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TEXAS SUPREME COURT ADVISORY COMMITTEE
ON THE CODE OF JUDICIAL CONDUCT

SEPTEMBER 10, 2004

REPORTED BY:
CINDY K. SYMPSON
TEXAS CSR #4303

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APPEARANCES

Mr. Chip Babcock

4 Judge Brian Quinn
5 Judge Ben Woodward
6 Judge Michael Keasler
7 Judge Mack Kidd
8 Judge Wallace B. Jefferson
9 Judge Kem Frost
10 Professor Doug Laycock
11 Professor Elaine Carlson
12 Ms. Lisa Hobbs
13 Ms. Seana Willing
14 Ms. Sharon Callaway
15 Ms. Angie Senneff
16 Judge Doug Lang (via video conference)
17 Judge Levi Benton (via video conference)
18 Dean James Alfini (via video conference)
19 Judge Grant Dorfman (via video conference)
20 Judge Marcia Weiner (via video conference)
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1 PROCEEDINGS

2 MR. BABCOCK: Cindy Sympson is our court
3 reporter here who is volunteering her time, which is great.
4 In Dallas it looks like we have Justice Lang by himself. And
5 we have empty offices in Houston and San Antonio, although
6 we're expecting some people in both places, aren't we?

7 MS. SENNEFF: Yes.

8 MR. BABCOCK: Okay. Well, hopefully they'll
9 get there when they get there. And some of you may not know
10 Lisa Hobbs, who is the new rules attorney for the
11 Texas Supreme Court and has already been thrown into the briar
12 patch in a number of different issues.

13 And she's sitting right to the left of Justice Jefferson,
14 Doug, for your edification.

15 And we have an agenda for today and then we're going to
16 need to have at least one more meeting that we're going to
17 have to talk about at some point. But as is customary,
18 Justice Jefferson, if you'd like to tell us anything from the
19 Court, we'd be delighted to hear it.

20 JUDGE JEFFERSON: I don't have too much to say
21 except that, as you know, we're in a period of transition on
22 the Court. There are two -- well, there's one current vacancy
23 in the chief justice. And I don't think Justice Schnider has
24 been confirmed by the Senate to be U.S. district judge for the
25 Eastern District of Texas. He's not formally resigned from

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1 the Court yet, but when he does there will be another vacancy.
2 And when the government makes his replacement, we'll have, you
3 know, new faces on the Court, which could change somewhat the
4 dynamics of the Court's consideration of these -- the work of
5 this committee, but I don't think substantially.

6 So the Court means to see after the Supreme Court's
7 opinion and Republican Party of Minnesota changes to the Code
8 of Judicial Conduct. And so although the Court doesn't have
9 any commentary on your work thus far, I have shared it with
10 them. And Lisa will be sure after this meeting is over to
11 share whatever proposals are made today. And so there's
12 constant communication coming from me to the Court about the

13 Court's work.

14 And I know there are some proposals for public hearings,
15 potentially in the near future, on some of the proposed
16 changes. And I think we'll wait until after we have a full
17 Court to broach that subject with them. But I think that's
18 all I have.

19 Lisa has been a godsend for the Court, very, very good.
20 She's up to speed on this committee's work and the Rules
21 Advisory Committee's work. And if you have any questions
22 about the current code or procedures at the Court, if you
23 don't reach me, you can certainly talk to Lisa. She was
24 formerly briefly an attorney for Judge Baker at the Court
25 about three years ago, I guess.

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1 MR. BABCOCK: Great. Just in terms of where we
2 are, we're going to talk about Canon 2 today, and
3 Elaine Carlson is going to take us through that exercise. And
4 then we're going to talk -- Doug Laycock has some preliminary,
5 I think, things that he's put together on Canon 4. And if
6 anybody didn't get his e-mail --

7 Angie, do we have extra copies down there?

8 MS. SENNEFF: Yes.

9 MR. BABCOCK: So everybody should have a copy
10 of that.

11 Doug, did you get a copy of that in Dallas?

12 JUDGE LANG: I did. Thank you.

13 MR. BABCOCK: Who's in Houston now?

14 Dean Alfini, did you get a copy of Doug's Canon 4 handout?

15 DEAN ALFINI: If it was attached to the

16 materials that Angie sent out, I did.

17 MR. BABCOCK: It was not, Dean, so we'll get
18 somebody in the Houston office to get you a copy of that right
19 away.

20 Still nobody in San Antonio.

21 So we have that. And then in addition Justice Frost has
22 not completed her follow-up with her subcommittee for some
23 understandable reasons, but she'll have just some things to
24 tell us where we are. And then we'll need another meeting to
25 finish those things off.

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1 We have, I think, finished on Canon 5. We've
2 substantially done Canon 3, except for the follow-up from
3 Justice Frost. But we have not discussed, I don't think at
4 all, the Preamble in Canon 1.

5 Am I right about that, Dean Alfini?

6 DEAN ALFINI: Yes.

7 MR. BABCOCK: Okay. So we'll probably try to
8 slate that for the next -- for the next meeting.

9 DEAN ALFINI: Could you say that again? You're
10 keeping that for the next meeting?

11 MR. BABCOCK: Yes, sir. If that's okay with
12 you.

13 DEAN ALFINI: That's fine. Has that meeting
14 date been set?

15 MR. BABCOCK: No, it hasn't. And
16 Justice Jefferson and I were just talking about it. And there
17 may be a date that we can propose to everybody in late October
18 that had been reserved for the Supreme Court Advisory
19 Committee, but for a variety of reasons that's not going to
20 happen. So when Justice Jefferson and I check our calendars,
21 we'll shoot out that date and see what everybody's reaction is

22 to it. But it would be late October; and if not, we'll try to
23 get a good date for everybody.

24 So with that said, Professor Carlson.

25 PROFESSOR CARLSON: Hi. After our last meeting

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1 the Canon 2 subcommittee reconvened to consider some concerns
2 that were expressed to us by Justice Kidd pertaining to our
3 original proposal. As a result of that meeting and subsequent
4 votes, our report has changed because the subcommittee is
5 divided on some issues now. And the amended report, the
6 report entitled "Amended Report of Canon 2 Subcommittee," is
7 the only report that you'll need for today's meeting.

8 Our subcommittee viewed our mission as reviewing Canon 2
9 of the Texas Code of Judicial Conduct, comparing it with the
10 ABA Model Code, including any 2003 proposed changes, looking
11 at if there were any White vs. Minnesota implications as to
12 Canon 2 and looking at the case law and commentary.

13 On Pages 2 and 3 of our report, we point out the
14 differences between the Texas Canon 2 and the ABA Model
15 Canon 2, and I'll broach those as we go through the report
16 itself, but that's like a red-lined version to give you a
17 clear heads-up.

18 When we reviewed the ABA task force report of 2003, we
19 noted that there were no proposed amendments from that task
20 force to Canon 2 except to the accompanying commentary. In
21 the ABA working group report on Canon 2, I was informed that
22 they did not at that time study the black letter law of these
23 canons but thought that a comprehensive review would be
24 necessary, and of course that review is ongoing now. And
25 Dean Alfini sits on that committee and that task force, and

1 they have not yet completed their work. But in terms of our
2 committee, we would certainly want to take a look at that
3 perhaps, again, if it comes up by the end of the year.

4 One of the things that Chip brought up at our first
5 meeting, and the materials that came out, was the vagueness
6 attack that was made in another jurisdiction on Canon 2. And
7 so we looked at the issue of whether Canon 2 under the Texas
8 version was impermissibly vague to support disciplinary
9 action. We started by looking at the decision of *In re Barr*
10 adopted by the Texas Supreme Court in 1999 where the Court
11 instructed the opinions that the canons were intended not only
12 to state basic standards to govern the conduct of judges but
13 also to provide guidance in allowing judges to establish and
14 maintain high standards of judicial and personal conduct.

15 Canon 2, unlike the other canons we've looked at, and
16 Canon 1 are both very general in nature. And the Texas case
17 law seldom reflects the application of Canon 2 as a sole basis
18 of discipline. It's usually cited along with a more specific
19 canon, such as 3, 4, 5. The Texas Supreme Court has construed
20 Canons 1 and 2 to apply to judges acting not only in their
21 official capacity but --

22 All right. Who's making that noise?

23 (DISCUSSION OFF THE RECORD)

24 PROFESSOR CARLSON: The Texas Supreme Court has
25 construed Canon 2 to apply to judges not only when they act in

1 their official capacity but also in their personal conduct as
2 well.

3 JUDGE LANG: Can somebody -- I can't hear very

4 well.

5 MR. BABCOCK: I think Justice Lang says he
6 can't hear, so we're --

7 (DISCUSSION OFF THE RECORD)

8 MR. BABCOCK: Let's go forward.

9 PROFESSOR CARLSON: Our Canon 2 speaks of some
10 obligations in terms of "shall," which, of course, are the
11 bases for disciplinary action. Many of the obligations in
12 Texas Canon 2 speak in terms of "should" and, of course, will
13 not form the basis for disciplinary action but are
14 aspirational in nature.

15 Dean Alfini shared with me debate at the national level
16 that we discussed in our subcommittee, and that is the proper
17 role of the canons. There are those who criticize broad
18 prescriptions of prohibited conduct that can result in
19 disciplinary action on the basis that there should be more
20 specificity in the canons and there should be a movement away
21 from including aspirational aspects of the Code and instead
22 have clear, bright-line rules of thou shalt not do X. That
23 view is not universal.

24 The opponents, including the American Judicature Society
25 on their -- their Web page -- and it's cited on Page 5 of our

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1 report -- shared a very different view. They feel that the
2 Code should not be relegated to the role of only providing
3 penal or disciplinary regulations, but instead see it as a
4 positive aspect and task to remind judges of the ethical
5 foundation that underlie their responsibility and to allow
6 them to achieve the highest possible standards that are
7 possible.

8 The Judicature -- the American Judicature Society also
9 notes -- and it's certainly true -- that Canon 1 and Canon 2
10 provide a background for judicial ethics committees and
11 judicial educators to interpret the other remaining provisions
12 of the Code, and they would call for maintaining in Canon 1
13 and Canon 2 both disciplinary provisions as well as hortatory
14 statements of conduct; our subcommittee shared that view as
15 well.

16 Vagueness attacks on Canon 2, and particularly on the
17 Texas Canon 2, have been rejected by the Texas Supreme Court
18 as recently as 1999. As Chip shared with us in the original
19 materials that we received for the subcommittee, in 2003 a
20 New York federal district court held that Code provisions
21 requiring a judge to uphold the integrity and the independence
22 of the judiciary and to act "in a manner that promotes public
23 confidence in the integrity and impartiality of the judiciary"
24 were void for vagueness. A lower court concluded that the
25 Code in that other jurisdiction failed to provide adequate

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1 guidelines to allow members of the judiciary to determine
2 permissible and impermissible conduct. That decision was
3 subsequently vacated under Younger abstention principles.

4 It should be noted that the provision that the Court was
5 looking at in Spargo vs. New York State Commission on Judicial
6 Conduct had a "shall." That is, the prohibition that was
7 being looked at as being impermissibly broad in that
8 jurisdiction had a "shall," where our Texas version has a
9 "should." So even if that decision were to be upheld, if it
10 were allowed to go forward on appeal, we certainly have a
11 basis for distinction.

12 Among the issues that our subcommittee considered were

13 whether it was desirable to maintain aspirational behavioral
14 norms in the Code or whether the Code should be -- Canon 2
15 should be more specific in its disciplinary prohibitions,
16 whether the inclusion of additional definitions and commentary
17 to Canon 2 was desirable. There was some sentiment among our
18 subcommittee that there should be more specificity,
19 particularly in the area of commentary, to allow for more
20 predictable interpretations of the broad statements in
21 Canon 2. And then we looked at whether we thought Canon 1 and
22 2 would sufficiently support a violation.

23 We also discussed whether Canon 1 and 2 should be folded
24 into the Preamble because it is, for the most part,
25 aspirational in nature. In particular we looked at the

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1 ABA Model Code and the Texas variation to see whether we felt
2 that there was any merit in suggesting modifications on that
3 basis. And so on Page 7 we start looking at each particular
4 provision of the Texas Canon 2 and compared it to the
5 ABA Model Code and other materials to see where we came out.

6 There's a big difference in the title to Canon 2. Texas
7 Canon 2 is entitled "Avoiding Impropriety and the Appearance
8 of Impropriety in All of the Judge's Activities." The
9 ABA Model Canon 2 is actually stated in terms of disciplinary
10 action; "A Judge Shall Avoid Impropriety and the Appearance of
11 Impropriety in All of the Judge's Activities." And that
12 distinction is significant because the Texas title certainly
13 wouldn't support disciplinary action, where the ABA Model Code
14 arguably would. Our subcommittee did not recommend any change
15 to the title of our canon.

16 Canon 2(A), as adopted in Texas, has two variations from

17 the ABA Model Code. The first is that Texas Canon 2(A) omits
18 the requirement that a judge "respect the law" and instead
19 provides that a judge "should" -- as opposed to the ABA Model
20 Code "shall" -- act in a manner that promotes public
21 confidence in the integrity and impartiality of the judiciary.
22 Our subcommittee does not recommend any change in the Texas
23 version 2(A).

24 We do not endorse the requirement that a judge respect the
25 law as the Model Code provides, even though at first look at

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1 it, it seems perfectly reasonable. We spent a fair amount of
2 time discussing exactly what that meant and if the judge
3 believes that long-standing precedents should be changed and
4 declines to follow it, has the judge disrespected the law,
5 have they violated the canon, is a dissenting opinion a
6 disrespect of the law. We felt that the Canon 2 is a
7 requirement, which is in a "shall," that the judge shall
8 comply with the law was sufficient.

9 We also recommend that we retain the requirement that a
10 judge should, as opposed to shall, act in a manner that
11 promotes public confidence. We felt that there was good
12 reason for why the Texas version was originally adopted. The
13 Canon requires viewing the judge's obligations from the public
14 perception. And our subcommittee felt it would be
15 inappropriate to subject a judge to disciplinary action for
16 behavior that was viewed from that perspective, but we
17 concurred that that was a proper aspirational code -- goal,
18 and would leave it as "should."

19 We then looked at whether we felt commentary to Canon 2(A)
20 would be desirable, and our full committee originally was of
21 the mind that that would be desirable and would provide some

22 guidance to the Texas judiciary on how they would model their
23 behavior. Since that time we have been educated by
24 Justice Kidd. He shared a number of --

25 JUDGE KIDD: And Seana Willing. Don't leave

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1 Seana Willing out.

2 PROFESSOR CARLSON: -- who brought a number of
3 concerns to our subcommittee. And after reviewing
4 Justice Kidd's and Seana Willing's concerns, our committee
5 divided on the issue. Some of our committee members still
6 believe that commentary to Canon 2(A) is desirable, and that
7 proposed -- Texanized ABA Model Code proposed commentary
8 appears on Page 9 in the two indented paragraphs. You might
9 just want to take a second to look at those.

10 Justice Kidd shared two concerns about the inclusion of
11 commentary at all in any of our canons. One, he, having
12 served on prior task forces, shared the history of why we
13 don't have commentary, and noted that originally the ABA Model
14 Canon 2 was purely aspirational in nature -- it was all
15 "should" -- and that as the ABA Model Code changed over time
16 to include disciplinary provisions, that the Texas task force
17 on judicial conduct spent considerable debate and negotiation
18 on what behavior in that canon should be aspirational and what
19 behavior should subject a judge potentially to discipline.

20 Justice Kidd also suggested that the 288 judicial ethics
21 opinions in effect serve as the commentary to the Texas Code
22 of Judicial Conduct, and relayed that those opinions are
23 relied upon heavily by the Texas judiciary in formulating
24 their conduct and that -- noted that the opinions were readily
25 accessible on line, as are the opinions of the Texas State

1 Commission on Judicial Conduct and that judicial seminars
2 often use these opinions and decisions as a basis for
3 educating the judges. And Justice Kidd suggested that
4 additional commentary is not necessary and is not desirable.

