

1 Provisions that have been enacted to assist us in what we  
2 do, a statute that requires cooperation with the Commission.  
3 And I hadn't really thought about using that in tandem with  
4 a referral to the Amicus program, mostly because we are  
5 trying to make that a voluntary program and not a mandatory  
6 program.

7 I don't know how successful a candidate could  
8 be if they were forced into the program and it wasn't  
9 voluntary because it's such a long road to recovery in some  
10 of these cases. And then who makes the decision that the  
11 judge has not been successful in the program?

12 MR. ALFINI: Well, I was responding mostly to  
13 the notion of often times someone who is impaired is in  
14 denial. And so maybe at least requiring them to put their  
15 foot in the door, maybe a step in the right direction.

16 MS. WILLING: Well, there is that ability.  
17 The Commission has the ability when a case has gotten into a  
18 disciplinary setting where there are allegations of  
19 misconduct because the judge was drinking or had some sort  
20 of impairment where they could order through an order of  
21 education that the judge submit to evaluation. And that's  
22 the extent that that really could work because the board in  
23 evaluating the judge isn't going to require them to  
24 participate in the program. And, Justice Seerden, you can  
25 correct me if I'm wrong on this, but I don't think they can

888-306-ARTS

1 require a judge to submit to a program if through their  
2 evaluation is not a good candidate for the program.

3                   And I don't know all the ins and outs of what  
4 makes a judge who has a drinking problem or some other  
5 impairment a good or bad candidate for the program. We give  
6 the board a lot of discretion in that area, but we do that.  
7 The Commission does order judges into the program. And we  
8 have had in the past judges who have participated in the  
9 program. Ultimately, at least in one or two cases, I don't  
10 think it has been all that successful simply because it's a  
11 lifelong struggle. And if they -- for example, if they  
12 start drinking again, do we kick them out of the program?

13                   MS. GONZALEZ: But at least it's an  
14 opportunity and hopefully remedial.

15                   MS. WILLING: But it is an opportunity.

16                   MR. HARRISON: Seth and then Jan.

17                   MR. ROSNER: I have two questions. First,  
18 from what proportion of complaints come from, assuming there  
19 would be three categories of complainants, public litigants,  
20 typically, other lawyers and other judges?

21                   MS. GONZALEZ: And are you talking  
22 specifically to this program?

23                   MR. ROSNER: No, I'm talking out complaints,  
24 general complaints, misconduct complaints.

25                   MS. WILLING: That would be correct. And you

1 could put in law enforcement, I guess, in the public or, you  
2 know.

3 MR. ROSNER: I guess specifically what I'm  
4 interested in is do you have complaints from other judges?

5 MS. WILLING: Yes, we do.

6 MR. ROSNER: And is that a significant source  
7 of the complaint?

8 MS. WILLING: It really isn't. I would say  
9 the greatest percentage of complaints come from litigants,  
10 inmates, criminal defendants, family-type disputes, but  
11 those are going to be the unhappy litigants who will  
12 complain about the judge's decisions.

13 MR. ROSNER: The other question is what is  
14 the typical length of a referral to the program? How long  
15 is that likely to last? And the reason that I'm interested  
16 in that is the source of the next question which is, how do  
17 you respond to the complaining party during that time? In  
18 other words, is there a response made to the complainant  
19 about a referral or what's happening to my complaint?

20 MS. GONZALEZ: Well, I think as far as the  
21 length of time, it can vary, you know, depending on how  
22 active the participant is pursuing whatever is required or  
23 whatever remedial measures have been provided. So I think  
24 that's going to vary.

25 MR. ROSNER: Well, I would assume that but I

1 guess the real reason I ask that is because there can be  
2 referrals that last a significant period of time.

3 MS. GONZALEZ: Yes.

4 MR. ROSNER: And I'm thinking of the public  
5 perception of I've made a complaint now about some clear  
6 judicial misconduct, and I don't hear anything from the  
7 Commission for a month or six months, a year. And I guess  
8 that's what I'm interested in finding out. What does the  
9 complaining party hear during a referral, if anything?

10 MS. WILLING: Usually we will provide them  
11 status that the case is either ongoing or continuing, but  
12 there is really not much specific we could provide them  
13 because of the confidential nature of the referral.

14 MR. ROSNER: Right.

15 MS. WILLING: In those cases where the  
16 Commission actually disciplines the judge with the order of  
17 referral, we will let the complaining person know that the  
18 Commission has taken action that's of a confidential nature.  
19 And so we don't let people just hang out there in limbo if  
20 we can prevent that.

21 MR. HARRISON: Jan.

22 MR. BARAN: Thank you. And thank you for  
23 coming today.

24 MS. GONZALEZ: Thank you.

25 MR. BARAN: I have some questions with

1 respect to Canon Five, and before getting into my questions  
2 to help me to know a few facts about elections here in  
3 Texas. I believe you mentioned that there are some 3,600  
4 judges in the state. Are they all elected?

5 MS. WILLING: No, not all of them. Included  
6 in that number are associate judges who are actually hired  
7 or appointed. There is municipal judges and a few cases are  
8 elected but for the most part are appointed. We also have  
9 retired and visiting judges who at one point may have been  
10 elected but are no longer.

11 MR. BARAN: So would more than half of the  
12 judges here be elected?

13 MS. WILLING: Oh, yes.

14 MR. BARAN: And I think you also mentioned  
15 that you've received about 1,000 complaints this last year.  
16 And if I understood you, perhaps 50 of them actually evolved  
17 into some sort of a proceeding. Is that correct?

18 MS. WILLING: Right. That's about right.

19 MR. BARAN: And so of those complaints and of  
20 those 50 proceedings, how many of them, if any, implicated  
21 Canon Five?

22 MS. WILLING: Last year, I don't really off  
23 the top of my head know. It wasn't an election year. So  
24 for the most part, with the exception of one of our  
25 provisions under Canon Five, deals with the Judicial

1 Campaign Fairness Act under the election code. And judges  
2 who are elected officials have an ongoing responsibility to  
3 the Ethics Commission that enforces the election code to  
4 report their financial contributions and things like that.

5                   So we did have a public discipline against a  
6 judge who did not file his reports and was fined something  
7 -- not by us, but by the other entity that had jurisdiction  
8 over the misconduct. He was fined about \$20,000 for that.  
9 So that's something that comes to mind as a sanction that we  
10 took against a judge in violation of --

11                   MR. BARAN: And did you take that sanction  
12 under Canon Five or under Canon One or Two that requires a  
13 judge to follow the law? It sounds like a judge who didn't  
14 follow the law.

15                   MS. WILLING: It would have been that  
16 provision of Canon Five, it would have been Canon Two A in  
17 Texas which requires a judge to comply with the law. There  
18 is also a Canon under I think it's 4 I which requires judges  
19 to file any public reports that are required by law.

20                   MR. BARAN: And just a couple more questions.  
21 Which version of Canon Five does Texas have? Is it the 1990  
22 version or the 1972 version?

23                   MS. WILLING: I believe it's a recently  
24 modified 1990 version because the Supreme Court very quickly  
25 responded to the Minnesota v. White case in August of 2002

1 and did make the changes to get rid of the provision that  
2 was found to be unconstitutional.

3 MR. ALFINI: Jan, could I ask you to amend  
4 your first question and ask her how many Canon Five  
5 complaints they get in an election year?

6 MR. BARAN: Sure. I would be interested in  
7 something like that, yes.

8 MS. WILLING: I can't give you a definitive  
9 number, but right around this time of the year is when we  
10 will be flooded with complaints, some legitimate and some  
11 just by the opponent who is looking for a way of gaining  
12 some momentum in their election before the primary.

13 MR. BARAN: You mean these Canons are used  
14 for political purposes?

15 MS. WILLING: It's shocking. It's shocking,  
16 isn't it?

17 MS. GONZALEZ: And convenient.

18 MR. HARRISON: All of my illusions have been  
19 shattered.

20 MS. WILLING: I know. I told you the  
21 situation in Texas wasn't grim.

22 MR. BARAN: So unlike New York, Texas has  
23 actually become more liberal and adopted the changes. I  
24 don't know if you heard the testimony earlier but apparently  
25 New York with this liberalization.

1                   MR. TEMBECKJIAN: No, no. New York didn't  
2 have the announced clause so we were not out of compliance  
3 of Minnesota against White.

4                   MR. BARAN: Oh, okay.

5                   MS. WILLING: They're way advanced.

6                   MR. TEMBECKJIAN: We were ahead of the game.

7                   MR. BARAN: I see.

8                   MR. HARRISON: Questions? Tom.

9                   MR. FITZPATRICK: Do you provide advisory  
10 opinions or advice to judges, like you said, they all want  
11 to know about the elections? Do you guys informally counsel  
12 judges on what you think is appropriate behavior?

13                   MS. WILLING: We do on a very informal oral  
14 basis only. We can't provide them anything in writing. We  
15 also give them a disclaimer that we can sort of help them  
16 brainstorm their way through the Canons but we can't bind  
17 the Commission in any way with what we say because we don't  
18 get to vote on the cases that come before us. But we  
19 probably respond to a thousand calls a year from judges and  
20 even more so in an election year because they do want to  
21 know what to do and what's the right thing to do.

22                   There's a committee of the State Bar, the  
23 Judicial Ethics Committee does issue written opinions but  
24 they're not binding on the Commission either. They're  
25 really just guidance and provide some instruction.

1 MS. GONZALEZ: And then in the past year with  
2 the Commission.

3 MS. WILLING: Yeah. We use the Commission  
4 sanctions to help judges to know what the Commission has  
5 done in the past in similar situations. There are a few  
6 public statements that the Commission has issued over time  
7 relating to election-type issues that are also provided to  
8 judges. Of course, our Commission changes make-up, you  
9 know, every couple of years we have members that leave and  
10 new members that come on. And so there is -- there tends to  
11 be a shift philosophically over time. And so I'd have to  
12 tell some judges that, you know, maybe back in 1990 this is  
13 how the Commission felt about endorsements, you know, made  
14 by judges, whereas now in 2004 they may not feel the same.  
15 I can't hold them to that public statement.

16 MS. GONZALEZ: But the more specific that it  
17 can be the better, obviously, you know, so there is not a  
18 gray area there.

19 MR. HARRISON: Loretta.

20 MS. ARGRETT: You mentioned the mentor  
21 relationship. Can you describe how that works with respect  
22 to the judge's conduct of his or her official duties?

