

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 21, 2009

(SATURDAY SESSION)

* * * * *

[COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 21st
day of November, 2009, between the hours of 9:03 a.m. and
12:03 p.m., at the Texas Association of Broadcasters, 502
E. 11th Street, Suite 200, Austin, Texas 78701.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Documents referenced in this session

- 09-34 Recusal Rule 18a strikeout version (10-31-09)
- 09-35 Recusal Rule 18a clean version (10-31-09)
- 09-36 Recusal Rule 18b, memo from Mr. Orsinger (11-18-09)
- 09-37 Civil case cover sheets - subcommittee report 9-7-9.

--*-*-*

1 are on lines 13 through 16, 17. First, I added in
2 italics, "State with detail and particularity facts that
3 if proven would be sufficient to justify recusal," and
4 Judge Ovard from Dallas says that he gets motions in which
5 they say, "I'm a Republican. The judge is a Democrat. I
6 can't get a fair hearing." And he says if that's what
7 they prove, I'm not going to grant that one, and I
8 shouldn't have to have a hearing on that, and so that kind
9 of thing is taken care of with the italicized language on
10 lines 14 and 15. And then the next sentence, we had some
11 discussion the last time. This sentence implements the
12 common law ruling or decisions which say a judge's rulings
13 in that case are not a basis for recusal unless they're
14 just off the face of the earth basically, and the language
15 that's there comes from a Supreme Court -- U.S. Supreme
16 Court case.

17 And then in a comment, look on page --
18 excuse me, line 132, several pages back. 132 to 135 is a
19 comment where I explained the distinction that we made at
20 the last meeting. It's one thing for someone to be able
21 to complain about rulings and trigger the right to have a
22 hearing, and I think we don't want that, but it's
23 something else altogether if you've got a legitimate
24 allegation and to bolster that allegation you want to show
25 rulings, and we thought that was okay, and that's -- these

1 four lines of comment say that, and just as a general
2 matter I think we need to decide whether to put things
3 like that in a comment. I don't know if the Supreme Court
4 wants to do comments on this or whether to put it in the
5 black letter of the statute, but I put it in a comment on
6 this one, so those are the two main changes in paragraph
7 (a).

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE SARAH DUNCAN: So --

10 CHAIRMAN BABCOCK: Go ahead, Sarah.

11 HONORABLE SARAH DUNCAN: If my motion were
12 to allege bias or prejudice and I supported that with
13 evidence of off the chart rulings, that would be
14 sufficient?

15 HONORABLE DAVID PEEPLES: Okay, you said two
16 things, off the chart rulings, if they're bad enough,
17 they've got to be bad, but if they're bad enough I think
18 the presiding judge or the assigned judge would have the
19 discretion to say you need to have a hearing on this.

20 HONORABLE SARAH DUNCAN: But the ground
21 would be bias or prejudice.

22 HONORABLE DAVID PEEPLES: Okay. I would say
23 if that's all -- to simply say bias, the judge is biased
24 and prejudice, that doesn't state with detail and
25 particularity facts that if proven would justify recusal.

1 I mean, it is easy to allege "This judge is unfair. This
2 judge can't be impartial." And the existing rule requires
3 more, and this bolsters it even more to require -- you
4 know, it's just not enough to trigger the right to a
5 hearing to say, "This judge is going to be unfair to me."

6 HONORABLE SARAH DUNCAN: I'm just trying to
7 understand what's required, what's the ground the rulings
8 can be evidence of.

9 HONORABLE DAVID PEEPLES: Relationship with
10 a lawyer, coziness with a party, some sort of experience,
11 but I think there are two principles in subsection (a),
12 and we need to understand that. Number one is a general
13 allegation of bias or partiality or whatever doesn't get
14 you a right to a hearing. You've got to have details, and
15 if all you're complaining about is rulings, even if you
16 look at them and say, "Hmm, gosh, I wouldn't have done
17 that," that's not enough to recuse somebody or to trigger
18 the right to a hearing. If you've got something else that
19 sort of pleads your way to a hearing then if you've got
20 rulings the judge can hear those and think, "Hmm, coziness
21 with this lawyer and look at these rulings. You're
22 recused."

23 HONORABLE STEPHEN YELENOSKY: But, David,
24 does the rule make clear that -- to me when I read the
25 rule, it's not clear to me that it says what you're saying

1 now. Because it seems to -- and maybe it's just because
2 I'm not giving proper importance to the language in the
3 first sentence that we're talking about, but in quickly
4 reading this I would think you could file a motion for
5 recusal solely on the basis of rulings, and that would be
6 enough to get you to a hearing, and it doesn't sound like
7 that's what you intend.

8 HONORABLE DAVID PEEPLES: Well, the sentence
9 that starts on line 15, "The judge's rulings in the case
10 may not be a basis for the motion," unless they are off
11 the charts, just a --

12 HONORABLE STEPHEN YELENOSKY: But you said
13 they also have to be -- there has to be a predicate
14 factual assertion other than just the ruling, and that's
15 not clear to me from this.

16 CHAIRMAN BABCOCK: That's what the comment
17 says.

18 HONORABLE STEPHEN YELENOSKY: Well, maybe
19 the comment is clear.

20 HONORABLE DAVID PEEPLES: But the sentence
21 before that is the one that says what you're saying. I
22 mean, you've got to have a factual motion which states
23 something that if you prove it would be enough.

24 HONORABLE STEPHEN YELENOSKY: Okay. And I
25 guess --

1 CHAIRMAN BABCOCK: But Judge Yelenosky's
2 point is could the motion say, verified, that the judge's
3 rulings show a deep-seated favoritism or antagonism and
4 that here's what they are and A, B, C, and D is the
5 rulings I'm talking about and that would be enough, and I
6 think you're saying no, but the rule itself doesn't say
7 it's got to be a couple --

8 HONORABLE STEPHEN YELENOSKY: Yeah, the
9 facts could be the rulings is how one could read that.
10 The facts are that Judge Yelenosky ruled against me these
11 three times in a row without letting me say a word.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: I disagree that
14 rulings should be sufficient to justify recusal, because
15 we have methods for reviewing rulings. We have mandamus
16 for ones that are extraordinary that need to be reviewed
17 before final judgment, and we have appeal, and the idea of
18 the rulings reflecting deep-seated favoritism or
19 antagonism to me is very subjective in the eye of the
20 beholder. It's in the eye of the party who lost the
21 rulings, it's in the eye of the judge reviewing the
22 rulings, it's in the judge making the rulings -- the
23 rulings in that judge's mind who made those rulings would
24 say that isn't a reflection of antagonism or favoritism,
25 it's a reflection of what was presented to me, and so to

1 me what we're doing is providing an avenue for substantive
2 review of rulings to remove a judge, and I just -- I think
3 that we'll see a floodgate of motions to recuse, because
4 there's always a little sting when a judge rules against
5 you, and there's always the question of whether the
6 judge -- the judge's decision, if you disagree with it, if
7 you don't think it was within the reasonable range is
8 because of something else, and I think we're going to
9 start having trials about the import of the judge's
10 rulings and whether they reflect favoritism or antagonism,
11 and it seems that's really not what the recusal rule is
12 getting at, is not at bad rulings, but at whether the
13 appearance of impartiality is protected.

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE SARAH DUNCAN: But that's existing
16 law, that rulings -- and I wish we still had -- at one of
17 these meetings we had excerpts from the decisions that
18 talked about rulings.

19 HONORABLE TOM GRAY: It's on page three.

20 HONORABLE SARAH DUNCAN: Page three.

21 HONORABLE DAVID PEEPLES: Page three, line
22 120 is the Texarkana court's summary of the Supreme Court
23 of the United States' law on this point. Jane, I would
24 say we already have a lot of motions in which they
25 complain about nothing but rulings. I think this language

1 strengthens the hand of the presiding judge or the
2 assigned judge to say, you know, these are not enough.
3 That's strong language on line 16. In my opinion that's
4 very hard to meet.

5 HONORABLE JANE BLAND: Except that when you
6 use "unless" or "but" what comes after "unless" or "but"
7 becomes more important than what comes before it, and I
8 agree with Judge Yelenosky that when I read this I see
9 this as a single basis for recusal. I don't have any
10 problem if somebody wants to say, "Here's why I think this
11 judge -- judge's appearance of impartiality is
12 compromised" and then, "Oh, by the way, you know, it's
13 having an effect on this case because of these rulings."
14 But this doesn't say that. This says that the rulings can
15 be -- can be a basis for recusal. The rulings alone can
16 be a basis for recusal if they show deep-seated favoritism
17 or antagonism, and I don't think in Caperton the reason
18 that the rulings -- or in any case, it's not the rulings
19 alone that do it, and the way this reads to me, it's if
20 the rulings are bad enough then that is enough.

21 HONORABLE SARAH DUNCAN: But that's what the
22 Supreme Court apparently said in *Woodruff vs. Wright*, or,
23 no, *Texarkana*, and the Supreme Court in *Liteky vs. United*
24 *States*.

25 CHAIRMAN BABCOCK: Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: I don't think
2 it says "rulings." What it says is "opinions formed by
3 the judge." So if the judge in a hearing says, "You're a
4 liar," okay, to the plaintiff or the lawyer or whatever,
5 and that opinion that he has given versus, you know, "I'm
6 denying your motion for whatever" or "granting your motion
7 for whatever." I mean, it's an opinion that you give
8 according to this. It's comments like that that get
9 judges in trouble.

10 HONORABLE SARAH DUNCAN: It says the rule --

11 HONORABLE TRACY CHRISTOPHER: No, it says
12 opinions --

13 HONORABLE SARAH DUNCAN: Judicial ruling.

14 HONORABLE TRACY CHRISTOPHER: -- formed by
15 the judge.

16 HONORABLE DAVID PEEPLES: And "events," at
17 the end of that line.

18 HONORABLE TRACY CHRISTOPHER: Remarks.

19 HONORABLE DAVID PEEPLES: Remarks, yeah.

20 HONORABLE TRACY CHRISTOPHER: "Revealing an
21 opinion." I think that's an opinion by the judge, not his
22 ruling.

23 HONORABLE JANE BLAND: And it's also an
24 opinion derived from an extra-judicial source, not a
25 ruling based on what's presented to you, and the way that

1 we have it written it's what the rulings reflect, but
2 rulings can reflect all kinds of things. It's only if the
3 judges -- I agree with Judge Christopher. It's only if
4 the judge is saying, you know, "I don't like you from
5 another case," or I don't -- you know, "You've never had a
6 case worth any merit in my court before," some sort of --
7 but not I grant a summary judgment, and any judge in this
8 room that looked at it would have not granted it. I mean,
9 is that showing a deep-seated favoritism because one judge
10 would grant the summary judgment and a hundred would not?
11 Or is that just reversible error?

12 CHAIRMAN BABCOCK: Richard, then Lonny, then
13 Harvey.

14 MR. ORSINGER: I withdraw my comment. I
15 think I might have changed my mind in light of --

16 PROFESSOR HOFFMAN: And they already said
17 what I want to say.

18 CHAIRMAN BABCOCK: Harvey. We're making
19 progress.

20 HONORABLE HARVEY BROWN: I agree with the
21 comments of the three judges, and I think one of the
22 things this would do is also make it harder for a lawyer
23 to try to explain to a client why they can't bring a
24 recusal motion. I had a case where we subsequently
25 mandamus'd a judge twice, and there were some rulings we

1 thought were not within the realm of reasonableness, but
2 we explained you can't recuse for rulings alone. If this
3 language was shown to them, they would say "Well, that
4 judge has deep-seated favoritism." I mean, they felt like
5 that. "That judge is antagonistic to us, he's not fair."
6 So I think this would bring more challenges and make it
7 harder for a lawyer to explain to a complaint why we don't
8 bring recusal motions.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: You will notice
11 that this language is in italics. The draft I brought
12 last time didn't have this language, and the body insisted
13 that we have it.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID PEEPLES: You're blowing hot
16 and cold. Just tell me what you want.

17 HONORABLE TRACY CHRISTOPHER: Depends on who
18 shows up.

19 CHAIRMAN BABCOCK: Jeff, did you have
20 something?

21 MR. BOYD: Well, I kind of hate to say it in
22 light of that comment, but I guess first it -- and I'll
23 admit I missed this last time, but looking over it this
24 week, number one, this rule goes to the procedure, not the
25 standard for recusal. 18a is procedure, so if you're

1 going to put something like this in, it ought to be in
2 18b, not in 18a, because 18b is what governs the standard,
3 and then if you look at 18b to see what the standard is,
4 it's bias and prejudice, and then you've got the case law
5 that's fleshed that out. It just seems like if we're
6 going to go down the road of defining "bias" and
7 "prejudice" as to particular types of evidence in the
8 rule, then we're -- we may have a much longer road ahead
9 of us --

10 CHAIRMAN BABCOCK: Yeah.

11 MR. BOYD: -- than we want.

12 CHAIRMAN BABCOCK: I don't remember the
13 exact vote, but, Judge Peeples --

14 HONORABLE DAVID PEEPLES: It may not have
15 been a vote, but the sense of the house was --

16 CHAIRMAN BABCOCK: Well, I thought we did
17 take a vote. No? I thought -- you're right, the sense of
18 the house was that we ought to do something about this.

19 HONORABLE DAVID PEEPLES: I mean, basically
20 what people said was they looked at the big quote at the
21 bottom of page three and said -- they were nice about it,
22 but they said the language you've got in sub (a) is not
23 true to the quotation on page three. So I put language
24 from page three in (a), and I, frankly, can go with either
25 way, but I do think it's true, somebody said that, you

1 know -- Harvey, lawyers can show their client this, the
2 pro se people can read it, and I think it helps to have --
3 if we can agree on what we want, it helps to have it in
4 the black letter of the rule.

5 CHAIRMAN BABCOCK: Yeah, Hayes.

6 MR. FULLER: If we were to substitute
7 "opinions" for "judicial remarks or rulings" would that --
8 would that help?

9 PROFESSOR HOFFMAN: Say that again.

10 MR. FULLER: If we were to substitute "the
11 judge's opinions or judicial remarks," use that language
12 instead of the "judge's rulings."

13 CHAIRMAN BABCOCK: Lonny.

14 PROFESSOR HOFFMAN: Okay, so that's
15 potentially an option. What I was going to think is it
16 sounds like, David, you're in -- effectively in agreement
17 with the sort of sense, which is that there really should
18 never be a motion solely on the basis of a ruling. So
19 your question is only whether we say anything or how we
20 say it. What about the idea of taking your note, so the
21 one that begins on line 132 and putting that into the
22 rule? In other words, drop the language and use that.

23 CHAIRMAN BABCOCK: Judge Evans.

24 HONORABLE DAVID EVANS: What if we just
25 change the word "basis" to "evidence"? And the concept is

1 it's just not circumstantial evidence of bias unless the
2 rulings reflect deep-seated antagonism.

3 CHAIRMAN BABCOCK: Uh-huh.

4 HONORABLE DAVID EVANS: It's just not
5 relevant.

6 CHAIRMAN BABCOCK: Okay. Justice Bland, and
7 then Hayes.

8 HONORABLE JANE BLAND: And I know we are
9 blowing hot and cold, Judge Peeples, but I think when we
10 see the language written out and we try to match it up,
11 that's when you look at it, and if you look at the
12 language in the Texarkana case it says that the -- that
13 judicial remarks may support recusal "if they reveal an
14 opinion deriving from an extra-judicial source." And I
15 think they're talking -- in this whole paragraph they're
16 talking about extra-judicial sources, not a ruling on the
17 merits in a case where there's no evidence of any
18 extra-judicial source to support an idea that the ruling
19 is not just an aberrant ruling, but it's a ruling that
20 reflects some sort of bias or prejudice.

21 CHAIRMAN BABCOCK: Hayes, then Skip, then
22 Judge Yelenosky, and then Richard the First.

23 MR. FULLER: One other thing to throw into
24 the mix, if we're trying to pull in the language of that
25 case, if there's a difference, we say "a deep-seated

1 favoritism." The case actually says "such a high degree
2 of deep-seated favoritism," so it would appear that there
3 may be some deep-seated favoritism that's okay, unless
4 it's of a high degree. So I think we probably need to
5 consider that also.

6 CHAIRMAN BABCOCK: All right. Skip.

7 MR. WATSON: Well, they just said it. I
8 think it needs more. I think it needs exactly the two
9 things that have just been said. It needs to add "a high
10 degree of deep-seated favoritism" and that after the word
11 of "antagonism" it means derived, it should say "derived
12 from an extra-judicial source." I think that clause will
13 kill them, that that's the clause that will accomplish
14 what David wants to accomplish.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: The U.S.
17 Supreme Court case, and quoting Justice Scalia, who I'm
18 fond of quoting, says, "It is enough for present purposes
19 to say the following: First, judicial rulings alone" --
20 and he says, "almost never constitute a valid basis for a
21 bias or partiality motion," and he never tells us when
22 they might because he then goes on to say, "in and of
23 themselves they" -- meaning rulings -- "cannot possibly
24 show reliance upon an extra-judicial source and can only
25 in the rarest circumstance evidence the degree of

1 favoritism or antagonism required when no extra-judicial
2 source is involved," so I guess that's the exception. I
3 guess Scalia is saying there can be, but almost never be a
4 bias or I guess a favoritism or antagonism without an
5 extra-judicial source. So if that's what you're trying to
6 reference, I guess my suggestion would be that it only be
7 in a comment rather than in a rule itself because it's
8 almost never.

9 MR. ORSINGER: What case did you quote,
10 Steve?

11 HONORABLE STEPHEN YELENOSKY: *Liteky V. U.S.*

12 CHAIRMAN BABCOCK: *Liteky*. Richard
13 Munzinger and then Frank.

14 MR. MUNZINGER: I agree with Jeff. The
15 language seems to me to be a summary of Rule 18b(1) and
16 (2). Rule 18b(1) says, "A judge must recuse in the
17 following circumstances: (1), the judge's impartiality
18 might reasonably be questioned." So if a judge whose
19 rulings are as described in the italicized language then
20 clearly his impartiality might reasonably be questioned.
21 The second ground is "The judge has a personal bias or
22 prejudice concerning the subject matter or a party." I
23 think it's the same thing.

24 I think Jeff's point is that you've added a
25 substantive standard to a procedural rule. My point is

1 that the substantive standard is already covered by 18b(1)
2 and (2). If you delete the language, leave 18b(1) and (2)
3 as they are, you don't encourage pro se litigants or
4 lawyers to file spurious motions or motions which drag
5 this issue into the case, but you don't preclude it, and
6 there's no reason to look at a United States Supreme Court
7 case discussing that issue because the rule itself says,
8 "A judge who by his conduct has demonstrated that his
9 impartiality might be reasonably be questioned," and his
10 conduct can be in a ruling, an off the cuff remark, an
11 attitude expressed in or out of court, could be anything.
12 It's covered. "And he has personal bias or prejudice
13 concerning the subject matter or a party," and
14 presumptively a party's attorney. There's no reason for
15 the language, and I think it ought to be deleted, and if
16 it's appropriate I so move.

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: I think we -- going to line
19 14, we need to leave the stricken out language, and it
20 should say, "It shall state the reasons why the judge
21 should not sit, together with the facts, if proven, would
22 be sufficient to support those reasons." So you say the
23 reason is, is impartiality might be questioned. Then the
24 facts are he happens to be in a real estate joint venture
25 with one of the parties, and then you go on and say that

1 the judge's rulings will not support the motion or support
2 the reasons or grounds unless -- and then you put that
3 standard in. I don't like -- I don't like taking out the
4 reasons because, you know, you've got to say kind of the
5 theory behind the recusal, not just the facts.

