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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 12, 2001

(MORNING SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 12th
day of January, 2001, between the hours of 9:11 a.m. and
12:17 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

INDEX OF VOTES

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: Welcome, everybody.

3 Sorry, we're starting a couple minutes late. Bill, let's
4 get started. Okay. We have the agenda, and we have some
5 honored guests with us, which we will get to in a minute,
6 and we will start as usual with the report from Justice
7 Hecht as to what the Court is or is not doing with our
8 handiwork.

9 JUSTICE HECHT: We're thinking about summary
10 judgment and should approve it, I hope, forthwith; and the
11 only reason for any delay at all has been that we were
12 hoping to have something to put with it, like the recusal
13 rule or the TRAP rules or something, rather than just do
14 one by itself. But if we don't have anything else then
15 we're going to go ahead and do it because we know that one
16 of the committees of the House of Representatives has
17 indicated in an interim report that they would be glad if
18 we do that, so that's what we're going to do on that.

19 On TRAP 47, we're still waiting for the
20 courts of appeals to kind of mull it over. Almost all the
21 feedback has been positive, but since it affects the work
22 of all those judges very intimately, we want to be sure
23 that they are comfortable with the end result. And on
24 voir dire, again, we have not talked about the voir dire
25 proposal itself yet, but it's behind the other two.

1 Certainly behind summary judgment.

2 CHAIRMAN BABCOCK: Great. Thanks, Justice
3 Hecht. On the voir dire rule, I don't know how many
4 people have had an opportunity to read the report that
5 Representative Bosse put together about our committee and
6 about some issues like summary judgment that were being
7 studied, but I'm going to try to get a copy of that page
8 of the report that deals with our discussion about that,
9 because I think that there are some incomplete or
10 inaccurate statements about it.

11 And the issue was this: As you may
12 recall -- and, Paula, remind me if this is right or not,
13 but as you recall, the subcommittee met and unanimously
14 recommended two matters. In other words, unanimity on two
15 issues, and then four members of the subcommittee didn't
16 think there were any reasons for any additional changes,
17 while a minority of the subcommittee thought there should
18 be additional changes; and we came up and we debated the
19 whole thing and then sent to the Court the rule that we
20 came up with.

21 We were criticized for having that debate,
22 even though a majority of our subcommittee thought there
23 was no reason for any further change in the rule; and the
24 result of that, according to the committee, is that they
25 think we should have some sort of parliamentary rules or

1 practices beyond what we have. So I have authored a
2 letter in response to that, which I will pass out to you
3 either today or tomorrow. But, Paula, is my recollection
4 of the facts correct?

5 MS. SWEENEY: Yeah.

6 CHAIRMAN BABCOCK: Okay. And my view of it
7 is that if the Court sends us an issue to study, we will,
8 as our practice dictates, refer it to a subcommittee to be
9 looked at, and then the subcommittee will come back and
10 report to us and then our full committee will decide what
11 to do. But the fact that a majority of the subcommittee
12 thinks that there's no need for change doesn't mean we
13 don't debate it. We may ultimately, as we did here,
14 conclude as the subcommittee did that there isn't any need
15 for any further action, but that doesn't mean our full
16 committee doesn't debate the issue.

17 MS. SWEENEY: And, Chip, to clarify, I said
18 "yes," but as a precursor to all of that, the initial vote
19 of the subcommittee was that the majority felt there was
20 no need for a voir dire rule at all. Then when we
21 decided, okay, well, hypothetically since we didn't think
22 we should then just turn around and tell the Court, "No,
23 we're not drafting one." And so we then said, "All right,
24 if there is going to be a rule," and then pick up with
25 what you said, everybody agreed about the first two

1 components and then there was only a couple of folks who
2 wanted the other parts we brought forward, which is
3 essentially what this group ended up doing. But we felt,
4 as you just said, that the Court had asked this group to
5 advise and that, therefore, it wasn't our job to say "no."

6 CHAIRMAN BABCOCK: Yeah.

7 MS. SWEENEY: "We won't be advising."

8 CHAIRMAN BABCOCK: I suppose there may be
9 some instance someday where they ask our advice and our
10 collective advice is, you know, "Forget about it. This is
11 not a problem," but certainly a subcommittee can't make
12 the decision. It's the whole group of us that will have
13 to make that decision.

14 JUSTICE HECHT: That's what the committee
15 did on recusal, but the Court felt like to be responsive
16 to last -- some comments made during the last session that
17 we just couldn't do that. We were going to have to do
18 something, and even if the product that we come up with
19 ultimately doesn't make it for some reason, I mean, I
20 think we still have to go through the whole process before
21 we say we won't work on it.

22 Then parental notification is in the
23 marginal and will take effect March 1st, and we have not
24 received any comments on those, and the Court has asked me
25 to refer two other matters to the committee. I have got a

1 letter here to Chip, and they are fairly minor things, but
2 there is a split in the Houston courts over whether Rule
3 245, which requires that lawyers get notice of trial
4 settings, means that they must get actual notice or have
5 the clerk just send it to the last known address.

6 And the other issue is whether the rules
7 should provide for some review of a court's refusal to
8 abate cases when there's litigation pending in multiple
9 courts. The current state of the law is you can't get
10 that unless the courts are acting in direct conflict.

11 CHAIRMAN BABCOCK: Okay, this -- oh, I'm
12 sorry. Yes.

13 MR. TIPPS: Chip, maybe we're going to talk
14 about this later, but going back to your comment about the
15 criticism that was directed at our deliberations, do I
16 understand we were criticized for debating and discussing
17 the voir dire rule, given the fact that the committee had
18 recommended no rule?

19 CHAIRMAN BABCOCK: The subcommittee, right.

20 MR. TIPPS: And if so, what's the basis for
21 the criticism?

22 CHAIRMAN BABCOCK: Well, you know, I don't
23 know. I will let you read it from the report. We will
24 get -- it's just one single page.

25 MS. SWEENEY: The sense I got was that if we

1 were a legislative -- if we were the Legislature and the
2 committee had said, "We're not voting this out in
3 committee" then it would never come to the floor, and that
4 was the kind of parallel, but --

5 MR. YELENOSKY: We don't have that.

6 MS. SWEENEY: I didn't get elected. I
7 think --

8 CHAIRMAN BABCOCK: Are you sure about that?

9 MS. SWEENEY: Yeah. I don't know that we
10 can or should, you know, take that as an exact parallel.

11 CHAIRMAN BABCOCK: Yeah, Buddy.

12 MR. LOW: Chip, isn't it true that we were
13 faced with the Legislature? There was a proposal in the
14 Legislature to pass this thing where you're going to get
15 so many hours of voir dire and everything, so we were kind
16 of under a directive or under some pressure to do
17 something, weren't we?

18 CHAIRMAN BABCOCK: Right. Yeah. I think we
19 take directions from the Court, but I think the Court was
20 sensitive to what the Legislature was saying. Yeah. No
21 question about it.

22 Okay. Frank and I had -- Frank Gilstrap and
23 I had a meeting with Senator Harris about the recusal
24 rule; and just when we thought we had the thing the way we
25 needed it, the Senator raised some additional issues; and

1 I think we finally got to the genesis of the statute, the
2 tertiary recusal statute; and Senator Harris was very
3 gracious and receptive to our rule, but thinks that
4 there's still some issues that we haven't addressed and
5 referred us to two judges in Tarrant County, Judge Harris
6 and Judge McCoy, who are here today; and we thank them for
7 joining us.

8 You may have seen that in the middle of
9 December or so that Judge McCoy sent us a letter. It's
10 behind Tab 2.3(b), regarding the recusal rule; and some of
11 you may have had a chance to read it, some not; but I'd
12 like to ask Judge McCoy to kind of take us through what
13 his concerns were; and it's really his case that led to
14 Senator Harris' bill, I think. So, judge -- yeah, Frank.

15 MR. GILSTRAP: Chip, in light of -- to make
16 the record totally clear, Judge McCoy didn't send that
17 letter to the committee. He sent it to the people that it
18 was addressed to and people that he's been -- worked with
19 professionally for a long time, and I have assured him
20 that this committee is no stranger to lively debate and
21 collegiality, and I went ahead and forwarded it on to
22 Chip. So he sent to it me, and I sent it to the
23 committee.

24 CHAIRMAN BABCOCK: Okay, thanks. Judge.

25 HONORABLE ROBERT MCCOY: Well, I was sitting

1 in my office one day minding my own business, and the
2 phone rings, and it's Senator Harris' office, and
3 apparently Chip and Frank Gilstrap were sitting there
4 having a lively discussion with the Senator about the
5 proposed changes to the recusal rule, which I hadn't seen.
6 And so then I was basically asked to expound on the
7 recusal rule; and subsequently Jeff Walker, who is the
8 administrative regional judge for our area, I think Region
9 8, and I went over the proposed changes, which we had then
10 sent to us; and we wrote a letter to Frank and to Chip and
11 to Senator Harris; and then I don't know exactly how we
12 got from there to me being here today, but I am.

13 Now, my experience with the recusal rule
14 comes from disciplinary cases; and Judge Walker's
15 experience comes from being the regional administrative
16 judge when he hears recusals all the time; and he wanted
17 me to express his view that he doesn't think that the rule
18 needs to be whole -- in a wholesale fashion rewritten; and
19 that, second, if it needs to be rewritten, that the change
20 that needs to be made is the teeth need to be put into the
21 recusal bill or the recusal rule, because he's seen an
22 explosion of recusal motions in our region.

23 If our region is having it, I'm assuming
24 that it's everywhere, and he, I believe, would like to
25 incorporate the Senator's bill or 30.016 into the rule so

1 that he has some teeth in the rule that he -- so that he
2 can deal with these recusals as they come up.

3 Now, Chip, do you want me to kind of walk
4 through my letter and --

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE ROBERT McCOY: -- hit a few
7 highlights or lowlights, or what would you like for me to
8 do?

9 CHAIRMAN BABCOCK: Yeah. I think it would
10 be helpful to walk through your letter, and then Richard
11 Orsinger and Carl Hamilton were the two members of this
12 committee who worked on the subcommittee and tried to get
13 this recusal rule in place, so as we go through these
14 items maybe we can have a short discussion item-by-item
15 about what the rule that we've got in draft form right now
16 says about these things and whether or not there's a sense
17 that we should revise our rule to meet the comments that
18 you're making.

19 HONORABLE ROBERT McCOY: All right. I guess
20 my first sort of question was the very first part of the
21 rule, grounds for recusal. "A judge must recuse in the
22 following circumstances," and I was wondering if that
23 means "if requested to do so."

24 CHAIRMAN BABCOCK: I think I know the answer
25 to that, but, Carl.

1 HONORABLE ROBERT McCOY: As opposed to just
2 automatically, because I know situations where the lawyers
3 decide they don't want the judge to recuse himself, and
4 yet this says it applies automatically. You are recused.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: I think that the judge has a
7 good point there, because the rule -- and I don't think we
8 messed with this language. I think this just came from
9 the recodification where it says "a judge must recuse";
10 and I do think that is sort of ambiguous when we talk
11 about waiver later on; and it raises the question about
12 whether or not the judge himself has an obligation to come
13 forward and recuse as any of these things exist or whether
14 he just has to wait to be requested. So I do think that's
15 not clear in the rule.

16 CHAIRMAN BABCOCK: So how do we fix that?

17 HONORABLE ROBERT McCOY: How about putting
18 the word "if requested" at the end of that line?

19 CHAIRMAN BABCOCK: It seems simple. Sarah.
20 Your Honor.

21 HONORABLE SARAH DUNCAN: It seems to me that
22 what the rule as written requires is that either the judge
23 must recuse or make full disclosure on the record and then
24 the parties can waive it. If you change it to "if
25 requested" then you've obviated the full disclosure

1 requirement.

2 MR. EDWARDS: Can't you just refer to
3 subparagraph (c), unless the dis -- unless the ground for
4 recusal is waived by the parties? (C) says, "Waiver. The
5 parties to a proceeding may waive any ground for recusal
6 after it's fully disclosed on the record." So if you come
7 back up here to the "must" part of it and say "must,
8 unless waived under (c), recuse," something like that.

9 CHAIRMAN BABCOCK: Well, okay. Richard.

10 MR. ORSINGER: I would support Bill's
11 suggestion. I really think the language should say "a
12 judge must recuse unless waived," because in the first
13 analysis we're giving directions to the court of when to
14 take themselves out of a case; and if the parties say,
15 "Well, we know that the grounds for recusal exist, but
16 we're willing to waive it because we want to overlook it
17 and we want to keep you in the case," that's fine; but I
18 really feel like it should stay mandatory unless the
19 parties expressly waive that nature; and I think the judge
20 should be permitted to recuse if they want to even if the
21 parties don't want the judge to recuse. So it should be a
22 waiver issue.

23 CHAIRMAN BABCOCK: Yeah. What you're saying
24 is if you put "if requested," that that might be limiting
25 on the judges who want to self-recuse.

1 MR. ORSINGER: Yeah. I'm worried that even
2 if both parties want to waive it, the judge should have
3 the freedom to get out of the case if he or she does not
4 feel comfortable because of some other circumstances in
5 their life. I don't know if everyone agrees with that.

6 MR. EDWARDS: I think if the circumstances
7 of the sitting are such that the outside world is going to
8 look at it and say it stinks, the judge has a duty to get
9 out, even if the parties say, "We don't care if it stinks.
10 We're going to put our gas mask on and go ahead."

11 CHAIRMAN BABCOCK: Okay. So how would we
12 suggest putting language in to accommodate what you're
13 talking about?

14 HON. F. SCOTT McCOWN: How about if we just
15 said "except as provided in subdivision (c), a judge must
16 recuse in the following circumstances"?

17 CHAIRMAN BABCOCK: Judge McCoy, does that do
18 it for you or not?

19 MR. ORSINGER: Well, but that doesn't answer
20 the question of whether a judge could recuse even if the
21 parties want him to stay. How do you feel about that?

22 HONORABLE ROBERT MCCOY: I think the judge
23 should be able to step down whenever he feels it is
24 appropriate to do so, but I think that also he shouldn't
25 automatically have to recuse himself if that's not the

1 circumstance and the lawyer doesn't feel -- the lawyers do
2 not feel that it's warranted.

3 CHAIRMAN BABCOCK: Would the concept of
4 waiver as opposed to request satisfy both needs or not?

5 MR. EDWARDS: You might want to add
6 something to the waiver part that says the judge -- the
7 waiver doesn't bind the judge or something.

8 PROFESSOR DORSANEO: I want to second Scott
9 McCown's suggestion.

10 CHAIRMAN BABCOCK: Okay.

11 HON. F. SCOTT McCOWN: And could I point out
12 that --

13 CHAIRMAN BABCOCK: Could you restate that,
14 Judge?

15 HON. F. SCOTT McCOWN: I mean, this goes
16 back to a philosophical point. We don't have to write
17 down in the rules everything we think of. Nobody has ever
18 suggested in the history of man that you could force a
19 judge to hear a case if the judge wanted to recuse him or
20 herself. We don't need to put that in a rule. But to
21 address the problem that Judge McCoy I think has raised,
22 we can simply cross-reference subdivision (c).

23 CHAIRMAN BABCOCK: Okay. So your language
24 was again, "except" --

25 HON. F. SCOTT McCOWN: "Except as provided

1 in subdivision (c)," comma, "a judge must recuse in the
2 following circumstances."

3 HONORABLE JOHN CAYCE: Yeah.

4 CHAIRMAN BABCOCK: Does that -- does that
5 allow the judge and the parties to sit down and say,
6 "Look, I'm likely to be a material witness, but I'm
7 comfortable with staying in here if you guys are"?

8 HON. F. SCOTT McCOWN: Well, that's what
9 subdivision (c) says. "The parties to a proceeding may
10 waive any ground for recusal after it is fully disclosed
11 on the record." So you would sit down, talk to them,
12 disclose it on the record, get their agreement that they
13 wanted you to be the judge, and move forward.

14 CHAIRMAN BABCOCK: Okay. So by
15 incorporating the waiver part into this subpart (b), you
16 are implicitly saying if everybody waives, everybody is
17 okay with it, you can stay.

18 HON. F. SCOTT McCOWN: You're expressly
19 saying that.

20 CHAIRMAN BABCOCK: Okay.

21 PROFESSOR DORSANEO: It's a drafting
22 problem. It really never was an inconsistency.

23 CHAIRMAN BABCOCK: Yeah. I agree with that.
24 Judge McCoy, does that get it done for you?

25 HONORABLE ROBERT McCOY: (Nods head.)

1 CHAIRMAN BABCOCK: How does everybody feel
2 about adding that language? Is that okay, Judge Cayce?

3 HONORABLE JOHN CAYCE: I think so.

4 CHAIRMAN BABCOCK: Hatchell?

5 MR. HATCHELL: I'm opposed to that.

6 CHAIRMAN BABCOCK: Huh?

7 MR. HATCHELL: I'm opposed to that.

8 CHAIRMAN BABCOCK: You know, I could sense
9 that you were. Why?

10 MR. HATCHELL: I think I agree with Sarah
11 that once you start dumbing down the concept of mandatory
12 recusal, what you're doing, you're putting the exception
13 first in the rule; and I know of many venues where the
14 judges who know they're recused will put pressure on the
15 parties to agree.

16 PROFESSOR DORSANEO: Mr. Chairman?

17 CHAIRMAN BABCOCK: Yeah.

18 PROFESSOR DORSANEO: I was thinking the same
19 thing, Mike, when I heard Judge McCoy talk about how this
20 is all going to be fine with everybody, and that's why the
21 request language, you know, was suggested, but I think
22 it's not -- it still keeps the priorities right drafted
23 this way. "The judge must recuse." That's the real
24 thrust of this, but waiver, that's far different from "The
25 judge, if requested," you know, "must recuse." It puts

1 the dynamics of the situation in a whole different context
2 for me, and I'm sensitive to what you and Justice Duncan
3 think about this and agree with you, but I think it's all
4 right to do it.

5 MR. HATCHELL: I would have a tiny bit less
6 indigestion if instead of saying "except" as a first
7 clause you would end the first clause by saying "unless."

8 MR. YELENOSKY: Right.

9 CHAIRMAN BABCOCK: Okay. "A judge may
10 recuse in the following circumstances, unless" --

11 MR. HATCHELL: Whatever.

12 CHAIRMAN BABCOCK: "Unless waived pursuant
13 to subdivision (c)"?

14 HON. F. SCOTT McCOWN: I'll accept that
15 amendment. Because it will really restrain those judges
16 who will put pressure on you otherwise.

17 CHAIRMAN BABCOCK: Okay. How does everybody
18 feel about that? Do we want any more discussion on this?
19 Anybody want to move to adopt this?

20 HON. F. SCOTT McCOWN: I've moved and --

21 CHAIRMAN BABCOCK: Dorsaneo has seconded.

22 All in favor of, again, in subdivision (b)
23 saying, "A judge must recuse in the following
24 circumstances, unless waived pursuant to subdivision (c),"
25 raise your hand.

