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2-10 Cobb & Consul

February 8, 2000

Mr. Charles L. Babcock
Jackson & Walker
901 Main St., Suite 6000
Dallas, Texas 75202

Dear Chip:

Enclosed is a redlined version of my proposed changes to straighten-out Rule 735, et seq. For the most part they make those Rules fit other applicable longstanding Texas Rules of Civil Procedure.

Mike Baggett advises me that if these changes are made, particularly the few substantive ones, the Texas home equity loans and reverse mortgage loans would not likely be acceptable for warehousing, packaging, and resale to the investment community. His preference is to change the rules only to the extent of his recommendation at our last meeting. I doubt the Supreme Court will want to impair the availability of credit on terms that the Legislature has authorized, so I suppose accommodation of the attitudes of the secondary credit markets is essential.

Mike recognizes that the practices in Rule 735, et seq. are facially severe but emphasizes that actual operation of the rule simplifies debtor protection existing in present practice. For example, in the circumstances of a home equity loan or a reverse mortgage loan in order to stop a foreclosure no restraining order is required, and no bond. All the debtor must do is respond pursuant to Rule 736 and file a separate suit. The filing of a separate suit stops the process. Accordingly, it may be that we can tolerate the procedure so long as the debtor is given absolutely clear and obvious instruction that in order to stop a foreclosure process commenced pursuant to Rules 735 and 736 all that is necessary is to file a response and file a separate lawsuit. That could be placed on the notice by amending the rule with bold notice language to that effect.

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/ LICENSED IN WASHINGTON, D.C.

And, if that is our solution, I propose that we provide another form in the rule and some instructions as to how one or more debtors could file the form pro se and stop the process and access some measure of justice.

Fundamentally, will the Supreme Court advance rules that allow creditors to take away the homesteads of people of all ages, or the inheritances of people after the deaths of our elderly, on procedures that deny any discovery whatsoever and do not even require that the debtor prove that the debtor has immediate right to foreclose? Will that be advanced just because hidden somewhere in vague language a debtor can do something called "abate"? I'm sure they must know what-the-hell "abate" is!

If the answer of the creditors to the criticism of these rules is simply "all the debtor has to do for protection is file a separate suit," then I think we need to get that message to the debtors in a clear and unmistakable notice and provide the debtor sufficient guidance that, with little more than a stroke of a pen and a visit to the clerk of the court, that person knows and is able to exercise rights otherwise buried.

If I understood Mike, if the Supreme Court does only that, and does not otherwise change the rules, then the changes will not affect secondary marketability.

I trust Mike will respond.

Very truly yours,

Luther H. Soules III

LHSIII:gc
::ODMA\WORLDOX\U:\DATA\4543\1\00135916.WPD;2

cc: Mr. Mike Baggett, Dallas, Texas
Justice James Baker, Supreme Court
SCAC Members

TEXAS RULES OF CIVIL PROCEDURE

Part VII Rules Relating to Special Proceedings

*Section 1. Procedures Related to Home Equity ~~Loan~~ **and Certain Reverse Mortgage** Foreclosure*

Rule 735. Procedures

A party seeking a foreclose a lien created under TEX. CONST. art. XVI, § 50(a)(6), **for a home equity loan, or TEX. CONST. art. XVI, § 50(a)(7), for a reverse mortgage, that is to be foreclosed on grounds other than TEX. CONST. art. XVI, §§ 50(k)(6)(A) or (B),** may file: (1) a suit seeking judicial foreclosure; (2) a suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and TEX. PROP. CODE § 51.002; or (3) ~~an application~~ suit under Rule 736 for an order allowing foreclosure.

Rule 736. Expedited Foreclosure Proceeding

1. Application

A party filing ~~an application~~ suit under Rule 736 seeking a court order allowing the foreclosure of a lien under TEX. CONST. art. XVI, § 50(a)(6)(D), **for a home equity loan, or § 50(k)(11), for a reverse mortgage,** shall initiate such ~~in rem~~ proceeding by filing a verified ~~application~~ petition in the district court in any county where all or any part of the real property encumbered by the lien sought to be foreclosed (the "property") is located. The application shall:

(A) be styled: "In re: Order for Foreclosure Concerning _____ (*Name of person to receive notice of foreclosure*) and _____ (*Property Mailing Address*)";

(B) identify by name the party who, according to the records of the holder of the debt, is obligated to pay the debt secured by the property;

(C) identify the property by mailing address and legal description;

(D) identify the security instrument encumbering the property by reference to volume and page, clerk's file number, or other identify recording information found in the official real property records of the county where all or any part of the property is located or attach a legible copy of the security instrument;

(E) allege that:

(1) a debt exists;

(2) the debt is secured by a lien created under TEX. CONST. art. XVI, § 50(a)(6) ~~that encumbers the property;~~ **, for a home equity loan, or § 50(a)(7), for a reverse mortgage;**

(3) a default under the security instrument exists;

(4) the petitioner ~~applicant~~ has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, TEX. PROP. CODE § 51.002, **TEX. CONST. art. XVI, § 50(k)(10), for a reverse mortgage,** and applicable law;

(5) the petitioner has the immediate right to foreclose under the security instrument;

(F) describe facts which establish the existence of a default under the security instrument; and

(G) state that the ~~applicant~~ plaintiff seeks a court order required by TEX. CONST. art. XVI, § 50(a)(6)(D)**, for a home equity loan, or § 50(k)(11), for a reverse mortgage,** to sell the property under the security instrument and TEX. PROP. CODE § 51.002.

A notice required by TEX. CONST. art. XVI, § 50(k)(10), for a reverse mortgage, may be combined or incorporated in any other notice referenced in Rule 736(1)(E)(4). The verified ~~application~~ petition and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

2. Notice

(A) Service. Every application filed with the clerk of the court shall be served ~~pursuant to Rule 117a in the same manner as citation for delinquent ad valorem taxes~~ by the party filing the application. ~~Service of the application and notice shall be by delivery of a copy to the party to be served by certified and first class mail addressed to each party who, according to the records of the holder of the debt, is obligated to pay the debt. Service shall be complete upon the deposit of the application and notice, enclosed in a postage prepaid and properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. [See Rule 4.] If the respondent is represented by an attorney and the applicant's attorney has knowledge of the name and address of the attorney, an additional copy of the application and notice shall be sent to respondent's~~

~~attorney.~~ [Not necessary if Rule 117a is the standard for citation.]

~~(B) Certificate of Service. The applicant or applicant's attorney shall certify to the court compliance with the service requirements of Rule 736. The applicant shall file a copy of the notice and the certificate of service with the clerk of the court. The certificate of service shall be prima facie evidence of the fact of service.~~ [Not necessary if Rule 117a is the standard.]

(C) Form of Notice. The notice shall be sufficient if it is in substantially the ~~following~~ form ~~in at least ten point type:~~ of Rule 117a [~~Add Rule 99(c) to Rule 117a at a new Rule 117a(6) as follows:~~

[Type text of Rule 99(c)]

DELETE THIS PAGE

Cause Number _____

In re: Order for Foreclosure Concerning

_____ *1

and

_____ *2

In The District Court

~~*Of*~~ *of* _____ *County*

_____ *Judicial District*

NOTICE TO _____ *3

_____

_____

An application has been filed by _____, *as Applicant, on* _____ *4, *in a proceeding described as:*

"In re: Order for Foreclosure Concerning
_____ *1 and _____ *2.

The attached application alleges that you, the Respondent, are in default under a security instrument creating a lien on your homestead under TEX. CONST. art. XVI, § 50(a)(6), ***for a home equity loan, or § 50(a)(7), for a reverse mortgage****. This application is now pending in this court.*

Applicant seeks a court order, as required by TEX. CONST. art. XVI, § 50(a)(6)(D) ***or § 50(k)(11)****, to allow it to sell at public auction the property described in the attached application under the security instrument and TEX. PROP. CODE § 51.002.*

You may employ an attorney. If you or your attorney do not file a written response with the clerk of the court at _____ *5 *on or before 10:00 a.m. on* _____ *6 *an order authorizing a foreclosure sale may be signed. If the court grants the application, the foreclosure sale will be conducted under the security instrument and TEX. PROP. CODE § 51.002.*

You may file a response setting out as many matters, whether of law or fact, as you consider may be necessary and pertinent to contest the application. If a response is filed, the court will hold a hearing at the request of the applicant or respondent.

In your response to this application, you must provide your mailing address. *In addition, you must send a copy of your response to* _____ *7.

ISSUED

*By*_____
Applicant or Applicant's Attorney

DELETE THIS PAGE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this notice with a copy of the application was sent certified and regular mail to _____ *[3] on the* ____ *day of* _____.

_____ *[signature]*
Applicant or Attorney of Applicant

---

*1	name of respondent	*4	date application filed
*2	mailing address of property	*5	address of clerk of court
*3	name and address of respondent	*6	response due date
		*7	name and address of applicant or applicant's attorney

(D) The petitioner and citation ~~applicant~~ shall state in the notice the date the response is due in accordance with Rule 736(3).

~~(E) The application and notice may be accompanied by any other notice required by state or federal law.~~ [Unnecessary if Rule 117a is the standard.]

3. Response Due Date

A response is due on or before 10:00 a.m. ~~on the first Monday~~ after the expiration of ~~thirty-eighty~~ forty-two (~~38~~42) days after the date of ~~mailing~~ service of the application and ~~notice~~ citation to respondent~~, exclusive of the date of mailing, as set forth in the certificate of service~~.

4. Response

~~(A)~~ The respondent may file ~~a~~ and serve any response permitted by Rule 83 through 98 ~~setting out as many matters, whether of law or fact, as respondent deems necessary or pertinent to contest the application. Such response and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated~~.

~~(B) The response shall state the respondent's mailing address.~~ [~~Unnecessary if Rule 93 - 98 are the standard.~~]

~~(C) The response shall be filed with the clerk of the court. The respondent shall also send a copy of the response to the applicant or the applicant's attorney at the address set out in the notice.~~ [~~Unnecessary if Rule 93 - 98 are the standard.~~]

5. Default

At any time after a response is due, the court shall grant the application without further notice or hearing if:

(A) the ~~application~~ petition and notice complies with Rule 736(1) and 736(2);

(B) the respondent has not ~~previously~~ filed a response; and

(C) a copy of the notice and the ~~certificate~~ return of service shall have been on file with the clerk of the court for at least ten days exclusive of the date of filing.

6. Hearing When Response Filed

On the filing of a response, the application shall be promptly heard after ~~reasonable~~ Rule 245 notice to the applicant and the respondent. ~~No discovery of any kind shall be permitted in a proceeding under Rule 736. Unless the parties agree to an extension of time, the issue shall be determined by the court not later than ten business days after a request for hearing by either party.~~ [Unnecessary if Rule 245 is standard and priority of first sentence here.] ~~At the hearing, the applicant shall have the burden to prove by affidavits on file or evidence presented the grounds for the granting of the order sought in the application.~~ [Unnecessary if Rule 245 and Rules of Evidence are the standard.]

7. Only Issue

(A) The only issue to be determined under Rule 736 shall be the right of the ~~applicant~~ petitioner to obtain an order to proceed with foreclosure under the security instrument and TEX. PROP. CODE § 51.002. No order or determination of fact or law under Rule 736 shall be res judicata or constitute collateral estoppel or estoppel by judgment in any other proceeding or suit.

(B) The granting of an application under these rules shall be without prejudice to the right of the respondent to seek relief at law or in equity in any court of competent jurisdiction. The denial of an application under these rules shall be without prejudice to the right of the ~~applicant~~ petitioner to re-file the application or seek other relief at law or in equity in any court of competent jurisdiction.

8. Order to Proceed with Notice of Sale and Sale

(A) Grant or denial. The court shall grant the ~~application~~ petition if the court finds applicant has proved the elements of Rule 736(1)(E). Otherwise, the court shall deny the ~~application~~petition. The granting or denial of the ~~application~~ petition is not an appealable order.

(B) Form of order. The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security agreement and TEX. PROP. CODE § 51.002, provide that a copy of the order shall be sent to respondent with the notice of sale, provide that ~~applicant~~ petitioner may communicate with the respondent and all third parties reasonably necessary to conduct ~~or prevent~~ the foreclosure sale, and, if respondent is represented by counsel, direct that notice of the foreclosure sale ~~date~~ shall also be mailed to counsel by certified mail.

(C) Filing of order. The applicant is to file a certified copy of the order in the real property records of the county where the property is located within ten business days of the

~~entry~~signing of the order. Failure to timely record the order shall not affect the validity of the foreclosure or defeat the presumption of TEX. CONST. art. XVI, § 50(i). [Why is this necessary?]

9. Abatement and Dismissal

A ~~proceeding~~ suit under Rule 736 ~~is automatically abated~~ must be dismissed if, before the signing of the order, notice is filed with the clerk of the court in which the application is pending that respondent has filed a petition in a different suit contesting the right to foreclose in a district court in the county where the application is pending. ~~A proceeding that has been abated shall be dismissed.~~

#00140945

********** -COMM. JOURNAL- ********** DATE FEB-10-2000 ***** TIME 17:34 *** P.01

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-JACKSON WALKER L.L.P. -

********** -DALLAS OFC - ***** - 214- **********

MEMORANDUM

TO: Chip Babcock January 7, 2000

FROM: Bob Pemberton

RE: Revisions to Recusal Rule

Attached is a redlined draft of Rules of Civil Procedure 18a and 18b that incorporates changes that have been proposed to the Court during the last year.

1. Rule 18a(1) has been revised to require parties to assert recusal motions within ten days after acquiring actual knowledge of the grounds for recusal. These changes are modeled on two of the new discovery rules, Rules 193.4(c) and 193.7. Rule 18a(1) currently requires only that the party file the motion at least ten days before the hearing or trial from which recusal is sought. This has led to last-minute "ambush" recusal motions in attempts to blow trial settings. Senator Harris has taken an interest in this problem.

Because Rule 18a(e) is rendered obsolete by the changes in paragraph (a), it is deleted.

Consistent with Rules 193.4(c) and 193.7, we might add a comment to the effect that if a party knows of a potential ground for recusing the judge that is unknown to other parties, he or she could force other parties either to assert a recusal motion or waive it by disclosing the grounds to the other side. We might also impose a general duty on parties to disclose any grounds for recusal of which they are aware, and perhaps a coextensive rule of professional responsibility.

2. Before S.B. 788 was enacted, I had drafted a new Rule 18(e) to address the problem of multiple successive recusal motions. Some potential problems with this provision and the general concept of limiting recusal motions include:

a. What happens if the Chief assigns a judge who is subject to recusal under Rule 18b? On one hand, if the grounds for recusal are solely those set forth in Rule 18b, as opposed to statutory or constitutional grounds, then seemingly the Court could freely limit Rule 18b recusal motions by rule, at least in theory. But should it? Should the Court in this way permit the appearance of unfairness inherent in the possibility that the Chief could assign a judge who, under ordinary circumstances, would be subject to recusal?

b. A more practical problem is a potential conflict between the draft rule and a

1997 statute governing motions to recuse in probate courts. The draft rule avoids any potential conflicts with statutory or constitutional rights to strike or disqualify because it limits only motions to recuse. But Section 25.0255 of the Government Code also authorizes parties to file motions for recusal of probate judges. This unqualified statutory right to seek recusal would appear inconsistent with the draft rule's limitations on such motions.

c. However we formulate the limits, wouldn't a limit on the right to move to recuse judges appointed by the Chief merely invite parties to seek recusal of such judges by writ of prohibition? Perhaps this is an acceptable result — at least a court will finally adjudicate the right of a judge to hear the last recusal motion, enabling the proceedings to move along.

3. A new paragraph (j) has been added to clarify that the recusal rules apply to associate judges and magistrates. There currently is no recusal requirement expressly applicable to masters and associate judges.

4. Judge Bob McCoy of Fort Worth pointed out that the reference in Rule 18b(6) to subparagraph (f)(iii) makes no sense – if a judge's relative is a material witness, clearly the judge or his relative can't "divest[] himself of the interest that would otherwise require recusal." (Presumably, the judge isn't required to disown or kill the relative). The reference probably should be to subparagraph (f)(ii).

R.H.P.

(g) Repealed by Acts 1999, 76th Leg., ch. 251, § 2, eff. Sept. 1, 1999.

Added by Acts 1997, 75th Leg., ch. 887, § 1, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 251, §§ 1, 2, eff. Sept. 1, 1999.

Section 2 of Acts 1997, 75th Leg., ch. 887 provides:

"This Act takes effect September 1, 1997, and applies only to suits filed on or after the effective date of this Act."

Section 3 of Acts 1999, 76th Leg., ch. 251 provides:

"This Act takes effect September 1, 1999, and applies only to suits filed on or after the effective date of this Act. A suit filed before the effective date of this Act is governed by the law in effect when the suit was filed, and that law is continued in effect for that purpose."

§ 30.016. Recusal or Disqualification of Certain Judges

(a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.

(b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:

(1) preside over the case;

(2) sign orders in the case; and

(3) move the case to final disposition as though a tertiary recusal motion had not been filed.

(c) A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.

(d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.

(e) If a tertiary recusal motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.

Section 2 of Acts 1999, 76th Leg., ch. 608 provides:

"(a) This Act takes effect September 1, 1999, and applies to all cases:

"(1) filed on or after the effective date of this Act; or

"(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

"(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose."

§ 30.017. Claims Against Certain Judges

(a) A claim against a district court, statutory probate court, or statutory county court judge that is added to a case pending in the court to which the judge was elected or appointed:

(1) must be made under oath;

(2) may not be based solely on the rulings in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and

(3) is automatically severed from the case.

(b) The clerk of the court shall assign the claim a new cause number, and the party making the claim shall pay the filing fees.

(c) The presiding judge of the administrative region or the presiding judge of the statutory probate courts shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of Subsection (a)(1) or (2).

Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.

Section 2 of Acts 1999, 76th Leg., ch. 608 provides:

"(a) This Act takes effect September 1, 1999, and applies to all cases:

"(1) filed on or after the effective date of this Act; or

"(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

"(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose."

AN ACT

relating to claims against, including motions for the recusal or disqualification of, certain judges.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 30, Civil Practice and Remedies Code, is amended by adding Sections 30.016 and 30.017 to read as follows:

Sec. 30.016. RECUSAL OR DISQUALIFICATION OF CERTAIN JUDGES. (a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.

(b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:

(1) preside over the case;

(2) sign orders in the case; and

(3) move the case to final disposition as though a tertiary recusal motion had not been filed.

(c) A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.

(d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.

