

1 ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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4
5 Thursday, April 25, 2013
6 2:09 p.m.

7
8 **Location**

9
10 Evans House
11 1100 West Washington Street
12 Phoenix, Arizona 85007

13 **Attending**

14 Colleen C. Mathis, Chair, telephonically
15 Jose M. Herrera, Vice Chair, telephonically
16 Scott Day Freeman, Vice Chair
17 Linda C. McNulty, Commissioner, telephonically
18 Richard P. Stertz, Commissioner, telephonically

19 Raymond F. Bladine, Executive Director
20 Kristina Gomez, Deputy Executive Director
21 Buck Forst, Information Technology Specialist
22 Mary O'Grady, Counsel, Osborn Maledon
23 Joe Kanefield, Counsel, Ballard Spahr

24 **PREPARED BY:**

25 AZ Litigation Support, LLC
Michelle D. Elam, CR
Certified Reporter
CR No. 50637

Phoenix, Arizona
April 25, 2013
2:09 p.m.

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4 CHAIRPERSON MATHIS: This meeting of the
5 Arizona Independent Redistricting Commission will
6 now come to order.

7 This date is April 25, 2013. The time is
8 2:09 p.m.

9 We'll go ahead and run through roll call.
10 Sounds like everyone is here, but --

11 Vice Chair Freeman?

12 VICE CHAIR FREEMAN: Here.

13 CHAIRPERSON MATHIS: Vice Chair Herrera?

14 VICE CHAIR HERRERA: Here.

15 CHAIRPERSON MATHIS: Commissioner McNulty?

16 COMMISSIONER MCNULTY: Here.

17 CHAIRPERSON MATHIS: Commission Stertz?

18 COMMISSIONER STERTZ: Here.

19 CHAIRPERSON MATHIS: Okay. And other folks in
20 the room, Ray Bladine, our executive director; our
21 deputy director, Kristina Gomez; we have our legal
22 counsel, Joe Kanefield and Mary O'Grady. And our
23 court reporter is Michelle today. Thank you,
24 Michelle.

25 And anybody else I've missed?

1 RAYMOND BLADINE: I think that's it.

2 CHAIRPERSON MATHIS: Okay. Great.

3 We'll go ahead and go to agenda I -- or
4 II, legal advice, direction to counsel, discussion
5 and possible action regarding Harris versus IRC,
6 first part.

7 Two, counsel for individual commissions
8 in ongoing lawsuits and Commissioner Stertz's
9 request for separate counsel.

10 Three, Leach versus IRC.

11 Four, State Legislature versus IRC.

12 And five, access to Commission documents,
13 including documents subject to attorney/client or
14 work product protection and executive session
15 transcripts. The Commission may vote to go into
16 executive session which would not be open to the
17 public for the purpose of obtaining legal advice and
18 providing direction to counsel.

19 So with that, does counsel want to say
20 anything now on any of those five topics?

21 MARY O'GRADY: This is Mary, and I'll just
22 give a brief procedural status in open session of
23 the cases.

24 CHAIRPERSON MATHIS: Okay.

25 MARY O'GRADY: Before we go into executive

1 session on Harris versus AIRC, we are awaiting the
2 decision from the court. We have filed our closing
3 briefs and the trial is complete. So that's the
4 status there.

5 On Leach versus AIRC, that's the State
6 court challenge to the congressional maps. And
7 that -- we are in the early phase of exchanging
8 information and we have -- we'll be exchanging what
9 would be our supplemental disclosure and our initial
10 disclosure next week.

11 And the third lawsuit that's pending is
12 is the State Legislature versus AIRC. And this is
13 the case that's pending in federal court that the
14 legislature filed challenging the Commission's
15 authority to do congressional redistricting.

16 And that -- the status of that, we have
17 two motions pending. One is our motion to
18 reconsider the appointment of a three-judge panel
19 and the second is our motion to dismiss.

20 So we are waiting to hear on those issues
21 or for an argument to be scheduled. But that's the
22 procedural status.

23 And as to the remaining -- the remaining
24 issues that we wanted to discuss, we recommend that
25 we do so in executive session.

1 CHAIRPERSON MATHIS: Okay. Any questions from
2 the commissioners?

3 COMMISSIONER STERTZ: Madame Chair.

4 CHAIRPERSON MATHIS: Mr. Stertz.

5 COMMISSIONER STERTZ: Thank you.

6 I would like to do as much of the
7 discussion about this agenda item in public session.

8 I think that the public needs to know
9 some of the reasons about why we're looking for --
10 or why I'm looking for separate counsel, why the
11 agendized item four, access to Commission documents,
12 is -- I don't think there's evidence, in my opinion
13 to subject to attorney/client privilege, and I think
14 that I would like to have the public hear about this
15 as they can.

16 CHAIRPERSON MATHIS: Okay. Do you have a
17 comment, Mary or Joe, on Mr. Stertz's request?

18 VICE CHAIR FREEMAN: Madame Chair, it's Scott
19 Freeman.

20 CHAIRPERSON MATHIS: Mr. Freeman.

21 VICE CHAIR FREEMAN: I would endorse
22 Commissioner Stertz's comments.

23 I don't think there's anything new with
24 respect to the posture of the lawsuit, so I assume
25 the recommendation to go into executive session

1 deals strictly with the issue pertaining to separate
2 counsel for Commissioners -- Commissioner Stertz's
3 request and the access to documents, the way it's
4 been couched on this agenda item.

5 With respect to the access to documents,
6 that is something I've been requesting since
7 probably November with the executive director.
8 There's always been a reason for a delay.

9 It was February of last year when I put
10 it in writing to the executive director requesting
11 that the Commission, at least if it wasn't going to
12 honor my request, to get access to Commission
13 documents, that it be put on the agenda.

14 And I told the executive director I
15 wasn't going to let the issue go. And with every
16 subsequent hearing, I think there's been maybe five
17 of them, I've asked that all of my requested agenda
18 items be put on the agenda.

19 I guess this -- I did so again with
20 respect to this hearing, and I guess this agenda
21 item has something to do with it.

22 As a commissioner, I think I have a
23 responsibility to look over the shoulder of the
24 staff and the experts and the lawyers that the
25 Commission retains to make sure that everyone is

1 doing their job, that we are spending State money
2 wisely. And that entails, if I request, getting
3 access to records and communications among staff
4 with the experts, with the lawyers.

5 And this arose in October -- in
6 particular in October of 2011 when the Commission
7 was working on the draft map and there seemed to be
8 delays with respect to getting some information with
9 respect to competitiveness, with respect to racial
10 polarized voting analysis from the expert and nobody
11 really knew what was going on and the reasons why
12 there were these delays.

13 And that's what prompted that aspect of
14 my request for at least some internal transparency
15 with this Commission.

16 I also saw at least one instance of where
17 communications -- you know, the commissioners
18 regularly get e-mails from the staff and they almost
19 always say, and there might have been a brief period
20 of time when they didn't say this, but, you know,
21 don't reply to all, lest you violate the
22 open-meeting law. They want to comply with that.

23 I know the Commission took the position
24 there for a while that the open-meeting law didn't
25 apply to us, but we now know that it does, except

1 where it conflicts with the constitutional
2 provision.

3 And yet I saw an instance where a
4 commissioner's response had been circulated to other
5 commissioners. Now, it might have been
6 inadvertently, it might have been just an innocent
7 mistake. I don't know that, but I would like to
8 know whether that was commonplace, whether certain
9 commissioners' communications were being shared with
10 the other three commissioners.

11 So I included that with my request, that
12 I would like to have access to those communications.

13 I know that there was the issue of
14 attorney/client privilege that came up. And I
15 respect that, but that's kind a murky area for me
16 because we have lawyers representing the Commission,
17 not individual commissioners.

18 In fact, I've had a Commission lawyer
19 tell me point blank, look me right in the eye and
20 tell me that he does not represent me and that he
21 gave -- this was a meeting with respect to our
22 run-up to the trial last month, that -- a speech
23 that lawyers often give when they are meeting with
24 unrepresented parties. They say, I don't represent
25 you. I want to make that clear.

1 And, in fact, at that meeting, I had my
2 own lawyer, the lawyer that the Commission had
3 retained for me, in attendance. So that was sort of
4 a record, quote, unquote, was made of that.

5 If that's the case, then -- if there is
6 strictly -- the lawyers strictly work for the
7 Commission as a body, I'm a commissioner, I
8 shouldn't -- I should have access to those
9 communications by commissioners to the lawyers, too.

10 But even if there is a problem with that,
11 it's an easy one to solve. The Commission could
12 easily vote to at least waive any claim of privilege
13 within the Commission itself. The documents
14 wouldn't necessarily be made public, but at least
15 the commissioners would all have an opportunity to
16 know what's going on on this Commission.

17 So that prompted me to make that request.
18 I styled them as internal transparency request.

19 You know, the law is what it is. I don't
20 know if that -- I don't see a reason to go into
21 executive session to get legal advice on that. I
22 would not support that.

23 With respect to the component of this
24 agenda item dealing with separate counsel for
25 commissioners, again, that's another murky area for

1 me. And again, you know, it raises all sorts of
2 issues in my mind, given the posture of the
3 Commission's counsel has taken with respect to
4 certain commissioners. With respect to me and with
5 respect to Commissioner Stertz, as I have seen it.