1 All opposed? It passes by a vote of 30 to
2 0, so unanimous with some people abstaining, Sarah.

3 Okay. What's next, Judge McCoy?

4 HONORABLE ROBERT McCOY: Over in section
5 (e)(1) it says, "A judge's ruling may not be a basis for
6 the motion," and I think that's been the law for a long
7 time, but I would just point out that there is a Houston
8 14th court that has said, "An unfavorable disposition
9 towards a party arising from events occurring in judicial
10 proceedings may nonetheless support recusal if it is so
11 extreme as to display a clear inability to render fair
12 judgment."

13 So I was just pointing out that there is a
14 case that is an exception to the language in the new rule.

15 MR. ORSINGER: Can you give us a cite on
16 that?

17 HONORABLE ROBERT McCOY: It is Sommers with
18 an o, Sommers vs. Concepcion, 20 S.W. 3d at 44, Houston
19 14th, and it's 2000.

20 CHAIRMAN BABCOCK: Yeah, Justice Duncan.

21 HONORABLE SARAH DUNCAN: I don't see that
22 that's inconsistent --

23 PROFESSOR DORSANEO: Me, either.

24 HONORABLE SARAH DUNCAN: -- with this rule.
25 The basis for the recusal motion, it seems to me in that

1 circumstance, would be bias or prejudice towards a party;
2 and the ruling, as the rule says, may be admissible as
3 evidence to support that ground.

4 CHAIRMAN BABCOCK: Yeah. I tend to agree
5 with that. Of course, Judge McCoy, it's not fair to you
6 since you haven't been here for these prior discussions,
7 but we had a lengthy discussion about this provision when
8 there was some controversy about including it, but I think
9 the sense was that, consistent with the holding in the
10 Sommers case, that there could be circumstances where the
11 rulings would be such that it's something that the court
12 should consider, and that's why we put it into the rule.
13 So I don't see inconsistency there. But maybe I'm --
14 maybe others do. Richard or Carl, do you have any thought
15 or response to that?

16 MR. HAMILTON: No. I agree with Judge
17 Duncan that if that condition exists, it probably comes
18 under section (1), (b)(1), that the judge's impartiality
19 might be reasonably questioned. So I don't see that
20 that's particularly a problem.

21 CHAIRMAN BABCOCK: Judge McCoy, do you still
22 have a problem?

23 HONORABLE ROBERT McCOY: No. I was just --
24 again, the point of this letter was to point out --

25 CHAIRMAN BABCOCK: Well, I know, and that's

1 what we want to do.

2 HONORABLE ROBERT McCOY: -- items for
3 discussion. I don't have a problem with that. I agree
4 with you.

5 CHAIRMAN BABCOCK: Yeah, Judge Brown.

6 HONORABLE HARVEY BROWN: While we're on
7 (e) (1) can I raise an issue that's come up in my court
8 recently?

9 CHAIRMAN BABCOCK: Yes.

10 HONORABLE HARVEY BROWN: I had a motion
11 filed by a nonparty, a witness, and I wondered when it
12 occurred whether I had to rule on it or not, and I don't
13 see anything in here that addresses who can file a motion
14 to recuse, but that may be a good thing to have. At least
15 I wish I had it in my --

16 HONORABLE SCOTT BRISTER: A witness moved to
17 recuse you?

18 MR. TIPPS: What did you do?

19 HONORABLE HARVEY BROWN: I wondered what the
20 testimony was going to be. I don't know. And the parties
21 don't know what to do either.

22 CHAIRMAN BABCOCK: Yeah, Bill.

23 PROFESSOR DORSANEO: Generally speaking,
24 only parties or people who are allowed to intervene in
25 some formal or informal manner would have the ability to

1 seek action from the court.

2 HONORABLE HARVEY BROWN: Well, we have
3 motions to quash by witnesses.

4 PROFESSOR DORSANEO: Well, those people are
5 kind of involuntarily brought into the fray by someone
6 else, and they are in effect cited in some manner.

7 CHAIRMAN BABCOCK: Well, this is a witness
8 that's moving. Yeah, Justice Duncan.

9 HONORABLE SARAH DUNCAN: It just doesn't
10 seem to me they would have enough of an interest to invoke
11 recusal since they shouldn't be interested really in how
12 the action comes out; whereas, on a motion to quash it is
13 their direct interest that gives them standing to file it.

14 PROFESSOR DORSANEO: Anymore than they could
15 move for summary judgment.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE HARVEY BROWN: Your reaction is
18 the same as mine, but I don't see anything in the rule.

19 HONORABLE SCOTT BRISTER: But, I mean, one
20 could imagine circumstances, two competitors subpoena a
21 third party in an antitrust claim and would like to get
22 Microsoft's trade secrets; and the judge, who hates
23 Microsoft, would like to get them out in public domain. I
24 mean, I can imagine circumstances where you wouldn't want
25 to prevent a nonparty from filing a recusal motion. I'd

1 suggest we don't get into that.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: I totally support what Scott
4 just said. I think that any time that the court is going
5 to exercise judicial authority over a person, it needs to
6 be impartial, and whether you're a witness who's been
7 subpoenaed or whether you're -- I don't care how you're
8 brought into it, but if the judge is exercising judicial
9 power of the state over you, I think you should have the
10 opportunity to come to court and claim relief, so this may
11 be specious. I'm not saying that it has to go through --

12 HON. F. SCOTT McCOWN: May not be.

13 MR. ORSINGER: -- our procedure, but I think
14 we shouldn't write it. I think we ought to leave it
15 there, and we ought to allow the courts to deal with it on
16 an ad hoc basis as it comes up.

17 CHAIRMAN BABCOCK: Judge Brown, how does
18 that make you feel?

19 HONORABLE HARVEY BROWN: Well, I think
20 Scott's point is a really good point, in fact, one I
21 hadn't thought of, but I wish I knew what I was supposed
22 to do.

23 MR. ORSINGER: Just deny it and keep moving
24 on the case, and if you don't get mandamus then it's
25 okay.

1 HONORABLE HARVEY BROWN: That's what I did
2 the first time. I'm on my second motion now, and the
3 administrative regional judge has got a motion now from
4 this witness.

5 HON. PHIL HARDBERGER: After your case there
6 may be law.

7 CHAIRMAN BABCOCK: Yeah. You may get some
8 direction. Okay. Back to you, Judge McCoy. Where do we
9 go next on your letter?

10 HONORABLE ROBERT McCOY: All right. Section
11 (e)(2) talks about time to file, and I felt like that an
12 attorney who is going to file a recusal motion should have
13 to do so in some period of time after he learns or
14 discovers the reason for recusal and not wait around and
15 see how the judge's rulings go and then wait up until the
16 tenth day before trial to file his recusal motion. If he
17 thinks that he has a reason to file a recusal motion, he
18 should go ahead and file it and not wait around and kind
19 of see how the lay of the land goes.

20 CHAIRMAN BABCOCK: Yeah. We have struggled
21 with this issue.

22 HONORABLE ROBERT McCOY: Okay.

23 MR. ORSINGER: Can I explain?

24 CHAIRMAN BABCOCK: We need to -- I think the
25 reason we're taking so much time with this exercise is

1 because this is a very tricky rule. We have done some
2 substantial things to recusal. It's extraordinarily
3 important, so I think it's worth the time to go through
4 it. So, Richard.

5 MR. ORSINGER: We've had some very, I think,
6 insightful debates on this very point, but I think the
7 thing that convinced me to support the rule the way it is
8 is that in the hands of an unscrupulous lawyer the
9 requirement that you do it as soon as the attorney learns
10 of the grounds can cause the focus of the recusal to shift
11 from the grounds for disqualification or recusal to when
12 the lawyer knew or should have known.

13 And we had a description of an incident in
14 which a lawyer acquired some information that there was a
15 corrupt arrangement between the judge and the opposing
16 party, but it started out as a rumor, and he wasn't
17 willing to file on the basis of a rumor, so he tried to
18 get a little bit more evidence and then he got a little
19 corroboration of the rumor and then he got a little
20 documentation and then he got somebody to be willing to
21 sign an affidavit and then he got a deposition, and he got
22 some testimony under oath and then he filed a motion. And
23 so at what point does the attorney know?

24 And if you're going to say that the grounds
25 for recusal are waived if you don't move soon enough then

1 the recusal is going to get refocused from whether the
2 judge should get out of the case to whether the lawyer
3 acted early enough and, of course, the lawyer doesn't want
4 to act too early because you can be sanctioned. So rather
5 than refocus it on the behavior of the complaining lawyer,
6 we were afraid that would be a greater evil than the
7 problem you're talking about, and it was debated hotly and
8 earnestly, I think, on all sides.

9 HONORABLE ROBERT McCOY: All right. Section
10 (e)(3) says, "Unless the parties agree that the case may
11 be reassigned in accordance with local rules." Well,
12 Judge Walker, being the administrative judge, was
13 concerned that this is opening up the possibility that
14 local rules could in some way affect what his duties and
15 responsibilities are as administrative judge.

16 CHAIRMAN BABCOCK: Richard or Carl, you-all
17 dealt with this problem.

18 MR. ORSINGER: Yeah.

19 CHAIRMAN BABCOCK: This is in response,
20 Judge McCoy, to a specific comment that we received from
21 one of the administrative judges. I forget who.

22 MR. ORSINGER: It was Judge Hester, I think.

23 CHAIRMAN BABCOCK: Judge Hester.

24 MR. ORSINGER: And I think Carl ought to
25 talk about it, because I think it was his case, wasn't it?

1 MR. HAMILTON: Yeah, but I don't think
2 that's the point.

3 HON. F. SCOTT McCOWN: No, that's not the
4 issue.

5 MR. ORSINGER: Oh, that's not the point?

6 HON. F. SCOTT McCOWN: The point of this --
7 Carl, if you don't mind -- is the Travis County/Bexar
8 County central docket. Travis County/Bexar County central
9 docket didn't want to lose the option of the informal
10 reassignment if the parties agreed, which is fast and
11 inexpensive, and that's why we put that in, and I don't
12 think that there is any local rule that could change the
13 authority of the presiding regional administrative judge.
14 That's statutory authority, and all local rules have to be
15 consistent with the statute and approved by the Supreme
16 Court, but so that was just built for those counties that
17 have a central docket.

18 MR. HAMILTON: Yeah. This is the first part
19 of the referral part, but I don't know that we necessarily
20 tinkered with that if the judge voluntarily recuses
21 himself and the parties agree, the new judge can be
22 reassigned in accordance with local rules so that it
23 doesn't even go to the regional judge. It's the last part
24 of (3) that Judge Hester wanted us to put in.

25 Once he gets it and assigns somebody, it

1 can't be reassigned without his consent.

2 CHAIRMAN BABCOCK: Okay. Richard.

3 MR. ORSINGER: Judge McCoy, to address your
4 concern, I mean, we debated this over so many meetings
5 it's hard to summarize; but we were attempting to concern
6 ourselves with a situation where a party invoked the
7 recusal process and then the local judge subverted the
8 recusal process by -- the local presiding judge took the
9 case away from that judge and kept it; and what Judge
10 McCown just said is that in Bexar County and Travis County
11 we have random assignment on the morning of the hearing or
12 the morning of the trial.

13 HONORABLE ROBERT McCOY: Right.

14 MR. ORSINGER: And sometimes you'll get
15 assigned to someone you didn't expect to go to, and it
16 turns out this is their next door neighbor or, you know,
17 some bona fide reason why they shouldn't get the case; and
18 the lawyers will frequently say, "Hey, you know, we didn't
19 know we were going to get assigned down here. We agree it
20 would be uncomfortable for you to make this ruling. Just
21 send us back to the central docket and let us get
22 reassigned out."

23 HONORABLE ROBERT McCOY: Okay.

24 MR. ORSINGER: If both parties are
25 comfortable with that then there is really not much risk

1 that the recusal process is being subverted, but if one
2 party wants the recusal process to go through its steps
3 and then a local judge were to take it and reassign it
4 then that would be a subversion. And so I think this is
5 kind of a compromise where if both sides agree we can use
6 local reassignment, but if one party wants to stand on
7 their rights in the recusal process then it has to go all
8 the way through the recusal process, right, Scott?

9 HON. F. SCOTT McCOWN: That's right, and it
10 also only applies when a judge voluntarily recuses
11 himself, so you have got several safeguards. The judge
12 you've moved to recuse has to say, "I'm out of here" and
13 then the parties have to agree to just get it locally
14 reassigned.

15 CHAIRMAN BABCOCK: Judge McCoy, does that
16 address your concern?

17 HONORABLE ROBERT McCOY: Yes.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE ROBERT McCOY: All right. The
20 next item was also in (3), and again, this is pointing out
21 what one case said.

22 MR. EDWARDS: Could we go back?

23 CHAIRMAN BABCOCK: Bill Edwards.

24 MR. EDWARDS: Is there any impact on the
25 last sentence on (3) on what we have just been talking

1 about? Because it says, "After a motion to recuse or
2 disqualify has been filed no judge may preside" and so
3 forth "until the motion has been decided by the judge
4 assigned by the presiding judge." And does that --
5 because the judge may voluntarily recuse himself on that
6 motion, I don't know whether there's a conflict there of
7 any kind.

8 CHAIRMAN BABCOCK: Do you see a conflict,
9 Judge McCown?

10 HON. F. SCOTT McCOWN: Yeah, I do. Let me
11 look at (e)(4).

12 MR. EDWARDS: Because the thing we were
13 talking about foresees not even sending the recusal to the
14 presiding judge, I think.

15 CHAIRMAN BABCOCK: Uh-huh.

16 MR. EDWARDS: I mean, the last sentence
17 seems to me to say you have to send it to the presiding
18 judge for an assignment.

19 HON. F. SCOTT McCOWN: Well, I think that
20 what -- I do think you've identified a conflict in the way
21 the rule is drafted, and I think that the conflict can be
22 fixed, but I'm not sure that it doesn't create another
23 problem.

24 You can -- this last sentence is designed to
25 work where a judge doesn't voluntarily recuse; and the top

1 sentence that we were just looking at, actually the second
2 sentence of the paragraph, is designed where a judge does
3 voluntarily recuse. So you could say, "Notwithstanding
4 any local rule or other law, after a motion to recuse or
5 disqualify has been filed, if the judge does not
6 voluntarily recuse, then no judge may preside, assign,
7 transfer, or hear any other matter in the case except
8 pursuant to paragraph (e)(4) before the motion has been
9 decided by the judge assigned by the presiding judge of
10 the administrative region," but -- and I'm sorry that
11 Judge Peeples isn't here today because I am not sure that
12 the solution I'm proposing -- while it makes the rule
13 consistent, I'm not sure it doesn't inadvertently change
14 what we were trying to get at. Because what Judge Peeples
15 was trying to get at here, if I recall, was a situation
16 where a judge -- you move to recuse a judge, he steps
17 aside, and the case goes to the judge's good buddy.

18 HONORABLE SCOTT BRISTER: Yeah. His problem
19 was you file the motion to recuse, then everything
20 thereafter is supposed to be done by the administrative
21 judge.

22 HON. F. SCOTT McCOWN: Right.

23 HONORABLE SCOTT BRISTER: Instead, the local
24 judge, the judge who has been recused, goes to his buddy
25 who's the local judge and says, you know, "Move it from my

1 court to so-and-so's court" or some deal like that.

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

3 HONORABLE SCOTT BRISTER: That avoids the
4 process of --

5 HON. F. SCOTT McCOWN: Okay.

6 MR. EDWARDS: I don't think your suggestion
7 undoes what we did up in the second sentence with regard
8 to the problem that was just outlined.

9 MR. ORSINGER: Aren't we safe because it
10 would require both parties to agree to reassign it under a
11 local rule?

12 HON. F. SCOTT McCOWN: How about this?
13 Here's the fix. What I just suggested isn't the fix.
14 Here's the fix. You leave the sentence exactly as it is,
15 but you add -- at the end you say, comma, "Except by
16 agreement of the parties as provided above," and that
17 references back the agreement of the parties provided
18 above. That makes them consistent. Because, really, this
19 rule, this last sentence needs to operate whether they are
20 involuntarily or voluntarily recused, and so you would
21 just say "except by agreement of the parties as provided
22 above." So I would move that change.

23 CHAIRMAN BABCOCK: Okay. Bill, does that
24 fix it for you?

25 MR. EDWARDS: I think it does.

1 CHAIRMAN BABCOCK: Huh?

2 MR. EDWARDS: Yeah.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: (Nods head.)

5 MR. EDWARDS: It seems to to me.

6 CHAIRMAN BABCOCK: Moved. Bill Edwards
7 seconded it, I think.

8 MR. EDWARDS: Yes.

9 CHAIRMAN BABCOCK: Does anybody want to
10 further discuss this change? Anybody opposed to the
11 change?

12 Okay. By unanimous vote then we add -- and,
13 Scott, let's just be sure about this. On subparagraphs
14 (e)(3)? Yeah, (e)(3) after the word "region" -- Judge
15 McCown, after the word "region," comma --

16 HON. F. SCOTT McCOWN: "Except by agreement
17 of the parties as provided above."

18 CHAIRMAN BABCOCK: Okay. All right. Then
19 that change will be made and passed unanimously.

20 Okay. Judge McCoy, back to you.

21 HONORABLE ROBERT McCOY: When a judge gets a
22 recusal motion, of course, he needs to either recuse
23 himself or refer to the administrative judge, and that's
24 what's referred to in (3). There's a Corpus Christi case
25 that says that before either of those occur he may hold a

1 hearing to flesh out what information is being presented
2 such that he should recuse himself; and I, again, just
3 point out that there is some case law which is a little
4 different from what Item No. (3) says.

5 CHAIRMAN BABCOCK: Okay. This is the in re:
6 Rio Grande Valley Gas Company.

7 HONORABLE ROBERT McCOY: Right. And then if
8 you want to read Judge Walker's comment, you can. I
9 won't.

10 CHAIRMAN BABCOCK: "The Corpus Christi court
11 basically left the fox to determine the need for security
12 in the henhouse." Colorful.

13 Well, first of all, do we agree that the
14 trial judge does not have the authority to flesh out
15 whether or not he should -- he or she should recuse him or
16 herself in the first instance?

17 HON. F. SCOTT McCOWN: Which provision are
18 we looking at?

19 CHAIRMAN BABCOCK: This is (e)(3), referral.

20 MR. HAMILTON: There's no provision there,
21 though. The question is should we have a provision that
22 the judge who was sought to be recused can't have a
23 hearing to determine whether he should be recused.

24 HONORABLE ROBERT McCOY: Exactly. That's
25 what this case says he has the right to do, and the only

1 case that I know of.

2 CHAIRMAN BABCOCK: And there's nothing in
3 this rule that prohibits that.

4 HONORABLE ROBERT McCOY: No.

5 CHAIRMAN BABCOCK: So the question is should
6 we by rule suggest to the Court that the Corpus Christi
7 decision in 1999 be overruled?

8 MR. ORSINGER: Let me ask this, Chip. The
9 very first sentence of (3) says, "The judge in the case in
10 which the motion is filed must promptly sign an order
11 ruling on the motion prior to taking any other action in
12 the case." How could you convene a hearing and conduct a
13 court of inquiry to see what the basis of it is? Isn't
14 that other action prior to signing an order ruling on the
15 motion?

16 CHAIRMAN BABCOCK: Well, that's not new
17 language, so apparently that's the language before the
18 Corpus Christi court.

19 MR. ORSINGER: Well, the language is
20 perfectly clear to me, so is the problem with the language
21 or is the problem with the court?

