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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 20, 2000

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 20th
day of October, 2000, between the hours of 9:10 a.m. and
12:10 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

INDEX OF VOTES

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2 CHAIRMAN BABCOCK: Good morning, everybody.
3 Sorry I'm late. We were taping a program about our
4 committee for the -- and our work for the Bench/Bar
5 conference that's being held today, the Dallas Bench/Bar
6 conference which was being held today in Largo, and Judge
7 Rhea was the moderator of this panel discussion that we
8 had with Justice Hecht and Judge Peeples and Paula Sweeney
9 and myself right over here in the next room, and he's
10 going to take that videotape and drive it down to wherever
11 they're going to have their conference and play it this
12 afternoon, so we got on television early. That's why I'm
13 late. Sorry about that.

14 So the first order of business is for
15 Justice Hecht to repeat exactly what he just did on
16 videotape a minute ago and tell us how our rules are
17 fairing, our proposed rules are fairing with the Court,
18 and anything else that he cares to comment on.

19 JUSTICE HECHT: Thanks, Chip. First I'd
20 like to introduce the Court's new rules attorney, Chris
21 Griesel, who is on my left. Chris is a graduate of Texas
22 A&M and the -- an honors graduate of the Texas Tech Law
23 School where he was editor-in-chief of the Law Review
24 about a dozen years ago. He was a briefing attorney for
25 Chief Justice Phillips for a year and then was in practice

1 with the Haynes & Boone firm for three or four years until
2 he went to legislative counsel, where he has been over on
3 the other side of the street drafting legislation for
4 several years, so we are -- we know Chris. The Court
5 knows him from when he was there before, and we're excited
6 that he's on board; and former rules attorney Pemberton
7 seems to be going great guns down on the other side of the
8 street, so we keep stealing their people and they steal
9 ours, and it's working all right so far.

10 Chris' e-mail address is just chris.griesel
11 at the Court's website. So if you need to communicate
12 with him, you can; and he has Bob's old telephone number,
13 which is 463-6645; and you're welcome to call him about
14 rules problems as they come up.

15 On parental notification, the Court still
16 has not taken action, but I anticipate they will in a few
17 weeks, and I don't see much controversial in the rules,
18 and I anticipate that as soon as they get on the Court's
19 agenda that the Court will approve them and try to put
20 them into effect forthwith; but otherwise, the -- as far
21 as we can tell, the parental notification procedure seems
22 to be working exceptionally. We don't hear complaints of
23 any major problems.

24 We did hear the other day that -- the first
25 time we've heard this, that a case has gone to a

1 constitutional county judge, so there was some concern
2 among that body that they would get these cases because,
3 as you well know, constitutional county judges in many
4 counties are really the mayor of the county. It's more of
5 an administrative position than a judicial one, and they
6 were concerned on a number of issues, but one of them had
7 to do with whether their administrative position was
8 really adaptable to these kinds of hearings. But as far
9 as we know this is the first time that that issue has come
10 up in the nearly ten months that the proceedings have been
11 possible under the statute.

12 And then on summary judgment, we've kind of
13 waited to discuss it until after this meeting because we
14 hope -- the Court hopes that we make some progress on some
15 of the other agenda items this time, particularly the
16 appellate rules and maybe Justice Duncan's report on that
17 set of rules, and so -- and, of course, Paula's report on
18 the voir dire rule, and once we get a little more package
19 together, I think we will look at those and see if we want
20 to do something before the session. So that's what the
21 Court has done.

22 CHAIRMAN BABCOCK: Great. Thanks, Justice
23 Hecht. Well, we have got a lot to cover, as usual, so
24 unfortunately, I thought we were going to be able to send
25 the recusal rule to the Court after our last meeting, but

1 there have been a few glitches that have come up. And
2 Carl Hamilton and Richard Orsinger have been working very
3 hard at it, and Judge Peeples has noticed something, and I
4 think Skip Watson I think maybe noticed something, and I
5 didn't think it was appropriate for us to provide new
6 language on the recusal rule, particularly since it's so
7 tricky, without going back to the full committee. So
8 that's the first thing we are going to take up.

9 There should be a new redlined version dated
10 October 19th that all of you have. Does everybody have
11 that? Because if you don't, it's not going to be very
12 easy to get through all of this stuff. The first thing
13 is, I think -- and this is just mechanical, but we say
14 "Supreme Court Advisory Committee subcommittee working
15 draft of recusal rule," and it probably should be
16 "disqualification and recusal rule," even though we don't
17 make very many changes in the disqualification provision.
18 So if nobody has got objection to that we will change
19 that.

20 The second thing is Richard and Carl and I
21 noticed that there are some terms that have been added to
22 the rule, and we're not quite sure where they came from,
23 the neverworld perhaps; but if you'll notice in subsection
24 (a) (2), we say "the judge has an economic interest in the
25 matter, either individually or as a fiduciary"; and then

1 you'll notice if you go down to (b) (7) when we're talking
2 about recusal, you'll see that it says "the judge or the
3 judge's spouse is related," etc., "to anyone with a
4 financial interest in the matter." So it got us to
5 wondering what's the difference between economic and
6 financial.

7 Interestingly enough, the word "economic" is
8 not in any current rule, and it's not in the Constitution.
9 Both the Constitution and the current rule just say "an
10 interest"; and yet the difference between an interest
11 without modification and the recusal language of financial
12 interest is in the current rule; and there is, therefore,
13 some potential ambiguity. I believe there is only one
14 case that I'm aware of, although Bill Dorsaneo may be
15 aware of others, where that distinction has been
16 discussed; and it is a -- I think a Beaumont case called
17 Gulf Maritime Warehouse vs. Powers, Beaumont Court of
18 Appeals 1993, 858 S.W. 2d 556; and at 558 the Court notes
19 the difference between the constitutional provision where
20 it just says "No judge shall sit in any case wherein he
21 may be interested," and then the provision of the current
22 Rule 18b(2)(e) where it says "financial interest." And
23 the Court concludes that there is no difference between
24 the two standards, and it says that we -- for a judge to
25 be disqualified or recused he must in general be a direct

1 pecuniary or property interest in the subject matter in
2 litigation.

3 No Supreme Court authority on this that I'm
4 aware of, and so, Bill, as you're leaving the table, have
5 you got anything else to --

6 PROFESSOR DORSANEO: No. You're doing
7 wonderfully well.

8 CHAIRMAN BABCOCK: Okay. So the issue now
9 becomes whether we want to inject a new word, "economic,"
10 into subparagraph (a)(2) or whether we want to take that
11 out and whether or not we want to leave the language as it
12 is, with (a)(2) just saying the judge has an interest, and
13 then leave (b)(7) the way it is by saying that the judge
14 has a financial interest or is related to somebody with a
15 financial interest or whether we want to do something
16 else. Judge McCown.

17 HON. SCOTT F. McCOWN: Could we just change
18 (a)(2) to "a judge has a financial interest"?

19 CHAIRMAN BABCOCK: We could do that.

20 HON. F. SCOTT McCOWN: And just that way it
21 would all be consistent.

22 CHAIRMAN BABCOCK: Alex.

23 PROFESSOR ALBRIGHT: Doesn't the
24 Constitution just say "an interest"?

25 CHAIRMAN BABCOCK: Yeah. And that would be

1 something to --

2 PROFESSOR ALBRIGHT: And grounds (a) or
3 disqualification would just be a constitutional one.

4 HON. F. SCOTT McCOWN: Well, but I think the
5 purpose of the rule is to kind of -- I hate this word --
6 operationalize the broader concepts, and my understanding
7 was that the Constitution is only a financial interest.
8 If you say "if the judge has an interest in the matter,"
9 you're not kind of putting the average person who's trying
10 to use the rules in a working way on notice because I
11 would hope that all judges would be interested in all
12 their cases in the sense of the word "interest," but so we
13 need to kind of spell it out.

14 CHAIRMAN BABCOCK: Well said. Justice
15 Hardberger.

16 HON. PHIL HARDBERGER: Yeah. I would concur
17 with that. I think if you take out the word, either
18 "economic" or "financial," and I do think it ought to be
19 lined up so they say the same word. If you take that out
20 you greatly weaken the rule because you broaden it out so
21 much it can hardly be enforced. I think you will have
22 changed the entire meaning of it to remove that word, and
23 I would use the word "financial" just to be consistent.

24 CHAIRMAN BABCOCK: Okay. There is some case
25 law from the Supreme Court that Luke and Bill have in

1 their book that says that the constitutional
2 disqualification interest is such that, however small it
3 is, rests upon a direct pecuniary -- sounds like financial
4 or economic to me -- or personal interest in the result of
5 the case presented to the judge or court. That's in
6 Cameron vs. Greenhill, and the same holding is found in
7 Sun Oil vs. Whitaker.

8 Does the Court support saying there that
9 there is something more than financial or pecuniary when
10 you are applying the constitutional interest standard? I
11 don't know.

12 HONORABLE MICHAEL SCHNEIDER: What about
13 "personal interest"? "Personal interest" might cover all
14 grounds on that.

15 CHAIRMAN BABCOCK: Yeah. Sarah.

16 HONORABLE SARAH DUNCAN: It seems to me that
17 if we don't know what the constitutional provision means
18 because it hasn't yet been interpreted by the Court, it's
19 not our place to define it.

20 CHAIRMAN BABCOCK: Judge Patterson, you want
21 to say something?

22 HONORABLE JAN PATTERSON: No, I couldn't
23 quite hear. I was sort of --

24 CHAIRMAN BABCOCK: Justice Duncan was saying
25 that -- unless there's a clear understanding about what

1 the constitutional interest means that we shouldn't go
2 fiddling with that language. In lay terms, interpreting
3 for Justice Duncan.

4 HONORABLE SARAH DUNCAN: I didn't say
5 "fiddling."

6 CHAIRMAN BABCOCK: Yeah. Steve.

7 MR. YELENOSKY: I just had a question. This
8 is pretty unfamiliar to me, but in the recusal portion of
9 (7) you were referring to, it says if the judge or the
10 judge's spouse essentially is related to someone with a
11 financial interest or any other interest it may be grounds
12 for recusal; but there isn't anything in the recusal,
13 other recusal provisions, that seems to refer to the judge
14 having any other interest and unless that is just implicit
15 somewhere else, perhaps in (b)(1); but if not, would we be
16 saying under disqualification a judge can be disqualified
17 for a financial interest but there's no grounds for
18 recusing a judge for other interest, even though you can
19 recuse a judge for other interests of relatives?

20 CHAIRMAN BABCOCK: Richard, what's the
21 answer to that?

22 MR. ORSINGER: Well, you know, we're dealing
23 with a lot of uncertainties here, and one of the things
24 that we're doing is we're deleting old 18b(4), which
25 defines things like fiduciary and financial interest and,

1 in fact, the definition of financial interest has five
2 subparts. We're deleting all that, and we're just going
3 with the term "financial interest or other interest" on
4 recusal, and we're going with "economic interest" or else
5 what we change it to under the Constitution.

6 CHAIRMAN BABCOCK: Now, I think Steve's
7 point is that our (b)(7) now only talks about the judge
8 being related to somebody without -- with a financial
9 interest, but doesn't say but if the judge himself has a
10 financial interest.

11 MR. YELENOSKY: Yeah. It seems incongruous.

12 MR. SOULES: Isn't that taken care of by
13 (a)(2)? I mean, if the judge has an interest he's
14 disqualified. If his family has an interest --

15 MR. YELENOSKY: Well, that's the question,
16 because if they narrow (a)(2) to being financial interest
17 then you couldn't disqualify a judge under (a)(2) for
18 other interests, but you could recuse him because his
19 relatives have other interests.

20 CHAIRMAN BABCOCK: Luke then Judge Lawrence.

21 MR. SOULES: There is a lot of litigation
22 over issues other than financial issues. We tend to think
23 that the courts way of working out problems with
24 transferring money, but that's not the only thing courts
25 do. That's not the only thing we do; and if the judge has

1 an interest in the outcome of the litigation other than
2 financial, the judge should not sit in the case; and I
3 think that the word "interest" should not be modified at
4 all. It should be "if the judge has an interest" because
5 of that.

6 CHAIRMAN BABCOCK: Judge Lawrence.

7 HONORABLE TOM LAWRENCE: I would suggest
8 striking "economic" and putting "financial." The
9 disqualification rule should be something that's a
10 no-brainer, that's obvious, that's easily ascertainable.
11 There shouldn't be much of a burden to prove that up.

12 If you leave "economic" then there's
13 confusion between what's economic and what's financial in
14 the recusal portion. If you leave out "economic" and
15 "financial" and just say "interest" then that's too vague
16 and ambiguous. What does that mean exactly?

17 I think that grounds for recusal should be
18 something that has to be proved up, and you've got the
19 standards in there that are going to have -- a burden is
20 going to be on somebody to prove up why the judge is
21 recused, but disqualification ought to be so obvious that
22 there shouldn't be much discussion about it, and it needs
23 to be a clear standard.

24 CHAIRMAN BABCOCK: Well, here's what worries
25 me, is that the term "interest" is not qualified in the

1 Constitution. It's not currently qualified in the rule;
2 and you have two cases from the Texas Supreme Court that
3 says "a direct pecuniary," which sounds like financial or
4 economic, but says "or personal interest"; and it's the
5 "or personal interest" that worries me because if we throw
6 "financial" in here then we're striking the "or personal
7 interest" it seems to me; and I'm not sure that we should
8 be doing that in light of the constitutional provision,
9 and we may be unintentionally changing the holding of two
10 Texas Supreme Court cases. Now --

11 MR. SOULES: Why not use that language,
12 "direct pecuniary or personal interest"?

13 CHAIRMAN BABCOCK: We could use that. Yeah,
14 Scott.

15 HON. F. SCOTT McCOWN: I think Luke has
16 convinced me, but rather than use the language from the
17 case, why don't we just exactly use the language from the
18 Constitution and not modify it in either way, particularly
19 with this "individual or as a fiduciary" and just put down
20 exactly what the Constitution says?

21 HONORABLE SARAH DUNCAN: Make that a motion.

22 HON. F. SCOTT McCOWN: Do you have what the
23 Constitution says? I guess I ought to check that before I
24 move to put it down exactly.

25 MR. ORSINGER: It just says "interest."

1 CHAIRMAN BABCOCK: Yeah. It just says
2 "interest."

3 HON. F. SCOTT McCOWN: But what are the
4 exact words?

5 MR. ORSINGER: We will have it here in a
6 second.

7 CHAIRMAN BABCOCK: "No judge shall sit in a
8 case wherein he may be interested."

9 HON. F. SCOTT McCOWN: Then let's just say
10 "the judge has an interest."

11 HONORABLE DAVID PEEPLES: Or "is
12 interested."

13 HON. F. SCOTT McCOWN: Or "the judge is
14 interested." Yeah.

15 CHAIRMAN BABCOCK: So do you want to make
16 that in the form of a motion to strike the word "economic"
17 from (a) (2)?

18 HON. F. SCOTT McCOWN: Yeah, but I would
19 also strike "individually or as a fiduciary" and just go
20 with exactly -- because "individually or as a fiduciary"
21 seems to me to imply itself some kind of economic or
22 pecuniary. So I would go with "the judge has an
23 interest." And I wouldn't say "in the matter." I would
24 just say "the judge has an interest," colon.

25 CHAIRMAN BABCOCK: Okay. Anybody want to

1 talk about that?

2 MR. TIPPS: Why would you not say "in the
3 matter"?

4 HON. F. SCOTT McCOWN: Because there's a lot
5 of case law about the difference in subject matter and
6 that the subject matter could be broader than the actual
7 case that's in front of you or --

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: I can --

10 HON. F. SCOTT McCOWN: I'll give you an
11 example. You could own Exxon stock but not own Mobil
12 stock, but the issue in front of you is one that could
13 somehow affect the prices of oil. I think the grounds for
14 disqualification should be as narrow as possible because
15 the broader recusal rule would pick up anything else.

16 CHAIRMAN BABCOCK: Just so everybody knows,
17 the current rule says "Judges shall disqualify themselves
18 in all proceedings in which," subparagraph (b), "they know
19 that individually or as a fiduciary they have an interest
20 in the subject matter in controversy." That's the current
21 rule. Yeah, Carl.

22 MR. HAMILTON: Well, if you just said "has
23 an economic interest" and stopped, there's no object of
24 that sentence; but the Constitution says, "No judge shall
25 sit in any case where he may be interested." So I don't

1 see anything wrong with "has an economic interest in the
2 case" or "economic interest in the matter."

3 CHAIRMAN BABCOCK: Yeah. We've used "in the
4 matter" throughout the rule, so I wouldn't want to -- I
5 mean, either we're going to change it for everything in
6 the rule or --

7 MR. HAMILTON: But I think "economic" ought
8 to be dropped, just "has an interest in the matter" and
9 then that takes care of the disqualification and makes it
10 consistent with the Constitution and then the recusal part
11 is okay, because that is more specifically defined as a --
12 as some relative who has a financial interest in the
13 matter.

14 CHAIRMAN BABCOCK: Right.

15 MR. YELENOSKY: Or any other interest.

16 MR. HAMILTON: Or any other interest.

17 CHAIRMAN BABCOCK: Luke, how did this -- if
18 you recall, or Bill, how did this concept of fiduciary
19 creep into 18b(1)(b)? It's not in the Constitution, but
20 it is in the current rule.

21 MR. SOULES: I think it clarifies that the
22 interest may not be only an individual interest; that is,
23 a personal beneficial interest, but -- and the words
24 actually add some information that clarify the rule,
25 clarifies the rule to extend it to the judge in a

1 fiduciary capacity. A lot of judges do, of course, serve
2 as fiduciaries. The same reason they're picked for courts
3 they're picked to be fiduciaries. So it answers the
4 question if my beneficiaries have an interest, is that my
5 interest? And that answer is, yes, it is your interest,
6 and you must disqualify.

7 CHAIRMAN BABCOCK: Makes sense.

8 HONORABLE MICHAEL SCHNEIDER: Now, what is
9 the objection to using what the Supreme Court has said
10 that means, like, what was it, beneficial --

11 MR. ORSINGER: "Direct pecuniary or personal
12 interest".

13 CHAIRMAN BABCOCK: "A direct pecuniary or
14 personal interest in the result of the case presented to
15 the jury or court." Yeah, Sarah.

