals to establish a
4 statewide repository or some kind of place where we could
5 go as lawyers and look at -- and look at, you know, at
6 motions or rulings to help us talk to our clients.

7 CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

8 MR. BOYD: I just wanted a clarification,
9 and I -- I missed the very beginning. I was not at a
10 fundraiser this morning. And I haven't read Caperton
11 since it first came out a few months ago, but I'm looking
12 at the language from Richard's very helpful memo, and as
13 quoted, what the Court said about significant and
14 disproportionate was not that the amount was significant
15 and disproportionate, but the influence in placing the
16 judge on the case was significant and disproportionate,
17 but what I'm hearing this morning is this discussion of
18 whether we ought to tie that language to an evaluation of
19 the amount given to the judge, which seems to me to be
20 going beyond what I recalled the Court saying and what
21 this quote would suggest, that it may be the amount or it
22 may be the trip out onto the French Riviera or it may be
23 -- you know, it could be a lot of different things that
24 could constitute a significant and disproportionate
25 influence in getting that judge on the case. It could be

1 a improper visit with Judge Dietz saying, "Give me a
2 special assignment. I want Steve Yelenosky on my" -- I
3 mean, it could show up in a lot of different ways, and so
4 I think we should be careful trying to apply that too
5 directly to the campaign finance limits.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE STEPHEN YELENOSKY: Of course,
8 they would only do that if they wanted absolute
9 impartiality.

10 MR. BOYD: Of course.

11 HONORABLE STEPHEN YELENOSKY: Of course.

12 CHAIRMAN BABCOCK: I was looking at the
13 White opinion last night to see exactly what Justice
14 Kennedy said about recusal in the context of a judicial
15 speech prohibited by the canons and in the White case
16 unconstitutionally prohibited by the canons, and he said
17 just a single sentence, but it's gotten a lot of
18 notoriety. Justice Kennedy said, "The state may adopt
19 recusal standards more rigorous than due process requires
20 and censure judges who violate these standards," and it
21 seems to me that even though that's in a speech case, we
22 certainly are discussing whether we ought to stop at the
23 boundary of due process or we ought to have a recusal
24 standard that is more vigorous than that, and we -- you
25 know, we could I suppose go as far as we want, which would

1 have a huge -- could have a huge impact on how our
2 judicial campaigns are financed, because if we went far
3 enough we could create a system whereby somebody would
4 say, "I don't want to contribute to that judge because
5 he's a really good judge and if I do that I'm going to
6 lose him on all my cases, and that would be a very bad
7 thing for my clients" and then, you know, where does the
8 money come from to finance these campaigns? And if
9 there's less money financing the campaigns, is that a good
10 thing or a bad thing? R. H.

11 MR. WALLACE: This is not farfetched.
12 There's a particular person in Fort Worth who runs
13 periodically that we would probably give in excess of the
14 campaign guidelines to make sure we never had a case in
15 his court, and I'm being serious about that.

16 HONORABLE SARAH DUNCAN: But the candidate
17 has a --

18 HONORABLE DAVID EVANS: I'm not up until
19 2012, R. H.

20 HONORABLE SARAH DUNCAN: But the candidate
21 has a responsibility to return funds in excess of the
22 limits.

23 CHAIRMAN BABCOCK: Yeah. Yeah, Jeff.

24 MR. BOYD: In response to what you said, I
25 kind of thought, starting with Justice Hecht's letter,

1 that the whole reason we were taking this back up again
2 was we want to make sure that Caperton didn't require us
3 to do something different to our rules and that but for
4 Caperton we wouldn't be having this conversation again. I
5 guess White comes into play there some, too.

6 CHAIRMAN BABCOCK: Yeah, my sense is it's
7 broader than that, but I'll --

8 HONORABLE NATHAN HECHT: Yeah. I mean, it
9 really raises the issue, but, you know, it's a recurring
10 issue, and it deserves being revisited from time to time
11 just because it's very important to the judiciary's
12 integrity as perceived by the public, which is a concern
13 to the Bar and the judiciary and everybody, that our
14 justice system looks just to the citizenry, and so when
15 Caperton comes along and people start talking about it and
16 then there's news, and it makes you almost think maybe we
17 should go back and look at this again and see if we're
18 still on the right path. So I really think the Court was
19 interested -- is interested in a re-evaluation of where we
20 are.

21 CHAIRMAN BABCOCK: And, Jeff, we're not the
22 only state looking at it either. I know Colorado is
23 looking at it carefully, and there is a group based in
24 Colorado that is going to try to come out with some model
25 rules, and that's made up of rules committee people from

1 multiple states, so --

2 HONORABLE NATHAN HECHT: And I'm not
3 suggesting that there needs to be change. I don't think
4 the Court is of that mind either. Just maybe we are where
5 we should be, or maybe very profound change would be
6 advisable at this point. We just kind of need to take
7 stock.

8 CHAIRMAN BABCOCK: It's the Institute for
9 the Advancement of the American Legal System that is
10 holding meetings and hearings about this, about the
11 Caperton decision. Richard.

12 MR. ORSINGER: David Peeples has an analysis
13 of these older cases that's a little bit different from
14 mine in which he doesn't think that the common law
15 precludes consideration, which hopefully he'll speak on in
16 a minute, but since there does seem to be differences of
17 opinion to what extent existing law allows contributions
18 to judges' campaigns to be a factor in recusal, even if we
19 decided we didn't want to mention a number, we could list
20 it as a factor to consider on this impartiality question
21 just so we can eliminate any doubt whether the common law
22 permits you to consider that or not consider that.

23 CHAIRMAN BABCOCK: Yeah. Good point. Why
24 don't we -- speaking of Judge Peeples, why don't we take
25 our morning break, and when we come back Judge Peeples

1 has -- there's a handout talking about some procedural
2 aspects to our recusal rule, and we could spend some time
3 discussing that when we come back.

4 MR. GILSTRAP: Are we talking about White?
5 Are we going to talk about White today?

6 MR. ORSINGER: No, we're talking about
7 procedure.

8 CHAIRMAN BABCOCK: This is procedure. We're
9 going to talk about White. We're not going to finish this
10 recusal issue today. So we're off the record.

11 (Recess from 10:29 a.m. to 10:48 a.m.)

12 CHAIRMAN BABCOCK: We are back on the
13 record, and Judge Peeples has canvassed with his fellow
14 presiding judges in the administrative regions and come up
15 with a very thoughtful and helpful memo, and he's going to
16 talk about those issues for the rest of the session today.

17 HONORABLE DAVID PEEPLES: Okay, thanks. I
18 want everybody to have before you this -- the handout is
19 seven pages, got a memo from me to this committee on top
20 of it, because I'm going to refer to that in just a few
21 minutes. I want to make three or four points before we
22 talk about that memo. I think it's helpful to keep in
23 mind that our system right now is divided into a
24 procedural 18a and you might say substantive law 18b, and
25 we've been talking about the substantive law of recusal.

1 The procedures is what I now want to turn
2 to, and I want to make just these points. The rules that
3 is the Supreme Court comes up with will apply to civil
4 cases and family law and criminal and juvenile and
5 probate. The Court of Criminal Appeals back in 1993 said
6 we're going to apply 18a and 18b in criminal cases, and so
7 we need to keep in mind that we're making rules or
8 recommending rules for all of those kinds of cases, and in
9 addition these rules apply whether there's a lawyer
10 involved or whether the people are pro se, and as Judge
11 Underwood's statistics -- I don't want anybody to look at
12 them right now, but they show roughly one-third of the
13 recusals that he gets in the second region are filed by
14 pro se litigants. So you've got that issue also. A lot
15 of pro se people, and a lot of them are prisoners who are
16 complaining about the judge who presided over their trial
17 where they were found guilty, and in addition, this has
18 been mentioned I know by Skip Watson and maybe another
19 person or two here. The rules that we come up with apply
20 to Judge Christopher and Judge Yelenosky and to the judges
21 who are on the Supreme Court Advisory Committee, and they
22 apply to the judges in the Valley and in East Texas and in
23 every place there is, and that makes it hard, but the
24 rules have to apply everywhere to all judges.

25 Now, the -- I want to look at the handout.

1 I tried to make the point in the memo that the presiding
2 judges who administer this recusal system, we want to see
3 some procedural strengthening of 18a in ways that are
4 totally separate and independent from the campaign
5 contribution issues or whatever the substantive rules are
6 because there's a lot happening out there that has nothing
7 to do with contributions and so forth, and we've got 29
8 years of experience with this rule, something like that,
9 and we think that it's time to have some procedural
10 strengthening of the rules, and I've listed the four areas
11 at the bottom of that memo, and what we did, a committee
12 was set up. There were three of us, and I did the
13 drafting and we came up with a redline strikeout version
14 that starts with existing 18a so you can see what changes
15 we would like to see made and just as an effort to flag
16 for everybody so you can try to find out what the changes
17 would be.

18 Then there's a clean version toward the end,
19 and I want to just go over the last page of this, which is
20 from Judge Olen Underwood. He's the presiding judge of
21 the second region, which is roughly the southeast quadrant
22 of Texas. Houston, Galveston, Beaumont, and a bunch of
23 little counties, but they've got a lot of people and a lot
24 of litigation and a lot of lawyers and lawsuits and so
25 forth, and what he did was just to give -- I asked him to

1 do this.

