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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

November 21, 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 21st  
day of November, 2009, between the hours of 9:03 a.m. and  
12:03 p.m., at the Texas Association of Broadcasters, 502  
E. 11th Street, Suite 200, Austin, Texas 78701.

**Documents referenced in this session**

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09-34 Recusal Rule 18a strikeout version (10-31-09)  
09-35 Recusal Rule 18a clean version (10-31-09)  
09-36 Recusal Rule 18b, memo from Mr. Orsinger (11-18-09)  
09-37 Civil case cover sheets - subcommitte report 9-7-9.

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2                   CHAIRMAN BABCOCK: Full agenda this morning,  
3 and we'll start out with Judge Peeples and Richard  
4 Orsinger on recusal.

5                   HONORABLE DAVID PEEPLES: You want me to go?

6                   MR. ORSINGER: Okay. We're going to take it  
7 in two parts. The first part Justice Peeples is going to  
8 talk about the procedural parts of the recusal rule, and  
9 then I will talk about the grounds of recusal, so we'll  
10 start with David.

11                  HONORABLE DAVID PEEPLES: I would ask you to  
12 have before you the strikeout version and also the clean  
13 version, but I'm going to go through the strikeout version  
14 section by section, and let me say that the changes --  
15 what I did was I took the clean version from last meeting  
16 and started there, and so this strikeout version is that  
17 with changes, suggested changes, and the changes in here  
18 came from two sources. Number one, if there was consensus  
19 or if I thought something was a good idea at the last  
20 meeting I put it in. Now, that's one source of changes,  
21 and then second, Richard and I had a discussion for at  
22 least an hour a week or two ago, a good long discussion,  
23 and we came up with some things we thought would be good,  
24 and so there is some of those suggested changes, too.

25                  So section (a), the main two changes there

1 are on lines 13 through 16, 17. First, I added in  
2 italics, "State with detail and particularity facts that  
3 if proven would be sufficient to justify recusal," and  
4 Judge Ovard from Dallas says that he gets motions in which  
5 they say, "I'm a Republican. The judge is a Democrat. I  
6 can't get a fair hearing." And he says if that's what  
7 they prove, I'm not going to grant that one, and I  
8 shouldn't have to have a hearing on that, and so that kind  
9 of thing is taken care of with the italicized language on  
10 lines 14 and 15. And then the next sentence, we had some  
11 discussion the last time. This sentence implements the  
12 common law ruling or decisions which say a judge's rulings  
13 in that case are not a basis for recusal unless they're  
14 just off the face of the earth basically, and the language  
15 that's there comes from a Supreme Court -- U.S. Supreme  
16 Court case.

17           And then in a comment, look on page --  
18 excuse me, line 132, several pages back. 132 to 135 is a  
19 comment where I explained the distinction that we made at  
20 the last meeting. It's one thing for someone to be able  
21 to complain about rulings and trigger the right to have a  
22 hearing, and I think we don't want that, but it's  
23 something else altogether if you've got a legitimate  
24 allegation and to bolster that allegation you want to show  
25 rulings, and we thought that was okay, and that's -- these

1 four lines of comment say that, and just as a general  
2 matter I think we need to decide whether to put things  
3 like that in a comment. I don't know if the Supreme Court  
4 wants to do comments on this or whether to put it in the  
5 black letter of the statute, but I put it in a comment on  
6 this one, so those are the two main changes in paragraph  
7 (a).

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE SARAH DUNCAN: So --

10 CHAIRMAN BABCOCK: Go ahead, Sarah.

11 HONORABLE SARAH DUNCAN: If my motion were  
12 to allege bias or prejudice and I supported that with  
13 evidence of off the chart rulings, that would be  
14 sufficient?

15 HONORABLE DAVID PEEPLES: Okay, you said two  
16 things, off the chart rulings, if they're bad enough,  
17 they've got to be bad, but if they're bad enough I think  
18 the presiding judge or the assigned judge would have the  
19 discretion to say you need to have a hearing on this.

20 HONORABLE SARAH DUNCAN: But the ground  
21 would be bias or prejudice.

22 HONORABLE DAVID PEEPLES: Okay. I would say  
23 if that's all -- to simply say bias, the judge is biased  
24 and prejudice, that doesn't state with detail and  
25 particularity facts that if proven would justify recusal.

1 I mean, it is easy to allege "This judge is unfair. This  
2 judge can't be impartial." And the existing rule requires  
3 more, and this bolsters it even more to require -- you  
4 know, it's just not enough to trigger the right to a  
5 hearing to say, "This judge is going to be unfair to me."

6 HONORABLE SARAH DUNCAN: I'm just trying to  
7 understand what's required, what's the ground the rulings  
8 can be evidence of.

9 HONORABLE DAVID PEEPLES: Relationship with  
10 a lawyer, coziness with a party, some sort of experience,  
11 but I think there are two principles in subsection (a),  
12 and we need to understand that. Number one is a general  
13 allegation of bias or partiality or whatever doesn't get  
14 you a right to a hearing. You've got to have details, and  
15 if all you're complaining about is rulings, even if you  
16 look at them and say, "Hmm, gosh, I wouldn't have done  
17 that," that's not enough to recuse somebody or to trigger  
18 the right to a hearing. If you've got something else that  
19 sort of pleads your way to a hearing then if you've got  
20 rulings the judge can hear those and think, "Hmm, coziness  
21 with this lawyer and look at these rulings. You're  
22 recused."

23 HONORABLE STEPHEN YELENOSKY: But, David,  
24 does the rule make clear that -- to me when I read the  
25 rule, it's not clear to me that it says what you're saying

1 now. Because it seems to -- and maybe it's just because  
2 I'm not giving proper importance to the language in the  
3 first sentence that we're talking about, but in quickly  
4 reading this I would think you could file a motion for  
5 recusal solely on the basis of rulings, and that would be  
6 enough to get you to a hearing, and it doesn't sound like  
7 that's what you intend.

8 HONORABLE DAVID PEEPLES: Well, the sentence  
9 that starts on line 15, "The judge's rulings in the case  
10 may not be a basis for the motion," unless they are off  
11 the charts, just a --

12 HONORABLE STEPHEN YELENOSKY: But you said  
13 they also have to be -- there has to be a predicate  
14 factual assertion other than just the ruling, and that's  
15 not clear to me from this.

16 CHAIRMAN BABCOCK: That's what the comment  
17 says.

18 HONORABLE STEPHEN YELENOSKY: Well, maybe  
19 the comment is clear.

20 HONORABLE DAVID PEEPLES: But the sentence  
21 before that is the one that says what you're saying. I  
22 mean, you've got to have a factual motion which states  
23 something that if you prove it would be enough.

24 HONORABLE STEPHEN YELENOSKY: Okay. And I  
25 guess --

1                   CHAIRMAN BABCOCK: But Judge Yelenosky's  
2 point is could the motion say, verified, that the judge's  
3 rulings show a deep-seated favoritism or antagonism and  
4 that here's what they are and A, B, C, and D is the  
5 rulings I'm talking about and that would be enough, and I  
6 think you're saying no, but the rule itself doesn't say  
7 it's got to be a couple --

8                   HONORABLE STEPHEN YELENOSKY: Yeah, the  
9 facts could be the rulings is how one could read that.  
10 The facts are that Judge Yelenosky ruled against me these  
11 three times in a row without letting me say a word.

12                  CHAIRMAN BABCOCK: Justice Bland.

13                  HONORABLE JANE BLAND: I disagree that  
14 rulings should be sufficient to justify recusal, because  
15 we have methods for reviewing rulings. We have mandamus  
16 for ones that are extraordinary that need to be reviewed  
17 before final judgment, and we have appeal, and the idea of  
18 the rulings reflecting deep-seated favoritism or  
19 antagonism to me is very subjective in the eye of the  
20 beholder. It's in the eye of the party who lost the  
21 rulings, it's in the eye of the judge reviewing the  
22 rulings, it's in the judge making the rulings -- the  
23 rulings in that judge's mind who made those rulings would  
24 say that isn't a reflection of antagonism or favoritism,  
25 it's a reflection of what was presented to me, and so to



1 me what we're doing is providing an avenue for substantive  
2 review of rulings to remove a judge, and I just -- I think  
3 that we'll see a floodgate of motions to recuse, because  
4 there's always a little sting when a judge rules against  
5 you, and there's always the question of whether the  
6 judge -- the judge's decision, if you disagree with it, if  
7 you don't think it was within the reasonable range is  
8 because of something else, and I think we're going to  
9 start having trials about the import of the judge's  
10 rulings and whether they reflect favoritism or antagonism,  
11 and it seems that's really not what the recusal rule is  
12 getting at, is not at bad rulings, but at whether the  
13 appearance of impartiality is protected.

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE SARAH DUNCAN: But that's existing  
16 law, that rulings -- and I wish we still had -- at one of  
17 these meetings we had excerpts from the decisions that  
18 talked about rulings.

19 HONORABLE TOM GRAY: It's on page three.

20 HONORABLE SARAH DUNCAN: Page three.

21 HONORABLE DAVID PEEPLES: Page three, line  
22 120 is the Texarkana court's summary of the Supreme Court  
23 of the United States' law on this point. Jane, I would  
24 say we already have a lot of motions in which they  
25 complain about nothing but rulings. I think this language

1 strengthens the hand of the presiding judge or the  
2 assigned judge to say, you know, these are not enough.  
3 That's strong language on line 16. In my opinion that's  
4 very hard to meet.

5 HONORABLE JANE BLAND: Except that when you  
6 use "unless" or "but" what comes after "unless" or "but"  
7 becomes more important than what comes before it, and I  
8 agree with Judge Yelenosky that when I read this I see  
9 this as a single basis for recusal. I don't have any  
10 problem if somebody wants to say, "Here's why I think this  
11 judge -- judge's appearance of impartiality is  
12 compromised" and then, "Oh, by the way, you know, it's  
13 having an effect on this case because of these rulings."  
14 But this doesn't say that. This says that the rulings can  
15 be -- can be a basis for recusal. The rulings alone can  
16 be a basis for recusal if they show deep-seated favoritism  
17 or antagonism, and I don't think in Caperton the reason  
18 that the rulings -- or in any case, it's not the rulings  
19 alone that do it, and the way this reads to me, it's if  
20 the rulings are bad enough then that is enough.

21 HONORABLE SARAH DUNCAN: But that's what the  
22 Supreme Court apparently said in *Woodruff vs. Wright*, or,  
23 no, *Texarkana*, and the Supreme Court in *Liteky vs. United*  
24 *States*.

25 CHAIRMAN BABCOCK: Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: I don't think  
2 it says "rulings." What it says is "opinions formed by  
3 the judge." So if the judge in a hearing says, "You're a  
4 liar," okay, to the plaintiff or the lawyer or whatever,  
5 and that opinion that he has given versus, you know, "I'm  
6 denying your motion for whatever" or "granting your motion  
7 for whatever." I mean, it's an opinion that you give  
8 according to this. It's comments like that that get  
9 judges in trouble.

10 HONORABLE SARAH DUNCAN: It says the rule --

11 HONORABLE TRACY CHRISTOPHER: No, it says  
12 opinions --

13 HONORABLE SARAH DUNCAN: Judicial ruling.

14 HONORABLE TRACY CHRISTOPHER: -- formed by  
15 the judge.

16 HONORABLE DAVID PEEPLES: And "events," at  
17 the end of that line.

18 HONORABLE TRACY CHRISTOPHER: Remarks.

19 HONORABLE DAVID PEEPLES: Remarks, yeah.

20 HONORABLE TRACY CHRISTOPHER: "Revealing an  
21 opinion." I think that's an opinion by the judge, not his  
22 ruling.

23 HONORABLE JANE BLAND: And it's also an  
24 opinion derived from an extra-judicial source, not a  
25 ruling based on what's presented to you, and the way that

1 we have it written it's what the rulings reflect, but  
2 rulings can reflect all kinds of things. It's only if the  
3 judges -- I agree with Judge Christopher. It's only if  
4 the judge is saying, you know, "I don't like you from  
5 another case," or I don't -- you know, "You've never had a  
6 case worth any merit in my court before," some sort of --  
7 but not I grant a summary judgment, and any judge in this  
8 room that looked at it would have not granted it. I mean,  
9 is that showing a deep-seated favoritism because one judge  
10 would grant the summary judgment and a hundred would not?  
11 Or is that just reversible error?

12 CHAIRMAN BABCOCK: Richard, then Lonny, then  
13 Harvey.

14 MR. ORSINGER: I withdraw my comment. I  
15 think I might have changed my mind in light of --

16 PROFESSOR HOFFMAN: And they already said  
17 what I want to say.

18 CHAIRMAN BABCOCK: Harvey. We're making  
19 progress.

20 HONORABLE HARVEY BROWN: I agree with the  
21 comments of the three judges, and I think one of the  
22 things this would do is also make it harder for a lawyer  
23 to try to explain to a client why they can't bring a  
24 recusal motion. I had a case where we subsequently  
25 mandamus'd a judge twice, and there were some rulings we

1 thought were not within the realm of reasonableness, but  
2 we explained you can't recuse for rulings alone. If this  
3 language was shown to them, they would say "Well, that  
4 judge has deep-seated favoritism." I mean, they felt like  
5 that. "That judge is antagonistic to us, he's not fair."  
6 So I think this would bring more challenges and make it  
7 harder for a lawyer to explain to a complaint why we don't  
8 bring recusal motions.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: You will notice  
11 that this language is in italics. The draft I brought  
12 last time didn't have this language, and the body insisted  
13 that we have it.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID PEEPLES: You're blowing hot  
16 and cold. Just tell me what you want.

17 HONORABLE TRACY CHRISTOPHER: Depends on who  
18 shows up.

19 CHAIRMAN BABCOCK: Jeff, did you have  
20 something?

21 MR. BOYD: Well, I kind of hate to say it in  
22 light of that comment, but I guess first it -- and I'll  
23 admit I missed this last time, but looking over it this  
24 week, number one, this rule goes to the procedure, not the  
25 standard for recusal. 18a is procedure, so if you're

1 going to put something like this in, it ought to be in  
2 18b, not in 18a, because 18b is what governs the standard,  
3 and then if you look at 18b to see what the standard is,  
4 it's bias and prejudice, and then you've got the case law  
5 that's fleshed that out. It just seems like if we're  
6 going to go down the road of defining "bias" and  
7 "prejudice" as to particular types of evidence in the  
8 rule, then we're -- we may have a much longer road ahead  
9 of us --

10 CHAIRMAN BABCOCK: Yeah.

11 MR. BOYD: -- than we want.

12 CHAIRMAN BABCOCK: I don't remember the  
13 exact vote, but, Judge Peeples --

14 HONORABLE DAVID PEEPLES: It may not have  
15 been a vote, but the sense of the house was --

16 CHAIRMAN BABCOCK: Well, I thought we did  
17 take a vote. No? I thought -- you're right, the sense of  
18 the house was that we ought to do something about this.

19 HONORABLE DAVID PEEPLES: I mean, basically  
20 what people said was they looked at the big quote at the  
21 bottom of page three and said -- they were nice about it,  
22 but they said the language you've got in sub (a) is not  
23 true to the quotation on page three. So I put language  
24 from page three in (a), and I, frankly, can go with either  
25 way, but I do think it's true, somebody said that, you

1 know -- Harvey, lawyers can show their client this, the  
2 pro se people can read it, and I think it helps to have --  
3 if we can agree on what we want, it helps to have it in  
4 the black letter of the rule.

5 CHAIRMAN BABCOCK: Yeah, Hayes.

6 MR. FULLER: If we were to substitute  
7 "opinions" for "judicial remarks or rulings" would that --  
8 would that help?

9 PROFESSOR HOFFMAN: Say that again.

10 MR. FULLER: If we were to substitute "the  
11 judge's opinions or judicial remarks," use that language  
12 instead of the "judge's rulings."

13 CHAIRMAN BABCOCK: Lonny.

14 PROFESSOR HOFFMAN: Okay, so that's  
15 potentially an option. What I was going to think is it  
16 sounds like, David, you're in -- effectively in agreement  
17 with the sort of sense, which is that there really should  
18 never be a motion solely on the basis of a ruling. So  
19 your question is only whether we say anything or how we  
20 say it. What about the idea of taking your note, so the  
21 one that begins on line 132 and putting that into the  
22 rule? In other words, drop the language and use that.

23 CHAIRMAN BABCOCK: Judge Evans.

24 HONORABLE DAVID EVANS: What if we just  
25 change the word "basis" to "evidence"? And the concept is

1 it's just not circumstantial evidence of bias unless the  
2 rulings reflect deep-seated antagonism.

3 CHAIRMAN BABCOCK: Uh-huh.

4 HONORABLE DAVID EVANS: It's just not  
5 relevant.

6 CHAIRMAN BABCOCK: Okay. Justice Bland, and  
7 then Hayes.

8 HONORABLE JANE BLAND: And I know we are  
9 blowing hot and cold, Judge Peeples, but I think when we  
10 see the language written out and we try to match it up,  
11 that's when you look at it, and if you look at the  
12 language in the Texarkana case it says that the -- that  
13 judicial remarks may support recusal "if they reveal an  
14 opinion deriving from an extra-judicial source." And I  
15 think they're talking -- in this whole paragraph they're  
16 talking about extra-judicial sources, not a ruling on the  
17 merits in a case where there's no evidence of any  
18 extra-judicial source to support an idea that the ruling  
19 is not just an aberrant ruling, but it's a ruling that  
20 reflects some sort of bias or prejudice.

21 CHAIRMAN BABCOCK: Hayes, then Skip, then  
22 Judge Yelenosky, and then Richard the First.

23 MR. FULLER: One other thing to throw into  
24 the mix, if we're trying to pull in the language of that  
25 case, if there's a difference, we say "a deep-seated



1 favoritism." The case actually says "such a high degree  
2 of deep-seated favoritism," so it would appear that there  
3 may be some deep-seated favoritism that's okay, unless  
4 it's of a high degree. So I think we probably need to  
5 consider that also.

6 CHAIRMAN BABCOCK: All right. Skip.

7 MR. WATSON: Well, they just said it. I  
8 think it needs more. I think it needs exactly the two  
9 things that have just been said. It needs to add "a high  
10 degree of deep-seated favoritism" and that after the word  
11 of "antagonism" it means derived, it should say "derived  
12 from an extra-judicial source." I think that clause will  
13 kill them, that that's the clause that will accomplish  
14 what David wants to accomplish.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: The U.S.  
17 Supreme Court case, and quoting Justice Scalia, who I'm  
18 fond of quoting, says, "It is enough for present purposes  
19 to say the following: First, judicial rulings alone" --  
20 and he says, "almost never constitute a valid basis for a  
21 bias or partiality motion," and he never tells us when  
22 they might because he then goes on to say, "in and of  
23 themselves they" -- meaning rulings -- "cannot possibly  
24 show reliance upon an extra-judicial source and can only  
25 in the rarest circumstance evidence the degree of

1 favoritism or antagonism required when no extra-judicial  
2 source is involved," so I guess that's the exception. I  
3 guess Scalia is saying there can be, but almost never be a  
4 bias or I guess a favoritism or antagonism without an  
5 extra-judicial source. So if that's what you're trying to  
6 reference, I guess my suggestion would be that it only be  
7 in a comment rather than in a rule itself because it's  
8 almost never.

9 MR. ORSINGER: What case did you quote,  
10 Steve?

11 HONORABLE STEPHEN YELENOSKY: *Liteky V. U.S.*

12 CHAIRMAN BABCOCK: Liteky. Richard  
13 Munzinger and then Frank.

14 MR. MUNZINGER: I agree with Jeff. The  
15 language seems to me to be a summary of Rule 18b(1) and  
16 (2). Rule 18b(1) says, "A judge must recuse in the  
17 following circumstances: (1), the judge's impartiality  
18 might reasonably be questioned." So if a judge whose  
19 rulings are as described in the italicized language then  
20 clearly his impartiality might reasonably be questioned.  
21 The second ground is "The judge has a personal bias or  
22 prejudice concerning the subject matter or a party." I  
23 think it's the same thing.

