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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 20, 2000

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of May, A.D., 2000, between the hours of 8:30 o'clock a.m. and 12:21 o'clock p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

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1 CHAIRMAN BABCOCK: Okay. Judge McClure
2 is trying to call in, but the phone won't answer, so
3 we're still working on that, but we're onto (d)(2), time
4 to file. Carl, do you want to talk about that?

5 MR. HAMILTON: Yeah. We worded that the
6 way I think we discussed it at the last meeting, but
7 having looked at it I'm not sure that it's going to work
8 because it says, "A motion to recuse may not be filed
9 later than." Well, the clerk's office is going to file
10 these you know, so to say that it can't be filed to me
11 is unrealistic, and so then I thought, well, maybe we
12 ought to say something like "A motion to recuse filed
13 later than the tenth day of the date the case is set for
14 trial or hearing will be denied without a hearing except
15 under the following circumstances," but then when you
16 put good cause in there then it almost seems like
17 everybody is going to file something with at least a
18 prima facie good cause in it, so I'm not sure that we're
19 going to end up back where we started from that the
20 motion to disqualify or recuse could be filed at any
21 time. I guess I just think that the clerks are not
22 going to try to make a decision of whether or not good
23 cause is shown.

24 CHAIRMAN BABCOCK: Yeah.
25

1 MR. HAMILTON: So to say it can't be
2 filed I think is not realistic.

3 CHAIRMAN BABCOCK: What if you say, Carl,
4 "A motion to recuse is waived if not filed"?

5 MR. HAMILTON: Well, yeah, we could say
6 that, "is waived if not filed."

7 CHAIRMAN BABCOCK: How does that strike
8 everybody?

9 PROFESSOR CARLSON: Yeah.

10 CHAIRMAN BABCOCK: "A motion to recuse is
11 waived if not filed."

12 HONORABLE HARVEY BROWN: Before?

13 HONORABLE SARAH DUNCAN: Isn't that the
14 reason for --

15 CHAIRMAN BABCOCK: "A motion to recuse is
16 waived if not filed" -- "if filed." Take the "not" out.
17 "A motion to recuse is waived if filed later than the
18 tenth day prior to the date the case is set for trial or
19 hearing except in the following instances." That gets
20 you out of the clerk problem anyway.

21 MR. HAMILTON: "Motion to recuse is
22 waived if filed later than the tenth day."

23 CHAIRMAN BABCOCK: Anybody have an
24 objection to that?

25 MR. EDWARDS: Where are we working from?

1 We've got something on our desk this morning.

2 CHAIRMAN BABCOCK: Off the record for a
3 moment.

4 (Off the record.)

5 MS. SWEENEY: Are we working from this?

6 CHAIRMAN BABCOCK: No, you're working
7 from --

8 MR. HAMILTON: Either one. They're both
9 the same.

10 CHAIRMAN BABCOCK: Either one.

11 MS. SWEENEY: They're the same as what
12 we -- okay. Thank you.

13 CHAIRMAN BABCOCK: What was on your desk
14 is what we decided yesterday. Okay. So, Carl, so we
15 fixed that problem. Now what's next?

16 MR. HAMILTON: Well, the four things
17 there that we discussed last time, unless anybody has
18 any changes in the wording.

19 HONORABLE SARAH DUNCAN: Technically you
20 don't waive a motion to recuse. You can waive a ground,
21 you know. It seems kind of funny to say the motion is
22 waived because what we're really saying is you've waived
23 these grounds if you don't file a motion.

24 HONORABLE MICHAEL SCHNEIDER: Right.
25 Yeah.

1 CHAIRMAN BABCOCK: Okay. That doesn't
2 strike me as odd, but --

3 MS. SWEENEY: Do we still have Brian
4 Garner cleaning up behind us on things like that or --

5 JUSTICE HECHT: (Nods head.)

6 MS. SWEENEY: Yes? Okay.

7 HONORABLE SARAH DUNCAN: We don't have to
8 worry about it then.

9 CHAIRMAN BABCOCK: Anybody have any
10 problems with the four grounds? (a) is pretty
11 straightforward, I think. If the facts didn't exist
12 then that ought to be an exception.

13 "(b), the judge who is sought to be
14 recused was not assigned to the case before ten days
15 prior to the date the case is set for trial or other
16 hearing." That's pretty easy it seems to me.

17 "(c), the party filing" --

18 (Off the record.)

19 CHAIRMAN BABCOCK: (c) is the one that
20 we've had trouble with. "The party filing the motion
21 neither knew nor should have known of the basis for
22 recusal before ten days prior to the date the case is
23 set for trial or the hearing."

24 (Off the record.)

25 MR. HAMILTON: That's the one that Luke

1 was against because of the problems of proof.

2 CHAIRMAN BABCOCK: Right.

3 MR. HAMILTON: But we revisited that, and
4 I think we voted the last time to put that back in.

5 CHAIRMAN BABCOCK: Well, that's not my
6 recollection, but I'll vote for this.

7 Who's got a recollection of whether we
8 voted to put that back in or not?

9 MR. HAMILTON: I think we need Richard's
10 notes because I think Richard had that in his notes to
11 put back in.

12 CHAIRMAN BABCOCK: Well, I've got a memo
13 regarding all the votes we took.

14 MR. HAMILTON: Yeah.

15 MR. EDWARDS: I don't believe we actually
16 had a vote on it. We had a discussion.

17 CHAIRMAN BABCOCK: Yeah, I don't believe
18 we did vote on it.

19 MR. EDWARDS: And if I recall the
20 objection was that somebody is going to have to testify,
21 but it's my notion that if there's a ground for recusal
22 that has been unavailable to a party not through the
23 party's own negligence, in other words, no reason that
24 they should have known it, that the recusal should be
25 denied because, after all, it's still we're talking

1 about a lot of these things the appearance of
2 impropriety, and the system I think calls out for the
3 ability to make the motion.

4 CHAIRMAN BABCOCK: Yeah. I recall our
5 trying to get away from this "knew or should have known"
6 language two meetings ago because of the problems of,
7 you know, when does somebody really know something, and
8 I thought our committee was fairly unanimous at that
9 point in time that that was not a good thing to get
10 into, but then if that's true then how do you remedy --
11 how do you remedy the problem you just identified?

12 MR. EDWARDS: Well, we deal with knew or
13 should have known all the time. When it comes to
14 conditions that exist and other things, we ask juries to
15 decide it. We ask courts to decide it.

16 MS. CORTELL: Chip, wasn't it the
17 reverse? At the time that Luke spoke wasn't it that we
18 were saying you had to file within so many days of when
19 you knew or should have known?

20 CHAIRMAN BABCOCK: That's right.

21 MS. CORTELL: In other words, it was a
22 beginning trigger, not an end trigger.

23 CHAIRMAN BABCOCK: That's right.

24 MR. EDWARDS: Not an end trigger.

25 MS. CORTELL: So maybe the concerns are

1 lessened when you look at it in that context.

2 CHAIRMAN BABCOCK: Yeah. That's a good
3 point. That's a very good point. Well, I think we've
4 got a clear field for our merry little band. Bobby, how
5 do you feel about it?

6 MR. MEADOWS: I'm thinking it over.

7 CHAIRMAN BABCOCK: Okay. What's
8 everybody else think about the "knew or should have
9 known" language? Judge Peeples, do you have -- Scott.

10 HONORABLE SCOTT BRISTER: It's going to
11 be raised in every case if it's -- well, let's think how
12 this works. It's waived if it's not filed within ten
13 days before any trial or setting, so all we're talking
14 about, are we going to bump an immediate setting. So I
15 guess you could avoid it and say, well, if it's a
16 summary judgment setting and you're less than ten days
17 you could -- then your option is I can try to show that
18 I neither knew nor should have known, or I can just wait
19 'til after the summary judgment and see how it goes and
20 if I lose, file it more than ten days before the motion
21 for rehearing and still have it heard just the same.
22 What's wrong with --

23 MR. EDWARDS: Well, I was going to bring
24 up that particular issue, whether if you -- you know,
25 the way it is now, if you don't make your motion to

1 recuse before the first hearing that that judge sits on
2 a case, you've lost your opportunity to make it. You
3 can't lay behind the log, if you will, and say, "Well,
4 I'll wait and see how this one comes out and make it
5 before trial." You can't do that under present day
6 rules. This rule the way it's written I think would
7 allow you to perhaps do that.

8 HONORABLE SCOTT BRISTER: No, I don't
9 think you can. I think if --

10 MR. EDWARDS: I think the only time it
11 can occur, and it would be -- I think they have done
12 this in the area of former judges, where a former judge
13 hears --

14 HONORABLE SCOTT BRISTER: Oh, sure.

15 MR. EDWARDS: -- a motion and then his
16 appointment runs out and then you get a trial setting
17 over here and he's re-appointed. That's -- there seems
18 to be -- that seems to be handled differently, and it's
19 just a question of how do you want to do it.

20 HONORABLE SCOTT BRISTER: Right, but if
21 some -- I think somebody -- I think under our current
22 recusal rules somebody can come in three hearings with
23 me, knowing there is some ground for recusal and not
24 saying anything about it, but when things start looking
25 bad, file it before the fourth one. There is no waiver

1 there.

2 MR. EDWARDS: I don't think so.

3 MS. JENKINS: Yes.

4 CHAIRMAN BABCOCK: The current rule reads
5 very similarly to this rule.

6 MR. EDWARDS: Well, my understanding of
7 the current -- we are all very careful where I practice
8 in law to be sure if you're going to file a recusal
9 motion it's done before the first time that judge --

10 HONORABLE SCOTT BRISTER: Certainly that
11 applies to former judges, but that's by statute. That's
12 a different thing.

13 MR. EDWARDS: Well, we're talking about
14 recusal, too.

15 HONORABLE SCOTT BRISTER: Because
16 currently, I mean, these things are filed all the time
17 after the trial when the jury comes back with a bad
18 verdict. I've never seen one of those that goes off on
19 a "knew or should have known" or waiver. Am I just not
20 remembering?

21 CHAIRMAN BABCOCK: Well, I can read the
22 language, which says, "At least ten days before the date
23 set for trial or other hearing in any court other than
24 the Supreme Court."

25 HONORABLE SCOTT BRISTER: Yeah, but that

1 can be any -- if I have 20 hearings on the case --

2 CHAIRMAN BABCOCK: I know. I know.

3 HONORABLE SCOTT BRISTER: -- you just

4 file it more than ten days before any one of them.

5 There's no waiver if you don't file it ten days before

6 the first one. You file it ten days before the second

7 one or the tenth one.

8 CHAIRMAN BABCOCK: Unless you're aware of

9 some case law that restricts this language.

10 MR. EDWARDS: I don't know of any either

11 way, just sitting here.

12 HONORABLE SCOTT BRISTER: All I'm saying

13 is if a -- I would kind of think -- I would rather than

14 getting into a long hearing about who knew what and

15 when, which is going to definitely get into

16 attorney-client and everything else --

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE SCOTT BRISTER: -- I'd rather

19 just relegate them to, well, just file it before the

20 next hearing we have, more than ten days before the next

21 hearing.

22 CHAIRMAN BABCOCK: Yeah, but what if

23 you're set for trial, and you legitimately -- I mean,

24 you're two days before trial and you find something out

25 big time about the judge.

1 HONORABLE SCOTT BRISTER: Then you fall
2 under just found out less than ten days before. Then
3 you fall under No. 1 -- (a).

4 CHAIRMAN BABCOCK: No, no, no.

5 MR. EDWARDS: No, no. It existed. You
6 just didn't know about it.

7 CHAIRMAN BABCOCK: If the basis has
8 existed for a year. Here is the example, and this is
9 from a real case. The judge had obtained a loan from
10 the president of the bank. The loan is outstanding. It
11 hadn't been paid for awhile, and the bank was a party in
12 the case. The plaintiff doesn't find out about that
13 until two days before trial, even though that's been
14 going on for years. (a) doesn't save them.

15 HONORABLE SCOTT BRISTER: Well, what's --
16 (d) could.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE SCOTT BRISTER: And, again, the
19 alternative is you say, "Look, it's less than ten days.
20 You should have found out beforehand."

21 CHAIRMAN BABCOCK: Right. Everybody in
22 town knew about this loan.

23 HONORABLE SCOTT BRISTER: But in any
24 event, it's less than ten days, we're two days from
25 trial. I'm not going to stop the trial to have a

1 motion, multi-day hearing on who should have known what.
2 Let's go ahead with the trial. We'll have the hearing
3 afterwards, and if you're right, we may have to set it
4 all aside, and then the judge balances how serious is
5 this motion to recuse versus the trial schedule, and
6 how -- whether I can bump this trial for ten days.

7 CHAIRMAN BABCOCK: Judge Brown and then
8 Anne McNamara.

9 HONORABLE HARVEY BROWN: It seems to me
10 this kind of goes back to Nina's point, though. If the
11 lawyer wants to open himself up to this issue by raising
12 "I didn't know and I couldn't have known," well, then
13 that's a conscious choice by the lawyer. He's decided
14 to open that box up, so I don't think the other side
15 gets to open that box up, and if we want to make it
16 clear, we could say something like "except when a party
17 claims default in the filing exceptions," to make it
18 clear that the party is the one that opens that box up,
19 not the other side.

20 CHAIRMAN BABCOCK: Anne.

21 MS. McNAMARA: In your example, Chip, if
22 you assume that there was no real way to know about the
23 loan since it's not public, I don't think you can
24 proceed with the trial and then sort it out afterwards.
25 I think for all the reasons we have been talking about

1 on the subject the appearance of impropriety is so
2 overwhelming and the consequences of an adverse verdict
3 in the trial where you think you've gotten an unfair
4 deal in the first instance is so overwhelming. This
5 kind of goes back to Luke's example. I think you have
6 to have some way to address that situation without
7 proceeding to the trial first.

8 CHAIRMAN BABCOCK: So you're in favor of
9 (c).

10 MS. McNAMARA: Yeah, I really am.

11 CHAIRMAN BABCOCK: Okay. Paula.

12 MS. SWEENEY: And I agree with Anne. I
13 think the alternative of, you know, "Let's not mess up
14 the docket. Let's go to trial. Let's not stop and have
15 a hearing" is to the horrible detriment to the litigants
16 in the case and trying a case for ten days or two weeks
17 or three months and then having to do it all over again
18 is -- to me is the worst of all possible worlds from the
19 litigants' standpoint and from the standpoint of the
20 system if you're going to be challenging the
21 impartiality of the judge after all that.

22 HONORABLE SCOTT BRISTER: Would you feel
23 the same way if it's a hearing rather than a trial?

24 MS. SWEENEY: I would. I mean, yeah,
25 then it gets down to is the hearing on a motion to

1 compel or is it a dispositive summary judgment, but,
2 yeah, I think that if the judge is --

3 HONORABLE SCOTT BRISTER: But both of
4 those are short. In other words, the obvious
5 distinction is those don't last three months.

6 MS. SWEENEY: True.

7 MS. McNAMARA: But still, if you have a
8 dispositive summary judgment hearing you're going to
9 make substantial decisions coming out of that. Can you
10 dare -- do you dare take a case to trial or do you
11 simply have to settle it because you can't live with the
12 consequences?

13 HONORABLE SCOTT BRISTER: All I'm getting
14 at, the thing we're addressing is because the
15 Legislature -- and I agree with them -- people use these
16 to bump a trial setting or a hearing setting.

17 MS. SWEENEY: That's true.

18 HONORABLE SCOTT BRISTER: And if you
19 throw this in, you're going to bump it.

20 MS. McNAMARA: Right, but I think that's
21 not as bad as risking a bad outcome that is perceived as
22 grossly unfair.

23 CHAIRMAN BABCOCK: Yeah, Carl.

24 MR. HAMILTON: Don't forget that those
25 four come under the interim proceedings under (4), under

1 paragraph (4). Any motion that's filed after that tenth
2 day, the court can go on with the trial or whatever.

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE SCOTT BRISTER: So all our
5 arguments are irrelevant.

6 MS. McNAMARA: If that survives.

7 MR. EDWARDS: They're irrelevant only if
8 we agree that --

9 HONORABLE SCOTT BRISTER: It's a timely
10 motion, but I'll hear it three months later after the
11 trial.

12 MS. McNAMARA: We haven't talked about
13 the interim proceeding.

14 CHAIRMAN BABCOCK: Well, we're going to
15 get to that referral thing in a minute, but do we leave
16 (c) in or not? Anymore discussion on it? All right.
17 Everybody who's in favor of leaving (c) in as worded
18 raise your hand. 19 in favor.

19 Anybody against? One against. So that
20 will carry 19 to 1.

21 HONORABLE HARVEY BROWN: That was worse
22 than Richard.

23 CHAIRMAN BABCOCK: Yeah. Richard's
24 laying low on this.

25 How about (d), for other good cause

1 shown? Any discussion on (d)?

2 HONORABLE SCOTT BRISTER: What does that
3 cover? Give me an instance where it's not under (a),
4 (b), or (c) but is under (d).

5 MR. EDWARDS: I don't know of any.

6 CHAIRMAN BABCOCK: Oh, you could --

7 HONORABLE SARAH DUNCAN: Substitution of
8 counsel.

9 CHAIRMAN BABCOCK: Yeah. Substitution of
10 counsel. You get a new lawyer in. It's pretty clear
11 that the prior lawyer knew about this, knew about this
12 problem, but he was an idiot and he didn't raise it, and
13 so now the new guy comes in. He says, "Yeah, we knew
14 about it. I know this is going to be terribly
15 disruptive, but this is horrible. This is really
16 terrible facts, and you've got to cut us some slack on
17 this." That would be an instance.

18 MR. EDWARDS: I guess it -- well, yeah.
19 Because if something about a contribution or something
20 that the lawyer -- or some relationship between the new
21 lawyer and the judge that would have been unknown before
22 he came in the case.

23 HONORABLE SCOTT BRISTER: The problem
24 with -- the current rule is it's easy, was the motion
25 filed ten days before or not. The problem with this,

1 and if it's less than ten days, you throw it back in the
2 file and forget about it. The problem is the person
3 deciding whether good cause has been shown is the judge
4 you're attacking for being biased. It defeats the
5 purpose of the -- you know, who decides whether good
6 cause is shown? The judge who took the filthy
7 contribution or whatever.

8 MR. EDWARDS: I would assume it would be
9 the recusal judge.

10 HONORABLE SCOTT BRISTER: No. No. I
11 mean, you don't have to refer it if it's not a timely
12 motion. That's somewhere else in here.

13 MR. HAMILTON: Well, that's a good point.
14 The judge who's going to be recused --

15 HONORABLE SCOTT BRISTER: Who's the same
16 person deciding whether you should have known or not
17 known.

18 CHAIRMAN BABCOCK: Is Judge McClure
19 coming across the --

20 MR. ORSINGER: Yes. We're billing it to
21 my long distance service.

22 CHAIRMAN BABCOCK: Whoa, now we're
23 talking.

24 MR. ORSINGER: Ann, are you there?

25 HON. ANN CRAWFORD McCLURE: Good morning.

1 CHAIRMAN BABCOCK: Morning.

2 MR. TIPPS: How was the graduation?

3 HON. ANN CRAWFORD McCLURE: It was
4 wonderful. My son got an award for math excellence in
5 his AP algebra, so I was delighted.

6 CHAIRMAN BABCOCK: Good for you.

7 HON. ANN CRAWFORD McCLURE: Thank you.

8 CHAIRMAN BABCOCK: And him. Ann, we're
9 on (d)(2), time to file.

10 HON. ANN CRAWFORD McCLURE: All right.

11 CHAIRMAN BABCOCK: And we're on
12 subparagraph (d) of Rule (d)(2) relating to "for other
13 good cause shown," and there is a discussion as to what
14 subparagraph (d) adds to what is already there in (a),
15 (b), and (c), and there may be some small sliver of
16 circumstances not covered by (a), (b), or (c) which (d)
17 would cover, and Judge Brister has just raised the
18 question of, well, if you come in with (d) you're going
19 to make that good cause argument to the judge you're
20 trying to recuse, and he doesn't have to refer it on
21 under our scheme, and so isn't that kind of a fruitless
22 gesture.

23 MR. HAMILTON: Well, if the trial judge
24 decides that there isn't good cause shown for the late
25 filing then the way we have it worded I suppose that

1 it's considered to be waived.

2 CHAIRMAN BABCOCK: If he says it's not
3 good cause?

4 MR. HAMILTON: Yeah.

5 CHAIRMAN BABCOCK: Right. That's right.

6 MR. HAMILTON: Then it's considered to be
7 waived.

8 HONORABLE SARAH DUNCAN: How so? Under
9 (3), either option, there's still a requirement that the
10 judge that's the subject of the motion to recuse either
11 has to grant or refer.

12 MR. EDWARDS: Yeah. Where is the
13 determination? I don't see that in here that there's
14 any discretion on the part of the judge with respect to
15 whom the motion is filed gets to determine whether it's
16 timely filed or not.

17 CHAIRMAN BABCOCK: Scott, do you see it
18 anywhere?

19 HONORABLE SCOTT BRISTER: It was in the
20 last draft unless it's been dropped.

21 MR. EDWARDS: Well, the way this is in
22 here it says that either way that the judge either has
23 to recuse or refer. Or disqualify or refer.

24 MR. HAMILTON: Well, then putting that
25 phrase in there that the motion is waived if it isn't

1 timely filed is confusing because then that looks like
2 the trial judge can decide whether or not it's waived or
3 not. If he thinks it's waived, he may not even refer
4 it.

5 MR. EDWARDS: Well, the issue is who
6 decides whether it's waived or not, and the way that
7 this is written that he either recuses, disqualifies, or
8 refers, I don't think there's any discretion to make the
9 decisions that you're talking about. Nor do I think
10 there should be.

11 CHAIRMAN BABCOCK: Yeah. I don't see in
12 the way you've got the referral options written that if
13 the trial judge, the judge that is being recused, says
14 he doesn't think there's good cause that that absolves
15 him of the responsibility to refer it. I don't see that
16 exception in here.

17 HONORABLE HARVEY BROWN: I think you have
18 to do that, though.

19 HONORABLE SCOTT BRISTER: (c), it's
20 (4)(c) on interim proceedings.

21 CHAIRMAN BABCOCK: (4)(c). "When the
22 motion to recuse or disqualify is filed after the tenth
23 day prior to the date the case is set for trial or other
24 hearing."

25 MR. HAMILTON: That just gives the trial

1 court the right to proceed.

2 CHAIRMAN BABCOCK: Right.

3 MR. HAMILTON: But it still has to be
4 referred.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE SARAH DUNCAN: Yeah. He's
7 still got to refer.

8 CHAIRMAN BABCOCK: Right.

9 MR. HAMILTON: Well, as long as that
10 waiver language doesn't indicate that the trial judge
11 doesn't have to forward it then that's okay.

12 CHAIRMAN BABCOCK: Okay. So let's get
13 back to the "for good cause shown." Do people want to
14 leave it in there or not? Judge Brown.

15 HONORABLE HARVEY BROWN: Well, I first
16 did, but Scott's point has convinced me maybe otherwise.
17 We do get a lot of these motions to recuse the day of
18 trial by pro se's.

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE HARVEY BROWN: And if this rule
21 means that now I can go on with my trial but I have to
22 refer it every time, all a pro se is going to do is put
23 "good cause," and it's going to get in the forms these
24 pro se's use all across the state.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE HARVEY BROWN: So the exception
2 is going to create havoc in a trial court.

3 CHAIRMAN BABCOCK: But let's say that he
4 doesn't -- let's say the motion is silent. It's filed.
5 It doesn't have good cause in it, doesn't say anything.
6 Does it excuse the late filing? Don't you have to --

7 HONORABLE HARVEY BROWN: If he doesn't
8 say anything, he's dead or she's dead, but they're going
9 to learn.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE HARVEY BROWN: I mean, the pro
12 se's are -- most of them are pretty good at it because
13 they do it a lot, and so they know the right things to
14 say.

15 CHAIRMAN BABCOCK: What if they just put
16 in there, "By the way, I didn't know about this until a
17 couple of days ago, nor did I have reason to know about
18 it"?

19 HONORABLE HARVEY BROWN: That's a
20 problem. It seems like to me if we want to allow an
21 out, the out is this judge decides if this judge is
22 wrong there is a remedy. The remedy is on appeal.

23 CHAIRMAN BABCOCK: Judge Duncan.

24 HONORABLE SARAH DUNCAN: I thought that
25 was the reason that we are proposing to amend the rule

1 to provide that the trial or hearing can go forward for
2 good cause stated in an order on the record so that if
3 you determine that that pro se motion is frivolous and
4 is frivolous on its face, even though it facially
5 complies with the requirements of the rule, you can go
6 forward with the trial or hearing. The presiding judge,
7 the judge to whom it's referred, can have the hearing.
8 There can be due process about hearing the motion, but
9 it doesn't delay the trial, but if you take out -- if
10 you -- I don't think consistent with due process you can
11 let the judge that's the subject of the motion to recuse
12 decide whether there's good cause or the "knew or should
13 have known" or any of those other excepting factors,
14 because you've got a judge that's already subject to a
15 motion to recuse.

16 CHAIRMAN BABCOCK: Yeah. As we're going
17 down the road here we're trying to cure the problem of
18 pro se litigants or just people are trying to gum up the
19 trial filing these late -- these motions at the last
20 minute. Yeah, Paula.

21 MS. SWEENEY: You know, we have this
22 perennial problem of a few pro se litigants or a lot of
23 pro se litigants but people outside the mainstream
24 creating problems and then we want to write a rule
25 that's going to hamstring the mainstream, the people who

1 are using the courts properly for the right reasons for
2 serious matters, and I can't see this committee doing
3 that. Surely there is another fix to the frivolous
4 pro se litigant like sanctions or, you know,
5 applications of --

6 HONORABLE SCOTT BRISTER: Waste of time
7 on pro se's. They never have any money.

8 HONORABLE SARAH DUNCAN: But we're going
9 to let the trial go forward.

10 MS. SWEENEY: Well, then let the bailiff
11 take them away. I mean, I don't know, but to penalize,
12 you know, Anne's client or my client or, you know,
13 Chip's client or someone who has got a really important,
14 serious matter because of the nutballs on the fringes
15 can't possibly be our solution, and although that
16 doesn't necessarily get us any closer to a solution, I
17 can't embrace one that would have that effect. And I
18 also share Sarah's concern that the judge whose status
19 is being questioned ought not be the one with the power
20 to decide whether or not good cause has been shown.