22 MR. SOULES: Right.

23 MR. ORSINGER: The Supreme Court exists to
24 cure errors when courts of appeals can't read the law
25 correctly.

1 HON. F. SCOTT McCOWN: Well, hold on,
2 though. Whoa, whoa, whoa.

3 MR. SOULES: But they didn't.

4 CHAIRMAN BABCOCK: How many votes did you
5 get the last election?

6 HONORABLE JAN PATTERSON: They are
7 accountable because they are last.

8 HON. F. SCOTT McCOWN: But, I mean, I can
9 see this both ways, but I can sure see that if a trial
10 judge got a motion to recuse in the mail that the trial
11 judge might want to talk to the lawyers either to clarify
12 some facts that maybe they got wrong or to clarify some
13 things about the motion that the trial judge doesn't
14 understand and that as a result of that the parties might
15 either withdraw their motion or the trial judge might
16 voluntarily recuse. I can see that that would be a good
17 thing, and I'm not sure we would want a world where when
18 the trial judge got the motion, however little it said or
19 however unclearly it said it, that the trial judge had to
20 make an instantaneous decision to either recuse or to
21 refer it to the presiding judge.

22 On the other hand, I can see that if you
23 file a motion to recuse you might not -- you might want a
24 system where you didn't have to go down and talk to the
25 trial judge about it, that the only person you had to talk

1 to about it was the recusal judge, and if there were any
2 clarification that needed to be sought, the recusal judge
3 could seek it. It kind of goes to your view of whether
4 the Bench and Bar are collegial or whether the Bench and
5 Bar are adversarial.

6 CHAIRMAN BABCOCK: Well, I had a case where
7 this came up. The recusal motion said that the judge had
8 been a -- the judge had formerly practiced law with a
9 material witness. It didn't identify who the material
10 witness was, and there are two ways of approaching it.
11 One is just to deny the motion on the basis that there is
12 not sufficient specificity, as required by the rule, and
13 therefore, the motion is defective and, therefore, it
14 should be denied.

15 The other way to handle that is to -- for
16 the opposing party to specially except or for the judge to
17 say, "Well, who is it that you think that I practiced law
18 with, and what's his relationship to this case?" And
19 depending on the answer to that question, the judge may
20 very well say, "Yeah, you're right. I need to get out of
21 this. I need to get out of this case."

22 HON. F. SCOTT McCOWN: But under Richard's
23 interpretation the judge couldn't ask that question.

24 CHAIRMAN BABCOCK: That's right.

25 MR. ORSINGER: You can't have a special

1 exceptions hearing under this rule, unless the Corpus
2 court is right.

3 CHAIRMAN BABCOCK: Yeah. Okay. Stephen and
4 then Skip.

5 MR. TIPPS: I don't believe this sentence is
6 perfectly written, but it's still clear to me that the
7 Corpus Christi court is right and that what this sentence
8 is saying is that before the judge deals with anything
9 else in the case he has to dispose of the recusal motion;
10 and I think it's implied that if he's under an obligation
11 to sign an order ruling on the motion, that he can conduct
12 some kind of hearing or ask some sorts of questions that
13 will enable him to make a ruling.

14 I mean, and your situation is a good example
15 of how it has to be that way; otherwise, we would be
16 putting judges in a position in which they would be
17 potentially having to make blind rulings with regard to
18 motions that they don't understand.

19 CHAIRMAN BABCOCK: Yeah. Surely if they are
20 called to rule upon the motion they are entitled to have a
21 hearing.

22 MR. TIPPS: Sure. And I think that's true
23 with regard to any motion.

24 CHAIRMAN BABCOCK: So we're glad you're not
25 on the court, Richard.

1 MR. ORSINGER: Well, that means your first
2 recusal hearing could well be in front of the judge you're
3 trying to recuse, and he'll say, "I want you to bring in
4 witnesses to back up this motion. We're going to have a
5 hearing next Thursday morning." Is this what we want?
6 We want to try our recusal hearings in the first instance
7 to the judge that we're attacking?

8 CHAIRMAN BABCOCK: Well, don't we give the
9 district judges in the first instance the opportunity to
10 recuse or not? And if we're doing that, why can't they
11 have the opportunity to know the basis of the motion?

12 MR. EDWARDS: Well, it seems to me that if
13 you make a motion for recusal that has any substance, the
14 judge is going to know about it.

15 CHAIRMAN BABCOCK: Right.

16 MR. EDWARDS: You say he practiced law with
17 somebody that's involved in the case. He knows with whom
18 he's practiced law. If he doesn't have any notion about
19 what the motion means, he just overrules it because it
20 doesn't tell him he's recused, and then you go from there,
21 but having been in -- you know, I think I filed one
22 recusal motion in my whole life and made it through
23 several courts, and it's a decision that you don't take
24 lightly, and I certainly would not have wanted to have
25 that hearing in front of the judge against whom I had

1 filed it. It happened to be a personal friend and
2 neighbor of mine who actually appeared at two hearings,
3 filed his own motion for rehearing when he was
4 disqualified the first time.

5 It can get pretty sticky, and I know that as
6 a practitioner if I'm going to make that decision, I don't
7 want to have to do it in front of the judge whom I am not
8 attacking but suggesting should not be hearing my case.
9 You go to the people -- and I know in the disciplinary
10 area where they are going to do one after another they
11 don't give a hoot about what -- those kind of things, but
12 I don't think we can just change the whole system because
13 of some guy out there or some person, some lawyer, that's
14 violating all of the rules of our profession. I think the
15 grievance process takes care of that kind of person, has
16 to.

17 CHAIRMAN BABCOCK: Skip and then Buddy and
18 then Carl and Justice Duncan.

19 MR. WATSON: I think that the core of the
20 old rule and what we were trying to beef up in this rule
21 is just the core concept that if a motion to recuse is
22 filed, the judge cannot pick up a pen to do anything other
23 than to sign an order saying, "I'm recused," or to refer
24 it to someone else to sort out the special exceptions, to
25 hold the hearings, or to do everything else. That's

1 bedrock. That judge shouldn't do another thing other than
2 sign that order, and that's the way it should be.

3 CHAIRMAN BABCOCK: What's your authority for
4 that, Skip?

5 MR. WATSON: Pardon me?

6 CHAIRMAN BABCOCK: What's your authority for
7 that? What is it on the law?

8 HON. F. SCOTT McCOWN: This sentence. His
9 authority is exactly what Richard said.

10 MR. WATSON: I mean, that's the way I read
11 it before we started tinkering with it, and I thought what
12 we were trying to do is seal up all of the little
13 mouseholes that got out from under that in this process,
14 that the person who is subject of the recusal shouldn't
15 have anything to do with the recusal process, period.

16 CHAIRMAN BABCOCK: All right. You're in a
17 jurisdiction like Bexar -- well, it wouldn't be Bexar
18 County. You're in a jurisdiction where they have an oral
19 docket. You have oral hearings. So you file your motion.
20 The computer spits out a hearing date for your motion.
21 You go down to court. The judge says, "What's this
22 about?" You stand up and you say, "Judge, we have got a
23 motion to recuse you." Okay. Does the judge say, "Okay.
24 I'll read the papers and see you guys later," or does the
25 judge have the authority to say, "Tell me about it"?

1 MR. WATSON: No. The judge says, "I'll read
2 the papers and you'll receive my order." That's exactly
3 the way it should be.

4 CHAIRMAN BABCOCK: So in your view the judge
5 is precluded from saying, "Tell me about it."

6 MR. WATSON: Exactly. Now, that doesn't
7 mean --

8 CHAIRMAN BABCOCK: Others are nodding their
9 heads, so --

10 HONORABLE WILLIAM HARRIS: I think that's
11 correct.

12 MR. WATSON: That doesn't mean that with
13 judges like the judges in this room that two counsel may
14 go to the judge together and say, "We have got a problem.
15 Let's talk about it." I mean, that's the way we handle it
16 in West Texas, but there are also judges in which -- that
17 are not in this room -- in which if you had that hearing,
18 you're walking into a sweatbox, and that's not pleasant.
19 It's going to be in camera, and it's not going to be
20 recorded, and it's going to be an unpleasant prospect, and
21 that shouldn't happen.

22 CHAIRMAN BABCOCK: Judge Brown, we had three
23 other people, and we will get to you next. Buddy was
24 next.

25 MR. LOW: I totally agree with Skip and

1 Bill, and the way the rule is written they must state in
2 detail, and it must be on personal knowledge. I mean, you
3 can't just throw something out in the air and say to the
4 judge, "Well, I need to develop that." And then you go
5 before the judge and say, "Well, Judge, he gave you
6 \$10,000 as a campaign contribution, violation of the law."
7 He says, "Are you calling me a liar? I didn't get but
8 5,000." I mean, you can't do both of them.

9 CHAIRMAN BABCOCK: Okay. Carl.

10 MR. HAMILTON: Well, I'm not sure the rule
11 is clear. You made a statement while ago about the judge
12 denying the motion if it didn't have all the right stuff
13 in it.

14 CHAIRMAN BABCOCK: Right.

15 MR. HAMILTON: My view is that the trial
16 judge doesn't do that. Only the regional presiding judge
17 would do that once it goes to him, and when this says
18 "once the motion is filed must promptly sign an order
19 ruling on the motion" --

20 CHAIRMAN BABCOCK: That's what it says.

21 MR. HAMILTON: Yeah, but I don't think he
22 can make a ruling that the motion is not in proper form
23 and therefore deny it. I think his only ruling can be
24 "It's either granted and I recuse myself" or "It's denied
25 and I refer it to the presiding judge."

1 CHAIRMAN BABCOCK: All right. Right.
2 That's what happened, yeah.

3 MR. HAMILTON: But I'm not sure that that's
4 really clear when it says that he signs an order ruling on
5 the motion, unless we make it clear that that's all he can
6 do, is either grant it or deny it -- I mean, grant it --
7 either recuse himself or not recuse himself and just deny
8 it.

9 CHAIRMAN BABCOCK: Well, two sentences later
10 it says, "If the judge refuses to recuse or disqualify,
11 the judge must promptly refer the motion to the presiding
12 judge of the administrative region."

13 MR. HAMILTON: Yeah, but that doesn't answer
14 the question what if the motion isn't verified, for
15 example.

16 CHAIRMAN BABCOCK: Right.

17 MR. HAMILTON: Can he simply deny it and not
18 refer it to the presiding judge?

19 CHAIRMAN BABCOCK: I don't think so. I
20 think if he denies it for any reason he's got to refer it.

21 MR. ORSINGER: Chip, what about this special
22 exceptions you're talking about? I mean, it's too vague
23 to figure out really what it is, so the other side says,
24 "I'm going to specially except to that." Now, is the
25 trial judge the one that says, "I grant your special

1 exceptions and order you to replead your motion"?

2 CHAIRMAN BABCOCK: I don't know.

3 MR. ORSINGER: I hope not.

4 MR. HAMILTON: That's what I'm saying. I
5 don't think that's clear.

6 CHAIRMAN BABCOCK: Yeah, Justice Hardberger.

7 HON. PHIL HARDBERGER: I can see the reasons
8 for a clarification hearing, for lack of a better word.

9 CHAIRMAN BABCOCK: Right.

10 HON. PHIL HARDBERGER: But I think it is
11 such a ripe opportunity for intimidation that the better
12 policy is that there cannot be such a hearing, and I would
13 be against any broadening of the rule to allow a
14 clarification or initial hearing to special exceptions,
15 whatever you want to call it. It is -- my experience
16 would be the same as Bill Edwards. I've only made one
17 recusal motion, and it's a very unpleasant experience, and
18 nobody is going to really want to do that unless there is
19 a good reason.

20 So I think we have to be careful about once
21 that recusal motion is being made of doing anything to
22 impose the person who has made the motion before that
23 judge.

24 CHAIRMAN BABCOCK: Okay. Judge Brown, then
25 Judge Harris, and then Luke and then Bill.

1 HONORABLE HARVEY BROWN: Well, I do think
2 that rule is a little ambiguous because I read it the same
3 way that Steve Tipps does, different than Richard. So I
4 don't view a hearing as "other action," personally.

5 It seems to me that Skip has got a great
6 point for some of the grounds for recusal but not others,
7 and maybe this is too complicated, but obviously if you're
8 saying the judge is biased or is not -- is impartial -- I
9 mean is partial, you don't want to do that in front of the
10 judge. That's too adversarial for the judge, but if
11 you're saying the judge is related to somebody or a spouse
12 is related to a witness, that seems to me that's not very
13 adversarial and that as a judge it would be nice to know
14 that.

15 Getting back to the special exceptions
16 thing, I also have a sense that a judge should have a
17 right to hear it first and decide before some other judge
18 does. What if, to go back to your hypothetical, the judge
19 can't do anything? It goes to the presiding judge, who
20 says, "Who is the material witness?" They now say who the
21 material witness is. Does the presiding judge then rule,
22 or does the trial judge at least now get to rule, knowing
23 the facts first before he's essentially reversed on his
24 first recusal?

25 CHAIRMAN BABCOCK: In my hypothetical, the

1 presiding judge referred it to another judge who said,
2 "Who is the witness?" They said, "What does he know?"
3 And he recused the judge based on that and without
4 remanding it back to the first judge for further
5 determination.

6 HONORABLE HARVEY BROWN: I just think it
7 would be nice for the trial judge to be able to do that
8 himself or herself.

9 CHAIRMAN BABCOCK: Judge Harris.

10 HONORABLE WILLIAM HARRIS: I can't cite any
11 specific cases, but the case law -- all the case law on
12 this, when you start talking about judges making orders
13 with a recusal pending, that is almost always found to be
14 improper. What my position on this is, when I receive a
15 motion to recuse me, I don't -- and this may be a matter
16 of semantics. I don't think that I grant or deny that
17 motion. I think that I either recuse myself or I decline
18 to do so and send it, but I don't think that my declining
19 to do so is an order, and I don't think that recusing
20 myself is granting the motion.

21 In other words, if I'm presented with
22 grounds where I feel like the grounds are proper to
23 recuse, I'm going to recuse myself by a letter. If I do
24 not feel like the motion and its attachments on its face
25 state grounds for recusal, I'm under an obligation to

1 resist it, to forward it to the administrative judge, and
2 he goes on from there. I don't think that I can look at
3 it and say, "Well, I need to have -- take more time on
4 this. I need to hear evidence."

5 I think that, you know, the special
6 exception Richard is talking about I think is a concern.
7 That constitutes making orders, and this Corpus Christi
8 case is the only one I'm aware of that's ever come down to
9 that. When a judge gets a recusal and then does something
10 subsequently it's almost always improper.

11 CHAIRMAN BABCOCK: Luke.

12 MR. SOULES: I don't know which of the
13 options under, what, (d)(3) --

14 CHAIRMAN BABCOCK: (d)(3)?

15 MR. SOULES: -- we've really focused on in
16 rule -- whatever it is. I guess it's 134, 18a, on 18a,
17 but in the Option Two it's clear that it says, "If the
18 motion is procedurally proper and grounds have been
19 alleged, the presiding judge shall hear a motion or assign
20 a judge to hear it. If the motion is not procedurally
21 proper or does not allege grounds, the presiding judge of
22 the region shall dismiss the motion without a hearing."
23 So there we are saying all this procedural stuff takes
24 place in front of the presiding judge --

25 HON. F. SCOTT McCOWN: Right.

1 MR. SOULES: -- if he rules even on whether
2 or not the motion is procedurally correct, and I think
3 Option Two -- this is earlier paper -- is what we wanted,
4 and that certainly makes it clear that the presiding judge
5 makes all the decisions, even the decision that the motion
6 itself is so sketchy as to give no notice to the trial
7 judge of what's even being alleged.

8 HON. F. SCOTT McCOWN: Chip, can I make a
9 motion on specific language?

10 CHAIRMAN BABCOCK: You can if Bill Dorsaneo
11 will yield.

12 PROFESSOR DORSANEO: Yeah, I will yield. I
13 think you will do the same thing I was going to do.

14 HON. F. SCOTT McCOWN: Okay. I agree with
15 Luke; and I would suggest, to incorporate everybody's
16 comments, "The judge in the case in which the motion is
17 filed must, without further proceedings, promptly recuse
18 or refer the motion to the presiding judge of the
19 administrative region before taking any other action in
20 the case." And then I would also suggest because -- and
21 the judge from Fort Worth whose name I'm blocked --

22 MR. ORSINGER: Judge Harris.

23 HON. F. SCOTT McCOWN: Judge Harris. Judge
24 Harris made a very good point. Down in the italicized
25 sentence where we say, "If the judge in the case in which

1 the motion is filed does not promptly grant the motion," I
2 would suggest instead of saying "promptly grant the
3 motion," we say "promptly recuse or refer the motion" so
4 that it's parallel in both sentences, because from the
5 judge's perspective, I may not want to be granting your
6 motion and saying I agree with it, but I may be wanting to
7 recuse, and we give them a little room there.

8 HONORABLE HARVEY BROWN: That's true.

9 HON. F. SCOTT McCOWN: And so I would offer
10 that amendment.

11 PROFESSOR DORSANEO: I will second that.
12 That's what I was going to do. Maybe not as well.

13 CHAIRMAN BABCOCK: Bill seconded. Okay.
14 Let's get the language down again, Scott.

15 HON. F. SCOTT McCOWN: Okay. "The judge in
16 the case in which the motion is filed must, without
17 further proceedings," and I will accept Luke's amendment,
18 "recuse or" -- "promptly recuse or disqualify, or sign" --
19 "or refer the motion to the presiding judge of the
20 administrative region before" -- getting rid of that Latin
21 and changing to Anglo Saxon, "before taking any other
22 action in the case."

23 PROFESSOR DORSANEO: I would say we might
24 put that last part first.

25 HON. F. SCOTT McCOWN: "Before taking any

1 other action in the case"?

2 PROFESSOR DORSANEO: Yeah. Then
3 blah-blah-blah.

4 HON. F. SCOTT McCOWN: "The judge in the
5 case in which your motion is filed must, without further
6 proceedings, promptly recuse or disqualify or refer the
7 motion to the presiding judge of the administrative
8 region," and then down in that first italicized sentence I
9 would make it parallel by saying "recuse or disqualify or
10 refer the motion to the presiding judge of the
11 administrative region."

12 And I think, frankly, if you use the term
13 "without further proceedings" you give a good judge who --
14 he could call the lawyers on the phone and say, "What's
15 this about?" I mean, you know, but there can't be any
16 more proceedings.

17 CHAIRMAN BABCOCK: Right.

18 HON. F. SCOTT McCOWN: There couldn't be a
19 hearing.

20 CHAIRMAN BABCOCK: So the effect of this is
21 going to be to overrule the Corpus Christi case.

22 MR. WATSON: Right.

23 CHAIRMAN BABCOCK: Okay. Yeah, Buddy.

24 MR. LOW: What is the effect of that in the
25 provision that we have already talked about, "unless the

1 parties agree that the case may be reassigned in
2 accordance with local rules"? Do we mean then that they
3 can't even do that?

4 HON. F. SCOTT McCOWN: Well, but for that
5 provision to happen the judge has to voluntarily recuse.
6 So the judge would say, "I'm out of here," and then the
7 parties would say, "We want it reassigned pursuant to
8 local rules." So this wouldn't prevent the reassignment
9 pursuant to local rules.