24 I think Jeff's point is that you've added a  
25 substantive standard to a procedural rule. My point is

1 that the substantive standard is already covered by 18b(1)  
2 and (2). If you delete the language, leave 18b(1) and (2)  
3 as they are, you don't encourage pro se litigants or  
4 lawyers to file spurious motions or motions which drag  
5 this issue into the case, but you don't preclude it, and  
6 there's no reason to look at a United States Supreme Court  
7 case discussing that issue because the rule itself says,  
8 "A judge who by his conduct has demonstrated that his  
9 impartiality might be reasonably be questioned," and his  
10 conduct can be in a ruling, an off the cuff remark, an  
11 attitude expressed in or out of court, could be anything.  
12 It's covered. "And he has personal bias or prejudice  
13 concerning the subject matter or a party," and  
14 presumptively a party's attorney. There's no reason for  
15 the language, and I think it ought to be deleted, and if  
16 it's appropriate I so move.

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: I think we -- going to line  
19 14, we need to leave the stricken out language, and it  
20 should say, "It shall state the reasons why the judge  
21 should not sit, together with the facts, if proven, would  
22 be sufficient to support those reasons." So you say the  
23 reason is, is impartiality might be questioned. Then the  
24 facts are he happens to be in a real estate joint venture  
25 with one of the parties, and then you go on and say that

1 the judge's rulings will not support the motion or support  
2 the reasons or grounds unless -- and then you put that  
3 standard in. I don't like -- I don't like taking out the  
4 reasons because, you know, you've got to say kind of the  
5 theory behind the recusal, not just the facts.

6 CHAIRMAN BABCOCK: Okay. Lonny.

7 PROFESSOR HOFFMAN: So I want to go back to  
8 the business about the judge's rulings in the case.  
9 Without regard to what we may or may not have been right  
10 about before, let's step back and see what we're doing.  
11 So there's no language in the current rule about this.

12 CHAIRMAN BABCOCK: Yeah, there is.

13 HONORABLE DAVID PEEPLES: About rulings --

14 PROFESSOR HOFFMAN: Where is that?

15 HONORABLE DAVID PEEPLES: -- I think that's  
16 right. No, there is not.

17 PROFESSOR HOFFMAN: There is no language in  
18 the current rule about it. So we should only put in  
19 language of whatever kind if we believe that there's a  
20 sufficient problem that people are bringing, you know,  
21 recusal motions based on decisions the judge is making.  
22 We want to set some higher, different -- you know, we want  
23 to tighten that. It's not clear to me that we've ever  
24 demonstrated that that's some existing problem that we  
25 need to fix. The risk here is if we're putting it in

1 we're going to get precisely to Jane's point, that  
2 everything after the "but" will become the debate over the  
3 standard. So all we're doing is highlighting a problem  
4 that maybe doesn't exist or does exist but is not as big  
5 as we think it is, and now we're going to make it worse.

6 CHAIRMAN BABCOCK: Richard Orsinger.

7 MR. ORSINGER: I'm wondering if a ruling on  
8 its face reflects a bias or prejudice that would qualify  
9 it for recusal, why couldn't you use the ruling? For  
10 example, I could imagine -- let's say a judge refuses an  
11 adoption because of the race of the adopting parents or  
12 the religion of the adopting parents, and the order says,  
13 "The adoption is denied because of whatever," and we know  
14 it's an improper consideration, we know it reflects bias  
15 or prejudice, we know that you could reasonably question  
16 impartiality. That order alone, if that's your only  
17 evidence, your only violation, ought to be enough to get  
18 rid of the judge.

19 HONORABLE SARAH DUNCAN: Absolutely.

20 PROFESSOR HOFFMAN: Well, why can't you seek  
21 mandamus or appellate review?

22 MR. ORSINGER: You can, but you can't get  
23 rid of the judge that way. All you can do is overturn  
24 that ruling. So why is -- I mean, is the law truly that  
25 if a court order reflects a bias or prejudice that we

1 would all agree is sufficient to recuse, that we can't use  
2 that order as evidence? Is that what we're saying?

3 HONORABLE STEPHEN YELENOSKY: It's the  
4 ruling is to deny the adoption. What you're saying is  
5 that the basis announced by the judge, the remarks of the  
6 judge --

7 MR. ORSINGER: Or even if it's written in  
8 the order.

9 HONORABLE STEPHEN YELENOSKY: Yeah, but the  
10 ruling is not -- doesn't show.

11 MR. ORSINGER: Well, to me the ruling is  
12 everything that's in the order or judgment that the judge  
13 signs, not just the actually dispositive sentence, but the  
14 whole order.

15 CHAIRMAN BABCOCK: Sarah.

16 HONORABLE SARAH DUNCAN: In response to  
17 Lonny, why should a party have to overcome the standard of  
18 review to get reversal when a judge has demonstrated bias  
19 or prejudice on the record in a ruling if that judge can't  
20 be a fair tribunal for this particular matter for some  
21 reason?

22 PROFESSOR HOFFMAN: So I think there are two  
23 answers. The first is it may be possible in rare unusual  
24 cases, and that is Richard the First's point about recusal  
25 under (2) (a), under 18b(2) (a). In other words, it may be

1 that the ruling is just so -- you know, "I'm not going to  
2 let these white parents adopt this black kid because I  
3 don't believe in interracial adoption," then (2)(a), his  
4 impartiality might reasonably be questioned by the order,  
5 and so it may be in one of these rare circumstances where  
6 it's just sort of like that we would say, yes, and so we  
7 don't have to change the existing rule. It would work.

8           But short of something that dramatic, I  
9 would say there's a -- I would go along with Jane. I  
10 think there's a serious concern about tertiary or  
11 satellite litigation about rulings that we don't like, the  
12 sort of sour grapes problem, and it seems far better as a  
13 general proposition to have bad rulings or wrong rulings  
14 reversed through the normal and ordinary course as opposed  
15 to saying, hey, the judge is biased.

16           HONORABLE SARAH DUNCAN: Chip.

17           CHAIRMAN BABCOCK: Yeah, I don't know who's  
18 -- Judge Patterson or Justice Bland, whoever.

19           HONORABLE JAN PATTERSON: Well, one reason  
20 that you have recusal is because it's -- it may be the  
21 only remedy without going through the full lawsuit. If  
22 you have a bad ruling, a bad law, it's easily remedied  
23 through appeal or mandamus, so recusal is a narrow option,  
24 not necessarily related to rulings.

25           CHAIRMAN BABCOCK: Justice Bland.

1 HONORABLE JAN PATTERSON: But they are -- I  
2 do think they can be evidence of it, but everything else  
3 can be remedied either through mandamus or appeal.

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: In Richard's example  
6 I think you could argue that that opinion that the judge  
7 expresses in an adoption case is from an extra-judicial  
8 source. It's not based on evidence presented to him that  
9 this is -- or based on any law. In fact, it's against the  
10 law. But what lots of recusal motions do, or a fair  
11 number, they're from people who have created antagonism in  
12 the lawsuit. In other words, they've engaged in some bad  
13 behavior, the judge has made some bad ruling -- not bad  
14 rulings, has made some rulings against the party and then  
15 the party then says, "Well, the judge doesn't like me, the  
16 judge is antagonistic to my case or has a deep-seated  
17 favoritism to the other side, because look at all these  
18 rulings," you know, ignoring the fact that it was their  
19 own bad behavior that created the problem in the first  
20 place.

21 And then, of course, once they've made the  
22 judge make some, you know, sanctions rulings or other  
23 kinds of rulings, their idea is, well, let's recuse the  
24 judge, and that's the problem that I see with putting this  
25 language in there. It would not be used for the rare case



1 where the judge truly is evidencing a bias or prejudice  
2 from an extra-judicial source or something that's just  
3 beyond the pail like you're describing, but, you know, the  
4 closer cases where the judge might have a little  
5 antagonism, but the little bit of antagonism might be  
6 deserved, you know.

7 HONORABLE STEPHEN YELENOSKY: Arising  
8 through the procedure.

9 HONORABLE JANE BLAND: Arising through the  
10 proceeding, and maybe the judge does go a little too far,  
11 and we would agree that the ruling is wrong, but on the  
12 other hand, it's not because the judge is acting with any  
13 bias or prejudice or any partiality that he or she has  
14 from some extra-judicial source. It's just because of the  
15 conduct of the proceedings and the case.

16 CHAIRMAN BABCOCK: Okay. Judge Peeples.

17 HONORABLE DAVID PEEPLES: I want to make  
18 three points. The first is that while the U.S. Supreme  
19 Court's statements are instructive, we're not bound by  
20 them. As long as this rule grants due process of law we  
21 can come up with some state law grounds, and so they're  
22 helpful, but we're not bound by them, and that's point  
23 one.

24 Point two, Jeff is right that this might  
25 technically belong in 18b, but I will say that it really

1 helps to have it in 18a, which is the one that people  
2 read, and to have it right there I think would be very  
3 helpful. I could live with it if it's in 18b. Now,  
4 third, what we've been talking about, the hypo that  
5 Richard gives, the judge who denies an adoption because of  
6 race --

7 CHAIRMAN BABCOCK: Wasn't that Lonny's hypo?

8 HONORABLE DAVID PEEPLES: Well, whoever.

9 MR. ORSINGER: It was mine and then he --

10 PROFESSOR HOFFMAN: I adopted it.

11 MR. ORSINGER: -- amplified it.

12 CHAIRMAN BABCOCK: And he picked up on it.

13 HONORABLE DAVID PEEPLES: Well, whoever  
14 claims parentage of it can have it. Just as a general  
15 rule I think we need to draft for what usually happens  
16 instead of drafting for the extreme case, and I want to  
17 say that at least a plurality of the recusal motions that  
18 are filed in Texas and maybe a majority complain about  
19 rulings and nothing else. I can't even think of what's in  
20 second place right now. We've got to deal with that. And  
21 I think the -- you know, if we can maybe get rid of this  
22 language and just say, you know, rulings can't be a basis,  
23 period, that would deal with the mine run of these cases  
24 where it's an abusive motion, and then when the case that  
25 Richard and/or Lonny come up with, when that case is

1 pleaded, I mean, when something totally off the face of  
2 the earth is alleged, I think you can count on the  
3 presiding judge to say, "You know what, we need a hearing  
4 on this."

5                   That's -- I think, I mean, somebody has to  
6 be trusted at some point, and I think if it's really that  
7 bad, you can probably count on the people who administer  
8 this system to say, "Let's have a hearing and go into  
9 this." And a related point is if it's that bad, Richard  
10 and Lonny, I think you can count on if there's a lawyer  
11 they'll come up with some other ground. "This judge has  
12 made statements saying I don't" -- you know, racist  
13 statements or whatever, and that would be extra-judicial,  
14 and then the ruling would come into evidence. So I just  
15 think it would be a bad mistake for us to draft the rule  
16 to take care of the surreal hypo instead of dealing with  
17 what's out there.

18                   CHAIRMAN BABCOCK: Justice Patterson.

19                   HONORABLE JAN PATTERSON: To add to that and  
20 to Harvey's point earlier about dealing with clients, I  
21 think that it would be useful to give guidance, whichever  
22 way we go, because I will tell you that a large number of  
23 complaints to the Commission on Judicial Conduct come "He  
24 ruled against me," "She ruled against me," that she was  
25 bias because she found the adoption the other way, and

1 that is the sole basis for the complaint to the  
2 commission. So if you can make it clear, and whether it's  
3 that it can be evidence or an extreme case, I'm not  
4 against addressing it entirely. On the other hand, I  
5 think it would be a public service to lawyers and judges  
6 but also to clients so that they don't spin their wheels  
7 unnecessarily only complaining about a ruling and so that  
8 the lawyer can have a conversation with them about where  
9 the line is, and I don't have the -- you know, I hate to  
10 not ever allow it to be a basis. On the other hand, we  
11 all know that there is a remedy for a bad ruling, and  
12 recusal may not be that.

13 CHAIRMAN BABCOCK: Lonny.

14 PROFESSOR HOFFMAN: So I fear that my  
15 comments may have been misunderstood from what you said,  
16 David, so I want to try again, because you're likely  
17 listening more than others, so that's a bad sign for my  
18 odds of persuading others. So my point is, to be clear,  
19 is that the existing rule has no language about this, so  
20 we should only add something if we think there's a  
21 problem. So my first -- to which you suggested just a  
22 moment ago that you think there is a big problem, but I  
23 hadn't heard that, and I'm not sure we had heard that, but  
24 so my first point is if there's not a problem then we  
25 shouldn't add anything because it will only create a

1 problem. It will create the very problem that you're  
2 decrying, people will suddenly be bringing motions to  
3 recuse on the basis of a ruling they don't like. That's  
4 point number one.

5           Second, if there is a problem such that we  
6 should do something about it, I don't like the existing  
7 language for the reason that Jane described because I  
8 think it will actually again create more motion practice  
9 here. Rather, if there would be any language, I would be  
10 in favor of putting in the language you have in your  
11 comment because that seems more precisely to say what it  
12 is you're after. "The complaints about rulings are not  
13 sufficient in and of themselves." However, if we've got  
14 extra-judicial stuff going on questioning impartiality  
15 then the rulings could also bear relevance there. I don't  
16 know whether that's the best language or not, but I like  
17 that significantly better, and I think it's entirely  
18 consistent with the position that you're after.

19           So the only point about bringing up the  
20 strange, oddball case was only that in that rare example  
21 where you've got the judge is not only biased but so  
22 stupidly biased that he lays it all out there expressly in  
23 the ruling, then we don't need anything. The existing  
24 rule is adequate. 18b(2)(a) says, "His impartiality might  
25 reasonably be questioned," based on the ruling itself

1 there, and there is nothing in the rule that would stop us  
2 from doing that. So the point is not that we ought to be  
3 drafting to the unusual case, not at all. Not at all.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Maybe there's  
6 more to Richard -- are you Richard the First or Second?

7 MR. ORSINGER: I'm the second.

8 HONORABLE STEPHEN YELENOSKY: You're the  
9 second. Richard the Second's remark about what the ruling  
10 is because what you just said, Lonny, I would disagree  
11 with. It wasn't --

12 PROFESSOR HOFFMAN: Which part?

13 HONORABLE STEPHEN YELENOSKY: What we're  
14 talking about perhaps is that grant, deny, I award X, I  
15 grant -- or it's a take-nothing judgment. That's what I'm  
16 talking about as a ruling, and maybe we could say that  
17 that never is grounds for recusal because even looking at  
18 the Supreme Court case, the example that Scalia gives is  
19 not that the ruling was against somebody or even that  
20 series of rulings were against somebody. They were grant,  
21 deny, et cetera, but a ruling in which the judge said the  
22 remark along with the ruling was that "One must have a  
23 very judicial mind indeed not to be prejudiced against the  
24 German-Americans because their hearts are wreaking with  
25 disloyalty." So it wasn't the ruling. It was the remark

1 that accompanied the ruling, and I dare say that if we  
2 define ruling as what you grant, deny, award, that that  
3 never is a grounds for recusal, although maybe it would be  
4 a grounds for mandamus or appeal, and so there has to be  
5 something more than that, and it may accompany that  
6 particular ruling or explain it. It may be in the  
7 judgment, but it's something other than the grant, deny,  
8 award, take nothing.

9 PROFESSOR HOFFMAN: Okay, I agree.

10 CHAIRMAN BABCOCK: Jeff.

11 MR. BOYD: I guess I'd say again we're  
12 talking about how to articulate a substantive standard to  
13 put into a procedural rule, and we do that a lot, and we  
14 do that a lot by adopting court rulings, so this isn't all  
15 that unusual, except I guess it seems to me what this  
16 discussion shows is that this -- what we're talking about  
17 is applying a substantive standard, impartiality might  
18 reasonably be questioned, to a whole variety of different  
19 factual scenarios that could come up, and I'm not sure we  
20 have the court ruling, the case law, to give us enough  
21 guidance on how to come up with a standard to apply to  
22 every factual scenario that would come up. It seems to me  
23 that this is a great oral argument, and if we just knew  
24 what the case was, you know, and that's the problem, is we  
25 don't know the facts that we're arguing over, which to me

1 argues in favor of not trying to write the application of  
2 the standard into the rule at this point, because there's  
3 no way to write it where it's going to address every  
4 factual scenario.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: Well, what I understand  
7 that Justice Peeples is trying to accomplish is be able to  
8 empower the trial judge first and then if it gets to the  
9 presiding judge, the ability to rule on the motion based  
10 upon the contents of the motion, and this rule being to  
11 guide the litigant of what has to be in that motion, and  
12 based on the comments here today, I mean, I'm okay with  
13 the sentence as written, given the comments from last  
14 time, but it seems that a modification could be that to  
15 insert the word "alone" immediately in front of "may" so  
16 that it would read "The judge's rulings in the case alone  
17 may not be a basis for the motion" and put a period and  
18 delete the part that's been added, and I think that would  
19 address many of the concerns that have been expressed.

20 CHAIRMAN BABCOCK: Is --

21 HONORABLE TOM GRAY: Because, again, it  
22 focuses on just the ruling alone can never be that basis.  
23 It's got to have something beyond the ruling.

24 HONORABLE JAN PATTERSON: I like that  
25 approach.



1 MR. JEFFERSON: Yeah, same.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: Well, if the comment sets  
4 out the law, what Justice Gray just said would not be  
5 recognizing the law because the way I read the comment,  
6 rulings in the case may be sufficient grounds for recusal  
7 if they reveal a deep-seated favoritism or antagonism, et  
8 cetera, and so to say that you can't recuse a judge based  
9 upon his rulings in that case alone would ignore the  
10 substance or content of the rulings, and Judge Peeples,  
11 having said this is a serious problem, why not put it in a  
12 comment that summarizess the relevant governing law so  
13 that a judge's bias, impartiality, et cetera, based upon  
14 rulings in the case, is grounds for a recusal only when --  
15 and then quote the language from the cases or the  
16 citations, and you've then told the practitioners and the  
17 bench you can't get a recusal based upon rulings unless  
18 you demonstrate that it rises to this level. Don't bring  
19 these in to us unnecessarily.

20 CHAIRMAN BABCOCK: Justice Sullivan.

21 HONORABLE KENT SULLIVAN: I think we've got  
22 a recurring problem in our discussion, and that is it's  
23 increasingly clear to me that we need to define what a  
24 ruling is, and it has disturbed me that there's been  
25 comments that have been significantly inconsistent with

1 one another as to what that definition is. If ruling is,  
2 as I believe it to be, granted, denied, then quite frankly  
3 it's almost axiomatic that that does not lead to recusal.  
4 If, to touch on Richard's comment -- Richard the Second  
5 apparently, I want to get it right -- that if it just  
6 happened to be in the body of an order or some rationale  
7 for the ruling, that rationale, which in our hypothetical  
8 was racist and illegal, that is not a ruling, in my view.  
9 It's the granted or denied that is the ruling, and I think  
10 you could use, quite frankly, the statement of that  
11 rationale, whether it be in an order or opinion or  
12 otherwise, as grounds for the recusal, but I think  
13 defining one versus the other is going to be pretty  
14 important.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,  
17 I think that's what I was trying to say, and Richard the  
18 First, if you're saying the comment and/or the law is that  
19 that type of ruling can be a grounds for a recusal then I  
20 just disagree. If you're saying that remarks can be then  
21 I think it's a question of definition, because as I said,  
22 going back to the U.S. Supreme Court case, I don't think  
23 you can read that as under any circumstance saying that  
24 you can line up grants, denied, award, take-nothing kind  
25 of rulings, and come up with a grounds for recusal. If

1 there is such a case, then I don't know what it is.

2 CHAIRMAN BABCOCK: Richard the Second, and  
3 then Richard the First.

4 MR. ORSINGER: I agree with Justice Sullivan  
5 that we need to define "ruling"; and if we define  
6 "ruling," then I'm totally comfortable with Justice  
7 Bland's suggestion that rulings, meaning the true outcome,  
8 is never a grounds for recusal; and in my experience  
9 what's going to happen is you're going to get a ruling  
10 from the bench where the judge maybe says a little  
11 something about his or her thinking. The order that gets  
12 typed up is never going to have some kind of improper  
13 rationale built into it because the lawyer is smart enough  
14 not to put that in the typed up order. If we have some  
15 way for us to distinguish the disposition from the  
16 utterance that goes along with it then I would be very  
17 comfortable, and it would even probably help David's case  
18 that the ruling in that limited sense is never the  
19 grounds. I would be willing to say even if -- I mean,  
20 that it requires out -- it requires other comments other  
21 than the disposition before you would even meet the U.S.  
22 Supreme Court standard.