21 CHAIRMAN BABCOCK: Richard, then Carl.

22 MR. ORSINGER: I haven't followed the
23 entire debate, but would it make a difference if we said
24 under "Time to File," "A motion to recuse cannot be
25 granted if filed later than the tenth day unless"? And

1 that makes it operative on the judge assigned to hear
2 the recusal. So it's not a question of waiver, but it's
3 a question that the motion will be denied, but that
4 motion would have to be denied by the judge assigned to
5 hear it. Would that help?

6 MS. SWEENEY: Say it again, Richard.

7 MR. ORSINGER: "A motion to recuse filed
8 later than the tenth day prior to the date the case is
9 set for trial or hearing must be denied except in the
10 following instances." Now, wouldn't that lead you
11 into --

12 MR. HAMILTON: The problem with that is
13 you're asking the very judge who you're trying to recuse
14 to make the decision as to whether there's good cause.

15 MR. ORSINGER: No.

16 MR. HAMILTON: You're letting him deny it
17 then.

18 MR. ORSINGER: What happens if you deny
19 it, though? Don't you refer it out?

20 MR. HAMILTON: No. Well, yeah, I guess
21 you would still refer it out.

22 CHAIRMAN BABCOCK: Carl, you had a point.
23 What was your point?

24 MR. HAMILTON: Well, I was just going to
25 say these pro se litigants that are always filing these

1 motions, probably practically none of those go on for an
2 appeal, do they?

3 HONORABLE SCOTT BRISTER: Well, it's
4 disbarred lawyers are the other -- lawyers in disbarment
5 proceedings are the other frequent because the judge has
6 to come in from out of county, so it's a great
7 opportunity to shut things down by filing that and
8 getting a several day wait so the judge has to go back
9 and then who knows when he reschedules.

10 MR. HAMILTON: I know, but if you proceed
11 under (4), under the interim proceedings, even though
12 they file this and maybe have said all the right things,
13 you go on and you get a decision made. How many of
14 those go on and appeal it based upon the recusal?

15 CHAIRMAN BABCOCK: Yeah. You're going to
16 get that fixed. Okay. I think we're ready to vote on
17 whether or not we're going to leave (d) in or take it
18 out. All in favor of leaving (d), "for good cause
19 shown," in the rule raise your hand. Do you have a hand
20 to raise?

21 HON. ANN CRAWFORD McCLURE: Yes. I vote
22 "yes."

23 CHAIRMAN BABCOCK: 22 in favor. How many
24 against?

25 MR. ORSINGER: Ann.

1 HONORABLE SARAH DUNCAN: No, she's not
2 against. She's in favor.

3 CHAIRMAN BABCOCK: 22 to 1. Judge
4 Peeples gets the award for this lopsided --

5 MR. ORSINGER: He gets a Richard Orsinger
6 award.

7 CHAIRMAN BABCOCK: All right. Let's go
8 on to referral. We've got two options.

9 MR. EDWARDS: Before we leave that, could
10 we talk just a minute about the wisdom of allowing the
11 motion to be filed if there's already been hearings
12 before the judge and the motion is something that was
13 known before those hearings started to be filed later on
14 after you start looking at what the judge's, how his
15 rulings have been coming or her rulings have been coming
16 down? That's the thing we talked about before.

17 CHAIRMAN BABCOCK: No. I think that's a
18 legitimate thing to talk about, Bill.

19 MR. EDWARDS: It doesn't make good sense
20 to me for a ground for recusal to be out there and known
21 and put the judge, the court, the system in a position
22 where if it's serious enough to warrant recusal that
23 that judge is going to be sitting on motions and then
24 some party didn't like the way that the motions are
25 coming out, maybe the motions in limine or who knows

1 what, and then you get the partial summary judgments or
2 whatever and then the motion is filed. It seems to me
3 that fairness says if you've got a ground for recusal
4 and you know about it that you ought to make that motion
5 before the first activity that the judge undertakes.

6 CHAIRMAN BABCOCK: Is this -- yeah,
7 Richard.

8 MR. ORSINGER: The problem is how do you
9 know when it's known, when the ground is known?

10 MR. EDWARDS: Well, we've already been
11 across -- we've covered that already in one of these,
12 "known or should have known."

13 MS. JENKINS: (c).

14 MR. EDWARDS: (c). So we have been
15 through that discussion already before a couple of
16 meetings and today also, but this is a question of at
17 what point in time is it too late to file it, and, you
18 know, we do it with an assigned judge or a retired judge
19 or a former judge, and I don't see where there's any
20 difference in it.

21 CHAIRMAN BABCOCK: Have you run into
22 problems like this?

23 MR. EDWARDS: Me personally?

24 CHAIRMAN BABCOCK: Yeah.

25 MR. EDWARDS: No, because if I think

1 there's a recusal basis out there, and I've only filed
2 two in my life I think, or one, I make the thing and
3 would make it at an early date.

4 CHAIRMAN BABCOCK: But have you seen it
5 on the other side?

6 MR. EDWARDS: No, but Judge Brister is
7 the one that raised the issue.

8 CHAIRMAN BABCOCK: Hartley, do you have
9 something?

10 MR. HAMPTON: I've had recusal motions
11 filed after a couple of years of intense trial activity
12 when everything is done, and it was denied, referred and
13 denied.

14 CHAIRMAN BABCOCK: Yeah. But was it
15 based on things that had been known for a long time?

16 MR. HAMPTON: Uh-huh.

17 CHAIRMAN BABCOCK: Was that a basis for
18 the denial?

19 MR. HAMPTON: Well, they weren't -- I
20 mean, the things that were known for a long time didn't
21 justify the recusal, but if the question is are recusal
22 motions filed after long periods of pretrial activity
23 and lots of motions being ruled on, the answer is "yes."

24 MR. EDWARDS: And Judge Brister raised
25 that issue.

1 CHAIRMAN BABCOCK: Richard's had his hand
2 up.

3 MR. EDWARDS: I think that's bad
4 practice.

5 MR. ORSINGER: This is revisiting the
6 issue that Luke Soules talked about when it first came
7 up, and we've debated this several times, and I know
8 that previous results don't make any difference on this
9 rule.

10 CHAIRMAN BABCOCK: Yeah, they do.

11 MR. ORSINGER: But we decided that we did
12 not want a waiver ground based on knew or should have
13 known because the other side would attack the motion on
14 knew or should have known and then the lawyer had to
15 come in and defend when they had enough information to
16 know it, and what we ended up saying is, well, if you
17 file within ten days, if you want to raise the knew or
18 should have known issue voluntarily and put your own
19 thinking into play, that's fine, but we're not going to
20 allow the person defending the motion to put knew or
21 should have known in play every time.

22 Now, if we do Bill's suggestion, which
23 cures the harm that he's talking about, introduces a
24 countervailing harm, which is that every single time you
25 can say, "You should have filed that three weeks before

1 you did," and then you're in this argument about how
2 much information did you have and at what point would a
3 reasonable person have known and then if you blew it
4 then you've got a malpractice case by your client even
5 though maybe in good faith you didn't feel like you had
6 enough evidence to attack the judge.

7 CHAIRMAN BABCOCK: We did talk about
8 this.

9 MR. ORSINGER: And so we ended up putting
10 this here saying if you file within ten days and you
11 want to put knew or should have known at issue, you can,
12 but we're not going to allow the other side to put it in
13 issue whenever they want.

14 HONORABLE HARVEY BROWN: Well, how does
15 Bill's change affect that?

16 MR. ORSINGER: Because Bill would have a
17 stand-alone provision saying that if you don't file it
18 within so many days of when you knew or should have
19 known, or as Bill said in earlier debate, before a
20 dispositive hearing, whether it's summary judgment,
21 trial, or whatever, then you have a "knew or should have
22 known" standard.

23 HONORABLE HARVEY BROWN: No, I think he's
24 just saying instead of saying "is set for trial or other
25 hearing," he's saying "set for trial or the first

1 hearing" or some language like that. That's all he's
2 talking about.

3 MR. EDWARDS: "The earlier of trial or
4 the first hearing that the judge presides" as opposed to
5 "before trial or hearing."

6 MR. ORSINGER: Well, I may misunderstand
7 the proposal, but I thought you were saying that if --

8 MR. EDWARDS: I'm not changing the
9 standards. I'm just saying that if you -- the first
10 cutoff would be the first hearing that the judge
11 presided at or the trial if that was the first and after
12 that you would fall into the exception. You would have
13 to fall into the exception or you wouldn't have a ground
14 for recusal. It doesn't change anything on the
15 exceptions.

16 MR. ORSINGER: And the burden is still
17 available to you if you want to raise the "knew or
18 should have known." It's just that the start date is
19 earlier.

20 MR. EDWARDS: Yeah.

21 MR. ORSINGER: Okay. Well, then that is
22 different from that other.

23 MR. EDWARDS: That's all I'm suggesting,
24 is that if it's one of those things that is subject to a
25 "knew or should have known," well, that's fine, but for

1 those things that are clearly known, I mean, the judge
2 comes in and says, "Hey, I want you guys to know about
3 this, you lawyers, and I'm putting this out there," and
4 everybody says, "Well, okay, we now know it." And then
5 you have a hearing and then that judge rules against one
6 side, and now we're coming down to another hearing and
7 ten days before that hearing the losing side on the
8 first hearing says, "Well, you remember that ground for
9 recusal you raised? I'm raising it." And I just think
10 that you can -- if there's stuff out there that is
11 grounds for recusal you ought to clean it up, and that
12 judge ought to be sitting in that case, and that
13 eliminates those people.

14 CHAIRMAN BABCOCK: So, Bill, you would
15 say then "It's waived if filed later than the tenth day
16 prior to the date the case is set for trial or the first
17 hearing before the judge except in the following
18 circumstances."

19 MR. EDWARDS: Yeah. That's what I would
20 say.

21 CHAIRMAN BABCOCK: Yeah, Sarah.

22 HONORABLE SARAH DUNCAN: I have one
23 question about that. For instance, with San Antonio's
24 central docket system, it may be that my client, we go
25 in for a hearing on a motion to compel and we get

1 Judge X, and we've got a ground for recusing Judge X,
2 but frankly, on a motion to compel it's not worth the
3 time and the expense of filing the motion to recuse, but
4 then we get Judge X on trial on the merits. Now, you're
5 saying that we've waived it because we didn't raise that
6 recusal ground for a garden variety motion to compel? I
7 have serious questions about that.

8 MS. JENKINS: That's a good point.

9 MR. EDWARDS: Well, if the ground is
10 serious enough -- you're saying from the standpoint of
11 the litigants. We're -- I'm looking at it from the
12 standpoint of the public and the system. If it's
13 serious enough for the judge not to try the lawsuit, you
14 understand that in this area of the appearance of
15 impropriety if you follow the Federal cases on it, it
16 doesn't matter whether there is actually any lack of
17 impartiality or not. It's the appearance that makes the
18 difference, and those case that have gone to appeal in
19 the Federal system have held that harm is not an issue.
20 It's whether or not the particular statute has been --
21 should have been followed, even if the trial has gone
22 all the way to the end, even if the impartiality
23 question arises in the middle of the trial, even if it's
24 a several week trial, and even if the judge who tried
25 the case was totally impartial.

1 CHAIRMAN BABCOCK: Wall.

2 HONORABLE SARAH DUNCAN: All I'm saying
3 is to me that if you waive it for one hearing, to me it
4 should not mean that you waive that ground for all
5 future hearings or trials.

6 CHAIRMAN BABCOCK: Yeah, Wall.

7 MR. JEFFERSON: I also think the problem
8 with that is you're going to force motions to recuse
9 when lawyers otherwise wouldn't file them, thinking, you
10 know, that this judge could be impartial or the ground
11 for recusal is really not all that important to the
12 case, but if you know that if you don't raise it at this
13 point, in Bexar County at least, you're never going to
14 be able to raise it again, well, then a careful lawyer
15 to avoid malpractice or what have you or just the
16 possibility of an impartial judge is going to be filing
17 them left and right.

18 There are many times when you think you
19 have a ground -- you may think you have a ground for
20 recusal, but it's going to take some more investigation,
21 it's going to take some more time to study it, and then
22 you've got to weigh that against you're not looked with
23 high esteem when you file a motion to recuse in general
24 anyway, and so you're sort of reluctant, and if it's a
25 case that you can just waive and say, "I'm not going to

1 pursue this," then you don't. But I think the problem
2 with requiring the motion for that first hearing is that
3 you're going to err on the side of filing that motion,
4 and that's going to really muck up the system.

5 CHAIRMAN BABCOCK: Bobby.

6 MR. MEADOWS: The problem I have with the
7 focus the way it is in Bill's view is that it puts
8 recusal up front in virtually every case. I mean, a lot
9 of times you will be in a case and things are going in a
10 way that seem odd. I mean, rulings that you ought to be
11 getting you're not getting, and you get a pattern of
12 conduct that makes you then investigate it, and all of
13 the sudden something might turn up. And if it's
14 something out there and arguably should have been
15 discovered then you've lost your right to act on it, and
16 the way we're talking about it, it would mean that
17 virtually in every case you would need to do some sort
18 of due diligence up front before you had a hearing.

19 CHAIRMAN BABCOCK: Judge Peeples has got
20 a rule which says if -- this rule has been developed
21 over many years, but I've learned of it by sitting next
22 to him in these meetings, and that is if you've got
23 language that's in the rule that has existed for a long
24 time and there is no demonstrated problem with that
25 language, it's not generally a good idea to tinker with

1 it. This language has been in our rule for a long, long
2 time, and I wonder if we ought not to invoke the Peoples
3 rule.

4 MR. EDWARDS: Well, the reason I raised
5 the issue in the first place was that Judge Brister --

6 CHAIRMAN BABCOCK: Who has been silent
7 during this whole debate.

8 MR. EDWARDS: But he is the one who
9 raised the issue about these last minute motions to
10 recuse after a series of --

11 CHAIRMAN BABCOCK: Yeah. But I don't
12 think he raised this problem. Right, Scott?

13 HONORABLE SCOTT BRISTER: Right. I was
14 saying I didn't think it was a waiver, but I'm not
15 saying I necessarily think it should be.

16 CHAIRMAN BABCOCK: Yeah. Okay. Carl,
17 last comment and then we're going to move on.

18 MR. HAMILTON: Well, yesterday we decided
19 under the waiver provision that if a matter was fully
20 disclosed on the record --

21 HONORABLE SCOTT BRISTER: Right.

22 MR. HAMILTON: -- it may be waived, but
23 by using the word "may" means it doesn't have to be
24 waived at that time, and we discussed that later on a
25 party might come in and decide to go ahead and file the

1 motion.

2 CHAIRMAN BABCOCK: Yeah. Okay.

3 MR. HAMILTON: So we would have to go
4 back and change that if we were going to change
5 something else.

6 CHAIRMAN BABCOCK: Let's go on to the
7 referral, the two referral options.

8 MR. HAMILTON: Okay. The two options
9 are -- the differences are on Option 2 the presiding
10 judge of the administrative region has the ability to
11 look at the motion, and if it doesn't comply with
12 paragraph (d)(1) deny it without a hearing. Option 1
13 doesn't give the presiding judge that right, but
14 Option 2 does. Otherwise the two are the same.

15 And it also gives the lawyer the right to
16 bring the motion to the attention of the presiding judge
17 if the judge to be recused hasn't promptly forwarded it.

18 CHAIRMAN BABCOCK: Okay. Discussion on
19 these two options?

20 MR. HAMILTON: There was a suggestion,
21 oh, way back a year or two ago by I think Judge Hedges,
22 who's on the Houston court, that the presiding judge
23 ought to have the right to summarily dispose of recusal
24 motions that didn't have anything in them of any
25 substance without having to waste everybody's time going

1 through a hearing, so that idea was generated way back
2 there I think at the Court Rules Committee level, and I
3 don't know exactly how it got in here, but that
4 suggestion was made at one of the meetings here that
5 maybe the presiding judge ought to have that right, so
6 that's --

7 MR. ORSINGER: I believe we favorably
8 acted on this proposal in a prior meeting.

9 HONORABLE SCOTT BRISTER: Don't the last
10 two sentences of Option 2 say the same thing twice, or
11 am I missing that?

12 HONORABLE DAVID PEEPLES: They're the
13 flip side of each other, aren't they?

14 HONORABLE SARAH DUNCAN: No, they don't.

15 MR. HAMILTON: One says if the motion
16 complies he has to hear it or assign it, and if it
17 doesn't comply, he can deny it without a hearing.

18 MR. ORSINGER: But it doesn't require him
19 to deny it without a hearing. It just permits him to
20 deny it without a hearing.

21 CHAIRMAN BABCOCK: Well, if we already
22 decided it, why is it an option?

23 MR. HAMILTON: I don't know that we have
24 decided between Option 1 and 2, have we?

25 MR. ORSINGER: Okay. Well, I thought

1 that we had said favorably, but that's fine. Let's just
2 vote on it this morning.

3 CHAIRMAN BABCOCK: All right. Any other
4 discussion about this? Yeah, Steve.

5 MR. TIPPS: Is this intended to deal with
6 the pro se motion or the frivolous motion?

7 HONORABLE SCOTT BRISTER: Right. They
8 don't verify them.

9 MR. ORSINGER: And also a motion that
10 doesn't -- we're now requiring the motion to detail the
11 factual basis, and so if you get a motion that just says
12 the judge's impartiality may be reasonably questioned,
13 it's gone. No hearing required.

14 MR. MEADOWS: Do we have a recommendation
15 on this from the subcommittee?

16 CHAIRMAN BABCOCK: Yeah, which option do
17 you guys like? Normally you put the option that you
18 like as No. 1, but maybe not.

19 MR. ORSINGER: No, I like the second
20 option. I think that probably the subcommittee -- I
21 have the minutes of the meeting.

22 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

23 HONORABLE DAVID PEEPLES: Can I step back
24 and try to look at the big picture, and I think Option 2
25 is vastly better. The present rule is very rigid and

1 doesn't allow good cause and so forth, but once a motion
2 is filed you've got to go through the procedures, but we
3 don't have an out of control problem right now because
4 there are some very strict requirements. I mean, you
5 just can't file a lot of these. Apparently with the
6 recodification draft we've made the decision to make it
7 much easier to file a plausible motion. You know, the
8 judge was assigned late, the grounds didn't exist, you
9 didn't know or should have known the grounds, or good
10 cause.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE DAVID PEEPLES: And if we're
13 going to allow that many facially valid motions to be
14 filed then we've got to do something on the other end to
15 keep it from getting out of control, and so Option 2,
16 the last two sentences are our way in this draft to keep
17 it from going out of control. I mean, we require a
18 factual detailed motion. You can't just have a shotgun
19 general motion. It's under oath, and if it's not done
20 that way under Option 2 as presiding judge you don't
21 have to -- somebody can't gum up the system. You know,
22 if they won't make it a detailed, factual, sworn to
23 motion, it can be dismissed out of hand; and if Option 2
24 is not adopted then we've opened the floodgates, so to
25 speak, and not given judges the way to control those

1 floodgates.

2 CHAIRMAN BABCOCK: In light of that does
3 anybody in this room want to argue for Option 1?

4 HONORABLE SCOTT BRISTER: That's pretty
5 strong.

6 CHAIRMAN BABCOCK: Judge Brown.

7 HONORABLE HARVEY BROWN: I don't, but I
8 want to suggest maybe we should add not only "(d)(1)"
9 but "(d)(2)" to the last sentence. If it doesn't apply
10 with (d)(2), in other words, if it's not timely or it's
11 within ten days and it doesn't say "good cause,"
12 et cetera, then that should also be able to be denied
13 summarily.

14 CHAIRMAN BABCOCK: How do people feel
15 about that? Judge Peeples, is that a thumbs up for the
16 record?

17 MR. ORSINGER: The implication of that is
18 that if you file within ten days of trial or other
19 hearing then it can be denied no matter how detailed it
20 is? Denied without a hearing, no matter how detailed it
21 is?

22 HONORABLE HARVEY BROWN: No. Denied
23 without a hearing if there is no statement of good
24 cause, for example, or if the person doesn't say they
25 didn't know or shouldn't have known, et cetera.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HONORABLE SARAH DUNCAN: I think that's
3 the question. Are we just going to require that the
4 motion contain a ground in (d)(2), a statement of a
5 ground in (d)(2), or are we going to require that the
6 motion comply in the sense of the evidentiary proof?

7 The differences between (d)(1) and (d)(2)
8 is (d)(1) is simply you can look at the motion and see
9 if it's verified, contains detailed legal and factual
10 allegations, but the exceptions in (d)(2) are
11 evidentiary concerns, and I don't know that the
12 presiding judge can look at the motion to determine
13 whether one of the (d)(2) grounds exists. They
14 certainly can look at the motion and see whether one of
15 the (d)(2) grounds is alleged.

16 CHAIRMAN BABCOCK: Elaine, did you have
17 something to say about that?

18 PROFESSOR CARLSON: No. I agree with
19 Sarah.

20 HONORABLE DAVID PEEPLES: On that point,
21 if we leave it to say only (d)(1) and that means that
22 you have to allege factually your grounds under (d)(2)
23 why it's filed within ten days, if that's what this
24 means and that's very clear then we may not need to add
25 (d)(2).

1 MR. ORSINGER: It doesn't mean that. We
2 don't -- (d)(1) does not require that your exception to
3 (d)(2) be stated in the motion. We better do that if
4 we're going to do this.

5 HONORABLE DAVID PEEPLES: I think we
6 should.

7 MR. ORSINGER: We better require that
8 they allege specifically why if filing within ten days
9 they need an exception.

10 MR. EDWARDS: All you have to do is go
11 into (d)(2) and just before where it says -- well, where
12 it says "except in the following instances" put in
13 something like "which shall be detailed in the motion"
14 or something. "In the motion to recuse."

15 HONORABLE SARAH DUNCAN: Just put "If the
16 motion complies with subparagraph (d)(1) and states one
17 of the exceptions for late filing under (d)(2), the
18 presiding judge shall hear or assign."

19 MR. ORSINGER: Well, but just stating
20 it --

21 HONORABLE SARAH DUNCAN: "Shall not apply
22 or" --

23 MR. ORSINGER: Do you have to have the
24 factual detail to support your exception or do you just
25 allege the exception exists?

1 MR. EDWARDS: I think you have to have --
2 if you want to get where we're talking about, and I
3 agree that we should want to get there, I think you have
4 to provide for a factual recitation of the basis for
5 your claim to be under (d)(2).

6 HONORABLE DAVID PEEPLES: Yeah.

7 MR. ORSINGER: Well, I would propose then
8 in (d)(1) we add a sentence that says something like,
9 "If filed later than the tenth day prior to the date the
10 case is set for trial or other hearing then the
11 exception under (d)(2)" -- "any applicable exception
12 under (d)(2) must be stated" -- or "must give the
13 factual and legal basis for any exception under (d)(2)"
14 or something like that.

15 CHAIRMAN BABCOCK: And that way you could
16 just leave -- you could leave Option 2 with (d)(1) in it
17 because (d)(1) would then pick up (d)(2).

18 MR. ORSINGER: But, see, it should be
19 probably in (1) because that talks about the motion, and
20 (2) just talks about timing, and we don't want to have
21 motion requirements under timing.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE DAVID PEEPLES: Would another
24 way to do that be in Option 2 to add a sentence that
25 says, "If it's not timely," in other words, if it's

1 closer than ten days you have to allege those in detail,
2 and a judge can dismiss it if it's not adequately
3 alleged.

4 CHAIRMAN BABCOCK: You could do it that
5 way, but wouldn't it be better -- wouldn't it be easier
6 for the practitioner to have their pleading requirements
7 in (d)(1), which is the motion, rather than have to say,
8 "Whoops, I forgot to read" --

9 HONORABLE DAVID PEEPLES: Okay.

10 CHAIRMAN BABCOCK: -- "(d)(3)," so I kind
11 of like Richard's idea, so will you write that sentence
12 for us, Richard? And while you're doing that, do we
13 have a ground swell of support for Option 2? Is anybody
14 opposed to Option 2 as opposed to Option 1? No hands
15 are up, so Option 2 is adopted unanimously.

16 And Richard will get us a sentence here
17 in a minute, but in the meantime we will go to
18 subparagraph (4), interim proceedings, and, Carl, what
19 are you trying to accomplish here?

20 MR. HAMILTON: Okay. We added one change
21 to that yesterday, "except for good cause" portion. I'm
22 not sure that we ought to have a semicolon there,
23 though.

24 CHAIRMAN BABCOCK: Not sure you ought to
25 have what?

1 MR. HAMILTON: Well, we added yesterday
2 on interim proceedings, after "disposed of" we added
3 "except for good cause stated in the order in which the
4 action is taken." I'm not sure we need a semicolon
5 after the "of" there.

6 CHAIRMAN BABCOCK: You mean you and
7 Richard just added it or we added it in our meeting?

8 HONORABLE SCOTT BRISTER: Yeah. You
9 can't write it proposition, except, except, because then
10 you're excepting to the exception.

11 MR. MEADOWS: Yeah, I'm glad you -- I
12 couldn't follow it.

13 MR. TIPPS: I remember that language, but
14 I'm not sure that we added it here. Didn't we add it to
15 something else?

16 MR. HAMILTON: Well, that's where Luke
17 wanted to add it. I was going to add it as an (e), as a
18 paragraph (e), but Luke thought it ought to go in there,
19 so that's where we put it. "Except for good cause
20 stated in the order in which the action was taken."

21 CHAIRMAN BABCOCK: Yeah. If you'll look
22 on the draft that's on your table, there is some
23 additional language, right?

24 MR. HAMILTON: Yeah. And then we have --

25 CHAIRMAN BABCOCK: "After referring the

1 motion to the judge of the administrative region, the
2 judge in whose case the motion is filed must take no
3 further action in the case until the motion is disposed
4 of except for good cause stated in the order in which
5 the action is taken, except that in the following
6 instances the judge may proceed with the case as though
7 no motion had been filed pending a ruling on the
8 motion."

