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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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**COPY**

Taken before Anna L. Renken, a  
Certified Shorthand Reporter in Travis County for  
the State of Texas, on the 19th day of May, 2000,  
between the hours of 1:30 p.m. and 5:00 o'clock  
p.m. at the Texas Law Center, 1414 Colorado,  
Room 101, Austin, Texas 78701.

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(512) 323-0626 FAX (512) 323-0727

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Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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1  
2 CHAIRMAN BABCOCK: Okay. We're going to  
3 shift briefly to the third item on the agenda which  
4 is Rule 199.5(f), the proposed amendment; and  
5 Steve Susman and his subcommittee have met. As you  
6 may recall, Frank Branson was here at the last  
7 meeting and made a presentation to us, and Steve's  
8 group and John Martin I think was the emissary to  
9 that subcommittee from the last meeting, have  
10 talked about it. So Steve, fire away.

11 MR. SUSMAN: Yes. The subcommittee  
12 met by telephone on Wednesday. There's a written  
13 report over there, up there I have done for you.  
14 If you consider Frank's proposal, Frank basically  
15 thinks that the part of Rule 199.5 that allows at a  
16 deposition a lawyer to instruct a witness not to  
17 answer a question which is either abusive or in  
18 answer to which would be misleading has allowed  
19 lawyers to overstep their bounds in depositions and  
20 in fact abusively instruct witnesses not to answer  
21 the question.

22 In a letter he sent us on April 7th where  
23 Tex Quesada, who I guess is one of his associates  
24 or partners, sent a memo to him because I had asked  
25 for some examples of abusive questions, he gave

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1 examples from four depositions. And Mr. Quesada  
2 suggested in his memo that the Rule be amended to  
3 conform to the Federal Rule which does not allow a  
4 defender to instruct the witness to -- a defender  
5 to instruct the witness not to answer the question  
6 either because it's abusive or the answer to which  
7 the question would be misleading. The Federal  
8 Rules are even more restrictive than our Rules on  
9 defenders of depositions.

10 In any event, we looked at examples. There  
11 are four of them. They were outrageous cases of  
12 lawyers abusing that portion of the Rule. I think  
13 they would all, all of the lawyers had the matter  
14 been brought to the attention of the Court, would  
15 be subject to sanctions.

16 So it was the recommendation of our Committee  
17 that in view of the background of the Rule in the  
18 first place, which was that some of us felt  
19 initially that the lawyer should not be able to  
20 instruct the witness not to answer the question,  
21 and during the process of the Rule formulation over  
22 time the Supreme Court ultimately listening to  
23 various people who objected to the idea that  
24 lawyers had to be potted plants in defending  
25 depositions, the Supreme Court added some

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1 protection for the deponent, and that protection  
2 was that you can instruct the witness not to answer  
3 the question if the question is abusive. And the  
4 comment gives a number of examples of abusive  
5 questions. A question which is harassing, a  
6 question which is repetitive, a question which is  
7 beyond the scope of permissible discovery is  
8 abusive by definition.

9 And the Supreme Court also added before the  
10 Rule was passed the idea that came not from this  
11 Committee, but from the Supreme Court that a  
12 deponent could be instructed not to answer a  
13 question, the answer to which would be misleading  
14 like "When did you stop beating your wife?" That  
15 was the example we all had in mind, that if that  
16 question was asked at a deposition, you could tell  
17 the deponent "I ask you not to answer that  
18 question."

19 I think the subcommittee feels that we ought  
20 to leave the Rule like it is. It has gone very far  
21 towards accomplishing the result of making the  
22 conference room look a lot like and feel like the  
23 courtroom, and it has done a lot to prevent abuses,  
24 and there was no sense of the Committee and  
25 subcommittee members that this is being abused, and

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1 if it's being abused, the judges could recognize  
2 immediately that a lawyer has gone too far, because  
3 I think any judge looking at the four examples  
4 would say that's a ridiculous instruction.

5 So and there was another letter we considered  
6 at the same time from a lawyer that -- a guy named  
7 Steve Amis who suggested that the Rule might not  
8 allow a witness to be instructed to refuse to  
9 answer an irrelevant question; but we pointed out  
10 that Comment 4 clearly says that if the question is  
11 beyond the scope, seeks information that is beyond  
12 the scope of discovery, i.e. is irrelevant, the  
13 lawyer can instruct the witness not to answer that  
14 question as being an abusive question.

15 And so we don't recommend that the Rule be  
16 changed until someone comes forward with better  
17 examples of abuse.

18 MR. SOULES: Second.

19 CHAIRMAN BABCOCK: Okay. Any discussion? Any  
20 disagreement? Well, seeing none and hearing none,  
21 then the subcommittee's recommendation will be  
22 adopted by the full Committee and we will report  
23 accordingly to the Court and to the parties that  
24 brought this problem to our attention.

25 MR. SUSMAN: The second thing we

1 considered was a suggestion by Robert Pemberton  
2 that there is a problem with the Rules because  
3 while the Rules clearly contemplate and provide  
4 that discovery requests can be served with the  
5 original petition, they also provide that discovery  
6 requests are not to be filed with the Court, with  
7 the clerk. And some clerks are refusing to accept  
8 interrogatories or requests for disclosure or  
9 document requests as attachments or served with,  
10 attached to or clipped together with a petition  
11 when they issue a citation because they aren't  
12 supposed to file those. They aren't accepted.

13 We are having some problems like that in  
14 district clerks' offices. Someone has suggested in  
15 response to Pemberton's point that the clerks are  
16 misreading Rule 99, which says that you can tender  
17 things to the Court. You can furnish things to the  
18 clerk, and so you simply furnish the clerk the  
19 discovery request. Furnishing is not filing, and  
20 therefore the clerk gets the discovery request and  
21 can serve it with the petition.

22 I've personally never had this problem happen  
23 to me so I don't know how big a problem it is. One  
24 way of dealing with it is sometime changing the  
25 Rule to provide that while the discovery

1 request -- the exception to not filing discovery  
2 requests with the Court would be to file initial  
3 discovery requests. Those that are to be served  
4 with the petition, they are to be filed with the  
5 Court. It might not be a bad idea anyway. And I'm  
6 sure we're not burdened. I don't think it's done  
7 so frequently that it would really make the clerks'  
8 files so much larger; and it might be a pretty good  
9 idea since initially there may be reasons people  
10 want to go down and look at the file before lawyers  
11 of record are even hired and you could see whether  
12 discovery requests were filed and what they were  
13 after.

14 But our feeling there again, that this is not  
15 a problem that warrants a special change in the  
16 Rules, that we ought to wait for another year to  
17 pass and see whether additional technical problems  
18 like this, and this was a technical problem, arise,  
19 and if so, ask the Court or recommend to the Court  
20 that all these technical problems be cured at once,  
21 and so we don't stir up any problem with the  
22 legislature thinking we're coming back with a  
23 substantive change so quickly.

24 And there may be some other technical  
25 problems. This is the only one that has been



1 brought to our attention as a technical problem;  
2 and that's what the Committee thinks on that, do  
3 nothing now. But it is kind of a problem.

4 CHAIRMAN BABCOCK: Okay. Yes, Steve.

5 MR. TIPPS: I would be interested in  
6 knowing from Bonnie if you've encountered that  
7 problem in your county and how you dealt with it.

8 MS. WOLBRUECK: We have encountered it,  
9 and in fact Bob Pemberton and I have had several  
10 conversations regarding this.

11 CHAIRMAN BABCOCK: Could you speak up a  
12 little, Bonnie?

13 MS. WOLBRUECK: Yes. Bob and I had  
14 several discussions about that in regards to this  
15 issue trying to come up with a solution; and Bob  
16 and I agreed that possibly we could just add a  
17 notation to the bottom of the citation, not on the  
18 issuance part, but at the bottom of it, that said  
19 that discovery attached was not filed with the  
20 clerk so that there was no definition to the fact  
21 that this is just a copy that has been attached for  
22 service purposes only.

23 Other than that, I know I've had a couple of  
24 clerk's offices call me and ask me. I've referred  
25 to them the way we have handled it. I realize that

1 it's probably a problem; but maybe we can -- and I  
2 know that -- okay. Go ahead. I know that Richard  
3 is going to speak to the fact that we'd hate to  
4 alter Rule 99, and that's also an issue of the  
5 clerk adding some notation. It's not in the body  
6 of the citation, but it's just on the bottom of the  
7 citation.

8 CHAIRMAN BABCOCK: Richard.

9 MR. ORSINGER: My subcommittee which had  
10 responsibility for this range of Rules involving  
11 process I think has a tentative opinion that what  
12 we should do is formalize a procedure that exists  
13 around Texas in a de facto basis. There's a piece  
14 of process called a precept that most district  
15 clerks around the state apparently recognize as the  
16 process by which things that do not fit other  
17 categories of the process, you attach them to the  
18 precept and you serve them. For example, serve  
19 interrogatories on a party that's representing  
20 themselves. You want to prove service. You get a  
21 Sheriff's Deputy or a private process server to  
22 serve them by precept and file a return.

23 If you took a default judgment against  
24 somebody and you want to set them up for contempt  
25 enforcement, which frequently happens in a family

1 law case, you attach it to a precept, you get it  
2 served, and have a return of this precept in the  
3 court.

4 There is no Rule of Procedure that recognizes  
5 the validity of the precept; but I did research on  
6 Weslaw, and precepts are mentioned in the case  
7 law. And so our proposal is at my subcommittee  
8 level to just simply alter the process list and add  
9 on top of a citation, a temporary restraining, an  
10 order for show cause hearing, temporary injunction,  
11 all those things; and we'll just add another piece  
12 of process called a precept, and that anything that  
13 doesn't -- that needs to be served that you want  
14 formal return on that doesn't fit any of the other  
15 categories gets attached to a precept.

16 I'm fundamentally against using a citation to  
17 serve something other than a petition because the  
18 citation language makes it clear that you're being  
19 sued and you have to file an answer and it  
20 doesn't -- this kind of jerry-rigged language  
21 that's typed in by some clerk depending on -- it  
22 probably varies from locale to locale, to me I  
23 think is a very dangerous and misleading thing.

24 So our proposal rather than fooling with all  
25 that is to create a precept and then to make it

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1 clear that when someone uses a precept to serve  
2 discovery that a copy of that discovery is not to  
3 be retained by the clerk and the problem goes  
4 away.

5 MR. SUSMAN: The discovery subcommittee  
6 gladly cedes to the precept committee, the citation  
7 committee, the solution to this problem.

8 MR. ORSINGER: Yes. And that would solve  
9 other problems too, because there are other things  
10 you want to serve sometimes and you can't stick  
11 them on a citation either.

12 CHAIRMAN BABCOCK: Is there any Rule  
13 you're not involved with?

14 MR. ORSINGER: Well, because my committee  
15 by default is handling the whole recodification, I  
16 mean, the restructuring.

17 CHAIRMAN BABCOCK: Let's not talk about  
18 that.

19 MR. ORSINGER: Yes. In fact the truth is  
20 "no."

21 CHAIRMAN BABCOCK: Okay. So the  
22 discovery subcommittee having ceded that to you, by  
23 next meeting will you give us some language on the  
24 precept situation?

25 MR. ORSINGER: Okay. Bonnie and Bill and

1 I will bring you back a precept Rule, Bill  
2 Dorsaneo.

3 CHAIRMAN BABCOCK: Okay. Terrific.  
4 Thanks. Is that it, Steve?

5 MR. SUSMAN: That's it.

6 CHAIRMAN BABCOCK: Great. Thanks so  
7 much. Justice Hecht has had transportation  
8 problems and has just been able to join us. And  
9 unfortunately, Justice Hecht, while you were not  
10 here this morning we withdrew rulemaking authority  
11 from the Court.

12 JUSTICE HECHT: Get in line.

13 CHAIRMAN BABCOCK: No. We've been making  
14 good progress, and we've got the Parental  
15 Notification Rules out of the way, and we're now  
16 working on recusal. And where we left off was with  
17 Judge McCown's Option 11, which the language is now  
18 as proposed as follows: "A lawyer in the  
19 proceeding or the lawyer's law firm is doing legal  
20 work for the judge, the judge's spouse, or the  
21 judge's minor child in an ongoing legal matter  
22 other than a class action except for legal work by  
23 a government attorney in their official capacity"  
24 with a Comment which says "Class action litigation  
25 should be handled on a case-by-case basis."

1           So that's the language we now have before us.  
2           What comments, if any, do we have on that? Are we  
3           ready to vote on that?

4           MR. ORSINGER: Well, it seems to me like  
5           we ought to discuss Option 11(a) before we vote on  
6           Option 11 before we conclude the debate on it.

7           CHAIRMAN BABCOCK: Well, we did discuss  
8           11(a).

9           MR. ORSINGER: We did?

10          CHAIRMAN BABCOCK: Well, on the  
11          adversity.

12          MR. ORSINGER: Okay.

13          CHAIRMAN BABCOCK: If Carl wants to talk  
14          about the attorney-client relationship language, we  
15          didn't talk about that. So we can if we want.

16          MR. HAMILTON: Well, I guess my concept  
17          was that what we're trying to avoid here is an  
18          appearance of impropriety because of a relationship  
19          that the judge has with the lawyer in the case; and  
20          we talked about cutoff times and how long it's  
21          going to continue. So my concept was if he had an  
22          existing attorney-client relationship.

23          Now, you know, there are those who say "When  
24          does that end?" Scott brought up the problem if  
25          you do a will for somebody. I mean, I don't

1 consider than an attorney-client relationship  
2 that's ongoing. I think it has to be something  
3 that you're now engaged in and that covers  
4 everything. I'm not sure that I know exactly what  
5 doing legal work means. Is that different than an  
6 attorney-client relationship. If it is, we need to  
7 know what it means. If we're dealing with an  
8 attorney-client relationship, we know what that  
9 is.

10 And I think that that is the problem is  
11 because if you have that relationship, the lawyer,  
12 as Steve pointed out, can have private conferences  
13 with the judge over that. You don't know whether  
14 they're talking about that or something else that  
15 is in the Court. It just presents an appearance of  
16 impropriety, so I think any kind of attorney-client  
17 relationship ought to be a ground for recusal. And  
18 I guess I'm kind of leaning toward that rather than  
19 the general Rule, because the general Rule you have  
20 to get into the question of whether the  
21 impartiality might be reasonably questioned. This  
22 way you have a definite Rule that simply says "If  
23 you have got that relationship, that's it. He's  
24 out." You don't have to have a hearing over  
25 whether he's going to be impartial or not.

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1           And then I just continued it because I think  
2           that if you're going to condemn a judge because  
3           he's on the same side with the lawyer and therefore  
4           might be prejudiced, you ought to also condemn him  
5           if he's adverse.

6                   CHAIRMAN BABCOCK: We voted on that.

7                   MR. HAMILTON: I know. We already voted  
8           on it. But I think if you just leave it one-sided,  
9           it sends the signal that it's okay if you're on the  
10          same side; but if you're on the adverse side, then  
11          you're going to have to have a hearing on that and  
12          prove whether or not there is any impartiality or  
13          his impartiality might be questioned, so --

14                   CHAIRMAN BABCOCK: Well, unless there is  
15          a groundswell to reopen something we voted on on  
16          this issue, we've got tons of stuff we've got to do  
17          today, so I'd say we shouldn't.

18                   MR. HAMILTON: That's all I wanted to  
19          say. I put "party" in there because I thought  
20          there might be a situation where a party in the  
21          lawsuit was a lawyer such as in a malpractice  
22          case.

23                   CHAIRMAN BABCOCK: Right.

24                   MR. HAMILTON: And that lawyer was the  
25          lawyer for the judge, so it would be



1 attorney-client relationship with a lawyer or a  
2 party.

3 CHAIRMAN BABCOCK: Would you solve your  
4 problem if in Scott's language you said  
5 "is representing the judge" as opposed to the  
6 current language is "doing legal work for"?

7 MR. HAMILTON: I think that's a little  
8 clearer, yes.

9 CHAIRMAN BABCOCK: And how is that  
10 different?

11 MR. HAMILTON: Well, representing the  
12 judge means to me there's an attorney-client  
13 relationship.

14 CHAIRMAN BABCOCK: And doing legal work,  
15 a lawyer doing legal work for the judge does not  
16 mean there's an attorney-client relationship?

17 MR. HAMILTON: Well, suppose that the  
18 judge calls you up and says "I have this problem in  
19 my court. You're not a lawyer in it; but I wish  
20 you would tell me what the law is" or "brief this  
21 for me." And that happens.

22 CHAIRMAN BABCOCK: Yes.

23 MR. HAMILTON: And so you do some legal  
24 work for the judge to help him out on one of his  
25 cases. That's doing legal work for him.

1 MR. SOULES: "Representing" is the word  
2 that is used in the Disciplinary Rules. We ought  
3 to pick that up.

4 MR. SUSMAN: Yes.

5 CHAIRMAN BABCOCK: Yes, Nina.

6 MS. CORTELL: I still have one question.  
7 I'm not comfortable, and maybe others are, when we  
8 say "ongoing legal matters" what that really  
9 means. Everybody uses the will example. Isn't  
10 there an argument that your representation  
11 continues even after the will is executed?

12 I mean, a lawsuit is easy to define. It's  
13 over when it's over; but other types of legal  
14 representation I think it's more difficult. Are  
15 others satisfied that that's limited in time, or do  
16 we all think it's a continuing obligation?

17 MR. SOULES: If you use the word  
18 "representing," you're going to pick up the  
19 concepts of former client and all that that's in  
20 the Disciplinary Rules and be able to use those for  
21 benchmarks. There's a lot of work being done on  
22 that by the Disciplinary Rules of Professional  
23 Conduct within the State Bar right now.

24 CHAIRMAN BABCOCK: So you're in favor of  
25 putting "representing" in?

1 MR. SOULES: Yes. So that we can get a  
2 lot about what that means.

3 CHAIRMAN BABCOCK: Okay. Steve.

4 MR. SUSMAN: No. I think I agree with  
5 Luke in that I think that "representing" is  
6 probably the word of art we rely on here.

7 CHAIRMAN BABCOCK: Okay. Nina, I think  
8 that, you know, like with any Rule there's always  
9 going to be, I mean, he did -- you know, I did a  
10 will for him 10 years from now. I have no other  
11 time sheets to reflect contact with the judge about  
12 that. You know, I think the ongoing legal matter  
13 language would be probably exclude recusal in that  
14 instance, I would guess. Richard.

15 MR. ORSINGER: A slightly different  
16 subject. But it would seem to me that the logic of  
17 Option 11 would apply when the litigant rather than  
18 a lawyer in the case is representing the judge. I  
19 have a hard time distinguishing why you would have  
20 a recusal if one of the lawyers in the case is  
21 representing the judge and you wouldn't have a  
22 recusal when the opposing party is representing the  
23 judge; and that's in Carl's Option 11(a), and I  
24 don't hear anybody arguing against it; but I think  
25 that it's an important concept we ought to face and

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1 either include or not include because we intend  
2 to.

3 CHAIRMAN BABCOCK: Comment on that?  
4 Everybody feels that strongly?

5 HONORABLE DAVID PEEPLES: This is a  
6 malpractice case where the lawyer who is being sued  
7 represents the judge?

8 MR. ORSINGER: Yes. In other words,  
9 under Scott's proposal it only counts if one of the  
10 lawyers who is an advocate in the case is  
11 representing the judge. Under Carl's proposal if a  
12 litigant is a lawyer for the judge, then the  
13 recusal would still be just as good. It doesn't  
14 have to be a malpractice case. I mean, it could  
15 be, in other words, the judge might be being sued  
16 or might be a Plaintiff somewhere and the party is  
17 representing the judge rather than the party's  
18 lawyer is representing the judge.

19 CHAIRMAN BABCOCK: The problem with  
20 saying "party" the way we've got this here it's  
21 apparent that a lawyer in the proceeding or the  
22 lawyer's law firm is representing.

23 MR. ORSINGER: Right.

24 CHAIRMAN BABCOCK: That clearly  
25 implicates the attorney-client privilege. If you

1 add "party," I mean, my stockbroker might be  
2 representing me.

3 MR. TIPPS: But aren't we saying  
4 representing in an ongoing legal matter still so  
5 that clearing we're talking about --

6 CHAIRMAN BABCOCK: Yes.

7 MR. TIPPS: -- legal representation as  
8 opposed to --

9 CHAIRMAN BABCOCK: Yes. That's true.  
10 That's true.

11 MR. ORSINGER: You could say "If a party  
12 or a lawyer in the proceeding or the lawyer's law  
13 firm is doing work for the judge," and you'd get to  
14 the same place.

15 MR. TIPPS: Or it had to be party's law  
16 firm.

17 HONORABLE BILL RHEA: Is it "the  
18 proceeding" or "a proceeding"?

19 MR. ORSINGER: It's "another proceeding."

20 HONORABLE DAVID PEEPLES: This is going  
21 to happen once every century.

22 HONORABLE SCOTT A. BRISTER: The  
23 difference between the two is the (a)(d)20 Rule.  
24 It does make sense to write a Rule for things that  
25 come up frequently, and it does not make sense to

1 write a Rule for things that come up extremely  
2 infrequently.

3 HONORABLE BILL RHEA: Yes.

4 CHAIRMAN BABCOCK: There is some wisdom  
5 to that. Carl, could you live without the  
6 "party"?

7 MR. HAMILTON: Yes. Yes. Then I had  
8 another question. When we're talking about  
9 accepting the work done by a county attorney,  
10 district attorney and so forth --

11 CHAIRMAN BABCOCK: Well, let me read the  
12 language, because it has changed now. "Except for  
13 legal work by a government attorney in their  
14 official capacity." And the thinking was that that  
15 was going to pick up all representation of the  
16 judge where the judge's official duties are  
17 implicated. That's why that official capacity  
18 language was added.

19 MR. HAMILTON: So if I have a case where  
20 the judge is being represented in very, very bitter  
21 litigation, but he's being represented by the  
22 Attorney General, and that same Attorney General  
23 comes into another case that I'm in, --

24 CHAIRMAN BABCOCK: Right.

25 MR. HAMILTON: -- then I can't recuse the

1 judge because of that relationship?

2 CHAIRMAN BABCOCK: Not under this Rule.

3 MR. HAMILTON: Or is it just because the  
4 Attorney General in general represents judges if  
5 they get into litigation? Does there have to be a  
6 specific ongoing matter that the Attorney General  
7 is representing the judge in, or just because they  
8 represent the judge in general?

9 CHAIRMAN BABCOCK: Scott?

10 HONORABLE SCOTT A. BRISTER: Well, surely  
11 it's an ongoing matter.

12 MR. HAMILTON: A specific matter.

13 HONORABLE SCOTT A. BRISTER: I mean, I  
14 don't have any cases and haven't for years; but I  
15 might some day, so surely that doesn't recuse me  
16 from all cases where the Attorney General  
17 represents the state. That would paralyze us.

18 MR. EDWARDS: In this one it excludes any  
19 representation by a governmental lawyer with regard  
20 to this provision.

21 MR. HAMILTON: I guess I have a problem  
22 with if we're going to say the judge is recused  
23 because Richard is representing him in a case. Why  
24 should it be any different if the Attorney General  
25 is representing him in one case?

1 HONORABLE SCOTT A. BRISTER: Several  
2 reasons.

3 MR. HAMILTON: The prejudice is still  
4 going to be there.

5 CHAIRMAN BABCOCK: Steve.

6 MR. SUSMAN: As a practical matter  
7 there's not going to be the warm and fuzzy feeling  
8 between the judge and the Attorney General that  
9 there is between the judge and Richard. The judge  
10 went out and selected Richard. It's a buddy.  
11 There's going to be a personal warm and fuzzy  
12 feeling there; but with the Attorney General, you  
13 know, it's somebody has got to represent him. I  
14 mean, I think we need to recognize there's a  
15 practical difference.

16 MS. EADS: We prohibit warm and fuzzy  
17 feelings.

18 MR. SUSMAN: In fact, I think it would be  
19 an advantage to have the Attorney General on the  
20 other side of a case where the Attorney General has  
21 been representing that judge, because they usually  
22 do such a lousy job.

23 COMMITTEE MEMBERS: (Laughter.)

24 MR. ORSINGER: Can I ask about this new  
25 language?



1 CHAIRMAN BABCOCK: Yes.

2 MR. ORSINGER: "By a government attorney  
3 in their official capacity," are we talking about  
4 the government attorney's official capacity?

5 CHAIRMAN BABCOCK: Right.

6 MR. ORSINGER: Or representing the judge  
7 in the judge's official capacity?

8 CHAIRMAN BABCOCK: Well, the thinking  
9 was, and Bill and Scott came up with this so they  
10 can speak to this, Scott McCown. The thinking was  
11 that "their" referred to the government attorney,  
12 but they wouldn't be doing it in their official  
13 capacity if the judge's lawsuit wasn't relating to  
14 his official capacity or her official capacity.

15 MR. ORSINGER: Okay.

16 CHAIRMAN BABCOCK: Okay? All right. Are  
17 we ready to vote on this?

18 HONORABLE MICHAEL H. SCHNEIDER: Just one  
19 thing.

20 CHAIRMAN BABCOCK: No.

21 HONORABLE MICHAEL H. SCHNEIDER: When you  
22 limit it to official capacity does that mean  
23 administrative capacity, because there is a  
24 distinction there?

25 MR. EDWARDS: I think administrative

1 capacity is official capacity.