2 HONORABLE JAN PATTERSON: Who was this,
3 David?

4 HONORABLE DAVID PEEPLES: Pardon?

5 HONORABLE JAN PATTERSON: Who was this?

6 HONORABLE DAVID PEEPLES: Judge Olen
7 Underwood. He's from Conroe. He is a retired judge, and
8 now he's the presiding judge of the second region, which
9 is the southeast fourth or 20 percent of the state, and
10 this is his summary of the recusal issues that he had in
11 the year just finished in August, and I just want to flag
12 a few things for you. In the top third of the page he's
13 got grounds that were -- 18b grounds were clearly alleged,
14 but he says there "essence of motion," and he says in here
15 that most every motion he gets -- and I find this to be
16 true, too -- has more than one ground urged, but he tried
17 to say the main ground urged in the motion was as he has
18 it there, and you can see "impartiality might reasonably
19 be questioned," that's included in almost every motion,
20 but other grounds are included also.

21 HONORABLE STEPHEN YELENOSKY: So, I'm sorry,
22 is this 20 then those instances in which he thought that
23 was the main grounds and he did not include those others?

24 HONORABLE DAVID PEEPLES: That probably is
25 -- that's the only ground in those particular ones, but in

1 everything else you see on this page that ground was
2 probably thrown in, too, the basis in 18b for most
3 motions. It's an all-encompassing ground. And then 37,
4 where the salient ground was personal bias and so forth,
5 you can see there. And then look right in the middle.
6 There were other grounds that he thought the main ground
7 in the motion was not something truly anchored in 18b. It
8 was just something different, and look at 22, adverse
9 rulings. We get a lot of motions where all they're
10 complaining about or virtually everything is the rulings
11 in the case, which the case law says can't be a ground
12 unless it is just beyond the pail.

13 Now, down in the bottom third, I think it's
14 significant, he's got voluntary recusals, and I was
15 surprised to see this high number, but a lot of motions
16 are granted by the judges who are being challenged, which,
17 you know, never go to court. They just bow out and the
18 presiding judge assigns another judge to try that case.
19 Now, down at the bottom, dispositions, looks like about
20 four out of five are not granted in that year, but about
21 one out of five were, 19 out of about a hundred. And down
22 at the bottom, roughly two-thirds pro -- excuse me, filed
23 by lawyers and one-third pro se. So it's a kind of a
24 complicated picture here, all kinds of cases. We're
25 talking about all over the state, lawyers and not lawyers,

1 and they complain about rulings and just general
2 unfairness, and some of them have no details, it's very
3 general, and so that's just a snapshot of the second
4 region, which is the most populous region in Texas.

5 HONORABLE JAN PATTERSON: David, do you
6 think these numbers include a lawyer who repeatedly moves
7 to recuse a judge, and there are some lawyers and judges
8 because of either prior contact or something that happens
9 that lawyer then begins to make motions to recuse that
10 judge in all family law cases? Does this include that you
11 think?

12 HONORABLE DAVID PEEPLES: Well, I'm sure
13 that during this fiscal year if a lawyer moved more than
14 once to recuse a judge and actually filed a motion it
15 would be here, however many times that happened. I don't
16 think these numbers are skewed because of that, but I feel
17 sure that those are counted however many times they were,
18 but I doubt that -- and if there were that situation, like
19 somebody who just takes the bench and their law firm has a
20 case, most people just recuse voluntarily for a certain
21 amount of time on that, but I doubt that there are a whole
22 bunch of motions on these figures on that, and frankly,
23 that's all I have to say by way of introduction. Yeah,
24 Tracy.

25 HONORABLE TRACY CHRISTOPHER: I was just

1 going to say at least our understanding of the rule is if
2 you recuse without a motion being filed we don't actually
3 have to send it to Olen Underwood, we can send it to our
4 local administrative judge. So we -- if a motion is
5 filed, you've got to send it to Underwood to assign the
6 next judge, but if a motion isn't filed then it comes to
7 me currently in a civil division and goes to the various,
8 you know, chairs of the different divisions in Harris
9 County, so voluntary recusals without motions filed, very
10 underrepresented.

11 HONORABLE DAVID PEEPLES: Yeah. The number
12 probably would be larger --

13 HONORABLE TRACY CHRISTOPHER: Much larger.

14 HONORABLE DAVID PEEPLES: -- in Harris
15 County, which has an automatic re-assignment system --

16 HONORABLE TRACY CHRISTOPHER: Right.

17 HONORABLE DAVID PEEPLES: -- were included
18 here.

19 HONORABLE TRACY CHRISTOPHER: Right.

20 HONORABLE DAVID PEEPLES: I don't know how
21 many counties he has, but there are a lot of counties and
22 a lot of judges in southeast Texas, so that 53 would be
23 larger probably.

24 HONORABLE TRACY CHRISTOPHER: Yeah. Oh,
25 much larger.

1 HONORABLE DAVID PEEPLES: That's all I have
2 by way of introduction. I assume people have looked at
3 this.

4 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: I had -- the
6 one recusal motion I had that actually was -- well, the
7 one I had was a pro se litigant, and they filed it but
8 didn't serve it on me. I'm looking at (b) under the
9 notice, and I didn't find out about it until after I had
10 signed another order. Does this draft address that in any
11 way or -- I couldn't see where there was a consequence
12 under the current rule or this rule to the failure to
13 serve the judge, and it sort of put in jeopardy the
14 validity of the order signed in between.

15 HONORABLE DAVID PEEPLES: Yeah. Again, as I
16 understand your question, you're worried about when a
17 motion is filed and not brought to your attention and you
18 go ahead and hear the case, is the case in jeopardy.

19 HONORABLE STEPHEN YELENOSKY: Well, I didn't
20 do that. I signed an order, which I wouldn't have signed
21 if I knew -- if I had known it was pending, and ultimately
22 the recusal was denied and sanctions were imposed and
23 such, but is there anything to do done about that? Is it
24 not a problem generally? Of course, typically you would
25 think they would serve the judge if they want to stop

1 things. Either they didn't want to -- didn't know to do
2 that or they were playing games or whatever.

3 HONORABLE DAVID PEEPLES: Statistically I'm
4 not aware that that's a problem.

5 HONORABLE STEPHEN YELENOSKY: Okay.

6 CHAIRMAN BABCOCK: Justice Bland, then Judge
7 Christopher.

8 HONORABLE JANE BLAND: There is a problem
9 with technical deficiencies in motions to recuse that mean
10 they fail, like service or, you know, they're not
11 verified, and there's a problem with district judges
12 getting the motion, realizing that it fails for -- it
13 lacks technical merit and then not referring it, and so I
14 like the idea of clarifying the rules because there are a
15 number of cases out there about what to do when a judge
16 doesn't refer it, and I think we need a bright line rule
17 that you have to refer it.

18 HONORABLE DAVID PEEPLES: No matter how
19 defective.

20 HONORABLE JANE BLAND: No matter what, and
21 it really comes in -- I think it's within the 10 days if
22 they don't file it within 10 days before a trial setting,
23 so it's clear that they haven't complied with the rule,
24 but they need to file it prior to the trial setting, and
25 some judges just deny it because they say it's an untimely

1 motion to recuse, and I think the rule should be that it
2 has to be referred no matter what.

3 HONORABLE DAVID PEEPLES: I think the Court
4 of Criminal Appeals has held for criminal cases that an
5 untimely motion can be disregarded by the trial judge.

6 HONORABLE JANE BLAND: That's right.

7 HONORABLE DAVID PEEPLES: The problem with
8 that is if the motion alleges something special, I didn't
9 find out about the ground until yesterday and so forth,
10 you proceed at your own risk.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE DAVID PEEPLES: And so I think
13 what most of the time happens is the trial judge gets an
14 untimely motion, will telephone and fax a copy to the
15 presiding judge. The judge will get on the phone and take
16 care of it quickly.

17 HONORABLE JANE BLAND: Right.

18 HONORABLE DAVID PEEPLES: Because there's so
19 much at stake trying a case and having it set aside if you
20 were wrong in disregarding the motion, but if your
21 suggestion is we need to be more clear about that, I think
22 that's a good suggestion.

23 HONORABLE JANE BLAND: Well, the question of
24 timeliness can -- it can be a question because, you know,
25 they didn't get notice of the setting or various reasons

1 why there might be some excuse for not having filed it 10
2 days out. The bigger problem with that is no matter what
3 issue needs to be resolved, whether it's technically
4 deficient or substantively lacks merit, it has to be ruled
5 on by another judge, and I think there is a lack of
6 clarity in the case law, and I worked on a case about five
7 or six years ago, and I'll try to send it to you, David,
8 but there's a lack of clarity in the courts of appeals
9 about that, and there are some courts -- I think Waco is
10 one of them -- that very strongly say no matter what you
11 have to refer, and there are other courts that are --
12 don't take quite that extreme position, that a trial judge
13 if the motion is technically deficient they can go ahead
14 and disregard it or deny it without referring it, but that
15 opens up a lot of problems.

16 HONORABLE DAVID PEEPLES: Yeah.

17 HONORABLE JANE BLAND: Because the whole
18 idea is to get a judge not affiliated with the case to
19 look at the whole thing.