6 CHAIRMAN BABCOCK: Okay. Lonny.

7 PROFESSOR HOFFMAN: So I want to go back to
8 the business about the judge's rulings in the case.
9 Without regard to what we may or may not have been right
10 about before, let's step back and see what we're doing.
11 So there's no language in the current rule about this.

12 CHAIRMAN BABCOCK: Yeah, there is.

13 HONORABLE DAVID PEEPLES: About rulings --

14 PROFESSOR HOFFMAN: Where is that?

15 HONORABLE DAVID PEEPLES: -- I think that's
16 right. No, there is not.

17 PROFESSOR HOFFMAN: There is no language in
18 the current rule about it. So we should only put in
19 language of whatever kind if we believe that there's a
20 sufficient problem that people are bringing, you know,
21 recusal motions based on decisions the judge is making.
22 We want to set some higher, different -- you know, we want
23 to tighten that. It's not clear to me that we've ever
24 demonstrated that that's some existing problem that we
25 need to fix. The risk here is if we're putting it in

1 we're going to get precisely to Jane's point, that
2 everything after the "but" will become the debate over the
3 standard. So all we're doing is highlighting a problem
4 that maybe doesn't exist or does exist but is not as big
5 as we think it is, and now we're going to make it worse.

6 CHAIRMAN BABCOCK: Richard Orsinger.

7 MR. ORSINGER: I'm wondering if a ruling on
8 its face reflects a bias or prejudice that would qualify
9 it for recusal, why couldn't you use the ruling? For
10 example, I could imagine -- let's say a judge refuses an
11 adoption because of the race of the adopting parents or
12 the religion of the adopting parents, and the order says,
13 "The adoption is denied because of whatever," and we know
14 it's an improper consideration, we know it reflects bias
15 or prejudice, we know that you could reasonably question
16 impartiality. That order alone, if that's your only
17 evidence, your only violation, ought to be enough to get
18 rid of the judge.

19 HONORABLE SARAH DUNCAN: Absolutely.

20 PROFESSOR HOFFMAN: Well, why can't you seek
21 mandamus or appellate review?

22 MR. ORSINGER: You can, but you can't get
23 rid of the judge that way. All you can do is overturn
24 that ruling. So why is -- I mean, is the law truly that
25 if a court order reflects a bias or prejudice that we

1 would all agree is sufficient to recuse, that we can't use
2 that order as evidence? Is that what we're saying?

3 HONORABLE STEPHEN YELENOSKY: It's the
4 ruling is to deny the adoption. What you're saying is
5 that the basis announced by the judge, the remarks of the
6 judge --

7 MR. ORSINGER: Or even if it's written in
8 the order.

9 HONORABLE STEPHEN YELENOSKY: Yeah, but the
10 ruling is not -- doesn't show.

11 MR. ORSINGER: Well, to me the ruling is
12 everything that's in the order or judgment that the judge
13 signs, not just the actually dispositive sentence, but the
14 whole order.

15 CHAIRMAN BABCOCK: Sarah.

16 HONORABLE SARAH DUNCAN: In response to
17 Lonny, why should a party have to overcome the standard of
18 review to get reversal when a judge has demonstrated bias
19 or prejudice on the record in a ruling if that judge can't
20 be a fair tribunal for this particular matter for some
21 reason?

22 PROFESSOR HOFFMAN: So I think there are two
23 answers. The first is it may be possible in rare unusual
24 cases, and that is Richard the First's point about recusal
25 under (2)(a), under 18b(2)(a). In other words, it may be

1 that the ruling is just so -- you know, "I'm not going to
2 let these white parents adopt this black kid because I
3 don't believe in interracial adoption," then (2)(a), his
4 impartiality might reasonably be questioned by the order,
5 and so it may be in one of these rare circumstances where
6 it's just sort of like that we would say, yes, and so we
7 don't have to change the existing rule. It would work.

8 But short of something that dramatic, I
9 would say there's a -- I would go along with Jane. I
10 think there's a serious concern about tertiary or
11 satellite litigation about rulings that we don't like, the
12 sort of sour grapes problem, and it seems far better as a
13 general proposition to have bad rulings or wrong rulings
14 reversed through the normal and ordinary course as opposed
15 to saying, hey, the judge is biased.

16 HONORABLE SARAH DUNCAN: Chip.

17 CHAIRMAN BABCOCK: Yeah, I don't know who's
18 -- Judge Patterson or Justice Bland, whoever.

19 HONORABLE JAN PATTERSON: Well, one reason
20 that you have recusal is because it's -- it may be the
21 only remedy without going through the full lawsuit. If
22 you have a bad ruling, a bad law, it's easily remedied
23 through appeal or mandamus, so recusal is a narrow option,
24 not necessarily related to rulings.

25 CHAIRMAN BABCOCK: Justice Bland.

1 HONORABLE JAN PATTERSON: But they are -- I
2 do think they can be evidence of it, but everything else
3 can be remedied either through mandamus or appeal.

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: In Richard's example
6 I think you could argue that that opinion that the judge
7 expresses in an adoption case is from an extra-judicial
8 source. It's not based on evidence presented to him that
9 this is -- or based on any law. In fact, it's against the
10 law. But what lots of recusal motions do, or a fair
11 number, they're from people who have created antagonism in
12 the lawsuit. In other words, they've engaged in some bad
13 behavior, the judge has made some bad ruling -- not bad
14 rulings, has made some rulings against the party and then
15 the party then says, "Well, the judge doesn't like me, the
16 judge is antagonistic to my case or has a deep-seated
17 favoritism to the other side, because look at all these
18 rulings," you know, ignoring the fact that it was their
19 own bad behavior that created the problem in the first
20 place.

21 And then, of course, once they've made the
22 judge make some, you know, sanctions rulings or other
23 kinds of rulings, their idea is, well, let's recuse the
24 judge, and that's the problem that I see with putting this
25 language in there. It would not be used for the rare case

1 where the judge truly is evidencing a bias or prejudice
2 from an extra-judicial source or something that's just
3 beyond the pail like you're describing, but, you know, the
4 closer cases where the judge might have a little
5 antagonism, but the little bit of antagonism might be
6 deserved, you know.

7 HONORABLE STEPHEN YELENOSKY: Arising
8 through the procedure.

9 HONORABLE JANE BLAND: Arising through the
10 proceeding, and maybe the judge does go a little too far,
11 and we would agree that the ruling is wrong, but on the
12 other hand, it's not because the judge is acting with any
13 bias or prejudice or any partiality that he or she has
14 from some extra-judicial source. It's just because of the
15 conduct of the proceedings and the case.

16 CHAIRMAN BABCOCK: Okay. Judge Peeples.

17 HONORABLE DAVID PEEPLES: I want to make
18 three points. The first is that while the U.S. Supreme
19 Court's statements are instructive, we're not bound by
20 them. As long as this rule grants due process of law we
21 can come up with some state law grounds, and so they're
22 helpful, but we're not bound by them, and that's point
23 one.

24 Point two, Jeff is right that this might
25 technically belong in 18b, but I will say that it really

1 helps to have it in 18a, which is the one that people
2 read, and to have it right there I think would be very
3 helpful. I could live with it if it's in 18b. Now,
4 third, what we've been talking about, the hypo that
5 Richard gives, the judge who denies an adoption because of
6 race --

7 CHAIRMAN BABCOCK: Wasn't that Lonny's hypo?

8 HONORABLE DAVID PEEPLES: Well, whoever.

9 MR. ORSINGER: It was mine and then he --

10 PROFESSOR HOFFMAN: I adopted it.

11 MR. ORSINGER: -- amplified it.

12 CHAIRMAN BABCOCK: And he picked up on it.

13 HONORABLE DAVID PEEPLES: Well, whoever
14 claims parentage of it can have it. Just as a general
15 rule I think we need to draft for what usually happens
16 instead of drafting for the extreme case, and I want to
17 say that at least a plurality of the recusal motions that
18 are filed in Texas and maybe a majority complain about
19 rulings and nothing else. I can't even think of what's in
20 second place right now. We've got to deal with that. And
21 I think the -- you know, if we can maybe get rid of this
22 language and just say, you know, rulings can't be a basis,
23 period, that would deal with the mine run of these cases
24 where it's an abusive motion, and then when the case that
25 Richard and/or Lonny come up with, when that case is

1 pleaded, I mean, when something totally off the face of
2 the earth is alleged, I think you can count on the
3 presiding judge to say, "You know what, we need a hearing
4 on this."

5 That's -- I think, I mean, somebody has to
6 be trusted at some point, and I think if it's really that
7 bad, you can probably count on the people who administer
8 this system to say, "Let's have a hearing and go into
9 this." And a related point is if it's that bad, Richard
10 and Lonny, I think you can count on if there's a lawyer
11 they'll come up with some other ground. "This judge has
12 made statements saying I don't" -- you know, racist
13 statements or whatever, and that would be extra-judicial,
14 and then the ruling would come into evidence. So I just
15 think it would be a bad mistake for us to draft the rule
16 to take care of the surreal hypo instead of dealing with
17 what's out there.

18 CHAIRMAN BABCOCK: Justice Patterson.

19 HONORABLE JAN PATTERSON: To add to that and
20 to Harvey's point earlier about dealing with clients, I
21 think that it would be useful to give guidance, whichever
22 way we go, because I will tell you that a large number of
23 complaints to the Commission on Judicial Conduct come "He
24 ruled against me," "She ruled against me," that she was
25 bias because she found the adoption the other way, and

1 that is the sole basis for the complaint to the
2 commission. So if you can make it clear, and whether it's
3 that it can be evidence or an extreme case, I'm not
4 against addressing it entirely. On the other hand, I
5 think it would be a public service to lawyers and judges
6 but also to clients so that they don't spin their wheels
7 unnecessarily only complaining about a ruling and so that
8 the lawyer can have a conversation with them about where
9 the line is, and I don't have the -- you know, I hate to
10 not ever allow it to be a basis. On the other hand, we
11 all know that there is a remedy for a bad ruling, and
12 recusal may not be that.

13 CHAIRMAN BABCOCK: Lonny.

14 PROFESSOR HOFFMAN: So I fear that my
15 comments may have been misunderstood from what you said,
16 David, so I want to try again, because you're likely
17 listening more than others, so that's a bad sign for my
18 odds of persuading others. So my point is, to be clear,
19 is that the existing rule has no language about this, so
20 we should only add something if we think there's a
21 problem. So my first -- to which you suggested just a
22 moment ago that you think there is a big problem, but I
23 hadn't heard that, and I'm not sure we had heard that, but
24 so my first point is if there's not a problem then we
25 shouldn't add anything because it will only create a

1 problem. It will create the very problem that you're
2 decrying, people will suddenly be bringing motions to
3 recuse on the basis of a ruling they don't like. That's
4 point number one.

5 Second, if there is a problem such that we
6 should do something about it, I don't like the existing
7 language for the reason that Jane described because I
8 think it will actually again create more motion practice
9 here. Rather, if there would be any language, I would be
10 in favor of putting in the language you have in your
11 comment because that seems more precisely to say what it
12 is you're after. "The complaints about rulings are not
13 sufficient in and of themselves." However, if we've got
14 extra-judicial stuff going on questioning impartiality
15 then the rulings could also bear relevance there. I don't
16 know whether that's the best language or not, but I like
17 that significantly better, and I think it's entirely
18 consistent with the position that you're after.

19 So the only point about bringing up the
20 strange, oddball case was only that in that rare example
21 where you've got the judge is not only biased but so
22 stupidly biased that he lays it all out there expressly in
23 the ruling, then we don't need anything. The existing
24 rule is adequate. 18b(2)(a) says, "His impartiality might
25 reasonably be questioned," based on the ruling itself

1 there, and there is nothing in the rule that would stop us
2 from doing that. So the point is not that we ought to be
3 drafting to the unusual case, not at all. Not at all.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Maybe there's
6 more to Richard -- are you Richard the First or Second?

7 MR. ORSINGER: I'm the second.

8 HONORABLE STEPHEN YELENOSKY: You're the
9 second. Richard the Second's remark about what the ruling
10 is because what you just said, Lonny, I would disagree
11 with. It wasn't --

12 PROFESSOR HOFFMAN: Which part?

13 HONORABLE STEPHEN YELENOSKY: What we're
14 talking about perhaps is that grant, deny, I award X, I
15 grant -- or it's a take-nothing judgment. That's what I'm
16 talking about as a ruling, and maybe we could say that
17 that never is grounds for recusal because even looking at
18 the Supreme Court case, the example that Scalia gives is
19 not that the ruling was against somebody or even that
20 series of rulings were against somebody. They were grant,
21 deny, et cetera, but a ruling in which the judge said the
22 remark along with the ruling was that "One must have a
23 very judicial mind indeed not to be prejudiced against the
24 German-Americans because their hearts are wreaking with
25 disloyalty." So it wasn't the ruling. It was the remark

1 that accompanied the ruling, and I dare say that if we
2 define ruling as what you grant, deny, award, that that
3 never is a grounds for recusal, although maybe it would be
4 a grounds for mandamus or appeal, and so there has to be
5 something more than that, and it may accompany that
6 particular ruling or explain it. It may be in the
7 judgment, but it's something other than the grant, deny,
8 award, take nothing.

9 PROFESSOR HOFFMAN: Okay, I agree.

10 CHAIRMAN BABCOCK: Jeff.

11 MR. BOYD: I guess I'd say again we're
12 talking about how to articulate a substantive standard to
13 put into a procedural rule, and we do that a lot, and we
14 do that a lot by adopting court rulings, so this isn't all
15 that unusual, except I guess it seems to me what this
16 discussion shows is that this -- what we're talking about
17 is applying a substantive standard, impartiality might
18 reasonably be questioned, to a whole variety of different
19 factual scenarios that could come up, and I'm not sure we
20 have the court ruling, the case law, to give us enough
21 guidance on how to come up with a standard to apply to
22 every factual scenario that would come up. It seems to me
23 that this is a great oral argument, and if we just knew
24 what the case was, you know, and that's the problem, is we
25 don't know the facts that we're arguing over, which to me

1 argues in favor of not trying to write the application of
2 the standard into the rule at this point, because there's
3 no way to write it where it's going to address every
4 factual scenario.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: Well, what I understand
7 that Justice Peeples is trying to accomplish is be able to
8 empower the trial judge first and then if it gets to the
9 presiding judge, the ability to rule on the motion based
10 upon the contents of the motion, and this rule being to
11 guide the litigant of what has to be in that motion, and
12 based on the comments here today, I mean, I'm okay with
13 the sentence as written, given the comments from last
14 time, but it seems that a modification could be that to
15 insert the word "alone" immediately in front of "may" so
16 that it would read "The judge's rulings in the case alone
17 may not be a basis for the motion" and put a period and
18 delete the part that's been added, and I think that would
19 address many of the concerns that have been expressed.

20 CHAIRMAN BABCOCK: Is --

21 HONORABLE TOM GRAY: Because, again, it
22 focuses on just the ruling alone can never be that basis.
23 It's got to have something beyond the ruling.

24 HONORABLE JAN PATTERSON: I like that
25 approach.

1 MR. JEFFERSON: Yeah, same.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: Well, if the comment sets
4 out the law, what Justice Gray just said would not be
5 recognizing the law because the way I read the comment,
6 rulings in the case may be sufficient grounds for recusal
7 if they reveal a deep-seated favoritism or antagonism, et
8 cetera, and so to say that you can't recuse a judge based
9 upon his rulings in that case alone would ignore the
10 substance or content of the rulings, and Judge Peeples,
11 having said this is a serious problem, why not put it in a
12 comment that summarizess the relevant governing law so
13 that a judge's bias, impartiality, et cetera, based upon
14 rulings in the case, is grounds for a recusal only when --
15 and then quote the language from the cases or the
16 citations, and you've then told the practitioners and the
17 bench you can't get a recusal based upon rulings unless
18 you demonstrate that it rises to this level. Don't bring
19 these in to us unnecessarily.

20 CHAIRMAN BABCOCK: Justice Sullivan.

21 HONORABLE KENT SULLIVAN: I think we've got
22 a recurring problem in our discussion, and that is it's
23 increasingly clear to me that we need to define what a
24 ruling is, and it has disturbed me that there's been
25 comments that have been significantly inconsistent with

1 one another as to what that definition is. If ruling is,
2 as I believe it to be, granted, denied, then quite frankly
3 it's almost axiomatic that that does not lead to recusal.
4 If, to touch on Richard's comment -- Richard the Second
5 apparently, I want to get it right -- that if it just
6 happened to be in the body of an order or some rationale
7 for the ruling, that rationale, which in our hypothetical
8 was racist and illegal, that is not a ruling, in my view.
9 It's the granted or denied that is the ruling, and I think
10 you could use, quite frankly, the statement of that
11 rationale, whether it be in an order or opinion or
12 otherwise, as grounds for the recusal, but I think
13 defining one versus the other is going to be pretty
14 important.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
17 I think that's what I was trying to say, and Richard the
18 First, if you're saying the comment and/or the law is that
19 that type of ruling can be a grounds for a recusal then I
20 just disagree. If you're saying that remarks can be then
21 I think it's a question of definition, because as I said,
22 going back to the U.S. Supreme Court case, I don't think
23 you can read that as under any circumstance saying that
24 you can line up grants, denied, award, take-nothing kind
25 of rulings, and come up with a grounds for recusal. If

1 there is such a case, then I don't know what it is.

2 CHAIRMAN BABCOCK: Richard the Second, and
3 then Richard the First.

4 MR. ORSINGER: I agree with Justice Sullivan
5 that we need to define "ruling"; and if we define
6 "ruling," then I'm totally comfortable with Justice
7 Bland's suggestion that rulings, meaning the true outcome,
8 is never a grounds for recusal; and in my experience
9 what's going to happen is you're going to get a ruling
10 from the bench where the judge maybe says a little
11 something about his or her thinking. The order that gets
12 typed up is never going to have some kind of improper
13 rationale built into it because the lawyer is smart enough
14 not to put that in the typed up order. If we have some
15 way for us to distinguish the disposition from the
16 utterance that goes along with it then I would be very
17 comfortable, and it would even probably help David's case
18 that the ruling in that limited sense is never the
19 grounds. I would be willing to say even if -- I mean,
20 that it requires out -- it requires other comments other
21 than the disposition before you would even meet the U.S.
22 Supreme Court standard.

23 CHAIRMAN BABCOCK: Richard the First.

24 MR. MUNZINGER: What happens in a case
25 where -- let's assume it's a complex case with a great

1 deal of paper discovery. The judge consistently and
2 without explanation rules in favor of the plaintiff or the
3 defendant on a discovery issue. When the same rationale
4 or logic is brought up by the other side of the case the
5 judge consistently denies it. A pattern is created so
6 that the judge -- the record clearly reflects that the
7 judge has chosen sides in the case. He's kept his mouth
8 shut. He's a smart judge, or she is. Doesn't reveal his
9 or her political attitudes or racial attitudes or whatever
10 they might be, but simply rules consistently in favor of
11 one party and consistently against the other party when
12 the subject matter is the same. Doesn't a person have a
13 right to seek a recusal from the judge under those
14 circumstances --

15 HONORABLE STEPHEN YELENOSKY: No. No.

16 MR. MUNZINGER: -- on the basis that -- your
17 answer is no. You're a judge. I'm a party, and I
18 represent a party. Do you think that's fair? Do you
19 think that someone should be relegated to having to sit
20 with that judge throughout a trial?

