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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
APRIL 7, 2000
(MORNING SESSION)

.....

Taken before D'Lois L. Jones, a Certified
Shorthand Reporter in Travis County for the State of
Texas, on the 7th day of April, A.D., 2000, between the
hours of 9:00 o'clock a.m. and 12:30 o'clock p.m. at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

1 really haven't heard back yet. We've had some
2 difficulty getting a hold of them, but they're still
3 pending, but in the meantime -- and Justice Hecht may
4 choose to elaborate on this, and I think you have this
5 in your materials. The Court discovered a need to, I
6 guess, make a technical correction to one of the other
7 TRAP rules, 4.5. I think you have that in your
8 materials; and, Judge, I don't know if you want to talk
9 about that now or --

10 JUSTICE HECHT: Just briefly, the rule
11 before, the old TRAP rule, I think was 17 or I've
12 forgotten the number, said that if a lawyer does not get
13 notice of the judgment or order of a court of appeals
14 then the time for doing something that depends on that
15 event can be extended up to I think 90 days is what the
16 old rule said, but the key words were "judgment or
17 order."

18 When the rule was recodified last time,
19 the words "or order" were left out, and so now it just
20 reads if you don't get notice of a judgment. So it
21 could happen that you would get notice of the court of
22 appeals judgment and file a motion for rehearing and
23 then not get notice of the order denying the motion and
24 not know that your time for filing a petition in our
25 Court was running and miss your deadline.

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1 We've gone back through the records that
2 we've got, and Bill Dorsaneo has looked through his
3 files, and we can't find any substantive reason for that
4 change, and how it happened in the editorial process I'm
5 not even sure about either, but we also can't think of
6 any reason why you shouldn't get the extra time if you
7 don't know that your order -- that your motion for
8 rehearing has been denied. So we would propose while
9 we're making these other changes in the TRAP rules to
10 put "or order" back in Rule 4.5 and add a note at the
11 bottom that says "no substantive change was intended in
12 the 1997," whatever, 6 or 7 changes.

13 CHAIRMAN BABCOCK: 1997.
14 JUSTICE HECHT: 1997, yeah.
15 CHAIRMAN BABCOCK: Does anybody have any
16 comments, objections, thoughts about that?
17 PROFESSOR DORSANEO: So moved.
18 CHAIRMAN BABCOCK: Okay. Everybody in
19 favor of that? Okay. So that takes care of that.
20 With respect to the parental notification
21 rules, anything you want to comment about that?
22 JUSTICE HECHT: No. The -- we've got a
23 number of just technical problems that have come up
24 about how to handle various different aspects of the
25 process, so we've asked the subcommittee to reconvene

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CHAIRMAN BABCOCK: Good morning,
everyone. We've got a full agenda of things to do
today, but first, we have a new member, Judge Gene
Terry, who is a constitutional county judge from Marion
County. Judge Terry is right over there with his hand
up. We welcome him to the committee, and you're going
to maybe save us from some things that we have done
without a member of your pedigree on our committee.
We also have Frank Branson, who has
traveled from Dallas to be here today, Frank was, as you
may recall, going to address us at the last meeting
about Rule 199.5(f), which is one of the discovery rules
that he has identified a problem with; and since he has
got some other things to do today, we're going to let
him lead off in just a second.
But following up on old business, Bob,
you've got an update on the TRAP Rule amendments and the
Court of Criminal Appeals amendments that we talked
about.
MR. PEMBERTON: Right. As the committee
will recall last meeting, you voted out several changes
to the TRAP rules, 38.6 being the most significant for
civil practitioners. We made a couple of proposed
revisions, sent it to the Court of Criminal Appeals,

1 next week -- in ten days, I think.
2 MR. PEMBERTON: April 18, which is a
3 Tuesday.

4 JUSTICE HECHT: And most of them have to
5 do with how to handle the confidentiality aspect of
6 them, whether the reports sent into the comptroller are
7 confidential, what kind of statistics should be gathered
8 on these cases, how they should be gathered, who should
9 gather them, just a lot of sort of technical workings
10 out. So we think we will get their recommendation. If
11 there's anything urgent, we'll report it to you.
12 Otherwise, if there's anything more long-term, we'll
13 report back to you what their recommendations are and go
14 through it one more time, but we don't have anything
15 definite at this point.

16 CHAIRMAN BABCOCK: Okay.
17 MR. HARWELL: Chip, I have a quick
18 question. Bob, we spoke a few months back about
19 counties requesting local rules for -- you know, being a
20 county clerk, if we don't have a local rule to the
21 contrary then we're to take the individual to the
22 district court, was my understanding, unless there was a
23 local rule to the contrary. Have there been many
24 counties that request a local rule to this point?
25 MR. PEMBERTON: There have probably been

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1 about ten so far. You're referring I guess to the --
 2 what he's referring to, there's an assignment process in
 3 the rules where each locality is encouraged to come up
 4 with their own system through local rules for assigning
 5 the applications or the orders to a particular court,
 6 and there's a default rule that in priority order you
 7 take whatever clerk's office has filed and then you go
 8 to district court, county court at law, and then the
 9 constitutional county court. There have been about ten.
 10 MR. HARWELL: Okay.
 11 JUSTICE HECHT: But if counties want to
 12 do that, we've also pledged that we will rule on them
 13 right away, and we will treat them on an expedited basis
 14 if people want to send that.
 15 CHAIRMAN BABCOCK: Anything else on the
 16 parental notification rules? Okay.
 17 Frank Branson wrote to Buddy Low back in
 18 May of 1999 regarding Rule 199.5(f), which is one of the
 19 new discovery rules regarding protecting a witness from
 20 an abusive question or one for which an answer would be
 21 misleading. Frank is here today to talk to us. He was
 22 supposed to be here last meeting but got ill, and we had
 23 plenty to do anyway, so we pushed it forward to this
 24 meeting. I'm sorry that Steve Susman, who is the chair
 25 of that subcommittee is not here, but, Carrie, would you

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1 make sure that Steve gets this handout that Mr. Branson
 2 has prepared for us? And we'll have a record of this
 3 proceeding.
 4 So, Frank, why don't you tell us what --
 5 MR. BRANSON: Thank you, Chip, and thank
 6 you for allowing me to miss last time. I came down with
 7 the flu just before we were to come. The reason I wrote
 8 this note to Buddy, and if you'll look at the handout --
 9 has everybody got one? There's some extra copies. I
 10 decided to -- I had given this problem once Buddy -- I
 11 had really hoped Buddy would sponsor this for me so that
 12 you would have a more persuasive speaker perhaps on the
 13 subject than myself, so when it got given back to me I
 14 asked Tex Quesada in my office to do me a memorandum
 15 outlining problems as I saw them and to look at the law
 16 for me.
 17 I thought Tex did a good job, and rather
 18 than take credit for the work, I just included his memo.
 19 Basically the problem that I've -- that has bothered me
 20 with 199.5(f) is the addition of the ability to protect
 21 a witness with the phrase -- or to instruct the witness
 22 not to answer with the phrase "protect the witness from
 23 an abusive question or one for which any answer would be
 24 misleading." Contrary to the rumor Judge Rhea started,
 25 it's not my intention to do away with protecting a

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1 witness from an abusive question. My problem is with
 2 the last sentence there, "or one for which an answer
 3 would be misleading."
 4 What Tex has done here is outline the
 5 history of the rule as it went through the subcommittee
 6 as we could find it, and the original proposal, the
 7 original draft of the subcommittee, on page 26 of a
 8 memorandum sent to this committee as it was previously
 9 constituted by Justice Hecht in January of '98, if
 10 you'll turn to page 26, it's in section A, the rule
 11 reads, "Instructions to the deponent not to answer a
 12 question are improper except to preserve a privilege
 13 against disclosure, to enforce a limitation on evidence
 14 directed by the court, or to protect a witness from an
 15 abusive question, or to secure a ruling pursuant to
 16 paragraph 6. Upon request of the instructing" -- "upon
 17 request the instructing party shall explain the grounds
 18 for the instruction clearly, concisely, and in a
 19 non-argumentative manner and non-suggesting manner."
 20 "Should a court later order the deponent
 21 to answer the question to which the deponent was
 22 instructed not to answer, the court may impose an
 23 appropriate sanction for discovery abuse under 215."
 24 Now, there is a later draft which follows
 25 that that was sent out in June which discusses -- which

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1 on page 30 changes that somewhat but still is short of
 2 the final draft that was adopted. Along with the final
 3 draft there was a comment put in which, I think, perhaps
 4 adds some additional confusion, and that is, "A witness
 5 should not be required to answer whether he has ceased
 6 conduct which he denies doing subject to an objection to
 7 form," parenthesis, "i.e., the question is confusing or
 8 assumes facts not in evidence," end parenthesis,
 9 "because any answer would be necessarily misleading on
 10 account of the way in which the question is put, the
 11 witness may be instructed not to answer."
 12 For those of you in the room -- and I
 13 know Buddy has a big practice in Federal court -- who
 14 practice in Federal court, the abusive question section
 15 is not in their rule, and it works in the Federal court
 16 without it because you have magistrates available and
 17 the deposition can be stopped and you can get a ruling
 18 on an abusive question as you proceed.
 19 We don't have that form available to us
 20 in the state court, but I submit the original proposal,
 21 which doesn't include the comment and doesn't include
 22 the last part of the current Rule 199.5, which is to
 23 protect a witness, which is one for which an answer
 24 would be misleading is a better -- from a user-friendly
 25 standpoint for the lawyer, is a better way to do it, and

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1 let me give you an example.
 2 Let's go to section C. The first --
 3 these are not cases out of our office, but the first one
 4 is a good example of what I feared when I wrote Buddy.
 5 This is out of a deposition taken in May of 1999 in a
 6 medical malpractice suit in which the witness being
 7 deposed is not only the defendant doctor but has been
 8 designated as an expert in the case. It begins by, "Q.
 9 have you read the contents of Deposition Exhibit 5?
 10 "A. I briefly went through the contents.
 11 "Q. Did you find anything in there that
 12 you think is different than the way you would practice
 13 medicine?
 14 "A. As I say, I briefly reviewed the
 15 contents of this orientation manual. I didn't see
 16 anything different the way I practice medicine.
 17 "Q. Do you think it reflects the
 18 accurate standard of care for emergency physicians?"
 19 The lawyer objects and says, "No, you're
 20 not going to answer that."
 21 The witness, "I'm not able to answer it."
 22 Lawyer, "I object to form, the
 23 question -- to the form of that question because any
 24 answer the doctor gives is misleading and instruct the
 25 doctor not to answer the question."

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1 Now, he goes on, and the lawyer is never
 2 able to get an answer as to what standard the doctor
 3 should have been following or what is the appropriate
 4 standard for an emergency room doctor from not only the
 5 defendant, but a defendant who has been named as an
 6 expert in the case. If you turn to the next page, the
 7 same lawyer in the same case is instructing the witness
 8 not to answer the following questions.
 9 "Q. So you just get these bonuses, and
 10 you have no idea how you got them." talking about
 11 bonuses he gets, I assume, from an HMO. "I don't
 12 understand."
 13 "A. You don't need to answer that
 14 question, instruct him not to."
 15 "Q. Do you get bonuses based on
 16 something other than just providing hourly services to
 17 the emergency room doctor" -- I mean, "to the emergency
 18 room?" Again he gets an instruction not to answer.
 19 You go on to the next page, and the
 20 question is asked, "Do you understand or did you know
 21 that Presbyterian Hospital at Greenville had some sort
 22 of hospital emergency discount policy for employees?"
 23 Again he gets the instruction not to answer.
 24 On page 36 of that deposition, "Q. Why
 25 did you choose a family practice residency?" Going on

1 down to line 11, "Does a family practice doctor usually
 2 refer emergency room situations to a hospital or treat?"
 3 Again, you get an objection not to answer, instruct the
 4 witness not to answer, that the question is vague and
 5 any answer would be misleading.
 6 Now, if you'll look through there, that
 7 deposition is full of the problems that I anticipate,
 8 and they're not ordinarily going to happen to Buddy Low
 9 or Bill Dorsaneo or myself. They're going to happen
 10 with experienced lawyers who the rule was originally
 11 passed to keep from giving the type objections in
 12 depositions that instruct the witness how to answer the
 13 question, and now they're going to go to instructing
 14 them not to answer questions that obviously did not meet
 15 the intent of the rule.
 16 I would merely urge that the committee
 17 reconsider its original draft unless there's some
 18 mechanism that can be set up to accommodate the way the
 19 Federal courts handle it, and that is have a magistrate
 20 or magistrate type judge available to handle this type
 21 of problem. The section D of the handout contains some
 22 Federal cases. We could find no Fifth Circuit cases.
 23 There are a couple of district court cases, one out of
 24 the Western District, the Midland Division, and one out
 25 of Judge Shell's court and an NDL which goes into

1 in Arlington and talked to him about his statute and
 2 talked to him about what our committee was doing and
 3 attempting to do, and we had about an hour, hour and a
 4 half meeting, I would guess with Senator Harris. It was
 5 very productive. He was very supportive of what we were
 6 doing, and I think, if I'm not misquoting him, said that
 7 if we got the recusal rule worked around to where it
 8 covered some of the concerns he had, which we discussed
 9 at our last meeting, he would be happy to roll his
 10 statute into our rule and basically have the statute
 11 repealed, so that there's just one place you can look
 12 for recusal. Have I quoted him correctly, Bob?
 13 MR. PEMBERTON: AS I recall, yeah.
 14 CHAIRMAN BABCOCK: Okay. So Richard's
 15 subcommittee has been working feverishly and has
 16 violated our rule of having a draft one week before our
 17 meeting by only giving us a draft of their rule
 18 yesterday?
 19 MR. ORSINGER: Oh, no. It was sent out
 20 Tuesday.
 21 CHAIRMAN BABCOCK: Tuesday. Well, only
 22 broke it by a couple of days.
 23 MR. ORSINGER: Sorry.
 24 CHAIRMAN BABCOCK: But Justice Hecht is
 25 giving us a dispensation. So --

1 elaborate detail describing how he wanted it handled in
 2 that particular case.
 3 There are a couple of other examples.
 4 They are examples that they're not quite as clear to me
 5 as the original one in the malpractice suit, and they
 6 are where lawyers just decide because you now have a
 7 provision that allows an instruction not to answer that
 8 they will obstruct -- they will instruct because the
 9 question is argumentative or they will instruct because
 10 they believe it's been previously answered in the
 11 deposition.
 12 I'd like to commend the committee because
 13 the rule -- the purpose of 199 in doing away with the
 14 long objections and the informing the witness how to
 15 answer has certainly made deposition practice better on
 16 both sides of the Bar. This little hitch in our giddyup
 17 here, I would hope we can find some way to address and
 18 would hope that our proposal would be of help to the
 19 committee.
 20 CHAIRMAN BABCOCK: Thanks, Frank. Is
 21 there anybody here who is on that discovery
 22 subcommittee? I know Susman is the chair. David, Judge
 23 Brown.
 24 MR. MARTIN: Who is on it now or was?
 25 CHAIRMAN BABCOCK: On it now.

1 MR. ORSINGER: We beg your forgiveness.
 2 CHAIRMAN BABCOCK: So, Richard, why don't
 3 we get to it?
 4 MR. ORSINGER: Okay. We have some
 5 handouts back there that contain some communications to
 6 the committee on the subject matter of recusals. You
 7 also have behind Tab 3 and 4 of the bound materials for
 8 this meeting, you have materials relating to the
 9 recusals. Most of the bound materials you've seen and
 10 we've discussed in prior meetings, and we've attempted
 11 to address --
 12 HONORABLE SCOTT BRISTER: Is this it?
 13 MR. ORSINGER: There's a letter from --
 14 let's see. Actually, my materials have been kind of
 15 mixed together, so I don't -- you have a letter from a
 16 presiding district judge up there and, well, there's a
 17 letter from Judge Hester, I think, back there.
 18 MR. PEMBERTON: Yeah.
 19 MR. ORSINGER: Fifth Administrative
 20 Judicial Region and then I'm going to apologize. I
 21 don't remember which -- there is two or three pieces of
 22 correspondence back there.
 23 Oh, just two, okay. Elaine is sharing
 24 with me there is a proposed Rule 18a amendment that has
 25 Luke Soules' business card on it, but I believe that

1 MR. MARTIN: I'm on it now.
 2 CHAIRMAN BABCOCK: Okay. Well, you-all
 3 can take this back to the subcommittee. Our next
 4 meeting is going to be in May, and if you-all can get
 5 together on this between now and then we'll put it on
 6 the agenda for then, and if not, we'll bump it over to
 7 the meeting after that.
 8 MR. BRANSON: Thank you for your time and
 9 consideration.
 10 CHAIRMAN BABCOCK: Thank you very much
 11 for coming. Onto recusal, which I think will take the
 12 balance of the day, but we're going to have one other
 13 person join us. Representative Dutton from Houston
 14 wants to talk to us about Rule 166a, which Judge Peoples
 15 is working on with his subcommittee, and that revolves
 16 around stating -- having district judges give the
 17 reasons why they either grant or disgrant summary
 18 judgments, and Representative Dutton will be here when,
 19 Bob, this afternoon?
 20 MR. PEMBERTON: 2:00 o'clock.
 21 CHAIRMAN BABCOCK: 2:00 o'clock. So
 22 we'll break in our deliberations to hear from
 23 Representative Dutton on that. With respect to the
 24 recusal rule, since our last meeting Bob Pemberton and
 25 Richard and I went and had a meeting with Senator Harris

1 that was attached to one of the other pieces of
 2 correspondence, and he just forwarded it and then there
 3 is the revised language for Rule 18a that we're going to
 4 talk about this morning. Thank you, Elaine.
 5 Probably the best thing for us to do is
 6 to go through Judge Hester's proposal and tell you what
 7 our thoughts were on that, and then we have a proposal
 8 from the presiding judge up in Dallas, Judge McDowell,
 9 which we'll comment on that, and then we'll go into our
 10 revised draft and explain how it's changed from last
 11 time and how it responds to some other input we had.
 12 Judge David Peoples joined in our
 13 subcommittee deliberations, which is very helpful
 14 because he's a presiding administrative district judge
 15 and had some other conversations with other presiding
 16 judges, and they forwarded some of their ideas, which
 17 we've attempted to integrate and which we're going to
 18 discuss today.
 19 The first thing I'd like to take up is
 20 Judge Hester's letter of February 23 of 2000, and you'll
 21 see attached to the back of that letter is this revised
 22 Rule 18a that has Luke Soules' business card attached to
 23 it, and basically Judge Hester is complaining about a
 24 potential abuse of the Rule 18a recusal process that was
 25 referred to in Justice Hecht's dissent in the PG&E

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1 Energy case, and this attached rule is a proposed fix.
 2 Our subcommittee looked at this and said, well, we see
 3 that it could be subject to abuse in the right
 4 circumstances or the wrong circumstances, but we didn't
 5 feel like the proposed language would be the fix, and
 6 the problem is this, as I understand it -- and, Justice
 7 Hecht, correct me because I think you analyzed this in
 8 detail.
 9 Once the recusal has occurred the
 10 presiding judge is supposed to appoint a replacement
 11 judge to try the case. In this particular case that is
 12 in question here, the PG&E Energy case, a recusal
 13 occurred, the presiding judge appointed a replacement
 14 judge to hear the case, but the local presiding
 15 administrative judge eventually removed that new
 16 appointed judge from the case and assigned it to
 17 himself. So basically the recusal process worked well,
 18 but the replacement process, if you will, was overridden
 19 by operation of local rules about re-assigning the case
 20 after recusal to another local district judge, and I
 21 believe that this proposal here was attempted to -- is
 22 an attempt to be sure that no local administrative
 23 authority to re-assign cases can override the
 24 appointment of the presiding judge of a replacement
 25 judge for a judge who has been recused. I hope that was

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1 clear. Is that correct?
 2 JUSTICE HECHT: Yeah. I think in a
 3 nutshell the question is either before or after a motion
 4 to recuse is ruled on can the local judges transfer the
 5 case in such a way as to moot the motion?
 6 MR. ORSINGER: Okay. Well, I hope that
 7 our language solves that problem. We'll look at it.
 8 Now, at the subcommittee level there was a concern.
 9 There are some counties, particularly Bexar County and
 10 Travis County, where we have, if you will, random
 11 assignment every time the case comes up; and if this
 12 particular problem is a problem in one area of the
 13 state, you don't want necessarily to write a rule that
 14 wrecks legitimate practice in other areas. So we tried
 15 to do something that would address this problem but not
 16 too much encroach on other practices, and let's look at
 17 that when we get to the rule.
 18 Carl Hamilton has rewritten this rule for
 19 us, and we're going to go through it sequentially, and
 20 I'm not going to take up that language right now. I
 21 just want to put this idea before you, and we'll get to
 22 it in a minute. We've attempted to address that
 23 problem, but it may require even a little more
 24 flexibility than what we've written into it, and we'll
 25 get to it in discussion.

