1 He did everyone a favor because while
2 driving to work one morning, he saw someone driving
3 erratically, and when the policeman came up to stop
4 the person driving erratically, Judge McMillen
5 pulled his car over, stopped, volunteered that he
6 had been a witness and this was one of the worst
7 things he had ever seen, smelled alcohol on the
8 man's breath.
9 Questionable whether the judge should
10 have injected himself at this point, but the next
11 morning, Judge McMillen got to court early and he
12 looked at the first appearance calendar to find out
13 which judge was going to have the first appearance
14 on the probable cause or the bond hearing for this
15 particular fella. He called that judge and he said,
16 You know what? I'm not doing anything this morning.
17 Why don't you let me handle that first appearance?
18 That took Judge McMillen out of the
19 picture because he got booted even though he had
20 some fairly egregious election charges against him.
21 He got the boot for that.
22 So that left us with a case involving
23 Judge Kinsey who was also a county court judge.
24 This is interesting. We have had a lot of county

1 court cases in Florida.
2 In Florida, a county court judge has
3 jurisdiction in civil cases, I think it's up to
4 $25,000. Recently, it was $5,000. In the criminal
5 cases, the jurisdiction ends at things like petty
6 theft, misdemeanor possession of marijuana, things
7 like that. This is where all the action seems to be
8 in the lock-them-up type of campaigns.
9 Both Pat Kinsey and her opponent have
10 been long standing friends of mine. I watched this
11 with a little bit of interest. They're both from my
12 hometown and both decent people as far as I knew.
13 Judge Kinsey, while all this other
14 litigation had been going on, ran in 1998 against an
15 incumbent in the county court race in Pensacola, and
16 she used a lot of print media. Not a lot of
17 electronic media, not a lot of billboards, but a lot
18 of print media which is effective because she can do
19 a lot of mass mailings in a one-county election.
20 She did that and her highlighted
21 brochures, which were very well done, a lot of good
22 pictures and quotes and things like that. She made
23 several statements. I'll just read a few of them to
24 you because the statements are not as important as

1 to how the Florida Supreme Court dealt with them.
2 She first said that she would take police
3 testimony seriously and help put criminals back
4 behind bars where they belong.
5 She would support the hard working law
6 enforcement officers by putting criminals back
7 behind bars where they belong.
8 She said that -- well, she printed up a
9 brochure that showed Pat, who is a woman, dressed in
10 business attire. She was an assistant state
11 attorney. She brought ten members of Tampa's
12 Tactical Weapons Unit up to Pensacola to pose in a
13 commercial with her.
14 You know, they have the black on, with
15 the combat boots and the semiautomatic weapons
16 holstered. She brought these fellas up and they
17 were actually special weapons officers.
18 She had a picture taken in front of them
19 and then stated in the brochure that she was the
20 unanimous choice of law enforcement, not 99 percent,
21 the unanimous choice of law enforcement. She was
22 the only candidate that would stand up for victims'
23 rights because victims have a right to expect
24 judgments to protect them by the (inaudible).

1 No mention at any point in her campaign
2 of what the of pretrial detention is in our state or
3 any other state, but denying bond to potentially
4 dangerous -- I'm not to go any further than that.
5 Suffice it to say, there were half a
6 dozen or more violations of our Canon 7, false and
7 misleading commitments and pledges and promises.
8 She was charged with all of the big three there.
9 Florida Supreme Court, in that case,
10 discussed White and acknowledged White and took the
11 US Supreme Court at its word as Roy did in his brief
12 for the Conference of Chief Justices and said, We
13 don't have an announce clause in Florida and we
14 believe, we the Florida Supreme Court, by a vote of
15 five to two believe that the pledge, promise and
16 commit clause are, in fact, more narrowly tailored
17 than the announce clause and that they do not
18 offend, first, the First Amendment, presumably even
19 under strict scrutiny.
20 It had to be strict scrutiny because it
21 wouldn't have been narrowly tailored if it hadn't
22 been strict scrutiny because narrowly tailored
23 (inaudible) is strict scrutiny.
24 As you know, generally, strict scrutiny

1 is the death knell for a public defender in a First
2 Amendment challenge, but I was not in this case.
3 Now, the Florida Supreme Court has been
4 steadfast. It is a very diverse group in terms of
5 their politics, but they have been steadfast in
6 pending cases.
7 As recently as just a few months ago,
8 they resolved a case involving partisan campaigning
9 by an incumbent judge and resolved after he was
10 thrown out of federal court on the abstention
11 doctrine, which by the way, is always your first
12 defense if any state proceedings are pending, even
13 at the commission level. Many federal courts are
14 going to apply this.
15 The younger abstention doctrine tossed it
16 back to the state Supreme Court. That happened and
17 that judge was then censured as a result of partisan
18 political campaigning.
19 The last thing I will mention is this.
20 This is one of those points we have, it is kind of
21 seepage over into the nonpolitical.
22 We have a case pending now involving a
23 trial judge whose name is Judge Todd. I don't know
24 Judge Todd, but Judge Todd had an issue with -- I

1 guess he didn't have enough to do on the bench and
2 he was stopping and talking almost always to female
3 deputy sheriffs and female deputy clerks.
4 He would talk to them about things like
5 their propensity to have children out of wedlock and
6 their propensity to raise, what they termed as
7 bastards, and passing around ultrasound photographs
8 about these little bastards, saying we didn't need
9 to take care of them in society. He went on and on
10 and on.
11 He proceeded against (inaudible)
12 affirmative defenses, which I have here. It raises
13 what? Free speech, free exercise of religion,
14 because he has no compelling interest to restrict
15 his speech even in the courthouse off the bench. It
16 hasn't been litigated yet.
17 Finally, I want to add to what Roy said
18 about the University of Pennsylvania Law Review
19 Article by the Columbia Law professor. It is a very
20 good article and he suggests some interesting
21 analyses between McConnell and Feingold (inaudible).
22 Thank you.
23 JUSTICE TOAL: Thank you so much,
24 Charles. We'll next hear from Rick Dove, who is the

1 Director of the Office of Policy and Programs of the
2 Ohio Supreme Court.
3 He's another one of our go-to guys. His
4 wisdom and advice, particularly as a long-time
5 observer of the scene in Ohio where there have been
6 some tough electoral fights is very much
7 appreciated. Rick?
8 MR. DOVE: Thank you, Chief Justice Toal.
9 The ad you saw earlier today didn't make me proud to
10 an Ohioan, but nonetheless, we're stuck with what we
11 have.
12 I have been asked to give a brief update
13 on the litigation that was filed in September of
14 last year in four states by Mr. Bob, who, we know,
15 (inaudible) personally being here today because he
16 was the counsel in the White lawsuit.
17 There were four cases that were filed in
18 September of last year, in Alaska, Indiana, North
19 Dakota and Kentucky.
20 These cases were filed on behalf of Right
21 to Life organizations in Alaska and Indiana on
22 behalf of a group called the North Dakota Family
23 Alliance in North Dakota and a group called the
24 Family Trust Foundation in Kentucky.

1 These cases, for the most part, dealt
2 with situations where judges had been asked to
3 respond to questionnaires that had been sent out by
4 these organizations, that pose a series of questions
5 to the candidates.
6 The basis of the challenge -- and many
7 candidates, I should say, declined to answer citing
8 restrictions under the judicial canons that
9 prevented them from making comments and answering
10 the questions that were posed in the questionnaires.
11 The plaintiffs turned around and filed
12 these lawsuits claiming that their free speech was
13 chilled by the fact that the judges and judicial
14 candidates would not respond because of the
15 existence of the commit clause other provisions of
16 particular state's canons.
17 The status of those cases is that three
18 of the four are, in essence, pending. The Kentucky
19 lawsuit was recently settled by agreeing to a
20 permanent injunction that would not allow for
21 enforcement of the commit clause. That was done in
22 late January of this year. That case, for the most
23 part is over, although I understand there is still
24 some litigation going on regarding attorneys' fees.

1 The Indiana case remains pending. That
2 District Court in Indiana declined to issue a
3 preliminary injunction in the case citing the 7th
4 Circuit opinion that had been decided a few weeks
5 earlier regarding a ballot challenge by Ralph Nader.
6 That case remains pending with exchange of discovery
7 among the various parties in the case.
8 In North Dakota and Alaska, there does
9 not appear to be much in the way of litigation or a
10 process of litigation beyond the filing of the
11 Complaint. There's been an Answer and some exchange
12 of documents. There have been no (inaudible) in
13 those two states, North Dakota and Alaska.
14 JUSTICE TOAL: Thanks, Rick. Would you
15 care to comment, before I turn to Ben Studdard, on
16 Ohio and disclosure?
17 MR. DOVE: Sure. As you know from the
18 ads that we saw and some of the materials that you
19 received today, there was some litigation that was
20 filed in 2000, shortly after 2000 regarding the
21 attempting to determine who the contributors were to
22 the Citizens for a Strong Ohio independent ad
23 campaign. We saw two of their advertisements in the
24 tape earlier.

1 The parties that attempted to obtain this
2 information filed a lawsuit and actually they
3 started with the elections commission process. The
4 elections commission claimed that they did not have
5 jurisdiction over the matter.
6 They went to court on the issue and the
7 trial court judge who, interestingly enough, had
8 previously been the statewide elections counsel for
9 the Secretary of State, and was appointed to his
10 judicial seat by the governor who raised money on
11 behalf of Citizens for a Strong Ohio -- there are a
12 lot of interesting ironic relationships with the
13 parties in the case.
14 The trial court judge told the elections
15 commission that, in fact, they did have jurisdiction
16 over the case and should hear it.
17 The case proceeded on, and, in essence,
18 what occurred is the plaintiffs in the matter
19 received a ruling that indicated that the
20 contributions or the names and identities of the
21 contributors to the third-party campaigns were
22 subject to disclosure under then Ohio law.
23 You're talking about a total expenditure
24 of about $4.2 million in contributions to the

1 Citizens for a Strong Ohio campaign.
2 The numbers that we're talking about, and
3 if you look at the list that is published in late
4 January after it was finally released, it's a who's
5 who of business organizations and businessmen and
6 women in the state of Ohio.
7 We had $100,000 that was contributed to
8 the Citizens for a Strong Ohio by corporations such
9 as Honda of America, Proctor & Gamble, State Farm
10 Insurance. $200,000 was by (inaudible) insurance
11 company. $370,000 by American Insurance Associates,
12 and $400,000 contribution by the Howard Chamber of
13 Commerce itself.
14 Those are just some of the larger numbers
15 that reached six figures. As I said, those
16 contributors were disclosed in late January,
17 published pretty widely.
18 There were no great surprises, I think,
19 either about the dollar amounts we were talking
20 about or some of the people who actually made those
21 contributions.
22 There are a series of articles in the
23 materials that TC Brown, who is with us today,
24 authored both during 2000 and more recently, that

1 talk a little bit more about the ad campaign and a
2 little bit more about the disclosure, and I would
3 recommend those to you if you want some more
4 information.
5 Shortly after the 2000 campaign, in fact,
6 the day after the November election, our Chief
7 Justice Moyer did a speech and talked about the need
8 to have enhanced disclosure laws in Ohio that would
9 require the third-party entities to disclose the
10 names and addresses of their contributors.
11 We continued to beat that drum for four
12 years before we finally convinced the legislature in
13 March of 2004, just about a year ago, to introduce
14 some legislation to require disclosure of these
15 third-party campaigns and Supreme Court campaigns
16 only.
17 One of the more notable facts for us was
18 the fact that Chief Justice Moyer went over to the
19 general assembly and testified before both the
20 Senate and House committees.
21 It's the first time in anyone's memory
22 that a sitting chief justice had gone over to
23 testify on legislation that was pending before the
24 general assembly, and to do so as his role of chief

1 justice.

2 The bill eventually was enacted by the

3 general assembly of Ohio near the end of last year.

4 It was not done in regular session, but the governor

5 convened a special session to deal with campaign

6 finance in Ohio.

7 I'll just go over the key components of

8 the electioneering communications provisions of that

9 bill.

