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11 HEARING OF THE SUPREME COURT

12 CODE OF JUDICIAL CONDUCT COMMITTEE

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21 Taken before Patricia Gonzalez, a Certified
22 Shorthand Reporter in Travis County for the State of Texas,
23 on the 13th day of February, 2004, between the hours of
24 1:00 p.m. and 4:50 p.m. at the Supreme Court of Texas,
25 201 West 14th Street, Austin, Texas 78701.

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1 CHAIRMAN BABCOCK: Okay. We're on the record

2 here in the courthouse for the Texas Supreme Court. My
3 name, for the people on the phone, is Chip Babcock, Chair of
4 this task force appointed by the Court. And to start,
5 Chief Justice Phillips was unable to be with us today, but
6 he has delegated to the most senior member of the Court --
7 seems hard to believe -- Justice Hecht, for some remarks on
8 behalf of the Chief.

9 JUSTICE HECHT: Thanks, Chip, and thank
10 you-all for being here and for agreeing to serve on this
11 important working group.

12 In the last couple of years, we have had to --

13 JUSTICE LANG: I'm sorry. But I can't hear.
14 This is Doug Lang. I don't know about anybody else on the
15 phone.

16 UNIDENTIFIED SPEAKER: It's very light.

17 UNIDENTIFIED SPEAKER: Yeah. I can't hear
18 either.

19 UNIDENTIFIED SPEAKER: I can't hear either.

20 HON. RUDOLFO GONZALEZ: The same thing over
21 here. Judge Rudy Gonzalez.

22 CHAIRMAN BABCOCK: Do we need to maybe move
23 the speakerphone into the middle?

24 MR. GRIESEL: We're at our limits on that
25 issue.

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1 (Laughter)

2 (Simultaneous discussion)

3 THE REPORTER: Are we still on or off?

4 CHAIRMAN BABCOCK: Be off the record for a

5 second.

6 (Discussion off the record)

7 JUSTICE HECHT: Okay. Perhaps you can hear
8 better, for a moment anyway. I want to thank you for
9 joining this group and for agreeing to provide your service
10 in this important way.

11 The last few years, we've had to rethink rules
12 that we have been very comfortable with for a long time, and
13 so we drop from your expertise, your knowledge and your
14 experience in the profession and on the Bench to help us
15 craft Rules of Judicial Conduct that will be clear and
16 useful to the judges of Texas in the future.

17 The Chief Justice is out of town today. His
18 father is ill in Dallas, and so he asked me simply to
19 welcome you. And I know all of my colleagues would like to
20 express to you our genuine appreciation for the service
21 you're going to give us.

22 So, Chip, that's all I have. Thank you.

23 CHAIRMAN BABCOCK: Thank you, Justice Hecht.

24 Justice Jefferson, who is the Court's liaison
25 to this task force, has some opening remarks.

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1 JUSTICE JEFFERSON: Thank you, Chip. I would
2 also like to note that Justice Wainwright is present, and
3 Justices Hecht and Wainwright and the whole Court is very
4 pleased that you would be willing to give of your time and
5 effort. And so on behalf of the Court, I'd like to extend
6 our appreciation for your time and talent to this project.

7 We've asked you to do no less than advise the
8 Court on the standards governing the conduct of all judges
9 in Texas, standards that must be consistent with the
10 Constitution of the United States.

11 This is the first time we've engaged in a
12 thorough review of the code since March 1994 --

13 UNIDENTIFIED SPEAKER: Excuse me. I hate to
14 interrupt. But I can't hear.

15 UNIDENTIFIED SPEAKER: I can't either, real
16 well. It's very dim.

17 UNIDENTIFIED SPEAKER: Very weak here in
18 Lubbock.

19 HON. RUDY GONZALEZ: It's the same thing here
20 in Edinburg. This is Judge Gonzalez.

21 UNIDENTIFIED SPEAKER: I can barely hear in
22 Houston.

23 (Laughter)

24 (Simultaneous discussion)

25 JUSTICE JEFFERSON: Okay. We'll try again.

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1 UNIDENTIFIED SPEAKER: It would also be
2 helpful if you would identify the speaker. I don't know.
3 Maybe you did. I couldn't hear that.

4 CHAIRMAN BABCOCK: Yeah. We're trying.

5 UNIDENTIFIED SPEAKER: Okay.

6 CHAIRMAN BABCOCK: We did identify
7 Justice Jefferson, who is in the process of speaking.

8 JUSTICE JEFFERSON: And I say this: We are on
9 a very limited budget here. We would prefer to have held

10 this in a way that we could reimburse expenses and all of
11 that, so we're working under some constraints here, but we
12 will try our best to speak up.

13 This is the first time we've had a chance to
14 engage in a thorough review of the code since March of 1994,
15 and the last substantive change occurred in August 2002 in
16 response to the United States Supreme Court's decision in
17 Republican Party of Minnesota vs. White.

18 The Court deliberated long and hard about this
19 committee's composition, and we are fortunate to have an
20 expert on the topic of judicial conduct in Dean James
21 Alfini. He is not present at the moment, but we expect him.
22 Dean Alfini also sits on the ABA's Committee looking over
23 the rewrite of their Model rules.

24 I reminded Chief Justice Phillips at the
25 conference that Dean Huffman, who's also a member, was the

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1 Army's judge advocate general, and in that capacity, he
2 oversaw more judges than exist in Texas and that they ought
3 to not only listen to what he said but salute it.

4 (Laughter)

5 UNIDENTIFIED SPEAKER: Not always, Justice
6 Jefferson.

7 (Laughter)

8 JUSTICE JEFFERSON: The Chief liked that
9 motto.

10 We have distinguished professors, judges from
11 all levels of the judiciary and lawyers who understand how

12 impartiality in judges -- or, truly, partiality in judges
13 can affect the administration of justice.

14 Soon after the Supreme Court of the United
15 States released its decision in Republican Party of
16 Minnesota vs. White, the Court asked Chip to chair an
17 advisory committee to determine whether our code's
18 restrictions on speech were compatible with the Supreme
19 Court's ruling. That committee recommended changes, and the
20 Court adopted most of them in August of 2002.

21 In the process of making those changes, the
22 Court determined that the code would benefit from a more
23 thorough review, both to fix what has not worked, and more
24 importantly, to satisfy ourselves that our code, while
25 ensuring an independent and impartial judiciary, complies

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1 with the United States Constitution.

2 Seana Willing is the executive director of the
3 Judicial Conduct Commission and Judge Monica Gonzalez, who
4 is here -- I hope both of them will share with us some of
5 the changes that disciplinary body had seen since 1994.
6 Judge McCorkle, who has studied the code extensively, can
7 provide needed insight into its practical application.

8 The outside world continues to evolve in the
9 way they view judges. The public has shown renewed interest
10 in the global phrase "appearance of impropriety," and
11 through such things as editorials and televised confirmation
12 hearings, is insisting that our judges take seriously their
13 obligation to promote public confidence in the integrity and
14 impartiality of the judiciary.

15 So what the Court is asking this committee to
16 do is its best work and its best views on what the preamble
17 to our code called "Basic Standards that Govern the Conduct
18 of Judges" and help us maintain the high standards of
19 personal and professional conduct of the Texas judiciary.
20 Beyond that, nothing is sacred and it's all on the table in
21 this review of our code.

22 I have just a few comments on Canon 5 and the
23 ABA study on that canon. Last year, in February of 2002,
24 the Bar Association's Standing Committee on Judicial
25 Independence released "Report of the Working Group on the

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1 First Amendment and Judicial Campaigns," and we have copies
2 here for people who are in attendance. I'm just going to
3 talk about a few of their findings and what their work was
4 about.

5 They reviewed the White case, and for those of
6 you who are not familiar, in the White case, the Minnesota
7 Supreme Court's Canon of Judicial Conduct, it prohibited
8 candidates for judicial election from announcing their views
9 on disputed legal and political issues. The Court
10 determined that that Canon violated the First Amendment, and
11 we have in Texas -- or we had in Texas a similar provision.

12 Now, a narrow reading of the White decision
13 led many to conclude that the campaign speech provisions of
14 the ABA Model Code are still viable. With regard to
15 the -- what's called "pledges or promises" clause, Justice
16 Scalia -- I'm quoting from the report. "Justice Scalia

17 seemingly ducks the issue by stating: "...this is a
18 prohibition that is not challenged here and on which we
19 express no view."

20 Although the Court explicitly declined to rule
21 on the constitutionality of the pledges or promises clause,
22 or what is termed the "commit clause," both of these
23 provisions and the misrepresent clause are like the announce
24 clause, in that they are content-based restrictions on a
25 candidate's speech and would, therefore, be subject to

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1 strict scrutiny if challenged in subsequent cases. Those
2 clauses are something that we expect this committee to look
3 at in determining whether Canon 5 needs to be further
4 revised to comply with the constitution or to comply with
5 the practicalities in Texas election. Justice Scalia, in
6 that opinion, considered definitions of "impartiality," and
7 I know that the ABA Model Code has written a proposed
8 definition that would, they believe, comport with the
9 decision in that case, Republican Party vs. White.

10 I attended the ABA committee meeting last week
11 on judicial -- on the Model Code of Judicial Conduct, and
12 I'm just going to summarize some of the issues that that
13 committee is looking at. And I'm sure that Dean Alfini can
14 talk to us in more detail about their study.

15 Can the format and organization of the code be
16 improved? And I'm talking about our code. Should the
17 concept of appearance of impropriety be addressed in the
18 code more explicitly?

19 There was a lot of discussion at the meeting

20 last week about whether the code needs to look into pro se
21 representation, about whether judges can promote lawyers to
22 take cases for the poor and whether that's a violation of
23 the current code or whether it should be. There was a
24 witness who said it shouldn't be, because that furthers the
25 concept of the administration of justice.

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1 What types of statements should judges be
2 permitted to make, especially as judicial candidates, during
3 or independent of campaigning for office? What significance
4 should attach to statements, affiliations or interest of
5 members of a judge's family?

6 We see this -- the Court has seen it quite
7 recently in the class action context. When judges or their
8 family members might be impacted by a decision that the
9 Court reaches, does that mean that the Court itself needs to
10 recuse or the class definition has to be changed? Are there
11 limitations on judges' involvement with civic, charitable,
12 educational and other organizations that are appropriate and
13 necessary?

14 These and other issues are currently being
15 studied by the American Bar Association, and we think that
16 they ought to be studied by this committee as well. There
17 was a lot of discussion at the committee last week about
18 judges who are impaired by alcohol abuse or other issues and
19 whether that ought to be more expressly addressed in our
20 Code of Conduct.

21 These are just some of the issues that the ABA

22 Committee is considering. As they progress on their work,
23 we will share their findings and conclusions with you.

24 And I believe, Chip, that that's all I have to
25 say, except -- let me say this: Chip has been fantastic for

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1 the Court. He chairs the Supreme Court Advisory Committee
2 and he has spent countless hours and days doing this work.
3 And every time we've asked him to help us study another
4 issue, he has volunteered very graciously to do so, and I
5 think you'll experience what a great leader he is in
6 reviewing our rules and in this -- in this case, our Code of
7 Judicial Conduct.

8 So on behalf of the Court, Chip, thank you
9 very much for your work.

10 CHAIRMAN BABCOCK: Thank you, Justice
11 Jefferson.

12 Can the people on the phone hear better now?

13 CHORUS OF VOICES: Yes.

14 CHAIRMAN BABCOCK: Well, we have all moved
15 down the table to be closer to you. So if you can't hear,
16 just speak up.

17 And Justice Jefferson's very kind remarks
18 about me should be shared with somebody that you probably
19 already know but will come to know, which is Debra Lee, who
20 is my assistant in Houston and is employed by my law firm,
21 Jackson Walker, which the firm contributes an enormous
22 amount of time and money to this very worthwhile effort.

23 And kind of an overview, this process is going
24 to be free, open and hopefully fun. Free, in the sense

25 that, as Justice Jefferson and Justice Hecht remarked, there

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1 are no funds to underwrite this. So we're all contributing
2 our time and money to this effort. Open in the sense that
3 our proceedings are open to the public. There is a
4 transcript being taken of these proceedings which will be
5 available to the public and on a Web site that Debra is
6 working on getting up and running. And, hopefully, this
7 project, in addition to being some work and effort, will
8 also be fun.

9 I know that Justice Jefferson thanks me. I
10 thank the Court, because probably the most fulfilling hours
11 I spend as a lawyer is working on these issues that the
12 Supreme Court Advisory Committee and now this task force are
13 called upon to address for the Court, which brings me to a
14 comment about the nature of our service.

15 We are an advisory committee, and nothing more
16 and nothing less. The Court is free or not to take our
17 advice. Because the advise -- the Supreme Court Advisory
18 Committee has been around so long and some of its members
19 have outdated any existing member of the Court, there's
20 sometimes -- who's giving the advice and who's taking it
21 gets lost on our membership, and I know that that won't
22 happen here. We may have very strongly held views on
23 things. They may be unanimous, and, yet, the Court may not
24 choose to take our advice, and that's fine. And I know the
25 Court has different views on some of the things that we're

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1 going to be studying, including our first topic, which is
2 Canon 5.

3 As Justice Jefferson indicated, we have
4 already spent some time studying this, but only in a very
5 hurried way, because we were trying to react to the US
6 Supreme Court's decision, and there was, as you all know, a
7 pending lawsuit brought by a now-sitting member of the Court
8 challenging Canon 5 -- the announce clause of Canon 5, which
9 was ultimately struck down by Judge Nowlin, the federal
10 judge here in Austin.

11 I'm going to ask the chair of our
12 subcommittee, Jim George, in a minute, to make some remarks.
13 For those of you who don't know Jim, he is probably the dean
14 of the First Amendment lawyers in Texas, has a long standing
15 varied practice dealing with free speech issues, and he is
16 certainly a worthy chair for our subcommittee.

17 As we go forward in this process, we are going
18 to try to work through subcommittees; and that is, you-all
19 should have received notice of appointment to a particular
20 subcommittee, which is chaired by one of our members, and
21 as we go forward into the upcoming meetings, the next one
22 being April 16th on Canons 2 and 3, we hope that the
23 subcommittees will be able to meet in advance of our
24 meetings and will be able to report their views to the full
25 committee on the various issues.

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1 In dealing with Canon 5, it seems to me that
2 we have a number of different and sometimes conflicting
3 interests to consider. We have the interests of the
4 speaker -- that being the judges or candidates for judicial
5 office -- and their right to speak or not to speak as they
6 choose. We have the rights of the listeners; that is, the
7 people who are going to be voting for those candidates for
8 judge and who are going to monitoring their fitness and
9 performance as they go forward in their tenure. And we have
10 the interest of the system, our judicial or governmental
11 system, what is best for it in terms of promoting confidence
12 that we fairly and impartially administer the law. And all
13 of these three interests, of course, have to be faithful to
14 our overriding commitment to the federal and state
15 constitution, the First Amendment to the US Constitution and
16 Article 1, Section 8 of our Texas Constitution.

17 There is, you should know, an
18 interrelationship suggested by the White case to another of
19 our rules, which is not under study by this committee, that
20 is the recusal and disqualification rules. The Supreme
21 Court Advisory Committee spent a substantial amount of time,
22 probably 18 months, working on revision to our recusal and
23 disqualification rules dealing with a whole bunch of issues,
24 not including the White case, because we had finished our
25 work before that case was decided. I believe that the Court

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1 is, at some point in time, probably going to remand that
2 rule for our consideration in light of what this task force

3 decides. So that is something that's lurking in the
4 background, and, obviously, is going to influence what we
5 do.

6 Sorry about the long-winded nature of my
7 remarks, but there you have it. And so, Jim, why don't you
8 give us your thoughts and we'll get the discussion started,
9 and whoever wants to chime in, chime in.

10 MR. GEORGE: Thank you, Chip. This is
11 Jim George, for those of you who are far away in telephone
12 land.

13 It seems to me that there is a decision tree
14 kind of analysis that needs to be made in connection with
15 what to do about Canon 5. The first one is whether or not
16 we should have any sort of restrictions on the speech of
17 candidates for judicial office or judicial office holders
18 other than the requirements of due process such that would
19 lead to recusal or disqualification of those people to
20 handle particular cases or particular matters that would be
21 policed by the litigants themselves so that if Justice Jim
22 George makes a speech or statement about a pending case or
23 anything else that indicates that that person wasn't
24 impartial, that would be a matter to be adjudicated by some
25 other judge and determined on the basis of a general

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1 standard of impartiality. And we would go down the road so
2 that the two competing constitutional values that are at
3 stake in this discussion -- the one is free, unfettered
4 discussion of political and judicial issues in an
5 environment where election to office is a judicial and

6 political function and the due process rights of the
7 litigants and the fairness of the system -- are competing,
8 to some extent, in this discussion.

9 The Supreme Court, in the White case, has made
10 it clear that candidates for judicial office and judicial
11 office holders have a First Amendment Right for broad
12 ranging speech. What exactly the limits of that right are,
13 we don't know. It is also clear from that opinion, and
14 as -- its conclusion about what is or is not impartiality
15 outlines some of the barriers or limitations placed on this
16 topic by the due process clause of our state and federal
17 constitution.

18 So there is a decision tree. The first
19 decision is: Should we have a Canon 5? Should we limit the
20 speech of judicial conducts with a rule that is separate and
21 apart from the policing of our fairness of our system
22 through the litigants process and the people involved in the
23 system?

24 That is an important decision point, because
25 if you decide that they -- competing values are such that

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1 there should be such a limitation on the speech of judicial
2 office holders and candidates, then you have to go down a
3 path of what is the desirable limit and what limit on that
4 speech or political activity is within where the boundary is
5 on the limit of the White case and what you can reasonably
6 anticipate would follow from the White case.

7 So one path makes our job real easy. "There

8 shouldn't be any limits," and we can take Canon 5 out and
9 we'll all go home. The second is a harder and much harder
10 process, because it is a decision about line drawing that
11 is -- both represents an analysis of political and social
12 values and legal limitations put on the Court by this
13 constitution as interpreted by the Supreme Court of the
14 United States.

15 So it seems to me that we at least ought to
16 examine the first proposition first, why there are not -- a
17 rule that is enforced independently of anything else in the
18 world -- litigant's rights or anything else -- a rule that
19 can be enforced like Canon 5 as amended now can be enforced
20 should be the path we go down. And I don't have any
21 predetermining views on that. I, as a kind of libertarian
22 in my view of many things in life, the least -- the fewer
23 rules we have as a general matter, the better off we are,
24 but starting with that proposition, I'm not going to take a
25 particular position about that. I'd like to hear from the

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1 committee about: How do we make the judgment of whether or
2 not we should have a rule and what are the competing
3 considerations?

4 CHAIRMAN BABCOCK: Okay. That throws it open.
5 Who wants to jump in? And if you're on the phone, please
6 identify yourself for the purposes of our court reporter and
7 the rest of us.

8 JUSTICE LANG: George. This is Doug Lang in
9 Dallas.

10 I've read Chip's letter of August 19, 2002 to

11 the Court, and it looks like the prior committee -- and I
12 guess a lot of those folks are on this committee -- have
13 already kind of been -- visited this, and I know that we're
14 probably not bound by that analysis, but I'd appreciate kind
15 of hearing where you guys came out -- I mean, I can read
16 what's in the letter, but I think you only have a few pages
17 to discuss it.

18 MR. GEORGE: Chip, you were the chair. You
19 get to go first.

20 CHAIRMAN BABCOCK: Judge Lang, we did have
21 some very spirited discussion, and I think there were
22 differing views among the committee, but I think it would be
23 fair to say that the majority of the committee, by a fairly
24 wide margin, felt that the promises clause as redrafted or
25 suggested for redraft would be constitutional and were in

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1 the best interests of our system of government. However,
2 there were dissenting views on the subcommittee, and the
3 Court, and specifically Justice Hecht in a written opinion,
4 felt that -- in the interest of the fact that we were in an
5 election cycle at the time, that it was important for the
6 Court to act at that time and then sit back and reflect with
7 more deliberation than had been possible at that time, given
8 the fact that we tried to study as hard as we could in the
9 short time we had, and that was the reason, in fact, for
10 this committee being formed.

11 I should point out as well that there has been
12 a change in the Court since that time -- some substantial

13 change, and that the Court of then may not have the same
14 view of this issue as of the Court of today.

15 So I think -- even though I chaired this
16 committee before, I don't know if it should be given any
17 sort of weight other than people trying to do the best they
18 could in a short period of time.

19 MR. GEORGE: Chip, let me add to that -- this
20 is Jim George again. What we did is -- those of you who may
21 have gone back and tried to reconfigure where we were in the
22 summer or -- late spring or summer of 2002 when the White
23 case was decided and we had to make some decisions, the
24 Canon 5, as we started, with had a general prohibition about
25 the kind of things that judicial candidates and judicial

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1 officers could say generally.

2 We, as a group, believed that the breadth of
3 that language violated the holding in the White Minnesota
4 case and struck the Canon (1). We recommended that the
5 Court take that out of the canon, which the Court did. We
6 then redid the -- or suggested language, which is now in --
7 I guess it's (1) -- Canon 5 -- I don't know how they
8 renumbered it, but I guess it's --

9 CHAIRMAN BABCOCK: Subpart (i).

10 MR. GEORGE: (1)(i) that says a judicial -- "A
11 judge or judicial candidate shall not make pledges or
12 promises of conduct in office regarding pending or impending
13 cases." The concept was that there was a limitation in the
14 holding in the White Minnesota case that prohibit -- that
15 would allow bans on statements by judicial candidates or

16 judges relating to particular cases or particular -- or if
17 the case wasn't pending, some discussion about, "This case
18 is going to be filed," and somebody who is a judge or
19 judicial candidate couldn't say anything about what they --
20 make a promise of what they would do or pledge of what they
21 would do about either of those categories.