16 HONORABLE SARAH DUNCAN: I may be wrong on
17 this, but if memory serves, I believe this -- the
18 amendments to this rule that were in whatever year --

19 CHAIRMAN BABCOCK: 1990.

20 HONORABLE SARAH DUNCAN: -- came from the
21 Court, and I believe they were to track the Federal rule.

22 JUSTICE HECHT: Statute, Federal statute.

23 HONORABLE SARAH DUNCAN: Statute.

24 JUSTICE HECHT: But I still don't remember
25 how they got into subsection (1).

1 MR. SOULES: It may be in the Code of
2 Judicial Conduct, too. I haven't looked at it. We took
3 it out of the Texas Code of Judicial Conduct. I believe
4 we took disqualification out and put it in the rules so it
5 wouldn't be a disciplinary offense for a judge not to
6 disqualify himself where disqualification was required
7 under the law. So they took it out of the Code of
8 Judicial Conduct. That was the reason at the time many
9 years ago, so it's not in the Texas Code, but it may very
10 well be in the national proposed code.

11 JUSTICE HECHT: Yeah. Subsections -- the
12 recusal part of the rule came from the Federal statute.

13 HONORABLE SARAH DUNCAN: But not the
14 disqualification.

15 JUSTICE HECHT: But not the disqualification
16 part of it.

17 HON. F. SCOTT McCOWN: Well, I would move we
18 just leave it exactly as it's written except we delete the
19 word "economic."

20 MR. SOULES: Second.

21 CHAIRMAN BABCOCK: Second. Any further
22 discussion? All in favor?

23 Anybody opposed? It's unanimous -- oh, wait
24 a minute. Sorry. Well, maybe we need to talk about it.

25 HON. PHIL HARDBERGER: And I'm opposed

1 because I think you've weakened it down so much it will be
2 very hard to enforce, and it will selective enforcement at
3 that. It's like saying, "All judges should be good."

4 CHAIRMAN BABCOCK: Yeah, okay. Well, then
5 maybe we need to talk about this some more. Judge
6 Schneider.

7 HONORABLE MICHAEL SCHNEIDER: And I agree
8 with what Judge Hardberger says. In addition, I think it
9 just invites more litigation on what that means.

10 CHAIRMAN BABCOCK: Well, yeah, Bill.

11 MR. EDWARDS: Does anybody know whether
12 anybody has had any problem with 18b -- 18b(1)(b) the way
13 it's written? Has it been a problem? It's been
14 interpreted. Has it been a problem? If there's not a
15 problem, why are we fixing it? I haven't heard of a
16 problem.

17 CHAIRMAN BABCOCK: Judge McCown.

18 HON. F. SCOTT McCOWN: I guess I don't feel
19 strongly about this, but when you talk about
20 disqualification that's a constitutional concept. It
21 cannot be broadened by the Supreme Court. It cannot be
22 narrowed by the Supreme Court. It is what it is; and when
23 you're disqualified, everything you've done is void, not
24 voidable, but void; and so it becomes very important that
25 the rule not inadvertently broaden or narrow the

1 Constitution.

2 Anything you want you can put into recusal,
3 but in disqualification you ought to just track the
4 Constitution, and to the extent the Constitution is
5 ambiguous then you just have to track that ambiguity and
6 let it get worked out by case law.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE MICHAEL SCHNEIDER: But if the
9 Supreme Court has ruled, I disagree with you about what
10 you're saying about the Supreme -- if they have said
11 what -- if they have given a definition of what it means
12 and we have a case that says what it means, they can
13 expand it any way they want to. We may not agree with the
14 philosophy.

15 HON. F. SCOTT McCOWN: Well, I guess it's
16 just the constitutional law, like the common law, is case
17 by case adjudication, and I don't think we should take the
18 language from one case and put it into the rule and say
19 that's the Constitution when the very next case the
20 Supreme Court might be confronted with a fact pattern
21 where they say it's a little narrower or a little broader.

22 I mean, I agree with you they define it, but
23 the Constitution sets the standard, and I just think we
24 ought to stick with the words in the Constitution.

25 HON. PHIL HARDBERGER: I think Judge

1 Schneider has a very good point. The Supreme Court
2 interprets the Constitution. They have interpreted it, so
3 if we are going to change it, let's use the words of the
4 Supreme Court. They are fully within their rights to do
5 it, and they have done it, so we can't go wrong by taking
6 the Supreme Court's interpretation if we insist on
7 changing it.

8 CHAIRMAN BABCOCK: Wallace, did you have
9 anything?

10 MR. JEFFERSON: I agree. I agree with that.
11 It has to be narrower than just "interest." I don't think
12 even the framers of the Constitution could have believed
13 that if a judge, I mean, just has a general interest, a
14 philosophical interest, an intellectual interest in the
15 case that he must be disqualified. So it can't be that,
16 and I agree we've got to -- I mean, we can take what the
17 Supreme Court has said, which seems reasonable to me.
18 Make it "personal or pecuniary."

19 CHAIRMAN BABCOCK: Yeah, Steve.

20 MR. YELENOSKY: Well, if it can't be that
21 when we read it in the Constitution, why don't we just say
22 it can't be that when we read it in the rule? I mean, why
23 would putting it in the rule in the same language as it's
24 in the Constitution suddenly make it so much broader if
25 when we read the Constitution it's obvious to us that it

1 isn't that broad?

2 MR. JEFFERSON: Because if you can confine
3 it -- if you can say a personal, what seems to me
4 narrower than just "interest" or "pecuniary," then when
5 people read the rule that's what they're going to start
6 thinking of this rule being, that this is what
7 disqualification means. If they just have "interest" in
8 there and they begin thinking about that, they might --
9 you know, they might find some reason to disqualify and
10 prove that there is an interest that doesn't have any
11 narrow definition to it.

12 CHAIRMAN BABCOCK: Well, if somebody is
13 going to move to disqualify somebody under this rule,
14 presumably they are going to go to the cases. They don't
15 have to go very far if they have got Luke's book to find
16 these two Supreme Court cases, and that defines what it
17 is, but the Court could, as somebody said, change that by
18 common law. I'm sort of persuaded by Judge McCown's
19 approach to it, but anyway, we voted too hastily because I
20 thought it was -- because I misread our group, so let's
21 vote now, and I'll count the votes.

22 There's been a motion that's been made and
23 seconded that we delete the word "economic" from (a) (2),
24 but otherwise leave the language as it is. So everybody
25 in favor of that raise your hand.

1 Everybody opposed to that raise your hand.

2 It carries by a vote of 19 to 6, so we will
3 delete the word "economic" from (a) (2), which takes us to
4 (b) (7), where the word "financial interest" is included,
5 as it is in the existing rule. So now the question is
6 should we leave that as-is or should we change it in some
7 fashion?

8 MR. SOULES: I move we leave it as-is.

9 CHAIRMAN SOULES: Justice Duncan.

10 HONORABLE SARAH DUNCAN: I just have a
11 question. Why is it that we have deleted the definitional
12 section?

13 MS. SWEENEY: Can't hear you.

14 HONORABLE SARAH DUNCAN: Why is it that we
15 have deleted the definitional section?

16 CHAIRMAN BABCOCK: What section are you
17 referring to?

18 HONORABLE SARAH DUNCAN: 18b(4).

19 CHAIRMAN BABCOCK: 18b(4).

20 HONORABLE SARAH DUNCAN: Or have we not?

21 CHAIRMAN BABCOCK: Well, I don't think we
22 have, but --

23 MR. ORSINGER: Yes, we have. It's not here.
24 It's gone.

25 CHAIRMAN BABCOCK: Yeah, but --

1 MR. ORSINGER: And, frankly, I don't
2 remember that we made the conscious decision to do that in
3 this cycle.

4 CHAIRMAN BABCOCK: What does that mean,
5 "this cycle"?

6 MR. ORSINGER: "This cycle" means since
7 you've been chair.

8 CHAIRMAN BABCOCK: Okay. So b(4) is out and
9 we don't know why? Well, let's get to that next. All
10 right. Let's -- I thought that it had been embodied in
11 the rule, but I think it probably hasn't.

12 HONORABLE SARAH DUNCAN: If it wasn't a
13 conscious decision to leave the definitional section out,
14 what else has been left out without conscious decision?

15 MR. ORSINGER: This cycle it was not a
16 conscious decision. I'm not saying it wasn't a conscious
17 decision in the last cycle. It may well have been. I
18 can't remember. Bill has been following the conversation.
19 He may remember. I don't remember.

20 PROFESSOR DORSANEO: I don't remember.

21 CHAIRMAN BABCOCK: Okay. Well, let's hold
22 off on that a second until we get this interest thing
23 worked out. "Financial interest" is in the current rule,
24 and there's one court -- and as far as I know, one court
25 only -- that has picked up on the fact that the

1 Constitution says just "interest," but then when you get
2 to recusal it says "financial interest." And they say it
3 doesn't make any difference, but that's the Beaumont Court
4 of Appeals only speaking on that, not the Supreme Court,
5 best I can tell. So does everybody feel that we need to
6 change (b) (7)? Or am I just being overly anal about it?
7 Yeah, Scott.

8 HON. F. SCOTT McCOWN: Well, I think we
9 should leave (b) (7) the way it is, because to the extent
10 that the judge him or herself has an interest that we feel
11 would be disqualifying that's not economic, that's one
12 thing, but to go out to the judge's spouse -- but to go
13 out to parties that are related by consanguinity or
14 affinity within the third degree and start looking at
15 their noneconomic interests and tagging the judge with
16 those, I don't think we want to do that.

17 If we did in a particular case then the
18 general rule could catch it, but I think we want to keep
19 this rule reasonably narrow to "financial interest."

20 CHAIRMAN BABCOCK: Any comment on that?
21 Luke, no?

22 MR. SOULES: When you've got (b) (1), "the
23 judge's impartiality might reasonably be questioned,"
24 that's plenty broad, and I think that (7) ought to be as
25 narrow as it is presently written.

1 MS. McNAMARA: Yeah, Chip, it's not just
2 "financial interest" because it goes on to say "or any
3 other interest that could be substantially affected by the
4 outcome."

5 HON. F. SCOTT McCOWN: Yeah.

6 HONORABLE DAVID PEEPLES: Good point.

7 HON. F. SCOTT McCOWN: Yeah, substantially
8 affected.

9 MS. McNAMARA: Yeah, not that it's overly
10 broad, but it isn't just financial.

11 CHAIRMAN BABCOCK: Yeah. Good point, Anne.
12 Thank you. Richard.

13 MR. ORSINGER: There's a subtle difference
14 here, and I want to be sure that we all concur that this
15 is true. I believe that No. (7) only refers to relatives
16 of the judge and not the judge himself or herself.

17 MR. SOULES: Right.

18 HONORABLE DAVID PEEPLES: Right.

19 MR. ORSINGER: Under the current rule
20 18b(2)(e), as opposed to (f), (e) picks up the judge's
21 financial interest or any other interest that could be
22 substantially affected. I don't think (7) does the same
23 as 18b(2)(e), and I don't think we have anything else that
24 does the same as b(2)(e).

25 MR. SOULES: (a)(2).

1 MR. HAMILTON: (a) (2) .

2 MR. YELENOSKY: Now we do.

3 MR. SOULES: (a) (2) takes care of that
4 problem.

5 MR. YELENOSKY: That was the question I had,
6 but now that we changed (a) (2) to take out the qualifier
7 of economic or financial, (a) (2) takes care of it.

8 MR. ORSINGER: I mean, it ceases to be a
9 grounds for recusal and becomes a ground for
10 disqualification, and the condition that it be other
11 interest substantially affected by the outcome is gone,
12 and it's substituted for personal interest.

13 MR. SOULES: Plain "interest."

14 MR. ORSINGER: What?

15 MR. SOULES: Plain "interest." No modifier.

16 MR. ORSINGER: Well, under the Supreme Court
17 definition of "interest" that means direct pecuniary or
18 personal interest. You lose the idea of any other
19 interest that could be substantially affected, so it's
20 dropped as a recusal ground now. Anything involving the
21 judge personally having a financial or personal interest
22 is dropped as a recusal ground. We go totally under
23 disqualification, and the requirement that the interest be
24 substantially affected is no longer in the rule.

25 MR. HAMILTON: For the judge.

1 MR. ORSINGER: For the judge. I'm not
2 opposed to that. I'm just saying that we need to
3 understand that (7) only relates to relatives of the
4 judge.

5 CHAIRMAN BABCOCK: Well, that's clear that
6 (7) relates to relatives. I don't know that the Court,
7 the Supreme Court or a court of appeals, would be
8 precluded from interpreting the interest section in
9 (a) (2), in our new rule (a) (2), as not encompassing what
10 you just said about a substantial interest in the outcome.
11 Steve.

12 MR. YELENOSKY: Well, if what we said
13 earlier was correct, that the matter of disqualification
14 needs to be left as we just voted then essentially we said
15 that the prior 18 rule, or whatever it was, was redundant
16 because it wasn't -- it was and still is encompassed in
17 the constitutional disqualification provision.

18 So having a recusal provision that relates
19 to that and that puts -- and is not only redundant but
20 puts a -- it narrows it impermissibly if it's
21 substantially affected because the Constitution doesn't
22 say that.

23 MR. ORSINGER: It would be okay for us to be
24 more exacting on recusal than the Constitution is on
25 disqualification, and arguably we may have been more,

1 arguably less, but under the new rule it is not a recusal
2 point anymore. Now it's just a disqualification point.
3 We don't have any of these specific definitions of terms
4 like we did on the old recusal rule.

5 CHAIRMAN BABCOCK: We're going to get to
6 that.

7 MR. ORSINGER: And so we're basically just
8 operating on the constitutional language as interpreted by
9 the Texas Supreme Court as a grounds for disqualification.

10 CHAIRMAN BABCOCK: Justice Duncan.

11 HONORABLE SARAH DUNCAN: I'm just getting
12 confused about why things have changed. In (f)(2)(i) the
13 rule now says --

14 CHAIRMAN BABCOCK: Current rule?

15 HONORABLE SARAH DUNCAN: 18b(2)(f)(ii).

16 MR. SOULES: What page?

17 MR. ORSINGER: Are you on the new rule?

18 HONORABLE SARAH DUNCAN: Old rule. 18b,
19 subsection (2)(f)(ii). It used to be that the judge was
20 recused if a person within the third degree or a spouse
21 was known to have an interest that could be substantially
22 affected by the outcome of the proceeding. Now we've
23 limited interest to financial, and we've taken out the
24 "known," and I guess I don't understand why changes have
25 been made.

1 CHAIRMAN BABCOCK: Well, it says "or any
2 other interest that could be substantially affected by the
3 outcome." It's not just -- that was Steve's point.

4 HONORABLE SARAH DUNCAN: Okay.

5 CHAIRMAN BABCOCK: It wasn't just limited to
6 financial.

7 HONORABLE SARAH DUNCAN: Okay. Then why
8 have we taken out the "known"?

9 CHAIRMAN BABCOCK: Why taken out the
10 "known"? Steve.

11 MR. YELENOSKY: Well, I'm still stuck on
12 Richard's point because recusal could be more narrow in
13 that it could cause the removal of a judge in more
14 situations than disqualification does, but that's not what
15 we're talking about if we're saying that the recusal
16 motion applies only if things are substantially affected,
17 because the disqualify -- I mean, the judge would already
18 be disqualified if he has an interest at all, whether it's
19 substantially affected or not, so how does that recusal
20 provision even operate?

21 MR. ORSINGER: Well, to make matters even
22 worse, under the old rule there is an exception that you
23 can cure the financial interest by divestiture, under the
24 old rule. That's (2) -- no, it's -- pardon me it's (6).
25 18b(6). If the judge doesn't discover a (2)(e) ground or

1 a (2)(f)(iii) ground until after a substantial time, then
2 the judge is not recused if they divest or if the relative
3 divests. Well, that is not in our power to do if
4 disqualification is legitimate. You can't divest and cure
5 because if you're disqualified, you're disqualified before
6 you divest. So I think we were probably undertaking to do
7 some stuff that we really didn't have the authority to do
8 anyway.

9 MR. YELENOSKY: In the old rule.

10 MR. ORSINGER: In the old rule by allowing
11 cure. Now, it's okay to allow a cure on a relative.

12 MR. YELENOSKY: But not on the --

13 MR. ORSINGER: Because the Constitution
14 doesn't speak to that, does it? I don't think. But it's
15 not okay, I think, to talk about a cure on the judge, and
16 we still allow a cure on the relative. We'll get to that
17 in a minute. We're carrying that forward.

18 HON. F. SCOTT McCOWN: Can I ask, Chip?

19 CHAIRMAN BABCOCK: Yeah, Scott.

20 HON. F. SCOTT McCOWN: Is there a need to
21 finish this rule up today and send it on to the Court, or
22 would it be possible for it to be referred back to the
23 subcommittee for one last careful review of what's been
24 left out that was there?

25 And I will give you an example that Sarah

1 just raised that I'd like to expound on. In that -- in
2 the old rule the judge had to know about his relative's
3 interest before it was a ground for recusal. In the new
4 rule or the proposed rule the judge doesn't have to know.
5 If you make that change, does that creates a duty on me to
6 investigate? Because when you think about who your
7 relatives are within consanguinity or affinity within the
8 third degree, there's some of those people I don't even
9 talk to, and yet am I required now as an ethical matter to
10 know what their financial holdings are?

11 CHAIRMAN BABCOCK: Yeah. Who even knows
12 what consanguinity means except --

13 MR. ORSINGER: You have a duty of
14 investigation under the current Rule 3, but it only
15 extends to your finances, your spouse's finances, and your
16 minor children residing in the household. So parents and
17 grown children and aunts and uncles and nieces and nephews
18 might be part of your new burden if it's interpreted that
19 way.

20 HON. F. SCOTT McCOWN: But where is --

21 MR. ORSINGER: But as Carl points out, if it
22 isn't known to you before, it will be known to you when
23 the motion is filed, if somebody is smart enough to find
24 it out.

25 MR. YELENOSKY: But he's asking whether he

1 has to, as an ethical matter, determine that in advance of
2 the motion, is what he's asking.

3 MR. ORSINGER: I would never vote that he
4 has that obligation.

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: I was just going
7 to say that you don't find out about this -- don't have a
8 duty to investigate until they bring it to your attention,
9 and then you know about it.