2 MR. SOULES: All official capacities.

3 HONORABLE MICHAEL H. SCHNEIDER: Well,  
4 we're not immune from suit from that area. We are  
5 in the --

6 MR. EDWARDS: We're not talking about --

7 HONORABLE MICHAEL H. SCHNEIDER: --  
8 public capacity.

9 MR. EDWARDS: We're not talking about  
10 immunity from suit. We're talking about --

11 HONORABLE SCOTT A. BRISTER: We're  
12 talking about the government lawyer's --

13 MR. EDWARDS: We're talking about --

14 HONORABLE SCOTT A. BRISTER: -- official  
15 capacity.

16 MR. EDWARDS: -- what business can a  
17 government --

18 HONORABLE MICHAEL H. SCHNEIDER: Well,  
19 that's what the question was. Are you talking  
20 about the judge's official capacity?

21 CHAIRMAN BABCOCK: No.

22 MR. EDWARDS: No. It would be the  
23 government lawyer's official capacity. Maybe I'm  
24 misunderstanding it; but I understand that a  
25 government lawyer in his or her official capacity

1 can't do anything but official work.

2 HONORABLE MICHAEL H. SCHNEIDER: Yes.  
3 I'm sorry. But I thought I heard you say that you  
4 were talking about the judge's official capacity.

5 CHAIRMAN BABCOCK: No. Skip.

6 MR. WATSON: The only thing I can think  
7 of that is undecided is whether to flip "his doing  
8 legal work" and make it "his representing."

9 CHAIRMAN BABCOCK: Well, now we've --

10 MR. WATSON: Have we decided that?

11 CHAIRMAN BABCOCK: Yes. We've stricken  
12 the phrase "doing legal work for" and inserted the  
13 word "representing" in its place.

14 MR. WATSON: Thanks.

15 CHAIRMAN BABCOCK: Yes. Let me read it  
16 again. "A lawyer in the proceeding or the lawyer's  
17 law firm is representing the judge, the judge's  
18 spouse, or the judge's minor child in an ongoing  
19 legal matter other than a class action except for  
20 legal work by a government attorney in their  
21 official capacity." Comment, "Class action  
22 litigation should be decided on a case-by-case  
23 basis." That's the present idea.

24 MR. ORSINGER: And is it our  
25 understanding that "representing" would apply even

1 if there was just a private consultation, no  
2 confrontation, no negotiations, no lawsuit? If  
3 they come for consultation on a problem, is that  
4 representing?

5 CHAIRMAN BABCOCK: It's an ongoing legal  
6 matter.

7 MR. HAMILTON: If that's the case law.

8 MR. EDWARDS: I think that the language  
9 contemplates two things, an ongoing legal matter  
10 and continuous ongoing representation, because it  
11 says "is representing," not "has represented."

12 MR. ORSINGER: So if the judge has a  
13 dispute, it's a contract dispute, but it has not  
14 gone to court, and he goes to see a lawyer about  
15 it, but doesn't hire him to, quote, "represent him"  
16 in negotiations or a lawsuit, that three-hour  
17 conference does not constitute representing past  
18 the end of the conference; is that right?

19 MR. EDWARDS: I would assume.

20 CHAIRMAN BABCOCK: Luke.

21 MR. SOULES: If you take out the word  
22 "ongoing legal matter" and say "as a client" you  
23 pick up a lot of developed concepts about present  
24 client and former client and so forth.

25 CHAIRMAN BABCOCK: I think, though, that

1 the thinking was "ongoing legal matter" was  
2 important so that we would exclude things, not pick  
3 them up.

4 MR. EDWARDS: In other words, it brings  
5 to a temporal end the recusal period at the end of  
6 the litigation or at the end of whatever it is.

7 MR. ORSINGER: It's real easy to envision  
8 if it's a lawsuit; but if it's not a lawsuit, I'm  
9 having trouble what constitutes "representing."  
10 I'm understanding now that merely having a  
11 conference with a judge does not mean I'm  
12 representing the judge. That's what I'm getting  
13 out of this conversation.

14 HONORABLE SCOTT A. BRISTER: What do you  
15 mean? "I'm interviewing you about perhaps  
16 representing me in this claim," that would be  
17 representing because it's covered by the  
18 attorney-client privilege, because it leads up. Or  
19 do you mean just "I have a question; it's family  
20 law; you're not involved"; --

21 MR. ORSINGER: No. You asked me to meet  
22 you --

23 HONORABLE SCOTT A. BRISTER: -- "let's  
24 have a chat"?

25 MR. ORSINGER: You asked me to meet with

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1 you for three hours on some kind of problem you  
2 have, legal problem you have, and I talk to you for  
3 three ours, and we leave without any kind of  
4 agreement that I'm going to file a lawsuit or  
5 negotiate on your behalf, so we've gone away now.  
6 I've had a conference that's covered by the  
7 attorney-client privilege. There's no lawsuit.  
8 There's no negotiations. I haven't sent a letter  
9 to anybody; and so I'm not representing you on an  
10 ongoing matter once that conference is over.  
11 Right?

12 MR. SUSMAN: I agree.

13 MR. MARTIN: That's right. No recusal.

14 CHAIRMAN BABCOCK: Richard, you sound  
15 like you have something in mind. We'll let that  
16 pass. Are we ready to vote on this? I think we  
17 should. Does anybody want to hear it again?

18 COMMITTEE MEMBERS: No.

19 CHAIRMAN BABCOCK: No. Okay. All in  
20 favor of Option 11 raise their hands.

21 HONORABLE ANN C. MCCLURE: I vote "yes."

22 CHAIRMAN BABCOCK: One. Twenty-six in  
23 favor. All opposed? Two. So this will pass.  
24 Ann, did you vote for this?

25 HONORABLE ANN C. MCCLURE: I did vote for

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1 it.

2 CHAIRMAN BABCOCK: Great. Thank you.

3 MR. TIPPS: And it's good to be reminded  
4 that you're there by your vote.

5 MR. ORSINGER: The vote was 25 to 2?

6 CHAIRMAN BABCOCK: Twenty-six to two,  
7 Richard. One of your most lopsided defeats.  
8 Okay.

9 MR. CHAPMAN: Before we go on, --

10 CHAIRMAN BABCOCK: Yes, Carlyle.

11 MR. CHAPMAN: -- can you just restate for  
12 the record why it is that, the thinking of the  
13 Committee, because I have lost it as to why it is  
14 that when the mirror image of this situation is  
15 presented we don't ask the judge to recuse him or  
16 herself, that is to say when the lawyer who is  
17 opposing a judge in an ongoing matter? I'm losing  
18 the logic of why we are not pursuing the mirror  
19 image.

20 CHAIRMAN BABCOCK: Well, frankly if it  
21 were up to me, I would seriously consider the  
22 mirror image; but Scott McCown made a --

23 MR. SOULES: Don't you remember? It was  
24 the lawyer is supposed to quit because it's more  
25 important to keep the judge on the bench.

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1 HONORABLE SCOTT A. BRISTER: Yes. But I  
2 don't necessarily endorse --

3 MR. SOULES: The lawyer has totally lost,  
4 we've totally lost --

5 HONORABLE SCOTT A. BRISTER: I don't  
6 necessarily --

7 MR. SOULES: -- the Disciplinary Rules of  
8 Professional Conduct in that, and that's typical.

9 HONORABLE SCOTT A. BRISTER: The  
10 difference is whether -- the difference is one of  
11 the other reasons when you write a Rule or don't  
12 write a Rule is can the Rule be used to create more  
13 abuse than what you're trying to correct. And the  
14 problem with recusal Rules is folks like you-all  
15 file them very rarely; but there are people who use  
16 them as a weapon as a part of their litigation; and  
17 they will sue the judge so they can get another  
18 judge assigned to the case. I have had that  
19 specifically happen. I mean, you know, --

20 MR. SUSMAN: Mr. Chairman.

21 HONORABLE SCOTT A. BRISTER: -- if the  
22 deal is you can get rid of Brister by suing him,  
23 you know, I'm going to get sued a lot.

24 MR. CHAPMAN: But isn't that an anomaly  
25 in the broad scope of things?



1 MR. SUSMAN: Mr. Chairman, --

2 MR. CHAPMAN: Isn't that an anomaly?

3 MR. SUSMAN: -- two hours ago we voted.  
4 Two hours ago there was a vote on this, and we  
5 heavily voted against; and I think those who want  
6 to re-raise it ought to have some minimum quorum  
7 here to bring it forth or we'll be discussing the  
8 same thing over and over again.

9 CHAIRMAN BABCOCK: Well, Carlyle had --

10 MR. SUSMAN: This has been passed and  
11 voted on.

12 CHAIRMAN BABCOCK: Yes.

13 MR. SOULES: We're going to do some silly  
14 things. This is just one of them. Let's go.

15 CHAIRMAN BABCOCK: Well, Carlyle had  
16 standing because he hadn't said very much; but --

17 MR. ORSINGER: I'm not sure the vote  
18 wouldn't turn around if you took it again, now that  
19 Scott is gone.

20 CHAIRMAN BABCOCK: We'll think about it  
21 over the evening, because we're still going to be  
22 on recusal tomorrow.

23 MR. CHAPMAN: Steve, I'm just basically  
24 begging the logic of that. That's all. I don't  
25 want to visit it again. I just want us to think

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1 about it, because I'm sure that at some point in a  
2 more rational, lucid moment we will revisit it.

3 CHAIRMAN BABCOCK: Well, over tonight,  
4 Friday night we'll all think about it; and then  
5 tomorrow when there's only six of us here we'll  
6 change the vote.

7 MR. ORSINGER: It's going to be like the  
8 TVs and Court Rule.

9 CHAIRMAN BABCOCK: That's right. All  
10 right. Let's go on to the next thing.

11 MR. ORSINGER: What we ought to do  
12 probably is take up an issue that Luke raised at  
13 lunch before we launch into the Rule, because I  
14 want him to state it before he leaves, and he's  
15 leaving. Can we do that?

16 CHAIRMAN BABCOCK: Sure.

17 MR. ORSINGER: There was a change that  
18 was made that we've never discussed that seems to  
19 be of great magnitude.

20 CHAIRMAN BABCOCK: Change regarding what?

21 MR. ORSINGER: It has to do with the  
22 action of the trial judge in being able to work on  
23 emergencies in the face of a motion to recuse  
24 that's filed more than 10 days in advance. And in  
25 the reconstruction draft or whatever we sent to the

1 Supreme Court three years ago we changed that  
2 language; and I'm not sure we intended to, and Luke  
3 has got a concern about it.

4 CHAIRMAN BABCOCK: Okay. Go ahead, Luke.

5 MR. SOULES: The language that I think is  
6 lost is in current Rule 18(a)(c), and it's the very  
7 last phrase of the clause, and it has to do with  
8 the judge acting in the interim after a motion to  
9 recuse has been filed. All right.

10 Well, we've got some specifics on interim  
11 proceedings that start with after referring a  
12 motion to the judge of the administrative region.  
13 I guess that's something that can be done  
14 instanter, so the judge could be faced with,  
15 presented with a motion to recuse, and pick up the  
16 phone and say "I'm referring it to the judge of the  
17 administration region." So I guess the timing is  
18 not so bad on that; but I'm getting to something  
19 more fundamental.

20 After that occurs the judge can act. The  
21 judge under a recusal confrontation can act if  
22 certain grounds are the only grounds. If the  
23 motion is a third or substantive, if the motion is  
24 filed within 10 days of a setting, and I'm assuming  
25 that means a setting that exists at the time the

1 motion is filed, or when the presiding judge says  
2 he's going to hear it and they move to recuse the  
3 presiding judge.

4 Now what this doesn't take care of is the  
5 situation that the Rule granted relief in from the  
6 very inception; and the language that is used in  
7 the Rule is "The judge shall take no further action  
8 in the case except for good cause stated in the  
9 order in which the action is taken." That's to  
10 take care of the situation, and we debated this  
11 whenever the Rule was first passed whatever, 10, 15  
12 years ago; and I can still remember that. My  
13 short-term memory is not as good as my long-term  
14 memory.

15 The party has a 14-day TRO. Everybody expects  
16 it's going to be extended; but nobody, the party  
17 benefitting from the TRO has not filed a motion to  
18 extend. It's five days out, four days. Probably  
19 not time to get a hearing on the recusal, and so  
20 they file a motion to recuse the trial judge in  
21 order to avoid the extension of the TRO so that  
22 they can violate the TRO and go hide a bunch  
23 of property. That is the circumstance in which the  
24 judge under recusal confrontation could state good  
25 cause and say "I extend the TRO for good cause" and

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1 state what it is. And I think this language  
2 "except for good cause stated in the order in which  
3 such action is taken" should be restored to the  
4 present draft.

5 CHAIRMAN BABCOCK: Richard, what -- Carl,  
6 what are your views on that?

7 MR. ORSINGER: I think that it happened  
8 at the time of the last recodification. Did we  
9 conclude that, Carl? Do you agree with that?

10 MR. HAMILTON: Yes.

11 MR. ORSINGER: And it's not anything this  
12 incarnation of the Committee has debated; and I  
13 don't recall that we did it intentionally. And so  
14 I don't know that eliminating that power was a  
15 conscious act.

16 MR. SOULES: I think what they did is  
17 they put some specifics in, but didn't have in mind  
18 what this was intended for; but the specifics don't  
19 pick it up.

20 CHAIRMAN BABCOCK: Yes. This frankly  
21 doesn't sound like it ought to be very  
22 controversial.

23 MR. SOULES: I don't think it should be.

24 CHAIRMAN BABCOCK: Is it?

25 MR. HAMILTON: We can add that to

1 paragraph four, make it 4(e), the interim  
2 proceeding, page 5.

3 CHAIRMAN BABCOCK: Is that the place to  
4 put it?

5 MR. SOULES: Well, I think you put it in  
6 number (4) in the third line after the words  
7 "disposed of." That would be the same position it  
8 was in in the present one; but I don't care where  
9 it goes as long as it's there.

10 HONORABLE SCOTT A. BRISTER: I think the  
11 thinking was in most cases you don't need the  
12 emergency, because if it's the three listed  
13 grounds, you know, partiality might reasonably be  
14 questioned, or personal bias or prejudice, which  
15 are usually the things used by people who want to  
16 delay things, those don't stop anything, and the  
17 trial judge can keep on making orders.

18 But what if the motion is based on the judge  
19 has knowledge of material evidentiary facts or is  
20 related to one of the parties or their attorneys?  
21 Do you feel it's comfortable then about, "Well,  
22 they're related to them, but it's an emergency.  
23 Let them go ahead and make the ruling anyway"?  
24 Certainly if they're disqualified, it's especially  
25 troubling to say "Well, go ahead and make the

1 emergency orders anyway"; but I don't remember much  
2 specifically about the discussion either. It's a  
3 waste of time for them to make those.

4 MR. SOULES: Well, it was a waste of  
5 time. I realize you can violate a Court order with  
6 immunity; but that's not something I do or my  
7 clients do.

8 MS. BARON: Scott, if you're  
9 disqualified, it doesn't matter. The order is void  
10 regardless, so that's not an issue of, well, it  
11 would only present itself in a recusal context.

12 HONORABLE SCOTT A. BRISTER: I agree. My  
13 recollection is this was a family law concern  
14 maybe.

15 MR. SOULES: It can be a TRO in a  
16 business case where they're going to hide assets  
17 too.

18 CHAIRMAN BABCOCK: Does anybody object to  
19 putting this language back in there in subsection  
20 4?

21 MS. BARON: No.

22 MR. TIPPS: What would be the precise  
23 language?

24 CHAIRMAN BABCOCK: "Except for good cause  
25 stated in the order in which such action is taken,"

1 that would be the language.

2 HONORABLE SCOTT A. BRISTER: Just from  
3 the current Rule.

4 CHAIRMAN BABCOCK: Okay.

5 MR. HAMILTON: Can't we just say "except  
6 for good cause" --

7 MR. SOULES: If it hasn't been a problem  
8 for 15 years, I don't think it's going to be a  
9 problem for the next hundred.

10 CHAIRMAN BABCOCK: Okay.

11 MR. HAMILTON: I would recommend that, as  
12 Luke suggested, after the "disposed of" --

13 CHAIRMAN BABCOCK: Right. Yes.

14 MR. HAMILTON: -- "except for good cause  
15 stated." I don't think we need anything besides  
16 that, "except for good cause stated."

17 CHAIRMAN BABCOCK: Well, no. It ought to  
18 be in the order so you can tell.

19 MR. SOULES: "In the order in which the  
20 action is taken."

21 CHAIRMAN BABCOCK: Right.

22 MR. SOULES: Deliberately the judge has  
23 got to say in his order why he did it.

24 CHAIRMAN BABCOCK: Right. That makes  
25 sense. Okay.



1 MR. SOULES: Thank you.

2 CHAIRMAN BABCOCK: You bet. Thank you.

3 All right. Now we're back to the --

4 (Discussion with Ms. Gagnon.)

5 CHAIRMAN BABCOCK: We already talked  
6 about that. We already voted on that; but thanks.

7 Richard or Carl, Subsection 9, is that where  
8 we are?

9 MR. ORSINGER: Yes. We would like some  
10 direction from the Committee Chair. Should we just  
11 focus on the changes rather than go through from  
12 start to finish, because that's just an invitation  
13 for more debate if we go through from start to  
14 finish?

15 CHAIRMAN BABCOCK: The Chair feels  
16 changes are the way to --

17 MR. ORSINGER: Okay.

18 CHAIRMAN BABCOCK: Does the ex Chair feel  
19 the same way?

20 MR. SOULES: Yes, sir.

21 CHAIRMAN BABCOCK: And Buddy Low is not  
22 here, so we can't get a vote. And you were late,  
23 so you don't get a vote either.

24 MR. SOULES: That's right.

25 MR. HAMILTON: The next matter then is

1 going to be on page two, paragraph nine, and  
2 there's 9, 9(a), 9(b) and 9(c) Options. And I  
3 think we had a comment by someone, didn't we,  
4 Richard that the word "knowingly" needed to be in  
5 there?

6 CHAIRMAN BABCOCK: You do have it in 9c.  
7 9(c) has "knowingly."

8 MR. HAMILTON: Well, but in all of them.

9 CHAIRMAN BABCOCK: Well, maybe not.

10 HONORABLE SCOTT A. BRISTER: What is the  
11 difference in all these?

12 MR. HAMILTON: 9 is that he's accepted a  
13 campaign contribution which exceeds the limits,  
14 period. 9b is it exceeds the limits, but it has to  
15 be in violation of the Election Code. No. I'm  
16 sorry. 9b is just it has to be in violation of the  
17 Election Code. And (c) is knowingly accepted a  
18 contribution in violation of the Election Code.

19 So the first one sets the standards in the  
20 Rule, and the second one relies upon the Code  
21 itself to set the standards. The third one relies  
22 upon the Code to set the standards; but you have to  
23 have a knowing violation.

24 CHAIRMAN BABCOCK: Our thinking, I think,  
25 or I know speaking for myself, my thinking has

1 evolved on this. In the first meeting I think when  
2 Jim Dunham said that maybe the legislature wouldn't  
3 receive too kindly this sort of an effort I was  
4 worried about some separation of powers problems  
5 and issues.

6 I've done a little research myself on that,  
7 and I think the Court would clearly be within its  
8 rulemaking authority to do any one of these three  
9 options. Now whether it's politically palatable to  
10 the legislature or not is another matter; but  
11 certainly in terms of the Court's rulemaking  
12 authority, I think they clearly have the power to  
13 do this.

14 Then in the second meeting we were talking  
15 about, well, we're having all these problems of  
16 definition as to whether or not something is or is  
17 not a violation; and my thinking at the time in our  
18 second meeting, our last meeting was that we ought  
19 to tie it to a violation of the statute and how  
20 could anybody disagree with that. The judge has  
21 violated a statute. The problem with that is we  
22 are then going to have satellite litigation galore  
23 while we have a mini trial about whether a judge  
24 has or has not violated a very complex statute that  
25 has got knowledge requirements in it and it's got

1 all sorts of other things, and we may just be  
2 causing way more trouble and time and effort than  
3 this could ever possibly benefit us by doing it  
4 that way.

5 So that leads to the other option which I  
6 guess is embodied in 9(a) here which says the  
7 legislature will set the limit, whatever that may  
8 be; and it may be evolving as time goes on, and  
9 that's why rather than set dollar limits in the  
10 Rule 9 here, subpart 9, we just say whatever they  
11 say it is, that's what it is.

12 MR. ORSINGER: I need to clarify what you  
13 just said about that.

14 CHAIRMAN BABCOCK: Okay. Go ahead.

15 MR. ORSINGER: Paragraph 9 as opposed to  
16 Option 9(a) does what you just said. We take the  
17 numbers out of the statute, and if you exceed those  
18 numbers, you're recused.

19 CHAIRMAN BABCOCK: Right.

20 MR. ORSINGER: But 9(a) admits or permits  
21 you to consider what we're calling opt-out  
22 language.

23 CHAIRMAN BABCOCK: Right.

24 MR. ORSINGER: And then (b) and (c)  
25 basically say, you know, if you violate the Code,

1 or if you knowingly violate the code, which is even  
2 different from just bringing in the opt-out  
3 exception. So it's kind of like 9 is just the raw  
4 dollars, no excuses, no extenuating circumstances.  
5 (b) is the raw dollars recognizing opt-out. (c) is  
6 any kind of technical violation of the statute; and  
7 (d) is any kind of knowing technical violation of  
8 the statute.

9 CHAIRMAN BABCOCK: Right. I misspoke.  
10 I'm sorry. Let me just finish one thought, Luke,  
11 and then on to you. So 9, not 9(a). You're right,  
12 Richard. The proposed language in 9 would borrow  
13 from the legislation giving deference to the  
14 legislature that they will set the policy about  
15 what the limits are, whether they are low or high,  
16 but giving the Court the -- or allowing the Court  
17 to express by a Rule what is a rather major change  
18 in common law, which is that campaign contributions  
19 don't get judges recused.

20 Now there are two ways the Court could do it.  
21 The Court could do it by decision in an adversarial  
22 case, or they can do it by a Rule. And the Rule  
23 would be 9, and then the other baggage that 9(a),  
24 (b) and (c) carry with it we'll have to talk  
25 about. But, Luke, you had a comment.

1 MR. SOULES: Well, I think three things  
2 here: One, I think any lawful contribution ought  
3 to be -- shouldn't recuse the judge, so we ought to  
4 include the opt-out limits unless they're extended  
5 by the opt-outs, whatever the proper language is  
6 for that, because it's a legal contribution. It's  
7 a contribution that the judge legally accepted, and  
8 it's not a violation.

9 Second, I don't think "knowingly" ought to be  
10 there, because the judge may or may not realize  
11 that the judge has accepted that contribution, and  
12 I think the way that ought to be dealt with is add  
13 the language "and the judge has not or does not  
14 promptly when it's brought to his attention refund  
15 the amount that exceeds the limit."

16 So anything that is a legal contribution is  
17 okay. It doesn't recuse a judge. He doesn't have  
18 to know about it; but when it's brought to his  
19 attention then he must either recuse himself or  
20 return it unless he has already returned the  
21 surplus.

22 CHAIRMAN BABCOCK: Yes. Judge Schneider.

23 HONORABLE MICHAEL H. SCHNEIDER: Certainly  
24 I favor it. But is there any type of time frame in  
25 this situation?

1 MR. SOULES: The time frame would be  
2 "Judge, you've taken an illegal contribution.  
3 Here's what it is." And the judge says "I'll  
4 return it immediately. I'll promptly return it."

5 HONORABLE MICHAEL H. SCHNEIDER: I'm  
6 saying that person, do you recuse yourself --

7 MR. SOULES: Oh, ever?

8 HONORABLE MICHAEL H. SCHNEIDER: -- from  
9 that person forever?

10 CHAIRMAN BABCOCK: No. No. No. Wait a  
11 minute. Richard, doesn't this incorporate the  
12 statute which defines the contribution as limited  
13 to the time period where the officerholder has been  
14 elected for?

15 MR. HAMILTON: No.

16 MR. ORSINGER: Well, I think that  
17 certainly Options (b) and (c) do, because you have  
18 to violate the statute, so they recognize the  
19 primary season as being different from the main  
20 election season, I think.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE SCOTT A. BRISTER: No. No.  
23 No. No.

24 MR. ORSINGER: That's not true?

25 HONORABLE SCOTT A. BRISTER: His question

1 is different.

2 MR. ORSINGER: Oh.

3 HONORABLE SCOTT A. BRISTER: If I take  
4 too much during this primary season, we don't limit  
5 the recusal just to this primary season.

6 MR. ORSINGER: No. It's during the term  
7 of office --

8 HONORABLE SCOTT A. BRISTER: For which I  
9 was running.

10 MR. ORSINGER: -- for which you get  
11 elected.

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE SCOTT A. BRISTER: So it would  
14 be for the next four years --

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE SCOTT A. BRISTER: -- after  
17 that.

18 MR. ORSINGER: After you swear in.

19 HONORABLE SCOTT A. BRISTER: And it  
20 would probably need to be the rest of this term  
21 before the one for which I'm running.

22 MR. SOULES: Right. That's it. For the  
23 balance of the term in which he took it and the  
24 subsequent term.

25 HONORABLE HARVEY G. BROWN, JR.: Is that



1 in the statute?

2 MR. ORSINGER: No. It's not in the  
3 statute because the statute doesn't recognize  
4 recusal. We're having to fashion that remedy  
5 ourselves.

6 CHAIRMAN BABCOCK: No. But wait a  
7 minute. Doesn't the statute -- I mean, you have to  
8 have some benchmark about when the contribution is  
9 excessive.

10 MR. ORSINGER: The statute --

11 CHAIRMAN BABCOCK: I give you \$1000 this  
12 year --

13 MR. ORSINGER: The time frame that's  
14 relevant to the statute is the period of time in  
15 which contributions are regulated. The time that  
16 we're concerned with is how long is the judge  
17 subject to recusal. And I think that our previous  
18 debates have been they're subject to recusal  
19 initially for the term to which they're elected;  
20 but then the last time we said if they're an  
21 incumbent that's running, there's going to be a  
22 violation, say, six months before the new term, so  
23 we want to pick up those six months plus the full  
24 term, but not past that new term.

