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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 17, 2010

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 17th day of September, 2010, between the hours of 9:03 a.m. and 4:56 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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10-10 Recusal grounds memo - 18b (11-16-09)

10-11 Juror questions during deliberations memo re: Ford vs. Castillo (11-4-09)

10-12 Proposed amendments to Rules 296-299a (5-28-10)

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CHAIRMAN BABCOCK: All right, guys, everybody ready to get going? Welcome to our session today. I think we've got three agenda items, and we ought to be able to get through that today, but we'll start as always with a report from Justice Hecht as to what he and the Court have been up to.

HONORABLE NATHAN HECHT: The civil case information sheet, also known as the cover sheet, has been finally approved and has been distributed to the clerks' offices and available to the bar, and there were a few comments, good comments, that we got back from the public comment period, but I think the Office of Court Administration is happy with the end result, and we hope to get better statistics from using the cover sheet.

The disciplinary rules are being talked about, and I just can't tell you how many hundreds of hours the Court has devoted to the disciplinary rules. It really has consumed a lot of time, and they are very complex, and I know some of them are controversial, but there will be a referendum of the bar on the rules probably -- the current thinking is still mid-November to mid-December, but I hope you will pay attention to them and encourage your colleagues to do the same. Kennon has worked an enormous amount on them, and if they pass then

we can have her back and get something else done, which would be a good thing.

So please pay attention to those, and the Court is about to take up the proposed amendments to Rule 18a and maybe 18b after this meeting and then the standard jury instruction rule. I think we'll -- I hope we'll get those later in this month. Also, there is -- we are moving -- or maybe I should say lurching toward electronic filing in the appellate courts, and some of that is contingent or mostly contingent on there being the software on the receiving end, on the courts' end, to handle the electronic submissions when they come in, and that is still being developed and may not be available for -- until next year sometime, but meanwhile, the Houston courts of appeals and our Court and some of the other courts are experimenting with electronic submissions in various different ways through e-mail and other ways, so you should see more of that happening in the next few months.

We're also trying to move toward filing of the reporter's record and the clerk's record electronically so that those would be -- so that we would do away with the paper filings there, so all of this is going to take some time, but we're moving in that direction, and this committee looked at electronic filing

rules a year or so ago in anticipation of this time, and probably when there is more of a movement to electronic filing we'll probably do pilot projects in some of the courts, like maybe the Houston courts first, the courts that want to -- want to be the guinea pigs, before we go to a statewide system and change the Rules of Appellate Procedure. That's kind of the paradigm that the Federal circuits use. They did them one by one around the country, and now I think they're all -- I think all of the circuits are doing electronic filing, so we're moving in that direction as well. Any questions about that?

And then 15 years ago Chief Justice Rehnquist, always a friend of the state courts, helped establish an award, a most valuable player award for state judges, and this year's recipient and the first Texas judge to receive it is Justice Jane Bland of the Houston court of appeals.

(Applause)

CHAIRMAN BABCOCK: And it wouldn't have to do with the Supreme Court Advisory Committee.

HONORABLE NATHAN HECHT: Right. One of her colleagues wrote that "She has a thorough understanding of the complexities of a large state justice system that is diverse both geographically and in the type of cases it handles as well as an appreciation of the various

interests it must serve. Justice Bland is smart, even-handed, articulate, hard-working, and committed, and she enjoys the earned respect of her peers."

CHAIRMAN BABCOCK: Is that Tracy that said that?

HONORABLE NATHAN HECHT: Well, no, could have been.

CHAIRMAN BABCOCK: Could have been.

HONORABLE NATHAN HECHT: And -- but one of the things that was pointed out in the nominating process was her service on this committee, so --

CHAIRMAN BABCOCK: Now we're talking.

HONORABLE NATHAN HECHT: So congratulations to her, and you're welcome to attend the ceremony in November when Chief Justice Roberts presents her with the award.

CHAIRMAN BABCOCK: Where is it going to be?

HONORABLE NATHAN HECHT: In Washington at the Supreme Court building.

CHAIRMAN BABCOCK: Oh, wow. Great. We've got to find out what the date was. Jane, do you know what the date is?

HONORABLE JANE BLAND: November 18th.

CHAIRMAN BABCOCK: November 18th. Okay. It's now on our calendars. And anybody can go?

HONORABLE NATHAN HECHT: I don't know about that. I don't know the details.

HONORABLE JANE BLAND: Who wants to go all the way to D.C.?

CHAIRMAN BABCOCK: Well, you know, I could see some hecklers from this crowd perhaps showing up. That's a terrific honor. Congratulations.

On the issue of the office of court information, just a funny story from California. They went where we decided not to go and have complex courts, so if you have your case designated as complex, you not only lose your judge but you get a different judge, but you go to a different building, which they call "the bank." I don't know why they call it "the bank," but it sounds ominous. Anyway, after three and a half years of litigation I'm in a case where suddenly the plaintiffs want to get the case designated as complex. So in responding to it I said to our associate, "Hey, call up their office of court information and find out what types of cases get designated complex, how many cases and whether, you know, any defamation cases, which this is, have ever been designated as complex," and so she reports back that the office of court information in California, which has a budget of, you know, a gazillion dollars said, quote, "You would think that we would have that kind of

information, but we don't." And so we're flying blind on that.

HONORABLE NATHAN HECHT: Let me mention --

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: -- also we're asking the committee to take a look at the new changes in Federal Rule 26 that are supposed to take effect, I think December 1st, having to do with expert reports, and Chief Justice Gray has asked that we take a look at the problems that surround the use of letter orders, letter rulings. Trial courts say, "This is what I'm going to do," and the parties are not sure whether to treat that as a ruling or not, and so the Court thinks that's a good idea, and we have a letter to Chip sending that along to the committee.

CHAIRMAN BABCOCK: Great, thanks. Okay. That takes us to our first agenda item, which is going to be Richard Orsinger continuing to lead the discussion on Rule 18b, the recusal rule, and you'll notice in one of your tabs that Richard is obviously a frustrated football coach because he has taken the rule and diagrammed it, so tell us what our new play is.

MR. ORSINGER: Well, thank you, Chip. I've had a lot of thoughts about this idea of drafting the updated or modernized wording of the recusal rule, and I really don't know that that's the best use of our

resources as a large committee. What I have attempted to do by all those lines that look confusing are really fairly simple, is that I've taken some of the more prominent versions of these rules, which are very similar in many jurisdictions, and tried to show where specific wording is different, and it's not just a simple straight line diagram because some people have subdivided grounds into subparts, and as a result you get those kind of crisscrossing diagonal lines, but I don't really think this committee is probably a very effective place to consider modernizing our language to make it gender neutral and otherwise.

And, Chip, what I'm going to suggest is that we continue the debate on the fundamental questions about what we should do to regulate judicial behavior or campaign contributions or whatnot and get some resolution, if that's possible today, and then either have a group of draftspersons or others later on come in to work through the modernization choices, which are probably not so much policy driven as it is just in terms of clarity of language. Does that seem good to you?

CHAIRMAN BABCOCK: Well, whatever is good to Justice Hecht is good to me, but our initial charge, I think, was to deal with Caperton and those --

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: -- issues.

MR. ORSINGER: Those crisscross lines don't deal with Caperton. They deal with the different ways as possible to express kind of the existing concepts, because our rule is old, and other rules have been written more recently, and they've been -- gender neutral terms have been adopted, and so there are improvements that can be made, but they're not at the policy level.

CHAIRMAN BABCOCK: Yeah. Well, just in terms of the matter of timing, if the Court is going to be dealing with 18a, which this committee's work is finished on, and wants to get to 18b then maybe today is the time to say whatever we're going to say about 18b, but I don't want to speak for --

HONORABLE NATHAN HECHT: Yeah, that would be good.

MR. ORSINGER: Okay. Then having reviewed our transcripts from recent sessions, and it's been -- last time we talked in June, but it's been quite a long time before that since we debated some of the fundamental policies, but the way the debate and actually the kind of public concern nationally has evolved is that we have considerations for campaign contributions and the effect that that should have on the recusal process, if any. And then we have the issue of campaign speech or extra

judicial speech generally, even outside the context of the campaign and the extent to which recusal rules can and should have some standards or some -- reflect some policy regarding what judicial candidates say and what judges say outside the context of their official role as a judge adjudicating cases.

What I thought I'd do to lead this discussion today is to start with the campaign contribution issue and then later on get into the free speech or the campaign speech issue. On the campaign contribution issue, there has been obviously a lot of renewed interest in that issue since the Caperton decision by the U.S. Supreme Court said that the 14th Amendment imposed on the states certain minimum safeguards where it appears in the -- in an objective -- from an objective point of view that a particular litigant may have had a disproportionate effect on a judicial race where the judge is the or one of the deciding officials; and that, I think everyone agrees, sets the outer limit; and as the debate in this last committee meeting indicated, it's probably a fairly rare situation where it will be so extreme and so obvious that the 14th Amendment will be implicated.

And previous discussions, including Judge Peeples -- I don't see him here today -- is of the view that we don't have a really severe 14th Amendment problem

in Texas because the Caperton problem was, is that the Supreme Court justice who considered the recusal motion decided his own recusal, and there were no other judges that had any decision-making power or review power over that decision, and Judge Peeples has made the point several times in this committee that in Texas we do have -- the first line recusal is the judge decides whether or not to recuse, and if he or she doesn't recuse, then some other judicial official will make that decision in the trial court level, and we've been through all this, the procedure of the appointment of the judge to sit and review.

At the appellate level, as a practical matter, what they do is members of the appellate court that are not being challenged will review the recusal decision; and if everyone is being challenged, everyone on the court, which sometimes happens at the Supreme Court level, eight judges will take up the recusal of judge number one, rule on it; and then eight other judges will take up the recusal of justice No. 2 so that eventually the recusals of all members of the Court are decided by someone other than the judge who is being challenged; and because we have that procedural safeguard that an independent person will make the decision of recusal, Judge Peeples has many times said that he feels like we

don't have near the exposure to a 14th Amendment problem than some of the other states that don't permit that.

And I -- I don't know that his conclusion was that we should do nothing because of that, but I would think the argument could be made that because we have procedural safeguards in place, that grounds for recusal are not maybe as important in this state as they would be in a state where the judge alone is deciding whether he or she should recuse himself. To me we have two very broad grounds for recusal that would suffice to provide a sense of not only constitutionality but fairness. One is the objective test and one is the subjective test. The objective test is that viewed from a standpoint of a third party a judge's impartiality might reasonably be questioned, and I say that's an objective standard because it has nothing to do with the actual beliefs or feelings or actions of the judge who's being challenged. It's an evaluation that's conducted from the perspective of a third party and the reaction of the third party would have to the circumstances. And I think it most directly addresses the idea that the state as a whole has an interest in the judiciary appearing to be impartial and that any circumstances that might imperil that perception would lead to a disregard of the results of individual cases or perhaps a general disrespect for the rule of law

in the state, and this public policy that the state has an interest in the appearance of impropriety has been recognized by different U.S. Supreme Court judges who have written on these questions that have come before them, including the free speech question.

And in my view, and others here may disagree, I believe that the U.S. Supreme Court justices are more intolerant of attempting to control the content of speech than they are of saying that speech has certain consequences, so while it may be unconstitutional to prohibit a judicial candidate from saying what they believe, those same justices in their opinions either have statements or intimations that while you may be free to say what you want in a judicial campaign, if you say something that would impinge on the state's policy interest in an appearance of an impartial judiciary, the state has greater freedom to provide for a disqualification or recusal for having exercised the speech, whereas they don't have any right to control the exercise of that speech to begin with.

So, anyway, having said that, we have the impartial standard or the objective standard and then we have the subjective standard, and that is if you can make a case that this judge has a bias or prejudice relating to the subject matter of a litigant then you have a grounds

for recusal. Those are broad grounds. Some of them are reflected in many states, some of them are struggling to move from just a subjective to include an objective ground, and as an aside I might note the objective ground is probably more susceptible to review by an appellate court because subjectivity inherently focuses on the facts of the specific individual judge and their -- what their behavior and statements reflect about their feelings and beliefs, and that's not something that an appellate court is free to involve themselves in because it's so fact specific, and it's very subjective, and for the most part appellate courts are less empowered I guess to act on their beliefs of individual facts than they are for abstract propositions.

The objective standard does lend itself to appellate review more readily because it's an artificial construct, and it's an effort to envision what an average citizen or a nonparty or even maybe an average party would think based on certain statements or actions by a judge whether a third party would feel that the judge was impartial or not. And I think you see that in the Caperton case, because the West Virginia Supreme Court judge that did not recuse was attacked on the only available ground, which was subjective bias; and he said, "I'm not subjectively biased, I've searched my own soul

and I don't have a bias"; and the U.S. Supreme Court did not look at the record and say, "Well, we've searched your soul also and we find a bias." They said, "We're going to evaluate this from an objective standard. It doesn't matter whether you truly are biased or feel that you're biased. Irrelevant. We're going to apply an objective standard that a third party looking at the situation would not have confidence that you as a judge would be impartial."

And so I think that the objective standard is very important that it exists in Texas because it allows the appellate courts or even the trial -- the judge at the trial level that's brought in to evaluate the recusal of the first judge, it allows them to evaluate and weigh the public interest that the state has in an appearance of fairness to the public as an important part of maintaining respect for the judicial system and the rule of law.

Okay. So we have an objective and a subjective standard, and the proposals that are being mentioned, not only on this committee but also around America, are can we make those standards more objective in certain areas; and in campaign contributions, that's easiest to make objective, less so in speech, because in campaign contributions can be measured in terms of dollars

and we can say that certain campaign contributions are not significant and do not reflect on the impartiality of the judge and others are so significant that they do; and we can adopt a bright line that would mean objectively you are either okay or not okay to preside over a case where you've received contributions from the litigants or maybe even from the lawyer, from the lawyers for the litigants; and so we need to make a decision whether we want to have an objective standard that has a bright line distinction that everyone can see in advance. They know it during the campaign period. They can return contributions in excess of that amount if they want to avoid recusal, and if they accept contributions in excess of that amount then they will be subject to that recusal.

The advantage of the bright line is, is that everyone knows where the line is and whether they want to cross it or not. The problem with the bright line is where do you draw it. Do you draw it too narrowly, do you draw it too broadly, and there are policy issues that are involved in that. And in Texas, though, the Legislature has told us what bright lines they think reflect the public policy of the state. They didn't tell us that they would apply for recusal purpose, but they adopted it in the Judicial Campaign Fairness Act. They have some bright lines, and so in Texas we have the advantage that the

courts are not going to make up these bright lines or don't have to make up the bright lines. The Legislature has already given them to us, and the question is whether we just want to be that objective or not, and do we want to create a safe harbor that everyone knows in advance and then what is the punishment if it's exceeded.

The previous iteration of this panel -- of this committee that produced a proposal is that there would be a recusal for judges who exceed the bright line, and that recusal would be available to opposing parties, not to someone who themselves exceeded a contribution limit, but anyone that was opposing them could then recuse the judge during that term. So there is a definitive time period that's involved, and there is a specific amount of money.

Now, when you get to these campaign expenditures that are not direct contributions, that bright line idea becomes more problematic because an individual judge has no power over people buying advertisements that either promote a campaign or detract from someone else's campaign. So the judge in terms of direct contributions to -- not to the candidate but to the campaign, the judge actually has no control over that, and so perhaps those rules need to be evaluated differently.

What the discussion aids that I sent around

have pointed out, different ways that different committees have attempted to address the bright line issue. I think the objective and subjective standards that exist under our Rule 18b are pretty much recognized around the country and in Federal statutes as well, so I don't think that we need to change the language of our objective and subjective standard. The question is do we want to adopt any specific standards for campaign contributions or later on on speech?

The last committee there was a suggestion that Mike Hatchell made to look at the work that had been done by a task force that the Supreme Court had put together about a decade ago, and it was called the Supreme Court of Texas Judicial Campaign Finance Study Committee, and it was -- the report was dated February 23rd of '99, and that was available to this committee when it made its recommendations on adopting bright line rules for campaign contributions as a ground for recusal, and so there was some interest expressed, and Kennon was able to locate a copy in the archives, I suppose, either electronic or paper archives of the Supreme Court, and that was sent out to you-all by e-mail, and their -- that task force made specific recommendations for amendments to Rule 18b by adopting an 18c that was campaign-related and was bright line standard for recusal based on dollars contributed,

and then they also later on proposed an amendment to Canon 5 of the Code of Judicial Conduct, so that the two would be working identically, that it would be improper for a judge who could be sanctioned for taking contributions in excess of what the statute allowed, and there would also be recusal grounds, and I was hoping by sending this out before the meeting -- I wish it was further in advance of the meeting, but I sent them out when we were able to locate them. I was hoping that some people had had the chance to reread these proposals before we came here today, but having reviewed these again a decade later, it appears to me, and others may disagree, that the proposed bright line rules that this committee adopted previously about a decade ago are, in fact, kind of a synthesis or a purification of a long rule, a Rule 18c that goes on for four pages of definitions and concepts, and they were really, really boiled down and set out in a kind of a compact manner on the two proposed rules that came out of the 2001 draft which were being discussed last time.

Now -- I'm sorry, did you want to say something, Bill?

PROFESSOR DORSANEO: I just wanted to -- I noticed that Justice Pemberton was the reporter to this --

MR. ORSINGER: I think he was the rules committee attorney at that time.

HONORABLE BOB PEMBERTON: I was Kennon then.

PROFESSOR DORSANEO: It says on the second page of this, Bob, that you were the reporter. Does that mean you wrote all of this?

HONORABLE BOB PEMBERTON: Well, I was the scribe. I mean, where this got started, Chief Justice Phillips was real active in some of the ABA efforts studying these kinds of issues. If I recall the history, there had been proposals to encourage states to switch to an appointed system away from elections, and I think the approach was to figure out ways that states could adopt procedural rules, things within the domain of the judiciary, things that were short of constitutional amendments and changing selection systems and that sort of thing that would make the system -- you know, eliminate some of the perceived -- possibly perceived taint of campaign contributions and the like. He carried some of these ideas back to Texas, and we wanted these -- the Court appointed these task forces, and, yeah, basically I did a lot of the drafting, and these were all ideas that were vetted through the committee and discussed. We had a series of meetings, and there was a lot of exchange, so it represents a lot of input from a lot of people, including the ABA.

PROFESSOR DORSANEO: The reason I brought

that up is that I wondered if you agreed with Richard that the 18c four pages is roughly re-articulated in the 2001 proposal from this committee.

HONORABLE BOB PEMBERTON: It seems like the 2001 proposal. That may have been actually how it came about. You know, I believe this -- I want to say the -- well, the task force report, actually the Court held at least one hearing I recall, Judge Hecht, I remember in the courtroom and having folks come in. We had representatives and political parties speaking about the proposals. I think there was a perception that maybe the Court was potentially overstepping its proper bounds and getting into essentially legislative matters, so ultimately I think a lot of these ideas got winnowed down to a more narrow focus and that what remained of that recusal rule may reflect some of that process. Like, for example, the --

PROFESSOR DORSANEO: I'll take that as a yes.

HONORABLE BOB PEMBERTON: The judicial canon, you notice the amendment about sanctioning judges for knowingly violating the campaign limits. I believe the Court narrowed that to be a knowing violation of something you know is a -- or a knowing of your act that you know has a legal consequence of a violation, and it

has to be witnessed by a law enforcement officer. It's pretty narrow, narrow provision, what came out of it, but, yeah, I think generally the 2001 proposal of the committee is probably generally kind of going the same direction as this more lengthy proposal did. There may be some moving parts that it glosses over. I recall, you know, having to look at the campaign finance laws, which could be a somewhat intricate process, but I think generally they're the same.

CHAIRMAN BABCOCK: Representative Dunnam from Waco was a member of our committee at the time that we considered this, and he and others very much believed that were the Court to adopt a rule like what we were considering and ultimately recommended that the Court would be overstepping its boundaries and intruding on the legislative process, because -- I hope I paraphrase this argument correctly -- but it was that the Legislature has considered this, it's a very complex statute, not easily put into shorthand as the rule was attempting to do.

HONORABLE BOB PEMBERTON: Yeah.

CHAIRMAN BABCOCK: Not an easy bright line to draw and that we should stay out of it, and if somebody violated the statute then they would get in trouble for that, but that recusal should be left alone and not -- not attempt to deal with that. I think that was his position.

HONORABLE BOB PEMBERTON: And I think that happened at about a time where the Court had aroused some concern among some legislators about things like the no evidence summary judgment rules, the discovery rules. Richard, I think you and I were at that civil practices hearing where they kept us until 11:00 p.m.

MR. ORSINGER: I still have the scars. Yeah.

HONORABLE BOB PEMBERTON: The one was the -- I think the evidence would support a finding of a motion of abuse on Richard Orsinger, and it was pretty ugly.

MR. ORSINGER: I was on so late I was the only activity, and finally the Speaker of the House came over and told them to let me go home. About 10:30 at night.

CHAIRMAN BABCOCK: So you were under house arrest.

MR. ORSINGER: I was on Capitol TV I found out later on.

HONORABLE BOB PEMBERTON: Oh, yeah. They were probably in the suite watching it.

MR. ORSINGER: It was like being cross-examined by 12 vicious enemies at one time.

CHAIRMAN BABCOCK: Well, that may or may not have explained -- we did recommend a rule to the Court,

and the Court never adopted it.

HONORABLE BOB PEMBERTON: Yeah.

CHAIRMAN BABCOCK: And perhaps because of this concern about the Legislature.

MR. ORSINGER: Well, a couple of things could be said. First of all, the makeup of the Legislature today is entirely different from what it was then. I think Dunnam is still in the House.

MS. PETERSON: He's still there.

MR. ORSINGER: But I don't think he's in the majority anymore, and secondly, there's a -- you would expect, and this is important, and it's good, but you would expect a member of the Legislature to feel like something that the judicial system does to implement a statute might be an encroachment on the legislative authority, but the truth is it's the job of judges to interpret statutes, and there is actually three components to our government under the Constitution, one of which is the Legislature and one of which is the courts, and regulating the courts and deciding which judges are qualified and not qualified and which judges should be recused and not recused is often considered to be a judicial function, not a legislative function.

So to me the strongest argument the legislative advocate can make is you shouldn't use our

bright line rule for your recusal standard, but I don't think that they should say you can't have a recusal based on judicial contributions because that's not supported by the separation of powers in the Constitution. So we may not want to adopt the legislative bright line rule because the Legislature may have had certain policies in their mind, but we might arrive at our own bright line rule which might coincidentally be the same rule they adopted. I think that the Supreme Court has the constitutional authority to make its own decision about when judges should be recused.

CHAIRMAN BABCOCK: Yeah. Alistair hang on for a second. In fairness to Representative Dunnam, though, he would say that we thought very hard in the Legislature about what was a legal campaign contribution and what was illegal, and if it's legal then it's per se not a basis for recusal. That was his argument. You cannot recuse somebody if they received a legal campaign contribution. Alistair, and then Buddy.

MR. DAWSON: But in light of the Citizens United case and the ethics opinion that I read, isn't there some question about whether the Judicial Campaign Fairness Act either can be enforced or is constitutional or can be circumvented? I mean, as I read that ethics opinion, what they say is you can't -- the restrictions on

campaign contributions is unconstitutional, and my interpretation of that is, well, you may have restrictions on political contributions, but we can't -- lawyers, companies, PACs, whomever made contributions to -- campaign contributions to judges beyond the limits of the -- that are set forth in the Campaign Fairness Act.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, I point out, Richard, that it was not only Dunnam. There were some Republican senators that took the position that we had the power only to draw Rules of Procedure, and they asked me what was procedural and what was substantive, and I said, well, the best I can do, if it's in the rules now it's procedural, and if it's not, it's not, but it was not just him.

MR. ORSINGER: Uh-huh.

MR. LOW: I don't know, because there was some dealing among many, and there were three different proposals, that he wasn't the only one proposing that we change the rule-making authority of the Supreme Court so that it didn't go into effect until 90 days after they met and like the Supreme Court, so it was -- thank goodness we -- we escaped from that, but it wasn't just -- you can't just blame him. There were others that --

CHAIRMAN BABCOCK: And I didn't mean to suggest it was only him, because there were people on this

committee that felt as he did.

MR. LOW: Right.

CHAIRMAN BABCOCK: I was using him as a spokesperson.

MR. LOW: No, but he was by far the leader, I would say.

CHAIRMAN BABCOCK: And the most outspoken. Yes, Justice Hecht.

HONORABLE NATHAN HECHT: But times change, and so, I mean, that was our experience then. Part of the reason to put together this task force was that there was quite a bit of ignorance that had built up over judicial campaigning since the late Seventies. I mean, it had evolved and not everybody was aware of that. I remember, for example, that the members of the task force were astonished to learn that judicial candidates were often asked to contribute part of their contributions to other political activities, other than the party, and was that fair to the contributors to the judge, to the judge's campaign, that the judge then turned around and contributed to something else that maybe they didn't want to see it go to, but so that resulted in some further limitations on what judges can do with contributions, which I think most of the judges found welcome, but so it was exploring some of those things.

But the landscape keeps changing, and it's not just the complexion of the Legislature, but the Legislature is a dynamic process, and they think different things as time passes, and so the question -- I think the Courts -- I can't speak for all of my colleagues, although I should be able to --

HONORABLE DAVID MEDINA: I thought you always did.

HONORABLE NATHAN HECHT: The world would be a better place if I did, but I think the thought was that it was -- you know, it was just not right, it hadn't -- there was not -- there were too many moving parts, and there was not a -- people weren't coalescing around a consensus. There seemed to be lots of outlying thought, and so it just wasn't the time yet to do it, but Citizens United, it doesn't go quite as far, Alistair, as to -- I mean, I think it does call into question some of the statutory restrictions, but there are lots of them that it doesn't, but it certainly -- that and the White case and the West Virginia case all --

CHAIRMAN BABCOCK: Caperton.

HONORABLE NATHAN HECHT: Yeah, Caperton -- all raise the issue once again shouldn't we take another look at this and not necessarily that we should -- I mean, maybe the answer is the same answer it was in 2001, it's

working fine, let's leave it alone, but maybe not, and there are a lot of -- there has been a lot of reaction around the country, some of it very volatile and, for example, in Wisconsin, to the Court's most recent decisions, and so we need to take another look at it.

CHAIRMAN BABCOCK: Yeah. And what one of the motivating things of looking at this, Richard, was that Justice Kennedy, who is an important voice on the Court, specifically mentions recusal in both Caperton and in White, as an alternative to restricting speech.

MR. ORSINGER: I agree with that. I think he is the most vigilant protector of the First Amendment that's on the Court today and in his opinion that he wrote in White, which only he signed onto, he said that if you have concerns about the appearance that's created by campaign statements, you don't address that by restricting speech, you address that in the recusal rules.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Now, he didn't have nine judges sign that opinion, but in my view, he represents the most extreme position for when you are allowed to restrain speech or sanction speech, and that his view was that -- and you'll see this in the writing of other judges that come up in these decisions, only maybe not as explicit as what Chip just referred to, that when you

introduce the public interest or the state's interest in having respect for the rule of law, you now have something to weigh in the scales that's not there when you're restricting speech and prohibiting people from learning who they should vote for. So I feel like we have a completely different constitutional background when we're evaluating recusal rules that are driven by public perception of fairness of the judiciary.

And a couple of other things. Buddy and I were there during that bloody committee meeting, and the recusal rule was not the focus of that committee meeting. It was the discovery rules.

HONORABLE BOB PEMBERTON: Yeah. I just said that -- I'm sorry.

MR. ORSINGER: And they were very angry, the litigators, particularly, on that, and one of them was a doctor, so he wasn't even a litigator, but they were very angry about the discovery rules having been adopted in a way that impaired their normal practice, which it did, especially in deposition practice. It changed deposition practice radically, and it was vociferously objected to in that committee hearing, and I think that Justice Dunnam started attending this committee as a result of --

CHAIRMAN BABCOCK: Representative Dunnam.

MR. ORSINGER: I'm sorry. Representative

Dunnam started attending this committee as a result of the discovery rule thing and was therefore participating in our discussion when the recusal rules came up; and as I recall his position, is that there were many people on the Legislature that only voted for the Fairness in Judicial Campaign Act because it really didn't have any kind of lock solid enforcement mechanism like automatic recusal, and had they tried to enact automatic recusal in the statute they might not have had the votes to even get the bright line standards adopted, and having recognized that, that's fine. They passed a law. That Legislature has come and gone. The law is on the books. They didn't provide the recusal mechanism, but if you look around the country, you're seeing that more and more the American Bar Association has a model Rule of Judicial Conduct that requires for a bright line disqualification, they call it -- they don't use the word "recusal" -- based on contributions. Alabama statute has it. The Arizona Supreme Court has adopted a rule that's a four-year disqualification window. Mississippi Code of Judicial Conduct.

And we know that the First Amendment is not an absolute barrier to these kinds of rules because in the Caperton case the Supreme Court said the 14th Amendment requires you to disqualify if the campaign contributions

exceed a certain level. So we know that the 14th Amendment is going to put some kind of restriction on how much effect a litigant or a lawyer can have on a campaign. So I really feel like we have plenty of room to maneuver in the context of the First Amendment and the constitutionality, and what we really ought to be debating is the policy question of whether we want a bright line rule or not, where we would draw the line if we have one, and then if we're going to have one how do we write it.

MR. LOW: Richard, but am I correct, the Supreme Court -- all the Federal judges have rules of disqualification but not the Supreme Court. That judge decides himself.

PROFESSOR DORSANEO: Uh-huh. That's right.

MR. ORSINGER: U.S. Supreme Court.

MR. LOW: That's what I'm saying. So the people that tell us what we've got to do, draw bright line, they just -- they don't even have a procedure like we do, and that's the top court, because when the Bush case came along, Scalia's son, John, filed an amicus brief, his firm did, and nothing was ever said about it. I mean, he made his decision, and he's going on with it, so the top court doesn't, but all the others do.

CHAIRMAN BABCOCK: Well, let's do that the next meeting, figure out a rule for the U.S. Supreme

Court.

MR. ORSINGER: Yeah, the supreme Supreme Court advisory committee.

CHAIRMAN BABCOCK: Alistair, did you have your hand up?

MR. DAWSON: No.

CHAIRMAN BABCOCK: Okay. Anybody have any thoughts about the wisdom of having a bright line as opposed to leaving it -- leaving the rule where it is, where it sits right now?

MR. SCHENKKAN: Could I --

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: At least some clarification, is the bright line for the campaign contributions to the candidate as opposed to the campaign expenditures or the independent expenditures. I think those present two different policy questions.

CHAIRMAN BABCOCK: I think that's probably right.

MR. SCHENKKAN: As well as two different sets of constitutional background sets, so which is it or both? What's the question?

CHAIRMAN BABCOCK: Well, I think it would be both on the table.

MR. ORSINGER: The Supreme Court's --

Supreme Court Advisory Committee 2001 had separate proposals for each, and I agree with you completely, Peter. I think that the public policies are different and should -- and each question should be divided differently -- decided differently, and we could, for example, I think reasonably say we're going to have a bright line standard for what the judge can control, which is what I accept as a contribution, and not have a bright line standard for something they can't control, which is that some interest group has decided to go after some political issue I have no control over.

CHAIRMAN BABCOCK: Yeah, Judge Christopher. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: May I ask a question about the first time this was brought up? Was the purpose at that point to create a recusal rule or to protect judges who took money up to the campaign levels? Because my understanding of the idea behind why we're bringing it up now -- and perhaps I'm misunderstanding it, but the idea is that now that Caperton exists it's unclear whether even if we're within the limits that that could be used as a ground for recusal against a trial -- or against a judge, and that's potentially what's been filed so far, have been some contentions that even if you're staying within the limits because you took a certain amount of

money from a litigant or a party, you should be recused.

So, you know, I'm trying to understand what the purpose of our rule is. Is it to say if you're over this you're recused, or is it to say if you stay within these limits you're fine? And I see those as two different ideas.

HONORABLE NATHAN HECHT: Well, I think it started out the former, that this was a threshold bottom limit and anything over that was going to be recusal because the idea was that the public is concerned about the effect of campaigning on judicial decision-making, and so we should try to do what we can to assuage those concerns, and this is one way to do it. Then as -- as people looked at it I think the second idea arose, but my understanding all along was the appearance of impropriety is kind of the -- is sort of the last resort. I mean, it -- no matter what happens, no matter how little you take or who gives it to you or under what circumstances, if there is an appearance of impropriety that's always going to be a ground for recusal, even if the contribution was legal.

Now, Texas has some law, as you might expect, that says that generally taking campaign contributions is not grounds to recuse the judge, but it might be under different circumstances, and so that

overarching idea was always there, but whether -- I think now whether there should be a safe harbor or not is a reason -- is something to talk about.

CHAIRMAN BABCOCK: Yeah. Roger, Buddy, Bill, and then Stephen.

MR. HUGHES: Well, generally speaking I'm -- I like bright line rules because they're easier to apply, and that's always to be desired. That being said, what we're doing is tying -- at least I understand the basic proposal is tying the bright line to a specific series of statutes, which can be changed every time the Legislature wanders to Austin. So we -- one of the risks I see is that by tying the rule to the statutes, it means if we want to be current every two years you may have to rewrite the rule as, you know, statutes proliferate, et cetera.

The second thing is -- maybe this is not much of a concern, but I'll throw it out. I could see the possibility that people are going to litigate campaign contribution violations only in recusal motions. That is, all the sudden recusal law will be the primary source of interpreting these statutes. People bringing up all kinds of -- I don't want to say arcane, but subtle violations or arguable violations for the first time in recusal motions, which is -- and as I understand, criminal penalties are attached to some of these. So all the sudden people are

going to be finding themselves accused of I guess -- I don't know whether they're felonies or misdemeanors, in campaign contributions for the first time after the election has occurred.

Now, maybe this is not a problem because I have noticed that in, you know, contested campaigns, everybody watches each other's contributions and expense reports like hawks, and often your opponent or interest groups are the first ones to make every subtle or tricky argument there is, but that I think is a concern if we tie it expressly to a statute. Maybe there's some way to blend it by simply saying -- adopting some of the rules we have from negligence per se, which would give the Court some leeway not to be strictly tied to a statute, just as when negligence per se we aren't always saying that the statute sets a standard of care. I throw that out.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Chip, one of the problems with a bright line contribution, that might just be one factor. There may be other factors. They're in business together, and if we say you're okay if you do that then can you not use that along with the other, or one case I know where a judge, nobody paid his filing fee but one lawyer, I mean, for every time he came up. Well, it was within the statute, of course, so it may be considered along with

other things, so if we just exempt that so that that can't be considered as disqualification, maybe you could say "solely," but it may be a series of things.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, the -- Richard's bright line candidates, if I -- maybe I should ask you what they are rather than trying to restate your position, but I got the idea that the judge's impartiality might reasonably be questioned or some language like that, appearance of impropriety, which I think is about the same thing, maybe it isn't. That's a kind of one bright line, but the other bright line has to do with the -- for campaign contributions has to do with the exceeding the circumstances and the limits under the Campaign Fairness Act. Is that right?

