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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

COPY

Taken before Anna L. Renken, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 12th day of
January, 2001, between the hours of 1:19 p.m.
and 5:03 o'clock p.m. at the Texas Law Center,
1414 Colorado, Suite 101, Austin, Texas
78701.

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1 CHAIRMAN BABCOCK: Okay. Let's go
2 back on the record everybody. Okay. We've
3 got the proposed solutions to our problems.
4 Okay. Let's take up the work product of the
5 ad hoc subcommittee on (e)(4); and you should
6 have in front of you the language which has
7 been proposed. And Luke is the author of
8 this. Why don't you tell us what you've done

9 MR. SOULES: Okay. Thank you.
10 (4), interim proceedings, there are three
11 inserts there starting with the sentence
12 "However, in the following instances, the
13 judge," and I inserted "against whom the
14 motion is directed may proceed" -- strike out
15 "with the case" -- "may proceed as though the
16 motion had not be filed." So that would be
17 the judge against whom the motion is
18 directed. That could be the trial judge, the
19 recusal judge, regional judge, Justice of the
20 Supreme Court, whomever would proceed as
21 though the motion had not be filed. And of
22 course, if that's the recusal judge, the only
23 proceedings before that judge are recusal
24 proceedings as opposed to trial.

25 So this takes care of the issue of

1 whether it's what we've called vertical
2 motions or horizontal motions. It could be
3 subsequent trial judges, or it could be going
4 up the ladder in the recusal process; but it
5 does not empower the initially challenged
6 trial judge to try the case until just because
7 the recusal judge has been challenged and
8 maybe the regional judge has been challenged.
9 The process has to work its way back to the
10 trial court.

11 And then the -- so the purpose of that
12 was to get the vertical and horizontal and to
13 say that the judge who would proceed would be
14 the judge who is confronted with the third
15 motion, and that judge would proceed with
16 whatever is before that particular judge.

17 The ground then that was added was "when
18 the motion is a third or subsequent motion
19 filed in the same case by the same party."

20 MR. HAMILTON: What is the
21 difference in (c) and (a)?

22 MR. SOULES: (c) and (a). (a) is
23 where the party has been sanctioned.

24 MR. HAMILTON: I think Judge McCoy
25 suggested that "sanction" wasn't the right

1 word anyway, that it ought to be "denied,"
2 where the motion had been denied. I mean,
3 what difference does it make whether they've
4 been sanctioned or not sanctioned as long as
5 there has been a third motion filed?

6 MR. SOULES: The big difference
7 between (a) and (c) is that (a) could apply to
8 a second motion. If the party has been
9 sanctioned on the first motion, then it would
10 apply to a second motion, I think.

11 CHAIRMAN BABCOCK: I don't think
12 so.

13 MR. SOULES: No. That's not right.
14 Because your sanctions don't occur until the
15 third motion.

16 CHAIRMAN BABCOCK: Well, under (a)
17 it could be anytime. It could be sanctioned
18 any time; but under (b) it doesn't apply to a
19 third or subsequent motion.

20 MR. HAMILTON: Also (a) refers to
21 e(11)(b), which I thought we were going to
22 eliminate.

23 MR. SOULES: (e)(11)(b) only applies
24 to the third and subsequent motion for
25 sanctions.

1 CHAIRMAN BABCOCK: Right.

2 MR. YELENOSKY: So (c) eats up (a)?

3 CHAIRMAN BABCOCK: Well, let's focus
4 on (c) first. Let's focus on --

5 MR. SOULES: I move that we, just so
6 we have got something on the table, I move
7 that the inserts and the strike-throughs that
8 I've submitted to the Committee be passed.

9 CHAIRMAN BABCOCK: Do we have a
10 second?

11 MR. HAMILTON: Second.

12 CHAIRMAN BABCOCK: Any further
13 discussion about this?

14 CHAIRMAN BABCOCK: Skip.

15 MR. WATSON: No.

16 CHAIRMAN BABCOCK: Stephen.

17 MR. TIPPS: I think that (a) and (c)
18 overlap unduly.

19 CHAIRMAN BABCOCK: Yes. The motion
20 is just to discuss the inserts and strike-outs
21 in the introductory paragraph and the addition
22 of (c). I agree with you. We need to pay
23 attention to (a) in a second.

24 MR. TIPPS: Okay.

25 CHAIRMAN BABCOCK: But let's move on

1 Luke's motion. Any further discussion about
2 this, or do you want to take a second look at
3 it? Okay. Nobody has said anything, Luke.
4 So everybody in favor of the additional
5 language in the introductory paragraph of
6 (e)(4), Interim Proceedings, and the addition
7 of the language on (c) which says "when the
8 motion is the third or subsequent motion filed
9 in the same case by the same party" raise your
10 hand. Anybody opposed? By a vote of 22 to
11 nothing it passes.

12 Okay. Now let's take up the issue of
13 whether or not (11)(b) and (11)(a) do what we
14 want them to do. Now the reason for having a
15 sanctions feature for third or subsequent
16 motions is because that's in the statute, and
17 Senator Harris thought that that was an
18 important feature of his statute.

19 I think in fairness to Judges McCoy and
20 Harris, they're more concerned about the
21 process moving along and less about sanctions;
22 but nevertheless, we ought to do what we can.
23 Luke.

24 MR. SOULES: Can I speak to that?
25 (11), the sanctions section (11)(b), is a

1 mandatory sanctions provision where three or
2 four motions have already been denied. I
3 don't see what the problem is. I think we
4 ought to leave that in there, (11)(b). Now
5 and I don't know whether or not you want to
6 take this a piece at a time. I do want to say
7 something about (4)(a). (4)(a) is swallowed
8 up by (c) the way it's written now because
9 you're to the fourth motion under the (11)(b)
10 before the sanctions are mandatory, so you're
11 already past the time where the trial court
12 can proceed under (c).

13 However, it seems to me that we could
14 discuss -- back up just one second. A trial
15 judge can sanction a party, has discretion to
16 sanction a party for the first motion to
17 recuse. (e)(11)(b) is mandatory sanction
18 after three denials.

19 CHAIRMAN BABCOCK: Right.

20 MR. SOULES: So we could discuss
21 whether under (a) we wanted to have a
22 provision that the trial judge could proceed
23 with the case if the party had ever been
24 sanctioned for filing any motion to recuse. I
25 don't favor that because I think (c) is

1 enough.

2 CHAIRMAN BABCOCK: Yes. (c) is
3 broader than (a), but encompasses everything
4 that is in (a).

5 MR. SOULES: Well, but if you took
6 out "pursuant to subparagraph (e)(11)(b)" out
7 of (a), --

8 CHAIRMAN BABCOCK: Right.

9 MR. SOULES: -- then you would have
10 a situation where the trial could proceed or
11 the hearing could proceed on any motion to
12 recuse, not the third or fourth or second.

13 CHAIRMAN BABCOCK: Right.

14 MR. SOULES: If the party had been
15 sanctioned for the first one.

16 CHAIRMAN BABCOCK: That was not the
17 intent when we drafted this; but maybe we --

18 MR. SOULES: I don't favor it.
19 Somebody asked what is the difference. I
20 think we ought to eliminate (a).

21 CHAIRMAN BABCOCK: Yes. I do too.

22 MR. SOULES: But I want to get what
23 I see before the Committee, what I see in this
24 heard by the Committee before we vote on
25 that. There may be something else here that

1 I'm not seeing; but I think we ought to
2 eliminate (a).

3 CHAIRMAN BABCOCK: What does
4 everybody else think? Eliminate (a)?

5 COMMITTEE MEMBERS: Yes.

6 CHAIRMAN BABCOCK: Is there a
7 consensus on that? Anybody opposed to that?
8 (No opposition.) Okay. Bye-bye (a).

9 MR. SOULES: And keep mandatory
10 sanctions under (e) (11) (b)

11 CHAIRMAN BABCOCK: (e) (11) (b) yes.
12 There's another issue under (11) (b) we'll talk
13 about in a second. Now do we want to -- we're
14 going to need to renumber. And do we want to
15 just make (4) (b) now (4) (a)?

16 MR. SOULES: I think so.

17 CHAIRMAN BABCOCK: Okay. And (4) (c)
18 will now become (4) (b). Okay.

19 MR. SOULES: Right.

20 CHAIRMAN BABCOCK: All right. Now
21 onto (11) (b), Senator Harris had a concern
22 about our insertion of the word "against a
23 judge," because it sounded like, it sounds
24 like perhaps that we're talking about denial
25 of three motions against the same person.

1 HONORABLE SARAH B. DUNCAN: You
2 are.

3 CHAIRMAN BABCOCK: Excuse me?

4 HONORABLE SARAH B. DUNCAN: I
5 believe that was our intent.

6 CHAIRMAN BABCOCK: Yes. I think it
7 was too.

8 MR. HAMILTON: What paragraph?

9 CHAIRMAN BABCOCK: We're at (11)(b)
10 now.

11 MR. SOULES: Yes.

12 CHAIRMAN BABCOCK: And so the
13 question is what is our thinking about this?
14 Do we want to --

15 MR. SOULES: It was heavily debated
16 because of the central docket issues; and this
17 got voted in this way because of the central
18 docket issues. See, this doesn't -- this is
19 mandatory sanctions.

20 CHAIRMAN BABCOCK: Right.

21 MR. SOULES: So now you've had a
22 series. You've had your first judge in Bexar
23 County that you had to recuse. Well, of
24 course, this is a denial.

25 CHAIRMAN BABCOCK: Yes. The thing

1 we were concerned about, Luke, was when you
2 win two and then you lose the third that's the
3 way the statute reads.

4 MR. SOULES: Right. But things are
5 getting worse. I got the first judge. I
6 thought that judge should be recused; but I
7 lost. Then I got a worse judge for the next
8 hearing in Bexar County; and I filed my
9 motion, and I lost. Now I have got the worst
10 of all worlds assigned to me for trial.

11 MR. CHAPMAN: Which Judge McCown
12 said would not happen to anyone normally.
13 Wasn't that his point, that who here would
14 ever believe?

15 CHAIRMAN BABCOCK: Yes. You're
16 running into a string of bad luck if that
17 happens; but follow Luke's --

18 MR. SOULES: Well, you can run into
19 random bad luck, you know. And --

20 MR. CHAPMAN: I just want us to make
21 sure that that's --

22 MR. SOULES: And now I need to file
23 a motion. And if I lose that one, I am going
24 to get mandatory sanctions. I think it's
25 great for the trial to go forward with the fix

1 MR. ORSINGER: I'm not sure that
2 this language addresses the concern that I
3 thought we had; and so I would like to pose
4 this question to Sarah that assume that I have
5 my first hearing in the case coming up, and I
6 don't file my motion to recuse until maybe
7 four days before the hearing. It's clear to
8 me that at that hearing nothing in my motion
9 can be considered unless it meets these listed
10 criteria. So then the factors that can be
11 considered are considered and denied; but I
12 have others that were never considered. So
13 then after the hearing I file a new motion to
14 recuse. My trial is six months away. There
15 can't be any delay here; but I want to get rid
16 of the judge on grounds that didn't get
17 considered in my first motion because it was
18 filed too close to special exceptions hearing
19 or something. Am I entitled to re-present
20 those grounds that were not considered, or
21 have they been waived because I didn't get
22 them heard before the first hearing, filed at
23 least 10 days before the first hearing?

24 HONORABLE SARAH B. DUNCAN: As I
25 understand the intent of the Committee, that

1 motion, that second motion would not be
2 subject to (e)(2).

3 MR. ORSINGER: So the grounds that
4 did not get considered in the first hearing
5 then I go ahead and have my hearing; but now
6 by gosh, I'm entitled to my unconsidered
7 grounds. I want a hearing on that; and I
8 haven't waived it because I filed it too close
9 to an earlier hearing.

10 HONORABLE SARAH B. DUNCAN: Right.

11 MR. CHAPMAN: But you can only file
12 one more motion before you would be
13 sanctioned.

14 MR. ORSINGER: Right.

15 HONORABLE SARAH B. DUNCAN: That's
16 the problem I think with using the word
17 "waiver" at all.

18 MR. WATSON: That's right.

19 HONORABLE SARAH B. DUNCAN: Because
20 waiver isn't something that comes and goes.
21 It's something that comes, it's done, and it's
22 never going to be seen again. And what
23 should, as I understood the intent of the
24 Committee, if you've got a good ground, but it
25 doesn't meet one of these criteria, and you

1 file it in a motion that is not within 10 days
2 of a setting, you ought to be able to get that
3 ground heard.

4 CHAIRMAN BABCOCK: Justice
5 Hardberger.

6 HONORABLE PHIL HARDBERGER: I think
7 that this proposed language is not saying what
8 we want it to say. Specifically the phrase
9 "the only grounds that will be considered" I
10 assume the grounds that would be considered is
11 the substance of the recusal motion. What
12 these are, the (a), (b), (c), (d) merely give
13 you the right to be heard on the substantive
14 grounds. This says the only thing, the only
15 grounds that will be considered is what allows
16 you to talk about what you should be talking
17 about, so it leaves you nowhere, it would seem
18 to me, as stated.

19 MS. CORTELL: Didn't we have
20 alternative language I think from Richard
21 earlier to address this, which is that it's
22 waived only for purposes of that hearing or
23 that trial? And doesn't it really fix the
24 problem or not? Are we looking at both sets
25 of proposals?

1 CHAIRMAN BABCOCK: Does that fix
2 Phil's problems?

3 MR. ORSINGER: Well, I think that it
4 answers my question more clearly in Sarah's
5 language; but Sarah says "Can you waive
6 something for purposes of a hearing and not
7 waive it for the lawsuit?" I don't have an
8 answer to that. But it would seem to me that
9 if, say, it's waived for purposes of the
10 hearing, but only that hearing, --

11 MR. YELENOSKY: Right. For purposes
12 of that motion.

13 MR. ORSINGER: -- then that means
14 that it's not waived for purposes of a later
15 hearing, so to me my language would cure that
16 problem.

17 CHAIRMAN BABCOCK: I mean, that
18 happens all the time, doesn't it? I mean, you
19 have a pretrial and you file something late.
20 The judge says "I'm not going to consider that
21 now. We're too close to the hearing date.
22 They didn't have an opportunity to respond.
23 I'm going to set that over for some other time
24 when everybody has" --

25 MR. CHAPMAN: But you have not been

1 told that it was waived, though.

2 CHAIRMAN BABCOCK: And that's the
3 very thing. That's the very problem. Like
4 Sarah says, if you waive it, it's waived for
5 all time. You don't waive it for a little
6 bit.

7 MR. EDWARDS: Well, you can waive
8 elements of proof, a particular hearing, maybe
9 a venue hearing. You agree to waive certain
10 elements for purposes of that hearing.

11 CHAIRMAN BABCOCK: File a summary
12 judgment and you assume certain facts are true
13 that you waive at the hearing.

14 HONORABLE SARAH B. DUNCAN: I don't
15 think you waive them. I think you stipulate
16 for purposes of the hearing only that those
17 grounds have been met.

18 MR. EDWARDS: What is the difference
19 between that and waiving it for that hearing
20 only?

21 CHAIRMAN BABCOCK: Tipps.

22 MR. TIPPS: I think the question is
23 whether or not the motion is considered; and I
24 think what this needs to say is "if a motion
25 to recuse is filed within 10 days, the motion

1 is considered prior to that trial or hearing
2 only if these criteria are met." It's the
3 circumstances under which -- what this Rule
4 deals with is the circumstances that would
5 justify a late file motion, and this Rule says
6 only under these special circumstances will
7 the Court entertain a late-filed motion.

8 HONORABLE PHIL HARDBERGER: I think
9 that's the point.

10 CHAIRMAN BABCOCK: Yes. Carl.

11 MR. HAMILTON: I agree with Judge
12 Duncan about the motion being waived; but I
13 think that what we were trying to do on this
14 is we were trying to have a 10-day rule to say
15 that any motion that you file for recusal
16 outside of 10 days is okay. It doesn't affect
17 anything. You get that heard if and when.
18 But if it's filed five days before the
19 hearing, it doesn't stop the hearing or the
20 trial unless it meets one of the four
21 criteria. Now -- and, well, let me back up.

22 If it meets one of the four criterion, it
23 may not even necessarily stop the trial then.
24 It still may be an interim parallel
25 proceeding; but at least it's going to be

1 heard. It's not going to be those grounds
2 aren't going to be waived. Any ground that
3 you don't put in there that's in existence and
4 you could have put in there within the 10 days
5 is waived forever. You can't ever hear that
6 again. So that the only thing that is going
7 to be heard by the recusal judge is what
8 was -- what meets one of these four criteria
9 if it's filed within the 10 days.

10 HONORABLE SARAH B. DUNCAN: And is
11 what you're saying is a motion to disqualify
12 may be filed at any time? A motion to recuse
13 must be filed before of the 10th day prior to
14 trial --

15 MR. HAMILTON: Right.

16 HONORABLE SARAH B. DUNCAN: --
17 unless it alleges one of the following, --

18 MR. HAMILTON: Correct.

19 HONORABLE SARAH B. DUNCAN: -- or
20 unless the recusal judge or somebody finds one
21 of the following.

22 And as I say, I don't really have a dog
23 in the hunt as to whether it's waived or not
24 waived; but I think we need to have a Rule
25 that is clear about what it is we're trying to

1 accomplish; and I don't think the discussion
2 indicates that we have such a Rule.

3 CHAIRMAN BABCOCK: Nina.

4 MS. CORTELL: This is just a
5 proposal. What if instead of "waive" we say
6 "will not be heard", the motion will not be
7 heard?

8 HONORABLE PHIL HARDBERGER: Will not
9 be what?

10 MS. CORTELL: Heard.

11 HONORABLE PHIL HARDBERGER: I had
12 one very similar to that, Mr. Chairman.

13 CHAIRMAN BABCOCK: Yes.

14 HONORABLE PHIL HARDBERGER: Which is
15 striking out the words from Sarah "The only
16 grounds that will be considered" and
17 substituting "it will not be considered unless
18 one of the following criteria is met:"

19 CHAIRMAN BABCOCK: What does
20 everybody think about that?

21 MS. CORTELL: I think you can keep
22 the present wording and just take out "is
23 waived" and say "will not be considered" right
24 there. I think it's more consistent with the
25 rest of the drafting.

1 CHAIRMAN BABCOCK: Just so I
2 understand Justice Hardberger's suggestion,
3 "However, if a motion to recuse is filed
4 within 10 days of trial or other hearing, it
5 will not be considered unless the following
6 criteria are met."

7 HONORABLE PHIL HARDBERGER: "One of
8 the following criteria."

9 CHAIRMAN BABCOCK: "Unless one of
10 the" --

11 MR. YELENOSKY: But that implies
12 that if you meet any one of those criteria,
13 the whole motion gets considered; and that's
14 not what we mean to say. We just want those
15 portions of the motion that meet the
16 criteria.

17 HONORABLE SARAH B. DUNCAN: Which is
18 why I think we need to talk about grounds.

19 MR. YELENOSKY: We need to do
20 something other than just say what Chip read,
21 because what that means is you touch one and
22 you get the whole trash can motion in.
23 Right?

24 CHAIRMAN BABCOCK: Well, I think
25 that's right, though, isn't it? Oh, no. No.

1 I see what you're saying. No. No. No. I
2 see what you're saying.

3 MR. YELENOSKY: You can have a
4 litany of reasons for recusal. You don't want
5 them all considered just because one of them
6 is right.

7 CHAIRMAN BABCOCK: Because you could
8 say because if there are four grounds for
9 recusal, one of which only arose within the
10 last three days, can you bootstrap in the
11 other three that have been around for a long
12 time?

13 MR. YELENOSKY: So we have to make
14 the language more precise.

15 CHAIRMAN BABCOCK: Right.

16 MR. GILSTRAP: We can solve that
17 problem if you want to take Nina's approach.
18 Go to (e)(2), and in the second sentence say
19 "a motion to recuse will not be considered if
20 filed later than the 10th day prior," blah,
21 blah, blah, "except on the following grounds."

22 CHAIRMAN BABCOCK: Does that cure
23 the multiple grounds problem?

24 HONORABLE JOHN CAYCE: Frank, did
25 you intend to change the word "instances" to

1 "grounds"?

2 MR. GILSTRAP: Yes. I mean, that's
3 the point. It's only on these grounds.

4 HONORABLE SARAH B. DUNCAN: If we're
5 going to have a 10-day filing deadline, we
6 need to say you've got a 10-day filing
7 deadline. If there is an exception to the
8 10-day filing deadline, let's say what the
9 exception is; but we're getting it so
10 convoluted that I think people aren't going to
11 realize "Hey, guys, there's a 10-day filing
12 deadline unless you meet this test."

13 MR. YELENOSKY: But typically when
14 we talk about a filing deadline we talk about
15 a filing deadline for a pleading, motion,
16 whatever; and in this instance that's not what
17 we're talking about. We're talking about a
18 filing deadline for a particular point,
19 ground, whatever you want to call them that
20 might be made, not the whole motion. Right?
21 So we can't use our standard language about a
22 filing deadline.

23 HONORABLE SARAH B. DUNCAN: I don't
24 understand why. Why can't we say "A motion to
25 recuse must be filed before" --

1 HONORABLE SCOTT A. BRISTER: At
2 least 10 days before.

3 HONORABLE SARAH B. DUNCAN: -- "at
4 least 10 days before trial except the
5 following grounds may be raised in a motion to
6 recuse filed within 10 days of trial."

7 MR. YELENOSKY: Well, you can say
8 that. Yes. You can say that. It's different
9 than what I thought you were suggesting that
10 we have a cutoff, and then if you meet the
11 exception, the motion comes in. And I was
12 concerned about all the issues raised in a
13 motion coming in when we only intended some
14 ground or using a word that perhaps is
15 preferable.

16 HONORABLE SARAH B. DUNCAN: I
17 completely agree with your comment and still
18 do. We've got to distinguish between a motion
19 and grounds.

20 CHAIRMAN BABCOCK: What is wrong
21 with bootstrapping other grounds for recusal
22 if one of them meets the (a) through (d)? I
23 mean, I am just raising the question. Why
24 would you not want to permit? I mean, you're
25 going to get in under your first ground

1 because the facts just arose a couple of days
2 ago; but you have got to wait for grounds (2)
3 through (4). Why?

4 MR. GILSTRAP: Because you should
5 have raised them earlier.

6 MR. EDWARDS: What do you do if the
7 new ground is frivolous?

8 PROFESSOR BILL DORSANEO: The judge
9 got older.

10 CHAIRMAN BABCOCK: I guess it
11 matters if it's a trial or a hearing, because
12 if it's a trial, then you're out of luck; but
13 if it's just a hearing, based on what
14 everybody has said, then you could raise
15 grounds (2) through (4) later.