5 Insofar as the specific comment to Canon 2, as I said, we
6 had a divided subcommittee. Justice Kidd and Seana Willing
7 suggested that judges are not disciplined in Texas solely on
8 the basis of a lack of impartiality and that the proposed
9 comments that were Texanized but based on the ABA Model Code
10 were not appropriate for inclusion for that reason.

11 And so I guess, Mr. Chairman, our first vote, if you want
12 to proceed this way, is whether or not the full committee is
13 of the mind that the proposed commentary on Page 9 for Canon 2
14 should be included or should not be included.

15 MR. BABCOCK: Okay. Let's start with that.
16 And, Justice Kidd, do you want to state the case for or
17 against or for moderation in the middle?

18 JUDGE KIDD: Well, obviously there are portions
19 of the commentary that I'm more opposed to than others.
20 Because what has -- what the subcommittee and -- and I've got
21 to admit in one brief telephone conference with
22 Professor Carlson she has done a magnificent job of gathering
23 together all of these difficulties in applying this commentary
24 to our Texanized version of Canon 2, and has stated, probably,
25 my arguments and positions better than I could do today.

1 There are some portions of the commentary that are taken
2 from the ABA Model Code that don't fit with our Code because
3 we purposefully, when we had our earlier task force, did not

4 adopt certain portions of the 1990 Model Code. There's some
5 portions of this commentary that conflict with our ethics
6 opinions; for example, "Judicial letterhead must not be used
7 for conducting a judge's personal business." Well, our
8 Ethics Opinion No. 137 says that in certain circumstances
9 that's incorrect, that a judge must be careful not to use the
10 prestige of judicial office to further his own ends or that of
11 any other person. But that's simply incorrect.

12 Then there's an example given about writing letters of
13 recommendation.

14 PROFESSOR LAYCOCK: I'm sorry, Judge, where --

15 PROFESSOR CARLSON: I think you're going more
16 into 2(B) instead of 2(A).

17 JUDGE KIDD: Do we want to stick with just 2(A)
18 for right now?

19 MR. BABCOCK: Yeah.

20 JUDGE KIDD: Okay. Let's just stick with 2(A).
21 My basic problems with 2(A) were that the first paragraph, I
22 think, says -- you know, I don't have too much objection to
23 the first paragraph in and of itself. It uses "should" as
24 opposed to "shall," so it's modifying an aspirational goal.
25 My only concern is that a number of these things are stated in

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1 the Preamble in Canon 1, and I contend that they're stated a
2 little more elegantly than they're stated in this commentary.

3 "Public confidence in the judiciary is eroded by
4 irresponsible or improper conduct by judges." Well, you know,
5 in the Preamble we say, "The role of the judiciary is central
6 to American concepts of justice and the rule of law.
7 Intrinsic to all sections of this Code of Judicial Conduct are

8 the precepts that judges, individually and collectively, must
9 respect and honor the judicial office as the public's trust
10 and strive to enhance and maintain confidence in our legal
11 system." Well, to me that says it, but it says it a little
12 better than that one does.

13 "A judge should expect to be the subject of constant
14 public scrutiny. A judge should accept restrictions on the
15 judge's conduct that might be viewed as burdensome by the
16 ordinary citizen and should do so freely and willingly." Like
17 Professor Carlson points out, our Supreme Court has already
18 decided that judges are subject to scrutiny both in their
19 personal life as well their public life on the bench. And so
20 that would be my problem with the first paragraph.

21 My problem with the second paragraph is it just doesn't
22 fit. It starts off, "The prohibition against behaving with
23 impropriety or the appearance of impropriety..." Again,
24 that's the -- going back to the ABA "shall." That's a
25 prohibition in the ABA Model Code that can subject a judge to

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1 discipline. And then later in that paragraph they go down and
2 actually set out a test for the appearance of impropriety,
3 which is completely unnecessary under our Code if you're not
4 going to try to discipline a judge. And as long as the
5 imperatives are in terms of "should" as opposed to "shall," I
6 just don't think it fits.

7 MR. BABCOCK: Proponents of this Preamble, are
8 there any, Elaine?

9 PROFESSOR CARLSON: Proponents of the comments?

10 MR. BABCOCK: I'm sorry. The comments, the two
11 paragraphs.

12 PROFESSOR CARLSON: We are evenly divided. No.

13 MR. BABCOCK: So who wants to speak toward --
14 in favor of? Justice Keasler?

15 JUDGE KEASLER: I don't have any problem with
16 it at all. I think it makes a statement of what we expect of
17 ourselves. And stating it -- I agree with Mack that the
18 Preamble sets out in a positive way what judges should be, but
19 I think this points out what some of the pitfalls are. As far
20 as the test is concerned, it doesn't bother me. I mean, I
21 don't think -- it doesn't necessarily -- a test doesn't have
22 to subject somebody to some kind of penalty. It's a test with
23 which we can look at our own behavior. I mean, I find it -- I
24 think the more we remind ourselves of what's expected of us,
25 the better off we are.

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1 MR. BABCOCK: So it not only doesn't bother
2 you, but you would be a proponent?

3 JUDGE KEASLER: I would be in favor, yeah.

4 MR. BABCOCK: Sharon?

5 MS. CALLAWAY: Chip, when the proponents are
6 finished, may I speak in general against the inclusion of
7 commentary at all?

8 MR. BABCOCK: You want to have the last word on
9 it?

10 MS. CALLAWAY: That's what I'm trying to do. I
11 get to speak last.

12 I would add to Justice Kidd's substantive comments
13 directed at Canon 2 about why you don't -- just the practical
14 consideration. You know, I sort of recognize consistencies,
15 the hobgoblins of little minds, but there is something to be
16 said if we are going to comment in -- I don't think you can

17 just comment in Canon 2 or one comment in Canon 3. If we're
18 going to comment, we're going to have to comment on the entire
19 Code.

20 And speaking from a PJC person of twelve years, I can tell
21 you it takes us a year to write that little tiny commentary,
22 and we don't have the force that this canon has to be used in
23 discipline. It's simply a bunch of lawyers commenting, and
24 even that takes forever. Every word has to be thought about.
25 Every, you know, possible scenario that you may be speaking to

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1 or coming up -- and to undertake to comment on the entire
2 Code, I think, is a task that could take years to do.

3 MR. BABCOCK: Okay. Is there anybody at --
4 Justice Lang?

5 JUDGE LANG: Yes, sir, I have a general comment
6 about our position to include commentary at all, and it
7 certainly applies to this 2(A) as well as others, and that is
8 I kind of view this as sort of legislative history for
9 statutes. And the problem is people can use bits and pieces
10 of it to make arguments or to find -- reach conclusions, and
11 it's kind of like the old saying goes that -- you know, some
12 judges have said before that looking at legislative history
13 can be misleading and abused because it's kind of like looking
14 out over the crowd -- over the hill at the people in the crowd
15 and looking for your friends and picking them out. I just
16 don't think we ought to go there for that reason, and I'm
17 concerned about it. If we need more specific language in the
18 Code provisions that you might want to see in the statute to
19 be clear, then let's work on that. I don't hear any
20 suggestion to do that, but...

21 MR. BABCOCK: Justice Weiner, do you have

22 anything? Can you even hear us, I hope?

23 JUDGE WEINER: Are you talking to me?

24 MR. BABCOCK: Yeah.

25 JUDGE WEINER: Well, I've been listening, and

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1 I'm still trying to make up my own mind.

2 MR. BABCOCK: Okay. Great. I just didn't want
3 you to feel excluded if you had something to say.

4 Anybody in Houston have anything to say about this? Can
5 you hear me?

6 JUDGE BENTON: Justice Kidd started with -- I
7 think his statement was the commentary is not necessary or
8 desirable, and I come down with a different account. I don't
9 agree completely with whoever -- the more commentary and
10 advice you provide the judiciary, I think the better. We can
11 quarrel and quibble about what the commentary should say. I
12 don't believe it's necessary to edit the body of the canons.
13 But giving guidance by way of commentary is helpful for the
14 judiciary and, I think, proactive.

15 DEAN ALFINI: If I could add to that, Chip, it
16 seems to me -- I thought the logic of Justice Kidd's point
17 went the other way. That is, you don't need the commentary
18 when you've got either cases or advisory opinions on the
19 topic. Well, but they're not very accessible to a judge
20 looking at the Code. It seems to me that's the very reason
21 why you would want to have commentary, to make those things
22 accessible to the individual judge.

23 MR. BABCOCK: Doug Laycock?

24 PROFESSOR LAYCOCK: It seems to me we've got
25 two debates kind of commingled here. One is whether there

1 should be commentary at all and, two, if so what should it
2 say, and Justice Kidd had some issues about what it should
3 say. On whether to have commentary at all, I don't have any
4 strong views, but I -- but I do have some reaction to some of
5 the things that should be -- that have been said.

6 Formal commentary by the committee adopted by the Court
7 does not have most of the vices of legislative history because
8 legislative history, at least as it operates in Congress, is
9 often written by lobbyists, things get planted in legislative
10 history because they know they couldn't possibly have been
11 passed by a bill. If we're careful and we have the same
12 people doing the text and the commentary, we can avoid a lot
13 of those problems.

14 Commentary helps solve some of the problems of drafting.
15 You don't have to be quite as tight or as universal in the
16 commentary; you can be suggestive. The flip side of that is
17 reliance on commentary is often a temptation to sloppy
18 drafting -- "We don't have to get this right. Just stick it
19 in the comment" -- and that would be, I think, a serious
20 mistake. And so doing it right -- I don't think it takes
21 years or months, but it does take substantial efforts, as she
22 was saying.

23 Commentary is more useful for some things than for others,
24 particularly -- I think it's particularly useful to explain
25 drafting decisions whose purpose is not apparent on their

1 face. And we've had issues where we talked about for a long
2 time do we do it this way, do we do it that way. It would
3 sure help down the road to have some record of why we chose to

4 do it the way we did it.

5 I was looking at -- I was comparing this morning and last
6 night our version of Canon 4 and the Model rules version of
7 Canon 4, and there are some very substantial differences we'll
8 be talking about later. I have no idea why those differences
9 exist; I'm hoping someone remembers, but it's not written down
10 anywhere. Someone spent a lot of time, made a decision, and I
11 have no idea why they made that decision. I think there's
12 some useful things that commentary can accomplish. And you
13 have to be careful to avoid the downsides of it, but there's
14 some good things you can do.

15 MR. BABCOCK: Do you have any opinion on this
16 commentary?

17 PROFESSOR LAYCOCK: No, because I haven't been
18 focused on this section. I don't have -- I don't have 1 in
19 front of me so I don't have an opinion on whether it's
20 redundant or not. But I do think if there's going to be
21 commentary that we need to be consistent and have at least
22 some commentary on each canon.

23 MR. BABCOCK: Justice Quinn?

24 JUDGE QUINN: I'm a little bit confused about
25 this commentary because I've used commentary as a supplement

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1 to the rules. Where in Canon A do they set up some type of
2 prohibition about avoiding impropriety? Canon A, as written
3 here, says nothing about avoiding impropriety. It talks about
4 promoting public confidence and having an impartiality. The
5 commentary is saying, well, there's a prohibition of
6 impropriety there. Then you look in the second paragraph
7 there, and if that prohibition -- does that relate to

8 complying with the law or does that relate to promoting
9 confidence in the integrity and impartiality? If it's the
10 latter, then the commentary makes it a prohibition, whereas in
11 the canon it says "should"; it's not a prohibition. So is the
12 commentary making -- making "should" "shall" then?

13 I'm just wondering, if we want to avoid the appearance of
14 impropriety maybe we should put that in the canon as opposed
15 to somewhere in the commentary.

16 MR. BABCOCK: I think Doug's quite right.
17 There's two questions; one is should we have a comment at all,
18 particularly since we're not going to be -- we're not going to
19 be recommending a change to the language of the body of 2(A).
20 And so we would be putting a comment in to do what, to explain
21 what somebody before did or explain what we think now they did
22 before? So I'm not --

23 PROFESSOR CARLSON: This commentary is
24 modeled -- comes from the Model ABA Canon 2. And the members
25 of the subcommittee who voted in favor of it, I think, felt

24

1 that it would assist judges in their conduct. But I do agree
2 with you, Justice Quinn, that in some respects it is a round
3 peg in a square hole. "Prohibition" probably isn't a good
4 word. If we were to have commentary, it would be something
5 like that "admonition." But I think we should take up a vote
6 to see if we desire commentary at all.

7 MR. BABCOCK: I agree with that. Anybody
8 else -- I think it would be wise to have a vote, but we'll
9 have some more discussion because there's hands up.
10 Justice Jefferson?

11 JUDGE JEFFERSON: One comment about the ethics
12 opinions, and Seana will know this. There were times when I

13 sat on the Commission on Judicial Conduct, we would look at
14 the ethics opinions and disagree with the recommendation of
15 those opinions to whatever judge asked the question. And so
16 the question arises, how authoritative are they. A judge
17 might pick up one of those opinions and say, "I can do X. I
18 can use letterhead as long as it's not too associated with a
19 personal interest of mine or I can't." And then when the
20 complaint is filed and it comes to the Commission, the
21 Commission wouldn't always refer to the ethics opinions; and
22 even when it did would sometimes say, "They got it exactly
23 wrong, and we think discipline ought to be imposed, no matter
24 what that opinion says."

25 And so I'm not taking position for or against the

25

1 commentary, but there's some reservation I have about, you
2 know, sending people off to a body that doesn't speak for the
3 Commission and perhaps subjecting themselves to discipline
4 that wouldn't occur if the ethics opinions had stronger value.

5 MS. WILLING: Can I weigh in on that?

6 MR. BABCOCK: Yeah, sure.

7 MS. WILLING: And this is somewhat in response
8 to Dean Alfini's statement that the information from the
9 Ethics Commission -- or the Ethics Committee or from the
10 Commission, as far as our disciplinary actions, isn't readily
11 accessible to the judges; I disagree. And maybe this is a
12 more recent phenomenon. But with the Internet, there are Web
13 sites linked to the Texas judiciary on line, to our Web site
14 where you can get all the ethics opinions, you can get all of
15 our disciplinary actions.

16 I know Lamar McCorkle has done an annotated code, a book

17 that has the history of the canons and how they've been
18 amended over the years, has the canons that are annotated with
19 ethics opinions, public statements, and disciplinary actions.

20 And we field probably a thousand calls a year from judges
21 who have these questions about, you know, conduct that might
22 have an appearance of impropriety. And so we respond to
23 thousands of calls over the years with -- and direct those
24 judges to the ethics opinions, to our disciplinary actions.
25 Of course we don't tell them what they can and can't do.

26

1 They've got to make that call themselves. But there's plenty
2 of information available to judges if they would choose to
3 seek it out.

4 And I think although the ethics opinions aren't
5 necessarily binding on the Commission, they are some guidance.
6 And I think that probably it's more of a rare occurrence than
7 anything that a judge who has used some due diligence to find
8 out what's okay and what's not okay before he or she embarks
9 on a particular course of action and does find themselves in
10 front of the Commission -- if that due diligence is expressed
11 to the Commission, I think it may have, you know, somewhat of
12 a mitigating effect on any discipline, if any, that would be
13 issued.

14 But I do take -- I guess I object to the comment that it's
15 just not readily accessible.

16 MR. BABCOCK: I think that's a good point. I
17 think Dean was thinking about me, because when I get on line I
18 can't remember my code and my subscription name, and all those
19 things, so it's not accessible in that sense.

20 Justice Keasler?

21 JUDGE KEASLER: The one thing, though, that you

22 said, Ms. Willing, that has long been the position of the
23 Commission on Judicial Conduct, is that they are not bound by
24 the ethics opinions. They give -- you know, they certainly
25 give some deference to them, but they're not bound by them.

