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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 APRIL 7, 2000
10 (AFTERNOON SESSION)
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19 Taken before D'Lois L. Jones, a Certified
20 Shorthand Reporter in Travis County for the State of
21 Texas, on the 7th day of April, A.D., 2000, between the
22 hours of 1:25 o'clock p.m. and 5:10 o'clock p.m. at the
23 Texas Association of Broadcasters, 502 East 11th Street,
24 Suite 200, Austin, Texas 78701.
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1 MR. ORSINGER: Well, I would -- for those
2 who are particularly conversive either intellectually or
3 practically with the statute, are there any anomalies or
4 procedures or safeguards or anything in the statute that
5 we should be sure to include? I mean, we've already
6 discussed the refund problem. We've already discussed
7 the time limitation on disqualification.
8 CHAIRMAN BABCOCK: Nina, you said you had
9 some problems with the language, didn't you? Was it
10 Nina?
11 MS. CORTELL: I don't think so. I wanted
12 to do the two different versions, but the question I've
13 got is probably separate from what everyone else has, is
14 that there are certain things I would like to tie to the
15 legislation on and others not. For example, the opt out
16 deal, I'd be inclined to go with that concept so any
17 amounts that you can receive under the statute would be
18 permissible and wouldn't trigger a recusal. I don't
19 know if you want to broaden that issue out, whether you
20 want to get it sent -- let me back up. Your Option 2
21 was we would borrow some features. Do you want to find
22 out from a consensus of the committee what features it
23 is we're talking about borrowing, or did you have
24 something specific in mind when you did that?
25 CHAIRMAN BABCOCK: Well, what I had in

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1 mind was pretty much what you see here in (9) and (10),
2 which Judge Rhea suggests we should just go ahead and
3 adopt. Carl.
4 MR. HAMILTON: There is another statute
5 referred to here which I don't think is in the finance
6 committee's report. It's 253.001, which deals with
7 contributions in someone else's name being a violation,
8 so that's the reason that's put in there to cover that,
9 too. I don't think we have a copy of that anywhere.
10 That's what 253.001 is, makes it a violation to make
11 contributions in someone else's name.
12 CHAIRMAN BABCOCK: What would be the
13 theory behind recusing the judge for accepting a
14 contribution that was from Joe Smith when it was really
15 from --
16 MR. HAMILTON: It violates the statute,
17 and it could make his contribution excessive if he
18 really got it from A, but it was split up into two or
19 three parts and given in someone else's name.
20 HONORABLE PHIL HARDBERGER: He might not
21 know about it.
22 CHAIRMAN BABCOCK: That's what I'm
23 thinking about.
24 MR. ORSINGER: Well, that kind of gets at
25 "might not know about" to one of the things that

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1 CHAIRMAN BABCOCK: Our next meeting will
2 be May 19 and 20. It's going to be a two-day -- all day
3 Saturday -- I mean Friday the 19th and half a day
4 Saturday the 20th. It's going to be back at the Bar
5 headquarters at Room 101 at our old meeting spot.
6 HONORABLE SCOTT McCOWN: What are those
7 dates again?
8 CHAIRMAN BABCOCK: May 19th and 20th.
9 PROFESSOR DORSANEO: That's the same one
10 that's been published.
11 CHAIRMAN BABCOCK: Yeah, that's the same
12 one that's been published for several months now. It's
13 not different. I just want to remind everybody.
14 Where is Orsinger? Well, we'll tell him
15 when he gets back, but we want to finish this recusal
16 thing at the next meeting and hopefully will have
17 generated enough momentum that we will be able to do
18 that.
19 Okay. Richard, we're working on taking
20 subparagraphs (9) and (10) and getting them in as good a
21 shape as we can, recognizing that we're going to come
22 back next meeting, which is May 19th and 20th, to finish
23 up this recusal rule. So what do you need to know from
24 us?
25

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1 concerns me, which is what to do with discovery on these
2 motions. The task force said "no discovery." We don't
3 say that, but we can and probably should, but the task
4 force did not prohibit subpoenas from the hearing, and
5 so you could issue 30 subpoenas, 50 subpoenas if you
6 want, and so I guess you just have to decide how serious
7 we are. Is the proponent of the motion going to have to
8 make their case off of public records and whatever
9 knowledge they could scrape together on their own
10 through investigators, or are they going to be permitted
11 to use the legal process to force people to tell them
12 information on a nonvoluntary basis, and is that going
13 to be before the hearing through discovery or during the
14 hearing by subpoena?
15 CHAIRMAN BABCOCK: Judge Brown.
16 HONORABLE HARVEY BROWN: This might
17 overlap with the thing we started today, which is
18 whether the judge would have a lawyer, too, because if
19 we're now saying the judge violated some rule that later
20 may cause him problems with the Ethics Commission, the
21 judge is going to certainly want to have some incentive
22 to be able to defend himself. Even if it's not viewed
23 that way, if a judge is subpoenaed and asked to bring
24 documents, the judge might be interested in having a
25 lawyer. So this might create those problems.

1 CHAIRMAN BABCOCK: That's a good point.
 2 I think if this rule is not a violation rule but merely
 3 a recusal rule, which I think is the road we're going
 4 down, maybe that's not as big of a problem, but still I
 5 wouldn't think any judge would want to even have this on
 6 his record if he didn't think he did it. He might want
 7 representation. Anybody else got any reaction to
 8 Richard's question?
 9 MR. ORSINGER: Well, I really want to
 10 have some help on the discovery issue because it scares
 11 me in theory, but maybe it's not a practical problem. I
 12 don't know.
 13 HONORABLE SCOTT BRISTER: Well, who are
 14 they going to subpoena other than the judge?
 15 MR. ORSINGER: Well, the campaign
 16 treasurer. But they could subpoena anyone that they
 17 have a theory that was in a league to make an illegal
 18 contribution such as what Carl just said, subpoena all
 19 three of them and make them bring bank records to prove
 20 that it was their money they put in and not somebody
 21 else's money that was a conduit.
 22 HONORABLE SCOTT BRISTER: Are you going
 23 to -- how are you going to allow discovery as to
 24 everybody except the judge? The problem is on recusal
 25 if you allow subpoena it becomes untenable. You almost

1 have to grant all recusals if they're allowed to
 2 subpoena the judge and cross-examine the judge and make
 3 accusations during the recusal hearing. I mean, we're
 4 ethically supposed to fight subpoenas and much less
 5 getting into a cross-examination with the guy who's
 6 trying to get rid of us, it just seems to me it's
 7 untenable to get evidence from the judge under oath at
 8 the recusal hearing.
 9 CHAIRMAN BABCOCK: Yeah, Carl.
 10 MR. HAMILTON: Well, I think a simple way
 11 to do it would be to eliminate that and just tie it to
 12 the amounts in the statute, and those can be discovered
 13 by the election committee records.
 14 MR. ORSINGER: They can't be. The
 15 obvious violations can be, but the aggregate violations
 16 require you probably to go off the public records.
 17 Because you have to find out who's married to who and
 18 who's in what law firm, and sometimes that's in the
 19 reports, right, and sometimes -- and sometimes -- or
 20 not, right?
 21 HONORABLE DAVID PEEPLES: Supposed to be.
 22 CHAIRMAN BABCOCK: Yeah. Judge Peeples.
 23 HONORABLE DAVID PEEPLES: In subdivision
 24 (d) we require -- this draft requires that the motion to
 25 recuse state in detail the factual and legal basis for

1 it. How could you comply with that and still need
 2 discovery?
 3 CHAIRMAN BABCOCK: Well, because
 4 sometimes despite -- and that's not different than the
 5 current 18b.
 6 HONORABLE DAVID PEEPLES: We tried to
 7 make it a little bit stronger than the current.
 8 CHAIRMAN BABCOCK: Yeah. A little bit,
 9 but still 18b says you have to state with specificity,
 10 and sometimes you complain that they haven't done that,
 11 and the judge says, "That's all right."
 12 HONORABLE DAVID PEEPLES: Well, we say in
 13 here that it can be dismissed outright if it doesn't
 14 comply with this requirement of the factual detail.
 15 HONORABLE F. SCOTT MCCOWN: I mean, you
 16 can't have discovery until you have a motion. You can't
 17 have a motion until you have sufficient facts to put a
 18 motion together, so I don't think this is a real
 19 problem. If you've got a motion with sufficient facts
 20 to put it together and file it then the judge who
 21 presides over the recusal proceeding can decide the
 22 appropriate amount of discovery, can decide what's
 23 reasonable and what's not, what's intrusive, what's
 24 not.
 25 CHAIRMAN BABCOCK: Anybody else have any

1 comments on this? Well, the task force said "no
 2 discovery," but I didn't read that to mean that you
 3 couldn't subpoena somebody to the hearing.
 4 MR. ORSINGER: I go with you. I think
 5 you can subpoena them. "No discovery is permitted
 6 concerning a motion under this rule" to me doesn't have
 7 to do with subpoenas.
 8 CHAIRMAN BABCOCK: Right.
 9 MR. ORSINGER: So if we want to bar
 10 subpoenas on this subject matter, which is narrower than
 11 what Judge Brister said because he's because talking
 12 about subpoenas under any circumstances on the judge
 13 himself, but then we ought to say so. The task force
 14 didn't even recommend that one, and we maybe ought to
 15 get a feeling for whether we're going to permit that or
 16 not.
 17 CHAIRMAN BABCOCK: Well, how many people
 18 think that subpoenas to the -- because as it exists
 19 today, if you have an 18b hearing, you can subpoena
 20 witnesses to that hearing; isn't that right?
 21 MR. ORSINGER: Sure.
 22 MR. HAMILTON: Sure.
 23 MR. ORSINGER: Absolutely.
 24 MR. HAMILTON: Almost have to.
 25 CHAIRMAN BABCOCK: Yeah. In most cases

1 you have to. So how many people think we should not --
 2 we should preclude subpoenas at a hearing if the motion
 3 is made under (9) or proposed (9) or (10)? You think no
 4 subpoenas?
 5 MR. ORSINGER: I think that we should not
 6 have subpoenas. That's right. If I'm the only one
 7 here, let's move on. We'll just subpoena 50 people, and
 8 we'll just try this hearing.
 9 CHAIRMAN BABCOCK: Okay. No, no, no.
 10 That's a respectable position.
 11 MR. ORSINGER: I think we ought to work
 12 from the public records and whatever knowledge they can
 13 get from voluntary witnesses, and the minute you hand
 14 that tool to somebody to subpoena 50 or a hundred people
 15 it's a zoo.
 16 HONORABLE DAVID PEEPLES: The problem
 17 with that is the judge who's been assigned to hear the
 18 recusal motion doesn't go into action until the day of
 19 the hearing, and so subpoenas may have been issued
 20 before, and I guess you could have a motion to quash,
 21 but unless we say "no subpoenas" I think there are
 22 sometimes going to be subpoenas, and the people show up
 23 or they're on call, and the judge doesn't even know
 24 about it until the day of the hearing.
 25 CHAIRMAN BABCOCK: Unless we say "no

1 subpoenas" there will be subpoenas.
 2 HONORABLE DAVID PEEPLES: That's right.
 3 HONORABLE F. SCOTT MCCOWN: But why have
 4 a rule that you're not entitled to prove the violation
 5 of?
 6 CHAIRMAN BABCOCK: It seems odd to me,
 7 but that's what Richard voted for.
 8 HONORABLE F. SCOTT MCCOWN: These are the
 9 people -- the people who are for no subpoenas are the
 10 same people who were for no rule. I mean, if you've got
 11 a rule, you've got to let people call the witnesses, and
 12 sometimes you're going to have to call them
 13 involuntarily.
 14 MR. ORSINGER: Well, Scott, if you can
 15 call them for the hearing then how come you can't take
 16 their deposition in advance of the hearing?
 17 HONORABLE F. SCOTT MCCOWN: I have no
 18 problem with discovery. I would allow discovery under
 19 the control of the judge. I wouldn't have that in here
 20 either.
 21 MR. ORSINGER: So how many weeks are we
 22 going to give a judge to rule on this motion to recuse?
 23 HONORABLE F. SCOTT MCCOWN: I would leave
 24 that up to the judge working with the parties to
 25 determine how serious it is, how much discovery is

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1 needed, when the hearing should be scheduled given the
2 case. If it's a suit for injunction, you might schedule
3 it more quickly. If it's a suit for money damages, you
4 might take a little time. I would leave it to the sound
5 discretion of the trial judge.

6 MR. HAMILTON: The current rule requires
7 the hearing to be held within ten days.

8 CHAIRMAN BABCOCK: Anne, you look like
9 you're just bursting out with saying something.

10 MS. McNAMARA: No, not on this subject.

11 I'll come back in a minute when you get done with
12 subpoenas and discovery.

13 CHAIRMAN BABCOCK: All right.

14 HONORABLE DAVID PEEPLES: How about "no
15 discovery without prior court approval"?

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE DAVID PEEPLES: And then
18 subpoenas, of course, when the judge goes out and starts
19 the hearing he can take care of those.

20 MR. EDWARDS: Has there been any problem
21 anywhere in the state with recusal motions insofar as
22 discovery or subpoenas are concerned up until now?

23 HONORABLE HARVEY BROWN: There was a case
24 in Houston recently I know of where a judge was
25 subpoenaed for the recusal hearing with a subpoena duces

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1 tecum which the judge considered very onerous. I think
2 there was a problem with, you know, do I have to gather
3 all the documents before the hearing that day because if
4 the judge isn't going to hear it that day that's making
5 him do all the work ahead of time, and it was difficult.

6 MR. EDWARDS: That's one case out of how
7 many?

8 HONORABLE SCOTT BRISTER: We have -- I
9 asked my administrative office. We have had 95 recusal
10 hearings in the last two years in Harris County. Half
11 of them in district civil court.

12 MR. EDWARDS: How many problems?

13 HONORABLE SCOTT BRISTER: Less than ten
14 were granted.

15 MR. EDWARDS: No, no. How many problems
16 with subpoenas or discovery?

17 HONORABLE SCOTT BRISTER: I didn't ask
18 that, but my bet is probably a third of these they tried
19 to subpoena the judge. It's a frequent tactic to
20 subpoena the judge.

21 MR. EDWARDS: Is that a problem or not a
22 problem?

23 HONORABLE SCOTT BRISTER: Not if you're
24 not a judge. If you're a judge, it's a major problem.
25 I mean, it just puts you in an untenable position to be

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1 fighting against the person. It seems to me, I mean,
2 the whole setup of this is I'm not supposed to fight
3 against recusal. If I'm recused, I'm recused. Somebody
4 else decides that, but I'm not supposed to have a dog in
5 that fight.

6 MR. EDWARDS: Well, maybe the rule should
7 be the judge doesn't testify, period, and doesn't have
8 anything to do with the hearing.

9 HONORABLE SCOTT BRISTER: Fine with me.

10 HONORABLE F. SCOTT McCOWN: Well, but I
11 think we're confusing being subpoenaed and giving
12 evidence with fighting. I mean, I've been subpoenaed in
13 a recusal hearing, answered the subpoena, gave my
14 testimony, and the motion was denied. I mean, the fact
15 that you've been subpoenaed and are called upon to give
16 your evidence doesn't necessarily put you in an
17 adversarial position.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: But if this is
20 not going to have a subjective mental state component,
21 what evidence does the judge have to give that's unique
22 to the judge that would put him into this awkward --
23 potentially awkward situation? If the only question is
24 going to be whether there was a contribution in excess
25 of the limits in that section, the only questions are

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1 going to be aggregation questions, spousal/marriage type
2 questions, and certainly there are people better able to
3 answer those questions probably than the judge.

4 CHAIRMAN BABCOCK: Yeah. If you take the
5 knowledge requirement out of it then what does the judge
6 have to do with it?

7 MR. ORSINGER: Well, I don't run a
8 campaign. I've never run a campaign, and hopefully I
9 never will run a campaign, but it's my understanding
10 that the reporting requirements do not require you to
11 file reports on aggregate. They only require you to
12 file reports for the individual contributors and the
13 amounts. So there will --

14 JUSTICE HECHT: But you do show the
15 employment stuff. I mean, you have to go through one by
16 one and cull them all out.

17 MR. ORSINGER: But like the law firm that
18 they work for is listed on the report?

19 JUSTICE HECHT: Yes.

20 MR. ORSINGER: But somebody else has to
21 add up how many people belong to that same law firm?

22 JUSTICE HECHT: Right.

23 MR. ORSINGER: And spousal relationships
24 are listed also?

25 HONORABLE SCOTT BRISTER: It's on the

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1 report and the spouse's employer.

2 MR. ORSINGER: Okay. So is it feasible
3 for us to limit the recusal motion to just the
4 information that's in public record so that someone
5 wouldn't subpoena the judge for campaign records that
6 might have summarized this information or might have
7 filled in the holes that are not in the public report or
8 something like that?

9 HONORABLE F. SCOTT McCOWN: No. Because
10 if your public report is faulty or faults, the only way
11 for a party to determine that is to look at your
12 campaign records.

13 MR. ORSINGER: So we are going to -- I
14 mean, the object of this is to permit somebody to
15 subpoena the judge's campaign records? That should be
16 permissible?

17 HONORABLE SCOTT BRISTER: You don't have
18 to subpoena the campaign records.

19 MR. ORSINGER: I mean, if you want to
20 make a case, you're going to have to subpoena the
21 campaign records.

22 MR. LOW: We're overlooking something.
23 We're looking like the only thing in there is this
24 campaign, but there's a first part which says his
25 impartiality, and subpoenas could deal with some

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1 personal issues, some other thing. So we're not just
2 talking about subpoenas with regard to campaign
3 contributions. We're talking about subpoenas in
4 procedures where the cart is something broader, and if I
5 were a judge, I would rather answer those questions as
6 some of the others.

7 CHAIRMAN BABCOCK: Richard, I thought you
8 were raising this only in the context of (9) and (10).

9 MR. ORSINGER: Yes. I was talking about
10 a prohibition against subpoenas and discovery on grounds
11 (9) and (10) but no prohibition against subpoenas on
12 other grounds. Scott Brister was talking about
13 prohibitions on subpoenas on other grounds, and I happen
14 to agree with him, but that's not what we're fighting
15 over right this minute.

16 MR. LOW: I'm sorry. I just --

17 MR. ORSINGER: I'm trying to figure out
18 whether the public record is enough to make this motion;
19 and if it is, can we squash all the rest of these
20 subpoenas and depositions; and if it's not, then are we
21 going to allow it?

22 CHAIRMAN BABCOCK: Judge Peeples.

23 HONORABLE DAVID PEEPLES: The more I
24 listen to this I think what we should do is remain
25 silent about discovery and subpoenas, and if people

1 initiate discovery or get out subpoenas, they have their
 2 remedy. They can go to the judge that's appointed to
 3 hear the thing and move to quash it. I think if we
 4 start talking about it it's going to give people the
 5 idea, "Hey, that's a good idea. I'm going to try that."
 6 And I don't think it's a problem right
 7 now, and I agree with what Phil Hardberger said. The
 8 case is going to be few and far between when somebody
 9 exceeds these limits, and I think probably on a balance
 10 it would be unwise to talk about discovery and subpoenas
 11 because it gives people ideas, and the remedy is already
 12 there, which is a motion for protection before the
 13 judge.

14 CHAIRMAN BABCOCK: Yeah, John.
 15 MR. MARTIN: I agree with Judge Peeples
 16 for an additional reason. If you limit -- if you say no
 17 discovery on (9) and (10) only that's going to encourage
 18 some lawyers to throw in another ground just so they can
 19 subpoena the judge and take his deposition.
 20 CHAIRMAN BABCOCK: Yeah. They move under
 21 (1) as well as (9) and (10).
 22 MR. MARTIN: Yeah. I think I agree with
 23 Judge Peeples. Leave it out.
 24 CHAIRMAN BABCOCK: Yeah. That's a good
 25 point. Good point.

1 HONORABLE DAVID PEEPLES: I will say
 2 also, a judge who wants to go through all of this just
 3 to stay on this case probably shouldn't be sitting on it
 4 anyway. Life is too short. There are other cases.
 5 MR. ORSINGER: What you've done then is
 6 you've allowed the lawyers who are willing to undertake
 7 this fight to selectively exclude judges who are not
 8 willing to go through this fight, and that's a very
 9 powerful tool.
 10 HONORABLE DAVID PEEPLES: If the judge
 11 who is appointed to hear the recusal motion let's them
 12 do it, which I hope doesn't happen.
 13 MR. ORSINGER: So you're not --
 14 HONORABLE DAVID PEEPLES: I had one
 15 Wednesday where they wanted a week's continuance to do a
 16 whole bunch of stuff. Just deny it. If you get the
 17 wrong judge it may happen, but I think that's all we can
 18 do.
 19 CHAIRMAN BABCOCK: Nina.
 20 MS. CORTELL: I do think there are
 21 grounds to distinguish these disqualification
 22 subsections, and it's been awhile since I read the task
 23 force report, but wasn't the notion that these motions
 24 would be based solely upon public records? I mean,
 25 Mike, was that --

1 CHAIRMAN BABCOCK: While the task force
 2 report did have a prohibition against discovery it
 3 didn't -- it was silent about subpoenas.
 4 MS. CORTELL: I guess that was just a
 5 jump I had made. I don't like the idea of going beyond
 6 that. I think we assume a threshold of honesty by the
 7 judges, and I don't like opening the doors of discovery
 8 to a free-for-all on financial records.
 9 HONORABLE F. SCOTT McCOWN: Well, but
 10 again, let me point out that you have to have enough to
 11 put together a motion. Once the motion's filed in order
 12 to engage in discovery or subpoena people to trial you
 13 have to have enough to convince the recusal judge to
 14 allow you to do that; and it seems to me when we talk
 15 about public perception, how's it going to look when we
 16 say the Supreme Court has adopted a rule that if you
 17 accept an excessive campaign contribution you can't sit
 18 on the case, but they have prohibited any discovery or
 19 any evidence at the trial to prove a violation of the
 20 rule? I mean, it looks bad, and I don't see that it's
 21 defensible.
 22 CHAIRMAN BABCOCK: Are we ready to give
 23 Richard some direction on this? How many people think
 24 that Judge Peeples' suggestion is appropriate; that is,
 25 that we be silent on discovery and subpoenas? Raise

1 your hand. 25.
 2 How many against? 25 to 1, Nina.
 3 MS. CORTELL: I'm reminded of Paula one
 4 time said, "Well, I want to know why the one vote went
 5 that way."
 6 MR. ORSINGER: Chip, another issue, the
 7 task force recommendation has a deadline for bringing
 8 these issues to the surface. Do we want to have a
 9 special deadline? Their deadline on Bates page 96 is
 10 "Before the hearing or trial or other proceeding but not
 11 to exceed 21 days after the later of the assignment of
 12 the judge to the case, the appearance of the party,
 13 lawyer, or law firm whose action are grounds for recusal
 14 or disclosure of the grounds in the public reports."
 15 CHAIRMAN BABCOCK: Mike, what was the
 16 thinking behind that? No idea?
 17 MR. HATCHELL: No, it seems to me to be
 18 self -- we're giving people a period of time to do due
 19 diligence. One thing you need to remember is in the
 20 first part of the task force report is we have tried to
 21 enhance the public's ability to have the information by
 22 requiring it to be posted in many more places, including
 23 websites and things of that nature, and we thought with
 24 the increased ability of the public to have access to
 25 this information that you ought to be able to do your

1 due diligence when one of these three precipitating
 2 events occurs; that is, the judge appears or the report
 3 is filed or whatever and not essentially lay behind the
 4 log and let proceedings develop, that it ought to be
 5 done and over with quickly, as quickly as possible.
 6 CHAIRMAN BABCOCK: Okay.
 7 MR. EDWARDS: The problem with the last
 8 one is that the case may not even be filed 'til six
 9 months after the report is filed. So it has to be tied
 10 to 21 days after filing -- after the case is assigned or
 11 something provided that the report has been filed before
 12 that.
 13 CHAIRMAN BABCOCK: Yeah. They catch that
 14 by their (e)(3), which says one of the events is 21 days
 15 after the report has been filed.
 16 MR. ORSINGER: But it says if a party
 17 joins the lawsuit or first appears in the action after
 18 the events then you have 21 days, but the plaintiff
 19 appears when they file and the defendant appears when
 20 they file an answer, I guess, right? So that means that
 21 everyone has three weeks from the time they either file
 22 the lawsuit or file the answer to file this motion.
 23 Of course, that isn't going to help in
 24 Austin or San Antonio because you get a different judge
 25 every time you go to the courthouse, so we're always

1 going to be filing ours on the day that the motion is
 2 set for hearing, and if you don't -- I presume if you
 3 don't do it the very first motion, you've waived it,
 4 even if you get subsequently re-assigned there.
 5 CHAIRMAN BABCOCK: Why would that be?
 6 Not under this rule.
 7 MR. ORSINGER: Well, I mean, don't we
 8 have a general ground that if you have a grounds for
 9 recusal and you don't assert it and you allow the judge
 10 to rule that you've waived any existing grounds? So
 11 you -- maybe that's not explicit. I don't know.
 12 CHAIRMAN BABCOCK: Under the task force
 13 rule you had 21 days after the assignment of the judge
 14 to the case. I query whether that means assignment of
 15 the judge to a motion; but even if it did, you go down
 16 to Bexar County, show up in the big room. They send you
 17 to a judge. Don't you have 21 days from that date under
 18 this proposal to recuse him?
 19 MR. ORSINGER: Yes, I would think you
 20 would, but I think you better do it with your first
 21 motion in front of that judge because if you come back
 22 down there six weeks later, take random assignment, and
 23 get sent to that judge again, I think you've blown your
 24 21 days, so you're going to have to do it.
 25 CHAIRMAN BABCOCK: Judge McCown.