20 HONORABLE DAVID PEEPLES: One reason -- at
21 the bottom of the first page of this strike out version,
22 lines 43 and 44, one reason we want the presiding judge to
23 have the ability to deny without a hearing a legally
24 insufficient motion is exactly for what Judge Bland is
25 talking about. There have been times when a lawyer has

1 filed a motion to recuse while the jury is deliberating
2 based on rulings, and the cautious judges have telephoned
3 the presiding judge, who either heard it by telephone or
4 assigned the judge next door, but if what we are trying to
5 get here gets passed, a motion based on rulings is legally
6 insufficient, the presiding judge gets a fax or an e-mail
7 copy of it, looks at it, says "That's denied." Then the
8 judge can go ahead and proceed with it, but at least
9 another judge, not the respondent judge, is making that
10 decision, but that's why that particular sentence, lines
11 43 and 44, we think is very important.

12 CHAIRMAN BABCOCK: Justice Hecht.

13 HONORABLE NATHAN HECHT: These numbers at
14 the bottom of Judge Underwood's sheet are very
15 interesting. Under dispositions and movement, those both
16 add up to 121, so that's the recusal motions referred to
17 the presiding judge, so 19 were granted. That's about one
18 in six. I would have thought 1 in 20 would be high, but
19 that -- so this is one in six motions that the judge
20 refused to recuse himself after he saw the motion, the
21 presiding judge recused him. That seems like a lot to me.
22 And if you assume that all of the pro se motions were
23 denied it jumps up to about one in four, so that sort of
24 reflects on the -- what we were talking about earlier
25 about the standards, but that seems like a lot of ordered

1 recusals to me.

2 HONORABLE DAVID PEEPLES: Well, okay, my
3 experience in the fourth region, if you factor out, you
4 know, pro se prisoners that are complaining about the
5 "Don't let the judge hear my habeas corpus proceeding
6 because I got an unfair trial," you factor those out, I
7 probably grant one out of four.

8 HONORABLE NATHAN HECHT: Hmm.

9 MR. MEADOWS: Let me ask you about, Judge
10 Peeples, if I could -- you know, I, too, have had very
11 limited personal experience with recusal, just two or
12 three, really. They were -- but, you know, they were --
13 they were difficult situations to deal with, but what I
14 saw in one of these was -- and I'm asking you if this
15 occurs -- is a situation where basically a motion was
16 made, this time by the opposing counsel, and there was no
17 really -- in my judgment there were not sufficient grounds
18 for recusal, but there was a hearing and essentially the
19 recusal occurred, and it was -- if you boiled it down to
20 it was just life's too short, you know, we can just --
21 let's just remove any question here, let's get it to
22 another judge, and move on down the road and remove this
23 sort of taint from the case, if you will.

24 How often does that happen where someone --
25 either the judge himself or at a hearing, you know, it's a

1 close call, or not even a close call, but the decision is
2 made, you know, let's just move away from this?

3 HONORABLE DAVID PEEPLES: I can't give you,
4 Bobby, an answer about how often it happens. As a -- I've
5 been recused three or four times. I think the judge who's
6 being sought to be recused almost always will think this
7 is outrageous, I can be fair, but, you know, I don't have
8 any stake in hearing a given case. If I bow out of case
9 A, you know, I'm going to get case B, and somebody else
10 down the hall is going to get case A, and it's no skin off
11 of my back, and I think people do sometimes have that
12 attitude, and --

13 MR. MEADOWS: Just to fall through.

14 HONORABLE DAVID PEEPLES: Even if it's close
15 to frivolous, some mud can be thrown, and it can dirty you
16 up a little bit. I think it does happen. I don't know
17 how often.

18 HONORABLE STEPHEN YELENOSKY: But don't we
19 have a countervailing ethical duty not to recuse and allow
20 somebody else to decide if we don't think there's grounds,
21 because obviously they can use it for gamesmanship
22 purposes?

23 HONORABLE DAVID PEEPLES: Well, judges have
24 a duty to sit.

25 CHAIRMAN BABCOCK: Tom. I'm sorry.

1 HONORABLE DAVID PEEPLES: But --

2 CHAIRMAN BABCOCK: Tom Riney.

3 HONORABLE DAVID PEEPLES: I think there are
4 people, judges, who feel as Bobby Meadows was saying,
5 that, you know, I don't have any dog in this fight. I'll
6 be glad to take a different case, let someone else do this
7 one. That's a rational thing to do in some cases, I
8 think.

9 CHAIRMAN BABCOCK: Tom.

10 MR. RINEY: I think Judge Yelenosky makes a
11 very good point. My experience is very similar to
12 Bobby's. I don't think I've ever been involved in a
13 recusal where there had not already been a significant
14 ruling by the judge adverse to the party who then filed
15 the recusal, and my concern is that far too often the
16 judge in an attempt to think, well, I want to be fair,
17 will be inclined to step aside, and I argue exactly that,
18 no, that's not right, it's inefficient, it's unfair to the
19 parties, and we can't be having someone be recused every
20 time they rule some way that someone doesn't like.

21 HONORABLE STEPHEN YELENOSKY: Yeah.

22 MR. RINEY: And that's one of the reasons
23 I'm kind of against tinkering with the rules too much.

24 HONORABLE STEPHEN YELENOSKY: I think our
25 natural inclination is to do that, but we're obliged to

1 resist it.

2 HONORABLE DAVID PEEPLES: On the rulings,
3 look again on the strikeout version, lines 15 and 16.
4 That italicized language would be new, which says the
5 judge's rulings can't be a basis for recusal. The case
6 law that that's based on is in the comments, lines 84 to
7 99, and, you know, the case law does say there's got to be
8 extra judicial conduct. There's got to be something other
9 than what the judge did in that case unless it is just
10 beyond the pail, and let's see what they say, "unless the
11 rulings display" -- I'm on line 94. "Unless the rulings
12 display a deep-seated favoritism or antagonism that would
13 make fair judgment impossible."

14 CHAIRMAN BABCOCK: Where did you read that
15 from, Judge?

16 HONORABLE DAVID PEEPLES: The strikeout
17 version starting on line 94. That's from the U.S. Supreme
18 Court in the Liteky case.

19 HONORABLE SARAH DUNCAN: So doesn't the rule
20 -- the proposal go too far?

21 HONORABLE DAVID PEEPLES: Well, the proposal
22 doesn't have that language, Sarah, but here's the reason
23 we don't. Statistically how often are the judge's rulings
24 going to be so far beyond the pail that they'll justify
25 recusal? One out of a hundred or a thousand? Very few,

1 but if you put that in the rule people will think, "I'm
2 going to go ahead and allege that," and you've opened the
3 door to -- you've opened Pandora's box.

4 HONORABLE SARAH DUNCAN: Okay. This is the
5 existing comment.

6 HONORABLE DAVID PEEPLES: Yes.

7 HONORABLE SARAH DUNCAN: I haven't compared
8 it.

9 HONORABLE DAVID PEEPLES: Pardon?

10 HONORABLE SARAH DUNCAN: This line 94, is
11 this in the existing comment?

12 HONORABLE DAVID PEEPLES: That's a comment
13 that I wrote for this committee.

14 HONORABLE SARAH DUNCAN: That's your
15 comment. It's not a published comment.

16 HONORABLE DAVID PEEPLES: The quoted
17 language is from an opinion that distills the case law and
18 so forth.

19 HONORABLE SARAH DUNCAN: Okay. Well, then
20 what if we said "the judge's rulings may not be the sole
21 basis"? Of course, then all they have to do is put in an
22 appearance of impropriety.

23 HONORABLE DAVID PEEPLES: You know,
24 yesterday during the home equity foreclosure discussion
25 several people said, you know, whatever rules you write

1 people will try to game the system, and I think that's a
2 fair statement of how the world works. Whatever rules you
3 write, people are going to advocate within those rules,
4 and I think that if you were to say something like the
5 rulings can't be a basis for recusal unless they're really
6 bad or, you know, over the line, you'll get a whole lot of
7 challenges on that and then is it worth doing.

8 CHAIRMAN BABCOCK: Judge Christopher. I'm
9 sorry, Sarah. Go ahead.

10 HONORABLE SARAH DUNCAN: I was reading about
11 the Banales/Celis case during our discussion because I
12 missed that in the paper --

13 HONORABLE DAVID PEEPLES: That's the Corpus
14 Christi case we've been talking about.

15 HONORABLE SARAH DUNCAN: Uh-huh. And I
16 think part of the backdrop of that case was Judge Banales'
17 rulings. The sentence that Mark Luitjen was going to
18 announce and the sentence that Banales announced were
19 vastly different, so I think I'm a little concerned about
20 writing in the rule that they may not be a basis when they
21 may be a factor to be considered in deciding whether
22 recusal is warranted.

23 HONORABLE DAVID PEEPLES: The draft that we
24 came up with 8 or 10 years ago, Chip, when Luke Soules was
25 chairman, had language -- and I'm going from memory. It

1 said the rulings can't be a basis but they can be
2 admissible if other grounds are alleged, something like
3 that, and I'm fine with that. The judge hearing the
4 motion would have the discretion to consider, you know,
5 contributions or always rules for this lawyer and so forth
6 and look at these rulings, and I had a case a year or so
7 ago where a judge in a little county was accused of being
8 -- always showing favoritism to a lawyer, and there was
9 testimony that that was true, but in addition in that case
10 the judge had refused to transfer a family law case to a
11 place where the child had been living for two years, and
12 as Richard Orsinger will verify, that's as bright line
13 slam dunk of a rule as there is that you transfer to where
14 the child has been, but this judge wouldn't do it in a
15 case where he was accused of being favored.