9 MR. ORSINGER: I would propose we move
10 that to (e).

11 HONORABLE SARAH DUNCAN: Is it a -- is it
12 a separate exception or is it simply a requirement that
13 the exception be stated in the order? Is it (e), other
14 good cause stated in the order?

15 MR. ORSINGER: That was my conception of
16 it yesterday.

17 HONORABLE SARAH DUNCAN: I wasn't here.

18 MR. ORSINGER: Well, for Sarah, we
19 apparently unknowingly dropped it out of the
20 recodification draft, and Luke was worried about a
21 temporary restraining order scenario, and he suggested
22 that we give the trial court the good cause power back
23 again, but putting it in this paragraph at this point
24 makes it really confusing, and I don't see why we
25 couldn't just stick it in (e).

1 HONORABLE SARAH DUNCAN: And change it to
2 "other good cause stated in the order in which the
3 action was taken."

4 CHAIRMAN BABCOCK: Yeah. I think that
5 will work, won't it?

6 HONORABLE DAVID PEEPLES: Yeah.

7 MR. HAMILTON: Do we want to change the
8 wording of it some?

9 Okay. We'll move that to (e), and there
10 has been some controversy over subparagraph (a). I
11 think Nina has comments on that.

12 MS. CORTELL: I have been the dissenter
13 in the subcommittee. I don't like the idea of interim
14 proceedings. We got the idea primarily, at least most
15 recently, from I believe the legislation, which
16 incorporated the concept of when you have a tertiary
17 motion to recuse, but we've expanded it to (b)(1),
18 (b)(2), (b)(3), and now (9) and (10) motions.

19 (b)(3), for example, I think if we look
20 back, is where the judge is a material witness or is
21 related to a material witness. I do not understand at
22 all going forward in front of that judge when that's
23 been alleged, and I --

24 HONORABLE SCOTT BRISTER: I can explain
25 that one real quick. That's because the pro se's when

1 they say you're biased will also say they want to call
2 the judge, he or she is a material witness because he
3 said this in the last hearing, and he's ruled against
4 all of my --

5 MS. CORTELL: Right. Well, I --

6 HONORABLE SCOTT BRISTER: If you just
7 leave it on (1) or (2) they will get around it with (3).

8 MS. CORTELL: Right, but then I would
9 incorporate the Paula Sweeney rule, which is it's a
10 terrible principle to adopt just because it gets abused
11 by pro se's, I would think.

12 HONORABLE SCOTT BRISTER: When would the
13 judge be a material witness that you didn't know about
14 that a long time before anything?

15 MS. CORTELL: That has nothing to do with
16 whether it's timely or not. If I file it the minute I
17 know then why should he be allowed to continue at the
18 interim proceedings?

19 HONORABLE SCOTT BRISTER: Because this is
20 just we're not going to bump an immediately impending
21 trial proceeding --

22 MS. CORTELL: No, that's not right.

23 HONORABLE SCOTT BRISTER: -- for a late
24 filed --

25 MS. CORTELL: No, that's not right. (4)

1 right now allows interim proceedings to go forward
2 irrespective of when the motion is filed if the grounds
3 are alleged under (b)(1), (b)(2), (b)(3), (b)(9),
4 (b)(10). (b)(9) and (10) are the contributions. (b)(1)
5 is appearance, isn't it, of impartiality?

6 HONORABLE SCOTT BRISTER: Right.

7 MS. CORTELL: (b)(3) is a witness, (b)(2)
8 is personal bias, and it has nothing do with when it was
9 filed. The timing of the filing is picked up under (c),
10 and I would submit with our changes today on that I
11 think that's going to be pretty confusing.

12 I just think, going back to the integrity
13 of the system, that if your client legitimately believes
14 that you have a biased judge that you ought to -- that
15 the current system of stopping, allowing that to be
16 resolved before you return to proceedings in front of
17 that judge makes the best sense. Now, if you want to
18 narrow it down to where it's an untimely motion or it's
19 a tertiary motion, my concerns would be reduced, but the
20 open-ended (a) here bothers me significantly.

21 MS. McNAMARA: I agree with Nina. I
22 think this would be a lot better without (a) because
23 things can happen that will change the litigant's
24 situation that can be irreversible, and the inefficiency
25 of the system that the pro se's may inject isn't to me a

1 worthwhile basis for taking that risk.

2 HONORABLE SARAH DUNCAN: Listen to how it
3 sounds. When you take out the numbers and the letters
4 and you put in what they stand for, "When the motion
5 only alleges that the judge can't be impartial, is
6 biased and prejudiced and has received excessive
7 campaign contributions and direct campaign
8 expenditures," it doesn't sound like we're really
9 defending a system of justice.

10 CHAIRMAN BABCOCK: If that's all you've
11 got on the guy.

12 HONORABLE SARAH DUNCAN: That's right.
13 It sounds horrible.

14 HONORABLE SCOTT BRISTER: Can't do better
15 than that.

16 CHAIRMAN BABCOCK: Judge Brister.

17 HONORABLE SCOTT BRISTER: Well, maybe
18 we've overstated it. It's not just pro se's, and it's
19 not because judges are -- I mean, I had a case, four or
20 five year old case. It's fixing to go to trial. The
21 attorneys switch. Jimmy Williamson refuses to file the
22 motion to recuse, so his client does it himself,
23 instructs him to, and it goes to our administrative
24 judge, regional presiding judge, who appoints a visiting
25 judge who can't come in for six weeks. He comes in for

1 six weeks.

2 After the hearing he says, "Okay. Give
3 me your briefs. I'll rule on it after next
4 Thanksgiving, four months away," and this just -- you
5 know, the other side -- I can't do anything about it. I
6 can't rule a thing on it. The other side who wants to
7 get this crazy claim to trial instead gets to spend
8 \$20,000 fighting a motion to recuse. This is -- because
9 it says nothing more than the judge is biased. It costs
10 nothing to say that. It is very expensive to do this,
11 and all we're talking about is if it's a good motion,
12 it's going to go forward anyway. It's going to be
13 granted and somebody is going to have to go back and
14 revisit it all. So we're not doing anything
15 irreversible, I don't think.

16 MS. McNAMARA: Oh, I would disagree. I
17 mean, it's sort of like -- it's comparable to the New
18 York Times running a horrible article about you on the
19 front page and then a week later on page 12 doing a
20 retraction. You may get it sorted out, but the
21 consequences of the harm can be irreversible.

22 You know, if you're talking about, you
23 know, a nine-figure verdict or a motion for summary
24 judgment where you're forced to settle, you can't undo
25 the settlement if it turns out later the judge who

1 denied your motion was biased, and so I know that there
2 are some really bad consequences of stopping things
3 until you get it sorted out, but I think for sort of the
4 appearance of fairness in the system you've got to deal
5 with the issue before things happen.

6 HONORABLE SCOTT BRISTER: Well, this is
7 not a threat, but let me tell you, the trial judges will
8 come up in arms if you say people have an absolute right
9 to stop our trial docket by filing the motion. They
10 will come unglued because it happens too often. They
11 will -- I don't know if they will have the power to kill
12 this rule, but they will try.

13 MS. CORTELL: That's the current system.

14 MR. ORSINGER: No, the current system is
15 it has to be filed more than ten days in advance of
16 trial.

17 HONORABLE SCOTT BRISTER: No, no. It has
18 to be more than ten days before. If it's less than ten
19 days before --

20 MS. CORTELL: But we're talking you can
21 come back down in the timing, okay, but I'm just talking
22 about (a) right now.

23 MS. McNAMARA: Just (a).

24 MS. CORTELL: If you just focus on (a),
25 right now if you file a timely motion under any of the

1 current grounds, (b)(1), (b)(2), (b)(3), of course, we
2 don't have the campaign contribution rule, you stop the
3 proceeding.

4 HONORABLE SARAH DUNCAN: And isn't
5 that -- I mean, frankly it's ashame you-all don't have
6 Judge Peeples because he could have gotten that thing
7 heard in two days, and you could have moved on, but
8 that's a function of how each locality deals with
9 motions to recuse, and I don't think we can write a rule
10 to require any given district to handle motions to
11 recuse under (a) expeditiously.

12 HONORABLE DAVID PEEPLES: Chip.

13 CHAIRMAN BABCOCK: Yes, sir.

14 HONORABLE DAVID PEEPLES: Right now the
15 only -- the protection, Nina, that you could have would
16 be the lawyer can fax to the presiding judge the motion,
17 and the presiding could look at it and say, "I think
18 this is serious enough to stop the proceedings." Okay.
19 I'll grant you that might not happen very much. How
20 would it work -- this is just a proposal -- if we put
21 the burden on the judge who thinks it's frivolous to fax
22 it to the presiding judge and get a presiding judge or
23 his designee the right to look at it and say, "I think
24 that the recused judge can go ahead and proceed until we
25 can have a full hearing on this"?

1 In other words, instead of putting the
2 burden on the lawyer to get things -- you know, to get
3 the judge bumped from interim proceedings, put the
4 burden on the judge who does know the ropes a little
5 better, put the burden on the judge who's being recused
6 to get a ruling that interim proceedings can go ahead.

7 HONORABLE SCOTT BRISTER: Well, you kind
8 of have to -- I mean, some judges do that right now.

9 HONORABLE DAVID PEEPLES: I mean, it can
10 be done without a hearing.

11 HONORABLE SCOTT BRISTER: But it does
12 kind of get me crosswise with the party who's filed
13 this. "Well, this is frivolous." Call up David. "You
14 need to deny these frivolous guy's motion."

15 HONORABLE DAVID PEEPLES: Yeah. I just
16 want to say to those of you -- it's been said many
17 times. The lawyers in this room are not the problem,
18 and you-all have lawsuits against each other. We try
19 lawsuits involving everybody, including pro se's, but
20 people who are on the fringe of practicing law, and
21 really, if the rules don't allow us to manage the system
22 with a reasonably firm hand, we're making some real bad
23 decisions here.

24 CHAIRMAN BABCOCK: So you're in favor of
25 keeping (a) the way it is?

1 HONORABLE DAVID PEEPLES: Well, yeah, but
2 I think if that's unpalatable to everybody else what I
3 suggested would be a reasonably okay way to take care of
4 it, to say that it does stop everything, but if a
5 neutral decision maker looks at its and says, "I think
6 that interim proceedings are okay until we can have a
7 fuller hearing a few days from now," or maybe a couple
8 of weeks in Houston. You know, in other words, the
9 people who are offended by the motion, Scott, and who
10 know the ropes can maybe get the interim proceeding to
11 proceed --

12 CHAIRMAN BABCOCK: Wallace.

13 HONORABLE DAVID PEEPLES: -- for just
14 somebody wanting to gum things up.

15 MR. JEFFERSON: I think it is true that
16 the lawyers in here are not the problem, but also the
17 judges in here are not the problem. There are judges in
18 parts of this state that are a tremendous problem and
19 where you really need to stop the proceedings right away
20 and get something heard and possibly get a mandamus
21 going or something. Otherwise, you lose rights, and
22 there could be a course, settlement, and there are all
23 sorts of things that happen. And so I think I agree. I
24 don't like the subsection (a) in there that sort of
25 gives an out when there's some -- the timing is a real

1 injustice to go to trial.

2 CHAIRMAN BABCOCK: Bobby and then
3 Richard.

4 MR. MEADOWS: If I understand what Judge
5 Brister said, it doesn't -- if we took out (a) and left
6 in (c), the judges are in no worse shape than they are
7 now. It doesn't matter if a untimely motion says
8 everything in (a), if it's untimely the proceedings can
9 continue until you get a hearing. So I guess based upon
10 that I would be in favor of taking out (a) and at least
11 until I could hear how the trial judges are
12 disadvantaged by this.

13 HONORABLE SCOTT BRISTER: That's probably
14 right. (a) was in when the recodification draft, which
15 had no ten-day requirement in it.

16 MR. MEADOWS: So an untimely rule could
17 say those things in (a) and you could still continue.

18 CHAIRMAN BABCOCK: So your point is that
19 (c) really --

20 MR. MEADOWS: Right.

21 CHAIRMAN BABCOCK: -- solves the problem
22 that Judge Brister has been worried about.

23 MR. MEADOWS: Right.

24 CHAIRMAN BABCOCK: And Judge Peeples has
25 expressed concern about. Do you agree with that, David?

1 HONORABLE DAVID PEEPLES: I think maybe
2 Bobby is right about (a) and (c) and how they work with
3 each other.

4 HONORABLE SCOTT BRISTER: Right.

5 CHAIRMAN BABCOCK: Yeah. Well, then do
6 we have a consensus for deleting (a)? All in favor of
7 deleting (a) raise your hand.

8 HON. ANN CRAWFORD McCLURE: I vote "yes."

9 CHAIRMAN BABCOCK: All in favor of
10 deleting (a).

11 MR. EDWARDS: I don't think she has a
12 copy of what we're talking about.

13 HON. ANN CRAWFORD McCLURE: Yes, I do.

14 MR. ORSINGER: She votes "yes."

15 HON. ANN CRAWFORD McCLURE: But I'm sorry
16 if you didn't hear me clearly. I said I vote "yes" on
17 the motion to delete (a).

18 CHAIRMAN BABCOCK: 25 in favor of
19 deleting (a). Richard, you want to vote against that?

20 MR. ORSINGER: No, I'm not. I want to
21 publicly recognize that Nina has lost this fight every
22 time before until right now, and she got almost -- she
23 did get unanimous support, so persistence counts.

24 MR. EDWARDS: Are we working off the
25 draft that's got a date May 19?

1 MR. ORSINGER: Ann does not have that
2 draft.

3 MR. EDWARDS: That's what I was --

4 MR. ORSINGER: But there are only a few
5 edits that we made yesterday.

6 MR. EDWARDS: Okay. Well, that's what I
7 was saying. I didn't think she had the exact draft we
8 were working off of.

9 MR. ORSINGER: But this language is in
10 her draft.

11 CHAIRMAN BABCOCK: Yeah, but she
12 doesn't -- but the draft she has, the stuff we're
13 talking about now, there are hardly any changes.

14 MR. EDWARDS: We'll tell you if there are
15 any changes.

16 HON. ANN CRAWFORD McCLURE: Thank you.

17 CHAIRMAN BABCOCK: Okay. Having deleted
18 (a) overwhelmingly, do we have any other issues? Nina,
19 do you have any other issues with (b), (c), (d), or the
20 newly written (e)?

21 MR. ORSINGER: I have --

22 CHAIRMAN BABCOCK: No, no, no. We called
23 on Nina.

24 MS. CORTELL: How is it going to read so
25 that you have a good cause exception to the whole thing?

1 MR. ORSINGER: The wording on that is not
2 that simple.

3 CHAIRMAN BABCOCK: Well, for you maybe.

4 MR. ORSINGER: Okay. Then we'll let
5 somebody else write it.

6 CHAIRMAN BABCOCK: Let Hatchell do it.

7 HONORABLE SCOTT BRISTER: It's in the
8 current rule.

9 MR. ORSINGER: Yeah, I know, but we now
10 are listing them all as "when" clauses, and it's hard to
11 make this a "when" clause, w-h-e-n.

12 CHAIRMAN BABCOCK: Right.

13 MR. ORSINGER: You want to visit the --

14 MS. CORTELL: I'm okay as long as there
15 is a good cause hook at the end.

16 MR. TIPPS: Why can't we say "when good
17 cause exists, provided that such good cause is stated in
18 the record"?

19 CHAIRMAN BABCOCK: Yeah.

20 MR. TIPPS: I mean, it's a little clumsy,
21 but...

22 CHAIRMAN BABCOCK: "When good cause
23 exists, if it is stated in the order."

24 MR. HALL: Where is that?

25 MR. ORSINGER: That is going to go in the

1 (4)(d), new (4)(d).

2 MS. CORTELL: Do we want to require that
3 it be agreed to by the judge and therefore incorporated
4 in the order, or do you just say "when good cause
5 exists"?

6 HONORABLE SCOTT BRISTER: You have to say
7 "exists and is stated" since it's the -- again, it's the
8 judge subject to recusal who's going to be writing the
9 order stating good cause.

10 MS. CORTELL: I would ask that we look
11 back at the language from "time to file" where we added
12 "for other good cause shown" and some concept like that,
13 but to allow a good cause exception.

14 MR. WATSON: But wouldn't you want that
15 stated in the order?

16 MS. CORTELL: Well, that leaves it to the
17 judge to so find, and what I'm thinking is what if the
18 advocate believes that there is good cause. The
19 example -- I can't remember whether we talked about it
20 in an entire committee or the subcommittee, but we did
21 have a matter involving the diocese in Dallas where
22 there was a post-verdict motion to recuse, which after
23 hearing was denied, but I thought that the process of
24 having a hearing and stopping the proceeding and not
25 having a judgment entered really served the public good,

1 in my own opinion, but that was a very late motion.

2 MR. ORSINGER: Well, no, this language,
3 you understand, is in the existing rule today. This
4 "good cause stated in the order in which the action is
5 taken" is what Luke complained about yesterday we
6 inadvertently dropped out.

7 MS. CORTELL: But there is no interim
8 proceeding concept in the current rule.

9 MR. ORSINGER: There is an absolute bar
10 against taking action if the motion is filed within ten
11 days of the hearing except for good cause shown in the
12 order, I believe. There is an exception for events that
13 occur within ten days, but --

14 MS. CORTELL: Does someone have the rule?

15 MR. ORSINGER: The introductory clause
16 says that you have to "stop proceedings except for good
17 cause shown in the order in which the action is taken
18 unless" and then if the event occurred within ten days
19 or if it occurred before but you didn't know or should
20 have known, we've got a list of exceptions.

21 MS. CORTELL: Well, we don't have here a
22 concept of if the event occurred -- in other words, we
23 have (c), but we don't have all the exceptions to (c)
24 that we put in the when to file rule. Do you want to
25 incorporate the exceptions that we've put in under "Time

1 to File"?

2 MR. ORSINGER: I need to correct what I
3 said. The good cause clause that Luke mentioned
4 yesterday is in the provision about that once the trial
5 judge refuses to recuse and refers it to the presiding
6 judge then they are not to take any further action
7 except for good cause shown in the order in which the
8 action is taken.

9 MS. CORTELL: So it's the reverse.

10 MR. ORSINGER: So the good cause
11 exception -- right now if the motion for recusal is
12 filed and denied you cannot take further action after
13 that point as a trial judge except for good cause shown
14 in the order.

15 MS. CORTELL: Right. So the presumption
16 is that everything stops.

17 MR. ORSINGER: Yeah.

18 MR. EDWARDS: In the order in which the
19 further action is taken.

20 MR. ORSINGER: Yes. That's right. Okay.
21 So I think we have a complete halting right now no
22 matter what, except for the good cause in the order.

23 MS. CORTELL: Right.

24 MR. ORSINGER: And then when we drop that
25 out that's what Luke called to our attention yesterday.

1 CHAIRMAN BABCOCK: Right. And there are
2 circumstances where even though there's been a motion
3 filed and referred, things like a T.R.O. situation,
4 there may be emergencies where the judge just has to
5 act, like extending a T.R.O., not letting it expire,
6 things like that. So we've got to add a new subsection
7 in it, and you would put it in the body of "Interim
8 Proceedings."

9 MR. ORSINGER: That was Luke's suggestion
10 and I've --

11 CHAIRMAN BABCOCK: And it's awkward
12 there, so we are going to take it out of the body, and
13 we're going to put it in new subsection (d), which is
14 going to say, "When good cause exists, if it is stated
15 in the order in which the action is taken." Right?

16 MR. ORSINGER: I think you ought to
17 say -- I don't know about "it." How about "if such good
18 cause is stated in the order"?

19 HONORABLE SCOTT BRISTER: Brian Garner
20 says you're not suppose to say "such."

21 MR. ORSINGER: You don't like "such"?

22 HONORABLE SCOTT BRISTER: No, Brian
23 Garner doesn't like "such."

24 MR. ORSINGER: Okay. Well, I don't like
25 Brian Garner. I'm just kidding. I'm just kidding,

1 Brian.

2 MR. HAMILTON: How about "when good cause
3 exists which is stated in the order in which the action
4 is taken"?

5 CHAIRMAN BABCOCK: Yeah.

6 MR. ORSINGER: You think Brian would like
7 that?

8 CHAIRMAN BABCOCK: Well, Brian will get a
9 shot at this. "Which is stated in the order in which
10 the action is taken."

11 Okay. Are we all right on that?
12 Everybody okay on that?

13 All right. With that change is there
14 any --

15 MS. CORTELL: I really think we're
16 inadvertently -- because we have the flip of the concept
17 under the current rule, and we're trying to fit it in
18 here, and I don't think it's -- there is a reason to put
19 it in the body of (4) even though it's awkward because
20 this is where you're saying the judge will take no
21 further action.

22 I guess, let me ask a different question.
23 We have a lot of exceptions currently to the time to
24 file rule, but we've incorporated here the timing rule
25 without those exceptions. Is there a reason to

1 incorporate those here? You know, where we're
2 implicitly saying it's timely if you fall under a time
3 to file, those exceptions, but we have a strict ten-day
4 rule now under (4)(c).

5 MR. HAMPTON: And the other thing that
6 we're doing in (4)(c) is it's inconsistent with the
7 notion that a motion to disqualify can be filed at any
8 time.

9 CHAIRMAN BABCOCK: Is it inconsistent
10 with it?

11 MR. HAMPTON: Well, in here a motion to
12 disqualify can be filed at any time. A motion to recuse
13 there's a ten-day cutoff, yet a judge can continue to
14 rule on motions if the motion for -- motion to
15 disqualify that would be timely under this rule is filed
16 less than ten days.

17 CHAIRMAN BABCOCK: But isn't the concept
18 of this subparagraph (c) that the motion comes so late
19 in the game that we shouldn't automatically just disrupt
20 everything and stop everything, but that there is that
21 option of going forward? Obviously if it's a serious
22 motion to disqualify that on its face everybody says,
23 "Whoops, we've got a problem here," the judges, I
24 wouldn't think -- nobody would go forward under those
25 circumstances. But if you've got a pro se litigant who

1 is just going to file a pro forma, "You're disqualified,
2 Judge, because of X, Y, and Z," and everybody knows
3 that's nonsense, why shouldn't you in the spirit of this
4 rule have the ability to keep going forward?

5 MR. HAMPTON: Well, you're absolutely
6 right except that the purpose of this rule is to deal
7 with those situations where there is grounds for
8 disqualification and the judge continues to act, so when
9 the grounds for disqualification are sufficiently narrow
10 and black and white that -- I just point this out.

11 CHAIRMAN BABCOCK: No, I think you're
12 right to point it out, but I think that it doesn't
13 matter in light of the spirit of what we're trying to do
14 with subparagraph (c), which the trial judges are all
15 telling us we really need to do and the Legislature, I
16 promise, you is telling us we need to do it, or at least
17 some members of the Legislature.

18 MR. HAMPTON: The other thing I'd point
19 out is that becomes a more acute problem where you have
20 a central docket.

21 CHAIRMAN BABCOCK: Yeah. Nina.

22 MS. CORTELL: I have one other question.
23 I'm just trying to understand how (d) will work. If the
24 matter is being heard by the presiding judge and there's
25 a motion to disqualify the presiding judge, who hears

1 the -- who goes forward hearing the case?

2 MR. HAMILTON: That's covered over on --

3 MR. TIPPS: The old (d).

4 MS. CORTELL: I'm sorry, your old (d).

5 MR. TIPPS: Old (d), new (c).

6 MR. HAMILTON: That's covered on page
7 seven under paragraph (10).

8 CHAIRMAN BABCOCK: Okay. Well, we're not
9 there yet. Any other comments about subparagraph (4),
10 interim proceedings?

11 MS. CORTELL: Well, could I still ask how
12 that's going to work?

13 CHAIRMAN BABCOCK: Sure.

14 MS. CORTELL: I mean, who -- in other
15 words, the presiding judge is hearing the motion to
16 recuse the -- are we just referring to the fact that he
17 can hear the motion to recuse?

18 MR. ORSINGER: No, Nina. This occurs
19 when a motion to recuse the trial judge is filed.

20 MS. CORTELL: Right.

21 MR. ORSINGER: It's denied and referred
22 out to the presiding judge. The presiding judge takes
23 the case, the recusal, themselves and then a motion to
24 recuse is filed against the presiding judge who's
25 getting ready to rule on the recusal.

1 MS. CORTELL: Right.

2 MR. ORSINGER: So now you have two layers
3 of recusal, and now you've got to go to the Texas
4 Supreme Court, probably, I think is what we ended up
5 doing, to have the presiding judge replaced.

6 MS. CORTELL: Right.

7 MR. ORSINGER: And if they're going to
8 play that game and go up to that level for a judge even
9 to just rule on the recusal then we're going ahead with
10 the trial court.

11 HONORABLE DAVID PEEPLES: The idea is
12 there needs to be somebody who is bulletproof and can
13 keep on having hearings if they need to be held and who
14 can't be knocked off and stopped by a motion.

15 MS. CORTELL: But we're saying that the
16 trial judge can proceed?

17 HONORABLE DAVID PEEPLES: No, the
18 presiding judge. The way I remember this getting in
19 here is a lot of times the presiding judge will assign
20 somebody else who's on the scene and then there will be
21 a motion to recuse that person. If that kind of thing
22 is happening, the trump card that this gives is the
23 presiding judge can say, "All right, I'm going to hear
24 that," and if they want to recuse me, this gives the
25 presiding judge the power to go ahead and issue interim

1 orders without being stopped dead in his tracks until
2 Tom Phillips can have somebody brought in.

3 MR. ORSINGER: David, this allows the
4 trial judge to continue. In other words, if they --

5 MS. CORTELL: So two times you're out?

6 MR. ORSINGER: No, you're not out
7 anything. All we're doing is saying, "Okay, look." If
8 you filed a motion to recuse --

9 MS. CORTELL: Right

10 MR. ORSINGER: -- and then you try to
11 recuse the judge who's assigned to hear the recusal, the
12 trial judge is going to continue to operate until
13 finally the recusal stuff is settled, because it's
14 almost never going to happen that you have a good
15 recusal against the trial judge and then a good recusal
16 against the presiding judge.