1 HONORABLE F. SCOTT MCCOWN: Well, why
 2 have a special time for this rule? You're going to have
 3 very few violations to begin with. The violations you
 4 have are not going to be violations that are going to be
 5 detectable on the public record. They're going to be
 6 violations that you stumble across outside the public
 7 record is my estimation, if you have any at all. Why
 8 have a special time? Just make it simple.
 9 MR. ORSINGER: But aren't people going to
 10 lay behind the log? The whole --
 11 HONORABLE SCOTT MCCOWN: There's not any
 12 log to lay behind because you're not going to have
 13 hardly any violations. If you do have a violation, it
 14 won't be one discoverable from the public record, which
 15 is where you've got the trigger, so why not just keep it
 16 simple?
 17 HONORABLE DAVID PEEPLES: And, Richard,
 18 we've got this provision on page three, sub (2), that
 19 says if it happens within ten days everything keeps on
 20 going. I mean, it doesn't stall things.
 21 MR. ORSINGER: Okay. So --
 22 HONORABLE DAVID PEEPLES: Don't you think
 23 that would --
 24 MR. ORSINGER: I mean, you know, I'm two
 25 and a half years into this case. I'm 11 days before my

1 that issue.
 2 MR. ORSINGER: Which means the lawyer is
 3 on the witness stand testifying about when they became
 4 aware of it, so there becomes a trial of the lawyer
 5 rather than the judge.
 6 CHAIRMAN BABCOCK: Getting back to this,
 7 what other issues do you need some direction on,
 8 Richard? And on this last one it's the consensus of our
 9 group here that we should not have a special time
 10 limit --
 11 MR. ORSINGER: Right.
 12 CHAIRMAN BABCOCK: -- for (9) and (10),
 13 but rather we should try to grapple with the time limit
 14 issue for the rule as a whole.
 15 MR. ORSINGER: Maybe we ought to find out
 16 how the committee feels about Representative Dunnam's
 17 suggestion that we aggregate per party rather than per
 18 law firm. That's not in the statute, but he put it out
 19 on the table.
 20 CHAIRMAN BABCOCK: Yeah. I think that's
 21 a good idea.
 22 MS. McNAMARA: That's as good a place for
 23 me to give my one thought, and that is that I think
 24 that's just a -- you know, the more I think about it,
 25 the harder it is I think to make work, and I for one

1 jury trial. I've had this motion in the can for six
 2 months, and 11 days out I file it. Before you had to
 3 raise it -- before you had to raise it -- oh, my gosh.
 4 Under the current rule I've even forgotten because the
 5 interim proposal was, is that -- let's see. Under the
 6 current 18 you have to raise your ground for recusal
 7 within at least ten days before the date set for trial.
 8 CHAIRMAN BABCOCK: Or hearing.
 9 MR. ORSINGER: Or hearing. Then we've --
 10 then we changed that by saying you can file it within
 11 ten days, but it just doesn't stop it.
 12 HONORABLE SCOTT MCCOWN: Well, but --
 13 MR. HAMILTON: We went through a system,
 14 you remember, where we were going to have it ten days
 15 from when you first learned about it.
 16 MR. ORSINGER: That was what the interim
 17 proposal was. That's right.
 18 MR. HAMILTON: Yeah. And that was too
 19 difficult.
 20 MR. ORSINGER: Because it had to do with
 21 when you knew or should have known.
 22 CHAIRMAN BABCOCK: Right.
 23 HONORABLE F. SCOTT MCCOWN: But that
 24 problem that you've just identified, and I agree that
 25 that's a problem, but that applies to all the

1 would much rather go back to what I think is
 2 Representative Dunnam's concern, which is we are
 3 departing from the statute with what we're recommending.
 4 I'd rather do what the statute said
 5 explicitly and allow the waiver process to prevent the
 6 recusal of the judge than the situation where he's
 7 permitted to take excess contributions. That to me is
 8 far less troublesome than some kind of a rule which
 9 aggregates law firms because it's simply a question of
 10 how you staff your case, whether you use one firm or
 11 three in a lawsuit. I mean, you could pick two people
 12 from V&E and two from Fulbright and two from Baker &
 13 Botts. It doesn't mean, you know, you're doing it for
 14 the contributions. You're just doing it because you're
 15 picking individual people to work on the case.
 16 HONORABLE F. SCOTT MCCOWN: Any judge
 17 that can be bought for 100,000 can be bought for 30,000.
 18 There is no point in aggregating beyond the top limit.
 19 CHAIRMAN BABCOCK: Yeah. Judge
 20 Patterson.
 21 HONORABLE JAN PATTERSON: I think
 22 Representative Dunnam's problem is that by adopting
 23 certain definitions from the statute we were expanding
 24 it somehow, and I disagree with that notion. I think we
 25 can pick and choose without expanding, and while I might

1 subdivisions, not to this one in particular. So we
 2 ought to just leave this subdivision with no special
 3 features, and we either fix the problem you've
 4 identified, which I agree is a problem, or we live with
 5 it for everything.
 6 MR. ORSINGER: Okay. I kind of go along
 7 with that.
 8 CHAIRMAN BABCOCK: Yeah. I kind of do,
 9 too. Is everybody else comfortable with that? Skip
 10 Watson is nodding "yes" that he represents the right
 11 side of the room.
 12 MR. WATSON: Oh, yeah.
 13 HONORABLE HARVEY BROWN: Do we have a
 14 proposed fix for that in the general scheme of things?
 15 In other words, not just for (9) and (10) but for (1),
 16 (2), (3), et cetera.
 17 CHAIRMAN BABCOCK: Well, there is a
 18 proposal here on page three about time to file which
 19 we're going to get to in a minute, but it may or may not
 20 be the right fix.
 21 MR. ORSINGER: We have debated that
 22 probably -- every single time we've discussed it we've
 23 debated that specific issue about whether you have to do
 24 it within so many days of when you become aware of it.
 25 HONORABLE DAVID PEEPLES: Which opens up

1 be in favor of that provision I think it's a legislative
 2 matter, and I think that would be an expansion and not
 3 within our province.
 4 CHAIRMAN BABCOCK: Well, his argument, I
 5 think, is that we are expanding the statute in that we
 6 are attaching consequences to conduct that the
 7 Legislature attaches no consequence to; i.e., in the
 8 unknowing acceptance of -- or acceptance without
 9 knowledge of certain contributions or making certain
 10 expenditures and participating whether it's going to
 11 give you a waiver or not, that we're attaching
 12 consequences to those actions where the Legislature
 13 doesn't.
 14 So in his view I think we're expanding
 15 the statute. I'm not sure that that's right the more I
 16 think about it, because the statute imposes penalties
 17 and now the canons impose certain consequences to the
 18 violation of the statute. All we're doing is, as a
 19 matter of procedure, shifting from one judge to another
 20 under certain circumstances which we think give the --
 21 raise the problems of perception of impropriety.
 22 HONORABLE JAN PATTERSON: That's how I
 23 view it, and I think this would be a substantive change
 24 and not a procedural change. So while -- ordinarily I
 25 would be in favor of it, but I think it really does

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1 expand, and it would change the game.
 2 MS. MCNAMARA: it might well be viewed as
 3 a legislative matter, and I think that's maybe what
 4 Representative Dunnam was suggesting, is that we might
 5 end up with legislation looking to aggregate firms. I
 6 don't know, but I think that becomes an argument for
 7 giving the Court alternative approaches because at the
 8 end of the day I think it becomes their decision whether
 9 or not they want to get closer to that line between the
 10 judiciary and the Legislature.
 11 CHAIRMAN BABCOCK: Yeah.
 12 MS. MCNAMARA: And giving the Court sort
 13 of thought-through language that goes both ways, one
 14 that tracks the statute clearly and one which simply
 15 uses the limits in the statute but doesn't take into
 16 account the waivers would be doing the Court a favor.
 17 CHAIRMAN BABCOCK: Yeah. And Nina
 18 suggested that earlier, and I think you're exactly right
 19 about that, and, Richard, I think what we should do --
 20 and this should be fairly simple, although nothing
 21 appears to be in this area. Just some language that
 22 says -- that we can present to the Court that says,
 23 "Here is another option for you and that is violation of
 24 the statute equals recusal."
 25 MR. ORSINGER: Yeah. That's easy to

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1 write, not easy to apply, but that's the Legislature's
 2 fault, not ours.
 3 CHAIRMAN BABCOCK: Well, in any event I
 4 think we should probably give them that option.
 5 MR. ORSINGER: Okay.
 6 CHAIRMAN BABCOCK: Although expressing to
 7 them when we're all said and done which is this
 8 committee's preference.
 9 MR. YELENOSKY: I'm sorry, Chip. Does
 10 that mean we're going to suggest a possible formulation
 11 for aggregation by party?
 12 HONORABLE BILL RHEA: No.
 13 MR. ORSINGER: No. We haven't decided
 14 that.
 15 MR. YELENOSKY: And did we decide that we
 16 weren't going to suggest that?
 17 MR. ORSINGER: No. Chip just said that
 18 one of the proposals we're going to make, whether we
 19 support it or not, is that a violation of the statute
 20 means recusal.
 21 MR. YELENOSKY: Right.
 22 MR. ORSINGER: And if you don't violate
 23 the statute, you're not recused under these grounds.
 24 That returns us to the debate we were having, which was
 25 whether or not to go with Dunnam.

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1 MR. YELENOSKY: All right. So we haven't
 2 settled that issue?
 3 MR. ORSINGER: No.
 4 MR. YELENOSKY: Can I speak to that?
 5 CHAIRMAN BABCOCK: Yeah, Steve.
 6 MR. YELENOSKY: well, I think -- I mean,
 7 I have to agree with Representative Dunnam from the
 8 Legislature's perspective of what we've already decided
 9 we're going to propose we aren't crossing the line and
 10 we aren't crossing the line any more if we also suggest
 11 that we aggregate by party.
 12 Whether it's a good idea or not may be a
 13 different question, but we're looking at it there are
 14 certain interests to be served. Perhaps it's due
 15 process, what I've been saying, by a recusal that are
 16 different from the interests to be served by the
 17 statute, and that's why we say that it's a flat rule
 18 mens rea of knowing or whatever, and we could also say
 19 that's why we also aggregate, because it's a question of
 20 how it appears from the litigant's perspective, but we
 21 should do it or not, but I don't think on the basis of
 22 we're crossing the line.
 23 CHAIRMAN BABCOCK: Yeah. Well, you were
 24 out a minute ago when we were talking about crossing the
 25 line, and I'm not sure we are, but in any event, we are

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1 talking about aggregating by party. Anne had a comment.
 2 Does anybody else have any comments about
 3 it? Yeah, Sarah.
 4 HONORABLE SARAH DUNCAN: I can understand
 5 the perception that we need to have a rule, a recusal
 6 rule for aggregation by party. I can understand how in
 7 a particular case the choice of law firms might be
 8 motivated by improperly influencing a judge, and I'm
 9 sympathetic to that, but at the same time I can think of
 10 too many instances in which the choice of lawyers at
 11 individual law firms has nothing to do with influencing
 12 the judge. It may be that your water specialist is at
 13 Bickerstaff and your appellate specialist is at V&E and
 14 your bankruptcy specialist is at Akin-Gump, and I think
 15 we really could run into some serious trouble when we
 16 start indirectly interfering with a party's choice of
 17 lawyers on substantive matters via a recusal rule.
 18 So as much as I'm sympathetic to the
 19 motivation and I would be interested in exploring ways
 20 that we might could address the underlying problem, I'm
 21 not sure that a blanket aggregation by party rule isn't
 22 overly broad.
 23 CHAIRMAN BABCOCK: Elaine.
 24 PROFESSOR CARLSON: I guess I don't see
 25 the huge conflict between the legislation and proposed

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1 recusal rules. I look at the legislative policy to be
 2 that if one candidate busts the spending limits, there
 3 should be a level playing field for the other, and
 4 that's a policy of electability in the process, but to
 5 me to look at a question of judicial recusal based on
 6 expenditure limits is a different policy of fairness to
 7 an individual litigant in any particular case, and I
 8 just have a hard time believing that it was the
 9 legislative intent that because of the conduct of one
 10 judicial candidate the other judicial candidate then has
 11 a free right of unlimited spending and contributions,
 12 that there's no level at which a candidate who, if they
 13 are successful for office, shouldn't be recused, and I'm
 14 just struggling with the basic conflict issue to begin
 15 with.
 16 CHAIRMAN BABCOCK: Okay. Any more
 17 comments on the aggregate by party issue? All right.
 18 MS. MCNAMARA: Chip, one more comment
 19 just because I keep thinking of horrors that come out
 20 of this. I don't even know how you would define who
 21 counsel was because one solution would be to only have
 22 one firm of record. You have all of these other guys in
 23 your conference room, you know, working on the papers.
 24 I don't know how you'd even know who the counsel for the
 25 party was.

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1 CHAIRMAN BABCOCK: well, but the point of
 2 this, as I understand it, would be that if judge X is
 3 sitting up there on the bench and he says, "Whoops, here
 4 I've got firm A which has given me 25 grand and I've got
 5 firm B which has given me 25 grand, and I've got firm
 6 C," so now I've got three firms that have given me 75
 7 grand and they're not -- firm B and C are not in the
 8 conference room. They're on the pleadings. They're in
 9 front of the judge, and presumably he therefore knows
 10 that.
 11 MS. MCNAMARA: But if you're the litigant
 12 what you're going to do is just keep B and C at the
 13 office and not let them come to court.
 14 CHAIRMAN BABCOCK: Right. In which case
 15 the judge presumably won't know about it and there won't
 16 be that appearance of influence.
 17 MR. ORSINGER: Presumably unless the
 18 paperwork -- "This particular paper was drafted by
 19 lawyer so-and-so."
 20 MS. MCNAMARA: And the other side knows
 21 which firms are really helping.
 22 CHAIRMAN BABCOCK: Oh, yeah. I
 23 understand, but it's a matter of -- okay. Any other
 24 comments about the aggregating by party?
 25 Okay. This is just to give Richard some

1 direction when he goes back with the subcommittee. How
 2 many people think that he -- his subcommittee should
 3 write a rule along the lines suggested by Representative
 4 Dunnam that there should be prohibitions against
 5 aggregation by party? Raise your hand if you think
 6 that's appropriate.
 7 Raise your hand if you are against that
 8 idea. Who's sitting next to you, Scott? Is that Pam?
 9 18 people think it's a bad idea. Two people think it's
 10 a good idea.
 11 HONORABLE JIM DUNNAM: I'll buy you-all a
 12 Coke later.
 13 CHAIRMAN BABCOCK: what did you say? I'm
 14 sorry.
 15 MR. ORSINGER: He's going to buy him a
 16 Coke. He's going to pay him by a Coke.
 17 MR. YELENOSKY: You should have told me
 18 before I voted.
 19 MR. ORSINGER: Another item I think that
 20 we ought to get some direction on is that the task force
 21 discusses the issue of non-natural person litigants, and
 22 actually they combine that with lawyers, but they say
 23 "if made by a law firm or a party who is not a natural
 24 person, those exceeding six times the applicable
 25 contribution limits," and I don't know for sure what

1 MR. YELENOSKY: Law firms.
 2 MS. CRAIN: PC's can.
 3 MR. WATSON: But, I mean, that really
 4 compounds, so what are they talking about? I don't
 5 know.
 6 MS. SWEENEY: why can't corporations in
 7 state races --
 8 MR. ORSINGER: I thought it was just
 9 Federal races.
 10 MS. SWEENEY: I thought that was just
 11 Federal, too.
 12 MS. CRAIN: Huh-uh, state.
 13 MS. SWEENEY: Houston Power & Light makes
 14 contributions.
 15 MS. CRAIN: Probably through their PAC.
 16 MS. SWEENEY: Oh.
 17 MR. ORSINGER: Okay. Well, then I don't
 18 know. Mike, do you remember what that was?
 19 MR. HATCHELL: I'm not as clear on this
 20 one as I'd like to be.
 21 MR. ORSINGER: Bob, do you have any idea
 22 about that?
 23 MR. PEMBERTON: I'm sorry. What was that
 24 again?
 25 MR. ORSINGER: Well, it's on page 97, but

1 that means, but it sounds to me like -- there was also
 2 some discussion in here about political action
 3 committees, and I think that that's treated separately.
 4 MR. HAMILTON: They are in the statute.
 5 They are in the statute.
 6 MR. ORSINGER: They are treated
 7 separately in the statute?
 8 MR. HAMILTON: Yeah, but they are in
 9 there just like it's in the rule.
 10 MR. ORSINGER: well, if this law firm is
 11 not a natural person, meaning it's a limited liability
 12 partnership --
 13 MR. HAMILTON: Law firm is defined as a
 14 person in the statute.
 15 MR. ORSINGER: Is it a natural person?
 16 The task force proposal is that you get six times the
 17 contribution limits under the statute if it's by a law
 18 firm or a party who is not a natural person. So you
 19 have a corporate defendant, and they get six times the
 20 limit of a normal living person. If you have -- I
 21 presume a law firm that is not a natural person would
 22 have to be a partnership or a corporation, right?
 23 Right? Do you know? Can somebody help me on this? Am
 24 I --
 25 CHAIRMAN BABCOCK: What page are you

1 in the definitions part of this task force proposed
 2 rule, "if made by a law firm or a party who is not a
 3 natural person, those exceeding six times the applicable
 4 contribution limits under section 155(b)" is defined as
 5 an excessive campaign.
 6 MS. SWEENEY: Subject to somebody
 7 educating us on a real good reason for that I move that
 8 we treat them all the same.
 9 MS. McNAMARA: Are you saying treat a law
 10 firm --
 11 MR. ORSINGER: I was just assuming that
 12 there's probably something afoot here that we're not
 13 realizing because someone thought about this and wrote
 14 it.
 15 MR. PEMBERTON: I think that was the
 16 committee's attempt to bring in together or treat direct
 17 campaign expenditures the same as excessive campaign
 18 contributions.
 19 MS. SWEENEY: Can you speak up, Bob?
 20 MR. PEMBERTON: well, I'm trying to
 21 remind myself --
 22 CHAIRMAN BABCOCK: He's talking to
 23 himself actually.
 24 MR. YELENOSKY: Then could you speak
 25 softer?

1 reading from?
 2 MR. ORSINGER: That's Bates 97.
 3 MS. SWEENEY: What's the issue, Richard?
 4 MR. ORSINGER: The issue is that are we
 5 supposed to be treating parties that are not natural
 6 persons or law firms that are not natural persons
 7 differently because the task force did? I'm not sure I
 8 understand why, and then you're going to find out that
 9 the task force also treats PACs differently from natural
 10 persons. And maybe we just ignore all that and say that
 11 General Motors Corporation aggregates the same way as an
 12 individual plaintiff, but that's -- the statute probably
 13 doesn't do that, does it?
 14 MR. HAMILTON: I think the answer to your
 15 question is that the statute does not go into that.
 16 That's why I did not put it into the rule. It's not in
 17 the statute.
 18 MR. ORSINGER: Okay. It's not in there
 19 because the special treatment of corporations and
 20 partnerships is just not discussed in the statute
 21 according to Carl.
 22 MR. WATSON: Corporations can't make
 23 contributions. It's illegal.
 24 MR. ORSINGER: Okay. Can partnerships?
 25 MS. CRAIN: Yeah.

1 MR. PEMBERTON: What's the specific
 2 question, Richard?
 3 MR. ORSINGER: Is there anything raised
 4 there that we ought to write into our rule, because
 5 that's a pretty big difference there? These guys are
 6 treating -- you've got a six times limit if it's a
 7 partnership than if it's an individual lawyer. I wish I
 8 understood the statute better.
 9 MR. PEMBERTON: Yeah. I'm thinking it
 10 was just an attempt to treat any kind of organization
 11 the same way, but --
 12 CHAIRMAN BABCOCK: But the six times
 13 limit is not in the statute that I can see.
 14 MR. PEMBERTON: I thought it -- well, I
 15 think it may be derived from one of the statutory
 16 provisions.
 17 MR. EDWARDS: It's in there with regard
 18 to law firms.
 19 MR. PEMBERTON: That's it. That's where
 20 the six times came from.
 21 MR. EDWARDS: Yeah. And it also applies
 22 to the special purpose PAC of a law firm, and
 23 I think what you're looking at over there is to make it
 24 to apply -- that same limit apply to any party. For
 25 example, if General Motors has a General Motors PAC and

1 the PAC gives some amount to the judicial candidate,
 2 whatever that happens to be, or if seven of the officers
 3 each give the limit to the campaign then you aggregate
 4 them in some way so that the party is in the same
 5 position as the law firm, I think.
 6 MR. ORSINGER: Do we need to carry this
 7 forward in the rule or just let it go?
 8 MR. PEMBERTON: Admittedly, that probably
 9 was an effort on behalf of the task force to go beyond
 10 the statute in some ways and encompass some other arenas
 11 that maybe the statute doesn't specifically, for what
 12 that's worth.
 13 MR. ORSINGER: Some of us think we have
 14 already decided to do that. Others don't.
 15 MR. YELENOSKY: well, we're committing
 16 this to the subcommittee, right? And if we can't --
 17 MR. ORSINGER: I know, and we'll make
 18 these decisions if you want, but we're just going to
 19 have to debate them after we spend the time writing
 20 them, and we may find out it's going right into the
 21 wastebasket. So if we don't know enough, we'll try to
 22 struggle with it.
 23 CHAIRMAN BABCOCK: No. The time to do it
 24 is now, I think.
 25 MR. EDWARDS: The real criticism as I

1 and run-off.
 2 MR. ORSINGER: So you're permitted to
 3 reach a maximum in the primary and you start over at
 4 zero for the general election?
 5 MR. EDWARDS: I think so.
 6 HONORABLE JAN PATTERSON: Right.
 7 MR. ORSINGER: Okay. So then we probably
 8 need to preserve that concept in this rule then if we're
 9 writing our own limits, shouldn't we?
 10 CHAIRMAN BABCOCK: Unless it's a bad
 11 idea.
 12 MR. ORSINGER: Okay. I'm just not used
 13 to legislating, so I just want a little assistance here.
 14 In other words, we are going to preserve this concept
 15 that the primary is different from the general election
 16 in terms of aggregating or in terms of calculating
 17 contributions? Okay. So we will carry forward the
 18 election period idea.
 19 CHAIRMAN BABCOCK: And I'm not sure that
 20 your language right now doesn't pick that up.
 21 MR. ORSINGER: Okay.
 22 CHAIRMAN BABCOCK: Because even as
 23 modified if the judge has accepted a campaign
 24 contribution as defined, et cetera, et cetera,
 25 et cetera. Carl.