23 MS. GONZALEZ: Well, and this is the  
24 information that I know. Just, basically, when a judge is  
25 in that program, just someone that's checking up with them

1 that this judge is reporting to and progress that has  
2 occurred. And I believe they're also able to contact any  
3 sort of -- wherever they're going to receive as far as the  
4 mentor.

5 MS. WILLING: Yeah. The mentors have a lot  
6 of leeway and the judges that are under the program will  
7 sign the leases so that the mentors can gain access to  
8 information about their progress. That's the mentorship  
9 within that Amicus program. We also have through the  
10 Commission's ability to issue orders of additional  
11 education. We use that mechanism to get judges hooked up  
12 with mentors not because they have an impairment, but  
13 because either there is a particular area in the law where  
14 they have proven to be deficient or they have a demeanor  
15 problem, they have lost their temper and, in some cases,  
16 just bad judgment calls by a young judge who is not seasoned  
17 enough to know how to respond to media attacks and things  
18 like that. We get them with somebody who will spend a  
19 couple of hours or a couple of days with them and try to get  
20 them on the right track.

21 MR. HARRISON: Jim.

22 MR. ALFINI: One of the ways that the Texas  
23 Code is more permissive than the ABA Code is that it allows  
24 face-to-face direct campaign solicitations. Judges can  
25 actually solicit and they have to use committees that can

1 argue on the ABA code. Can you comment on whether that's  
2 been a source of complaints and how workable that provision  
3 has been, I guess?

4 MS. WILLING: Well, again, what usually  
5 happens are the judges become frustrated with what they  
6 consider a disconnect. You know, they can solicit directly  
7 campaign funds from lawyers and businesses who have  
8 interests before them, but they can't help a worthy cause,  
9 you know, like Big Brothers, Big Sister, the Boy Scouts,  
10 their church with their fund raising. And that's a constant  
11 frustration for the judges because it doesn't make sense.  
12 It's sort of a hypocrisy within the ethical framework. As  
13 far as complaints --

14 MR. ALFINI: I'm sorry. Are you saying that  
15 the judges would probably prefer not to have that ability to  
16 raise funds?

17 MS. WILLING: I know some judges actually  
18 take great strides to avoid that direct contact because  
19 they're very concerned about the appearance problem that  
20 that does create. And so, of course, they have got campaign  
21 treasurers and campaign managers who, to some degree, they  
22 let handle that side of it and they try not to know who has  
23 contributed to their campaign.

24 A It become difficult, though, because they've got  
25 to sign the reports that they file with the Ethics

1 Commission so that there are probably less opportunities for  
2 them to remain totally ignorant of that fact. What we see  
3 as a Commission on that issue with the complaints are people  
4 who believe that the judge has treated a particular lawyer  
5 or law firm or business in a favorable way, and lo and  
6 behold, look at their campaign finance report and that firm  
7 gave them \$5,000 in their last campaign. I don't think the  
8 Commission is going to make that huge leap and say that,  
9 uh-huh, the judge has committed a conduct because so and so  
10 gave them \$100 or \$1,000 to their campaign and they have  
11 prevailed in a particular case.

12                   It gets a little more problematic with judges  
13 who appoint lawyers to act as ad litem, and in some cases  
14 those ad litem fees are in the hundreds of thousands of  
15 dollars. And we have sanctioned judges through, you know,  
16 of course, they will think it is circumstantial evidence but  
17 we think we have painted a clear enough picture that a  
18 particular case that that attorney was appointed as an ad  
19 litem and earned a \$70,000 fee in two-month period during  
20 the same time that that judge was running for office, was  
21 getting campaign contributions from that lawyer and his firm  
22 and, oh, by the way, the lawyers was also representing the  
23 judge in a private matter for free. So it does come up.  
24 And it can be an issue.

25                   MS. GONZALEZ: A few years back there was a

1 district court judge here that was campaigning, and part of  
2 his campaign was I will not accept money from lawyers. So,  
3 yeah, and so I think obviously there is an undertone there  
4 of, you know, what's appropriate, what's not. Is it  
5 uncomfortable for an attorney to got before a judge that did  
6 not contribute. There is that underlying thought.

7 MR. BARAN: Did that candidate raise any  
8 money?

9 MR. HARRISON: Did that candidate get  
10 elected?

11 MS. GONZALEZ: Yes and yes.

12 MR. CUMMINS: Just took money from the  
13 litigants in front of it.

14 MS. WILLING: But if you're looking at an  
15 appearance of impropriety, then that is a very good example  
16 of something that even the judges recognize it doesn't make  
17 sense.

18 MR. HARRISON: Can you recall ever having  
19 charged a judge under the appearance of impropriety  
20 provision and no other provision?

21 MS. WILLING: Under our Code of Judicial  
22 Conduct, the Commission has no authority to sanction a judge  
23 for an aspirational or oratory provision. And so Canon Two  
24 A is kind of unique in Texas because it's one sentence with  
25 two provisions, one is mandatory and one is aspirational.

1                   So as long as, you know, they have failed to  
2 comply with the law and that's a strong enough allegation  
3 and there is strong enough evidence, then it's likely that  
4 the Commission will just charge them and discipline them for  
5 the entire Canon Two A because I think it goes hand in hand  
6 that if the judge fails to comply with the law, then these  
7 failed to limit the appearance to the public.

8                   MR. HARRISON: Of the 50 to 70 cases, how  
9 many resulted in private admonitions as distinguished from  
10 lawyers? We're asking a ballpark.

11                   MS. WILLING: Let's see. Do you have your  
12 report?

13                   MS. GONZALEZ: No.

14                   MS. WILLING: I think last year there was a  
15 trend away from public discipline, whereas the years before  
16 there had been a lot more public discipline. I think there  
17 were about 59 disciplinary actions taken, maybe about a  
18 dozen, and I've got my statistics in my bag, but maybe a  
19 dozen of them were private.

20                   MR. HARRISON: And my last question, can you  
21 quantify the basis for most of the discipline -- what Canon  
22 was most frequently violated?

23                   MS. WILLING: You know, I think probably, and  
24 I may not be a hundred percent accurate on this, but Canon  
25 Two B is frequent and Two A, those are the two that we see

1 most frequently, the failure to comply with the law and  
2 using the prestige of office to advance either the judge's  
3 private interest or someone else's private interest. Those  
4 are the big issues.

5                   And we also have under Article 5 of the Texas  
6 Constitution just the general authority to discipline judges  
7 for willful violations that cast public discredit on the  
8 judiciary for the administration of justice. So it's a  
9 broad authority to discipline for conduct.

10                   MR. HARRISON: There is a provision in the  
11 Arizona Supreme ruled that ostensibly gives the Bar the  
12 authority to discipline lawyers for offensive personality,  
13 I mean --

14                   MS. WILLING: The jerk role.

15                   MS. TURNEY: Wait a minute. You're the one  
16 who filed it against the lawyer for offensive personality,  
17 weren't you?

18                   MR. HARRISON: I couldn't resist. Bob.

19                   MR. CUMMINS: In Illinois and Chicago where  
20 we are a fairly neutral law on political activity.

21                   MR. BOWIE: We lost your credibility.

22                   MR. CUMMINS: We have what we call the  
23 Judicial Ethics Advisory Committee that is created on an  
24 ad hoc basis during elections. They keep a hotline open so  
25 that if a judge has a question about whether or not he can

1 attend a particular fund raiser and the like. And we have  
2 just implemented that in the last couple of years, and it  
3 has been finessed some problems for judges who without that  
4 resource, because the Judicial Inquiry Board in Illinois  
5 will not give advisory opinions, they just don't do it.

6                   Although we do have -- and Jim Alfini,  
7 Professor Alfini is a member of it, or was a member of it --  
8 we do have an Ethics Advisory Group in Illinois that is  
9 sponsored by the judges association. So if you'd like some  
10 information on that hotline, I can provide that to you.

11                   MS. WILLING: Appreciate it.

12                   MR. HARRISON: Any other questions?

13                   MR. TEMBECKJIAN: Well, I did. In the Amicus  
14 program, can a judge be referred to it by another judge or  
15 does it rely on the voluntary commitment, so to speak, of  
16 the judge who has the problem or referral by the Commission?

17                   MS. WILLING: At this point, I think it  
18 relies on the two latter. And I don't know what that would  
19 look like if we had it where another judge could refer a  
20 judge because it is a voluntary program at this point with  
21 the exception of when the Commission orders a judge. And  
22 really I think the extent that they can order a judge to  
23 participate in the program is only to get evaluated. But we  
24 don't have any mechanism for a judge to get evaluated  
25 involuntarily because of a referral from another judge or an

1 attorney or family members or something.

2 MR. TEMBECKJIAN: And is it your experience  
3 that in reaching a decision to refer the judge to the Amicus  
4 program that the Commission tends to be unanimous about it  
5 or is there some -- are there conflicts? And the reason I  
6 ask is because of the proposed language that Marv was  
7 referring to earlier where a judge who learns or has  
8 reasonably informed of a disability or a dependence problem,  
9 is expected to take appropriate action, including referrals,  
10 that you can have three different judges looking at the  
11 exact same conduct and conclude that appropriate action  
12 means something different.

13 To one, appropriate action might be lecturing  
14 the lawyer in front of him and the other might be to refer  
15 to the Commission for discipline and the third might be to  
16 refer the judge to an assistance program. How do you deal  
17 within your own Commission with those kinds of conflicts?

18 MS. WILLING: There are conflicts within the  
19 Commission on this issue. There are some Commission members  
20 that are really committed to assisting these judges in  
21 getting whatever assistance they might need because they  
22 recognize that, you know, but for this issue of impairment,  
23 we've got a judge with a great career and high esteem in his  
24 community and with a future in front of him. And they want  
25 to give that judge an opportunity to seek help.

1                   But there are other members of the  
2 Commission -- we have five judge members, we have four  
3 public members and two lawyer members. So there's a cross  
4 section of the community and different ideas and  
5 philosophies, and so there are going to be some Commission  
6 members that just want to sanctions the judge for the  
7 conduct and be done with it. And they don't see or  
8 recognize the potential that the program could have.

9                   And yet maybe they do, maybe they just can  
10 see or they believe when they see that judge before them  
11 that there is nothing that's going to help them. And so we  
12 are not going to -- why spend the Commission's resources on  
13 this particular fellow.