21 HONORABLE TRACY CHRISTOPHER: Maybe you've
22 made bad motions every single time.

23 MR. MUNZINGER: Pardon me?

24 HONORABLE TRACY CHRISTOPHER: I said maybe
25 you've made bad motions every single time.

1 MR. MUNZINGER: Well, I agree that a test of
2 recusal --

3 HONORABLE TRACY CHRISTOPHER: You can't be
4 saying, "Well, you know, you ruled against me five times
5 and only ruled for me one time" as a basis for recusal.
6 We're going to start counting who's granted or, you know,
7 affirmed -- you know, overruled, sustained in the middle
8 of trial. "Well, you sustained 20 of my objections" or
9 "of their objections and none of mine, so you must be
10 biased." I mean --

11 CHAIRMAN BABCOCK: Lamont.

12 MR. JEFFERSON: I like Justice Gray's
13 solution to the problem, and I appreciate that the problem
14 is with trying to define what a ruling is, but I don't
15 think we can do that in this context. I mean, there are
16 cases out there now where judges make comments from the
17 bench that's important, their opinion, and those become
18 reviewed on appeal, and the other problem that I see with
19 that, with the concept of trying to define a ruling is
20 what everyone is here -- what everyone is thinking about
21 is one side says they want X, the other side says they
22 want Y, and the judge picks one of them, but that's not
23 always what happens. I mean, a lot of times the judge
24 fashions his own remedy to the solution, and it's not just
25 a question of picking who's got the better argument. The

1 judge by his own ruling is evidencing some bias.

2 CHAIRMAN BABCOCK: Judge Evans and then
3 Judge Yelenosky.

4 HONORABLE DAVID EVANS: Well, I don't
5 think -- I agree with Justice Gray and Lamont, but, you
6 know, a person with a well-known bias, say against a
7 lawyer or race or a gender, that's a vocalized over the
8 years, is well-known in the community. Their rulings
9 could be circumstantial evidence that they're acting upon
10 that bias, and it's evident -- it's a problem of direct
11 evidence and circumstantial evidence as to what the ruling
12 is and what it's doing, and the word "basis" still throws
13 me off. It's not a ground. It's just evidence, and
14 they're going to come in every time that the judge is
15 acting on his bias. If I were -- go off half-cocked and
16 lecture a lawyer and say, you know, get off reservation
17 and get angry in court and espouse that and then a series
18 of rulings come out after that, I expect the
19 administrative judge to review those rulings and look at
20 those comments and decide if there's evidence that I can't
21 act impartially, and so I kind of go back over here on
22 this that "basis" is the wrong word. It's just an
23 evidentiary problem. Is it direct or circumstantial
24 evidence that you can't act impartially in the case, and
25 so I would kind of merge it in that fashion to get to that

1 basis.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, again,
4 to reply to Richard the First, again, it's "alone," and
5 yours isn't alone because you just said there is evidence
6 in the community that this person has an extra-judicial
7 source of influence, which is their own bigotry or
8 whatever, but if what you're positing is all these rulings
9 went this way and all the other rulings went that way and
10 there's no rational explanation for it, there's at least
11 two possibilities. One is bias, and the other is the
12 judge is incompetent. You don't get to recuse a judge for
13 incompetence, and so if all you have is rulings that don't
14 make sense and then theoretically it's just incompetence.
15 You have to have something more than that.

16 CHAIRMAN BABCOCK: Okay. Hugh Rice Kelly.

17 MR. KELLY: Just to get outside the box of
18 what's proposed, I've been in a fair number of cases in
19 California. In California they avoid a lot of these
20 problems by the one -- by the one strike rule. You can
21 strike the first judge, but you've got to take the second
22 one, and before you object that that would be frivolously
23 used, let me tell you, the California lawyers are
24 extremely cherry about using it because, you know, what
25 goes around comes around. The next time you strike you

1 may end up in the court of the judge you struck before.
2 They weigh this thing, I mean, in a fine balance, and it
3 is not often used, but I can think of three judges out of
4 25 in Harris County that I would strike every time. I
5 mean --

6 CHAIRMAN BABCOCK: Present company excepted.

7 MR. KELLY: Yeah. When I was, a million
8 years ago, a real trial lawyer, went to Polk County,
9 Texas, and all of the lawyers apparently were related to
10 Judge Coker. I mean, some beyond the required you know
11 consanguinity. Well, I would have struck Coker in a
12 minute and they would have sent me to San Jacinto County
13 or someplace. Any place would be better than Polk County,
14 and it avoids a lot of these problems because you go into
15 a court, and every lawyer in this room knows that there's
16 probably one judge in the world that you'll never get a
17 fair trial from, but that's my suggestion.

18 CHAIRMAN BABCOCK: Yeah, I don't know where
19 we are on -- Richard. And then Judge Peoples and then --

20 MR. ORSINGER: I was going to make a
21 suggestion, may not be popular, but what if we say, "The
22 judge's rulings in the case alone are not sufficient to
23 justify recusal, unless" --

24 HONORABLE STEPHEN YELENOSKY: No "unless."

25 MR. ORSINGER: No "unless"?

1 CHAIRMAN BABCOCK: Then you have it --

2 HONORABLE DAVID EVANS: What was the
3 grounds.

4 CHAIRMAN BABCOCK: -- as a grounds.

5 HONORABLE SARAH DUNCAN: Just to refresh
6 recollections, because the previous version of this rule
7 that we looked at said that rulings will never be a basis
8 for a hearing or recusal, and we talked about that at the
9 meeting quite a bit, and we were talking about Judge
10 Banales' ruling and Judge Luitjen's rulings in the Corpus
11 Christi case, and I think the agreement was that that
12 sentence had to come out because that wasn't the law and
13 it didn't reflect reality, but what had to come in was not
14 something had to come in, but that sentence had to come
15 out. Just to refresh recollections. I don't think we
16 were waxing hot and cold. I think what we were presented
17 with at the last meeting was unacceptable, but no
18 consensus was reached on what would be acceptable.

19 CHAIRMAN BABCOCK: Judge Peeples.

20 HONORABLE DAVID PEEPLES: Yeah. Let's just
21 get back to how it really works out there. The great
22 strength of our system is that a second judge makes this
23 decision. We need to remember that. Except way down on
24 the bottom of the page where a motion is made during a
25 hearing or during trial where I say, you know, that's

1 just -- doesn't get it, a second judge is always doing
2 this, and that takes us out of Caperton, and that is just
3 an enormous wonderful feature of our system.

4 Now, two common situations of rulings.
5 There's somebody who's been convicted by a jury of a
6 criminal offense and he's in prison and he doesn't want
7 the judge who tried him to hear his writ of habeas corpus,
8 and so the motion, handwritten and pro se, will say, "She
9 ruled against me every time. My poor lawyer didn't get a
10 single ruling." That's typical. And second is family law
11 cases. I had one a month ago or so where the guy said,
12 you know, "I proved this and this and then she denied me
13 visitation." Let me just say that this is a motion filed
14 by somebody. There is no guarantee that they're telling
15 the whole truth and nothing but the truth when they say,
16 "My lawyer didn't get a single ruling," but we've got to
17 decide these on the pleadings, and to draft this so that
18 someone like that can plead his or her way into court and
19 get a right to a hearing on point of the whole case being
20 reversed is a high price to pay, and I urge us not to do
21 that.

22 CHAIRMAN BABCOCK: Carl.

23 MR. HAMILTON: Maybe I'm confused, but we're
24 talking now about rulings in the case, and if we're
25 already in the case and it's beyond the 10 days before the

1 case, you can't file a motion for recusal at that point,
2 so are we talking about a second case that comes along and
3 you had this judge in the first case and you're
4 complaining about the rulings he made in the first case?

5 HONORABLE DAVID PEEPLES: Pretrial,
6 discovery, summary judgment pleadings.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE DAVID PEEPLES: Or maybe there's a
9 summary judgment hearing coming up or trial coming up in
10 the case, and there's a history in the case that's all
11 interlocutory.

12 MR. HAMILTON: Well, it's too late.

13 HONORABLE DAVID PEEPLES: No.

14 MR. HAMILTON: You've got to do it 10 days
15 before --

16 HONORABLE DAVID PEEPLES: Before the trial
17 or hearing that's coming up. Not before the case starts,
18 but before --

19 MR. HAMILTON: Isn't that before the first
20 trial or hearing?

21 HONORABLE DAVID PEEPLES: (Shakes head.)

22 CHAIRMAN BABCOCK: No, no, no.

23 MR. HAMILTON: Huh?

24 CHAIRMAN BABCOCK: No.

25 MR. HAMILTON: It's not?

1 CHAIRMAN BABCOCK: I don't think so.

2 HONORABLE NATHAN HECHT: You're thinking
3 about striking. When you strike a visiting judge, that
4 has to be before the first hearing, right?

5 HONORABLE DAVID PEEPLES: Right.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. ORSINGER: Well, can I comment on that?
8 If the grounds for recusal are known before the first
9 hearing and you don't raise them and then you're into your
10 third or fourth hearing before you raise grounds that were
11 known before the first hearing, I think you've waived your
12 recusal. Now, have you waived it because it wasn't 10
13 days before the first hearing or have you waived it
14 because you knew about it and didn't present it when you
15 first could have? I'm not entirely sure the law is clear
16 on that. In other words, I'm not entirely sure that you
17 could raise a ground for recusal on your fifth hearing if
18 you knew about it before your first four hearings. But it
19 may be a waiver question and not a 10-day question.

20 CHAIRMAN BABCOCK: Right. Judge Peeples,
21 surely you get a lot of recusal motions that are
22 midstream. I mean in the --

23 HONORABLE DAVID PEEPLES: Oh, almost every
24 one is in the case --

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE DAVID PEEPLES: -- as opposed to
2 the case is just assigned to a judge and there's no
3 history on that case.

4 CHAIRMAN BABCOCK: Right.

5 MR. ORSINGER: So is it our consensus that
6 you can file a motion to recuse on your fifth hearing as
7 long as the grounds occurred after the fourth hearing?

8 HONORABLE DAVID PEEPLES: Absolutely.

9 HONORABLE TRACY CHRISTOPHER: Uh-huh.

10 HONORABLE STEPHEN YELENOSKY: Yeah.

11 MR. HAMILTON: Yeah, but if the grounds
12 occurred -- if you knew about the grounds when the lawsuit
13 is filed, but you don't do anything until the fifth
14 hearing because you want to complain about the rulings in
15 one to four, I don't think you can do it then.

16 CHAIRMAN BABCOCK: You may have a waiver.

17 MR. ORSINGER: But that's probably a
18 question of waiver and not a question of that it was 10
19 days before the upcoming hearing.

20 CHAIRMAN BABCOCK: Judge Peeples, do you
21 ever see sort of the flip side of what we're talking
22 about? There is a -- there's a motion to recuse saying
23 that the judge's impartiality might reasonably be
24 questioned, and the opponent of recusal says, "What are
25 you talking about? This judge has been even-handed in his

1 treatment of the case. The plaintiff's won five motions
2 and I've won five motions, so we're -- he's right down the
3 middle. Sometimes I win, sometimes I lose." Is that ever
4 done?

5 HONORABLE DAVID PEEPLES: So what you're
6 saying is there's a motion and then you look at the
7 response, and you're persuaded by the response?

8 CHAIRMAN BABCOCK: Well, the response uses
9 the rulings of the judge as a basis not to recuse, says,
10 "How can you say this guy's not impartial because" --

11 HONORABLE DAVID PEEPLES: I've seen that
12 said in a response, yeah. The judge had been fair, you
13 know, "ruled against me the other day," that kind of
14 thing.

15 CHAIRMAN BABCOCK: Yeah. Yeah.

16 MR. ORSINGER: Well, what Chip is saying,
17 though, is you can't use it for the motion, but you can
18 use it for the response. What's the public policy logic
19 there?

20 HONORABLE DAVID PEEPLES: You can use it for
21 evidence. If you get into court, if you plead your way
22 into court and are entitled to a hearing, you can
23 introduce the evidence.

24 CHAIRMAN BABCOCK: And that's the purpose of
25 your comment, which --

1 HONORABLE DAVID PEEPLES: And I know
2 we're -- I had a case, the allegation was that the judge
3 was just cozy with this lawyer in a family law case. I
4 granted a hearing, and part of the evidence was that this
5 judge refused to transfer a child custody case to another
6 county where the mother and the child had lived for two
7 years. That's a slam dunk ruling. He just wouldn't do
8 it, and that evidence persuaded me there's something here.
9 There was just no reason for that ruling, utterly no
10 reason, and that without that bit of evidence, that
11 terrible ruling, I might not have granted it.

12 MR. ORSINGER: But that was a mandamusable
13 decision.

14 HONORABLE DAVID PEEPLES: Yes, it was.

15 MR. ORSINGER: And so you granted a recusal
16 on a grounds where mandamus is a remedy, and I know
17 Justice Bland doesn't like that.

18 HONORABLE DAVID PEEPLES: No, Richard, I
19 granted it because there was plausible evidence that he
20 was cozy with this lawyer.

21 MR. ORSINGER: In addition to the ruling.

22 HONORABLE DAVID PEEPLES: I think the judge
23 was afraid this lawyer was going to run against him, and
24 he kept ruling for him, and it was an open secret on the
25 street that you didn't want to be opposing her in his

1 court.

2 HONORABLE STEPHEN YELENOSKY: So it wasn't
3 just the ruling.

4 HONORABLE DAVID PEEPLES: No. He is
5 entitled to a hearing on that, but that ruling convinced
6 me there's something here. That refusal to rule.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Well, to state my conclusion in
9 advance, I think I favor the suggestion before of putting
10 it in a comment, and I'll tell you one of my chief
11 concerns here is a lot of the grounds we use for recusal
12 are borrowed from the Federal -- Federal statutes, and
13 we're -- and you can cite back and forth. As an example,
14 well, the Federal courts have faced this and so you're
15 using the same language, et cetera, et cetera. My concern
16 is, is if we put it in the rule, whether it's 18a or 18b,
17 what the evidentiary effect or result of all of this and
18 whether it's probative, we may have, so to speak,
19 encapsulized a rule that's still evolving.

20 The Federal courts may get more hard-nosed
21 about the standards for how you use the judge's rulings to
22 show extra-judicial bias or a source of extra-judicial
23 bias, or et cetera; and if they get more conservative,
24 well, then we've got a rule that sort of means that we
25 can't take advantage of the change in Federal law or the

1 change in direction; and on the other hand, if they go the
2 other way and start liberalizing it, well, here we've got
3 a rule that says that -- that encapsulates the old law,
4 which people may start arguing subjects us to a due
5 process challenge; and -- but I am very sensitive to the
6 idea that people -- people engineer these things.

7 I mean, the idea that people will -- so to
8 speak, are just looking for an opportunity to recuse a
9 judge rather than mandamus, I'm perfectly aware of, so I
10 think there needs to be something in the rule -- or,
11 pardon me, at least at as a comment so that when the
12 presiding judge goes "We're not going to have a hearing on
13 this. I've looked at your motion. You don't get there
14 because all you're relying on is a ruling, and it's not
15 completely crazy, and it doesn't show extra-judicial bias
16 or at least you haven't explained it," I think that's a
17 very useful thing to give them that. In other words,
18 something for the presiding judge to hang the hat on, but
19 to put it in the rule, I'm afraid all we're doing is
20 encapsulating the -- you know, the version of it announced
21 five years ago, and what happens if the Feds go another
22 way in five years. Well, we're stuck with a rule, and we
23 won't be able to take advantage of it.

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: If we're going to

1 have something in the rule about this, I like Judge Gray's
2 solution about rulings in the case alone, and Lamont
3 Jefferson and other people have spoken up in favor of
4 that, and I like that because I think it allows you to
5 consider -- it signals that you can consider a ruling if
6 you've got something else, and it would take care of the
7 situation that Judge Evans was talking about where either
8 the judge goes off the reservation, you've got something
9 other than the ruling here, you've got some kind of anger
10 that's sort of out of proportion for a judge to have, if
11 they're going to continue to sit in the case and continue
12 to be -- to be fair, so I think that gets the concept in
13 that you can look at the ruling, but you have to have
14 something else.

15 CHAIRMAN BABCOCK: Okay. Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, I just
17 wanted to make a comment about Richard the Second's
18 waiver. I don't really think that we recognize a waiver
19 of being biased. The only time you could in my opinion
20 have a waiver is if the judge says, "Oh, you know, by the
21 way, my minor child, you know, owns one share of stock in
22 something, and do you want to waive that under the recusal
23 grounds." Not the disqualification grounds, okay. So,
24 for example, you might know a fact about a judge, and
25 you're a little worried about the judge as a result of

1 this fact, but you don't file a motion to recuse because
2 you think, well, I'm not sure. Then you go in and you get
3 the really bad ruling that Judge Peeples was talking
4 about. All right. Well, then you file motion, even
5 though you knew about the fact before the hearing, but you
6 couple the fact and the ruling, and in certain
7 circumstances that can be enough, if it's egregious
8 enough, but the other side will say, "Well, you knew about
9 that fact before the ruling and this is just sour grapes."
10 So it's used in that manner, but it's not a true waiver, I
11 don't think.

12 CHAIRMAN BABCOCK: Okay. Jeff, and then
13 we're going to move on to (b), (c), (d), and beyond.

14 MR. BOYD: I would just say the idea of
15 saying rulings alone cannot be a basis is a simple more of
16 a bright line, but it's just not consistent with what the
17 Supreme Court said, because what the Supreme Court said
18 was "except rarely." I mean, the language is --

19 HONORABLE STEPHEN YELENOSKY: But when it
20 goes on he doesn't distinguish. He --

21 MR. BOYD: "Judicial rulings alone almost
22 never constitute a valid basis for bias or partiality
23 motion in and of themselves; i.e., apart from surrounding
24 comments or accompanying opinion, they cannot possibly
25 show reliance upon an extra-judicial source and can only

1 in the rarest circumstances evidence the degree of
2 favoritism or antagonism required." So it -- now,
3 somebody said that Federal law doesn't control us. I
4 guess as a matter of state law we can draw a more brighter
5 line if we want, but that it would not be consistent --
6 which goes back to my point that we're trying to address
7 every possible factual scenario, and I don't think we
8 should.

9 CHAIRMAN BABCOCK: Judge Peeples, what about
10 subpart (b)?

11 HONORABLE DAVID PEEPLES: (b) is
12 unremarkable, and I think we ought to skip over it. If
13 you've got any input on that, just e-mail me or call me.

14 CHAIRMAN BABCOCK: Okay. What about part
15 (c)?

16 HONORABLE DAVID PEEPLES: (c) is important.
17 Retitle it "Duties of respondent judge," so the judge
18 who's being -- is the target of the motion can look at it
19 and say, "Here's what I do." You either -- you either
20 recuse voluntarily or you send it to the presiding judge.
21 There's no third choice. We tell him that. We put a
22 three-day fuse on this on line 27, and then it's enforced
23 on line 41, and I broke it into three paragraphs. You
24 might want to look at your clean copy, just so the judge
25 who, you know, shows up for work and, you know, has

1 criminal and family law and everything else and doesn't do
2 this daily can look at it and figure it out.

3 The second paragraph says if you recuse
4 voluntarily here's what you do, if you don't recuse
5 voluntarily, here's what you do, and then the third
6 paragraph is new. It starts on line 44 at the very
7 bottom, and Richard and I talked about this. It is an
8 abuse of the system when someone is in trial or in a
9 hearing and files a motion to recuse. It is -- and so
10 this stand-alone paragraph would say that the trial judge
11 can just ignore that, and if you want to recuse somebody
12 in the middle of trial you get the presiding judge to do
13 it, and I think very few people will do that because it's
14 always frivolous, but that's what paragraph (c) does.