MR. ORSINGER: Well, this -- the proposal from 2001 was to add as an automatic dis -- automatic recusal ground these two campaign grounds. It wasn't to make it a factor in the impartiality might reasonably be questioned.

PROFESSOR DORSANEO: No. I realize that. They're separate things, but as Justice Christopher says, it's perfectly obvious to me that somebody is going to argue that if you're -- if you -- if it's a campaign contribution issue and you're not in violation of the

statute then your impartiality cannot reasonably be questioned. I mean, that's going to be -- those two things are going to be right next to each other, and under those circumstances I wouldn't like adding the statutory item because it sends the wrong message rather than the right message. I might want to change the language, "the judge's impartiality might reasonably be questioned," or as in the current rule, "his impartiality might reasonably be questioned," which obviously we want to make gender neutral, just so it's clear that an appearance of impropriety is something that we want to avoid based upon the Judicial Campaign Finance Committee study report, although it's old, and based upon just frankly what I think the public believes that campaign contributions make a difference in the outcome of cases; and if we're looking to the public's perception rather than, you know, somebody else deciding whether the conduct is inappropriate, like lawyers and judges, if we're looking to the public's perception, and I think that's probably where we should look, then our current law is really not in sync with what the standard would mean.

I mean, to say that accepting campaign contributions is just -- that that has no -- that that's just not something to even be considered, that's really just silly, especially in terms of situations that Buddy

talks about where you accept contributions and, and, and, and, and, and, and, so I don't know where that leads me, but I think I get to the point of saying the general objective standard as reworded perhaps, modernized perhaps, is where I would be leaning, because I don't think it adds very much to say that if you violate the law you're, you know --

CHAIRMAN BABCOCK: You're going to be recused.

PROFESSOR DORSANEO: -- you're subject to recusal.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Well, if by a bright line rule we're talking about a rule that says if a judge accepts more than X dollars he or she must recuse in a case involving the contributor, I would be disinclined to support that for two reasons. One is it does strike -- that does strike me as a legislative type decision rather than a judicial type decision setting that kind of a rule; and so I think there would be some other risks of our encroaching on legislative prerogative; and the other reaction I have is that unless that dollar figure was so low that we would all agree that a contribution of that level could never really have that much influence on a judge, and maybe it would be, I don't think we would be

addressing the Caperton problem because the Caperton test is case-specific; and the rule under Caperton is that the -- if the contribution is likely to have a significant and disproportionate influence on getting the judge elected then there's a consequence. And it seems to me that if we're going to change the rule to comply with Caperton, the way to do that would be simply to incorporate in the rule the language from the opinion rather than try to come up with a specific dollar figure.

CHAIRMAN BABCOCK: Pete, and then Bill.

MR. SCHENKKAN: I'm still not sure where I come out on the idea of having a bright line recusal rule, but if we do have one I don't think it has the problem you described, and here's the distinction I would offer for why I don't think it does. The bright line we're talking about would be a ceiling but not a floor. That is, you would have an automatic established recusal bright line in that sense if you were a judge receiving contributions above the specified level from the parties or their lawyers, but a party on the other side if it wanted to attack the judge would still have opened the due process of it on the fact-specific argument that in this case, even though you, the judge, only took less than the Texas legislative levels of contributions from the parties and judges combined with all these other facts, which is what

happened in Caperton, the whole thing goes too far for due process. And I'm suggesting that our goal here, if we have one, and I'm still saying I'm not too sure where I come out on this -- if we did this we would be offering -- the Texas Supreme Court would be able to say, "We have adopted a bright line rule that says this much is too much in the way of direct campaign contributions" that in effect would be a comment, would have to be put in a comment that says, "This is not to say that under specific circumstances under the Caperton opinion that there might be due process challenging the direct contributions for less."

That's why I asked that question earlier about which are we talking about here, because I really don't think there's much we can do by rule about these direct campaign expenditures in the teeth of Citizens United. I pretty well take that to be the United States Supreme Court saying nobody can do anything about it. So does that go any way to --

MR. TIPPS: Yeah, I know what you're saying.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: No, I don't --

CHAIRMAN BABCOCK: Richard. Then Buddy.

MR. ORSINGER: I want to call everyone's attention to the fact that the existing Code of Judicial

Conduct in Texas, Canon 5, subdivision (4), says, "A judge or judicial candidate subject to the Judicial Campaign Fairness Act," cites the act, "shall not knowingly commit an act for which he or she knows the act imposes a penalty. Contributions returned in accordance with section so-and-so of the act are not a violation of this paragraph." If I understand the interface of this Code of Judicial Conduct with the statute then the Code of Judicial Conduct prohibits a judge from accepting, knowingly keeping, an excessive campaign contribution.

If I understand the interface between the statute and the code and if I'm right -- and maybe, Bob, I'm wrong -- but if I'm right then we have a standard that might subject the judge to censure or even being removed from the bench, and yet it's not a ground for recusal or at least not an exclusive ground for recusal, and it seems to me like there's a -- the Supreme Court has already made the decision that these campaign bright line rules are going to apply for purposes of -- of judges retaining their bench or it being subject to censure, and it seems to me to be a natural following that step to say then the litigants can use that same standard for their case rather than just file a complaint. Did I get it wrong, Bob?

HONORABLE BOB PEMBERTON: That actually -- that language was added as a product of this ABA report.

In fact, I think that may be the only enactment of any kind that stemmed from all that, the '99 task force.

MR. ORSINGER: The task force that we were discussing to begin with made a recommendation --

HONORABLE BOB PEMBERTON: Yeah.

MR. ORSINGER: -- that Canon 5 be changed.

HONORABLE DAVID MEDINA: Yeah, and it narrowed it.

MR. ORSINGER: It's not the literal language. It's rewritten slightly, but it's essentially the task force's recommendation.

HONORABLE BOB PEMBERTON: It was tied together.

MR. ORSINGER: And someone here that knows campaign law needs to comment, I suppose, but if you take a campaign contribution that you know is in excess and don't return it, that is an act -- is that something that the act imposes a penalty on?

HONORABLE BOB PEMBERTON: Yeah, that's the --

MR. ORSINGER: If it is, then we can already -- your client can file a judicial -- a complaint against the judge with the Judicial Conduct Commission, but can't argue that that violation is a ground for recusal in the case, so I'd have to ask what's our public policy we're

defending there?

CHAIRMAN BABCOCK: Why couldn't they?

HONORABLE TRACY CHRISTOPHER: Why couldn't you?

MR. ORSINGER: Well, I mean, there's no bright line rule. All you could do is just say it creates an appearance of impropriety, that they could be sanctioned for this, and therefore they shouldn't be -- they shouldn't be able to hear my case. Well, I guess you can make that argument, but that gets back to the question of if we have a bright line rule for purposes of regulating judicial behavior at the administrative level then why don't litigants have that bright line rule to get the judge out of their case rather than just have the judge publicly sanctioned after the case is over, which is what we're saying. It seems to me like if the policy -- and maybe this is not good policy, but it's the existing policy is what the Supreme Court has done, and why wouldn't litigants be able to -- now, yes, with the objective standard you can come in and say, consider a violation of Canon 5 to be grounds to say an appearance of propriety exists, but --

CHAIRMAN BABCOCK: Impropriety.

MR. ORSINGER: Impropriety. Do we want to just leave that as an unstated inference that people can

argue and lose, or do we want to go ahead and implement it on the litigant level?

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I don't understand why a litigant is not free to seek recusal of a judge on the basis that his impartiality might be reasonably questioned under circumstances where he has accepted a campaign contribution in excess of the amount permitted by the statute and allowed for him to keep it. The fact that the judge has violated the law knowingly, certainly at least in my opinion, would raise a question as to whether the judge would or would not be impartial. Specifying particular acts that result in recusal runs the risk that if an act is not specified it may not be considered. It might be best to leave it as general as it is and allow the lawyers to argue the point that I just argued, any judge who keeps a contribution in violation of the law, how can he be honest? Or she.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The -- a violation of the judicial canons or a violation of the election rules by a judge, if someone makes that allegation against you, you have some due process as a judge in responding to those allegations. When someone makes that allegation against you in a recusal hearing you

don't have the ability as a judge to respond. In fact, we have case law that says if you, the judge, get yourself involved in the recusal proceedings and try to argue that my contribution was not an illegal contribution, that in and of itself is a ground to recuse you. So, you know, I think it's a bad idea to have, you know, without an already -- if you have been found to have violated the Election Code or if you have been found to have violated the Code of Judicial Conduct by the two bodies that regulate that, then, yes, it could be a ground for recusal after due process has happened.

CHAIRMAN BABCOCK: Huh. Yeah, because the timing of it is going to be that you get recused, you as the trial judge refuse -- or whoever the trial judge, refuse, and then it's kicked up to the administrative judge who says, "Oh, yeah, looks to me like you ought to be recused." Then that is used in your judicial conduct hearing as evidence that you have violated the canon.

HONORABLE TRACY CHRISTOPHER: And, you know, in the recusal hearing itself you don't get to -- you, the judge, don't get to defend yourself.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: And if you hire a lawyer then you kind of become a party, so --

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOW: -- you're in a catch situation, but back to one point, we used to have in the canons of ethics a provision, appearance of impropriety; and when I was writing a canon -- writing opinions for years I would always avoid that, it was so -- now that is not in the canons of ethics. It's been taken out, our last model code, because it was so -- we just didn't -- it's difficult to answer. But that was taken out of the judicial -- the -- excuse me, the canons of ethics. But we used to have it in the old EC, appearance of impropriety, and we had to take it out. I would always gauge -- I would never rely on that. I would rely on other specific provisions, whether they were violated. Bill.

PROFESSOR DORSANEO: Well, what's the difference between that and the impartiality might reasonably be questioned?

MR. LOW: That's the question I'm asking without stating it.

PROFESSOR DORSANEO: Okay. But, I mean, those standards are -- at least the appearance of impropriety had some case law that talked about what it meant. They seem to be roughly synonymous to me, impartiality might reasonably be questioned, appearance of impropriety.

MR. LOW: I don't know. I know -- all I'm telling you, I've told you everything I know. It was in there, and it's no longer there.

PROFESSOR DORSANEO: But there's something else in there that's similar.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Can I ask, how big is this problem when you attach a 5,000-dollar figure to it that would require for the Court to get involved in it, period? Are there a lot of 5,000-dollar contributions floating around the state to individual judges that people are then trying to get recused? I haven't heard of the 5,000-dollar thing, and it just seems to me -- maybe it's just because I distinctively don't like a lot of bright line rules because every time we have them it doesn't allow for situations that we really shouldn't be invoking, and do we really have this big a problem on recusals, or is this just simply an attempt to address the public's concern about campaign contributions?

That, I mean, I have a vested interest in loving to see that go away just because of all the people running for office that ask you to contribute to, but the flip side of that is, is that this doesn't seem to address really that problem as to whether or not it's appropriate for litigants to be contributing to a judge. We're just

setting a figure on it, and it just seems to me it's kind of a false issue.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: If we're -- if we're concerned about following Caperton, I mean, Caperton wasn't so much, I think, about an individual contribution to a judge. It was a campaign to defeat a judge that someone was involved in.

CHAIRMAN BABCOCK: Right.

MR. JEFFERSON: So I'm more -- I don't know, if we're trying to set a bright line, are we going to try to -- I mean, if the concern is, look, the public thinks that if someone contributes money to a judge that person is going to get the favor of the judge, that seems to be addressed in our campaign contribution limits. If the concern is, you know, we want to have a judge -- discipline a judge to not accept too much money from an individual, that's addressed there, too, but I don't see that we can set a bright line rule that says a judge has to recuse if someone orchestrates a campaign or an organization or association orchestrates a campaign to defeat a judge that in -- that just seems like there would be -- it would be way too complex to try to set the rule that would address all situations.

CHAIRMAN BABCOCK: Yeah. Rusty, as Justice

Hecht alluded to a minute ago, I mean, there is case law that -- it's somewhat dated now, but there is case law that says that campaign contributions may not be the basis of a ground for recusal, and back in 2001 when we were looking at this question, one of the kind of the threshold issues was should we change that, should we now alert the bar and the judiciary that we can look at campaign contributions as a basis for recusal, and now Caperton has brought that into even sharper focus because now the Supreme Court has said in certain extreme circumstances it raises a due process 14th Amendment issue. So it for sure can be the basis, and the question is whether -- whether we do no more than alert the bar that, hey, this is something that can be done, or do we try to bring some structure as to when it can be done inside that extreme due process frontier. I mean, obviously if it violates due process, judge has got to be recused, but is there somewhere short of that that we're trying to get to?

MR. HARDIN: And I guess the only thing that I'm questioning is putting a figure on it. I think the issue is appropriate and should be taken -- allowed to be taken into consideration, but I don't know where we get the arbitrary $5,000. That's all I'm saying.

CHAIRMAN BABCOCK: Yeah. And the Caperton case itself shows, you know, all the permutations of how

money can go into influence in a judicial election; and, you know, I was involved in a situation where the money went into the opponent of the judge who won; and the judge who won arguably took it out on the firm that was -- that had contributed heavily to the losing opponent, so that wasn't even money that went to that candidate. It was a money that went against that candidate. Judge Lawrence.

HONORABLE TOM LAWRENCE: If you were to set a dollar figure, how would that work? Would that be the same number for all judges? Because $5,000 --

CHAIRMAN BABCOCK: Oh, you're going to throw some JP stuff at us now, aren't you?

HONORABLE TOM LAWRENCE: No, a 5,000-dollar contribution to a county court at law running in a small rural county --

MR. HARDIN: Yeah.

HONORABLE TOM LAWRENCE: -- is going to have a lot more impact than a 5,000-dollar contribution to an appellate court running statewide or in 14 counties or something.

MR. HARDIN: And the same could be for 2,000 or 3,000, depending on --

HONORABLE TOM LAWRENCE: Well, whatever the number is, it's --

CHAIRMAN BABCOCK: Well, there was a -- you

know, in Harris County and in Dallas County, you know, there have been these, you know, turnovers. The Republicans have lost, the Democrats have come in, and the Democrat insurgents typically have not raised the kind of money that the incumbents have, but there may be one firm that has contributed a lot of money to that now winning candidate, and the amount of money they've contributed to that candidate dwarfs everything else, so, now, does that raise a concern? Under our old law for sure not, but questions whether it should be. Yeah, Richard.

MR. ORSINGER: In response -- two things I want to say. One is in response to Judge Lawrence, is that the act itself has different levels, depending on the population that votes on that, so the Supreme Court has higher limits than a district judge that has higher limits than someone that has a smaller geographic area, so if you're concerned about the fact that $5,000 is appropriate for a district judge but not for a judge of smaller jurisdiction, adopting by reference the statute is going to fix that gradation problem.

And, Chip, the comment you made about the Texas case law points up an important distinction that we need to keep in mind. The cases that I have seen on campaigns not being grounds for recusal have all been attacks based on the lawyers having made big

contributions, because for the most part nobody cares about judicial races, or at least until the medical profession woke up about 15 years ago. It was only lawyers who were making contributions, and so all the recusals were based on the fact that a prominent lawyer --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- had dominated the campaign. So we have like a half dozen or more than a half dozen -- we have a dozen Texas cases that say that the lawyers making a disproportionate campaign contribution is not grounds for recusal, and here's the way the Fifth Circuit summarizes it in this memo I sent out: "Texas courts have repeatedly rejected the notion that a judge's acceptance of campaign contributions from lawyers automatically creates either bias or the appearance of impropriety, necessitating recusal." So I think our case law has not discussed what do you do when a litigant has had a disproportionate contribution; and our debate really has been more about litigants, because that was in Caperton, and not so much about lawyers; and we need to remember that we have a choice there. We can just create a rule for litigants, or we could create a rule just for lawyers or a separate rule for each or a rule that applies equally to both. The committee proposal in 2001 applied equally to lawyers representing parties or

parties.

CHAIRMAN BABCOCK: Yeah, and apropos of nothing, but I've had many conversations with out-of-state clients, you know, in-house counsel and that type of thing; and, you know, this system we have seems normal to us, we do it; and nobody in room believes that if I contribute a thousand dollars to a judge that that's going to get me a win in my next case in front of that judge. Nobody here thinks that, but you're talking about public perception. The people outside of Texas are just shocked and amazed that we have lawyers with cases pending before judges making campaign contributions. That just seems crazy to them.

MR. ORSINGER: Especially if it's made a few days before the trial starts.

CHAIRMAN BABCOCK: Which I've heard happens. Bill.

PROFESSOR DORSANEO: Well, I think that's right.

CHAIRMAN BABCOCK: I've never done it, by the way.

PROFESSOR DORSANEO: You know, I was connected with a large California national firm, and I tried to get them to make campaign contributions, because otherwise I'm at a disadvantage, and I'm at a disadvantage

to your thousand dollars, quite frankly, or at least I so think, but they wouldn't do it.

HONORABLE DAVID MEDINA: I'll just help you out, you're wrong. You're wrong, has zero effect, none.

PROFESSOR DORSANEO: Well, maybe not -- maybe it doesn't have an effect everywhere or even most places, but it seems to me that our perception that it's -- and the case law really says it can be a factor. It doesn't say it's not -- nothing to be considered at all, but our attitude needs some re-examination. The justification that you have is that it's necessary because somebody has to pay to run these campaigns is not adequate to convince me that there's at least an appearance of something going on.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: The out-of-state folks you're talking about, they're all from states where judges are not elected?

CHAIRMAN BABCOCK: No, California, they're elected.

MR. BOYD: What is it that they do in California that makes it -- how do they -- how does the system work there?

CHAIRMAN BABCOCK: Well, they're not elected the same way we elect them in partisan. It's retention in

California, I think.

MR. ORSINGER: Yeah. I think it starts with an appointment and then you're subject to retention periodically.

MR. BOYD: So, I mean, are there any kind of states that have the same kind of election system that we have --

MR. ORSINGER: Oh, yeah, sure.

MR. BOYD: -- but have some rule or other funding -- campaign financing system in place where those citizens and lawyers would think it odd that we would be giving a thousand dollars to a judge?

MR. GILSTRAP: Yes. I mean, Michigan has one. My sister-in-law is a judge there. They have temporal limits. They can't give within a certain period of time, but they do get elected every time, and they do take campaign contributions. There's no retention, and so I suspect there are several other states. I don't know that -- maybe we're more, quote, blatant. I don't know, but I would be shocked if Texas -- this system is unique to Texas.

CHAIRMAN BABCOCK: Yeah, and to your point, Jeff, the people I have in mind do come from states where there are appointed judges and not elected. Yeah, Pete.

MR. SCHENKKAN: I'm just wondering if this

is useful focus for us because we can't do anything about the fact that we do have the election system we have in Texas, and we don't have any reason to expect after years and years of vigorous leadership, talented leadership of the Texas Supreme Court and many others, it seems reasonably clear it isn't going to change any time soon. So we've got to first accept that; and, second, there's a limit on what we can do about the perception of it, whether correct or incorrect or a mixture of correct and incorrect by people from California, New York, Michigan, or wherever.

We really have only a fairly limited scope of decision here, but we ought to try to get it right, and I want to take a stab, just one, at what I think the question is, still saying I'm not too sure where I come out on the answer. It seems to me that we are talking only right now about whether to have a bright line ceiling for recusal if the judge has gotten campaign contributions in more than the amount set out in the Election Code from the party or the lawyer or the law firm or whatever the other combinations are, then no one on the other side gets to say -- and I'm going to get to the point that Judge Christopher makes that that's being treated as only the opposing party and none of the judge's business, but nobody on the other side gets to say, "Oh, that doesn't

really create an appearance of bias or lack of impartiality in this case." It's just deemed sufficient. It does. The judge is off the case.

We are not saying that a party can't make an argument that there is bias and prejudice even though the dollar amounts directly to the candidate's campaign were less. They can still do that. We are not saying they can't make a due process argument that the combination of much smaller direct candidate -- contributions to the candidate plus these independent expenditures by the party or the law firm, maybe even trade associations or whatever creates a due process problem. That's still on the table. We're only saying we're going to give the judges the comfort of knowing that at least if the campaign contributions I have accepted are below these limits then I'm not automatically out of the -- in this case, and we're going to give the public the satisfaction of knowing that if they are above that limit they are out of here, and that then leads me to the question, which it seems to me there's sort of two parts to the question after that.

One part is the part that Judge Christopher likes, which is any recusal bright line rule, even this limited ceiling rule, puts the judge in a position of not being able to defend herself in one circumstance; and I'm asking the question when that circumstance is as narrow as

this, does it say anything about committing an act for which the judge knows there's a penalty. It just says the campaign contributions were above these dollar amounts. Is that so bad that it outweighs the benefit to the credibility of the judicial system to say, well, at least we know that if the campaign contributions direct to the judge have been above that dollar amount the judge is off the case?

And that seems to me to be the real question. I don't mean to dismiss either half of it, but it's a little bit different from the question of whether we're, you know, solving all these problems, and biting off a huge, bigger task that creates a lot of other problems. It's a much more narrowly focused question, both for good and for real.

HONORABLE NATHAN HECHT: One of the reasons to have this discussion is because with the recent -- with the more recent developments, the Court would -- needs the advice of this group about whether we should do something -- something more should be done of any kind. So we sort of have to go back and talk about it again, but we don't want to reinvent the wheel either; and in our prior discussions, even though Pete has done a nice job of presenting a narrow issue, remember that the devil is in the details and that once you start trying to write it

down it becomes enormously complicated. The lawyer leaves the firm that made the contribution; the lawyer comes to the firm; the contribution happened five years ago, 10 years ago; the judge has been re-elected since. I mean, there is a million little twists and turns that -- you know, Rusty I think has a good point -- may be better addressed in a more general approach, but we have -- my only point is to just jump to that part of our prior discussions and remind us that when we have gone along this trail before a lot of people fell off when we got to the point of, okay, now, exactly now what are we talking about.

CHAIRMAN BABCOCK: Yeah. Roger.

MR. LOW: You can draw bright lines on certain things and then others you can't. It's like on negligence, a bright line negligence per se, but then it's very difficult to draw a bright line on everything. If you draw it on some things and not others, what does that mean? I mean, I don't know how you can draw a bright line on everything.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I guess, as they say, the devil is in the details. What are we asking the judge deciding the recusal to decide when they decide the bright line? Is the finding going to be that the judge did

accept an illegal campaign contribution, or are we simply saying that because there is the possibility that it was illegal there is an appearance of fairness? When you make the first one, which is a hard finding, that, in fact, a violation did occur, well, one problem as you just noticed is one of the key players in this question can't testify, which is the judge.

The second is if you have a hard finding that there was a contribution violation that did occur, all of the sudden you've made -- you may have made a finding that a crime occurred, and there are some problems. If the question then is, well, because of the totality of the circumstances that a campaign contribution violation may have occurred and the circumstances look bad, so we're going to do it on an objective basis of the perception of fairness, well, you still have some of the same problems, but at least you haven't automatically set people up for the accusation that they've been a party to a crime or subject now to a complaint before the Ethics Commission.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: And those concerns are complicated by the fact that a contribution is anything of value. So, you know, the judge thinks he's reported accurately the contribution, but he's maxed out

at that contribution level from that particular lawyer; and so someone comes in and tries to show that, in fact, he received an in-kind contribution, something of value that exceeded; and so that, if we have a bright line, he's automatically recused, yet he has not had any ability to defend himself or herself in the process. There also is an implicit finding of fact that he's violated the law, he's violated the Judicial Conduct Code. So I guess the thing that concerns me are the comments that Judge Christopher made and also the comments just made about the process, not the fact that it would be -- I mean, I think that these are useful guidelines for purposes of determining when a judge should be recused or not. My concern is that if we use the recusal mechanism as a tool to enforce these Election Code guidelines we might have unintended consequences that are pretty dramatic.

CHAIRMAN BABCOCK: Yeah, there's a lot of mischief that could be caused. I agree. Justice Pemberton.

HONORABLE BOB PEMBERTON: Well, and another potential wrinkle in all of this, I'm not sure that if you have a system where these violation or not violation issues are resolved in the context of the recusal, the Ethics Commission what might not have primary jurisdiction, I mean, to make that decision. I mean, you

could have potentially sort of a procedural mess here.

CHAIRMAN BABCOCK: Yeah.

HONORABLE BOB PEMBERTON: And to the extent the Ethics Commission is making the call on whether these violations occurred or not, does anybody have an idea how often there have been findings that judges have actually accepted contributions in excess of these amounts and not returned them? Has that happened?

HONORABLE NATHAN HECHT: I think I asked Judge Peeples that --

HONORABLE BOB PEMBERTON: Yeah.

HONORABLE NATHAN HECHT: -- last time or one time, but I'm aware of one.

HONORABLE BOB PEMBERTON: Oh, okay.

HONORABLE NATHAN HECHT: There was one in Corpus Christi that made the newspapers.

HONORABLE BOB PEMBERTON: Okay. And by that, I'm wondering about just, you know, dollar amounts. I mean, it seemed to be a very rare thing. That was my point.

HONORABLE NATHAN HECHT: Yeah. But he had a -- he said it occasionally happens, but the only time I think that anybody really knows about was the one time in Corpus Christi.

HONORABLE BOB PEMBERTON: Okay. Now I think

the --

CHAIRMAN BABCOCK: Bill. Bill, then if you're ready --

PROFESSOR DORSANEO: Looking at Richard's November 16th report, he has on pages 13 and 14, and maybe even earlier than that, 12, 13, and 14, examples of various approaches taken, and based upon what I've been listening to, it looks to me like some of the states do it by reference to a statute, like Arizona; is that right, Richard? And some of them simply talk in more general terms about becoming a major donor without reference to numbers or statutory technicalities, but they do make it plain that campaign contributions at a major donor level, at a substantial contribution level, can be taken into account in deciding whether there was an appearance of impropriety or a situation in which the judge's impartiality might reasonably be questioned, and I'm tending to favor, you know, that approach as being progress, to make it plain that campaign contributions are something to be taken into account, even though that may not -- may not at all mean that it has any effect on the judge or justice. It just gives the wrong appearance to the public, you know, rather than going to a statutory cross-reference, but -- and I'm not really worried about that being a violation of separation of powers.

CHAIRMAN BABCOCK: We've already turned loose of 18a, but if you're going to take that approach would you -- would you put that somewhere in 18a, which is more procedural in nature?

MR. ORSINGER: To me I think if you're going to advocate Bill's view you would recite that "The court may consider" --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- "in deciding whether a contribution is in excess," or maybe you don't even want to refer to the statute or the size or legality of it. To me it would belong in the articulation of grounds rather than in the procedure because it actually goes to the substantive argument rather than just the notices that are given and who makes the decision.

CHAIRMAN BABCOCK: Yeah, but didn't we just approve a modification to 18a which said that the judge's rulings could be considered?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: So, I mean, isn't this sort of the same thing?

MR. ORSINGER: I guess you could say that. To me the fact that you can consider the judge's ruling is not setting in --

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: -- it's not setting a grounds or it's not setting a way that -- it's the scope of what you can consider rather than putting weight on a particular factor.

PROFESSOR DORSANEO: It's similar in that we -- that is in 18a because of case law saying that you can't consider it.

CHAIRMAN BABCOCK: Right. Right.

PROFESSOR DORSANEO: So and if anybody would read the case law on campaign contributions to say that that's not a factor, then that shouldn't be -- that shouldn't be allowed to be the outcome.

CHAIRMAN BABCOCK: Yeah, Jeff. And then Justice Patterson, I'm sorry.

MR. BOYD: I represented an elected official in the executive branch at -- or his campaign committee accused of accepting a contribution, a PAC contribution illegally, and the reality was they had accepted it, that his campaign office had accepted it, but the defense was there was no knowing -- they didn't know that it wasn't documented the way it needed to be documented. So I guess I'm interested in hearing from the judges how easy is it to accept a contribution for you, meaning your campaign treasurer or whoever? I mean, I would just be concerned that we're automatically recusing a judge for a violation

that occurred, but occurred without the kind of knowledge or motivation that really ought to justify recusal.

So maybe technically, yeah, someone in my campaign office accepted this contribution, and it was too large, and so I've had to deal with the consequences of that with -- outside of -- but that doesn't mean that I am biased or prejudiced in favor of that party. In fact, I kind of don't like that party because they got me in a lot of trouble, and I didn't know it. You know, the person I was counting -- my treasurer accepted it. I mean, is that -- is that a -- I've never been a judge, I don't know, or run for office.

HONORABLE DAVID MEDINA: That's a very valid point. I mean, I certainly don't look at any of the contribution lists. You get a treasurer or someone else to do that, and when reports are due you kind of look over them and sign them, and hopefully whoever you've hired and paid money to has done them right, and sometimes that doesn't happen. I think that's a very valid point.

MR. BOYD: It's not to say you shouldn't pay a consequence for violating the statute limit, but we're talking about recusal -- refusing to allow the judge to act as a judge in the case. Seems like a different question.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Well, it could also be an intentional attempt to get a judge in trouble. I suppose somebody could try that, but I think with any amount of oversight an excessive campaign contribution should be caught by the judge and will be caught by the judge, and you need to have oversight so that it clearly would be. I can't imagine that. My concern is that we not attempt to change anything simply to respond to one or two cases or a small number; and so I think we need to answer sort of the larger problem; and it seems to me that questions concerning impropriety, appears to be impartial, these kind of questions are matters of the spectrum and that the term that we generally deal with these kinds of things are "totality of the circumstances"; and we're used to dealing with that and that that's a useful concept; and it's not as though something is so malignant all the time that it automatically appears to everybody, but matters of bias, impartiality, impropriety, to some extent are matters of the heart, and so they are not susceptible of a bright line always, but they should be in the mix, and they should be part of the totality of the circumstances; and usually it is a larger number of things, and it's not one thing. It's not a campaign contribution, but I do think that we ought not to focus necessarily on just the ceiling amount when that is not the real problem. I think

I agree with Pete's analysis on that.

CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, Jeff's point, I think, Jeff, you focused on what the intent or state of mind of the judge was or wasn't, and the accepting a contribution over the limit, state of mind of the judge might very well be relevant to whether there's an ethical violation or not, but the presumption that there's a grounds for recusal isn't based on the state of mind of the judge in accepting it unwittingly or not. It's based on an assumption that may be correct or not that anything above the statutory limit is too much and is an amount that influences, so I don't see that the state of mind of the judge with respect to the ethical issue is really relevant to the recusal issue. I mean, what might be more relevant, does he still have it or she have it or did they give it back. I'm not saying those are good bases, but I think you're conflating to it.

CHAIRMAN BABCOCK: Last comment from Pete if he still has one. No. Then Richard -- go ahead.

MR. SCHENKKAN: I think this discussion has helped me. I'm now committed to the proposition we don't want this bright line even as the ceiling; and I got there by way of finally being obliged to flip back into Exhibit 5 of Richard's August 24, 2009, memo, which is the actual

Election Code; and I guess I never even looked at it before; and what it says is after setting out the contribution limits, it says, "A person who receives a political contribution that violates subsection (a) shall return the contribution to the contributor not later than the later of the last day of the reporting period or the fifth day after the date of the contribution, and a person who fails to do so is liable for a civil penalty not to exceed three times the total amount of contributions accepted from the" -- whoever it was; and I guess where I am is, having read that, is it seems to me that adding this recusal thing is both unnecessary -- we have a presumptively adequate statute that deals with the problem of excessive contributions -- and unhelpful.

All it does is create opportunities for different forums, gamesmanship, different standards, depriving people of the ability to defend themselves; and it doesn't advance the ball on the problem that in some instances a contribution above these limits, while it may have been a violation of this provision, actually wasn't much basis for suggesting bias or whatever because of the screw up by the campaign treasurer that was corrected seven days instead of five days after the limit; and in other cases, even though it was below these limits it doesn't mean that there's not a viable case that there is

an appearance of impropriety. So I'm now back where I was a year ago that a bright line is a bad idea.

CHAIRMAN BABCOCK: But you're better off from having made that journey. All right. We're going to take our morning break, and we'll be back in 15 minutes.

(Recess from 10:44 a.m. to 11:11 a.m.)

CHAIRMAN BABCOCK: All right. When we left off I think somebody, Pete Schenkkan, wanted to say something, or it was Elaine?

PROFESSOR CARLSON: No, I was talking to Justice Medina.

CHAIRMAN BABCOCK: Or Richard. Who was it?

MR. ORSINGER: If Pete was able to get his data he had something to say.

CHAIRMAN BABCOCK: Yeah, Pete, did you have data that you wanted to share?

MR. SCHENKKAN: No, I just wanted to say we talked about coming full circle, that's TSL, you know, come back to the place where we began, you know, for the first time.

CHAIRMAN BABCOCK: Yeah, but you can never go home again.

MR. ORSINGER: I hope we got that on the record.

CHAIRMAN BABCOCK: We're on the record right

now. All right, let's pick the discussion back up. Alistair.

MR. DAWSON: I am told that the Campaign Fairness Act does not apply to -- or does not set any limits with respect to corporations or trade unions, and if that's the case, in light of what happened in Caperton and the holding in Caperton, then it seems to me that we ought to have a bright line test, because what happens if a corporation or a trade union, who under Citizens United you can't have -- as I interpret that decision, you can't have limits on campaign contributions by those two entities, if they make contributions to a judge --

HONORABLE TRACY CHRISTOPHER: No, no, no. It's expenditures.

HONORABLE STEPHEN YELENOSKY: No, they can. It's just direct expenditures they can do. They can't make contributions to candidates. Citizens United didn't rule that out.

MR. DAWSON: Oh, okay.

HONORABLE STEPHEN YELENOSKY: They're still prohibited from making direct. I guess they could do an ad about judges that reflects on a particular judge. I don't know.

MR. SCHENKKAN: They could. That's what happened in Caperton, but that's not the same thing as a

campaign contribution.

CHAIRMAN BABCOCK: Pete, you have to talk up.

MR. SCHENKKAN: The difference is that the judge at least nominally, given the fact that the judge works through a campaign treasurer and that campaign treasurer's professional staff has control over accepting a campaign contribution, but none over what you're talking about, a corporation or union that decides they want to make an independent expenditure.

HONORABLE STEPHEN YELENOSKY: Well, they call a direct -- as I understand it, a direct -- a direct contribution is not -- well, it's not a contribution to the office holder. It's a direct expenditure.

MR. SCHENKKAN: Right.

HONORABLE STEPHEN YELENOSKY: They make a film, they make an ad, they don't give money to the candidate, but under Texas law, not overruled by U.S. Supreme Court, it's illegal for them to give money to a campaign of a particular candidate. Is that right?

MR. SCHENKKAN: Uh-huh.