14                   MR. TEMBECKJIAN: And is the judge who is in  
15 the Amicus program still discharging his or her duties,  
16 presiding over cases while at the same time getting  
17 assistance or do you take a leave of absence?

18                   MS. WILLING: In some cases they will take a  
19 leave of absence. We've been able to get some judges to  
20 voluntarily and yet basically be suspended on a voluntary  
21 basis for a period of time so that they can really focus and  
22 concentrate on what they need to get better, but it's not  
23 necessarily something that a judge would have to take a  
24 leave of absence to do. So either one could happen.

25                   MS. GONZALEZ: But, again, the Commission may

1 receive information about the possibility of a judge having  
2 these type of problems and is not raised to the level of  
3 judicial misconduct. And so there is that avenue on a  
4 voluntary basis for the judge to go through the program.

5 MR. HARRISON: Jan.

6 MR. BARAN: Very quickly, I just want to  
7 confirm my understanding again of Canon Five here in Texas.  
8 You said you made changes after the White case. And were  
9 those changes consistent with the changes that we made in  
10 the Model Rule by deleting the commit or appear to commit  
11 clause?

12 MS. WILLING: I don't think that we had the  
13 commit clause in Texas, but we did have the announce clause  
14 and so that was what was taken out. We had the announce  
15 clause but I don't believe we had the commit clause.

16 MR. BARAN: So you have neither the commit  
17 clause nor the announce clause?

18 MS. WILLING: Right. Correct.

19 MR. BARAN: And just to confirm how that  
20 contrasts with New York testimony we heard earlier. I  
21 gather New York, Bob, doesn't have the announce clause?

22 MR. TEMBECKJIAN: Correct.

23 MR. BARAN: But it does have the commit  
24 clause?

25 MR. TEMBECKJIAN: It does have the commit

1 clause and, of course, the pledges and promises clause.

2 MS. WILLING: We still have pledges and  
3 promises.

4 MR. BARAN: Pledges and promises. So what  
5 New York in contrast to what Texas did is retain the commit  
6 clauses and that is different from what our ABA Model Rules  
7 provide.

8 MR. TEMBECKJIAN: Right. Although, in  
9 New York now there are a couple of commissions that are  
10 reviewing the New York Rules on Judicial Conduct. And so  
11 far, all of the ones who have reported have reported  
12 changing commit clause to be more in line with Minnesota  
13 against White. The reason we didn't do it earlier is  
14 because Minnesota against White addressed only the announce  
15 clause. And since New York didn't have it, there was no  
16 need to rush the change. We decided to be a little more  
17 deliberate about it.

18 MR. HARRISON: I can't let you go without  
19 asking you who and how did you get the Texas legislature to  
20 fund the Amicus court program?

21 MR. GONZALEZ: You know, this was initially  
22 funded with the Texas Center for the Judiciary through the  
23 Court of Criminal Appeals. And then as far as the funding,  
24 I think you would be better at --

25 MS. WILLING: I think what initially

1 happened, we were able to get a grant, the Court of Criminal  
2 Appeals administers a fund of money used for judicial ethics  
3 programs and education, and all of the different levels of  
4 judges have training schools that are funded as grantees  
5 through the Court of Criminal Appeals. And so we got sort  
6 of some seed money, if you will, through a grant originally  
7 when this idea took off.

8                   Thereafter, it just was part of our budget  
9 that we used funds for the Amicus program. I don't -- at  
10 least in our current budget there is not a single line item  
11 that's designated, you know, or earmarked or Amicus.

12                   MR. HARRISON: Thank you very much both of  
13 you for coming.

14                   MS. GONZALEZ: Thank you.

15                   MS. WILLING: Thank you.

16                   MR. HARRISON: And sharing your information  
17 with us. And while we are on a Texas role, I think we have  
18 Guy Harrison. We're not related so you don't have to  
19 apologize and I won't apologize.

20                   MR. GUY HARRISON: Thank you, Mr. Chairman.  
21 My name is Guy Harrison, I am the immediate past president  
22 of the State Bar of Texas. You will probably catch up some  
23 of your time or you may be behind but what I have to say is  
24 pretty much the same as what the people who have just  
25 testified about.

1           The State Bar of Texas as an entity has not  
2 taken any specific position or review of the Model Code, so  
3 I bring you simply general information about what's  
4 happening in the State of Texas and not specifics on any  
5 parts of your Model Code, but I will try to answer any  
6 questions you might have. As the two previous individuals  
7 testified to, immediately after Minnesota versus White came  
8 out, our Supreme Court created an eight-member panel that  
9 reviewed our Canons, and in August of 2002 came out and they  
10 changed Canon Five and part of Canon Three.

11           The change in Canon Three was to make it  
12 apply to judicial candidates as well as judicial officers,  
13 and Canon Five changed the language to hopefully comport  
14 with the White case. And our Canon speaks in terms of  
15 pledges or promises made.

16           There was an -- interestingly, there was a  
17 concurring opinion, even to the creation of the new  
18 amendment, by one justice who said that he was still  
19 concerned regarding First Amendment rights and that we  
20 should have a more studied approach to it. So our court has  
21 created a committee now. One of the members is Dean Alfani  
22 that will now take a look at the entire code and virtually  
23 go line by line, and hopefully we will have some consistency  
24 with your work as a result of Dean Alfani being on both of  
25 the Commissions.

1 MR. ALFINI: I hope there is not a conflict.

2 MR. HARRISON: You're going to assure us that  
3 there is no conflict.

4 MR. GUY HARRISON: In speaking to -- well,  
5 let me say, first of all, we have through -- in our states  
6 we have different bar associations, volunteer bar  
7 associations that have approached judicial races and created  
8 a creed amongst themselves. The Dallas Bar Association  
9 specifically has adopted rules for people who are running  
10 for judge in Dallas County that applies to all those  
11 lawyers, and they have gone further than our Canons go into  
12 specifics about not asking for campaign funds while they're  
13 at the courthouse, not asking for support while they're at  
14 the courthouse, things like that.

15 To my knowledge, the Dallas Bar Association  
16 is the only one that has adopted it in writing and there may  
17 be some other associations that are approaching that, but  
18 individual associations are trying to do something about it.

19 In speaking to judges across our state both  
20 from the Supreme Court and appellate courts and trial  
21 courts, I have specifically asked them if they had concerns  
22 about what the Model Rules should say or about what our own  
23 code should say. And every single one of them has asked me  
24 to impress on this group how important the Model Code is  
25 because that's really our starting place, but they want you

1 to understand that in Texas not only do we elect our judges,  
2 we elect our judges in partisan races and that the raising  
3 of funds is unbelievably an important part of those races.  
4 A race for higher officer, either at the appellate level or  
5 the Supreme Court level, can very easily cost you in excess  
6 of 1.5 to \$2 million.

7                   So when these judges have to raise  
8 \$2 million, you know, how they raise it and being able to  
9 appear at political functions and be able to appear at  
10 political parties, events, and being able to appear say, you  
11 know, if some political entity comes to town, if the  
12 President comes to town or something, those are important  
13 issues in regard to how our judges run for office. That's  
14 not to say that that's a good system, and there has been  
15 comments or suggestions how our legislature should look at  
16 that system, but Texas -- voters in Texas' judges have been  
17 pretty specific about keeping the judicial elections and, in  
18 fact, keeping partisan elections.

19                   With that, I'll be more than happy to try to  
20 answer you any questions. I virtually -- like I say, I  
21 apologize, I have nothing to offer specifically. The State  
22 Bar is an entity, we're a mandatory Bar, and we depend upon  
23 our Judicial Conduct Commission and we depend upon the  
24 Supreme Court's committees to come forth with the changes  
25 that we need to make.

1 MR. HARRISON: Questions?

2 MR. ALFINI: You refer to the Dallas Pledge,  
3 I think, it is generally referred to. Would you suggest  
4 that we consider having some commentary in Canon Five that  
5 encourages judges to abide by those kinds of initiatives of  
6 local and State Bar associations?

7 MR. GUY HARRISON: As an individual trial  
8 lawyer, I will simply tell you that in Texas, and especially  
9 I'm sure it happens in the major metropolitan areas, but  
10 especially in rural areas, it is not unusual in the past to  
11 go into a court, say, for a summary judgment hearing. And  
12 as you go past the court coordinator's desk, there is a  
13 clipboard there that says you will sign up for a yard sign  
14 in your yard or something. Well, you feel pretty compelled  
15 to sign up on that judge's -- for the yard sign if you're  
16 going to appear in the next five minutes for the summary  
17 judgment hearing.

18 So with that said, I would think that it is a  
19 positive to have some type of a commentary, if it is nothing  
20 but aspirational goals, but it gives some direction that the  
21 appearance of impropriety is just an incredible part of what  
22 this is all about and how the public views us. So I would  
23 think that would be a very positive thing to have that type  
24 of commentary.

25 MR. HARRISON: Jan.

1                   MR. BARAN: I would follow up on that, that  
2 in other jurisdictions and in other contexts there are  
3 rules such as there shall be no fund raising while the  
4 legislature is in session and things of that sort. But  
5 would it be appropriate, if not necessary, from what you  
6 just said to perhaps have something in Canon Five that says  
7 that there will be absolutely no fund raising or political  
8 activity in a courthouse?

9                   MR. GUY HARRISON: Well, it would certainly  
10 be consistent with what the Dallas Bar Association has done,  
11 and I would think that it would be disingenuous for a  
12 sitting judge to argue against that but --

13                   MR. BARAN: Would it work?

14                   MR. GUY HARRISON: Well, I don't know.

15                   MR. CUMMINS: Of course, that's not the issue  
16 in Texas. The issue is Texas is that you can give, you're  
17 on the other side of a case, you can give the judge ten  
18 grand and there is no taint associated with your  
19 representation.

20                   MR. BARAN: I understand that. And I don't  
21 know what the contribution limit is in Texas, but there is a  
22 lot of fund raising going on, we've got to raise \$2 million,  
23 and we're not going to change that unless they adopt public  
24 financing, which is what the ABA recommended as a result of  
25 Dudley Oldham's Commission on that. And, of course, I'm not

1 going to ask what the prospect of public financing in  
2 judicial in Texas --

3 MR. GUY HARRISON: I can pretty much answer  
4 that question. Dudley can answer that question.

5 MR. OLDHAM: I can answer that.

6 MR. GUY HARRISON: If we all moved to  
7 Wisconsin, we might be able to make it work.

8 MR. BARAN: Well, I'm looking for other, you  
9 know, the vices around the edges here that might, at least,  
10 in some modest way improve the environment.

