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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 26, 2009

(SATURDAY 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 26th day of September, 2009, between the hours of 9:06 a.m. and 12:04 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

Documents referenced in this session

09-26 Recusal - memo from Mr. Orsinger, 8-24-09

09-27 Recusal - memo from Judge Peeples, 9-23-09

09-28 Recusal - Rule 18a strikeout version

09-29 Recusal - Rule 18a clean version

09-30 Recusal - Second region statistics

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CHAIRMAN BABCOCK: Still talking about recusal, and as we ended yesterday Judge Christopher had a question, which she deferred to this morning, so if your question is still fresh in your mind --

HONORABLE TRACY CHRISTOPHER: No, it wasn't a question, it was a comment.

CHAIRMAN BABCOCK: It was a comment.

HONORABLE TRACY CHRISTOPHER: If that's all right.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Well, it seems to me, just listening to the discussion, we have three issues on campaign contributions. We have the first issue is should we have a rule that relates directly to the Campaign Fairness Act, like the old version was, which basically says if you get a contribution over that, the judge should recuse. We don't discuss the reverse of it, which is if all the contribution levels that you have taken, you know, are within the Judicial Campaign Fairness Act, then can someone still present a motion to recuse against you, even though you have complied with the act. So the old version didn't address the reverse, and I guess I'd like to -- if we had a rule at all I'd like to see it address the reverse.

Now, some people say, well, I don't think we can do that constitutionally. I'm not expressing an opinion on that.

MR. GILSTRAP: Say what the reverse is again, please.

HONORABLE TRACY CHRISTOPHER: The reverse would be it would not be a basis for recusal, just like under our case law, that if your -- the contributions that you accepted were below the Campaign Fairness Act limits, and the reason why I think that's important is that since Caperton, although the little handout that we got from the Second Judicial Region said that there were three cases involving campaign contributions, I believe that there is really five that I know of in the second region involving campaign contributions, and they were all for motions in connection with a campaign contribution that was less than the statutory limit, the Campaign Finance Act limit, and this is just bringing a lot of uncertainty into -- and politics into judging, which, you know, maybe you say that's the system we have, we're elected judges, we're stuck with it, but from a point of view of getting ready for a campaign season and, you know, you need to know, the lawyers need to know is the money I give you going to be a basis for a recusal against you? Is the money I take going to be a basis of a recusal against me? You know, I

favor a bright line because that gives certainty to the judges, the lawyers, the litigants. So that's the first issue.

The second issue involved in Caperton were the PACs, the PAC money. I don't really see how we can write a rule involving the PAC money, and I think we just have to do that -- that has to be considered on a case by case basis. I mean, you know, the funny thing about it is what if a plaintiff won a big verdict and what if the -- and say the plaintiff was a company and had a lot of money, and they decided that they were going to support all of the conservative Republican judges that were up, okay, and then when they did and all those conservative Republican judges won, you know, you've got to recuse, because this PAC supported you. And so it would be the opposite of Caperton. You'd have -- you'd definitely have games playing going on, I think. So I don't think we can write a rule about the PAC.

Then the third issue that kind of came up was the bundling issue, as I call it. A lawyer goes out and, you know, gets 10 contributors with a certain amount of money on your behalf. Well, that is a time-honored manner of campaigning, has been around forever, and the question is whether it should be considered a ground for recusal. Now, I understand that recusal in -- where was

that, David?

HONORABLE DAVID EVANS: Corpus.

HONORABLE TRACY CHRISTOPHER: In Corpus, might have involved sort of that allegation, sort of the bundling allegation, but, you know, as I start the campaign season I've had friends say to me, you know, "I'd like to throw you a fundraiser at my house," lawyer friends. Obviously they tend to be the ones who actually are interested in throwing you fundraisers, right, or "I want to throw you a fundraiser at" -- "and you can use the atrium of our building," and so he then would use his list of friends, you know, send out an invitation, and say, you know, "Come to Tracy's fundraiser at my building." All right. Is that permissible anymore? Is that something that should be a basis for recusal? I don't know.

And certainly Caperton and that decision down there in Corpus has made us all a little nervous about it, and that's just all there is to it, and then I say, well, which is worse, really? I ask Harvey, "Harvey, I really need another $20,000 for this one last TV buy. Can you help me?" and Harvey calls 20 people, okay, to get that last bit of money for me. Is it really worse that I've asked Harvey to call those 20 people than for a sitting judge to make the phone call herself? I mean, talk about -- and, you know, it's not wrong for a sitting

judge to do it, to make the phone calls themselves, to ask for money themselves, but I know you lawyers that are on this committee, when you get a phone call from the sitting judge, you know, him or herself, it's much more coercive than a letter or a phone call by Harvey to that lawyer saying, you know, "Judge Christopher really needs this extra money. Can you come up with that money?"

So, yes, maybe Harvey is bundling, you know, because he's helping me get that last $20,000, but is that really a worse thing than me calling people myself in terms of the electoral process and how we want to think about encouraging or discouraging that idea, the bundling idea, so and those are just sort of practical things that you have to think about in connection with this rule.

CHAIRMAN BABCOCK: Okay. Yeah, Eduardo.

MR. RODRIGUEZ: And I agree that we have to think about all those things; but your second point about if you come within the amounts in the Judicial Fairness Act that shouldn't be considered, my problem is, you know, in an area like where we come from in South Texas, where, you know, you can have a two- or three-man firm come within the Campaign Fairness Act, but that's the significant portion of a judicial candidate's contributions; and, you know, I've been practicing down there for forty some years and, you know, Roger and Carl

can tell you that, you know, it makes a significant difference when you're on the other side of somebody who's that way, or a bundler.

I mean, you know, we all know who the bundlers are; and we all know, you know, if he's on the other side with this particular judge, you know, it's -- you know, you're going uphill; and so from that perspective from being where I come from, it is something that I think we should consider and see if there can be anything done. I don't know that there can under everything that we've got, but I can tell you that reality in South Texas -- and I'm sure that it's not just in South Texas, it's in other parts of the state as well. You know, we can -- we can name you a list of four or five lawyers that if you're against them in a particular court, you've got -- you know, you've got your work cut out for you, and that's unfair to my client, and so how do we -- how do we make that -- how do we fix that situation? Or can we ever?

HONORABLE TRACY CHRISTOPHER: In connection with -- I mean, I know one of the -- I'm sorry I'm speaking out of turn, but one of the facts in Caperton was, you know, how much money was involved versus the total campaign contributions. And, yes, I can understand, you know, that idea, that idea. So even if you are within

the limits but say your law firm -- a law firm ended up giving $30,000, which in Harris County at least that's possible, and -- or, you know, for the statewide, $30,000, and you only raise $30,000. Okay. So a hundred percent of your campaign contributions came from that law firm. Well, you know, that looks bad in terms of a percentage, a percentage rule, but are we going to recuse a judge for six years or four years because of that one fact?

A couple of years I raised $5,000 because that covered my filing fee and a few miscellaneous expenses. That's all I raised. I had like a thousand dollars in the bank, and I raised $5,000. So I, you know, got, you know, 10, 15 law firms to give me between, you know, 250, a hundred, 250, $500. Well, a 500-dollar contribution was 10 percent of my pot that I raised. Okay. Is that too much in terms of a percentage? I mean, yes, I can understand the fear and the worry, but to try and write a rule like that where you've got that percentages involved I think will be very difficult.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, right now I still am inclined to -- I don't like the proposed ethical canon or the ABA canon. The reason I start off not liking it is when I went back and looked at the Caperton opinion the majority was working from the premise as justice one

person should not be able to judge their own cause, that violates due process. One person should not be able to choose the judge for their own cause, that that somehow violates due process, and so they articulated the standard that there has to -- that due process violated when there's a -- and I'm reading from the handout here. "A serious risk of actual bias based on objective and reasonable perception, 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 election campaign when the case was pending or imminent."

So what you get tied up in that is someone who knows that their case is probably going to be in front of that candidate or that incumbent, and they get real involved and they have a real significant influence in getting that person's campaign successful, and so with what we've got as a proposed rule here is, is now we're going beyond that. We're not talking about someone with a case that's probably going to be in front of that particular judge or incumbent. We're talking about someone who just happens to give money, even though they may not have a case or even an imminent case, and we're now talking about a bright line rule tied to a specific amount of money, and I guess I'm troubled by that because

now you're not just focusing on a party choosing their own -- the judge for their cause, which was I think the extension that drove Caperton.

We're talking about what would in popular vernacular be called buying influence. That is, I get name recognition or the judge now knows who I am or my firm or this particular -- you know, this particular litigant who is a player in the system, and that's what troubles me about this rule, is that we're taking another step out into the void, which -- I don't want to say into the void, but we're going beyond what Caperton is addressing, which is a particular litigant with a particular case trying to get a particular judge and tying it to campaign -- I mean, to the minimum one troubles me, because of just the -- what was articulated here, that it's a very low level standard; whereas, Caperton talks about a significant and disproportionate.

Now, that being said, I'm not sure the public is going to let us get away with not doing anything, and I think that, as they say, is to be seen. There may be a feeling this is the tip of the iceberg and we want something in place, and when I looked at the other two states that have something in place, which were in your -- in the packet, one of them -- what was it?

MR. ORSINGER: On page 52, Alabama and

Mississippi.

MR. HUGHES: Yeah, 50, Mississippi just says, "The party is a major donor to the election campaign of the judge." Well, what's going to be a major donor? And the Alabama code, which is at 49, because a candidate received a substantial contribution from a party in the case. I -- the two things that concern me about this, and I'm not sure I saw them, is once again the public may demand something, but I think if we're going to set -- if we're going to set a standard, the bar ought to be high rather than -- I mean, we're not -- we're not talking about just a campaign contribution that, you know, might be above the statutory.

I think what's driving it here is that one is, so to speak, getting influence, and that requires something more than I think a campaign violation. I mean, because those are deliberately set at, you know, as they say, a minimum standard. If we're trying to implement Caperton it ought to be the higher level. I mean, that -- but then this gets into the other thing. I mean, I'm a little worried, and it was articulated yesterday, about the discovery aspect of all of this, because now we're beginning to see people want to do discovery against the judge that's been recused, and that troubles me a great deal, because first you're making a -- you're making the

trial judge a witness, and how's that -- and if the recusal motion fails then the judge has become a witness in the cause, a material witness perhaps, and most judges don't -- would feel an obligation to step down for that very reason, even if they win the motion. And the other thing is that you're going to allow discovery into their major campaign, I mean, into that. It could get pretty dicey.

CHAIRMAN BABCOCK: Judge Christopher says, Roger, that of the three issues on the first one, there ought to be a bright line, and what I heard her saying was that the bright line would be the campaign finance limits in the act, which is what -- which is the approach our committee took eight or nine years ago when we sent a proposed rule to the Court. If I hear you right, you're in favor of a bright line, but you say it ought to be more rigorous than that.

MR. HUGHES: Well, I favor it at a higher level because you're no longer talking about a Caperton case where a person is getting so involved in the campaign that they're trying to choose their own judge for a particular case. You're talking about attorneys who will frequently appear, or perhaps frequent -- you know, litigators who may not have a case this month, but the next time they know -- sometime in four years I'm going to

have some case, and it might go in front of that district judge or that district judge; and in that case, if what you're worried about is a Caperton situation, the bar ought to be high.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Well, but that's exactly what's happening, Roger, is that the high contributions to judges are to buy influence in all the cases that that lawyer has in that judge's court. That's exactly why they do it and give the big contributions.

CHAIRMAN BABCOCK: I heard a choking noise to my right. Sarah.

HONORABLE SARAH DUNCAN: I won't ascribe that motive to all people who make contributions, large as an absolute amount or large as a percentage. Some people make contributions because they believe the person to whose campaign they're contributing will be a good judge, but I think we have to differentiate between problems that are inherent in the system we have of elected judges with lawyers being the primary contributors to any campaign. Those are just problems in the system, and I'm as antagonistic to elected judges on a partisan basis as anybody at these tables, but I've given my testimony, and the Legislature has not seen fit to make that change, and so I think we need to decide what is our goal? Is our

goal to implement Caperton, in which case I agree with Roger that the bar is extremely high? It's less rigorous than the Judicial Campaign Fairness Act, which is to a very large extent voluntary compliance with what the Legislature has seen fit to decide is a big contribution. We've got to distinguish between Caperton and the vices inherent in an elected judiciary when lawyers are the primary campaign contributions, contributors.

CHAIRMAN BABCOCK: Well, getting back to Judge Christopher's first prong, would you favor some sort of bright line, or would you leave it like Alabama and Mississippi and just say have a standard like a substantial contributor or whatever?

HONORABLE SARAH DUNCAN: I don't know how the candidate or the incumbent complies with anything other than a bright line.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: The problem with the bright line is that it generally is designed to address a smaller category of problems, and I think given the variety of circumstances in our state and the disparity of whether it's the courts or judging situation or wealth, I don't think that you can have a bright line system or that you necessarily want it because that may lead to gaming and circumvention in a variety of ways.

I do have greater confidence in our system of justice than to think that all lawyers really want to buy a case or buy a judge, because I do think that judges over a period of time make it clear that that's not happening, and so really lawyers, I think, come to learn that sometimes they win and sometimes they lose of the judges to whom they have contributed. I do think that there's a greater problem of purchasing with the large contributions, and another reason I don't favor a bright line is that I think you give large contributions -- maybe the motive is different with those contributions, or at least they're more suspect, and I think you give those large amounts at your peril, but we may have circumstances where we have a small jurisdiction -- we're not always talking about the Supreme Court. We may have a smaller jurisdiction where the lawyer comes from the only firm in town, and the only firm in town or nearby has given him money to run, and that's his only source of funds, and that may or may not lead to problems.