1 perceive it about the campaign contributions are those
 2 coming from lawyers and law firms, and there hasn't been
 3 a whole lot of unhappiness about campaign contributions
 4 from non-lawyers and non-law firms.
 5 HONORABLE BILL RHEA: Maybe I'm missing
 6 the issue, but the six times, is that what we're talking
 7 about now? Six times? I think that comes right out of
 8 the 157 that deals with law firms. They use that
 9 language "six times the applicable contribution."
 10 MR. YELENOSKY: They're talking about
 11 going beyond that, I think.
 12 MR. ORSINGER: Well, we can certainly
 13 limit it to that because that's what -- limit it to law
 14 firms. This is written "if made by a law firm or a
 15 party who is not a natural," and I don't know if "a
 16 party who is not a natural person" is an add-on to the
 17 statute. Is that what you're saying?
 18 HONORABLE BILL RHEA: I see.
 19 MR. ORSINGER: Is it?
 20 MR. EDWARDS: Yes, it is.
 21 MR. PEMBERTON: I think it is.
 22 MR. ORSINGER: Okay.
 23 MR. EDWARDS: That would apply to large
 24 professional corporations of accountants and engineers.
 25 It wouldn't apply to corporations because corporations

1 MR. HAMILTON: This brings up another
 2 area that's sort of like what you're talking about now,
 3 but in going through all of this it seemed to me that if
 4 a judge takes an illegal campaign contribution and
 5 becomes tainted with that particular lawyer or law firm,
 6 that he ought to be subject to recusal at any time, not
 7 just that year or that term or even the next term, and
 8 we didn't provide for any limits in here.
 9 CHAIRMAN BABCOCK: The task force rule
 10 does. They limit it to the term that the election was
 11 for.
 12 MR. HAMILTON: Correct. And we didn't
 13 limit it.
 14 MR. ORSINGER: The subcommittee's
 15 proposal doesn't have any kind of limitations period on
 16 that.
 17 CHAIRMAN BABCOCK: How do people feel
 18 about that?
 19 HONORABLE F. SCOTT MCCOWN: I think we
 20 should stick with the statute, and, you know, I believe
 21 in redemption. And since --
 22 MR. YELENOSKY: If not redemption, at
 23 least the disincentive to do it again.
 24 HONORABLE F. SCOTT MCCOWN: And let me
 25 point out, the one place we've departed from the statute

1 can't make contributions, I would assume.
 2 MR. ORSINGER: Okay. So why don't we get
 3 a sense of whether we should broaden the statute up?
 4 MR. LOW: I move to leave it up to the
 5 statute for the lawyers and law firms.
 6 CHAIRMAN BABCOCK: Okay. People who
 7 think it should be broader than lawyers or law firms
 8 raise your hand.
 9 People that are against that raise your
 10 hand. 18 to 1 against, so you don't need to spend your
 11 time on that.
 12 MR. ORSINGER: Okay, we won't. On page
 13 97, subdivision (b) -- I mean (5) says that for
 14 aggregation -- well, I mean that all of these are to be
 15 calculated as of the close of the election period. Is
 16 election period -- does that mean the date of the
 17 election?
 18 MR. PEMBERTON: That's the statutory
 19 term, which I think goes from X number of days before
 20 the actual election to sometime after it.
 21 MR. ORSINGER: Until sometime after the
 22 election?
 23 MR. PEMBERTON: Yeah.
 24 MR. EDWARDS: Election period would
 25 divide it up into primary, run-off, general election,

1 is we've said we're talking about a technical violation.
 2 We're not looking at knowing or purposeful or
 3 intentional, and if a judge has a technical violation in
 4 one term and is recused and the next term doesn't have a
 5 technical violation, he shouldn't be recused. By
 6 definition there's going to be four to six years between
 7 those two events.
 8 MR. ORSINGER: well, it could be an
 9 unexpired term.
 10 MR. YELENOSKY: Otherwise they would
 11 forever be knocked out, and the next election there
 12 would be no reason not to take as much or more money
 13 from the same firm because they have been forever
 14 knocked out.
 15 MR. ORSINGER: well, they wouldn't give
 16 it to you, Steve.
 17 MR. YELENOSKY: Well, that's true. Why
 18 would they? I missed the practical thing.
 19 CHAIRMAN BABCOCK: You got the
 20 theoretical but not the practical.
 21 MR. YELENOSKY: Okay. Well, then I do
 22 believe in redemption, at least after four to six years.
 23 MR. EDWARDS: It seems to me that the
 24 period should include the election for the term that's
 25 being served, but in addition to that any contributions



1 made for any subsequent election that are made during
 2 that original term, because you've got an overlap,
 3 somebody is going to run for re-election, they're going
 4 to be collecting money, you know, whenever the rules say
 5 they can collect it, but it will be January of one year
 6 to January of the next year. That one year will be
 7 overlapped. So you will be dealing with two elections
 8 during that one year or two election periods.
 9 HONORABLE F. SCOTT MCCOWN: I didn't
 10 understand that, Bill.
 11 MR. EDWARDS: Well, if you limit it, if
 12 you limit the refusal to contributions made for the
 13 election of the term that's being served and you don't
 14 include the term that the sitting judge is running for
 15 at the time during the re-election period.
 16 HONORABLE F. SCOTT MCCOWN: Okay.
 17 MR. EDWARDS: That's what I'm saying.
 18 HONORABLE F. SCOTT MCCOWN: Okay. Yeah.
 19 You can run it backwards. Just don't run it forwards.
 20 MR. EDWARDS: No, no. I'm not running it
 21 forward. And I'm cutting it, you know --
 22 HONORABLE F. SCOTT MCCOWN: Right. I
 23 understand.
 24 MR. EDWARDS: Okay.
 25 CHAIRMAN BABCOCK: Do people feel that

1 don't know if this is in the statute. Somebody help.
 2 If this is a contribution by a party who is not a
 3 natural person then anyone who owns more than five
 4 percent of the corporate stock as well as officers,
 5 directors, and general partners are aggregated.
 6 MR. HAMILTON: I don't think that's in
 7 the statute.
 8 MR. PEMBERTON: That was a fairly
 9 ambitious effort on behalf of the committee to address
 10 those types of issues. It's not in the statute.
 11 MR. ORSINGER: So we might ought to agree
 12 that we're legislating here.
 13 MR. PEMBERTON: It's pretty clear.
 14 PROFESSOR DORSANEO: That to me gets to
 15 the question that relates to all these things as to how
 16 are you ultimately going to decide who a party is. You
 17 know, like if we're talking about aggregating law firms,
 18 et cetera, well, I can see that you can look at the law
 19 firms, you know, being aggregated to work on the case or
 20 being aggregated to make contributions; and at some
 21 point we're going to have to confront, you know, who is
 22 a party and who are the representatives of the party and
 23 do they get counted in some way that's not, you know,
 24 expressed with the same degree of clarity that we talk
 25 about law firms, and lawyers and law firms. What I'm

1 that's what we ought to do, that we ought to have that
 2 sort of a limit to it, or should it just be for the term
 3 of the election? Carl.
 4 MR. HAMILTON: Let me just say one other
 5 thing. If what we're looking at is the appearance of
 6 impropriety because a judge might be partial to the side
 7 that gave him a lot of money, so if he's going to be
 8 partial to that lawyer who gave him a lot of money, why
 9 is that partiality going to stop when his term is up?
 10 Especially if he runs again and he gets elected again.
 11 It seems to me like the partiality is going to remain.
 12 HONORABLE F. SCOTT MCCOWN: But there are
 13 many areas in recusal where we allow time to dissipate
 14 the issue. For example, we're talking about existing
 15 attorney-client relationship and not an attorney-client
 16 relationship from 20 years ago. We're talking about
 17 many judges hear cases that their former law firm brings
 18 after the passage of a number of years. I mean, I was
 19 at Vinson Elkins a long, long time ago, and I hear its
 20 cases now, and this is a statute of limitations that the
 21 Legislature adopted. I think we ought not depart from
 22 it.
 23 CHAIRMAN BABCOCK: Okay. How many people
 24 think that we ought to have a time limit in here limited
 25 to the term of office relating to the contribution?

1 saying is it's not a solution to act as if it's clear
 2 who the party is.
 3 CHAIRMAN BABCOCK: Yeah, Buddy Low.
 4 MR. LOW: If we go beyond lawyers then
 5 there is definitely a line of legislation.
 6 CHAIRMAN BABCOCK: Right.
 7 MR. LOW: We can see that, but when we
 8 start even parties, I mean, you know, that's what the
 9 Legislature dealt with, and we're dealing with conduct
 10 of lawyers and judges, and I know judges need to be
 11 recused, but this is going to court too far over the
 12 line of legislation.
 13 CHAIRMAN BABCOCK: What else, Richard?
 14 MR. ORSINGER: So this one dies?
 15 CHAIRMAN BABCOCK: This one is even
 16 further out than the one we just rejected, so --
 17 MR. ORSINGER: Okay. The next
 18 subdivision has to do with PACs and the specific purpose
 19 and general purpose committees and a special definition
 20 about how they -- you aggregate the contributors who
 21 made a contribution to the PAC beginning January 1 of
 22 the year prior to the contribution ending with the
 23 election period. So now aren't we going into, if I
 24 understand this, the contribution lists of the PACs?
 25 Bob, are you with us?

1 MR. ORSINGER: Wait a minute. That
 2 ignores Bill's -- Bill wants it to relate to --
 3 MR. EDWARDS: You want it to overlap.
 4 MR. ORSINGER: -- the current term as
 5 well as the upcoming term.
 6 MR. EDWARDS: I would say current -- that
 7 were relating to the current term or contributions made
 8 during the current term.
 9 CHAIRMAN BABCOCK: Okay. With that
 10 friendly amendment.
 11 HONORABLE F. SCOTT MCCOWN: The way to
 12 put it is for your present term or a contribution in
 13 connection with an election for a future term.
 14 MR. EDWARDS: It's a contribution made
 15 within --
 16 HONORABLE F. SCOTT MCCOWN: Your present
 17 term.
 18 MR. EDWARDS: -- your present term.
 19 CHAIRMAN BABCOCK: Okay. For a future
 20 term. Okay. With that amendment how many people are in
 21 favor of that limitation? 22 in favor.
 22 How many against? Nobody against who's
 23 willing to put their hand up. Okay. Richard, you got
 24 that?
 25 MR. ORSINGER: Got it. The next one, I

1 MR. PEMBERTON: I'm with you.
 2 MR. ORSINGER: I think there is a
 3 constitutional right not to produce your contribution
 4 list, isn't there, if you're a PAC? No, there's not?
 5 MR. PEMBERTON: I'm not -- I wasn't --
 6 MS. McNAMARA: Excuse me. Does that mean
 7 that an individual's contribution is aggregated with
 8 their gift to the PAC even though they don't know at the
 9 time they give to their PAC where the money is going to
 10 go?
 11 MS. SWEENEY: No.
 12 MS. CRAIN: No.
 13 MS. SWEENEY: Because PACs don't have to
 14 say who gave them money. The judge has to say what the
 15 PAC gave her, but the PAC does not have to say who gave
 16 them their money.
 17 MR. ORSINGER: Well, can the PAC be
 18 forced to say that?
 19 MS. SWEENEY: No.
 20 MR. ORSINGER: Why not?
 21 HONORABLE JAN PATTERSON: The PAC makes
 22 its own filing for which we're not accountable.
 23 MR. ORSINGER: Well, I wish you would
 24 read on page 97, subdivision (7) there. It seems to me
 25 like they're aggregating the contributors to the PAC.

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1 Does it seem to say that to you?
 2 MS. McNAMARA: Yeah, it seems to say
 3 that.
 4 MR. ORSINGER: Okay. So, No. 1, is that
 5 in the statute, and I think the answer to that is "no."
 6 CHAIRMAN BABCOCK: Pemberton says "no."
 7 MR. PEMBERTON: Yeah.
 8 CHAIRMAN BABCOCK: So, Hatchell, why was
 9 this a good idea?
 10 MR. HATCHELL: I think the notion is to
 11 try to make all of this a level playing field; in other
 12 words, to have the standards to be roughly the same
 13 whether you're talking about lawyers or parties; and I
 14 believe this language, Bob, comes from some other
 15 statute. Doesn't it come from a Federal statute?
 16 MR. PEMBERTON: I've forgotten, but I
 17 want to say it came from somewhere else, whether it's
 18 another provision of the Texas Election Code or maybe
 19 some Federal limitation.
 20 MR. HATCHELL: It has a statutory analog
 21 somewhere else. We're just basically trying to make
 22 sure that all types of parties, lawyers, and other
 23 people are treated pretty much the same and that there's
 24 not an ability to find a lot of loopholes to this in
 25 terms of the aggregation. We recognize that this is

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1 pretty far out. It's going to be difficult to
 2 administer.
 3 MR. PEMBERTON: Actually, now that I
 4 recall, it may have come from the ABA proposal.
 5 MR. HATCHELL: I'm almost positive it's
 6 from the ABA proposal.
 7 CHAIRMAN BABCOCK: Is there an appetite
 8 to try to get out on the edge on this? Buddy's shaking
 9 his head "no." No? So there's your answer, Richard.
 10 MR. ORSINGER: I think that's the last
 11 independent concept I'm aware of in the task force
 12 proposal.
 13 HONORABLE F. SCOTT McCOWN: Good.
 14 MR. YELENOSKY: Don't think about it
 15 anymore.
 16 CHAIRMAN BABCOCK: Yeah. That's right.
 17 Now, in terms of redrafting, we've got a meeting coming
 18 up very soon, and I'd like to report this rule out at
 19 that meeting. Can you guys do that, Richard?
 20 MR. ORSINGER: Sure. The meeting is
 21 when?
 22 CHAIRMAN BABCOCK: The 19th and 20th of
 23 May.
 24 PROFESSOR CARLSON: Six weeks.
 25 MR. ORSINGER: Yeah, we can do that.

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1 HONORABLE DAVID PEEPLES: If we finish
 2 the rest of the rule today.
 3 CHAIRMAN BABCOCK: Yeah. We're going to
 4 finish the rest of the rule, but I'm trying to emphasize
 5 while everybody is still here that we want to try to
 6 finish this rule and get it to the Court at the next
 7 meeting, and I don't particularly want to take a day and
 8 a half on this rule either.
 9 MR. ORSINGER: Well, we'll just try to
 10 get it out earlier, but you know, hopefully we've quit
 11 opening up new areas to explore on this thing, and we're
 12 going to report back on some language that --
 13 CHAIRMAN BABCOCK: Well, we've got 20
 14 people who are not here. I'm sure they will all want to
 15 open up new areas.
 16 MR. YELENOSKY: Can we have some kind of
 17 collateral estoppel rule?
 18 MR. ORSINGER: I think Skip has learned a
 19 lesson about just --
 20 HONORABLE SARAH DUNCAN: And could we
 21 maybe get the rule more than three days before the
 22 meeting?
 23 MR. ORSINGER: Yes. Yes. We're going to
 24 try to get it out quicker.
 25 HONORABLE SARAH DUNCAN: Two weeks maybe

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1 before the meeting.
 2 MR. ORSINGER: I mean, we'll try to get
 3 it out quicker. It's not going to be easy.
 4 CHAIRMAN BABCOCK: Okay. Either Carl or
 5 Richard, it looks to me like the next big item is (d)
 6 maybe. Is there anything in (c) we need to talk about?
 7 Waiver, isn't that --
 8 MR. LOW: There is one thing.
 9 CHAIRMAN BABCOCK: Is that from the
 10 current Rule 18b(5).
 11 MR. LOW: I don't think so. It says, "A
 12 ground for recusal may be waived by the parties after it
 13 is fully disclosed on the record." Does that mean I
 14 know something and don't do anything, it's not a waiver,
 15 that I have to put it on the record to be a waiver?
 16 CHAIRMAN BABCOCK: Well, the judge gets
 17 everybody around and says, "Hey, I just want you to know
 18 that the defendant is my next door neighbor. We've been
 19 buddies for 15 years, and has anybody got a problem with
 20 that?"
 21 MR. LOW: No, but what I'm saying is that
 22 would be on the record, but what if I know that,
 23 everybody knows. I don't say anything about it. I say,
 24 "Well, wait a minute. I didn't waive that because it
 25 wasn't disclosed on the record."

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1 HONORABLE SCOTT BRISTER: Otherwise,
 2 you're going to get into a fight about whether it was or
 3 wasn't disclosed.
 4 HONORABLE DAVID PEEPLES: Failure to
 5 assert needs to be a waiver.
 6 HONORABLE SARAH DUNCAN: The question I
 7 think Buddy is posing that I also have is really what
 8 does this mean? Does it mean that a ground for recusal
 9 is waived only if it is disclosed on the record and
 10 there is no motion to recuse filed within X number of
 11 times?
 12 MR. LOW: Right.
 13 HONORABLE SARAH DUNCAN: Or does it mean
 14 that a court has discretion to find waiver in these -- I
 15 don't know what it means.
 16 MR. LOW: I would just say, "A ground for
 17 recusal may be waived by the parties." I mean, and just
 18 let the law be what it is.
 19 HONORABLE SARAH DUNCAN: Like on the
 20 campaign contributions, do we give everybody that comes
 21 into the court copies of our contribution reports and
 22 that's disclosure on the record, and if we do that
 23 then -- I just don't know what it means.
 24 MR. WATSON: Only if you violated the law
 25 then you do it.

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1 HONORABLE SARAH DUNCAN: I don't know if
 2 I violated the law.
 3 CHAIRMAN BABCOCK: The current rule says,
 4 "The parties to a proceeding may waive any ground for
 5 recusal after it is fully disclosed on the record."
 6 Now, what's -- has there been a problem with that rule?
 7 MR. EDWARDS: No.
 8 MR. ORSINGER: Well, the argument is that
 9 that implies that, for example, if you've had 15
 10 hearings in front of the judge and you knew about the
 11 recusal ground and then finally he rules against you and
 12 now you trod it out for the first time, maybe that is
 13 not waiver.
 14 CHAIRMAN BABCOCK: Well, or maybe it is,
 15 but is there any problem with this rule? Have you
 16 judges in practice had difficulty interpreting this
 17 rule?
 18 HONORABLE SCOTT BRISTER: It's timed with
 19 the ten-day before rule. If we're going to abolish the
 20 all motions less than ten days before a trial or hearing
 21 are too late then this is not a problem -- then it
 22 becomes a problem. Because the way it works now is, you
 23 know, you should have known that. You didn't file a
 24 motion until after the verdict came back. Too late.
 25 It's not too late for disqualification,

1 but it is too late for recusal because you're less than
 2 ten days before trial. If we're going to do away with
 3 that all motions have to be filed at least ten days
 4 before trial then this becomes very important, and the
 5 way you use this is on the ones where the person from
 6 your church or the guy who was the best man in your
 7 wedding comes in. The judge discloses on the record so
 8 that's the end of the discussion. We don't have it come
 9 up and be a problem later, and obviously I think it's
 10 fine with the current rule. If you're going to disclose
 11 it, you ought to disclose it on the record, because
 12 otherwise you're going to get a subpoena and the judge
 13 and who said what to who. Same as a Rule 11 agreement.
 14 CHAIRMAN BABCOCK: Okay. Where did this
 15 sentence, "Disqualification cannot be waived or cured,"
 16 I mean, that's self-evident, but where did that come
 17 from?
 18 HONORABLE SCOTT BRISTER: That's from the
 19 current rule, isn't it?
 20 MR. ORSINGER: No. We decided to say
 21 that because we wanted to make it clear that we did not
 22 purport to say that the grounds for disqualification
 23 were waived, and nor can be it be stipulated by the
 24 parties it will be ignored.
 25 CHAIRMAN BABCOCK: Buddy.

1 group wants to make it. I just don't think this is
 2 clear. I mean, if what this is trying to say is if a
 3 judge discloses a ground for recusal on the record and
 4 the parties elect to continue with the hearing or trial,
 5 the ground is waived, that's saying one thing. If what
 6 it's saying is the only time the parties waive a ground
 7 for recusal is if it is disclosed on the record, that's
 8 a whole other thing. So maybe we should decide which we
 9 think it ought to say and then Richard's committee could
 10 just say that more clearly.
 11 CHAIRMAN BABCOCK: Yeah. What you're
 12 proposing is that the rule say, "A ground for recusal is
 13 waived by the parties after it is fully disclosed on the
 14 record if a motion is not filed within ten days" or
 15 something.
 16 HONORABLE SARAH DUNCAN: Or if the
 17 parties elect to proceed with the hearing or trial.
 18 CHAIRMAN BABCOCK: Right.
 19 MR. ORSINGER: And that eliminates the
 20 knew or should have known problem because the judge is
 21 informing you on the record, and that is you should have
 22 known.
 23 CHAIRMAN BABCOCK: And then you get to do
 24 something.
 25 MR. ORSINGER: Right.

1 MR. LOW: I thought it was only to say
 2 what's pretty clear. If you're disqualified, you can't
 3 waive it. A recusal can be waived, and I thought -- and
 4 then the law, whatever, how you waive or so forth, you
 5 can raise those issues, but there's not been a rule on
 6 that, and that was just to clarify and simplify what can
 7 be waived and what can't.
 8 CHAIRMAN BABCOCK: All right. Well,
 9 that's not very controverted. So do we like this second
 10 sentence, or do we want to change it?
 11 HONORABLE F. SCOTT MCCOWN: Well, I think
 12 it goes to what Judge Brister said, though. It depends
 13 whether you like it or whether you want to change it on
 14 what you do with Rule (d)(2), so there's a later rule
 15 that we have to look at to tell us whether we're happy
 16 with this earlier rule.
 17 MR. ORSINGER: I really feel like our
 18 previous debate has decided that we are not going to
 19 require everything to be done ten days before trial at
 20 least or you don't have the chance to do it, and we are
 21 not going to require ten days within the time that you
 22 knew it, because if you do within the time that you knew
 23 it then the lawyer is on trial for when he knew it. And
 24 so we know that it's not free from problems, but I feel
 25 like in at least two prior meetings, maybe three prior

1 CHAIRMAN BABCOCK: Yeah, Buddy.
 2 MR. LOW: What if the judge says -- Judge
 3 Brister said, "Okay. I went to church with this guy,
 4 did this, did that," but he forgets to tell them that
 5 they were on vacation together.
 6 HONORABLE SCOTT BRISTER: It wasn't fully
 7 disclosed.
 8 MR. LOW: Is that not something that --
 9 then so that's not waived.
 10 HONORABLE SCOTT BRISTER: It's only been
 11 partly disclosed.
 12 MR. LOW: Pardon?
 13 HONORABLE SCOTT BRISTER: It's only been
 14 partly disclosed.
 15 MR. LOW: Well, I'm saying so you're
 16 saying then they could come back after that and require
 17 even later on and file on that?
 18 HONORABLE SCOTT BRISTER: That's like
 19 Luke's case where, you know, the judge took a trip up to
 20 visit the law firm the week before he got sworn in and
 21 also lied about it, but the also lied about it adds a
 22 significant amount.
 23 MR. LOW: That's probably one judge out
 24 of ten jillion we've had in Texas, and you just -- but
 25 if you say that every ground has to be on the record and

1 meetings, we've come to a consensus that we're not going
 2 to have a bar, absolute bar, ten days before trial, and
 3 we're not going to run the time clock from knew or
 4 should have known.
 5 HONORABLE F. SCOTT MCCOWN: I agree.
 6 HONORABLE DAVID PEEPLES: Can we have the
 7 time end at the hearing or trial? Richard, we don't
 8 have that expressly in here. It shouldn't go beyond the
 9 trial.
 10 HONORABLE SCOTT BRISTER: Yeah. How -- I
 11 disclose he's my best man. We go to trial. He wins,
 12 and then you file and somebody grants a recusal and
 13 voids everything because -- I mean, that ought not be.
 14 You ought not be able -- that is classic laying behind
 15 the log and then when you lose undoing everything.
 16 HONORABLE BILL RHEA: Except that when
 17 you make that disclosure as a trial judge you also ask
 18 the lawyers if they waive it on the record.
 19 HONORABLE SCOTT BRISTER: well, but what
 20 if they say, "No, we reserve our rights."
 21 HONORABLE F. SCOTT MCCOWN: Then you say
 22 "I'm not going ahead. Get another judge. You either
 23 waive it or I'm out of here."
 24 CHAIRMAN BABCOCK: Justice Duncan.
 25 HONORABLE SARAH DUNCAN: Whichever the

1 so forth, they're going to come up with something else.
 2 There should be a waiver other than something the judge
 3 has told them about and it's on the record. There
 4 should be a way to do it. You waive it by not doing
 5 diligence, and we litigate waiver and what constitutes
 6 waiver all the time. We don't need to put it in here.
 7 HONORABLE SARAH DUNCAN: I agree, Buddy.
 8 I think what we're saying is that in this circumstance
 9 it would be waived.
 10 MR. LOW: Right.
 11 HONORABLE SARAH DUNCAN: There may be
 12 other circumstances of waiver, but that's what I don't
 13 think is clear in this formulation, this sentence.
 14 HONORABLE HARVEY BROWN: So, Sarah, are
 15 you saying we should change the "may be" to "is" and in
 16 addition should say "and may also be waived under other
 17 circumstances" or some general catchall and make it
 18 clear this isn't exclusive?
 19 HONORABLE SARAH DUNCAN: To me what this
 20 section was trying to do initially is say
 21 disqualification can't be waived, recusal can. If we're
 22 going to go further and say one of the ways in which a
 23 ground for recusal is waived then we shouldn't imply
 24 that that's the only way. We could just go on and say
 25 "or otherwise."

1 CHAIRMAN BABCOCK: Judge Peeples.
 2 HONORABLE DAVID PEEPLES: I think Judge
 3 Brister was correct when he said that this isn't a
 4 problem now because the present rule says you've got to
 5 file it ten days before. We've changed that in sub (2),
 6 time to file, which by its terms says you can file it at
 7 any time, which would mean after trial, and certainly we
 8 don't mean that. Do we, Richard?
 9 MR. ORSINGER: Not unless it's something
 10 that occurred after trial.
 11 HONORABLE DAVID PEEPLES: Yeah. Don't we
 12 need to put a limit in sub (2) --
 13 MR. ORSINGER: Yeah.
 14 HONORABLE DAVID PEEPLES: -- to take the
 15 place of the ten-day rule that we've softened and then
 16 haven't you waived it by not asserting it.
 17 HONORABLE SARAH DUNCAN: That's what we
 18 decided not to do.
 19 HONORABLE DAVID PEEPLES: No, no, no.
 20 CHAIRMAN BABCOCK: Scott.
 21 HONORABLE F. SCOTT MCCOWN: How about
 22 this? What if we say in subdivision (c) that when a
 23 judge fully discloses a ground for recusal a party
 24 waives recusal on that ground if the party does not then
 25 move for recusal. So if a judge discloses it, if you

1 CHAIRMAN BABCOCK: Buddy's got a comment
 2 about this.
 3 MR. LOW: The definition of waiver is an
 4 intentional relinquishment of a known right. It doesn't
 5 have to be disclosed by the judge. That's what waiver
 6 is. You try a lawsuit and you define "waiver," you'll
 7 find it in those terms. That's what this is. So it
 8 doesn't have to be revealed by the judge, but I know the
 9 judge's brother-in-law is an investigator for so-and-so.
 10 I know that. He forgets to disclose that on the record
 11 and say it every time. He's busy trying, so I say, "Oh,
 12 wait a minute. It wasn't on the record. There's a
 13 waiver."
 14 I have intentionally relinquished a known
 15 right. I knew about it. You can litigate and take care
 16 of Luke's problem with it because they didn't know about
 17 that, so waiver takes care of it, and you start
 18 expanding it and you have problems when you say it has
 19 to be on the record and disclosed by the judge.
 20 MR. ORSINGER: Well, Buddy, no one is
 21 saying that you can't have waiver except when it's
 22 disclosed. The rule would say if it is disclosed on the
 23 record if you don't move then you waive it, and we don't
 24 take a position on the rest of it, but Luke's had more
 25 of a problem, is that he didn't want to have to get up

1 don't then move for recusal you've waived it; and then
 2 to go back to what Richard said, I mean, we can either
 3 have A or we can have B, but I can't think of any way to
 4 blend the two.
 5 You can either have a system where no
 6 matter when you learn of the grounds for recusal you can
 7 raise recusal, or you can have a system that it's waived
 8 if you don't do it within X days of knowing it. Each of
 9 those has advantages and disadvantages, but what Luke
 10 made the big speech about that swayed the group last
 11 time, and now it seems to be Luke's not here it's moving
 12 away from it, is learning about something within that
 13 ten days or having to litigate when did you know it
 14 exactly. "Well, I knew a little bit, but I didn't know
 15 all." And you either pay one cost or you pay the other,
 16 but there isn't any way to blend the two.
 17 CHAIRMAN BABCOCK: Dorsaneo had
 18 something, Buddy, and then you.
 19 PROFESSOR DORSANEO: Just in terms of the
 20 draft I think that the sentence -- Buddy's suggestion
 21 made sense to me. If you wanted to just get agreement
 22 on, you know, what it could say, "A ground for recusal
 23 may be waived," you know, period. It seems to me then
 24 you have a series of questions as to when that happens.
 25 MR. LOW: Right.