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1 Then in your materials behind Tab 3 is a
 2 letter from Judge Pat McDowell, who is the presiding
 3 administrative judge in Dallas and a lot of North
 4 Central Texas, and his letter of October 21, '99, has
 5 two proposals relating to recusal. The first proposal
 6 is that the judge who's being attacked in the recusal
 7 practice should have a lawyer representing his or her
 8 interest other than the opposing party in the underlying
 9 lawsuit, and he proposes that the local district
 10 attorney or county attorney would be appointed to defend
 11 the judge in the recusal, except in criminal cases where
 12 obviously they're representing the state in the
 13 prosecution or in front of judges where the D.A. appears
 14 in prosecutions.
 15 Now, that's going to be a problem in some
 16 counties because some counties have both criminal and
 17 civil jurisdiction in front of the civil judges. At our
 18 subcommittee level there was just no support for the
 19 idea of having government attorneys defend the judge,
 20 and as an alternative Judge McDowell suggested that
 21 private attorneys be appointed and paid by the county,
 22 and there likewise seemed to be no support at the
 23 subcommittee level for this proposal. We'll lay it out
 24 here for discussion, but we're not recommending that
 25 that step of having the D.A. or the county attorney take

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1 it over or private attorneys at county expense should be
 2 written into the rule.
 3 The second proposal that Judge McDowell
 4 made is that the sanctions rules for recusals are not
 5 very well tailored to the recusal process. To a certain
 6 degree they just invoke discovery sanctions, some of
 7 which are not appropriate, and he also complains that
 8 the standard for sanctions is the motion is made without
 9 just cause and solely for the purpose of delay, and the
 10 words "solely for the purpose of delay" I believe Judge
 11 McDowell felt like was a more difficult proposition
 12 because there might be reasons besides delay, even if
 13 delay was the major reason, and if you took the word
 14 "solely" out of there, that would give the judge more
 15 freedom to impose sanctions, and further he wanted to
 16 beef up the court's contempt power in recusal process,
 17 and this is not the attacked judge but the judge
 18 appointed to hear the recusal would be given the power
 19 for contempt.
 20 And we have written the rule -- our
 21 assessment of it was that we did not want to liberalize
 22 that too greatly, and when we get into this discussion
 23 we can go into the reasons why and wherefore, but
 24 basically I think it's our view that the sanctions rule
 25 does need to be revised somewhat but not as radically as

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1 Judge McDowell has suggested.
 2 Now, Chip, our proposed rule doesn't
 3 address in any way this issue of the appointment of the
 4 judge to represent -- or appointment of a lawyer to
 5 represent the judge, and so probably we ought to take
 6 that up before we get into the rule because it's just
 7 simply not in our rule. As I said, the subcommittee
 8 just is not forwarding a recommendation that this step
 9 be taken, and so basically it's laid before the
 10 committee for a discussion.
 11 CHAIRMAN BABCOCK: Well, why don't we --
 12 rather than try to take up time while we're fresh on
 13 something that you don't have any language on and which
 14 I could see --
 15 MR. ORSINGER: We'll defer it until later
 16 then.
 17 CHAIRMAN BABCOCK: Yeah. Do that when
 18 we're all tired and want to blow it off.
 19 MR. ORSINGER: Judge Peoples had --
 20 CHAIRMAN BABCOCK: Note the laughter. No
 21 disrespect to Judge McDowell. We'll take that issue
 22 seriously.
 23 MR. ORSINGER: Yes. Well, Judge Peoples
 24 had forwarded a list of suggestions that the presiding
 25 judge had worked up, and I believe that we either

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1 accommodated all of them in our draft or reserved some
 2 for Judge Peoples to bring up on his own as we go
 3 through this, and in light of your instructions, Chip, I
 4 think what we're going to do is go into the
 5 subcommittee's proposed draft and take these issues up
 6 as they arise, so I'm going to turn it over to Carl who
 7 has been the words craftsman here and drafted all this,
 8 so he gets all the credit for that work and I'll take
 9 the criticism. So, Carl, go ahead.
 10 MR. HAMILTON: well, I don't deserve the
 11 credit. This is a joint effort, and Bob spent a lot of
 12 time footnoting everything for us, too, which is very
 13 helpful. The first page of the new rule is basically
 14 the same as in the recodification grounds for --
 15 HONORABLE SCOTT BRISTER: Are we looking
 16 at your --
 17 MR. ORSINGER: This is --
 18 HONORABLE SCOTT BRISTER: The
 19 single-spaced one or double-spaced one?
 20 HONORABLE DAVID PEEPLES: The
 21 single-spaced one has got April 4th in the right-hand.
 22 Excuse me, double-spaced. I'm sorry.
 23 MR. HAMILTON: Is there two versions,
 24 Richard?
 25 HONORABLE SCOTT BRISTER: There's one in

1 our printed materials, Carl, from January 18th.
 2 MR. ORSINGER: No. You need to look at
 3 the one that's -- either you got it by e-mail or it got
 4 handed out today on that table, and it's footnoted. It
 5 has Bob Pemberton's footnotes explaining differences
 6 between this existing rules and other justifications.
 7 CHAIRMAN BABCOCK: It's dated April 4th,
 8 2000.
 9 MR. HAMILTON: Has everybody got a copy
 10 of that now? Okay. The grounds for disqualification
 11 and recusal have not changed except for the addition of
 12 (9) and (10) on grounds for recusal, and that comes from
 13 the task force that studied the campaign finance
 14 expenditures to judges, and they wrote a rather
 15 lengthy --
 16 HONORABLE F. SCOTT MCCOWN: Could I --
 17 CHAIRMAN BABCOCK: Yes, Judge McCown.
 18 HONORABLE F. SCOTT MCCOWN: Before --
 19 Carl and the committee have done a great job on this,
 20 but there are a couple of changes in the wording in the
 21 grounds of disqualification and grounds of recusal that
 22 I think do, in fact, make substantive changes, and so I
 23 don't want to skip over Carl's statement unchallenged
 24 and not have an opportunity -- you may want to put it
 25 off 'til later, but I would like to point out what I

1 beginning with the ABA and following up through some
 2 Texas cases to make it clear that government lawyers do
 3 not practice together.
 4 For example, under the rule as written
 5 when Chief Justice Rehnquist joined the Supreme Court he
 6 couldn't have heard any cases involving the Justice
 7 Department, or when Jack Hightower joined the Texas
 8 Supreme Court he couldn't have heard any cases involving
 9 the Attorney General but for the line of the cases that
 10 say "association" concerns private practice, and I would
 11 hate to inadvertently drop out the rule and change that.
 12 We could either go exactly with the
 13 language we have or we could add a phrase, if you look
 14 down at the draft rule, "The judge expressing an opinion
 15 concerning the matter while acting as an attorney in
 16 government service," we could add to the end of
 17 subdivision (1) "other than while acting as an attorney
 18 in government service," which would parallel our phrases
 19 and capture that case law, but I think that's an
 20 important one.
 21 CHAIRMAN BABCOCK: Yeah. Carl.
 22 MR. HAMILTON: Chip, let me just point
 23 out that the draft that we're working from now was taken
 24 basically from the recodification and not from the
 25 existing rule, and in the recodification that language

1 think are a couple of inadvertent changes.
 2 CHAIRMAN BABCOCK: Yeah, we're going to
 3 go through this subsection by subsection, so --
 4 HONORABLE F. SCOTT MCCOWN: Okay. I just
 5 wanted to flag.
 6 CHAIRMAN BABCOCK: Thank you.
 7 MR. HAMILTON: There may be a change in
 8 (8).
 9 MR. PEMBERTON: And relating to my
 10 footnotes, I literally just sat down with the
 11 committee's draft and the old rule and tried to just
 12 note where things appeared to have come from, so those
 13 of you involved in drafting the proposal may differ in
 14 some of this, but it's --
 15 HONORABLE F. SCOTT MCCOWN: Well, I think
 16 the committee didn't intend to make any changes, but any
 17 time you do any slight editing you can inadvertently
 18 make a change, and I think there are a couple of
 19 important ones.
 20 CHAIRMAN BABCOCK: As we just found out
 21 from the TRAP Rule 4.5.
 22 MR. ORSINGER: Yeah. I think Scott's
 23 point is well taken that 18b(2), grounds for recusal
 24 subdivisions are a little bit different from this and
 25 the wording is a little bit different, and so we should

1 was taken out and that -- I guess the recodification was
 2 approved, wasn't it?
 3 PROFESSOR DORSANEO: Well, I don't know
 4 if this point was ever raised and --
 5 HONORABLE F. SCOTT MCCOWN: This is a
 6 subtle point probably visited only by district judges
 7 who join the bench from the AG's office, but it's a very
 8 practical point. It also concerns very much many, many
 9 criminal district judges who join the bench from the
 10 D.A.'s office and, like I say, there's a long line of
 11 cases on it, and I think we need to make sure we don't
 12 inadvertently change it.
 13 CHAIRMAN BABCOCK: Well, Rule 18b as it
 14 is in Tab 3 here is what we're operating with today,
 15 right?
 16 MR. ORSINGER: Yes. That's a current
 17 rule.
 18 CHAIRMAN BABCOCK: That's a current rule.
 19 MR. ORSINGER: And Scott likes that rule
 20 because it uses the word "association" which he says has
 21 a rich history of interpretation that would permit
 22 lawyers in government service to take the bench and
 23 still hear cases.
 24 CHAIRMAN BABCOCK: Right.
 25 PROFESSOR DORSANEO: But the language of

1 probably look at each line at some point and be sure
 2 we're comfortable with the new language. They are not
 3 word for word the same, but they are very close.
 4 PROFESSOR DORSANEO: Why don't we talk
 5 about that now and get rid of it?
 6 MR. HAMILTON: You want to bring it up
 7 now?
 8 MR. ORSINGER: Let's do it now. Is that
 9 all right with you?
 10 CHAIRMAN BABCOCK: Sure.
 11 MR. ORSINGER: Okay. You have in your
 12 materials behind Tab 3 Rule 18b, grounds for
 13 disqualification and recusal. It's maybe about 15 pages
 14 back behind Tab 3.
 15 HONORABLE F. SCOTT MCCOWN: Could I point
 16 out what I think are the two that I see?
 17 CHAIRMAN BABCOCK: Sure. Yeah.
 18 HONORABLE F. SCOTT MCCOWN: Okay. In
 19 (a)(1) it says, "The judge formerly acted as counsel in
 20 the matter or practiced law with someone while they
 21 acted as counsel in the matter." And if you'll look at
 22 the present 18b(1)(a) you'll find that it uses the word
 23 "association," previously "practiced law, served during
 24 such association," and that word "association" actually
 25 has a long line of commentary and cases behind it

1 18b, you know, (1)(a) is otherwise quite cumbersome, and
 2 I believe that's why Judge Brister is probably the one
 3 who came up with this language and shortened it.
 4 HONORABLE SCOTT BRISTER: I'm sure I was
 5 the one.
 6 PROFESSOR DORSANEO: We could put the
 7 concept in there clearly and maybe use the word
 8 "association" if it's such an important word.
 9 HONORABLE F. SCOTT MCCOWN: I mean, you
 10 don't even have to use the word "association." I've
 11 suggested two fixes. One is leave it like it is, a
 12 little bit cumbersome; or alternatively, at the end of
 13 the new (a)(1) just add the phrase "other than while
 14 acting as an attorney in government service," which
 15 parallels the phrase we use in (b)(5). Either of those
 16 fixes would be -- I think would work.
 17 MR. EDWARDS: You're going to get in the
 18 same problem with that add-on with what does it modify?
 19 Certainly it doesn't matter if you're a government
 20 lawyer if you were in the D.A.'s office and worked up a
 21 case against the murder and then took the bench and then
 22 tried him. I think you're disqualified.
 23 HONORABLE F. SCOTT MCCOWN: Right. Okay.
 24 But that's covered by the judge formerly acting as
 25 counsel in the matter.

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1 MR. EDWARDS: But I'm saying if you add
 2 on at the end "other than if you're a government
 3 attorney," what does that modify?
 4 HONORABLE F. SCOTT MCCOWN: Okay. I
 5 would have thought that would have been captured by the
 6 comma, but we could change --
 7 MR. EDWARDS: Well, it might, but then
 8 you get into a grammatical argument, and sometimes
 9 people disagree on grammar.
 10 HONORABLE F. SCOTT MCCOWN: We could make
 11 one -- we could put a colon there and make this a
 12 separate subdivision or we could put a little (a) and a
 13 little (b).
 14 HONORABLE SCOTT BRISTER: Could you just
 15 say "or while in private practice with someone"?
 16 PROFESSOR DORSANE0: If the key word that
 17 modifies "practice law" is "association" --
 18 HONORABLE F. SCOTT MCCOWN: We could just
 19 say "practiced law in association"?
 20 PROFESSOR DORSANE0: Yes, or "was
 21 associated in the practice of law." If "association" is
 22 what gets us there under the case law, that's the word
 23 that needs to be added --
 24 HONORABLE F. SCOTT MCCOWN: Okay.
 25 PROFESSOR DORSANE0: -- to modify

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1 "practiced law," which otherwise would seem to cover --
 2 HONORABLE F. SCOTT MCCOWN: Okay.
 3 PROFESSOR DORSANE0: -- a lot of
 4 territory.
 5 HONORABLE F. SCOTT MCCOWN: I agree.
 6 That would be a simple fix. You could just say "or
 7 practiced law in association with someone who acted as
 8 counsel in the matter."
 9 PROFESSOR DORSANE0: If that was a
 10 motion, I'll second it.
 11 HONORABLE SCOTT BRISTER: If "in
 12 association" is a code for "in private practice," why
 13 don't we just say "private practice"?
 14 PROFESSOR DORSANE0: It might be more
 15 code than that. I'm sure the judge is right on what it
 16 means, but I haven't read all of these cases, and it
 17 might mean, you know, more than that.
 18 HONORABLE F. SCOTT MCCOWN: For example,
 19 it might include legal aid lawyers if they were all in
 20 the same legal aid.
 21 CHAIRMAN BABCOCK: Let me just ask a
 22 question. Carl or Richard, was there some problem with
 23 18b(1) that we were trying to address, or were we just
 24 trying to make the language simpler and easier, which
 25 has led to all these other problems?

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1 HONORABLE SCOTT BRISTER: It's been so
 2 long since we looked at all this. You know, who
 3 remembers?
 4 MR. ORSINGER: We really, really debated
 5 these grounds three or four years ago, but I don't
 6 remember specifically that this ground was debated. I
 7 do remember that Scott Brister typed up his own version
 8 of grounds and then we eventually merged those
 9 suggestions with a lot of the debate and came up with
 10 the final result which then got approved and forwarded
 11 to the Supreme Court, but I don't think that we can
 12 necessarily assume that we entered into this kind of
 13 intellectual inquiry about the specific language the
 14 last round.
 15 PROFESSOR DORSANE0: I'm sure we didn't.
 16 I'm sure it was simplification of language so we could
 17 try to understand it.
 18 CHAIRMAN BABCOCK: And it sounds like in
 19 trying to simplify things we've now created problems
 20 that --
 21 HONORABLE SCOTT BRISTER: Well, we don't
 22 want to revisit that from four years ago. If you'll
 23 recall, the problem is there are certain things required
 24 by the Constitution the rule has never required. There
 25 are other things required by the rule the Constitution

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1 has never -- there is a direct conflict between the
 2 existing rule and the Constitution, and there are other
 3 things that are just nobody knows what they mean and
 4 so --
 5 HONORABLE F. SCOTT MCCOWN: My problem is
 6 completely solved by just adding the words "in
 7 association" after the word "law."
 8 PROFESSOR DORSANE0: And I'll second that
 9 if that was a motion.
 10 HONORABLE F. SCOTT MCCOWN: It's your
 11 motion. I'm urging it.
 12 PROFESSOR DORSANE0: All right. Second?
 13 PROFESSOR CARLSON: I'll second it.
 14 CHAIRMAN BABCOCK: Okay. Any discussion
 15 on it? On our draft you're going to add the word -- the
 16 phrase "in association" after the word "law"; is that
 17 correct?
 18 HONORABLE F. SCOTT MCCOWN: Right.
 19 CHAIRMAN BABCOCK: All right. Anybody
 20 opposed to that? Let the record reflect nobody is
 21 opposed to it.
 22 So is everybody in favor of it?
 23 Everybody is nodding their head "yes," they're in favor
 24 of it. Okay.
 25 HONORABLE F. SCOTT MCCOWN: Then I had

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1 one other small matter, and I could go either way on
 2 this, but if you look at (b)(3) in the new draft it
 3 says, "the judge is a material witness." In the old law
 4 if you'll look at 18b(2)(3) it's "the judge has been a
 5 material witness," and I think if you say "the judge is
 6 a material witness" you invite motions for recusal based
 7 upon the ground that I need the judge's testimony about
 8 something. I don't -- you know, it just broadens it a
 9 little bit.
 10 The rule already says in subdivision (4)
 11 that if you have personal knowledge, whether you've ever
 12 been a witness or not, if you've got personal knowledge
 13 then you need to recuse, so I'm -- if you have been a
 14 witness in the past you also have to recuse, but this
 15 broadens it a little bit by saying if you're going to be
 16 a witness -- if a party can allege you're going to be a
 17 witness in the future, and materiality might include,
 18 you know, a lot of things lawyers could cook up that
 19 they say they need your testimony about. It's a small
 20 point, but I would rather stick with "has been" than
 21 "is."
 22 PROFESSOR DORSANE0: Yeah, to me "has
 23 been" means that you actually were a witness, not that
 24 you have information.
 25 MR. EDWARDS: Well, it's already in the

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1 old rule "is to the judge's knowledge likely to be a
 2 material witness in the proceeding." That's --
 3 HONORABLE F. SCOTT MCCOWN: Where are you
 4 reading?
 5 MR. EDWARDS: I was under 18b(2)(f),
 6 little (3).
 7 HONORABLE F. SCOTT MCCOWN: "Is to the
 8 judge's knowledge likely to be a material witness."
 9 MR. EDWARDS: Well, all you have to do is
 10 tell them.
 11 HONORABLE F. SCOTT MCCOWN: Well, but if
 12 you look at --
 13 MR. LATTING: "Hey, Judge, you're going
 14 to be a witness."
 15 HONORABLE F. SCOTT MCCOWN: But if you
 16 look at 18b(2)(c) it says "he or a lawyer with whom he
 17 previously served has been a material witness."
 18 MR. EDWARDS: It's both ways.
 19 MR. ORSINGER: Well, I think one rule
 20 relates to the past and one relates to the future.
 21 Doesn't (2)(c) mean that in the past the judge or a
 22 lawyer with whom he previously practiced law was a
 23 material witness in the case; and (f)(3) is, is that in
 24 the future it's likely that they will be called as a
 25 witness, the judge will be called as a witness?

1 MR. EDWARDS: Yeah. It's both past and
 2 future, I think.
 3 MR. WATSON: Richard, just tell me where
 4 something I had falls in this so I can see my way clear.
 5 I had one in which the judge while a lawyer agreed to be
 6 a witness on attorneys fees for one side and was deposed
 7 on attorneys fees for one side and then was elected to
 8 the bench, got the case, and refused to recuse. In
 9 fact, became quite indignant that anyone would question
 10 any appearance of impropriety. Now, how's that covered?
 11 Is that (a), material and (b) -- I mean, to me the
 12 attorneys fees is no big deal, but --
 13 MR. ORSINGER: No, but it's material.
 14 MR. WATSON: -- to a client it's --
 15 MR. ORSINGER: If you're trying it to a
 16 fact-finder, it's material.
 17 MR. WATSON: Correctamundo. Especially
 18 when the fact-finder is a judge who's the witness.
 19 MR. ORSINGER: In my view he was a
 20 material witness.
 21 MR. WATSON: The opposite being, though,
 22 in that situation of "No, no, we'll get a new one. You
 23 know, that deposition testimony will never be used.
 24 He's not going to be a material witness, he's not going
 25 to testify," and I'm not trying to gum things up. I

1 CHAIRMAN BABCOCK: Have we got a second
 2 on that, "has been or is likely to be"?
 3 MR. ORSINGER: I think Bill moved it.
 4 I'll second it.
 5 CHAIRMAN BABCOCK: Okay. All in favor of
 6 that change? All opposed? It's unanimous.
 7 "The judge has been or is likely to be a
 8 material witness." Okay. Judge McCown, you're two for
 9 two.
 10 HONORABLE F. SCOTT MCCOWN: That's it
 11 then. All right. I'm out of here.
 12 CHAIRMAN BABCOCK: He's batting a
 13 thousand. Judge Brister.
 14 HONORABLE SCOTT BRISTER: We had
 15 discussed sometime back on (a)(2) the cases say the
 16 interest has to be an economic interest, so for
 17 instance, on the SMU whatever you-all were doing, paying
 18 your football players there --
 19 PROFESSOR DORSANEO: We had to do
 20 something to get good football players.
 21 HONORABLE SCOTT BRISTER: Right. The
 22 judge who was a Pony Club or whatever was you-all's club
 23 that was raising the funds to pay the football player
 24 was not recused on that ground just because he was a big
 25 SMU fan; and if you just say the judge has an interest,

1 just want to see how this particular thing works because
 2 I lost a friend over that and really did, and he still
 3 doesn't see it today, and I couldn't nail it down in the
 4 rules. They redesignated someone.
 5 HONORABLE SCOTT BRISTER: Tell me again
 6 why "has been" is better than "is"? This is a pending
 7 case.
 8 HONORABLE F. SCOTT MCCOWN: Bill Edwards
 9 has completely convinced me. I withdraw my comment, and
 10 I don't think we ought to spend anymore time on it.
 11 MR. EDWARDS: I better go home while I'm
 12 ahead.
 13 PROFESSOR DORSANEO: Both of you have
 14 convinced me that the language needs to be changed to
 15 say, you know, first, "has been" and then say --
 16 MR. ORSINGER: "Or is likely to be."
 17 PROFESSOR DORSANEO: "Or is likely."
 18 MR. ORSINGER: Yeah.
 19 PROFESSOR DORSANEO: Because you don't
 20 want to be, and I don't know whether the judge's
 21 knowledge is what we want to go by, but what -- in my
 22 writing I'd say, you know, "has been a material witness"
 23 or to the -- you know, "to the judge's knowledge is
 24 likely to be a material witness," incorporating the same
 25 language, whatever "to the judge's knowledge," you know,

1 the only time this is ever applied that I'm aware of is
 2 if it's an economic interest in the case.
 3 HONORABLE F. SCOTT MCCOWN: I move we add
 4 the word "economic."
 5 CHAIRMAN BABCOCK: Don't press your luck
 6 here.
 7 PROFESSOR DORSANEO: The only argument
 8 against that is it's already there in the word
 9 "interest." That's the only argument against it.
 10 CHAIRMAN BABCOCK: Say that again, Bill.
 11 I'm sorry.
 12 PROFESSOR DORSANEO: The only argument
 13 against adding the word in would be that you don't need
 14 it, that it's already there, and that everybody knows
 15 that "interest" means "economic interest."
 16 HONORABLE SCOTT BRISTER: Well, how many
 17 of you-all knew about that before today?
 18 CHAIRMAN BABCOCK: About that case, the
 19 SMU case?
 20 HONORABLE SCOTT BRISTER: Yeah. Sure.
 21 CHAIRMAN BABCOCK: I know about it. I
 22 was in it. I did not move to recuse then Judge Enoch.
 23 The codefendant did.
 24 HONORABLE SCOTT BRISTER: Just a judge
 25 reading this, that's the problem with this thing, you

1 may or may not mean and then go on, and then it at least
 2 says what the former, that is to say the current, rule
 3 says in the same clear way.
 4 HONORABLE SCOTT BRISTER: So what
 5 happened to the judge has been a material witness but no
 6 longer is one?
 7 MR. ORSINGER: Well, I have a problem
 8 with Skip's scenario because the judge formulated an
 9 opinion about the reasonableness of those fees in the
 10 capacity of a testifying witness, and now all of the
 11 sudden he's sitting in judgment of it. I don't think he
 12 should.
 13 PROFESSOR DORSANEO: If he has been then
 14 he's out.
 15 HONORABLE SCOTT BRISTER: Of course not.
 16 MR. ORSINGER: Even if you quash the
 17 deposition and never allow anybody to see it, the judge
 18 has already formulated a view.
 19 MR. YELENOSKY: Does "has been" cover
 20 that?
 21 MR. WATSON: I'm just asking does "has
 22 been" cover it?
 23 MR. ORSINGER: I think "has been" does
 24 cover it, but it's not in there now, and so Bill is
 25 saying let's put it in. I agree.

1 know, just a judge reading it you don't know that.
 2 CHAIRMAN BABCOCK: Yeah.
 3 HONORABLE SCOTT BRISTER: It sounds like
 4 they're interested in the case.
 5 CHAIRMAN BABCOCK: I agree with Judge
 6 Brister on this. There is a big difference.
 7 MR. ORSINGER: Let's put it in there even
 8 if -- because not everybody carries around Professor
 9 Dorsaneo's knowledge of the law.
 10 HONORABLE F. SCOTT MCCOWN: Thank God.
 11 HONORABLE SCOTT BRISTER: Yeah, I'm
 12 willing to neglect it if there's some other interest
 13 that anybody can find for disqualifying, but I don't
 14 think there is.
 15 CHAIRMAN BABCOCK: Okay. There's a
 16 motion to put "economic" in here. Is it seconded?
 17 HONORABLE PHIL HARDBERGER: Second.
 18 CHAIRMAN BABCOCK: All in favor? Okay.
 19 Anybody opposed? Okay. "Economic" will be inserted.
 20 Judge Brister, you said just a second ago
 21 something that should be of concern to us, and that is
 22 that there is a disconnect between this rule and the
 23 Constitution.
 24 MR. ORSINGER: And the statute, I might
 25 add.