25 CHAIRMAN BABCOCK: Where is that in

1 these?

2 MR. ORSINGER: I've got to find that.  
3 Let's see.

4 MR. HAMILTON: The discussion as I recall  
5 it last time was that a judge who is tainted by an  
6 illegal contribution, the fact that his term runs  
7 out doesn't change that. He's still tainted. We  
8 didn't put a time limit in there.

9 HONORABLE SCOTT A. BRISTER: But  
10 remember, it's not exactly. We are talking about  
11 illegal. It's not exactly illegal. I can  
12 choose -- well, I guess that's the spending  
13 things.

14 CHAIRMAN BABCOCK: That's not my  
15 recollection.

16 MR. EDWARDS: I recall what we talked  
17 about was the judge would be recused during the  
18 term with respect to which the judge took the  
19 contribution and would be recused for that portion  
20 of any term during which he accepted a contribution  
21 regardless of what term it was for.

22 MR. ORSINGER: Yes. Of course, the  
23 Committee has changed its position on this Rule  
24 quite a lot; but my recollection of the last  
25 position we took was what Bill just said, that we

1 finally ended up saying it was going to be for an  
2 incumbent during the rest of the current term, and  
3 then if they're successful in the election, for the  
4 rest of that full term is where I think we ended  
5 up, although I don't know that I could prove that  
6 in writing. And that being the case, if that's  
7 true, then we need to limit the grounds for  
8 recusal.

9 But, Luke, you were not here when we took this  
10 vote. The vote, as I recall, was that we weren't  
11 going to recognize any statutory exceptions, that  
12 it may well be that the contribution was okay under  
13 the statute, but if it was in excess of the  
14 statutory limits, you still got recused. That was  
15 the position of the task force. They said we don't  
16 care about all these exceptions and extenuating  
17 circumstances. We're taking the limits, and if you  
18 violate the limits, you're out, no ifs, ands or  
19 buts.

20 And we debated that a lot, and I'm not sure we  
21 didn't change our opinion on that; but my  
22 recollection was the last time we voted on it was  
23 we decided that -- or we didn't.

24 MR. SOULES: If that's been decided in my  
25 absence, I'm not going to --

1 MR. ORSINGER: Well, the problem is that  
2 we, the vote if you follow this over several  
3 meetings, our positions have -- we have formally  
4 voted different ways on different things, and  
5 finally we just cratered in exhaustion at the end  
6 of the last meeting and said "We're going to come  
7 back with four options."

8 So I feel like all four of these options are  
9 on the table to be adopted; but we are going to  
10 need to write some language if we're going to  
11 finalize this this weekend, talking about the  
12 recusal.

13 CHAIRMAN BABCOCK: Here's the vote we  
14 took. How many people think that we ought to have  
15 a time limit in here limited to the term of office  
16 relating to the contribution? And you typically  
17 say "Wait a minute," and then you say "the current  
18 term as well as the upcoming term," Orsinger says.  
19 And then Bill Edwards says "I would say current,  
20 that were related to the current term or  
21 contributions made during the current term." And  
22 so I say "With that friendly amendment"; and then  
23 Scott McCown says the way to put it is "for your  
24 present term or a contribution in connection with  
25 an election for a future term." And that's the

1 vote we took. And it was 22 to nothing in favor of  
2 that, which is your current term or a contribution  
3 for a future term.

4 MR. ORSINGER: Okay. We're going to have  
5 to write that sentence today. I will work on that  
6 while we're discussing the rest of this, because  
7 that should have been in here and it's not. I  
8 apologize.

9 HONORABLE TOM LAWRENCE: Well, arguably  
10 you're really talking about over seven years,  
11 because if you take a contribution right after your  
12 reelection and that money is still going to be  
13 remaining in your fund from that term and possibly  
14 used for a future election, then we're talking  
15 about perhaps almost eight years --

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE TOM LAWRENCE: -- under that.

18 CHAIRMAN BABCOCK: Judge Brown.

19 HONORABLE HARVEY G. BROWN, JR.: I think  
20 the term "future election" or "future term" is a  
21 little ambiguous. If I give money today, since  
22 money is fungible and my accountant typically never  
23 gets completely to zero, I may not arguably use it  
24 for eight years, so I think it should be the next  
25 election. At least that's what I thought we were

1 trying to say, and I thought that's what Scott was  
2 trying to say last time.

3 CHAIRMAN BABCOCK: Well, my thinking was  
4 that it not ought to be open-ended. Like if I  
5 screw up and I give too much money today, it ought  
6 not to recuse the judge forevermore.

7 HONORABLE HARVEY G. BROWN, JR.: Right.

8 CHAIRMAN BABCOCK: That's what I was  
9 trying to get to.

10 HONORABLE JAN P. PATTERSON: Well, the  
11 statute also speaks in terms of raising money for a  
12 period of time in connection with that particular  
13 election, so you can reference it that way.

14 CHAIRMAN BABCOCK: That's what I thought  
15 you guys had done. I thought you had picked up  
16 that language; but maybe not.

17 MR. WATSON: What is that, you guys?

18 MR. ORSINGER: Me and Carl is what he's  
19 talking about.

20 CHAIRMAN BABCOCK: Sorry. I didn't mean  
21 to sweep so broadly as to pick you out.

22 MR. SOULES: Can't we just do it and say  
23 "in the term in which the judge accepts the  
24 contribution and the subsequent term"?

25 MR. ORSINGER: Is it possible you could

1 make a contribution --

2 HONORABLE JAN P. PATTERSON: After the  
3 election.

4 MR. ORSINGER: -- after the election and  
5 after you're sworn in?

6 MR. SOULES: It takes too much.

7 MR. ORSINGER: You pick up eight years.

8 MR. SOULES: You know what is going to  
9 happen is that the judge's favorite lawyers who  
10 usually give the judge a lot of money are not going  
11 to give the judge that much money. After that  
12 every time they go into court the judge is going to  
13 be recused.

14 MR. ORSINGER: Well, that is the hidden  
15 agenda, if it in fact is hidden.

16 MR. SOULES: Well, I doesn't seem to be  
17 very hidden to me.

18 MR. ORSINGER: All right.

19 HONORABLE BILL RHEA: It may be a little  
20 esoteric.

21 MR. SOULES: We did vote to do this.  
22 There wasn't any question we are going to do it;  
23 and now we're just kind of getting down to the  
24 details, where the devil is. And I think it's the  
25 term in which the judge takes the contribution and

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1 the subsequent term, so then you don't have to  
2 figure out what election it's for. A date, and  
3 he's in office. That's the rest of that term; and  
4 whether it's for the next term or not, it's the  
5 next term too. You don't have to worry about which  
6 term it's for.

7 CHAIRMAN BABCOCK: Yes.

8 MR. SOULES: And it's clear.

9 CHAIRMAN BABCOCK: Judge Rhea.

10 HONORABLE BILL RHEA: This may be a  
11 little off the wall; but I think it's worth  
12 mentioning. One of the dangers I think we ought to  
13 be on the lookout for as we draft these and think  
14 about these time periods is the possibility that  
15 this could kind of be used in reverse.

16 An unpopular judge can receive very high  
17 contributions for the purpose of having that judge  
18 disqualified by the other side. I think this  
19 could -- you could wind up with a very unpopular  
20 judge who will be on the bench forever because he  
21 or she has a lot of money.

22 HONORABLE SCOTT A. BRISTER: That's  
23 excepted somewhere else.

24 MR. ORSINGER: No. He's talking about a  
25 different. If you make the excessive contribution,



1 you can't move to disqualify; but what the Judge is  
2 talking about is here is a guy that is so bad that  
3 everybody wants him out, so I'm going to go ahead  
4 and make the excessive contribution knowing that  
5 everyone in town is going to use that as an excuse  
6 to get him out of my case.

7 HONORABLE MICHAEL H. SCHNEIDER: What  
8 about this situation? There are a number of  
9 lawyers who I would pay to stay out of my court.

10 CHAIRMAN BABCOCK: Bring on the money.  
11 Judge Brister.

12 HONORABLE SCOTT A. BRISTER: I'm  
13 confused, and I get these mixed up. But the deal  
14 about opting out is on spending. It's not on  
15 accepting. This is just this is \$5,000 from  
16 anybody, and you can't opt out of that. This is  
17 just you can't take more than \$5,000. If so, you  
18 have violated the law. You have got to return it.  
19 There is a civil penalty. Who is it that's giving  
20 me \$10,000? My opponent sues me for \$5,000 times  
21 three of it back. What is the difference in 9 and  
22 9(a)? You can't opt out of the contribution  
23 limits. Those are for everybody.

24 MS. SWEENEY: There has to be a way.

25 MS. MCNAMARA: That's not what we said

1 two meetings ago or last meeting, where someone  
2 said that if your opponent takes too much or spends  
3 too much, you are relieved --

4 HONORABLE SCOTT A. BRISTER: If your  
5 opponent spends too much, you're relieved from the  
6 spending limits.

7 MS. MCNAMARA: All the limits.

8 HONORABLE BILL RHEA: We need to clarify  
9 that. I thought it was all limits too.

10 MS. SWEENEY: It is all limits, because  
11 you give more than that to judges all the time.

12 HONORABLE SCOTT A. BRISTER: Well, I  
13 looked up the one that's referenced here about if  
14 you opt out, and that's not an opt-out.

15 MR. SOULES: But if the judge can -- if  
16 what happens is the judge gets too much money from  
17 some source he doesn't recognize and it's brought  
18 to his attention, he can refund it and go on the  
19 case.

20 MS. MCNAMARA: But we're talking about  
21 not too much, because if it's legal, is it too  
22 much?

23 MR. SOULES: No.

24 MS. MCNAMARA: That is the difference  
25 between 9 and 9(a).

1 MR. SOULES: Yes.

2 CHAIRMAN BABCOCK: 9 it's not a matter of  
3 legality or not. 9 says that the Court in its  
4 infinite wisdom with this great advice from this  
5 Committee has decided that campaign contributions  
6 raise an appearance of impropriety at a certain  
7 level, and they're going to let the legislature  
8 define that level; but it has nothing to do with  
9 whether or not it's a legal contribution or an  
10 illegal contribution under the statute.

11 MS. MCNAMARA: Right. It's a hard  
12 limit.

13 CHAIRMAN BABCOCK: Right. It's just a  
14 hard limit, and that's 9. Now when you get down to  
15 9(a), (b) and (c) then you get into legality. Then  
16 you get to whether the statute has been violated or  
17 not.

18 MS. MCNAMARA: Right.

19 HONORABLE SCOTT A. BRISTER: Okay.  
20 Nevermind.

21 CHAIRMAN BABCOCK: Yes. Steve. Wait a  
22 minute. John had something first.

23 MR. MARTIN: I agree that it ought to  
24 apply to the remaining term and the term that he's  
25 running for. But what happens if you make a

1 contribution and then the judge jumps into a  
2 different race, which seems to happen  
3 occasionally? It ought to make -- what Richard is  
4 doing it ought to be clear that it covers whatever  
5 bench he runs for during that election cycle. I'm  
6 not sure how you word that.

7 CHAIRMAN BABCOCK: Okay. I see. Steve.

8 MR. TIPPS: How do we deal with, if we  
9 intend to deal with it, the good faith mistake in  
10 that the judge takes too much because he doesn't  
11 realize that this person is married to this person  
12 and then in good faith discovers that there is a  
13 problem and gives the money back? I would assume  
14 that we would not want to make that the basis for  
15 automatic recusal.

16 MR. ORSINGER: That's the issue of  
17 knowingly, I think.

18 MR. SOULES: No.

19 MR. ORSINGER: That's why the word  
20 "knowingly" is in some of these options is  
21 because you may not realize when you take the  
22 contribution; and that's when we had the discussion  
23 that the judges -- I think Judge Hecht, for  
24 example, running a statewide race makes the effort  
25 to find out if there are spouses or members of the

1 law firm that they exceed aggregate limits.

2 MR. TIPPS: In a statewide race for sure  
3 I would think it's almost inevitable that there  
4 would be glitches and the money would be in the  
5 account for a week and then somebody would figure  
6 out that this is too much and it get sent back.

7 MR. ORSINGER: Well, the statute gives  
8 you a certain window of time to refund the excess;  
9 but I think that that window of times expires  
10 before the election. It's when your campaign  
11 finance report is due.

12 MR. TIPPS: Well, are we incorporating  
13 that window, though, in any of these Rules?

14 MS. MCNAMARA: Not as 9 and 9(a) are  
15 worded.

16 MR. ORSINGER: No.

17 MS. MCNAMARA: Particularly 9, if you  
18 just have that numerical hard test, unless you  
19 address Steve's point by saying "and does not  
20 return the money within a reasonable time, or any  
21 excess within a reasonable time."

22 CHAIRMAN BABCOCK: Luke.

23 MR. SOULES: The problem with "knowingly"  
24 is it's knowingly accepted. The judge may have  
25 inadvertently accepted it. But if he has, he is

1 still subject to recusal. That's why "knowingly"  
2 doesn't work. And then remember the safety valve  
3 that I mentioned earlier, and that was unless the  
4 judge had returned or promptly returned the  
5 surplus. So once he's confronted with this issue,  
6 the judge can promptly return the surplus. At that  
7 point he knows about it. He returns the money, and  
8 it shouldn't be a recusal issue. That's what I  
9 think.

10 HONORABLE JAN P. PATTERSON: The statute  
11 already speaks --

12 MR. SOULES: That does speak directly to  
13 Tipps.

14 HONORABLE JAN P. PATTERSON: I thought we  
15 adopted a term of art that the statute utilizes  
16 which means acceptance is deemed at the time of  
17 filing. I know we talked about that, to use that  
18 language so that we wouldn't have to speak to a  
19 day, a week, or two weeks, but it meant time of  
20 filing by term of -- by a definition.

21 MR. ORSINGER: Let me quote you 253.155:  
22 "Contribution Limits: (a) Except as provided in  
23 subsection (c), a judicial candidate or  
24 officeholder may not knowingly accept political  
25 contributions," and then it dots on down, and then

1 it has this recapture provision: "A person who  
2 receives a political contribution that violates  
3 subsection (a) shall return the contribution to the  
4 contributor not later than the later of (1), the  
5 last day of the reporting period in which the  
6 contribution is received, or (2), the fifth day  
7 after the date the contribution is received."

8 So you've got either five days of when you  
9 receive it, or at least by the time you must file  
10 your campaign report to make the refund or it  
11 didn't count for purposes of violating the  
12 statute. It might count for purposes of our Rule  
13 if we write it that way; but it doesn't -- it would  
14 not be refunded in time to save you from violating  
15 the statute.

16 MR. TIPPS: But would that not then mean  
17 the way you have this written that if it was  
18 returned consistent with the statutory  
19 requirements, the limits of these provisions would  
20 not have been exceeded?

21 HONORABLE SARAH B. DUNCAN: Right.

22 HONORABLE HARVEY G. BROWN, JR.: But  
23 going back to the hypo' about the spouse, if you  
24 didn't realize until somebody called it to your  
25 attention six months after the filing, you're out,

1 even if you return it.

2 MR. TIPPS: Right. I mean, there should  
3 be some incentive. We shouldn't be creating  
4 negative incentives on the part of judges to  
5 monitor and do what you have to do; but neither  
6 should we create a situation in which there's a  
7 got-you when they're acting in good faith and  
8 trying.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HONORABLE SARAH B. DUNCAN: We talked  
11 about this last time, about the good faith mistake  
12 that wasn't corrected by the date we filed, that we  
13 have to determine whether we accept or reject this  
14 contribution by the end of the filing period; and  
15 what we discussed last time was it's not much  
16 comfort to the litigant that the judge returned the  
17 excess after the filing period for that  
18 contribution report. The excess contribution was  
19 still made, and it's still if it ever creates the  
20 same appearance of impropriety.

21 MR. ORSINGER: I'd like to say that I  
22 don't think 9 permits you to even refund. I think  
23 the way that we have written 9, if you get the  
24 excessive contribution, you're recused. And the  
25 way that you correlate our provision 9 to the



1 statute is if it's in excess of (b), and (b) sets  
2 the limits out, and (e) talks about a requirement  
3 to refund if you're in excess of the limits; but if  
4 you took it in excess of the limits, even if later  
5 you refunded it, you still took it in excess of the  
6 limits. The way I read 9, if you violate (b),  
7 you're out even if you refund it by the time you  
8 file your report; but I'm not an expert in this  
9 area.

10 HONORABLE SARAH B. DUNCAN: I was going  
11 to say to me it comes down to what does it mean to  
12 accept a contribution. And I would go to the  
13 Election Code to determine whether I have accepted  
14 a contribution.

15 MR. ORSINGER: Well, the statute, by the  
16 way, says "knowingly accept," and we have taken  
17 knowingly out of 9, and thereby means that the  
18 innocent judge who didn't even realize it and  
19 corrected it in time to be okay with the statute  
20 would still be recused under version 9 as I read  
21 it.

22 MR. TIMMS: So what you're saying then is  
23 that recusal would become effective once somebody  
24 in the campaign office opened the envelope and  
25 deposited the check in the bank account if it's too

1 much?

2 MR. ORSINGER: Unless you go with Sarah  
3 in saying that depositing in the account doesn't  
4 constitute acceptance; but it does for purposes of  
5 the statute, so I think 9 is clearly overly severe.

6 MR. SOULES: I'm going to talk about  
7 policy. Why don't we make the policy if you  
8 accepted it and you don't refund it promptly when  
9 it's brought to your attention, you can be  
10 recused. We're writing a recusal Rule. We're not  
11 trying to track the statute. We're trying to  
12 decide what should get the judge in this  
13 predicament.

14 MS. MCNAMARA: The benefit to that  
15 approach would be not having to prove what the  
16 judge knew, because when you go to 9(c) you're  
17 ending up having to talk about what the judge knew,  
18 which may not be where we want to go.

19 MR. ORSINGER: Especially on aggregation  
20 Rules, because maybe you don't realize somebody  
21 switched law firms in the middle of a campaign or  
22 something like that.

23 CHAIRMAN BABCOCK: Judge Lawrence.

24 HONORABLE TOM LAWRENCE: I think (b) is  
25 somewhat unworkable, because what does "violation"

1 mean? If the judge argues that, well, the Ethics  
2 Commission has not found that I've done anything  
3 wrong, I have not been indicted for this and  
4 arguably there is no violation, (c), to prove  
5 knowingly I think is a tremendous burden on the  
6 part of the litigant to show that the judge  
7 knowingly did anything. I think (b) and (c) both  
8 have some serious problems as far as working in the  
9 real world.

10 CHAIRMAN BABCOCK: Yes. I wonder if we  
11 can maybe agree with that sentiment that we ought  
12 to take those two options off the table, because I  
13 think that those two options are going to create  
14 more havoc than they possibly can do good.

15 MR. ORSINGER: Which two are they?

16 CHAIRMAN BABCOCK: (b) and (c) where  
17 we're tying it. You've got to in order to prevail  
18 on (b) and (c), and in a litigation where there is  
19 a lot of money at stake you may very well have a  
20 party who is willing to engage in a satellite  
21 proceeding and try to prove a violation of the  
22 statute and just raise all sorts of, reek all sorts  
23 of havoc in the litigation.

24 So is there a sense following what  
25 Judge Lawrence and what Luke said that we ought to

1 just take those off the table and not worry about  
2 them?

3 MR. SOULES: Yes. So moved.

4 MR. TIPPS: Second.

5 CHAIRMAN BABCOCK: How many in favor of  
6 that? Anybody opposed? Okay. We're making  
7 progress. So that gets us to 9 or 9(a). Now 9(a)  
8 it seems to me suffers from some of the same  
9 problems, Richard, because the only difference  
10 there is unless the limits were suspended for the  
11 judges when a candidate. And the limits that get  
12 suspended are the spending limits, right?

13 MR. ORSINGER: Well, we say that; but I'm  
14 not sure I agree with that. There are several  
15 people that said they don't, and --

16 HONORABLE BILL RHEA: I think Scott just  
17 acknowledged that it's both.

18 HONORABLE SCOTT A. BRISTER: I was  
19 wrong.

20 MR. ORSINGER: Okay. So in other words,  
21 the policy we're debating is exactly what someone  
22 mentioned earlier. We are recusing a judge for  
23 doing something that the law specifically says they  
24 can do in certain circumstances. And if that's the  
25 policy, that's the policy; but let's realize that

1 what we're doing is saying that you can obey the  
2 law and be perfectly legit' and straight up and  
3 still be recused.

4 MR. SOULES: I move "no" on what he said.

5 HONORABLE BILL RHEA: Second.

6 HONORABLE SARAH B. DUNCAN: That was too  
7 cryptic.

8 MR. ORSINGER: All in favor of "no" say  
9 "aye."

10 MR. SOULES: I move if it's a legal  
11 contribution, the judge is not subject to recusal.

12 CHAIRMAN BABCOCK: Well, now wait a  
13 minute. That gets us right back into the problem  
14 we just jumped out of.

15 MR. SOULES: If the amount of the  
16 contribution is not illegal, I move that it not be  
17 a grounds for recusal.

18 MR. ORSINGER: That would be 9(a),  
19 because he's talking about the limits and he's not  
20 talking about whether you have an adjudication from  
21 the Ethics Commission.

22 MR. SOULES: This is a dollar limit  
23 motion.

24 CHAIRMAN BABCOCK: Okay. So what 9(a) is  
25 is a dollar amount.

1 MR. SOULES: Forget about 9(a). This is  
2 a dollar limit motion.

3 CHAIRMAN BABCOCK: Yes. Whatever the  
4 legislature has declared is the limit, that's the  
5 limit; and the only way you escape the limit is if  
6 because of a peculiarity of your campaign you've  
7 been allowed to opt out of it.

8 MR. SOULES: Or anything else that the  
9 legislature says cuts you loose.

10 CHAIRMAN BABCOCK: Well, that's getting  
11 right back to proving a violation of the statute,  
12 because we've got "knowingly." You've got  
13 "knowingly" in there. You've got "acceptance."

14 MR. SOULES: This is not that hard. It's  
15 either the dollar cap, or there's a reason why the  
16 dollar cap is not there.

17 HONORABLE JAN P. PATTERSON: Well, and  
18 the reason why it's not there is because one party  
19 has decided not to comply with any of the  
20 limitations and that frees up everybody, and so  
21 then you essentially have no recusal because of any  
22 kind of contribution.

23 MR. SOULES: Right.

24 MR. ORSINGER: Luke doesn't realize that  
25 he's moving 9(a).

1 MR. SOULES: Forget about 9(a). This is  
2 a dollar limit motion.

3 CHAIRMAN BABCOCK: Yes. Whatever the  
4 legislature has declared is the limit, that's the  
5 limit; and the only way you escape the limit is if  
6 because of a peculiarity of your campaign you've  
7 been allowed to opt out of it.

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11 right back to proving a violation of the statute,  
12 because we've got "knowingly." You've got  
13 "knowingly" in there. You've got "acceptance."

14 MR. SOULES: This is not that hard. It's  
15 either the dollar cap, or there's a reason why the  
16 dollar cap is not there.

17 HONORABLE JAN P. PATTERSON: Well, and  
18 the reason why it's not there is because one party  
19 has decided not to comply with any of the  
20 limitations and that frees up everybody, and so  
21 then you essentially have no recusal because of any  
22 kind of contribution.

23 MR. SOULES: Right.

24 MR. ORSINGER: Luke doesn't realize that  
25 he's moving 9(a).

1           CHAIRMAN BABCOCK: I think he is. And  
2 it's kind of not what he's saying; but I think  
3 that's what he means.

4           HONORABLE BILL RHEA: And I don't think  
5 with 9(a) you get into "knowingly" or violation at  
6 all. You either have a limit or you don't have a  
7 limit.

8           CHAIRMAN BABCOCK: I agree.

9           MR. SOULES: But I've got the -- the only  
10 reason I'm not saying 9(a) is I want the judge to  
11 be able to refund and cure the problem.

12           HONORABLE JAN P. PATTERSON: Well, those  
13 are two different things.

14           MR. SOULES: Well, that's right. But I'm  
15 not moving 9(a). This is a limit issue. I'm  
16 moving that be the cap or whatever for recusal.

17           HONORABLE JAN P. PATTERSON: Well, it  
18 doesn't make sense that if you have unlimited  
19 contributions, that you can then return them.  
20 Those are inconsistent.

21           MR. SOULES: If you have unlimited  
22 contributions, there is no excess to return.

23           HONORABLE JAN P. PATTERSON: Right. So  
24 there is nothing to return.

25           MR. SOULES: Right. But that only



1 happens --

2 HONORABLE JAN P. PATTERSON: If somebody  
3 decides not to comply.

4 MR. SOULES: -- if there is a statutory  
5 exception to the cap.

6 HONORABLE JAN P. PATTERSON: If somebody  
7 decides not to comply.

8 MS. MCNAMARA: He is addressing the  
9 other, you know, which is you have to give them a  
10 chance to give the money back if you're not in that  
11 no caps environment because of your opponent.

12 MR. JEFFERSON: I think we ought to look  
13 at it differently. I think the legislature is  
14 saying that as a general rule there ought to be a  
15 limit on contributions, and it ought to be this  
16 amount, and it's bad not to have a limit at all;  
17 and the only circumstance where we're going to let  
18 the judge go is when, you know, there is a complete  
19 violation of the Rules on both sides and then we're  
20 going to let it again be a free-for-all. I'm  
21 wondering about the wisdom of that.

22 But I think, you know, the legislature had set  
23 a limit, and I kind of agree with them, because I  
24 think lawyers and the public generally look with  
25 profound disfavor on someone appearing before that

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1 Court and giving \$20,000 and then getting a ruling  
2 in his or her favor. I just don't think the public  
3 likes that; and I think the policy of the  
4 legislature can be incorporated here in 9.