16 HONORABLE STEPHEN YELENOSKY: Well, why
17 isn't that dealt with by mandamus or appeal?

18 HONORABLE DAVID PEEPLES: No, it's not.
19 There's all kinds of things that trial judges can do that
20 are not mandamusable.

21 HONORABLE STEPHEN YELENOSKY: Not anymore.

22 HONORABLE DAVID PEEPLES: I'm just saying in
23 this case -- in this case --

24 CHAIRMAN BABCOCK: Now, now.

25 HONORABLE DAVID PEEPLES: -- there were

1 favoritism allegations bolstered by a ruling that 50 out
2 of 50 real judges would have granted lickety-split, and
3 that is fine.

4 CHAIRMAN BABCOCK: Judge Peeples, you say
5 that the judge's ruling may not be a basis for the motion.
6 What if the opponent of the motion says, "You're claiming
7 that this guy is" -- "this judge is biased in my favor.
8 He's been ruling in your favor, you know, for months now.
9 You know, every time I file a motion he denies it. How
10 can you possibly say he's biased?" Is that okay?

11 HONORABLE DAVID PEEPLES: Well, what we're
12 trying to do with the language on lines 15 and 16 is to
13 say if all you're alleging is this judge has been ruling
14 against me, that is legally insufficient.

15 CHAIRMAN BABCOCK: Okay. But so Sarah's --

16 HONORABLE DAVID PEEPLES: But, but --

17 CHAIRMAN BABCOCK: -- amendment is okay.

18 HONORABLE DAVID PEEPLES: -- but that
19 doesn't mean at a hearing you can't consider evidence,
20 this outside judge is forbidden to hear evidence of
21 rulings, but there's got to be some other allegation under
22 this language to get you into court, so to speak.

23 CHAIRMAN BABCOCK: So Sarah's amendment
24 would be okay then?

25 HONORABLE DAVID PEEPLES: I'd need to hear

1 the language again, but --

2 HONORABLE SARAH DUNCAN: "May not be the
3 sole basis of the motion."

4 HONORABLE DAVID PEEPLES: I make a
5 distinction between a basis in the motion, which triggers
6 a right to a hearing. I make a distinction between that
7 and what the judge can consider on the bench in a hearing,
8 which is legally -- there is a basis for it. And I think
9 that most judges who are hearing these, they've got some
10 sufficient basis that's alleged and then someone wants to
11 say, "and here are the rulings," the judge can consider
12 that and think, "Hmm, that helps me understand the
13 unfairness here," but to allow rulings to --

14 HONORABLE SARAH DUNCAN: That's a helpful
15 distinction.

16 HONORABLE DAVID PEEPLES: -- ever be a basis
17 to get you a hearing I think is just not worth it.

18 CHAIRMAN BABCOCK: Yeah. If we go that way,
19 that is a helpful distinction. If we go that way, we
20 would want to be clear about that. Yeah, Eduardo.

21 MR. RODRIGUEZ: Yeah, but I would want it to
22 be clear that whoever is hearing the motion can hear
23 ruling evidence, because -- because if this language is in
24 there, they can just say, "Hey, that's not -- you can't
25 bring that up at all."

1 CHAIRMAN BABCOCK: Right.

2 MR. RODRIGUEZ: And so, I mean, I understand
3 what Judge Peeples is saying, but on the other hand, he's
4 saying, "When I hear a case I listen to those things
5 because it's a part of everything," but there will be some
6 judges that will not because it's not relevant.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. RODRIGUEZ: And so I think we need to
9 have --

10 HONORABLE DAVID PEEPLES: Maybe the language
11 that was in here 8 or 10 years ago ought to go back in.

12 CHAIRMAN BABCOCK: Yeah. Justice Patterson.

13 HONORABLE JAN PATTERSON: David, am I
14 correct that you want -- that you intend this to mean
15 rulings in that case?

16 HONORABLE DAVID PEEPLES: Yeah.

17 HONORABLE JAN PATTERSON: Because the bigger
18 picture, the totality of the circumstances, may be the
19 kind of extrajudicial conduct or something. I think
20 David's distinction, Judge Peeples' distinction, is one
21 that is made by the vast majority of states and Federal
22 case law, the extrajudicial conduct as opposed to
23 intrinsic rulings, and the goal is to avoid the complaint
24 about this case, this ruling, "He's unfair to me." It has
25 to be based upon some other quantifiable unfairness; and I

1 think that the Federal law and most states draw that
2 distinction; and having seen a lot of these complaints,
3 fairly often the pro se, the family law cases, the
4 criminal law cases very often focus on "He ruled against
5 me unfair in this case." So but I think the distinction
6 is an excellent one.

7 My question goes to the procedure upon
8 referral to a presiding judge. What is the practice --
9 and I assume it's not a matter of rule, and I also assume
10 that it differs from the regions, as to whether there is
11 communication between the judge against whom a motion is
12 filed and the presiding judge? There seems to be a
13 controversy about whether there is a submission
14 conversation. Sometimes even presiding judges I
15 understand recuse themselves if they've had a
16 conversation -- if the judge calls them up and there's a
17 conversation. What is that all about?

18 HONORABLE DAVID PEEPLES: I'm not aware of
19 anything written down anywhere in the recusal rules that
20 speaks to that one way or the other, but the judge who's
21 the respondent judge is basically a party to the motion.

22 HONORABLE JAN PATTERSON: Right.

23 HONORABLE DAVID PEEPLES: And so the judge
24 who is going to hear the case and presiding judge
25 shouldn't be talking to the party, but, you know, judges

1 talk to each other. Suppose it's the person next door to
2 you, but I'm not aware of anything except in the canons of
3 ethics that talks about that. I will say that because the
4 respondent judge is a de facto party to that motion there
5 shouldn't be discussion, certainly about the merits or the
6 facts.

7 CHAIRMAN BABCOCK: Bobby.

8 MR. MEADOWS: It seems to me, and maybe
9 we're all talking about the same thing, but there almost
10 has to be some extrajudicial reason to complain to support
11 the motion over and above an unfavorable ruling, because
12 to take your example of a ruling that just made no sense,
13 I mean, it could be the result of what Steve said earlier
14 about incompetence. You can't recuse a judge for
15 incompetence, so just to complain about a ruling or
16 rulings, it can't just be about an objective analysis of
17 whether the ruling is right or wrong. There has to be
18 some extrajudicial, you know, cloud around it, and I think
19 we just need to be very careful that we don't allow
20 lawyers that don't like rulings to move to recuse judges.

21 CHAIRMAN BABCOCK: Yeah, Justice Gray.

22 HONORABLE TOM GRAY: Kind of moving to a
23 different part for conversation, subsection (b) that's
24 currently on line 20 or starts on line 20 entitled
25 "notice," that deals with service and a response, service

1 of a copy on the judge, who Judge Peeples has now
2 characterized as a de facto party, that should be under
3 provision subsection entitled "service" and the response
4 under subsection entitled "response," just break those two
5 sentences out. I would substitute for the first sentence,
6 "A copy of the motion must be immediately served on the
7 judge in addition to those persons normally required to be
8 served." My problem of saying "the parties or their
9 counsel of record," we don't do that anywhere else in the
10 rules. It's clear that parties, service on counsel is
11 service on the party if they're represented, so I would
12 propose that change.

13 On line 36, I don't know if Judge Peeples
14 intended this, but he's serving "copies" instead of "a
15 copy" of the motion, and I would just recommend that where
16 it's italicized there for the addition be "a copy" rather
17 than multiple copies; and on line 39, in the addition it
18 says "until the motion has been heard." It needs to be
19 "until the motion has been ruled on," because some people
20 may think that once the hearing has been held if it hadn't
21 been ruled on they can go back into the soup and start
22 making rulings.

23 Line 44, it says "without a hearing,"
24 there's always been confusion, comes up in a lot of
25 different circumstances, whether or not when a judge

1 considers something in chambers not on the record or not
2 an oral hearing or an evidentiary hearing whether or not
3 that is a hearing. I think that is a hearing. If he sits
4 down in chambers or stands up in chambers and decides the
5 motion, there has been a hearing on that motion, and so I
6 would say "without an oral or evidentiary hearing" at that
7 point.

8 Line 49, same -- and this is apparently in
9 the existing rule this way where it says "given to all
10 parties or their counsel." I would strike "or their
11 counsel." Last comment, on the sanctions section, we had
12 this issue before our court a while back, and a trial
13 judge attempted to impose sanctions and never told the
14 parties that he was considering it or was going to do it,
15 and I think you -- even if you're going to do it sua
16 sponte you have to at least advise the parties that you
17 are considering sanctions against them so that they can
18 respond to it. With those changes, I'm all in favor of
19 Judge Peebles' suggestions.