6 Obviously, I voted against the maps. I
7 stated my objections in numerous public hearings.
8 That's no secret. So in that respect, my interests
9 might be contrary to the Commission's interest.
10 That situation has been in existence since at least
11 December of 2011.

12 Furthermore, in the context of the
13 lawsuit, the Harris lawsuit, there came a time when
14 the plaintiff's counsel intimated or requested
15 discovery with respect to the commissioners.

16 So there was this issue of legislative
17 privilege. Is there one? Can the commissioners
18 invoke it? Can they claim it?

19 And there was a communication by
20 Commission counsel to the plaintiff's counsel saying
21 that, at least with respect to me, I was not
22 inclined to invoke legislative privilege. That was
23 early December that communication took place.

24 So there we have one commissioner, me,
25 saying I wasn't inclined to invoke privilege, at

1 least a blanket claim to privilege. I didn't
2 understand exactly the confines of the privilege.
3 We knew that I was at a position contrary to what --
4 to the Commission with respect to the maps and I
5 believe that the Commission really was implementing
6 part of the maps, and said so in hearings.

7 And if there was an issue with respect to
8 a conflict of interest, it certainly was manifest at
9 that moment. And yet after that communication to
10 opposing counsel, the Commission took positions
11 contrary to my interest, made representations to the
12 court that all of the commissioners had invoked
13 privilege.

14 And it wasn't until the hearing in
15 January of this year when there was oral argument
16 that the three-judge panel asked a lot of questions
17 about that and said, you know, there's a conflict of
18 interest there. You guys can't be advising the
19 individual commissioners on the issue of privilege.
20 They all got to get their own lawyers.

21 So all of a sudden I got my own lawyer
22 and then I filed something with the court through
23 my -- this lawyer that the Commission had retained
24 for me that said Commissioner Freeman does not
25 assert a claim and has not asserted a claim to

1 legislative privilege in this matter.

2 It's a bizarre situation for me, at
3 least, and I don't know exactly how -- it almost
4 seems untenable because we've got the Commission's
5 lawyers now taking positions contrary to positions
6 that commissioners have taken.

7 The Commission's lawyer have sought to
8 undermine positions commissioners have taken. They
9 have made arguments to the court that are contrary
10 to the positions that commissioners have taken in
11 hearings and in their depositions.

12 There was no need, I don't think, to do
13 that. We've had Commission's counsel seek to really
14 cross-examine and impeach commissioners.

15 It's not a very comfortable situation.
16 And even going forward I feel like how do I know now
17 that in hearings a statement will be elicited from
18 me that the design was really to undermine my
19 position in any subsequent legal position. That
20 concerns me.

21 So I think all of these issues -- and I
22 really just scratched the surface -- should be aired
23 publicly. I think whatever the law is with respect
24 to attorneys representing public bodies and how that
25 interplays, I mean, it is what it is. The law is

1 what it is, and I don't see how a resolution of
2 those issues would necessarily impact what the
3 Commission is doing in any subsequent lawsuit. It
4 might actually, to air this out, might actually, you
5 know, foster public confidence that at least we're
6 following the rules and we're doing what's
7 appropriate to defend the Commission's interest.

8 And I honestly have different opinions of
9 what's in the Commission's interest than three of
10 the other commissioners do, but I don't think my
11 opinion is any less valuable or deserves to be
12 undermined you undercut by the Commission's counsel.

13 I recall way back when we were
14 interviewing the lawyers for the Commission that it
15 was said in reference to the 1990 redistricting, and
16 that was a redistricting conducted by the
17 legislature, that -- you know, we had -- the comment
18 was made that, you know, maybe all of the
19 legislators should have had their own lawyers in
20 that because they were all working for their own
21 partisan interest and they probably all should have
22 been individually represented.

23 I think that comes into play with respect
24 to this Commission because it has not been
25 independent. It has, at least this lawsuit, has

1 shown some ray of sunshine on what was going on,
2 that we had commissioners in direct contact with an
3 elections director for the State Democratic party
4 and really just implementing their maps, having
5 numerous meetings with that individual during
6 critical mapping periods.

7 That individual had direct access,
8 apparently, to Strategic Telemetry and the maps on
9 their survey.

10 VICE CHAIR HERRERA: Can I break --

11 VICE CHAIR FREEMAN: Excuse me.

12 VICE CHAIR HERRERA: I have one that I want to
13 devote to this meeting, and I apologize to
14 Commissioner Freeman, but I want to make sure that
15 everybody understands that I have one hour --

16 VICE CHAIR FREEMAN: We understand that,
17 Commissioner Herrera. I'll let you know when I'm
18 finished. I'm almost finished.

19 So we've got Commission's counsel taking
20 positions directly contrary to positions I took
21 during hearings. We've got eliciting testimony that
22 I just think -- I was flabbergasted that -- it's
23 flat out wrong that we've got eliciting testimony
24 that the chair of the Commission was actually the
25 procurement officer for the Commission.

1 I'm not aware of any hearing that this
2 Commission inducted -- in fact, the only thing I
3 remember the Commission doing is agreeing to follow
4 the procurement code. And I think the chair,
5 herself, said that at one of the hearings back in
6 April or May of 2011. That's what we were going to
7 do.

8 And we never took action to anoint any
9 particular commissioner for the procurement officer
10 for this Commission. Doesn't say that in the
11 Constitution.

12 Robert's Rules says, you know, that the
13 president or the chair of the Commission -- of the
14 body has administrative duties but only those set
15 forth in the bylaws or by agreement of the body.

16 Well, there's nothing set forth in the
17 Constitution that says anything about the duties of
18 the chair, and this Commission never made any
19 decisions as to what additional administrative
20 duties the chair was going to have.

21 So I was kind of blown away that that
22 story came out now, almost two years later during a
23 trial.

24 Yeah. And I could go on, but, you know,
25 I'm concerned that the situation might be untenable.

1 I don't want to cause unnecessary problems or
2 anything like that. I'm certainly trying to be
3 cooperative in every stage with Commission's
4 counselor.

5 I've offered to make myself available to
6 them. In fact, did make available to them before
7 the trial to find out -- try to find out as a
8 commissioner what was going to happen.

9 And, you know, we've got a couple more
10 lawsuits to deal with, so let's just try and figure
11 out the best approach to take going forward. And I
12 think we can do that in a public session.

13 And that's all I got for the moment,
14 Madame Chair.

15 CHAIRPERSON MATHIS: Do other commissioners
16 have comments before I ask legal counsel to talk?

17 (Inaudible).

18 (Interruption by the court reporter.)

19 THE COURT REPORTER: I'm sorry, Madame
20 Chairwoman, your voice is very muffled.

21 CHAIRPERSON MATHIS: I'm sorry, what?

22 THE COURT REPORTER: I'm having a hard time
23 understanding you.

24 CHAIRPERSON MATHIS: Oh, okay. Sorry about
25 that.

1 I asked -- I thanked Mr. Freeman and then
2 I said, does any other commissioner want to say
3 anything before I ask Mary or Joe to talk?

4 Okay.

5 COMMISSIONER MCNULTY: Madam Chair.

6 CHAIRPERSON MATHIS: Go ahead, Ms. McNulty.

7 COMMISSIONER MCNULTY: This is Linda McNulty.

8 I have a question for counsel.

9 Can you hear me Joe and Mary?

10 VICE CHAIR FREEMAN: You're coming through --
11 we can hear you real good, Linda.

12 COMMISSIONER MCNULTY: Okay. To the extent
13 that any of us disagree with the characterization of
14 the events as Commissioner Freeman has just
15 described them, I'm going to just state for the
16 record that I think this isn't the place for me to
17 recite all of the ways in which I disagree.

18 I expect we'll deal with those things in,
19 you know, the lawsuits as they become -- as the
20 opportunity presents itself.

21 But I would just ask Joe and Mary whether
22 we need to respond to those things right now or
23 whether we can reserve those and deal with those at
24 another time and place?

25 MARY O'GRADY: Commissioner -- Madame Chair,

1 Commissioner McNulty, I don't think a point-by-point
2 response on the record right now is necessary.

3 I think -- and I don't think that the
4 fact that commissioners don't do a point-by-point
5 rebuttal of one another suggests that any
6 commissioner agrees, you know, with what
7 Commissioner Freeman said.

8 I don't think the record -- and so we'll
9 just -- we can make that clear for the record that
10 we aren't going to -- that commissioners don't need
11 to put that on the record right now. And we -- we
12 can proceed with the issues.

13 CHAIRPERSON MATHIS: Thank you.

14 COMMISSIONER STERTZ: Madame Chair.

15 CHAIRPERSON MATHIS: Mr. Herrera.

16 COMMISSIONER STERTZ: Mr. Stertz.

17 This is Rick Stertz. Madame Chair?

18 In absence of the chair's response, can
19 you hear me in Evans House?

20 VICE CHAIR FREEMAN: Loud and clear.

21 COMMISSIONER STERTZ: My -- in respect to my
22 request for separate counsel, my request for
23 separate counsel comes really because I was at the
24 Harris v. IRC trial, I was called up by the
25 Commission counsel as a hostile witness.