MR. DAWSON: Then I withdraw my comment.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: If the debate is winding down, I wanted to throw one other alternative out on the

table, and we'll discuss this when we get to the campaign speech ground, but the Texas Supreme Court has adopted a comment to the Code of Judicial Conduct relating to campaign speech, and it's not a prohibition. It's just a comment, and I want to read that and then present that in the context of our campaign contribution discussion. The comment at the end of Canon 5 of the Code of Judicial Conduct here in Texas says, "A statement made during a campaign for judicial office, whether or not prohibited by this canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."

What the Supreme Court of Texas has done there is said, "We're not prohibiting you from saying anything about announcing your position." They still prohibit promises, but not announcements, but they say "whether it's prohibited or not," so, for example, announcing is not prohibited. It may still be the ground for recusal in a specific case. What that does is it warns incumbent judges that are running for re-election and it warns candidates who are trying to take an open seat or unseat somebody and everyone else associated with it that you may be free to say these things, but if you -- if you create this public impression that you may not be impartial, it may keep you from sitting in this type of

case or a case involving this particular litigant, if the comment is maybe against an industry or against a particular company, polluting in a locale or something like that.

So an available alternative the Supreme Court has is to not have a bright line rule that's a ground for recusal, but to have a comment that says that the acceptance of contributions, either contributions at all or contributions in violation of the Judicial Campaign Fairness Act, may cause a judge's impartiality to be reasonably questioned in the context of a particular case, so that there is a comment alternative to this discussion we're having.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: The last comment about the bright line, again, the bright line, you focus on the line; and the real focus is whether or not you've got a fair and honest judge; and if you start focusing on bright lines, you can be misled. My secretary can make a contribution, $2,000 under the bright line limit. So can her husband, so can my legal assistant, so can my brother, so can my sister, so can my client. None of these contributions are above the bright line. All of them are indicative of something going on and that would cause a

problem to the judge. The weakness of the bright line is you focus on the line instead of the ultimate question.

CHAIRMAN BABCOCK: Yeah. Richard, is it -- whether it's a bright line or not, is it -- are we driving toward a recommendation to the Court that in Rule 18b(2), which deals with recusal, you know, we've got grounds (a), (b), (c), (d), (e), (f), and (g), adding an (h) that says something about campaign contributions?

MR. ORSINGER: That was -- you know, Chip, my particular subcommittee doesn't have a specific recommendation. We only say, look, these are what the other people have done to address this problem or propose to address this problem, and the only language that -- that's being offered specifically is what this committee did in 2001, which has advantages and disadvantages that we've all discussed.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: It seems to me like the most that we could do -- we could take a vote, although I think I know how it's going to turn out, about whether we want to have an objective bright line or not or whether we want to have a comment that contributions are a factor or whether we want to have nothing at all and, you know, see what the committee thinks. I think that's probably less important to the Supreme Court than just knowing what the

alternatives are, though.

CHAIRMAN BABCOCK: Yeah, but you could have an (h) that was not a bright line, but said that it is a -- it is a ground of recusal that the campaign contributions as opposed to just being -- as I was suggesting before in 18a and saying, you know, you can consider campaign contributions just like you can consider, you know, judicial funds, but instead of that, and as an alternative to that, have a ground (h) that says the campaign contributions raise an appearance of impropriety or unfairness or --

MR. ORSINGER: Well, you know, Chip, in some discussions we were having off the record during the break, if we're going to do something like that it might be say "may be considered a factor in" rather than "a ground for" because much of the debate has been that as a ground there are certain disadvantages by saying it's a ground per se, because it may be a contribution that's less ought to be grant a recusal or one that's more shouldn't. So if you were to say "may be considered" in -- on the question of impartiality or a factor in determining recusal, then it wouldn't say that it's only the big ones. It wouldn't rule out the small ones. See what I'm saying?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And you could do that either by -- it would be unique in our list of things, but we do have a list of specifics. Most of them are grounds, or all of them are grounds, I guess.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Or you could put it in the comment, either one, and it would be the same thing. What we're doing is we're calling the attention of the bench and the bar to the fact that there are standards out there that are articulated already, but we're not going to promulgate them as a bright line test. We want you to pay attention to them, both judge and lawyer, as a factor.

CHAIRMAN BABCOCK: Well, campaign contributions could fit, could fit under either (a) or (b). Rule 18b(2)(a) or (2)(b). Wouldn't you agree?

MR. ORSINGER: I think you could -- yeah, I would agree that you could consider that to be a listing of -- we did that --

CHAIRMAN BABCOCK: You say -- the argument is "You should recuse yourself, Judge, because your impartiality might reasonably be questioned because five days before trial you accepted $15,000 from my party opponent, and even though you're running for election you don't have an opponent, and further, you should be recused under (b) for the same reason because this would raise an

issue of personal bias or prejudice concerning the party." Bill.

PROFESSOR DORSANEO: I think based in part on what Justice Medina said it's more like (a).

CHAIRMAN BABCOCK: It's more like (a).

PROFESSOR DORSANEO: It's not bias or prejudice. I have to prove bias or prejudice is -- the focus is on the wrong -- on the wrong thing. The question is, is there something that doesn't make this seem appropriate to the public.

CHAIRMAN BABCOCK: The argument of the person moving for recusal would say, "You're way biased in favor of him, who just gave you 10 grand even though you don't need it."

PROFESSOR DORSANEO: Well, yeah, but and all I have to prove is that you're not -- is that your impartiality might reasonably be questioned, so we're way --

CHAIRMAN BABCOCK: That would be a stronger --

PROFESSOR DORSANEO: I proved that because we're actually way past that.

MR. ORSINGER: The problem with the (b) ground from a practical matter is that if it's evidence that a judge is recused by a supervising judge or an

overseeing judge based on (b), it's a personal indictment about the judge's fairness personally.

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: And so every recusal I've ever been involved in, which is few, but they've been successful, have always been under (a).

CHAIRMAN BABCOCK: Did you get that? He's a hundred percent on his recusals.

MR. ORSINGER: But, yes, but I pick them very carefully.

CHAIRMAN BABCOCK: And he's careful.

MR. ORSINGER: I don't think that you -- I don't think that --

PROFESSOR DORSANEO: You have a card?

MR. ORSINGER: There are situations -- no, I mean, there are situations where you can prove personal bias.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I mean, I've had situations where you call witnesses that had conversation with judges. I don't think that's a very effective way to get a recusal. Maybe I shouldn't be this candid, but my assessment of it as a practitioner is that the judges deciding recusals probably have a predisposition to protect the individual judge from an unjustified attack,

but at some point if the controversy surrounding the judge keeping the case starts to damage the reputation of the judiciary as a whole then they will recuse the judge to protect the system. That's my assessment of the way it works.

So if we write a rule that requires the reviewing judge to find that an individual judge is not fair, they're going to be reluctant to do that by nature, and it's just human nature. So to me if you were going to put it anywhere, you ought to put it under (a), which has nothing to do with the individual judge whatsoever. They could be as pure as the driven snow. The question is what does the public think about the situation, not just what does the judge think about the situation.

CHAIRMAN BABCOCK: Yeah. And what I was suggesting, Richard, not that (a) would be preferable over (b), but if you could recuse somebody for campaign contributions under (a), do you need to have a separate ground (h), and I -- see what people think about that. Do you think we need to elevate campaign contributions to a separate ground and add another ground to this rule that says something about campaign contributions? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: In a perfect world we wouldn't have to accept money to run campaigns,

right, but we don't have a perfect world. We have to have money to run campaigns, and the only people that give us money are lawyers. Maybe some of our family will give us money, maybe some of our church friends will give us money, but that is the reality of being an elected judge. If the Legislature has said we're allowed to take this amount of money from these people under this timing, it's very restrictive now, some of the excesses of the past are gone, but if suddenly campaign contribution by -- within a -- you know, within the statutory limits can be used in every single recusal motion as some sort of evidence, A, you're turning over well-established law in the state that says it can't be used, and, B, you're going contrary to the Legislature, in my opinion, who has said these amounts are acceptable.

I personally think what we need is a generic standard like Stephen was saying quoting Caperton and personally think that if my contribution that I accept is within the limits then I should not be recused. It should not be a ground. Now, you know, and I've argued for this before; and I can tell from the sense of the room that there's zero support for it, or perhaps the four other judges in the room think it's a good idea but they're keeping their mouth shut --

HONORABLE DAVID MEDINA: You're brilliant,

statute.

CHAIRMAN BABCOCK: Yeah. And what you would be suggesting would be that our recusal related to campaign contributions would -- it would be permissible up to the limits of due process, I mean, sort of like our personal jurisdiction statute?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. I'm with you. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: That was going to be my question. Are you saying that the safe harbor could never be pierced by a due process argument?

HONORABLE TRACY CHRISTOPHER: I believe --

HONORABLE STEPHEN YELENOSKY: I know we can't say that.

HONORABLE TRACY CHRISTOPHER: I believe that it cannot, but --

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE TRACY CHRISTOPHER: -- you know, I think that would require someone attacking the legislative --

HONORABLE STEPHEN YELENOSKY: Determination.

HONORABLE TRACY CHRISTOPHER: -- determination.

HONORABLE STEPHEN YELENOSKY: Well, because,

HONORABLE STEPHEN YELENOSKY: Safe harbor.

HONORABLE TRACY CHRISTOPHER: -- but there's nobody here, like I said, that seems to be in favor of that one.

MR. ORSINGER: I think that's a good, so don't feel like you're alone there, for whatever it's worth.

CHAIRMAN BABCOCK: Yeah, a lot of people will be sucking up to you to your face, but -- but would you -- that doesn't speak -- or maybe I'm not clear. Do you think that we ought to have a separate subsection (h) or not?

HONORABLE TRACY CHRISTOPHER: I don't think it's necessary --

CHAIRMAN BABCOCK: Right, that's --

HONORABLE TRACY CHRISTOPHER: -- because people can raise the Caperton grounds without it being in the rule, but to the extent we had -- that we wanted it in there, I would -- I would follow what Stephen said, which was we quote the Caperton grounds --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- as potential recusal, you know, significant, you know, whatever the language is exactly in the Supreme Court case and then we have a safe harbor if we comply with the

statute.

CHAIRMAN BABCOCK: Yeah. And what you would be suggesting would be that our recusal related to campaign contributions would -- it would be permissible up to the limits of due process, I mean, sort of like our personal jurisdiction statute?

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Okay. I'm with you. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: That was going to be my question. Are you saying that the safe harbor could never be pierced by a due process argument?

HONORABLE TRACY CHRISTOPHER: I believe --

HONORABLE STEPHEN YELENOSKY: I know we can't say that.

HONORABLE TRACY CHRISTOPHER: I believe that it cannot, but --

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE TRACY CHRISTOPHER: -- you know, I think that would require someone attacking the legislative --

HONORABLE STEPHEN YELENOSKY: Determination.

HONORABLE TRACY CHRISTOPHER: -- determination.

HONORABLE STEPHEN YELENOSKY: Well, because,

I mean, I agree with you as practical matter. The problem is you can have lots of motions for recusal based on legal contributions, but the other part of it is how can we create a safe harbor when Caperton to me doesn't seem to allow us to create a safe harbor simply based on the amount of the contribution without consideration of all the circumstances, and the example being it's within the limit but all your contributions come from one law firm, for example. So how do we do it consistent with due process?

HONORABLE TRACY CHRISTOPHER: Well, again, I -- we can take the example of the lawyer that pays the filing fee once every four years, okay, and that might be the only amount of money you ever raise. All right, well, is that a ground for recusal? Okay. It's time for me to re-up, and I don't have an opponent, so, you know, I call 10 law firms and say, "Can you give me a hundred dollars?" Do I have to like tell them, "You can only give me a hundred dollars"? "You can only give me $200 because if suddenly the percentage of money that you have sent me hits some magic number I'm going to get recused."

HONORABLE STEPHEN YELENOSKY: Well, I agree. I agree. I don't know the answer to that. Alistair suggested rebuttal of presumption, which maybe that works, but the fact that there are practical problems with due

process is Justice O'Connor's argument for not electing judges, and we can't change that, but I don't know that we can nonetheless create a practical system.

HONORABLE TRACY CHRISTOPHER: But --

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The only concern I have about safe harbor is that it creates a tension between subsection (a) and the safe harbor. The judge's impartiality might reasonably be questioned, that's the standard. That is one of the standards. Now if you say that there is a safe harbor, none of the contributions to the judge exceed the statutory limit. What about the hypothetical that I just gave you? My secretary, my wife, my children, et cetera. Everybody gives money within the limit. There's 18 of us, and there's only 20 contributors to the judge's campaign. It's a small jurisdiction. Doesn't make any difference now because you've got a safe harbor.

HONORABLE TRACY CHRISTOPHER: Well, actually your family and wife would be part of --

MR. MUNZINGER: The object here -- the object here is for the litigants to have a fair trial conducted by an impartial, honest judge who gives the appearance of impartiality and honesty at the same time, that a judge may -- his or her reputation may be impacted

goes with the territory, just as seeking contributions goes with the territory. I don't say a judge is dishonest because they ask for a contribution or accept a contribution. At the same time, there are -- I've practiced law 40 some-odd years. I'm trying to think who I've tried to recuse in my life. That's not a motion you file cavalierly. It's certainly not a motion that doesn't have a potential adverse effect on your client if denied. You have to be concerned about that.

I am concerned about the judges and their welfare. I'm far more concerned about the litigants. The comment that Chip made and that Bill Dorsaneo said he sought a contribution from a -- I think you said a Los Angeles law firm for the judge. Good god, our system is -- we have to live with it, but who in this room representing a corporation or a company from out of state has not discussed with that client the advantages in Federal court that your adversary didn't contribute to the judge or the judge is a Democrat and your client is a Republican or what have you. None of that in a perfect world should come into the discussion. We don't live in a perfect world. Don't foul this up by putting in some bright line that makes an artificial imprimatur of correctness on something when it in fact is not correct and when in fact the bright line safe harbor would

conflict with (b)(1).

CHAIRMAN BABCOCK: Let's say, Richard, that it's not a bright line, but our hypothetical subsection (h) says something like you can be recused if your campaign -- if you accept campaign contributions that would question your partiality or something broad like that. Are you in favor of that or against that?

MR. MUNZINGER: No, I think leave it alone. Creative lawyers, good lawyers who are really sincerely concerned about whether this judge will or will not be impartial in this case --

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: -- are going to know that they can, in fact, investigate the judge's campaign contributions. If there is a pattern that suggests impartiality or that can raise this issue of a reasonable questioning of the judge's impartiality, they're going to assert it. Why would you want to set that as a separate ground and raise all of these discussions when it already exists? We can do that -- I can do this now. I don't need to have a statute that tells me I can go look at my judge's contributions. I've been in jurisdictions where people have told me -- I've come down to try the case and they say, "You understand that judge so-and-so does so-and-so for this particular lawyer in every case.

Forget it, you are going to lose this case. Why are you fighting it? Lawyer X is on the other side."

Well, I mean, none of those people ever seek recusal, but it's part of what we live with. Leave it alone and leave it to good lawyers to come up with a solution instead of setting up some category that opens up a whole different discussion.

CHAIRMAN BABCOCK: Gotcha. Jim, did you have your hand up? No? Stephen.

MR. TIPPS: Well, I'm in Tracy's camp, not only because she's the only one who endorsed my particular recommendation, but also because given the fact that we have a system that necessarily requires that lawyers contribute to judges if judges are to be elected or run successful campaigns, I think it's a very salutary thing that our case law says that the mere fact of making a campaign contribution does not warrant recusal. We have a legislative scheme that undertakes to regulate that, and if we put something in the rule that referenced campaign contributions, that would increase the number of recusal motions that get filed exponentially because it would be such a temptation to the lawyer who himself did make a contribution to the judge who's not getting along well with the judge to complain that the judge is ruling the way he or she is because the lawyer on the other side gave

$500 or a thousand dollars or something like that.

CHAIRMAN BABCOCK: So, Stephen, is your view that having a subsection (h), no matter what, is a bad idea?

MR. TIPPS: Well, I think that it would not be a bad thing to have a subsection (h) that incorporated the language of the Caperton opinion. I don't know that we need to do that because that's the law whether it's in Rule 18b or not, and I would not support saying anything else in a subsection (h).

CHAIRMAN BABCOCK: Okay. All right. Bill, and then --

PROFESSOR DORSANEO: On (h) embracing Caperton, and Caperton applies only to a party, but I don't -- I just think that's because of the facts of Caperton.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And I don't see any reason why it shouldn't be a party or an attorney, and then Richard's comment about a comment also appeals to me as long as -- which we don't have the language of the comment, but it could embrace whatever the policy is about campaign contributions, including that by themselves they don't constitute a basis for recusal, but -- and I'm not sure if anybody has worked on that at all at the committee

level.

MR. ORSINGER: We don't have a --

PROFESSOR DORSANEO: That might be worth doing if someone thought -- if the committee thought that a comment would be a way to handle it.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Hayes, and then Eduardo.

MR. FULLER: I would agree with Stephen. Caperton sets a minimum standard, and there's really no reason to do anything to ours unless we're going to make a more stringent standard --

CHAIRMAN BABCOCK: Right.

MR. FULLER: -- or state ours more clearly. So --

CHAIRMAN BABCOCK: Okay. Eduardo.

MR. RODRIGUEZ: Just a question. Do we have any statistics as to how many motions have been filed to recuse on the basis of campaign contributions?

CHAIRMAN BABCOCK: Well, we have the reported cases that have decided the issue, and there are maybe a half dozen over the years, and then we have a recent post-Caperton situation in Corpus Christi that was reported in the press, but I don't think it's a reported decision, right?

MS. PETERSON: I don't think so.

CHAIRMAN BABCOCK: So, you know, there may be more, but that's what we know about.

MR. RODRIGUEZ: So --

HONORABLE TRACY CHRISTOPHER: There were several filed in Harris County that I'm aware of.

CHAIRMAN BABCOCK: Okay. With what result?

HONORABLE TRACY CHRISTOPHER: I'm not sure.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, we have -- you were talking about (b) and including in that. The only place -- we don't mention contributions or anything on the part about bias or prejudice with regard to a lawyer. They mention subject matter and party, and the only thing I guess (a) would -- impartiality may be questioned, that's the only thing that would pertain to attorneys, because attorney is not even mentioned in (b). Do we want to draw some distinction? There can be prejudice to a party, a cause, or a lawyer, and (b) doesn't mention the lawyer. It only mentions the party.

CHAIRMAN BABCOCK: Right.

MR. LOW: And that.

CHAIRMAN BABCOCK: Yeah, you're talking about Rule 18b --

MR. LOW: (b).

CHAIRMAN BABCOCK: -- (2)(b).

MR. LOW: Right, (2)(b), as prejudice, subject matter, or a party.

CHAIRMAN BABCOCK: Right.

MR. LOW: So when you say contributions to a lawyer or from a lawyer, it'd have to come under (a) really because that's -- might be questioned.

CHAIRMAN BABCOCK: Well, you know, Orsinger, who never loses these things, says that that's what you do anyway.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Tactically.

MR. LOW: Well, then if I ever file one that's what I'll do.

CHAIRMAN BABCOCK: Yeah, he's handing out cards.

MR. ORSINGER: I don't want anymore, thank you. That's not a nice place to be, win or lose.

CHAIRMAN BABCOCK: You're our go-to recusal guy. We're going to let the *Texas Lawyer* know about that.

PROFESSOR DORSANEO: Luke is probably still in this business, though, too.

CHAIRMAN BABCOCK: That's right. Anybody else have any thoughts about whether we should have a separate subsection (h) to Rule 18b(2) that talks in some

fashion about campaign contributions? Any other comments about that? All right. I think it might be helpful to have a vote on this, and, Tracy, help me so that I frame it right, but it seems like the first vote ought to be without -- without voting on what it should say, whether or not we think it would be helpful to have a subsection (h) that deals with campaign contributions, and then we could have a separate vote on whether it ought to be a bright line, a safe harbor, or a due process standard or whatever other options there are.

HONORABLE JAN PATTERSON: And, Chip, how are you addressing Richard's suggestion that it be added to the canons?

CHAIRMAN BABCOCK: As to what?

HONORABLE JAN PATTERSON: That it be added to the canons.

CHAIRMAN BABCOCK: We're ignoring that for now.

MR. DAWSON: Chip, would --

CHAIRMAN BABCOCK: And maybe forever.

MR. DAWSON: Would it make more sense to vote on whether you're going to have a bright line or a safe harbor before deciding whether you have a separate subsection? Because whether we have a separate subsection depends for me on whether you're going to have a bright

line.

CHAIRMAN BABCOCK: What it says.

MR. DAWSON: Yeah, what it says. Right, exactly.

CHAIRMAN BABCOCK: Yeah, this is our classic cart before the horse type thing, and I don't know how to deal with it, so I'm open to suggestions.

MR. DAWSON: I think I would vote on whether you have a -- a ceiling as Pete says --

HONORABLE JAN PATTERSON: Yeah.

MR. DAWSON: -- or not and then do you have a safe harbor or not, and if you vote in favor of either of those, are you in favor of doing it as a separate subsection or in a comment?

HONORABLE JAN PATTERSON: That way you go with the concept first.

CHAIRMAN BABCOCK: Yeah, okay.

MR. GILSTRAP: Well, bright line and safe harbor aren't the only alternatives, are they?

CHAIRMAN BABCOCK: What's that?

MR. GILSTRAP: Bright line and safe harbor aren't the only --

CHAIRMAN BABCOCK: I wouldn't think so.

MR. GILSTRAP: I didn't hear the third alternative in that, what Alistair was proposing.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: What about the alternative of inserting the language from Caperton?

CHAIRMAN BABCOCK: That's been suggested. That's what I call the due process language.

HONORABLE JANE BLAND: Just but incorporating it into the rule.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: Yeah, that's -- that seems to me to be an option, too. Okay. So which one do we want to vote on first?

MR. DAWSON: The ceiling and then due process.

CHAIRMAN BABCOCK: Which one?

MR. DAWSON: Ceiling, due process, and then safe harbor.

MR. GILSTRAP: Choice among those.

CHAIRMAN BABCOCK: Everybody know what we're talking about? Yeah, Harvey.

HONORABLE HARVEY BROWN: There was another suggestion -- I think it was yours, Alistair -- that we have a rebuttable presumption for the safe harbor, not an absolute safe harbor.

CHAIRMAN BABCOCK: All right. Ceiling, due

process, safe harbor, safe harbor light.

HONORABLE JAN PATTERSON: Safer.

CHAIRMAN BABCOCK: And what's the other one? Ceilings, due process, safe harbor, safe harbor light. Was there a fifth one?

HONORABLE JANE BLAND: Is due process -- is that the Caperton language?

CHAIRMAN BABCOCK: That's Caperton, yeah.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: If you vote to leave it alone, you finesse all those if the majority says leave it alone.

CHAIRMAN BABCOCK: That's an idea.

MR. ORSINGER: But that shouldn't be the end of the vote because the Supreme Court probably wants to see whether certain alternatives have more support than others.

CHAIRMAN BABCOCK: Yeah, that's a good point, too.

HONORABLE LEVI BENTON: Tracy, does your safe harbor include contributions from a party or just from lawyers?

HONORABLE TRACY CHRISTOPHER: It would be both.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: But I would go with the rebuttable presumption, too. I mean, I'm amenable to that.

HONORABLE STEPHEN YELENOSKY: If you lose yours.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: All right. Would it be -- would the threshold vote be leave it alone?

MR. LOW: Right.

CHAIRMAN BABCOCK: No?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE HARVEY BROWN: I think that's the threshold.

CHAIRMAN BABCOCK: Huh?

HONORABLE STEPHEN YELENOSKY: As long as you take the other votes so the Supreme Court knows --

CHAIRMAN BABCOCK: Deal or no deal, rule or no rule. Okay. Well, let's vote on rule or no rule. How many people --

PROFESSOR CARLSON: Does that, excuse me, include a comment?

CHAIRMAN BABCOCK: What?

PROFESSOR CARLSON: Does that include comments?

CHAIRMAN BABCOCK: We're not even talking about comments right now. We'll talk about comments later. How many people that think we should leave the rule alone, think it's adequate? Raise your hand.

All right. How many people think we ought to add something to the rule?

MR. DAWSON: Right side of the room versus the left.

HONORABLE STEPHEN YELENOSKY: Depends on where you're sitting.

MR. DAWSON: I'm in the middle.

CHAIRMAN BABCOCK: Well, the vote is 16, leave it alone; 11, do something to it, the Chair not voting, although if he was he would have been in the leave it alone camp, so now let's have some votes.

MR. ORSINGER: That was a comment.

CHAIRMAN BABCOCK: That was a comment.

MR. ORSINGER: We're not discussing comments.

CHAIRMAN BABCOCK: All right. Let's see how many people --

HONORABLE JAN PATTERSON: Is that a vote or no vote?

CHAIRMAN BABCOCK: -- think of these various options which one is the most popular. Harvey.

HONORABLE HARVEY BROWN: I just want to say something about the rebuttable presumption for just a second since we really haven't discussed that. It seems to me that's a pretty good option because it gives the judge pretty much a safe harbor, but if the contributions are kind of like Richard's example and they're the day before trial, there may just come a point where you say, you know, enough's enough, and the rebuttable presumption I think gives the judge a strong amount of protection, but still recognizes that there can be exceptional circumstances, so I just wanted to comment on that.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: My only question on that is how much evidence would you require to rebut the presumption? Would it have to be Caperton or something like that?

HONORABLE TRACY CHRISTOPHER: Well --

PROFESSOR DORSANEO: That's kind of your example, right?

HONORABLE TRACY CHRISTOPHER: Look at Justice Roberts' 50 questions in Caperton to, you know, answer that with the due process.

PROFESSOR DORSANEO: Well, I think it's a question that needs to be addressed. I mean, typically you can rebut a presumption without very much evidence.

How strong a presumption is it going to be?

MR. LOW: Where is the evidence coming from? The judge? He can't testify.

CHAIRMAN BABCOCK: Buddy.

PROFESSOR DORSANEO: Maybe he can.

MR. LOW: No, I'm sorry. Where is the evidence, rebuttable evidence? The judge can't testify, so how do you rebut it? I mean, sounds good, but how do you do it?

PROFESSOR DORSANEO: The cases I'm thinking of I can --

MR. JEFFERSON: I could put on evidence --

CHAIRMAN BABCOCK: I'm trying to find in the Caperton decision the standard. Anybody remember -- in reading those, it is interesting that Justice Kennedy says --

MR. TIPPS: It's page 14 of Richard's memo.

CHAIRMAN BABCOCK: -- states may choose to, quote, "Adopt recusal standards more rigorous than due process requires." Interesting. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Just to respond to that first point, I oppose the safe harbor because I don't think it's consistent with Caperton. I oppose the safe harbor light because it perhaps will by mentioning encourage recusal motions and perhaps make the

judge deciding the recusal motion give it more credence than it really deserves because, as Bill Dorsaneo points out, it doesn't usually take much to overcome a presumption. In 99.9 percent of the cases I imagine if there's a legal campaign contribution the judge hearing the recusal can just say it's a legal contribution, end of story, no recusal, and it's going to be the very rare case where he or she really needs to go beyond that, but they can under Caperton as long as we don't propose an absolute safe harbor.

CHAIRMAN BABCOCK: Okay. Yeah, Elaine.

PROFESSOR CARLSON: I oppose the rebuttable presumption because I don't think you can really have a rebuttable presumption of due process. I think there's a fluidity -- there has to be enough factors to be considered when you look at due process law that you can't really say, "The Legislature said X, so therefore it meets the standard." It probably does, but I just think that's a bad idea.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah, Buddy.

MR. LOW: Chip, as a practical matter, what happens, they try to make it so complicated the judge will just say, "Oh, to heck, I don't want to fool with it, I'll just recuse myself," and I've seen that happen, so the

more complicated, the more burden you put on the judge, the more inclined he is to say, "I don't want to mess with it," and he's supposed to hear the case filed in his court unless he's truly disqualified, so do we want to do something that's going to interfere with that.

CHAIRMAN BABCOCK: Yeah. Levi.

HONORABLE LEVI BENTON: The benefit of putting a safe harbor in the rule, it seems to me, is that it will discourage the flood of motions that will come until case law develops in this area. If there is a presumption set out in the rule that's consistent with the one espoused by Justice Christopher or Tracy that gives the practitioner something to look at and says, okay, there's just no sense in filing this motion because it's legal, it's within the time lines set out by the statutory, let's just forget about it, let's just go on.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: My concern about trying to insert some sort of verbal formulation of Caperton into the statute is, first, if anyone has ever found a reliable means to sum up a U.S. Supreme Court opinion in one or two sentences, I'd like to know it. I'm afraid we'll encapsulate the wrong version. This is still an evolving area. And, secondly, I think what the touchstone of Caperton is, and, you know, it's kind of like one of those

blind men who only puts a hand on one part of the elephant, is not that it was just a lot of money, but that it was an apparently successful effort by a litigant to pick their own judge through the means of an astounding amount of money in an -- in a contested election, and therefore, the touchstone to me is that one through dent of money and organizing, et cetera, manages to get a particular judge on a particular case. I'm not sure it's money alone.

So I'm more concerned about how we're going to set the bar for a different standard about the appearance of fairness, and you know, I -- to me, the last comment, maybe putting a safe harbor would deter, because Caperton's out there. People are thinking -- and maybe they're right -- that money alone and size of contribution is the issue in Caperton. I think it's already out there. I think we need maybe the safe harbor to say, well, you can try due process if you want. Due process is the wild card that trumps every rule, but if you want to -- if you want to work on subsection (a), I mean, maybe a rebuttable presumption or something to keep people from just saying, well, you managed to round up a lot of money for the judge even if it is legal. I think there needs to be some protection for the judges, otherwise we're going to have judges recusing themselves just because they don't need

the publicity.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I mean, people get the message that that's not going to work when judges deny recusal motions based on that, and I think that will happen. If judges will refuse to recuse, hopefully if it's a legal contribution, because we can see where that's going, we'll be recused in every case and then there will be some decisions on those. The mention that was -- again, I mean, I've got a constitutional problem with the safe harbor absolute, and with the light, it just raises the issue and maybe sets the wrong standard, as both Bill Dorsaneo and Elaine have said.

CHAIRMAN BABCOCK: Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: So how would contributions by PACs and independent groups who make expenditures that the judge doesn't know about, or at least initially, how would that fit into these options? Because you talked about lawyers and parties. You didn't mention PACs.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM LAWRENCE: Would that be considered a -- I mean, that wouldn't necessarily be a party. That might just be an industry group that wouldn't be a party to a lawsuit.

CHAIRMAN BABCOCK: It could be. It could be related to a party.

HONORABLE TOM LAWRENCE: Well, it's possible that a party to the lawsuit might be a member of this PAC that made a contribution. I don't know how --

HONORABLE JAN PATTERSON: Possible.

HONORABLE TOM LAWRENCE: -- direct that would be, and then you've got expenditures that are made for or against the candidate that are not reported to the candidate that may be couched in terms of issue-driven but are really not. They're really directly related to the campaign. So would that factor into any of these options?

CHAIRMAN BABCOCK: Yeah, I've been trying to spot the language in Caperton that -- that we could maybe use for a rule if we were inclined to try to use, and this is what I found. People may see other things in the opinion, but the standard that Justice Kennedy seemed to articulate was, quote, "A serious risk of actual bias based on objective and reasonable perceptions when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Rusty.

MR. HARDIN: Does U.S. Supreme Court law

still rule the land?

CHAIRMAN BABCOCK: Yeah.

MR. HARDIN: Then why do we need to mess with this at all?

CHAIRMAN BABCOCK: That would be an argument against articulating --

MR. HARDIN: All of it. All of it.

CHAIRMAN BABCOCK: -- the holding.

MR. HARDIN: All of it. And does anybody in the room know a single presiding judge or any judge appointed to hear recusal that under really extreme facts is going to deny the recusal? I just can't imagine actually the scenarios that are being talked about to try to guard against not actually being ruled in favor of recusal when it's in the real world. Now, I may be living in a tree, but I don't really know how big a problem --

CHAIRMAN BABCOCK: I have been to your house. It is tree-like.

MR. HARDIN: I don't know how bad this problem is. How do we start trying to figure out how to torture into that language -- I mean, I can't imagine if we put that in there. I mean, first of all, it's going to be five years before the bar figures out -- and everybody will have a different view of what that means.

CHAIRMAN BABCOCK: Yeah. Stephen.

MR. TIPPS: Well, I basically agree with Rusty, though it does occur to me that -- well, to start with, Caperton is very fact-specific --

CHAIRMAN BABCOCK: Right.

MR. TIPPS: -- and it was a case decided on facts that are unlikely to recur, and that's probably a reason not to try to incorporate its language into a rule, but it seems to me it might make some sense to have a comment to this rule that simply says, "The practitioner also should be mindful of law that's developed under the due process laws of the U.S. Constitution. See Caperton."

CHAIRMAN BABCOCK: Yeah. Anything else? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, but lawyers presumably know that, and pro se aren't going to be deterred by anything we put in here. I get motions -- I get motions to recuse on the grounds that my decision is wrong, you know, and --

MR. HARDIN: I like that one.

HONORABLE STEPHEN YELENOSKY: -- that's clearly not a good -- that's clearly not a good ground, but if you read the rule you should have known that, but it's not going to deter a pro se.

CHAIRMAN BABCOCK: Right. Well, let's do some voting. Unless Frank wants to say something.

MR. GILSTRAP: No, no, that's fine. That's fine.

CHAIRMAN BABCOCK: No, we --

MR. GILSTRAP: No, no, no.

CHAIRMAN BABCOCK: No, you haven't contributed enough to this debate. Pam wants to say something.

MS. BARON: When we vote on Caperton can we just vote on it generically and then have a second vote on whether we like the comment approach or the insert-language-here approach?

CHAIRMAN BABCOCK: Well, yes and no. Let's vote on whether -- whether there should be a subsection (h) that has due process/Caperton language. It may not be this language, but some language, and then we can talk about whether comments are appropriate.

MS. BARON: Well, does (h) include a comment or not include a comment then? Is that a potential resolution of (h)? If we vote for that are we voting to --

CHAIRMAN BABCOCK: No, I think if you vote for anything in (h) you're going to have a ground, a separate ground that has campaign finance aspects to it.

MS. BARON: Okay.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I'm just curious. We use the word "due process," which I have always understood to mean I keep -- my rights may not be taken away from me without both substantive and procedural due process. What right does a judge have to preside over a case that would trigger a due process right if that is the language used?

MR. GILSTRAP: It's the litigant's right.

MR. MUNZINGER: What?

MR. GILSTRAP: It's the litigant's right to due process.

MR. MUNZINGER: So now we're going to have a new rule where we throw out due process that creates a whole new subject matter. Wow.

CHAIRMAN BABCOCK: So you would be against it, too, but, okay. Yeah, Levi.