17 HONORABLE DAVID PEEPLES: Richard, I
18 thought that (d) gave the presiding judge the power to
19 make the interim orders, not the recused trial judge.

20 MR. HAMILTON: No.

21 HONORABLE DAVID PEEPLES: I thought that
22 was Nina's question, wasn't it?

23 MS. CORTELL: That's the problem I have.

24 MR. ORSINGER: No, it doesn't. It's one
25 of those instances that the trial judge is permitted to

1 continue on unless stopped.

2 HONORABLE DAVID PEEPLES: Well, that
3 would mean that by filing the second recusal motion you
4 would forfeit the first one on an interim basis,
5 wouldn't you?

6 CHAIRMAN BABCOCK: On an interim basis
7 you do, but you don't forfeit it forever because if they
8 go up to the Supreme Court and the Supreme Court says,
9 "Yeah, you're right. The presiding judge should have
10 been recused, so should the trial judge," or one or the
11 other.

12 MS. CORTELL: Let's go back to the
13 diocese case. The diocese filed a motion to recuse the
14 trial judge. Then the plaintiffs file a motion to
15 recuse the presiding judge, so in that situation the
16 diocese has to go back to the trial judge? I don't
17 think that's fair, but that's how that reads.

18 HONORABLE DAVID PEEPLES: I didn't think
19 that's what we meant.

20 CHAIRMAN BABCOCK: And I don't think
21 that's how it reads either.

22 HONORABLE SARAH DUNCAN: Yeah, it does.

23 MR. TIPPS: It says "a motion" not "a
24 motion by the same" --

25 CHAIRMAN BABCOCK: They're going to have

1 to be by the same party. You're right.

2 MR. TIPPS: "By the same party" would
3 solve that problem.

4 MR. ORSINGER: Boy, I tell you, that just
5 doesn't offend me. I mean, how many layers of these
6 recusals are you going to get because --

7 MS. CORTELL: But you're punishing the
8 party that felt they had a good faith motion in the
9 trial court because the adversary then files at the next
10 level. I think it -- I don't think that's fair. I like
11 Judge Peeples' notion. I think -- and I thought that's
12 what we intended, too, was that the presiding judge --
13 at some point you have to stop the nonsense, and you
14 need to allow a judge to go forward, but I don't think
15 that means you revert back and you have your trial judge
16 conducting interim proceedings, and I certainly don't
17 think it should mean that the original movant gets
18 penalized because the adversary filed a second motion.

19 MR. ORSINGER: But you do understand that
20 the consequence of this two layers is that we have now
21 gummed up the recusal process, so we now have to get a
22 hold of the Chief Justice of the Texas Supreme Court or
23 whatever our fallback procedure is just to get another
24 presiding judge who could, in fact, do something like
25 extend a temporary restraining order.

1 CHAIRMAN BABCOCK: Hang on, Richard.
2 What if you added to old (d), new (c), at the end of it
3 "by the same party"? Would that solve your problem?

4 MS. CORTELL: Well, it's less of a
5 problem. I still -- in the best of all worlds I would
6 prefer to go with Judge Peeples' notion, which is you
7 have to settle at some point on a judge to rule on the
8 recusal but that you would still be stopping the trial
9 court proceedings.

10 CHAIRMAN BABCOCK: Well, Judge Peeples,
11 maybe I'm not clear about what you suggested. How would
12 you change this paragraph?

13 HONORABLE DAVID PEEPLES: Well, I think
14 the way it's worded it does mean that if there's a
15 motion to recuse the presiding judge the original trial
16 judge is back on the case for interim proceedings, and I
17 didn't mean for that to happen.

18 MR. ORSINGER: Well, who is going to be
19 able to answer emergencies during -- while you're
20 chasing Justice Phillips down to find someone to rule on
21 the recusal?

22 HONORABLE DAVID PEEPLES: I really don't
23 care who it is. I think the system needs to have
24 somebody who is immune to these motions on interim
25 proceedings. There has got to be somebody.

1 MR. ORSINGER: Well, the only one --
2 David, right now the only one that's immune is the one
3 that Chief Justice Phillips assigns to rule on the
4 recusal of the presiding judge, and if the presiding
5 judge is cleared then the presiding judge goes forward
6 to rule on the recusal of the trial judge. If not, then
7 Justice Phillips' replacement will rule on it and so
8 we're talking about how many days or maybe even weeks
9 before we have a judicial officer who's in power to take
10 any action at all.

11 CHAIRMAN BABCOCK: How often does this
12 happen?

13 MR. ORSINGER: What is your remedy?

14 HONORABLE DAVID PEEPLES: Not often.

15 MS. CORTELL: I will just tell you
16 that -- and my last reference to the diocese case -- it
17 actually worked very smoothly. Judge Phillips appointed
18 someone and it was resolved within a matter of a couple
19 of weeks.

20 MR. ORSINGER: But a couple of weeks is
21 not very good if you have something that needs to be
22 acted on in a matter of days and the system is gummed up
23 because the recusal process is now frozen.

24 CHAIRMAN BABCOCK: Alex.

25 PROFESSOR ALBRIGHT: Well, just sitting

1 here listening to this, the one instance that it
2 happened it worked smoothly, but what we're worrying
3 about is if that happens again and if there is a
4 situation where there's got to be a ruling in less than
5 two weeks, which is even less likely. It just seems to
6 me that we're -- the more I sit on this committee the
7 more I think we try to solve every potential problem
8 with a rule when that problem may never come up, and
9 then you just make these rules more complicated, and it
10 just seems to me that this may be a situation where we
11 should just let the system work because things work out.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: It sounds to me,
14 though, like this is a relatively simple drafting
15 problem. Subsection (4) can be interim proceedings.
16 (a) will be when the trial judge can go forward and
17 that's the new (a) and the new (b), and then subsection
18 (d), when can the presiding judge go forward, and that's
19 one provision, and it's if -- it's regardless of motions
20 to recuse either by the same party or any party. But
21 we're talking about two different things. We're talking
22 about when can the trial judge go forward and when can
23 the presiding judge go forward, and we need somebody to
24 go forward at the second level. So don't we all agree
25 on that?

1 MR. ORSINGER: I would agree with that.
2 I mean, that's a compromise that hadn't really been
3 discussed.

4 CHAIRMAN BABCOCK: But what I'm hearing
5 from Judge Peeples, who is a in position to know at
6 least with respect to one large region, this doesn't
7 come up, right?

8 HONORABLE DAVID PEEPLES: Not much. But
9 we've made some decisions here making it easier to file
10 these and expanded the bases on which you can file them,
11 so I don't know if that's going to change, you know,
12 what Alex said or not.

13 CHAIRMAN BABCOCK: Okay. Well, Sarah,
14 how would you propose changing subparagraph (c)?

15 HONORABLE SARAH DUNCAN: Just break it
16 down into -- it's actually subparagraph (4).

17 CHAIRMAN BABCOCK: (4).

18 HONORABLE SARAH DUNCAN: Break interim
19 proceedings down into (a), and subsection (a) would read
20 as it does now, "referring the motion to the judge of
21 the administrative region, the judge in whose case the
22 motion is filed must take no further action in the case
23 until the motion is disposed of, except in the following
24 instances the judge may proceed," blah-blah-blah, and
25 then we've deleted (a), so we have a new (a), and we

1 have the new (b). Since we've got -- since this is now
2 subsection (a) those are to be (1) and (2), right?

3 MR. ORSINGER: Okay.

4 HONORABLE SARAH DUNCAN: Then (b), "When
5 the motion has been referred to the presiding judge of
6 the administrative region and that judge elects to hear
7 the motion to recuse or disqualify" -- you know, David
8 would have the better language -- "that judge may make
9 interim orders in the case regardless of whether a
10 motion to recuse that judge is filed by any party."

11 HONORABLE DAVID PEEPLES: I think that if
12 the system has somebody who is bulletproof, I just think
13 that will chill some of the abuse that otherwise might
14 happen.

15 HONORABLE SARAH DUNCAN: I mean, I don't
16 care so much what (b) says substantively or I'm not
17 proposing anything at this point, just that if you break
18 it down into (a) when the trial judge can go forward and
19 (b) when the presiding judge can go forward, I think we
20 resolve it.

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: Well, I guess I have to
23 disagree with that because if the presiding judge -- if
24 there's a motion filed then to recuse the presiding
25 judge and you're going to let him go forward anyway in a

1 case that he knows nothing about, why not let the trial
2 court judge go forward in the interim proceeding? What
3 difference does it make really? If they're both subject
4 to a motion for recusal what difference does it make
5 which one goes forward?

6 CHAIRMAN BABCOCK: What if we just took
7 this paragraph old (d) just completely out of here?
8 Would we -- kind of what Alex just said. I mean, this
9 is not a big issue, big problem, and why completely
10 revamp our rule when we could fix this just by taking
11 this paragraph out of there?

12 MR. ORSINGER: Well, if you're going to
13 do that then we better take everything out of here about
14 how to process a motion to recuse a presiding judge.
15 It's not in the rule right now. No mention is made
16 about what to do when somebody tries to recuse the
17 presiding judge. We've now written a lot of procedures
18 on how to handle recusal of the presiding judge, and so
19 we've given a road map to the pro se litigants who want
20 to recuse the presiding judge that they can do it and
21 how it works, and so if we're not going to prevent any
22 interim proceedings then it might be wiser not to cover
23 recusals of presiding judges so as not to suggest the
24 thought to the pro se's that they can do it.

25 MS. SWEENEY: And that's my question.

1 Right now, Judge Brister and the people who argue, are
2 the pro se's that are abusively filing motions for
3 recusal, do they know about recusing the presiding judge
4 yet, or are we going to be teaching it to them? Are
5 they doing that now, trying to in addition to recuse
6 trial judges frivolously moving on up? Yes? No?

7 HONORABLE SCOTT BRISTER: Well, I see it
8 normally as they move to recuse the trial judge and then
9 appoint a visiting judge, and they strike them under the
10 Government Code and appoint somebody new.

11 MS. SWEENEY: So they're not going up to
12 the presiding judge level?

13 HONORABLE SCOTT BRISTER: I don't think
14 I've ever had an instance where they tried both.

15 MS. SWEENEY: Because the only case I
16 know about is the one Nina and I have been alluding to
17 because we saw it unfold in Dallas.

18 HONORABLE DAVID PEEPLES: I had one with
19 a guy that's been disbarred since then.

20 MS. SWEENEY: So recusing the presiding
21 judge is sort of a non-problem in the norm?

22 HONORABLE DAVID PEEPLES: Not a common
23 problem.

24 MS. SWEENEY: Well, then Richard may be
25 right. Why do we need a rule for it?

1 HONORABLE DAVID PEEPLES: We're trying to
2 fix everything that could possibly go wrong.

3 CHAIRMAN BABCOCK: All right. So --

4 MS. SWEENEY: I agree with Richard.
5 Let's not put it in at all.

6 CHAIRMAN BABCOCK: All right. How many
7 people are in favor of deleting this paragraph which is
8 currently (d) but because we already deleted (a) it's
9 moved into (c), but the one that says "when the
10 presiding judge of the administrative region elects to
11 hear the motion to recuse or disqualify, and a motion to
12 recuse or disqualify such presiding judge is filed," how
13 many people vote to delete that language?

14 HON. ANN CRAWFORD McCLURE: I do.

15 CHAIRMAN BABCOCK: 19 people vote to
16 delete. How many people vote to leave it in? Seven
17 vote to leave it in.

18 MS. SWEENEY: You know, I said I would
19 never do this again, but, Richard, why did you just do
20 that? You convinced me and then you voted the other
21 way?

22 CHAIRMAN BABCOCK: That's his style.

23 MR. ORSINGER: No, what I said, Paula, is
24 that if we take this out then I'm not in favor of --

25 MS. SWEENEY: Okay.

1 MR. ORSINGER: -- detailing how you
2 recuse a presiding judge. I think that's unwise. We
3 don't know how to handle a recusal on a presiding judge
4 right now because there are no procedures. We just make
5 it up. So we thought, well, instead of making it up
6 let's put a procedure in place and let's put a
7 bulletproof individual like David Peeples wants, and
8 that's the end of the hunt, but if we take this out then
9 a pro se knows they can buy lots of confusion and delay
10 by filing the first motion and then the second motion.

11 And then it's on the hunt for Chief
12 Justice Phillips, and then if he puts a retired judge in
13 then, bang, you've got an objection there, and then
14 you've got another guy coming in and, you know, that's
15 why you shouldn't -- the chances that we're going to
16 have another multi-million-dollar case with huge
17 commercial law firms on both sides with a judge who goes
18 down and cries with the jurors when the verdict's come
19 in is zero.

20 CHAIRMAN BABCOCK: Now, now.

21 MR. ORSINGER: The chance that some nut
22 case is going to be shooting these like wild bullets in
23 a crowd to try to bring everything to a halt, that is
24 highly likely, and so we're arming these people and then
25 we're saying basically you can bring the wheels of

1 justice to a halt, and so --

2 CHAIRMAN BABCOCK: Okay. Okay, kids.
3 Here's the deal. We're going to take a ten-minute
4 break, but we've got a lot of ground to cover, so let's
5 try to keep our comments in focus very tight because
6 we're now on page six --

7 MR. TIPPS: Can I make a quick comment?

8 CHAIRMAN BABCOCK: And we've got three
9 and a half pages to go. Yes, Steve.

10 MR. TIPPS: Can I make a quick comment on
11 the "except for good cause stated in the order" notion?

12 CHAIRMAN BABCOCK: Yeah.

13 MR. TIPPS: I want to point out simply
14 that that is really a different concept from the
15 concepts that we've now captured in the new (a) and the
16 new (b). (a) and (b) are situations in which the judge
17 can proceed with the entire case, rule on everything as
18 though no motion has been filed.

19 CHAIRMAN BABCOCK: Right.

20 MR. TIPPS: And the good cause is really
21 a particularized situation in which we're saying you
22 can't proceed with the entire case, but if you've really
23 got to do something and there's good cause, like extend
24 a T.R.O., you can do that.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. TIPPS: Which suggests to me that
2 maybe it ought to be dealt with in the body as an
3 exception rather than one of the enumerated exceptions.

4 CHAIRMAN BABCOCK: Okay. Over the
5 ten-minute break you and Richard straighten that out.

6 (Recess taken from 10:17 a.m. to 10:27
7 a.m.)

8 CHAIRMAN BABCOCK: All right, guys. Here
9 we are about --

10 MR. ORSINGER: We have a proposal.

11 CHAIRMAN BABCOCK: All right. A
12 proposal. What is it?

13 MR. ORSINGER: This is in (d)(4), and the
14 recommendation is to return it to the language as
15 written, the except clause, "except for good cause
16 stated in the order in which the action is taken,"
17 period. Scratch "except that" and put in the word
18 "however," comma, so it will read, "After referring the
19 motion to the judge of the administrative region the
20 judge in whose case the motion is filed must take no
21 further action in the case until the motion is disposed
22 of except for good cause stated in the order in which
23 the action is taken. However, in the following
24 instances the judge may proceed with the case."

25 And I have been informed that Brian

1 Garner does not like the use of the word "however" and
2 so --

3 JUSTICE HECHT: He likes "but."

4 MR. ORSINGER: "But." Maybe we should
5 say "but in the following." Do you think that would
6 be -- okay. That will make Brian happy. We'll say "but
7 in the following instances the judge may." That's our
8 proposal.

9 CHAIRMAN BABCOCK: All right. And that's
10 been endorsed by whom?

11 MR. ORSINGER: It's been endorsed by
12 Brian Garner. The language came -- well, this is --
13 Stephen Tipps was the one who recommended this elegant
14 solution to the problem.

15 CHAIRMAN BABCOCK: All right. So,
16 objection, nonresponsive. So it's Tipps and you and who
17 else? Duncan?

18 HONORABLE SARAH DUNCAN: Huh-uh.

19 MR. ORSINGER: No. Actually, we were
20 having a different conversation. This is on the table
21 for consideration.

22 CHAIRMAN BABCOCK: All right. Stephen,
23 it's okay with you?

24 MR. TIPPS: Yeah.

25 MR. ORSINGER: It's his idea.

1 MR. TIPPS: Changing "however" to "but"?
2 Yeah, that's fine.

3 CHAIRMAN BABCOCK: Okay. All right.
4 Everybody okay with that?

5 MR. HAMILTON: So then that deletes (c)
6 then.

7 HONORABLE SARAH DUNCAN: Right. Down to
8 an (a) and a (b).

9 CHAIRMAN BABCOCK: Right. Down to an (a)
10 and a (b).

11 MR. HAMILTON: I just have one comment to
12 make.

13 CHAIRMAN BABCOCK: Yes, sir.

14 MR. HAMILTON: I'm not sure how clear
15 that language is. Are we just talking about emergency
16 situations?

17 CHAIRMAN BABCOCK: That's what Luke
18 posited yesterday.

19 MR. HAMILTON: Well, if we are, why don't
20 we say that instead of letting "for any good cause
21 shown" go on?

22 CHAIRMAN BABCOCK: Well, because that
23 language has got history to it and rather than changing
24 language just for the sake of changing language, I mean,
25 that would be the reason why you wouldn't.

1 MR. ORSINGER: If I understand this
2 correctly, Nina doesn't realize that this just gutted
3 the last victory that she had.

4 CHAIRMAN BABCOCK: Well, she's happy
5 about that.

6 MR. ORSINGER: Okay.

7 CHAIRMAN BABCOCK: Okay. Everybody okay
8 with that? So, Richard, you will provide me with that
9 language?

10 MR. ORSINGER: Yes.

11 CHAIRMAN BABCOCK: All right. We're now
12 onto abatement, subparagraph (5) on page six.

13 MR. EDWARDS: Did we work out the
14 language to incorporate the requirements on pleading the
15 less than ten days? I think we were working on that.

16 CHAIRMAN BABCOCK: Yeah, I think we've
17 worked on that, Bill.

18 MR. EDWARDS: We never agreed on it, I
19 don't think, did we? We assigned Richard the job of
20 drafting that.

21 MR. ORSINGER: Oh, I have drafted it.
22 This is (3). No, this is --

23 MR. EDWARDS: We were talking about what
24 you had to plead.

25 MR. ORSINGER: (d)(1). Okay. This was

1 Bill's suggestion. In (d)(1), the third line where it
2 says, "State in detail the factual and legal basis for
3 recusal or disqualification," comma, "and if applicable,
4 any exceptions under subdivision (d)(2)," comma. So
5 that means that you'd have to state in detail the
6 factual and legal basis for recusal and disqualification
7 and, if applicable, any exception under (d)(2).

8 CHAIRMAN BABCOCK: Is that okay with you?

9 MR. EDWARDS: I think it does what we
10 were talking about and gives the presiding judge the
11 ability to see if there -- they failed to state a legal
12 and factual basis for an exception to (1).

13 CHAIRMAN BABCOCK: Okay.

14 MR. ORSINGER: I put the comma in the
15 wrong place it should be "for recusal or
16 disqualification and," comma, "if applicable," comma,
17 "any exception under subdivision (d)(2)," comma.

18 CHAIRMAN BABCOCK: All right. Anybody
19 have any problem with that? No hands are raised, so
20 apparently no problems.

21 All right. Now, can we go to abatement
22 of interim proceedings?

23 MR. HAMILTON: Okay. Well, I think most
24 of this we agreed on last time except that Judge Brister
25 didn't like having one judge order another judge to do

1 something, so it's been reworded to say that the judge
2 hearing the motion to recuse or disqualify may also
3 order the parties to stop interim proceedings pending a
4 ruling on the motion, and then, of course, the parties
5 can agree upon stopping the interim proceedings, and if
6 the recusal judge orders the parties to stop then they
7 request the judge hearing the interim proceedings to
8 stop. It's kind of cumbersome, but --

9 MR. EDWARDS: What happens if the judge
10 hearing the proceeding says, "No, I ain't going to
11 stop"?

12 CHAIRMAN BABCOCK: And you've got
13 conflicting orders from two different judges. One says
14 "stop," the other says "go."

15 MR. ORSINGER: And then it's Haybor vs.
16 Black, right?

17 CHAIRMAN BABCOCK: Let's let Judge
18 Brister defend his --

19 HONORABLE SCOTT BRISTER: Well, I don't
20 know. I'm trying to recall --

21 MR. HAMILTON: The way we had it worded
22 before was that the recusal judge --

23 HONORABLE SCOTT BRISTER: That's just a
24 general principle. You don't have one trial judge
25 ordering another trial judge to do something.

1 MR. EDWARDS: Well, you can abate the
2 proceedings. You give the judge hearing the recusal the
3 power to abate the proceedings and not order the other
4 judge not to do something.

5 HONORABLE DAVID PEEPLES: Or use the
6 passive voice, "or the proceeding is abated."

7 MR. EDWARDS: Or something.

8 HONORABLE DAVID PEEPLES: You know, the
9 person who is going to hear the motion to recuse does,
10 so to speak, outrank the other judge.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE DAVID PEEPLES: He has the
13 power to knock him off the case. I'm not offended by
14 that.

15 HONORABLE MICHAEL SCHNEIDER: Yeah. I
16 mean, that's the rule.

17 HONORABLE DAVID PEEPLES: That's the way
18 it needs to be.

19 CHAIRMAN BABCOCK: "May also order the
20 interim proceedings abated pending"?

21 MS. JENKINS: I think that makes more
22 sense.

23 MR. MEADOWS: I do, too. I think that's
24 a lot better. I can't imagine the parties acting in
25 concert to come back to the trial judge and have him --

1 it just doesn't work.

2 MR. HAMILTON: Say "order the interim
3 proceedings abated"?

4 CHAIRMAN BABCOCK: "May also order the
5 interim proceedings abated pending a ruling on the
6 motion to recuse or disqualify," period, and strike the
7 rest of the paragraph. Anybody got a problem with that?

8 All right. Any other comments about this
9 subparagraph (5)? This was all discussed last time.

10 HONORABLE SARAH DUNCAN: Just one thing.
11 We just need to decide on "stop" or "abate" and use it
12 throughout. I mean, the way it was originally drafted
13 it's "abatement of interim proceedings" and then we
14 never used the word "abate" in the paragraph.

15 CHAIRMAN BABCOCK: We just did now.

16 HONORABLE SARAH DUNCAN: And now we've
17 put the word "abate" in the second sentence and we use
18 "stop" in the first sentence. If we're going to say
19 "abate," let's say "abate."

20 CHAIRMAN BABCOCK: "If all parties to the
21 interim proceedings agree that the interim proceedings
22 should be abated"?

23 MS. CORTELL: Right.

24 CHAIRMAN BABCOCK: Okay.

25 MS. CORTELL: And then "the judge shall

1 abate."

2 MR. ORSINGER: Uh-oh, Brian likes "must"
3 and not "shall." Can we use "must"?

4 CHAIRMAN BABCOCK: "Must abate."

5 MS. EADS: Well, we must.

6 CHAIRMAN BABCOCK: All right. Any other
7 comments on this paragraph? Then moving to paragraph
8 sub (6), order entered during interim proceedings.
9 Carl, any -- we talked about this, of course, at length.

10 MR. HAMILTON: I think there's been no
11 changes in that one from what we talked about last time.

12 CHAIRMAN BABCOCK: All right. Anybody
13 got any comments on (6)? Since there are no comments on
14 (6) let's go to (7).

15 MR. HAMILTON: (7) essentially opted for
16 two, and that will read "Unless the presiding judge of
17 the region has denied the motion without hearing,"
18 comma, then a small t, "the presiding judge of the
19 region must immediately hear" and so forth.

20 CHAIRMAN BABCOCK: Okay. Any issues on
21 subparagraph (7), hearing?

22 MR. TIPPS: I think it would make it
23 easier on the practitioner if we referred back to the
24 provision pursuant to which the presiding judge may deny
25 the motion without hearing. "Unless the presiding judge

1 of the region has denied the motion without hearing
2 pursuant to" whatever that rule is.

3 CHAIRMAN BABCOCK: Subsection (d)(3)

4 MR. HAMILTON: (d)(3), yeah.

5 CHAIRMAN BABCOCK: Huh?

6 MR. TIPPS: Yeah.

7 CHAIRMAN BABCOCK: I don't have a problem
8 with that. Does anybody have a problem with that?

9 MS. CORTELL: No.

10 CHAIRMAN BABCOCK: Judge Schneider, is
11 that a good idea?

12 HONORABLE MICHAEL SCHNEIDER: Looks good
13 to me.

14 MR. MARTIN: You want to change "stopped"
15 to "abated" again, last sentence?

16 CHAIRMAN BABCOCK: Yeah. Okay. Where is
17 "stopped"?

18 MR. MARTIN: Last sentence of the last
19 line.

20 CHAIRMAN BABCOCK: "Or the interim
21 proceeding is abated"?

22 HONORABLE SARAH DUNCAN: "Pending a
23 ruling."

24 CHAIRMAN BABCOCK: "Pending a decision on
25 the motion to recuse or disqualify." Is that okay,

1 Sarah?

2 HONORABLE SARAH DUNCAN: We've been
3 saying "ruling" but we can say "decision."

4 CHAIRMAN BABCOCK: "Pending a ruling"?
5 Would you prefer "ruling"?

6 HONORABLE SARAH DUNCAN: Well, I think
7 that's what we've been using.

8 CHAIRMAN BABCOCK: Everybody okay with
9 making it "ruling"? Okay. Any other comments on this
10 subsection?

11 HONORABLE DAVID PEEPLES: Yes.

12 CHAIRMAN BABCOCK: Yeah, David.

13 HONORABLE DAVID PEEPLES: I would like to
14 know how everybody feels about the 10-day time period
15 and the 20-day time period for the poor judge to make up
16 his mind as to how to rule on this matter.

17 CHAIRMAN BABCOCK: You want a historical
18 read on that?

19 HONORABLE DAVID PEEPLES: Well, I think
20 if you put in time periods that are that long, some
21 people are going to think they can take them, and I
22 think that we ought to do what we can to speed the
23 process up.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: I have a question about

1 how it works because I think the way it works, at least
2 in our area, is Judge Hester assigns a judge to hear the
3 recusal motion and then that judge sets it. This
4 requires the presiding judge to set it. I'm not sure
5 practically how that works, how the presiding judge
6 could set it and then assign some judge. Maybe he has a
7 conflict or something.

