AMERICAN BAR ASSOCIATION

JOINT COMMISSION TO EVALUATE

THE MODEL CODE OF JUDICIAL CONDUCT

American Bar Association Office

John Marshall Conference Room

Ninth Floor

740 15th Street, NW

Washington, D.C.

Public Hearing

December 5, 2003

10:00 a.m.

Reported by:

Ethel M. Coates

APPEARANCES:

CHAIR - MARK HARRISON, ESQUIRE
EILEEN GALLAGHER - ABA Staff Member
THE HONORABLE JAMES WYNN
THE HONORABLE CARA LEE NEVILLE
THE HONORABLE PETER BOWIE
THE HONORABLE MARGARET McKOWEN
PETER MOSER, ESQUIRE
SETH ROSNER
THOMAS FITZPATRICK, ESQUIRE
LORETTA ARGRETT
CHARLIE GEYH
JAN BARAN, ESQUIRE
DONALD HILLIKER, ESQUIRE
ROBERT TEMBECKJIAN, ESQUIRE
ROBERT CUMMINS, ESQUIRE
MARVIN KARP, ESQUIRE

APPEARANCES (CONINTUED):

(Via Telephone)

THE HONORABLE HARRIETTE TURNER

GEORGE COLEMAN

EILEEN LIBBY

MAGGIE VERTEL

JEAN GRAY

P R O C E E D I N G S

THE HONORABLE JUDGE TURNER: Hello, Mark.

CHAIR HARRISON: Good morning, Harriette, how are you?

THE HONORABLE JUDGE TURNER: I'm good, thank you.

CHAIR HARRISON: Thank you for participating by phone. That's Harriette Turner, Administrative Law Judge in Phoenix, who's a member of the Commission, who couldn't be here because of hospitalization of a partner and she's going to be taking care of that.

Welcome, everybody. I'm Mark Harrison, Chair of this Commission, and I think I've met most of the guests and Commission Members I had not met.

This morning we're going to have the pleasure of hearing from several group representatives who are expressing views, in some

instances, on behalf of groups that they represent. In other instances, simply because of a lot of research and study and thought.

I don't think we're slated to be committed to this schedule, but as I understand it, the first person we expect to hear from this morning is Suzanne Mishkin from HALT.

But before I do that I thought it might be helpful to those of you who are speaking to know to whom you're speaking. So let me go around the table, briefly, and ask each person to introduce themselves so that you know who you're talking to.

And I apologize, I don't know the lady sitting there.

MS. HOLMES: I'm Marilyn Holmes. I'm the administrative officer of the U.S. Courts.

CHAIR HARRISON: I've heard a lot about you Marilyn. So I'm glad you're here.

MR. ROSNER: Seth Rosner. I chair of the Standing Commission of Ethical and

Professional Responsibility, and I was on the drafting committee the last time the Model Code of Judicial Conduct was looked at and revised.

THE HONORABLE JUDGE BOWIE: I'm Pete Bowie, a bankruptcy judge from San Diego and one of the liaisons to the Judicial Conference of the U.S. Judicial Commissions.

THE HONORABLE JUDGE WYNN: Jim Wynn on the North Carolina Court of Appeals. I'm on the Standing Committee of Judicial Independence and chair appellate commission on independence.

THE HONORABLE JUDGE McKOWEN: I'm Margaret McKowen, Ninth Circuit Court of Appeals, and I also sit on the Judicial Conference on Ethics Commission.

MS. ARGRETT: Loretta Argrett. A former member on the Standing Committee on Ethics and Professional Responsibility, Washington, D.C., and a member of the Commission.

MR. GEYH: I'm Charlie Geyh. I'm a reporter to the Commission, and I'm a professor

of law at the University of Washington.

CHAIR HARRISON: And I've introduced myself. I'm a practicing lawyer in Phoenix with the firm of Brian and Kaye.

MS. GALLAGHER: I'm Eileen Gallagher, and I'm on staff at the ABA Association.

MR. BARAN: I'm Jan Baran, I'm a practicing lawyer in Chicago and I'm a former member of the ABA Standing Committee on Ethics.

MR. TEMBECKJIAN: I'm Bob Tembeckjian, the administrator and counsel to the New York Commission on Judicial Conduct. And I'm on the advisory committee to the Commission of the Association of Judicial Conduct.

MR. CUMMINS: Bob Cummins, a trial lawyer from Chicago, and I've been involved in judicial discipline and ethics for some time, and chaired or been involved in a number of ABA committees.

MR. KARP: Marvin Karp. I'm a practicing lawyer in Cleveland, Ohio. I'm the

current chair of the ABA Standing Committee on Ethics, and I'm an advisor to the commission.

CHAIR HARRISON: Also, just for your edification, on the telephone we have George Coleman and Eileen Libby, who are staff directors of the Ethics Committee, and Maggie Vertel, who's staff assistant at the center.

Do I have anybody else? I've already introduced Harriette Turner. Am I missing anybody else?

MR. COLEMAN: At same point, Mark -- this is George Coleman. Hello, everybody. At some point, I believe, that Jean Gray will be connecting into the call, too. She's the director of the Center.

CHAIR HARRISON: Okay. When that happens she can introduce herself. And the lady who just walked in, you can introduce yourself.

MS. CONNORS: My name is Nance Connors. I'm with the League of Women Voters Education Fund, and I'm the manager for a project called

Judicial Independence, where we work with leagues across the country looking at their State courts.

CHAIR HARRISON: Great. Nice to have all of you here.

Suzanne, looking forward to hearing from you.

MS. MISHKIN: Thank you, Chairman. Good morning everyone. My name is Suzanne Mishkin, contrary to popular belief, because I think that many of you may actually believe that my name is Nancy, but it's actually Suzanne.

It's good to be with all of you. I am the associate counsel with HALT, an organization of Americans for Legal Reform, and I want to start by thanking this Commission for the opportunity us to be able to provide input into the reviewed model code.

Just briefly a bit of background on HALT. We are a national nonprofit, nonpartisan legal consumer advocacy organization. We work to expand access to the civil justice system and to

increase accountability within it. And through our judicial integrity project we have an opportunity to speak with legal consumers every day about their concerns with regard to judicial accountability and making sure that judges don't present conflicts of interest in cases over which they preside.

One of the items that was highlighted in Chair Harrison's notice of public hearing was -- that this Commission was interested in exploring was: How should the concept of appearance of impropriety be addressed in the code. And this is the issue that I intend to speak to. And I'm going to do that by looking at four areas that I think that this commission should consider in revising the code.

The first is a financial disclosure reporting requirement. The second is increased access, public access, to financial disclosure records. The third is annual certification that a judge should not preside over any case in which

he possessed a financial conflict of interest. And the fourth is limitations of privately funded, special interest funded seminars that purport to offer judicial education.

I want to first turn, briefly, to the financial disclosure requirement.

A party appearing before judges are entitled to have ready access to judges' financial information, so that they can preserve their right to unbiased decision-making. And while we have confidence that most judges make the right decision when it comes to disqualifying themselves from cases in which they have a financial conflict, it's important to incorporate principles of sunshine into the revised code, so that litigants themselves can confirm for themselves that there are no disqualifying financial interests in their cases. This is something that I believe that will instill, increase public confidence into the judiciary.

This is a duty, as this Commission

knows, that's consistent with the federal requirement laid out in the Ethics in Government Act, which requires Members of Congress, Members of the Executive Branch and federal judges to turn over the annual financial disclosure reports.

The current code, though, when I was examining it, it fails to provide for full disclosure. It states that disclosure is only required, insofar as it's stated in Section 3E and 3F, as well as portions of the fourth Canon. However, 3E and 3F simply require judges to keep informed about their financial interests; it requires them to disqualify themselves when they know that they have a disqualifying interest; and it allows them to ask parties to consider waiving disqualifications.

It does not go to the issue of disclosing all financial interests so that litigants can make some of those determinations for themselves.

And the fourth Canon relates only to disclosure insofar as it covers extrajudicial activity. A phrase that's only not defined in the terminology section, but one that may or may not include income derived from investments.

So we would like to see a clear provision in the third Canon, which requires judges to keep and continuously update a list of their personal and fiduciary economic interests.

The second issue I want to briefly address is public access to the disclosure reports, because certainly it's clear that a strength in the disclosure rule is meaningless if the public doesn't have a convenient way of accessing those reports.