So I really don't see how we can draw a rule that has a bright line. I just don't think it would address the situations. I think there has to be some give and some judgment in evaluating the problem. I do think it's a good point to talk about. I mean, certainly you would much rather have others calling than the judge, but

I don't think our only choice is between the judge calling or bundling. I mean, you've got a wide range of activities between that that certainly somebody else raising money, but presumably it's well-intentioned. I mean, they can make calls, and it's -- but it does not necessarily result in bundling. So I think that's a little bit of -- you know, I think we've got other choices here, but I think it is an important time to address this issue and to revisit what we have done in the past, and I think it's an important time to do that.

CHAIRMAN BABCOCK: Frank, and then Carl.

MR. GILSTRAP: Certainly there are problems that are inherent in the system. There's problems inherent with partisan election of judges, but as Justice Hecht, you know, sagely pointed out, we're going to have that forever. We've got to assume that's going to be our system, and any way to address this is not going to be perfect. The problem I have -- I mean, this idea of a substantial contribution and we're going to look at it and say, well, there were only $4,000 given in the race and 4,000 came from one person and that's within the limits, but still we're going to -- that judge is going to be recused when the person who gave 4,000 has a case. The problem with that is it really has a Russian roulette quality.

Sarah's right, and I give money to judges because I think that's a good judge. The better the judge is, the more I tend to give, and I wind up with a person that I think is a good judge being disqualified on my case, I've really shot myself in the foot. I'm not sure that there's any -- I mean, let's look at the bright line. You know, are we going to say that, well, the limit is $2,500, that's what the Legislature has set that, you know, you can't give more than $2,500, and yes, this person gave $5,000, but we're not going to recuse. I mean, I don't know how that's going to play, I really don't. You know, generally, you know, and I guess there's one more problem, and I'll mention this, and maybe this is just too Machiavellian, but if there's some limit that if I go past I'm going to get recused and I don't like the judge and he's going to be there for the next six years or four years, I may just go ahead and give it.

HONORABLE SARAH DUNCAN: I don't think that's too Machiavellian at all.

MR. GILSTRAP: I mean, I could see that happening.

CHAIRMAN BABCOCK: Carl, and then Justice Bland.

MR. HAMILTON: We had this same discussion eight years ago, and that's why we elected to go with the

bright line test of the legislative line of that maximum contribution, and, I mean, that was the best we could do. Anything over that would be subject to recusal, and I think by implication, Tracy, anything less than that would not be subject to recusal. So that would be okay. That's why we did that bright line test based on the Election Code.

CHAIRMAN BABCOCK: Yeah. It was also a little different because, as I recall, we were facing the issue of legislating in the absence of legislation from the Legislature, and we also were operating under the assumption that the law was that campaign contributions would not generally be an issue in recusal and that there was no due process issue, and so the landscape has changed a little bit since then because of those things, but Justice Bland.

HONORABLE JANE BLAND: I had a question for Roger. Is the instructive language from Caperton "significant and disproportionate" or "significant or disproportionate"?

MR. HUGHES: Just a second. "Significant and disproportionate influence in placing the judge on the case."

HONORABLE JANE BLAND: Okay. So a discussion about the fairness act limits seems to address

the significant aspect of it, and then I'm not sure what it does about the disproportionate aspect of it, but since you have to have both, if you don't have significant, I guess then it doesn't -- it could take care of the problem.

CHAIRMAN BABCOCK: Justice Gaultney, then Justice Gray.

HONORABLE DAVID GAULTNEY: My worry is about unintended consequences. You know, I listened to Buddy's comment the other day or yesterday about a judge who was called to testify, whose records were subpoenaed. You know, the problem I've got with tying a -- I understand the advantages of a bright line. It allows some certainty. My concern is that if you tie a bright line recusal issue to whether or not a contribution -- whether or not there was compliance of the Campaign Finance Act you then have returned turned your recusal motion into a compliance, a compliance hearing, whether or not the definition of "contribution" -- you know, you reported a certain amount of contributions when, in fact, you know, you did -- this should have been reported, and the way I'm going to establish that, I shouldn't have to take your filings as face value for that, because the implication is if you have a bright line, if you get over it by any amount, you should be recused. $50, $100. What if you

mistakenly did not report a 50-dollar contribution? Now you've turned a compliance -- you've turned a recusal hearing into a compliance hearing, if there is that compliance with the CFA as being the bright line. That's my concern.

I also think it doesn't address -- I mean, the 40 questions that the chief justice raises in his dissent are great questions. One is should we assume -- this is 18 -- that elected judges fill a debt of hostility towards major opponents of their candidacies. Okay. So here's the way that works. What if Massey -- Massey's candidate had lost? He spent $3 million trying to defeat a judge. Can he then recuse the judge he wanted off the case in the first place? I mean, he has now had a win-win situation. Okay.

CHAIRMAN BABCOCK: Could have done it cheaper, too.

HONORABLE DAVID GAULTNEY: It didn't end up that way, but you see the way that could be calculated, and so I'm just throwing that out as the concept that I don't think simply addressing it as a CFA compliance issue answers all the questions or provides the type of -- lack of litigiousness or certainty that we might hope for. That's my concern, unintended consequences.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: Until David spoke I was more in favor of bright lines for an absolute point at which a judge can be recused. Now, a little bit more eye-opening, I have some more reservations about that, but I'm very concerned that simply compliance -- if I understand Judge Christopher's bright line test, you are creating essentially a safe harbor if you fall below that bright line, and I don't think we can do that. I respectfully think that the problems are greater than simply did I not receive as much as the campaign laws would have allowed. It has to be what is fairly common in the criminal area where you look at the totality of the circumstances. The amount that you got that was within the campaign finance guidelines is a factor, but if the same person that gave the maximum to your campaign or maybe didn't give a dollar to your campaign, but was also the leader of the PAC that contributed $3 million and the bundler that brought to you another $3 million even if they didn't contribute a dollar to your campaign and would fall within the safe harbor.

That's why I think that whatever we do it has to be from a purview of -- I mean, obviously if the -- and I do agree with Sarah and those that have expressed it that we're dealing with a very small part of the judiciary that when they have a real bias in a case do not

voluntarily recuse without being asked, without a motion being filed. They just -- they know what's right, and they do it, and I think that that is by far the majority. But to try to pigeonhole everything you're going to test that judge's actions against, you will -- if you create a safe harbor, you will have created a situation in which you cannot remove or recuse a judge that actually does have a bias, and you need to be looking at the totality of the circumstances of contributions, issue preclusion, you know, all the things that are going to impact the fairness of the decision that the judge is acting on.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, and then Justice --

HONORABLE STEPHEN YELENOSKY: At the beginning Tracy I think alluded to some people may think we can't do that, and that's the first question for me, and since Pete's so shy, I'll just say Pete's convinced me and he hasn't said it, but this is -- Pete's convinced me that you cannot consistent with Caperton and due process create a safe harbor, and if you cannot do that then the policy debate is superfluous. So I guess the first question is what do people think about that, and, you know, people have alluded to that.

The second thing that I wanted to say is it's a bit surprising, I guess, that we hadn't gotten to

this point sooner, given the fact that we elect judges and they receive contributions from the attorneys who practice before them very often. That just seems odd even to us who have had it for so many years. To people who look at us from other states or other countries, they just really can't fathom it, and I would just say that that's a situation that I don't think we can resolve. I remember when I started hearing family law cases, more senior judges always said, "Well, always remember that however bad the situation is, you didn't create it. These people decided to get married and decided to have kids, and there's only so much you can do."

So the same is true here. We're put in a situation where I don't think we can resolve it by a bright line consistent with due process, which obviously is a fairness issue, so we have a fairness problem built into the system that we have. I don't think we can try to gloss over that problem and make everything okay. It's part of -- it's part of the issue that legislators and people through their Constitution have to consider when they decide to elect judges.

CHAIRMAN BABCOCK: Sarah and then Judge Christopher and then Pete and Carl.

HONORABLE SARAH DUNCAN: I agree, Steve, and Pete. I don't think that a bright line necessarily

complies with due process, but what we did the last time we did this was say -- without regard to due process because we didn't have Caperton at that point -- this is a mandatory basis for recusal. Beyond that, the situation of Tracy getting all of her campaign finance from one law firm, let's say, that is something above and beyond Caperton that can be taken up on an individual motion basis, the totality of circumstances. Yeah, in the totality of circumstances, it may not be a mandatory recusal, but it may be mandatory under Caperton, but that's two different ways of analyzing a problem that, I agree, we can't -- we can't fix the system around this table, but we can say that if -- and I agree with David.

It will use -- turn a recusal motion into a compliance tool, but I don't think that's a bad thing, if that's what the Court decides to do, but it's two different things to say that there are -- under totality of the circumstances, this would be a due process violation, and then the Court saying without regard to due process, this is a mandatory basis for recusal, and I think we should distinguish those two because they're very different.

HONORABLE STEPHEN YELENOSKY: Well, just to be clear, I don't think a bright line is a problem if it's a mandatory basis for recusal. I think a bright line safe

harbor is a problem.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: If Caperton says that the contribution has to be significant and disproportionate and our Legislature has said that, you know, $5,000 for a county of over 2 million people is an okay contribution, it seems to me that that $5,000 by the Legislature, they have found that that is not significant and would not have a significant impact on a judge, so I think we could clearly say that those campaign limits are what we consider to be significant. Otherwise, we write a rule -- we write a rule that says "The judge shall recuse if the campaign contributions were significant and disproportionate." Talk about discovery, oh, my gosh. I mean, that would be a huge amount of discovery involved in terms of more than just your financial records.

You'd have to have -- you know, okay, say I took $5,000, and it's all I raised. Well, it is disproportionate, but was that significant? Well, it was the only way you could have paid your filing fee. Well, no, I probably could have dug into my own pocket and paid my own filing fee if I had wanted to, you know. I mean, we're going to have discovery on whether I had the ability to, you know, pay the 2,500-dollar filing fee out of my own pocket versus campaign funds, I mean, you know, we'll

just -- if we don't have something definite, discovery will be huge.

CHAIRMAN BABCOCK: Pete and then Carl and then Skip.

MR. SCHENKKAN: I would like us to turn and look at this from the other end and ask the question are we going to allow discovery and under what circumstances and with what consequences, because I don't think we can solve it by picking our bright line standard. Now, I will back up and say, again, I don't think we can pick a bright line standard, and the essence of due process is the totality of the circumstances, and Massey is a good illustration. Massey could perfectly well have given only -- or whichever one, yeah, Massey, the coal company, could have given only $5,000 or 4,999, and under the Supreme Court majority's holding it's still -- recusal was still mandatory under due process because he gave 2,500,000 to the PAC, which is not touched by our rules. I'd really like us to not waste the opportunity to look and see if there's anything useful, protective, helpful, constructive that can be done on the procedure because I don't think we can solve this.

CHAIRMAN BABCOCK: Yeah, but Judge Peeples has spent a lot of time working on the procedural end which we're going to get to in a minute.

MR. SCHENKKAN: I was hoping we could. I'm nervous about our using all our time striving for what I think is --

CHAIRMAN BABCOCK: We're not going to finish this topic today. We're going to continue it next meeting, but I do think we should spend time today on the procedural aspects of it for sure. So Carl. And then Skip.

MR. HAMILTON: I agree with what Sarah said. We're talking about two separate things here. Eight years ago when we worked on this we already had the provision in there about impartiality might reasonably be questioned, so a motion could be filed under that for campaign contributions at that time. We just decided to add to that a separate ground for recusal with a bright line test so that if campaign contribution exceeded that amount that would be a separate ground, but if it didn't exceed that amount but it was still unreasonable or disproportionate or however the language in that case is, you could bring that under the impartiality provision, so there are two different things.

CHAIRMAN BABCOCK: Yeah, good point.

MR. HAMILTON: And it's not a safe harbor, doesn't give anybody a safe harbor.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: My memory of my first days on this committee was this topic. The Legislature had just passed a statute. A legislator and aides were attending every meeting to see how we were going to react to it, but the message was very clear to me that if we didn't do something out of this committee, it would be done for us. I'm not at all unsure that that climate does not still exist. I think that's an overlay of reality we need to be very cognizant of. In that context, we have a bright line, whether there should be a bright line to me is -- I mean, I like talking about it, but we have a bright line that's been drawn. The question is going to be do we match it or not.

It goes against every instinct I have to say that I should be hobbled in supporting a good judge, and, you know, this is one of those things where we're killing the fly with a sledgehammer. I understand how bad it can be in some parts of the state. I've experienced it. I also understand that the people in this room, the majority of the people that judges get their money from, give money because they want the best possible judiciary in place regardless of party affiliation.

To take -- to hobble that, it's not taking away, but to hobble that galls me, but the realist in me says that that's where I am, and how do I deal with it? I

don't think that matching the Legislature -- what the Legislature has done necessarily solves the problem. I don't think it does. I also don't think it needs to be done in a way that creates a safe harbor, that you're safe if you're within the limit, but my instincts tell me we better do that, that needs to be done as a first step. I'm not saying I'm advocating it or that I like it. I don't. My instincts tell me it needs to be done, that line needs to be matched. Whether we make it presumptive where somebody can -- you know, it's clear that there's an uphill battle with a big burden going beyond that, I don't know, but I definitely think people should be able to go beyond that and probe.

The third and last thing I would say is, is that I -- again, my instinct tells me that at the end of the day where we may end up in this, not necessarily this committee but perhaps legislatively, is that we may go to a much more detailed reporting system in which the records are there and are public records of what I would call in-kind contributions where the donating the lobby of a law firm for the reception is assigned a value in reporting and where there is reporting of, you know, not just the line on the card that says, "Are you a member of the law firm? "If so, what firm are you in?" but it may be "Were you contacted by somebody to give this? If so,

who is that person?" That stuff is just entered into a database, and that's there for anybody to print out, and I just think the reality is the information is going to be there, and I think we need to view this with that overlay as well. It's possible to get the relevant information about the gatherers of what I used to call the bag men, you know, to --

CHAIRMAN BABCOCK: The bag men. I'm sorry.