8 MR. ORSINGER: What about "who must set a
9 hearing to commence"?

10 HONORABLE SARAH DUNCAN: The "who" is
11 misplaced.

12 MR. ORSINGER: The "who" is misplaced,
13 huh? Why? "Assign another judge to hear the motion who
14 must."

15 CHAIRMAN BABCOCK: Well, let's take Judge
16 Peeples' issue first.

17 MR. ORSINGER: Oh, okay.

18 CHAIRMAN BABCOCK: Are the 10 and 20-day
19 deadlines too generous? Should it be five and ten?

20 HONORABLE SCOTT BRISTER: They seem too
21 generous to me, but do you-all know of cases where you
22 need that much time?

23 MR. EDWARDS: I don't understand why
24 it -- a recusal motion is usually pretty short, quick
25 and why somebody needs 20 days to say "granted" or

1 "denied" is -- you know, if they can't do it within
2 three working days or a couple of working days, you
3 know, and we've spent the first part of yesterday
4 dealing with very short timetables.

5 CHAIRMAN BABCOCK: And so three days?
6 Replace "ten days" with "three days"?

7 MR. ORSINGER: I was involved in a
8 recusal that Judge McDowell did in Tyler, and he took it
9 under advisement and asked for briefs, and it took him
10 almost a month to rule on it, and we had expert
11 witnesses on both sides and all that stuff, and so some
12 of this stuff is real clear, but for him maybe -- and he
13 must have done 500 of these.

14 HONORABLE JAN PATTERSON: The 10 days
15 doesn't seem so unreasonable as the 20 days does.

16 CHAIRMAN BABCOCK: Okay.

17 MS. EADS: I don't understand why you
18 need ten days to do the hearing. I mean, there must be
19 a way to -- well, first of all, we're doing the same
20 thing about making sure that the rules cover every
21 eventuality. Most recusal motions are going to take --
22 you know, you set the hearing the next day and they will
23 take half an hour in the courtroom and you can rule. I
24 mean, this is not going to be protracted in most
25 situations.

1 CHAIRMAN BABCOCK: Justice Hecht, throw
2 out some numbers.

3 JUSTICE HECHT: Well, the only problem
4 with the ten is getting everybody together. Of course,
5 the movant ought to be standing by and ready to go, and
6 it's just the question of the other side. So maybe five
7 days, but I think less than -- I would think less than
8 ten and on the how many days to rule --

9 HONORABLE SCOTT BRISTER: Why couldn't
10 you measure that from when the referral as well? You
11 don't want to string out the hearing just so --

12 JUSTICE HECHT: Measure when to rule
13 from --

14 HONORABLE SCOTT BRISTER: From the
15 referral.

16 JUSTICE HECHT: Well, Richard says
17 sometimes the hearings last quite awhile and you call a
18 lot of witnesses, so I wouldn't want to put a time in
19 there that people couldn't function with, but I would
20 think that after the case was submitted surely the judge
21 could decide it within a day or two.

22 CHAIRMAN BABCOCK: So change 20 to 3?

23 MS. JENKINS: Yes. I think that would
24 make sense.

25 MR. EDWARDS: I would say "three working

1 days."

2 CHAIRMAN BABCOCK: "Three business days."

3 MS. JENKINS: Yeah.

4 MR. EDWARDS: Yeah, business. However
5 the -- we've got that in some other -- what is the word
6 of art we use in --

7 HONORABLE JAN PATTERSON: Three days,
8 isn't that business days?

9 MR. EDWARDS: But somewhere in the rules
10 we use is it working days, business days, how do we --

11 HONORABLE JAN PATTERSON: Well, I think
12 don't we calculate --

13 CHAIRMAN BABCOCK: Okay. Well, whatever
14 it is. We'll get the --

15 MR. EDWARDS: I know there is some other
16 stuff in here that has three days in it. Some number of
17 days.

18 CHAIRMAN BABCOCK: Well, actually, your
19 calculation of time rule --

20 HONORABLE JAN PATTERSON: Yeah.

21 CHAIRMAN BABCOCK: -- excludes weekends
22 and holidays, doesn't it?

23 MS. EADS: If it's less than a time
24 period.

25 CHAIRMAN BABCOCK: Okay. So the proposal

1 on the tabling is five and three. How many people are
2 in favor of that?

3 PROFESSOR ALBRIGHT: Except you don't
4 count under the counting rule you don't count --

5 HONORABLE JAN PATTERSON: Weekends.

6 PROFESSOR ALBRIGHT: Oh, you don't --
7 never mind.

8 HONORABLE SCOTT BRISTER: You don't count
9 Saturdays, Sundays, or holidays if it's any time period
10 of five days or less.

11 CHAIRMAN BABCOCK: So there you have it.
12 So we can just say "three days."

13 MS. JENKINS: Three days.

14 CHAIRMAN BABCOCK: Judge Peeples.

15 HONORABLE DAVID PEEPLES: On the ten I
16 think I would favor saying "promptly" or something like
17 that. There are times when nobody is in a hurry, and
18 it's filed way in advance of the hearing, and there's no
19 urgency, and people are busy, and there are going to be
20 times when a time fuse is not important, and what
21 happens if it's not done in ten days?

22 HONORABLE SCOTT BRISTER: It's granted.

23 HONORABLE DAVID PEEPLES: So I think
24 there is a problem with putting a number in the first
25 one. I think a short number definitely ought to be in

1 the second one.

2 HONORABLE TOM LAWRENCE: Are we assuming
3 the presiding judging has checked with the judge to make
4 sure he doesn't have any conflicts for five days or ten
5 days? Because if he does then that's going to be
6 another problem.

7 CHAIRMAN BABCOCK: If it's in the rule I
8 would think he would do that. Steve.

9 MR. TIPPS: I would simply observe that
10 this short ten-day period could very easily, and in many
11 cases would, disadvantage the nonmovant. In the one
12 recusal motion I've ever handled we had a hearing with
13 three witnesses, and we were the movants, and we spent a
14 lot of time getting ready, and under this rule what you
15 would have to do if you wanted to file that kind of
16 motion is get your case together, ready to go, and file
17 it, and the other guy would have very little time to
18 react. Maybe we want to -- I mean, maybe that's the
19 exception that we don't want to try to write a rule
20 around, but I think it has that effect.

21 MR. CHAPMAN: That may be another reason
22 to use Judge Peeples' suggestion of "promptly" so that
23 the judge who is going to hear the hearing, hold the
24 hearing, could make a determination as to what's proper
25 and reasonable under the circumstances.

1 CHAIRMAN BABCOCK: Okay. So what if we
2 insert the word "promptly" in front of "set"? "And must
3 promptly set a hearing to commence before such judge,"
4 period.

5 MR. ORSINGER: So that means the
6 presiding judge will set the hearing and not the judge
7 who's assigned. Is that what we really want?

8 CHAIRMAN BABCOCK: No, probably not.

9 HONORABLE DAVID PEEPLES: The judge who
10 is going to hear it needs to set the date.

11 MR. EDWARDS: Richard has it done. He's
12 drafted it comma, "who."

13 MR. TIPPS: "Who must promptly set a
14 hearing."

15 CHAIRMAN BABCOCK: Does that work? "Who
16 must promptly"?

17 HONORABLE SARAH DUNCAN: Bad English.

18 CHAIRMAN BABCOCK: All right. How would
19 you do it?

20 MR. ORSINGER: We just can't please
21 everybody, can we?

22 MR. CHAPMAN: What does "who" modify, the
23 presiding judge?

24 HONORABLE SARAH DUNCAN: That's the
25 problem.

1 MR. HAMILTON: "Must promptly set a
2 hearing on the motion."

3 MR. CHAPMAN: You could eliminate that by
4 just saying "and the hearing must be promptly set" or
5 "must commence promptly before such judge"?

6 JUSTICE HECHT: Brian would break it into
7 two sentences and say, "The assigned judge must set a
8 hearing promptly."

9 CHAIRMAN BABCOCK: Okay. "Immediately
10 hear or assign another judge to hear the motion,"
11 period. "The hearing must be promptly set."

12 MR. EDWARDS: "The assigned judge must
13 set."

14 MR. ORSINGER: What if the presiding
15 judge does it? You can't say "the assigned judge." The
16 presiding judge may hear it himself.

17 HONORABLE SARAH DUNCAN: "The judge who
18 will hear the motion."

19 CHAIRMAN BABCOCK: "The judge hearing the
20 motion."

21 MR. CHAPMAN: The hearing, that's what
22 we're worried about. "The hearing must be promptly
23 set."

24 MS. McNAMARA: It must occur. I mean,
25 setting it, you can set it for three months from now.

1 The old language dealt with the commencement of the
2 hearing. We've sort of lost that in the last five
3 minutes.

4 MR. CHAPMAN: Yes. "The hearing must
5 occur." "Must commence promptly."

6 MS. McNAMARA: "Commence." "Commence" is
7 better.

8 CHAIRMAN BABCOCK: "The hearing must
9 commence promptly."

10 MR. MARTIN: If the presiding judge is
11 going to hear it, we're saying, "The presiding judge
12 must immediately hear it" and then the next sentence
13 we're saying he must promptly set it for hearing.

14 CHAIRMAN BABCOCK: "Must immediately hear
15 or assign."

16 MR. ORSINGER: So if he takes it himself,
17 it's immediate.

18 MS. EADS: And I would prefer "immediate"
19 to "prompt" because I'm worried about those judges out
20 there who aren't in this room who prompt can mean three
21 months, and "immediate" has a different connotation,
22 which means as quickly as --

23 MS. SWEENEY: Instanter.

24 MS. EADS: Instanter, right.

25 CHAIRMAN BABCOCK: Well, it ought to be

1 parallel, I would think.

2 HONORABLE DAVID PEEPLES: The existing
3 rule says, "The presiding judge shall immediately set a
4 hearing before himself or some other judge designated."
5 So "immediately" is in the rule right now.

6 CHAIRMAN BABCOCK: "The hearing must
7 commence immediately." Sarah.

8 HONORABLE SARAH DUNCAN: Why don't you
9 just say "unless the presiding judge of the region has
10 denied the motion without hearing the judge hearing the
11 motion must immediately hear," -- "set a hearing to
12 commence."

13 CHAIRMAN BABCOCK: Yeah, but if he's not
14 going to hear it, you don't want him setting it.

15 HONORABLE SARAH DUNCAN: That's what I'm
16 saying, "the judge hearing the motion."

17 MR. HAMILTON: We don't have a vehicle
18 for him to assign it. That's where it gets assigned.

19 MR. ORSINGER: This is the operative
20 clause where he assigns.

21 HONORABLE SARAH DUNCAN: Actually, I
22 think that's already been stated, hasn't it?

23 CHAIRMAN BABCOCK: No.

24 HONORABLE SARAH DUNCAN: I think so.
25 Yeah. That's under subsection (3), referral. "If the

1 motion complies with subparagraph (d)(1), the presiding
2 judge of the administrative region shall hear the motion
3 or assign a judge to hear it." This is just about the
4 hearing.

5 MR. ORSINGER: Okay. You're right.

6 HONORABLE HARVEY BROWN: Didn't we hear
7 from Judge Brister that although the word "immediately"
8 has been in here that he had one that wasn't assigned
9 for weeks and weeks?

10 HONORABLE SCOTT BRISTER: The hearing was
11 set immediately. It was just set for two months off.
12 It was immediately set for two months out.

13 HONORABLE HARVEY BROWN: So it might be
14 good to have an outer parameter such as ten days.

15 HONORABLE SARAH DUNCAN: Well, why don't
16 we leave out the whole preparatory language and say,
17 "The hearing on a motion to recuse must commence
18 prompt" -- "immediately" or "promptly" or "within three
19 days" or whatever we decide the language needs to be?
20 The presiding judge has already either decided to hear
21 it or refer it under subsection (3), so we don't need to
22 talk about that anymore.

23 CHAIRMAN BABCOCK: So you say -- so it
24 would say, "Unless the presiding judge of the region has
25 denied the motion without hearing pursuant to paragraph

1 (d)(3), the hearing must commence immediately."

2 HONORABLE SARAH DUNCAN: Just leave all
3 that out. The entire introductory clause has already
4 been stated in subsection (3), and this subsection (7)
5 is supposed to just be about the hearing.

6 CHAIRMAN BABCOCK: All right. How does
7 everybody feel about that? Paula, are you pretty happy
8 about that?

9 MS. SWEENEY: I am so happy.

10 CHAIRMAN BABCOCK: Can we talk voir dire
11 for a minute?

12 MS. SWEENEY: You bet.

13 CHAIRMAN BABCOCK: All right. Everybody
14 okay with that? Hartley, is that okay?

15 MR. ORSINGER: Well, Carl has raised the
16 issue that the Option 2 language only talks about the
17 referral from the trial judge to the presiding judge,
18 but it doesn't talk about a referral from the presiding
19 judge to another judge, so this is our operative clause
20 for the assignment out on the recusal.

21 MR. HAMILTON: Oh, here it is. "Or
22 assign a judge to hear it."

23 MR. ORSINGER: I withdraw that statement.

24 MR. HAMILTON: But that only deals with
25 if he doesn't promptly do something then the movant can

1 ask the judge to assign a judge to hear it, but it's not
2 the operative clause for the presiding judge to assign
3 it.

4 MR. ORSINGER: Are we going to leave in
5 the sentence that the presiding judge must hear or
6 assign another judge to hear?

7 CHAIRMAN BABCOCK: Sarah's proposal is to
8 take it out.

9 MR. ORSINGER: Okay. Then if we take
10 that out, we don't have a explicit authority for the
11 presiding judge to assign it out.

12 CHAIRMAN BABCOCK: Well, then let's leave
13 it in. Well, I mean --

14 HONORABLE SARAH DUNCAN: If all we need
15 is a sentence that says the presiding judge can assign
16 another judge to hear it, just retitle subsection (3)
17 "Referral and Assignment" and leave that sentence, "If
18 the motion complies with subparagraph (d)(1), the
19 presiding judge of the administrative region shall hear
20 the motion or assign another judge to hear it."

21 CHAIRMAN BABCOCK: Yeah. Richard, why do
22 you think this language in the referral paragraph, "If
23 the motion complies with subparagraph (d)(1), the
24 presiding judge of the administrative region shall hear
25 the motion or assign a judge to hear it"? Why doesn't

1 that cover it?

2 MR. ORSINGER: It does. It's the third
3 time I've changed my mind.

4 CHAIRMAN BABCOCK: Okay. Is everybody
5 comfortable with Sarah's proposal that we take this
6 preparatory language out there and just say, "The
7 hearing must commence immediately"? Is everybody
8 comfortable with that? Anybody not comfortable with
9 that?

10 MR. HAMILTON: How does the sentence read
11 then?

12 CHAIRMAN BABCOCK: "The hearing must
13 commence immediately."

14 MR. HAMILTON: What about the first
15 sentence?

16 CHAIRMAN BABCOCK: No, she takes all of
17 that out.

18 HONORABLE SARAH DUNCAN: We've already
19 done that. But with reference to what Judge Peeples was
20 saying, I can see situations in which you don't need to
21 have it immediately.

22 MR. MARTIN: How about "upon request of
23 either party," somebody thinks there needs to be a
24 hearing.

25 HONORABLE SARAH DUNCAN: Yeah. That's

1 great.

2 HONORABLE HARVEY BROWN: What about Steve
3 Tipps' point that sometimes the responding party might
4 need more than a day to get ready?

5 MR. HAMPTON: And Judge Peeples' point
6 that it might not need to be heard yet. So the answer
7 to your question is anybody -- is the question is
8 anybody uncomfortable with that still pending?

9 HONORABLE JAN PATTERSON: My hand was
10 about to throw up.

11 CHAIRMAN BABCOCK: All right. I'm not
12 sure I heard what everybody said. The proposal is on
13 the table, "The hearing must commence immediately upon
14 request of any party," because it could be a --

15 MR. MARTIN: "Any party."

16 CHAIRMAN BABCOCK: "Any party."

17 MR. TIPPS: That potentially
18 disadvantages the nonmovant if the movant is ready to
19 go, all of his ducks in a row, and the other guy is just
20 saying, "You want to what?"

21 MR. CHAPMAN: What about, "The hearing
22 shall commence promptly consistent with justice"?

23 MR. ORSINGER: In this Tyler case there
24 were actually depositions taken of non-parties to find
25 out about communications with the judge. How can you do

1 that in three days if you're the respondent?

2 HONORABLE DAVID PEEPLES: Chip, I think
3 we ought to leave it the way it's written.

4 HON. ANN CRAWFORD McCLURE: You also have
5 a problem with rural judges, and it may be 300 miles,
6 350 miles, away from another judge to even get them
7 there to hold the hearing. Not everybody has another
8 judge down the hall.

9 CHAIRMAN BABCOCK: Good point. Judge
10 Peeples.

11 HONORABLE DAVID PEEPLES: On line three
12 just put a period after "motion" and say, "A hearing
13 must be promptly scheduled," period, and move on. You
14 can't make people hold hearings. What are you going to
15 do if it's not held? You've got to trust somebody to
16 hear the arguments and decide if it needs to be heard
17 now and if somebody needs more time. You've just got to
18 trust somebody to make those decisions, and we can't
19 mandate it in this rule. I think that's the best we can
20 do.

21 MR. TIPPS: I agree.

22 MR. ORSINGER: I support that, too.

23 MR. HAMILTON: Agree.

24 CHAIRMAN BABCOCK: Sarah, do you agree
25 with what Judge Peeples said? Even though he sits on an

1 inferior court to yours.

2 HONORABLE SARAH DUNCAN: Only because of
3 his choice to go someplace else. I still don't
4 understand why you need all of the introductory clause
5 or why it's appropriate in the section entitled
6 "Hearing," but I don't think that that makes much
7 difference.

8 CHAIRMAN BABCOCK: Not anything to go to
9 war over.

10 HONORABLE SARAH DUNCAN: Brian will clean
11 it up.

12 MR. ORSINGER: We can delete the first
13 two sentences.

14 HONORABLE DAVID PEEPLES: They are in the
15 existing rule. Do we have them somewhere else in this
16 rule?

17 CHAIRMAN BABCOCK: Yeah. It's in (d)(3),
18 but the word "immediately" is not in (d)(3).

19 HONORABLE SARAH DUNCAN: Add it.

20 CHAIRMAN BABCOCK: It should be added.

21 MR. ORSINGER: In (d)(3) it says, "If the
22 motion complies with subparagraph (d)(1), the presiding
23 judge of the administrative region shall hear the motion
24 or assign it to a judge to hear it."

25 HONORABLE DAVID PEEPLES: That's good.

1 MR. ORSINGER: The word "immediate" is
2 not in there or anything. It does no timetable.

3 CHAIRMAN BABCOCK: The "immediate" should
4 modify "assign."

5 MR. ORSINGER: Well, there was -- we
6 wanted also to encourage the presiding judges to take
7 action promptly, and we have the word "immediate" here
8 on the assignment. If we fall back on Option 2 to
9 (d)(3), there is no encouragement for the presiding
10 judge to act quickly on making the referral.

11 CHAIRMAN BABCOCK: If we add the word
12 "immediately" before assigned that will take care of
13 that.

14 MR. ORSINGER: Yes.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE DAVID PEEPLES: The word
17 "immediately" is in the existing rule.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE DAVID PEEPLES: And it works in
20 some cases, and it does not work in other cases.

21 CHAIRMAN BABCOCK: Okay. But, David,
22 we're back to your -- let's see what he's got on the
23 table, Carl. Read that language again, David.

24 HONORABLE DAVID PEEPLES: Well, I guess
25 drop the first two and a half lines and say, "A hearing

1 must be promptly scheduled" or something. "A prompt
2 hearing must be scheduled," something like that. That
3 doesn't say who does it. I guess you could say one
4 person or the other. I don't know.

5 CHAIRMAN BABCOCK: Okay. Carl.

6 MR. HAMILTON: Well, I think we need the
7 first line in there because we have a provision that
8 allows the presiding judge to act without a hearing.

9 CHAIRMAN BABCOCK: Yeah. I kind of feel
10 that way, too, because that could potentially conflict
11 with that.

12 MR. HAMILTON: So I think we need the
13 first line in there, and as Steve suggested or somebody,
14 that we add "pursuant to paragraph (d)(3)."

15 CHAIRMAN BABCOCK: Right. So "Unless the
16 presiding judge of the region has denied the motion
17 without hearing pursuant to subparagraph (d)(3), a
18 hearing must be promptly scheduled."

19 MR. TIPPS: Uh-huh.

20 CHAIRMAN BABCOCK: Hartley, does that
21 work for you or not?

22 MR. HAMPTON: Works for me.

23 CHAIRMAN BABCOCK: Anybody? Nina, does
24 that work for you?

25 MS. CORTELL: (Nods head.)

1 CHAIRMAN BABCOCK: Does that not work for
2 anybody?

3 MS. EADS: I would rather have it say
4 "must be scheduled to promptly commence" rather than
5 "promptly scheduled" because the issue isn't how fast
6 it's scheduled but that it be promptly handled.

7 CHAIRMAN BABCOCK: Ann, you think that's
8 right?

9 MS. McNAMARA: I do. I mean, there are
10 all these good objections to trying to do some things
11 too fast, but the concept of "promptly" incorporates
12 some reasonableness. I would prefer that.

13 CHAIRMAN BABCOCK: Okay. David, there
14 has been a friendly amendment offered, very friendly,
15 from the right side of the table. "A hearing must be
16 scheduled to commence promptly."

17 HONORABLE DAVID PEEPLES: That sounds
18 sublime.

19 MR. HAMILTON: "Promptly commence" or
20 "commence promptly"?

21 CHAIRMAN BABCOCK: I don't know. What
22 would Garner say?

23 MR. ORSINGER: Well, you don't end
24 sentences with adverbs under the old grammar.

25 CHAIRMAN BABCOCK: Okay. So "to promptly

1 commence."

2 MR. TIPPS: Don't split the infinitive.

3 HONORABLE SCOTT BRISTER: Garner says
4 it's okay to split infinitives.

5 CHAIRMAN BABCOCK: So which way are we
6 doing it? Do we split the infinitive?

7 MR. ORSINGER: My language advisor won't
8 comment.

9 MR. TIPPS: I will vote against it if we
10 split the infinitive.

11 CHAIRMAN BABCOCK: "To commence promptly"
12 it is then. Okay. Are we happy with that? Anybody
13 unhappy with that?

14 MR. ORSINGER: Let me ask you, back on
15 (d)(3) on Option 2, are we going to insert the word
16 about "the presiding judge shall immediately hear the
17 motion or assign"?

18 CHAIRMAN BABCOCK: No.

19 MR. ORSINGER: No "immediate."

20 CHAIRMAN BABCOCK: Well, wait a minute.
21 We are going to put the word "immediate" in there, but
22 it's going to be in front of "assign."

23 MR. ORSINGER: A-ha. Okay. Okay.

24 CHAIRMAN BABCOCK: Okay. So the language
25 here is "Unless the presiding judge of the region has

1 denied the motion without hearing pursuant to
2 subparagraph (d)(3), a hearing must be scheduled to
3 commence promptly." Okay. Everybody all right with
4 that? Okay. That's what we'll do then.

5 Now, there is a proposal by Justice Hecht
6 to change 20 days to 3 days.

7 HONORABLE DAVID PEEPLES: So moved.

8 CHAIRMAN BABCOCK: All right. Anybody
9 have a problem with that? There are no hands raised.
10 There are no heads shaking.

11 MR. TIPPS: Just three business days or
12 three working days?

13 MR. ORSINGER: Under five days, three
14 means business days. It's under five days.

15 We don't need it in letters and numerals,
16 do we? Don't we just use letters?

17 JUSTICE HECHT: Yes.

18 CHAIRMAN BABCOCK: Yes.

19 MR. ORSINGER: Okay.

20 MR. HAMILTON: Just letters.

21 CHAIRMAN BABCOCK: Okay. Anything else
22 on subparagraph (7)? Carl.

23 MR. HAMILTON: Well, the next sentence
24 may or may not be correct. "The presiding judge must
25 set the notice of hearing."

1 MR. TIPPS: It ought to say, "The judge
2 hearing the motion must send notice."

3 CHAIRMAN BABCOCK: Well, that makes more
4 sense, but was this done this way for a reason?

5 HONORABLE SCOTT BRISTER: Do you send
6 notice, David?

7 HONORABLE DAVID PEEPLES: I think it
8 happens both ways. People show up, and you have the
9 hearing, and it's not a problem. This is in the regular
10 rule right now. I don't think it's a problem, and I
11 would say we shouldn't spend our precious time tinkering
12 with it.

13 MR. MARTIN: Chip, I have one comment
14 about that.

15 CHAIRMAN BABCOCK: Yeah, John.

16 MR. MARTIN: It says "send notice." If
17 this is going to happen so fast this could be in the
18 presiding judge's chambers or on a phone call or
19 something like that. Maybe "must give notice" or
20 something like that. "Send" implies send something in
21 the mail.

22 CHAIRMAN BABCOCK: I'm okay with that.
23 David, you all right with that?

24 HONORABLE DAVID PEEPLES: That or "shall
25 notify everybody." "Give notice" is fine.

1 CHAIRMAN BABCOCK: "Give."

2 MR. HAMILTON: "The presiding judge must
3 give notice"?

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE SCOTT BRISTER: The current
6 rule is "presiding judge shall cause notice of such
7 hearing to be given."

8 MR. HAMILTON: That may have been in the
9 recodification, by the way.

10 CHAIRMAN BABCOCK: Okay. Anything else
11 about subparagraph (7), hearing?

12 MR. HAMILTON: That's the way it was in
13 the recodification.

14 MS. CORTELL: We probably want to change
15 "stopped" to "abated."

16 CHAIRMAN BABCOCK: We've done that.

17 MR. ORSINGER: We agreed to do that, and
18 "decision" to "ruling."

19 MR. HAMPTON: Is that sentence necessary
20 in light of paragraph (5)?

21 CHAIRMAN BABCOCK: Say that again,
22 Hartley.

23 MR. HAMPTON: Is the last sentence
24 necessary in light of paragraph (5)?

25 CHAIRMAN BABCOCK: I think that's a

1 little different.