(e) If a tertiary recusal motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

Sec. 30.017. CLAIMS AGAINST CERTAIN JUDGES. (a) A claim against a district court, statutory probate court, or statutory county court judge that is added to a case pending in the court to which the judge was elected or appointed:

(1) must be made under oath;

(2) may not be based solely on the rulings in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and

(3) is automatically severed from the case.

(b) The clerk of the court shall assign the claim a new cause number, and the party making the claim shall pay the filing fees.

(c) The presiding judge of the administrative region or the presiding judge of the statutory probate courts shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of Subsection (a)(1) or (2).

SECTION 2. (a) This Act takes effect September 1, 1999, and applies to all cases:

(1) filed on or after the effective date of this Act; or

(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect

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immediately before that date, and that law is continued in effect for that purpose.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 788 passed the Senate on April 8, 1999, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 788 passed the House on May 26, 1999, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

RECUSAL PACKET

January 28-29, 2000

MORRIS ATLAS
ROBERT L. SCHWARZ
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January 18, 2000

Via Federal Express
Mr. Richard R. Orsinger
Attorney at Law
Tower Life Building, Suite 1616
San Antonio, TX 78205

RE: Supreme Court Advisory Committee's Subcommittee on Rule 134

Dear Richard:

Enclosed are my suggestions for Rule 134 (formerly Rule 18a TRCP).

I have incorporated the suggestions from our last discussion but I have not attempted to redline the copy since it probably would not be meaningful to the full committee unless everyone had a copy of the recodified rules. If you think it would be beneficial, however, I will attempt to underline all of the new additions to the recodified rule.

I am sending a copy of this proposal to Bill Dorsaneo for his comments and I assume that you will send copies to all of the members of the subcommittee. Please let me know if you want to have a further subcommittee discussion about this before the full committee hearing.

Sincerely,

Carl

O. C. Hamilton, Jr.

OCH/cd
Enclosure
cc: William V. Dorsaneo, III
School of Law, Southern Methodist University
PO Box 750116, 3315 Daniel Avenue
Dallas, Texas 75275-0016 (via First Class)

JAN 19 2000

Rule 134 (formerly Rule 18a TRCP)

(d) Procedure.

(1) *Motion.* A motion to disqualify or recuse a judge, as defined herein, must state in detail the grounds asserted and when the party learned of the grounds for recusal or disqualification. The motion must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A judge's rulings may not be used as the grounds for the motion, but may be used as evidence supporting the motion. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Time to File.* The motion to recuse must be filed no later than ten (10) days after the party obtains actual knowledge of the grounds for the motion or the right to file such motion is waived. A timely filed motion to recuse filed within 3 days of the date the case is set for trial or other hearing is governed by paragraph (d)(4)(c).
Option 1: A motion to disqualify may be filed at any time.
Option 2: A motion to disqualify must be filed as soon as practicable after learning of the grounds for disqualification.

(3) *Referral.* Option 1: The judge must sign an order ruling on the motion promptly, and prior to taking any other action in the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region who shall hear the motion or assign a judge to hear it.
Option 2: The judge must sign an order ruling on the motion promptly, and prior to taking any other action in the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region who shall determine whether the motion is procedurally proper and whether the movant has alleged grounds to recuse or disqualify. If the motion is procedurally proper and grounds for recusal or disqualification have been alleged, the presiding judge of the region shall hear the motion or assign a judge to hear it. If the motion is not procedurally proper or if the movant has not alleged grounds for recusal or disqualification, the presiding judge of the region shall deny the motion without a hearing.

(4) *Interim Proceedings.* If the motion alleges grounds for recusal or disqualification, the judge must take no further action in the case until the motion is disposed of, except that

(a) if the motion alleges only grounds listed in subparagraphs (b)(1), (b)(2) or (b)(3), the judge may proceed with the case as though the motion had not been filed; or

(b) if the motion is a third or subsequent motion to recuse or disqualify filed in the case against a judge by the same party and regardless of the grounds alleged, the judge shall proceed with the case as though no motion had been filed; or

(c) if a motion to recuse or disqualify is filed within 3 days of the date the case is set for trial or other hearing, the judge shall proceed in the case as though no motion had been filed.

(5) *Orders to be vacated.* If the judge who signed any order in an interim proceeding is recused or disqualified, the judge assigned to the case shall vacate such order.

(6) *Hearing.* Unless the presiding judge of the region has denied the motion without hearing, the presiding judge of the region must immediately hear or assign another judge to hear the motion, and must set a hearing to commence before such judge within ten (10) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone and facsimile copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within twenty (20) days of referral or the motion is deemed granted [denied].

(7) *Disposition.* If a District Court judge is disqualified or recused, either by the original judge or the judge hearing the motion, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(8) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be reviewed.

(9) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(10) *Sanctions.* If a party files a motion under this rule and it is determined on motion of the opposite party, that the motion was brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2. Upon denial of a third or subsequent motion, filed in the case against a judge by the same party, the judge denying the motion shall award to the party opposing such motion reasonable and necessary attorneys' fees and costs. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs which must be paid before the 31st day after the date of the order denying the motion unless the order is properly superseded.

(11) *Definitions.* The term "judge" means the judge, associate judge or master of any court except the Supreme Court, Court of Criminal Appeals, Courts of Appeals, Statutory Probate Courts as defined by the probate code and commissioners' courts.

Comment 1: A party's failure to file a motion under this rule within 3 days of the date the case is set for trial or other hearing waives the parties' right to seek recusal or

disqualification of the judge as to that hearing or trial. It does not, however, prejudice the party's right to subsequently seek recusal or disqualification of the judge from the case.

Comment 2: A motion to recuse or disqualify a statutory probate court judge is governed by §25.00255 Government Code.

First Administrative Judicial Region

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October 21, 1999

Honorable Nathan L. Hecht
Supreme Court of Texas
Supreme Court Bldg.
P.O. Box 12248
Austin, Texas, 78711-2248

Re: T.R.C.P. Rule 18a and T.R.A.P. 48.1

Dear Nathan:

I would like to suggest some study of a couple of Rules and I hope you can give me some suggestions and comment.

RULE 18A

I have found Rule 18a T.R.C.P. to be less than workable in at least two areas. Aside from the fact that I believe most recusal motions are filed either to delay the case or to intimidate the trial judge--for which I don't think there is a cure--I believe two changes in the Rule might be considered.

First, there is no provision for representation of the judge being challenged. Usually, therefore, the other side takes up the task which generally creates a much greater perception of impropriety that the alleged misconduct. I realize that the Attorney General's office will " defend" judges in suits but I understand they would not do so in a recusal action. Further, they are slow to

get up to speed and most of these recusals have short fuse. Some judges have accepted the offer of volunteers from the Bar to represent them but this, too, creates an unhealthy appearance. Needless to say most judges cannot afford to hire counsel.

I have found in hearing at least 500 recusals over the last four years that many times the accusations are absolutely groundless, oftentimes politically drive, and the judges need some way to respond. Frequently an effort is made to call them or others as witnesses when a motion to quash the subpoena or some form of protective order would be appropriate. Judges should be very careful in responding pro se to these motions, not only because they can end up disqualified but because they can run afoul of the Code of Judicial Conduct or the Ethics Committee.

I believe the Rule could be changed to provide that the local district attorney or county attorney would represent the judge. Obviously they should not in a criminal recusal or in defense of a judge in a civil recusal in front of whom they appear in criminal cases. I would prefer to allow the Presiding Judge assign an attorney to represent the judge or to allow the challenged judge select counsel but in either event have the County pay the attorneys fees involved, with some sort of reasonable cap. If the Rule can be changed to improve the Sanction section, I believe we would see situations where these fees could be recovered as a sanction.

That section, Rule 18a(h), dealing with sanctions, has always struck me as being a good idea not carefully thought out. The Rule 215(2)(b) sanctions for discovery abuse simply do not fit the usual recusal problem. Rule 13 sanctions do but I have always been a little afraid of using Rule 13 in a recusal sanction situation where Rule 18a has its specific sanction provision, i.e. Rule 215 (2)(b). It could be argued that Rule 13 therefore may not be applied in recusal situations.

I believe if the judge hearing the recusal had contempt power to use in the proper case and the power to order payment of fees or costs, that we would deter frivolous motions. Also I read Rule 18a (h) to require a finding that the Motion was without just cause *and was made solely for the purpose of delay.* It also requires, as I read it, that someone move for the sanction compared to Rule 13, which may be sua sponte. I believe that the sanction provision could be cleaned up considerably. Delay is sometimes hard to prove and I don't believe that the requirement of proving both delay *and* lack of sufficient cause should be required.

If at some time I can give further input on this I would be happy to do so. Short of that I would enjoy discussing this with you because I am sure that there are shades of it I am not seeing.

T.R.A.P. RULE 48.1

Next, to another problem. I am sure there is and was a good reason for Rule 48.1 T.R.A.P which causes stacks of appellate opinions to come to my office on a regular basis. While I will not confess that I have not read the hundreds of these opinions from all the Courts which consider First Region appeals, it would take me 26 hours a day doing nothing else just to start. It has recently taken me several hours just to open and sort the opinions into two stacks, reading those which reversed a lower court or otherwise took action adverse to the trial court. I know we are being required to employ performance standards but I frankly don't know what reading these opinions does to accomplish that. When a judge is affirmed or reversed there is nothing I can do about it, except in the case of assigned judges where I have some authority. Reversals or other actions involving extraordinary remedies are only informational to me to the extent that I can identify the regular judges who seem to get negative results more often that others. In the rare case where an assigned judge is reversed I can, of course, use that information.

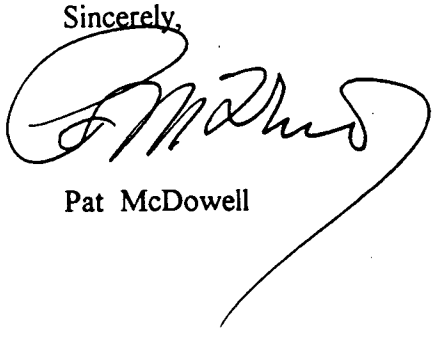
Also I usually don't know if some judge other than the regular judge of the court heard

the case. Justice Thomas for the Fifth Court has changed their computer program to reflect who actualy tried the case and this has been great help. But your Court , the Court of Criminal Appeals and all of the other Courts of Appeals do not do this. In fact your Court and the Court of Criminal Appeals don't even identify the trial court by court.

As a suggestion I would certainly like to continue getting the negative information which may have some usefullness.

Thanks again for taking time to read this and please let me know what you think.

Sincerely,



Pat McDowell

Citation
TX GOVT s 21.005
V.T.C.A., Government Code § 21.005

Found Document

Rank 1 of 1

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TX-ST-ANN

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
GOVERNMENT CODE
TITLE 2. JUDICIAL BRANCH
SUBTITLE A. COURTS
CHAPTER 21. GENERAL PROVISIONS

Current through End of 1999 Reg. Sess.

§ 21.005. Disqualification

A judge or a justice of the peace may not sit in a case if either of the parties is related to him by affinity or consanguinity within the third degree, as determined under Chapter 573.

CREDIT(S)

1988 Main Volume

Added by Acts 1987, 70th Leg., ch. 148, § 2.01(a), eff. Sept. 1, 1987.
1999 Electronic Update

Amended by Acts 1991, 72nd Leg., ch. 561, § 21, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 76 5.95(28), eff. Sept. 1, 1995.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

1991 Legislation

The 1991 amendment provided that consanguinity or affinity was to be "as determined under article 5996h, Revised Statutes".

1995 Legislation

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CONSTITUTION OF THE STATE OF TEXAS 1876
ARTICLE V. JUDICIAL DEPARTMENT

Current through End of 1999 Reg. Sess.

§ 11. Disqualification of judges; exchange of districts; holding court for other judges

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

CREDIT(S)

1993 Main Volume

As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

1993 Main Volume

The 1891 amendment, proposed by Acts 1891, 22nd Leg., S.J.R. No. 16, substituted "the Court of Criminal Appeals, the Court of Civil Appeals," for "the Appellate Court" and "any number of either" for "any two of the members of either", added "either" preceding "by affinity or consanguinity", and substituted "such cause" for "said cause" and "required by law" for "directed by law".

Earlier Constitutions:
Const.1845, Art. 4, § 14.
Const.1861, Art. 4, § 14.
Const.1866, Art. 4, § 12.
Const.1869, Art. 5, § 11.

CROSS REFERENCES

Civil cases, recusal or disqualification of trial judge, see Vernon's Ann.Rules Civ.Proc., Rules 18a, 18b.

Disqualification of judges, see V.T.C.A., Government Code § 21.005; Vernon's Ann.C.C.P. art. 30.01 et seq.

WEST'S TEXAS RULES OF COURT
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 1. GENERAL RULES

Current with amendments received through 1-1-1999

RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(Added June 10, 1980, eff. Jan. 1, 1981; amended Dec. 5, 1983, eff. April 1, 1984; April 10, 1986, eff. Sept. 1, 1986; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

This is a new rule.

Change by amendment effective April 1, 1984: Section (a) is changed textually.

Comment: The words "the Court of Criminal Appeals" have been added in (a); and subsection "1" has been added to (g).

Vernon's Ann. Texas Rules Civ. Proc., Rule 18a

TX R RCP Rule 18a

END OF DOCUMENT

WEST'S TEXAS RULES OF COURT
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 1. GENERAL RULES

Current with amendments received through 1-1-1999

RULE 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) Recusal. A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

(Added July 15, 1987, eff. Jan. 1, 1988; amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).

Vernon's Ann. Texas Rules Civ. Proc., Rule 18b

TX R RCP Rule 18b

END OF DOCUMENT

WEST'S TEXAS RULES OF COURT
TEXAS RULES OF APPELLATE PROCEDURE
SECTION ONE. GENERAL PROVISIONS

Current with amendments received through 1-1-1999

RULE 16. DISQUALIFICATION OR RECUSAL OF APPELLATE JUDGES

16.1 Grounds for Disqualification. The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.

16.2 Grounds for Recusal. The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.

16.3 Procedure for Recusal.

(a) Motion. A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) Decision. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) Appeal. An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.

(Effective September 1, 1997.)

Notes and Comments

Comment to 1997 change: Former Rules 15 and 15a are merged. Former Rule 15a appears as subdivision 16.2. For grounds for disqualification, reference is made to the Constitution and statutes rather than the Rules of Civil Procedure. The procedure for disqualification is not specified. The nature of prior participation in a proceeding that requires recusal is clarified. Former subdivision (b) of Rule 15, requiring service of the motion, is omitted as unnecessary. The remaining subdivisions of former Rule 15 are contained in subdivision 16.3. Other changes are made.

Rules App. Proc., Rule 16

TX R RAP Rule 16

END OF DOCUMENT

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL PRACTICE AND REMEDIES CODE
TITLE 2. TRIAL, JUDGMENT, AND APPEAL
SUBTITLE B. TRIAL MATTERS
CHAPTER 30. MISCELLANEOUS PROVISIONS

Current through End of 1999 Reg. Sess.

§ 30.016. Recusal or Disqualification of Certain Judges

(a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.

(b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:

(1) preside over the case;

(2) sign orders in the case; and

(3) move the case to final disposition as though a tertiary recusal motion had not been filed.

(c) A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.

(d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.

(e) If a tertiary recusal motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

CREDIT(S)

1999 Electronic Update

Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

1999 Legislation

Section 2 of Acts 1999, 76th Leg., ch. 608 provides:

"(a) This Act takes effect September 1, 1999, and applies to all cases:

"(1) filed on or after the effective date of this Act; or

"(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

"(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose."

V. T. C. A., Civil Practice & Remedies Code §.30.016

TX CIV PRAC & REM § 30.016

END OF DOCUMENT

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
GOVERNMENT CODE
TITLE 2. JUDICIAL BRANCH
SUBTITLE A. COURTS
CHAPTER 25. STATUTORY COUNTY COURTS
SUBCHAPTER B. GENERAL PROVISIONS RELATING TO STATUTORY PROBATE COURTS

Current through End of 1999 Reg. Sess.

§ 25.00255. Recusal or Disqualification of Judge

(a) A party in a hearing or trial in a statutory probate court may file with the clerk of the court a motion stating grounds for the recusal or disqualification of the judge. The grounds may include any disability of the judge to preside over the case.

(b) A motion for the recusal or disqualification of a judge must:

(1) be filed at least 10 days before the date of the hearing or trial, except as provided by Subsection (c);

(2) be verified; and

(3) state with particularity the alleged grounds for recusal or disqualification of the judge based on:

(A) personal knowledge that is supported by admissible evidence; or

(B) specifically stated grounds for belief of the allegations.

(c) A motion for recusal or disqualification may be filed at the earliest practicable time before the beginning of the trial or other hearing if a judge is assigned to a case 10 or fewer days before the date set for a trial or hearing.

(d) A party filing a motion for recusal or disqualification shall serve on all other parties or their counsel:

(1) copies of the motion; and

(2) notice that the movant expects the motion to be presented to the judge three days after the filing of the motion unless the judge orders otherwise.

(e) A party may file with the clerk of the court a statement opposing or concurring with a motion for recusal or disqualification at any time before the motion is heard.

(f) Before further proceedings in a case in which a motion for the recusal or disqualification of a judge has been filed, the judge shall:

(1) recuse himself; or

(2) request that the presiding judge of the statutory probate courts assign a judge to hear the motion.

(g) A judge who recuses himself:

(1) shall enter an order of recusal and request that the presiding judge of the statutory probate courts assign a judge to hear the motion for recusal or disqualification; and

(2) may not take other action in the case except for good cause stated in the order in which the action is taken.

(h) A judge who does not recuse himself:

(1) shall forward to the presiding judge of the statutory probate courts, in either original form or certified copy, an order of referral, the motion for recusal or disqualification, and all opposing and concurring statements; and

(2) may not take other action in the case during the time after the filing of the motion for recusal or disqualification and before a hearing on the motion, except for good cause stated in the order in which the action is taken.

(i) After receiving a request under Subsection (g) or (h), the presiding judge of the statutory probate courts shall:

(1) immediately set a hearing before himself or a judge designated by the presiding judge;

(2) cause notice of the hearing to be given to all parties or their counsel to the case; and

(3) make other orders, including orders for interim or ancillary relief, in the pending case.

(j) After a statutory probate court has rendered the final judgment in a case, a party may appeal an order that denies a motion for recusal or disqualification as an abuse of the court's discretion. A party may not appeal an order that grants a motion for recusal or disqualification.

(k) A party may file a motion for sanctions alleging that another party in the case filed a motion for the recusal or disqualification of a judge solely to delay the case and without sufficient cause. The presiding judge or the judge assigned by the presiding judge to hear the motion for recusal may approve a motion for sanctions authorized by Rule 215(2)(b), Texas Rules of Civil Procedure.