16 The problem we're having is because we've
17 got this odd situation where you could -- the
18 10-day rule applies to a trial and a hearing;
19 but we all think that you can revive your
20 grounds after the hearing date, but more than
21 10 days before the next hearing or trial.
22 Right? That's the problem, I think.

23 MR. YELENOSKY: Well, I mean, the
24 10-day I thought was because we wanted to
25 prevent. We had two different evils to

1 remediate between; and one was the people
2 filing them at the last minute in order to
3 delay a hearing. And allowing somebody to
4 later file the same motion when it's not going
5 to delay anything doesn't seem to be an evil
6 that we've identified, so I mean if we want to
7 be punitive, I guess we could say, you know,
8 "You didn't file it within 10 days of this
9 motion to continue; therefore, you can never
10 raise it again in the case." But that doesn't
11 seem to me to be an evil.

12 HONORABLE SARAH B. DUNCAN: And part
13 of the whole point of the discussion from last
14 time was I might be very willing to waive this
15 ground for recusal, as Bill says, for purposes
16 of a motion for continuance hearing; but I
17 don't want this guy hearing my case.

18 MR. YELENOSKY: Right.

19 CHAIRMAN BABCOCK: Bill.

20 PROFESSOR BILL DORSANEO: I'm
21 reluctant to even begin thinking very much
22 about changing a lot of the language given all
23 of the many, many, many hours that have been
24 put into this; but I do think Sarah's draft
25 which talks about "will be considered or will

1 not be considered" is better than saying
2 "waived." So I would recommend Nina
3 Cortell's ever so slight modification, "A
4 motion to recuse will not be considered," you
5 know, rather than something more elaborate
6 than that.

7 I'm tempted to stop and probably should
8 stop with that statement. If you wanted to do
9 a little bit more, you would say "A ground in
10 a motion to recuse will not be considered if
11 the ground is included in a motion filed later
12 than the 10 -- is included for the first time
13 in a motion filed later than the tenth day
14 prior to the date," et cetera. But that's
15 just an elaboration on my first point. Let's
16 change "waived" to something that we mean.

17 CHAIRMAN BABCOCK: Elaine.

18 PROFESSOR CARLSON: I'm confused.

19 CHAIRMAN BABCOCK: At least you're
20 willing to admit it.

21 PROFESSOR CARLSON: In (e)(2) we're
22 talking about not being entitled to a hearing
23 when you're within the 10-day window. Right?
24 And then it refers at the bottom of (e)(2),
25 last sentence, to "any motion filed after the

1 tenth day is governed by (e) (4)." And go to
2 (e) (4) Interim Proceeding, and talks about the
3 fact the judge gets to go ahead pending a
4 ruling on the motion. That's the last end of
5 that first subsection (4).

6 So is this overall scheme that if you
7 file something within 10 days, this motion to
8 recuse, it will only be heard on these four
9 grounds? The judge can proceed on an interim
10 basis; but then it says pending a ruling on
11 the motion on any of those grounds in (4).
12 They just don't read consistently to me. I
13 don't get it. And that's why I think we're
14 back to Sarah's point. Are we really talking
15 about waiver, or are we talking about you
16 don't get a hearing at all, or the judge rules
17 on it without you getting a hearing? I don't
18 understand how (e) (2) and (e) (4) fit
19 together.

20 CHAIRMAN BABCOCK: Well, if you
21 satisfy one of the four, then even if it's
22 within 10 days of trial or hearing, then it
23 gets considered.

24 PROFESSOR ELAINE CARLSON: Okay.

25 CHAIRMAN BABCOCK: And the

1 proceedings are stopped. You don't have an
2 interim proceeding.

3 PROFESSOR CARLSON: You don't?

4 CHAIRMAN BABCOCK: You do not.

5 HONORABLE SARAH B. DUNCAN: Any
6 motion filed after the tenth day prior to the
7 date the case is set for trial or other
8 hearing is governed by subparagraph (e)(4).
9 Any within 10-day motion is going to go
10 through the interim proceeding.

11 MR. HAMILTON: It doesn't stop the
12 proceedings; but you still get heard if you
13 meet the four criteria. If you don't meet the
14 four criteria, --

15 CHAIRMAN BABCOCK: You're out.

16 MR. HAMILTON: -- you don't get
17 heard on anything.

18 HONORABLE SARAH B. DUNCAN: Maybe
19 that's what -- if all we're talking about is
20 whether you're going to get a hearing on a
21 ground that is included within a 10-day
22 motion, maybe that is what we need to say is
23 "However, only those grounds meeting the
24 following criteria will be heard or
25 considered" or whatever; but if our concern is

1 what are we going to have a hearing on if it's
2 filed within 10 days, then maybe we just need
3 to be more express and tell people that unless
4 you -- only those grounds that meet one of
5 these criteria will be heard.

6 MR. HAMILTON: But you have the
7 "good cause" in there, so there's always
8 going to be a hearing.

9 HONORABLE SARAH B. DUNCAN: If
10 there's always going to be a hearing, then
11 we're not really limiting any hearings, so why
12 don't we just --

13 MR. HAMILTON: We're not limiting
14 the hearings. We're limiting the grounds on
15 which recusal can be granted; and that's the
16 problem with the "good cause" catchall; but --

17 HONORABLE SARAH B. DUNCAN: It's a
18 significant problem. You're going to have to
19 have a hearing to determine if there is good
20 cause to have a hearing.

21 CHAIRMAN BACOCK: Richard. Richard,
22 are you still here?

23 HONORABLE SCOTT A. BRISTER: No. He
24 stepped out.

25 PROFESSOR BILL DORSANEO: Carl,

1 isn't it as I'm reading this, perhaps I should
2 have read it a bit more carefully before.
3 Doesn't the connection pointed out by
4 Professor Carlson between (e)(1) and (e)(4)
5 operate on the assumption or (d)(4) operate on
6 the assumption that the waiver is a waiver of
7 the ground for the case as a whole? Isn't
8 that what it assumes?

9 MR. HAMILTON: Yes. I think so.
10 The waiver is a waiver of the ground.

11 PROFESSOR BILL DORSANEO: For this
12 case forever after.

13 MR. HAMILTON: Right.

14 PROFESSOR BILL DORSANEO: So when
15 Richard talked about making the modification
16 to make it clear that's only for the
17 continuance hearing --

18 HONORABLE SARAH B. DUNCAN: I don't
19 see where you get that out of (4).

20 PROFESSOR BILL DORSANEO: Why would
21 you have all this (4) in there if it only
22 makes a difference for the continuance
23 hearing?

24 PROFESSOR ELAINE CARLSON: Wasn't it
25 the sense of the Committee that we felt that a

1 10-day absolute Rule was not desirable and
2 that we wanted to allow people to seek a
3 recusal within 10 days if one of these four
4 grounds was present; but that you don't get
5 the reward of stopping a hearing or trial?

6 CHAIRMAN BABCOCK: Right.

7 PROFESSOR ELAINE CARLSON: And
8 that's what these are supposed to read?

9 CHAIRMAN BABCOCK: Right.

10 PROFESSOR CARLSON: Okay.

11 CHAIRMAN BABCOCK: What if we said
12 this, Elaine? "A motion to disqualify can be
13 filed at any time. A motion to recuse must be
14 filed at least 10 days prior to any trial or
15 any hearing except in the following
16 instances:"

17 HONORABLE PHIL HARDBERGER: Yes.
18 Yes.

19 CHAIRMAN BABCOCK: Anything wrong
20 with that? Do you want me to read it again?
21 Okay. "Time To File: A motion to disqualify
22 may be filed at any time. A motion to recuse
23 must be filed at least 10 days prior to any
24 trial or other hearing except in the following
25 instances:" and then pick up the language.

1 MR. HAMILTON: Good.

2 HONORABLE MICHAEL A. SCHNEIDER:

3 (Nods affirmatively.)

4 CHAIRMAN BABCOCK: Is that okay?

5 HONORABLE SARAH B. DUNCAN: Uh-huh

6 (yes).

7 PROFESSOR ELAINE CARLSON: And then

8 when we get to the end of (e)(2) as it now

9 reads do we want to say "Any motion filed

10 after the tenth day is subject to (e)(4)," or

11 do we want to say "Any motion subject to the

12 exception is then subject to (e)(4)"?

13 HONORABLE SARAH B. DUNCAN: Any

14 motion.

15 CHAIRMAN BABCOCK: Any motion.

16 Because of what you just said.

17 HONORABLE SARAH B. DUNCAN: You

18 don't want to give them the incentive to delay

19 the trial or hearing.

20 PROFESSOR ELAINE CARLSON: Let's say

21 I don't have one of these four grounds, and I

22 file a motion to recuse within 10 days.

23 CHAIRMAN BABCOCK: Right.

24 PROFESSOR ELAINE CARLSON: That

25 doesn't stop the interim proceeding. It

1 doesn't stop. You go forward under (e)(4)
2 pending a ruling on the motion.

3 HONORABLE SCOTT A. BRISTER: If it
4 doesn't cite any of those four, it does just
5 like the current Rule, which is it is
6 ignored. A motion filed less than 10 days is
7 considered not filed. It doesn't exist. I
8 ignore it, and I go on with the trial.

9 PROFESSOR ELAINE CARLSON: So then
10 when you go to (e)(4) it talks about Interim
11 Proceeding. The judge can go forward pending
12 a ruling on the motion.

13 HONORABLE SCOTT A. BRISTER: If it
14 raises one of these four grounds, then you go
15 to (4), the Interim Proceeding.

16 MR. YELENOSKY: So if I file a
17 motion to recuse which happens to be six days
18 before a discovery hearing, you ignore it?

19 MR. CHAPMAN: Unless it completes
20 one of those four.

21 CHAIRMAN BABCOCK: For the purposes
22 of the discovery hearing.

23 HONORABLE SCOTT A. BRISTER: That
24 hearing, absolutely.

25 MR. YELENOSKY: Yes. But did we

1 make it clear for purposes of that hearing in
2 our language?

3 HONORABLE SCOTT A. BRISTER: The
4 language in this is about the same as the
5 current 18(a). Current 18(a) is "At least 10
6 days before the date set for trial or other
7 hearing filed," et cetera.

8 MS. CORTELL: But don't we still
9 have the inconsistency, Elaine, that you
10 pointed out earlier in the last line?

11 PROFESSOR CARLSON: I'm sorry, Nina?

12 MS. CORTELL: That any motion filed
13 still is broader than a motion meeting these
14 four criteria, and so it's still overly
15 broad. There's still the inconsistency that
16 Elaine mentioned if we don't narrow what we're
17 talking about in the last sentence.

18 HONORABLE SCOTT A. BRISTER: Right.

19 MR. YELENOSKY: And Scott was
20 referring to Chip's language. I just tried to
21 jot it down. But Chip's language doesn't
22 solve the problem identified. Maybe it's
23 elsewhere. I mean, it says a motion must be
24 filed within up to 10 days before a hearing
25 unless it's on one of these grounds, so I file

1 a motion that's not on one of these grounds.

2 HONORABLE SCOTT A. BRISTER: We
3 ignore it.

4 MR. HAMILTON: I don't think you
5 ignore it. I think it has to be passed on to
6 the presiding judge, and you just proceed with
7 the interim proceeding, and they still get a
8 hearing on it.

9 HONORABLE SCOTT A. BRISTER: Well,
10 then you want something other than a filing
11 deadline. The filing deadline says that you
12 have to file it by then. If it's not filed by
13 then, what do we do with it? Do we still look
14 at it? No. It wasn't filed by then.

15 MR. YELENOSKY: Right. And that's
16 my concern, because if I file the motion, and
17 it's a perfectly good motion to recuse, and I
18 don't expect you to rule on it before the
19 hearing on discovery, but I happen to file it
20 within 10 days of the hearing on discovery, it
21 goes in the trash can.

22 HONORABLE SCOTT A. BRISTER: No.
23 No. I'm sorry. We ignore it for purposes of
24 the hearing that it was within 10 days of.

25 MR. YELENOSKY: Okay. Well, I'm

1 just saying Chip's language, maybe when we get
2 the projection system and stuff we'll be able
3 to see the language, and I'll put in my two
4 cents then; but I didn't see Chip's language
5 as I jotted it down making that clear. And
6 maybe it does.

7 CHAIRMAN BABCOCK: I'm not sure it
8 does; but I'm not sure any of the language
9 we've been talking about does either.

10 HONORABLE SARAH B. DUNCAN: So is
11 what we're saying, and this does sort of ring
12 a bell -- it may be the wrong bell -- is that
13 if a motion is filed within 10 days of trial
14 or other hearing, it must allege one of these
15 things or it won't be considered before that
16 trial or hearing?

17 HONORABLE SCOTT A. BRISTER: Right.
18 Because where we started on this draft was we
19 removed a filing deadline completely. The
20 deal was you can file it at any time you
21 want. If it's filed within 10 days, then
22 we're going to go on with about our
23 proceedings; but then people raised the
24 lying-behind-the-log problem. I know that the
25 judge is going to have to recuse him or

1 herself; but I also want to delay this thing
2 and put off the day of reckoning, so I'm going
3 to hold that ace in the hole, file it, you
4 know, the moment before trial. It's going to
5 be good, so it won't do any good that you-all
6 are going to proceed onto this trial. We're
7 going to have to cancel the trial anyway
8 because it's a good recusal. So that is why
9 the 10-day thing came back in again.

10 I wasn't convinced personally that was
11 that big a problem; but maybe it was. But as
12 a result the two -- an argument can be made
13 you don't really need both. If you're doing
14 one, you don't need the other.

15 MR. YELENOSKY: And what we're
16 really saying is an exception to the interim
17 proceedings. We're not talking about a filing
18 deadline. You can file it any time you want;
19 and the only thing is if it's on -- it goes to
20 an interim proceeding except for those
21 following grounds. Right?

22 PROFESSOR CARLSON: I don't know.
23 That's what I'm asking.

24 MR. HAMILTON: It goes to an interim
25 proceeding any time it's filed within 10

1 days.

2 CHAIRMAN BABCOCK: Unless it's
3 unverified.

4 MR. HAMILTON: Unless what?

5 CHAIRMAN BABCOCK: Unless it's
6 unverified.

7 MR. HAMILTON: Well, yes.

8 CHAIRMAN BABCOCK: Because remember,
9 we had that debate, and in (e)(1) it says "A
10 motion to recuse must be verified. An
11 unverified motion does not invoke the
12 proceedings under this Rule except for
13 sanctions." Right? So you can ignore an
14 unverified motion. So you could, if you
15 wanted to, say you can ignore a late-filed
16 motion that doesn't comply with (2).

17 HONORABLE SARAH B. DUNCAN: It's not
18 a filing deadline. It's a limitation on the
19 grounds that will be heard at that --

20 MR. YELENOSKY: But it's interim
21 anyway. Right? Once you have the interim
22 proceeding, why do we need it?

23 MR. CHAPMAN: I thought it was to
24 consider the exceptions.

25 HONORABLE SCOTT A. BRISTER: That's

1 where the waiver idea came from. Hide behind
2 the log with this in your pocket, and wait
3 until you go to trial because you know you can
4 get the trial canceled.

5 MR. YELENOSKY: That's a
6 conventional trial. But it says "or other
7 hearing," which we've all said so I lie behind
8 the log until five days before the hearing on
9 my discovery motion or my continuance, and the
10 punishment is I waive it. So you could say
11 "conventional trial."

12 HONORABLE SCOTT A. BRISTER: You
13 could just drop "or other hearing."

14 MR. YELENOSKY: Or drop "or other
15 hearing." But if you say "trial" --

16 HONORABLE SCOTT A. BRISTER: And I
17 think we had a discussion about that, dropping
18 "or other hearing"; and the argument was that
19 some hearings were so expensive to prepare for
20 and bring everybody in for you wanted it to
21 apply to that too.

22 My feeling was "or other hearing" you can
23 always reschedule a hearing. From the trial
24 judge's perspective the trial is what I care
25 about. I'll always be here on Monday; but the

1 argument from a lot of the lawyers was "Well,
2 not me. I have to bring everybody in for a
3 special appearance" or whatever the particular
4 hearing they had in mind was, and that is
5 expensive if I have to bump that for some
6 reason that you knew about and just decided to
7 make life difficult."

8 CHAIRMAN BABCOCK: Well, the motion
9 is on the table, but it hasn't been seconded
10 for the language to read "A motion to
11 disqualify may be filed at any time. A motion
12 to recuse must be filed at least 10 days prior
13 to any trial or other hearing except in the
14 following instances:" And do we want to talk
15 about -- do we want to vote on that? Is there
16 a second?

17 HONORABLE PHIL HARDBERGER: I'll
18 second it.

19 CHAIRMAN BABCOCK: Okay. Second.
20 Any more discussion on that language? Do you
21 want to vote on it? All in favor of that
22 language raise your hand.

23 MR. HAMILTON: Are you saying "or
24 other hearing"?

25 CHAIRMAN BABCOCK: Yes.

1 MR. HAMILTON: I can't remember what
2 the prior discussion was. Maybe you remember,
3 Scott. This talks about "other hearing" at
4 that point; and it talks as though there is
5 going to be an interim proceeding on that; but
6 when you get over to the interim proceeding
7 Rule the Court only proceeds on an interim
8 proceeding if when the motion to disqualify or
9 recuse is filed 10 days before set for
10 conventional trial. We left out "other
11 hearing" there.

12 MR. SOULES: We deliberately did
13 that.

14 MR. HAMILTON: We did that
15 deliberately. But it seems like that's sort
16 of inconsistent if we're going to have
17 "hearing" in the time to file. What happens
18 if you file within 10 days of a hearing?

19 MR. GILSTRAP: There is no need for
20 an interim proceeding. You just have the
21 hearing later.

22 CHAIRMAN BABCOCK: That's right.
23 Yes.

24 MR. GILSTRAP: See, the hearing on
25 discovery is passed. You couldn't raise it at

1 MR. ORSINGER: The problem with
2 random assignment counties is that in the
3 rural counties you don't have random
4 assignment; but as a practical matter like if
5 you have a trial in the third week of April
6 and you think you're going to get judge so and
7 so, but he had a criminal -- he had a capital
8 murder case that carried over in an adjoining
9 county, and now they've flipped judges on you;
10 and so it's not a Bexar County, but it's
11 probably two thirds of the counties in Texas.

12 MR. SOULES: You have three times.

13 MR. ORSINGER: What?

14 MR. SOULES: You still have three
15 strikes.

16 MR. ORSINGER: I know the
17 percentages are low.

18 MR. GILSTRAP: I understand that
19 they may change judges on you; but the problem
20 in the random assignment counties is you're
21 going to have a different motion every -- a
22 different judge every time you go to court.
23 And it seems to me that if you could carve
24 them out, that might diffuse that problem,
25 because we're trying to do one size fits all,

1 and one size doesn't fit all.

2 MR. SOULES: It does, because --

3 CHAIRMAN BABCOCK: Judge Cayce.

4 HONORABLE JOHN CAYCE: I wanted to
5 try to address Sarah's concern and this
6 rebuttable presumption idea. What if we
7 provided in (b), left it mandatory as it is
8 provided in there, the opportunity for the
9 party who brought the motion to show that it
10 was not brought for purpose of delay and
11 without sufficient case? In other words, put
12 the burden on them to show there is some merit
13 to bringing this third or fourth or fifth
14 motion; but otherwise if they don't meet that
15 burden, they're sanctioned?

16 CHAIRMAN BABCOCK: That's an idea.
17 What do people think about that?

18 MR. WATSON: Isn't that the
19 rebuttable presumption?

20 HONORABLE JOHN CAYCE: That's the
21 request on rebuttable presumption.

22 CHAIRMAN BABCOCK: Yes, it is.

23 HONORABLE SARAH B. DUNCAN: That's
24 what rebuttable presumption does though. It
25 shifts the burden to the moving party to

1 demonstrate that it was not abuse of power.

2 HONORABLE JOHN CAYCE: It's just a
3 little stronger to keep it mandatory unless
4 they show this, I think.

5 CHAIRMAN BABCOCK: I kind of like
6 that. Mike, what do you think? You like that
7 too, don't you?

8 MR. HATCHELL: I don't think
9 anything of this. I don't have any dogs in
10 this fight.

11 CHAIRMAN BABCOCK: Did you get that
12 down? Hatchell has no dog in this fight.
13 Okay. I like the idea even if Hatchell
14 doesn't.

15 Anybody else have any thoughts about
16 this?

17 HONORABLE PHIL HARDBERGER: Do we
18 need a motion?

19 CHAIRMAN BABCOCK: I'd love to hear
20 a motion.

21 HONORABLE JOHN CAYCE: I make that
22 in the form of a motion.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE PHIL HARDBERGER: I second
25 it.

1 CHAIRMAN BABCOCK: All right.
2 Discussion on that? Everybody clear on what
3 we're talking about?

4 MR. GILSTRAP: State it again,
5 please.

6 CHAIRMAN BABCOCK: The motion, I
7 believe, is that in (11)(b) we would strike
8 the words "against the judge," and at the end
9 of the sentence, the first sentence we would
10 say "unless the party bringing the motion can
11 demonstrate that it wasn't brought for the
12 purposes of delay and without sufficient
13 cause." Okay. That's what we're talking
14 about.

15 HONORABLE SCOTT A. BRISTER: But and
16 only on the third time? Why wouldn't that
17 apply to the first time?

18 HONORABLE JOHN CAYCE: It would.
19 But the first time we're talking mandatory
20 here unless you demonstrate that you've got
21 some merit. Otherwise --

22 CHAIRMAN BABCOCK: Otherwise the
23 judge --

24 HONORABLE JOHN CAYCE: -- you'd be
25 sanctioned automatically.

1 HONORABLE SCOTT A. BRISTER: My
2 question is you filed it and you lost, imposed
3 costs on the other side. Why should --
4 shouldn't there be a presumption that you pay
5 for that cost unless you show just the same as
6 we do with discovery motions?

7 CHAIRMAN BABCOCK: The way Judge
8 Cayce has suggested it there is.

9 MR. ORSINGER: I'm saying do it with
10 the first motion.

11 HONORABLE SCOTT A. BRISTER: I'm
12 saying why are you waiting until the third
13 time to do that? That ought to be the rule
14 the first time.