HONORABLE LEVI BENTON: You know, before you take any vote could we put this off to the November meeting so that we could have some data from Harris County, Dallas County, Bexar County, Travis County on really at the trial court level how many motions are coming that are -- that even touch on this area? There are people in those counties in the administrative offices that could give us that data, because I think we really need to look at -- it's not the pro ses. There is nothing you can do to cut off pro ses from filing the motions, but

practitioners do need guidance, and they're going to file the motions and delay the hearings, delay the trials, cause administrative judges to travel to hear these motions if there's no guidance. That's my concern, but it may be that my concern is ill-founded because there's -- there's no motions being filed. We don't have any data.

CHAIRMAN BABCOCK: Yeah, I think you've maybe just outlined a homework assignment for Kennon because before you got here Justice Hecht said he wants us to get through this on this meeting.

MR. ORSINGER: The Supreme Court is going to take up 18a before our next meeting and it would be --

CHAIRMAN BABCOCK: So Kennon has been directed to do some research by Judge Benton.

MS. PETERSON: Thanks, Judge.

CHAIRMAN BABCOCK: Harvey.

MR. DAWSON: Thank you for that homework, Judge Benton.

HONORABLE HARVEY BROWN: Before we vote, since our discussion has all been about campaign contributions I would point out that the language you read, which is on page 14, covers not just contributions but, quote, "raising funds," so if somebody signs a letter, which is done by lots of lawyers, or has the benefit at their home, that would be potentially covered

by this. "Directing the judge's campaign election," I'm not sure exactly what that means, but you would certainly have some argument about that. So I just want to point that out so people understand the language is pretty broad.

CHAIRMAN BABCOCK: It is broad, and I may not have spotted the exact language that ought to be used, but anyway --

HONORABLE TOM GRAY: Chip, I've got just --

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: -- confusion on what you meant by subsection (h), and because you just said that it would be a ground for recusal.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: My understanding was that it was going to be in the factor analysis, a factor potentially for recusal. You're talking about campaign contributions alone being a ground for recusal?

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Was that the first vote we took, whether or not we're going to change that?

CHAIRMAN BABCOCK: Yeah. That was the first -- the 16 people who --

HONORABLE TOM GRAY: Make it 17.

CHAIRMAN BABCOCK: 10.

HONORABLE TOM GRAY: And 10, yeah. I misunderstood the first vote then.

CHAIRMAN BABCOCK: Okay. So the record will be corrected to reflect Justice Gray's flip-flop on this. So --

HONORABLE TOM GRAY: More enlightened vote.

CHAIRMAN BABCOCK: All right. Now, if the Court, despite the majority vote here, thinks that we ought to have a subsection (h), what is the sense of the committee as to what it should be? Should it be ceiling? Should it be due process with language derived from Caperton or from some other due process source? Should it be a safe harbor, or should it be a safe harbor light, that is, a rebuttable presumption?

MR. SCHENKKAN: Just for clarification, you're saying if those of us -- whether it's 16, 17, or 18 of us who voted to do nothing we are now --

CHAIRMAN BABCOCK: No, no, no. Everybody gets a vote on this.

MR. SCHENKKAN: We are now being told we vote on this, too --

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: -- on the assumption that the Court does want to do something and they want to know -- they want our opinion --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- as to which is the least harmful thing to do.

CHAIRMAN BABCOCK: Yeah, Justices Hecht and Medina are sitting around saying, well, we think they're wrong about not having a subsection (h), so now we're curious about what (h) ought to say and what does our committee think about it. So --

MR. HARDIN: I thought the Court traditionally ignored what they thought we ought to do but did not do the reverse.

CHAIRMAN BABCOCK: Well, it's all a secret. You never know.

MR. FULLER: Hey, Chip, as a clarification to your bright line part of that vote --

CHAIRMAN BABCOCK: Yeah.

MR. FULLER: Or for that. Caperton, if I recall correctly, references with not disapproval, maybe even approval, the ABA model rule, which, if I'm recalling correctly, I think there may be -- I think Richard may have put it in the comparison. It actually has a blank for an amount, which it seems to me might tie into our limits that are expressly stated in the campaign rules. It might be appropriate to ask or clarify in that vote are we in favor of something like the ABA model rule or not.

CHAIRMAN BABCOCK: Well, if we do that, Hayes, which is fine, we need to see what the ABA model rule says.

MR. FULLER: It's --

PROFESSOR CARLSON: Page 12.

CHAIRMAN BABCOCK: Page 12.

MR. FULLER: It's in -- I was looking at Richard's comparison of what we have now.

CHAIRMAN BABCOCK: Page 12 of what?

PROFESSOR CARLSON: November 16.

MR. ORSINGER: You have it, Chip? I can bring it to you if you want.

CHAIRMAN BABCOCK: No, no, no, I've got it. I was just looking for it in the opinion. Yeah, but in the football playbook it's page 12.

MR. FULLER: Yeah, it's page -- no, it starts on page 10 and page -- carries over to page 11.

PROFESSOR CARLSON: Oh, mine's on page 12.

MR. MUNZINGER: There's one at the bottom of 12 carrying over to 13 that addresses contributions more specifically.

MR. FULLER: Yeah, I may be looking at a different draft, but yeah.

CHAIRMAN BABCOCK: Somebody want to read the language?

MR. MUNZINGER: "The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer, has within the previous," blank, "years made aggregate contributions to the judge's campaign in an amount that is greater than," blank dollars, "for an individual or," blank dollars, "for an entity." That's it.

CHAIRMAN BABCOCK: Okay. And if the judge learns that, he's out of there.

PROFESSOR DORSANEO: Well, not exactly. Because you have to go back to the opening language.

MR. FULLER: Right.

PROFESSOR DORSANEO: "In any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances." Maybe I'm not understanding that. Is that a per se?

MR. ORSINGER: I think it's a per se.

PROFESSOR DORSANEO: Is it per se?

MR. ORSINGER: What you've got is this is all under the impartiality standard, and you have various triggers, and this is one of the triggers the ABA is saying you can consider.

PROFESSOR DORSANEO: Okay. I take back "not exactly."

CHAIRMAN BABCOCK: Okay. All right. And would that ABA -- is that a fifth option for us, the ABA language, or is that part of our ceiling/bright line?

MR. DAWSON: Part of the ceiling.

HONORABLE TRACY CHRISTOPHER: It's a ceiling.

CHAIRMAN BABCOCK: That's a ceiling/bright line.

MR. ORSINGER: Well, there's another distinction, too, and that is this proposal asks the Court to put the number in the rule.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Whereas the 2001 SCAC proposal just adopted the Legislature's number.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So that's a fine distinction, but it is an important one.

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. I know that the anticipation has been building here, and --

MR. ORSINGER: Can I ask one thing?

CHAIRMAN BABCOCK: We really don't want to vote, but go ahead.

MR. ORSINGER: You're asking for a vote separately on a ceiling versus the safe harbor, but there may be some people that support both, so those of us

who -- those who support both, can they vote in favor of both?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: We're not -- okay.

CHAIRMAN BABCOCK: I think you can vote in favor of all of these.

MR. ORSINGER: Okay. Okay.

CHAIRMAN BABCOCK: I don't think once you've -- because some people might want to have a big, old fat rule that has all of this stuff in it.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: They may want ceiling, safe harbors, due process.

MR. ORSINGER: Okay. I'm with you. I'm with you.

CHAIRMAN BABCOCK: Okay. The only thing that I think would be inconsistent would be safe harbor versus safe harbor light.

MR. ORSINGER: Anyone that's in favor of a safe harbor would -- by lesser inclusion would probably favor at least a light, but maybe it's better if they don't vote for light --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- because it will mislead the Court.

CHAIRMAN BABCOCK: That's right. So we don't want to do that.

HONORABLE STEPHEN YELENOSKY: Don't tell us how to vote, though.

CHAIRMAN BABCOCK: We're going to have a little Election Code for how we vote on votes.

PROFESSOR DORSANEO: Well, I think we still miscast this a little bit. There are two options, and Richard read one of them. It's the option of an amount that is greater than amounts, amounts, or alternatively an amount that is greater than -- I don't know if it's worded all that well -- because there are two brackets there, right? Bracket, bracket, then you get another bracket.

Another alternative says "is reasonable and appropriate for an individual or an entity," rather than numbers, "is reasonable and appropriate."

MR. ORSINGER: You make a good point.

CHAIRMAN BABCOCK: Well, without getting too bogged down in the language, if we take a vote on what we'll call ceiling/bright line, it's some concept like this. The words could be written better.

MR. ORSINGER: Well, the ABA alternative is not a bright line. It's just a factor. It's reasonable and appropriate. If it's beyond reasonable and appropriate then you should recuse, so the ABA model

actually has a bright line alternative and a nonbright line alternative.

PROFESSOR DORSANEO: Yeah, it's in two of the categories that you're voting on.

MR. DAWSON: Chip?

CHAIRMAN BABCOCK: Yeah.

MR. DAWSON: I will just point out, which may be obvious, you can have safe harbor and bright line or safe harbor and --

CHAIRMAN BABCOCK: Yeah, right. I understand.

MR. DAWSON: -- so they're not mutually exclusive.

CHAIRMAN BABCOCK: Right. That's right, so that's why everybody can vote on both. Okay. How many people think we ought to have a ceiling/bright line? Raise your hand.

Okay. How many think not? Well, the nays have that one. 23 nays, two -- two yeas, ayes. So that is pretty clear.

MR. DAWSON: With the Chair not voting.

CHAIRMAN BABCOCK: How about the due process Caperton language? How about people in favor of having a subsection (h) that has due process Caperton language in it? Raise your hand.

How many people say no to that? All right. The nos have it, but barely. 14, no; 12, yes.

How about safe harbor? How many in favor of that?

How many against safe harbor? Okay. Five in favor of safe harbor, 20 against.

How about safe harbor with a rebuttable presumption? In favor?

And how about against? Six in favor, 20 against. Chair not voting on any of this. Okay. So that's --

MR. HARDIN: How would the chairman vote?

CHAIRMAN BABCOCK: Huh?

MR. HARDIN: Never mind.

CHAIRMAN BABCOCK: That's out of order whatever it was. I couldn't hear it.

HONORABLE STEPHEN YELENOSKY: I heard it down here. It was.

CHAIRMAN BABCOCK: Yeah, thank you. Harvey.

HONORABLE HARVEY BROWN: We have one other option before we close this topic, and that is a comment that basically is just a "see Caperton," which doesn't try to encapsulate somewhat --

MR. SCHENKKAN: And I relied on that in reference to the earlier question saying even though I

voted don't do anything, I was now being told vote the thing that would do the least damage.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: And the reason I voted no on everything up till now is the one that will do the least damage is the comment, and that's what I'm for.

CHAIRMAN BABCOCK: We've got to go to comments now.

MR. SCHENKKAN: Right.

CHAIRMAN BABCOCK: How many people --

MR. RODRIGUEZ: Are we doing the model rules?

CHAIRMAN BABCOCK: Say that again.

MR. RODRIGUEZ: I thought we were going to vote on the --

CHAIRMAN BABCOCK: The ABA model?

MR. RODRIGUEZ: Yeah.

CHAIRMAN BABCOCK: I was told and persuaded that that was in the bright line/ceiling --

MR. FULLER: Okay, that's fine.

CHAIRMAN BABCOCK: -- category. But how many people -- without getting now to what it would say, how many people think there should be a comment to this rule on the issue of campaign financing? Raise your hand.

HONORABLE BOB PEMBERTON: Assuming that you're going to do something.

MR. SCHENKKAN: Yes.

HONORABLE BOB PEMBERTON: Okay.

CHAIRMAN BABCOCK: Okay. How many people think there should be no comment?

HONORABLE STEPHEN YELENOSKY: All right, Tracy.

CHAIRMAN BABCOCK: 24 in favor, 2 against. What should the comment say?

PROFESSOR DORSANEO: I move that Richard writes the comment.

PROFESSOR CARLSON: Second. Second.

MR. ORSINGER: No. Oh, no, we can't do that. You could run the same votes that you did, only now in a comment rather than a subpart of the rule.

CHAIRMAN BABCOCK: Yeah, and, frankly, the vote that garnished the most -- that garnished the most support was to have something about Caperton, about the due process issue.

HONORABLE STEPHEN YELENOSKY: After the vote that said we shouldn't do anything.

CHAIRMAN BABCOCK: Right. Right. After the vote.

MR. ORSINGER: Some of these may shift since

it's a comment. I mean, could we just quickly vote?

MR. SCHENKKAN: Let me say, why do we have to even talk about this, because what the Court wanted on a deadline that's tighter than this is to get the sense of the house, and if the sense of the house is the only way to do this is a comment, the option of "see Caperton," you know --

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: -- this is a way to raise a Caperton motion issue is good enough. We don't need to try to --

CHAIRMAN BABCOCK: Justice Hecht indicates that they've got enough feedback from us, so Tracy says and promises that if we took up her juror questions during deliberations issue that it would be 15 minutes, and we by coincidence have 15 minutes before lunch, so --

HONORABLE TOM GRAY: Chip, could I put a 30-second comment on the record just for the vote?

CHAIRMAN BABCOCK: Yeah. You want me to time it?

HONORABLE TOM GRAY: This is just one of those things if the Legislature ventures over in this area they need to at least be aware of. We can't deal with it, but a way to deal with the issue of campaign contributions is the equivalent of a blind trust so that nobody knows

who made the contribution. They go into a blind fund for the candidate, and nobody knows, and there's -- I could go on for that for some period of time about ways to enforce it and that kind of stuff, irrelevant, but I do find it interesting that I can be disqualified for a direct interest no matter how tiny, but yet in a government case, no matter how large the impact on the debt or the taxes, I can still sit, and yet we're talking about campaign contributions sort of ad infinitum in the context of, you know, a thousand-dollar contribution kind of stuff.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Since we're making comments on the record, I'd like to say one more thing. You know, we're all dealing here with the nuts and bolts of elected judges and the effect on the perception of impartiality, lack of partiality, that's inherent in that, and that's a problem, and we know the system could be reformed, but I think we kind of have a hang dog attitude about this. You know, this is the system we've got, and, gosh, the people from other states have a better system and if we had a perfect world and so on. There is a reason, historic reason, for elected judges, and that is that the people should have the right to decide who their officials are, and the converse of this is you have appointed judges -- the most extreme example is the United States Federal

judiciary -- where at times they become -- it's been called an imperial judiciary, and we have people like Sandra Day O'Connor, who happens to be an appointed Federal judge, saying how bad it is to have elected judges. There's a long history here, and I don't think we should denigrate our system quite like we're doing or implicitly doing here. There's a reason we have elected judges, and I think it's a good reason.

(Applause)

CHAIRMAN BABCOCK: Note the smattering of applause.

PROFESSOR DORSANEO: Clam clout.

CHAIRMAN BABCOCK: That's right. Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: All right. This issue is about juror questions during the deliberations. So if they're back there deliberating and they want to write a note to the judge or the lawyers asking a question, you know, "Can we go to lunch" or "How do we answer question two," anything like that. So that's the subset of juror questions that we're talking about here. If you'll remember in *Ford Motor vs. Castillo*, there was a juror who sent out -- happened to be the presiding juror, who sent out a note asking about the maximum amount of damages that could be awarded in a case.

Ford Motor Company promptly settled after that juror note came out. Then in talking to the jurors afterwards they discovered that the jury had already answered several of the liability questions in Ford Motor Company's favor and appeared to be getting ready to answer the last one in their favor. They thought that perhaps some outside influence had come to bear on the juror, tried to -- the one that sent the note, tried to get some discovery, couldn't get discovery. Supreme Court said, yes, go get some discovery from that juror.

Ultimately there was a retrial, according -- and I haven't -- according to the newspapers there was a retrial of the case as to whether or not there was fraud by that juror in connection with the jury note, and fraud that was at the request or by the plaintiff or the plaintiff's lawyer, and my understanding from a newspaper report is that there was a "yes" answer to that. I don't know where that case is on appeal. Justice Wainwright in a concurring opinion thought that we needed to look at the manner in which jurors asked questions during deliberations, and he specifically said, "The Rules of Procedure and instructions to the jury should be amended to specify that only the jury can send questions about the deliberations to the judge during deliberations. At a minimum the entire jury should know that a question about

deliberations is being sent to the judge."

We first talked about this in June of 2009 briefly. We voted 16 to 3 not to change our instructions to the jury in the updated version of 226a that had been approved by the committee and actually was almost ready to go in February of 2009.

CHAIRMAN BABCOCK: 2009 or 10?

HONORABLE TRACY CHRISTOPHER: Nine.

CHAIRMAN BABCOCK: Nine. Well, we're deliberate.

HONORABLE TRACY CHRISTOPHER: I've been on the agenda many times since then. Okay. We were told at the next meeting that the Supreme Court wanted us to look into this issue more thoroughly, so I did. In connection with that I identified Justice Wainwright's concern, reviewed prior cases to see if there had been other cases where jury notes created similar issues, reviewed our draft, reviewed other states' instructions to the jury, gathered articles, and discussed the issue with the Pattern Jury Charge Oversight Committee. We were unable to find any other cases where misleading jury questions that caused a settlement resulted in further litigation. So *Ford Motor Company vs. Castillo* seemed to be a case of first impression.

We were also unable to find any cases where

any question was raised about a fact that a note was or was not signed, nor did we find any cases where the rest of the jury appeared to be unaware of a jury note. Now, I have to say I haven't updated this for six months, is probably the last -- when I last -- no, actually a year since I wrote this. This is September. There are questions, you know, where the answers to a question is part of the case on appeal, and I did note that a lot of people don't know how to preserve objections to jury answers -- or questions, but that wasn't my charge. My understanding --

HONORABLE DAVID MEDINA: We can change it.

HONORABLE TRACY CHRISTOPHER: -- was just to look at Justice Wainwright's concern. So in connection with that, his two concerns, first, only the jury can send deliberations to the judge, all right; and by that we thought he meant that the entire jury should know the contents of any note being sent to the judge. We believe that that was what he meant by that statement, and we discussed this quite a bit in the pattern jury charge committee and actually, A, felt it genuinely wasn't a concern and, B, felt that it was a very difficult concern to address because there will be times that an individual juror will want to send a private note to the judge, and to try to make a rule saying you can't make a private note

to the judge or you can only have a private note to the judge in, you know, these circumstances struck us as extremely difficult to deal with. I mean, we even sort of played with the idea, well, you know, if it's a personal matter. You know, you feel sick, you feel bullied, you know, that could be private, but if it's about the case everybody has to know about it, and we just thought that that was an extremely difficult type of instruction to put into a rule, because we thought that there were circumstances when a juror should be able to send a private note to the judge. So --

HONORABLE STEPHEN YELENOSKY: Can I ask a question about that?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE STEPHEN YELENOSKY: When you say "aware," that doesn't answer the question of suppose the juror is quite happy for the rest of the jurors to be aware of his or her note but still want it to be sent out and the others don't want it to be sent out.

HONORABLE TRACY CHRISTOPHER: Exactly. I mean, that was another issue we had. What if someone wanted to ask a question and the other jury said no? Does every question that goes out have to be by a ten-two vote, a majority vote? I mean, there were just so many problems with the concept that the -- you know, that somehow the

entire jury had to collectively know about every note, every communication, and by what number of jurors would be voting to send these notes out. So we drafted something in the pattern jury charge committee, but we don't agree with it, and we don't recommend it.

The draft language that we put in there, it's on page two of my memo: "Give written questions and comments about this case to the bailiff after you read them aloud to the jury." The bailiff will give them to the judge. This was a duty of the presiding juror, but you know, you run into problems, well, do we all have to vote, as I indicated before, so, I mean, we just don't recommend it, but that's the proposed language that we had.

One of the other questions, Justice Wainwright did have some concern about signatures by a juror, and we were neutral on whether this needed to be in a rule, but we could -- and some states specifically say it needs to be signed by a juror or signed by the presiding juror, so we drafted up a proposed instruction that would say, "Give written questions or comments, signed by one or more jurors," paren, "alternate, signed by the presiding juror, to the bailiff who will give them to the judge."

You know, again, most of us, most trial

judges when you get a note from the jury that's not signed, you send it back and say, you know, "Who sent this? Please sign it," and someone will sign it, and then you'll know whether it's the presiding juror or an individual juror that's just written this note. Generally your bailiff will say, you know, "Sign that before you, you know, give it to me to give to the judge." So we didn't think it was really necessary to put it in the rule, but we can either -- we can easily put that in the rule. Then this -- I don't really want a revote on this because this will not take -- this will take up more than 15 minutes.

We -- if you will remember, the oversight committee had recommended that we threaten the jury with contempt twice, and this group said, oh, no, just once is enough, and the Supreme Court took them both out, and we would just like to, you know, argue to put it back in there, because if this juror was having private conversations with a plaintiff or a plaintiff's lawyer in connection with this note in *Ford Motor Company vs. Castillo* she should be held in contempt of court, and, you know, it's good to warn them about that, and maybe it would have prevented that juror from doing it to begin with, but I don't want to vote on it. You know where we are on it, we know where you are on it, so those are the

suggestions we made.

HONORABLE NATHAN HECHT: We want you to explain to the press why we're going to put individual jurors in --

HONORABLE TRACY CHRISTOPHER: All right. You know, I'll take it. I'll just say, "See *Ford Motor Company vs. Castillo*." So those are the two possibilities, one of which we were neutral on, one of which we were opposed to. So the first one that we were neutral on was to put in the rule that it needed to be signed by one or more jurors or alternatively signed by the presiding juror. Discussion on that point? Vote?

CHAIRMAN BABCOCK: What do people think about that? Yes, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I don't think there is any practical way of doing this. If you think -- I initially thought we were going to be talking about questions -- and I got this straightened out with Tracy -- prior to deliberations, but taking that into account I thought about, well, now we have the possibility of questions prior to deliberations, which apparently the Legislature has considered before and some of us allow. I guess an individual juror can always send out that very same question prior to deliberation, and so are we going to control that as well because of one case in which this

has become a serious problem? It just seems to me it's not worth the trouble.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I think if this is added in the order after Rule 226a or put in 226a, you know, in lieu of the order, that other rules will need to be revised, because in the other rules you aren't supposed to communicate with the court by notes.

HONORABLE TRACY CHRISTOPHER: Well --

PROFESSOR DORSANEO: Now, you can if everybody says notes are fine or if nobody complains about notes, but there -- it's a more complicated process than that.

HONORABLE TRACY CHRISTOPHER: Well, the rule says the presiding juror shall communicate with the court. It doesn't say it can't be by note. It does say to answer it you're supposed to bring them back into court and answer it, which generally none of us follow, but, I mean, that is what the rule says. Most of us write the answer and send it back, but the rule itself says we're supposed to answer it in open court, but it doesn't -- if I remember right. I don't have my rule book in front of me, but --

PROFESSOR DORSANEO: I may not exactly remember it.

HONORABLE TRACY CHRISTOPHER: -- it doesn't say the presiding juror can't write us a note.

PROFESSOR DORSANEO: I think the question is supposed to be asked in open court, too, but I may be wrong.

HONORABLE TRACY CHRISTOPHER: I could be wrong, too.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I think Rule 285 says, "The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court and may then in open court and through the presiding juror communicate with the court either verbally or in writing."

PROFESSOR DORSANEO: That's what I remember.

HONORABLE TRACY CHRISTOPHER: So what we do is we take the note and then in open court we read it. We don't make them come out and read their note in open court. Maybe you want to.

PROFESSOR DORSANEO: But it's ambiguous.

MR. RODRIGUEZ: If that had been followed in this case -- if that had been followed in this case we would have known that that was a question sent solely by the presiding juror.

HONORABLE TRACY CHRISTOPHER: I don't think

so.

MR. RODRIGUEZ: Yeah, if he had brought the jury into open court --

HONORABLE TRACY CHRISTOPHER: Right.

MR. RODRIGUEZ: -- and read the question --

HONORABLE TRACY CHRISTOPHER: Right.

MR. RODRIGUEZ: -- we could have known from the rest of the jurors that they had not -- that they had not agreed to that question.

HONORABLE TRACY CHRISTOPHER: Only if we allowed the other jurors to say that. I mean, that -- assuming that had been a legitimate question of this particular juror, the question is whether or not a juror can ask a question.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: As opposed to -- because otherwise the other jurors are going to say, "Oh, gosh, we're finding against Ford Motor Company. Why is that juror asking that question?" Or "We don't need to know the answer to that."

MR. RODRIGUEZ: Or they could have said, "We didn't authorize -- we were not aware of this question."

MR. JEFFERSON: The question wouldn't have been asked. I mean, the juror wouldn't have offered a note in open court if he knew he was the only one going

against the way the verdict was going.

HONORABLE STEPHEN YELENOSKY: Absent fraud, which is alleged in this case, why do we think that parties should be able to -- should have a right to rely on information in the form of a question from a jury during deliberation? Absent actual fraud, they don't have a right to rely on that information. We have no obligation to make sure they know where that question is coming from. Don't rely on it.

HONORABLE TRACY CHRISTOPHER: I've been practicing law for 30 years. Every time we have a jury question in any court I've been in that's how it's handled. It comes out from the bailiff. It's read to the lawyers. The lawyers discuss it, agree on how to answer it, and send the note back to the jury. I mean, maybe we aren't following 285, but it hasn't been followed for 30 years.

PROFESSOR DORSANEO: We're certainly not following 286.

HONORABLE TRACY CHRISTOPHER: Right. Again, in open court, yeah.

CHAIRMAN BABCOCK: Eduardo's point is -- you know, is well-taken. I mean, this might have -- had it been done in open court somebody might have said, "Wait a minute, what's this about?" Maybe not, but maybe so, too.

PROFESSOR DORSANEO: Castillo may be the reason why the rules are written the way they are. Huh?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And I never knew why.

CHAIRMAN BABCOCK: Well, now we know.

HONORABLE STEPHEN YELENOSKY: It sounds like you're inviting --

MR. LOW: Chip, one of the first things we learn is --

HONORABLE STEPHEN YELENOSKY: -- something without a procedure. You're going to bring the jury in in front of the parties and people are just going to start speaking up. "No, I don't agree with that" --

HONORABLE TRACY CHRISTOPHER: Start asking questions.

HONORABLE STEPHEN YELENOSKY: -- "question. I didn't ask that question. Why are we asking that question?" It seems crazy to me, absent actual fraud, to try to deal with that situation so people can then rely on questions in deciding whether to settle during deliberations.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: One of the first things I learned is not to rely on the jury questions. The jury sends out a note in a case of clear liability, and they say, "Do we

have to award damages if we don't want to, if we think we could give nothing?" I withdrew my offer, other side tried to get me to take it, and the jury stuck me double the offer, and the reason they did that was because one of them said, "Well, the only thing we have to decide is damage. We have to give them something." Somebody said, "No, we don't." They said, "Well, let's ask Judge Cope," and so they asked the question. I mean, you just don't pay much -- of course, Ford, it did good for them to pay, but I never paid attention to the question.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Can I ask suggest that a single anecdote is usually the worst basis for forming a rule or a new piece of legislation.

CHAIRMAN BABCOCK: I know, but multiple anecdotes.

MR. HARDIN: But I just haven't seen it as a problem. I mean, for instance, if you bring -- if you require to bring them back off, not only will they start talking but all of us will be going "Did you look? What did they look like? Which one do you think it was?" Everybody goes off on something that has nothing to do with the trial.

CHAIRMAN BABCOCK: Yeah.

MR. HARDIN: And it's working. One single

time it didn't look like it was working and they gave them a new trial, but why do we have to have a rule to do that?

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: It seems to me if you bring them in open court you're invading to some degree what is occurring in jury deliberations. We don't want to -- that's supposed to be kept, you know, private and secret, and, you know, if you allow them to talk about questions and who asked the questions then it seems to me you're bordering up against what's going on in the jury deliberation.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, having been the lawyer that got stuck during the trial, although I didn't do any of the negotiations, as a result of this I really, frankly, agree after I've been trying cases out there for 40 years. This is -- I wouldn't change the rule because of this one case. I just -- it was a very unique circumstance. It has happened that we've had -- just like all of y'all have had questions that -- that lead you to a conclusion that end up being completely the opposite, but I don't think I would change the rule just because of the Castillo case. That was a very unique situation, and I wouldn't change it.

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: It seems to me that even if we believe the practice is working pretty well currently it would be useful to go back and at least revisit the rule, because it looks like actual practice has begun to drift away from at least some aspects of the rule with respect to the jury being in open court and the suggestion that I think the presiding juror -- I think everybody was a little nervous about the suggestion that you could communicate -- that the presiding juror could communicate verbally questions, sort of unrestricted realtime aspect of what that could mean to the process, and I -- it just seems to me that almost regardless of where you are on this that it would be worthwhile to have somebody revisit this.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Just, I mean, I know this is anecdotal. It sounds like it's an outlier, may well be, but just this summer a similar situation happened, didn't result in a settlement of the case, but there are -- in Bexar County over the handling of a jury note, and we've had several hearings about the handling of the jury note, and had the rule been followed -- and I frankly was not aware of it, but had all the jurors been brought back into the courtroom and if the note had been read in that instance, we wouldn't have the issue that we've been

dealing with for the last couple of months in a very substantial case.

CHAIRMAN BABCOCK: Huh. Okay. Yeah.

MR. HUGHES: I can't say the experience is universal, but I will say this. Once you bring the jury back into the courtroom, either during deliberations or to report the verdict, there's just going to be conversation. I bet every time I've -- most every time jurors just sort of want to speak up. They feel like this is their portion of the case, and some of them just want to be heard. The last jury case I tried in Brownsville, while the jurors were being polled we found out that they hadn't answered -- that the jurors who said they answered it unanimously hadn't, and in a matter of -- and when it became clear that it hadn't they knew what they had done, because they had sent out several questions asking just exactly what's this voting, does it mean the same group on every one.

HONORABLE TRACY CHRISTOPHER: If we had our new instructions we wouldn't have that problem.

MR. HUGHES: Yes. Well, all I'm saying, and so the presiding juror just stood up, and before anyone could really tell him maybe we don't need to know this he explained exactly why they had voted differently on -- the different groups had voted differently on the two basic

liability questions. I think there is perhaps a human desire once they have taken over the case, they kind of want to talk to the lawyers and the judge. That's just my impression.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: The Federal courts answer to that by you don't even know they've asked a question. It's just filed of record, and the judge either answers it or doesn't. You don't get to see the question. Most Federal judges don't allow you to see the question they're asking.

CHAIRMAN BABCOCK: That's not my experience.

MR. LOW: That's the way the practice is in the Federal courts I've been in.

CHAIRMAN BABCOCK: And, furthermore, Judge Robinson brings them in and has them ask the question and tells them the answer.

MR. LOW: Well, I'm not saying every Federal judge is alike, and I don't know what the Federal rule says.

PROFESSOR DORSANEO: Like most things they don't say anything.

MR. LOW: Yeah. But, I mean, I was surprised when it first happened to me many years ago.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: Because I thought I was entitled

to see it, but they said, well, it's of record, but you don't see it.

CHAIRMAN BABCOCK: Huh. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm about to strangle Kent Sullivan, but -- no, I'm just kidding.

CHAIRMAN BABCOCK: He's oblivious.

HONORABLE STEPHEN YELENOSKY: We can put out the new 226a --

HONORABLE KENT SULLIVAN: Whatever it is, I object to it.

CHAIRMAN BABCOCK: Yeah, your own strangling, I think it's probably a good objection.

HONORABLE TRACY CHRISTOPHER: -- and still continue to debate this issue, because the only thing that is in 226a right now is to say, "Give written questions or comments to the bailiff, who will give them to the judge." If we want everybody to start following 285 again, and, you know, we can talk about that later, and the Supreme Court can say, "Hey, please start following 225," send a little note to all the trial judges --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- and we think that's a really good way to do it, but I just don't want to hold up something that's been done for --

CHAIRMAN BABCOCK: A year or more.

HONORABLE TRACY CHRISTOPHER: Over a year at this point.

CHAIRMAN BABCOCK: So do you want any votes?

HONORABLE TRACY CHRISTOPHER: Well, we did not recommend a change, but there's two possible changes to vote on if you want a change.

CHAIRMAN BABCOCK: Yeah. Well, let's vote on that.

HONORABLE TRACY CHRISTOPHER: Okay. So the first change would be to require a signature, either by one or more jurors or the presiding juror.

CHAIRMAN BABCOCK: How many people think that's a good idea? Raise your hand. The absentee votes.

How many people think that's a bad idea? 22 to zero, Chair not voting, think it would be a good idea to have a signature. All right. What's the next thing to vote on?

HONORABLE TRACY CHRISTOPHER: Well, the question is then, do you want signed by one or more jurors or signed by the presiding juror?

CHAIRMAN BABCOCK: All right. Everybody that thinks the presiding juror ought to sign it, raise your hand.

MR. JEFFERSON: Ought to be required to sign any note.

CHAIRMAN BABCOCK: Right. Required to sign any note.

MR. HARDIN: Wait, wait, wait.

HONORABLE HARVEY BROWN: What about this thing about I'm sick or I'm getting bullied or --

MR. HARDIN: Or, yeah, they're hammering on me.

HONORABLE TRACY CHRISTOPHER: Right.

MR. HARDIN: I thought that was the very issue that Judge Christopher raised.

HONORABLE TRACY CHRISTOPHER: That's why we didn't think that it had to be from the presiding juror.

PROFESSOR DORSANEO: Okay. I take my vote back.

MR. HARDIN: And that becomes a big deal when you say only the presiding juror, because then that minority juror cannot communicate with the judge.

CHAIRMAN BABCOCK: Yeah. Right. So you would be against.

MR. HARDIN: Yeah, but I'm not sure we aired that out. That's all I'm saying. Now that you're going to vote on it, that's fine now that we got to air it out.

CHAIRMAN BABCOCK: Discussion. Anybody want

to talk about this before we vote?

HONORABLE TRACY CHRISTOPHER: I mean, that's the main reason, is that you want a juror to be able to communicate with you.

CHAIRMAN BABCOCK: Okay. So the vote is how many is in favor of requiring that only the presiding juror may sign the notes to the judge? How many are in favor of that?

How many against?

MR. ORSINGER: It's unanimous. You don't have to count that.

CHAIRMAN BABCOCK: 22 against, 1 in favor. Okay.

HONORABLE TRACY CHRISTOPHER: Okay. The second drafted issue --

MR. RODRIGUEZ: But may I ask a question? Does that mean that we are going to say that every note has to be signed by --

CHAIRMAN BABCOCK: Somebody.

MR. RODRIGUEZ: -- a juror?

HONORABLE TRACY CHRISTOPHER: Yes. Right.

MR. DAWSON: One or more jurors.

HONORABLE TRACY CHRISTOPHER: One or more jurors, signed by one or more jurors.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Then the -- to address the other concern raised by Justice Wainwright was his statement that "At a minimum the entire jury should know that a question about deliberations is being sent to the judge," and our proposed language is at the bottom of page two on my memo. "Give written questions and comments about this case to the bailiff after you read them aloud to the jury. The bailiff will give them to the judge." And this is an instruction to the presiding juror.