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1 CHAIRMAN BABCOCK: And the statute. Is
2 that disconnect still there?
3 HONORABLE SCOTT BRISTER: No, I think we
4 tried to cure all of those. I haven't finished looking
5 through this to make sure -- the main one was the
6 bizarre constitutional deal that if a judge is
7 disqualified the parties have a right to pick the judge
8 who follows him. Nobody knows that, but that's what the
9 Texas Constitution says, and only if they can't agree on
10 who they want to try their case does somebody else pick
11 their judge for them. Is that still in here? It was
12 last meeting.
13 CHAIRMAN BABCOCK: Okay. Well, would you
14 take it upon yourself, Judge, to --
15 HONORABLE SCOTT BRISTER: Sure.
16 CHAIRMAN BABCOCK: To make sure we don't
17 have a disconnect?
18 MR. ORSINGER: It's like four pages
19 before that is the Constitution. Three pages before
20 that.
21 HONORABLE SCOTT BRISTER: Yeah.
22 CHAIRMAN BABCOCK: Okay. Any more
23 comments about the grounds for disqualification?
24 MR. MARTIN: Chip, I'm a little concerned
25 in changing the language of the existing rule from

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1 plural "judges" to singular, a "they" got left in there,
2 and I think it's -- I think it's clear what it means,
3 but some lawyer might try to argue that the "they acted
4 as counsel in the matter" means both the judge and the
5 lawyer with whom the judge was associated represented
6 the person when it may just be the person that the judge
7 was associated with.
8 MR. HAMILTON: What number are you
9 talking about?
10 MR. MARTIN: (a)(1).
11 MR. ORSINGER: What if you say "either"
12 instead of "they"?
13 MR. MARTIN: Yeah, something like that.
14 Or "who acted as counsel in the matter during such
15 association."
16 MR. HAMILTON: Just take "while" and then
17 put "who" in there. "Someone who acted."
18 MR. MARTIN: You have to get the concept
19 that it has to be while they were practicing together.
20 HONORABLE F. SCOTT MCCOWN: it should be
21 "while."
22 CHAIRMAN BABCOCK: Isn't Richard's idea
23 "either"?
24 MR. ORSINGER: Well, you may not need
25 "either" because the first clause is entirely

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1 independent.
2 HONORABLE DAVID PEEPLES: "while the
3 person acting"?
4 PROFESSOR DORSANEO: Yeah, "the person"
5 would be best, I think. Not "he or she."
6 MR. MARTIN: "while the attorney"?
7 MR. ORSINGER: I propose "that person."
8 PROFESSOR DORSANEO: Uh-huh.
9 CHAIRMAN BABCOCK: "That person." Is
10 that okay with you, John?
11 MR. MARTIN: That's fine.
12 CHAIRMAN BABCOCK: Anybody opposed to
13 inserting "that person" as opposed to "they"?
14 Okay. Anything else about the subsection
15 (a), grounds for disqualification?
16 MR. WATSON: Now, these are all
17 constitutional? These are just picking up the
18 Constitution and plugging them in there?
19 MR. ORSINGER: No. Well,
20 disqualification is constitutional. The recusal is not
21 constitutional.
22 HONORABLE SCOTT BRISTER: It's purely
23 rule.
24 MR. ORSINGER: It's out of the statute.
25 MR. WATSON: No, I was talking about

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1 disqualification.
2 CHAIRMAN BABCOCK: He's talking about
3 subparagraph (a). Is that all constitutionally
4 compelled?
5 MR. ORSINGER: Yes. It's supposed to be,
6 so check.
7 MR. WATSON: That's what I'm asking,
8 there are no strangers in there.
9 CHAIRMAN BABCOCK: Buddy Low.
10 MR. LOW: Chip, I have a question. I
11 thought I heard Judge Brister say that the Constitution
12 gives -- and I don't know this. I never heard of it
13 before -- the lawyers the right to choose. If they have
14 a constitutional right how can the Legislature or the
15 rules take it away?
16 MR. ORSINGER: We can't, and it's in
17 here.
18 MR. LOW: Okay. That's all right.
19 MR. ORSINGER: "if the judge of the
20 district court is disqualified by any of the causes
21 above stated the parties may by consent appoint a proper
22 person to try the case. Failing to do so" --
23 MR. LOW: I thought there was a conflict
24 is what I had been led to believe, and I thought we
25 were --

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1 CHAIRMAN BABCOCK: Yeah, we're trying to
2 avoid the conflicts.
3 MR. LOW: Okay. I wanted to be sure we
4 weren't taking something away.
5 MR. ORSINGER: Well, you know, in our
6 procedure we purport to have the presiding judge with
7 the authority to pick the replacement, and we don't
8 support making it up to the parties' constitutional
9 authority to pick one by agreement.
10 HONORABLE SCOTT BRISTER: No, it's in
11 here.
12 MR. ORSINGER: It is?
13 HONORABLE SCOTT BRISTER: It's in (8) of
14 your -- let's see, is it -- (d)(8).
15 HONORABLE F. SCOTT MCCOWN: Could I
16 challenge the constitutional interpretation being placed
17 on this? I mean, what the Constitution says is that --
18 and I quote, "when a judge of the district court" -- so
19 it only applies to the district court to begin with --
20 "is disqualified by any of the causes above stated, the
21 parties may by consent appoint a proper person to try
22 said case."
23 Now, the term "proper person" is not
24 defined, and I think the proper person would be the
25 person that the statutes and rules say is the one to try

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1 the case. I don't think the parties necessarily have a
2 constitutional right to just pick anybody they want.
3 HONORABLE SCOTT BRISTER: Why say by
4 consent they can appoint a proper person?
5 PROFESSOR DORSANEO: Yeah. Why would it
6 say that?
7 HONORABLE F. SCOTT MCCOWN: Because when
8 the Constitution was written in a very rural state with
9 very little judicial infrastructure it allowed them to
10 pick somebody, just like it has a provision when a judge
11 is sick to hold an election there in front of the
12 courthouse to pick a judge, but it assumes that you use
13 procedures that are elsewhere set out in the law. I
14 don't think it just says -- for example, certainly they
15 would have to meet the requirements of being a district
16 judge, practicing the requisite number of years, being a
17 lawyer. So if you say they have to meet those
18 requirements that are set out in the law then whatever
19 requirements are set out in the law they have to meet.
20 HONORABLE SARAH DUNCAN: I don't think
21 you can assume that.
22 CHAIRMAN BABCOCK: Well, we're not there
23 yet.
24 MR. ORSINGER: I'd also -- I think there
25 is a disjuncture because our rule, Scott, permits us

1 to -- it says "if the parties consent, the presiding
 2 judge may assign that judge." The Constitution may not
 3 make it discretionary.
 4 CHAIRMAN BABCOCK: Okay. That's down the
 5 road in this rule, though, right?
 6 MR. ORSINGER: Okay. Yeah. We'll get to
 7 it when we get to it.
 8 CHAIRMAN BABCOCK: Okay. Anything more
 9 on subparagraph (a), grounds for disqualification?
 10 HONORABLE SCOTT BRISTER: Just we should
 11 note on (b)(8) that is a change. Sorry.
 12 CHAIRMAN BABCOCK: That's grounds for
 13 recusal.
 14 HONORABLE SCOTT BRISTER: Sorry. Never
 15 mind.
 16 CHAIRMAN BABCOCK: We're on grounds for
 17 disqualification right now. So nothing more on that?
 18 So we're okay on subparagraph (a); is that correct?
 19 Nobody else sees anything?
 20 Okay. Let's go to (b) then. We've
 21 already made one change on (b)(3). What else? Judge
 22 Brister did you have something?
 23 HONORABLE SCOTT BRISTER: Yeah. (8)(a)
 24 extends "judge related to the lawyer to the third
 25 degree." Currently the rule is just the first degree,

1 with Vinson & Elkins even if he's not a lawyer in the
 2 proceeding or he practices in Washington, and I'm
 3 hearing some case in the Austin office?
 4 PROFESSOR DORSANEO: It would have to be
 5 your uncle or your aunt. Cousins are fourth degree.
 6 HONORABLE SCOTT BRISTER: You're right.
 7 You're right.
 8 HONORABLE F. SCOTT MCCOWN: Well, still.
 9 My uncle or my aunt.
 10 PROFESSOR DORSANEO: You only know that
 11 if you teach this stuff.
 12 HONORABLE F. SCOTT MCCOWN: And it's also
 13 my spouse's uncle or aunt?
 14 CHAIRMAN BABCOCK: Okay. Aunt Sally from
 15 the Washington office of V&E.
 16 HONORABLE F. SCOTT MCCOWN: I don't think
 17 we want to do this.
 18 CHAIRMAN BABCOCK: Okay. Justice Duncan,
 19 what do you think?
 20 HONORABLE SARAH DUNCAN: That's pretty
 21 broad.
 22 HONORABLE SCOTT BRISTER: Which, any --
 23 the lawyer in the case or just in the lawyer's firm?
 24 HONORABLE F. SCOTT MCCOWN: Lawyer's
 25 firm.

1 so the judge's cousin is fine under the current rule,
 2 but would be barred under this change.
 3 MR. ORSINGER: I believe that's required
 4 by the Government Code.
 5 HONORABLE SCOTT BRISTER: Yeah. We
 6 discussed that at length and, you know, there may be a
 7 problem in small towns, but I think we came down
 8 agreeing that it's better not to have a judge who --
 9 especially in this day of so many visiting judges, it's
 10 better not to have cousins trying cases for each other.
 11 HONORABLE BILL RHEA: Or the cousins in
 12 the law firm.
 13 PROFESSOR DORSANEO: Cousins are the
 14 fourth degree.
 15 CHAIRMAN BABCOCK: And the footnote says
 16 currently first degree.
 17 PROFESSOR DORSANEO: Cousins are the
 18 fourth degree.
 19 CHAIRMAN BABCOCK: Doesn't 18b(2)(f) say
 20 third degree?
 21 MR. ORSINGER: Yeah. It does, and also
 22 the Government Code 21.005 says third degree.
 23 CHAIRMAN BABCOCK: So where does --
 24 HONORABLE SCOTT BRISTER: b(2)(f) is
 25 parties. We're talking about the lawyers.

1 HONORABLE SCOTT BRISTER: I agree the
 2 lawyer's firm is broader than I -- you-all added this
 3 on, right, the subcommittee?
 4 MR. HAMILTON: No. It's in the
 5 recodification.
 6 HONORABLE SCOTT BRISTER: Why is it in
 7 italics?
 8 HONORABLE F. SCOTT MCCOWN: Because it's
 9 a bad idea.
 10 HONORABLE SCOTT BRISTER: My recollection
 11 was our previous draft was just the lawyer trying the
 12 case can't be third degree as a judge.
 13 MR. HAMILTON: It's in the
 14 recodification.
 15 CHAIRMAN BABCOCK: So you're suggesting
 16 we strike this italicized language?
 17 HONORABLE F. SCOTT MCCOWN: So moved.
 18 PROFESSOR DORSANEO: I'll bet we find it
 19 in our debate. I think it may have gotten voted up, you
 20 know, closed votes, but I'll bet -- it's not in the
 21 recodification draft unless it was voted by the
 22 committee to be in there.
 23 HONORABLE SCOTT BRISTER: But I thought
 24 the stuff in italics here -- because we didn't have
 25 anything in the recodification draft about the campaign

1 CHAIRMAN BABCOCK: Oh, I see. Okay.
 2 MR. ORSINGER: If you look in your
 3 materials, a few pages further up is Government Code
 4 Section 21.005, which is disqualification. "A judge or
 5 justice of the peace may not sit in a case if either of
 6 the parties is related to him by affinity or
 7 consanguinity within the third degree."
 8 Now, that's the Legislature speaking, but
 9 the Constitution permits the Legislature to speak
 10 because the Constitution says within such degree as may
 11 be provided by law.
 12 HONORABLE SCOTT BRISTER: That's just
 13 parties again.
 14 MR. ORSINGER: Only parties?
 15 HONORABLE SCOTT BRISTER: (8) is
 16 attorneys.
 17 HONORABLE F. SCOTT MCCOWN: Well, and the
 18 other thing about the Government Code is they have to be
 19 the lawyer in the proceeding. This draft expands it
 20 tremendously. It includes any lawyer in the firm, and I
 21 don't think we want to do that.
 22 HONORABLE SCOTT BRISTER: Why did you-all
 23 add that?
 24 HONORABLE F. SCOTT MCCOWN: If my cousin
 25 practices at Vinson & Elkins, I can't hear any cases

1 contribution.
 2 CHAIRMAN BABCOCK: Well, what's everybody
 3 think? What's the right side of the room think?
 4 MS. CORTELL: Strike the new language.
 5 CHAIRMAN BABCOCK: Who said that? Nina
 6 said that. Nina from a big firm, by the way. Aunt Nina
 7 from the Dallas office.
 8 Anybody opposed to striking this?
 9 Justice Hardberger.
 10 HONORABLE PHIL HARDBERGER: No. I would
 11 second Judge McCown's motion.
 12 CHAIRMAN BABCOCK: Okay. Everybody in
 13 favor?
 14 MR. HAMILTON: Let me make a comment,
 15 Chip. I guess I don't see the difference in if the
 16 judge is going to be related to the lawyer that's in the
 17 proceeding and he's got a partner back in the office and
 18 they stand to make a million-dollar fee out of the case,
 19 and what difference does it make if it's the lawyer at
 20 the proceeding or the lawyer that's back at the office
 21 he's related to?
 22 HONORABLE F. SCOTT MCCOWN: But let me
 23 point out that can be handled under the reasonable
 24 appearance, the generic rule, and you can fine-tune a
 25 specific recusal motion if you've got a two-person law

1 firm and your uncle lives next door to you and you're
 2 the beneficiary of his will, but this rule would be for
 3 every situation, and it seems like there are lots of
 4 situations where it would be way too broad.
 5 CHAIRMAN BABCOCK: Buddy Low.
 6 MR. LOW: Chip, I know when David Fisher
 7 in my firm was an associate we could practice in Judge
 8 Fisher's court. David couldn't. When he became a
 9 partner we just could no longer. I mean, I don't know
 10 if that followed the Federal or what, but there was a
 11 difference between an associate and a partner drawn in
 12 that particular situation. Now, that might have been
 13 because of some Federal rule in the Eastern District
 14 or -- but they did draw a distinction.
 15 CHAIRMAN BABCOCK: Yeah. If we --
 16 "member" may have some connotation there.
 17 MR. LOW: Right.
 18 HONORABLE SCOTT BRISTER: But remember
 19 the last -- whatever the last-minute case was that
 20 started the deal about motions within less than ten days
 21 was because they hired the judge's son as an associate
 22 at the law firm, and that does look stinky. I don't
 23 care if they're not paying him dirt. It still looks bad
 24 hiring the judge's son, even if he doesn't get to share
 25 partnership profits.

1 anything to say about this? There is a motion which has
 2 been seconded to delete the language "or a member of
 3 such lawyer's firm." Let's count the votes on this one.
 4 All in favor of deleting that language raise your hand
 5 now. I count 22 in favor.
 6 All opposed? Five opposed. It carries
 7 22 to 5, so we will delete that language.
 8 Okay. What else about grounds for
 9 recusal subparagraph (b)?
 10 MR. HAMILTON: Well, we've added two new
 11 paragraphs, (9) and (10).
 12 CHAIRMAN BABCOCK: We're going to talk
 13 about them for sure.
 14 MR. WATSON: Let me ask one other thing
 15 before we get to those. Was there any discussion in the
 16 prior drafting of the situation in which one of the
 17 counsel in the case is representing the judge in another
 18 matter? I don't want to go into that if it hasn't come
 19 up, but I've hit that. I just recently had a motion for
 20 new trial granted on the court's own motion after the
 21 time -- you know, everything had expired on the last day
 22 of plenary jurisdiction and found out that indeed that
 23 the lawyer on the other side was a member of the firm
 24 handling that judge's medical malpractice case which was
 25 ongoing and in settlement at the time the motion for new

1 CHAIRMAN BABCOCK: Associates today get
 2 paid more than dirt, I might add.
 3 MR. LOW: But there the judge's son is
 4 working in the case and here the associate has nothing
 5 to do with the case. They hired him for that case.
 6 Here the associate doesn't. We have like a district
 7 judge's son-in-law works for us. He can't brief or do
 8 anything, and when he becomes a partner we can no longer
 9 practice in that court. I mean, that's the way we've --
 10 HONORABLE SCOTT BRISTER: Well, this says
 11 "the lawyer in the proceeding," so as written it doesn't
 12 matter whether you bring the -- you know, the judge's
 13 grandson would be second degree, so if he's in the
 14 proceeding the judge is recused.
 15 MR. LOW: He's --
 16 HONORABLE SCOTT BRISTER: And ought to
 17 be.
 18 MR. LOW: That's what I'm saying. He was
 19 not allowed to do anything in that judge's court. He
 20 was an associate. He couldn't do anything. He couldn't
 21 work on any cases in that court. He became a partner
 22 and then the whole firm no longer can practice in that
 23 court for some reason. I don't know if we made our own
 24 rules or -- but it sounded logical to me.
 25 HONORABLE F. SCOTT McCOWN: Well, every

1 trial was granted on the court's own motion.
 2 It did get my attention, and yet I don't
 3 see anything here that would tell me that when I go in
 4 and the lawyer on the other side owes a fiduciary duty
 5 to the judge that I have any basis to raise that, if
 6 maybe this is a little too close indeed. To me third
 7 degree of consanguinity pales by comparison to an
 8 existing attorney-client relationship between the judge
 9 and the person who's on the other side.
 10 JUSTICE HECHT: This came up in a
 11 reported case, didn't it, out of the --
 12 MR. EDWARDS: It sure did.
 13 JUSTICE HECHT: The 13th Court of
 14 Appeals.
 15 MR. EDWARDS: It sure did, and what
 16 happened in that case was the motion to disqualify the
 17 judge or to recuse him was heard by the appointed judge
 18 who recused him. The recused judge then filed a motion
 19 for rehearing through the lawyer who represented him and
 20 was also a party in the case. The recusal judge
 21 reversed his position and overruled the motion to
 22 recuse. A mandamus was sought.
 23 The 13th Court split three/three on
 24 whether there was a gross abuse of discretion in failing
 25 to recuse on one hand or whether there was jurisdiction

1 judge can make an assessment of the actual nature of the
 2 relationship with their relatives and have their own
 3 individual rules for recusal, and every party can make
 4 an assessment and use the generic rule if they want to
 5 move to recuse, but to say that in all situations you
 6 have to stand aside seems to me to be too broad. I
 7 think we've got it covered just deleting that italicized
 8 language.
 9 MR. YELENOSKY: Assuming that this
 10 language doesn't limit the broader rule by being more
 11 specific. Because I agree with you, but if one reads
 12 that rule and says, well, it can never come under the
 13 general rule because it's, you know, beyond the terms of
 14 No. (8), do you think you could still raise, for
 15 instance, the judge's son being hired under the general
 16 rule?
 17 HONORABLE F. SCOTT McCOWN: Sure.
 18 HONORABLE SCOTT BRISTER: Sure.
 19 CHAIRMAN BABCOCK: You would think you
 20 could.
 21 MR. ORSINGER: And how likely are you to
 22 win?
 23 HONORABLE F. SCOTT McCOWN: Well, it's
 24 going to depend.
 25 CHAIRMAN BABCOCK: Has anybody else got

1 to hear a mandamus for a recusal on the other hand, and
 2 they brought in a seventh judge who cast his vote in
 3 favor of gross abuse, and the Supreme Court held that
 4 there was no mandamus jurisdiction for recusal because
 5 the rule says it may be raised on appeal. So it is a
 6 problem.
 7 JUSTICE HECHT: I think I remember those
 8 cases, and I think the attorney --
 9 MR. WATSON: Yeah. Believe me, I looked
 10 at mandamus cases.
 11 JUSTICE HECHT: Wasn't the attorney in
 12 that case representing the judge in another recusal
 13 context?
 14 MR. EDWARDS: No. Well, yeah.
 15 JUSTICE HECHT: He was not representing
 16 him in a malpractice case.
 17 MR. EDWARDS: The judge had represented
 18 himself through the 13th Court and then the lawyer
 19 picked up the case to file another mandamus to the
 20 Supreme Court.
 21 MR. WATSON: Well, I mean, I've had them
 22 come to me, all of us have, and say, "Can you represent
 23 me in X matter," you know, "My roof is falling in. I
 24 need a DTPA case," and I just say, "No, I would not feel
 25 comfortable in your court," but that's me handling it on

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1 my end. My problem is when I walk in the courtroom and
 2 the guy on the other side I find out by hook or crook is
 3 trying to get a million dollars for the judge.
 4 You know, where do I go? And
 5 particularly in my situation a new trial is granted on
 6 the court's own motion, appeal from that? Mandamus from
 7 that? Mandamus to recuse? Grounds for recusal? It
 8 stinks. It looks terrible. You know, the weapon is go
 9 to the press. That's the weapon that you have there.
 10 That's it, but to me this committee ought to do
 11 something in that area if we're worried about third
 12 degree associates.
 13 HONORABLE F. SCOTT MCCOWN: Are we going
 14 to come back to these rules at our next meeting?
 15 CHAIRMAN BABCOCK: It depends. It
 16 depends on whether we've gotten through them today.
 17 HONORABLE F. SCOTT MCCOWN: The reason I
 18 ask is because I wonder if this question should be
 19 recommitted to the subcommittee because it's a lot -- on
 20 first flush you agree that a lawyer who has an existing
 21 attorney-client relationship with the judge should not
 22 be a lawyer in a proceeding in front of the judge. The
 23 problem is you have to write the rule to catch a lot of
 24 subtleties.
 25 For example, every judge in the state has

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1 cases where the AG represents him because we're
 2 constantly getting sued by pro se litigants, and the AG
 3 comes in and represents us or the county attorney
 4 represents us. You also have the problem of are you
 5 talking about a then existing attorney-client
 6 relationship or are you talking about a former one?
 7 For example, is the lawyer who drafts
 8 your will, and he did it 15 years ago, disqualified?
 9 And then what about the law firm? And while we
 10 certainly need to write a rule that's fair to the
 11 parties there are also some concerns about judges being
 12 able to get representation in a community, and I'm not
 13 opposed to having a rule about it and can see some good
 14 sense to a rule, but I don't think we can sit right here
 15 in this big group and draft a rule that's actually going
 16 to catch all of the subtleties.
 17 MR. WATSON: That's why I started by
 18 saying has it been considered? I assumed it had and has
 19 been rejected.
 20 PROFESSOR DORSANEO: I don't think you
 21 can assume that. There are a lot of things that could
 22 be added. Judges have a lot of relationships with a lot
 23 of different people, and you know, this one may be
 24 currently of real, you know, significance at a higher
 25 level than, you know, just good friends or lifelong

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1 friends which might be a serious problem, too, but I
 2 think the thing to do is to send it back to the
 3 committee. These rules are never finished. As Judge
 4 Pope used to say, you know, rule-making is a continuous
 5 process.
 6 MR. WATSON: I didn't mean to throw it
 7 off track.
 8 CHAIRMAN BABCOCK: Which is a good thing
 9 for people who publish books about them.
 10 PROFESSOR DORSANEO: Actually, that turns
 11 out not to be true.
 12 CHAIRMAN BABCOCK: Okay. Buddy Low.
 13 MR. LOW: I was going to say, there are a
 14 lot of other things you can get -- I'd rather have a
 15 lawyer representing the judge be on the other side than
 16 be involved in some lawyers that I know who travel with
 17 the judge, and I mean, they don't represent him, but
 18 it's a lot closer than that. So that's why you have to
 19 deal with that other ways.
 20 CHAIRMAN BABCOCK: Justice McClure.
 21 HON. ANN CRAWFORD McCLURE: If you put
 22 that in, you need to recognize also that when judges get
 23 divorced somebody is representing their spouse, and so
 24 the lawyer who represented the spouse is likely going to
 25 want to recuse the judge whose spouse he represented in

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1 any further proceedings that he's gotten from then on,
 2 as nasty as some of them in El Paso have been. So if
 3 the committee is going to consider that sort of
 4 representation, you need to consider also not just who's
 5 representing the judge but who's representing the
 6 judge's wife.
 7 CHAIRMAN BABCOCK: Somebody else over
 8 here have something that I missed? Okay. Richard.
 9 MR. ORSINGER: This is a very profound
 10 mission that this subcommittee is about to go off on
 11 because it's --
 12 CHAIRMAN BABCOCK: Says the leader of the
 13 subcommittee.
 14 MR. ORSINGER: Well, I mean, you know, we
 15 can take Skip's fact scenario and say that it's
 16 troublesome; but, you know, there are judges that hunt
 17 on leases with other judges. There are judges that take
 18 vacations with other judges. There are judges whose
 19 children are best friends. I mean with lawyers. I
 20 mean, once we start down the road that we're going to
 21 disqualify judges based on friendships or associations
 22 with the opposing lawyer then we have opened up a whole
 23 new universe from where we've ever been before, and
 24 let's plan to take a lot of time with it.
 25 MR. LOW: And I think the rule is based

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1 on, first, the integrity of the judge. It might not be
 2 there every time and then these are just sort of minimal
 3 things. If you go way beyond that, I think Richard is
 4 absolutely right.
 5 CHAIRMAN BABCOCK: Okay. Let's do this.
 6 Let's take a vote on whether or not this issue is of
 7 serious -- of sufficient seriousness to commit it to the
 8 subcommittee. Scott.
 9 HONORABLE SCOTT BRISTER: It seems to me
 10 these -- you know, these rules are in every case you're
 11 disqualified, period, if this exists. If it's one that
 12 it's sometimes yes, sometimes no, then it ought to come
 13 under the appearance of impropriety. It seems like, you
 14 know, this one seems to me close, but you know, I can
 15 imagine a case where, you know, the attorney is suing to
 16 change the way judges are elected or something, so in
 17 effect, this guy or gal is my attorney, but you know,
 18 it's so far removed.
 19 HONORABLE F. SCOTT MCCOWN: You're a
 20 member of a class action.
 21 HONORABLE SCOTT BRISTER: Right. I mean,
 22 there are circumstances where I would hate to -- it
 23 seems to me this falls more in the category of it ought
 24 to be case by case rather than it's always a recusal
 25 ground.