1 on the witness stand and go through a half-day hearing
 2 on when he had enough information to be said to have
 3 known something rather than just suspected it.
 4 CHAIRMAN BABCOCK: Yeah. That was with
 5 the timing issue. That doesn't have anything to do with
 6 waiver.
 7 MR. ORSINGER: Yes, it does because --
 8 HONORABLE F. SCOTT MCCOWN: That's
 9 exactly what it is.
 10 MR. ORSINGER: -- the waiver point is
 11 waiver from some start point, and the start point is
 12 either when you knew or should have known.
 13 HONORABLE SCOTT BRISTER: The current
 14 rule is you waive your motion for recusal ten days
 15 before trial, period.
 16 CHAIRMAN BABCOCK: Right.
 17 HONORABLE SCOTT BRISTER: Now, there's
 18 this one case law exception, unless you didn't find it
 19 until after. So this is a way to get rid of it before
 20 then because this -- for example, the way it comes up is
 21 you've got a big case, 30 lawyers, 6,000 plaintiffs. I
 22 get called up in the middle of the night. "We found a
 23 bomb, Judge Brister, with your name on it, and it's a
 24 reference to this case on it."
 25 My wife doesn't sleep for two days, and

1 PROFESSOR DORSANEO: One of them would be
 2 for noncompliance with the provisions of this rule,
 3 whatever they, you know, end up being. Then we might
 4 come up with a special purpose thing, you know,
 5 disclosure on the record. I'm not sure when then is in
 6 your "then moves for recusal." Presumably it doesn't
 7 mean, you know, instantan then, and then maybe you would
 8 say, you know, there may be other bases for waiver, too.
 9 We're trying to do too much too soon here
 10 it seems to me. Maybe we could say, all right, we like
 11 that one waiver idea that you talked about as a separate
 12 matter, but then come back to it after we deal with the
 13 other things. It's at least four different thoughts or
 14 potentially four different thoughts embedded in one, you
 15 know, ambiguous sentence now.
 16 HONORABLE F. SCOTT MCCOWN: But the key
 17 policy question you have to decide is are you going to
 18 pay the cost of having some number of litigants lay
 19 behind the log in order to not have to litigate
 20 knowingness or due diligence or promptness, or are you
 21 going to have rules that trigger on knowing or due
 22 diligent or prompt, which then means that you're going
 23 to have some number of cases where you have to litigate
 24 those nasty issues or find yourself having waived
 25 something.

1 the, you know, cops watch the house for two weeks and
 2 then it turns out it was all a joke, and it was one of
 3 the former attorneys for one of the plaintiffs. That
 4 needs to be disclosed because for obvious reasons, and I
 5 don't want to fool around with a case with 30 lawyers
 6 and 6,000 plaintiffs which is going to take years to try
 7 if I don't have to.
 8 If I'm recused, if this is what happened,
 9 somebody recuse. File it now. Let's get it figured
 10 out, but for crying out loud this -- recusals are in one
 11 of two cases. They are in bad lawyer cases, frequently
 12 disciplinary lawyers. Lawyers being disciplined love to
 13 file a recusal for the same reason they're getting
 14 disciplined usually, and the other one is extremely
 15 complicated cases where I need to disclose this. We
 16 need to decide this because I've got too many other
 17 things to do to waste months on this complicated case
 18 and then have somebody decide after things don't look
 19 like they're going their way, "Oh, I'm going to file a
 20 motion to recuse. It's 11 days before trial, so you
 21 have to give it to me." That's a big problem.
 22 MR. ORSINGER: Of course, it's a problem
 23 you can cure by calling a hearing and then saying, "I
 24 have this relationship."
 25 HONORABLE SCOTT BRISTER: What in the

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1 rules says I can say, "You must waive right now. You
 2 decide whether you must file a motion within X days."
 3 MR. ORSINGER: The original proposal was
 4 that if the disclosure is made on the record so that we
 5 all know the start point then you'd have a certain
 6 amount of time to move on it or you waive it. Buddy's
 7 debate, though, is that there ought to be waiver based
 8 on other than disclosure on the record.
 9 HONORABLE SCOTT BRISTER: I don't
 10 disagree with that, but I do disagree with there being
 11 no procedure where I can say before I get any further
 12 embroiled in this case, "Is this going to be a problem,
 13 and you-all speak up or forever hold your peace?"
 14 CHAIRMAN BABCOCK: You don't think you
 15 have that authority now?
 16 MR. LOW: What keeps you from doing that
 17 now? No rule tells you you can't do it, so you can do
 18 it.
 19 CHAIRMAN BABCOCK: You call it a 166
 20 hearing. You say we're going to come down and talk
 21 about this case. When you get there you say, "By the
 22 way, here is a potential -- here are potential grounds
 23 for recusal. I'm going to disclose this." You do it on
 24 the record. "Now, I'm telling you guys that you've got
 25 ten days to tell me whether or not you want me to recuse

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1 myself." Don't you think you have that authority right
 2 now?
 3 HONORABLE SCOTT BRISTER: If you have a
 4 rule that says you waive it after it's fully disclosed.
 5 CHAIRMAN BABCOCK: Under the current
 6 rules. Under the current rule.
 7 HONORABLE SCOTT BRISTER: The current
 8 rule says if I fully disclose it on the record then they
 9 waive it if they don't move.
 10 CHAIRMAN BABCOCK: Well...
 11 HONORABLE SCOTT BRISTER: I thought we
 12 were talking about shortening this or dropping it.
 13 CHAIRMAN BABCOCK: It says they may waive
 14 it. "May waive any ground after it is fully disclosed."
 15 There is no provision when they have to waive it.
 16 MR. ORSINGER: This is a voluntary waiver
 17 by the aggrieved party. The new proposal we're talking
 18 about is that the judge sets a time clock on the recusal
 19 by convening everything and saying, "Look, I go to
 20 church. This is my son's godfather that's on the other
 21 side of the case, and if you have a problem with that,
 22 you tell me within ten days."
 23 CHAIRMAN BABCOCK: And I think the judge
 24 has that authority now.
 25 HONORABLE SARAH DUNCAN: I don't think,

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1 Chip, the question is whether the judge has the
 2 authority. It's whether the trial judge can ensure, is
 3 what you're talking about, that waiver will be found.
 4 If I make this disclosure then the party will be deemed
 5 to have waived that ground of recusal, and I can
 6 understand how you would want to fully disclose and get
 7 the issue decided before you --
 8 CHAIRMAN BABCOCK: Judge Brister does two
 9 things. He makes full disclosure. We assume that. And
 10 then second thing, he says, "Now, I've made full
 11 disclosure. Tell me within ten days whether you waive
 12 or not."
 13 HONORABLE SARAH DUNCAN: I think it's
 14 "tell me now."
 15 CHAIRMAN BABCOCK: Or "tell me now."
 16 HONORABLE SCOTT BRISTER: No, I don't
 17 want them to have to do it right in front of me. I
 18 think they ought to be able to talk to their client,
 19 et cetera.
 20 CHAIRMAN BABCOCK: Okay. Three days,
 21 however many days.
 22 HONORABLE SCOTT BRISTER: Ten days is
 23 fine.
 24 CHAIRMAN BABCOCK: But can't he do that
 25 right now? And can you imagine an appellate court

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1 saying that there has not been waiver if he does it that
 2 way?
 3 HONORABLE SCOTT BRISTER: I think I can,
 4 and that's why I like this language. I thought we were
 5 talking about dropping this language.
 6 HONORABLE SARAH DUNCAN: Yeah, I can see
 7 an appellate court saying there is no waiver. I can see
 8 them saying that it was not voluntary.
 9 MR. ORSINGER: What do the two court of
 10 appeals justices say?
 11 HONORABLE PHIL HARDBERGER: I would agree
 12 there's waiver.
 13 HON. ANN CRAWFORD MCCLURE: There's
 14 waiver.
 15 MR. ORSINGER: Three, okay. Well, we
 16 have a unanimous opinion.
 17 CHAIRMAN BABCOCK: Yeah. I mean, I
 18 can't --
 19 HONORABLE DAVID PEEPLES: Nobody is
 20 proposing to take this language out, are they?
 21 CHAIRMAN BABCOCK: Yeah. That's how we
 22 got started on all this.
 23 HONORABLE HARVEY BROWN: I think they're
 24 proposing to add to it.
 25 HONORABLE SARAH DUNCAN: I'm only

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1 proposing to make it clear what it says.
 2 HONORABLE DAVID PEEPLES: I think it
 3 needs to be supplemented.
 4 CHAIRMAN BABCOCK: Paula, you've got
 5 something to say? And then tell me what we need to
 6 supplement it with, David.
 7 MS. SWEENEY: Is -- and forgive me for
 8 not knowing this, but if you're recused in this scenario
 9 that you gave, does that void or make voidable all prior
 10 orders?
 11 HONORABLE SCOTT BRISTER: I'm recusable.
 12 Recusable they're voidable. The new judge can revisit
 13 them but doesn't have to.
 14 MS. SWEENEY: Well, then why is it such a
 15 horrendous waste of time for the scenario that you
 16 enumerated where --
 17 HONORABLE SCOTT BRISTER: Because I've
 18 got 800 cases I could spend rather than their motions
 19 for summary -- you know, I mean, that's a --
 20 MS. SWEENEY: But that's no different
 21 than the Bexar County different judge every time you go
 22 down there issue.
 23 HONORABLE SCOTT BRISTER: Well, that may
 24 be, but you can bet once I'm recused -- my experience
 25 has been on the cases where I voluntarily recuse or

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1 something like that, it goes to the new judge, the
 2 motion will always be filed for rehearing, and another
 3 judge will have to look at -- will cover all the same
 4 ground again.
 5 MS. SWEENEY: Okay.
 6 CHAIRMAN BABCOCK: Okay.
 7 HONORABLE F. SCOTT MCCOWN: I guess I've
 8 come around to thinking this language that we have is
 9 perfect because we may need additional language to cover
 10 other situations, but what this says, you can't put a
 11 time limit on it because of central dockets, because of
 12 T.R.O.'s, because of injunctions. This just says that a
 13 judge can say to the parties, "This ground for recusal
 14 exists in this case. What do you want to do?" And if
 15 they want to say on the record, "We waive it," they can.
 16 If they have got some time to talk about it or get with
 17 their clients, it gives you complete flexibility. The
 18 parties can't be forced to do anything by the judge.
 19 It's perfect to cover what we want. It may not cover
 20 other things we want.
 21 CHAIRMAN BABCOCK: Okay. I agree with
 22 what you're saying. David, didn't you have some other
 23 language that you thought it ought to be supplemented
 24 with?
 25 HONORABLE DAVID PEEPLES: Well, I already

1 said it, and nobody agreed with it.
 2 CHAIRMAN BABCOCK: well, try it again.
 3 This is a flexible group.
 4 HONORABLE DAVID PEEPLES: Okay. In the
 5 existing 18b sub (5) we've got virtually the same
 6 language. It's rewritten, but it says the same thing.
 7 CHAIRMAN BABCOCK: Okay.
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 9 you can look at that language and say that's how you
 10 waive, but if you just go right up to the brink and
 11 later on and don't assert it timely that's not waiver
 12 because this is the waiver rule we've got here. That's
 13 not a problem under the present rule because you've got
 14 the ten-day time limit. We have softened the ten-day
 15 time limit in sub (2).
 16 CHAIRMAN BABCOCK: Right.
 17 HONORABLE DAVID PEEPLES: It says you can
 18 file this at any time, and I think that needs to say
 19 "any time before a trial or hearing" or something, and
 20 then you've got --
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 19 MR. LOW: But, Scott, what if you don't
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 22 HONORABLE F. SCOTT MCCOWN: No, wait,
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 24 to waive and saying this is the only way to waive. This
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 9 CHAIRMAN BABCOCK: Sarah.
 10 HONORABLE SARAH DUNCAN: And with that
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 24 lawyers in the context of them not having complete
 25 information, Luke's argument from last time. Maybe we

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1 do, in fact, want to consider as an alternative that
 2 it's waived only when there's been disclosure on the
 3 record and inaction or an express agreement to proceed
 4 before the judge by the party and the party's counsel.
 5 CHAIRMAN BABCOCK: Okay. Hold those
 6 thoughts because we're going to keep talking about them
 7 as we talk about procedure. So, Richard, outline for us
 8 what (d)(1) does for us. Or Carl. I don't care who.
 9 MR. ORSINGER: Either one of us. We've
 10 added factual basis. As the rule existed before, and,
 11 Carl, I think I'm correct, am I not, that you had to
 12 state the grounds with specificity but you didn't have
 13 to state the grounds to back it up, and we're now
 14 requiring that the facts be backed up and be under oath.
 15 MR. HAMILTON: Yeah. This is David
 16 Peeples' suggestion to have more detail in the motion.
 17 Of course, that also goes hand in hand with the Option 2
 18 on page four, which would allow the presiding judge to
 19 summarily deny the motion if it wasn't procedurally
 20 proper and didn't have enough detail stated in the
 21 motion.
 22 CHAIRMAN BABCOCK: Anybody opposed to
 23 having this language, "the factual and legal basis for
 24 recusal or disqualification"? I'll tell you an
 25 additional reason in my judgment to have this is an

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1 experience I had recently where the petition was
 2 extraordinarily vague, and we asked for more detail,
 3 didn't get it, at the hearing got ambushed where they
 4 supplied the detail. The motion was granted. The
 5 recusal motion was granted at the hearing, and there was
 6 virtually no remedy when the recusal is granted, which
 7 may be another issue, but -- and it's had a big impact
 8 on the litigation, so I think this is a very good change
 9 myself. Anybody think this is a bad idea?
 10 PROFESSOR DORSANEO: Just the first one,
 11 right, the first part?
 12 CHAIRMAN BABCOCK: Yeah. Just the
 13 "factual and legal basis for recusal or
 14 disqualification."
 15 PROFESSOR DORSANEO: That's fine.
 16 CHAIRMAN BABCOCK: Anybody think that's a
 17 bad idea? Okay. So we'll incorporate that. What's
 18 next, Carl?
 19 MR. HAMILTON: Next says that "The motion
 20 must be filed in the case in which the movant seeks
 21 removal and disqualification." That wasn't in there,
 22 and it may be unnecessary, but --
 23 HONORABLE SCOTT BRISTER: Where else
 24 would you file it?
 25 MR. HAMILTON: Well, you might file it as

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1 another lawsuit or something to try to get the judge
 2 recused.
 3 HONORABLE SCOTT BRISTER: I think it's
 4 surplus.
 5 MR. ORSINGER: I think we can eliminate
 6 that.
 7 HONORABLE DAVID PEEPLES: I do, too.
 8 CHAIRMAN BABCOCK: Anybody disagree that
 9 this is surplusage, that it should be eliminated?
 10 Anybody think that's not a good idea?
 11 Okay. That's eliminated then. So then
 12 that would pick up "state in detail the factual and
 13 legal basis for recusal or disqualification and must be
 14 made on personal knowledge or upon information and
 15 belief if the grounds for such belief are stated
 16 specifically," period.
 17 MR. HAMILTON: Right. Right.
 18 PROFESSOR DORSANEO: Let me--
 19 CHAIRMAN BABCOCK: Bill.
 20 PROFESSOR DORSANEO: This is probably --
 21 I'm probably not thinking straight, but suppose we do go
 22 back and put that campaign contribution stuff in there
 23 in some form. Is that going to have to be redone in
 24 every case?
 25 MR. ORSINGER: What do you mean?

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1 PROFESSOR DORSANEO: Well, you're going
 2 to have a motion to recuse based upon one or both of
 3 those grounds in one case and then you relitigate it or
 4 we're just going to let estoppel by judgment principles.
 5 HONORABLE SCOTT BRISTER: Judge X is
 6 recused because Vinson & Elkins gave him more, does
 7 that -- I would think you would have to do it in each
 8 case.
 9 HONORABLE F. SCOTT MCCOWN: It's
 10 waivable, so you have to do it in each case.
 11 MR. ORSINGER: We've got to have a motion
 12 and a new case is decided anew. Otherwise --
 13 HONORABLE SCOTT BRISTER: Otherwise some
 14 other judge is recusing them in my case.
 15 PROFESSOR DORSANEO: Okay. That's taken
 16 care of by other preclusion principle, I guess.
 17 MR. ORSINGER: But it should be proven.
 18 CHAIRMAN BABCOCK: All right. New
 19 sentence, Carl, "a judge's ruling."
 20 MR. HAMILTON: well, this is part of the
 21 recodification, "may not be used as a grounds for the
 22 motion but may be used as evidence supporting the
 23 motion." That's in the recodification now.
 24 CHAIRMAN BABCOCK: But it's new to the
 25 present rule.

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1 MR. HAMILTON: New to present rule.
 2 MR. ORSINGER: And we discussed this at
 3 great length in the last committee cycle that sometimes
 4 rulings can reflect a bias which sometimes can be a
 5 basis but that a ruling itself should not be a ground,
 6 and we had a big discussion. The distinction wasn't all
 7 that clear to me, but this is here now because the full
 8 committee decided to do it last time and not because
 9 this subcommittee has redebated it.
 10 CHAIRMAN BABCOCK: Was I at that meeting?
 11 MR. ORSINGER: You were at a lot of those
 12 meetings.
 13 CHAIRMAN BABCOCK: You're not talking
 14 about this group in our last meeting. You're talking
 15 about --
 16 MR. ORSINGER: In the former incarnation.
 17 When he talks about this is from the recodification
 18 draft that means the final product that this committee
 19 sent three or four years ago to the Supreme Court.
 20 CHAIRMAN BABCOCK: Okay. All right.
 21 MR. ORSINGER: Two or three years ago.
 22 CHAIRMAN BABCOCK: All right. I'm with
 23 you.
 24 MR. ORSINGER: So it has more --
 25 HONORABLE F. SCOTT MCCOWN: Does that

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1 mean that a litigant could plead as the ground bias
 2 against me and can prove that ground solely by pointing
 3 to the rulings of the judge? Because if so, that is a
 4 change in the present law and one that I think would be
 5 unwise.
 6 MR. HAMILTON: It says he cannot do that.
 7 HONORABLE DAVID PEEPLES: Well, it might
 8 be relevant on these other subject matters.
 9 CHAIRMAN BABCOCK: Well, the ground is
 10 the judge's impartiality might reasonably be questioned.
 11 Exhibit 1 through 6. Look at these discovery rules, you
 12 know, "He's ruled against me every time, and I say that
 13 that's evidence and that I have clear winners each time,
 14 so that's evidence that his impartiality is in
 15 question."
 16 HONORABLE SCOTT BRISTER: The remedy for
 17 that ought to be appeal.
 18 CHAIRMAN BABCOCK: Have you got a better
 19 example, Richard, than the one I just gave?
 20 MR. ORSINGER: Well, I think that's
 21 the -- the most telling -- I mean, the most telling
 22 evidence that a judge is not impartial is if the judge
 23 is making rulings that an assigned judge can see cannot
 24 be explained on any basis other than on a lack of
 25 impartiality. So we're going to say that --

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1 HONORABLE F. SCOTT McCOWN: Well, what
 2 about a lack of intelligence?
 3 MR. ORSINGER: Well, then the -- that's a
 4 question -- see, that is a question for the judge who's
 5 assigned to hear the recusal as to whether it's
 6 impartiality or just bad judging, but what you're
 7 proposing basically for us to predetermine that rulings
 8 themselves cannot be evidence of impartiality. We're
 9 not saying that rulings prove lack of impartiality.
 10 We're just saying that they can be evidence of it.
 11 HONORABLE F. SCOTT McCOWN: well, I guess
 12 the problem is this is the No. 1 ground for pro se
 13 litigants, and I just think it -- you can't -- the law
 14 right now is that you can't look at rulings to prove
 15 bias; and if we put this in, I think that changes the
 16 law and the remedy for that. If those rulings are so
 17 outrageous that they prove bias then we don't have to
 18 have recusal. They're correctable by mandamus or
 19 appeal. The reason you need recusal is because you're
 20 getting rulings against you that are going to be
 21 unreviewable on appeal because they're discretionary and
 22 et cetera, and I just think this would be a big mistake.
 23 CHAIRMAN BABCOCK: Bill, then Sarah.
 24 PROFESSOR DORSANEO: The language is a
 25 little bit, you know, ambiguous to me as to why this

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1 evidence is coming in, but wouldn't you agree that
 2 the -- that it would at least be relevant to the entire
 3 question as to what rulings were made?
 4 HONORABLE SCOTT BRISTER: It's hard to
 5 say it ought to be inadmissible.
 6 PROFESSOR DORSANEO: Yeah. I think what
 7 I'm reading this as trying to say is this is avoiding
 8 arguments about the admissibility of these rulings, and
 9 it strikes me that it would be odd that you couldn't
 10 talk about the case, right? And that's all I'm reading
 11 it to mean. Now, where it says -- it says this
 12 language. It has "supporting the motion." Well, maybe
 13 that's just suggestive that it's enough, but that's not
 14 how I would read it. That's not how I would read it.
 15 HONORABLE F. SCOTT McCOWN: Well, I'm not
 16 saying that you can't in a particular case show the
 17 rulings as evidence of bias, but I don't think we ought
 18 to have this language in here.
 19 CHAIRMAN BABCOCK: Sarah, did you have a
 20 comment?
 21 HONORABLE SARAH DUNCAN: I did, but I've
 22 forgotten it.
 23 HONORABLE SCOTT BRISTER: The reason we
 24 put them in here the last time I remember, I've got it
 25 on my notes, is because otherwise in the old rule there

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1 is nothing indicating that the rulings of the judge are
 2 not a good ground to show bias or prejudice. So the
 3 reason this was put in was to try to help exactly your
 4 concern because there is certainly nothing in the
 5 current rule that says the judge's ruling can't be a
 6 perfectly good ground to try to get them recused on.
 7 CHAIRMAN BABCOCK: Sarah.
 8 HONORABLE SARAH DUNCAN: I remember. Why
 9 should a party have to appeal, go through a trial and
 10 have rulings that are clearly purely a result of bias or
 11 prejudice? We ought to be able to short-circuit that
 12 and stop the trial and get the judge recused and then
 13 proceed with a judge that's not biased or prejudiced.
 14 So I don't -- if the rulings are admitted
 15 and they don't demonstrate bias or prejudice, they're
 16 like so much other evidence. They're just evidence.
 17 They're not proof. I can't imagine if there are rulings
 18 that are clearly evidence of bias or prejudice that you
 19 wouldn't be able to get those admitted in recusal. I
 20 can't imagine.
 21 CHAIRMAN BABCOCK: Bill.
 22 MR. EDWARDS: why are we having a hearing
 23 on a recusal after the judge is making rulings? I
 24 thought we were doing the recusal before we had any
 25 rulings and that --

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1 HONORABLE DAVID PEEPLES: They may be
 2 pretrial rulings, you know, summary judgment, Dauber,
 3 discovery.
 4 MR. EDWARDS: well, I know, but if there
 5 is a reason to recuse -- if there's a reason to recuse,
 6 it should be done before those hearings.
 7 HONORABLE SARAH DUNCAN: But we've lifted
 8 the time limit.
 9 MR. ORSINGER: When do you reasonably
 10 know that a judge is not impartial? After the first
 11 ruling, before the first ruling, after the third ruling,
 12 after the --
 13 MR. EDWARDS: He may be -- a judge is a
 14 human, and they hear the evidence, and they decide that
 15 there is no evidence to support one side or the other,
 16 does that make them impartial or not impartial?
 17 CHAIRMAN BABCOCK: A month before trial
 18 after you've been in pretrial for two years, and you've
 19 been getting hammered. You find out that the lawyer on
 20 the other side has contributed excessive campaign
 21 contributions to the judge. You file a motion. You say
 22 under (1) or if we have (9) or (10), under (9) or (10),
 23 and you say, "Judge, you ought to be recused." He says,
 24 "I'm not going to do it."
 25 Then you go to the next guy, and the

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1 recusal judge, you say, "Judge, there is a -- there is
 2 grounds to recuse this judge because he's gotten
 3 excessive campaign contributions, plus look at what he's
 4 been doing to me. He called my client an ignorant slut
 5 on the record" and you know, blah-blah-blah. It seems
 6 to me you ought to be able to do that.
 7 MR. EDWARDS: Yeah, but on the other hand
 8 the judge comes in and says, "Listen, I've ruled in his
 9 favor every time so far," in the back of his head, "I'm
 10 going to get him in the end." Are the favorable rulings
 11 evidence? I don't think so. Bad rulings over a period
 12 of time may be your ability, if you need to do it, to
 13 show harm at the end of the case. That issue on whether
 14 or not on appeal of a refusal to recuse requires a
 15 showing of harm or whether it's subject or not subject
 16 to the harmful error rule.
 17 If it is subject to the harmful error
 18 rule then rulings on appeal, yeah, they will help
 19 bolster your case, but it seems to me that we should be
 20 through with recusal by the time we get in trial, and if
 21 we get in trial then we're looking at appeal. Because I
 22 know as a litigating lawyer regardless of which side I'm
 23 on I don't want to be in there for two weeks trying a
 24 lawsuit and I happen to be winning, the rulings are
 25 going with me, and the lawyer on the other side files a

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1 motion to recuse and wants to prove up every ruling that
 2 that court made. It takes us a month to get the record
 3 so he can prove up his case. That's ridiculous.
 4 MR. ORSINGER: Isn't that a timing issue?
 5 You want it, like David Peeples' was saying, waived if
 6 you don't raise it by the time you start trial?
 7 MR. EDWARDS: You've got that right.
 8 MR. ORSINGER: Okay. So that's really
 9 the next paragraph.
 10 CHAIRMAN BABCOCK: Okay. Is there any
 11 disagreement about the first part of this sentence, "A
 12 judge's rulings may not be used as the grounds for the
 13 motion."? Everybody is in agreement on that, right?
 14 PROFESSOR DORSANEO: Right.
 15 CHAIRMAN BABCOCK: So what we're hung up
 16 on is "The rulings may be used as evidence supporting
 17 the motion." Buddy.
 18 MR. LOW: Michael has a point. A judge's
 19 ruling in this case or other cases?
 20 MR. EDWARDS: I was going to ask that,
 21 too, you know.
 22 MR. LOW: Mike called it to my attention.
 23 MR. ORSINGER: I don't see why we're
 24 limiting the scope of evidence. Why are we sitting here
 25 ruling that perhaps legitimate evidence can't be used?