CHAIRMAN BABCOCK: Gotcha.

HONORABLE TRACY CHRISTOPHER: And so to sort of address the issue of, you know, if I'm feeling sick or I'm feeling bullied, well, that's not necessarily about this case, so it doesn't have to be read allowed. That was our attempt to sort of distinguish between the types of questions that you might get.

MR. HARDIN: But this is one that you-all would not recommend?

HONORABLE TRACY CHRISTOPHER: We do not recommend it, but it was our best stab at a sort of neutral way to say it.

CHAIRMAN BABCOCK: Yeah. Okay. Anything you want to say about this, Rusty, before we vote?

MR. HARDIN: No, that's all right.

CHAIRMAN BABCOCK: Richard. Anybody want to

talk about this before we vote? Okay. Everybody -- oh, Stephen. Sorry.

MR. TIPPS: I would simply say that I appreciate the committee's efforts, but I don't think that the prepositional phrase "about this case" is going to be -- going to communicate enough to the typical juror to allow him or her to distinguish between something that's related to the law as opposed to being sick.

PROFESSOR DORSANEO: How about "the law or the evidence in the case"?

MR. TIPPS: If I'm being bullied, well, that's about this case, so I just -- I think that that would create more problems.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

PROFESSOR DORSANEO: When I read that I wrote in the margin, "about the law or the evidence in this case," which is what I think the questions are about.

HONORABLE HARVEY BROWN: Yeah, that is better.

MR. TIPPS: It's better.

PROFESSOR DORSANEO: Always.

CHAIRMAN BABCOCK: Yeah, R. H.

MR. WALLACE: Suppose you have one juror out of the 12 who is, for whatever reason, holding out on one issue. It may be about the law and the evidence, but they

may feel bullied. They may be getting bullied. It just seems to me there's a problem any way you go there. If you can start having one juror send out a note saying, you know, "I'm being beaten up on" or bullied or whatever.

CHAIRMAN BABCOCK: Yeah, I had a note in a case where the juror complained about plaintiff's counsel having a notebook that had messages to the jury on it. Not about the law or the evidence.

MR. ORSINGER: That occurred while the trial was still ongoing?

CHAIRMAN BABCOCK: Yeah.

MR. HARDIN: Were you the plaintiff's lawyer?

CHAIRMAN BABCOCK: No, I was -- I was far removed from where that was going on.

PROFESSOR DORSANEO: Tracy, are these meant to be alternatives, these two (c)'s, or are they --

HONORABLE TRACY CHRISTOPHER: Well, if we voted for both of them we would have to combine the language somehow, but --

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: How many people are in favor of language like this? I think that would be a good idea. Raise your hand.

How many against?

MR. DAWSON: I'm sure Judge Benton is against it as well.

MR. SCHENKKAN: Here he comes. You can ask him.

CHAIRMAN BABCOCK: Two in favor, 22 against. Possibly 23, but we'll never know. So does that --

MR. TIPPS: He voted as he walked in. You didn't see him.

CHAIRMAN BABCOCK: Yes, sir.

HONORABLE LEVI BENTON: Did we begin our proceedings by noting the anniversary of the Constitution?

CHAIRMAN BABCOCK: We did that. We had a big ceremony.

HONORABLE LEVI BENTON: Very good. Very good.

CHAIRMAN BABCOCK: Actually, we had a pipe and drum and --

HONORABLE LEVI BENTON: I just wanted to make sure.

CHAIRMAN BABCOCK: Yeah. Tracy, anything else on this?

HONORABLE TRACY CHRISTOPHER: That was it.

CHAIRMAN BABCOCK: All right. So, not too bad.

HONORABLE TRACY CHRISTOPHER: Not too bad.

CHAIRMAN BABCOCK: 30 minutes. Justice Sullivan.

HONORABLE KENT SULLIVAN: 15 seconds. I just want to say --

CHAIRMAN BABCOCK: Hey, listen.

HONORABLE KENT SULLIVAN: Having looked for the first time in a long time at 285 and 286, we need to revisit these. They are very convoluted. They're confusing. Depending on how you read them, they can be read almost in a contradictory way. We need to revise them and modernize them.

CHAIRMAN BABCOCK: Bill wrote them, you know.

PROFESSOR DORSANEO: No, I didn't. I tried to rewrite them many times. I agree with everything Kent said.

CHAIRMAN BABCOCK: Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: I think jury questions would be very helpful in JP court because we have so many pro ses. Currently you can't have a charge, a jury charge in JP court, so we have really no way to communicate that. So if you think that's a good idea then it would be nice maybe to change that rule to allow some type of a mini charge to allow this, and if you're going to adopt these changes and you don't think it's a good

idea, maybe put something in that it wouldn't apply to JP courts so we don't have that confusion.

CHAIRMAN BABCOCK: Okay. Good point, thanks. Break for lunch.

(Recess from 12:46 p.m. to 1:41 p.m.)

CHAIRMAN BABCOCK: Richard reminds me that while we've done the hard part of the recusal dealing with campaign finances we've not done the easy part, which is campaign speech, so we're going to talk about that a little bit. Everybody, I'm sure, recalls the *Republican Party of Minnesota vs. White* case, which resulted in a five-four decision of the United States Supreme Court, opinion by Justice Scalia, where he found the so-called announce clause of the Minnesota Canons of Judicial Conduct unconstitutional. The announce clause being, as its name would suggest, that the judge who was either an incumbent or a candidate for a judicial office could not announce his positions on whatever issues he cared to talk about, and the Court found that was unconstitutional. Kennedy, again, holding that even though a judge couldn't be prevented from announcing his positions during a campaign, he might be able to be recused because of something that he or she had said during the campaign, and that recusal was an alternative to suppressing the speech.

Subsequent to that opinion, our Supreme

Court withdrew the Texas announce clause, which was virtually identical, from our canons. There has been a -- some sentiment on the Court that the -- the so-called promises clause, which prohibits a judge or judicial candidate from promising that they're going to do something once you're in office, that's still in our canons, but there has been some sentiment that that's unconstitutional as well, the theory being that the -- there's not much room speechwise between a judge who gets up and says, you know, "I'm going to announce my position," on whatever it may be, abortion or insurance or whatever, and then the next guy comes up and says, "I'm announcing my position, and I promise you I'm never going to change my feelings about this," and that under the current canon might be prohibited. The question is whether that's constitutional or not, and some thought that maybe it's not, but it's still in our canons. The recusal issue is still there, and so Richard has many smart things to say about that.

MR. ORSINGER: Okay, we're going to have kind of an accelerated presentation of this issue. The subcommittee has no particular proposed change for you to consider, so we just want you to know what the situation is and then consider whether a change should be pursued. I would like to echo what Chip said about the fact that in

the recusal area we probably have much more freedom to make decisions about campaign speech than we do when we're prohibiting it. In Justice Kennedy's majority decision in Caperton in dicta he made the statement that you have more freedom to regulate speech. Of course, Caperton had nothing to do with speech, but he made that comment, and he had a majority behind him. In the White case Kennedy wrote a concurring opinion, although he joined in the majority opinion, in which he explicitly said that a court or a state may adopt recusal standards more rigorous than due process requires and censor judges who violate these standards.

And then if you look at the minority opinion, which, remember, this was a five to four decision, so there were four justices that thought it was okay to regulate announcement speech during campaigns. And then we have one that says I won't go for any kind of regulation of speech, but I would think it would be okay if you were going to adopt it as a grounds for recusal, and if you look through -- there were two different dissenting opinions in White, all of which garnered four votes, and they talk about as a justification for why they supported the ability to control the announcement clause, was that the state had a compelling state interest in being sure that the public perception of the judiciary was

that it was impartial.

They felt that strongly that they were willing to curtail First Amendment rights to support that state right. So what you're left with in the White case is from a constitutional analysis standpoint, this was considered to be a regulation of speech, political speech, that was a core right under the 14th Amendment and that it regulated speech based on content, and different judges maybe have resonated -- one of those resonated more with some judges than others, but together the fact that it was political speech that was a core right and that it was an attempt to regulate speech based on content resulted in the majority deciding that it was subject to strict scrutiny constitutional analysis, and the only way to impinge on a fundamental right or to regulate speech based on content is if it has a compelling state interest and if the statute is narrowly tailored to serve that state interest. So when we're regulating core speech or regulating speech based on content, we have a compelling state interest standard, and it has to be as narrow as possible.

Now, this Court in White, there was some general comments about the promises clause, but I'm not at all convinced that there would have been a majority for declaring the promises clause unconstitutional, but I'm

not a constitutional scholar, and so it may be that people are right when they say that it only -- it's only a matter of time before somebody knocks down the promises clause or before the Texas Supreme Court decides to take steps of its own based on its own perception of freedom of speech and core speech and political speech, to take the restriction out of our Code of Judicial Conduct. This restriction that was knocked down in the Minnesota case, which was, you know, *White vs. the Republican Party of Minnesota*, it came out of their code of conduct, their Judicial Code of Conduct; and that was based on an ABA promulgated model, which many states had adopted both the promises clause and the announcement clause out of. So the announcement clause is now gone constitutionally, although I think that the language in the Minnesota statute was a little worse because they said a spouse -- pardon me, a incumbent judge may not announce his or her views on disputed legal or political issues. That was kind of an unconditional limitation on what they could say, whereas some of the other states, including Texas, said you can't make comments that indicate what your position is on matters that may come before you and that would suggest to a reasonable person what your probable decision would be.

So the Texas version of it really kind of

was from the standpoint of is a litigant going to feel like you made up your mind before the case was ever assigned to your court. The promises clause is still with us here in the Texas version. It's in our Code of Judicial Conduct, and it says, "A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, classes of litigants, or propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge." So we have a kind of a linguistic issue of how is that really different from an announcement? Is it just the use of the P word that makes it legal to control it, and so maybe it is difficult to linguistically distinguish between an announcement that doesn't make a promise but is tantamount to it and a promise that is, if you will, kind of a representation to the voters, "If you elect me I will always deny probation to drunk drivers," or whatever the promise may be.

Anyway, we still have it, but we may lose it. However, we know that at all levels of analysis that recusal rules have an important public interest or policy or compelling state interest of respect for the rule of law and the perception that the judiciary is impartial, and the same judges who have been holding forth on the

First Amendment rights, freedom of speech and elected politics, have been saying that they themselves recognize the compelling state interest in the impartiality and the perception of fairness. So what we have at this time is we have no ground of recusal in our procedural rules that mention anything about campaign speech or the speeches of the judge, but we do have a promise prohibition in the Code of Judicial Conduct, and then we have the following comment, which was referred to earlier. This is a comment to Canon 5, "A statement made during a campaign for judicial office, whether or not prohibited by this canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal." So that's a warning that if you say something on the campaign trail that suggests how you're going to vote in a certain class of cases that that could well be grounds to recuse you from all of those cases.

Now, there's another important component of the Code of Judicial Conduct that affects speech, and that's Canon 3(b), subdivision (10), and the general canon is "performing the duties of judicial office impartially and diligently," but subdivision (10) starts out with this sentence: "A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a

reasonable person the judge's probable decision in any particular case." Okay. Our general promises clause is in a separate part of the Code of Judicial Conduct, and it relates to promises about how they would rule in pending or impending cases, whereas 3 -- Canon 3(b)(10) just talks about public comment. It doesn't actually require a promise. So we actually have, if you will, two components of canons there that purport to address what judges say.

Now, I know of no groundswell of support to make a specific ground for recusal a violation of either of these prohibitions in the judicial -- Code of Judicial Conduct. So unlike the impetus that was given to us on the judicial campaign issue, perhaps nothing needs to be done about this yet, but we should discuss it because we've -- we haven't revisited this in the last nine years and the political temper is different, and Justice Hecht said he wanted us to go ahead and address this issue before the Supreme Court was making its re-analysis of this rule, and one of the obvious possibilities to me is one that we debated before about contributions, which is should we have a ground for recusal that has something to do with making a promise or making a statement or public comment that suggests the way you would rule on a particular matter that comes before you, and then when that kind of matter comes before you or maybe your

statement was against a litigant or like -- like a refinery that is accused to have polluted the groundwater and the judge says something that would indicate that on that kind of litigation he is going to be very sympathetic to a claim or whatever or maybe not sympathetic, either way.

The idea is do we want to have a particular ground, do we want to mention as a grounds to recuse? Do you want to mention it as a factor, or do you want to leave it as the comment that it is, which is that if you say things on the campaign trail, they may be used against you in a recusal hearing? And there may be a lot of people that feel like that comment is enough. That comment does not limit itself to promises. It's a statement made during a campaign that may cause the judge's impartiality to be reasonably questioned in the context of a particular case, so it's nothing more than throwing out there a statement that everyone involved should be aware that campaign statements may be a ground for a finding of a lack of -- that impartiality could reasonably be questioned. So that's kind of the long and the short of it. There's no proposal to change anything.

CHAIRMAN BABCOCK: I'd say that's the long of it.

MR. ORSINGER: That's the long of it. Okay.

So I'm going to pass the baton.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Richard, what's our basis -- are there decided cases that are making us question whether the promises clause is unconstitutional, or are we extrapolating from the White decision?

MR. ORSINGER: I don't know. I'm not an advocate of that view, and I don't know why they think that. I think the conversations that I've had with people that talk about that are reading the White case and then when you see that there's recently the campaign contribution issues seem to kind of blow the -- blow the limits off of what used to be considered to be reasonable restrictions on campaigns, judicial campaigns, is that the Court, the U.S. Supreme Court, when asked will probably say you can't even prohibit promises and what's the distinction between a promise and an announcement anyway, but surely if they do that they would have to recognize that if somebody does get up on the campaign trail and make a promise and that's constitutional, then surely that should be grounds for recusal. But I don't -- Chip may be able to tell you more why there's a perception around that promises clause is vulnerable.

CHAIRMAN BABCOCK: Yeah, the -- I don't know of a case, although there may be one in New York where the

promises clause was struck down, but at the time of White the Court appointed a group to study this, and I think the group was close to recommending that the promises clause be booted, and there certainly were a lot of comments in the record, and as I recall, Justice Hecht wrote a concurring opinion when we got rid of the announce clause and said that the promises clause may well be unconstitutional and I don't want anybody to think my vote says otherwise.

PROFESSOR CARLSON: And then subsequently there was a task force appointed with the Code of Judicial Conduct.

CHAIRMAN BABCOCK: That was the task force that recommended withdrawing the announce clause.

PROFESSOR CARLSON: But what was the recommendation of the task force on the promises, just narrowly divided?

CHAIRMAN BABCOCK: I don't remember if there was a vote, but there was a lot of discussion, and there was some people that felt that it could not stand and others that it could, and I think we recommended to leave it in. I think that was the majority.

PROFESSOR CARLSON: I think that was it.

MR. ORSINGER: I believe that's right, Chip.

CHAIRMAN BABCOCK: As the majority view.

PROFESSOR CARLSON: Yeah, I was on both of those, and my recollection is exactly the same as yours, Chip. I thought the discussion really came down to something similar to campaign contributions, and that's the due process rights of the litigants versus the due process rights of the judge, and it's a very close call.

MR. ORSINGER: Now that --

PROFESSOR CARLSON: On whether --

MR. ORSINGER: -- close call probably is a closer call when you're regulating speech than when you're talking about grounds for recusal.

PROFESSOR CARLSON: Yeah.

MR. ORSINGER: And, don't forget, we're not purporting to regulate speech today. We're only discussing whether we should back away from the speech regulation area and instead seek the protection in recusal grounds or recusal factors where we have much more assurance that that's constitutional and where the compelling state interests of an impartial -- perception of an impartial judiciary seems to be recognized by members of the majority and the minority in White.

PROFESSOR CARLSON: Yeah. I think that's right.

MR. ORSINGER: And the reason that we bring it up right now, obviously if this Supreme Court knocks

out everything in the Code of Judicial Conduct about campaign statements then we really have to have a meeting about what to do about recusal because we have no standards whatsoever at that point to restrain people from making promises or anything.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I just wanted to point out that it is enough of an issue that again the ABA has proposed a model rule I think that addresses that that read, "The judge, while a judge or a judicial candidate, has made a public statement other than in a court proceeding, judicial decision, or opinion that commits or appears to commit the judge to reach a particular result or rule in a particular way in a proceeding or controversy."

CHAIRMAN BABCOCK: For recusal, they should be recused?

MR. FULLER: Yeah, that's part of that laundry list that they brought out.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Trying to get clarification, I guess. If the right to announce your position is a fundamental right, free speech fundamental right, and if any restriction on that is subject to scrutiny then would a recusal rule qualify as a restriction on that and therefore subject to rational -- are you saying it would

not because it's not punishment to the judge?

MR. ORSINGER: The Supreme Court didn't talk about that. My assessment of it is that you have a question whether you even regulate speech at all. The White case was premised on the idea that certain speech was prohibited and could be sanctioned in some way against the candidate for doing it. To say that if you take a strident enough position in the campaign that everyone knows that you're biased and therefore you could be recused by individual litigants, I'm not sure that's a restraint on speech. There may be consequences applied to the speech, but you're free to say what you want, but on the other hand, litigants are free to get you out of their cases if you're biased. So I'm not sure that you have a strict scrutiny or even a rational basis problem there, and until we get some higher up courts to apply constitutional analysis we don't know, but what we do have is we have dissenting opinions and concurring opinions in two different cases that seem to suggest that the majority of the judges, whether they're in the dissent or majority in that particular case, all seem to recognize in their rationale that a better place to address this kind of speech is in recusals and individual cases rather than a ban on speech, a preexisting ban on speech.

CHAIRMAN BABCOCK: Right. Buddy.

MR. LOW: Chip, have there been any -- I know as a practical matter there's not much difference in saying, "Here's how I stand" and "I promise I'll do that," but there could be a difference because you receive a vote based upon a promise to do something, so you receive something of value and promise. Now, when you're sworn into office do you swear that you've made no promises or commitments? I've never been sworn into office, so I don't know what you have to swear, but what do you swear, Richard, when you get sworn into office?

MR. ORSINGER: I think you swear to uphold the Constitution of the state and the United States.

MR. LOW: Yeah, but you don't say, "I've received nothing," or --

CHAIRMAN BABCOCK: Justice Scalia has a really great sentence in the opinion in White, and I won't do it justice because I can't remember it precisely, but he said, "Campaign promises are among the least enforceable in our society."

MR. LOW: Well, he's probably right.

CHAIRMAN BABCOCK: So I'm not sure they're binding. Back to Jeff's point, though, and, Justice Hecht, as I recall, we've talked about this. There could be an argument on recusal because there may be a duty to recuse, but there's also a right not to recuse.

MR. BOYD: Can be recused.

CHAIRMAN BABCOCK: And one could construct an argument that if the obligation to recuse, which is speech-based, is too onerous then that may raise free speech concerns.

MR. BOYD: So we just need -- if we adopt that rule we just need to document the record showing why it is the narrowest rule available.

CHAIRMAN BABCOCK: And there's a compelling state interest in doing so.

MR. BOYD: Well, yeah, and I think we got the compelling state interest, but then we just need to show narrowly tailored.

MR. ORSINGER: Which I think is driving some of the language attempting to correlate the speech to specific issues or specific cases. It's not just a prohibition against talking about abortion; it's a prohibition about taking positions on abortion that are so clear and so unconditional that a member of the public would think that you're no longer impartial on that issue. So that brings it down to there must be a specific litigant that has a specific issue in front of a specific judge who made a specific statement that suggests that they can't get an impartial tribunal, so that's pretty narrow.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: The recusal issue is one problem. The other problem is the Code of Judicial Conduct itself, because that regulates not just campaign, but any statements by the judge, and I don't know that it's all that clear right now what a judge can and cannot say that makes it violative of the Code of Judicial Conduct. It's unclear, and a lack of clarity causes problems for judges not knowing what to say, complaints coming in that allege some action is violative of the code, and it's not clear how it should be enforced, which gives you inconsistent results. So, you know, I would think that maybe a closer look at the language and the code would be helpful.

CHAIRMAN BABCOCK: Yeah. Elaine, I sort of regret that we didn't press harder on the -- on the promises clause in that, because I think it is a trap for the unwary, and I think some judge or judicial candidate is going to get caught in it some day and then they're going to be brought before the Commission on Judicial Conduct, and it's going to be an ugly thing.

HONORABLE TOM LAWRENCE: Most of the complaints are not campaign-related. They're related newspaper articles and statements that come in. I think

that's an even bigger problem really than the campaign-related statements.

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Any other comments? Where we're headed is should we have a new section (h) or (i) or whatever it may be, that -- in the recusal rule that talks about public statements that the judge has made promising certain action in pending or impending cases.

MR. ORSINGER: Actually, we may have the freedom to even put announcements in there. I don't think you should rule that out of the discussion.

CHAIRMAN BABCOCK: No, I agree with that. Justice Gray.

HONORABLE TOM GRAY: So the issue is not whether or not to take out the promises clause from the canons.

CHAIRMAN BABCOCK: No, that's not before us today.

HONORABLE TOM GRAY: It should be.

CHAIRMAN BABCOCK: Well, it can be if anybody wants us to, but right now --

MR. ORSINGER: When you're elected to the Supreme Court and you're selected as the liaison you can put it on our agenda.

CHAIRMAN BABCOCK: But how do people feel

about having a ground for recusal -- Richard.

MR. ORSINGER: I'm sorry.

CHAIRMAN BABCOCK: A ground for recusal as being based on comments a judge or judicial comment -- judicial candidate has made, whether it's in a campaign or not, anywhere, promises or announcement of position. Yes, Eduardo.

MR. RODRIGUEZ: Well, I'm -- I think that we ought to definitely have something along those lines. I mean, I believe in free speech, but I also believe in a judge that's fair, and depending on the type of comment that you make, it's very -- it's very possible that a litigant could not feel that he's in a fair -- in a fair court if that court has made comments dealing with that, whether it be in a campaign or whether it be at a speech to the Rotary Club or whether it be in speaking to the news reporter. I just -- I think it's something that we definitely ought to look at.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I recall some years ago that Justice Scalia made some comments in a public speech and was the subject of a recusal motion before the U.S. Supreme Court. I don't recall the case, and I don't recall the grounds. I do believe he recused himself in response to the motion, but, of course, it was not made in

the course of a campaign. He was appointed by God -- or by the President and the Senate.

CHAIRMAN BABCOCK: He was confirmed by God.

MR. MUNZINGER: He was confirmed by God.

MR. ORSINGER: Endowed by God.

MR. MUNZINGER: But the point is I can display my heartfelt view of an issue in such a way that a litigant could believe that I might not be able to overcome my point of view, and this comment as it is written in the context that it's written, of course, it applies to a campaign, but I think Eduardo is correct that people can make statements in public speeches or other places that can cause litigants or the public at large to question whether a judge can overcome it, and I think the last time we discussed this was in the issue of abortion, which is obviously a very emotional issue for people who are involved in it. A judge who makes a comment about abortion may or may not be able to change his or her mind on that subject matter in as much as so much of it is religiously based, and that can cause a problem to a litigant, and I think the comment should not limit comments to campaigns.

CHAIRMAN BABCOCK: Okay. Rusty, are you stretching, or do you have your hand up?

MR. HARDIN: No, I'm just listening.

CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

MR. BOYD: I agree with that, that it shouldn't be limited to statements made during campaigns. On the other hand, I think we -- the rule should not assume that a statement of a personal belief automatically demonstrates an inability to offer a fair decision. I mean, whatever, abortion or whatever issue. If a candidate says, "Yeah, I personally believe that abortion is wrong," that doesn't mean that they are -- should automatically be recused from any case, you know, a challenge to the parental consent law or something. I mean, I think there's got to be more than just the fact that they made a statement stating -- and I don't think that's what you were saying, but that was kind of what I heard.

CHAIRMAN BABCOCK: No, that's a good distinction, Jeff.

HONORABLE TOM GRAY: Well, I mean, it can always be that -- and I've made the decisions where the opinion that I had to write following the law was not what I personally would have preferred the law to be.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TOM GRAY: And, of course, you know, that's exempted by even the comment that's offered, but, I mean, if y'all are talking about in the context of

campaigns where it's more problematic, because there's just more rhetoric that is out there, I mean, we had a candidate for the Sixth Court of Appeals in the last election cycle that staked out his position as being that which the United States Supreme Court stated may not necessarily be constitutional, and therefore, he was not obligated to follow it, and amassed quite a large following with that theory of the law. And so, I mean, the proof ultimately is in the pudding of whether or not they follow the law or not, but there's got to be room in which a judge can state or announce or talk about, maybe approach the term "promise," of what their personal view is, but yet at the same time recognize, but that is not why you elect me. You elect me to be a fair arbiter of the law, and that is what I take my oath to mean.

CHAIRMAN BABCOCK: Uh-huh. Yeah.

HONORABLE TOM GRAY: And so I'm -- that's why I'm more focused on taking out the restraint on speech that is in the canons than the subject of the recusal, which -- but I understand that's not the issue before us today.

CHAIRMAN BABCOCK: Okay. Okay. Yeah, Stephen.

MR. TIPPS: This all sounds to me like a discussion of a situation in which a judge's impartiality

might reasonably be questioned or a situation in which a judge has a personal bias on a particular issue, and our rule already provides that if you can prove that, you can get the judge recused, and so I'm not sure why we want to start going down the road of identifying specific examples of situations in which there might be partiality or bias rather than simply relying upon 18b(2)(a) and (b).

CHAIRMAN BABCOCK: Okay.

MR. TIPPS: And then let some court at the appropriate time when there is a ruling recusing some judge based upon some position he's taken in a campaign or elsewhere decide whether or not that implicates any kind of constitutional issue, which I wouldn't think that it would, but that's not for me or us to decide.

CHAIRMAN BABCOCK: Well, it would be a ruling declining to recuse a judge.

MR. TIPPS: Yeah, sure. Right.

CHAIRMAN BABCOCK: Because otherwise they would take it up on appeal. Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Yeah, I think I agree with that, and right now when you're running for office and you're asked to take a position on a particular subject, often you can say, "Look, I don't want to take a position on an issue that might come before me." I guess my concern would be if we add a -- if we wrote a provision

in this rule that was so narrow as to pass constitutional muster, the response might be, "Wait a minute, I'm not asking you what your opinion in my case on this issue is. I just want to know" -- whatever, and so that same judge who would normally not comment is being kind of pushed to make a comment because of the very narrow item that we have added to the rule, but maybe a comment here as opposed to in the judicial conduct --

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE DAVID GAULTNEY: -- might be appropriate.

CHAIRMAN BABCOCK: Well, there is a comment now.

MR. ORSINGER: It's in the Code of Judicial Conduct, though.

CHAIRMAN BABCOCK: Oh, that's right, it is.

MR. ORSINGER: Justice Gaultney is saying if we stick it down in the recusal rule, that gives us an emphasis as this is also a grounds for recusal.

CHAIRMAN BABCOCK: Right. Okay. Any more thoughts about whether we should have a specific subsection as opposed to a comment or leave it alone? Any more thoughts about that? Jeff.

MR. BOYD: I'll just -- looping back to the question of whether it is a restriction -- a recusal rule

would be a restriction on speech, it seems to me that if the rule is -- as is broadly enough to allow recusal whenever the conduct of the judge demonstrates personal bias, or the conduct or speech, I guess -- I forget how the exact word is now -- for us to then adopt a rule that narrows it into speech doesn't get us where we aren't already are in terms of the ability to recuse and yet then raises the potential constitutional issue. I just don't see why we should go there.

CHAIRMAN BABCOCK: Okay. Any other comments? Justice Christopher, you've been awfully quiet.

HONORABLE TRACY CHRISTOPHER: Well, I agree with David that, you know, sometimes you like to not be able to talk and you like to be able to say, "I'm going to get recused if I talk," but I also agree with Tom that, you know, judges should have the right to talk if they want to, so I'm conflicted on both ways here.

CHAIRMAN BABCOCK: All right. Well, you're clearly recused then. You won't be voting on this one then.

Okay. I think -- well, tell me, should we vote on whether to leave the rule as it is? Should that be the first vote?

MR. LOW: Right.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: Since Richard hadn't done his "I'm entitled as a citizen, by God, to know," I feel obligated to make that argument for him.

CHAIRMAN BABCOCK: I tell you what, if you want --

MR. MUNZINGER: I was biting my tongue.

CHAIRMAN BABCOCK: You make it, but then let's wind him up because --

HONORABLE TOM GRAY: I mean, we are -- if you can't say what you feel because you're afraid you're going to step in it with the Judicial Conduct Commission or you're going to be later subject to -- and this is where it's real important to me as to whether or not this is an independent ground for recusal versus a factor to be considered in the courts of a recusal motion, huge difference to me. I mean, if you can be recused only for this, that's one thing, but if it's just a factor, it's less important, but the -- we are hiding from the citizenry that which they need to know to make an informed decision, and, yes, judicial candidates have hidden for years behind the Canons of Ethics saying, "I can't talk about what I'm going to do when I get elected," and I just think that is fundamentally wrong and contrary to our system of electing judges, which I'm sure Frank would support me on if he were here that we should defend, but

he's not. He stepped out.

CHAIRMAN BABCOCK: He slipped away.

PROFESSOR CARLSON: He recused himself.

HONORABLE TOM GRAY: So, Richard, take it away. Help me out here.

MR. MUNZINGER: Well, I read the White opinion, and I think White is looking at elections and saying restrictions on what the public can be given are unconstitutional. There is a concern there that government should not be dictating what may or may not be said in an election, this very same thing they just did about campaign contributions. What a country we live in if I run an add 90 days before a Federal election that mentions -- I'm making this up -- Hillary Clinton's view of abortion. I can be penally sanctioned for that? I can be in criminal trouble for making a statement within 90 days in an election on an issue of election and I live in America?

CHAIRMAN BABCOCK: Now we're going.

MR. MUNZINGER: Hey, am I right or wrong? I'm just asking you the question. Do I live in America, or do I live in someplace where somebody made up a rule that I can't talk 90 days before an election? And you're exactly right. Judges for years have said, "Well, I can't tell you what I think." Is law given us or do we make it?

That's the -- that is a philosophical question about law. So if I'm a person who says I can make the law, you ought to be telling me what you think the law is. I ought to be able to know what you think, and if you're going to tell me, "No, I can't say that," then I'm electing somebody in the blind. I don't know what they think, and yet I'm told that I have to obey this law.

There is a judge in San Francisco who has just told us that 52 some-odd percent of the people of California are bigoted, stupid people who cannot make their own law.

HONORABLE DAVID MEDINA: That's a true statement.

MR. MUNZINGER: They can't make their own law in a democracy. 52 percent of the people cannot make their own law. Now, this fellow never had to answer a question because he was a Federal judge. I bet if he had said that to the electorate of California he wouldn't have been elected. So maybe, you know, anything that restricts my right to know I'm -- I suspect it. We really need to have all the information we can possibly get about people, but that really wasn't the vote.

CHAIRMAN BABCOCK: Lamont, any way you can top that?

MR. JEFFERSON: No, no. But I think there's

a difference between commenting by a judicial candidate, especially commenting on a subject matter, and committing to a position in the case. It's one thing to say, you know, "I'm against abortion, I think abortion is bad," and then if you take the next step and say, "The first case that I get in front of me that allows me to rule consistent with that position, that's how I'm going to rule," I think those are two very different things. I mean, I think you could presume that a judge is going to follow the law. That's kind of the presumption for electing judges, is you're electing them to follow the law, but if a judge says as a part of a campaign, "If this case comes before me, this is how I'm going to rule," or if comments that he makes or she makes are so strident in that regard that you know it doesn't matter what the litigants say in front of him, he's already made up his mind, then that -- I think if he's made those sorts of public comments he ought to be subject to recusal.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Well, we keep talking like people want to know what you think about the law. I'm sorry, I could not help but recall a former justice on the 13th, who I won't name, that said when he was running for office one person came up to him after a rather lengthy speech and said, "Well, there is only one thing I want to

know," and the judge responded, "What's that?"

"Can you fix my parking ticket or not?" And when he said, "No, I don't handle parking tickets or traffic tickets," he said, "Well, I have no use for you," and I don't think people want to know -- I don't think the electorate wants to know what your views of the law are. They want to know how you're going to rule for me. They're going to want to know how you rule on the cases I care about in front of you right now, and that's where it's all headed to, and so the idea -- the idea that a person -- in which case we're not voting for law. I mean, when you're electing judges you're not voting for laws; you're voting for specific decisions. That's what they want to know. Well, I don't -- I have no problems then with saying we can attach a consequence called recusal, if you want to get that specific, in which case -- I mean, as I said, I have no problem with it, but the idea that all of this is about values and abstract discussions of law, no, I don't think that's what the voters want to know when they ask those kind of questions.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: So is the evil that we're trying to prevent the fact that the judge has a opinion or that the public knows what that opinion is? In other words, say we're in one of these meetings and someone here who's

not a judge says, "Well, this statute is unconstitutional," and "I'm reading it, and it's just plain unconstitutional." Now, that person can never be a judge or if they become a judge they're automatically recused from any case that comes in front of them that challenges the constitutionality of that statute?

The reality is they have that view whether they ever expressed it or not, and my guess is all of you judges, you know, have dealt with questions that have never come before you as a judge but you know how you'd rule if it did. It's just you haven't expressed it to other people. I'm not sure what evil we're trying to prevent.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Well, I would add to that, I mean, you could give a lecture to the law school about the First Amendment, and there will be something in the content of that that will show a point of view or your understanding of cases that could be construed that way, but what we're doing is we're conflating two things that need to be separated. First is that judges should be restrained in their speech and should contemplate what they talk about because we do rule in a specific context on specific facts. So, yes, we do have First Amendment rights; yes, we can speak out; but we

cross certain lines at our peril that at some point if we have gone so far as to express a point of view on a subject that affects our impartiality then we can be recused.

So we have First Amendment rights. We can speak out, and really whatever you want to say, but there is -- but it has to be thoughtful that at some point you -- that you can't go so far as to express a predisposition in a certain issue or you are -- that issue might be raised in a recusal, and so it's only if at that point, some later point, that you have gone beyond that point or been so entrenched in a position that it's clear that you are no longer impartial and somebody does have the right to make that recusal motion, but certainly we can speak out, we can give lectures, we can give points of view, but it has to be thoughtful and respectful and not a predisposition, and I agree with David.

I -- this really does protect judges from having to speak out, and we rule against our values all the time, and we have to follow the law, and so it's very important that those -- we get these -- and I was late, and I apologize, but we get these questionnaires all the time that are so offensive, and sometimes they're couched in ways that we can answer them, but most of the time judges should not be answering those, and this is what

protects us from having to answer those. So it's a sad commentary that people think a judge can't decide on the facts or the context or the multitude of considerations that we consider at that time that somehow that we have to predisclose that in order to have a system of justice, and I resist that notion.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just came back from a CLE, so I apologize. I didn't hear the whole thing. Richard, I've really got to ask you because I may not have heard what you said correctly, but I don't want to let it go uncommented if I understood you correctly, because I think it was an attack on the judiciary and judicial reasoning, and I don't think that should go unanswered when I hear it, and I'm surprised to hear it here actually, because what I heard you say was that a Federal judge has no business deciding what Federal Constitution is, and to me that's an attack on the judiciary. You may disagree with his constitutional interpretation, but clearly a Federal judge has the obligation to overrule a state decision, even if it's a hundred percent of the state, if it's found to be in violation of the Federal Constitution.