CREDIT(S)

1999 Electronic Update

Added by Acts 1997, 75th Leg., ch. 1435 § 2, eff. Sept. 1, 1997.

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

1997 Legislation

Section 5(c) of Acts 1997, 75th Leg., ch. 1435 provides:

"Section 25.00255, Government Code, as added by this Act, applies only to a motion for recusal or disqualification of a statutory probate court judge filed on or after the effective date of this Act. A motion for recusal or disqualification of a statutory probate court judge filed before the effective date of this Act is governed by the law as it existed on the date the motion was filed, and that law is continued in effect for that purpose."

V. T. C. A., Government Code § 25.00255

TX GOVT § 25.00255

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The Supreme Court of Texas

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February 23, 1999

Hon. Chris Harris
Texas State Senator
State Capitol — E1.704
Austin TX 78711

INTERAGENCY DELIVERY

Re: Rule 18a, Texas Rules of Civil Procedure and
Texas Government Code § 25.00255

Dear Senator Harris:

Thank you for suggesting that Rule 18a of the Texas Rules of Civil Procedure be amended to require that a motion to recuse be timely filed so that it cannot be used for ambush. The Court agrees and is inclined to change Rule 18a as follows:

(a) ~~At least ten days before the date set for trial or other hearing~~ Any party in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals~~, any party~~ may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit and when the party learned of the grounds for recusal. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated. The motion must be filed not later than ten days after the party obtains actual knowledge of the grounds for the motion and before the date set for trial or other hearing.

* * *

~~(c) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.~~

Succeeding subsections (f)-(h) would be renumbered, the reference in (h) corrected, and the following comment might be added:

> Comment: A party's failure to file a motion under this rule before the date set for hearing or trial waives the party's right to seek recusal of the judge as to that hearing or trial. It does not, however, prejudice the party's right subsequently to seek recusal of the judge from the case provided that the motion is filed within ten days after the party obtains actual knowledge of the grounds for recusal.

Following its customary procedure, the Court will submit this proposal to its Advisory Committee when that group is reconstituted within the next few weeks. We will instruct the Committee to expedite consideration of the proposal.

As Bob Pemberton, the Court's Rules Attorney, has pointed out to your staff, Section 25.00255 of the Government Code contains recusal provisions governing probate court proceedings that are similar to those of Rule 18a, and with respect to the timeliness of motions, substantively identical. I respectfully suggest that the recusal provisions for probate judges would be more readily available to lawyers and litigants if found in the Rules of Civil Procedure instead of the general statutes, and the Court would be willing to move the provisions of Section 25.00255 to the Rules of Civil Procedure without substantive change if in so doing it would not contravene the intent of the Legislature. If the Legislature were unwilling for this change to be made, it should consider amending Section 25.00255 to be consistent with the proposed change in Rule 18a, as follows

(b) A motion for the recusal or disqualification of a judge must:

(1) be filed ~~at least 10 days~~ not later than ten days after the party obtains actual knowledge of the grounds for the motion and before the date of the hearing or trial~~, except as provided by Subsection (c)~~;

(2) be verified;~~ and~~

(3) state with particularity the alleged grounds for recusal or disqualification of the judge based on:

(A) personal knowledge that is supported by admissible evidence; or

(B) specifically stated grounds for belief of the allegations; and

(4) state when the party acquired actual knowledge of the grounds for recusal or disqualification on which the motion is based.

~~(c) A motion for recusal or disqualification may be filed at the earliest practicable time before the beginning of the trial or other hearing if a judge is assigned to a case 10 or fewer days before the date set for a trial or hearing.~~

Section 22.00255 was enacted in 1997 as part of H.B. 3086, which was sponsored by Representative Will Hartnett and Senator Jeff Wentworth. Because of their apparent interest in this matter, I am taking the liberty of providing them with a copy of this letter.

An additional problem with Section 25.00255 arises when the presiding judge of the statutory probate courts, who must assign a judge to hear a motion to recuse that is not granted by the trial judge, is also the trial judge. One can argue that a judge who is the subject of a motion to recuse should not ordinarily assign the judge who will hear the motion. The same problem arises under Rule 18a when the regional presiding administrative judge is also the trial judge. The Court will ask its Advisory Committee to consider changes in the rule that will eliminate the problem.

Finally, on a related subject, the Court has solicited advice concerning whether violations of the Judicial Campaign Fairness Act, Tex. Election Code §§ 253.151-.176, should be grounds for recusal. The same issue would be involved in Section 25.00255.

On the specific subject of your comment, the Court is presently inclined to make the change you have suggested as soon as the advisory process can be completed. If I may provide you with any other information, I am completely at your service, and Bob Pemberton is available to you and your staff to assist you in any way he can.

Thank you for your helpful comment on the rules.

Sincerely,

Nathan L. Hecht
Justice

cc. Hon. Thomas R. Phillips, Chief Justice
Hon. Jeff Wentworth
Hon. Will Hartnett
Mr. Robert H. Pemberton

SUPREME COURT OF TEXAS
JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE

REPORT AND RECOMMENDATIONS

FEBRUARY 23, 1999

SUPREME COURT OF TEXAS
JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE

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SUPREME COURT OF TEXAS
JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE
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I. BACKGROUND

The Supreme Court of Texas appointed the Judicial Campaign Finance Study Committee (the "Committee") "[t]o determine whether the Supreme Court of Texas can improve the administration of justice by promulgating or amending rules that bear upon judicial campaign finance."[1]

The Committee was instructed to consider the 1998 American Bar Association Task Force Report on Lawyers' Political Contributions, Part II ("ABA Report")[2], Recommendation 19 of the 1997 Report of the Texas Commission on Judicial Efficiency[3], and the 1993 Report of the Texas Ethics Commission ("Ethics Commission Report").[4] During the course of the Committee's work, the Court also asked it to consider additional literature relating to judicial campaign finance. These resources include the discussion draft report of the ABA Ad Hoc Committee on Judicial Campaign Finance,[5] the Response of the Conference of Chief Justices to the ABA Report,[6] and recent editorials. A bibliography of materials considered by the Committee is attached.

The Supreme Court also invited the Committee to "recommend legislative initiatives in addition to or in support of rule changes."[7] However, the Court specified that "[a]ny change in the judicial selection system

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[1]Order in Misc. Docket No. 98-9179 (Oct. 19, 1998), ¶ 1. The Court relied on its powers under Article V, Section 31 of the Texas Constitution and Section 74.007 of the Texas Government Code. *Id.*

[2]American Bar Association Task Force on Lawyers' Political Contributions, Report and Recommendations, Part II (July 1998).

[3]Texas Commission on Judicial Efficiency, Governance of the Texas Judiciary: Independence and Accountability: Report of the Texas Commission on Judicial Efficiency (Jan. 1997), vol. 2, at 6. Recommendation 19 states:

> A judge who accepts campaign contributions from a party to a lawsuit or from counsel for the party that exceed the limits in the Judicial Campaign Fairness Act, should be subject to automatic disqualification on motion of the opposing party.

Id.

[4]Texas Ethics Commission, Study and Recommendations (Jan. 6, 1993).

[5]American Bar Association, Ad Hoc Committee on Judicial Campaign Finance, Report and Recommendations, Discussion Draft (Dec. 4, 1998).

[6]National Center for State Courts, Conference of Chief Justices, Response of the Conference of Chief Justices to the Report and Recommendations of the ABA Task Force on Lawyers' Political Contributions — Part II (Dec. 11, 1998).

[7]Order in Misc. Docket No. 98-9179, *supra* note 1, ¶ 4.

that could be implemented only through a constitutional amendment is beyond the scope of the Committee's charge."[8]

A. The Committee's Challenge

The Committee's consideration of judicial campaign finance practices in Texas has one paramount goal: Texans must perceive their judges as fair and impartial, and Texas judges must, in fact, be fair and impartial. The ABA Task Force has described the characteristics of a fair and impartial "ideal judge" as follows:

> The ideal judge has integrity. He or she not only appears to be, but actually is, scrupulously honest, impartial, free of prejudice, and able to decide cases on their merits without regard to the identity of the parties of their attorneys, his or her own interests, or likely criticism. The ideal judge is committed to the rule of law — he or she will respect the authority of higher courts, follow existing precedent, and adhere to accepted procedures for interpreting statutes and deciding issues. Finally, the ideal judge is humane. He or she invariably treats all who appear before the court with dignity and courtesy, is sensitive to the special vulnerabilities of victims, children, and disadvantaged groups, and is patient, recognizing that people who resort to the courts have very different backgrounds and abilities. Humaneness is an especially important quality for trial judges, who have the most frequent contact with the public. Of course, the ideal judge is impossible to find; judges are, after all, human beings. A good judge, however, deviates from the ideal infrequently and only in minor ways.[9]

The manner in which Texas judges are permitted to raise and spend money in judicial elections must advance this goal or at least not serve to undermine it.

Unfortunately, there is strong evidence suggesting that current practices relating to judicial campaign finance in Texas are widely perceived as undermining the impartiality and fairness of the state's judges. In the recent "Public Trust and Confidence in the Courts and the Legal Profession in Texas" study, a comprehensive telephone survey of over 1200 Texas adults, *eighty-three* percent felt that campaign contributions have a "very significant" (43%) or "somewhat significant" (40%) influence on the decisions judges make in the courtroom.[10]

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[8] *Id.*

[9] ABA Report, at 4-5 (quoting Mathias, Electing Justice: A Handbook of Judicial Election Reforms (1990), at 4).

[10] State Justice Institute, Public Trust and Confidence in the Court and the Legal Profession in Texas: Summary Report (Dec. 1998) [hereinafter

In addition to these statistics, the issue of whether "justice is for sale in Texas" has been a frequent topic of contention among political and media commentators throughout the last decade. To the extent such commentary reflects actual public perceptions, it is deeply troubling.

The Public Trust and Accountability survey also suggests that most Texans have a positive overall impression of the Texas court system,[11] are satisfied with the process and judges they have observed in Texas courts,[12] think they would be treated fairly if they had a case pending in Texas courts,[13] and overwhelmingly rate the state's judges as "very" or "somewhat" honest and ethical, a statistic that greatly exceeded similar ratings for many other types of professions.[14] These ratings, which are somewhat inconsistent with those concerning the effects of campaign contributions on judicial decisionmaking, are both heartening and disconcerting. On one hand, they suggest that any current public disillusionment with the Texas judiciary stems from concern about current judicial campaign finance practices rather than from a belief that Texas judges individually are unethical and that the positive attributes of the Texas judiciary still generally outweigh any perceived negative effects of campaign contributions. Conversely, the fact that survey respondents so overwhelmingly believe that judges and a judicial system of which they otherwise thought highly were nonetheless influenced by campaign contributions illustrates the powerful damage these perceptions can cause to Texans' faith and trust in their judicial system.

Public concern and criticism of judicial campaign finance practices and concerns of actual or perceived impropriety focus on the following areas:

- The practice of judges receiving or soliciting campaign funds from persons who are or will be litigants or lawyers, or may have interests at stake in a case. The latter problem often arises when an interest or trade group contributes to a judge.

- The practice of judges raising or soliciting campaign funds from persons whom they have appointed or will later appoint as attorneys ad litem, masters, or other positions for which a fee is paid. To observers, this practice may suggest some form of explicit quid pro quo.

- Any actual or perceived impropriety arising from these practices is further compounded where judges receive extraordinarily large contributions or receive or solicit contributions at

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"Public Trust and Confidence"], at 6.

[11] *Id.* at 3 (52 percent had a favorable impression; 27 percent unfavorable).

[12] *Id.* (82 percent).

[13] *Id.* at 4.

[14] *Id.* 71 percent of respondents rated judges as "very" or "somewhat" honest and ethical. 77 percent gave this rating to the Texas Supreme Court, 69 percent to Texas courts in general, and 66 percent to the Texas Court of Criminal Appeals. *Id.*

By contrast, only 40 percent gave a similar rating to lawyers, 39 percent to auto mechanics, and 26 to politicians. *Id.*

times when there is no immediate electoral justification for such contributions, such as when a judge is unopposed.

- The practice of judges contributing to political organizations that later appear to return the favor with support, such as an endorsement or inclusion on a slate card. These practices suggest the extraction of political tribute by the organization or the *de facto* purchase of an endorsement by the judge. Besides demeaning the judiciary, these practices imply that the judge would be beholden or indebted to the organization or its members in court proceedings.

A majority of the Committee — although not all members — believe that the current public disillusionment with judicial campaign finance practices in Texas is an inevitable by-product of the fact that Texas judges are chosen in contested elections. As one former Texas Supreme Court justice put it, "[b]efore you can be a good judge, you've first got to be a judge."[15] And getting to be a judge in the 1990s has often required a considerable amount of resources. This is true for at least two reasons. The first is the high cost of television and other advertising media, a staple of modern judicial campaigns in all but the smallest of localities. Second, and perhaps more importantly, voters tend to be poorly informed about candidates for judicial offices, thus necessitating that the candidates spend large amounts of money on advertising.[16]

These realities of elective politics, in turn, create tremendous pressure on Texas judges to raise campaign funds, especially when the judges have opponents (or the threat of opponents) who will attempt to do the same thing. When a judge's campaign contributors later appear as lawyers, litigants, or judicial appointees in the judge's courtroom, a perception of impropriety arguably arises. Such a perception, moreover, is accentuated by the increasingly combative nature of electoral politics, which increases the need for campaign funds and impugns the character of judicial candidates in the eyes of the public, as well as by a general cynicism and distrust of elected officials that has appeared to have only worsened in recent years.[17]

Nevertheless, the Supreme Court has instructed the Committee not to consider changes in Texas' judicial selection system — such as appointment or some version of the merit retention scheme that the ABA has

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[15]Attributed to Texas Supreme Court Justice W. St. John Garwood (1948-58).

[16]*See, e.g.*, ABA Report at 10. The problem of voter ignorance or apathy in judicial elections is further compounded by (1) lengthy ballots in some localities (the ballot in some recent Harris County elections, for example, have featured as many as 50 judicial races); and (2) judicial candidates who enter races to capitalize on familiar-sounding names. *Id.* at 9, 11-13.

[17]In the Public Trust and Confidence survey, for example, only 26 percent of respondents though politicians were "very" or "somewhat" honest or ethical. This was 14 percent lower than the rating for lawyers and 13 points below that for auto mechanics. Public Trust and Confidence, at 4.

advocated for many years[18] — that could be implemented only through a constitutional amendment. Thus, the Committee makes no recommendations concerning whether Texas' current method of selecting judges through contested elections should be changed and what alternative methods of judicial selection, if any, might be preferable. But in light of the current public disillusionment with Texas judicial campaign practices and their relationship to the demands of electoral politics, a majority of the Committee urges the 76th Legislature to revisit whether Texas' current elective system of judicial selection should be changed.

But the Committee's work should not end by simply exhorting that the judicial selection system should be changed. This is true both because of the scope of its charge and the political reality that Texans appear to strongly support the principle that they should elect their judges. In the same Public Trust and Confidence survey that revealed an overwhelming perception that campaign contributions influence judicial decision making, seventy percent believed that judges should be elected by the people.[19] In other words, in the eyes of most Texans, judicial elections, *per se*, are not the problem — rather, the problem is the manner in which judges solicit and raise campaign funds while attempting to remain fair and impartial. As the ABA Task Force suggests:

> whatever one's views on how judges should be selected, the problems inherent in funding judicial election campaigns must be addressed. Judicial independence, the integrity of the courts, and the public's trust in the judicial process . . . are all vulnerable to erosion by concerns about the relations between a judge and the attorneys appearing before him or her.[20]

With these considerations in mind, the Committee believes that the actual or perceived impartiality of Texas's elected judiciary can be improved through a number of rule and statutory changes designed to reform current judicial campaign practices and the manner in which judges conduct judicial business involving contributors. But the Committee's recommendations are neither as simple or, in some respects, as far-reaching as those that some reform advocates and commentators have advocated — or, indeed, as those that some Committee members would have advocated at the inception of their work. As the Committee has studied various proposals and issues relating to judicial campaign finance, it has determined that any effective reform proposals must take into account at least the following factors, all of which stem from the central fact that Texas elects its judges.

1. *The interest in assuring that all Texans can participate in the judicial election process.*

Given that Texas elects its judges and

[18]Order in Misc. Docket No. 98-9179, ¶ 4; *see* ABA Report at 3.

[19]Public Trust and Confidence, at 7.

[20]ABA Report, at 3-4.

that most Texans apparently would prefer to retain that system, any analysis of measures to reform judicial campaign finance must concede the reality that meaningful judicial campaigns cost money. There are three basic alternative sources for this money: (1) the personal resources of judges or judicial candidates; (2) campaign contributions; or (3) some form of public funding.

The Committee opposes the use of public funds to finance judicial candidates or elections, and, in any event, the Committee doubts that such a proposal would be politically realistic. This leaves either judges' personal funds or campaign contributions.

If judicial campaign contributions are prohibited or severely restricted, wealthier judges and judicial candidates would have a significant advantage over those of lesser means and would likely prevail in a disproportionate share of judicial races, all other things being equal. The Public Trust and Confidence survey suggests that such a development could undermine Texans' trust in the judiciary to a degree rivaling the effects of current campaign finance practices. Only 22 percent of persons surveyed believed that the courts treat the poor and wealthy alike.[21] While this statistic likely is attributable in part to such factors as the actual or perceived price of legal services, it would only be made worse by the perception or reality that the Texas judiciary is exclusively a domain for the well-heeled.

Assuming that judges and judicial candidates have to raise campaign contributions, they should be permitted to seek contributions from a broad spectrum. Understandably, one of the leading sources of judicial campaign contributions is lawyers who are likely to be most informed and concerned about the quality of the judiciary. Lawyers tend to take a leadership role in all aspects of judicial campaigns.[22] The Bar represents a diverse spectrum of political and economic interests. Broad support from the Bar reflects broad support from society. Elimination or severe limitation of lawyers as sources of judicial campaign contributions would undermine the viability of all but the wealthiest of judicial candidates or force judicial candidates to turn to various special interests for funding.

Given that lawyers must be allowed to participate in the process, there is still legitimate concern over the degree to which lawyers or their clients can participate in judicial elections by making campaign contributions. As demonstrated below, some prospective judicial campaign reform initiatives may have the unintended consequence of preventing or discouraging smaller contributors from participating in judicial elections. Besides creating the appearance or reality of a judicial selection process dominated exclusively by the wealthy, it would create or worsen the appearance or reality that judges are accountable only to larger contributors.