27

1 And to me that's not real comforting because it could always
2 change.

3 JUDGE KIDD: Let me speak to a couple of things
4 that have been raised here. Last point first, when I took
5 over as chair of the Ethics Committee two years ago, our
6 committee sat around and the first order of business was
7 "These are advisory opinions. I mean, you know, they're not
8 binding on the Conduct Commission. I mean, what are we doing
9 here? Are we just wasting our time?"

10 To my knowledge there has never been a judge in this state
11 disciplined that followed an advisory opinion written by the
12 Ethics Committee; I do not know of a single case. And
13 Seana Willing and I have discussed this many times, that if a
14 judge in good faith relies upon one of our Ethics Committee
15 advisory opinions, we do not know of a single case where a
16 judge has been disciplined for that action.

17 Now, you know, I'm the first one to recognize the fact
18 that, you know, things can be done better. And if some of
19 those ethics opinions are wrong, they need to be looked at and
20 revisited. We've revisited two of them since Republican Party
21 of Minnesota vs. White; one of them, whether a judge could
22 serve as a delegate to state and national conventions, which
23 our Ethics Committee decided that they could not because they
24 were endorsing candidates for office and they were also
25 setting policy, both of which are prohibited by our Code. So

1 that can always be remedied if there's a problem there.

2 But I continue to say that both from the standpoint of the
3 Judicial Conduct Commission -- and they issue not only public
4 comment, but they also issue sanctions opinions as well as our
5 advisory opinions, which now number 289 and date back from
6 1975 to the present. That's a body of work that we don't
7 write on a clean slate. And so this ABA Model commentary in
8 many respects just doesn't fit with our Code.

9 Now, the second proposition -- you know, it's been over a
10 decade ago since I served on the first task force, and so it's
11 difficult for me to remember exactly, but I think we discussed
12 whether to include commentary within the Code and rejected
13 that at that time. And that's one of the reasons why when we
14 get to Canon 4 Professor Laycock points out that there's some
15 commentary in the ABA Model Code to Canon 4 that's included
16 within our Code in Canon 4, and that was the reason. We made
17 a conscious decision to try to avoid commentary if we possibly
18 could.

19 MR. BABCOCK: Judge Woodward, you had your hand
20 up a minute ago.

21 JUDGE WOODWARD: A couple things. I respect
22 the ethics opinions, and I take a look at them and they give
23 me guidance. But it doesn't give me a whole lot of comfort
24 that Seana referred to the ethics -- if you follow the ethics
25 opinions it will be used in mitigating circumstances. And

1 Justice Kidd has said if they are followed in good faith, no
2 one's been -- and that good faith can turn against you pretty
3 quickly. So that doesn't give me a whole lot of comfort, but

4 I rely on them.

5 As far as commentary in the Code, it seems to me we're
6 still struggling with starting out with an admonitory code
7 written in the 1930s that has now been transformed into a
8 statutory penal code for judicial conduct, and it -- and we're
9 in this transition, and we seem to be mixing the admonitory
10 idea of the Code with the disciplinary action of the Code.

11 If we sit down and separate those two things out, it would
12 either require commentary or here's what -- one book that says
13 here's what judges should do and another book that's a
14 completely separate code. And we are talking about years of
15 developing a "should" book and a disciplinary book. So I'm
16 not sure -- I guess what I'm saying is that commentary is a
17 little confusing because of the transition of the Code that
18 we're going through.

19 So I guess I fall off by saying I really don't know if I
20 like commentary everywhere. But I do like that first
21 paragraph of the proposed commentary in Canon 2, and I would
22 suggest that it be added to the Preamble of the entire Code as
23 opposed to a commentary to a specific portion.

24 MS. WILLING: I guess I have a question, but
25 you may have just answered it. But how would having

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1 commentary alleviate the concerns that you and Judge Keasler
2 have expressed, that the ethics opinions are not binding and,
3 you know -- I mean, because the commentary wouldn't be binding
4 any more than the ethics opinions unless you're going to be
5 defining sanctionable conduct, and in that case you're just
6 adding on to mandatory -- the "shall" language. It should be
7 interpreting the "should" language, and then it's not any more

8 binding than an ethics opinion.

9 JUDGE WOODWARD: I think the "should"
10 language -- you know, despite Minnesota vs. White, I still
11 think that there ought to be some "should" language about
12 should or should not speak out on some issues, even though it
13 may violate my constitutional rights to enforce it. I think
14 judges ought to have some guidelines that are not
15 sanctionable. And so the commentary -- I don't think it's a
16 good use of it perhaps, but commentary would be more of the
17 "should," admonitory kind of things, but I don't think we can
18 go through the entire Code and do that.

19 I'm wondering if eventually we're going to reach a point
20 where we have the original ABA Model Code on the one hand and
21 on the other hand a strict disciplinary code. And your job on
22 the Commission would be the strict code, and everybody else
23 can rely on the admonitory code to say this is why or why not
24 I do things or don't do things.

25 MR. BABCOCK: Justice Keasler?

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1 JUDGE KEASLER: I agree with that
2 wholeheartedly. Another reason that I like -- I like the
3 aspirational parts of it is that it's something to fall back
4 on. You know, you're hit, judges are, especially in Texas
5 where we have to run for office, and you're hit with all these
6 special interest groups wanting you to fill out questionnaires
7 and stuff. And to me it's really kind of a comfort to say,
8 "Well, I know Minnesota vs. White says I can do this, and if
9 you try to discipline me for it, then you're going -- you're
10 out of luck." But to me, you know, I like to kind of go
11 beyond that. And I think a good judge does this and this
12 because that's what we aspire to, and it's a nice thing to

13 have that.

14 MS. WILLING: How are you going to get the
15 commentary to address all of those things that you face day in
16 and day out?

17 JUDGE KEASLER: You can't get them to face all
18 of it, but you can edit the -- that's the reason for some of
19 the broad language, is that to me if I answer this, then I'm
20 not promoting confidence in the judiciary, that I'm not
21 avoiding the appearance of impropriety, that I'm not appearing
22 that I can be impartial, and I am going to invite recusal by
23 this. And Minnesota vs. White says that's just fine, but it's
24 not fine to me.

25 MR. BABCOCK: Justice Quinn?

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1 JUDGE QUINN: Can the ethics opinions -- even
2 though they're not binding on the Committee and the
3 commentaries you view would not be binding on the Commission,
4 but can the ethics opinions be considered the commentary
5 because they flesh out the rules?

6 JUDGE KIDD: I think that's what happens right
7 now. I think it's a combination of the advisory opinions that
8 the Ethics Committee writes, Seana's opinions that she writes
9 in specific sanctionable cases, and the public comment that
10 comes from the Commission in the form of kind of their
11 advisory opinions. And I think that the ABA Model Code, if
12 you go through this, as we get a little farther on, you'll see
13 that we've got some of our Ethics Committee advisory opinions
14 that track these exactly. As a matter of fact, on letters of
15 recommendation, which is our No. 222, we actually quote from
16 the ABA Model Code commentary in toto in the ethics opinion

17 itself.

18 PROFESSOR LAYCOCK: So it was useful to have
19 commentary.

20 JUDGE KIDD: Well, it's useful to have
21 commentary, absolutely. I'm just saying not within the Code
22 where it conflicts with what you already have, a body of work
23 that you already have, unless you're going to go and overrule
24 one or the other.

25 MR. BABCOCK: Looks to me here's where we are:

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1 We can say we don't want any commentary; we can say that we
2 want some commentary but we only like paragraph one, which
3 Justice Kidd doesn't have any objection to, but not paragraph
4 two, which Justice Kidd and his followers feel is in conflict
5 with the compromises that have been made with respect to our
6 Code, or we could have both paragraphs, or -- I guess there's
7 a fourth possibility -- we could completely rewrite it. So
8 how do we get the expression of the full committee on that --
9 on those possibilities?

10 PROFESSOR CARLSON: Well, Chip, I think the
11 initial vote should be on whether the full committee favors
12 including commentary at all.

13 JUDGE FROST: On any canon?

14 PROFESSOR CARLSON: On any canon.

15 JUDGE FROST: Okay. That's what we're doing
16 too.

17 PROFESSOR CARLSON: That will tell us whether
18 we need to take other votes.

19 MR. BABCOCK: Okay. Is everybody comfortable
20 that we've discussed that issue? Because we have been
21 focusing on 2(A). And just my own view, I think 2(A) -- the

22 comments that are proposed for 2(A) are misplaced. I mean, I
23 don't see that there's any reason to have commentary -- this
24 commentary for 2(A). But the first paragraph doesn't offend
25 me either, just as it doesn't offend Justice Kidd. But have

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1 we had enough discussion on comments at all?

2 JUDGE KIDD: Any commentary at all?

3 MR. BABCOCK: Any comments at any part of the
4 canons, any of the canons.

5 MS. HOBBS: Can I add one thing?

6 MR. BABCOCK: Sure.

7 MS. HOBBS: If the idea, too, is to promote
8 public confidence by having these canons -- we actually have
9 two readers of these canons. We have judges who need to know
10 how to conduct their daily activities and the public who needs
11 to know how to evaluate the judges conducting their
12 activities. And I think in determining whether or not the
13 Committee's ethics opinions are -- should be in place of
14 commentary, we have to ask ourselves, too, whether the public
15 would have access to the --

16 JUDGE KIDD: They would.

17 MS. HOBBS: And they do, but do they know that
18 they're available in the same way that the judiciary knows
19 that they're available? And I just throw that out there for
20 discussion and thought.

21 PROFESSOR LAYCOCK: The public doesn't know, at
22 least this law professor didn't know and I don't think many of
23 my colleagues know. But can I offer a friendly amendment for
24 the no commentary side? Which would be to say one alternative
25 is we'll do commentary and I'll wade through; the other is

1 there will be no commentary except for one global comment to
2 the entire Code that explains these two different bodies at
3 issue, rulings and opinions, and where you can find them on
4 line and how you can search them.

5 JUDGE KIDD: A very friendly amendment.

6 JUDGE QUINN: I hate to say no to everything to
7 situations that are not even in front of us right now in other
8 canons. There may be -- I can see there is a problem with
9 trying to draft commentary to everything and requiring there
10 be commentary to everything, every canon. But there may be a
11 canon that needs commentary, a short clarification or
12 something. I have a problem with saying nowhere is there
13 going to be commentary.

14 JUDGE KIDD: I think that's a good point, and I
15 would move to table that first issue and move on and just
16 consider specific commentary as we go, because I think the
17 judge is absolutely right. I mean, we might have commentary
18 to Canon 4 that we want. We've already talked about drafting
19 commentary to Canon 3. So I don't want to get pushed into the
20 position of saying never, we can't ever have any commentary.
21 But I think it might be better to just take up these specific
22 commentaries.

23 MR. BABCOCK: I think that's probably a fair
24 statement. So should we vote on whether or not this specific
25 comment to Canon 2(A) is appropriate? Is that okay?

1 PROFESSOR CARLSON: Yes.

2 JUDGE KIDD: Could we do it by paragraph?

3 MR. BABCOCK: Which way would you like to frame

4 it, in the positive or the negative?

5 PROFESSOR CARLSON: Positive.

6 MR. BABCOCK: Is everybody in favor of having
7 this comment or some variation?

8 PROFESSOR CARLSON: I think Justice Kidd had a
9 good suggestion, paragraph by paragraph, paragraph one and
10 paragraph two.

11 MR. BABCOCK: On the comment or on like
12 paragraph 2(A) or Canon 2? Should we have a --

13 JUDGE KIDD: Paragraph one of -- as commentary
14 to Canon 2(A).

15 MR. BABCOCK: All right. Everybody in favor of
16 paragraph one, as stated on Page 9 of the report, as a
17 potential comment to Canon 2(A), raise your hand -- everybody
18 in favor of that. All opposed?

19 JUDGE WEINER: I was in favor.

20 MR. BABCOCK: Okay. Then that fails by a vote
21 of eight to five. So paragraph one will not be included.

22 Anybody in favor of paragraph two on Page 9 -- a comment
23 that contains the language in paragraph two on Page 9 as a
24 potential comment to paragraph 2(A) of Canon 2? Anybody in
25 favor of that? All opposed? Looks like almost everybody is

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1 opposed to it; some not voting on that. All right. So that
2 comment is history.

3 MS. WILLING: What about the first paragraph in
4 the Preamble?

5 MR. BABCOCK: We're not on the Preamble right
6 now.

7 MS. WILLING: But don't just forget about the

8 first paragraph.

9 MR. BABCOCK: We're going to get to the
10 Preamble at our next meeting. If you had been here on time,
11 you would know that.

12 MS. WILLING: I know. But I'm just saying the
13 way you just made that sound is that this is gone, it's
14 history.

15 MR. BABCOCK: It's history as to Canon 2. But
16 anybody can suggest whatever they want for the Preamble
17 because we're not on that right now.

18 Okay. Elaine, what next? Have we taken a helpful vote
19 for you?

20 PROFESSOR CARLSON: Yes. I didn't know if you
21 wanted to pick up on Doug's suggestion of including a comment
22 that cross-references these opinions.

23 MR. BABCOCK: I think we can. I think that's
24 probably a good idea. But if I could ask Doug to remember
25 that when we get to the Preamble, typically that's the best

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1 place to put a comment like that.

2 PROFESSOR CARLSON: Okay. The next item of
3 business is on Page 10, item 4. Justice Kidd and
4 Seana Willing asked our subcommittee to consider splitting the
5 first sentence of Texas Canon 2(A) into two sentences. You
6 can read how it currently is adopted. Justice Kidd and Seana
7 asked that we would split it without changing really the
8 wording to provide "A judge shall comply with the law. A
9 judge should act at all times in a manner that promotes public
10 confidence in the integrity and impartiality of the
11 judiciary."

12 Justice Kidd suggested that there are some who believe or

13 opine that a judge may not be disciplined for failing to
14 comply with the law unless that failure ties in with the
15 second part of the same sentence; it reflects negatively on
16 public confidence or the integrity and impartiality of the
17 judiciary. Separating the two sentences would make clear that
18 that is not so. And also because the first obligation is
19 mandatory in "shall" and the other is a "should," that would
20 highlight the disparate nature of those two distinct
21 obligations. And a majority of our subcommittee favored doing
22 this.

23 MR. BABCOCK: Okay. Discussion on that?

24 JUDGE KEASLER: Sounds good.

25 JUDGE KIDD: I'm not going to speak against it.

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1 JUDGE FROST: I had a question about
2 interpreting the "judge shall comply with the law." What if a
3 judge got a parking ticket?

4 JUDGE QUINN: Exactly.

5 JUDGE FROST: Is that going to also mean a
6 judicial reprimand in addition to the parking violation?

7 JUDGE QUINN: Or a speeding ticket.

8 JUDGE FROST: Or a speeding ticket.

9 JUDGE QUINN: They didn't comply with the law,
10 but it has nothing from that respect from the public
11 confidence in the judge or the integrity or --

12 MS. WILLING: I doubt that's a Code violation.

13 JUDGE KIDD: Yeah. I mean, we're not changing
14 anything. It's just that if you include those two together,
15 if you tie them together with an "and," it restricts --

16 JUDGE QUINN: It adds another element to the

17 violation.

18 JUDGE KIDD: Right.

19 MS. WILLING: But the flip side --

20 JUDGE QUINN: And I'm not saying that's a bad
21 idea, to have another element that, in effect, requires that
22 the violation of law somehow impugn public confidence and
23 integrity and impartiality of the judiciary.

24 MS. WILLING: If the Code says that discipline
25 cannot be issued for a "should," then possibly a way to look

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1 at this with the "and" in between those two provisions is that
2 a judge would never be disciplined for failure to comply with
3 the law because the second part that would be required is a
4 "should."