MR. MUNZINGER: His view of the Federal Constitution. I wasn't attacking the right of a judge to

decide a case.

HONORABLE STEPHEN YELENOSKY: Well, it sounded to me like you were attacking the notion that a judge should be in the position of making an anti-democratic decision, and my point is, that is within contemplation of our Constitution and is very American.

MR. MUNZINGER: I don't question but that the procedure is correct. I was obviously questioning his decision. To me it is astounding, maybe not to you, and that's why we are free people in a free country to have differing views. The question is if I'm going to vote for my judges should I know how they feel before I vote for them. That was the subject under discussion. A rule that tells a judge not to say what the judge thinks, if you're going to elect judges, doesn't seem to me to make sense. I wasn't attacking the judiciary.

HONORABLE JAN PATTERSON: But nobody asks us what we think of summary judgment --

MR. MUNZINGER: Sorry you felt that way, but I felt the decision was stupid.

CHAIRMAN BABCOCK: Which is your right to express that opinion.

MR. MUNZINGER: Exactly so. That's why I said it in those terms.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: For people's consideration I want to give a real world example that's in 1976 and we're in the earlier great energy crisis. You remember when there was an interstate market for natural gas and intrastate, and intrastate was unregulated, interstate was regulated, and Lo-Vaca Gas Company, which had fixed price contracts at 10 cents an MCF for all these cities in South Texas, starting with San Antonio, couldn't buy gas in the intrastate market for more -- for less than $1.50. They couldn't possibly honor their contract. The Railroad Commission of Texas, headed by three elected Railroad Commissioners, regulates gas utilities. They suspended that contract and allowed Lo-Vaca to buy gas on the intrastate market at whatever it costs and pass that cost through to the voters of San Antonio and Austin and Corpus Christi and the Valley. Not a very popular decision.

There was a vacancy on the Railroad Commission; and Governor Briscoe appointed Jon Newton, who was an active state representative from down there in South Texas somewhere; and Jon had to immediately run in the special election; and the issue was whether to undo this temporary suspension order, enforce the contract, put Lo-Vaca into bankruptcy. That was an issue pending before the Railroad Commission of Texas; and Commissioner Newton running for re-election, ran for re-election, was

re-elected and then voted to enforce the 10-cent contract, the bankruptcy threatening order; and Lo-Vaca CEO, Oscar Wyatt, sued saying that this was outrageous because during the campaign Commissioner Newton had said, "Putting Oscar Wyatt in charge of the gas supply in South Texas was like putting a barracuda in a goldfish bowl." And so the issue in a court case in front of Judge Herman Jones here in Austin was did that show -- we weren't using the recusal standards for judges, but the administrative law standard and the irrevocably closed mind for the decision.

CHAIRMAN BABCOCK: I like that phrase.

MR. SCHENKKAN: Irrevocably closed mind. That's the standard for disqualifying administrative judges.

CHAIRMAN BABCOCK: I think that's our new subsection.

MR. PERDUE: That's (i).

MS. PETERSON: Yeah.

MR. SCHENKKAN: I was a baby lawyer at the Attorney General's office, and I don't know why, but Commissioner Newton thought perhaps I was not adequate to his defense. General Hill was running for Governor and had deputized me, so he hired on his own nickel recently retired Jim Myers, Judge Jim Myers, and he and I defended the case together, and I've always thought that Herman

Jones handled this in the most brilliant possible way, which was he allowed Oscar's lawyer to, in fact, take a deposition to question Commissioner Newton in open court where Judge Jones could ensure that it didn't get out of hand, but in which, you know, Commissioner Newton could have an opportunity to demonstrate that despite his campaign statements he was, in fact, interested in knowing what all the facts and all the law that might bear on this order would be, and, of course, that did have -- you know, allowed full ventilation of this issue, but I think ultimately protected the -- I don't know whether that cuts in any of this discussion.

MR. ORSINGER: You've got to tell us how it turned out.

MR. SCHENKKAN: No, they didn't -- that was all that Judge Jones did. He said, "You got this deposition." At the end of it he said "dismissed."

MR. ORSINGER: Huh.

MR. SCHENKKAN: Poured it out.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

MR. HUGHES: Well, maybe because temporally today the discussion of campaign finance has preceded this particular discussion, I am still -- I mean, I just can't get it out of my mind that no matter where you set the line, the public's -- the question -- they don't want to

know how you feel. They want to know what you're going to do. That's what they want to know, and the press and the public are going to want to walk right up to that line with every judge, and so where you set the line is going to have to do a lot with campaign and electioneering, because that's not enough always to know feelings or platitudes. They're going to want the 30-second explanation to make the 6:00 o'clock news of how that's going to translate into your action, and regrettably, the level of political discourse has fallen to a level where a high level discussion of abstract values is not going to interest anyone. Eyes glaze over, people sit back and start looking at the ceiling. They want to -- they want to bring it down to that final question, which is what's going to either make it or break it for most people. Okay, so that means you're going to vote how? So this means you're going to rule this way?

Because unfortunately, there is a tendency to want to -- to say that's really the test of what you think or believe or do. It's not the values that you throw out in discussion. Those are just political rhetoric. Tell me how you're going to rule. That tells me whether you really believe what you say, you really think that -- you really think the things you've put forward in the past five minutes are true or not, and so

if -- I think the line has to be drawn in such a way, so to speak, to protect judges who have not come to a conclusion, because I suspect a lot of people have found out in life until you have to make a decision you really don't know what you think. I think we need to have some protection for them to back away from that and say, "Look, I can discuss certain things, but what you want to know I can't discuss or I'll be off the case or I won't be able to hear those cases and then what good am I?"

CHAIRMAN BABCOCK: Well, judges have that right, of course. I mean, you know, to say that the state doesn't have the ability to restrict their right to speak does not -- does not also say that they must speak if they don't want to. They can easily in those questionnaires say, "I decline to respond to the questionnaire. I decline to answer that question, Mr. Editorial Board, because I don't want to, number one, and, number two, if I do, I might be recused from all those types of cases, so I choose not to speak." There's nothing wrong about that that I can see.

MR. HUGHES: Well, but the public and the reporters are becoming sophisticated enough to know that they can -- you know, if you can't point to a rule or regulation, they can say, well, you choose not to speak.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: And we can interpret your silence.

CHAIRMAN BABCOCK: That's right.

MR. HUGHES: And so the judge who is pressed with, well, on these issues -- it's like, well, your silence will speak more loudly than anything you could ever say. You know, once again, what was it -- I think it was one of the articles today, to be a good judge you first have to get elected, and that's a hard choice to put decent people in, and I'd like to give them a little ability to say, "I can't answer that" rather than "I'm pleading the Fifth."

CHAIRMAN BABCOCK: Yeah. Jeff.

MR. BOYD: The scary part is I agree a hundred percent with Mr. Munzinger.

CHAIRMAN BABCOCK: What's scary about that?

MR. BOYD: Because --

MR. ORSINGER: It scares Munzinger.

MR. BOYD: That's right. He's going to change his views. The example I'm thinking of, okay, so attorney writes and publishes a *Law Review* article that covers all the authorities that have ever been published on the issue and concludes that -- pick any issue that we're still waiting on ultimate guidance in front of us, same sex marriage is a fundamental right under the

constitution or whatever. Pick some issue like that and reaches a conclusion and then announces they're running for judge. It just seems to me I can't -- and so now I'm about to go in front of that person who is now a judge on that exact issue. I don't see what the evil is that we're trying to prevent that should allow me to recuse him or her because they've already done the research and reached a conclusion.

Now, if they issue an order saying, "I'm not going to accept any briefing or hear any argument on the issue, I've already decided," then we have a due process issue, but the mere fact that they've reached a conclusion on the issue in a *Law Review* article doesn't make them unable to give me due process to make my arguments and make sure that they've considered every authority and argument I think is possible. I mean, I think the right to know their view is more important than any concern that they're going to be biased in rendering their decision.

CHAIRMAN BABCOCK: Rusty, and then Eduardo. Rusty, did you have your hand up?

MR. HARDIN: Well, I guess the problem I have with the discussion is, is that I'm sort of a product of the Sixties where until the -- until the Bork nomination, judicial philosophy and so was considered -- maybe in the general terms, but trying to pin judges down

on their views of a lot of different things was very rebuffed. It wasn't acceptable. It didn't happen, and I remember saying when Bork happened that the Democrats were making a big mistake because when it was their turn the Republicans were going to do the same thing. We have this nastiness now about what judges views are. I understand the idea that we need to know where people in office stand, but I think there has to be a permitted source of protection for judges because when we're electing judges, that doesn't mean that we have -- we don't want to have these campaigns and these decisions, in my view, like a city council representation; and I think judges have to be insulated and allowed to stay a little bit above the fray; and if all of the sudden we start passing rules that say because you can't punish people, that's a free speech right, if we do this in a way that judges -- it's incumbent on them. For instance, what you're saying, I agree, if they don't have the sort of protection that says, "There are certain things I am just not allowed by my profession to talk about," then every Tom, Dick, and Harry that has an issue they want to punish somebody for, he or she is free meat; and I really believe that I liked the way it used to be better. That's all I'm saying, and so I really want to protect judges from that. I like -- I believe in having elected state judges and appointed

Federal judges. I like that dichotomy, but there are certain limits on what we ought to put elected judges through.

CHAIRMAN BABCOCK: Yeah. So that's a plea for the good old days. Eduardo.

MR. RODRIGUEZ: Well, I mean, due process isn't just the right to file and be able to argue something. It also includes the right that the person you're arguing it in front of is going to be fair, and if that person has already made a decision and he's written in a *Law Review* article about it, he ought not to be sitting in that kind of a case.

MR. HARDIN: And that would be a legitimate recusal motion, but when we're talking about rules that govern what they can and cannot say before this issue is before them, the solution is to take them off of that particular case if they have reached such a conclusion, but it's not, I think, to remove all their protections.

CHAIRMAN BABCOCK: I think R.H. had his hand up first, and then Alistair.

MR. WALLACE: I was thinking what do we do with jurors all the time? When a panel comes into the courtroom the judge tells them or the lawyer tells them or we both tell them that everybody comes in here with certain biases and prejudices, we can't help it, that's

human nature, but the important thing is can you set those aside and be fair and impartial. So, I mean, in a sense it's the same -- is there going to be some kind of a different standard for a judge? Is a judge not entitled to have certain views and opinions? There used to be a judge on the bench in Fort Worth, Bob McCoy, who is now on the court of appeals, who always used an example to explain to jurors about having a prejudice, that he had a prejudice against pit bulls. He thought they were too dangerous to be kept and shouldn't be kept as pets and dah-dah-dah-dah. I always figured if I ever had a dog bite case in his court I had a sure ground for recusal, but, I mean, really, we assume -- we engage in this assumption, maybe fiction, that jurors can set aside -- as long as they utter the magic words and say, "Yes, I can set that aside and I can be fair and impartial," then, you know, they're not going to be struck for cause, so how do you judge the judges by a different standard?

CHAIRMAN BABCOCK: Alistair, and then Judge Yelenosky.

MR. DAWSON: Maybe I misunderstood. I thought the question we were being asked to consider is whether a judge's speech should be or can be included for -- as a ground for recusal, not whether judges -- their speech should or should not be restricted or what

should or should not be restricted, but just simply if -- can what they say be used in a recusal motion, and the answer is yes. I mean, if the judge says something, either before he or she gets on the bench or after he or she gets on the bench, that indicates that, you know, they could never rule in favor of ABC Company for whatever reason, well, you know, that could be a ground for recusal, and we have that now.

I think Stephen's point earlier, we already have that in our system, and I don't think we need to change the rule to point this out, because then it's going to, you know, incentivize people to go look for that, and it will be another ground people will be looking for, and they'll be searching through all this stuff; but, you know, if a person who ends up on the bench has said something that indicates that he or she cannot be fair and impartial then it should be under the right circumstances grounds for recusal; and we have that now, so I don't think we need to do anything else.

CHAIRMAN BABCOCK: Judge Yelenosky, then Lamont.

HONORABLE STEPHEN YELENOSKY: Well, the scary thing is I agree with Jeff on this.

CHAIRMAN BABCOCK: Does that mean you agree with Munzinger?

HONORABLE STEPHEN YELENOSKY: No. But I obviously don't agree with Munzinger on certain things, but it was an interesting point about the article because so a candidate puts out an article expressing an opinion, I think there's a real distinction between what you think the law is, that kind of question; what do you think is good policy, that kind of question, and the answer to which should be irrelevant for a judicial campaign; and do you have any prejudices, like are you scared of pit bulls; but on the law question, you know, not only do we have candidates who write articles -- and your point is, well, that really shouldn't be a basis for recusal. They can still -- we have judges like me who ruled a particular way, and I thought I was right, I wrote a letter explaining I was right, and on a particular point I get reversed by the court of appeals, and I read the opinion, and I said, "You know what, they're right, I was wrong." So even though I expressed my opinion I was still susceptible to being convinced otherwise, and all you can expect is that I will use the proper means of answering a question of law, and the fact that I think the law is this doesn't seem to me to violate your due process.

It's still susceptible to argument, but it all really -- it depends on what's being asked, and, you know, if people are asking us policy questions, "What do

you think the law ought to be" on something, "What should the Legislature do," the answers to that should be irrelevant, and I don't know if we protect that or not, but they should be irrelevant.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I think we're mixing things. You talk about the public's right to know and all that. There is no constitutional freedom of speech issue about the public's right. It's the freedom of speech of the person, and Alistair is right. They can say what they want to, but it might end up they suffer the consequences, and so I don't think the public's right to know -- I don't know of any constitutional issue on that. You might say it's a violation of due process or stretch it to something else, but we're really talking about freedom of speech is what brought it up.

MR. JEFFERSON: Well, I mean, aren't we talking about -- we're talking about two different things. Writing a scholarly *Law Review* article seems to me an effort to enforce the rule of law, even though it might be a subject of recusal because, yeah, you've signaled how you'd vote if the case comes before you, how you'd rule if that case comes before you. That shouldn't be the kind of thing you ought to be recused for because the basis for your decision is the law. So you've expressed your

opinion about what the law is, but if you're out in front of a room full of, you know, people who you think want to hear that marriage is between a man and a woman and you go after -- you want their vote and you say, "You vote for me and I promise you when that case comes before me I'm going to vote in a certain way," and it's not based on the law or any scholarly review of anything, it's just a promise to get a vote, that person ought to be subject to recusal.

CHAIRMAN BABCOCK: Justice Christopher. Right in the middle of your speech, Lamont, her hand went --

MR. JEFFERSON: I saw that.

CHAIRMAN BABCOCK: -- zooming up.

HONORABLE TRACY CHRISTOPHER: This is actually one of my two examples that I was going to talk about, was the Defense of Marriage Act in the Texas Constitution, and it's a very fine line between announcing your view of what the law is and to the point that you might be recused. So I have these two examples. Suppose I said in a campaign context, "I am anti-abortion. I believe parents of minors ought to know before they have an abortion. I promise never to grant a judicial bypass." Okay. Everybody knows what that is. If a minor wants to have an abortion and not tell their parents, they come to court and they can get a district or county court judge to

grant them permission to have the abortion without notifying a parent.

All right. Well, that strikes me as a promise not to follow the law, okay, and should be subjecting me to recusal, all right. "I am anti-gay marriage. I have studied the Defense of Marriage Act and the Texas Constitution, I have written a scholarly article, and I believe that you should -- I should not grant a divorce to two gay -- to two gay people who are married in another state." Well, you know, that to me is a different question.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: I mean, and I don't think you should necessarily be recused for that opinion that you gave, so --

HONORABLE STEPHEN YELENOSKY: I don't either.

HONORABLE TRACY CHRISTOPHER: -- even when you're, you know, saying promises, I mean, there's -- there's very -- there's big shades and phases of promises that makes it very difficult.

MR. JEFFERSON: Well, I mean, I don't think you should necessarily be recused, but at the same time it doesn't offend me that someone puts it in a motion and says, "Hey, you wrote this" -- "This judge wrote this *Law*

Review article and committed himself and didn't give the litigants a chance to hear them out, and so I'm filing a motion." Now, that motion might get denied, but everything that the judge wrote and said can be and ought to be scrutinized if someone thinks they've gotten a --

HONORABLE STEPHEN YELENOSKY: What about a prior ruling by the judge?

MR. JEFFERSON: Would a prior ruling by the judge --

HONORABLE STEPHEN YELENOSKY: Yeah. A trial court judge rules a particular way on a point of law. It's going up to the court of appeals. You have other cases come in. Should you be able to recuse me because I've already ruled on that? You know what happens on --

HONORABLE JAN PATTERSON: Have you ever seen such a motion based on a prior ruling?

HONORABLE STEPHEN YELENOSKY: No.

HONORABLE JAN PATTERSON: Of course not.

HONORABLE STEPHEN YELENOSKY: No. Of course not.

HONORABLE STEPHEN YELENOSKY: And not only wouldn't you be able to recuse me, the presiding judge is going to assign those cases to me so that we have consistent rulings and they all go up together.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And this comes up all the time. Right now we have two new members on our court, and they've ruled on stuff, and Judge Guzman has been on a court of appeals, so she -- you can go look in the books, and you can see what she thinks about this and this and this and this, and we don't even suggest that recusal is a topic unless she sat in that case, unless she was attached to that -- ruled on a motion or somehow that case came before her, but if it's just an expression of "This is what I think about this law as it's applied in this circumstance," the fact that an indistinguishable circumstance is now in the present case as far as I know has never been thought on our Court to be grounds for recusal of the judge.

And the second thing, emphasizing what Tracy says, there are shades and phases, because once a month I -- sitting in the robing room about to hear some case and one of my colleagues says, "Well, this next case is easy. I mean, I don't think the petitioner or respondent has a prayer." Then we go out and listen to the arguments for 40 minutes and come back in and the judge has completely changed his mind or thought differently about it or said, "Well, this is harder than I thought," or you rethought it, and your first take on it was one way, but as you got into it even a little bit you -- then you had another

take. And of course, it happens all the time that judges after having given things a lot of thought still change their minds when they see another presentation of the situation. So this business about, well, if I get elected I'm going to be for this or that, you know, if the judge is really going to be true to his oath, you can't take that statement to be absolute. I mean, it's not -- he can't possibly stick to it, and if he's not going to follow his oath, we've got a bigger problem than what he talks about on the campaign trail.

MR. JEFFERSON: Just real quickly, the -- I mean, there is -- you do have the rule, though, that a judge -- the recusal rule on the Court that if the judge was involved in the underlying decision, that judge shouldn't be on the case, and it's not -- the judge -- they may be in the best position to understand the facts and to have a reasoned opinion, but the reason why they recuse is because of the public perception, right --

HONORABLE NATHAN HECHT: Right, but --

MR. JEFFERSON: -- because they've committed to a position, and now it would look like they're just defending their prior position and not giving the litigants in front of them a fair shake.

HONORABLE NATHAN HECHT: Well, interestingly, the first case decided by the New York

court of appeals was a case in which the issue was whether the trial judge who had since been elevated to the court of appeals should have to recuse in the very case that he decided as a trial judge, and the court said "no," because who would know the case better than the judge who tried it, so there would be less explanation involved, and who would be quicker to realize that he had made a mistake than the judge who sat on the case in the first instance, so the judge didn't have to recuse, and the opinion was written by the trial judge who had sat on that case.

CHAIRMAN BABCOCK: Did he affirm himself?

HONORABLE NATHAN HECHT: And he affirmed himself, but that was a long time ago, but the rule now is, that's right, if a judge has sat on any aspect of the case, on that case, he's not supposed to sit on it.

CHAIRMAN BABCOCK: But there are exceptions to that, too. The Fifth Circuit goes en banc, and the panel that sat on the case will sit en banc.

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: And sometimes --

HONORABLE NATHAN HECHT: And that's true in the state courts.

CHAIRMAN BABCOCK: State courts, too, right, and so sometimes even the judges -- in fact, I did have an en banc case where the panel was unanimous, but two of the

judges abandoned the author of the opinion en banc.

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: And went -- you know, leaving the fourth judge all by himself.

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: So even exceptions to that. I don't know where this has taken us, but it's been fun.

HONORABLE TOM GRAY: Well, I think the best phrase that we have learned in this entire discussion is that "irrevocably closed mind," and if that is what the group senses needs to be part of a recusal motion, that's great. I think that's probably something that is -- everybody agrees on. It gets into those shades of gray of where, you know, it's -- where do you go from being a proper ground for recusal to, you know, just picking at the judge. So --

CHAIRMAN BABCOCK: Eduardo, you had your hand up earlier, and I --

MR. RODRIGUEZ: Well, I was just -- I mean, during the conversation that we've had, we've looked -- we've talked about the issue mostly from the perspective of the judge. I think we need to consider also the perception that's given by having a judge who's made an announcement about an issue sit on that particular case

and the perception that the community gets about, you know, how can he be fair or --

CHAIRMAN BABCOCK: Yeah.

MR. RODRIGUEZ: -- or she be fair.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I just need to clarify, in case it wasn't clear from before, during that question or comment, Justice Gray, that the standard is different for administrative agencies.

HONORABLE TOM GRAY: Oh, I understand.

MR. SCHENKKAN: The irrevocably closed mind standard is conciously a much tougher standard to meet. A movant for recusal -- or disqualification is what it is in administrative law context -- you've got just about impossible burden, very nearly impossible.

HONORABLE TOM GRAY: Which is why I liked it.

MR. SCHENKKAN: As long as we're clear that that would be a huge change that isn't on the table here to the "impartiality might reasonably be questioned" standard, which is vastly different, and there's all sorts of considerations to take into account about differences between judges, even elected judges, and administrative agency's heads, who are by their nature by their statutory in the case of Railroad Commission of Texas state

constitutional duties policymakers as well as judges. It's just, you know, they aren't the same thing, and we would have to spend a lot of time talking about is the gap between them bigger than it should be, and that's, you know, a discussion we probably won't for purposes of this afternoon.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Is there a need for a change at this time?

CHAIRMAN BABCOCK: Well, that's -- I mean, that may be our first vote.

MR. HARDIN: That's what I mean. That's what I want to --

MR. JEFFERSON: Just to discuss, I mean, the reason why I think there is is because of the White opinion, because the White opinion leaves it wide open, and that would at least place some control on a judge and give a judge the ability to say, look, I don't want to -- "I don't want to, you know, fully err out my views in the campaign because I might be subject to recusal if that issue comes before me"; whereas before, without the White opinion, the judge could rely upon the canons and just say, "Sorry, I can't talk about that or I'll be disciplined."

CHAIRMAN BABCOCK: Well, is it an

appropriate time for a vote on whether we need to change or add to the rule, change the rule? That be all right?

MR. LOW: Yeah.

HONORABLE JANE BLAND: I'm just confused because we kept the canons -- the only thing that got struck down was 5.1, right? So, I mean, that got taken out of our canons after White.

MR. JEFFERSON: Well, we're --

HONORABLE JANE BLAND: But we left in --

CHAIRMAN BABCOCK: The promises clause.

HONORABLE JANE BLAND: -- the promises clause, and we also left in the comment about that -- that that may be a basis for recusal, so why wouldn't the --

MR. JEFFERSON: We're talking about 18b, right?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: No, I was talking about the Judicial Conduct Code.

MR. JEFFERSON: Well, I thought the question was whether we were going to add a comment.

HONORABLE JANE BLAND: Right.

MR. ORSINGER: That's correct. Not a comment.

CHAIRMAN BABCOCK: Section.

MR. JEFFERSON: Or a section.

MR. ORSINGER: Yes.

HONORABLE JANE BLAND: But if we still have this in the canons and we have 18b that talks about the impartiality reasonably being questioned, why do we need a separate provision in the rule? As -- since we have something in the code -- in the canon?

MR. JEFFERSON: Well, I mean, I think that -- and I'm not necessarily --

HONORABLE JANE BLAND: No, I'm just trying to --

MR. JEFFERSON: I'm going to vote for the change, but in my estimation White, although we address the canons, there's nothing in the recusal rule that adequately addresses it, or is there?

MR. ORSINGER: No, there isn't.

HONORABLE JANE BLAND: Well, there's nothing that specifically talks about promises or -- but if we have something in the canons that suggests that there may be a basis for recusal --

MR. JEFFERSON: But the canon --

HONORABLE JANE BLAND: -- and we have 18b(a), which talks about your impartiality being questioned, just the general provision.

HONORABLE JAN PATTERSON: Catch all.

HONORABLE JANE BLAND: Catch all.

HONORABLE BOB PEMBERTON: You've got some limited prospect of potential recusal problems out there.

MR. SCHENKKAN: It's (a) and (b), impartiality might reasonably be questioned or has a personal bias or prejudice concerning the subject matter or -- I mean, those are available in these cases, and as I understand the question, it's really just whether we need to go further somehow and say evidence of impartiality might reasonably be questioned, and personal bias and prejudice can include, though it is not limited to, statements you've made or promises you've made or whatever.

CHAIRMAN BABCOCK: Now it's announcements or promises, whatever.

MR. SCHENKKAN: Yeah.

CHAIRMAN BABCOCK: Speech that you made.

MR. SCHENKKAN: But I'm with you. I don't see why we need it.

CHAIRMAN BABCOCK: Okay. So how many people think we should leave the rule as-is without change? Raise your hand.

How many people think we should change it? Seventeen say it should not be changed, five say that it should. If we change it, how do we change it? Do we just -- yeah, Justice Bland.

HONORABLE JANE BLAND: I would just add the -- if this is the current comment --

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: -- that says, "A statement made during a campaign for judicial office may cause a judge's impartiality to be reasonably questioned in the context of a particular case," we just change that to, you know, "in the particular case the judge has made a statement that causes his impartiality to be reasonably questioned." I mean, that's why I don't see that it's that different than what we already say in 18a, but if we were going to change it then we should track this language in the canon.

CHAIRMAN BABCOCK: Okay. Anybody have any other thoughts? Yeah, Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, White may have started out referring only to speeches in a campaign, but it's certainly gone way beyond that now.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM LAWRENCE: And it' really gone to any First Amendment privileges that a judge may have, so the comment that would limit it to merely campaigns I think is kind of outdated. It really is any First Amendment rights.

HONORABLE JANE BLAND: I agree with that.

Any statement, not just campaign statements.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the problem with a rule like that is we do have a kind of a long -- I mean, there are cases in the recusal context that says if you have been listening to the parties and the case and the witnesses and you say something that indicates you think one side or the other is a liar, okay, that is not a ground for a recusal because you have based that opinion based on what you have seen and heard in the courtroom.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TRACY CHRISTOPHER: So, I mean, we have to be very careful about what kind of statements and what our statements are based on before they could become a recusal basis. So, I mean, if you take it outside of a judicial campaign and just say any statement, you'll run afoul of that line of cases, which I think is good. I mean, a judge ought to be able to say, "I don't believe you," "I believe you," and that shouldn't be a cause a week later of a motion to recuse. Well, the judge doesn't believe me, the judge can't be fair.

MR. HARDIN: This is the problem any time we try to regulate speech. It leads to all these opinions.

CHAIRMAN BABCOCK: Sure. But there are many, many efforts to regulate speech and --

MR. HARDIN: I know, but aren't you always opposed?

HONORABLE STEPHEN YELENOSKY: Shouldn't you recuse?

CHAIRMAN BABCOCK: I probably should. I probably should not vote. Wait a minute, I don't vote.

HONORABLE STEPHEN YELENOSKY: Maybe you're in the best position to know.

CHAIRMAN BABCOCK: That's right. That's right. I've written several scholarly *Law Review* articles about this.

HONORABLE STEPHEN YELENOSKY: But your mind is not irrevocably closed.

CHAIRMAN BABCOCK: It is not. It's always open. Justice Bland.

HONORABLE JANE BLAND: Well, the canons talk about pledges or promises, because probably a statement may not be enough, "pledges or promises regarding pending or impending cases, specific classes of cases, specific classes of litigants, specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge." That's what the canon says.

CHAIRMAN BABCOCK: Right. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, if we're going to say something -- and I voted against saying anything, but I don't know that there's any magic words because we don't have those words in there now, and again, we already have pro ses who are moving for --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: -- recusal on the grounds that we didn't believe them. So if somebody -- if it contains within it "is reason to believe that" -- what is the word "impartial" or whatever? What's the language you just read?

HONORABLE JANE BLAND: "Impartiality might be" --

HONORABLE STEPHEN YELENOSKY: "Impartiality might be questioned," and they say "because he doesn't believe me," the answer to that is, no, that isn't a reason to believe that his impartiality might be questioned. That's opinion formed on what was presented in court. Do we have to actually come up with the language that says which statement we're talking about, or can we just go with the principle that statements in some context might reflect on impartiality and others might not?

HONORABLE TRACY CHRISTOPHER: I think what

Stephen said, though, is it's really covered in 18a and 18b.

HONORABLE STEPHEN YELENOSKY: Well, right. I don't think we should say anything, but --

HONORABLE TRACY CHRISTOPHER: If we're just saying that.

HONORABLE STEPHEN YELENOSKY: -- the question was what do we say if we say anything.

MR. DAWSON: If we're forced to say something, what are we going to say?

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: And is the only thing so far on the table is to say what we said in the canon? And is the only question whether we put that in the rule? Because if that's so I want to ask if we could consider if we're going to do anything at all, and I voted against doing anything at all --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- making a comment to the rule just the way it's a comment now to the canon, which again seems to me to be the least harmful way to say anything.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I also don't think we should do anything at all to the rule, but to the extent

that we do something to the rule, we need to make it consistent with the canon so that we don't have two different obligations, one in the canons and one in the rule.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: I'm suggesting the very same comment just be made a comment to the rule.

CHAIRMAN BABCOCK: And you guys didn't notice, but in her acceptance speech up there in Washington to the Supreme Court she's going to do a survey of Texas law, what it is, what it should be.

HONORABLE JANE BLAND: And why it's better than all the others.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, the problem is that canon, because of the extension of the White case to virtually any speech, and cases like the Genovide case out of the Fifth Circuit recently, I don't know that the canon makes much sense anymore. It's very difficult to enforce the canon, so I don't know that we want to use the canon in the rule because the canon I think needs some work.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Wasn't there a whole task force or something dedicated to revising that canon,

Canon 5, and we have -- and do we have a copy of what the proposal is for Canon 5?

CHAIRMAN BABCOCK: Yeah, we alluded to that earlier. Elaine and I were both on that task force, and, in fact, Angie has got the transcripts back at our office if anybody is just really bored.

HONORABLE TOM LAWRENCE: But a lot of things have changed since that task force. There have been a lot of decisions that have expanded things, so I don't know that --

CHAIRMAN BABCOCK: No, I agree, and I said earlier today that I lament not being stronger in criticizing the remainder of that canon. Because I agree with you, Judge Lawrence.

MS. PETERSON: Do we need a task force reunion?

CHAIRMAN BABCOCK: A task force reunion.

PROFESSOR CARLSON: Which one?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: To respond to Jane, I have a copy, which you can borrow right now if you give it back, but that task force result was published in 68 *Texas Bar Journal* 514. I didn't make multiple copies because it's quite lengthy, but if you want to borrow it now you can look at it or if anyone wants to look at it later, June

2005 *Texas Bar Journal*, 68 *Texas Bar Journal* 514.

I want to mention something else that seems to have been overlooked. There's another speech provision in these canons, and it's Canon 3(b)(10), which says, "A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case," and that language is somewhat different from Canon 5 --

CHAIRMAN BABCOCK: It is.

MR. ORSINGER: -- and it may be a standard that's more appealing than the Canon 5 standard, so I just want it not to be overlooked when Kennon is writing this new rule.

MS. PETERSON: Message received.

CHAIRMAN BABCOCK: Yes, Justice Bland.

HONORABLE JANE BLAND: Well, that sounds more modern, and it doesn't quite have all the surplusage about political campaigns and stuff in it, so that might work better.

CHAIRMAN BABCOCK: Thoroughly modern.

HONORABLE JANE BLAND: Three might work better, but it shouldn't say yet something different, or go ahead and amend the canons when you amend the rule, but don't have a different -- don't pull out still a third

standard in the rule.

MR. ORSINGER: Or you could adopt it by reference, which says a violation of so-and-so may be a factor in determining recusals and then just whatever language the Supreme Court comes out with is automatically incorporated in the recusal rule.

CHAIRMAN BABCOCK: Well, the bad news is Kennon's head is swimming and Dee Dee's hands are tired, so we're going to take a little break here for 10 minutes or so, and then I think Justice Hecht feels that we're where we need to be on the recusal.

MR. ORSINGER: Before we close the record can I say one thing?

CHAIRMAN BABCOCK: Except for one thing that you're going to say. Yes.

MR. ORSINGER: The Supreme Court has really two avenues to do something about the canons. One is in the rule-making authority and the other is in their capacity as -- in their judicial capacity in adjudicating claims. The advantage of allowing this decision of the constitutionality of this provision to be decided in the judicial context of advocacy and adversary proceedings is it will be fully briefed on both sides by people who are educated to the constitutional law issues, and so --

CHAIRMAN BABCOCK: You may be assuming some

things, but --

MR. ORSINGER: -- to the extent that anybody ever reads this transcript, there might be an advantage to letting someone challenge the constitutionality, let it go through the district court, through the court of appeals, and then finally to the Texas Supreme Court, rather than to decide as a matter of rule-making that it's unconstitutional. That was where I wanted to end the record. Thank you.

CHAIRMAN BABCOCK: Okay. Any other comments for the record before we take a break? Okay. We're in recess for about 10 minutes and then we'll come back and do the proposed amendments to 296 through 329b.

(Recess from 3:10 p.m. to 3:28 p.m.)

CHAIRMAN BABCOCK: All right. We're now going to the dynamic team of Dorsaneo and Carlson. Sounds like either a law firm or a circus act, but either way --

PROFESSOR DORSANEO: Comedy act.

PROFESSOR CARLSON: A tragedy. I'm going to go first, I think. Right, Bill?

CHAIRMAN BABCOCK: Elaine's going first.

PROFESSOR CARLSON: All right. We're picking back up with findings of fact, and the last time we talked about this was at our April meeting, and I went back and read the transcript as carefully as one can, and

there were three things that we accomplished for sure. We -- well, for sure for that meeting. Hopefully we don't revisit it. We modified the time frame to request findings of fact from 20 days after the final judgment is signed in 30 days. We eliminated the reminder requirement to the trial court after a proper request had been made, so preservation of error only requires that you make a request to the court timely for findings of fact, and we voted on the level of specificity that findings of fact should encompass, and the language that we voted on is reflected in Rule 298.