23 CHAIRMAN BABCOCK: Richard the First.

24 MR. MUNZINGER: What happens in a case  
25 where -- let's assume it's a complex case with a great

1 deal of paper discovery. The judge consistently and  
2 without explanation rules in favor of the plaintiff or the  
3 defendant on a discovery issue. When the same rationale  
4 or logic is brought up by the other side of the case the  
5 judge consistently denies it. A pattern is created so  
6 that the judge -- the record clearly reflects that the  
7 judge has chosen sides in the case. He's kept his mouth  
8 shut. He's a smart judge, or she is. Doesn't reveal his  
9 or her political attitudes or racial attitudes or whatever  
10 they might be, but simply rules consistently in favor of  
11 one party and consistently against the other party when  
12 the subject matter is the same. Doesn't a person have a  
13 right to seek a recusal from the judge under those  
14 circumstances --

15 HONORABLE STEPHEN YELENOSKY: No. No.

16 MR. MUNZINGER: -- on the basis that -- your  
17 answer is no. You're a judge. I'm a party, and I  
18 represent a party. Do you think that's fair? Do you  
19 think that someone should be relegated to having to sit  
20 with that judge throughout a trial?

21 HONORABLE TRACY CHRISTOPHER: Maybe you've  
22 made bad motions every single time.

23 MR. MUNZINGER: Pardon me?

24 HONORABLE TRACY CHRISTOPHER: I said maybe  
25 you've made bad motions every single time.

1                   MR. MUNZINGER: Well, I agree that a test of  
2   recusal --

3                   HONORABLE TRACY CHRISTOPHER: You can't be  
4   saying, "Well, you know, you ruled against me five times  
5   and only ruled for me one time" as a basis for recusal.  
6   We're going to start counting who's granted or, you know,  
7   affirmed -- you know, overruled, sustained in the middle  
8   of trial. "Well, you sustained 20 of my objections" or  
9   "of their objections and none of mine, so you must be  
10   biased." I mean --

11                  CHAIRMAN BABCOCK: Lamont.

12                  MR. JEFFERSON: I like Justice Gray's  
13   solution to the problem, and I appreciate that the problem  
14   is with trying to define what a ruling is, but I don't  
15   think we can do that in this context. I mean, there are  
16   cases out there now where judges make comments from the  
17   bench that's important, their opinion, and those become  
18   reviewed on appeal, and the other problem that I see with  
19   that, with the concept of trying to define a ruling is  
20   what everyone is here -- what everyone is thinking about  
21   is one side says they want X, the other side says they  
22   want Y, and the judge picks one of them, but that's not  
23   always what happens. I mean, a lot of times the judge  
24   fashions his own remedy to the solution, and it's not just  
25   a question of picking who's got the better argument. The

1 judge by his own ruling is evidencing some bias.

2 CHAIRMAN BABCOCK: Judge Evans and then  
3 Judge Yelenosky.

4 HONORABLE DAVID EVANS: Well, I don't  
5 think -- I agree with Justice Gray and Lamont, but, you  
6 know, a person with a well-known bias, say against a  
7 lawyer or race or a gender, that's a vocalized over the  
8 years, is well-known in the community. Their rulings  
9 could be circumstantial evidence that they're acting upon  
10 that bias, and it's evident -- it's a problem of direct  
11 evidence and circumstantial evidence as to what the ruling  
12 is and what it's doing, and the word "basis" still throws  
13 me off. It's not a ground. It's just evidence, and  
14 they're going to come in every time that the judge is  
15 acting on his bias. If I were -- go off half-cocked and  
16 lecture a lawyer and say, you know, get off reservation  
17 and get angry in court and espouse that and then a series  
18 of rulings come out after that, I expect the  
19 administrative judge to review those rulings and look at  
20 those comments and decide if there's evidence that I can't  
21 act impartially, and so I kind of go back over here on  
22 this that "basis" is the wrong word. It's just an  
23 evidentiary problem. Is it direct or circumstantial  
24 evidence that you can't act impartially in the case, and  
25 so I would kind of merge it in that fashion to get to that

1 basis.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, again,  
4 to reply to Richard the First, again, it's "alone," and  
5 yours isn't alone because you just said there is evidence  
6 in the community that this person has an extra-judicial  
7 source of influence, which is their own bigotry or  
8 whatever, but if what you're positing is all these rulings  
9 went this way and all the other rulings went that way and  
10 there's no rational explanation for it, there's at least  
11 two possibilities. One is bias, and the other is the  
12 judge is incompetent. You don't get to recuse a judge for  
13 incompetence, and so if all you have is rulings that don't  
14 make sense and then theoretically it's just incompetence.  
15 You have to have something more than that.

16 CHAIRMAN BABCOCK: Okay. Hugh Rice Kelly.

17 MR. KELLY: Just to get outside the box of  
18 what's proposed, I've been in a fair number of cases in  
19 California. In California they avoid a lot of these  
20 problems by the one -- by the one strike rule. You can  
21 strike the first judge, but you've got to take the second  
22 one, and before you object that that would be frivolously  
23 used, let me tell you, the California lawyers are  
24 extremely cherry about using it because, you know, what  
25 goes around comes around. The next time you strike you

1 may end up in the court of the judge you struck before.  
2 They weigh this thing, I mean, in a fine balance, and it  
3 is not often used, but I can think of three judges out of  
4 25 in Harris County that I would strike every time. I  
5 mean --

6 CHAIRMAN BABCOCK: Present company excepted.

7 MR. KELLY: Yeah. When I was, a million  
8 years ago, a real trial lawyer, went to Polk County,  
9 Texas, and all of the lawyers apparently were related to  
10 Judge Coker. I mean, some beyond the required you know  
11 consanguinity. Well, I would have struck Coker in a  
12 minute and they would have sent me to San Jacinto County  
13 or someplace. Any place would be better than Polk County,  
14 and it avoids a lot of these problems because you go into  
15 a court, and every lawyer in this room knows that there's  
16 probably one judge in the world that you'll never get a  
17 fair trial from, but that's my suggestion.

18 CHAIRMAN BABCOCK: Yeah, I don't know where  
19 we are on -- Richard. And then Judge Peeples and then --

20 MR. ORSINGER: I was going to make a  
21 suggestion, may not be popular, but what if we say, "The  
22 judge's rulings in the case alone are not sufficient to  
23 justify recusal, unless" --

24 HONORABLE STEPHEN YELENOSKY: No "unless."

25 MR. ORSINGER: No "unless"?



1 CHAIRMAN BABCOCK: Then you have it --

2 HONORABLE DAVID EVANS: What was the  
3 grounds.

4 CHAIRMAN BABCOCK: -- as a grounds.

5 HONORABLE SARAH DUNCAN: Just to refresh  
6 recollections, because the previous version of this rule  
7 that we looked at said that rulings will never be a basis  
8 for a hearing or recusal, and we talked about that at the  
9 meeting quite a bit, and we were talking about Judge  
10 Banales' ruling and Judge Luitjen's rulings in the Corpus  
11 Christi case, and I think the agreement was that that  
12 sentence had to come out because that wasn't the law and  
13 it didn't reflect reality, but what had to come in was not  
14 something had to come in, but that sentence had to come  
15 out. Just to refresh recollections. I don't think we  
16 were waxing hot and cold. I think what we were presented  
17 with at the last meeting was unacceptable, but no  
18 consensus was reached on what would be acceptable.

19 CHAIRMAN BABCOCK: Judge Peeples.

20 HONORABLE DAVID PEEPLES: Yeah. Let's just  
21 get back to how it really works out there. The great  
22 strength of our system is that a second judge makes this  
23 decision. We need to remember that. Except way down on  
24 the bottom of the page where a motion is made during a  
25 hearing or during trial where I say, you know, that's

1 just -- doesn't get it, a second judge is always doing  
2 this, and that takes us out of Caperton, and that is just  
3 an enormous wonderful feature of our system.

4           Now, two common situations of rulings.  
5 There's somebody who's been convicted by a jury of a  
6 criminal offense and he's in prison and he doesn't want  
7 the judge who tried him to hear his writ of habeas corpus,  
8 and so the motion, handwritten and pro se, will say, "She  
9 ruled against me every time. My poor lawyer didn't get a  
10 single ruling." That's typical. And second is family law  
11 cases. I had one a month ago or so where the guy said,  
12 you know, "I proved this and this and then she denied me  
13 visitation." Let me just say that this is a motion filed  
14 by somebody. There is no guarantee that they're telling  
15 the whole truth and nothing but the truth when they say,  
16 "My lawyer didn't get a single ruling," but we've got to  
17 decide these on the pleadings, and to draft this so that  
18 someone like that can plead his or her way into court and  
19 get a right to a hearing on paint of the whole case being  
20 reversed is a high price to pay, and I urge us not to do  
21 that.

22           CHAIRMAN BABCOCK: Carl.

23           MR. HAMILTON: Maybe I'm confused, but we're  
24 talking now about rulings in the case, and if we're  
25 already in the case and it's beyond the 10 days before the

1 case, you can't file a motion for recusal at that point,  
2 so are we talking about a second case that comes along and  
3 you had this judge in the first case and you're  
4 complaining about the rulings he made in the first case?

5 HONORABLE DAVID PEEPLES: Pretrial,  
6 discovery, summary judgment pleadings.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE DAVID PEEPLES: Or maybe there's a  
9 summary judgment hearing coming up or trial coming up in  
10 the case, and there's a history in the case that's all  
11 interlocutory.

12 MR. HAMILTON: Well, it's too late.

13 HONORABLE DAVID PEEPLES: No.

14 MR. HAMILTON: You've got to do it 10 days  
15 before --

16 HONORABLE DAVID PEEPLES: Before the trial  
17 or hearing that's coming up. Not before the case starts,  
18 but before --

19 MR. HAMILTON: Isn't that before the first  
20 trial or hearing?

21 HONORABLE DAVID PEEPLES: (Shakes head.)

22 CHAIRMAN BABCOCK: No, no, no.

23 MR. HAMILTON: Huh?

24 CHAIRMAN BABCOCK: No.

25 MR. HAMILTON: It's not?

1 CHAIRMAN BABCOCK: I don't think so.

2 HONORABLE NATHAN HECHT: You're thinking  
3 about striking. When you strike a visiting judge, that  
4 has to be before the first hearing, right?

5 HONORABLE DAVID PEEPLES: Right.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. ORSINGER: Well, can I comment on that?  
8 If the grounds for recusal are known before the first  
9 hearing and you don't raise them and then you're into your  
10 third or fourth hearing before you raise grounds that were  
11 known before the first hearing, I think you've waived your  
12 recusal. Now, have you waived it because it wasn't 10  
13 days before the first hearing or have you waived it  
14 because you knew about it and didn't present it when you  
15 first could have? I'm not entirely sure the law is clear  
16 on that. In other words, I'm not entirely sure that you  
17 could raise a ground for recusal on your fifth hearing if  
18 you knew about it before your first four hearings. But it  
19 may be a waiver question and not a 10-day question.

20 CHAIRMAN BABCOCK: Right. Judge Peeples,  
21 surely you get a lot of recusal motions that are  
22 midstream. I mean in the --

23 HONORABLE DAVID PEEPLES: Oh, almost every  
24 one is in the case --

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE DAVID PEEPLES: -- as opposed to  
2 the case is just assigned to a judge and there's no  
3 history on that case.

4 CHAIRMAN BABCOCK: Right.

5 MR. ORSINGER: So is it our consensus that  
6 you can file a motion to recuse on your fifth hearing as  
7 long as the grounds occurred after the fourth hearing?

8 HONORABLE DAVID PEEPLES: Absolutely.

9 HONORABLE TRACY CHRISTOPHER: Uh-huh.

10 HONORABLE STEPHEN YELENOSKY: Yeah.

11 MR. HAMILTON: Yeah, but if the grounds  
12 occurred -- if you knew about the grounds when the lawsuit  
13 is filed, but you don't do anything until the fifth  
14 hearing because you want to complain about the rulings in  
15 one to four, I don't think you can do it then.

16 CHAIRMAN BABCOCK: You may have a waiver.

17 MR. ORSINGER: But that's probably a  
18 question of waiver and not a question of that it was 10  
19 days before the upcoming hearing.

20 CHAIRMAN BABCOCK: Judge Peeples, do you  
21 ever see sort of the flip side of what we're talking  
22 about? There is a -- there's a motion to recuse saying  
23 that the judge's impartiality might reasonably be  
24 questioned, and the opponent of recusal says, "What are  
25 you talking about? This judge has been even-handed in his

1 treatment of the case. The plaintiff's won five motions  
2 and I've won five motions, so we're -- he's right down the  
3 middle. Sometimes I win, sometimes I lose." Is that ever  
4 done?

5 HONORABLE DAVID PEEPLES: So what you're  
6 saying is there's a motion and then you look at the  
7 response, and you're persuaded by the response?

8 CHAIRMAN BABCOCK: Well, the response uses  
9 the rulings of the judge as a basis not to recuse, says,  
10 "How can you say this guy's not impartial because" --

11 HONORABLE DAVID PEEPLES: I've seen that  
12 said in a response, yeah. The judge had been fair, you  
13 know, "ruled against me the other day," that kind of  
14 thing.

15 CHAIRMAN BABCOCK: Yeah. Yeah.

16 MR. ORSINGER: Well, what Chip is saying,  
17 though, is you can't use it for the motion, but you can  
18 use it for the response. What's the public policy logic  
19 there?

20 HONORABLE DAVID PEEPLES: You can use it for  
21 evidence. If you get into court, if you plead your way  
22 into court and are entitled to a hearing, you can  
23 introduce the evidence.

24 CHAIRMAN BABCOCK: And that's the purpose of  
25 your comment, which --

1 HONORABLE DAVID PEEPLES: And I know  
2 we're -- I had a case, the allegation was that the judge  
3 was just cozy with this lawyer in a family law case. I  
4 granted a hearing, and part of the evidence was that this  
5 judge refused to transfer a child custody case to another  
6 county where the mother and the child had lived for two  
7 years. That's a slam dunk ruling. He just wouldn't do  
8 it, and that evidence persuaded me there's something here.  
9 There was just no reason for that ruling, utterly no  
10 reason, and that without that bit of evidence, that  
11 terrible ruling, I might not have granted it.

12 MR. ORSINGER: But that was a mandamusable  
13 decision.

14 HONORABLE DAVID PEEPLES: Yes, it was.

15 MR. ORSINGER: And so you granted a recusal  
16 on a grounds where mandamus is a remedy, and I know  
17 Justice Bland doesn't like that.

18 HONORABLE DAVID PEEPLES: No, Richard, I  
19 granted it because there was plausible evidence that he  
20 was cozy with this lawyer.

21 MR. ORSINGER: In addition to the ruling.

22 HONORABLE DAVID PEEPLES: I think the judge  
23 was afraid this lawyer was going to run against him, and  
24 he kept ruling for him, and it was an open secret on the  
25 street that you didn't want to be opposing her in his

1 court.

2 HONORABLE STEPHEN YELENOSKY: So it wasn't  
3 just the ruling.

4 HONORABLE DAVID PEEPLES: No. He is  
5 entitled to a hearing on that, but that ruling convinced  
6 me there's something here. That refusal to rule.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Well, to state my conclusion in  
9 advance, I think I favor the suggestion before of putting  
10 it in a comment, and I'll tell you one of my chief  
11 concerns here is a lot of the grounds we use for recusal  
12 are borrowed from the Federal -- Federal statutes, and  
13 we're -- and you can cite back and forth. As an example,  
14 well, the Federal courts have faced this and so you're  
15 using the same language, et cetera, et cetera. My concern  
16 is, is if we put it in the rule, whether it's 18a or 18b,  
17 what the evidentiary effect or result of all of this and  
18 whether it's probative, we may have, so to speak,  
19 encapsulized a rule that's still evolving.

20 The Federal courts may get more hard-nosed  
21 about the standards for how you use the judge's rulings to  
22 show extra-judicial bias or a source of extra-judicial  
23 bias, or et cetera; and if they get more conservative,  
24 well, then we've got a rule that sort of means that we  
25 can't take advantage of the change in Federal law or the



1 change in direction; and on the other hand, if they go the  
2 other way and start liberalizing it, well, here we've got  
3 a rule that says that -- that encapsulates the old law,  
4 which people may start arguing subjects us to a due  
5 process challenge; and -- but I am very sensitive to the  
6 idea that people -- people engineer these things.

7           I mean, the idea that people will -- so to  
8 speak, are just looking for an opportunity to recuse a  
9 judge rather than mandamus, I'm perfectly aware of, so I  
10 think there needs to be something in the rule -- or,  
11 pardon me, at least at as a comment so that when the  
12 presiding judge goes "We're not going to have a hearing on  
13 this. I've looked at your motion. You don't get there  
14 because all you're relying on is a ruling, and it's not  
15 completely crazy, and it doesn't show extra-judicial bias  
16 or at least you haven't explained it," I think that's a  
17 very useful thing to give them that. In other words,  
18 something for the presiding judge to hang the hat on, but  
19 to put it in the rule, I'm afraid all we're doing is  
20 encapsulating the -- you know, the version of it announced  
21 five years ago, and what happens if the Feds go another  
22 way in five years. Well, we're stuck with a rule, and we  
23 won't be able to take advantage of it.

24           CHAIRMAN BABCOCK: Justice Bland.

25           HONORABLE JANE BLAND: If we're going to

1 have something in the rule about this, I like Judge Gray's  
2 solution about rulings in the case alone, and Lamont  
3 Jefferson and other people have spoken up in favor of  
4 that, and I like that because I think it allows you to  
5 consider -- it signals that you can consider a ruling if  
6 you've got something else, and it would take care of the  
7 situation that Judge Evans was talking about where either  
8 the judge goes off the reservation, you've got something  
9 other than the ruling here, you've got some kind of anger  
10 that's sort of out of proportion for a judge to have, if  
11 they're going to continue to sit in the case and continue  
12 to be -- to be fair, so I think that gets the concept in  
13 that you can look at the ruling, but you have to have  
14 something else.

15 CHAIRMAN BABCOCK: Okay. Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, I just  
17 wanted to make a comment about Richard the Second's  
18 waiver. I don't really think that we recognize a waiver  
19 of being biased. The only time you could in my opinion  
20 have a waiver is if the judge says, "Oh, you know, by the  
21 way, my minor child, you know, owns one share of stock in  
22 something, and do you want to waive that under the recusal  
23 grounds." Not the disqualification grounds, okay. So,  
24 for example, you might know a fact about a judge, and  
25 you're a little worried about the judge as a result of

1 this fact, but you don't file a motion to recuse because  
2 you think, well, I'm not sure. Then you go in and you get  
3 the really bad ruling that Judge Peeples was talking  
4 about. All right. Well, then you file motion, even  
5 though you knew about the fact before the hearing, but you  
6 couple the fact and the ruling, and in certain  
7 circumstances that can be enough, if it's egregious  
8 enough, but the other side will say, "Well, you knew about  
9 that fact before the ruling and this is just sour grapes."  
10 So it's used in that manner, but it's not a true waiver, I  
11 don't think.

12 CHAIRMAN BABCOCK: Okay. Jeff, and then  
13 we're going to move on to (b), (c), (d), and beyond.

14 MR. BOYD: I would just say the idea of  
15 saying rulings alone cannot be a basis is a simple more of  
16 a bright line, but it's just not consistent with what the  
17 Supreme Court said, because what the Supreme Court said  
18 was "except rarely." I mean, the language is --

19 HONORABLE STEPHEN YELENOSKY: But when it  
20 goes on he doesn't distinguish. He --

21 MR. BOYD: "Judicial rulings alone almost  
22 never constitute a valid basis for bias or partiality  
23 motion in and of themselves; i.e., apart from surrounding  
24 comments or accompanying opinion, they cannot possibly  
25 show reliance upon an extra-judicial source and can only

1 in the rarest circumstances evidence the degree of  
2 favoritism or antagonism required." So it -- now,  
3 somebody said that Federal law doesn't control us. I  
4 guess as a matter of state law we can draw a more brighter  
5 line if we want, but that it would not be consistent --  
6 which goes back to my point that we're trying to address  
7 every possible factual scenario, and I don't think we  
8 should.

9 CHAIRMAN BABCOCK: Judge Peeples, what about  
10 subpart (b)?

11 HONORABLE DAVID PEEPLES: (b) is  
12 unremarkable, and I think we ought to skip over it. If  
13 you've got any input on that, just e-mail me or call me.