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[21] Public Trust and Confidence, at 5. This statistic was particularly low among African-American and Anglos surveyed (17%). 36 percent of Hispanics thought Texas courts treated poor and wealthy alike. *Id.* at 10.

[22] *See* ABA Report, at 10-11.

In sum, the Committee must confront the daunting challenge of advancing justice by improving the current system of financing Texas judicial elections without undermining justice by creating real or perceived economic barriers to participation in those elections.

2. *The loophole of direct campaign expenditures.*

"Direct campaign expenditures" or "direct expenditures" refer to money that a person not a candidate spends in a political race that is not contributed to a candidate.[23] Examples of direct expenditures include the purchase of billboards by an interest or trade group to show support for a candidate or a group of candidates.

Direct expenditures, in contrast to campaign contributions to candidates, are largely unregulated under current Texas law. Nor is it clear that they can be regulated to any greater degree. As discussed below, the United States Supreme Court has repeatedly struck down attempts to limit direct expenditures as violating the First Amendment. By contrast, the Court has upheld some efforts to regulate contributions to candidates. The Judicial Campaign Fairness Act, discussed below, reflects these constitutional distinctions.

At the present time, direct expenditures are largely a peripheral aspect of Texas judicial campaigns. For a variety of reasons, most Texans desiring to participate in judicial elections tend to contribute directly to candidates rather than to purchase their own billboards or advertisements to benefit their preferred candidates. Yet as contributions to candidates are further restricted or prohibited, it becomes increasingly likely that more sophisticated "players" in judicial politics will use direct expenditures rather than contributions to influence judicial elections.

As between the two forms of campaign spending, contributions would seem to be the lesser of the evils. Direct expenditures give rise to many of the same concerns of actual or apparent impropriety as campaign contributions, yet they are largely unregulated or not susceptible to regulation. Thus, any efforts to regulate or limit judicial campaign contributions should balance the interests in dispelling actual or apparent impropriety against that of ensuring that contributions remain the primary means of participation in judicial elections.

3. *Concerns of judicial administration.*

Some judicial campaign reform proposals, such as recusal of judges who have accepted campaign contributions from lawyers or litigants, would have the effect of delaying proceedings and imposing administrative burdens on judges, litigants and the court system. To some degree, such costs are acceptable, yet they cannot be ignored. The goal of ensuring that judges are untainted by the appearance of impropriety arising from campaign contributions cannot be pursued so zealously as to create costs and delay that would defeat the larger goal of timely, efficient justice.

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[23] *See* Tex. Elec. Code § 251.001(8).

4. *Constitutional considerations.*

Many activities associated with judicial elective politics — contributing to candidates, direct expenditures, and expenditures or other conduct by candidates — implicate First Amendment interests. The United States Supreme Court has strictly limited regulation of campaign contributions and has struck down several attempts to regulate direct expenditures or candidate expenditures.[24] Any effective reform proposals must be consistent with these constitutional guidelines.

* * *

While consideration of these four factors adds to the complexity of its task and its recommendations, the Committee believes that simplistic "reform" measures that ignore the factors would only worsen the current perceived or actual effects of Texas judicial campaign practices or would undermine other important aspects of the Texas justice system. The best reform proposals for Texas, in other words, often come down to a difficult choice between the "lesser of the evils" created by current judicial campaign finance practices versus those that would be created by the reform proposals themselves.

This is not to say, however, that the Committee advocates the status quo. Many of its proposals are unprecedented and are likely to be controversial.

B. Existing Regulations of Judicial Campaign Finance in Texas

To some extent, Texas law already attempts to address the problem of ensuring actual and perceived judicial impartiality within the context of Texas' current elective system.

1. Canon 5 of the Code of Judicial Conduct

Canon 5 of the Code of Judicial Conduct regulates the extent to which judges or judicial candidates may engage in "political activity." It forbids forms of electioneering familiar to campaigns for other types of elective offices. Judges and judicial candidates may not make statements indicating the judge's views on any issue that may be subject to judicial interpretation by the office that is being sought or held.[25] Similarly, Canon 5 generally bars judges and judicial candidates from making promises or pledges of conduct in office other than the faithful and impartial performance of the duties of office and from making misrepresentations concerning themselves or

[24] *See Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976) (per curiam); *see also Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 613-26 (1996) (political party could make direct expenditures; mere fact that expenditures benefitted party candidate did not make the expenditures "coordinated" with candidate and subject to contribution limitations); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-65 (1986) (invalidating ceiling on direct expenditures on behalf of federal candidates by nonprofit corporation organized to advocate a political position); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 490-501 (invalidating federal ceiling on direct expenditures by political action committees in support of federal candidates).

[25] Code of Judicial Conduct, Canon 5(1).

their opponent.[26]

Canon 5 also limits the extent to which judges or judicial candidates associate themselves, or are perceived to associate themselves, with political parties and political organizations. Judges and judicial candidates must not authorize the use of their name to endorse another candidate for public office, although they may indicate support for a political party, attend political events, and express their views on political matters to the extent they do not comment on pending or impending cases or issues.[27] Finally, Canon 5 requires that a judge resign upon becoming a candidate in a contested election for a non-judicial office.[28]

Although Canon 5 limits the conduct of judges and judicial candidates during campaigns and their involvement with political organizations, it does not presently address the manner in which judges raise funds for campaigns. In 1994, however, the Texas Supreme Court amended Canon 5 to limit judicial campaign fund-raising to a period beginning 210 days before the filing deadline and ending 120 days after the general election.[29] This amendment later was superseded by the Judicial Campaign Fairness Act, discussed below, and was repealed.

[26]*Id.* Canon 5(2).

[27]*Id.* Canon 5(3).

[28]*Id.* Canon 5(4).

[29]Code of Judicial Conduct, Canon 5(4) (1995).

2. *The Judicial Campaign Fairness Act*

The Texas Judicial Campaign Fairness Act[30] (the "Act") seeks to reduce the need for judges to raise funds in judicial campaign, the size of campaign contributions, and the time at which such contributions are made.

The Act imposes limits on the amount of contributions that a judicial candidate may accept in connection with each election in which the candidate is involved. Candidates for statewide judicial office may accept up to $5000 per person.[31] Equal or lower limits, graduated according to the population served by the judicial office the candidate seeks, govern candidates for lower judicial offices.[32] In addition to these individual limits, judicial candidates are limited in the aggregate amounts they may accept per election from members of a law firm or a law firm "general purpose committee" (a political action committee).[33] These aggregate limits are equal to six times the applicable individual contribution limits.[34]

The Act's scheme of individual and aggregate law firm contribution limits were the product of a delicate legislative

[30]Acts 1995, 74th Leg., ch. 763, § 1, amended by Acts 1997, 75th Leg., ch. 479 § 1, *et. seq.*, *codified as* Tex. Elec. Code. § 253.151, *et. seq.*

[31]Tex. Elec. Code § 253.155(a) & (b).

[32]Tex. Elec. Code § 253.155(a) & (b).

[33]*Id.* §§ 253.155 - 253.162.

[34]*Id.*

compromise designed to reduce the perceived or actual impropriety arising from judicial campaign contributions without eliminating them completely or unfairly favoring a particular segment of the bar. The Legislature devised the scheme in an effort to set a sufficiently high individual limit to permit plaintiffs' lawyers (who typically practice as solo practitioners or in smaller firms) to remain on a level playing field with big-firm defense lawyers, yet set the firm aggregate limits sufficiently high so as to permit individual attorneys within large firms to make contributions and participate in the political process.

Judicial candidates also are limited in the amount of contributions they may accept from general purpose committees not affiliated with law firms.[35] The limit is fifteen percent of the applicable voluntary campaign expenditure limits, which are explained below.[36]

In addition to these limits on the size of campaign contributions that they may accept, the Act imposes limits on the time at which judicial candidates may accept campaign contributions similar to those originally adopted by the Texas Supreme Court in the Code of Judicial Conduct. Judicial candidates may accept contributions only within an "election period" beginning 210 days before the deadline for filing to run for the judicial office and ending 120 days after the election.[37] The election period may end earlier if the candidate is unopposed in the general election or in both the general and primary elections.[38]

The Act also provides a series of campaign expenditure limitations with which judicial candidates may voluntarily choose to comply.[39] Judicial candidates who agree to be governed by these voluntary limits are entitled to use that fact in their political advertising.[40]

The Act imposes civil penalties on judicial candidates for accepting contributions outside the campaign period, in excess of applicable limits, or for exceeding the voluntary campaign expenditure restrictions, if the candidate has agreed to be governed by those restrictions.[41] However, the Act imposes no sanctions on the person making the contribution.

3. Campaign Disclosure Requirements

All political candidates, including judicial candidates, are subject to detailed disclosure requirements under Chapter 254 of the Election Code. These reports must include, for the applicable reporting period:

- The amount of political contributions from each person that, in the

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[35] *Id.* § 253.160(a).

[36] *Id.*

[37] *Id.* § 253.153(a).

[38] *Id.*

[39] *Id.* §§ 253.164, 253.168.

[40] *Id.* § 253.166.

[41] *Id.* §§ 253.153(d), 253.154(b), 253.155(f), 253.157(c), 253.160(e), 253.161(d), 253.1611(f), 253.162(d), 253.164(d), 253.168(b).

aggregate, exceed $50, the full name and address of the contributor, and date(s) of the contribution(s);

- The amount of any loans made for campaign or officeholder purposes that, in the aggregate, exceeds $50, the date of such loans, the interest rate, maturity date, the type of collateral, the full name and address of the financial institution making such loans, the full name and address of the guarantor of the loans, and the aggregate principal amount of all outstanding loans as of the last day of the reporting period;

- The amount of any political expenditures that, in the aggregate, exceed $50, the full name and address of the person to whom the expenditure is made, and the dates and purposes of the expenditures;

- The amount of any expenditures made from political expenditures that are not political expenditures, the full name and address of the person to whom the expenditure is made, and the dates and purposes of the expenditures;

- The total amount or a specific listing of all political contributions of $50 or less and the total amount or a specific listing of all political contributions of $50 or less; and

- The total amount of all political contributions accepted and the total amount of all political expenditures.[42]

Judicial candidates and judges are subject to additional specific reporting requirements concerning their contributors' affiliation with law firms.[43]

Judicial candidates, like candidates for other offices, are required to file these reports semiannually. Opposed candidates also are required to file reports not later than 30 days prior to the election and again by eight days prior to the election.[44]

Failure to comply with these requirements is punishable by civil and criminal penalties.[45]

4. Direct Campaign Expenditures

The Judicial Campaign Fairness Act does not limit or regulate direct expenditures other than to presumptively impute to a judicial candidate direct expenditures by general purpose committees that benefit the candidate.[46] This presumption can be overcome, however, if the treasurer of the general purpose committee files an affidavit denying that the committee collaborated with the candidate concerning the expenditure.[47]

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[42]Tex. Elec. Code § 254.031; *see also id.* § 254.036 (report must be verified).

[43]*Id.* §§ 254.0611, 254.0911.

[44]*Id.* § 254.064.

[45]*Id.* §§ 254.041, 254.042.

[46]Tex. Elec. Code § 253.160(c).

[47]*Id.*

Other provisions of the Election Code, however, prohibit direct expenditures (as well as candidate contributions) by corporations except through general purpose committees and require reporting of all individual direct expenditures exceeding $100.[48] Individuals making such expenditures are required to comply with the same reporting requirements applicable to campaign treasurers of political committees under Chapter 254 of the Election Code.[49] Among other things, this means that individuals must file reports disclosing, for each reporting period, the name of the candidate or officeholder who benefits from a direct campaign expenditure and the office sought or held.[50]

5. Reporting of Ad Litem Fees

Finally, the Supreme Court currently requires courts to report fee awards from court appointments that exceed $500 to the local clerk and to the state Office of Court Administration.[51] This enables citizens to ascertain whether, among other things, a judge is appointing campaign contributors to fee-paying positions and the amount of such fees.

C. The Supreme Court's Rulemaking Authority

By virtue of its rulemaking authority over judges and lawyers, the Supreme Court has the power to regulate certain conduct in judicial campaigns. The Supreme Court alone is responsible for promulgating the Code of Judicial Conduct and the Rules of Civil Procedure.[52] The Supreme Court is primarily responsible for promulgating the Rules of Judicial Administration, but must request the advice of the Court of Criminal Appeal before adopting rules that affect the administration of criminal justice.[53] The Supreme Court and Court of Criminal Appeals jointly promulgate the Rules of Appellate Procedure.[54] Finally, the Supreme Court, with the consent of the members of the State Bar of Texas, promulgates the Disciplinary Rules of Professional Conduct, the standards governing the conduct of lawyers.[55]

II. RECOMMENDATIONS

Texas law addresses some of the problems associated with judicial campaign finance but it fails to address many others or does so inadequately. The following recommendations are ways in which the Texas Supreme Court, through its rulemaking powers, and the Legislature can improve upon current regulations affecting judicial

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[48]Tex. Elec. Code §§ 253.062, 253.094, 253.100; *but see id.* § 253.104 (permitting certain types of corporate contributions to political parties).

[49]Tex. Elec. Code §§ 253.062, 253.094, 253.100.

[50]*Id.* § 254.031(a)(7).

[51]Order in Misc. Docket No. 94-9143 (Sept. 21, 1994).

[52] Tex. Const. Art. V, § 31; Tex. Govt. Code §§ 22.003 & 22.004.

[53] Tex. Govt. Code § 74.024.

[54] Tex. Govt. Code §§ 22.004 & 22.108.

[55] Tex. Govt. Code § 81.024.

campaign finance and further lessen the perceived, if not actual, impact of judicial campaign contributions on judicial decision making.

A. Enhance Public Access to Information Concerning Both Judicial Campaign Contributions and Direct Expenditures.

The Committee's first recommendation is to refine one of the more favorable aspects of current regulations impacting judicial campaign finance in Texas. Texas law already imposes extensive public disclosure obligations not only on judicial candidates, but also on persons who make direct expenditures that benefit candidates. These disclosure requirements go beyond those advocated by the ABA Task Force on Lawyers' Political Contributions.[56]

The Committee strongly endorses the ideal of full, open and conspicuous disclosure embodied in these reporting requirements. Displaying judicial campaign finance activities for the public to see, in a spirit of "nothing to hide," tends both to dispel any perception of impropriety potentially arising from judicial campaign conduct and to serve as a deterrent against any actual improprieties. The ABA Task Force on Lawyers' Political Contributions has reasoned:

> [f]ull, timely disclosure of contributions reduce the likelihood of any unduly large contributions or inappropriate contributors. Also, experience with full, systemic disclosure of contributions will establish norms of just what are appropriate levels of contributions, and what are outliers that may warrant further inquiry. Finally, transparency is indispensable to assure public confidence that there are no inappropriate levels or patterns of contributions in judicial campaigns.[57]

An additional practical benefit of public disclosure is that it aids enforcement of the Committee's recommendations concerning recusal and judicial appointments, discussed below.

The Committee advocates improving public access to campaign and direct expenditure disclosure reports. Presently, these reports are made available to the public through the entity with which they are

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[56] *See* ABA Report, at 20-23. The Committee perceives no need to expand upon either the types of information conveyed in these disclosures or the frequency with which it is conveyed. Again, these requirements already are more comprehensive than even those which the ABA Task Force recommends.

Moreover, the Committee is sensitive to the need not to impose additional administrative burdens on judges required to file the reports. Although beneficial, the current campaign finance reporting requirements already require substantial time and effort by judges to comply. These burdens are magnified by the fact that judges often prepare the lengthy reports without the aid of court staff or equipment in order to avoid an appearance of intermingling court and campaign business.

[57] *Id.* at 19.

required to be filed. Reports of candidates for judicial offices filled by voters of more than one county are filed with the Texas Ethics Commission; those of candidates for offices filled by voters of one county are filed with the county clerk or another designated local elections official.[58] Reports concerning direct expenditures are required to be filed with the Ethics Commission.[59]

In theory, the public is free to obtain copies of these reports from the entities with whom they are filed, but practical limitations may render such access more conceptual than real. First, the location of the report, particularly if it is filed with the Ethics Commission in Austin, may be inaccessible to many Texans. Second, the Committee is informed that logistical, operational, and other types of problems at the entities maintaining the reports may severely impede public access.

Accordingly, the Committee makes the following specific recommendations to improve and ensure full and expeditious public access to disclosure reports:

1. The Supreme Court should amend the Code of Judicial Conduct to require judges and judicial candidates to file their campaign disclosure reports with the Office of Court Administration (OCA). By making OCA a repository for campaign finance information, the Court can ensure that the public has access to the information without the impediments that may exist at the local level.

To aid enforcement of the Committee's recusal and judicial appointments proposals, OCA should be required to maintain copies of the reports for at least the length of time for which recusal could be sought or for which judicial appointments would be limited under those proposals. Under both proposals, this period is the duration of the term that a judge was serving at the time he or she accepted the reported contribution and any subsequent term, if the contribution concerned an election for the subsequent term.[60]

The Committee proposes to require judges and judicial candidates, whenever they are required to file a disclosure report with the Ethics Commission or county elections officials, to send a copy of the report to OCA. The Committee rejects the alternative of requiring the Ethics Commission or county elections officials to forward copies of those documents to OCA when filed. The Committee believes that direct filing by judges and judicial candidates is the best way to ensure that these reports are filed properly and timely. While it is sensitive to imposing additional administrative burdens on judges, the Committee believes that the added burden of complying with this requirement — making a copy and mailing a report that a judge or candidate is required to prepare anyway — would be minimal.

However, to avoiding imposing judicial discipline for purely inadvertent failures to comply with this requirement and to prevent the requirement from being misused as a tool of election-period gamesmanship, the Committee recommends

[58] Tex. Elec. Code §§ 252.005, 254.097.

[59] *Id.* §§ 253.062, 254.163.

[60] *See* Recommendations B and E, below.

that judges or judicial candidates be sanctioned solely for knowing or willful failures to file the reports with OCA.

These recommendations could be effectuated by adding the following subparagraph to Canon 5 of the Code of Judicial Conduct:

> (__) In addition to any other filings or disclosures required by law, a judge or judicial candidate must file with the Office of Court Administration a copy of any report the judge or candidate is required to file under Chapters 252, 253, or 254 of the Texas Election Code at the time the Election Code requires the report to be filed. Knowing or willful failure to file a copy of such reports with the Office of Court Administration is grounds for judicial discipline.

Alternatively, the same requirement could be implemented through an amendment to the Election Code.

2. The Election Code should be amended as necessary to require persons obligated to file direct expenditure reports to file copies with the OCA. Because the Supreme Court's rulemaking power extends only to court procedures and the conduct of lawyers and judges, it could not promulgate rules requiring other persons to file direct expenditure reports with the OCA.