And, again, this is a duty that I think is consistent with the Ethics in Government Act, which requires, for example, members of the Senate to turn over their reports to the Secretary of the Senate and then individual members of the public can simply request from the

Secretary of the Senate immediate access to those reports. And the Ethics in Government Act provides that they shall receive it upon request.

So our recommendation is that, again, in the third Canon, there would be some provision made that says that a copy of the financial disclosure report shall be made available in the Clerk of the Court for which the judge presides.

The third recommendation we have governs certification. Certification annually that a judge has not presided over any case in which he possesses a conflict of interest, is, we believe, an important second safeguard. It requires a judge to go beyond simply enumerating his or her financial interests, but additionally taking the second step of evaluating the bearing that his or her holdings have on the cases in which he or she has presided during the previous calendar year. So we'd like to see, in the third Canon, a requirement for that form of certificating.

And the final issue that I want to

address are these seminars, that I know that this Commission has heard and knows a good deal about. It's been well-documented. 30 editorial boards from across the political spectrum, Members of Congress on both sides of the aisle, judges, ethics experts have roundly condemned the kinds of seminars that are funded by special interest groups and corporations that are using these expense-paid trips in what we believe to be somewhat of a thinly veiled attempt to really lobby judges.

And if this Commission is interested in exploring the issue of appearance of impropriety, I think there's no greater concern than this.

We hear from legal consumers every day who are concerned about these kinds of lavish vacations and trips, dude ranch vacations and Hawaiian vacations, that are funded by special interest groups, perhaps, because they relate to "the practice of law" because they happen to feature a couple of seminars about property

rights, but really are an opportunity to provide a particular partisan idealogical prospect to a judge and gives the judge the opportunity to enjoy, perhaps a well-deserved, but enjoy a nice five-day vacation or retreat.

That's the kind of thing that I think goes immediately to the issue of appearance of impropriety.

There is, in Section -- in Canon 4 -- excuse me -- a provision that says that judges may accept gifts. But it carves out an exception for gifts are incident to activities -- and I'm quoting -- "devoted to the improvement of the law, the legal system or the administration of justice".

Clearly, this leaves a gaping loophole that largely eviscerates the Canon's prophylactic provision, because the exception covers seminars funded by corporations and special interest groups as long as they're touted as activities that are even tangentially related to the legal

system.

Our recommendation is that, in the fourth Canon, this Commission amend the fourth Canon so that it provides the judges shall not accept gifts that have an aggregate value in excess of $500 in association with privately-funded continuing legal education programs for judges.

Now, this clearly leaves the cap that we've come up with, $500, is not one that needs to be set in stone, and it could even be a bracketed monetary provision in the code, as other provisions of the code allow state legislators to make up their own determinations as to what the appropriate cap is. But the important element is that there is a cap, that there is an established limit of some kind.

We also think that the commentary should clarify that participation in these kinds of programs inevitably creates the appearance, at least, of impropriety, and all program fees,

materials, travel, food, lodging, should constitute gifts under the Canon.

I think that these kinds of recommendations achieve a balance. Because on the one hand, they don't ban these kinds of seminars. They don't -- they even allow some private funding so long as the funding falls under the established limits.

On the other hand, it also ensures that judges avoid creating the appearance of impropriety by accepting gifts and lavish vacations from groups that really stand to profit at some point or to benefit from that ruling.

I know that time is short and I want to leave time for any questions that the Commission may have. But thank you so much for your time.

CHAIR HARRISON: Well, thank you for both the paper which you've submitted and your testimony, Suzanne.

And I failed to mention that the method we're going to follow today is to provide some

time after each speaker for members of the Commission to ask questions.

Let's start over there. No questions there.

Jim? Margaret? Loretta?

MS. ARGRETT: You mentioned in your testimony that each branch of the government that has now the filing of the financial reports provide for its own rules relating to disclosure. You didn't talk about the Executive Branch.

Do you know, to what extent and how a member of the public would be able to have access to those documents?

MS. MISHKIN: That's a good question. I know that, certainly, the Ethics in Government Act does cover members of the Executive Branch. I am not familiar with the particular procedure that it gets for obtaining those kinds of records, but I know that the Ethics in Government Act lays that out.

I'd be more than happy to examine that

and return to the Commission with a response about how people obtain financial reports related to members of the Executive Branch. I know it does exist, though.

THE HONORABLE JUDGE McKOWEN: A question on the financial disclosures on the federal side.

There already are publicly filed or publicly available financial disclosure forms, and most of the articles, in fact, have involved federal judges who've already filed these forms.

I'm just wondering if you have comments about a particular reform, are you proposing to be already in effect at the federal level and to some degree in the state?

MS. MISHKIN: Absolutely. And I think that the fact there is a requirement on the federal level only goes to show that the sky isn't falling, and this is something that could be expanded to state judges as well.

And you're correct to point out that it does exist in any states. However, there's a

number of states, notably, Connecticut, the District of Columbia and Maine, which do not provide for full disclosure.

The District of Columbia, I believe, requires, for example, that judges put out these kinds of reports, but they're confidential as to spouses' financial holdings. So that's certainly something that we'd like to see greater disclosure on.

So a number of states have disclosure provisions in place, but there's loopholes in the statutes that allow for a lot of this to still remain under shield and kept closed from litigants.

THE HONORABLE JUDGE McKOWEN: On the seminar issue, that is much cause for some debate.

MS. MISHKIN: Right.

THE HONORABLE JUDGE McKOWEN: When you talk about a privately-funded seminar. In your mind you have -- do you include private

universities, for example, in that environment?

MS. MISHKIN: That's an interesting question. I know that the fourth Canon already carved out an exception for, for example, bar-related seminars. And certainly that's something we have no problem with. We certainly believe that bars -- state bars should be able to deliver those kinds of seminars.

When it comes to private universities, I think that may be a bit more dicey. I think there may be some ideological concerns there. I think that this may be something that this Commission may be -- you know, it may be worth exploring, where the line needs to be drawn. And it may be a case-by-case sort of ad hoc consideration, because certainly some of those seminars may be objective in nature and some may be bipartisan.

To err on the side of caution, I think that we probably would like to see a cap done, the kind of reimbursement that judges can receive

by attending those seminars.

THE HONORABLE JUDGE McKOWEN: So, in other words, if Harvard University were to sponsor a seminar, the judge would need to make or the rule would need to make a content-based evaluation. Is that a suggestion?

MS. MISHKIN: I think so. I think that, you know, if Harvard University were to do that I think that, again, Harvard University should still go ahead and provide that seminar, and I'm sure that there would be many judges who would still be able to attend even though they would not be able to receive full reimbursement.

But the issue to us is that they -- that there be some sort of cap placed on the kind of funding that judges can receive for attending those. Not that those kinds of seminars be prohibited. That, I think, could impose free speech problems.

CHAIR HARRISON: Jim.

THE HONORABLE JUDGE WYNN: I had a

fleeting opportunity through the federal report to read for a brief period of time. And on the state level we don't have such a thing. We have job requirement that requires the disclosure of income in excess of a certain amount of money, $1,000, $2,000. And I'm not so sure I'm reading you.

Are you asking that we move toward this more detailed report that this disclosure names? And then the other part of that is: I'm not sure how we would have the authority to have a spouse or some other person connected to, to disclosure theirs, because, after all, we're apparently in period now where we don't quite enjoy that kind of authority.

MS. MISHKIN: Right.

THE HONORABLE JUDGE WYNN: At least I don't.

MS. MISHKIN: And I can appreciate that.

I think that, you know, there's many provisions within the current Canons which

require judges to be informed about spouses' and minor children's financial holdings, and I think that we would want to see that same kind of language in this recommendation.

And in terms of our specific request. What we're requesting is simply that this Canon incorporate the same principles that are already drawn in the Ethics in Government Act that apply to the federal branches. And so we're not asking for anything beyond those requirements.

Certainly, for example, if a judge were to hold a mutual fund that were to cover hundreds of securities. Clearly we would not be asking that the judge meticulously lay out every single stock that is held by that mutual fund and go to that level of detail, specificity and labor.

But we ask that, for example, with a mutual fund that covers a particular specialty, if it's a mutual fund that covers technology issues, for example, that that kind of general information be released and be accessible to the

public, so at least, litigants have an idea that the judge may or may not have some bias in that respect.

THE HONORABLE JUDGE WYNN: This certification requirement seems to me it puts the judge in an interesting position. If you certify that you have done something that you shouldn't have done, I take it a disciplinary proceeding could happen. If you fail to certify something, one could happen.