10 First off, the electioneering

11 communications, which is what triggers the

12 disclosure requirement applies to any electronic

13 communication, basically television and radio

14 communications done by broadcast cable or satellite.

15 I also should add that although the

16 initial bill dealt with just Supreme Court

17 campaigns, the final legislation that the general

18 assembly enacted applies across the board to any

19 electioneering communication that occurs, whether

20 it's for Supreme Court, whether it's for a Court of

21 Appeals judge, whether it's for a statewide elected

22 official, for the general assembly. It's across the

23 board so it's not just specific to Supreme Court

24 campaigns.

1 The ad has to refer, the electioneering
2 communication has to refer to a clearly identified
3 candidate using either that candidate's name, their
4 title in office, a nickname, photograph or drawing
5 or some kind of portrayal of that candidate.
6 The electioneering communication
7 provisions apply only to the advertisements that are
8 made up to 30 days prior to the date of the
9 election. The key point there or key reason for
10 that is the electioneering communications now under
11 Ohio law or law that will go into effect likely at
12 the end of March, the electioneering communications
13 can be funded by using direct contributions from
14 corporations and direct contributions from labor
15 organizations.
16 Arguably, some made this point in the
17 general assembly. There had been a long-standing
18 restriction in Ohio and many other states on direct
19 corporate contributions to political campaign ads.
20 This law makes it clear that you can use
21 corporate contributions. You can use labor money to
22 fund electioneering communications, but you can only
23 do so up until 30 days before the election campaign.
24 After that period of time, you can still

1 have electioneering communications but they are
2 considered a different type of communication for
3 disclosure purposes, and you also cannot have direct
4 corporate contributions or labor organization money
5 going to fund those.
6 There are disclosure requirements that
7 require prompt and electronic disclosure of
8 identities of contributors to third-party campaigns.
9 In essence, it's a 24-hour turnaround time.
10 You have to have a disclaimer on
11 electioneering communication that not only
12 identifies the name of the entity that is running
13 the communication, but it also has to contain
14 information that says the ad is not being run with
15 the agreement or consent of the candidate in the
16 particular campaign.
17 Now, the last couple points I want to
18 make with regard to this, and that's just a general
19 overview. If you're interested in the legislation
20 or a summary of that, I'll be happy to send that to
21 you, or direct you to a web site where you can find
22 it.
23 The act does become effective on March
24 31st of this year; however, there is an ongoing

1 effort by some entities to get the matter on the
2 ballot by the May election, perhaps, on a
3 referendum, not only dealing with some of the
4 provisions regarding electioneering communications,
5 but the entire content of House Bill 1, which has
6 several other provisions regarding campaign finance
7 disclosure.
8 There's a possibility if that referendum
9 is successful, that the act will not go into effect
10 on March 31st.
11 The other point is, I'm certain there
12 will be some challenges to parts of this
13 legislation. If it does go into effect, there will
14 be legal challenges by labor organizations or other
15 organizations regarding some specific content of the
16 bill.
17 Some pieces of this or large portions of
18 it may be, at some point in time, invalidated.
19 JUSTICE TOAL: Thank you, Rick.
20 MR. DOVE: Thank you.
21 JUSTICE TOAL: Now, Ben Studdard who will
22 tell us about the use of recusal laws. Ben?
23 JUDGE STUDDARD: A couple of disclaimers
24 first. I'm listed in your materials as I'm here on

1 behalf on the State Bar of Georgia, which is a
2 mandatory bar, and doesn't necessarily endorse
3 anything that I'm about to say.
4 They are a state actor for some purposes,
5 and in particular, they don't endorse me saying what
6 a terrific report you have from Bill Ide that Roy
7 Schotland mentioned a minute ago, nor do they
8 sanction me having anything do with that. In fact,
9 you all heard me say, I didn't have anything to do
10 with it. I don't know who Bill Ide is, but his
11 report is really good.
12 Second, Judge Kahn asked me to tell you
13 all, since he is a judge in a Weaver state, he will
14 be hitting you all up for a personal contribution at
15 lunch. I also am a judge in a Weaver state, but my
16 personal sense of ethics won't allow me to do that.
17 I'm hoping to tantalize you here with a
18 possible solution. One is Professor Schotland's big
19 five or big six -- I kind of got a different count
20 as he was going through that -- on the subject of
21 recusal.
22 There is not a lot of case law dealing
23 with this especially post-White, but there is a lot
24 of talk about it.

1 Talk about the theoreticians, now I'm not
2 a theoretician, I'm just a little old trial court
3 judge in a little old 11th Circuit state, so I'm one
4 of your soldiers on the ground and not one of your
5 theoreticians. Maybe I can give you a couple of
6 different perspectives about that.
7 Let's all go now to an imaginary state
8 that's going to be in the 11th Circuit; therefore,
9 it's going to be somewhere west of Florida and south
10 of Alabama, and we're now all moved to the imaginary
11 State of Composure, where the capital is named after
12 that legal guy, it's the capital of Schotland City.
13 You're all a part of the judiciary of the
14 State of Composure. In the State of Composure,
15 we're trying to decide what to do about White, and
16 we also have Weaver to deal with, but let's talk
17 about White, okay?
18 What if we had a way to deal with the
19 problems created by White without requiring any
20 action at all by our legislature? We, as the
21 judges, could fix the problem by saying, Okay,
22 candidate for judge, you can say whatever you want
23 to but you won't get the rule on all those cases
24 that come up before you on the issues that you

1 commented about while the campaign was pending.
2 Using, for purposes of this discussion,
3 the terms "recusal" and "disqualification" as being
4 synonymous, the very idea that we might have some
5 partial solution that doesn't require legislative
6 action ought to be pretty attractive.
7 Given the fact that there is not any
8 authority yet that deals with this post-White, I
9 want to encourage each of you to go back to your
10 home states and give this some thought, give this
11 some thought thinking about some points that I want
12 to give to you.
13 I remind you to review the article that
14 has already been mentioned to you out of the
15 Pennsylvania Law Review from Professor Briffault.
16 I'm going to reference to you another case too as we
17 go along.
18 A couple of points, things that we know.
19 First of all, we know from White that recusal for
20 comments merely about issues that might arise in
21 general are not required by due process.
22 Just a comment on issues that might arise
23 not required by due process. We'll modify that
24 statement here in just a moment.

1 Are they required by the Model Code of
2 Judicial Conduct from the ABA? There are four
3 specific standards in the model code where recusal
4 is required. Each of those has to do with actual
5 interest in the case or controversy pending before
6 the judge. This is Canon 3(E)(1).
7 It has to do with relationships of
8 parties to a case, actually being a party to a case,
9 being an attorney in a case. They don't (inaudible)
10 having commented on issues, the specific ones.
11 There is a general standard for recusal
12 that says, "The judge shall disqualify him or
13 herself where his or her impartiality might
14 reasonably be questioned." That is the only
15 standard in the model code where recusal might be
16 used as a remedy under the current model code.
17 One thing that you all, as jurists, might
18 consider is whether it would be appropriate to have
19 additional provisions in your code in your state to
20 require recusal in specific circumstances. We'll
21 talk about that as we go on here.
22 Now, although recusal for public comment
23 is not required by due process, the White decision
24 does make it clear that states may be free to recuse

1 in circumstances not mandated by due process. This
2 is suggested explicitly in Justice Kennedy's
3 concurrence.
4 There may be a possibility for recusal
5 even when circumstances are not mandated by due
6 process.
7 We also know from White that the state
8 does have a compelling interest in providing an
9 unbiased judiciary or an impartial judiciary. You
10 have already heard some discussion this morning
11 about what does "impartial" mean as interpreted in
12 the White decision.
13 The White decision, Justice Scalia's
14 decision talks about three possible definitions for
15 "impartial."
16 The first one has to do with the specific
17 requirements for recusal under the model code where
18 the judge has an interest in the particular case at
19 issue. That clearly would mean that you did not
20 have an impartial judge and recusal would be
21 required.
22 The second definition that they use is
23 the lack of preconception in favor of or against a
24 particular legal view, and the final one is

1 open-mindedness.

2 Justice Scalia, on the second one, says,

3 "A judge's lack of predisposition regarding the

4 relevant legal issues in a case has never been

5 thought a necessary component of equal justice in

6 part because it is virtually impossible to find a

7 judge who does not have preconceptions about the

8 law."

9 The majority opinion says not only is

10 that not a compelling interest, it's not even a good

11 idea.

12 On the subject of open-mindedness, they

13 really don't get to that in White because they say

14 the announce clause was woefully inadequate,

15 woefully under-inclusive for considering whether

16 this judge was open-minded or not.

17 I recommended to you the article that is

18 in your materials, and I particularly want to point

19 out to you -- if you have your materials in front of

20 you, this would be on the bottom of page 2-107,

21 where they quote the comments on open-mindedness.

22 This quality in a judge demands not that

23 he have no preconceptions on legal issues but that

24 he be willing to consider views that oppose those

1 preconceptions and remain open to persuasion when
2 the issues arise in a pending case.
3 This kind of impartiality seeks to
4 guarantee litigants not an equal chance to win the
5 legal points of the case but at least some chance of
6 doing so.
7 The problem with all of the speech
8 restrictions in the current code, the White decision
9 says, it only deals with speech in a campaign. It
10 doesn't deal with speech, writings, expressions of
11 opinion that that person may have made before they
12 became a judge, before they became a candidate for a
13 judge, when they're a judge except when they're in a
14 campaign. It only deals with campaign speech, so
15 therefore, it is woefully under-inclusive.
16 I think this commentator suggests and
17 other commentators can suggest that there may be a
18 difference between campaign speech.
19 When you consider the interest of the
20 state not only in providing an impartial judiciary
21 but also the appearance of impartiality.
22 Now, it's not at all clear under White
23 that the interest in having the appearance of an
24 impartial judiciary is a compelling state interest.

1 In fact, some commentators would say that that is
2 not a compelling state interest.
3 Let's go to our State of Composure and
4 say, Well, what if we considered that campaign
5 speech is different because campaign speech is
6 obviously intended, even if you don't say, "I
7 promise," you're obviously trying to give the
8 impression that you're committing on how you're
9 going to vote on future cases before having to
10 consider what the merits of those cases are.
11 In other words, are you making an
12 apparent commitment as to how you're going to vote
13 and rule on future decisions?
14 The ABA would suggest to you that that is
15 not going to withstand strict scrutiny. They
16 considered that and rejected that in the standing
17 committee's reports to the House of Delegates in
18 2003 and decided not to put a ban on apparent
19 commitments because it is just so difficult to
20 define what is an apparent commitment.
21 Are we dealing with strict scrutiny then
22 because we're not stopping this candidate from
23 making this speech?
24 The candidate sues the State of Composure

1 and says, This is, nevertheless, an infringement on
2 my free speech right because the whole purpose of
3 this canon that you're trying to enforce here is to
4 try to get me not to make the speech. You're trying
5 to chill my rights of free speech and say things
6 that are, now under White, protected free speech.
7 Now, there is no right answer here
8 because it hasn't been litigated yet, but it would
9 seem that the logic of White would say that the
10 plaintiff in that case is probably correct, that our
11 attempt to recuse for protected speech is probably
12 just as suspect as the recuse law to begin with.
13 Can you recuse for speech that is not
14 protected? Well, if you don't have strict scrutiny,
15 then obviously the answer to that would be yes.
16 Then the question is going to be, are our
17 remaining speech limitations still valid or not?
18 This writer says that they are.
19 Justice Shepard, and I wish Justice
20 Shepard were here, in his excellent article from the
21 Georgetown Journal in 1996 would suggest that those
22 restrictions are valid.
23 I want to refer you to another article
24 for a contrary view. Michelle Freidland, a lecturer

1 at Stanford Law School, is a former clerk for
2 Justice O'Connor, clerked for Justice O'Connor
3 during the time that Republican Party versus White
4 was being decided.
5 She writes an article in the Columbia Law
6 Review in April of last year that in her view, based
7 on the reasoning of White, that all speech
8 restrictions are probably going to be found
9 unconstitutional.
10 The suggestion that she comes up with in
11 her excellently reasoned article -- I recommend it
12 to you even though I don't necessarily agree with
13 all of it -- that every state ought to have a system
14 of peremptory disqualification at the request of the
15 parties. Each party would have the right to make a
16 request for peremptory disqualification.
17 Now, Professor Friedland says that is
18 already the case -- is anybody here from a state
19 that has peremptory rights to do this?
20 Do you like it? It works? Okay.
21 I come from a state where we don't have
22 that, and being a foot soldier, I have to tell you,
23 it sounds like an awful idea to me, but I haven't
24 dealt with it. I would be interested to hear from

1 you about how this works.
2 She says that this takes away the
3 problem. If somebody has a problem with a speech
4 the judge made, they have a peremptory right to
5 disqualify. It's not based on their speech
6 necessarily, so it's not chilling that speech in any
7 way.
8 I have a court with two judges. If my
9 other judge went out and said something and made me
10 take all his cases, I'd be riled. On the other
11 hand, being the chief judge, if I was smart enough
12 to do it first, then I could get myself some rounds
13 of golf in.
14 JUSTICE TOAL: Ben, we thank you for
15 those observations.
16 We're going to close with someone who has
17 been a friend both in Alabama and nationally to the
18 judiciary in very difficult times that recent
19 elections have put all state court systems in.
20 Mark was the chairman of the Alabama
21 Supreme Court Judicial Campaign Oversight Committee,
22 which was the first campaign oversight committee in
23 Alabama and is also co-chair of Ad Hoc National
24 Advisors Committee on Judicial Campaign Conducts.