20 CHAIRMAN BABCOCK: Yeah, Jeff.

21 MR. BOYD: The question I have, the comments
22 that Justice Gray made about the hearing dovetails into
23 that because I think if the presiding judge has to give a
24 hearing, what does that mean, is it evidentiary, can the
25 judge say, "Submit it all on the record and I'll look at

1 it and get back to you" or what, but I'm more concerned
2 about this new provision that says if the motion is
3 legally insufficient then the judge can deny it without a
4 hearing, whatever that hearing is to which they're
5 entitled, and I appreciate and I think I support the
6 concept behind saying, yeah, but if it's not really a
7 motion as required by the rule, because I'm not sure what
8 legally insufficient is, and the example I'm looking at
9 it, it says "The motion shall be verified." Well, I can
10 understand if you get a motion in and it's not verified, I
11 can see the judge saying, "I'm not giving you a hearing on
12 it. It's not a motion."

13 But the rule also says, "It shall state with
14 detail and particularity the reasons why the judge cannot
15 sit." Can the presiding judge say, "Well, this isn't
16 detailed enough, doesn't give me enough particularity, so
17 I don't think it complies with subsection (a), I'm not
18 even going to consider it"? So I would be concerned that
19 if we're going to allow that out, we do it with a little
20 more detail and particularity as to what does and doesn't
21 constitute legally insufficient.

22 HONORABLE DAVID PEEPLES: The intention on
23 that, just take a prisoner petition, handwritten, okay.
24 "Judge Jones was unfair to me, and her impartiality might
25 reasonably be questioned, and she shouldn't hear my habeas

1 corpus petition." Do I have to grant a hearing on that?
2 Surely not. It just verified --

3 MR. BOYD: I support that intention. I'm
4 just worried that wording it this way allows for something
5 other than that intention.

6 HONORABLE DAVID PEEPLES: Yeah, what I
7 stated was one that was based on rulings and which was
8 very vague and general and, you know, we see them also
9 which just basically say, "This judge is hostile and
10 antagonistic to me and," quote, "her impartiality might
11 reasonably be questioned." There ought to be more than
12 that to require a hearing. We don't want the challenged
13 judge to be able to ignore that, but when the outside
14 judge, usually the presiding judge looks at it, we think,
15 you know, it ought to be dismissed right then and move on.

16 This is just me. In my order I tell them
17 why I dismissed it. "It didn't allege with
18 particularity," which is in the rule right now, or "A
19 judge's rulings can't be a basis," blah, blah, blah, and I
20 cite some cases so they will know, and once in a while
21 they'll come back with a more specific motion which then
22 we consider, but we think that the system cries out for
23 giving the presiding judge the discretion to look at the
24 thing and say, "Denied without a hearing."

25 HONORABLE TOM GRAY: So we need to have

1 findings of fact and conclusions of law from these? I
2 jest. I jest.

3 CHAIRMAN BABCOCK: Judge Christopher, and
4 then Sarah.

5 HONORABLE TRACY CHRISTOPHER: A couple of
6 things. I wanted to know why you took out the provision
7 that we need to rule within three days.

8 MR. ORSINGER: What line was that?

9 HONORABLE TRACY CHRISTOPHER: That was on
10 line 21, 22.

11 MR. ORSINGER: Okay.

12 HONORABLE TRACY CHRISTOPHER: I actually
13 think it's, you know, maybe three days is short, but I
14 actually --

15 HONORABLE DAVID PEEPLES: That says
16 "presented to the judge three days after filing."

17 HONORABLE TRACY CHRISTOPHER: No.

18 HONORABLE DAVID PEEPLES: Line 21, 22?

19 HONORABLE TRACY CHRISTOPHER: Yeah,
20 presented to the judge, well, I mean, most of us take the
21 position that we're supposed to rule on it when it's
22 presented to us three days after filing. And the -- maybe
23 I've been considering that wrong, but I always considered
24 that as I need to rule three days after it's served on me,
25 one way or the other.

1 HONORABLE DAVID PEEPLES: So you're talking
2 about the challenge to the judge. You like the provision
3 that says you've got to do something with this right away.

4 HONORABLE TRACY CHRISTOPHER: I do, just
5 because I can envision a situation where somebody moves to
6 remove the judge and the judge just sits there, just lets
7 the case sit. Okay. You know, what if it's the plaintiff
8 who wants the case to move forward and the trial judge
9 just says, you know --

10 HONORABLE DAVID PEEPLES: That's a good
11 suggestion.

12 CHAIRMAN BABCOCK: Yeah. That's a good
13 point.

14 HONORABLE HARVEY BROWN: What happens if the
15 judge is on vacation that week?

16 HONORABLE TRACY CHRISTOPHER: Well, you
17 know, I mean, maybe, you know, within a reasonable time or
18 whatever would be appropriate in there. I mean, I always
19 took it I got it, I needed to rule on it. And another
20 thing, from a trial judge's point of view, I think it's
21 useful to see if the other side is going to file a
22 response, and this always sort of -- that three-day idea,
23 it made the other party get on there and file something to
24 say, "Don't recuse." And the reason why I say that that
25 is kind of important, and I don't know exactly how to do

1 it, is sometimes it's good to see what the other side says
2 in response, because sometimes their response is kind of
3 lukewarm. All right. And so you've got somebody who
4 really wants you to recuse, and the response is kind of
5 like, "Nah, don't do it, Judge." Well, then you might
6 grant that recusal because ultimately the burden of, you
7 know, of cost and time and money is on that party opposing
8 the recusal.

9 I mean, you know, I mean, they've got to go
10 to the hearing. They've got to speak up. Generally they
11 do, you know, if they want to keep the judge, and I'd kind
12 of like to know whether they're in for the fight or not,
13 and you can generally tell that from the opposing party's
14 response as to whether -- because they're not going to say
15 "yeah, we agree" -- sometimes they do, "We agree, recuse
16 yourself," but you can tell by the way they're responding
17 whether they're really in on the fight. Now, I know this
18 one's going to really, really surprise Jane, but --

19 CHAIRMAN BABCOCK: Wake up, Jane.

20 HONORABLE TRACY CHRISTOPHER: -- I think a
21 denial should be reviewable by mandamus.

22 HONORABLE JANE BLAND: I'm not surprised.

23 HONORABLE TRACY CHRISTOPHER: Because,
24 again, the person who is penalized is the party if the
25 judge was not recused when the judge should have been.

1 Okay. It's -- so you've got -- and there's been -- there
2 have been several opinions out of the First and Fourteenth
3 Court of Appeals that I don't agree with, but that's where
4 we are on it. There was a procedural problem with the
5 recusal, the hearing wasn't held or, you know, it didn't
6 get sent to the right judge to hear it. There was a
7 procedural problem with the recusal. The recusal was
8 denied. The trial judge went forward. The parties spent,
9 you know, tons and tons of money trying their case in
10 front of the trial judge. Then on appeal the appellate
11 court says, "Oh, that was a procedural problem with how
12 that recusal was done, so everything the trial judge has
13 done is void."

14 HONORABLE JANE BLAND: That was the
15 Fourteenth.

16 HONORABLE TRACY CHRISTOPHER: Okay, it was
17 the Fourteenth. It was the Fourteenth, not the First.
18 Well --

19 HONORABLE JAN PATTERSON: And one case,
20 right?

21 HONORABLE TRACY CHRISTOPHER: No, it's
22 twice. They've done it twice, and so that has penalized
23 the parties because of a procedural problem with the way
24 the recusal issue, you know, was or was not handled, and
25 huge expense for the parties, huge expense for the

1 parties. So, you know, I am not a big mandamus believer
2 at all. I don't like to expand it at all, but --

3 HONORABLE DAVID PEEPLES: Well, there's no
4 harmless error rule on this.

5 HONORABLE TRACY CHRISTOPHER: There's no
6 harmless error on this.

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE DAVID PEEPLES: For me that's the
9 appellate judges that can fight that one. I don't care.

10 CHAIRMAN BABCOCK: Justice Gray.

11 HONORABLE TRACY CHRISTOPHER: I just --

12 HONORABLE TOM GRAY: I very much agree with
13 Judge Christopher on the point about the review. We had
14 one come through Waco, a majority of the judges determined
15 that there had been error and it was based upon factors
16 that were not extrajudicial. It was based on rulings of
17 the court. Judge Underwood determined that it was a
18 technically deficient motion, and they abated it for a
19 hearing after the life sentence had been rendered for the
20 hearing that should have been held. A new judge heard the
21 motion. Judge Underwood referred it to a judge. That
22 judge determined that the trial judge that heard the case
23 should have recused himself, and therefore, the entire
24 murder trial that was held was void. Then we get the next
25 motion or appeal, which was from a habeas proceeding to

1 dismiss it because of double jeopardy violations, and so
2 I -- you know, and because it couldn't go up from there
3 because the trial judge had then determined that it was a
4 grant of recusal and it was just -- it was a huge mess,
5 and we've had essentially two of those, and I would very
6 much join in Judge Christopher's --

7 CHAIRMAN BABCOCK: Levi, and then Judge
8 Peeples.

9 HONORABLE LEVI BENTON: I want to speak to
10 something else that Tracy touched on. I always understood
11 that the trial judge had three days to address the motion
12 also, but I understood it not from the rule but from case
13 law, but if the rule is going to be modified we ought to
14 expressly state not in a subparagraph that's captioned
15 "notice," but duties of the trial court judge who is
16 sought to be recused and expressly state when the judge or
17 the court must address it. Then we ought to add a
18 paragraph that expressly addresses the options, duties,
19 and responsibilities of the other -- of counsel for other
20 parties who have not sought the recusal.

21 CHAIRMAN BABCOCK: The record should also
22 note that Judge Benton was a sought recusal of him because
23 of his service on this committee.