It just seems to me that it doesn't give you any amnesty by coming forth. There's no incentive.

In an essence, it's requiring the judge to come forth and self-police, but it's already happened, so to speak. It's almost an incriminating situation where you have to come forth and say, okay, I did this, now come discipline me.

And I'm just wondering -- it seems to me the emphasis should be on the front end of it,

more of the requirement where you're back at the disclosure. If you've done it there, then why do you need a certification at the end? Is it like you didn't believe him at the beginning?

MS. MISHKIN: Well, I think --

THE HONORABLE JUDGE WYNN: And then the litigants have access to his financial holdings. They can make the determination as to whether they feel that, based upon this information, to them, whether this judge should recuse himself. By making this full disclosure, he's essentially saying, here I am. Which your new requirements are they come back now and certify further.

MS. MISHKIN: Certainly, litigants should have that first opportunity to access the records, to make some of these determinations for themselves.

But in many cases litigants may still not be aware of the direct implication or ramifications that a particular holding may have on a case. And in that case we think that the

judge, who certainly may be in the best position to make that kind of determination -- and it's true that very few judges are, perhaps, likely to look favorably upon the prospect of self-policing -- but we think that the certification provision will be a constant reminder to a judge as he or she goes through the year looking at presiding over cases, making those determinations all along the way, so that upon the end of the year the judge can, with confidence, sign that certification and profess that he's not -- he or she has not presided over a case. So this is something that the judge can look at as sort of a future remedy.

THE HONORABLE JUDGE WYNN: One last question.

CHAIR HARRISON: I'm concerned that we're going to get -- okay.

THE HONORABLE JUDGE WYNN: Just one last question on the issue of the multi-day seminar. I have attended such a type of seminar, but not

as elaborate as you've described. The ones I've went to, they were meeting all day long and then you went to the hotel and came back.

MS. MISHKIN: Right.

THE HONORABLE JUDGE WYNN: I don't recall all the other stuff that go along with it.

But my concern is that they are seminars of that type which is mainly funded by individuals of particular groups that really attempt to try to -- I think they try to do a balanced implication. Because they are tremendously valuable to judges, in terms of learning, particularly economics is an area born out of the environmental health concerns that are things that a judge ordinarily would not pick up.

If you take that away from them, there may be no avenue for them to do it. What you end up with is a judge who has virtually no opportunity to enhance, the opportunity to learn these sorts of things. After all, there's no incentive for a lot of other groups to get

involved in it.

And I'm thinking, isn't there some middle ground, perhaps you could have the Chief Justice of the Supreme Court of each state to oversee such activities, to ensure that the activity is -- that the program content is intended to balance against that kind of effect as opposed to one that just says that you can't attend?

MS. MISHKIN: Certainly. That's one excellent alternative, having an independent body in place to assess whether or not a seminar is ideologically-based or partisan in nature, and to then determine funding based upon those independent decision-making -- that decision-making process.

But another alternative is allowing for these seminars to go on, but simply asking that after, for example, a $500 cap is met, that the judge pay his own way after that.

And another alternative is allowing

state bars to allow for these kinds of seminars, and to provide the same kind of education on economics that they -- you were just mentioning, and judges to receive continuing judicial education in that form.

Certainly, we think it's very important and it's critical that judges receive continuing judicial education. That's something that our organization promotes and encourages. But we simply don't support the kind of conferences that I was referencing earlier, which are much more about being wined and dined than they are about education.

MR. HILLIKER: Are these ideas in place anywhere?

MS. MISHKIN: The certification, it was in place for some year for federal judges. It was recently a requirement that was -- that was repealed with no justification. There was really no specified reason for repealing it. And I'm not aware, on the state level, of particular

areas. But that's another area I'd like to explore and get back to the Commission about.

CHAIR HARRISON: I want to provide time for the people to ask questions, but I also don't want to get hopelessly behind our schedule, mainly because I don't want to impose on the people who assumed they were going to be talking at approximately particular times.

So I want to get an idea of how many questions we have left.

Seth, you have a question; Marv, you have question. Are they all going to be brief?

MR. KARP: Very brief.

CHAIR HARRISON: And Bob? Okay.

MR. ROSNER: Mine is a yes or no answer.

MR. KARP: With eight minutes to give out the question.

MR. ROSNER: With financial disclosure, would you restrict the definition of family to spouse and minor child or minor children?

MS. MISHKIN: I know you want a yes or

no. I would say no, because we would also include any independents living in the household of the judge. But, yes, that's where we draw the line.

MR. BARAN: I have two questions and they will be brief.

With respect to financial disclosure. We sort of referred to the Ethics in Government Act as some guidelines here, for example, they require -- they disclose financial holdings of spouse with respect to assets that they benefit from and share, and also for independent children. Would that be useful?

MS. MISHKIN: Absolutely. That's precisely the guide that we'd like the Commission to follow.

MR. BARAN: And with respect to seminars. Would it also be useful to rely on some federal rules, for example, the ethics and gift rules that basically have allowances for government officials to attend conferences and

seminars sponsored by 501 legal organizations, and they permit the official, let's say, you know, value of travel, food and lodging but not any other gifts. I mean they wouldn't be able to have the officer pick up green fees for 18 holes at the golf course. God forbid we had time to do something like at a conference.

Would something like that be acceptable to your organization?

MS. MISHKIN: Certainly that would be an improvement over what already does exist. I don't know that we would support the full lodging, travel, expenses of ideologically-based seminars. I think that sometimes --

MR. BARAN: Well, I think it's necessary. You know, this is practical. I mean we have judges here from the west coast --

MS. MISHKIN: Sure.

MR. BARAN: -- that come to these conferences in Washington. I mean $500 just ain't going to cut it. And we're living in a

time when we all recognize that there's insufficient appropriations in funding in the judicial system, and judges' salaries are pretty low. So I think there's a balancing that needs to be done.

MS. MISHKIN: Absolutely. There does need to be balancing. But, for example, this particular conference, of the ABA, is something that would fall within the bar-related gift exception, so there would be, under our recommendation, no cap set. It would only be for special interest group funding. So, again, there'd be plenty of seminars available for judges to attend where there'd be absolutely no limits placed; they could receive full reimbursement. It would only be with a particular carved out exception where there would be the cap.

MR. BARAN: Including the federal society under your exception?

MS. MISHKIN: I think so, yes.

CHAIR HARRISON: Bob.

MR. TEMBECKJIAN: Is the heart of that appearance of impropriety issue that you are addressing, the financial benefits to the judge in attending a conference that is either sponsored by an idealogical organization, or the appearance of an idealogical organization giving itself the opportunity and the judge availing him or her to the opportunity to be influenced even though the cost is minimal? That's the first thing.

And the second thing is: How would you enforce the attendance of the conference rule if it is the judge's spouse who is invited, perhaps even as a member of the organization, but the judge goes along, he pays his or her own airfare, but clearly enjoys the benefits of the resort and the meals and perhaps even attends the meetings without actually being an invitee?

MS. MISHKIN: To your first question on our concern about the appearance of impropriety.

Certainly, our concern is that parties who may or may not be coming before that particular judge may, for example, have members that would later come before the judge, may stand to benefit from the judge's ruling, and that the kind of idealogical perspective offered at those seminars is likely to influence the judge. And more -- or even if it doesn't influence the judge, goes to the issue of the appearance of impropriety that so many legal consumers who contact us every day are concerned about. So that's our primary concern.

On the issue of, sort of the finer details of spouses, for example, attending seminars and where the line needs to be drawn. I think that the line needs to be drawn where a judge is accepting in excess of lavish accommodations in a seminar in which he is being idealogically influenced.

And I think that, you know, certainly if a spouse is a member of an organization, attends

that conference and it is part of her employment, certainly we wouldn't prohibit her from receiving her just reimbursement. But we are concerned about judges attending judicial education seminars in which they're being fed a particular idealogical perspective.

MR. TEMBECKJIAN: And, again, on a case-by-case basis, a judicial conduct organization such as mine would have to make the judgment once this lavish gift was in excess of some minimal threshold standard, and I just indicated, that would be a very difficult thing under ordinary circumstances for a judicial conduct commission to determine, typically if the judge is far removed from the jurisdiction that they're in.