14 CHAIRMAN BABCOCK: Okay. What about part  
15 (c)?

16 HONORABLE DAVID PEEPLES: (c) is important.  
17 Retitle it "Duties of respondent judge," so the judge  
18 who's being -- is the target of the motion can look at it  
19 and say, "Here's what I do." You either -- you either  
20 recuse voluntarily or you send it to the presiding judge.  
21 There's no third choice. We tell him that. We put a  
22 three-day fuse on this on line 27, and then it's enforced  
23 on line 41, and I broke it into three paragraphs. You  
24 might want to look at your clean copy, just so the judge  
25 who, you know, shows up for work and, you know, has

1 criminal and family law and everything else and doesn't do  
2 this daily can look at it and figure it out.

3           The second paragraph says if you recuse  
4 voluntarily here's what you do, if you don't recuse  
5 voluntarily, here's what you do, and then the third  
6 paragraph is new. It starts on line 44 at the very  
7 bottom, and Richard and I talked about this. It is an  
8 abuse of the system when someone is in trial or in a  
9 hearing and files a motion to recuse. It is -- and so  
10 this stand-alone paragraph would say that the trial judge  
11 can just ignore that, and if you want to recuse somebody  
12 in the middle of trial you get the presiding judge to do  
13 it, and I think very few people will do that because it's  
14 always frivolous, but that's what paragraph (c) does.

15           CHAIRMAN BABCOCK: Okay. Any comments on  
16 (c)? Yeah, Judge Christopher.

17           HONORABLE TRACY CHRISTOPHER: Just one  
18 question on, you know, "or a hearing has begun" issue  
19 because sometimes what will happen is the person will have  
20 filed the motion, but you don't know it, and you'll start  
21 the hearing, and they don't tell you, and then you make a  
22 ruling against them, and they're like, "Well, Judge, you  
23 didn't rule on my motion to recuse," and you're like, you  
24 know, "You filed a motion to recuse against me?" But I  
25 mean, technically they filed it before the hearing had

1 begun and I didn't know about it, so I'm a little -- what  
2 would I do under this, under this rule?

3 HONORABLE DAVID PEEPLES: Look back up at  
4 line 22. We say, "The movant must send copies to the  
5 judge. I'm okay with saying you need to personally  
6 deliver it to the judge. Maybe we should say that.

7 HONORABLE KENT SULLIVAN: Right.

8 HONORABLE STEPHEN YELENOSKY: Right. I've  
9 had the same situation.

10 CHAIRMAN BABCOCK: Judge Evans.

11 HONORABLE DAVID EVANS: I want to just point  
12 out that -- and it might occur in the rarest of cases.  
13 There would be no advantage where the administrative judge  
14 is on it, but if it was known that I was taking a vacation  
15 and somebody wanted to file a recusal, I wouldn't have any  
16 knowledge and couldn't comply with the rule. So delivery  
17 to the judge within three days of receipt or on three-day  
18 holiday, there's no time to study the motion, and, you  
19 know, you read the motion, those who have ever  
20 gotten recused, I've never received one, but -- touch of  
21 humor.

22 HONORABLE DAVID PEEPLES: You must not be  
23 working.

24 HONORABLE TRACY CHRISTOPHER: I was going to  
25 bow to you.

1                   CHAIRMAN BABCOCK: He's not making any  
2 rulings.

3                   HONORABLE DAVID EVANS: My friends have told  
4 me this. You read the motion, and, you know, you want to  
5 put it down first for a while and go think about it before  
6 you just react to it, and so the judge should have some  
7 time to reflect on the motion and what's the proper thing  
8 to do, and it should be three days -- three days is  
9 adequate, but it ought to be three days.

10                  CHAIRMAN BABCOCK: Justice Bland.

11                  HONORABLE JANE BLAND: Well, I don't know  
12 that we have a big problem with judges not promptly ruling  
13 on motions to recuse because they can't take any further  
14 action --

15                  CHAIRMAN BABCOCK: Right.

16                  HONORABLE JANE BLAND: -- in the case under  
17 the rule until they rule on the motion to recuse, and I'm  
18 all right with not putting some limit on the judge,  
19 because is this three days if the judge doesn't make a  
20 ruling within the three days, does that mean that that's  
21 basically recusal because you haven't acted, recusal by  
22 inaction? I'm not sure what the penalty is for not ruling  
23 in three days.

24                  HONORABLE DAVID PEEPLES: The penalty is on  
25 line 41. If I'm trying to recuse some person and he just

1 lets it sit there, I send it to the presiding judge and a  
2 phone call will be made.

3 HONORABLE JANE BLAND: Oh, okay.

4 HONORABLE DAVID PEEPLES: I don't know how  
5 that looks on paper, but that will get the job done.

6 HONORABLE JANE BLAND: Okay. Well, that's  
7 okay with me. And then the other thing is the  
8 disregarding a motion that's made after a trial or a  
9 hearing has begun is subject to abuse by judges who really  
10 probably need to think about recusing. For example, in  
11 the family law context. You have an initial hearing about  
12 the distribution of assets and then you're about to have a  
13 giant child custody trial, and a motion to recuse might  
14 get filed, and that judge then would say, "I've begun,  
15 I've begun my hearing/trial. I began it a year ago," and  
16 I think there is a big problem with your instinctive  
17 reaction might be or some judges' instinctive reaction  
18 might be that just throw this away, this is a frivolous  
19 motion, it's procedurally defective, all these things, and  
20 so they don't want to rule -- they just disregard it like  
21 we're allowing in the rule --

22 HONORABLE DAVID PEEPLES: Can I just point  
23 out --

24 HONORABLE JANE BLAND: -- and a bright line  
25 test of making the judge rule by either -- by declining to



1 recuse and referring and not disregarding is better,  
2 because otherwise we have judges using it -- disregarding  
3 for all kinds of things, and then it creates problems on  
4 down the road because they've gone on and made rulings  
5 and --

6 HONORABLE DAVID PEEPLES: I meant to point  
7 out the language on 29, which says the respondent judge  
8 has two choices even if the motion doesn't comply with  
9 section (a). It's only when the motion is filed during  
10 trial or during a hearing that the judge can disregard it.  
11 That's the only time.

12 HONORABLE STEPHEN YELENOSKY: It says  
13 "after," not "during." That's the problem.

14 HONORABLE DAVID PEEPLES: "After." Well,  
15 after it's begun is during, isn't it?

16 HONORABLE STEPHEN YELENOSKY: Well, that's  
17 the problem because --

18 HONORABLE DAVID PEEPLES: Well, when  
19 something has begun may need some elaboration. Yeah.

20 HONORABLE JANE BLAND: If there's a motion  
21 to recuse filed against a judge, the judge shouldn't do  
22 anything with it other than rule on it, and some other  
23 judge ought to make the call. It just -- it's just the  
24 whole idea of this is we think that the current judge --  
25 there's somebody that's alleged that the current judge

1 isn't fair, so the judge then disregards it, so everybody  
2 -- well, that's more evidence that the judge isn't fair,  
3 and, you know, I think you were saying earlier one of the  
4 the great things about the way we have our system in this  
5 is that the judge's conduct who's being looked at doesn't  
6 have any involvement in these decisions, and to me this is  
7 sort of letting that involvement creep in, and it's going  
8 to put that judge smack in the middle of some dispute  
9 about whether or not this thing occurred during trial, and  
10 I understand the difficulty of motions to recuse brought  
11 during the middle of trial, but I also know that the  
12 administrative judges rule on those like lightning. So  
13 it's just like orders of remand. They're -- if a removal  
14 happens right on the eve of trial, you know, it's funny  
15 how a Federal judge can get that case remanded within 24  
16 hours.

17 CHAIRMAN BABCOCK: Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Yeah. I think  
19 first I would want to note well that we judges aren't  
20 always protecting ourselves. Here's one instance in which  
21 I think Judge Bland has pointed out that we should be  
22 subject, and I agree, to something that requires more of  
23 us than this rule does, because I think the problem, Judge  
24 Peeples, is if you get a motion to recuse and you're in  
25 the middle of a hearing, are you supposed to stop the

1 hearing, but if you just say -- if you just said that the  
2 judge does not have to recess the hearing because a motion  
3 to recuse is filed in the middle of the hearing and he can  
4 complete the hearing at least, and that's the problem, not  
5 being able to complete the hearing because a motion is  
6 filed, but other than that, I don't particularly see why  
7 we should say that if it's made after a trial or hearing  
8 has begun it has to be presented to the presiding judge,  
9 and it is subject to the question of, well, when has it  
10 begun, and, of course, with the central docket, when  
11 something begins and ends is also a difficult question.  
12 So if it addresses you're in the midst of a hearing and  
13 the judge doesn't have to drop everything in the midst of  
14 a hearing and there's some language for that, I would  
15 agree with that.

16 CHAIRMAN BABCOCK: Justice Patterson, then  
17 Richard.

18 HONORABLE JAN PATTERSON: I don't think that  
19 sentence is necessary in 44 and 45 either because it seems  
20 to me that if it's -- it is either evidence of a tactical  
21 effort, I'm filing one right now, but I think it tries to  
22 speak to too many circumstances. I could imagine a judge  
23 saying to somebody, "Well, I'll show you, I'm going to put  
24 you to trial tomorrow" and then all the sudden the trial  
25 begins. I mean, there might be some petulance that

1 somebody needs to respond to that they can't respond to or  
2 at least not easily with that sentence.

3           The other thing I think that we haven't  
4 said, and maybe the lawyers can speak to this better, but  
5 I think that one thing that happens is that, you know,  
6 we've talked about the short fuse, but there also remain  
7 those lawyers who the last thing they want to do is to  
8 file a motion to recuse, so they wait and they wait and  
9 they hope and they hope that it's not going to evidence  
10 itself, but there may be that last indication of bias that  
11 they just have to respond to, and the timing may not be  
12 great. I'm not sure our statements earlier about when  
13 waiver occurs are correct because the law is -- it has  
14 spoken a great deal about this, but there are a lot of  
15 lawyers who the last thing they want to do is to file one,  
16 and they wait until there's clear evidence, and the timing  
17 may not be appropriate, but it seems to me that when you  
18 see a lawyer who has filed it in the middle of trial as a  
19 matter of a tactic that's one of the easiest ways for  
20 either the judge or the presiding judge to deal with it,  
21 if that becomes so clear, so I'm not sure that this  
22 sentence is necessary.

23           CHAIRMAN BABCOCK: Richard Orsinger and then  
24 Justice --

25           MR. ORSINGER: A possible way to accommodate

1 this is back on pages -- lines 29, 30, and 31, is to say  
2 this comment, that if the motion is filed or first  
3 presented to the judge during a hearing or trial, the  
4 court may finish that hearing or trial, because that's  
5 kind of what the evil we're trying to avoid, is stopping  
6 an ongoing hearing or trial.

7           Another possibility is to take line 30 that  
8 says, "Take no further action except for good cause stated  
9 in writing," you could -- in the comment you could say  
10 that the presentation of the -- filing or the presentation  
11 of the motion to the court during a hearing or trial is  
12 good cause to continue -- to conclude the hearing or  
13 trial. In other words, we're telling the judges that if  
14 they find out about it during the hearing or trial then  
15 they just need to say on the record, "I find that there's  
16 good cause to continue or complete the hearing or trial  
17 because this wasn't presented until we were underway" and  
18 then the judges can solve their own problems by those good  
19 cause findings.

20           CHAIRMAN BABCOCK: Okay. I think Justice  
21 Sullivan had his hand up, and then Ralph, Judge Evans, and  
22 Sarah.

23           HONORABLE KENT SULLIVAN: I was just going  
24 to echo to a large extent the comments that Richard the  
25 Second made, and that is it seems to me that the evil --

1 at least I presume the evil that Judge Peeples is  
2 concerned about is the potential disruption of  
3 proceedings, and I do wonder if we incorporate this, which  
4 conceptually I agree with, you simply wouldn't push the  
5 timing of the disruption forward. In other words, you  
6 file it a day before trial begins and you get the same --  
7 because trial had not, quote, begun, close quote. So it  
8 will just change the tactics slightly and not remedy the  
9 problem. So I do wonder if what we're really driving at  
10 is much like what the suggestion was, and that is within  
11 some period of time, which you have to define, and maybe  
12 if there's a set trial date you would want to define it in  
13 advance of that trial date, simply that the motion can be  
14 referred to the presiding judge, but absolutely nothing  
15 stops, you know, because I think that's the -- that's the  
16 evil, is the disruption of proceedings and the ability to  
17 use this rule as a tactic for purpose of gamesmanship.

18 CHAIRMAN BABCOCK: Ralph.

19 MR. DUGGINS: I think it's unwise to -- I  
20 understand the point of permitting the judge to continue  
21 the hearing or trial, but when we say a judge can  
22 disregard the motion, I think that's not good. I'd rather  
23 see us rework this phrase and say you cannot disregard it,  
24 you've got to send it to the presiding judge, but you're  
25 not required to recess the hearing or the trial.

1 CHAIRMAN BABCOCK: Judge Evans.

2 HONORABLE DAVID EVANS: I do not favor  
3 including this language in the rule. I don't think it  
4 occurs often, and I think the new sanctions provisions  
5 will take care of any abuse, and so that if a person files  
6 one in the middle of trial and throws off the witnesses'  
7 schedules and causes the trial to collapse, the person  
8 opposing the motion is going to move for sanctions to  
9 include costs for bringing witnesses back, and I think  
10 could get it if the sanction rule was properly -- is broad  
11 enough, because it would be a conclusion by the presiding  
12 judge it was delay.

13 The other twist that I worried about in  
14 reading it had to do with it's filed, the hearing  
15 continues, the movant does not seek a stay from the  
16 presiding judge, I rule. Don't I still have a motion I  
17 have to send to the presiding judge? And what happens  
18 when the presiding -- and so how does that work? Does  
19 this excuse me from taking no further action? Or how  
20 would that -- that's what I didn't understand.

21 HONORABLE DAVID PEEPLES: What I meant in  
22 that paragraph was if you're in the middle of a trial or  
23 hearing, you go to the presiding judge to get it stopped.  
24 You can't just file something and get an automatic stop  
25 and, you know, an hour later you continue it.

1 HONORABLE DAVID EVANS: But I finish the  
2 hearing. I say I'm going to grant the motion for  
3 discovery, and it's just a short hearing. I grant the  
4 motion. Do I still have to act on the motion for recusal  
5 within a three-day period after receipt or not? It's not  
6 a long hearing. They're not going to get a stay. Judge  
7 Walker is off in Wichita Falls. So I just thought that it  
8 raised questions for us about what we might do with one we  
9 received during a hearing.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: Are we still just  
12 in the talking phases about this? We didn't have a vote  
13 on (a), and we haven't had a vote on (b), right?

14 CHAIRMAN BABCOCK: There has been no votes  
15 taken this morning. Okay. Richard -- Justice Hecht.

16 HONORABLE NATHAN HECHT: I just have a  
17 technical question of Judge Peeples. When things are  
18 filed do they go in the case file, or does the presiding  
19 judge keep a file, or what happens to all of this stuff?

20 HONORABLE DAVID PEEPLES: I think both. I  
21 mean, it's filed. It's a motion in the case, just like a  
22 motion to compel, but a copy needs to be sent to the  
23 presiding judge and then he files them.

24 HONORABLE NATHAN HECHT: And so the  
25 presiding judge keeps files apart from the clerk?



1 HONORABLE DAVID PEEPLES: Yes.

2 HONORABLE NATHAN HECHT: So then they don't  
3 go to the clerk's file ordinarily.

4 HONORABLE DAVID PEEPLES: Well, no, if a  
5 motion to recuse is filed it is filed with the clerk.

6 HONORABLE NATHAN HECHT: Right.

7 HONORABLE DAVID PEEPLES: And it's part of  
8 the papers in that case, just like the plaintiff's  
9 original petition, but a copy also goes to the presiding  
10 judge and other parties, of course. Presiding judges keep  
11 copies of them, so there are two.

12 HONORABLE NATHAN HECHT: And when you have  
13 hearings and things, the record is kept by the presiding  
14 judge separately from the case file or --

15 HONORABLE DAVID PEEPLES: Well, the court  
16 reporters, of course, keep their notes and exhibits unless  
17 they're given back, and maybe clerks keep some of that  
18 stuff.

19 MR. ORSINGER: Well, David, all the -- once  
20 the referral is made to the presiding judge, if they're  
21 responses or whatever, they're still filed with the  
22 original court clerk.

23 HONORABLE DAVID EVANS: In the original case  
24 file.

25 MR. ORSINGER: In other words, the presiding

1 judge's is an informal file for convenience only. The  
2 official file is still the trial court file, all the way  
3 through, right?

4 HONORABLE DAVID PEEPLES: That's correct.

5 CHAIRMAN BABCOCK: It would have to be.  
6 Because if the presiding judge or his designee denies the  
7 motion to recuse, that ruling can carry through in the  
8 case.

9 MR. ORSINGER: Uh-huh.

10 CHAIRMAN BABCOCK: It may be a point on  
11 appeal.

12 HONORABLE DAVID PEEPLES: Part of the record  
13 and they can take it up at the end.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE NATHAN HECHT: But when you say --  
16 I'm just trying to get the procedure in mind here -- it  
17 could be presented to the presiding judge, the party would  
18 just go find the presiding judge physically and --

19 HONORABLE DAVID PEEPLES: Or e-mail or fax.  
20 In Bexar County, since I'm in the courthouse where most of  
21 the judges are, they probably walk to my office and give  
22 it to me or my assistant, but if you're out of town,  
23 e-mail and fax makes it very, you know, instantaneous.

24 CHAIRMAN BABCOCK: Okay. Yeah, Roger.

25 MR. HUGHES: I would favor -- going back to

1 the service of the motion, I'd favor that the copy be  
2 served in chambers in order to bring it to the judge's  
3 attention as soon as possible because I have seen  
4 instances where a party will file the motion immediately  
5 after the hearing in order to prevent the judge from  
6 reducing his rulings to writing and to stall the whole  
7 thing, so I think it's important that the judge know as  
8 soon as possible that a motion has been filed, and if that  
9 means dropping a copy off in chambers, so much the better.  
10 The judge ought to know as soon as possible.

11           And the second thing, I agree with the  
12 remark earlier saying a judge may disregard the motion may  
13 not look very good. I -- but one thing I have seen is,  
14 you know, these things can be tactical. People look at a  
15 jury and go, "God bless, the strikes didn't go the right  
16 way. I really don't like this panel. I'm going to file a  
17 motion to recuse right now and end this travesty," or they  
18 just watched the opposing counsel ruin their best witness  
19 on the stand, and the jury is just laughing at the guts of  
20 their case now. At that point the thing is in South Texas  
21 -- I mean, maybe in the bigger cities these motions will  
22 get ruled on within 24 hours, but the possibility of a  
23 three or four delay, three or four delay in the Valley is  
24 a distinct possibility. I think the judge ought to be  
25 able to say, "You made that motion for the first time

1 during trial. That alone is good cause," and maybe  
2 putting that in the rule, that first making the motion  
3 during the hearing or during trial is a ground for good  
4 cause and gives the judge the option to scrub it or to  
5 continue.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: I would suggest just removing  
8 the problem that David and I think Tracy were talking  
9 about by saying -- by putting the duty on the litigants to  
10 actually present the motion before the beginning of the  
11 hearing or trial. I would suggest just wording it that a  
12 motion not presented to the trial court prior to the  
13 beginning of the motion for trial must be presented to the  
14 presiding judge.

15 CHAIRMAN BABCOCK: Okay. Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: I agree a lot  
17 with what's said about the wording of 44 and 45. Maybe we  
18 could tweak that a little bit. I would prefer to limit it  
19 to just trials rather than hearings, so I guess I just  
20 didn't know -- I mean, for me a hearing, a hearing could  
21 be postponed, and I could wait, and, you know, we can get  
22 it done in a couple of days. A trial strikes me as  
23 different, especially a jury trial. The idea that we have  
24 to stop the jury trial for 24 hours or 48 hours to get the  
25 hearing done strikes me as an abuse of the system. Now,

1 you know, so I'm not sure why we wanted to include the  
2 hearings, but that's just my thought on it.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE DAVID PEEPLES: Can I say as long  
5 as the trial judge is not stopped dead in his tracks by a  
6 motion during a trial, I'm fine with it.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE DAVID PEEPLES: That's just six of  
9 one, half dozen of the other, if you say "may disregard"  
10 or "can keep on trying the case," it's fine with me.

11 HONORABLE TRACY CHRISTOPHER: The question  
12 is whether we want the trial judge to have to fax it to  
13 you because we know how to do that probably easier than  
14 the litigants do.

15 HONORABLE DAVID EVANS: Yeah.

16 HONORABLE TRACY CHRISTOPHER: Or are we  
17 going to make the litigants do it. Right here the way you  
18 have it written is the litigant has to do it, the movant.