15 HONORABLE JOHN CAYCE: I was just
16 going to say the first time give the opposing
17 party the right to seek sanctions as I read
18 it. This subpart (b) is directed to the trial
19 court to issue automatic mandatory sanctions
20 unless the party against whom the sanction is
21 going to be issued demonstrates that the third
22 motion is not frivolous.

23 CHAIRMAN BABCOCK: Yes, Sarah.

24 HONORABLE SARAH B. DUNCAN: As
25 worded the proposal doesn't address Richard's

1 point, which I thought was a good one, --

2 MR. YELENOSKY: Right.

3 HONORABLE SARAH B. DUNCAN: -- which
4 is the third and subsequent motion won't be
5 brought for purposes of delay because it won't
6 delay.

7 MR. YELENOSKY: It has to be
8 abusive. It has to be some other evil we're
9 attacking other than delay. We have to define
10 what that evil is.

11 HONORABLE SARAH B. DUNCAN: Good way
12 to put it.

13 MR. GILSTRAP: But in your motion in
14 your proposed wording change "and/or," and I
15 think that would solve that problem.

16 CHAIRMAN BABCOCK: Jan.

17 HONORABLE JAN P. PATTERSON: It also
18 puts the trial judge back in the position of
19 having to make findings, which I think was
20 Judge Brister's comment about why we have this
21 problem in the first place.

22 I would like to suggest that we get a
23 sense of the Committee on the language of
24 either "shall enter," "should enter" or "may
25 enter" and just leave the language as it is

1 otherwise.

2 CHAIRMAN BABCOCK: We have a motion
3 that's been seconded, so that's what we're
4 discussing right now.

5 HONORABLE JAN P. PATTERSON: I
6 still, of all the things, I mean, to take the
7 discretion out of the hands of the trial judge
8 on something this particular and specific and
9 given to such a variety of situations, as
10 Frank says, it just -- this is not the area we
11 could do that. It's just like the three
12 strikes you're out statute. It's trying to
13 fit all instances.

14 And so I will favor -- and the other
15 comment, with all due regard to Senator
16 Harris, it's possible that when he hears the
17 full discussion he will agree with us. This
18 is the whole question of what is legislative
19 intent and what did he have in mind at that
20 point. Until we have a discussion with him or
21 a proposal we may not have the complete answer
22 to that and we may satisfy him in some way.
23 So until we know that we have not satisfied
24 him I don't think we ought to put anything
25 onerous in place just because of some

1 unspecified concern that someone had now a
2 year ago.

3 CHAIRMAN BABCOCK: Well, based on
4 our discussion with him, Frank Gilstrap's and
5 my discussion with him, I don't think his
6 concern has lessened any. Do you agree,
7 Frank?

8 MR. GILSTRAP: I think he's still
9 concerned; and I think you've correctly
10 identified the source of his concern, and I
11 think we took a great step today by bringing
12 these two judges in, and I think they were
13 very pleased with the way it went. And so I'm
14 optimistic that we're going to be able to get
15 there with Senator Harris; but I've only known
16 him for 40 years, so I can't read him.

17 CHAIRMAN BABCOCK: Judge Cayce,
18 could you reread the language again that you
19 think we should add to this sentence in
20 (11) (b)?

21 HONORABLE JOHN CAYCE: Well, mine is
22 a little different than the way you worded
23 it.

24 CHAIRMAN BABCOCK: Well, that's why
25 I wanted to get your language.

1 HONORABLE JOHN CAYCE: I would just
2 add at the end of that sentence after taking
3 out "against a judge" at the end of that
4 sentence put a comma, "unless the party making
5 such motion demonstrates the motion was not
6 brought for the purposes of delay and/or
7 without sufficient cause."

8 CHAIRMAN BABCOCK: John.

9 MR. MARTIN: Do you have to show
10 that all three meet that test, or the last
11 one, or?

12 HONORABLE JOHN CAYCE: "And/or."

13 CHAIRMAN BABCOCK: "And/or."

14 MR. ORSINGER: No. He's talking
15 about the third motion. You're talking about
16 the third motion.

17 HONORABLE JOHN CAYCE: I'm talking
18 about the third motion.

19 MR. MARTIN: Just the third motion?

20 HONORABLE JOHN CAYCE: Just the
21 third motion, yes.

22 MR. CHAPMAN: Doesn't the "and/or"
23 raise the specter that you'll in some courts
24 have to prove both delay and without
25 sufficient cause and in other courts you can

1 prove one prong or the other? Isn't that --

2 HONORABLE SARAH B. DUNCAN: That's
3 the problem with "and/or." It's inherently
4 ambiguous.

5 MR. CHAPMAN: -- vague?

6 HONORABLE JOHN CAYCE: Just leave
7 "or."

8 PROFESSOR BILL DORSANEO: "Or" means
9 "and/or."

10 CHAIRMAN BABCOCK: Stephen Tipps.

11 MR. TIPPS: I don't think it should
12 be "or" in (4) because if you're in a
13 situation in which the filing of a motion
14 necessarily would not delay the trial, then
15 you could always avoid sanctions by proving I
16 didn't -- I'm demonstrating that I did not
17 file this for purposes of delay.

18 MR. YELENOSKY: Don't we want to
19 take "delay" out of this provision. We may
20 want it in the other sanctions provision where
21 it's possible that you're going to delay
22 things; but we've just said when we couple
23 this with the other provision there's no way
24 there is going to be delay.

25 HONORABLE SARAH B. DUNCAN: Right.

1 MR. TIPPS: Without sufficient
2 cause.

3 MR. CHAPMAN: Without sufficient
4 cause.

5 CHAIRMAN BABCOCK: Judge Cayce, do
6 you agree with that?

7 HONORABLE JOHN CAYCE: I'll take
8 that. That sounds good.

9 CHAIRMAN BABCOCK: All right.
10 Richard.

11 MR. ORSINGER: Well, we have Rule 13
12 that has a set of how you figure out when you
13 sanction somebody; and we've got Chapter 10.

14 CHAIRMAN BABCOCK: Right.

15 MR. ORSINGER: And we're now going
16 to have yet a different standard. But Rule 13
17 for better or worse kind of rotates around the
18 idea of whether it's groundless or not. And I
19 don't know that we want to buy into all the
20 case law that's background here; but this has
21 been relatively serviceable insofar as other
22 motions and pleadings are concerned. Perhaps
23 we should consider using similar language, or
24 maybe Rule 13 is not well written and maybe we
25 shouldn't; but we do have a lot of

1 interpretive history on this. And the
2 standard is groundless means no basis in law
3 or fact and not warranted by a good faith
4 argument for the extension, modification or
5 reversal of existing law.

6 MR. SOULES: That's going to get
7 repealed in the recodification which goes to
8 the statute book. That was the recommendation
9 this Committee made several years ago to the
10 Supreme Court.

11 HONORABLE JOHN CAYCE: Rule 13 is
12 addressing pleadings that are groundless.
13 We're not just talking about what is alleged
14 in the motion being necessarily completely
15 groundless.

16 CHAIRMAN BABCOCK: This is
17 different, I think, Richard.

18 MR. ORSINGER: Different in what
19 sense? Because Rule 13 applies to motions as
20 well as pleadings. In fact, Rule 13 applies
21 to this motion unless we say it doesn't.

22 CHAIRMAN BABCOCK: Well, this
23 (11)(a) is already in the statute. I mean,
24 it's already in the Rule 18.

25 MR. ORSINGER: That's right.

1 HONORABLE SCOTT A. BRISTER: That
2 was one of the problems is there's 20 places
3 where sanctions are in the Rules of Civil
4 Procedure.

5 CHAIRMAN BABCOCK: We've got to deal
6 with the hand we're dealt, though.

7 MR. ORSINGER: Well, see, what's
8 happening is we're carrying forward the old
9 sanction Rule under 18(a) that it has to be
10 for a delay. And what is the other?

11 CHAIRMAN BABCOCK: We changed that.
12 You know, we took "solely" out. The current
13 rule says "solely for purposes of delay."
14 Judge Brister persuaded everybody that that
15 should come out last time around.

16 But the point is we have a motion that is
17 seconded on the floor. So anymore discussion
18 about the language that Judge Cayce has
19 proposed?

20 MR. CHAPMAN: And that would presume
21 that we would not tinker with (a)?

22 CHAIRMAN BABCOCK: That's right.
23 This motion, unless I misunderstood it, does
24 not address (a), (11)(a). Anybody else?
25 Well, then let's vote on this. Everybody that

1 thinks that we should strike the words
2 "against a judge" and add the words after the
3 last, the first sentence of (11)(b), the last
4 word including comma, "unless the party making
5 such motion demonstrates that the motion was
6 brought with sufficient cause."

7 MR. HAMILTON: Can we vote on those
8 separately?

9 CHAIRMAN BABCOCK: Oh, you mean
10 "against the judge"? No. Unless you want to
11 accept the amendment to --

12 MR. HAMILTON: Okay. That's all
13 right.

14 HONORABLE DAVID CAYCE: No. Let's
15 just go for it.

16 CHAIRMAN BABCOCK: Okay. All
17 right. Everybody in favor of that raise your
18 hand. Everybody against raise your hand. The
19 motion carries by a vote of 20 to 11. So
20 that's the way we'll fix it. Bill.

21 PROFESSOR BILL DORSANEO: If there
22 is concern about the use of the standard
23 "without" or "with sufficient cause," which
24 actually is the standard which was in the
25 former Appellate Rule, we could be more

1 consistent with Chapter 10 and with the
2 current Appellate Rule by using the word
3 "frivolous" or "nonfrivolous."

4 I don't know if that's a large issue.
5 You could use the sufficient cause standard.
6 Presumably that would send somebody back to
7 the case law with respect to what are now
8 regarded as frivolous appeals, and you could
9 come up with something fairly understandable
10 as a standard; but there is concern about
11 consistency.

12 I think the right thing to look to would
13 be Chapter 10 rather than Civil Procedure Rule
14 13. And there, you know, the title uses the
15 term "frivolous," and that's the term we
16 picked up in the Revised Appellate Rule.

17 CHAIRMAN BABCOCK: Is there not
18 however some case law or a body of cases that
19 have developed around Rule 18 that has used
20 the words "without sufficient cause"?

21 HONORABLE JOHN CAYCE: I don't
22 know.

23 CHAIRMAN BABCOCK: It's been around
24 a long time, has it not?

25 JUSTICE NATHAN HECHT: It's been

1 around a while.

2 HONORABLE JOHN CAYCE: What was the
3 purpose of including that terminology in
4 subpart (a)?

5 CHAIRMAN BABCOCK: That's carried
6 forward from the current Rule.

7 HONORABLE JOHN CAYCE: Okay.

8 PROFESSOR BILL DORSANEO: That's the
9 way we used to talk about these kinds of
10 things for "delay" and "without sufficient
11 cause"; and we don't talk about it that way
12 elsewhere anymore.

13 PROFESSOR ELAINE CARLSON: Could I
14 ask a point of clarification? Did we just
15 vote the entirety of (b) including the joint
16 and several liability on the attorney and the
17 client?

18 CHAIRMAN BABCOCK: We haven't
19 discussed that; and I don't think that was the
20 vote.

21 PROFESSOR ELAINE CARLSON: All
22 right. Thank you.

23 CHAIRMAN BABCOCK: If somebody has
24 got a concern about that, we should talk about
25 it; but I think the motion was only to strike

1 that language and add the other language.

2 PROFESSOR BILL DORSANEO: I'm going
3 to move that we use the word "frivolous,"
4 because the more I think about it once you
5 take the "not for purposes of delay" away from
6 "without sufficient case" you may water the
7 standard down to amount to no standard at
8 all.

9 CHAIRMAN BABCOCK: Okay. So what
10 you would do, Bill, then is change the
11 language we just voted on to say "Unless the
12 party making such motion demonstrates that the
13 motion was not frivolous"?

14 PROFESSOR BILL DORSANEO: Yes. Or
15 words to that effect. But I would also change
16 (a).

17 HONORABLE JOHN CAYCE: Subpart (a).
18 That's where I got the term.

19 MR. EDWARDS: Where does "frivolous"
20 come from?

21 MR. ORSINGER: The Appellate Rules.

22 PROFESSOR BILL DORSANEO: Well, it
23 actually comes from the way we started talking
24 about these types of issues for a while. And
25 Chapter 10 is titled. Chapter 10 of the Civil

1 Practices & Remedies Code is at least entitled
2 Sanctions For Frivolous Pleadings & Motions.
3 Granted, --

4 MR. ORSINGER: Yes. But what --

5 PROFESSOR BILL DORSANEO: Granted,
6 when you read the text of Chapter 10 it's more
7 complicated than that.

8 MR. EDWARDS: Yes. It says "not for
9 any improper purpose including to harass or
10 cause unnecessary delay or needless increase
11 in the cost of litigation."

12 CHAIRMAN BABCOCK: That sounds like
13 "without sufficient cause" to me. Okay.
14 Carl.

15 MR. HAMILTON: What does the word
16 "demonstrate" mean? How do you -- what is
17 the standard to see whether or not one has
18 demonstrated something? Is that like
19 "preponderance of the evidence"?

20 MR. EDWARDS: I would assume.

21 CHAIRMAN BABCOCK: I don't know.

22 MR. HAMILTON: A prima facie case or
23 what?

24 HONORABLE JOHN CAYCE: It is shown.

25 CHAIRMAN BABCOCK: They would have

1 to overcome what otherwise would be a
2 mandatory order, I would guess; but what
3 quantum of proof you need for that I suppose
4 would depend on how the subject would be
5 judged.

6 MR. ORSINGER: We really have one
7 articulation of this concept in Rule 13. We
8 have another articulation in Chapter 10. We
9 have another articulation in the Rules of
10 Appellate Procedure, and yet a different
11 articulation now we're not contemplating.

12 CHAIRMAN BABCOCK: How are they
13 different, Richard?

14 MR. ORSINGER: There's no one way of
15 describing the concept that we're after. Like
16 if you actually look at Chapter 10, they've
17 got four different aspects that you're
18 vouching for whenever you sign and file a
19 motion. And if they find that you violated
20 any of those, you're subject to sanctions
21 under Chapter 10.

22 The frivolous appeals just says if the
23 appeal is frivolous, no explanation or
24 definition of any kind, no standards set out
25 in the Appellate Rules at all.

1 And in Rule 13 they have a bunch of
2 recitals; but apparently you're not punished
3 for them if they're wrong unless they're
4 groundless and brought in bad faith or
5 groundless and brought for purposes of
6 harassment; and then "groundless" is defined.
7 They're I think trying to get at the same
8 thing; but they used different words; and some
9 of them have longer lists. Some of them have
10 short lists. The Appellate Rules doesn't have
11 a list at all. It just uses the word
12 "frivolous" which is not the word
13 "groundless."

14 And so I guess it's consistent for us to
15 make up a new word and use it; but it might
16 also be appropriate for us to find out is
17 there a core concept hear, and can we describe
18 it in such a way that it would be useful at
19 the trial level and at the appellate level and
20 for purposes of recusals.

21 CHAIRMAN BABCOCK: I would say we're
22 not making up a new word. This has been in
23 the Rules for a long time. They're making up
24 new words.

25 MR. JEFFERSON: I'd like to second

1 Professor Dorsaneo's motion. I'd second the
2 motion to use the word "frivolous." I think
3 we all know what it means; and the Courts do
4 too.

5 CHAIRMAN BABCOCK: We haven't had a
6 motion yet; but when there is one I will take
7 that as a second.

8 MR. GILSTRAP: I think I know what
9 "groundless" and "frivolous" mean. I think
10 they come out of the DTPA; and it's just hard
11 as can be to get your attorney's fees under
12 the DTPA if you're the Defendant. And we're
13 going to stick that in (b) and make, you know,
14 require that that hill can be climbed; and the
15 result, and so we're saying on the third
16 motion you could be sanctioned if it's
17 frivolous. And that's seems to me to
18 completely take the teeth out of (b). I mean,
19 I could see it in (a); but I don't see on (b),
20 say, where you're given three strikes and the
21 third strike the test is frivolousness.

22 CHAIRMAN BABCOCK: Elaine.

23 PROFESSOR CARLSON: Bill, I notice
24 that Rule 251 the motion for continuance uses
25 sufficient cause. Do you think that

1 "frivolous" is a less onerous test to meet,
2 as Frank has suggested?

3 PROFESSOR BILL DORSANEO: I think
4 that it's possible and in fact you're almost
5 compelled to do so to read the words "without
6 sufficient cause" to mean that you didn't win,
7 which makes it a type of strict liability
8 standard which is not what we intend.

9 I think when the Appellate Rules had the
10 twin standard of "for delay and without
11 sufficient cause" what was really driving the
12 imposition of the sanction was the "without
13 delay" part, and the protection was additional
14 protection, talking about "sufficient cause."

15 The appellate cases, as you know, set up,
16 you know, a list of factors that you would
17 look at to see whether this is, you know, for
18 purpose of delay, without sufficient cause. I
19 don't think any of this -- any appellate
20 lawyer would have too much trouble thinking
21 that those factors and that type of thinking
22 are embodied in the word "frivolous" as
23 currently set forth in Appellate Rule 45. I
24 think that's what everybody would think.

25 People use the word "frivolous" in just

1 general parlance now. We know what it means.
2 It probably does mean "groundless" and "for
3 some improper purpose"; and I don't know
4 whether we can come up with a really good
5 definition of it; but in the absence of coming
6 up with a really good definition, which I
7 can't, I like the use of the word "frivolous"
8 because it better conveys what I think ought
9 to be the way this is looked at than "without
10 sufficient cause" which is way too strict.

11 CHAIRMAN BABCOCK: Okay. So you
12 would propose in (a), or your motion, Bill, in
13 (a) is "brought for purposes of delay and
14 frivolous" striking "without sufficient
15 cause"?

16 PROFESSOR BILL DORSANEO: No. We
17 took out the "delay" part, didn't we?

18 CHAIRMAN BABCOCK: Not in (a) we
19 didn't.

20 PROFESSOR BILL DORSANEO: We didn't?

21 CHAIRMAN BABCOCK: We did it in
22 (b).

23 PROFESSOR BILL DORSANEO: Yes. I
24 would say take out the "delay" part.

25 CHAIRMAN BABCOCK: That the motion

1 was brought for purposes of delay and
2 frivolous.

3 PROFESSOR BILL DORSANEO: We'll just
4 say it was frivolous.

5 CHAIRMAN BABCOCK: That the motion
6 was frivolous.

7 MR. CHAPMAN: Are you talking about
8 (a) or (b) now?

9 PROFESSOR BILL DORSANEO: (a) and
10 (b). I'm talking about both.

11 CHAIRMAN BABCOCK: But we're
12 starting with (a). Let's start with (a). Your
13 motion is that (a) should read "If a party
14 files a motion under this Rule and if it's
15 determined on motion of the opposite party or
16 on the Court's own initiative that the motion
17 was frivolous, the judge hearing the motion
18 may impose any sanction authorized by Rule
19 215.2(b)." That's the first part of your
20 motion. Right?

21 PROFESSOR BILL DORSANEO: (Nods
22 affirmatively.)

23 CHAIRMAN BABCOCK: Is that a "yes,"
24 Bill?

25 PROFESSOR BILL DORSANEO: Yes.

1 MR. CHAPMAN: I don't understand why
2 we're tinkering with (a) when this implied the
3 first motion, and what we're concerned about
4 is that it is for the purpose of delay and it
5 does not have a proper basis. And that seems
6 to be substantially different than the concept
7 that we are grappling with in (b) where it
8 seems to me that the "delay" and "without
9 sufficient cause" is proper in (a); but what
10 we're trying to do is heighten the standard in
11 (b) so that it's "frivolous." And I thought
12 that's where you were going, that "frivolous"
13 was a standard to be imposed in (b) as opposed
14 to delay.

15 PROFESSOR BILL DORSANEO: I must
16 admit, Carlyle, that the only reason that I
17 began to talk about (a) was for consistency;
18 and I'm not sure consistency is important.

19 MR. CHAPMAN: Yes. It seems to me
20 that what we're after in (b) is to, as someone
21 else pointed out, to avoid the trap of the
22 argument about delay and there's been no delay
23 because I'm doing this within the 10-day
24 period, et cetera, et cetera. And I was
25 convinced. I been convinced that "without

1 sufficient cause" in the context of (b), if it
2 can be interpreted to mean you didn't win, is
3 not enough. And so it seems to me that (b)
4 ought to be "frivolous," and we ought to leave
5 (a) as it is.

6 CHAIRMAN BABCOCK: Okay. Do you
7 accept that?

8 PROFESSOR BILL DORSANEO: I accept
9 that (a) is a different matter.

10 CHAIRMAN BABCOCK: So we're going to
11 leave (a) alone; and (b) we're going to change
12 the language, Judge Cayce's language we just
13 voted on to say "unless the party making such
14 motion demonstrates that the motion was not
15 frivolous."

16 HONORABLE DAVID CAYCE: Second.

17 CHAIRMAN BABCOCK: Okay. All
18 right. All in favor of that raise your
19 hands. All opposed? It carries by a vote of
20 20 to 5, so we'll make that change.

21 All right. Now moving right along, Sarah
22 has proposed language for (e)(2) which you-all
23 should have. It's in her beautiful
24 handwriting. Do you want to tell us what you
25 have done, Sarah?

1 HONORABLE SARAH B. DUNCAN: As I
2 said to someone earlier, "I don't care" if the
3 decision of the Committee is to say that
4 grounds not brought more than 10 days before
5 trial are waived just for purposes of that
6 setting or are waived forever. Actually I do
7 care. But assuming, as I think was said, it
8 was the intent of the provision that a ground
9 not contained in a motion to recuse filed more
10 than 10 days before trial be waived only for
11 purposes of that setting, I think we need to
12 be more clear about that intent and be more
13 clear. I still don't even understand the
14 concept of waiving a motion. To me you can
15 only waive grounds. You can't waive a
16 motion.

17 But what we're trying to say I think is
18 that we will only consider grounds that meet
19 the criteria in (e)(2) if they're contained in
20 a motion filed within 10 days of trial. So
21 that's what I've tried to say.

22 CHAIRMAN BABCOCK: Did you
23 intentionally exclude "or other hearing"?

24 HONORABLE SARAH B. DUNCAN: No.

25 CHAIRMAN BABCOCK: "10 days of trial

1 or other hearing," correct?