MS. MISHKIN: It may be a difficult consideration, and that certainly is important to evaluate. However, I think that the code, which is in place to really instill public confidence in the judiciary, to ensure that judges are

erring on the side of caution, should really be one that stands for the proposition that judges need to avoid the appearance of impropriety, and that the public is only really going to have the strength and the trust and confidence in their judges when judges aren't being paid back by these ideological organizations to attend these kinds of conferences.

CHAIR HARRISON: Marv.

MR. KARP: My question also relates to the seminar issue, because as Judge McKowen alluded to the fact there are probably half a dozen of us around this table who have spent a couple of years trying to get our arms around this particular problem.

But I notice that on the first page of your written commentary, you've proposed, essentially, a blanket rule about attending multiday seminars, and yet when you get over to page 10 the proposal is totally different. It simply puts it -- puts a cap.

Did you think it through further by the time you got to page 10?

MS. MISHKIN: I'm sorry if our comments were a little confusing.

What we're proposing is a cap.

MR. KARP: Is a cap?

MS. MISHKIN: Right. We're not advocating an out-and-out band on these kinds of seminars.

MR. KARP: Okay. Thank you.

MS. MISHKIN: Sure.

CHAIR HARRISON: The question that I -- what is a recusal list?

MS. MISHKIN: A recusal list differs from a financial disclosure list report, in that, it lists all the cases in which a judge recused himself and the reason for that recusal, the financial interest which led to that recusal.

Whereas, the financial disclosure report, it's simply an enumeration of all financial holdings, whether or not they pertain

to a judge, or the cases before the judge.

CHAIR HARRISON: That's interesting, because in my experience judges don't typically say why they're recusing themselves.

But thank you. Any other -- I think we've got to move on. Thank you very much.

MS. MISHKIN: Thank you so much for your time. I appreciate it.

CHAIR HARRISON: We really appreciate your participation very much.

MS. MISHKIN: Thank you.

CHAIR HARRISON: Our next guest is Alan Morrison.

MR. MORRISON: I want to talk about the issues related to judicial elections. I hope you have my testimony, and I'll try to be brief. Particularly those arising out of the problem with money and judicial elections.

Those in the federal system don't have to worry about that, and some of you in state systems don't have to worry about it. They have

other worries, but not this one.

As we lay out in written statement, we've been very concerned about this issue in the State of Texas for a long time. Until fairly recently there were no contributions limits at all in Texas. Now the contribution limit is $5,000 for elections, which, put into perspective, is two and a half times what people were able to give to President Bush, Governor Dean and others, over, I might point out, a much smaller denominator than there are, and, of course, with the opportunity to make decisions on a regular basis.

The principal problem in Texas is not just the amount of money, but it's the absence of any standard of recusal. Indeed, under Texas law, it's absolutely clear that judges not only don't have to but shouldn't recuse themselves "just because they got money from the parties", and it doesn't make any difference how much money you got from parties, there are no cases in which

somebody actually gave an illegal contribution. So one could assume that that would be -- that that might be too much.

I'm always reluctant to tell stories but -- about this, but I was told a story by a California lawyer who was litigating a trial in Texas, and at the break one of the -- the judge said to the lawyers, "y'all coming to my barbecue tonight, I'm having my fund-raising barbecue tonight, hope y'all be able to come."

The California lawyer was, needless to say, taken aback by this, since he hadn't experienced this particular phenomenon. And he caucused with the lawyer on the other side, and they both agreed that -- the lawyer -- the other lawyer was from Texas, I assume, it was the local counsel also -- he said that they agreed that he would not come because he wasn't sure that he could do it lawfully under California law, even though he was in Texas when this proposal occurred.

And the judge said, "oh, it's perfectly all right. You don't have to come, I don't mind."

But the notion that a judge should be actually soliciting the lawyers who are appearing in cases before them to come to the barbecue for fund-raising for his re-election, strikes most people as probably inappropriate.

I would hope that we could come up with something more than that. And we have made a proposal here to which, of course, we are not wedded in the language, saying that anyone who receives a -- a judge who receives a substantial campaign contribution from a party to a proceeding or from a parties' lawyer or a law firm or from an amicus, should consider recusal.

This is obviously inevitably going to be vague. The commentary that we have suggested, it deals with such questions as the size of the contribution, in the absolute, the size of the contribution in relation to what other people are

contributing; the size of the contribution in relation to the total; whether the contribution occurred five years ago, last week, while the case was pending, while it was not pending; does the contributor have some other role in the re-election campaign of the judge.

All of those things which we are used to taking into account in other kinds of situations, seem to us to take into account here. Some people are going to say, well, you know, if you do this, where are the judges going to be able to raise the money? And I have two answers to that. Maybe we're pointing out what's really fundamentally wrong with judicial elections that are being financed by litigants with an outcome in a situation.

Nobody would -- if you look at recusals for stock ownership, particularly in the federal system, nobody would be allowed to have this kind of an interest and sit on a case. And we don't think people should be able to sit on these cases

when they are elected in this situation.

And second is, this may mean that we need to have either no judicial elections, or we ought to have public financing for judicial elections. But the current system is simply unacceptable.

As indicated by our -- the evidence here on the surveys, we have actually been trying to continue -- to litigate these cases. It's very difficult to get a case litigated in the state system, in part because sometimes both lawyers are giving monies, although in differing amounts; lawyers are extremely reluctant to raise the issue before a judge saying, Your Honor, you're violating my due process rights, which is really what the heart of the claim is; and lawyers just don't want to do it and/or -- and the clients are reluctant to have to lawyers do it. Particularly since the law is absolutely clear in Texas that it's a functional equivalent of Oliver Twist asking for seconds. You just don't get recusal.

So we're coming to this Commission and urging that the Commission take this idea and try to move ahead with it. I have no brief for the particular language here. There's lots of things that can be done and circulated. But the principal ought to be recusal in these circumstances. It's not right. It's not the way due process ought to work.

Now, the second part of my statement relates to the fallout from the Republican party, Minnesota against White, and what to do about the statements that may be made during the campaign.

I have referred to an article, and I have a copy -- an extra copy of my article here that I'll just submit to you, for the record here. Basically taking the position that one of the serious problems that White got to was the fact that the rules about what a judicial candidate can say when they are running for office, resulted in the fact that many people did not know about what judges actually thought about

the issues of which they were going to be called upon to judge.

And it's not that judges don't have opinions or judicial nominees don't have opinions. Everybody's go opinions. It would be terrible if they didn't have opinions. The question is, what do we do about it. And that's why my article's entitled, "The Judge Has No Robes", because it's about pretending that people who run for judicial office don't have views. And my view is that, we ought to know what they're doing.

Whether my view is right or wrong, the Supreme Court has made it pretty clear that the blanket, no announce rule, is too broad. It violates the First Amendment, in part, because it's both too broad and too narrow, and it doesn't work consistent with the First Amendment.

So what do we do about it? Well, I make two suggestions. The first is, that we get away from the notion of judicial discipline or people

who are running for office who make statements that cross whatever line it maybe crossed. And also the same for lawyers who make the statements. And I suggest that, if people make inappropriate statements, they prejudge cases. Then the thing to do is to take them off the case that they have prejudged, instead of punishing them in some other way, such as removing them from the bench or imposing whatever other kind of sanctions might be possible.

Or in the case of lawyers who don't get elected to become judges, they're being punished even though they can never possibly have the ability to carry out any of their allegedly prejudged opinions.

So I want to focus it away from penalties into recusals, not only because I think it will produce more people who are expressing their views, but also the question of whether a particular statement is so inappropriate that we ought to "do something about it" can best be

judged in the context of an actual case that's coming before the judge, where you see what were the statements made; how long ago; what context; and you look at what the judge is being asked to do in a particular context, rather than trying to figure out in the abstract in advance, how that might possibly affect the judge's ability to be fair in some case which is not yet before the Court, and which you don't have any idea what it's about. So, again, the focus on recusal.

The second, I do think that there is something to be said or thinking about what we can do to see that judges don't gain election by improper statements. Making kinds of promises that we think are inappropriate, saying everyone that comes before me is going to get the death penalty or no one's going to get the death penalty, whatever you think is going to get you elected.

And the proposal is, is to take it out of the state disciplinary function, and to create

commissions. And my article refers to some of them that are just getting started. Independent citizen commissions having no power other than the power of persuasion. And that during the course of a campaign, if a judge or someone running for office, judicial office, makes statements that are inappropriate under whatever rules will serve after White, that persons can file a complaint, the group can investigate promptly, can give the person an opportunity -- must give the person an opportunity to respond, and then come to a quick judgment about whether it's appropriate or inappropriate and hopefully be able to issue a statement during the campaign where the voters have an opportunity to take that into account.