19 HONORABLE DAVID PEEPLES: Of course,  
20 litigant is supposed to do it anyway under sub (b).

21 HONORABLE TRACY CHRISTOPHER: Yeah, but they  
22 might just drop it in the mail.

23 HONORABLE DAVID PEEPLES: Not after I  
24 rewrite it. I thought we agreed. I thought there was  
25 consensus that it ought to be delivered to the judge.

1 CHAIRMAN BABCOCK: Yeah, there was.

2 HONORABLE DAVID PEEPLES: Was there not  
3 consensus on that?

4 CHAIRMAN BABCOCK: No, there is.

5 HONORABLE DAVID PEEPLES: Instead of "sent"?

6 HONORABLE STEPHEN YELENOSKY: But not  
7 chambers.

8 HONORABLE TRACY CHRISTOPHER: Not chambers.

9 HONORABLE DAVID PEEPLES: No, to the  
10 respondent judge so they'll know about it.

11 CHAIRMAN BABCOCK: Justice Bland.

12 HONORABLE JANE BLAND: David, what happens  
13 if the judge, the presiding judge, grants the motion to  
14 recuse that's filed during the middle of trial --

15 HONORABLE DAVID PEEPLES: Should have  
16 stopped.

17 HONORABLE JANE BLAND: But what happens to  
18 all the rulings that have been made while the --

19 MR. ORSINGER: They're nullified, I believe.

20 HONORABLE DAVID PEEPLES: If we're creative  
21 we can think about --

22 HONORABLE JANE BLAND: So are we looking at  
23 a new trial?

24 MR. ORSINGER: Yes. Yes.

25 HONORABLE DAVID PEEPLES: If we're creative

1 we can think about a legitimate motion in the middle of  
2 trial. Most of them are going to be "The rulings are  
3 going against me, he's unfair," but maybe something came  
4 up that's extra-judicial that you didn't know about  
5 before. I'll grant you that you can dream up something  
6 like that, and if you want to draft for that, it's fine,  
7 but I'm just concerned about the 99.9 percent, and I think  
8 we've taken care of it through discussion here.

9 HONORABLE JANE BLAND: How many are brought  
10 up during trial as opposed to during a hearing?

11 HONORABLE DAVID PEEPLES: Yeah, I'm fine  
12 with that.

13 CHAIRMAN BABCOCK: Okay. Judge Evans, did  
14 you have something?

15 HONORABLE DAVID EVANS: Well, I think Judge  
16 Peeples addressed it. I would be concerned that they  
17 didn't seek a stay, I proceeded and finished a week-long  
18 trial, and then it gets to the presiding judge, and the  
19 presiding judge doesn't -- and it's just an awkward  
20 situation, gets it to presiding judge, the presiding judge  
21 decides that the recusal grounds were good, and maybe I've  
22 only spent three days at it. I've gotten a verdict back,  
23 gotten everything else back. So maybe if there was some  
24 penalty for not seeking a stay from the presiding judge  
25 that it was waived, that would be helpful, because they

1 either ought to act on it or not. There ought to be some  
2 sort of firmness on it, but that would just be a  
3 suggestion.

4 CHAIRMAN BABCOCK: Okay. Harvey.

5 HONORABLE HARVEY BROWN: This is a little  
6 off what we were talking about immediately, but I want to  
7 go back to the delivery to the judge question. Do you  
8 mean physically put it in the judge's hands --

9 HONORABLE STEPHEN YELENOSKY: No.

10 HONORABLE HARVEY BROWN: -- rather than the  
11 clerk of the court?

12 HONORABLE STEPHEN YELENOSKY: The judge's  
13 office.

14 HONORABLE HARVEY BROWN: Judge's office.

15 HONORABLE DAVID PEEPLES: Well, what I don't  
16 want is to put it in the mail. I think it needs to be --

17 HONORABLE HARVEY BROWN: I wouldn't want  
18 somebody to have to hand it to the judge.

19 HONORABLE STEPHEN YELENOSKY: But putting it  
20 to the clerk, the clerk isn't going to get it to us, at  
21 least in Travis County, in time.

22 HONORABLE HARVEY BROWN: So what do you want  
23 exactly?

24 HONORABLE STEPHEN YELENOSKY: Well, in  
25 Travis County we want it delivered like all deliveries to



1 the judge's office, which is separate from chambers,  
2 because in some instances you don't want the angry pro se  
3 litigant coming back and facing you directly.

4 HONORABLE HARVEY BROWN: That's why I asked.  
5 I think you need to make that clear.

6 HONORABLE TRACY CHRISTOPHER: I think every  
7 county is slightly different, though, as to who you would  
8 give it to to actually get it to the judge.

9 HONORABLE STEPHEN YELENOSKY: Or maybe you  
10 just say "delivered to the judge pursuant to local rule"  
11 or whatever, but --

12 CHAIRMAN BABCOCK: Carl.

13 MR. HAMILTON: I don't agree that in one  
14 instance if it's a trial that you're allowed to go on, but  
15 if it's a hearing you can put that off, because a lot of  
16 times hearings are just as important as trials, if they're  
17 on a temporary injunction or something like that, so I  
18 think the rule ought to be consistent that either one --

19 CHAIRMAN BABCOCK: Okay.

20 MR. HAMILTON: -- should be abated.

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE SARAH DUNCAN: I agree. I can  
23 think of any number of motion to transfer venue because  
24 you can't get a fair trial in the county and you find out  
25 that the things you don't want to know but find out, and

1 that hearing can be just as important as a trial.

2 CHAIRMAN BABCOCK: Okay. Judge Peeples, you  
3 want to go on to subparagraph (d), the hearing?

4 HONORABLE DAVID PEEPLES: (d), hearing.  
5 Made some changes in sub (1), so "The presiding judge or  
6 the judge assigned to hear the motion may deny a motion  
7 that doesn't comply with subsection (a)." There was  
8 discussion last time about what kind of hearing, and so I  
9 put an oral hearing, and I agreed and put in here that,  
10 you know, if the judge is going to say dismissed -- deny a  
11 motion without a hearing, you need to say why. It's  
12 rulings only, and that's not enough. It's unsworn. I  
13 wouldn't deny one for that reason, but whatever it is,  
14 they might be able to cure it, and so the order ought to  
15 say what they did wrong so if it's curable it can be  
16 cured.

17 (3) (b), lines 63 to 65, I just tweaked that  
18 to make it read a little bit better. And look at (4). I  
19 was impressed with what Kennon said last time about it's a  
20 little dangerous to mention the Chief Justice in this rule  
21 because pro se people might think, "Hey, I can file with  
22 the chief," and all of the sudden he gets a lot of  
23 filings, and, frankly, it's the last -- everything after  
24 "except," you want to strike that, that's fine, but I'm a  
25 little sensitive about anybody being above the law and

1 unreviewable, but I do think it's very important, as I  
2 said last time, to have some actor in this system that is  
3 bulletproof in the sense that a motion to recuse doesn't  
4 stop that person, and so a presiding judge who is hearing  
5 a recusal motion, and this is existing law, there's no  
6 objection under Chapter 74 and a motion to recuse -- I  
7 guess people didn't like "may be disregarded," but there's  
8 got to be some way that a motion to recuse, the person who  
9 is going to hear the recusal motion doesn't stop the whole  
10 process or that really gums up the works, and so I just  
11 thought if you want to do that you go to the Chief  
12 Justice.

13 CHAIRMAN BABCOCK: Has there ever been an  
14 instance where a presiding judge has been recused?

15 HONORABLE DAVID PEEPLES: Yeah. I did it  
16 just the other day. Here's what happened. I had a motion  
17 in a case, and there were rulings, and after I had read  
18 about two or three pages I realized I had mediated that  
19 case about three months before, obviously without success.  
20 When I found that out I -- I didn't recuse. I just  
21 assigned somebody else to it, but I would have recused.

22 CHAIRMAN BABCOCK: Somebody had filed a  
23 motion.

24 HONORABLE DAVID PEEPLES: Well, instead of  
25 telling them and saying, "I'll recuse if you want me to,"

1 I just decided life's too short, assign somebody else. It  
2 may be a presiding judge has some history with a litigant  
3 or a lawyer. There can be cases, but again, if we're  
4 drafting for the reality that's out there, in my opinion  
5 we've got to have an actor who can get things done so the  
6 legal system is not abused, and this is my proposal to do  
7 it.

8 CHAIRMAN BABCOCK: But this -- by this  
9 proposal you're not saying that a presiding -- that  
10 recusal could not be sought against a presiding judge  
11 under any circumstances?

12 HONORABLE DAVID PEEPLES: No. I'm saying  
13 you've got to go to the Chief Justice.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID PEEPLES: To merely file a  
16 motion -- and, by the way, I'm assigned on something --  
17 I'm not going to mention the county -- about a week and a  
18 half from now, a pro se litigant, and I'm assigned by the  
19 Chief Justice to hear a motion to recuse Judge Schraub  
20 because Judge Schraub made a ruling the guy didn't like.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE DAVID PEEPLES: I'm going to drive  
23 up to this county and do it.

24 CHAIRMAN BABCOCK: With a smile on your  
25 face, I'm sure.

1 HONORABLE DAVID PEEPLES: Oh, yes.

2 MR. ORSINGER: How did it get to the Chief  
3 Justice instead of it coming to you as the presiding judge  
4 first?

5 HONORABLE DAVID PEEPLES: Okay. Judge  
6 Schraub was going to hear a recusal motion on a judge  
7 that's assigned to a case.

8 MR. ORSINGER: Oh.

9 HONORABLE DAVID PEEPLES: The litigant filed  
10 a motion to recuse Judge Schraub before he could hear the  
11 motion.

12 MR. ORSINGER: So you're saying this  
13 procedure already exists?

14 HONORABLE DAVID PEEPLES: No. No. Judge  
15 Schraub is frozen dead in his tracks by that motion. He's  
16 got to refer it. Who does he refer it to? He referred it  
17 to the Chief Justice.

18 MR. ORSINGER: He did on his own?

19 HONORABLE DAVID PEEPLES: Yeah.

20 MR. ORSINGER: Even though there's no Rule  
21 of Procedure saying that?

22 HONORABLE DAVID PEEPLES: Well, he was going  
23 to have, if you look at -- the first sentence in the  
24 existing rule says "within 10 days before any trial or  
25 hearing." That covers a recusal hearing, and he was going

1 to preside over a hearing. There was a motion to recuse  
2 him because of a ruling he had made, and instead of  
3 saying, "I'm above the law," he said, "Chief Justice,  
4 please have somebody hear this," and that's what Chief  
5 Justice Jefferson did. This would stop that.

6 CHAIRMAN BABCOCK: Justice Sullivan.

7 HONORABLE KENT SULLIVAN: The evil, as I  
8 understand it, that we're trying to remedy is the  
9 disruption of the process, and I confess what I'm about to  
10 say is just -- is half-baked, just a thought, and that is  
11 it's possible what we ought to do -- it would be very  
12 unusual for something half-baked to come out of these  
13 proceedings.

14 CHAIRMAN BABCOCK: Yeah, imagine that.

15 HONORABLE KENT SULLIVAN: But is it possible  
16 that what we ought to do is have the general rule simply  
17 be that nothing stops when you file a motion and that the  
18 burden is on the movant to add facts that show good cause  
19 as to why proceedings, whatever they may be, should stop,  
20 and that can be then delivered to the presiding judge. In  
21 other words, it would be akin to an emergency motion  
22 saying this is so unusual that whatever is in process in  
23 this case really should stop immediately, with the thought  
24 that a presiding judge could take a threshold look at it  
25 and decide whether indeed they have alleged something

1 because something is imminent, so imminent, that, in fact,  
2 that should happen. It might end a lot of the problems  
3 that we've discussed.

4           Certainly I would think that the notion of  
5 using this tactically and becoming a serial recuser, i.e.,  
6 the matter has been assigned from the original judge to  
7 Judge Peeples, now I want to recuse Judge Peeples, and the  
8 rest of it. You've got someone that's either irrational  
9 or incompetent, which you don't want to encourage it seems  
10 to me, or you have someone who is tactically attempting to  
11 disrupt the process, and that's the only person that you  
12 can design a rule against, it seems to me. You can't  
13 design the rules to deal with the irrational or the  
14 incompetent very easily, and what if you just simply  
15 changed the burden. Just a thought.

16           CHAIRMAN BABCOCK: Is anybody trying to  
17 apprehend the serial recuser? Justice Bland.

18           HONORABLE TRACY CHRISTOPHER: You obviously  
19 haven't been in a case with one.

20           CHAIRMAN BABCOCK: Justice Bland.

21           HONORABLE JANE BLAND: So the idea is we've  
22 got the serial recusers on one side, but we've got the  
23 other side, the principle of, you know, a judge ought not  
24 to be ruling on motions where it's the judge that's --

25           HONORABLE STEPHEN YELENOSKY: Challenged.

1 HONORABLE JANE BLAND: -- challenged or the  
2 judge's conduct that's being brought into question, maybe  
3 for a frivolous ground, but maybe not, and so we're going  
4 to draw the line at the presiding judge and say we're  
5 going to let the presiding judge disregard the motion,  
6 which is the same as ruling on it, basically, because that  
7 evidence is some sort of frivolous conduct because it's  
8 now -- we've now moved to recuse two judges and not just  
9 one. I'm just trying to think about this because, you  
10 know, to the outside world the whole idea is a judge  
11 shouldn't be ruling on their own motion to recuse, and I  
12 understand that it's a burden, and I certainly understand  
13 that if every one of these has to go up to the Chief  
14 Justice and then assigned to another judge that way  
15 that's -- that adds just another layer of delay and  
16 disruption. Is there some other way to handle that? Like  
17 transfer to the next region, you know, like if you're in  
18 the Second Region, transfer it to the judge of the Third  
19 Region, who may not be -- I don't know. At some point I  
20 agree, they can move to recuse every single judge in the  
21 entire system if they want and disrupt the process.

22 CHAIRMAN BABCOCK: Roger.

23 MR. HUGHES: Well, the way I see this rule  
24 working is, is that when the trial judge gets the motion  
25 and feels that it's frivolous, everything stops, refer to



1 the presiding judge, and the presiding judge either  
2 details another judge or acts on it himself or herself. I  
3 don't have a problem making the presiding judge  
4 bulletproof until the Supreme Court intervenes, Supreme  
5 Court Chief Justice intervenes. I mean, I've seen the  
6 serial recusers, and at that point, I mean, once you've  
7 already knocked one judge off the case -- and my hunch is  
8 that the presiding judge is only going to get involved  
9 when another judge has been knocked off just by the  
10 motion, I think at some point you ought to have a system  
11 going, okay, we're going to send somebody out there, and  
12 if you want to recuse that person, go to Austin, because  
13 that judge is going to hear it until otherwise.

14 I think that's acceptable, and I'm not so  
15 troubled about it because in Federal court, unless you  
16 file a really detailed affidavit, the district judge is  
17 going to rule on -- on that motion to recuse, and their  
18 system seems to work. Of course, they have a lot fewer  
19 judges, and it may be a necessity that Federal judges must  
20 rule on their own recusal motions, and also the simple  
21 fact they have to live with each other forever, unlike our  
22 judiciary. So I think maybe saying at some point you're  
23 going to get a bulletproof judge or a judge who is only  
24 subject to removal when the Supreme Court says so, that  
25 doesn't trouble me a whole lot.

1 CHAIRMAN BABCOCK: Judge Christopher, did  
2 you want to say something?

3 HONORABLE TRACY CHRISTOPHER: Yeah. I  
4 disagree with Judge Bland on this, and I agree with Judge  
5 Peebles that we need to have a stopping point.

6 HONORABLE JANE BLAND: No, I said the same  
7 thing. I just didn't know where.

8 HONORABLE TRACY CHRISTOPHER: I'm not sure  
9 you did, so --

10 CHAIRMAN BABCOCK: All right now. Somebody  
11 get between those two.

12 HONORABLE DAVID EVANS: Round one.

13 HONORABLE TRACY CHRISTOPHER: Because, you  
14 know, you see the trial judge, the presiding judge, then  
15 it goes to the Supreme Court. Supreme Court appoints  
16 another trial judge. The trial judge shows up for the  
17 hearing. The motion to recuse is made again. Then it has  
18 to go back to the Supreme Court. The presiding judge is  
19 the logical place to stop it, in my opinion.

20 CHAIRMAN BABCOCK: Okay. Yeah, Kennon.

21 MS. PETERSON: I just wonder whether it  
22 might be worthwhile to add a provision that the presiding  
23 judge can do what you did, and that is just assign it to  
24 somebody else, similar to the procedure we have for the  
25 original judge. You can recuse voluntarily, and I don't

1 know if that needs to be spelled out in the rule or not,  
2 but it might be worthwhile.

3 HONORABLE DAVID PEEPLES: I understand what  
4 you're saying, Kennon, but I do think that the presiding  
5 judges develop some expertise and some feel for things,  
6 and, as I said last time, I prefer just myself to hear  
7 every one of these myself unless I just can't do it for  
8 some reason, because I know how I want it done, and  
9 frankly, I trust myself more than I trust some other  
10 judges on these matters, and so I would just rather be  
11 able to stand my ground and hope that there is some trust,  
12 if somebody has some reason I shouldn't sit, I'll have  
13 enough sense to assign the motion to someone else like I  
14 did the other day, but that's just my thought.

15 CHAIRMAN BABCOCK: Justice Hecht.

16 HONORABLE NATHAN HECHT: I've got another  
17 question. You said you were driving to the county to hear  
18 the motion. Do the motions have to be heard in the county  
19 where the case is pending?

20 HONORABLE DAVID PEEPLES: Well, okay, the  
21 Government Code says that if no one objects, you can  
22 have anything other than a trial on the merits heard  
23 elsewhere. I'm dealing with a pro se guy that just,  
24 frankly, is ornery.

25 HONORABLE NATHAN HECHT: Right.

1 HONORABLE DAVID PEEPLES: And I'm not about  
2 to try to make him come somewhere else. I'm going up  
3 there. It's about an hour's drive from where I am, but I  
4 could do it by telephone. I just think this one needs to  
5 be done in person.

6 HONORABLE NATHAN HECHT: So, of course, the  
7 Constitution has a provision and the Government Code has  
8 an exception and then as a general rule the presiding  
9 judges, of course, have several counties in their region,  
10 and so when you're hearing all of these, do you conduct  
11 the hearings in person? Do you go to the county? Do they  
12 come to you? Is it by telephone?

13 HONORABLE DAVID PEEPLES: I'm not sure I've  
14 ever made out of county people come to Bexar County. I  
15 don't think I have. I don't remember it. I've gone to  
16 other counties and done a bunch. Of course, most of mine  
17 are in Bexar County. This other place, as I said, is  
18 about an hour away. Under these changes a lot of them  
19 would be denied because they're just -- there's nothing to  
20 them, and this does, a couple of lines up, authorize  
21 telephone/fax hearings. That's very helpful, but with an  
22 ornery pro se litigant, I'm going there. I mean, there's  
23 something to be said for letting people vent and have  
24 their day in court, and I think this case calls for it,  
25 but I've denied plenty of them because they didn't get to

1 first base. This one I'm not doing that.

2 CHAIRMAN BABCOCK: I've been involved in  
3 three recusal hearings, and none of them have taken place  
4 in the county where the -- where the underlying case was  
5 pending.

6 HONORABLE DAVID PEEPLES: Huh.

7 CHAIRMAN BABCOCK: I just thought that was  
8 pertinent.

9 HONORABLE DAVID PEEPLES: Government Code  
10 puts the burden on a party to object, instead of -- you  
11 don't have to get the agreement to go to a different  
12 county. You can just say, "I would like to do this in  
13 Bexar County. Anybody have a problem with that?"

14 "Oh, no, judge, we're fine with it."

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: My experience is just the  
17 opposite. In our area the presiding judge always goes to  
18 the county where the judge was sitting that's subject to  
19 recusal.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: I wanted to ask David some  
22 clarification on the recusal of the presiding judge. Is  
23 there essentially no review of the -- if we adopted this  
24 proposal and the presiding judge is not subject to being  
25 recused, is there ever any review of that decision,

1 whether the grounds are good or bad, or is there --  
2 because "except by order of the Chief Justice of the  
3 Supreme Court" would exclude review by the court of  
4 appeals on appeal to the case on the merits, so there  
5 really is no second person looking over -- maybe the Chief  
6 Justice would look over the motion, but the Chief Justice  
7 would never preside over a hearing to recuse the presiding  
8 judge. So is this person truly not subject to a second  
9 look?