2 HONORABLE SARAH B. DUNCAN: Right.

3 CHAIRMAN BABCOCK: Okay. So the
4 first sentence from (e)(2) is not changed; but
5 the second sentence --

6 HONORABLE SARAH B. DUNCAN: Actually
7 the first sentence is changed.

8 CHAIRMAN BABCOCK: It is?

9 HONORABLE SARAH B. DUNCAN: It's
10 changed to include motions to recuse.

11 CHAIRMAN BABCOCK: Oh, sorry. I
12 see. Okay. So "A motion to disqualify or
13 recuse may be filed at any time. However, if
14 a motion to recuse is filed within 10 days of
15 trial or other hearing, the only grounds that
16 will be considered are grounds that meet at
17 least one of the following criteria: (a),
18 (b), (c), (d)." And then would you delete the
19 final sentence in (e)(2), Sarah? I would
20 think not; but I'm not sure.

21 HONORABLE SARAH B. DUNCAN: No, I
22 would not.

23 CHAIRMAN BABCOCK: Okay. So now
24 we're clear on the changes that are proposed.
25 Everybody clear on that? Judge Cayce.

1 HONORABLE JOHN CAYCE: I agree in
2 theory with what Sarah has said. I just
3 wonder though if by providing that a motion to
4 recuse may be filed at any time are we
5 inviting the kind of abuse that we've been
6 talking about most of the morning which is the
7 successive filing of motions to interfere with
8 the progress of a trial? And I realize it's
9 addressed in these other provisions; but if we
10 say you can file a motion at any time to
11 recuse, then we're asking parties to do just
12 what --

13 CHAIRMAN BABCOCK: Yes. You're
14 giving with one hand, and you're sort of
15 taking away with one.

16 HONORABLE SARAH B. DUNCAN: Well,
17 we're saying you can file the motion at any
18 time. To that extent, yes, we're inviting
19 motions to recuse; but then we're saying it's
20 not going to delay the proceeding, one; and
21 two, the only grounds we will consider are
22 grounds that meet one of these criteria, which
23 I think is what we were trying to say in the
24 language that we've now got.

25 CHAIRMAN BABCOCK: Richard.

1 that we put over in (4) (b), now (4) (b); but I
2 think I don't think it should be mandatory
3 sanctions unless it's filed against the same
4 judge.

5 CHAIRMAN BABCOCK: What does
6 everybody think about that? John, what do you
7 think?

8 MR. MARTIN: If we're going to say
9 the same judge, I think it ought to have the
10 word "same" in there, because I think it's
11 going to be interpreted two different ways.
12 Personally I think it just ought to be three
13 motions that are denied.

14 CHAIRMAN BABCOCK: You don't think
15 it should be the same judge?

16 MR. MARTIN: No.

17 CHAIRMAN BABCOCK: You think it
18 should be --

19 MR. MARTIN: Right.

20 CHAIRMAN BABCOCK: So you're with
21 Senator Harris on this.

22 MR. MARTIN: Well, I wouldn't put it
23 that way. Our opinions on this topic just
24 happen to coincide.

25 CHAIRMAN BABCOCK: All right. There

1 we go. Okay. What else? Buddy.

2 MR. LOW: That would be accomplished
3 by just striking out "against the judge" the
4 motion filed in the case under this rule.

5 CHAIRMAN BABCOCK: By the same
6 parties?

7 MR. LOW: Yes.

8 CHAIRMAN BABCOCK: That's great.
9 Bill, how do you feel about that?

10 MR. EDWARDS: I think if I were
11 caught with three, I wouldn't like it very
12 much; but I think the chances of getting
13 caught with three denials in the same case is
14 pretty slim.

15 CHAIRMAN BABCOCK: Skip.

16 MR. WATSON: I just move we take out
17 "against a judge."

18 MR. LOW: I second that.

19 MR. WATSON: And see how we feel
20 about it.

21 CHAIRMAN BABCOCK: Elaine.

22 PROFESSOR CARLSON: I agree with
23 Luke. I think if you've got mandatory
24 sanctions, you really should -- you should be
25 able to show the abuse.

1 COURT REPORTER: You should be able
2 to show?

3 PROFESSOR CARLSON: You abused the
4 system.

5
6 MR. YELENOSKY: This includes those
7 vertical motions too now. Right? Because we
8 started talking about them without
9 distinguishing. So if, Luke, as you said to
10 me at lunch, you want to get to Chief Justice
11 Phillips, aren't you mandatorily setting
12 yourself up for sanctions because you've got
13 three motions in the same case?

14 CHAIRMAN BABCOCK: Well, and but
15 maybe you should, I mean.

16 MR. YELENOSKY: Well, I know. Do we
17 mean that? That's all I'm saying.

18 CHAIRMAN BABCOCK: Yes. Well, I
19 think if we take out "against a judge," yes,
20 that would catch the vertical sanctions
21 motions as well. Anybody else? Yes, Buddy.

22 MR. LOW: But this means you have to
23 have lost three times.

24 CHAIRMAN BABCOCK: Right.

25 MR. LOW: Denial. Not what Luke is

1 talking about where you win one and you win
2 one. It doesn't say you just filed three. It
3 says upon denial. And even in baseball you're
4 out after that.

5 CHAIRMAN BABCOCK: Especially in
6 baseball you're out after that.

7 MR. EDWARDS: I did have one case
8 where the motion to recuse was against the
9 entire Court of Appeals, which would be six
10 judges. What happens there?

11 CHAIRMAN BABCOCK: Well, that's just
12 one motion.

13 MR. EDWARDS: It's one motion. But
14 if you have "judge" in there, it's six
15 judges.

16 CHAIRMAN BABCOCK: Yes. Okay.
17 Justice Hecht, here you go. Now that you've
18 waded into the thicket of this, we're talking
19 about (11)(b) and whether or not we should
20 strike the phrase "against a judge."

21 So the debate, and there seems to be some
22 split on it, is some people think that we
23 should take out "against a judge" and just
24 have mandatory sanctions if you have taken
25 three motions, they've all been denied, and

1 upon the denial of the third one you get
2 sanctioned just automatically.

3 Others say "Well, but what if they're
4 real close cases, and you're in good faith,
5 and you're not a bad person? Should you
6 really get sanctioned upon that third denial?"
7 And so that would militate in favor of leaving
8 it "against a judge," which would mean we
9 would say denial of three or more motions
10 filed against the same judge.

11 Senator Harris I think thought that it
12 was not the intent of this statute to make it
13 against the same judge. He meant to have it
14 just three or more motions. Now Senator
15 Harris' statute or the legislature's statute
16 does not make a distinction about between
17 whether it's granted or denied; and I think we
18 unanimously think that is a problem, because
19 you wouldn't want somebody winning two and
20 then losing a third and getting sanctioned;
21 but now subparagraph (b) says "upon the denial
22 of three other motions filed in a case." Do
23 we leave "against a judge" in or take it out?

24 JUSTICE NATHAN HECHT: Well, are you
25 going to do what I say?

1 CHAIRMAN BABCOCK: Whatever you say
2 I'm sure this group is going to raise their
3 hands.

4 JUSTICE NATHAN HECHT: I'm for
5 taking it out; but that's just me. I think
6 that's closer to what Senator Harris had in
7 mind.

8 CHAIRMAN BABCOCK: Yes. That's for
9 sure.

10 JUSTICE NATHAN HECHT: But I don't
11 speak for the Court on that. That is just my
12 view.

13 MR. SOULES: One last try. In most
14 of the venues it's going to be against the
15 same judge. That takes care of itself. But
16 where we've got random assignment dockets
17 there is a risk to litigants if you don't say
18 "the same judge." And it may be just a few
19 places in the state; but for the most part
20 throughout the state if you put "the same
21 judge" in there, it doesn't change the
22 practice at all. And I think for those of us
23 who practice in randomly assigned venues it's
24 protective of the parties and protective of
25 the system of justice to have it this way.

1 CHAIRMAN BABCOCK: Luke is there a
2 circumstance that you can think of in Bexar
3 County where there would be three judges who
4 ought to be disqualified or recused in a case
5 that either don't do it themselves or are not
6 recused by a higher authority?

7 MR. SOULES: Probably in Bexar
8 County you would get voluntarily recusal. You
9 probably wouldn't have to fight.

10 JUSTICE NATHAN HECHT: I guess part
11 of my reaction is when are you ever going to
12 lose three motions to recuse? I'm kind of
13 like Scott McCown. I just can't imagine it
14 happening; but it may be so far removed from
15 the practice it's not realistic.

16 MR. SOULES: You could have a case,
17 and I don't -- this is not a reflection on our
18 Bexar County judges, because I think we have
19 great judges; but you can have a case that is
20 so inflammatory that you keep fighting your
21 local judges until you can get somebody from
22 out of the county to come in and try the
23 case. You just don't believe any judge in
24 that county can be fair in those
25 circumstances.

1 MR. CHAPMAN: Or you could have a
2 party that in a particular county or
3 jurisdiction is just disfavored, and you don't
4 have -- your intent is not to delay the trial,
5 because remember, we started this whole
6 discussion with the problem being that the
7 trial is being delayed. It was a dilatory
8 practice.

9 CHAIRMAN BABCOCK: Right.

10 MR. CHAPMAN: But rather there is a
11 legitimate concern with regard to the issue of
12 fairness. And I think that it's sufficient to
13 say that you can't delay the trial; and we've
14 dealt with that. And I think it goes beyond
15 what is really required to make it mandatorily
16 sanctioned simply because you have lost three
17 motions. Your motions may be very close, or
18 you may have, as I've said, a party who is
19 just disfavored in the county.

20 CHAIRMAN BABCOCK: Or favored.

21 MR. CHAPMAN: Or favored. And
22 you're attempting to oppose that.

23 MR. SOULES: This only deals with
24 mandatory sanctions. It's not dealing with
25 any other issue.

1 MR. CHAPMAN: Yes. And I think the
2 problem I'm having is that the sanctions are
3 mandatory regardless of the merits of the
4 motions.

5 HONORABLE SARAH DUNCAN: Right.

6 MR. CHAPMAN: And that strikes me as
7 inequitable.

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: I
10 completely agree. I think to say that
11 mandatory sanctions based merely upon the
12 number of motions filed there's no hint of due
13 process in an equity sense in that.

14 I would also point out that in the
15 counties that have central dockets we're not
16 just talking about the judge assigned to try
17 the case. We're talking about all of the
18 judges who were assigned to hear all of the
19 matters in that case. We're talking about all
20 the pretrial motions. And I can conceive of a
21 situation in Bexar County where you would have
22 three recusal motions that you lost each of
23 which was just almost good and each was
24 directed to a judge assigned to hear a
25 particular pretrial matter. And I have great

1 concerns with mandatory sanctions without
2 regard to the merit of the motion.

3 CHAIRMAN BABCOCK: Carl.

4 MR. HAMILTON: I think the problem
5 is we disagree with the statute because it
6 imposes harsh penalties on some instances
7 where it ought not to be imposed. I think
8 that one solution is to delete (b) entirely
9 and not try to have a sanction. Let the
10 statute stand on its own, and let the Supreme
11 Court interpret it as to whether it's good,
12 bad or indifferent, because we've taken care
13 of it by the interim proceeding in effect.

14 The statute says we're going to punish
15 you if you do it three times. We're saying
16 we're not going to punish you. We're just
17 going to let the interim proceeding go
18 forward, so you can't stop the proceedings by
19 doing it and then let the sanctions take care
20 of themselves with the statute.

21 CHAIRMAN BABCOCK: Carl, the only
22 thing though is that the statute is worse than
23 this, because the statute punishes you whether
24 you win or lose the first two. So do you
25 really want to kind of punt the issue and

1 allow that situation to be out there to -- you
2 know, and maybe an appellate court will turn
3 that around and say the legislature can't do
4 that, or maybe not. But to let that situation
5 exist when we have the opportunity to fix it.

6 MR. HAMILTON: To fix it, though, we
7 have to go contrary to the statute.

8 CHAIRMAN BABCOCK: Well, yes. We've
9 got to do something. Maybe not contrary to
10 the statute; but we've got to do something.

11 MR. CHAPMAN: But if we come up with
12 a fix, then the statute may be withdrawn.

13 MR. SOULES: That's right.

14 CHAIRMAN BABCOCK: That's the
15 point.

16 MR. CHAPMAN: And so that's why,
17 Carl, you ought to do something that is
18 equitable and so that it replaces the statute
19 which is clearly in my view inequitable.

20 CHAIRMAN BABCOCK: That's the point.

21 MR. SOULES: Sarah's due process
22 point just on the sheer number of filings,
23 that if we are to the third motion against the
24 same judge, we've had some opportunity
25 already; and that doesn't bother me as much as

1 I've got a new face, and I have got a big
2 problem, and I the lawyer or somebody is going
3 to getting sanctioned if I lose this; but I
4 can't represent my client if I don't file this
5 motion, so I just have to take the risk.

6 MR. CHAPMAN: And, you know, we all
7 tend to think about this in our home county;
8 but think about the lawyer who is out of his
9 or her home county, and you're trying it
10 somewhere else where you don't know, you don't
11 have those relationships, and you really do
12 need to protect your client. And I worry
13 about that.

14 JUSTICE NATHAN HECHT: I mean, part
15 of this is an effort to discuss with Senator
16 Harris whether his purposes and the
17 legislature's as he understands them wouldn't
18 be better served by a change from the statute
19 that he proposed and got enacted. So in that
20 regard perhaps the Committee wants to just
21 suggest to him several options, one of which
22 would be to take that out, or another might be
23 to change it from "must" to "should" or some
24 lesser term, or another might be "should"
25 taking into consideration the grounds for the

1 motions that have been made or something
2 to -- I don't think it's productive unless he
3 just happens to agree with us to tell him we
4 don't think that's a good idea. We can
5 explain it to him; but maybe we have some
6 middle ground we can agree on.

7 MR. GILSTRAP: I think the closer we
8 come to the statute, the more chance we have
9 of getting it withdrawn. That's certainly the
10 sense I have.

11 CHAIRMAN BABCOCK: I agree.

12 HONORABLE SARAH B. DUNCAN: I would
13 also just post for your consideration if
14 you're substitute counsel, and there have been
15 previously filed in the case two really bad
16 motions, and you come in with one that you in
17 good faith believe should be granted, but it's
18 denied and you get sanctioned.

19 MR. SOULES: You put at risk your
20 board certification and your federal
21 credentialing where you have to report
22 sanctions even if it's a dollar and a slap on
23 the hand. The problem is the mandatory
24 sanctioning feature of this.

25 CHAIRMAN BABCOCK: Stephen.

1 MR. YELENOSKY: Just a couple of
2 things. I understood from Judge McCoy and
3 Judge Harris that there was an opportunity to
4 talk to Senator Harris, as Justice Hecht also
5 suggested. And if there is, then perhaps we
6 can clarify what they said, or we can confirm
7 what they suggested, that he was more
8 interested in preventing the delay of cases
9 than imposing sanctions, in which case perhaps
10 he isn't opposed to dealing with it as we
11 proposed here without having a mandatory
12 sanctioning provision.

13 But if he is insistent on a mandatory
14 sanction provision of the type that is the
15 proposed legislation where three motions and
16 the third one denied and even if you won the
17 other two imposes mandatory sanctions, I would
18 not agree with Frank that we should try to
19 approximate that, and because what we're doing
20 then, if the Supreme Court takes our advice,
21 is putting in place something that maybe would
22 not be passed legislatively. At least it
23 would have to go through a legislative process
24 and be subject to people saying "This isn't a
25 good idea. Perhaps it violates due process."

1 And we on the fear that that's going to pass
2 would be suggesting to the Supreme Court
3 through its power it put it in place; and I
4 just I don't think we should operate that
5 way.

6 CHAIRMAN BABCOCK: I think we ought
7 to try to get a sense of the Committee as to
8 what we want to do and on these various
9 options. I think Justice Hecht has got a
10 great idea that maybe (11)(b) should be in
11 play to a certain degree with Senator Harris
12 just to see what his views are; but I think it
13 would helpful to see what our Committee's
14 views are. Bill.

15 MR. EDWARDS: I have not been able
16 to put my finger on what Senator Harris'
17 objective really is. I've heard a lot of
18 suggestions. But does anybody really know
19 what he's trying to do? Because if you know
20 what he's really trying to do, it makes our
21 job easier.

22 CHAIRMAN BABCOCK: I think, and
23 Frank, supplement what I say; but I think he
24 was reacting as it turns out to the situation
25 that he had experienced somewhat himself, but

1 more importantly that Judge McCoy and Judge
2 Harris from Tarrant County had suffered with
3 this case where a lawyer facing disbarment was
4 engaging in multiple recusal motions and
5 thereby stringing the proceeding out
6 ad infinitum; and he wanted that stopped, and
7 he wanted that person sanctioned for doing
8 that.

9 MR. EDWARDS: Isn't the elimination
10 of the delay, doesn't that really do what he's
11 wanting done, and then the sanctions can be,
12 you know, permissive, but not mandatory?

13 CHAIRMAN BABCOCK: Mandatory, yes.
14 Buddy.

15 MR. LOW: You've got to assume that
16 Senator Harris can read what he has written;
17 and he did put in there sanctions. He didn't
18 stop with just saying, you know, I'm trying to
19 keep delay. He wanted more teeth in it; and
20 that is more teeth. Now whether he really
21 would be satisfied with fewer is a question we
22 don't know; but we have to assume that he
23 knows what he drew meant sanctions, and he
24 wanted to do that. So what Justice Hecht said
25 is right, that most of us here probably don't

1 favor mandatory sanctions; but if he's really
2 serious about not just delay, but sanctions,
3 then we need to come up with something that
4 will satisfy him and not just tell him we're
5 not going to do it.

6 CHAIRMAN BABCOCK: This is just an
7 idea. But what if we took out the phrase
8 "against the judge" and in the third line
9 where it says "shall enter an order" we insert
10 the word "should" instead of "shall"?
11 Stephen.

12 MR. YELENOSKY: Well, also just what
13 about suggesting that, and as Luke pointed out
14 earlier, you can impose sanctions permissively
15 even prior to any number of motions being
16 filed. So why aren't we presenting our
17 suggestion as one in which sanctions are
18 available even at an earlier date, and
19 certainly are available at three, but we just
20 don't want to make them mandatory?

21 CHAIRMAN BABCOCK: We've got that in
22 (a) under certain conditions.

23 MR. YELENOSKY: Right. All I'm
24 saying is that if in fact, and I don't think
25 any of us know, but the suggestion is that,

1 well, maybe he really is interested in
2 sanctions. If he's not, apparently there's
3 not a problem. If he is, it isn't clear that
4 he's necessarily interested in having them
5 mandatory. And we have a provision for
6 sanctions, or we could go with one I think by
7 consensus if it's not mandatory.

8 CHAIRMAN BABCOCK: Nina.

9 MS. CORTELL: Is there a way to put
10 a concept in here that if you could file
11 multiple motions, that there is a presumption
12 that arises, something like that, and then it
13 could interplay with (a) in that way? I think
14 what we're all struggling with is this notion
15 of three times and you're out even if there
16 was something reasonable. But if you create a
17 presumption at three, would that get you
18 there?

19 CHAIRMAN BABCOCK: Maybe so. Sarah.

20 HONORABLE SARAH B. DUNCAN: I guess
21 I would have an alternative suggestion to
22 yours, Chip. I would simply change (a) to
23 "must." I don't care if it's the third
24 motion or the sixth motion or the first
25 motion. If someone files a motion to recuse

1 for purposes of delay without sufficient
2 cause, I think it ought to be a mandatory
3 sanction; but there you're tying the sanction
4 to the abuse of the recusal process.

5 CHAIRMAN BABCOCK: What if you put
6 "must" in (a) and had a comment, or even put
7 it in (a) and say "denial of three or more
8 motions raises a presumption" of bad manners
9 or something like that?

10 HONORABLE SARAH B. DUNCAN:
11 Rebuttable presumption, that would be fine.

12 CHAIRMAN BABCOCK: Judge Brister.

13 HONORABLE SCOTT A. BRISTER: Are we
14 talking about the sanctions rule or the
15 interim proceedings right now?

16 CHAIRMAN BABCOCK: Sanctions.

17 MR. SOULES: (e)(11).

18 HONORABLE SCOTT A. BRISTER: And the
19 question is whether we should drop this?

20 CHAIRMAN BABCOCK: What we've
21 started moving toward now, Scott, is that if
22 in (a) we would change "may" to "must," and we
23 would add a sentence that says "denial of
24 three or more motions filed in a case under
25 this rule by the same party raises as

1 rebuttable presumption, that the motion is in
2 violation of this subsection" and drop (b).

3 HONORABLE JOHN CAYCE: Rebuttable
4 presumption, what type of proof would be
5 necessary?

6 CHAIRMAN BABCOCK: Well, that "Hey,
7 it's a close call each time," you know, and/or
8 "Look, I'm new to this case. You know, the
9 lawyer that filed a couple of bad ones before,
10 I don't know; but this one is really, even
11 though I lost, is solid."

12 MR. CHAPMAN: But we should go on to
13 say that the rebuttable presumption is that of
14 abuse. That's what the judge is asking.

15 CHAIRMAN BABCOCK: Right.

16 MR. CHAPMAN: What is the standard?
17 And what we're looking for is whether or not
18 there is abuse.

19 CHAIRMAN BABCOCK: Right. And the
20 rebuttable presumption would be tied back into
21 subsection (a) which is for purposes of delay
22 and without sufficient cause. Yes. Judge
23 Brister.

24 HONORABLE SCOTT A. BRISTER: I don't
25 necessarily oppose that; but I mean, my

1 understanding was the reason the legislature
2 did what they did several years ago on
3 frivolous pleadings and stuff like that is
4 because they did not want to leave judges with
5 discretion about sanctions because they
6 thought judges who are elected tended not to
7 want to sanction lawyers because it makes them
8 mad. And the legislature's message "We don't
9 care whether it makes them mad. We want to
10 sanction them because it's expensive when
11 people do this." And I don't really have a
12 problem with that.

13 Remember, what you could do after the
14 second time if you want to avoid this is go
15 ahead and try the case and appeal. Let's
16 remember. I don't see any due process
17 question in this at all. All you have to do
18 is look at the federal court. And what stops
19 when you file a motion of recusal in the
20 federal court? Nothing. Absolutely nothing.
21 The judge who is involved says "denied" and
22 you keep right on going, and nobody says
23 that's a violation of the way the world is
24 created or the Constitution or anything else.
25 But if that judge is wrong and should have

1 recused, you go through the trial and you
2 appeal, and the appeals court says "We're not
3 doing it. You should have recused. You
4 should have gotten out of the case."