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1 MR. LOW: No, we're not the evidence.
 2 We're just saying a judge's rulings may not be used as
 3 grounds for the motion.
 4 MR. ORSINGER: I think we all agree that
 5 that's okay. We're fighting over the second part of
 6 that sentence.
 7 MR. LOW: But rulings in this case or
 8 does it mean that --
 9 CHAIRMAN BABCOCK: You can do a ten-year
 10 study on that judge and say he always rules against
 11 plaintiffs.
 12 MR. LOW: On any case.
 13 MR. ORSINGER: That's probably pretty
 14 meaningful evidence.
 15 MR. LOW: And so as rulings, I think it's
 16 intended "the judge's rulings in this case may not be
 17 used" is what I think it is maybe, but I don't know.
 18 CHAIRMAN BABCOCK: Mike had his hand up
 19 first and then Sarah and then Carl.
 20 MR. HATCHELL: No. I wasn't going to say
 21 anything.
 22 CHAIRMAN BABCOCK: You weren't going to
 23 say anything? Well, then Sarah.
 24 HONORABLE SARAH DUNCAN: If I can prove
 25 that -- if the ground in my motion is bias or prejudice,

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1 I'm representing General Motors and I can prove that
 2 this judge has ruled against General Motors on every
 3 objection General Motors has ever filed in every lawsuit
 4 before this judge, and I can't admit that as evidence of
 5 bias or prejudice against this judge?
 6 MR. LOW: Well, now, you're talking about
 7 evidence. "As a ground" is the first part.
 8 HONORABLE SARAH DUNCAN: Right. And I'm
 9 not disagreeing about that. I'm speaking to not being
 10 able to admit evidence of rulings in other cases as well
 11 as this case as evidence of bias or prejudice in this
 12 case.
 13 CHAIRMAN BABCOCK: Carl.
 14 MR. HAMILTON: The sentence might,
 15 however, limit the evidence to evidence supporting the
 16 motion, and as Bill suggested, maybe we ought to provide
 17 that you can also introduce his favorable rulings. I
 18 don't know why it ought to be just maybe used as
 19 evidence on the hearing. Either way.
 20 CHAIRMAN BABCOCK: Scott, Buddy, then
 21 David.
 22 HONORABLE F. SCOTT MCCOWN: I mean, this
 23 is really a Pandora's box that shouldn't be opened. If
 24 you've got the "but" clause, it completely undoes the
 25 first part of the sentence because you can always just

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1 append your attack on the judge's rulings to some
 2 allegation of personal bias or prejudice which concerns
 3 the subject matter or the party. Judges should not be
 4 subject to attack or recusal based on their rulings.
 5 That can be appealed. If they're wrong, they're
 6 reversed.
 7 In answer to Justice Duncan's question
 8 why should we have to have an appeal, it's because of
 9 the cost to the system. We pay a very high cost when we
 10 have recusal motions based upon rulings in this case or
 11 rulings in a judge's history. It's a very high cost,
 12 and in an individual case you've got a judge who has
 13 ruled against you. If those rulings are so extreme or
 14 that judge is so extreme then your remedy is appeal in
 15 your case.
 16 CHAIRMAN BABCOCK: Buddy.
 17 MR. LOW: I really -- go ahead.
 18 CHAIRMAN BABCOCK: David, then Bill.
 19 HONORABLE DAVID PEEPLES: Scott said a
 20 lot of what I want to say. I think all of us can agree
 21 that there are judges who are unfair and you could
 22 probably prove it if you could get all of this evidence
 23 in. You could prove it to the satisfaction of many
 24 people, but it seems to me if we allow it by having this
 25 language in there, we pay a big price in the

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1 unmeritorious times that this is alleged.
 2 I think if we take that language out, the
 3 recusal judge will still have the discretion to hear a
 4 little bit of this evidence, but wouldn't have to let
 5 somebody introduce, you know, reams concerning other
 6 cases and so forth, and I think that on balance I agree
 7 with Scott McCown. The cost to the system if we allow
 8 this and encourage it with this language vastly outweigh
 9 the good recusal motions.
 10 CHAIRMAN BABCOCK: Bill Rhea.
 11 HONORABLE BILL RHEA: I virtually always
 12 agree with the Central Texas judges, but I don't in this
 13 instance. It seems to me that's --
 14 HONORABLE F. SCOTT MCCOWN: I want to
 15 move to recuse him because he's obviously biased against
 16 Central Texas.
 17 HONORABLE BILL RHEA: It's a regional
 18 thing. It's envy of the Hill Country, I think. It
 19 doesn't seem to me that there's any Pandora's box here.
 20 There are a hundred examples you could think of of
 21 appropriate inquiry into judicial rulings. I mean, you
 22 could draft an order that included some suggestion of
 23 racial bias, for instance, that's going to come in, and
 24 a hundred other things you could think of along that
 25 line, and it seems to me that I think the language

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1 should be changed to just "relative to the motion" or
 2 something like that rather than just "supporting the
 3 motion," but it's innocuous. It makes it clear that the
 4 judge's rulings can come in, and I think it's just
 5 too -- I just don't think it's right to not let that in,
 6 but I would suggest we vote on that idea.
 7 CHAIRMAN BABCOCK: Bill, did you have
 8 something you wanted to add?
 9 MR. EDWARDS: Just that I thought the
 10 problem with recusals were that they were being abused
 11 and filed too many times, one after another and in ways
 12 that ambushed people, had them getting ready for trial
 13 and then losing all the trial preparation, and to add in
 14 that we're going to do it all the way through trial and
 15 let all the rulings come in and all of that, you know,
 16 there is another suggestion in here that under certain
 17 circumstances the trial can continue so that you have
 18 got somebody trying to try the case and at the same time
 19 try the recusal motion. It doesn't make sense to me.
 20 CHAIRMAN BABCOCK: Bill.
 21 PROFESSOR DORSANE: I don't know if this
 22 needs to be said, and I'm not wedded to this language,
 23 instead of "used" we might say "admissible as evidence,"
 24 "admissible if relevant," might take out, you know,
 25 "supporting the motion," but I didn't hear any of the

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1 judges say that they thought that these rulings would
 2 be, you know, just out of bounds, and I think someone
 3 could take that first part of the sentence without the
 4 rest of it as meaning that they're just inadmissible all
 5 the time, and that's why the language at the end is
 6 added. If we make the one point that they are not a
 7 basis for recusal we suggest too much to some people.
 8 HONORABLE F. SCOTT MCCOWN: And I agree.
 9 I would take out the whole thing. I think that some
 10 things may be proper and allowed, but that doesn't mean
 11 you have to write them down and invite people to a
 12 party.
 13 CHAIRMAN BABCOCK: Okay. We've got to
 14 move along here, so here's what we're going to take a
 15 vote on. "A judge's ruling may not be used as the
 16 grounds for the motion but may be admissible as evidence
 17 relative to the motion," period. So that's both clauses
 18 in. How many people think that's a good idea? Raise
 19 your hand. Bill, do you have your hand up?
 20 MR. EDWARDS: No. My hand is way down.
 21 It's my elbows up.
 22 CHAIRMAN BABCOCK: All right. How many
 23 people think that's a bad idea? Okay. 13 to 3 people
 24 think that's a good idea. I don't like it when we take
 25 these votes at the end of the day when -- you know, when

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1 a lot of people have left. The problem is that, you
 2 know, we'll come back here bright-eyed and bushy-tailed
 3 in May and spend five hours talking about this very
 4 thing again.
 5 HONORABLE SCOTT BRISTER: No, the problem
 6 is when it's three years between the last time we voted
 7 on it. It's hard to remember what the discussion was.
 8 CHAIRMAN BABCOCK: Yeah, I know.
 9 MR. ORSINGER: You know, part of the
 10 problem is, is that the people who have the strongest
 11 opinions are not there and don't do the drafting, and
 12 then a lot of them, when those of us are doing the
 13 drafting are asking for help, the people with strong
 14 opinions leave because they have got other things to do,
 15 and we don't find out about their strong opinions until
 16 we bring the language back and then we have another
 17 five-hour denigral.
 18 PROFESSOR DORSANEO: Well, and it just
 19 also could be sometimes that it's just really hard to
 20 get this done.
 21 CHAIRMAN BABCOCK: Too hard? Well, then
 22 we quit.
 23 MR. ORSINGER: If you don't think it's a
 24 waste of the committee's time it would be helpful for us
 25 to go through and discuss these even if we don't have

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1 enough of the committee here.
 2 CHAIRMAN BABCOCK: It's not a waste of
 3 time, and what I'm trying to say is that we are going to
 4 keep a record of what we're doing. In fact, in this
 5 here we've got the transcript of the last hearing, and
 6 the next time we're going to have the transcript of both
 7 these meetings. So we're going to have a record. We're
 8 going to know what we did, and if somebody, you know,
 9 has got a real good point to raise next time then
 10 obviously we'll consider it, but we're not going to just
 11 rehash everything.
 12 MR. ORSINGER: I can't support you more.
 13 How do I support you?
 14 CHAIRMAN BABCOCK: Let's go to the next
 15 part, and that goes back to (b)(9) and (b)(10), and I
 16 think that the intent here is that somebody can't
 17 contribute \$10,000 to Judge Smith and then say, "Oh, by
 18 the way, since I've contributed too much, you're out of
 19 here. You've got to be recused." Right?
 20 MR. HAMILTON: Right. That's the purpose
 21 of it.
 22 MS. SWEENEY: If that works, someone tell
 23 me.
 24 CHAIRMAN BABCOCK: Paula's got that one
 25 in her bag. (5.1/3b)

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1 MS. SWEENEY: I've got some checks to
 2 send out.
 3 PROFESSOR DORSANEO: Did the verification
 4 thing get out of there, or are these always required to
 5 be verified?
 6 MR. HAMILTON: No, it's there.
 7 MR. ORSINGER: No one suggested taking it
 8 out.
 9 CHAIRMAN BABCOCK: Okay. This is going
 10 to get tied into how we fix (9) and (10), if we fix it,
 11 but it looks to me like the sentiment is supported by
 12 everybody. Okay. Now, time to file, No. (2). Who
 13 wants to talk about that, Richard or Carl?
 14 MR. HAMILTON: Well, the last time we
 15 discussed it we decided to eliminate the problem of
 16 having to have knowledge of something, so we just wrote
 17 it that it could be filed at any time, but if it was
 18 filed within that ten-day period it went into the
 19 interim proceedings, but that would still allow one to
 20 lay behind the log and wait until the trial was over to
 21 file a motion to recuse.
 22 So having thought about it, I guess my
 23 suggestion would be that we still allow the filing even
 24 during the time of trial rather than having to litigate
 25 when one had knowledge of grounds, but do not let it be

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1 filed before -- or any time after verdict so that that
 2 would deter someone from laying behind the log and
 3 waiting 'til the verdict was in before they file their
 4 motion to recuse. So it would have to be filed before
 5 verdict, so the only one I would suggest is you say it
 6 could be filed at any time before verdict.
 7 CHAIRMAN BABCOCK: You lost me. What
 8 rule or what part of this proposed rule are you talking
 9 about?
 10 MR. HAMILTON: Time to file.
 11 MR. ORSINGER: What Carl is saying is
 12 that perhaps we ought -- we have no deadline now. In
 13 other words, you are not barred by the passage of any
 14 date. Carl is suggesting that we should put the return
 15 of verdict in a jury trial as a deadline. That's not
 16 written here. That's his proposal.
 17 MR. HAMILTON: For recusal. I think it
 18 would just have to be recusals.
 19 MR. ORSINGER: Just recusals, and then
 20 David Peeples' is floated when you start to trial.
 21 HONORABLE DAVID PEEPLES: Well, the
 22 language that Scott McCown, you know, says what I feel.
 23 MR. ORSINGER: Well, but the problem with
 24 Scott McCown's language is that he pushes it back not to
 25 the start of trial but to within ten days of when the

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1 objective person would have known of the grounds, and
 2 he's got an objective test instead of a subjective test,
 3 but it's still going to be cross-examination time for
 4 the lawyer that filed the motion.
 5 HONORABLE F. SCOTT MCCOWN: Well, but
 6 there's just -- you know, you can either eat chocolate
 7 or you can eat vanilla.
 8 MR. ORSINGER: And we've already voted on
 9 this.
 10 HONORABLE SCOTT MCCOWN: Well --
 11 HONORABLE SARAH DUNCAN: Talk about
 12 rehashing.
 13 MR. ORSINGER: At least twice, if not
 14 three times, we've voted on this.
 15 HONORABLE SARAH DUNCAN: We have voted
 16 repeatedly on whether to have either an objective or a
 17 subjective standard or both, and we have --
 18 HONORABLE F. SCOTT MCCOWN: Well, except
 19 it became clear, though, that that wasn't really the
 20 majority view when we started talking about waiver
 21 because everybody, or at least it seemed like a large
 22 group of people, felt that there could be waiver, which
 23 is just the time question under a different category.
 24 CHAIRMAN BABCOCK: No. It's whether you
 25 win or lose.

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1 HONORABLE SARAH DUNCAN: There are some
 2 people who are here now, but as far as when we voted the
 3 previous time, a majority of the group on those previous
 4 votes --
 5 HONORABLE F. SCOTT MCCOWN: Well, but
 6 here's what you're saying. Are you telling me that
 7 after the verdict I marry the plaintiff's lawyer and you
 8 can't recuse me while I'm considering the motions for
 9 judgment or new trial?
 10 MR. LOW: You have to get you a brief
 11 annulment.
 12 HONORABLE F. SCOTT MCCOWN: I just don't
 13 think that's workable.
 14 MR. ORSINGER: Well, if you're going to
 15 have a deadline before a ruling, you need to make an
 16 allowance for events that occur after the deadline.
 17 Obviously nobody can waive something that hasn't
 18 happened yet.
 19 HONORABLE BILL RHEA: Scott, are you
 20 advocating for the existing language that's on this
 21 piece of paper?
 22 HONORABLE F. SCOTT MCCOWN: No.
 23 MR. ORSINGER: No, no. He wants --
 24 HONORABLE BILL RHEA: At any time.
 25 HONORABLE F. SCOTT MCCOWN: Well, I guess

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1 the way I would say is you can file it at any time, but
 2 after we examine it, if we find that you were laying
 3 behind the log, we can rule that you waived it.
 4 HONORABLE BILL RHEA: But that relates to
 5 what we just talked about in waiver.
 6 MR. ORSINGER: Yes.
 7 HONORABLE SCOTT McCOWN: I think these
 8 two things are the opposite sides of the coin
 9 inextricably intertwined. You can't separate them. You
 10 have to --
 11 MR. ORSINGER: What the committee has
 12 previously done is to eliminate this short fuse on how
 13 quickly you have to file a motion after you become aware
 14 of the grounds. We have done that heretofore.
 15 Today we are redebating whether we ought
 16 to have a deadline that starts a time clock running, and
 17 so if the deadline is when you should have known, not
 18 knew, Scott's proposal forgets "knew." Let's forget
 19 when they knew. Let's just use the objective standard
 20 of when they should have known. Scott's clock starts
 21 running ten days from when they should have known an
 22 objective standard but that's still going to require
 23 inquiry into the evidence that was available to the
 24 lawyer at the time so that a reasonable person without
 25 knowledge either would or wouldn't know to file the

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1 motion.
 2 David is saying the day of trial is the
 3 cutoff time and it's not ten days. It's the day of
 4 trial. Carl is saying that the jury verdict is the
 5 cutoff time, and it's not ten days. It's just the jury
 6 trial. All of those are defensible positions.
 7 HONORABLE DAVID PEEPLES: I'm for cutting
 8 it off I think at the time of trial or hearing with the
 9 exceptions that Scott McCown just --
 10 HONORABLE BILL RHEA: I agree that we've
 11 rehashed that too many times, and we're here, as far as
 12 I can tell. Except that I would raise just a technical
 13 issue. This would appear to apply to motions to recuse
 14 or disqualify, and I would assume we're really talking
 15 about motions to recuse here, so I'd insert after the
 16 "motion" on the second line "a motion to recuse filed on
 17 or after the tenth day," but otherwise it seems --
 18 HONORABLE SCOTT BRISTER: Well, if it's
 19 they can be filed at any time that certainly applies to
 20 disqualification.
 21 MR. ORSINGER: Yeah. He's talking about
 22 the second clause after "however."
 23 CHAIRMAN BABCOCK: Nina.
 24 MS. CORTELL: Isn't it inconsistent for
 25 us to have that first line that you can file at any time

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1 and we also have a concept of waiver? You don't think,
 2 Bill?
 3 PROFESSOR DORSANEO: I think they have to
 4 be -- I think they are two sides of the same question,
 5 and we've put the waiver sentence in abeyance. Me, now,
 6 I would reconcile them. I would be willing to go with
 7 waiver -- the waiver on the record language trumping
 8 this "filed at any time" provision and just have that be
 9 drafted, but I wouldn't probably at this point be
 10 willing to vote in favor of intentional relinquishment
 11 of a known right somebody could argue when I made the
 12 motion later in the game.
 13 The judges have convinced me that that's
 14 a very sensible way to deal with this problem to say,
 15 "Okay. Here's the information," kind of tee it up for
 16 the lawyers. You have to decide within a reasonable
 17 time, but adding waiver in before that or calling the
 18 imposition of some -- I'm not going to use the adjective
 19 "arbitrary," but you know, specific time or date or
 20 period, you know, calling that waiver when it really is
 21 just a requirement, you know, I don't really like that.
 22 I don't like those things.
 23 CHAIRMAN BABCOCK: Judge Peeples.
 24 HONORABLE DAVID PEEPLES: I just pose the
 25 question, should there be a cutoff date after which you

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1 cannot allege grounds (b)(1) and (2), impartiality might
 2 reasonably be questioned, the judge has a personal bias?
 3 Should there not be a cutoff date on that, just a date
 4 after which you can't do it?
 5 HONORABLE BILL RHEA: How do you define
 6 when that becomes apparent?
 7 MS. CORTELL: Yeah. I'm very opposed to
 8 a cutoff on that, and we talked about it in our
 9 subcommittee meeting because we had a very emotional
 10 case in Dallas involving the Catholic diocese, and there
 11 was an event after trial while the jury was
 12 deliberating, and the motion was denied, and I don't
 13 quarrel with that, but there were very high emotions,
 14 and I very much feel like for a sense for that client to
 15 feel that his rights should be heard and were heard and
 16 were heard in a very dignified and proper way was very
 17 important to our system of justice, and I would really
 18 be opposed to a cutoff.
 19 HONORABLE DAVID PEEPLES: That was for
 20 conduct after the verdict?
 21 MS. CORTELL: That's right.
 22 MR. ORSINGER: No, it was -- was it while
 23 the jury was deliberating or after the verdict came
 24 back?
 25 MS. CORTELL: The jury was deliberating.