5 And the one other, I think I like what Luke  
6 was saying about the returning the money; but the  
7 problem with that is that it requires somebody  
8 finding out or somebody, you know, some exposure of  
9 that contribution, which isn't always going to be  
10 the case.

11 MR. SOULES: That's true of any recusal.

12 MR. JEFFERSON: But the way you stop that  
13 is just by having this limit in the first place.  
14 You don't have the excessive campaign  
15 contribution.

16 MR. ORSINGER: Yes. But the problem,  
17 Wallace, is that sometimes the limit will be  
18 exceeded because of attribution rules that are not  
19 apparent from the check that you received.

20 MR. JEFFERSON: I think we do need to  
21 deal with that. I think we need to deal with that,  
22 because you don't always, especially in a statewide  
23 race, and I think we need to deal with that  
24 separately.

25 But on the question of a campaign, you know,

1 whether you're going to enforce a strict limit, I  
2 think we ought to follow the legislature.

3 HONORABLE SAMUEL A. MEDINA: What is  
4 wrong with what Luke is saying? I haven't heard  
5 anything yet. We are talking in circles here.  
6 What is wrong with it?

7 CHAIRMAN BABCOCK: Judge Brister and then  
8 Steve Tipps.

9 HONORABLE SCOTT A. BRISTER: Unless I'm  
10 misreading this, the executive director of the  
11 Commission has to issue an order that suspends the  
12 limit on contributions and expenditures. So if in  
13 cases where this easy-to-find statutory limit  
14 doesn't apply, 253.165(b), there's going to be some  
15 bureaucrat that issues this thing and there's not  
16 going to be collateral satellite litigation about  
17 it.

18 HONORABLE MICHAEL H. SCHNEIDER: It's  
19 going to be easy to prove.

20 HONORABLE SCOTT A. BRISTER: It's going  
21 to be easy to prove. You can get a certified copy  
22 of the Commissioner's order.

23 CHAIRMAN BABCOCK: Good point. So that  
24 removes that problem.

25 MR. ORSINGER: Can I restate what I think

1 Wallace was saying? If one person files one, --

2 CHAIRMAN BABCOCK: I understood it.

3 MR. ORSINGER: -- gives one check in  
4 excess of the limit, you shouldn't be able to come  
5 in on the day of trial and get that refund and  
6 clean them up. But if it's a problem of  
7 aggregation and it's not apparent that there was a  
8 violation, then they should be able to come in the  
9 day before trial and clean that up. Is that what  
10 you're saying?

11 MR. JEFFERSON: Pretty much.

12 MR. ORSINGER: And there's a lot of logic  
13 to that. You don't like that?

14 HONORABLE SARAH B. DUNCAN: (Nods  
15 negatively.)

16 MR. SOULES: I think they ought to be  
17 able to clean it up no matter what, be able to  
18 write a check and be done with it.

19 CHAIRMAN BABCOCK: Well, but Luke, the  
20 problem that we're trying to address is your client  
21 says, you know, "Wait a minute. This lawyer over  
22 here and then his brother and his sister and his  
23 wife and daughters gave the judge too much money,  
24 and so I want you to raise it." You raise it, and  
25 the judge says "Oh, whoops. I'll give it back."

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1 Well, your client doesn't feel any better about  
2 that, do you think?

3 MR. SOULES: I think so. The judge has  
4 acted in good faith. He has disgorged the amount  
5 of the illegal contribution, and nobody knows he  
6 even, --

7 CHAIRMAN BABCOCK: You could spin that a  
8 different way.

9 MR. SOULES: -- whether he even knew  
10 about it until it was brought to his attention.

11 CHAIRMAN BABCOCK: You could say the  
12 judge really wants to stay on this case to the  
13 point where he'll give up \$25,000 so he can take  
14 care of his bud. I mean, that's how your client  
15 would look at it.

16 HONORABLE PHIL HARDBERGER: Now that  
17 you're caught.

18 CHAIRMAN BABCOCK: Yes. Now that he's  
19 caught. That's how Luke's client would look at it.

20 MR. SOULES: It's not that simple. I  
21 don't think it's that simple. I think that the  
22 judge should -- I think in most cases when a judge  
23 keeps campaign contributions that are in excess of  
24 the limit it's inadvertent, and when it's called to  
25 their attention they're going to disgorge it; and

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1 that's -- I just I think if we do that, we're  
2 fixing a problem enough, and if we have got that  
3 other kind of a problem, we're probably going to  
4 have some other information about some other basis  
5 for recusal.

6 CHAIRMAN BABCOCK: Carl and then  
7 Judge Rhea.

8 MR. HAMILTON: I was going to say could  
9 we vote on the question of whether or not we ought  
10 to incorporate the return of the excessive  
11 contribution in order to fix the problem?

12 CHAIRMAN BABCOCK: Yes. It looks like  
13 we're down to 9(a), it sounds like. And now we're  
14 just kind of debating Luke's idea that we ought to  
15 have some mea culpa provision in it where they  
16 return the money.

17 MR. ORSINGER: Well, Wallace has an  
18 alternate one, which is if it's obvious that they  
19 knew they were taking it, they don't get a chance  
20 to opt out; but if it was only through aggregation  
21 that you get there, then they would.

22 HONORABLE SARAH B. DUNCAN: So we're  
23 going to litigate?

24 MR. ORSINGER: You're going to litigate  
25 aggregation any way you look at it.

1                   CHAIRMAN BABCOCK: Judge Rhea was up next  
2 and then Luke and then Nina.

3                   HONORABLE BILL RHEA: Maybe I misheard  
4 Wallace. I thought what I was hearing him say was  
5 that we ought to look at 9. And the more I hear  
6 the discussion I'm thinking we ought to look at 9.  
7 Should we just have a bright line rule and say  
8 it's -- you know, \$5,000 is an awfully big number  
9 for civil district court in Dallas county. Anyway,  
10 if I get more than \$5,000 regardless of what the  
11 statutory exemptions are to that or relief from  
12 that may be, maybe we should look, and maybe we  
13 should have a big vote on whether we just set a  
14 bright line rule at \$5,000 without the opt-out. I  
15 see Nina nodding her head, so I suspect that might  
16 be.

17                   CHAIRMAN BABCOCK: Okay. Who did I say  
18 I'd go to after you?

19                   MR. ORSINGER: Carl.

20                   CHAIRMAN BABCOCK: No.

21                   MR. ORSINGER: No? Excuse me.

22                   CHAIRMAN BABCOCK: Luke and then Nina.

23                   MR. SOULES: Can either side file this  
24 motion, the party who gave the money or the party  
25 that is against?

1 HONORABLE BILL RHEA: The opposite side.

2 MR. ORSINGER: The one who caused the  
3 problem cannot use it to recuse.

4 MR. SOULES: All right. That's in this  
5 Rule someplace?

6 HONORABLE SCOTT A. BRISTER: Yes.

7 CHAIRMAN BABCOCK: Okay. Nina.

8 MS. CORTELL: Just echoing Judge Rhea, I  
9 think, and what Wallace said, the risk is we're  
10 doing something that's outside the law, I think.  
11 And there may be political aspects to that; but  
12 there is something, I think, attractive just from a  
13 public policy standpoint on to appearance of  
14 impropriety of going with 9, because these levels  
15 are high. And to say if we fall under 9(a) just  
16 because someone has done an opt-out suddenly it's  
17 okay for appearance of propriety or impropriety  
18 that if someone made a \$50,000 contribution, that's  
19 okay because there was an opt-out, I find  
20 bothersome.

21 CHAIRMAN BABCOCK: Judge Patterson.

22 HONORABLE JAN P. PATTERSON: I think also  
23 9 has the benefit of, one, simplicity, and two, a  
24 bright line, and three, it just doesn't make sense  
25 to me that if in Judge Brister's race everybody has



1 opted out, so there is no recusal; but in my race  
2 I'm complying, so there is recusal. You would have  
3 the anomaly in the same court you would have  
4 different results, and it would just be much more  
5 complicated.

6 Let me just also speak briefly to the  
7 aggregation problem, which I think the other judges  
8 can -- we all have a different view of it. But you  
9 do have to be in these campaigns fairly hands-on to  
10 guard against the technical requirements of the  
11 statute; but I think all of us are fairly guarded  
12 and watch it very carefully, if not the day  
13 something comes in, by the filing date. And so I  
14 think that's the significance.

15 I mean, I think that it is good to have some  
16 opportunity to cure either when it comes to your  
17 knowledge or by filing date, whichever is earlier,  
18 you could adopt. I think it is not simple to avoid  
19 that; but I think it's an important incentive for  
20 judges to have to comply. So I just I don't want  
21 to let it pass by that aggregation is impossible to  
22 watch or difficult. It's an incentive that we all  
23 need and must support.

24 CHAIRMAN BABCOCK: Paula.

25 MS. SWEENEY: Nina and those of you-all

1 who are favoring, if I'm understanding, just a  
2 \$5,000 bright line sort of test, are you-all  
3 including in that statewide races, or are we  
4 talking --

5 MS. CORTELL: It's whatever the limits  
6 are.

7 MS. SWEENEY: Well, I know. And I don't  
8 know what the answer is about that; but to me there  
9 is a huge difference if we're talking about a  
10 \$5,000 lawyer contribution to a district court  
11 judge or a county court judge versus somebody who  
12 is running a statewide race.

13 MS. CORTELL: They're staggered.

14 MR. ORSINGER: For an individual it's  
15 \$5,000 for a statewide race for an individual. In  
16 other words, \$5,000 is the cap for the Texas  
17 Supreme Court.

18 CHAIRMAN BABCOCK: Luke, what about  
19 this? Would this if we took 9 and we added  
20 language somewhere that said "unless the excess  
21 campaign contribution is returned prior to the  
22 filing of the motion to recuse"? Well, following  
23 up on what Judge Patterson said, --

24 MR. SOULES: I mean, that's better than  
25 not being able to disgorge it at all. I can go

1 tell the judge, call my buddy, call you and say  
2 "We need to go see the judge." And we go over and  
3 see the judge, and I say "Judge, you've got a bad  
4 campaign contribution here." I mean, but I just  
5 think that's a trap for the judge.

6 CHAIRMAN BABCOCK: Just a what?

7 MR. SOULES: I think it's a trap for the  
8 judge, somebody to be able to blow a judge off the  
9 court. I think he ought to have a chance to cure.

10 CHAIRMAN BABCOCK: It's not blowing him  
11 out of the court. It's just blowing him off the  
12 case.

13 MR. SOULES: Well, the case. If the  
14 judge has an inadvertent mistake, he shouldn't be  
15 subject to recusal; and I think most of those  
16 mistakes are going to be inadvertent, so I don't  
17 like the idea of it.

18 CHAIRMAN BABCOCK: Okay. Fine.

19 MR. SOULES: I think it should be after  
20 the motion.

21 HONORABLE TOM LAWRENCE: I'm not  
22 convinced that there are that many occurrences in  
23 the state of Texas where someone accepts  
24 contributions in excess of the limits. I think  
25 most judges are pretty careful about that; and

1       there may be a few. But if the issue is whether or  
2       not there is bias or prejudice or warm fuzzy  
3       feelings that are going to be had on the part of  
4       the judge toward whoever gave him the money, the  
5       fact that it's discovered and he gives it back  
6       prior to trial I'm not sure that that's going to  
7       necessarily erase all that. I would be more in  
8       favor of 9 rather than 9(a) because of that.

9                   CHAIRMAN BABCOCK: Let Scott have a say.

10                   HONORABLE SCOTT A. BRISTER: Help me  
11       think through this. I think I'm in favor of 9(a).  
12       As I understand it the time when the limit is  
13       lifted is going to basically be a rich person  
14       running for office, because I can't list the  
15       contribution. So this is just to me a rich  
16       attorney who has decided he doesn't like the judge  
17       and is going to run against me, and he's got a  
18       million dollars and he's going to spend a million  
19       dollars.

20                   Now if the rest of us in town if that needs to  
21       happen, that's fine even; but if the rest of us in  
22       town just don't like this lawyer who has gotten  
23       rich and wants to take over the courthouse, what do  
24       we have to do? We've got to contribute more than  
25       the limits; and the only people that's going to do

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1 that is the law firms, especially if it's not a big  
2 town. There is going to be nobody if you don't  
3 have this exception who can try a case if I happen  
4 to win. So basically a rich person could shut the  
5 courthouse down if you don't do 9(a) instead of 9.

6 Am I missing something?

7 CHAIRMAN BABCOCK: No. That's a good  
8 point. Let's hear it for the rich guys. Judge  
9 Hardberger.

10 HONORABLE PHIL HARDBERGER: Well, I just  
11 think that you had a very good idea that I wanted  
12 to speak to on returning the money as long as it's  
13 before the motion for recusal, because that shows  
14 the judge was in good faith in the error and tried  
15 to fix it and takes care of the problem that "Oh,  
16 I'm caught. Okay. Well, then I'll give it back."

17 CHAIRMAN BABCOCK: Yes. I just think  
18 under the appearance of impropriety, I mean, to the  
19 client, I mean that just "Oh, we filed a motion to  
20 recuse. We caught him; but now he's going to be  
21 able to escape, and we've still got to live with  
22 this guy." I don't you know.

23 HONORABLE PHIL HARDBERGER: I would say  
24 the 9(a) with that grafted on it, that if he's  
25 returning the money before recusal, you've pretty

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1 well got a reasonable Rule there.

2 MR. EDWARDS: I have a question.

3 CHAIRMAN BABCOCK: Yes, Bill.

4 CHAIRMAN BABCOCK: Do you aggregate the  
5 lawyer and the client?

6 MR. ORSINGER: The task force  
7 recommendation is doing that kind of aggregating;  
8 but this Rule is --

9 MR. EDWARDS: I'm just asking. I'm not  
10 advocating. I'm asking.

11 CHAIRMAN BABCOCK: Yes.

12 MR. ORSINGER: It's picking up the  
13 statutory aggregations which is pretty much limited  
14 to spouse or child, and then --

15 HONORABLE SCOTT A. BRISTER: And law  
16 firms.

17 CHAIRMAN BABCOCK: Steve.

18 MR. TIPPS: In light of what Judge  
19 Patterson said, do we understand 9 and 9(a) to  
20 allow the judge to avoid recusal if he or she has  
21 complied with the law and refunded the improper  
22 contribution before the election filing date or  
23 not? I'm still not sure what or how we believe  
24 these Rules would apply if the judge acts most  
25 diligently during the campaign, monitors the

1 contributions, gets a check in one day, and in  
2 three days sends it back. Have these provisions  
3 been violated if that occurs or not?

4 HONORABLE JAN P. PATTERSON: I think  
5 those are two different issues, and I'm not sure  
6 either one necessarily incorporates. I think that  
7 the cure is a separate issue from the limits. I  
8 think I would be in favor of some opportunity to  
9 cure; but I recognize the problem, so I don't think  
10 if ought to be absolute.

11 MR. ORSINGER: If I can respond to what  
12 you've just said, --

13 CHAIRMAN BABCOCK: Wait a minute. Wait a  
14 minute.

15 MR. ORSINGER: -- it depends entirely on  
16 what "acceptance" means, like Sarah keeps saying.

17 MR. TIPPS: I know. What's the answer to  
18 that question?

19 MR. ORSINGER: The statute sets the  
20 limits; and if you are in violation of them, 9  
21 applies; but the statute has a separate paragraph  
22 that says that you can avoid being in violation of  
23 the statute by making a return that is no later  
24 than your filing date of your election report; but  
25 if you don't realize it until one day after your

1 election report is filed, you have violated 9 and  
2 you're out unless the definition of acceptance  
3 means somehow inherently knowing, that you knew  
4 it.

5 HONORABLE SARAH B. DUNCAN: It's not so  
6 much that's knowing.

7 CHAIRMAN BABCOCK: Go ahead.

8 HONORABLE SARAH B. DUNCAN: But as a for  
9 instance, I received when I ran in '94, I received  
10 a contribution, a check before I had designated a  
11 treasurer, which I'm not permitted to do. So I  
12 received that contribution in the sense that I got  
13 that check in my mailbox and I took it in my house  
14 and I looked at it; but I did not accept the  
15 contribution because I never deposited it to my  
16 account and I never of course listed it on a  
17 filing, because I had not accepted it.

18 And we're able to -- there is a period of time  
19 between raw technical acceptance and depositing it  
20 in your account that you're able to look at it and  
21 determine if it's in excess of the contribution  
22 limits individually or in the aggregate or spouses  
23 or law firms.

24 MR. TIPPS: But what happens if you  
25 deposit the check in your account and three days

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1 later you find out that the person that wrote you  
2 the check is married to somebody who has already  
3 made a \$5,000 contribution to you, and you give the  
4 money back?

5 CHAIRMAN BABCOCK: If you accept my  
6 little friendly amendment, then that fixes it  
7 presumably because there has been no motion to  
8 recuse done.

9 HONORABLE SARAH B. DUNCAN: I can't  
10 accept that amendment, because the same -- the  
11 skunk is in the jury box.

12 MR. TIPPS: I think it's --

13 HONORABLE SARAH B. DUNCAN: Those people  
14 gave that money and indicated that level of support  
15 for that candidate, and that's what causes the  
16 appearance of impropriety, not I don't think  
17 whether you kept it or not.

18 MR. TIPPS: I think the judge -- I think  
19 my personal view is that in order to avoid recusal  
20 the judge himself or herself must have caught it on  
21 their own during the campaign and given it back,  
22 that if it's not caught at that point, it's too  
23 late on the eve of the motion for recusal to give  
24 the money back.

25 CHAIRMAN BABCOCK: Yes. I see a

1 difference. If the judge gets this, checks all the  
2 aggregation rules, and writes a very nice note and  
3 says "I'm sure you're unaware of this, but by  
4 sending me this you're over the limits; I can't  
5 accept this; here's the money back; and thank you  
6 for your support; I'll keep the rest," and goes on  
7 about his business, to me that doesn't raise the  
8 specter of impropriety under our system which has  
9 lawyers and parties contributing to judges. That  
10 doesn't raise the same specter of impropriety as  
11 the judge who gets the money, says "Uh-huh, they've  
12 violated the limit, but who cares," and keeps it;  
13 and then when a motion to recuse is filed says  
14 "Whoops, they caught me," and then sends it back.  
15 Two totally different situations.

16 HONORABLE SARAH B. DUNCAN: I agree  
17 they're different situations; but I think to say  
18 that one is worse than the other is not to say the  
19 first one was okay.

20 CHAIRMAN BABCOCK: I'll accept that; but  
21 I think we're trying to come to a middle ground.  
22 Judge Rhea.

23 HONORABLE BILL RHEA: I agree with your  
24 comment and Steven's as well; but I would humbly  
25 suggest that we took the ax to (b) and (c). I

1 would suggest that it would make sense to just have  
2 a general vote on 9 or 9(a) without the issue of  
3 acceptance, and then go to the issue what is  
4 acceptance along the lines of what we are debating  
5 here.

6 CHAIRMAN BABCOCK: Here, here. That's  
7 okay; but Judge Patterson wants to say one thing  
8 before we do.

9 HONORABLE JAN P. PATTERSON: I can't let  
10 Judge Brister's comment go unresponded to. And  
11 that is that I don't think that 9(a) is just to  
12 protect against the rich guy. I think the virtue  
13 of 9 is to inhibit to some extent the escalation of  
14 campaign chest wars. I think the tendency is not  
15 for the rich guy to waive the requirements, but for  
16 those who can raise substantial amounts of money  
17 fast; and I think that a recusal Rule that's easy  
18 and that's flat as in 9 speaks to the issues that  
19 are behind the whole purpose of recusal, and it  
20 doesn't speak to what is campaign finance reform,  
21 any of those issues. I think it speaks to money in  
22 the system and the purposes behind recusal, and we  
23 need to keep those -- those policies are different,  
24 and that we don't need to cure one or the other.

25 CHAIRMAN BABCOCK: Judge McClure, what do

1 you think?

2 HONORABLE ANN C. MCCLURE: I'm in favor  
3 of 9 over 9(a).

4 CHAIRMAN BABCOCK: Because?

5 HONORABLE ANN C. MCCLURE: I think if  
6 we're going to accept the premise that the campaign  
7 contributions taint the system, that allowing a  
8 free-for-all does nothing to further the public  
9 perception. If we're going to require recusal,  
10 then it ought to be straight across the board, and  
11 you understand that going in. But if you are in a  
12 position where the levels are lifted based on  
13 something that your competitor does, you're going  
14 to put yourself in a recusal situation if you play  
15 that game, and I just -- I'm opposed to accepting  
16 that thought.

17 CHAIRMAN BABCOCK: Okay. Does everybody  
18 feel good about maybe voting between 9 and 9(a)  
19 right now? Let's try it. Everybody in favor of 9  
20 raise your hand.

21 HONORABLE ANN C. MCCLURE: I vote "yes."

22 CHAIRMAN BABCOCK: Thank you. Everybody  
23 in favor of 9(a). 9 has got 21 votes, and 9(a) has  
24 eight votes, so it sort of sounds like 9 carries  
25 the day.

1 HONORABLE SCOTT A. BRISTER: But it  
2 wasn't the most lopsided.

3 CHAIRMAN BABCOCK: No. That's true, even  
4 though Richard was once again in the minority.

5 MR. ORSINGER: If you count the  
6 percentage of the judges' votes, it was  
7 fairly -- it was not lopsided at all.

8 HONORABLE JAN P. PATTERSON: This doesn't  
9 address "cure."

10 MR. TIPPS: No. No. We haven't talked  
11 about "cure."

12 CHAIRMAN BABCOCK: Yes.

13 HONORABLE SARAH B. DUNCAN: Or  
14 "acceptance."

15 CHAIRMAN BABCOCK: Well, yes, we haven't  
16 talked about that; but I think we probably ought to  
17 direct our discussion toward 9. So let's talk  
18 about the acceptance problem.

19 HONORABLE DAVID PEEPLES: Can I say  
20 something real quick?

21 CHAIRMAN BABCOCK: Yes, Judge Peeples.

22 HONORABLE DAVID PEEPLES: I don't think  
23 that anybody is going to know whether you have  
24 accepted it until you file the report. I mean, how  
25 is anybody other than me and my team going to know

1 what I have accepted and then sent back until the  
2 report is filed?

3 CHAIRMAN BABCOCK: An anonymous memo.

4 COMMITTEE MEMBERS: (Laughter.)

5 CHAIRMAN BABCOCK: Inside joke.

6 HONORABLE SARAH B. DUNCAN: We can  
7 subpoena your checkbook records.

8 HONORABLE DAVID PEEPLES: What?

9 HONORABLE SARAH B. DUNCAN: We can  
10 subpoena your checkbook records.

11 MR. ORSINGER: But we're not allowing  
12 discovery.

13 CHAIRMAN BABCOCK: Right, at this point.

14 HONORABLE DAVID PEEPLES: I don't think  
15 acceptance --

16 MR. ORSINGER: I don't know whether a  
17 subpoena is allowed or not.

18 HONORABLE DAVID PEEPLES: -- is a big  
19 issue.

20 CHAIRMAN BABCOCK: Yes. I was being  
21 flippant as usual. That's a good point.

22 All right. What else?

23 MR. HAMILTON: We need to vote on whether  
24 or not you can cure it by returning it.

25 CHAIRMAN BABCOCK: Yes.

1 MR. ORSINGER: And if so, when.

2 CHAIRMAN BABCOCK: Yes. And if so,  
3 when. Yes, Steve.

4 MR. TIPPS: My proposal in whatever words  
5 we can come up with is that the judge should not be  
6 obligated to recuse if a contribution that has been  
7 received is returned in such a fashion that the  
8 judge has complied with the provisions of the  
9 Election Code for returning money.

10 HONORABLE MICHAEL H. SCHNEIDER: Right.

11 MR. TIPPS: I didn't say that very  
12 artfully; but that otherwise that if it later comes  
13 to the attention of anyone that contributions were  
14 received, were not returned, and the limits were  
15 violated, then there's a basis for a recusal  
16 motion.

17 CHAIRMAN BABCOCK: Yes, Sarah.

18 HONORABLE SARAH B. DUNCAN: So if, I  
19 mean, the filing deadlines don't correspond to  
20 anything, right, any terms of court or scheduling  
21 cases or anything like that, so we're in the middle  
22 of one now. And I don't have a report due until  
23 July 17th; and I know what my docket is for the  
24 month of June. Now Wendell doesn't; and I know  
25 that Wendell has given me a \$10,000 contribution.

1 This is all totally fabricated; but assume it. He  
2 has given me a \$10,000 contribution. I see on my  
3 docket that I get from the clerk that's not yet  
4 been made a public record that Wendell is coming  
5 into my court. Well, the last thing Wendell wants  
6 is to have me recused. So I know that there may  
7 be -- there will be a motion to refuse filed as  
8 soon as the lawyer on the other side finds out that  
9 I'm assigned to that panel.

10 Well, I can easily beat the motion to recuse  
11 deadline because I have advanced -- I have  
12 knowledge before the attorneys do, so all I have to  
13 do is before that docket gets mailed to the  
14 attorneys I give the money back.

15 CHAIRMAN BABCOCK: Steve.

16 HONORABLE SARAH B. DUNCAN: I don't think  
17 that's very comforting.

18 MR. SUSMAN: I don't understand why we  
19 give the judges an opportunity to give the money  
20 back. I mean, once they get someone's largess  
21 aren't they tainted. I mean, don't they know that  
22 their big buddy is Steve Susman who just wrote a  
23 check for \$20,000? I mean, I just hope they have  
24 to give it back. Okay?