10 CHAIRMAN BABCOCK: Yeah. Let's -- I think
11 Judge McCown has got an idea that I'm loath to accept,
12 except that I think it's probably a pretty good one.
13 Let's, Richard, trace the genealogy of this rule. On this
14 round, as you say, we were primarily focused in our early
15 meetings about implementing, as the Court had directed us
16 to do, the findings of the Judicial Campaign Finance Study
17 Committee, and so we spent a lot of time working on that,
18 which finds expression in (b) (9) and (10) now. That was
19 what we did initially.

20 MR. ORSINGER: I think so.

21 CHAIRMAN BABCOCK: Now we have come up with
22 a rule that -- run me through this, that we inherited from
23 the prior session?

24 MR. ORSINGER: That's right, and it was part
25 of a package that was sent to the Supreme Court based on,

1 you know, by the last analysis probably a unanimous vote.
2 Even though there was some nonunanimous votes along the
3 road, I think the final package went to the Supreme Court;
4 and so we operationally made a decision that rather than
5 go back to the old Rules of Procedure, we took the last
6 work product of this committee so that those four years or
7 five years of work were not completely wasted; and as a
8 result of that there are some changes in this rule, and if
9 the other subcommittees have made the same operational
10 decision it's going to be true in other rules, where old
11 changes that were debated, vented on the record, and then
12 voted on were not redebated. They were just assumed as a
13 starting point, and my memory does not go back to the
14 rationale, for example, of why we took out all these
15 specific definitions of financial interest and whatnot.

16 CHAIRMAN BABCOCK: Have you got any
17 recollection of all this, Luke?

18 MR. SOULES: I think the reason was that we
19 felt that even with the laundry list that was there they
20 were not altogether inclusive of every conceivable type of
21 financial interest and that we could spend a lot of time
22 trying to think of every one and we would never get them
23 all together, and if we just put at the tail end of the
24 laundry list "or any other financial interest" or "any
25 other interest," then we just had a lot of words in the

1 rule that didn't really help that much, other than to say,
2 "These are some types that we know are interests and then
3 anything else can be an interest, too." I think the
4 feeling was just not to try to define it.

5 CHAIRMAN BABCOCK: Yeah, Elaine.

6 PROFESSOR CARLSON: But, Richard, this is
7 off of the codification draft, the recodification draft?

8 MR. ORSINGER: That was our starting point
9 for this cycle, and our initial problem was, is that we
10 had a task force that came forward with some
11 recommendations which we were directed to fold in, but in
12 the process of doing that people started looking at this
13 rule and having really good ideas, and the next thing you
14 know it was an evolving process in other areas, but the
15 evolution was largely people reacting to the language of
16 the codification version, you see, and so a lot of people
17 made a lot of changes but maybe didn't realize other
18 changes had been made before.

19 HON. F. SCOTT McCOWN: Let me make a
20 slightly different suggestion. Why don't we take this up
21 first thing in the morning after everybody has had an
22 opportunity to read through the rule and do their own
23 double-check to see if there's been anything left out,
24 perhaps inadvertently or perhaps by conscious decision
25 that we don't agree with that we want to urge go back, and

1 just give us the evening to look at it.

2 CHAIRMAN BABCOCK: Homework. I like that
3 idea.

4 MR. SOULES: Can't we vote it out? We're
5 all focused on this. Can't we vote it out today subject
6 to anybody bringing something up tomorrow that they find
7 to be uncomfortable?

8 CHAIRMAN BABCOCK: That's another way to do
9 it. Buddy.

10 MR. LOWE: Chip, I have one question. We've
11 not discussed the Government Code, and I haven't read it,
12 but Section 74 does address this very thing, and I think
13 it's something we shouldn't just go off. We should look
14 and see what it says because we don't want to be
15 inconsistent with the Legislature.

16 MR. ORSINGER: We have been through that.
17 We have been through that probably three separate meetings
18 already.

19 MR. LOWE: I'm not telling you. I'm asking
20 a question.

21 MR. ORSINGER: Okay, Buddy. This came up
22 the last time, but we have debated through this. I
23 remember Scott McCown over there educating us all on the
24 fine distinctions and the application to assistant AGs and
25 everything else. I mean, you know, it's possible that we

1 could spend another twelve hours going through all that
2 again and arrive at a different place from where we are
3 today.

4 MR. LOWE: I'm not suggesting twelve hours.
5 I'm only asking, and I'm not going to do it, and I'm
6 assuming you have, and I just want to hear it.

7 MR. ORSINGER: This committee has done this
8 on the record in prior meetings. If somebody has a
9 specific problem about that statute that they want to
10 raise then I think we ought to put it on the table, but I
11 really don't think that the subcommittee needs to go back
12 and re-evaluate that, because we have debated that on the
13 record on at least three different occasions in this
14 committee cycle.

15 MR. LOWE: No more questions.

16 MR. YELENOSKY: I just want to know if
17 we're going to have homework if it's going to be on the
18 test.

19 CHAIRMAN BABCOCK: Well, we're about to vote
20 on homework, so hang on.

21 MS. SWEENEY: I vote against homework.

22 CHAIRMAN BABCOCK: Who said that?

23 HON. F. SCOTT McCOWN: Well, the only thing
24 that I see that's been left out in doing a quick check, we
25 did leave out completely this subdivision (3) about the

1 duty of a judge to inform himself. That's not there, and
2 then we did leave out all of subdivision (4), and I -- you
3 know, I kind of agree with Luke, that I don't really see
4 that we need subdivision (4), but it's not there. But I
5 think everything else has a counterpart in the present
6 rule.

7 MR. SOULES: Except the "known" standard
8 that you raised earlier, which it can be very important.
9 It certainly is important in the redraft of the
10 disciplinary rules, "known or should have known" is a very
11 fine --

12 CHAIRMAN BABCOCK: Richard, were you chair
13 of the subcommittee on the last cycle, as you say?

14 MR. SOULES: I think we can fix the "known"
15 problem --

16 MR. ORSINGER: I think I was.

17 MR. SOULES: -- just by saying "within the
18 third degree to anyone known or disclosed to the judge to
19 have a financial interest."

20 MR. ORSINGER: Well, is it really necessary?
21 I mean, if the ground is there in the abstract and someone
22 files a motion and says the ground applies, then the judge
23 is out. Whether he knows it or doesn't know it the judge
24 is out. So the use of the word "know," does it really
25 have any functional importance? I mean, if the judge does

1 know, theoretically they are going to disqualify
2 themselves; and if they don't know, the minute they find
3 out about it they are going to disqualify.

4 MR. SOULES: I guess I am being
5 uncharacteristically sensitive to the judges here. If you
6 say "known or disclosed to the judge" then you have -- you
7 have a level of consciousness about this problem on the
8 bench.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HONORABLE SARAH DUNCAN: Maybe I'm
11 approaching this recusal differently, but as I view it,
12 it's not initially up to the parties to make a motion to
13 recuse me. It is initially up to me to be informed about
14 when I need to be recused; and so, yeah, I mean, if you
15 want to go investigate my husband's relatives that I
16 haven't even met yet and find out that they have interests
17 that might be affected by this litigation and file a
18 motion to recuse, yes, I would immediately recuse myself
19 from that proceeding; but I don't view that as initially
20 the parties' responsibility. I view it as initially my
21 responsibility.

22 So if the "known" isn't in there, I have a
23 dilemma about whether I need to inform myself about all
24 these people in Boston or not, and I think the current
25 rule is clear about what I have a responsibility to find

1 out about me and those related within the third degree of
2 me or my husband.

3 CHAIRMAN BABCOCK: Judge Lawrence, then
4 Buddy.

5 HONORABLE TOM LAWRENCE: The Code of
6 Judicial Conduct makes a distinction between family
7 members that are residing in the judge's household and
8 others, and the judge has an obligation under the Code of
9 Judicial Conduct to be aware and make himself or herself
10 aware of the interests, financial interests, of those that
11 reside in the household, but there is no obligation under
12 the Code of Judicial Conduct for him to be aware of the
13 third cousin you don't talk to or someone not remaining in
14 your household.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOWE: But there are only two ways it
17 can come to the judge's attention. He either knows it or
18 it's pointed out in a motion, and if he doesn't even know
19 it and is not consciously aware of it, how does it affect
20 his decision and why should he be recused anyway? So what
21 difference does it make?

22 HON. F. SCOTT McCOWN: Could I make --

23 CHAIRMAN BABCOCK: Yeah, Judge McCown.

24 HON. F. SCOTT McCOWN: I'd like to move that
25 after the words "anyone," we add "known to the judge."

1 MR. ORSINGER: What rule are you on? What
2 subdivision?

3 HON. F. SCOTT McCOWN: Subdivision (b)(7),
4 "The judge or the judge's spouse is related by
5 consanguinity or affinity within the third degree to
6 anyone known to the judge to have a financial interest."

7 MR. SOULES: Would you let me propose a
8 friendly amendment here, "known or disclosed to," because
9 I don't want that to be tempered. "I didn't know it until
10 you disclosed it; therefore, I'm not subject to
11 disqualification." I think we all know here what it
12 means, known at any time, but I want to eliminate the
13 argument.

14 HON. F. SCOTT McCOWN: I could probably live
15 with that. The only problem I have with that is that if
16 you've got a judge who doesn't know it, do we want parties
17 to be able to create recusal by finding it out and telling
18 it to him? On the other hand, if the party finds it out,
19 they don't know if the judge knows it or not, and so they
20 have to test it by asking him if he knows it, and once he
21 knows it -- so I'll go with what you say. I'll accept
22 Luke's amendment, "known or disclosed to the judge to
23 have..."

24 CHAIRMAN BABCOCK: How do people feel about
25 that? Justice Duncan, does that fix your problem? Carl.

1 MR. CHAPMAN: I wonder why we're adding the
2 verbiage. It seems to me it's a practical matter. The
3 point of the rule is that if a party suspects or if there
4 is something that's going to affect the decision that the
5 party has an obligation to bring it to the court's
6 attention, and the court has an obligation under the rules
7 to weigh it and determine whether or not he or she should
8 be in the case, and I don't think it really matters
9 whether the judge at the outset knows it or not. The
10 question is --

11 HON. F. SCOTT McCOWN: Well, let me give you
12 the reason, and I think Luke put his finger right on it.
13 It's just sensitivity to the judge. If I recuse myself
14 and it's on the front page of the newspaper, "Judge
15 recuses himself," that reflects badly on me. The
16 layperson reading the paper thinks the judge, you know,
17 had to step aside for some reason; and if you do it later
18 in the case, it looks even worse. And so if you can say,
19 "I stepped aside as soon as I knew," that's one thing.
20 Otherwise, it looks like you're stepping aside after
21 you've been caught.

22 You see the difference in stepping aside
23 after you've been notified versus stepping aside after
24 you've been caught? So it's just how you package it for
25 the judge.

1 MR. CHAPMAN: I understand.

2 MR. DUGGINS: What is meant by
3 "substantially affected," not to ask a stupid question,
4 but --

5 MR. SOULES: Can we stay on one point at a
6 time?

7 MR. DUGGINS: Well, as long as you're
8 talking about an amendment, that seems to me it's just a
9 question I have of whether it should be that heavy a test
10 or whether it ought to be "materially affected."

11 CHAIRMAN BABCOCK: "Substantially or
12 materially"? I think the subcommittee had a thought about
13 that, and I think we talked about it, but I can't remember
14 exactly what we said.

15 HON. F. SCOTT McCOWN: Well, "substantially
16 affected" is what the rule has now, and I think the point
17 is these are relatives. These aren't the judge. These
18 are relatives, and if they've got some minor interest in
19 it, we're not going to make the judge step aside. If they
20 have got some big interest then we are.

21 MR. SOULES: I second Judge McCown's motion
22 as amended.

23 CHAIRMAN BABCOCK: And so we're clear about
24 it, Luke, the way it would read is "The judge or the
25 judge's spouse is related by con" -- whatever that word is

1 -- "or affinity within the third degree to anyone" --

2 HON. F. SCOTT McCOWN: "Known or disclosed
3 to the judge" --

4 CHAIRMAN BABCOCK: "with a financial
5 interest."

6 HON. F. SCOTT McCOWN: No, "to have."
7 "Known or disclosed to the judge to have a financial
8 interest."

9 MR. SOULES: Strike "with" and substitute
10 those words for the word "with".

11 CHAIRMAN BABCOCK: Okay. Gotcha.
12 "Financial interest in the matter of the parties," etc.,
13 etc. Okay. Any more discussion on Judge McCown's
14 seconded motion to add that language?

15 Okay. Everybody in favor of adding that
16 language raise your hand. Everybody opposed? Everybody
17 opposed? One. It carries by a vote of 22 to 1. So we'll
18 add that language.

19 Okay. Now to the issue of homework or not.
20 Do we collectively think or are we collectively concerned
21 that -- and there's more to talk about this rule just on
22 what we have on the table today anyway, but are we
23 collectively concerned that there has not been sufficient
24 study, regardless of what cycle it's on, sufficient study
25 of the old rule to the new rule such that we would have

1 concerns about sending it to the Supreme Court in the form
2 it is after we discuss the other issues? If I could
3 rephrase the question that way. Elaine.

4 PROFESSOR CARLSON: Is it our procedure,
5 Chip, that we're going to have redlined versions or no?

6 CHAIRMAN BABCOCK: This is redlined.

7 MR. WATSON: Not from the old rule?

8 CHAIRMAN BABCOCK: Not from the old rule.

9 PROFESSOR CARLSON: But only from the
10 recodification draft?

11 CHAIRMAN BABCOCK: Well, I mean, way back
12 when I think we had a redlined version, but every time we
13 agree on something then we drop that and then --

14 PROFESSOR CARLSON: Okay.

15 CHAIRMAN BABCOCK: So this is the things
16 that are in play today.

17 PROFESSOR CARLSON: Okay.

18 HON. F. SCOTT McCOWN: I haven't done a
19 word-by-word comparison while we have been sitting here,
20 but it looks to me like the only things that don't have a
21 counterpart are subdivision (3) of the old rule and
22 subdivision (4) of the old rule, and so I guess I think we
23 ought to just send it on and speak of recusal no more.

24 CHAIRMAN BABCOCK: That's one view.

25 MR. SOULES: After we get done talking about

1 it.

2 CHAIRMAN BABCOCK: Yeah. We've got some
3 more to talk about this, but I don't think there is much
4 controversial. Well, there may be one thing. Okay. So
5 Judge McCown thinks we ought to go forward, and Justice
6 Duncan.

7 HONORABLE SARAH DUNCAN: Well, I haven't
8 been through -- and in Richard's defense, I went off the
9 recodification draft, too, on the assumption that -- but
10 I'll go back tonight and see how it compares to the Rules
11 of Civil Procedure.

12 CHAIRMAN BABCOCK: Self-imposed homework, it
13 sounds like to me.

14 HONORABLE SARAH DUNCAN: But I did notice
15 just looking through this briefly that under
16 18b(2)(f)(iii) there is also a knowledge requirement on
17 "likely to be a material witness in the proceeding" where
18 in the subcommittee proposal (b)(3) there is no knowledge
19 requirement.

20 CHAIRMAN BABCOCK: I'll tell you, I see a
21 potential compromise in the works here, and that is that
22 Justice Duncan and any like-minded members of the
23 committee go back and find issues that we have left out
24 and so that we can discuss them in the morning.

25 Now, you said you were going to do it.

1 HONORABLE SARAH DUNCAN: I am willing to do
2 it for my subcommittee and its work.

3 CHAIRMAN BABCOCK: Well, okay. You don't
4 like that.

5 MS. SWEENEY: We all heard you volunteer.

6 HONORABLE SARAH DUNCAN: For my
7 subcommittee.

8 CHAIRMAN BABCOCK: You don't like that
9 proposal. Well, that's one way we could handle it, is
10 everybody could look at it, compare it tonight, and then
11 make a laundry list of things that rise to the level of
12 "We're concerned about it, so we want to talk about it
13 tomorrow morning," and if any member of this committee is
14 concerned about it then I think we ought to talk about it.
15 Fair enough? No? Sarah is glaring at me, so...

16 MR. ORSINGER: Chip, in the footnotes we've
17 tried to -- actually, Pemberton started this -- we've
18 tried to refer people to where the language came from.
19 The rule has been so radically restructured that you will
20 not be able to compare it sentence-for-sentence, and a
21 redlined draft will be almost useless.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. ORSINGER: But the footnotes will tell
24 you where to look for in the old rule if you want to find
25 out how the new rule compares to the old rule in that

1 sentence or that subdivision.

2 CHAIRMAN BABCOCK: I agree, and I read it
3 last night and tried to compare it, and I thought that
4 most everything was carried forward in some fashion,
5 although the language changes radically.

6 MR. ORSINGER: And there's some subtleties
7 in there that might bother someone, but I think they were
8 debated on in the last cycle, so I don't think it's --
9 it's not nefarious or even secret.

10 CHAIRMAN BABCOCK: But there are two things,
11 as Justice Duncan points out, that are just totally
12 dropped, and one is the definition section and one is this
13 self-informing function that's been totally dropped.
14 Carl.

15 MR. HAMILTON: Well, I think that the
16 approach is different. I think under the old rule it says
17 a judge shall recuse himself if he knows these things, so
18 that implies he has to know it.

19 CHAIRMAN BABCOCK: Right.

20 MR. HAMILTON: But under our approach it's a
21 motion type procedure.

22 CHAIRMAN BABCOCK: Motion framed.

23 MR. HAMILTON: In addition to recusing
24 himself if he already knows, but ours is more directed
25 towards the filing of the motion to recuse, so...

1 CHAIRMAN BABCOCK: Do I hear a second to my
2 motion that we look at this tonight in a comparison or
3 whenever we have time before tomorrow morning in a
4 comparative way and see if there are any items that any
5 member of this committee wants to bring up for further
6 discussion, and the standard being things that were in the
7 old rule but are left out of the new rule.

8 PROFESSOR DORSANEO: Why don't you just say
9 that? Do we need to vote on what you want to do?

10 CHAIRMAN BABCOCK: That's a good point.
11 Anybody opposed to what I want to do? Okay. Well, then
12 let's do that. We'll take that up first thing in the
13 morning.