1 And if their position of me as a standing
2 commissioner is that they are considering me as a
3 hostile witness, I cannot come to any comprehension
4 of how they can recognize my voice and opinion as a
5 standing commissioner with equality with the other
6 four commissioners.

7 It is not just a gray area, and I know
8 that in the letter crafted by Mr. Kanefield, he
9 shows that -- and has the opinion that there is no
10 conflict of interest, I cannot reconcile that.

11 And more importantly is that in the
12 preparation for the Harris v. IRC -- I'll just make
13 a point that I happened to have never been contacted
14 for any discussion with the Commission's counsel to
15 ever get them to a place where they could determine
16 what my testimony may or may not be.

17 I found it -- so I find it absolutely
18 disingenuous to believe that there isn't an agenda
19 that is contrary to at least this commissioner's
20 view of his role on this Commission by the existing
21 sitting legal counsel.

22 And therefore, I cannot in any way, shape
23 or form determine that there is anything other than
24 a conflict of interest. And to say otherwise by
25 legal counsel is just, again, disingenuous.

1 So therefore, I'm going to be requesting
2 that the Commission make the request to the State to
3 fund independent counsel for not only myself but I
4 believe the other four commissioners as it pertains
5 to legal representation going forward, not just in
6 the Leach v. IRC, but all subsequent legal matters
7 where representation would be required.

8 VICE CHAIR HERRERA: Madame Chair.

9 Madame Chair, this is Jose.

10 We can assume that Chairwoman Mathis
11 can't hear me?

12 VICE CHAIR FREEMAN: Commissioner Herrera,
13 we're not sure whether she's even on the line, so
14 let's just hold on a second.

15 VICE CHAIR HERRERA: Okay.

16 VICE CHAIR FREEMAN: Will she dial back in?

17 RAYMOND BLADINE: Unless we locked it.
18 Remember last time there was a question about
19 locking it. And we talked about doing it, but I
20 don't know if we did. I had thought of that.

21 COMMISSIONER STERTZ: Madame Chair?

22 This is Commissioner Stertz.

23 In absence of the chair being available
24 and this is an ongoing meeting and there is no way
25 to postpone, the vice chair should take the chair's

1 role so that we can continue moving this meeting
2 forward.

3 CHAIRPERSON MATHIS: Can you hear me?

4 VICE CHAIR FREEMAN: We can hear you now,
5 Colleen.

6 CHAIRPERSON MATHIS: Okay. Sorry. I'm sorry
7 you couldn't hear me before but I was on. I could
8 hear you but you couldn't hear me.

9 VICE CHAIR FREEMAN: Correct. We thought we
10 had lost you.

11 CHAIRPERSON MATHIS: So the last I heard, I
12 thought Mr. Herrera wanted to say something, but
13 maybe I was mistaken.

14 VICE CHAIR HERRERA: No. No, you actually
15 weren't.

16 Thank you for acknowledging me.

17 Again, I don't -- this isn't the time or
18 place to either debate points that both
19 commissioners made, but if Commissioner Stertz feels
20 really passionately that he is entitled to --

21 THE COURT REPORTER: I'm sorry, I'm having a
22 hard time -- Mr. Herrera, I'm having a hard time
23 hearing you.

24 VICE CHAIR HERRERA: Is this better?

25 THE COURT REPORTER: Yes, it is.

1 VICE CHAIR HERRERA: As I was saying, I'm not
2 going to argue with the point by point of the points
3 that both Commissioner Freeman and Stertz made.

4 But if Commissioner Stertz feels that
5 passionately that he is entitle to his
6 representation for legal action going forward, you
7 know what, I have no problem with it as long as each
8 individual commissioner is entitled to their own
9 attorney as well.

10 And if they want to make a vote -- motion
11 for that, I'm happy to support it. That's not what
12 I want, but again, I do want to move this forward.
13 And if they feel that passionately, I would support
14 it.

15 MARY O'GRADY: Madame Chair, this is Mary.

16 I just had a comment along the lines of
17 Commissioner McNulty said.

18 The lawyers also will not be clarifying
19 the record and making -- you know, in terms of
20 whether we agree or disagree with statements made.
21 And obviously, communications that we have with
22 commissioners, we consider privilege, so we'll
23 just -- again, I don't want to -- but wanted to make
24 that clear.

25 VICE CHAIR FREEMAN: Madame Chair, this is

1 Scott Freeman.

2 CHAIRPERSON MATHIS: Go ahead, Mr. Freeman.

3 VICE CHAIR FREEMAN: I agree with that, and I
4 just want to make sure that the Commission in any
5 subsequent legal proceeding does not make the
6 argument that failure to make a point-by-point
7 response to any action or -- by the Commission or
8 any statement made by commissioner does not
9 constitute consent and agreement and consensus
10 because those positions were made, at least during
11 my deposition, and I cannot recall whether it was
12 during the trial, and I don't agree with that.

13 I agree with the position that
14 Commissioner McNulty made her statement and I agree
15 with Ms. O'Grady's statement, it does not require a
16 point-by-point response. Silence does not
17 constitute consent or consensus.

18 VICE CHAIR HERRERA: Madame Chair, this is
19 Jose.

20 CHAIRPERSON MATHIS: Go ahead, Mr. Herrera.

21 VICE CHAIR HERRERA: Commissioner Stertz, if
22 you're willing to make a motion, I would love to
23 hear it.

24 COMMISSIONER STERTZ: Madame Chair.

25 CHAIRPERSON MATHIS: Mr. Stertz.

1 COMMISSIONER STERTZ: Is the time for a motion
2 now?

3 The motion would be that for all current
4 litigation, I guess it would be for all pending
5 litigation and all future litigation, that the --
6 between the IRC and any other outside parties, that
7 the Commission would approve the -- and authorize
8 independent legal counsel for all five
9 commissioners, if they desire.

10 CHAIRPERSON MATHIS: Mr. Stertz's motion.

11 COMMISSIONER MCNULTY: Madame Chair.

12 Ms. O'Grady, are you going to give us
13 legal advice on these issues today in point or do we
14 -- are you waiting for us to decide whether or not
15 we're going to go into executive session or --

16 MARY O'GRADY: Well, our recommendation was
17 that the legal advice on these issues, that we give
18 that in executive session. So that's been our
19 recommendation. And that --

20 COMMISSIONER MCNULTY: Are we waiving anything
21 if we -- for future legal advice if we don't do
22 that?

23 MARY O'GRADY: We -- you can always seek
24 future legal advice. So there is no waiver.

25 COMMISSIONER MCNULTY: I don't know. I guess

1 we need legal advice about the legal advice.

2 You know, I don't have a problem with
3 Mr. Freeman and Mr. Stertz, you know, making their
4 statements, you know, and I should probably do the
5 same because I just -- you know, I'm getting tired
6 of all of the insinuation about the behavior of the
7 other three commissioners, which includes myself.

8 And I just have to -- I have to say,
9 again, it's just categorically incorrect what's
10 being insinuated.

11 But nevertheless, now that Mr. Freeman
12 has said that he would like you to give your legal
13 advice on agenda number I in public, you know, what
14 would be the reason not to do that? I mean, if the
15 law is what it is, that you represent this
16 Commission, we have a legislature who can't, you
17 know, afford to pay for the legal counsel we have
18 now, never mind five lawyers.

19 So I'm asking you for legal advice about
20 whether or not we need to get your legal advice in
21 executive session or whether you can give us some
22 legal advice in public.

23 MARY O'GRADY: Well -- and I think you were
24 talking about agenda II, counsel for individual
25 commissioners?

1 COMMISSIONER MCNULTY: Yes.

2 MARY O'GRADY: And let me defer to Joe on that
3 issue.

4 JOE KANEFIELD: Madame Chair --

5 COMMISSIONER STERTZ: Madame Chair, before
6 Mr. Kanefield proceeds, there is a motion on the
7 floor awaiting a second. If the motion is not going
8 to be seconded, let's let the motion fail for lack
9 of a second or let's allow the -- a second to take
10 place before we move off-target, because the motion
11 has been made and the next step would be for a
12 second to be requested.

13 VICE CHAIR FREEMAN: Madame Chair, this is
14 Scott Freeman.

15 Colleen, if you responded, we couldn't
16 hear you.

17 CHAIRPERSON MATHIS: Mr. Freeman.

18 VICE CHAIR FREEMAN: Okay. I just want to
19 make sure I understand the motion.

20 It is that -- to authorize all -- any
21 commissioner who desires to have individual counsel
22 with respect to ongoing litigation where they are
23 named as a party in their official capacity or is
24 it -- is it broader than that? Is it narrower than
25 that? I can't remember the verbiage.

1 COMMISSIONER STERTZ: Madame Chair.

2 CHAIRPERSON MATHIS: Go ahead, Mr. Stertz.

3 COMMISSIONER STERTZ: I didn't spend much time
4 in designing or crafting the motion. The concept of
5 the motion is going to be that each individual -- it
6 will be very similar to what we have done in the
7 past -- that was done in the fall of 2011 where each
8 individual commissioner has the right on any
9 litigation that is in front of them where they are
10 either a direct or an indirect party, where they may
11 or may not be asked to testify or be deposed or to
12 be involved, that they have got the right to their
13 own individual legal counsel and the fees for that
14 legal counsel would be paid for under contract with
15 the State of Arizona.