25 HONORABLE SARAH B. DUNCAN: I'll give you



1 this one back; but I'm expecting another one  
2 shortly after I deny the motion to recuse.

3 MR. SUSMAN: I mean, in the ideal world I  
4 figure out how to give it to them under  
5 circumstances that they would have to give it back,  
6 because I have accomplished the same thing as  
7 giving the money. So what is the reason for  
8 allowing the judge to give the money back? Now I  
9 can only think of one. This is if I wanted, if I  
10 had a case that was important enough to me and I  
11 wanted to get rid of the judge, maybe I'd give him  
12 more than the limit to get rid of him, I guess,  
13 although --

14 HONORABLE PHIL HARDBERGER: He wouldn't  
15 have to take it.

16 MR. SUSMAN: -- it has to be a really  
17 good case --

18 HONORABLE PHIL HARDBERGER: You don't  
19 have standing then to file it.

20 MR. SUSMAN: -- to want to do that. But  
21 you can solve that, can't you, by just saying that  
22 the judge -- if the judge made the contribution  
23 after he knew he had a case in the judge's court,  
24 then that's the specter of impropriety.

25 HONORABLE SARAH B. DUNCAN: Well, we've

1 already said that motion to recuse can't be filed  
2 by the contributing lawyer, right?

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE SARAH B. DUNCAN: So you can't  
5 use this. You can't use a contribution --

6 MR. SUSMAN: Oh, that's right.

7 HONORABLE SARAH B. DUNCAN: -- to get a  
8 judge recused.

9 CHAIRMAN BABCOCK: Right.

10 MR. SUSMAN: I mean, why allow? I don't  
11 understand. Luke, could you explain that? Why are  
12 you going to allow? You are the one that brought  
13 it up, right? I didn't understand. Why allow the  
14 judge to remove the taint by giving the money back  
15 in excess of the limits? I mean, you know, he's  
16 already tainted.

17 MR. SOULES: Because I think that it  
18 doesn't taint the judge when somebody else tenders  
19 the judge too much money and the judge puts it in  
20 the judge's bank account. I think that what taints  
21 the judge is when the judge clearly understands  
22 that he's got a violation or an excess contribution  
23 and the judge doesn't return it. I think that's  
24 where you know. That's what I think.

25 MS. MCNAMARA: The other argument for

1 letting him return it is he just doesn't know you  
2 aggregated. You've got husbands and wives with  
3 different names and different firms and just  
4 coincidentally they add up to more than \$3,000 each  
5 adds up to six as opposed to five. And it would  
6 give him a chance to respond.

7 MR. SOULES: I think Judge Peeples says  
8 these laws are not that difficult to deal with; but  
9 they seem to be kind of complicated to me.

10 HONORABLE JAN P. PATTERSON: Well, it  
11 requires diligence.

12 MR. SUSMAN: Maybe the people who give  
13 the money should be responsible; and if they gave  
14 too much, they're going to lose the judge. If they  
15 keep it under the limit, --

16 CHAIRMAN BABCOCK: They're okay.

17 MR. SUSMAN: -- they're okay. But, I  
18 mean, why shouldn't we want to be encouraging  
19 lawyers? I mean, the price of exceeding the limit  
20 or not -- of being ignorant of the law when you  
21 give, husbands and wives give is that you're going  
22 to lose yourself some good judges.

23 HONORABLE JAN P. PATTERSON: The statute  
24 requires --

25 MR. SUSMAN: So, you know, given if it is

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1 a \$5,000 limit, give them \$4,999.99 or whatever it  
2 is. I mean, give them as much friendship as you  
3 can and still keep them as judges.

4 CHAIRMAN BABCOCK: Yes. One thing we  
5 ought not to lose sight of, you know, this is not  
6 like the election code where the judge is going to  
7 lose his office. I mean, he's just going to lose a  
8 case.

9 HONORABLE SCOTT A. BRISTER: Right.

10 CHAIRMAN BABCOCK: That's all.

11 MR. HALL: I'm curious. How often is  
12 this a problem?

13 HONORABLE SARAH B. DUNCAN: \$5,000 is  
14 five times more than I have ever received from a  
15 single contributor.

16 MR. HALL: I mean, I'm really curious. I  
17 mean, are we kind of running in circles around a  
18 problem that doesn't really exist?

19 CHAIRMAN BABCOCK: I don't think so.

20 HONORABLE PHIL HARDBERGER: Chip, --

21 CHAIRMAN BABCOCK: Yes,

22 HONORABLE PHIL HARDBERGER: -- I've been  
23 feeling kind of badly because I've never had the  
24 problem.

25 CHAIRMAN BABCOCK: Stick around.

1 HONORABLE SAMUEL A. MEDINA: Are you  
2 saying lose the case, or lose that firm for that  
3 term, for the next term? What did we decide on  
4 that?

5 CHAIRMAN BABCOCK: We haven't gotten to  
6 that. We're going to get to that in a second.  
7 Yes. Judge Peeples.

8 HONORABLE DAVID PEEPLES: On the issue of  
9 how easy it is to know, I think in a one-county  
10 district it's much easier to know and keep track of  
11 than statewide in a district. I'd be interested in  
12 what Justice Hecht's experience is.

13 JUSTICE HECHT: Well, on my last race it  
14 wasn't too hard to keep up with it, because we  
15 didn't raise that much money and we didn't feel  
16 like we needed that much money. But if you were  
17 going to raise two million plus dollars for a real  
18 hard race both in the primary and the general, it  
19 would be hard to keep up with. It wouldn't be  
20 hard -- I mean, I think you could do it. And let's  
21 see.

22 The candidates in '98 who raised quite a bit  
23 of money just had accountants, and they said they  
24 didn't have much problem. And I don't think you  
25 even in those circumstances, you don't get close to

1 the caps more than in one or two instances or three  
2 or four at the very most.

3 HONORABLE SARAH B. DUNCAN: Well, isn't  
4 it our responsibility to determine whether we are  
5 tendered a contribution in excess of the cap?

6 JUSTICE HECHT: Yes. I mean, it is. And  
7 it is hard if a firm has given you a lot of money,  
8 and then somebody who, particularly if their spouse  
9 is in the firm and they're a lawyer too is they  
10 want to give you something, and they don't know  
11 what the other firm has done necessarily, it  
12 can -- but that's not -- I mean, it just doesn't  
13 come up that often.

14 CHAIRMAN BABCOCK: Hartley.

15 MR. HAMPTON: Does anybody know, does  
16 "party" include a PAC that is controlled by that  
17 party?

18 HONORABLE SARAH B. DUNCAN: Huh-uh (no).

19 MR. ORSINGER: The Code specifically  
20 discusses that.

21 HONORABLE SARAH B. DUNCAN: 253.155,  
22 "This section does not apply to a political  
23 contribution made by a general purpose committee."

24 MR. HAMPTON: Made by what?

25 HONORABLE SARAH B. DUNCAN: A general

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1 purpose committee.

2 HONORABLE BILL RHEA: What about a  
3 specific purpose committee?

4 CHAIRMAN BABCOCK: Are we ready to vote  
5 on whether we have a return mechanism in the Rule  
6 or not? Yes, Judge.

7 HONORABLE DAVID PEEPLES: I don't have a  
8 whole lot of sympathy for people what can't keep up  
9 with these contributions; but I'm willing to  
10 concede that if there is a true case of an  
11 inadvertent acceptance, you know, you didn't  
12 aggregate it right and didn't know who was married  
13 to whom and so forth, it seems to me that if the  
14 judge can prove to someone that it was inadvertent,  
15 maybe we ought to show mercy on that judge or  
16 whoever the contributors were.

17 And I don't know. Maybe we can say that if  
18 the judge files an affidavit with the Election  
19 Commission and they accept the contention that it  
20 was inadvertent, that that gets them off the hook.  
21 But I just think that we shouldn't do backflips to  
22 try to accommodate people that can't keep track of  
23 these enormous contributions.

24 CHAIRMAN BABCOCK: Who had their hand up  
25 first? Judge Brown?

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1                   HONORABLE HARVEY G. BROWN, JR.: I think  
2 that's an interesting idea, because it in a sense  
3 goes back to the knowing, but it flips the burden  
4 of proof. It puts the burden on the judge to say,  
5 you know, "I did X, Y and Z." And sometimes you  
6 can do all the right things, but not find out.

7                   You know, for mine we had them fill out the  
8 name of the spouse. We had them fill out the  
9 employer of the spouse. Sometimes they don't.  
10 We'll make 10 phone calls and not be able to get an  
11 answer sometimes. So, you know, if somebody did  
12 that, and we put the burden on the judge to prove  
13 inadvertence, I think that deals with the issue,  
14 and it doesn't have the problem about knowing that  
15 we talked about earlier, because the burden is on  
16 the judge.

17                   CHAIRMAN BABCOCK: Sarah.

18                   HONORABLE SARAH B. DUNCAN: And where are  
19 we going to litigate this, and who is going to be  
20 the decisionmaker on this question? I mean, I  
21 would rather just be recused than for you-all to  
22 decide that I have to go to David Peeples in the  
23 trial court and have a trial on whether I  
24 inadvertently. "Just take the case. Just take  
25 them all."



1 MR. ORSINGER: And do I get to cross  
2 examine Sarah?

3 HONORABLE SARAH B. DUNCAN: Yes.

4 CHAIRMAN BABCOCK: For sure, whether or  
5 not you're involved. Judge Rhea.

6 HONORABLE BILL RHEA: Could I put forth a  
7 proposal? And that is that we add a comment that  
8 says "acceptance means acceptance without having  
9 refunded within the time periods of the Code"?

10 CHAIRMAN BABCOCK: Okay. That's a  
11 proposal. Sarah.

12 HONORABLE SARAH B. DUNCAN: If we adopt  
13 that proposal, we have the problem that I was  
14 talking about before, that I will find out I have a  
15 case with these lawyers in it before the filing  
16 deadline, and I can return it before July 17th and  
17 avoid recusal.

18 HONORABLE JAN P. PATTERSON: Isn't that  
19 cured by the periodic filing? I mean, the reports,  
20 they seem to come around so frequently that I would  
21 think that would be cured by the frequency of the  
22 filing.

23 CHAIRMAN BABCOCK: Steve.

24 MR. SUSMAN: Could we have a vote on just  
25 the bald proposition, I mean, whether you accept,

1 if you accept, it's tough luck, and then figure out  
2 all the exceptions later and see whether we get a  
3 majority for no exceptions to the acceptance?

4 CHAIRMAN BABCOCK: Yes. That's where I  
5 was angling toward. And the question is whether  
6 it's two votes or three; and I think two votes is  
7 probably better. Whether we have a return feature  
8 with or without inadvertence or, you know, whatever  
9 the standard may be, or no return feature. Okay?  
10 So anybody that thinks we ought to have a return  
11 feature in some fashion, raise your hand.

12 HONORABLE TOM LAWRENCE: I have a  
13 question first. When you say "return" would that  
14 include a return in accordance with the Election  
15 Code?

16 CHAIRMAN BABCOCK: It could be anything.  
17 It could be the inadvertence, you know, the judge  
18 demonstrated inadvertence and he's going to give it  
19 back, or it could be in accordance with the  
20 Election Code, or it could have been by suggestion  
21 you've got to give it back before the motion is  
22 filed.

23 HONORABLE TOM LAWRENCE: All right. If I  
24 receive it, and then return it either by the  
25 reporting period or within five days, then would

1 that be within this motion?

2 CHAIRMAN BABCOCK: Yes. If you're in  
3 favor of writing that into 9, if you're in favor of  
4 writing that into 9, then you should vote "yes" in  
5 a second.

6 MR. SOULES: Point of clarification:  
7 Using "acceptance" as it is in the statute or  
8 depositing the check in the bank account when he  
9 gets it?

10 MR. SUSMAN: What is "acceptance"? Is it  
11 defined in the Election Code?

12 MR. SOULES: Yes. It's way down the line  
13 when they make a report and do a bunch of stuff,  
14 right?

15 CHAIRMAN BABCOCK: Right now we're not --

16 MR. SOULES: Meanwhile the judge has got  
17 \$25,000.

18 CHAIRMAN BABCOCK: Right now we're not  
19 voting on that, Luke.

20 MR. SUSMAN: Is "acceptance" --

21 MR. SOULES: I'm saying deposit, yes,  
22 just deposited in the bank account.

23 CHAIRMAN BABCOCK: Luke, we're not voting  
24 on acceptance right now.

25 MR. SOULES: Okay.

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1                   CHAIRMAN BABCOCK: We're voting on  
2 "return."

3                   MR. SOULES: Excuse me. We're voting on  
4 "return."

5                   CHAIRMAN BABCOCK: Okay. The two votes  
6 you have are if you're in favor of having a return  
7 feature, in other words, the judge can get off the  
8 hook by returning it somehow, some way, under some  
9 circumstances yet to be defined, or no return, no  
10 return feature, that is, bright line test, here's  
11 the money, if you're not smart enough to figure it,  
12 do your own accounting, then tough luck. No  
13 discussion on this. Just a vote.

14                   MR. CORTELL: But you have to understand  
15 what you mean by "acceptance." I think they're  
16 interrelated.

17                   HONORABLE BILL RHEA: It's confusing.

18                   MR. SOULES: You can't. If you deposit  
19 the money, you haven't accepted it according  
20 to -- I say you have; but that's what the statute  
21 ought to say. If you deposit the check, you've got  
22 the money.

23                   CHAIRMAN BABCOCK: Steve.

24                   JUSTICE HECHT: Part of the problem is  
25 you won't know.

1 MR. SUSMAN: Why don't we have a vote to  
2 see whether there is any sentiment here for making  
3 the law -- making the Rule read "the receipt of a  
4 contribution in excess of the limit disqualifies  
5 you." Okay. Because if you get a majority on  
6 that, you're home free. You don't have to keep  
7 voting. Right? And if you don't get a majority on  
8 that, then you've got to talk about, well, what  
9 does acceptance mean, and then you've got to talk  
10 about, well, what is the return going to be even  
11 after acceptance.

12 HONORABLE TOM LAWRENCE: Because you're  
13 saying and what we're going to vote on, if I get it  
14 in the mail, then if I vote "yes," then that's  
15 going to be a recusal, correct, whether I deposit  
16 it or not?

17 MR. ORSINGER: We don't know yet.

18 CHAIRMAN BABCOCK: No. I don't think so.  
19 Yes, Carl.

20 MR. HAMILTON: The only way we're going  
21 to know about it is when it gets reported, so maybe  
22 that should be the test, when the judge has  
23 reported a campaign contribution.

24 CHAIRMAN BABCOCK: Judge Patterson.

25 HONORABLE JAN P. PATTERSON: I'm not sure

1 exactly of my time periods here; but I think we  
2 have an 180-day period before an election we can  
3 raise funds, and within that I think that we may  
4 have three filing periods. You have a seven-day  
5 before the election, 30-day before, and then I know  
6 we've got one July 17th. I'm not quite sure about  
7 the frequency; but they are fairly frequently,  
8 frequent within the limited time period during  
9 which you can raise it. So it's not as though you  
10 can keep the money for a terribly long period of  
11 time.

12 And we were just talking. I mean, it seems  
13 like they come up every other week; but when you're  
14 in the middle of a campaign they come up fairly  
15 frequently, and it applies to both primary and  
16 regular election that you have those frequent  
17 filings then. So a lot of time doesn't pass.

18 CHAIRMAN BABCOCK: Yes.

19 HONORABLE JAN P. PATTERSON: And  
20 particularly if you have a large campaign where  
21 you're going to have this problem, you need some  
22 passage of days before it comes to your knowledge  
23 and maybe even research, so a little time lag isn't  
24 inconsistent with...

25 CHAIRMAN BABCOCK: Well, in all deference

1 to Luke who has left the building Like Elvis, only  
2 lawyers could argue this long about what to vote  
3 on; but it seems to me about whether you deem the  
4 money to be accepted upon receipt or whether you  
5 deem it to be accepted upon filing a campaign  
6 report, the issue is whether or not we're going to  
7 have in this Rule an allowance that you can give it  
8 back and escape the Rule, which to me seems like a  
9 logical thing to vote on. And then we can vote on  
10 when you are deemed to have accepted as a separate  
11 matter.

12 HONORABLE DAVID PEEPLES: I move that  
13 vote.

14 MR. HAMILTON: Second.

15 CHAIRMAN BABCOCK: Okay. So let's try to  
16 vote on that. Do we want to have a return  
17 feature? That's the first vote. Everybody that  
18 wants a return feature in the Rule raise your  
19 hand. I'll count Luke. Sixteen in favor of a  
20 return feature. Those who are in favor of no  
21 return feature.

22 HONORABLE ANN C. MCCLURE: Count me in  
23 that vote too.

24 CHAIRMAN BABCOCK: Thank you. Well, the  
25 Committee feels strongly both ways. Sixteen in

1 favor of a return feature, thirteen for no return  
2 feature. Steve.

3 MR. SUSMAN: Maybe, I mean, maybe the  
4 vote would change, people would change their mind  
5 if we understood what "acceptance" was.

6 CHAIRMAN BABCOCK: Yes.

7 MR. SUSMAN: I mean, Luke is telling me  
8 that -- and I thought acceptance meant, you know,  
9 you get a check and you put it in your bank  
10 account. He's saying, no, it means something else.  
11 I mean, if way down the road there are plenty of  
12 opportunities to send it back or to fix it before  
13 you technically accept it, if that's the case and  
14 we use acceptance in the term of the Code, then  
15 maybe people don't feel it's so important to have  
16 the return feature; but I don't know what the law  
17 is.

18 CHAIRMAN BABCOCK: Justice Hecht.

19 JUSTICE HECHT: And as a practical matter  
20 you'll never know. I mean you hardly ever will  
21 know that the candidate took the money and gave it  
22 back, because he doesn't have to report that. He  
23 only has to report the bottom line at the end of  
24 the period.

25 CHAIRMAN BABCOCK: So what if we had the



1 language in 9 that we have, the judge had accepted,  
2 and then comment "Acceptance is defined as it is in  
3 the Election Code as the reporting period which is  
4 down the road"?

5 MR. HAMILTON: It's not defined.

6 MR. ORSINGER: Let's not say that,  
7 because they don't define "acceptance." They just  
8 say that if you have violated it and you find out,  
9 you must refund it. It really doesn't --

10 CHAIRMAN BABCOCK: It doesn't define  
11 "acceptance"?

12 MR. ORSINGER: Well, no. It just says  
13 "knowingly accept" and doesn't define it as being  
14 as of the filing date. There's a separate  
15 paragraph that says if you receive one in excess,  
16 you must refund it no later than the filing date.

17 CHAIRMAN BABCOCK: Okay. Judge  
18 Schneider.

19 HONORABLE MICHEAL J. SCHNEIDER: Why  
20 don't we just, and maybe it's in one of those  
21 proposals. Why don't we just tie it to whether or  
22 not there is a violation of the Code, and that way  
23 it takes care. If the Code permits acceptance or  
24 permits return, do it that way. I don't know which  
25 one of those; but that -- I mean, we're not here

1 rewriting the Rules of Ethics. Basically that's  
2 already been established. The policy has been  
3 established by the legislature.

4 CHAIRMAN BABCOCK: Yes. Judge Patterson.

5 HONORABLE JAN P. PATTERSON: I think that  
6 has the benefit of the virtue of simplicity, and as  
7 Justice Hecht said, I mean, really the system has  
8 built into it the opportunity for cure and return  
9 if you're diligent, and that is the filing  
10 deadline. So it is forgiving by virtue of the Code  
11 itself.

12 CHAIRMAN BABCOCK: Okay. Steve.

13 MR. SUSMAN: I mean, let me ask a basic  
14 question again, because I don't quite understand.  
15 I mean, if we are -- what are we about here? Are  
16 we really trying to present the appearance of  
17 impropriety, or in fact impartiality? If so, what  
18 do the limits mean? Why do they make any  
19 difference? I mean, a judge looks just as bad if  
20 he takes \$5,000 as to take \$7500 or \$10,000. I was  
21 mean, why is the line drawn there? I mean, he's  
22 going to be just as against you or for you if he's  
23 going to be motivated by money. I thought what the  
24 purpose of this was was simply to add additional  
25 deterrent affect to the Code, I mean, that we are

1 simply trying to encourage lawyers to abide by the  
2 Rules.

3 CHAIRMAN BABCOCK: No. I don't think so,  
4 Steve.

5 MR. SUSMAN: But if that's not it.

6 CHAIRMAN BABCOCK: Well, that's part of  
7 it. But if this Rule, if the Court adopts this  
8 Rule, they are affecting a huge change in Texas  
9 law, because right now the case law uniformly says  
10 "Don't talk to us about campaign contributions in  
11 connection with recusal because that doesn't  
12 count." And this Rule is going to say "Yes, it  
13 does count. Under certain circumstances you lose  
14 your judge."

15 MR. SUSMAN: Are we doing it because we  
16 want to enforce among the Bar the limits, the  
17 campaign contribution limits, are are we doing it  
18 because we think it really makes a difference in  
19 whether the public perceives the judge is going to  
20 be fair. Or, you know, the normal reasons to  
21 recuse a judge is he appears or is partial.

22 CHAIRMAN BABCOCK: Right.

23 MR. SUSMAN: And is that why we are doing  
24 this? I mean, does it really make a difference  
25 what side of the line of that limit he's on if he's

1 still getting money from a lawyer who is before  
2 him? I just don't know, I mean.

3 CHAIRMAN BABCOCK: Well, you know, I  
4 think frankly that's a basic question I've been  
5 wondering about. I know from my own experience I  
6 have an answer to that.

7 But, Anne, you have talked to probably general  
8 counsels and business people all around the country  
9 who have a view on Texas. And doing research on  
10 this I pulled up a Stanford Law Review article that  
11 was all about -- Stanford, it was all about our  
12 system, and how crappy it was, and how there was a  
13 huge appearance of impropriety, and about how the  
14 only way to fix it is to pass a Rule like this.

15 MS. MCNAMARA: Perception tends to lag  
16 reality, so I think to the extent you're reading  
17 that article it probably deals with the world as it  
18 was perhaps a while ago.

19 But I guess I would say to answer Steve's  
20 question, we're probably doing the second most  
21 intensely, and there may be a rub-off effect on the  
22 first of those two objectives. You know, if you  
23 have this Rule, the election law will be complied  
24 with more because you're putting teeth in it that  
25 didn't exist before.

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1 I'm not sure how you tie that to the  
2 acceptance question. What connection do you see  
3 with your question to what we were talking about?

4 MR. SUSMAN: Well, if it's to deter  
5 lawyers, okay, if that's your objection, to deter  
6 lawyers from violating the Rule by giving too much,  
7 then the return of the money is really immaterial.  
8 I mean, the lawyer shouldn't have given too much.  
9 We know what the lawyer's intent was. He either  
10 didn't pay attention to the law or intended to get  
11 around the law. So if you want to deter the  
12 lawyers, you punish the lawyers by saying "You  
13 can't have that judge."

14 MS. MCNAMARA: If you accept that he  
15 would never have inadvertent excessive  
16 contributions.

17 MR. SUSMAN: On the part of the lawyer  
18 who is giving it.

19 MS. MCNAMARA: Yes.

20 MR. SUSMAN: Forget about the  
21 inadvertency of the judge. And then on the other  
22 hand, if you're really intent, if you really think  
23 that what side of \$5,000 -- let's say that the  
24 limit is \$5,000. What side of the line the  
25 contribution falls on is going to make a difference

1 as to whether people perceive the judge as being  
2 impartial or not? I mean, then I guess you could  
3 think, "Well, maybe if the judge gives the money  
4 back, he can fix it."

5 I'm not sure if I had this all to do from  
6 scratch, I would put in a law like this. We live  
7 in a state where political contributions are a part  
8 of our way of life. They are there. And so, you  
9 know, if they make judges biased, they make them  
10 biased. We should get rid of political  
11 contributions. Maybe get rid of the way we change,  
12 select judges. But I'm not sure --

13 MR. SOULES: Let's talk about that.

14 MR. SUSMAN: I'm not sure \$5,000 --

15 CHAIRMAN BABCOCK: Now we've got  
16 something we can sink our teeth in.

17 MR. SOULES: I think we ought to get that  
18 over in about five minutes.

19 CHAIRMAN BABCOCK: Judge Lawrence and  
20 then Linda.

21 HONORABLE TOM LAWRENCE: I think that  
22 virtually every study that's been done in Texas in  
23 the recent years says that the public believes that  
24 there is some corresponding relationship between  
25 campaign contribution and quality of justice. This

1 to me is a modest first step to try to correct that  
2 perception and have some effect without creating a  
3 devastating effect on the system.

4 I guess what Mike suggested by saying it's a  
5 violation, I would have a little bit of the same  
6 difficulty with that as I would with 3, that how  
7 are we going to -- or (b) rather, 9(b). How are we  
8 going to establish that it's a violation? That  
9 gets into other issues. How would a movant prove  
10 that the judge was in violation without there  
11 having been an indictment or conviction or the  
12 Ethics Commission handing something down?

13 I would say that it is more reasonable for me  
14 to say that the judge either deposits the  
15 contribution or reports it, because you can be  
16 in --

17 MR. SOULES: I agree.

18 HONORABLE TOM LAWRENCE: -- compliance  
19 with the Election Code by doing either one of  
20 those. So if you deposit it or you report it as  
21 having been received and you do not give it back  
22 within the time limits prescribed by the Election  
23 Code, then I think you're in violation and need to  
24 recuse yourself. And that would be to me the  
25 minimal standard.

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1                   CHAIRMAN BABCOCK:   Okay.   Linda.