14 Okay. Let's now go through the changes that
15 Carl and Richard are suggesting. When there are changes
16 that just are typographical in nature or are getting the
17 right sections referred to I wouldn't propose talking
18 about that unless somebody spots a problem, so the first
19 change would be on page three under subsection (d). "If a
20 judge does not discover that there must be a recusal,"
21 there's some language there that was changed, and, Carl or
22 Richard, could you explain what was going on there?

23 MR. ORSINGER: Well, cross-references
24 really. The reason that that whole thing is bolded was
25 because old subdivision 18b(6) was omitted entirely, and

1 we decided last time we did not want to omit it entirely,
2 and so now it is included in (d), and the cross-references
3 have been cleaned up because now it only cross-refers to
4 (b) (7) instead of old (2) (e) and old (2) (f) (iii).

5 CHAIRMAN BABCOCK: Okay. Does anybody have
6 a problem with the changes that have been made in
7 subparagraph (d)?

8 HON. F. SCOTT McCOWN: I have a slight
9 suggestion.

10 CHAIRMAN BABCOCK: Judge McCown.

11 HON. F. SCOTT McCOWN: To solve your gender
12 problem, just take out "himself/herself" and "of" and just
13 say "divest the interest that would otherwise require
14 recusal."

15 CHAIRMAN BABCOCK: Yeah, I thought that was
16 awkward, too, that "himself/herself" thing.

17 HON. F. SCOTT McCOWN: You just say "divest
18 the interest" and not have a pronoun.

19 CHAIRMAN BABCOCK: Bill, do you think that
20 makes sense?

21 PROFESSOR DORSANEO: Uh-huh.

22 CHAIRMAN BABCOCK: Richard, do you accept
23 that as a friendly amendment?

24 MR. ORSINGER: Yeah, that's fine. The old
25 rule said "himself," and we know that's intolerable, so

1 this is better.

2 CHAIRMAN BABCOCK: Okay. Anybody got a
3 problem with that? Okay. Nobody has raised their hand or
4 their voice, so that will be carried forward.

5 All right. Now, in subparagraph (e),
6 procedure, there's been a change from an "unverified
7 motion may be ignored," changing the language to "an
8 unverified motion does not invoke the proceedings under
9 this rule except for sanctions," and why did we do that?

10 MR. ORSINGER: We debated that until we were
11 exhausted, and this is the language we agreed on last
12 time.

13 CHAIRMAN BABCOCK: I thought so. All right.

14 HON. F. SCOTT McCOWN: But now we're rested
15 again.

16 CHAIRMAN BABCOCK: Subparagraph (2), I
17 spotted something.

18 MR. EDWARDS: Can I ask something on that
19 subparagraph (1)? What is (d)(2), subdivision (d)(2)?
20 What does that refer to?

21 CHAIRMAN BABCOCK: Yeah. I had a question
22 about that. It doesn't seem like we have a (d)(2).

23 MR. EDWARDS: That's hanging out there
24 somewhere.

25 MR. ORSINGER: Yes, you're right. It's not.

1 CHAIRMAN BABCOCK: Should be subdivision --

2 MR. ORSINGER: Thank you, Bill.

3 MR. EDWARDS: And, also, we're talking about
4 (b) (9) and (b) (10). Is that in this rule or some other
5 rule? I guess that's the (b) (9) and (10) which we added.

6 MR. ORSINGER: Yeah.

7 CHAIRMAN BABCOCK: Right.

8 MR. EDWARDS: But do we want to talk about
9 subparagraph (b) (9) and (b) (10), or do we want to talk
10 about Rule 18, whatever this is going to be, 18a sub --
11 a(b) (2) or whatever it is so that we don't lose track of
12 what rule we're talking about on subparagraph?

13 CHAIRMAN BABCOCK: Would you want to say
14 "subparagraph (b) (9) or (b) (10) of this rule"?

15 MR. EDWARDS: Something like that, I would
16 think.

17 MR. ORSINGER: I wonder if there is some
18 kind of drafting principle that we use in the rules. When
19 we cross-refer to another subdivision in the same rule do
20 we qualify that?

21 PROFESSOR DORSANEO: No. We assume it's the
22 same rule.

23 MR. ORSINGER: Okay. I think we ought to be
24 consistent.

25 CHAIRMAN BABCOCK: You do agree, though,

1 that subdivision (d) should be -- should drop the (2)
2 since we have no (2), right?

3 HONORABLE DAVID PEEPLES: Does that not mean
4 (e) (2), exceptions to the ten-day?

5 MR. EDWARDS: I don't know what it means.

6 HONORABLE SARAH DUNCAN: Yeah. Yeah.

7 HON. F. SCOTT McCOWN: Yeah. It's (e) (2).
8 That's the problem. It's (e) (2).

9 CHAIRMAN BABCOCK: Is that right, Richard?

10 MR. HAMILTON: Yeah. That's right. (e) (2).

11 MR. SOULES: (e) (2)?

12 MR. ORSINGER: Yeah. Yeah. That's right,
13 because what happened was we inserted a paragraph (d) in
14 front of this, may turn this from (d) to (e), and we
15 forgot to change this (d) to (e).

16 CHAIRMAN BABCOCK: Okay. Okay. Are we all
17 all right with that? Yeah, Steve.

18 MR. TIPPS: I think we're also inconsistent
19 in referring to "subdivision" in one place and
20 "subparagraph" in another place.

21 CHAIRMAN BABCOCK: Which should it be?

22 MR. SOULES: Subparagraph.

23 CHAIRMAN BABCOCK: Subparagraph?

24 PROFESSOR DORSANEO: What's the enumeration?

25 MR. ORSINGER: In one place we call it

1 subparagraph (b) (9) and the other one we call it
2 subdivision (d) (2), so the idea is to go with
3 "subparagraph" in both places.

4 CHAIRMAN BABCOCK: Okay. Anything else on
5 (e)?

6 MR. EDWARDS: What did (d) turn into, just
7 for clarification?

8 Mr. ORSINGER: (d) became (e) when the new
9 (d) was created, so (d) (2) is now (e) (2). (e) as in
10 Edward.

11 CHAIRMAN BABCOCK: Okay. On subparagraph
12 (2) I notice that (2) (b) and (c) talk about before ten
13 days prior to the date the case was set for trial or other
14 hearing, but that other -- that word "other" is left out
15 of (2) (a), and I wonder why.

16 MR. ORSINGER: I think that's an omission.

17 CHAIRMAN BABCOCK: That should be put in
18 (a)?

19 MR. ORSINGER: I think so.

20 CHAIRMAN BABCOCK: All right.

21 HONORABLE MICHAEL SCHNEIDER: On --

22 CHAIRMAN BABCOCK: Yeah, Judge Schneider.

23 HONORABLE MICHAEL SCHNEIDER: On (e) (4).

24 CHAIRMAN BABCOCK: Where? I'm sorry. I
25 couldn't hear you.

1 HONORABLE MICHAEL SCHNEIDER: On (e) (4)
2 under "procedure."

3 MR. SOULES: I've got something on (e) (3).

4 HONORABLE MICHAEL SCHNEIDER: In the
5 sentence, first sentence there, should you have "presiding
6 judge" rather than just "judge of the administrative
7 district"?

8 MR. SOULES: What do they call that now?
9 They have called it different things at different times.
10 It may be.

11 HONORABLE MICHAEL SCHNEIDER: Well, all the
12 other references have been to the presiding judge.

13 MR. SOULES: Presiding judge.

14 HONORABLE DAVID PEEPLES: In the first line
15 it ought to be "presiding".

16 CHAIRMAN BABCOCK: Okay. "After referring
17 the motion to the presiding judge"?

18 HONORABLE DAVID PEEPLES: Yeah.

19 MR. SOULES: Chip, I have got something on
20 (3) in the added language at the bottom of the motion --

21 CHAIRMAN BABCOCK: Okay. Let's try to take
22 it in order if we can.

23 MR. SOULES: Well, you skipped to (4).
24 That's why I'm going back.

25 CHAIRMAN BABCOCK: Well, I didn't mean to

1 skip to (4). It's just that Justice Schneider skipped to
2 (4). I'm still on (2).

3 MR. SOULES: Oh, you're on (2). I'm with
4 you.

5 CHAIRMAN BABCOCK: Okay. Anything else on
6 (2)?

7 MR. HAMILTON: Page two?

8 CHAIRMAN BABCOCK: No. (e) (2).

9 HONORABLE TOM LAWRENCE: In (c) are we going
10 to strike "or other hearing" there also?

11 MR. ORSINGER: No. We're going to add "or
12 other hearing."

13 CHAIRMAN BABCOCK: Right. We're going to
14 insert "other." Anything else on (e) (2)? I don't hear
15 anything, so let's go to (3).

16 MR. SOULES: Chip, I had a -- on the added
17 language in the last two lines that's underscored there --

18 CHAIRMAN BABCOCK: Yes, sir.

19 MR. SOULES: I would hope to see that say
20 "neither the case nor the motion may be reassigned" in
21 order to prevent the notion that reassigning the case
22 makes the motion moot.

23 CHAIRMAN BABCOCK: You're on --

24 HONORABLE DAVID PEEPLES: Bottom of page
25 four.

1 MR. ORSINGER: The last sentence of
2 subdivision (3).

3 CHAIRMAN BABCOCK: Which now says
4 "notwithstanding these rules or any local rule, the motion
5 cannot be reassigned to another judge, except by the
6 presiding judge of the administrative region." So you want
7 to add the word "case"?

8 MR. SOULES: "Neither the case nor the
9 motion may be reassigned." And I so move.

10 CHAIRMAN BABCOCK: What does everybody think
11 about that?

12 HONORABLE DAVID PEEPLES: I think Luke's
13 right.

14 CHAIRMAN BABCOCK: So it should read
15 "neither the case nor the motion may be reassigned"?

16 MR. SOULES: May is promiscuous. It's not
17 permitted.

18 MR. ORSINGER: You could say "neither the
19 motion nor the case."

20 MR. SOULES: That's what I would propose.
21 Well, "neither the case nor the motion." "Neither the
22 motion nor the case".

23 CHAIRMAN BABCOCK: What's the word after
24 "motion"?

25 MR. SOULES: "May," "shall," "can,"

1 whatever.

2 MR. ORSINGER: If you put the negative in
3 the "neither" then you can say "can," but if you don't put
4 it there you have to say "cannot."

5 PROFESSOR ALBRIGHT: What if you say "only
6 the presiding judge can"?

7 MR. SOULES: "Can" is okay with me.

8 CHAIRMAN BABCOCK: Okay. "Can." All right.
9 So it now would read "Notwithstanding these rules or any
10 local rule, neither the case nor the motion can be
11 reassigned to another judge except by the presiding judge
12 of the administrative region." Good. All right. Ralph.

13 MR. DUGGINS: Shouldn't the (d)(1) reference
14 in that paragraph be (e)(1)?

15 CHAIRMAN BABCOCK: Yeah. It should be.
16 Same problem we had before. Right, Richard?

17 MR. ORSINGER: Yes.

18 CHAIRMAN BABCOCK: Okay. All right.
19 Anybody got a problem with Luke's language? Scott.

20 HON. F. SCOTT McCOWN: Well, I don't have a
21 problem with Luke's language, and I know the nefarious
22 practice we're trying to kill here, and I don't know if
23 I'm being too conspiratorial, but you don't reassign the
24 case if you have another judge come into your courtroom to
25 hear it. You haven't reassigned the case or the motion.

1 CHAIRMAN BABCOCK: Yeah. We talked about
2 that, I think, didn't we, last time?

3 MR. ORSINGER: I don't know. He's talking
4 about leaving it in the same court but just swapping the
5 person in the chair behind the bench. I haven't thought
6 about that trick.

7 HON. F. SCOTT McCOWN: Well, it's not a
8 trick. It's a constitutional right, but if you're trying
9 to kill it -- I mean, if you're aiming at people you think
10 are doing something deliberately inappropriate, there is a
11 way around this rule, I think.

12 MR. ORSINGER: So if another judge comes to
13 hear that that's not called reassignment. What is that
14 called?

15 HON. F. SCOTT McCOWN: Exchange of benches.
16 I mean, I think it would be better to put it in the
17 positive. It would be better to say, "Notwithstanding
18 these rules or any local rule, only the presiding judge of
19 the administrative region may hear the motion to recuse or
20 assign any other judge to hear the motion to recuse" and
21 vest the authority positively in the presiding judge.

22 MR. ORSINGER: Yeah, but Luke's change this
23 morning is not to reassign the motion to recuse, but to
24 reassign the case which moots the motion to recuse, which
25 is, in fact, the evil that occurred -- or, pardon me, the

1 circumstances that existed that caused this --

2 HON. F. SCOTT McCOWN: I would say,
3 "Notwithstanding these rules or any local rule, no further
4 action can be taken on the case, and only the presiding
5 judge may hear the motion or assign somebody to hear the
6 motion."

7 CHAIRMAN BABCOCK: Doesn't this language
8 that Luke proposes cure the court swapping? Because the
9 court swapping would be reassigning to another judge.

10 MR. ORSINGER: To another judge as opposed
11 to another court?

12 MR. SOULES: That's a good point because --
13 and we probably ought to put the word "transfer" in here,
14 too. I'm not too sensitive about that, but it says
15 "reassign to another judge." It doesn't say "to another
16 court." It does say "judge," and we know there's a
17 difference there, and I think by the use -- and I want to
18 debate this with you, Judge McCown. I mean, it seems to
19 me that if we say "neither the motion nor the case can be
20 reassigned to another judge" -- I guess we could say "nor
21 can another judge be assigned to hear them," but I
22 don't -- that I think is probably unnecessary because what
23 we're saying here is a different judge can't pick up the
24 motion or the case unless permitted to do so by the
25 presiding regional judge.

1 CHAIRMAN BABCOCK: Yeah. I think your
2 language --

3 MR. SOULES: Judge.

4 CHAIRMAN BABCOCK: I think your language
5 roadblocks Judge McCown's thought that you could swap
6 benches.

7 MR. YELENOSKY: Well, if the problem is the
8 word "reassign," can you use a different word?

9 MR. SOULES: I think we ought to say
10 "reassigned or transferred."

11 CHAIRMAN BABCOCK: Yeah.

12 MR. SOULES: Because "transfer" is a word
13 that's used in a lot of districts.

14 CHAIRMAN BABCOCK: Okay. Now, the proposal
15 is "Notwithstanding these rules or any local rule, neither
16 the case nor the motion can be reassigned or transferred
17 to another judge except by the presiding judge of the
18 administrative region." I think that sounds okay.

19 MR. SOULES: One last question, and that is
20 should it be "reassigned" or just plain "assigned"?

21 CHAIRMAN BABCOCK: Well, it's been assigned
22 when the case was filed and landed in the court that's
23 being challenged, so now it's going to be reassigned.

24 MR. SOULES: Well, it's been assigned and
25 it's stuck with the judge.

1 CHAIRMAN BABCOCK: Right.

2 MR. SOULES: It's subject to the rule.

3 CHAIRMAN BABCOCK: Yeah, I think
4 "reassigned" is okay, Luke.

5 HON. F. SCOTT McCOWN: Well...

6 CHAIRMAN BABCOCK: Unless Judge McCown has
7 got a problem with it.

8 HON. F. SCOTT McCOWN: Well, I mean, you're
9 working with people who you're presuming are operating in
10 bad faith.

11 MR. SOULES: That's right.

12 HON. F. SCOTT McCOWN: And I can go down to
13 San Antonio and get on Judge Peoples' bench with his
14 permission, and there is no paperwork. Nobody has
15 assigned me. The presiding judge hasn't assigned me. The
16 local administrative judge hasn't assigned me. We have
17 exchanged benches, which the Constitution says we can do,
18 and there is no paperwork on it.

19 CHAIRMAN BABCOCK: Okay. I've got it. I've
20 got it. "The motion and the case can't be reassigned,
21 transferred, or heard to or by" --

22 MR. YELENOSKY: Yeah. "Heard" takes care of
23 it by itself.

24 MR. ORSINGER: Well, "heard" doesn't help
25 you if they reassign the case on the merits and moot the

1 motion to recuse.

2 CHAIRMAN BABCOCK: Yeah, that's right.

3 MR. ORSINGER: So you probably ought to add
4 it on.

5 MR. SOULES: I like it, "reassigned," --

6 CHAIRMAN BABCOCK: "Transferred, or heard."

7 MR. SOULES: "transferred, or heard."

8 CHAIRMAN BABCOCK: "To or ."

9 MR. SOULES: How emphatic can we get?

10 CHAIRMAN BABCOCK: Yeah, Luke, the way I had
11 it was "neither the case nor the motion can be reassigned,
12 transferred, or heard to or by another judge."

13 HON. F. SCOTT McCOWN: Can I make a
14 suggestion?

15 MR. ORSINGER: Why not say "transferred to
16 or heard by"?

17 HON. F. SCOTT McCOWN: How about this?
18 "Notwithstanding these rules or any local rule, no other
19 judge may preside over the case or decide the motion
20 except by order of the presiding judge of the
21 administrative region." That's pretty simple. "No other
22 judge may preside over the case or decide the motion
23 except by order of the presiding judge of the
24 administrative region."

25 CHAIRMAN BABCOCK: What do you think about

1 that, Luke?

2 MR. SOULES: I think I would take out the
3 word "other." "No judge."

4 HON. F. SCOTT McCOWN: Okay. "No judge may
5 preside in the case or decide the motion except by order
6 of the presiding judge of the administrative region."

7 MR. SOULES: I think that's good.

8 CHAIRMAN BABCOCK: Okay. Say that one more
9 time. "No" --

10 HON. F. SCOTT McCOWN: "Notwithstanding
11 these rules or any local rule," comma.

12 CHAIRMAN BABCOCK: Right.

13 HON. F. SCOTT McCOWN: "No judge may preside
14 in the case or decide the motion except by order of the
15 presiding judge of the administrative region."

16 MR. ORSINGER: Well, don't forget that if
17 it's filed within ten days of a trial or hearing that the
18 judge can continue to preside over the trial or the
19 hearing. I mean, we have a parallel recusal proceeding.

20 MR. SOULES: Well, you could say "except as
21 provided in subparagraph (4)," which is the interim
22 proceedings paragraph. That's the exception, right,
23 Richard?