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1 CHAIRMAN BABCOCK: Okay.
 2 MR. HAMILTON: It's covered under ground
 3 (1) perhaps.
 4 CHAIRMAN BABCOCK: Yeah. It would be
 5 under ground (1), impartiality. Yeah, Steve.
 6 MR. YELENOSKY: Well, in order for that
 7 to work I imagine there should be something done with
 8 regard to disclosure, though. You may not have known
 9 that the attorney on the other side was representing the
 10 judge, and even if we don't want an automatic rule that
 11 says that's grounds for recusal and we want to put it
 12 under the generic rule, you'd have to have presumably
 13 some rule that requires disclosure of that information.
 14 CHAIRMAN BABCOCK: Okay. Everybody who
 15 wants to submit this issue to the subcommittee raise
 16 your hand.
 17 HONORABLE SCOTT BRISTER: I'm sorry.
 18 What was the --
 19 CHAIRMAN BABCOCK: Everybody who wants to
 20 submit the issue of recusing the judge when he's
 21 represented by a lawyer who is representing a party in
 22 the case raise their hand.
 23 MS. McNAMARA: The alternative is to just
 24 let it go?
 25 CHAIRMAN BABCOCK: Yes.

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1 MS. SWEENEY: Say the question again,
 2 Chip.
 3 CHAIRMAN BABCOCK: Yeah. Everybody who
 4 wants to submit the issue of recusing the judge when a
 5 party in a pending case is represented by a lawyer who
 6 also currently represents the judge raise your hand.
 7 Everybody who is opposed to submitting it
 8 to the subcommittee raise your hand. All right. There
 9 are 16 people that think it should not be submitted and
 10 five that think it should. I think based on that we
 11 ought to not worry about it. Yeah, Joe.
 12 MR. LATTING: How does the committee feel
 13 about what Stephen raised, which is the notion of not
 14 trying to list each one of these potential abuses, but
 15 put something in the rule that would enable the lawyers
 16 in the case to find out that there was some basis that
 17 they ought to be concerned? Is there anything in the
 18 rule that covers that now where if the judge, for
 19 example, is represented by an attorney and the other
 20 attorneys in the case don't know that? Is the judge
 21 under any duty to divulge that, and should he or she be?
 22 It seems to me that it would be reasonable to require
 23 the judge to publicize at least among the members of
 24 that -- of the parties in the case that there's a basis
 25 that someone might reasonably be concerned.

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1 CHAIRMAN BABCOCK: Judge McCown.
 2 HONORABLE F. SCOTT MCCOWN: That sounds
 3 good in theory but in practice can't work, because what
 4 a judge has to do when the parties and lawyers come
 5 before him or her, the judge knows what all his or her
 6 relationships are with those parties and lawyers, and if
 7 he thinks it's a matter for recusing, he needs to
 8 recuse. If he's not prepared to recuse, there's no
 9 reason to disclose, and if you -- your relationships
 10 with lawyers in any community, big or small, are
 11 endless. You know, should I disclose that I went to
 12 Joe's house for a Christmas party, though, in fact, he's
 13 never invited me I'd like the record to reflect.
 14 MR. LATTING: I considered it.
 15 HONORABLE F. SCOTT MCCOWN: Should I
 16 disclose that Tommy Jacks and I go to the same church?
 17 I mean, it just becomes endless for a judge as to what
 18 other people might make a big deal out of that the judge
 19 is not going to stand aside for.
 20 CHAIRMAN BABCOCK: Well, and judges
 21 frequently do say at the beginning of a case, "Hey, I
 22 know this person or I know that person." I mean,
 23 there's often disclosures. "Anybody think that makes a
 24 difference?"
 25 PROFESSOR DORSANEO: I think anybody who

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1 has lived in a particular legal community for 25 years,
 2 lawyer, judge, whatever, has all kinds of relationships
 3 with a number of different parties; and it's like you'd
 4 say to yourself a kind of, well, they don't -- you know,
 5 "I was represented by this firm. I worked with this
 6 firm and, well, then I worked for this other firm, too,
 7 and I've had these connections," and you have to be
 8 giving a whole history of the community before someone
 9 would think that he or she has enough information.
 10 HONORABLE F. SCOTT MCCOWN: And let me
 11 point out, and I may be sounding guilty here by being a
 12 little defensive sounding, but lawyers have a completely
 13 different attitude about themselves than they do about
 14 judges. If you're a lawyer and somebody comes to hire
 15 you, you may be hunting buddies with the lawyer on the
 16 other side. It would never cross your mind that you're
 17 going to throw the case for your client or go easy for
 18 your client because you hunt with the lawyer on the
 19 other side. Well, then why would you think the judge
 20 would? I mean, lawyers don't have any disclosures or
 21 relationship filters.
 22 MR. LATTING: Well, first of all, I
 23 wanted to say that Suzanne and I are having a
 24 get-together. We would like to have you -- give you the
 25 details. I just raise the question about whether -- the

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1 issue is public confidence, and of course you can get so
 2 far convoluted that you wouldn't want to do that or be
 3 required to say, "I went to so-and-so's house for dinner
 4 or for lunch," but the issue is if there -- I said if
 5 there is a basis that reasonable persons might think
 6 that there is a basis for recusal, shouldn't the judge
 7 just say to the attorneys, "I think everybody needs to
 8 know this," period, and then if they don't want to do
 9 anything about it they don't have to. I'm trying to
 10 cover the situation that --
 11 MR. YELENOSKY: But also, I mean, we
 12 started with the example where the attorney on the other
 13 side was representing the judge, which is far afield
 14 from "I went to lunch with this guy," and so --
 15 HONORABLE F. SCOTT MCCOWN: But what
 16 I'm -- he should have recused in that case. That's what
 17 I'm saying, that you don't --
 18 MR. LATTING: Not necessarily.
 19 MR. ORSINGER: I don't agree with that
 20 either.
 21 HONORABLE F. SCOTT MCCOWN: You don't
 22 have a disclosure rule different from a recusal rule.
 23 You've got the recusal rule. If it comes within the
 24 rule, the judge needs to put it on the table and recuse.
 25 There are a few gray areas where a judge might put it on

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1 the table and the parties might waive it, and the judge
 2 wants it on the table, and if the parties want to waive
 3 it or not, fine. But you can't write a rule that says
 4 to judges, "These things you have to disclose" that's
 5 separate from a rule about "This is when you recuse."
 6 MR. YELENOSKY: Well, but we've said that
 7 this is a gray area, and I think you've reiterated that,
 8 that sometimes it could be and sometimes it shouldn't,
 9 and what you're saying is the judge should make that
 10 decision, and once he's made the decision there's no
 11 point in anybody second-guessing, and I guess I'm saying
 12 that there may be a reason for second-guessing.
 13 HONORABLE F. SCOTT MCCOWN: No. I'm
 14 saying something different. I'm saying you can't define
 15 the gray area. You can put a comment down. You can say
 16 the judges should have integrity and be sensitive, and
 17 if they have any doubt they might want to -- or should
 18 say something, but there is no way to write a rule that
 19 defines the gray area, and there is no way to write a
 20 rule that requires disclosures.
 21 CHAIRMAN BABCOCK: Pam, what do you
 22 think?
 23 MS. BARON: Well, I agree with Scott. I
 24 think that there is a limit to how many rules you can
 25 write that make people behave properly, and we know that

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1 judges like Scott will disclose. Some others may not,
 2 but we can't write a rule that makes everybody do the
 3 same thing in all circumstances and that we do have to
 4 have some faith in the system and that it works.
 5 MR. LOW: Chip, do the judicial canons --
 6 and I'm not familiar with them. Do they cover or hit on
 7 that in any way?
 8 CHAIRMAN BABCOCK: Canon 5 I don't think
 9 requires any particular disclosure.
 10 MR. WATSON: They do not.
 11 MR. LOW: I didn't know whether they did
 12 or not.
 13 MR. WATSON: Our system is so different.
 14 The Federal system, for example, the Center for the
 15 Judiciary has a 12-volume set of red books that goes
 16 through every one of the canons and then goes through
 17 example after example. I mean, all the way to the one
 18 on -- the one I remember is the judge is the godfather
 19 of one of the counsel's children, and the ruling is
 20 clear, no recusal.
 21 You know, I mean, it's crystal clear
 22 going down through these things. The fact that the
 23 judge is currently being represented by one of the
 24 counsel, if I remember correct, has to be disclosed. I
 25 mean, it's just bang, bang, bang, bang, and most of it

1 is just common sense, but we don't have anything like
2 that. We've got the Constitution, the statute, and this
3 rule.

4 MR. ORSINGER: But a disclosure rule
5 isn't going to shed any more light on it. We've got a
6 12-volume set on how to interpret the --

7 MR. WATSON: I agree.

8 MR. ORSINGER: -- disclosure rule.

9 MR. WATSON: I agree.

10 MR. ORSINGER: What we need is a
11 12-volume set of wisdom like that. I presume that came
12 from rulings.

13 MR. WATSON: Yeah.

14 MR. ORSINGER: Or was it opinions of
15 committees?

16 MR. WATSON: Oh, it's write the letter,
17 "What do I do in this situation?"

18 MR. ORSINGER: So it's opinions.

19 MR. WATSON: Center for Judiciary kicks
20 back an opinion letter.

21 MR. ORSINGER: Because if all of that
22 wisdom is there and you put a rule in place that says
23 everyone should disclose whenever they think there might
24 be a potential argument of impartiality or something
25 then what standard do the judges have to go by on what

1 they need to disclose?

2 MR. WATSON: They're Federal judges. My
3 God, who's going to tell them?

4 MR. ORSINGER: No, the state judges. I
5 mean the state judges if we were to adopt a disclosure
6 rule.

7 HONORABLE F. SCOTT MCCOWN: And let me
8 point out, I don't think it promotes public confidence
9 because what happens is you disclose you go to church
10 with Tommy Jacks. The two lawyers know you, know Tommy,
11 know law. They say, "no problem." The case is over.
12 The party that lost says, "By God I lost because he goes
13 to church with Tommy Jacks and I've been shafted." I
14 don't think it promotes --

15 MR. WATSON: I don't know how we got from
16 the lawyer -- from the judge depending on the lawyer for
17 making a million dollars to going to church with Tommy
18 Jacks, but the only thing I'm interested in is if the
19 judge is dependent on counsel to either make or keep him
20 from losing money, should that be a ground for recusal
21 or be a ground for disclosure? Obviously that ain't
22 going to happen. I think we ought to move on.

23 MR. LATTING: Well, I just -- I want to
24 say one thing. I think we're moving in this
25 committee -- we seem to be moving in every one of the

1 discussions I've been to so far toward the notion that
2 the public really doesn't need to know this and this
3 doesn't promote public confidence. I think that person
4 is entitled to think that he got shafted because you
5 went to church with Tommy Jacks. I think that the
6 people are entitled to know what the judiciary is doing,
7 where they're getting their money, and who their
8 associations are with, particularly in light of the fact
9 that we're moving toward an ever more urban society,
10 people don't know these things, and I think there ought
11 to be -- I think we ought to err in the direction of
12 disclosure and not privacy or secrecy in judicial
13 proceedings. So that's where I --

14 CHAIRMAN BABCOCK: Judge Rhea.

15 MR. LATTING: -- come down on that.

16 HONORABLE BILL RHEA: My wife is
17 currently represented by a lawyer, a plaintiff's lawyer,
18 in a case, and her lawyer has not yet appeared in my
19 court, but I'm not convinced that absent a specific rule
20 on this it would have occurred to me to think about
21 whether I should recuse or disclose, and it seems to me
22 that even though there is a rabbit trail here we could
23 go down a line of a bunch of different circumstances,
24 but this issue of a lawyer representing a judge or I
25 think even a judge's spouse is significant, ought to be

1 included, and I would propose we include it. It doesn't
2 seem to me it needs to be referred to a committee. It
3 seems to me straightforward, and I would propose this
4 language: "The judge or the judge's spouse has an
5 existing attorney-client relationship with a lawyer in
6 the proceeding."

7 CHAIRMAN BABCOCK: AS a rule of
8 disclosure?

9 HONORABLE BILL RHEA: AS a rule of
10 recusal.

11 MR. ORSINGER: No, as a grounds for
12 recusal.

13 MR. LOW: When does the attorney-client
14 relationship end? There is a big line of question. I
15 mean, when does it end? Has one? He comes to me and he
16 says, "Would you look at this? I want you to interpret
17 this case for me. I've got some land." No lawsuit, no
18 nothing. Do I have an attorney-client relationship with
19 him, tomorrow, next week? I mean, when does it end?

20 HONORABLE F. SCOTT MCCOWN: Didn't we
21 vote on this question already?

22 CHAIRMAN BABCOCK: Yeah, we did. We're
23 about to take a break.

24 HONORABLE BILL RHEA: The question was
25 whether we referred it to the committee or not.

1 CHAIRMAN BABCOCK: Right. Yeah. Yeah.
2 It was 16 to 5 that the issue was not of sufficient
3 seriousness to submit it to the subcommittee.

4 HONORABLE SARAH DUNCAN: No, I think what
5 we voted on was whether to refer it to the subcommittee,
6 not the significance of the issue. We haven't voted on
7 whether to incorporate precise language into the rule
8 without going to subcommittee.

9 CHAIRMAN BABCOCK: That's true.

10 HONORABLE PHIL HARDBERGER: Elaborating
11 on what Buddy said, too, about the -- I would have
12 trouble with the existing relationship. Wills is a good
13 example. You have a will lawyer who draws up your will.
14 Seven, eight years later he suggests that, you know,
15 that needs to be changed because the tax laws have
16 changed and so forth. It can virtually go over a
17 lifetime, you know, you keep fiddling with it, but there
18 would be years that you're not.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE PHIL HARDBERGER: I don't know
21 whether that's an existing relationship or not. I think
22 we could go and list lots of reasons or lots of examples
23 of where it's -- that's a tough call whether it's an
24 existing relationship or not.

25 CHAIRMAN BABCOCK: No question about

1 that, particularly in the will context. I mean, my wife
2 is a probate lawyer. She has a client. She drafts a
3 will. There's an amendment a year from now and --
4 MR. LOW: What if he's a member of a club
5 and you're doing something -- I think Lillejendol raised
6 that in the Supreme Court, but there are many situations
7 that are hard to define. It's not just like I represent
8 him in a personal injury lawsuit, period.

9 CHAIRMAN BABCOCK: Okay. Yeah, Joe.

10 MR. LATTING: I may be confused, but it
11 seems to me we're talking about two different issues.
12 One is whether something is a basis for recusal,
13 mandatory recusal, and the other is whether a court
14 ought to disclose a relationship. In the interest of
15 public confidence and full disclosure doesn't mean
16 necessarily that if you say, "This guy wrote my will
17 seven years ago and I hear from him from time to time,"
18 and if I were on the bench my reaction -- I think my
19 action would be to say, "And I don't think that creates
20 any problem, and I don't feel like recusing myself, and
21 I'm not going to, but I want you to know about it."

22 CHAIRMAN BABCOCK: We are talking about
23 two different things. Judge Rhea has got some language
24 that he proposed that we're going to take up after the
25 break that this whole committee, since we're not

1 referring it to the subcommittee, the whole committee is
2 going to consider as to whether or not to add an
3 additional ground for recusal, which would be (11) or
4 however we fit it in, and we'll either accept that or
5 not. You're talking about just disclosing it without
6 any comment on whether that's grounds for recusal or
7 not.

8 MR. LATTING: That's right.

9 HONORABLE F. SCOTT MCCOWN: Could I
10 before we break --

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE F. SCOTT MCCOWN: Could we vote
13 on a slightly different question because if I had
14 known -- I thought the way you framed the question it
15 was "Do something or move to another issue."

16 CHAIRMAN BABCOCK: That was my intent,
17 but I can see there was ambiguity in it.

18 HONORABLE F. SCOTT MCCOWN: I would vote
19 to send it to the committee over trying to draft it here
20 and would point out, for example, the rule that's been
21 proposed doesn't do anything about the fact that every
22 single one of us is represented by the Attorney General
23 and the district attorney and the county attorney on a
24 regular basis. It's going to be too complicated to
25 draft here.

1 Judge, but I think we ought to send it back to the
2 committee because it's -- at the break Skip and I were
3 talking about it, and the question comes to my mind
4 there is a distinction between an attorney-client
5 relationship and a fiduciary duty.

6 The fiduciary duty that arises as a
7 result of the relationship is ongoing and continues,
8 keep information confidential. The relationship depends
9 on the scope of the engagement, and if you're engaged
10 just to write a will and nothing further, the
11 relationship terminates when the will is written, but
12 there are situations where you may have a greater scope
13 of that engagement. It might be to continue to monitor
14 estate planning, and I just think because of the
15 complexities of it that it's something that we probably
16 would be better served to allow the committee to
17 deliberate on it rather than vote today, even though if
18 we had to vote or do nothing, I'm in favor of that
19 proposed change.

20 CHAIRMAN BABCOCK: Okay. Yeah, Judge
21 Patterson.

22 HONORABLE JAN PATTERSON: Well, I want to
23 speak in favor of Judge Rhea's language or sending it to
24 committee. I voted in favor of going to committee just
25 because of that concern. I think we're talking here

1 HONORABLE BILL RHEA: Well, the rule as
2 proposed talks about the specific lawyer. That's all it
3 says. If you have an Attorney General in Austin
4 representing me in Federal court then that lawyer ought
5 not to appear in my court. I would recuse if he does.

6 HONORABLE F. SCOTT MCCOWN: I don't think
7 that captures the Attorney General and the D.A., who is
8 the elected official whose name is going to be on your
9 pleadings.

10 CHAIRMAN BABCOCK: Judge Peeples.

11 HONORABLE DAVID PEEPLES: On the issue of
12 what goes back to the subcommittee, I think that this
13 rule, even though I've had some input into it, is rough
14 enough that we shouldn't think we're going to finish it
15 today, and therefore, the committee is going to deal
16 with it again, and everything that we discuss I think is
17 up for grabs in the subcommittee the next time we meet.

18 CHAIRMAN BABCOCK: Okay. Good point.
19 Let's take a break for about ten minutes.

20 (Whereupon a recess was taken.)

21 CHAIRMAN BABCOCK: Okay. I'm going to
22 pass around two lists, one which has the e-mail
23 addresses that we have for everybody, and the second
24 list is the list of fax, telephone numbers, and
25 addresses. There have been a couple of instances where

1 more about a simple bias or economic interest. When
2 you're talking about a lawyer's -- and it may not be
3 wills, but it may be some complex domestic family
4 situation, the judge is going to go to -- is going to go
5 to a lawyer. This is the person in whom they have the
6 utmost confidence that it will be hard to shake, so it
7 is a relationship dealing with life and death problems
8 very often and is a critical relationship, and I think
9 Judge Rhea's language speaks to that, and I would be in
10 favor of it or at least to have it discussed by a
11 committee.

12 CHAIRMAN BABCOCK: Anybody else?

13 HONORABLE PHIL HARDBERGER: I think the
14 committee is the best way to go because there is some
15 substance to this, and yet I have some problems with the
16 language as suggested. That's what we have committees
17 for.

18 CHAIRMAN BABCOCK: Yeah. There was a
19 substantial majority of our group that did not want to
20 send it to the committee. Have we rethought that now?

21 MR. EDWARDS: Yeah.

22 HONORABLE BILL RHEA: And I think the
23 problem with the vote the last time was I didn't hear
24 the option as do we discuss that as a whole, so maybe we
25 ought to just revote.

1 people haven't gotten things, either e-mail or by fax,
2 and so we just want to be sure that our records are
3 accurate, so I'm going to pass these two lists to my
4 left to Joe, and check them off.

5 Also, the sign-in list is at the front of
6 the room here as you come in, so be sure you sign in so
7 you get credit for attendance. Back to -- we've ditched
8 Judge McCown for a period of time, so let's go back to
9 the issue he was interested in. He has an excused
10 absence for about an hour and a half.

11 What about the issue that Judge Rhea has
12 put on the table of the full committee deciding whether
13 there should be an additional ground for recusal which
14 has to do with a lawyer in a case who is also actively
15 representing the judge, taking into account some probate
16 problems and that type of thing? Yeah, Ralph.

17 MR. DUGGINS: I've had similar situations
18 to those that Skip reported, and the judge has continued
19 on in the case. He had a -- has an ongoing
20 attorney-client relationship with one of the lawyers in
21 the case, and he had prior to that a relationship with
22 another lawyer, and then to get around it he had that
23 lawyer hand off his malpractice case to another lawyer,
24 and so I think it is a problem, and as much as I'm
25 tempted to -- I think your suggestion is a good one,

1 MR. YELENOSKY: It just took us awhile to
2 convince you-all. That's all.

3 HONORABLE JAN PATTERSON: That's right.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: Since I will
6 probably be a part of the discussions in the committee,
7 I want to see what the sense of the house is. Can we
8 agree that if we limit this to an existing litigation
9 relationship, that would limit it. That's the main
10 thing we have been talking about here, and that would
11 cut off the will and, you know, tax laws change and the
12 lawyer calls you back up.

13 HONORABLE PHIL HARDBERGER: I think that
14 might cure it, if you have current litigation.

15 HONORABLE JAN PATTERSON: I think so,
16 too.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE PHIL HARDBERGER: That clearly
19 should be grounds.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: The judge -- the judge's
22 wife or husband is talking about getting a divorce, so
23 the judge goes and consults with a family lawyer, but
24 there's no lawsuit filed, but there's a prospect of
25 lawsuit and you're getting advice. Is that a grounds

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1 for recusal even though no lawsuit has been filed?
 2 CHAIRMAN BABCOCK: Justice Duncan.
 3 HONORABLE SARAH DUNCAN: Why are we
 4 distinguishing -- in that vein and the previous comment,
 5 why are we distinguishing litigation? If Richard
 6 Orsinger is doing my pre-nup, is that not --
 7 CHAIRMAN BABCOCK: Just for example.
 8 HONORABLE SARAH DUNCAN: For example.
 9 MR. ORSINGER: That's a hypothetical, I
 10 might point out.
 11 HONORABLE SARAH DUNCAN: Is that not an
 12 ongoing attorney-client relationship? Frankly, I would
 13 like a rule because it would have never occurred to me
 14 to recuse myself in Richard's cases in our court just
 15 because he's doing some contract over there for me.
 16 MR. ORSINGER: Nor would it occur to me
 17 to do it.
 18 HONORABLE SARAH DUNCAN: But if it's the
 19 sense of the group that we should be doing that, I say
 20 let's have a rule. If the AG is representing me in, you
 21 know, a redistricting suit, if people want me to recuse,
 22 that's fine. Just tell me what the rule is.
 23 CHAIRMAN BABCOCK: Yeah. To me it sounds
 24 like it's a distinction between active representation
 25 and inactive or dormant representation. For example, if

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1 somebody wrote a will ten years ago, that representation
 2 is dormant. It may not be over because either the
 3 client -- the judge could call up tomorrow and say,
 4 "Hey, I want to amend my will. I want a codicil or
 5 something," but there's nothing going on. Whereas, your
 6 contract matter is very active. You're talking to him.
 7 You've got a relationship going on at the same time the
 8 case is going on.
 9 MR. LOW: But in the will situation if
 10 the law changes and you know you've drawn a will for
 11 somebody, you have a duty to notify them, so it doesn't
 12 just end when you draw that piece of paper.
 13 CHAIRMAN BABCOCK: Yeah. Carl.
 14 MR. HAMILTON: It seems to me that if we
 15 single out any particular attorney-client relationship
 16 then that give us problems because we can't name them
 17 all, and even by naming that, why name that instead of a
 18 business relationship or something else as a grounds.
 19 So it seems to me that if these grounds are covered
 20 under item No. (1), (b)(1), that what we really need is
 21 a disclosure rule which simply says that the judge has
 22 to disclose if he or his wife is currently being
 23 represented by any party in the litigation, and he has
 24 that duty anyway except there's just no rule that says
 25 that.