2                   MS. EADS:   Let me run this scenario by  
3   you, and tell me what's wrong with it.   We're all  
4   assuming judges who are inadvertent or that the  
5   contributors are inadvertent in going over the  
6   limit.   Let's assume purposeful.   Let's assume  
7   statewide campaign.   You need to buy media time.  
8   You don't have the \$500,000 you need to buy media  
9   time.   You get the contribution and you return it  
10  before you file your report.   Is that okay?   Is  
11  that what we're saying is in that situation that  
12  contributor can then go before that judge and not  
13  be recused?   Am I missing something there, because  
14  isn't that what we're talking about?

15                  We're not talking about like the issue of when  
16  do we accept like, well, you know it's \$100 over,  
17  and you know, you deposit it, and then you don't  
18  have to report it, and you give it back before you  
19  do the report.   What's the big deal?   Sure, what's  
20  the big deal?   What if it is a serious violation  
21  that causes that judge to be able to buy something  
22  the judge needs in order to win an election, and  
23  then they give it back before they file the  
24  report?   Okay.   Fine.   I mean, I'll really troubled  
25  by it.   I might be wrong how it works because I've

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1 never been involved in any of this; but I am real  
2 troubled by that scenario.

3 CHAIRMAN BABCOCK: Justice Hecht.

4 JUSTICE HECHT: That's the way it works.  
5 And I can't take -- you can't take an excessive  
6 contribution knowingly no matter what, so I can't  
7 take \$300,000 from Susman & Godfrey on October the  
8 12th after the 30-day filing period, buy all my TV  
9 time, work like the dickens to try to get the  
10 contributions from everybody else, pay Steve back  
11 on the 9th day out before the election, and then  
12 report that nothing ever happened. I can't do  
13 that.

14 So there are two things in the statute. You  
15 can't knowingly do it; and if you do take an  
16 excessive contribution, you've got to give it back  
17 within 5 days.

18 HONORABLE BILL RHEA: What keeps you from  
19 doing that?

20 MR. ORSINGER: The statute says you can't  
21 knowingly accept one in excess. That is  
22 prohibited. And if you violate that, you must  
23 correct it by the filing period or you get fined up  
24 to three times the amount of the illegal  
25 contribution.

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1                   CHAIRMAN BABCOCK:  What if 9 is amended  
2                   to say "the judge deposits or reports a campaign  
3                   contribution as defined in Section 251.101"?  
4                   Would that --

5                   MS. EADS:  That's fine.

6                   CHAIRMAN BABCOCK:  Does that cure any of  
7                   the problems that we're worried about?

8                   HONORABLE HARVEY G. BROWN, JR.:  Deposits  
9                   might be a clerk.

10                  CHAIRMAN BABCOCK:  Excuse me?

11                  HONORABLE HARVEY G. BROWN, JR.:  Deposits  
12                  might be a clerk.  Why don't you say "report."  I  
13                  mean, I don't see what you want, what you're  
14                  getting out of "deposits."

15                  CHAIRMAN BABCOCK:  Okay.  The judge  
16                  deposits a -- "The judge reports a campaign  
17                  contribution as defined in Section 251."  Yes,  
18                  Richard.

19                  MR. ORSINGER:  This doesn't cure  
20                  everybody's problem; but I would propose that we  
21                  take 9 as is and add onto the end of that "unless  
22                  the excessive contribution is returned as provided  
23                  in Section 253.155(e)."

24                  HONORABLE BILL RHEA:  That's fine.

25                  MR. ORSINGER:  And that tells you what

1 your periods are.

2 CHAIRMAN BABCOCK: Yes. But the problem  
3 with that is that you could have a contribution  
4 that gets returned after a motion to recuse is  
5 filed.

6 MR. ORSINGER: No. No. If it's in  
7 compliance with 155, you're talking only if it's  
8 the contribution is excessive and it's made  
9 shortly --

10 CHAIRMAN BABCOCK: Right.

11 MR. ORSINGER: -- during the campaign  
12 period and before the reporting period is due?

13 CHAIRMAN BABCOCK: Yes.

14 MR. ORSINGER: The only way to beat that  
15 ever is to either say there are no exceptions, or  
16 it has to be a knowing violation.

17 MR. TIPPS: Or you can go back to  
18 appearance of impropriety, general appearance of  
19 impropriety.

20 CHAIRMAN BABCOCK: Yes. But under the  
21 case law you get nowhere on that.

22 MR. TIPPS: That's probably true.

23 CHAIRMAN BABCOCK: Well, I've read the  
24 cases. You get zero. You get nowhere. There is a  
25 case -- nevermind. You just don't. Trust me.

1           What if you say "the judge reports" so that  
2 gives him a lot of lead time, right?

3           MR. ORSINGER: No. Because they'll cure  
4 it before they report it. It doesn't --

5           CHAIRMAN BABCOCK: Right.

6           MR. ORSINGER: Well, if that's true, then  
7 let's just say unless it's returned as provided in  
8 subdivision (e), because the deadline for returning  
9 as provided in the statute is the filing deadline,  
10 the reporting deadline.

11           MR. HAMPTON: And you can tack on "and  
12 before a motion to recuse."

13           COURT REPORTER: I'm sorry. I couldn't  
14 hear you.

15           MR. HAMPTON: You can tack on "and before  
16 a motion to recuse."

17           MS. MCNAMARA: Richard, does that address  
18 the situation Judge Hecht was describing where you  
19 get the \$300,000, buy the media time, and then --

20           MR. ORSINGER: No, it doesn't.

21           MS. MCNAMARA: It doesn't.

22           MR. ORSINGER: The only thing that  
23 addresses that is an outright prohibition against  
24 knowingly accepting a violation. But if you don't  
25 have something in there to allow some kind of

1 return, then a good faith judge whose treasurer has  
2 deposited an excessive check and he finds it out  
3 three days later, it's too late.

4 MS. MCNAMARA: Right.

5 MR. ORSINGER: So, I mean, I can't solve  
6 everybody's problem; but the problem I consider the  
7 problem of somebody that makes a humongous  
8 contribution during the campaign period that's  
9 going to be used and returned before the report is  
10 filed is less than one tenth of one percent of  
11 anything that is ever going to happen; and I would  
12 rather just ignore it and just say if you comply  
13 with the --

14 MS. EADS: And the empirical data says  
15 that?

16 MR. ORSINGER: -- return provisions,  
17 you're okay.

18 MS. EADS: I mean, it's a serious  
19 problem. And if you're sure it's one tenth of one  
20 percent that it never happens, then I'm  
21 comfortable; but I don't believe we know that. And  
22 that is the essential problem we're faced here  
23 with.

24 MR. ORSINGER: Well, anybody that is  
25 going to do that is going to be violating this

1 statute because they knowingly did it.

2 HONORABLE TOM LAWRENCE: And it's one  
3 thing to have the violation occur because you take  
4 it from a husband and a spouse with a different  
5 last name; but to take something that's twice or  
6 four times the amount, that is a pretty good case  
7 for knowingly, knowing that it was over the limit.

8 CHAIRMAN BABCOCK: How much? Let's see  
9 if we can take this piece by piece. How much  
10 support is there for putting the words, "The judge  
11 has reported a campaign contribution" as opposed to  
12 "the judge has accepted"?

13 HONORABLE MICHAEL H. SCHNEIDER: Well, I  
14 don't.

15 CHAIRMAN BABCOCK: No.

16 HONORABLE MICHAEL H. SCHNEIDER: What  
17 about I'd like could we give an alternative to what  
18 Richard just suggested, please, on that?

19 CHAIRMAN BABCOCK: Would I, or would  
20 you?

21 HONORABLE MICHAEL H. SCHNEIDER: Yes.  
22 Would you.

23 MR. ORSINGER: I would add onto the end  
24 of this sentence "unless the excessive contribution  
25 is returned as provided in Section 253.155(e),"

1 which basically gives you up until the last day of  
2 the reporting period to refund it.

3 CHAIRMAN BABCOCK: Okay. Judge  
4 Schneider, are you saying you leave the "accepted"  
5 language and then tack on his language?

6 HONORABLE MICHAEL H. SCHNEIDER: Yes.

7 CHAIRMAN BABCOCK: Okay. That's what  
8 you're talking about?

9 HONORABLE MICHAEL H. SCHNEIDER: Yes.

10 CHAIRMAN BABCOCK: Okay. Yes, Judge  
11 Rhea.

12 HONORABLE BILL RHEA: I think we ought to  
13 vote on that.

14 HONORABLE DAVID PEEPLES: I do too.  
15 Let's vote on that.

16 CHAIRMAN BABCOCK: All right. State it  
17 one more time, and we'll vote "yes" or "no" on  
18 that.

19 MR. ORSINGER: 9 as written, and end it  
20 with a comma "unless the excessive contribution is  
21 returned in accordance with Section 253.155 of the  
22 Election Code."

23 CHAIRMAN BABCOCK: Okay. Everybody in  
24 favor of that raise your hand.

25 MS. EADS: That's where we put in the

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1 date?

2 MR. ORSINGER: Yes. It's the later of  
3 the fifth date after the date the contribution is  
4 received or the last day of the reporting period.

5 CHAIRMAN BABCOCK: There are 19 people  
6 who have voted in favor of that. Everybody  
7 against? Justice McClure, you haven't voted.

8 HONORABLE ANN C. MCCLURE: I'm against.

9 CHAIRMAN BABCOCK: Thank you. Five  
10 people against. So Richard, you've got your first  
11 win. On that historic event, we'll take a  
12 ten-minute break.

13 (Recess 3:45 to 3:55 p.m.)

14 CHAIRMAN BABCOCK: Richard, you've got  
15 the language so you can redraft, right?

16 MR. ORSINGER: Right.

17 CHAIRMAN BABCOCK: All right. Now the  
18 next question on this is does this Rule as written  
19 have an ending period? In other words, if you've  
20 violated the bright line and you haven't given it  
21 back, are you forever recused from considering a  
22 case by that party or lawyer or law firm?

23 MR. ORSINGER: I have some proposed  
24 language. There is no language in here that does.

25 CHAIRMAN BABCOCK: Okay. So let's hear



1 your proposal.

2 MR. ORSINGER: This is a target to shoot  
3 at, I'm sure, given this discussion. "This ground  
4 for recusal arises at the time the excessive  
5 contribution is accepted and extends for the term  
6 of office for which the contribution was made."

7 CHAIRMAN BABCOCK: Okay. Judge  
8 Schneider, what do you think?

9 HONORABLE MICHAEL H. SCHNEIDER: It  
10 sounds good to me. It sounds better than that and  
11 the future one, because in my case appellate judges  
12 will be 12 years.

13 CHAIRMAN BABCOCK: Yes.

14 HONORABLE MICHAEL H. SCHNEIDER: However,  
15 if there was enough money.

16 COMMITTEE MEMBERS: (Laughter.)

17 HONORABLE TOM LAWRENCE: Would you read  
18 that again, Richard?

19 MR. ORSINGER: "This ground for recusal  
20 arises at the time the excessive contribution is  
21 accepted and extends for the term of office for  
22 which the contribution was made."

23 HONORABLE TOM LAWRENCE: So if you  
24 accepted it in October when you're up for election  
25 in November, does that mean it only lasts for two

1 months?

2 MR. ORSINGER: No. It would be for  
3 the -- the contribution would be for the term of  
4 office you're moving for; but if you accept it as  
5 an incumbent, it becomes available even before  
6 you're sworn in for that term of office.

7 HONORABLE TOM LAWRENCE: So if I have a  
8 fund-raiser after January 1st after I've just been  
9 reelected and that money stays in the bank for a  
10 period of time, does that mean it's going to be for  
11 seven years and 11 months?

12 MR. ORSINGER: No. No. Because the  
13 contribution, the campaign law permits you to raise  
14 money after the campaign for the campaign you just  
15 closed; but it doesn't permit you to raise money  
16 for the campaign four or six years down the road.  
17 So when you say "for which the contribution was  
18 made" I'm pretty sure that that is going to mean  
19 the race that you just ran.

20 The problem with this language is that it  
21 doesn't provide the time limit for a refund where  
22 we say "unless the excessive contribution is  
23 returned in accordance with the Section." If we  
24 have that bizarre situation where someone makes an  
25 illegal contribution and it's accepted all before

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1 the recording period, the ground for recusal will  
2 arise the moment you accept it. So basically, I  
3 mean, you could be in a situation where you can  
4 save yourself from recusal by refunding before the  
5 hearing; but other than that situation, which I  
6 don't seem to think is a risk, but that over here  
7 there seems to be strong feeling it's a risk, the  
8 language works.

9 CHAIRMAN BABCOCK: Yes. Steve.

10 MR. TIPPS: Doesn't that create a  
11 problem, though, Richard, if an excessive  
12 contribution is made at a late train, retire  
13 campaign debt fund-raiser in that the judge is  
14 recused only for the prior term of office? It's  
15 not forward looking?

16 HONORABLE JAN P. PATTERSON: No. And for  
17 the term it's given.

18 MR. ORSINGER: It would be for which the  
19 contribution was made. That would be the term  
20 you're moving into. So if you have a January 5th  
21 fund-raiser, --

22 MR. TIPPS: Okay. You're right. Okay.  
23 I understand. I'm wrong.

24 CHAIRMAN BABCOCK: Okay. Is there  
25 anybody that has got any more comments on that

1 proposed language? Is anybody opposed to that  
2 proposed language?

3 MR. ORSINGER: What I would say about it  
4 it's going to be dysfunctional during that period  
5 of time when you have an illegal contribution and  
6 you haven't hit your reporting deadline.

7 CHAIRMAN BABCOCK: Does that mean you're  
8 opposed to it?

9 MR. ORSINGER: No. I mean, there's no  
10 way to solve everybody's problems. I'm almost  
11 convinced.

12 CHAIRMAN BABCOCK: Judge Patterson.

13 HONORABLE JAN P. PATTERSON: I think that  
14 that deadline provides a nice compromise. It  
15 provides for some forgiveness; but it also provides  
16 for a definite deadline. And I think one of the  
17 great virtues of this Rule is because it -- we have  
18 lawyers participating in the self policing of  
19 campaign contributions and not just judges; and I  
20 think if you go beyond the reporting deadline, it's  
21 not a bad result for a recusal to result. So I  
22 think that this -- and I'm going against my last  
23 vote actually, in Scott's tradition.

24 MR. ORSINGER: In the Committee's  
25 tradition, I might add.

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1 HONORABLE JAN P. PATTERSON: But I think  
2 the filing deadline does provide the forgiveness  
3 that you need, and that you need not provide  
4 addition cure beyond that.

5 CHAIRMAN BABCOCK: Okay. There's one  
6 vote against this language. Sarah, do you want to  
7 say anything to explain your vote?

8 HONORABLE SARAH B. DUNCAN: Well, I think  
9 the problem I have is the situation where the  
10 illegal contribution has got the judge elected and  
11 basically has made him bulletproof, and there  
12 aren't going to be any more contested elections,  
13 and that judge can go sit in the cases of the  
14 person who got him elected.

15 MR. ORSINGER: You're talking about like  
16 seven or eight years later.

17 HONORABLE SARAH B. DUNCAN: No. It could  
18 be a short time later.

19 MR. ORSINGER: Why?

20 HONORABLE SARAH B. DUNCAN: Because you  
21 could have an election on an unexpired term.

22 HONORABLE MICHAEL H. SCHNEIDER: This is  
23 not going to solve anything.

24 HONORABLE SARAH B. DUNCAN: I'm thinking  
25 about Justice Angelini's race. She ran for the

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1 rest of an unexpired term. Then she comes up this  
2 year. Nobody is going to run against her. She is  
3 so well established, her reputation or whatever you  
4 want to call it. And I'm not saying anything  
5 against Karen as regard to running. As far as I  
6 know she didn't accept any contributions that  
7 remotely came close to this; but I could easily see  
8 a situation in which an illegal contribution is  
9 made and the judge wins that contested election so  
10 handily that there's never going to be another  
11 contested election, and now we're just going to let  
12 that person go back and sit in the cases of the  
13 person who made the illegal contribution.

14 MR. ORSINGER: Well, if you make this for  
15 that term plus the following term, then just  
16 remember that some Court of Appeals judge is going  
17 to last for 12 years.

18 HONORABLE TOM LAWRENCE: Why don't you  
19 just put a time limit on this: A year, three  
20 years, four years from the date of contribution as  
21 reported or accepted.

22 HONORABLE MICHAEL H. SCHNEIDER: This is  
23 self limiting. I mean, this does define the time.

24 CHAIRMAN BABCOCK: Yes. Sarah, I think  
25 you just -- you know, the situation you raise, you

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1 know, could certainly happen; but, you know, don't  
2 you create more harm than good?

3 HONORABLE SARAH B. DUNCAN: Not in my  
4 view.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE SARAH B. DUNCAN: But I'm,  
7 you know, one of the five that voted against the  
8 the original provision.

9 CHAIRMAN BABCOCK: Yes. Anybody else?

10 HONORABLE JAN P. PATTERSON: At least you  
11 would at that point have disclosure of excessive  
12 contributions and perhaps there would be a stigma,  
13 we would hope, and that might be enforcement of  
14 some kind.

15 CHAIRMAN BABCOCK: Richard, do we now  
16 have a Rule once you make this language, these  
17 language changes?

18 MR. ORSINGER: Yes, we do.

19 CHAIRMAN BABCOCK: Or a subpart.

20 MR. ORSINGER: We haven't talked about  
21 all the changes.

22 MR. HAMILTON: We haven't talked about  
23 10.

24 CHAIRMAN BABCOCK: No. No. No. I'm not  
25 getting carried away here. We have a 9.

1 MR. ORSINGER: We have a 9.

2 CHAIRMAN BABCOCK: Yes. I didn't mean to  
3 suggest that we've even closely gotten through this  
4 Rule.

5 Okay. So now we we're going to talk about 10;  
6 and I'm sure you're going to be able to tell us  
7 succinctly how 10 is different than 9.

8 MR. HAMILTON: 10 deals with direct  
9 campaign expenditures rather than contributions.

10 CHAIRMAN BABCOCK: Oh, sorry. It should  
11 have been obvious.

12 MR. ORSINGER: At this point of the day  
13 on this topic nothing is obvious.

14 CHAIRMAN BABCOCK: Yes. So the judge is  
15 spending too much money now.

16 MR. ORSINGER: No. No. It's a lawyer  
17 that pays it direct. Like I go buy \$100,000 worth  
18 of advertising. That's a direct expense.

19 CHAIRMAN BABCOCK: Oh, okay.

20 MR. ORSINGER: Or I throw a party down at  
21 the beer distributorship and I pay for everything.

22 MS. MCNAMARA: And that is not a  
23 contribution under the Code?

24 MR. ORSINGER: No. They're calling it a  
25 direct campaign expenditure in the statute.



1 MS. SWEENEY: I don't think that's the  
2 same thing as a party.

3 MR. ORSINGER: You don't? We'll look --

4 MS. SWEENEY: It may be someplace else.

5 MR. ORSINGER: -- at it. They define it  
6 right here. Let's look at it.

7 MS. SWEENEY: Is it the same?

8 HONORABLE SARAH B. DUNCAN: It's  
9 different.

10 MS. SWEENEY: It's different.

11 HONORABLE SARAH B. DUNCAN: It's  
12 different. If the candidate -- I think to some  
13 extent it turns on the candidate's participation in  
14 the expenditure. Somebody can put up a billboard  
15 for a candidate without the candidate even knowing  
16 about it; and if the candidate then receives a  
17 notice of direct campaign expenditure, they have to  
18 list that in a separate section.

19 MR. ORSINGER: Here is the definition, if  
20 anyone wants to hear it. "Campaign expenditure  
21 means an expenditure made by any person in  
22 connection with a campaign for elective office or  
23 on a measure. Direct campaign expenditure means a  
24 campaign expenditure that does not constitute a  
25 campaign contribution by the person making the

1 expenditure. A campaign contribution means a  
2 contribution to a candidate or political committee  
3 that is offered or given with the intent that it be  
4 used in connection with the campaign for elective  
5 office or a measure."

6 So does it matter whether we -- I mean, we can  
7 probably spend 30 minutes trying to figure that  
8 out, or we can just go ahead and debate 10.

9 HONORABLE TOM LAWRENCE: The results is  
10 the same to the campaign.

11 CHAIRMAN BABCOCK: I see what 10 is  
12 trying to get at now.

13 MR. ORSINGER: There is no -- we have no  
14 refund provision here or anything like that. I  
15 mean, you know, there is no way --

16 CHAIRMAN BABCOCK: The judge couldn't  
17 refund it.

18 MR. ORSINGER: No.

19 HONORABLE SARAH B. DUNCAN: I think the  
20 difference in my view, and that's what I was  
21 talking about earlier in terms of the candidate's  
22 involvement, the contribution is a contribution to  
23 the candidate which would include things I think  
24 like parties; whereas a direct campaign expenditure  
25 is not something that ever was given to the

1 candidate. It was simply done or said or  
2 whatever.

3 MS. SWEENEY: Like if you run a pole,  
4 there's a distinction between if you run it whether  
5 you tell the candidate about it or you don't tell  
6 the candidate about it. But if you do tell them  
7 about it, then --

8 HONORABLE SARAH B. DUNCAN: You get their  
9 consent.

10 MS. SWEENEY: No. Afterwards I mean.  
11 Either one. But let's say you go out and you don't  
12 tell them you're going to do it, you run it, and  
13 then you decide you want to share it with them.  
14 Then it becomes a contribution; and if you don't  
15 tell them, it's not.

16 JUSTICE HECHT: It's probably a direct  
17 expenditure.

18 MR. ORSINGER: This debate doesn't  
19 matter; but if I throw the party and I pay the  
20 overhead and everybody makes a contribution to the  
21 judge's treasurer when they come in the front door,  
22 I think that those people out there are making  
23 contributions. But when I pay for the beer and  
24 tamales I think that's a direct campaign  
25 expenditure. But does it matter? Does it really

1 matter if it is or if it isn't.

2 MS. SWEENEY: Okay. Well, tell me why  
3 it doesn't matter.

4 MR. ORSINGER: Because this Rule is -- if  
5 that is a campaign expenditure, then it's going to  
6 fit under 9. If it's not, I mean, if it's a  
7 contribution, it's going to fit under 9. If it's  
8 not, it's going to fit under 10. So does it matter  
9 if it's under 9 or 10?

10 JUSTICE HECHT: If it's an in kind  
11 contribution, which is probably what most people  
12 treat parties as, then it's going to be under 9.  
13 If it's like you say, you buy a poll and you don't  
14 tell the candidate, and then you tell them the  
15 results and they get the benefit of it, then maybe  
16 they have to report that as a direct expenditure.

17 MR. ORSINGER: What if it's like a  
18 billboard?

19 JUSTICE HECHT: Usually it's a direct  
20 expenditure.

21 HONORABLE JAN P. PATTERSON: One of the  
22 examples I think that is typical is it could be  
23 office space.

24 JUSTICE HECHT: It could be office  
25 space.

1 MS. SWEENEY: But, Richard, your point is  
2 it makes no difference because they can sort that  
3 out as a recusal?

4 MR. ORSINGER: Well, the difference  
5 between 9 and 10 is that if it's a campaign  
6 contribution, they have the chance to pay it back  
7 if it's 9; but if it's 10, there is no provision in  
8 here for them to undo the harm.

9 HONORABLE MICHAEL H. SCHNEIDER: Well,  
10 yes. We're saying essentially what we've said in 9  
11 was that if you violate the statute. And part of  
12 that violating the statute is that you didn't  
13 return it when you should have, right? But in this  
14 you could deal with it all in 9 just by bringing  
15 those numbers up there and say it's a violation of  
16 blah, blah, blah, whatever these numbers here.

17 MR. ORSINGER: Well, I don't know if the  
18 statute permits you to eliminate an excessive  
19 direct campaign expenditure by writing a check. If  
20 I buy billboards --

21 HONORABLE MICHAEL H. SCHNEIDER: Yes.

22 MR. ORSINGER: -- or TV ads, can you  
23 write me a check and make it legal?

24 HONORABLE MICHAEL H. SCHNEIDER: But you  
25 don't have to. I mean, you wouldn't have to. If

1 there's no exception for it, you have violated the  
2 law.

3 MR. ORSINGER: Well, but there's a return  
4 provision written into the statute for campaign  
5 contribution; and I don't know if there's a return,  
6 some kind of reimbursement provision for a direct  
7 campaign expenditure. I don't think there is.

8 CHAIRMAN BABCOCK: Let me ask a stupid  
9 question. Who gets in trouble then for an  
10 excessive direct campaign expenditure?

11 JUSTICE HECHT: The person that makes  
12 it.

13 CHAIRMAN BABCOCK: The person who makes  
14 it. Well, isn't it appropriate that if the person  
15 who makes it is a lawyer, a party, or a part of  
16 that law firm, that another consequence of them  
17 doing that means that they have a judge -- that the  
18 judge is recused?

19 JUSTICE HECHT: (Nods affirmatively.)  
20 Because the candidate won't necessarily know that  
21 the expenditure is being made. In fact, the person  
22 making it is supposed to report to the Ethics  
23 Commission and to the candidate that he's making a  
24 direct expenditure on the candidate's behalf; but  
25 you know, if they don't, they don't.

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1                   CHAIRMAN BABCOCK: Yes.

2                   MS. SWEENEY: And also you have got no  
3 control over how much people out there are  
4 spending.

5                   MS. MCNAMARA: Is it aggregated with the  
6 contributions?

7                   JUSTICE HECHT: It's treated some other  
8 way; but I don't know. I don't know how it falls  
9 under the limits. I'm kind of with Richard a  
10 little bit. I'm not sure if it matters the way  
11 it's set up here. But if you get an in kind  
12 contribution, and the typical example is somebody  
13 throws a party for you and that puts them over the  
14 limit, you can reimburse that expense and then they  
15 are not over the limit anymore. You can just pay  
16 for the party yourself. But if they go and buy a  
17 billboard, I don't know if you can reimburse that  
18 or not.