15 CHAIRMAN BABCOCK: Okay. Any comments on
16 (c)? Yeah, Judge Christopher.

17 HONORABLE TRACY CHRISTOPHER: Just one
18 question on, you know, "or a hearing has begun" issue
19 because sometimes what will happen is the person will have
20 filed the motion, but you don't know it, and you'll start
21 the hearing, and they don't tell you, and then you make a
22 ruling against them, and they're like, "Well, Judge, you
23 didn't rule on my motion to recuse," and you're like, you
24 know, "You filed a motion to recuse against me?" But I
25 mean, technically they filed it before the hearing had

1 begun and I didn't know about it, so I'm a little -- what
2 would I do under this, under this rule?

3 HONORABLE DAVID PEEPLES: Look back up at
4 line 22. We say, "The movant must send copies to the
5 judge. I'm okay with saying you need to personally
6 deliver it to the judge. Maybe we should say that.

7 HONORABLE KENT SULLIVAN: Right.

8 HONORABLE STEPHEN YELENOSKY: Right. I've
9 had the same situation.

10 CHAIRMAN BABCOCK: Judge Evans.

11 HONORABLE DAVID EVANS: I want to just point
12 out that -- and it might occur in the rarest of cases.
13 There would be no advantage where the administrative judge
14 is on it, but if it was known that I was taking a vacation
15 and somebody wanted to file a recusal, I wouldn't have any
16 knowledge and couldn't comply with the rule. So delivery
17 to the judge within three days of receipt or on three-day
18 holiday, there's no time to study the motion, and, you
19 know, you read the motion, those who have ever
20 gotten recused, I've never received one, but -- touch of
21 humor.

22 HONORABLE DAVID PEEPLES: You must not be
23 working.

24 HONORABLE TRACY CHRISTOPHER: I was going to
25 bow to you.

1 CHAIRMAN BABCOCK: He's not making any
2 rulings.

3 HONORABLE DAVID EVANS: My friends have told
4 me this. You read the motion, and, you know, you want to
5 put it down first for a while and go think about it before
6 you just react to it, and so the judge should have some
7 time to reflect on the motion and what's the proper thing
8 to do, and it should be three days -- three days is
9 adequate, but it ought to be three days.

10 CHAIRMAN BABCOCK: Justice Bland.

11 HONORABLE JANE BLAND: Well, I don't know
12 that we have a big problem with judges not promptly ruling
13 on motions to recuse because they can't take any further
14 action --

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE JANE BLAND: -- in the case under
17 the rule until they rule on the motion to recuse, and I'm
18 all right with not putting some limit on the judge,
19 because is this three days if the judge doesn't make a
20 ruling within the three days, does that mean that that's
21 basically recusal because you haven't acted, recusal by
22 inaction? I'm not sure what the penalty is for not ruling
23 in three days.

24 HONORABLE DAVID PEEPLES: The penalty is on
25 line 41. If I'm trying to recuse some person and he just

1 lets it sit there, I send it to the presiding judge and a
2 phone call will be made.

3 HONORABLE JANE BLAND: Oh, okay.

4 HONORABLE DAVID PEEPLES: I don't know how
5 that looks on paper, but that will get the job done.

6 HONORABLE JANE BLAND: Okay. Well, that's
7 okay with me. And then the other thing is the
8 disregarding a motion that's made after a trial or a
9 hearing has begun is subject to abuse by judges who really
10 probably need to think about recusing. For example, in
11 the family law context. You have an initial hearing about
12 the distribution of assets and then you're about to have a
13 giant child custody trial, and a motion to recuse might
14 get filed, and that judge then would say, "I've begun,
15 I've begun my hearing/trial. I began it a year ago," and
16 I think there is a big problem with your instinctive
17 reaction might be or some judges' instinctive reaction
18 might be that just throw this away, this is a frivolous
19 motion, it's procedurally defective, all these things, and
20 so they don't want to rule -- they just disregard it like
21 we're allowing in the rule --

22 HONORABLE DAVID PEEPLES: Can I just point
23 out --

24 HONORABLE JANE BLAND: -- and a bright line
25 test of making the judge rule by either -- by declining to

1 recuse and referring and not disregarding is better,
2 because otherwise we have judges using it -- disregarding
3 for all kinds of things, and then it creates problems on
4 down the road because they've gone on and made rulings
5 and --

6 HONORABLE DAVID PEEPLES: I meant to point
7 out the language on 29, which says the respondent judge
8 has two choices even if the motion doesn't comply with
9 section (a). It's only when the motion is filed during
10 trial or during a hearing that the judge can disregard it.
11 That's the only time.

12 HONORABLE STEPHEN YELENOSKY: It says
13 "after," not "during." That's the problem.

14 HONORABLE DAVID PEEPLES: "After." Well,
15 after it's begun is during, isn't it?

16 HONORABLE STEPHEN YELENOSKY: Well, that's
17 the problem because --

18 HONORABLE DAVID PEEPLES: Well, when
19 something has begun may need some elaboration. Yeah.

20 HONORABLE JANE BLAND: If there's a motion
21 to recuse filed against a judge, the judge shouldn't do
22 anything with it other than rule on it, and some other
23 judge ought to make the call. It just -- it's just the
24 whole idea of this is we think that the current judge --
25 there's somebody that's alleged that the current judge

1 isn't fair, so the judge then disregards it, so everybody
2 -- well, that's more evidence that the judge isn't fair,
3 and, you know, I think you were saying earlier one of the
4 the great things about the way we have our system in this
5 is that the judge's conduct who's being looked at doesn't
6 have any involvement in these decisions, and to me this is
7 sort of letting that involvement creep in, and it's going
8 to put that judge smack in the middle of some dispute
9 about whether or not this thing occurred during trial, and
10 I understand the difficulty of motions to recuse brought
11 during the middle of trial, but I also know that the
12 administrative judges rule on those like lightning. So
13 it's just like orders of remand. They're -- if a removal
14 happens right on the eve of trial, you know, it's funny
15 how a Federal judge can get that case remanded within 24
16 hours.

17 CHAIRMAN BABCOCK: Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Yeah. I think
19 first I would want to note well that we judges aren't
20 always protecting ourselves. Here's one instance in which
21 I think Judge Bland has pointed out that we should be
22 subject, and I agree, to something that requires more of
23 us than this rule does, because I think the problem, Judge
24 Peeples, is if you get a motion to recuse and you're in
25 the middle of a hearing, are you supposed to stop the

1 hearing, but if you just say -- if you just said that the
2 judge does not have to recess the hearing because a motion
3 to recuse is filed in the middle of the hearing and he can
4 complete the hearing at least, and that's the problem, not
5 being able to complete the hearing because a motion is
6 filed, but other than that, I don't particularly see why
7 we should say that if it's made after a trial or hearing
8 has begun it has to be presented to the presiding judge,
9 and it is subject to the question of, well, when has it
10 begun, and, of course, with the central docket, when
11 something begins and ends is also a difficult question.
12 So if it addresses you're in the midst of a hearing and
13 the judge doesn't have to drop everything in the midst of
14 a hearing and there's some language for that, I would
15 agree with that.

16 CHAIRMAN BABCOCK: Justice Patterson, then
17 Richard.

18 HONORABLE JAN PATTERSON: I don't think that
19 sentence is necessary in 44 and 45 either because it seems
20 to me that if it's -- it is either evidence of a tactical
21 effort, I'm filing one right now, but I think it tries to
22 speak to too many circumstances. I could imagine a judge
23 saying to somebody, "Well, I'll show you, I'm going to put
24 you to trial tomorrow" and then all the sudden the trial
25 begins. I mean, there might be some petulance that

1 somebody needs to respond to that they can't respond to or
2 at least not easily with that sentence.

3 The other thing I think that we haven't
4 said, and maybe the lawyers can speak to this better, but
5 I think that one thing that happens is that, you know,
6 we've talked about the short fuse, but there also remain
7 those lawyers who the last thing they want to do is to
8 file a motion to recuse, so they wait and they wait and
9 they hope and they hope that it's not going to evidence
10 itself, but there may be that last indication of bias that
11 they just have to respond to, and the timing may not be
12 great. I'm not sure our statements earlier about when
13 waiver occurs are correct because the law is -- it has
14 spoken a great deal about this, but there are a lot of
15 lawyers who the last thing they want to do is to file one,
16 and they wait until there's clear evidence, and the timing
17 may not be appropriate, but it seems to me that when you
18 see a lawyer who has filed it in the middle of trial as a
19 matter of a tactic that's one of the easiest ways for
20 either the judge or the presiding judge to deal with it,
21 if that becomes so clear, so I'm not sure that this
22 sentence is necessary.

23 CHAIRMAN BABCOCK: Richard Orsinger and then
24 Justice --

25 MR. ORSINGER: A possible way to accommodate

1 this is back on pages -- lines 29, 30, and 31, is to say
2 this comment, that if the motion is filed or first
3 presented to the judge during a hearing or trial, the
4 court may finish that hearing or trial, because that's
5 kind of what the evil we're trying to avoid, is stopping
6 an ongoing hearing or trial.

7 Another possibility is to take line 30 that
8 says, "Take no further action except for good cause stated
9 in writing," you could -- in the comment you could say
10 that the presentation of the -- filing or the presentation
11 of the motion to the court during a hearing or trial is
12 good cause to continue -- to conclude the hearing or
13 trial. In other words, we're telling the judges that if
14 they find out about it during the hearing or trial then
15 they just need to say on the record, "I find that there's
16 good cause to continue or complete the hearing or trial
17 because this wasn't presented until we were underway" and
18 then the judges can solve their own problems by those good
19 cause findings.

20 CHAIRMAN BABCOCK: Okay. I think Justice
21 Sullivan had his hand up, and then Ralph, Judge Evans, and
22 Sarah.

23 HONORABLE KENT SULLIVAN: I was just going
24 to echo to a large extent the comments that Richard the
25 Second made, and that is it seems to me that the evil --

1 at least I presume the evil that Judge Peeples is
2 concerned about is the potential disruption of
3 proceedings, and I do wonder if we incorporate this, which
4 conceptually I agree with, you simply wouldn't push the
5 timing of the disruption forward. In other words, you
6 file it a day before trial begins and you get the same --
7 because trial had not, quote, begun, close quote. So it
8 will just change the tactics slightly and not remedy the
9 problem. So I do wonder if what we're really driving at
10 is much like what the suggestion was, and that is within
11 some period of time, which you have to define, and maybe
12 if there's a set trial date you would want to define it in
13 advance of that trial date, simply that the motion can be
14 referred to the presiding judge, but absolutely nothing
15 stops, you know, because I think that's the -- that's the
16 evil, is the disruption of proceedings and the ability to
17 use this rule as a tactic for purpose of gamesmanship.

18 CHAIRMAN BABCOCK: Ralph.

19 MR. DUGGINS: I think it's unwise to -- I
20 understand the point of permitting the judge to continue
21 the hearing or trial, but when we say a judge can
22 disregard the motion, I think that's not good. I'd rather
23 see us rework this phrase and say you cannot disregard it,
24 you've got to send it to the presiding judge, but you're
25 not required to recess the hearing or the trial.

1 CHAIRMAN BABCOCK: Judge Evans.

2 HONORABLE DAVID EVANS: I do not favor
3 including this language in the rule. I don't think it
4 occurs often, and I think the new sanctions provisions
5 will take care of any abuse, and so that if a person files
6 one in the middle of trial and throws off the witnesses'
7 schedules and causes the trial to collapse, the person
8 opposing the motion is going to move for sanctions to
9 include costs for bringing witnesses back, and I think
10 could get it if the sanction rule was properly -- is broad
11 enough, because it would be a conclusion by the presiding
12 judge it was delay.

13 The other twist that I worried about in
14 reading it had to do with it's filed, the hearing
15 continues, the movant does not seek a stay from the
16 presiding judge, I rule. Don't I still have a motion I
17 have to send to the presiding judge? And what happens
18 when the presiding -- and so how does that work? Does
19 this excuse me from taking no further action? Or how
20 would that -- that's what I didn't understand.

21 HONORABLE DAVID PEEPLES: What I meant in
22 that paragraph was if you're in the middle of a trial or
23 hearing, you go to the presiding judge to get it stopped.
24 You can't just file something and get an automatic stop
25 and, you know, an hour later you continue it.

1 HONORABLE DAVID EVANS: But I finish the
2 hearing. I say I'm going to grant the motion for
3 discovery, and it's just a short hearing. I grant the
4 motion. Do I still have to act on the motion for recusal
5 within a three-day period after receipt or not? It's not
6 a long hearing. They're not going to get a stay. Judge
7 Walker is off in Wichita Falls. So I just thought that it
8 raised questions for us about what we might do with one we
9 received during a hearing.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: Are we still just
12 in the talking phases about this? We didn't have a vote
13 on (a), and we haven't had a vote on (b), right?

14 CHAIRMAN BABCOCK: There has been no votes
15 taken this morning. Okay. Richard -- Justice Hecht.

16 HONORABLE NATHAN HECHT: I just have a
17 technical question of Judge Peeples. When things are
18 filed do they go in the case file, or does the presiding
19 judge keep a file, or what happens to all of this stuff?

20 HONORABLE DAVID PEEPLES: I think both. I
21 mean, it's filed. It's a motion in the case, just like a
22 motion to compel, but a copy needs to be sent to the
23 presiding judge and then he files them.

24 HONORABLE NATHAN HECHT: And so the
25 presiding judge keeps files apart from the clerk?

1 HONORABLE DAVID PEEPLES: Yes.

2 HONORABLE NATHAN HECHT: So then they don't
3 go to the clerk's file ordinarily.

4 HONORABLE DAVID PEEPLES: Well, no, if a
5 motion to recuse is filed it is filed with the clerk.

6 HONORABLE NATHAN HECHT: Right.

7 HONORABLE DAVID PEEPLES: And it's part of
8 the papers in that case, just like the plaintiff's
9 original petition, but a copy also goes to the presiding
10 judge and other parties, of course. Presiding judges keep
11 copies of them, so there are two.

12 HONORABLE NATHAN HECHT: And when you have
13 hearings and things, the record is kept by the presiding
14 judge separately from the case file or --

15 HONORABLE DAVID PEEPLES: Well, the court
16 reporters, of course, keep their notes and exhibits unless
17 they're given back, and maybe clerks keep some of that
18 stuff.

19 MR. ORSINGER: Well, David, all the -- once
20 the referral is made to the presiding judge, if they're
21 responses or whatever, they're still filed with the
22 original court clerk.

23 HONORABLE DAVID EVANS: In the original case
24 file.

25 MR. ORSINGER: In other words, the presiding

1 judge's is an informal file for convenience only. The
2 official file is still the trial court file, all the way
3 through, right?

4 HONORABLE DAVID PEEPLES: That's correct.

5 CHAIRMAN BABCOCK: It would have to be.
6 Because if the presiding judge or his designee denies the
7 motion to recuse, that ruling can carry through in the
8 case.

9 MR. ORSINGER: Uh-huh.

10 CHAIRMAN BABCOCK: It may be a point on
11 appeal.

12 HONORABLE DAVID PEEPLES: Part of the record
13 and they can take it up at the end.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE NATHAN HECHT: But when you say --
16 I'm just trying to get the procedure in mind here -- it
17 could be presented to the presiding judge, the party would
18 just go find the presiding judge physically and --

19 HONORABLE DAVID PEEPLES: Or e-mail or fax.
20 In Bexar County, since I'm in the courthouse where most of
21 the judges are, they probably walk to my office and give
22 it to me or my assistant, but if you're out of town,
23 e-mail and fax makes it very, you know, instantaneous.

24 CHAIRMAN BABCOCK: Okay. Yeah, Roger.

25 MR. HUGHES: I would favor -- going back to

1 the service of the motion, I'd favor that the copy be
2 served in chambers in order to bring it to the judge's
3 attention as soon as possible because I have seen
4 instances where a party will file the motion immediately
5 after the hearing in order to prevent the judge from
6 reducing his rulings to writing and to stall the whole
7 thing, so I think it's important that the judge know as
8 soon as possible that a motion has been filed, and if that
9 means dropping a copy off in chambers, so much the better.
10 The judge ought to know as soon as possible.

11 And the second thing, I agree with the
12 remark earlier saying a judge may disregard the motion may
13 not look very good. I -- but one thing I have seen is,
14 you know, these things can be tactical. People look at a
15 jury and go, "God bless, the strikes didn't go the right
16 way. I really don't like this panel. I'm going to file a
17 motion to recuse right now and end this travesty," or they
18 just watched the opposing counsel ruin their best witness
19 on the stand, and the jury is just laughing at the guts of
20 their case now. At that point the thing is in South Texas
21 -- I mean, maybe in the bigger cities these motions will
22 get ruled on within 24 hours, but the possibility of a
23 three or four delay, three or four delay in the Valley is
24 a distinct possibility. I think the judge ought to be
25 able to say, "You made that motion for the first time

1 during trial. That alone is good cause," and maybe
2 putting that in the rule, that first making the motion
3 during the hearing or during trial is a ground for good
4 cause and gives the judge the option to scrub it or to
5 continue.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: I would suggest just removing
8 the problem that David and I think Tracy were talking
9 about by saying -- by putting the duty on the litigants to
10 actually present the motion before the beginning of the
11 hearing or trial. I would suggest just wording it that a
12 motion not presented to the trial court prior to the
13 beginning of the motion for trial must be presented to the
14 presiding judge.

15 CHAIRMAN BABCOCK: Okay. Judge Christopher.

16 HONORABLE TRACY CHRISTOPHER: I agree a lot
17 with what's said about the wording of 44 and 45. Maybe we
18 could tweak that a little bit. I would prefer to limit it
19 to just trials rather than hearings, so I guess I just
20 didn't know -- I mean, for me a hearing, a hearing could
21 be postponed, and I could wait, and, you know, we can get
22 it done in a couple of days. A trial strikes me as
23 different, especially a jury trial. The idea that we have
24 to stop the jury trial for 24 hours or 48 hours to get the
25 hearing done strikes me as an abuse of the system. Now,

1 you know, so I'm not sure why we wanted to include the
2 hearings, but that's just my thought on it.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE DAVID PEEPLES: Can I say as long
5 as the trial judge is not stopped dead in his tracks by a
6 motion during a trial, I'm fine with it.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE DAVID PEEPLES: That's just six of
9 one, half dozen of the other, if you say "may disregard"
10 or "can keep on trying the case," it's fine with me.

11 HONORABLE TRACY CHRISTOPHER: The question
12 is whether we want the trial judge to have to fax it to
13 you because we know how to do that probably easier than
14 the litigants do.

15 HONORABLE DAVID EVANS: Yeah.

16 HONORABLE TRACY CHRISTOPHER: Or are we
17 going to make the litigants do it. Right here the way you
18 have it written is the litigant has to do it, the movant.

19 HONORABLE DAVID PEEPLES: Of course,
20 litigant is supposed to do it anyway under sub (b).

21 HONORABLE TRACY CHRISTOPHER: Yeah, but they
22 might just drop it in the mail.

23 HONORABLE DAVID PEEPLES: Not after I
24 rewrite it. I thought we agreed. I thought there was
25 consensus that it ought to be delivered to the judge.