MR. WATSON: That are gathering or the folks that are -- the PACs, you know, did you contribute to a PAC, and if so, how much? That's all.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I would like to reemphasize something that Carl brought up. The Citizens Watch People or whoever they were that monitor contributions was very critical because I apparently am a tool of the trucking industry, and --

CHAIRMAN BABCOCK: We've always thought that.

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE STEPHEN YELENOSKY: I thought you just drove one.

HONORABLE SARAH DUNCAN: That would be Justice Hecht. And the truth is that my father was a truck dealer and my brother was a truck dealer and my

father's next door neighbor was in the trucking industry, and so if you just look at where the money came from, yes, I received a great deal of money from the trucking industry, but of course I'm recused in my brother's cases and I'm recused in my father's cases and I would never sit on Tom Clough's cases.

There's got to be room in the rule to explore the totality of the circumstances. At the same time Frank needs to be able to know that he can in most cases give -- barring other circumstances, give the maximum under the Campaign Fairness Act to the judge he wants elected, and I should be able to receive it, assuming I would be one of those judges, without fear that I'm going to have to recuse in Frank's cases, but that would just be a presumption; and if we looked at the totality of circumstances, if, in fact, I am a tool of the trucking industry I should recuse in truck cases, and somebody ought to be able to make that point.

But we're talking two -- apples and oranges if we're talking about a safe harbor for due process and the Campaign Fairness Act. Those are two different things, and just because -- and the Campaign Fairness Act doesn't talk about the trucking industry, right? It talks about a person or a lawyer or a law firm or a special purpose committee. That's a really bare bottom line.

CHAIRMAN BABCOCK: Okay. Frank and then Pete and then Judge Evans and then Judge Christopher.

MR. GILSTRAP: Let me see if I can summarize. One approach is do we or do we not have a bright line, and the approach of the bright line are mandatory recusal if you exceed the bright line. Another approach is a safe harbor if you don't exceed the bright line, and I guess the third approach could be both. If we have a bright line, what is it and is there some exception to it. In other words, can you still go behind the bright line under some circumstances.

If we don't have a bright line, do we have simply some type of generalized Caperton test, that's significant and disproportionate, that type thing, or do we just tighten up the recusal rule? I mean, we do have the fact that, you know, unlike Caperton, the judge doesn't decide whether he's recused, or do we do both those.

And then the third thing is, in any event and kind of a separate problem, what do we do about discovery of these cases? It seems like regardless of what you do you're going to have to address that.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think that's a helpful summary. I've got a stupid question that relates to the

first issue, the bright line question, that maybe people here could easily answer. Under the rule that was adopted X years ago when this came up that ties to the Campaign Finance Act, what happens if the judge's opponent in that election does not abide by the Campaign Finance Act and so, as I understand it, the limit does not apply? Is the way our rule is presently set up, is the judge still supposed to recuse himself if he took more than the amount even though he had to do it to prevent unilateral disarmament in the election campaign?

HONORABLE NATHAN HECHT: We should clarify that the contribution limits apply no matter what. It's the expenditure limits that you can opt out of.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: Okay. So the contribution limit still applies.

HONORABLE NATHAN HECHT: You don't have -- they're not voluntary. You're stuck -- for the candidates, those are mandatory, but there are expenditure limits, and those are voluntary. You don't have to abide by -- you can elect to abide or not to abide by those.

MR. SCHENKKAN: So you just keep on raising more of the 5,000-dollar contributions that your opponent has not.

HONORABLE NATHAN HECHT: Right.

MR. SCHENKKAN: But we are now making the 5,000 a bright line recusal in a situation in which it's less and less significant, in fact, in that election because you've had to raise that many more. Okay.

On the second point Frank raised about if you -- you're not a fan of a bright line rule, and I remain not one, though I like the suggestion that Skip has if we're going to do it, we try to do it as a presumption, not as a true bright line. If we were going to work with some language, it seems logical to use the Caperton language, and the Caperton language has more in it than I think we might ought to look at using if we're going to go that direction. It does have the "significant and disproportionate," that's -- with both words being important, "significant and disproportionate," but it also has -- and I don't have it up in front of me on the computer, but it also has in the same sentence, "significant and disproportionate" and something about picking the judge in a case that is pending or imminent, and I think if we're going to go this direction we ought to use that as well.

Here it is, "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." And if we're going to try to use some generic language, I would rather try to draw that line in that way and not invite this notion that any time you have given to one side or the other of one of the great issue divides or party divides or something like that that you are automatically subject to this rule. That's it.

I still think we have the due process problem, which none of this can prevent somebody from saying I have a case on the facts that does -- and, again, I would say that leads us to the third question, what are we really going to do about the process, especially the discovery, which is really where the burden is, where the mischief is, where the bad publicity is.

CHAIRMAN BABCOCK: Yeah, we're going to get to that. Judge Evans, then Judge Christopher, and then Justice Gaultney.

HONORABLE DAVID EVANS: The adoption of a bright line would be helpful, of course, to anybody that's in judicial politics, but it would have to be written in a way that it trumps the standard that was used down in Corpus and that Judge Peeples referred to, and that's where most of the discretion comes to the presiding judge in hearing recusals, is that the impartiality might be reasonably questioned. There's ethics opinions out there,

for instance, about judges who have notes or barrings or business dealings with litigants and how that might affect their stock ownership. So you would have to write it to say that that question overrides your impartiality couldn't be reasonably questioned based upon a contribution.

I'm really worried about the discovery war going back into, well, how many times has this firm appeared in front of you, how many times have you ruled in their favor, and relitigation of all the prior cases. It's a -- you can come up with nightmare scenarios, and just for the record, I'd like to just point out that if you try to get advisory opinions on ethics right now in the state if you're a lawyer you go to a Supreme Court committee. If you want to get it on campaign financing, you have to go to Texas Ethics Commission, and if you want judicial ethics, according to the website of the Commission on Judicial Conduct, there's a State Bar committee that handles judicial ethics opinions.

Now, those are printed and on that website. I was just looking at some of them while we were talking, but I couldn't find that the Bar still had a standing committee on judicial ethics, but must be one because there's a recent opinion out there. So I'm not sure if I'm right about the source of that comment or not, but

there's going to be advisory opinions sought at some point by somebody on some of these issues raised by Caperton. I'd hate to see -- I don't know if I want them published or not, but sometimes you're better off not knowing, but just for the record, there seems to be some need to look at that. These are a lot of hypotheticals we're dealing with that just can't be answered by rule-making.

CHAIRMAN BABCOCK: Judge, do you know if the Corpus case or, Judge Peeples, do you know, was that post Caperton?

HONORABLE DAVID PEEPLES: Yes.

CHAIRMAN BABCOCK: It was post-Caperton.

HONORABLE DAVID EVANS: It was post-Caperton.

CHAIRMAN BABCOCK: Anybody know the name or cite of it?

HONORABLE DAVID PEEPLES: All I know is what I read in the newspaper, which may or may not be good.

HONORABLE TRACY CHRISTOPHER: I mean, it's just -- the judge who heard it just did a written order, so it's not at the appellate level. There is no appellate decision on it, and it's not reviewable.

HONORABLE DAVID PEEPLES: Right.

HONORABLE TRACY CHRISTOPHER: Which is another thing that's, you know, difficult from a judge's

point of view, you get sort of this little truncated thing in the newspaper, the *Texas Lawyer* newspaper, and all of the sudden you're just like, well, does that mean I can do this, does that mean I can do that --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- you know, is it okay for you to hold a fundraiser for me anymore? I don't know.

CHAIRMAN BABCOCK: Did you have anything -- you were next being called on.

HONORABLE DAVID EVANS: The problem is on the opinion in Corpus is the reports indicate it was just not a Caperton decision. They looked at a lot of history and relationship between the judge who was the object of the recusal motion and the lawyers in the case, and so as it stands right now, for whatever value, it is certainly within the bar, and I would think any good advocate would be advocating it -- would be reviewing it now to see if the risk of bringing a recusal motion was worth the benefit that might come to the client.

CHAIRMAN BABCOCK: Justice Gaultney and then Harvey and then R. H.

MR. WALLACE: Well, I hate to see us have to inject this whole thing of campaign contributions specifically into the rule because nothing good is going

to come of that, I don't think, but maybe that's where we are and that's what we have to do. One thing that the judge just mentioned, Judge Evans, was what's best for the client. You know, we as lawyers and judges look at this one way. Laypeople don't quite understand as we do that lawyers give judges money to get them elected and that some lawyers give more than others, and in my 25 years of private practice I've filed one recusal motion and succeeded. I've had dozens of clients say, "Well, don't we have a grounds to get this judge recused? He doesn't like us, he doesn't like this, maybe some lawyer in town is known to be a heavy contributor or supporter of his," and you can always say, "No, there's no grounds for that."

Now we're going to put something specifically in the rule that that client can point to and says -- or well, maybe there is. And I just -- if we're going to do it, it seems like we need to do some kind of a bright line rule to give lawyers the guidance to say to their clients, look, we don't have a basis to recuse this judge or else somewhere down the line that lawyer is going to end up getting sued when the things come out bad for the -- for them in court, and he says, "Well, Wallace told me I didn't have grounds to recuse this lawyer, and I did."

The -- I wonder if we could do some kind of

a bright line rule, a presumptive bright line rule, that could be overcome by showing the type of relationship in the language that's in the Supreme Court opinion. That's just a thought. I don't like the whole thing, but if we've got to do it, I think I would prefer some kind of a bright line rule other than just leaving it out there in gray area.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, of course, compliance with the Campaign Finance Act is absolutely required. You know, of course it's a good thing, of course we have to insist on it. The judicial conduct rules require it. My only concern is that we be careful and we not shift compliance with the disclosure requirement into what is a different issue so that an inadvertent non-report of an in-kind contribution, which are reportable, an inadvertent becomes a ground for recusal. Because if it doesn't address the Caperton standard, what are we adding? If it doesn't address the impartiality of the judge, why are we requiring recusal? And if we're going to establish a way of litigating whether every in-kind contribution is adequately disclosed, that's my concern. That's my concern.

Now, that having been said, I'm very sympathetic to the concept of having a -- I also think

that the Campaign Finance Act doesn't make any sense to set different standards. I understand that. I understand that. But -- and I also understand that the Legislature is going to expect us to do something with Caperton, and I'm sympathetic to the concept of there being a safe area. I also think there ought to be -- ought to be I guess a presumption to comply with Caperton rather than a bright line deal, but I'm just extremely concerned that we not turn this into something it's really not intended to be, and that's my concern.

CHAIRMAN BABCOCK: Harvey, then Kennon.

HONORABLE HARVEY BROWN: Well, I was just curious as to what Tracy thought about the presumption idea.

HONORABLE TRACY CHRISTOPHER: Well, I like it. I kind of drafted something, but I'm not sure whether it addresses some of the other issues, so my idea was the judge receives -- you know, "As a ground for recusal, the judge receives campaign contributions from a party, lawyer, or a law firm representing a party that was significant and disproportionate in the judge's campaign when the case was pending" and, you know, the language from Caperton. "A contribution that complies with the CFA is presumed to be not significant." And then if we want to say, "This presumption can be rebutted" and have a list

of things on when the presumption can be rebutted, but it's -- are we really saying that that dollar amount is rebuttable, or are we really saying that there are other factors --

HONORABLE STEPHEN YELENOSKY: The latter.

HONORABLE TRACY CHRISTOPHER: -- plus that dollar amount that's important? I mean, because, you know, it seems to me that, you know, the 5,000-dollar or the 2,500-dollar, depending on the size of your county, that contribution itself should not be significant, but if there were other factors that might require a recusal is what we've been talking about.

CHAIRMAN BABCOCK: Okay. Kennon, then Tom, then Carl, then Richard. Somebody over there. Judge Yelenosky.

MS. PETERSON: I just have a question, and that is to what extent, if at all, are campaign contributions considered currently when determining recusal and disqualification?

HONORABLE SARAH DUNCAN: Considered what?

MS. PETERSON: To what extent are campaign contributions considered currently? In other words, if this were incorporated into the rules, would that be a sweeping change in practice, or are people currently looking at campaign contributions when determining

recusal?

CHAIRMAN BABCOCK: Well, that was the --

HONORABLE TRACY CHRISTOPHER: Well, the law always was that it wasn't a basis for recusal. Then Caperton came down, and at least in region two we've had at least three, maybe five, I believe, recusal motions now where they're basing it on -- in part on campaign contributions. So it's going to happen.

MS. PETERSON: Uh-huh.

HONORABLE TRACY CHRISTOPHER: I mean, it's going to -- it's -- you know, the due process opinion is out there, and people are starting to use it.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Well, Judge Christopher has answered part of my question, because my question is how much impact has this had. We have this Corpus Christi decision. I tend to agree with this memo from Judge Peeples with the administrative judges saying maybe change is not needed. If there's a lot of these then maybe we need to address it, but for the most part for the last several years recusals have sort of calmed down. It's not near the problem that it was years ago, and if we make a rule change, I think that tells the lawyers something has changed, and I fear that we might cause even more of them than we're having now. I think our rule is adequate to

address it.

I don't understand this Corpus Christi decision, although it apparently says -- it deals with, quote, "the timing of the fundraising event in addition to contributions," and that's -- I don't think that's particularly helpful in deciding what should occur in a particular circumstance, but I think there is a real danger that if we change the rule we may make the problem worse as opposed to just kind of letting some decisions --

CHAIRMAN BABCOCK: And the problem is what? What problem are we making worse?