24 HONORABLE LEVI BENTON: Oh, you'd be
25 surprised at things that people will say, and, you know, I

1 appreciate that because it reminds me of another motion
2 that was filed against me. There ought to be consequences
3 for movants who assert things even in sworn affidavits
4 that are just factually incorrect. I've had people say,
5 well, I went to law school with Ed Rodriguez and we were
6 in the same class when everybody knows Ed went to that
7 other school because he couldn't get into South Texas
8 College of Law, and I went to South Texas College of Law,
9 and, you know, and people will swear to things under oath,
10 and there should be consequences to -- when parties swear
11 to things under oath that they have no good basis to swear
12 to.

13 HONORABLE TOM GRAY: You don't think leaving
14 them in the trial court where they filed that motion was
15 enough?

16 HONORABLE LEVI BENTON: No, because I know
17 the trial judges purge themselves of all those things and
18 give those persons fair, impartial trials.

19 CHAIRMAN BABCOCK: Justice Bland.

20 HONORABLE JANE BLAND: On the review, the
21 current state of the law, as I understand it, is that
22 disqualification is reviewable by mandamus. Recusal is
23 not. They're very similar concepts. They have -- the
24 consequences of not bringing a disqualification motion
25 until later are really serious because everything is void

1 and it can be raised at any time; but it would seem to me
2 like we ought to have them on the same sort of appellate
3 track, and maybe if we're not really willing to go so far
4 as to -- and I -- I'm not sure we need to go so far as to
5 mandate that a decision granting a motion to re -- or I'm
6 sorry, denying a motion to recuse is reviewable by
7 mandamus, mandated in the rule, we could maybe take out
8 the opposite, take out that it's not reviewable and let
9 the common law percolate so that an important motion to
10 recuse in a case, if the parties want to take it up by
11 mandamus and let's see if the appellate courts will handle
12 it by mandamus, so that we don't have, you know, every
13 single pro se litigant who has filed a frivolous motion
14 then continue on up the appellate track delaying the
15 ultimate disposition of the case, which is my guess -- I
16 don't know why the rule says it has to be reviewable in
17 the case and not by mandamus, but my guess is it's because
18 a lot of these recusal motions come at inopportune times
19 when the case is about to go to trial and further
20 appellate review only delays, and maybe -- and maybe
21 that's the main effort in filing the motion, the main
22 effort was just to delay the trial setting.

23 CHAIRMAN BABCOCK: Eduardo.

24 MR. RODRIGUEZ: Well, that's exactly what I
25 was going to say. If you had this mandamus and a party

1 is, you know, gaming the system by filing a motion to
2 delay the trial setting, you just accomplished in giving
3 them more time, and, you know, that happens in real life,
4 and it doesn't happen just with habeas corpus type of
5 people. It happens in trial.

6 CHAIRMAN BABCOCK: Justice Bland.

7 HONORABLE TRACY CHRISTOPHER: Well, I
8 wouldn't let the mandamus delay. I mean, the ruling's
9 gone, you know, then it gives the appellate court a little
10 bit of time. It's just that it's such a penalty on the
11 parties if the judge failed to recuse or there was a
12 procedural problem and a failure to recuse. I mean, you
13 know, for a judge, okay, so what I did was void, well, all
14 right, that means somebody else has to try the case, fine,
15 but for the parties who have spent all this time and money
16 trying the case, and it's all void because of a procedural
17 problem or because the judge shouldn't have been recused
18 or should have been recused.

19 MR. RODRIGUEZ: How often does that happen
20 to really warrant a change? I mean, if it's happened once
21 or twice out of, you know, seven, eight hundred times, I
22 mean, is it worth it?

23 CHAIRMAN BABCOCK: Well, you don't know.
24 You know about -- because sometimes people might say,
25 "Hey, if we've gone through all of this, we're not going

1 to raise that as an issue for sure." Justice Bland, did
2 you have something to say?

3 HONORABLE JANE BLAND: Well, it will build
4 in some delay if we allow recusal to be reviewed by
5 mandamus as a matter of right, and because even though I
6 think the presiding judges are very facile at ruling on
7 these motions quickly, you know, within a matter of
8 minutes or hours, once you involve the appellate court,
9 just shepherding -- getting the papers on file and
10 shepherding it through, it's very difficult even on an
11 expedited time frame for the appellate court to act that
12 quickly or an appellate court to act that quickly, and the
13 first thing the appellate court -- and which they are
14 pretty quick about is granting a stay to preserve their
15 jurisdiction, so -- but if you maybe just didn't comment
16 in the rule and then if somebody tried to mandamus and
17 could say, "Look, this is a case involving a lot of money
18 and a lot of time and we think that the ruling is
19 incorrect, and we would like it to be reviewed now," you
20 know, maybe the appellate courts could take a look at it.

21 CHAIRMAN BABCOCK: David.

22 HONORABLE DAVID PEEPLES: I have zero stake
23 in whether this is mandamusable, but I think one reason
24 for what the rule says right now in the books is the -- we
25 know that of a hundred cases where there's been a recusal

1 motion denied, what, 95 percent of them are going to
2 settle and never go to the appellate court, because the
3 final judgment is never going to go up. The movant
4 sometimes is going to win those cases and, therefore,
5 won't be appealing, but if you allow mandamus now out of a
6 hundred cases we can get 30 mandamuses. So you've got
7 that problem right there; and second, you know, we would
8 have to decide whether now that you've got this right to
9 mandamus, if you don't use it have you waived the right to
10 take it up when you lose the case? I mean, unless we're
11 going to say that, Tracy, you've still got the problem
12 that you mentioned, but I, frankly -- it is no problem
13 with me, but I --

14 HONORABLE TRACY CHRISTOPHER: Your first
15 comment on mandamus is inherent in all mandamus, which is
16 why I generally don't like an expansion of mandamus --

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE TRACY CHRISTOPHER: -- powers
19 because the vast majority of time the case goes away or
20 the complaining party wins, and it's no longer an issue
21 for them. I don't know exactly how to do it, and perhaps
22 the ones that are bothering me the most are where it's a
23 procedural problem versus an actual good reason to have
24 recused the judge. Do you know what I mean?

25 HONORABLE DAVID PEEPLES: Yeah.

1 HONORABLE TRACY CHRISTOPHER: You know, if
2 the judge was biased and should have been recused, then
3 the fact that the trial was void has a little more merit
4 to me than because the proper procedures weren't followed
5 and the hearing wasn't held appropriately all the actions
6 that the judge did was void. I mean, you know, so that
7 strikes me as two different problems.

8 CHAIRMAN BABCOCK: Kennon. Justice Hecht,
9 and then Kennon.

10 HONORABLE NATHAN HECHT: Well, I'll have to
11 go back and try to reconstruct what we were thinking, if
12 we were thinking when we put this in, but I imagine that
13 one thing that we were thinking was that the chances of it
14 ever being reversible were just so slight that it just --
15 there's just no point in worrying about it, but I think
16 that was at least in my thinking with the idea that 95
17 percent or maybe a whole lot more than that of the motions
18 to recuse just had no valid basis whatever. But if a
19 fourth of them are being granted, that suggests to me that
20 others were close, if a fourth are granted then surely
21 there were some that were close to being granted, and if
22 it's a bigger problem then you wonder why there shouldn't
23 be some sort of review.

24 CHAIRMAN BABCOCK: Kennon.

25 MS. PETERSON: My comment is not about

1 review, and I don't want to interrupt the discussion if
2 yours is about review.

3 CHAIRMAN BABCOCK: Sarah.

4 HONORABLE SARAH DUNCAN: Mine is about
5 review, thank you. I'm very concerned about delay if this
6 is a matter of right because the majority of recusal
7 motions that I'm aware of personally were for the purpose
8 of delaying a trial setting. But at the same time I'm
9 very sensitive to Tracy's and Tom's experiences that there
10 are cases in which there should be immediate review, but I
11 think we accomplish that by what Jane was saying by just
12 taking that sentence out. That will be a significant
13 change. It will be commented on at every seminar. We'll
14 have this record to support, and the courts can deal very
15 quickly with a frivolous mandamus petition.

16 What's hard, what takes time, is one that
17 may have merit, and I was just hearing about how the
18 Fourth Court got a mandamus petition, immediately issued a
19 stay, held onto it for six months delaying the trial, then
20 it went to the Supreme Court, which continued the stay and
21 it held onto it for three months, so there was nine
22 months, but they ultimately denied, so there was a
23 nine-month delay to deal with this in the trial, and
24 that's -- I think that's inexcusable in our system, but if
25 you build in a right to mandamus in these cases I think

1 that's what's going to happen. But if you leave it with
2 the discretion of the courts, I think you've got a good
3 chance that they'll go -- the frivolous ones will go in
4 and out. The really tough ones like Jane and Tom spoke of
5 will get appropriate attention.

6 CHAIRMAN BABCOCK: Okay. I think Richard,
7 and then Justice Bland.

8 MR. ORSINGER: Were you going to comment on
9 the appellate review, because I'm not?

10 HONORABLE JANE BLAND: Okay. Yeah.

11 MR. ORSINGER: Go ahead.

12 HONORABLE JANE BLAND: The cases that get
13 reversed on the technical defects, it's not so much the
14 technical defect. It is that the district judge that the
15 motion was filed against looks at it, sees that there's a
16 technical defect, denies the motion, rather than referring
17 it, and the courts have -- the courts of appeals -- and
18 it's cloudy, which is why we've got this problem of trial
19 judges doing this. The courts of appeals have said,
20 "Look, even though the motion didn't have merit, the trial
21 judge had but one option when the motion was filed, to
22 refer it," and so you might be able to fix that with some
23 sort of quick, you know, "refer," you know, "just refer."