1 CHAIRMAN BABCOCK: Yeah, there was.

2 HONORABLE DAVID PEEPLES: Was there not
3 consensus on that?

4 CHAIRMAN BABCOCK: No, there is.

5 HONORABLE DAVID PEEPLES: Instead of "sent"?

6 HONORABLE STEPHEN YELENOSKY: But not
7 chambers.

8 HONORABLE TRACY CHRISTOPHER: Not chambers.

9 HONORABLE DAVID PEEPLES: No, to the
10 respondent judge so they'll know about it.

11 CHAIRMAN BABCOCK: Justice Bland.

12 HONORABLE JANE BLAND: David, what happens
13 if the judge, the presiding judge, grants the motion to
14 recuse that's filed during the middle of trial --

15 HONORABLE DAVID PEEPLES: Should have
16 stopped.

17 HONORABLE JANE BLAND: But what happens to
18 all the rulings that have been made while the --

19 MR. ORSINGER: They're nullified, I believe.

20 HONORABLE DAVID PEEPLES: If we're creative
21 we can think about --

22 HONORABLE JANE BLAND: So are we looking at
23 a new trial?

24 MR. ORSINGER: Yes. Yes.

25 HONORABLE DAVID PEEPLES: If we're creative

1 we can think about a legitimate motion in the middle of
2 trial. Most of them are going to be "The rulings are
3 going against me, he's unfair," but maybe something came
4 up that's extra-judicial that you didn't know about
5 before. I'll grant you that you can dream up something
6 like that, and if you want to draft for that, it's fine,
7 but I'm just concerned about the 99.9 percent, and I think
8 we've taken care of it through discussion here.

9 HONORABLE JANE BLAND: How many are brought
10 up during trial as opposed to during a hearing?

11 HONORABLE DAVID PEEPLES: Yeah, I'm fine
12 with that.

13 CHAIRMAN BABCOCK: Okay. Judge Evans, did
14 you have something?

15 HONORABLE DAVID EVANS: Well, I think Judge
16 Peeples addressed it. I would be concerned that they
17 didn't seek a stay, I proceeded and finished a week-long
18 trial, and then it gets to the presiding judge, and the
19 presiding judge doesn't -- and it's just an awkward
20 situation, gets it to presiding judge, the presiding judge
21 decides that the recusal grounds were good, and maybe I've
22 only spent three days at it. I've gotten a verdict back,
23 gotten everything else back. So maybe if there was some
24 penalty for not seeking a stay from the presiding judge
25 that it was waived, that would be helpful, because they

1 either ought to act on it or not. There ought to be some
2 sort of firmness on it, but that would just be a
3 suggestion.

4 CHAIRMAN BABCOCK: Okay. Harvey.

5 HONORABLE HARVEY BROWN: This is a little
6 off what we were talking about immediately, but I want to
7 go back to the delivery to the judge question. Do you
8 mean physically put it in the judge's hands --

9 HONORABLE STEPHEN YELENOSKY: No.

10 HONORABLE HARVEY BROWN: -- rather than the
11 clerk of the court?

12 HONORABLE STEPHEN YELENOSKY: The judge's
13 office.

14 HONORABLE HARVEY BROWN: Judge's office.

15 HONORABLE DAVID PEEPLES: Well, what I don't
16 want is to put it in the mail. I think it needs to be --

17 HONORABLE HARVEY BROWN: I wouldn't want
18 somebody to have to hand it to the judge.

19 HONORABLE STEPHEN YELENOSKY: But putting it
20 to the clerk, the clerk isn't going to get it to us, at
21 least in Travis County, in time.

22 HONORABLE HARVEY BROWN: So what do you want
23 exactly?

24 HONORABLE STEPHEN YELENOSKY: Well, in
25 Travis County we want it delivered like all deliveries to

1 the judge's office, which is separate from chambers,
2 because in some instances you don't want the angry pro se
3 litigant coming back and facing you directly.

4 HONORABLE HARVEY BROWN: That's why I asked.
5 I think you need to make that clear.

6 HONORABLE TRACY CHRISTOPHER: I think every
7 county is slightly different, though, as to who you would
8 give it to to actually get it to the judge.

9 HONORABLE STEPHEN YELENOSKY: Or maybe you
10 just say "delivered to the judge pursuant to local rule"
11 or whatever, but --

12 CHAIRMAN BABCOCK: Carl.

13 MR. HAMILTON: I don't agree that in one
14 instance if it's a trial that you're allowed to go on, but
15 if it's a hearing you can put that off, because a lot of
16 times hearings are just as important as trials, if they're
17 on a temporary injunction or something like that, so I
18 think the rule ought to be consistent that either one --

19 CHAIRMAN BABCOCK: Okay.

20 MR. HAMILTON: -- should be abated.

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE SARAH DUNCAN: I agree. I can
23 think of any number of motion to transfer venue because
24 you can't get a fair trial in the county and you find out
25 that the things you don't want to know but find out, and

1 that hearing can be just as important as a trial.

2 CHAIRMAN BABCOCK: Okay. Judge Peeples, you
3 want to go on to subparagraph (d), the hearing?

4 HONORABLE DAVID PEEPLES: (d), hearing.
5 Made some changes in sub (1), so "The presiding judge or
6 the judge assigned to hear the motion may deny a motion
7 that doesn't comply with subsection (a)." There was
8 discussion last time about what kind of hearing, and so I
9 put an oral hearing, and I agreed and put in here that,
10 you know, if the judge is going to say dismissed -- deny a
11 motion without a hearing, you need to say why. It's
12 rulings only, and that's not enough. It's unsworn. I
13 wouldn't deny one for that reason, but whatever it is,
14 they might be able to cure it, and so the order ought to
15 say what they did wrong so if it's curable it can be
16 cured.

17 (3)(b), lines 63 to 65, I just tweaked that
18 to make it read a little bit better. And look at (4). I
19 was impressed with what Kennon said last time about it's a
20 little dangerous to mention the Chief Justice in this rule
21 because pro se people might think, "Hey, I can file with
22 the chief," and all of the sudden he gets a lot of
23 filings, and, frankly, it's the last -- everything after
24 "except," you want to strike that, that's fine, but I'm a
25 little sensitive about anybody being above the law and

1 unreviewable, but I do think it's very important, as I
2 said last time, to have some actor in this system that is
3 bulletproof in the sense that a motion to recuse doesn't
4 stop that person, and so a presiding judge who is hearing
5 a recusal motion, and this is existing law, there's no
6 objection under Chapter 74 and a motion to recuse -- I
7 guess people didn't like "may be disregarded," but there's
8 got to be some way that a motion to recuse, the person who
9 is going to hear the recusal motion doesn't stop the whole
10 process or that really gums up the works, and so I just
11 thought if you want to do that you go to the Chief
12 Justice.

13 CHAIRMAN BABCOCK: Has there ever been an
14 instance where a presiding judge has been recused?

15 HONORABLE DAVID PEEPLES: Yeah. I did it
16 just the other day. Here's what happened. I had a motion
17 in a case, and there were rulings, and after I had read
18 about two or three pages I realized I had mediated that
19 case about three months before, obviously without success.
20 When I found that out I -- I didn't recuse. I just
21 assigned somebody else to it, but I would have recused.

22 CHAIRMAN BABCOCK: Somebody had filed a
23 motion.

24 HONORABLE DAVID PEEPLES: Well, instead of
25 telling them and saying, "I'll recuse if you want me to,"

1 I just decided life's too short, assign somebody else. It
2 may be a presiding judge has some history with a litigant
3 or a lawyer. There can be cases, but again, if we're
4 drafting for the reality that's out there, in my opinion
5 we've got to have an actor who can get things done so the
6 legal system is not abused, and this is my proposal to do
7 it.

8 CHAIRMAN BABCOCK: But this -- by this
9 proposal you're not saying that a presiding -- that
10 recusal could not be sought against a presiding judge
11 under any circumstances?

12 HONORABLE DAVID PEEPLES: No. I'm saying
13 you've got to go to the Chief Justice.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE DAVID PEEPLES: To merely file a
16 motion -- and, by the way, I'm assigned on something --
17 I'm not going to mention the county -- about a week and a
18 half from now, a pro se litigant, and I'm assigned by the
19 Chief Justice to hear a motion to recuse Judge Schraub
20 because Judge Schraub made a ruling the guy didn't like.

21 CHAIRMAN BABCOCK: Yeah.

22 HONORABLE DAVID PEEPLES: I'm going to drive
23 up to this county and do it.

24 CHAIRMAN BABCOCK: With a smile on your
25 face, I'm sure.

1 HONORABLE DAVID PEEPLES: Oh, yes.

2 MR. ORSINGER: How did it get to the Chief
3 Justice instead of it coming to you as the presiding judge
4 first?

5 HONORABLE DAVID PEEPLES: Okay. Judge
6 Schraub was going to hear a recusal motion on a judge
7 that's assigned to a case.

8 MR. ORSINGER: Oh.

9 HONORABLE DAVID PEEPLES: The litigant filed
10 a motion to recuse Judge Schraub before he could hear the
11 motion.

12 MR. ORSINGER: So you're saying this
13 procedure already exists?

14 HONORABLE DAVID PEEPLES: No. No. Judge
15 Schraub is frozen dead in his tracks by that motion. He's
16 got to refer it. Who does he refer it to? He referred it
17 to the Chief Justice.

18 MR. ORSINGER: He did on his own?

19 HONORABLE DAVID PEEPLES: Yeah.

20 MR. ORSINGER: Even though there's no Rule
21 of Procedure saying that?

22 HONORABLE DAVID PEEPLES: Well, he was going
23 to have, if you look at -- the first sentence in the
24 existing rule says "within 10 days before any trial or
25 hearing." That covers a recusal hearing, and he was going

1 to preside over a hearing. There was a motion to recuse
2 him because of a ruling he had made, and instead of
3 saying, "I'm above the law," he said, "Chief Justice,
4 please have somebody hear this," and that's what Chief
5 Justice Jefferson did. This would stop that.

6 CHAIRMAN BABCOCK: Justice Sullivan.

7 HONORABLE KENT SULLIVAN: The evil, as I
8 understand it, that we're trying to remedy is the
9 disruption of the process, and I confess what I'm about to
10 say is just -- is half-baked, just a thought, and that is
11 it's possible what we ought to do -- it would be very
12 unusual for something half-baked to come out of these
13 proceedings.

14 CHAIRMAN BABCOCK: Yeah, imagine that.

15 HONORABLE KENT SULLIVAN: But is it possible
16 that what we ought to do is have the general rule simply
17 be that nothing stops when you file a motion and that the
18 burden is on the movant to add facts that show good cause
19 as to why proceedings, whatever they may be, should stop,
20 and that can be then delivered to the presiding judge. In
21 other words, it would be akin to an emergency motion
22 saying this is so unusual that whatever is in process in
23 this case really should stop immediately, with the thought
24 that a presiding judge could take a threshold look at it
25 and decide whether indeed they have alleged something

1 because something is imminent, so imminent, that, in fact,
2 that should happen. It might end a lot of the problems
3 that we've discussed.

4 Certainly I would think that the notion of
5 using this tactically and becoming a serial recuser, i.e.,
6 the matter has been assigned from the original judge to
7 Judge Peeples, now I want to recuse Judge Peeples, and the
8 rest of it. You've got someone that's either irrational
9 or incompetent, which you don't want to encourage it seems
10 to me, or you have someone who is tactically attempting to
11 disrupt the process, and that's the only person that you
12 can design a rule against, it seems to me. You can't
13 design the rules to deal with the irrational or the
14 incompetent very easily, and what if you just simply
15 changed the burden. Just a thought.

16 CHAIRMAN BABCOCK: Is anybody trying to
17 apprehend the serial recuser? Justice Bland.

18 HONORABLE TRACY CHRISTOPHER: You obviously
19 haven't been in a case with one.

20 CHAIRMAN BABCOCK: Justice Bland.

21 HONORABLE JANE BLAND: So the idea is we've
22 got the serial recusers on one side, but we've got the
23 other side, the principle of, you know, a judge ought not
24 to be ruling on motions where it's the judge that's --

25 HONORABLE STEPHEN YELENOSKY: Challenged.

1 HONORABLE JANE BLAND: -- challenged or the
2 judge's conduct that's being brought into question, maybe
3 for a frivolous ground, but maybe not, and so we're going
4 to draw the line at the presiding judge and say we're
5 going to let the presiding judge disregard the motion,
6 which is the same as ruling on it, basically, because that
7 evidence is some sort of frivolous conduct because it's
8 now -- we've now moved to recuse two judges and not just
9 one. I'm just trying to think about this because, you
10 know, to the outside world the whole idea is a judge
11 shouldn't be ruling on their own motion to recuse, and I
12 understand that it's a burden, and I certainly understand
13 that if every one of these has to go up to the Chief
14 Justice and then assigned to another judge that way
15 that's -- that adds just another layer of delay and
16 disruption. Is there some other way to handle that? Like
17 transfer to the next region, you know, like if you're in
18 the Second Region, transfer it to the judge of the Third
19 Region, who may not be -- I don't know. At some point I
20 agree, they can move to recuse every single judge in the
21 entire system if they want and disrupt the process.

22 CHAIRMAN BABCOCK: Roger.

23 MR. HUGHES: Well, the way I see this rule
24 working is, is that when the trial judge gets the motion
25 and feels that it's frivolous, everything stops, refer to

1 the presiding judge, and the presiding judge either
2 details another judge or acts on it himself or herself. I
3 don't have a problem making the presiding judge
4 bulletproof until the Supreme Court intervenes, Supreme
5 Court Chief Justice intervenes. I mean, I've seen the
6 serial recusers, and at that point, I mean, once you've
7 already knocked one judge off the case -- and my hunch is
8 that the presiding judge is only going to get involved
9 when another judge has been knocked off just by the
10 motion, I think at some point you ought to have a system
11 going, okay, we're going to send somebody out there, and
12 if you want to recuse that person, go to Austin, because
13 that judge is going to hear it until otherwise.

14 I think that's acceptable, and I'm not so
15 troubled about it because in Federal court, unless you
16 file a really detailed affidavit, the district judge is
17 going to rule on -- on that motion to recuse, and their
18 system seems to work. Of course, they have a lot fewer
19 judges, and it may be a necessity that Federal judges must
20 rule on their own recusal motions, and also the simple
21 fact they have to live with each other forever, unlike our
22 judiciary. So I think maybe saying at some point you're
23 going to get a bulletproof judge or a judge who is only
24 subject to removal when the Supreme Court says so, that
25 doesn't trouble me a whole lot.

1 CHAIRMAN BABCOCK: Judge Christopher, did
2 you want to say something?

3 HONORABLE TRACY CHRISTOPHER: Yeah. I
4 disagree with Judge Bland on this, and I agree with Judge
5 Peebles that we need to have a stopping point.

6 HONORABLE JANE BLAND: No, I said the same
7 thing. I just didn't know where.

8 HONORABLE TRACY CHRISTOPHER: I'm not sure
9 you did, so --

10 CHAIRMAN BABCOCK: All right now. Somebody
11 get between those two.

12 HONORABLE DAVID EVANS: Round one.

13 HONORABLE TRACY CHRISTOPHER: Because, you
14 know, you see the trial judge, the presiding judge, then
15 it goes to the Supreme Court. Supreme Court appoints
16 another trial judge. The trial judge shows up for the
17 hearing. The motion to recuse is made again. Then it has
18 to go back to the Supreme Court. The presiding judge is
19 the logical place to stop it, in my opinion.

20 CHAIRMAN BABCOCK: Okay. Yeah, Kennon.

21 MS. PETERSON: I just wonder whether it
22 might be worthwhile to add a provision that the presiding
23 judge can do what you did, and that is just assign it to
24 somebody else, similar to the procedure we have for the
25 original judge. You can recuse voluntarily, and I don't

1 know if that needs to be spelled out in the rule or not,
2 but it might be worthwhile.

3 HONORABLE DAVID PEEPLES: I understand what
4 you're saying, Kennon, but I do think that the presiding
5 judges develop some expertise and some feel for things,
6 and, as I said last time, I prefer just myself to hear
7 every one of these myself unless I just can't do it for
8 some reason, because I know how I want it done, and
9 frankly, I trust myself more than I trust some other
10 judges on these matters, and so I would just rather be
11 able to stand my ground and hope that there is some trust,
12 if somebody has some reason I shouldn't sit, I'll have
13 enough sense to assign the motion to someone else like I
14 did the other day, but that's just my thought.

15 CHAIRMAN BABCOCK: Justice Hecht.

16 HONORABLE NATHAN HECHT: I've got another
17 question. You said you were driving to the county to hear
18 the motion. Do the motions have to be heard in the county
19 where the case is pending?

20 HONORABLE DAVID PEEPLES: Well, okay, the
21 Government Code says that if no one objects, you can
22 have anything other than a trial on the merits heard
23 elsewhere. I'm dealing with a pro se guy that just,
24 frankly, is ornery.

25 HONORABLE NATHAN HECHT: Right.

1 HONORABLE DAVID PEEPLES: And I'm not about
2 to try to make him come somewhere else. I'm going up
3 there. It's about an hour's drive from where I am, but I
4 could do it by telephone. I just think this one needs to
5 be done in person.

6 HONORABLE NATHAN HECHT: So, of course, the
7 Constitution has a provision and the Government Code has
8 an exception and then as a general rule the presiding
9 judges, of course, have several counties in their region,
10 and so when you're hearing all of these, do you conduct
11 the hearings in person? Do you go to the county? Do they
12 come to you? Is it by telephone?

13 HONORABLE DAVID PEEPLES: I'm not sure I've
14 ever made out of county people come to Bexar County. I
15 don't think I have. I don't remember it. I've gone to
16 other counties and done a bunch. Of course, most of mine
17 are in Bexar County. This other place, as I said, is
18 about an hour away. Under these changes a lot of them
19 would be denied because they're just -- there's nothing to
20 them, and this does, a couple of lines up, authorize
21 telephone/fax hearings. That's very helpful, but with an
22 ornery pro se litigant, I'm going there. I mean, there's
23 something to be said for letting people vent and have
24 their day in court, and I think this case calls for it,
25 but I've denied plenty of them because they didn't get to

1 first base. This one I'm not doing that.

2 CHAIRMAN BABCOCK: I've been involved in
3 three recusal hearings, and none of them have taken place
4 in the county where the -- where the underlying case was
5 pending.

6 HONORABLE DAVID PEEPLES: Huh.

7 CHAIRMAN BABCOCK: I just thought that was
8 pertinent.

9 HONORABLE DAVID PEEPLES: Government Code
10 puts the burden on a party to object, instead of -- you
11 don't have to get the agreement to go to a different
12 county. You can just say, "I would like to do this in
13 Bexar County. Anybody have a problem with that?"

14 "Oh, no, judge, we're fine with it."

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: My experience is just the
17 opposite. In our area the presiding judge always goes to
18 the county where the judge was sitting that's subject to
19 recusal.

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: I wanted to ask David some
22 clarification on the recusal of the presiding judge. Is
23 there essentially no review of the -- if we adopted this
24 proposal and the presiding judge is not subject to being
25 recused, is there ever any review of that decision,

1 whether the grounds are good or bad, or is there --
2 because "except by order of the Chief Justice of the
3 Supreme Court" would exclude review by the court of
4 appeals on appeal to the case on the merits, so there
5 really is no second person looking over -- maybe the Chief
6 Justice would look over the motion, but the Chief Justice
7 would never preside over a hearing to recuse the presiding
8 judge. So is this person truly not subject to a second
9 look?