5 JUDGE KEASLER: That's exactly right.

6 MR. BABCOCK: What do you do for Judge Quinn's
7 hypothetical for parking tickets and, you know, being ten
8 miles over the speed limit?

9 MS. WILLING: The only complaint I've ever seen
10 like that is a judge speeding through a school zone.

11 MR. BABCOCK: And what happened?

12 MS. WILLING: I don't think that we ever were
13 able to prove it. I don't think that -- I mean, sometimes
14 citizens -- concerned citizens give us, you know, judge
15 plates. That's one of the, I guess, downsides to having judge
16 plates, is that you're a moving target and they get reported
17 to us. They don't know who the person is behind the wheel,
18 but in some of those instances it was not the judge driving
19 the car.

20 JUDGE QUINN: How about in a situation where
21 they do know who the judge is, they turn them in, and the

22 judge is not going to lie and says, "Yes, I was speeding
23 through it." You shall not violate the law. Can you be
24 disciplined?

25 MS. WILLING: It's possible.

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1 JUDGE KEASLER: I don't even know of any case
2 nationally -- and I've looked at -- I don't know of any place
3 in the United States that anybody has been disciplined for
4 speeding tickets or parking tickets. I mean, you can due
5 process the effectiveness out of any code; I mean, you really
6 can. You can make this so that we'll have the same standards
7 as bail bondsmen if you want to. But to me this makes perfect
8 sense, and I'm all in favor of dividing it into two sentences.

9 MR. BABCOCK: Professor Laycock?

10 PROFESSOR LAYCOCK: It's easy for me to say
11 because I'm not subject to these rules. But I think you can
12 probably trust prosecutorial discretion on the parking
13 tickets. The alternative is pretty unattractive too. You
14 don't want to start saying a judge shall comply with the law
15 except that he can violate the law a little bit if we don't
16 think it's a very important law. You starting trying to
17 codify that exception and put it in print, and I think you'll
18 wind up embarrassed by the result.

19 MR. BABCOCK: That's a good point.

20 JUDGE KIDD: By the way, there is a provision
21 that Justice Quinn might get some comfort from back in
22 Canon 8, the construction and terminology of the Code. The
23 sections are "Rules of Reason which should be applied
24 consistent with constitutional requirement, statutes, other
25 court rules, and decisional law, and in the context of all

1 relevant circumstances. The Code is to be construed so as not
2 to impinge on the essential independence of judges in making
3 judicial decisions," and so on and so forth.

4 I mean, you know, I think that the Judicial Conduct
5 Commission is not going to attempt to discipline a judge for
6 getting a speeding ticket.

7 JUDGE QUINN: Well, there are other crimes out
8 there, other laws out there that are a little bit more
9 invasive and pose a little bit more burden than speeding
10 tickets. I think speeding tickets and parking tickets were
11 the examples and the extreme, but I think there's laws out
12 there that do not place some type of taint on your integrity
13 or your impartiality. But yet judicial discretion or
14 prosecutorial discretion, that didn't protect Kay Bailey
15 Hutchison ten years ago in her prosecutorial discretion
16 either. I mean, it depends on the person.

17 JUDGE KEASLER: Well, using a little dope
18 doesn't hurt somebody's impartiality. But still I don't know
19 too many people that would argue against the fact that a
20 person like that ought to be disciplined.

21 JUDGE QUINN: How about a judge who scalps
22 tickets -- football tickets and that's against the law; should
23 we punish him?

24 JUDGE KIDD: Probably should.

25 JUDGE KEASLER: Yeah.

1 MS. WILLING: You know, the constitution
2 provides that discipline can lie for a judge's conduct that
3 casts public discredit on the judiciary. I mean, that's a

4 very broad --

5 JUDGE QUINN: I understand that.

6 MS. WILLING: -- thing, and that's -- I mean,
7 that's not defined either, but that's in the constitution.

8 JUDGE WOODWARD: I think that's what we're
9 talking about in that first sentence of the commentary. A
10 judge should avoid impropriety and expect constant public
11 scrutiny and accept restrictions on your life. I took the
12 plates off my car.

13 MR. BABCOCK: As you sped through the --

14 JUDGE WOODWARD: I didn't want to be
15 self-reporting. For the other reason, I didn't want people to
16 say, "He's going ninety-five so I get to go ninety-five."

17 JUDGE QUINN: And that's why I took them off
18 mine too.

19 JUDGE WOODWARD: So if I'm going to be an
20 example -- you know, it wasn't an original idea, but it was
21 just -- not only did I not want you to get a call about one of
22 my kids speeding, but I also think if I'm a judge I better
23 follow the laws.

24 JUDGE KEASLER: A judge in Florida said about
25 judicial license plates, "Why don't you just paint a big

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1 bull's-eye on your windshield."

2 MR. BABCOCK: Good point. Well, I think
3 there's a recommendation from the subcommittee that we amend
4 paragraph 2(A) of Canon 2 in the fashion that is suggested at
5 Page 10 of the report. And if there's no further discussion
6 of that, I think we're ready to vote. So everybody who is in
7 favor of adopting the subcommittee's proposal of splitting the

8 two sentences -- splitting into two sentences, raise your
9 hand. All opposed? That carries by a vote of nine to three,
10 the chair not voting.

11 Okay. Elaine, what's next?

12 PROFESSOR CARLSON: On Page 11 our full
13 committee recommendation was to include in Canon 8 a
14 definition of impartiality. And the definition that we
15 thought was appropriate was the ABA Model Code definition,
16 which, I apologize, appears on Page 19. I didn't put it in
17 the body of the report.

18 MR. BABCOCK: Gotcha.

19 JUDGE KEASLER: Just a question grammatically.
20 "As well as maintaining" or "maintenance of" an open mind
21 or -- rather than "as well as maintain"?

22 PROFESSOR CARLSON: I'll double-check.

23 JUDGE KEASLER: It denotes "maintaining."

24 MR. BABCOCK: "Maintaining" sounds right.

25 JUDGE WEINER: "Maintaining" is correct.

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1 PROFESSOR CARLSON: I should give a
2 disclaimer -- and I do within the report -- that we did not
3 look at how including the definition in Canon 8 might affect
4 canons other than Canon 2. Dean Alfini, I think, mentioned to
5 me that that was something that the Canon 1 subcommittee was
6 looking at. So we might wish to make either a provisional
7 vote subject to recommendation of the other subcommittees on
8 other canons and how they might view it or we might table that
9 for the end of the project.

10 MR. BABCOCK: Well, let's talk about it and
11 then take a provisional vote.

12 JUDGE KIDD: I think that's good.

13 MR. BABCOCK: What's the derivation of this
14 definition? Is this from ABA?

15 PROFESSOR CARLSON: ABA Model Code.

16 JUDGE FROST: Which was taken out of the White
17 case?

18 PROFESSOR CARLSON: Yes. This amendment, I
19 believe, came out of the 2003 ABA task force report. And they
20 state that "...the analysis of impartiality in the majority
21 opinion of White that the working group of the ABA reported
22 that it is narrowly tailored yet encompasses the general
23 concepts of judicial impartiality that are vital to the
24 maintenance of an independent judiciary."

25 So the ABA Model Code, I believe, was amended to include

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1 this really to address White. Our subcommittee felt that it
2 was desirable also in looking at the judges' obligations under
3 Canon 2.

4 DEAN ALFINI: Chip, if I could add to what was
5 said.

6 MR. BABCOCK: Yeah.

7 DEAN ALFINI: The definition was adopted by the
8 House of Delegates of the ABA in August of 2003, along with
9 other changes that were adopted by the House at that time.
10 And they came out of a report of a working group on the
11 judicial campaigns in the first amendment that was a result of
12 a White decision. So what we were trying to do was to capture
13 the essence of White, if you will, to the extent that we
14 could. So you'll see that some of that language sort of flows
15 from, just as deleted, parsing out of the word "impartiality"
16 in the White decision.

17 MR. BABCOCK: Was there any significant dissent
18 to this language? Was there anybody that objected to it?

19 DEAN ALFINI: No. It got pretty widespread
20 approval. But I must say, as you know, there's an ABA task
21 force looking at the entire Code right now, and we haven't
22 gotten to Canon 5 yet or these definitions, so there may be a
23 working over of it by this new task force. But at that time
24 there wasn't much quibbling over the language, no.

25 MR. BABCOCK: Okay. Any other comments about

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1 this definition? All right. Speaking provisionally, subject
2 to the Preamble in Canon 1 and Canon 8 discussion, all in
3 favor of adopting this definition as part of Canon 8, raise
4 your hand.

5 JUDGE WEINER: We're correcting the grammar?

6 MR. BABCOCK: Yes, we are.

7 All opposed? All right. By a vote of fourteen to none,
8 chair not voting, that passes. So whoever wants to change
9 this is going to have a steep hill to climb.

10 All right. What's next, Elaine?

11 PROFESSOR CARLSON: On Page 11 we start our
12 study of Canon 2(B). Canon 2(B), you recall, requires a judge
13 to not allow any relationship to influence their judicial
14 conduct or judgment, not to lend the prestige of judicial
15 office to advance the private interest of the judge or others,
16 the judge is not to convey or permit others to convey the
17 impression that they are in a special position to influence
18 the judge, and then it concludes with "A judge shall not
19 testify voluntarily as a character witness."

20 Our subcommittee considered two things in regard to
21 Canon 2, whether the inclusion of commentary, again, would be

22 desirable and, secondly, whether the last sentence of
23 Canon 2(B), prohibiting a judge from testifying voluntarily as
24 a character witness, was appropriately placed in this canon or
25 in Canon 4.

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1 Again, the subcommittee is evenly divided on the proposed
2 inclusion of commentary. That proposed commentary appears in
3 the report on Page 11 and 12. There are five separate
4 paragraphs. Those subcommittees members who favored that
5 ABA Model commentary also favored the adoption of an
6 additional comment that begins at the bottom of Page 12, top
7 of Page 13 that attempted to cross-reference to other sections
8 of the Code to facilitate more information to the reader.

9 Justice Kidd asked us to take a look at our proposed
10 inclusion of commentary, and if you'll look at Page 13,
11 hopefully I've done justice to his concerns. His concern of
12 the first paragraph of Canon 2(B) is that it is largely
13 redundant of the Preamble in Canon 1, that it speaks to the
14 obligation of a judge to respect the law, an obligation that
15 we do not include, and that the last sentence of the first
16 paragraph of the commentary dealing with judicial letterhead
17 was contrary to Advisory Opinion No. 137.

18 Justice Kidd suggested that the second paragraph of the
19 suggested Canon 2(B) commentary addresses obligations under
20 Canon 4 and it would be more appropriate to take that up at a
21 later time, with the general disfavoring of commentary from
22 his perspective.

23 The third and fourth paragraphs of the suggested
24 Canon 2(B), Justice Kidd suggested, discusses limitations on
25 judicial recommendations, but it was contrary to, in some

1 places, and redundant of Texas Advisory Ethics Opinion 222.

2 The fifth paragraph addresses limitations on judges
3 testifying as a witness, a matter that's covered by Texas
4 Advisory Ethics Opinion 139. And Justice Kidd's final comment
5 was -- and I'll try and say this very -- well, the comment was
6 not sufficiently informative to warrant inclusion, essentially
7 telling the reader to see Canon 4.

8 And so the next vote that we need from the full committee
9 is whether this proposed commentary to Canon 2(B) set forth on
10 Pages 12 and 13, those five paragraphs, should be included or
11 excluded.

12 JUDGE QUINN: Can we add a comment saying that
13 Canon 2(B) applies to my wife?

14 MR. BABCOCK: That would be the sixth
15 paragraph?

16 JUDGE QUINN: She cannot influence me, that I
17 don't have to listen to her.

18 JUDGE KIDD: I think we've done an advisory
19 opinion on that, as a matter of fact.

20 MR. BABCOCK: That's not binding, though.

21 Okay. Discussions on this comment, this rather lengthy
22 comment?

23 JUDGE WEINER: May I go ahead and talk?

24 MR. BABCOCK: Yes, please, Justice Weiner.

25 JUDGE WEINER: I was just thinking about where

1 we have "nor shall a judge convey or permit others to convey
2 the impression that they are in a special position to
3 influence the judge." I think without commentary there we're

4 creating a problem where something might happen and then the
5 judge is strictly held responsible to make sure that he or she
6 did not permit it to happen. Unless we put in the word
7 "knowingly" we almost have to have commentary to give some
8 examples there.

9 MS. CALLAWAY: Can I ask a question of
10 Justice Kidd?

11 MR. BABCOCK: Sure.

12 MS. CALLAWAY: Justice Kidd, how did you find
13 the conflicts with the ethics opinion? Did you just run word
14 searches or -- what I'm thinking about is how do we know
15 there's not other things that conflict?

16 JUDGE KIDD: Well, there probably are.

17 MS. CALLAWAY: But to come up with these, you
18 just happened to --

19 JUDGE KIDD: These were the major ones I came
20 up with.

21 MS. CALLAWAY: That you happened to know?

22 JUDGE KIDD: Yeah. Because in a lot of these
23 it -- if you notice, in a lot of these it's the examples. So
24 under the ABA Model Code in the first paragraph, for example,
25 they give some general guidelines and then they come down and

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1 they say "for example." You know, it would be improper for a
2 judge to allude to his or her judgeship to gain a personal
3 advantage, such as deferential treatment when stopped by a
4 police officer for a traffic offense. I mean, we teach that
5 at every judicial seminar that takes up ethics. I mean, it's
6 almost laughable to include it as a part of the commentary to
7 the Code.

8 And then specifically on the letterhead, I knew that --

9 MS. CALLAWAY: It just made me wonder, how do
10 we know if there are not other conflicts in the ethics
11 opinions?

12 JUDGE KIDD: Well, I think there probably are.
13 But there are -- you know, there are like ten advisory
14 opinions on letterhead. I just picked out the one that's in
15 direct conflict with this statement. 222 is kind of the Bible
16 on letters of recommendation, and I knew that. And so -- but
17 it's basically the examples. But on some of the general
18 topics, there are a lot of advisory opinions on those.

19 MR. BABCOCK: Who's in favor of the comment?
20 You're not going to rat them out, Elaine?

21 PROFESSOR CARLSON: Oh. Two members of our
22 subcommittee.

23 MR. BABCOCK: Are they here?

24 PROFESSOR CARLSON: No.

25 MR. BABCOCK: Okay. Anybody else want to speak

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1 in favor of inclusion of the five paragraphs or any
2 combination thereof? Okay. Well, are we ready to take a
3 vote, then?

4 And the subcommittee, was it evenly divided?

5 PROFESSOR CARLSON: Evenly divided.

6 MR. BABCOCK: Okay. So we'll put it in the
7 positive. Everybody who is in favor of including the
8 paragraphs proposed here as comment to Canon 2(B) found at
9 Pages 11 and 12 of the report, as well as the additional
10 paragraph found at Page 12 and 13, raise your hand. All those
11 opposed? That fails by a vote of zero to eight. So eight
12 people are opposed, and nobody was in favor.

13 All right. What's next?

14 PROFESSOR CARLSON: On Page 13 the second
15 recommendation that the full subcommittee supported was moving
16 the prohibition that a judge not testify voluntarily as a
17 character witness to Canon 4. Canon 2 is general in nature,
18 and we just felt that it was more appropriate for this to be
19 in Canon 4.

20 PROFESSOR LAYCOCK: It fits there.

21 PROFESSOR CARLSON: I see our Canon 4 chair
22 shaking his head "yes."

23 MR. BABCOCK: Anybody opposed to doing that,
24 moving that sentence to Canon 4? All right. The chair
25 sensing no dissent, we'll go ahead and do that.