11 MR. GUY HARRISON: I think that it's  
12 important to say that judges have a problem with it also.  
13 A specific example is, as everybody in this room will know,  
14 Justice Priscilla Owen has been really taking a task about,  
15 and I believe unfairly, that she receives a campaign  
16 contribution from an organization that she wrote an opinion  
17 about, a case about and she testified, she didn't even know  
18 who gave the money.

19 They have a campaign treasurer. And  
20 virtually, if you're raising \$1 million, I mean, \$10,000  
21 sounds like a lot money and it is, but the reality is you  
22 have a campaign treasurer in a statewide race and someone  
23 gives you \$10,000, it's very possible that that candidate  
24 really has no knowledge of or no remembrance of it in any  
25 manner. I think judges might welcome, you know, some

1 commentary. Now, I can't address how you can enforce it or  
2 how the realities would work in any particular courthouse  
3 but --

4 MR. BARAN: Well, it could be grounds for  
5 disciplinary action if there is a judge that is doing fund  
6 raising in the courthouse or doing what you just described,  
7 you know, asking for yard signs, a litigant could complain  
8 about that.

9 MR. HARRISON: Marv.

10 MR. KARP: Well, I agree with the principle,  
11 the unseen result with the conduct being done at the  
12 courthouse, but there are all sorts of ways in doing it that  
13 I'm wondering and it really falls within the -- what the  
14 Dallas Bar Association seeks to prohibit. You know, the  
15 bailiff sits at his desk and picks up the phone and calls  
16 your law office and says, by the way, judge so and so is  
17 having a fund raiser next Friday night at a particular  
18 Italian restaurant. Can we count on you to pick up a couple  
19 of tickets? All of that done by phone.

20 Well, is that really soliciting funds at the  
21 courthouse? Or if you go down to the restaurant a block  
22 away from the courthouse and get all of the lawyers or  
23 something of that nature?

24 MR. GUY HARRISON: Well, we have a couple of  
25 specific high profile instances where it has been brought to

1 the public's attention and brought to the criminal systems's  
2 attention use of public telephones, use of public computers  
3 and things like that in the judicial races. And while that  
4 has been a problem in the past, I think that's less and less  
5 because of the public awareness of that. I think judges  
6 really shy away from that. And it would be unusual, I  
7 think, I'm sure it happens in small very rural areas where  
8 the judges hold, you know, a fish Friday with the good old  
9 boys, but I don't think that's a real problem seriously.

10 I think that the specter of a criminal  
11 investigation that has been raised in Texas both against  
12 statewide offices, I think that's not a real problem. Now,  
13 raising specific funds in the courthouse is a problem.

14 MR. KARP: Do you have any other examples --  
15 examples is not the choice word -- any other details of the  
16 Dallas Bar Association program in this regard? I thought  
17 you indicated that they had promulgated this series of  
18 guidelines or rules.

19 MR. GUY HARRISON: I did not bring it but I  
20 will make a point of providing Chairman Harrison with a  
21 copy to virtually everybody. And it is in writing and it  
22 has been adopted.

23 MR. HARRISON: Judge Wynn.

24 MR. WYNN: I, as you know, don't want to do  
25 business in that, the public financing system in North

1 Carolina if we can fund it. And if we do, we will send some  
2 information to Texas in making it work. We have also moved  
3 from partisan to nonpartisan. How do you view that? Does  
4 that in any way change it in terms of the rule making,  
5 decision making in terms of rules for the Model Code?

6 MR. GUY HARRISON: Well, I think it would  
7 change, it would impact how you could address the raising of  
8 funds in political parties and things like that and making  
9 appearances with certain political individuals. But I think  
10 being pragmatic about it, I would have to tell you that the  
11 State Bar of Texas in 1995, when we had a Democratic  
12 governor, the State Bar president that came in held a  
13 statewide, kind of an open-line survey to see if anybody was  
14 interested in talking about going to nonpartisan elections.

15 And at that time the Republicans wanted  
16 non-partisan elections and the Democrats very much against  
17 it. Governor Richards was defeated and Governor Bush came  
18 in, and immediately the Republicans wanted to keep partisan  
19 elections and the Democrats wanted to have non-partisan  
20 elections. So it depends on where your oxen are getting  
21 gored. I don't we're going to get there in Texas.

22 MR. WYNN: Same think we had in North  
23 Carolina. The other question I had was did I understand you  
24 to say that your local bar associations enact specific  
25 rules?

1                   MR. GUY HARRISON: The Dallas Bar Association  
2 and everybody signed it.

3                   MR. WYNN: And are those enforceable or are  
4 they just voluntary?

5                   MR. GUY HARRISON: I don't know how they  
6 enforce them because it is a voluntary bar and I would think  
7 it's more of an aspirational situation.

8                   MR. HARRISON: Is it the kind of thing that  
9 results in publicity if a judge doesn't follow the program?

10                  MR. GUY HARRISON: I'm sure it would. And  
11 they have specifics in their rules about use of their  
12 judicial surveys and things in the campaigns also. So I'm  
13 sure it would come out.

14                  MR. HARRISON: Other questions? Bob.

15                  MR. CUMMINS: If you live with the practical  
16 reality of Texas where judges do solicit money from  
17 litigants and lawyers, part of that can be remedied with  
18 disqualifications. The problem in Texas is that it is not a  
19 predicate for disqualification. And that's where there is a  
20 more serious problem in Texas. Where a litigant has given a  
21 judge \$10,000 and the judge refuses to disqualify himself  
22 because he says this is not going to influence my opinion,  
23 now, that is something that's curable and a rule could deal  
24 with that if it was mandated that the judge had to  
25 disqualify himself having received money from the litigant

1 or a lawyer that appeared before him.

2 MR. HARRISON: In a stated amount or excess  
3 of a stated amount.

4 MR. CUMMINS: Sure, yeah. Right.

5 MR. HARRISON: And that's been suggested.  
6 Dudley.

7 MR. OLDHAM: Mark, I would point out in  
8 response to Bob's remark that in a notable case involved  
9 Penzoil three years ago, the litigant on one side had given  
10 \$10,000 to all the judges in the area. So it just depends  
11 on who --

12 MR. HARRISON: So they all disqualified  
13 themselves.

14 MR. OLDHAM: So with Bob's comments, that's  
15 the system, it's raising funds and perhaps those judges  
16 didn't even realize that they had received campaign  
17 contributions.

18 MR. GUY HARRISON: Well, in Texas you see --  
19 now you see, especially with the last cycle of elections,  
20 "issue ads or third-party ads" that will come in and attack  
21 a candidate, and not be for a specific candidate ostensibly,  
22 but attack a candidate so the ability to respond to those  
23 kinds of things really requires this money. And it's kind  
24 of a cycle of no win proposition.

25 MR. HARRISON: Guy, thank you very much for

1 giving us your thoughts. You've been helpful.

2 MR. GUY HARRISON: Thank you for the  
3 opportunity. It's very nice.

4 MR. HARRISON: Next speaker, I'd like to go a  
5 little beyond our appointed time because our next speaker is  
6 Wendall Griffen who has to be someplace else relatively  
7 soon, and I don't want to delay him. So if the Commission  
8 and Advisory Group will indulge us, we can hear  
9 Judge Griffen and then we will break for lunch. And you  
10 weren't here for the general order of the day, Judge, but if  
11 you would for the record tell us who you are and what court  
12 you sit on.

13 MR. GRIFFEN: Thank you Mr. Chairman. My  
14 name is Wendall Griffen. I am a judge on the Arkansas Court  
15 of Appeals in Little Rock, Arkansas where I have served for  
16 the past eight years. I thank the Chairman and the  
17 Commission for this indulgence, and we will try to be brief  
18 so as not to interfere with your schedule. I tried lawsuits  
19 before I went on the bench and I know that the closer you  
20 get to the jury's noontime, the less attentive the jury  
21 becomes and the more prejudice one ensues to one's case by  
22 continuing to put on testimony, no matter how compelling the  
23 lawyer may think it will be.

24 I would like the Commission to take a close  
25 look at defining the term "judge's interest" as that term is

1 used in Canon Four C 1 of the Model Judicial Code. I speak  
2 to this issue from personal experience which I will try to  
3 briefly summarize. On November 20 of last year, the  
4 Arkansas Supreme Court issued a decision in the case of  
5 Wendell Griffen versus the Arkansas Judicial Discipline and  
6 Disability Commission, a case arising out of my own  
7 situation where our court held that that provision of our  
8 Code was unconstitutionally vague because it did not define  
9 the term "judge's interest."

10 Briefly, I am a double alumnus of the  
11 University of Arkansas. In March of 2002, shortly after  
12 the somewhat public firing of the basketball coach at the  
13 University of Arkansas, a group of legislators in Arkansas held  
14 a public hearing to discuss racial inequities in higher  
15 education. As a double alumnus of the University of  
16 Arkansas and past president of the Black Alumnus Society of  
17 the University of Arkansas, I was asked by the chair of that  
18 group of legislators to appear to testify about that issue.  
19 I did so in my personal capacity, and within a short time  
20 after doing so an anonymous complaint was filed against me  
21 alleging that I had violated the code.

22 To make a long story short, the Commission  
23 initiated a proceeding against me and ultimately in November  
24 of 2002 found me in violation of the code and issued a  
25 letter of admonishment. I appealed that letter of

1 admonishment to the Arkansas Supreme Court which, as I  
2 mentioned at the outset, in November of last year overturned  
3 the letter of admonishment on the ground that the term  
4 "judge's interest" as it appears in Canon Four C 1 is  
5 unconstitutionally vague.

6                   My argument at the time of my appeal was that  
7 the term "judge's interest" encompasses those areas of  
8 interest that are otherwise described within Canon Four  
9 which, as you know, deals with extrajudicial activities.  
10 And a judge can permissibly engage in extrajudicial  
11 activities that are social, that are charitable, that are  
12 ideomotionary and that are educational. And my argument was  
13 that as long as a judge was engaged in those activities,  
14 that conduct fit within the notion of judge's interest so as  
15 to make the judge's conduct permissible under the Code.