5 So it seems to me the first person who
6 files it the third time an argument can be
7 made is asking for trouble. If they really
8 have good grounds, we file this twice, we
9 knocked them down twice. And we're telling
10 you we'd like to try this case, and you may
11 change and win on appeal; but that's not too
12 much to ask to say "If you want to do it a
13 third time, you better be right this time or
14 you are paying because."

15 CHAIRMAN BABCOCK: Yes. I think
16 Sarah's point on due process though was that
17 you're sanctioning somebody in a mandatory
18 fashion tied not to abuse of conduct, but just
19 the fact that they filed three motions.

20 HONORABLE SCOTT A. BRISTER: Right.
21 And you could write the rule another way to
22 say no more than two motions may be filed
23 period, and your ground after that is you
24 appeal saying they shouldn't have denied my
25 motion to recuse.

1 CHAIRMAN BABCOCK: And that may be
2 okay in Harris County. But in Bexar County
3 that's a disaster, I mean, if you only have
4 two shots.

5 HONORABLE SCOTT A. BRISTER: Well,
6 yes, if you don't tie it to the same judge.

7 CHAIRMAN BABCOCK: Buddy.

8 MR. LOW: One of problems, it was
9 suggested in (a) that we make it mandatory if
10 the motion was brought for purposes of delay.
11 And generally when you get into delay they say
12 the main purpose. I mean, you know, "Put me
13 on the stand; and I think I've got a good
14 motion." They say "Well, didn't you really
15 want some delay?" "Well, yes, I did want some
16 delay." A purpose. I mean is it just any
17 purpose? Is it a main? I think if you just
18 put "for purpose of delay" and leave it there,
19 I think you're opening up a can of worms.

20 CHAIRMAN BABCOCK: Well, it goes on
21 to say "and without sufficient cause."

22 MR. LOW: Well, but any motion
23 that -- okay.

24 CHAIRMAN BABCOCK: Richard.

25 MR. ORSINGER: I think we need to

1 consider that if a motion is filed within 10
2 days and it doesn't slow anything down, than
3 an argument could be made that it couldn't
4 have been filed for purposes of delay; and I
5 don't want to eliminate the possibility we
6 could sanction someone for filing a malicious
7 or frivolous motion just because they filed it
8 nine days before trial.

9 MR. YELENOSKY: Or if it's the
10 fourth or fifth motion, it's interim
11 proceeding, so it couldn't be for purposes of
12 delay either.

13 MR. ORSINGER: I think we have to be
14 careful if the only sanction is upon a finding
15 of purpose of delay, because we have now made
16 it to where many of them will not delay, and
17 they're still going to be frivolous, some of
18 them.

19 CHAIRMAN BABCOCK: Yes, Frank.

20 MR. GILSTRAP: We were, everybody
21 seemed okay with (b) until we raised the
22 problem of random assignments. Would it be
23 possible to carve random assignment counties
24 out of (b)?

25 MR. SOULES: It's okay with me.

1 that time. You don't put that motion on an
2 interim proceeding. You then go ahead and
3 hear it later. The only time you have a need
4 for an interim proceeding is when you're in
5 trial.

6 MR. HAMILTON: Well, but if you go
7 ahead with that motion, that is an interim
8 proceeding.

9 MR. GILSTRAP: I don't understand.

10 MR. HAMILTON: If you have a
11 discovery pending, a motion to recuse is filed
12 five days before, if the judge goes ahead with
13 that discovery motion, that is an interim
14 proceeding.

15 CHAIRMAN BABCOCK: No. I don't
16 think that's right.

17 PROFESSOR CARLSON: What about
18 summary judgment?

19 CHAIRMAN BABCOCK: That's why we put
20 "conventional trial" in there.

21 PROFESSOR CARLSON: I know.

22 CHAIRMAN BABCOCK: But this
23 subparagraph (2) only says "Any motion filed
24 after the tenth day prior to the date the case
25 is set for trial or other hearing is governed

1 by subparagraph (e)(4)." But (e)(4)(b) says
2 when the motion to recuse or disqualify is
3 filed after the tenth day prior to the date
4 that the case is set for conventional trial on
5 the merits you can go forward, so it's not
6 picking up a normal, old discovery hearing.
7 Right?

8 MR. HAMILTON: Right. That's what
9 I'm saying. But we're not providing for that
10 in here. We don't say what happens. If you
11 file it five days before a discovery hearing,
12 I suppose the way this is worded that hearing
13 cannot go forward. That's canceled. And
14 maybe that's the way it is supposed to be,
15 because that can be re-set. So that
16 automatically knocked it off. The only thing
17 that it doesn't knock off is the conventional
18 trial.

19 CHAIRMAN BABCOCK: I think we did
20 that deliberately, didn't we?

21 MR. HAMILTON: We did. Yes.

22 CHAIRMAN BABCOCK: Okay. Are you
23 saying do you want to revisit that? Is that
24 what you're saying?

25 MR. HAMILTON: No. No. No. I'm

1 just saying, questioning whether these are
2 consistent or whether we need more explanation
3 as to whether or not the hearing on the
4 discovery motion goes forward or doesn't.
5 Maybe it's clear. I don't know.

6 PROFESSOR BILL DORSANEO: Mr.
7 Chairman.

8 CHAIRMAN BABCOCK: Yes, Bill.

9 PROFESSOR BILL DORSANEO: Maybe Carl
10 is talking about the same thing here. I'm
11 trying to concentrate and focus. But I think
12 the last sentence in (e), the last
13 unenumerated sentence in (e)(2) is something
14 that needs to be changed.

15 CHAIRMAN BABCOCK: Okay. The last
16 sentence in the paragraph?

17 PROFESSOR BILL DORSANEO: Yes.

18 CHAIRMAN BABCOCK: Okay.

19 PROFESSOR BILL DORSANEO: I think a
20 number of changes are necessary.

21 PROFESSOR BILL DORSANEO: But it's
22 at least too cryptic when it doesn't refer to
23 more than subparagraph (e)(4), because it's
24 pretty clear this would also at least be
25 governed by (e)(3), but that if it's late,

1 that it's still going to be processed. And
2 then the question is when it's or while it's
3 being processed what else can happen? And to
4 say it's governed by (e)(4) is not all that
5 helpful to me either because it's very hard
6 for me to see the relationship between (e)(4)
7 and (e)(2), not to mention the absence of any
8 reference to (e)(3).

9 CHAIRMAN BABCOCK: Yes.

10 PROFESSOR BILL DORSANEO: Maybe
11 somebody could write just a sentence to
12 replace the sentence I've identified as the
13 one that gives me trouble and kind of spell
14 that out without trying to do it by some sort
15 of a cross-reference which normally creates
16 more puzzlement than enlightenment; but that
17 needs more work.

18 CHAIRMAN BABCOCK: Yes.

19 MR. HAMILTON: I think the fix is on
20 that sentence, "Any motion filed after the
21 tenth day prior to the date the case is set
22 for conventional trial" and strike "or other
23 hearing" --

24 MR. GILSTRAP: Yes.

25 MR. HAMILTON: -- "is governed by

1 (e) (4) ."

2 CHAIRMAN BABCOCK: Uh-huh (yes).

3 MR. HAMILTON: Because that
4 eliminates the other hearing, which is where
5 the confusion arises.

6 MR. GILSTRAP: I think that works.

7 PROFESSOR BILL DORSANEO: But
8 doesn't that assume that you can't re-file the
9 motion within, you know, a period of time
10 greater than 10 days before the subsequent
11 trial? It assumes that I need to get this
12 motion ruled on rather than, you know, filing
13 one that is not subject to some sort of
14 tardiness complaint, which may have been what
15 was in the mind of the person doing all of
16 this subsequent engineering.

17 CHAIRMAN BABCOCK: So how do you fix
18 that?

19 MR. HAMILTON: I don't think that
20 assumes you can't file a motion unless those
21 grounds have been waived because you didn't do
22 it when you knew about it.

23 PROFESSOR BILL DORSANEO: Let me try
24 to say this another way. Maybe we're just
25 talking over each other. I don't need to

1 worry about this late motion if the only
2 adverse effect is that I'm getting a ruling on
3 some preliminary matter that I would prefer
4 some other judge to make if I can go ahead and
5 move to recuse on all of my grounds and get
6 that, you know, back on track.

7 This engineering, you know, has this
8 motion that is tardy penned. I don't need to
9 worry about this motion anymore if I can file
10 another one.

11 MR. HAMILTON: No. That's not
12 right, Bill.

13 PROFESSOR BILL DORSANEO: Okay.

14 MR. HAMILTON: The motion that is
15 tardy is filed. If it's filed five days
16 before a hearing, it stops the hearing and it
17 goes through the normal channels.

18 MR. SOULES: What's the consequence
19 of just taking out the sentence?

20 MR. HAMILTON: If filed five days
21 before a conventional trial, it doesn't stop
22 the trial, and it goes into the interim
23 proceeding.

24 MR. SOULES: Right now we say it
25 does stop something.

1 CHAIRMAN BABCOCK: Yes. And, Bill,
2 if you limit this last sentence to
3 "conventional trial" even though you pick up
4 (4) (b), that may suggest that you're not
5 giving effect to the introductory photograph
6 (4) which say everything stopped except for
7 good cause stated in the order in which the
8 action was taken.

9 HONORABLE SCOTT A. BRISTER: The
10 whole problem we're addressing here is just
11 with "hearing." Right?

12 CHAIRMAN BABCOCK: Yes.

13 HONORABLE SCOTT A. BRISTER: Does
14 everybody still feel strongly that we can't
15 bump this hearing until this recusal is done?
16 If you just remove "or other hearing" from
17 both of these, then you don't have this, you
18 know, what happens to one that was too late,
19 but can it be resurrected? Does everybody
20 still feel? I never did feel strongly that it
21 was any big deal to bump any other hearing,
22 get the recusal done, and come back and do
23 that hearing.

24 CHAIRMAN BABCOCK: Yes. That's what
25 I think. But what about in following up on

1 that, Judge Brister, what about Luke's point?
2 Why don't you even need that sentence?

3 HONORABLE SARAH B. DUNCAN: You
4 don't.

5 MR. SOULES: Take it out.

6 CHAIRMAN BABCOCK: Take it out. And
7 then you've got a pretty clean subparagraph
8 (2) if you take out the last sentence. So
9 I'll amend my motion to include deletion of
10 the last sentence.

11 HONORABLE SCOTT A. BRISTER: The
12 question will still be if we drop that
13 sentence, then what happens to the motion
14 filed six days before a special exceptions
15 hearing?

16 CHAIRMAN BABCOCK: It stops the
17 hearing. It stops the hearing.

18 HONORABLE SCOTT A. BRISTER: I think
19 we need to make that clear, because it says we
20 either -- it can't be considered or it can't
21 be filed.

22 CHAIRMAN BABCOCK: Well, it says --
23 (4) says "After referring the motion to the
24 presiding judge or the administrative region
25 the judge in whose case the motion is filed

1 must take no further action in the case until
2 the motion is disposed of except for good
3 cause stated in the order in which the action
4 is taken. However," and then we have two
5 interim proceeding sections.

6 HONORABLE SCOTT A. BRISTER: But
7 there are at least one or two cases that say
8 right now under the current Rule which is just
9 you can't file it within 10 days. If you do
10 file it, everybody can ignore it. It does not
11 get referred.

12 HONORABLE SARAH B. DUNCAN: Isn't
13 that -- maybe that's the point that was the
14 intent behind (e)(2) is that you have to file
15 by the tenth day. If you don't file by the
16 tenth day, it will be and can be and will be
17 ignored unless you allege one of these things
18 in which case it will go through the referral
19 process and stop the proceedings.

20 MR. CHAPMAN: But only stop trial
21 and not stop hearings?

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE SARAH B. DUNCAN: No.

24 Stop --

25 CHAIRMAN BABCOCK: Stop hearings,

1 but not trials.

2 MR. CHAPMAN: Yes. Stop hearings.

3 HONORABLE SARAH B. DUNCAN: Because
4 under the interim proceedings you can go
5 forward with the trial.

6 CHAIRMAN BABCOCK: Maybe you say
7 then "A motion to recuse must be filed at
8 least 10 days prior to any trial or other
9 hearing except in the following instances
10 which must be asserted in the motion or
11 alleged in the motion:" You don't like that,
12 Sarah?

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

15 CHAIRMAN BABCOCK: Okay. I'll
16 withdraw it then.

17 HONORABLE SARAH B. DUNCAN: Because
18 you're getting back into the problem of if a
19 motion alleged one of these, it's going to
20 have to go through the referral process and
21 we're going to have to hear all of it. What
22 we're really talking about is the only grounds
23 we're going to here that are going to stop a
24 hearing are these grounds if they're filed in
25 a motion that's file within 10 days.

1 MR. SOULES: Actually in these
2 circumstances the grounds. In the
3 circumstances.

4 HONORABLE SARAH B. DUNCAN: In the
5 circumstances.

6 HONORABLE SARAH B. DUNCAN:
7 Circumstances.

8 CHAIRMAN BABCOCK: Or instances.

9 MR. SOULES: These circumstances
10 open up all grounds.

11 HONORABLE SARAH B. DUNCAN: Right.

12 MR. SOULES: If you change Time to
13 File, you essentially do what you were saying,
14 Chip, "Must be filed at least 10 days" -- I'm
15 not using artful language -- "at least 10 days
16 before the case is set for trial or other
17 hearing unless the basis for the judge who the
18 party filing or good cause is shown," then you
19 take care of the filing problem. And then...

20 CHAIRMAN BABCOCK: Judge Cayce.

21 HONORABLE JOHN CAYCE: We're trying
22 to do too much. You had a motion that would
23 have set a 10-day time period for filing
24 motions to recuse, and unless alleged or
25 asserted, these types of grounds or

1 circumstances. And we've gotten into this
2 other part. Could we just go ahead and maybe
3 get your motion voted up or down?

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE JOHN CAYCE: Because I
6 think it would be easier to fix these other
7 parts of the Rule once we get past that. Do
8 you follow?

9 CHAIRMAN BABCOCK: I do. That was
10 sort of what I was thinking.

11 MR. SOULES: Would you say your
12 words again?

13 CHAIRMAN BABCOCK: Yes. The first
14 sentence is unchanged. "A motion to
15 disqualify may be filed at any time." The
16 second sentence now reads "A motion to recuse
17 must be filed at least 10 days prior to any
18 trial or other hearing except in the following
19 instances: A motion to recuse must be filed
20 at least 10 days prior to any trial or other
21 hearing except in the following instances:"
22 Yes, Carl.

23 MR. HAMILTON: Keeping with the
24 drafting rule, I think we're still supposed to
25 say "not later than 10 days prior to the date

1 the case is set" --

2 CHAIRMAN BABCOCK: Okay.

3 MR. HAMILTON: -- rather than

4 "within 10 days."

5 HONORABLE JOHN CAYCE: Has that been
6 seconded?

7 HONORABLE PHIL HARDBERGER: I second
8 it.

9 CHAIRMAN BABCOCK: Phil seconded
10 it.

11 MR. SOULES: Question.

12 CHAIRMAN BABCOCK: Yes.

13 MR. SOULES: I just called for the
14 question.

15 CHAIRMAN BABCOCK: All right.
16 Everybody in favor of that raise your hand.
17 Everybody against? Anybody against? It
18 passes 25 to nothing.

19 MR. SOULES: I move we delete the
20 last sentence in (e)(2).

21 HONORABLE PHIL HARDBERGER: I second
22 that.

23 CHAIRMAN BABCOCK: Any discussion?

24 PROFESSOR BILL DORSANEO:

25 Discussion. We need to know, or at least I

1 need to know what you have in mind, because I
2 think we need to know what happens if this
3 motion doesn't satisfy the 10-day
4 requirement. Is it referred, or is it
5 annulled? If it's referred, then we need to
6 know what effect the referral has. If it's
7 referred or otherwise acted upon, what effect
8 does the referral or other action have on the
9 trial judge's ability to proceed?

10 MR. SOULES: Okay. Then I move that
11 we add to what we just voted "otherwise the
12 motion will not be considered."

13 MR. HAMILTON: I don't think that
14 does very much, because any good lawyer is
15 going to always put something in there for
16 good cause; and so practically all of these
17 motions are going to have a good cause
18 paragraph that means it's going to have to be
19 deferred.

20 MR. SOULES: The door is open. It
21 gets referred.

22 HONORABLE SCOTT A. BRISTER: I'd
23 drop "or other hearing" from the second
24 sentence, and then you can drop that last
25 sentence. So then --

1 MR. SOULES: The second sentence of
2 what, Justice Brister?

3 HONORABLE SCOTT A. BRISTER: Drop
4 the last sentence where the same motion was
5 dropped and then drop "or other hearing" from
6 the 10-day time limit. Therefore, if you file
7 a motion within 10 days of just some discovery
8 hearing or something like that, there is no
9 time limit. You can file it the day before
10 the discovery hearing. No problem. You could
11 bounce this discovery hearing. It's referred,
12 and you get the recusal done in the normal
13 channels.

14 If it's before trial, within 10 days of
15 trial, though, then there's whether or not it
16 does this, there is no question what you do.
17 You refer it; but you go ahead with the
18 trial. Okay. You don't have this problem of
19 what if you do -- what about the one that is
20 filed less than 10 days before a hearing? Do
21 you refer it, or do you not refer it? What is
22 the point of referring it? Does it come back
23 up, or can you refile it?

24 PROFESSOR BILL DORSANEO: That makes
25 sense to me; but I think that's really a

1 slightly independent idea. We have to figure
2 out, you know, if whether or not we take out
3 the "or other hearing" business in there, we
4 need to figure out whether the motion that is
5 still covered is going to be referred or not.

6 And I think what Carl said is that the
7 only practical solution is to say that it
8 needs to be referred even if it's tardy, even
9 if it's tardy.

10 CHAIRMAN BABCOCK: That's Carl's
11 point.

12 PROFESSOR BILL DORSANEO: That's
13 Carl's point. So that needs to be in this
14 last sentence which is not in there now
15 explicitly anyway. And I would without trying
16 to put motions on top of motions on top of
17 motions suggest that the last sentence, if
18 it's retained, say that "any tardy motion,"
19 whatever that language is, "must be referred
20 or otherwise acted upon as provided in
21 subparagraph," if that's what it is, (e)(3).
22 And then after that we would have to say
23 more. After that we need to say more; but
24 that's as far as I'm able to get in working
25 through this.

1 I like Justice Brister's idea that all of
2 this engineering probably makes very little
3 sense if what we are talking about is some
4 little hearing that can be rescheduled without
5 any big deal.

6 CHAIRMAN BABCOCK: What about if we
7 kind of borrow the concept we had before which
8 would be to say that if you file a motion, if
9 you file a tardy motion, and you don't assert
10 the one or more of the four grounds?

11 HONORABLE SCOTT A. BRISTER: Who
12 decides that is the problem.

13 CHAIRMAN BABCOCK: The pleader.

14 HONORABLE SCOTT A. BRISTER: That's
15 kind of my problem with the deadline in any
16 event is the problem with the judge to be
17 recused deciding whether you got this in on
18 time or not. It's the problem with the judge
19 who is the subject of the motion deciding
20 whether you've said that in your motion or
21 not. That's why it seems to me the Rule ought
22 to be they're all referred.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE SCOTT A. BRISTER: Then
25 the second part is but if it's within 10 days

1 of trial, it doesn't matter to me whether it's
2 good or not or timely or not. Let the
3 administrative judge decide that. Meanwhile
4 get ready for trial.

5 CHAIRMAN BABCOCK: Okay. So you
6 would say, you know, even if it's on its face
7 inadequate.

8 HONORABLE SCOTT A. BRISTER: I kind
9 of disagree with the cases that say I make a
10 call about whether I think it's timely or
11 not.

12 CHAIRMAN BABCOCK: Good point.

13 HONORABLE SARAH B. DUNCAN: But you
14 could also have an interim, intermediate
15 provision. If the motion does not comply with
16 subparagraph (e)(1), the said presiding judge
17 may deny the motion without a hearing. What
18 we could also have is if you have got a
19 within-10-day motion and don't allege one of
20 the criteria in (2), --

21 HONORABLE SCOTT A. BRISTER:
22 Exactly.

23 HONORABLE SARAH B. DUNCAN: -- it's
24 denied without a hearing.

25 CHAIRMAN BABCOCK: Is that different

1 than referral?

2 HONORABLE SCOTT A. BRISTER: No.
3 It's referred.

4 HONORABLE SARAH B. DUNCAN: It's
5 still referred.

6 HONORABLE SCOTT A. BRISTER: The
7 presiding judge can't touch it until it is
8 referred.

9 HONORABLE JOHN CAYCE: If we went
10 back to Luke's suggestion just to take that
11 out all together, wouldn't we be where we're
12 trying to get?

13 CHAIRMAN BABCOCK: Yes. Actually we
14 would, because subparagraph (3) is referral;
15 and it doesn't distinguish between late filed
16 motions or not. It just says "The judge in
17 the case in which the motion is filed must
18 promptly sign an order ruling prior to taking
19 any action."

20 MR. HAMILTON: I'll second Bill's
21 motion that we change that to read "Any motion
22 filed after the tenth day prior to the date
23 the case is set for trial shall be referred,
24 shall be either granted or referred in
25 accordance with paragraph (e)(3)."

1 MR. SOULES: Can I try something
2 else here? If we start with Time to File and
3 say "A motion to disqualify or recuse may be
4 filed at any time." And I think Sarah
5 disagrees with this. But "If a motion is
6 filed within 10 days, it must allege, show,"
7 whatever, and then these four things. If it
8 doesn't, then of course, the presiding judge
9 could decide the motion is defective; but it
10 would still be referred.

11 HONORABLE SARAH B. DUNCAN: I do
12 agree with that.

13 MR. SOULES: That's okay?

14 PROFESSOR BILL DORSANEO: I really
15 think it would work if you just do the
16 referral in that last sentence, and then you
17 end up going through the interim proceeding.

18 MR. SOULES: But you refer every
19 motion, not just that particular kind.

20 CHAIRMAN BABCOCK: Any motion
21 whenever filed.

22 MR. SOULES: I'm trying to make it
23 general. You can file either motion any time;
24 but a recusal motion has to allege this extra
25 information.

1 CHAIRMAN BABCOCK: But Judge
2 Brister's point --

3 MR. SOULES: And then they all get
4 referred under (3).

5 CHAIRMAN BABCOCK: Why don't you
6 have a final sentence, Luke, that says "Any
7 motion whenever filed is referred pursuant to
8 subsection (3)"?

9 MR. SOULES: That's fine. That's
10 fine. But you probably should still say that
11 the recusal motion within 10 days has to have
12 these additional allegations.