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1 And if he's required by rule to make the
 2 disclosure, he has to decide, "Do I want to disclose the
 3 fact that I go hunting with this lawyer every weekend?
 4 Do I want to disclose the fact that he's representing me
 5 in a lawsuit?" He has to decide to make the disclosure,
 6 and then once it's made then the lawyer can decide
 7 whether he wants to ask for recusal under (b)(1), but I
 8 think the disclosure is a better way to do it than
 9 trying to write a rule to cover all the situations.
 10 CHAIRMAN BABCOCK: Justice McClure.
 11 HON. ANN CRAWFORD McCLURE: We have
 12 another sticky problem if we're going to go down that
 13 route. Some discussion needs to be given about lawyers
 14 that are representing the children of the judge and/or
 15 the judge's spouse. If there is ongoing family law
 16 litigation, there's likely to be in real extreme cases
 17 an ad litem appointed to represent the child, and a
 18 judge may be far more interested, if some sort of
 19 impropriety is going to occur, with currying favor with
 20 an ad litem for use in his case than his own lawyer or
 21 her own lawyer.
 22 MR. HAMILTON: You could say "judge or
 23 judge's family" instead of "spouse."
 24 MR. WATSON: Third degree of
 25 consanguinity.

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1 CHAIRMAN BABCOCK: Anybody have any other
 2 comments?
 3 MR. ORSINGER: Can I respond to Carl's?
 4 CHAIRMAN BABCOCK: Yeah.
 5 MR. ORSINGER: The principle of
 6 disclosure, inventing a disclosure requirement as
 7 opposed to inventing a right of recusal doesn't make as
 8 much sense to me if we don't even have a requirement
 9 that a judge disclose a known ground of recusal, like
 10 (b)(1) through (10), and yet we're going to have a
 11 disclosure rule on one that's not even listed as a
 12 ground for recusal.
 13 It would make sense to me if you're going
 14 to go the disclosure route to disclose the known grounds
 15 but exclude, number one, the judge's impartiality might
 16 reasonably be questioned because that's so vague that it
 17 doesn't give a standard for a judge to go by, but if
 18 there's a disclosure requirement it ought to be on the
 19 accepted grounds of recusal and not on one that we can't
 20 even agree is a ground for recusal.
 21 HONORABLE HARVEY BROWN: I'm not sure
 22 what the disclosure rule would have as a sanction for
 23 failure to do it. So I wonder if this is better handled
 24 as a judicial ethics issue for disclosure rather than a
 25 Rule of Civil Procedure. If you do have a disclosure

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1 rule and the judge doesn't disclose, what happens? I
 2 don't see how there is a sanction within the rule for
 3 that. That seems to me that's ethics. It might be a
 4 good ethical issue.
 5 HONORABLE SARAH DUNCAN: There is some
 6 sort of sanctions. As written, "a ground for recusal
 7 may be waived by the parties after it is fully disclosed
 8 on the record," which would seem to indicate that if
 9 it's not disclosed it's not waived.
 10 CHAIRMAN BABCOCK: Okay.
 11 HONORABLE HARVEY BROWN: Right, but if
 12 it's something we are going to require disclosure of but
 13 we are not going to make it a ground for recusal such as
 14 the hunting lease, there would be no sanction.
 15 HONORABLE SARAH DUNCAN: Well, one
 16 question I have on the disclosure aspect of it is I
 17 think maybe if we're going to require disclosure we need
 18 to tell judges what they need to disclose because that's
 19 going to vary with each judge as to what they think they
 20 do need to disclose. I mean, it's like Orsinger. I'm
 21 happy to disclose that. I'm happy to recuse, but maybe
 22 we need a set of rules to tell us what to do.
 23 CHAIRMAN BABCOCK: Uh-huh. Well, on this
 24 whole issue of --
 25 MR. WATSON: Can I just take it back,

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1 take the whole issue back? I was just asking a question
 2 if it had been considered or not.
 3 CHAIRMAN BABCOCK: Yeah. Thanks, Skip.
 4 MR. ORSINGER: That's the danger of
 5 throwing something out in a committee.
 6 CHAIRMAN BABCOCK: Yeah. That's right.
 7 Well, do we have a consensus that maybe this issue of a
 8 lawyer representing the judge that he's appearing in
 9 front of on behalf of a party ought to be considered
 10 some more? Is there a consensus on that?
 11 HONORABLE DAVID PEEPLES: By the
 12 subcommittee?
 13 CHAIRMAN BABCOCK: Is everybody okay with
 14 that? Well, then Richard -- Richard dislikes it, but
 15 get your subcommittee to look into that.
 16 MR. ORSINGER: We will.
 17 MR. LATTING: I would like to --
 18 CHAIRMAN BABCOCK: Disclosure is part of
 19 that.
 20 MR. LATTING: To be specific, I would
 21 like to suggest that the judge be under a duty to
 22 disclose all grounds for recusal, including No. (1).
 23 You know, what do you do --
 24 HONORABLE SCOTT BRISTER: When?
 25 MR. LATTING: -- about a sanction for

1 those --
 2 HONORABLE SCOTT BRISTER: When? I have
 3 800 cases filed a year. I don't get like the Supreme
 4 Court does the first page of the brief is who's
 5 involved.
 6 MR. LATTING: Well, then you're not --
 7 then you can just deal with it on a rule of reasonable
 8 basis, Scott. That is, the purpose I'm trying to
 9 accomplish is that if a judge has something that he or
 10 she knows that the people of this courtroom ought to
 11 know about that might reasonably reflect on the
 12 impartiality of the judge, the judge ought to say so and
 13 not sit there quiet about it. That's all. It's very
 14 simple. Now, it may be difficult, but it's not complex.
 15 HONORABLE HARVEY BROWN: I somewhat beg
 16 to differ about whether it's complex just in the sense
 17 of it's a very amorphous, vague standard. If I'm going
 18 to disclose something that might cause my impartiality
 19 to be reasonably questioned, what you think that is and
 20 what I think that is are very different, and I think
 21 Tommy Jacks at church is a good example. Is it Tommy
 22 Jacks at my church if my church is a hundred people, 20
 23 people, Second Baptist in Houston, you know, with 5000
 24 or 10,000 people? I just think that's a pretty
 25 amorphous standard that would be hard for judges.

1 CHAIRMAN BABCOCK: Yeah. If you leave it
 2 kind of vague like this, aren't you -- I mean, if the
 3 judge discloses it, have you not almost answered the
 4 fact that he ought to be recused?
 5 MR. LOW: Right. That's going to raise
 6 many recusals.
 7 CHAIRMAN BABCOCK: That's the problem.
 8 HONORABLE HARVEY BROWN: Because I raised
 9 it that means I think it might cause my impartiality.
 10 MR. LOW: Right.
 11 CHAIRMAN BABCOCK: Or might reasonably be
 12 questioned, well, I've disclosed it because somebody
 13 might reasonably question it.
 14 MR. LATTING: The converse seems to me to
 15 be a worse situation, namely that the judge knows, has
 16 actual active knowledge of something that might
 17 reasonably call his or her impartiality into question,
 18 yet decides not to disclose that. How can that be a
 19 good situation?
 20 CHAIRMAN BABCOCK: It can't, but under
 21 that circumstance wouldn't a judge recuse himself
 22 voluntarily?
 23 MR. LATTING: He should, but there is an
 24 area where someone might think that is -- might think
 25 that it's grounds for recusal, and he or she discloses

1 it, and the lawyers say, "No, we don't think so," or it
 2 gets explored and worked out. It just doesn't seem to
 3 me to do harm, and it seems to me to inform the public,
 4 and that seems to me to be a good principle, so that's
 5 why I'm harping on it.
 6 MR. YELENOSKY: Well, I think the
 7 difference is what I was getting back to before with
 8 Judge McCown is there are these close calls where it
 9 reasonably could be questioned, and the judge -- Judge
 10 McCown would have in his own mind, even those close
 11 calls, he would make the decision, and if he made the
 12 decision that he wasn't going to recuse then it did not
 13 need to be second-guessed by anyone, and I think the
 14 rule of disclosure would say on those close calls that
 15 it should be subject to being questioned by others, and
 16 it does require the judge to make some decision about
 17 what a close call is.
 18 For instance, I'm the judge and this firm
 19 has hired my son, I think that would be one you want to
 20 disclose even though you may have in your own mind
 21 determined that this is my long-estranged son who I want
 22 to have nothing to do with and, therefore, when we get
 23 down to looking at it I won't be recused, but by
 24 appearances, that's something that ought to be disclosed
 25 and see the light of day.

1 CHAIRMAN BABCOCK: Okay. Richard, as
 2 part of your charge you're going to think about this
 3 disclosure thing, too. You want to contribute to that,
 4 Joe?
 5 Who else had something to say?
 6 MR. LATTING: I've already contributed on
 7 it.
 8 HONORABLE SCOTT BRISTER: Well, there's
 9 a -- you know, I mean, I don't have any privacy interest
 10 once you run for office, but you know, you're not
 11 worried about this when the parties settle. You don't
 12 care when the parties settle. It doesn't matter. You
 13 don't care about this if the person who the judge was
 14 arguably biased in favor of loses. The only reason
 15 these ever come up and the ones the public gets upset
 16 about is like whatever the case was where the big gas
 17 pipeline got hit for a huge verdict and it turned out
 18 the judge -- then of course people started hunting
 19 around for a connection. Then they find the connection,
 20 and then the judge recuses, and they set it aside and do
 21 a new trial. Who's offended by that? Nobody.
 22 It is a waste of time, but that's -- the
 23 incentive for judges right now to disclose is not to
 24 waste time because if I disclose it up front nobody
 25 moves to recuse. Then it's waived, and that's the end
 1 of it, but if you get to "I've got to disclose it" then
 2 what's going to happen when somebody catches me on one,
 3 and I have oral hearings, and I can't look through these
 4 files and find out and maybe this friend of mine doesn't
 5 show up at that hearing or I don't know of your
 6 association, and then if I rule one way, the headline in
 7 the paper is "Judge Violates Disclosure Law" because
 8 this is what the press loves. They love disclosure
 9 laws, and they hate violation of disclosure laws, and
 10 they love to say we have broke the law by not
 11 disclosing, and this is going to be a
 12 how-to-embarrass-judges in my view.
 13 MR. LATTING: Well, it sounds like a good
 14 rule to me, Judge.
 15 HONORABLE SCOTT BRISTER: Look, you're
 16 already paying us less than a first year associate. Now
 17 you want to shame us, too.
 18 MR. LATTING: Well, you're right. I'll
 19 withdraw that comment.
 20 CHAIRMAN BABCOCK: Well, and, remember,
 21 Joe is the guy that didn't want cameras in the
 22 courtroom.
 23 MR. EDWARDS: Well, I think we ought to
 24 get you a raise. The heck with --
 25 CHAIRMAN BABCOCK: Okay. Richard, you're

1 going to look at all this stuff. One last comment,
 2 Judge Brown.
 3 HONORABLE HARVEY BROWN: If you're going
 4 to look at disclosure rules, you might as a starting
 5 point look at the disclosure rules for arbitrators
 6 because at least there is some case law on that for a
 7 guide.
 8 CHAIRMAN BABCOCK: Thanks. Let's move
 9 on. Is there anything before we get to (b)(9) and (10)?
 10 Is there anything in (1) through (8) that needs revision
 11 or change or study? We've already made one change to
 12 (b)(3), "the judge has been or is likely to be a
 13 material witness," and we've deleted the italicized
 14 phrase from (b)(8), which said "or a member of such
 15 lawyer's firm."
 16 Anything else? Okay. Seeing nothing
 17 then, let's go to (9) and (10). Richard, you want to
 18 tell us what you've done here?
 19 MR. ORSINGER: well, basically this is
 20 the last proposal from the last time, isn't it, Carl?
 21 MR. HAMILTON: Yes, it is.
 22 MR. ORSINGER: Since the debate, though,
 23 Bob Pemberton has further explored this issue of the
 24 mandatory nature of these campaign contribution limits,
 25 sent a memo out, and I think Bob ought to share his

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1 current thinking on that.
 2 MR. PEMBERTON: Okay. Well, I guess I've
 3 kind of gone back and forth. You may think I'm foolish,
 4 but at least I'm intellectually honest or trying to be.
 5 In our last meeting, as you remember, Representative
 6 Dunnam and I got into an exchange about whether the
 7 campaign contribution limits under the Judicial Campaign
 8 Fairness Act were mandatory or not mandatory.
 9 Representative Dunnam's and many of yours impression was
 10 they are the sort of thing -- they were purely voluntary
 11 that you could opt into.
 12 My recollection as I was relating it from
 13 our Judicial Campaign Finance Task Force was that they
 14 were mandatory, and on that basis the committee
 15 perceived that writing a recusal rule based around these
 16 limitations that were mandatory was not that big of a
 17 deal. Subsequently I re-examined the issue, and also
 18 there were some matters that were released from the
 19 Ethics Commission that sort of bore upon this and
 20 changed my thinking a bit and realized the way this
 21 thing works is in the first instance the contribution
 22 limits do apply to everybody. In that sense they are
 23 mandatory, but if a candidate opts out of or does not
 24 opt into the limits on expenditures then the limits of
 25 all kinds, expenditures and contributions, are waived as

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1 to the other candidates, but they still would apply in
 2 the first instance to the first waiving candidate.
 3 MR. YELENOSKY: Assuming the Ethics
 4 Commission has declared that that happened.
 5 MR. PEMBERTON: Right.
 6 MR. YELENOSKY: So there would have to be
 7 a declaration by the Ethics Commission, so there
 8 wouldn't be any doubt about it.
 9 MR. PEMBERTON: That's how it works.
 10 That's how it works. In the first instance the
 11 contribution limits do apply, and then if one candidate
 12 opts out or files a declaration with the Ethics
 13 Commission saying they are not going to comply with the
 14 contribution limits, the Ethics Commission then issues a
 15 directive that the limits are waived as to everybody
 16 else; and, in fact, the Ethics Commission has done that
 17 recently.
 18 MR. YELENOSKY: They continue to apply, I
 19 think you and I agree --
 20 MR. PEMBERTON: Right.
 21 MR. YELENOSKY: -- to the noncomplying
 22 candidate.
 23 MR. PEMBERTON: That's correct.
 24 MR. YELENOSKY: And so in that sense the
 25 noncomplying candidate never gets out of the

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1 contribution limits. They can exceed the expenditure
 2 limits, but they can never exceed the contribution
 3 limits, and the only way they could be lifted for a
 4 complying candidate is if somebody else does something.
 5 MR. PEMBERTON: That's my understanding
 6 now. We were kind of all over the map about that both
 7 in the meeting and in the meantime, but that's what
 8 appears to -- how it appears to work.
 9 MR. ORSINGER: So if someone intends to
 10 get excessive contributions all they have to do is file
 11 that declaration of intent with the Ethics Commission
 12 and then they are no longer held to those limits?
 13 MR. EDWARDS: No.
 14 MR. PEMBERTON: No. The candidate that
 15 files the declaration saying they are not complying,
 16 they can opt out of the -- what they spend, but they
 17 would still be subject to the contribution limits unless
 18 another candidate got the limits waived as to them.
 19 MS. MCNAMARA: You have to hope for a
 20 rich opponent who spends a lot of money.
 21 MR. PEMBERTON: Right. Who wants to
 22 spend as much as they want and doesn't care that their
 23 contributions are going to be capped.
 24 HONORABLE JIM DUNNAM: That makes the
 25 contribution limits voluntary for the other person.

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1 MR. YELENOSKY: No.
 2 HONORABLE JIM DUNNAM: Yeah. If I say
 3 I'm opting out and I'm running against you, but also the
 4 limits don't apply to you, which makes them voluntary as
 5 to you. Right?
 6 MR. YELENOSKY: After you've acted, yeah.
 7 HONORABLE JIM DUNNAM: If I say I'm
 8 opting out and I'm running against Bob then all of the
 9 sudden Bob is totally voluntary on everything.
 10 MR. YELENOSKY: Assuming that you've done
 11 that and the Ethics Commission has issued a declaration.
 12 HONORABLE JIM DUNNAM: If I opt out,
 13 everything is voluntary for him, and expenditures are
 14 voluntary for me.
 15 MR. YELENOSKY: Right, but you're
 16 still --
 17 HONORABLE JIM DUNNAM: My contributions
 18 will remain mandatory.
 19 MR. YELENOSKY: Right.
 20 HONORABLE JIM DUNNAM: Very good law.
 21 CHAIRMAN BABCOCK: well, it's easy to
 22 follow.
 23 HONORABLE SCOTT BRISTER: Do the caps
 24 apply to direct expenditures, too?
 25 MR. PEMBERTON: I don't think so. I

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1 don't think there are any limits on the direct
 2 expenditures. That's a whole free speech jurisprudence.
 3 JUSTICE HECHT: You've just got to report
 4 them.
 5 MS. MCNAMARA: (10) would contradict
 6 that. When you read the words we've got in (10) it
 7 says, "excessive direct campaign expenditure."
 8 MR. YELENOSKY: But he's asking whether
 9 they apply to caps in the sense of the statute as
 10 opposed to the rule because you could have a recusal
 11 rule that's based on excessive expenditures even if it's
 12 not --
 13 MS. MCNAMARA: It says it comes from the
 14 statute because it refers to the statute.
 15 MR. YELENOSKY: Well, can I speak on --
 16 CHAIRMAN BABCOCK: Yeah, go ahead, Steve.
 17 MR. YELENOSKY: Well, I mean, the rule --
 18 because I've looked at this. I obviously talked about
 19 it last time and looked at it since, and Bob and I have
 20 exchanged some e-mails. First of all, the rule refers
 21 to an excessive campaign contribution. I don't think
 22 you're going to find that term in here.
 23 What you're going to find in the statutes
 24 are contribution limits and the reference to exceeding
 25 contribution limits, and whether "excessive" means

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1 you're above the limits or whether "excessive" means
 2 you're both above the limits and it was a violation is a
 3 question left unanswered by this rule because you could
 4 exceed the contribution limits in the example that
 5 Representative Dunnam just gave and not be in violation
 6 of the statute, so one of the things I was going to say
 7 about the rule draft is we need to be clear on whether
 8 we mean to provide for recusal when you exceed
 9 contribution limits per se or when you exceed
 10 contribution limits and it's a violation of the statute,
 11 because those aren't the same thing. Then we can get to
 12 expenditures. For some of the same reasons we have the
 13 same questions.
 14 CHAIRMAN BABCOCK: But on the threshold
 15 issue of whether it's mandatory or not, as I understand
 16 it, the statute applies to judges generally with some
 17 exceptions.
 18 MR. PEMBERTON: When the statute applies?
 19 CHAIRMAN BABCOCK: Yeah.
 20 MR. ORSINGER: It applies to all judges.
 21 MR. PEMBERTON: It applies to all judges.
 22 CHAIRMAN BABCOCK: It applies to all the
 23 judges, but there are certain circumstances where it
 24 might not because of the opt out or because of the rich
 25 opponent.

1 MR. ORSINGER: The first judge can opt
 2 out of the spending limits but not the contribution
 3 limits, but if the first judge opts out of the spending
 4 limits, the second judge is liberated from all limits.
 5 Correct?
 6 MR. PEMBERTON: That's my understanding.
 7 MR. YELENOSKY: Right.
 8 CHAIRMAN BABCOCK: Right. So it's
 9 generally applicable, but you can get out of it in
 10 certain circumstances.
 11 MR. YELENOSKY: The part that I was
 12 fooling with with Bob was can you get out of it, no. A
 13 candidate cannot do anything himself unilaterally which
 14 gets him or her out of the contribution limits. It has
 15 to be the action of someone else, because if I'm the
 16 candidate who exceeds any of these provisions then I'm
 17 letting everybody else out except myself, so in that
 18 sense it's never voluntary.
 19 It is voluntary in the sense once someone
 20 else acts then you're free, but you're going to know
 21 that happens because it has to happen pursuant to an
 22 Ethics Commission declaration. So I guess the easy
 23 thing to say is if you're a candidate and there's been
 24 no declarations from the Ethics Commission that it's
 25 lifted, it applies to you; and even if there has been a

1 of a campaign, and so I think we better make it clear
 2 that if there is a cure at some point then it doesn't
 3 work a recusal.
 4 CHAIRMAN BABCOCK: Steve.
 5 MR. YELENOSKY: Well, the report that Bob
 6 presented spoke to that, and they had suggested because
 7 the rule on contribution limits, if you violate it also
 8 says you have to give it back, and so the report
 9 suggested that it would be -- the recusal would be -- or
 10 the eligibility for recusal would end when they had
 11 given it back and something about the term of office
 12 ending that I wasn't quite clear on.
 13 But even before you get to that question,
 14 which is a question in this rule, I think you still need
 15 to answer that prior question about whether "excessive"
 16 means that the judge got a contribution that exceeds
 17 these limits or the judge got a contribution that
 18 exceeds these limits and was not entitled to do so,
 19 because you can certainly have the situation where the
 20 limits have been lifted, and so which do we mean?
 21 If, for instance, you're in a judicial
 22 office with a population more than a million and the
 23 judge has a 6,000-dollar contribution from the other
 24 attorney, is that enough for us to say it's excessive
 25 because it's above the 5,000-dollar limit, or do we also

1 declaration from the Ethics Commission that it's lifted,
 2 if it was lifted because of you it's not lifted as to
 3 you; and that's essentially what it comes down to.
 4 CHAIRMAN BABCOCK: Representative Dunnam,
 5 do you agree with that more or less?
 6 HONORABLE JIM DUNNAM: I think that's
 7 probably right. I'll tell you that there's a lot of
 8 confusion on that. It doesn't make sense, but --
 9 CHAIRMAN BABCOCK: On the issue of
 10 whether we should even be messing with this, the point
 11 you raised at our last meeting whether we should even be
 12 messing with this, I have gone back and looked at the
 13 order of the Court, of the Supreme Court, and it
 14 specifically charged us with messing with this; and then
 15 I've consulted with Chief Justice Phillips, and he wants
 16 us to mess with it, but duly noting your issue about the
 17 legislative sentiment, at least in some quarters, which
 18 Senator Harris I think in our meeting agreed with and
 19 said that politically this might not be the smartest
 20 thing for the Court to do; but that's not for us to
 21 decide. We just have to try to come up with the best
 22 rule we can, so that's what we're about today.
 23 MR. ORSINGER: If I can in that
 24 connection, Senator Harris, though, was agreeable to
 25 allowing the Supreme Court to use its repealer authority

1 need to check and see if, in fact, the limits as applied
 2 to that particular judicial candidate were lifted?
 3 MR. ORSINGER: Agreed. I think we need
 4 to answer that question, and that's a separate question
 5 from the one I'm raising because as a practical matter
 6 the campaign contributions all get deposited and then
 7 you get periodic reports on where the money is from, and
 8 if you're saying that every single judge has got to
 9 update the report before they deposit the check, I think
 10 that's unworkable. So we have to allow a judge to cure
 11 in the event that they inadvertently take a contribution
 12 in excess, and that's separate from Steve's point.
 13 CHAIRMAN BABCOCK: Will you fix that,
 14 Richard, by saying the judge has accepted and not
 15 refunded? Buddy.
 16 MR. LOW: Yeah. Chip, I have one other
 17 question. Isn't it true that a lawyer may give a
 18 certain amount and then firms then are limited.
 19 CHAIRMAN BABCOCK: Right.
 20 MR. LOW: The way I read the rule it says
 21 "the lawyer representing the party or any lawyer in that
 22 firm." Maybe no lawyer in that firm has given more than
 23 a lawyer's limit but totally then the firm has exceeded
 24 the limit. I guess you could technically say that once
 25 you get your amount then anybody in that firm has done