16                   While the Court overturned my letter of -- my  
17 admonishment, the Court did not accept that argument and  
18 remanded the case -- or did not remand the case -- but asked  
19 the Arkansas Judicial Discipline and Disability Commission  
20 to come up with a definition of "judge's interest." I would  
21 respectfully ask that this body, inasmuch as it is dealing  
22 with studying the Code, might be able to be somewhat  
23 instructive to the learned members of the Arkansas Judicial  
24 Discipline and Disability Commission whose integrity I do  
25 not question but who I'm sure would benefit from whatever

1 insight you might add on the subject.

2                   And there I have said my peace as quickly as  
3 I could so as not to interfere with your lunch hour.

4                   MR. HARRISON: I'm going to depart from the  
5 normal practice and sort of pitch this ball back to you,  
6 Judge. We might benefit from what Arkansas is doing. Have  
7 they responded to the Supreme Court request and tried to  
8 draft some language?

9                   MR. GRIFFEN: To my knowledge, Mr. Chairman,  
10 no.

11                   MR. HARRISON: And I can't believe they're  
12 sitting with bated breath waiting for us to come down with  
13 the Holy Grail.

14                   MR. GRIFFEN: I do not know whether they're  
15 sitting there with bated breath or not, Mr. Chairman. I can  
16 say that, and I do not want to be viewed as disparaging  
17 towards my Commission at all, I can say that given that the  
18 Commission itself did not accept the notion that a judge's  
19 interest includes activities that are specifically permitted  
20 within Canon Four as extrajudicial activities, there is  
21 perhaps not the enthusiasm to revisit that subject as you or  
22 I might think. I hope I have been sufficiently respectful.

23                   MR. HARRISON: Well, you have and I really  
24 appreciate your very distinct education. Judge Bowie.

25                   MR. BOWIE: I was just going to ask if you

1 have some specific language that you would suggest that  
2 would go into a commentary that would define it that way,  
3 whether from your brief before the Arkansas Supreme Court or  
4 otherwise?

5 MR. GRIFFEN: Judge Bowie, in our brief  
6 before the Arkansas Supreme Court, we did not offer a  
7 suggestion. Quite honestly, we took -- like most lawyers,  
8 we were very, very concerned that a final assault on the  
9 constitutionality of Canon Four C1 would not be viewed in  
10 friendly terms by the Supreme Court that had adopted Canon  
11 Four C 1 and, therefore, like the smart lawyers we thought  
12 we were, elected not to do so.

13 When the court overturned Canon Four C 1,  
14 in toto, I was not disappointed, but I was a little bit  
15 surprised because I think the Canon Four C 1 did not  
16 require -- it could have been -- it could have been  
17 interpreted consistent with constitutional standards.

18 Let me suggest this definition. I would  
19 suggest that a definition of "judge's interest" would be  
20 that a judge's interest for purposes of the Judicial Code  
21 shall consist of conduct engaged in that is consistent with  
22 the items specified in Canon Four. As you will recall,  
23 Canon Four with regard to extrajudicial activities includes  
24 charitable, educational, philosophic and ideomotionary as  
25 well as fiduciary kind of activities.

1                   For instance, if a judge is engaged in  
2 extrajudicial conduct as a fiduciary of a charitable trust,  
3 and in the context of that conduct, for instance, he or she  
4 is a member of the Board of Directors of the local Heart  
5 Association or the local Red Cross Chapter, and in the  
6 context of that conduct appears at a legislative hearing and  
7 asks the general assembly of that state to appropriate more  
8 funds for heart research at medical schools run by the  
9 state, that would be consistent with extrajudicial  
10 activities within the meaning of Canon Four, even though it  
11 is not involving the administration of law or the  
12 administration of justice or changing the law itself.

13                   The issue that the Arkansas Supreme Court was  
14 concerned about understandably is separation of powers. And  
15 my argument to the Supreme Court was, and although it wasn't  
16 accepted, was that as long as there is no exercise in  
17 judicial power, because separation of powers argument deals  
18 with not operation of persons, but separation of powers,  
19 that there is no -- that there is no collusion of  
20 governmental power between branches of government. As long  
21 as the judicial officer does not engage in or purport to  
22 engage in the exercise of judicial power, then it is not  
23 impermissible for the judicial officer to meet with or to  
24 use the term that was used by the Commission, lobby members  
25 of a legislative or executive branch of government.

1                   Therefore, the definition I would  
2 respectfully suggest would be very general, that we define  
3 judge's interest to include any interest covered by Canon  
4 Four in which the judge does not engage in the exercise of  
5 judicial power. And to summarize, and to hopefully bring  
6 clarity to this, the commentary to Canon Four C 1 refers to  
7 Canon Two, specifically Canon 2 B. Where the example most  
8 often used is the exercise of a judge using influence if she  
9 or she gets a traffic ticket and tries to talk his or  
10 herself out of a traffic ticket by referring to the fact  
11 that they're a judicial officers.

12                   Obviously, judicial power would obviously be  
13 in play at that point in time. Obviously, the police  
14 officer is a member of the executive branch of government or  
15 agent of the executive branch of government and, therefore,  
16 you would have a collusion of powers, if not a coalition of  
17 powers, not at all the same situation as you would have in  
18 the typical lobbying situation where, for instance, if the  
19 judge was actively involved as a member of the local Heart  
20 Association and wanted to testify about heart disease, or if  
21 the judge was concerned about breast cancer and wanted to  
22 ask for more research on breast cancer.

23                   So that's my perspective on it. I don't know  
24 if I answered your question or not.

25                   MR. BOWIE: No, you did, but just as a follow

1 up, because you bring it up in terms of the Canon Two issue  
2 as the notion of the influence, is how can you ever -- I  
3 mean, where would you say the line is in terms of when you  
4 are not a judge and using the influence of your position as  
5 a judge to advance these Canon Four interests? That's one  
6 of the areas that troubled me and troubled the dissent in  
7 the Arkansas Supreme Court.

8 MR. GRIFFEN: Indeed. I do not -- and in the  
9 majority opinion in my case, I may be oversimplifying, my  
10 argument was rejected with the notion that a judge is always  
11 a judge. I believe that is a truism but that is not  
12 necessarily truth. I am not exercising judicial power when  
13 I fill out a credit card application and indicate my  
14 occupation is judge. Now, if I fill out a credit card  
15 application and do it in the context of in response to an ad  
16 that comes to me as a state employee, I have not exercised  
17 judicial power, I have simply done what any consumer can do,  
18 even though that credit card application offered to me as a  
19 state employee may be blessed by another branch of  
20 government, the general assembly as executive, for instance,  
21 as the state budget office is concerned.

22 I would draw the line this way. It is not  
23 hard at all to determine whether or not a judge is  
24 exercising judicial power. If a judge is, for instance,  
25 suggesting in a legislative interaction or executive

1 interaction that a course of conduct is or is not legal,  
2 or a course of conduct that might be controversial should be  
3 viewed in this perspective or another so as to suggest that  
4 he or she is offering a judicial opinion regarding to the  
5 propriety or impropriety of that course of conduct, then I  
6 think that is a suggestion of judicial power influence for  
7 which Canon Two would obviously be implicated.

8                   That does not however arise in the typical  
9 situation of, and use the term the Commission used, lobbying  
10 where the judge says, listen, homelessness is a problem, I'm  
11 on the Habitat for Humanity board of directors. We would  
12 like to have more funding for homelessness. And if the  
13 judge says to a legislature whether in a legislative hearing  
14 or, and Canon Four doesn't distinguish it, or in the context  
15 of a quail hunting trip the two have, because judges go  
16 quail hunting I am told, I'm not sure that that is the  
17 impermissible exercise of judicial influence.

18                   The obvious answer to that problem is  
19 recusal, which answers the problem. Where the judge is  
20 suspected of having approached or crossed the line, the time  
21 honored response to that is a suggestion of recusal by a  
22 party or voluntary recusal by the judge. Judges already do  
23 it. I mean, we're recusing and nobody knows why we do it,  
24 but to outright suggest that a judge who engages in such  
25 lobbying activity acts unethically poses a cloud over the

1 judge, and especially does so in those jurisdictions where  
2 judges are elected because ethical complaints are the new  
3 stalking horse for judges.

4                   They can be done anonymously. If filed  
5 anonymously, in most cases, they must be investigated. When  
6 investigated, if allegations are brought forth and if  
7 charges are brought and if sanctions ensue, those sanctions  
8 become public and a judge must then run the risk of facing  
9 those sanctions any time he or she runs for office.

10                   I'm currently in a race for Chief Justice  
11 State Supreme Court. Had my case turned out differently, I  
12 can be assured that the letter of admonishment that I  
13 received as a result of an anonymous complaint about  
14 testifying about inequities in higher education at a school  
15 that I have degrees from, my wife has two degrees from, and  
16 my sister has a degree from, would be top conversation. It  
17 would in many circles deem me unelectable.

18                   MR. HARRISON: Jan and then Jim.

19                   MR. BARAN: Well, maybe I will turn my  
20 question which I think is more into a commentary is that one  
21 of the things that we struggle with in the Code is not only  
22 the reality of impropriety but the appearance. And this  
23 seems to be yet another area where there may be a debate  
24 over the appearance of impropriety. And it's not so much  
25 whether it's impropriety or rather the conduct of a judge

1 that casts a cloud not necessarily over the judge but a  
2 cloud over the integrity and independence and impartiality  
3 of the judiciary itself.

4                   And I just wanted to point out that this is a  
5 consistent problem that I perceive in the Code in general  
6 and leads to these types of controversies I would suggest.

7                   MR. HARRISON: Jim.

8                   MR. ALFINI: Seems to me, Justice Griffen,  
9 one of the problems with this Canon, and I've always thought  
10 this is a problem, is that it starts with a negative, you  
11 may not, and then offer some exception. Wouldn't it be  
12 preferable to have it drafted saying that you may testify as  
13 long as, and then maybe parallel the campaign speech  
14 provisions as long as you don't make pledges and promises of  
15 conduct in office or commit yourself on issues that may come  
16 before you as a judge. Would you find that acceptable? It  
17 seems to me that would be more consistent when the spirit of  
18 the Code?