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1 PROFESSOR CARLSON: All right. On Page 13 the
2 last part of Canon 2 we looked at was Canon 2(C). The Texas
3 version is different from the Model Code. Our canon says a
4 judge shall not knowingly, which is a key difference, hold
5 membership in any organization that practices discrimination
6 provided -- prohibited by law. The Model canon does not have
7 the "knowing" requirement. It says a judge shall not hold
8 membership in any organization that practices invidious
9 discrimination on the basis of race, sex, religion, or
10 national origin. And, of course, the Model Code has
11 additional commentary which we did not suggest to be included,
12 but it is noted at footnote 18 on Page 14.

13 We felt that the Texas Canon 2(C) was -- should not be
14 changed, that a judge should not be held in violation of the
15 canon in the absence of knowledge of their membership in an
16 organization that practices discrimination. And we thought

17 the inclusion of "knowingly" was a positive matter, and I
18 note -- it's noted at Page 21 there are other jurisdictions
19 that include that requirement as well.

20 MR. BABCOCK: What's the difference between
21 discrimination and invidious discrimination? Just a matter of
22 curiosity, that's all.

23 PROFESSOR CARLSON: Arguably, invidious
24 discrimination could be something that is not against the law
25 and could be broader.

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1 JUDGE KEASLER: What is an organization that
2 illegally discriminates? I don't know that the Ku Klux Klan
3 illegally discriminates. I don't think this provision says
4 anything.

5 JUDGE KIDD: Mr. Chairman, from a historical
6 perspective, we passed it with the "knowing" requirement just
7 like it was in the 1990 ABA Model Code, that if he knowingly
8 belonged to an organization that practiced invidious
9 discrimination, that that was a prohibition of the Code. The
10 Supreme Court changed that in 1996 to reflect that language
11 that is presently in the Code. I share Judge Keasler's
12 concerns, but we've done it once.

13 We used "invidious discrimination" because that tracked
14 the 1990 Model Code. And in a constitutional law context,
15 that word has some usefulness. There are certain groups that
16 practice invidious discrimination, and those are described in
17 case law context.

18 MR. BABCOCK: But we don't have "invidious."
19 We just have "prohibited by law"?

20 JUDGE KIDD: We had it as we originally passed
21 it in '94, but the Supreme Court came along and changed it to

22 the present version in '96.

23 PROFESSOR LAYCOCK: "Invidious" is a word you
24 see a lot in constitutional law, and it's not a word that is
25 ever very clearly defined in constitutional law. It shows up

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1 in arguments over affirmative action. One side says, "That's
2 discrimination too," and the other side says, "Yeah, but it's
3 not invidious." It's a very loaded kind of term sometimes.

4 But since our Court took it out there's been a new
5 doctrinal development in the federal constitutional law in
6 Boy Scouts vs. Dale confirming Justice Keasler's point.
7 There's a lot of clearly invidious discrimination that's
8 protected by the first amendment, including the Ku Klux Klan.
9 And I'm sure we'd all be unhappy with a judge who is still a
10 Klan member.

11 And, you know, what is illegal discrimination? Well,
12 discrimination by a place of public accomodation is illegal,
13 but discrimination by a private club may not be illegal and
14 the private clubs are presumably the principal target of this.
15 So "discrimination prohibited by law" may not get it.

16 "Invidious discrimination" invites all sorts of arguments.
17 I'm sure we would have people saying discrimination against
18 gays is invidious, and a majority of Texans would probably say
19 it's not invidious. So neither correcting alternative is
20 very -- is a very happy solution here.

21 JUDGE KEASLER: In fact, I think in some states
22 they've said belonging to the Boy Scouts -- at least in
23 California that's been raised, that belonging to the
24 Boy Scouts or being a Scout Master is belonging to a group
25 that invidiously discriminates.

1 I don't know what the answer is, but I do think that we
2 could -- we might bring down justifiable scorn on ourselves if
3 we have something that just absolutely is meaningless, and to
4 me this is.

5 JUDGE KIDD: I do have one point to make. The
6 way that the ABA had it, the 1990 Model Code, a judge shall
7 not -- and we added "knowingly" -- hold membership in any
8 organization that practices invidious discrimination on the
9 basis of race, sex, religion, or national origin, so it was
10 the big four constitutional protections.

11 MR. BABCOCK: Justice Quinn?

12 JUDGE QUINN: Even though you may be able to be
13 a member of the Ku Klux Klan or some organization that
14 discriminates against gays, again, judges are being held to a
15 higher standard. To the extent that they're a member of an
16 organization that discriminates against anybody, even if
17 legitimate, isn't that casting doubt upon their ability to act
18 unbiasedly, impartially, vis-à-vis those people in that
19 category that may come in front of them?

20 I think discrimination by law is probably too narrow. I
21 think if you want to get the type of discrimination that would
22 affect impartiality, bias, you go to invidious discrimination.
23 It's a bigger category.

24 JUDGE KEASLER: Or invidious discrimination as
25 limited by Mack's suggestion on the big four. You know, that

1 would be -- you know, at least it would mean something.

2 JUDGE QUINN: I don't know if I'd limit it to
3 the big four. And I'm not saying my position on gays or

4 anything like that, but that is a class that's arising, and
5 the big four doesn't include gay.

6 JUDGE KIDD: I think the "Discrimination"
7 section expands it to either six or eight and includes sexual
8 orientation, it includes socioeconomic status.

9 JUDGE KEASLER: It's bias or prejudice.

10 JUDGE KIDD: Bias or prejudice, yeah, the
11 discrimination provision.

12 PROFESSOR LAYCOCK: When I spoke a minute ago,
13 I had forgotten that the "invidious" sentence has the list.
14 And we can argue how expansive that list should be, whether it
15 should just be the four from the classic Civil Rights statutes
16 or whether it should be more. But the list avoids the problem
17 of simply leaving it open to some complainant or the Committee
18 on Judicial Conduct to decide whether discrimination against
19 various groups, like sexual orientation, is highly
20 controversial, is invidious. But "invidious" does real work
21 with that list because it picks up the places where the law
22 hasn't reached, like private clubs; it excludes some things
23 that should be excluded.

24 This may sound too silly but I'll tell you there are
25 complaints out there; there are lawsuits like this. Churches

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1 discriminate on the basis of religion. They say, "If you want
2 to be a member, you've got to believe certain things." Well,
3 no one believes that's invidious discrimination -- or almost
4 no one believes that's invidious discrimination. But to
5 discriminate based on religion at your country club, that is
6 invidious. So "invidious" does real work; the list does real
7 work; and then the question is how long should the list be.

8 But simply "prohibited by law," I think, leaves out a lot of
9 things that we mean to reach.

10 MR. BABCOCK: Everybody agree with that?

11 JUDGE FROST: I would leave it alone.

12 MR. BABCOCK: That will get some fights
13 started, by the way.

14 Anybody in the annex offices want to speak?

15 JUDGE LANG: I think we ought to leave that
16 where it is, "prohibited by law." "Knowingly prohibited by
17 law" will take care of it. We're getting into too many things
18 by talking about invidious. I thought I heard earlier that's
19 a term that's unclear. It is in a lot of different ways. And
20 we don't know what we're getting into. I'm just concerned
21 about dropping it out so that we're beyond what may be on the
22 books.

23 MR. BABCOCK: Anybody in Houston have any
24 thoughts about this?

25 JUDGE BENTON: Since we're on the record, I

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1 think we ought to change it, but I don't have anything else to
2 add to what's already been said. And I fully expect that it
3 won't be changed.

4 DEAN ALFINI: Let me make a slightly different
5 case for changing it. I think that given the White decision
6 the importance of establishing judicial impartiality is a
7 compelling stated interest. It's important that this
8 provision have a little bit more bite than it does now. I
9 agree with Judge Keasler; it's virtually meaningless by saying
10 "as required by law" -- or "prohibited by law."

11 I think that it needs to say essentially that judges
12 should act in an unbiased and impartial manner by saying that

13 "they shouldn't discriminate on the basis of," and then we
14 could certainly have a very lengthy discussion over the list,
15 whether, as Doug says, it's the traditional big four from the
16 Civil Rights acts or we add "sexual orientation" or whatever,
17 or "socioeconomic status." But it seems to me that right now
18 it really doesn't say anything more than "obey the law." And
19 it should say something -- or it should say "be impartial, be
20 unbiased, don't discriminate."

21 JUDGE LANG: Are we talking about changing this
22 language to go beyond "hold membership in any organization" or
23 are we talking about a judge should be unbiased in different
24 matters? I'm not following. Perhaps I didn't hear it.

25 MR. BABCOCK: The suggestion --

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1 JUDGE LANG: If it's for addressing the
2 language that you see, then it's for the Court of Appeals
3 to --

4 DEAN ALFINI: I wasn't suggesting that we add
5 words like "impartiality" to it. But the thrust -- the
6 message should be consistent with the notion that judges
7 should be unbiased, impartial, not acting in a discriminatory
8 manner, and I don't think this current message is.

9 MR. BABCOCK: Yes, Elaine Carlson?

10 PROFESSOR CARLSON: Dean Alfini, do you mean
11 "should" or do you mean "shall"?

12 DEAN ALFINI: Oh, I'm sorry, I mean "shall."
13 What did I say, "should"?

14 PROFESSOR CARLSON: Yes.

15 MR. BABCOCK: Elaine is always watching our
16 backs.

17 JUDGE QUINN: As it's written now, if it's
18 saying discrimination -- thou shalt not discriminate as
19 prohibited by law, isn't that just redundant of what we just
20 said the first Canon 2 says, thou shall comply with the law?

21 JUDGE FROST: It's prohibiting holding
22 membership.

23 JUDGE QUINN: But it's still based on what's
24 permitted by law. If it's prohibited by law, then the
25 membership is prohibited by law. Isn't that just the same or

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1 redundant of the first canon?

2 MR. BABCOCK: It might not be, because the
3 organization as a whole might be doing something illegal but
4 you as a member of that organization may not be, depending on
5 the facts.

6 As I see it, the vote that we have to take is whether, as
7 the subcommittee recommended, the Texas Canon 2(C) remain as
8 is, and that reads, "A judge shall not knowingly hold
9 membership in any organization that practices discrimination
10 prohibited by law." The discussion has led us to an
11 alternative which says -- which would be based in part on the
12 ABA standard which would say, "A judge shall not knowingly
13 hold membership in any organization that practices invidious
14 discrimination on the basis of race, sex, religion, or
15 national origin."

16 And if there's no more discussion, I think we'll vote on
17 the subcommittee's recommendation first and then see where we
18 go from there. So everybody that is in favor of leaving Texas
19 Canon 2(C) as written, raise your hand. All those opposed?
20 All right. The people opposed prevailed by a vote of eight to
21 six, the chair not voting. So let's see what we ought to

22 substitute in its stead.

23 Is there any more discussion on the language of the ABA
24 slightly modified by inserting "knowingly"? "A judge shall
25 not knowingly hold membership in any organization that

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1 practices invidious discrimination on the basis of race, sex,
2 religion, or national origin," anybody want to discuss that?
3 Doug Laycock?

4 PROFESSOR LAYCOCK: I think those four are a
5 minimum that are uncontroversial that we can all agree on.
6 "Knowingly" is an important protection. It picks up areas not
7 regulated by law. "Invidious" prevents ridiculous
8 applications like churches. I think a way to proceed
9 procedurally is we should adopt that with "knowingly"
10 inserted, and then if anybody wants to amend it by adding
11 additional categories, they can propose that.

12 MR. BABCOCK: Sounds good. The committee chair
13 is in favor. Any more discussion on that?

14 JUDGE KEASLER: One thing on the business of
15 invidious discrimination. A lot of people have expressed
16 concerns that that would include maybe the Masonic Lodge or
17 Junior League or things like that, and over the country it's
18 been found no, that they -- that that's not invidious. It's
19 entirely different from something that inspires what invidious
20 discrimination does.

21 MR. BABCOCK: In my --

22 JUDGE WEINER: Can you give an example of what
23 would be invidious discrimination?

24 JUDGE KEASLER: Well, let's see.

25 JUDGE QUINN: Based on race.

1 JUDGE KEASLER: Yeah, based on -- based on --
2 Rotary used to only allow men and --

3 JUDGE FROST: So does the Houston Country Club.

4 JUDGE KEASLER: -- but it was an organization
5 that to belong really meant advancement in business and what
6 have you, at least in some communities. And they -- of course
7 they changed that but -- because a lot of judges were dropping
8 out. It depended on the jurisdiction, of course.

9 MR. BABCOCK: I believe there's a country club
10 in Texas that not only doesn't allow women members but doesn't
11 allow them on the premises.

12 PROFESSOR CARLSON: A lock-in bar.

13 MR. BABCOCK: That's what I had in mind.

14 PROFESSOR CARLSON: We discussed that.

15 JUDGE KEASLER: Sounds like Augusta. At least
16 they could go to the dining room in Augusta.

17 MR. BABCOCK: Justice Quinn?

18 JUDGE QUINN: Related to the "invidious"
19 definition -- I understand that it's somewhat vague, but
20 doesn't it -- the concept of "invidious" capture an idea of
21 some ill will, some badness, things like that, as opposed to
22 just you've got to be a Catholic to be admitted to the
23 Catholic church?

24 JUDGE KEASLER: Or the Knights of Columbus.

25 PROFESSOR LAYCOCK: I think it captures -- or

1 it focused more on the exclusions than on the inclusions.
2 We've got a common purpose here together; you share the common
3 purpose and everybody is welcome as opposed to -- you know,

4 the Rotary Club -- the Rotarians didn't necessarily have ill
5 will towards women, but their excluding women for no
6 particular good reason suddenly had real economic and career
7 consequences. And so without getting into the questions about
8 their motives, I think that was judged invidious because of
9 its practical consequences.

10 JUDGE QUINN: Because of its effect --
11 unacceptable effect.

12 PROFESSOR LAYCOCK: Yeah.

13 MR. BABCOCK: I think Doug's discussion is a
14 good one. Let's vote on this sentence that --

15 JUDGE LANG: May I make a suggestion?

16 MR. BABCOCK: Yeah.

17 JUDGE LANG: My comment is that we have come
18 from arguing on other points that we need -- that some people
19 feel we need specific directions. Now on this provision we're
20 going to have terms like "invidious," which I think this
21 discussion shows is anything but clear. And its application
22 has not been used in case law to an expansive list which
23 suggests we could, you know, add to -- you can add to this
24 list of four and be more expansive. And even with that,
25 that's exactly the ambiguity of what we are telling the

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1 judges.

2 What we have done is gone from a situation where judges
3 are told, "Look, don't hold membership knowingly in an
4 organization who practices discrimination prohibited by law."
5 That is more -- what we're dealing with now, invidious
6 discrimination, which is not --

7 THE REPORTER: I'm having a very difficult time

8 hearing him.

9 MR. BABCOCK: Hey, Doug, could you speak up?
10 We're having a hard time hearing you.

11 JUDGE LANG: I think this little ball in front
12 of me is the microphone but I can't be sure.

13 JUDGE KEASLER: It sounds like it.

14 MR. BABCOCK: Sounds like it might be.

15 JUDGE LANG: Okay. Thank you. I think
16 vagueness is the problem. Invidious is -- has been discussed
17 as being vague, not clear. And what it applies to in case
18 law -- I guess we can further seek out whether it applies to
19 anything more than these four categories, but I'm hearing it
20 probably does not as far as case law goes. So we are going
21 from something that's a little bit more predictable to
22 something that's vague and unpredictable, which runs counter
23 to what other people -- some of the judges were asking for, a
24 little bit of direction.

25 When we add other categories that -- which was suggested

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1 we might do, we get into adding things that, it's my
2 understanding, have not been found to be discriminatory or a
3 problem. I've seen this in bylaws of organizations where
4 they're adding things in and you get into a number of
5 categories that are vague that could mean anything anyone
6 wants them to mean, like cultural lifestyle. Add to those
7 things and you have a real problem. So my suggestion is that
8 they're going too far.