16 CHAIRPERSON MATHIS: Does that help clarify,
17 Mr. Freeman?

18 VICE CHAIR FREEMAN: A little bit. And I
19 guess another question is, so right now, the
20 Commission has retained individual counsel for the
21 commissioners to give them legal advice on issues of
22 legislative privilege and discovery matters in
23 Harris and in Leach and I think it's limited to
24 that.

25 This -- I take it then that this -- the

1 intent of the motion is to expand that authority --
2 well, I'm not sure. That would allow individual
3 commissioners then to have their own lawyers
4 retained by the Commission, file papers and
5 pleadings with the court on their behalf to assert
6 their positions, their defenses and allegations.

7 Is that correct?

8 COMMISSIONER STERTZ: That's correct.

9 COMMISSIONER MCNULTY: Why would there be
10 defenses if they are not parties? There aren't any
11 defenses if people aren't defendants.

12 VICE CHAIR FREEMAN: Well, I think we're all
13 still parties in our official capacities in the
14 Leach matter. I'm not sure about the legislature's
15 lawsuit.

16 COMMISSIONER MCNULTY: But again, that's just
17 as a proxy for the Commission.

18 COMMISSIONER STERTZ: Again, I was taken -- in
19 the Harris case, I was taken by the Commission,
20 which as a commissioner, they are my counsel, I was
21 considered by my own counsel as hostile to derive
22 testimony, of which they had never ever interviewed
23 me, discussed with me anything about the Harris case
24 leading up to this, unlike what had been done with
25 other commissioners.

1 So I take great umbrance to the concept
2 of requiring some level of independence, as I do not
3 believe for a millisecond that there is independence
4 in this representation for this independent
5 redistricting commission.

6 So I'm pleased that Mr. -- Commissioner
7 Herrera is going to support this motion and we just
8 want to, in my opinion, make sure that we have
9 individual commissioners working for a single body
10 to benefit the entire body.

11 COMMISSIONER MCNULTY: It's not disingenuous.
12 Rick, you disagree with the body. I mean, the
13 lawyers are just representing the Commission. They
14 are trying to defend our maps. That's all. And you
15 disagree with that. It's just -- it's not a legal
16 issue, it's a personal, political issue.

17 COMMISSIONER STERTZ: It's not a personal or
18 political issue, Linda.

19 COMMISSIONER MCNULTY: But it is. You
20 disagree with what we did. You disagree with what
21 we agreed to do. And that's all it comes down to.
22 And, you know, I don't want to debate it with you,
23 but I do feel like I need to respond in some way.

24 COMMISSIONER STERTZ: Why?

25 COMMISSIONER MCNULTY: Why do I feel like I

1 need to respond?

2 COMMISSIONER STERTZ: Yes.

3 COMMISSIONER MCNULTY: Because decisions were
4 made by -- in what we believe was in the best
5 interest of the Commission and the state.

6 COMMISSIONER STERTZ: Who is "we"?

7 COMMISSIONER MCNULTY: A majority of the
8 commissioners. All of the commissioners. And your
9 decisions -- you had a different perspective but
10 that doesn't mean anyone was bad or anyone has a --

11 COMMISSIONER STERTZ: You had a different --
12 you had a different perspective than me.

13 COMMISSIONER MCNULTY: Yeah, we did.

14 COMMISSIONER STERTZ: My view is not the
15 result -- my view on this has to do with the
16 process. And my -- what was represented about me in
17 testimony in Harris and the way that the Commission
18 -- the Commission's attorneys approached me as an
19 individual, I feel was absolutely -- had nothing to
20 do with working for the benefit of the Commission as
21 a body, including all five members.

22 COMMISSIONER MCNULTY: Well, that's how I
23 feel --

24 COMMISSIONER STERTZ: If they are representing
25 three members -- if this legal team is only

1 representing the majority, then, Linda, I agree with
2 you completely. Because that is the appearance that
3 they are -- that they have given. That is how --
4 they assisted to couch testimony during this trial.
5 They assisted the couch testimony during depositions
6 and they are representing the majority.

7 I have not -- had no participation at all
8 with my own, quote, unquote, commissioner's legal
9 counsel.

10 So I believe it's disingenuous. I think
11 that it's real and I think that the public needs to
12 know that what we have is that we've got two very
13 high-powered legal firms working together with the
14 perceived majority on this. And I believe that the
15 result of the maps -- of whatever the result of the
16 maps are, my issue had to do, and currently still
17 has to do, with the process.

18 And I still believe that there were
19 things during -- that were in the process that we
20 could have all done better. But no one asked that
21 question.

22 When I was asked at trial, Linda, about
23 you, I've got the highest level of respect for you,
24 the highest level respect. I thought that our
25 interplay was fantastic. I thought that we worked

1 extremely well together.

2 But to be brought up in this Harris case
3 and even referred to in a letter from Joe Kanefield
4 saying that this was a personal issue, this isn't a
5 personal issue. They had no idea what I was going
6 to testify. They didn't -- they had no knowledge at
7 all because they never asked me.

8 My own attorneys, as a sitting
9 commissioner, never contacted me to find out what
10 was going to take place at the Harris trial.

11 So therefore, I don't believe that they
12 are looking out for the benefit of the body; that
13 they are looking out for the benefit of the
14 majority. And I happen to not be in that majority.

15 COMMISSIONER MCNULTY: Well, all I can say is
16 that it's a difficult situation because I feel the
17 same way that you do about the high-powered
18 attorneys that are being paid by the Republican
19 party and Republican interests who are impugning me.
20 And it just so happens that it's not the majority on
21 the Commission but it's the same thing going the
22 other way. It's exactly the same thing going the
23 other way.

24 You know, I acted in good faith. I did
25 what I thought was best and right. I educated

1 myself and you guys were doing the same thing.
2 But -- and, you know, I don't know how we get
3 through it and we get to the end, but I do believe
4 we need to stop calling each other bad people. We
5 just did what we each believed was correct.

6 We had different perspectives, but we're
7 wasting a whole lot of money using process as an
8 excuse to argue about our different perspectives.

9 VICE CHAIR HERRERA: Madame Chair.

10 COMMISSIONER MCNULTY: And accusing one
11 another of directly or indirectly or allowing these
12 third-party people to accuse us directly or
13 indirectly of things that are just plain wrong.

14 VICE CHAIR HERRERA: Madame Chair.

15 CHAIRPERSON MATHIS: Mr. Herrera.

16 VICE CHAIR HERRERA: Yeah, I constantly agree
17 with Commissioner McNulty. That's probably why
18 she's highly paid as an attorney and I'm not.

19 You know, one of the things -- I think if
20 we're ever going to come up with a consensus or
21 start, you know, coming up with, okay, this is an
22 area we can agree -- there's five of us and we're
23 all very different. You know, there were things
24 that were said when I was being deposed that -- you
25 know, it just shocked -- it really shocked me

1 because I really felt that there were a couple
2 commissioners on the Commission that took things
3 personally.

4 When I was asked -- I was actually asked
5 if I like the other commissioners. I said, you know
6 what, I like them all. I don't have an issue with
7 all of them because what we do --

8 COMMISSIONER STERTZ: That's not in your
9 deposition.

10 VICE CHAIR HERRERA: No, actually you read it.
11 I don't have a problem with anyone.

12 COMMISSIONER STERTZ: I read your deposition.
13 That's not what --

14 VICE CHAIR HERRERA: Mr. Stertz, can I finish?
15 I actually did not interrupt you at all. I would
16 appreciate it if you would let me talk.

17 You know, I didn't take things personally
18 at all because this wasn't personal for me. This
19 was a job that we were all -- we all volunteered to
20 do.

21 And, you know, I never -- coming in, I
22 never thought, oh, I'm going to agree with the
23 Democrat because there was times where I disagreed
24 with Commissioner McNulty quite often. And if you
25 look at the record, we didn't vote consistently yes

1 or no on issues. We disagreed quite a bit. I
2 disagreed quite a bit with the chair.

3 And I was fine with that. This isn't
4 personal for me. We had a job to do.

5 But, you know, when we have commissioners
6 that consistently, you know, label people this or
7 that, it's, like, what did I do to this individual
8 for them to dislike me that much. All I was doing
9 was what I thought was best for the State. And I
10 still think that. I still think whatever I did,
11 however I voted was best for the State.

12 And, you know what, I'm not going to take
13 that back. Not at all. Nothing I did I regret
14 because I did -- as I said, the right thing.

15 And -- but I want to move forward because
16 I -- the maps -- we keep forgetting that these maps
17 were approved on the first try. And it never
18 happened before and it was completely ignored. And
19 we did a damn good job and all we can focus on and
20 all we focused on has been these lawsuits by our
21 state.

22 And, I'm, like, we did a huge thing.
23 Never been done before. Even when the old
24 legislators were doing these maps, it had never been
25 approved on the first try.

1 And, you know what, we didn't pat
2 ourselves on the back. We actually never had time
3 to do that because we've been arguing, bickering,
4 spending government money that I'm opposed to. But,
5 you know what, if these two attorneys -- these two
6 commissioners want their own -- want their own legal
7 counsel going forward, let's vote on that, let's
8 move forward and let's keep wasting it. If they
9 want to waste government state money that we don't
10 have? Okay.