1 A frequent lecturer on this topic, Mark
2 is our clean-up. As spring training is almost well
3 underway; pitchers and catchers haven't reported, it
4 seems appropriate to end with Mark who will talk to
5 us about non-elective states and about federal
6 comparison. Mark?
7 MR. White: Thank you very much, Your
8 Honor.
9 The symposium decided as part of its
10 outreach program to invite one practicing lawyer and
11 that is me.
12 One point of personal privilege. I have
13 been on a number of programs for a lot of years, and
14 for most years, Alabama appears in the commercials,
15 and I have to be subjected to the front of the
16 program as opposed to the end.
17 In 2004, in Alabama, Justice Mike Boland,
18 a very experienced and accomplished judge, was
19 elected to the Supreme Court of Alabama, on the
20 theme, and I'm looking at my friend, Justice See, on
21 the theme of orphans should be adopted by nice
22 people, and it worked.
23 Judge Patty Smith, an accomplished and
24 qualified lawyer, was elected to the Alabama Supreme

1 Court in 2004 on a theme of the juvenile court
2 system should help our children.
3 Those were the campaign ads that
4 predominated the political scene in Alabama which is
5 why we don't make the review and why my friend Roy
6 Schotland, suffice it to say, made passing
7 reference.
8 The other Supreme Court situation was
9 frankly, a ten commandment candidate supported by
10 Former Chief Justice Moore who did defeat in the
11 Republican primary, Justice Steven Brown, who is an
12 experienced and accomplished member of our court.
13 But we're not sure what that means
14 because the reason that the defeat came in the
15 Republican primary was the ten commandment
16 candidate, backed by money from the trial lawyers
17 who all showed up to vote in the Republican primary,
18 which must have been one hell of a sight, made the
19 difference in that campaign. We're not really sure
20 what that means, but I can tell you what one thing
21 means in Alabama and that is this.
22 When our ultimate metal was tested,
23 regardless of how the members of our court got there
24 or how long they have been, unanimously the rule

1 follows uphill.

2 That court issued opinions on two
3 occasions -- you want to talk about pressure? There
4 were hundreds of people camped out for months or
5 more in and around the Supreme Court building when
6 this was going on.

7 The canons do not mention, but I would be
8 remiss if I did not say to you that if you want to
9 look for courage, come to Alabama.

10 Now, I'll sort of give you some arrows
11 from the quiver from various aspects and various
12 places and I'm happy to do that at clean-up.

13 First, always carry around with you a
14 copy of the Code of Conduct for United States
15 Judges. It's a magnificent document that will look
16 relatively familiar to you except that it has even
17 more general commentary, and it talks about
18 reasonableness and all those terms that some people
19 find very vague, apparently, in the federal code.

20 Never forget this. This Code applies to
21 every single federal judge except one group. The
22 Supreme Court of the United States is not subjected
23 to the Code of Conduct for United States Judges.

24 It's great for any civic club you speak

1 to. They become enamored with that.
2 Carry that with you and look at the
3 comparison because, frankly, my one criticism of the
4 White opinion is that I felt like, from my
5 perspective, that the error in the White opinion is
6 the implicit assumption by some rather snooty
7 writers, with all due respect, that political
8 campaigns disseminate intelligent information, and I
9 don't think that's correct.
10 Where are you going to see it in
11 non-judicial states? What does this opinion mean?
12 Last year, it was my privilege to serve
13 as the president of the Birmingham Bar Association,
14 3,700 members strong.
15 I got a call from a reporter from New
16 York who said to me that the federal judge that has
17 and is trying, as we sit here, the Richard Scrushy
18 case, the HealthSouth case, that he wanted to
19 interview the federal judge and that Minnesota
20 versus White meant that she had to answer any
21 question that he asked, and he wanted me to order
22 her to sit for an interview.
23 Despite the temptation, I resisted and
24 there's nothing like a lawyer to get to say rarely,

1 "denied and overruled." That is the perception of a
2 lot of people that the case means a lot more than it
3 does.
4 Already, you're seeing in every state
5 lawyers or groups of lawyers starting to collect
6 what you do say. You're saying, Is that for
7 political purposes? No, it's because I want to
8 forum shop, and I want a judge shop. I want to know
9 what it is you have been out there and said.
10 I understand Roy's argument that we need
11 to be more communicative, and I don't disagree with
12 that, but be mindful and careful of where we're
13 headed on those sorts of situations.
14 On recusal situations, Alabama has had a
15 statute for ten years that mandates recusal of trial
16 court judge if they receive more than $3,000, and
17 state court judges if they receive more than $5,000
18 from a contributor.
19 That statute has never been enforced
20 because it has never been pre-cleared by the
21 Department of Justice, and it's an abomination,
22 frankly.
23 One of the things that became apparent as
24 the statute was being studied because the

1 legislature, in its infinite wisdom, said to the
2 court, Here are the statutes, you all go make rules
3 to make it work, which was an impossibility.
4 One of the things that became apparent
5 was you could get rid of four members of the court
6 for $20,000, which was a heck of a lot cheaper than
7 supporting them to get elected. That became
8 something very obvious and of great concern.
9 So as you go through the process, I would
10 say don't panic. Take a hard look at what it means
11 when you start to turn the recusal issues in various
12 and sundry ways because it may come back to bite
13 you.
14 Also, always assume for purposes of going
15 forward that what you say in any context is going to
16 be an issue that will come to recusal. Because
17 typically, on recusal or disqualification --
18 disqualification, I always say, that is where
19 (inaudible). Recusal is when the judge looks in the
20 mirror.
21 The problem you're going to run into is
22 you're inviting my profession to be standing there
23 looking in the mirror with you, so I would say be
24 mindful of that.

1 Final note about Alabama, we have already
2 changed our canons to modify them. We have already
3 done that. We went to a New York Times versus
4 Sullivan standard on speech.
5 We went to an aspirational treatment on
6 Weaver. The court decided they would make that
7 aspirational.
8 Interestingly enough, our trial court
9 judges all wanted to stick with the original
10 mandatory language, but frankly, the court, I think
11 rightfully so, was anxious to put in place before
12 the 2006 elections a set of canons that could be
13 used in those campaigns.
14 The only other thing -- do you still want
15 that?
16 JUSTICE TOAL: Of course.
17 MR. White: The only other thing I can
18 close with is this. If the issue of judicial
19 campaign becomes First Amendment, then that should
20 (inaudible) to the benefit of an ethical judge.
21 I have a good friend that sat down with
22 me who is a political consultant, and I said, Okay,
23 what are you going to do for your candidate? He
24 said, I'm going to make the First Amendment an issue

1 because making the First Amendment the issue when
2 someone is coming after you in an attack ad gives
3 you leverage, and this is his ad by Justice Toal,
4 who has recently been subjected.
5 This is the ultimate judicial outcome.
6 You have been subjected to an attack by a
7 third-party group, and Justice Toal appears on TV,
8 looking charming, and says the following.
9 "The attack mounted against me by the
10 group that labels itself Citizens for God and
11 Country is an obvious attempt to aid my opponent by
12 spreading falsehoods.
13 "This groups enjoys the protection of the
14 First Amendment of the United States Constitution,
15 and while I support the constitution, I cannot stand
16 by and allow this group to spread falsehoods.
17 "Flag burners, pornographers and
18 communists have historically benefitted from the
19 protections afforded by the First Amendment. I call
20 upon this group to distinguish themselves from those
21 other groups by disclosing who its contributors are
22 and what are their expenditures because further
23 acknowledgement of this group may give them the
24 publicity they seek.

1 "I will either ignore their falsehood in
2 the future and encourage you to do the same, or
3 merely refer to them as that, 'Additional liberal
4 first amendment crap.'
5 "Finally, my family and I will pray for
6 this group because absent them ceasing this campaign
7 of falsehood, I fear that the fires of hell will not
8 be banked one degree for what they have done to me
9 and my family."
10 JUSTICE TOAL: Well done, Mark. Great
11 home run at clean-up, and this completes our panel.
12 We know that we are close to the dinner
13 hour, but we will halt here for a minute and take
14 questions briefly about what has been said.
15 My thanks to a very knowledgeable group
16 of judges and lawyers for their participation this
17 morning. Questions?
18 QUESTION/COMMENT FROM AUDIENCE: With
19 Ohio changing the law, if you don't have the teeth
20 in it that I think is absolutely necessary by saying
21 unless they name a candidate in some direct fashion,
22 it's toothless. It's a toothless tiger.
23 There is only one race for the Supreme
24 Court and they just talk about "courts." Courts in

1 this state have done this. Courts in this state
2 have done that. It's a toothless tiger if it
3 doesn't say you can do it by implication.
4 MR. DOVE: That's a good point. I think
5 most of the advertisements we have seen in Ohio, and
6 the reason the statute was written the way it was,
7 they have all had some direct comment or mention of
8 the candidate.
9 QUESTION/COMMENT FROM AUDIENCE: Well,
10 West Virginia had a very ugly campaign, and it was
11 about 50-50. Some did and some didn't, but it was
12 no doubt what the others were and no disclosure,
13 just willy nilly go out and spend the money.
14 MR. DOVE: It's a good point. We'll see
15 how it works. There is no doubt that the entities
16 who have run these advertisements will doubt their
17 conduct to try --
18 JUSTICE TOAL: Roy?
19 PROFESSOR SCHOTLAND: Ben Studdard is so
20 good to ask about how people are in states with
21 recusal. A number of hands went up.
22 I wonder if we could hear from some of
23 them, particularly if they think their system isn't
24 good.

1 QUESTION/COMMENT FROM AUDIENCE: Are you
2 asking for trial judges or appellate judges?
3 PROFESSOR SCHOTLAND: Just expand on your
4 system.
5 JUSTICE TOAL: Jerry brings up a question
6 that I thought of right away. I'm not from a
7 peremptory challenge state, and frankly, with the
8 greatest of respect for that concept, I can't
9 imagine how that would work.
10 I just issued an administrative order out
11 of my own office to combat prisoners who, now in one
12 particular county, have decided that the trip du
13 jour is going to be to move to recuse their
14 appointed counsel by filing grievances against them
15 right before their case is to be called for trial.
16 The prisoners are simply not going to be
17 in charge of the general session's docket in South
18 Carolina, so I made it clear that the judge has
19 discretion, it's not automatic. The judge needs to
20 decide whether to appoint new counsel or take old
21 counsel out or even recuse himself or herself if the
22 complaint is against them.
23 This peremptory recusal thing, I am
24 nervous beyond what I can describe at what kind of

1 tool this would be in the hands of people who are
2 abdicating, in particular, a hotly contested
3 judicial election.
4 There just might be some implications all
5 over the place.
6 QUESTION/COMMENT FROM AUDIENCE: In
7 California, we have peremptory recusal of all trial
8 judges, one per side, and it's not applicable to
9 appellate judges. There is no recusal.
10 The tool is frequently used as a blanket
11 recusal by district attorneys or public defenders,
12 and the net effect in a county with a few judges is
13 devastating because you can take a judge out for all
14 purposes from hearing criminal cases.
15 JUSTICE TOAL: Wow. Unreal. Wolff?
16 JUDGE WOLFF: We have the same thing and
17 the California judge's comment is correct, that the
18 prosecutor can take out a judge on every criminal
19 case.
20 We have to move judges, sometimes assign
21 judges from other counties and other circuits to do
22 that, but actually, the system is wildly popular
23 among the lawyers.
24 JUSTICE TOAL: Oh, I can imagine.