24 HON. F. SCOTT McCOWN: Well, isn't it this
25 subparagraph (d)(1) that we're proceeding under here? You

1 could say, "If the motion complies with subparagraph
2 (d)(1)," comma, "notwithstanding these rules or any local
3 rule," comma, "no other judge may preside in the case or
4 decide the motion except by the order of the presiding
5 judge of the administrative region," because we're
6 talking --

7 MR. SOULES: Well, I think you would want to
8 leave all that sentence there, Judge McCown, before -- up
9 to "hear it" and you could add your language, "and no
10 other" -- because that's where we give the directive to
11 the presiding judge what he or she's supposed to do.

12 HON. F. SCOTT McCOWN: Right. Right. Well,
13 how about this? You could put a comma after "hear it."
14 "If the motion complies with subparagraph (d)(1)," comma,
15 "the presiding judge of the administrative region shall
16 hear the motion or immediately assign a judge to hear it,"
17 comma, "and no judge may preside in the case or decide the
18 motion except by order of the presiding judge of the
19 administrative region."

20 MR. ORSINGER: But, see, that is contra to
21 paragraph (4), interprim proceedings, which permits the
22 trial judge to act in emergencies for good cause stated,
23 or if it's filed within ten days of trial to proceed with
24 trial, so we have to permit the sitting judge to continue
25 to preside, and we have to stop the reassignment to

1 another court or another judge.

2 HON. F. SCOTT McCOWN: Right. We've got to
3 put the word "other" back. Luke had said we need to take
4 out "other," but we've got to put "other" back. "No other
5 judge."

6 CHAIRMAN BABCOCK: So, Scott, read where you
7 are now. "Notwithstanding these rules or any other local
8 rule, no other judge" --

9 HON. F. SCOTT McCOWN: "No other judge may
10 preside in the case or decide the motion except by order
11 of the presiding judge of the administrative region."

12 MR. LOWE: Scott, let me raise a question.
13 The Constitution is what allows you to swap benches, so
14 it's not this rule or a local rule, so notwithstanding the
15 Constitution, too? Or, I mean --

16 HONORABLE TOM LAWRENCE: You've got a
17 Government Code.

18 MR. LOWE: Does that mean when you say
19 "Notwithstanding this rule and any local rule" but it
20 doesn't include the Constitution, so they can do it
21 pursuant to the Constitution?

22 HON. F. SCOTT McCOWN: Well, we talked about
23 this, and we decided that under the Constitution that the
24 Supreme Court could promulgate a process for deciding
25 recusal. Now, you could make the contrary argument. You

1 could say that they can't, but we decided to proceed under
2 the theory that we could control how this decision was
3 done and we could stop people from exchanging benches.

4 MR. SOULES: And if that's the case, we
5 ought to take out the words "notwithstanding this rule or
6 any local rule."

7 MR. LOWE: Right. Just say it.

8 MR. SOULES: Just say no other judge can do
9 it.

10 MR. LOWE: No other judge can do it.

11 HON. F. SCOTT McCOWN: Well --

12 MR. ORSINGER: But, remember, the reason we
13 put "notwithstanding the local rules" was because of the
14 previous court ruling that the local rules permitted the
15 reassignment of the case on the merits that mooted the
16 recusal, and that wasn't a violation of our Rules of
17 Procedure. It just mooted the recusal.

18 MR. LOWE: I know, but if this way will take
19 care of the Constitution, it sure ought to take care of a
20 local rule. I mean, you couldn't get around that.

21 MR. ORSINGER: If it goes without saying
22 then that's fine.

23 MR. SOULES: I guess I keep tinkering with
24 this. How about "Notwithstanding these rules or any local
25 rule or any other law"?

1 MR. ORSINGER: I mean, the reason to keep
2 "other local rules" in there is that the Supreme Court of
3 Texas --

4 MR. SOULES: I know.

5 MR. ORSINGER: -- will sometimes approve a
6 local rule that deviates from this rule, and we need to be
7 sure that that power doesn't exist.

8 MR. SOULES: I'm leaving that in.
9 "Notwithstanding these rules or any local rule or any
10 other law." Notwithstanding all those things, this
11 controls it.

12 MR. ORSINGER: I don't have a problem with
13 that. It seems --

14 MR. SOULES: And I agree with you that we're
15 trying to fix this local rule problem, and it's better to
16 express that --

17 MR. ORSINGER: Yeah.

18 MR. SOULES: -- so people can understand it.

19 CHAIRMAN BABCOCK: Have we cured the problem
20 with the interprim proceeding?

21 HON. F. SCOTT McCOWN: Yeah.

22 MR. ORSINGER: By saying another judge --

23 HON. F. SCOTT McCOWN: "No other judge".

24 MR. ORSINGER: Inferentially the same judge
25 is not encumbered by this clause.

1 CHAIRMAN BABCOCK: Right. Okay. All right.
2 So now the language is "Notwithstanding these rules or any
3 local rule or any other law, no other judge may preside in
4 the case or decide the motion except by order of the
5 presiding judge of the administrative region." Correct?
6 Any --

7 MR. SOULES: We still have to say "except as
8 provided in paragraph (4)."

9 MR. ORSINGER: Well, paragraph --

10 MR. YELENOSKY: Say "no other judge."

11 MR. SOULES: Well, is the other judge the
12 presiding judge of the region or the judge of the court
13 that's been challenged with recusal? I understood this
14 as --

15 HON. F. SCOTT McCOWN: No. The other judge
16 is the challenged judge's buddy.

17 MR. SOULES: No.

18 CHAIRMAN BABCOCK: The court he's going to
19 swap with.

20 MR. SOULES: Okay. Who are not the other
21 judges?

22 HON. F. SCOTT McCOWN: The sitting judge is
23 not the other judge.

24 MR. SOULES: Oh, I thought it was the
25 regional judge is not the other judge.

1 HON. F. SCOTT McCOWN: No. It's the sitting
2 judge.

3 CHAIRMAN BABCOCK: The sitting judge is the
4 other judge.

5 MR. SOULES: Because before that we say
6 that the -- and the reason is the way one sentence follows
7 the other. "If the motion complies with subparagraph
8 (e)(1)" -- it is now -- "the presiding judge shall hear
9 the motion or immediately assign a judge to hear it."

10 HON. F. SCOTT McCOWN: You're right. It's
11 not clear. Luke's right.

12 MR. SOULES: It should say "no judge other
13 than the regional judge" because --

14 MR. ORSINGER: And our problem is created
15 because we're trying to combine continuing on the merits
16 of the case with hearing the motion to recuse. The
17 presiding judge has appointed a judge to hear the motion
18 to recuse. That stands separate and independent from the
19 trial judge continuing to rule on the merits of the case.
20 We're trying to write them into one clause, and they're
21 really different. Once the presiding judge has picked the
22 judge to hear the motion to recuse, that should not
23 change. We should not allow the local judge to reassign
24 the case and moot the motion, but we do want the trial
25 judge to be able to proceed in an emergency or if it was

1 filed within ten days.

2 MR. SOULES: Well, we can fix that, Richard,
3 I think, by saying, "No judge shall hear the motion or
4 preside over the case except as provided in paragraph
5 (4)." Or if you want to reverse those and make it clear
6 what the modifier is, "No judge shall preside over the
7 case, except as provided in paragraph (4), or hear the
8 motion."

9 MR. ORSINGER: Well, you know, the truth is
10 that no other judge can hear the motion, and that's not
11 the problem that we've ever had was that Judge X was
12 appointed to hear the motion and somebody else came in and
13 heard the motion. The problem is that they pulled the rug
14 out from under the assigned judge by reassigning the case
15 on the merits and moot the motion.

16 MR. SOULES: That's true.

17 MR. ORSINGER: So do we even need to say
18 that no judge except the one picked by the presiding judge
19 can hear the motion to recuse? Isn't that obvious? We
20 don't need to say that. All we need to do is stop the
21 reassignment of the case on the merits to another judge.

22 MR. HAMILTON: No, because the local rules
23 allow transfer of the case even on the motion.

24 MR. ORSINGER: They did not transfer the
25 appointment of the judge to hear the recusal.

1 MR. HAMILTON: No, but I say the local rules
2 allow that, though.

3 MR. ORSINGER: I don't agree. Once the
4 presiding judge says Judge X will hear the motion to
5 recuse I think that decision is in concrete. I don't
6 think a local rule can have another judge appointed to
7 hear the recusal.

8 MR. SOULES: But it doesn't hurt to say so.

9 CHAIRMAN BABCOCK: So say your language
10 again, Luke.

11 MR. SOULES: If I can get it back.

12 HON. F. SCOTT McCOWN: I've got a suggestion
13 on Luke's language. I think if we say -- this is Luke's
14 idea, but I have just been tinkering with the language.
15 If we say, "Notwithstanding these rules or any other local
16 rule," comma, "no judge" --

17 MR. SOULES: "Or any other law."

18 HON. F. SCOTT McCOWN: "Or any other law, no
19 judge may preside in the case or decide the motion except
20 by order of the presiding judge of the administrative
21 region, except that when authorized by (d)(4) the
22 challenged judge may proceed in the case."

23 CHAIRMAN BABCOCK: Should be (e)(4).

24 HON. F. SCOTT McCOWN: (e)(4).

25 MR. ORSINGER: You have an exception to an

1 exception.

2 HON. F. SCOTT McCOWN: Exactly.

3 MR. ORSINGER: Does that put you back within
4 the main rule, or is that yet a third place that you are?

5 HON. F. SCOTT McCOWN: The exception within
6 the exception is what we have. It is an exception to an
7 exception.

8 CHAIRMAN BABCOCK: Okay. Scott, could you
9 read that again? I'm sorry.

10 HON. F. SCOTT McCOWN: Well, it's not very
11 eloquent.

12 MR. SOULES: Okay. Let me try it. "No
13 judge other than the regional judge" -- or "presiding
14 judge of the administrative region." "No judge other than
15 the presiding judge of the administrative region may
16 preside over the case except as provided in paragraph (4)
17 or hear the motion unless assigned by presiding judge of
18 the administrative region."

19 CHAIRMAN BABCOCK: Okay. So you say,
20 "Notwithstanding these rules or any local rule or any
21 other state law."

22 HON. F. SCOTT McCOWN: Or the Ten
23 Commandments.

24 CHAIRMAN BABCOCK: "No judge other than the
25 presiding judge of the administrative region may preside

1 over the case, except as provided in subparagraph (e)(4),
2 or hear the motion unless assigned by the presiding judge
3 of the administrative region."

4 MR. EDWARDS: Yeah, now what do you do in --
5 you've got -- everybody is real happy with the assignment
6 that's been made by the administrative judge to a sitting
7 judge in another court, and now there's an exchange of
8 benches between that assigned judge and some other judge.
9 I mean, he can't hear the case? I don't think so. The
10 Constitution says they can change benches.

11 MR. SOULES: Well, we talked about that, and
12 I think the consensus was that the Constitution gets
13 trumped by this rule because the Court has the power to
14 define certain practices under the Constitution.

15 MR. EDWARDS: I don't think so.

16 MR. SOULES: Maybe we're wrong.

17 HON. F. SCOTT McCOWN: How about this? I
18 think this captures what Luke's saying but a little
19 shorter. "Notwithstanding these rules or any local rule
20 or law," comma, "once a motion to recuse has been filed,"
21 comma, "no judge may preside in the case unless, one,
22 assigned by the presiding judge of the administrative
23 region, or, two, pursuant to (e)(4)."

24 MR. ORSINGER: I have a problem with that.
25 You've short-circuited the recusal process by allowing the

1 presiding judge before the recusal motion is granted to
2 appoint a replacement to carry on with the case. That
3 language permits that, and this rule doesn't permit that,
4 and the party who wants to keep the judge is entitled to
5 have a hearing and a ruling on the recusal before a
6 strange judge comes in and starts ruling on the merits of
7 the case. So you've given too much power to the presiding
8 judge to --

9 HON. F. SCOTT McCOWN: Well, I didn't want
10 to do that.

11 CHAIRMAN BABCOCK: Okay. We're going to
12 take a 15-minute break. Those who are working on the
13 language, fix it for us by the time we get back.

14 (Recess from 10:47 a.m. to 11:05 a.m.)

15 CHAIRMAN BABCOCK: All right. Here's the
16 new and improved language. Richard, you want to do this?
17 We need a picture of Orsinger on the telephone. Here's
18 the language. Everybody ready? "Notwithstanding any
19 local rule or other law, after a motion to recuse or
20 disqualify has been filed no judge may preside, reassign,
21 transfer, or hear any matter in the case," comma, "except
22 pursuant to subparagraph (e)(4), before the motion has
23 been decided by the judge assigned by the presiding judge
24 of the administrative region."

25 MR. TIPPS: I move we adopt that.

1 CHAIRMAN BABCOCK: Sounds pretty good.
2 Anybody got any problems with it? Richard, okay with
3 you?

4 MR. ORSINGER: I need to read it. I'm not
5 going to oppose it, but I need to read it.

6 CHAIRMAN BABCOCK: You're not going to
7 oppose it, but you need your --

8 MR. ORSINGER: Well, if we're just going to
9 write it in here --

10 CHAIRMAN BABCOCK: We're going to write it
11 in here.

12 MR. ORSINGER: Great. I'll live with it.

13 CHAIRMAN BABCOCK: Carl noticed there was a
14 sentence dropped out of subparagraph (3), and we will put
15 that back in, and it's not an issue.

16 MR. EDWARDS: Did you change (d)(1) to
17 (e)(1) in there?

18 MR. ORSINGER: Yes.

19 CHAIRMAN BABCOCK: (e)(1) is going to go in
20 there. There's some language in bold up top. Is
21 everybody okay with that? "If the judge voluntarily
22 recuses or disqualifies pursuant to the motion, the case
23 shall be referred to the presiding judge of the
24 administrative region for reassignment, unless the parties
25 agree that the case may be reassigned in accordance with

1 local rules." Any problem with that? That was just a
2 drafting issue from our last meeting.

3 Okay. Are we done with subparagraph(3),
4 referral? I see no hands or voices raised, so we'll go to
5 interim proceedings. There's already been a suggestion by
6 Justice Schneider that we should put in the word
7 "presiding," and I think that's not controversial. "After
8 referring the motion to the presiding judge of the
9 administrative region, the judge in whose case," etc.,
10 etc. Any problem with that? Okay. We've put a "however"
11 for a "but." Any problems with that?

12 MR. HAMILTON: Where is that?

13 CHAIRMAN BABCOCK: That's on the fourth line
14 of four. "However, until the following instances..."

15 MR. SOULES: Top of page five.

16 CHAIRMAN BABCOCK: Yeah. Top of page five.
17 Okay. Those are the only changes in the interim
18 proceedings. I don't think there is any controversy.

19 MR. EDWARDS: Yeah. There's controversy,
20 but I don't know that --

21 CHAIRMAN BABCOCK: You know, any controversy
22 we haven't already discussed.

23 MR. EDWARDS: Well, I don't know, but you've
24 got Footnote 23 to say "see subsection (e)(2) above," and
25 that deals with some exceptions to when you can file the

1 thing as a matter of right; and, you know, the notion of
2 going -- I know we've discussed this before, but the
3 notion on going two fronts at the same time, trying the
4 case and dealing with the recusal at the same time, is not
5 very palative to me, and the notion of trying a case for a
6 week or two and then having the recusing -- the judge
7 hearing the recusal kick the case out is not palative to
8 me.

9 CHAIRMAN BABCOCK: Yeah. I think those
10 objections that have been raised by you and other members
11 are in the record and the Court can --

12 MR. EDWARDS: Okay. I just wanted to make
13 sure they were in there again for my sake.

14 CHAIRMAN BABCOCK: You wanted them in this
15 session.

16 MR. EDWARDS: Well, when the insurance
17 companies start complaining about the bills they're
18 getting because their lawyers are having to try the case
19 twice, I don't want it to be known that I didn't come to
20 their aid.

21 MR. LOWE: You've always come to the aid of
22 the insurance companies.

23 CHAIRMAN BABCOCK: Here's -- Richard and
24 Carl, here's an issue that worries me. You've got under
25 (4) (b) here "When the motion to recuse or disqualify is

1 filed after the tenth day prior to the date the case is
2 set for trial or other hearing," so anything within the
3 ten-day period you can have an interprim proceeding; is
4 that correct?

5 MR. HAMILTON: Correct.

6 CHAIRMAN BABCOCK: All right. Now, we have
7 said previously that the ten-day period doesn't apply if
8 the facts that give rise to the recusal or
9 disqualification arise within the ten-day period, which is
10 probably not going to happen very much, or you don't know
11 what judge you're going to get, which is going to happen
12 all the time in Bexar and Travis County. So you go down
13 to the courthouse; and you're assigned Judge Smith to hear
14 your motion; and you say, "Hold it. Judge Smith has
15 financial interest" or whatever, some other ground for
16 recusal. Under this rule, because you filed your motion
17 within ten days of the hearing or trial, Judge Smith can
18 go ahead and hear the case under this interim proceedings.
19 Is that right or not?

20 MR. ORSINGER: No. We made a policy
21 decision that we had to choose between the people that
22 were going to misuse the rule for a motion for continuance
23 and the people who were going to have a legitimate ground
24 to complain that they discovered at the last minute, and I
25 think we debated that if we start trying to distinguish

1 between motions that were legitimately discovered within
2 ten days and motions that were not that we are going to
3 allow this to be misused as a motion for continuance.

4 HONORABLE DAVID PEEPLES: But, Richard, I
5 think Chip is talking about sub (b), when the case didn't
6 get assigned to the judge until right then. We don't want
7 interim proceedings when that happens, do we?

8 CHAIRMAN BABCOCK: That's the issue I'm
9 raising.

10 PROFESSOR ALBRIGHT: But isn't the answer
11 that the judge can -- on (5) the judge can abate the
12 interim proceeding? You know, if Scott McCown gets a real
13 recusal motion filed against him and everybody needs to
14 work on it awhile, I assume he is not going to have the
15 trial go on at the same time. Is that right?

16 MR. EDWARDS: Well, this says "the judge
17 hearing the motion," and that judge may not be appointed
18 by the administrative judge for a week.