2 No, it's not, either.

3 HONORABLE HARVEY BROWN: The footnote
4 says it's meant to correspond with (5).

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE HARVEY BROWN: If so, why say
7 it twice? Everybody getting in a fight over which --

8 MR. ORSINGER: We don't need it the
9 second time, I agree.

10 CHAIRMAN BABCOCK: Yeah. Let's take that
11 out. Okay. We're onto disposition. Any issues on this
12 paragraph?

13 HONORABLE DAVID PEEPLES: Yes. The
14 second sentence allows the parties to agree on the
15 judge.

16 MR. MEADOWS: Or permits them to not
17 agree.

18 MS. McNAMARA: It doesn't require the
19 presiding judge to assign.

20 CHAIRMAN BABCOCK: Is this in the current
21 rule?

22 HONORABLE SCOTT BRISTER: No. This is
23 the constitutional deal, and we talked about this
24 briefly, whether you want to tell parties that or not,
25 but the Constitution says, Texas Constitution, if

1 somebody is disqualified the parties have a right to
2 select an appropriate person, not required to be a
3 judge, to hear the case. If they cannot agree on that
4 person then the presiding judge appoints somebody.

5 Now, that's what the Constitution says.
6 We put this originally in the codification because
7 that's what the Constitution says. Counter-argument is,
8 well, if they know the Constitution, which, of course,
9 nobody in Texas does, then they can do that, but if they
10 don't, why tell them.

11 HONORABLE SARAH DUNCAN: That was the
12 reason you came to this meeting at 8:30 on a Saturday
13 morning, to find out that you get to select your judge.

14 HONORABLE SCOTT BRISTER: That was the
15 argument.

16 HONORABLE DAVID PEEPLES: In one sense
17 that sentence states something obvious, which is people
18 can agree on a judge, and that can be ratified by the
19 presiding judge if he or she wants to. If this is going
20 to cause people to want to read the Constitution and go
21 around agreeing on judges and just say, "We want some
22 nonlawyer to hear a case," I think that's just --

23 HONORABLE SCOTT BRISTER: Can't have
24 that.

25 HONORABLE DAVID PEEPLES: We shouldn't do

1 that.

2 MS. McNAMARA: We call an ADR, though. I
3 mean, that's --

4 HONORABLE SARAH DUNCAN: That's exactly
5 right.

6 MR. ORSINGER: But it doesn't say the
7 presiding judge is required to accept the parties'
8 agreement, right? So this isn't harmful, is it?

9 HONORABLE DAVID PEEPLES: But, Richard,
10 is it helpful?

11 MR. HAMILTON: I think it's helpful in
12 the sense that it avoids a second recusal and it avoids
13 a second challenge that may be made under the Government
14 Code if the parties can agree on a judge.

15 HONORABLE HARVEY BROWN: There can be
16 some sensitivity on the judges sometimes when they hear
17 that lawyers really want another judge, didn't want me
18 in this one. What about the next case that is in my
19 court? Why do you want that one over me? I mean, I
20 have heard those discussions in the past when the judges
21 talk about letting lawyers pick their judge, so it might
22 have unintended consequences beyond this particular
23 case.

24 MR. JEFFERSON: I think most lawyers, you
25 know, if they want the trial to go forward and they see

1 another judge sitting there with nothing to do and can
2 agree will make that agreement, and it will be ratified
3 by the presiding judge if it avoids all these recusal
4 hearings. I don't see any need for that sentence in the
5 rule at all.

6 CHAIRMAN BABCOCK: What's the third
7 sentence add? What's the third sentence getting at?

8 MR. HAMILTON: This was brought up by
9 Scott.

10 MR. ORSINGER: Scott Brister.

11 HONORABLE DAVID PEEPLES: McCown.

12 MR. ORSINGER: I mean Scott McCown. I'm
13 sorry. Excuse me.

14 MR. EDWARDS: The presiding judge doesn't
15 have the power to appoint a master, a statutory power.

16 MR. ORSINGER: He said the practical
17 decision when an associate judge is recused is that the
18 judge in the court is just going to hear it, or at least
19 they want to pick the other associate judge. They don't
20 want the presiding judge to do that.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE SCOTT BRISTER: And didn't he
23 say also that the presiding judge can appoint?

24 MR. EDWARDS: I thought he said that the
25 regional presiding judge didn't have authority to make

1 the appointment.

2 MR. ORSINGER: That was a bold assertion.

3 MR. EDWARDS: I don't know whether it's
4 correct or incorrect.

5 CHAIRMAN BABCOCK: Okay. Well, I'm
6 sorry. I got ahead of myself. That third sentence
7 doesn't relate to the second, so the proposal is to
8 delete sentence two. All in favor of deleting sentence
9 two raise your hand.

10 HON. ANN CRAWFORD McCLURE: I vote "yes."

11 CHAIRMAN BABCOCK: Everybody in favor of
12 deleting sentence two raise their hand.

13 HON. ANN CRAWFORD McCLURE: I vote "yes."

14 MR. ORSINGER: Oh, she's against.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE SCOTT BRISTER: No, she's --

17 CHAIRMAN BABCOCK: 13 in favor. All in
18 favor of keeping sentence two raise your hand.

19 Bill, do you have your hand up?

20 MR. EDWARDS: No. I had it up the first
21 time.

22 CHAIRMAN BABCOCK: Ten.

23 MR. ORSINGER: Does that include Ann?

24 CHAIRMAN BABCOCK: Yes.

25 MR. JACKSON: Did she say "I vote 'yes'?"

1 or --

2 MR. ORSINGER: She said -- I think she
3 said "against."

4 MR. HAMILTON: She said "against."

5 CHAIRMAN BABCOCK: So I counted her with
6 you, Richard.

7 MR. ORSINGER: And so it lost by --

8 CHAIRMAN BABCOCK: 13 to 10.

9 MR. ORSINGER: 13 to 10.

10 CHAIRMAN BABCOCK: So that sentence will
11 be deleted.

12 MR. ORSINGER: Does it remain in the
13 Constitution, though?

14 HONORABLE SCOTT BRISTER: Yes, but don't
15 tell anybody.

16 CHAIRMAN BABCOCK: We're going to take
17 that up next. All right. Judge McCown's concept of
18 associate judge or master.

19 HONORABLE DAVID PEEPLES: I think it
20 ought to stay the way it is right there. It's very
21 important that the people hearing these abuse and
22 neglect cases and so forth be somebody who understands
23 that, and I think the judge who is close to the scene is
24 more likely to be sensitive to those concerns than
25 somebody farther removed, and there is also a turf issue

1 here, and I think that Judge McCown is correct and that
2 language ought to stay.

3 CHAIRMAN BABCOCK: Okay. Anybody
4 disagree with that?

5 MS. SWEENEY: So the way it is proposed
6 now it's going to read sentence one, sentence three.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE HARVEY BROWN: Well, just as a
9 drafting issue, what if the district court wants to just
10 do it himself or herself now?

11 HONORABLE DAVID PEEPLES: You can do it?

12 HONORABLE HARVEY BROWN: Well, it says
13 "must appoint." "Must direct the district court to
14 appoint a replacement." What if the judge doesn't want
15 a replacement, the judge just wants to do it himself or
16 herself?

17 MR. EDWARDS: Just add in there "or hear
18 the matter himself or herself."

19 CHAIRMAN BABCOCK: Yeah, appoint
20 themselves as a replacement.

21 HONORABLE DAVID PEEPLES: Richard, is
22 this your language or Scott McCown's?

23 MR. ORSINGER: This was Scott's language,
24 but actually the way this is written, it means the
25 recusal is automatically granted no matter whether it's

1 meritorious or not, doesn't it?

2 CHAIRMAN BABCOCK: No.

3 MR. ORSINGER: "The presiding judge must
4 direct the district court to appoint a replacement."
5 It's like --

6 MS. JENKINS: "If."

7 MS. EADS: "If."

8 MR. EDWARDS: "If the judge is recused or
9 disqualified."

10 MR. ORSINGER: Oh, that's after the
11 conclusion. I'm with you. Okay.

12 CHAIRMAN BABCOCK: Any other comments to
13 this?

14 MR. ORSINGER: I think we ought to add
15 "or hear it him or herself," however you would do that.

16 HON. ANN CRAWFORD McCLURE: Sometimes,
17 though, there are locations in which one associate judge
18 serves more than one court, so there is not going to be
19 a particular district judge that appointed that
20 associate judge. It will have been the agreement of the
21 local council of judges who made that appointment.

22 MR. ORSINGER: That's true in San
23 Antonio.

24 HON. ANN CRAWFORD McCLURE: El Paso. Do
25 you want to clarify that the district judge to whom the

1 case is assigned will appoint the replacement?

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE DAVID PEEPLES: I'm wondering
4 if we need this reference to the presiding judge in that
5 sentence. "If an associate judge or master is recused
6 or disqualified, the district court which appointed the
7 associate judge or master shall appoint a replacement."

8 CHAIRMAN BABCOCK: Well, and Ann's --
9 "the district court to whom the case is assigned," she
10 says.

11 MR. EDWARDS: Yeah. I don't know what
12 you gain from having the presiding judge directing the
13 district court to appoint.

14 HONORABLE DAVID PEEPLES: Yeah. Take
15 that out.

16 MR. EDWARDS: The rule does that.

17 CHAIRMAN BABCOCK: All right. How about
18 this? "However, if an associate judge or a master is
19 recused or disqualified, the district court to whom the
20 case is assigned must hear the case or appoint a
21 replacement."

22 HON. ANN CRAWFORD McCLURE: I think
23 that's fine.

24 CHAIRMAN BABCOCK: Okay. Paragraph (9),
25 appeal.

1 PROFESSOR CARLSON: Chip, can I ask one
2 question?

3 CHAIRMAN BABCOCK: Yeah, Elaine.

4 PROFESSOR CARLSON: Is it only the
5 district courts that have the power to appoint masters?
6 I thought the county courts also did. Under Rule 171.

7 CHAIRMAN BABCOCK: I don't know.

8 MR. ORSINGER: This is a different kind
9 of master. This is statutory associate judge.

10 PROFESSOR CARLSON: So it does not apply
11 to -- there is no power to recuse a master under 171? I
12 don't know.

13 MR. ORSINGER: Yeah. They're not listed
14 as judges in here, I don't think. Where do we list
15 judges, Carl?

16 MR. HAMILTON: We don't.

17 MR. ORSINGER: I thought we did.

18 MR. HAMILTON: Oh, at the end we say it
19 doesn't apply to some of them.

20 MR. JEFFERSON: Well, but isn't there --
21 you can object to having your case heard by an associate
22 judge or master.

23 HONORABLE DAVID PEEPLES: You have an
24 appeal de novo. I don't think there is an objection.

25 MR. JEFFERSON: Well, that's right.

1 CHAIRMAN BABCOCK: Paragraph (9), appeal.
2 This is something that I asked the subcommittee to look
3 at. There are instances where the recusal is obtained
4 by fraudulent testimony, and at least some judges take
5 the position that they have no powers to rectify that,
6 even on a motion to reconsider where the evidence has
7 been shown to be fraudulent. So this -- and I'm not
8 sure if that's right or not, but that's the way that
9 some judges view it. So this paragraph is intended to
10 cure that problem so that "the order may not be reviewed
11 except in cases where the movant presented fraudulent
12 evidence in support of the motion." Paula.

13 MS. SWEENEY: Two components to my
14 question. A, again, are we writing to the exception?
15 How often is fraudulent evidence induced at these, and,
16 B, aren't we creating a reason to appeal with the
17 argument that your evidence was fraudulent in every
18 case? In other words, kind of both sides of the
19 problem.

20 CHAIRMAN BABCOCK: Sarah.

21 HONORABLE SARAH DUNCAN: Who is going to
22 decide if it's fraudulent and how? I mean, appellate
23 courts generally review determinations by trial judges.
24 I don't think they're equipped to decide in the first
25 instance whether evidence is fraudulent.

1 CHAIRMAN BABCOCK: Oh, I agree. And I
2 think this would permit a trial judge to review that.

3 HONORABLE SARAH DUNCAN: Well, this is
4 appeal.

5 CHAIRMAN BABCOCK: No.

6 MS. SWEENEY: Yeah.

7 CHAIRMAN BABCOCK: It says "may not be
8 reviewed." It doesn't say anything about appeal.

9 MR. EDWARDS: Well, the whole thing says
10 "appeal."

11 MR. ORSINGER: But the paragraph title
12 leads you to think that.

13 MS. McNAMARA: And the prior line says
14 "reviewed on appeal."

15 HONORABLE SARAH DUNCAN: That's what I
16 see.

17 CHAIRMAN BABCOCK: I understand that, and
18 maybe there is another way to do this, but --

19 MR. ORSINGER: How about "Reconsideration
20 and Appeal"?

21 CHAIRMAN BABCOCK: Yeah.
22 "Reconsideration and Appeal."

23 MR. EDWARDS: Well, I think we're getting
24 down to that letting the tail wag the dog business
25 again.

1 MS. SWEENEY: Yeah. How often do you
2 have fraudulent testimony, truly fraudulent? I mean,
3 not just stupid, but fraudulent.

4 CHAIRMAN BABCOCK: Well, I can tell you
5 one instance for sure.

6 MR. EDWARDS: Well, at what point do you
7 learn that the testimony is fraudulent and what has
8 happened in the meantime?

9 MS. EADS: And what do you want to do
10 with it? Are you going to suggest that the party that
11 produced fraudulent testimony against a judge then has
12 to have that judge? If the purpose of producing --

13 MR. ORSINGER: That's fitting punishment.

14 MS. EADS: Maybe so.

15 CHAIRMAN BABCOCK: Well, no. Here's how
16 it works. There's a vague -- there's a vague motion,
17 arguably doesn't comply with the rule that says it has
18 to be specific but alleges a ground that the trial
19 judge, the judge being recused, practiced law with a
20 material witness in the case. Special exception denied.
21 Who's the person? Who's the witness? Interrogatory
22 won't tell you. Go to a hearing. Movant gets up on the
23 stand, reveals for the first time it's this guy, says
24 that he did this, he did that, he did the other thing.
25 The guy can't be subpoenaed down to the

1 hearing, but within a day or so executes an affidavit
2 saying, "That's absolutely false. I never did this with
3 the trial judge. I never did this. I never did that,"
4 et cetera, et cetera. On motion for reconsideration the
5 judge who's been appointed to hear the recusal motion
6 says under this paragraph, "I can't review it. It
7 says -- I've already granted it. It can't be reviewed."
8 So then you try to mandamus. That doesn't work either.
9 You try to go to the presiding judge, "Sorry. I've
10 already appointed another judge to hear it." So you've
11 allowed somebody to get up there and absolutely lie and
12 recuse a judge which has made in this instance --

13 HONORABLE SARAH DUNCAN: That's your
14 perspective, but so far as the record is concerned there
15 is a fact issue.

16 CHAIRMAN BABCOCK: Oh, yeah. That's
17 right.

18 HONORABLE SARAH DUNCAN: As to who is
19 telling the truth.

20 CHAIRMAN BABCOCK: And the judge who made
21 the decision says -- no, no, no. Certainly that's true.
22 The judge who made the decision says, "Whoa, this is a
23 serious matter. I would reconsider it except for this
24 paragraph which says that it can't be reviewed, and so I
25 feel like I can't review my decision." The presiding

1 judge agrees with that.

2 HONORABLE SARAH DUNCAN: You may want a
3 separate paragraph that talks about reconsideration by
4 the trial court.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE SARAH DUNCAN: But that
7 wouldn't be part of an appellate.

8 MR. ORSINGER: Well, you could rename
9 this "Reconsideration."

10 MR. EDWARDS: Well, I don't think you
11 want them both in the same paragraph, No. 1. No. 2,
12 we -- the judges who are making the complaint that
13 you're speaking of are thinking that the recusal motion
14 is against them, and the whole reason for these recusal
15 things outside of the area of constitutional
16 disqualification in large part is the appearance of a
17 lack of impartiality. That's what a whole lot of it is.

18 CHAIRMAN BABCOCK: Yeah, but the evil of
19 this situation is forum shopping. Didn't like the
20 judge, didn't like the judge that they got, so they
21 moved to recuse him, and they do it arguably --

22 MR. EDWARDS: Well, if they do it
23 fraudulently there are a whole raft of things in here.
24 First of all, you get down here to the sanction part
25 that puts you back into whatever it is, 215(b)(2), which

1 allows all kinds of bad things to happen. If they have
2 presented fraudulent testimony --

3 CHAIRMAN BABCOCK: Yeah, but they have
4 won the motion, so nothing bad can happen to them for
5 winning the motion.

6 MR. EDWARDS: Yes, they can. They're in
7 contempt of court, and if it's sworn to, there may be
8 all kinds of problems.

9 CHAIRMAN BABCOCK: But that decision
10 means that they have succeeded in their forum shopping.

11 MR. EDWARDS: Well, so has the bank robber
12 succeeded in getting the money from the bank, you know,
13 but we take care of that in another way. We don't
14 say -- the rule that he couldn't rob the bank doesn't
15 stop him.

16 CHAIRMAN BABCOCK: Judge Peeples.

17 HONORABLE DAVID PEEPLES: Chip, I think
18 that what Paula and Bill have said is correct here. If
19 the motion is granted, you know, and the recusal judge
20 believed what turned out to be fraudulent testimony, it
21 seems to me very important that we still move on and
22 take it from there.

23 Now, if you had a judge who thought that
24 he didn't have the authority to grant a rehearing, I
25 don't see that in the present rule, which says, "If the

1 motion is granted, the order shall not be reviewable."
2 If we were to say here, "If the motion is granted, the
3 order may not be reviewed on appeal," period, then that
4 would clearly limit that to reviewed in an appellate
5 court, and it seems to me you could probably convince
6 that judge, "You've been had. There's nothing in this
7 rule that prevents a reconsideration," but it doesn't
8 open the door to the extent that this last -- this
9 italicized language seems to do.

10 MS. SWEENEY: The only question I have
11 about reconsideration procedurally, and I may just be
12 too ignorant, but if you persuade the judge with your
13 fake testimony, he recuses himself, it gets assigned
14 someplace else. Now you're in another court. You
15 figure out it's fake testimony. You go back to the
16 original judge who says, "Whoops, I unrecuse myself."
17 What's happened to the other proceeding? Are those
18 orders voidable? What if that other judge doesn't want
19 to get shed of the case? Who has authority to order it?
20 Are we now walking into a situation -- and I don't know,
21 and, I mean, I like what you're saying but --

22 CHAIRMAN BABCOCK: Yeah. This may be
23 just one of those situations where the wrong has no
24 remedy.

25 HONORABLE DAVID PEEPLES: Got to live

1 with it.

2 HONORABLE SARAH DUNCAN: Motion for
3 sanctions.

4 CHAIRMAN BABCOCK: Huh?

5 HONORABLE SARAH DUNCAN: You have a
6 motion for sanctions.

7 CHAIRMAN BABCOCK: You know, but what's
8 your sanction? I mean, the problem is that the guy has
9 forum shopped and he's been successful. You can't go to
10 the new judge and say, "By the way, Judge, you're better
11 for this guy than the last guy and so I want sanctions."

12 MS. McNAMARA: You might. If the new
13 judge fits any of the qualifications, you know, of
14 impartiality.

15 CHAIRMAN BABCOCK: Okay. Well, there's a
16 proposal by Judge Peeples to say, "If the motion is
17 granted, the order may not be reviewed on appeal," and
18 stop there or say "but may be considered" --

19 HONORABLE DAVID PEEPLES: Period.

20 CHAIRMAN BABCOCK: Period.

21 MR. ORSINGER: Would you be willing to
22 say "by mandamus or appeal"?

23 HONORABLE DAVID PEEPLES: Yeah.

24 CHAIRMAN BABCOCK: Huh?

25 MR. ORSINGER: "By mandamus or appeal."

1 HONORABLE DAVID PEEPLES: That needs to
2 be in there.

3 MR. EDWARDS: Well, I don't know that you
4 have to say that, because the language "reviewed on
5 appeal" has already been -- in this context already been
6 decided that it's not a mandamus order.

7 CHAIRMAN BABCOCK: You think there's case
8 law on that?

9 MR. EDWARDS: I know there is.

10 CHAIRMAN BABCOCK: Really?

11 MR. HALL: There is.

12 MR. ORSINGER: There's no harm in saying
13 it, is there?

14 JUSTICE HECHT: You still get someone
15 that wants one.

16 MR. EDWARDS: It might cut them off.

17 CHAIRMAN BABCOCK: Yeah. David, is there
18 any appetite for saying that the trial court -- the
19 recusing court has authority to entertain a motion to
20 reconsider?

21 HONORABLE DAVID PEEPLES: Chip, I just
22 think it's very important that these decisions be made
23 and you move on. That's a very important consideration
24 here.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE DAVID PEEPLES: And I wouldn't
2 say it.

3 CHAIRMAN BABCOCK: All right. Any other
4 comments? Yeah, Skip.

5 MR. WATSON: Can I ask a question on the
6 first sentence? If memory is correct, the old 18a,
7 whatever it was, said that if it was denied, the order
8 may be reviewed for abuse of discretion on appeal. I'm
9 sure there was a reason that was dropped out, and I may
10 be dead wrong on that.

11 CHAIRMAN BABCOCK: No, you're right.
12 That's what it says.

13 MR. WATSON: But I'm wondering why that
14 was dropped out.

15 MR. ORSINGER: Let's put it back in. I
16 don't think it was -- probably Bill Dorsaneo took it
17 out, truthfully, and I don't remember that we ever
18 discussed that we would drop that out, because that is
19 the standard of review.

20 MR. WATSON: And by dropping it, it
21 appears that it's not, intended not to be the standard,
22 and I'm sitting here wondering what the heck the
23 standard is and how am I ever going to show reversible
24 error. I mean, and I'm frankly still wondering that of
25 how one shows this is reversible error unless -- I mean,

1 it just is awfully hollow as it is written.

2 CHAIRMAN BABCOCK: Yeah.

3 MR. EDWARDS: That's a question I was
4 going to raise on appeal, what's the burden on appeal,
5 not the -- insofar as whether or not you have to show
6 harm or don't show harm. Is this subject to the
7 harmless error rule, or is it like venue?

8 MR. ORSINGER: I don't know.

9 MR. WATSON: I mean, I agree with Bill.
10 To me, based on everything we've been going through in
11 this whole process, it is incredibly hollow. I mean,
12 all these attempts that we've made to try to say that
13 the appearance of impropriety or actual impropriety is
14 just not going to be tolerated, period, when we get down
15 and say, "Hey, look at the evidence. You know, the
16 outcome would have been the same regardless of the
17 judge." You know, or how can you show the outcome would
18 have been different?

19 HONORABLE SARAH DUNCAN: I don't think
20 there is a harm analysis in recusal.

21 MR. EDWARDS: In order to show that the
22 outcome --

23 CHAIRMAN BABCOCK: Whoa, whoa, whoa. Are
24 you finished?

25 HONORABLE SARAH DUNCAN: I don't think

1 there is a harm analysis in recusal.

2 MR. ORSINGER: But we're not going to
3 write that in this rule anyway, so let's move on.

4 CHAIRMAN BABCOCK: Yeah. We're not going
5 to write it.

6 MR. ORSINGER: We're either going to put
7 abuse of discretion in here or we're not, but we're not
8 going to put whether it's subject to harmless error.

9 CHAIRMAN BABCOCK: Abuse of discretion
10 was in the prior rule.

11 MR. ORSINGER: Yes. For --

12 CHAIRMAN BABCOCK: No, I know it was.
13 I'm reading it.

14 MR. ORSINGER: It says "reviewed for
15 abuse of discretion on appeal."

16 MR. WATSON: That's fine.

17 CHAIRMAN BABCOCK: All right. Let me --

18 MR. EDWARDS: Unless there is harmful
19 error other than this in the case it is impossible to
20 show harm as a result of a ruling.

21 MR. ORSINGER: That may be true, but
22 that's not a rule of procedural problem, is it? That's
23 a rule of appellate substantive law.

24 CHAIRMAN BABCOCK: Let me read the rule
25 as it stands right now. "If the motion is denied, the

1 order may be reviewed for abuse of discretion on appeal
2 from the final judgment. If the motion is granted, the
3 order may not be reviewed by mandamus or" -- "by
4 mandamus or appeal," period. That's the language we
5 currently have. How many -- we have got to move on,
6 guys. How many people are in favor of that?

7 HON. ANN CRAWFORD McCLURE: I am.

8 CHAIRMAN BABCOCK: 21 in favor. How many
9 against? One against. 21 against. 21 to 1 it passes.

10 MR. ORSINGER: Chip, we need to go back,
11 I think, and clarify on Elaine's point. Carl and I
12 looked in here, and we don't, in fact, specifically say
13 that associate judges or masters are or are not covered.

14 Under subdivision (d)(1) on page three,
15 "A motion to disqualify or recuse a judge other than a
16 judge of the Supreme Court, Court of Criminal Appeals,
17 Court of Appeals or Statutory Probate Court," and so
18 we're only inferentially saying associate judge or
19 master, and we don't indicate whether the master is
20 what, Elaine, is Rule 171?

21 PROFESSOR CARLSON: 171.

22 MR. ORSINGER: Special master or whether
23 it's a master appointed pursuant to the Government Code.
24 And I think we ought to get a consensus and then write
25 something while we're going on here. Are we going to

1 include 171 special masters or not?

2 HONORABLE DAVID PEEPLES: No.

3 PROFESSOR CARLSON: No.

4 MR. ORSINGER: No? Okay. We're not.

5 Then it's just going to be associate judges because
6 there is a statutory concept for those.

7 MS. SWEENEY: So you can't recuse a
8 special master, you're saying?

9 MR. ORSINGER: That's what the no's just
10 meant.

11 MS. SWEENEY: Well, what if it's the
12 opponent's wife? I mean, of course you have to be able
13 to do something.

14 CHAIRMAN BABCOCK: Yeah. I don't
15 understand why you wouldn't, if they are going to be
16 making decisions in the case.