We started to look at Rule 290 -- 299. We didn't take any votes. There was some criticism on the wording of the statute. There was some discussion about the substantive meaning of the rules, and we didn't take any votes, and I went back in light of those comments and tried to address them as best I could, but I think there's still some room for disagreement. At the very end of our discussion, you recall, there was expressed a sentiment by all, or at least no one dissented, to the embracing of the Federal practice of allowing oral findings of fact to be pronounced by the trial judge on the record at the conclusion of the evidence.

Our subcommittee started -- picked up there and went back and looked at the Federal rule and the

Federal practice and also looked at our rules, which are quite different, and started to see how we would finesse that, weave that option of obtaining the findings of fact orally into our rules. One of the things we discovered or at least I discovered in spending some time in -- with Wright & Miller on Federal practice and procedure is that in Federal court the trial judge is under an obligation in every case to make findings of fact. It's a self-executing Rule 52, unlike our rule which requires the request and then perhaps the need for additional or amended findings. And when you look at the case law on the Federal side, the case law really dissuades the trial judge from adopting verbatim proposed findings of one party, the Federal case law, and they really admonish the judge, "This is your responsibility to make findings of fact, and they talk about the purposes. One is to alert the appellate court, of course, on the basis of the decision. Another is to be sufficiently precise in the findings for purposes of estoppel, collateral estoppel, and res judicata, because of the implications from the decision, and, of course, to inform the parties of the basis of the trial court's decision.

And so the Federal cases suggest to the judge you can get proposed -- you can request from the parties that they each proffer proposed findings of facts,

but ultimately it should be your work product and it should meet those goals. Now, we don't have that, I don't think, underlying understanding or policy in our rules because we can't print money, because we put the responsibility really on the lawyers to get the job done, and so we started looking at weaving in the notion of oral findings of fact, and as Justice Hecht said earlier, the devil is in the detail. We ran into a lot of concerns in the practical application of doing that, and Justice Peeples in his infinite wisdom, which he does have, suggested it might be profitable for us to discuss the pros and cons just generally, once again on using oral -- allowing oral findings of facts versus maintaining our current practice of requiring only written ones.

And so in the draft that you have that is dated May 28th, 2010, under proposed Rule 297 on page two, mid-page, there are some pros and cons that the subcommittee discussed that we thought we might revisit with you, because we never did have a vote on whether we wanted to go with oral findings of fact as an option, but I think Chip asked is anyone opposed to the notion. So let's talk a little bit about the practical application and then maybe revisit or not.

CHAIRMAN BABCOCK: Sure.

PROFESSOR CARLSON: Of course, the largest

benefit, and it's a huge benefit, of getting the trial court's oral pronouncement of findings of fact at the conclusion of evidence on the record is you're really getting the judge's findings of fact at the time when the evidence is probably freshest in the judge's mind, and they would probably be very succinct. They probably wouldn't be the voluminous findings of fact that the parties' lawyers dream up after the fact, and, of course, findings that would be pronounced at the conclusion of the evidence would expedite the whole time frame because that would be your findings of fact, and the next thing comes your request for additional or amended and then onto appellate land.

The cons that we discussed of using this Federal model is that, as Justice Peeples pointed out, most cases are not appealed, and so do we really want to require or use judicial resources in every case to require the judge to make findings of facts and conclusions of law, or should we weed that out the way we do in our current system by requiring a written request. So one thing is do you get them in every case or should the judge have to make them in every case if there's a request orally at the conclusion. You know, it might satisfy the litigants to hear the court's findings, but it will take the court some effort.

The larger concern that was expressed by several people on our subcommittee is that a trial judge will often make pronouncements pertaining to the judgment that is orally pronounced on the record that might be misinterpreted as broad findings of fact, and if they are findings of fact under our current system that triggers your time frame to formulate your request for additional or amended findings. So you might be sucker punched thinking the judge is just sort of talking about the judgment when, in fact, those were your findings, you're negligent and, defendant, you owe X number of dollars. So there's some question about the level of specificity you would get in finding that would rise to the level that would trigger and would really equal oral findings of fact to trigger the request for additional or amended findings to avoid deemed or presumed findings.

There was also the practical application that the trial court will have made its findings of fact orally on the record and you would have a not -- in our proposal not a very short time, but 20 days to request any additional or amended findings, which you would need to do to avoid potential waiver of deemed finding, depending upon what they are, that the counsel is going to have to get a record, and what if the court reporter wasn't present or the court reporter is uncooperative, we're

putting an extra burden on the trial counsel to -- now it is a pretty short time, right, get that transcribed in a short period of time and then make the request for the additional or amended if necessary.

Then there's satellite issues that could come up in a case that were discussed, like what if all counsel was not present in the courtroom, some were, some weren't when the court made its oral findings of facts. How general can the court make findings of fact, as I suggested a moment ago, or can they be broad form or should they be -- should we have some level of specificity perhaps greater than we discussed last time? Because if the court says something like "Defendant is negligent and judgment for $500,000," which it shouldn't, but we have to have some language of monitoring that or making it clear if we're going to use oral findings of fact that won't do it.

So we started then to go and look at each of the individual rules to try and weave this in as a practical matter, and I think if you look at the application it will help a little bit. In Rule 298, on page -- well, actually, I'm sorry, let me go back to page two, Rule 297. We took the last version of the rule as endorsed by the full committee, "Upon timely request the court must make and file its findings of fact and

conclusions of law within so many days," and then bracketed would be the kind of language that we might consider including if we want to go the route of oral findings of fact.

PROFESSOR DORSANEO: The way it's drafted now you won't necessarily get the trial court stating findings and conclusions on the record, and probably you won't get -- get it to happen very often for judges that are happy to just rubberstamp what the judgment winner has -- has prepared.

PROFESSOR CARLSON: Let me respond two ways. One, you're right, current case law says trial court shouldn't make oral findings of fact, but, two, do I hear you saying, Bill, if it's not a "must" --

PROFESSOR DORSANEO: Yes.

PROFESSOR CARLSON: -- it's a "may"?

PROFESSOR DORSANEO: Yes. And I would predict that it won't happen, and I think it would be good if it happened.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: This might be germane or it might not, but what about the possibility of using both concepts, that either party may request the court to make preliminary oral findings at the conclusion of the hearing or the trial, but don't treat them as the official ones,

so the court could say, "I find this and this and this and this," but no timetables are running, and we don't have the foundation for the appeal yet, and then if somebody was really serious about an appeal then they request written findings, and the judge has already given guidance to the lawyers as to what those findings should be. So that way you get the presto response of the judge, and you could say the findings should be on ultimate issues so we don't have to have 25 or 30 evidentiary rulings, but don't make that the official. Use the official written procedure for the official findings. That might be an advantage of both systems together.

PROFESSOR CARLSON: What does everyone think of that idea? It certainly could be done.

HONORABLE JAN PATTERSON: I think that's brilliant, Richard.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The Court has spent a lot of time, from my perception, attempting to make bright line rules for appeals and post-verdict activities and what have you, and anything that complicates that process it seems to me makes it ambiguous. Why would you want to have the judge -- encourage a judge to make oral findings? The truth of the matter is if he's going to rule for one party or another he's going to make whatever findings are

necessary for his judgment to be affirmed, assuming that there is evidence to support it. I don't question his good faith or her good faith at all, but why have a preliminary procedure for a judge to make something on a record or to encourage it -- what's broke with the current procedure is, is that people come in with 250 requested findings of fact because they ignored the portion of the rule that says "essential findings."

The proposal to have verbal findings isn't going to change that, because the judge, in my opinion, at least, he's going to turn to the litigant and say, "Draft up the findings and send them, y'all draft" -- he can say to both parties, "Draft the findings you want and send them to me. I'll choose the ones I want." And so the lawyers are going to be the guys that are doing the two or three hundred findings. I think it's a bad idea to have a bifurcated system. I think it raises the question about time lines and everything else.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You know, I try -- family lawyers try a lot of nonjury trials, and they don't try single issue trials either. They try trials that may have 25 or 30 issues, each one of which needs to -- you have to have a ruling on, and it's not unusual in those kind of cases for the judge to keep notes of what the various

contingents are that they have to resolve, and they'll say, "I'm going to find so-and-so" or "I'm going to rule that so-and-so," and you're just writing as fast as you can because they're handing down rulings on all those contested issues. It's not just negligence, liability, you know, and damages. Negligence, proximate cause, and damages. The problem with the system we have right now is, is that you're just going to get a general feeling that some people won and some people lost, and the lawyers go fight out how they're going to draft it, and then the findings that you get, the judge typically probably hasn't even read.

PROFESSOR DORSANEO: That's right.

MR. ORSINGER: And so what you don't get under the formal written procedure is what the judge really thought. You just get what the appellee wants the appellate court to think in order to affirm the judgment. So I had never even thought -- I was not at the meeting when you discussed it, but for the judges in the cases that I've tried that give us findings right at the time, it's extremely helpful because then we know how to write all those other clauses in the decree. I don't think that's a burden because they have to keep notes anyway of what they need to rule on, and if you limit it to only ultimate issues so that the judge doesn't feel obliged to

rule on every little ancillary dispute, only on the core issues, I don't think it's an added burden. I think it's almost a necessary part of the thinking a judge has to do to rule on the issues.

So I like the idea of having oral findings, but it scares me to death that they might start the appellate timetable running, because I promise you that the family lawyers are not going to be thinking that they're going to be requesting any kind of amended anything, and so the time will be long gone by the time they get into the hands of the appellate lawyer and realize that they needed a further request.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree with Richard on this point, and I think the dilemma is how to make sure they're designated findings and that they are specific enough, and I think that can be done upon request for findings of fact and conclusions of law so that the judge then makes findings of fact on the record, but this is the system that we had in criminal cases, and very often the judges would make findings of fact in criminal cases that would not be necessarily in writing but would be on the record, and I found them very helpful, and the lawyers do generally take the judge up and then commit them to writing, but sometimes they didn't, and they were

not required to in criminal cases, but just simple findings. For example, "I find this witness was not credible" or those types of findings, if they are specific enough and if they are designated findings of fact, I think they could be very helpful, and I agree that it does give the judge an incentive to give her views at that moment when the evidence is fresh and at the conclusion of the case, and it has to be part of the job description.

HONORABLE STEPHEN YELENOSKY: So the rule would say the judge is to make oral findings? What would it do? What would it say?

HONORABLE JAN PATTERSON: Well, I think you could have the choice of either written or oral, but it would allow for oral findings.

CHAIRMAN BABCOCK: Justice Sullivan, you got any ideas about this?

HONORABLE KENT SULLIVAN: I'd love to eliminate any distinction between findings of fact and conclusions of law in terms of just making a submission by the parties less complicated. I found on the -- Judge Yelenosky gave that the thumbs up.

HONORABLE STEPHEN YELENOSKY: Well, because they always put at the end, "Anything that's a finding of fact that should be" --

HONORABLE KENT SULLIVAN: Right.

HONORABLE STEPHEN YELENOSKY: You know, it's silly.

HONORABLE KENT SULLIVAN: There is clearly some degree of confusion about that. It would be great to talk about findings and then you can describe the scope of what they need to be, and I think it would be great for the rule just to talk about resolving the ultimate issues and stating briefly the reasons therefore, and that that ought to be enough.

CHAIRMAN BABCOCK: Uh-huh. What about the oral thing?

HONORABLE KENT SULLIVAN: I think that's fine.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: For the oral thing, one, I don't think it should be mandatory because sometimes judges want to think about it. Two, I don't think it should begin any time lines because sometimes you think you know what you're going to do, you might even say it, but when you sit down to start writing it you change your mind, and unlike what has been said about judges, I think there are judges who seriously pour over findings of fact and conclusions of law and think about it, and so I don't think that's always rubberstamped, and I think writing it does sometimes change your view. So I don't

think we start any deadline on an oral statement of what the judge is inclined to do.

HONORABLE KENT SULLIVAN: But could we --

CHAIRMAN BABCOCK: Yeah.

HONORABLE KENT SULLIVAN: Couldn't we solve that just by giving the judge the discretion? I mean, there are cases -- if you're trying a car wreck to the bench you're going to be able to very quickly say, "Here's the way I rule," boom, boom, boom. If you have a very complicated case you would probably decline to make oral rulings, and it seems to me the rule ought to contemplate giving the discretion in an appropriate case to do so.

HONORABLE HARVEY BROWN: I agree.

PROFESSOR CARLSON: Without triggering the --

HONORABLE KENT SULLIVAN: Right.

PROFESSOR CARLSON: -- appellate deadline.

HONORABLE KENT SULLIVAN: Right. What you don't want, I think, is to force the judge in my hypothetical auto accident case to have to go through a lot of machinations when otherwise the parties could have found out immediately what the answer was. He could have -- he or she could have responded when it was fresh, all the reasons we've stated earlier. There's no reason to go through all of the delay, the burden, in a simple case

which is -- I think somebody made the point, you know, most of what the courts deal with at the district court level are relatively small or straightforward cases in terms of the volume that they process. Why not have a procedure that facilitates it?

HONORABLE STEPHEN YELENOSKY: What happens if you make oral findings and then later you're requested to make written findings and you think better of one of your findings? Can you change it?

MR. ORSINGER: Sure. Absolutely.

HONORABLE KENT SULLIVAN: I would think you could, just the way you -- as long as you have plenary power it seems to me you've got the ability to do it.

HONORABLE JAN PATTERSON: That happens.

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: I have not tried very many cases to the bench, and I've never been a judge, so I've sort of got limited views on this, but just listening to the conversation, it occurs to me that it would be a salutary thing to in some way encourage judges to make some kind of oral findings for at least two reasons, one of which is that it gives greater satisfaction to the litigants whether or not there's ever an appeal to hear the decision-maker explain why he or she decided the case the way it was decided; and, secondly, I would think that such

a requirement or at least an encouragement would -- should result in a better decision if the judge is under some obligation to articulate why he or she decided the case the way it was decided rather than just being able to say, "I rule for the defendant, good-bye."

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: If we start doing that, do you think this process ought to start before judgment or simultaneously with the announcement of a probable judgment to be made -- to be made as part of the judgment-making process rather than a part of the appellate process? It always struck me as quite odd that these findings are made after the judgment, and that's why they're done by the appellee's counsel.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: My recommendation on the oral findings is let's find the rule that talks about rendition of judgment and then say at the time the judgment is rendered the court may, either upon request or without request, whatever you want to say, issue findings, and it ought to be tied with the rendition, because that's when the judge is announcing the ruling, and they ought to have by that time decided all of the important fact issues. And if it's not part of these appellate rules, no one will get confused about it. It's just part of the natural

process of rendering a judgment. If you render a judgment like Harvey is talking about three weeks after the trial closes in the form of a letter that you send to counsel, you can put your findings in the letter, because that's when you make rendition.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, that would be, you know, Rule 300 basically, which says very little.

MR. ORSINGER: Right.

PROFESSOR DORSANEO: And then there are some rules that aren't even in our drafting process at this point that talk about, you know, what the judgment should look like, including details about particular kinds of judgments, and that is -- that's really Judge Peeples little area. He was revising or making something like Rule 300, but it evolved in our committee process into just codifying the Lehmann when actually, you know, more would be -- we're going to have to do more than that anyway before we ever finish this.

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: Well, I'm all for encouraging the trial judge to make findings of fact and conclusions of law at the time of entry of judgment, and I think a lot of judges do that already. They ask for the proposed findings at the end of the bench trial and --

because they don't want this extra clock ticking on these findings, and they don't want these notices of past due findings, and it just seems to me like we should -- if we're going to do a wholesale revision of these rules, we should do it so that it makes sense to the trial judge, which to the trial judge it's better to enter the judgment and enter the findings and all of that all at once, start the clock on all of that.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE JANE BLAND: From entry of judgment.

HONORABLE TRACY CHRISTOPHER: I mean, I think that's a great idea, but the problem is you have to remember that the vast majority of bench trials never get appealed so that there is no need for findings of fact. So I'm not sure how we in creating a perfect system come up with that idea, too. I mean, if we were creating a perfect system, I would get rid of all of this, you know, request for additional, amended, and whether or not that does or doesn't, you know, create a waiver or a deemed finding or things like that. I mean, if the judge failed to rule on your breach of contract case in the findings that he or she did, you say, "Judge, you know, please make a ruling on my breach of contract," or, you know, "Judge, I pled waiver, and I don't see a finding with respect to

waiver," but that is not what these additional and amended findings of fact and conclusions of law have become. I mean, it's just like a total regurgitation of the whole argument. I've already said the light is red, and their request for additional or amended findings says the light is green, and it's extremely -- so you get to the point where you don't even pay attention to the amended or request for amended or additional because it's just this huge gobbledygook, when if they just told you, "Hey, you forgot to mention my waiver defense," you would say, "Oh, I forgot to mention your waiver defense. Okay, here's my finding on it." The whole system needs work, and -- truthfully.

PROFESSOR CARLSON: Justice Peeples would agree with -- did raise the issue that he did not think it would be efficient to require trial judges to make findings of fact in every case for the reasons you state. On the other hand, it would probably, as Stephen said, satisfy the litigants, but do we have the luxury of expending judicial resources on that? And we've looked at findings of fact in our system as serving the purpose different than Federal court, of narrowing the scope of the appeal, and when you look at the case law, it looks at is it reversible error when the trial court fails to make findings of fact. They look at could the litigant figure

out which grounds the trial court found on, and if it's a one ground case you're not prejudiced by the trial court not making findings of fact because you know it had to be that ground. So we've looked at it in Texas in our practice very different than the Federal perspective, but I serve at the will of the committee.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, could we do something like, you know, "Trial judge after bench trial shall make findings of fact or conclusions of law upon entry of judgment. If trial judge does not do so then," you know -- then start the timetable for requesting them, "The party shall request that the trial court make such findings within 30 days of entry of judgment," sort of like a motion for new trial.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE JANE BLAND: Do everything from the signing of the judgment and then have everything be like a 30-day increment. The problem with the request for findings of fact and the request for, you know, those past due notice of findings of fact is that it's all its own little timetable, and it makes it difficult for judges to track it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I would

separate out the goal -- whatever the goals are for the appellate part, and I agree with Judge Christopher, it's unclear to me that any of that is necessary, but whatever the goals are for the appellate part, and the stated goal of satisfying the litigants by telling them what happened. I don't think that litigants right now are getting their satisfaction, if they're getting their satisfaction, when they get back the signed findings of fact. I mean, it's not like the litigant at the end of a bench trial is wondering what the judge was thinking and they find it out, you know, 30 or 40 days later when their lawyer presents them with the 50 findings of fact, and if that is how they find out, it's really the level -- that's the level of -- a level of detail that they're not really looking for.

In a family law case, if you're trying to reach the goal of explaining to litigants then you say to the judge that a judge upon announcing his or her ruling shall succinctly explain the ruling or whatever, it has no appellate effect, whatever, and usually most judges will do that. In a family case they'll say, "I'm setting the child support at this level because" -- this, that, or the other thing. "I think the children should go here because" -- blah, blah, blah, but it's not the level of detail that one goes into for findings of fact and

conclusions of law for appellate purposes. So I think they're two different things, and you shouldn't try to meet one objective with the other tool.

CHAIRMAN BABCOCK: Okay. Justice Patterson.

HONORABLE JAN PATTERSON: Well, I have never liked the concept of ruling and running, and I do think that litigants deserve explanations, so I think the purpose of these traditionally is not just for appellate purposes but also to render justice and for litigants to feel as though justice has been rendered and that they have been listened to. So anything that incentivizes a district judge and trial judge to explain, to make findings, however efficient they are, I think is a good thing.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: But if you don't separate the two, as somebody said, some judges anyway are going to put everything in there that might uphold the judgment when that's not really what they're thinking, and if you want the litigants to know what they're really thinking, that's a different thing, and I wouldn't -- I agree with you. I don't like rule and run either, and when I take something in advisement I usually write a letter and put it all out there, but if I decide something from the bench I explain what I'm really

thinking, but that isn't necessarily what the findings of fact and conclusions of law would look like. So if you're saying judges should be required to succinctly explain their reasoning and we could somehow enforce that, I would agree with that.

HONORABLE JAN PATTERSON: Well, that's why you could have these core oral findings with subsequent written findings.

CHAIRMAN BABCOCK: Justice Bland, and then Pam.

HONORABLE JANE BLAND: I think we should just allow oral findings, and if the judge later amends findings like they amend findings, great, but the oral findings stand as they are. I think about two or three years ago the Court of Criminal Appeals began to require trial judges to make findings in motion to suppress hearings, and before trial judges on the criminal side didn't have to make any kinds of findings, you know, ever really. I mean, and just it was only on very rare circumstances do they have to make findings, and everybody said, "Oh, this is going to be very difficult, and how's it going to work?" And the reality is that at the conclusion of the motion to suppress hearing both sides either tender written findings or the judge makes oral findings, but it isn't -- it hasn't turned out to be

unworkable. In the very rare event that no findings are made, somebody requests that they be made to the trial judge, and the trial judge then enters them after judgment or even on appeal, some -- a party will ask that the case be abated for the findings.

HONORABLE JAN PATTERSON: And it was a great improvement.

HONORABLE JANE BLAND: And it hasn't proved to be unworkable, and, in fact, maybe, you know, the lesson is not that findings are so difficult that we shouldn't require them in all these cases that they are appealed but that we're overcomplicating findings.

HONORABLE STEPHEN YELENOSKY: That's true.

HONORABLE JANE BLAND: And that's what makes them difficult.

CHAIRMAN BABCOCK: Yeah, Pam. Sorry.

MS. BARON: Just to make clear, I think the proposed rule corrects a lot of the timing problems with findings that have been discussed. They say you have 30 days to request them. There's no longer a need for a reminder of past due findings, so it has simplified the process. I have concerns, at least in civil cases, that may be more complicated that we're going to have these nonbinding statements on the record. If I'm the losing party and I think, "Well, I can make some hay with that.

I'm not going to ask for written findings. I'm going to take this judge up on appeal and I know I can reverse it."

Or you have a situation where you make written findings and they're different from what the judge said on the record. What is the appellate court supposed to do with that? I have concerns about nonbinding oral statements.

HONORABLE STEPHEN YELENOSKY: Well, the answer I thought to that last question that I got was, well, if a judge changes the findings, it's the last ones he or she finds.

MR. JEFFERSON: You can change them, but, no, I've been involved in that situation where a judge says something and then says an order that says something different but doesn't modify his oral statements and then the appellate court is confused on that. I've been a victim of that.

MS. BARON: Well, we already have that when the judge writes the letters and explains something, and it's not part of findings. Those are considered to be irrelevant, but I know appellate courts read them, so I'm not sure what you do with those. I mean, certainly if they help my case I'm going to tell the appellate court about them, but they're not binding.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I don't know why they should be irrelevant, and I don't know why findings can't be in the judgment. I just -- you know, we have this sort of bizarre idea that findings of fact have to be this separate document done after judgment when it makes a lot more sense that the findings are all in your head before you actually enter the judgment. I don't know how to fix it, but it's kind of this weird cottage industry of appellate problems.

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: And just to make clear, I agree with Judge Christopher that that is the best time to make findings and that findings are their own cottage industry, and, you know, the winning party goes out and manufactures a bunch of garbage that we have to deal with on appeal, and I hate it, but you have to balance that against the efficiency of everybody making findings in judgments, and I don't know what the answer to that is, but I agree with you.

HONORABLE STEPHEN YELENOSKY: What about requiring the attorneys to propose their findings at the close of evidence so they have to prepare them along the way?

HONORABLE TOM GRAY: You are the judge. Can't you do that?

HONORABLE STEPHEN YELENOSKY: Do what, require them to do that?

HONORABLE TOM GRAY: Yeah.

HONORABLE STEPHEN YELENOSKY: Yeah, sure I can. It's a good idea. I think I'll adopt that, but -- but if you want to institutionalize it we put it in a rule.

MS. BARON: And representing appellate lawyers, I'm sure they would just be all over that. They would think it's a great idea because it gets them involved earlier. So --

HONORABLE STEPHEN YELENOSKY: Well, and why not? Because you're right, if I'm going to have to sort through a bunch of proposed findings, it's easier to sort through them when I'm sitting right there and I'll, you know, check the boxes that really make sense.

MS. BARON: Yeah.

HONORABLE STEPHEN YELENOSKY: I may modify it later, but most of it can be done right then.

MS. BARON: It might produce much better findings.

CHAIRMAN BABCOCK: Orsinger, and then Pete, and then Kennon.

MR. ORSINGER: One of the practical problems with putting findings in judgments is that when it comes

time to enter the judgment you may find that there are huge fights over the findings that are in the judgment that end up being unnecessary because that judgment is not appealed, and I would -- I would feel, as a lawyer who tried and is going to appeal the case, that I have to fight over every single finding in there that I don't like, try to get it written differently or whatever, and so there is a virtue in keeping the fact-finding process separate in that it simplifies the entry of judgment just down to the relief granted, and I think that should be weighed against the sensibility of having the findings in the judgment from a logical standpoint and from an appellate review standpoint.

HONORABLE STEPHEN YELENOSKY: Well, it doesn't matter if they're separate documents as long as it's done at the same time. I mean, if you're concerned you won't be able to enter the judgment because you'll be caught up on the findings --

MR. ORSINGER: There will be fightings over -- it's one thing to say, "I don't like this judgment because you granted more relief or less relief than what the judgment says." It's another thing to say, "I don't like findings number 12, 45, 27, and 43." If you have a separate set of findings then the argument over what the findings are doesn't complicate what the relief granted

is. So to me I think there should be a distinction -- I don't object to the timing. I like the idea of the findings being what the judge actually thinks, because right now it's pure fiction. These findings -- I mean, I know that there are some judges that write their own findings, like Harvey apparently. I don't ever appear in front of them, and what happens is you get this fairy tale.

HONORABLE STEPHEN YELENOSKY: I mean, some of us get it in soft copy so we can make changes, but, yeah, there's a limited amount of time you can put on it, but what would be wrong with two different documents, the lawyer has got to present proposed findings at the close of evidence, the judge has to enter or whatever you want to call them preliminary or -- or just findings at the time of entering judgment in a separate document, and it's subject to like a judgment being changed during the --

MR. ORSINGER: And the only problem with that is that nobody will do it. You can write that in gold letters, underlined, all caps with red background, and it still isn't going to happen because these guys -- most of the cases that are tried nonjury, the guys are lucky if they get all their witnesses on the witness stand and their evidences marked and entered. If you're going to ask them to draft the judgment they want and all the

findings they want before they go to the hearing or the trial, it's just not going to happen.

HONORABLE STEPHEN YELENOSKY: Well, what about at the time they present the judgment for signature? What about that?

MR. ORSINGER: That's much more reasonable because by that time they've thought through all these consequences and sorted through the relief granted and that kind of thing.

HONORABLE TRACY CHRISTOPHER: That's a good idea.

HONORABLE STEPHEN YELENOSKY: But, of course, in those family law cases that will come six months later.

MR. ORSINGER: Well, that's another problem. The judge won't remember it at that point either.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: I just wanted to echo what Justice Patterson said as far as the litigants go. I mean, I think it's always a much better experience for the litigants to get the -- from the judge's own mouth their impressions of how the hearing went, and whether you call them findings or whatever you call them, I think that that's a tremendously valuable thing to have just for the administration of justice, and so anything that's a trap

in that, that's discouraging a judge from doing that, I would like to eliminate because I think that it's very important for them.

CHAIRMAN BABCOCK: Munzinger.

MR. MUNZINGER: I'm just curious about the logistical problem that you put on trial judges. I'm not a trial judge, and there are several in the room.

HONORABLE STEPHEN YELENOSKY: They've all been elevated. Except me.

MR. MUNZINGER: Well, there's one in the room.

CHAIRMAN BABCOCK: You bucking for a promotion?

HONORABLE STEPHEN YELENOSKY: No, no. I'm very happy where I am.

MR. MUNZINGER: What logistical problems do you put on a Texas state trial judge? On Monday he hears a divorce case; he starts a criminal case on Tuesday; it lasts two days; on Thursday he starts an automobile accident case; the following Tuesday he's in a constitutional case or a school district case. He doesn't have a briefing clerk, and the Federal judges, they sit over there. They've got a clerk, a deputy clerk, a law clerk, a senior law clerk, and the resource of the United States of America, and that's why they have all these

rules, because they've got all of these people that can do this work for them. And so if you're going to say in every case, nonjury case, whether it's appealed or not, whether the terms of the judgment are contested or not, you have to go through this stuff, what are you doing to the trial judges? I don't know what that does to you.

CHAIRMAN BABCOCK: Justice Bland and then --

HONORABLE JANE BLAND: Well, I agree with Lamont that we need to make it easier, and one of the ways to make it easier is to allow oral findings, and I don't agree that it gets any easier 30 days later. So, yes, you've heard the divorce case and then you've heard the contract case and then, guess what, a month later somebody is asking you to make findings about a case you tried a month ago, and you're trying to remember the witnesses and what the witnesses said, and you don't have a record yet because the record hasn't been requested, so your court reporter hasn't typed it up, and to me the very -- the very time it's freshest in your memory is when it's easy to do it. It's never easy, but it's the easiest when you're trying the case.

And as far as, you know, we can request that trial judges enter findings of fact at the time they enter the judgment, but they'll never do it, well, we have trial judges that don't do it now with reminders and all this

process that we've built into it. All we do is drag it out into this long process, and so to me, you know, we're -- the best response rate we can get is the response rate we get from making it an easier chore, from encouraging trial judges to make it at the time when it's freshest in their memory, and that is at entry of judgment, assuming they don't sit on the judgment for six months.

MR. ORSINGER: You said entry of judgment twice now, and I'm wondering if you mean rendition of judgment, because entry is when you sign it 60 days later.

CHAIRMAN BABCOCK: Whatever.

MR. ORSINGER: I don't mean to get -- you're an appellate now. You know the difference. You meant rendition, right?

HONORABLE TRACY CHRISTOPHER: That is only followed in divorce cases, as best I can tell, the rendition and entry.

HONORABLE STEPHEN YELENOSKY: Yes, that's right.

CHAIRMAN BABCOCK: Pete.

HONORABLE JANE BLAND: Richard, you know what I'm saying.

MR. ORSINGER: I do. I just wanted to be sure. I agree with you if you mean rendition.

HONORABLE JANE BLAND: Then I do, just so you'll agree with me. Tell me the word to use so that you'll agree, and I'll use it.

MR. HARDIN: Chip, you're going to lose three votes in about five minutes.

MR. SCHENKKAN: If we need to take any votes.

CHAIRMAN BABCOCK: I know. I'm conscious of that. Pete.

MR. SCHENKKAN: I just want to say that while I respect the desire of the lawyers in this room and judges in this room to improve this practice for the sake of those cases that are going up on appeal, that we live in Texas state judicial system in which the vast majority of these cases are not going to go up on appeal, and it is not just an unreasonable burden on the district judges, though I fully agree with that. It is also yet another part of pricing our justice system out of the market to suggest that every lawyer in every bench trial on both sides has to draft and prepare findings of fact and conclusions of law before we get there. If it's a two-party case, which I don't do these, but I understand whole lots of them are, you know, are perfectly content with the hard fought battle over the wording of the judgment, and there isn't going to be an appeal? Then we

don't need all of this stuff that's just an unduly cost and burdensome deal. So we have to then wind up with a rule that may have to settle for a distant second best for what we want on appeal just so we don't screw the whole system up for the rest of the cases.

CHAIRMAN BABCOCK: Justice Christopher. Yeah.

HONORABLE TRACY CHRISTOPHER: I agree. So go on.

CHAIRMAN BABCOCK: Okay. Justice Bland had her hand up, and then Justice Gray.

HONORABLE JANE BLAND: Well, we can have a provision about entry of findings of fact. The parties can decide we don't need findings, just like they waive voir dire in some cases, and they waive, you know -- I'm sorry, the court reporter recording voir dire, and you know --

MR. HARDIN: Yeah, where both sides waive it.

HONORABLE JANE BLAND: Both sides say we don't need findings. This is a 30-minute sworn account, Judge, and we don't need findings.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I was just going to say that most of the complaints and problems that I have had

on appeal with the findings and everything is solved by the proposed new rule (b) where it says, "Unless otherwise required by law, findings of fact should be in broad form whenever feasible," making that a much smaller burden on the trial judge at the time as opposed to these 110 pages of findings that I have had to confront on appeal, so it may not be such a problem now with this rule in place.

CHAIRMAN BABCOCK: Before we lose some of our most knowledgeable and respected members, maybe we should vote on whether -- I'm not talking about you.

HONORABLE JANE BLAND: Thank you.

CHAIRMAN BABCOCK: Maybe we should vote on --

HONORABLE TRACY CHRISTOPHER: And award-winning members, too.

CHAIRMAN BABCOCK: Huh?

HONORABLE TRACY CHRISTOPHER: Award-winning members.

CHAIRMAN BABCOCK: Award-winning members, not to mention knowledgeable and respected, maybe we should vote on whether this oral -- these oral findings is a good idea or not.

PROFESSOR CARLSON: Yeah, we could start there.

CHAIRMAN BABCOCK: So everybody that thinks

that language having -- permitting the judge to have oral findings on the record, raise your hand.

MR. SCHENKKAN: Permitting?

MR. ORSINGER: Yeah, it's not required.

CHAIRMAN BABCOCK: All against? The vote is 14 in favor, 2 against, the Chair not voting. Any other votes we can take?

PROFESSOR CARLSON: Yeah, yeah.

CHAIRMAN BABCOCK: Yeah, let's take a vote.

PROFESSOR CARLSON: Yeah, let's have some more. "Trial court may" or "must make the oral findings upon request."

CHAIRMAN BABCOCK: All right. Everybody that thinks it should be discretionary with the trial court, trial court may make findings on request, raise your hand.

MR. HUGHES: Oral or written?

CHAIRMAN BABCOCK: Written.

PROFESSOR CARLSON: Not written. Oral.

CHAIRMAN BABCOCK: Sorry, oral.

HONORABLE TOM GRAY: Like in the rule or change the word in the rule to "must"?

PROFESSOR CARLSON: It would either say "may" or "must." That's what we're voting on in 297, "trial court may state it's findings" or "the trial court

must on request."

CHAIRMAN BABCOCK: Everybody that's a "may" raise your hand.

MR. MUNZINGER: And this is for oral findings, so I say, "Judge, I want you to make oral findings."

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: And it's "may."

HONORABLE KENT SULLIVAN: "May."

CHAIRMAN BABCOCK: Okay. All that say it should be "must." 16 to 2 in favor of the "mays."

PROFESSOR CARLSON: Binding or nonbinding? Are we envisioning the trial court's findings of fact are binding, or are we -- well, Richard, don't look quizzically. You made this up.

MR. ORSINGER: Well, I mean, if you get a written finding later that contradicts an oral finding, either you say it or you know that it overrides the oral finding, so I think it's kind of binding unless it's overridden.

HONORABLE KENT SULLIVAN: Right.