24 But I think when you're talking about at the
25 end of the case, hard to know whether or not that would be

1 harmful, I think what's bothering the appellate courts in
2 the cases is that it didn't get referred like it was
3 supposed to, and Judge Christopher is correct. If you
4 look at the motion itself, it would not have carried the
5 day, so the trial judge that denied it, you know, denied a
6 motion that was deniable. It's just that he wasn't the
7 judge or she wasn't the judge that should have ruled on
8 it, and that's more of a systemic problem that I think the
9 appellate courts kind of say we have to take a bright line
10 on this because if we don't we're going to have trial
11 judges ruling on motions to recuse filed against them, and
12 we don't want them touching these things, we want them
13 referring them.

14 HONORABLE TRACY CHRISTOPHER: And I think at
15 least one in the Fourteenth was caught in the -- it was a
16 multiple recusal issue, and so there were problems with,
17 you know, to keep referring, which I think David is trying
18 to cure in part of this, which I think --

19 HONORABLE JANE BLAND: Yes.

20 HONORABLE TRACY CHRISTOPHER: -- will go a
21 long way to stopping that sort of procedural problem with
22 saying you can't file the recusal motion against the
23 presiding judge.

24 CHAIRMAN BABCOCK: Richard.

25 MR. ORSINGER: Okay. My comments have

1 nothing to do with appellate review. In the very first
2 part of subdivision (a) around lines 9 to 11, there is a
3 problem that exists in the old rule that still exists
4 under this language, and that is where the grounds arise
5 within 10 days, not just that they existed and you didn't
6 know about them, but that the grounds arose. There was a
7 case out of the Texarkana court of appeals where they
8 waited until 10 days before trial and then hired the
9 judge's son-in-law as one of the counsel in the case, and
10 that would be a ground for recusal if it had happened 10
11 days before. It went up to the Texarkana court of
12 appeals, and I think read a common law exception to the
13 10-day thing for events that occurred within 10 days. As
14 long as we're rewriting this rule, I think we ought to
15 take into account events that occur within 10 days that
16 would give rise.

17 HONORABLE DAVID PEEPLES: I agree with that.

18 MR. ORSINGER: Also, in San Antonio you have
19 a kind of a conundrum, and this also exists in Austin
20 because you have random assignment.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. ORSINGER: It also exists in rural
23 counties where there may be three or four district judges
24 that overlap one urban area but have different -- and
25 they'll substitute for each other all the time, and the

1 question is, is that your motion gets assigned to the
2 judge on the day you come into court, and you don't
3 recuse, but then something happens in the intervention and
4 then like nine months later the trial get assigned to that
5 judge just by random luck. Well, the case was first
6 assigned to the judge for the motion. Does that mean that
7 you had to recuse him before the motion or can you file a
8 recusal later on when they're assigned for trial, and the
9 way this is written is, is the judge was assigned to the
10 case. In San Antonio really the motion of the trial is
11 assigned to the judge. The judge is not really assigned
12 to the case, and so I think we ought to tweak with that a
13 little bit so that it fits those rotating --

14 HONORABLE DAVID PEEPLES: Does the language
15 on line 7 not catch that you think? "At least 10 days
16 before the date set for trial or hearing." In other
17 words, nine months later you find out you're going --

18 MR. ORSINGER: Well, I know we debate this
19 issue in San Antonio, and it may be that it's a dead
20 debate, but I'm just raising these. I mean, we can
21 discuss it off the record.

22 Did you want to respond to just that?

23 HONORABLE STEPHEN YELENOSKY: Well, to that.
24 I have another comment I can hold, but I can respond to
25 that. I mean, the central docket in Austin, we're well

1 aware of how sometimes the rules are directed not at a
2 central docket, and so we have to keep in mind the
3 original spirit of it, and we always -- well, I think I
4 can speak for every judge in that if there's a motion to
5 recuse we don't say, "Well, it's too late because nine
6 months ago I had a hearing in this case, and you didn't
7 move to recuse me then." I mean, any motion to recuse
8 we're going to refer, and moreover, we fully understand
9 and expect that since you just got the assignment it
10 should not be dismissed out of hand as late.

11 MR. ORSINGER: Okay. The next point I'd
12 like to make is --

13 CHAIRMAN BABCOCK: Well, before you go on to
14 that, I mean, it says "at least 10 days before the date
15 set for trial or hearing," so how do you deal with that?

16 HONORABLE STEPHEN YELENOSKY: It says
17 "practicable" further down.

18 CHAIRMAN BABCOCK: It says what?

19 HONORABLE STEPHEN YELENOSKY: Further down
20 it says if the judge was assigned the case within 10 days
21 then you do it as soon as practicable.

22 MR. ORSINGER: See, it depends on what you
23 mean by "assigned the case." I mean, the first time the
24 judge got assigned the case was when he heard some
25 pretrial motion.

1 HONORABLE STEPHEN YELENOSKY: Right. Well,
2 all I'm saying is that we interpret that in a way that I
3 think is the only fair way to interpret it, which is how
4 soon did you know that you should move for recusal of this
5 judge, and for us, that's from the time you knew you were
6 getting this judge on this hearing.

7 MR. ORSINGER: Then you would probably have
8 no objection to us clarifying this language to be sure
9 that --

10 HONORABLE STEPHEN YELENOSKY: I don't.

11 MR. ORSINGER: -- everyone across the state
12 reads it the same way.

13 HONORABLE STEPHEN YELENOSKY: I don't, but
14 it probably only affects San Antonio.

15 MR. ORSINGER: No. It affects the rural
16 counties, too, because if you go to some rural counties
17 you'll have a judge that's there that day because the
18 other judge is off somewhere, and they swap benches all
19 the time just like it was a random assignment, even though
20 it's not, but I didn't want to get bogged down on the
21 language because we have some rewriting to do.

22 HONORABLE DAVID PEEPLES: I agree with you
23 on that, so let's talk about it sometime.

24 MR. ORSINGER: Okay. Let me move on. I'm
25 not entirely sure that a failure to raise a ground that

1 you know about 10 days is not a waiver on appeal. It's my
2 recollection that if you know about it and you don't raise
3 it, you waived it, rather than you can just take it up --
4 the question presented is if you know about it and you
5 fail to file it 10 days in advance, do you just waive the
6 pretrial recusal or do you waive the ground for recusal?
7 I think you waive the ground for recusal, and if there's
8 some uncertainty about that, I can do a little research on
9 it. We ought to probably decide what we're saying. If
10 you know about it and you don't file it, is -- no matter
11 how awful it is, is it excused because you didn't file, or
12 is it just you waive your pretrial remedy and now you have
13 to wait, prove it on in the trial and then get a reversal
14 at the end of the case. Is my distinction --

15 HONORABLE DAVID PEEPLES: I'm not sure, but
16 we don't want to encourage people to file these when in
17 doubt just to preserve error.

18 MR. ORSINGER: Well, I would like it if the
19 rule was that if you don't file within 10 days but the
20 grounds are good, as long as the grounds are in the record
21 before the trial or at least before the end of the trial
22 that you should be able to get appellate review. My
23 recollection, though, having appealed a couple of these,
24 is that you waive the ground if you don't file it timely.
25 So I think we need to make a conscious awareness here that

1 we may be allowing a bad trial to go forward because of a
2 waiver argument because of a timing argument, and I just
3 want to say that and then move on.

4 The part of the motion about it being
5 legally insufficient and legally sufficient is troublesome
6 to me because that term is not apparent from the rule, and
7 if a significant number of these are pro ses they won't
8 have the faintest idea what that is. I would suggest that
9 we define "legally sufficient" in the following terms,
10 that "a motion is legally sufficient if the verified
11 reasons constitute a prima facie showing that the grounds
12 for recusal exist." In other words, there are reasons,
13 they're verified, and if they can be proven they would
14 support a finding of recusal. Maybe not mandate a finding
15 of recusal, but it's adequate to require a hearing from an
16 independent judicial officer, and particularly with the
17 pro ses I would think if we could define "legally
18 sufficient" then everybody kind of knows what target
19 they're looking for.

20 And along those lines, if you're going to
21 dismiss a recusal because it's not procedurally correct or
22 not legally sufficient, I would suggest that we require
23 that that kind of peremptory dismissal with no hearing
24 recite some explanation for why it was peremptorily
25 denied, like denied because it was not verified or denied

1 because there were not sufficient reasons given or some
2 clue to somebody why they didn't get a hearing in front of
3 a third party, and particularly if it's a curable flaw.
4 If it's either an ignorant lawyer or a pro se litigant
5 that really doesn't understand all the technicalities here
6 but might have a good recusal if they just knew how to do
7 it, now I don't want to overburden the judges, but if
8 they're not going to get a hearing in front of an
9 independent person or whatever, it seems to me like we
10 ought to tell them that it's just a technicality and if
11 you had done it right you would have gotten your hearing.