10 HONORABLE DAVID PEEPLES: The way I think  
11 this would work is somebody -- I'm getting ready to hear a  
12 motion to recuse and somebody wants to recuse me from  
13 hearing that motion, I could disregard it, and they would  
14 have to file the same thing or file something with the  
15 Chief Justice. Presumably it would have some details.  
16 "Peeples used to practice law with these people," goes  
17 hunting or fishing or whatever, and whatever it might be.  
18 Now, the truth of the matter is if that kind of allegation  
19 is made, how likely am I to say, "I'm going full speed  
20 ahead and hearing this case, and letting Wallace Jefferson  
21 see all of that about me"? Very unlikely if it's a  
22 plausible motion, but if I did that, I guess they would  
23 make it a point of error and try to get the court of  
24 appeals, if they lose the case and so forth, to take it up  
25 and convince the court of appeals that the Chief Justice

1 should have granted that. That's a gutsy thing to do.

2 MR. ORSINGER: But it says it "may be  
3 disregarded," makes me wonder if the Rules of Procedure  
4 even allow appellate review of the attempt to recuse the  
5 presiding judge. If this were adopted the way it is  
6 written I'm wondering whether you have ordinary appellate  
7 review.

8 CHAIRMAN BABCOCK: Justice Gaultney, and  
9 then we'll take a break.

10 HONORABLE DAVID GAULTNEY: Just to follow up  
11 on that, Judge Peeples, aren't you really saying that the  
12 motion to recuse will be decided by the presiding judge  
13 alone and not be subject to being looked at by some other  
14 judge, except -- in other words, if the presiding judge is  
15 making a ruling on it that you're not going to recuse  
16 yourself, wouldn't that put it in the chain of appellate  
17 review?

18 MR. ORSINGER: Well, not if it has no effect  
19 and can be disregarded.

20 HONORABLE DAVID GAULTNEY: Right. No, I'm  
21 suggesting different language.

22 MR. ORSINGER: Yes, okay. Right.

23 HONORABLE DAVID GAULTNEY: Not that it has  
24 no effect, but that it's to be ruled on solely by the  
25 presiding judge.

1                   HONORABLE DAVID PEEPLES: As I look at this,  
2 I'll admit that I didn't play this out in my mind to the  
3 appellate level the way Richard and Justice Gaultney have  
4 done. If this happens to me and somebody makes some  
5 allegations, first of all, that are plausible, I don't  
6 have a dog in this fight. I would assign somebody else to  
7 hear that motion. Suppose they make some allegations that  
8 are just nonsense, but they're there. I mean, they would  
9 never be refuted or aired out in a trial. I probably  
10 would grant it, or I don't know, but I just think that's  
11 not going to happen very often. I think litigants when  
12 they realize -- if this passes, when they realize I don't  
13 get an automatic stop of everything by just filing a  
14 motion, how many of them are going to file something with  
15 the Supreme Court Chief Justice? I just -- I don't think  
16 it will happen much, and I think we can work our way  
17 through these things if they do happen, but I haven't  
18 thought it out.

19                   CHAIRMAN BABCOCK: Let's take a 10-minute  
20 break.

21                   (Recess from 10:51 a.m. to 11:04 a.m.)

22                   CHAIRMAN BABCOCK: I think we're up to  
23 subsection (e), on subpoena of judge.

24                   HONORABLE DAVID PEEPLES: I thought there  
25 was consensus at the last meeting that we needed to put



1 some limits on the ability of a movant to subpoena the  
2 judge and that kind of thing, and so I drafted a brand new  
3 paragraph, and "no subpoena or other discovery." If you  
4 want that, go to the presiding judge or the judge  
5 assigned. You just can't issue it and put the burden on  
6 the judge to get it quashed. I mean, how does a judge get  
7 something quashed? You hire a lawyer, you get a lawyer  
8 friend to do it, and get a complaint filed against you for  
9 doing that. This puts the burden on the person who wants  
10 the discovery to convince the independent judge that he  
11 ought to get it, and the second sentence says, you know,  
12 you don't have to -- if it's issued in violation of this  
13 rule, you don't have to get it quashed. You just ignore  
14 it.

15 CHAIRMAN BABCOCK: Justice Gray.

16 HONORABLE TOM GRAY: I just wanted to see if  
17 there was a consensus that that approval from the  
18 presiding judge, a copy of it should be attached as part  
19 of the subpoena. It seemed to be reasonable. That way  
20 you would know as to whether or not you could comfortably  
21 disregard the subpoena because it did not have the  
22 approval of the presiding judge.

23 CHAIRMAN BABCOCK: Okay. Gene.

24 MR. STORIE: Chip, I think I'm trying to  
25 back up a little bit, but I believe we need to address the

1 situation where the presiding judge is actually the judge  
2 before whom the case is pending to begin with, because I  
3 think that could happen.

4 HONORABLE DAVID PEEPLES: Gene, that's a  
5 good point. On line 67 the reason I added the language  
6 "who hears the recusal motion," that's designed to say  
7 that that paragraph deals with the judge hearing the  
8 motion, not hearing the case, and admittedly that applies  
9 to the first clause -- I mean, it's in the first clause.  
10 It's my intention that that language applies to both  
11 clauses of that compound paragraph. Does that solve your  
12 problem? In other words, if I'm -- if I assign myself to  
13 hear a case, I'm recusable and objectionable. I mean,  
14 they've got a right to both object and recuse me on the  
15 case, but on a motion to recuse they don't under this.  
16 That's the intent at least.

17 MR. STORIE: Okay, yeah. I'm not sure if  
18 that's everything.

19 HONORABLE STEPHEN YELENOSKY: But that  
20 doesn't solve the subpoena paragraph.

21 HONORABLE DAVID PEEPLES: Yeah, I think Gene  
22 was just going back to where we left off before the break.

23 CHAIRMAN BABCOCK: Yeah. Justice Bland.

24 HONORABLE JANE BLAND: Okay, two things. On  
25 that paragraph, I agree about the presiding judge being

1 bulletproof. Because I started thinking about it, if the  
2 presiding judge grants the motion to recuse and he  
3 appoints another judge, it's hard to see how -- it's just  
4 like denying -- replacing a juror in voir dire when you've  
5 granted a challenge for cause. It's hard to say that  
6 there's any error that could affect the trial with the new  
7 judge. If the presiding judge grants the motion to recuse  
8 then it's really just the underlying judge's -- I mean,  
9 I'm sorry, denies the motion to recuse, it's really just  
10 the underlying judge's conduct that's going to be subject  
11 to review and whether that recusal motion had any merit.  
12 So to the extent I was disagreeing, you-all have persuaded  
13 me.

14               Secondly, on the subpoena of a judge, do we  
15 need this in the rule, because how often are we wanting  
16 judges to testify at recusal hearings? My understanding  
17 is that we do not want the judge that's involved to be  
18 called as a witness in the proceeding, and it should be  
19 almost never.

20               HONORABLE DAVID PEEPLES: But wouldn't this  
21 paragraph say before you can do that you've got to get the  
22 officer who is presiding over the hearing to agree, "I  
23 want that judge to come testify"?

24               HONORABLE JANE BLAND: But aren't we going  
25 to just encourage a lot of people to come and try to

1 subpoena the judge, or no? I mean --

2 HONORABLE DAVID PEEPLES: And get permission  
3 from --

4 HONORABLE JANE BLAND: -- isn't this just  
5 moving the motion to quash a subpoena ahead of time? Is  
6 the idea then because sometimes judges are showing up for  
7 these hearings because they've been subpoenaed or --

8 CHAIRMAN BABCOCK: We heard last -- at the  
9 last meeting that judges are getting subpoenaed. It's not  
10 just for their -- not just for their testimony, but also  
11 documents. I was involved in a recusal case where a co --  
12 not me, but one of the codefendants, the allegation was  
13 that the judge was having ex parte communication with the  
14 plaintiff's counsel, and they subpoenaed the judge's  
15 e-mails responsive to that charge.

16 HONORABLE JANE BLAND: Right, but can't that  
17 just be handled on a motion to quash, and why are we  
18 putting something in the recusal rule about -- why are we  
19 requiring this prior approval and --

20 CHAIRMAN BABCOCK: Because Judge Peeples is  
21 trying to insulate the judges from having to move to quash  
22 and kind of reverse the burden. In other words, if the  
23 party seeking the information wants it, they've got the  
24 burden of going to the judge in the first instance and  
25 persuading the judge you ought to allow this discovery.

1 HONORABLE JANE BLAND: Okay.

2 CHAIRMAN BABCOCK: Which I think is a good  
3 -- a good procedure. Roger.

4 MR. HUGHES: Well, and I do see the  
5 discovery against a judge, and what I'm concerned -- why I  
6 personally favor this at a minimum the way it's written is  
7 the moment you draw the judge into discovery, I mean, if  
8 they can routinely be drawn into discovery battles with  
9 the counsel or the parties, I mean, it's almost a gotcha  
10 situation by the judge. Once the judge has had to hire  
11 somebody to file a motion to quash and maybe had to pay  
12 money out of his or her own pocket to -- and incur time  
13 away from other duties, I mean, it's a little hard to say  
14 at that point that judge is going to not have perhaps a  
15 little bit of bias against the party who is putting him  
16 through all of this, and the party can almost get him in a  
17 gotcha situation. "Well, you know, if you weren't biased  
18 now, the fact that you've had to go out and pay \$5,000 to  
19 file a motion to quash, I'll bet you're biased now."

20 CHAIRMAN BABCOCK: In the case I was  
21 involved in, the county attorney showed up for the judge,  
22 not showed up, but responded for the judge. I don't know  
23 if that was the right way to do it or not, but I think any  
24 time you file a recusal motion you run the risk of  
25 irritating the judge if it gets denied, and that's why I

1 think most lawyers are loathed to do it. Justice  
2 Gaultney.

3 HONORABLE DAVID GAULTNEY: I think this is a  
4 good idea because sometimes the threat of the burden of  
5 discovery in and of itself causes -- may cause the judge  
6 just to say, "Life's too short."

7 CHAIRMAN BABCOCK: Well, that's true.  
8 Justice Hecht.

9 HONORABLE NATHAN HECHT: I don't know if we  
10 talked about this the last time. Is there a problem with  
11 the other side of this where a judge wants to participate  
12 in the recusal process?

13 HONORABLE DAVID PEEPLES: Yeah. Sometimes  
14 judges want to be heard on it because the allegations are  
15 offensive to them.

16 HONORABLE NATHAN HECHT: We've tried to  
17 discourage that.

18 HONORABLE DAVID PEEPLES: Yeah. The problem  
19 with that is once you testify, become adversary, and then  
20 you may sure enough need to be recused. I think the judge  
21 just needs to sit back and trust the system, but, yes,  
22 sometimes they say, "I need to respond to some of this."

23 HONORABLE NATHAN HECHT: But should there be  
24 something in the rule to discourage the personal  
25 participation of the target judge?

1                   CHAIRMAN BABCOCK: The voluntary  
2 participation by the target judge.

3                   HONORABLE NATHAN HECHT: Yeah. Right.

4                   CHAIRMAN BABCOCK: You know, I can see  
5 instances, and I don't think they're at the edge of  
6 practice, where there has been improper contact, but the  
7 only way to really establish that is by having some  
8 discovery, and I like Judge Peeples' plan because right  
9 now it's getting to be routine I think where judges are  
10 just getting subpoenaed, and I think there needs to be  
11 some -- some -- there's some barrier to that, and it needs  
12 to be some sort of showing.

13                  HONORABLE DAVID PEEPLES: As I said last  
14 time, this kind of is like the request for documents.  
15 Back up until the early Eighties the Texas Rules of Civil  
16 Procedure said you've got to go to court and show good  
17 cause to get documents in discovery. They changed that  
18 sometime in the Eighties where you just ask for them, the  
19 burden is on the resisting party to get it quashed. It's  
20 just a changing of the burden of who's got to go forward.

21                  CHAIRMAN BABCOCK: Yeah. Okay. Any other  
22 -- yeah, Judge Yelenosky.

23                  HONORABLE STEPHEN YELENOSKY: Well, just as  
24 far as discouraging the judge from participating as he or  
25 she wants to, it's my understanding there's an ethical

1 rule that we shouldn't testify as a witness without a  
2 subpoena, so if you're controlling the subpoena, you're  
3 controlling that, too.

4 MR. ORSINGER: But, you know, the defending  
5 party may want to subpoena the judge also. I mean, let's  
6 not rule that possibility out also.

7 CHAIRMAN BABCOCK: Sure. I think what  
8 Justice Hecht was talking about, though, was that there is  
9 a tendency sometimes for a judge to say, "My honor has  
10 been attacked. I'm going to go down there and tell them  
11 that that's not right," and there ought to be something  
12 maybe saying, "Hey, resist that temptation."

13 HONORABLE STEPHEN YELENOSKY: Well, that's  
14 the ethical rule, though, I think does that.

15 CHAIRMAN BABCOCK: Okay. If he gets  
16 subpoenaed, that's another thing, but --

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE DAVID PEEPLES: I can draft a  
19 sentence that says basically "only in extraordinary cases  
20 when the judge who is going to hear the hearing approves  
21 should the respondent judge come testify." If there's  
22 agreement on that.

23 CHAIRMAN BABCOCK: Or maybe make a reference  
24 to the ethical --

25 MS. PETERSON: To the ethical rule.



1 CHAIRMAN BABCOCK: To the ethical rule.

2 MS. PETERSON: Right.

3 HONORABLE STEPHEN YELENOSKY: Put it in the  
4 comment.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: I think a  
7 comment would be better.

8 HONORABLE DAVID PEEPLES: Okay.

9 CHAIRMAN BABCOCK: Okay. Anything else on  
10 subpoena of judge? How about sanctions?

11 HONORABLE DAVID PEEPLES: Okay. The  
12 discussion last time, I think the gist of it was that the  
13 sanctions in 215.2 are so strong that we don't want all of  
14 those sanctions available, and it should be more narrowly  
15 tailored. So I struck that language, which was from the  
16 original, the existing rule, and limited it to attorney's  
17 fees and expenses. Also, the group wanted notice and a  
18 hearing, which is implicit but needs to be there, against  
19 the attorney or the party or both.

20 HONORABLE STEPHEN YELENOSKY: Do you intend  
21 to include the expenses that are caused by the disruption  
22 of a trial?

23 HONORABLE DAVID PEEPLES: Incurred by the  
24 party opposing the motion.

25 HONORABLE STEPHEN YELENOSKY: But in

1 opposing the motion or does it include expenses that are  
2 collateral damages essentially from disrupting the trial.

3 HONORABLE DAVID PEEPLES: Lost profits.

4 HONORABLE STEPHEN YELENOSKY: Well, no. I  
5 mean, your expert has to be flown back.

6 HONORABLE DAVID PEEPLES: Yeah. I guess the  
7 way it is right now there would be a lot of discretion.  
8 The judge who hears the recusal motion would have  
9 discretion. If you want to make it more specific, I'm  
10 open to that.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: The way this is written, it's  
13 so similar to so many other rules and statutes that I  
14 would interpret "expenses" to mean expenses associated  
15 with the motion --

16 HONORABLE STEPHEN YELENOSKY: Right.

17 MR. ORSINGER: -- defending the motion, and  
18 I don't have the Civil Practice and Remedies Code here  
19 with me, but there is -- there's a little bit broader  
20 standard in what you can recover under Chapter 10 for a  
21 frivolous pleading than this, but if we intend -- and I  
22 think it would be beneficial to allow you to recover the  
23 costs associated with the necessity of rescheduling the  
24 trial, that we better be more explicit or in the comment  
25 we better say expenses are not limited to the expenses in

1 the motion and maybe attorney's fees are not limited to  
2 the -- because you've -- let's say you're three quarters  
3 of a way through a trial and now it's blown, and it was  
4 really improper, it was a frivolous motion to recuse.  
5 You've now lost all your attorney's fees for the first  
6 week of trial. Maybe that should be subject to --

7 HONORABLE STEPHEN YELENOSKY: Well, if we  
8 mean that, we should say it, because I at least as a judge  
9 without that being explicit would say it's limited to --

10 MR. ORSINGER: I agree with you.

11 HONORABLE STEPHEN YELENOSKY: -- to what's  
12 involved in the motion and the rest of it's sort of on the  
13 system.

14 MR. ORSINGER: I agree with you. I think  
15 this routinely means the fees and expenses of the motion,  
16 wherever it appears in various places in the law.

17 HONORABLE DAVID PEEPLES: On the other hand,  
18 if the strengthening that we have in here, if it gets  
19 adopted, you know, telephone hearings, fax submission of  
20 documents, quick action, and so forth, if all of that gets  
21 enacted, I don't understand why a trial would ever be  
22 delayed, if the presiding judge is doing his job. You  
23 have an instant hearing on this thing.

24 MR. ORSINGER: Then the damages would be --  
25 there would be no damages in those cases.

1                   HONORABLE DAVID PEEPLES: For delay, but to  
2 have to bring people and spend attorney's fees to get  
3 ready for the motion, there would be some of that, but  
4 damages for a delayed trial setting, if the presiding  
5 judge or the assigned judge is doing his or her job, a  
6 trial shouldn't be delayed if this rule is strengthened, I  
7 think.

8                   HONORABLE STEPHEN YELENOSKY: Right, but do  
9 we want the rule to allow for the possibility, in which  
10 case if it only happens in one percent of the trials,  
11 nobody can meet their burden of showing anything but  
12 attorney's fees in the motion, fine, but as it's written  
13 now I don't think it allows for the possibility of the one  
14 percent case.

15                  CHAIRMAN BABCOCK: Richard Munzinger.

16                  MR. MUNZINGER: I agree with the analysis of  
17 the rule as written. It only would apply to the expenses  
18 occurred in the motion, and since the order would be  
19 saying that this was done frivolously or would be  
20 sanctionable conduct, the expenses that occurred by the  
21 other party ought to be paid, the resulting expenses, and  
22 a rule which envisions or permits that is also a rule  
23 which encourages people not to file spurious, frivolous  
24 motions, including pro se litigants, and the expenses can  
25 be quite substantial if you're in a trial or a hearing.

1           We don't know what the eventualities are that  
2 can be during real life, but they can be very expensive  
3 when experts are charging five and six and seven hundred  
4 dollars an hour, and they're on a plane or what have you,  
5 and somebody's got to pay for that. Why should I pay for  
6 it because you were a dumbbell and filed the motion?

7           CHAIRMAN BABCOCK: Yeah, Justice Gray.

8           HONORABLE TOM GRAY: I think the phrase  
9 "after notice and hearing" needs to be moved up to  
10 immediately after "if" so that it reads "if, after notice  
11 and hearing." The point of that being that the first  
12 phrase, "The trial judge has already made the  
13 determination that it was frivolous," and that needs to  
14 precede it.

15          HONORABLE DAVID PEEPLES: Yeah.

16          CHAIRMAN BABCOCK: Uh-huh.

17          HONORABLE TOM GRAY: And unless the -- and  
18 given the conversation with regard to (e), you may not  
19 want to add this. I thought the respondent judge might  
20 not be considered within the word "incurred by" -- "the  
21 expenses incurred by the party." If that's clear, that's  
22 fine, but I was going to add the phrase "including the  
23 respondent judge" as to what attorney's fees and expenses  
24 have to be paid as sanctions. In other words, the  
25 respondent judge could recover his or her attorney's fees

1 if any were incurred in resisting discovery.

2 CHAIRMAN BABCOCK: Judge Christopher is  
3 shaking her head no, but Richard Munzinger has his hand  
4 up.

5 MR. MUNZINGER: This limits fees and  
6 expenses to be incurred by the party opposing the motion.  
7 Number one, a party -- let's pretend it's a two-party  
8 lawsuit. The party may not oppose it, but you still have  
9 to have the hearing because the motion has been filed.  
10 The judge doesn't have any authority, it seems to me, so  
11 I'm not so sure we need the language opposing the motion,  
12 and in a multiparty case one party may oppose, another one  
13 may not, but they all incur expenses. So if you were to  
14 say that the fees and expenses incurred by the other  
15 parties to the litigation necessarily resulting or what  
16 have you, but this would limit an award of the expenses to  
17 those who oppose the motion.