19                   MR. GRIFFEN: I think it would be both more  
20 acceptable and more workable both from an enforcement  
21 perspective and also from a compliance perspective. For  
22 instance, if the idea is to have -- to encourage judges to  
23 be full-bodied citizens engaged in the affairs of society to  
24 the extent that we do not encumber our ability to function  
25 impartially or raise the appearance of impropriety, and if

1 the idea of an independent judiciary includes the notion of  
2 a judiciary that is both accessible and accountable, it is  
3 easier for a member of the judiciary to account for his or  
4 her conduct if we know what is permitted at the first  
5 instance rather than to presume that otherwise permissible  
6 conduct is impermissible under circumstances that are, to  
7 put it mildly, less than clear.

8 MR. HARRISON: Carol.

9 MS. AMON: Judge, two of the examples that  
10 you use which is going before a legislature and lobbying for  
11 funds for whatever entity that you thought was worthwhile,  
12 be it breast cancer or Habitat for Humanity. And this, I  
13 think, gets back a little bit to the question public burden,  
14 private person. There is a provision of the Code that says  
15 judges cannot actively participate in soliciting funds on  
16 behalf of an entity. How do you see one is acceptable and  
17 one is not acceptable?

18 Aren't you really lobbying for funds in the  
19 two examples you gave on behalf of an organization, and  
20 isn't it your public person that people are perceiving doing  
21 that? How would you distinguish that you can't raise funds  
22 for an organization but you think it would be permissible to  
23 lobby for funds for an organization?

24 MR. GRIFFEN: Two things would come to mind.  
25 Obviously, the judge shouldn't have his or her name out for

1 a fund raiser for the heart fund, thereby suggesting that  
2 individual citizens would somehow incur his or her favor or  
3 disfavor to the extent that they did or did not contribute  
4 to the cause the judge believed in, or was opposed to for  
5 that matter. Where, on the other hand, the judge is engaged  
6 in the permissible activities mentioned in Canon Four, and I  
7 don't want to be redundant but I repeat myself  
8 intentionally, Canon Four specifically allows judges to  
9 engage in educational and philosophical and philanthropic  
10 and charitable kind of activities.

11 MS. AMON: But not to raise funds for them?

12 MR. GRIFFEN: But not to raise funds for  
13 them. But if the judge was, for instance, appearing before  
14 the legislature, and in the context of appearing before the  
15 legislature and saying to the legislature, we have a need,  
16 this area, homelessness, breast cancer research is not  
17 adequately studied, we need more money to study it. It is  
18 not the exercise of judicial authority in that situation, it  
19 is not a violation of the code in that situation. We're not  
20 trying to use personal influence in that situation.

21 Now, perhaps I used a poor example, but I do  
22 believe that again the question of impropriety or the  
23 appearance of impropriety can be answered in this way. That  
24 is really not much different from the judge going before the  
25 legislature and saying, I want you to give money for a study

1 to have more diversity in legal education at the law school  
2 if the judge is a member of the Law Board of Visitors, and  
3 does it make a difference that we're talking about the law  
4 school where the judge is a member of the Board of Visitors  
5 as opposed to the medical school where the judge is simply a  
6 member of the heart association or involved in the Susan B.  
7 Komen Foundation.

8 MR. HARRISON: Bob and then Seth.

9 MR. TEMBECKJIAN: Judge Griffen, I am the  
10 administrator of the New York Commission on Judicial  
11 Conduct. And I have to tell you, which may not be much of a  
12 consolation since you're in Arkansas, but most of us in the  
13 field outside of Arkansas never really understood what the  
14 big deal was in your case. And in the meeting that our  
15 association of counsel from around the country have every  
16 year last year, we are trying to figure out what sub-rosa  
17 was really going on here because, as a practical matter,  
18 whether or not the Arkansas Supreme Court ultimately  
19 declared Four C 1 to be unconstitutional or vague, you were  
20 speaking at the behest of a legislative invitation on a  
21 subject that arguably was dealing with the law and the legal  
22 system and was not pending before you or otherwise creating  
23 some conflict that would have made it inappropriate for you  
24 to attend.

25 You may not know what was going on beneath

1 the surface but, as I recall, the Arkansas Commission votes  
2 four to three, is there something that is not visible on the  
3 surface that would actually explain what happened in this  
4 case because to most of us in the field, as I said, it just  
5 didn't make any sense. It's certainly not a case that we  
6 would have brought in New York.

7                   So other than the geography, geographical  
8 accident of your being in Arkansas and my being in New York,  
9 is there some other issue, explanation, something that would  
10 give us some insight as to why this happened because it just  
11 doesn't make sense?

12                   MR. CUMMINS: Let the record reflect that the  
13 witness's demeanor has answered the question.

14                   MR. ROSNER: I'll second that.

15                   MR. ALFINI: And that a response might  
16 compromise his current situation.

17                   MR. OLDHAM: It's apparent to University of  
18 Texas alumnus that the two questioners both have red and  
19 black ties on so they're affiliated.

20                   MR. HARRISON: Very good.

21                   MR. ROSNER: My question actually tracks  
22 Bob's last question, Judge. And that is in the course of  
23 preparing your matter for the Supreme Court, did you come  
24 across any other case that raised this issue?

25                   MR. GRIFFEN: No. As you know, the only

1 other -- the commentary to the Alaska Judicial Code perhaps  
2 provides the most instructive assistance on how one should  
3 interpret the meaning of judge's interest. And the Alaska  
4 Judicial Code simply in its commentary says that the judge's  
5 interest should be construed liberally. We argued that both  
6 before the Arkansas Judicial Discipline Commission and  
7 before the Arkansas Supreme Court. The Judicial Discipline  
8 Commission did not find argument persuasive. The Supreme  
9 Court, while deciding the case in my favor, did not cite to  
10 the commentary in the Alaska Code. And so I really don't  
11 know that most other jurisdictions have taken a cut on this  
12 issue.

13 I am afraid, however, that it is an issue  
14 that most people never would have thought about. I will, at  
15 the risk of violating the immunity I have been graciously  
16 given in the last few minutes, I will say that I was perhaps  
17 not shocked because, as I told someone in Arkansas, I've  
18 been black too long, but I -- I was not -- I was really  
19 somewhat taken aback that the complaint would be taken  
20 seriously. Some several tens of thousand dollars later I  
21 can tell you it was quite serious.

22 MR. HARRISON: Tom. And then I think we need  
23 to let -- I think you have some place else to go, although  
24 I've got a question for you.

25 MR. FITZPATRICK: Well, I kind of want to

1 follow up where Judge Amon left off. I think your structure  
2 that you gave us of whether or not you are exercising  
3 judicial power is helpful and insightful, but I guess I have  
4 a hard time seeing exactly even where you draw the line, for  
5 instance, that you can go advocate for Habitat on Humanity  
6 but you can't ask money. I don't understand why not.

7                   For instance, let's say you are a drug court  
8 judge. You perceive a need for treatment centers in the  
9 community. A group gets together that you work with and  
10 wants to go out and raise funds for a drug rehab facility.  
11 Why should you not be able to ask for funds for that? And  
12 more so, the specific question, I mean, one of the things  
13 that we're trying to keep in mind is the changing nature of  
14 the judiciary with a lot of specialized courts and more  
15 direct involvement in the community. So, I mean, I guess I  
16 fail see why you are still holding on to that the judge, you  
17 know, can't go out and directly solicit money.

18                   MR. GRIFFEN: Well, as I understand it, and I  
19 think that it is not only a credible but a valid concern, to  
20 the extent that judges are actively engaged in the private  
21 solicitation of monies, that raises the appearance of  
22 impropriety because someone may feel that there is an uneven  
23 power of relationship. The judge, as judge, may be viewed  
24 as more powerful, too powerful to say no to, or that the  
25 person who comes before the judge having given money might

1 belief that he or she has somehow carried favor with the  
2 judge by the act of making contribution toward a cause that  
3 the judge feels strongly about.

4                   I again think that the answer to that  
5 question is in recusal. I think that that answers the  
6 question about the ethics of the judge in that specific  
7 instance. It does not particularly answer the question  
8 raised earlier about whether or not how it affects the  
9 appearance of impropriety to the judiciary as a whole. I do  
10 not think you have a separation of powers problem there, but  
11 I am not at all interested to the concern that we need to  
12 protect the appearance of impropriety from the judiciary.

13                   I would suggest, however, that it is possible  
14 for us in the interest of trying to protect the appearance  
15 of impropriety for us to be guilty of creating -- guilty of  
16 overinclusiveness. And I am not sure how consistent with  
17 the First Amendment judges who, as I argued are not beyond  
18 the protection of the First Amendment, how judges would ever  
19 know when we have somehow violated the appearance of  
20 impropriety by asking people in the executive or legislative  
21 branches to support initiatives in our personal capacity  
22 which do not involve the exercise of judicial power.

23                   I am not sure we would know that. And I  
24 don't know how, if you've constructed a rule prohibiting us  
25 from doing that, you can do so without being guilty of the

1 kind of conduct that the Arkansas Supreme Court found  
2 unconstitutional in my case.

3 MR. HARRISON: Judge Griffen, thank you very,  
4 very much. This has been a very stimulating and interesting  
5 segment of our meeting. And I really appreciate your  
6 articulate exposition of your position.

7 MR. GRIFFEN: Mr. Chairman, I thank you very  
8 much for the Committee's indulgence. I thank you for  
9 allowing me to appear before you on such short notice. And  
10 I pray that I have not prejudiced my cause by intruding into  
11 your lunch hour.

12 MR. HARRISON: And on that, we are going to  
13 break for lunch. And since we were originally scheduled to  
14 break at noon and come back at 1:30. What do you think?  
15 Should I extend the lunch hour to 1:40 or come back at  
16 1:30? Okay. 1:30.

17 (Lunch break was had at 12:25-1:40 p.m.)

18 MR. HARRISON: I think we better reconvene.  
19 My program indicates we have the opportunity to hear from  
20 Judge Lamar McCorkle. Do we have a sign?

21 MR. McCORKLE: Oh, I don't need a sign.  
22 Believe me.

23 MR. HARRISON: It's for us.

24 MR. McCORKLE: And Lamar will do just fine.  
25 It's five letters.

1 MR. HARRISON: Thanks, Harriet. Now I know  
2 who you are.

3 MR. TEMBECKJIAN: Oh, you're that Lamar  
4 McCorkle.

5 MR. ALFINI: He's going to be my -- so may I  
6 introduce him?

7 MR. HARRISON: I'd be delighted to have you  
8 introduce him.

9 MR. ALFINI: The first thing you need to know  
10 about Judge McCorkle is he is a graduate of the South Texas  
11 College of Law.