Obviously, the candidate would have an opportunity to respond, and the battle would be in the election forum. We're going to have elections, and it seems to me that that's the time to do it, not two or three years later when

we discipline a judge for having done something in the course of an election, or even worse, disciplining a poor lawyer who fails to get elected and then finds he's sanctioned for something he'd never carry out.

In any event, those are my proposals, and thank you for the opportunity to sit before you today.

CHAIR HARRISON: Thank you.

MR. BARAN: It's sort of a catch 22, in the code, in that if it goes in the direction of saying, judges, you can say what you want to, and the fact is that the public's interested in having judges say what they want to, the only problem being is that you may have to recuse yourself if you take positions that will imbed -- you look as though you're deciding cases prematurely.

There are other aspects of the code that say, judges, you've got a duty to sit and you've got a duty not to do things that are going to

cause your recusal and you'll be punished if you do things knowing you're going to have to recuse yourself regularly.

So it seems to me that the judge just takes the course you're proposing, which is, take positions on issues knowing that you may have to recuse yourself later, is, itself, a violation of a different aspect of the code, which is that you shouldn't be saying things knowing that it's going to diminish your ability to act as a judge later.

MR. MORRISON: Well, I guess my first response is that, I think most of these statements are not knowing in the sense that they're really focusing on it. That is, they're inadvertent statements or occasionally some -- to challenge the authority to do so.

Second is, I'm trying -- I was trying to think through what the mindset would be of a judge who basically believes, for example, the death penalty, that says, I'm going to hang

everybody I can hang and then finds himself having to recuse himself and not being able to hang people. I don't understand why a person would think that and make these statements.

MR. BARAN: But that happens, right?

MR. MORRISON: Yeah. But then you can't carry out the election. I mean then they put somebody else in your place who will sit in those cases.

The third thing, I guess, I would say is, if anyone had a knowing pattern of making these statements, having been warned and told about them, seems to me you could still have that part of the code still take effect and bring that into account. But eliminating most of the inadvertence or occasional statements or things that happen during the course of the campaign and that if somebody was doing that -- for example, suppose it was said that somebody didn't want to sit on Title 7 cases, for example, or what the equivalent is for state court and said, I think

Title 7 plaintiffs should lose all the time in order to get -- so they don't have to sit on those cases. It seems to me we could probably do something with those kind of people who did things like that.

I guess I just don't think that the intentional problem is going to be that great, but if it is, we can deal with it in that way.

CHAIR HARRISON: Peter -- by the way, for the record, since the last speaker started we've got Peter Moser has arrived; Tom Fitzpatrick has arrived. I don't know whether anybody else has arrived.

Peter.

MR. MOSER: I think that recusal is a great idea. But you yourself have said that it won't work, that is, by lawyers raising it, at least, in the campaign contribution area.

So I'm wondering how it would work. If a judge makes certain statements, are they automatically disqualified? And, incidentally, I

make a distinction between recusal in a set, which is, the judge takes himself or herself out of it, and a total disqualification.

You would say that the judge is disqualified?

MR. MORRISON: Well, I think I may have been guilty of interchanging those two terms. The code talks about recusal; some statutes talk about disqualification. And given the nature -- I'm talking about campaign contributions first -- but of them, there's got to be recusal, because there's no automat -- it's one thing if you own a share of stock that you could have an automatic rule. But I don't see, given what we've said here about substantial contributions, it couldn't be automatic, so it would be recusal.

Now, can I answer your first question.

MR. MOSER: And would you judge when that threshold is met? They're all shades of comments that a judge can make.

MR. MORRISON: Could I just --

MR. MOSER: Does he decide himself? Is it appealable; are there standards set or just what? How would it work as a practical matter?

MR. MORRISON: Well, I guess I'll come back to contributions in a second. But as far as the statements are concerned, take, for example, just the other day, many of you may know Justice Scalia has recused himself in the Pledge of Allegiance case, because he made a statement to a group when the decision first came down in the Ninth Circuit. And this was -- I think there was a footnote dropped in one of the briefs. I had a similar occasion to do that in another situation. It was simply no motion to recuse, you simply call it to the judge's attention, and in this case Justice Scalia recused himself.

Now, there would also be the opportunity to move to recuse. Chief Justice -- then Justice Rendquist, was asked to recuse himself in Laird against Tatum, he ultimately wrote a memorandum saying -- in which he declined to do

because of some prior statements he made.

I would think that many cases judges would be willing to do so because it's the right thing to do. Particularly in situations where there's someone who's a ready substitute to come on. In the Supreme Court it's a problem because there are only nine of them, and if one recuses you could end up with 4/4 tie.

So I think that in some of these cases, I think that the judges will be asked to recuse themselves in these situations. It will not be automatic. There will be standards and there will be appeals. There are appeals now for appearances of impropriety when judges have family members or prior connections, they're asked to do it. The question is, under what circumstance they do it.

The reason that I say that it doesn't work in the campaign contribution area, is only because in Texas the substantive law of recusal is such that judges should not, as a matter of

Texas law, recuse themselves because of campaign contributions. That substantive law seems to me to be wrong, and I have no indication that judges would not carry out the substantive law if the substantive law were changed.

MR. MOSER: As for the Chief Justice, has he tried to do something about it?

MR. MORRISON: He has tried to widely and not succeeded.

CHAIR HARRISON: Other questions?

Margaret.

THE HONORABLE JUDGE McKOWEN: I have a question with respect to amicus in disqualification or recusal, whichever term we want to use.

And I understand the imputes for it in your proposal, but I'm wondering how it would cross over to other financial disqualifications or recusal on amicus. Because, in general, that is not regarded as a party and it's not regarded, generally, as the basis for disqualification.

And one of the reasons being, of course, that it's a voluntary act. It's not the attorney in front of the judge, and often you get down the road, you know, years into the litigation and then somebody can file an amicus and you might just get that judge picked.

So I'm wondering if you've given it some thought?

MR. MORRISON: Yes. I surely don't think one ought to weigh the amicus so carefully that it's treated the same way. And I would do it on a case-by-case basis.

I don't know of any situations in which an amicus has come in and caused a recusal or not. But I can certainly envision something where a case came in and the amicus was perfectly clear that, suppose the judge owned stock in General Motors and the case involved Honda, for example. He wouldn't have to recuse himself.

Amicus files a brief -- General Motors comes in and files a brief and says that this is

going to wipe out the entire auto industry including General Motors, and the judge owns General Motors stock, at that point, despite the fact that it's amicus, I would think the judge ought to think very long and hard about it.

And, so, why -- it wouldn't have an automatic rule, and the statute doesn't make it automatic -- it does at least get into the area of appearance of impropriety. And, you know, I think it would depend upon situation as to whether the judge, whether there would or would not be a recusal. But I certainly would not want to eliminate it, because in many of these situations, particularly at the highest state courts, where there had been substantial monetary contributions or independent expenditures in support of a judicial campaign, the judge could very much "owe" his or her seat to that person. And at least it ought to be on the table.

THE HONORABLE JUDGE McKOWEN: So you wouldn't see, although that was proposed -- and

I know you're not wedded to the language -- that would distinguish somehow between a typical campaign contribution by a party or a lawyer or law firm versus --

MR. MORRISON: Yes. I simply want to make it clear that I don't think we should exclude it from consideration, but I would recognize it would be -- ordinarily it would be a lower order of magnitude. Depending upon all of the circumstances as well.

CHAIR HARRISON: Bob.

MR. TEMBECKJIAN: I'd like to ask about the colorful Texas judge who stood up and said are y'all coming to my barbecue.

MR. MORRISON: This is hearsay, I want the record to reflect.

MR. BARAN: We've passed laws on the basis of hearsay.

MR TEMBECKJIAN: Even if there were not Canon 5, political activity distinction, why wouldn't the appearance of impropriety, Canon 2,

which, among, other things, exclusively says that a judge shall not lend the prestige of judicial office to advance the private interest of the judge or others, apply and be the same as for discipline --

MR. MORRISON: I should have mentioned this. My written says that, in Texas there's a specific exception that allows judges to personally solicit campaign contributions from litigants and lawyers.

MR. TEMBECKJIAN: But I gather you're not suggesting that as we need to amend Canon 2B because Texas has an exception to it?

MR. MORRISON: No, no.