18 MR. ORSINGER: Well, if the motion is  
19 frivolous why shouldn't it be limited to those who oppose  
20 the motion?

21 MR. MUNZINGER: Well, because I don't oppose  
22 the motion, I'm just neutral on the motion, do whatever  
23 you want to do, but I still incur expenses because of the  
24 delay that's occasioned by the filing of a frivolous  
25 motion by my adversary. I've been hurt by it. Do I have

1 to oppose the motion to protect my expenses? Why should I  
2 have to oppose the motion? I can't stop it from being  
3 filed, and if it meets the requirements of the rule that  
4 it sets out the facts and what have you, arguably, and  
5 delay or expense is incurred, why should I have to file  
6 some kind of formal opposition to the motion in order to  
7 recover my expenses as a litigant that are incurred by the  
8 frivolous conduct of somebody else?

9 HONORABLE STEPHEN YELENOSKY: You oppose the  
10 recusal, though.

11 MR. MUNZINGER: Say again.

12 HONORABLE STEPHEN YELENOSKY: It sounds like  
13 you are saying you shouldn't have to oppose the filing of  
14 the motion. You don't, but because they have a right to  
15 it, but you oppose the recusal. That's what makes you --  
16 and I do think you have to oppose the recusal in order to  
17 claim these things. You're saying not?

18 MR. MUNZINGER: I don't know why I would.

19 CHAIRMAN BABCOCK: There are three  
20 situations. The current Rule 13a, subpart (b), says "any  
21 other party," so it would be a codefendant or another  
22 plaintiff separately represented perhaps, "may file with  
23 the clerk an opposing or concurring statement at any time  
24 before the motion is heard." So codefendant files an  
25 opposing statement. Then they would be an opposing party,

1 but they might just be silent as Richard says, and yet  
2 they'd still incur a lot of expense. They have to go to  
3 the hearing, and if it's frivolous then why shouldn't they  
4 get --

5 HONORABLE DAVID PEEPLES: How about if we  
6 say "by the party responding to the motion"? Does that  
7 open it up a little bit more?

8 HONORABLE TOM GRAY: But they may not file a  
9 response.

10 CHAIRMAN BABCOCK: They may not file a  
11 response.

12 HONORABLE TERRY JENNINGS: Just say  
13 "opposing parties." Now, that wouldn't include the judge,  
14 but --

15 MR. MUNZINGER: "Other parties." "Other  
16 parties." We're coplaintiffs. I'm an intervenor. I can  
17 be victimized by the frivolous conduct of a pro se  
18 litigant or another lawyer. Why shouldn't I recover my  
19 expenses?

20 HONORABLE STEPHEN YELENOSKY: The judge is  
21 going to be, if represented, by the AG or county attorney,  
22 aren't they? Do we really want to --

23 CHAIRMAN BABCOCK: Yeah, I don't know  
24 opening it up to the judge is such a good idea. Carl.

25 MR. HAMILTON: I thought we decided earlier



1 that the hearings and the trial were not going to stop, so  
2 why are there going to be any expenses for the stopping of  
3 the trial?

4 MR. ORSINGER: It's only if they're filed  
5 during the trial that they're not stopped. If they're  
6 filed 24 hours before the trial, they are stopped.

7 MR. HAMILTON: But then where is there any  
8 harm done if they're filed 24 hours before?

9 MR. ORSINGER: Because it may not get heard  
10 for six days, in which event you've lost your opportunity  
11 on the docket, so you've got to get reset six months  
12 later.

13 HONORABLE STEPHEN YELENOSKY: Or people have  
14 already traveled there.

15 CHAIRMAN BABCOCK: Ralph.

16 MR. DUGGINS: How about if you said  
17 "incurred by any party," "by any affected party," or "any  
18 party affected by the motion," broaden the ability there?  
19 And then I wasn't here for the meeting where apparently  
20 there was a discussion about dropping the sanctions in  
21 215, but I don't know why we wouldn't want to allow the  
22 judge hearing the motion to have the option to do that.  
23 You may have a party, a pro se plaintiff, who can't pay an  
24 award of the fees and costs, but I would certainly  
25 understand if their pleading was struck. I mean, I don't

1 know why we would differentiate between a frivolous  
2 recusal motion and any other violation of Rule 13, but I'm  
3 not suggesting we revisit that discussion.

4 CHAIRMAN BABCOCK: Okay. Anybody else?  
5 Justice Hecht.

6 HONORABLE NATHAN HECHT: Two questions.  
7 Should there be punitive sanctions apart from recovery of  
8 costs and attorney fees, and should the -- should an  
9 appropriate sanction be for these serial movants that they  
10 can't file any more motions to recuse? That's a -- I  
11 notice that is a frequent practice in the Federal courts,  
12 that after somebody abuses the filing process enough times  
13 the circuit says you can't file anymore stuff like this or  
14 you can't file it without leave of court, or they put  
15 restrictions on it, and of course, the statutes already do  
16 that with so-called tertiary motions, and I wonder if to  
17 stop this recusing up the ladder and recusing over and  
18 over again and filing the motion to recuse in every case,  
19 there shouldn't be some direction that no more motions to  
20 recuse can be filed, just at some point we've heard all  
21 we're going to hear.

22 CHAIRMAN BABCOCK: There is a part of the  
23 Civil Practice and Remedies Code, isn't there --

24 HONORABLE NATHAN HECHT: Yeah.

25 CHAIRMAN BABCOCK: -- for multiple recusals?

1 HONORABLE NATHAN HECHT: Tertiary. It's in  
2 the Government Code and the Remedies Code, what the  
3 statute calls tertiary motions and --

4 CHAIRMAN BABCOCK: What kind of a motion is  
5 that?

6 MR. ORSINGER: The Supreme Court is going to  
7 tell us.

8 HONORABLE NATHAN HECHT: Well, we've got a  
9 case on it, and unfortunately it's not as clear as it  
10 might be, but the idea when the bill was introduced was  
11 that enough's enough, and after a while you just can't  
12 file any more motions to recuse, and I wonder if that's  
13 not a good idea.

14 HONORABLE STEPHEN YELENOSKY: But that's  
15 only in that case, right? The tertiary rule restricts you  
16 in that case.

17 HONORABLE NATHAN HECHT: Well, what the  
18 circuit does is they after -- after a prisoner or a pro se  
19 litigant or anybody, but it's typically prisoner or pro se  
20 cases, files enough things that are frivolous they say you  
21 can't file anything in any case anymore without first  
22 asking a judge to let you do it.

23 HONORABLE STEPHEN YELENOSKY: Yeah, like a  
24 vexatious litigant. I was just saying right now we don't  
25 have anything for recusal --

1 HONORABLE NATHAN HECHT: Right.

2 HONORABLE STEPHEN YELENOSKY: -- that would  
3 restrict you from filing --

4 MR. ORSINGER: That's correct.

5 HONORABLE STEPHEN YELENOSKY: -- a hundred  
6 in one case --

7 HONORABLE NATHAN HECHT: Right.

8 HONORABLE STEPHEN YELENOSKY: -- and then  
9 filing another one in a different case.

10 HONORABLE NATHAN HECHT: But shouldn't we,  
11 or is that really a problem? I don't know.

12 HONORABLE DAVID PEEPLES: Let me just say,  
13 I'm open to the suggestion of authorizing some kind of  
14 fine, which I think you were suggesting, or after a  
15 certain number you can't file any more, but I do think  
16 this. If this substantially gets enacted, I think it  
17 takes away a lot of the incentives that cause people to  
18 file these, because there can be such quick action. I  
19 mean, the rule will be much stronger if we enact this, and  
20 I think that takes away the incentives, and I think  
21 behavior is affected by incentives. And a second point --

22 HONORABLE STEPHEN YELENOSKY: Only rational  
23 behavior.

24 HONORABLE DAVID PEEPLES: Pardon? Yeah,  
25 rational.

1 HONORABLE STEPHEN YELENOSKY: Sometimes it's  
2 irrational.

3 HONORABLE DAVID PEEPLES: Sometimes it is.  
4 Sanctions is, you know, kind of like subsequent  
5 punishment. I'd rather affect behavior on the front end  
6 by empowering actors to administer the system with some  
7 strength and also have the ability to punish after the  
8 fact, but I think that it's -- and that's more effective  
9 than relying too much on if you abuse this we're really  
10 going to zap you. I'm much more comfortable with  
11 empowering the people that administer this rule.

12 CHAIRMAN BABCOCK: Okay. Justice Bland.

13 HONORABLE JANE BLAND: I like Justice  
14 Hecht's idea about some sort of vexatious recuser  
15 because -- or, you know, motion to recuse person because  
16 the vexatious litigant statute won't touch this problem --

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE JANE BLAND: -- because it's very,  
19 very difficult to get somebody adjudicated as a vexatious  
20 litigant, because there have to be a certain number of  
21 cases, they have to lose them, they have to be finally  
22 adjudicated, so all the appeals have to be concluded and  
23 all has to happen within a very short time frame, but in a  
24 lot of these or in some of these abusive cases where  
25 they're filing multiple motions to recuse they've also

1 filed multiple lawsuits and stayed in Federal court and  
2 maybe in more than one county, and they also sue multiple  
3 parties, like, for example, the counsel in the case or  
4 other -- and so you've got this explosion of cases all  
5 over the place and then the next thing is that there's all  
6 these motions to recuse, and if we had something similar  
7 to the vexatious litigant statute, which after a certain  
8 number of motions to recuse you would have to -- that have  
9 been all denied, assuming that you had not -- that none of  
10 them had been meritorious, seek permission from the  
11 administrative judge to proceed and put up a cost bond,  
12 like -- like we do with the vexatious litigant statute.

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Yeah, and I  
15 mentioned the irrational part because it's not that -- at  
16 least in my experience it's not that I want to be  
17 protected against recusal motions because, you know, if  
18 it's an irrational recusal motion, it gets dealt with by  
19 somebody else and I go onto something else or it gets sent  
20 back to me, but we do have people against their own  
21 interests recuse judge after judge after judge, and, you  
22 know, it takes years to get the matter resolved because of  
23 that, and it seems to me that the disincentives aren't  
24 going to work on that person.

25 CHAIRMAN BABCOCK: What fact pattern are we

1 trying to talk about here? I mean, Justice Hecht, is it a  
2 litigant who files multiple recusals against the same  
3 judge, or is it, as Judge Yelenosky's saying, like every  
4 time a new judge gets assigned then there's another  
5 recusal motion, so it's -- you know, it's never ending  
6 really?

7 HONORABLE NATHAN HECHT: Well, I'm wondering  
8 about both, because -- and picking up on Judge Yelenosky's  
9 point just now, you know, sanctions only work against  
10 people that behave rationally and have money, and some of  
11 these people don't fit into either group, and it's the  
12 very filing of the motion that is disruptive, interrupts  
13 counsel, proceedings may have to stop, presiding judge has  
14 got to go look at it, and I don't know how many of these  
15 are a problem -- are that big of a problem. I just don't  
16 know, but my sense is that it does happen from time to  
17 time that someone will either file multiple cases and  
18 multiple motions to recuse in multiple cases, always  
19 losing, but just knowing that it's a tactic, and that's  
20 really all it is, or the up-the-chain motions that you get  
21 in some cases that the tertiary statute is supposed to  
22 address, but we still have problems with it.

23 HONORABLE JAN PATTERSON: And are you-all  
24 talking about pro se cases or those with lawyers as well?

25 HONORABLE NATHAN HECHT: Well, just any.

1 HONORABLE TRACY CHRISTOPHER: It's both.

2 HONORABLE NATHAN HECHT: Yeah, anything.

3 Where somebody just is --

4 HONORABLE JAN PATTERSON: But, I mean, do we  
5 have a problem with both?

6 HONORABLE NATHAN HECHT: I don't know.

7 HONORABLE DAVID PEEPLES: I think there's  
8 more -- the repeated filers, there's more of a problem  
9 with pro ses than represented people.

10 MR. MUNZINGER: Yes, but the rule you've  
11 drafted requires detailed factual pleadings and not  
12 conclusions or mere allegations of bias or prejudice, but  
13 it requires a detailed and specific -- I think those were  
14 the words you put in the rule -- allegations of fact,  
15 which ought to be a prophylactic from the kind of serial  
16 motion that you're thinking about.

17 HONORABLE STEPHEN YELENOSKY: No, it doesn't  
18 stop the motion.

19 MR. MUNZINGER: Yes, but --

20 HONORABLE STEPHEN YELENOSKY: If they file  
21 the motion, I still have to refer it. Then another judge  
22 has to determine it doesn't meet the detailed  
23 requirements.

24 CHAIRMAN BABCOCK: Justice Sullivan.

25 HONORABLE KENT SULLIVAN: I would like to



1 suggest that stopping the disruption, which we've decided  
2 was the primary evil, actually is an important goal with  
3 respect to the -- even the irrational filers, the pro se  
4 or prisoner litigant, and that is because I think there is  
5 a sense of power in knowing that -- or accomplishment, if  
6 you will, in knowing that by filing the motion you've  
7 stopped the proceeding. In other words, they see cause  
8 and effect, and they feel some sense of empowerment that  
9 is I think very problematic. We have built in the defect  
10 in our proceeding in that sense.

11           We've all already -- I think all agree that  
12 we also have a problem with respect to the competent  
13 person who is, if you will, an evil tactician, who knows  
14 that, in fact, this is an automatic continuance or they  
15 gain some temporary advantage by filing it and disrupting  
16 the proceeding, and that's why if I can, I would go back  
17 and make another quick pitch for my half-baked idea, and  
18 that is I wonder if we aren't better off with simply  
19 saying that the mere filing of a motion to recuse does not  
20 stop any proceeding. To the extent that the proceeding or  
21 some imminent proceeding would cause some horrific harm,  
22 you simply ask that the ruling be stayed or that the  
23 proceeding be stayed by the presiding judge, which  
24 presumably the presiding judge would act quickly if you  
25 could make such a showing, if you could show good cause;

1 but the fact of the matter is, is that by having a general  
2 rule that requires, regardless of the substance of the  
3 motion, that you stop everything immediately, you have  
4 built in the defect that you are now trying to cure; and I  
5 suggest if we switch the burden of proof, we would go a  
6 long way.

7 MR. JEFFERSON: I take the other side of  
8 that.

9 HONORABLE KENT SULLIVAN: I would be  
10 disappointed if you did.

11 MR. JEFFERSON: I think actually most  
12 lawyers try to do the right thing, and I think knowing  
13 that if you file a motion like this it's got the automatic  
14 disruption to it, it discourages people from filing what  
15 they think aren't solid motions, so I think actually  
16 the --

17 HONORABLE KENT SULLIVAN: Well, but you've  
18 now --

19 HONORABLE STEPHEN YELENOSKY: That's just  
20 you.

21 MR. JEFFERSON: But there's --

22 HONORABLE KENT SULLIVAN: But that applies  
23 -- that applies to the people who are going to obey the  
24 rules, and the whole point of this exercise, it seems to  
25 me, is to deal with and discourage the people who for

1 tactical reasons or for irrational reasons are really  
2 trying to circumvent the rules and cause problems. I  
3 mean, I agree with you, if everybody who could trigger  
4 this, who could push this button, fit your description we  
5 wouldn't be here talking about it at all.

6 MR. JEFFERSON: And if you take your logic  
7 then wouldn't as a possible by-product actually  
8 encouraging the filing of more of these motions because it  
9 doesn't -- all it does is put a motion out there that  
10 makes someone rule but doesn't have the consequence of  
11 actually stopping anything.

12 HONORABLE KENT SULLIVAN: But Judge Peeples  
13 has dealt with that, because to the extent what your  
14 positing is more motions, i.e., frivolous motions, you now  
15 have sanctions.

16 MR. JEFFERSON: I don't think they're  
17 frivolous. I think they would just be not necessarily  
18 either as well thought out or as well-grounded as right  
19 now before I file a motion, I think, you know, 80, 90  
20 percent of all the lawyers in the state before they file a  
21 motion, they're not going to do it unless --

22 HONORABLE KENT SULLIVAN: If they're not  
23 well-grounded it seems to me you don't want to stop the  
24 proceeding because you're not going -- you shouldn't have  
25 stopped the proceeding with that as the hypothetical, and

1 as a practical matter they're going to get overruled. I  
2 don't see what the harm is in shifting the burden and  
3 saying you've simply got to show cause as to why the  
4 proceeding should stop, and given the other parts of this  
5 proposal, given that you can very quickly, for instance,  
6 just be an emergency motion like any other motion saying,  
7 you know, "Your Honor, Mr. Presiding Judge, we ask that  
8 you stop the proceeding," and I've seen -- I've actually  
9 been in a proceeding as a litigant in which I saw that  
10 happen in Federal court. It can happen under the right  
11 circumstances. So the circuit sent an order, faxed it in,  
12 and said proceedings are stayed, and I was there and  
13 watched it all play out, so it can happen in the right  
14 circumstances.

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: I would think if the court  
17 can hold someone in contempt for not fixing their roof,  
18 that contempt could -- contempt could be a vehicle for  
19 obstruction of justice for --

20 CHAIRMAN BABCOCK: I knew we were going to  
21 tie this all together.

22 MR. ORSINGER: I want to reconsider my vote  
23 on the roof then.

24 MR. HAMILTON: -- for filing frivolous  
25 motions, then the court ought to be able to hold them in

1 contempt.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: Would this address your  
4 concerns, Justice Hecht? "Before the party who filed at  
5 least two prior motions to recuse the same judge, which  
6 have been denied, may file a third motion against the same  
7 judge, the party must obtain the written approval of the  
8 regional presiding judge. The written approval must be  
9 attached to the motion."

10 HONORABLE NATHAN HECHT: Well, something  
11 like that. I just raise the issue. When Senator Harris,  
12 as I recall, introduced the bill on tertiary motions he  
13 asked about it, and I thought the basic idea was good. I  
14 was afraid that some of the issues that have come up would  
15 come up about where is the -- which strike is the third  
16 strike, but, you know, I wouldn't necessarily tie it to a  
17 number. If a guy files two or three questionable motions,  
18 I wouldn't be opposed to him filing a fourth, but, you  
19 know, the presiding judges can tell when somebody just  
20 keeps filing something over and over again that doesn't  
21 have any merit to it, at some point it should stop, but I  
22 wonder if it's really that much of a problem or that we  
23 should address it this way.

24 But I just don't think that the sanctions  
25 are going to be very effective because most of the time, I

1 hope, presiding judges will be reluctant to oppose  
2 sanctions. We don't want to get in another sanctions war  
3 here, and the real offenders may not respond to sanctions.

4 CHAIRMAN BABCOCK: Just there is another  
5 tactical aspect to this thing, and that's the sanctions  
6 wars that you're talking about, because I know I was  
7 involved in some litigation recently where the plaintiff's  
8 lawyer filed a sanction just every time they filed a  
9 motion, that, you know, there's a sanction because they  
10 didn't do this, and there are probably seven or eight or  
11 ten sanction motions, you know, pending, and that causes  
12 antagonism on the other side. You have to report to your  
13 client, of course, and then they may have other, you know,  
14 reporting issues that they have to deal with, so I think  
15 Judge Peeples has struck the right balance here, with a  
16 little tweaking as we've discussed about expanding it to  
17 parties, not just the opposing parties, but as Munzinger  
18 said, but that's just my thought. Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: We were  
20 talking over here. I mean, this may be farfetched and  
21 maybe never has happened, but the way it's set up, it's a  
22 King's X, and if you had a judge in some rural county and  
23 it's the only judge around, somebody comes in on a TRO,  
24 and the other party gets notice because that judge's  
25 practice is to try to not do them ex parte, a motion to

1 recuse would prevent issuance of a TRO. We had a holiday  
2 period where we had a visiting judge sitting in, and  
3 somebody came in on a TRO, and pursuant to our local rules  
4 the other party was there because they could be reached  
5 and there was no reason not to have them there, and they  
6 filed an objection. And, of course, that's King's X on  
7 that visiting judge or bad, but, you know, we were able to  
8 get -- as I understand it, I wasn't there at the time, we  
9 were able to get some other judge, elected judge, to deal  
10 with the TRO, but it is an interesting jurisprudential  
11 question. We put -- we allow somebody on the allegation a  
12 grounds for recusal to stop anything, King's X.

13 MR. JEFFERSON: Except for good cause.

14 HONORABLE STEPHEN YELENOSKY: Yeah, but, you  
15 know, difficult for a judge. I think most of us who get  
16 motions to recuse, the counsel we get from others and give  
17 to ourselves is stop everything and refer it.