1 JUDGE WOLFF: It's actually popular among
2 judges because judges like to be disqualified
3 without people saying bad things about them.
4 QUESTION/COMMENT FROM AUDIENCE: Nevada
5 has a rule that if you pay $350, you can perempt --
6 you get one peremption in civil cases only.
7 JUSTICE TOAL: Who gets the $350?
8 QUESTION/COMMENT FROM AUDIENCE: Well, it
9 goes into a fund in the Nevada Supreme Court to be
10 used for a variety of purposes.
11 Don't laugh. It may sound odd, but it
12 has been around for years and it has allowed the
13 court to do some things like purchase technology or
14 things of that nature.
15 MR. White: Well, you can't buy a judge
16 for $350, but you can sell one.
17 QUESTION/COMMENT FROM AUDIENCE: Each
18 side gets one peremptory challenge, and then in the
19 smaller jurisdictions where there is only one or two
20 judges, we find another judge to hear the case.
21 I don't think you have a real problem
22 with not being able to fill-in or not being able to
23 find a judge to hear the case.
24 The lawyers tend to like it because they

1 don't have the file motion making allegations that
2 they would rather not make against the judges. Some
3 judges like it and some judges don't.
4 The judges who do tend to do so for the
5 very reason that if someone has an issue with me --
6 JUSTICE TOAL: Do they have a time limit?
7 QUESTION/COMMENT FROM AUDIENCE: Yes.
8 There are strict time limits in terms of when you
9 can file them. You have to do it before any kind of
10 substantive rulings have been made in the case.
11 There are strict time limits so you can't
12 just in the middle of the case say, Oops, I want a
13 new judge.
14 QUESTION/COMMENT FROM AUDIENCE: Don't
15 underestimate judges liking not having to have
16 somebody give their reasons. Our judges basically
17 like it.
18 We also have some, should I say implicit,
19 enforcement criteria that keeps it from being
20 abused.
21 In the larger counties, the rule is that
22 those judges that get struck a lot are in the pool
23 and that's a judge you're likely to get, and
24 sometimes, you have to make a decision. Do I want a

1 judge who has been struck on a number of other
2 cases? Sometimes, they are their less favorite
3 judge. Attorneys do that with caution in those
4 larger counties.
5 Second, we do have the ability to bring
6 judges in from other counties, and again, there is
7 some concern who they're going to get. It does have
8 some abuses.
9 We had one judge who got defeated in a
10 election where someone -- the public defenders filed
11 a number of times and used that as an issue.
12 It's also a way of getting to some judges
13 who aren't doing a good job. When we see a number
14 of recusals, generally the chief judge and possibly
15 the chief justice will sit down with that judge and
16 say, Hey, what is going on here? You're affecting
17 the system, and we'll often get some change of
18 behavior.
19 JUDGE ROSENBLUM: In Oregon, we allow two
20 affidavits per case per lawyer, and of course, it
21 has to be done before any substantive rulings have
22 been made.
23 It does require advance notice, but it
24 has resulted in some problem judges' issues being

1 addressed to the satisfaction of the district
2 attorney, public defender's office.
3 I use it as a way to talk to the jury
4 when I do the jury orientation about fairness. I
5 say, Hey, look, don't get upset if you don't get
6 picked. Judges can get affidavits too. They talk
7 about how it's all for the ultimate goal of fairness
8 in our system.
9 QUESTION/COMMENT FROM AUDIENCE: We have
10 it separately in the criminal rules and civil rules
11 in Idaho. In the civil rules, it has been there
12 forever and it hasn't been interrupted.
13 It was abused in one district in the
14 criminal rules, and the court kept going back to the
15 lawyers, and saying, If you don't stop overusing
16 this, it's going to be taken away from you, and it
17 was about ten years ago.
18 They just put it back in about six months
19 ago and we're going to see where it goes again, but
20 the ultimate power to regulate it was with the
21 Supreme Court taking it away despite the objection
22 from the bar association, and the public defender
23 was the biggest objector.
24 The judge said, If you want to campaign

1 against me on the fact that I'm too tough on
2 criminals, be my guest.
3 JUSTICE TOAL: How many have recusal at
4 the appellate level? It looks like the answer to
5 that is zip. I can't imagine how that would
6 operate.
7 QUESTION/COMMENT FROM AUDIENCE: At the
8 appellate level?
9 JUSTICE TOAL: Yes.
10 QUESTION/COMMENT FROM AUDIENCE: Sure.
11 Our Court of Appeals has judges that can be -- well,
12 they can file a motion to disqualify.
13 JUSTICE TOAL: We're not talking about
14 that. We're talking about the free shot without
15 having to specify.
16 QUESTION/COMMENT FROM AUDIENCE: In
17 Arizona, we modified our criminal recusal rule
18 because of some abuses and now require something of
19 an affidavit not requiring a cause, but making
20 people say that they're not doing this for purposes
21 of delay.
22 If someone has gotten the same judge
23 every time --
24 JUSTICE TOAL: You have some kind of

1 string on it.
2 QUESTION/COMMENT FROM AUDIENCE: The one
3 thing people may not have said so far, this is the
4 only issue that I can recall that brings the
5 criminal defense bar and the prosecutors together.
6 They hold hands whenever anybody tries to
7 attack this issue because they all believe that
8 there are some judges on either side they shouldn't
9 get, and in the urban counties, it works pretty
10 well. The presiding judges are the ones that don't
11 like it because they have to shuffle the
12 assignments.
13 In the rural counties, it's hardly ever a
14 problem because nobody has enough guts in a county
15 with three lawyers and one judge to notice that
16 judge.
17 JUSTICE TOAL: I'll let Joe Lambert
18 finish it up for us. Joe?
19 JUSTICE LAMBERT: In Kentucky, we have a
20 system that is different a little bit than what has
21 been discussed but one that works pretty well.
22 Many years ago, our legislature enacted a
23 statute that permitted parties to bypass the judge
24 they wanted to have recused and file an affidavit

1 directly with the chief justice, and the chief
2 justice had the power to recuse any judge at any
3 level except the Supreme Court. We leave that issue
4 at the Supreme Court exclusively in the realm of
5 each individual judge.
6 But otherwise, a motion and affidavit can
7 be filed with the chief justice seeking the recusal
8 of an individual judge. Now, in the past --
9 JUSTICE TOAL: For cause?
10 JUSTICE LAMBERT: Oh, yes.
11 JUSTICE TOAL: It's not a free shot?
12 JUSTICE LAMBERT: Well, a lot of those
13 motions, as you can well imagine, are pretty light
14 on facts, but they have a cathartic effect because
15 it gives this unhappy litigant -- and by the way,
16 the affidavit must be signed by the party, not the
17 lawyer.
18 It gives this unhappy litigant an
19 opportunity to say, This judge is being unfair, and
20 in the past, my predecessors and I have rarely
21 granted those types of disqualifications.
22 I can see a time coming, however, in
23 which it might be useful in the context of all that
24 we're discussing right now to be a bit more liberal

1 with granting those disqualifications and letting it
2 be known that maybe the ground has shifted a little
3 bit, and that what in the past has not been seen as
4 an appropriate grounds for recusal or
5 disqualification, now will be seen in that way.
6 JUSTICE TOAL: Thank you, Judge. Now I'm
7 going to turn this back to Bill Dressel. I'd like
8 to give my great thanks to a wonderful audience and
9 to this terrific panel.
10 JUDGE DRESSEL: Time for lunch.
11 (Lunch break taken at 12:06 p.m.)
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1 RENO, NEVADA; THURSDAY, FEBRUARY 24TH, 2005; 1:09 P.M.
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5 JUDGE DRESSEL: Okay. If I could please
6 have your attention, your moderator is Justice
7 Shepard from Indiana. I'll turn it over to Justice
8 Shepard.
9 JUSTICE SHEPARD: Good afternoon. This
10 afternoon's panelists, I'm going to give you sort of
11 a broad brush look at what we're going to try to do
12 this afternoon.
13 We are, of course, gathered principally
14 to talk about the post-White world. It is
15 coincidental to that that the American Bar
16 Association has been in the process of reexamining
17 the existing Model Rules of Conduct with the idea of
18 creating a new model for the first time in 13, 14
19 years.
20 As you would recognize, the Code gets
21 revised in very modest ways from time to time, but
22 only once every decade or two is there a kind of
23 large scale effort to examine the entire document
24 involving the nature of the American judiciary.

1 It came to pass after the ethics 2000
2 exercise on the revision of the rules as they apply
3 to lawyers that the association launched the
4 revision project for the judicial code.
5 They did that by creating a joint
6 commission of representatives of the principal
7 bodies that examined ethics inside the association,
8 and that group is staffed by a number of the people
9 who are here in the room who are ethics counsel for
10 the ABA.
11 It was also advised by a limited number
12 of people, three of us here are in that category,
13 people who are at the table to advise, and as a
14 practical matter, to participate in and representing
15 different pieces of the American bench, state and
16 federal judges, for instance.
17 This task has now been underway for every
18 bit of a year and a half, and it is creeping up on
19 completion.
20 I want to say a few things about the
21 state of the exercise and about some of the big
22 picture changes.
23 The joint commission body that is putting
24 this together has now posted for comment all five

1 proposed canons, and I think four canons worth
2 commentary although the commentary for Canon 5 is
3 nearly born, right?
4 It has, as you might imagine, generated a
5 Niagara of comment from every part of the judicial
6 world. The commission, as soon as it sort of
7 finishes off on 5, will also attempt to finish
8 examining all those comments and go back through all
9 of the black letter and commentary that have been
10 posted, and hopefully, create document which will be
11 submitted by May so that it could be to the House of
12 Delegates and will be voted on in August.
13 I, myself, have modest confidence that
14 all this will happen in the schedule I have just
15 described, but that is an important fact for you to
16 know because one of the reasons why the people who
17 have assembled on the stage this afternoon have done
18 so is because they're still in the process of
19 soliciting comments, complaints, suggestions and are
20 still at a moment in the exercise when actual
21 changes are still being made.
22 It seemed to us, quite aside from the
23 Canon 5 considerations that are the central focus of
24 today's and tomorrow's meeting, that it's going to

1 be valuable to hear what people here assembled have
2 to say on various topics.
3 I say that to make it clear for one thing
4 we're going to talk with you about all five of
5 these.
6 When we get to the breakout groups, if we
7 break-out in a way that sort of follows judicial
8 selection lines, that would be helpful when the
9 breakout groups talk about Canon 5, but it will be
10 our objective to talk about all five during the hour
11 after our introduction.
12 Two things about the shape of the
13 document and the questions that have been asked.
14 One is -- although I wasn't a
15 participant, one could know by reading the report
16 that the 1990 model code was largely an -- I think
17 the 1990 code could fairly be called a set of
18 revisions to the 1972 code.
19 While there is an enormous amount of
20 material, a great many provisions, the draft that
21 you all have and has been posted, this commission
22 believes itself to be forming that or it thought of
23 itself as doing something more comprehensive, so
24 while there are a lot of things that have been in

1 the code, some of them for a very long time, they're
2 not necessarily in the same place, and they are --
3 they look different for a second reason that I want
4 to highlight for you, and that is an ongoing
5 discussion, the extent of which the code is auditory
6 and aspirational and regulatory.
7 We obviously use it for all of those
8 purposes, but whether you think of yourself
9 primarily as drafting a document that will be used
10 for judicial education for judicial advice, for
11 various sorts of symposium programs and articles,
12 something that the judge can pull it off the wall
13 when she has a question about something that is in
14 front of her, or whether you think about it in the
15 context where we use it in a disciplinary
16 proceeding.
17 Depending on which of those modes you're
18 in, you may very well make certain choices about
19 what language you use and what sorts of things you
20 keep in and don't keep in.
21 This aspect of the work is the still
22 product of an active debate, and I think you will
23 probably see some of that as we go through the
24 afternoon.