3. The Legislature should assist OCA with the budgeting and staff necessary to enable OCA to post copies of all reports filed with it on the Texas Judiciary Internet site that OCA maintains.[61] By using the Internet, the Texas judiciary can ensure that any person with a computer can access reports concerning campaign contributions and direct expenditures from anywhere in the world.

Alternatively, or in addition, the Committee urges that the Legislature and local governments work together in making all arrangements necessary to enable judges and judicial candidates to file the reports electronically with OCA or on computer disk. This would facilitate the posting of the reports on the Internet and greatly ease the burden that such an undertaking would impose on OCA.

4. The Legislature should assist OCA with the budgeting and staff necessary to enable OCA to send out "reminder" cards to judges and judicial candidates ten days prior to the due date of the reports and again ten days after the deadline for those who have failed to file copies of their campaign disclosure reports. This would reduce the number of inadvertent failures to file reports and provide notice from which it could be inferred that continued noncompliance is willful or knowing.

To aid in implementing this procedure, if adopted, the Committee recommends that judicial candidates who are not yet judges be required to file a copy of their designation of campaign treasurer with

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[61]The Texas Judiciary website is at www.courts.state.tx.us.

OCA.[62] This would ensure that OCA would have correct addresses for all judges and judicial candidates where they could send the reminder cards.

5. Steps should be undertaken to inform the public that campaign and direct expenditure reports are publicly available. Not all Texans are aware that these reports exist or are publicly available. At a minimum, informing the public concerning the availability of this information enhances the spirit of openness that these reports embody.

6. The Ethics Commission and county elections officials should undertake measures as warranted to assure full and expeditious access to the campaign contribution and direct expenditure reports they are charged with maintaining.

B. Promulgate Rules Extending and Strengthening the Contribution Limits of the Judicial Campaign Fairness Act

The Judicial Campaign Fairness Act already limits the size of and time at which most Texas judges may accept campaign contributions. These limits were the product of delicate legislative compromises that sought to reduce actual or perceived impropriety arising from judicial campaign contributions without effectively barring candidates of lesser means or any segment of the bar from participating in judicial elections. The Committee applauds the goals of these limits but urges that they be extended and that the mechanisms for their enforcement be strengthened.

While comprehensive, the Judicial Campaign Fairness Act has several key deficiencies or "loopholes":

- The sole mechanisms for enforcing the Act are civil and criminal penalties.[63] The Committee questions whether, as a practical matter, government enforcement of the Act will ever be a priority.

- More importantly, nothing in the Act would bar a judge who has accepted an excessive, illegal contribution to preside over a case involving the contributor. Nor is there other Texas law that would require recusal or disqualification in such an instance. "Texas courts have repeatedly rejected the notion that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal, or even an appearance of impropriety."[64]

- The Act penalizes only judges and judicial candidates who accept excessive contributions, not the contributors.

- The Act regulates only contributions to judges and judicial candidates. It does not limit direct expenditures otherwise permitted by the Election

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[62] *See* Tex. Elec. Code §§ 252.001, *et. seq.*

[63] *Id.* §§ 253.153(d), 253.154(b), 253.155(f), 253.157(c), 253.160(e), 253.161(d), 253.1611(f), 253.162(d), 253.164(d), 253.168(b).

[64] *Aquilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.--El Paso 1993, writ denied).

Code[65] except to the extent that a candidate or their campaign organization knowingly participated in making such an expenditure.[66]

- While the Act imposes aggregate contribution limits on law firms, there are no limits on aggregate contributions by members or employees of other types of non-natural persons.[67]

- The Act does not apply to justices of the peace.

The following are some means by which the Supreme Court can address these shortcomings of the Judicial Campaign Fairness Act and better advance the Act's goals within the practical realities of Texas elective judicial system. The Committee urges that the Court adopt all or some combination of these measures:

1. *Require Recusal of Judges Who Have Accepted Campaign Contributions Exceeding the Judicial Campaign Fairness Act's Limits from a Litigant or Lawyer, and Extend This Rule to Direct Expenditures and Non-Natural Persons Other Than Law Firms*

The ABA Task Force has urged:

> [I]t is imperative to adopt a system for recusal in connection with campaign contributions. The bench and bar face unblinkable evidence that campaign contributions severely erode public confidence in courts.[68] To ignore this challenge is, we submit, to say that public confidence in courts does not matter.
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> Recusal is the best way to enforce contribution limits and assure the public that special access to a court cannot be bought. Litigants and lawyers alike will know that if they exceed the prescribed limit . . . they run a substantial risk of being unable to appear before

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[65]As noted above, other provisions of the Election Code prohibit both direct expenditures and candidate contributions by corporations. *See* Tex. Elec. Code §§ 253.062, 253.094, 253.100; *but see id.* § 253.104 (permitting certain types of corporate contributions to political parties).

[66]Tex. Elec. Code § 253.160(c).

[67]Aggregate limits on contributions by members or employees of a non-natural person should not be confused with individual limits on contributions by that entity. As noted above, the Act forbids judges from accepting contributions from general purpose committees in an aggregate amount exceeding fifteen percent of the applicable voluntary campaign expenditure limits. *Id.* § 253.160(a). Aggregate limits, moreover, should not be confused with the ban on contributions by corporations. *See id.* §§ 253.062, 253.094, 253.100.

[68]*See, e.g.*, Public Trust and Confidence, at 6 (83 percent of Texans surveyed believed campaign contributions had a "very significant" or "somewhat significant" impact on judicial decision making).

> the judge they support. This mode of enforcement is more certain, more timely, more efficient and, we believe, more just than relying on enforcement by busy prosecutors and often underfunded election agencies.[69]

Yet, the ABA Task Force also acknowledged, it is "much easier . . . to call for a recusal system . . . than to implement it."[70] Any effective recusal system must take into account at least the following factors and issues:

- Recusal often means delay, especially in jurisdictions where there are a small number of judges who can hear the case.[71]

- Another general consideration is the likelihood that litigants will attempt to use any recusal system that ultimately is devised for tactical advantage.[72]

- *How closely related must a contributor be to a named party or lawyer in order to require recusal?* For example, should the campaign contributions of spouses or business affiliates be imputed to litigants? Should contributions be imputed in the same way they are under the Judicial Campaign Fairness Act? Or, should the rule borrow from the current recusal rule, Tex. R. Civ. P. 18b?

- *How long should the recusal requirement extend?* If a contribution warranting recusal is accepted, should the judge have to recuse only during the term in which the contribution was accepted or the term of judicial office that the judge was seeking when the contribution was accepted? The rest of the judge's life? A fixed term of years?[73]

- *Who should be permitted to assert a motion to recuse under this rule?* Can any party move for recusal, or only a party other than the one who made the contribution warranting recusal?

- *What should be the deadline for moving for recusal?* Under current Texas Rule of Civil Procedure 18a, a motion for recusal must be raised at least 10 days before "the date set for

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[69]ABA Report, at 37.

[70]*Id.*

[71]*Id.*

[72]*Id.* at 38.

[73]And what happens if, for example, a judge who is recused based on a campaign contribution subsequently assumes another judicial office? Alternatively, what if a judge who is required to recuse himself through the subsequent term serves until the end of the current term, sits out two years, and then gets elected to a different judicial office? The Committee would also note a similar issue relating to judicial candidates who accept contributions that would require recusal if they were elected, lose the election, but later get elected or appointed to a judicial office.

trial or other hearing."[74] This deadline may be inappropriate for motions to recuse based on campaign contributions, particularly if the contribution is made or disclosed after that deadline.

- *What sorts of campaign finance conduct or misconduct should be the basis for recusal?* Should a judge be required to recuse himself or herself from all cases involving contributors or only those where the contribution was, by some standard, excessive? And what about other forms of campaign assistance like direct expenditures?

Taking these factors into account, the Committee endorses a recusal requirement with the following features:

- To be effective, the recusal rule must apply to a very wide range of relations and associations to the lawyers and litigants in the case. This ensures that litigants and lawyers cannot circumvent the recusal requirement by engaging in improper campaign conduct through colleagues or relatives. Plus, it reflects how broadly the public would likely perceive the taint of improper campaign conduct.

- The recusal obligation should begin at the moment the conduct that warrants recusal occurs and extend through the end of the term of office that the judge was seeking at the time he or she accepted the contribution. This standard reflects the probable length of time that the judge and contributor would be "tainted" and is administratively feasible.

- Only a party on a side opposite a party whose actions warrant recusal should be permitted to move for recusal.[75] Otherwise, parties may attempt to misuse the rule by, *e.g.*, making excessive campaign contributions to the judge — or having allied parties do so — and then moving for recusal.

- The deadline for moving for recusal should be roughly 21 days after the contribution warranting recusal is disclosed or ascertained.

- Recusal should be required only when the judge has accepted a contribution from a litigant or lawyer that is "excessive," not every time that *any* contributor is before the court. As the ABA Task Force maintains, in an elective judicial system "[t]he sweeping simplicity of declaring that . . . a judge should never sit if a contributor is before the court would work only in cloud-cuckoo land."[76]

What is an "excessive" contribution should be determined according to the

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[74]Tex. R. Civ. P. 18a(a).

[75]*Cf.* Tex. R. Civ. P. 190.3(b)(2) & comment 6.

[76]The ABA Task Force goes on to list a number of reasons why such "flat rules are unrealistic and simplistic attacks are unfair." *Id.* at 36 n.61.

limits of the Judicial Campaign Fairness Act, for reasons explained below in Part II(B)(4).

- Although the Committee would borrow the monetary limits in its recusal requirement from the Judicial Campaign Fairness Act, it would go beyond the Act to: (1) require recusal based on direct expenditures exceeding the Act's contribution limits; and (2) for purposes of the recusal requirement, apply the aggregate contribution limits now applicable to law firms also to other types of entities.

- The rule should apply to all judges, including justices of the peace, not merely those covered by the Act. The concerns of actual or apparent impropriety to which this rule is directed apply at every level of the Texas judiciary. If anything, these concerns are even more pronounced at the justice of the peace level because these are the courts with which Texans most frequently come into contact.

The Committee thus proposes the following amendment to the Texas Rules of Civil Procedure:

RULE 18c. RECUSAL BASED ON EXCESSIVE CONTRIBUTIONS OR DIRECT CAMPAIGN EXPENDITURES[77]

(a) *Grounds for recusal.* In addition to any other grounds for recusal provided in these rules, a judge must be recused if either:

(1) the judge has accepted an excessive campaign contribution from a party, a lawyer representing a party, or the lawyer's law firm; or

(2) a party, a lawyer representing a party, or the lawyer's law firm has made an excessive direct campaign expenditure to benefit the judge.

(b) *Duration of grounds for recusal.* The grounds for recusal set forth in Part (a) arise at the time the excessive contribution is accepted or the excessive direct campaign expenditure is made and continue until:

(1) the judge returns the excessive contribution in accordance with Sections 253.155(e), 253.157(b), or 253.160(b) of the Texas Election Code; and

(2) the judge either:

(A) completes the term of judicial office being sought at the time of

[77]Current Rule 18c, which governs electronic recording of court proceedings, would be renumbered as Rule 18d.

the excessive contribution or excessive direct campaign expenditure; or

(B) ceases to serve that term of office.

(c) *Who may file.* A motion under this rule may be filed only by a party on a side other than the party, lawyer or law firm whose actions constitute the grounds for recusal.

(d) *Requirements of motion.* Except as otherwise provided in this rule, the procedures of Rule 18a govern motions under this rule. A motion under this rule must be verified.

(e) *Time for filing motion.* A motion under this rule must be filed before the hearing, trial, or other proceeding upon which the recusal is to take effect but not to exceed 21 days after the later of:

(1) the assignment of the judge to the case;

(2) the appearance of the party, lawyer or law firm whose actions are grounds for recusal; or

(3) disclosure of the grounds for recusal in reports filed in accordance with Canon __ of the Code of Judicial Conduct.[78]

But if the party seeking recusal first appears in an action after the events triggering these deadlines have occurred, the party has 21 days to file a motion under this rule.

(f) *No discovery.* No discovery is permitted concerning a motion under this rule.

(g) *Definitions.* For purposes of this rule:

(1) "Campaign contribution" includes only campaign or officeholder contributions to the judge and contributions to any specific-purpose committee supporting the judge or opposing any opponent of the judge, as these terms are defined in Section 251.001 of the Election Code.

(2) "Direct campaign expenditure" has the meaning ascribed to the term by Section 251.001(8) of the Election Code.

(3) "Excessive" campaign contributions or direct campaign expenditures mean:

(A) If made by a party who is a natural person or a lawyer, those exceeding the

[78]The new disclosure requirement discussed above.

applicable contributions limits under Section 253.155(b) of the Election Code;

(B) If made by a law firm or a party who is not a natural person, those exceeding six times the applicable contributions limits under Section 253.155(b) of the Election Code.

(4) Contributions or direct campaign expenditures by a lawyer or a party who is a natural person include those made by their spouse or minor children.

(5) Contributions or direct campaign expenditures by a law firm include all individual contributions or direct campaign expenditures by lawyers associated with that law firm as of the close of the election period, including partners, associates, shareholders, lawyers of counsel, and in-house contract lawyers. The aggregation rules in paragraph (4) do not apply to this paragraph.

(6) Contributions or direct campaign expenditures by a party not a natural person include all contributions by any persons with equity ownership of five percent (5%) or more in the non-natural person and officers, directors, and general partners of the non-natural person.

(7) Contributions or direct campaign expenditures by a political action committee, specific-purpose committee or general purpose committee are deemed to be made by the contributors to those committees from the period beginning on January 1 in the year prior to the date of the contribution and ending at the end of the election period in which the contribution or direct campaign expenditure was made.

(8) "Election period" is defined in Section 253.153(a) of the Election Code.

Notes and Comments

1. If a party fails to seek recusal under this rule before a hearing, trial, or other event in the proceeding, this does not prejudice the party's right to seek recusal as to subsequent portions of the proceeding, assuming the 21-day deadline for asserting such motions has not expired. *See Bourgeois v. Collier*, 959 S.W.2d 241, 245-46 & n.4 (Tex. App.--

Dallas 1997, no writ).

2. The concept of "side" in Rule 18c(c) is borrowed from the 1999 discovery rule revisions. *See* Tex. R. Civ. P. 190.3(b)(2) & comment 6.

2. Amend Canon 5 of the Code of Judicial Conduct to Track the Judicial Campaign Fairness Act and New Rule 18c.

To further aid enforcement of the limitations of the Judicial Campaign Fairness Act, the Supreme Court should amend Canon 5 of the Code of Judicial Conduct to add a new subparagraph making violation of the Act subject to judicial discipline:

> (__) A judge or judicial candidate shall not knowingly violate the Judicial Campaign Fairness Act. Contributions returned in accordance with Sections 253.155(e), 253.157(b), or 253.160(b) of the Texas Election Code are not a violation of this rule.

The Committee recommends that only "knowing" violations of the Act be subject to judicial discipline because (1) this is what the Act itself requires; (2) the Committee does not wish to punish purely inadvertent violations, such as those that result from good faith bookkeeping errors; and (3) the Committee fears that if judges were held to a lower standard, like negligence, they would be forced to scrutinize their contributor lists for violations.[79] This would make judges more acutely aware of the identity of their contributors and the amount each gave, thus increasing, rather than decreasing, the risk of perceived if not actual impropriety.

The Court should also add the following language, either in the same subparagraph as the preceding provision or separately:

> (__) A judge must recuse himself or herself as required by Texas Rule of Civil Procedure 18c.

3. Appoint a Special Task Force Dedicated to the Study of Direct Campaign Expenditures, "Soft Money," and Other Forms of Campaign Spending Not Directed to Candidates.

Texas' current judicial campaign finance regulations focus almost exclusively on contributions to candidates. But there are other means by which money can be used to influence voters in judicial campaigns that do not involve direct contributions to candidates. In addition to direct campaign expenditures, funds can be routed through party organizations or "voter education" efforts, among other methods. These types of expenditures raise a number of unique

[79] Unlike most states, Texas does not require judges to conduct campaign fund-raising through campaign committees. *See* Part B(4), below.

practical, conceptual and constitutional difficulties.

The Committee's attempts to wrestle with issues relating to these types of campaign expenditures has caused it to conclude that this task is simply too large and multifaceted to be completed within the time the Court has afforded it to present this report.[80] The Committee believes that time for intensive, focused study of issues relating to these non-candidate campaign finance mechanisms — a luxury it does not possess — is necessary to enable it to formulate meaningful policy recommendations.

The Committee thus urges the Supreme Court to appoint a committee or task force specifically devoted to analysis of issues relating to direct expenditures and other forms of non-candidate campaign spending. As the issues to be addressed by such a committee also have arisen in other states and in the federal system, the Court might also consider cooperative study efforts with courts and the bar in those jurisdictions.

4. *A Comment Concerning the Limits in the Judicial Campaign Fairness Act*

In each of the proposals discussed in this Part, the Committee incorporates the Judicial Campaign Fairness Act's existing limits of the timing and amount of campaign contributions as its definition of an "excessive" contribution or direct campaign expenditure. Among its other charges, the Supreme Court asked the Committee to consider whether these limits should be made more restrictive. Initially, the sense of many members of the Committee was that the Act's limits on the amount of judicial campaign contributions should be lowered. Yet upon further study of this issue in the context of the practical limitations of Texas elective judicial system, the Committee must conclude that such a measure would tend to create greater problems in the Texas judicial campaign finance system than it would solve:

- Tightening the limits on contributions will encourage groups and individuals with the wherewithal to do so to channel their resources into direct expenditures or other forms of non-candidate spending instead of candidate contributions. These types of non-candidate political expenditures are largely unregulated and represent a potential end-run around the Act.

- Restricting the size of candidate contributions, as suggested above, would tend to create a disproportionate advantage to wealthy candidates who need not raise large sums of money to run a successful campaign.

- Lowering or altering the limits would undermine the sensitive compromise that underlies the Act's framework of individual and aggregate law firm contribution limits.[81]

[80]The Committee would note that policymakers in the federal government have devoted years of effort to resolving these types of issues with little evident success.

[81]*See* Section I(B)(2), above.

Particularly in light of the threat currently posed by direct expenditures, the Committee believes that for the present, the "lesser of the evils" is to incorporate the legislative policy judgments embodied in the Act's limits on the timing and amount of judicial campaign contributions, at least until the "loophole" of direct expenditures and soft money is better regulated. However, it invites the Legislature to revisit the limits and regulation of direct expenditures in light of the recent evidence concerning the public's perception of the impact of judicial campaign contributions on the Texas judicial system.