MR. RINEY: That there might be more recusal motions. I think most of my objections to recusal motions is that they're used unfairly when someone simply doesn't like the ruling of the judge, and that's what I have seen in the last 10 years. That's about the only problem I have seen with it, and I think if we give people by a rule change perhaps more incentive to file those types of motions we're wasting a lot of time. In my experience recusal motions are seldom valid, and they're seldom granted, and I don't think we ought to encourage more of that.

CHAIRMAN BABCOCK: Tom, you weren't here, but we had an interesting debate eight years or nine years ago on that very point of can you use the judge's rulings

as some evidence in your recusal, and I think the consensus was you cannot, but the minority view of that perhaps was that there are rulings that are so inexplicable that you could put it up in front of 50 judges and lawyers and say, "There is no way you can get to that result and so there must be something else going on," and we had a lengthy discussion about it, so it's --

HONORABLE STEPHEN YELENOSKY: Could be incompetence.

CHAIRMAN BABCOCK: Huh?

HONORABLE STEPHEN YELENOSKY: Could be incompetence as opposed to bias.

CHAIRMAN BABCOCK: That's right.

MR. ORSINGER: Which is not a grounds for recusal.

HONORABLE STEPHEN YELENOSKY: It's not, that's right.

HONORABLE NATHAN HECHT: Since we're talking about practice, let me ask Judge Peeples, if he knows, what percentage or how many recusal motions are decided by the regional judges themselves and how many are farmed out?

HONORABLE DAVID PEEPLES: It varies. I decide 99 percent of my own, and only when I just can't do it do I assign someone else. I think the heavily

populated regions, which are East Texas, Dallas, and Houston, I think Underwood does a lot of his but can't do them all. I don't know what the percentage would be. I think in other parts of the -- generally the presiding judges try to do it themselves and do a lot of them by telephone and do a lot of them quickly because they are filed in the middle of a trial or something, but it varies from almost all of them to most of them.

HONORABLE STEPHEN YELENOSKY: I can answer for our region it's typically a retired judge, like Paul Davis, that B. B. Schraub will appoint.

CHAIRMAN BABCOCK: Carl, Richard, and then Harvey.

MR. HAMILTON: Well, as the Caperton case points out, what we're trying to do here is we're trying to establish an objective standard for recusal that, as they say here, doesn't require any proof of actual bias. So, again, we don't want to mix the two up. We've got a provision for actual bias. What we're talking about here is just an objective standard that is a bright line test. They fit it, well, they can be recused.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Just a couple of comments. The Caperton case establishes the limit of what's so outrageous that it's unconstitutional, and I don't think

we should articulate our operative standard to be the absolute limit of the most intolerable situation that the U.S. Supreme Court can contemplate. I think our standard ought to be less extreme than that. So I wouldn't favor that the standard be expressed in Caperton terms.

In terms of the campaign contribution limits, in the materials on page 43 the ABA has a slightly different approach. They have very similar grounds for recusal, but they have an overriding subdivision (a) about recusing when impartiality might reasonably be questioned, and then they list -- "such as the following" -- "including but not limited to the following circumstances," and you could, for example, reformat our rule from absolute recusal to "the impartiality might reasonably be questioned" with a list of things where their impartiality might reasonably be questioned.

And you can phrase the campaign contribution rule as "whether or not the party or the party's lawyer has made contributions exceeding the maximum amount specified in the Judicial Campaign Fairness Act," so that whether the contribution is less or more is a factor that can be considered on whether they can be considered whether their impartiality might reasonably be questioned. It's kind of a bright line in the sense that it's a stated factor. If you're under, that's a factor to consider. If

you're over, that's a factor to consider, but it's not the only factor to consider.

But in the Corpus case, I wasn't there, but I'll bet you -- because I've done a recusal in Corpus myself. I'll bet you that there's lots of other factors including campaign contributions that contributed to that, including the common knowledge that certain lawyers always win when they go in that court or whatever. I mean, I don't know what they were. I mean, I know what my own experiences are down there, but that would be a way maybe to meet a lot of these different needs because it would give us -- it would give us a sense of what's right and what's wrong, but it wouldn't be a mindless test that if you're one penny under you're always safe and if you're one penny over you're always dead suggestion.

CHAIRMAN BABCOCK: Harvey, then Judge Yelenosky.

HONORABLE HARVEY BROWN: I was going to ask Judge Peeples, right now in a recusal hearing if somebody wants to offer evidence somebody made a contribution of $5,000, do you find that irrelevant and inadmissible, or is that one fact that you consider that by itself would not be determinative but is one of many facts?

HONORABLE DAVID PEEPLES: I think what I would do would be to consider that evidence along with

everything else that was submitted.

HONORABLE HARVEY BROWN: All right. And before Caperton would you have considered that evidence?

HONORABLE DAVID PEEPLES: Yes. It's been my experience that there's usually more than one thing alleged and offered.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Tracy asked a question, and actually, Carl I think pointed this out earlier on, the difference between a safe harbor, which I was saying I thought would be a problem with due process, and stating whether or not a particular amount is significant or presumptively significant, because a safe harbor, if that's what somebody means, would cover all the factors or more than one factor in any event. I don't know that there's a due process problem with saying that presumptively an amount within the Campaign Finance Act is not significant, and even if we didn't say it in a rule, I would be surprised if any decisions coming down failed to de facto by those decisions, by case law, establish that to be true. So I don't know that it needs to be said, and normally I guess the good argument against saying it is the unintended consequences of addressing it at all in the rule.

CHAIRMAN BABCOCK: Pete Schenkkan, and then

Eduardo.

MR. SCHENKKAN: I'm going to have to step out for the rest of this morning in order to attend a campaign fundraiser.

HONORABLE STEPHEN YELENOSKY: You might as well get it all on the record.

MR. SCHENKKAN: But it's not for a judicial candidate. My contribution will be insignificant and not disproportionate in any way to the election, but it is important that I accompany my wife to this event. I just offered that fact as some illustration of the fact that this totality of the circumstances sweeps very broadly. You can have many motives for attending campaign fundraisers.

CHAIRMAN BABCOCK: Okay. Thanks, Pete. Eduardo.

MR. RODRIGUEZ: I think one of the things that may be -- and I don't know that it has anything to do with the rule, but if there was some way to capture on a statewide basis the filings of motions and the granting or refusal of motions, it could go a long ways to help Wallace in terms of being able to tell our clients, "Well, this has been tried in so-and-so and the court held that it wasn't grounds." Right now, there's no way of anybody short of going to each county to find out whether or not

the motion has been filed, and I just throw that out there to see if we can come up with some system that we would recommend to the Court involving recusals to establish a statewide repository or some kind of place where we could go as lawyers and look at -- and look at, you know, at motions or rulings to help us talk to our clients.

CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

MR. BOYD: I just wanted a clarification, and I -- I missed the very beginning. I was not at a fundraiser this morning. And I haven't read Caperton since it first came out a few months ago, but I'm looking at the language from Richard's very helpful memo, and as quoted, what the Court said about significant and disproportionate was not that the amount was significant and disproportionate, but the influence in placing the judge on the case was significant and disproportionate, but what I'm hearing this morning is this discussion of whether we ought to tie that language to an evaluation of the amount given to the judge, which seems to me to be going beyond what I recalled the Court saying and what this quote would suggest, that it may be the amount or it may be the trip out onto the French Riviera or it may be -- you know, it could be a lot of different things that could constitute a significant and disproportionate influence in getting that judge on the case. It could be

a improper visit with Judge Dietz saying, "Give me a special assignment. I want Steve Yelenosky on my" -- I mean, it could show up in a lot of different ways, and so I think we should be careful trying to apply that too directly to the campaign finance limits.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Of course, they would only do that if they wanted absolute impartiality.

MR. BOYD: Of course.

HONORABLE STEPHEN YELENOSKY: Of course.

CHAIRMAN BABCOCK: I was looking at the White opinion last night to see exactly what Justice Kennedy said about recusal in the context of a judicial speech prohibited by the canons and in the White case unconstitutionally prohibited by the canons, and he said just a single sentence, but it's gotten a lot of notoriety. Justice Kennedy said, "The state may adopt recusal standards more rigorous than due process requires and censure judges who violate these standards," and it seems to me that even though that's in a speech case, we certainly are discussing whether we ought to stop at the boundary of due process or we ought to have a recusal standard that is more vigorous than that, and we -- you know, we could I suppose go as far as we want, which would

have a huge -- could have a huge impact on how our judicial campaigns are financed, because if we went far enough we could create a system whereby somebody would say, "I don't want to contribute to that judge because he's a really good judge and if I do that I'm going to lose him on all my cases, and that would be a very bad thing for my clients" and then, you know, where does the money come from to finance these campaigns? And if there's less money financing the campaigns, is that a good thing or a bad thing? R. H.

MR. WALLACE: This is not farfetched. There's a particular person in Fort Worth who runs periodically that we would probably give in excess of the campaign guidelines to make sure we never had a case in his court, and I'm being serious about that.

HONORABLE SARAH DUNCAN: But the candidate has a --

HONORABLE DAVID EVANS: I'm not up until 2012, R. H.

HONORABLE SARAH DUNCAN: But the candidate has a responsibility to return funds in excess of the limits.

CHAIRMAN BABCOCK: Yeah. Yeah, Jeff.

MR. BOYD: In response to what you said, I kind of thought, starting with Justice Hecht's letter,

that the whole reason we were taking this back up again was we want to make sure that Caperton didn't require us to do something different to our rules and that but for Caperton we wouldn't be having this conversation again. I guess White comes into play there some, too.

CHAIRMAN BABCOCK: Yeah, my sense is it's broader than that, but I'll --

HONORABLE NATHAN HECHT: Yeah. I mean, it really raises the issue, but, you know, it's a recurring issue, and it deserves being revisited from time to time just because it's very important to the judiciary's integrity as perceived by the public, which is a concern to the Bar and the judiciary and everybody, that our justice system looks just to the citizenry, and so when Caperton comes along and people start talking about it and then there's news, and it makes you almost think maybe we should go back and look at this again and see if we're still on the right path. So I really think the Court was interested -- is interested in a re-evaluation of where we are.

CHAIRMAN BABCOCK: And, Jeff, we're not the only state looking at it either. I know Colorado is looking at it carefully, and there is a group based in Colorado that is going to try to come out with some model rules, and that's made up of rules committee people from

multiple states, so --

HONORABLE NATHAN HECHT: And I'm not suggesting that there needs to be change. I don't think the Court is of that mind either. Just maybe we are where we should be, or maybe very profound change would be advisable at this point. We just kind of need to take stock.

CHAIRMAN BABCOCK: It's the Institute for the Advancement of the American Legal System that is holding meetings and hearings about this, about the Caperton decision. Richard.

MR. ORSINGER: David Peeples has an analysis of these older cases that's a little bit different from mine in which he doesn't think that the common law precludes consideration, which hopefully he'll speak on in a minute, but since there does seem to be differences of opinion to what extent existing law allows contributions to judges' campaigns to be a factor in recusal, even if we decided we didn't want to mention a number, we could list it as a factor to consider on this impartiality question just so we can eliminate any doubt whether the common law permits you to consider that or not consider that.

CHAIRMAN BABCOCK: Yeah. Good point. Why don't we -- speaking of Judge Peeples, why don't we take our morning break, and when we come back Judge Peeples

has -- there's a handout talking about some procedural aspects to our recusal rule, and we could spend some time discussing that when we come back.

MR. GILSTRAP: Are we talking about White? Are we going to talk about White today?

MR. ORSINGER: No, we're talking about procedure.

CHAIRMAN BABCOCK: This is procedure. We're going to talk about White. We're not going to finish this recusal issue today. So we're off the record.

(Recess from 10:29 a.m. to 10:48 a.m.)

CHAIRMAN BABCOCK: We are back on the record, and Judge Peeples has canvassed with his fellow presiding judges in the administrative regions and come up with a very thoughtful and helpful memo, and he's going to talk about those issues for the rest of the session today.

HONORABLE DAVID PEEPLES: Okay, thanks. I want everybody to have before you this -- the handout is seven pages, got a memo from me to this committee on top of it, because I'm going to refer to that in just a few minutes. I want to make three or four points before we talk about that memo. I think it's helpful to keep in mind that our system right now is divided into a procedural 18a and you might say substantive law 18b, and we've been talking about the substantive law of recusal.

The procedures is what I now want to turn to, and I want to make just these points. The rules that is the Supreme Court comes up with will apply to civil cases and family law and criminal and juvenile and probate. The Court of Criminal Appeals back in 1993 said we're going to apply 18a and 18b in criminal cases, and so we need to keep in mind that we're making rules or recommending rules for all of those kinds of cases, and in addition these rules apply whether there's a lawyer involved or whether the people are pro se, and as Judge Underwood's statistics -- I don't want anybody to look at them right now, but they show roughly one-third of the recusals that he gets in the second region are filed by pro se litigants. So you've got that issue also. A lot of pro se people, and a lot of them are prisoners who are complaining about the judge who presided over their trial where they were found guilty, and in addition, this has been mentioned I know by Skip Watson and maybe another person or two here. The rules that we come up with apply to Judge Christopher and Judge Yelenosky and to the judges who are on the Supreme Court Advisory Committee, and they apply to the judges in the Valley and in East Texas and in every place there is, and that makes it hard, but the rules have to apply everywhere to all judges.

Now, the -- I want to look at the handout.