10 HONORABLE DAVID PEEPLES: The way I think
11 this would work is somebody -- I'm getting ready to hear a
12 motion to recuse and somebody wants to recuse me from
13 hearing that motion, I could disregard it, and they would
14 have to file the same thing or file something with the
15 Chief Justice. Presumably it would have some details.
16 "Peeples used to practice law with these people," goes
17 hunting or fishing or whatever, and whatever it might be.
18 Now, the truth of the matter is if that kind of allegation
19 is made, how likely am I to say, "I'm going full speed
20 ahead and hearing this case, and letting Wallace Jefferson
21 see all of that about me"? Very unlikely if it's a
22 plausible motion, but if I did that, I guess they would
23 make it a point of error and try to get the court of
24 appeals, if they lose the case and so forth, to take it up
25 and convince the court of appeals that the Chief Justice

1 should have granted that. That's a gutsy thing to do.

2 MR. ORSINGER: But it says it "may be
3 disregarded," makes me wonder if the Rules of Procedure
4 even allow appellate review of the attempt to recuse the
5 presiding judge. If this were adopted the way it is
6 written I'm wondering whether you have ordinary appellate
7 review.

8 CHAIRMAN BABCOCK: Justice Gaultney, and
9 then we'll take a break.

10 HONORABLE DAVID GAULTNEY: Just to follow up
11 on that, Judge Peeples, aren't you really saying that the
12 motion to recuse will be decided by the presiding judge
13 alone and not be subject to being looked at by some other
14 judge, except -- in other words, if the presiding judge is
15 making a ruling on it that you're not going to recuse
16 yourself, wouldn't that put it in the chain of appellate
17 review?

18 MR. ORSINGER: Well, not if it has no effect
19 and can be disregarded.

20 HONORABLE DAVID GAULTNEY: Right. No, I'm
21 suggesting different language.

22 MR. ORSINGER: Yes, okay. Right.

23 HONORABLE DAVID GAULTNEY: Not that it has
24 no effect, but that it's to be ruled on solely by the
25 presiding judge.

1 HONORABLE DAVID PEEPLES: As I look at this,
2 I'll admit that I didn't play this out in my mind to the
3 appellate level the way Richard and Justice Gaultney have
4 done. If this happens to me and somebody makes some
5 allegations, first of all, that are plausible, I don't
6 have a dog in this fight. I would assign somebody else to
7 hear that motion. Suppose they make some allegations that
8 are just nonsense, but they're there. I mean, they would
9 never be refuted or aired out in a trial. I probably
10 would grant it, or I don't know, but I just think that's
11 not going to happen very often. I think litigants when
12 they realize -- if this passes, when they realize I don't
13 get an automatic stop of everything by just filing a
14 motion, how many of them are going to file something with
15 the Supreme Court Chief Justice? I just -- I don't think
16 it will happen much, and I think we can work our way
17 through these things if they do happen, but I haven't
18 thought it out.

19 CHAIRMAN BABCOCK: Let's take a 10-minute
20 break.

21 (Recess from 10:51 a.m. to 11:04 a.m.)

22 CHAIRMAN BABCOCK: I think we're up to
23 subsection (e), on subpoena of judge.

24 HONORABLE DAVID PEEPLES: I thought there
25 was consensus at the last meeting that we needed to put

1 some limits on the ability of a movant to subpoena the
2 judge and that kind of thing, and so I drafted a brand new
3 paragraph, and "no subpoena or other discovery." If you
4 want that, go to the presiding judge or the judge
5 assigned. You just can't issue it and put the burden on
6 the judge to get it quashed. I mean, how does a judge get
7 something quashed? You hire a lawyer, you get a lawyer
8 friend to do it, and get a complaint filed against you for
9 doing that. This puts the burden on the person who wants
10 the discovery to convince the independent judge that he
11 ought to get it, and the second sentence says, you know,
12 you don't have to -- if it's issued in violation of this
13 rule, you don't have to get it quashed. You just ignore
14 it.

15 CHAIRMAN BABCOCK: Justice Gray.

16 HONORABLE TOM GRAY: I just wanted to see if
17 there was a consensus that that approval from the
18 presiding judge, a copy of it should be attached as part
19 of the subpoena. It seemed to be reasonable. That way
20 you would know as to whether or not you could comfortably
21 disregard the subpoena because it did not have the
22 approval of the presiding judge.

23 CHAIRMAN BABCOCK: Okay. Gene.

24 MR. STORIE: Chip, I think I'm trying to
25 back up a little bit, but I believe we need to address the

1 situation where the presiding judge is actually the judge
2 before whom the case is pending to begin with, because I
3 think that could happen.

4 HONORABLE DAVID PEEPLES: Gene, that's a
5 good point. On line 67 the reason I added the language
6 "who hears the recusal motion," that's designed to say
7 that that paragraph deals with the judge hearing the
8 motion, not hearing the case, and admittedly that applies
9 to the first clause -- I mean, it's in the first clause.
10 It's my intention that that language applies to both
11 clauses of that compound paragraph. Does that solve your
12 problem? In other words, if I'm -- if I assign myself to
13 hear a case, I'm recusable and objectionable. I mean,
14 they've got a right to both object and recuse me on the
15 case, but on a motion to recuse they don't under this.
16 That's the intent at least.

17 MR. STORIE: Okay, yeah. I'm not sure if
18 that's everything.

19 HONORABLE STEPHEN YELENOSKY: But that
20 doesn't solve the subpoena paragraph.

21 HONORABLE DAVID PEEPLES: Yeah, I think Gene
22 was just going back to where we left off before the break.

23 CHAIRMAN BABCOCK: Yeah. Justice Bland.

24 HONORABLE JANE BLAND: Okay, two things. On
25 that paragraph, I agree about the presiding judge being

1 bulletproof. Because I started thinking about it, if the
2 presiding judge grants the motion to recuse and he
3 appoints another judge, it's hard to see how -- it's just
4 like denying -- replacing a juror in voir dire when you've
5 granted a challenge for cause. It's hard to say that
6 there's any error that could affect the trial with the new
7 judge. If the presiding judge grants the motion to recuse
8 then it's really just the underlying judge's -- I mean,
9 I'm sorry, denies the motion to recuse, it's really just
10 the underlying judge's conduct that's going to be subject
11 to review and whether that recusal motion had any merit.
12 So to the extent I was disagreeing, you-all have persuaded
13 me.

14 Secondly, on the subpoena of a judge, do we
15 need this in the rule, because how often are we wanting
16 judges to testify at recusal hearings? My understanding
17 is that we do not want the judge that's involved to be
18 called as a witness in the proceeding, and it should be
19 almost never.

20 HONORABLE DAVID PEEPLES: But wouldn't this
21 paragraph say before you can do that you've got to get the
22 officer who is presiding over the hearing to agree, "I
23 want that judge to come testify"?

24 HONORABLE JANE BLAND: But aren't we going
25 to just encourage a lot of people to come and try to

1 subpoena the judge, or no? I mean --

2 HONORABLE DAVID PEEPLES: And get permission
3 from --

4 HONORABLE JANE BLAND: -- isn't this just
5 moving the motion to quash a subpoena ahead of time? Is
6 the idea then because sometimes judges are showing up for
7 these hearings because they've been subpoenaed or --

8 CHAIRMAN BABCOCK: We heard last -- at the
9 last meeting that judges are getting subpoenaed. It's not
10 just for their -- not just for their testimony, but also
11 documents. I was involved in a recusal case where a co --
12 not me, but one of the codefendants, the allegation was
13 that the judge was having ex parte communication with the
14 plaintiff's counsel, and they subpoenaed the judge's
15 e-mails responsive to that charge.

16 HONORABLE JANE BLAND: Right, but can't that
17 just be handled on a motion to quash, and why are we
18 putting something in the recusal rule about -- why are we
19 requiring this prior approval and --

20 CHAIRMAN BABCOCK: Because Judge Peeples is
21 trying to insulate the judges from having to move to quash
22 and kind of reverse the burden. In other words, if the
23 party seeking the information wants it, they've got the
24 burden of going to the judge in the first instance and
25 persuading the judge you ought to allow this discovery.

1 HONORABLE JANE BLAND: Okay.

2 CHAIRMAN BABCOCK: Which I think is a good
3 -- a good procedure. Roger.

4 MR. HUGHES: Well, and I do see the
5 discovery against a judge, and what I'm concerned -- why I
6 personally favor this at a minimum the way it's written is
7 the moment you draw the judge into discovery, I mean, if
8 they can routinely be drawn into discovery battles with
9 the counsel or the parties, I mean, it's almost a gotcha
10 situation by the judge. Once the judge has had to hire
11 somebody to file a motion to quash and maybe had to pay
12 money out of his or her own pocket to -- and incur time
13 away from other duties, I mean, it's a little hard to say
14 at that point that judge is going to not have perhaps a
15 little bit of bias against the party who is putting him
16 through all of this, and the party can almost get him in a
17 gotcha situation. "Well, you know, if you weren't biased
18 now, the fact that you've had to go out and pay \$5,000 to
19 file a motion to quash, I'll bet you're biased now."

20 CHAIRMAN BABCOCK: In the case I was
21 involved in, the county attorney showed up for the judge,
22 not showed up, but responded for the judge. I don't know
23 if that was the right way to do it or not, but I think any
24 time you file a recusal motion you run the risk of
25 irritating the judge if it gets denied, and that's why I

1 think most lawyers are loathed to do it. Justice
2 Gaultney.

3 HONORABLE DAVID GAULTNEY: I think this is a
4 good idea because sometimes the threat of the burden of
5 discovery in and of itself causes -- may cause the judge
6 just to say, "Life's too short."

7 CHAIRMAN BABCOCK: Well, that's true.
8 Justice Hecht.

9 HONORABLE NATHAN HECHT: I don't know if we
10 talked about this the last time. Is there a problem with
11 the other side of this where a judge wants to participate
12 in the recusal process?

13 HONORABLE DAVID PEEPLES: Yeah. Sometimes
14 judges want to be heard on it because the allegations are
15 offensive to them.

16 HONORABLE NATHAN HECHT: We've tried to
17 discourage that.

18 HONORABLE DAVID PEEPLES: Yeah. The problem
19 with that is once you testify, become adversary, and then
20 you may sure enough need to be recused. I think the judge
21 just needs to sit back and trust the system, but, yes,
22 sometimes they say, "I need to respond to some of this."

23 HONORABLE NATHAN HECHT: But should there be
24 something in the rule to discourage the personal
25 participation of the target judge?

1 CHAIRMAN BABCOCK: The voluntary
2 participation by the target judge.

3 HONORABLE NATHAN HECHT: Yeah. Right.

4 CHAIRMAN BABCOCK: You know, I can see
5 instances, and I don't think they're at the edge of
6 practice, where there has been improper contact, but the
7 only way to really establish that is by having some
8 discovery, and I like Judge Peeples' plan because right
9 now it's getting to be routine I think where judges are
10 just getting subpoenaed, and I think there needs to be
11 some -- some -- there's some barrier to that, and it needs
12 to be some sort of showing.

13 HONORABLE DAVID PEEPLES: As I said last
14 time, this kind of is like the request for documents.
15 Back up until the early Eighties the Texas Rules of Civil
16 Procedure said you've got to go to court and show good
17 cause to get documents in discovery. They changed that
18 sometime in the Eighties where you just ask for them, the
19 burden is on the resisting party to get it quashed. It's
20 just a changing of the burden of who's got to go forward.

21 CHAIRMAN BABCOCK: Yeah. Okay. Any other
22 -- yeah, Judge Yelenosky.

23 HONORABLE STEPHEN YELENOSKY: Well, just as
24 far as discouraging the judge from participating as he or
25 she wants to, it's my understanding there's an ethical

1 rule that we shouldn't testify as a witness without a
2 subpoena, so if you're controlling the subpoena, you're
3 controlling that, too.

4 MR. ORSINGER: But, you know, the defending
5 party may want to subpoena the judge also. I mean, let's
6 not rule that possibility out also.

7 CHAIRMAN BABCOCK: Sure. I think what
8 Justice Hecht was talking about, though, was that there is
9 a tendency sometimes for a judge to say, "My honor has
10 been attacked. I'm going to go down there and tell them
11 that that's not right," and there ought to be something
12 maybe saying, "Hey, resist that temptation."

13 HONORABLE STEPHEN YELENOSKY: Well, that's
14 the ethical rule, though, I think does that.

15 CHAIRMAN BABCOCK: Okay. If he gets
16 subpoenaed, that's another thing, but --

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE DAVID PEEPLES: I can draft a
19 sentence that says basically "only in extraordinary cases
20 when the judge who is going to hear the hearing approves
21 should the respondent judge come testify." If there's
22 agreement on that.

23 CHAIRMAN BABCOCK: Or maybe make a reference
24 to the ethical --

25 MS. PETERSON: To the ethical rule.

1 CHAIRMAN BABCOCK: To the ethical rule.

2 MS. PETERSON: Right.

3 HONORABLE STEPHEN YELENOSKY: Put it in the
4 comment.

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: I think a
7 comment would be better.

8 HONORABLE DAVID PEEPLES: Okay.

9 CHAIRMAN BABCOCK: Okay. Anything else on
10 subpoena of judge? How about sanctions?

11 HONORABLE DAVID PEEPLES: Okay. The
12 discussion last time, I think the gist of it was that the
13 sanctions in 215.2 are so strong that we don't want all of
14 those sanctions available, and it should be more narrowly
15 tailored. So I struck that language, which was from the
16 original, the existing rule, and limited it to attorney's
17 fees and expenses. Also, the group wanted notice and a
18 hearing, which is implicit but needs to be there, against
19 the attorney or the party or both.

20 HONORABLE STEPHEN YELENOSKY: Do you intend
21 to include the expenses that are caused by the disruption
22 of a trial?

23 HONORABLE DAVID PEEPLES: Incurred by the
24 party opposing the motion.

25 HONORABLE STEPHEN YELENOSKY: But in

1 opposing the motion or does it include expenses that are
2 collateral damages essentially from disrupting the trial.

3 HONORABLE DAVID PEEPLES: Lost profits.

4 HONORABLE STEPHEN YELENOSKY: Well, no. I
5 mean, your expert has to be flown back.

6 HONORABLE DAVID PEEPLES: Yeah. I guess the
7 way it is right now there would be a lot of discretion.
8 The judge who hears the recusal motion would have
9 discretion. If you want to make it more specific, I'm
10 open to that.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: The way this is written, it's
13 so similar to so many other rules and statutes that I
14 would interpret "expenses" to mean expenses associated
15 with the motion --

16 HONORABLE STEPHEN YELENOSKY: Right.

17 MR. ORSINGER: -- defending the motion, and
18 I don't have the Civil Practice and Remedies Code here
19 with me, but there is -- there's a little bit broader
20 standard in what you can recover under Chapter 10 for a
21 frivolous pleading than this, but if we intend -- and I
22 think it would be beneficial to allow you to recover the
23 costs associated with the necessity of rescheduling the
24 trial, that we better be more explicit or in the comment
25 we better say expenses are not limited to the expenses in

1 the motion and maybe attorney's fees are not limited to
2 the -- because you've -- let's say you're three quarters
3 of a way through a trial and now it's blown, and it was
4 really improper, it was a frivolous motion to recuse.
5 You've now lost all your attorney's fees for the first
6 week of trial. Maybe that should be subject to --

7 HONORABLE STEPHEN YELENOSKY: Well, if we
8 mean that, we should say it, because I at least as a judge
9 without that being explicit would say it's limited to --

10 MR. ORSINGER: I agree with you.

11 HONORABLE STEPHEN YELENOSKY: -- to what's
12 involved in the motion and the rest of it's sort of on the
13 system.

14 MR. ORSINGER: I agree with you. I think
15 this routinely means the fees and expenses of the motion,
16 wherever it appears in various places in the law.

17 HONORABLE DAVID PEEPLES: On the other hand,
18 if the strengthening that we have in here, if it gets
19 adopted, you know, telephone hearings, fax submission of
20 documents, quick action, and so forth, if all of that gets
21 enacted, I don't understand why a trial would ever be
22 delayed, if the presiding judge is doing his job. You
23 have an instant hearing on this thing.

24 MR. ORSINGER: Then the damages would be --
25 there would be no damages in those cases.

1 HONORABLE DAVID PEEPLES: For delay, but to
2 have to bring people and spend attorney's fees to get
3 ready for the motion, there would be some of that, but
4 damages for a delayed trial setting, if the presiding
5 judge or the assigned judge is doing his or her job, a
6 trial shouldn't be delayed if this rule is strengthened, I
7 think.

8 HONORABLE STEPHEN YELENOSKY: Right, but do
9 we want the rule to allow for the possibility, in which
10 case if it only happens in one percent of the trials,
11 nobody can meet their burden of showing anything but
12 attorney's fees in the motion, fine, but as it's written
13 now I don't think it allows for the possibility of the one
14 percent case.

15 CHAIRMAN BABCOCK: Richard Munzinger.

16 MR. MUNZINGER: I agree with the analysis of
17 the rule as written. It only would apply to the expenses
18 occurred in the motion, and since the order would be
19 saying that this was done frivolously or would be
20 sanctionable conduct, the expenses that occurred by the
21 other party ought to be paid, the resulting expenses, and
22 a rule which envisions or permits that is also a rule
23 which encourages people not to file spurious, frivolous
24 motions, including pro se litigants, and the expenses can
25 be quite substantial if you're in a trial or a hearing.

1 We don't know what the eventualities are that
2 can be during real life, but they can be very expensive
3 when experts are charging five and six and seven hundred
4 dollars an hour, and they're on a plane or what have you,
5 and somebody's got to pay for that. Why should I pay for
6 it because you were a dumbbell and filed the motion?

7 CHAIRMAN BABCOCK: Yeah, Justice Gray.

8 HONORABLE TOM GRAY: I think the phrase
9 "after notice and hearing" needs to be moved up to
10 immediately after "if" so that it reads "if, after notice
11 and hearing." The point of that being that the first
12 phrase, "The trial judge has already made the
13 determination that it was frivolous," and that needs to
14 precede it.

15 HONORABLE DAVID PEEPLES: Yeah.

16 CHAIRMAN BABCOCK: Uh-huh.

17 HONORABLE TOM GRAY: And unless the -- and
18 given the conversation with regard to (e), you may not
19 want to add this. I thought the respondent judge might
20 not be considered within the word "incurred by" -- "the
21 expenses incurred by the party." If that's clear, that's
22 fine, but I was going to add the phrase "including the
23 respondent judge" as to what attorney's fees and expenses
24 have to be paid as sanctions. In other words, the
25 respondent judge could recover his or her attorney's fees

1 if any were incurred in resisting discovery.

2 CHAIRMAN BABCOCK: Judge Christopher is
3 shaking her head no, but Richard Munzinger has his hand
4 up.

5 MR. MUNZINGER: This limits fees and
6 expenses to be incurred by the party opposing the motion.
7 Number one, a party -- let's pretend it's a two-party
8 lawsuit. The party may not oppose it, but you still have
9 to have the hearing because the motion has been filed.
10 The judge doesn't have any authority, it seems to me, so
11 I'm not so sure we need the language opposing the motion,
12 and in a multiparty case one party may oppose, another one
13 may not, but they all incur expenses. So if you were to
14 say that the fees and expenses incurred by the other
15 parties to the litigation necessarily resulting or what
16 have you, but this would limit an award of the expenses to
17 those who oppose the motion.