MR. TEMBECKJIAN: If Texas followed the ABA model code, that judge would --

MR. MORRISON: That little part of it would -- I think certainly should be improper. But that would only eliminate one part of the problem.

CHAIR HARRISON: It wouldn't be the

first time that that Canon would have been a stand-alone Canon for disciplining a judge.

MR. TEMBECKJIAN: No. Quite the contrary.

CHAIR HARRISON: Marv.

MR. KARP: Yeah, Alan, two questions. They're really interrelated.

I gather in your comments about the Republican party against White, that what you're advocating is a totally different philosophy if we revise the model rules.

In other words, the philosophy that was -- seem to be somewhat pervasive, prior to the Republican against White, is that it's unseemly for judges to get up and talk about their points of view on various issues that may be coming before them or just generally.

Your view is, no, it's better. It's in the public interest that people know that judges -- what their views are on particular issues before they vote for them.

If that is the philosophy and if we adopt that here, should we not also be adopting a rule that says judges seeking judicial appointment when asked what are your views in respect to this particular issue, that rather than saying, I can't answer that because I don't want to prejudge, aren't we saying that they should -- those judges should answer that question directly as to what their views are?

MR. MORRISON: The answer is no. And let me explain why.

MR. KARP: Okay.

MR. MORRISON: The first, nothing in what I have proposed or advocated requires a judge or a candidate to say anything. The question is what do you do if you say something.

The second, I have a footnote in my article which says that in those kinds of situations, the nominee should be required to tell the Senate, for example, in answer to a question, what are your views about abortion? If

the person has given the White House -- to pick an example -- the President or the Justice Department has asked that same kind of question and gotten an answer, I don't think you should be able to withhold that answer from the Senate, because that's obviously a part of what the process of selecting the person is. It ought to be part of the confirmation as well.

But short of that, I don't think people should be required to say anything at all in response to a question.

But if you told one part of the process what your views are, then the other part of the process has a right to the same information. That's the line I would draw.

CHAIR HARRISON: Jan and then Judge Wynn.

MR. BARAN: Alan, I want to follow up on both the contribution issue and the speech issue.

With respect to contributions, the ABA has support in its contribution limits in

judicial elections, and obviously increasingly states have adopted that.

MR. MORRISON: Yes.

MR. BARAN: And, of course, under traditionally constitutional analysis, a state's determination as to what that limit ought to be establishes its decisions that amounts less than that are not corrupt.

MR. MORRISON: In and of themselves.

MR. BARAN: In and of themselves.

MR. MORRISON: Yes.

MR. BARAN: In fact, do you agree with that?

MR. MORRISON: (Nods head.) But I don't think that -- sorry.

MR. BARAN: So it's something in that proposition amendment. What would the proposed standard be for recusal you're suggesting, that is, that somebody has exceeded the limit or that there are circumstances other than the individual contribution?

MR. MORRISON: Well, let's take the contribution -- let's take the situation in Texas where somebody gave the amount of $5,000 to a Justice of the Texas Supreme Court running for re-election. It was only the lawyer, no parties, no law firms, nothing, and the race was a million dollars. It seems to me in that circumstance there would be no need for recusal.

But if instead of the $5,000 limit there was $30,000 for a law firm, there were two other law firms in the case, the parties also gave money and there was a pack that gave money and they amounted to 60 percent and one of the lawyers was the campaign manager for the judge, then we've got a different situation.

But, in and of itself, a single contribution would almost certainly not be grounds for recusal. But one of the ABA proposals, and I can't remember whether it was the one that was adopted or not, said that, so long as the contribution was legal, then there

would be basis for recusal. I reject that.

It seems to me that that does not give adequate sway to the due process interest. And the fact that it may be legal for the criminal law purposes, doesn't suggest that the judge can, in all circumstances, sit on a case just because it's legal.

MR. BARAN: With respect to the announced clause -- and I appreciate your answer to that question -- you mentioned Justice Scalia's recusal. That was because he made public comments specifically addressing the pending case, that then it was appealed.

And there was a reference to that specific case.

MR. MORRISON: Yes.

MR. BARAN: Now, conversely, not picking on Justice Scalia, but it's a convenient example, you used the case that numerous public speakers regarding the role of religion in his life and his public life.

In the first instance, he's recusing himself because he made a public comment that appears to prejudge the outcome of the specific case. In the second example, as you mentioned, he had made general statements, perhaps, to the sort that this judge were an elected judge it was like making a campaign contribution, I believe that the role of God in a society, things of that sort.

Are you suggesting that a candidate or the Justice would have to recuse himself or herself from any establishment clause?

MR. MORRISON: Certainly not.

MR. BARAN: So where would you draw the line?

MR. MORRISON: Well, I think you have to look at the specific statements. If you're talking about general statements, the answer is no. But general statements wouldn't violate the no announce rule. That is, if the judge running for office says I believe in God, religion is an

important part of my life; nobody thinks that would have violated the announce rules.

MR. BARAN: So there needs to be a specific reference I guess to the prejudging of a specific case?

MR. MORRISON: Well, let me try and give you an example. Let's take somebody who's running for an office in a state court where the issue would relate to abortion. And for the judge to say, I don't think -- the candidate to say, I don't think that the judiciary has any place in reviewing determinations by the legislature as to what abortions are and are not permissible. It seems to me that's quite specific.

But for the judge to say -- or the candidate to say, I think that, as a general proposition, that courts ought to be giving more deference to the legislature than they have given in the past on matters relating to personal rights, I don't think that's specific enough to

require recusal.

But, again, remember that unlike White, where the judge could have been -- lost his job for it, or the candidate could -- if he had been elected --

MR. BARAN: Well, that's another point. Now, these rules really affect people who are not incumbents. Because incumbents have written decisions and --

MR. MORRISON: Well, that's -- yes. That was another problem with White, that they announce their positions all the time in opinions which they may have chosen not to issue or issue during the campaign depending on whether they think it would do them more good or not. And that was perfectly okay as long as it was labeled opinion, which is one of the other problems with the overkill there.

CHAIR HARRISON: I think Judge Wynn was next and then Bob and we've got to wrap this up because we have other speakers to get to.

THE HONORABLE JUDGE WYNN: I want to follow up on Jan's last question.

Justice Scalia recused himself in that case, because it fit deeply within his definition of impartiality and in particular with Minnesota versus White.

How would you have us look at the impartiality, because it has to be basis for recusal?

MR. MORRISON: I'm not sure that I understand your question. I mean we already have the appearance of impropriety already.

THE HONORABLE JUDGE WYNN: Well, let me make sure we're clear. Scalia recused himself because he made comments on an issue that was pending in his case. That is a limited definition of impartiality, that you're only impartial when you comment on issues that --

MR. MORRISON: You're partial.

THE HONORABLE JUDGE WYNN: Yes, you're only partial to cases that are directly before

you and issues that are currently before you. But outside of that it doesn't fit within his definition of impartiality, and a crucial thing we're going to have to deal with is, what is impartiality. And if you're to reach this question of recusal, we have to have some guidance in terms of what you think impartiality is. What is the definition that would fit, not necessarily that Scalia's definition is controlling, but it certain is there.

MR. MORRISON: Well, I would say the reasonable person would believe that the judge has prejudged the case and cannot listen to arguments of the other side.

He had prejudged that case. He told us what he thought the outcome was going to be. He actually wasn't technically before it because it had just been decided by the Ninth Circuit.

There's another case involving Justice Scalia which I happen to know something about involving -- he was in the Office of Legal

Counsel and he wrote an opinion, at that time, saying that he thought that certain aspects of the Federal Advisory Committee Act were unconstitutional.

When a case involving the constitutionality of the Federal Advisory Committee Act came before the Supreme Court when Justice Scalia was on there, we had located this opinion, we put it in a footnote, he did not sit on that case involving the American Bar Association Committee on Judicial Evaluation. He did not sit on that case.

It was obviously not a pending case before him, but he felt that under the circumstances he had expressed his views and he was not -- I put it in colloquial terms -- open to reasoned discussion about it, that he had made up his mind.

And I think we know kind of when you've made up your mind, and the answer is, there are -- I can't give a precise definition. But I do

think it's important that the only "penalty" there will be is that somebody can't sit on a case as opposed to somebody losing their license to practice law or being removed as a judge.

And so I think we can have a little bit of room, wiggle room, in this case.

MR. BARAN: What if Scalia had simply made that opinion as a dissent in the case, instead of when he was at OLC?