22 The consensus was that we should have, as a
23 matter of policy, such a rule to be enforced by the same
24 enforcement mechanism that all of the other canons are
25 enforced by, and the Court agreed with that. There we

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1 made -- Canon 3(B)(10) had similar language, and we modified
2 that to reflect the same kind of statements about pending or
3 impending cases.

4 So we start, today, with the wisdom, or lack
5 thereof, of the Court and under our recommendations of
6 having limited Canon 5 fundamentally to statements about
7 pending or what I call "identifiable" -- we called them --
8 used the language in the amendment "impending cases." That
9 is, litigation that hadn't been -- wasn't pending yet but
10 was about to be. And you can't make a promise of what
11 you're going to do in those or you can't make a pledge of
12 what you're going to do in those cases. That's the limit
13 today.

14 There is another limit about whether or not
15 you can overstate your qualifications in Canon 5 that some
16 of us, including myself, thought probably violated White vs.
17 Minnesota, which says you can't knowingly or recklessly

18 misrepresent the identity, qualifications, present position
19 or other facts concerning the candidate or an opponent. You
20 can't say something that you know is untrue about an
21 opponent. The majority of the committee and the Court
22 believed it was a good idea to leave that in.

23 There is a whole other section about using
24 your power of holding office or running for office to
25 promote somebody else that is involved in this, and in party

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1 politics, that becomes an issue of some moment where you
2 endorse the Democratic or Republican or Libertarian
3 candidates for other offices, that, on the face of this, the
4 language that is now Canon (2) would be implicated.

5 Those are -- those are some of the decisions
6 that we made to leave that there. Fundamentally, it is my
7 memory -- and the older I get, the less reliable that
8 gets -- but I think I remember -- Justice Jefferson and Chip
9 I know were there for all of the meetings, but that it was
10 the general consensus that we changed it to make it
11 constitutional, and that's all we did. And we probably
12 succeeded in that, although no court has tested us and the
13 Court's homework on that.

14 So -- Doug was there. He probably remembers
15 it best of all.

16 DEAN ATTANASIO: Yeah. This is
17 John Attanasio. I was there for the meetings, too. I mean,
18 I -- it is possible there's no question that the Supreme
19 Court could come out and strike down the pledges and
20 promises clause, but there's no evidence whatsoever we have

21 from Republican Party vs. White that they will do so. They
22 don't even do any meaningful dicta in Republican Party vs.
23 White that suggests that would be unconstitutional and -- I
24 mean, I think -- this was certainly my view on the
25 committee.

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1 In light of the very small competing
2 interests, which Chip articulated well, of due process, and
3 also in light of the strong competing interest in terms of
4 recusal, judges would have to recuse themselves, it seems to
5 me, in any number of cases if they start making pledges and
6 promises of the kind that are currently prohibited in the
7 revised version of Canon 5. Without a holding from a court,
8 particularly without a holding from the United States
9 Supreme Court, it just seems to me that to further fiddle
10 with the language of Canon 5 and to relax the pledges and
11 promises prohibition would be unwise.

12 Republican Party vs. White was a five/four
13 decision with Justice O'Connor writing a pretty strong -- I
14 have it in both my case book and my treatise, but Justice
15 O'Connor writing a pretty strong concurring opinion, and the
16 four dissenters, I think, wrote very tough dissenting
17 opinions.

18 You never like to handicap the Court, but
19 I'd be -- I, for one, would be very surprised if they struck
20 down a pledges and promises clause of the kind that exists
21 in the current -- additional Canon.

22 MR. GEORGE: Doug Laycock had a comment.

23 PROFESSOR LAYCOCK: Yeah. I was on the
24 committee. It was not actually by a wide margin. It was
25 pretty close. But I do think we had time to do our

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1 homework. The legal analysis, I think, is pretty complete,
2 and I have confidence in it. If somebody has additional
3 information about the behavior of judges or judicial
4 candidates or how this works in the real world, that's
5 certainly something we should take a look at. But in the
6 absence of that kind of information, I'm comfortable with
7 what the last committee did, and this is sort of in the
8 nature of a motion for rehearing, I think.

9 The distinction we drew is a little more
10 specific than at least one way Jim put it in his summary.
11 It's not just a difference between statements of
12 identifiable cases and broader statements about general
13 issues. It's also a difference between a statement of your
14 present viewpoint and inclination and a pledge or promise
15 about what you will do in the future. It's a difference
16 between the present tense and the future tense. And the
17 pledge or promise to decide an issue in a particular way in
18 the future is a pledge or promise that, "I won't listen to
19 the other side. I will not consider" -- "I will not act as
20 a judge. I've already made up my mind." And the majority
21 of the committee believed that can be prohibited. It's been
22 prohibited for a long time in the Canons. Minnesota vs.
23 White expressly reserved the issue.

24 I share John Attanasio's instincts about where
25 the Court is going, but I really don't care where the Court

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1 is going. We shouldn't give it away. If they want to
2 strike it down, let them strike it down, but we shouldn't
3 give it away when they've expressly reserved the issue and
4 expressly not struck it down.

5 And the second piece of this is "no material
6 false statements of fact," and the Supreme Court has always
7 said false statements of fact are not protected with the
8 First Amendment. They are sometimes protected incidentally
9 to avoid (inaudible) effects, and negligent false statements
10 of fact are protected. But willful or reckless false
11 statements of fact are not protected, and we drafted that
12 to be in this body of law.

13 Now, as Jim pointed out -- it may not be
14 obvious, the most familiar body of law about false
15 statements of fact is defamation, and this rule is entirely
16 consistent with the general law of defaming your opponent,
17 but it's broader than that because it also includes material
18 false statements of fact that might be positive about
19 yourself. You can't claim that you argued 24 cases in the
20 Supreme Court if you've never been there. But it has to be
21 quite specific and verifiable false statements of fact.

22 And then the third one, the rule against
23 participating in other election campaigns going on at the
24 same time, endorsing the candidate for governor and attorney
25 general and so forth, there really isn't much law

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1 specifically to point on that. That rule has also been
2 around for a very long time and the majority of the
3 committee was not inclined to give it away without some
4 stronger indication that it was unconstitutional.

5 And, obviously, underlying all of this is, you
6 know, a deeper issue about elected judges, and if we're
7 going to have elected judges, can we run judicial elections
8 in a way that isn't wholly inconsistent with due process
9 considerations of not prejudging cases and maintaining
10 judicial temperament and so forth.

11 I share John Attanasio's view that a judge who
12 has made a pledge or promise that he's going to decide a
13 particular issue in the future in a particular way ought to
14 have to recuse himself. That's a different committee,
15 apparently. We don't have control over what that rule is
16 going to say, but he ought to have to recuse himself. And
17 if we're right about that, then the pledge or promise is
18 really a fraud on the voters. The minute he makes the
19 pledge or promise, he disqualifies himself from delivering
20 on the pledge or promise. So I don't see any reason to rely
21 solely on the recusal mechanism and not allow -- and not
22 have a restriction on pledges or promises on the front end.

23 Very briefly, I'd like to say one other thing
24 about the decision tree that Jim outlined. It may not be --
25 it may not be that we want to consider first, and in the

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1 abstract, should we rely only on recusal or should we have

2 campaign rules, because the answer to that question may
3 depend on whether we think the campaign rules are capable of
4 drafting or workable. If we couldn't do anything better
5 than just say "Don't go too far," I think I'd say, "Let's
6 just wait and do it after the statement has been made and
7 rely on recusal." But if we can draft workable more or less
8 bright-line rule, "no pledge or promise about what you'll do
9 in the future, no material false statement of fact," I think
10 that's workable enough to make it worthwhile to have the
11 rules. And that was the reasoning of the majority of the
12 last committee.

13 And I don't remember it being as lopsided as
14 Chip might have said. There was a substantial dissent, but
15 that was the reasoning of the majority.

16 CHAIRMAN BABCOCK: I think I felt it was
17 lopsided just because I was in the minority.

18 (Laughter)

19 UNIDENTIFIED SPEAKER: I'm sorry. I missed
20 the name of that speaker just now.

21 UNIDENTIFIED SPEAKER: Chip Babcock.

22 CHAIRMAN BABCOCK: That was me. Sorry.

23 Professor Alfini.

24 DEAN ALFINI: This is Jim Alfini. Being a
25 newcomer to Texas, I wonder if I could offer an outsider's

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1 view here.

2 CHAIRMAN BABCOCK: Certainly.

3 DEAN ALFINI: I think you did it right the

4 first time. I agree with Professor Laycock. I think -- in
5 fact, it was so right that the ABA working group that I was
6 a reporter to that recommended changes to the ABA Model Code
7 last August that were adopted by the House of Delegates in
8 San Francisco last August used the Texas Experience as a
9 blueprint for what we would do.

10 We have slightly different language in the
11 revised ABA Model Code, but largely because we had a commit
12 clause and you didn't the first time around and we left
13 commitments in there. But the whole idea of responding to
14 Justice Scalia's concern over under-inclusiveness and making
15 a change -- a parallel change in Canon 3 -- and we added a
16 definition of "impartiality." We felt that the Texas
17 approach was the right approach.

18 The report of that committee -- that working
19 group is in the -- one of the additions to your materials
20 here, Free Speech vs. Forced Speech, and I just thought I'd
21 read just a little brief portion here: The working group
22 believed that restrictions on judicial campaign speech will
23 most likely pass constitutional muster if they are, first,
24 supported by a definition of "impartiality" to be added to
25 the terminology section of the code that comports with the

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1 discussion of impartiality in the majority opinion in White.
2 And in particular, we tried to respond to the
3 open-mindedness notion that Justice Scalia puts forth when
4 he parses that word, "impartiality," in the opinion. And
5 then, second, narrowly crafted to further the compelling
6 state interest in judicial impartiality. And then, third,

7 imposed on judges in connection with all of their judicial
8 duties in response to the majority's criticism that the
9 announced clause restriction was under-inclusive.

10 So I think Texas pretty much took that
11 approach and we adopted a similar approach, I think, in
12 moving forward on this one.

13 I should mention that I'm on the ABA
14 Commission that is currently involved in the revision of the
15 of the ABA Model Code, and we haven't gotten to Canon 5 yet,
16 but I'll try to share any thoughts that they might have as
17 we get to that point.

18 CHAIRMAN BABCOCK: Okay. Thank you.

19 Judge Quinn.

20 JUSTICE QUINN: Chip, this is Brian Quinn.

21 I have several comments. First, with regard
22 to the comments that were made about endorsing in judges, I
23 was playing on the Internet the other day and I came upon a
24 document called the "Campaign Legal Center" and it made a
25 reference to a United States district court judge up in

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1 Utica, New York who sat in a case involving a
2 Justice Spargo, and according to this article, that judge
3 struck down as unconstitutional everything that --
4 everything that -- scratch -- every restriction from
5 attending political gatherings to endorsing other
6 candidates.

7 DEAN ALFINI: That case has been overturned by
8 the --

9 JUSTICE QUINN: Has it been overturned? Okay.

10 DEAN ALFINI: -- Second Circuit on abstention
11 grounds. They really never got to the merits, but the case
12 was overturned by the Second Circuit.

13 JUSTICE QUINN: And is it dead, then, up
14 there?

15 DEAN ALFINI: As far as I know, yes.

16 JUSTICE QUINN: The other comment I'd like to
17 make -- and as a judge -- and maybe I'm analogizing it to an
18 attorney as well -- I look at the Canons as serving two
19 purposes. One as a disciplinary purpose, you cross the
20 line, but I also look at the Canons as serving the purpose
21 of how to act like a judge. And so it's disciplinary plus
22 aspirational.

23 Though the Supreme Court said that the
24 announce clause cannot be enforced, I'd view that as a --
25 saying the judge can't be disciplined for doing that, but I

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1 think the announce clause in and of itself has some
2 aspirational aspect to it, some value saying, "You're
3 not" -- and I guess this is what Judge Ginsburg was trying
4 to allude to in her dissent, but you're not the average
5 elected official. You're not the state rep. You're not the
6 governor. You are, supposedly, on a higher plane. And I
7 think that the Code of Judicial Conduct helps establish what
8 that higher plane is.

9 I would like to see some type of announce
10 clause in there, even though it can't be enforced. It may
11 be more of an aspirational thing, that a judge shouldn't do

12 this stuff, and I think we already have aspirational aspects
13 in the present code, given the definition of "shall" and
14 "should." You know, "shall," those things we can do.
15 "Should," those are the aspirational things that we're not
16 going to be disciplined for.

17 So with regard to political activities, I
18 think we got -- at least I would like to see that considered
19 as a guideline for other judges, what they should do, so
20 they just don't become the general, run-of-the-mill elected
21 official.

22 CHAIRMAN BABCOCK: George McWilliams.

23 MR. McWILLIAMS: Chip, I noticed on our
24 committee we have probably 15 members of the judiciary who
25 probably all at some point in their life have had a

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1 contested race.

2 UNIDENTIFIED SPEAKER: I can't hear very well.

3 UNIDENTIFIED SPEAKER: I can't either.

4 UNIDENTIFIED SPEAKER: I can't hear the last
5 speaker or got his name.

6 CHAIRMAN BABCOCK: It's George McWilliams, and
7 he's --

8 MR. McWILLIAMS: I'll try to speak up.

9 CHAIRMAN BABCOCK: He's going to speak up.

10 MR. McWILLIAMS: I noticed we've got probably
11 15 members of the judiciary on our committee, many of whom I
12 know have had elected races or contested races and run for
13 re-election and probably have some in their future.

14 I think Doug mentioned this. I would like to
15 hear -- and I've never walked in those shoes before. I'd
16 like to hear from members of the judiciary some of their
17 feelings about what type of pressures and what they would
18 live under without a Canon 5 and maybe some of their
19 experiences, just the practical aspects of the theory that
20 we're debating here. We've got lots in this room, I think.

21 CHAIRMAN BABCOCK: Yeah. I think that's an
22 excellent idea, George. This is Chip Babcock again
23 speaking.

24 I think that's a great idea. And frankly,
25 that informed some of the debate which wound up in the

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1 minority in our previous subcommittee, and that was that we
2 certainly don't want to create a trap for the unwary in our
3 rules.

4 The Supreme Court has told us that it is
5 unconstitutional to restrict candidates for the judiciary by
6 prohibiting them from announcing their positions. And one
7 could easily imagine a situation where a candidate goes out
8 and says, "Let me just tell you what my position is." You
9 know, "I don't like insurance companies. I make no bones
10 about it. And I'm not telling you what I'm going to do when
11 I get on the Bench, but let me just tell you, I don't like
12 insurance companies. So that is my judicial philosophy."
13 His opponent, the unwary buffoon --

14 (Laughter)

15 CHAIRMAN BABCOCK: -- who goes out there and
16 says, "Let me just promise you this, that if I get on the

17 Bench, the insurance companies are not going to do very well
18 in my court."

19 Now, we talked about, "Is Candidate A," the
20 first candidate who has announced his position, his dislike
21 for insurance companies, "okay because you can't restrict
22 him from announcing? Is Candidate B, who used the 'P' word,
23 is he now going to get called to task?" And that is -- and
24 we can talk about things in the abstract and we can write
25 rules, but when you get down to the stump, words have a way

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1 of flowing out of our mouths. And we don't want to set up a
2 system that is unfair to people who want to speak.

3 Now, I agree with Judge Quinn, we certainly --
4 there's nothing in the constitution that says we have to
5 speak, and we can aspire to greater dignity and greater
6 reticence and whatever it may be, that we're not about
7 telling people what they have to say, but we are talking
8 about what the state -- what the judiciary can keep them
9 from saying.

10 So with that said, it would be interesting to
11 hear -- we have many candidates, some who run statewide
12 office races and regional and countywide.

13 Judge Woodward.

14 HON. BEN WOODWARD: This is Ben Woodward. And
15 by the grace of God or somebody, I do not have an opponent.

16 (Laughter)

17 JUSTICE KIDD: It's the only way to run,
18 Judge.

19 (Laughter)

20 HON. BEN WOODWARD: But knowing that I do have
21 to run, I have considered this, and my concern, if we did
22 not have a Canon 5 whatsoever is, if I chose what I believe
23 is the higher plane and not announce a position and not
24 commit, if I chose to do that, the public could perceive
25 that as somebody that's wishy-washy, avoiding the subject,

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1 won't tell me what he stands for.

2 On the other hand, if we make the Canon so
3 narrow and too -- and enforceable, perhaps, then I run into
4 the problem that -- Stephen Carter, a Yale law professor,
5 wrote Integrity and Civility, he talks about how the Ethics
6 in Government Act passed in the '70s, that since then, it
7 lowered the bar of ethics in government, because, before, a
8 congressman didn't do something because it was wrong.
9 Afterwards, a congressman did something right up to the line
10 and then when the Ethics Committee said, "Well, he didn't
11 violate any rules," the congressman said, "I didn't do
12 anything wrong." Whereas, before the Ethics in Government
13 Act, we would say, "Man, that was a bribe. You can't do
14 it."

15 And so if we make the line too bright-lined
16 without some aspirational comment in it, I'm concerned that
17 if you -- that we're going to begin electing people that
18 just don't break the rule but don't necessarily aspire to a
19 higher standard and don't get any support from somewhere to
20 the public that says, "You know, it's a good thing that he
21 didn't announce his position. He's trying to remain fair."

22 You know, without a Canons of ethics or an aspirational
23 Canon out there somewhere, I'm out there by myself saying,
24 "I'm a good guy and I've got these high standards. And I'm
25 not going to tell you how I feel about teenage abortion.

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1 I'm not going to tell you how I feel about this, this and
2 this." So I would hate to see us abandon it entirely,
3 because I don't want to be left out there on a limb by
4 myself.

5 MR. McWILLIAMS: Yeah. My first impression
6 is, most of the Supreme Court justices have never run for
7 re-election -- US Supreme Court justices.

8 CHAIRMAN BABCOCK: That's true.

9 MR. GEORGE: The US Supreme Court people have
10 probably never -- this is Jim George again. One of the
11 things we did recommend and the Court adopted is a comment
12 that is at the end of Canon 5 which is maybe not the most
13 articulate enforceable way that it could be said, but was
14 designed to be an admonishment in some fashion about the
15 announce and comment clause problems. So that is -- you can
16 create an admonition of good conduct, and if it's not
17 enforceable, there won't be a judicial controversy about it
18 that creates litigation that somebody would hold it
19 unconstitutional. So one of the things that could be done
20 is to increase the stringency of the admonition as a part
21 of -- that's not a rule but as an admonition of candidates
22 and judicial office holders.

23 One thing that I believe -- I have been told

24 over time by people seeking judicial office and holding
25 judicial office in elected circumstances that the Canon

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1 provides cover, so that when someone comes to you and says,
2 "I will support your candidacy if you promise me or say to
3 me or you're going to take a position on a particular
4 issue," and I've been told that candidates and judges like
5 to have -- they can pull out their trusty Canon and say,
6 "See. I can't do that. If I do that, I can't serve." Of
7 all of the reasons to have this particular -- some sort of
8 language like we have in the current Canon 5, that struck me
9 as one of the best, because it -- there is not any doubt in
10 my mind that there are people and interest groups who ask
11 for the pledge, and being able to refuse to give it without
12 being -- indicating to them that you're not going to be
13 their supporter directly, but you can just simply, "I can't
14 say one way or the other, because, see here, I would be
15 disqualified or I could get removed from office if I did"
16 was, I thought, a wonderful reason to have the Canon 5
17 language.

18 So in terms of the decision tree I talked
19 about, "Is there a good reason to have it," that's the best
20 one I've ever heard because people say that happens.

21 CHAIRMAN BABCOCK: Does anyone have any
22 experience -- Judge Dorfman, you can say whatever you want,
23 but here's the question: Does anybody have experience in
24 the post-White era and our amended Canon 5 era with what Jim
25 is talking about, where the Republican Party of Harris

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1 County or Dallas County comes to you and says, "Hey, we'll
2 support you if we know what your position is on A, B, C or D
3 and how have you handled that?"

4 And that's probably not what you wanted to
5 talk about, Judge Dorfman, but talk about that or anything
6 else, as long as you speak up.

7 HON. GRANT DORFMAN: This is Grant Dorfman.
8 Conveniently, that is precisely the point I wanted to
9 make --

10 (Laughter)

11 CHAIRMAN BABCOCK: We worked this all out
12 ahead of time.

13 (Laughter)

14 HON. GRANT DORFMAN: -- which is that I was
15 attending -- I was appointed in May of 2002 for election for
16 the first time that November, which -- and there was a rally
17 in Houston of Republican Party faithful at which the
18 governor was going to make an appearance, I believe in
19 August. It was -- the day I can date if from was the date
20 that the Houston Chronicle that morning had run the story on
21 the Western District of Texas' decision in Justice Smith's
22 case, and the party faithful who were in attendance were
23 buzzing with this news -- very excitedly, because now
24 they -- perhaps understandably -- were tired of judicial
25 candidates and judges using the cover that Jim George spoke

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1 about, and, as they saw it, ducking the issues that they
2 were interested in. So I think there's a very keen
3 understanding of this issue that our work here will be
4 publicized.