10 MR. LOW: Okay. As long as it's not
11 inconsistent.

12 CHAIRMAN BABCOCK: Mike Hatchell, do you
13 have your hand up, or are you just stretching?

14 MR. HATCHELL: Nope.

15 CHAIRMAN BABCOCK: Just stretching. Okay.
16 Any further comment on this suggestion that has been moved
17 and seconded?

18 If there's no further discussion, then all
19 in favor raise your hand.

20 Anybody opposed? I should have asked that
21 question first. By a vote of 31 to nothing that passes.

22 You're opposed?

23 JUSTICE HECHT: No, but may I suggest we add
24 a comment indicating that the rule does reject the --
25 whatever holding or whatever it is in the Rio Grande case?

1 PROFESSOR DORSANEO: Second.

2 CHAIRMAN BABCOCK: Anybody opposed to that?

3 By unanimous vote --

4 MR. TIPPS: Can we use Judge Walker's
5 commentary as part of our comment?

6 CHAIRMAN BABCOCK: Probably not. Okay.

7 MR. SOULES: Clarification. Are these
8 changes being made to Option Two which specifically --

9 CHAIRMAN BABCOCK: No, I think you're a
10 draft or two behind, Luke.

11 MR. SOULES: It says "Packet, January 28,
12 29" -- that's several -- that's a year behind. Too much
13 stuff.

14 CHAIRMAN BABCOCK: I think we've got the
15 draft of November 28th, 2000.

16 HONORABLE JOHN CAYCE: I've got a question.
17 Are the changes that we just voted on, are they
18 reconcilable with this subsection (4) here, interim
19 proceedings?

20 HON. F. SCOTT McCOWN: Right.

21 HONORABLE JOHN CAYCE: Okay.

22 HON. F. SCOTT McCOWN: Because before taking
23 any other action in the case, once you do that, you can
24 then take other action in the case pursuant to the rule,
25 but --

1 HONORABLE JOHN CAYCE: For good cause.

2 HON. F. SCOTT McCOWN: Well, or -- yeah.
3 For the various -- or the interim proceeding for various
4 purposes, but the presiding judge is going to be on notice
5 that this motion to recuse has been made, and if the
6 presiding judge wants to swoop in and stop you, the rule
7 allows for all of that. It moves the lawyers to another
8 court.

9 CHAIRMAN BABCOCK: Okay. Judge McCoy, we're
10 back to you.

11 HONORABLE ROBERT McCOY: All right. We were
12 on (3), so let me digress slightly. The last sentence of
13 (2) says, "Any motion filed after the tenth day prior to
14 the date the case is set for trial or other hearing is
15 governed by subparagraph (e)(4)," but if you look at (2)
16 it talks about if you file a motion too late it is waived
17 unless certain circumstances are met. So is this an
18 untimely motion or a motion that has not been waived, or
19 does it really mean any motion, even one that has been
20 waived by filing it untimely?

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: I think we have a problem
23 with this, and I don't know how this occurred. I guess
24 with all of our tinkering; but it seems to me that the way
25 this now reads, if it's intended that if it's not filed

1 within ten days it's completely waived then we don't even
2 need the last sentence, which is (e)(2), then we don't
3 need to have any interim proceedings, if it's completely
4 waived.

5 If it means it's only waived as to that
6 hearing or as to that trial, that may be what we're trying
7 to say, because that brings into (4), and (4)(b) on the
8 interim proceedings means you can go ahead if it's done --
9 if it violates the ten-day rule.

10 CHAIRMAN BABCOCK: Well, I thought --
11 Richard, help me out with this, but I thought that the
12 reason for that sentence was because there are litigants
13 out there -- and these are the bad litigants we're trying
14 to deal with -- who, notwithstanding the fact that it is
15 waived, it's a bad motion, are just trying to stop the
16 proceedings. And they feel that they do stop the
17 proceedings by filing a motion to recuse the day the case
18 is set to go to trial and that the purpose of this
19 sentence was to say, "No matter whether your motion is
20 good, bad, or otherwise, whether it's waived or not
21 waived, you're going to go into the interim proceedings
22 procedure if you do it within ten days, unless you're
23 excused under one of the four excuses that you get under
24 (2)(a) through (d)."

25 Richard, isn't that why that sentence is

1 there?

2 MR. ORSINGER: Yeah, but I mean, I -- and
3 now that Judge McCoy has raised this I'm concerned that we
4 really don't mean that it's waived, we just mean that it
5 doesn't stop the trial proceeding.

6 MR. HAMILTON: That's all we mean.

7 MR. ORSINGER: But you still get to have
8 your after-hours hearing on whether it's legitimate or
9 not. I don't know. I'm really troubled now.

10 MR. HAMILTON: The only time it does stop
11 the trial proceedings would be if you meet exceptions
12 (2) (a), (b), (c), or (d) and it's filed within the ten
13 days, then it would stop those proceedings.

14 MR. ORSINGER: Yeah, but if it's waived, I
15 mean, if it's truly waived, there's no point in having a
16 parallel proceeding --

17 MR. HAMILTON: Right.

18 MR. ORSINGER: -- because you will lose
19 because you've waived it.

20 MR. HAMILTON: That's right.

21 MR. ORSINGER: So we can't mean "waived"
22 really.

23 HONORABLE HARVEY BROWN: Well, what if we
24 don't know if it's waived because we don't know when they
25 first learned of something?

1 CHAIRMAN BABCOCK: Yeah. You still have to
2 have a determination about whether there's been waiver.

3 HONORABLE SARAH DUNCAN: Right.

4 HON. F. SCOTT McCOWN: Waiver is, I think,
5 the correct term. I think you're confusing procedure with
6 substance.

7 CHAIRMAN BABCOCK: Not for the first time,
8 either.

9 HON. F. SCOTT McCOWN: Because you have the
10 parallel proceeding, but in the recusal proceeding the
11 ultimate decision may be that motion, you waived it
12 because it didn't fall within any of the exceptions, so
13 it's denied.

14 HONORABLE SARAH DUNCAN: Actually, I think
15 we may be confusing things by talking about motions being
16 waived as opposed to grounds being waived.

17 CHAIRMAN BABCOCK: Uh-huh.

18 HONORABLE SARAH DUNCAN: And I think we did
19 mean, if I remember the discussion correctly, that the
20 ground is waived unless you come within one of these
21 exceptions, if it's included in a motion that is filed
22 within the ten-day period.

23 HON. F. SCOTT McCOWN: That's a good point.
24 We could say, "A ground to recuse is waived if the motion
25 is filed later than the tenth day before the date the case

1 is set for trial."

2 MR. ORSINGER: Okay.

3 CHAIRMAN BABCOCK: How is that?

4 MR. ORSINGER: That's a great improvement.

5 CHAIRMAN BABCOCK: What problem does that
6 solve?

7 MR. SOULES: Where does that go?

8 CHAIRMAN BABCOCK: It would be in the second
9 sentence of subparagraph (2).

10 HON. F. SCOTT McCOWN: Well, I don't think
11 it necessarily solves the problem. It just makes clear, I
12 think, what -- it makes clear the difference in substance
13 and procedure.

14 CHAIRMAN BABCOCK: Okay.

15 HON. F. SCOTT McCOWN: That what's waived,
16 is your substantive ground for recusal if it's raised in a
17 motion filed later than the tenth day before the date the
18 case is set for trial, unless it falls within one of the
19 exceptions. We're going to have a parallel proceeding if
20 it comes that late, but the outcome of the parallel
21 proceeding will be "Too late, you waived it."

22 CHAIRMAN BABCOCK: Right. Right. I think
23 that's right. So is everybody comfortable with striking
24 the word "motion" and putting the word "ground" in in the
25 second sentence of subparagraph (2)?

1 MR. YELENOSKY: Is it waived permanently? I
2 mean, what if you're reset?

3 CHAIRMAN BABCOCK: What, Steve? I'm sorry.
4 I couldn't hear you.

5 MR. YELENOSKY: Well, is the ground waived
6 permanently? What if you're reset? Can you urge it
7 further than ten days out of the new setting?

8 MR. SOULES: Yes.

9 CHAIRMAN BABCOCK: Maybe.

10 MR. ORSINGER: I think the context of our
11 discussion has been that it can be raised -- if you blow
12 it for purposes of a preliminary hearing, you can still
13 raise it after the hearing.

14 MR. YELENOSKY: But does the language say
15 that?

16 MR. ORSINGER: No, I don't think it does.

17 MR. YELENOSKY: So we have that problem.

18 MR. ORSINGER: That was just my
19 understanding of what we believed.

20 CHAIRMAN BABCOCK: Well, let's take on
21 Sarah's -- you say that's not enough, though, to put it in
22 the second sentence.

23 HONORABLE SARAH DUNCAN: Well, it's not
24 grammatical. To just change "motion" to "ground" doesn't
25 leave you with a grammatical sentence.

1 MR. ORSINGER: You say, "A ground for
2 recusal is waived if the motion to recuse is filed later
3 than the tenth day"? No?

4 HONORABLE SARAH DUNCAN: "If not made the
5 subject of a motion to recuse" by then.

6 MR. ORSINGER: You've got to have a Ph.D. to
7 understand that sentence.

8 HONORABLE SARAH DUNCAN: Well, I didn't
9 write this sentence as it exists in its current form. It
10 is always more difficult to edit to make something correct
11 than it is to write it correctly to begin with, but that's
12 not --

13 HON. F. SCOTT McCOWN: You-all shouldn't
14 fuss when we have company.

15 MR. ORSINGER: She has a special advisor on
16 legal writing, too, so I lose this fight.

17 CHAIRMAN BABCOCK: Okay. So how should the
18 sentence read then, Sarah?

19 HONORABLE SARAH DUNCAN: Well, as I
20 understand it, Brian Garner is going to rewrite all of
21 this stuff anyway.

22 CHAIRMAN BABCOCK: I know, but we need to
23 come up with --

24 PROFESSOR DORSANEO: I hope that was humor.

25 HON. F. SCOTT McCOWN: "A ground for recusal

1 is waived if it's not raised in a motion for" -- "if the
2 motion to recuse is not" -- "A ground for recusal is
3 waived if the motion to recuse is" --

4 HONORABLE SARAH DUNCAN: "If not asserted."
5 Do we care if it's in a motion as opposed to an objection
6 as opposed to a --

7 HONORABLE HARVEY BROWN: Has to be in a
8 motion.

9 HON. F. SCOTT McCOWN: No, no. It has to be
10 in a motion. "Is waived if the motion is filed later than
11 the tenth day before the date the case is set for trial."

12 "A ground for recusal is waived if the
13 motion is filed later than the tenth day" -- "the motion
14 to recuse is filed later than the tenth day before the
15 date the case is set for trial."

16 MR. YELENOSKY: "For purposes of that
17 motion"? Does that help?

18 HON. F. SCOTT McCOWN: Well, let's solve one
19 problem at a time.

20 MR. HAMILTON: Why wouldn't it be better to
21 say, "The ground to recuse is waived if not asserted in a
22 motion"?

23 MR. TIPPS: Uh-huh.

24 HON. F. SCOTT McCOWN: Okay. "Asserted in a
25 motion filed" -- well, you'd have to say "if asserted in a

1 motion filed later than the tenth day prior to the date
2 the case is set for trial."

3 MR. ORSINGER: I don't like that because it
4 could be an amended motion. I think it would be better to
5 do it --

6 HON. F. SCOTT McCOWN: The first way?

7 PROFESSOR DORSANEO: Yeah, less than ten
8 days.

9 HON. F. SCOTT McCOWN: "A ground for recusal
10 is waived if the motion to recuse is filed later than the
11 tenth day prior to the date the case is set for trial or
12 other hearing, except in the following instances."

13 CHAIRMAN BABCOCK: Sarah, is that
14 grammatically clean enough for you?

15 HONORABLE SARAH DUNCAN: I'm not making any
16 more comments.

17 CHAIRMAN BABCOCK: Nina.

18 HONORABLE SARAH DUNCAN: Other than to say
19 maybe it's good that we have got Brian Garner.

20 MS. CORTELL: Why isn't this in that
21 back-door sort of way raising the problem that we were
22 trying to avoid by not keying the filing to the time when
23 you knew about a problem, because then if you say, you
24 know, in a subsequent hearing, "Well, you didn't raise it
25 ten days prior to the last hearing and you knew about it,

1 so you waived it"?

2 CHAIRMAN BABCOCK: Luke.

3 MR. SOULES: We really are changing this
4 significantly by changing "motion" to "ground" because now
5 we're saying that if you ever file a motion late and it
6 doesn't fit in one of these exceptions, every ground in
7 that motion is waived. The grounds are waived. And I
8 think we ought to go back to the motion. You only waive
9 the motion. You don't waive the ground, and if the
10 opportunity comes up later when you can file a timely
11 motion that's not going to be waived, you can reassert the
12 ground.

13 HON. F. SCOTT McCOWN: Well, is that right,
14 Luke, because it seems to me that -- let's say you have
15 got a big summary judgment hearing, and you don't move
16 timely on a ground and it's waived, and the judge invests
17 him or herself in deciding that summary judgment, and it's
18 denied, and the case is set for trial. Are you suggesting
19 that you could then move to recuse that judge for trial
20 after he's already ruled on the summary judgment? Because
21 that would be a change in the law.

22 PROFESSOR DORSANEO: I think there is case
23 law that supports that interpretation as well.

24 MR. SOULES: Right.

25 HON. F. SCOTT McCOWN: On a ground that's

1 not new?

2 MR. SOULES: It may be a ground, one of many
3 grounds, some of which are newer. And you talk about
4 those things when you go to a recusal hearing.

5 CHAIRMAN BABCOCK: Justice Duncan.

6 HONORABLE SARAH DUNCAN: Could Richard or
7 Carl explain -- historically I'm getting very confused.
8 Where does this come from? I thought we decided several
9 times that you could file the motion to recuse at any
10 time, and that we didn't want to be looking at when did
11 you discover or should you have discovered this ground?

12 CHAIRMAN BABCOCK: I think --

13 HONORABLE SARAH DUNCAN: I'm just confused
14 historically.

15 CHAIRMAN BABCOCK: Yeah, I think
16 historically what happened was we did reject, as Richard
17 said earlier today, the "know or should have known" kind
18 of language in other parts of the rule, but when we got
19 here we had a lengthy discussion about Bexar County and
20 Travis County when you have a judge that you don't even
21 know who he is until you go down to the courthouse that
22 day, and so we started trying to build in protections, and
23 so (c) was part of that effort to protect people from
24 stuff that just arises.

25 HONORABLE SARAH DUNCAN: This does just the

1 opposite of protection. This creates waiver of grounds.

2 CHAIRMAN BABCOCK: I know.

3 HONORABLE SARAH DUNCAN: And if what we want
4 to do is protect, it seems to me we say, "A motion can be
5 filed at any time," period, and then the court will look
6 at the nature of the ground itself and whether --

7 CHAIRMAN BABCOCK: I'll tell you the example
8 that I recall from our discussions, and that was you're in
9 trial, and all of the sudden you learn that the trial
10 judge has got a loan at the bank where the president of
11 the bank is on trial, and you didn't know about that.
12 There was no way to know about it, but in the middle of
13 the trial you find out that the judge has got a financial
14 obligation to one of the parties in the litigation, and so
15 you then move to recuse. Well, you're not timely in any
16 way, shape, or form, but subsection (c) is going to save
17 you.

18 HONORABLE SARAH DUNCAN: Well, why wouldn't
19 you -- no.

20 MR. YELENOSKY: Because you didn't learn in
21 time.

22 HONORABLE SARAH DUNCAN: No. Actually,
23 under subsection (c) we are now going to go litigate
24 whether you could have known the bank president's
25 relationship with --

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE SARAH DUNCAN: I thought that's
3 exactly what we decided we didn't want to do.

4 CHAIRMAN BABCOCK: Well, we don't want to do
5 that, but the debate was that -- but the lesser evil
6 there -- I mean, yeah, you do have to litigate that issue,
7 but the lesser evil there was giving somebody the
8 opportunity to recuse that judge when they were innocent
9 as opposed to never being able to do it.

10 HONORABLE SARAH DUNCAN: Well, what in the
11 rule, but for this subsection, the last -- I mean, as I
12 remember it, subsection (2) used to read, "A motion to
13 disqualify may be filed at any time," period. Move on to
14 the next section, and somewhere all this got added, and
15 it's actually only the clause "any of this" -- after that
16 first sentence is added that there's any waiver at all of
17 a ground because of the timeliness or untimeliness.

18 HON. F. SCOTT McCOWN: Well, no.

19 HONORABLE SARAH DUNCAN: This is the only
20 place that it comes from.

21 CHAIRMAN BABCOCK: Okay. Carl.

22 MR. HAMILTON: As I remember, we started out
23 with the concept that we didn't want people coming in at
24 the last minute filing motions to recuse. So we said,
25 okay, we are going to have a ten-day deadline. If it's

1 not done within ten days, they're out. Then we said, "No,
2 that isn't going to work because they may have really good
3 grounds, and we ought not to do that." So then we said,
4 "Okay, if it comes within ten days we won't stop the
5 hearing. We will go ahead with the hearing, and we will
6 have this parallel proceeding."

7 HONORABLE SARAH DUNCAN: Right. Right.

8 MR. HAMILTON: So I really think what we
9 intended on this time to file is not that there is a
10 waiver, but it's just that a motion that is not timely
11 filed doesn't stop those hearings or trials except in
12 instances (a), (b), (c), or (d). If you meet those
13 exceptions then it does stop the hearing. But if you
14 don't meet those exceptions then you go into the interim
15 proceeding, so I don't think we really want to say
16 "waiver" there, Richard.

17 HONORABLE SARAH DUNCAN: Exactly.

18 HON. F. SCOTT McCOWN: Well, no, wait.
19 Well, wait, though. We've gone back and forth on this,
20 but at one point the trial judges said, "Hey, wait a
21 minute. You've got to have some limit. You don't want to
22 let a guy develop the grounds for a motion and sit on them
23 until really late in the game." And so this -- and it may
24 not work, but what this is an effort to do is to have our
25 cake and eat it, too.

1 It says, "We won't look at when you knew or
2 should have known or anything like that, except within
3 that period of after ten days before trial." If you're
4 that close, then it's going to be waived unless you come
5 within one of these exceptions. So it was an effort to
6 split the baby, to try to get the advantages of both
7 policies. And it is, by the way, what we have in our
8 present rule.

9 HONORABLE HARVEY BROWN: Right.

10 HON. F. SCOTT McCOWN: And so it was an
11 effort to keep that kind of baby-splitting that's in the
12 present rule, and we did vote on that, and so now we're
13 rehashing --

14 CHAIRMAN BABCOCK: I'm looking for the vote.

15 HON. F. SCOTT McCOWN: We're rehashing that
16 policy.

17 MR. HAMILTON: If it's waived then we don't
18 need any interim proceedings.

19 HONORABLE SARAH DUNCAN: Right.

20 HON. F. SCOTT McCOWN: Well, yes, you do,
21 because you may have a fuss, you may have a fight about
22 the truth or validity of it. For example, you may have a
23 big fight about whether it was known ten days or not known
24 ten days, and so what we say is we're going to have this
25 debate about whether the motion should be granted or

1 denied in front of the recusal judge, but we're not
2 stopping the trial if it's within this ten-day period.