17 MS. SWEENEY: How about your appearance
18 of impropriety?

19 CHAIRMAN BABCOCK: Huh?

20 PROFESSOR CARLSON: There is some case
21 law that says you cannot.

22 HONORABLE SARAH DUNCAN: They're not
23 making decisions.

24 MR. ORSINGER: It says you what? It says
25 you what, Elaine?

1 HONORABLE SARAH DUNCAN: They're making
2 recommendations to the district judge.

3 MR. ORSINGER: Elaine, the case law says
4 what?

5 PROFESSOR CARLSON: There is some case
6 law that says you cannot.

7 CHAIRMAN BABCOCK: There is a heightened
8 standard of review?

9 PROFESSOR CARLSON: There is case law
10 saying that you cannot.

11 MR. ORSINGER: Cannot?

12 PROFESSOR CARLSON: Recuse a 171, but
13 that's why I was asking.

14 CHAIRMAN BABCOCK: When they make a
15 recommendation.

16 HONORABLE SARAH DUNCAN: I'm not arguing
17 against having them recusable.

18 CHAIRMAN BABCOCK: All right. Yeah,
19 Judge Brown.

20 HONORABLE HARVEY BROWN: Well, I appoint
21 them rarely, but I have on a couple of occasions, and if
22 somebody had a reason to recuse them, I would want to
23 know right then, so I think they should have a right to
24 file a motion.

25 HONORABLE SCOTT BRISTER: Yeah, but then

1 do you want to load onto it all of our recusal
2 procedures and interim proceedings and ten days? I
3 agree. I would expect if I appoint somebody, my
4 brother-in-law, somebody would say something, 'so I would
5 say, "Oh, okay. Let's do somebody else," but remember
6 those are not decision makers, those are recommenders.

7 HONORABLE HARVEY BROWN: Yeah, although
8 as a practical matter if you have got a discovery fight
9 with a master looking at a million documents --

10 HONORABLE SCOTT BRISTER: Don't admit
11 that on the record.

12 HONORABLE MICHAEL SCHNEIDER: You know,
13 but isn't the threshold extremely high for even
14 justifying a master? I mean, you've got --

15 MR. ORSINGER: Not in Fort Worth it
16 isn't.

17 HONORABLE MICHAEL SCHNEIDER: Well,
18 according to the Supreme Court it is. I mean, that can
19 also be one of the -- as a practical matter, if one
20 party strongly opposes a master, it's really difficult
21 for a trial judge to meet all those thresholds.

22 CHAIRMAN BABCOCK: Yeah. Yeah. How many
23 people think we ought to include master?

24 HONORABLE MICHAEL SCHNEIDER: Special
25 masters you mean?

1 CHAIRMAN BABCOCK: Special masters.

2 HONORABLE SCOTT BRISTER: Don't you
3 get -- I mean, No. 1, couldn't you object and bring that
4 up once the special master makes the report? No. 2,
5 wouldn't it be like, I mean, an arbitrator you bring
6 that up when the arbitration awards, somebody moves to
7 affirm it.

8 HONORABLE MICHAEL SCHNEIDER: I think we
9 ought to vote. Didn't we already vote?

10 CHAIRMAN BABCOCK: Well, we were in the
11 middle of a vote.

12 HONORABLE MICHAEL SCHNEIDER: I'm sorry.

13 CHAIRMAN BABCOCK: And started kind of
14 talking about it. That's okay.

15 HONORABLE SCOTT BRISTER: You know,
16 before we --

17 HONORABLE SARAH DUNCAN: If I can argue
18 my "yes" vote, what if you have got a really
19 document-intensive accounting problem, a tracing
20 problem, and you've got 30 years of documents that
21 you're going to have to present to this master. Are we
22 saying that even though I know the master is the husband
23 of my opposing counsel I have to produce my 30 years of
24 documents and wait until he makes a recommendation
25 before I can get rid of them?

1 HONORABLE SCOTT BRISTER: No.

2 HONORABLE MICHAEL SCHNEIDER: No. This
3 could be ruled by mandamus. I mean, this would be an
4 abuse of discretion to basically violate any of these
5 recusal problems.

6 HONORABLE SARAH DUNCAN: Well, the last
7 one of those was granted by the Third Court of Appeals
8 was -- I'll just hire Pam.

9 HONORABLE SCOTT BRISTER: I'm not saying
10 you ought to appoint biased special masters. I'm saying
11 we've got a how many page rule now? It's going to be a
12 three-page printed rule. Okay. That's fine for judges,
13 but for special masters, too? I mean, you know, that
14 you have to do it on this time and it's abuse of
15 discretion.

16 It's not reviewed by abuse of discretion.
17 It's the trial judge that's going to do it, and it's the
18 trial judge -- the fact is that the special master does
19 not make the decision. The trial judge has to make the
20 decision. It's unconstitutional for the special master
21 to do anything but make a recommendation. We get on
22 down that road, how about, you know, special expert
23 panels and stuff like that. I mean, I can imagine you
24 sure want a right to object that person is biased, and
25 that record ought to be made, but these are not judges.

1 It's different, and it ought to be if you want to write
2 a whole rule for that procedure, that's one thing, but
3 we ought not to just treat them like judges because
4 they're not.

5 MS. EADS: And so the procedure would be
6 in this situation where you would inform the judge,
7 "This master has a problem," the judge ignores you, you
8 do a mandamus. So you have protections built in.

9 CHAIRMAN BABCOCK: Elaine.

10 PROFESSOR CARLSON: I'm sorry I brought
11 this up, but for the record, Rule 171 does not allow the
12 court to appoint a master that is related to any party,
13 so that covers it. It does not speak in terms of bias
14 and impartiality. I think that most times judges will
15 ask the parties if they're comfortable with the special
16 master and even ask them for names, so I don't think
17 this is a problem.

18 HONORABLE MICHAEL SCHNEIDER: Absolutely.
19 Absolutely.

20 MR. CHAPMAN: Well, in Dallas County
21 special masters get appointed without the court asking
22 anybody, and you may have it for a Dauber motion, which
23 is important in your case, and it's going to be decided,
24 and the cases may be set for trial the two weeks hence,
25 and then say you have to take it up on mandamus and

1 that's your only remedy. If, in fact, you have a basis
2 for -- a real basis for objection because of recusal or
3 disqualification, it seems as though you're putting the
4 party at an unnecessary cost and disadvantage when we've
5 got a rule that takes care of it at the trial level.
6 Otherwise, you're forcing a party with a lesser judicial
7 officer to take it up on appeal in essence. That
8 doesn't make any sense to me, and we ought to include
9 them because as a practical matter they are decision
10 makers.

11 CHAIRMAN BABCOCK: Yeah, Judge Lawrence.

12 HONORABLE TOM LAWRENCE: Well, I think
13 perhaps there does need to be some way to recuse a
14 master, but I'm not sure that it needs to be in this
15 rule to give them the same status or prestige or rights
16 that a regular judge would have. Perhaps we need to
17 look at 171 or a similar rule. I think it would be a
18 mistake to put it in this.

19 CHAIRMAN BABCOCK: Okay. Let's vote on
20 this. How many people would vote in favor of including
21 special master in this procedure?

22 HON. ANN CRAWFORD McCLURE: You're
23 talking under the rules and not statutory masters,
24 right?

25 CHAIRMAN BABCOCK: Yes. How do you vote,

1 Judge McClure?

2 HON. ANN CRAWFORD McCLURE: Not including
3 them.

4 CHAIRMAN BABCOCK: Not including them.
5 Okay. How many vote not to include them?

6 HON. ANN CRAWFORD McCLURE: Now I vote
7 "yes."

8 CHAIRMAN BABCOCK: 17 not to include
9 them. 12 to include, so they will not be included. I
10 wrote in "associate judge." We've got them in, right?

11 MR. ORSINGER: On (d)(1) we will say, "A
12 motion to disqualify or recuse a judge or associate
13 judge." Is that all right? No. (1).

14 HON. ANN CRAWFORD McCLURE: Richard,
15 under the Family Code aren't the (4)(d) masters still
16 referred to as masters?

17 MR. ORSINGER: I think they are.

18 MS. JENKINS: I think they are.

19 MR. ORSINGER: Yes.

20 HON. ANN CRAWFORD McCLURE: So maybe what
21 you want to say is "statutory masters."

22 HONORABLE MICHAEL SCHNEIDER: Statutory
23 masters.

24 CHAIRMAN BABCOCK: You want to include
25 statutory masters?

1 MS. JENKINS: I think you have to for the
2 (4)(d) cases.

3 CHAIRMAN BABCOCK: Okay. So it would
4 read "judge, associate judge, or statutory master"?

5 HON. ANN CRAWFORD McCLURE: Right.

6 CHAIRMAN BABCOCK: Okay. All right.

7 MR. EDWARDS: And then you would change
8 down in (8) from "a master" to "a statutory master."

9 CHAIRMAN BABCOCK: Yes. Right. Thanks,
10 Bill.

11 MS. McNAMARA: Chip, could we get an
12 expression of interest in Tom Lawrence's suggestion that
13 we do something somewhere?

14 MR. ORSINGER: I support putting it into
15 the proper rule and just say "on the same grounds as in
16 18a."

17 MS. McNAMARA: Just so they don't get all
18 the complexity of this, but there is some
19 acknowledgement that they can be recused.

20 CHAIRMAN BABCOCK: I think that's a good
21 idea. Richard and Carl, that would be your subcommittee
22 that would --

23 MR. ORSINGER: We'll bring that to the
24 September meeting.

25 CHAIRMAN BABCOCK: August.

1 MR. ORSINGER: Oh, August.

2 CHAIRMAN BABCOCK: August meeting. Okay.
3 Subparagraph (10), assignment of judges by Chief Justice
4 of the Supreme Court.

5 MR. HAMILTON: That will be deleted now.

6 MR. ORSINGER: Well, I mean, we didn't
7 exactly vote to do that. We just discussed it, didn't
8 we?

9 MR. HAMILTON: It won't make any sense
10 because we removed the recusal to the regional presiding
11 judge, so I would say we have to delete (10). Except
12 for the last sentence. That's in the current rule.

13 CHAIRMAN BABCOCK: I'm not quite sure why
14 since we deleted the other thing this necessarily has to
15 go, but --

16 MR. HAMILTON: Well, we decided we didn't
17 want to create a road map for the recusals of the
18 regional presiding judge, so we took out that part over
19 in --

20 CHAIRMAN BABCOCK: Yeah. I hear what
21 you're saying. Justice Hecht, how do you feel about
22 that?

23 JUSTICE HECHT: I mean, I thought the
24 committee crossed the bridge with the taking out the
25 road map, so if that's what we're going to do, that's

1 fine. As a matter of fact -- but this is what's going
2 to happen I think. Time will tell what's going to
3 happen. If somebody does move to recuse the presiding
4 judge, except for the first phrase, I mean, I think
5 whether he decided to hear the motion to recuse or not,
6 if the party didn't want the regional presiding judge
7 making the appointment of the judge to hear the case,
8 the recusal motion, it would still come to the Chief and
9 he'd appoint somebody.

10 MS. SWEENEY: I would move to take it out
11 consonant with what we already did.

12 CHAIRMAN BABCOCK: All right. So taking
13 it out except for the non-italicized sentence, which is
14 already in the existing rule. All right. So that's
15 history. All right. Sanctions.

16 MR. EDWARDS: Before we get there in
17 talking about procedure, I don't think there is anything
18 in here that's the equivalent of the old Rule 18a,
19 paragraph (b), and was that left out for some reason?

20 MR. HAMILTON: 18a what?

21 MR. EDWARDS: Paragraph (b), little (b),
22 which has to do with what you do when you file a motion.
23 And this says you've got to give everybody notice and
24 get it set in three days and other things. Was there a
25 reason --

1 HONORABLE SCOTT BRISTER: You're taking
2 care of the setting in the other section and then Rule
3 21 would handle service.

4 MR. EDWARDS: Where does it take care of
5 it?

6 HONORABLE SCOTT BRISTER: On how fast the
7 hearing has to be set.

8 MR. EDWARDS: No. That's --

9 MR. HAMILTON: Paragraph (7) says the
10 presiding judge must give notice of the hearing to all
11 parties.

12 MR. EDWARDS: Yeah, but this is the
13 filing of the motion itself and the hearing on the
14 motion before the -- bringing it to -- not the hearing
15 on it, but presenting it to the district judge with
16 respect to whom it's filed. In other words, this
17 covered the gap between filing and getting it to the
18 presiding judge, this paragraph (b).

19 MR. HAMILTON: Well, I think where we've
20 covered that is under the referral, paragraph (3).

21 MR. EDWARDS: I just didn't know whether
22 we did or didn't.

23 MR. HAMILTON: It says, "If the
24 judge...in which the motion is filed does not promptly
25 grant the motion or refer it to the presiding judge, the

1 movant may forward a copy of the motion to the presiding
2 judge and request him to hear it or assign a judge to do
3 it."

4 CHAIRMAN BABCOCK: Well, but the
5 paragraph that Bill is talking about says, "On the day
6 the motion is filed copies shall be served on all other
7 parties." That sounds like you've got to serve it the
8 day the motion is filed --

9 MR. EDWARDS: Right.

10 CHAIRMAN BABCOCK: -- as opposed to
11 putting it in the mail and it gets there --

12 MR. ORSINGER: Putting it in the mail is
13 service. This doesn't add anything to Rule 21.

14 CHAIRMAN BABCOCK: Okay. All right.
15 Well, if it doesn't add anything to 21 then there's not
16 that problem.

17 MR. EDWARDS: Well, this makes
18 presentation to the judge either three days or six days,
19 depending on whether you mail it or hand-deliver it
20 or --

21 MR. ORSINGER: Well, I mean, notice that
22 you're going to present it to the judge within three
23 days, are we requiring them to present it to the trial
24 judge within three days, because --

25 MR. EDWARDS: I don't know.

1 MR. ORSINGER: -- this just gives notice
2 of your intent? It doesn't really make you present it.

3 CHAIRMAN BABCOCK: But the question is,
4 the question Bill raises, is does this -- is there
5 anything substantive in old paragraph (b) that we're
6 leaving out?

7 MR. EDWARDS: That's what I'm saying.
8 What paragraph (b) does is make you give notice to the
9 other side and tell the other side that you're going to
10 present this to the judge, not just file it, but present
11 it to the judge, in some given period of time; and that
12 gives the other side a particular period of time to
13 respond to it before the recusal judge is -- or later
14 rules said you either got to recuse or refer, and this
15 gives the opposing -- anybody opposing the motion to
16 recuse an opportunity to get some evidence in front of
17 the district judge where the motion is filed to give
18 that judge something to decide the motion on if there's
19 an opposition to the motion.

20 If the motion says there's some stock
21 ownership or some relationship and then the other side
22 comes in with affidavits, says, "No, there's not," or
23 something. Or gives them an opportunity to say this is
24 an inadequate motion or at least gives them a chance to
25 say something. Otherwise all that the judge with

1 whom -- with respect to whom the motion is filed, the
2 only thing that's going to be there before that judge is
3 what the movant has before that judge.

4 CHAIRMAN BABCOCK: It seems to me
5 self-evident that if you're opposing a motion and you
6 want to file something, you would do that. I wouldn't
7 think that this rule either prohibits or allows it. I
8 mean --

9 MR. EDWARDS: That's what I'm saying.
10 I'm just talking about an opportunity to do so.

11 CHAIRMAN BABCOCK: Yeah.

12 MR. ORSINGER: Well, the rule doesn't
13 give you that opportunity. It just requires that you
14 make the statement that you expect to present it in
15 three days. Does that prohibit you from presenting it
16 in two days or does it prohibit you from presenting it
17 in four days? I mean, the rule requires someone to make
18 a statement about their intent for a future act, right?

19 MR. EDWARDS: I just wondered if there
20 was a reason for leaving it out.

21 MR. ORSINGER: It doesn't make any sense
22 to me. I don't remember that we discussed this. It
23 probably came out on the recodification draft, but now
24 that you have brought it to attention I don't see that
25 (b) accomplishes anything. It doesn't require you to do

1 it.

2 CHAIRMAN BABCOCK: Okay. Here is the
3 answer. Nobody can recall why it was left out. The
4 question is should it be put back in? Anybody think we
5 ought to put it back in, in any form?

6 Well, since nobody seems to think it's
7 necessary, let's go on to sanctions. The sanctions
8 section in large part, particularly the boldfaced
9 language, is from Senator Harris' bill, and as you may
10 recall, Richard and Bob Pemberton and I met with Senator
11 Harris, and he said he would be delighted if we folded
12 his bill into our rule, in which case his statute would
13 go away.

14 So that's what Carl and Richard have
15 tried to do here I think on subparagraph (b). And there
16 was an issue that the bill did not address that we
17 thought was a substantial issue, and that is to have
18 some way for the sanctioned person or attorney to
19 suspend the sanction order, sort of like a supersedeas,
20 and we talked to Senator Harris about that, and he
21 didn't have any problem with that concept and said, you
22 know, "If you guys come up with something, fine, let me
23 see it, and we'll go from there." So that's what these
24 next two pages are dealing with, and, Richard and Carl,
25 do you want to make any comments about it?

1 MR. HAMILTON: Well, under (11)(b) we
2 added the last sentence because the bold part coming
3 right out of the statute, but the statute didn't provide
4 for any sanctions if the order was not superseded or the
5 money was not paid. So we provided for those sanctions
6 under 215.2(b). Then we had a previous rule which said
7 that supersedeas was to be in accordance with Appellate
8 Rule 24, and I think Sarah Duncan wanted some more
9 detail, and I think she was right because some parts of
10 that appellate rule really didn't fit. So what we've
11 designed this to do is give the party the right to
12 supersede either by a written agreement or a bond or
13 deposit in lieu of a bond. Only those three things.

14 The written agreement is -- could be any
15 way you want to do it, but we just stuck in there that
16 it has to provide for the terms of the suspension,
17 conditions under which the award must be paid, and
18 method of payment has to be approved by the court. That
19 is patterned somewhat from the appellate rules, but the
20 bond is patterned from the appellate rules and the
21 deposit in lieu of bond is the same way. We sort of
22 designed the payment or refund by the clerk.

23 CHAIRMAN BABCOCK: Okay. Anybody have
24 any problems, either conceptually or in a picky way?

25 MR. EDWARDS: We had the discussion, and

1 I can't remember if we decided or didn't decide whether
2 this means third or subsequent motion against the same
3 judge in the lawsuit or against any judge in the
4 lawsuit.

5 MR. ORSINGER: The Senator said it was
6 any judge.

7 MR. EDWARDS: Then we should say that.
8 If that's what we're doing, it ought to be there,
9 because you -- the way it's written you can argue either
10 way.

11 CHAIRMAN BABCOCK: Well, the Senator also
12 conceded that he had not thought about the situation
13 where I file two motions to recuse. They're both
14 granted because they are absolutely, positively solid
15 gold, and then I file a third one that's denied, even
16 though it's a close call, and I get sanctioned for it,
17 which does not seem to be in any sense fair. Probably
18 won't come up very often, but --

19 MR. ORSINGER: Yeah. One Senator does
20 determine whether or not he's happy when we override a
21 statute, and the way I recall that it ended up was that
22 he had not recognized that possibility; but he said,
23 "Look, I think if you've had three shots to get your
24 judge, you know, the system, you ought to just live with
25 it, and if you're going to come in the third time, even

1 if you have been successful twice, you ought to pay."
2 Now, that was what I recollect. We don't have a tape
3 recording of that.

4 CHAIRMAN BABCOCK: Well, we didn't go in
5 and bug the guy.

6 MR. ORSINGER: Well, I mean, we may have
7 a difference of opinion about what he said, but I
8 thought he kind of hung in there for the interpretation.

9 CHAIRMAN BABCOCK: Yeah, I didn't sense
10 that he hung in there that tough on that.

11 MR. ORSINGER: Oh, you didn't?

12 CHAIRMAN BABCOCK: But we may find out
13 otherwise.

14 MR. ORSINGER: I don't feel strongly
15 about it myself, but I say let's run it by him. Because
16 if we're going to ask him to agree for us to override
17 his statute, we want to be sure that he's with us.

18 MR. EDWARDS: Well, I think the
19 practicing Bar deserves to know what their risks are in
20 filing a third motion and not have to find out on appeal
21 whether they're right or wrong in determining that it
22 means three times against one judge or not.

23 MR. JEFFERSON: This raises the problem
24 again with systems like Bexar County. What happens if
25 you have two or three judges out of the same law firm,

1 and there is some big case that's been pending for years
2 and they would be disqualified and you filed a motion to
3 recuse on all of them?

4 MR. EDWARDS: If you win, you're all
5 right.

6 CHAIRMAN BABCOCK: And with the Bexar
7 County/Travis County docket, I mean, you get a whole
8 string of judges. You don't get just one.

9 MR. EDWARDS: I don't know. I'm just
10 asking which it is, and people ought to be told in
11 advance if we can.

12 MR. ORSINGER: Well, I would propose that
13 we vote what we want, write it that way, and then take
14 it to Senator Harris and say, "This is what we voted and
15 this is why, and are you comfortable if we repeal your
16 statute?" And if he says "no" then we will have to
17 report to the Supreme Court, and they can make a
18 decision about how to handle the politics.

19 JUSTICE HECHT: Could I understand, in
20 Bexar County would you ever move -- since you don't know
21 who's going to try the case or hear a dispositive
22 motion, would you prophylactically move to recuse the
23 judges who might be assigned to hear it?

24 MR. JEFFERSON: No.

25 JUSTICE HECHT: You would wait until you

1 got it assigned?

2 MR. ORSINGER: Yes.

3 MS. CORTELL: If we change the concept, I
4 think we should be mindful it's the same concept that we
5 have currently in the interim proceedings rule, so any
6 change we make here has to be made there, I would think.

7 CHAIRMAN BABCOCK: That's right.

8 Richard, how did you draft this? Did you try to draft
9 it for three strikes and you're out, even though you hit
10 a home run on the first two pitches?

11 MR. ORSINGER: No. This picks up the
12 ambiguity in the statute and carries it into the rule.

13 MR. EDWARDS: You've done a wonderful
14 job.

15 CHAIRMAN BABCOCK: Attaboy, Richard.

16 MR. CHAPMAN: Applied consistency.

17 CHAIRMAN BABCOCK: Wall.

18 MR. JEFFERSON: What if you were to
19 change the letter "a" to the word "the" in the second
20 line.

21 CHAIRMAN BABCOCK: Yeah. That's what I
22 was thinking as a fix.

23 MR. EDWARDS: Which judge? The judge
24 that's now sitting, the judge that was sitting? (B) and
25 (a) doesn't make a difference.

1 MR. JEFFERSON: No, no. I'm sorry.
2 "Upon denial of the third or subsequent motion filed in
3 the case against the judge."

4 MS. McNAMARA: A single judge, the same
5 judge.

6 MR. JEFFERSON: Well, but if you say the
7 judge --

8 MR. ORSINGER: I wouldn't call that
9 crystal clear, Wallace.

10 MR. JEFFERSON: No, but I also wouldn't
11 know if our legislator would think that's an overruling.

12 MR. HALL: Richard, would it be possible
13 to say something along the lines of "upon the denial of
14 three motions"? Isn't that what he's really getting at,
15 the three motions, for instance, were denied and you
16 still keep filing motions for recusal?

17 MS. McNAMARA: Richard, it sounds like
18 your description of the conversation, he would be okay
19 with against the same judge.

20 MR. ORSINGER: Yeah, he's definitely okay
21 with three against the same judge, but he's also okay
22 with two successful and then an unsuccessful one against
23 your third replacement.

24 MS. EADS: But that's not clear that the
25 Legislature is okay with that. I mean, this was -- as I

1 recall legislative history is that the Legislature
2 wanted to stop the abuse of the system where you keep
3 filing them to delay the process. But there's not --
4 it's not very clear the Legislature thought that you
5 have two successful and then -- and nowhere was it in
6 front of them two successful and then one is denied on a
7 close call that they still want to impose attorney's
8 fees on that.

9 MR. ORSINGER: Okay. Well, this is what
10 I think. I think we ought to do what we think is right,
11 fully explain it in the record, take whatever votes we
12 want, and then we will go sell it to Senator Harris, but
13 I'm clear in my mind that if you lose your third motion,
14 you pay whether you won your first two or didn't.
15 That's just what I recollect his view was.

16 CHAIRMAN BABCOCK: Oh, that was his view.

17 MR. ORSINGER: He said, "I don't mind you
18 guys using your rule-making authority to revoke my
19 statute as long as you get my policy enacted." So if
20 we're going to do what we're saying here, I think we
21 ought to just go to Senator Harris, explain the
22 discussion and reasoning and ask him if he would go
23 ahead and accede to the recommendation of the Advisory
24 Committee. If he does, everything is okay. If he
25 doesn't, the Supreme Court knows they have got a

1 recommendation from us that's hostile to the intent of
2 the Senator and that if they want to use their
3 rule-making authority to revoke his statute and suffer
4 the consequences, they can.

5 MS. EADS: Well, that's not revoking his
6 statute. That's the point. I think we need to make
7 that clear. We may not be going against the legislative
8 will. It may not be what Senator Harris believes was
9 legislative will, and that's a reasonable debate, but it
10 is an important distinction that I think as a committee
11 we have to acknowledge.

12 MR. ORSINGER: But we would list this as
13 a statute repealed, so his statute would be replaced by
14 this rule.

15 MS. McNAMARA: But we would be listing it
16 that way because of your sense of what he really meant
17 behind the words that were adopted.

18 MR. ORSINGER: Yeah. We know what he
19 meant. We may not know what the Legislature meant.

20 MS. McNAMARA: And that's Linda's point.

21 MR. ORSINGER: But I'm not talking about
22 the Legislature. I'm talking about Senator Chris
23 Harris, who is the vice-chair of the Senate
24 Jurisprudence Committee, who is going to get -- might
25 get upset if we override his statute. That's all, and I

1 think we ought to do what we think is right. Let's try
2 to persuade him. He's a very reasonable man, and then
3 if he just draws his line in the sand, it's a political
4 decision from then on.