I tried to make the point in the memo that the presiding judges who administer this recusal system, we want to see some procedural strengthening of 18a in ways that are totally separate and independent from the campaign contribution issues or whatever the substantive rules are because there's a lot happening out there that has nothing to do with contributions and so forth, and we've got 29 years of experience with this rule, something like that, and we think that it's time to have some procedural strengthening of the rules, and I've listed the four areas at the bottom of that memo, and what we did, a committee was set up. There were three of us, and I did the drafting and we came up with a redline strikeout version that starts with existing 18a so you can see what changes we would like to see made and just as an effort to flag for everybody so you can try to find out what the changes would be.

Then there's a clean version toward the end, and I want to just go over the last page of this, which is from Judge Olen Underwood. He's the presiding judge of the second region, which is roughly the southeast quadrant of Texas. Houston, Galveston, Beaumont, and a bunch of little counties, but they've got a lot of people and a lot of litigation and a lot of lawyers and lawsuits and so forth, and what he did was just to give -- I asked him to

do this.

HONORABLE JAN PATTERSON: Who was this, David?

HONORABLE DAVID PEEPLES: Pardon?

HONORABLE JAN PATTERSON: Who was this?

HONORABLE DAVID PEEPLES: Judge Olen Underwood. He's from Conroe. He is a retired judge, and now he's the presiding judge of the second region, which is the southeast fourth or 20 percent of the state, and this is his summary of the recusal issues that he had in the year just finished in August, and I just want to flag a few things for you. In the top third of the page he's got grounds that were -- 18b grounds were clearly alleged, but he says there "essence of motion," and he says in here that most every motion he gets -- and I find this to be true, too -- has more than one ground urged, but he tried to say the main ground urged in the motion was as he has it there, and you can see "impartiality might reasonably be questioned," that's included in almost every motion, but other grounds are included also.

HONORABLE STEPHEN YELENOSKY: So, I'm sorry, is this 20 then those instances in which he thought that was the main grounds and he did not include those others?

HONORABLE DAVID PEEPLES: That probably is -- that's the only ground in those particular ones, but in

everything else you see on this page that ground was probably thrown in, too, the basis in 18b for most motions. It's an all-encompassing ground. And then 37, where the salient ground was personal bias and so forth, you can see there. And then look right in the middle. There were other grounds that he thought the main ground in the motion was not something truly anchored in 18b. It was just something different, and look at 22, adverse rulings. We get a lot of motions where all they're complaining about or virtually everything is the rulings in the case, which the case law says can't be a ground unless it is just beyond the pail.

Now, down in the bottom third, I think it's significant, he's got voluntary recusals, and I was surprised to see this high number, but a lot of motions are granted by the judges who are being challenged, which, you know, never go to court. They just bow out and the presiding judge assigns another judge to try that case. Now, down at the bottom, dispositions, looks like about four out of five are not granted in that year, but about one out of five were, 19 out of about a hundred. And down at the bottom, roughly two-thirds pro -- excuse me, filed by lawyers and one-third pro se. So it's a kind of a complicated picture here, all kinds of cases. We're talking about all over the state, lawyers and not lawyers,

and they complain about rulings and just general unfairness, and some of them have no details, it's very general, and so that's just a snapshot of the second region, which is the most populous region in Texas.

HONORABLE JAN PATTERSON: David, do you think these numbers include a lawyer who repeatedly moves to recuse a judge, and there are some lawyers and judges because of either prior contact or something that happens that lawyer then begins to make motions to recuse that judge in all family law cases? Does this include that you think?

HONORABLE DAVID PEEPLES: Well, I'm sure that during this fiscal year if a lawyer moved more than once to recuse a judge and actually filed a motion it would be here, however many times that happened. I don't think these numbers are skewed because of that, but I feel sure that those are counted however many times they were, but I doubt that -- and if there were that situation, like somebody who just takes the bench and their law firm has a case, most people just recuse voluntarily for a certain amount of time on that, but I doubt that there are a whole bunch of motions on these figures on that, and frankly, that's all I have to say by way of introduction. Yeah, Tracy.

HONORABLE TRACY CHRISTOPHER: I was just

going to say at least our understanding of the rule is if you recuse without a motion being filed we don't actually have to send it to Olen Underwood, we can send it to our local administrative judge. So we -- if a motion is filed, you've got to send it to Underwood to assign the next judge, but if a motion isn't filed then it comes to me currently in a civil division and goes to the various, you know, chairs of the different divisions in Harris County, so voluntary recusals without motions filed, very underrepresented.

HONORABLE DAVID PEEPLES: Yeah. The number probably would be larger --

HONORABLE TRACY CHRISTOPHER: Much larger.

HONORABLE DAVID PEEPLES: -- in Harris County, which has an automatic re-assignment system --

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID PEEPLES: -- were included here.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID PEEPLES: I don't know how many counties he has, but there are a lot of counties and a lot of judges in southeast Texas, so that 53 would be larger probably.

HONORABLE TRACY CHRISTOPHER: Yeah. Oh, much larger.

HONORABLE DAVID PEEPLES: That's all I have by way of introduction. I assume people have looked at this.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I had -- the one recusal motion I had that actually was -- well, the one I had was a pro se litigant, and they filed it but didn't serve it on me. I'm looking at (b) under the notice, and I didn't find out about it until after I had signed another order. Does this draft address that in any way or -- I couldn't see where there was a consequence under the current rule or this rule to the failure to serve the judge, and it sort of put in jeopardy the validity of the order signed in between.

HONORABLE DAVID PEEPLES: Yeah. Again, as I understand your question, you're worried about when a motion is filed and not brought to your attention and you go ahead and hear the case, is the case in jeopardy.

HONORABLE STEPHEN YELENOSKY: Well, I didn't do that. I signed an order, which I wouldn't have signed if I knew -- if I had known it was pending, and ultimately the recusal was denied and sanctions were imposed and such, but is there anything to do done about that? Is it not a problem generally? Of course, typically you would think they would serve the judge if they want to stop

things. Either they didn't want to -- didn't know to do that or they were playing games or whatever.

HONORABLE DAVID PEEPLES: Statistically I'm not aware that that's a problem.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Justice Bland, then Judge Christopher.

HONORABLE JANE BLAND: There is a problem with technical deficiencies in motions to recuse that mean they fail, like service or, you know, they're not verified, and there's a problem with district judges getting the motion, realizing that it fails for -- it lacks technical merit and then not referring it, and so I like the idea of clarifying the rules because there are a number of cases out there about what to do when a judge doesn't refer it, and I think we need a bright line rule that you have to refer it.

HONORABLE DAVID PEEPLES: No matter how defective.

HONORABLE JANE BLAND: No matter what, and it really comes in -- I think it's within the 10 days if they don't file it within 10 days before a trial setting, so it's clear that they haven't complied with the rule, but they need to file it prior to the trial setting, and some judges just deny it because they say it's an untimely

motion to recuse, and I think the rule should be that it has to be referred no matter what.

HONORABLE DAVID PEEPLES: I think the Court of Criminal Appeals has held for criminal cases that an untimely motion can be disregarded by the trial judge.

HONORABLE JANE BLAND: That's right.

HONORABLE DAVID PEEPLES: The problem with that is if the motion alleges something special, I didn't find out about the ground until yesterday and so forth, you proceed at your own risk.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: And so I think what most of the time happens is the trial judge gets an untimely motion, will telephone and fax a copy to the presiding judge. The judge will get on the phone and take care of it quickly.

HONORABLE JANE BLAND: Right.

HONORABLE DAVID PEEPLES: Because there's so much at stake trying a case and having it set aside if you were wrong in disregarding the motion, but if your suggestion is we need to be more clear about that, I think that's a good suggestion.

HONORABLE JANE BLAND: Well, the question of timeliness can -- it can be a question because, you know, they didn't get notice of the setting or various reasons

why there might be some excuse for not having filed it 10 days out. The bigger problem with that is no matter what issue needs to be resolved, whether it's technically deficient or substantively lacks merit, it has to be ruled on by another judge, and I think there is a lack of clarity in the case law, and I worked on a case about five or six years ago, and I'll try to send it to you, David, but there's a lack of clarity in the courts of appeals about that, and there are some courts -- I think Waco is one of them -- that very strongly say no matter what you have to refer, and there are other courts that are -- don't take quite that extreme position, that a trial judge if the motion is technically deficient they can go ahead and disregard it or deny it without referring it, but that opens up a lot of problems.

HONORABLE DAVID PEEPLES: Yeah.

HONORABLE JANE BLAND: Because the whole idea is to get a judge not affiliated with the case to look at the whole thing.

HONORABLE DAVID PEEPLES: One reason -- at the bottom of the first page of this strike out version, lines 43 and 44, one reason we want the presiding judge to have the ability to deny without a hearing a legally insufficient motion is exactly for what Judge Bland is talking about. There have been times when a lawyer has

filed a motion to recuse while the jury is deliberating based on rulings, and the cautious judges have telephoned the presiding judge, who either heard it by telephone or assigned the judge next door, but if what we are trying to get here gets passed, a motion based on rulings is legally insufficient, the presiding judge gets a fax or an e-mail copy of it, looks at it, says "That's denied." Then the judge can go ahead and proceed with it, but at least another judge, not the respondent judge, is making that decision, but that's why that particular sentence, lines 43 and 44, we think is very important.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: These numbers at the bottom of Judge Underwood's sheet are very interesting. Under dispositions and movement, those both add up to 121, so that's the recusal motions referred to the presiding judge, so 19 were granted. That's about one in six. I would have thought 1 in 20 would be high, but that -- so this is one in six motions that the judge refused to recuse himself after he saw the motion, the presiding judge recused him. That seems like a lot to me. And if you assume that all of the pro se motions were denied it jumps up to about one in four, so that sort of reflects on the -- what we were talking about earlier about the standards, but that seems like a lot of ordered

recusals to me.

HONORABLE DAVID PEEPLES: Well, okay, my experience in the fourth region, if you factor out, you know, pro se prisoners that are complaining about the "Don't let the judge hear my habeas corpus proceeding because I got an unfair trial," you factor those out, I probably grant one out of four.

HONORABLE NATHAN HECHT: Hmm.

MR. MEADOWS: Let me ask you about, Judge Peeples, if I could -- you know, I, too, have had very limited personal experience with recusal, just two or three, really. They were -- but, you know, they were -- they were difficult situations to deal with, but what I saw in one of these was -- and I'm asking you if this occurs -- is a situation where basically a motion was made, this time by the opposing counsel, and there was no really -- in my judgment there were not sufficient grounds for recusal, but there was a hearing and essentially the recusal occurred, and it was -- if you boiled it down to it was just life's too short, you know, we can just -- let's just remove any question here, let's get it to another judge, and move on down the road and remove this sort of taint from the case, if you will.

How often does that happen where someone -- either the judge himself or at a hearing, you know, it's a

close call, or not even a close call, but the decision is made, you know, let's just move away from this?

HONORABLE DAVID PEEPLES: I can't give you, Bobby, an answer about how often it happens. As a -- I've been recused three or four times. I think the judge who's being sought to be recused almost always will think this is outrageous, I can be fair, but, you know, I don't have any stake in hearing a given case. If I bow out of case A, you know, I'm going to get case B, and somebody else down the hall is going to get case A, and it's no skin off of my back, and I think people do sometimes have that attitude, and --

MR. MEADOWS: Just to fall through.

HONORABLE DAVID PEEPLES: Even if it's close to frivolous, some mud can be thrown, and it can dirty you up a little bit. I think it does happen. I don't know how often.

HONORABLE STEPHEN YELENOSKY: But don't we have a countervailing ethical duty not to recuse and allow somebody else to decide if we don't think there's grounds, because obviously they can use it for gamesmanship purposes?

HONORABLE DAVID PEEPLES: Well, judges have a duty to sit.

CHAIRMAN BABCOCK: Tom. I'm sorry.

HONORABLE DAVID PEEPLES: But --

CHAIRMAN BABCOCK: Tom Riney.

HONORABLE DAVID PEEPLES: I think there are people, judges, who feel as Bobby Meadows was saying, that, you know, I don't have any dog in this fight. I'll be glad to take a different case, let someone else do this one. That's a rational thing to do in some cases, I think.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I think Judge Yelenosky makes a very good point. My experience is very similar to Bobby's. I don't think I've ever been involved in a recusal where there had not already been a significant ruling by the judge adverse to the party who then filed the recusal, and my concern is that far too often the judge in an attempt to think, well, I want to be fair, will be inclined to step aside, and I argue exactly that, no, that's not right, it's inefficient, it's unfair to the parties, and we can't be having someone be recused every time they rule some way that someone doesn't like.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. RINEY: And that's one of the reasons I'm kind of against tinkering with the rules too much.

HONORABLE STEPHEN YELENOSKY: I think our natural inclination is to do that, but we're obliged to

resist it.

HONORABLE DAVID PEEPLES: On the rulings, look again on the strikeout version, lines 15 and 16. That italicized language would be new, which says the judge's rulings can't be a basis for recusal. The case law that that's based on is in the comments, lines 84 to 99, and, you know, the case law does say there's got to be extra judicial conduct. There's got to be something other than what the judge did in that case unless it is just beyond the pail, and let's see what they say, "unless the rulings display" -- I'm on line 94. "Unless the rulings display a deep-seated favoritism or antagonism that would make fair judgment impossible."

CHAIRMAN BABCOCK: Where did you read that from, Judge?

HONORABLE DAVID PEEPLES: The strikeout version starting on line 94. That's from the U.S. Supreme Court in the Liteky case.

HONORABLE SARAH DUNCAN: So doesn't the rule -- the proposal go too far?

HONORABLE DAVID PEEPLES: Well, the proposal doesn't have that language, Sarah, but here's the reason we don't. Statistically how often are the judge's rulings going to be so far beyond the pail that they'll justify recusal? One out of a hundred or a thousand? Very few,

but if you put that in the rule people will think, "I'm going to go ahead and allege that," and you've opened the door to -- you've opened Pandora's box.