19                   CHAIRMAN BABCOCK: Should we have a time  
20 limitation, Richard, like we did in 9?

21                   MR. ORSINGER: I'm not totally convinced  
22 that there is provision in this statute that if  
23 someone makes a direct campaign expenditure that  
24 puts them over, you can write them a check and  
25 reimburse part of that and bring them back within

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1 the campaign limits.

2 JUSTICE HECHT: I just don't know.

3 MR. ORSINGER: I don't see it.

4 MR. TIPPS: What is the provision that we  
5 invoked previously, say?

6 MR. ORSINGER: It's 25.163, "A person  
7 other than a candidate, officerholder or principal  
8 political committee of the state executive  
9 committee or county executive committee of a  
10 political party may not make political expenditures  
11 that in the aggregate exceed \$5,000 for the purpose  
12 of supporting or opposing a candidate for the  
13 office other than statewide." And then if it's  
14 statewide, it's \$25,000, I believe. And then you  
15 have to file a declaration. It's the person  
16 spending the money has to file a declaration,  
17 right?

18 JUSTICE HECHT: Yes.

19 MR. TIPPS: What is the reimbursement or  
20 refund?

21 MR. ORSINGER: I don't know that there  
22 is. I don't see a reimbursement provision in here.

23 JUSTICE HECHT: I mean, The whole idea is  
24 the candidate had no control over it.

25 MR. ORSINGER: There is a penalty for



1 three times the amount of political expenditure  
2 made; but there's no proviso that would permit the  
3 judge to write a check by the reporting period and  
4 bring him back within time; but I'm worried because  
5 I am far from an expert on this statute.

6 HONORABLE MICHAEL H. SCHNEIDER: Wouldn't  
7 this be that situation where if I wanted to take a  
8 judge out, you would just go spend money on his  
9 campaign?

10 MR. ORSINGER: Yes. But you can't file  
11 the motion to recuse if you are the one that spent  
12 the money. So you're letting everyone else take  
13 that judge out of your cases; but you can't take  
14 him out of your cases.

15 HONORABLE SCOTT F. MCCOWN: Do you not  
16 have the authority, Mr. Chairman, to issue a writ  
17 of attachment and require Pemberton to attend these  
18 meetings now that he's changed jobs?

19 CHAIRMAN BABCOCK: Well, in fact, he  
20 volunteered to be here right about now; and I don't  
21 see him, so let's send the sheriff out after him.

22 MR. ORSINGER: Well, Yelenosky was our  
23 self-appointed statutory expert, and it's too bad  
24 he didn't come today.

25 CHAIRMAN BABCOCK: Yes. He didn't.

1 MR. ORSINGER: But I don't see a refund  
2 provision. I think we ought to look at it; but a  
3 direct campaign expenditure once it occurs it's not  
4 curable.

5 CHAIRMAN BABCOCK: Okay. What about the  
6 time limit? Should we have the same kind of --

7 HONORABLE TOM LAWRENCE: If a PAC does  
8 something for your candidate, you've got to notify  
9 him. But if an individual does something not in  
10 concert with the campaign, I was thinking that  
11 there wasn't any specific requirement he tell the  
12 candidate, they just had to report it to the Ethics  
13 Commission.

14 JUSTICE HECHT: No. You're supposed to  
15 send the -- the candidate is supposed to report all  
16 of the direct expenditures he knows about, and he  
17 is supposed to get a statement from the entity or  
18 whoever the person that says "We spent this much on  
19 your behalf in the last reporting period."

20 CHAIRMAN BABCOCK: So Richard, back to  
21 the point. Should we have a time limit on here  
22 similar to 9?

23 MR. ORSINGER: Well, of course, we have  
24 no reporting -- we have no refund provision written  
25 in; but we can make one up.

1                   CHAIRMAN BABCOCK: No. I'm not talking  
2 about refunds. I'm talking about the time limit.

3                   MR. ORSINGER: Oh, you mean the period of  
4 recusal? Sure.

5                   CHAIRMAN BABCOCK: Yes.

6                   MR. ORSINGER: Yes. I mean, I don't see  
7 how this is any worse than giving them cash.

8                   CHAIRMAN BABCOCK: I don't think that  
9 there should be any distinction between 9 and 10.  
10 If we're going to have a time limit on 9, we ought  
11 to have a time limit on 10, right? Does everybody  
12 agree with that?

13                   MR. ORSINGER: I agree with that  
14 totally.

15                   CHAIRMAN BABCOCK: Okay. Nobody  
16 disagrees with that. Now the refund, I don't see  
17 how we can have a refund since they never got the  
18 money to begin with. So that's out, isn't it?

19                   MR. ORSINGER: Yes. Unless -- yes.

20                   CHAIRMAN BABCOCK: Okay. With that  
21 language added to 10, the same language we added to  
22 9 is there anymore discussion on 10?

23                   MR. EDWARDS: I think you've got a comma  
24 missing in 10 that changes the entire meaning of  
25 it.

1                   CHAIRMAN BABCOCK: You've got to let us  
2 know where that comma should go.

3                   MR. EDWARDS: It says "When a  
4 candidate" -- let me see. "When this is done for  
5 the benefit of a judge when a candidate, by or on  
6 behalf of a party by a lawyer," so the way that's  
7 written you left the comma out.

8                   MR. ORSINGER: Where does the comma go?

9                   MR. EDWARDS: After "party."

10                  MR. ORSINGER: Okay.

11                  MR. EDWARDS: Because otherwise the  
12 lawyer would have had to have made it on behalf of  
13 a party on behalf of a candidate.

14                  MR. TIPPS: The comma is in (a), but it's  
15 not in 10.

16                  MR. EDWARDS: You've got it. In (a) it's  
17 okay.

18                  MR. ORSINGER: Yes. But we're not going  
19 to -- we've already voted the concept of (a) out.  
20 That buys into the violation of the statute, and  
21 we're not going to consider that.

22                  MR. EDWARDS: I'm just talking about  
23 grammar.

24                  MR. ORSINGER: Okay. So we'll put a  
25 comma in there like Bill says.

1 CHAIRMAN BABCOCK: Good comma.

2 MR. ORSINGER: And then we either add  
3 another sentence about "This ground for recusal  
4 arises at the time the expenditure is made and  
5 expends for," or we just say that on grounds 9 and  
6 10, the ground for recusal under 9 and 10 arise, we  
7 just do both of them in one Rule.

8 CHAIRMAN BABCOCK: That would be fine.

9 HONORABLE JAN P. PATTERSON: Well, except  
10 that 10 provides for a declaration. You might want  
11 to make it consistent with when you have to file  
12 the declaration that's in this self enforcement  
13 provision.

14 MR. EDWARDS: I would think that it would  
15 have -- they may not declare it. And you know,  
16 when you start you get into a lot of free speech  
17 stuff when an individual goes out there and starts  
18 saying I don't like "X," or "X" is a bad person or  
19 whatever it is. And there may be a fight over  
20 whether they ever declare.

21 HONORABLE SARAH B. DUNCAN: This may  
22 sound inconsistent on by part; but I'm a little  
23 troubled by getting recused from cases by the acts  
24 of a third party over which I have no control. I  
25 can return, investigate and return excess

1 contributions; but if somebody wants to get me out  
2 of a group of cases, all they've got to do is find  
3 somebody basically to make a direct campaign  
4 expenditure.

5 MR. EDWARDS: Well, it's got to be a  
6 direct campaign expenditure. It's got to be in  
7 excess of the limit that's provided, and that  
8 person has to be a party to the litigation.

9 MR. TIPPS: And somebody else has to move  
10 to recuse you.

11 MR. EDWARDS: And somebody else has to  
12 move to recuse you.

13 HONORABLE TOM LAWRENCE: Shouldn't there  
14 be a requirement that the judge be notified of  
15 this, because you can get hit with a recusal motion  
16 and you've never gotten notified by the party that  
17 did it?

18 MR. EDWARDS: Well, look. The thing is  
19 we're all looking at recusal like it's something  
20 bad for the judge. Recusal is because that either  
21 because it's been established that there is not  
22 impartiality as a matter of law, or it has the  
23 appearance of lack of impartiality as a matter of  
24 law. It's for the protection of the system and the  
25 protection of the parties, and it theoretically

1 protects the judge because the judge isn't sitting  
2 where he or she is going to be criticized for being  
3 in a case when she shouldn't or he shouldn't be  
4 there.

5 And it's no bad mark on the judge at all.  
6 That's where we get to thinking that it's a bad  
7 mark on the judge. It's not a bad mark on the  
8 judge.

9 HONORABLE SARAH B. DUNCAN: I'm not  
10 thinking about it in terms of being a bad mark on  
11 the judge. I'm talking about the fallout to the  
12 judicial system if third parties are without either  
13 notifying or getting the judge's consent able to  
14 get them recused.

15 MR. EDWARDS: The only way that --

16 HONORABLE SARAH B. DUNCAN: And I'm not  
17 saying this is a definite conviction of mine. It's  
18 just it's a little troubling.

19 MR. EDWARDS: The person giving the money  
20 doesn't get them recused unless the other party  
21 makes the motion.

22 CHAIRMAN BABCOCK: Yes. The way it works  
23 is, see, John has got a client.

24 HONORABLE SARAH B. DUNCAN: You can have  
25 a person who is in control of a PAC and have the

1 PAC make the expenditure and then the persons  
2 involved in the litigation, and that's not going  
3 to --

4 MR. EDWARDS: Well, the PAC has to be a party  
5 to the litigation.

6 CHAIRMAN BABCOCK: Yes.

7 MR. ORSINGER: Or a member of the PAC.

8 MR. EDWARDS: Or a member of the PAC.

9 CHAIRMAN BABCOCK: John has got a client,  
10 and John says "Look, I've discovered that this  
11 judge that we're going to be before received a  
12 benefit from our adversary, our opponent. Now the  
13 judge claims that they don't know anything about it  
14 and never heard about it; but nevertheless there it  
15 is, you know, \$30,000 or \$100,000 100 that they  
16 paid for barbecue and everything. What do you want  
17 me to do about it?" What do you think the client  
18 is going to say? The client is going to say "Well,  
19 recuse him. I mean, we can't take that chance."  
20 And John says "Well, no, no, no. But this is a  
21 great judge and she swears she knew nothing about  
22 it." Shouldn't the client at least have the  
23 opportunity to say "I don't care whether she claims  
24 she never heard about it; I don't want that judge  
25 sitting on my case"? And that's the way it ought

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1 to be, probably.

2 MR. HAMILTON: She now knows about it.

3 CHAIRMAN BABCOCK: She knows about it now  
4 for sure. Okay. Anybody else that's got any other  
5 comments?

6 MR. ORSINGER: I want to put something in  
7 the record. The statute applies when you spend  
8 money against a candidate as well as when you spend  
9 money in favor of a candidate. So if somebody  
10 wants to run TV ads or billboards about getting rid  
11 of judge so and so, under the statute that's a  
12 violation of that race. I mean, that's a violation  
13 of the law in that race.

14 CHAIRMAN BABCOCK: Right.

15 MR. ORSINGER: Now our Rule comes into  
16 the middle of that situation where someone might be  
17 running a campaign to get rid of one judge even if  
18 there's two or three people in the primary on the  
19 other side, and it only applies when it's for the  
20 benefit of the judge when a candidate.

21 Now I'd just like some acknowledgment in the  
22 record here if the money is spent to get rid of  
23 somebody, does that automatically mean it's for the  
24 benefit of everyone else in the race, or does for  
25 the benefit of the judge mean only when you're

1 campaigning in favor of a particular candidate,  
2 because I mean, it's a big difference there?

3 CHAIRMAN BABCOCK: You drafted this.  
4 What do you think?

5 MR. ORSINGER: Well, I would think it  
6 would only apply when you make the expenditure that  
7 benefits a particular judge by advocating that that  
8 judge be elected; but as we well know, if there's  
9 only two people in a race, spending money against  
10 one is indirectly spending money for another.

11 MS. JENKINS: I don't think you can make  
12 that kind of distinction. You see negative  
13 advertising as much as you see positive  
14 advertising; and I mean, what you're going to wind  
15 up with is a situation where someone runs negative  
16 campaign ads and that's not going to count, but  
17 it's neither sanctioned by the person they are  
18 trying to defeat.

19 MR. ORSINGER: Well, the person that  
20 they're trying to defeat --

21 MS. JENKINS: They're sanctioned by the  
22 person that --

23 MR. EDWARDS: The side of the other  
24 candidate.

25 MS. JENKINS: Yes. Exactly.

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1 MR. ORSINGER: It may not be sanctioned.  
2 They have no control over it. If I'm a candidate  
3 and they hate the person I'm running against, I  
4 can't control how much money people spend trying to  
5 knock that person off the bench.

6 MS. JENKINS: But people make those kinds  
7 of expenditures all the time is what I'm saying and  
8 make it knowingly and with the candidate's  
9 approval; and so I don't think you can make that  
10 distinction.

11 MR. ORSINGER: All right. Well, then  
12 it's kind of misleading; but then "for the benefit  
13 of the judge" also means spent on negative  
14 campaigning against the judge's opponent.

15 HONORABLE SCOTT F. MCCOWN: Only if  
16 that's a direct campaign expenditure --

17 MR. ORSINGER: Right.

18 HONORABLE SCOTT F. MCCOWN: -- as defined  
19 in Section 251.001. As long as we stick with what  
20 the election code says, then it's defined.

21 HONORABLE MICHAEL H. SCHNEIDER: That's  
22 what we should do.

23 MR. ORSINGER: Well, yes, it's defined,  
24 except our Rule talks about when it's for the  
25 benefit of the judge, and the statute makes it

1 illegal whether you're for a judge or against him;  
2 and because the statute doesn't distinguish whether  
3 you're for or against a candidate, but our Rule  
4 appears to, at least to me, "for the benefit of the  
5 judge" could arguably mean when you're campaigning  
6 in favor of somebody. That's why I wanted to get  
7 it in the record. I don't have the answer to that  
8 question. Joe and I have different personal  
9 opinions about what that means.

10 HONORABLE DAVID PEEPLES: Richard, maybe  
11 we should leave something for the Courts to  
12 interpret.

13 MR. ORSINGER: Okay. Fine. That's okay  
14 with me.

15 CHAIRMAN BABCOCK: Any other comments?  
16 All right. This 10 with the language added about  
17 limiting it to time, all in favor raise their hand.

18 HONORABLE ANN C. MCCLURE: I vote in  
19 favor.

20 CHAIRMAN BABCOCK: Thank you. Twenty-two  
21 in favor. All against raise your hands. Nobody  
22 against. So it passes 22 to zero.

23 Okay. Let's go to waiver. Scott, you've got  
24 thoughts about waiver, I know, because I've seen  
25 your E-mail.

1           HONORABLE SCOTT F. MCCOWN: I do? I have  
2 thoughts about everything, so I'm having to catalog  
3 it.

4           CHAIRMAN BABCOCK: All right.  
5 Here's -- Richard, this is pretty straight  
6 forward. We talked about it last time. We took  
7 some votes. Judge McCown raised a problem about  
8 the 10-day Rule saying that the Rule seems to imply  
9 that you have 10 days, you can take up to 10 days,  
10 where some things require a quicker response. Is  
11 that a fair?

12           HONORABLE SCOTT F. MCCOWN: Yes. Yes. I  
13 don't -- it takes out of the judge's control the  
14 ability to say "I'm telling you people this, and we  
15 need an answer, because I've got a jury panel out  
16 there". And one lawyer could say, "Look, the Rule  
17 gives me 10 days. I'm going to think about it. I  
18 want my whole 10 days." And so the judge  
19 then -- I mean, I guess you can say "Well, if you  
20 want your whole 10 days, then I'm going to have to  
21 step aside and recuse; but I mean, we are giving  
22 people the option to sit on it for 10 days.

23           MR. SWEENEY: The way you're reading it  
24 would you sit on it for the 10 first days of the  
25 trial?

1 HONORABLE SCOTT F. MCCOWN: No judge  
2 would do that.

3 MS. SWEENEY: But you're saying the  
4 litigant could sit on it for 10 days. Could a  
5 litigant sit on it for 10 days?

6 MR. EDWARDS: Until after verdict.

7 CHAIRMAN BABCOCK: Well, on the other  
8 hand, if this disclosure is just being made on the  
9 first day of trial, I mean, what is that all  
10 about?

11 HONORABLE SCOTT F. MCCOWN: Well, I don't  
12 know that I'm going to try a jury case until Monday  
13 morning.

14 MS. SWEENEY: That's correct. You're  
15 sent to the docket --

16 HONORABLE SCOTT F. MCCOWN: The case  
17 arrives on Monday, and we pick a jury at 1:00.

18 CHAIRMAN BABCOCK: But you just  
19 discovered this problem?

20 HONORABLE SCOTT A. MCCOWN: I don't know  
21 who I'm going to hear until I know at 9:30 who I'm  
22 going to hear. I couldn't have discovered it any  
23 earlier.

24 CHAIRMAN BABCOCK: Well, how about --

25 MS. SWEENEY: So I show up again in his

1 court.

2 CHAIRMAN BABCOCK: How about when you --

3 MS. SWEENEY: Central docket. And he  
4 says, you know, "There is this ground I need to  
5 disclose," and he discloses it. We try the case  
6 for 10 days. There's a knock on the door, and you  
7 know, "That knock came too soon." Could you do  
8 that? The way this is written could you do that?

9 MR. EDWARDS: I think so.

10 CHAIRMAN BABCOCK: You sure couldn't  
11 argue waiver.

12 MR. ORSINGER: We don't need to give them  
13 10 days. I mean, we talked last time about having  
14 them decide right at the time; but then somebody  
15 wanted to have a little time to think about whether  
16 they should recuse themselves or not. So how much  
17 time do you need to know whether to recuse  
18 yourself?

19 HONORABLE SCOTT F. MCCOWN: This is the  
20 opposite. I'm telling you that there is a  
21 problem. You need to tell me whether you want me  
22 to recuse or not.

23 MR. TIPPS: Right now.

24 HONORABLE SCOTT F. MCCOWN: Right now,  
25 because I have got to pick a jury. We've got to

1 get going. If you want to waive it, that's fine.  
2 If you don't, we'll go ahead.

3 MR. EDWARDS: What this says is that it's  
4 waived unless a motion is filed --

5 MR. ORSINGER: Yes.

6 MR. EDWARDS: -- within 10 days, which  
7 give you --

8 MR. ORSINGER: So then the party --

9 MR. EDWARDS: -- which gives you 10 days  
10 to file a motion.

11 MR. ORSINGER: So what Scott is proposing  
12 then is the party has to make a decision  
13 immediately upon disclosure of the ground for  
14 recusal, right? That's what you want?

15 HONORABLE SCOTT F. MCCOWN: I  
16 would -- Judge Peeples has some language that works  
17 for me. He just says "may be expressly waived on  
18 the record." We don't have to -- we can leave it  
19 silent.

20 If a lawyer said to me, "Look, I need to talk  
21 to my client, I need to think about this," or "My  
22 client needs to think about this a few days," and  
23 there wasn't a press, you know, that would be  
24 fine. I don't think we need to say it one way or  
25 the other.



1 CHAIRMAN BABCOCK: Judge Brister.

2 HONORABLE SCOTT A. BRISTER: Yes. Until  
3 you get to the part of the proposal that has the  
4 10-day, the other stuff is currently in the Rule.  
5 It's 18(b)(5), "Parties to a proceeding may waive  
6 any ground for recusal after it's fully disclosed  
7 on the record."

8 Now I assume the various things we're talking  
9 about, and if in Scott's case he tells them right  
10 then, even if he says you have to decide right now,  
11 and they say "Judge, I need to at least talk with  
12 my client out in the hallway," and the judge says  
13 "No. I hold you waive it," I would bet the  
14 Appellate Court would say that's not an intentional  
15 relinquishment of a known right.

16 HONORABLE SCOTT F. MCCOWN: Yes. You  
17 couldn't do that.

18 HONORABLE SCOTT A. BRISTER: On the other  
19 hand, if I say that, if I say "Now we're starting  
20 this trial in two days," and you go to trial and  
21 don't until the eighth day of trial say it, that is  
22 a waiver. You started the trial. You took an  
23 intentional act that's inconsistent with doing  
24 this.

25 I frankly say we ought to leave that one just

1 like it is in the current Rule; and waiver is, you  
2 know, whether they've intentionally acted is a fact  
3 specific thing, but it's not going to be that hard  
4 to figure out in most circumstances. I propose to  
5 go back to what the current Rule is and not change  
6 it.

7 CHAIRMAN BABCOCK: Judge Peeples.

8 HONORABLE DAVID PEEPLES: We have on the  
9 next page some time periods that take care of a lot  
10 of this. I thought, and maybe I'm not remembering  
11 it correctly, but I thought that (c), waiver, was  
12 for the situation where the judge says "You-all  
13 need to know that so and so is my neighbor." And I  
14 thought that what we wanted to do was to say that,  
15 you know, if 10 days go by, that's waived; but I  
16 thought we wanted to do something that allows the  
17 judge to say "If you guys are going to waive this,  
18 let's go ahead and get it done, and then we can go  
19 ahead with the trial."

20 And so I have some language that I think does  
21 that. In the middle line there the words "is  
22 waived" I would strike those, so it would say "a  
23 basis for recusal which is disclosed on the record  
24 may be expressly waived and is waived by operation  
25 of law unless a motion is filed." Doesn't that get

1 us? 10 days go by.

2 HONORABLE SCOTT F. MCCOWN: Instead of  
3 "and" say "or." "May be expressly waived or is  
4 waived by operation of law if a motion isn't filed  
5 10 days afterwards."

6 MR. ORSINGER: Doesn't that mean, though,  
7 that if they are assigned to you for a trial, that  
8 they've got 10 days to decide whether to recuse you  
9 or not?

10 HONORABLE DAVID PEEPLES: What I would  
11 tell them, "I'd say I'm telling you that so and so  
12 is an issue," and they say "Oh, no. We want to  
13 waive that," that's an express waiver, and it says  
14 that that's binding.

15 MR. ORSINGER: Right.

16 HONORABLE DAVID PEEPLES: But if I make  
17 that notification and then the case isn't on the  
18 docket, they have to make the motion within 10  
19 days.

20 MR. ORSINGER: I know. But the problem  
21 you're going to have is like in Dallas when they  
22 show up for trial and they haven't said anything,  
23 you make a disclosure, and they say "My gosh, I  
24 didn't know that, you know, I have got to go talk  
25 to my client, and the ramifications of delay, you

1 know, we have all this pressure on us to try the  
2 case," you're going to pass your trial setting, and  
3 by the tenth day after that that judge is going to  
4 be in the next jury trial and the next one, and  
5 you've got to re-set for six or nine months.

6 HONORABLE DAVID PEEPLES: I think we want  
7 the person to have some time when they don't -- you  
8 know, they show up right then. I mean, they  
9 haven't waived it at that point.

10 MS. SWEENEY: Didn't we have an earlier  
11 concept in here of time limit? Did we shoot that,  
12 or am I thinking of a different part?

13 CHAIRMAN BABCOCK: The current Rule  
14 doesn't seem to have any time limit, does it?

15 MR. EDWARDS: Yes, it does.

16 MR. ORSINGER: In 18(a) --

17 HONORABLE SCOTT A. BRISTER: It's in  
18 18(a).

19 MR. ORSINGER: -- you have to file  
20 something 10 days before trial or hearing unless it  
21 happened within 10 days of trial, and then it's at  
22 the earliest practical time. So we have a 10-day  
23 Rule right now.

24 MR. EDWARDS: Ten days or as soon as  
25 practical.

1 MR. ORSINGER: If it occurs after the  
2 tenth day, it's as soon as practical.

3 MR. EDWARDS: Right.

4 MR. ORSINGER: And for reasons we're not  
5 going to hopefully get into today, we decided not  
6 to go that road. So then the question becomes if  
7 somebody gets assigned to a trial setting, and the  
8 judge in good faith makes a disclosure that the  
9 counsel didn't know about, so there is no  
10 sandbagging or anything going on here, do they have  
11 10 days in which they have selected discretionary  
12 continuance for them?

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH B. DUNCAN: Am I  
15 misremembering our discussion last time? I thought  
16 all we were going to put in here was simply a  
17 sentence that said it could be waived  
18 on -- expressly waived on the record.

19 CHAIRMAN BABCOCK: Well, then we're not  
20 adding much to what is already in the Rule.

21 HONORABLE SCOTT F. MCCOWN: I agree with  
22 Judge Brister. I don't think on this point we need  
23 to add anything to what is already in the Rule. I  
24 mean, this is not a problem now. Judges disclose  
25 things all the time, and they work out between them

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1 and the lawyer how much time the lawyer needs to  
2 get back to him on it. And then once the lawyer  
3 gets back to them on it that's it. They've made  
4 their decision. It's on the record. If the  
5 judge -- and this is all self policing, because if  
6 the judge is unreasonable and says "I'm giving you  
7 three seconds to decide," then the answer is "We  
8 want you recused," you know, so this is not a real  
9 problem.

10 CHAIRMAN BABCOCK: If you took (c),  
11 Richard, and just left the "disqualification cannot  
12 be waived or cured" and picked up the language from  
13 18(b)(5), why wouldn't that?

14 MR. ORSINGER: That's perfectly fine.  
15 That just means --

16 CHAIRMAN BABCOCK: Everybody okay with  
17 that?

18 MR. ORSINGER: -- if you go ahead with  
19 the trial, you have a waiver, obviously. And if  
20 you can talk the judge into giving you three days,  
21 you don't have a waiver.