11 I don't like it, but I want to move
12 forward. I want to move on with my life because I
13 have a life. The maps are through, done. And I
14 have kids to look after. I have a job to do. They
15 are not paying me for this. I'm not being paid at
16 all.

17 And, you know what, I thought I did my
18 job but it just keeps going on and on and on and I'm
19 tired of it. I really am. Because this is not fun.
20 This is not what I signed up for. I didn't sign up
21 for my own commissioners, my own colleagues to be
22 calling me -- I don't know what names they were
23 calling me. I didn't sign up for that.

24 It isn't -- and again, I don't want to
25 take things personally and I'm doing my best not to,

1 but you know what, we did a damn good job. Yeah, we
2 disagreed and we're still going to disagree. Ten
3 years from now, guess what, we're still going to
4 disagree but it doesn't matter because we did our
5 jobs and we need to move forward. And that's what I
6 want to do. I want to move forward.

7 And whatever it takes for us to move
8 forward today, that's what I want to do. That's
9 exactly what I want to do because I want to end this
10 as quickly as possible.

11 CHAIRPERSON MATHIS: Mr. Herrera, thank you.

12 COMMISSIONER STERTZ: Madame Chair.

13 Just one question before Mr. Stertz
14 talks.

15 Mr. Herrera you have to leave when? Like
16 soon?

17 VICE CHAIR HERRERA: Shortly. I'll probably
18 leave in 10 or 15 minutes.

19 CHAIRPERSON MATHIS: Okay. I'm just wondering
20 how much time we have.

21 One idea would be to continue this,
22 because this is, needless to say, a weighty topic
23 and there's, you know, these five subparts to this,
24 you know, legal advice and maybe it needs to be
25 broken up into separate things and we have another

1 meeting at some point to discuss it because we're
2 not going to get through this with Mr. Herrera
3 leaving in 10 or 15 minutes.

4 So I'm just kind of practically wondering
5 how we --

6 COMMISSIONER STERTZ: Madame Chair, I'll be
7 brief.

8 Just on the --

9 CHAIRPERSON MATHIS: Go ahead, Mr. Stertz.

10 COMMISSIONER STERTZ: Just in response to
11 Commissioner McNulty.

12 The issue of representation and
13 attacks -- the Commission's attorney from Ballard
14 Spahr and Osborn Maledon, represent the Commission
15 and the individual commissioners in their capacity
16 as commissioners.

17 I have no relationship with the
18 plaintiff's attorneys in any of these cases. Don't
19 know them. Don't know anything about them.

20 So when I'm saying that -- when the
21 concept of your guys and their guys, I believe that
22 Osborn Maledon and Ballard Spahr are our guys. And
23 it was the way that our guys treated me that I had
24 my issue with. And therefore, I don't believe that
25 I can have a relationship with our guys going

1 forward.

2 I don't have a relationship with the
3 plaintiffs. I wasn't taking the positions, and I
4 didn't even know what the positions were going to be
5 of the plaintiffs.

6 Again, I had no idea what -- the
7 direction that the defendants, our guys, were going
8 to take because our guys never contacted me. They
9 were believing through assumption and true their own
10 view of who I am. And therefore, I don't see them
11 as being able to represent me as a commissioner
12 going forward.

13 So either -- let's either second my
14 motion and vote on it or let's go on to the second.

15 VICE CHAIR FREEMAN: Madame Chair, it's Scott
16 Freeman.

17 CHAIRPERSON MATHIS: Mr. Freeman.

18 VICE CHAIR FREEMAN: I'll second the motion
19 because I would like to hear what Mr. Kanefield has
20 to say.

21 CHAIRPERSON MATHIS: I couldn't make out what
22 you said there. You said you second the motion but
23 what?

24 VICE CHAIR FREEMAN: Because I would like to
25 hear what Mr. Kanefield has to say.

1 CHAIRPERSON MATHIS: Okay. So we have this
2 motion that's been seconded for Mr. -- motion made
3 by Mr. Stertz, seconded by Mr. Freeman.

4 Is there any discussion on -- even though
5 we've been discussing it?

6 JOE KANEFIELD: Madame Chair.

7 COMMISSIONER MCNULTY: Go ahead.

8 JOE KANEFIELD: Madame Chair, members of the
9 Commission, this is Joe.

10 I think this would probably be a good
11 time for me to summarize our response to
12 Commissioner Stertz's request for us to withdraw as
13 counsel on behalf of Mr. Stertz in his official
14 capacity.

15 We copied the Commission on the letter,
16 so you're all familiar with it.

17 And let me just start by saying, you
18 know, we're very sorry that this has all played out
19 the way it has. Speaking for myself, when you all
20 interviewed me, it was done in public session. You
21 asked me very pointedly, who would I represent --
22 whose interest would I represent and I told you that
23 I would represent the Commission as a whole because
24 that's what you were hiring me to do and that's
25 ethically what I would be required to do, not

1 individual commissioner's interest but the
2 Commission as a whole.

3 And I apologize to Commissioner Stertz.
4 I can hear very clearly how he feels as a result of
5 the trial and the discovery leading up to the trial.
6 And it doesn't surprise me. Unfortunately,
7 litigation is an ugly business. It's very
8 adversarial. It's -- cross-examination is part of
9 the process of ascertaining the truth. It's not
10 pleasant to be deposed. I've been deposed and I've
11 been subject to cross-examination in my former
12 capacity as the election director. So I know the
13 feeling. And I'm sorry that you all had to go
14 through it.

15 We were doing our best as counsel for the
16 Commission to represent the Commission and the
17 decision made by the Commission. The problem, of
18 course, is that the Commission is divided.

19 That's not uncommon in state government
20 or even sometimes in corporate life. And our
21 ethical rules guide us in these situations and tell
22 us what to do, and that is to continue representing
23 the body.

24 So what -- the reason we felt that we
25 needed to respond to Commissioner Stertz's letter

1 requesting that we withdraw -- to put it in context
2 of those that aren't as familiar with this as we all
3 are -- in the Leach case, the State court action,
4 the Commission was sued as a whole alleging
5 irregularity -- procedural irregularities with
6 respect to the process for drawing the congressional
7 map.

8 In addition to naming the Commission as a
9 whole, the individual commissioners were named in
10 their official capacity. And that's an important
11 point to make because that's the way you plead a
12 case sometimes when you need to name individuals to
13 get specific relief.

14 Without boring everyone about the details
15 of that area of the law, we know in federal court
16 you do have to name individuals in their official
17 capacities to get some relief because of the 11th
18 Amendment prevents you from naming the state. Same
19 issues don't necessarily present themselves in the
20 state court proceeding.

21 When we were asked to withdraw as
22 counsel, you know, we had to look at this issue a
23 little more carefully, of course, but this isn't the
24 first time it's come up. To the credit of
25 Commissioner Freeman, he's identified this issue in

1 the past and we've certainly looked into it.

2 The letter --

3 COMMISSIONER MCNULTY: Joe, I'm having a
4 little trouble hearing you. If you have a mic,
5 could you get closer to it?

6 JOE KANEFIELD: Yes. I'm sorry, Commissioner
7 McNulty. I was not speaking directly into the mic.

8 Can you hear me now?

9 COMMISSIONER MCNULTY: That's much better.
10 Thank you.

11 JOE KANEFIELD: I can't repeat everything I
12 just said.

13 COMMISSIONER MCNULTY: You don't need to.

14 JOE KANEFIELD: Anyway, I was getting to the
15 letter to just explain the position of Ballard Spahr
16 and Osborn Maledon. Mary -- this isn't Mary's
17 letter but she sent a separate letter indicating
18 that she and her firm were in agreement.

19 And frankly, you know, one of our
20 concerns is that this issue about us withdrawing
21 raises ethical questions about conflicts of
22 interest, and that's a very serious matter with
23 respect to members of our profession.

24 So we, of course, wanted to make sure
25 that we were responsive to our client, the

1 Commission, was responsive to Commissioner Stertz
2 and setting forth how we see the law and how we
3 interpret the law.

4 So essentially, what we have pointed out,
5 as I've already said at least two or three times
6 now, is that we represent the Commission as an
7 entity, not individual commissioners but the
8 Commission as an entity.

9 The relief requested in the Leach case is
10 against the Commission, not against any specific
11 commissioner. So the -- obviously, the relief is
12 that new maps be drawn, following what the
13 plaintiffs say should have been the proper
14 procedure.

15 So if they were successful in this case,
16 the relief would not be personal to any particular
17 commissioner, but it would be to the Commission as a
18 whole. So that certainly factored into our
19 analysis.

20 We also cite to the case law that -- as I
21 noted earlier, that discusses official capacity
22 suits and why you caption a case naming individuals
23 in their official capacity, which usually is
24 required in federal court proceedings to deal with
25 the 11th Amendment issues.

1 But in this case, we have yet to identify
2 what the issue -- why the plaintiffs felt the need
3 to name the individual commissioners in their
4 official capacity. I'm not saying that there isn't
5 a reason why they did. We just haven't identified
6 it. Perhaps they will tell us at some point.

7 But the lawsuit doesn't seek relief
8 against any of you in your official capacities. And
9 therefore, we -- as I indicated in the letter to
10 Commissioner Stertz -- do not -- our role is to
11 defend the Commission's decisions and not
12 necessarily the personal interests of any individual
13 commissioner.