3 MS. BARON: Right.

4 CHAIRMAN BABCOCK: Richard.

5 MR. ORSINGER: I concur in Scott's comments.
6 The debate at one point was whether you had a deadline to
7 file within so many days of when you knew or should have
8 known, which might be, you know, six months before your
9 trial; and there's always been a tension between the point
10 of view that you should be able to raise a valid recusal
11 ground at any point versus you shouldn't be able to lay
12 behind the log, see whether the judge is ruling for you or
13 against you, but you have this ace in the hole, which is
14 this recusal ground that you're not telling anybody about
15 until you start losing.

16 And I was opposed to putting this in here
17 because I think it's a horrible thing to call the other
18 lawyer in the middle of a recusal hearing and subpoena his
19 legal assistant and his records and everything else and
20 have this huge fight over work product, attorney-client
21 privilege, and have them testifying about what they knew
22 and when they knew and when they should have known it. I
23 think that's horrible policy, but I agree that what was
24 happening is we were trying to split the baby by not being
25 so onerous about when you have a duty to file, but saying

1 that if you wait until ten days before the hearing or
2 trial then the burden is going to be on you to come
3 forward and prove that you didn't know about it in time to
4 file it more than ten days in advance.

5 And it was a kind of a compromised position,
6 and I don't like it because I think it's still going to
7 result in putting the lawyer on trial, but I believe that
8 the vote was made as a kind of a compromise, like Scott
9 was saying.

10 HON. F. SCOTT McCOWN: Yeah, well, but
11 nobody likes a compromise, so you don't vote on whether
12 you like the compromise or not. I mean, we all agreed
13 that that would be the policy we would go forward on.

14 MR. ORSINGER: Well, I don't know. I think
15 I still voted against it. So I never agreed on it. I
16 just lost.

17 But I think Sarah is right. I think that
18 this is inherently in tension with the other principle,
19 and this is a compromise of that principle, a pretty
20 serious one.

21 CHAIRMAN BABCOCK: Okay. Let's take our
22 morning break. Ten minutes.

23 (Recess from 10:38 a.m. to 10:55 a.m.)

24 CHAIRMAN BABCOCK: Before we dive back into
25 recusal, we have a great, great, development to report on.

1 Now, that got everybody quiet. Joe Lattig was given the
2 task of getting CLE credit for all these many hours we
3 spend on these issues, and, Joe, you want to report on the
4 progress?

5 MR. LATTIG: That's a bit exuberant.

6 CHAIRMAN BABCOCK: In keeping with the tenor
7 of our committee, exuberant.

8 MR. LATTIG: Okay. It is in the process,
9 and I have been talking to the general counsel of the Bar,
10 and we are right now talking about getting CLE credits for
11 these meetings and for the preparation time and --

12 HONORABLE SCOTT BRISTER: Wonderful.

13 MR. LATTIG: We haven't gotten a
14 commitment, but we're talking about maybe some
15 retroactive.

16 (Applause.)

17 MR. LATTIG: Actually, there's going to
18 be -- the bad news is that they want there to be a
19 negative effect on the ethics hours. We're still
20 negotiating.

21 Anyway, I hope by the next meeting that we
22 can have something to give you.

23 HONORABLE SARAH DUNCAN: Get it done by May
24 23rd.

25 MR. LATTIG: Okay. Yeah. When's your

1 birthday? Let me know.

2 Well, I'm threatening to deluge them with
3 letters if they don't hurry up and grant it, so...

4 CHAIRMAN BABCOCK: Okay. We have been
5 talking about -- yeah, Judge McCown.

6 HON. F. SCOTT McCOWN: I have a motion on
7 this paragraph (2).

8 CHAIRMAN BABCOCK: All right. Let's hear
9 it.

10 HON. F. SCOTT McCOWN: I think we should
11 leave it exactly the way it's typed and move on because --

12 MS. EADS: Second.

13 HON. F. SCOTT McCOWN: And let me point out
14 why. Because we fought this debate out, and we came up
15 with this compromise and because for those, say, like
16 Richard, who don't like the compromise, that fourth bullet
17 point, "for other good cause shown," would always give you
18 a place to hang your hat. If you had a motion that was
19 very persuasive, that shouldn't have been waived, you can
20 hang your hat on "for other good cause shown," and the
21 recusal judge could say, "I am not going to waive this
22 because this is just too serious and shouldn't be waived."

23 And I think instead of getting into "ground"
24 and "motion," we should just leave it "a motion to recuse"
25 and just leave it the way it is.

1 CHAIRMAN BABCOCK: Okay. Bill.

2 PROFESSOR DORSANEO: By that you're meaning
3 to say that all of the grounds in the motion are waived.

4 MR. SOULES: No.

5 HON. F. SCOTT McCOWN: I'm meaning to say
6 the motion is waived and leave to the development of the
7 law what that is.

8 PROFESSOR DORSANEO: Oh, you're saying you
9 don't think you can win the vote, is what you're saying.

10 HON. F. SCOTT McCOWN: No. No. I'm really
11 not. I mean, on some occasion I might be saying that, but
12 on this occasion I'm really not.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: I guess my question
15 is what does it mean to waive a motion?

16 MR. EDWARDS: It means that the grounds are
17 still good, and if you for some reason -- maybe you try
18 the case, get a new trial or reversed. You can file a
19 motion on the same grounds at a later time. That's what
20 it means to me.

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: If there's a ground for
23 recusal that's in existence and, therefore, it doesn't
24 come within these four exceptions, it's in existence but
25 you don't know about it. So you find out about it five

1 days before trial and you file the motion, the way this is
2 worded, that's waived. You can never raise it.

3 HON. F. SCOTT McCOWN: No, it's not.

4 MR. SOULES: What about (c)?

5 HON. F. SCOTT McCOWN: Because it's bullet
6 No. (3). "The party filing the motion knew or should have
7 known before" --

8 CHAIRMAN BABCOCK: Well, let's get back to
9 Scott's --

10 MR. HAMILTON: Okay. You're right, Scott.

11 CHAIRMAN BABCOCK: -- motion, which is that
12 this subparagraph (2) has been thoroughly discussed and
13 debated and --

14 MR. YELENOSKY: Second.

15 CHAIRMAN BABCOCK: -- I was going to, before
16 Scott even made a motion, by executive fiat say that Judge
17 McCoy and Judge Harris are here at our invitation, and we
18 need to be respectful of their time, so I would like to
19 get through their list of concerns; and if somebody wants
20 to go back through the record and suggest that we need to
21 revisit this, I am not against doing that. It's a very
22 hard rule, very complicated rule, but let's not do it
23 right now.

24 HON. F. SCOTT McCOWN: I will withdraw my
25 motion in favor of executive fiat.

1 MR. ORSINGER: Chip, we want to be sure that
2 every vote is counted.

3 CHAIRMAN BABCOCK: Mr. Dangling --

4 HON. F. SCOTT McCOWN: But not more than
5 once.

6 CHAIRMAN BABCOCK: All right. So, Judge
7 McCoy, let's go back to you.

8 HONORABLE ROBERT McCOY: All right. My
9 original question was, the last sentence before (3) says
10 any motion filed is governed by subparagraph (4), and do
11 you mean any motion?

12 HON. F. SCOTT McCOWN: Yes.

13 HONORABLE ROBERT McCOY: Or do you mean any
14 untimely or any unwaived? You just mean any motion,
15 waived or not?

16 HON. F. SCOTT McCOWN: Right. Any motion.

17 MR. YELENOSKY: Any motion.

18 CHAIRMAN BABCOCK: Right. All right.

19 HONORABLE ROBERT McCOY: The next two or
20 three might put under the housekeeping label. (e)(4), my
21 copy here has a subpart (a) followed by another (a) and --

22 CHAIRMAN BABCOCK: I think we fixed that.

23 HONORABLE ROBERT McCOY: The second (a)
24 says, "When the motion to recuse or disqualify is filed
25 after the tenth day prior to the date the case is set for

1 conventional trial." What is that?

2 HON. F. SCOTT McCOWN: That's a new term of
3 art developed by Professor Bill Dorsaneo, a noted expert
4 on Texas procedure.

5 PROFESSOR DORSANEO: No. I can't take
6 credit for that. That's really Robert W. Calvert's term
7 from Aldridge vs. Northeast Independent School District,
8 and it has a well-understood meaning as to include jury
9 trials and bench trials that are tried in the conventional
10 manner rather than --

11 HONORABLE ROBERT McCOY: Unconventional?

12 PROFESSOR DORSANEO: Rather than summary
13 judgment practice, which is also a trial practice.

14 HONORABLE JOHN CAYCE: In Fort Worth it
15 means any case not tried in Judge McCoy's court.

16 HON. F. SCOTT McCOWN: Can we add a comment
17 to the rules that incorporates what Bill just said and
18 that cites the case?

19 CHAIRMAN BABCOCK: Yeah. We have it
20 footnoted, if you see in the November 28th draft, but I
21 think a comment would be helpful, because that does strike
22 somebody who doesn't study these things.

23 PROFESSOR DORSANEO: And it may well be that
24 conventional trials really are summary judgments, and
25 that -- I'm being facetious now, but --

1 HONORABLE SARAH DUNCAN: Don't be.

2 CHAIRMAN BABCOCK: Don't be facetious on the
3 record. Bill, can we commission you to do a comment?

4 PROFESSOR DORSANEO: Yes, you may.

5 CHAIRMAN BABCOCK: All right. Judge McCoy,
6 what's next?

7 HONORABLE ROBERT MCCOY: All right. In
8 (e) (7), again we're under housekeeping. "The presiding
9 judge must promptly give notice," I think that's probably
10 "The presiding judge shall refer the matter to the clerk
11 of the court, who must promptly give notice." I may be a
12 little picky there.

13 And then also in (e) (7) it talks about that
14 the judge must rule within three days, and I'm assuming
15 that that's either three business days or three days
16 excluding weekends and holidays, unless you really meant
17 that you hear it on Friday and, by golly, you need to have
18 that ruling on Monday.

19 Or what if Monday is a holiday? Do you have
20 to have it on Monday, a holiday?

21 CHAIRMAN BABCOCK: If I recall our
22 discussion on that, we were relying on the general time
23 rules contained in the rules, so it would exclude weekends
24 and holidays. Judge Harris.

25 HONORABLE WILLIAM HARRIS: Well, that has

1 come up in some other contexts because there are certain
2 three-day periods where if you're relying on Rule 4 you
3 have a different result than if you're relying on Code
4 Construction Act in the Civil Practice and Remedies Code.
5 Specifically, the appeal of an associate judge has been
6 construed to be under the Code Construction Act rather
7 than under Rule 4, and three days under the Code
8 Construction Act is three days unless it says "excluding."
9 So that might be something you want to consider.

10 HON. F. SCOTT McCOWN: Well, but the
11 associate judge appeal is governed by statute, which would
12 be the Code Construction Act.

13 HONORABLE WILLIAM HARRIS: Exactly.

14 HON. F. SCOTT McCOWN: And this is a rule,
15 so it would be governed by Rule 4.

16 HONORABLE ROBERT McCOY: All right.

17 CHAIRMAN BABCOCK: Go ahead, Judge McCoy.

18 HONORABLE ROBERT McCOY: In (e)(8), the last
19 sentence starts out, "If an associate judge or a statutory
20 master," I believe it should include the statutory
21 magistrate, which I believe in Tarrant County we have in
22 criminal courts.

23 CHAIRMAN BABCOCK: These rules probably
24 would not be applicable to criminal cases, would they?

25 MR. ORSINGER: No. They are covered by the

1 Code of Criminal Procedure.

2 HONORABLE ROBERT McCOY: All right.

3 CHAIRMAN BABCOCK: But didn't we talk about
4 the statutory master versus statutory magistrate?

5 MR. ORSINGER: I don't know. We talked
6 about associate judges versus statutory master because --

7 HONORABLE WILLIAM HARRIS: What about a
8 referee? Our juvenile courts have referees.

9 MR. ORSINGER: No, they are covered by the
10 Rules of Civil Procedure.

11 HONORABLE WILLIAM HARRIS: It's a civil
12 case. A juvenile case is a civil matter.

13 MR. ORSINGER: Do we need to mention
14 something about juveniles?

15 MR. SOULES: I'm sorry. I'm a little lost
16 where you are, Judge. Where is it?

17 HONORABLE WILLIAM HARRIS: It doesn't say it
18 in there, but I was just thinking outloud that if you are
19 going to cover all the different types of judges, I don't
20 know if they're elsewhere, but our masters in our juvenile
21 courts are called referees.

22 CHAIRMAN BABCOCK: So we're on (e)(8), Luke,
23 and it's the last sentence that says, "If an associate
24 judge or a statutory master is recused or disqualified,
25 the district court to whom the case is assigned must hear

1 the case or appoint a replacement," and the issue on the
2 table is whether or not we need to expand that category of
3 people to include referees or masters.

4 HON. F. SCOTT McCOWN: Can I just
5 recommend --

6 CHAIRMAN BABCOCK: Yeah, Scott.

7 HON. F. SCOTT McCOWN: -- that we check the
8 Family Code to see if you have an absolute right to object
9 to a referee? Because if you have an absolute right to
10 object to a referee, there would never be any need to
11 recuse. If you don't have an absolute right to object to
12 a referee then we would want to add "referee," and just
13 let that turn on whatever we find out.

14 CHAIRMAN BABCOCK: How does everybody feel
15 about that? Richard, is that doable?

16 MR. ORSINGER: Sure. Absolutely.

17 CHAIRMAN BABCOCK: By you?

18 MR. ORSINGER: It's in the Family Code. I
19 don't practice juvenile law, but we could sure find it
20 out.

21 CHAIRMAN BABCOCK: But you're kind of a
22 family guy.

23 MR. ORSINGER: That's right. But Judge
24 Harris is a family law judge. He probably knows.

25 JUSTICE HECHT: Do -- I just don't know the

1 answer to this. Do county courts have associate judges or
2 masters or referees in jurisdictions where --

3 MR. SOULES: Yes.

4 JUSTICE HECHT: -- their jurisdiction is the
5 same as the district courts? El Paso, Corpus Christi.

6 HONORABLE TOM LAWRENCE: I think they
7 appoint hearing officers for condemnations.

8 MR. SOULES: We ought to take the word
9 "district" out. Courts look at cases --

10 MR. YELENOSKY: Well, is there a generic
11 term we could use for a description?

12 HON. F. SCOTT McCOWN: Yeah. Let's just say
13 "the court."

14 MR. SOULES: That's a good point.

15 CHAIRMAN BABCOCK: That would solve that
16 problem, wouldn't it? Everybody okay with taking
17 "district" out of (e)(8)?

18 HON. F. SCOTT McCOWN: Yeah.

19 MR. YELENOSKY: No, I was referring to the
20 term for master, etc. Is there a generic term there that
21 would encompass all the litany that we might get wrong or
22 might be under-inclusive with future changes?

23 HONORABLE SARAH DUNCAN: How about
24 "judge equivalent"?

25 MR. YELENOSKY: "Judge equivalent."

1 "Pseudo."

2 MR. EDWARDS: Who is it that appoints all
3 these people? Who is it that appoints them, and can we do
4 this in generic terms of people who make decisions
5 pursuant to appointment by whomever?

6 HON. F. SCOTT McCOWN: I think we have it
7 fixed if we adopt Luke's suggestion of just taking
8 "district" out because the only things there are are
9 associate judges, masters, and referees, if a referee --
10 if you don't have an absolute right to object to referee,
11 we can put that in. Commissioners, anything else, the
12 statute already has a procedure for qualifying and
13 disqualifying them.

14 CHAIRMAN BABCOCK: What's the difference
15 between a statutory master and just a regular old master?

16 HON. F. SCOTT McCOWN: Well, the difference
17 is that if you appoint a discovery master under
18 Rule 171 --

19 CHAIRMAN BABCOCK: Right.

20 HON. F. SCOTT McCOWN: -- that's different
21 than a 4(d) master appointed pursuant to a statute that
22 hears a large volume of cases, and there's already a way
23 under 171 to object to the appointment of a particular
24 master. What we're trying to cover here is regular
25 judicial officers.

1 MR. ORSINGER: I might point out also that
2 the regular judicial officers, these associate judges and
3 masters, they have permanent jobs. They are hired by the
4 county or the district or the state; whereas, a Rule 171
5 master is appointed by a judge to act in a particular
6 case.

7 HON. F. SCOTT McCOWN: Right.

8 MR. ORSINGER: And then when the case is
9 gone they're gone also.

10 CHAIRMAN BABCOCK: So where does that leave
11 us? Are we just going to check the Family Code and see
12 whether that ought to be included, and otherwise we're not
13 going to worry about it? Okay. Richard, can you do that?

14 MR. ORSINGER: Yes, I will do that.

15 CHAIRMAN BABCOCK: All right. Judge McCoy,
16 next.

17 HONORABLE ROBERT McCOY: Is 18 -- the
18 present 18b(6), "if a judge does not discover that he is
19 recused," and so forth and so on, "he is not required," is
20 that addressed in the revised rule?

21 CHAIRMAN BABCOCK: I believe it's supposed
22 to be.

23 MR. ORSINGER: It's supposed to be.

24 HONORABLE ROBERT McCOY: And the reason I
25 bring it up is because there's a mistake in there where it

1 refers to 2(f)(iii), should be 2(f)(ii).

2 MR. ORSINGER: Look at subdivision (d).
3 Subdivision (d) is I think our current rule effort to try
4 to address that.

5 HONORABLE ROBERT McCOY: Okay.

6 MR. ORSINGER: But, no, I mean, let's verify
7 that.

8 HONORABLE ROBERT McCOY: I see.

9 MR. ORSINGER: Because we had a
10 cross-reference problem in an earlier draft of this rule,
11 but I think (d)(7) has to do with financial interest of a
12 relative of the judge, and that is not a financial
13 interest of the judge that can be cured by failure to
14 realize it; but of a relative of a judge, that is curable
15 under these conditions, right, if they divest?

16 HON. F. SCOTT McCOWN: So what was the
17 question, Judge McCoy?

18 HONORABLE ROBERT McCOY: I think I was -- I
19 was assuring myself that 18b(6) is addressed in the
20 revisions, and it is in section (d).

21 CHAIRMAN BABCOCK: Okay. What's next?

22 HONORABLE ROBERT McCOY: My last
23 -- I guess last comment is that the purpose of what we'll
24 call Senator Harris' bill I believe was to limit the
25 number of recusals in a case to three, not against the

1 judge; and that is the kind of teeth that Judge Walker
2 feels and I feel is necessary to stop the use of the
3 recusal rule for purposes for which it is not designed.
4 So I just want to end with that comment.

5 CHAIRMAN BABCOCK: Okay. This is -- and
6 this is a really important issue, and I think that there
7 are some circumstances that Judges McCoy and Harris and
8 maybe now Judge Brown have faced that I don't think we
9 considered or we thought about when we were coming up with
10 this subsection (11) (b).