5 MR. HAMPTON: What was it Lloyd Benson
6 said in the debate? "I know Chris Harris. Chris Harris
7 is" --

8 MR. HALL: I do think it ought to be
9 rewritten so that we're talking about sanctioning
10 conduct of multiple denials of motions to recuse because
11 I think that's what's really sanctionable, not if you've
12 had two good motions to recuse and a third motion,
13 particularly as everybody said in Bexar County and
14 Travis County that won't work. And I assume we could
15 probably sell that to him. What you want to stop is
16 someone who keeps filing these motions to recuse and
17 they're repeatedly denied, and that's the person that
18 you want to sanction, I think.

19 JUSTICE HECHT: And if you lose three,
20 why do you need a supersedeas? It looks to me like if
21 you're wrong three times in a row, suffer the
22 consequences.

23 MR. HALL: Yeah. Penalty is sanctions.

24 MR. HAMPTON: Chip, could you back up a
25 little bit and tell us sort of the procedure and where

1 this is? I mean, is he saying, "I will carry a bill to
2 repeal this if you pass a rule"?

3 MR. ORSINGER: No. The Supreme Court has
4 the authority to revoke a specific statute if they list
5 it as a revoked statute, but from a political standpoint
6 if we run around and start revoking statutes
7 willy-nilly, we make some people mad, and then in the
8 next session they come back and they say, "Well, we're
9 just going to take rule-making authority and put it over
10 here in the House or Senate committee," and then that's
11 really a lot of fun.

12 JUSTICE HECHT: Well, I mean, except when
13 it didn't operate the way it should have, the Court
14 would never consider revoking -- repealing a statute
15 without incorporating that policy into the rule. The
16 reason that we got the authorization in the first place,
17 and the only reason we ever used it, except perhaps
18 once, was simply to take -- to avoid the redundancy of
19 having the procedures stated in the statutes and also
20 stated in the rules, and that's the only reason that we
21 were still here is if the -- it was the process revealed
22 that the policy adopted by the Legislature in this
23 statute could be moved over where lawyers are more
24 likely to find it and use it than isn't it a good thing
25 to do that, and I think Senator Harris would agree with

1 that, and I would hope the whole Legislature would.

2 But on the other hand, if we don't think
3 this is a good procedure then I don't know that the
4 Court would quarrel with the Legislature on that. I
5 mean, they passed it. They thought it was a good idea,
6 and unless -- well, I just can't foresee circumstances
7 where we would dispute that with them.

8 MS. SWEENEY: So is there a statute on
9 the books right now that says three strikes you're out?

10 JUSTICE HECHT: Yeah. Well, it says
11 this.

12 MS. SWEENEY: It did get passed, and it's
13 on the books?

14 MR. ORSINGER: It's subject to some
15 ambiguity. It's also subject to another one we haven't
16 discussed this morning, which is three tiers, the trial
17 judge, the presiding administrative judge, and then the
18 replacement judge, and you could have -- that could be
19 implicated, too, although Senator Harris said it never
20 occurred to him, but I know of at least one case where
21 that happened. So the statute is ambiguous, but we do
22 know the intent of the sponsor.

23 MR. HAMPTON: Just so that the
24 committee -- everybody in the committee is clear, the
25 sponsor is the one who picked up the bill to strip the

1 Supreme Court of the rule-making authority, and it
2 passed the House and went to the Senate, just so
3 everybody understands that.

4 MR. ORSINGER: And I would also point out
5 that he said if we do this by agreement and we revoke
6 his statute, he suggested that we get a letter from him
7 consenting to the repealer so that it can't be used in
8 the next session as evidence of the Court's rule-making
9 authority is out of control.

10 CHAIRMAN BABCOCK: And additionally
11 whether or not he bought off on this issue, he, I think,
12 said that when I posed the question of, well, wait a
13 minute, you can have two good motions and then a close
14 one, the third one is a close one you lose and get
15 sanctioned, he said, "Well, I hadn't really thought of
16 that situation." Now, Richard may be right. Now that
17 he's thought about it he may say, "Well, I don't care,"
18 but, I thought, my impression was he was sympathetic to
19 that problem, not necessarily committing to what he was
20 going to do about it. Yeah, Linda.

21 MS. EADS: I mean, I really think we
22 should go ahead and figure what we think a good rule
23 would look like, like Richard said, and then go to
24 Senator Harris with whatever we come up with. I mean,
25 his influence on this is going to be enormous. There's

1 no doubt about that, but I can tell, I mean, I just did
2 physicians joint negotiation rules. He was the sponsor
3 on that bill. We did not do everything in adopting
4 those rules that he thought he was going to get. We
5 talked to him. I mean, you know, it happens a lot in
6 the legislative process. That's just how it comes down,
7 but I think we need to do what we think is right and
8 then go from there. But I really -- I mean, I have a
9 hard time with some of these things, imposing sanctions
10 on a lawyer after some of these scenarios. It offends
11 my sense of what a good rule would look like.

12 CHAIRMAN BABCOCK: Judge Peeples.

13 HONORABLE DAVID PEEPLES: Would it help
14 if we decide to rewrite (b) to make it three strikes
15 against the same judge? Would it help with Senator
16 Harris if we tightened up paragraph (a), which is
17 straight out of the existing rule and, frankly, which is
18 very toothless because it requires that there be a
19 motion, which frequently there's not? In other words,
20 you can't do it sua sponte, and second, you have to show
21 that the motion was brought solely for delay, which is
22 very hard to do. Now, if we were to change those two
23 provisions of (a), that would make the sanctions more
24 realistic and discretionary. Would that help the Harris
25 version?

1 CHAIRMAN BABCOCK: It might. How would
2 you change it again, David?

3 HONORABLE DAVID PEEPLES: Well, I think
4 that the court ought to be able to do it even if the
5 responding party doesn't move for it, which frankly, a
6 lot of times they just don't want to mess with it.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE DAVID PEEPLES: And second, the
9 requirement that the motion to recuse has to be brought
10 solely for the purpose of delay, that's hard to do a lot
11 of times. There might be some other reason. You know,
12 there wasn't delay. They just wanted to be ornery.
13 Soley for delay is I think awfully hard to show.

14 HONORABLE SARAH DUNCAN: We changed the
15 TRAP Rules to incorporate David Lopez' research on the
16 meaning of "frivolous" and Rule 45, for instance --

17 MS. SWEENEY: Could you speak up, please.

18 HONORABLE SARAH DUNCAN: We amended the
19 TRAP Rules definition of "frivolous" for just this
20 reason, because the meaning of "frivolous" had gotten
21 kind of distorted during all the various amendments, and
22 Rule 45, for instance, in the TRAP Rules now just reads,
23 "If the court of appeals determines that an appeal is
24 frivolous, it may on motion of any party or on it's own
25 initiative after notice of a reasonable opportunity for

1 response award each prevailing party just damages." And
2 I would propose that we incorporate something that
3 simple into this rule. Just say "if the judge hearing
4 the motion determines that," you know, "it's frivolous."

5 MS. EADS: I would agree with you if we
6 didn't have this statute, and if we're trying to work
7 the statute into the rules, which would really be good
8 for practicing lawyers to have one place where they look
9 for it, then I don't know Senator Harris is going to go
10 that far down the road to ignoring what he wants in the
11 bill, what he wanted originally or the Legislature,
12 because there is something about a number that just
13 triggers something.

14 HONORABLE SARAH DUNCAN: Well, I'm not
15 proposing that we delete (b).

16 MS. EADS: Oh, okay.

17 HONORABLE SARAH DUNCAN: Merely that we
18 modify (a) to say --

19 MS. EADS: Well, maybe Judge Peebles was
20 suggesting that we go a different route.

21 HONORABLE SARAH DUNCAN: I'm sorry. You
22 were suggesting --

23 HONORABLE DAVID PEEPLES: Well, I think
24 that there are going to be sometimes that sanctions are
25 called for but the responding party just wants to go to

1 trial. They are not interested in sanctions, but it
2 might be good to have them, and if it is totally
3 frivolous, but it might not be completely frivolous.

4 HONORABLE SARAH DUNCAN: I thought you
5 had said, David, to make (b) a motion against -- three
6 motions against the same judge?

7 HONORABLE DAVID PEEPLES: Well, I'm
8 saying if we did that then to sort of strengthen
9 sanctions, which is I think what Senator Harris wants,
10 we could strengthen (a).

11 CHAIRMAN BABCOCK: How about if we do
12 this, David? "If a party files a motion under this
13 rule, and it is determined on motion of the opposite
14 party," and add this language, "or on the court's own
15 motion that the motion was brought" -- strike "solely"
16 -- "for purposes of delay and without sufficient cause,"
17 et cetera, et cetera.

18 HONORABLE DAVID PEEPLES: That goes a
19 long way toward the --

20 MR. EDWARDS: In Section 10.001 of the
21 Civil Practice and Remedies Code there is a whole series
22 of things that a party or a lawyer does when they sign a
23 pleading or motion, and it provides that the signing
24 represents that "The pleading or motion is not being
25 presented for any improper purpose, including to harass

1 or to cause unnecessary delay or needless increase in
2 the cost of litigation, that each claim, defense, or
3 other legal contention in the pleadings or motion is
4 warranted by existing law or by a nonfrivolous argument
5 for the extension, modification, or reversal of existing
6 law or the establishment of new law, that each
7 allegation or other factual contention in the pleading
8 or motion has evidentiary support or has specifically
9 identified allegations or factual contention is likely
10 to have evidentiary support after a reasonable
11 opportunity for further investigation or discovery, and
12 each denial in the pleading or motion of a factual
13 contention is warranted on evidence or for a
14 specifically identified denial is reasonably based on
15 lack of information or belief."

16 Now, it seems to me if we tied in this
17 (a) that when that occurs that the judge may impose the
18 sanctions and, (b), if it's a second time he gets stuck
19 that way, he shall impose the sanctions, you may get
20 there. Or the third -- whether it's against the same
21 judge or a different judge. It's really the evil is not
22 filing a motion that has a reason to be filed and it's
23 denied. The evil is filing a frivolous motion. That's
24 the evil, whether it's against the same judge or against
25 successive judges.

1 MR. CHAPMAN: You know, I think it makes
2 little sense to try to determine a number or a
3 circumstance from which the rule is keyed. It seems to
4 me that what we ought to do is pay attention to (a) and
5 try to make it -- give it more teeth, as Judge Peeples
6 has suggested, and so that the judge hearing the motion
7 makes a determination at that time under the
8 circumstances. Part of the circumstance being whether
9 this same party has brought three or four motions
10 previously in this same case or not, whether there is
11 any real basis for the motion, or whether it was for the
12 purpose of delay and harassment only.

13 The judge can make that determination
14 under the circumstances and then we don't have to -- it
15 just seems to me we don't have to get involved with
16 arbitrariness of whether it's three motions or four
17 motions or whether it's the same judge or whether
18 multiple judges. In a central docket like San Antonio
19 where under some circumstances that we can easily think
20 about there could be very good motions that were just
21 lost, and it seems to me that the intention ought to be
22 on making the rule one that the court can consider all
23 of the circumstances and enter the proper ruling.

24 MS. SWEENEY: Can we get the subcommittee
25 to create that for us?

1 MR. ORSINGER: We're reporting this rule
2 out today.

3 CHAIRMAN BABCOCK: Sarah, did you have
4 something?

5 HONORABLE SARAH DUNCAN: Well, we had the
6 same discussion when we had the discussion on the no
7 evidence summary judgment rule and also with the basic
8 sanctions rule, and part of the problem is incorporating
9 sanctions provisions into the rule that conflict with
10 Chapter 10 of the Civil Practice and Remedies Code, and
11 I think what we ultimately recommended to the Supreme
12 Court was, I think, a 166a(i) that expressly
13 incorporated Chapter 10 so that people would be mindful
14 of it, and what we've ended up with, what the Supreme
15 Court actually passed was a comment that referenced
16 Chapter 10.

17 But either way, if we got rid of section
18 (b), that is a direct conflict with what -- with the
19 current statute, as much as any of us may like or
20 dislike it. I mean, I agree with Carl. There are
21 certainly circumstances in a central docket system where
22 you could easily have three good recusal motions one
23 after the other, and to think that you could be
24 sanctioned for that is a little hard for me to believe,
25 but --

1 CHAIRMAN BABCOCK: Richard, let me
2 suggest something to you. Can I, for a second? What if
3 you said, "Upon denial of three or more motions, the
4 judge denying the third or subsequent motion shall enter
5 an order," et cetera. So, in other words, you've lost
6 three times, and when you're a three-time loser you're
7 going to get whacked, regardless of who you're trying to
8 recuse.

9 MR. ORSINGER: Another way to say that
10 would be "Upon denial of a third or subsequent
11 unsuccessful motion," which would be my proposal.

12 CHAIRMAN BABCOCK: And I will tell you
13 what. I think Senator Harris would go for that because,
14 I mean, you can't argue with the scenario that I present
15 where you win two and then you lose a close one.

16 MS. CORTELL: That may not be saying the
17 same thing as you're saying.

18 MR. ORSINGER: It isn't?

19 MS. CORTELL: I think you could read it
20 either way. "Upon denial of a third or subsequent
21 unsuccessful motion," I don't know that that necessarily
22 means that the other two were unsuccessful.

23 MR. ORSINGER: Let's go with Chip's
24 language then.

25 MR. HAMILTON: What's your language,

1 Chip?

2 MR. HALL: How about "upon denial of
3 three motions" --

4 MS. CORTELL: "Three or more."

5 MR. HALL: -- "to recuse."

6 MR. HAMILTON: "Three or more"?

7 MR. ORSINGER: Yeah, because there might
8 be a fourth one.

9 CHAIRMAN BABCOCK: I mean, the guy may
10 not get the idea the first time. "Filed in a case
11 against the judge by the same party, the judge denying
12 the third or subsequent motion shall enter an order
13 awarding to the party opposing such motion reasonable
14 and necessary attorney's fees and costs. The party
15 making such motion and attorney for such party are
16 jointly and severably liable. The costs must be paid,"
17 blah-blah-blah-blah-blah and then pick up the language.

18 MR. ORSINGER: And we take out "filed in
19 a case against the same" -- "filed against a judge." It
20 doesn't matter if you file them against the presiding
21 judge --

22 CHAIRMAN BABCOCK: "Filed in a case under
23 this rule."

24 MR. HALL: It seems like that would make
25 him happier because that's broader than three against

1 the same judge.

2 CHAIRMAN BABCOCK: Yeah.

3 MS. EADS: Yes. Yes.

4 MR. HALL: You just have three motions to
5 recuse, which is broader than three against the same
6 judge. I mean, that's a more likely scenario than three
7 against the same judge.

8 MR. ORSINGER: I know, but he wasn't
9 limiting it to the same judge.

10 MR. HALL: I know, but --

11 MS. EADS: That's what we're saying.

12 CHAIRMAN BABCOCK: Strike "against the
13 judge" and insert "under this rule by the same party."

14 MR. ORSINGER: So read the first two
15 lines.

16 CHAIRMAN BABCOCK: "Upon denial of three
17 or more motions filed in a case under this rule by the
18 same party, the judge denying the third or subsequent
19 motion shall enter an order."

20 And, Paula, I know you want to talk about
21 voir dire. We're going to get to it in a second.

22 MS. SWEENEY: I do. I'm poised, as you
23 can see.

24 CHAIRMAN BABCOCK: Now that you've run
25 off Judge Brister.

1 MS. SWEENEY: Yeah. He's not here.
2 That's right. Call the question.

3 CHAIRMAN BABCOCK: No, Peeples is lurking
4 over here in the wings. You're not going to run it by
5 him.

6 MS. CORTELL: Can I just ask one other
7 question? Then any concept of supersedeas, shouldn't it
8 apply across the board? Right now we have it only under
9 (b).

10 CHAIRMAN BABCOCK: Nina, let's stick on
11 (b) first. Okay. How many people like this concept of
12 three or more motions? Everybody in favor raise their
13 hand.

14 MR. WATSON: Denied?

15 CHAIRMAN BABCOCK: Yeah, unsuccessful
16 motions.

17 HON. ANN CRAWFORD McCLURE: I'm in favor.

18 CHAIRMAN BABCOCK: Anybody against? One
19 against. So that passes 19 to 1. Okay. Now, I'm
20 sorry, Nina. Supersedeas. Did you just ask --

21 MS. CORTELL: I was just saying right now
22 it looks like we have supersedeas relating to just
23 one -- I'm going to lose my ride. We have a concept of
24 supersedeas applying to (11)(b), and my only thought was
25 it should apply across the board to the extent we have

1 any concept of supersedeas. It's just kind of weird
2 anyway.

3 JUSTICE HECHT: Why should you get
4 supersedeas here and not in any other discovery or
5 Rule 13 setting?

6 MS. CORTELL: Oh, I'm not disagreeing
7 with that, but we put it in I guess because of the
8 statute. I guess that's the reason it's here.

9 CHAIRMAN BABCOCK: Yeah. Because Richard
10 thought --

11 MS. CORTELL: For the tertiary motions.

12 MS. SWEENEY: But I agree with Judge
13 Hecht. Why would we have this here, and we don't have
14 any -- you know, you can file 15 frivolous motions for
15 summary judgment and there's no --

16 HONORABLE SARAH DUNCAN: It's in the
17 statute.

18 CHAIRMAN BABCOCK: Richard, make the case
19 for why we should have it here and nowhere else.

20 MR. ORSINGER: Civil Practice and
21 Remedies Code, Section 30.016, subdivision (c) "The fees
22 and costs must be paid before the 31st day after the
23 date the order denying the tertiary recusal motion is
24 rendered unless the order is properly superseded," and
25 the problem we had, of course, is that you can't

1 properly supersede it because it's not appealable
2 anyway. So that's why we created this
3 pseudo-supersedeas process that paralleled the Rules of
4 Appellate Procedure, and if we revoke that then that's
5 just another modification of the statute that we are
6 making.

7 MR. WATSON: Aren't you also avoiding a
8 potential TransAmerican situation? I mean, where a
9 person can't pay the money and that means they're out of
10 court. I mean, I can see a reason for that. I thought
11 that was the reason it was in the statute.

12 MR. EDWARDS: My guess is if they can't
13 pay it they are going to have a hard time superseding
14 it.

15 MR. WATSON: But the Senator doesn't
16 necessarily know about it.

17 MR. JEFFERSON: What would stop the trial
18 court from superseding it himself without going through
19 the technical rules of the appellate supersedeas? I
20 mean, that would be consistent with Harris' -- or with
21 the legislation, that you wouldn't have to go into all
22 of this detail.

23 CHAIRMAN BABCOCK: Well, Richard, this
24 subparagraph (12) is an effort to reconcile the
25 provision in the statute that kind of suggests

1 supersedeas but doesn't really come to grips with it.

2 MR. HAMILTON: It's to create a vehicle
3 for the supersedeas.

4 MR. ORSINGER: That's right.

5 CHAIRMAN BABCOCK: What?

6 MR. HAMILTON: It's to create a vehicle
7 to implement the statute that authorizes supersedeas.

8 MR. ORSINGER: Wallace's issue, I mean,
9 philosophically if you have a right to supersede by
10 posting money instead of paying the judgment, it should
11 not depend on the permission of the trial judge imposing
12 the sanction. If we're not going to give you the
13 absolute right to defer collection and you have to throw
14 yourself on the mercy of the court, that's a different
15 concept of supersedeas. That's not like the rules of
16 appellate procedure concept. You can supersede as a
17 matter of right if you have got the money or the bond.

18 CHAIRMAN BABCOCK: Paula.

19 MR. ORSINGER: So Wallace is suggesting a
20 philosophically different approach to it.

21 MR. JEFFERSON: I just don't know if
22 Harris was thinking along the lines of the right to
23 supersede that just exists no matter what, and I'm
24 trying to find a way -- because I don't like having it
25 just in that section, not in (a), and then in a very

1 strange, you know, like Nina was saying and Justice
2 Hecht, supersedeas provision where you don't get it for
3 discovery sanctions and for all the band of other --

4 CHAIRMAN BABCOCK: Are we agreed that if
5 we implement section (11)(b) and strike the italicized
6 language and then don't recommend paragraph (12) and
7 revoke the statute that we've cured the problem?

8 MR. ORSINGER: Well, cured the problem of
9 a statute that presents us with a --

10 CHAIRMAN BABCOCK: The statute.

11 MR. ORSINGER: Yeah. So we're basically
12 revoking that concept in the statute.

13 CHAIRMAN BABCOCK: Right. So what you
14 could say to Senator Harris is, "Look, there are two
15 ways to deal with this. We can provide a mechanism that
16 implements your statute but then gives rights to the
17 wrongdoer that are unlike any rights they get when they
18 are wrongdoing in other circumstances" --

19 MS. EADS: Right.

20 CHAIRMAN BABCOCK: -- "under Chapter 10
21 or under our rules under Rule 215, and if you want us to
22 do that, that's fine, but it does not strike us that
23 that was your intent, was to give the wrongdoer here
24 more rights than they had in other circumstances.

25 "So our thought would be let's just do

1 away with this supersedeas concept, not have this, but
2 if you want it, I mean, if that's important to you, then
3 our committee would recommend that to the Court if the
4 Court chooses to do that in this way." And just kind of
5 draw a dotted line above subsection (12) and say, "This
6 is kind of, you know, whatever you think." How about
7 that?

8 MR. ORSINGER: We can do that, and what
9 would we do with (b) then? We're just going to drop off
10 the "unless" clause?

11 CHAIRMAN BABCOCK: Yes. Well, wait a
12 minute. What "unless"?

13 MR. ORSINGER: "Unless the order awarding
14 attorney's fees and costs is superseded."

15 CHAIRMAN BABCOCK: Yeah. Right.

16 MR. ORSINGER: No mention of superseding.

17 CHAIRMAN BABCOCK: Right. Right.

18 MR. ORSINGER: But we just -- and then
19 the next sentence would pick up "the judge" -- or "If
20 the money is not timely paid the judge hearing the case
21 may impose any sanctions"?

22 CHAIRMAN BABCOCK: Right. Correct.

23 HON. ANN CRAWFORD McCLURE: Chip, I have
24 to go. Thank you very much for accommodating me.

25 CHAIRMAN BABCOCK: Well, you're not

1 allowed to go when you're on the phone.

2 HON. ANN CRAWFORD McCLURE: Sorry. You
3 promised it would be over at noon.

4 CHAIRMAN BABCOCK: Yeah, well, I didn't
5 know about Orsinger.

6 HON. ANN CRAWFORD McCLURE: Yeah, well...

7 CHAIRMAN BABCOCK: I thought we would get
8 him drunker so he would be more hungover this morning.
9 Okay. Thanks, Judge.

10 HON. ANN CRAWFORD McCLURE: Thank you.

11 CHAIRMAN BABCOCK: Okay. So I think what
12 we have done here would be appealing to Senator Harris
13 in terms of the harm that he is trying to cure. We have
14 strengthened subsection (a), given the judge more
15 authority, and we have created a more workable and
16 fairer subsection (b), and thirdly, if he wants
17 supersedeas then we have got the mechanism to do that,
18 although our thought and at least we think -- our advice
19 to the Court and we think the Court would be inclined
20 this way as well, why give this wrongdoer more rights
21 than other wrongdoers have. Is that fair to say?

22 MR. EDWARDS: Yeah.

23 MR. ORSINGER: So we haven't voted to
24 change (a) yet.

25 CHAIRMAN BABCOCK: Huh?

1 MR. HAMILTON: We haven't strengthened
2 (a) yet.

3 CHAIRMAN BABCOCK: How many in favor of
4 changing (a) along Judge Peeples' proposal?

5 MR. ORSINGER: He's taken "solely" out.
6 Is that the only change, David, is to take "solely" out?

7 CHAIRMAN BABCOCK: No, giving the court
8 the right to do a motion. Anybody opposed to that?

9 MR. ORSINGER: Just say "on the court's
10 initiative."

11 CHAIRMAN BABCOCK: One person opposed to
12 that.

13 MR. WATSON: No, I thought you said "in
14 favor."

15 CHAIRMAN BABCOCK: Oh, in favor. Okay.
16 Nobody opposed. So that rule will read, Richard, "If a
17 party files a motion under this rule and it is
18 determined on motion of the opposite party," and adding
19 this, "or on the court's own motion."

20 MR. ORSINGER: We now say "on the court's
21 own initiative." We decided that on the appellate side.

22 CHAIRMAN BABCOCK: Okay. I'll give you
23 that one. "That the motion was brought" -- striking the
24 word "solely" -- "for purposes of delay," and then the
25 rule reads on.

1 MR. ORSINGER: Okay. So we're going to
2 have (12) as an alternative.

3 CHAIRMAN BABCOCK: Right.

4 MR. ORSINGER: Then we're going to report
5 back what Senator Harris' response is, or do we just not
6 submit (12) if he goes with this proposal?

7 CHAIRMAN BABCOCK: Well, we'll take it
8 and show it to him, but we'll draw a dotted line over
9 the top of (12).

10 MR. ORSINGER: Okay.

11 CHAIRMAN BABCOCK: Okay.

12 MS. SWEENEY: I move we adjourn.

13 CHAIRMAN BABCOCK: We've got voir dire.
14 It's on the agenda for today, Paula. I thought that's
15 why you were staying.

16 MS. SWEENEY: Yeah. That is why I'm
17 staying.

18 CHAIRMAN BABCOCK: All right. You can
19 leave. She wants it on the record that we're adjourned.
20 Okay. We're adjourned.

21 MS. SWEENEY: Yes, I do. Thank you.

22 (Proceedings adjourned at 12:21 p.m.)
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1 -----
2 CERTIFICATION OF THE HEARING OF
3 SUPREME COURT ADVISORY COMMITTEE
4 -----

5 I, D'LOIS L. JONES, Certified Shorthand
6 Reporter, State of Texas, hereby certify that I reported
7 the above hearing of the Supreme Court Advisory
8 Committee on May 20, 2000, and the same were thereafter
9 reduced to computer transcription by me.

10 I further certify that the costs for my
11 services in this matter are \$ 1156.50.

12 CHARGED TO: Charles L. Babcock.

13
14 Given under my hand and seal of office on
15 this the 30th day of May, 2000.
16

17
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22 D'Lois L. Jones
23 D'LOIS L. JONES, CSR
24 Certification No. 4546
25 Cert. Expires 12/31/2000

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