HONORABLE SARAH DUNCAN: Okay. This is the existing comment.

HONORABLE DAVID PEEPLES: Yes.

HONORABLE SARAH DUNCAN: I haven't compared it.

HONORABLE DAVID PEEPLES: Pardon?

HONORABLE SARAH DUNCAN: This line 94, is this in the existing comment?

HONORABLE DAVID PEEPLES: That's a comment that I wrote for this committee.

HONORABLE SARAH DUNCAN: That's your comment. It's not a published comment.

HONORABLE DAVID PEEPLES: The quoted language is from an opinion that distills the case law and so forth.

HONORABLE SARAH DUNCAN: Okay. Well, then what if we said "the judge's rulings may not be the sole basis"? Of course, then all they have to do is put in an appearance of impropriety.

HONORABLE DAVID PEEPLES: You know, yesterday during the home equity foreclosure discussion several people said, you know, whatever rules you write

people will try to game the system, and I think that's a fair statement of how the world works. Whatever rules you write, people are going to advocate within those rules, and I think that if you were to say something like the rulings can't be a basis for recusal unless they're really bad or, you know, over the line, you'll get a whole lot of challenges on that and then is it worth doing.

CHAIRMAN BABCOCK: Judge Christopher. I'm sorry, Sarah. Go ahead.

HONORABLE SARAH DUNCAN: I was reading about the Banales/Celis case during our discussion because I missed that in the paper --

HONORABLE DAVID PEEPLES: That's the Corpus Christi case we've been talking about.

HONORABLE SARAH DUNCAN: Uh-huh. And I think part of the backdrop of that case was Judge Banales' rulings. The sentence that Mark Luitjen was going to announce and the sentence that Banales announced were vastly different, so I think I'm a little concerned about writing in the rule that they may not be a basis when they may be a factor to be considered in deciding whether recusal is warranted.

HONORABLE DAVID PEEPLES: The draft that we came up with 8 or 10 years ago, Chip, when Luke Soules was chairman, had language -- and I'm going from memory. It

said the rulings can't be a basis but they can be admissible if other grounds are alleged, something like that, and I'm fine with that. The judge hearing the motion would have the discretion to consider, you know, contributions or always rules for this lawyer and so forth and look at these rulings, and I had a case a year or so ago where a judge in a little county was accused of being -- always showing favoritism to a lawyer, and there was testimony that that was true, but in addition in that case the judge had refused to transfer a family law case to a place where the child had been living for two years, and as Richard Orsinger will verify, that's as bright line slam dunk of a rule as there is that you transfer to where the child has been, but this judge wouldn't do it in a case where he was accused of being favored.

HONORABLE STEPHEN YELENOSKY: Well, why isn't that dealt with by mandamus or appeal?

HONORABLE DAVID PEEPLES: No, it's not. There's all kinds of things that trial judges can do that are not mandamusable.

HONORABLE STEPHEN YELENOSKY: Not anymore.

HONORABLE DAVID PEEPLES: I'm just saying in this case -- in this case --

CHAIRMAN BABCOCK: Now, now.

HONORABLE DAVID PEEPLES: -- there were

favoritism allegations bolstered by a ruling that 50 out of 50 real judges would have granted lickety-split, and that is fine.

CHAIRMAN BABCOCK: Judge Peeples, you say that the judge's ruling may not be a basis for the motion. What if the opponent of the motion says, "You're claiming that this guy is" -- "this judge is biased in my favor. He's been ruling in your favor, you know, for months now. You know, every time I file a motion he denies it. How can you possibly say he's biased?" Is that okay?

HONORABLE DAVID PEEPLES: Well, what we're trying to do with the language on lines 15 and 16 is to say if all you're alleging is this judge has been ruling against me, that is legally insufficient.

CHAIRMAN BABCOCK: Okay. But so Sarah's --

HONORABLE DAVID PEEPLES: But, but --

CHAIRMAN BABCOCK: -- amendment is okay.

HONORABLE DAVID PEEPLES: -- but that doesn't mean at a hearing you can't consider evidence, this outside judge is forbidden to hear evidence of rulings, but there's got to be some other allegation under this language to get you into court, so to speak.

CHAIRMAN BABCOCK: So Sarah's amendment would be okay then?

HONORABLE DAVID PEEPLES: I'd need to hear

the language again, but --

HONORABLE SARAH DUNCAN: "May not be the sole basis of the motion."

HONORABLE DAVID PEEPLES: I make a distinction between a basis in the motion, which triggers a right to a hearing. I make a distinction between that and what the judge can consider on the bench in a hearing, which is legally -- there is a basis for it. And I think that most judges who are hearing these, they've got some sufficient basis that's alleged and then someone wants to say, "and here are the rulings," the judge can consider that and think, "Hmm, that helps me understand the unfairness here," but to allow rulings to --

HONORABLE SARAH DUNCAN: That's a helpful distinction.

HONORABLE DAVID PEEPLES: -- ever be a basis to get you a hearing I think is just not worth it.

CHAIRMAN BABCOCK: Yeah. If we go that way, that is a helpful distinction. If we go that way, we would want to be clear about that. Yeah, Eduardo.

MR. RODRIGUEZ: Yeah, but I would want it to be clear that whoever is hearing the motion can hear ruling evidence, because -- because if this language is in there, they can just say, "Hey, that's not -- you can't bring that up at all."

CHAIRMAN BABCOCK: Right.

MR. RODRIGUEZ: And so, I mean, I understand what Judge Peeples is saying, but on the other hand, he's saying, "When I hear a case I listen to those things because it's a part of everything," but there will be some judges that will not because it's not relevant.

CHAIRMAN BABCOCK: Yeah.

MR. RODRIGUEZ: And so I think we need to have --

HONORABLE DAVID PEEPLES: Maybe the language that was in here 8 or 10 years ago ought to go back in.

CHAIRMAN BABCOCK: Yeah. Justice Patterson.

HONORABLE JAN PATTERSON: David, am I correct that you want -- that you intend this to mean rulings in that case?

HONORABLE DAVID PEEPLES: Yeah.

HONORABLE JAN PATTERSON: Because the bigger picture, the totality of the circumstances, may be the kind of extrajudicial conduct or something. I think David's distinction, Judge Peeples' distinction, is one that is made by the vast majority of states and Federal case law, the extrajudicial conduct as opposed to intrinsic rulings, and the goal is to avoid the complaint about this case, this ruling, "He's unfair to me." It has to be based upon some other quantifiable unfairness; and I

think that the Federal law and most states draw that distinction; and having seen a lot of these complaints, fairly often the pro se, the family law cases, the criminal law cases very often focus on "He ruled against me unfair in this case." So but I think the distinction is an excellent one.

My question goes to the procedure upon referral to a presiding judge. What is the practice -- and I assume it's not a matter of rule, and I also assume that it differs from the regions, as to whether there is communication between the judge against whom a motion is filed and the presiding judge? There seems to be a controversy about whether there is a submission conversation. Sometimes even presiding judges I understand recuse themselves if they've had a conversation -- if the judge calls them up and there's a conversation. What is that all about?

HONORABLE DAVID PEEPLES: I'm not aware of anything written down anywhere in the recusal rules that speaks to that one way or the other, but the judge who's the respondent judge is basically a party to the motion.

HONORABLE JAN PATTERSON: Right.

HONORABLE DAVID PEEPLES: And so the judge who is going to hear the case and presiding judge shouldn't be talking to the party, but, you know, judges

talk to each other. Suppose it's the person next door to you, but I'm not aware of anything except in the canons of ethics that talks about that. I will say that because the respondent judge is a de facto party to that motion there shouldn't be discussion, certainly about the merits or the facts.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: It seems to me, and maybe we're all talking about the same thing, but there almost has to be some extrajudicial reason to complain to support the motion over and above an unfavorable ruling, because to take your example of a ruling that just made no sense, I mean, it could be the result of what Steve said earlier about incompetence. You can't recuse a judge for incompetence, so just to complain about a ruling or rulings, it can't just be about an objective analysis of whether the ruling is right or wrong. There has to be some extrajudicial, you know, cloud around it, and I think we just need to be very careful that we don't allow lawyers that don't like rulings to move to recuse judges.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: Kind of moving to a different part for conversation, subsection (b) that's currently on line 20 or starts on line 20 entitled "notice," that deals with service and a response, service

of a copy on the judge, who Judge Peeples has now characterized as a de facto party, that should be under provision subsection entitled "service" and the response under subsection entitled "response," just break those two sentences out. I would substitute for the first sentence, "A copy of the motion must be immediately served on the judge in addition to those persons normally required to be served." My problem of saying "the parties or their counsel of record," we don't do that anywhere else in the rules. It's clear that parties, service on counsel is service on the party if they're represented, so I would propose that change.

On line 36, I don't know if Judge Peeples intended this, but he's serving "copies" instead of "a copy" of the motion, and I would just recommend that where it's italicized there for the addition be "a copy" rather than multiple copies; and on line 39, in the addition it says "until the motion has been heard." It needs to be "until the motion has been ruled on," because some people may think that once the hearing has been held if it hadn't been ruled on they can go back into the soup and start making rulings.

Line 44, it says "without a hearing," there's always been confusion, comes up in a lot of different circumstances, whether or not when a judge

considers something in chambers not on the record or not an oral hearing or an evidentiary hearing whether or not that is a hearing. I think that is a hearing. If he sits down in chambers or stands up in chambers and decides the motion, there has been a hearing on that motion, and so I would say "without an oral or evidentiary hearing" at that point.

Line 49, same -- and this is apparently in the existing rule this way where it says "given to all parties or their counsel." I would strike "or their counsel." Last comment, on the sanctions section, we had this issue before our court a while back, and a trial judge attempted to impose sanctions and never told the parties that he was considering it or was going to do it, and I think you -- even if you're going to do it sua sponte you have to at least advise the parties that you are considering sanctions against them so that they can respond to it. With those changes, I'm all in favor of Judge Peeples' suggestions.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: The question I have, the comments that Justice Gray made about the hearing dovetails into that because I think if the presiding judge has to give a hearing, what does that mean, is it evidentiary, can the judge say, "Submit it all on the record and I'll look at

it and get back to you" or what, but I'm more concerned about this new provision that says if the motion is legally insufficient then the judge can deny it without a hearing, whatever that hearing is to which they're entitled, and I appreciate and I think I support the concept behind saying, yeah, but if it's not really a motion as required by the rule, because I'm not sure what legally insufficient is, and the example I'm looking at it, it says "The motion shall be verified." Well, I can understand if you get a motion in and it's not verified, I can see the judge saying, "I'm not giving you a hearing on it. It's not a motion."

But the rule also says, "It shall state with detail and particularity the reasons why the judge cannot sit." Can the presiding judge say, "Well, this isn't detailed enough, doesn't give me enough particularity, so I don't think it complies with subsection (a), I'm not even going to consider it"? So I would be concerned that if we're going to allow that out, we do it with a little more detail and particularity as to what does and doesn't constitute legally insufficient.

HONORABLE DAVID PEEPLES: The intention on that, just take a prisoner petition, handwritten, okay. "Judge Jones was unfair to me, and her impartiality might reasonably be questioned, and she shouldn't hear my habeas

corpus petition." Do I have to grant a hearing on that? Surely not. It just verified --

MR. BOYD: I support that intention. I'm just worried that wording it this way allows for something other than that intention.

HONORABLE DAVID PEEPLES: Yeah, what I stated was one that was based on rulings and which was very vague and general and, you know, we see them also which just basically say, "This judge is hostile and antagonistic to me and," quote, "her impartiality might reasonably be questioned." There ought to be more than that to require a hearing. We don't want the challenged judge to be able to ignore that, but when the outside judge, usually the presiding judge looks at it, we think, you know, it ought to be dismissed right then and move on.

This is just me. In my order I tell them why I dismissed it. "It didn't allege with particularity," which is in the rule right now, or "A judge's rulings can't be a basis," blah, blah, blah, and I cite some cases so they will know, and once in a while they'll come back with a more specific motion which then we consider, but we think that the system cries out for giving the presiding judge the discretion to look at the thing and say, "Denied without a hearing."

HONORABLE TOM GRAY: So we need to have

findings of fact and conclusions of law from these? I jest. I jest.

CHAIRMAN BABCOCK: Judge Christopher, and then Sarah.

HONORABLE TRACY CHRISTOPHER: A couple of things. I wanted to know why you took out the provision that we need to rule within three days.

MR. ORSINGER: What line was that?

HONORABLE TRACY CHRISTOPHER: That was on line 21, 22.

MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: I actually think it's, you know, maybe three days is short, but I actually --

HONORABLE DAVID PEEPLES: That says "presented to the judge three days after filing."

HONORABLE TRACY CHRISTOPHER: No.

HONORABLE DAVID PEEPLES: Line 21, 22?

HONORABLE TRACY CHRISTOPHER: Yeah, presented to the judge, well, I mean, most of us take the position that we're supposed to rule on it when it's presented to us three days after filing. And the -- maybe I've been considering that wrong, but I always considered that as I need to rule three days after it's served on me, one way or the other.

HONORABLE DAVID PEEPLES: So you're talking about the challenge to the judge. You like the provision that says you've got to do something with this right away.

HONORABLE TRACY CHRISTOPHER: I do, just because I can envision a situation where somebody moves to remove the judge and the judge just sits there, just lets the case sit. Okay. You know, what if it's the plaintiff who wants the case to move forward and the trial judge just says, you know --

HONORABLE DAVID PEEPLES: That's a good suggestion.

CHAIRMAN BABCOCK: Yeah. That's a good point.

HONORABLE HARVEY BROWN: What happens if the judge is on vacation that week?