A related issue concerns the manner in which judges should be permitted to raise campaign contributions. One popular though somewhat controversial method is tiered fund-raising. "Tiered fund-raising" refers to the practice of distinguishing among campaign contributors at an campaign event or activity based on the size of contribution. A common example of tiered fund-raising occurs when organizers of a political fund-raising reception or dinner identify donors on the invitation according to the amount of their contribution. For example, a $100 contributor might be termed an "Elephant", a $1000 donor "Jumbo", and a $5000 donor a "Babar Royale."

The ABA Task Force recommended that tiered fund-raising be prohibited in judicial elections."[82] It concluded that the practice of distinguishing among campaign contributors by contribution amount creates the perception that larger contributors would be singled out for special favor, thus compounding the negative perception of judicial campaign fund-raising generally.[83] Moreover, the ABA Task Force noted, where the candidate is made conspicuously aware of the identity of their contributors and the amount each gave, an appearance of impropriety arguably arises.[84]

Initially, many Committee members agreed with the ABA Task Force recommendation to abolish tiered fund-raising. Yet after more careful consideration, the Committee ultimately concluded that while tiered fund-raising does have some harmful effects, it is nonetheless a "lesser of the evils" that would occur if this fund-raising technique was prohibited. This is true in several ways:

- The same conspicuousness of tiered fund-raising that makes it an evil — *e.g.*, displaying the identity of contributors and the amount each gave on event invitations — also

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[82]ABA Report, at 33-34.

[83]The ABA Task Force urged:

> Single fund-raising events . . . should not distinguish between contributors based on the amount contributed. Fund-raising events that recognize contributors based on the level of giving demeans the judicial process by suggesting that donors of larger sums will get special treatment from the candidate once elected, since the contributor giving more during a single fund-raising event had higher visibility.

Id. at 34 (quoting Ohio Citizens' Committee on Judicial Elections, Report at 6 (1995)).

[84]*Id.*

makes it beneficial. While displaying the identities of contributors and the amount each gave might tend to inform the judge of these matters, it also serves to inform the rest of the world as well. To this extent, tiered fund-raising serves to advance the objective of public access and openness in matters relating to judicial campaign finance, the goal of Recommendation A.

- By inviting contributions of varying amounts, tiered fund-raising helps dispel some of the unfortunate perception, present in all types of political races, that only larger or maximum contributors can or should bother contributing to a candidate. By designating lower and intermediate tiers of contribution levels at fund-raising events, smaller contributors can be made to feel they can still participate in the campaign. This, in turn, lessens the perception that judges are beholden only to a small number of large contributors. Moreover, because it encourages a wider range of persons to contribute, tiered fund-raising is very effective.

- Because tiered fund-raising focuses primarily on raising money for discrete events that are typically organized by persons other than the candidate, it is a less innocuous means of campaign fund-raising than direct solicitation or other means of raising campaign funds. Receiving or responding to an invitation from a third party to donate to a publicly known fund-raising event at a "sponsor" or "benefactor" level, for example, is far more benign in appearance that would be receiving or responding to a private personal phone call from a judge who is asking for campaign contributions.

One alternative means of distancing judges and judicial candidates from their contributors that is used in most other states is committees. In those states, judges are forbidden to raise campaign funds directly, but must instead designate a committee of lawyers or other citizens to solicit and manage their campaign funds. While the Committee agrees with the general goal of insulating judges and judicial candidates from the solicitation of contributions and knowledge of how much each contributor gave, it believes that committees may create a greater appearance of impropriety than they would eliminate.

Fund-raising committees smack of cronyism, a select group of lawyers who actually or apparently have special access to the judge and to whom the judge is uniquely indebted. Alternatively, incumbent judges may use fund-raising committees to increase the already considerable advantages they possess over potential opposition. Through tacit threat of reprisal, a judge conceivably could enlist most or all lawyers in a jurisdiction to be members of their "committee," thus assuring their allegiance in the campaign (or at least assuring that those lawyers don't actively support their opponents).

Additionally, the Committee doubts that, as a practical matter, the use of fund-raising committees could effectively dispel the perception, if not the reality, that judges have knowledge of their contributions and are involved in fund-raising efforts. It is the Committee's understanding that, in fact, fund-raising committees often have proven to be of very limited benefit, if any benefit, in insulating judges from campaign fund-raising in many other states. In light of these considerations, the Committee believes that tiered fund-raising is preferable to the use of fund-raising committees as a means of insulating judges from the active solicitation of campaign contributions.

C. Promulgate Rules to Limit the Aggregation of Campaign "War Chests"

A problem closely related to the issues of the amount and timing of permissible judicial campaign expenditures is the practice by judges of raising and stockpiling campaign contributions, even when not immediately necessary to fund an election effort, to guard against the threat of future opponents. Such a practice is an understandable response to the pressures of the current elective system. But this practice arguably gives rise to a greater perception of impropriety than when judges are raising funds against viable opponents.

To some degree, the Judicial Campaign Fairness Act has addressed the problem of judges engaging in constant or unnecessary fund-raising by imposing limitations on when judges can accept campaign contribution — the "election period" — and the amount that judges can accept from individuals and law firms during that period. But because judges may now compile campaign "war chests" without limit, the inherent demands of Texas elective system still encourage judges to elicit campaign contributions within each election period, subject to the per-election limitations on the amount of such contributions, regardless whether the judge has any immediate need for the funds. Thus, an appearance of impropriety arguably remains. The ABA Task Force suggested that:

> for a judicial candidate to campaign actively although unopposed, is to blur the vital distinction between judges and politicians seeking other offices. Second, funds raised for a campaign in one election cycle are for use in that election. To retain surplus funds that may remain after the election (or after the election became uncontested) will seem to some people to violate the implicit contract between the candidate and the contributors, and certainly lacks the justification for contributions by lawyers and others to support an able judiciary. Contributors who support a judge or candidate today might not contribute their support for another campaign years later, let alone for a campaign for some other office. Last, if surpluses may be retained without limit, incumbents can help themselves to a great

> advantage compared to challengers; few, if any challengers will have any surpluses from prior campaigns.[85]

For all of these reasons, the Committee advocates limiting the aggregate amount of campaign funds that a judge or judicial candidate can retain after the close of the election period. The Committee rejects the idea, proposed by some commentators, of forbidding judges and candidates to retain *any* surplus campaign funds between elections. Such a prohibition would lead to at least two undesirable results. First, by requiring judges and candidates to begin each campaign at "ground zero" financially, it would give an unfair advantage to wealthy judges or judicial candidates who could fund campaigns with their own money. Second, while perhaps lessening the incentive to raise campaign funds when not immediately necessary, starting judges and candidates at "ground zero" financially would increase the need for judges and candidates to raise funds during the election period when there is the threat of opposition. This would only intensify judicial fund-raising efforts during the election period and, with this, the negative perceptions that such activities might create. The Committee believes that permitting judges and judicial candidates to retain some reasonable "war chest" is the lesser of the evils.

The Committee would permit judges to retain surplus campaign contributions of an amount equal to one-half of the voluntary campaign expenditure limits applicable to the judge under the Judicial Campaign Fairness Act[86] but not to exceed $150,000. The Committee believes that this amount strikes an appropriate balance between the goals of reducing incentives for judges to engage in constant fund-raising without simply concentrating fund-raising within the election period.

A related question concerns what judges may do with campaign funds in excess of these limits and when judges must dispose of them. The Committee recommends giving judges and candidates six months after the election to divest themselves of surplus funds. This reflects the practical reality that many campaign expenditures are made after the election, as bills come due and debts are paid.

As for how judges should be permitted to divest themselves of surplus campaign funds, the Committee notes that the manner in which judges are permitted to spend campaign contributions may create equal or greater appearances of impropriety as their receipt of such contributions.[87] Thus, some limitations are necessary. As a starting point, the Committee looked to Section 254.204(a) of the Election Code, which governs how former officeholders may dispose of excess political contributions. It provides, in relevant part:

> [T]he former officeholder or candidate shall remit any unexpended political contributions to one or more

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[85] ABA Report, at 51-52.

[86] *See* Tex. Elec. Code § 253.168.

[87] *See* ABA Report, at 52 n.88.

of the following:

(1) the political party with which the person was affiliated when the person's name appeared on a ballot;

(2) a candidate or political committee;

(3) the comptroller of public accounts, for deposit in the state treasury;

(4) one or more persons from whom political contributions were received . . . ;

(5) a recognized tax-exempt, charitable organization formed for educational, religious, or scientific purposes; or

(6) a public or private postsecondary educational institution or an institution of higher education . . . solely for the purpose of assisting or creating a scholarship program.[88]

The Committee believes that several of these alternatives are not appropriate for judges and judicial candidates with surplus political contributions. The Committee believes that both alternatives (1) and (2) are inappropriate for judges because these sorts of financial interrelationships between overtly political organizations and judges undermine the perception that judges are or can be impartial and apolitical in their decision making — a perception with which the current system of partisan elections is already in constant tension. The Committee would add, moreover, that if judges are permitted to contribute surplus political contributions to political organizations, it encourages those organizations to pressure or coerce judges to make such contributions. This problem is discussed in more detail in Recommendation D.

Although it empathizes with the general goals underlying them, the Committee believes that alternatives (5) and (6) are not appropriate as applied to judges. While advancing a salutary goal, alternatives (5) and (6) donating political funds to charities and higher education scholarship programs — would also tend to create an appearance of impropriety associated with judges "grandstanding" with their donations. Such donations also tend to create the perception that the charity or school or their often numerous benefactors owe something in return.[89] This would especially be true where a charity tended to represent or be comprised of persons or interests that are frequently involved in litigation before the judge.

In light of these considerations, the Committee recommends the following amendment to Canon 5 of the Code of Judicial Conduct:

(__) *Divestiture of Unexpended Political Contributions.*

[88]Tex. Elec. Code § 254.204(a).

[89]*See id.*

(A) Definition. "Unexpended" political contributions are political contributions — as that term is defined under Section 251.001(5) of the Texas Election Code — received but not expended by the judge or judicial candidate in connection with an election. This term does not include an amount not to exceed the lesser of (1) $150,000; or (2) one-half (1/2) of the ceiling limit under Tex. Elec. Code §§ 253.168(a) applicable to the judge or judicial candidate during the election.

(B) To the extent that a judge or judicial candidate has political contributions that exceed the ceiling limit described in (A) after the last day to accept contributions for an election, the judge or judicial candidate — within six months after that election — must dispose of all excess unexpended political contributions either:

(1) in accordance with the disposition alternatives under Tex. Elec. Code § 254.204(3) and (4); or

(2) to the Texas Equal Access to Justice Foundation.

(C) This paragraph does not apply with respect to campaign contributions accepted prior to its effective date.

D. Limit the Ability of Political Organizations to Use Judges as Fund-Raising Tools.[90]

As the Committee studied the issue of how judges should be permitted to dispose of excess political contributions, *see* Recommendation C, above, it became aware of a troubling practice in some localities whereby various political organizations, including political parties, aggressively solicit contributions from judges. Judges are expected to make such contributions from their campaign or officeholder funds, effectively rendering judges and their campaigns fund-raising conduits for the political organization. Because a judge's refusal to contribute may be met with dire political consequences, payments by judges to these organizations arguably amount to tribute.

These sorts of financial interrelationships give rise to an understandable inference of impropriety. The average Texan perceives that if judges are supporting political organizations financially, they likely will tend to favor those organizations or their interests when deciding cases. Worse, the average Texan may perceive that judges' contributions to political organizations that can or will support them politically is merely a purchase of an endorsement. All of these factors, plus the perception that judges have been rendered mere fund-raising conduits for political organizations, undermines the dignity of the judiciary and the public's perception that it is fair, impartial, and above any possible

[90]Chief Justice Davis, Judge Godbey and Judge Kennedy note their dissent to this recommendation.

political or corruptive influences.

The Committee endorses strong measures to combat this problem. Yet at the same time, the Committee recognizes that particularly within the context of the current elective system, judges necessarily must engage in political activities and attend political organization events. Any measures that the Committee recommends must balance these competing interests.

For guidance, the Committee looked to the ABA Model Code of Judicial Conduct. Virtually every state, including Texas, has adopted some version of the ABA Model Code of Judicial Conduct. Canon 5, as noted above, regulates judges' political activities. Unlike Texas' version of Canon 5, the Model Code version generally prohibits judges from "solicit[ing] funds for, pay[ing] an assessment to or mak[ing] a contribution to a political organization[91] or candidate, or purchas[ing] tickets for political party dinners or other functions."[92]

Over fifteen states apply some version of Canon 5 to bar judges from making contributions to political organizations or purchasing tickets to political events.[93] But only two of these states, Connecticut and Maine, apply these types of limitations to judges selected in partisan elections, and then only with respect to probate judges.[94] No other state with partisan judicial elections applies these limitations to judges selected by that method.[95]

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[91]The term includes political parties. ABA Model CJC Terminology.

[92]ABA Model CJC Canon 5(A)(1)(e).

[93]*See* Colorado CJC Canon 7(A)(1)(c); Connecticut CJC Canon 7(A)(3); Delaware CJC Canon 7(a)(3); Georgia CJC Canon 7(A)(1)(c); Hawaii CJC Canon 5(A)(1)(e); Kentucky CJC Canon 7(A)(1)(c); Maine CJC Canon 5(A)(1)(e); Massachusetts CJC Canon 7(A)(1)(c); Minnesota CJC Canon 5(A)(1)(e); New Hampshire CJC Canon 7(A)(1)(c); New Jersey CJC Canon 7(A)(4); North Dakota CJC Canon 5(A)1)(e) & (f); Oklahoma CJC Canon 5(A)(1)(d); Utah CJC Canon 5(B)(3); Virginia CJC Canon 7(A)(1)(c); Wisconsin CJC 60.06(2).

Oklahoma, in fact, has a statute that forbids judges of its Court of Civil Appeals from "directly or indirectly" contributing to a political party. 20 Okla. Stat. Ann. § 30.19.

[94]*See* Connecticut CJC Canon 7(A)(3); Maine CJC Canon 5(A)(1)(e).

[95]The following states, like Texas, impose no limits or even expressly authorize judges to make contributions to political parties: Illinois CJC Canon 7(B)(1)(a)(iii); Michigan CJC Canon 7(A)(2)(c); Nevada CJC Canon 5 & Commentary; New Mexico CJC Rule 21-700(A)(2)(c); Ohio CJC Canon 7(C)(8)(c); *see also* Missouri CJC Canon 5(A)(2) & (3) (judges subject to merit selection barred from contributing to political parties, but judges subject to partisan elections are permitted to contribute); Alabama CJE Canon 7(A)(1) (no express prohibition); Maryland Rule of Court 16-814, Canon 5 (same); Oregon CJC Canon JR 4-101 (same). *Compare* ABA Task Force Report at 7 & n.9 (identifying Illinois, Michigan, Missouri, New Mexico, Ohio, and Alabama, among other states, as having partisan judicial selection).

The following states that have partisan judicial elections follow the ABA framework and generally ban judges from contributing to political parties but exempt either judges who are subject to election or are presently running for election. *See* Arkansas CJC Canon 5(A)(1)(e) & (C)(1)(a)(iii); Indiana CJC Canon 5(A)(1)(e) & (C)(1)(c); Kansas CJC Canon 5(A)(1)(e) & (C)(1)(a)(iii); Louisiana CJC Canon 7(A)(1)(d) & (C)(2)(d); New York CJC Canon

Three states — Arizona, California and Washington — permit judges to contribute to political parties and events but limit the amount of those contributions. Arizona and California permit judges to contribute an aggregate annual total of $250 and $500, respectively, to political parties and candidates.[96] Washington generally bans judges from contributing to political parties, as does the ABA Model Code of Judicial Conduct, but exempts judges subject to election only to the extent of permitting them to purchase tickets to political organization events during a campaign.[97]

Drawing on the ABA Model Code of Judicial Conduct, the manner in which it has been implemented in other states, and the unique needs of Texas, the Committee advocates a total ban on judges' solicitation of funds for political organizations and candidates and a ban on judges' contributions to political organizations and candidates from their political funds. The Committee would include, however, a limited exception to the contribution ban similar to that of Washington, Arizona, and California for the purchase of tickets to political events. However, due to constitutional considerations and in light of the fact that virtually no states have applied such a ban to judges selected through partisan elections, the Committee would not extend the contribution limit to contributions made from judges' personal funds.

Accordingly, the Committee recommends the following addition to Canon 5 of the Code of Judicial Conduct.

(__) *Political contributions by judges and judicial candidates.*

1. Generally. A judge or judicial candidate shall not:

(A) authorize the public use of his or her name endorsing another candidate for any public office;

(B) solicit funds for a political candidate; or

(C) pay an assessment to or make a contribution

7(A)(1)(c) & (2); North Carolina CJC Canon 7(A)(1)(d) & (2); Pennsylvania CJC Canon 7(A)(1)(c), (A)(2); Tennessee CJC Canon 5(A)(1)(d), (C)(1)(a)(iii); West Virginia CJC Canon 5(A), (C)(1)(a)(iii).

The ABA Model Code of Judicial Conduct, in fact, exempts judges "subject to election" from the prohibition against contributing to political organizations and purchasing tickets for and attending political gatherings. ABA Model CJC Canon 5(C)(1)(a)(i) & (iii). The ABA Model Code also allows judicial candidates who are not judges to contribute to political organizations and candidates and purchase tickets for political party dinners and similar functions. ABA Model CJC Canon 5(B)(2)(b)(iii).

[96]Arizona CJC Canon 5(A)(1)(c) (judge or judicial candidate can contribute to or solicit contributions for a political party or to a non-judicial candidate of no more than $250 annually); California CJC Canon 5(A)(3) (judge's contributions and solicitation for political party, political organization, or candidate capped at $500 annually per party and $1000 annually for all parties).

[97]Washington CJC Canon 7(A)(1)(c) & (d), (2) (exempt only purchase of tickets to political organization events during campaign).

to a political organization or political candidate, or purchase tickets for political party dinners or other functions from a judge's political contributions, as that term is defined in Section 251.001(5) of the Texas Election Code, except as permitted in paragraph (2).

(2) *Exceptions and limitations.*

(A) For purposes of subparagraph (1)(A), appearing on the same primary or general election ballot as another candidate is not an "endorsement" of that candidate.

(B) For purposes of subparagraph (1)(C), a filing fee to enter a party primary is not an "assessment" or a "contribution."

(C) A judge or judicial candidate may, without making a contribution or payment to a political organization or purchasing a ticket, indicate support for a political party, attend political events, and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(D) A judge or judicial candidate may expend an aggregate amount not to exceed $[_____][98] annually from their political contributions to purchase tickets or admission to attend political party dinners or other political functions.