5 And to the extent those pressures have
6 existed -- and I can talk about that, too -- and continue to
7 exist, for party -- for activists of either political party
8 to want to know a judge's opinions about pending and
9 impending cases or political issues, I think those will be
10 intensified if the work that we do here seems to, as
11 Republican Party of Minnesota vs. White does, indicate a
12 relaxation of the strictures that previously have existed,
13 and I think those pressures will increase. And they're
14 certainly out there.

15 CHAIRMAN BABCOCK: One question, Judge
16 Dorfman, is: Is that a bad thing? Is it a bad thing for
17 our democracy -- for groups of people who are very
18 interested in the qualifications of their judicial
19 candidates, given the fact, as Justice O'Connor pointed out,
20 that, "Hey, you guys have the system that you have. Don't
21 go crying to us when all of a sudden people are interested
22 in what your candidates for office have to think about
23 things," is it such a bad thing for people who are
24 interested to be able to ask their candidates, "Hey, how do
25 you feel about this?"

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1 Judge Dorfman.

2 HON. GRANT DORFMAN: Let me announce my views

3 on that.

4 (Laughter)

5 CHAIRMAN BABCOCK: But don't promise anything.

6 (Laughter)

7 HON. GRANT DORFMAN: I promise I reserve the
8 right to change these views, but --

9 (Laughter)

10 HON. GRANT DORFMAN: -- especially after I
11 hear from more of the committee members, but I really align
12 myself with Judge Quinn and Judge Woodward. I, too, was
13 struck, in reviewing Minnesota vs. White, that the language
14 seems to follow that this subjects judges and judicial
15 candidates to disciplinary measures, which seemed to me to
16 leave open the possibility that an aspirational component --
17 and I think it's Canon 8 that has the "should not" versus
18 "shall" terminology defined -- would be something that we
19 could consider and perhaps recommend.

20 Also, in response to Mr. George's pointing out
21 the comment that the committee came up with in the most
22 recent addition -- revision to Canon 5, that it would be
23 helpful to put in -- to cross-reference that with the duty
24 imposed on judges not to avoid recusal and disqualification,
25 or at least use reasonable efforts to do so.

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1 So it's right there. And again, it provides
2 that cover, should we need it. But I wholly agree, and I
3 find it frustrating at times that I am precluded from at
4 least -- there's a line between judicial philosophy and

5 explaining your judicial philosophy and then talking about
6 issues on a more tangible level, and as a judicial candidate
7 and as one who, frankly, likes to share his thoughts on
8 judicial philosophy, I find myself having to monitor that
9 line a lot, and I would certainly prefer -- appreciate
10 clearer guidance on that.

11 And I agree, I think the electorate
12 understandably wants to know where we stand on the issues
13 that are important to them. I think, in the past, it's not
14 only been, perhaps, too strict a rule but also has been
15 used -- perhaps abused as cover by judicial candidates and
16 judges who, understandably, on their end, don't want to lose
17 any voters that they don't otherwise have to.

18 CHAIRMAN BABCOCK: Anybody on the phone want
19 to say anything?

20 HON. LAMAR McCORKLE: Grant, this is Lamar.
21 And, Chip, I'm not quite sure who asked the question, but
22 Dean Alfini has been very quiet. One other thing he's doing
23 right now is putting on a program -- and I don't know if
24 Seana Willing is there, but Seana is participating in it as
25 well -- talking about campaigns. And I think that we can

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1 provide you -- we've already done it once. We're going to
2 do it again next week. We can provide you some anecdotal
3 stories and information, if it's of interest to the
4 committee, from those presentations, but there -- in some
5 ways, they're two different types of speech that really may
6 be broken down to make it simpler. One, which is my
7 willingness to go out and speak on whatever I wish to do and

8 the other is responding to these questionnaires. And I
9 think that if we look at those separately, although they
10 tend to have the same intellectual process, some of the
11 questionnaires could probably be resolved in a different way
12 than the judge who goes out and gives a speech or a news
13 conference or something along that line. I think those are
14 two different issues.

15 DEAN ATTANASIO: This is John Attanasio on the
16 phone. I just wanted to take up the recusal idea.

17 If you ratcheted up language from what the
18 committee did a couple of years ago, one way to do that that
19 might be constitutionally safe is to focus on, of course,
20 you know, "Some of this speech may result in recusal in
21 future cases," or language would have to be a lot tighter
22 than that. But if judges want -- and I think the
23 committee -- I don't know if Chip or Doug or anyone else
24 remembers. I thought we talked about this a little bit and
25 just decided to avoid the issue. I thought that was right,

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1 but my recollection could be wrong.

2 But to connect any sort of "should" language
3 to recusal could be very valuable. I think you have to be
4 very careful, though, with "should" language, because it
5 could be regarded by the Supreme Court as a way to just
6 circumvent the White case, in which case, any rule like that
7 would go down, to a certainty, but if there's some language
8 in there about recusal that sort of focuses in on "Certain
9 kinds of remarks could result in recusal of a judge," that

10 could be language that judges may be able to point to when
11 they get asked these sorts of questions to say, "Well, look,
12 you know, there really are adverse consequences to how we
13 answer this. It's not as though we don't want to keep the
14 electorate informed, but we have these competing
15 considerations. We're, after all, running to be a judge.
16 We want to be able to sit on these cases. If we talk too
17 much, we're going to have to be recused."

18 CHAIRMAN BABCOCK: John, I think -- Jim can
19 correct me if I'm wrong, but I think we did suggest a
20 comment that addressed, in a very soft way, recusal, which
21 the Court adopted and is currently in Canon 5.

22 DEAN ATTANASIO: I think that is right,
23 actually. I think you're right. But could we make that a
24 little bit -- is that enough? Do the judges think that's
25 enough for them to go on?

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1 CHAIRMAN BABCOCK: Yeah. Doug Laycock.

2 PROFESSOR LAYCOCK: I dimly remember that we
3 only did a comment because we were told this other committee
4 had reasonably reworked recusal and the Court didn't want
5 another recusal proposal so quickly.

6 I agree with John, aspirational stuff -- you
7 have to be very clear that it's aspirational, and I'm not
8 sure of the difference between "should" and "shall" with a
9 definition backup some place is enough to do it. But, you
10 know, there are lots of things where constitutional law
11 permits the government to attempt to lead public opinion or
12 express its own opinion as long as it doesn't coerce or

13 impose an undue burden in one body of law.

14 And if you make it clearly aspirational and
15 you say, you know, that no discipline could be imposed, I
16 think it would be of help. The judge can use it for cover.
17 If he doesn't use it for cover, his opponent can use it to
18 criticize him. "This is inappropriate stuff that he's been
19 doing and saying." I think that has a lot of appeal.

20 On the recusal issue, I assume most of the
21 committee knows, but in case somebody doesn't, we have very
22 recent behavioral precedent. Justice Scalia has recused
23 himself in the Pledge of Allegiance case because he made the
24 mistake of giving a speech right after the Ninth Circuit
25 decision where he said, "That's a really stupid decision."

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1 I don't think he violated the pledge or
2 promise rule. I think he made a very specific statement
3 about his position on a pending case, knowing it might be
4 headed his way, and, you know, there's rumor and speculation
5 about whether he did it voluntarily or whether some of his
6 colleagues leaned on him, but, you know, I think it would be
7 eminently reasonable to write a recusal rule that says, "You
8 have to recuse if you make too specific a statement about a
9 foreseeably impending case."

10 And one of the things that we did do that we
11 haven't mentioned, we wrote a pretty specific definition of
12 "impending" to try to reduce some of the ambiguity around
13 that word.

14 CHAIRMAN BABCOCK: Judge Dorfman and then

15 Professor Alfini.

16 HON. GRANT DORFMAN: I recall, from my
17 corporate law courses in law school, what we called a "race
18 to the bottom" in terms of various states trying to be the
19 safe haven for corporate wrong-doing in one eye or corporate
20 liberty in another way of looking at it, and my concern,
21 without the aspirational clause we've been talking -- some
22 kind of aspirational statement that mimics the announce
23 clause, that there will be, at the grass roots level, sort
24 of a race to the bottom, because one candidate will
25 adamantly state that impartiality compels him or her to

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1 avoid announcing a position that might cause litigants to
2 suspect that that judge is not impartial in that type of a
3 case. Another -- that judge's opponent or that judicial
4 candidate's opponent may not hold such a view, and,
5 therefore, come forward and state that position and be
6 rewarded for that.

7 I don't know in a free, you know, electoral
8 system whether you can avoid that possibility or those
9 pressures, but I think as -- it seems to me that the Supreme
10 Court has said in innumerable First Amendment cases, the
11 solution to speech is more speech, not to restrict speech.
12 And it does seem to me -- I'd like to hear Professor
13 Attanasio more on the point -- his concern that we may be
14 seeing -- to the extent we put in an aspirational statement
15 in there that mimics the announce clause, we may be seeing a
16 subverted Minnesota vs. White, at least the legal analysis
17 on that point, because it seems to me that, as Professor

18 Laycock said, that government may speak, and to the extent
19 government states an ethical standard without -- that has no
20 compulsion behind it, it seems to me that that would empower
21 candidates to say --

22 (Phone interruption)

23 (Laughter)

24 (Simultaneous discussion)

25 UNIDENTIFIED SPEAKER: We're getting some

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1 nifty music here, guys.

2 (Simultaneous discussion)

3 UNIDENTIFIED SPEAKER: -- that was just me or
4 everybody.

5 UNIDENTIFIED SPEAKER: No. Everybody.

6 HON. GRANT DORFMAN: May I assume I droned on
7 a little bit too long?

8 PROFESSOR LAYCOCK: The person that did it
9 doesn't know they did it.

10 CHAIRMAN BABCOCK: Yeah. They don't know they
11 did it.

12 Professor Alfini.

13 HON. GRANT DORFMAN: Let me just --

14 CHAIRMAN BABCOCK: Oh. I'm sorry.

15 HON. GRANT DORFMAN: Let me just conclude that
16 comment by saying: To the extent there's that aspirational
17 provision in there, the candidate who has maintained that
18 standard can at least point to that and criticize his
19 opponent -- his or her opponent on that basis.

20 CHAIRMAN BABCOCK: Professor Alfini.

21 DEAN ALFINI: Yes. Jim Alfini.

22 I think the door on the recusal side is much
23 wider open on constitutional grounds than we might think.
24 As I recall, Justice Kennedy's concurrence in White -- and
25 as you know, Justice Kennedy is probably the most absolutist

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1 as far as direct restrictions on judicial campaign speech
2 are concerned. I mean, he wouldn't -- I don't think he'd
3 uphold anything, but he, I think, clearly states, as I
4 recall, that "Take the recusal route." He doesn't see any
5 constitutional prohibition, indicating in the
6 disqualification rules of the Court, that a judge's speech
7 might require him or her to disqualify themselves. And so I
8 really think that the recusal route is something that should
9 be explored.

10 One of the things we might do, though, if we
11 do explore that is to think about the consequences of having
12 a fairly strict recusal rule. I could imagine candidates
13 for judicial office, for instance, saying in public that,
14 you know, "Justice Quinn or Justice Laycock announced their
15 position. They're going to have to recuse themselves. You
16 don't want to elect somebody who can't sit on cases." I
17 mean, I can imagine that kind of dialogue going on, but that
18 may not be a bad thing.

19 CHAIRMAN BABCOCK: Yeah. If I were running,
20 which I never will --

21 (Laughter)

22 CHAIRMAN BABCOCK: -- you know, I would try to

23 pick out all the worse kind of cases and announce exactly
24 what my feelings were so I'd never have to handle them.

25 (Laughter)

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1 MR. GEORGE: This is Jim George. One of the
2 things -- in trying to move this committee forward into
3 making some sort of organized way to make decisions about
4 this topic, one of the issues that we need to decide is
5 whether or not our charter allows us to combine the two
6 topics; that is, recusal and limitations on speech.

7 It seems to me that it is very difficult to do
8 the job that Canon 5 envisions without a jurisdiction, so to
9 speak, to deal with --

10 (Phone Interruption)

11 MR. GEORGE: -- the jurisdiction to deal with
12 the problem of our decisions and recusal, because the nature
13 of the restrictions in Canon 5 and the general due process
14 rights, without having a recusal analysis to go with them,
15 puts us in a very difficult situation to make something that
16 is a whole picture that both protects due process rights and
17 protects speech at the same time.

18 Now, the Court gives us our charter. We
19 don't. We have only the charter of Canon 5 at this moment.
20 I do not know whether or not -- and Justice Jefferson may
21 enlighten us, if we recommended something about recusal
22 in -- to combine that with Canon 5, would that be profitable
23 use of our time?

24 JUSTICE JEFFERSON: Well, the Advisory

25 Committee is working diligently on that as we speak, and

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1 I -- I mean, I think the Court will take recommendations on
2 recusal, and it's something that needs to be looked at. And
3 we can even -- I forget who's chairing that. Is it
4 Orsinger?

5 CHAIRMAN BABCOCK: I think it's Orsinger.
6 Yeah.

7 JUSTICE JEFFERSON: I mean, we can talk to
8 him -- we might want to bring him in at some point.

9 MR. GEORGE: Well, I think that this whole
10 topic is so interrelated, the level -- how we deal with the
11 speech clause and the equal protection clause has got to be
12 considered simultaneously if we're going to try to both have
13 a fair and vigorous debate in elections about judges and
14 have fair and impartial decisionmakers decide cases. To do
15 those two things separately without considering the
16 implications of one on the other seems to me to be an
17 opportunity to spend a lot of theoretical time that is not
18 very profitable, because they have to work together. And if
19 we don't do them both together, I think we're in grave
20 danger of creating more problems than we solve and wasting a
21 lot of time.

22 CHAIRMAN BABCOCK: Jim -- this is Chip
23 Babcock. Wayne, just one second.

24 I think there's nothing at all to prohibit us
25 from talking about recusal and coming up with whatever

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1 recommendation that we want. Recusal on the basis of
2 political speech is a discrete part of the bigger recusal
3 problem. I mean, the rule that we worked on has recusal
4 recommended based on violation of campaign finance spending
5 limits -- first time in hundred years of juris prudence in
6 this state. So, I mean, that's a completely different issue
7 from what we're talking about.

8 What I suspect would happen -- and Justice
9 Jefferson can correct me if I'm wrong, is that whatever
10 recommendation we submit to the Court will be folded in to
11 other parts of the recusal rule that the Supreme Court
12 Advisory Committee is working on, and I suspect, if the
13 habit of the last six, seven years is followed, that
14 whatever we come up with will be sent to the Supreme Court
15 Advisory Committee for discussion and analysis and their
16 recommendation to the Court.

17 So that's a long way of saying, I don't think
18 there's anything that prohibits us from talking about it,
19 Jim, and I think you're right, that it is a connected thing.

20 MR. GEORGE: Well, Brian had something to say,
21 and I don't want to cut him off, but if we could create --
22 we need to figure out a mechanism to move this to -- this
23 discussion into fruition and the committee to propose some
24 changes in existing language and that sort of thing.

25 But I would like, before we get too far down

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1 this road, to get people from that organization -- the
2 people doing the recusal work -- political speech part of
3 that particularly -- to meet with us and talk about
4 coordinating those activities, because it seems to me that
5 if we just met together and worked together, we're more
6 likely to produce a coherent product that would be the most
7 value to the Court.

8 CHAIRMAN BABCOCK: Wayne.

9 MR. FISHER: Well, I'm not as well informed as
10 the rest of you, because I've just been on this committee a
11 very short period of time, and I'm not really entirely sure
12 what we're doing, whether we have before us Exhibit A as a
13 proposal or are we starting anew. I mean -- and perhaps all
14 of you know the answer to this. I'm not -- are we starting
15 all over or are we taking this and correcting it?

16 I would just simply say for myself that, in my
17 view, I have a strongly held opinion that recusal should not
18 be separated out into some separate broad, you know,
19 down-the-road over-on-another-chapter when we're talking
20 about these things. I guess what we're trying to do is say,
21 "Well, you can exercise your First Amendment rights pursuant
22 to Minnesota vs. White, but you also" -- we in protecting
23 the judiciary in this state and the integrity of the
24 judiciary and its public -- you know, what the public thinks
25 about this judiciary, we've got the right to recuse you.

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1 And you can exercise your free -- you know, your right of
2 free speech. Nobody is, you know, keeping you from doing
3 that, but we've got a right to decide whether that creates

4 an appearance of impartiality that will get somebody else to
5 sit on one of those cases, and I really think we need to
6 keep them joined at the hip, in my view.

7 CHAIRMAN BABCOCK: Okay. That was Wayne
8 Fisher, by the way, speaking just now. This is Chip Babcock
9 again.

10 And I think, Wayne, Exhibit A is the current
11 Canons, and I think that the Court -- our task is to advise
12 the Court on whether or not we think there should be
13 changes, if any, to the Canons. And today's topic of
14 conversation is Canon 5. And so -- and I think anything is
15 open, whatever we collectively think should be changed --
16 and maybe nothing -- but whatever we think should be changed
17 is what's on the table, today.

18 JUSTICE LANG: Jim and Chip -- this is
19 Doug Lang. I just want to ask kind of a point of
20 information about how you intend to proceed. We're,
21 obviously, talking, as you said, about Canon 5 today. And
22 then I take it the next conference we're going to talk about
23 other Canons, separate and apart from that. Is that right?

24 CHAIRMAN BABCOCK: That's correct.

25 JUSTICE LANG: And so will the subcommittee

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1 that's designated to deal with Canon 5 go off -- will we go
2 off on our own after this and come back and report or is
3 this closing it out today or what's the deal?

4 CHAIRMAN BABCOCK: Well, I might let
5 Justice Jefferson speak to that if I get this wrong, but I

6 think that for a lot of reasons, not the least of which is
7 the limited funding, the Court wanted us to create a record
8 of discussion about Canon 5 in this meeting. And if we can
9 come up with concrete proposals, the Court would be
10 interested, but at the next meeting, we'll move on to Canons
11 2 and 3, and the meetings after that, other Canons. And by
12 June, the Court would have a record of, sort of, thinking
13 about these issues.

14 Now, we can extend our time and put more work
15 into it, and if the Court wants us to -- I know -- I can't
16 imagine anybody on this committee wouldn't want to do that.

17 But, Justice Jefferson, is that pretty much
18 how we laid this thing out?

19 JUSTICE JEFFERSON: I think that's right. But
20 there will be -- if there's drafting to be done, I doubt
21 that it can be accomplished, you know, in this setting on
22 Canon 5. So, Jim, I would think you'd want to share with
23 other committee members or the whole committee -- your
24 subcommittee, if there's language that needs to be
25 recommended, that you would work on it and then present it

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1 again to the full committee.

2 MR. GEORGE: And let me start with, I am
3 starting with the proposition that the work that was adopted
4 for the 2002 election reflects a legal rule, a rule that
5 does not have any legal defect, and the rule, on its face,
6 there is no apparent reason to change the rule, the
7 exact -- the language that is mandatory.

8 Now, if people believe that there is something

9 in Canon 5 as it exists today, amended in 2002, is either
10 illegal or as a matter of policy should be changed, I would
11 like someone to tell me what it is. I do believe that the
12 comment language that is not mandatory could -- should be
13 strengthened and made more -- I don't know -- to some
14 extent, a broader language, as long as it is advisory and
15 not mandatory and that's clear. But I do not have -- and I
16 don't know of anyone else that has any reason that Canon 5
17 today would be illegal. I think most people believe it's
18 legal. That is, the Court except for Justice Kennedy would
19 hold it -- uphold it. We've got eight votes, maybe, on that
20 Court to uphold it, and the rest of it is a matter of
21 policy. And I don't know of any pressing political or
22 social reason that the current language should be changed.
23 If anybody thinks that there is something that needs to be
24 changed, I'd like to hear it.

25 HON. BEN WOODWARD: This is Ben Woodward. And

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1 I don't know if other people are concerned about this or
2 not, but I would also like some bright-line rules on what a
3 judge can say, and I think we can speak as to the
4 advancement for the administration of justice, maybe some
5 other things. And I wonder if we can structure a rule that
6 said, "Paragraph 1, a judge may speak about the following:
7 Paragraph 2, a judge should not speak about these matters.
8 If he does, it may lead to recusal under the following
9 conditions, and it may call into question the judge's
10 impartiality and ability to serve fairly in a case." And

11 then a Paragraph 3 that says essentially what the Canon says
12 now, "A Judge shall not say these things. And if he does,
13 he may be sanctioned by the Judicial Conduct Commission."
14 Maybe in that second paragraph saying you should not -- if
15 he violates these rules, he won't be sanctioned by the
16 Judicial Conduct Commission, but he may be recused and may
17 call into question his fairness. Is that too much?

18 CHAIRMAN BABCOCK: That gives a certain safe
19 harbor feature to the rule, because you could easily say,
20 "Look, I'm in this race to serve, and the Canon says that
21 even though I'm not going to get in trouble, that I could
22 get recused, and that's not my business. I want to serve
23 all the people all the time, so I'm not going to talk about
24 this and that's" -- "and the Canon gives me support for
25 that."

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1 HON. BEN WOODWARD: Or, in your position, "I
2 will talk about it because I don't want to serve in that
3 case."