9 MR. BABCOCK: Okay. Any more comments? I
10 think the proposal is to vote on this sentence and then to
11 discuss whether any other categories should be added other
12 than race, sex, religion, or national origin. And does

13 anybody have any more discussion about this sentence from the
14 ABA Code as modified?

15 JUDGE BENTON: Chip, would you have
16 Professor Laycock restate his proposal? I don't know where
17 the mike is in your room. Where he's seated I'm having a hard
18 time hearing him.

19 MR. BABCOCK: Well, because he's soft-spoken,
20 but he's right in front of the mike. Now he's going to lean
21 into it.

22 PROFESSOR LAYCOCK: I think this was actually
23 Chip's proposal, but I certainly endorsed it. "A judge shall
24 not knowingly hold membership in any organization that
25 practices invidious discrimination on the basis of race, sex,

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1 religion, or national origin." And there's no controversy
2 about race, sex, religion, or national origin. We've had
3 societal agreement on those four categories for a very long
4 time. I share -- I think it's Judge Lang's -- but I share the
5 comments about the dangers of adding too many things to that
6 list. If people have proposals we can vote on them. But
7 there's nothing controversial or dangerous about that list.

8 And the only work that "invidious" does is to limit the
9 scope of the sentence. It carves out some narrow exceptions
10 for those few contexts where we think a single-sex
11 organization, like the Junior League, isn't really doing any
12 harm or a single-religion organization, like a church,
13 certainly isn't doing any harm, may be doing good.

14 But if a judge who wants to know what this means says, "If
15 the organization discriminates on the basis of race, sex,
16 religion, or national origin, the presumption is strong I

17 shouldn't be in it." And if he's unsure at the margin he can,
18 I suppose, ask the Ethics Committee about whether it's
19 invidious or not.

20 If we go back to only what is "prohibited by law," it is,
21 as Judge Keasler said at the beginning, meaningless. The
22 country clubs that still discriminate do it because they're
23 private clubs and their discrimination is not prohibited by
24 law. A judge who joined the Klan would not be violating
25 anything because the Klan's discrimination is not prohibited

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1 by law, but it's certainly on the basis of race and it's
2 certainly invidious.

3 So I think this is a very minimalist statement that
4 doesn't get to any of the questions that might reasonably
5 provoke disagreement.

6 MR. BABCOCK: Any other comments?

7 JUDGE BENTON: I heard him loud and clear that
8 time.

9 JUDGE FROST: I would just echo the comments
10 about the vagueness because I think there is potential for
11 varying interpretations of that. Some people might argue
12 sororities, you know, were different than the Junior League
13 and didn't have that purpose. I just think the more
14 definition you can put on a prohibition to make it clear what
15 is prohibited and not be in this mushy area of, you know,
16 having to decide whether something is or isn't is what judges
17 are looking for in terms of, you know, defining their behavior
18 and forming it to it. I think this is unclear and it will
19 provoke a lot of discussion.

20 MR. BABCOCK: You're going to have to get out
21 of the Tri Delts, Judge.

22 JUDGE FROST: Kai Omega.

23 JUDGE KEASLER: My wife's a Tri Delt.

24 JUDGE FROST: Well, what about the
25 National Association of Women Judges?

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1 JUDGE KIDD: I'm a member. I'm a member.

2 JUDGE KEASLER: I think there's such a body of
3 law nationally. Almost every state in the union has adopted
4 this just exactly as Professor Laycock is proposing. Across
5 the country it's been pretty much accepted without too much
6 controversy. The only place -- I was shocked that we had as
7 much controversy about it as we did here.

8 MR. BABCOCK: Fair enough. Justice Quinn?

9 JUDGE QUINN: In the (inaudible) of conferences
10 invidious discrimination, I think, was first brought up by the
11 United States Supreme Court, and that's the standard they used
12 in order to usher in the Bill of Rights. If it's good enough
13 for the United States Supreme Court and they feel that it's
14 clear enough, maybe we can use them for guidance.

15 MR. BABCOCK: Elaine?

16 PROFESSOR CARLSON: I want to ask Seana a
17 question.

18 Seana, have we had any discipline on your watch on 2(C)?

19 MS. WILLING: No. In fact, I don't even recall
20 in the five years I've been here that we've had a complaint on
21 2(C).

22 PROFESSOR CARLSON: And in those jurisdictions
23 that adopted the ABA version, what is the appropriate
24 discipline?

25 JUDGE KEASLER: Normally the judge is given a

1 year to change the policy of the organization, and if they
2 don't, well, they get out. And there really hasn't been
3 terribly much discipline done for this, that I can find.

4 MR. BABCOCK: There is a sitting state judge in
5 Texas who, even under our version, resigned from a country
6 club because he believed that they were --

7 JUDGE KEASLER: Unlawful.

8 MR. BABCOCK: Not that they were unlawful but
9 that they were practicing discrimination. And he said, "I'm
10 not going to -- I'm not going to get involved in semantics
11 about this. I'm out," and I consulted with him about it.

12 Okay. Let's have a vote on this language, "A judge shall
13 not knowingly hold membership in any organization that
14 practices invidious discrimination on the basis of race, sex,
15 religion, or national origin." Everybody in favor, raise your
16 hand. All those opposed? By a vote of twelve to zero, the
17 chair not voting, that's passed.

18 PROFESSOR CARLSON: Chip, we only have one more
19 matter and it's a -- it's the question of whether Canon 2(C)
20 should apply to a judge as well as to members of a judge's
21 household. The subcommittee, with one member dissenting, did
22 not recommend that Canon 2(C) be extended to apply in that
23 fashion. So I guess I would open up the discussion.

24 MR. BABCOCK: Anybody here who was in favor of
25 household?

1 PROFESSOR CARLSON: Yes.

2 MR. BABCOCK: So what do you think about that,
3 Elaine?

4 PROFESSOR CARLSON: It wasn't me. Anybody want
5 to speak in favor of this?

6 JUDGE BENTON: You know, I'll talk if no one
7 else here wants to be intellectually honest. Ha, ha, ha.

8 But I don't see how we can prohibit conduct on the part of
9 the judge just because we feel like -- or we don't have the
10 courage to say to a judge that "Judge Frost, you need to go
11 tell your husband if you can't do it, he can't either," you
12 know. And I don't see how we can reconcile our failure to do
13 that with Canon 2(A), I think it is. The things that
14 promote -- or, you know, take away the confidence in a
15 judiciary apply the same whether it's the judge or someone --
16 or the judge's spouse. That's my view. Thank you for giving
17 me your time and attention, and I'll --

18 PROFESSOR CARLSON: Let the record reflect that
19 Judge Benton is not married. And those members of the
20 committee who voted against him were perhaps not being
21 intellectually honest but we were being emotionally and
22 socially honest.

23 JUDGE KEASLER: Well, I think the Code has
24 evolved over the years and I think it's evolved from a time
25 when we thought we had control over our spouses. But the

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1 difference is I think most spouses are vitally interested in
2 their spouse's good performance on the bench and their being
3 well thought of. And they're aware -- our families are aware
4 that people are not only looking at us under a microscope but
5 are looking at our families too. And I think most go out of
6 their way not to -- not to embarrass us. In fact, there are
7 very -- they reflect very well on us. I probably reflect

8 worse on them than they do on me.

9 MR. BABCOCK: Justice Quinn?

10 JUDGE QUINN: I have a question regarding
11 enforcement. How are you going to enforce it? And second,
12 can you lawfully discipline one person for acts of an
13 independent -- legally independent other person?

14 MR. BABCOCK: Professor Laycock?

15 PROFESSOR LAYCOCK: I don't know the answer to
16 that, but there's a way around it. One issue is the spouse
17 who is off on his own joining some organization that the judge
18 has nothing to do with and knows nothing about. But the other
19 concern is the judge dropped out of the discriminatory club,
20 the spouse joined a discriminatory club, and they both go over
21 to the club every weekend for dinner and golf now on the
22 spouse's membership. We could at least prohibit the judge
23 from participating in the discriminatory club that the spouse
24 has joined, and that is the judge's own behavior and there's
25 no question about whether the canons reach that.

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1 MR. BABCOCK: Okay.

2 JUDGE WEINER: I agree. That sounds like a
3 very good way around a potentially very difficult problem.

4 JUDGE BENTON: Chip, I couldn't tell whose
5 voice it was. Somebody said something about disciplining the
6 judge for the conduct of another. Discipline might mean
7 removal from the bench, which is separate from -- and apart
8 from whether the Commission should reprimand a judge, which
9 isn't necessarily discipline.

10 MR. BABCOCK: I think that was Justice Quinn's
11 point that he made; so that was the author, the spokesperson
12 of the comment. And I think he was raising the issue of,

13 well, you know, my spouse goes and plays bridge at a country
14 club and I'm working hard on the bench, and you're going to
15 sanction me because that country club may be discriminatory.
16 But Professor Laycock came back and said, well, that's one
17 thing. But if it's just -- if the withdrawal from the country
18 club is just a subterfuge for continuing the conduct by having
19 the wife join -- or the husband, whatever the spouse is, join
20 the country club and going on as before, then perhaps that
21 should be dealt with. So that's --

22 JUDGE KEASLER: It's possible later on to add
23 some -- I'm sorry -- maybe add some language that a judge
24 shall not hold membership or participate in organizations that
25 invidiously discriminate, and that might cover the very evil

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1 that we're talking about. But I don't think we need to do
2 that right now.

3 MR. BABCOCK: Okay. Anybody else? All right.

4 JUDGE LANG: Are you suggesting that particular
5 language?

6 JUDGE KEASLER: No.

7 MR. BABCOCK: I don't think any language has
8 been proposed, Justice Lang. I think the vote now is just
9 going to be whether or not to try to come up with some
10 language to embrace that concept. So everybody who's in favor
11 of amending the language in 3(C) that we've just voted on --

12 PROFESSOR CARLSON: 2(C).

13 MR. BABCOCK: I'm sorry, 2(C). Everybody who
14 is in favor of revising the language in 2(C) that we just
15 voted on to incorporate the activities of a judge -- of a
16 judge's spouse -- everybody who is in favor of that, raise

17 your hand. Okay. Everybody opposed?

18 Well, Judge Benton, as predicted, the vote was twelve to
19 one. It's an important issue, and it's -- you never know.
20 Sometimes when we have these discussions it will be that; it
21 will be twelve to one, and then the Supreme Court will adopt
22 the view of the lonely dissenter.

23 Anybody who doesn't remember no-evidence summary judgments
24 doesn't remember the succession -- a string of votes that, by
25 my recollection, were about twenty-two to four opposed to

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1 no-evidence summary judgments, and look where we are today.

2 Is that -- are we done with this, Elaine?

3 PROFESSOR CARLSON: Mr. Chairman, that
4 concludes our report on Canon 2.

5 MR. BABCOCK: Nicely done.

6 And, Doug, do you have a comment before we take a short
7 break?

8 PROFESSOR LAYCOCK: Do we need a show of hands
9 or have we given or decided not to give an instruction to this
10 neatly applied language about restricting a judge from taking
11 advantage of participating on the spouse's membership?

12 MR. BABCOCK: I think that's the vote we just
13 took.

14 PROFESSOR LAYCOCK: Oh, okay. I wasn't clear
15 what the alternative...

16 MR. BABCOCK: All right. Let's take a
17 ten-minute break, which means we'll be back at 3:15.

18 (RECESS FROM 3:05 p.m. TO 3:21 p.m.)

19 MR. BABCOCK: We're done with Canon 2. And
20 Judge Frost, could you just kind of tell us -- give us a quick
21 update on where you are on Canon 3, just three or four

22 minutes?

23 JUDGE FROST: At the end of our June meeting,
24 we had concluded Canon 3 except for two follow-up matters.
25 And one had to do with adding comments and putting some

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1 additional material in regarding Canon 3(B)(1) and (2) and the
2 subcommittee to prepare some draft language that at that time
3 was commentary. Given our discussion today, we may -- when we
4 bring this fine-tuned language back to you, perhaps we'll
5 bring it back as a commentary version and vote to incorporate
6 into the actual canon version.

7 In Canon 3(D) there is a provision in some other state's
8 canon that a judge who is charged by prosecutorial complaints
9 or indictment to -- with certain crimes to notify the
10 Commission about that, and we're tinkering with that language
11 too, to include a proposed revision on that as well. Those
12 are the two follow-up matters, which I assume we'll cover at
13 the October meeting.

14 MR. BABCOCK: We will do that for sure.
15 Thanks.

16 Professor Laycock, on Canon 4 you want to tell us where we
17 are on that and see how we can help you get to the goal line?

18 PROFESSOR LAYCOCK: "Help" is the relevant
19 word. The only document you should have before you -- it
20 looks like an e-mail on the front, but it's entitled "Texas
21 Canon 4 Compared to Model Canon 4." I apologize for not being
22 further along than we are, and I won't bore you with all the
23 reasons. You're all busy people too. I will say a couple of
24 things in my own defense.

25 Two years ago the Court asked me to serve on a committee

1 to respond to Republican Party vs. White because I know
2 something about free speech law. Somebody who I don't know
3 looked at a committee roster and decided I must know something
4 about judicial ethics. Because no good deed goes unpunished,
5 I got put on this committee as well and was asked to chair the
6 subcommittee on Canon 4. I know absolutely nothing about
7 Canon 4, so you-all have to tell me where the bodies are --
8 where the problems are. I don't know if it's in pretty good
9 shape, if it's broken, or if it needs fixing. And then I got
10 snagged with an unexpected project in the late summer when I
11 might have otherwise been working on this.

12 So what I would hope to get out of today is the
13 Committee's sense of where are potential problems that we need
14 to take a serious look at. And I think we can come back with
15 a proposed draft by the time of the next meeting if we get
16 some of that kind of guidance.

17 And I began simply by flagging the differences between the
18 Texas version and the ABA version, some of which are pretty
19 self-explanatory and don't seem to be very important, but some
20 of which seem to raise pretty substantial policy choices.

21 The Texas you have in front of you is the current Texas
22 Canon 4, and the notes in italics are comments flagging the
23 differences. And maybe a way -- there's a lot of detail here.
24 This covers charitable boards, investments, covers of lot of
25 things. So maybe the way to organize getting reactions is

1 just go through them subdivision by subdivision. But some of
2 them I'm sure will generate more discussion than others.

3 This introductory material in section A, the only change

4 there is we don't have "demean the judicial office." Was
5 there a vagueness concern or something like that?

6 JUDGE KEASLER: It has been held to be vague by
7 at least one federal court.

8 PROFESSOR LAYCOCK: Not much detail here. But
9 does anybody know something useful I need to know about this
10 paragraph A?

11 In B we started to get into real substance. These are
12 activities judges may do, law reform activities, principally,
13 in B(1). I noticed it was a little broader than reform
14 activities in the second line. After "administration of
15 justice" it says "and non-legal subjects." I guess "legal and
16 nonlegal" means all subjects.

17 And 2 covers organizations or governmental agencies
18 devoted to law reform activities. And there is a substantial
19 change here; I don't know if it's intended. We appear to
20 authorize judges to solicit money for these organizations if
21 they do it privately. "A judge may assist such an
22 organization in raising funds and may participate in their
23 management and investment, but should not personally
24 participate in public fund-raising activities."

25 Now, C on charities is different. There's no solicitation

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1 permitted at all in C. But for these law reform organizations
2 do we mean only to permit judges to participate in planning
3 the fund-raising effort, or do we mean to authorize them to
4 solicit money as long as they don't do it publicly? I assume
5 judges are not out soliciting money very often.

6 MS. WILLING: I've heard the argument made that
7 "assist" includes soliciting funds. And so if we're going

8 to -- if the continuing -- if you're going to continue to
9 prohibit fund-raising activities, it needs -- "assist" needs
10 to be defined, I guess.