19 MR. SOULES: We need to have two judges
20 there. We need to have the PJAR and the judge hearing it.

21 CHAIRMAN BABCOCK: See, Alex, the issue here
22 is, see, under subparagraph (e)(2)(b) we say can you file
23 the motion -- you've got to file it prior to ten days
24 unless, subparagraph (b), the judge who is sought to be
25 recused is not assigned to the case before ten days prior

1 to the date the case is set for trial or other hearing.
2 So we're saying that's a timely motion in those
3 circumstances, and yet when we get over here to (4)(b) we
4 say, "But even though the motion is timely under the rule,
5 you can still have an interim proceeding"; and, Richard, I
6 don't know that we have discussed this. Maybe we have and
7 I just --

8 MR. EDWARDS: Well, that was the point I was
9 raising to whomever.

10 CHAIRMAN BABCOCK: You think we have already
11 decided it? Well, if we've already decided it let's not
12 decide it again.

13 MR. SOULES: Did we take out the standard
14 about can hear matters that affect emergency matters?

15 MR. ORSINGER: No. It's still here.

16 CHAIRMAN BABCOCK: Yeah, that's still in.

17 MR. SOULES: Where is that?

18 MR. ORSINGER: That is in --

19 MR. SOULES: (e)(4)?

20 MR. ORSINGER: Right. In the first
21 sentence, "except for good cause stated in the order in
22 which the action is taken," the first sentence of (e)(4).

23 MR. ORSINGER: Okay. Chip, so what you're
24 saying is that any time that the motion is not waived then
25 it halts the proceedings.

1 CHAIRMAN BABCOCK: Well, any time the motion
2 is timely.

3 MR. ORSINGER: Well, timely and waiver are
4 the same thing. In other words, under our measure of
5 timeliness, you waive it if you're not timely.

6 CHAIRMAN BABCOCK: Yeah. Okay.

7 MR. ORSINGER: "A motion to recuse is waived
8 if filed later than the tenth day prior, except," and then
9 you can go ahead and file it. It hasn't been waived, but
10 if it's within ten days, it doesn't stop the trial. Now,
11 what you're saying is that we do want to stop the trial in
12 an instance where you found out about the ground within
13 ten days or the judge was assigned within ten days.

14 HON. F. SCOTT McCOWN: No.

15 MR. ORSINGER: No?

16 HON. F. SCOTT McCOWN: He's saying -- he's
17 raising the question of whether when the judge is assigned
18 within ten days, so you couldn't have known about the
19 ground earlier than ten days, but that's not what triggers
20 it. What triggers it is the judge is assigned within ten
21 days, and the judge could go ahead with the trial the way
22 our rule is written.

23 And I think that's a good point, but I don't
24 see any easy way to fix it, and I wonder if it's worth
25 trying to fix, because, you know, the judge on a central

1 docket, one of the things that we did agree was if the
2 parties wanted to just go to another judge, they could do
3 that, and that happens all the time on a central docket.
4 It's one of the advantages of a central docket, and so the
5 only time this would be a real problem is when a motion
6 was -- you got a judge. You filed a motion. It was a
7 good motion. You had a misguided or mean-spirited judge
8 who wasn't going to let go of the case or let you go down
9 the hall to another judge and was going to put you to
10 trial in his court. I just don't think -- I don't think
11 that's realistic on a central docket.

12 MR. ORSINGER: Scott, I'm not sure your
13 premise is correct. If you look at referral, paragraph
14 (3), the parties can agree to go to the central docket
15 again only if the judge voluntarily recuses or
16 disqualifies. If the judge -- as I interpret that, if the
17 case is assigned and the motion is filed and the judge
18 refuses to get out of the case, you are forced into the
19 recusal process.

20 CHAIRMAN BABCOCK: The parties can agree to
21 abate the proceedings, though.

22 MR. ORSINGER: Yeah, but he's talking about
23 just walking down the hallway and saying --

24 CHAIRMAN BABCOCK: I know.

25 MR. ORSINGER: -- "To hell with it, let's

1 just get a new assignment."

2 HON. F. SCOTT McCOWN: Well...

3 MR. ORSINGER: So it's not quite as liberal
4 as you think.

5 HON. F. SCOTT McCOWN: Well, I guess it's
6 not quite as liberal, but it's pretty liberal. I mean,
7 you're presuming a judge who for some reason wants to hear
8 a case and wants to run the risk of having it heard over
9 again and getting involved in this brew-ha-ha, I just
10 don't think -- I don't think that the amount of times that
11 this would ever come up on a central docket are worth
12 trying to rewrite or trying to write a special provision
13 for.

14 CHAIRMAN BABCOCK: Judge Peeples.

15 MR. SOULES: Doesn't (e) (2) somewhat take
16 care of that? Because the ground for recusal, you don't
17 know that until the judge is assigned and then you get a
18 specific provision (b), the judge was assigned within ten
19 days; and a way to fix this would be to limit interim
20 proceedings under (b) to cases in which the case is set
21 for trial, because other hearings are set frequently on
22 less than ten days notice.

23 MS. SWEENEY: That's true.

24 MR. SOULES: And it seems to me like that
25 part of it, "or other hearing" in (4) (b) is pretty

1 unworkable. On the other hand, by the time the case is
2 set for trial on the merits, the parties that are going to
3 raise recusal issues ought to be doing that; and I don't
4 know what the experience is in most of the jurisdictions;
5 but in Bexar County, since we try to make a central docket
6 work effectively, the judges are very lenient about
7 rolling over, I mean, to another judge.

8 Because the central docket will not work if
9 you apply the time standards in this rule literally, and
10 since there's an array of judges available anyway, if --
11 maybe it's not even a good ground for recusal. It just
12 makes a little bit more sense to have a different judge
13 hear the case, then in our central docket that triggers
14 you're going to another judge. You might have to wait
15 until tomorrow, but you won't have to wait long because
16 right now Bexar County is trying every case set every
17 week. So I think we ought to limit this (b) to settings
18 on trial on the merits.

19 CHAIRMAN BABCOCK: Okay. Judge Peeples,
20 then Justice Duncan.

21 HONORABLE DAVID PEEPLES: I'd like to hear
22 someone make the argument that a motion filed within ten
23 days because you just found out that day who your judge
24 was going to be, why that judge ought to be able to go
25 ahead and start trying the case. That's a radical change

1 from what we've got right now, and I agree with what Luke
2 and Scott are saying, that it's not going to happen very
3 often in Travis County and Bexar County. It won't ever
4 happen probably, but still, what is the argument for
5 having interim proceedings when the person didn't find out
6 who the judge was until right then?

7 MR. SOULES: Well, I mean, we probably don't
8 make rules that are different for central dockets than
9 other dockets, and it's this issue that the Senator raised
10 that late-filed motions to recuse are being used for
11 continuance, and we are trying to address that concern,
12 and it's just a balancing of various concerns that we may
13 have to live with a rule that would allow abuse of parties
14 who have a right to recuse; however, we take care of that
15 by giving them an escape. If the judge is recused they
16 are not bound by the orders of the judgments until they
17 are reviewed by a subsequent judge.

18 It's the whole fabric here, Judge Peeples,
19 of trying to balance these interests. I don't think they
20 balance well on other hearings, but they probably balance
21 somewhat on trials.

22 CHAIRMAN BABCOCK: Sarah.

23 HONORABLE DAVID PEEPLES: Skip, can -- Chip?

24 CHAIRMAN BABCOCK: Judge Peeples.

25 HONORABLE DAVID PEEPLES: You've got a judge

1 who's either out in the country, you know, and people show
2 up and they see a different face on the bench. That can
3 happen, and in Travis County and Bexar County you don't
4 find out until the day of trial or maybe Friday before
5 Monday. Okay. If I'm the judge and the motion has been
6 filed on me, as this is written, I can say, "Go ahead and
7 have your hearing, but we're starting with your case.
8 Bring a jury panel." I don't think that ought to happen,
9 and I think we ought to change it.

10 Now, if I think it's a bad motion, and it's
11 filed for delay, I can get on the phone, and we can have a
12 telephone or fax hearing if I'm out in the country. We
13 have made some very good changes here that give us fast
14 hearings, so why shouldn't the judge who's being recused
15 at have to -- I mean, he knows how the system works. He
16 can get a reasonably quick hearing if it's a delay motion,
17 but I think the alternative which we have got here, which
18 is the judge can start the case is -- we didn't mean to do
19 that, I don't think.

20 CHAIRMAN BABCOCK: Joan Jenkins.

21 MS. JENKINS: Can't you cure your concerns,
22 Chip, and the concerns of Judge Peebles by just simply
23 saying at (b) "date the case is set for trial or other
24 hearing, except in circumstances set out at (e) (2) (b) (c),"
25 because it's your (b) and your (c) that you're concerned

1 about that are being omitted from the considerations at
2 (b).

3 CHAIRMAN BABCOCK: Judge McCown and then
4 Carl.

5 HON. F. SCOTT McCOWN: Let me point out the
6 difference in what Luke's saying and what Judge Peeples is
7 saying. We have this parallel proceeding, which I don't
8 think we need but we've decided we want to have this
9 parallel proceeding to cure an evil, and the evil we want
10 to cure with the parallel proceeding is last-minute,
11 useless, worthless motions to recuse that bump people from
12 trial settings.

13 If you adopt Judge Peeples' position, you
14 would have the parallel proceeding available to you
15 against the evil in every county in the state but Bexar
16 and Travis, because you never know in advance in Bexar and
17 Travis who your judge is, and so the exception would
18 swallow the rule, and there would be no parallel
19 proceedings in those two counties, which is fine with me,
20 but that's what Luke was saying.

21 If you want -- it just depends on what you
22 think is the bigger evil. If you think that these
23 last-minute motions to recuse that are worthless and bump
24 people off trials is the bigger evil, or do you think the
25 bigger evil is the misguided district judge in Bexar

1 County who's going to put you to trial anyway even though
2 you didn't know that you had him until you walked in his
3 court that morning.

4 CHAIRMAN BABCOCK: Well, Judge Peeples, do
5 you and Judge McCown both agree, because it seems to me
6 these two cities are the cities or the counties where
7 there is a central docket, that this is not likely to
8 happen at all?

9 HON. F. SCOTT McCOWN: Yeah.

10 HONORABLE DAVID PEEPLES: I agree in Bexar
11 County and Travis County. I do think people -- you know,
12 the other 252 counties, you might show up some morning and
13 there is just a different judge there, and you didn't find
14 out. You know, the assignment wasn't made until two or
15 three days ago, and it will apply in those situations,
16 too, I think.

17 HON. F. SCOTT McCOWN: Yeah.

18 CHAIRMAN BABCOCK: Yeah. Carl.

19 MR. HAMILTON: I think the safeguards,
20 though, for that are two things. No. 1, if the motion is
21 filed and it has any merit at all then the judge ought not
22 to go forward with interim proceedings; or if you have a
23 cantankerous judge, and he says, "Well, I'm going to go
24 ahead anyway," well, then you have got the next step where
25 the parties can elect not to go ahead; and then you have

1 got the third step where the judge assigned to hear the
2 case can stop the proceedings. So we have got three steps
3 in there where the actual trial can be stopped if there's
4 any merit to this motion at all.

5 CHAIRMAN BABCOCK: Justice Duncan.

6 HONORABLE SARAH DUNCAN: To follow up with
7 what Carl was saying, I had forgotten that in (6) if that
8 judge is subsequently recused, the judge assigned to the
9 case can vacate the previous orders.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE SARAH DUNCAN: And I had
12 forgotten about that.

13 CHAIRMAN BABCOCK: Well, I think even though
14 I raised this issue, I'm probably -- I'm persuaded that
15 because of the policy issues that we're trying to deal
16 with here and because of the fact that this is not likely
17 to ever happen and because we have procedural safeguards,
18 it's probably okay to leave it like it is.

19 MR. EDWARDS: Well, you're saying it's not
20 going to happen. But all you've polled is two counties.
21 I guarantee you it's going to happen.

22 CHAIRMAN BABCOCK: Well, on the other hand,
23 maybe it's going to happen.

24 MR. EDWARDS: You know, you're sitting here,
25 you're talking about bad guys. You're talking about some

1 lawyer that's going to -- or some party that's going to
2 have something fancy going with some judge somewhere, and
3 so you're talking about bad guys, and what you're doing is
4 you're penalizing all the good guys in the world and all
5 the good parties in the world for a few bad guys.

6 You already have Rule 13. You already have
7 Chapter 10 of the Civil Practice and Remedies Code. And
8 maybe you want to say, well, the administrative judge can
9 impose sanctions if it's found that the -- that one of
10 these recusal motions was filed for the purpose of a
11 continuance or delay only, which seems to be what the
12 problem is.

13 CHAIRMAN BABCOCK: Yeah, but, Bill, there's
14 lots of bad guys out there. It's not only that bad guy,
15 which you think there are pretty few of them. It's also
16 all the bad guys that file these motions for delay.

17 MR. EDWARDS: Well, that's what I'm saying.
18 Maybe you can take care of that by giving the
19 administrative judge somebody outside the matrix that
20 you're working with the authority to sanction if the
21 filing is for delay only. Now you're taking care of the
22 problem and not damaging the whole system going on a
23 two-level trial for the purpose of taking care of the bad
24 guys.

25 CHAIRMAN BABCOCK: Luke and then Judge

1 McCown and then Wallace.

2 MR. SOULES: I think the policy of not
3 delaying trials is served by deleting "or other hearing."
4 I haven't heard a lot of concern or problems or issues
5 with delaying hearings. It's really a trial delay that
6 we're talking about or that we have spent most of our time
7 talking about, and I think we should delete the words "or
8 other hearing," for the reasons I have previously stated
9 and that one, out of (b); and then this partially I think
10 responds to -- well, it's a different fix for Bill's
11 issue.

12 If in (5) we authorize not only the judge
13 hearing the motion but also the presiding judge of the
14 administrative region to stay, that would stop the
15 parallel proceedings until the motion got decided. So I
16 would move that we delete the words "or other hearing" out
17 of (b) and that we add "the presiding judge of the
18 administrative region" in the second sentence of (5).

19 CHAIRMAN BABCOCK: Wallace.

20 MR. JEFFERSON: I agree with Luke. And if
21 we were to delete "or other hearing" but then add at the
22 end of that sentence "unless the judge's first assignment
23 to the case is within ten days of trial."

24 CHAIRMAN BABCOCK: Okay. How do people feel
25 about those proposals?

1 HON. F. SCOTT McCOWN: Well, no. If you
2 add -- well, I happen to agree with Bill on the merits of
3 the parallel proceeding, but where I disagree with him is
4 we have fought this, we have voted on it, and he's trying
5 to use a little technical glitch to go back and revisit
6 the policy issue.

7 MR. EDWARDS: Well, I don't know whether we
8 have voted.

9 HON. F. SCOTT McCOWN: Well, let me just
10 finish this thought. This is responsive to this
11 legislative request that -- and we've been through this.
12 I agree with Luke that a good way to minimize any harm is
13 to limit it to trial, but I disagree with Wallace that you
14 want to say where anything is set within ten days, because
15 if you say that then you don't have the rule in Travis
16 County or Bexar County.

17 MR. JEFFERSON: Well, I'm saying unless it's
18 first set for trial within ten days, like Travis County or
19 Bexar County. Usually on Thursday you call up and you
20 find out who the judge is going to be on Monday. Thursday
21 or Friday. And if you find out first then, then why
22 should that judge be able to go forward and hear the trial
23 if you've got a good reason to recuse the judge?

24 HON. F. SCOTT McCOWN: Well, I guess I'm
25 not -- that's what we were just talking about. If you

1 want a parallel proceeding rule and you want that rule in
2 Travis County, you can't say we won't have a parallel
3 proceeding for any assignments within ten days because all
4 our assignments are within ten days.

5 MR. SOULES: And that's not just Bexar and
6 Travis County. I mean, you can -- pick a scenario. Let
7 me use a few words here. I have had a horrible divorce
8 with my law partner who has now moved to Angleton or to
9 Houston and become a district judge and now retired. All
10 this is ancient history, but we have never buried the
11 hatchet, and I get down to Houston, and I found out that
12 the regional judge has assigned that judge to the court
13 where I'm going to try my case this week, and I just found
14 out about it. I mean, it can happen anywhere. It's not
15 just in our county.

16 HON. F. SCOTT McCOWN: That's true.

17 CHAIRMAN BABCOCK: Yeah, Anne.

18 MS. McNAMARA: Chip, what I'm hearing is
19 that in these two counties if you have a situation where
20 you get a judge who is aligned with one of the parties,
21 you may go to trial and you may go to judgment before you
22 sort it out, because the procedural safeguards seem to
23 work only if somebody is intent on doing the right thing;
24 but the problem that these rules are designed to deal
25 with, it seems like, just isn't getting solved in these

1 two counties; and we're prepared to sacrifice the solution
2 to the problem to preserving the parallel proceedings,
3 which to me seems we're putting the cart before the horse.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: I want to comment
6 on Luke's two proposals, but first, his second one, which
7 is on page five, subdivision (5), I think that helps to
8 give the presiding judge or the assigned judge the power
9 to abate the proceedings. I think we ought to do that.
10 Now, his first proposal is to drop the words on the top of
11 page four, "or other hearing."

12 MR. SOULES: No, I said in (b), right here
13 just above that same paragraph (5).

14 MR. YELENOSKY: Page five.

15 HONORABLE DAVID PEEPLES: Okay. Thank you
16 for clarifying that. Okay.

17 CHAIRMAN BABCOCK: Say that again, Luke,
18 because I think I missed that too then.

19 MR. SOULES: It's on page five. Page five
20 starts with the end of an unnumbered paragraph. Then it
21 has (a), and then it has a (b), then paragraph (5).

22 CHAIRMAN BABCOCK: Right.

23 MR. SOULES: Paragraph (5) says "abatement
24 of interprim proceedings." Go to (b) immediately above
25 that. You have "the motion to recuse or disqualify is

1 filed after the tenth day the day the case is set for
2 trial," and that's where I would delete "other hearing."

3 MR. YELENOSKY: By Footnote 23.

4 MR. SOULES: At Footnote 23, right. And I
5 would probably add "trial on the merits" so we know what
6 trial we're talking about.

7 HONORABLE DAVID PEEPLES: So, Luke, if we do
8 that, that means if you show up out in the country and a
9 different judge is on the bench and you have got a very
10 important summary judgment, that judge can do interim
11 proceedings and say, "We're going on," but not for a
12 trial.

13 MR. SOULES: Well, I think summary judgment,
14 if it's -- particularly if it's a summary judgment on the
15 whole case is a trial.