4 (Laughter)

5 CHAIRMAN BABCOCK: Yeah. Professor Laycock.

6 PROFESSOR LAYCOCK: I like that structure.
7 That sounds very promising. And I do think -- endorse the
8 comments earlier, that it would be silly to try to separate
9 the recusal piece of this from the rest. We ought to --

10 MR. GONZALEZ: This is Judge Gonzalez. I can
11 hardly hear.

12 PROFESSOR LAYCOCK: -- recommend as a whole --

13 UNIDENTIFIED SPEAKER: I can't hear either.

14 PROFESSOR LAYCOCK: The structure that Judge
15 Woodward just outlined sounds to me very promising as a way
16 to approach this. And second, I was endorsing views
17 expressed earlier, that we ought to make recommendations
18 about the recusal piece of this as well as the campaign
19 piece and then, you know, our betters can decide what they
20 want to do with that recommendation, but it will be a
21 mistake to separate it out.

22 CHAIRMAN BABCOCK: Judge Quinn.

23 JUSTICE QUINN: Yes. I'd like to see, in what
24 Judge Woodward said would be his Paragraph 2, the "should
25 nots," something like the announce clause to give us some

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1 harbor as well.

2 CHAIRMAN BABCOCK: Okay. Somebody on the
3 phone wanted to speak, I think, and then Judge Benton after
4 that.

5 HON. RUDOLFO GONZALEZ: I had a comment --
6 this is Judge Gonzalez -- regarding this -- follow-up on the
7 comment about having specific -- I guess a list of specific
8 statements that can be said, and keeping that in mind, I
9 guess then we could start providing certain statements to be
10 passed around and decide which ones would fall under A, for
11 example, what the judge can say, and, B, what the judge
12 cannot say or shouldn't say.

13 MR. GEORGE: Yes. You have to remember that
14 the -- as long as none of this is mandatory, and it should
15 not and won't be enforced, then we have reasonably broad

16 power to suggest things. The language that makes it
17 advisory needs to be clear, but I think that's a drafting
18 problem to begin with.

19 CHAIRMAN BABCOCK: Judge Benton, and you're
20 going to have to speak way up or maybe even walk up here.

21 Judge Benton is in the recesses of our meeting
22 room, so --

23 (Laughter)

24 CHAIRMAN BABCOCK: But now he's not.

25 HON. LEVI BENTON: I'm not a proponent of

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1 separating the recusal issue. But having said that,
2 listening to comments around the room, I'm inclined to
3 believe that we kid ourselves. If, by way of example, I
4 express or announce that the statute creating the pledge is
5 unconstitutional, which I don't announce, but if I do --

6 (Laughter)

7 HON. LEVI BENTON: -- it shouldn't lead to
8 recusal in one of Mr. Fisher's personal injury cases. But I
9 think we kid ourselves if we don't believe that such
10 statements won't lead to all of this satellite litigation on
11 recusal hearings. That's exactly what will happen. We'll
12 be on the eve of trial, "Uh, Benton said he didn't think the
13 Pledge was constitutional. Let's file the motion to recuse
14 him."

15 MR. GEORGE: Well, I think you're right. I
16 don't know that there is -- given -- this is Jim George.
17 Given the Supreme Court's decision that limits the
18 announce -- that makes it unconstitutional to have the

19 announce clause in the first place, and given the
20 proposition that we address these with a recusal, that the
21 Supreme Court of the United States has said in the
22 Republican Party White case, the Minnesota case, I don't
23 know that we can actually do anything that won't keep that
24 from happening. I mean, the way they kept it from happening
25 before is that you couldn't say it in the first place; and,

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1 therefore, you didn't have that problem. We're going to
2 have the problem. And now the question is, we need to think
3 about the rules as to when the speech really recuses,
4 because what we're left with today is a great big blank.

5 We know that speech about topics probably does
6 cause recusal, but we have no guidelines or rules or ways to
7 decide that. So we're kind of in that pot already, and, you
8 know, we're going to have to deal with what the Supreme
9 Court has placed us by trying to create rules that will have
10 the effect of making -- of, one, limiting that satellite
11 litigation over recusal, and, two, giving us a reasonable
12 way to decide all those cases under some standard that's
13 known in advance.

14 JUSTICE JEFFERSON: There's also, to me, the
15 question of, you know, "What do we mean by 'speech'?"
16 There's -- you know, we've got a section in here that, "A
17 judge or judicial candidate shall not authorize the public
18 use of his or her name endorsing another candidate's
19 issues," and things like that. What comes up in a judicial
20 campaign is, well, where are you -- you know, if you were to

21 show up with President Bush -- on stage with President Bush
22 as he comes through campaigning for office, is that lending
23 your name or office to an endorsement of that candidate or
24 is it proper political activity because you want to be seen.
25 You think he's popular in Texas. You want to be seen beside

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1 him and maybe that will help in your campaign. Just what is
2 it that we're talking about here?

3 And do the rules currently -- are they
4 specific enough to let us know what is proper conduct or
5 what is not? You know, you go to political party
6 conventions and they have on the floor -- they've got
7 platforms and they go into very great detail about what they
8 believe is constitutional and what is not constitutional,
9 what is prohibited and not in terms of public policy. If a
10 judicial candidate is present at that convention, is that
11 somehow endorsing that view so that you'd be subject to
12 recusal, or if you're present when the platform is adopted,
13 are you endorsing each aspect of that platform? These are
14 things that I don't think are plain from Canon 5 today.

15 MR. GEORGE: Well, this is -- Doug -- I want
16 to say -- Jim George. Doug has -- I, in the last session,
17 back in 2002, thought that whole clause was probably
18 unconstitutional, although there is no court that has passed
19 on a case similar so that we can draw that line --

20 CHAIRMAN BABCOCK: Which clause are you
21 talking about, Jim?

22 MR. GEORGE: The one about endorsing other
23 candidates and participating -- "shall not authorize the

24 public use of his or her name endorsing another candidate or
25 for any public office, except...may indicate support for a

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1 political party...may attend political events and express
2 his or her views on political matters in accordance with
3 this Canon and Canon 3B."

4 I think the first sentence of that may well be
5 unconstitutional. There is no case law suggesting I'm
6 right. There is one which is frequently -- and some of you
7 judges point that out to me from time to time, but there is
8 a -- but if it is a practical problem, which I don't know,
9 we need to address it.

10 CHAIRMAN BABCOCK: Well, Justice Jefferson
11 paints a hypothetical that's not so hypothetical. I hear
12 that President Bush is running for re-election --

13 (Laughter)

14 CHAIRMAN BABCOCK: -- and if a judge -- a
15 Republican judge from the Supreme Court or Harris County or
16 wherever it may be --

17 HON. GRANT DORFMAN: It's hypothetical for me.
18 It's not for Justice Jefferson.

19 (Laughter)

20 CHAIRMAN BABCOCK: -- shows up on the same
21 rostrum, you know, has he -- and he may even -- some
22 reporter says, "Hey, are you for President Bush?" "You darn
23 right I'm for President Bush. He appointed me. I love him.
24 He's great. He's terrific for the country." Well, have you
25 violated Canon 5, Subpart (3)?

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1 Professor Laycock.

2 PROFESSOR LAYCOCK: I hear he's running for
3 re-election, too, but he won't waste time or money
4 campaigning in Texas, so --

5 (Laughter)

6 PROFESSOR LAYCOCK: -- if you want you're
7 picture --

8 (Laughter)

9 PROFESSOR LAYCOCK: -- taken with him, you've
10 got to go to New Mexico.

11 (Laughter)

12 PROFESSOR LAYCOCK: This goes back a couple of
13 comments, but, you know, Jim was talking about how the key
14 to the frivolous recusal motion problem -- which won't
15 totally solve it, but to some extent we have to address that
16 by what we say in this aspirational language or language
17 about what might justify a recusal. And assuming we put
18 some kind of an announce clause in there, I think it has to
19 be narrower than the old announce clause which said, "A
20 judge shall not make statements and indicate an opinion on
21 any issue that may be subject to judicial interpretation by
22 the office which is sought or held."

23 That is very broad, and, you know, it doesn't
24 have to be as narrow as the -- I don't think it has to be as
25 narrow as the pledge or promise clause, though I haven't

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1 thought that through, but we need some language about the
2 specificity of the statement there. The statement has to be
3 pretty specific to a particular case or a particular issue,
4 I would think, before it becomes a serious ground for
5 recusal.

6 And, you know, I don't have any language to
7 propose at this point, but if we work through that and put
8 in specificity language, it seems to me that does two
9 things: It makes it easier to get rid of the frivolous
10 recusal motions. It won't make them all easy, but it will
11 make a lot more of them easier. And, second, it addresses
12 the problem John Attanasio raised maybe an hour ago. It
13 looks less like an end run around White and -- because it's
14 not as broad as the announce clause they struck down, but
15 it's easier to bend. It's a good-faith attempt to really
16 deal with the due process issue of a judge who has made
17 statements that are simply too specific to the case or issue
18 that is now before him.

19 CHAIRMAN BABCOCK: Yeah. Judge Dorfman.

20 HON. GRANT DORFMAN: It may be too early to
21 get into drafting issues, but let me suggest that one way to
22 avoid the appearance of subverting the White decision would
23 be to flip the announce prohibition and make it permissible.
24 "A judge may announce in such issues, but that conduct may
25 be subject to recusal," and that leads us into the comment

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1 language and perhaps the strengthened version that some of

2 have suggested.

3 CHAIRMAN BABCOCK: Fair enough. Anybody on
4 the phone or -- Justice Monica Gonzalez.

5 HON. MONICA GONZALEZ: In following up on what
6 Justice Jefferson said, I think with any of the Canons, the
7 more specific you can be, obviously, the better, but then
8 what -- especially for Canon 5, how specific can you
9 actually be in giving a definition of what a judge is
10 supposed to follow? I mean, that's -- we're talking about
11 such a huge, wide range of possible subjects or types of
12 litigation that would come up in court. But again, you
13 know, I just think if it can be broader -- more language,
14 but more specific in that language as to what you're
15 referring to.

16 CHAIRMAN BABCOCK: Judge Quinn.

17 JUSTICE QUINN: Just a quick aside. You're
18 talking about Canon 5. And if you look at Canon 2B, the
19 second sentence, it says, "A judge shall not lend the
20 prestige of his judicial office to advance the private
21 interests of" -- that can be interpreted as some type of
22 restriction on political activity, too. So Canon 5 does
23 definitely have links within the other Canons that have to
24 be considered when you're changing Canon 5(1).

25 CHIEF JUSTICE LOPEZ: This is Alma Lopez, and

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1 I just also wanted to indicate that Canon 5, I think, is
2 going to definitely affect Canon 2 in how it is set up,
3 because Canon 2A talks about confidence and the integrity
4 and the impartiality of the judiciary. And certainly if

5 you're free to go out and make statements even though you
6 can be recused -- and I don't know if you-all are thinking
7 in light of the fact that, you know, most appellate
8 courts -- the supreme courts, court of criminal appeals are
9 always referred to as a group, and I don't know how that
10 would affect it also.

11 CHAIRMAN BABCOCK: I'm sorry. Could you
12 repeat that last point again, Judge Lopez?

13 CHIEF JUSTICE LOPEZ: I said: Most of the
14 time the Appellate Court and the Supreme Court and the Court
15 of Criminal Appeals are referred to as a group. And when
16 you have this about the appearance of impropriety and the
17 impartiality matter, how is that going to affect if people
18 say, "Well, one judge recused himself, but there's seven of
19 them. How do we know that they haven't all been affected?"

20 CHAIRMAN BABCOCK: Yes. Professor Alfini.

21 DEAN ALFINI: One of the ways to look at this,
22 I suppose -- much of the conduct we're discussing concerns
23 judges or candidates creating an appearance that they've
24 said or committed themselves or pledged or promised
25 something. The ABA Model Code had commit -- or appeared to

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1 commit language in it. When we suggested the revision, we
2 kept the commit language in there, but we moved the "appear
3 to commit" to the recusal provision.

4 And again, I think the concern was that that's
5 a legitimate way of capturing that potential restriction
6 without running the risk of having it dumped on

7 unconstitutional grounds if it's a direct restriction on a
8 judge's speech. So just a thought there.

9 JUSTICE LANG: This is Doug Lang. I have a
10 thought about the consideration of very specific language in
11 Canon 5 versus what's there now, which is broader.

12 I'm concerned about being more specific,
13 because I think this -- being more specific would tend to,
14 like it does in a lot of statutes, focus people on how close
15 they can get to that line because we've told them specific
16 things. This language, I heard a while back from several
17 speakers, you know, is probably going to pass muster
18 constitutionally. It also -- you know, it's going to -- it
19 should tell people where they can't go, but with the breadth
20 of -- with the number of issues that could come up, I think
21 we get in trouble being specific.

22 I agree that maybe some commentary is going to
23 be helpful, but I'm not personally seeing that this is
24 broken at this point, and, you know, I'm not adverse to
25 certainly listening and looking at what somebody wants to

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1 draft, but I'm not sure where we go with it and what kind of
2 trouble we get into with all of the specifics.

3 CHAIRMAN BABCOCK: This is Chip Babcock. I
4 was going to say, Justice Lang has just articulated the
5 off -- articulated and repeated Judge Peeples' rule on the
6 Supreme Court Advisory Committee, which is, "If it's not
7 broke, don't fix it. Don't just be tinkering with the
8 language just for the sake of tinkering with the language."

9 DEAN ATTANASIO: This is John Attanasio. I

10 wanted to focus on Doug Laycock's remarks of a few minutes
11 ago, which I agree with. I wonder if we could not -- and
12 there was another remark saying -- one of the judges
13 remarked we could say, "A candidate for judicial office may
14 announce his position on," and then do the "but may be
15 compelled to recuse himself or herself." And Doug talked
16 about whether we could use the exact language of the pledges
17 and promises clause or we might even be able to go beyond
18 that.

19 I mean, I think, at least as a starting point,
20 the language of the current pledges and promises clause
21 Canon 5(1)(i) is nice language. And to suggest that if a
22 judge announces an opinion with regard to one of these
23 things, the judge will, should or -- you know, we could
24 monkey with the language -- recuse himself, that might be a
25 useful addendum.

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1 You know, I agree with what Judge Lang was
2 saying. I think that, as it currently stands, this will
3 pass constitutional muster, at least Canon 5(1). Canon 2, I
4 think, is more interesting -- sorry -- 5(2) is a more
5 interesting question. But I'll hold my fire on that. Just
6 as a quick note, I think that how one construes the word
7 "endorse" -- "A judge or official candidate shall not
8 authorize the public use of his or her name endorsing
9 another candidate," you know, that could -- if we can
10 tighten up the definition of "endorse," that -- you know, if
11 there are problems with that clause, that could be helpful.

12 CHAIRMAN BABCOCK: Yeah. Let's go over that
13 in a second. I think, before we take our break, it might be
14 good to focus a little bit on Canon 5(1)(ii), the language
15 which is "knowingly or" -- it's prohibition. "Knowingly or
16 recklessly misrepresent the identity, qualifications,
17 present position, or other fact concerning the candidate or
18 an opponent." And, Doug Laycock, my recollection is that we
19 had a lot of trouble with this provision, and I thought that
20 we were a lot closer on this because of the vagueness of
21 what is an "other fact." It may not be a defamatory fact.
22 For example, I could say, "Even though Justice Jefferson is
23 my opponent for the Supreme Court, that, you know, he is a
24 war hero and a very nice guy, and I'm not going to criticize
25 him about his war record." Well, I knew that he never went

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1 to war and doesn't have any war record, but I said that for
2 whatever reason. Well, am I going to get in trouble for
3 doing that, saying something laudatory about my opponent,
4 and so we had problems on that. So why don't we focus on
5 little (ii) right now for a minute and see if anybody else
6 has concerns or thoughts about it.

7 Does anybody on the telephone have any
8 thoughts about that provision of the Canon?

9 HON. LAMAR McCORKLE: This is Lamar. The only
10 thing that has come up about that particular provision thus
11 far at the last program that we did in Corpus Christi was --
12 and this was a comment I think Seana Willing also would be
13 aware of, that there's no practical solution to it.

14 If a judge -- if a candidate operates and says

15 something, the State Bar traditionally does not pursue it,
16 nor does the newly elected judge, if the judge could, say,
17 pursue it, and so you have misstatements that sort of
18 continue to occur, and then the issue of timeliness of when
19 the misstatement was made, either by the judge or by the --
20 and the candidate who is not a judge takes so long that
21 this, in some ways, is a meaningless paragraph or -- in
22 operation, and a judge is almost -- one of the comments by
23 one of the judges, who will go nameless, something to the
24 effect of, "Well, if I'm in a campaign and something is
25 being said, I'm going to say back and worry about the

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1 Commission later on, simply because there's no effective
2 means to deal with the issue."

3 CHAIRMAN BABCOCK: Good points.

4 DEAN ATTANASIO: Chip, this is John Attanasio.
5 I was one of the people complaining about that clause, and I
6 think Doug and I disagreed on one particular point in the
7 clause, which is: I personally think "knowingly or
8 recklessly misrepresent the identity, qualifications,
9 present position, or other fact concerning an opponent"
10 is -- yeah. We can posit circumstances on which that might
11 not be defamatory, but often, it's going to be defamatory,
12 as the comments say, and it's going to meet the rules of
13 New York Times vs. Sullivan.

14 The part that troubled me was "knowingly or
15 recklessly misrepresenting the identity, qualifications,
16 present position or other fact concerning the candidate."

17 Now, on this one, I think Doug -- I changed my mind based on
18 a case decided in 2003, and I think Doug was right and I was
19 wrong. The telemarketing case, the Illinois Madigan vs.
20 Telemarketing. There's a specific passage from Justice
21 Ginsburg writing for a unanimous court where she says,
22 "While a mere failure to disclose to potential donors the
23 percentage of proceeds that will go directly to charity does
24 not establish fraud" -- and here I'm quoting -- "when
25 disclosure is accompanied by intentionally misleading

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1 statements designed to deceive the listener, the First
2 Amendment" -- and she italicizes First Amendment -- "leaves
3 no room" -- I'm sorry -- "leaves room for a fraud claim."
4 So I personally think the telemarketing decision just
5 decided this last term supports Doug's position and supports
6 the clause as it's currently drafted.

7 CHAIRMAN BABCOCK: John, is the speech that
8 was at issue in the telemarketing case of a different
9 character than the speech that would typically occur in a
10 political race?

11 DEAN ATTANASIO: Yes. It's fair to say -- I'm
12 not saying it decides the issue, but I think it supports --
13 I do think it supports the basic claim that Doug made to
14 support this rule.

15 CHAIRMAN BABCOCK: Jim George.

16 MR. GEORGE: This -- boy, this is another area
17 that I disagree with the Committee and supported John's view
18 on this last -- couple of years ago. I don't know of any
19 case in which statements about oneself in a campaign have

20 ever been held to be illegal. Okay?

21 And I think the efficacy of this paragraph and
22 the legal -- whether or not it violates the First Amendment
23 in connection with campaign speech is highly problematical.
24 I say that I was the best constitutional law student in my
25 class, or whatever. We have all sorts of "that would" if

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1 somebody determined it was false and you can have people to
2 get into -- in a hearing before some commission to
3 discipline the judge who makes that statement.

4 I think it doesn't do any particular good, and
5 I think it could create a legal problem by having it in
6 there. I'm not sure it does a whole lot of harm to have it
7 in here, but I kind of feel like what Judge McCorkle said in
8 his comments, that it just doesn't have any effect on life.

9 JUSTICE LANG: Well -- this is Doug Lang. I
10 think it's got to be there and at least pretty close to what
11 it says now.

12 It occurred to me, as I was reading all this
13 stuff -- and maybe the authority is not just defamation law,
14 but, you know, the rules -- the disciplinary rules, the
15 introduction to disciplinary rules, the Texas Lawyer's
16 Creed, you know, about honesty. And, you know, that ought
17 to take up this kind of consideration for a candidate who
18 isn't a judge as well as the judge who's running. If we
19 can't be honest in our dealings of -- political dealings,
20 you know, how can we be honest anywhere else?

21 Anyway, I think that's the consideration that

22 supports it.

23 HON. LAMAR McCORKLE: Can I tag in behind

24 Doug? This is Lamar again.

25 Please don't -- in my comments about that

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1 particular paragraph, I don't think they should be construed
2 as "People didn't want it there." I think people do want it
3 there, and I think I would second what Doug said.

4 I was going to -- after our programs were
5 over, I was going to suggest to Don Miller and maybe even
6 talk with members of this committee about setting up a
7 practical structure immediately responding to misstatements
8 in some meaningful way so that there is -- (phone
9 interruption) -- a practical solution, not a theoretical or
10 ethical solution to it.

11 CHAIRMAN BABCOCK: Okay. Justice Kidd, and
12 then Doug Laycock and then Justice Quinn.

13 JUSTICE KIDD: This is Mack Kidd. I feel a
14 little bit like the multitude of lawyers that have shown up
15 for a deposition and I haven't asked a single question.

16 (Laughter)

17 JUSTICE KIDD: On the misrepresent clause, I
18 think I feel pretty comfortable with the way it's drafted as
19 is. The only thing that I'd call to the committee's
20 attention is: The ABA consistently uses "knowingly," and
21 we've got "knowingly or recklessly" in there, and I'm not so
22 sure about that. Obviously, we've got some case law for the
23 proposition that "negligently" is too broad.