13 PROFESSOR BILL DORSANEO: That's
14 what Chip's motion did already saying it must
15 be filed. To me it must be filed not later
16 than except under the following circumstances,
17 well, I'm going to tell somebody they need to
18 put in their motion; but those circumstances,
19 one or more of them.

20 MR. SOULES: Yes. But we're
21 changing the practice now in our debate.
22 We're saying the recusal motion can be filed
23 any time. Not -- we're not -- we no longer
24 have a 10-day rule on recusal motions. We're
25 just saying, and that's where we're headed, I

1 think, or what several people are talking
2 about. So to say the recusal motion has to be
3 filed within 10 days unless is no longer
4 correct. It can be filed at any time; but it
5 has to have these extra allegations in it, and
6 then every motion has been to be referred. If
7 you want to put it in there, that's fine with
8 me.

9 PROFESSOR BILL DORSANEO: I
10 understand that now. I like that.

11 CHAIRMAN BABCOCK: I had previously
12 suggested that we ought to say "except in the
13 following instances which must be asserted or
14 pled" or whatever you say "in the motion."
15 Sarah didn't like that when I suggested it
16 before.

17 MR. SOULES: If you're going to say
18 it can be filed at any time, and it's got to
19 be referred and all that, you get into the
20 question of a defective motion at the
21 presiding judge's level, because if it doesn't
22 have these allegations in there and it's
23 within 10 days, the presiding judge and
24 regional judge can take care of it.

25 HONORABLE SARAH B. DUNCAN: Well, we

1 would need to add that to the referral
2 provision, because now it just says if it's
3 defective under (e)(1), the judge can deny it
4 without a hearing. What we're saying is, and
5 I think this actually was our intent back when
6 we did this six months ago, if it's defective
7 under (e)(2), you can deny it without a
8 hearing.

9 HONORABLE JOHN CAYCE: But it still
10 would have to be referred to deny it.

11 HONORABLE SARAH B. DUNCAN:
12 Everything has to be referred.

13 CHAIRMAN BABCOCK: All right. So
14 here's -- we will say "Any motion whenever
15 filed must be referred pursuant to (e)(3)."
16 And then in (e)(3) we're going to say "If the
17 motion does not comply with subparagraph
18 (e)(1) or (e)(2), the said presiding judge may
19 deny the motion without a hearing." Right?

20 MR. SOULES: That gets most of it;
21 but we're still going to have to put in there
22 that a motion filed within -- a recusal motion
23 filed within 10 days must allege these
24 additional items.

25 CHAIRMAN BABCOCK: Well, I suggested

1 that, and it was not accepted.

2 PROFESSOR BILL DORSANEO: No.

3 That's fine.

4 HONORABLE JOHN CAYCE: My initial
5 had it in there.

6 HONORABLE SARAH B. DUNCAN: You said
7 it differently than Chip said it. The way
8 Chip said it it was -- he said it a different
9 way.

10 MR. SOULES: It's a different way of
11 saying the same thing. "Time to File: A
12 motion to disqualify or recuse may be filed at
13 any time. A motion to recuse filed later than
14 the tenth day prior to the date the case is
15 set for trial must allege one or more of the
16 following:"

17 HONORABLE SCOTT A. BRISTER: "Must
18 show the following:"

19 MR. SOULES: However you want to say
20 it. I don't know whether the motion shows.

21 PROFESSOR BILL DORSANEO: Actually
22 the motion states.

23 MR. SOULES: "Must state," that's a
24 good word, "must state."

25 CHAIRMAN BABCOCK: Okay. We're

1 going to take a break, Luke. Why don't you
2 write it out.

3 (Recess 3:25 to 3:45 p.m.)

4 CHAIRMAN BABCOCK: Okay. Guys,
5 let's get back to work. Okay. Let's go on
6 the record. Luke, has been hard at work at
7 the break and has language that is going to
8 probably supplant change or modify what we've
9 already voted on that, so that's fine.

10 MR. SOULES: Let me try to step
11 through this with you, and then we can go back
12 and take it point by point. Start with (e)(2)
13 which is page three of seven to say "A motion
14 to disqualify or recuse may be filed at any
15 time. A motion to recuse that is filed later
16 than the tenth day prior to the date the case
17 is set for trial must state one or more of the
18 following:" And then I just deleted "when,"
19 so that it's stating something and ends with
20 "other good cause." Then delete that last
21 sentence of (e)(2). And then proceed to
22 (e)(3) which is Referral, and we change two
23 sentences here. The first is starting in the
24 where I've drawn a rectangle around it. "If
25 the judge refuses" -- no. That's not right.

1 Skip over those words and start "the judge
2 must promptly refer every motion to disqualify
3 or recuse to the presiding judge of the
4 administrative region if the judge refuses to
5 recuse or disqualify." And then as Sarah has
6 pointed out, "If the motion does not comply
7 with subparagraph (e)(1) or (e)(2), the
8 presiding judge may deny the motion without a
9 hearing."

10 PROFESSOR BILL DORSANEO: Luke, we
11 may have already voted on that first
12 suggestion when Scott moved to change the
13 language at the beginning part, okay, in the
14 voting what you've just suggested.

15 MR. SOULES: Well, may be. I guess
16 we can vote again.

17 PROFESSOR BILL DORSANEO: Question.

18 MR. SOULES: But the idea here is
19 that either kind of motion can be filed at any
20 time. A late-filed motion to recuse has to
21 state one of these four additional things.

22 HONORABLE JOHN CAYCE: It's not
23 late- filed if it's filed within 10 days.

24 MR. SOULES: Within 10 days. Within
25 10 days, that's right. And we've made it

1 clear, I hope, that every motion has to be
2 referred if the judge refuses to recuse; and
3 then so it's clear that the presiding judge is
4 the person who decides whether the motion is
5 adequate if it had these additional
6 allegations that were filed within 10 days.
7 That's (e)(2), and that's something for the
8 presiding judge to decide.

9 And I guess just so we can get discussion
10 going, Mr. Chairman, I move those changes.

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: A couple of
13 comments. One, did you take "or other
14 hearing" out of that?

15 MR. SOULES: We took "or other
16 hearing" out, yes. I'm sorry.

17 MR. HAMILTON: I think that needs to
18 be in there.

19 MR. SOULES: I'm sorry. I missed
20 that.

21 MR. HAMILTON: Doesn't "or other
22 hearing" need to stay in there?

23 MR. EDWARDS: Different places.

24 MR. SOULES: All right. Let's go to
25 Interim Proceedings. And that's why I think

1 that can come out. The way the interim
2 proceedings Rule work against -- the way
3 (e)(4) works against (e)(2) and (e)(3) is that
4 in three instances the trial judge can proceed
5 even without good cause stated in the
6 motion -- in the order. The trial judge can
7 proceed for good cause stated in the order no
8 matter what; but without that the trial judge
9 can proceed to hearings if it's a subsequent
10 motion for one where sanctions have been
11 opposed.

12 CHAIRMAN BABCOCK: No. We changed
13 that.

14 MR. SOULES: You took that out?

15 CHAIRMAN BABCOCK: We took that
16 out.

17 MR. SOULES: All right. Oh, that's
18 right. We've got (a) and (b) when it's a
19 conventional trial on the merits or it's a
20 third or subsequent motion.

21 CHAIRMAN BABCOCK: Right.

22 MR. SOULES: Any hearing can be
23 conducted.

24 MR. HAMILTON: What you're now
25 saying is that --

1 MR. SOULES: Regardless.

2 MR. HAMILTON: -- you can put
3 anything you want in a motion filed five days
4 before a hearing. It doesn't have to comply
5 with these four. I thought that even if it
6 was before a hearing, it had to comply with
7 these four requirements if it was within 10
8 days.

9 PROFESSOR BILL DORSANEO: I think
10 you're going to put that "or other hearing"
11 back in (2) such that the way this works is
12 that the other, that hearing --

13 HONORABLE SCOTT A. BRISTER: No. It
14 doesn't work.

15 PROFESSOR BILL DORSANEO: No. It
16 doesn't work.

17 HONORABLE SCOTT A. BRISTER: If you
18 have "or other hearing" in (e)(2), but it's
19 less than five days, and you don't state,
20 because remember, if you don't state it, what
21 happens? It goes to the administrative
22 judge. The administrative judge, "This didn't
23 say the right things." Bounce it, not because
24 it's not good, but because it didn't say the
25 right things; and we're back to the problem we

1 were trying to address which was what do you
2 do with a hearing that is -- can it be
3 resurrected or not resurrected, when, and all
4 that kind of thing.

5 MR. SOULES: And you stop every
6 hearing except the conventional trial. I
7 mean, that's right.

8 MR. CHAPMAN: Luke, I thought that
9 we spent a lot of time talking about
10 circumstances where some hearings can be case
11 determinative even though they're not case
12 final, for example, a motion to transfer or a
13 motion for summary judgment or, for example, a
14 venue hearing in a very important case or a
15 significant case for your client. And I
16 thought that what we said is that there are
17 some hearings, and the run of the mill
18 discovery hearings are not those hearings; but
19 there are some hearings where the issues
20 presented for the litigants are so important
21 that you don't want to lose your opportunity
22 to complain about an inappropriate judge in
23 the case.

24 HONORABLE SCOTT A. BRISTER: And you
25 won't because you're not bouncing. Those

1 hearings are delayed. They will not be
2 disposed on a case dispositive hearing because
3 the hearing is put off until after we decide
4 recusal.

5 MR. CHAPMAN: And here's the problem
6 with that: There are some issues. For
7 example, I can think of motion to transfer,
8 that if it's not determined and determined on
9 a prompt basis, as a substantive matter as
10 well as a practical matter you've lost the
11 opportunity to get the advantage that your
12 client seeks. And the delay that then is it
13 imposed because you can't proceed with the
14 hearing is a problem; and it's a problem for
15 the litigant on a substantive basis.

16 MR. SOULES: My experience on the
17 recusal process is that it moves fast.

18 HONORABLE SCOTT A. BRISTER: It
19 can.

20 MR. SOULES: I've had six; and they
21 all moved fast. So they moved as fast as you
22 ordinarily get a venue hearing decided. All
23 of them I've been in have been over within 30
24 days.

25 MR. CHAPMAN: I just want to make

1 sure that we are affirmatively deciding to
2 eliminate hearings from this process.

3 MR. SOULES: A motion filed before a
4 hearing doesn't have to say these things in
5 order to stop the hearing. The hearing can go
6 forward unless it fits --

7 HONORABLE SCOTT A. BRISTER: No. By
8 dropping --

9 MR. SOULES: -- (b), the third or
10 substantive motion.

11 MR. HAMILTON: What we're doing is
12 we're departing from what we decided last
13 time, which was that there are many hearings
14 that parties spend lots and lots of money for
15 getting ready, bringing witnesses and so forth
16 that ought not to be bumped.

17 HONORABLE SCOTT A. BRISTER: Right.
18 And the reason, the only reason I suggested we
19 should do that is because I don't think we
20 discussed last time if you do that you have
21 this resurrection problem. If you put the
22 10-day deadline before "or other hearing," we
23 didn't discuss, "Oh, and what happens with
24 that motion which is denied because it wasn't
25 10 days, but there is some good grounds in

1 there?" How do you write a -- I think it gets
2 cumbersome to try to write the Rule of when
3 grounds or motions or which part of it comes
4 back up and how later. My suggestion was
5 you're going to have to do it one way or the
6 other; and I think it's easier just to drop
7 "or other hearing."

8 MR. HAMILTON: Well, then we might
9 try to visit the "conventional trial" and
10 change that to define it to include hearings
11 that are going to take X number of days or
12 something.

13 HONORABLE SCOTT A. BRISTER: But
14 then what do you do? You file a late motion
15 five days. It does or does not state the
16 ground. Okay. So then you go ahead with the
17 hearing.

18 MR. HAMILTON: Go ahead with the
19 hearing.

20 HONORABLE SCOTT A. BRISTER: And
21 what about those grounds? What about that
22 motion?

23 MR. HAMILTON: They get referred to
24 the presiding judge.

25 HONORABLE SCOTT A. BRISTER: Who

1 denies them because it was late.

2 MR. HAMILTON: No. No. No. The
3 only thing that the "late" has to do with is
4 that it doesn't stop the hearing. He still
5 has to consider the grounds; and if they're
6 good, parties just run the risk going ahead
7 with the hearing.

8 HONORABLE SCOTT A. BRISTER: If it's
9 in (e)(2), you don't consider it because it's
10 filed late. That's what I would like to drop
11 out of (e)(2). If it's in (e)(2), you don't
12 consider it. There's a deadline of 10 days.

13 MR. HAMILTON: The trial court
14 doesn't consider it.

15 MR. SOULES: And the presiding judge
16 doesn't either because he rules it's
17 defective. I mean the regional judge doesn't
18 consider it either because he rules it's
19 defective for not having one of these four
20 allegations.

21 MS. EADS: What I'm hearing then is
22 that if it's filed, then the hearing will be
23 canceled and reset. That's going to have a
24 very big effect on the State who is often
25 engaged in hearings all over the state every

1 day often on significant issues; and we
2 dispose of a lot of our cases through summary
3 judgment and the like.

4 So I'm just worried about the financial
5 and fiscal impact of that because there are
6 hearings that have great consequences. We're
7 engaged in a lot of that. So there is
8 something to be argued for. Understandably I
9 understand in some hearings it doesn't matter;
10 but some of them will have a substantial
11 effect on the business of the State and its
12 litigation.

13 MR. CHAPMAN: Judge Brister, what
14 about my opponent who has not filed a response
15 timely to a motion for summary judgment who
16 then files a motion to recuse? If the hearing
17 is canceled and then reset, then suddenly his
18 seven-day period to respond has been extended.

19 HONORABLE SCOTT A. BRISTER: Right.

20 MR. CHAPMAN: What happens to the
21 substantive rights of my client, because he
22 simply files a motion that in essence is a
23 motion to delay?

24 HONORABLE SCOTT A. BRISTER: Of
25 course, there's a thousand things that people

1 can do to delay. This is just one of them.
2 People who get sick, people have conflicting
3 court settings. There's a lot.

4 MR. CHAPMAN: But that's not the
5 hypothetical I asked about.

6 HONORABLE SCOTT A. BRISTER: That's
7 great. And I would be happy to say that's
8 fine. The problem is where we started with
9 this discussion. Okay. What do you do
10 with, all right, if there's other hearings in
11 there, you filed it late, it's referred; but
12 it's denied, because it was filed late? But
13 what about the grounds that are in there?
14 When did the -- what do we do with those? Are
15 they waived as the Rule originally started
16 this morning? Not waived, but you could
17 raise? You have got to -- if it's a deadline,
18 there's a procedural grounds to get rid of it
19 that does nothing to the underlying grounds;
20 and so we need to then if that's fine, the way
21 you want to go, that's fine; but we've got to
22 put another paragraph in about what happens to
23 those motions.

24 MR. CHAPMAN: I didn't raise that to
25 get back into the argument about that

1 procedure, because I think those are -- that
2 is a thicket. But I do raise it because we
3 may want to look at whether or not we include
4 summary judgment in the kinds of hearings. Or
5 what have we said? We've called them
6 conventional trials. We may want to include
7 summary judgments because of that problem. I
8 raise that.

9 MR. SOULES: Well, I guess that
10 focuses, Mr. Chairman, on the question of
11 whether we have "or other hearing" in there --

12 MR. YELENOSKY: Well, summary
13 judgments --

14 MR. SOULES: -- in about four
15 places, which would be in the lead-in of (2)
16 and then in the first three points of that.
17 Perhaps if we get past that, we can get the
18 rest of this done.

19 MR. YELENOSKY: Carlyle, you're
20 talking about having the summary judgment
21 hearing go ahead, right, just like the
22 conventional trial would with the interim
23 proceeding.

24 MR. CHAPMAN: (Nods affirmatively.)

25 MR. YELENOSKY: And that only, what

1 I heard you say was your particular concern is
2 with respect to summary. So that concern
3 could be fixed by changing "conventional
4 trial" to "trial including summary judgment on
5 the interim proceedings provision without
6 changing the other ones. Right?

7 MR. CHAPMAN: I think so.

8 MR. SOULES: We have beat that to
9 death.

10 HONORABLE SCOTT A. BRISTER: Then you're
11 right in the teeth of that. I mean, most of
12 the time people, you know, don't ask you about
13 whether they ought to file a summary
14 judgment. They just do it, and it's set
15 within 21 days. And maybe this is a brand-new
16 case, and maybe you're just finding out about
17 this judge and his or her relationship with
18 the opposing counsel. And if you put that in
19 there, then that's fine; and the summary
20 judgment goes ahead anyway and is granted by
21 the time you get to your recusal hearing. Is
22 that -- I think that looks a lot worse.

23 CHAIRMAN BABCOCK: We're replowing a
24 lot of ground we have already plowed. I'm
25 hearing the same people make the same comments

1 they did the last two meetings. Let's see if
2 we can fix the problem that we identified and
3 try to avoid rearguing stuff we have already
4 argued about and decide it. Don't you think?

5 HONORABLE PHIL HARDBERGER: Here,
6 here.

7 CHAIRMAN BABCOCK: Okay. Where does
8 that leave you, Luke, if we apply that
9 standard?

10 MR. SOULES: Well, I think we still
11 have to decide whether "or other hearing"
12 belongs in (2), lead-in and then the first
13 three pieces. There is some ambiguity and I
14 think in some of the cases too if you accept
15 the trial judge for the first hearing, are you
16 ready to roll? Are you stuck with the trial
17 judge?

18 There are instances that have occurred
19 where a lawyer who files a case gets the judge
20 to set a hearing very quickly after answering
21 it, a pretrial hearing, and then contends that
22 that judge can't be recused. And the judge
23 doesn't want to be recused because he's a
24 friend of the lawyer that filed the case; and
25 there are some abuses. So that's (11).

1 The other is that you would cause due to
2 some pretrial hearings. That's the other side
3 of it without making these, stating these
4 additional items. I think that's the
5 intention. That's where the line is drawn.

6 MR. HAMILTON: Luke, where we are is
7 if we're not going to protect any other device
8 except the conventional hearing from being
9 bumped off, if that's the only thing we're
10 going to protect, we don't need "other
11 hearing" there.

12 MR. SOULES: Well, you can go
13 forward with other hearings if the motion is a
14 third or subsequent motion to recuse, because
15 that gives the judge the right to go forward
16 in interim proceedings no matter what they are
17 under (e)(4), so it won't stop it there.
18 You've got two bites at the apple. I guess if
19 you want to do it for delay, you are subject
20 to getting sanctioned if you do that on motion
21 number one; but --

22 MR. HAMILTON: All I'm saying is
23 unless you're going to project other hearings,
24 we don't need the 10-day requirements in these
25 four things.

1 MR. SOULES: That's right.

2 MR. HAMILTON: That's all I'm
3 saying.

4 MR. SOULES: That's right.

5 CHAIRMAN BABCOCK: Bill, did you
6 want to say something? One thing that we're
7 doing I think just kind of in a late Friday
8 afternoon fashion is we are about to take the
9 focus off this 10-day thing which is exactly
10 opposite of what we are being told by
11 outsiders we shouldn't be doing. Now if we
12 take it out of the hearing, if we take that
13 out of the hearing thing and just eliminate
14 that, you know, isn't that a signal to the Bar
15 that they can lay behind the log just the way
16 we've worded that?

17 It seems to me that what we have to do is
18 follow the language we already voted on and
19 approved, I might add, is that it must be
20 filed within 10 days, and you can get out of
21 that for four reasons, but the focus is still
22 on the fact that it's got to be filed 10 days
23 before any hearing or trial.

24 HONORABLE SCOTT A. BRISTER: But the
25 only -- we're not -- I didn't raise that just

1 because I wanted -- I lost last time. The
2 only reason we're doing that is because we
3 started with the problem what do you do with
4 the one that was filed late procedurally and
5 you still want to raise those grounds after?
6 That's the only reason we got back into that
7 is because we have this problem that if we
8 stick to that, we're going to have to add
9 another paragraph that says what to do with
10 that. Do the grounds come back? Does the
11 whole motion come back now that it's not
12 untimely anymore? It still hasn't been ruled
13 on. It was just ruled on once untimely; and
14 that's a problem we didn't address last time.

15 If we want to stick with that, that's
16 fine; but we've got to start writing that
17 paragraph. And I'm just suggesting don't
18 write that paragraph. It's just easier to
19 just revote this other one.

20 MR. SOULES: We still have the
21 10-day prior to conventional trial.

22 PROFESSOR BILL DORSANEO: One other
23 really important thing that has occurred to me
24 and Justice Cayce too, I think, is once we
25 start working this up; and let me do it this

1 way: If we leave the "or other hearing" in
2 (e)(2), and somebody manages to pass the
3 pleading hurdle by having that alleged, then
4 presumably in order to obtain a favorable
5 ruling on the recusal motion, not only the
6 grounds for recusal, but the special
7 circumstance needs to be established. And
8 that as I understand Justice Brister is one of
9 the reasons why you want to take "or other
10 hearing" out.

11 HONORABLE SCOTT A. BRISTER: (Nods
12 affirmatively.)

13 PROFESSOR BILL DORSANEO: Okay. But
14 the same problem exists for "conventional
15 trial" such here is what happens if we leave
16 it the way it is: You have a special
17 requirement for an eave of trial, an eave of
18 conventional trial motion. That motion passes
19 the pleading burden. The trial is conducted.
20 You lose the motion not because the grounds
21 were bad, but because you should have been
22 quicker; and we end up with the worst of all
23 possible situations.

24 HONORABLE SCOTT A. BRISTER: No. We
25 decided that because it wasn't fair knowing

1 that was a financial interest in the judge's
2 family to wait until five days before trial
3 and then -- or in the middle of the trial and
4 scuttle the whole trial and waste not just
5 counsel's time, but juror's time and
6 everything else.

7 PROFESSOR BILL DORSANEO: We can
8 move those special requirements down into the
9 interim proceedings provision and not have
10 them impair the determination of the ground,
11 however long that takes.

12 I don't know mechanically how to do
13 that. I think it's a bad place for these
14 additional things that you need to prove in
15 order to get the motion granted to be, okay,
16 when it means that you lose the motion when
17 it's ultimately determined.

18 HONORABLE SCOTT A. BRISTER: Right.

19 PROFESSOR BILL DORSANEO: It's the
20 same point that you just made changed into a
21 different context. I don't want to stop the
22 trial; but I want if it turns out that this
23 judge needs to be, you know, recused or
24 disqualified, to have the trial not tapped. I
25 don't know exactly how to word that.