HONORABLE TRACY CHRISTOPHER: Well, you know, I mean, maybe, you know, within a reasonable time or whatever would be appropriate in there. I mean, I always took it I got it, I needed to rule on it. And another thing, from a trial judge's point of view, I think it's useful to see if the other side is going to file a response, and this always sort of -- that three-day idea, it made the other party get on there and file something to say, "Don't recuse." And the reason why I say that that is kind of important, and I don't know exactly how to do

it, is sometimes it's good to see what the other side says in response, because sometimes their response is kind of lukewarm. All right. And so you've got somebody who really wants you to recuse, and the response is kind of like, "Nah, don't do it, Judge." Well, then you might grant that recusal because ultimately the burden of, you know, of cost and time and money is on that party opposing the recusal.

I mean, you know, I mean, they've got to go to the hearing. They've got to speak up. Generally they do, you know, if they want to keep the judge, and I'd kind of like to know whether they're in for the fight or not, and you can generally tell that from the opposing party's response as to whether -- because they're not going to say "yeah, we agree" -- sometimes they do, "We agree, recuse yourself," but you can tell by the way they're responding whether they're really in on the fight. Now, I know this one's going to really, really surprise Jane, but --

CHAIRMAN BABCOCK: Wake up, Jane.

HONORABLE TRACY CHRISTOPHER: -- I think a denial should be reviewable by mandamus.

HONORABLE JANE BLAND: I'm not surprised.

HONORABLE TRACY CHRISTOPHER: Because, again, the person who is penalized is the party if the judge was not recused when the judge should have been.

Okay. It's -- so you've got -- and there's been -- there have been several opinions out of the First and Fourteenth Court of Appeals that I don't agree with, but that's where we are on it. There was a procedural problem with the recusal, the hearing wasn't held or, you know, it didn't get sent to the right judge to hear it. There was a procedural problem with the recusal. The recusal was denied. The trial judge went forward. The parties spent, you know, tons and tons of money trying their case in front of the trial judge. Then on appeal the appellate court says, "Oh, that was a procedural problem with how that recusal was done, so everything the trial judge has done is void."

HONORABLE JANE BLAND: That was the Fourteenth.

HONORABLE TRACY CHRISTOPHER: Okay, it was the Fourteenth. It was the Fourteenth, not the First. Well --

HONORABLE JAN PATTERSON: And one case, right?

HONORABLE TRACY CHRISTOPHER: No, it's twice. They've done it twice, and so that has penalized the parties because of a procedural problem with the way the recusal issue, you know, was or was not handled, and huge expense for the parties, huge expense for the

parties. So, you know, I am not a big mandamus believer at all. I don't like to expand it at all, but --

HONORABLE DAVID PEEPLES: Well, there's no harmless error rule on this.

HONORABLE TRACY CHRISTOPHER: There's no harmless error on this.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE DAVID PEEPLES: For me that's the appellate judges that can fight that one. I don't care.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TRACY CHRISTOPHER: I just --

HONORABLE TOM GRAY: I very much agree with Judge Christopher on the point about the review. We had one come through Waco, a majority of the judges determined that there had been error and it was based upon factors that were not extrajudicial. It was based on rulings of the court. Judge Underwood determined that it was a technically deficient motion, and they abated it for a hearing after the life sentence had been rendered for the hearing that should have been held. A new judge heard the motion. Judge Underwood referred it to a judge. That judge determined that the trial judge that heard the case should have recused himself, and therefore, the entire murder trial that was held was void. Then we get the next motion or appeal, which was from a habeas proceeding to

dismiss it because of double jeopardy violations, and so I -- you know, and because it couldn't go up from there because the trial judge had then determined that it was a grant of recusal and it was just -- it was a huge mess, and we've had essentially two of those, and I would very much join in Judge Christopher's --

CHAIRMAN BABCOCK: Levi, and then Judge Peeples.

HONORABLE LEVI BENTON: I want to speak to something else that Tracy touched on. I always understood that the trial judge had three days to address the motion also, but I understood it not from the rule but from case law, but if the rule is going to be modified we ought to expressly state not in a subparagraph that's captioned "notice," but duties of the trial court judge who is sought to be recused and expressly state when the judge or the court must address it. Then we ought to add a paragraph that expressly addresses the options, duties, and responsibilities of the other -- of counsel for other parties who have not sought the recusal.

CHAIRMAN BABCOCK: The record should also note that Judge Benton was a sought recusal of him because of his service on this committee.

HONORABLE LEVI BENTON: Oh, you'd be surprised at things that people will say, and, you know, I

appreciate that because it reminds me of another motion that was filed against me. There ought to be consequences for movants who assert things even in sworn affidavits that are just factually incorrect. I've had people say, well, I went to law school with Ed Rodriguez and we were in the same class when everybody knows Ed went to that other school because he couldn't get into South Texas College of Law, and I went to South Texas College of Law, and, you know, and people will swear to things under oath, and there should be consequences to -- when parties swear to things under oath that they have no good basis to swear to.

HONORABLE TOM GRAY: You don't think leaving them in the trial court where they filed that motion was enough?

HONORABLE LEVI BENTON: No, because I know the trial judges purge themselves of all those things and give those persons fair, impartial trials.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: On the review, the current state of the law, as I understand it, is that disqualification is reviewable by mandamus. Recusal is not. They're very similar concepts. They have -- the consequences of not bringing a disqualification motion until later are really serious because everything is void

and it can be raised at any time; but it would seem to me like we ought to have them on the same sort of appellate track, and maybe if we're not really willing to go so far as to -- and I -- I'm not sure we need to go so far as to mandate that a decision granting a motion to re -- or I'm sorry, denying a motion to recuse is reviewable by mandamus, mandated in the rule, we could maybe take out the opposite, take out that it's not reviewable and let the common law percolate so that an important motion to recuse in a case, if the parties want to take it up by mandamus and let's see if the appellate courts will handle it by mandamus, so that we don't have, you know, every single pro se litigant who has filed a frivolous motion then continue on up the appellate track delaying the ultimate disposition of the case, which is my guess -- I don't know why the rule says it has to be reviewable in the case and not by mandamus, but my guess is it's because a lot of these recusal motions come at inopportune times when the case is about to go to trial and further appellate review only delays, and maybe -- and maybe that's the main effort in filing the motion, the main effort was just to delay the trial setting.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, that's exactly what I was going to say. If you had this mandamus and a party

is, you know, gaming the system by filing a motion to delay the trial setting, you just accomplished in giving them more time, and, you know, that happens in real life, and it doesn't happen just with habeas corpus type of people. It happens in trial.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE TRACY CHRISTOPHER: Well, I wouldn't let the mandamus delay. I mean, the ruling's gone, you know, then it gives the appellate court a little bit of time. It's just that it's such a penalty on the parties if the judge failed to recuse or there was a procedural problem and a failure to recuse. I mean, you know, for a judge, okay, so what I did was void, well, all right, that means somebody else has to try the case, fine, but for the parties who have spent all this time and money trying the case, and it's all void because of a procedural problem or because the judge shouldn't have been recused or should have been recused.

MR. RODRIGUEZ: How often does that happen to really warrant a change? I mean, if it's happened once or twice out of, you know, seven, eight hundred times, I mean, is it worth it?

CHAIRMAN BABCOCK: Well, you don't know. You know about -- because sometimes people might say, "Hey, if we've gone through all of this, we're not going

to raise that as an issue for sure." Justice Bland, did you have something to say?

HONORABLE JANE BLAND: Well, it will build in some delay if we allow recusal to be reviewed by mandamus as a matter of right, and because even though I think the presiding judges are very facile at ruling on these motions quickly, you know, within a matter of minutes or hours, once you involve the appellate court, just shepherding -- getting the papers on file and shepherding it through, it's very difficult even on an expedited time frame for the appellate court to act that quickly or an appellate court to act that quickly, and the first thing the appellate court -- and which they are pretty quick about is granting a stay to preserve their jurisdiction, so -- but if you maybe just didn't comment in the rule and then if somebody tried to mandamus and could say, "Look, this is a case involving a lot of money and a lot of time and we think that the ruling is incorrect, and we would like it to be reviewed now," you know, maybe the appellate courts could take a look at it.

CHAIRMAN BABCOCK: David.

HONORABLE DAVID PEEPLES: I have zero stake in whether this is mandamusable, but I think one reason for what the rule says right now in the books is the -- we know that of a hundred cases where there's been a recusal

motion denied, what, 95 percent of them are going to settle and never go to the appellate court, because the final judgment is never going to go up. The movant sometimes is going to win those cases and, therefore, won't be appealing, but if you allow mandamus now out of a hundred cases we can get 30 mandamuses. So you've got that problem right there; and second, you know, we would have to decide whether now that you've got this right to mandamus, if you don't use it have you waived the right to take it up when you lose the case? I mean, unless we're going to say that, Tracy, you've still got the problem that you mentioned, but I, frankly -- it is no problem with me, but I --

HONORABLE TRACY CHRISTOPHER: Your first comment on mandamus is inherent in all mandamus, which is why I generally don't like an expansion of mandamus --

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: -- powers because the vast majority of time the case goes away or the complaining party wins, and it's no longer an issue for them. I don't know exactly how to do it, and perhaps the ones that are bothering me the most are where it's a procedural problem versus an actual good reason to have recused the judge. Do you know what I mean?

HONORABLE DAVID PEEPLES: Yeah.

HONORABLE TRACY CHRISTOPHER: You know, if the judge was biased and should have been recused, then the fact that the trial was void has a little more merit to me than because the proper procedures weren't followed and the hearing wasn't held appropriately all the actions that the judge did was void. I mean, you know, so that strikes me as two different problems.

CHAIRMAN BABCOCK: Kennon. Justice Hecht, and then Kennon.

HONORABLE NATHAN HECHT: Well, I'll have to go back and try to reconstruct what we were thinking, if we were thinking when we put this in, but I imagine that one thing that we were thinking was that the chances of it ever being reversible were just so slight that it just -- there's just no point in worrying about it, but I think that was at least in my thinking with the idea that 95 percent or maybe a whole lot more than that of the motions to recuse just had no valid basis whatever. But if a fourth of them are being granted, that suggests to me that others were close, if a fourth are granted then surely there were some that were close to being granted, and if it's a bigger problem then you wonder why there shouldn't be some sort of review.

CHAIRMAN BABCOCK: Kennon.

MS. PETERSON: My comment is not about

review, and I don't want to interrupt the discussion if yours is about review.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Mine is about review, thank you. I'm very concerned about delay if this is a matter of right because the majority of recusal motions that I'm aware of personally were for the purpose of delaying a trial setting. But at the same time I'm very sensitive to Tracy's and Tom's experiences that there are cases in which there should be immediate review, but I think we accomplish that by what Jane was saying by just taking that sentence out. That will be a significant change. It will be commented on at every seminar. We'll have this record to support, and the courts can deal very quickly with a frivolous mandamus petition.

What's hard, what takes time, is one that may have merit, and I was just hearing about how the Fourth Court got a mandamus petition, immediately issued a stay, held onto it for six months delaying the trial, then it went to the Supreme Court, which continued the stay and it held onto it for three months, so there was nine months, but they ultimately denied, so there was a nine-month delay to deal with this in the trial, and that's -- I think that's inexcusable in our system, but if you build in a right to mandamus in these cases I think

that's what's going to happen. But if you leave it with the discretion of the courts, I think you've got a good chance that they'll go -- the frivolous ones will go in and out. The really tough ones like Jane and Tom spoke of will get appropriate attention.

CHAIRMAN BABCOCK: Okay. I think Richard, and then Justice Bland.

MR. ORSINGER: Were you going to comment on the appellate review, because I'm not?

HONORABLE JANE BLAND: Okay. Yeah.

MR. ORSINGER: Go ahead.

HONORABLE JANE BLAND: The cases that get reversed on the technical defects, it's not so much the technical defect. It is that the district judge that the motion was filed against looks at it, sees that there's a technical defect, denies the motion, rather than referring it, and the courts have -- the courts of appeals -- and it's cloudy, which is why we've got this problem of trial judges doing this. The courts of appeals have said, "Look, even though the motion didn't have merit, the trial judge had but one option when the motion was filed, to refer it," and so you might be able to fix that with some sort of quick, you know, "refer," you know, "just refer."

But I think when you're talking about at the end of the case, hard to know whether or not that would be

harmful, I think what's bothering the appellate courts in the cases is that it didn't get referred like it was supposed to, and Judge Christopher is correct. If you look at the motion itself, it would not have carried the day, so the trial judge that denied it, you know, denied a motion that was deniable. It's just that he wasn't the judge or she wasn't the judge that should have ruled on it, and that's more of a systemic problem that I think the appellate courts kind of say we have to take a bright line on this because if we don't we're going to have trial judges ruling on motions to recuse filed against them, and we don't want them touching these things, we want them referring them.

HONORABLE TRACY CHRISTOPHER: And I think at least one in the Fourteenth was caught in the -- it was a multiple recusal issue, and so there were problems with, you know, to keep referring, which I think David is trying to cure in part of this, which I think --

HONORABLE JANE BLAND: Yes.

HONORABLE TRACY CHRISTOPHER: -- will go a long way to stopping that sort of procedural problem with saying you can't file the recusal motion against the presiding judge.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Okay. My comments have

nothing to do with appellate review. In the very first part of subdivision (a) around lines 9 to 11, there is a problem that exists in the old rule that still exists under this language, and that is where the grounds arise within 10 days, not just that they existed and you didn't know about them, but that the grounds arose. There was a case out of the Texarkana court of appeals where they waited until 10 days before trial and then hired the judge's son-in-law as one of the counsel in the case, and that would be a ground for recusal if it had happened 10 days before. It went up to the Texarkana court of appeals, and I think read a common law exception to the 10-day thing for events that occurred within 10 days. As long as we're rewriting this rule, I think we ought to take into account events that occur within 10 days that would give rise.