1 What we're going to do is that my four
2 friends are going to talk with you about,
3 collectively, each of the five, more or less in
4 order but not completely, and one of the things I'd
5 like to suggest is that as the presentations from
6 here go forward, if you want to -- we're not going
7 to save comments to the end. If you would like to
8 say something or ask something, simply put up your
9 hand and we'll stop to talk about whatever it is
10 that interests you.
11 Thereafter, we'll break for small group
12 discussions. There will then be a refreshment
13 break, they promise, and thereafter, we'll come back
14 for the reporters who have been identified in the
15 papers.
16 So we'll begin talking about Canons 1 and
17 3 with Dean Jim Alfini, one of the premier scholars
18 in this field. It's a great pleasure to spend time
19 with him.
20 DEAN ALFINI: Thank you, Chief Justice
21 Shepard. I must say that when you said three of us
22 are advisors to the commission, I had to think which
23 ones. We've sort of lost sight who is on the
24 commission and who is advisory to the commission.

1 The advisors have been as present at the
2 meetings as the commission members, and it really
3 has been a wonderful process from that standpoint,
4 wonderful.
5 JUSTICE SHEPARD: Certainly establishing
6 our plausible deniability.
7 DEAN ALFINI: I guess I'm the only
8 commission member here. Chief Justice Shepard
9 represents the Conference of Chief Justices, and
10 Judge Rosenblum is the National Judicial College,
11 and Peter Bowie is the Judicial Conference of the
12 United States, right? Eileen is our counsel, so
13 actually Eileen is the one we should turn to.
14 I'm going to talk a little bit about the
15 overall structure of the code as revised in the new
16 draft. I think you all have copies of the current
17 draft so you may want to look at these things as we
18 sort of go through them.
19 I'm going to talk about overall structure
20 and then Canons 1 and 3 since they're by far the
21 shortest, and then I guess we'll go to Peter who is
22 going to do 2, and Ellen has the rough job with 5.
23 She missed the conference call.
24 I did it at the ABA meetings on my cell

1 phone, and then went in there and Ellen is the
2 secretary of the American Bar Association, and after
3 a House of Delegates session, I went up to her and
4 gave her the good news and she was thrilled that she
5 had Canon 5.
6 A little bit about overall structure,
7 you'll note that the commission made a decision to
8 restructure the current code, and the draft
9 certainly reflects that. The draft is in rules
10 format, similar to the Model Code of Professional
11 Conduct.
12 The draft has retained the five reworded
13 Canons as statements of principle from which the
14 rules in each of the five, those five categories
15 flow.
16 This restructuring has been undertaken --
17 I must say I was one of the doubters at the
18 beginning especially since I'm a co-author of a book
19 on judicial conduct and ethics, and I was thinking
20 of all the revisions we had to go through, all the
21 numbers and everything, but I have become a
22 believer.
23 I think it will be a much more accessible
24 document and it will be much clearer what is

1 enforceable and what is more aspiration.
2 There is a more coherent grouping, I
3 think, of rules under each one of the canons. In
4 general, though, the rule should be viewed as
5 enforceable provisions and the aspirational and
6 auditory language has been moved to the commentary
7 or expressed, for that matter, in the canons
8 themselves.
9 There is a current debate amongst us over
10 where the canons should be. I'm of the opinion, and
11 many of us are in the opinion, that they should stay
12 where they belong, and that is in front of the rules
13 that flow from them. Some believe though they
14 should be put in the front in the introduction as a
15 list of general principles. I think we're headed
16 more towards keeping them where they are and should
17 be.
18 Let's look at Canon 1 first. The current
19 draft of Canon 1 combines provisions from the 1990
20 code, from Canons 1 and 2 of the 1990 version of the
21 code. It's by far -- well, it is the shortest
22 canon, not by far, though. Canon 3 only has three
23 rules. This only has two rules.
24 First, it calls upon judges to observe in

1 Rule 1.01 the high standards of conduct that are
2 embodied in the rules that are contained in the code
3 to preserve the independence, integrity and
4 impartiality of the judiciary.
5 You'll see these three words repeated
6 fairly often as we go through the code. I think
7 that has been a conscious attempt on our part to
8 make it clear that there are indeed compelling state
9 interests for these rules.
10 The second rule, Rule 1.02, requires
11 judges to respect and comply with the law. These
12 two rules flow from the general principle enunciated
13 in Canon 1 that say, quote, "A judge shall avoid
14 impropriety and the appearance of impropriety in all
15 the judge's activities so as to uphold the
16 integrity, independence and impartiality of the
17 judiciary."
18 The commission has retained the important
19 concept of avoiding the appearance of impropriety,
20 even though it has been the subject of some
21 controversy. Some argue that this provision is
22 unenforceable, it is too vague.
23 Note, however, that the commission has
24 preserved the concept in the canon and not in an

1 enforceable rule. Actual, the New York Times went
2 after us early on for suggesting it wasn't an
3 enforceable provision, and there has been some
4 considerable discussion amongst commission members
5 about that phrase, "the appearance of impropriety,"
6 whether it is enforceable or not.
7 One of the advisors has made it clear to
8 us, I think, time and time again, I think it's
9 sinking in, that it's you guys. It's the state high
10 court judges that made the mistake of trying to
11 enforce it. It's not the commission people who, in
12 the complaints, use it, but when it gets up to the
13 level of the Supreme Court enforcing or ruling on a
14 disciplinary matter, that's generally where it gets
15 used or misused, for that matter, when you talk
16 about that as an enforceable provision.
17 QUESTION/COMMENT FROM AUDIENCE: We had a
18 lot of discussion earlier today on judicial
19 campaigns and saw some advertisements and quotations
20 from a judge in a case about the perception of what
21 judges do and this leads to what they participate
22 in.
23 There was some discussion as well as to
24 judicial outreach and the importance of judges being

1 in the community, educating, speaking about the role
2 of the courts.
3 I believe that about two years ago, the
4 midyear meeting of the ABA, the judicial division of
5 the ABA talked about judicial outreach and the
6 importance of that. I think they even proposed a
7 language to go in the code about judicial outreach
8 and the duty of the judge to participate in judicial
9 outreach.
10 Was that discussed by the commission, and
11 if so, what was your rationale on that, or do you
12 have discussion on whether that should or should not
13 be in the model code?
14 DEAN ALFINI: I think the juvenile court
15 judges probably have been the most vocal on that
16 point. I think we have looked for opportunities to
17 deal with what is not an easy subject to deal with.
18 I think the general concern is that if a
19 judge involves himself or herself in a local group,
20 usually involving juveniles or the CASA programs or
21 domestic violence issues, things like that, the
22 judge may be telegraphing a position on cases that
23 ultimately may come before the court or becoming
24 familiar with people who may appear before the judge

1 on a regular basis, advocating certain positions.
2 On the other hand, I think we generally
3 believe that judges have a lot to offer their
4 communities so I think we have tried to moderate
5 that tension a little bit here and there.
6 Eileen, do you have anything specific?
7 MS. GALLAGHER: I know we did address it,
8 and in Canon 4 it comes up too in your extrajudicial
9 activities. It does come up in there.
10 I know that ABA did pass policy on
11 judicial outreach, encouraging judicial outreach,
12 and that has been brought to the attention of the
13 joint commission.
14 DEAN ALFINI: If you think we haven't
15 done enough now that the draft is fully out there,
16 let us know. It's particularly helpful at this
17 point if you could suggest language, either in black
18 letter rule or in the commentary.
19 QUESTION/COMMENT FROM AUDIENCE: I think
20 the judicial division had language that they
21 actually suggested.
22 JUDGE ROSENBLUM: I think perhaps not the
23 exact language but we have included a pretty strong
24 provision in the commentary, which I can pull for

1 you.

2 In 4.02, it is now that if you appear at
3 a public hearing, you can only speak on matters
4 concerning the law, the legal system or the
5 administration of justice, and we proposed expanding
6 that in part B to other matters that might
7 reasonably merit the attention and comment of the
8 judge because of knowledge or expertise acquired in
9 the course of the judge's judicial duties.

10 That may not sound like it speaks to your
11 point, but I think it arguably does because there
12 are a lot of areas like juvenile court judges might
13 speak on things that are traditionally law-related
14 but are important to the community because they may
15 help solve a problem with juvenile delinquency.

16 JUSTICE SHEPARD: Commentary gives that
17 example.

18 JUDGE ROSENBLUM: Right.

19 QUESTION/COMMENT FROM AUDIENCE: You
20 commented on appearance of impropriety, and I know
21 just by way of contrast, the commentary on Canon 2
22 talks about if the judge willfully disobeys the law,
23 it may constitute misconduct. If he's into drugs,
24 it may diminish his ability.

1 And yet, on the comment here on
2 impropriety, it says that an appearance of
3 impropriety occurs when the conduct could create, in
4 reasonable minds, a perception, not it may never
5 have done so, but if it could, if it's possible to
6 create that perception in reasonable minds, then
7 there is an appearance of impropriety, and that's
8 going change apparently from "would" to "could."
9 Why that -- if in fact, appearance of
10 impropriety is being downplayed, why -- this sounds
11 enormously powerful. There is an appearance of
12 impropriety if I can find a reasonable mind that
13 believes that can be done.
14 DEAN ALFINI: Does any of us remember why
15 we changed from "would" to "could"?
16 That's a good point, and you're
17 absolutely right. The import is very different.
18 It's probably Cindy Gray recommended that.
19 MS. GRAY: No, no, no.
20 JUDGE BOWIE: I would just add, it
21 re-illustrates a critical point of why it's so
22 important that we hear from you and the others that
23 you see and talk to about all of this.
24 We have been living with this, as Justice

1 Shepard said, for a year and a half now, and
2 sometimes you lose -- just like when you're editing
3 your own material rather than somebody else's, you
4 don't see the typos and that kind of thing.
5 DEAN ALFINI: What was the comment?
6 QUESTION/COMMENT FROM AUDIENCE: Seven.
7 DEAN ALFINI: Well, we'll bring that
8 back.
9 QUESTION/COMMENT FROM AUDIENCE: If I
10 may, I want to go back to Judge Ridgely's comment on
11 outreach. I believe in outreach. It's important
12 to the judiciary, some could say maybe it's not as
13 discriminate as it should be.
14 I have a broad base across the spectrum.
15 The broad base of people that I interact with, the
16 broad base of organization where often they provide
17 me some protection because I'm not taking any
18 favors. Is that ill-founded or not?
19 JUDGE ROSENBLUM: That's not ill founded.
20 JUDGE BOWIE: Do you have a charge
21 pending?
22 QUESTION/COMMENT FROM AUDIENCE: No, I
23 don't. If I do, I'm going to raise it.
24 DEAN ALFINI: It will certainly be good

1 in mitigation.
2 JUDGE ROSENBLUM: Justice Anderson, I
3 think it has more to do with what you say when
4 you're there than who you're going to visit.
5 Hopefully, we all agree that justices,
6 especially chief justices ought to be getting out
7 into the community.
8 We have a judicial outreach committee and
9 it has a very active program and is well supported
10 by our judges as well, so I think that the important
11 thing is to examine what it is you're saying when
12 you're there so that you're not misstepping, and
13 also being as broad based as you could be so you
14 wouldn't be accused of playing favorites.
15 QUESTION/COMMENT FROM AUDIENCE: If the
16 impropriety issue is not a black letter discipline,
17 what is meant by "ordinarily" in the comment 2?
18 The second sentence, if you leave out
19 "ordinarily," we seem to be saying that you might be
20 disciplined for appearance of impropriety if you
21 violate another rule, but to start the sentence with
22 "ordinarily," seems to open up a potential that
23 maybe there is a black letter violation possibly.
24 JUDGE BOWIE: That was not the intent.