11 PROFESSOR LAYCOCK: We certainly need to
12 clarify. Either solicitation is permitted or it is
13 prohibited. I don't know if people have views preliminarily
14 about which way we ought to go with that.

15 MR. BABCOCK: You always hear the criticism
16 that, yeah, Judge X has called me for a campaign contribution
17 for his campaign or her campaign, and that's perfectly
18 permissible, but there's pressure for me to do it because I've
19 got six cases in that court, and I'm sure going to do it.
20 Well, that is an evil -- maybe a necessary evil -- of our
21 system. But when you start expanding it to a judge who calls
22 you who you've got six cases in front of and says, "By the
23 way, we're building a new bar headquarters here, and I'm sure
24 your firm is going to put a lot of money into it," that's
25 maybe something we don't want to do; I don't know.

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1 JUDGE KEASLER: I think the reason that this --
2 there's, I think, some ethics opinions on this also. It was
3 to allow judges to help in getting money for either the
4 Texas Senate for the Judiciary or for the national judicial
5 college organizations like that. And judges in particular,
6 you know, they're the ones that benefit from it. It's -- you
7 know, it's good for the system and all this, but it -- it's
8 too vague and really needs to be nailed down.

9 MR. BABCOCK: In my hypothetical I heard --
10 which wasn't so hypothetical -- I heard some lawyers upset
11 that they were getting solicited by judges for projects like
12 that. Not that they did anything about it. They were just

13 upset.

14 PROFESSOR LAYCOCK: And I bet they gave too.

15 MR. BABCOCK: They probably gave.

16 PROFESSOR LAYCOCK: There is a plausible
17 exception in the ABA rules that didn't make it in here, which
18 is it permits judges to solicit funds from other judges. So
19 you could take on -- you could have a judge run the judge part
20 of the campaign, and that seems to make a certain amount of
21 sense. But I share Chip's reaction to judges soliciting
22 lawyers who have cases in front of them. Any other thoughts
23 or advice on soliciting?

24 JUDGE QUINN: With regard to the soliciting of
25 funds, if you were to prohibit solicitation of funds, how

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1 about if the judge goes out and solicits donations -- in-kind
2 donations so they can auction them off at a fundraiser? That
3 may be just as bad too.

4 PROFESSOR LAYCOCK: I think that's right.

5 JUDGE QUINN: You may want to expand the
6 concept of "funds" to include those other things.

7 PROFESSOR LAYCOCK: Okay. That makes sense to
8 me.

9 JUDGE KEASLER: I think including the way the
10 ABA Model Code says it, that a judge can solicit from other
11 judges that they don't have supervisory power over, that's a
12 good limitation.

13 MR. BABCOCK: Okay. Go ahead, Doug.

14 PROFESSOR LAYCOCK: C is about civic and
15 charitable activities other than these law reform -- mostly
16 law reform organizations in B. And C(1) at the top of the

17 page, this says a judge should not be a director or an officer
18 of an organization that is frequently engaged in litigation
19 before his court or her court. That's a "shall" in ABA.
20 We've made it a "should." So you should not be on the ACLU
21 board but you can be? I was wondering if anyone knows why
22 that change was made or if there's a reason to keep it as a
23 "should."

24 MR. BABCOCK: Anybody know?

25 JUDGE KIDD: What section is that?

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1 PROFESSOR LAYCOCK: 4(C)(1).

2 MR. BABCOCK: Judge Kidd, you're our
3 institutional memory here.

4 JUDGE KIDD: Well, I was telling
5 Professor Laycock that I remember after the task force decided
6 to go with the shalls and the shoulds as the ABA Model Code
7 had suggested, that we went through painstakingly and, I
8 thought, looked at all of these, but I can't tell you exactly
9 why we did one or the other. Most of them in the Code that we
10 had prior to 1990 were shoulds, and so I think it might have
11 been more from omission rather than commission.

12 MR. BABCOCK: I can see an argument that, you
13 know, I'm on the board of the Boy Scouts or I'm on the board
14 of the Heart Foundation and, you know, there's a lot of
15 uncertainty about whether or not they're going to come up in
16 front of my court or any court and, you know, should I get
17 penalized if all of a sudden I'm on their board and they get
18 sued. And they may not even be in my court, or if they were I
19 would recuse myself.

20 PROFESSOR LAYCOCK: Maybe it's the prediction
21 problem.

22 MR. BABCOCK: I could see a reason for "should"
23 because of the prediction problem.

24 JUDGE KEASLER: Except you want the saving
25 words in this that would ordinarily come. It's not something

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1 that just pops up like that.

2 JUDGE FROST: Why is it "any court" as opposed
3 to "the judge's court"?

4 MR. BABCOCK: Other than having a judge on the
5 board might lend some prestige to it that, you know...

6 PROFESSOR LAYCOCK: Well, "in any court" is
7 modified by "regularly or frequently," so, I mean, that sounds
8 like an organization that litigates a lot.

9 JUDGE KEASLER: Probably litigates with you.

10 MR. BABCOCK: What civic organization is suing
11 people all the time or getting sued?

12 PROFESSOR LAYCOCK: ACLU. They're a litigating
13 organization.

14 MR. BABCOCK: That's right.

15 JUDGE KIDD: The "or frequently" was added in
16 1987.

17 PROFESSOR LAYCOCK: So that's been around for a
18 while. We'll see if we can better distinguish the frequent
19 litigators from the ones who might conceivably some day get
20 sued.

21 And for these organizations there's -- there is a complete
22 ban on solicitation. And, again, we may look at the running
23 the judge campaign for judges you don't supervise.

24 MS. WILLING: I just want to raise something
25 that came up very recently that we had never really looked at

1 in terms of how Canon 4(C) is drafted. And if you look at
2 4(C) in the second sentence where it starts, "A judge may
3 serve as an officer, director, trustee or non-legal advisor of
4 an education, religious, charitable" and all that, and then it
5 says "subject to the following limitations," and then you have
6 1, 2, and 3 following that, it has been interpreted -- maybe
7 not correctly but in an interesting way -- that if you are not
8 an officer, director, trustee, or advisor of these, then these
9 provisions don't apply to you and, therefore, you can solicit
10 for them.

11 JUDGE KEASLER: Oh, murder.

12 PROFESSOR LAYCOCK: That's surely not right.
13 So if you're just a member?

14 MS. WILLING: That's how it was -- you could
15 read it that way. I don't know that that's the way it was
16 intended to be read, but...

17 JUDGE WEINER: That's another example of why
18 commentary is sometimes helpful, to avoid that kind of problem
19 with understanding what was meant.

20 MR. BABCOCK: Or you can draft it in such a way
21 that there's no ambiguity --

22 PROFESSOR LAYCOCK: There's an --

23 MR. BABCOCK: -- once we know there's
24 ambiguity.

25 PROFESSOR LAYCOCK: Once we know there's an

1 ambiguity, we'll fix it.

2 Okay. Financial activities here -- no, there's one
3 important variation. But the basic theory of this rule is,

4 you know, everybody has to have some savings, and so you can
5 manage your own investments and your family's investments, but
6 anything more active than that becomes -- becomes problematic.
7 The principal question here is can a judge be actively
8 involved in running a business. And the Model rule is a judge
9 can be involved in a family-owned business with his own
10 family.

11 And Dean Alfani may be pleased, or may be unhappy, to know
12 that the most recent edition of his book has gone missing at
13 the Texas library; I've been tracking it down. The edition
14 before that says most states did not adopt that provision and
15 say a judge can't run a business at all, even if it's a family
16 business. Texas went the other direction. You can run a
17 business that is a family business or a small business as long
18 as it doesn't have more than ten owners outside your family.
19 And we have a letter from Judge Kaufman in Plano suggesting it
20 be seventy-five owners outside your family. That's the limit
21 for a subchapter S corporation.

22 And I think the theory here is managing a business takes a
23 lot more time than passively managing investments. And
24 businesses can be sued and legal advice is more likely to
25 involve the judge in private activities that draw on his

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1 understanding and capacity as a judge, so running a business
2 is problematic.

3 Is there any -- any thoughts or guidance on that much
4 broader than usual business exception in the Texas version of
5 these rules?

6 MR. BABCOCK: Anybody have any thoughts on
7 that? We're looking at you, Justice Kidd.

8 JUDGE WOODWARD: It's an archaic rule in my
9 view. You know, if it -- if the intent is to discourage
10 judges from devoting their time when they should be devoting
11 the time to bench activities, it makes sense. But simply to
12 prohibit a judge from running a business that doesn't distract
13 from his obligations -- his or her obligations of a judge, to
14 me, is unnecessarily restrictive.

15 And if the concern is we don't want the judge
16 participating in matters that might put the judge -- where he
17 might be subject to litigation, how is that different than
18 driving in an urban area? Like any driver, he might have a
19 car wreck.

20 PROFESSOR LAYCOCK: Someone suggested some of
21 these provisions -- some of these provisions are looser in
22 Texas because we've got justices of the peace and part-time
23 judges. So I don't know if there's any thought about drawing
24 a distinction between full-time and part-time.

25 JUDGE WOODWARD: There is an exception in

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1 Canon 6 on justices of the peace and municipal judges, and
2 we're studying that as part of Canon 6. And it exempts
3 justices of the peace and municipal judges and constitution --
4 and constitutional county court judges from, I think,
5 subdivisions 2, 3, and 4 -- 2 and 3. But that's another
6 discussion.

7 PROFESSOR LAYCOCK: Right. Okay.

8 JUDGE WEINER: Is there any provision anywhere
9 that prohibits a judge of any kind from spending, you know,
10 time on a business that would take him or her away from the
11 official judicial duties?

12 JUDGE QUINN: I don't know if it's Canon 5, but

13 I think there is a canon that says you've got to devote -- you
14 shall or should devote your time primarily to judicial
15 activities.

16 JUDGE KEASLER: Is that in 3?

17 MR. BABCOCK: I don't think it's 5.

18 MS. WILLING: It's 3(A).

19 JUDGE KEASLER: A judge's judicial
20 responsibilities should take precedence over all other
21 responsibilities.

22 JUDGE WOODWARD: What is that noise?

23 JUDGE WEINER: It's coming from the offices
24 here in San Antonio. I'll see if we can stop it because I'm
25 having trouble hearing.

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1 PROFESSOR LAYCOCK: Okay. So we -- I'll get
2 the exact language about allocating your time and then try to
3 coordinate the business provision with that.

4 But the one comment that this might be too restrictive,
5 are there any other comments the other way? We're basically
6 content with this the way it is?

7 JUDGE WOODWARD: I've got a question on the
8 last line in paragraph 1 about soliciting campaign funds.
9 Would that be better in -- if it was moved to Canon 5?

10 PROFESSOR LAYCOCK: I think it's in Canon 5 and
11 this is kind of a cross-reference. I'll coordinate that.

12 JUDGE QUINN: As read under the last sentence
13 in (D) that Judge Woodward just referred to, if you read that,
14 would that allow one judge to solicit funds -- campaign funds
15 for another judge?

16 PROFESSOR LAYCOCK: It may depend on what the

17 state law says.

18 MR. BABCOCK: What "appropriate" means too.

19 JUDGE QUINN: I think the intent was he can
20 solicit funds for his own campaign, but it looks a little
21 ambiguous.

22 PROFESSOR LAYCOCK: And then (D)(3) over at the
23 top of the next page is a provision to manage investments in a
24 way to minimize the number of cases in which you're
25 disqualified.

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1 Seana, did we get problems with that?

2 MS. WILLING: Mostly we get questions from
3 judges about whether or not the recusal is appropriate and
4 maybe how to cure any type of appearance of impropriety. And
5 we just suggest that they follow Rule 18(B) and maybe a
6 disclosure on the record and see if the parties have any
7 objection.

8 PROFESSOR LAYCOCK: Okay. And we also get in
9 (D)(4) a variation on the issue we talked about a few minutes
10 ago. "Neither a judge nor a family member residing in a
11 judge's household should accept a gift, bequest, favor, or
12 loan from anyone," and then there's some exceptions. The ABA
13 says it's unreasonable to expect the judge to control all the
14 family members in his household, or even know what they're
15 doing. It says the judge shall urge the family members not to
16 accept. I took our earlier conversation to be more consistent
17 with the urging of family members not to accept.

18 JUDGE KEASLER: Yeah.

19 PROFESSOR LAYCOCK: Do we have disclosure rules
20 someplace else that are not in the canons?

21 JUDGE FROST: We have to file personal

22 financial statements.

23 PROFESSOR LAYCOCK: The ABA does it here, and
24 that's why I ask the question.

25 JUDGE FROST: We need to ask about that.

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1 JUDGE KEASLER: That and everything --

2 PROFESSOR LAYCOCK: Then there's a list of
3 exceptions for basically modest social gifts.

4 DEAN ALFINI: One of the issues on gifts that
5 came up at the conclusion of the current ABA task force
6 revisions had to do with the media attention that's been given
7 to judges, particularly federal judges going to -- going to
8 seminars that are funded by special interest groups, for the
9 most part, and having to -- should that -- is that a gift,
10 particularly the horseback riding or the golf or whatever it
11 is that's thrown in with the seminar and passed to them, and
12 should it be reported? I don't know that the Texas judges are
13 being tempted in ways like that, but it's something that your
14 subcommittee might want to look at.

15 PROFESSOR LAYCOCK: Good point.

16 JUDGE LANG: Those are offered, by the way, so
17 it's something to address.

18 MR. BABCOCK: What about the Bench-Bar
19 conferences? Do the judges golf at --

20 JUDGE FROST: We pay for those.

21 JUDGE KEASLER: I heard Chief Justice Rehnquist
22 talk about this very thing at the ALI annual meeting. He --
23 apparently Congress was trying to pass some kind of act that
24 would prevent federal judges from going to anything but the
25 Federal Judicial Center for training, that they couldn't go to

1 this law and economics thing that George Mason University puts
2 on and all this, and he argued strenuously against it. I
3 don't think that bill passed. I can see the issue that judges
4 might be influenced, but I think we're independent enough so
5 that we can take opinions and view them just as what they are.

6 PROFESSOR LAYCOCK: I think it's a real
7 problem, at least for the federal judges. It's a hard problem
8 to draft about because the -- in terms of the ethics rules,
9 what you think about is the financial value of the trip. But
10 I don't think the financial value of the trip is the problem.
11 I think the problem is the two weeks of propaganda the judge
12 is subjected to once he gets there. And there's a lot of
13 money on the one end of the political continuum to run a
14 summer camp for federal judges, and it's an influence.

15 JUDGE KEASLER: And state judges attend those
16 too.

17 PROFESSOR LAYCOCK: How you distinguish that
18 from any other kind of CLE would be a very hard thing to
19 draft, right?

20 JUDGE KEASLER: Uh-huh.

21 PROFESSOR LAYCOCK: Anything else on gifts that
22 I need to know about?

23 Paragraph (E) on fiduciary activities, basically here we
24 do track the Model rule that a judge can be a fiduciary within
25 his own family and basically not otherwise, and is subject to

1 all the same restrictions the judge would be subject to
2 managing his or her own proprietor or investments. It seemed
3 fairly straightforward to me. I didn't see a problem. If

4 anybody knows about one, let's flag it.

5 (F) on arbitrator or mediator, here there is a distinction
6 between part-time judges and full-time judges. And here we
7 also have a distinction in terms of whether you're doing it
8 for compensation or not. So this rule would authorize even a
9 full-time judge to serve as mediator or arbitrator pro bono.
10 I guess that's not a very real-world problem. But -- and
11 part-time judges can -- could have a mediation or arbitration
12 practice for pay.

13 JUDGE KIDD: Retired judges that are still seen
14 as visiting judges, frequently that is a big source of income.

15 JUDGE KEASLER: Especially now that they've cut
16 back visiting judges 70 percent.

17 PROFESSOR LAYCOCK: I don't think anyone has a
18 problem with retired judges. Is there an issue about
19 part-time judges?