1 HONORABLE JOHN CAYCE: I think what
2 would, if I follow you, what could be done to
3 this is take, okay, looking at (e)(2), Time to
4 File, let's say we leave it "A motion to
5 disqualify or recuse may be filed at any
6 time." We take these four criteria that allow
7 you, or these grounds that you can assert at
8 any time and still be valid and bring them
9 down to (e)(4) and somehow connect them to the
10 provision that when the motion to recuse is
11 filed after the 10th day prior to the case
12 being set for trial or hearing unless, and
13 then you have these four provisions.

14 In other words, there could not be a --
15 the proceeding could not go forward if you had
16 a ground for recusal that you did not know
17 about, for instance, until the fifth day
18 before trial; but in any case all motions to
19 disqualify or recuse would be referred and
20 would be heard pursuant to (e)(3). It's just
21 that in those motions that have these four
22 grounds, one of these four grounds stated in
23 there the proceeding could go forward in that
24 case. Is that?

25 PROFESSOR BILL DORSANEO: I'm having

1 a hard time. What I want to do is have the
2 trial go forward, but the result not count if
3 you were not misbehaving. No. I don't even
4 think I mean that. I can't say what I mean.

5 HONORABLE JOHN CAYCE: Well, you
6 would not be misbehaving. The trial should go
7 forward if you did not know of the ground for
8 recusal until getting to trial within the
9 10-day period. In that case that would be an
10 exception to the (e)(4) --

11 PROFESSOR BILL DORSANEO: Oh, that's
12 right.

13 HONORABLE JOHN CAYCE: -- provision
14 of allowing the trial to proceed even though a
15 motion has been filed. I know that's
16 radical. That's a radical change.

17 MR. SOULES: That's not going to
18 satisfy Senator Harris.

19 CHAIRMAN BABCOCK: Skip.

20 JUSTICE JOHN CARLYLE: Why isn't it
21 going to satisfy Senator Harris?

22 MR. WATSON: I'm just trying to --

23 MR. SOULES: He wants the trial to
24 go forward.

25 MR. CHAIRMAN BABCOCK: Hang on.

1 Skip.

2 MR. WATSON: -- figure out why we
3 have had "or other hearings" in there in the
4 first place. And is it -- can you look at --
5 I don't have 30.06 with me. Is that part of
6 the statute that we are trying to --

7 CHAIRMAN BABCOCK: That's been in in
8 the Rule for 17 years. That was a point I was
9 going to make.

10 MR. WATSON: Yes.

11 CHAIRMAN BABCOCK: "Trial or other
12 hearing" has been in this Rule since 1984 when
13 it was first passed. Now has this -- Judge
14 Brister, has this caused a big problem?

15 HONORABLE SCOTT A. BRISTER: No.
16 The only problem is that -- I've never seen
17 the recusals being used as a weapon to stop
18 pretrials hearings. When it's used is to stop
19 trials.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE SCOTT A. BRISTER: And so
22 that's why I think we ought to drop the "and
23 other hearings," because that's really -- I
24 think that's really when it's used, and don't
25 get into. You know, if you did it before a

1 hearing, we're going to go ahead and get rid
2 of it and not face this "what happens when,"
3 because you get into with hearings you're in
4 the middle of a case, and you're going to have
5 a chance to raise that ground with that same
6 judge again, and you have to answer the
7 question "can you." And if you drop "other
8 hearings," that problem goes away.

9 PROFESSOR BILL DORSANEO: Here's
10 what I want to -- here's what I mean. What I
11 mean is that you get to litigate your recusal
12 grounds late if you discover late -- no. I
13 still don't have a grasp on it.

14 MR. SOULES: Mr. Chairman, I want to
15 get past this. Let me make my motion with "or
16 other hearing" in there. Then we can move to
17 get that out. Is there anything otherwise if
18 we leave "or other hearing" in there, is the
19 rest of this true to the debate that we had
20 before I tried to write it?

21 MR. HAMILTON: Well, one other
22 point: And that is to say you must say these
23 things, but we don't say what happens if it
24 doesn't say that.

25 MR. SOULES: Well, we do. We say

1 "If the motion does not comply with
2 subparagraph (e)(2), the said presiding judge
3 may deny the motion without a hearing."

4 CHAIRMAN BABCOCK: Right. So that
5 takes care of that. But let's back up, Luke.
6 What are we trying to accomplish on (e)(2)?
7 Let's stick with (e)(2) for a minute. What
8 are we trying to accomplish?

9 MR. SOULES: We're saying that we
10 can file it at any time. There was consensus
11 on that in the motion.

12 HONORABLE SCOTT A. BRISTER: And
13 that's changing the law and changing the
14 Rule.

15 CHAIRMAN BABCOCK: Wait a minute.
16 Do we have consensus on that, that we can file
17 it any, that that's what we should say, you
18 can file it at any time you want?

19 HONORABLE SCOTT A. BRISTER: It
20 depends on what the exceptions are.

21 CHAIRMAN BABCOCK: Well, yes. But I
22 think that's a bad signal if you put it that
23 way. I mean, obviously with disqualification
24 you can file it at any time, because that's
25 something if it exists, it's a problem. Is

1 that the way we want to say recusal, you can
2 file at any time?

3 MR. SOULES: You can file it at any
4 time; but if you file it within 10 days, you
5 have to state one of these grounds. I was
6 seeing all heads shaking "yes" and was told to
7 go write it. I don't know. It looked like
8 there was a consensus to me; but I don't
9 know.

10 MR. ORSINGER: If you don't have a
11 deadline precluding filing, you're tacitly
12 telling them they can file it at any time. I
13 don't know that it really matters. What
14 matters is what is the consequence of not
15 filing it early enough. To me that's what the
16 real matter is.

17 CHAIRMAN BABCOCK: Well, just it's
18 this whole thing of giving with one hand and
19 taking away with the other. You know, the
20 lawyer that readings this says "Oh, I can file
21 this any time. But wait a minute. Hold on.
22 If I file it within 10 days, then maybe I
23 can't file it." It seems to me you ought to
24 affirmatively say you've got to file it at
25 least 10 days before unless you can wiggle out

1 of it for these four reasons.

2 HONORABLE SCOTT A. BRISTER: I don't
3 think that's -- it's the same thing one way or
4 the other.

5 CHAIRMAN BABCOCK: It is the same.
6 You get to same finish line; but you get there
7 a different way.

8 HONORABLE JOHN CAYCE: Isn't the
9 evil we're trying to address at least in part
10 is to keep proceedings from proceeding in the
11 face of a what may be a frivolous motion? Is
12 that not what we're trying to address?

13 CHAIRMAN BABCOCK: Well, that's part
14 of it. But I misunderstood what Judge Brister
15 said before. And I think his most recent
16 explanation is that "Look, the hearing is
17 going to get stopped whether it's 10 days
18 before or five days before the way we've
19 structured it here; and that's okay with us by
20 in large, because you know, a hearing you can
21 reset."

22 But the real evil is the trial. When
23 they do it to delay the trial that's a big
24 problem; and we've covered that in our Rule
25 because now we have an interim proceeding when

1 it's within 10 days of the conventional trial
2 no matter what. The judge can with his
3 discretion go forward unless the recusal judge
4 stops him.

5 So Judge Brister says "Look, let's take
6 this hearing thing out, and we have got other
7 protections in there. We have got something
8 on waiver. Like when something has been
9 stated on the record it may be waived. We've
10 got protections on multiple motions, so that's
11 okay." So Judge Brister's point is that let's
12 just take this hearing think out because it
13 unnecessarily complicates things and means
14 that somebody might file one within five days
15 of a hearing, but then turn right around and
16 file the same motion, and there would be
17 another hearing, you know, more than 10 days.
18 So why complicate things that way? Let's
19 clear out that underbrush and just key it off
20 a conventional trial.

21 HONORABLE JOHN CAYCE: By doing that
22 we would be permitting successive motions to
23 recuse to be filed prior to the hearings
24 without any impugnity.

25 HONORABLE SCOTT A. BRISTER:

1 Sanctions. You bet.

2 HONORABLE JOHN CAYCE: You can have
3 three.

4 CHAIRMAN BABCOCK: Three. And then
5 you're in trouble.

6 MR. SOULES: Two.

7 CHAIRMAN BABCOCK: Or two, and then
8 the third one you're in trouble.

9 HONORABLE SCOTT A. BRISTER: If when
10 you get referred and you have the hearing and
11 the motion and "By the way, Judge, they did
12 this five minutes before we had our special
13 appearance, and I had five witnesses coming
14 from Tennessee and I'd like their airfares
15 paid," that ought to be paid. It ought to be
16 granted.

17 CHAIRMAN BABCOCK: And we have that
18 ability in (11).

19 HONORABLE SCOTT A. BRISTER: Yes.

20 CHAIRMAN BABCOCK: So we have it.
21 We can do that by (11). Okay. So maybe I was
22 the only one that was an impediment to
23 dropping this "or other hearing." But I do
24 think we ought to be very careful about
25 dropping language that has been there for 17

1 years and there's not been any problems; but I
2 think maybe I'm persuaded that Judge Brister
3 is right about this.

4 MS. EADS: I am too.

5 CHAIRMAN BABCOCK: Are you okay with
6 that, Linda?

7 MS. EADS: Yes.

8 CHAIRMAN BABCOCK: Skip.

9 MR. WATSON: I don't know where we
10 are; but maybe if we just move through it a
11 sentence at a time and voted on the
12 sentences.

13 CHAIRMAN BABCOCK: Yes. We're
14 spending way too much time on this.

15 MR. WATSON: I'm worried about the
16 Rule against perpetuity.

17 MR. SOULES: You're more worried
18 about the Rule --

19 MR. WATSON: This life and being is
20 finite; and I don't know who plus 20 years
21 is.

22 CHAIRMAN BABCOCK: Okay. I
23 completely agree with what you just said. So
24 the first sentence, "A motion to disqualify
25 may be filed at any time."

1 MR. HAMILTON: "Or recuse."

2 CHAIRMAN BABCOCK: Well, okay.

3 HONORABLE SARAH B. DUNCAN: Luke has
4 a motion on the floor.

5 MR. SOULES: That never got seconded
6 because he went to debate.

7 HONORABLE SARAH B. DUNCAN: I second
8 your motion so long as it included "or other
9 hearing."

10 CHAIRMAN BABCOCK: Judge Cayce had a
11 motion that had been seconded that preceded
12 Lukes. We have several things on the floor
13 here.

14 MR. SOULES: Okay.

15 CHAIRMAN BABCOCK: All right. Let's
16 stick with this. "A motion to disqualify," do
17 we want to put "or recuse" in there "may be
18 filed at any time," because that is telling
19 the Bar that, you know, basically any old
20 time?

21 MR. SOULES: So moved.

22 HONORABLE SARAH B. DUNCAN: Second.

23 CHAIRMAN BABCOCK: Okay. Let's vote
24 on that. How many people want to include the
25 word "or recused" after "disqualify"? And how

1 many are opposed to that? It passes 13 to 11.
2 Okay. All right.

3 Now the next sentence, we voted on
4 language earlier that says "A motion to recuse
5 must be filed at least 10 days prior to any
6 trial or other hearing except in the following
7 instances:" Now is the sentiment that we
8 should scrap that in favor of something else?

9 HONORABLE SARAH B. DUNCAN: Yes.

10 HONORABLE SCOTT A. BRISTER: Sure.

11 If we do "A motion to disqualify or recuse may
12 be filed at any time, but the motion to recuse
13 filed within 10 days of trial" and that
14 separate "or other hearing" question --

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE SCOTT A. BRISTER: --

17 "must state the following:"

18 CHAIRMAN BABCOCK: I think our vote
19 a minute ago necessarily means that we have
20 got to change that language. So Luke's --

21 HONORABLE JOHN CAYCE: In light of
22 the vote, I'd move we adopt Luke's language.
23 "A motion to recuse if filed later than the
24 10th day prior -- not later the 10th day prior
25 to date," whatever Luke's language.

1 CHAIRMAN BABCOCK: Yes. Luke's
2 language, Luke, read along with me. "A motion
3 to recuse if filed later than the tenth day
4 prior to the date the case is set for trial
5 must state one or more of the following:"

6 MR. SOULES: So moved.

7 CHAIRMAN BABCOCK: Second?

8 HONORABLE SARAH B. DUNCAN: Second.

9 CHAIRMAN BABCOCK: All right. All
10 in favor of that raise your hand. Opposed?
11 That would be passing by 22 to 2.

12 All right. You want to strike the word
13 "when" in subparagraph (2)(a), correct,
14 Luke?

15 MR. SOULES: Right.

16 CHAIRMAN BABCOCK: Anybody opposed
17 to that in light of the prior votes?
18 (No opposition.) Okay. Now so that will pass
19 unanimously. Going down to the last sentence,
20 Luke --

21 MR. SOULES: There is an editorial
22 correction where it says "other good cause,
23 must state other good cause," just take out
24 two words to make it fit grammatically.

25 CHAIRMAN BABCOCK: Wait a minute.

1 MR.. SOULES: "Other good cause" at
2 the top of page four of seven must state
3 something. You can't state "for other good
4 cause."

5 CHAIRMAN BABCOCK: And you want us
6 to strike the word "for" and "shown"?

7 MR. SOULES: Right.

8 CHAIRMAN BABCOCK: And now what do
9 you want to do about the last sentence in
10 this?

11 MR. SOULES: Delete it.

12 CHAIRMAN BABCOCK: Delete it.

13 MR. SOULES: I move to delete it.

14 CHAIRMAN BABCOCK: Okay. Does
15 anybody second that?

16 HONORABLE SARAH B. DUNCAN: Second.

17 CHAIRMAN BABCOCK: All right. All
18 in favor of deleting the last sentence? All
19 opposed. That passes 25 to zero.

20 Now within this paragraph the phrase
21 "trial or other hearing" is used a number of
22 times. I assume -- well, what do you want to
23 do about "or other hearing"?

24 MR. SOULES: I move we delete "or
25 other hearing" in four places in paragraph two

1 are the places it appears.

2 CHAIRMAN BABCOCK: All right. So
3 that would be in subparagraph (a), right?

4 MR. SOULES: The lead-in, and in
5 subparagraph (a), (b), (c) and (d) bullets.
6 (a), (b) and (c).

7 CHAIRMAN BABCOCK: Okay. Anybody
8 second that?

9 MR. HAMILTON: What paragraph?

10 HONORABLE SCOTT A. BRISTER: Second.

11 MR. SOULES: It's (e)(2), and the
12 lead-in, and in the three bullets on page
13 three of seven.

14 CHAIRMAN BABCOCK: And do we want to
15 say "conventional trial"?

16 HONORABLE SCOTT A. BRISTER: One
17 thing at a time.

18 CHAIRMAN BABCOCK: You're right.
19 Good point. Let's do -- strike "or other
20 hearing." A second on that?

21 HONORABLE SCOTT A. BRISTER:
22 Second.

23 CHAIRMAN BABCOCK: Okay. All in
24 favor of striking "or other hearing" in
25 subparagraph (2)(a), (b) and (c) raise your

1 hand. All opposed? That passes by a vote of
2 14 to 8.

3 Now inserting the word "conventional
4 trial" in (a), (b) and (c), is that what we
5 want to do, Luke, or not?

6 MR. SOULES: I assume. That's the
7 only thing that really gets stopped, because
8 we could spend forever talking about
9 conventional trial in (4).

10 CHAIRMAN BABCOCK: Okay. Is there a
11 second?

12 MR. EDWARDS: Second.

13 CHAIRMAN BABCOCK: All in favor of
14 adding the word "conventional" prior to the
15 word "trial" in subparagraph (2)(a), (b) and
16 (c) raise your hands.

17 MR. SOULES: And the lead-in.

18 PROFESSOR BILL DORSANEO: And the
19 lead, yes.

20 CHAIRMAN BABCOCK: And the lead.
21 All opposed? That passes by a vote of 11 to
22 4.

23 CHAIRMAN BABCOCK: All right. What
24 other violence can we do to subparagraph
25 (e)(2)?

1 MR. SOULES: (e)(2) is done. (e)(3)
2 we could get to now. We can just rearrange
3 and add something to the sentence that starts
4 one, two, three, four, five lines from the top
5 of (3). It begins now "If the judge refuses"
6 just to get your eyes to the right place.

7 CHAIRMAN BABCOCK: Right.

8 MR. SOULES: Re-do that sentence to
9 start "The judge must promptly refer every
10 motion to disqualify or recuse to the
11 presiding judge of the administrative region
12 if the judge refuses to recuse or disqualify."

13 CHAIRMAN BABCOCK: All the language
14 is there except for "every," right?

15 MR. SOULES: Yes, "every motion to
16 disqualify or recuse."

17 HONORABLE SARAH B. DUNCAN: Why are
18 you moving the "if" clause?

19 MR. SOULES: Just to put the
20 emphasis I've got to refer every motion.

21 HONORABLE SCOTT A. BRISTER: Really
22 you're just replacing the first phrase of that
23 sentence.

24 MR. ORSINGER: No. He's moving it.

25 MR. CHAPMAN: Moving it to the end

1 of the sentence.

2 MR. ORSINGER: He's changing "if" to
3 an "unless."

4 MR. SOULES: No.

5 HONORABLE SARAH B. DUNCAN: No.
6 He's moving the "if" clause to the end of the
7 sentence. And to me --

8 HONORABLE SCOTT A. BRISTER: It's
9 already in the first phrase of the next
10 sentence.

11 CHAIRMAN BABCOCK: Okay. The
12 proposal is this: That we're going to move
13 the introductory clause to the end of this
14 sentence, and we're going to add the word
15 "every" before "motion" and "to disqualify or
16 recuse" after "motion," so that the sentence
17 would read "The judge must promptly refer
18 the" -- "must refer " -- strike "the" --
19 "every motion to disqualify or recuse to the
20 presiding judge of the administrative region
21 if the judge refuses to recuse or disqualify."
22 That's the proposal. Is there a second?

23 MR. HAMILTON: Second.

24 CHAIRMAN BABCOCK: Any further
25 discussion?

1 PROFESSOR BILL DORSANEO: Mr.
2 Chairman.

3 CHAIRMAN BABCOCK: Yes.

4 PROFESSOR BILL DORSANEO: I think we
5 need to get from the court reporter the
6 language that we voted on earlier changing the
7 first sentence.

8 CHAIRMAN BABCOCK: The language we
9 voted on early, which the court reporter can't
10 possibly find since she wasn't here this
11 morning, --

12 PROFESSOR BILL DORSANEO: Oh, well,
13 that's a good point.

14 CHAIRMAN BABCOCK: -- but which I
15 wrote down says "The judge in the case in
16 which the motion is filed must without further
17 proceedings promptly recuse or disqualify or
18 refer the matter to the presiding judge of the
19 administrative region before taking any other
20 action in the case."

21 Any further discussion on this proposed
22 amendment to (e)(3)? All right. All in favor
23 of the proposed amendment raise your hand.
24 All opposed? That passes by a vote of 17 to
25 2.

1 MR. SOULES: And the last item is
2 one, two, three, four, five, six, seven,
3 eight, nine lines from the top of that
4 referral paragraph. The center of the ninth
5 line down starts "If the motion does not
6 comply with," to get your eyes to the right
7 place, subparagraph (e)(1). We add "or
8 (e)(2)."

9 CHAIRMAN BABCOCK: Is there second
10 to that?

11 HONORABLE SARAH B. DUNCAN: Second.

12 CHAIRMAN BABCOCK: Anybody opposed
13 to that? That will pass unanimously.
14 Are we done with this?

15 PROFESSOR ELAINE CARLSON: Don't we
16 have to also do another (e)(2) on the next
17 line? "If the motion complies with (e)(1) or
18 (e)(2), add there?"

19 CHAIRMAN BABCOCK: That's a good
20 point.

21 MR. HAMILTON: (e)(1) and (e)(2)?
22 It might not be an (e)(2) motion.

23 CHAIRMAN BABCOCK: Why don't we just
24 say "If the motion complies with subparagraph
25 (e)"?

1 MR. SOULES: I think we definitely,
2 (e) (1) and (e) (2) are the provisions that talk
3 about what the motion has to contain.

4 CHAIRMAN BABCOCK: Right.

5 MR. SOULES: And that's what I was
6 trying to get to expressly state, that the
7 jurisdiction to determine compliance with
8 (e) (1) and (e) (2), if necessary, is in the
9 jurisdiction of the presiding judge.

10 CHAIRMAN BABCOCK: It's got to be
11 (e) (1) and (e) (2).

12 HONORABLE SARAH B. DUNCAN: And
13 comma, "if applicable."

14 CHAIRMAN BABCOCK: "And (e) (2), if
15 applicable."

16 MR. HAMILTON: They're not all
17 (e) (2) motions.

18 CHAIRMAN BABCOCK: That's right.

19 MR. SOULES: Sarah just read it to
20 you.

21 CHAIRMAN BABCOCK: "And (e) (2), if
22 applicable."

23 MR. SOULES: Why don't we just say
24 "presiding judge of the region, presiding of
25 the administration region"?

1 CHAIRMAN BABCOCK: Okay. Here is
2 the proposal on this: "If the motion does not
3 comply with subparagraph (e)(1) or (e)(2),
4 the," striking the word "said," "the presiding
5 judge may deny the motion without a hearing.

6 MR. SOULES: I accept Sarah's
7 amendment.

8 CHAIRMAN BABCOCK: Now wait a
9 minute. The amendment is coming up in a
10 minute. "If the motion complies with
11 subparagraph (e)(1) and (e)(2), if
12 applicable," that's her amendment, "the
13 presiding judge of the administrative region
14 shall hear the motion or immediately assign a
15 judge to hear it." Have I correctly stated
16 that, Sarah?

17 HONORABLE SARAH B. DUNCAN: Uh-huh
18 (yes).

19 MR. ORSINGER: If that first
20 connector was an "or," --

21 CHAIRMAN BABCOCK: It is.

22 MR. ORSINGER: It is?

23 CHAIRMAN BABCOCK: Yes.

24 MR. ORSINGER: -- that means that
25 you can comply with (1) and not (2) even if

1 (2) is applicable. That will not work.

2 CHAIRMAN BABCOCK: So it should be
3 parallel, "and (e)(2), if applicable."

4 MR. ORSINGER: That's right.

5 CHAIRMAN BABCOCK: "And (e)(2) if
6 applicable." "Where applicable" is more
7 appropriate. Okay. Any discussion on that?
8 Anybody opposed to that? That will pass
9 unanimately. Bill.