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1 MR. ORSINGER: Okay. So it was before
 2 verdict, but it was after the evidence closed.
 3 MS. CORTELL: But it could have been --
 4 but, Richard, I mean, it could have been after.
 5 HONORABLE F. SCOTT McCOWN: well, could I
 6 make a suggestion? If we go exactly with the language
 7 we have here in the time to file provision.
 8 CHAIRMAN BABCOCK: (D)(2).
 9 HONORABLE F. SCOTT McCOWN: (D)(2), and
 10 then we add waiver language that takes out -- that says
 11 "Recusal may be waived, (a), by agreeing on the record
 12 to waive the ground of recusal, or (b), by failing to
 13 bring a motion to recuse a judge before a hearing or
 14 trial unless the ground did not exist before or the
 15 judge was not assigned before." Then you just take out
 16 the subjective test.
 17 MR. ORSINGER: Actually, it's an
 18 objective test.
 19 HONORABLE F. SCOTT McCOWN: I'm sorry.
 20 You take out the objective test and you just live with
 21 the sandbag.
 22 HONORABLE SARAH DUNCAN: Is it "may be
 23 waived" or "is waived"?
 24 MR. ORSINGER: And so, Scott, you're
 25 saying if you fail to raise it ten days before a motion

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1 you've blown it for trial as well, right?
 2 HONORABLE F. SCOTT McCOWN: well, I said
 3 "hearing or trial."
 4 MR. ORSINGER: So let's say as a
 5 practical matter, the first time I appear before that
 6 judge is on some special exceptions. Okay. That's
 7 going to be maybe six months before trial, but I have to
 8 file my motion to recuse more than ten days before my
 9 hearing on special exceptions or I've waived it for the
 10 whole rest of the case.
 11 HONORABLE F. SCOTT McCOWN: Unless the
 12 ground did not exist then.
 13 MR. ORSINGER: Okay.
 14 MR. HAMILTON: But you've left out if you
 15 don't know about it.
 16 MR. ORSINGER: That's right.
 17 HONORABLE F. SCOTT McCOWN: well, but,
 18 see, you-all are schizophrenic.
 19 MR. ORSINGER: No, I'm not. I'm not at
 20 all.
 21 HONORABLE F. SCOTT McCOWN: I mean, you
 22 either want that you don't know about it or you want to
 23 give up and not have litigation into that, but every
 24 time we go one direction then the other people start
 25 pulling back. I don't care. From a judge's point of

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1 view I'm willing to live with the sandbagging, but you
 2 can't have them both. You-all keep wanting them both.
 3 Buddy wants them both.
 4 MR. LOW: Oh, no. I don't have any
 5 quarrel with getting on the stand and testifying when I
 6 found out about it. I mean, I'm going to present all
 7 the evidence of what it is, and me finding out about it
 8 is not going to be damaging to my relationship with the
 9 judge as what I'm going to present, so I don't mind that
 10 at all.
 11 MR. HAMILTON: If you remember Luke's
 12 example, a lot of facts developed and it was very
 13 difficult even with those facts to determine whether
 14 there was a ground for recusal.
 15 MR. LOW: I know, but he could testify
 16 about when he first had reason to believe.
 17 MR. ORSINGER: But the problem Luke
 18 presented, we all know that ultimately he ended up with
 19 grounds. The guy lied under oath, the judge did. Okay.
 20 That's grounds. The question is when did Luke know or
 21 should have known that he had the grounds, and he was
 22 accumulating evidence. He started out with hearsay. He
 23 got some feedback from somebody that told him they heard
 24 from some -- and he got an affidavit and then he got
 25 another affidavit, and then finally he filed his motion,

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1 and then he took a deposition, and he got some proof.
 2 Now, at what point did Luke know or
 3 should have known, and he doesn't want to be in there
 4 when he's trying to build a case before he makes an
 5 accusation like that and then some judge that's assigned
 6 to the hearing says, "You should have known after the
 7 first hearsay comment that was just rumors. Motion
 8 denied," and then Luke's client comes back and says,
 9 "You mean I'm stuck with this corrupt judge because you
 10 didn't file this motion in time?"
 11 I mean, why are we trying the judgment
 12 call on when to file the motion. We ought to be trying
 13 the judgment call on whether the judge should be recused
 14 or not. That was Luke's point, I think.
 15 MR. LOW: well, Luke won that case, so I
 16 don't have a lot of sympathy for him.
 17 HONORABLE SCOTT BRISTER: So what
 18 happens, judge's nephew is the attorney for one of the
 19 parties. The judge doesn't disclose it on the record
 20 because judge assumes everybody knows this is my nephew.
 21 Goes to trial, you lose, so then you make the motion.
 22 Judge is recused because nephew tried the case, has to
 23 be granted because it's third degree, and then do you
 24 just --
 25 MR. ORSINGER: Did you just name a

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1 disqualification ground?
 2 HONORABLE SCOTT BRISTER: No.
 3 MR. ORSINGER: That's not a
 4 disqualification ground?
 5 HONORABLE SCOTT BRISTER: No. That's a
 6 recusal ground. So then the question is, you know, is
 7 that what you want to do, that that's -- you haven't
 8 waived that by going all the way through even though
 9 you've got a clear recusal ground?
 10 HONORABLE BILL RHEA: And the new judge
 11 files a motion based on the new evidence, trial
 12 evidence, denied.
 13 HONORABLE SCOTT BRISTER: You would file
 14 a motion for new trial and then the question is -- you
 15 know, that would be an interesting question whether you
 16 grant it or not, but that's a different question.
 17 MR. HAMILTON: Why isn't that cured by
 18 requiring that the judge disclose that on the record and
 19 creating the waiver?
 20 HONORABLE SCOTT BRISTER: Well, for
 21 instance, I don't disclose any more that I worked at
 22 Andrews-Curth ten years ago because it was ten years
 23 ago, but then sure enough two years ago a contract which
 24 had been drafted the month before I left Andrews & Curth
 25 by a lawyer who has also left Andrews & Curth was the

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1 subject of this case, and it never came up. I had no
 2 idea. You know, I figured I had been doing this for ten
 3 years and this came up afterwards and it was
 4 disqualified. You know, sometimes you -- do you have to
 5 tell everybody forever where you used to work?
 6 CHAIRMAN BABCOCK: Buddy.
 7 MR. LOW: You know, trying to cure Luke's
 8 problem when you had a judge that lied, do you think
 9 disclosure, telling him that he's got to disclose, isn't
 10 going to keep him from lying? Really, that's a
 11 situation I hate to draft a rule from it's so
 12 exaggerated and out, and to do that it just violates
 13 many things that never exist. A judge that lied and so
 14 forth, I don't know how you pass rules like that.
 15 MR. ORSINGER: Yeah, the problem, though,
 16 is broader than that. If it's any one of these grounds
 17 then the lawyer who did not move as soon as a reasonable
 18 lawyer under the same or similar circumstances would be
 19 out, and so we have a negligence case going on in the
 20 middle of a motion to recuse on the lawyer who's
 21 representing the party who wants fair justice, and now
 22 all of the sudden we're saying, "You can't have fair
 23 justice because we decided that your lawyer waited one
 24 day too long to file this motion, even though maybe it
 25 wasn't quite that clear, but a reasonable lawyer under

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1 the same or similar circumstances would have." Why
 2 should justice depend on that?
 3 MR. LOW: How do you avoid it?
 4 MR. ORSINGER: The way this is written,
 5 if you've got grounds then you can file them any time
 6 you want, and if Scott's worried that somebody is going
 7 to disqualify him because of something, he can say, "I
 8 worked for Andrews-Curth ten years ago." I don't think
 9 anyone is going to recuse you because you worked there
 10 ten years ago, and if it was your nephew and you didn't
 11 disclose it, I think that probably the judge might
 12 recuse you if they have to, but then go ahead and resign
 13 all of your orders.
 14 CHAIRMAN BABCOCK: Judge Peeples. I'm
 15 sorry. Go ahead, Richard.
 16 MR. ORSINGER: That's all right.
 17 HONORABLE DAVID PEEPLES: Do you-all
 18 think that somebody ought to urge after trial "I want
 19 this judge recused for post-trial motions because so
 20 many rulings went against me and the way he acted and so
 21 forth and, therefore, he was partial?"
 22 MR. HAMILTON: No.
 23 MR. ORSINGER: No.
 24 HONORABLE DAVID PEEPLES: How do we stop
 25 that?

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1 HONORABLE BILL RHEA: I don't agree with
 2 that. You know, the judge can roll their eyes during
 3 the trial, for instance. You bet they ought to be able
 4 to do that in front of the jury.
 5 HONORABLE DAVID PEEPLES: I thought
 6 Luke's point last meeting was that the time -- there
 7 shouldn't be a starting time --
 8 MR. ORSINGER: Based on knew or should
 9 have known.
 10 HONORABLE DAVID PEEPLES: Yeah. And then
 11 you look back to see if people acted quickly enough, but
 12 I thought he said there should be an ending time after
 13 which it's not timely unless there are some of these
 14 rare exceptions.
 15 MR. ORSINGER: Yeah, I think the debates
 16 are different debates.
 17 HONORABLE DAVID PEEPLES: And I thought
 18 we had decided that one in favor of having a stop time
 19 as opposed to a starting time. That's the vote we took,
 20 and I thought it passed.
 21 HONORABLE SARAH DUNCAN: I don't think
 22 so.
 23 MR. ORSINGER: I don't think our vote
 24 includes your position that there's a stop time, but I
 25 think our vote does say that the start time shouldn't

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1 depend on what the lawyer knew or should have known.
 2 HONORABLE DAVID PEEPLES: We certainly
 3 decided that.
 4 HONORABLE F. SCOTT McCOWN: But there's a
 5 difference between a start time and an exception. So,
 6 for example, under the way I originally proposed my
 7 waiver rule you could file your motion at any time, and
 8 we did not inquire into your diligence or your knowledge
 9 unless it was within ten days of the trial or hearing,
 10 and if you're going to do it that late then we would
 11 inquire into your diligence, was the test I proposed,
 12 objective. You could make it subjective, we could say
 13 "your knowledge."
 14 You're just going to have to decide what
 15 particular cost do you want to pay? Do you want to live
 16 with sandbagging, or do you want to live with losing
 17 some recusal motions, or do you want to strike a
 18 compromise that does away with some sandbagging but
 19 leaves you with some? I mean, we've argued this. It's
 20 just a matter of your empirical feel for which one of
 21 those makes a better world.
 22 CHAIRMAN BABCOCK: I've been trying to go
 23 over some of the last proceedings, and here's what I've
 24 found. No. 1, it seems to me when we're talking about
 25 waiver and time to file, they are related but they are,

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1 it seems to me, different concepts. Time to file is
 2 more like a statute of limitations. You've got to do it
 3 within this period of time. You may do it within the
 4 right period of time, but you may have also waived your
 5 rights.
 6 HONORABLE F. SCOTT McCOWN: But if that's
 7 true then the waiver is the true time to file. They are
 8 not -- you can't --
 9 CHAIRMAN BABCOCK: Not necessarily. Not
 10 necessarily. Because, you know, the judge could fully
 11 disclose in his mind and say, "Okay, anybody here got a
 12 problem with that?" "No, your Honor." "No, your
 13 Honor." They go forward. Then ten days before trial or
 14 whatever time period we put on it, they file a motion to
 15 recuse saying there was not a full disclosure. The
 16 defense to that is waiver. "Yes, there was a full
 17 disclosure and you waived," and then the issue relates
 18 to whether there was a full disclosure.
 19 HONORABLE F. SCOTT McCOWN: But the time
 20 to file is the last point in time at which you can file
 21 without having waived. I mean, that is the true time to
 22 file.
 23 CHAIRMAN BABCOCK: Maybe so. In any
 24 event, we did vote on this, that the issue was raised
 25 after Luke made his speech and then a whole bunch of

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1 discussion whether or not we ought to tag the time to
 2 file to when the lawyer knew it, when you know it, and
 3 we unanimously rejected that, and I made a comment in
 4 the record that almost the full committee was here, so
 5 that was put on the record.
 6 Then as we went forward Luke was asked
 7 about whether there ought to be an ending time, and he
 8 said, "Well, there could be facts that develop during
 9 trial that could" -- what you said, Bill, that could
 10 justify recusal, and those ought to be preserved, and as
 11 best I can tell we didn't take a vote on that. We just
 12 discussed it for a long time. So that's some history.
 13 Yeah, Bill.
 14 HONORABLE BILL RHEA: Taking into account
 15 much of this discussion and also going back to what Nina
 16 said a little while ago about whether filed at any time
 17 may be the flip side of the waiver issue, what if we
 18 just eliminated the first part of the phrase, because I
 19 don't think it really adds anything? We can just stay
 20 silent as to that, so it doesn't eliminate it, it
 21 doesn't suggest anything in regards to waiver, and we
 22 just say, "A motion to recuse filed on or after the
 23 tenth day prior to the date discovered by paragraph
 24 such-and-such," and I -- well, I'll leave it at that.
 25 HONORABLE F. SCOTT McCOWN: I think that

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1 obscures the problem, but I don't think it solves it.
 2 HONORABLE BILL RHEA: Well, we haven't
 3 finalized what kind of waiver language we're going to
 4 have. I guess that's going back to the subcommittee; is
 5 that right?
 6 MR. ORSINGER: That's right. We just
 7 quit debating how to waiver it and put it back to the
 8 subcommittee so we could get on with the rest of the
 9 rule.
 10 CHAIRMAN BABCOCK: Right.
 11 HONORABLE F. SCOTT McCOWN: I move we do
 12 the same thing with this.
 13 CHAIRMAN BABCOCK: Yeah, Sarah.
 14 HONORABLE SARAH DUNCAN: I think Scott
 15 makes a very good point, that ultimately time to file is
 16 when you waive it, and they are inextricably
 17 intertwined, and they ought to be together in the rule.
 18 The rule ought to say, it seems to me, that you've got
 19 to file it by this date or it's waived, or you can file
 20 it any time and it's not waived, but those two
 21 subsections of the rule ought to be merged, and I think
 22 we -- you know, if we're going to vote again, let's vote
 23 again, but it's an easy concept. Either there's a time
 24 limit for filing it and beyond that date it's waived, or
 25 there's not.

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1 CHAIRMAN BABCOCK: Well, what it is now
 2 is at least ten days before the date set for trial or
 3 other hearing.
 4 HONORABLE F. SCOTT McCOWN: Except
 5 there's an important case law exception, which is if the
 6 ground didn't exist --
 7 CHAIRMAN BABCOCK: Right.
 8 HONORABLE SCOTT McCOWN: -- or you didn't
 9 have the judge.
 10 CHAIRMAN BABCOCK: Right. So with two
 11 common law exceptions.
 12 PROFESSOR DORSANEO: It's in the rule,
 13 too.
 14 HONORABLE SCOTT BRISTER: I think the
 15 advantage -- and there's problems with it either way,
 16 but I think the advantage is just have them file it at
 17 any time. We're talking about things that cause the
 18 public to have distrust in the system, and there ought
 19 not to be a time when we cut off and say, "Well, yeah,
 20 it makes the system look bad, but you didn't ask in
 21 time." It ought to be file it at any time. If it
 22 creates a problem post-trial -- I can imagine one
 23 might -- an appellate court or a recusal judge might
 24 find in a nephew case, "You knew he was a nephew, didn't
 25 you?"

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1 "Well, yeah, but we didn't think it would
 2 make a difference." I can imagine a judge finding that
 3 it has been waived under our "this is not the only way
 4 to waive" exception, but we're talking about the
 5 appearance of integrity of the whole system and that
 6 ought not be untimely raised any time.
 7 HONORABLE SARAH DUNCAN: Here, here.
 8 CHAIRMAN BABCOCK: Carl, then Bill.
 9 MR. HAMILTON: I think that what we ought
 10 to have is the waiver rule ought to simply say that a
 11 ground for recusal may be waived, period. That means
 12 that if it's disclosed on the record and you don't file
 13 anything, you waive it. It means if it's disclosed on
 14 the record you can go forward with the hearing and you
 15 waive it, and it means that you can waive it however
 16 waiver works, and then the time to file ought to say
 17 "Unless waived the motion to recuse may be filed at any
 18 time," period.
 19 CHAIRMAN BABCOCK: Bill.
 20 HONORABLE BILL RHEA: Well, I just wanted
 21 to say one more thing in connection with this, whether
 22 "at any time" is inextricably intertwined with the
 23 waiver issue, and I don't think it is. As far as I
 24 remember, there is no filing deadline on special
 25 appearances, for instance, but yet there's lots of case

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1 law on when a special appearance can be waived by having
 2 been filed too late. So I don't see that those are
 3 necessarily related or inextricably intertwined, but I
 4 like that last suggestion. It seems to me that
 5 addresses it, "unless waived" in front of that sentence.
 6 CHAIRMAN BABCOCK: Bill.
 7 PROFESSOR DORSANEO: Well, I agree with
 8 Carl's suggestion, too, but I think if we could -- and
 9 maybe we can't come to any agreement on this, and that
 10 would be as far as we could get -- we ought to consider
 11 whether the only way to waive is if there is disclosure
 12 on the record and the lawyer elects to continue. I can
 13 see that that's a -- may be a good idea, although may
 14 not be a good idea. I don't think we have to come to
 15 agreement on that to finish the job as far as we've
 16 gotten.
 17 CHAIRMAN BABCOCK: I'm, frankly,
 18 struggling with this separateness and not inextricably
 19 intertwinedness of these two concepts because if you
 20 have a drop-dead date of ten days before the trial or
 21 hearing, it doesn't matter whether you've waived it or
 22 not if you do it on day nine. You're just out of luck.
 23 It's a bar to your filing the motion.
 24 PROFESSOR DORSANEO: I think the way you
 25 analyzed it before was exactly right. I mean, if you

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1 MR. ORSINGER: Actually, there is another
 2 issue here which Bill has raised, and that is, is that
 3 we are presented with the opportunity to define waiver
 4 by rule, and Buddy's proposal punts.
 5 CHAIRMAN BABCOCK: That's right. Yeah.
 6 And when you say, "You can file at any time unless
 7 waived," well, you know, what does that mean?
 8 HONORABLE SARAH DUNCAN: You can't do
 9 that. You don't know if it's been waived until you've
 10 filed it and get a determination that it's been waived.
 11 CHAIRMAN BABCOCK: It's not a bar to
 12 filing. You file it. The other guy says, "Hey, wait a
 13 minute. It's waived." It doesn't mean it gets unfiled.
 14 It just means you lose.
 15 HONORABLE SARAH DUNCAN: And I think what
 16 we're talking about inextricably intertwined is if it's
 17 not filed by a particular date, that's an instance in
 18 which there would be waiver, if we were to agree with
 19 that, and there may be other ways, but I think it's
 20 pretty clear that if there is a deadline in the rule for
 21 filing the motion and you don't file it by that
 22 deadline, it's waived.
 23 CHAIRMAN BABCOCK: It's waived, but I
 24 mean, you can call it that, but it's you're dead.
 25 You're out of luck. Too bad. It's denied.

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1 have just a time period for doing something, for
 2 requesting the relief, that's one thing, and then the
 3 question as to whether you get the relief is another
 4 thing.
 5 CHAIRMAN BABCOCK: Is another thing,
 6 right.
 7 PROFESSOR DORSANEO: And that depends on
 8 waiver.
 9 CHAIRMAN BABCOCK: Right. And it seems
 10 to me that we have to solve the fundamental issue of
 11 whether we do it as with the current rule of ten days
 12 before the trial or hearing or before trial or within
 13 ten days after trial or at any time, and once we get
 14 that decided then we can decide under what
 15 circumstances. But it seems to me we've got to solve
 16 that problem of when we're going to do it, when the
 17 magic line is. Buddy.
 18 MR. LOW: But, Chip, the ten-day rule is
 19 not a drop-dead rule.
 20 CHAIRMAN BABCOCK: Because there's common
 21 law exceptions.
 22 MR. LOW: Just because they're set so
 23 drop-dead doesn't mean it's over, so it's not, but I
 24 like Carl's idea. I've spoken to Mike about it, because
 25 you waive by not filing it in time. I mean, that's how

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1 HONORABLE SARAH DUNCAN: whatever. I
 2 think it's more practically. It's not like -- you know,
 3 a statute of limitations, it's not that you no longer
 4 have a cause of action. It's just that you can't assert
 5 it. For all practical purposes you don't have a cause
 6 of action if you can't assert it.
 7 CHAIRMAN BABCOCK: Right. Right.
 8 HONORABLE F. SCOTT McCOWN: Could I --
 9 CHAIRMAN BABCOCK: Well, it comes back to
 10 the question, though, of when can you file these damn
 11 things, no matter what the circumstances.
 12 HONORABLE F. SCOTT McCOWN: Well, I'm
 13 happy as a judge to go with Carl's suggestion. As a
 14 judge, that's fine, that's great. As a lawyer, you're
 15 making a huge mistake because these recusal motions are
 16 difficult and nasty, and if the judge that's hearing
 17 them can say it's waived then by golly he's going to say
 18 it's waived, and I just -- you know, we're just going
 19 round and round.
 20 CHAIRMAN BABCOCK: And that may lead to
 21 satellite litigation, if a lawyer waives something that
 22 he shouldn't have.
 23 HONORABLE SCOTT McCOWN: I mean, you're
 24 right back to where you started.
 25 CHAIRMAN BABCOCK: Yeah. So forget that.

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1 you waive it, by not filing it, you know, based on
 2 certain things, whenever that is. If ten days were
 3 just -- you've got to file it in ten days, we have no
 4 problem, but we can't go with that. We've got many
 5 exceptions, so therefore, you get into all of this. So
 6 I think Carl's idea is a good one, and it's simple and
 7 workable.
 8 CHAIRMAN BABCOCK: And Carl's idea again
 9 is -- say it again.
 10 MR. LOW: Is that you -- first of all,
 11 that you can have the provision you strike out, didn't
 12 you say, Carl, just that waiver -- what was the first
 13 provision you went to?
 14 MR. HAMILTON: "Ground for recusal may be
 15 waived," period.
 16 MR. LOW: "May be waived." And then on
 17 this one, "filed at any time unless waived." And then
 18 you don't worry about if it's post- or pre- or after
 19 because even afterward you can say, "Okay, you can't
 20 introduce all these." Well, you make a bill of
 21 exceptions. You don't save time. I mean, you just --
 22 PROFESSOR DORSANEO: We all agree with
 23 those two concepts. We just can't agree with what they
 24 mean.
 25 MR. LOW: well, I told you.

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1 I don't have to explain that. So should we keep the
 2 ten-day rule with the common law exception and maybe
 3 even write them into the rule; that is, after acquired
 4 facts or a different judge? Or should we go with the
 5 concept that is before us, which is you can file it at
 6 any time, but if it's within ten days of the trial or
 7 hearing then special procedures apply? That's the --
 8 yeah, Sarah.
 9 HONORABLE SARAH DUNCAN: If we did as
 10 Carl suggested --
 11 CHAIRMAN BABCOCK: If you what?
 12 HONORABLE SARAH DUNCAN: Just have in
 13 subsection (c), "A ground for recusal may be waived,"
 14 and leave (2) as it is.
 15 CHAIRMAN BABCOCK: Right.
 16 HONORABLE SARAH DUNCAN: There's nothing
 17 to prevent a court from finding that it's been waived.
 18 CHAIRMAN BABCOCK: Absolutely correct.
 19 HONORABLE SARAH DUNCAN: Because it was
 20 filed --
 21 HONORABLE F. SCOTT McCOWN: Too late.
 22 HONORABLE SARAH DUNCAN: -- too late.
 23 CHAIRMAN BABCOCK: Too late.
 24 HONORABLE F. SCOTT McCOWN: That's fine.
 25 Let's do that.

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1 CHAIRMAN BABCOCK: That's right. I agree
 2 with that. Scott, that's okay with you. How about the
 3 right side of the table?
 4 MS. McNAMARA: That also would permit it
 5 not to be waived if you go back to Luke's scenario.
 6 HONORABLE SARAH DUNCAN: Exactly.
 7 HONORABLE DAVID PEEPLES: Could we hear
 8 it again?
 9 CHAIRMAN BABCOCK: Could you read that
 10 back?
 11 HONORABLE SARAH DUNCAN: Uh-huh. In
 12 subsection (c), "Disqualification cannot be waived or
 13 cured. A ground for recusal may be waived," period.
 14 Subsection (d)(2) as-is, except I would add that the
 15 comma before "however" really needs to be a semicolon.
 16 HONORABLE SCOTT BRISTER: A potential
 17 problem with that is the part you're cutting is in the
 18 current rule. Somebody is going to argue that you can
 19 no longer fully disclose on the record and force the
 20 parties to elect.
 21 HONORABLE SARAH DUNCAN: And that's why
 22 we have a court of appeals I think.
 23 CHAIRMAN BABCOCK: If you add by a
 24 comment saying that we don't intend that.
 25 HONORABLE F. SCOTT McCOWN: I mean, when

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1 you say it may be waived, if the judge says to them on
 2 the record, "Waive it or I'm out of here."
 3 CHAIRMAN BABCOCK: Or else.
 4 HONORABLE F. SCOTT McCOWN: And they say,
 5 "We're waiving it," do you think a court of appeals
 6 would say, well --
 7 HONORABLE SCOTT BRISTER: Well, that's
 8 easy if they say they waive it.
 9 MR. ORSINGER: What if they just don't
 10 file?
 11 HONORABLE SCOTT BRISTER: What if they
 12 say, "We want to think about it. We reserve our
 13 rights."
 14 HONORABLE F. SCOTT McCOWN: well, then
 15 the trial judge has to say, "If you want to think about
 16 it, I'm stepping aside."
 17 CHAIRMAN BABCOCK: Or "You've got 48
 18 hours to think about it or three days or whatever."
 19 MR. HAMILTON: I would think that the
 20 comment ought to encourage everybody to disclose
 21 whatever they know, the judge included, in order that
 22 all the parties will know whether they need to file a
 23 motion. We could take care of that in the comment.
 24 CHAIRMAN BABCOCK: Okay. Well, Sarah's
 25 got an idea here. Other than Judge Brister's comment,

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1 what other reaction does anybody have?
 2 MR. EDWARDS: I have a real problem with
 3 the right to file a motion to recuse at any time with
 4 respect to knowledge that you have more than ten days
 5 before the trial or hearing.
 6 HONORABLE F. SCOTT McCOWN: Don't worry
 7 about it, because we're going to find that's what's
 8 waived.
 9 HONORABLE SARAH DUNCAN: That's right.
 10 MR. EDWARDS: Yeah. I'll believe it when
 11 I see it. And it's going to take time, and if it comes
 12 up in the middle of the trial, what are you going to do?
 13 And suppose it's a good ground, you know. If somebody
 14 knows there is a ground for recusal, they either ought
 15 to have to make it before you start or they can't make
 16 it. There's no problem with that.
 17 HONORABLE SARAH DUNCAN: I don't think
 18 there's a problem with that. There's a problem with
 19 knowing when a lawyer knows or should have known a
 20 ground.
 21 MR. EDWARDS: Well, you know, we have all
 22 kinds of things where you have to file on time or you
 23 show good cause or you show that whatever you did was a
 24 mistake and not intentional disregard for the rules. A
 25 hundred times when a lawyer has to get on the stand and

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1 explain that stuff. You mailed something and they
 2 didn't get it. There's a question of the date on the
 3 receipt or the -- you know, there's an office stamp on
 4 it that says one date, and it can't be that way, and you
 5 get in a big fight over when it was filed. The lawyers
 6 are all testifying.
 7 They don't happen often, but it does
 8 happen, and it's not ripping the system apart, but
 9 you've got to have some finality in what you're doing.
 10 If you're going in there and trying a lawsuit, you've
 11 got to have a reasonable belief that no one's going to
 12 come up with something later on.
 13 HONORABLE DAVID PEEPLES: Amen.
 14 CHAIRMAN BABCOCK: Well, isn't that the
 15 reason why for motions that are filed after ten days
 16 before the trial or hearing that this interim proceeding
 17 comes in?
 18 MR. EDWARDS: But the interim proceeding
 19 is not satisfactory if you're going to -- if you're
 20 ultimately going to lose.
 21 MR. HAMILTON: That's not necessarily
 22 true, Bill, because if you have the interim proceeding
 23 and the judge enters two orders during it and then the
 24 judge gets recused, the next judge that's assigned may
 25 or may not just re-enter the same orders.