14 And, Commissioner Stertz, I apologize if
15 that statement sounds harsh. It was not meant to
16 sound that way, but the issue is whether you -- I
17 think what I was trying to say is that if you as an
18 individual commissioner had some kind of an exposure
19 as an individual, then that is a different question.
20 If it's just a disagreement with the majority and
21 the final decisions of the map or even the process,
22 then we -- without any specific relief requested
23 against you, we don't see that as a conflict. So
24 ethically we don't see that as a conflict.

25 Now, having said all of that, on the

1 question of individual representation and
2 withdrawal, we felt that it was necessary for the
3 Commission to address those questions because that's
4 who we represent and we think that that's your
5 decision to decide whether the individual
6 commissioners should, in fact, have their separate
7 counsel.

8 And if you would direct us to withdraw as
9 counsel for the commissioners in their official
10 capacity, then we would most certainly honor that
11 request.

12 We also told Commissioner Stertz that we
13 would let the court know about this in any filings
14 and -- before the issue is resolved, but we haven't
15 had to file. Our next filing will be next week.
16 It's not even a filing, it's a disclosure exchange
17 between counsel.

18 And again, in fairness, we brought this
19 up before we filed our first responsive pleading
20 because we did want to get this resolved. We
21 certainly don't want to be accused of any ethical
22 impropriety.

23 On the issue of expense, we do take the
24 position that separate counsel for individual
25 commissioners in their official capacity is not a

1 justified expense for the reasons stated in that
2 there's no specific relief sought against the
3 individual commissioners, with one caveat being that
4 there may be occasion for separate counsel for
5 individual commissioners, and we have already
6 identified that situation with respect to privilege
7 and waiver. And there may be other situations --
8 conflict situations that identify themselves where
9 individual counsel would be appropriate at
10 Commission-Stated expense.

11 But in terms of a blanket recommendation
12 to authorize the expenditure of individual counsel,
13 counsel for individual commissioners in their
14 official given the manner in which this case is
15 postured, we're just not seeing how this is a
16 justified expense.

17 In addition to obviously representing you
18 and defending the maps in these cases, we also are
19 obligated to advise you on other aspects of the law,
20 including incurring expenditures and what kind of
21 exposure they might be there.

22 So we are not saying that it's
23 necessarily legal or unlawful, but we just aren't
24 convinced that it's a necessary expense.

25 And with that having been said, I will

1 pass the microphone to Mary to see if she has
2 anything to add. On that last point, the Commission
3 can discuss that perhaps in a little bit more
4 detail.

5 MARY O'GRADY: I guess my comment in terms of
6 expense and what the separate counsel might do, as I
7 understand the motion, it would be, you know -- well
8 -- and Commissioner Stertz's proposal, we would not
9 represent Commissioner Stertz. And perhaps if this
10 motion is approved, we would only be responding for
11 the Commission and perhaps we would have five
12 separate lawyers who do everything for the
13 individual commissioners. So we would have six
14 separate defense counsel doing whatever needs to be
15 done in the lawsuit.

16 And again, as Joe said, that doesn't seem
17 to be either appropriate or necessary, given the
18 nature of this lawsuit, which is the commissioners
19 are named in their official capacity in this
20 challenge to the Commission's decisions and the
21 relief sought is against the maps and the naming of
22 the commissioners in their official capacity is
23 unnecessarily, like in the Harris case, they were
24 dismissed based on legislative immunity. We think
25 that same action is likely appropriate in the State

1 case. And really, the commissioners in their
2 official capacity are just proxies, therefore, the
3 entity. And in our research, as we have pointed
4 out, you know, commissioners in this type of
5 lawsuit, really their role is as witnesses perhaps
6 and -- perhaps but perhaps not because of
7 legislative privilege. And -- but -- and as
8 decision-makers as commissioners in the body's
9 defense, but not to individually direct, you know,
10 their personal representation in the case. And you
11 have five individual voices representing the
12 commissioners in their official capacity when they
13 are really just named as proxies for the entity.

14 And I think that's my supplemental
15 comment at this point.

16 VICE CHAIR FREEMAN: Madame Chair, this is
17 Scott Freeman.

18 CHAIRPERSON MATHIS: Mr. Freeman.

19 VICE CHAIR FREEMAN: Question to counsel, and
20 it's just -- I guess my question is, am I
21 articulating a legitimate concern here?

22 I understand it as the Commission
23 authorized individual counsel for commissioners in
24 their official capacity for -- with respect to the
25 issues pertaining to legislative privilege and

1 discovery, but that was it.

2 So at trial, I mean, we were told at the
3 last hearing you all can have your individual
4 lawyers there when you testify at trial but it
5 probably would be a waste of time if they stay for
6 other parts of the trial, although I think some of
7 the other lawyers did stay.

8 But -- so my lawyer was there, the lawyer
9 the Commission had retained for me, but he couldn't
10 object, he couldn't take, at least that I was
11 aware -- he couldn't take any action. He could
12 object at the deposition, which he did a couple of
13 times, but -- and there were probably times when I
14 was up there where I wanted an objection and there
15 was nobody. There was nobody. I guess I could have
16 lodged my own objection, but there was nobody to do
17 that.

18 And maybe -- I guess what I'm -- is that
19 a concern and is there maybe a third way whereby
20 maybe the scope of representation of the individual
21 lawyers is maybe broadened in some way that would
22 address some of these concerns and yet not upset the
23 applecart too much?

24 JOE KANEFIELD: Madame Chair, Commissioner
25 Freeman, I'll take a quick stab at that.

1 I think the answer is yes, and I always
2 felt it was appropriate for the individual
3 commissioners to have separate counsel on privileged
4 questions because I could see a potential for a
5 conflict with commissioners and the body with
6 respect to positions taken.

7 I think that that's an appropriate
8 request, I'm just not sure what the exact language
9 or scope of that would be. But, yes, in certain
10 situations it may very well be appropriate to expand
11 the scope of the counsel that the Commission has
12 authorized you to hire -- or us to hire on your
13 behalf.

14 VICE CHAIR FREEMAN: And I'm searching for it
15 as well. And I go back to the example of which
16 commissioners invoked privilege. Well, Freeman
17 didn't but the court thought maybe I did and so
18 that -- to me, that was a problem. And I didn't
19 know about it until later.

20 And I know you guys thought, you know,
21 all the commissioners, they were named as proxies so
22 it doesn't matter what they say, but -- and I don't
23 mean to put words in your mouth, but, I mean, I've
24 got my own -- I feel like my duty and responsibility
25 is to uphold the Constitution. So I do have -- and

1 I'm named. I was served. You accepted service for
2 me. So there is this notion that there is an
3 interest that each individual commissioner has that
4 maybe isn't being protected enough under the
5 construct we have right now.

6 VICE CHAIR HERRERA: Madame Chair.

7 CHAIRPERSON MATHIS: Go ahead, Mr. Herrera.

8 VICE CHAIR HERRERA: Yeah, I'm going to have
9 to be hanging up now. I apologize. So -- you guys
10 still have a quorum without me, so I'm going to be
11 hanging up.

12 Both of our attorneys really don't need
13 to apologize for anything. I think they did the job
14 they needed to do, the job we hired them for. You
15 know, and I felt very comfortable talking to Joe
16 Kanefield. And myself as a Democrat talking Joe
17 Kanefield, a Republican. And sometimes I talked to
18 him more than I did to Mary.

19 And, you know, that's what the Commission
20 is supposed to be about, when we hire attorneys. I
21 really never thought that we were going to hire
22 attorneys for Democrats and Republicans. I never
23 saw Joe that way and I never saw Mary that way.

24 And it's sad to say -- to hear the other
25 commissioners felt that they were -- they don't --

1 you know, they weren't listened to or they
2 weren't -- you know, they felt that they were being
3 ignored or whatever the case might be that -- you
4 know, I feel bad, but I never saw it the same way.

5 Obviously, it's their opinion and I'm
6 going to have to respect that, but, you know, our
7 attorneys don't have to apologize for anything.

8 If I had to do it all over again, these
9 are the attorneys I want as well. So -- and again,
10 I hope one of these days these people will look back
11 and say, you know what, I don't even know why I took
12 this personally. They all had a job to do, they did
13 it. So that's all that I got to say.

14 Like I said, I don't know how long you're
15 going to be on the conference call, but I wish you
16 guys the best but I will have to hang up.

17 COMMISSIONER STERTZ: Madame Chair, are we
18 able to take a vote before Mr. Herrera hangs up?

19 CHAIRPERSON MATHIS: I'm not (inaudible) -- I
20 feel like -- I don't want to (inaudible) --

21 THE COURT REPORTER: I'm sorry, I can't --
22 what was that last sentence.

23 CHAIRPERSON MATHIS: Can you hear me? I don't
24 know where -- what part -- where do I --

25 RAYMOND BLADINE: Madame Chair, we can't hear

1 you, but I would like to ask a question before you
2 vote, if I may.

3 CHAIRPERSON MATHIS: Is that Ray?

4 RAYMOND BLADINE: Yes, it is. I'm sorry.
5 This is Ray.

6 I would just ask that whatever you vote,
7 that we make sure that our attorneys feel we can pay
8 for those services.

9 I've just spent the last three months
10 meeting with legislative leadership and talking
11 about the amounts of money that we are spending on
12 lawyers and defending it. And I think the
13 legislature knows it has a constitutional
14 responsibility, but I think we also have a legal
15 responsibility to not ask staff to be paying
16 invoices unless we know that they legally can be
17 paid.