1 What we were trying to flag is picking a situation,
2 for example, there's a Specter case out of New York
3 which involves a conclusion by the New York Court of
4 Appeals that several judges had, in fact, violated
5 the canons by creating an appearance of impropriety,
6 but not by creating an appearance of impropriety of
7 a violation of some other provision.
8 That goes back to what Jim was talking
9 about. One of our members is a disciplinary lawyer.
10 The charging document is always going to say that
11 you're charged with creating an appearance of
12 impropriety by doing something else that appears to
13 violate some other canon or subsection of a canon.
14 If it only comes out, you're disciplined
15 for an appearance of impropriety without elaborating
16 further, then the question and concern is do you
17 have what amounts to a bill of detainer, somebody
18 deciding after the fact that something is, in fact,
19 a violation.
20 The concern and what is intended by
21 "ordinarily" is to say, look, if all you've got is
22 an appearance of impropriety, that in and of itself
23 without implicating some other rule is not generally
24 a basis.

1 You raise a good question because it's a
2 negative question in that sense.
3 DEAN ALFINI: I think it was a compromise
4 between those of us who would like to put some meat
5 on the appearance of impropriety bones and those who
6 thought they were totally unenforceable and thought
7 we should take it out.
8 QUESTION/COMMENT FROM AUDIENCE: Well,
9 certainly Comment 7 sounds like somebody wrote that
10 with an idea that you were putting meat on the bone.
11 That is where it runs contrary to the rule.
12 DEAN ALFINI: Thank you. We'll bring
13 these comments back. I think we do need to look at
14 that again. Sometimes you compromise in a way that
15 ultimately may not be wise.
16 If there are no other questions at this
17 point, let me go on to Canon 3.
18 You'll note that the revised Canon 3
19 deals with personal conduct of the judge. It
20 states, "A judge shall conduct the judge's personal
21 affairs to preserve the integrity, impartiality and
22 independence of the judiciary."
23 Here, three rules flow from this general
24 statement principle. Rule 3.01 is largely drawn

1 from the old Canon 2B, which states that a judge
2 will not lend the prestige of the judicial office to
3 advance the private interests of the judge or
4 others. Perhaps the most significant commentary
5 that flows from this is paragraph 5.
6 Paragraph 5 is involving judges serving
7 as reference. You have all faced this periodically.
8 I must say I'm a bit of a dissenter on this. I
9 would like to broaden it a little bit, but here is
10 where we came out.
11 We attempted to provide a clearer and
12 more straightforward rule by saying, "A judge may
13 provide a reference or recommendation for an
14 individual based upon the judge's personal
15 knowledge," and that is important.
16 John Feerick and I, and I'm sure other
17 law school deans often get letters saying, I know
18 this kid's parents, but you should never do that. I
19 would hope you wouldn't do that.
20 "However, unless the recommendation is
21 based upon information obtained through the judge's
22 expertise or experience as a judge, the reference or
23 recommendation should not be communicated on the
24 judge's judicial letterhead."

1 I think that is probably workable. I
2 probably would be more permissive. Again, as a law
3 school dean, I like to be able to see that it's a
4 judge on the judge's letterhead recommending a next
5 door neighbor who he or she has known all of his
6 life because judges know what it takes to be a good
7 lawyer. This kid hasn't worked for the judge so the
8 judge can't use the letterhead.
9 At any rate, you can certainly make the
10 point that you are a judge in the letter without
11 using your letterhead. That took us a while to get
12 there.
13 Rule 3.02, "A judge shall not disclose or
14 use, for any purpose unrelated to judicial duties,
15 nonpublic information acquired in a judicial
16 capacity." This is largely taken from the old Canon
17 3B(12).
18 Then 3.03 has been the subject of some
19 considerable debate. It states, "A judge shall not
20 hold membership in any organization that practices
21 invidious discrimination on the basis of race, sex,
22 religion, national origin, ethnicity or sexual
23 orientation, and shall not use the facilities of
24 such an organization to any significant extent."

1 I want to note here that we have added
2 ethnicity and sexual orientation to the list in the
3 old Canon 2C.
4 Also, the commission decided to add to
5 the black letter the idea that even if the judge is
6 not a member of a discriminatory organization, he or
7 she should not use the organization's facilities to
8 any significant extent.
9 There were discussions about spouses
10 being the member of that organization and the judge
11 being able to use the facilities, et cetera, but it
12 was intended to clarify and reinforce the notion
13 that the rule to the extent of the use of facilities
14 of the discriminatory organization as well.
15 QUESTION/COMMENT FROM AUDIENCE: This
16 raises a question that sort of recurs throughout.
17 It appears to me that the ABA is
18 attempting to create a mini anti-discriminatory
19 statute throughout the canons. It occurs in Canon 2
20 and saying protective groups -- I guess I'm
21 interested in why --
22 DEAN ALFINI: Well, it's not entirely
23 anti-discriminatory. It's socioeconomic status too.
24 We haven't put in that.

1 QUESTION/COMMENT FROM AUDIENCE: Well,
2 that's just another protected category.
3 My question, I suppose, apart from the
4 associational issue that is implicated in 3, saying
5 I cannot participate in an organization that
6 discriminates on one of the enumerated protected
7 categories, I guess I'm wondering why when the -- I
8 think the overarching issue is whether judges
9 comport themselves with respect to the litigants and
10 participants in the judicial process with respect
11 and dignity, an issue that is covered in Canon 2.07.
12 Why is it so particularized in these
13 other canons to create, in effect, a Title Seven or
14 super discrimination issue?
15 DEAN ALFINI: I don't think this was the
16 intent. I think the intent is to underscore the
17 need to have unbiased impartial judges.
18 If the judge is a member of a
19 discriminatory organization, there is an appearance
20 that the judge may not be entirely impartial or
21 unbiased.
22 QUESTION/COMMENT FROM AUDIENCE: So a
23 judge, to follow-up with his example, is a Boy Scout
24 leader may be perceived as not being fair to gay

1 people.

2 DEAN ALFINI: Well, only recently, since

3 it became such an issue. I suppose that is --

4 QUESTION/COMMENT FROM AUDIENCE: So the

5 ABA's contention is a judge who is a Boy Scout

6 leader would be --

7 DEAN ALFINI: Let's not use the ABA now.

8 The ABA hasn't looked at this yet. Do you mean the

9 House of Delegates of the ABA?

10 QUESTION/COMMENT FROM AUDIENCE: No.

11 DEAN ALFINI: These are a few deranged

12 people.

13 QUESTION/COMMENT FROM AUDIENCE: Well,

14 the canon is only modified in part.

15 QUESTION/COMMENT FROM AUDIENCE: Does

16 that mean that a judge of Italian heritage cannot

17 belong to the Sons of Italy?

18 DEAN ALFINI: There is commentary along

19 those lines. The American Bar Association

20 discriminates, doesn't it? Only lawyers, right?

21 You have to be a lawyer in order to be

22 involved in the leadership, though.

23 There is commentary, though, that

24 explains that away.

1 QUESTION/COMMENT FROM AUDIENCE: The
2 canon giveth and the commentary taketh away.
3 DEAN ALFINI: Which commentary explains
4 it?
5 MS. GALLAGHER: The first comment to 3.03
6 is at the end.
7 "Rule 3.03 does not prohibit a judge's
8 membership in any United States military
9 organization, an organization dedicated to the
10 preservation of religious, ethnic or legitimate
11 cultural values of common interest to its members,
12 or one that is in fact and effect an intimate,
13 purely private organization whose membership
14 limitations --
15 QUESTION/COMMENT FROM AUDIENCE: Like the
16 catholic church.
17 QUESTION/COMMENT FROM AUDIENCE: Then
18 what organizations are left?
19 QUESTION/COMMENT FROM AUDIENCE: Does the
20 catholic church qualify under your commentary
21 because the catholic church has specific canons
22 itself that make your limitations, at least one of
23 your limitations a problem.
24 QUESTION/COMMENT FROM AUDIENCE: Well,

1 the commentary isn't enforceable anyway. It's the
2 canon.
3 DEAN ALFINI: The catholic church is
4 devoted to the preservation of religious value,
5 isn't it?
6 QUESTION/COMMENT FROM AUDIENCE: That is
7 exempted here.
8 JUDGE ROSENBLUM: That was the intent and
9 it has been all along.
10 QUESTION/COMMENT FROM AUDIENCE: This is
11 just a drafting comment. If you, in fact, are
12 creating an exception, why don't you put the
13 exception in the rule because just from a structural
14 point of view, if the commentary is aspirational, it
15 seems to me, this is truly an exemption, why -- that
16 doesn't that make sense.
17 DEAN ALFINI: Well, if I said that, I
18 overstated. The commentary is primarily
19 explanatory, but it also has some aspiration and
20 auditory language, but the commentary is intended to
21 explain.
22 QUESTION/COMMENT FROM AUDIENCE: If
23 you're a texturalist, which one should you look to?
24 DEAN ALFINI: I'm not.

1 QUESTION/COMMENT FROM AUDIENCE: I don't
2 have to pay any attention to any of it.
3 JUDGE ROSENBLUM: Well, it's a legitimate
4 point because a lot of states haven't adopted a
5 commentary. If you are one of those states, then
6 you may want to adopt some of this language in your
7 code.
8 DEAN ALFINI: Remember, this is a model
9 code. It should be as good a model as we can make
10 it. If a state, as Ellen suggests, is not going to
11 adopt a commentary, they may want to consider
12 putting it in.
13 QUESTION/COMMENT FROM AUDIENCE: Can I
14 just ask the narrow question? Why doesn't 3.03
15 create an associational problem?
16 I'm on the Supreme Court. This is a
17 model code. I'm asking you why should I take on
18 this. What is it in your studies that allows you to
19 conclude that this doesn't create an associational
20 problem?
21 DEAN ALFINI: I'm not sure what you mean
22 by that.
23 QUESTION/COMMENT FROM AUDIENCE:
24 Violation of the rights of association.

1 QUESTION/COMMENT FROM AUDIENCE: The
2 First Amendment.
3 DEAN ALFINI: You're talking about in the
4 context of a judge having been disciplined and
5 coming before you on that issue?
6 QUESTION/COMMENT FROM AUDIENCE: Yeah.
7 Why do we have the right to impose upon a judge the
8 obligation that he avoid associating with an
9 organization that discriminates on the basis of
10 sexual orientation?
11 DEAN ALFINI: Well, there is a point of
12 view out there that is by far the minority view and
13 that is the judge's personal life is outside the
14 bounds of judicial disciplinary authorities.
15 If you take that view, I would say no.
16 QUESTION/COMMENT FROM AUDIENCE: No, no,
17 no. You're ducking my question. I'm not saying
18 that.
19 You are offering this as a model code for
20 courts like all of ours to adopt, and I'm suggesting
21 to you, that there seems to be a fundamental, at
22 least, threshold associational violation here.
23 There is a right to associate under our
24 federal constitution and probably most of our state

1 constitutions.
2 DEAN ALFINI: And when you put on those
3 black robes, some restrictions apply.
4 QUESTION/COMMENT FROM AUDIENCE: The only
5 modification, as I see it, is the addition of
6 ethnicity and sexual orientation, right?
7 DEAN ALFINI: This is in the current
8 model code except for ethnicity and sexual
9 orientation.
10 If I am understanding you correctly, it
11 sort of parallels the issue of judicial speech.
12 There are those of us who think when we put on the
13 black robes, you have to accept certain
14 restrictions.
15 QUESTION/COMMENT FROM AUDIENCE: I think
16 the question was more, have you researched and
17 thought about it so that for those states that have
18 adopted this, when we get the next level of
19 challenges, which is, this violates First Amendment
20 right of association, are there articles that we can
21 go to on that? Have you researched it? Is this
22 subject to a strict scrutiny test?
23 That, I think, was what he was trying to
24 get to.