18 CHAIRMAN BABCOCK: Okay. Yeah, Roger.

19 MR. HUGHES: Well, I take to heart the idea  
20 that some serial offenders may not be deterred easily or  
21 at least by rational, but one thing I have seen is  
22 somewhat effective is I saw one Federal judge say, "You  
23 know, what I can do is order you that you don't get to  
24 proceed pro se. You keep wanting to file these suits,  
25 you're going to have to cough up money," and that seemed

1 to bring a halt to some of this. So perhaps a way of  
2 dealing with this serial sanction person for whom  
3 meaningless money orders aren't a deterrent is simply to  
4 say if you don't -- after you've been sanctioned you don't  
5 get to file another motion to recuse unless you pay your  
6 prior sanctions in full. In other words, if the judge  
7 awards attorney's fees and expenses because it's  
8 frivolous, you don't get to file another recusal motion  
9 without proof that you have paid those in full.

10 CHAIRMAN BABCOCK: There's a statute in  
11 Federal court, I think it's 28 USC 1915, that authorizes  
12 the judge to do that, but I don't know if we have any  
13 similar provision in our state law.

14 HONORABLE NATHAN HECHT: I don't think so.

15 MR. HUGHES: Or to say you can't file it  
16 without proof of payment of the prior sanctions in full or  
17 the permission of the presiding judge. That might put a  
18 startling halt to some of this.

19 CHAIRMAN BABCOCK: Judge Peeples, do we want  
20 to talk about disqualification a little bit?

21 HONORABLE DAVID PEEPLES: No.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE DAVID PEEPLES: We do need to wrap  
24 it up.

25 HONORABLE SARAH DUNCAN: No, don't want to



1 go there.

2 CHAIRMAN BABCOCK: I'm talking about the  
3 paragraph that's --

4 HONORABLE DAVID PEEPLES: Yeah.

5 CHAIRMAN BABCOCK: -- little (i) that you've  
6 added the language.

7 HONORABLE DAVID PEEPLES: Yeah. The thought  
8 that procedural aspects of this rule ought to apply to  
9 disqualification, but you don't waive it by not being  
10 timely and so forth, and it's the appellate review  
11 provisions don't apply, so that's why we did that.

12 CHAIRMAN BABCOCK: Yeah, one thing, just  
13 reading this quickly, it says "but disqualification is not  
14 waived by failure to comply with time limits, and  
15 appellate review of disqualification is governed by other  
16 rules." It almost looked to me like the waiver applied to  
17 both things.

18 HONORABLE DAVID PEEPLES: Yeah.

19 CHAIRMAN BABCOCK: And I don't think you  
20 intended that.

21 HONORABLE DAVID PEEPLES: No, I don't.

22 CHAIRMAN BABCOCK: Either a period and a new  
23 sentence or a semicolon maybe.

24 HONORABLE DAVID PEEPLES: Rewrite it you're  
25 saying?

1                   CHAIRMAN BABCOCK: Whatever. You are  
2 nervous travelers, you two. You don't have to leave now.  
3 You've got plenty of time to get to your flight.

4                   HONORABLE TRACY CHRISTOPHER: Okay. Well,  
5 we don't have a car that takes us there, so we have to get  
6 a cab and everything for our 12:50 flight, and we're  
7 leaving at 11:45, so I just -- I couldn't get any traction  
8 with Judge Peeples on this, but still, again, I would like  
9 the Court or this group to consider mandamus review of  
10 denials of recusals because it is such a huge penalty to  
11 the parties at the end of the day that everything gets  
12 overturned, huge penalty. So if the recusal wasn't done  
13 right in terms of, you know, didn't get referred right or  
14 if the judge should have been recused, I mean, you know,  
15 that's a failure of the system and shouldn't penalize the  
16 side who, you know, nominally opposed the recusal.

17                  CHAIRMAN BABCOCK: Justice Bland.

18                  HONORABLE JANE BLAND: I just want to say I  
19 am very thankful I get to practice law with all of you and  
20 have a very happy Thanksgiving. I'm just putting that out  
21 there because it's the holidays, and I hope y'all have a  
22 good one.

23                  CHAIRMAN BABCOCK: Now, don't fight, you  
24 two.

25                  HONORABLE TRACY CHRISTOPHER: No, we've made

1 up.

2 CHAIRMAN BABCOCK: Apparently. Justice  
3 Peeples.

4 HONORABLE DAVID PEEPLES: Chip, I want to  
5 say that I just appreciate immensely the wisdom of this  
6 group, and the insight on all this has been --

7 CHAIRMAN BABCOCK: I feel a lot of love in  
8 this room, I tell you. Just for those of you who are --

9 MR. KELLY: Just call it an oasis of love.  
10 We've got a place like that in Houston.

11 CHAIRMAN BABCOCK: There you go.

12 MR. KELLY: Just one.

13 CHAIRMAN BABCOCK: Just so we reward the  
14 nonnervous travelers among us, Richard Orsinger, why don't  
15 you just five or ten minutes --

16 MR. ORSINGER: Let me make a suggestion,  
17 Chip. Let's skip to the civil cover sheets, which is  
18 something we might more effectively accomplish in the time  
19 available.

20 CHAIRMAN BABCOCK: There's no way we're  
21 going to get through civil cover sheets in five minutes.

22 MR. ORSINGER: All we've got to do is decide  
23 what to put in the comment. Five minutes or ten minutes?

24 CHAIRMAN BABCOCK: Well, 10 minutes.

25 MR. ORSINGER: I'm willing to give it a

1 shot. I mean, do you mind?

2 CHAIRMAN BABCOCK: No, it's fine with me.

3 If we can knock that out, that's great.

4 MR. ORSINGER: Okay. Moving quickly, this  
5 is Item 6 on the agenda. You-all will recall that the  
6 Office of Court Administration wants a civil cover sheet  
7 standardized so the information they get by computer is  
8 the same, but the local judges want to be able to add  
9 stuff that they need for local administrative purposes.  
10 So we have proposed a rule that would require a civil  
11 cover sheet when you file the initial pleading, and we've  
12 been through all of this, and it's not that popular, and  
13 the vote was close, and we even had one tied vote that the  
14 Chair had the opportunity to break, and so what we're  
15 talking about today is the last sentence in the proposed  
16 rule, "The filing of a cover sheet is for administrative  
17 purposes and does not affect or determine how the action  
18 is commenced in district or county court." That was the  
19 subcommittee's original proposal to try to safeguard the  
20 misuse of this cover sheet to game the system and injure  
21 somebody, and some people didn't like that in the rule,  
22 they wanted it in the comment. Other people wanted other  
23 things in the comment.

24 So what I've done is I've taken all of the  
25 transcript, I've taken all the alternatives, and I've

1 written out several alternative comments, and they're  
2 listed here numbers 1 through 6. The first one is to move  
3 that last sentence down into a comment. The second one is  
4 a rewrite that was kind of discussed. The rule requires  
5 the party initiating a civil case to submit to the court  
6 clerk, and the word is "submit" because we had a lot of  
7 discussion about filing, that if something is filed it  
8 triggers the Rules of Procedure, so the proposal is you  
9 could use the word "submit" instead of "file." "Submit to  
10 the court clerk at the time the original petition is filed  
11 a civil case cover sheet containing information that the  
12 clerk needs to make a monthly case activity report to the  
13 Office of the Court Administration."

14           Now, that's -- that's what the rule  
15 requires. The rule requires that of everybody, but the  
16 rule allows the local judges to pile on and add other  
17 forms or other things to the form, so (2) is not a full  
18 statement of civil cover sheet practice in Texas, but it  
19 does state what's required in civil cover sheets. I have  
20 two item 2's, I'm sorry. The second item 2 is "Local  
21 judges may require that additional information be  
22 submitted in a civil case cover sheet that is to be used  
23 in docket administration." You could combine those  
24 together. In other words, the first one states that  
25 there's required information above, but the local judges

1 can require additional information.

2           Proposal 3, "The civil case cover sheet  
3 neither replaces nor supplements the filings and service  
4 of pleadings or other papers as required by law." That  
5 comes out of the Federal form civil cover sheet, only I  
6 took off the "except as provided by local rules of court"  
7 because we really don't want local rules of court  
8 requiring service of these cover sheets or anything else.  
9 I think it's archaic and hard to understand, and it's --  
10 so I'm not attracted to it, but it's what the Feds do, so  
11 we could consider that.

12           No. 4, another proposal, "The information in  
13 the civil cover sheet does not constitute a discovery  
14 request, response, or supplementation, and is not  
15 admissible in evidence," and that comes from the Harris  
16 County civil information cover sheet form, except that  
17 they say "is not admissible at trial," and I changed that  
18 to use "not admissible in evidence" so that it would cover  
19 pretrial hearings, but other than that change, paragraph  
20 four is borrowed from the civil cover sheet in Harris  
21 County for civil case, general civil cases.

22           No. 5, another alternative, "The civil cover  
23 sheet does not constitute a pleading or discovery, is not  
24 admissible in evidence, and does not affect the  
25 substantive rights of any party." That was advocated in

1 discussions here at our last meeting, and that's really  
2 nobody voted in favor of it, but that was a view that was  
3 expressed as a good way to put a comment.

4           And then No. 6 is "The civil case cover  
5 sheet need not be served on other parties" or "shall not  
6 be served on other parties in the case." It's hard to  
7 serve it other than with your citation because you really  
8 have no other parties when you file your original  
9 petition, but there's been some issue about service, and  
10 so you could put in there that you don't have to serve it.

11           This basically are the alternatives that are  
12 out there and that were discussed in the committee, and  
13 they're typed up like I said I would do last time for us  
14 to decide if we like any of them. The Supreme Court may  
15 or may not adopt this rule. If they do adopt a rule, they  
16 may pick one or more of these comments, but they're put  
17 here for us to consider in seven minutes.

18           CHAIRMAN BABCOCK: You said there were only  
19 six. My sheet has actually 13 since you have two number  
20 2's.

21           MR. ORSINGER: Oh, really? Okay. Well,  
22 okay, let me go on then. Thank you for pointing that out.

23           CHAIRMAN BABCOCK: I'm not trying to  
24 encourage that behavior. I'm just noting it.

25           MR. ORSINGER: Okay. Let's move on then.

1                   PROFESSOR CARLSON: Like a bad David  
2 Letterman.

3                   MR. ORSINGER: Apparently I wasn't using the  
4 official version of the proposal. No. 6, "The filing or  
5 presentation or submission as an alternative of a cover  
6 sheet is for administrative purposes only."

7                   CHAIRMAN BABCOCK: You're not as funny as  
8 Letterman either.

9                   MR. ORSINGER: "The filing, presentation, or  
10 submission of a cover sheet is for administrative purposes  
11 and does not affect substantive or procedural rights of  
12 the parties to the litigation." Another alternative, "The  
13 civil cover sheet is for statistical purposes only and  
14 does not affect substantive rights." No. 9, "Civil cover  
15 sheet is for recordkeeping purposes only." No. 10, "Civil  
16 cover sheet is for administrative purposes only and cannot  
17 be used for any other purpose in the litigation."

18                   No. 11, "The purpose of this rule is to  
19 gather information and does not prejudice the rights of  
20 parties." No. 12, "The civil cover sheet need not be" or  
21 "shall not be served." Those are all the alternatives  
22 that came out of our last debate. They've been typed up  
23 here for evaluation and discussion.

24                   CHAIRMAN BABCOCK: Carl.

25                   MR. HAMILTON: I move that we accept No. 10



1 and add it to the rule instead of making it a comment.

2 PROFESSOR CARLSON: Second.

3 HONORABLE SARAH DUNCAN: I second that.

4 PROFESSOR CARLSON: Third.

5 CHAIRMAN BABCOCK: Okay. Any other  
6 comments? Justice Patterson.

7 HONORABLE JAN PATTERSON: I assume that  
8 means that we also 2 and 3 are -- I mean, they're not  
9 alternatives, are they?

10 MR. ORSINGER: You can mix and match these  
11 any way you want.

12 HONORABLE JAN PATTERSON: My only comment is  
13 on No. 2, which should be 3, that we may want to say  
14 "local rules" instead of "local judges."

15 CHAIRMAN BABCOCK: Gene.

16 MR. STORIE: Would we want to say something  
17 like "cannot be used by any party or attorney," because I  
18 can see where the court itself might want to know  
19 something about the case in terms of scheduling?

20 CHAIRMAN BABCOCK: Uh-huh.

21 MR. ORSINGER: Well, when you say "is for  
22 administrative purposes only," scheduling to me would be  
23 embraced by "administrative purposes."

24 MR. STORIE: I agree. I'm a belt and  
25 suspenders guy sometimes.

1 CHAIRMAN BABCOCK: Did we not -- Sarah,  
2 check me on this, but didn't -- last session didn't we  
3 talk about how at least there was some people that thought  
4 that we shouldn't try to imagine what purpose a civil  
5 cover sheet might be used for by a litigant?

6 HONORABLE SARAH DUNCAN: I have no memory.  
7 My friend Angie could help me find a record and I can read  
8 it, but memory is not something I do.

9 CHAIRMAN BABCOCK: Well, mine is gone, too,  
10 but I thought that there was discussion about, well, how  
11 can we -- we can't imagine what purpose the civil cover  
12 sheet might come into play in a lawsuit and to at the  
13 front end say you can't use it for any other purpose might  
14 not be the right thing to do.

15 MR. ORSINGER: Well, I read the transcript  
16 recently, Chip, and what I --

17 CHAIRMAN BABCOCK: Sorry, I should have  
18 asked you, not her.

19 MR. ORSINGER: What I recall is that we  
20 believed that the need for the cover sheet is for -- for  
21 the state to acquire information. That's why OCA came to  
22 us.

23 CHAIRMAN BABCOCK: Right.

24 MR. ORSINGER: But then the Harris County  
25 civil district judges told us that they use it for

1 administrative purposes and they add stuff to it that OCA  
2 doesn't require.

3 CHAIRMAN BABCOCK: Right.

4 MR. ORSINGER: So we found out that the  
5 state has the information gathering need and the Harris  
6 County judges have the administrative need, but I felt  
7 like we all agreed that none of the litigants should be  
8 using this cover sheet that's used just for administrative  
9 or informational purposes to try to gain an advantage  
10 against another litigant.

11 CHAIRMAN BABCOCK: Yeah. It's coming back  
12 to me a little bit because I've got a case that involves  
13 whether -- you know, when a lawsuit was filed, and the  
14 civil cover sheet is being used by both sides as evidence,  
15 not that it's conclusive or anything, but it's just it was  
16 signed and dated by a guy on a particular date, which is  
17 important to the litigation, and it's being used as  
18 evidence, and having a comment or rule like this might  
19 preclude that.

20 MR. ORSINGER: Sure, it would, and the point  
21 is that you shouldn't be using a cover sheet to do that.  
22 You should be using the file stamp on the original  
23 petition or the complaint.

24 CHAIRMAN BABCOCK: Well, what if the file  
25 stamp was changed?

1                   MR. ORSINGER: Well, then you ought to have  
2 a hearing on changing the file stamp rather than saying in  
3 that particular case "We've got a second piece of paper  
4 that wasn't changed."

5                   CHAIRMAN BABCOCK: Justice Patterson.

6                   HONORABLE JAN PATTERSON: There was also  
7 some reference to its use in venue and identifying  
8 parties, but I think -- I think where we came out was that  
9 any use of that is more or less a gotcha use and that it  
10 should be used only for administrative purposes, and the  
11 way very often these are filled out is a little bit of a  
12 last minute sort of thing, so -- and not by attorneys. We  
13 had that discussion.

14                  CHAIRMAN BABCOCK: I'll tell you another  
15 example. There was a pro se litigant who filed a lawsuit  
16 and pled it a particular way and then when in responding  
17 to the motion to dismiss said, "You know, no, no, no, that  
18 wasn't my claim at all. You know, my claim was something  
19 else," and the court looked at the civil cover sheet where  
20 the box was that this pro se litigant checked, and it was  
21 what they had pled, not what they later said they were  
22 trying to plead, and that was used by the court as  
23 evidence that this other thing had not been pled and had  
24 not been intended to be pled by the pro se litigant, and  
25 that went up on appeal to the First Circuit and was

1 affirmed.

2 MR. ORSINGER: See, in both of those  
3 instances you're putting material weight on what is in a  
4 cover sheet, and the question is, is that -- are we now  
5 elevating the cover sheet to something that's as important  
6 as your original petition, and we're not -- I don't think  
7 any of us really -- or at least most of us didn't want to  
8 do that. The OCA brought this idea to us and said, "We  
9 want to gather some information." The Harris County  
10 judges said, "Well, we use it for administrative  
11 purposes." Do we want to create a document that can be  
12 relied upon in litigation for litigants to prove things,  
13 strike things, get sanctions, or, you know, whatever?

14 CHAIRMAN BABCOCK: Just to be -- not even  
15 the devil's advocate, but to take the other side of that,  
16 this is something that either a lawyer or a pro se party  
17 is filling out. It's a representation to somebody to the  
18 court, to the administrative office, whoever it is, it's a  
19 representation about their lawsuit. You know, what if  
20 they send a letter to their mother and said, "You know, by  
21 the way, you know, I'm suing for copyright. I'm not suing  
22 for trade secrets," and you get a hold of that letter?  
23 You couldn't use that in court as an admission against  
24 your party opponent? I would think you could. Yeah,  
25 Judge Evans.

1 HONORABLE DAVID EVANS: Well, I was one of  
2 those persons that felt like you could not imagine the  
3 possible uses of a cover sheet and where it might come up  
4 in, or the only person, but maybe the way to avoid this  
5 debate going on is to say, "The civil cover sheet is for  
6 administrative purposes only and does not constitute a  
7 pleading in the case," because a pleading with an  
8 admission against him -- with an admission in it may have  
9 greater weight than an informational use and I --

10 (Phone ringing)

11 CHAIRMAN BABCOCK: Somebody likes your  
12 comment, for sure.

13 HONORABLE DAVID EVANS: I once applied, but  
14 if it's not a pleading, if it's not a pleading then the  
15 likelihood of it becoming an admission that is frozen, a  
16 judicial admission, is just unlikely. You could amend the  
17 cover sheet to correct it, and so I just want to point out  
18 that if you say it's not a pleading and can be amended by  
19 a party, you may have voiced some of your concerns,  
20 Richard, and that allows people to look at it and give it  
21 the credibility and weight that it might deserve in some  
22 circumstance that it might become evidence.

23 CHAIRMAN BABCOCK: Pam.

24 MS. BARON: I don't think OCA is going to  
25 want amendments to these things. I think the idea is when

1 the clerk enters the information into the online docket  
2 sheet, they have the information. They can put it in,  
3 it's somewhat standardized by the cover sheet, and the  
4 idea is that you're not going to go back and keep changing  
5 it, but it's a way of them to identify how many cases in  
6 our system are family law cases or how many are these kind  
7 of cases, and the point is not to use it as an admission  
8 against anything. And I think that Richard Orsinger, not  
9 Richard the Second, appropriately captured this --

10 CHAIRMAN BABCOCK: No, he is Richard the  
11 Second.

12 MS. BARON: -- in his item 10, which just  
13 says it's only for administrative purposes, it's not to be  
14 used in litigation, period. That's succinct. It's to the  
15 point. I think it said everything that we talked about  
16 last time we raised this.

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: I was just going to say a lot  
19 of times people don't fill out a cover sheet with as much  
20 care as they do a pleading, and maybe even an assistant  
21 does it, so you shouldn't really use that for anything.

22 CHAIRMAN BABCOCK: Okay. Anything else?  
23 Well, thanks, everybody. The schedule for next year is  
24 going to take some doing as always. I think we'll try to  
25 meet in January, wouldn't you think, Justice Hecht?

1 HONORABLE NATHAN HECHT: Yes.

2 CHAIRMAN BABCOCK: So we'll try to get that  
3 out as quickly as we can, and thanks everybody for another  
4 great year.

5 MR. ORSINGER: Thank you.

6 (Applause)

7 (Meeting adjourned at 12:03 p.m.)

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2 **REPORTER'S CERTIFICATION**  
3 MEETING OF THE  
4 SUPREME COURT ADVISORY COMMITTEE

5 \* \* \* \* \*

6  
7  
8 I, D'LOIS L. JONES, Certified Shorthand  
9 Reporter, State of Texas, hereby certify that I reported  
10 the above meeting of the Supreme Court Advisory Committee  
11 on the 21st day of November, 2009, and the same was  
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13 I further certify that the costs for my  
14 services in the matter are \$\_\_\_\_\_.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on  
17 this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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