24 So I'm not so sure that we ought not to

25 consider using the "knowingly" standard and eliminating the

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1 "recklessly" standard, but I haven't formulated an opinion
2 on that.

3 CHAIRMAN BABCOCK: Judge Kidd. I think that
4 this was a -- I will say only for myself -- an inartful
5 attempt to adopt the New York Times standard, which is
6 "knowledge of falsity or reckless disregard of the truth
7 that is, in fact, entertaining substantial and serious doubt
8 about the truth of what you're saying." But without adding
9 the phrase, "recklessly" sounds like some sort of -- some
10 species of negligence, and I think -- I think there's a
11 problem because of that.

12 JUSTICE KIDD: Or could be.

13 CHAIRMAN BABCOCK: Could be a problem because
14 of that.

15 Professor Laycock and then Judge Quinn.

16 PROFESSOR LAYCOCK: Yeah. I agree that that
17 could probably be clarified. This rule operates as
18 aspirational rather than disciplinary except in the most
19 egregious cases, for the reason that somebody mentioned on
20 the phone, that it's -- in the heat of a campaign, you can't
21 enforce it. And it may be that that's true of most of these
22 rules. Except for the recusal mechanism, you know,
23 disciplinary proceedings are hard to bring.

24 The bad stuff about your opponent half of
25 this, as long as it's confined to the New York Times

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1 standard, is sort of an application of the substantive
2 principles of the defamation model with a very different
3 remedy. The good stuff about yourself, we don't think of
4 coming up as often, but I'm sure it does, and the only
5 question is whether it's material.

6 My teenage son looked at a campaign flier the
7 other night, a judge who shall remain nameless, said "I
8 decided 30,000 cases and I've never been reversed." My
9 teenage son said, "Is that judge at a very low-level court
10 with a lot of unimportant cases that never get appealed?" I
11 said, "You got it right."

12 (Laughter)

13 MR. GEORGE: Or maybe it wasn't true.

14 PROFESSOR LAYCOCK: Maybe it wasn't true.

15 (Laughter)

16 PROFESSOR LAYCOCK: It never -- probably
17 wasn't true.

18 Most of us can recall a time when we had a
19 justice on the Supreme Court who was a fugitive from justice
20 in the Cayman Islands or some such place, and my guess is,
21 if we can review all of his campaign statements, he probably
22 said some things that weren't very true about himself and we
23 might have wished we could have done something about him
24 before the voters elected him instead of after.

25 And even if it's only aspirational in this

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1 practical effect, I think it would probably -- not probably.
2 It would certainly send a very -- the very wrong
3 aspirational signal to take it out at this point. It's been
4 there for a very long time. And you take it out, the
5 implication is, "We don't care about false statements
6 anymore. Have at it, guys."

7 And finally, just picking up on Chip's example
8 a while ago, last night I saw a commercial of a candidate
9 bragging, "My Daddy was a war hero."

10 (Laughter)

11 PROFESSOR LAYCOCK: He hadn't served, but his
12 daddy was a war hero.

13 (Laughter)

14 CHAIRMAN BABCOCK: Judge Quinn.

15 JUSTICE QUINN: I think both of our two prior
16 speakers said what I was going to say, but I just -- my
17 believe is that (ii) focuses on misrepresentation, and I
18 think it's saying judges and those who want to be judges
19 shouldn't misrepresent, and I have a problem with judges or
20 people who want to be judges going out there and giving
21 their position, trying to be impartial, have integrity and
22 going out there and fudging with the truth.

23 And I understand the difference between a
24 negligence and a knowing and an intentional, and I
25 understand the constitutional limitations on punishment for

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1 negligence, but I feel it's very important to have that in
2 there.

3 CHAIRMAN BABCOCK: Yeah. There is the issue
4 of what some people call "puffing;" what other people call
5 "opinion." And, you know, I can, perhaps, go out there and
6 say, "I'm the best darn lawyer in Dallas County," and that
7 may be my opinion, hard to challenge one way or the another,
8 and yet, you know, do we want -- does that get picked up by
9 (ii) here? Does that kind of statement get picked up by
10 (ii)?

11 Judge Woodward.

12 HON. BEN WOODWARD: I spoke to Seana at the
13 Judicial Conduct Commission, and I haven't had time to
14 really talk to her about this, but one of the problems also
15 is, as a sitting judge, if I violate this rule, I can be
16 sanctioned very severely by the Judicial Conduct Commission;
17 even removed from office. My candidate, who doesn't care,
18 may not have the same consequences. And so I don't know if
19 that -- we'll be looking at that in my subcommittee, and I
20 don't know if that means we need to expand who the Judicial
21 Conduct Commission can sanction or how they can sanction
22 them or if we need to get in with the State Bar and say,
23 "You need a stronger rule and you need to be consistent with
24 the decisions of the Judicial Conduct Commission when it
25 comes to sanctioning lawyers who violate this rule."

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1 CHAIRMAN BABCOCK: Yeah. Good point.
2 We're going to take our afternoon break. It
3 will be 15 minutes. So we'll be back on the phone at 3:15.
4 (Recess: 3:01 p.m. to 3:18 p.m.)
5 CHAIRMAN BABCOCK: By the way, we should all

6 acknowledge and gives thanks to Anna Renken & Associates
7 Court Reporters, and specifically to Patty Gonzalez, who are
8 donating their time to create this record for us.

9 UNIDENTIFIED SPEAKER: Thank you.

10 UNIDENTIFIED SPEAKER: Thank you.

11 THE REPORTER: You're welcome.

12 CHAIRMAN BABCOCK: All right. Having had a
13 break to think about it, does anybody have any more thoughts
14 about Canon (1)(ii), the knowing or reckless misrepresent
15 provision?

16 HON. GRANT DORFMAN: I had one thought, and
17 it's not a well thought-out thought, but just a
18 consideration.

19 (Laughter)

20 CHAIRMAN BABCOCK: Any comment is fine.

21 HON. GRANT DORFMAN: I thought it floated in
22 response to what one of the people on the phone said about
23 the enforceability or lack thereof of this provision, was
24 whether we might ought to consider -- and I'm hesitant to
25 propose adding duties to the Canon, but a duty to correct

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1 any misstatement, at least upon it being called to the
2 attention or the corrective information being supplied to
3 the candidate or office holder. And that's just a proposal.

4 CHAIRMAN BABCOCK: Okay. Professor Alfini.

5 DEAN ALFINI: Yeah. One thought on the
6 language. There's a Post-White decision, Weaver vs. Bonner,
7 in the Eleventh Circuit that I don't personally agree with,

8 but largely because I think they read White as requiring a
9 lot more than I think it does, but one of the things they
10 did in that case was to declare that there was a New York
11 Times vs. Sullivan test for the misrepresent clause. And I
12 think the way it's worded right now probably would be --
13 well, could be read as failing that test and might want to
14 consider tightening it up from that standpoint.

15 CHAIRMAN BABCOCK: Yeah. I agree with that.
16 I think that our subcommittee was of a view that the New
17 York Times vs. Sullivan test should be in this provision,
18 but I agree with you that I don't think this does it. So
19 that's an area for, perhaps, improvement.

20 JUSTICE QUINN: How is it short?

21 CHAIRMAN BABCOCK: Excuse me?

22 JUSTICE QUINN: In your view, how is it short?

23 CHAIRMAN BABCOCK: I think when it says
24 "recklessly misrepresent," recklessly, if you talk about it
25 in a Sullivan sense, it's reckless disregard of the truth,

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1 but that has been refined by the Court to mean that the
2 speaker, in fact, entertains serious doubt about the truth
3 of what was being said as subject of standard; whereas, just
4 "recklessly" all out by itself could be some sort of
5 negligent or objective standard. And so I think that that
6 is something that could be improved upon.

7 MR. GEORGE: When I tell judges what that
8 means, defending media clients, I say it means you lied or
9 you think you probably lied but don't care. That's what New
10 York Times really requires, and that is we -- it's a little

11 more polite the way Chip says it, but that's what it really
12 means, is: You lied or you think you probably lied but you
13 don't mind -- doesn't care whether you lied or not.
14 Something that captures that idea needs to be put in here.

15 CHAIRMAN BABCOCK: Well, and I think that
16 there's a large body of law that has developed around the
17 phrase "actual malice," which means knowing falsity or
18 reckless disregard of the truth that is, in fact,
19 entertaining substantial doubt as to the truthfulness of
20 what you're saying, and the more -- if that's what we're
21 intending, if we want to incorporate New York Times vs.
22 Sullivan, then to use terms that, if you go into Westlaw and
23 you can find cases is probably the thing to do.

24 Professor Laycock.

25 PROFESSOR LAYCOCK: I agree that that's what

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1 we intended. Whatever you do, don't go back to actual
2 malice, because nobody knows what that means until they look
3 at the explanation.

4 (Laughter)

5 CHAIRMAN BABCOCK: Right. Right.

6 PROFESSOR LAYCOCK: Do it in plain English.

7 CHAIRMAN BABCOCK: Right. I agree. I agree
8 on that.

9 Anybody on the phone have any thoughts about
10 Canon 5(1)(ii)?

11 (No response)

12 CHAIRMAN BABCOCK: Okay. Moving to Canon

13 5(1)(iii), my suggestion is that we postpone discussion on
14 this to our next meeting in April and use this as a bridge
15 between our discussion today on Canon 5 and our discussion
16 in April on Canon 3, because this is in there, but
17 Professor Laycock has a comment about that.

18 PROFESSOR LAYCOCK: I fully agree with that,
19 but just in case people are puzzled, the reason we put this
20 cross-reference in is that 5 applies to judicial candidates
21 as well as judges; 3, I think, only applies to judges. And
22 I don't even remember what 3(B)(10) is, but it was something
23 that should have applied evenhandedly to both candidates in
24 an election.

25 CHAIRMAN BABCOCK: Yeah. 3(B)(10) is a

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1 lengthy provision and it -- basically, it talks about
2 abstention from pending or impending proceedings which come
3 before the judge's court, and there are a whole bunch of
4 other things on it which we can discuss at our next meeting,
5 if that meets with everybody's approval.

6 Let's move on, then, to Canon 5(2). And we've
7 already been talking about this somewhat, but this is the
8 endorsement provision. Everybody here in the room should
9 have a copy of Canon 5, and hopefully people on the phone do
10 as well. But what are people's thoughts about this?

11 MR. GEORGE: Let me just ask a question. Does
12 the idea of this section provide meaningful protection of
13 the integrity of the judicial offices and fair trials to the
14 citizens of Texas? Does it do anything the way it is that's
15 good?

16 CHAIRMAN BABCOCK: Yeah. Judge Laycock -- I
17 mean --

18 (Laughter)

19 CHAIRMAN BABCOCK: -- Professor Laycock and
20 then Judge Kidd.

21 PROFESSOR LAYCOCK: I am not now, nor have I
22 ever been.

23 (Laughter)

24 PROFESSOR LAYCOCK: I do think it does some
25 good, and what you have to think about is not the bare

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1 minimum conduct that would violate this, but the whole range
2 of conduct that would be permissible if we took this out.
3 And, you know, we could have sitting judges or judicial
4 candidates, you know, accompanying legislative candidates
5 making their campaign rounds, appearing at every rally.
6 There would be no visible difference whatever between a
7 judicial candidate and any other candidate if we took this
8 out and if somebody wanted to experiment with taking full
9 advantage of that and playing it to the hilt. And I do
10 think that would be bad for the judicial office.

11 CHAIRMAN BABCOCK: Wayne Fisher.

12 MR. FISHER: Several years ago, at the request
13 of the Court, I chaired what was called The Judicial
14 Campaign Fairness Act. And one of the things that was, I
15 think, very surprising, to those of us who weren't judges,
16 were the number of judges who said -- who explained all of
17 the political pressure that is put upon them, particularly

18 in rural areas, to attend all of these political functions
19 that all of these judges -- I mean, sheriffs or whatever
20 they may be are running for, and pressure to help raise
21 money and all of that sort of thing. And I really do think
22 that this needs to be in here.

23 CHAIRMAN BABCOCK: Okay. You should have --
24 and if you haven't seen it, Judge Menton Murray, who is a
25 member of our committee who couldn't be here today from

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1 Cameron County, a district judge, gave a memo to us, which
2 has been passed out here, that has a number of his thoughts,
3 that being one of them, Wayne, where he raised the same
4 point you did. So there's a second to your thought on that
5 one.

6 Judge Kidd.

7 JUSTICE KIDD: Yeah. I think that this is
8 probably a worthwhile position that ought to be retained,
9 and it's pretty narrowly crafted and I think serves a useful
10 purpose. I know that there are a lot of judges on the
11 Dallas Court of Appeals, for example, that will not attend
12 any political fund-raisers at all, because they consider
13 that an endorsement. The judges on our court have never
14 felt that way because the rule is drafted specifically to
15 allow the judge to engage in reasonable political activity,
16 but I can see it working very much to the detriment of the
17 judiciary.

18 We've got a hybrid appointive/elective system
19 here where an awfully high percentage of our judges are
20 appointed to judicial office, especially on their first

21 occasion to attain the Bench, and I can see this used, you
22 know, where judges go out and endorse gubernatorial
23 candidates and congressional candidates and travel with
24 them, and like Wayne Fisher points out, do fund-raising.

25 I can see it especially being detrimental

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1 regarding a multi-judge court where you have certain clicks
2 developed and judges out endorsing and campaigning for other
3 judges or opponents for judges sitting on the court; and on
4 a collegial court, that would just be absolute death.

5 So I think it's probably a worthwhile
6 provision and ought to be retained.

7 CHAIRMAN BABCOCK: Judge Dorfman.

8 HON. GRANT DORFMAN: I agree with Justice Kidd
9 about the concerns, but my concern is that we're talking, it
10 seems to me, about a restriction on speech that should be
11 subject to the same analysis -- legal analysis as in
12 Republican Party vs. White, and it seems to me that we've
13 identified some of the reasons why this is a good rule and
14 should be retained, but they seem to speak to a different
15 compelling interest, if it is compelling, than the one that
16 underlies the other rules in terms of impartiality. It may
17 be well for the administration of justice for collegiality,
18 but I think those are distinct interests and probably
19 require a different legal analysis.

20 CHAIRMAN BABCOCK: Professor Laycock.

21 PROFESSOR LAYCOCK: I haven't seen these
22 comments Wayne Fisher mentioned. There's probably a letter

23 in the record about judges being pressured to attend events.
24 I don't know if that includes being pressured to buy a
25 ticket to the event or contribute.

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1 There is Supreme Court law on that. It's old,
2 but it's still a good law, and the statute upheld is still
3 in effect. Mitchell vs. Public Employees Union upholds an
4 absolute ban on government employees making campaign
5 contributions. And the principal rationale is, they're
6 vulnerable for being shaken down for campaign contributions
7 by the politicians who employ them, and, you know, it -- I
8 used to think it was outrageous. I now think it's not such
9 a bad decision. It's a little out of tune with some of the
10 things Kennedy's been writing lately, but, you know, it's a
11 venerable precedent, and I don't think it's likely to be
12 overruled. And if judges are subject to that kind of
13 pressure, that's a reason squarely based in precedent for
14 keeping something like this.

15 CHAIRMAN BABCOCK: Good point. Anybody else?

16 Yeah. Judge Dorfman.

17 HON. GRANT DORFMAN: I wanted to add, it seems
18 to me, also, some of the -- a lot of these activities are
19 permissible and do occur, and so I don't know where you
20 would draw the line on whether or not -- how bright the line
21 you could draw would be, so I think, also, the
22 overinclusiveness -- underinclusiveness analysis that took
23 place in the White decision would apply as well.

24 CHAIRMAN BABCOCK: So, Judge Dorfman, it
25 sounds like --

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1 (Simultaneous discussion)

2 CHAIRMAN BABCOCK: -- you're not too keen on
3 this provision.

4 (Simultaneous discussion)

5 HON. GRANT DORFMAN: I think it's a good
6 provision. I have concerns about its constitutionality in
7 light of the White decision --

8 (Simultaneous discussion)

9 HON. GRANT DORFMAN: -- and whether we can
10 simply leave it as written or whether we need to modify it
11 and identify -- do some legal analysis to identify what the
12 compelling interests we're talking about is and
13 differentiating from the others.

14 CHAIRMAN BABCOCK: Right. Somebody on the
15 phone was speaking while Judge Dorfman was just talking.
16 And I'm sorry. We couldn't quite hear you.

17 CHIEF JUSTICE LOPEZ: I'm sorry. I couldn't
18 hear him. Alma Lopez. It's just that -- I don't know if
19 it's my phone or the equipment there, but it keeps cutting
20 off periodically, and particularly when you mention
21 someone's name.

22 CHAIRMAN BABCOCK: Well --

23 UNIDENTIFIED SPEAKER: It was very difficult
24 to hear Justice Kidd. If you-all could all keep your voices
25 up, that would be very helpful.

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1 CHAIRMAN BABCOCK: Justice Kidd is at the far
2 reaches of the room, so that's probably why. We're all
3 huddled around this speakerphone. We're doing the best we
4 can. Sorry about that.

5 Okay. Does anybody else -- and I think
6 Judge Dorfman is right on the money. We have to be sure
7 that there is a sufficiently compelling public interest to
8 justify this provision, because I think it is subject to
9 attack, and we've heard some, but does anybody have any
10 others?

11 HON. LAMAR McCORKLE: Lamar here.
12 Anecdotally -- this is following up with one what Wayne
13 Fisher said.

14 There are or have been times where the judge
15 or the individual who wanted to run as judge was -- at least
16 appeared to have to be aligned with a particular political
17 officer in a particular county, and that alignment went so
18 far as to make representations of support or appearance of
19 support.

20 If Seana Willing were there, she would
21 probably tell you that there have been judges who -- and I
22 will give them the best intention, because I'm certain they
23 had the best intentions -- who have been sanctioned for
24 lending their image in photographs, lending their names on
25 promotional materials or lending their endorsement -- actual

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1 verbal endorsement of other political officers within a

2 county.

3 So it needs to be somewhere in the Canons. If
4 it is not in this particular provision, something should
5 preclude this team concept in the sense of a fair and
6 impartial court, because some of these people -- maybe the
7 commissioner or the county judge and the county judge may
8 want a road and the lawsuit may involve the road and the
9 only judge in the county happens to be the one that was
10 supporting that particular commissioner for that particular
11 race.

12 CHAIRMAN BABCOCK: You'll be interested to
13 know, Judge McCorkle, that Seana Willing is in the house.

14 (Laughter)

15 HON. LAMAR McCORKLE: Well, in that case, then
16 I will no longer speak for her nor would I ever presume to
17 do so.

18 (Laughter)

19 CHAIRMAN BABCOCK: And, Seana, you won't
20 believe what he's been saying about you.

21 (Laughter)

22 MS. WILLING: Oh, I think I would.

23 (Laughter)

24 MR. GEORGE: Well, one of the things, from a
25 practical consideration for this section of Canon 5, is to

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1 decide, "What do we do next?" If the language itself is
2 useful and satisfactory, the question of how to build a
3 record to justify it seems to me to be an issue that we need

4 some guidance from the Court. Right now, we don't have
5 commentary, like a restatement might have, in the Canons.
6 We adopt them and they stand on their own bottom and the
7 language sets out there by itself and there is no, so to
8 speak, legislative history or commentary about them.

9 I agree with Judge Dorfman that in this case
10 we do need to articulate and identify why we have this and
11 what the problem is and reflect that we have considered to
12 tailor this language to -- in a narrow way to -- most narrow
13 way to accomplish the goal we've set out to achieve. I just
14 don't know what the mechanism for doing that is. And I
15 don't know whether we have a system in the -- if the Court
16 wants us to do that or not.

17 MR. McWILLIAMS: This is George McWilliams.
18 We were speaking in the break. It seems like 90 percent of
19 what I have heard here today should actually be commentary
20 to the Canons, but whether there's some mechanism --
21 Judge Woodward had a scheme that he liked -- whether or not
22 that could be folded into a commentary -- if we're all
23 satisfied with the Canon and thinks it passes constitutional
24 muster, should we give the benefit of our commentary to
25 those?

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1 MR. GEORGE: That -- and again, in order to
2 make the commentary useful, it would need to be able to be
3 endorsed by, in some fashion, the body adopting the rule,
4 and justification for it, kind of like an opinion that's --
5 of some sort. But what I'm trying to figure out is, again,
6 the scope of our jurisdiction. Is this something we should

7 do for the Court?

8 JUSTICE JEFFERSON: The answer is yes. I
9 mean, I think the Court -- the Court believed that the whole
10 code needs to be looked at from top to bottom and made to
11 come to compliance with the majority view in -- or the
12 Court's holding in Republican Party vs. White. And so to
13 the extent that this might impact free speech rights, you
14 know, of candidates, then the Court would like the committee
15 to look at it and then just make a recommendation about
16 whether it ought to be in a rule or in a commentary.

17 But in terms of the background facts, I'd be
18 interested in learning from the Commission -- and maybe on
19 each one of these Canons as we go along -- what the
20 experience has been in terms of complaints that are made.
21 When are they made? Are they part of a campaign -- you
22 know, complaint season? How many sanctions have been given,
23 and in what context?

24 I remember when I used to be on the Commission
25 on Judicial Conduct, we'd get complaints by -- usually a

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1 candidate against the sitting judge saying, "That judge
2 appeared at this political event and allowed his or her name
3 to be used in support of another candidate for office." So
4 we'd have that sort of view. Another would be a complaint
5 that a judge showed up as a contributor to another judge,
6 and is that, you know, technically an endorsement or not.