12 MR. HARRISON: Your presence notwithstanding,  
13 we shouldn't hold that against him.

14 MR. ALFINI: And he also, I think, by  
15 everyone's thinking here is really sort of the expert on  
16 judicial ethics here in Texas. He sits on the District  
17 Court bench in Houston and he regularly organizes this  
18 program for the judiciary, and he is responsible largely --  
19 well, you want to tell them -- tell them a little bit about  
20 the book that you've just put together.

21 MR. McCORKLE: Well, the book that I've been  
22 working on and was sort of a concept came out of some  
23 judicial training that was done out of Reno, but it is an  
24 annotated volume of the Canons which incorporates the  
25 Canons, all ethic opinions that have ever been done in

1 Texas. It incorporates all public and private sanctions  
2 that the Commission has done since '99. It incorporates all  
3 public statements that the Commission has. It incorporates  
4 the only place in the whole historical record for how the  
5 Canons came about in Texas in one place. It can take a  
6 remarkable challenge to get it together.

7                   And it now includes the ABA Model Code and  
8 Commentary as an option at the back so that people can  
9 compare and contrast. It should be put out as a volume.  
10 The volume keeps growing. It's about 150 plus pages long  
11 and it should be published in September and also on disc in  
12 September for just the judges in the state. It will be  
13 loaded on our Judicial Texas Center for the Judiciary's web  
14 site with protected access for judges to do research.

15                   And I need to disclose to you also that I  
16 talked to Cindy Gray about this several years ago. I said,  
17 this is something I'd really like to do. Would you like to  
18 be a part of it? And, of course, she never says no to  
19 anything. Sometimes she will say, let me think about it.  
20 But she is going to be one of the editors as a participant  
21 in this as well, as well as some other folks, and it will be  
22 used as a teaching tool.

23                   We have for the judges in the state -- let me  
24 just start by saying, I am not here in my own right. I am  
25 here as a representative of the Texas Center for the

1 Judiciary. You invited Mary Kay Bickett who is in Lubbock  
2 today doing a program. And she called and she said, can you  
3 be in San Antonio? I said, well, I'm in San Antonio doing  
4 something across the street. She said, would you please  
5 represent us? And Molly Francis, who is the chair of the  
6 Judicial Section for the State called and said, Lamar, can  
7 you represent? So I represent two people.

8                   And as I understand it, what I first should  
9 say is as the Texas Center for the Judiciary, we probably  
10 don't have an opinion as to the Model Code. I will tell you  
11 that what we do with that Code and what we do with our Code  
12 is we start teaching that issue and those issues to our  
13 judges and our New Judges College, which is a week-long  
14 course. Every one of our regional and annual programs  
15 usually has an ethics component to it. And we have been  
16 have proactive. The education that we're trying to give at  
17 all levels has increased remarkably over the last 10 to 15  
18 years.

19                   As a judicial section, without being able to  
20 pole all the judges as to their opinions as to the Model  
21 Code, we offer you no opinion as to the merits of this  
22 potential modification. So that is what Justice Francis  
23 would have said if she were here other than to say that  
24 we're working very hard to make sure that the judges of the  
25 state both knowledgable in following the provisions of the

1 Texas Code. And we would take any guidance from you all in  
2 the issues and the work that you're doing and not just for  
3 Texas but for the United States. So that would be  
4 essentially my offer. Now, the question that was about to  
5 be asked about the Code or what we're doing in Texas.

6 MR. ALFINI: Well, given your experience --

7 MR. McCORKLE: And I decline to be the  
8 expert, sir, with you sitting in the room.

9 MR. ALFINI: No. But you have had experience  
10 with the Code and we would be interested, I think, to any  
11 holes that you might see in the current code, any  
12 suggestions you might have for --

13 MR. McCORKLE: Well, I, in working with the  
14 Commission and in doing several things and also sometimes  
15 helping other judges with issues, I think there is some  
16 tensions that you-all are probably aware of, especially  
17 those of you who are judges, and everyone else here has  
18 heard them, were asked to be aspirational in our lifestyles  
19 and to be a direction as to our personal and professional  
20 life, yet we're asked not to go to the monastery with our  
21 lifestyle.

22 And there is a tension there, especially in  
23 an elective state, which is what Texas is, as to how we  
24 accomplish all those things, particularly, Canons Four and  
25 Five dealing with our community activities and what we can

1 do or can't do and what we should do or we shouldn't do.  
2 There are a lot of worthy causes out there, some of which  
3 are supported by the Bar, some of which technically should  
4 be supported by the judiciary. And I'll address that first.  
5 And this is not the center and it's not the section. It's  
6 just issues that we face.

7                   Anecdotally, I will never forget listening to  
8 the wife of a federal judge at a church raffle,  
9 organizational function say, I don't understand these new  
10 young judges we're getting. As soon as they become judges,  
11 they refuse to do anything for us or with us, fund raise and  
12 things of this nature. And here is a person that arguably  
13 should be very well aware of what we can or cannot do. So  
14 the newly elected judge -- and our average tenure right now  
15 in the state of Texas is eight years for a trial judge and  
16 nine years for an appellate judge. So it takes, according  
17 to the National Center, I think somewhere between six and  
18 eight years to train a judge.

19                   So they're moving from one aspect of a very  
20 active personal lifestyle to all of a sudden be faced with  
21 these Canons and people ask them to be celebrity waiters or  
22 they ask them to be models or they ask them to be hosts or  
23 they ask them to be advisory of hosts or advisory board  
24 members. And even though we think sometimes that the Code  
25 is specific as to what we can and cannot do, we are all

1 trained as lawyers. And in law school we are trained to see  
2 what the rule is and then find the exception. And if it  
3 isn't exactly what the rule is, it's certainly not a  
4 violation.

5                   And so taking C. S. Lewis's comment but out  
6 of mere Christianity, I know what the traffic speed is  
7 coming to San Antonio; however, everyone else is traveling  
8 85, the semi is going to run me over if I travel 65. And  
9 it's the community expectation that I should be able to do  
10 this. And I begin justifying and rationalizing to  
11 accomplish what it is that I want to do or what someone else  
12 wants me to do.

13                   So I think there needs to be some clarity  
14 there. Either allow us to be actively involved in the  
15 community, or be more specific as to what you choose to  
16 suggest that we not be involved in the community. I think I  
17 know the answers, but I'm not confident that everybody does.  
18 And I think that that's an area that is fraught with  
19 problems for people because they want to accomplish  
20 something good, it's well intentioned, but then they well  
21 intentionally step into something that wasn't intended for  
22 them, i.e., a violation.

23                   As far as Minnesota versus White, none of us  
24 really know the end result of that, but the -- I think the  
25 perception in the public is that judges can talk about

1 anything now and they can talk about anything at any time.  
2 The way that they respond in papers is that, we can now  
3 state our opinions. And I think if you read the opinion,  
4 it's a little bit more narrowly drawn than that. And maybe  
5 if you even take it to the level of saying, well, no, no,  
6 Lamar, you missed it, it's only during the campaign that you  
7 can talk about anything, because that's again what the  
8 newspapers say, I think there needs to be some guidance in  
9 those areas because this whole area, especially when you get  
10 involved in elections is going to be difficult and probably  
11 already is for some people.

12 Those would be two specific areas that need  
13 some further work perhaps, at least, from the experiences  
14 that some people have. And maybe you've already heard that.

15 MR. ALFINI: Can I ask him a question? Texas  
16 was the first state to really respond to the White decision  
17 and do a rewrite of Canon Five. How is that working?

18 MR. McCORKLE: Well, we will know during this  
19 election cycle. And we are in our first election cycle now.  
20 So you also are aware that Texas is rewriting or proposing  
21 to look at our Canons and has a committee doing that. I am  
22 an advisory member to that committee, along with Seana  
23 Willing who is at the end of the table. I don't have an  
24 answer for you. I think there is a dearth of information,  
25 there is a dearth of actual sign posts along the road as to

1 where the gray ends and the black begins, or the white where  
2 it's all okay. I mean, there is a gray area out there.

3                   And as you well are aware, we are trying to  
4 educate on that issue during our regional programs and the  
5 judges just aren't clear as to what they can do and what  
6 they can't do. I will tell you from a pragmatic point of  
7 view, I think the conclusion is from some people is take the  
8 high road. And then there are some other people that say,  
9 it does you no good to take the high road, get elected and  
10 then ask permission for have violated the rule because by  
11 the time that the State Bar has acted on the person that is  
12 violating it, it might not be the judge, it will be for not  
13 because it will be six months or a year from now. And so,  
14 therefore, it's better to fight fire with fire and worry  
15 about getting hurt a little while later.

16                   There is one other issue, too, that might  
17 need to be addressed, and that is, at least, in Texas we  
18 have no statute of limitation. Now, that has some benefit  
19 and some detriment, but whether -- maybe there should be  
20 some limitation as to what the unlimited exposure might be  
21 as to whether it was an intentional act versus something --  
22 because time only does not enhance the quality of the  
23 exercise that any Commission is going to go through because  
24 the lack of witnesses and memories and that sort of thing.  
25 Yes, sir.

1                   MR. HARRISON: Given the fact that Texas is a  
2 state which elects judges, we heard from Guy Harrison  
3 earlier today anecdotally about things which most of us have  
4 read about regarding the solicitation of funds. And I  
5 wondered if you have any thoughts about what might be done  
6 in the Code even in the context of an elective state to  
7 inhibit or control or govern that in any given way.

8                   MR. McCORKLE: It's kind of like a Minnesota  
9 versus White issue, if you read that opinion, I guess, how  
10 can we preclude people from raising funds when it's the  
11 funds that they need to have to do the publicity to get  
12 their message out? I mean, there are certain things that --  
13 I always took the position I didn't want to know who gave me  
14 money. That was when I first started out. So I had a  
15 committee do it and I blindly signed whatever it was that I  
16 had to send into the State, I didn't really care. I trusted  
17 the people who were with me.

18                   We are now in a different generation with all  
19 kinds of limitations as to who gives how much money and  
20 making sure that that person isn't related to this person,  
21 isn't related to that law firm. So I know must begin  
22 looking at those forms to ascertain because the penalty is  
23 going to be on me if something happens. And so now all of a  
24 sudden, I'm aware of who is giving money, and I prefer not  
25 to do that. I don't know what you could do necessarily in

1 the Code.