20 MR. BABCOCK: I don't think so.

21 PROFESSOR LAYCOCK: Okay. "A judge shall not
22 practice law..." We have an exception, and someone told me at
23 the break that that's for JPs basically -- is the exception,
24 authorized by statute or code.

25 MS. WILLING: And county judges.

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1 JUDGE KEASLER: Constitutional county judges.

2 PROFESSOR LAYCOCK: Then in (H) is a provision
3 basically about not serving the other branches, not serving on
4 a committee or a commission or -- except for those concerned
5 with improving the law, the legal system, and administration
6 of justice. The Model Code has a separate provision tacked on
7 this that Texas did not adopt. It says the same exceptions

8 concerning the improvements on the law, the legal system, or
9 the administration of justice. Other than that, a judge
10 should not appear at a public hearing or consult a legislative
11 or executive body or official. I don't know if that's been an
12 issue here, if we need to think about putting that back in,
13 but we do not have it at the moment.

14 JUDGE FROST: Which one is that?

15 PROFESSOR LAYCOCK: 4(H) at the bottom of the
16 next-to-last page. We have one paragraph of 4(H); "A judge
17 should not accept appointment to a governmental committee,
18 commission, or other position that is concerned with issues of
19 fact or policy..."

20 JUDGE FROST: What was the part about should
21 not consult with legislators?

22 PROFESSOR LAYCOCK: That's in the Model Code
23 that we do not have.

24 JUDGE FROST: That's not a prohibition.

25 PROFESSOR LAYCOCK: It's not a prohibition, and

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1 I've forgotten to type it in here. You can appear at a public
2 hearing or consult with an executive or legislative body on
3 matters improving the law, the legal system, or the
4 administration of justice, "but not otherwise" is the
5 Model Code provision. And I -- I don't know if it's been -- I
6 don't know if it's been an issue here. It's occasionally been
7 an issue with federal judges going over to the White House to
8 consult.

9 MR. BABCOCK: The line can be a little fuzzy
10 with the legislature. House Bill 4 was arguably something to
11 improve the judiciary, but it touched a lot of areas. And yet
12 the legislature was --

13 PROFESSOR LAYCOCK: Almost any bill could be
14 described as an attempt to improve the law.

15 JUDGE KIDD: Because it is the law.

16 PROFESSOR LAYCOCK: It may not be a workable --
17 a workable prohibition. Whereas the one Texas did adopt is a
18 brighter line. "Accept appointment to a committee,
19 commission, or position" may be a more workable and
20 enforceable rule.

21 One issue that comes up two different places here in (I)
22 is you can accept a reimbursement for trips and the like. We
23 say "where appropriate the judge can accept reimbursement for
24 the judge and for family or spouse." The ABA says "spouse or
25 guest." So we're tougher on our single judges. I don't know

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1 if that's a policy position or a coincidence. I'm certainly
2 open to advice on that.

3 But then the general question is, do any of you know of
4 live issues that have arisen, either practical problems or
5 interpretive problems, under Canon 4 that my subcommittee
6 needs to look at? Because I can read it, but I've got no
7 experience with it in the real world.

8 MS. WILLING: A question that frequently comes
9 up -- and judges don't have a good place to find the answer
10 from what I've heard. And across the state there's different
11 ways that they handle this, and it relates to the gift section
12 of Canon 4.

13 PROFESSOR LAYCOCK: Right.

14 MS. WILLING: That section applies to the judge
15 and the judge's family that reside with the judge. But what
16 about the judge's staff, especially around Christmastime? We

17 get a lot of questions from judges about how to handle that
18 situation.

19 MR. BABCOCK: And there's a lot of gift-giving
20 that goes on at Christmas.

21 MS. WILLING: But they'll give it to staff.

22 MR. BABCOCK: It's not just law firms. It's
23 court reporters too, private process servers.

24 JUDGE QUINN: You're going to take my cookies
25 away? But that is a concern because that came up in our

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1 court, whether or not we should accept Christmas cookies and
2 cakes from court reporters and things like that when we're
3 reviewing court reporters -- when they file the records and
4 things like that.

5 JUDGE WOODWARD: Someone gave me a newspaper
6 article, which was a fairly recent newspaper article, that the
7 administrative law judges in San Antonio -- the entire staff
8 resigned because they had been given gift certificates to
9 McDonald's or something. And one of them resigned and said,
10 "I didn't even know I got the dadgum certificate."

11 JUDGE KEASLER: Isn't there an ethics opinion
12 on this, on gifts? Yeah, you're not supposed to accept them.

13 JUDGE WOODWARD: The other side of the coin is
14 last year we just told the lawyers, "We appreciate all the
15 gifts and cakes and stuff, but not this year," and it caused
16 some hard feelings. The lawyers were a bit upset.

17 MS. WILLING: And staff gets upset too.

18 JUDGE WOODWARD: The staff is real upset.

19 MS. WILLING: They look forward to the little
20 things like cookies or something.

21 JUDGE WOODWARD: The lawyer's attitude was, "Do

22 you really think I'm trying to influence you? I'm trying to
23 be a nice guy."

24 JUDGE KEASLER: Buy an opinion with a pound
25 cake?

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1 PROFESSOR LAYCOCK: We had an issue of this at
2 the law school. Staff is paid even less. The staff doesn't
3 have the prominent public position or any prestige that goes
4 with it. They're grinding away for you every day. A gift to
5 them seems -- is a very different political valence to me than
6 a gift to the judge.

7 JUDGE QUINN: To what extent does Canon
8 3(C)(2), where it says "...others subject to his direction and
9 control to observe the standards of fidelity and diligence
10 that apply to the judge and refrain from manifesting bias or
11 prejudice in the performance of their official duties" -- the
12 fidelity, does that connote unbiasedness, not accepting things
13 that would influence?

14 JUDGE KEASLER: I think it's a --

15 JUDGE BENTON: I'm going to ask Seana a
16 question. There's a document that's been distributed in
17 Harris County that's entitled "Unethical Guide to the Court
18 Staff" [sic] that I know I use with my staff along with my law
19 clerk. I don't know -- I always assumed that the source of
20 the document was Seana's office. Are you familiar with the
21 document?

22 MS. WILLING: No, I'm not. We don't provide
23 that kind of information generally because we're not allowed
24 to give written ethics opinions or written ethics advice. So
25 I'd like to know if it's been attributed to our office because

1 I don't know of it.

2 JUDGE BENTON: I'm not suggesting that it was.

3 I just thought that it was. I'll send you a copy.

4 Do you know what I'm talking about?

5 JUDGE DORFMAN: Of course I do.

6 JUDGE KEASLER: I think the American Judicature
7 Society had some kind of publication of that, obligation of
8 staff. The problem is a judge can be held accountable for
9 what staff does. The best example I can think of was the two
10 Supreme Court justices that got disciplined for favorable
11 treatment of their clerks. They were flown someplace --
12 Las Vegas or someplace at the plaintiff's lawyer's expense,
13 and they got in a heap of trouble for it.

14 PROFESSOR LAYCOCK: The result of that
15 conversion a couple years ago about firms paying clerks a
16 bonus to kind of hold them -- hold the job and make it easier
17 for the clerk.

18 JUDGE KEASLER: Right.

19 JUDGE KIDD: We had this come up at one of the
20 judicial seminars. I think there are some ethics opinions; I
21 didn't get a chance to research them. But I remember one
22 district judge who was a former chair of the judicial section,
23 and a wily guy in my opinion. The way he always worked all of
24 this out is the district clerk was not under his supervision
25 and control, and so he would tell any of the lawyers that

1 wanted to give Christmas cookies or cakes, "You put it down in
2 the district clerk's office," and then he would tell any of
3 his staff if they wanted to go down there and have a cookie or

4 cake or something of that sort, they were free to do it. I
5 think that was a brilliant solution to what's an otherwise
6 kind of insoluble problem.

7 Because while I agree with Professor Laycock that, you
8 know, our staff people obviously don't make the amount of
9 money, you know, at the same time, I mean, that's one of the
10 ways to really influence a judge, is to give gifts to staff
11 people because we operate through our staff and we appreciate
12 that.

13 MR. BABCOCK: If you want to get your hearing
14 set, make sure the cookies keep flowing.

15 Anything else, Doug?

16 PROFESSOR LAYCOCK: Anything else out in the
17 real world on any of these provisions my subcommittee needs to
18 know about?

19 DEAN ALFINI: Service as an arbitrator or
20 mediator, I seem to recall that judges in Texas may not be
21 able -- may not mediate their own cases. I don't know whether
22 that's somewhere in the Code or in -- in the statutes, but if
23 it's in the laws, you may want to add to the end of that "only
24 to the extent permitted by law" -- "a judge may encourage
25 settlement in the performance of official duties only to the

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1 extent permitted by law."

2 Seana, isn't there a provision that judges may not mediate
3 their own cases somewhere?

4 JUDGE WOODWARD: I think there's a provision
5 that says if you do mediate it, you can't serve as the judge
6 anymore.

7 JUDGE KIDD: That's what it is.

8 MS. WILLING: I'm not sure about where it is
9 that the judge can't mediate his own case. You can't mediate
10 any case if you're going to be the judge on the case.

11 MR. BABCOCK: That's not the practice in the
12 federal system.

13 JUDGE WOODWARD: There's some limitation on the
14 extent to which a judge can encourage settlement. We might
15 want to capture that there.

16 JUDGE KIDD: That's in there. I think that's
17 in there.

18 MR. BABCOCK: I don't know that the federal --
19 having been involved in federal cases where the judge acts as
20 a mediator and does the subtle diplomacy and everything, I'm
21 not sure that's good because when it doesn't settle, the
22 diplomacy happens right before you go to trial. Somebody has
23 colored the judge's view on the case even if it's a jury case,
24 but...

25 JUDGE DORFMAN: I think the reference he's

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1 talking to says authorizing -- it's the Civil Practice and
2 Remedies Code; I think it's 172 and 173 which references a
3 point to arbitrators and mediators. And maybe that's where
4 the prohibition is on the mediation of your own case, if we're
5 looking for a cross-reference.

6 PROFESSOR LAYCOCK: That's all I have. And if
7 you think of a real-world problem after you get home, just
8 send me an e-mail.

9 MR. BABCOCK: Doug, I apologize for, on top of
10 the load that you already had, giving you Canon 4. And I know
11 that some of your subcommittee members have not been able to
12 participate as much as you might like. If I could suggest

13 that Justice Kidd, who is really an institutional memory on
14 this thing, and Seana Willing, who is likewise -- if you need
15 to draw on somebody as a resource, they would be two likely
16 sources. And I think just for accounting purposes we'll add
17 them to the subcommittee.

18 JUDGE KIDD: No good deed goes unpunished.

19 MR. BABCOCK: That's what you get for showing
20 up. And it's even worse when you don't show up.

21 Here's where I see we are. At the next meeting it seems
22 to me we ought to start out with Justice Frost in Canon 3.
23 And I would think that would be relatively discrete and short,
24 finishing off Canon 3.

25 And then, Doug, I think we'll go to you and try to finish

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1 off Canon 4. And then go to the Preamble and Canon 1 with
2 Dean Alfini's group, and then finish with Judge Woodward and
3 Canon 6.

4 And I'll get with Justice Jefferson about this, but we
5 might -- we might -- in order to finish next time, maybe we
6 might want to consider having a slightly longer meeting, just
7 so we have enough time to get done.

8 There's another complication too, which is this is the
9 last meeting that's ever going to be held in this conference
10 room because the wreckers are coming in this weekend to
11 completely remodel this floor, and they may not be finished by
12 the end of October; knowing contractors, I suspect they won't.
13 So we may have to do it somewhere other than this office next
14 time. And we'll just -- Justice Jefferson and I will just,
15 you know, figure it out and let everybody know.

16 JUDGE JEFFERSON: Dean Alfini, can I ask you to

17 report where the ABA is currently on progress on its committee
18 and its study?

19 DEAN ALFINI: We're working through the end of
20 Canon 4 and going into Canon 5. We've done them in order.
21 They -- there's been a major format change. They look more
22 like the rules of professional conduct now than they do like
23 the canons, although we have retained the word "canon" and
24 the -- there is a canon sort of superimposed over each set of
25 rules in each of the five canons, if you will.

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1 We're going to have to fix some terminology. But this is
2 the first cut. I don't think anybody anticipates having
3 anything like a final version in the House of Delegates of the
4 ABA before next summer. It will probably be next summer at
5 the earliest that it goes before the House of Delegates. So
6 we've sort of done a first go-round, and then we'll get to
7 start over again and go through and sort of look at the
8 comments we've got.

9 So it's up on the Web site. 1 through 4 are up on the Web
10 site for comment. Others will be up on the Web site, you
11 know, probably by early 2005 for comment. And then it will
12 probably take us another six months or so to go through the
13 comments, make the necessary revisions, and put it before the
14 House of Delegates.

15 JUDGE JEFFERSON: Do you also have --

16 DEAN ALFINI: I don't know if that's helpful.

17 JUDGE JEFFERSON: Do you have transcripts of
18 your meetings, or no?

19 DEAN ALFINI: We have minutes. I could share
20 them. I'm not sure how helpful they would be. You want me to
21 make a report at the next meeting --

22 JUDGE JEFFERSON: Yeah.

23 MR. BABCOCK: I think that would be great.

24 DEAN ALFINI: -- that's a little fuller? I'm
25 trying to think -- why don't I do this: There's a lot on the

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1 Web site. If you ask me what that is, I couldn't tell you.

2 But why don't I get the Web site address to Angie, sort of
3 basic information on here's how to access what's going on with
4 the ABA task force kind of thing, and maybe she could pass
5 that on to everyone.

6 JUDGE JEFFERSON: Great.

7 MR. BABCOCK: That would be great, Dean. Thank
8 you.

9 Any other business that we have?

10 JUDGE KIDD: Could you ask Dean whether on
11 Canon 4 specifically there is any major change?

12 MR. BABCOCK: The question from Justice Kidd is
13 whether or not on Canon 4 there was any substantial change or
14 approach or attitude about it.

15 DEAN ALFINI: The only thing that I recall that
16 got a lot of discussion was the gift provision and the
17 attending of law and economic seminars and how do we treat
18 that. And the new language has to do largely with treating
19 certain things as a gift and reporting them. Again, why don't
20 I get that out to Angie, though. I think I can --

21 PROFESSOR LAYCOCK: We'll look at that.

22 MR. BABCOCK: That will be good. Anything else
23 anybody else has?

24 JUDGE WOODWARD: Do we have an idea when the
25 next meeting will be?

1 MR. BABCOCK: We're going to explore. The
2 Supreme Court Advisory Committee was supposed to meet at the
3 end of October but that meeting was shifted to November.
4 We're going to see if that Friday works. It's moving parts
5 with Justice Jefferson's schedule, my schedule, and
6 facilities. But we'll get that out to you shortly.

7 PROFESSOR LAYCOCK: The 28th, you're thinking
8 about?

9 MS. HOBBS: I think it was the 22nd or 29th.

10 PROFESSOR CARLSON: The 29th you may be
11 speaking at the UT conference.

12 MR. BABCOCK: Elaine has created a conflict for
13 me on that day. We'll get -- we'll work something out. In
14 fact, maybe we can start earlier and we can still do it.

15 PROFESSOR CARLSON: It's the 28th and 29th. I
16 can't remember which day you're speaking.

17 JUDGE FROST: Is it in Austin?

18 MR. BABCOCK: Yes. It's the second day, and I
19 think I'm speaking late, so maybe we can work around it. We
20 just have to find a location to meet in.

21 Thanks so much to everybody for showing up. And we'll see
22 you later.

23 (PROCEEDINGS CONCLUDED)

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