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1 MR. EDWARDS: That's right. And you're
 2 sitting there, and the motion to recuse comes in on the
 3 second day of trial, and the interim proceedings is five
 4 days of trial, and are you going to go get the record
 5 printed and see how the new judge is going to rule on
 6 every objection?
 7 HONORABLE DAVID PEEPLES: Even with this
 8 interim proceeding there still has to be a hearing. As
 9 it stands right now under the existing rule an untimely
 10 motion can be denied, and there is no hearing necessary.
 11 We do make the common law exceptions that we talked
 12 about.
 13 CHAIRMAN BABCOCK: Right.
 14 HONORABLE DAVID PEEPLES: Which is fine,
 15 but Bill Edwards is right. There needs to be finality.
 16 MR. ORSINGER: Well, it depends so much
 17 on how you pick the date. If the date is the first day
 18 of trial, that's a lot less problematic than if it's
 19 within ten days of when you knew or should have known
 20 it.
 21 HONORABLE DAVID PEEPLES: I'm not for
 22 that.
 23 CHAIRMAN BABCOCK: Yeah. Let's quit
 24 talking about that. We've rejected that.
 25 HONORABLE DAVID PEEPLES: Laid to rest.

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1 MR. ORSINGER: Okay. Then the question
 2 is then if you know the grounds you should be forced to
 3 state it either ten days before trial or on the date of
 4 trial or in the trial before the verdict comes in, and
 5 the only way around that is to say that the grounds
 6 didn't arise until after that point. You can't argue "I
 7 didn't know," or can you? Can you get around your
 8 beginning trial deadline by saying "I didn't know" or "I
 9 reasonably should not be held to knowledge"?
 10 CHAIRMAN BABCOCK: Or there was
 11 fraudulent concealment. Yeah, Carl.
 12 MR. HAMILTON: I think we're overlooking
 13 one other thing. There's also provisions in here that
 14 once a motion to recuse is filed the parties themselves
 15 can agree to stopping the interim proceedings, in which
 16 event the judge has to stop or the judge assigned to
 17 hear the recusal motion can order that the interim
 18 proceedings be stopped. So if you're starting on a
 19 trial, I would say the chances are the parties or the
 20 judge hearing the recusal motion is going to say, "Let's
 21 stop these proceedings until we find out where we are
 22 with the recusal motion."
 23 MR. EDWARDS: You're assuming that
 24 there's nothing that goes into getting ready for trial,
 25 getting your witnesses there, and starting. If you have

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1 a complicated trial, everybody has five or six expert
 2 witnesses, it's going to cost 50 to \$100,000 just to get
 3 ready to go to trial.
 4 MR. HAMILTON: That's right.
 5 MR. EDWARDS: And then you have to wait
 6 and get down there until everybody looks and sees how
 7 the jury panel is and maybe even how the jury looks in
 8 the box and then they file a motion to recuse. That
 9 doesn't sound right to me.
 10 MR. HAMILTON: Well, the safeguard to it
 11 is you go on with the trial.
 12 MR. EDWARDS: That's not a safeguard if
 13 the motion for recusal is good and hasn't been waived.
 14 MR. ORSINGER: Well, how far back do you
 15 need it to go before you feel unaggrieved at having a
 16 wasted trial?
 17 MR. EDWARDS: Well, the ten days that we
 18 have in the already exigent rule to my knowledge has not
 19 been a problem. I haven't heard anybody giving any
 20 horror stories on the ten days.
 21 HONORABLE F. SCOTT McCOWN: I agree.
 22 HONORABLE DAVID PEEPLES: I do, too.
 23 HONORABLE F. SCOTT McCOWN: I think we
 24 ought to go with the ten days and put the two case law
 25 exceptions into the rule.

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1 MR. ORSINGER: Well, there is another
 2 case law exception, which is, is that you didn't know
 3 about it. I believe there is some case law out there
 4 that if it was -- I may be wrong, but I think --
 5 HONORABLE SCOTT BRISTER: You didn't
 6 discover it.
 7 MR. ORSINGER: If it happened but you
 8 didn't know about it, you are permitted to raise it even
 9 up to that point.
 10 HONORABLE SCOTT BRISTER: Wasn't that
 11 Luke's?
 12 MR. ORSINGER: No, I think Luke's concern
 13 was that you start the clock running two years before
 14 trial by running the clock ten days from when he should
 15 have known. This is a concrete calendar date, and then
 16 if you don't make it you can come in and prove that you
 17 didn't know and shouldn't have known, and while the
 18 burden is the same, the circumstances are quite
 19 different.
 20 MR. EDWARDS: I don't have any problem
 21 with a good cause requirement after the ten-day, which
 22 would provide for what you're talking about, I didn't
 23 learn about it.
 24 MR. ORSINGER: But I think it's very
 25 important to this philosophy that we not keep the

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1 current rule of "hearing or trial," because if you leave
 2 "hearing" in there then you're pushed back to all of
 3 your preliminary hearings, and so that means that you're
 4 held to account for your knowledge on the special
 5 exceptions or motion for summary judgment because if you
 6 don't raise it by then you've waived it for trial.
 7 HONORABLE DAVID PEEPLES: Richard, the
 8 way that's always interpreted is that you waive it for
 9 that hearing. But if you don't raise it before the
 10 summary judgment, that doesn't mean you waive it for
 11 trial.
 12 MR. ORSINGER: I'm not too old to learn,
 13 but I thought that if you knew about it and didn't waive
 14 it for a preliminary hearing you could not come back in
 15 and recuse a judge for a later hearing of a trial.
 16 HONORABLE DAVID PEEPLES: I don't think
 17 so. I think that "hearing or trial" means for that
 18 hearing you waive it if you don't assert in time, but
 19 that doesn't mean you waive everything you knew before
 20 then for the trial a year later.
 21 MR. EDWARDS: I think you do as to that
 22 particular judge.
 23 PROFESSOR DORSANEO: You're right. Some
 24 courts of appeals have said that.
 25 MR. EDWARDS: Well, let me give you

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1 another horror story. Somebody files a motion for
 2 summary judgment. The judge rules -- grants the motion
 3 for summary judgment. A motion for new trial is filed.
 4 Now we're getting ready to go before the same judge
 5 again. You mean you can file a motion for recusal at
 6 that point in time? If you had the knowledge in your
 7 head before the motion for summary judgment, you should
 8 have done it at that point in time.
 9 HONORABLE SARAH DUNCAN: This really is
 10 where we started.
 11 MR. ORSINGER: If Bill is right -- I
 12 think Bill is right, but if Bill is right then all of
 13 the sudden we have Luke Soules' problem here because the
 14 truth is this is never going to happen ten days before
 15 trial. This is going to happen ten days before some
 16 preliminary hearing well before trial, and so now we're
 17 back into this kind of broken field running on when
 18 somebody knew or shouldn't have known, because there are
 19 going to have been a dozen hearings in which there was
 20 no recusal and then there is going to be a recusal
 21 leading up to the summary judgment of the trial and the
 22 whole issue was did he know before the special
 23 exceptions, did he know before the motion to quash the
 24 deposition, did he know, did he know?
 25 I could go with Bill's idea a lot better

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1 if it's a concrete date like trial or ten days before
 2 trial. It doesn't matter if you knew for the 12
 3 hearings leading up to that as long as you give me the
 4 exception that if I didn't discover it until after that
 5 tenth day I can come in and try to prove that I didn't
 6 discover it.
 7 HONORABLE F. SCOTT McCOWN: I'm ready to
 8 shoot myself because that's exactly what I read to you
 9 and you argued against not ten minutes ago.
 10 MR. ORSINGER: Because you want to do it
 11 with the hearings, Scott.
 12 HONORABLE F. SCOTT McCOWN: Well, I'm
 13 happy to take that out if you want to do it with the
 14 trial on the merits.
 15 MR. EDWARDS: I think it ought to be
 16 summary judgment because that is a trial on the merits
 17 really. It's a trial.
 18 HONORABLE F. SCOTT McCOWN: Can we --
 19 PROFESSOR DORSANEO: Time to regroup.
 20 HONORABLE SCOTT McCOWN: -- move to
 21 something else and wait 'til another day?
 22 CHAIRMAN BABCOCK: Let me suggest -- let
 23 me throw something out and see what people think. What
 24 if we said that the motion should be made as soon as
 25 practicable but in no event later than ten days before

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1 trial unless the facts giving rise to the recusal arise
 2 after ten days or the judge the subject of the recusal
 3 is assigned within the ten-day period or for good cause?
 4 HONORABLE F. SCOTT McCOWN: That's the
 5 discovery standard.
 6 MR. ORSINGER: As soon as practical is
 7 knew or should have known.
 8 HONORABLE SCOTT McCOWN: That's straight
 9 from the discovery standard of disclosure that caused so
 10 much heartache, and that's going back to a standard that
 11 we know is very difficult.
 12 CHAIRMAN BABCOCK: Okay. Then strike --
 13 MR. ORSINGER: We can fairly write a
 14 couple of different alternatives on this timing --
 15 CHAIRMAN BABCOCK: Strike that then.
 16 MR. ORSINGER: -- and bring them back.
 17 CHAIRMAN BABCOCK: In no event later than
 18 ten days with the two common law exceptions and a good
 19 cause provision.
 20 JUSTICE HECHT: When you-all met with
 21 Senator Harris he wanted a front-end after a certain
 22 time your time runs, like knew or should have known or
 23 after within a certain amount of time. That was his
 24 original legislation, wasn't it?
 25 CHAIRMAN BABCOCK: There was a letter

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1 that he wrote to you guys.
 2 MR. ORSINGER: Yeah. That was the bill
 3 that he didn't introduce. Right.
 4 CHAIRMAN BABCOCK: And you-all wrote back
 5 and said, "Yeah, that's a great idea."
 6 JUSTICE HECHT: Right.
 7 CHAIRMAN BABCOCK: And you sent him a
 8 letter, but we told him about the discussion we had, and
 9 he said, "Oh, that makes sense. That's okay."
 10 JUSTICE HECHT: All right.
 11 MR. ORSINGER: Yeah. I walked out of the
 12 meeting feeling like he wanted to preserve his tertiary
 13 motion and he didn't care so much about the bill that
 14 didn't make it.
 15 CHAIRMAN BABCOCK: Yeah.
 16 MR. ORSINGER: And we have a small group
 17 here. It's fractured. It's changing every time we
 18 talk. Maybe what we ought to do is draft two or three
 19 different alternatives on the cutoff, more or less doing
 20 our best job to try to draft each one of these
 21 positions, and then bring it back in the next meeting
 22 and then early on in the day take a vote on it.
 23 CHAIRMAN BABCOCK: well, I think part of
 24 that's okay with me. I think we ought to draft maybe a
 25 couple of proposals, but I don't want to have another

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1 three-hour discussion about it at the next meeting. If
 2 we want to circulate it to the full committee and get a
 3 sense by vote prior to the next meeting what everybody
 4 wants then that's okay, and maybe that's how we should
 5 proceed.
 6 MR. ORSINGER: Well, except nobody will
 7 vote.
 8 CHAIRMAN BABCOCK: well, we'll call.
 9 We'll call.
 10 MR. ORSINGER: You just make them vote or
 11 else they can't speak?
 12 CHAIRMAN BABCOCK: They're estopped.
 13 MR. EDWARDS: They will waive their right
 14 to speak.
 15 CHAIRMAN BABCOCK: They will waive their
 16 right.
 17 PROFESSOR DORSANEO: It seems to me there
 18 are really effectively three choices, putting aside what
 19 you pass as exceptions or whatever. One is just some
 20 specific time, at some specific point in the case it's
 21 too late, in the life of the case it's too late. The
 22 other would be dependent upon what the lawyer actually
 23 knew, and the third would be on what the lawyer knew or
 24 should have known, and --
 25 MR. ORSINGER: No. There's another

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1 choice, and that is that we don't have a deadline, and
 2 that's what this is drafted. We don't have a deadline.
 3 You just get a parallel proceeding is the worst that
 4 happens to you.
 5 CHAIRMAN BABCOCK: And the knew or should
 6 have known thing is dead. We have voted on that. We
 7 have thoroughly discussed it. In my mind that's dead.
 8 MR. ORSINGER: So it's specific time plus
 9 exceptions or it's no deadline, but you have a parallel
 10 proceeding if it's past a certain point.
 11 CHAIRMAN BABCOCK: Right.
 12 MR. ORSINGER: Ten days before trial, day
 13 of trial, whatever. Those are the two choices?
 14 PROFESSOR DORSANEO: The knowledge is not
 15 dead based upon what we talked about today, waiver on
 16 the record, but being told of information. That's
 17 actual knowledge, and if you're told by the --
 18 HONORABLE SCOTT BRISTER: The King case,
 19 which is the exception to the ten days under the current
 20 rule, is the grounds didn't exist or could not have been
 21 discovered. If you go back to that --
 22 PROFESSOR DORSANEO: which is a knew --
 23 kind of a variation on "knew or should have known."
 24 Yeah.
 25 HONORABLE SCOTT BRISTER: Or a diligence,

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1 yeah.
 2 CHAIRMAN BABCOCK: "Could not have
 3 demonstrated," does that mean they were concealed?
 4 HONORABLE F. SCOTT MCCOWN: Well
 5 concealed.
 6 CHAIRMAN BABCOCK: Hidden deep underneath
 7 the surface. Okay. One of the options is the current
 8 rule. A second option is the current ten-day rule with
 9 the common law exceptions and good cause or whatever
 10 else anybody may want. A third option is any time with
 11 the parallel proceeding. A fourth option is a time
 12 certain but something other than ten days, could be the
 13 date of trial, could be any other bench mark you want to
 14 pick. Are there any other options?
 15 Okay. Take a stab at that.
 16 MR. ORSINGER: We can do that, but
 17 doesn't that basically boil down to -- the ten-day rule
 18 just boils down to a specific deadline? It's either ten
 19 days before a hearing, it's ten days before trial, it's
 20 the day you go to trial, it's the day the verdict comes
 21 in? Basically it's a specific time --
 22 CHAIRMAN BABCOCK: Right.
 23 MR. ORSINGER: -- that with exceptions
 24 you're -- if you don't fit one of those exceptions,
 25 you're dead if you don't file it before that deadline.

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1 CHAIRMAN BABCOCK: Right.
 2 MR. ORSINGER: And we'll probably just
 3 have to take a vote on what the deadline is, or we have
 4 no deadline and we have a parallel proceeding. Doesn't
 5 it really boil down to those two alternatives?
 6 CHAIRMAN BABCOCK: David, is that pretty
 7 much what it boils down to?
 8 HONORABLE DAVID PEEPLES: I confess I was
 9 not listening.
 10 MR. ORSINGER: It boils down to a
 11 specific deadline of some kind, whatever it may be,
 12 together with exceptions to it, whatever they may be; or
 13 no deadline, in which event if it's too close to trial
 14 you have a parallel recusal proceeding that doesn't stop
 15 the case.
 16 HONORABLE DAVID PEEPLES: Well, we could
 17 have a deadline with exceptions and also within ten days
 18 a parallel proceeding. Well, no.
 19 PROFESSOR DORSANEO: why do that?
 20 HONORABLE DAVID PEEPLES: What if
 21 somebody says at the last minute, "I just discovered
 22 so-and-so"?
 23 MR. ORSINGER: So if you have a specific
 24 deadline that's in advance of trial and an exception
 25 fits then you continue to have the parallel proceedings.

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1 HONORABLE DAVID PEEPLES: Parallel.
 2 MR. ORSINGER: So we'll just add that
 3 onto the specific time.
 4 CHAIRMAN BABCOCK: Does anybody have any
 5 other options?
 6 MR. EDWARDS: With regard to the ten-day
 7 deadline, where you start it, give some thought to the
 8 first dispositive motion or trial if there be no
 9 dispositive motion, the hearing on it.
 10 MR. ORSINGER: So it could be special
 11 exceptions, for example, or it could be summary
 12 judgment.
 13 MR. EDWARDS: Special exceptions could
 14 not be dispositive.
 15 MR. ORSINGER: By the time the second one
 16 is denied it's dispositive because at that point can't
 17 you --
 18 MR. EDWARDS: There has to be a motion to
 19 dismiss or a motion for summary judgment because you
 20 wouldn't --
 21 CHAIRMAN BABCOCK: Right. Why don't you
 22 just make it a dispositive motion under Rule 166a?
 23 MR. EDWARDS: Right.
 24 MR. ORSINGER: And so if it's just
 25 against one ground out of three, that's your deadline as

1 to all three. Motion for summary judgment on one of
 2 your three claims is your deadline on all claims.
 3 HONORABLE DAVID PEEPLES: Are you all by
 4 chance confusing motions to recuse and objections?
 5 MR. ORSINGER: No.
 6 MR. EDWARDS: No. We're just trying to
 7 fix it.
 8 MR. ORSINGER: The specific time -- Bill
 9 is trying to push the specific time back to before the
 10 summary judgment, not just from the trial on the merits.
 11 MR. EDWARDS: I'd say "summary judgment
 12 or a motion for death penalty sanctions."
 13 HONORABLE F. SCOTT MCCOWN: Can we leave
 14 the details here to the subcommittee? Is there anything
 15 else?
 16 CHAIRMAN BABCOCK: Yeah. There's plenty
 17 to talk about. What about subsection (3), referral?
 18 MR. HAMILTON: Okay. We have two options
 19 under that. The first option was what was in the
 20 recodification essentially, with one addition at David
 21 Peeples' suggestion that if the judge in which the case
 22 where it's filed does not promptly grant the motion or
 23 refer it to presiding judge then the movant may forward
 24 a copy of the motion to the presiding judge and request
 25 a hearing or an assignment to prevent judges from

1 Either one.
 2 MR. ORSINGER: Well, no. Effectively you
 3 have a recusal if the administrative judge pulls it away
 4 from the trial judge and assigns it to another trial
 5 judge. That's tantamount to a recusal. What has
 6 happened, though, is that instead of the presiding judge
 7 or the assigned judge or the Supreme Court deciding the
 8 replacement judge the local administrative judge has
 9 made the replacement. That's the issue.
 10 HONORABLE SCOTT BRISTER: The problem we
 11 had, and I have trouble finding this language to meet
 12 it, but let's say the first judge -- and this was the --
 13 maybe Justice Hecht can help me remember the name of it,
 14 but City of Wharton case where there's 50 attorneys in
 15 the case. If Judge No. 1 is recused the next judge is
 16 an assigned judge, and everybody gets a strike, and the
 17 next 50 judges assigned all get a strike, but if Judge
 18 Brister in that case says, "A-ha, we're not doing that
 19 game and spending the next two years assigning judges
 20 and striking them. I'm moving it from Judge Davidson's
 21 court to Judge" -- no, I moved it from Judge Woods'
 22 court to Judge Davidson's court, and this was for -- not
 23 to try to avoid any grounds of impropriety. It was to
 24 try to stop the one strike that all 50 attorneys get.
 25 MR. LOW: Right.

1 sitting on the motions too long and delaying the
 2 process, but the first option is that it just gets
 3 referred to the presiding judge who has to hear it or
 4 assign it.
 5 The second option is that the presiding
 6 judge has a right to summarily deny it if it does not
 7 meet the procedural requirements and does not state the
 8 basis in detail and, therefore, saves the time of
 9 assigning a judge to hear it or hearing it himself.
 10 Those are the two options there on the referral.
 11 The other thing is that we've
 12 incorporated into this that no judge except a judge
 13 assigned by the presiding judge or Chief Justice of the
 14 Supreme Court shall hear a motion to recuse or
 15 disqualify. That prevents the local administrative
 16 judges from moving the case once a judge is assigned by
 17 the presiding judge, moving it to another judge, same
 18 provision that's been carried out in the -- with respect
 19 to the actual hearing of the case. So those are the
 20 basic changes in the referral part.
 21 CHAIRMAN BABCOCK: Anybody got any
 22 reaction to Option 1 versus Option 2?
 23 MR. LOW: I have a question.
 24 CHAIRMAN BABCOCK: Buddy.
 25 MR. LOW: What is wrong with the local

1 HONORABLE SCOTT BRISTER: If this
 2 prevents that, I'm against it, because otherwise there
 3 is no way out of that dilemma.
 4 MR. LOW: No, what I mean is that
 5 somebody has filed in your court, and they move to
 6 recuse you, and it's just a real -- just a sham, that
 7 you don't want to go through all that and send somebody
 8 down. You say, "Okay. If you don't want me," without
 9 recusing or anything, just let the judge transfer the
 10 case.
 11 HONORABLE SCOTT BRISTER: I agree with
 12 that.
 13 MR. LOW: Transfer it to Judge Davidson.
 14 HONORABLE SCOTT BRISTER: Where's the
 15 language on local administrative judge?
 16 MR. ORSINGER: It's the very end of
 17 Option 2 is where it says that --
 18 HONORABLE DAVID PEEPLES: Is that
 19 language -- I think that doesn't do what we want it to
 20 do.
 21 HONORABLE F. SCOTT MCCOWN: It's the
 22 language on page six under subdivision (a), right in the
 23 middle, that says "No judge except the judge assigned by
 24 the presiding judge of the administrative region shall
 25 preside over the case."

1 chief judge saying, "Okay, I don't want to go through
 2 all this. Judge Schmidt down the hall doesn't have any
 3 complaints." Just transfer it to him, get rid of the
 4 whole thing. Why deny the judge the right to do that if
 5 he wants to? You're not having the judge you're
 6 complaining of. I know there's got to be a reason for
 7 it. I just don't know.
 8 MR. HAMILTON: The reason was that --
 9 what's the name of that case?
 10 MR. ORSINGER: This is the one we
 11 discussed at the beginning of the day that Justice Hecht
 12 wrote the dissent on.
 13 MR. LOW: That was too long ago. At any
 14 rate, if there's a reason, let's don't rehash. I
 15 just --
 16 MR. HAMILTON: There was a reason.
 17 MR. ORSINGER: The point is that a local
 18 administrative judge could co-opt the recusal process,
 19 which pulls a judge from a different region or maybe
 20 even from the Texas Supreme Court. They could co-opt
 21 that by appointing another local judge, and the process
 22 is co-opted because -- and we're talking now about --
 23 the recusal may be granted, but we're talking now about
 24 who selects the replacement judge. The question is --
 25 MR. HAMILTON: Or the recusal judge.

1 HONORABLE SCOTT BRISTER: That's the
 2 problem.
 3 HONORABLE F. SCOTT MCCOWN: I question
 4 whether that's constitutional because the Constitution
 5 says that judges, elected judges, inside a county can
 6 trade benches willy-nilly for any or all part of a case.
 7 HONORABLE DAVID PEEPLES: But once you're
 8 recused can you do that?
 9 HONORABLE F. SCOTT MCCOWN: Well, you
 10 could no longer be part of the trading, but the other
 11 judges could be part of the trading.
 12 MR. LOW: But you're not recused until
 13 there is a ruling on it.
 14 HONORABLE F. SCOTT MCCOWN: Well, but
 15 this would say once there's a ruling if I'm recused and
 16 Judge Schrob appoints Judge Brister to come up and hear
 17 the case, my local administrative judge couldn't move
 18 the case to Judge Cooper.
 19 MR. ORSINGER: That's exactly what that
 20 says except that it -- and it doesn't, but it should say
 21 "without the permission of the presiding judge."
 22 HONORABLE F. SCOTT MCCOWN: I don't think
 23 that's constitutional.
 24 MR. ORSINGER: Okay. Why not?
 25 HONORABLE F. SCOTT MCCOWN: There's also

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1 a statute that gives the local administrative judge the
 2 power to assign cases or re-assign cases, and so, you
 3 know, I guess you could have the repealer here, but you
 4 have a constitutional problem and a statutory problem
 5 with this.
 6 MR. ORSINGER: What is the constitutional
 7 provision you're talking about?
 8 HONORABLE SCOTT McCOWN: The Constitution
 9 says that district judges inside a county may trade
 10 benches willy-nilly.
 11 MR. EDWARDS: To be specific, it says
 12 "and the district judges may exchange districts or hold
 13 courts for each other when they may deem it expedient
 14 and shall do so when required by law."
 15 HONORABLE F. SCOTT McCOWN: I thought it
 16 said "willy-nilly," but that's pretty close.
 17 MR. EDWARDS: I'm reading Section 11 of
 18 Article V.
 19 MR. LOW: But 'til there's been a ruling
 20 that you are recused, if they just file a motion, you
 21 are not recused at that point, are you, just because
 22 there is a motion?
 23 MR. EDWARDS: The motion stops things
 24 unless you've got the interim stuff, and if the recusal
 25 motion is good and you've transferred, I don't know what

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1 happens.
 2 MR. ORSINGER: Well, the rule says that
 3 the presiding administrative judge is supposed to
 4 appoint your replacement, but in the Pacific Gas &
 5 Electric case the replacement was appointed and then was
 6 taken off the case by the local administrative judge and
 7 essentially overriding the decision of the presiding
 8 judge, who has the prerogative under the procedure to
 9 appoint the replacement.
 10 MR. EDWARDS: Well, I can see -- I can
 11 see a case where recusal comes early in a case that's
 12 not going to go to trial for two years and they appoint
 13 somebody from Houston to sit in Austin, and every time
 14 there's a hearing or something else there's a tremendous
 15 problem with it of getting the judge there to hear the
 16 case.
 17 MR. ORSINGER: I can tell you the source
 18 of this was Judge Hester's letter in which this happened
 19 to him, and he -- there was a recusal, and he appointed
 20 a replacement judge, and the replacement judge was taken
 21 off the case by the local administrative judge, and it
 22 went to the Corpus court, and there was a mandamus, and
 23 I don't remember all the background, and finally ended
 24 up in the Texas Supreme Court, and it was decided that
 25 it was okay for the local administrative judge to do

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1 that because the rules permitted it. Right?
 2 JUSTICE HECHT: Right.
 3 MR. ORSINGER: And Judge Hester asked us
 4 to change the rules so that if he appointed a
 5 replacement judge --
 6 MR. EDWARDS: Just because Judge Hester
 7 requested it -- he's a friend of mine but just because
 8 he's requested it doesn't make it right.
 9 MR. ORSINGER: No, it doesn't, but that's
 10 the source of it.
 11 JUSTICE HECHT: No, the case, our Court
 12 didn't decide, and I dissented saying I thought the law
 13 was the other way, but I mean, I do think -- I think it
 14 would be a good idea to clarify as a matter of policy,
 15 but that doesn't have anything to do with the dissent or
 16 the case whether -- who should make this call.
 17 HONORABLE SCOTT BRISTER: I feel one way
 18 when the local administrative judge does it to thwart
 19 the presiding administrative judge. I feel differently
 20 when the local administrative judge does it to thwart
 21 what would be an endless process of striking appointed
 22 judges.
 23 MR. LOW: Right.
 24 MR. HAMILTON: Well, the concept here, I
 25 think, to take care of your problem, Scott, is that if

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1 you see that as a problem all you would have to do is
 2 call the administrative judge and say, "Hey, appoint
 3 somebody else," and he probably would.
 4 HONORABLE SCOTT BRISTER: No. The
 5 presiding judge is in article whatever it is,
 6 appointment, and everybody has got strikes.
 7 MR. HAMILTON: Well, that's true. Yeah.
 8 MR. ORSINGER: Is that true even if
 9 they're an elected judge?
 10 HONORABLE SCOTT BRISTER: Yeah.
 11 HONORABLE DAVID PEEPLES: Yeah.
 12 MR. HAMILTON: Well, if they're an
 13 elected judge they only get one strike within a party.
 14 HONORABLE SCOTT BRISTER: If there's
 15 enough lawyers, it could last forever.
 16 JUSTICE HECHT: For example, in subpart
 17 (3) on page four in Option 2, the last sentence, it's
 18 one thing to say that nobody can hear the recusal, the
 19 motion to recuse, except the judge assigned by the
 20 presiding judge, but can the judges themselves or the
 21 local administrative judge or however they set it up in
 22 the county circumvent the whole thing by just saying,
 23 "Look, just -- we give the case to Judge Brister and
 24 Judge Brown take one of his cases and that will be the
 25 end of it."