2 MR. HARRISON: I mean, it has been suggested,  
3 among other things, that -- a couple of things. One  
4 suggestion that came out earlier today was you preclude any  
5 form of direct or indirect solicitation on the premise of  
6 the court.

7 MR. McCORKLE: Oh, I'm assuming that that's  
8 already given, I'm sorry, I made a mistake. I assumed that  
9 that was already assumed. It's better not to meet someone,  
10 hey, Robert, it's good to see you at the hearing today and,  
11 by the way, did you bring the campaign contribution.

12 MR. HARRISON: Well, we resolved that.

13 MR. TEMBECKJIAN: The wheelbarrow is outside.

14 MR. McCORKLE: Is it? Thank you so much.  
15 It isn't a personal experience in my life. Well over a  
16 decade ago, I would say that there were some experiences  
17 where people would receive that. Having been one of those  
18 who did receive a call saying, gosh, we know that you  
19 received a ticket numbered blank and blank for so and so's  
20 fund raiser, and I'm certain the check is in the mail, and I  
21 know you're probably coming, but we wanted to let you know  
22 we hadn't gotten the check yet. So we wanted to let you  
23 know in case you were worried it was lost in the mail, some  
24 words to that effect. It was an awkward call when it came  
25 and it's not a policy I try to instill in any of my

1 campaigns.

2 MR. HARRISON: What about a proposal that  
3 called for recusal from any case in which a litigant or  
4 counsel gave the judge more than a stated amount, \$500, for  
5 instance?

6 MR. McCORKLE: Well, hypothetically speaking,  
7 \$500 seems like an awful lot of money in a lot of places.  
8 Campaigns that are run in Harris County for district judge  
9 which pays about, I guess, pays \$125,000 now, have been  
10 waged at the level of \$600,000. So a \$500 campaign  
11 contribution would recuse you from an awful lot of cases.

12 MR. HARRISON: Speak to it nonetheless. So  
13 it would recuse you from a lot of cases. I mean, how would  
14 that impact the system? Would people just quit giving  
15 money?

16 MR. McCORKLE: They would find other ways to  
17 get the message out which would probably be around the  
18 rules. The judges wouldn't necessarily do it. Of course,  
19 the lawyers on their own would create other ways of making  
20 sure that the judge's message got out for the judge, I'm  
21 sure, which the judge would have no accountability  
22 whatsoever.

23 MR. FITZPATRICK: Is it workable at all, that  
24 sort of proposal in rural areas where there is not a lot of  
25 judges readily available if there is a recusal?

1                   MR. McCORKLE: Well, in rural areas, they  
2 have a different style of campaigning, at least in Texas.  
3 They're not as expensive. You have a much smaller pool.  
4 In Harris County there are 17,000 lawyers. In some counties  
5 there is less than 50, less than ten. The lawyers know the  
6 judge, the judge knows the lawyers, which raises another  
7 issue regarding the social relationships with the parties.

8                   I don't think you're going to need the \$500  
9 rule in those areas. I could be wrong. I have not heard  
10 anyone justify or be concerned about a \$500 rule in a  
11 nonurban area. And in an urban area, a \$500 rule is not a  
12 significant -- is not an issue. I mean, I don't know how  
13 that would be solved.

14                  MR. TEMBECKJIAN: What about the flip side of  
15 problem which is the potential for form shopping, that if  
16 there's a judge that you don't want to appear before, you  
17 contribute \$600 to that person's campaign and you're in the  
18 anomalous situation of hoping to elect someone that you  
19 don't think is good enough to appear before.

20                  MR. McCORKLE: But there are -- there have  
21 been, and I don't remember which year it was, but we had  
22 this sort of a discussion where you could create recusal  
23 intentionally without the judge ever being aware that that's  
24 what was going on until it was too late, so you begin a  
25 reverse form shopping, that's correct. That is certainly

1 something we discussed, and I don't remember which year it  
2 was, but we did discuss that issue.

3 Thank you for bringing up something. My mind  
4 is -- I was up yesterday at 4:00 to get to Midland and back  
5 and back up again this morning at 4:00 to get here, so I may  
6 forget a few details.

7 MR. HARRISON: Jan.

8 MR. BARAN: What is the contribution limit  
9 here in Texas?

10 MR. McCORKLE: For some run, I want to think  
11 it's maybe like \$30,000 a firm.

12 MS. WILLING: It depends on the size of the  
13 population of the county.

14 MR. McCORKLE: Size of the community. Yeah,  
15 I think for Harris County and the large urban areas it may  
16 be \$30,000 per firm aggregate, but I don't really remember.

17 MR. BARAN: How much per individual? Is  
18 there limits on individual?

19 MS. WILLING: I could break it down for him.  
20 It's like \$1,000 and then there's a firm.

21 MR. McCORKLE: Is it \$1,000 a person? I just  
22 really don't remember.

23 MR. BARAN: So the smaller firm is at a  
24 disadvantage?

25 MS. WILLING: You think it's more? It really

1 does depend on the size of the county. There are 250  
2 counties in Texas.

3 MR. McCORKLE: And when you start looking at  
4 fund raisers and you look at the people, the stratified  
5 layers, a \$5,000 contribution is the standard in some levels  
6 and ten is not uncommon.

7 MR. HARRISON: You indicated that when you  
8 first started, you scrupulously avoided looking at the list,  
9 but now in light of changed circumstances, you look at it  
10 carefully. What circumstances changed that now prompt you  
11 to look at the list carefully to see who has contributed and  
12 how much?

13 MR. McCORKLE: The state legislature, in  
14 trying to resolve campaign issues, recrafted some of the  
15 legislation dealing with other elected officers and included  
16 the judiciary in that. And so, therefore, I would say it  
17 has just become more complex when you want to make sure that  
18 these people aren't affiliated with these people and that  
19 all these forms are filled out properly. And you can get a  
20 campaign manager to do it, but ultimately it's you who is  
21 going to be sanctioned for it.

22 And would do have some positive things. We  
23 have to swear that we're going to comply with the proper  
24 fund raising level; otherwise, we have to have an affirmative  
25 statement that we're not complying with the fund raising

1 ground rules. And it has some positive language that makes  
2 you sound all not that good if you don't comply with it, and  
3 you have to make that election at the beginning of the  
4 campaign. But in the issue of fund raising in the urban  
5 areas is the expense of it, when you've got to go to radio  
6 or TV to reach the audiences. And to do that, you've got to  
7 have a minimum of \$100,000 to go into a campaign.

8 MR. HARRISON: Questions?

9 MR. WYNN: Well, you've got \$600,000 which is  
10 a whole lot more than you raise in North Carolina under the  
11 statewide election.

12 MR. McCORKLE: No, this is \$300 aside, it's  
13 \$350 a side or something like that.

14 MR. WYNN: And so you can do some pretty neat  
15 things with it. In light of Minnesota versus White, are you  
16 going to anticipate or have you seen a change in the type of  
17 advertising that results?

18 MR. McCORKLE: It's too new. We had one  
19 candidate who ran for the Supreme Court who sued over this  
20 proceeding over Texas's rule. He's running again this year,  
21 but I haven't seen any ads. I don't think anybody has seen  
22 anything that -- this will be the first election where it is  
23 really open field. And I would think that the judges who  
24 are sitting would be more tentative in processing it, but  
25 I'm not sure that the candidates will be, the nonjudges, I

1 have no idea what to expect. And I think, again, it varies  
2 dependent upon urban versus nonurban areas.

3 MR. WYNN: Is there any limitation on a third  
4 party or a duty that a judge has so far as third party and  
5 that sort of stuff?

6 MR. McCORKLE: This is that change in the  
7 legislative enactment, which I have never had to deal with,  
8 but it seems to me that if I'm aware and were collaborating  
9 in some way, I begin to understand what your finances are.  
10 But if some third party is out there just delivering a  
11 message that I have no control over, I'm not sure that I  
12 have control over that issue or am I supposed to be  
13 knowledgeable about it. Again, this is what's going on in  
14 Washington at another level.

15 MR. TEMBECKJIAN: Is there a disclosure  
16 requirement or practice in Texas with regard to judges who  
17 are presiding over cases in which the lawyers or the parties  
18 have contributed to the campaign?

19 MR. McCORKLE: I don't know that there's a  
20 requirement. I think it's a good policy to disclose if you  
21 know. I just assume what I would do is just leave the  
22 campaign contribution list on the clerk's desk if somebody  
23 wants to look at it because it's public record anyway. It's  
24 just a matter of accessing it on line if someone wants to  
25 because it's all on line, and it's all over the County

1 Clerk's seat which is right across the door.

2                   So I think you should disclose so that people  
3 are aware of it, but if you're running a grassroots  
4 campaign, everybody is going to be contributing at some  
5 level anyway, so --

6                   MR. HARRISON: Additional questions? Judge,  
7 thank you very much.

8                   MR. McCORKLE: Well, I'm sorry if I haven't  
9 been as clear on some issues, but if there is anything I can  
10 do to help, please don't hesitate to call.

11                   MR. HARRISON: Thank you very much.

12                   MR. McCORKLE: Thank you very much for your  
13 time. And thank you for your working effort. This is not  
14 easy.

15                   MR. HARRISON: We are discovering that.

16

17                   (Speakers Concluded at 2:05 p.m.)

18

19

20

21

22

23

24

25

1 STATE OF TEXAS )

2

3 COUNTY OF BEXAR)

4

5

6 I, BARBARA DURAND-HOLLIS, Certified Shorthand  
7 Reporter, in and for the State of Texas, do hereby certify  
8 that the above and foregoing pages contain and constitute a  
9 true and correct transcription of all portions of speakers  
10 and other proceedings to be included in this volume of the  
11 Committee Meeting of the American Bar Association, Annual  
12 Midyear Conference, Model Code of Judicial Conduct, and were  
13 reported by me.

14

15

16 TO WHICH I CERTIFY on this, the 25th day  
17 of February, 2004.

18

19

20 BARBARA DURAND-HOLLIS, CSR, RPR  
21 Notary Public - Expires 8-12-06  
The State of Texas

22

23 CSR No. 2349 - Expires 12-31-05  
RPR No. 020068 - Expires 12-31-04

24

25

All American RealTime/Captioning Services, Inc.  
888-306-ARTS