MR. MORRISON: Well, it that was the rule --

MR. BARAN: Should he recuse --

MR. MORRISON: No, of course not.

MR. BARAN: -- on all the cases going forward?

MR. MORRISON: No. But the difference, of course, is, that in a dissent there has been an opportunity for full briefing with an adversary situation, whereas in an OLC opinion you may not get anybody on the other side to present the other side of the argument to you.

CHAIR HARRISON: Bob Cummins.

MR. CUMMINS: Just, thank you for your presentation. Two issues, one, on the pledge and promises thing.

You know, from judges' perspectives, at least my experience in Illinois when we have hotly contested elections, most judges would like to be immune from having special interest groups come to them and try to middle them on a position so that they can, then, use support or oppose the judge's candidacy.

So I don't think this is necessarily -- it may become a "throw the baby out with the bath water" situation. This isn't necessarily a situation where judicial candidates are screaming to be taking positions. I think that that's not the case, as a matter fact.

Now, there are some circumstances where, you know, we always have the 10 percent, where somebody thinks they can put some water on their wheel by patronizing a particular position. But

I think that's the exception rather than the rule. And, therefore, I don't think that we should necessarily believe that there's -- notwithstanding White -- that there's this great human cry among candidates for judicial office that they want to get out and speak on issues. It's not the case.

In fact, someone said to me, I wish to dickens I would just say, as I have said, I'm not going to comment on that without then being prejudiced for having not commented.

Anyway, it's something that I think we should think about. And I wonder whether you've experienced that circumstance?

MR. MORRISON: I think I agree with your general sentiment that most judges, both because they want to be at -- want to continue to be impartial, they want to sit on the cases that they're supposed to sit on, will try not to take those positions. There are some people who will be pushed into taking them, and there's some

people who will want to express them because they honestly believe them, and some cases they think it may help them get elected. And, you know, we're going to have judicial elections. And I know the ABA's position on it and my position doesn't matter, it's what it is.

You've got to figure out what the elections are going to be about, and that's one of the problems.

MR. CUMMINS: My second question, Mark, has to do with contribution business. I happen to have tried two disqualification proceedings in Texas, where the judge received $10,000 from the opposing party. In that proceeding, Peter, your question was, how do they deal with this. They've assigned the motion to another judge who then hears. And the first time the independent judge said what you said, Alan, listen, in Texas it's okay to give money, and that's not a ground for disqualification, peddle your papers elsewhere.

The second circumstance involving another judge, disqualified the judge. So it's -- it may be the kind of situation where there's the -- at least the procedural rule, contemplates, at least, determination has to be made by an independent judicial officer, not the judge himself.

MR. MORRISON: I'm not familiar with it. But in most places the judge ordinarily will sit on a recusal motion him or herself.

MR. CUMMINS: Right.

MR. MORRISON: But if you look at the cases we've cited in our testimony, the Texas law is quite clear on what it is. Now, somebody may actually decide it personally or for some other reason.

CHAIR HARRISON: I'd like to entertain more questions, but we really can't. Thank you.

MR. MORRISON: Thank you very much for the opportunity. I'm glad to help in any way I can.

CHAIR HARRISON: We are running behind and we don't want to get so far behind.

Our next guest is Bob Peck.

Bob, if you'd introduce yourself and explain -- tell us for whom you're appearing and so forth.

MR. PECK: Thank you, first, for inviting me to testify today. It's a pleasure to be here amongst so many friends. For those who don't know me, my name is Bob Peck and I am President of the Center for Constitutional Litigation, a Washington, D.C. law firm.

One of our clients is the Association of Trial Lawyers of America, and some of my comments will relate to views that I am conveying on their behalf. Some will have to do with my capacity as a private lawyer.

Of additional interest, within the ABA I'm on the Council of TIP Sections. I co-chair the First Amendment of Individual Rights Responsibility Section. And last year I served

on the Advisory Committee for the Commission on the 21st Century Judiciary. I also serve on the Lawyers' Committee of the National Center for State Courts. And with Judge McKowen, I serve on the grant for Institute for Civil Justice Court of Overseers.

The question of impartiality is basically the topic of my testimony. Impartiality is a fundamental aspect of due process. The Supreme Court has said so, at least as far back as 1927. It is the bedrock on which public confidence in respect to the judiciary is built. And one of the principles that -- under Gurley -- is that a tribunal must not only be free of bias, but must satisfy the appearance of justice.

The Supreme Court has repeatedly recognized that when the trial judge -- and this is a quote from 1986: "When the trial judge is discovered to have some basis for rendering a bias judgment, its actual motivations are hidden

from review and we must presume that the process was impaired." So that is how seriously the Court has taken this due process mandate.

One thing that I wanted to start with, but Alan did a wonderful job of covering, is that Adler joins him in his view that, recusal may be an appropriate remedy when campaign speech goes over the line.

I note that the Commission on the 21st Century Judiciary did include a commentary that felt that greater use of recusal in those situations, particularly White, Republican Party versus White, was appropriate. And when I was an advocate for that part of the report.

It is something that comes up increasingly as the continuous issues that often come before the courts are ones in which candidates taking positions on, and they go to the extent of, in some instances, thanking their supporters on election night, telling them that they owe them one, was an instance that occurred

during the course of the Ohio election campaign last year.

I won't dwell further on this particular issue in part because Alan covered it and because you are pressed for time.

The second issue that I wanted to talk about was really strengthening the recusal rules; disqualification as well as; and also, perhaps, in the commentary talking about the appropriate remedies when a judge refuses to disqualify himself and then continues to rule in the case.

I do so in part as an advocate. I am Counsel of record in a case pending on a petition in the Supreme Court at the moment called Patterson versus Mobil Oil.

This case involves the two federal disqualification statues, Sections 144 and 455, which are modeled after Canon 3E. And in this case, which is a consolidation of two cases, a RICO action alleging fraud in the legal conduct on the part of Mobil Oil for falsely claiming to

be a Workers' Compensation eligible employer in Texas for a 30-year period, when, in fact, it wasn't; and a wrongful death action, which is seeking to be reopened in light of that same accusation.

The cases came to be heard in the Eastern District of Texas where the judge who was assigned to it had been a partner in the law firm that represented Mobil in the original action, and at the time they were representing it and continues to represent Mobil in the current action.

The plaintiffs, at that time, did move under the federal statutes to disqualify him. He stated on the record that, unless they were making an accusation against his former law firm or his former partners, that he was not going to be recusing himself. They did take an interlocutory appeal to the Fifth Circuit, which ruled that he did not abuse his discretion in refusing him to disqualify himself.

The case then returned to him where he enjoined a whole discovery -- there had been a previous judge who eventually recused himself without ordering discovery to proceed. He had enjoined it. And during the course of further proceedings before him in a separate State court action, it came out that he had also actually represented one of the defendants on the precise issue before the Court and that is whether Mobil was an eligible Workers' Comp employer, that he had made representations to the Court on behalf of the insurance company that they were accusing of being a front, that they were, indeed, Mobil's valid Workers' Comp insurer.

So in light of those papers that he had signed as private counsel, they renewed their motion to disqualify him. He refused to and then entertained motions for summary judgment without any discovery having been permitted and awarded summary judgment to his former client.

The matter went back to the Fifth

Circuit where they found that there was an appearance -- said it was a close question, first of all, they determined. One that we don't think was close at all.

And second of all, they decided that, in close question, of course, a judge should disqualify himself. And so, therefore, he should have disqualified himself. And, nonetheless, they determined that it was harmless error.

You will recall that in 1986, the decision that I read to you a quote from earlier, Adler decision, the Court -- the Supreme Court seems to have taken a different view of whether harmless error can exist and the fact that the Circuit's decision is in conflict with many of the other U.S. Courts of Appeal.

The fact is that, under the Canon, it would be clear that the judge should have recused himself. It involved facts that he was personally aware from his private practice. It involved his former partners at a time when he

was a partner in the law firm representing the defendants in this matter, and that the matter was an extension of the case he'd been involved in earlier. So there seems to be no question that he would have fit within those rules.

The Fifth Circuit basically said that because we see that there was a close question on the appearance issue, there was no reason for them to have evaluated it on any specific grounds detailed in 455. So that here you have a situation where the guidance would seem clear under federal law. Nonetheless, that seems to have been lost on those who heard this case.