HONORABLE DAVID PEEPLES: I agree with that.

MR. ORSINGER: Also, in San Antonio you have a kind of a conundrum, and this also exists in Austin because you have random assignment.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: It also exists in rural counties where there may be three or four district judges that overlap one urban area but have different -- and they'll substitute for each other all the time, and the

question is, is that your motion gets assigned to the judge on the day you come into court, and you don't recuse, but then something happens in the intervention and then like nine months later the trial get assigned to that judge just by random luck. Well, the case was first assigned to the judge for the motion. Does that mean that you had to recuse him before the motion or can you file a recusal later on when they're assigned for trial, and the way this is written is, is the judge was assigned to the case. In San Antonio really the motion of the trial is assigned to the judge. The judge is not really assigned to the case, and so I think we ought to tweak with that a little bit so that it fits those rotating --

HONORABLE DAVID PEEPLES: Does the language on line 7 not catch that you think? "At least 10 days before the date set for trial or hearing." In other words, nine months later you find out you're going --

MR. ORSINGER: Well, I know we debate this issue in San Antonio, and it may be that it's a dead debate, but I'm just raising these. I mean, we can discuss it off the record.

Did you want to respond to just that?

HONORABLE STEPHEN YELENOSKY: Well, to that. I have another comment I can hold, but I can respond to that. I mean, the central docket in Austin, we're well

aware of how sometimes the rules are directed not at a central docket, and so we have to keep in mind the original spirit of it, and we always -- well, I think I can speak for every judge in that if there's a motion to recuse we don't say, "Well, it's too late because nine months ago I had a hearing in this case, and you didn't move to recuse me then." I mean, any motion to recuse we're going to refer, and moreover, we fully understand and expect that since you just got the assignment it should not be dismissed out of hand as late.

MR. ORSINGER: Okay. The next point I'd like to make is --

CHAIRMAN BABCOCK: Well, before you go on to that, I mean, it says "at least 10 days before the date set for trial or hearing," so how do you deal with that?

HONORABLE STEPHEN YELENOSKY: It says "practicable" further down.

CHAIRMAN BABCOCK: It says what?

HONORABLE STEPHEN YELENOSKY: Further down it says if the judge was assigned the case within 10 days then you do it as soon as practicable.

MR. ORSINGER: See, it depends on what you mean by "assigned the case." I mean, the first time the judge got assigned the case was when he heard some pretrial motion.

HONORABLE STEPHEN YELENOSKY: Right. Well, all I'm saying is that we interpret that in a way that I think is the only fair way to interpret it, which is how soon did you know that you should move for recusal of this judge, and for us, that's from the time you knew you were getting this judge on this hearing.

MR. ORSINGER: Then you would probably have no objection to us clarifying this language to be sure that --

HONORABLE STEPHEN YELENOSKY: I don't.

MR. ORSINGER: -- everyone across the state reads it the same way.

HONORABLE STEPHEN YELENOSKY: I don't, but it probably only affects San Antonio.

MR. ORSINGER: No. It affects the rural counties, too, because if you go to some rural counties you'll have a judge that's there that day because the other judge is off somewhere, and they swap benches all the time just like it was a random assignment, even though it's not, but I didn't want to get bogged down on the language because we have some rewriting to do.

HONORABLE DAVID PEEPLES: I agree with you on that, so let's talk about it sometime.

MR. ORSINGER: Okay. Let me move on. I'm not entirely sure that a failure to raise a ground that

you know about 10 days is not a waiver on appeal. It's my recollection that if you know about it and you don't raise it, you waived it, rather than you can just take it up -- the question presented is if you know about it and you fail to file it 10 days in advance, do you just waive the pretrial recusal or do you waive the ground for recusal? I think you waive the ground for recusal, and if there's some uncertainty about that, I can do a little research on it. We ought to probably decide what we're saying. If you know about it and you don't file it, is -- no matter how awful it is, is it excused because you didn't file, or is it just you waive your pretrial remedy and now you have to wait, prove it on in the trial and then get a reversal at the end of the case. Is my distinction --

HONORABLE DAVID PEEPLES: I'm not sure, but we don't want to encourage people to file these when in doubt just to preserve error.

MR. ORSINGER: Well, I would like it if the rule was that if you don't file within 10 days but the grounds are good, as long as the grounds are in the record before the trial or at least before the end of the trial that you should be able to get appellate review. My recollection, though, having appealed a couple of these, is that you waive the ground if you don't file it timely. So I think we need to make a conscious awareness here that

we may be allowing a bad trial to go forward because of a waiver argument because of a timing argument, and I just want to say that and then move on.

The part of the motion about it being legally insufficient and legally sufficient is troublesome to me because that term is not apparent from the rule, and if a significant number of these are pro ses they won't have the faintest idea what that is. I would suggest that we define "legally sufficient" in the following terms, that "a motion is legally sufficient if the verified reasons constitute a prima facie showing that the grounds for recusal exist." In other words, there are reasons, they're verified, and if they can be proven they would support a finding of recusal. Maybe not mandate a finding of recusal, but it's adequate to require a hearing from an independent judicial officer, and particularly with the pro ses I would think if we could define "legally sufficient" then everybody kind of knows what target they're looking for.

And along those lines, if you're going to dismiss a recusal because it's not procedurally correct or not legally sufficient, I would suggest that we require that that kind of peremptory dismissal with no hearing recite some explanation for why it was peremptorily denied, like denied because it was not verified or denied

because there were not sufficient reasons given or some clue to somebody why they didn't get a hearing in front of a third party, and particularly if it's a curable flaw. If it's either an ignorant lawyer or a pro se litigant that really doesn't understand all the technicalities here but might have a good recusal if they just knew how to do it, now I don't want to overburden the judges, but if they're not going to get a hearing in front of an independent person or whatever, it seems to me like we ought to tell them that it's just a technicality and if you had done it right you would have gotten your hearing.

The next concern I have is the extrajudicial source rule. It says that the rulings cannot be considered, the judge's rulings may not be a basis for the motion. That's lines 15 and 16, but the case that you cited, David, here says that they cannot be considered unless they display a deep-seated favoritism or antagonism. So I think the ban in the rule doesn't allow for the qualification or exception to the rule, and I think we should be careful how we state the ban, and I don't know that we want to put all of our case law in this motion, but just simply saying "rulings cannot be considered" really is not true to what the case law is. Rulings cannot be considered unless they reflect something else. So I think maybe we ought to look closely at that

language.

And then I'm a little concerned also about I believe that you should present these motions to the judge personally. This thing which is struck out on line 68 and 69, the three-day -- let's see. No, I'm sorry, on lines 20 through 25. Did I say that correctly? No. There's one of these in here where you have to present it -- give notice that you're going to present it to the judge. Line 22.

HONORABLE DAVID PEEPLES: 21, yeah.

MR. ORSINGER: We've struck out the requirement of presentation to the judge, and I think that's very important. I don't like people filing a motion to recuse down there in the district clerk's office among 30,000 pending cases and never telling the judge that the motion has been filed. In a small court they'll know right away, but in Dallas or San Antonio or Houston the trial judge may never find out that there's a recusal motion if the other side doesn't set it for hearing.

HONORABLE STEPHEN YELENOSKY: Yeah, that's what happened to me.

MR. ORSINGER: So I think that whoever files a motion for recusal, whether they get a setting on it or not or how many days it has to be ruled on is different. I think that the judge needs to be presented with the

recusal motion so that the judge knows that there's a jeopardy that all the actions taken are void.

And then the last thing I'm concerned about is the sanctions provision. I agree that the sanctions right now are too restricted because you have to show this plus this plus this, but to say all Rule 215.2 sanctions are available also means that you can strike somebody's pleadings and enter default judgment or dismiss their case without hearing any evidence, just because they were out of line in trying to recuse the judge. That's going too far. You maybe ought to pay some money, maybe pay a fine, maybe pay attorney's fees, maybe do public service as a lawyer, but I don't think that a litigant ought not to get a jury trial because they -- in the mind of the assigned judge they weren't justified in seeking to recuse. Now, I know that TransAmerican will probably come to the rescue there because the due process clause is out there even if it's not in our rule, but I hate to tell everybody that you can strike somebody's pleadings because of a recusal motion. That just to me the punishment doesn't fit the crime.

Now, that's a short run through, and I'm sorry, but we're out of time, and I just wanted to get it in the record.

CHAIRMAN BABCOCK: That was good, though,

because you've almost run us up to the end. Kennon.

MS. PETERSON: Just two quick things for the record as well. One, in terms of line 65 through 66, that's the paragraph (f) about assignment by chief justice, and one of the things you said is that a lot of pro ses file these motions. It's my understanding that a lot of people -- maybe not a lot, but a number of people will file with the chief justice before going through the other route, and they don't understand when they can file with the chief justice, and the reference to statute doesn't really help them, and I don't know if that's something that should be spelled out a little bit more in the rule or not. I'm just highlighting it as a potential area of confusion, particularly for pro se litigants.

And the other thing just really quickly in terms of when these things should be heard or ruled on without a hearing, it seems like that's addressed in paragraph (e) now. You have especially on line 54, "must hear it as soon as practicable and may hear it immediately," and then maybe it would help to put something in line -- line 43 or 44 about when you should rule on it in the absence of a hearing.

CHAIRMAN BABCOCK: Okay. Judge Patterson.

HONORABLE JAN PATTERSON: I really appreciate Richard's comments. My only concern about

presentment is that it tends to be a trap for pro se litigants and certainly prisoners, and it is a very difficult concept for litigants to deal with and tends to be a trap, although I agree that there ought to be some way to make sure it's been brought to the attention of the trial judge.

HONORABLE SARAH DUNCAN: If I can just tag on what Jan said, we need to distinguish between presentment, which is a term of art in the motion for new trial context, and personally serve.

HONORABLE JAN PATTERSON: That would do it.

CHAIRMAN BABCOCK: Okay. Judge Peeples, would it be okay for the next meeting if you synthesized all these comments and come back with a redraft, and we may get additional comments from a larger group, which will undoubtedly be present on the 20th?

HONORABLE DAVID PEEPLES: This has been very helpful, very helpful, and I think maybe Richard and I and whoever else is on the subcommittee ought to caucus, and I'll be glad to come up with something for next time.

HONORABLE STEPHEN YELENOSKY: Can I ask one question?

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE STEPHEN YELENOSKY: After listening to Jane Bland, would the vast majority of the

concerns for the opportunity to mandamus be addressed by putting in (d), referral to presiding judge, "The failure to grant a motion to recuse or refer to the presiding judge shall be subject to mandamus"? Because that ought to be subject to mandamus. If you're the trial judge and you don't -- you deny it rather than referring it, that should be mandamused, and if you said that explicitly would that not take care of at least two of the courts of appeals cases where they've -- they had a problem?

MR. ORSINGER: What about being able to file it directly with the presiding judge? If the trial judge won't do it right, then provide -- then file it with the presiding judge who knows that somebody's got to be appointed.

HONORABLE DAVID PEEPLES: Or just require in sub (b) that you copy the presiding judge on any motion you file, and then if the respondent judge sits on it at least the presiding judge knows about it.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. ORSINGER: You wouldn't be offended to be overwhelmed by all that paperwork?

HONORABLE TRACY CHRISTOPHER: He gets it anyway.

MR. ORSINGER: That would be a solution to mandamus because we'll get the right job done, and we

don't have to take everything up to the court of appeals with all the briefs and records.

HONORABLE STEPHEN YELENOSKY: That's fine. I was trying to avoid opening up mandamus to everything because of one particular mandamus problem.

HONORABLE TRACY CHRISTOPHER: I mean, once the motion to recuse is filed, the presiding judge is going to have to deal with it one way or the other.

MR. ORSINGER: Unless the trial judge doesn't like refer it or call somebody to rule on it.

HONORABLE TRACY CHRISTOPHER: No, no. Yeah, I mean, under current rule even if he recuses, the presiding judge then has to deal with it and reassign somebody else, so I don't think it will be more burdensome to require it the first time around to be served up there, do you?

MR. ORSINGER: That would cut out the mandamuses to cure the purely procedural problems that were created by a judge refusing to rule.

HONORABLE TRACY CHRISTOPHER: No. No, it wouldn't. The problem was serial recusers and, you know, timeliness on that, which I think David's fix in the rule will help a lot on you can't recuse the presiding judge. Because, I mean, that's what would happen. They file the motion and then they file the motion against --

MR. ORSINGER: The assigned judge?

HONORABLE TRACY CHRISTOPHER: Yeah, whoever the presiding judge assigned to hear it. Then they walk in and they try to recuse that judge and then, you know, get the presiding judge on the line again and --

MR. ORSINGER: Then all of the sudden you're in the tertiary recusal rule --

HONORABLE TRACY CHRISTOPHER: Well, yeah.

MR. ORSINGER: -- which Judge Harris gave us a statute on that, remember?

CHAIRMAN BABCOCK: I remember that, as well as Frank.

HONORABLE TRACY CHRISTOPHER: At least one appellate court has construed the tertiary recusal rule to be three per judge.

MR. ORSINGER: Individual judge.

HONORABLE TRACY CHRISTOPHER: Not three judges in a row, so we were in sort of this endless cycle of recusals.

CHAIRMAN BABCOCK: We were in recusal hell.

Okay. Thanks, everybody, for being here and working so productively the last day and a half. We will reconvene on the 20th. We will go back to recusal, taking up with Judge Peeples and the procedural aspects of it and then moving into the substantive aspects that Richard will

have some draft language, different types of recusals to deal with the Caperton and the White issues. So thanks again. We're in recess.

(Meeting adjourned at 12:04 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 26th day of September, 2009, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 798.25 .

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Given under my hand and seal of office on this the 14th day of October, 2009.

D'Lois L. Jones

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