10 PROFESSOR BILL DORSANEO: Maybe it
11 doesn't even bother me; but what happens now
12 is we get down to a hearing. At some point
13 we're going to get down to a hearing on this
14 motion to recuse that's either conducted
15 parallel to simultaneously with the interim
16 proceeding which is now could be the trial.
17 Okay? So I guess it really is the trial.
18 That's what we're talking about.

19 And my question is, is anybody, and I'm
20 not even sure I'm still uncomfortable with
21 it. Is anybody uncomfortable with the fact
22 that under the Hearing paragraph if the motion
23 is filed within 10 days, there will be more to
24 prove than the grounds for recusal? And this
25 is what I'm thinking.

1 MR. SOULES: Within 10 days of the
2 conventional trial?

3 PROFESSOR BILL DORSANEO: Yes. The
4 trial has gone through, and we have the
5 hearing. Somebody says "Well, I can see that
6 this judge should have recused himself because
7 this is in violation of the Code of Judicial
8 Conduct, this proceeding with this case, but
9 everything is fine because you should have
10 been a little quicker in figuring that out."

11 HONORABLE SARAH B. DUNCAN: Is the
12 question if anybody is bothered by that?

13 PROFESSOR BILL DORSANEO: Yes.

14 HONORABLE SARAH B. DUNCAN: Yes. I
15 remain bothered by that to this day. I think
16 it's disgraceful that in our judicial system
17 we would let a judge who should be recused
18 decide a case; but that is the vote --

19 HONORABLE SCOTT A. BRISTER: We
20 fought.

21 HONORABLE SARAH B. DUNCAN: We
22 fought that battle and lost.

23 PROFESSOR BILL DORSANEO: The
24 question is whether we should let the decision
25 stand, I think. Not so much whether we should

1 let the case go forward.

2 MR. SOULES: Well, and the case law
3 on that is that if a judge is under a recusal
4 challenge and makes rulings and then is
5 recused, the replacement judge decides whether
6 or not to vacate the orders that the judge
7 made while he was under a recusal hearing.
8 It's not like disqualification where the
9 orders are void. So a judge could proceed to
10 trial, verdict and judgment, and then the
11 replacement just say "I'm not going to vacate
12 it."

13 HONORABLE SARAH B. DUNCAN: Which is
14 generally what happens.

15 MR. SOULES: I've never had the
16 experience.

17 HONORABLE SARAH B. DUNCAN: I would
18 imagine the burden to show that the rulings
19 should be vacated is exceptionally high.

20 MR. SOULES: I move that we add to
21 the interim proceedings a provision that says
22 "If the motion is granted, orders made in
23 interim proceedings must be vacated.

24 CHAIRMAN BABCOCK: Wait a minute.
25 We all agree that we have debated this

1 before.

2 MR. ORSINGER: We gave the
3 discretion to the judge who grants the recusal
4 or the replacement judge to go back and set it
5 aside. I don't think we made it mandatory.

6 CHAIRMAN BABCOCK: That's right.
7 And, Luke, I don't in fairness --

8 MR. SOULES: If it's done, it's
9 done.

10 CHAIRMAN BABCOCK: In fairness, you
11 know how it is. We had the full Committee
12 before debating this for a lengthy period of
13 time. I don't think with half our Committee
14 here and because of the lateness of the hour
15 we ought to revisit something that
16 substantive.

17 MR. SOULES: I agree. And I'm on
18 the Disciplinary Rules Committee of
19 Professional Conduct too; and I have missed a
20 couple of meetings because of having
21 conflicts, so I missed that. I apologize for
22 taking your time.

23 CHAIRMAN BABCOCK: If you had been
24 here, it probably would have come out
25 differently.

1 MR. SOULES: Well, no. I don't say
2 that.

3 PROFESSOR BILL DORSANEO: We'll be
4 out of order if you must, Mr. Chairman. But
5 we didn't vote before on the -- on this
6 separate issue. If the motion can be made
7 late, if you satisfy special pleadings
8 requirements, the trial proceeds; and then at
9 the end of the process the judge should have
10 been recused, but you didn't prove everything
11 in your motion that you were required to put
12 in there, the verdict and judgment stands.

13 PROFESSOR ELAINE CARLSON: You mean
14 one of those four essentials?

15 PROFESSOR BILL DORSANEO: Yes. You
16 have to prove an exception in order to win the
17 recusal argument because you were late; and
18 that ends up just being waiver again.

19 HONORABLE SCOTT A. BRISTER: Because
20 otherwise you're back into the hiding behind
21 the log. If it doesn't, then the alternative
22 is you can hide behind the log. You can wait
23 until the day before trial. You can go
24 through the whole trial and then cancel it off
25 and get the things delayed for six months

1 simply by hiding behind the log.

2 PROFESSOR BILL DORSANEO: I think
3 that's the appropriate answer. And if that's
4 fine, I think that may well be a good answer;
5 but I hadn't thought this all the way through
6 until today.

7 HONORABLE SCOTT A. BRISTER: You
8 definitely will have to prove who knew what
9 when in that less-than-10-day circumstance;
10 but the argument was but your easy way out is
11 file it 11 days before if you don't want to do
12 that. That's all we're asking.

13 CHAIRMAN BABCOCK: These words all
14 come rushing back to me as familiar comments.

15 MR. SOULES: I'll withdraw my
16 motion. We don't need to talk about it.

17 CHAIRMAN BABCOCK: Now Chris, I
18 think if -- I've tried to keep track of
19 everything we've done; but you're going to
20 need to study the transcript. And the sooner
21 you can get a redraft to this Committee, the
22 better, so that Frank and I can go to Senator
23 Harris and Judges McCoy and Harris and make
24 sure that everybody is on the same page. And
25 having done that, we may finally be at the end

1 of the recusal Rule, which call to drinks on
2 Justice Hecht later.

3 (Laughter.)

4 CHAIRMAN BABCOCK: Richard.

5 MR. ORSINGER: I'd like to tie up
6 the loose end about the juvenile referee.
7 Chris was kind enough to share with me his
8 copy of the Family Code and pointed me to the
9 salient language. And the procedure is
10 self-contained, but ill defined. If there is
11 going to be a hearing before a referee, you
12 must inform the parties. Actually the referee
13 or master must inform the parties they are
14 entitled to have the hearing before the
15 juvenile court judge, and each party is given
16 an opportunity to object; and if nobody
17 objects to holding the hearing before the
18 referee or master, then it can go forward.
19 They don't tell you what the grounds for
20 objection are; and they don't tell you that if
21 the objection is to referee number one,
22 whether your only recourse is to go to the
23 full judge or whether your ultimate recourse
24 is to get a second referee or even a third
25 referee.

1 And it seems to me like what we ought to
2 do is leave this here and not try to bring it
3 into the Rules of Procedure or to put the
4 Rules of Procedure into this Family Code
5 provision, because they appear to have no
6 defined standard of when you object and what
7 the consequence of the objection is other than
8 you don't get this referee.

9 MR. SOULES: Second.

10 HONORABLE SARAH B. DUNCAN: Second.

11 MR. ORSINGER: But who is your
12 second or third referee or what the objection,
13 we ought to just let the juvenile people
14 figure that out.

15 MR. SOULES: Second.

16 CHAIRMAN BABCOCK: So your
17 recommendation is not to add any language?

18 MR. ORSINGER: Yes. I don't think
19 we ought to even mention it other than leave
20 it in our transcript and hope nobody reads
21 it.

22 CHAIRMAN BABCOCK: Right. And,
23 Bill, you're going to owe a comment in
24 Footnote 24 of the draft. Okay, Elaine, at
25 the risk of getting your heart ripped out.

1 PROFESSOR CARLSON: Just one real
2 quick. I had asked you earlier, Chip, under
3 (e) (11), Sanctions, paragraph (b) if the last
4 sentence was part of the vote; and you said
5 "no."

6 CHAIRMAN BABCOCK: That's right.

7 PROFESSOR CARLSON: And just maybe a
8 point of clarification. But it says that for
9 sanctions the party making the motion or the
10 attorney for the party are jointly and
11 severally liable for fees and costs, which
12 seems to be a little bit contrary to
13 jurisprudence on sanctions; but it may be what
14 the statute requires. I really don't know.

15 CHAIRMAN BABCOCK: It's what the
16 statute requires; and I'm almost certain.
17 I'll double-check.

18 MR. ORSINGER: Should we -- I mean,
19 at the very least we ought to say the attorney
20 who files the motion, shouldn't we, because
21 some law firms sign a law firm on the
22 pleadings.

23 MR. SOULES: That's a defining
24 term.

25 MR. ORSINGER: What is?

1 MR. SOULES: "Attorney" and
2 "charge."

3 CHAIRMAN BABCOCK: This is right out
4 of the statute. This language is right out of
5 the statute. The comment on the Rio Grande
6 case, Chris, can we delegate to you?

7 MR. GRIESEL: Yes.

8 CHAIRMAN BABCOCK: Okay. All
9 right. Anything else about this Rule? Okay.
10 Good. We're done for the moment. Who knows
11 whether it will rear its ugly head again.
12 Maybe the next meeting.

13 Bill, we've got about 20 minutes left.
14 Do you elect to proceed on the TRAP Rules, or
15 would you defer to tomorrow?

16 PROFESSOR BILL DORSANEO: Well,
17 let's do at least this much so people know
18 what it is we'll be looking at. I suppose
19 everybody downloaded on your machines or
20 otherwise had somebody prepare the package of
21 materials. You have basically in terms of
22 what I'm going to talk about three documents.
23 The first one is the one identified in the
24 agenda as the memorandum. It's 3.2(a),
25 memorandum date November 2, 2000, from Bill

1 Dorsaneo to Chip Babcock Re: Revised Rules of
2 Appellate Procedure. That memorandum which we
3 also talked about last time represents the
4 final draft of recommendations from this
5 Committee to the Court concerning the Rules
6 that we talked about at the October meeting.

7 I believe that no further action is
8 needed on this November 2, 2000, document,
9 because we dealt with that. The Rules staff
10 attorney had prepared a similar document which
11 now presumably corresponds with this document
12 from beginning to end.

13 MR. GRIESEL: (Nods affirmatively.)

14 PROFESSOR BILL DORSANEO: So that is
15 finished.

16 CHAIRMAN BABCOCK: Okay. Does
17 anybody disagree with that? (No opposition.)

18 Okay. Now is this in the possession of
19 the Court in any way other than just copying
20 Chris on your memo to me?

21 PROFESSOR BILL DORSANEO: Well, --

22 CHAIRMAN BABCOCK: And that's one
23 way to get it there. But typically what
24 happens is when our Committee approves
25 something, then I'll transmit it to the

1 Court.

2 PROFESSOR BILL DORSANEO: This is
3 ready for you to transmit to the Court; but
4 you may want to wait until we do, add other
5 things together.

6 The next document which you probably
7 downloaded is another memorandum which is not
8 expressly identified in the agenda, although I
9 believe it was on the website; and that is a
10 memorandum to Chip Babcock from Bill Dorsaneo
11 dated January 4, 2001. And this memorandum
12 covers what we talked about in November on
13 November 17th. And on November 17th we didn't
14 conclude a large number of additional
15 recommendations; but we did finish work on
16 four of them. And I'm confident that this
17 requires no further action either; but it
18 means that we have so far as reflected in two
19 memos dealt with a number of the proposed
20 suggestions for revision at our last two
21 meetings. And this January 4 memo has not
22 been formally transmitted to Chris as a
23 representative of the Court or to you at a
24 meeting; but I'm doing it now if it wasn't
25 already done when I sent it to you.

1 CHAIRMAN BABCOCK: I don't believe
2 that this -- Bill, I don't believe that this
3 made it onto the website.

4 PROFESSOR BILL DORSANEO: It
5 didn't?

6 CHAIRMAN BABCOCK: Unless I note
7 that on the cc: you copied it to all SCAC
8 members.

9 MR. HAMILTON: I got it off the
10 website.

11 CHAIRMAN BABCOCK: You got it off
12 the website?

13 MR. WATSON: It was on there late;
14 but it was on there.

15 CHAIRMAN BABCOCK: Okay. All right.

16 PROFESSOR BILL DORSANEO: But I
17 copied, I sent it to everybody too anyway.

18 CHAIRMAN BABCOCK: Great. That's
19 what it shows here. All right. Does anybody
20 have any comments or suggestions or problems
21 with the January 4 memo? (No comments.)

22 PROFESSOR BILL DORSANEO: If you do,
23 you can raise them tomorrow.

24 CHAIRMAN BABCOCK: Okay. All
25 right. What is next, Bill?

1 PROFESSOR BILL DORSANEO: The next
2 one is the one which I guess we should take up
3 tomorrow unless we can do some of it today;
4 and that's the memorandum like the preceding
5 two dated January 10, 2001, entitled Proposed
6 TRAP Revisions Discussed, But Not Finished At
7 November Meeting. And these were the ones
8 that the Committee was sent back to work on
9 more. These are the ones among those ones we
10 were directed to work on more that we've
11 finished working on. And that's what I
12 propose to talk about when we get into the
13 merits of considering these matters.

14 In addition to this January 10 memo there
15 is another document which was prepared by Pam
16 Baron in connection with subcommittee
17 discussions concerning TRAP Rule 42; and I
18 believe that is ready for full Committee
19 consideration, and Pam will be here tomorrow
20 to present it. If she's not, I can do that.

21 CHAIRMAN BABCOCK: Okay.

22 PROFESSOR BILL DORSANEO: I think
23 that's really all we're ready to move forward
24 with. There are additional matters on the
25 SCAC TRAP subcommittee agenda; and I'm

1 beginning to think, Mr. Chairman, that that
2 subcommittee needs to meet every month that
3 the full Committee is not meeting because
4 there are a lot of proposals coming from the
5 courts and from appellate specialists.

6 CHAIRMAN BABCOCK: Okay. The
7 December 10th memo to me appears to have
8 Rules, TRAP Rules 9, 34.6(e), 34.6(f) and
9 46.5. Is that right?

10 PROFESSOR BILL DORSANEO: Right.
11 That's the January 10th memo.

12 MR. HAMILTON: January 5th.

13 PROFESSOR BILL DORSANEO: January
14 10th memo.

15 CHAIRMAN BABCOCK: January 5th
16 superceded by January 10th.

17 PROFESSOR BILL DORSANEO: Yes.

18 MR. HAMILTON: The 5th is superceded
19 by the 10th?

20 PROFESSOR BILL DORSANEO: Yes.

21 CHAIRMAN BABCOCK: Correct.

22 PROFESSOR BILL DORSANEO: What
23 happened is the January 5th memo was sent to
24 the Chairman by me and to the members of the
25 TRAP subcommittee; and then it got sent to

1 everybody before the TRAP subcommittee had
2 acted on it.

3 CHAIRMAN BABCOCK: Okay. Are you
4 prepared, or do you want to in the 10 minutes
5 we have remaining --

6 PROFESSOR BILL DORSANEO: Yes.

7 CHAIRMAN BABCOCK: -- to try to
8 knock some of this out?

9 PROFESSOR BILL DORSANEO: Yes.

10 CHAIRMAN BABCOCK: Let's do it.

11 PROFESSOR BILL DORSANEO: Let's look
12 at the January 10th memo. The proposed change
13 is to Appellate Rule 9 which is the Rule
14 entitled "Papers," maybe "Papers" generally.
15 At the last at our November meeting on
16 November 17th the issue was raised about
17 whether the Appellate Rules should authorize
18 incorporation by reference when one party
19 files something and the other party wants to
20 embrace it and incorporate it by reference.
21 The proposal was to adopt, at that meeting to
22 adopt wholesale the language of Federal
23 Appellate Rule 28(i) which says this: "In a
24 case involving more than one appellant or
25 appellee, including consolidated cases, any

1 number of appellants or appellees may join in
2 a brief, and any party may adopt by reference
3 a part of another brief. Parties may also
4 join in reply briefs."

5 At the November 17th meeting after a
6 brief discussion we were instructed to
7 incorporate that or something like that in
8 Rule 9 rather than to amend the Briefing Rule,
9 our Briefing Rule, Appellate Rule 38. In
10 doing so I changed in the draft the language
11 to make it broader than appellants and
12 appellees making this incorporation concept
13 apply to original proceedings, adding the
14 words "relator or respondent, relators or
15 respondents," and beyond that I broadened it
16 to cover not merely briefs, petitions and
17 responses, but motions and other documents
18 filed in an appellate court.

19 The language is substantially like
20 Federal Appellate Rule 28(i); but it's broader
21 and extends the idea to everything.

22 HONORABLE SARAH B. DUNCAN: And
23 everybody.

24 PROFESSOR BILL DORSANEO: And this
25 was presented to the TRAP subcommittee at our

1 telephone conference meeting; and I -- and
2 there was a fairly well attended meeting.
3 About 10 members of the Committee, you know,
4 were there; and it was approved at that point
5 after I admonished them that I wanted them to
6 not to rubber stamp it, but to look at it very
7 carefully and critically.

8 CHAIRMAN BABCOCK: Was there any
9 criticism?

10 PROFESSOR BILL DORSANEO: No. In
11 fact, it was --

12 HONORABLE SARAH B. DUNCAN: I did have
13 one question that wasn't addressed in the
14 conference call. Can one adopt another
15 party's verified petition or response or
16 motion? And I don't -- it's not a criticism,
17 because I don't know the answer to it, and I
18 don't know that it's a problem at all. But I
19 just do have -- you know, it's one of those
20 niggling little questions.

21 PROFESSOR BILL DORSANEO: I don't --

22 MR. EDWARDS: Wouldn't the party
23 adopting it have to verify?

24 PROFESSOR ELAINE CARLSON: You'd
25 adopt; but you'd have to verify.

1 MR. EDWARDS: You'd adopt by
2 reference; but you would have to verify your
3 own pleading.

4 CHAIRMAN BABCOCK: You would think
5 that's what the Rule should be. Is this what
6 this says?

7 MR. EDWARDS: I don't know.

8 PROFESSOR ELAINE CARLSON: No. I
9 don't think it says.

10 CHAIRMAN BABCOCK: I think it's
11 silent. Don't you?

12 PROFESSOR ELAINE CARLSON: Yes.

13 MR. GILSTRAP: Tell me, what do we
14 have to verify in the Appellate Rules?

15 HONORABLE SARAH B. DUNCAN: Motions
16 that are based on facts outside the record and
17 not within, something akin to judicial notice,
18 mandamus petitions.

19 PROFESSOR BILL DORSANEO: It would
20 be very easy to restrict this to briefs.

21 MR. EDWARDS: Mandamus is one.

22 PROFESSOR BILL DORSANEO: Yes.

23 MR. HAMILTON: This doesn't include
24 amicus. Should it?

25 HONORABLE MICHAEL H. SCHNEIDER:

1 No.

2 PROFESSOR BILL DORSANEO: Well,
3 amicus would not be any of these people.

4 JUSTICE NATHAN HECHT: But they
5 frequently do do that. Could we simplify this
6 by just saying "A person may join in a brief,
7 petition response, motion or other document"?
8 I guess you wouldn't want amicus joining in a
9 petition.

10 CHAIRMAN BABCOCK: Skip.

11 MR. WATSON: One thing that was kind
12 of hanging over the discussion that at least I
13 didn't think was resolved in the subcommittee,
14 but that is just obvious, that is the
15 potential for there to be, for example, a
16 single appellant and 12 appellees and the
17 ability to split up multiple arguments, and
18 everybody make part of an argument, and then
19 by adopting by reference other arguments have,
20 you know, 150 or 200 pages of appellees'
21 briefing versus the 50 pages of the appellant;
22 and I think we sort of resolved that by the
23 Supreme Court is very sensitive to that by
24 virtue of some of the rulings on argument in
25 the jurisdiction section. I'm not convinced

1 the Courts of Appeals are that sensitive to
2 it; but I don't know how you fix it. I just,
3 we just sort of said "Yes. That's a problem,
4 and it's going to be there."

5 HONORABLE SARAH B. DUNCAN: You are
6 still going to have the same number of pages
7 of briefing. It's just that one brief is
8 going to be devoted to issue one instead of
9 being divided between issues one and two; and
10 brief number two is going to be devoted to
11 issue two instead of being divided half and
12 half.

13 MR. WATSON: Right.

14 HONORABLE SARAH B. DUNCAN: Which
15 actually might improve the quality of briefing
16 a lot.

17 MR. WATSON: Oh, I think it might
18 well do that; but...

19 CHAIRMAN BABCOCK: Let's get back to
20 issue of verification.

21 JUSTICE NATHAN HECHT: 52.3 says
22 that "All factual statements in the petition
23 for mandamus must be verified by affidavit
24 made from personal knowledge by a client
25 competent to testify in the matters stated."

1 So why should someone who has joined in the
2 petition that someone else has already had a
3 witness verify have to make an additional
4 verification?

5 HONORABLE SARAH B. DUNCAN: They
6 probably couldn't.

7 JUSTICE NATHAN HECHT: Not be able
8 to. Once it's verified it's verified; and
9 they're just saying "me too."

10 PROFESSOR BILL DORSANEO: That same
11 logic would apply to everything that's
12 verified and already verified.

13 CHAIRMAN BABCOCK: That's okay. So
14 your question is answered to your
15 satisfaction?

16 HONORABLE SARAH B. DUNCAN: (Nods
17 affirmatively.)

18 CHAIRMAN BABCOCK: Is that a "yes"?

19 HONORABLE SARAH B. DUNCAN: Yes.

20 CHAIRMAN BABCOCK: All right.
21 Anything else about this Rule? Any other
22 questions or comments, special effects?

23 MR. SOULES: I move we adopt Rule
24 9.

25 MR. MEADOWS: What was the reason

1 for having the two words "any number of," just
2 "number of," the second line?

3 PROFESSOR BILL DORSANEO: The reason
4 why is the monkey-see, monkey-do reason that
5 the language appears in 28(i) --

6 MR. MEADOWS: Okay.

7 PROFESSOR BILL DORSANEO: -- of the
8 Federal Appellate Rule.

9 CHAIRMAN BABCOCK: Good enough for
10 me. Any other comments? All right. It's
11 been moved and seconded. All in favor raise
12 your hand. Anybody opposed? It carries 19 to
13 nothing, and nobody opposed.

14 And that will do it for today. We'll see
15 you tomorrow morning at 8:30. And everybody
16 who had stayed, thank you.

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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 12th day of January, 2001, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are \$ 111.50 charged to Charles L. Babcock. Given under my hand and seal of office on this the 22nd day of JANUARY, 2001.

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