1 to change his sponsored provision in the Civil Practice
 2 and Remedies Code as long as we carried forward his
 3 fundamental philosophy.
 4 CHAIRMAN BABCOCK: Right.
 5 MR. ORSINGER: So assuming we get that
 6 consent from him that he approves our final product,
 7 we're going to have voluntary acceptance by that
 8 legislator of the change in his bill, which is different
 9 from this --
 10 CHAIRMAN BABCOCK: Yeah. That's not on
 11 this issue, though.
 12 MR. ORSINGER: Not on this precise issue.
 13 CHAIRMAN BABCOCK: Yeah. That's on the
 14 multiple recusal motion, which is different. Okay. So
 15 with that underbrush cleared away to a certain degree,
 16 is this rule okay as you've drafted it?
 17 MR. ORSINGER: Well, you know, I'd like
 18 to ask the question if "excessive" means before or after
 19 refunds, because I think it possible that a judge who in
 20 good faith is attempting to comply might find out after
 21 the fact that a contribution was made and then refunded,
 22 but this "accepted a campaign contribution," you know,
 23 the campaign contributions are accepted when the checks
 24 are deposited, I suppose, and the tallying up isn't done
 25 until later after all the checks come in over a period

1 it, but if they interpret it to mean, you know, as it's
 2 written then there's a way. The firm gives totally
 3 more, and I don't think it directly addresses that.
 4 MR. ORSINGER: I think he's right.
 5 CHAIRMAN BABCOCK: Good point. I agree.
 6 Let's stick on this refund issue. Richard, if you said
 7 "the judge has accepted and not refunded" --
 8 MR. ORSINGER: Well, how does the statute
 9 handle inadvertent excessive contribution?
 10 HONORABLE JAN PATTERSON: I think the way
 11 the statute reads, and I don't see it here, is that it
 12 is deemed accepted at the time of reporting so that
 13 there is a gap which allows for multiple checks to come
 14 in, but perhaps you don't catch it and you might deposit
 15 them on the day they come in, but you don't catch it
 16 until a week later, but it's within the reporting
 17 period. I think the statute speaks in terms of
 18 acceptance in terms of reporting so that there is leeway
 19 there.
 20 CHAIRMAN BABCOCK: But a month later you
 21 could be getting ready to start a four-week trial, and
 22 this issue comes up, and do we want to write a rule that
 23 allows the trial judge to say, you know, "Look, I
 24 completely overlooked this. I'm refunding the money
 25 right now. Let's go to trial," or not. I mean, do we

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1 want to cut them -- do we want to have a drop-dead date
 2 when they can't refund it and impact the recusal?
 3 MR. ORSINGER: My inclination would be to
 4 hold it -- if we're going to do this is to hold it to
 5 the statute. That would be my inclination simply
 6 because we're attempting to tag onto their procedure and
 7 their language, and if their procedure and language
 8 requires you to correct by the time you file your
 9 report, to me it's a little disingenuous for a judge to
 10 take an excessive contribution and then the day before
 11 they start into a trial to refund it. That's just a
 12 personal opinion.
 13 CHAIRMAN BABCOCK: Judge Peeples.
 14 HONORABLE DAVID PEEPLES: As someone who
 15 has run five times contested and raised money every
 16 time, I want to say that there's just really no excuse
 17 for a judge not to know when excessive contributions
 18 have come in because you notice when great big ones come
 19 in, and I just -- it is inconceivable that that kind of
 20 mistake should be made or condoned. Because the limits
 21 are pretty high, and it's just incredible to me that
 22 somebody could by mistake accept more than \$25,000
 23 aggregate from a law firm and not know about it.
 24 MR. ORSINGER: But, David, they may
 25 not -- two law firms may have made separate

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1 contributions and then merged later on and then it puts
 2 them over the top or something like that. You've got
 3 lawyers that may be up against the max, leave one law
 4 firm and join another law firm, and it puts the firm
 5 over the top. It's not all that clear-cut necessarily.
 6 HON. ANN CRAWFORD MCCLURE: The other
 7 problem that I think we run into is it applies to the
 8 lawyer's spouse who may also be a lawyer practicing with
 9 another firm someplace which you may not have ready
 10 access to that information if you're talking about
 11 extremely large law firms.
 12 For example, in my campaigns I've raised
 13 money out of Houston out of particular groups who were
 14 interested in opinions that I may write, family law
 15 being one of them. I have no way of knowing without
 16 doing some significant investigation whether a lawyer
 17 who contributes out of Fulbright is married to a lawyer
 18 that may practice with Vinson & Elkins or vice versa.
 19 So it may not be readily apparent as far as the
 20 aggregate is concerned without some independent
 21 investigation going on, and that's problematic because
 22 that information doesn't come without phone calls.
 23 CHAIRMAN BABCOCK: Does this rule as
 24 drafted cover spouses?
 25 HONORABLE SCOTT BRISTER: No, but the

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1 statute does.
 2 MR. ORSINGER: Well, I think the
 3 excessive contribution as defined I think does pick up
 4 that statutory definition. That would be aggregate.
 5 HONORABLE DAVID PEEPLES: Doesn't the
 6 contribution of a spouse count on the lawyer's aggregate
 7 amount?
 8 CHAIRMAN BABCOCK: I don't know.
 9 HONORABLE DAVID PEEPLES: In other words,
 10 if the limit is 5,000 for the lawyer and the lawyer has
 11 given that amount, I don't think the spouse can give any
 12 more.
 13 HONORABLE HARVEY BROWN: Right. Right.
 14 HON. ANN CRAWFORD MCCLURE: Well, I think
 15 that's true, but if it's less than that.
 16 MR. ORSINGER: The aggregate is what
 17 really frightens me about this whole thing because
 18 lawyers that change law firms can change aggregates when
 19 they change law firms and it's not even a thought in
 20 their mind, and it may even occur after the race, and I
 21 tell you, we're going to need some experts on this
 22 statute to help us write a rule if we're going to do
 23 anything other than just implement the statute in all of
 24 its glorious confusion. If we're trying to get real
 25 specific about how all of this applies in the face of a

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1 statute that probably most of us wouldn't agree on how
 2 it works then we're way off legislating ourselves.
 3 CHAIRMAN BABCOCK: Justice Duncan.
 4 HONORABLE SARAH DUNCAN: The statute
 5 refers to "a knowing acceptance of a contribution in
 6 excess of the limits," and I'm not sure how the Ethics
 7 Commission is going to adjudicate the "knowingly," but
 8 is that going to be a prerequisite to recusal under the
 9 subsection? Because there's no -- under (a), section
 10 (a), there's no -- there is a requirement that it be
 11 knowingly accepted, an excessive contribution; and in
 12 the case of spouses or changing the aggregate by a
 13 lawyer changing firms, I at least would argue that I did
 14 not knowingly accept a contribution in excess of the
 15 limits and so did not violate that section.
 16 HONORABLE DAVID PEEPLES: Maybe we need
 17 an affirmative defense for good faith mistake.
 18 HONORABLE JIM DUNNAM: Can I ask a
 19 question?
 20 CHAIRMAN BABCOCK: Representative Dunnam.
 21 HONORABLE JIM DUNNAM: I'm trying to
 22 understand how this is going to work if, again, Bob and
 23 I are running against each other and I opt out, okay,
 24 which means he can take excessive contributions, okay,
 25 if he wants to, and let's say he does. Is the intent to

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1 say that if Bob wins the election Bob can be recused for
 2 taking those allowable excessive contributions that he's
 3 permitted to take under the statute?
 4 CHAIRMAN BABCOCK: I would say not.
 5 MR. YELENOSKY: That was my question.
 6 MR. ORSINGER: Well, then we would be
 7 going further than the Legislature did. We would be
 8 saying even though the law permits it, you can't do it
 9 without being recused.
 10 HONORABLE JIM DUNNAM: So my question --
 11 so I'll make sure I understand what you-all are trying
 12 to do. If I take an excessive contribution for which
 13 the statute provides no exception, okay, why aren't
 14 you-all disciplining the judge and reprimanding him
 15 because he's violated the law, enacting a rule like that
 16 that says any judge who violates the law is subject to
 17 reprimand?
 18 The recusal bit -- I mean, if the judge
 19 violates the law, he should be removed from the bench,
 20 if that's what the law is. If the law says I can't take
 21 a contribution in excess of the limits and I do it, so
 22 what, we're going to recuse him. That judge ought to be
 23 removed. He just violated the law. I don't know if
 24 there's a criminal penalty for this statute or not, but
 25 it would seem to me that that would be a more proper

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1 focus of the committee. Any judge who violates the law,
 2 whether it's this one or another one, is subject to
 3 disciplinary action from the Judicial Council or whoever
 4 does that stuff.
 5 Maybe that's some of the confusion I've
 6 got, and it seems that we're going to recuse him. This
 7 is a guy that shouldn't even be on the bench or he
 8 should have been reprimanded or he should have been
 9 censured or he should have been whatever because he
 10 violated the statute.
 11 MS. MCNAMARA: But if you're a litigant
 12 you don't want to have to go to trial in front of him
 13 before that process takes place.
 14 HONORABLE JIM DUNNAM: Then all you have
 15 to say is "Any judge who violates the law is subject to
 16 recusal." Any judge who violates this statute is
 17 subject to recusal, and you don't have to go into the
 18 finance and who he took it from or whatever. The
 19 statute speaks for itself. If he violated the statute,
 20 he's subject to recusal. But I would also suggest that
 21 if there's not a rule that there ought to be one that
 22 says any judge who violates the law, including this one,
 23 is subject to disciplinary action, and that is -- and
 24 that's why I ask the question. Is this supposed to
 25 apply to Bob who legally took an excessive contribution

1 because I opted out; and if it's not, if you-all don't
 2 mean it to apply to him, then really all you want it to
 3 apply to is men and women who are violating the statute.
 4 MR. PEMBERTON: Yeah, and I'd agree just
 5 speaking from the perspective of the task force, they
 6 understood that these limits would be mandatory and
 7 overlooked the waiver provision. So the intent wasn't
 8 to rope in Bob if the limits were waived. It would be
 9 only if Bob violated the limits.
 10 CHAIRMAN BABCOCK: And that's certainly
 11 what I've been operating under all this time.
 12 HONORABLE JIM DUNNAM: All you have to
 13 say is any judge who violates this act is subject to
 14 recusal. He ought to be subject to disciplinary action
 15 first.
 16 CHAIRMAN BABCOCK: That's pretty close to
 17 what the task force said. Steve, then Sarah.
 18 MR. YELENOSKY: Well, Representative
 19 Dunnam, I expressed pretty much the same sentiment as
 20 that last time when I said, yeah, if a judge violates
 21 this act why are we just recusing him? He should not be
 22 a judge, and I tend to agree with that.
 23 At the same time I'm wondering because of
 24 this opt out provision you could have a firm on the
 25 other side who the candidate was allowed to accept a

1 CHAIRMAN BABCOCK: Well, and I think
 2 Representative Dunnam's answer to that would be you know
 3 because you've got the campaign finance reports signed
 4 under oath by the officeholder.
 5 HONORABLE SARAH DUNCAN: But I don't know
 6 that the two people each of whom gave me \$5,000 are
 7 married.
 8 CHAIRMAN BABCOCK: Well, I suppose that
 9 would be --
 10 MS. CRAIN: They're supposed to fill that
 11 out.
 12 MS. MCNAMARA: You've got an apparent
 13 violation. To answer your question, you do some
 14 discovery or something.
 15 MR. ORSINGER: Well, the term "knowing"
 16 would apply if the contribution on its face is in excess
 17 from one person, that's one thing. If it's aggregating
 18 between people you don't know are connected then
 19 obviously you wouldn't know that.
 20 CHAIRMAN BABCOCK: Yeah. They have got
 21 different last names, maybe even live in different
 22 cities. You know, you never know.
 23 HONORABLE SARAH DUNCAN: You just never
 24 know what people will do.
 25 CHAIRMAN BABCOCK: Judge Rhea.

1 contribution in his opt out provision but no matter how
 2 large it is there would never be grounds for recusal
 3 based on that because of the opt out, and that--
 4 HONORABLE JIM DUNNAM: That's why I asked
 5 this question. Evidently that's not what the committee
 6 is considering, so --
 7 MR. YELENOSKY: Well, I guess I was
 8 thinking you could have something that's not a violation
 9 of the law but nonetheless is so apparently excessive
 10 that you would want to have a ground for recusal, but I
 11 can see the point that that's -- that would be getting
 12 to us legislating too much, and it would be just easier
 13 to say "violation of the law." The problem there I
 14 guess is you've got the "knowingly" test, and you
 15 wouldn't have a violation of the law if the judge just
 16 says, "I didn't know until I'm in trial."
 17 HONORABLE JIM DUNNAM: He's going to know
 18 it because he signed a campaign finance report under the
 19 penalty of perjury, and if he signs a campaign finance
 20 report that says, "I took X contribution," I think
 21 that's pretty good evidence that he knew he took it.
 22 HONORABLE SARAH DUNCAN: But if I don't
 23 know that two people are married or two people are in
 24 the same law firm and together they have exceeded my
 25 limit or the law firm has exceeded my limit, as I

1 HONORABLE BILL RHEA: I don't have
 2 251.001 in front of me. Is it clear that "knowingly" is
 3 folded into the language that we've used in (9) and
 4 (10)?
 5 MR. YELENOSKY: Well, 253.155 is the
 6 language that has -- or is the section that has
 7 "knowingly" in (a), but the violation is (f), and in
 8 between is (e), which says that you can -- you need to
 9 give it back, and you need to give it back within a
 10 certain time period.
 11 HONORABLE BILL RHEA: But what we key
 12 this to is the language "excessive campaign
 13 contribution."
 14 MR. YELENOSKY: Well, there is no such
 15 language in the statute.
 16 HONORABLE BILL RHEA: Well, maybe that's
 17 the language we need to adjust.
 18 CHAIRMAN BABCOCK: Well, it does say that
 19 a judicial candidate or officeholder may exceed the
 20 limits prescribed by subsection (b), so I mean, the word
 21 "excessive" is not there, but "exceed the limits" is
 22 there.
 23 MR. HAMILTON: The phrase "excessive
 24 campaign contribution" is not meant to be what's
 25 defined. It's only "campaign contribution" that is

1 understand it, that's the kind of questions that will
 2 come into play in determining whether there has been a
 3 violation of the statute. And my question is, are we
 4 going to litigate that "knowingly" component in the
 5 context of a recusal motion, or does the recusal motion
 6 have to await an adjudication of the violation by the
 7 Ethics Commission?
 8 MR. YELENOSKY: Well, and the statute
 9 itself has an ambiguity on "knowingly" because it has
 10 that provision in there that says you have to give the
 11 money back, and there is a time period to do that. Does
 12 that then define the "knowingly"? In other words, is it
 13 not knowingly if you met that give-back provision and
 14 just on its own terms its ambiguous there. So I don't
 15 know, but you know, even if we understood what we wanted
 16 to do, it's not clear what the statute means on that.
 17 CHAIRMAN BABCOCK: And, Sarah, in answer
 18 to your question, I don't know how you could possibly
 19 wait for a decision of the Ethics Commission. I mean,
 20 you're going to hold up the litigation process while the
 21 Ethics Commission does its work?
 22 HONORABLE SARAH DUNCAN: But how are you
 23 going to have a recusal motion based on an excessive
 24 contribution as defined in 251.001 unless you know in
 25 fact it has been an excessive contribution?

1 defined. The word "excessive" modifies the campaign
 2 contribution as opposed to direct campaign expenditure.
 3 We're talking about two things, campaign contribution in
 4 (9) and direct campaign expenditure in (10). The phrase
 5 "excessive" modifies those two concepts as defined by
 6 the statute.
 7 MR. ORSINGER: But the statute is in the
 8 tab at the end of Tab 4 if you want to read the statute.
 9 MR. YELENOSKY: Even understanding
 10 "excessive" to simply refer to exceeding these limits
 11 you still have Representative Dunnam's comment that I'm
 12 echoing that it doesn't answer the question if you're
 13 exceeding those limits but you're within the law because
 14 it's been lifted, and so I mean, that may be a question
 15 we can answer. Are we trying to do something beyond
 16 what the statute does? If the answer to that is "no"
 17 then maybe we are just saying in violation of the
 18 statute, whatever it means.
 19 HONORABLE BILL RHEA: I'm not following
 20 that distinction because if the limits have been lifted
 21 then you're not exceeding them, right?
 22 HONORABLE SCOTT BRISTER: Right.
 23 MR. YELENOSKY: Well, but this section is
 24 not the one that lifts them, so one would read this
 25 section on its own.

1 CHAIRMAN BABCOCK: Yeah, let's put this
 2 issue to rest because this is not -- I don't think that
 3 this is even a close call. Is there anybody here who
 4 thinks that we ought to try to in this recusal rule go
 5 beyond what the Legislature has done in the statute so
 6 that we would specifically call for the recusal of a
 7 judge who has received excessive campaign contributions
 8 but nevertheless gotten a waiver so that it's perfectly
 9 legal for them to do so? Anybody who thinks we're doing
 10 that? Mike?

11 MR. HATCHELL: Well, I don't know that
 12 I'd -- I'm the only member, I guess, other than Bob of
 13 the task force, and I just wanted to tell the group that
 14 we did not really consider this question of the opt out,
 15 but I would say as a member that what I was thinking we
 16 were trying to do was something that was actually very
 17 simple and that is make the statute a litmus test.

18 CHAIRMAN BABCOCK: Right.
 19 MR. HATCHELL: And we were not thinking
 20 so much of the operation of the statute but that the
 21 levels of campaign contributions which had been declared
 22 in the statute were the point at which the appearance of
 23 impropriety arose. So actually I would take the
 24 position as a task force member that even when somebody
 25 opted out and could receive contributions in excess of

1 degree to contribute to political campaigns?
 2 HON. ANN CRAWFORD McCLURE: Well, then if
 3 we're going to take the position that we're only going
 4 to deal with the unlawful contributions then I agree
 5 with whoever it was -- it might have been Representative
 6 Dunnam -- that said if we follow under the category of
 7 if it's illegal, he's violated the law, and that ought
 8 to be a separate thing. I'm not sure that we need to be
 9 having this debate if that's the intention in putting it
 10 into the rule, is that there's been a violation of some
 11 sort of law. I think that's a whole other question.

12 HONORABLE PHIL HARDBERGER: I also would
 13 agree with Representative Dunnam. If you're going to
 14 insist on keeping it, and I submit it's virtually
 15 useless, but if you're going to insist, I would tie it
 16 to the statute just like Representative Dunnam says.

17 CHAIRMAN BABCOCK: Yeah, Buddy.
 18 MR. LOW: Chip, we have three things.
 19 Phil suggested just deleting it. Mike suggested don't
 20 worry about the technicalities. I mean, if you waive,
 21 don't worry about all that if you give a certain amount;
 22 isn't that right, Mike? Then the other ground is don't
 23 do anything but just say you don't violate the statute.
 24 We've talked, and if there is another ground, I would be
 25 open to it, but that's the three I hear and that looks

1 the limits that they would nevertheless be subject to
 2 recusal.

3 MR. YELENOSKY: So that was -- and that
 4 is reflected in the fact that the rule picks out
 5 particular sections rather than just saying "in
 6 violation of the statute." I mean, it refers to the
 7 sections that have the limits, and that's why the
 8 question arose, but it sounds like people aren't going
 9 to want to go where you're going, Mike.

10 HONORABLE PHIL HARDBERGER: Mr. Chairman?

11 CHAIRMAN BABCOCK: Yes, Justice
 12 Hardberger.

13 HONORABLE PHIL HARDBERGER: I submit that
 14 this is a fairly useless addition here and will almost
 15 affect nobody; and the truth is you're talking around
 16 the real problem, which is heavy contributions that are
 17 within the law that might, in fact, play on recusal.
 18 For instance, you won't have to say a thing if a firm
 19 has given you \$25,000. You don't have to say anything.
 20 If they gave 30 under this then you would have to say
 21 something and it would be grounds for recusal. The
 22 truth is the 30 is going to very, very, very rarely
 23 happen, but the heavy contributions is a fact of life.
 24 I would submit that we drop it altogether. It only
 25 looks good to the public. It really has no real effect.

1 like what we ought to vote on.

2 HONORABLE PHIL HARDBERGER: Agreed.

3 CHAIRMAN BABCOCK: Everybody agree with
 4 that? Judge Peeples.

5 HONORABLE DAVID PEEPLES: I want to make
 6 sure I understand how this works. If there's a judge or
 7 a challenger who says "I'm going to opt out of these
 8 voluntary limits and therefore I can accept \$50,000 from
 9 one person."

10 MR. ORSINGER: That's not right. That's
 11 not right.

12 MR. YELENOSKY: You can't opt out of
 13 contributions.

14 MR. ORSINGER: You can't opt out of
 15 contributions. You can only opt out of expenditures,
 16 but if you opt out of expenditures, your opponent is
 17 free of contributions or expenditures.

18 MR. YELENOSKY: Right. That's right.

19 MS. MCNAMARA: If you think about it,
 20 it's a rich adversary who's going to spend his own
 21 money. You as his opponent have to be able to raise
 22 more money to run against him, so you're free from the
 23 limits, so you can raise the money and you can spend in
 24 excess of the limits, but he's still limited on the
 25 fundraising side.

1 CHAIRMAN BABCOCK: Okay. Justice
 2 McClure.

3 HON. ANN CRAWFORD McCLURE: Well, the
 4 taint is in the money; and if the perception is that
 5 it's the money that's buying some sort of favor, I think
 6 we're just dealing with semantics over how much of a
 7 price tag we're going to put on it, because it ought not
 8 matter how much it is if it buys the favor, so that's
 9 another issue.

10 But it seems to me that what Mike is
 11 saying is true. If we're going to say that the taint is
 12 in the money and the statute spells out how much money
 13 causes the taint then it ought not matter that you've
 14 somehow fallen into a loophole because you've got a
 15 candidate who has waived it and, therefore, you're free
 16 to do whatever. That doesn't remove the taint, and we
 17 have a statute that spells out what price tag we put on
 18 the taint, and I think it ought to apply across the
 19 board if it's going to apply at all.

20 CHAIRMAN BABCOCK: But how can you say
 21 that there's a per se ground for recusal when the
 22 Legislature has said that the judge is acting properly
 23 and you've got lots of case law that say that campaign
 24 contributions of whatever amount is not a basis for
 25 recusal, and there is a constitutional right to some

1 HONORABLE DAVID PEEPLES: But that would
 2 mean somebody could be an elected judge who accepted an
 3 enormous amount of money from one person, and there
 4 would be no right to recuse.

5 CHAIRMAN BABCOCK: But not under this
 6 specific rule.

7 MR. ORSINGER: If the other side opted
 8 out. That also means that a rich person can spend as
 9 much as they want, and the other side can only hope to
 10 raise it.

11 MS. MCNAMARA: Right.

12 CHAIRMAN BABCOCK: It does not mean,
 13 however, that if Joe Blow is in your court and he's
 14 contributed a million dollars to your campaign last
 15 month that you can't recuse him. It's just that you
 16 can't recuse him under this statute. If the acceptance
 17 of that contribution was legal because of the opt out
 18 provision.