18 And I heard something in Joe's comments
19 that raised a question whether such a broad-ended
20 motion as was made, whether or not that would be
21 legal. I don't want to put words in his mouth, but
22 since I'm the one that approves, or Kristina, the
23 invoices, I want to make sure that I'm in a position
24 where I can do that and not have to come back to
25 you.

1 CHAIRPERSON MATHIS: Okay. Can you guys hear
2 me?

3 RAYMOND BLADINE: Yes.

4 CHAIRPERSON MATHIS: Is Mr. Herrera gone?

5 VICE CHAIR HERRERA: Is Mr. who?

6 CHAIRPERSON MATHIS: Herrera.

7 VICE CHAIR HERRERA: I'm sorry, I didn't hear
8 you. Yes, I am still on.

9 CHAIRPERSON MATHIS: Okay. Good.

10 So I was going to say with regard to
11 taking a vote before you depart, I would prefer if
12 we could postpone a vote on this motion. I don't --
13 is somebody talking? Can you guys hear me?

14 VICE CHAIR HERRERA: I can hear you.

15 CHAIRPERSON MATHIS: I can hear everybody
16 on -- that's dialing in, I can hear Mr. Stertz and
17 Ms McNulty super well but I can't hear Evans House
18 very well.

19 Can Evans House hear me?

20 RAYMOND BLADINE: Evans House can hear you.
21 We're just being quiet.

22 CHAIRPERSON MATHIS: Okay. You guys stay
23 quiet.

24 I would prefer we not take a vote on
25 Mr. Stertz's motion that's been seconded by

1 Mr. Freeman right away before Mr. Herrera gets off
2 the phone. I don't want to foreclose the option of
3 having any commissioner getting any individual
4 counsel at all, but I also am not ready to authorize
5 lawyering up and spending a whole bunch more money
6 on individual counsel when we have counsel
7 representing all five commissioners right now.

8 So I see both sides of this and I have
9 own -- my own issues, too, because I feel that we
10 need to be represented individually. I felt that
11 before as well.

12 So I guess I would like to, if possible,
13 have some more time to think about this before we
14 actually vote today. But I'm one commissioner. If
15 there is already a group of you that are ready to go
16 and vote, you know, I can --

17 VICE CHAIR HERRERA: Madame Chair.

18 CHAIRPERSON MATHIS: Mr. Herrera.

19 VICE CHAIR HERRERA: If you would like to
20 postpone the vote, when we would we be voting -- at
21 what meeting --

22 CHAIRPERSON MATHIS: Yeah, that's a good
23 question.

24 We would need to, obviously, notice
25 another meeting, and I know -- you know, I know it's

1 very difficult for us all to get together. But that
2 would be my preferred route.

3 VICE CHAIR HERRERA: And, Madame Chair.

4 CHAIRPERSON MATHIS: Mr. Herrera.

5 VICE CHAIR HERRERA: How would it be different
6 if you were to -- what would be different if we were
7 to postpone the vote? So let's just say we met two
8 weeks from now or maybe a week from now. What would
9 be different then as it is now?

10 CHAIRPERSON MATHIS: I just need to think
11 about it for my own self because I'm not ready to
12 vote on this right now. But if others are and want
13 to go ahead, we can do.

14 VICE CHAIR HERRERA: Madame Chair, one last
15 comment.

16 If you were to postpone the vote, as long
17 as we have a date in mind of when we want to
18 schedule this -- reschedule the topic and talk about
19 it and finally do a vote, either up and down, I'm
20 okay with that, with postponing it, but not much
21 longer because I'm assuming when we have another
22 meeting, we're going to talk about the same things
23 over again. People will say the same things they
24 have said today, rehashing everything.

25 I don't want to do that. If it's going

1 to be a meeting where we -- it's agendized and we
2 discuss things that haven't already been said, then
3 I'm okay with that. But I don't want to prolong it
4 and then go through the whole thing over again. I
5 mean, we have been on the phone for almost an hour
6 and a half and it hasn't been, to me as productive
7 as it could have been.

8 CHAIRPERSON MATHIS: I agree.

9 COMMISSIONER STERTZ: Madame Chair.

10 CHAIRPERSON MATHIS: Mr. Stertz.

11 COMMISSIONER STERTZ: The issue of Leach case,
12 the clock is ticking, and I think that we're all --
13 all members of this Commission are cognizant of the
14 financial constraints of the State of Arizona and
15 the desire to not use the phrase, to lawyer up, I
16 just feel that it is imperative to bring this to a
17 vote now so that we can -- if we want to revisit
18 post-Leach on any other litigation, that would be
19 satisfactory to me and I could restrict our -- the
20 motion and amend it to dealing specifically with the
21 cases that are currently active. I can withdraw any
22 future for us to have conversation later.

23 But at this time, I think that it is
24 imperative, from my perspective and I believe the
25 perspective of the other commissioners, to at least

1 have guidance from individual legal counsel in their
2 official capacity as commissioners, if they so
3 choose.

4 VICE CHAIR HERRERA: Madame Chair, I know I
5 gave my last comment. I do want to hear from
6 Commissioner McNulty and I would love to hear her
7 thoughts on this.

8 COMMISSIONER MCNULTY: My concern -- thank
9 you, Mr. Herrera.

10 My concern is that the legislature is
11 concerned about funding counsel right now and I
12 don't want to put ourselves in a position where we
13 have representation which would not, from a legal
14 perspective, be justified and which could cause the
15 legislature to be unwilling to pay the Commission's
16 lawyers or to -- or to reduce the compensation to
17 the Commission's lawyers. So I feel like I need to
18 think about this some more, too.

19 I liked the question that Mr. Stertz and
20 Mr. Freeman asked Joe Kanefield about whether there
21 is a way to expand the scope of the existing
22 representation somewhat to address Mr. Stertz's
23 concerns without being quite so open-ended.

24 But I am concerned about having -- you
25 know, all of us have lawyers in our individual

1 capacity when we really haven't been sued as
2 individuals and when we could and probably should
3 move for the Harris -- for the Leach court to
4 dismiss us out as individuals in our official
5 capacity so that it's clear that it's just the
6 Commission that's at stake -- that's a defendant and
7 then try and deal with Mr. Stertz's concern about
8 the depositions and, you know, being -- all of our
9 concerns about being -- about those things in a
10 narrower way.

11 I guess we don't yet know in Leach
12 whether we're going to waive executive --
13 legislative privilege and, you know, whether we will
14 be deposed and wonder whether this decision should
15 await a little better sense of all of that.

16 VICE CHAIR HERRERA: Madame Chair.

17 CHAIRPERSON MATHIS: Mr. Herrera.

18 VICE CHAIR HERRERA: Now, if we decide to
19 postpone it, when would be the soonest day we could
20 schedule this meeting to discuss whatever hasn't
21 been discussed, questions that have been brought --
22 that have come up since this discussion, when would
23 be the soonest time -- soonest date we could
24 schedule this next meeting?

25 CHAIRPERSON MATHIS: 48 hours from now, but I

1 don't know if everyone is available. So we would
2 have to, you know, poll everybody and ask when folks
3 are available.

4 VICE CHAIR HERRERA: I want to be as
5 accommodating as possible and -- but I also want
6 to -- I understand the concerns from the other two
7 commissioners that want to delay the vote. I do
8 understand that.

9 So if the vote needs to be delayed to
10 accommodate everyone, or at least the other two, I'm
11 okay with that as long as it's scheduled as soon as
12 possible, whether it be maybe Tuesday or Monday. I
13 don't know, Monday is -- I think that's plenty of
14 time.

15 That's my only concern, is if we decide
16 to postpone the vote, that we reschedule it as soon
17 as possible and have people think about what -- you
18 know, whatever issues that have been -- arose from
19 these conversations, think about it, discuss it and
20 then come into the meeting, if it's Tuesday, we talk
21 those issues and hopefully answer them and then vote
22 on whether or not to proceed.

23 MARY O'GRADY: Madame Chair --

24 COMMISSIONER STERTZ: Madame Chair.

25 MARY O'GRADY: -- this is Mary.

1 CHAIRPERSON MATHIS: Mr. Stertz.

2 COMMISSIONER STERTZ: Quick question, and, Ms.
3 O'Grady, just bear with me because this actually
4 pertains to you.

5 The letter that you have delivered to me
6 gives me the indication that you will be withdrawing
7 as representing me as a commissioner; is that
8 correct?

9 MARY O'GRADY: No, Madame Chair, Commissioner
10 Stertz. The letter just supported the analysis of
11 Joe Kanefield.

12 CHAIRPERSON MATHIS: Okay. So when can we
13 next all get together?

14 RAYMOND BLADINE: Madame Chair, I think Mary
15 has something she wants to offer --

16 CHAIRPERSON MATHIS: Oh, okay.

17 RAYMOND BLADINE: And then I would say this:
18 If everyone would, today, send us their availability
19 calendar for the next -- starting next Tuesday, then
20 we can quickly set a meeting, but that's normally
21 the first step.