11 As I explained to Judge McCoy and Judge
12 Harris before we started this morning, our concern with
13 the statute is that it has the sort of -- if it's
14 interpreted to be just three motions, you get three
15 motions and if you lose the third then you get sanctioned,
16 it is particularly a problem in counties like Bexar and
17 Travis that have a rotating docket where you could win two
18 motions, have a close motion on the third one but lose it,
19 and then all of the sudden get sanctioned.

20 And the concern of our committee
21 collectively was that that's not fair and surely that's
22 not what we're trying to get at; and so that's why the
23 language is drafted in this proposed rule as it is; but
24 there's another side of the coin, and I wasn't aware until
25 Frank Gilstrap and I went to visit with Senator Harris

1 that the statute is really trying to get at a fairly
2 discrete but nevertheless serious problem; and, Judge
3 Harris and McCoy, maybe you could tell us your experiences
4 and what the problem is and then we'll see how we can fix
5 it.

6 HONORABLE WILLIAM HARRIS: Well, first, as
7 we discussed briefly this morning, I think that the
8 Senator's obvious intent under 30.016, Civil Practice and
9 Remedies, was to get at these litigants -- and we've
10 touched on them earlier today -- who use recusal motions
11 in an offensive manner with complete disregard for any
12 kind of sanctions or anything else. I think you made a
13 good point this morning, Chip, that with the rotating
14 dockets that they have in Austin and San Antonio perhaps
15 the Senator could look at changing the wording on this to
16 where after the denial of two previous motions -- in other
17 words, if you keep filing recusals and you keep
18 prevailing, it doesn't seem to me that, you know, that
19 would be proper.

20 If you recuse -- file a recusal, you have a
21 hearing, and you win the recusal hearing, that doesn't
22 seem like it would -- it would go in the spirit of recusal
23 and disqualifications, but I think that's a problem that
24 would have to be addressed by the Legislature; but
25 perhaps, you know, someone could write a letter to the

1 Senator or I could visit with him about it.

2 CHAIRMAN BABCOCK: Well, I think what --
3 there is a provision that allows the Court -- and I am not
4 sure of the mechanics of how it works, and maybe Justice
5 Hecht is -- that allows the Court by rule to overcome a
6 statute on a procedure such as this; and I think the
7 intent of everybody, including Senator Harris, was to try
8 to bring all these different things that we're concerned
9 about, some of which had nothing to do with the problem
10 that you're talking about, into one rule and avoid the
11 confusion that is potentially existing between a rule that
12 says one thing and then a statute that says another.

13 So there's an attempt to harmonize things,
14 so I think what we're trying to do here is address the
15 problem that you're talking about in a way that everybody
16 thinks is appropriate so we can recommend it to the Court.

17 Yeah, Judge McCoy.

18 HONORABLE ROBERT McCOY: I think that the
19 point of this statute was not to sanction lawyers and was
20 not to keep lawyers from filing recusals, but was to get
21 the case over with. After you file three motions to
22 recuse, the fourth one and all of the rest of them are
23 heard on appeal and do not stop the case from going
24 forward, and that's what's happening in disciplinary
25 cases.

1 If you're about to lose your law license,
2 you really don't care if you have to pay some attorneys
3 fees. You want to delay having this case heard for as
4 long as you can, and a way to do that is to recuse or try
5 to recuse every judge that's assigned to hear the case on
6 the merits or to hear the recusal of the judge to hear the
7 recusal of the judge on the merits and so forth. And so
8 the point of this was to stop that so that these cases can
9 be heard; and if there is a problem, there is a reason the
10 judge should have been recused, it's heard on appeal; but
11 we go ahead and get the case heard and behind us.

12 CHAIRMAN BABCOCK: Right.

13 HON. F. SCOTT McCOWN: What are you
14 suggesting? How would you do it?

15 CHAIRMAN BABCOCK: Scott, hang on, before we
16 get to that. I want to see if what we have done or what
17 we are proposing here solves that problem or not; and I'm
18 not sure what the answer is; but we've got this concept,
19 which I think is a very interesting concept of the interim
20 proceedings; and I'm afraid that even though the interim
21 proceedings work in a lot of situations, they may not work
22 in the problem you guys face. Judge Harris.

23 HONORABLE WILLIAM HARRIS: And I don't read
24 30.016 that way. I agree with Judge McCoy that all it
25 does is says that on your third or subsequent motion you

1 don't get to stop the train. You keep on going. The
2 motion is heard, and I don't think it's heard on appeal.
3 I think it's heard by the presiding judge or the judge
4 that's assigned. The only difference is none of your
5 rights in a recusal are prejudiced, and none of them are
6 changed in any way except that under this tertiary motion
7 law the trial continues.

8 And the tertiary recusal statute says
9 that -- let's just suppose that you've recused three
10 judges and I'm your fourth and you file a motion to recuse
11 me and I say, "This is a tertiary motion. I'm going to
12 decline to recuse myself. I'm going to forward it to the
13 administrative judge, and we are going to continue with
14 this trial." Well, obviously the administrative judge is
15 going to want to resolve this as quickly as possible. The
16 trial keeps going. I can still sign orders. I can still
17 set hearings. I can still receive evidence.

18 Your rights for recusal are not prejudiced
19 because when you go to Judge Walker and present your
20 evidence and he says, "You know, you're absolutely right.
21 Judge Harris should be recused in this case," at that
22 point under the terms of 30.016 all of the orders I've
23 made during this what you guys refer to as an interim
24 period are vacated, but the only difference is that your
25 draftsmanship here I think is a little bit better because

1 your draftsmanship says that these interim proceedings,
2 they can either vacate the orders made by the recused
3 judge or they can -- the new judge can affirm or I guess,
4 you know, restate those orders.

5 CHAIRMAN BABCOCK: Okay. There are two
6 things that are working in 30.016. 30.016. One is what
7 you just described. The other thing is sanctions. Let's
8 take the first issue first, and that is we don't want the
9 abusive litigant to be able to stop the trial.

10 HONORABLE WILLIAM HARRIS: And that's the
11 whole point. We have a -- there are two or three cases
12 I'm aware of. I'm intimately familiar with one of them,
13 as is Judge McCoy, and it's a case where literally there
14 are -- I think Judge McCoy was the fifth or sixth and I
15 was the sixth or seventh judge on a disciplinary matter,
16 and the pattern is always the same. A judge is assigned.
17 A motion to recuse that judge is filed. It states little
18 or no grounds.

19 The judge always does the correct thing,
20 declines to recuse himself, forwards the motion to the
21 administrative judge, at which time the administrative
22 judge appoints a judge to hear the recusal, at which time
23 the litigant recuses the judge appointed to hear the
24 recusal, at which time the administrative judge goes to,
25 in my case, Mr. Justice Phillips, at which time the

1 litigant recuses Mr. Justice Phillips, and it's just sort
2 of an on and on thing.

3 And if you allow this, if you don't have
4 something to keep the ball rolling, you -- like Judge
5 McCoy said before, you give an unscrupulous litigant the
6 ability to absolutely stop a civil proceeding; and if
7 there's nothing -- if there's no way to go forward with
8 it, it's a real strange little loophole that a couple of
9 people, particularly in the disciplinary realm, have come
10 across, and they have been using it to great advantage.
11 There is one that I'm aware of that the case has been
12 pending for about three and a half years.

13 CHAIRMAN BABCOCK: Yeah. Richard, hang on
14 for just one second. There are two concepts at work here.
15 Our interim proceeding rule as drafted now is tied to
16 timing. In other words, if it doesn't make the ten-day
17 cutoff, then our interim proceeding procedure kicks in.
18 This statute and the situation you describe is not
19 necessarily time-sensitive. What it is is just
20 multiplicity of motions.

21 HONORABLE WILLIAM HARRIS: Exactly.

22 CHAIRMAN BABCOCK: So it seems to me to
23 solve the problem you-all describe, our remedy is fine.
24 It's consistent with 30.016. So we've got to -- if we're
25 going to harmonize these two provisions we've got to come

1 up with language that allows interim proceedings when
2 there have been multiple motions under the circumstances
3 that you describe without penalizing legitimate litigants
4 who are in the Bexar County or the Travis County system
5 who may have multiple motions, but that's because they
6 have multiple judges all the time. Richard.

7 MR. ORSINGER: We have the interim
8 proceedings in a multiple motion case, and it is ground
9 one under paragraph (4) which cross-refers to (e)(11)(b),
10 so the condition for the interim proceeding based on
11 multiple motions turns on what's on (e)(11)(b).

12 It's when someone is sanctioned under
13 (e)(11)(b) and they file a subsequent motion, then the
14 interim proceedings continue. We are coupling the interim
15 proceedings and the multiple motion case with the
16 imposition of sanctions. We don't have to do that.

17 Theoretically, the way this rule might work
18 is that by the time you have denied three motions and the
19 fourth one is denied -- or in denying the third or
20 subsequent motion, so when the third one is denied they
21 are required to grant sanctions. The interim proceeding
22 will only overcome the fourth motion. So in a sense it
23 takes four motions before the interim proceeding goes
24 rather than three. But that would probably unfairly
25 penalize someone in Austin or San Antonio who had three

1 legitimate motions against three different judges that
2 were all assigned.

3 Maybe we should uncouple the interim
4 proceeding from parallel motions from the imposition of
5 sanctions and just say by the time you've had three
6 recusals, granted or denied, the fourth one, you're going
7 to have to argue on appeal and not through our recusal
8 process.

9 CHAIRMAN BABCOCK: By "argue on appeal," do
10 you mean interim proceedings?

11 MR. ORSINGER: I don't. I think what
12 they're talking about is you try the case on the merits,
13 and your only remedy is to go to the court of appeals and
14 not to --

15 HONORABLE WILLIAM HARRIS: No.

16 MR. ORSINGER: -- go to the presiding
17 administrative judge.

18 HONORABLE WILLIAM HARRIS: I disagree.

19 MR. ORSINGER: What are you saying?

20 HONORABLE WILLIAM HARRIS: I think that what
21 30.016 says is that your hearing -- you're going to
22 continue the trial, the trial that forms the basis of the
23 recusal, but you're not going to be precluded from
24 pursuing recusal while this case is in trial.

25 HONORABLE ROBERT McCOY: I respectfully

1 disagree with my brother here. I think what it says, it's
2 just an appellate point. That last recusal which was
3 denied is just an appellate point that you have. I mean,
4 30.016 says, "The denial of this recusal shall be heard on
5 appeal," or whatever. It's just another appellate point.
6 You aren't denied the right to file it. It's just that
7 you don't get to stop the train by having it heard now.
8 That's a point that you could be heard on appeal, and if
9 it's reversed, you redo the trial on the merits, because
10 that judge should not have heard the case.

11 MR. SOULES: Judge McCoy, my question to
12 you, if it's only -- if it's only something that can be
13 decided on appeal, what record does the appellate court
14 look at if there hasn't been a trial court proceeding to
15 develop the evidence or to develop the merits of the
16 motion to recuse.

17 HONORABLE ROBERT McCOY: That's why the
18 motion has to be specific, setting out all grounds.

19 MR. SOULES: But it may be false.

20 MR. ORSINGER: You need to have a fact
21 hearing.

22 HONORABLE WILLIAM HARRIS: That's why I
23 interpret section (d) where it says "the denial of a
24 tertiary recusal motion," to me that necessarily says that
25 the presiding judge has to hear the motion while the case

1 is still before the judge whose recusal is sought because
2 there can't be a denial of the tertiary motion in my
3 opinion without a hearing before the presiding judge.

4 CHAIRMAN BABCOCK: Scott.

5 HON. F. SCOTT McCOWN: I have a proposal.
6 If you look at (11)(b), we really don't need (11)(b) for
7 sanctions because (11)(a) gives the judge all the sanction
8 authority the judge needs. What we need in (11)(b) is --
9 is to solve the problem raised by Judge McCoy, Judge
10 Harris, or, excuse me, Senator Harris originally on the
11 tertiary motion, which applies, as they point out, not to
12 a particular judge but in a case and applies whether it's
13 granted or whether it's denied.

14 And so what I propose is that we change or
15 delete (b) entirely and substitute the following language:
16 "When a party files a third motion to recuse, the judge
17 hearing the recusal motion may order, when appropriate,
18 that the proceeding shall continue unabated while the
19 pending recusal motion and any subsequent recusal motions
20 are considered."

21 So let me explain how that would work and go
22 over it again. We're just going to assume that the law of
23 averages doesn't visit on one case three really good
24 recusals, and when you get -- when you file that third
25 recusal motion, regardless of whether your other two were

1 granted or denied, the judge who's hearing that third
2 recusal motion can look at -- and this would vest some
3 discretion in the recusal judge -- can look at the nature
4 of the case, can look at the nature of the motions that
5 have been filed and the motion in front of him, and the
6 judge can say, regardless of whether he grants or denies
7 that motion, that this case is going to go forward
8 unabated while this motion and any subsequent recusal
9 motions in the case are litigated, and that creates then
10 the record for appeal that Luke pointed out we have to
11 have, but just says as a matter of discretion the recusal
12 judge can say, "We ain't stopping anymore. This is your
13 third one. We're not stopping anymore."

14 HONORABLE JAN PATTERSON: And where are you
15 recommending that be placed?

16 HON. F. SCOTT McCOWN: Well, we could place
17 it --

18 MR. ORSINGER: It needs to be in (4), Scott.
19 It has nothing to do with sanctions.

20 MR. SOULES: Why don't we take that first
21 clause, the clause, "Denial of three or more motions filed
22 in the case against a judge on this rule by the same
23 party" and put it under "4," under "interim proceedings"
24 and make it a new way that you go and do that.

25 CHAIRMAN BABCOCK: Hang on. Judge Harris

1 had a point on this.

2 HONORABLE WILLIAM HARRIS: Am I to
3 understand Judge McCown to say that if the recusal is
4 filed, whether it's the 3rd or the 18th or whatever, that
5 it's still -- the presiding judge has to make that
6 decision that the case can go on?

7 MR. SOULES: No.

8 MR. ORSINGER: Yes.

9 HON. F. SCOTT McCOWN: Well, it would be the
10 recusal judge.

11 MR. ORSINGER: Yes, that's what he's saying.

12 HONORABLE WILLIAM HARRIS: Because if we do
13 that, your Honor, what happens is this: The litigant
14 comes to court on the day of trial, and he's been turned
15 down on his -- he's had a hearing on his 15th motion to
16 recuse, and on the day of trial he appears at the trial
17 with the jury in the courtroom with his 16th motion to
18 recuse, and at that point he stops the trial.

19 HON. F. SCOTT McCOWN: Not under my rule.

20 HONORABLE WILLIAM HARRIS: Okay.

21 MR. ORSINGER: No. It would stop it long
22 enough to get the recusal judge in.

23 HON. F. SCOTT McCOWN: No. No, it wouldn't.

24 MR. SOULES: If you move --

25 HON. F. SCOTT McCOWN: Because it would be

1 under our interim proceedings under (4).

2 MR. SOULES: If you just move that (11)(b)
3 to interim proceedings, (4), and you only use the first
4 words of it, "Upon denial of three motions filed in a
5 case against a judge or under this rule by the same
6 party," then the interim proceeding rule would take --
7 would allow the court to proceed if there had been three
8 motions denied before.

9 HON. F. SCOTT McCOWN: Okay. But, no. See,
10 I'm saying something different, Luke.

11 MR. SOULES: Period.

12 HON. F. SCOTT McCOWN: I'm saying something
13 different.

14 MR. SOULES: I know you are.

15 HON. F. SCOTT McCOWN: Okay.

16 MR. ORSINGER: Judge Harris is saying even
17 if they were granted. I mean, aren't you saying even if
18 they were granted?

19 MR. SOULES: No. No.

20 HON. F. SCOTT McCOWN: Well, wait. The
21 first thing you have to get by is it's not against one
22 judge. It's in the case, period, and then it's whether
23 they are good or bad. There's two decisions to make
24 there, and what I'm saying is I can understand people not
25 wanting to penalize somebody for a good motion. So I

1 would say give the recusal judge discretion to look over
2 those earlier motions and make a decision, given the
3 nature of the case, whether it needs to go forward
4 regardless.

5 MR. SOULES: But under (4) the trial judge
6 goes forward. He doesn't have to go back to the presiding
7 judge, and that I think is Judge Harris' issue, that if he
8 wants to go forward with the case, he doesn't want to have
9 to interrupt it at all, if he's wrong about the -- you're
10 probably going to listen to what the fellow has to say
11 about recusal, and you probably are going to -- at least
12 you're going to read that motion. if you think you're
13 going to be recused, why waste the time of having a trial?

14 HONORABLE WILLIAM HARRIS: Exactly, and --

15 MR. SOULES: But if it's the 16th motion or
16 it's the 4th motion, three have been denied, you think
17 it's groundless, and you go forward, or whatever you think
18 you can go forward.

19 HONORABLE WILLIAM HARRIS: Whether I think
20 it's groundless or not.

21 MR. SOULES: You're probably not going to go
22 forward if you think it's a good motion, and (4) is the
23 trial judge himself going forward without worrying about
24 going to the presiding judge. He sends the papers to the
25 presiding judge for a parallel proceeding.

1 HONORABLE WILLIAM HARRIS: Exactly.

2 MR. SOULES: But the trial judge conducts
3 the trial, and what I'm proposing is that we just have a
4 third ground for permitting interim proceedings and that
5 be "Upon the denial of three or more motions filed in a
6 case" -- I don't care whether it's against the same judge
7 -- "under this rule by the same party."

8 HON. F. SCOTT McCOWN: I agree with Luke.
9 You've convinced me.

10 MR. SOULES: Once you get to the fourth
11 motion, the trial judge can go forward.

12 HON. F. SCOTT McCOWN: You've convinced me.

13 CHAIRMAN BABCOCK: Judge Brown.

14 MR. HAMILTON: Actually, Luke, doesn't that
15 just replace the (a)?

16 MR. SOULES: No, because -- well, I don't
17 know. I guess it would.

18 HONORABLE ROBERT McCOY: I think it's very
19 important that you not put in "against a judge," and it's
20 just if three motions to recuse have been denied in a
21 case.

22 MR. LOW: Right. Right.

23 MR. ORSINGER: Yeah.

24 HONORABLE ROBERT McCOY: Because otherwise
25 you're not stopping anything from halting the train.

1 MR. ORSINGER: And I would argue against
2 replacing (a) because (a) is --

3 CHAIRMAN BABCOCK: Hold it, guys. Judge
4 Brown has been very patiently holding his hand up, so
5 Judge Brown.

6 HONORABLE HARVEY BROWN: Well, two points.

7 CHAIRMAN BABCOCK: As opposed to you,
8 Richard.

9 HONORABLE HARVEY BROWN: Allowing interim
10 proceedings, it seems to me, cannot include a judgment
11 because if the judge enters a judgment we're soon not
12 going to have a record on appeal, so we need to think
13 about the issue -- maybe they can do everything up to
14 signing a judgment but not entering a judgment, because
15 otherwise there will be no record to appeal from a
16 recusal.

17 The second thing, to me it seems like we
18 should have a more radical remedy, and that is by using by
19 analogy the Vexatious Litigation Statute that has come
20 out, and so I would say we should have something like the
21 first clause and then say, "The judge denying the third or
22 subsequent motion may enter an order enjoining a party
23 from filing any additional motions except with permission
24 of the court," which essentially -- and it's not the court
25 -- the Vexatious Litigation Statute right now says you

1 have to go to the regional director or to the presiding
2 judge, but they have to come get permission basically to
3 file it.