1 DEAN ALFINI: I don't think there is any
2 significant literature on it. Cindy?
3 MS. GRAY: I think Professor Fox wrote
4 something in the Hofstra Law Review for the other
5 symposium. I can't say what his conclusions were,
6 but he wrote about it and he was actually fairly
7 critical I think of the rule on a variety of
8 grounds. But it's not been litigated.
9 QUESTION/COMMENT FROM AUDIENCE: I think
10 there are three or four sort of quick bullet point
11 answers, and I agree that you do need to have the
12 research and do some ground work so you can respond
13 to challenges but there are some fundamental
14 responses to those kinds of questions that I think
15 the commission should never let slip out of their
16 minds.
17 One of those, of course, is that judges
18 are different. I don't want to hear, No, we're not.
19 When I became a lawyer -- I'm not a judge but I'm a
20 lawyer and I traded away certain rights that
21 non-lawyers have for the privilege, not the right,
22 but the privilege of becoming a member of the bar.
23 Now, I also think in terms of the
24 question of why shouldn't a judge be able to be a

1 member of an organization that practices invidious
2 discrimination, one of the major reasons for having
3 the code of conduct is less about regulating judges
4 per se, than it is about ensuring that the
5 perception of due process is present and that there
6 is public confidence in the functioning of the
7 justice system.
8 I've got to tell you, if I have a case,
9 whether I'm going in as a litigant or lawyer, and I
10 find out that the judge in front of me has a
11 membership in anti-woman's organization, I'm going
12 to want a different judge, and I think I would be
13 entitled to a different judge.
14 That judge may bend over backward to make
15 sure that I get a fair decision, but if that
16 decision goes against me, am I ever going to believe
17 it wasn't biased? Certainly no nonlawyer is going
18 to believe that.
19 I think there are very, very valid
20 reasons for some of these rules, and I also think
21 that we do trade away certain broader rights for the
22 privilege of serving in these capacities, but I
23 think that those need to be made perhaps more
24 explicit in the commentary and perhaps get at some

1 of that in the rule itself as opposed to just
2 relegating it to commentary.
3 DEAN ALFINI: It seems like every time we
4 get more explicit, we get into trouble. Barbara's
5 point about due process is well taken.
6 Probably the best source on that is an
7 article by Chief Justice Shepard in the Georgetown
8 Journal of Legal Ethics. He makes that case very
9 forcefully and I think it comes over. It can be
10 made just as well on the associational side.
11 QUESTION/COMMENT FROM AUDIENCE: I also
12 want to say when I say, Make the rule more explicit,
13 I don't mean try to make sure that every single
14 conceivable possible potential I is dotted or T is
15 crossed because there comes a point if we try to do,
16 the public becomes the enemy of the good. This is a
17 human endeavor and there will be infirmities. It is
18 the nature of things.
19 I don't think we should jettison
20 something that has the potential to be very, very
21 good for the judicial system because we cannot make
22 it perfect.
23 QUESTION/COMMENT FROM AUDIENCE: I have a
24 question related to the use of the term and the

1 placement of the term "legitimate" in the
2 commentary.
3 As I read that exception, it wouldn't
4 necessarily prohibit me from belonging to the Arian
5 Nation or the KKK when I would say that it's an
6 organization dedicated to the preservation of ethnic
7 values of common interest to its members.
8 I see you do qualify cultural, but you
9 don't qualify religious or ethnic, so it's kind of a
10 two-level question, the specifics with regard to
11 "legitimate," it seems this commentary swallows the
12 rule. I read the "or" as being disjunctive.
13 DEAN ALFINI: Let me tell you, we
14 struggled with this as they did in 1990 when they
15 first put it in there. There is no reason why we
16 can't go back to the wording again. Your point is
17 well taken about that word.
18 MS. GALLAGHER: When we were just
19 together in Salt Lake, and we were looking at this
20 rule, I believe someone raised that issue as well.
21 Didn't we agree to take out "legitimate"? I think
22 we agreed to take it out.
23 QUESTION/COMMENT FROM AUDIENCE: Could
24 you give a couple of examples of what specific

1 organizations would be covered by the black letter
2 rule and not exempted by the commentary? What
3 organizations are we talking about?
4 DEAN ALFINI: Well, I think Barbara and
5 Judge Anderson bring up a couple. A downtown eating
6 club that professional people might go to that
7 excludes women or African Americans or Italians for
8 that matter, the Arian Nation, a country club that
9 has exclusionary practices.
10 QUESTION/COMMENT FROM AUDIENCE: And they
11 don't fall under the exceptions for the purely
12 private?
13 DEAN ALFINI: I don't think so. If
14 they're small enough, they might.
15 QUESTION/COMMENT FROM AUDIENCE: In other
16 words, a group of members that go to lunch, doesn't
17 that fall under the exception for the purely private
18 organization? How could you -- in other words, the
19 problem that was pointed out later is not covered
20 because it's a purely private organization that goes
21 to lunch and excludes people, and it's encompassed
22 by the exception.
23 QUESTION/COMMENT FROM AUDIENCE: I think
24 there's a difference if you're using the word

1 "organization" to mean just a loose aggregation of
2 friends and colleagues as opposed to a formal
3 organization that, for example, has filed
4 corporation papers has C3 or C4 status or whatever,
5 actually has some sort of superstructure to it.
6 QUESTION/COMMENT FROM AUDIENCE: But the
7 two examples are not those.
8 QUESTION/COMMENT FROM AUDIENCE: Right.
9 QUESTION/COMMENT FROM AUDIENCE: Back to
10 the same question. What organizations are not
11 encompassed?
12 DEAN ALFINI: The Rotary in 1985. They
13 excluded women. That is why this took so long to
14 get into the code. When the Rotary changed its
15 practices -- I think it was influence to some
16 extent. Many judges belonged to the Rotary.
17 QUESTION/COMMENT FROM AUDIENCE: Is the
18 Boy Scouts covered by the black letter law or the
19 exception?
20 DEAN ALFINI: We talked about that. I
21 don't know.
22 QUESTION/COMMENT FROM AUDIENCE: What's
23 the answer?
24 DEAN ALFINI: I don't know.

1 QUESTION/COMMENT FROM AUDIENCE: Well, it
2 depends upon what you mean by invidious. What does
3 invidious mean?
4 QUESTION/COMMENT FROM AUDIENCE: There is
5 a body of law out here for those of us who are
6 judges. Invidious is not some loosey goosey term.
7 We have been knowing, down south, what invidious
8 discrimination is for a long time. These things
9 have been litigated.
10 What frustrates me about our wonderful
11 friends on the commission and their fellow travelers
12 is that we, on the Supreme Court, need some guidance
13 here.
14 Is the Sons of Confederate Veterans bad
15 but the Daughters of the American Revolution is
16 okay? Is the Arian Nation bad, but the Oddfellows
17 Club is okay? Is the Hybernian Society bad because
18 it doesn't allow woman, but good because it
19 celebrates Irish heritage? Is the Catholic church a
20 problem?
21 Frankly, you can't all sit here and smile
22 and say, Oh, boy, these are tough problems. If we
23 are being asked to develop guidelines that guide the
24 conduct of judges, both for their guidance as

1 members of the judicial brother and sisterhood and
2 also guidance that is going to help us deal with
3 disciplining them, which are two not necessarily
4 compatible goals, we need some pretty specific legal
5 research that is grounded in something we can
6 understand in case law when you throw around terms
7 like "invidious" and whatnot that have very definite
8 meanings in the law.
9 JUDGE BOWIE: There are answers to that.
10 The ABA has put out an annotated model code that has
11 collected the disciplinary opinions from around the
12 country.
13 On the federal side, the Committee on
14 Codes of Conduct have published a compendium that
15 lists the various kinds of organizations, which,
16 when asked the controversial kind of things, they
17 have collected the notion of what they think fits at
18 that particular time.
19 QUESTION/COMMENT FROM AUDIENCE: I
20 understand, Judge, but what I am saying for the
21 members of this commission to take the position with
22 respect to the appearance of impropriety, that may
23 be a no-no because it's too vague, and you can't
24 really assign something when people don't have

1 notice of what they're being charged with on the one
2 thing, but then take 3.03 and say anything that's
3 got the appearance of impropriety is really bad.
4 We got to have some consistent guidance
5 here.
6 DEAN ALFINI: I'm just not seeing the
7 vagueness in this wording. You mention the Catholic
8 church. Clearly, the Catholic church is not
9 covered.
10 QUESTION/COMMENT FROM AUDIENCE: Okay.
11 How about the Sons of Confederate Veterans?
12 DEAN ALFINI: That my be a tougher case,
13 but that's what you guys do for a living. You deal
14 with the tougher cases.
15 QUESTION/COMMENT FROM AUDIENCE: Well, no
16 doubt about it.
17 QUESTION/COMMENT FROM AUDIENCE: Just a
18 little further on this. I understand and I have
19 been told, I'm not supposed to say that judges are
20 different.
21 The fact is, didn't the Supreme Court in
22 White say, We may not be as different as we thought
23 we were. Yet what we're doing is saying, Well,
24 we're going to build even more on this.

1 DEAN ALFINI: So you are guys arguing
2 there shouldn't be --
3 QUESTION/COMMENT FROM AUDIENCE: No.
4 You're coming to me and you're saying, I think you
5 ought to adopt this for your state. I'm saying,
6 Well, wait a minute. What is going to be adopted?
7 JUSTICE SHEPARD: Well, let's start
8 peeling the onion backwards. Would you want to rule
9 in your state that it's all right for judges to
10 belong to groups that admitted only White people?
11 QUESTION/COMMENT FROM AUDIENCE: We have
12 another question here. Would I want that? Heavens
13 no, I don't want that.
14 No, no, wait, wait, wait. Let me put a
15 little preface.
16 I understand I'm a little late. I have
17 never belonged to any of these organizations except
18 when I was a child I was a Boy Scout. I didn't know
19 at the time. If you told me that, I wouldn't belong
20 to that. I refuse to belong to any such
21 organization.
22 The question is isn't what I want. The
23 question is what does the Constitution say.
24 JUSTICE SHEPARD: Well, the essence of

1 your argument is that you believe the constitution
2 prohibits you from making the rule that I just
3 described.
4 QUESTION/COMMENT FROM AUDIENCE: I'm
5 asking for your help. You believe it's okay under
6 the constitution.
7 QUESTION/COMMENT FROM AUDIENCE: Why do
8 you believe that?
9 QUESTION/COMMENT FROM AUDIENCE: What
10 makes you believe this especially in light of the
11 fact -- if the argument is, Well, judges are
12 different, they give up their constitutional rights
13 when they put on a robe, all their constitutional
14 rights.
15 Show me. At least show me that judges
16 give up their right to association, their right to
17 free speech, their First Amendment rights when they
18 put on a robe.
19 I think when I look at White, the Supreme
20 Court has said, No, you don't give up all those free
21 speech rights.
22 If that is the case, why am I believing
23 that the Supreme Court is going to say, You give up
24 all your association rights?