7 I mean, I think it would be good to know what
8 the history is of the sanctions -- the complaints and the

9 sanctions on this before -- to be better able to articulate
10 a compelling reason.

11 MR. GEORGE: In terms of trying to do this, is
12 there something like a common law or series of decisions
13 construing these rules that we could collect without the
14 names, or whatever way we need to do it, to collect them to
15 see what -- how this has been construed so we may be
16 avoiding creating a new rule when we have a bunch of
17 construction that actually construes it in a way that solves
18 whatever problem might exist.

19 CHAIRMAN BABCOCK: Seana Willing.

20 MS. WILLING: Seana Willing. The Commission
21 has been in existence since 1965, and we do have sanctions,
22 public and private, going back, you know, to the late '60s,
23 early '70s that we could go through and look to see which
24 Canons that they speak to. Of course, the Canons have been
25 revised since then, so I guess we could go back to

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1 the -- since the last revision in '92 and go forward from
2 there.

3 I know Lamar McCorkle has an annotated code
4 that we've helped him work on, and I think it's going back
5 now from '99 forward through our fiscal year 2003, and it
6 does give, sort of, annotations with sanctions, ethics
7 opinions that the judicial section of the State Bar has
8 issued that speak to the Canons going back about seven
9 years -- six or seven years, but we could go back further.

10 CHAIRMAN BABCOCK: Professor Laycock.

11 PROFESSOR LAYCOCK: Commentary can serve

12 multiple functions, and two of them are worth
13 distinguishing. One is to help people understand the Canons
14 and to elaborate things that are hard to get in precise
15 rule-like language. And that, of course, would have to be
16 adopted by the Court and there may be views or even
17 practical limitations on how long that could be or how
18 detailed that could be.

19 A second function, which you-all were just
20 kind of talking about, is making a record, so that if
21 there's a lawsuit, the Attorney General has some ammunition
22 to defend this with. And that doesn't have to be in formal
23 commentary as published with the Canons. If we gather the
24 information, take all of the different things that members
25 of this committee know, organize it systematically and keep

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1 it in the files of this committee, then it is there and
2 available to explain why we thought this was compelling if
3 and when it is needed.

4 CHAIRMAN BABCOCK: Right. Somebody on the
5 phone was about to speak.

6 DEAN ATTANASIO: Yeah. This is John
7 Attanasio. The only thing that troubles me about the
8 language is -- and I said this earlier, but the committee
9 may not agree -- this word "endorsing," particularly when
10 endorsing is juxtaposed, "except that either may indicate
11 support for a political party." So particularly when one
12 thinks that -- with the "except clause," then it would
13 appear that even if I indicate any support for a candidate,

14 even possibly for a candidate's position, if I say, "I agree
15 with the President about thus and so," that may violate the
16 rule.

17 I personally would tighten up -- I was looking
18 for a definition of the word "endorsing" through the Canons,
19 and at least I didn't see one. Maybe there is one in some
20 of the decisions on the rule, which would be adequate, but
21 if there's not -- and maybe even if there is, the rule could
22 be criticized as overbroad or vague.

23 CHAIRMAN BABCOCK: Well, and Justice Jefferson
24 raised the issue, too. What if you appear on the podium
25 with candidate for president, George Bush, which I bet has

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1 happened, does that violate this provision?

2 MR. FISHER: The way it reads, it does.
3 "Candidate for any public office."

4 HON. LAMAR McCORKLE: This is Lamar again.
5 I'm certain that the Commission doesn't want to take a
6 position or make a recommendation on it. I think, though,
7 that if you listen or you read some of the materials,
8 there's a distinction between a judge appearing in a
9 political function, i.e., every judge in -- or every
10 candidate, every Republican or every Democrat in Dallas
11 County is notified that there's going to be a Dallas County
12 Republican Party Meeting, and if the president shows up,
13 well, that's great, but it is a party function. It's not
14 necessarily an endorsement of one of the candidates there
15 but it's a political function.

16 There has been an uneasy -- or a try to

17 delineate between what you can do with the party versus what
18 you can do for any one individual or any one issue, and I
19 think that that might be a simpler way of saying what we've
20 had to break through. But I don't think the Commission has
21 ever sanctioned anyone for appearing at a political event,
22 but I do think they have sanctioned people for making an
23 overt endorsement or allowing their image to be printed or
24 utilized by another candidate for a particular office.

25 DEAN ATTANASIO: This is John Attanasio again.

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1 If you limit it to an overt endorsement, which I -- or
2 narrowly means, "I say I endorse Candidate X" or having my
3 picture associated with Candidate X, then I think that's
4 probably not going to be regarded by a Court as overbroad.
5 But if you -- if by endorsement the rule means "I
6 support" -- maybe if it's -- the tough question, I think, is
7 does "I support Candidate X" -- is that enough? If the rule
8 means "I support this position taken by Candidate X," you
9 know, there's a part of the rule at the end that would seem
10 to indicate maybe it does not, because it says, "A judge or
11 judicial candidate may attend political events and express
12 his or her views on political matters," but suppose I
13 express my view but in some association -- some overt
14 association with another candidate for political office, I
15 think if that violates the rule, if a candidate says for
16 judicial office, "I support this idea or this position that
17 Candidate X also takes," I wonder -- I personally think that
18 will go down. I think that will be held unconstitutional.

19 I could be wrong. But if one says, "I support Candidate
20 X" -- I don't know. That's the tough question.

21 Clearly, I think if -- under the rule, if one
22 says, "I endorse Candidate X" and uses that sort of magic
23 word or allows it to be -- one's name to be in the newspaper
24 with an endorsement of Candidate X or something like that,
25 as long as, as several people have said, there's a

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1 sufficient record to substantiate why that could be a
2 problem -- and I think that record can be developed -- I
3 think that happens, but I think a lot hangs on the way the
4 word "endorse" is construed, and particularly in light of
5 the other language, particularly "except that either may
6 indicate support for a political party." If you do
7 something that indicates support for a particular candidate,
8 I -- and that violates this rule, that violation could be --
9 or the rule could be held unconstitutional, I think, as
10 overbroad.

11 CHAIRMAN BABCOCK: Okay. John, could you just
12 repeat for me the description of the situation where you
13 think the rule would be held unconstitutional?

14 DEAN ATTANASIO: To me, the really tricky one
15 is going to be if I say, "I support this position. I
16 support being tougher on crime just as the President has
17 said." If that violates this rule by including a specific
18 candidate in the rule, then -- which I think the rule could
19 be so construed, that that would violate the rule, then I
20 think that's to going to be flatly unconstitutional.

21 I think that if I just say "I support

22 Candidate X" -- say, the President, for example -- that's
23 the tough one. I'm not sure. I personally, to avoid
24 constitutional problems, would probably recommend using --
25 construing the word -- or defining the word "endorse" in as

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1 narrow a way as possible, but, you know, I also recognize,
2 that, you know, sort of, "I support the sheriff," the
3 sheriff's candidate who's going to appear before me a lot,
4 you know, maybe just the "I support a candidacy" is enough
5 to violate the rule and still pass constitutional muster,
6 but the record is going to have to be stronger.

7 The broader the rule is in terms of what it
8 prohibits, the more justification there's going to have to
9 be, I think, before this rule holds. If one construes the
10 word or defines the word "endorse" very narrowly, then the
11 kind of record that will be needed, I think, at least to
12 substantiate this rule so that it passes constitutional
13 muster, I think will be less. I think it will still have to
14 be substantial. But if one construes the word "endorse"
15 broadly; that is, to more broadly to say even indicating
16 support for a candidate is going to violate it, which the
17 way I read the rule right now, support for a candidate
18 would -- expressing support for another candidate in public
19 office would violate it, then I think the kind of record
20 that's going to have to be behind that is going to have to
21 be quite substantial, and, you know, clearly, I think, if
22 the rule takes the one additional step, which it appears to
23 do, to say -- to ban the statement saying "I support this

24 position on crime," say, for example, and which is also in
25 accordance with Candidate X -- say Candidate X being the

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1 President -- then I think the -- I personally think almost
2 no matter what record we develop, that's going to be struck
3 down. I think that some --

4 MS. CALLAWAY: I'm Sharon Callaway. I'm a
5 newcomer to this. I've tried to listen and -- because this
6 is my first round with thinking about these issues, but
7 something that's troubling me right now -- and maybe I'm
8 just admitting my ignorance -- is that I don't understand
9 precisely what we're trying to prohibit and why. And the
10 professor's discussion right now kind of pin-pointed that
11 question that's looming in my mind. I'm not sure what we're
12 trying to prevent.

13 CHAIRMAN BABCOCK: You cut out just a little
14 bit, the part about where you identified yourself.

15 MS. CALLAWAY: This is Sharon Callaway.

16 CHAIRMAN BABCOCK: Thanks, Sharon.

17 Professor Laycock.

18 PROFESSOR LAYCOCK: I don't know if this rule
19 will be upheld or struck down, but I can't imagine the line
20 that's going to be drawn between "I endorse" and "I
21 support." You know, I think anything that clearly indicates
22 you want this candidate to win will hang together and either
23 all be upheld or all be struck down.

24 I do agree with John, that the more the focus
25 is on the issue than on the candidate, the more it's within

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1 Minnesota vs. White, and as long as it's not about a
2 specific pending case, the judicial candidate can express
3 his view on the issue. And one easy way for it to come up,
4 which is worth thinking about, is, you know, the press comes
5 to a judicial candidate and says, you know, "The DA has
6 announced his proposal on some policy question. What do you
7 think about the proposal?" Well, I assume under Minnesota
8 White, he can answer that question and say what he thinks
9 about the proposal, and the fact that he agrees or disagrees
10 with the DA on that proposal should not be interpreted as an
11 endorsement of the DA's candidacy or disagreement as an
12 endorsement of his opponent. I think we would be in trouble
13 under White if we went that far.

14 CHAIRMAN BABCOCK: The question was asked:
15 Why are we having this rule? And so far I've heard
16 collegiality. You don't want judges of the same court
17 either banning together into clicks or coming out for or
18 against people. So that's an interest.

19 The second is, following the Mitchell case,
20 Mitchell-like coercion. You don't want judges being coerced
21 by their political party or by anybody to come out and
22 endorse somebody else.

23 Is there anything else -- have I missed
24 something?

25 Judge Woodward.

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1 HON. BEN WOODWARD: Not too farfetched a
2 scenario, but what if my county judge comes to me and he's
3 authorized by law to perform marriages and he comes to me
4 and says, "By the way, next week we're going to be
5 considering the budget, including your annual supplement
6 that's paid by the county, and I'm going to hold a ceremony
7 today and marry 80 homosexual couples in a ceremony like the
8 mayor of San Francisco and I want you to endorse me for my
9 candidacy for re-election. And when these couples get
10 divorced, I want you to divorce them and not say the
11 marriage is void"?

12 To me, you've got coercion. And by endorsing
13 him, I am endorsing, perhaps, more than just the candidate
14 but maybe some of the very issues that he's running on. And
15 I don't know how you draw the distinction by saying, "I like
16 the guy as a president and I want him to be president. He's
17 a good man. But I disagree with his position on X, Y and
18 Z."

19 CHAIRMAN BABCOCK: Okay. So that's coercion
20 with a twist.

21 JUSTICE KIDD: Capital "C."

22 HON. BEN WOODWARD: It's coercion, but it's
23 also an endorsement. I'm setting forth a specific view on
24 some issues that may very well come before me if my
25 endorsement is considered an endorsement of his position.

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1 CHAIRMAN BABCOCK: Okay. Wayne Fisher.

2 MR. FISHER: Let me amplify what we were told

3 in the committee that I referred to earlier on the judicial
4 campaign finance reform.

5 The judges in rural areas were almost
6 unanimous in saying that tremendous pressure is put upon
7 them by political parties, both Republican and Democrat or
8 whatever, to become fund-raisers and to become the principal
9 point, so to speak, in fund-raising in some of those
10 counties, and I think there is a compelling state interest
11 that the judiciary remain more independent and free from
12 that type of activity. And I just would like to have that
13 on the record.

14 CHAIRMAN BABCOCK: Good. Good.

15 Yeah. Judge Dorfman.

16 HON. GRANT DORFMAN: It seems to me we may
17 have -- I missed the immediately preceding discussion, so if
18 this has been said, please feel free to cut me off.

19 UNIDENTIFIED SPEAKER: I can't hear.

20 CHAIRMAN BABCOCK: He hasn't said anything
21 yet, but he's winding up to.

22 (Laughter)

23 JUSTICE KIDD: He's clearing his throat.

24 HON. GRANT DORFMAN: Whereas, Republican Party
25 vs. White seems to make this -- in my mind, makes this

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1 provision constitutionally suspect, what Mr. Fisher just
2 said seems to me to -- and Judge Woodward's comments
3 suggests another rationale that would certainly be
4 compelling under the campaign finance ruling that just came

5 down --

6 MR. FISHER: Correct.

7 HON. GRANT DORFMAN: -- which I think gives us
8 a little more leeway in terms of restrictions on speech,
9 especially in the electoral context where coercion is
10 involved, or the appearance of impropriety or appearance of
11 coercion.

12 CHAIRMAN BABCOCK: Okay. Professor Laycock.

13 PROFESSOR LAYCOCK: I think this has been
14 implicit a couple of times, but no one said it straight out.
15 Government is a repeat litigant. These executive branch
16 candidates, a lot of them are going to appear before the
17 local judge repeatedly. The legislative candidates won't
18 appear them themselves, but the laws they enact will appear
19 to be interpreted and to have their validity struck down.
20 So there may be an impartiality reason for not having judges
21 too tightly linked to candidates for their offices.

22 CHAIRMAN BABCOCK: Judge Benton.

23 HON. LEVI BENTON: I don't -- I understand the
24 concerns about coercion. But what if I want to go to Judge
25 Dorfman's fund-raiser? What if I want to play in the

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1 sheriff's golf tournament? Why should I be prohibited?

2 UNIDENTIFIED SPEAKER: I can't hear Judge
3 Benton.

4 CHAIRMAN BABCOCK: Judge Benton wants to go
5 play golf and party with Judge Dorfman, and he wants to know
6 why he can't.

7 (Laughter)

8 UNIDENTIFIED SPEAKER: Doesn't like him.

9 (Laughter)

10 HON. LEVI BENTON: If you wouldn't interrupt
11 me so much, you could hear.

12 (Laughter)

13 CHAIRMAN BABCOCK: Judge Benton says, "Hey,
14 what's wrong with going to Judge Dorfman's political
15 fund-raiser? How come I can't go to his golf tournament?
16 It's a fun time and there's no harm."

17 JUSTICE KIDD: This is Mack Kidd. It seems to
18 me that the rule does permit and give the judicial candidate
19 a little bit of running room in that regard. I mean, you
20 certainly can go to a political event. That's not an
21 endorsement of a candidate by going to that political
22 fund-raiser. And so I think the rule itself gives the
23 judicial office holder a little bit of running room.

24 (Simultaneous discussion)

25 MR. FISHER: And blessedly, for the judge, he

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1 didn't have to be named as a \$2,500 underwriter.

2 JUSTICE KIDD: Absolutely.

3 (Laughter)

4 JUSTICE QUINN: But taking it a step
5 further --

6 CHAIRMAN BABCOCK: Judge Quinn.

7 JUSTICE KIDD: He can stick to those under-\$50
8 contributions.

9 JUSTICE QUINN: Taking it a step further, how

10 about if the candidate wants to endorse President Bush or he
11 wants to endorse Governor Perry? Why should he not be able
12 to do that? And I think that is the angle that we have to
13 come from in order to support this restriction, because that
14 was the angle that the -- well, I guess White was coming
15 from in that case. He's saying, "I want to do this, and
16 you're stopping me." So we've got to view it from the
17 perspective of the person who wants to do it and how can we
18 justify stopping him from doing it, not "Oh, we don't want
19 to do some protectives because we don't want to do it."

20 CHAIRMAN BABCOCK: Right. Professor Laycock.

21 PROFESSOR LAYCOCK: Well, the coercion
22 rationale might be sufficient or it might not be. But if
23 the coercion rationale doesn't work here, then there can't
24 be an exception for people who want to, because -- and that
25 was recognized in Mitchell. It was recognized in labor

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1 laws. Any time the government is trying to protect against
2 coercion, if there's somebody who can coerce you to do it,
3 he can equally well coerce you to say "But I wanted to do
4 it." So no coercion rule ever has an exception for
5 volunteers.

6 Now, we may not want to go there, but if we do
7 go there and if there's enough evidence of coercion of
8 judges, then the fact that some judges want to do it and
9 don't feel coerced wouldn't, then, invalidate that
10 rationale.

11 CHAIRMAN BABCOCK: So where we are right
12 now -- this is Chip Babcock. Where we are right now is,

13 we've got three rationales for the rule -- the current rule,
14 which is collegiality, Mitchell-type coercion and the
15 impartiality interest. Those are the three. Does anybody
16 have any more -- anything else?

17 Yeah. Seana Willing.

18 MS. WILLING: This would really apply to the
19 judge candidates for re-election, but there's a second Canon
20 that usually comes into play with the endorsement violation,
21 and that's Canon 2B, lending the prestige of your office to
22 advance someone else's interest. And so there's still that
23 element -- not necessarily for the candidate, but for the
24 judge who is a candidate for re-election or for election to
25 another Bench.

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1 CHAIRMAN BABCOCK: Improper use of the office.

2 MS. WILLING: Correct.

3 CHAIRMAN BABCOCK: Judge Quinn.

4 JUSTICE QUINN: In something what Ms. Willing
5 said, the prestige of the office, I think that captures the
6 concept that we are different. I'm a judge and I don't want
7 to say I walk in a higher plane, but I think that was the
8 concept of these, is that they want to put us on the higher
9 plane and not getting us down there. And I think that may
10 be -- let me see if I can say this right. Because we're
11 supposedly walking on the higher plane and we're supposed to
12 have this integrity and this impartiality, if we were to
13 come out and say, "I'm going to endorse that person," the
14 public may say -- naive public -- but the public may say,

15 "Well, that person has integrity. That is probably the best
16 candidate, then, because this judge said to do it. He's not
17 in the political fray." You know, and that's the lending of
18 the prestige. I think that -- the word "prestige"
19 encompasses a lot of what we're supposed to be.

20 CHAIRMAN BABCOCK: But isn't the issue,
21 Judge Jones goes down to federal district court here in
22 Austin and gets before Judge Nowlin and he says, "Hey, I
23 want to endorse our president and this is not allowing me to
24 do it and I" -- "you know, I'm a citizen just like everybody
25 else. And why in the world can't I endorse President Bush

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1 for president? And by the way, while I'm at it, I want to
2 go play golf with Dorfman, and this" -- "I'm worried about
3 this."

4 (Laughter)

5 MR. GEORGE: Give him some money to run for --
6 run against those other people.

7 (Laughter)

8 JUSTICE QUINN: I think much of that goes back
9 to the impartiality concepts and all that which Judge Scalia
10 pretty much pooh-poohed, I think, in White, and that's my
11 problem with White. I think we have to -- have this
12 appearance of impartiality and open-mindedness, but those
13 are all things that weren't important to Scalia. So I don't
14 know how you'd justify it.

15 CHAIRMAN BABCOCK: Professor Alfini.

16 DEAN ALFINI: I think it's a judicial
17 independence issue -- I mean, the policy behind it, anyway.

18 If you are running around as a judge endorsing one of the
19 candidates for one of the two political branches, there's
20 some implication that you may be influenced by those people
21 after they take office and your independence might be
22 compromised. I think that's the policy rationale behind the
23 rule.

24 DEAN ATTANASIO: This is John Attanasio.
25 Suppose you're a candidate for office and you get a question

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1 by a reporter that says, "What do you think of the job the
2 president is doing"? Can you answer that question under
3 this rule?

4 MR. GEORGE: No.

5 DEAN ATTANASIO: Well, then I think it's going
6 to be struck down.

7 JUSTICE LANG: Well -- this is Doug Lang.
8 Following John's concern about, you know, the breadth of
9 that, I mean, I just -- I took the aggressive step of
10 looking in the dictionary at the word "endorse."

11 CHAIRMAN BABCOCK: No fair. You're on the
12 phone.

13 (Laughter)

14 JUSTICE LANG: I know. But it is a little
15 ambiguous, even in the unabridged version here. It says "to
16 lend support, to sanction." Well, I mean, "to lend support"
17 is pretty broad. "To sanction" is a little bit more
18 expressed. So, you know, we may have to tune that up a
19 little bit or to use the language "to lend your name to

20 indicate support for another candidate," to use that
21 same -- balance it out. But everything I heard about the
22 reason for it sounds very reasonable and rational.

23 MR. GEORGE: And compelling.

24 (Laughter)

25 MR. GEORGE: We need "compelling" in there,

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1 because we're building our record.

2 (Laughter)

3 (Simultaneous discussion)

4 JUSTICE LANG: And we ought to sanction it.

5 (Laughter)

6 CHAIRMAN BABCOCK: What if Judge Jones is at a
7 political event, which he can attend under this rule, and
8 somebody says, you know, "Do you endorse Governor Perry for
9 re-election," or, "Do you endorse President Bush," and he
10 says, "Well, let me just tell you, I'm a yellow-dog
11 Republican" -- if there is such a thing -- "and I can't say
12 who I endorse, who I don't endorse, but let me just tell you
13 I'm a yellow-dog Republican. That's all I'm going to say."
14 That, presumably, is okay under this rule.