4 That way you don't have your 16 motions,
5 and, you know, one thing we're ignoring by sanctions, it's
6 not just attorneys. It's all the court time spent on this
7 16 courts looking at this. So I think we should preclude
8 them from doing that, and they have lost their --

9 HON. F. SCOTT McCOWN: But there won't be 16
10 anymore because on the third one --

11 CHAIRMAN BABCOCK: The trial is going
12 forward.

13 HON. F. SCOTT McCOWN: The trial is going
14 forward.

15 HONORABLE HARVEY BROWN: But they may still
16 keep filing them.

17 CHAIRMAN BABCOCK: Skip Watson.

18 MR. WATSON: I just want to make sure that
19 Luke's proposal addresses the problems raised by Judges
20 McCoy and Harris. It sounds like we're assuming that the
21 third bad motion is against the same judge or a different
22 trial judge; but the example that got my attention was
23 where the third bad motion is against Chief Justice
24 Phillips deciding who should be hearing the recusal; and
25 if it's worded that the trial goes forward then we just

1 have undone everything because the first recusal may have
2 been good, you see; but we're saying now because you had
3 three denied going up the train of deciding who is going
4 to decide whether the first recusal is good, in fact, the
5 neutral to decide whether the first recusal is good, you
6 lose all three strikes and the trial goes forward.

7 I think we need to make it clear that the
8 recusal goes forward, but the trial is still stopped. The
9 trial is stopped until the initial recusal is decided by a
10 proper judge to hear it. Does that make any sense?

11 HONORABLE WILLIAM HARRIS: Yeah.

12 HON. F. SCOTT McCOWN: No.

13 MR. YELENOSKY: Well, actually, I had the
14 same concern. I don't know the answer, but do we mean
15 that if we went up the chain, okay, you've had your third,
16 then the trial goes forward even though there hasn't been
17 any decision?

18 MR. WATSON: There's been no decision, no
19 appeal.

20 MR. YELENOSKY: Three have been filed.
21 There's been no decision at all on any of them. Do we
22 mean that that trial goes forward, and if so, before whom?

23 CHAIRMAN BABCOCK: But keep in mind the
24 statute doesn't talk about winners or losers. I mean, the
25 statute just says "three motions."

1 HON. F. SCOTT McCOWN: Well, wait. I don't
2 think it can work the way they have just said, and let me
3 go -- I think I have got Luke's idea in some language.

4 If you look at interim proceedings,
5 subdivision (4), let's say there's been one motion to
6 recuse filed, but it doesn't fit inside subdivision (4).
7 The proceedings stop. That motion to recuse has been
8 ruled on. It's been granted or it's been denied.

9 Now you have a second motion. Well, that
10 second motion doesn't come within interim proceedings
11 either, so it's been ruled on. It's been granted or
12 denied. So now you have a third motion. You're in a
13 disciplinary proceeding. The Bar is going against a
14 lawyer. He makes his third motion to recuse.

15 If you took Luke's idea, what "Interim
16 Proceedings" would say was you would refer the motion to
17 the presiding judge. So the motion would go on and be
18 heard through our normal procedure, a record would be
19 created, but you would go forward under a third exception.
20 We've got two exceptions now. There would be a third
21 exception, which would read, "when the motion is the third
22 motion to recuse filed in the case by a party."

23 MR. SOULES: "Fourth."

24 HON. F. SCOTT McCOWN: You want to make it
25 the fourth?

1 MR. SOULES: Well, that's what our rule is
2 right now. You've got to have denial of three before you
3 would run into sanctions.

4 HON. F. SCOTT McCOWN: Well, this would be
5 denial or granted, is what I would say.

6 MR. SOULES: Oh, no.

7 HON. F. SCOTT McCOWN: If it's your fourth
8 motion to recuse, you can go forward.

9 CHAIRMAN BABCOCK: Well, let's be faithful
10 to the statute. The statute says "third or subsequent
11 motion," so...

12 HON. F. SCOTT McCOWN: All right. Third.
13 And it doesn't say denied or granted, or does it?

14 CHAIRMAN BABCOCK: Does not.

15 HON. F. SCOTT McCOWN: So, Luke, I can see
16 your point. If you've won a few, why should you be
17 penalized, but all this would be saying is if it's your
18 third motion to recuse, the judge may go forward. He
19 doesn't have to. He could make a discretionary decision
20 that it's a good motion or a close motion or you shouldn't
21 be penalized or whatever, but he could also make a
22 discretionary decision that, yeah, you won a few, but they
23 were probably BS and you have lost a few and it's a very
24 important case and you're just trying to evade discipline.
25 And you're not being denied your hearing. You're going to

1 get it, and if you win, everything he does could be set
2 aside, but he's going to go forward.

3 CHAIRMAN BABCOCK: Judge Harris.

4 HONORABLE WILLIAM HARRIS: I still think
5 that requires the judge that sits on the recusal to make
6 findings, and I think that's improper. I think that
7 the -- if the judge whose recusal is sought gets a motion
8 that, you know, for whatever procedural remedy you guys
9 fashion, it needs to be handled just exactly as a first
10 recusal motion. Look at it, say, "There are grounds, I
11 therefore recuse myself," or say, "There are no stated
12 grounds, and I therefore decline to recuse myself and
13 forward this to you, Mr. Administrative Judge," along with
14 any accompanying -- you know, just the language of the
15 statute, but on the ones where the proceedings go forward,
16 not make findings, not do anything except just continue
17 the trial.

18 HON. F. SCOTT McCOWN: That's what this
19 would provide.

20 HONORABLE WILLIAM HARRIS: And pretend --
21 put on the blinders, pretend there has been no motion
22 filed whatsoever. When the administrative judge calls me
23 and says, "Judge Harris, the recusal motion is a good one,
24 and you are recused," at that point walk off.

25 HON. F. SCOTT McCOWN: Okay. I think that's

1 what I just proposed. If you look at subdivision (4),
2 "Interim Proceedings," "after referring the motion to the
3 presiding judge," so that's what you do. You refer it to
4 the presiding judge, but you're authorized to go forward
5 under a third exception when the motion is the third
6 motion to recuse that's been filed in the case by the same
7 party. So I think I am proposing what you just sketched
8 out.

9 CHAIRMAN BABCOCK: Justice Hecht.

10 JUSTICE HECHT: But it would also apply to
11 the other circumstance where you have in essence vertical
12 motions, so that if you moved to recuse the trial judge,
13 it's the first motion, he sends it to the regional
14 presiding judge, who assigns a judge to hear it. The
15 party moves to recuse that judge. That goes to Chief
16 Justice Phillips. The party then moves to recuse the
17 Chief Justice. He's back in the trial court, and you're
18 ready to go forward at the discretion of --

19 HON. F. SCOTT McCOWN: The judge.

20 JUSTICE HECHT: The trial judge.

21 MR. YELENOSKY: Which trial court?

22 JUSTICE HECHT: The original trial court.

23 MR. CHAPMAN: That's the problem I see, that
24 you're bringing it back to the same judge that there may
25 have been a good motion to recuse.

1 JUSTICE HECHT: Well, but if he's chancing
2 enough to move to recuse the Chief Justice of Texas and
3 just -- that's just one of the risks. I mean, what are
4 the chances that the Chief Justice is going to be recused
5 from assigning a judge to hear the recusal motion? The
6 chances of that are just almost zero, I would think.

7 MR. CHAPMAN: Well, but what about the
8 nonvertical situation? In the vertical situation I
9 understand that, but if it's a situation where, in fact,
10 the party has a good basis for the motion in the first
11 instance and because of the circumstance ends up with
12 three motions? In order to solve the problem for the
13 unscrupulous, we are really causing a problem for the
14 litigant that brings the good motion. But that's the
15 concern I have.

16 CHAIRMAN BABCOCK: Luke.

17 MR. SOULES: Well, I think given what
18 Justice Hecht just said here, that would not be my
19 understanding of what should take place, that the third
20 motion challenging Judge Phillips triggers the viability
21 of the original trial judge to go forward. It seems to me
22 like what we ought to do is change in the very first part
23 of the interim proceeding and say, "The judge may proceed
24 with the trial or hearing" instead of "the case." "As
25 though no motion had been filed."

1 That would enable, of course, Judge
2 Phillips to proceed with the recusal hearing to recuse or
3 not recuse the recusal judge, but it would not empower the
4 originally challenged trial judge to go to trial, and I
5 think all we really need to fix is just the series of
6 recusals stops someplace so that there can be a recusal
7 hearing, and then Judge Phillips can say the recusal judge
8 is not disqualified. The recusal judge can say, "The
9 trial judge is not disqualified, so go to trial," and so I
10 don't think we ought to leave it vague as to whether or
11 not the trial judge could tee up a jury case just because
12 Judge Phillips has been challenged.

13 CHAIRMAN BABCOCK: Richard.

14 MR. ORSINGER: We started drafting and then
15 backed off of any recusal procedures in the trial rules
16 relative to the Supreme Court. We started to draft
17 procedures of what would happen if somebody tried to
18 recuse the presiding administrative judge before they made
19 an assignment or the recusal judge who received the
20 assignment or the Chief Justice who was picking a
21 replacement for the presiding judge who had been recused.

22 We don't actually acknowledge that
23 procedure, if I am not mistaken. And so we're talking now
24 about imposing a sanction for someone doing something that
25 we don't say they can do, and I think that there is some

1 wisdom in not recognizing that you have a procedure called
2 recusing the presiding administrative judge or recusing
3 the judge who was assigned or recusing the Chief Justice
4 of the Texas Supreme Court. When we discussed this
5 initially we were afraid it might invite pro se litigants
6 to do it when it might not otherwise occur to them, and so
7 if we are going to weave the vertical recusals into our
8 parallel proceeding and our sanction rule, we're
9 implicitly overturning our prior decision not to provide
10 procedures for those events.

11 HON. F. SCOTT McCOWN: Could I --

12 CHAIRMAN BABCOCK: Could I ask just one
13 question, Scott?

14 HON. F. SCOTT McCOWN: Okay.

15 CHAIRMAN BABCOCK: The vertical recusal, is
16 that covered by the statute?

17 MR. ORSINGER: It says "tertiary," and no
18 one really knows. "Tertiary" isn't defined.

19 CHAIRMAN BABCOCK: Well, but it also says
20 "filed against a district court, statutory probate court,
21 or statutory county court judge."

22 MR. HAMILTON: It doesn't include the
23 Supreme Court.

24 CHAIRMAN BABCOCK: No, it doesn't.

25 MR. ORSINGER: Well, but does it include a

1 district judge who is assigned to hear your recusal
2 motion, and does it apply to a presiding administrative
3 judge who assigns somebody to hear the recusal motion?

4 CHAIRMAN BABCOCK: Well, it doesn't say
5 that, but maybe it does.

6 MR. ORSINGER: Doesn't it say that? It may
7 not say the Chief Justice of the Texas Supreme Court, but
8 if you --

9 CHAIRMAN BABCOCK: It says "a district
10 court, statutory probate court, or statutory county court
11 judge."

12 MR. WATSON: So the tertiary statute is --

13 MR. SOULES: But the court does -- that's
14 who they send, is another district court judge to hear a
15 district court recusal. I think it's covered.

16 JUSTICE HECHT: When Senator Harris proposed
17 this legislation we did have some brief conversation with
18 his staff about whether it included, if you will,
19 horizontal motions or vertical motions or both, because
20 you don't ever get to the Chief Justice if you keep
21 recusing the recusal judge; but then to get around that,
22 the regional judge says, "Okay, well, then I will assign
23 myself," and then if you move to recuse him then that's
24 when you have to go to the Chief Justice.

25 HON. F. SCOTT McCOWN: Could I point out,

1 just empirically, we know that we have got some people who
2 don't want to go to trial and will file multiple recusal
3 motions in an effort to stop that. That's the evil that
4 we know exists and that we're trying to write a rule to
5 prevent. Does anybody really think that there is going to
6 be very many occasions when a truly worthy, innocent party
7 is going to find themselves in front of three judges for
8 whom they have got a good ground for recusal and that that
9 third judge is going to be so venal that he's going to go
10 forward with the trial anyway and that the guy is going to
11 lose and that the recusal procedure is not going to
12 ultimately vindicate him?

13 That seems to me to be such an unlikely
14 scenario that we're trying to guard against that we ought
15 to just be able to say when it's the third motion to
16 recuse filed in a case by the same party, that the trial
17 judge can exercise discretion to go forward. We'll still
18 have the recusal procedure, and if ultimately the recusal
19 is found to be valid, we'll have to back up and do it
20 again.

21 MR. SOULES: Well, that's a compromise that
22 I was getting to with my motion. I think if you're --
23 you've got a good grounds to go against a judge for
24 recusal you probably should be able to stop everything,
25 every time, but that's probably unrealistic. So if it's

1 the third motion by the same party in the same case and
2 you still get a hearing on the recusal and you can still
3 develop your record, perhaps it is post-judgment, but
4 you're either going to have an appellate point that you
5 weren't given the opportunity during the trial court's
6 plenary jurisdiction to develop the record, in which event
7 there should be a remand at least for that.

8 Or you weren't given the opportunity 'til
9 later, but there is the record while the trial court had
10 plenary power, even if it's after judgment. I think
11 someone made that point, and you have a record that -- you
12 know, that's probably enough due process, and my
13 experience has been that once the trial judge has been
14 recused ordinarily there's some pretty careful
15 consideration given to who replaces that judge for
16 purposes of the trial.

17 So you've got one additional chance, if a
18 judge is assigned to replace the original judge that you
19 can't live with because the judge is recused or should be
20 recused. Now you're to the third time, and you've got
21 reasonable judges making the appointments, and I think
22 there is enough protection there to just go ahead and say
23 the trial judge can proceed or the recusal judge can
24 proceed or Chief Justice can proceed if this is the third
25 motion, but they proceed with what is on their plate. The

1 third -- on the plate of the judge who is the subject of
2 the third motion. They don't proceed and cascade back to
3 the trial judge to start the trial.

4 MR. CHAPMAN: Yes. I think that's what --

5 MR. SOULES: And I think that's enough. I
6 think that takes care of our problems.

7 CHAIRMAN BABCOCK: Stephen.

8 MR. YELENOSKY: Well, what about -- I think
9 we do have to look at the vertical aspect or we're not
10 getting at the problems that Judge McCoy and Harris have
11 brought out, but what about --

12 MR. SOULES: I thought we were.

13 MR. YELENOSKY: Well, I know, but Richard
14 was suggesting that maybe we not look at that, but what
15 about saying that recusal at the vertical level never
16 stops the trial from going forward because you could
17 still -- I mean, if you recuse, it's denied, it goes to
18 the administrative judge, he assigns another judge, you
19 could still move to recuse that second trial judge, right?
20 So that's two, but your recusal of the administrative
21 judge itself wouldn't stop the trial.

22 MR. SOULES: That's the third time, and it
23 wouldn't stop.

24 MR. YELENOSKY: Well, no, I'm suggesting
25 something different.

1 MR. SOULES: Oh, okay.

2 MR. YELENOSKY: Which is that you just count
3 recusals against the trial judges. On the third recusal
4 against a trial judge then you have the interim proceeding
5 that goes forward and say that recusals of the
6 administrative judge or the Chief Justice don't in
7 themselves stop the proceeding from going forward.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Two things. First of all,
10 are we trying to draft a rule that implements the statute,
11 or are we just using that as a guideline, because a lot of
12 these comments are way beyond what's in the statute?

13 CHAIRMAN BABCOCK: Yeah. I think we're
14 doing two things. We're trying to cure the problem the
15 statute was intended to cure, but we're also trying to be
16 more comprehensive in our treatment.

17 MR. HAMILTON: I mean, if we come up with
18 something that Senator Harris isn't going to consider that
19 as changing the statute or whatever?

20 CHAIRMAN BABCOCK: Senator Harris is
21 supportive of our effort to try to come up with a
22 comprehensive recusal rule as long as we take care of the
23 problems that originally led to his suggestion of the
24 statute. Judge McCoy, is that fair to say?

25 HONORABLE ROBERT McCOY: The burr under the

1 saddle was a vertical case.

2 MR. SOULES: Well, does that take care of it
3 if the third one is -- if you file a motion to recuse the
4 trial judge that's timely filed, you get a recusal judge
5 appointed, file a motion to recuse the recusal judge
6 that's timely filed. That's two. Now you've stopped both
7 of those, but whenever you've filed a motion to recuse the
8 presiding judge of the region from coming down or sending
9 somebody else, that judge can go forward with the recusal
10 process.

11 HONORABLE ROBERT McCOY: But does your
12 method come all the way back down to the trial court?
13 Let's just say we went through Phillips in your example.
14 If Phillips can go ahead and rule on the recusal of the
15 presiding judge, can the presiding judge then go ahead and
16 rule on the original --

17 MR. SOULES: Yes.

18 HONORABLE ROBERT McCOY: And then come on
19 down and he can rule on the trial judge.

20 MR. SOULES: But because of the consequences
21 of the downward streaming rulings Phillips says the
22 regional judge is not disqualified or recused. So that
23 empowers that judge to act. That judge says the recusal
24 judge is not and then --

25 HON. F. SCOTT McCOWN: Well, okay, but the

1 problem with that, Luke, the reason that doesn't quite get
2 at the evil that's being supposed is because it works
3 vertically in a single recusal proceeding, but it doesn't
4 do anything about the next recusal proceeding. So let's
5 say that you cascade back down --

6 MR. SOULES: Well, that's the fifth. That's
7 the fifth. That judge can go to trial. That's the fifth
8 in the same case. You've had all these motions
9 vertically. Now you're back down, and say the trial judge
10 gets recused by the recusal judge. New judge is assigned.
11 That next motion is the fifth motion. The replacement
12 judge can go to trial.

13 HON. F. SCOTT McCOWN: Okay. So what's your
14 language that you're proposing?

15 CHAIRMAN BABCOCK: Let me suggest this, if
16 you can do it, Scott, because I know you've got to be in
17 court at some point. Over the lunch hour could I ask
18 Judge McCoy and Judge Harris, if you want, Judge McCown,
19 Luke, and either Carl or Richard to get language for us?
20 And I think that we've got -- conceptually we're pretty
21 much there. We're going to substitute something in
22 (4)(a). I think it's really a substitution more than a
23 (4)(c), though, and we're going to delete (11)(b); and if
24 we do that and maybe come back with some language right
25 after lunch, Judges McCoy and Harris, if you can stay over

1 the lunch hour to accomplish that, and then we will talk
2 about it --

3 HON. F. SCOTT McCOWN: Lunch is free, so...

4 CHAIRMAN BABCOCK: Lunch is free. There is
5 such a thing as a free lunch here. Richard, is that okay
6 with you?

7 MR. ORSINGER: I'd like to say something
8 before you recess.

9 MR. HAMILTON: I would, too.

10 CHAIRMAN BABCOCK: Well, we're not going to
11 recess, but we have another guest here that I want to try
12 to get in before lunch, so --

13 MR. ORSINGER: I would like to say something
14 before we go about the drafting because --

15 CHAIRMAN BABCOCK: Okay. Say your piece.

16 MR. ORSINGER: We have previously only
17 written about the trial going forward, and under Luke's
18 discussion we're talking about a rule saying that the
19 recusal process will go forward, so it's going to require
20 us to go into new territory, which is about the recusal
21 process itself is not stayed.