18 MR. ORSINGER: Well, if the motion is
19 frivolous why shouldn't it be limited to those who oppose
20 the motion?

21 MR. MUNZINGER: Well, because I don't oppose
22 the motion, I'm just neutral on the motion, do whatever
23 you want to do, but I still incur expenses because of the
24 delay that's occasioned by the filing of a frivolous
25 motion by my adversary. I've been hurt by it. Do I have

1 to oppose the motion to protect my expenses? Why should I
2 have to oppose the motion? I can't stop it from being
3 filed, and if it meets the requirements of the rule that
4 it sets out the facts and what have you, arguably, and
5 delay or expense is incurred, why should I have to file
6 some kind of formal opposition to the motion in order to
7 recover my expenses as a litigant that are incurred by the
8 frivolous conduct of somebody else?

9 HONORABLE STEPHEN YELENOSKY: You oppose the
10 recusal, though.

11 MR. MUNZINGER: Say again.

12 HONORABLE STEPHEN YELENOSKY: It sounds like
13 you are saying you shouldn't have to oppose the filing of
14 the motion. You don't, but because they have a right to
15 it, but you oppose the recusal. That's what makes you --
16 and I do think you have to oppose the recusal in order to
17 claim these things. You're saying not?

18 MR. MUNZINGER: I don't know why I would.

19 CHAIRMAN BABCOCK: There are three
20 situations. The current Rule 13a, subpart (b), says "any
21 other party," so it would be a codefendant or another
22 plaintiff separately represented perhaps, "may file with
23 the clerk an opposing or concurring statement at any time
24 before the motion is heard." So codefendant files an
25 opposing statement. Then they would be an opposing party,

1 but they might just be silent as Richard says, and yet
2 they'd still incur a lot of expense. They have to go to
3 the hearing, and if it's frivolous then why shouldn't they
4 get --

5 HONORABLE DAVID PEEPLES: How about if we
6 say "by the party responding to the motion"? Does that
7 open it up a little bit more?

8 HONORABLE TOM GRAY: But they may not file a
9 response.

10 CHAIRMAN BABCOCK: They may not file a
11 response.

12 HONORABLE TERRY JENNINGS: Just say
13 "opposing parties." Now, that wouldn't include the judge,
14 but --

15 MR. MUNZINGER: "Other parties." "Other
16 parties." We're coplaintiffs. I'm an intervenor. I can
17 be victimized by the frivolous conduct of a pro se
18 litigant or another lawyer. Why shouldn't I recover my
19 expenses?

20 HONORABLE STEPHEN YELENOSKY: The judge is
21 going to be, if represented, by the AG or county attorney,
22 aren't they? Do we really want to --

23 CHAIRMAN BABCOCK: Yeah, I don't know
24 opening it up to the judge is such a good idea. Carl.

25 MR. HAMILTON: I thought we decided earlier

1 that the hearings and the trial were not going to stop, so
2 why are there going to be any expenses for the stopping of
3 the trial?

4 MR. ORSINGER: It's only if they're filed
5 during the trial that they're not stopped. If they're
6 filed 24 hours before the trial, they are stopped.

7 MR. HAMILTON: But then where is there any
8 harm done if they're filed 24 hours before?

9 MR. ORSINGER: Because it may not get heard
10 for six days, in which event you've lost your opportunity
11 on the docket, so you've got to get reset six months
12 later.

13 HONORABLE STEPHEN YELENOSKY: Or people have
14 already traveled there.

15 CHAIRMAN BABCOCK: Ralph.

16 MR. DUGGINS: How about if you said
17 "incurred by any party," "by any affected party," or "any
18 party affected by the motion," broaden the ability there?
19 And then I wasn't here for the meeting where apparently
20 there was a discussion about dropping the sanctions in
21 215, but I don't know why we wouldn't want to allow the
22 judge hearing the motion to have the option to do that.
23 You may have a party, a pro se plaintiff, who can't pay an
24 award of the fees and costs, but I would certainly
25 understand if their pleading was struck. I mean, I don't

1 know why we would differentiate between a frivolous
2 recusal motion and any other violation of Rule 13, but I'm
3 not suggesting we revisit that discussion.

4 CHAIRMAN BABCOCK: Okay. Anybody else?
5 Justice Hecht.

6 HONORABLE NATHAN HECHT: Two questions.
7 Should there be punitive sanctions apart from recovery of
8 costs and attorney fees, and should the -- should an
9 appropriate sanction be for these serial movants that they
10 can't file any more motions to recuse? That's a -- I
11 notice that is a frequent practice in the Federal courts,
12 that after somebody abuses the filing process enough times
13 the circuit says you can't file anymore stuff like this or
14 you can't file it without leave of court, or they put
15 restrictions on it, and of course, the statutes already do
16 that with so-called tertiary motions, and I wonder if to
17 stop this recusing up the ladder and recusing over and
18 over again and filing the motion to recuse in every case,
19 there shouldn't be some direction that no more motions to
20 recuse can be filed, just at some point we've heard all
21 we're going to hear.

22 CHAIRMAN BABCOCK: There is a part of the
23 Civil Practice and Remedies Code, isn't there --

24 HONORABLE NATHAN HECHT: Yeah.

25 CHAIRMAN BABCOCK: -- for multiple recusals?

1 HONORABLE NATHAN HECHT: Tertiary. It's in
2 the Government Code and the Remedies Code, what the
3 statute calls tertiary motions and --

4 CHAIRMAN BABCOCK: What kind of a motion is
5 that?

6 MR. ORSINGER: The Supreme Court is going to
7 tell us.

8 HONORABLE NATHAN HECHT: Well, we've got a
9 case on it, and unfortunately it's not as clear as it
10 might be, but the idea when the bill was introduced was
11 that enough's enough, and after a while you just can't
12 file any more motions to recuse, and I wonder if that's
13 not a good idea.

14 HONORABLE STEPHEN YELENOSKY: But that's
15 only in that case, right? The tertiary rule restricts you
16 in that case.

17 HONORABLE NATHAN HECHT: Well, what the
18 circuit does is they after -- after a prisoner or a pro se
19 litigant or anybody, but it's typically prisoner or pro se
20 cases, files enough things that are frivolous they say you
21 can't file anything in any case anymore without first
22 asking a judge to let you do it.

23 HONORABLE STEPHEN YELENOSKY: Yeah, like a
24 vexatious litigant. I was just saying right now we don't
25 have anything for recusal --

1 HONORABLE NATHAN HECHT: Right.

2 HONORABLE STEPHEN YELENOSKY: -- that would
3 restrict you from filing --

4 MR. ORSINGER: That's correct.

5 HONORABLE STEPHEN YELENOSKY: -- a hundred
6 in one case --

7 HONORABLE NATHAN HECHT: Right.

8 HONORABLE STEPHEN YELENOSKY: -- and then
9 filing another one in a different case.

10 HONORABLE NATHAN HECHT: But shouldn't we,
11 or is that really a problem? I don't know.

12 HONORABLE DAVID PEEPLES: Let me just say,
13 I'm open to the suggestion of authorizing some kind of
14 fine, which I think you were suggesting, or after a
15 certain number you can't file any more, but I do think
16 this. If this substantially gets enacted, I think it
17 takes away a lot of the incentives that cause people to
18 file these, because there can be such quick action. I
19 mean, the rule will be much stronger if we enact this, and
20 I think that takes away the incentives, and I think
21 behavior is affected by incentives. And a second point --

22 HONORABLE STEPHEN YELENOSKY: Only rational
23 behavior.

24 HONORABLE DAVID PEEPLES: Pardon? Yeah,
25 rational.

1 HONORABLE STEPHEN YELENOSKY: Sometimes it's
2 irrational.

3 HONORABLE DAVID PEEPLES: Sometimes it is.
4 Sanctions is, you know, kind of like subsequent
5 punishment. I'd rather affect behavior on the front end
6 by empowering actors to administer the system with some
7 strength and also have the ability to punish after the
8 fact, but I think that it's -- and that's more effective
9 than relying too much on if you abuse this we're really
10 going to zap you. I'm much more comfortable with
11 empowering the people that administer this rule.

12 CHAIRMAN BABCOCK: Okay. Justice Bland.

13 HONORABLE JANE BLAND: I like Justice
14 Hecht's idea about some sort of vexatious recuser
15 because -- or, you know, motion to recuse person because
16 the vexatious litigant statute won't touch this problem --

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE JANE BLAND: -- because it's very,
19 very difficult to get somebody adjudicated as a vexatious
20 litigant, because there have to be a certain number of
21 cases, they have to lose them, they have to be finally
22 adjudicated, so all the appeals have to be concluded and
23 all has to happen within a very short time frame, but in a
24 lot of these or in some of these abusive cases where
25 they're filing multiple motions to recuse they've also

1 filed multiple lawsuits and stayed in Federal court and
2 maybe in more than one county, and they also sue multiple
3 parties, like, for example, the counsel in the case or
4 other -- and so you've got this explosion of cases all
5 over the place and then the next thing is that there's all
6 these motions to recuse, and if we had something similar
7 to the vexatious litigant statute, which after a certain
8 number of motions to recuse you would have to -- that have
9 been all denied, assuming that you had not -- that none of
10 them had been meritorious, seek permission from the
11 administrative judge to proceed and put up a cost bond,
12 like -- like we do with the vexatious litigant statute.

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Yeah, and I
15 mentioned the irrational part because it's not that -- at
16 least in my experience it's not that I want to be
17 protected against recusal motions because, you know, if
18 it's an irrational recusal motion, it gets dealt with by
19 somebody else and I go onto something else or it gets sent
20 back to me, but we do have people against their own
21 interests recuse judge after judge after judge, and, you
22 know, it takes years to get the matter resolved because of
23 that, and it seems to me that the disincentives aren't
24 going to work on that person.

25 CHAIRMAN BABCOCK: What fact pattern are we

1 trying to talk about here? I mean, Justice Hecht, is it a
2 litigant who files multiple recusals against the same
3 judge, or is it, as Judge Yelenosky's saying, like every
4 time a new judge gets assigned then there's another
5 recusal motion, so it's -- you know, it's never ending
6 really?

7 HONORABLE NATHAN HECHT: Well, I'm wondering
8 about both, because -- and picking up on Judge Yelenosky's
9 point just now, you know, sanctions only work against
10 people that behave rationally and have money, and some of
11 these people don't fit into either group, and it's the
12 very filing of the motion that is disruptive, interrupts
13 counsel, proceedings may have to stop, presiding judge has
14 got to go look at it, and I don't know how many of these
15 are a problem -- are that big of a problem. I just don't
16 know, but my sense is that it does happen from time to
17 time that someone will either file multiple cases and
18 multiple motions to recuse in multiple cases, always
19 losing, but just knowing that it's a tactic, and that's
20 really all it is, or the up-the-chain motions that you get
21 in some cases that the tertiary statute is supposed to
22 address, but we still have problems with it.

23 HONORABLE JAN PATTERSON: And are you-all
24 talking about pro se cases or those with lawyers as well?

25 HONORABLE NATHAN HECHT: Well, just any.

1 HONORABLE TRACY CHRISTOPHER: It's both.

2 HONORABLE NATHAN HECHT: Yeah, anything.

3 Where somebody just is --

4 HONORABLE JAN PATTERSON: But, I mean, do we
5 have a problem with both?

6 HONORABLE NATHAN HECHT: I don't know.

7 HONORABLE DAVID PEEPLES: I think there's
8 more -- the repeated filers, there's more of a problem
9 with pro ses than represented people.

10 MR. MUNZINGER: Yes, but the rule you've
11 drafted requires detailed factual pleadings and not
12 conclusions or mere allegations of bias or prejudice, but
13 it requires a detailed and specific -- I think those were
14 the words you put in the rule -- allegations of fact,
15 which ought to be a prophylactic from the kind of serial
16 motion that you're thinking about.

17 HONORABLE STEPHEN YELENOSKY: No, it doesn't
18 stop the motion.

19 MR. MUNZINGER: Yes, but --

20 HONORABLE STEPHEN YELENOSKY: If they file
21 the motion, I still have to refer it. Then another judge
22 has to determine it doesn't meet the detailed
23 requirements.

24 CHAIRMAN BABCOCK: Justice Sullivan.

25 HONORABLE KENT SULLIVAN: I would like to

1 suggest that stopping the disruption, which we've decided
2 was the primary evil, actually is an important goal with
3 respect to the -- even the irrational filers, the pro se
4 or prisoner litigant, and that is because I think there is
5 a sense of power in knowing that -- or accomplishment, if
6 you will, in knowing that by filing the motion you've
7 stopped the proceeding. In other words, they see cause
8 and effect, and they feel some sense of empowerment that
9 is I think very problematic. We have built in the defect
10 in our proceeding in that sense.

11 We've all already -- I think all agree that
12 we also have a problem with respect to the competent
13 person who is, if you will, an evil tactician, who knows
14 that, in fact, this is an automatic continuance or they
15 gain some temporary advantage by filing it and disrupting
16 the proceeding, and that's why if I can, I would go back
17 and make another quick pitch for my half-baked idea, and
18 that is I wonder if we aren't better off with simply
19 saying that the mere filing of a motion to recuse does not
20 stop any proceeding. To the extent that the proceeding or
21 some imminent proceeding would cause some horrific harm,
22 you simply ask that the ruling be stayed or that the
23 proceeding be stayed by the presiding judge, which
24 presumably the presiding judge would act quickly if you
25 could make such a showing, if you could show good cause;

1 but the fact of the matter is, is that by having a general
2 rule that requires, regardless of the substance of the
3 motion, that you stop everything immediately, you have
4 built in the defect that you are now trying to cure; and I
5 suggest if we switch the burden of proof, we would go a
6 long way.

7 MR. JEFFERSON: I take the other side of
8 that.

9 HONORABLE KENT SULLIVAN: I would be
10 disappointed if you did.

11 MR. JEFFERSON: I think actually most
12 lawyers try to do the right thing, and I think knowing
13 that if you file a motion like this it's got the automatic
14 disruption to it, it discourages people from filing what
15 they think aren't solid motions, so I think actually
16 the --

17 HONORABLE KENT SULLIVAN: Well, but you've
18 now --

19 HONORABLE STEPHEN YELENOSKY: That's just
20 you.

21 MR. JEFFERSON: But there's --

22 HONORABLE KENT SULLIVAN: But that applies
23 -- that applies to the people who are going to obey the
24 rules, and the whole point of this exercise, it seems to
25 me, is to deal with and discourage the people who for

1 tactical reasons or for irrational reasons are really
2 trying to circumvent the rules and cause problems. I
3 mean, I agree with you, if everybody who could trigger
4 this, who could push this button, fit your description we
5 wouldn't be here talking about it at all.

6 MR. JEFFERSON: And if you take your logic
7 then wouldn't as a possible by-product actually
8 encouraging the filing of more of these motions because it
9 doesn't -- all it does is put a motion out there that
10 makes someone rule but doesn't have the consequence of
11 actually stopping anything.

12 HONORABLE KENT SULLIVAN: But Judge Peeples
13 has dealt with that, because to the extent what your
14 positing is more motions, i.e., frivolous motions, you now
15 have sanctions.

16 MR. JEFFERSON: I don't think they're
17 frivolous. I think they would just be not necessarily
18 either as well thought out or as well-grounded as right
19 now before I file a motion, I think, you know, 80, 90
20 percent of all the lawyers in the state before they file a
21 motion, they're not going to do it unless --

22 HONORABLE KENT SULLIVAN: If they're not
23 well-grounded it seems to me you don't want to stop the
24 proceeding because you're not going -- you shouldn't have
25 stopped the proceeding with that as the hypothetical, and

1 as a practical matter they're going to get overruled. I
2 don't see what the harm is in shifting the burden and
3 saying you've simply got to show cause as to why the
4 proceeding should stop, and given the other parts of this
5 proposal, given that you can very quickly, for instance,
6 just be an emergency motion like any other motion saying,
7 you know, "Your Honor, Mr. Presiding Judge, we ask that
8 you stop the proceeding," and I've seen -- I've actually
9 been in a proceeding as a litigant in which I saw that
10 happen in Federal court. It can happen under the right
11 circumstances. So the circuit sent an order, faxed it in,
12 and said proceedings are stayed, and I was there and
13 watched it all play out, so it can happen in the right
14 circumstances.

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: I would think if the court
17 can hold someone in contempt for not fixing their roof,
18 that contempt could -- contempt could be a vehicle for
19 obstruction of justice for --

20 CHAIRMAN BABCOCK: I knew we were going to
21 tie this all together.

22 MR. ORSINGER: I want to reconsider my vote
23 on the roof then.

24 MR. HAMILTON: -- for filing frivolous
25 motions, then the court ought to be able to hold them in

1 contempt.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: Would this address your
4 concerns, Justice Hecht? "Before the party who filed at
5 least two prior motions to recuse the same judge, which
6 have been denied, may file a third motion against the same
7 judge, the party must obtain the written approval of the
8 regional presiding judge. The written approval must be
9 attached to the motion."

10 HONORABLE NATHAN HECHT: Well, something
11 like that. I just raise the issue. When Senator Harris,
12 as I recall, introduced the bill on tertiary motions he
13 asked about it, and I thought the basic idea was good. I
14 was afraid that some of the issues that have come up would
15 come up about where is the -- which strike is the third
16 strike, but, you know, I wouldn't necessarily tie it to a
17 number. If a guy files two or three questionable motions,
18 I wouldn't be opposed to him filing a fourth, but, you
19 know, the presiding judges can tell when somebody just
20 keeps filing something over and over again that doesn't
21 have any merit to it, at some point it should stop, but I
22 wonder if it's really that much of a problem or that we
23 should address it this way.

24 But I just don't think that the sanctions
25 are going to be very effective because most of the time, I

1 hope, presiding judges will be reluctant to oppose
2 sanctions. We don't want to get in another sanctions war
3 here, and the real offenders may not respond to sanctions.

4 CHAIRMAN BABCOCK: Just there is another
5 tactical aspect to this thing, and that's the sanctions
6 wars that you're talking about, because I know I was
7 involved in some litigation recently where the plaintiff's
8 lawyer filed a sanction just every time they filed a
9 motion, that, you know, there's a sanction because they
10 didn't do this, and there are probably seven or eight or
11 ten sanction motions, you know, pending, and that causes
12 antagonism on the other side. You have to report to your
13 client, of course, and then they may have other, you know,
14 reporting issues that they have to deal with, so I think
15 Judge Peeples has struck the right balance here, with a
16 little tweaking as we've discussed about expanding it to
17 parties, not just the opposing parties, but as Munzinger
18 said, but that's just my thought. Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: We were
20 talking over here. I mean, this may be farfetched and
21 maybe never has happened, but the way it's set up, it's a
22 King's X, and if you had a judge in some rural county and
23 it's the only judge around, somebody comes in on a TRO,
24 and the other party gets notice because that judge's
25 practice is to try to not do them ex parte, a motion to

1 recuse would prevent issuance of a TRO. We had a holiday
2 period where we had a visiting judge sitting in, and
3 somebody came in on a TRO, and pursuant to our local rules
4 the other party was there because they could be reached
5 and there was no reason not to have them there, and they
6 filed an objection. And, of course, that's King's X on
7 that visiting judge or bad, but, you know, we were able to
8 get -- as I understand it, I wasn't there at the time, we
9 were able to get some other judge, elected judge, to deal
10 with the TRO, but it is an interesting jurisprudential
11 question. We put -- we allow somebody on the allegation a
12 grounds for recusal to stop anything, King's X.

13 MR. JEFFERSON: Except for good cause.

14 HONORABLE STEPHEN YELENOSKY: Yeah, but, you
15 know, difficult for a judge. I think most of us who get
16 motions to recuse, the counsel we get from others and give
17 to ourselves is stop everything and refer it.