19 Yeah, Richard.

20 MR. ORSINGER: I don't want us to forget
 21 that there are some people, myself included, that don't
 22 think we ought to be including these because it's a
 23 legislative function and not a judicial function. I
 24 agree that practically, as Justice Hardberger said, this
 25 isn't going to arise very often, but I personally think

1 that the legislative enactment was probably the result
 2 of a compromise and that some legislators voted for this
 3 bill on the grounds that it didn't have anymore teeth in
 4 than it did, and if it had had more teeth in it, I
 5 think that the vote might have been different or the
 6 bill might not have been enacted.
 7 I know that the legislators who supported
 8 this would like to have the Supreme Court with its
 9 rule-making authority come and put teeth into the
 10 statute, but I'm worried about the legislators who
 11 opposed the bill or voted on the bill on the condition
 12 that it didn't have teeth now have the bill with teeth
 13 through the Supreme Court rule-making authority, and now
 14 those legislators are angry and you know the others are
 15 happy. And I've talked to two Senators about this who
 16 neither one of them really had a burning issue on this,
 17 and they both felt like it was politically unwise.
 18 Now, I know it's not our vote of what's
 19 wise and not wise for the Supreme Court to do, but I'm
 20 going to vote against including this because, first of
 21 all, we can't agree on what it means or how it's going
 22 to be implemented. Second of all, it probably won't
 23 make much difference in anyone's lives; and, thirdly,
 24 there are going to be some legislators over there who
 25 become angered about this particular issue and allow

1 adjudicated the violation. And I realize, you know,
 2 Chip, that you don't want to hold up the matter in
 3 litigation unless and until the Ethics Commission
 4 adjudicates a penalty, but I don't know -- otherwise
 5 we're going to litigate the subject matter that's
 6 delegated to the Ethics Commission in a recusal motion,
 7 and I question whether that would be a proper rule.
 8 CHAIRMAN BABCOCK: Well, in light of what
 9 Mike -- yeah, I see your point. In light of what Mike
 10 has said, maybe the fact that we have gotten tied into
 11 the statute is what's causing us the problem. Was it
 12 the sense of your committee that there is a number --
 13 for example, if Chip Babcock contributes \$10,000 to
 14 Judge Schmidt and he accepts \$10,000 and that \$10,000 is
 15 twice what I'm allowed to give him under this statute,
 16 regardless of whether he opted in or opted out that that
 17 just per se creates an appearance of impropriety and
 18 then he ought to be out of the case?
 19 MR. HATCHELL: The members of the task
 20 force -- and I don't want to speak for all of them, but
 21 it's a really good group from both sides of the
 22 spectrum -- probably believed that, but then the
 23 question becomes at what point do you commence recusal,
 24 and we were trying to give really deference to the
 25 Legislature, what it had done in this statute, by simply

1 that feeling to spill over into other rule-making areas
 2 where I think it is the Supreme Court's business.
 3 CHAIRMAN BABCOCK: Well, let me just --
 4 can I respond to this? No. 1, it is their sense that if
 5 we pass a rule that is tied to the statute -- in other
 6 words, if the statute has been violated that is a ground
 7 for recusal, I can't imagine that Representative Dunnam
 8 -- maybe I'm misreading this.
 9 HONORABLE JIM DUNNAM: I don't think
 10 that -- the thing that gave people heartburn I think
 11 last session was the committee report, if you read their
 12 committee report that came out, it was basically saying
 13 if you violate any of the voluntary provisions of the
 14 statute then it's per se recusal, and that was what gave
 15 people heartburn is that you were taking voluntary
 16 provisions that for some reason the Legislature tried to
 17 make -- decided to make voluntary, had to have been a
 18 compromise because a lot of people could go either way.
 19 CHAIRMAN BABCOCK: Right.
 20 HONORABLE JIM DUNNAM: And that these
 21 voluntary provisions, you would not violate the law but
 22 you were subject to recusal, and that's what gave
 23 people, I think, heartburn. When you say if you violate
 24 this statute, any of its mandatory requirements, you're
 25 subject to recusal, I can't speak for everybody else,

1 referencing that point as one in which the law has come
 2 into play, and certainly nobody can argue with that.
 3 We are acutely aware of Justice
 4 Hardberger's comments about the breadth of what we're
 5 proposing and that it probably won't catch a lot of
 6 people and it does not solve the problem of the public's
 7 perception of the influence of money in the litigation,
 8 but this was the best we could do after five or six
 9 meetings.
 10 CHAIRMAN BABCOCK: Yeah. Steve.
 11 MR. YELENOSKY: Well, I guess I don't
 12 want to get in between the Legislature and the Supreme
 13 Court, but it's posed as the legislative function versus
 14 the Supreme Court's rule-making authority, but to throw
 15 in a third element, then there's a due process question
 16 here which goes to the Court's interpretive authority
 17 and not just the Texas Supreme Court but the Federal
 18 courts, and there's a lawsuit filed now on that very
 19 point.
 20 Even if the Legislature can set how
 21 elections are done there's still a separate
 22 constitutional issue of whether or not people get fair
 23 and due process when they have to go to trial before a
 24 judge who has received contributions from one side,
 25 however it's defined, excessively. So I don't think we

1 but I don't have any problem with that. That's just
 2 saying if you violate the law you're subject to recusal.
 3 CHAIRMAN BABCOCK: Yeah, and I can't
 4 imagine how anybody would --
 5 HONORABLE JIM DUNNAM: In our view you
 6 were expanding and saying, well, if you violate the law,
 7 plus if you do something else in here that smells bad,
 8 it's a per se recusal.
 9 CHAIRMAN BABCOCK: Yeah. Sarah.
 10 HONORABLE JIM DUNNAM: I might change my
 11 mind after what Richard said. I think you-all ought to
 12 add more teeth in it.
 13 HONORABLE SARAH DUNCAN: Section 253.176
 14 provides -- in "civil penalty" provides "The Commission
 15 may impose a civil penalty against a person only after a
 16 formal hearing as provided by subchapter (e), Chapter
 17 571," and they only can provide -- they only can assess
 18 a civil penalty for an excessive contribution. A person
 19 who violates this section, okay, look to (e), "A person
 20 who receives a political contribution that violates
 21 subsection (a)," and it is subsection (a) that requires
 22 that the contribution be accepted knowingly.
 23 So I don't know how we can make the
 24 statute or the limits in the statute a ground for
 25 recusal unless the Ethics Commission has just

1 can easily just skirt it by saying the Legislature sets
 2 elections and contributions and ignore that there's --
 3 at least raise the due process issue. Maybe it won't go
 4 anywhere, but this question has been raised as a due
 5 process problem as well.
 6 CHAIRMAN BABCOCK: That case just got
 7 filed, didn't it?
 8 MR. YELENOSKY: Yeah.
 9 CHAIRMAN BABCOCK: Carl.
 10 MR. HAMILTON: Well, it seems like that
 11 Mike's committee's approach makes it easier than trying
 12 to just say "a violation of the statute" because then
 13 you have to get into Judge Duncan's problem of, well, do
 14 we have to wait for the Ethics Committee or does the
 15 recusal judge have to have a mini-trial to determine
 16 whether or not there's been a violation as opposed
 17 simply to a, quote, "excessive," close quote,
 18 contribution as those numbers are defined in the
 19 statute.
 20 CHAIRMAN BABCOCK: Mike, the rule that
 21 was proposed by your committee just said the judge has
 22 accepted an excessive campaign contribution from a
 23 party -- a lawyer representing a party or the lawyer's
 24 law firm. I didn't see that "excessive campaign
 25 contribution" was defined.

1 MR. HATCHELL: No.
 2 CHAIRMAN BABCOCK: Was that
 3 intentionally --
 4 MR. HAMILTON: Yeah. It's defined on
 5 page 23.
 6 CHAIRMAN BABCOCK: Oh, I gotcha. But
 7 that ties back to the statute.
 8 MR. HAMILTON: Yeah. It just ties back
 9 to the statute.
 10 MR. HATCHELL: Again, you have to
 11 understand what we were -- what our understanding of the
 12 way the statute operated, that it wasn't quite as
 13 complicated as it now appears that it may be. But I'm
 14 trying to tell you that because of that belief what I'm
 15 trying to express is I think we had a very simplistic
 16 notion of what we were doing or simple notion.
 17 We were trying to make it very simple,
 18 and I think we had in mind more that it was the limits
 19 at which the appearance of impropriety arose and not
 20 trying to get to draw in all the technicalities of the
 21 way the statute operates. Now, Bob was a much more
 22 objective observer of our discussions, and he may have a
 23 different view of that, and I'd like to hear that, but
 24 that was the way I sat there and heard what we were
 25 trying to do. This was not an easy thing to do.

1 the statute, the knowledge requirement, that there is a
 2 huge timing problem with whether or not you could ever
 3 say that somebody has definitively violated the statute
 4 without going through the due process that the statute
 5 permits the judge to have before a knowing violation is
 6 found. So that's a practical problem, but Mike as a
 7 member of the task force raised the issue that the task
 8 force really was thinking less in terms of the opt out
 9 provisions and the intricacies of the statute but rather
 10 the categories of contributions and expenditures that
 11 were delimited in the statute so that those were the
 12 touchstone of the recusal and not the various exceptions
 13 and knowledge and opt out provisions that there were.
 14 It seems to me that if we pursue the
 15 violation of the statute course there would be very
 16 little room to criticize. There may be practical
 17 problems of implementation but little room to criticize.
 18 If we try to expand on what the Legislature has done,
 19 put more teeth in it, whatever it may be, then we may or
 20 the Court may be subject to criticism from various
 21 members of the Legislature, and I guess that to me is
 22 where we are right now. Bill.
 23 MR. EDWARDS: Has not the Supreme Court
 24 already changed the judicial conduct rules or canons to
 25 incorporate what we're talking about here? Look on page

1 CHAIRMAN BABCOCK: Yeah. Well, that's
 2 pretty obvious. Okay. Well, you're a real smart guy.
 3 What should we do now?
 4 MR. HATCHELL: Well, No. 1, I would like
 5 to see the task force be polled and to write and to see
 6 what has been proposed here and to make a comment, and I
 7 would think that it ought to be remanded back for some
 8 more discussion. I also think that the Chief Justice is
 9 very interested in this proceeding with good pace.
 10 CHAIRMAN BABCOCK: There's no question
 11 about that. I don't think -- we're right about that,
 12 aren't we?
 13 JUSTICE HECHT: Well, that's complicated,
 14 too. I took your recommendation back to the Court after
 15 the last meeting, which was that we not do anything, and
 16 my impression was -- I actually thought we voted, but I
 17 must have been unclear about that. But my impression
 18 was that the Court was inclined to accept the
 19 committee's recommendation and not do anything further,
 20 but then there were other communications with other
 21 legislators, and it sounded as if others might still be
 22 interested in doing something, so I think on balance
 23 then the Court decided that we needed to get the best
 24 recommendation we could get from the committee and then
 25 see what to do.

1 70 in the --
 2 JUSTICE HECHT: There was a change.
 3 MR. PEMBERTON: There was a change.
 4 MR. EDWARDS: There was a change, and
 5 what it says is that there's a --
 6 MS. SWEENEY: Page what?
 7 MR. EDWARDS: It's 70 in this folder in
 8 the agenda. It's got a Bates number, I'm sorry, down on
 9 the bottom. 70.
 10 JUSTICE HECHT: Yes. Yes. No, this
 11 was -- I don't know. I mean, Representative Dunnam
 12 knows more about the Senate branch by far than I do, but
 13 I do know that people like Senator Ellis, who was
 14 instrumental in the statute being passed in the first
 15 place, has been encouraging in his comments about the
 16 Court looking at this. So I don't want to misrepresent
 17 his position. I really don't know what it is, and he
 18 may change his mind, but I think what we have to come up
 19 with is what we think is the best solution to the
 20 problem and then if there are other reasons why we ought
 21 not to do it, then so be it.
 22 MR. LATTING: Is that different from what
 23 Chip said impliedly?
 24 JUSTICE HECHT: No. I mean, we can't
 25 decide whether it is good politics or makes for a good

1 CHAIRMAN BABCOCK: Yeah. While you were
 2 out of the room that's what I told everybody was the
 3 feeling of the Chief on this matter.
 4 JUSTICE HECHT: Yeah. So it's not, you
 5 know, do this or else, but we do feel like there's
 6 conflicting views. We're getting conflicting
 7 indications from the Legislature, so we just need to do
 8 due diligence work here and then we will be ready to do
 9 whichever.
 10 CHAIRMAN BABCOCK: Also while you were
 11 out of the room something that to me is significant came
 12 up, and that is that if this -- if our recusal rule is
 13 doing nothing more than tying to the statute then at
 14 least it's Representative Dunnam's view that that
 15 wouldn't kick up a fuss with the Legislature because
 16 there are opt out provisions, and if we incorporate that
 17 and give deference to that in our recusal rule then
 18 that's not going to raise a political issue with the
 19 Legislature, which strikes me as right, because all we
 20 would be saying is, "Look, we've got a statute. It's
 21 very complicated, but if a judge and a lawyer or his law
 22 firm violate it then the judge ought to be recused."
 23 Pretty simple.
 24 Justice Duncan points out, however, that
 25 because there is a subjective element to a violation of

1 relationship between the branches of government for us
 2 to change this rule this way or this way or not change
 3 it at all, I don't think.
 4 MR. LATTING: Well, I heard Chip
 5 suggesting in effect that we make a violation of the
 6 statute grounds for recusal and leave it at that, and I
 7 was just wondering if you think that would satisfy what
 8 you need to happen.
 9 JUSTICE HECHT: Well, I think what the
 10 Court would like to know is from the practicing Bar,
 11 from just -- if you were just -- politics aside and
 12 everything else aside, if you were looking at these
 13 issues, what would you want to see happen? This,
 14 nothing, or what? And then the rest of it will just
 15 have to work itself out as it does.
 16 CHAIRMAN BABCOCK: Richard.
 17 MR. ORSINGER: Chip, I may be
 18 oversimplifying, but it seems to me like there is three
 19 proposals we have discussed and one that was just raised
 20 I think by Bill Edwards. One, we could make no mention
 21 of this because it may not affect very much or because
 22 of the politics or whatever. Two, we could make our
 23 rule be only if the statute is violated then you have a
 24 recusal ground and that buys into all the problems of
 25 the statute. Three, we could take the statutory limits

1 and have our own enforcement procedure. Regardless of
2 whether you have a waiver or not, you're limited, and if
3 you exceed it, you can recuse out; but I think that
4 there was another proposal, which is if Canon 5 has been
5 adopted then we could also say that if you violate Canon
6 5 that you can be recused.

7 CHAIRMAN BABCOCK: But Canon 5 is tied to
8 the statute.

9 MR. ORSINGER: Well, but Canon 5 is sort
10 of tied to the statute. It just says that "You shall
11 not knowingly commit an act for which the act" --
12 "commit an act for which the" capital A, "Act imposes
13 the penalty and contributions returned in accordance
14 with the Act are not a violation of the paragraph." So
15 but there is some logic in saying that if you violate
16 the Canons of Judicial Ethics that you could be recused
17 that maybe is a little bit different from saying that --

18 HONORABLE SARAH DUNCAN: There's
19 something real strange about deciding whether a judge
20 has violated the canons of ethics in ongoing litigation
21 in a trial court and outside of the Judicial -- Texas
22 Center for the Judiciary. I mean, I'm not saying I'm
23 against a rule that says if you take a contribution in
24 excess of the limits in Section 253.155(b) you must
25 recuse. That's clean. It's simple. We're not

1 necessarily knowing as we interpret it in other
2 statutes, but there is a gloss and there is a history to
3 that term, and it requires due diligence only, and so I
4 think that before we get mired down into that further
5 that the committee needs to look at that definition.

6 CHAIRMAN BABCOCK: Steve.

7 MR. YELENOSKY: Well, I actually think
8 we're getting sidetracked by the "knowing" issue because
9 "knowingly" is obviously an important consideration
10 before you impose some kind of punitive measure, which
11 either the civil penalty would be or the ethics finding
12 would be, but it's absolutely irrelevant from the
13 perspective of the litigant because whether or not the
14 judge knew it when they got it, the only question that's
15 in the perspective of due process and influence is did
16 the judge get the money because they know now that they
17 got it if they didn't know before, and unless they're
18 giving it back right now, the concern is that that's
19 going to influence the judge's decision.

20 So I think we're getting sidetracked by
21 the "knowingly" as applied to the point of acceptance.
22 The question from the perspective of the litigant,
23 getting back to the issue of due process, is whether or
24 not there's money there that could influence the judge;
25 and if we're going to try to get at that, I don't see

1 adjudicating anything that's delegated to another body.
2 When you talk about trial judges litigating ethics
3 violations and statutory violations, it's -- that's
4 pretty weird.

5 MR. ORSINGER: I think you're stuck on
6 the aggregate rule anyway. If you have any kind of
7 "knowing" concept here and it's anything other than a
8 self-evident excessive contribution, you are mired in a
9 discovery dispute that will require investigation or
10 depositions of minor children, about spouses, about law
11 firm re-alignment. I don't think we should be under the
12 illusion that there is a clean way to apply --

13 HONORABLE SARAH DUNCAN: You either did
14 or you didn't.

15 MR. ORSINGER: Well, I know, but if a
16 judge doesn't know that two lawyers that were in
17 separate law firms, and neither one of which violated
18 individual contribution limits and neither one of which
19 violated law firm contribution aggregate limits, if the
20 law firm is re-aligned and now all of the sudden the
21 current new law firm is over the aggregate limit, that's
22 not a knowing violation. That's not anyone's public
23 policy being violated, and yet arguably it's a technical
24 violation unless you use the word "knowing."

25 If you use the word "knowing" then aren't

1 how we can get at it but through some kind of recusal
2 position that works somewhat matter-of-factly. The
3 money is there and it's either going to stay there or
4 it's been there long enough that it's influenced the
5 judge, and that's a ground for recusal. I do think that
6 puts us in some problems with the Legislature, but it
7 gets back to the due process issue.

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: I completely
10 agree with Steve. The only thing I might disagree with,
11 just a little thing, is to me it doesn't make a lot of
12 difference if the judge gives it back because there
13 could easily be the expectation is "I'll give it back to
14 you now because we've got this pending case but then you
15 can give it to me next contribution report." So but I
16 agree with Steve. From the perception of the litigants
17 they don't care if it was knowingly. They only care if
18 it was.

19 CHAIRMAN BABCOCK: Judge Rhea.

20 HONORABLE BILL RHEA: It seems to me that
21 the subcommittee's language deals appropriately with all
22 of those issues. I would move that we accept the
23 language of the subcommittee and offer that as our
24 recommendation.

25 CHAIRMAN BABCOCK: Elaine.

1 you going to be litigating what the judge knew, and how
2 are you going to know what the judge knew without taking
3 the deposition of the judge or going through their
4 campaign files and deposing spouses?

5 HONORABLE SARAH DUNCAN: Well, that's
6 precisely what I'm suggesting we not do, is litigate
7 that within the context of the pending case.

8 CHAIRMAN BABCOCK: Sarah's got a point.

9 HONORABLE SARAH DUNCAN: If there's going
10 to be a limit, it seems to me that either a contribution
11 was accepted in excess of the limits or it wasn't, and
12 there would be discovery. I mean, there would be
13 discovery of, you know, what lawyer belongs to what law
14 firm and who's married to whom. I'm not saying that
15 that's what I would want. I'm just saying that if we're
16 going to have a rule I don't think that we should be --
17 that rule should incorporate the subjective component
18 that's in the statute and the ethical component that's
19 in the canons.

20 CHAIRMAN BABCOCK: Judge Patterson.

21 HONORABLE JAN PATTERSON: I'm not
22 speaking to the issue except to address this concern
23 that we keep coming back to of what is "knowing."
24 That's been interpreted a number of times, and there is
25 an element of due diligence that's required. It's not

1 PROFESSOR CARLSON: Can I ask Justice
2 Duncan, were you intimating then that "knowingly" would
3 not be any part of your proposal and that that could in
4 fact be a defense if and when a judge might be called on
5 the carpet from a judicial conduct perspective but would
6 not be part of the recusal?

7 HONORABLE SARAH DUNCAN: It's not my
8 proposal. As I understand it, I mean, I don't mind that
9 there be such a rule that you must recuse if you've
10 accepted a campaign contribution in excess of the limits
11 imposed by Section 253.155(b) and knowingly would not be
12 any part of that.

13 PROFESSOR CARLSON: Okay.

14 HONORABLE SARAH DUNCAN: But I don't
15 think that's what the subcommittee's -- this April 4th
16 draft does. I think it requires that there have been a
17 violation of the statute, and I think that's when we get
18 into this knowingly.

19 HONORABLE BILL RHEA: How do you read
20 that? I don't see that language in there? Is one of
21 these sections that's beside here the "knowingly"?

22 HONORABLE SARAH DUNCAN: Maybe not.
23 CHAIRMAN BABCOCK: It's Section 176 that
24 is the penalty provision that requires the "knowingly,"
25 isn't it?

1 MR. YELENOSKY: Right. And it's 155(a)
 2 that has the "knowingly" language, and the proposed rule
 3 cites the 155(b). It doesn't specifically cite the (a),
 4 and that's consistent with what Judge Rhea is saying and
 5 what Mike Hatchell was saying they meant, which was to
 6 import these limits irrespective of whether or not there
 7 was a mens rea.

8 HONORABLE SARAH DUNCAN: I stand
 9 corrected, if that is to be only.

10 MS. CORTELL: So we could probably just
 11 use a different word than "violates" and avoid that
 12 cause.

13 MR. YELENOSKY: Well, you could also take
 14 out the word "excessive" to make it very clear that
 15 you've accepted a contribution that's above the numbers
 16 that are in (b), and the only reason we don't put the
 17 numbers in, I guess, is because it makes it clear that
 18 we got them from the the Legislature and it could change
 19 later.

20 HONORABLE SARAH DUNCAN: I think it's the
 21 "excessive" and "violates" that are --

22 CHAIRMAN BABCOCK: Can you have a
 23 violation of 153.155(b) if you've opted out or been
 24 given a waiver?

25 MR. YELENOSKY: You can have a number

1 that's above the number stated there.

2 CHAIRMAN BABCOCK: But can you have a
 3 violation?

4 HONORABLE SARAH DUNCAN: Actually, you
 5 can violate (b). You can violate (b).

6 MR. ORSINGER: I can opt out of spending
 7 but not contribution, but if I do, then you're free of
 8 all of it, so the responding judge cannot violate this
 9 act.

10 CHAIRMAN BABCOCK: Right. So I have --

11 MR. ORSINGER: We're all of the sudden
 12 saying you're recused even though what you did is
 13 perfectly legal.

14 MR. YELENOSKY: Right. Right. And
 15 that's what Justice Duncan --

16 MR. ORSINGER: That's the whole point
 17 here. The whole point here is that we're borrowing the
 18 Legislature's limits, but we're not taking any of the
 19 offsetting, balancing, safeguards, procedures,
 20 knowingness, nothing. It's just a bright line test. If
 21 you took more than the dollar figure, no matter whether
 22 you knew it, didn't know it, whether they remarried,
 23 whether they got divorced, whether they joined law
 24 firms, you're out.

25 HONORABLE F. SCOTT MCCOWN: Could I

1 suggest that if we changed it to "The judge has accepted
 2 a campaign contribution" and then drop down and instead
 3 of saying "which violates," we say "which exceeds the
 4 limits in section" -- and that way it makes it clear
 5 that we're taking the limits from those sections. We
 6 drop out the term "violate," which makes it sound like
 7 the judge did something --

8 CHAIRMAN BABCOCK: Bad.

9 HONORABLE F. SCOTT MCCOWN: -- bad and,
 10 you know, I don't know where we are on our theory of
 11 comments, but we could have a comment that says that the
 12 rule is designed as a technical rule of recusal if the
 13 judge took money that exceeded those limits, and we're
 14 not passing on or suggesting that the rule is in any way
 15 an ethical rule or that we're trying to implement the
 16 statute or whatever such language.

17 CHAIRMAN BABCOCK: Well, Richard, I
 18 missed that if that's what we were doing, but we should
 19 have it someplace.

20 MR. ORSINGER: Well, this is largely the
 21 task force proposal, but the way I see this it doesn't
 22 address the confusion that we're struggling with today.
 23 It was an attempt to borrow the statute's limits, but it
 24 also carried with it, I think, by the word "violate" the
 25 statute's exceptions.

1 CHAIRMAN BABCOCK: Right.

2 MR. ORSINGER: And so we're debating
 3 today to get away from the statute, to borrow the
 4 numbers, and to make it an absolute bright line test.
 5 You're either over the number and you're out, or you're
 6 not over the number and you're not out.

7 CHAIRMAN BABCOCK: Opt out, opt in,
 8 doesn't matter.

9 MR. ORSINGER: That's right.

10 MR. LOW: But if we do that, the statute
 11 has a limitation period, but if you do that then that
 12 means 20 years from now, there's no limitation in this
 13 law firm. So how long is it going to be? As long as
 14 that judge is on the bench? So if you don't take the
 15 limitations, you've got a rule that's going to apply
 16 forever.

17 MR. ORSINGER: I'd also wonder about
 18 accepting even under Scott's language because I still
 19 feel like these judges are not necessarily going to know
 20 that a contribution is in the limit -- over the limit on
 21 the day they deposit the check, so when we use the word
 22 "acceptance" I feel like we ought to allow them to have
 23 at least the reporting period to find out that they're
 24 in excess and then do a refund.