PROFESSOR CARLSON: I thought when I heard the discussion originally from David and from Lamont and others is you were saying, look, a lot of cases don't get appealed so don't make this something that's difficult for

the trial court to do, let the trial court make them and provide some guidance to counsel, and then you go into -- I don't want to confuse the Chair -- written findings.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I think the problem would be easily resolved by saying if written and they conflict with the oral findings, the written findings prevail.

PROFESSOR CARLSON: We can do that.

HONORABLE TOM GRAY: Actually, rather than the oral over written, just the last finding by the trial court prevails, because what happens if you have a hearing, and he comes back and at the subsequent hearing makes a finding that conflicts with his earlier finding.

MR. ORSINGER: That's oral only and not in writing.

HONORABLE TOM GRAY: Yeah. It always ought to be just either the first one is binding or the last one is binding, and in this context the last one should be binding. The last one is the --

MR. ORSINGER: Well, I was envisioning that if there is -- if somebody is serious about appealing that they would request written findings. That was just an assumption on my part. Maybe you can take it up with oral findings.

CHAIRMAN BABCOCK: No, Pam's suggestion is

that, no, somebody who is serious about appealing may lay in the weeds.

MS. BARON: Yeah.

CHAIRMAN BABCOCK: Because they think the oral findings are so --

MR. ORSINGER: Well, that's why people hire her. She's smart.

CHAIRMAN BABCOCK: Now her tricks have been exposed. Okay. What do you want to vote on?

MS. BARON: Binding or not binding.

PROFESSOR CARLSON: Does everyone agree with Richard's comments -- or Justice Gray, last in time controls, however they're made, as long as the court has plenary power? Is that what I heard you say?

HONORABLE STEPHEN YELENOSKY: If you do it right now you can do findings of fact --

MS. BARON: I would vote that they be nonbinding, so I would like to vote on that.

CHAIRMAN BABCOCK: Yeah, okay. So everybody that thinks they should be nonbinding, raise your hand.

HONORABLE TRACY CHRISTOPHER: Nonbinding for appellate purposes?

PROFESSOR CARLSON: Yes.

MR. JEFFERSON: Yeah, what does nonbinding mean?

PROFESSOR CARLSON: Nonbinding for appellate purposes. They're not the findings that your bound by --

MR. SCHENKKAN: They're not the judgment, and they're not the findings for appellate purposes.

HONORABLE KENT SULLIVAN: But does that mean that you just -- the Chair is giving up, I can tell.

CHAIRMAN BABCOCK: No, no, no. I'm not giving up, but I'm confused about it. They apparently know what they're talking about.

HONORABLE KENT SULLIVAN: If they are binding then you would effectively then require written findings --

MR. ORSINGER: That's what I think.

HONORABLE KENT SULLIVAN: -- and that's the problem.

MS. BARON: For appeal.

HONORABLE KENT SULLIVAN: Right.

MR. ORSINGER: And I like that.

PROFESSOR CARLSON: It was your suggestion.

(Multiple simultaneous speakers)

THE REPORTER: Wait a minute. Wait.

CHAIRMAN BABCOCK: Whoa, whoa, whoa. One at a time, one at a time. She can't get it. All right, Justice Bland.

HONORABLE JANE BLAND: I think we should say

something like "The parties may request and the judge may enter upon rendition of judgment findings of fact and conclusions of law. These findings of fact and conclusions of law may be delivered orally or in writing. The parties may subsequently request additional findings of fact and conclusions of law. Any later amendment controls." But we don't need to make a whole separate track for oral findings and written findings. The whole idea is just one set of findings delivered somewhere near the time of rendition of judgment.

CHAIRMAN BABCOCK: Yeah, that makes sense. Pam has found a new Lady Gaga video on her iPod here.

MS. BARON: Yes, I have. Just in response to that, though, the problem that Elaine and the committee identify in this is that if they're made on the record you're not going to have a transcript, so --

MR. ORSINGER: You better not have the timetable run because you won't know what to modify.

MS. BARON: Exactly.

MR. ORSINGER: You didn't get it all down, and nobody can remember.

MS. BARON: That's the problem with making them binding.

MR. SCHENKKAN: Again, I think we're again on the verge of being guilty of letting the perfect be the

enemy of good. The argument for getting an oral statement at the time is it's fresh, and it gives an impression of what the judge thinks.

MR. HARDIN: No. That wasn't all of us's reason, but go ahead.

MR. SCHENKKAN: Okay. Well, okay, then that was at least an important --

MR. HARDIN: Right.

MR. SCHENKKAN: -- for a number people of commenting, an important part of that argument, and I agree with that. I've benefited by that personally, having some understanding of where the judge was coming from. For purposes of getting ready to fight with the other side about the form of the judgment and deciding whether I need to ask findings of fact and conclusions of law, if you want to encourage that, we say they're going to be binding or they're going to be binding unless somebody does something else later, we're going to discourage people from doing it in the first place. We don't want to do that. We want to give the judge every possible encouragement to take a little bit of a chance and say what he or she is thinking at the time she's telling us what the answer is, and then let's figure out later if we're going to have to have any of these other fights.

CHAIRMAN BABCOCK: Justice Bland was next.

HONORABLE JANE BLAND: No, I --

MR. SCHENKKAN: She's going to catch an airplane.

CHAIRMAN BABCOCK: Okay. Well, are we back to binding versus nonbinding, which I don't completely understand?

PROFESSOR CARLSON: I'll explain it to you later.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I guess I'm -- I thought I was following the conversation, but are we now voting on whether findings of fact are not binding? Is that where we are?

HONORABLE STEPHEN YELENOSKY: Oral.

MR. SCHENKKAN: Oral.

CHAIRMAN BABCOCK: Yeah. Why don't you frame what the vote is that we're voting?

PROFESSOR CARLSON: Well, as I understood Richard's original proposal, I thought it was a good one and I thought I heard support for it.

MR. ORSINGER: That was Justice Patterson that said it was brilliant.

PROFESSOR CARLSON: Well --

MS. BARON: Wow.

PROFESSOR CARLSON: That accompanied with Lamont's comments that why not allow the judge the discretion at the request of the parties -- I would say at the conclusion of the evidence and not rendition of the judgment, just because you're there, they may or may not render judgment at that point in nonfamily law cases -- to when requested trial court to give the basis, the factual basis for --

HONORABLE DAVID GAULTNEY: As an appellate court what weight am I to give that?

PROFESSOR CARLSON: None.

HONORABLE DAVID GAULTNEY: Zero.

PROFESSOR CARLSON: Zero.

CHAIRMAN BABCOCK: So why are you making him do it?

PROFESSOR CARLSON: Well, we talked about that then gives the parties an opportunity when they're drafting their findings of fact to know what the court is -- the grounds upon which the court has made its decisions.

HONORABLE DAVID GAULTNEY: So if there are no --

PROFESSOR CARLSON: It satisfies the litigants by telling them the basis of the trial court's decision without forcing the judge to make every

particularized judgment he or she might want to make at the end of the judgment. I mean, at the end of the trial.

HONORABLE DAVID GAULTNEY: What if that explanation is so clearly erroneous, so false, so unbelievable --

PROFESSOR CARLSON: When Pam comes into the game --

HONORABLE DAVID GAULTNEY: -- that the judgment itself, the judgment itself, if you found somehow implicitly -- I mean, it's just confusing to me that we would have -- give something -- we would put it in the rules, say this is an oral finding --

PROFESSOR CARLSON: Preliminary findings.

HONORABLE DAVID GAULTNEY: -- that we give no weight. I mean, it becomes a little confusing.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Why should the oral findings not be binding at least until written findings are entered?

PROFESSOR CARLSON: Well, two reasons. One, the judges aren't used to doing this, and we want judges to feel free to give their reasons on the record without feeling there is repercussions. Two, we said we don't want to attach to it any appellate consequences, that we can retain the request for findings in the traditional

method that we've used thereafter.

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: I'm just curious, though, why wouldn't that be a reason for allowing the discretion, kind of what Justice Patterson is saying, and that is you can always go back later and supplement or amend by way of written findings, but if you're the judge and you, you know, made these oral findings, and you've given it some additional consideration, then the oral findings were fine.

PROFESSOR CARLSON: So how do I -- how does the party who wants to seek additional amended findings then act?

HONORABLE KENT SULLIVAN: I think you file and you say it's a request.

PROFESSOR CARLSON: So you order a transcript? You don't order a transcript? You have 30 days? You have 20 days?

HONORABLE KENT SULLIVAN: Well, I will say I think the transcript issue is the naughtiest issue that we've got. I mean, I agree with that.

CHAIRMAN BABCOCK: Here's the other thing that it seems to me, and it's judicial resources thing.

HONORABLE KENT SULLIVAN: Right.

CHAIRMAN BABCOCK: You're saying to the

judge, "Hey, Judge, take the time to sit there and tell us what your oral findings are, but it's not going to count." You know, whatever -- "the time you're taking to do this, you know, you're going to have to do it again if we're going on appeal."

HONORABLE KENT SULLIVAN: On a practical level, though --

HONORABLE JAN PATTERSON: But it's going to count in 90 percent of the cases probably.

HONORABLE KENT SULLIVAN: On a practical level aren't these cases going to break out into two categories? One is a category that's small enough and easily compartmentable where the judge will feel comfortable in making oral findings, and the second category being really everything else, things that are larger, more complicated, where the judge is going to be reluctant to make oral findings. I mean, I think that's what you're going to deal with practically. If it's in the first category, you may often never need these written findings. The judge may feel very comfortable with stating on the record then, you know, what is otherwise necessary, and I suspect if it's in category two, you'll almost never get the judge to make oral findings of any consequence.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, since we've already said it would be a "may" thing, I mean, I tend to think it's an issue of judicial philosophy and maybe education. I mean, I remember back from, you know, new judge training, I mean, there were trainers there who would essentially tell you to rule and run, and there's a difference of opinion, and some people will teach it that way, and so if it's a "may" thing there are going to be judges who say, "I respectfully decline." And so unless we're making something required it seems to me we're saying you may do what you already may do, and it's going to be a function of your judicial philosophy and how you've been trained, and so if we're trying to fulfill that need for people to have an explanation, I think it is a question of judicial education, maybe commentary, that kind of thing, unless you're going to put a hard and fast rule in, and we should then just deal with the rules with respect to the things that matter for appellate purposes. I mean, I'm all against rule and run, but I don't think saying that judges may announce their ruling is going to change the mind of judges who are for rule and run.

CHAIRMAN BABCOCK: Okay. Justice Sullivan, and then Richard.

HONORABLE KENT SULLIVAN: Just one other quick practical thought. I think that the point that's

been made about getting a transcript is a serious one, and I think you just have to embed in the rule a requirement that the court reporter, you know, upon request has this much time in which to provide the transcript. I mean, I think that's practically how you would have to do it.

CHAIRMAN BABCOCK: Okay. Do we want to vote on binding versus nonbinding?

PROFESSOR CARLSON: We can. I sense that people aren't liking the nonbinding approach, but we could formalize it.

MS. BARON: I still like it.

CHAIRMAN BABCOCK: Well, Pam likes it, so we're going to vote on it.

MS. BARON: I'll be the only one.

CHAIRMAN BABCOCK: Everybody other than Pam that wants nonbinding, raise your hand.

HONORABLE STEPHEN YELENOSKY: What's nonbinding?

MR. SCHENKKAN: What's nonbinding?

CHAIRMAN BABCOCK: Everybody that says binding?

MR. ORSINGER: I wasn't clear on what the vote was.

HONORABLE KENT SULLIVAN: I think people are confused.

CHAIRMAN BABCOCK: Okay.

HONORABLE KENT SULLIVAN: There is some confusion over whether it's binding -- over the terms "binding" and "discretionary." Right?

MR. ORSINGER: Yeah. Binding means binding for purposes of appeal.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: "Mandatory" means the trial court must do it.

CHAIRMAN BABCOCK: This is different.

MR. ORSINGER: I thought you were voting on whether the trial court must do it.

CHAIRMAN BABCOCK: No. No, we've already voted on that. This is nonbinding for purposes of appeal.

MR. SCHENKKAN: And this is oral findings.

CHAIRMAN BABCOCK: The oral findings are nonbinding for purposes of appeal.

MR. SCHENKKAN: This is nonbinding --

HONORABLE KENT SULLIVAN: So it would require written findings even if oral findings had been made.

CHAIRMAN BABCOCK: Everybody that's in favor of making the oral findings, if made, nonbinding for purposes of appeal, raise your hand.

All right. Everybody opposed? Well, the

vote is 7 to 7.

MS. BARON: And the Chair doesn't understand the question.

CHAIRMAN BABCOCK: No, no, the Chair now understands the question, and you're going down.

MS. BARON: Oh, shoot.

CHAIRMAN BABCOCK: The Chair thinks they ought to be binding if you're going to do it, so --

MS. BARON: Okay.

CHAIRMAN BABCOCK: Richard.

HONORABLE JAN PATTERSON: What about "controlling"? Isn't "controlling" the better word?

CHAIRMAN BABCOCK: Or "controlling." Justice Gray.

HONORABLE TOM GRAY: I'd just like to say that I can't think of anything that would be more undermining of the perception of the judiciary and its reliability than to have a trial judge make nonbinding statements in support of a judgment that he can -- he or she can then come back and be 180 degrees different from that after the winning party explains to the judge that if that's all the findings you have, I can't hold this up on appeal, and it just --

HONORABLE STEPHEN YELENOSKY: But they can do that now. You can always change your findings.

HONORABLE TOM GRAY: I know you can, but what I'm talking about is to just be able to -- it just undermines the trial court's integrity, I think, to say "This is why I'm ruling" -- I mean, it's like Judge Gaultney was saying. "This is why I'm ruling this way," and then when it's explained to the trial judge that, "Well, may be, but that won't support it" --

HONORABLE STEPHEN YELENOSKY: Well, the way it would undermine, in my opinion, is the trial judge says blah, blah, blah, it goes up on appeal, and the court of appeals said, "Boy that's outrageous what the judge said, but it's not controlling, I can't give it any importance," and that's why I voted for it.

CHAIRMAN BABCOCK: Richard Munzinger.

HONORABLE STEPHEN YELENOSKY: But it's not because the trial judge changes his mind. It's because the trial judge doesn't change his or her mind and the appellate court can't do anything about what they said.

CHAIRMAN BABCOCK: Munzinger.

MR. MUNZINGER: Before the meeting started this morning Judge Bland and I were talking about a statute, it's a very arcane statute, and it has I don't know how many moving parts in it. So here we have a judge who has tried a case. It isn't a divorce case. It's a case over -- it's a commercial -- a commercial case, quite

complicated under this statute. The judge is asked to make oral findings, and he makes 6 of the 14 findings that are required by the statute, if you look at the statute. Now we're going to say that this is binding and it can't change because it undermines judicial integrity. Goes up on the court of appeals. Court of appeals says, "What happened to the other eight parts of this?" You're throwing the baby out with the bath water.

The problem that we have is, is that we've got lawyers who come in with fact findings -- 250 fact findings when 17 will suffice, and the cure to the rule is to say something along the lines of findings of fact will be sufficient if they would track a jury finding on the same cause of action, so with proper findings and proper definitions and instructions. Okay. So now you don't have judges who are asked their visceral reactions, and you're worried about what they really think. What they really think when all is said and done is I want to enter judgment for X because X carried the day and X satisfied me on all the points.

A rule that says, "Sorry, Judge, you left out those six in the afternoon that the case was over" is a silly rule, and a rule that lets lawyers go off and write 500 things when 16 suffice is also a silly rule. So the findings of fact, we say in this thing now, the -- I

forget what the language of the rule is, but it's the essential findings. If you have a case for a breach of contract or fraud or what have you, the essential finding is a fraudulent representation was made which led Joe to rely on it to his injury. Okay. That's -- that ought to be enough to support a fraud judgment. That's all that you need, and if the rule says "track jury findings" then that's sufficient, jury findings with appropriate definitions and instructions. You may have cured the whole problem.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I have to agree a little bit with Richard. I think we're getting away from the original issue we were addressing. I mean, every bench trial that I have ever tried, one of two things happens. Either the judge rules and runs, in which case both sides are requesting findings of fact or conclusions of law, or the judge says, "I've heard everything I want to hear. I want to take this under advisement. Why don't y'all submit to me your proposed findings of fact and conclusions of law and I'll get back to you?"

I mean, that as a practical matter is what happens most of the time, and good lawyers who are trying to prevail -- and if you've got good lawyers on both sides of the case -- will show up usually with their proposed

findings and conclusions at the outset to give the judge a blueprint. I mean, that as a practical matter what happens, and really the issue we're dealing with is exactly the one we started with and Richard brings up, and that is, you know, we're trying to avoid having these situations where we lay out, you know, multiple voluminous findings and requests simply to support our position.

MR. MUNZINGER: Rule 296(b), this is the proposed new rule. "The judge must make findings of fact and conclusions of law on each ultimate issue raised by the pleadings and the evidence." In a case tried in front of a jury, if you don't have a jury finding on an ultimate issue you don't have a valid judgment. True or false? That's true.

Okay. So what is the ultimate issue? The ultimate issue is a properly phrased question with properly phrased definitions and instructions. That being the case, if the rule says something along those lines, you have dissuaded the trial bar from submitting 275 when 15 work. You've told them where to go. Go look at the special issues and figure out what you would have to get to support a judgment tried to a jury, make those your findings of fact, and you're going to win on appeal if there's evidence to support them.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: We voted on that.

HONORABLE STEPHEN YELENOSKY: Yeah.

PROFESSOR CARLSON: So 296 is the language that was the consensus of the committee, which I think, I think, narrows the expected --

MR. FULLER: I agree.

PROFESSOR CARLSON: -- scope of the findings of fact. Getting back to your second point, if the judge makes findings of fact and he can't change them, that's a ridiculous system. That was never envisioned by the subcommittee, and let's just get nonbinding and binding off the table, and we'll go back to binding. If the -- the consensus of the subcommittee is that if we allow oral findings of fact that everyone thought it was important that the request for findings of fact be in writing and that there be -- we retain the deemed finding rule. So there is an opportunity if the trial court exercises its discretion on request to make oral findings for the litigants to come back and seek additional or amended findings, hopefully within the limited scope, not evidentiary or voluminous, that we set forth in 296. So there is a cure that can follow.

Justice Gray, you said, you know, we've got to allow the lawyers to come back and tell the judge what's missing to uphold the judgment, so the clear

consensus when it comes down to it on the committee is we want the lawyers involved.

HONORABLE TOM GRAY: What I was saying is I don't mind filling in the gaps. I'm talking about where a judge states for whatever reason they're going one direction with the judgment and that it's manifestly improper, and then when informed of that, judge says, "I'm still going that direction," but now comes in with a whole new theory of going that direction. To me that smacks of result-oriented justice as opposed to what we were trying to do in the first place, which is exactly what Richard is talking about, which is exactly what I had advocated from the beginning, is let's get this back to the issues that are necessary to support the judgment, and I don't remember who said it -- it may have been Hayes, that the -- you know, it's in the complex cases we're not going to have the trial judge making the, I don't think, off the cuff remarks that's probably going to lead down this road, but, I mean, I just didn't want it to go unsaid that allowing -- making them nonbinding where they could come back -- where they didn't mean anything on appeal could be just kind of, oh, well, that's just, you know, the judge changed his mind but not the result. So --

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: A lot of this last

discussion stemmed from the notion that there would be something horrible about a judge saying, "These are my preliminary or tentative findings and conclusions" and then later saying they aren't. Actually, in a number of Federal courts that's the way they do it. In fact, the judge writes an opinion that is labeled "tentative opinion" and then you've got a certain amount of time to tell the judge what's wrong with that under the law or the facts or whatever else may be relevant, and it works fine in a case in which the states justify that kind of resources, which is not the case, as I understand it, for 90 or 95 or 99 percent of the business of our state trial judges. So I, again, think we're letting the perfect be the enemy of the good. It is a good thing for a judge when she is willing to to let people know where she is after she's heard the evidence and the argument, and I don't want to deter her from doing that by anything that suggests she might have made a fatal and incurable mistake or even a dangerous, though curable, but with great effort and cost.

And it seems to me we need to flip it the other way around. We need to say if you're the trial judge in a case that's a bench trial in which there's a good chance that your decision is not the last word, that there's going to be more than a fight over the wording of

the judgment, then if you think you want to tell people a binding set of findings right at the close of the evidence, then you should tell the lawyers, "Give me your proposed findings of fact and conclusions of law, you know, before we go to trial," or you know, whatever, sometime in advance, and then I have the option of spending some of my time if I'm the judge studying up on those and then writing mine, and I can sign them, but the value of being able to get some oral indication from it is so great that the prejudice from making it look like it's more important than it is I think is not worth it. The game is not worth the candy.

CHAIRMAN BABCOCK: Elaine, are there some other big issues we can talk about?

PROFESSOR CARLSON: There is the related issue, and that's Rule 299a, and I -- that is do we want to retain the prohibition or the pseudo prohibition of the trial judge not reciting findings of fact in the judgment, or do we want to keep the attempt to have discreet findings from the judgment itself?

HONORABLE KENT SULLIVAN: Tracy's gone.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: The reason we have that rule is because of the fact that in the old days people used to recite their findings in the judgment, and then when

people got serious about getting separate written findings they would have a separate set of written findings that completed what was in the judgment, and I believe, if I remember correctly, which is not guaranteed at my age anymore, that we decided the best way to eliminate that argument was to eliminate the conflict by eliminating the findings in the judgment.

If we're going to have written findings or any kind of findings then we ought to decide where the serious findings occur. I voted against the serious findings being oral. I'd rather that they be in writing, but wherever they ought to be, I don't think -- if they're not going to be in the judgment we shouldn't have them in the judgment, because all that does is create conflicts where you have a judgment that's the operative judicial act conflicting with something that's subsidiary, which is the findings, and you're in there arguing to resolve a conflict that really shouldn't be even evident. So I would argue that we should not have findings and should prohibit them and continue to ignore them if they're in the judgment.

CHAIRMAN BABCOCK: Okay. Anybody feel differently? Justice Gray.

HONORABLE TOM GRAY: I don't feel differently, but I was going to ask Richard, I thought

this was where he might be going with his comments, but I was thinking that in the family law area was the one place in which some findings are required.

MR. ORSINGER: In child support matters, upon request the court has to include in the judgment findings about everything that was essential to setting the child support, but that the purpose of that has nothing to do with appeal. The purpose for that is to set official record of what the circumstances were so you can show a material and substantial change to get a change in child support later on. So it's easy to get a modification of child support because the old net resources and the old reasonable expenses of the children and all of those things, they're in the judgment. Otherwise, when you tried a modification of child support case you would have to prove what the facts were then and prove what the facts are now, and the facts are then are a bunch of old utility bills that have been thrown away. So I don't think you should allow this discussion to be influenced by that process because that's I think unique to the concept of modifying child support.

CHAIRMAN BABCOCK: Richard, the new -- the proposed new rule, 299a, are you in favor of it or against it? Or have no opinion?

MR. ORSINGER: Well, I think that written

findings should control. I think it should say they will be ignored, which by the way, I think we ought to say about evidentiary findings. I think it would be salutary to try to get people to stick with the principal issues by saying unnecessary or voluminous evidentiary findings are not to be made and will be ignored, but at any rate, but, yes, clearly the written findings ought to prevail over anything in the judgment, but we have a prohibition against putting them in the judgment, don't we?

PROFESSOR CARLSON: There's a split, as I see it, in the court of appeals. I think Beaumont -- Justice Gaultney, please correct me if I'm wrong -- that if there are no findings made, findings that recite in the judgment may be considered, in the view of the Beaumont court, with two other courts of appeals going to the contrary.

HONORABLE DAVID GAULTNEY: I think -- if I could, isn't the problem with conflicts, potential conflicts, not -- in other words, the problem with oral findings and written findings and the reason we need to be specific that you are -- that the trial judge is actually making oral findings and not simply explaining generally or discussing with the -- is when you get a conflict between the written finding and what someone argues is an oral finding. It strikes me that that's really the same

problem that Richard was just talking about as the reason for not giving effect to written findings in judgment, is if you have a conflict between the written findings and something that's in the judgment, a written finding in the judgment, and it's not necessarily -- it's not necessarily the petition that's a problem.

The lack of findings, if the only findings are in the judgment why is that difficult? What is it conflicting with? If the only findings are oral, why is that a problem? What is it conflicting with? It's when there is a conflict and the court has to decide which controls, don't we usually look to the later?

PROFESSOR CARLSON: We do.

HONORABLE DAVID GAULTNEY: And why would that not apply with respect to the judgment or with respect to --

PROFESSOR CARLSON: Well, I think there are two cases, one out of Dallas and one out of Texarkana, that was a question of there were no separate discreet findings of fact made anywhere outside the judgment had some findings, and the Dallas court in *RS vs. BJJ* and the Texarkana court in *Sutherland vs. Coburn* both made the statement that "We will not consider findings of fact that are recited in judgment," period.

MR. ORSINGER: That's because of the first

sentence of Rule 299a.

PROFESSOR CARLSON: Right.

MR. ORSINGER: If you took that first sentence out and addressed only a conflict between findings in the judgment and findings in the findings, those rulings probably would be decided differently.

PROFESSOR CARLSON: But don't you think it's better to have the first sentence in?

MR. ORSINGER: Well, I would like to -- I personally, having lived through the process when the findings were in the judgment and then we had separate conclusions, I would rather not have them in the judgment because that -- I have an intellectual problem with the only operative legal decision that we have, which is the judgment, which says it's premised on a bunch of findings, all of the sudden the findings have no legal vitality at all because of a subsidiary document that was filed later on. So I know that's the game we play, that the judgment that says it's based on these things is not really based on these things, it's really based on these other things, and that doesn't look very good and doesn't make much sense to me, but that's the way we do it.

I'd rather that there not be findings in the judgment, but I understand what Judge Gaultney is saying. If the only findings are in the judgment then the

appellate court has two choices. They either -- they either use the findings in the judgment or they deem implied findings from the rulings in the judgment, and of those two, the more sensible one is to go with the explicit findings rather than to ignore the explicit findings and deem implied findings. Probably nobody here thinks this is interesting, but it really is crazy when you're appealing these things. So I would -- I mean, I'm kind of shifting my long-term view. If the only findings are in the judgment then maybe we ought to just go ahead and appeal based on those findings and take that sentence out of not reciting findings in the judgment.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Well, have you shifted within the course of these last five minutes?

MR. ORSINGER: Yeah. I mean, I think that --

HONORABLE STEPHEN YELENOSKY: His mind is always controversial.

MR. ORSINGER: My mind is not irrevocably made up or whatever that is.

HONORABLE JAN PATTERSON: I'm not quite sure where I fall out on this, but I will offer up that it is confusing to pro se family litigants the prohibition of fact findings in the judgment, because I've had it in

three or four recent cases where they complained that there are findings in the judgment that may be based on child custody or whatever, but it is a confusing concept, and it -- I must say I found it confusing trying to figure it out and trying to say why these findings are different from these findings.

MR. ORSINGER: And, by the way, this rule is actually preempted by the Family Code as to child support issues. So that's another kind of intellectual anomaly, if you will, but we live with it.

CHAIRMAN BABCOCK: Okay. You want to vote on anything? Elaine?

PROFESSOR CARLSON: Yeah, the last question of whether we want to retain this notion that findings of fact are not to be recited in the judgment. We even added this last sentence that rules -- I'm on 299a, page six, the last sentence of the proposed rule, "Rule 296 to 299a do not apply to any recitals of findings of fact in a judgment," to really take the position that the findings in a judgment are not controlling.

MR. ORSINGER: I think if you're going to prohibit it, that's an excellent thing to say.

CHAIRMAN BABCOCK: Okay. So everybody that is in favor of that, which is to not permit findings of fact in the judgment, raise your hand.

PROFESSOR CARLSON: Right.

HONORABLE JAN PATTERSON: Are we in favor of 299a as written? Is that what you're asking?

CHAIRMAN BABCOCK: Well, I was trying to be broader than that.

HONORABLE JAN PATTERSON: Oh, okay.

CHAIRMAN BABCOCK: But just the concept of not permitting findings of fact in the judgment.

PROFESSOR CARLSON: Right. Right.

CHAIRMAN BABCOCK: So everybody who is in favor of not allowing findings of fact in the judgment, raise your hand.

Everybody that feels they should be permitted in the judgment? All right. That passes -- that is, there are seven votes in favor of precluding findings of fact from being in the judgment and only three that think it should be allowed. Another landslide vote for --

MR. ORSINGER: And that points out that we now have endorsed oral findings that are official for purposes of appeal, findings in a judgment that are official for purposes of an appeal, and Rule 296 separate findings that are purposes -- are official for purposes of appeal, which I don't like that, but --

HONORABLE STEPHEN YELENOSKY: Didn't we just

vote against findings in the judgment?

MR. ORSINGER: No, I thought we voted that findings would be permitted in the --

HONORABLE STEPHEN YELENOSKY: No. We voted against it.

MR. ORSINGER: Oh, well, I'm sorry. I missed it.

PROFESSOR CARLSON: Do you want to change your vote?

MR. ORSINGER: No, I missed that.

CHAIRMAN BABCOCK: Okay. Another big issue. Big issues here.

PROFESSOR CARLSON: We're not going to finish this next big issue, and that was waiver of omitted grounds. That's where we had a fair amount of controversy at our last meeting, and there are a lot of -- there were, well, maybe four or five people who thought this should not be included in the rules. It's in the rules now. Whether you're dealing with jury trial rules, jury charge rules, or findings of fact rules, the way I understand them, the way our committee understood them, except for there was a dissent on whether we should contain part of this, was that if you obtain no findings of fact, then, of course, you have deemed findings on appeal in support of the judgment, on all of it.

If there is a request for findings of fact made and the trial court makes findings of fact, if the trial court makes findings on some elements of a ground but not all elements of a ground and no one asks for additional or amended findings, then you're going to have presumed findings on those missing elements, if you will, but the ground remains a basis for the judgment.

Currently our rule provides -- and this is parallel in the jury charge rules, Rule 290 -- 279, is that if findings of fact are made by the trial court and the trial court makes findings on some grounds but makes no findings whatsoever on any element of an entire ground, that ground is waived. Is that your understanding?

MS. BARON: Yes.

MR. ORSINGER: Yes. That's right.

PROFESSOR CARLSON: Pam says, yes, that's her understanding. There were several people last meeting who said if that's the law, it shouldn't be the law, because conceivably, circling back around in 299a, you have a judgment that includes that ground. So now you're going to have a waiver of that ground. That was the expression I think that Justice Christopher made, and I think Michael Hatchell was also vocal a bit in our committee and here saying you really have to look at the waiver question on a ground differently in findings of

fact than a jury charge because you already have a judgment. So does it really make sense to have a waiver of a ground because a party who won didn't go back and ask for that ground?

Now, to me, I say I'm not offended by that because once there's a request for findings of fact, in my mind both litigants have an obligation to the court to look at the findings of fact and say, "Have I got all my grounds in there?" If I don't, I need to ask the court to include the grounds, or I risk waiver, unless you conclusively prove every element of the ground. And if the court has made findings on some of my elements of my ground but not all, if I won the case you don't do anything, because those will be deemed in supporting of the judgment. If you won the judgment, you don't need to do anything, but if you lost, you need to ask the court to make those findings or be stuck with the deemed findings. Remember, deemed findings can be attacked on appeal in a bench trial on factual and legal sufficiency basis. There is no preservation of error.

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: So it's not like a deemed finding is not subject to evidentiary support attacks on appeal. On the other hand, waiver is forever on the ground.

CHAIRMAN BABCOCK: Since we're going to have to come back to this anyway, Elaine, and since some of the vocal people --

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: -- have flown the coop, so to speak.

HONORABLE STEPHEN YELENOSKY: The award-winning people are all gone.

CHAIRMAN BABCOCK: The award winners -- actually, that's not exactly true, but we should maybe defer this to the next time.

PROFESSOR CARLSON: I think so, but I'd appreciate everybody giving some serious thought to it.

HONORABLE JAN PATTERSON: And can I add for your consideration which direction lends itself to less gamesmanship and more substantial justice to your thought?

MR. ORSINGER: I would be happy to comment on that. The --

CHAIRMAN BABCOCK: Why does that not surprise us?

MR. ORSINGER: The omitted finding issue is -- it is a trap for the unwary. What has happened is --

HONORABLE JAN PATTERSON: Which direction, Richard?

MR. ORSINGER: The fact that there's a

completely omitted ground of recovery or defense as a waiver.

HONORABLE JAN PATTERSON: As waiver, right.

MR. ORSINGER: That is a trap for the unwary.

HONORABLE JAN PATTERSON: I think so.

MR. ORSINGER: Because you've got a judgment that tells you whether your defense worked or didn't or tells you whether you've got a judgment based on tort or contract or deceptive trade practices. We can tell from the judgment, but if you don't get a finding on at least one element of one of those things that's already in the judgment, now there's a waiver of a ground for the judgment --

PROFESSOR CARLSON: If you don't ask for it.

MR. ORSINGER: -- so you get a reversal.

HONORABLE JAN PATTERSON: So I think we can end on that brilliant note by Richard.

MR. ORSINGER: Man. She's a fan.

PROFESSOR CARLSON: You got two brilliants.

MS. BARON: That's going to go to his head.

MR. ORSINGER: Did you get that, Dee Dee?

HONORABLE JAN PATTERSON: Chip, you missed Richard's final brilliant statement.

CHAIRMAN BABCOCK: I'm sorry, what did I

miss? My assistant --

MR. ORSINGER: Nothing important.

HONORABLE JAN PATTERSON: Final brilliant statement.

MS. PETERSON: Justice Patterson referred to one of his ideas as brilliant, and he said, "Man, she's a fan. Did you get that, Dee Dee?"

CHAIRMAN BABCOCK: There we go.

MR. ORSINGER: You have a steel trap mind. You don't need to wait for a transcript.

CHAIRMAN BABCOCK: Justice Patterson, we're going to -- we're going to cross-examine you on your thinking about Mr. Orsinger.

HONORABLE JAN PATTERSON: I know you're going to --

MR. ORSINGER: There's been a lot of things today. Somebody agreed with Munzinger.

CHAIRMAN BABCOCK: December 3rd is when we were -- we are next gathered, and --

MR. ORSINGER: Fa-la-la.

CHAIRMAN BABCOCK: And I guess the chair and vice-chair of the subcommittees dealing with this recent referral are not here, so we'll deal with that.

MR. ORSINGER: The record will reflect that my subcommittee has no work assigned to it.

CHAIRMAN BABCOCK: Well, we may fix that, but in any event --

MR. SCHENKKAN: Why in the world did you say that?

CHAIRMAN BABCOCK: Thanks, everybody, for hanging around. We're in recess.

(Adjourned at 4:56 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of September, 2010, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 2,043.50 .

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 7th day of October, 2010.

D'Lois L. Jones

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