16 MR. ORSINGER: If it's granted, it's a
17 trial. If it's denied, it's just a hearing.

18 MR. SOULES: Actually, I mean, I would hope
19 it would be limited to the trial on the merits, what would
20 traditionally either be a jury trial or bench trial to
21 decide the fact issues in the case. That's what we really
22 have spent our time worrying about, those things getting
23 derailed after a lot of money has been spent in
24 preparation.

25 If a summary judgment is delayed a month in

1 the span of time for disposition of a case, it probably
2 doesn't take a whole lot of time to prepare to argue it
3 once again, and it probably won't delay the ultimate
4 resolution of the case very much. So, but, you know, when
5 you lose a trial setting on the merits, either a jury
6 trial or a bench trial where you're going to use a lot of
7 the judge's time, that can delay for months the resolution
8 of a case; and I think that's really where the abuse is
9 occurring. That's my reason for it, Judge, if it adds any
10 validity.

11 CHAIRMAN BABCOCK: Well, how do people feel
12 about that? That is a compromise that is --

13 MR. ORSINGER: I agree we ought to let the
14 presiding administrative judge stay, and I agree with
15 Luke's last comment that I think the real harm has to do
16 with the delay associated with the new hearing or a new
17 setting.

18 CHAIRMAN BABCOCK: Right.

19 MR. ORSINGER: And if it's a jury trial, in
20 some courts that could be six months delay.

21 CHAIRMAN BABCOCK: Right.

22 MR. ORSINGER: But if it's a hearing, it may
23 just be a delay until the day after the recusal is
24 granted; or if the recusal is ruled on that afternoon, it
25 may be that afternoon. So I think that you don't lose

1 that much ground on hearings, but on trials you lose a lot
2 of ground.

3 CHAIRMAN BABCOCK: Okay. So the idea is on
4 (e)(4)(b), is that right, that we're going to say "the
5 date the case is set for trial on the merits"?

6 MR. ORSINGER: I'd like to clarify whether a
7 summary judgment is a trial on the merits, because I think
8 it is.

9 CHAIRMAN BABCOCK: Well, let's stick with
10 Luke's language first. "Trial on the merits" and delete
11 the words "or other hearing."

12 MR. SOULES: So moved.

13 CHAIRMAN BABCOCK: Yeah, Bill.

14 PROFESSOR DORSANEO: I appreciate the idea.

15 CHAIRMAN BABCOCK: I thought you were going
16 to stay out of this.

17 PROFESSOR DORSANEO: Well, it's taken so
18 long I thought I would comment. The addition of the words
19 "on the merits," I appreciate what's being attempted, but
20 I'm not sure it's all that helpful. I think we are better
21 off with the ambiguity of "trial." On the merits of what?

22 MR. ORSINGER: I agree with that.

23 CHAIRMAN BABCOCK: Luke, will you accept --

24 MR. SOULES: Okay with me.

25 CHAIRMAN BABCOCK: Okay. Alex.

1 PROFESSOR ALBRIGHT: I hate to muck this up
2 all again, but I'm going to. Isn't the harm that we're
3 talking about, that Bill was talking about, is the problem
4 of having to try a case and deal with recusals at the same
5 time? If you have hearings other than trials, that's
6 really not a problem, right? You can argue your discovery
7 motion or argue your summary judgment motion and then
8 proceed with the recusal and it's not that big a deal.
9 When it's a big deal is when you have a trial, right?

10 MR. ORSINGER: I think Bill's concern, to
11 speak for him, is that he gets eight days into trial and
12 finds out it's a waste of time or maybe even gets a
13 favorable verdict and finds out it's a waste of time. Not
14 so much that you have a two-hour hearing in the evening.

15 PROFESSOR ALBRIGHT: Yeah. So what's
16 happening here is you get a -- you walk into a trial, and
17 it's a summary judgment. Under the new rule as we may
18 amend it, taking out the "or other hearing," is you go to
19 a hearing for a summary judgment, and there's this judge
20 you've never seen before, and you say, "Wait a minute, got
21 to recuse that judge," then everything stops, but you
22 don't have the hearing, and then you get another setting
23 for the hearing. Is there -- I mean, that's not -- the
24 harm of going forward with that hearing is not the same as
25 the harm from having to have the trial go on and have the

1 recusal motion.

2 MR. ORSINGER: True. That's true.

3 MR. SOULES: Well, you go down for this
4 proceeding, and you -- the regular judge makes several
5 rulings under the -- in the face of a motion to recuse.
6 Then a recusal judge comes down, and you go through half a
7 day's hearing, and you recess for lunch, and you go over
8 to the local restaurant, and you see the recusal judge and
9 the regular judge having lunch together and then the
10 recusal judge recuses the regular judge, but the
11 subsequent judge then you see come back to town, and you
12 see the old judge and the new judge having lunch together
13 again, and all the old rulings are okay. They just turn
14 out to be okay whenever they get reviewed.

15 I mean, bad things can happen along the way
16 to a jury selection, from filing the petition to the jury
17 selection, and I don't think we should be encouraging
18 that.

19 PROFESSOR ALBRIGHT: But right now that's
20 what happens, right? That's what happens now. I mean, if
21 you walk in and there's -- you don't --

22 MR. SOULES: Because you can't proceed
23 except in emergencies, and the regular judge can't proceed
24 except in emergency circumstances --

25 PROFESSOR ALBRIGHT: Okay. Right.

1 MR. SOULES: -- under the present law, and
2 this is giving them a new window to act, and I think that
3 pretrial proceedings should be excepted from that new
4 window, and it should only be this evil that we have seen
5 trying to prevent the start of the trial on the date that
6 it's set and the importance of avoiding unnecessary delay.

7 CHAIRMAN BABCOCK: Scott.

8 HON. F. SCOTT McCOWN: If the Supreme Court
9 doesn't want parallel proceedings, they can strike all
10 this out, but we were asked to develop a rule in response
11 to the legislation that incorporated that idea. We've
12 done it. We've crossed that bridge. I would echo Carl's
13 comment. Your first line of defense is that you've got a
14 reasonable trial judge who's not going to do unfair
15 things. Luke's added a very good amendment that you could
16 immediately get on the phone, and the presiding judge of
17 the administrative region could stop the parallel
18 proceedings, or the presiding judge has the recusal judge
19 and the recusal judge stops the parallel proceeding, or
20 the parties themselves agree to stop the parallel
21 proceeding.

22 You've got a lot of safeguards before you
23 get to this craziness of a party in cahoots with the judge
24 and a presiding judge asleep at the wheel and a recusal
25 judge asleep at the wheel and you're in this trial, and

1 then the other thing that Luke's added is -- and I think a
2 good suggestion, is that we narrow this only to trials so
3 the only time this parallel proceeding would ever happen
4 is specifically for the evil we're trying to address, a
5 frivolous motion that's designed to knock your jury trial
6 off the docket.

7 My only quarrel with what we've got is that
8 the case law says a summary judgment proceeding is a
9 trial; and it says that in the context of having to have
10 your pleadings amended seven days before trial; and if we
11 don't want to include summary judgments, we're going to
12 have to say "trial other than summary proceedings," or
13 some such language. But I think we ought to make that
14 change and move on.

15 CHAIRMAN BABCOCK: Okay. So the proposal as
16 it stands right now, Luke, listen up, is that (e)(4)(b)
17 will be changed to say "when the motion to recuse or
18 disqualify is filed after the tenth day prior to the date
19 the case is set for trial," period, deleting the word "or
20 other hearing." Do you want to accept any other friendly
21 amendments to that?

22 MR. SOULES: That's fine with me.

23 CHAIRMAN BABCOCK: Is anybody seconding
24 Luke's suggestion here?

25 MR. LOWE: I second.

1 CHAIRMAN BABCOCK: Buddy seconds it. All
2 right. Everybody in favor of that raise your hand.
3 Everybody against? It passes 23 to 1.

4 HON. F. SCOTT McCOWN: And I'm against only
5 because that includes the summary judgments.

6 CHAIRMAN BABCOCK: Luke's second proposal is
7 to change subparagraph (e)(5) in the last sentence, as I
8 understand it, Luke, to say "The judge hearing the motion
9 to recuse or disqualify or the presiding judge of the
10 administrative region may also order the interim
11 proceedings abated pending a ruling on the motion to
12 recuse or disqualify." Is that right, Luke?

13 MR. SOULES: Right, except I would reverse
14 the order of the judges because it's just a matter of --

15 HON. F. SCOTT McCOWN: Put the big judge
16 before the little judge.

17 CHAIRMAN BABCOCK: Put the big judge first.
18 So it would read "The presiding judge of the
19 administrative region or the judge hearing the motion to
20 recuse or disqualify may also order the interim proceeding
21 abated pending a ruling on the motion to recuse or
22 disqualify." Have I got it right, Luke?

23 MR. SOULES: Yes.

24 CHAIRMAN BABCOCK: Second?

25 MR. TIPPS: Second.

1 CHAIRMAN BABCOCK: Any discussion on that?
2 Everybody in favor of Luke's proposal on that, raise your
3 hand. Anybody against? That passes 25 to nothing. Okay.

4 MR. SOULES: Frankly, it was a strategy
5 called on my part not to accept Judge McCown's amendment
6 because I didn't want to debate that until we got the
7 first thing out of the way, that was to strike "or other
8 hearing," but Richard and he both raised concerns about
9 that, and it seems to me like it's probably worth some
10 discussion about whether we would accept from the "trial"
11 summary judgments, if anybody wants to talk about that.

12 CHAIRMAN BABCOCK: I don't care to, but if
13 anybody else does.

14 HON. F. SCOTT McCOWN: But what are you
15 saying? Are you saying that they can go forward on
16 summary judgments, or are you saying that you think
17 "trial" doesn't cover summary judgments? Because if
18 you're saying the latter, there are appellate cases right
19 in point that say a summary judgment proceeding is a trial
20 and all the trial rules about pleadings, for example,
21 apply.

22 MR. ORSINGER: Instead of discussing the
23 definition of "trial," why don't we consider the policy?
24 As a matter of policy do we want summary judgments heard
25 by someone whose status is uncertain?

1 CHAIRMAN BABCOCK: Yeah, I think Scott's
2 right about what the law is, for sure.

3 PROFESSOR DORSANEO: I don't.

4 CHAIRMAN BABCOCK: Bill may disagree, and
5 I'd defer to him, but I think Richard's right. What's the
6 policy? If you're going to have a summary judgment --

7 HON. F. SCOTT McCOWN: You would defer to a
8 professor over a judge?

9 CHAIRMAN BABCOCK: Never. Not in the
10 judge's presence anyway.

11 MR. ORSINGER: Now that he's got his degree
12 he doesn't --

13 CHAIRMAN BABCOCK: A summary judgment is
14 going to dispose of the whole case. Do you want to take
15 that out of this (e)(4)(b) situation? And I think not, my
16 personal opinion.

17 PROFESSOR DORSANEO: Or anything else really
18 important.

19 MR. LOWE: Summary judgment is a dispositive
20 motion. Are you talking about any dispositive motion, any
21 motion that just disposes of the case? It could be a
22 situation where they don't replead or say you don't plead
23 a cause of action we allow on 12b.

24 CHAIRMAN BABCOCK: I'm not trying to cut off
25 the discussion about it. I mean, let's talk about it.

1 MR. ORSINGER: Special appearances, for
2 example, if it's granted, it's the end of the case.

3 MR. EDWARDS: What happens to these orders
4 that are done parallel if the ultimate ruling is the judge
5 is recused?

6 MR. ORSINGER: Then the new judge decides
7 whether to leave them in place or set them aside.

8 MR. EDWARDS: At what point in time?

9 MR. ORSINGER: After the new judge is
10 appointed.

11 MR. EDWARDS: Does it say that somewhere?

12 MR. SOULES: That's in (6), Bill.

13 MR. EDWARDS: Okay.

14 CHAIRMAN BABCOCK: Okay. Anybody want to
15 try to add or clarify what "trial" means?

16 MR. SOULES: Well, that's what I'm going to
17 argue, that it means trial on the merits, and it doesn't
18 mean any kind of summary disposition like summary judgment
19 or otherwise, and I think that's the intent, our intent,
20 but maybe that's not everybody's intent, and it's
21 certainly true that arguments can be made that the trial
22 includes something other than trial to determine the fact
23 issues and apply the law and reach a judgment.

24 CHAIRMAN BABCOCK: Bill Dorsaneo.

25 PROFESSOR DORSANEO: I think the endeavor to

1 define what the word "trial" encompasses would take as
2 long as the discussion so far, and it's just not fruitful.
3 Technically our pleadings are made up of pleas. Some of
4 them are called dilatory pleas; and although we think of
5 those as being heard in something that's not a trial,
6 technically those are all separate trials; and "trial" is
7 a word that has, you know, flexible meaning; and that's
8 just fine with me in the context of this rule because the
9 attitude ought to be that if it's important enough then
10 treat it like a conventional trial.

11 CHAIRMAN BABCOCK: Okay. Luke, do you still
12 want to talk about this anymore?

13 MR. SOULES: I think if we add the words "on
14 the merits" we eliminate at least special appearances. I
15 mean, special appearance is not a trial on the merits, no
16 question about that.

17 PROFESSOR DORSANEO: Well, it's on the
18 merits of the jurisdictional question.

19 CHAIRMAN BABCOCK: Anybody got any appetite
20 for that language?

21 MR. SOULES: I'm through.

22 HON. F. SCOTT McCOWN: There's nothing you
23 can say here that there can't be a question about.

24 MR. ORSINGER: I'd certainly like to propose
25 that we add "or summary judgment" because I don't think we

1 ought to dispose of cases on the merits.

2 PROFESSOR DORSANEO: But you won't be able
3 to stop once you start. What about a special appearance
4 motion?

5 MR. ORSINGER: I feel less strong about that
6 than summary judgment. We're going to litigate this for
7 ten years if we don't vote on it, and we probably will
8 anyway.

9 CHAIRMAN BABCOCK: Okay. Richard, Footnote
10 23 was attached right after subsection (e) (4) (b) after
11 "hearing," and Bill Edwards says maybe that shouldn't be
12 there. Do you agree or not?

13 MR. HAMILTON: Where is this?

14 MR. ORSINGER: Footnote 23, (e) (7).

15 CHAIRMAN BABCOCK: No, no, no. It's
16 (e) (4) (b). That's where it used to be apparently.

17 MR. ORSINGER: Footnote 23 which refers to
18 (e) (2)? Is that what you're saying?

19 CHAIRMAN BABCOCK: Right. "See subsection
20 (e) (2) above." Yeah. I think that ought to come out.

21 MR. ORSINGER: Why is that? (e) (2) is time
22 to file, isn't it?

23 CHAIRMAN BABCOCK: Right. But this is -- I
24 mean, we're kind of giving with one hand and taking it
25 away here, so...

1 MR. ORSINGER: Well, this is a
2 cross-reference for informational purposes, right? So you
3 want to just delete it because you think it's misleading
4 or doesn't add --

5 CHAIRMAN BABCOCK: I think it's misleading,
6 but I don't feel strongly about it.

7 MR. ORSINGER: This is just for the
8 committee and the Supreme Court's purposes. We'll take it
9 out if you don't like it.

10 CHAIRMAN BABCOCK: Okay. Yeah, take it out.

11 PROFESSOR DORSANEO: Mr. Chairman?

12 CHAIRMAN BABCOCK: Yes. Yes, I am.

13 PROFESSOR DORSANEO: It would be possible to
14 use adjectives or descriptive language that would have,
15 you know, some reference in the case law. When people are
16 talking about a trial or a trial on the merits they're
17 talking about what Judge Calvert has referred to in a
18 series of the final judgment cases as "a conventional
19 trial," and we might say -- and that's distinguished from
20 a summary judgment. If you wanted to accept conventional
21 trials in summary judgment proceedings, that would have,
22 you know, some meaning to me.

23 It would, you know, not include special
24 appearance hearings or venue hearings or pleas and
25 abatement that might be of a real -- you know, trials of

1 matters in abatement that might be of real significance.
2 It might, in fact, be dispositive. I don't know whether
3 we want to exclude those things, though. That's my point,
4 my problem.

5 CHAIRMAN BABCOCK: Well, there's two things
6 I have in response to that. One, Luke gave up a minute
7 ago; and, two, "conventional trial" is not anything that
8 most practitioners are familiar with, a term like that.

9 PROFESSOR DORSANEO: Well, they ought to be.

10 PROFESSOR CARLSON: You do a conventional
11 trial.

12 CHAIRMAN BABCOCK: I have never done a
13 conventional trial.

14 MR. ORSINGER: Well, Chip, what's happened
15 as a result of Luke's amendment is we didn't have to have
16 this debate before because it applied to any hearing.

17 CHAIRMAN BABCOCK: Right. Yeah.

18 MR. ORSINGER: Now Luke has said we're only
19 going to apply it to the final trial, but there's some
20 people around the room that feel like there are some other
21 things that are as important as the final trial. Now,
22 maybe some people don't think anything is as important.
23 Luke feels that way. I feel stronger about summary
24 judgments than I do about special appearances, but Bill
25 makes a compelling argument that special appearance can be

1 just as final as a summary judgment or a trial in front of
2 a jury.

3 CHAIRMAN BABCOCK: That's true. But you've
4 got to remember, now, you're letting interim proceedings
5 go on. You're applying interim proceedings to trial,
6 whatever that means, and you're excluding it from other
7 things. So this is a case where the challenged judge is
8 going to go forward.

9 MR. ORSINGER: Right.

10 MR. HAMILTON: Only in the trial.

11 MR. CHAPMAN: Only in the trial.

12 HONORABLE DAVID PEEPLES: In the trial.

13 CHAIRMAN BABCOCK: Only in the trial.

14 MR. ORSINGER: Okay. I see what you're
15 saying.

16 CHAIRMAN BABCOCK: Do you see what I'm
17 saying?

18 MR. ORSINGER: I do.

19 CHAIRMAN BABCOCK: Okay. Are you okay with
20 it?

21 MR. ORSINGER: I'm okay with it.

22 CHAIRMAN BABCOCK: Okay. Buddy.

23 MR. LOWE: Why don't we say "conventional
24 trial on the merits"? Everybody knows what conventional
25 trial on the merits is.