22 CHAIRMAN BABCOCK: Luke doesn't think so.

23 MR. ORSINGER: Secondly, under the sanction
24 rule of (11), there's still legitimate reasons to require
25 a sanction of someone who has lost three motions. I don't

1 think we ought to throw that out, but I think we should
2 quit using that as the trigger for when we have an interim
3 proceeding.

4 CHAIRMAN BABCOCK: That's agreed, I think,
5 by most everybody. Okay. So let's do that, okay, over
6 lunch and then right after lunch we'll see -- I'm sure you
7 guys will have perfect language, it will take two minutes
8 to unanimously pass. Now, before lunch we've got about
9 five minutes. We have --

10 (Off the record discussion.)

11 CHAIRMAN BABCOCK: Well, I'm just informed
12 that the free lunch won't be here until 1:00.

13 HON. F. SCOTT McCOWN: I would not have come
14 today if I had known that.

15 CHAIRMAN BABCOCK: That is a serious
16 problem. Well, we'll deal with that in a second.

17 Mr. Steves, I know you're here wanting to
18 talk about a different rule, and we want to be respectful
19 of your time. How long do you want to take addressing us
20 about Rule 3(a)(5)?

21 MR. STEVES: About three minutes.

22 CHAIRMAN BABCOCK: Okay. We're moving off
23 of recusal onto Rule 3(a)(5), which is an agenda item for
24 Saturday, but Sterling Steves could only be here today.

25 MR. STEVES: Thank you, Mr. Chairman. I

1 will be very quick about this because this is a really
2 simple matter. You know, when I've ever filed a motion to
3 recuse a judge I figured I had to take the feathers of the
4 chicken and so did he, but I want to congratulate the
5 committee on what you've done in the past. Particularly,
6 the rules pertaining to discovery have been very good. It
7 has been very nice to shut other lawyers up during the
8 deposition.

9 I have had a great deal of experience with
10 Rule 3, probably as much as anybody around, and that's the
11 reason that I have been communicating with them, and this
12 year I took back over the colation of the rules book, the
13 local rules in the district courts in Texas at the request
14 of Mathew Bender and LEXIS. Years ago when I first
15 started this book I was complaining to Joe Greenhill about
16 the fact that I could not get the local clerks to respond
17 to my requests to send me a copy of their local rules, and
18 he said, "Well, you know they don't respond to us either."

19 But it is a problem, and that is the number
20 that is getting the district clerks to respond to a
21 request for a copy of the local rules. I have
22 communicated with every district clerk in this state, and
23 the issue of -- the last issue of my book that has come
24 out is a completely updated version or updated copy of all
25 the local rules. We had to really work hard doing it to

1 get it. We wrote up to five letters to get them to the
2 clerks and then as we didn't get them from the clerks, we
3 would telephone and try and get them, a number of calls,
4 this, that, and the other.

5 We got all kind of responses from the
6 clerks, and some of them are, well, like in Tarrant County
7 the clerk said, "You can come down here and pick it up if
8 you want to," but the others say, "Well, we want to charge
9 you a fee of whatever" and then it varies from county to
10 county. Others say that they are on the website and you
11 can get it there, but in some counties like McKinney you
12 have got some judges have their rules on -- their rules
13 you can obtain by -- on a website, but the rest of them in
14 that county you can't.

15 So -- and probably the long term is that
16 people will get it on the website, and it may resolve
17 itself over a period of five years. I don't know. But
18 I've found that since I wrote all these people and tried
19 to get the rules that I think that I'm having the
20 identical problem that any lawyer would have in any county
21 trying to get the rules, and they simply do not respond,
22 and I suggested in a letter to my old friend Carl
23 Hamilton. Hi, Carl. I haven't seen Carl in a long time.
24 He and John Estes and I had a case in Laredo years ago we
25 thought would never end, but it did finally.

1 But what we're suggesting is what I'm urging
2 the committee do, is make some requirement on the district
3 clerk to respond and send a copy of the local rules,
4 postage prepaid, to the lawyer requesting it within a
5 period of time. I suggested ten days. Now, I don't think
6 that's an onerous thing, but some say, "Well, we don't
7 want to waste the postage," and "We don't want to do
8 this," and so forth; but getting them to respond to this
9 is a difficult thing; and this is a problem that all
10 lawyers are going to have trying to get a copy of the
11 out-of-town rules of the district court.

12 The reason I first started this book years
13 ago was because I couldn't get the -- I was unaware of
14 local rules in Taylor County in Abilene and almost got
15 sandbagged just before trial, and Bob Pickett, who was my
16 co-counsel that told me on Wednesday I had to have
17 everything heard or I waived it before the trial on
18 Monday, so I had to get out to Abilene quickly and have a
19 hearing on my motion, including motion in limine. So I
20 would urge the consideration of the committee to put
21 something in there to make them respond to any lawyer that
22 writes in and asks for a copy of the local rules.

23 CHAIRMAN BABCOCK: And, Mr. Steves, thanks
24 very much for being here. We're going to debate this
25 issue tomorrow, as you know, and I know you weren't able

1 to be here tomorrow.

2 MR. STEVES: I'm sorry I can't be here
3 tomorrow.

4 CHAIRMAN BABCOCK: Well, I'm sorry we
5 couldn't adjust our agenda to accommodate your schedule,
6 but the debate is a matter of public record. It will be
7 on our website when the court reporter types it up.

8 MR. STEVES: Thank you very much.

9 CHAIRMAN BABCOCK: You bet. Thank you, sir.
10 Okay. Our timing I guess is a little off because of the
11 lunch situation, and they're setting up, so it may not
12 take an hour, but I still think it's a good idea to have a
13 smaller group sit out and get some language that we can
14 look at and debate. So, Judge McCoy -- Ralph, could I get
15 Judge McCoy's attention again for a second?

16 MR. DUGGINS: Sorry.

17 CHAIRMAN BABCOCK: Once we get done with
18 this issue, if we ever get done with it, this last one,
19 have we pretty much addressed all of the issues?

20 HONORABLE ROBERT McCOY: Very well. Thank
21 you. I appreciate you allowing me to come speak.

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: I'm concerned about the
24 previous point that Judge McCoy made about the financial
25 interest question and whether the old rule is carried

1 forward in the new rule. As I read the new rule, we have
2 dropped any control over the judge who himself or herself
3 has a financial interest and are carrying forward only
4 situations in which a relative of the judge has a
5 financial interest as a grounds for recusal, and I would
6 like for some other people to read the rule and see if
7 they agree with me because we did that inadvertently, and
8 it was called to our attention, and I think we tried to
9 fix it, and I am concerned that we haven't fixed it.

10 CHAIRMAN BABCOCK: Are you talking about
11 subparagraph (b)?

12 MR. YELENOSKY: We agreed to fix it.

13 CHAIRMAN BABCOCK: Carl.

14 MR. HAMILTON: My recollection, Richard, is
15 that we discussed that and decided that if the judge
16 himself had a financial interest it couldn't be fixed.

17 MR. ORSINGER: I know that, but where does
18 it say that the judge himself having a financial interest
19 is a ground for recusal?

20 MR. GILSTRAP: It's disqualification.

21 HONORABLE SCOTT BRISTER: Why does it need
22 to be a ground for --

23 MR. ORSINGER: It's a ground for
24 disqualification and not recusal?

25 MR. GILSTRAP: Yeah.

1 MR. ORSINGER: Okay. Then that allays my
2 concern. That's how we fixed it, and I forgot. Thank
3 you.

4 CHAIRMAN BABCOCK: Okay. Anybody have
5 anything else about this rule? Yeah, Carl.

6 MR. HAMILTON: Judge McCoy skipped over one
7 thing and I thought was a good point, and that is on
8 referral we say, "Notwithstanding any local rule or other
9 law," and his point was that we can't do anything to
10 affect other law.

11 CHAIRMAN BABCOCK: You're talking about (3)
12 now?

13 MR. HAMILTON: (3), yes.

14 CHAIRMAN BABCOCK: Okay.

15 MR. HAMILTON: Maybe that ought to come out.

16 CHAIRMAN BABCOCK: "Notwithstanding any
17 local rule or other law after a motion to recuse or
18 disqualify has been filed, no judge may preside," etc.,
19 etc. Okay. What do people think about that? Bill?

20 PROFESSOR DORSANEO: I don't have any
21 thoughts about that.

22 CHAIRMAN BABCOCK: No thoughts about it.
23 Justice Duncan?

24 HONORABLE SARAH DUNCAN: I have no thoughts.

25 CHAIRMAN BABCOCK: No thoughts about it.

1 HONORABLE SARAH DUNCAN: I said "no
2 thoughts."

3 CHAIRMAN BABCOCK: I saw that, too, and it
4 struck me as a good point, but why did that language sneak
5 in there to begin with? Any thoughts about this, Justice
6 Hecht?

7 JUSTICE HECHT: What are we talking about?

8 CHAIRMAN BABCOCK: In the rule it says --
9 we're talking about (e) (3), "Referral." Or "Procedure,"
10 I'm sorry, "Procedure," and (3) is "Referral." It says,
11 "Notwithstanding any local rule or other law," and the
12 point was made that a Rule of Procedure shouldn't be able
13 to trump a statute, which this is interpreted to include.
14 So I suppose the proposal would be to strike the words "or
15 other law" and "notwithstanding any local rule."

16 JUSTICE HECHT: Well, there was a debate
17 about it. I don't remember it exactly. Didn't we talk
18 about whether some people did this by order, or maybe we
19 were referring to Rule 330 that allows judges to transfer
20 benches?

21 CHAIRMAN BABCOCK: That's what it was.

22 HONORABLE SARAH DUNCAN: That's what it was.
23 That's what it was.

24 JUSTICE HECHT: And so we didn't know
25 exactly how to characterize all of that, so we kind of

1 came up with a general phrase.

2 CHAIRMAN BABCOCK: And, Judge McCoy, of
3 course, interpreted it, as probably most people would,
4 "law" being a statute as opposed to a rule.

5 HONORABLE ROBERT McCOY: Yeah.

6 CHAIRMAN BABCOCK: So maybe we should say
7 "Notwithstanding any local rule or Rule of Procedure."

8 HONORABLE SARAH DUNCAN: That's actually a
9 constitutional exchange of benches, and I think all we
10 were trying to say is you can't use the exchange of
11 benches provision to avoid proper recusal process.

12 JUSTICE HECHT: Right. We were trying to
13 say that you couldn't use Rule 330 as an end runaround the
14 regional judge, but I think we even talked about 330 being
15 constitutional, being based on a provision in the
16 Constitution.

17 CHAIRMAN BABCOCK: Constitutionally
18 compelled.

19 JUSTICE HECHT: And I think that's why we
20 took the generic "other law" language out.

21 CHAIRMAN BABCOCK: All right. Can we do
22 that?

23 HON. F. SCOTT McCOWN: Well, we've talked
24 about that, and we've had a theory proposed as to how we
25 could and a theory proposed as to how we couldn't, and

1 we've decided to go forward.

2 MR. SOULES: That's right.

3 CHAIRMAN BABCOCK: All right. Well, I'm
4 against revoting on things as long as we have considered
5 it. Bill.

6 PROFESSOR DORSANEO: On that point about
7 waiving the motion or waiving the grounds, I'm happy
8 enough, if you are, to leave the meaning of that language
9 up in the air, but it might be a good idea to make it
10 clear what's waived.

11 CHAIRMAN BABCOCK: Okay. And you're talking
12 now about subparagraph (e)(2)?

13 PROFESSOR DORSANEO: I think so, yes.

14 MR. ORSINGER: Yes, it is. (e)(2).

15 CHAIRMAN BABCOCK: Stephen.

16 MR. YELENOSKY: Chip, on the "other law,"
17 weren't we really just saying that notwithstanding the
18 interpretation that some people might give to the other
19 laws, but obviously we can't do something notwithstanding
20 a statute and Constitution, and I guess the sense was that
21 some people were interpreting either the Constitution as
22 requiring that they -- that judges have the full
23 prerogatives they have under that other rule; and we were
24 saying, "No, it didn't have to be that way. This was
25 consistent with the Constitution."

1 So maybe it's academic, but I don't like the
2 idea of saying "notwithstanding other law" because we
3 really can't do that. Is there another way to say what we
4 really meant?

5 CHAIRMAN BABCOCK: Why don't you see if you
6 can find where it is in the transcript and see if we
7 adequately discussed it? If we didn't then we can talk
8 about it some more.

9 JUSTICE HECHT: There are local rules
10 already that arguably impinge on the constitutional
11 provision about exchanging benches, because it's quite
12 common for the judges in a county to agree that it will
13 only be done this way. I don't know of any challenge ever
14 being made to a rule like that, but they do -- virtually
15 every big county says, "Well, yes, we can exchange
16 benches, but you can't do it except this way."

17 CHAIRMAN BABCOCK: Okay. What else? Any
18 other? Yeah, Frank.

19 MR. GILSTRAP: Chip, this was in Judge
20 McCoy's letter. He didn't bring it up, probably because
21 he thinks we will pick it up as a matter of course, but we
22 may not, and that is that (b) (9) and (b) (12) duplicate
23 each other.

24 MR. HAMILTON: Yeah. That's just a
25 drafting error.

1 MR. GILSTRAP: And it just needs to be taken
2 out, but just don't need to --

3 MR. HAMILTON: (b) (12) needs to be taken out
4 because it was moved over to another spot.

5 MR. GILSTRAP: And then the old (9) and (10)
6 became the new (10) and (11), and there is at least one
7 place in the rules where that cross-reference wasn't
8 changed, and that is in the last sentence of (e) (1), the
9 reference to (b) (9) and (b) (10) I believe should be the
10 current (b) (10) and (b) (11), would solve that.

11 CHAIRMAN BABCOCK: Everybody agree with
12 that? Okay. What else, Frank? Anything else?

13 MR. GILSTRAP: That's it.

14 CHAIRMAN BABCOCK: Assuming we get this
15 language issue dealt with, are we comfortable that we
16 would then have a rule that would cure the problems that
17 the statute was intended to cure as well as fulfilling our
18 charge from the Supreme Court to solve the things the
19 Court asked us to look at?

20 Justice Duncan.

21 HONORABLE SARAH DUNCAN: Are we not going to
22 take up Bill's suggestion that if we don't even know what
23 we mean by (e) (2), perhaps it's not the best rule we will
24 have generated?

25 CHAIRMAN BABCOCK: Well, I think, yeah, we

1 can certainly take that up. I don't know that there is --

2 HON. F. SCOTT McCOWN: Luke has the
3 language.

4 CHAIRMAN BABCOCK: Good. Let's address
5 Sarah's point first. On the waiver issue, you know, I am
6 not sure that everybody thinks we don't know what we mean
7 here.

8 HONORABLE SARAH DUNCAN: We've had
9 disagreements expressed about what (e) (2) means.

10 CHAIRMAN BABCOCK: Yeah. There is a --

11 HONORABLE SARAH DUNCAN: Today.

12 CHAIRMAN BABCOCK: Yeah. Yeah. I guess
13 it's in the nature of a motion for rehearing. We have
14 debated this provision a lot. Maybe we need to debate it
15 some more. If everybody thinks we do then --

16 HONORABLE SARAH DUNCAN: All I'm saying is
17 that there have been different interpretations placed on
18 (e) (2) today by numerous members of the committee that
19 generated the rule, and that might indicate that either
20 it's not clear or it doesn't say what was intended to be
21 said.

22 CHAIRMAN BABCOCK: Yeah. Well, let's do
23 this. Let's see -- let's see if everybody thinks we ought
24 to dig back into (e) (2), and if everybody thinks we should
25 then we will do it. If they don't, we won't. Frank.

1 MR. GILSTRAP: Let me raise one
2 consideration. One of the goals, of course, here is to
3 have the statute harmonize with the rule. Either we pass
4 a rule that Senator Harris thinks works and addresses his
5 concerns and he possibly, you know, proposes to change the
6 statute or even repeal it. And he hadn't said he's going
7 to do that, but he said he might; and, you know, the
8 Legislature is in session, the clock is ticking. It may
9 be too late to do it this session, but to the extent we
10 can get it done, I think that counsels against dragging
11 this out.

12 CHAIRMAN BABCOCK: Yeah. I think the Court
13 is looking for us to send them this rule at the conclusion
14 of this meeting, so -- but we have got plenty of time.
15 It's just going to push other things up if we do.
16 Richard.

17 MR. ORSINGER: A way to bring it to a head
18 is to consider the following --

19 CHAIRMAN BABCOCK: Go ahead.

20 MR. ORSINGER: A way to bring it to a head
21 is to consider the following change to (e)(2). "A motion
22 to recuse is waived for a trial or hearing if filed later
23 than the tenth day prior to the date the case is set for
24 trial or hearing," or "for that trial or hearing." That
25 would make it clear that you've waived it for purposes of

1 that procedural event but not for subsequent procedural
2 events, and if that language is clear enough to everybody,
3 we can vote it up or down and then at least we will have a
4 record on what we think it means.

5 CHAIRMAN BABCOCK: Are you talking about
6 eliminating (a), (b), and (c) and (d)?

7 MR. ORSINGER: No. All I'm talking about is
8 changing the second sentence in (e)(2) to say, "A motion
9 to recuse is waived" and then insert "for a trial or
10 hearing" and carry on "if filed later than the tenth day
11 prior to the date the case is set for trial or hearing."

12 MR. CHAPMAN: That takes care of it, "that
13 trial or hearing."

14 MR. ORSINGER: "That trial or hearing." So
15 that means that makes it crystal clear, I think, that
16 either you waived it for the whole case or you're not
17 waiving it for the whole case, your vote on that. You're
18 taking sides on that issue.

19 MR. SOULES: Second.

20 CHAIRMAN BABCOCK: All right. And Luke
21 seconds that, which is really a third since Sarah started
22 all of this, but that's okay. And so it sounds like
23 that's something we ought to discuss, so apparently lunch
24 is ready. Why don't right after lunch let's -- and,
25 Scott, you and Luke have got language?

1 HON. F. SCOTT McCOWN: Luke has it, and it's
2 good.

3 MR. SOULES: I'm going to try to print it
4 where it can be read.

5 CHAIRMAN BABCOCK: Let's take that up right
6 after lunch. We are going to take an hour's lunch today
7 for a number of reasons, so at 1:15 we will take up that
8 issue and then we will take up the issue of the waiver
9 that Sarah and Richard and Luke have talked about. Okay.
10 And when we're done with that we ought to have a rule.

11 Okay. We're in recess.

12 (A recess was taken at 12:17 p.m., after
13 which the meeting continued as reflected in
14 the next volume.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported the
9 above meeting of the Supreme Court Advisory Committee on the
10 12th day of January, 2001, Morning Session, and the same was
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12 I further certify that the costs for my
13 services in the matter are \$ 853.00.

14 Charged to: Jackson Walker, L.L.P.

15 Given under my hand and seal of office on
16 this the 23rd day of January, 2001.

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