12 The next concern I have is the extrajudicial
13 source rule. It says that the rulings cannot be
14 considered, the judge's rulings may not be a basis for the
15 motion. That's lines 15 and 16, but the case that you
16 cited, David, here says that they cannot be considered
17 unless they display a deep-seated favoritism or
18 antagonism. So I think the ban in the rule doesn't allow
19 for the qualification or exception to the rule, and I
20 think we should be careful how we state the ban, and I
21 don't know that we want to put all of our case law in this
22 motion, but just simply saying "rulings cannot be
23 considered" really is not true to what the case law is.
24 Rulings cannot be considered unless they reflect something
25 else. So I think maybe we ought to look closely at that

1 language.

2 And then I'm a little concerned also about I
3 believe that you should present these motions to the judge
4 personally. This thing which is struck out on line 68 and
5 69, the three-day -- let's see. No, I'm sorry, on lines
6 20 through 25. Did I say that correctly? No. There's
7 one of these in here where you have to present it -- give
8 notice that you're going to present it to the judge. Line
9 22.

10 HONORABLE DAVID PEEPLES: 21, yeah.

11 MR. ORSINGER: We've struck out the
12 requirement of presentation to the judge, and I think
13 that's very important. I don't like people filing a
14 motion to recuse down there in the district clerk's office
15 among 30,000 pending cases and never telling the judge
16 that the motion has been filed. In a small court they'll
17 know right away, but in Dallas or San Antonio or Houston
18 the trial judge may never find out that there's a recusal
19 motion if the other side doesn't set it for hearing.

20 HONORABLE STEPHEN YELENOSKY: Yeah, that's
21 what happened to me.

22 MR. ORSINGER: So I think that whoever files
23 a motion for recusal, whether they get a setting on it or
24 not or how many days it has to be ruled on is different.
25 I think that the judge needs to be presented with the

1 recusal motion so that the judge knows that there's a
2 jeopardy that all the actions taken are void.

3 And then the last thing I'm concerned about
4 is the sanctions provision. I agree that the sanctions
5 right now are too restricted because you have to show this
6 plus this plus this, but to say all Rule 215.2 sanctions
7 are available also means that you can strike somebody's
8 pleadings and enter default judgment or dismiss their case
9 without hearing any evidence, just because they were out
10 of line in trying to recuse the judge. That's going too
11 far. You maybe ought to pay some money, maybe pay a fine,
12 maybe pay attorney's fees, maybe do public service as a
13 lawyer, but I don't think that a litigant ought not to get
14 a jury trial because they -- in the mind of the assigned
15 judge they weren't justified in seeking to recuse. Now, I
16 know that TransAmerican will probably come to the rescue
17 there because the due process clause is out there even if
18 it's not in our rule, but I hate to tell everybody that
19 you can strike somebody's pleadings because of a recusal
20 motion. That just to me the punishment doesn't fit the
21 crime.

22 Now, that's a short run through, and I'm
23 sorry, but we're out of time, and I just wanted to get it
24 in the record.

25 CHAIRMAN BABCOCK: That was good, though,

1 because you've almost run us up to the end. Kennon.

2 MS. PETERSON: Just two quick things for the
3 record as well. One, in terms of line 65 through 66,
4 that's the paragraph (f) about assignment by chief
5 justice, and one of the things you said is that a lot of
6 pro ses file these motions. It's my understanding that a
7 lot of people -- maybe not a lot, but a number of people
8 will file with the chief justice before going through the
9 other route, and they don't understand when they can file
10 with the chief justice, and the reference to statute
11 doesn't really help them, and I don't know if that's
12 something that should be spelled out a little bit more in
13 the rule or not. I'm just highlighting it as a potential
14 area of confusion, particularly for pro se litigants.

15 And the other thing just really quickly in
16 terms of when these things should be heard or ruled on
17 without a hearing, it seems like that's addressed in
18 paragraph (e) now. You have especially on line 54, "must
19 hear it as soon as practicable and may hear it
20 immediately," and then maybe it would help to put
21 something in line -- line 43 or 44 about when you should
22 rule on it in the absence of a hearing.

23 CHAIRMAN BABCOCK: Okay. Judge Patterson.

24 HONORABLE JAN PATTERSON: I really
25 appreciate Richard's comments. My only concern about

1 presentment is that it tends to be a trap for pro se
2 litigants and certainly prisoners, and it is a very
3 difficult concept for litigants to deal with and tends to
4 be a trap, although I agree that there ought to be some
5 way to make sure it's been brought to the attention of the
6 trial judge.

7 HONORABLE SARAH DUNCAN: If I can just tag
8 on what Jan said, we need to distinguish between
9 presentment, which is a term of art in the motion for new
10 trial context, and personally serve.

11 HONORABLE JAN PATTERSON: That would do it.

12 CHAIRMAN BABCOCK: Okay. Judge Peeples,
13 would it be okay for the next meeting if you synthesized
14 all these comments and come back with a redraft, and we
15 may get additional comments from a larger group, which
16 will undoubtedly be present on the 20th?

17 HONORABLE DAVID PEEPLES: This has been very
18 helpful, very helpful, and I think maybe Richard and I and
19 whoever else is on the subcommittee ought to caucus, and
20 I'll be glad to come up with something for next time.

21 HONORABLE STEPHEN YELENOSKY: Can I ask one
22 question?

23 CHAIRMAN BABCOCK: Yeah, Judge.

24 HONORABLE STEPHEN YELENOSKY: After
25 listening to Jane Bland, would the vast majority of the

1 concerns for the opportunity to mandamus be addressed by
2 putting in (d), referral to presiding judge, "The failure
3 to grant a motion to recuse or refer to the presiding
4 judge shall be subject to mandamus"? Because that ought
5 to be subject to mandamus. If you're the trial judge and
6 you don't -- you deny it rather than referring it, that
7 should be mandamus, and if you said that explicitly
8 would that not take care of at least two of the courts of
9 appeals cases where they've -- they had a problem?

10 MR. ORSINGER: What about being able to file
11 it directly with the presiding judge? If the trial judge
12 won't do it right, then provide -- then file it with the
13 presiding judge who knows that somebody's got to be
14 appointed.

15 HONORABLE DAVID PEEPLES: Or just require in
16 sub (b) that you copy the presiding judge on any motion
17 you file, and then if the respondent judge sits on it at
18 least the presiding judge knows about it.

19 HONORABLE TRACY CHRISTOPHER: Yeah.

20 MR. ORSINGER: You wouldn't be offended to
21 be overwhelmed by all that paperwork?

22 HONORABLE TRACY CHRISTOPHER: He gets it
23 anyway.

24 MR. ORSINGER: That would be a solution to
25 mandamus because we'll get the right job done, and we

1 don't have to take everything up to the court of appeals
2 with all the briefs and records.

3 HONORABLE STEPHEN YELENOSKY: That's fine.
4 I was trying to avoid opening up mandamus to everything
5 because of one particular mandamus problem.

6 HONORABLE TRACY CHRISTOPHER: I mean, once
7 the motion to recuse is filed, the presiding judge is
8 going to have to deal with it one way or the other.

9 MR. ORSINGER: Unless the trial judge
10 doesn't like refer it or call somebody to rule on it.

11 HONORABLE TRACY CHRISTOPHER: No, no. Yeah,
12 I mean, under current rule even if he recuses, the
13 presiding judge then has to deal with it and reassign
14 somebody else, so I don't think it will be more burdensome
15 to require it the first time around to be served up there,
16 do you?

17 MR. ORSINGER: That would cut out the
18 mandamuses to cure the purely procedural problems that
19 were created by a judge refusing to rule.

20 HONORABLE TRACY CHRISTOPHER: No. No, it
21 wouldn't. The problem was serial recusers and, you know,
22 timeliness on that, which I think David's fix in the rule
23 will help a lot on you can't recuse the presiding judge.
24 Because, I mean, that's what would happen. They file the
25 motion and then they file the motion against --

1 MR. ORSINGER: The assigned judge?

2 HONORABLE TRACY CHRISTOPHER: Yeah, whoever
3 the presiding judge assigned to hear it. Then they walk
4 in and they try to recuse that judge and then, you know,
5 get the presiding judge on the line again and --

6 MR. ORSINGER: Then all of the sudden you're
7 in the tertiary recusal rule --

8 HONORABLE TRACY CHRISTOPHER: Well, yeah.

9 MR. ORSINGER: -- which Judge Harris gave us
10 a statute on that, remember?

11 CHAIRMAN BABCOCK: I remember that, as well
12 as Frank.

13 HONORABLE TRACY CHRISTOPHER: At least one
14 appellate court has construed the tertiary recusal rule to
15 be three per judge.

16 MR. ORSINGER: Individual judge.

17 HONORABLE TRACY CHRISTOPHER: Not three
18 judges in a row, so we were in sort of this endless cycle
19 of recusals.

20 CHAIRMAN BABCOCK: We were in recusal hell.

21 Okay. Thanks, everybody, for being here and
22 working so productively the last day and a half. We will
23 reconvene on the 20th. We will go back to recusal, taking
24 up with Judge Peeples and the procedural aspects of it and
25 then moving into the substantive aspects that Richard will

1 have some draft language, different types of recusals to
2 deal with the Caperton and the White issues. So thanks
3 again. We're in recess.

4 (Meeting adjourned at 12:04 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 26th day of September, 2009, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2009.

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Certificate Expires 12/31/2010
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