25 HONORABLE F. SCOTT MCCOWN: Well, the

1 statute has a technical way to return a contribution.

2 It sets out the procedure for making a return, so if you
 3 inadvertently receive a contribution you can pursuant to
 4 the statute return it.

5 MR. ORSINGER: But the rule doesn't
 6 invoke that. What we're borrowing from the rule under
 7 the proposal that we're debating right now is the dollar
 8 limits and that's all.

9 MR. HAMILTON: The rule does invoke that.

10 MR. YELENOSKY: It doesn't cite the
 11 253.155, what is it --

12 CHAIRMAN BABCOCK: (e).

13 MR. YELENOSKY: (d) or (e)?

14 CHAIRMAN BABCOCK: (e).

15 MR. YELENOSKY: Which is the time limits,
 16 but even if it did, the practical problem raised I think
 17 was the judge -- there is a motion for recusal. The
 18 judge says -- I guess would the time have necessarily
 19 run in a campaign to have returned it? Not necessarily,
 20 so the judge would still be within the time frame to
 21 return it, and so would that be a practical problem with
 22 the recusal motion?

23 HONORABLE F. SCOTT MCCOWN: Well, I

24 think -- what does the statute say about returns?

25 MR. YELENOSKY: It says the last day of

1 the reporting period in which the contribution was
 2 received or the fifth day after the date the
 3 contribution is received, the later of.

4 HONORABLE F. SCOTT MCCOWN: I mean, I
 5 definitely think we should incorporate the return
 6 because we're just trying to strike a balance here, and
 7 if a judge's campaign, if a check rolls in and it's
 8 opened and deposited, but within five days or within the
 9 reporting period the judge learns of that and makes the
 10 return, then I don't think that should be an automatic
 11 recusal.

12 CHAIRMAN BABCOCK: You could say "The
 13 judge has accepted and not returned pursuant to
 14 sections," what, "253.155(e), 157(b) and 160(b)."

15 MR. YELENOSKY: But at the point of the
 16 motion to recuse you wouldn't want the judge to say,
 17 "Oh, I've still got a month" or whatever the reporting
 18 is to return it. You would want the judge to say,
 19 "Well, I'm returning it now," right? How else do you
 20 decide that -- I mean is the motion to recuse denied
 21 because there's still time left to return it even if he
 22 doesn't?

23 MR. WATSON: And who would want at the
 24 motion to recuse stage to be the one who prompts the
 25 judge to say, "Okay, I'm writing a check refunding

1 \$5,000. Thank you, sir, very much. I'm continuing."
 2 CHAIRMAN BABCOCK: Well, the problem,
 3 Skip, is the timing of the motion to recuse. If the
 4 motion to recuse comes after the reporting period then
 5 the judge has got no option because the time to return
 6 is already done.
 7 HONORABLE HARVEY BROWN: The motion to
 8 recuse is always going to come after the reporting
 9 period. The lawyers aren't going to know about it
 10 beforehand.
 11 CHAIRMAN BABCOCK: Good point.
 12 MS. CRAIN: That's true.
 13 CHAIRMAN BABCOCK: Good point.
 14 MR. ORSINGER: Chip, can I raise
 15 another -- either the statute is designed to protect the
 16 judge who doesn't have a lot of personal wealth against
 17 the judge who has a lot of personal wealth and lifts the
 18 spending caps, and the only recourse the judge without
 19 wealth has is to go raise an excess amount of money to
 20 compete with somebody who has an excess amount of
 21 personal money to spend.
 22 Now, we're only penalizing judges who
 23 take contributions in excess but not people who spend in
 24 excess. So the public policy in the statute that
 25 permits the average wealth judge to raise excess money

1 threatened to run for judgeship, and people don't give
 2 money other than lawyers in those small counties. They
 3 give you 20 or \$25, so you give a small amount. He's
 4 spending all this money and so forth. What's he going
 5 to do? He's going to go to the lawyers, all the
 6 lawyers. All of them are going to be disqualified
 7 because they give and this man is rich. It can happen.
 8 It can happen in a small county. Maybe it wouldn't
 9 happen in Austin, but it can sure happen in the little
 10 county I was raised in. Of course, most anything could
 11 happen there.
 12 CHAIRMAN BABCOCK: Well, Richard, it
 13 looks to me like you hit the nail on the head that we
 14 have probably three, maybe four, options. We can delete
 15 this and just say, you know, it's a bad idea. Let's not
 16 do it.
 17 MR. ORSINGER: It might be addressed
 18 under (b)(1), by the way. I mean, maybe, maybe not. In
 19 the old days a political contribution from the opposing
 20 party was not grounds -- or opposing lawyer was not
 21 grounds for recusal, but they have changed the Code of
 22 Judicial Conduct since then and I'm not sure that (b)(1)
 23 isn't the vehicle for this if we drop it out of (9) and
 24 (10).
 25 CHAIRMAN BABCOCK: Impartiality by --

1 to compete against a rich candidate is penalized, but
 2 the rich candidate who doesn't even take contributions
 3 from lawyers is free to spend anything they want.
 4 MR. YELENOSKY: Only if you equate
 5 recusal with penal. I mean, all you're doing is
 6 recusing. That doesn't mean you're penalized.
 7 MR. ORSINGER: No, but what I'm saying
 8 is, is that there's some logic, isn't there, in saying
 9 that a judge who doesn't have the personal resources to
 10 compete and the other side is violating spending limits,
 11 see, we're only focusing on contribution limits here and
 12 we're losing the public policy that's built into the
 13 statute on spending limits, and we're doing it without
 14 even discussing whether it's wise, which I think that a
 15 judge who can't compete on personal wealth and the other
 16 side is violating -- or should I say waived or
 17 disclaimed spending limits then the contribution limits
 18 on the opposite side should be waived also, and we're
 19 throwing that away.
 20 HONORABLE F. SCOTT McCOWN: But that's
 21 never happened in the history of the state, and I
 22 venture to say never will. You're not going to have any
 23 judges who decide and are able to fund effective
 24 campaign by the receipt of excessive contributions. As
 25 an empirical matter that isn't going to happen, and all

1 MR. ORSINGER: Yeah. I mean, what's the
 2 difference between a contribution that's one penny less
 3 than the limit and one penny more than the limit from a
 4 practical standpoint?
 5 HONORABLE F. SCOTT McCOWN: One it's over
 6 the line, and one it's under the line.
 7 CHAIRMAN BABCOCK: Right. So delete it,
 8 not worry about it; do it as Judge Rhea says, as
 9 drafted, which incorporates the spending and
 10 contribution limits but doesn't pick up the troublesome
 11 "knowledge" and opt out and other provisions to it; and
 12 then the third way to do it is to just say simply, "Hey,
 13 if you violate the statute then you're gone." Those are
 14 the three options we have pretty much?
 15 HONORABLE HARVEY BROWN: Well, then we
 16 have Scott McCown's.
 17 CHAIRMAN BABCOCK: Okay. Why don't we
 18 see if we can get a sense of where we are, where
 19 everybody feels about this?
 20 HONORABLE PHIL HARDBERGER: Chip, if the
 21 first motion to disregard it fails --
 22 CHAIRMAN BABCOCK: Yes.
 23 HONORABLE PHIL HARDBERGER: -- then the
 24 proponents of that would be able to vote on the best way
 25 to handle it, correct?

1 we're saying in this rule is to say to the public if a
 2 judge has gotten a contribution greater than the limits
 3 set by the Legislature that judge won't sit in that
 4 case. We're not saying there's anything wrong with that
 5 judge where he can't sit in other cases, but in that
 6 case he won't sit.
 7 MR. YELENOSKY: Yeah. I mean, how
 8 many -- even if he does, I mean, how many cases is he
 9 going to be recused from? It's not going to be as if he
 10 can't function as a judge.
 11 JUSTICE HECHT: I'm not sure of the exact
 12 numbers, but I think there are several races this time
 13 where judges are exceeding the spending limits or opting
 14 out of the statute.
 15 HONORABLE F. SCOTT McCOWN: But is their
 16 opponent running against them accepting excessive
 17 contributions and winning and then becoming a judge that
 18 has to be recused?
 19 JUSTICE HECHT: I don't know the answer
 20 to that.
 21 HONORABLE F. SCOTT McCOWN: I don't think
 22 so.
 23 MR. LOW: In a small county it very well
 24 could happen that somebody moves in there that's very
 25 wealthy, and I've seen a situation where a guy

1 CHAIRMAN BABCOCK: I think that's fair.
 2 Yeah. That's fair. So let's -- yeah, Sarah.
 3 HONORABLE SARAH DUNCAN: Can we separate
 4 out having a rule of recusal if you accept a
 5 contribution in excess of the limits and accepting this
 6 language as drafted, because my view at least is this
 7 language as drafted doesn't say that?
 8 CHAIRMAN BABCOCK: Okay.
 9 HONORABLE SARAH DUNCAN: So if we could
 10 just separate those two questions out.
 11 CHAIRMAN BABCOCK: Sure. Yeah. All
 12 right. Nina.
 13 MS. CORTELL: This may be premature, but
 14 should we consider two versions to give to the Court, a
 15 little bit like we did on the parental notification
 16 rules, and I realize this is premature because we don't
 17 have a sense of the group, but because there are
 18 political considerations between the two versions other
 19 than not going with it at all but whether you go beyond
 20 the statute by just using the limits without all the
 21 other aspects or the version where you incorporate the
 22 statute per se. I guess I would like to give both
 23 versions to the Court. I just want to put that on the
 24 table.
 25 CHAIRMAN BABCOCK: No, I think that's a

1 good comment. Probably a good idea. This is a
 2 nonbinding vote. We're still going to keep talking
 3 about it after lunch, but I'd just like for myself to
 4 see where we are on this debate so I have a good sense
 5 of it.
 6 MS. MCNAMARA: Chip, if you're going to
 7 vote on the three options, could you distinguish between
 8 the second and the third?
 9 CHAIRMAN BABCOCK: Yeah. Let's -- as
 10 Justice Hardberger points out, why don't we just vote on
 11 what I'll call the Hardberger let's-not-do-anything rule
 12 first and then we'll try to define the other two
 13 options. So how many people think --
 14 MR. EDWARDS: Could I ask a question
 15 before you start voting?
 16 CHAIRMAN BABCOCK: Sure. Yeah.
 17 MR. EDWARDS: Does anybody know what the
 18 present law is with regard to recusal under appearance
 19 of impropriety insofar as political contributions are
 20 concerned?
 21 HONORABLE F. SCOTT McCOWN: Yes.
 22 HONORABLE SCOTT BRISTER: I'm unaware
 23 of any -- it's always been raised, and I'm unaware of
 24 any case that said, "This was too big a contribution,
 25 you are recused." But to me that's the problem.

1 against that proposition raise your hand. 17 to 9
 2 against that proposition.
 3 Okay. Now, let's try to define the two
 4 remaining options. One is that even though the language
 5 in (9) and (10) is no doubt imperfect, the concept, as I
 6 understand what Richard and Mike Hatchell and others
 7 have been saying, is what they're trying to do is borrow
 8 the limits from the statute without also taking the
 9 "knowing" requirement, the opt out requirement, the
 10 waiver requirement, but rather make recusal an automatic
 11 thing if those limits are exceeded. Is that fair,
 12 Buddy?
 13 MR. LOW: Can I raise a question?
 14 CHAIRMAN BABCOCK: Yeah.
 15 MR. LOW: Does that include the statute
 16 of limitations that's imposed in the statute, or is that
 17 forever? I mean, the limits, is that --
 18 MR. HATCHELL: Bob, you'll have to help
 19 me on this. As I recall there's a self-executing aspect
 20 that prevents one campaign reporting period from having
 21 an effect aeons in the future. We dealt with this
 22 issue.
 23 HONORABLE SCOTT BRISTER: The task force
 24 report says only for the election --
 25 MR. PEMBERTON: Right. Right.

1 Somebody should have stepped up -- some of these court
 2 of appeals judges or somebody should have stepped up --
 3 HONORABLE F. SCOTT McCOWN: Somebody may
 4 have the chance in the future.
 5 HONORABLE SCOTT BRISTER: -- on some of
 6 these cases and said, "This looks really bad. We're not
 7 going to allow this," but every case that's ever been
 8 written said "This contribution -- it's elected judges.
 9 You've got to get contribution. No recusal."
 10 MR. LOW: Right. Right.
 11 MR. EDWARDS: What I was wondering, could
 12 we do with a comment to the bad appearance part of the
 13 rules something that nobody wants to do with a specific
 14 rule?
 15 HONORABLE SCOTT BRISTER: A rule that
 16 says, "Come on. Do it sometimes at least."
 17 CHAIRMAN BABCOCK: The task force cites
 18 an El Paso case from 1993, writ denied, Aguilar vs.
 19 Anderson which says, quote, "Texas courts have
 20 repeatedly rejected the notion that a judge's acceptance
 21 of campaign contributions from lawyers creates bias
 22 necessitating recusal or even an appearance of
 23 impropriety."
 24 HON. ANN CRAWFORD McCLURE: And there is
 25 a scathing dissent in that case by our now current Chief

1 MR. HATCHELL: Okay. Correct.
 2 HONORABLE SCOTT BRISTER: -- or the term
 3 that you got elected to with that contribution.
 4 MR. LOW: But the way you defined it is
 5 it didn't have that safeguard. It just had the monetary
 6 limits.
 7 MR. ORSINGER: That's right. This is
 8 unlimited as written.
 9 MR. LOW: And so the way you've defined
 10 it would mean it will be from now and the judge --
 11 CHAIRMAN BABCOCK: Yeah. I hear you, and
 12 I think that is a deficiency in this particular
 13 language. The concept is, however, that we're trying to
 14 borrow some things from the statute and reject others.
 15 That's the concept of this rule without worrying about
 16 the details.
 17 MR. LOW: All right.
 18 CHAIRMAN BABCOCK: That's one thing we're
 19 voting on, and then the alternative to that is put in
 20 our recusal rule and tie it specifically and explicitly
 21 to the statute, thus a violation of the statute gets you
 22 recused, but anything short of a violation of the
 23 statute does not get you recused. Okay.
 24 So those are the two things we're voting
 25 on. So you're voting for number -- for everybody who

1 Justice.
 2 MR. ORSINGER: But in fairness, that was
 3 before the Judicial Conduct Code was amended, right?
 4 HON. ANN CRAWFORD McCLURE: That was
 5 before the code was amended. That was back in '93.
 6 MR. ORSINGER: So it might be a different
 7 issue because if you now have it as an ethical
 8 constraint and you have a violation of it, it might be
 9 recusable under (b)(1). I'm not sure (b)(1) doesn't get
 10 us there. We don't know. The old cases are not dealing
 11 with an expressed prohibition in the Code of Conduct.
 12 MR. EDWARDS: Right. That's why I was
 13 wondering about a comment to (b)(1) that would overrule,
 14 if you will, any case law that's out there that says
 15 it's not a proper consideration.
 16 CHAIRMAN BABCOCK: All right. Justice
 17 Hardberger says, "Look, let's not mess with this. It's
 18 never going to come up. It's adequately dealt with
 19 other places. So let's just advise the Court that we
 20 think -- our considered judgment is not to include
 21 subparagraph (9) or subparagraph (10) in the recusal
 22 rule that we're working on. Forget about it.
 23 Everything is okay." Fair enough?
 24 All right. Everybody that votes for that
 25 proposition raise your hand. Everybody that votes

1 wants to use the borrowing concept, borrow some things
 2 but not all things from the statute, raise your hand.
 3 And all those who only want to have a
 4 recusal rule that is tied directly to a violation of the
 5 statute raise your hand.
 6 MR. ORSINGER: Two.
 7 CHAIRMAN BABCOCK: Who else?
 8 MR. ORSINGER: Edwards, I think.
 9 MR. EDWARDS: No, I didn't. I was just
 10 scratching my neck. I was not making a bid.
 11 CHAIRMAN BABCOCK: 19 to 1 in favor of
 12 borrowing. Representative Dunnam, did you raise your
 13 hand on either of those?
 14 HONORABLE JIM DUNNAM: No. I'm an
 15 ex officio member.
 16 CHAIRMAN BABCOCK: Oh, okay.
 17 JUSTICE HECHT: Ex officio members can
 18 vote.
 19 CHAIRMAN BABCOCK: Ex officio members can
 20 vote.
 21 HONORABLE JIM DUNNAM: Well, I would
 22 rather just sit here.
 23 CHAIRMAN BABCOCK: Excuse me?
 24 HONORABLE JIM DUNNAM: I'd rather sit
 25 here.

1 CHAIRMAN BABCOCK: Okay.
 2 HONORABLE JIM DUNNAM: I'll vote on some
 3 of these matters later.
 4 CHAIRMAN BABCOCK: Okay.
 5 HONORABLE JIM DUNNAM: I would like to
 6 propose something.
 7 CHAIRMAN BABCOCK: Okay.
 8 HONORABLE JIM DUNNAM: If you-all are
 9 going to consider expanding the statute, which I think
 10 is what was just voted for, to me the idea of
 11 discouraging the appearance of impropriety regarding
 12 financial contributions is a very noble thing. For
 13 example, we have limits on individuals. Harris
 14 County -- I asked some questions. Harris County is
 15 5,000 per individual. We've got big law firms there,
 16 and so we have 30,000 for law firms as I understand it,
 17 and I guess the idea is that anything over \$30,000 from
 18 a law firm has the appearance of impropriety, and that's
 19 what this -- that's what we're -- what you-all are
 20 saying, I think.
 21 And if you take that a little further,
 22 where I see things where people talk about impropriety
 23 has to do with aggregation of money like that. For
 24 example, if \$30,000 from a law firm is enough to raise
 25 the appearance of impropriety, what about if we have a

1 MR. HAMILTON: Our current rules do not
 2 authorize recusal of appellate court judges, so that
 3 wouldn't fit there unless we change that.
 4 MR. ORSINGER: Well, the appellate rules
 5 cross-refer to the TRAP -- Appellate Rule 16.2, "The
 6 grounds for recusal of an appellate court justice or
 7 judge are the same as those provided in the Rules of
 8 Civil Procedure," so if we change the grounds at the
 9 trial level, there's going to be a mirroring effect.
 10 CHAIRMAN BABCOCK: The TRAP rule will
 11 pick it up.
 12 MR. ORSINGER: Yeah. But if you write a
 13 special rule just for appeal, I mean, I don't know --
 14 HONORABLE JIM DUNNAM: I'm not suggesting
 15 appeal. I'm just saying that the limits should apply
 16 per party not per law firm.
 17 MR. ORSINGER: And that would apply to
 18 the trial judge as well under your suggestion?
 19 HONORABLE JIM DUNNAM: It would apply to
 20 all the judges, all the way up to the top.
 21 MR. ORSINGER: All the way to the Supreme
 22 Court. Okay. So if we make the change here it will
 23 apply to all levels of judges, except it won't apply to
 24 probate judges.
 25 CHAIRMAN BABCOCK: Judge Rhea.

1 case on appeal and all of the sudden when we're on
 2 appeal we have the three largest law firms who did not
 3 represent them at the trial court but now the three
 4 largest law firms in Houston, for example, are now the
 5 appellate counsel? Well, on aggregate those law firms
 6 gave this judge a hundred thousand bucks from one side
 7 in the litigation.
 8 So if you're going to think about saying
 9 that \$30,000 is a limit, I think it happens that law
 10 firms are hired because the client believes that it will
 11 have some influence on a judge. We see too many times
 12 in court of appeals cases that all of the sudden you've
 13 got three heavy-hitting law firms on the losing side
 14 going up before the court of appeals. So I would
 15 suggest that you consider that we're going to have -- if
 16 30,000 is the magic number then it should be per side,
 17 not -- it shouldn't be per law firm on the side. It
 18 should be per side.
 19 CHAIRMAN BABCOCK: Okay. The next order
 20 of business -- yeah, Anne.
 21 MS. McNAMARA: I think that is probably
 22 unworkable in like industry litigation. There's a case
 23 going on against Texas that has all of the Fortune 50
 24 corporations as defendants.
 25 HONORABLE JIM DUNNAM: Well, I think the

1 HONORABLE BILL RHEA: I think we're
 2 talking about borrowing from the statute here, and I
 3 think you're talking about adding to the statute, right?
 4 HONORABLE JIM DUNNAM: I think that
 5 what -- you-all just voted to say that if you opt out
 6 voluntarily that you're going to get recused, and that
 7 is a voluntary matter. If I opt out and Bob doesn't and
 8 he violates the spending contribution limits then he can
 9 be recused. You-all are expanding the statute --
 10 HONORABLE BILL RHEA: I don't think we're
 11 saying that.
 12 HONORABLE JIM DUNNAM: -- in that vote,
 13 and I'm just suggesting -- and I'd vote for this on the
 14 House floor in a second. I think it's good policy. I
 15 have some differences of opinion about the form to deal
 16 with it, but as long as you-all are thinking about
 17 public policy and the appearance of impropriety of
 18 judges then the aggregate limit should be per party or
 19 something to that effect as opposed to just a law firm.
 20 CHAIRMAN BABCOCK: I think right now is a
 21 good time for lunch.
 22 (Whereupon a recess was taken, and the
 23 proceedings were continued as reflected
 24 in the next volume.)
 25

1 people in this room know that when cases are lost, big
 2 cases are lost, all of the sudden you see big law firms,
 3 multiple big law firms, hired for the appeal and the
 4 client -- and the appearance of that, the appearance of
 5 that is bad, and the appearance of that is that the
 6 client believes they are going to buy influence in the
 7 court of appeals. This might not be a kosher thing for
 8 me to say, but I think it is believed, and if you want
 9 to do something about the appearance of influence and
 10 money then I would consider you-all think about that.
 11 I'm not saying that there is an appropriate way to do
 12 it, but I think that just because one law firm gave
 13 30,000 on appeal, you might have three of those law
 14 firms and not all three of those law firms are doing all
 15 the briefing.
 16 MS. McNAMARA: Would you be equally
 17 comfortable if it were per party? Because if you --
 18 HONORABLE JIM DUNNAM: Yeah, that's what
 19 I -- per party. Yeah. Per party. Now, of course, in
 20 multiple -- in these big cases with lots of parties,
 21 it's different, but I would just ask that you-all think
 22 about that because if aggregate per firm is an issue and
 23 it smells bad then aggregate per party smells equally
 24 bad.
 25 CHAIRMAN BABCOCK: Carl.

1
 2 CERTIFICATION OF THE HEARING OF
 3 SUPREME COURT ADVISORY COMMITTEE
 4
 5 I, D'LOIS L. JONES, Certified Shorthand
 6 Reporter, State of Texas, hereby certify that I reported
 7 the above hearing of the Supreme Court Advisory
 8 Committee on April 7, 2000, and the same were thereafter
 9 reduced to computer transcription by me.
 10 I further certify that the costs for my
 11 services in this matter are \$
 12 CHARGED TO: Charles L. Babcock .
 13
 14 Given under my hand and seal of office on
 15 this the ____ day of _____, 2000.
 16
 17 ANNA RENKEN & ASSOCIATES
 18 1906-B West 37th Street
 19 Austin, Texas 78731
 20 (312) 323-0626
 21
 22 D'LOIS L. JONES, CSR
 23 Certification No. 4346
 24 Cert. Expires 12/31/2000
 25 #005, _____ DJ

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Supreme Court Advisory Committee

Condenselt™

Richard's - shake

Table with multiple columns containing legal terms and associated numbers. Columns include Supreme Court Advisory Committee, Condenselt™, and Richard's - shake. Terms include safeguard, Sally, sanction, Sarah, sat, satisfy, save, saw, says, se, seal, second, second-guessed, second-guessing, seconded, secrecy, section, sections, secure, see, sets, settle, settlement, seven, seventh, several, shafted, shake, Seeing, seem, sees, self-evident, self-executing, semantics, Senate, Senator, Senators, send, sending, sense, sensitive, sent, sentence, sentiment, separate, sequentially, serious, seriously, seriousness, served, service, services, session, set, sets, settle, settlement, seven, seventh, several, shafted, shake.

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