1 MR. SOULES: Second.

2 MR. LOWE: I mean, we know that in Beaumont.

3 CHAIRMAN BABCOCK: Justice Schneider is
4 leering at you about that.

5 MR. LOWE: He's not from Beaumont.

6 HONORABLE MICHAEL SCHNEIDER: It wasn't me.
7 It was the other judge from Beaumont.

8 CHAIRMAN BABCOCK: It's the clean-shaven
9 judge. Anybody want to add the language "conventional
10 trial on the merits"?

11 MR. SOULES: Motion is moved, made and
12 seconded.

13 CHAIRMAN BABCOCK: Any discussion? Okay.
14 To add the language "conventional trial on the merits."
15 Everybody in favor.

16 MR. SOULES: Count Scott in on this, too.

17 CHAIRMAN BABCOCK: Everybody against? It
18 passes by a vote of 15-0 with some abstentions.

19 PROFESSOR DORSANEO: Yeah. Scott is
20 definitely in that vote.

21 CHAIRMAN BABCOCK: "Conventional trial on
22 the merits" to (e)(4)(b). Okay. All right. We're almost
23 done with this. I think the next change, Richard and
24 Carl, comes --

25 PROFESSOR CARLSON: Chip? I'd like to go

1 back. Maybe you could footnote the Aldrich case, Richard,
2 on the "after conventional trial on the merits," and then
3 that would be a good cross-reference. Sorry.

4 CHAIRMAN BABCOCK: No problem. Page seven.
5 This is dealing with the denial of three or more motions,
6 and it's in bold I think because we made a change, and
7 what was it, Richard?

8 Oh, "against a judge," and this is where we
9 part company with Senator Harris. Senator Harris thinks
10 it ought to be three strikes and you're out, and we say,
11 no, it's got to be three challenges to the judge. And I
12 think there's consensus in this committee that it would
13 not be appropriate to win two motions and lose a close
14 third motion and be subject to sanctions.

15 MR. LOWE: Right.

16 CHAIRMAN BABCOCK: So that's why we made
17 that change. That's the only reason we changed that
18 language, right, Richard?

19 MR. ORSINGER: Right.

20 CHAIRMAN BABCOCK: So now we get into
21 subparagraph (12), suspension of the sanctions order. I'm
22 sorry Justice Hecht left because I can't imagine why I
23 have in my notes that we agreed to take this out. That's
24 why there's a dotted line, but I thought we had voted to
25 take this out of the rule. Richard, Carl, and I tried to

1 find it in the transcript, and we couldn't find it. So is
2 this in or out? Anybody remember?

3 MR. ORSINGER: Well, let me say that the
4 statute provides that at least insofar as the tertiary
5 motion is concerned you can supersede, so...

6 CHAIRMAN BABCOCK: Yeah, but we're going to
7 repeal the statute, so...

8 MR. ORSINGER: Well, I know, but this is
9 carrying forward the principle that is just trying to make
10 it effective, and it applies it to all motions to recuse
11 sanctions rather than just tertiary motions sanctions.

12 HON. F. SCOTT McCOWN: Why does it matter?

13 CHAIRMAN BABCOCK: Good question, Richard.
14 Why does it matter?

15 HON. F. SCOTT McCOWN: Either way.

16 CHAIRMAN BABCOCK: Well, either way it
17 matters because now you can have within a recusal rule
18 this whole elaborate procedure about suspension of
19 sanction order tied to a recusal rule and --

20 HON. F. SCOTT McCOWN: It ought to be
21 treated just like any other order.

22 CHAIRMAN BABCOCK: Yeah. Right. That was
23 -- I thought was the point, and maybe it was expressed to
24 me privately by Justice Hecht -- I can't remember --
25 about, you know, we want to avoid having special sanctions

1 procedures per rule.

2 MR. EDWARDS: The problem is that the thing
3 provides for the payment on or before the 31st day of the
4 date of the order denying the motion.

5 CHAIRMAN BABCOCK: Right.

6 MR. EDWARDS: And there's no provision for
7 any appeal or process until the final appeal. That's what
8 the problem is.

9 CHAIRMAN BABCOCK: Right.

10 MR. EDWARDS: And you can go back into like
11 the like Chrysler vs. Blackman and some of those where the
12 sanctions were granted and ordered paid, and the Supreme
13 Court is saying, "Well, you can't, mandamus, grant. You
14 can't make them pay before they have had an opportunity
15 for review."

16 CHAIRMAN BABCOCK: Well, we were taking this
17 language straight out of the statute, and that's what's
18 creating the problem.

19 MR. ORSINGER: I was confused. This only
20 applies to a tertiary motion, and it doesn't apply to
21 every sanction.

22 I misstated that. This is an implementation
23 of the statute. Excuse me.

24 CHAIRMAN BABCOCK: Yeah. That's all right.

25 MR. EDWARDS: So the thought being there's

1 got to be some -- you might be able to just say something
2 to the effect of "an order can be superseded as any other
3 judgment" and so --

4 MR. ORSINGER: Well, the problem -- that's
5 what the statute says, Bill, but the problem is that you
6 can't supersede an interlocutory order, so those of us who
7 are familiar with the supersedeas procedures get nervous
8 about the fact the statute is telling you to do something
9 you don't know how to do.

10 MR. EDWARDS: Well, and what I'm saying is
11 that maybe you can just say, "The order can be superseded
12 like a final judgment can be superseded pending appeal" or
13 something like that. You can always supersede by
14 agreement. I don't think there is any question about
15 that, because the other party isn't going to execute.

16 CHAIRMAN BABCOCK: Well, the first question
17 is whether or not we want to have suspension of sanctions
18 order in this rule or supersedeas or whatever you want to
19 call it. Do we want to have a rule on that or not?

20 MR. ORSINGER: And it applies to only
21 tertiary motions.

22 CHAIRMAN BABCOCK: Right. Yeah.

23 MR. ORSINGER: So it will come up about once
24 in the next 100 years.

25 HON. F. SCOTT McCOWN: Well, I would move we

1 delete this whole provision No. (12) and refer the
2 question to the appellate rules committee.

3 PROFESSOR DORSANEO: Second.

4 HONORABLE DAVID PEEPLES: Second.

5 MR. ORSINGER: Well, then it doesn't go to
6 the Supreme Court any time soon. Unless you're prepared
7 to report back in the next five minutes.

8 PROFESSOR DORSANEO: I know what the report
9 would be.

10 MR. ORSINGER: Would you give us the report
11 after lunch?

12 PROFESSOR DORSANEO: Sure.

13 MR. ORSINGER: That's a good -- let Bill
14 decide. That's what Scott is saying.

15 CHAIRMAN BABCOCK: Is that appealing to
16 everybody? Carlyle?

17 MR. CHAPMAN: (Nods head.)

18 CHAIRMAN BABCOCK: Okay. Well, if there is
19 no dissent to that then we will delete --

20 HONORABLE SARAH DUNCAN: But --

21 CHAIRMAN BABCOCK: -- this and -- yes, there
22 is dissent to that.

23 HONORABLE SARAH DUNCAN: I just have a
24 question. So we're not going to have any provision
25 permitting supersedeas as to an interlocutory

1 nonappealable sanctions order for a tertiary? So you
2 just --

3 CHAIRMAN BABCOCK: That would be the effect
4 of deleting subsection (12).

5 MR. ORSINGER: Even though the statute
6 requires it and even though we want Judge Harris' consent
7 to this rule.

8 HONORABLE SARAH DUNCAN: And even though --

9 HON. F. SCOTT McCOWN: Well, I guess my
10 thinking is the problem of how you supersede a sanction
11 order is no different for the third time than it is for
12 the second and the first, and we shouldn't be writing a
13 supersedeas rule for this third time motion. We ought to
14 just have some standard supersedeas rule that applies to
15 any sanction order, and it ought to be in the Rules of
16 Appellate Procedure, and it ought to be thought out and
17 good.

18 HONORABLE SARAH DUNCAN: Why would it be in
19 the Rules of Appellate Procedure if it's not appealable?

20 HON. F. SCOTT McCOWN: If you can supersede
21 it, it's appealable at some point. I mean, that's why
22 you're superseding it is to appeal it.

23 MR. ORSINGER: I think it would be
24 appealable with the final judgment. Do you-all agree with
25 that?

1 HONORABLE SARAH DUNCAN: Yes.

2 MR. ORSINGER: Okay. So the question is --
3 we all agree it's appealable with the final judgment, but
4 can you supersede it until you get a final judgment or do
5 you have to pay now and appeal later?

6 HON. F. SCOTT McCOWN: If you have to pay
7 now then the Feds would say it's final and appealable, and
8 I think that may be true.

9 MR. ORSINGER: Not in Texas, but
10 TransAmerican says that if it's a significant sanction you
11 have a mandamus right.

12 HON. F. SCOTT McCOWN: Which is becoming
13 nothing but an interlocutory appeal.

14 MR. ORSINGER: If it's going to be ruled on
15 on the merits at the end of the case on appeal then why
16 would we want to have immediate sanctions that are subject
17 to mandamus review instead of following the statute, which
18 would supersede it until the final judgment is appealed?

19 MR. SOULES: In Rule 215 there's a sentence
20 involving monetary sanctions, attorneys fees, and so
21 forth. The last sentence, "Such an order shall be subject
22 to review on appeal from the final judgment." We ought to
23 add that here. I've never seen anybody make this
24 argument, but it seems to me like if an order is subject
25 to review on appeal from a final judgment it should be

1 superseded at the time of the final judgment and not
2 enforceable prior to that, but I haven't seen that
3 argument made.

4 HONORABLE SARAH DUNCAN: Not enforceable
5 prior to that?

6 PROFESSOR CARLSON: Yeah.

7 MR. SOULES: Right. Because if you have the
8 right to appeal it, your right to appeal may be terminated
9 by the fact that you have to pay it early and a part of
10 your right to appeal, according to the Texas Rules of
11 Appellate Procedure, is the supersedeas right, if you can
12 establish it.

13 MR. ORSINGER: Well, but TransAmerican says
14 that the sanction can be imposed during the pendency of
15 the case, in which event your only recourse is mandamus.

16 MR. SOULES: But a lot of the right
17 arguments weren't made in TransAmerican, and a lot of the
18 right arguments were made in TransAmerican.

19 HON. F. SCOTT McCOWN: But my point is this
20 is a whole policy issue that applies to all sanctions
21 problems, and we have it right now. What can a judge do
22 by way of sanctions that's enforceable immediately and how
23 do you get that before an appellate court, that's a
24 problem that we have right now.

25 And you could say, well, you take it by

1 mandamus, which there's this horrible trend for mandamus
2 just to become the Texas interlocutory appeal. Are the
3 standards different for mandamus than if you take it up as
4 part of the final judgment? Because if they are different
5 then you might want to take it up as part of the final
6 judgment, and you might want some way to supersede it or
7 suspend it until you can take it up, and I think this
8 ought to be studied in committee with a thoughtful
9 proposal for the whole problem as opposed to just having a
10 special little appended rule for the third sanctions
11 motion.

12 MR. HAMILTON: Chip?

13 CHAIRMAN BABCOCK: Yeah, Carl.

14 MR. HAMILTON: One of the reasons, Scott,
15 for this special rule -- well, two reasons. No. 1, the
16 statute said you could supersede, and, No. 2, this statute
17 makes the attorneys personally responsible.

18 MR. ORSINGER: Mandatorily.

19 MR. HAMILTON: Mandatorily personally
20 responsible, and our other supersedeas rules just deal
21 with the parties. So you've got to add the ability of the
22 attorney to supersede as well as the party. That's why
23 it's special to this particular statute. It's a tertiary
24 motion.

25 HON. F. SCOTT McCOWN: Well, the problem may

1 become more intense, but attorneys can be sanctioned now
2 in regular discovery proceedings. I think if we said to
3 Senator Harris that this particular issue we're working on
4 and it's more global and we're going to come up with a
5 global proposal that that ought to satisfy him.

6 CHAIRMAN BABCOCK: Yeah. Bill.

7 PROFESSOR DORSANEO: I think that's right.
8 I think treating it as a separate matter just in this one
9 context probably doesn't make as much sense as looking at
10 the overall question and seeing how we would be able to --
11 I don't see why it would be different in other contexts,
12 and it really isn't dealt with adequately at the moment.
13 So kind of an odd sentence here, sentence there, without a
14 plain --

15 MR. ORSINGER: Is this going to be in the
16 Rules of Appellate Procedure then as opposed to the trial
17 rules?

18 PROFESSOR DORSANEO: Well, then we have that
19 problem. You know, Justice Duncan is the chair of Rules
20 300 through 330. We have that problem of deciding, you
21 know, whether it's there or whether it goes into the
22 appellate rules all the time. I see that as, you know, a
23 common issue.

24 HONORABLE DAVID PEEPLES: Can I ask the
25 appellate lawyers a question? Is a sanctions order

1 severable?

2 PROFESSOR DORSANEO: Yes.

3 HONORABLE DAVID PEEPLES: Could we make it
4 severable by rule?

5 PROFESSOR DORSANEO: Yes.

6 HONORABLE DAVID PEEPLES: So then if the
7 judge wants it to go into effect right now couldn't the
8 judge say, "That part is severed. You can appeal it, and
9 if you don't supersede it, they can go collect on it."

10 PROFESSOR DORSANEO: We could make it
11 automatically severable, too.

12 HONORABLE DAVID PEEPLES: If the judge says,
13 "I want this to start happening to you right now," and if
14 not, keep it part of the main case, and it's not
15 enforceable right now.

16 HONORABLE SARAH DUNCAN: But it does. It's
17 an order to pay.

18 MR. ORSINGER: Is it an order to pay or is
19 it a judgment, Sarah? Does the court grant a judgment
20 against the lawyer, or does the court order the lawyer to
21 pay \$500 and he goes to jail if he doesn't?

22 HON. F. SCOTT McCOWN: It's an option of the
23 judge.

24 MR. ORSINGER: You can order the lawyer or
25 the party to pay the money and put them in jail if they

1 don't?

2 HON. F. SCOTT McCOWN: I think -- well, I
3 don't -- put them in jail becomes a separate issue, but --

4 MR. ORSINGER: Then it's a judgment. If you
5 can't put them in jail it's a judgment.

6 HON. F. SCOTT McCOWN: No. No. You can
7 order them to do something. Whether you can put them in
8 jail if they don't becomes a contempt issue problem, but
9 this whole area of sanctions is much abusable. I don't
10 want to say "much abused," but it's much abusable because
11 I as a judge, if I have an interlocutory summary judgment
12 for 10,000 bucks, writs of execution can't be issued on
13 it. It has to become final. It can be superseded. It
14 has to be appealed.

15 If I hit a lawyer or a party for \$20,000 in
16 sanctions and tell them I want it paid in ten days, it's a
17 sanction order. It's not final. It's not appealable. It
18 can't be superseded. They have got to pay in ten days or
19 they're in a contempt situation and you can take a
20 mandamus. I don't think we've really thought this issue
21 through very well.

22 CHAIRMAN BABCOCK: I think we have got two
23 alternatives here. It's lunchtime, and we're going to
24 take a break. But the alternatives are either to refer it
25 to Bill and Sarah's respective subcommittees for a

1 considered treatment of it or keep talking about it after
2 lunch.

3 MR. ORSINGER: I think we should refer it to
4 the appellate rules committee. And Sarah's if you want to
5 cover David's severance concept, which is a viable
6 concept.

7 CHAIRMAN BABCOCK: Anybody disagree with
8 that? Luke?

9 MR. SOULES: Well, I think we can fix this
10 for purposes of this rule and send the supersedeas
11 elsewhere and get this rule done. If we can just do --
12 (11)(a) stays as it is, and we delete everything after the
13 first sentence in (11)(b) and add as a (c) "such order
14 shall be subject to review on appeal from final judgment."

15 CHAIRMAN BABCOCK: We already have that.

16 MR. SOULES: Where is that?

17 CHAIRMAN BABCOCK: (9).

18 MR. SOULES: (9)?

19 CHAIRMAN BABCOCK: Oh, I'm sorry. No, never
20 mind. It's not.

21 MR. ORSINGER: Everything after the first
22 sentence in (b) you would strike, Luke?

23 MR. SOULES: Right. After "fees and costs."

24 MR. YELENOSKY: That's from the statute,
25 right?

1 MR. SOULES: Well...

2 MR. YELENOSKY: Are we bound to --

3 MR. SOULES: That would make it subject to
4 appeal for final judgment and then leave to the
5 supersedeas scheme how we would deal with superseding
6 either orders under 215 -- we have got the same problem
7 under 215 that we have under this rule. And we also have
8 the same problem under whatever the pleading rule is now.
9 72 or where is it? Anyway, we have got -- there's several
10 places in the rules where they adopt 215 -- yeah. Rule
11 13, which we may not have anymore, giving deference to
12 Chapter 10.

13 But it's a broader problem, as we have
14 discussed already here today, than just in this rule; and
15 it probably can be fixed universally. So I would take
16 out -- just make it mandatory. Well, first of all, a
17 frivolous motion, whatever (a) is is okay. We haven't
18 even talked about that, so it's got to be okay. (b), the
19 really offending problem is after the words "fees and
20 costs," mandatory, the judge can make the award, and then
21 state that it's subject to -- in either case, (a) or (b),
22 it would be subject to review on appeal, although it's
23 inherent, I think, in (a) because it refers to 215(b), but
24 (b) does not because it's mandatory.

25 Anyway, that's a lot of words just to say

1 this can be fixed here and supersedeas dealt with
2 elsewhere, and we can get this rule done.

3 CHAIRMAN BABCOCK: Yeah. Well, over lunch,
4 Luke, why don't you and Richard and Carl talk about doing
5 that?

6 MR. SOULES: Great.

7 CHAIRMAN BABCOCK: And we will come back at
8 1:00 to talk about voir dire. Now, Skip had some
9 housekeeping matters about this rule that he had written
10 to Carl about, and have you-all talked about that?

11 MR. HAMILTON: I don't have a problem with
12 that.

13 CHAIRMAN BABCOCK: We don't need the full
14 committee to work on that?

15 MR. HAMILTON: No.

16 CHAIRMAN BABCOCK: Okay. So you guys will
17 get that done and we will come back at 1:00 o'clock and
18 talk about voir dire.

19 (A recess was taken at 12:10 p.m., after
20 which the meeting continued as reflected in
21 the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
the above meeting of the Supreme Court Advisory Committee
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me.

I further certify that the costs for my
services in the matter are \$ 826.00 .

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Given under my hand and seal of office on
this the 3rd day of November, 2000.

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