15 MR. FISHER: It is, if that's what he says.

16 CHAIRMAN BABCOCK: Well, isn't he -- I mean,
17 isn't he's kind of speaking in code?

18 MR. GEORGE: Well, there's a practical problem
19 that Justice Jefferson was alluding to in this. You go to
20 the Travis County Republican or Democratic fund-raiser or
21 party or whatever and there's pictures taken and all of
22 the office holders get up on the stage and it appears in the

23 newspaper, your picture with all of the other people of your
24 party. Is that or is that not an endorsement of those other
25 people that are running for office or not? There is the

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1 giving of -- going as a candidate for your party to a
2 political convention, for example, and participating in the
3 discussion and voting in that regard, is that going to be
4 compliant or not compliant with this rule?

5 There are a series of practical problems that
6 I can see happening for judicial candidates and judicial
7 office holders that create risk of violating this rule. It
8 seems -- you know, this is kind of like making sausage.
9 There is good reasons for some sort of limitations and there
10 are difficult lines to draw here.

11 The issues of where we draw the lines and how
12 we say the words needs to be looked at carefully, and I
13 think of equally importance, we need to have some actual
14 events and stories and record of why this is important. The
15 coercion piece is a pretty compelling story, that people get
16 compelled to endorse folks and then they are in a difficult
17 situation when they rule on the county's road when you've
18 just endorsed the county commissioner. That's a pretty
19 compelling reason to having something like that.

20 The wordsmanship to try to deal with words
21 like support, endorsing and --

22 CHAIRMAN BABCOCK: Sanction.

23 MR. GEORGE: -- sanction really creates some
24 difficulty.

25 One of the things that I would like

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1 Ms. Willing to have us is all the cases that have all of the
2 fact situations where anybody has ever decided, "This one
3 violates it and this one doesn't," because right now, we are
4 just -- at least Jim George is -- operating under that great
5 advantage of complete ignorance of what the actual judicial
6 history of this is. And if there is a history, it would
7 sure be helpful knowing.

8 HON. GRANT DORFMAN: Can I just comment on
9 that?

10 CHAIRMAN BABCOCK: Judge Dorfman, and then
11 Judge Kidd.

12 HON. GRANT DORFMAN: It seems to me that that
13 itself is a problem, because we're talking about First
14 Amendment -- we're talking about speech, and if you believe
15 you're out to sea because all you have is the text of the
16 Canon before you and not its interpretation, I think there's
17 a chilling effect --

18 MR. GEORGE: You're right.

19 HON. GRANT DORFMAN: -- if there is any
20 variance between the actual words of the text and the case
21 law interpretation that's applied.

22 CHAIRMAN BABCOCK: Judge Kidd.

23 JUSTICE KIDD: Yeah. And Seana Willing
24 probably can follow up on this, but we have a whole body of
25 advisory case law on the issue of endorsement. Is putting a

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1 bumper sticker on my car an endorsement?

2 CHAIRMAN BABCOCK: Depends on what it says.

3 (Laughter)

4 JUSTICE KIDD: We've got advisory opinions.

5 We've got sanctions from the Judicial Conduct Commission,

6 and so I would really advise -- I mean, if we think that

7 this rule has some validity and ought to be retained, I

8 would strongly recommend not tinkering with the language,

9 because we've lived with this rule for a period of time now

10 and we've got this body of case law and I would really not

11 urge that we change from endorsement -- I mean, generally,

12 judges know what "endorsement" means. And does that mean

13 I'm attending a political function where I'm seen and is

14 that an endorsement? Generally, the Judicial Conduct

15 Commission says no, because the rule definitely has some

16 provisions in it that allow me to attend a political

17 gathering with no fear of retribution, but I would strongly

18 urge not tinkering with what we've got here.

19 MR. GEORGE: Let me interrupt here. This is

20 Jim George. One of the things that would make our work a

21 lot easier, if we actually had the history of construction

22 of application of this language, I -- you know, and one of

23 the problems I think people in the trenches face is, that

24 body of knowledge is relatively inaccessible on a quick

25 basis. There's no way to look up the annotations to this

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1 code --

2 JUSTICE KIDD: Not to us.

3 MR. GEORGE: -- in any kind of place that I
4 know of that one can get on-line and do that, index it by
5 construing endorsement.

6 JUSTICE KIDD: The advisory opinions are on
7 myhonor.com.

8 MR. GEORGE: They are?

9 JUSTICE KIDD: Yeah. They're all there, and
10 on the office of court administration. All of the advisory
11 opinions are there. Now, Seana Willing will have to speak
12 for the Commission, but those are there.

13 MR. GEORGE: Can you give us that Web site
14 again?

15 JUSTICE KIDD: Myhonor.com.

16 MR. GEORGE: I'm hesitant to show my
17 ignorance, so there are -- my honor?

18 JUSTICE KIDD: Myhonor.com.

19 MR. GEORGE: I haven't ever used that one.

20 (Laughter)

21 JUSTICE KIDD: That's the Texas Center for the
22 Judiciary, and then the Office of Court Administration keeps
23 all of the advisory opinions as well. But all of this is
24 well known to the judiciary. I mean, you know, a judge
25 coming on to a court will get this body of information.

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1 CHAIRMAN BABCOCK: Judge McCorkle, are you
2 still on the line?

3 HON. LAMAR McCORKLE: I'm here.

4 CHAIRMAN BABCOCK: You have annotated versions
5 of this, do you not?

6 HON. LAMAR McCORKLE: Yeah. I'll tell you
7 what I have and I'll tell you what the current status of it
8 is. I have the entire code annotated with Canons and with
9 the ethics opinions and also with the public sanctions or
10 public statements that the Commission has made since '99.
11 Once you get past '99 with the Commission, it's difficult to
12 get into their files, and it's just simply because of the
13 technology that they have at this point. And we may have
14 difficulty with their resources going back much further
15 right now, because we've been talking about going back, but
16 we haven't been able to get back quite that far.

17 I also have a statutory history -- the history
18 of the various portions of the code. I have it in hard copy
19 pretty much -- it's in its draft stage. It's supposed to be
20 delivered to the judiciary as a whole in September. It's
21 also going to be delivered in a disk format in September as
22 well.

23 I have the historical notes of all of the
24 provisions as I can find them through the help of Doug --
25 (phone interruption) -- hello?

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1 CHAIRMAN BABCOCK: Yeah. You're here.

2 HON. LAMAR McCORKLE: And so the document
3 itself, though, for me is well over -- it's going to be well
4 over 100, 200 pages -- it's going to be over 200 pages to
5 copy, and it's in its rough status. I could probably, in

6 some way -- now, I will tell you, Dean Alfini has seen it.
7 Mack Kidd has seen it. Seana Willing has seen it. And I'll
8 be glad to try and share some of it, but I sure would not
9 want a wide distribution on a product that might be flawed
10 yet still.

11 MR. GEORGE: Well, let me just deal with a
12 practical problem. Since I'm the -- Chip has made me the
13 chair of the subcommittee on Canon 5 --

14 HON. LAMAR McCORKLE: Right.

15 MR. GEORGE: -- to the extent that we have
16 that learning in some form on Canon 5 in this language, it
17 would be -- I would be very grateful if you would share that
18 part of it.

19 HON. LAMAR McCORKLE: You're in Austin right
20 now?

21 MR. GEORGE: I am.

22 HON. LAMAR McCORKLE: If you'll walk across
23 the street to the Texas Center for the Judiciary, that is
24 the piece that we're delivering to the judges at the
25 regional program, and we just got through delivering Canon 5

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1 to them. I've already found a couple of errors in it, so
2 it's still not final, but that will give the annotated
3 version of 5.

4 MR. GEORGE: All right. I will --

5 HON. LAMAR McCORKLE: And again, I'll be glad
6 to share some of this, but just so long as everybody
7 realizes that it's in a working final draft status.

8 CHAIRMAN BABCOCK: Terrific. Great, Judge.

9 Thank you.

10 We've got 45 minutes left, and I'd like to try
11 to have some discussion on the remaining two subdivisions of
12 Canon 5. And so let's move to Subdivision (3), "A judge
13 shall resign from judicial office upon becoming a candidate
14 in a contested election for a non-judicial office either in
15 a primary or in a general or in a specific election," et
16 cetera, et cetera.

17 Do we have -- this provision is, I think,
18 relatively recent, is it not? By that I mean within the
19 last ten years.

20 JUSTICE KIDD: Yeah.

21 CHAIRMAN BABCOCK: And I think it was
22 occasioned by the race of one of the sitting members of the
23 Court, wasn't it?

24 HON. LEVI BENTON: I thought it was the Whitic
25 rule.

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1 CHAIRMAN BABCOCK: Judge Whitic -- district
2 judge in Harris County?

3 HON. LEVI BENTON: Who ran for AG. That's
4 what I thought, but --

5 (Simultaneous discussion)

6 DEAN ALFINI: It goes back in the ABA Code
7 quite a ways. I don't know the history of the Texas
8 provision, but there is a Fifth Circuit opinion upholding
9 the constitutionality of the resign-to-run requirement.
10 It's Morial vs. Louisiana. It was Judge Morial running for

11 mayor of New Orleans back, maybe, in the late '80s.

12 So this -- I mean, it's been upheld in the
13 Fifth Circuit.

14 CHAIRMAN BABCOCK: There is a certain
15 Louisiana haze that sometimes --

16 (Laughter)

17 CHAIRMAN BABCOCK: -- doesn't reach over to
18 our state.

19 Judge Kidd.

20 JUSTICE KIDD: I had a question come up
21 recently -- and I know you've got Lamar McCorkle on here, so
22 he probably can comment on this. I thought the genesis of
23 this rule was probably Supreme Court Justice John Cornyn.

24 CHAIRMAN BABCOCK: That's what I thought.

25 JUSTICE KIDD: I mean, he's the one that, I

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1 think, proposed this rule and -- but in any event, I had an
2 inquiry to the Judicial Ethics Committee regarding this rule
3 and the application of this rule. We never got far enough
4 along to give the judge an advisory opinion, but he
5 raised -- and I did a little bit of research -- just a brief
6 amount of research, and I'm glad Dean Alfini is here,
7 because he might be able to comment on this.

8 Our rule says "a contested election." Now, I
9 was unable to find that term in any other state that has
10 this rule. And the question that was being asked by the
11 judge was, "Suppose that I file for a non-judicial office
12 and nobody files against me, either in the primary or in the
13 general election, can I continue to serve? Is that a

14 contested election? Do I have to resign to run?" And so he
15 was reading "contested" as opposed to "uncontested," and I
16 think it is ambiguous.

17 CHAIRMAN BABCOCK: You become a candidate when
18 you file. And when you file, you don't know whether it's
19 going to be contested or not unless you file two minutes
20 before the filing date, in which case it's probably not
21 going to be uncontested because somebody else will have
22 filed before you. That doesn't solve the question, but --

23 JUSTICE KIDD: Well, I think that was the
24 issue he was raising.

25 PROFESSOR LAYCOCK: Well, if it's really

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1 uncontested, he's unlikely to lose. So did he just want to
2 keep hearing cases right up to election --

3 (Laughter)

4 PROFESSOR LAYCOCK: -- day or until he was
5 sworn in?

6 JUSTICE KIDD: Yes. Exactly. He wanted to
7 continue to serve for that last year while he was on the
8 uncontested primary and general election ballot, and that
9 was his question.

10 CHAIRMAN BABCOCK: Judge Quinn.

11 JUSTICE QUINN: What's the policy behind the
12 rule?

13 CHAIRMAN BABCOCK: Does anybody know the
14 policy behind this?

15 JUSTICE QUINN: And I'm not going to do it,

16 but why could I run against Justice Jefferson but not -- and
17 still be a judge, but not run against the person that
18 appointed him the first time around and not be a judge?
19 What's the policy?

20 PROFESSOR LAYCOCK: It says "non-judicial," I
21 think, Judge, doesn't it?

22 JUSTICE QUINN: Yeah. I can run against him
23 and still be a judge, but if I run against Governor Perry, I
24 couldn't be a judge. Why?

25 PROFESSOR LAYCOCK: Again, I think it's at

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1 least roughly the independence of the judiciary -- you know,
2 keeping the judiciary independent from the two political
3 branches. I think that's at least part of the rationale.

4 UNIDENTIFIED SPEAKER: Isn't the idea to avoid
5 going to file -- under Rule (1)(i), to avoid having somebody
6 making a specific -- or to set forth a specific proposition?
7 They kind of go hand-in-hand, to me.

8 PROFESSOR LAYCOCK: That's an important point,
9 and the sound wasn't very good --

10 (Simultaneous discussion)

11 PROFESSOR LAYCOCK: -- but if you ran for a
12 legislative or an executive branch office, you're going to
13 have to take positions on all kinds of policy issues.
14 You're going under a different campaign. If you run for a
15 higher judicial office, you're subject to the same campaign
16 constraints that you're in in your current judicial
17 position, and so the conflict isn't as great. And then
18 there's just a practical matter, that it's a pretty natural

19 progression. A lot of judges, if they're successful, move
20 up, and they'd have to sit out for a whole year if they
21 couldn't.

22 JUSTICE QUINN: Is your first justification
23 still legitimate, given Minnesota vs. White, now that
24 judicial candidates can take positions on issues?

25 CHAIRMAN BABCOCK: But they can't make

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1 promises.

2 PROFESSOR LAYCOCK: Well, we need to think
3 about that.

4 CHAIRMAN BABCOCK: They can't make promises.
5 And people who run for the legislature or for the executive
6 branch can make promises. They may sometimes not keep the
7 promises, but they can make them.

8 (Laughter)

9 JUSTICE QUINN: Well, wasn't that Justice
10 Scalia's position, everybody makes a promise and a
11 politician keeping a promise is kind of laughable.

12 (Laughter)

13 CHAIRMAN BABCOCK: Yeah. He had a comment
14 about that, I think.

15 HON. LEVI BENTON: And it's possible to run
16 for a legislative or executive office perhaps maybe without
17 making promises.

18 HON. MARSHA WEINER: This is Marsha Weiner
19 from San Antonio. What would be wrong with taking the word
20 "contested" out of Canon 5(3) altogether? Is there any harm

21 in that?

22 JUSTICE KIDD: I don't see any harm -- this is
23 Mack Kidd. I don't see any harm in it, and that's the
24 reason that I mentioned it. You know, and I'll propose it
25 at the appropriate time.

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1 CHAIRMAN BABCOCK: That would certainly take
2 away that ambiguity and it would, at the same time, broaden
3 it -- broaden the rule.

4 Yeah. Seana Willing.

5 MS. WILLING: There's another ambiguity that
6 has surfaced with the Commission on this rule, and it has to
7 do with the fact that, under Canon 6B, justices of the peace
8 don't have to comply with this particular provision, but
9 what's not stated is that under Article 16 --

10 UNIDENTIFIED SPEAKER: Please have her repeat
11 it. We cannot hear her on the telephone.

12 CHAIRMAN BABCOCK: So far, Seana has said that
13 there's another ambiguity that, under Canon 6B, justices of
14 the peace --

15 MS. WILLING: 6C. I'm sorry.

16 (Simultaneous discussion)

17 CHAIRMAN BABCOCK: 6D. "D" as in dog. Sorry.

18 MS. WILLING: C.

19 (Simultaneous discussion)

20 CHAIRMAN BABCOCK: 6C.

21 (Laughter)

22 CHAIRMAN BABCOCK: You sure nobody wants 6A to
23 come in?

24 (Laughter)

25 CHAIRMAN BABCOCK: 6C, as in "cat," JPs don't

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1 have to comply.

2 MS. WILLING: Right. But under the
3 constitution Article 16, I believe it is, they would have to
4 comply and resign if there's more than a year left of their
5 term, and we've run into problems where JPs have read the
6 Canons but not bothered to read the Constitution.

7 UNIDENTIFIED SPEAKER: She's totally fading
8 out, and we cannot hear her.

9 CHAIRMAN BABCOCK: Sorry. Seana, either speak
10 up or --

11 (Simultaneous discussion)

12 MS. WILLING: I don't have a microphone, so I
13 can only do so much.

14 We've had the problem where JPs have been --
15 had lawsuits filed against them by county officials to have
16 them removed because they complied with the Canon but did
17 not comply with the Constitution, and it might be helpful to
18 the JPs that the rule was clarified in some ways that they
19 understand that to some degree -- for everybody, there's
20 still that provision, even for, you know, district judges --
21 well, not district judges but county level judges, that if
22 there's a year left of their term when they announce or run
23 for another -- even a judicial office, they have to resign.

24 CHAIRMAN BABCOCK: Yeah. For those of you on
25 the phone who didn't hear that, Seana said that there is a

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1 conflict between Canon 6C for JPs where they don't have to
2 follow this rule, but the Constitution, Article 16, she
3 thinks, does require them to resign, so that we ought to
4 somehow give them some direction as to what's going to
5 happen to them. And I would think that the Constitution
6 would trump the Canons, but -- just a hunch.

7 (Laughter)

8 CHAIRMAN BABCOCK: Okay. What else about
9 this?

10 (No response)

11 CHAIRMAN BABCOCK: Anybody else on Canon 5,
12 Subpart (3)?

13 (No response)

14 CHAIRMAN BABCOCK: All right. Here's a
15 show-stopper. Subpart (4), "A judge or judicial candidate
16 subject to the Judicial Campaign Fairness Act...shall not
17 knowingly commit an act for which he or she knows the Act
18 imposes a penalty."

19 Wayne, is this your handiwork here?

20 MR. FISHER: Yes, sir.

21 (Laughter)

22 MR. FISHER: Very proud of it.

23 (Laughter)

24 MR. FISHER: Move we accept it by --

25 (Laughter)

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1 CHAIRMAN BABCOCK: What are you doing to the
2 poor judges here?

3 MR. FISHER: This actually -- I had
4 considerable input from prominent members of the Supreme
5 Court in that language. This does not necessarily meet my
6 handiwork, but they -- otherwise, it was a rule, you know,
7 without any teeth, without any down side, so to speak,
8 without putting this provision in there. In other words,
9 "Hey, you violate it, well, then, hey, no consequences," and
10 this is the consequence that we came up with.

11 PROFESSOR LAYCOCK: Could you explain that a
12 little more?

13 MR. FISHER: No, sir.

14 (Laughter)

15 MR. FISHER: It's about as vague to me as it
16 is --

17 (Laughter)

18 PROFESSOR LAYCOCK: This seems to be triggered
19 only if the Campaign Act imposes a penalty.

20 MR. FISHER: Right.

21 PROFESSOR LAYCOCK: So what is the
22 no-consequences gap that it's filling? If there's no
23 penalty, this wouldn't seem to apply.

24 MR. FISHER: Yeah. That's a pretty good
25 point.

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1 Let's see. "Shall not knowingly commit an act

2 in which he or she knows the Act imposes a penalty."

3 Now, whether there's some other related
4 provisions in the act -- it's been some time since I've
5 looked at it. And I'm sorry. I can't give you a better
6 answer.

7 DEAN ALFINI: I don't know much about the
8 Judicial Campaign Fairness Act, but is it possible that
9 there's a penalty or penalties that are de minimis and that
10 a candidate might just go ahead and -- this adds a more
11 significant --

12 PROFESSOR LAYCOCK: Yeah.

13 MR. FISHER: I think -- Judge McCorkle, are
14 you familiar with this one?

15 CHAIRMAN BABCOCK: Judge McCorkle, are you
16 still on?

17 (No response)

18 CHAIRMAN BABCOCK: I think Judge McCorkle was
19 going to have to leave early, so he may not still be with
20 us.

21 JUSTICE KIDD: Mack Kidd. I think Dean Alfini
22 has probably put his finger right on it, and that is, you
23 want to make a judge -- you know, we had a judge on the
24 Court of Criminal Appeals recently that didn't file his C&E
25 reports, you know, and he was subject to a fairly

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1 significant fine, but at the same time, making him subject
2 to the Code of Judicial Conduct, it seems to me, is much
3 more significant.

4 MR. FISHER: Wayne Fisher again. I do believe

5 that this Judicial Campaign Fairness Act does have some
6 specific -- more specific penalties and sanctions if it's a
7 knowingly -- if it's an act that's knowingly committed,
8 because, otherwise, you could inadvertently accept a
9 contribution from a law -- from one of the big law firms,
10 for example, and you're getting it from this person and that
11 person, and, unknowingly, exceed the \$30,000 limitation or
12 whatever. And this has to do with what happens if -- the
13 difference between inadvertently and knowingly doing that,
14 and I think there's some specific penalties in that Judicial
15 Campaign Fairness Act for a knowing violation.

16 CHAIRMAN BABCOCK: Justice Jefferson, I
17 recall, I think, that this came up in our extended debate on
18 recusal and disqualification, because I think that the rule
19 that the Court has before it right now ties recusal into
20 violation of the act as Wayne's committee recommended.

21 MR. FISHER: Knowing violation. That's right.

22 CHAIRMAN BABCOCK: And I know only from the
23 Supreme Court Advisory Committee's work on this that this
24 act is exceedingly complex. It has a number of opt-out
25 provisions, that somebody can get out of it, and there are

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1 ins and outs. And I said that only to observe that this is
2 a, I suppose, burden that all judicial candidates or judges
3 have to assume, but it's not easy to figure it out --
4 perhaps illustrated by our discussion here.