22 If we try to set a meeting now, we're
23 just going to be changing it because people have
24 their own lives to live. And the thing that would
25 move it the fastest is everybody doing what they

1 have been good about doing, and that's sending us
2 the times they could meet over the next, say,
3 starting 48 hours from now.

4 MARY O'GRADY: And, Madame Chair --

5 CHAIRPERSON MATHIS: Availability -- go ahead,
6 Ms. McNulty.

7 COMMISSIONER MCNULTY: That's Mary.

8 CHAIRPERSON MATHIS: Sorry, Mary. Go ahead,
9 Mary.

10 VICE CHAIR HERRERA: Mary, before you speak --
11 I mean, Ms. O'Grady, before you speak, do you mind
12 if I cut in real quick?

13 I will send the IRC staff my availability
14 for next week and I will be as flexible as I need to
15 be so we can schedule a meeting, if Tuesday is the
16 date that everyone is available. Hopefully that's
17 the case.

18 But I'll send you my availability after I
19 hang up and I look forward to discussion on this
20 topic next week.

21 So thank you guys. Take care.

22 (Mr. Herrera left the meeting.)

23 MARY O'GRADY: Madame Chair, this is Mary, and
24 commissioners, just a few points.

25 One, I would appreciate the opportunity

1 for an executive session on legal advice because
2 some of the -- in terms of the Commission's strategy
3 and whatever issues are going on there because some
4 of this is interrelated with the -- you know, how
5 the Commission approaches things and so can talk
6 about some of the other issues that might come up if
7 there is there is -- if we do have expanded roles of
8 counsel in terms of the Commission's representation.

9 So I would like the opportunity to have
10 that executive session.

11 I do think it makes sense to have the
12 budget briefing as well. And -- and this
13 information is helpful so Joe and I can also think
14 about some of the options that the Commission is
15 considering in terms of roles for counsel. But I
16 would like that opportunity for an executive session
17 on Leach before a vote is taken and for that budget
18 briefing.

19 And procedurally, we do have a motion and
20 a second on the table. So if we're going to delay
21 the vote, not vote on those today, if there is --
22 either those are withdrawn, the second and the
23 motion, or motion to table that motion.

24 COMMISSIONER STERTZ: Madame Chair.

25 CHAIRPERSON MATHIS: Mr. Stertz.

1 COMMISSIONER STERTZ: Since both you and
2 Commissioner McNulty have given your opinion that
3 you do not wish to vote at this time, if we took --
4 a question was called, I know that you would vote
5 nay, so we would have a stalemate.

6 It's going to be easier for me just to
7 table the motion and the second so that we don't
8 have to debate that issue again.

9 And I would suggest that if there's
10 any -- as Mr. Kanefield was describing, if there's
11 any --

12 You've heard our concerns. And the goal
13 is not to excessively expand the cost to the
14 Commission, but you also need to recognize the place
15 that I was put in. I would not have made the
16 request if I did not feel very strongly about where
17 I am.

18 This is not a personal issue. I'm not
19 taking this as a personal issue, although I did use
20 the word "personal" in my letter to you and you did
21 respond to it in such a way that you're believing
22 that this is just something that's personal and
23 having personal feelings.

24 It was that our legal team did not, in my
25 opinion, approach at least this commissioner as a

1 part of that team. And therefore, I believe that
2 having counsel from outside is going to be helpful
3 in moving the facts down the field.

4 I will then table the motion if the
5 seconder agrees with the second. Then we will
6 reconvene at a date hopefully set within the next 10
7 days.

8 VICE CHAIR FREEMAN: Madame Chair, it's Scott
9 Freeman.

10 CHAIRPERSON MATHIS: Mr. Freeman.

11 VICE CHAIR FREEMAN: Given what Commissioner
12 Stertz has said, I will withdraw the second.

13 CHAIRPERSON MATHIS: Okay. Thank you.

14 So we'll table it until we next meet,
15 which will -- it will be on the agenda and everyone
16 is to provide their availability over the next week
17 to -- I mean for the next week but provide the
18 availability as -- you know, as soon as possible,
19 like today, to Ray and Kristina so they can figure
20 out what's going to work for everybody.

21 COMMISSIONER STERTZ: And, Madame Chair and
22 this if for Executive Director Bladine, I will make
23 myself available, Madame Chair, to their schedule.

24 RAYMOND BLADINE: And, Madame Chair,
25 Commissioner Stertz, I think Lisa is sending you all

1 an e-mail right now so there would be something for
2 you to respond to.

3 CHAIRPERSON MATHIS: Perfect.

4 Anything else from any commissioner?

5 VICE CHAIR FREEMAN: Madame Chair, it's Scott
6 Freeman.

7 CHAIRPERSON MATHIS: Mr. Freeman.

8 VICE CHAIR FREEMAN: Just so I'm clear, at the
9 -- if we have a hearing next week, which we're going
10 to try to schedule, this agenda item II will appear
11 again in its entirety?

12 CHAIRPERSON MATHIS: I couldn't hear that.

13 VICE CHAIR FREEMAN: Well, at least, I would
14 request, then, that agenda item II appear on the
15 next agenda as well. That nothing gets dropped off
16 it.

17 CHAIRPERSON MATHIS: Oh, right.

18 COMMISSIONER STERTZ: In other words, Madame
19 Chair, we still want to be talking about documents
20 and we still want to be talking about things that
21 each one of us as individual commissioners should be
22 getting from the Commission that is being asked for.

23 A lot of these legal expenses ended up
24 because I was asked to prepare for a trial and I
25 asked the Commission, and the attorneys for the

1 Commission blocked me getting documents that I as a
2 commissioner believe that I should have got.

3 I want that to be talked about at our
4 next hearing. I don't need to talk about anything
5 else other than that, but I want to make sure that
6 we go through the reason why I as a commissioner am
7 not privy -- can't be privy to the work product of
8 the Commission itself.

9 I find that not just strange, but for --
10 to adequately prepare for a legal case, to not be
11 able to review all of that data was unfair and
12 inappropriate.

13 MARY O'GRADY: And, Commissioner Freeman --
14 I'm sorry, again --

15 CHAIRPERSON MATHIS: Is that Mary?

16 MARY O'GRADY: This is Mary.

17 And, Commissioner, Madame Chair, again,
18 we're not responding to everything, but we'll
19 follow-up with you, Commissioner Stertz, and address
20 your concerns.

21 COMMISSIONER STERTZ: Thank you.

22 MARY O'GRADY: But I disagree with what was
23 said concerning those issues.

24 COMMISSIONER STERTZ: Okay. You can disagree.
25 I mean, but I didn't get all of the stuff that I was

1 asking for.

2 MARY O'GRADY: Right, because you were asking
3 for things that you had never seen before and
4 there's no need to see those in the context of
5 preparation for trial.

6 COMMISSIONER STERTZ: Yes, this is even a
7 larger level of concern about things that are taking
8 place behind the scenes that we are required to vote
9 on and participate in. It's our vote. It's our
10 names. It's our faces. It's our reputations that
11 are on the line with all of this. And we've all
12 gotten beaten up for various reasons at various
13 times.

14 And hiding stuff behind the scenes is
15 exactly what Proposition 106, and it was voted on to
16 not do, was to take all of this secret stuff that's,
17 you know, not being shown to the public and get it
18 all out there under the bright lights. And that's
19 what I don't understand why we can't get that done.

20 So if we're hiding stuff that
21 commissioners themselves can't see, as you've just
22 described, I got an issue with that. So we'll talk
23 about that at the next meeting.

24 CHAIRPERSON MATHIS: Okay. And everything --
25 the agenda will just continue -- the same agenda

1 from today will be the agenda for the next meeting.

2 Is that everyone's understanding?

3 COMMISSIONER STERTZ: Right.

4 CHAIRPERSON MATHIS: Okay. So with that,
5 everybody respond to Lisa's request.

6 And, legal counsel, did you have anything
7 else that you wanted to say before we adjourn?

8 RAYMOND BLADINE: Madame Chair, it's fine with
9 us if all of the items go over. I think the
10 material we gave you told you where we are with
11 budget. But if you want me to comment on that, I
12 would be glad to.

13 I can tell that everyone is bored with
14 the idea of talking about budget.

15 So, Madame Chair, we're going to assume
16 silence in this case is assent to not talking about
17 the budget.

18 VICE CHAIR FREEMAN: Madame Chair, it's Scott
19 Freeman.

20 CHAIRPERSON MATHIS: Mr. Freeman.

21 VICE CHAIR FREEMAN: Mr. Bladine or Ms. Gomez,
22 is there anything that we need to address today
23 that's of particular concern?

24 RAYMOND BLADINE: No, Commissioner Freeman,
25 Vice Chair, there's not.

1 VICE CHAIR FREEMAN: Thank you.

2 CHAIRPERSON MATHIS: Okay. Anything else?

3 Okay. With that, this meeting is
4 adjourned. And the time is 3:37 and we'll be
5 together next week at some point.

6 Thank you.

7 (The meeting adjourned at 3:37 p.m.)

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I, MICHELLE D. ELAM, Certified Reporter
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certify that the foregoing 71 printed pages
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the proceedings had in the foregoing matter, all
done to the best of my skill and ability.

WITNESS my hand this 26th day of April,
2013.

MICHELLE D. ELAM
Certified Reporter
Certificate No. 50637

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