1 JUDGE DRESSEL: Could I intervene here
2 and request that the panelist go back and finish it
3 and you can bring this up in your discussion groups
4 because we haven't gotten to Canon 5 yet.
5 DEAN ALFINI: We could go on.
6 JUSTICE SHEPARD: Why don't we go back.
7 Let's have Judge Bowie go into Canon 2.
8 JUDGE ROSENBLUM: Now, you know why I was
9 happy to get Canon 5. We're never going to get
10 there.
11 JUDGE BOWIE: Well, taking a look at it,
12 first I worked off of what was posted on the ABA web
13 site, and Eileen has given you in your pamphlet the
14 red line version so there may be a couple things --
15 I'm not going to go through the whole thing because
16 a lot of it, as you have already been told, has been
17 drawn from other canons, particularly former Canon
18 3.
19 It's just been repeated, but there have
20 been a few changes, but I want to focus on a couple
21 things that directly concern you. One is 2.11.
22 2.11 has to do with the judicial
23 statements in pending and future cases, and one of
24 the things we're talking about and need your help on

1 has to do with the reach of this.
2 The ABA had narrowed it down previously
3 to say a judge shall not, while proceeding is
4 pending or impending in any court, make any public
5 comments that might reasonably be expected to affect
6 the outcome or impair its fairness.
7 That was intended to be sort of
8 territorial, but now we have the Internet. We have
9 got the web logs, we have all this kind of stuff.
10 Is that realistic today in terms of the
11 reach of this limitation, or does it need to be
12 broader? That is one of the things that we're
13 looking at.
14 2.11(b) is an issue that we have already
15 talked about, but it specifically sets out that a
16 judge shall not with respect to cases, controversies
17 or issues that are likely to come before the court,
18 make pledges, promises or commitments that are
19 inconsistent with the impartial performances of the
20 adjudicative duties.
21 The thinking being if it is
22 administrative duties that we're going to clean up
23 the backlog and that's what you're promising, that's
24 not inappropriate, but when you're talking about

1 issues that are substantive issues in the context of
2 the litigation, then we're concerned.
3 2.12 is the disqualification section, and
4 we have organized it somewhat. One of the things
5 that is important to keep in mind is in (F), we have
6 the provision that the judge shall disqualify
7 himself or herself if the judge, while a judge or
8 candidate for judicial office, has made a public
9 statement that commits or appears to commit the
10 judge with respect to an issue in the proceeding or
11 the controversy in the proceeding.
12 Then you have all kinds of interesting
13 questions that crop up around that because you can
14 go back to (inaudible) in the Supreme Court's
15 decision in which Rehnquist refused to recuse having
16 written a memo when he was at the justice
17 department.
18 On the flip side, you have Justice Scalia
19 recusing in the Pledge of Allegiance case because of
20 comments he made, I think, down in New Orleans at
21 some meeting some months before. When challenged on
22 it, he decided to recuse. There is another section
23 that we want to --
24 DEAN ALFINI: We should note, though,

1 that they're on the only court in the country that
2 is not subject to any ethics rules.
3 JUDGE BOWIE: Well, that is not true.
4 Mark and I were talking about this at lunch.
5 They're not subject to the Canons of the Code of
6 Conduct, the federal judges. They are subject to
7 455.
8 DEAN ALFINI: Okay.
9 JUDGE BOWIE: 28 USC 455 is equally
10 applicable to the Supremes, although they have
11 demonstrated a tendency to read it differently
12 because of the uniqueness of their situation.
13 QUESTION/COMMENT FROM AUDIENCE: And the
14 secret standing order.
15 JUDGE BOWIE: Right. Mark was talking
16 about the secret standing order, which is so secret
17 that I haven't heard about it either.
18 There is a published 1993 statement of
19 recusal policy that the Supreme Court has set out
20 and uses. They've come up with some interesting
21 things just as Justice Rehnquist in the Microsoft
22 case, he filed a one-pager explaining why he was not
23 recusing even though his son was a partner in a firm
24 in Boston that handled unrelated but Microsoft

1 litigation. So you have that question.
2 QUESTION/COMMENT FROM AUDIENCE: How does
3 that compare with what Missouri has done with
4 recusals?
5 JUDGE BOWIE: I don't know what Missouri
6 has done, so I can't answer that.
7 DEAN ALFINI: Missouri, following White,
8 added a provision that said --
9 QUESTION/COMMENT FROM AUDIENCE: I think
10 it was -- did it say May?
11 JUDGE WOLFF: Well, it said that the
12 person can be recused or disqualified. Actually,
13 the exact language is in some of these materials
14 someplace, but it's not a per se, but it's basically
15 a warning that if you take a position, you're going
16 to be disqualified from ruling on cases where that
17 is going to be involved.
18 The classic example is the death penalty.
19 If you take the position that you will, by God,
20 impose the death penalty every time the jury
21 recommends it, then you're not going be sitting on
22 any death penalty cases.
23 QUESTION/COMMENT FROM AUDIENCE: Is that
24 different from saying, I'm against the death

1 penalty? I'm also against murder.
2 JUDGE WOLFF: The tricky part is and what
3 we were trying to avoid is if you think about the
4 instruction we normally give to juries about putting
5 aside your personal beliefs and follow the law, that
6 is really the standard that we should be holding
7 ourselves to.
8 I have an opinion about lots of stuff,
9 and there's a lot of stuff that comes out, judicial
10 opinions written by me is stuff that I don't agree
11 with personally. Not a lot, but some.
12 I'm only stating this for purposes of
13 discussion, but there is. So that's the dilemma in
14 this kind of thing.
15 I do think it was a good move on our part
16 to do that, and it came out -- we did it in August
17 of 2004 or whatever year it was. There was an
18 election going on, and we have a bunch of -- you
19 think the Missouri Plan is the whole state. It's
20 not. There's 110 counties where the Missouri Plan
21 doesn't exist. We have partisan elections, and we
22 had contested partisan elections.
23 DEAN ALFINI: We should know that Justice
24 Kennedy in the White decision invited the states to

1 do that. (Inaudible) a First Amendment issue, but
2 he said, Why don't you do this?
3 I think Missouri and the ABA has --
4 JUDGE ROSENBLUM: The difference seems to
5 be that in Missouri you use the term "announce," at
6 least in the language I see.
7 Whereas, we use "commit" or "appear to
8 commit," so there is a little stronger punch in the
9 ABA code.
10 JUDGE WOLFF: Yes. What we really wanted
11 to get to was the taking of a position. If you're
12 taking a position on an issue and then the issue
13 comes before you, whether you call it a commitment
14 or not, it's a commitment. The public takes it that
15 way.
16 QUESTION/COMMENT FROM AUDIENCE: On the
17 "appears to commit," we dropped that in California
18 after White. We dropped the "or appears to commit."
19 I just wondered if there was much
20 discussion about that language.
21 JUDGE ROSENBLUM: Did you drop it from
22 your recusal as well as of your substantive rule,
23 because we don't have it in the substantive rule,
24 but we do have it in the recusal?

1 QUESTION/COMMENT FROM AUDIENCE: We
2 dropped it in the recusal.
3 JUDGE ROSENBLUM: The ABA included that
4 language, I believe, although there seems to be some
5 discrepancy. On the recusal, we didn't reconsider
6 the ABA's decision to include it.
7 QUESTION/COMMENT FROM AUDIENCE: Was
8 there any discussion -- when you say commit,
9 presumably, you don't have to use the word "commit,"
10 but something that clearly appears to commit you or
11 reasonably does commit you, so we're talking about
12 something less than that.
13 It seems to me there is the danger there
14 of someone making the statement that you could
15 reasonably construe to be a commitment or you could
16 reasonably construe not to be a commitment.
17 I was wondering, was there any discussion
18 of a way for the judge to clear it up? Well, yeah,
19 I said that, but it didn't mean I was committing.
20 DEAN ALFINI: That's an idea maybe in the
21 comment to talk about a judge sort of --
22 JUDGE ROSENBLUM: I think it was some
23 discussion to limit commit because "commit"
24 obviously takes it to that next gray area, and

1 "appears to commit" takes it even further.
2 JUDGE BOWIE: This is part of the point
3 that Professor Schotland was making this morning.
4 While he said he thought that it couldn't
5 withstand constitutional scrutiny, the pledge and
6 promises language, it's figuring out what it really
7 is that is trying to define that.
8 QUESTION/COMMENT FROM AUDIENCE: Why
9 don't you consider dropping at this point "appears
10 to commit"? It's just too subjective. We'll get
11 differences of everybody in here on that. It isn't
12 necessary.
13 JUDGE ROSENBLUM: You're talking about
14 the disqualification?
15 QUESTION/COMMENT FROM AUDIENCE: Yes.
16 JUDGE ROSENBLUM: It's not in the other
17 part.
18 QUESTION/COMMENT FROM AUDIENCE: Would a
19 former concurrence or dissent be considered as
20 taking a position on a case that came up later?
21 Does that mean you have to get out of the case?
22 JUSTICE SHEPARD: No. Otherwise, there
23 would be no such thing as the Rule of Precedence,
24 right, at least, if you had ruled on the precedence.

1 QUESTION/COMMENT FROM AUDIENCE: I like
2 the "appears to commit" language to tell you the
3 truth because I read 2.1 something as an objective
4 standard.
5 The first paragraph gives you the
6 standard which is, to me, whether a reasonable
7 person with adequate knowledge of a situation would
8 question the judge's impartiality.
9 Telling a judge that he or she is not
10 going to be able to hear a case if they have done
11 things or said things appears to give them an
12 advantage is not a sanction against the judge in any
13 way. It's upholding the general purpose of rule.
14 JUDGE WOLFF: By the way, the reason we
15 did it was to keep people from making those kinds of
16 statements.
17 We weren't really trying to impose a rule
18 of discipline, but just as a way, and I think Roy
19 Schotland brought it out. What we're really trying
20 to do is give the opponent a means of saying, Look,
21 he may have looked like he's promising us a whole
22 lot of stuff, but he's not going to be able to sit
23 on any of those cases.
24 QUESTION/COMMENT FROM AUDIENCE: The

1 interesting thing that came out here is due
2 processes. There's no personal interest in the
3 judge or due process of the litigants. I have
4 always liked this language.
5 QUESTION/COMMENT FROM AUDIENCE: With
6 regard to the issue of public statements, what is
7 the difference if the statement is made publicly or
8 with five people at a cocktail party?
9 If you say to five people at a cocktail
10 party, I could never impose the death penalty, you
11 don't have to be disqualified?
12 It's clearly not a public statement. It
13 clearly is as biased as if you stood up and say --
14 DEAN ALFINI: Five people at a cocktail
15 party under certain circumstances could be public.
16 If there's a journalist as one of the five people,
17 it certainly is a public statement.
18 QUESTION/COMMENT FROM AUDIENCE: If
19 you're sitting at someone's house at a Christmas
20 party and you say that, if that's the case, then why
21 not take "public" out and just use "statement."
22 JUDGE ROSENBLUM: Just remember that
23 there's a general rule. A judge shall disqualify
24 himself or herself in any proceeding in which the

1 judge's impartiality might reasonably be questioned.
2 That doesn't require public, private.
3 It's wide open, and then there is more specific
4 laundry lists of different types of situations
5 including the one we have been talking here which
6 was recently added in light of White, so I don't
7 think it's really a problem.
8 QUESTION/COMMENT FROM AUDIENCE: So why
9 use the word "public"?
10 JUDGE ROSENBLUM: I think because we were
11 trying to -- we want to give judges a life. At the
12 same time, we want to make sure there is protection
13 in a situation that truly warrants disqualification.
14 That is what we have been doing all
15 along. There is a lot of compromise within the code
16 to give judges the opportunity to go out and speak,
17 but at the same time, be careful what they say, et
18 cetera.
19 I don't know if there's a better answer
20 than that.
21 JUDGE BOWIE: No. It's going to need the
22 time to figure out where the line is between what
23 you say to your spouse or domestic partner on the
24 one hand versus the classic example currently is

1 Justice O'Connor on the night of the election in
2 November of 2000, who's at a dinner party and hears
3 that it's just been called for Gore, and says, Oh,
4 that's terrible. That's all she said.
5 QUESTION/COMMENT FROM AUDIENCE: From the
6 litigant's perspective, it doesn't matter if it was
7 in a bathroom or in a -- the bias is still there no
8 matter where it was said.
9 JUDGE BOWIE: If that is what it was.
10 JUSTICE SHEPARD: Well, F is not designed
11 to overrule A or B. There was a fair amount of
12 discussion when the point was raised, and I think we
13 concluded that if the draft said, It doesn't make a
14 difference where you said it or how many people were
15 there or who you said it to, the charge would be
16 that we were micromanaging the private lives of
17 judges, and that the public statements are more as a
18 greater moment and are mentioned specifically for
19 that reason, but does not exclude the possibility
20 under A or B, depending on where you were or what
21 you said and who was there and so on, it might be a
22 basis for disqualification.
23 QUESTION/COMMENT FROM AUDIENCE: I just
24 have a note of caution on the public comment. That