18 CHAIRMAN BABCOCK: Okay. Yeah, Roger.

19 MR. HUGHES: Well, I take to heart the idea
20 that some serial offenders may not be deterred easily or
21 at least by rational, but one thing I have seen is
22 somewhat effective is I saw one Federal judge say, "You
23 know, what I can do is order you that you don't get to
24 proceed pro se. You keep wanting to file these suits,
25 you're going to have to cough up money," and that seemed

1 to bring a halt to some of this. So perhaps a way of
2 dealing with this serial sanction person for whom
3 meaningless money orders aren't a deterrent is simply to
4 say if you don't -- after you've been sanctioned you don't
5 get to file another motion to recuse unless you pay your
6 prior sanctions in full. In other words, if the judge
7 awards attorney's fees and expenses because it's
8 frivolous, you don't get to file another recusal motion
9 without proof that you have paid those in full.

10 CHAIRMAN BABCOCK: There's a statute in
11 Federal court, I think it's 28 USC 1915, that authorizes
12 the judge to do that, but I don't know if we have any
13 similar provision in our state law.

14 HONORABLE NATHAN HECHT: I don't think so.

15 MR. HUGHES: Or to say you can't file it
16 without proof of payment of the prior sanctions in full or
17 the permission of the presiding judge. That might put a
18 startling halt to some of this.

19 CHAIRMAN BABCOCK: Judge Peeples, do we want
20 to talk about disqualification a little bit?

21 HONORABLE DAVID PEEPLES: No.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE DAVID PEEPLES: We do need to wrap
24 it up.

25 HONORABLE SARAH DUNCAN: No, don't want to

1 go there.

2 CHAIRMAN BABCOCK: I'm talking about the
3 paragraph that's --

4 HONORABLE DAVID PEEPLES: Yeah.

5 CHAIRMAN BABCOCK: -- little (i) that you've
6 added the language.

7 HONORABLE DAVID PEEPLES: Yeah. The thought
8 that procedural aspects of this rule ought to apply to
9 disqualification, but you don't waive it by not being
10 timely and so forth, and it's the appellate review
11 provisions don't apply, so that's why we did that.

12 CHAIRMAN BABCOCK: Yeah, one thing, just
13 reading this quickly, it says "but disqualification is not
14 waived by failure to comply with time limits, and
15 appellate review of disqualification is governed by other
16 rules." It almost looked to me like the waiver applied to
17 both things.

18 HONORABLE DAVID PEEPLES: Yeah.

19 CHAIRMAN BABCOCK: And I don't think you
20 intended that.

21 HONORABLE DAVID PEEPLES: No, I don't.

22 CHAIRMAN BABCOCK: Either a period and a new
23 sentence or a semicolon maybe.

24 HONORABLE DAVID PEEPLES: Rewrite it you're
25 saying?

1 CHAIRMAN BABCOCK: Whatever. You are
2 nervous travelers, you two. You don't have to leave now.
3 You've got plenty of time to get to your flight.

4 HONORABLE TRACY CHRISTOPHER: Okay. Well,
5 we don't have a car that takes us there, so we have to get
6 a cab and everything for our 12:50 flight, and we're
7 leaving at 11:45, so I just -- I couldn't get any traction
8 with Judge Peeples on this, but still, again, I would like
9 the Court or this group to consider mandamus review of
10 denials of recusals because it is such a huge penalty to
11 the parties at the end of the day that everything gets
12 overturned, huge penalty. So if the recusal wasn't done
13 right in terms of, you know, didn't get referred right or
14 if the judge should have been recused, I mean, you know,
15 that's a failure of the system and shouldn't penalize the
16 side who, you know, nominally opposed the recusal.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: I just want to say I
19 am very thankful I get to practice law with all of you and
20 have a very happy Thanksgiving. I'm just putting that out
21 there because it's the holidays, and I hope y'all have a
22 good one.

23 CHAIRMAN BABCOCK: Now, don't fight, you
24 two.

25 HONORABLE TRACY CHRISTOPHER: No, we've made

1 up.

2 CHAIRMAN BABCOCK: Apparently. Justice
3 Peebles.

4 HONORABLE DAVID PEEPLES: Chip, I want to
5 say that I just appreciate immensely the wisdom of this
6 group, and the insight on all this has been --

7 CHAIRMAN BABCOCK: I feel a lot of love in
8 this room, I tell you. Just for those of you who are --

9 MR. KELLY: Just call it an oasis of love.
10 We've got a place like that in Houston.

11 CHAIRMAN BABCOCK: There you go.

12 MR. KELLY: Just one.

13 CHAIRMAN BABCOCK: Just so we reward the
14 nonnervous travelers among us, Richard Orsinger, why don't
15 you just five or ten minutes --

16 MR. ORSINGER: Let me make a suggestion,
17 Chip. Let's skip to the civil cover sheets, which is
18 something we might more effectively accomplish in the time
19 available.

20 CHAIRMAN BABCOCK: There's no way we're
21 going to get through civil cover sheets in five minutes.

22 MR. ORSINGER: All we've got to do is decide
23 what to put in the comment. Five minutes or ten minutes?

24 CHAIRMAN BABCOCK: Well, 10 minutes.

25 MR. ORSINGER: I'm willing to give it a

1 shot. I mean, do you mind?

2 CHAIRMAN BABCOCK: No, it's fine with me.

3 If we can knock that out, that's great.

4 MR. ORSINGER: Okay. Moving quickly, this
5 is Item 6 on the agenda. You-all will recall that the
6 Office of Court Administration wants a civil cover sheet
7 standardized so the information they get by computer is
8 the same, but the local judges want to be able to add
9 stuff that they need for local administrative purposes.
10 So we have proposed a rule that would require a civil
11 cover sheet when you file the initial pleading, and we've
12 been through all of this, and it's not that popular, and
13 the vote was close, and we even had one tied vote that the
14 Chair had the opportunity to break, and so what we're
15 talking about today is the last sentence in the proposed
16 rule, "The filing of a cover sheet is for administrative
17 purposes and does not affect or determine how the action
18 is commenced in district or county court." That was the
19 subcommittee's original proposal to try to safeguard the
20 misuse of this cover sheet to game the system and injure
21 somebody, and some people didn't like that in the rule,
22 they wanted it in the comment. Other people wanted other
23 things in the comment.

24 So what I've done is I've taken all of the
25 transcript, I've taken all the alternatives, and I've

1 written out several alternative comments, and they're
2 listed here numbers 1 through 6. The first one is to move
3 that last sentence down into a comment. The second one is
4 a rewrite that was kind of discussed. The rule requires
5 the party initiating a civil case to submit to the court
6 clerk, and the word is "submit" because we had a lot of
7 discussion about filing, that if something is filed it
8 triggers the Rules of Procedure, so the proposal is you
9 could use the word "submit" instead of "file." "Submit to
10 the court clerk at the time the original petition is filed
11 a civil case cover sheet containing information that the
12 clerk needs to make a monthly case activity report to the
13 Office of the Court Administration."

14 Now, that's -- that's what the rule
15 requires. The rule requires that of everybody, but the
16 rule allows the local judges to pile on and add other
17 forms or other things to the form, so (2) is not a full
18 statement of civil cover sheet practice in Texas, but it
19 does state what's required in civil cover sheets. I have
20 two item 2's, I'm sorry. The second item 2 is "Local
21 judges may require that additional information be
22 submitted in a civil case cover sheet that is to be used
23 in docket administration." You could combine those
24 together. In other words, the first one states that
25 there's required information above, but the local judges

1 can require additional information.

2 Proposal 3, "The civil case cover sheet
3 neither replaces nor supplements the filings and service
4 of pleadings or other papers as required by law." That
5 comes out of the Federal form civil cover sheet, only I
6 took off the "except as provided by local rules of court"
7 because we really don't want local rules of court
8 requiring service of these cover sheets or anything else.
9 I think it's archaic and hard to understand, and it's --
10 so I'm not attracted to it, but it's what the Feds do, so
11 we could consider that.

12 No. 4, another proposal, "The information in
13 the civil cover sheet does not constitute a discovery
14 request, response, or supplementation, and is not
15 admissible in evidence," and that comes from the Harris
16 County civil information cover sheet form, except that
17 they say "is not admissible at trial," and I changed that
18 to use "not admissible in evidence" so that it would cover
19 pretrial hearings, but other than that change, paragraph
20 four is borrowed from the civil cover sheet in Harris
21 County for civil case, general civil cases.

22 No. 5, another alternative, "The civil cover
23 sheet does not constitute a pleading or discovery, is not
24 admissible in evidence, and does not affect the
25 substantive rights of any party." That was advocated in

1 discussions here at our last meeting, and that's really
2 nobody voted in favor of it, but that was a view that was
3 expressed as a good way to put a comment.

4 And then No. 6 is "The civil case cover
5 sheet need not be served on other parties" or "shall not
6 be served on other parties in the case." It's hard to
7 serve it other than with your citation because you really
8 have no other parties when you file your original
9 petition, but there's been some issue about service, and
10 so you could put in there that you don't have to serve it.

11 This basically are the alternatives that are
12 out there and that were discussed in the committee, and
13 they're typed up like I said I would do last time for us
14 to decide if we like any of them. The Supreme Court may
15 or may not adopt this rule. If they do adopt a rule, they
16 may pick one or more of these comments, but they're put
17 here for us to consider in seven minutes.

18 CHAIRMAN BABCOCK: You said there were only
19 six. My sheet has actually 13 since you have two number
20 2's.

21 MR. ORSINGER: Oh, really? Okay. Well,
22 okay, let me go on then. Thank you for pointing that out.

23 CHAIRMAN BABCOCK: I'm not trying to
24 encourage that behavior. I'm just noting it.

25 MR. ORSINGER: Okay. Let's move on then.

1 PROFESSOR CARLSON: Like a bad David
2 Letterman.

3 MR. ORSINGER: Apparently I wasn't using the
4 official version of the proposal. No. 6, "The filing or
5 presentation or submission as an alternative of a cover
6 sheet is for administrative purposes only."

7 CHAIRMAN BABCOCK: You're not as funny as
8 Letterman either.

9 MR. ORSINGER: "The filing, presentation, or
10 submission of a cover sheet is for administrative purposes
11 and does not affect substantive or procedural rights of
12 the parties to the litigation." Another alternative, "The
13 civil cover sheet is for statistical purposes only and
14 does not affect substantive rights." No. 9, "Civil cover
15 sheet is for recordkeeping purposes only." No. 10, "Civil
16 cover sheet is for administrative purposes only and cannot
17 be used for any other purpose in the litigation."

18 No. 11, "The purpose of this rule is to
19 gather information and does not prejudice the rights of
20 parties." No. 12, "The civil cover sheet need not be" or
21 "shall not be served." Those are all the alternatives
22 that came out of our last debate. They've been typed up
23 here for evaluation and discussion.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: I move that we accept No. 10

1 and add it to the rule instead of making it a comment.

2 PROFESSOR CARLSON: Second.

3 HONORABLE SARAH DUNCAN: I second that.

4 PROFESSOR CARLSON: Third.

5 CHAIRMAN BABCOCK: Okay. Any other
6 comments? Justice Patterson.

7 HONORABLE JAN PATTERSON: I assume that
8 means that we also 2 and 3 are -- I mean, they're not
9 alternatives, are they?

10 MR. ORSINGER: You can mix and match these
11 any way you want.

12 HONORABLE JAN PATTERSON: My only comment is
13 on No. 2, which should be 3, that we may want to say
14 "local rules" instead of "local judges."

15 CHAIRMAN BABCOCK: Gene.

16 MR. STORIE: Would we want to say something
17 like "cannot be used by any party or attorney," because I
18 can see where the court itself might want to know
19 something about the case in terms of scheduling?

20 CHAIRMAN BABCOCK: Uh-huh.

21 MR. ORSINGER: Well, when you say "is for
22 administrative purposes only," scheduling to me would be
23 embraced by "administrative purposes."

24 MR. STORIE: I agree. I'm a belt and
25 suspenders guy sometimes.

1 CHAIRMAN BABCOCK: Did we not -- Sarah,
2 check me on this, but didn't -- last session didn't we
3 talk about how at least there was some people that thought
4 that we shouldn't try to imagine what purpose a civil
5 cover sheet might be used for by a litigant?

6 HONORABLE SARAH DUNCAN: I have no memory.
7 My friend Angie could help me find a record and I can read
8 it, but memory is not something I do.

9 CHAIRMAN BABCOCK: Well, mine is gone, too,
10 but I thought that there was discussion about, well, how
11 can we -- we can't imagine what purpose the civil cover
12 sheet might come into play in a lawsuit and to at the
13 front end say you can't use it for any other purpose might
14 not be the right thing to do.

15 MR. ORSINGER: Well, I read the transcript
16 recently, Chip, and what I --

17 CHAIRMAN BABCOCK: Sorry, I should have
18 asked you, not her.

19 MR. ORSINGER: What I recall is that we
20 believed that the need for the cover sheet is for -- for
21 the state to acquire information. That's why OCA came to
22 us.

23 CHAIRMAN BABCOCK: Right.

24 MR. ORSINGER: But then the Harris County
25 civil district judges told us that they use it for

1 administrative purposes and they add stuff to it that OCA
2 doesn't require.

3 CHAIRMAN BABCOCK: Right.

4 MR. ORSINGER: So we found out that the
5 state has the information gathering need and the Harris
6 County judges have the administrative need, but I felt
7 like we all agreed that none of the litigants should be
8 using this cover sheet that's used just for administrative
9 or informational purposes to try to gain an advantage
10 against another litigant.

11 CHAIRMAN BABCOCK: Yeah. It's coming back
12 to me a little bit because I've got a case that involves
13 whether -- you know, when a lawsuit was filed, and the
14 civil cover sheet is being used by both sides as evidence,
15 not that it's conclusive or anything, but it's just it was
16 signed and dated by a guy on a particular date, which is
17 important to the litigation, and it's being used as
18 evidence, and having a comment or rule like this might
19 preclude that.

20 MR. ORSINGER: Sure, it would, and the point
21 is that you shouldn't be using a cover sheet to do that.
22 You should be using the file stamp on the original
23 petition or the complaint.

24 CHAIRMAN BABCOCK: Well, what if the file
25 stamp was changed?

1 MR. ORSINGER: Well, then you ought to have
2 a hearing on changing the file stamp rather than saying in
3 that particular case "We've got a second piece of paper
4 that wasn't changed."

5 CHAIRMAN BABCOCK: Justice Patterson.

6 HONORABLE JAN PATTERSON: There was also
7 some reference to its use in venue and identifying
8 parties, but I think -- I think where we came out was that
9 any use of that is more or less a gotcha use and that it
10 should be used only for administrative purposes, and the
11 way very often these are filled out is a little bit of a
12 last minute sort of thing, so -- and not by attorneys. We
13 had that discussion.

14 CHAIRMAN BABCOCK: I'll tell you another
15 example. There was a pro se litigant who filed a lawsuit
16 and pled it a particular way and then when in responding
17 to the motion to dismiss said, "You know, no, no, no, that
18 wasn't my claim at all. You know, my claim was something
19 else," and the court looked at the civil cover sheet where
20 the box was that this pro se litigant checked, and it was
21 what they had pled, not what they later said they were
22 trying to plead, and that was used by the court as
23 evidence that this other thing had not been pled and had
24 not been intended to be pled by the pro se litigant, and
25 that went up on appeal to the First Circuit and was

1 affirmed.

2 MR. ORSINGER: See, in both of those
3 instances you're putting material weight on what is in a
4 cover sheet, and the question is, is that -- are we now
5 elevating the cover sheet to something that's as important
6 as your original petition, and we're not -- I don't think
7 any of us really -- or at least most of us didn't want to
8 do that. The OCA brought this idea to us and said, "We
9 want to gather some information." The Harris County
10 judges said, "Well, we use it for administrative
11 purposes." Do we want to create a document that can be
12 relied upon in litigation for litigants to prove things,
13 strike things, get sanctions, or, you know, whatever?

14 CHAIRMAN BABCOCK: Just to be -- not even
15 the devil's advocate, but to take the other side of that,
16 this is something that either a lawyer or a pro se party
17 is filling out. It's a representation to somebody to the
18 court, to the administrative office, whoever it is, it's a
19 representation about their lawsuit. You know, what if
20 they send a letter to their mother and said, "You know, by
21 the way, you know, I'm suing for copyright. I'm not suing
22 for trade secrets," and you get a hold of that letter?
23 You couldn't use that in court as an admission against
24 your party opponent? I would think you could. Yeah,
25 Judge Evans.

1 HONORABLE DAVID EVANS: Well, I was one of
2 those persons that felt like you could not imagine the
3 possible uses of a cover sheet and where it might come up
4 in, or the only person, but maybe the way to avoid this
5 debate going on is to say, "The civil cover sheet is for
6 administrative purposes only and does not constitute a
7 pleading in the case," because a pleading with an
8 admission against him -- with an admission in it may have
9 greater weight than an informational use and I --

10 (Phone ringing)

11 CHAIRMAN BABCOCK: Somebody likes your
12 comment, for sure.

13 HONORABLE DAVID EVANS: I once applied, but
14 if it's not a pleading, if it's not a pleading then the
15 likelihood of it becoming an admission that is frozen, a
16 judicial admission, is just unlikely. You could amend the
17 cover sheet to correct it, and so I just want to point out
18 that if you say it's not a pleading and can be amended by
19 a party, you may have voiced some of your concerns,
20 Richard, and that allows people to look at it and give it
21 the credibility and weight that it might deserve in some
22 circumstance that it might become evidence.

23 CHAIRMAN BABCOCK: Pam.

24 MS. BARON: I don't think OCA is going to
25 want amendments to these things. I think the idea is when

1 the clerk enters the information into the online docket
2 sheet, they have the information. They can put it in,
3 it's somewhat standardized by the cover sheet, and the
4 idea is that you're not going to go back and keep changing
5 it, but it's a way of them to identify how many cases in
6 our system are family law cases or how many are these kind
7 of cases, and the point is not to use it as an admission
8 against anything. And I think that Richard Orsinger, not
9 Richard the Second, appropriately captured this --

10 CHAIRMAN BABCOCK: No, he is Richard the
11 Second.

12 MS. BARON: -- in his item 10, which just
13 says it's only for administrative purposes, it's not to be
14 used in litigation, period. That's succinct. It's to the
15 point. I think it said everything that we talked about
16 last time we raised this.

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: I was just going to say a lot
19 of times people don't fill out a cover sheet with as much
20 care as they do a pleading, and maybe even an assistant
21 does it, so you shouldn't really use that for anything.

22 CHAIRMAN BABCOCK: Okay. Anything else?
23 Well, thanks, everybody. The schedule for next year is
24 going to take some doing as always. I think we'll try to
25 meet in January, wouldn't you think, Justice Hecht?

1 HONORABLE NATHAN HECHT: Yes.

2 CHAIRMAN BABCOCK: So we'll try to get that
3 out as quickly as we can, and thanks everybody for another
4 great year.

5 MR. ORSINGER: Thank you.

6 (Applause)

7 (Meeting adjourned at 12:03 p.m.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 * * * * *

2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6
 7
 8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 21st day of November, 2009, and the same was
 12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
 14 services in the matter are \$ 946.00 .

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
 17 this the 8th day of December, 2009.

18

19

D'Lois L. Jones
 D'LOIS L. JONES, CSR
 Certification No. 4546
 Certificate Expires 12/31/2010
 3215 F.M. 1339
 Kingsbury, Texas 78638
 (512) 751-2618

20

21

22

23

24 #DJ-270

25