E. Limit Judicial Appointments of Excessive Campaign Contributors and Repetitious Appointments.

The tension between the ideal of judicial impartiality and a judge's acceptance of excessive campaign contributions from lawyers or litigants is especially pronounced where the excessive contributor receives the tangible benefit of a judicial appointment. The Committee, therefore, recommends an amendment to Canon 5 of the Code of Judicial Conduct banning judges from knowingly appointing a lawyer who has made a contribution to or direct expenditure

[98]Rather than attempting to formulate a precise dollar limitation at this juncture, the Committee will leave this matter to the Supreme Court, which can arrive at this figure after obtaining additional public input.

on behalf of the judge in excess of the limits of the Judicial Campaign Fairness Act.

Yet a limitation on the lawyers whom a judge may appoint can create delay and even deprive the judge of access to the only persons willing and able to handle the appointment. This is especially true in smaller jurisdictions and in cases involving a highly specialized or complex subject matter. Any workable limitation on judicial appointments must take these factors into account.

The Committee proposes the following amendment to Canon 5 of the Code of Judicial Conduct. It is modeled roughly on the Committee's recusal proposal but incorporates an exception for cases where the limitation would prevent the judge from appointing the only lawyers who are willing and able to handle the appointment.

(__) *Judicial Appointments of Campaign Benefactors.*

(A) *Limitation.* A judge shall not appoint a lawyer to any position for which any fee may be paid[99] if the judge has actual knowledge that either:

(1) the judge has accepted an excessive campaign contribution from the lawyer or the lawyer's law firm; or

(2) the lawyer or the lawyer's law firm has made an excessive direct campaign expenditure to benefit the judge.

(B) *Duration of limitation.* The limitations of paragraphs (A)(1) & (2) arise at the time the excessive contribution is accepted or the excessive direct campaign expenditure is made and continue until:

(1) the judge returns the excessive contribution in accordance with Sections 253.155(e), 253.157(b), or 253.160(b) of the Texas Election Code;

(2) the judge either:

(A) completes the term of judicial office being sought at the time of the excessive contribution or excessive direct campaign expenditure; or

(B) ceases to serve that term of

[99]The Court's current order excludes appointments where the appointee's fee is paid by "government salary" or where the fee is paid by third parties. Because the concerns about the appearance of a quid pro quo apply regardless of the source of the fee, the Committee proposes to make the canon broader.

office.

(C) *Definitions*. For purposes of this Canon:

(1) "Campaign contribution" includes only campaign or officeholder contributions to the judge and contributions to any specific-purpose committee supporting the judge or opposing any opponent of the judge, as these terms are defined in Section 251.001 of the Election Code.

(2) "Direct campaign expenditure" has the meaning ascribed to the term by Section 251.001(8) of the Election Code.

(3) "Excessive" campaign contributions or direct campaign expenditures mean:

(A) if made by a lawyer, those exceeding the applicable contribution limits under Section 253.155(b) of the Election Code;

(B) if made by a law firm, those exceeding six times the applicable contribution limits under Section 253.155(b) of the Election Code.

(4) Contributions or expenditures by a lawyer include those made by their spouse or minor children.

(5) Contributions or direct campaign expenditures by a law firm include all individual contributions or direct campaign expenditures by lawyers associated with that law firm as of the close of the election period, including partners, associates, share-holders, lawyers of counsel, and in-house contract lawyers. The aggregation rules in paragraph (4) do not apply to this paragraph.

(6) "Election period" is defined in Section

253.153(a) of the Election Code.

(D) *Exception*. Notwithstanding the preceding paragraphs, in extraordinary cases, the judge may appoint a lawyer otherwise ineligible under this Canon if:

(1) the appointment is approved in advance by written order of the presiding judge of the administrative judicial region where the matter requiring appointment is pending; and

(2) the order of the presiding judge states that either:

(A) no person eligible for appointment under this paragraph is willing, competent, and able to accept the appointment; or

(B) the lawyer to be appointed possesses superior and unique qualifications for the appointment, describes those qualifications, and explains the need for those qualifications in the matter requiring appointment.

The Committee also proposes to add a counterpart duty of professional responsibility on the part of lawyers not to accept appointments that would violate these standards. Specifically, Disciplinary Rule 8.04(a) could be amended as follows:

(13) seeking or accepting a judicial appointment if the judge would be prohibited by Canon 5(__) from knowingly making the appointment.

A related problem that often overlaps with the problem of judicial appointments of campaign contributors is that of some judges continually appointing the same lawyers to fee-paying positions. Repetitious appointments solely to a limited number of lawyers to the exclusion of other lawyers imply that the lawyers who are appointed curry special favor with the judge. This perception is only made worse where the frequent appointees are also campaign contributors. All of these factors undermine the perception of an impartial judiciary. The Committee urges that judges refrain from repeatedly reappointing lawyers, particularly campaign contributors, to fee-paying positions if other qualified lawyers are

susceptible of appointment.

F. Encourage the State Bar of Texas and Secretary of State to Continue Efforts to Develop and Disseminate Voter Guides to Judicial Elections.

The Committee endorses the use of voters' pamphlets or voters' guides to combat the problem of uninformed or apathetic voters in judicial elections — a problem which, again, may be part of the reason why judicial candidates perceive the need to raise and spend money in judicial elections. As the ABA Task Force stated in recommending the use of voter guides, such guides and similar voter education efforts "reduce the pressure for judicial fund-raising and reduce the unlevel playing field and other frequent problems of campaign fund-raising, and also . . . obviously will go far to enable voters to make more informed choices."[100]

The State Bar of Texas introduced a voters' guide to statewide judicial races prior to the November 1998 elections. Also, the Secretary of State's office has proposed to the Legislature a similar guide to various offices, including judicial offices. The Committee urges the State Bar and/or the Secretary of State to continue these efforts and to work with local bar associations in formulating voters' guides for judicial races in each jurisdiction.

III. CONCLUSION

The foregoing recommendations are an attempt to fortify Texans' confidence in the impartiality of an elective judiciary. It is the Committee's hope that these recommendations are useful to the Supreme Court, the Legislature, and the people of Texas.

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[100] ABA Task Force Report at 56.

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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 99- 9112

OPINION AND ORDER IMPLEMENTING RECOMMENDATIONS OF THE SUPREME COURT JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE

In Misc. Docket No. 98-9179, dated October 19, 1998, this Court, pursuant to its constitutional and statutory duties and powers relating to the administration of justice,[1] appointed a group of distinguished lawyers and jurists — the Judicial Campaign Finance Study Committee (the "Committee") — and requested them to propose both rule and statutory changes to improve the way in which campaigns for the Texas judiciary are financed.[2] This action was prompted by continuing public concern that practices relating to judicial campaign finance in Texas were undermining the

[1] Article 5, Section 31 of the Texas Constitution makes the Supreme Court "responsible for the efficient administration of the judicial branch" and mandates that it promulgate rules of administration and procedure "as may be necessary for the efficient and uniform administration of justice in the various courts." Tex. Const. art. 5, § 31(a) & (b); *see also* Tex. Govt. Code §§ 22.003, 22.004, 74.024. Additionally, the Supreme Court is constitutionally and statutorily empowered to, among other things, promulgate rules governing the professional conduct of lawyers, judges and other participants in the legal system. Tex. Const. art. V, § 31(a) & (c); Tex. Govt. Code §§ 52.002 (court reporters), 81.024 (state bar); *see also* Tex. Govt. Code § 81.011(b) (State Bar Act "is in aid of the judicial department's powers under the constitution to regulate the practice of law, and not to the exclusion of those powers.").

[2] Order in Misc. Docket No. 98-9179, ¶ 1. Members of the Committee were Wayne Fisher, Chair; Lisa Blue; James E. Coleman, Jr.; Hon. Rex Davis; Hon. David C. Godbey; Michael A. Hatchell; Hon. Katie Kennedy; Jorge C. Rangel; and Harry M. Reasoner.

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public's confidence in the impartiality of the Texas judiciary.

The Committee was directed to consider prior Texas judicial campaign finance reform efforts, as well as those implemented or proposed in other states.[3] These included, most notably, the 1998 American Bar Association Report on Lawyers' Political Contributions, which had proposed several amendments to the ABA Model Code of Judicial Conduct[4] limiting judicial campaign contributions, enhancing disclosure, and restricting the aggregation of campaign "war chests."[5]

The Committee issued its Report and Recommendations to the Court in February 1999.[6] The Court immediately released the Report and Recommendations to the Legislature and the public. It

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[3] Order in Misc. Docket No. 98-9179, ¶ 3.

[4] Virtually every state supreme court has promulgated a code of judicial conduct patterned after the ABA Model Code of Judicial Conduct or its predecessors. These codes address, among other things, the political conduct of judges. *See, e.g.*, ABA Model Code of Judicial Conduct ("CJC") Canon 5; Texas CJC Canon 5; Alabama Code of Judicial Ethics Canon 7; Alaska CJC Canon 5; Arizona CJC Canon 5; Arkansas CJC Canon 5; California CJC Canon 5; Colorado CJC Canon 7; Connecticut CJC Canon 7; Delaware CJC Canon 7; Florida CJC Canon 7; Georgia CJC Canon 7; Hawaii CJC Canon 5; Idaho CJC Canon 7; Illinois CJC Canon 7; Indiana CJC Canon 5; Iowa CJC Canon 7; Kansas CJC Canon 5; Kentucky CJC Canon 7; Louisiana CJC Canon 7; Maine CJC Canon 5; Maryland Rule of Court 16-813, Canon 5; Massachusetts CJC Canon 7; Michigan CJC Canon 7; Minnesota CJC Canon 5; Mississippi CJC Canon 7; Missouri CJC Canon 5; Nebraska CJC Canon 5; Nevada CJC Canon 5; New Hampshire CJC Canon 7; New Jersey CJC Canon 7; New Mexico CJC Rule 21-700; New York CJC Canon 7; North Carolina CJC Canon 7; North Dakota CJC Canon 5; Ohio CJC Canon 7; Oklahoma CJC Canon 5; Oregon CJC Canon JR 4-101; Pennsylvania CJC Canon 7; Rhode Island CJC Canon 5; South Carolina CJC Canon 5; South Dakota CJC Canon 5; Tennessee CJC Canon 5; Utah CJC Canon 5; Vermont CJC Canon 5; Virginia CJC Canon 7; Washington CJC Canon 7; West Virginia CJC Canon 5; Wisconsin CJC 60.06; Wyoming CJC Canon 5.

[5] American Bar Association Task Force on Lawyers' Political Contributions, Report and Recommendations, Part II (July 1998) ["ABA Report"], at 19-59.

[6] Supreme Court of Texas Judicial Campaign Finance Study Committee, Report and Recommendations (Feb. 23, 1999).

then received testimony at two public hearings and invited public comment for two months.

The Committee's recommendations, and the Court's disposition of each, are discussed below.

1. ***Recommendation A: Enhance public access to judicial campaign finance-related information.*** The Committee recommended that Canon 5 of the Texas Code of Judicial Conduct be amended to require all judicial campaign disclosure reports to be filed in one central and accessible location[7] and that the Legislature allocate resources necessary to enable such reports to be posted on the Internet.[8]

The Seventy-Sixth Legislature has passed two bills that would largely fulfill the goals of this recommendation. S.B. 1726 would require candidates for "a judicial district office filled by voters of only one county" to file their campaign disclosure information with the Texas Ethics Commission, as judicial candidates from multi-county districts presently are required to do. H.B. 2611 would require many candidates, including many judicial candidates, to file their campaign disclosure information electronically and require the Ethics Commission to post the information on the Internet. If these bills are signed into law, the recommended amendments to the Code of Judicial Conduct will not be necessary.

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[7] Under current Texas law, judicial candidates are required to file certain campaign-related information either with the Texas Ethics Commission or county election officials, depending on whether the candidate is seeking an office serving more than one county or the candidate is seeking an office serving one county or less. Tex. Elec. Code §§ 252.005, 254.097.

[8] Report and Recommendations at 15-18. These recommendations were derived in part from Recommendation I of the ABA Report. ABA Report at 19-23.

2. ***Recommendation B: Promulgate rules extending and strengthening the contribution limits of the Judicial Campaign Fairness Act.*** The Committee proposed new procedural rules requiring judges to recuse themselves from any case in which a party, attorney, or certain relations or affiliates have made contributions or direct expenditures exceeding the contribution limits of the Judicial Campaign Fairness Act.[9] The Committee also recommended amending the Code of Judicial Conduct to make failure to recuse in accordance with the rule or violations of the Act subject to judicial discipline.[10]

The Court accepts the Committee's recommendation, and refers the recusal proposal to the Supreme Court Advisory Committee on the Rules of Procedure for assistance in drafting appropriate amendments to Rule 18a or 18b, Texas Rules of Civil Procedure, and Rule 16, Texas Rules of Appellate Procedure. The Court at this time adopts the Committee's proposal to amend the Code of Judicial Conduct to make violation of the Judicial Campaign Fairness Act subject to judicial discipline. Thus, under the Supreme Court's powers specified in Article V of the Texas Constitution and Section 74.024 of the Government Code, the Code of Judicial Conduct is amended as follows, effective July 1, 1999:

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[9] *Id.* at 19-25. This recommendation was derived in part from Recommendation III of the ABA Report. ABA Report at 34-44.

[10] Report and Recommendations at 25-26.

CANON 5
REFRAINING FROM INAPPROPRIATE
POLITICAL ACTIVITY

* * *

> (5) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

As adopted, the provision applies only to those judges covered by the Act, not all judges in Texas.

3. ***Recommendations C & D: Promulgate rules to limit the aggregation of campaign "war chests"; Limit judicial donations to political organizations.*** To reduce the pressures on candidates to solicit and contributors to donate campaign funds, the Committee proposed limits on the amount of campaign funds that judges could retain between elections.[11] The Committee also proposed amending the Code of Judicial Conduct to limit judges' use of political contributions to make donations to political organizations.[12] This proposal was based in part on similar provisions in the ABA Model Code of Judicial Conduct that other states have adopted.[13]

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[11] *Id.* at 29-32. This recommendation was derived in part from ABA Report Recommendation V(B). ABA Report at 49-52..

[12] Report and Recommendations at 32-35.

[13] ABA Model CJC Canon 5(A)(1)(e); Colorado CJC Canon 7(A)(1)(c); Connecticut CJC Canon 7(A)(3); Delaware CJC Canon 7(a)(3); Georgia CJC Canon 7(A)(1)(c); Hawaii CJC Canon 5(A)(1)(e);

While these recommendations are within the Court's province to address through amendments to the Code of Judicial Conduct, they involve decisions that the Court believes could better be resolved, at least for now, through the legislative process. The Court therefore requests the Texas Judicial Council to review whether legislation is appropriate to address these recommendations.

4. ***Recommendation E: Limit judicial appointments of excessive campaign contributors and repetitious appointments.*** The Committee proposed limits on judicial appointments of campaign contributors to positions from which the contributors could benefit, such as guardians or attorneys ad litem.[14] This recommendation, which paralleled its recusal proposal, was derived in part from Recommendation IV of the ABA Report.[15] Because it tracks the recusal proposal, the Court will defer further consideration of this recommendation until after the Advisory

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Kentucky CJC Canon 7(A)(1)(c); Maine CJC Canon 5(A)(1)(e); Massachusetts CJC Canon 7(A)(1)(c); Minnesota CJC Canon 5(A)(1)(e); New Hampshire CJC Canon 7(A)(1)(c); New Jersey CJC Canon 7(A)(4); North Dakota CJC Canon 5(A)1)(e) & (f); Oklahoma CJC Canon 5(A)(1)(d); Utah CJC Canon 5(B)(3); Virginia CJC Canon 7(A)(1)(c); Wisconsin CJC 60.06(2); *see also* Arizona CJC Canon 5(A)(1)(c) (judge or judicial candidate can contribute to or solicit contributions for a political party or to a non-judicial candidate of no more than $250 annually); California CJC Canon 5(A)(3) (judge's contributions and solicitation for political party, political organization, or candidate capped at $500 annually per party and $1000 annually for all parties); Washington CJC Canon 7(A)(1)(c) & (d), (2).

Oklahoma, in fact, has a statute that forbids judges of its Court of Civil Appeals from "directly or indirectly" contributing to a political party. 20 Okla. Stat. Ann. § 30.19.

[14] Report and Recommendations at 35-39.

[15] ABA Report at 44-47.

Committee completes its review of the recusal proposal.

5. ***Recommendation F: Encourage efforts to develop voter guides to judicial elections.*** The Committee urged continued efforts to develop voter guides to judicial elections informing voters about judicial candidates, thereby reducing the need for candidates to raise and spend campaign funds.[16] The Court asks the Texas Judicial Council and the State Bar of Texas to study this recommendation, H.B. 59 as passed by the 76th Legislature, and the Governor's veto message thereof, and similar activities in other states.

6. The Clerk is directed forthwith to file a copy of this Order with the Secretary of State, to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*, and to send a copy of this Order to each elected member of the Legislature.

IT IS SO ORDERED.

By the Court, en banc, in chambers, this 21st day of June, 1999.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

[16] Report and Recommendations at 39. This recommendation was based in part on Recommendation V(C) of the ABA Report. ABA Report at 53-56.