22 CHAIRMAN BABCOCK: Everybody okay with  
23 that?

24 HONORABLE SCOTT F. MCCOWN: Okay with  
25 what?

1                   CHAIRMAN BABCOCK: With leaving on  
2 subsection (c) leaving the language  
3 "disqualification cannot be waived or cured" and  
4 then picking up the language from 18(b)(5), which  
5 says "the parties to a proceeding may waive any  
6 ground for recusal after it is fully disclosed on  
7 the record."

8                   HONORABLE SCOTT F. MCCOWN: Yes. That's  
9 perfect.

10                  CHAIRMAN BABCOCK: Is that okay? Well,  
11 "perfect" I don't know. That may be a bit of a  
12 high standard for this late in the day.

13                  MR. ORSINGER: That's perfect until we  
14 discuss this in five minutes.

15                  CHAIRMAN BABCOCK: Judge Brown.

16                  HONORABLE HARVEY G. BROWN, JR.: I don't  
17 have a real problem with it; but I do think the  
18 word "fully" sometimes invites problems. I have  
19 seen this in an arbitration case where the  
20 disclosure was something along the lines of, you  
21 know, "I live near them"; but it wasn't disclosed  
22 how often I saw them in the building and walked by  
23 him and talked in the hallway. And was that a full  
24 disclosure or not? I personally think the language  
25 in here which is disclosing in the record is good;

1 but I'm not a strong advocate of that.

2 HONORABLE SCOTT A. BRISTER: The problem  
3 is with the current Rule saying "fully disclosed"  
4 if you drop "fully," then somebody is going to  
5 think it's changing the law.

6 HONORABLE SCOTT F. MCCOWN: Yes. It  
7 ought to be "fully." It ought to be "fully,"  
8 because that signals to the judge you need to be  
9 candid; and if the party is sandbagged, they ought  
10 to be protected. If all the judge says is "I knew  
11 that lady once," and there's a whole lot more to  
12 the story than that, you ought to be protected.

13 CHAIRMAN BABCOCK: Okay. Anybody opposed  
14 to changing subparagraph (c), waiver, in this way?  
15 No hands up, so let's go to --

16 JUSTICE HECHT: I've got one more  
17 question.

18 CHAIRMAN BABCOCK: Well, there is one  
19 more hand up.

20 JUSTICE HECHT: What does "cured" mean?  
21 For example, if a judge when a case is filed is  
22 disqualified because he owns stock in the party,  
23 but he sells the stock, then can he sit in the  
24 case?

25 HONORABLE SCOTT F. MCCOWN: No.



1 JUSTICE HECHT: Almost every judge I know  
2 does that.

3 HONORABLE SCOTT A. BRISTER: That got in  
4 too, because we used to have -- the current Rule  
5 has a cure provision; and for some reason three  
6 years ago when we were discussing it we dropped the  
7 deal about judges being allowed to cure. I have to  
8 think about why that was.

9 JUSTICE HECHT: Because once the  
10 financial interest is gone at least theoretically  
11 the judge doesn't care and would not have any  
12 reason to care about the outcome of the case one  
13 way or the other. But, I mean, I'm not sure I  
14 understand. Whichever is fine. I'm just not sure  
15 I understand what is meant by it.

16 CHAIRMAN BABCOCK: Well, the fact it's  
17 not in italics means it's in a Rule, right,  
18 Richard?

19 MR. ORSINGER: No. It means that it's  
20 not in our recodification draft. No. We've been  
21 working. Always we've been working from a  
22 recodification draft. So we are disclosing where  
23 we're making those changes, and then we're  
24 comparing the Rules as we go along. I don't know  
25 where. Scott, you said the cure provision is in

1 Rule 18(a) or (b). I don't know where it is.

2 HONORABLE SCOTT A. BRISTER: Yes. It's  
3 in 18(a).

4 MR. HALL: I sure would be curious why a  
5 judge would want to sell his interest in a stock in  
6 a party so badly just to hang onto the case.

7 JUSTICE HECHT: No. That's not what  
8 happens. What has happened on my court since I've  
9 been there is judges who were successful enough to  
10 have a stock portfolio or their spouses were at  
11 some point, and sometimes it's their spouses just  
12 decided to sell the stock because it was going down  
13 and they didn't want it anymore. And then could  
14 they sit, could they then sit in a case that they  
15 were not going to sit in because of that stock  
16 ownership?

17 MR. HALL: I see.

18 JUSTICE HECHT: It didn't have anything  
19 to do with as far as I know with wanting to decide  
20 the case.

21 MR. HALL: I was thinking more like on  
22 the trial court level as opposed to the appellate  
23 court level, if it's an individual judge.

24 HONORABLE HARVEY G. BROWN, JR.: What if  
25 you own stock the day the petition is filed? It's

1 in my court; and before I know anything about the  
2 case six months later I sell the stock, and then  
3 six months after that they come into my court and  
4 it's the first time I actually see them; but when I  
5 had that case in my court for six months when I  
6 owned stock. Aren't I disqualified if we don't  
7 allow a cure even though I never touched it, never  
8 knew anything about it, it was one of a thousand?

9 HONORABLE SCOTT A. MCCOWN: Well, the  
10 problem is you're working with stock, and there's  
11 lots of other things where you wouldn't want them  
12 to be able to cure.

13 JUSTICE HECHT: I was thinking, "Okay.  
14 I'll divorce her."

15 CHAIRMAN BABCOCK: You want to hang onto  
16 this case badly.

17 HONORABLE SARAH B. DUNCAN: 18(b),  
18 subsection (6), "If the judge does not discover  
19 that he is recused under subparagraphs (2)(e)"  
20 which is the financial interest, or (2)(f)(iii), is  
21 to the judge's knowledge likely to be a material  
22 witness into the proceeding, "until after he has  
23 devoted substantial time to the matter, he is not  
24 required to recuse himself if he or the person  
25 related to him divests himself of the interest that

1 would otherwise require recusal."

2 CHAIRMAN BABCOCK: Yes. But that's the  
3 difference between disqualification and recusal,  
4 right? Because this, the draft we're working on is  
5 disqualification as opposed to recusal.

6 HONORABLE SCOTT A. BRISTER: What does it  
7 hurt to say "disqualification can't be cured"? Is  
8 there a Constitutional argument? The Constitution  
9 you're disqualified, you're disqualified. The  
10 Constitution doesn't say you're disqualified, but  
11 you can cure.

12 MR. WATSON: But If you are disqualified,  
13 everything you've done is void.

14 HONORABLE SCOTT A. BRISTER: Right.

15 MR. WATSON: It's not avoidable. It's  
16 void.

17 MR. ORSINGER: Can someone illuminate the  
18 difference between the economic interest that  
19 supports disqualification and the economic interest  
20 that only supports recusal, financial interest that  
21 is recusal and economic interest that is  
22 disqualification?

23 HONORABLE SCOTT A. BRISTER: Financial  
24 interest that is recusal is spouse, minor child.

25 MR. ORSINGER: But it's the judge too,

1 isn't it?

2 PROFESSOR ALBRIGHT: Actually I had two  
3 students ask that question before the exam this  
4 year. They read the Rule very carefully right  
5 before the exam.

6 MR. TIPPS: What answer did you give?

7 PROFESSOR ALBRIGHT: The answer I gave  
8 was the only difference I could tell is that if it  
9 was in the judge's financial interest, it was  
10 disqualification, and if it was the spouse, minor  
11 child, then it was recusal. But they pointed out  
12 to me; but it's repeated for recusal.

13 MR. ORSINGER: Sure.

14 PROFESSOR ALBRIGHT: And that's wrong.  
15 And I said it appears to be so.

16 HONORABLE SCOTT A. BRISTER: Belt and  
17 suspenders.

18 PROFESSOR ALBRIGHT: That's right.

19 HONORABLE SCOTT A. BRISTER: You're  
20 disqualified and recused.

21 PROFESSOR ALBRIGHT: That's right.

22 CHAIRMAN BABCOCK: Well, disqualification  
23 in (1)(a) and (1)(c), neither one of those things  
24 looks like anything you can cure. So we're really  
25 talking about (1)(b). Either you --

1 HONORABLE SARAH B. DUNCAN: I have a  
2 vague memory of doing some research on the subject  
3 when it's not preceded by the adjective "financial"  
4 for the motion to change venue in the HL&P case.  
5 And the I think the way interest in the subject  
6 matter, I think there's a difference I think under  
7 the case law between 18(b)(1)(b), an interest in  
8 the subject matter in controversy and 18(b)(2)(e),  
9 financial interest in the subject matter in  
10 controversy, and that 18(b)(1)(b), interest in the  
11 subject matter excludes indirect financial interest  
12 in the subject matter. I wouldn't swear to that;  
13 but that's my memory.

14 CHAIRMAN BABCOCK: Well, do you think it  
15 could be cured?

16 HONORABLE SARAH B. DUNCAN: I think an  
17 interest in the subject matter that's not an  
18 indirect financial interest can't be cured.

19 CHAIRMAN BABCOCK: Cannot be cured?

20 HONORABLE SARAH B. DUNCAN: But a  
21 financial interest in the subject matter in  
22 controversy can be cured, and that's why (6) --

23 CHAIRMAN BABCOCK: What would be an  
24 example of an interest in the subject matter?

25 MR. ORSINGER: Like you own and interest

1 in the real estate that they're partitioning.

2 Would that be an example?

3 JUSTICE HECHT: Well, why should it  
4 depend on whether you have a central docket or  
5 whether you have an assigned docket? Judge McCown  
6 is not going to know whether he has an interest in  
7 the subject matter or not until the parties come up  
8 and say "We're ready to pick a jury." And Judge  
9 Brister and Judge Rhea and Judge Brown are going to  
10 know the moment, have constructive notice --

11 HONORABLE SCOTT A. BRISTER: We read all  
12 those petitions.

13 JUSTICE HECHT: -- the minute the case  
14 hits that they either have a significant interest  
15 or they don't. And it seems to me that if for  
16 whatever reason it seems my experience has been it  
17 affects more people right when they came to the  
18 bench, because they typically --

19 HONORABLE SARAH B. DUNCAN: They have  
20 money.

21 HONORABLE SCOTT A. BRISTER: That's  
22 true. They still have money.

23 HONORABLE SARAH B. DUNCAN: That's  
24 quickly gone.

25 JUSTICE HECHT: As they sell it off to

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1 try to survive then it gets to be less of a  
2 problem; but meanwhile the case has been pending  
3 there for some period of time, and I think it's  
4 true up and down the court system.

5 CHAIRMAN BABCOCK: Disqualification drops  
6 the word "financial."

7 MR. EDWARDS: Is there a difference  
8 between where you have a direct interest in the  
9 outcome of this lawsuit on the one hand, and where  
10 the outcome of this lawsuit is going to affect you  
11 in your pecuniary interest in other places, and  
12 does that fit into this in some way? Is the second  
13 one the recusal and the first one the  
14 disqualification?

15 HONORABLE SARAH B. DUNCAN: I think the  
16 first one, the disqualification is a non -- is a  
17 personal interest in the subject matter that is not  
18 simply ownership of stock.

19 PROFESSOR ALBRIGHT: What it is is it's a  
20 financial interest. The reason it only says  
21 "interest" in the disqualification part of the  
22 Rule is because that comes from the Constitution,  
23 and the Constitution says "interest" only. But  
24 that has been interpreted to mean a financial  
25 interest which means you may have a pecuniary gain



1 or loss from the outcome of this case.

2 MR. EDWARDS: Directly in this case, or  
3 from this case as opposed to it may affect  
4 something else you own in another case? Do you  
5 know whether there is a difference or not?

6 PROFESSOR ALBRIGHT: You mean like if I  
7 own stock?

8 MR. EDWARDS: Well, suppose you own stock  
9 in two banks, and you have got a case over here  
10 involving one bank, and the issue is does the  
11 Deceptive Trade Practices Act apply to a loan  
12 commitment, and that issue is over here in bank  
13 one. Okay. Now you own stock in bank two over  
14 here. Whatever happens here, whatever the final  
15 outcome of this lawsuit over here is going to  
16 affect how the law is applied over to bank number  
17 two.

18 PROFESSOR ALBRIGHT: Because it applies  
19 to all banks.

20 MR. EDWARDS: Yes.

21 PROFESSOR ALBRIGHT: If you own any bank  
22 stock, then you would be disqualified.

23 MR. EDWARDS: Yes.

24 PROFESSOR ALBRIGHT: I think it's a  
25 pecuniary interest in this particular case. You

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1 will either gain or lose money as a result of this  
2 case because of your interest.

3 HONORABLE SARAH B. DUNCAN: But it's  
4 not -- I don't think it's just --

5 PROFESSOR ALBRIGHT: It's very narrow.

6 HONORABLE SARAH B. DUNCAN: I don't think  
7 it's just any pecuniary interest, because like in  
8 the ST&P litigation there was the question of  
9 whether if the judge was an Austin resident, they  
10 might get a refund on their electric bill if Austin  
11 won the case against HL&P, and that was not an  
12 interest in the subject matter in controversy that  
13 would support disqualification.

14 PROFESSOR ALBRIGHT: Disqualification is  
15 very narrow because you have recusal later on,  
16 which the judge it may be an abuse of discretion  
17 not to recuse yourself; but disqualification has  
18 such broader implications. Everything that you do  
19 is void if you're disqualified.

20 CHAIRMAN BABCOCK: Is there case law that  
21 says it can't be waived or cured?

22 MR. EDWARDS: Yes. Everything that is  
23 done is void.

24 MR. ORSINGER: Well, I mean, the question  
25 is what Judge Hecht raised is that if you don't

1 realize this is going on and you own stock in  
2 Party A, and you sell three months into the case  
3 without any knowledge, and then three months later  
4 it comes to you, have you, quote, "cured the  
5 disqualification or not"?

6 HONORABLE SARAH B. DUNCAN: I don't think  
7 that's a disqualification.

8 MR. ORSINGER: Oh, you don't think it's a  
9 disqualification.

10 HONORABLE SARAH B. DUNCAN: I think  
11 that's a basis for recusal.

12 MR. ORSINGER: Have you cured the  
13 recusal?

14 MR. EDWARDS: Well, if it's a  
15 disqualification, it's Constitutional, and you  
16 can't cure it.

17 MR. ORSINGER: But as a whim, I mean,  
18 what time do you measure the disqualification?

19 MR. EDWARDS: I don't think we can decide  
20 that. I think that's a question of what the  
21 Constitution is and how the Court interprets it.

22 CHAIRMAN BABCOCK: Would it offend  
23 anybody greatly if we left this sentence in here,  
24 or should we take it out?

25 MR. ORSINGER: Well, this all started by

1 Justice Hecht asking what is curing; and that I  
2 guess depends on what interest means and when you  
3 measure when you have an interest.

4 HONORABLE SCOTT A. BRISTER: Since the  
5 paragraph is on waiver, we could just drop our  
6 cure, just don't say anything.

7 MR. ORSINGER: Yes. I'm not sure. I  
8 wish Dorsaneo was here, because he seems to be very  
9 fixed on this.

10 HONORABLE SCOTT A. BRISTER: The current  
11 Rule we have waiver, and then the next one was on  
12 cure. And I do remember arguing against the  
13 current cure because the deal is once the judge  
14 gets substantially involved in the case and then  
15 you discover your interest, then you can hold onto  
16 the case. That gives a judge, if there is such a  
17 person, whose perverse incentive to not disclose a  
18 possible financial interest so I can get knee deep  
19 in the case so I can hold onto it. Maybe that's  
20 worrying about something that won't come up; but it  
21 just seems odd to something that isn't disclosed to  
22 the parties, if I can work on it long enough, then  
23 you can't get me off.

24 HONORABLE SARAH B. DUNCAN: Well, the  
25 cure provision for recusal in the existing Rule

1 only applies if the judge didn't discover it until  
2 after he had devoted substantial time to it.

3 HONORABLE SCOTT A. BRISTER: Right.

4 MR. HAMILTON: And then he has to divest  
5 himself.

6 HONORABLE SCOTT A. BRISTER: You've got  
7 to sell it; but then you've also got to have a  
8 hearing with everybody cross examining the judge  
9 "When did you know, what did you know, and when did  
10 you know it?"

11 CHAIRMAN BABCOCK: As best I can tell,  
12 this language is not in either 18(a) or 18(b).  
13 Disqualification cannot be waived or cured. It's  
14 not there, I mean, unless I'm missing something. I  
15 just tried to read it. Does anybody see it there?  
16 No. Well, why don't we just stick with the  
17 language in 18(b)(5) and forget about this  
18 language.

19 MR. ORSINGER: Which will affect only  
20 recusal.

21 CHAIRMAN BABCOCK: Right, because that's  
22 all that's in the current Rule.

23 PROFESSOR ALBRIGHT: I think the reason  
24 this is in there is because the current recusal  
25 disqualification Rule makes it appear that you can

1 file a motion for disqualification. You have to  
2 file it 10 days before trial or whatever the  
3 deadline is, which just isn't true. I think that's  
4 why this was in here. So that problem can be  
5 solved if you just said "disqualification cannot be  
6 waived."

7 HONORABLE SCOTT A. BRISTER: And  
8 certainly everybody agrees that's the law. There  
9 is no question about it. And we are adding, you  
10 know, a little title to the section on waiver; and  
11 it's a Rule on both disqualification and waiver.  
12 What does it hurt to say "disqualification cannot  
13 be waived"?

14 CHAIRMAN BABCOCK: Okay. So period,  
15 strike "or cured." Everybody okay with that?  
16 Okay. Richard, is there anything remaining in this  
17 Rule that we could get out of the way in seven or  
18 eight minutes?

19 MR. HAMILTON: Yes.

20 CHAIRMAN BABCOCK: Okay. Go ahead.

21 MR. HAMILTON: The next paragraph on  
22 motion, Judge Lawrence pointed out to me this  
23 morning that this particular paragraph ought to  
24 except Justice of the Peace Courts, because they're  
25 not supposedly covered under Rule 18(a) and because

1 the presiding judge in the region doesn't have any  
2 authority over them. And so maybe that's right.

3 And then there's Rule 528 which is really a  
4 venue Rule, but that's sort of been construed by  
5 the courts as being a kind of a recusal Rule for  
6 the JP, so maybe we ought to leave Justice of the  
7 Peace courts out of this as well.

8 HONORABLE TOM LAWRENCE: What I would  
9 suggest is (b) where it talks about grounds for  
10 recusal, I would suggest saying "A judge," comma  
11 "except a Justice of the Peace," comma. I don't  
12 think any of 18(b) applies to a JP both because of  
13 Crowder v. Franks specifically says that, and  
14 that's a Court of Appeals. The Supreme Court has  
15 never written on this; but the Court of Appeals  
16 said that. It's been around since 1993. 950 JPs  
17 in Texas think that Rule 18(b) doesn't apply.  
18 Disqualifications obviously do. That's  
19 Constitutional; but the recusal doesn't. And the  
20 venue Rule 528 which says affidavit -- a venue  
21 changed on affidavit, it says venue; but it quacks  
22 like a recusal, and it says "if such party cannot  
23 have a fair and impartial trial before such Justice  
24 or in such Justice's precinct," so it's really a  
25 recusal issue.

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1           And that's the only recusal statute we have.  
2           There is nothing else that applies to JP. 18(b)  
3           doesn't apply. 528 is the only thing that applies;  
4           and we've got the Constitutional provisions for  
5           disqualification would certainly apply.

6           But also mechanically how would you do it?  
7           Because I can't find anything in the Government  
8           Code or anything else that would give the regional  
9           administrative judge, presiding judge any  
10          jurisdiction over a JP. Every time I have looked  
11          in any of their statutes it seems to talk in terms  
12          of district, county court, statutory county court,  
13          probate court.

14                   CHAIRMAN BABCOCK: Would you also add JP,  
15                   add JP into this (d)(1)?

16                   HONORABLE TOM LAWRENCE: The procedure?  
17                   Well, I think if you put it in (b) for grounds of  
18                   recusal on the first page, "except the Justice of  
19                   the Peace," wouldn't that cover everything in that  
20                   Rule --

21                   CHAIRMAN BABCOCK: Yes.

22                   HONORABLE TOM LAWRENCE: -- except  
23                   disqualification?

24                   MR. ORSINGER: Doesn't that mean that  
25                   they're not subject to recusal at all?



1 HONORABLE TOM LAWRENCE: Not under 18.

2 MR. ORSINGER: Under anything else?

3 HONORABLE TOM LAWRENCE: 528 is the only  
4 recusal. And what I would suggest is that  
5 ultimately this Committee take up a Recusal Rule  
6 for the JPs at some point in the future.

7 CHAIRMAN BABCOCK: Sarah.

8 HONORABLE SARAH B. DUNCAN: Why don't we  
9 just subject them to 18(a) and (b)?

10 HONORABLE TOM LAWRENCE: Because how  
11 would you mechanically -- well, one, we've got  
12 Crowder v. Franks. But if you ignore that, it says  
13 that 18(b) doesn't apply. And mechanically how  
14 would you have the recusal done, because we're not  
15 under the administrative, the regional  
16 administrative judges. They have no jurisdiction  
17 over us. We do not have presiding judges in JP  
18 Court except in Harris County, so you'd have to --

19 HONORABLE SARAH B. DUNCAN: So you've got  
20 nobody to defer to.

21 HONORABLE TOM LAWRENCE: Yes. In order  
22 to -- you could bring us under 18; but you'd have  
23 to create a separate statute which would establish  
24 presiding judges in 254 counties for the purpose of  
25 recusal for JPs in order to do that. And that

1 seems --

2 CHAIRMAN BABCOCK: Yes. You've convinced  
3 me.

4 MR. ORSINGER: I think that the better  
5 course is to have a paragraph at the end saying  
6 that the recusal provisions don't apply to JPs.

7 HONORABLE TOM LAWRENCE: I'm sorry? Says  
8 what?

9 MR. ORSINGER: Just have a separate  
10 paragraph at the end that the recusal provisions  
11 don't apply to Justices of the Peace.

12 HONORABLE TOM LAWRENCE: That would be  
13 fine. That would be one way to do it.

14 MR. HAMILTON: How do you deal with  
15 disqualification?

16 HONORABLE TOM LAWRENCE: Disqualification  
17 is Constitutional.

18 MR. HAMILTON: I know. But how do you  
19 deal with the procedure?

20 HONORABLE TOM LAWRENCE: Well, that's  
21 something that, well, if the judge himself does not  
22 make that determination to disqualify himself, then  
23 the litigant would have to go to 528 and file that  
24 motion.

25 MR. ORSINGER: With who?

1 HONORABLE TOM LAWRENCE: With the judge.  
2 It's automatic. The judge has to grant it.

3 MR. WATSON: It's automatic. In 528 you  
4 file a motion saying "I can't get a fair and  
5 impartial trial in front of this JP," and the venue  
6 is transferred. It's like a transfer of venue.

7 HONORABLE TOM LAWRENCE: It's an  
8 automatic recusal. In Harris County it was once  
9 done 14 times in a case.

10 MR. WATSON: There's no limit on it.

11 CHAIRMAN BABCOCK: Okay. Let's -- I  
12 think either we put it where Judge Lawrence  
13 suggests, or we put it in a separate section.

14 MR. ORSINGER: We've got to put it in  
15 separate places, because not only do the grounds  
16 not apply, but all of our procedures don't apply.

17 CHAIRMAN BABCOCK: Okay. So we'll put it  
18 in a separate section.

19 MR. ORSINGER: So isn't it better to just  
20 put it at the end?

21 HONORABLE TOM LAWRENCE: Yes. You're  
22 right.

23 CHAIRMAN BABCOCK: Now (d)(a), Carl and  
24 Richard.

25 MR. ORSINGER: Yes.

ANNA RENKEN & ASSOCIATES

(512) 323-0626 FAX (512) 323-0727

1                   CHAIRMAN BABCOCK: We have voted on all  
2 these things last time, everything that's in  
3 (d)(1); am I right?

4                   HONORABLE SARAH B. DUNCAN: (Nods  
5 affirmatively.),

6                   MR. WATSON: Yes.

7                   CHAIRMAN BABCOCK: Okay. So the question  
8 now is, have you faithfully executed in language  
9 our vote? And I for one think you've done a damn  
10 fine job. But does anybody disagree?

11                   HONORABLE SARAH B. DUNCAN: I second  
12 that.

13                   MR. ORSINGER: Carl has done a damn fine  
14 job.

15                   CHAIRMAN BABCOCK: Carl has done a damn  
16 fine job.

17                   HONORABLE SCOTT A. BRISTER: Everything  
18 in (d)(1) is what we already agreed to.

19                   CHAIRMAN BABCOCK: Yes. We've already  
20 agreed to that. Okay. So when we show up tomorrow  
21 we will be ready to start on (d)(2). And we're  
22 going to finish this tomorrow, guys.

23                   MR. ORSINGER: So each person is  
24 permitted to speak for three minutes one time.

25                   CHAIRMAN BABCOCK: Right. Well, except

1 for you. And tonight, Richard, will you get the  
2 language that we agreed on today and get it typed  
3 up, or you will get it to Carrie so she can type it  
4 up?

5 MR. ORSINGER: Well, I can hand that to  
6 her.

7 CHAIRMAN BABCOCK: Okay. Anybody else  
8 want to stay around and talk for another hour?  
9 We're adjourned until 8:30 in morning. Thanks  
10 everybody.

11  
12 (Whereas the proceedings were adjourned until  
13 May 20, 2000, and the proceedings were continued as  
14 reflected in the next volume.)  
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CERTIFICATE OF THE HEARING OF  
SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 19th day of May, 2000, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are \$ 1059.00 charged to Charles L. Babcock. Given under my hand and seal of office on this the 20th day of May, 2000.

ANNA RENKEN & ASSOCIATES  
1702 West 30th Street  
Austin, Texas 78703  
(512) 323-0626  
Anna Renken  
ANNA RENKEN, CSR  
Certification 2343  
Cert. Expires 12/31/2000

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