I relate these facts for two reasons. Lawyers needed in the code made clear that a judge who previously served as counsel for a party, often in a matter in dispute, not sit on our case. And also that there ought to be commentary about the fact that if the fundamental right here is a right to an impartial tribunal and a fair day in court, then, indeed, the matter

should be returned to a court with an opportunity to make these evaluations anew. And I suggest that the commentary should be about that.

I do want to make one comment. Charlie, you had mentioned to Alan, that you thought that the Canons, as they currently exist, are a bit in conflict on this. That, you know, there is the guarantee of an impartial judge, but then a duty to sit.

I would like to suggest that the duty to sit is something that ought to be abandoned. The Supreme Court itself in the Lillianburg case in 1988 abandoned that view which has been previously articulated by Justice Rendquist in Laird versus Tatum decision not to recuse himself. And I think that it is a relic. That the more important duty here is the duty to make sure that there's an impartial judge.

CHAIR HARRISON: Thank you very much, Bob.

Questions?

MR. TEMBECKJIAN: Can you fashion a rule that would guard against mistaken application or a wrong interpretation? In your view, a disqualification can and should have resulted in a clear judgment of the facts here, prior relationship.

How could the rule be made stronger to be sure that it is going to be imposed in the way that it's intended? Is that possible?

MR. PECK: I think that, you know, it is always possible to make a ruling somewhat more mandatory in its nature or specific in its nature. But I think this is where the comments probably have a greater role.

To indicate why these are so important and that there ought to be grounds for disqualifying a judge, in those instances. You know, in this instance, you know, we're looking at federal statutes, and, obviously, I think the federal statutes are very clear about this. But they are not accompanied by commentary. You

know, you look for a precedent, you look for the application of it, and, in fact, there does appear to be some confusion among the circuits about the application of the remedy. And here's something where I think the comments can be very strong.

They can talk about the remedy and talk about how harmless error is not an appropriate way of viewing this. And, indeed, because a trial judge has so many opportunities to structure the case in a fashion that leads to one inevitable disposition, that you have to go back to all of those rulings.

MR. BARAN: You know, one approach is what you just suggested in terms of remedy enforcement. The other is to have more specific ethical guidelines. And, so, for example, the comparable provision in the conflict of interest revolving door provision through the Ethics in Government Act, that any former employee of the federal government may not participate as an

attorney or in any other way in any matter in which he or she personally and substantially were involved at the time that they were in government. That's basically a lifetime thing, I mean, on that person participating in that case.

And it seems to me, by just the facts of your situation, there could be a rule to say that a judge must disqualify himself or herself in any case involving a client in which he or she personally or substantially represented when in private practice.

Would that be a solution?

MR. PECK: Well, I think that that is the kind of rule that could be more specific. Nonetheless, you know, the rule currently also talks about having personal knowledge of the facts in dispute. That would seem also to cover it, to some extent. But I would see that the two together might be more powerful, indeed.

MR. BARAN: I think impugning knowledge about the facts and circumstances makes things a

little more ambiguous. And what I have suggested doesn't, for example, implicate like a law firm in which the judge may have been a partner, but had not personally or substantially been involved in the education as it may be required. Those are the types of distinctions I'm searching for.

CHAIR HARRISON: Tom.

MR. FITZPATRICK: I want to follow up on that comment that Jan just made. I mean, interpreting your idea there, I mean are we going to back by varying degree disqualification because of association with the law firm. I mean in my days of private practice, I mean my partners represented a lot of people that I could care less about, I mean if I was a judge in ruling. So I mean, is that significant?

MR. PECK: Well, I think it's significant if you are a partner and therefore participating. Remember, under the rules of ethics, a whole law firm is a single lawyer.

MR. FITZPATRICK: Right. But should we

do that?

MR. PECK: I think you need to do that where you are, indeed, a partner. This was a law firm that consisted of 12 lawyers all together; 6 of whom were partners and one of them was this judge. And it seems to me that it's pretty harsh to say that there was a wall and this judge had no knowledge of this, particularly since he represented both defendants: The Mobil Oil and former insurance company, the co-defendant, the alleged co-conspirator, on precisely these kinds of matters.

And this goes, in part, also, to the kind of commentary that we were talking about with respect to alleged hearing. You know, they're talking -- you know, he may not have participated in the Ballinger case when it was first filed as a wrongful death case, but he made similar representations in hundreds of other Workers' Compensation cases indicating that, basically, he is telling the Court and that his

law firm -- essentially, the defendants were accused of having perpetrated a fraud on the Court for having made those kinds of representations. It seems to me that he cannot possibly view this case in an unbiased fashion.

MR. BARAN: How many years had this judge been on the bench? How long had it been since he left his firm?

MR. PECK: I'm not sure. I don't recall that.

MR. FITZPATRICK: If I can have one other, albeit slightly related to your campaign thing and, I don't want to put you on the spot, because Adler's your client. But separate and distinct from actual campaign contributions, particularly $500 paid to have an elected judiciary, but the trial lawyers endorse candidates. I mean it may not be money. They give out things such as Judge of the Year awards. That sort of thing. And I mean they're not the only ones who do that. Of course, there's a lot

of specialty interest groups or bar groups that do this sort of thing.

Should we be concerned about, and should the code provide for that, and should it be treated the same way as we treat campaign contributions?

MR. PECK: I don't think that that necessarily means that judges don't be bias in any particular case. This is the difference, I think, between the pledge or promise and the announce type of rule. Here, you can easily say, you know -- I'm a former trial lawyer myself -- I believe in the rights of people, nonetheless, it doesn't mean that you're going to favor trial lawyers in every single case.

As opposed to saying that, you know, I don't believe that these statutes are ever unconstitutional; I don't believe that a court should ever rule that it's unconstitutional to have "under God" in the Pledge of Allegiance or anything like that. That's very specific, saying

that I prejudge this specific case.

You know, the courts have traditionally taken a different view of, well, you are a lawyer in talking about the issues, and indicate what you think is favorable arguments or unfavorable and then sitting on a case in which you also listen to the arguments and think, well, maybe I was wrong.

You know, there's a famous story about Salmon Chase when he was Chief Justice. You know, he wrote the Legal Tender Act as part of the Lincoln administration and then ruled against it when he sat on the Court for that purpose. And the reason was, you know, when he was the President's lawyer, he had to do his best job in writing that statute. And when it came before him as a judge, his best job was not good enough.

CHAIR HARRISON: Any other questions for Bob?

Bob, thank you very much.

MR. PECK: Thank you.

CHAIR HARRISON: The Chair would like to take a two-minute break and then we'll reconvene.

(Break taken.)

CHAIR HARRISON: Let's reconvene, and let me just make this sort of statement, I really want to have time for questions from the Commission and the Advisory group in connection with each of the speakers and the roundtable this afternoon, but I think that in the interest of time, you ought to be sure you have a question and not simply use it as an opportunity to a stake out a position or make a speech.

All of us have views about these things, and I think that the main purpose of the question and answer session is to clarify something the speaker said and to elicit an answer to a real question, not an opportunity for extended separating speech on the part of the Commission.

Mr. Zorza, would you identify yourself for the record and tell us who you are and why you're here.

MR. ZORZA: Absolutely, Mr. Chair. And I will try and keep my remarks compressed so that there'll be an opportunity for a little discussion, if appropriate.

My name is Richard Zorza. I work as an independent consultant to a variety of national access to justice organizations, including the Open Society Institute Program on Law in Society; the Bellow Sacks Program on the Future of Access to Civil Justice at Harvard Law School, which I might say is a program at Harvard Law School that does conduct seminars in reference to our earlier discussion; and the Access to Justice Commission of both Washington State Law Associations.

By way of qualification, I'm one of the co-authors of an article in the Judges Journal, Winter, on the specific issues of how judges should handle courtrooms with pro se litigants. And also the author of a book published by the National Center for State Courts on how one might build a courthouse and courtroom from the ground

up in order so that it works for the people without lawyers. So those materials would be made available to the Commission.

Obviously, based on that, I'm here to speak specifically about the issue of pro se litigation and the appropriate -- the relevance of -- and a need for changes in the code to address that emerging phenomenon.

Let me say that we're, in a sense, in a very different environment here than we are with respect to the last set of testimony. This is not an area that had been, obviously, heavily thought of by this body or, indeed, by many bodies. It is also not an area of intense political controversy.

It is, however, an area of immense importance in the day-to-day operation of courtrooms. It is, in a sense, astonishing when you think that something like 50 percent of litigation at the courts -- at the state court level, at least, involves at least one litigant