5 Judge Quinn?

6 JUSTICE QUINN: Is the penalty mentioned in

7 that -- I guess, the penalty under the Act, is that an
8 administrative penalty? Is that a criminal penalty? Do you
9 remember?

10 MR. FISHER: I'd have to refresh my memory,
11 Judge. I'm sorry. I didn't bring it with me. And I
12 thought about it as I came down here, that maybe I should
13 have brought it, but I'd have to just review it myself to
14 tell you the answer to that.

15 JUSTICE QUINN: Assuming arguendo was a
16 criminal penalty, do we have a potential double jeopardy
17 problem? Is that --

18 JUSTICE KIDD: No. It's a fine.

19 JUSTICE QUINN: Well, fines could be criminal
20 as well. But assuming it's criminal -- it may not be -- if
21 it's administrative, it probably may not be a problem, but
22 if it's a criminal penalty, you've got one part of the
23 government sanctioning you and then you've got another part
24 of the government sanctioning you, through disbarment -- or
25 grievance, whatever.

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1 CHAIRMAN BABCOCK: Professor Laycock.

2 PROFESSOR LAYCOCK: This is purely
3 administrative --

4 JUSTICE QUINN: Is it pure -- okay.

5 PROFESSOR LAYCOCK: And after experimentation,
6 the US Supreme Court, at least, has been systematically
7 stripping away all double jeopardy protections as long as
8 half of it is administrative. I don't know what the Texas
9 Constitution might be interpreted to say.

10 CHAIRMAN BABCOCK: So do you think there is a
11 problem with this or not?

12 PROFESSOR LAYCOCK: There's no federal
13 problem. I'm quite confident of that.

14 CHAIRMAN BABCOCK: Okay.

15 PROFESSOR LAYCOCK: I don't know whether there
16 might be a state problem.

17 MS. WILLING: I can tell you -- this is Seana
18 Willing -- that all of our proceedings are civil. We don't
19 have any criminal authorities, so --

20 JUSTICE QUINN: But there's some cases that
21 say it doesn't matter if you categorize it civil or
22 criminal, it's the effect of what you're doing. What's the
23 purpose, but --

24 CHAIRMAN BABCOCK: Okay. Well, it seems to me
25 that Jim's subcommittee maybe ought to pull the act and just

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1 take a look at it to see if --

2 MR. GEORGE: I was hoping we could just bless
3 this one --

4 (Laughter)

5 MR. GEORGE: -- and say, "You don't need to do
6 anything on that one."

7 CHAIRMAN BABCOCK: "This is fine."

8 JUSTICE JEFFERSON: I'll talk to the other
9 members of the Court, too, and see, you know, who was the
10 proponent of this rule. It's probably -- the Chief is my
11 guess.

12 MR. FISHER: It was the Chief.

13 JUSTICE JEFFERSON: Yes. And he might be able
14 to give more detail on it, whatever I can get on it.

15 MR. GEORGE: If you'll just let me know,
16 because I would like to reduce the level of our activity as
17 much as possible.

18 CHAIRMAN BABCOCK: Judge Kidd and then
19 Judge Dorfman.

20 JUSTICE KIDD: Mack Kidd again. Are you sort
21 of winding down? Do I get that impression?

22 CHAIRMAN BABCOCK: Yes.

23 JUSTICE KIDD: Do you intend to address at all
24 Judge Murray's paragraph dealing with financial
25 contributions? Did you notice that in his letter?

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1 CHAIRMAN BABCOCK: Yes, I did. And I think
2 that's a fine thing to talk about.

3 UNIDENTIFIED SPEAKER: I couldn't hear what
4 you think is a fine thing to talk about.

5 (Laughter)

6 JUSTICE KIDD: You don't have the letter
7 either.

8 (Laughter)

9 CHAIRMAN BABCOCK: Yeah. The fine thing we
10 think to talk about is Judge Menton Murray, district judge
11 from Cameron County of the 103rd District Court, sent a
12 letter which everybody here has, but since we just got it, I
13 think yesterday, by fax, probably you-all don't, and
14 Judge Kidd was saying that there is a paragraph in here

15 about financial contributions, which is worthy of
16 discussion, and I think he's probably right about that. But
17 other than that, we're going to keep you in the dark.

18 MR. GEORGE: And it's the paragraph about
19 endorsing political activity that is -- we discussed
20 earlier, and in this he says that there's a problem with
21 making contributions to another candidate, particularly for
22 judicial office.

23 JUSTICE KIDD: Why don't you read it out,
24 Mr. Chair.

25 HON. LEVI BENTON: Not the whole letter.

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1 JUSTICE KIDD: No. Just that paragraph.

2 CHAIRMAN BABCOCK: Okay. Let's be sure we're
3 on the same --

4 JUSTICE KIDD: "A judge may solicit financial
5 contributions." That's what I had referenced.

6 MR. GEORGE: Oh. You're talking about the
7 next part. Yes.

8 JUSTICE KIDD: Yeah. "A judge may solicit
9 financial contributions."

10 CHAIRMAN BABCOCK: The proposal is that the
11 following language should be added: "A judge may solicit
12 financial contributions from an attorney practicing in his
13 or her court but should not do so in a manner or at a time
14 or under circumstances that suggests to a reasonable
15 attorney" --

16 (Laughter)

17 CHAIRMAN BABCOCK: -- "that the outcome of a
18 pending case might be affected by making or not making such
19 a political contribution."

20 UNIDENTIFIED SPEAKER: Chip, is the standard
21 what the reasonable attorney thinks as opposed to what a
22 judge ought to think?

23 CHAIRMAN BABCOCK: Well, that's why I chuckled
24 a little bit, but the Judge says that he thinks such a
25 provision would give us the moral authority to do what the

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1 law clearly allows, but at the same time, it would preclude
2 such abuses as a judge calling in lawyers from his morning
3 docket before he takes the Bench to hit them up for a
4 campaign contribution.

5 UNIDENTIFIED SPEAKER: That's pretty bad
6 anyway.

7 CHAIRMAN BABCOCK: And, you know, which end of
8 the telescope you're looking at, I suppose, is important,
9 but what reasonable attorney is going to complain about the
10 judge who's about to decide his motions from having a little
11 in-chambers conference?

12 Judge Kidd.

13 JUSTICE KIDD: Well, the first thing that I
14 would do is, I would make a drafting change to this
15 provision. I think that the Judge is making a good point,
16 though, and it might meld in very well under the Judicial
17 Campaign Fairness Act provision -- perhaps as a Sub A or
18 something. But I would say that a judge may solicit
19 financial contributions but should not do so in a manner or

20 at a time or under circumstances that suggests to a
21 reasonable person that the outcome of a pending case might
22 be affected by making or not making such a political
23 contribution.

24 In other words, I think -- I think he makes a
25 good point, but I wouldn't limit it to the situation of

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1 soliciting a contribution from an attorney. I think that
2 the point that he makes, which I think is a good point, is:
3 I think maybe there should be something in our code under
4 Canon 5, since we do elect judges in this state, that states
5 affirmatively that a judge is perfectly ethically able to
6 solicit a campaign contribution, but I think that Judge
7 Murray makes a good point in saying that we probably ought
8 to couple that with some provision that indicates that it
9 shouldn't be done in a manner that would suggest to a
10 reasonable person that they're being shaken down.

11 MR. FISHER: That it should be tasteful.

12 (Laughter)

13 JUSTICE KIDD: Should be done properly.

14 CHAIRMAN BABCOCK: It should be tastefully
15 done. Professor Laycock.

16 PROFESSOR LAYCOCK: Whatever we do with the
17 substance of it, the "should" should be "shall." "Shall not
18 do it in a way that suggests the lawyer is being shaken
19 shown." And I don't know if we can say -- I'm sure we can
20 say some things helpful about what would cause a lawyer to
21 feel that way.

22 I assume that what I'm about to say is naive
23 and wholly impractical, but it seems to me, if I get a
24 solicitation from a judge, it ought to be in a mass mailing.
25 If he asked me for a contribution one-on-one and I ever

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1 appeared in his court, I don't see how I can say no. My
2 guess is, to get enough money to run on, you have to do some
3 personal solicitation, but it is problematic.

4 MS. FROST: One of the -- this is Kim Frost.
5 One of the practical considerations I think we need to think
6 about is how much the judge knows about whose cases are
7 coming before him, and, you know, where the solicitations
8 are going, because, you know, in a big urban environment, he
9 might send out a mass mailing from a consultant and a judge,
10 for example, on the Court of Appeals may have, somewhere in
11 the pipeline, you know, a case but not even know that it was
12 three weeks out when that letter hit a particular lawyer.

13 CHAIRMAN BABCOCK: True enough.

14 Yeah. Judge Woodward.

15 HON. BEN WOODWARD: I guess I've got kind of a
16 discomfort with it. Judges have to solicit campaign
17 contributions. That has caused questions about the
18 independence of the judiciary and the integrity of the
19 judiciary in Texas. I'm not so sure that writing on a piece
20 of paper saying it's okay to do it gives us the moral
21 authority to do it. I don't know if making an ethical rule,
22 because, as a practical matter, it is the rule, makes it any
23 more ethical.

24 CHAIRMAN BABCOCK: Well, I will tell you

25 from -- this is Chip Babcock. I will tell you from long

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1 tortured meetings on the recusal rule that tried to address
2 the issue of campaign finances and solicitation of political
3 contributions in the context of a recusal rule, that there
4 was -- it is a tricky area, and there is literally almost
5 100 years of Texas jurisprudence that says that political
6 campaign contributions are not a basis for recusal, and you
7 have laid over that the Fisher Act, the Judicial Campaign
8 Fairness Act, that begins to regulate that. And then on top
9 of that, you have the Court's, at least, interest in
10 overturning that 100 years of jurisprudence by rule, which
11 is currently pending before the Court, but I think it's
12 going to be remanded to SCAC. And on top of that, you have
13 some people that -- particularly certain members of the
14 legislature who are outraged that after they crafted many,
15 many compromises in the Judicial Campaign Fairness Act, that
16 the Court, by rule, would come and undo that or amplify on
17 that or change that. They say, "Look, the Court's business
18 is procedural. Ours is substantive. And you can't get into
19 our arena without making us very angry."

20 Now, that's probably a minority of the current
21 legislature, but, nevertheless, we heard from them in loud
22 voices when we were taking this up. So there's that issue.

23 What does everybody think? Should we try to
24 tackle this and propose some language or -- George
25 McWilliams.

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1 MR. McWILLIAMS: One thing that jumped out at
2 me is that some people would say that after "solicit," the
3 word "or accept" financial contributions. We're looking,
4 really, at one side of the coin here.

5 JUSTICE KIDD: Mr. Chairman?

6 CHAIRMAN BABCOCK: Yes.

7 JUSTICE KIDD: I'm happy we discussed the
8 issue.

9 (Laughter)

10 CHAIRMAN BABCOCK: Do I hear a motion to maybe
11 move on to something else?

12 JUSTICE KIDD: I think so.

13 MR. GEORGE: My view is -- with Judge Kidd,
14 to -- I think this is just a tar baby that we don't want to
15 get into. I don't think that we can say anything that will
16 be sufficiently comprehensive to do any good and
17 sufficiently limited not to create just enormous disputes
18 that -- and we've gotten along so far without this in Canon
19 5, and I would think that we probably ought to just continue
20 to get along without it.

21 MR. FISHER: Chip, maybe we can say "obtain"
22 or "seek."

23 (Laughter)

24 CHAIRMAN BABCOCK: "Seek" or "obtain," just
25 put those right in there. That's a private joke --

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1 (Laughter)

2 CHAIRMAN BABCOCK: Okay. Well, let's try to
3 wrap this up and let me read into the record -- moving back
4 to Canon 5(1)(ii), let me just read into the record one
5 proposal for the subcommittee to consider, and that would be
6 Canon 5(1), "A judge or judicial candidate shall not,"
7 colon -- and then new language for (ii) -- "make a false
8 statement of fact with knowledge that it is false or with
9 reckless disregard for its truth concerning the identity,
10 qualifications or present position of the candidate or an
11 opponent," semicolon.

12 We don't need to discuss that. That's just a
13 way to cure two problems. One is, that, I think correctly
14 states New York Times vs. Sullivan, the standard. And, two,
15 it makes clear that we are talking here about statements of
16 fact as opposed to rhetoric, hyperbole, opinion, puffing --
17 some other type of speech that I think is less subject to
18 regulation in the political arena.

19 Having said that, what I would propose is that
20 Jim's subcommittee meet between now and our next meeting --

21 MR. GEORGE: Which is?

22 CHAIRMAN BABCOCK: Which is April 16th, I
23 believe.

24 HON. LEVI BENTON: What date?

25 CHAIRMAN BABCOCK: April 16, 2004, and try to

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1 present to us, to the extent there's consensus in the
2 subcommittee, concrete language, changes or proposed changes

3 for Canon 5 and let us discuss that, and then move on to
4 what is on the agenda for that meeting, which is Canon 2 and
5 Canon 3, recognizing there will be overlap between Canon 5
6 and Canon 3(B)(10).

7 MR. GEORGE: And Canon 2 as well.

8 CHAIRMAN BABCOCK: Canon 2 as well. And that
9 will be discussed as well.

10 Debra, who's the subcommittee chair on Canons
11 2 and 3? Let's see how quick she is.

12 MS. LEE: Chair for subcommittee on Canon 2 is
13 Carlson. Canon 3, sub chair is Frost.

14 CHAIRMAN BABCOCK: Okay. Judge Frost, you're
15 the chair of the subcommittee for Canon 3. And Elaine
16 Carlson, who could not be here today -- Professor Carlson
17 from South Texas is the chair of subcommittee for Canon 2.

18 So between now and April 16th, it would be
19 helpful if those subcommittees could meet and be ready to
20 talk about those subjects.

21 I know it is a burden to come to Austin when
22 there are no funds for you to get here, but to the extent
23 that anybody can, that would be great. And let Debra know
24 if you can make it. If you can't --

25 UNIDENTIFIED SPEAKER: Can I interrupt? I'm

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1 sorry.

2 CHAIRMAN BABCOCK: Yes.

3 UNIDENTIFIED SPEAKER: It would be helpful if
4 we get the information from our committee members as far as
5 where we can get a hold of them. I know that they're

6 judges, but -- so that we can discuss before April --

7 UNIDENTIFIED SPEAKER: It would be nice to get
8 a list of addresses and faxes, you know, of everybody.

9 UNIDENTIFIED SPEAKER: That's what I'm talking
10 about.

11 CHAIRMAN BABCOCK: Okay. It sounds like what
12 you're asking for -- you're a little bit hard to hear, but
13 it sounds like what you want is a roster of addresses, phone
14 numbers, e-mail addresses, and that will be forthcoming
15 early next week. Right, Debra?

16 MS. LEE: Monday it will be.

17 CHAIRMAN BABCOCK: Monday it will be.

18 MS. LEE: Oh, Tuesday.

19 CHAIRMAN BABCOCK: Tuesday. We're on
20 vacation -- holiday on Monday, but Tuesday --

21 JUSTICE LANG: Chip, this is Doug Lang. Let
22 me ask you a question. In the materials, there was some
23 reference to video conferencing.

24 CHAIRMAN BABCOCK: Yes.

25 JUSTICE LANG: Are we going to do that in

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1 April?

2 CHAIRMAN BABCOCK: Yeah. I was just about to
3 lead into that.

4 JUSTICE LANG: I'm sorry.

5 CHAIRMAN BABCOCK: No, no, no. That's quite
6 all right.

7 Jackson Walker has agreed to make its video

8 conferencing facilities available, and we have offices in
9 San Antonio, Austin, Dallas, Houston and Ft. Worth, San
10 Angelo -- but they don't have video conference, so forget
11 San Angelo. And we can -- if that's appropriate, if enough
12 people want to do that, we have that available for us.

13 What I would suggest, however, is that we make
14 the locus of the meeting here in Austin, and as many people
15 as can get here, get here. And we'll do that. And if we've
16 got, you know, a bunch of people in Houston who want to do
17 it video conference, then we'll do that -- or Dallas or
18 wherever else.

19 So that will be available, but Debra will be
20 contacting everybody to see who can make it to Austin and
21 who can't. And then we'll work the video conference angle
22 and see if we can do that.

23 It is -- it's not as good as it sounds,
24 frankly. I found that video conferencing technology is not
25 yet there, and there's a little delay and it's hard for the

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1 court reporter to hear. And it's very hard, if you're in a
2 big room, to see who exactly is speaking. It's better than
3 what we got today, but not by a whole lot. So if people can
4 come to Austin, that would be terrific.

5 And we'll give you the location. It will
6 either be here or the State Bar or at Jackson Walker's
7 offices in Austin.

8 UNIDENTIFIED SPEAKER: Is the only date that's
9 set now April the 16th?

10 CHAIRMAN BABCOCK: No. I think we've got

11 another date -- Debra, don't we -- in May?

12 MS. LEE: Yes, we do.

13 JUSTICE KIDD: May 7th.

14 CHAIRMAN BABCOCK: There's another date in
15 May. That would be May 7th.

16 JUSTICE KIDD: Friday, May the 7th.

17 UNIDENTIFIED SPEAKER: That's for everyone?

18 CHAIRMAN BABCOCK: Yes. That's for everyone.

19 That's for the full committee. That's going to be
20 considering the preamble, Canon 1 and Canon 6. So preamble,
21 Canon 1 and Canon 6.

22 And if it's necessary to have a June meeting,
23 which we hope it will not be, but if it is, then we'll
24 schedule that at a later time.

25 UNIDENTIFIED SPEAKER: And the April 16th is

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1 full committee?

2 CHAIRMAN BABCOCK: April 16th is the full
3 committee.

4 HON. RUDOLFO GONZALEZ: This is Judge
5 Gonzalez. That's going to be in Austin you said?

6 CHAIRMAN BABCOCK: Well, we're going to have
7 the locus of our meeting in Austin. Yes.

8 HON. RUDOLFO GONZALEZ: So if we were to make
9 plans to attend, make plans to attend that in Austin?

10 CHAIRMAN BABCOCK: Yes, sir.

11 UNIDENTIFIED SPEAKER: And the subcommittees
12 will be informed later?

13 CHAIRMAN BABCOCK: The subcommittees have been
14 formed. And I'll read out who's on the subcommittees right
15 now.

16 For the preamble and Canon 1, the chair is
17 Dean Alfini. Also, George Edwards, George McWilliams and
18 Judge McCorkle.

19 For Canon 2, the chair is Professor Elaine
20 Carlson with Guy Harrison, Alma Lopez, Judge Benton and
21 Judge Rudolfo Gonzalez.

22 For Canon 3, Justice Frost is the chair with
23 Dean Huffman, Sharon Callaway and Judge Harle -- Sid Harle
24 is the committee members.

25 Canon 4, Professor Laycock is the chair with

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1 Wayne Fisher, Scott Mann, Judge Jane Roden and Roberto
2 Ramirez.

3 Canon 5, Jim George, Dean Attanasio,
4 Justice Lang, Justice Kidd, Judge Murray, Judge Dorfman.

5 And finally, Canon 6, Judge Woodward is the
6 chair with Justice Quinn, Judge Monica Gonzalez, Judge
7 Weiner, Judge Lopez and Judge Margaret Keliher.

8 Canon 8, each subcommittee is responsible for
9 the provisions of Canon 8 that relate to Canons 1 through 6.

10 UNIDENTIFIED SPEAKER: Thank you.

11 CHAIRMAN BABCOCK: You bet.

12 UNIDENTIFIED SPEAKER: I'm sorry. But my
13 question was: Have you set dates on the subcommittee?

14 CHAIRMAN BABCOCK: No. That's up to the
15 chair.

16 UNIDENTIFIED SPEAKER: Okay.

17 CHAIRMAN BABCOCK: That's up to the
18 subcommittee chair.

19 UNIDENTIFIED SPEAKER: Thank you.

20 JUSTICE KIDD: Is terminology section --

21 UNIDENTIFIED SPEAKER: You're going to include
22 a copy of the document you-all were referencing from Menton
23 in that package that's going out on Tuesday. Right?

24 CHAIRMAN BABCOCK: We will.

25 UNIDENTIFIED SPEAKER: Thank you.

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1 CHAIRMAN BABCOCK: We will. And if there were
2 any handouts, Debra, today other than Menton, would you get
3 that to everybody?

4 MS. LEE: Yes, sir.

5 CHAIRMAN BABCOCK: That would be great.

6 Okay. I made a speech while people were
7 coming back into the room, but I particularly want
8 Justice Jefferson to know that Anna Renken & Associates
9 Court Reporters here in Austin have donated their services
10 this afternoon, and Patty Gonzalez is our court reporter,
11 and her time has been donated.

12 You may not have known that, Patty, but --

13 (Laughter)

14 (Applause)

15 CHAIRMAN BABCOCK: So note the applause, and
16 we will be in recess. Thank you very much for attending,
17 everybody.

18 (Proceedings concluded at 4:50 p.m.)
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7 I, Patricia Gonzalez, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported the
9 above hearing of the Supreme Court Code of Judicial Conduct
10 Committee on the 13th day of February, 2004, and the same
11 were thereafter reduced to computer transcription by me. I
12 further certify that the costs for my services in the matter
13 are \$_____ charged to Charles L. Babcock.

14 Given under my hand and seal of office on this
15 the ____ day of _____, 2004.

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