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1 MR. LOW: But what if the judge -- the
 2 motion is filed, and there's Judge Davidson and Judge
 3 Brister. All right. And Judge Brister goes to Judge
 4 Davidson and he says, "Look, I'm the chief judge. I'm
 5 going to assign" or gets the chief judge to assign it to
 6 Judge Davidson. No ruling on the motion. He enters an
 7 order. The motion is moot because now the case is in
 8 his court.
 9 MR. ORSINGER: Right.
 10 MR. LOW: There's no ruling on it.
 11 MR. ORSINGER: Right.
 12 MR. LOW: And why can't he do that under
 13 the Constitution? And he's not trying to do the work of
 14 the administrative judge because since there's been no
 15 decision on the recusal he's not invoked, and his motion
 16 is moot. Why can't that be done?
 17 JUSTICE HECHT: Well, I think it
 18 certainly can be done legally and then the question
 19 is -- and I don't have a feeling one way or the other --
 20 is it better policy for the local administrative judge
 21 or whoever may be designated under the local rules,
 22 because the local rules may just say they can do it
 23 willy-nilly, and they may not have a procedure where the
 24 local administrative judge may have to sign off on it,
 25 or is that the kind of thing that you want the presiding

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1 judge to come in from out here and control that process?
 2 CHAIRMAN BABCOCK: Yeah. If the motion
 3 to recuse has got some merit to it and you let the
 4 recused judge who's under attack --
 5 MR. ORSINGER: Pick his replacement.
 6 CHAIRMAN BABCOCK: -- pick his
 7 replacement, maybe I'm not so happy about that.
 8 HONORABLE SCOTT BRISTER: That looks bad.
 9 MR. LOW: No, I'm not -- I was just
 10 arguing legally and how we get around the constitutional
 11 right for them to do that if they want to, is what I was
 12 saying. No matter if we write a rule, if it violates
 13 the Constitution, it might not be good.
 14 HONORABLE F. SCOTT McCOWN: I don't think
 15 that the judge who they have moved recusal on -- I know
 16 it happens that they pick their replacement, but I don't
 17 think that legally they can because they're prohibited
 18 under the rules from taking any further action in the
 19 case, which would include transferring it to another
 20 judge. I think it has to either be the local
 21 administrative judge or the presiding judge, and to some
 22 extent this is a turf battle between the presiding
 23 judges appointed by the Governor coming from outside the
 24 county and the local administrative judge elected by the
 25 judges who were elected by the people inside the county.

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1 MR. ORSINGER: Well, some counties,
 2 though, let's take in the Hill Country, you might have
 3 three district judges with overlapping jurisdictions in
 4 one county, and they don't have a presiding judge. They
 5 just happen to have offices next to each other, and
 6 sometimes they even share the same office on different
 7 weeks. So a motion is filed there, and there's not
 8 going to be a presiding local judge. There's just going
 9 to be a judge saying, you know, will you take over this
 10 case for me? The answer is "yes," and so then you don't
 11 even have to re-assign it from one court to another
 12 because they all sit in each other's courts, or you can
 13 assign it formally or whatever you want to do.
 14 HONORABLE F. SCOTT McCOWN: But when the
 15 rule says you can't take further action I think that
 16 would include moving the case.
 17 PROFESSOR DORSANEO: Yeah, that's right.
 18 HONORABLE SCOTT BRISTER: Somebody has
 19 got to sign something to transfer a case from one court
 20 to another.
 21 JUSTICE HECHT: But it doesn't have to be
 22 the judge whose case it is.
 23 MR. ORSINGER: And wait a minute. Just
 24 because in Bexar County there is a judge that's in the
 25 73rd. Our case is docketed in the 73rd. I go down

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1 there to the 150th, and I get assigned that morning. My
 2 case is in the 73rd, docket in the 73rd. I'm having a
 3 hearing in the 150th. I file a motion to recuse the
 4 judge in the 150th, and it gets granted, my case is
 5 still in the 73rd. It's just that that judge can't rule
 6 in that case, so in Bexar County we wouldn't assign it
 7 to a different courtroom. We would just say you can't
 8 go in front of that person.
 9 So I don't see that there is an issue of
 10 transfer here. There's a question of who's going to
 11 take the bench when you have your hearing. And so are
 12 we going to allow -- when this procedure is invoked, are
 13 we going to allow an outside authority like the
 14 presiding judge to decide who the replacement is or are
 15 we going to allow the judge who's under attack?
 16 HONORABLE F. SCOTT McCOWN: Well, there's
 17 not just two choices. There's three choices. There's
 18 the judge under attack, and I think we would all agree
 19 that he should have no part in picking a replacement or
 20 trading benches to avoid -- he should have no part in
 21 that. There's the local administrative judge and
 22 there's the presiding judge. That's where you're
 23 picking between. Are we going to have our present
 24 system where they both have ways of dealing with it, or
 25 are we going to have a system where only the presiding

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1 judge deals with it?
 2 HONORABLE DAVID PEEPLES: Well, I thought
 3 the proposal was that the local administrative judge can
 4 make the transfer but with the approval of the presiding
 5 judge. In other words, have a little statewide input
 6 into that local decision where there has been a motion
 7 to recuse. That's what Judge Hester recommended. And I
 8 don't think we have any rule that way.
 9 MR. ORSINGER: It isn't written that way,
 10 but it can be written that way. We had discussed
 11 writing it that way.
 12 HONORABLE F. SCOTT McCOWN: I think that
 13 would be a great compromise. Wouldn't that be a great
 14 compromise, Scott?
 15 HONORABLE SCOTT BRISTER: Say it again.
 16 HONORABLE F. SCOTT McCOWN: That you
 17 could have the local administrative judge simply
 18 administratively transfer it to another judge, but that
 19 has to be reviewed and blessed by the presiding judge of
 20 the region.
 21 HONORABLE DAVID PEEPLES: The problem is
 22 that there's sometimes when there's been a motion to
 23 recuse one of the judges there is a broader problem, and
 24 the thinking is that while the local administrative
 25 judge ought to have the power that he has under the

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1 rules, there ought to be some consultation and potential
 2 veto by somebody with broader authority where there has
 3 been this motion to recuse and maybe there's a --
 4 HONORABLE F. SCOTT McCOWN: A black wall
 5 of silence.
 6 MR. ORSINGER: Yeah. Because you might
 7 have gone from the frying pan into the fire. In a lot
 8 of counties at least it's random assignment on who you
 9 get, but if you randomly get assigned to somebody you
 10 could recuse, all of the sudden you've fallen into the
 11 local politics of who your judge is going to be, and
 12 it's not random anymore. Now it's the local presiding
 13 judge can put you in whatever slot he or she wants you,
 14 and that's not even as fair as random assignment. So
 15 the thought is, well, okay, if we're going to abandon
 16 our random assignment sequences then we're going to
 17 bring in an outside authority who at least if they're
 18 political has a broader sense of politics.
 19 HONORABLE DAVID PEEPLES: And has the
 20 hammer.
 21 MR. LOW: That can happen. I know our
 22 chief judge had moved to disqualify him. He said,
 23 "Okay, you don't want me. I'll assign you to
 24 so-and-so."
 25 "Oh, Judge, I'll withdraw the motion."

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1 MR. ORSINGER: But if you do it with the
 2 consent of the presiding judge, which is probably just
 3 as unconstitutional, isn't it, then we would all feel
 4 like that's okay because the presiding judge
 5 theoretically won't approve something that's a back door
 6 deal?
 7 CHAIRMAN BABCOCK: Okay. Scott, one last
 8 comment about this rule and then I want Richard in the
 9 five minutes we have remaining to take us -- or Carl
 10 take us through the rest of the rule just briefly what
 11 you're doing.
 12 HONORABLE F. SCOTT McCOWN: I don't have
 13 another comment. I just think we ought to adopt
 14 Judge Peeples' suggestion, so if the subcommittee is
 15 going to draft that, that's great.
 16 CHAIRMAN BABCOCK: That sounds good to
 17 me, too. Okay. Carl, maybe you're the one to do it.
 18 You've got to take us through items (4) through (11).
 19 MR. HAMILTON: (4) is the interim
 20 proceedings. We had this before. There's some question
 21 been raised about why the proceeding should go on if the
 22 judge is being challenged under (b)(1) and (2) and (3),
 23 but we have provided that if they are (b)(1), (2), or
 24 (3) or (b)(9) or (10) the proceedings can go on; or
 25 under the statute, if it's a third motion to recuse, the

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1 proceedings can go on.
 2 When the motion to recuse is filed after
 3 the tenth day, it can go on; and we've added one now
 4 that when the presiding judge elects to hear the motion
 5 to recuse and the motion to recuse or disqualify the
 6 presiding judge is filed then the proceedings can go on
 7 in those four situations.
 8 (5) provides that the judge hearing the
 9 recusal motion -- I'm sorry, the judge shall stop all
 10 interim proceedings that's going on in the case if
 11 ordered to do so by the judge hearing the motion to
 12 recuse or if the parties all agree. That's just that if
 13 the parties say, "Well, this looks like it might be a
 14 waste of time to go on with these proceedings. We'd
 15 rather just stop until the recusal motion is heard,"
 16 then they can do that. Or if the judge hearing the
 17 recusal motion decides that maybe there's enough merit
 18 here that we ought not to waste everybody's time with
 19 interim proceedings, he can order them stopped.
 20 (6) provides for the orders. Any orders
 21 signed during the interim proceedings, if that judge has
 22 subsequently recused, and upon motion filed the new
 23 judge can either vacate those motions or he can review
 24 the basis for them, enter the same or similar orders.
 25 HONORABLE F. SCOTT McCOWN: Can I make a

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1 comment about (6)?
 2 CHAIRMAN BABCOCK: Yeah. Let's let him
 3 finish first, though.
 4 HONORABLE F. SCOTT MCCOWN: Well, all
 5 right.
 6 MR. HAMILTON: But if it's a
 7 disqualification the orders are void. (7) is the
 8 hearings. We have two -- this is really Option 1 and 2.
 9 Option 2 is unless the presiding judge has denied the
 10 motion without hearing. That's if we went with Option
 11 2. Otherwise the presiding judge has to hear it or
 12 assign another judge to hear it within ten days. He has
 13 to send notice to all the parties. The hearing can be
 14 conducted by telephone, facsimile. You can use
 15 electronic copies of documents. That's something that
 16 we just added. The judge must rule within 20 days of
 17 the last day of the hearing or the motion is granted,
 18 and the judge, that judge, may cause interim proceedings
 19 to be stopped if he wants to.
 20 Disposition, if the judge is disqualified
 21 or recused, the presiding regional judge assigns another
 22 judge. If the parties agree on another judge, he may
 23 assign that judge, but no judge can be assigned except
 24 by the presiding judge. If an associate judge or master
 25 is recused or disqualified, the presiding judge must

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1 direct the district court which appointed the associate
 2 judge or master to appoint a replacement. That's a
 3 little different.
 4 Appeal is the same as it has been.
 5 Assignment of the judges by Chief Justice of the Supreme
 6 Court. This is new because it deals with what happens
 7 if the regional presiding judge, the motion is filed to
 8 recuse him. So this provides that if the regional
 9 presiding judge elects to hear the motion to recuse or
 10 disqualify and then a motion is filed to recuse him and
 11 he refers that to the Chief Justice of the Supreme Court
 12 who assigns another judge to hear that recusal or
 13 disqualification motion; and if that motion to recuse
 14 the presiding judge is either granted by him and he
 15 steps down or it's granted by a hearing then he notifies
 16 the Chief Justice, who again assigns another judge to
 17 hear the motion to recuse or disqualify the judge
 18 hearing the case. And then the last sentence is the
 19 same sentence that's been there all the time.
 20 On sanctions the first part is the same
 21 except we decided to take out the word "solely," so that
 22 if the motion was brought for purposes of delay and
 23 without sufficient cause this can invoke the motion for
 24 sanctions. Then the bold part was taken from the
 25 Practice and Remedies Code, the new statute where you

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1 have a third motion filed, and it tracks the language of
 2 the statute, but then we added the last part because the
 3 statute refers to superseding that sanctions order.
 4 So we've now provided that unless the
 5 motion is superseded in accordance with Rule 24 of the
 6 Rules of Appellate Procedure and that if it is not
 7 superseded and the money is not timely paid then the
 8 presiding judge may impose sanctions; but if the order
 9 is superseded and not appealed or reversed on appeal, 31
 10 days after the judgment becomes final, including
 11 appeals, the clerk has to deliver to the creditors the
 12 cash bond or other security filed to supersede the
 13 order, and that's what's required under the appellate
 14 rules. So that's basically the outline on what we have.
 15 CHAIRMAN BABCOCK: Okay. Scott, you had
 16 a comment on (6).
 17 HONORABLE F. SCOTT MCCOWN: Yeah. (6) is
 18 contrary to what we actually voted on last time because
 19 it says you have to vacate and may reinstate, and what
 20 we argued through last time was you shouldn't have to
 21 vacate, and a good example would be a divorce. Divorce
 22 is granted, motion to recuse. Recusal is granted. You
 23 don't want the new judge to be forced to vacate and
 24 change the date of rendition of the divorce. There are
 25 all kinds of rights that are going to vest, and the new

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1 judge in fairness may want to keep that order, so he
 2 ought to just be able to review it and vacate it if he
 3 determines he should vacate it, and we voted on that
 4 before.
 5 CHAIRMAN BABCOCK: I've got a comment on
 6 No. (9) even though you didn't change it, Carl and
 7 Richard. I am aware of a circumstance where a motion
 8 was granted based upon what one could very clearly view
 9 was either -- was both fraudulent pleading and
 10 testimony, and that is this rule is written -- is not
 11 reviewable, and the question is whether it should be.
 12 So that's an issue to be considered.
 13 Anybody have any other comments about --
 14 yeah, Nina.
 15 MS. CORTELL: We talked about this last
 16 time, and I've talked about it in the subcommittee. I
 17 have a problem with (4)(a). If it's a valid ground of
 18 impartiality, you know, appearance of impropriety or
 19 bias or (b)(3) is the judge is a witness or related to a
 20 witness, I have a problem with the proceedings going
 21 forward under those circumstances. I think in terms of
 22 the perception of the system and the integrity of the
 23 system it ought to come to a stop. The proceedings
 24 ought to come to a stop when those motions are filed.
 25 If the problem is the ten-day rule, that's covered here.

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1 It can go forward if you file it within ten days.
 2 CHAIRMAN BABCOCK: Okay. Any other
 3 comments? Anne.
 4 MS. MCNAMARA: Ralph Duggins asked me
 5 just to pass one on on sanctions in the last page where
 6 if the order is not superseded and the money is not
 7 timely paid, Ralph's suggestion is that "the presiding
 8 judge shall impose attorneys fees and costs and any
 9 other sanctions he deems appropriate."
 10 CHAIRMAN BABCOCK: Okay. Any other
 11 comments on this?
 12 HONORABLE SCOTT BRISTER: There's a hole
 13 on (7) if you have to start the hearing within 10 days
 14 and you have to rule within 20 days after the last day
 15 of the hearing, it would be -- I'm reminded of the case
 16 where in order to thwart somebody's late designated
 17 expert the judge started the nonjury trial for an hour
 18 and recessed it and then brought it back in six weeks
 19 later for a couple of days and then recessed it and then
 20 three months later for a day or two. The idea ought to
 21 be, for crying outloud, you know, 20 days after it's
 22 filed this thing ought to be decided, even if it's
 23 difficult. If it's a close question, just recuse them,
 24 move on. But I've specifically had a visiting judge who
 25 took -- started the hearing and asked for briefing six

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1 months from now.
 2 CHAIRMAN BABCOCK: Okay. Any other
 3 comments? Sarah.
 4 HONORABLE SARAH DUNCAN: I have a
 5 question. Maybe we talked about this last time on the
 6 supersedeas issue, but the statute makes the attorneys
 7 fees and costs payable on the 31st day after the date of
 8 the order. Now, whether it's immediately appealable or
 9 not, if somebody doesn't want to pay it, it would have
 10 to be superseded, right? And we've made it in
 11 accordance with Rule 24 and drafted this footnote, and
 12 it seems to be saying that only if it's encompassed by
 13 TRAP 24 you have to supersede it. I don't understand
 14 what this is saying, I guess.
 15 MR. HAMILTON: Well, the statute said
 16 that you had to pay the money on the 31st day unless it
 17 was superseded. The statute didn't provide any way of
 18 superseding it, and there's really no way to supersede
 19 it under the current rules except under TRAP 24, and
 20 that just tells you what you have to do to supersede an
 21 order. Deposit cash, bond, and so forth.
 22 HONORABLE SARAH DUNCAN: Maybe it would
 23 resolve my question about it if you specified the
 24 subsection of the TRAPS that are the methods for
 25 superseding.

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1 MR. HAMILTON: That might make it
2 clearer.

3 CHAIRMAN BABCOCK: Any other comments?
4 MR. HAMILTON: I would point out one
5 other problem, is the statute says the 31st day after
6 the orders denying the motion. We just had one of these
7 here recently, and the judge asked for briefs on
8 sanctions, so after he denied the motion we didn't get a
9 ruling on the sanctions until about 45 days later. So
10 we actually drew the order to be 31 days after the order
11 for sanctions, but that's not what the statute says, so
12 that is another problem.

13 CHAIRMAN BABCOCK: Okay. Sarah.
14 HONORABLE SARAH DUNCAN: In subsection
15 (5) I was just asking Judge Brister if he can be ordered
16 to do something by one of his co-equal district judges,
17 and he suggested that that might not be appropriate. So
18 maybe if we just changed that to say "if requested to do
19 so by the judge who..."

20 MR. HAMILTON: "Requested to do so"?
21 That's fine.

22 MR. ORSINGER: Well, you know, I sure
23 would like to see a piece of paper somewhere that says
24 what judges are doing to each other. It needs to be a
25 formal, legal, judicial document, doesn't it?

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1 HONORABLE SCOTT BRISTER: Very
2 interesting. I'm unaware of any other area in our law
3 where one district judge can order another district
4 judge to do anything. Can anybody think of any
5 exception?

6 MR. ORSINGER: It might not be a district
7 judge. It might be a former court of appeals judge, but
8 there's administrative district judges. Don't they have
9 the power to order certain things?

10 HONORABLE SCOTT BRISTER: I don't think
11 so.

12 HONORABLE DAVID PEEPLES: Well, the
13 context of this is that most of the time the motion to
14 recuse stops everything, period. This applies only when
15 we soften that for in several cases. You know, you're
16 not stopped dead in your tracks, but if the judge who's
17 going to hear the recusal motion thinks there's enough
18 to it he or she can say "stop." What's wrong with that?
19 This person has been elevated above you just a little
20 bit, it seems to me.

21 HONORABLE SCOTT BRISTER: Another way --
22 one thing you might look at doing it, when you have
23 duplicative litigation the proper order is to order the
24 parties not to go forward in the other case, not to
25 order the judge to stop.

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1 MR. HAMILTON: Parties, okay.
2 HONORABLE SCOTT BRISTER: We can't issue
3 temporary injunctions against other judges.

4 CHAIRMAN BABCOCK: Richard, can I suggest
5 that you and Carl as you are redrafting that you not
6 wait until you have a whole complete rule unless
7 subparts are dependent upon others, but rather as you
8 finish something, e-mail it to everybody, and everybody
9 give comment back, and if there are some obvious things
10 that your subcommittee thinks ought to be changed then
11 incorporate the comments back so we can move more
12 quickly, and I would suggest that a full draft maybe be
13 communicated to everybody somewhere around the first
14 week of May to give us a week and a half, two weeks to
15 digest it before our next meeting. I know that puts a
16 lot of pressure on you for that. Do I hear a "Yes,
17 that's great. We'll do it"?

18 MR. ORSINGER: Yes. Yes. We'll do it.
19 CHAIRMAN BABCOCK: Okay. Do we have
20 anything else we could beat to death right now? Hearing
21 nothing, then we're in adjournment until May 19th at the
22 Bar headquarters, Room 101.

23 MR. ORSINGER: what time? 9:00 a.m.?
24 CHAIRMAN BABCOCK: 9:00 a.m. on Friday.
25 We'll start earlier on Saturday.

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1 (Whereupon the proceedings were
2 adjourned.)
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1 -----
2 CERTIFICATION OF THE HEARING OF
3 SUPREME COURT ADVISORY COMMITTEE
4 -----
5
6 I, D'LOIS L. JONES, Certified Shorthand
7 Reporter, State of Texas, hereby certify that I reported
8 the above hearing of the Supreme Court Advisory
9 Committee on April 7, 2000, and the same were thereafter
10 reduced to computer transcription by me.
11 I further certify that the costs for my
12 services in this matter are \$ _____.
13 CHARGED TO: Charles L. Babcock .
14
15 Given under my hand and seal of office on
16 this the ____ day of _____, 2000.
17
18 ANNA RENKEN & ASSOCIATES
19 1906-B West 37th Street
20 Austin, Texas 78731
21 (512) 323-0626
22
23 D'LOIS L. JONES, CSR
24 Certification No. 4546
25 Cert. Expires 12/31/2000
0#005, ____DJ

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Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Supreme Court Advisory Committee

Dear Justice Hecht:

Enclosed please find your copies of the transcript for the May 20-21, 1994, meetings of the Supreme Court Advisory Committee.

Very truly yours,



HOLLY H. DIDERSTADT
Legal Assistant

l/hhd
Enclosure

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January 24, 2001

~~Ms. Carrie Gagnon
Jackson Walker, LLP
1100 Louisiana
Suite 4200
Houston, Texas 77002~~

*Re: Supreme Court Advisory Committee Meeting; October 20 and 21, 2000; Austin,
Texas*

Dear Carrie:

Enclosed please find the original, condensed copy, and the ASCII diskettes for the Supreme Court Advisory Committee meeting held January 12 and 13, 2001. The additional copy will be delivered to Justice Hecht.

I have e-mailed the e-transcript™ versions as well. If you are unable to post them to the website, you could e-mail the e-transcript to any members who want to print their own condensed version.

I look forward to seeing you at the next meeting.

Sincerely,



Dee Dee Jones, CSR

Enclosures

cc: Honorable Nathan L. Hecht ✓

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December 4, 2000

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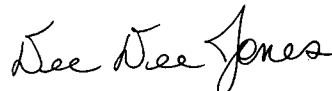
Re: Supreme Court Advisory Committee Meeting; October 20 and 21, 2000; Austin, Texas

Dear Carrie:

Enclosed please find the original, condensed copy, and the HTML diskette for the Supreme Court Advisory Committee meeting held November 17 and 18, 2000. The additional copy will be delivered to Justice Hecht.

I look forward to seeing you at the next meeting.

Sincerely,



Dee Dee Jones, CSR

Enclosures

cc: Honorable Nathan L. Hecht ✓

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August 15, 1995

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Supreme Court Advisory Committee

Dear Justice Hecht:

Enclosed is your copy of the transcript of the July 21-22, 1995, Supreme Court Advisory Committee meeting.

Sincerely,



Holly H. Duderstadt
Legal Assistant

/hhd
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