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

James A. Baker, Justice

Greg Abbott, Justice

Deborah G. Hankinson, Justice

Harriet O'Neill, Justice

Alberto R. Gonzales, Justice

SUBCHAPTER F. JUDICIAL CAMPAIGN FAIRNESS ACT

Sec. 253.151. Applicability of Subchapter. This subchapter applies only to a political contribution orpolitical expenditure in connection with the office of: (1) chief justice or justice, supreme court; (2) presiding judge or judge, court of criminal appeals; (3) chief justice or justice, court of appeals; (4) district judge; (5) judge, statutory county court; or (6) judge, statutory probate court.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.152. Definitions. In this subchapter: (1) "Complying candidate" or "complying officeholder" means a judicial candidate who files a declaration of compliance under Section 253.164(a)(1). (2) "In connection with an election" means: (A) with regard to a contribution that is designated in writing for a particular election, the election designated; or (B) with regard to a contribution that is not designated in writing for a particular election or that is designated as an officeholder contribution, the next election for that office occurring after the contribution is made. (3) "Judicial district" means the territory from which a judicial candidate is elected. (4) "Noncomplying candidate" means a judicial candidate who: (A) files a declaration of intent to exceed the limits on expenditures under Section 253.164(a)(2); (B) files a declaration of compliance under Section 253.164(a)(1) but later exceeds the limits on expenditures; (C) fails to file a declaration of compliance under Section 253.164(a)(1) or a declaration of intent under Section 253.164(a)(2); or (D) violates Section 253.173 or 253.174. (5) "Statewide judicial office" means the office of chief justice or justice, supreme court, or presiding judge or judge, court of criminal appeals.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 1, eff.Sept. 1, 1997.Sec. 253.153. Contribution Prohibited Except During Election Period. (a) A judicial candidate or officeholder, a specific-purposecommittee for supporting or opposing a judicial candidate, or a specific-purpose committee for assisting a judicial officeholdermay not knowingly accept a political contribution except duringthe period: (1) beginning on: (A) the 210th day before the date an application for a place on the ballot or for nomination by convention for the office is required to be filed, if the election is for a full term; or (B) the later of the 210th day before the date an application for a place on the ballot or for nomination by convention for the office is required to be filed or the date a vacancy in the office occurs, if the election is for an unexpired term; and (2) ending on the 120th day after the date of: (A) the general election for state and county officers, if the candidate or officeholder has an opponent in the general election; (B) except as provided by Subsection (c), the runoff primary election, if the candidate or officeholder is a candidate in the runoff primary election and does not have an opponent in the general election; or (C) except as provided by Subsection (c), the general primary election, if the candidate or officeholder is not a candidate in the runoff primary election and does not have an opponent in the general election. (b) Subsection (a)(2) does not apply to a politicalcontribution that was made and accepted with the intent that itbe used to defray expenses incurred in connection with anelection contest. (c) Notwithstanding Subsection (a)(2), a judicial candidate whodoes not have an opponent whose name will appear on the ballot ora specific-purpose committee for supporting such a candidate mayaccept a political contribution after another person files adeclaration of write-in candidacy opposing the candidate. (d) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of the political contributions accepted in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 2, eff.Sept. 1, 1997.Sec. 253.154. Write-in Candidacy. (a) A

write-in candidate for judicial office or aspecific-purpose committee for supporting a write-in candidatefor judicial office may not knowingly accept a politicalcontribution before the candidate files a declaration of write-in candidacy. (b) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of the politicalcontributions accepted in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.1541. Acceptance of Officeholder Contributions by Person Appointedto Fill Vacancy. (a) This section applies only to a person appointed to fill avacancy in an office covered by this subchapter who, at the timeof appointment, does not hold another office covered by thissubchapter. (b) Notwithstanding Section 253.153, a person to whom thissection applies may accept officeholder contributions beginningon the date the person assumes the duties of office and ending onthe 60th day after that date.Added by Acts 1997, 75th Leg., ch. 552, Sec. 1, eff. Sept. 1,1997.Sec. 253.155. Contribution Limits. (a) Except as provided by Subsection (c), a judicial candidateor officeholder may not knowingly accept political contributionsfrom a person that in the aggregate exceed the limits prescribedby Subsection (b) in connection with each election in which theperson is involved. (b) The contribution limits are: (1) for a statewide judicial office, $5,000; or (2) for any other judicial office: (A) $1,000, if the population of the judicial district is less than 250,000; (B) $2,500, if the population of the judicial district is 250,000 to one million; or (C) $5,000, if the population of the judicial district is more than one million. (c) This section does not apply to a political contributionmade by a general-purpose committee. (d) For purposes of this section, a contribution by a law firmwhose members are each members of a second law firm is consideredto be a contribution by the law firm that has members other thanthe members the firms have in common. (e) A person who receives a political contribution thatviolates Subsection (a) shall return the contribution to thecontributor not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the fifth day after the date the contribution is received. (f) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of the politicalcontributions accepted in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 3, eff.Sept. 1, 1997.Sec. 253.157. Limit on Contribution by Law Firm or Member or General-Purpose Committee of Law Firm.Text of subsec. (a) as amended by Acts 1997, 75th Leg., ch. 479,Sec. 5 (a) A judicial candidate or officeholder may not accept apolitical contribution in excess of $50 from a person if: (1) the person is a law firm, a member of a law firm, or a general-purpose committee established or controlled by a law firm; and (2) the contribution when aggregated with all political contributions accepted by the candidate or officeholder from the law firm, other members of the law firm, or from a general-purpose committee established or controlled by the law firm in connection with the election would exceed six times the applicable contribution limit under Section 253.155.Text of subsec. (a) as amended by Acts 1997, 75th Leg., ch. 552,Sec. 2 (a) A judicial candidate or a specific-purpose committee forsupporting or opposing a judicial candidate may not accept apolitical contribution in excess of $50 from a person if: (1) the person is a member of a law firm or a general-purpose committee established or controlled by a law firm; and (2) the contribution when aggregated with all political contributions accepted by the candidate or committee from other members of the law firm or from a general-purpose committee established or controlled by the law firm in connection with the election would exceed six times the applicable contribution limit under Section 253.155. (b) A person who receives a political contribution thatviolates Subsection (a) shall return the contribution to thecontributor not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the fifth day after the date the contribution is received. (c) A person who fails to return a political contribution asrequired by Subsection (b) is liable for a

civil penalty not toexceed three times the total amount of political contributionsaccepted from the law firm, members of the law firm, or general-purpose committees established or controlled by the lawfirm in connection with the election. (d) For purposes of this section, a general-purpose committeeis established or controlled by a law firm if the committee isestablished or controlled by members of the law firm. (e) In this section: (1) "Law firm" means a partnership, limited liability partnership, or professional corporation organized for the practice of law. (2) "Member" means a partner, associate, shareholder, employee, or person designated "of counsel" or "of the firm".Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 5, eff.Sept. 1, 1997; Acts 1997, 75th Leg., ch. 552, Sec. 2, eff. Sept.1, 1997.Sec. 253.158. Contribution by Spouse or Child Considered to be Contributionby Individual. (a) For purposes of Sections 253.155 and 253.157, acontribution by the spouse or child of an individual is considered to be a contribution by the individual. (b) In this section, "child" means a person under 18 years ofage who is not and has not been married or who has not had thedisabilities of minority removed for general purposes.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.159. Exception to Contribution Limits. Sections 253.155 and 253.157 do not apply to an individual whois related to the candidate or officeholder within the seconddegree by consanguinity, as determined under Subchapter B,Chapter 573, Government Code.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16, 1995.Sec. 253.160. Aggregate Limit on Contributions from and Direct Campaign Expenditures by General-Purpose Committee. (a) A judicial candidate or officeholder or a specific-purposecommittee for supporting or opposing a judicial candidate orassisting a judicial officeholder may not knowingly accept apolitical contribution from a general-purpose committee that,when aggregated with each other political contribution from ageneral-purpose committee in connection with an election, exceeds15 percent of the applicable limit on expenditures prescribed bySection 253.168, regardless of whether the limit on expendituresis suspended. (b) A person who receives a political contribution thatviolates Subsection (a) shall return the contribution to thecontributor not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the fifth day after the date the contribution is received. (c) For purposes of this section, an expenditure by ageneral-purpose committee for the purpose of supporting acandidate, for opposing the candidate's opponent, or forassisting the candidate as an officeholder is considered to be acontribution to the candidate unless the campaign treasurer ofthe general-purpose committee, in an affidavit filed with theauthority with whom the candidate's campaign treasurerappointment is required to be filed, states that the committeehas not directly or indirectly communicated with the candidate'scampaign, including the candidate, an aide to the candidate, acampaign officer, or a campaign consultant, or a specific-purposecommittee in regard to a strategic matter, including polling data, advertising, or voter demographics, in connection with thecandidate's campaign. (d) This section does not apply to a political expenditure bythe principal political committee of the state executivecommittee or a county executive committee of a political partythat complies with Section 253.171(b). (e) A person who violates this section is liable for a civilpenalty not to exceed three times the amount by which thepolitical contributions accepted in violation of this sectionexceed the applicable limit prescribed by Subsection (a).Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 6, eff.Sept. 1, 1997.Sec. 253.1601. Contribution to Certain Committees Considered Contributionto Candidate. For purposes of Sections 253.155, 253.157, and 253.160, acontribution to a specific-purpose committee for the purpose ofsupporting a judicial candidate, opposing the candidate'sopponent, or assisting the candidate as an officeholder isconsidered to be a contribution to the candidate.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Renumbered from V.T.C.A., Election

Code Sec. 253.156 andamended by Acts 1997, 75th Leg., ch. 479, Sec. 4, eff. Sept. 1,1997.Sec. 253.161. Use of Contribution from Nonjudicial or Judicial OfficeProhibited. (a) A judicial candidate or officeholder, a specific-purpose committee for supporting or opposing a judicial candidate, or aspecific-purpose committee for assisting a judicial officeholdermay not use a political contribution to make a campaignexpenditure for judicial office or to make an officeholderexpenditure in connection with a judicial office if thecontribution was accepted while the candidate or officeholder: (1) was a candidate for an office other than a judicial office; or (2) held an office other than a judicial office, unless the person had become a candidate for judicial office. (b) A candidate, officeholder, or specific-purpose committeefor supporting, opposing, or assisting the candidate orofficeholder may not use a political contribution to make acampaign expenditure for an office other than a judicial officeor to make an officeholder expenditure in connection with an office other than a judicial office if the contribution wasaccepted while the candidate or officeholder: (1) was a candidate for a judicial office; or (2) held a judicial office, unless the person had become a candidate for another office. (c) This section does not prohibit a candidate or officeholder from making a political contribution to another candidate orofficeholder. (d) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of politicalcontributions used in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.1611. Certain Contributions by Judicial Candidates,Officeholders, and Committees Restricted. (a) A judicial candidate or officeholder or a specific-purposecommittee for supporting or opposing a judicial candidate or assisting a judicial officeholder may not use a politicalcontribution to make political contributions that in theaggregate exceed $100 in a calendar year to a candidate orofficeholder. (b) A judicial candidate or a specific-purpose committee forsupporting or opposing a judicial candidate may not use apolitical contribution to make political contributions to apolitical committee in connection with a primary election. (c) A judicial candidate or a specific-purpose committee forsupporting or opposing a judicial candidate may not use apolitical contribution to make a political contribution to apolitical committee that, when aggregated with each otherpolitical contribution to a political committee in connectionwith a general election, exceeds $500. (d) A judicial officeholder or a specific-purpose committee forassisting a judicial officeholder may not use a politicalcontribution to make a political contribution to a politicalcommittee in any calendar year in which the office held is not onthe ballot. (e) This section does not apply to a political contributionmade to the principal political committee of the state executive committee or a county executive committee of a political party. (f) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of politicalcontributions used in violation of this section.Added by Acts 1997, 75th Leg., ch. 479, Sec. 7, eff. Sept. 1,1997.Sec. 253.162. Restrictions on Reimbursement of Personal Funds and Paymentson Certain Loans. (a) A judicial candidate or officeholder who makes politicalexpenditures from the person's personal funds may not reimbursethe personal funds from political contributions in amounts thatin the aggregate exceed, for each election in which the person'sname appears on the ballot: (1) for a statewide judicial office, $100,000; or (2) for an office other than a statewide judicial office, five times the applicable contribution limit under Section 253.155. (b) A judicial candidate or officeholder who accepts one ormore political contributions in the form of loans, including anextension of credit or a guarantee of a loan or extension ofcredit, from one or more persons related to the candidate orofficeholder within the second degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, maynot use political contributions to repay the loans. (c) A person who is both a candidate and an officeholder mayreimburse the person's personal funds only in one capacity. (d) A person who violates this section is liable for a civil penalty not to exceed three times the amount by which thereimbursement made in

violation of this section exceeds theapplicable limit prescribed by Subsection (a).Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.163. Notice Required for Certain Political Expenditures. (a) A person other than a candidate, officeholder, or theprincipal political committee of the state executive committee ora county executive committee of a political party may not makepolitical expenditures that in the aggregate exceed $5,000 forthe purpose of supporting or opposing a candidate for an officeother than a statewide judicial office or assisting such acandidate as an officeholder unless the person files with theauthority with whom a campaign treasurer appointment by acandidate for the office is required to be filed a writtendeclaration of the person's intent to make expenditures thatexceed the limit prescribed by this subsection. (b) A person other than a candidate, officeholder, or theprincipal political committee of the state executive committee ora county executive committee of a political party may not makepolitical expenditures that in the aggregate exceed $25,000 forthe purpose of supporting or opposing a candidate for a statewidejudicial office or assisting such a candidate as an officeholder unless the person files with the commission a written declarationof the person's intent to make expenditures that exceed the limitprescribed by this subsection. (c) A declaration under Subsection (a) or (b) must be filed notlater than the earlier of: (1) the date the person makes the political expenditure that causes the person to exceed the limit prescribed by Subsection (a) or (b); or (2) the 60th day before the date of the election in connection with which the political expenditures are intended to be made. (d) A declaration received under Subsection (a) or (b) shall befiled with the records of each judicial candidate or officeholderon whose behalf the person filing the declaration intends to makepolitical expenditures. If the person intends to make only political expenditures opposing a judicial candidate, thedeclaration shall be filed with the records of each candidate forthe office. (e) An expenditure made by a political committee or otherassociation that consists only of costs incurred in contactingthe committee's or association's membership may be made withoutthe declaration required by Subsection (a) or (b). (f) For purposes of this section, a person who makes apolitical expenditure benefitting more than one judicialcandidate or judicial officeholder shall, in accordance withrules adopted by the commission, allocate a portion of theexpenditure to each candidate or officeholder whom theexpenditure benefits in proportion to the benefit received bythat candidate or officeholder. For purposes of this subsection: (1) a political expenditure for supporting judicial candidates or assisting judicial officeholders benefits each candidate or officeholder supported or assisted; and (2) a political expenditure for opposing a judicial candidate benefits each opponent of the candidate. (g) A person who violates this section is liable for a civilpenalty not to exceed three times the amount of the politicalexpenditures made in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.164. Voluntary Compliance. (a) When a person becomes a candidate for a judicial office,the person shall file with the authority with whom the candidate's campaign treasurer appointment is required to befiled: (1) a sworn declaration of compliance stating that the person voluntarily agrees to comply with the limits on expenditures prescribed by this subchapter; or (2) a written declaration of the person's intent to make expenditures that exceed the limits prescribed by this subchapter. (b) The limits on contributions and on reimbursement ofpersonal funds prescribed by this subchapter apply to complyingcandidates unless suspended as provided by Section 253.165 or253.170. The limits on contributions and on reimbursement ofpersonal funds prescribed by this subchapter apply tononcomplying candidates regardless of whether the limits oncontributions, expenditures, and reimbursement of personal fundsare suspended for complying candidates. (c) A judicial candidate may not knowingly accept a campaigncontribution or make or authorize a campaign expenditure beforethe candidate files a declaration under Subsection (a). (d) A person who violates Subsection (c) is liable for a civilpenalty not to exceed three times the amount of the politicalcontributions or political expenditures

made in violation of thissection.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.165. Effect of Noncomplying Candidate. (a) A complying candidate or a specific-purpose committee forsupporting a complying candidate is not required to comply withthe limits on contributions, expenditures, and the reimbursementof personal funds prescribed by this subchapter if another personbecomes a candidate for the same office and: (1) files a declaration of intent to exceed the limits on expenditures under Section 253.164(a)(2); (2) fails to file a declaration of compliance under Section 253.164(a)(1) or a declaration of intent under Section 253.164(a)(2); (3) files a declaration of compliance under Section 253.164(a)(1) but later exceeds the limits on expenditures; or (4) violates Section 253.173 or 253.174. (b) The executive director of the commission shall issue anorder suspending the limits on contributions and expenditures fora specific office not later than the fifth day after the date theexecutive director determines that: (1) a person has become a candidate for that office and: (A) has filed a declaration of intent to exceed the limits on expenditures under Section 253.164(a)(2); or (B) has failed to file a declaration of compliance under Section 253.164(a)(1) or a declaration of intent under Section 253.164(a)(2); (2) a complying candidate for that office has exceeded the limit on expenditures prescribed by this subchapter; or (3) a candidate for that office has violated Section 253.173 or 253.174. (c) A county clerk who receives a declaration of intent toexceed the limits on expenditures under Section 253.164(a)(2)shall deliver a copy of the declaration to the executive directorof the commission not later than the fifth day after the date thecounty clerk receives the declaration. (d) A county clerk who receives a campaign treasurerappointment in connection with a judicial office and does notreceive a declaration of compliance under Section 253.164(a)(1)or a declaration of intent to exceed the limits on expendituresunder Section 253.164(a)(2) shall deliver a copy of the campaigntreasurer appointment and a written notice of the candidate'sfailure to file a declaration of compliance or a declaration ofintent to the executive director of the commission not later thanthe fifth day after the date the county clerk receives thecampaign treasurer appointment. (e) A county clerk who receives a written allegation that a complying candidate has exceeded the limit on expenditures orthat a candidate has engaged in conduct prohibited by Section253.173 or 253.174 shall deliver a copy of the allegation to theexecutive director of the commission not later than the fifth dayafter the date the county clerk receives the allegation. Thecounty clerk shall, at no cost to the commission, deliver to theexecutive director by mail or telephonic facsimile machine copiesof documents relevant to the allegation not later than 48 hoursafter the executive director requests the documents. (f) A county clerk is required to act under Subsection (c),(d), or (e) only in connection with an office for which acampaign treasurer appointment is required to be filed with thatcounty clerk.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 8, eff.Sept. 1, 1997.Sec. 253.166. Benefit to Complying Candidate. (a) A complying candidate is entitled to state on politicaladvertising as provided by Section 255.008 that the candidatecomplies with the Judicial Campaign Fairness Act, regardless ofwhether the limits on contributions, expenditures, and the reimbursement of personal funds are later suspended. (b) A noncomplying candidate is not entitled to the benefitprovided by this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.167. Certification of Population; Notice of Contribution andExpenditure Limits. (a) For purposes of this subchapter only, not later than June 1of each odd-numbered year, the secretary of state shall: (1) deliver to the commission a written certification of the population of each judicial district for which a candidate for judge or justice must file a campaign treasurer appointment with the commission; and (2) deliver to the county clerk of each county a written certification of the county's population, if the county: (A) comprises an entire judicial district under Chapter 26, Government Code; or (B) has a statutory county court or statutory probate court,

other than a multicounty statutory county court created under Subchapter D, Chapter 25, Government Code. (b) On receipt of the certification of population underSubsection (a), the commission or county clerk, as appropriate,shall make available to each candidate for an office covered bythis subchapter written notice of the contribution andexpenditure limits applicable to the office the candidate seeks.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16, 1995.Sec. 253.168. Expenditure Limits. (a) For each election in which the candidate is involved, acomplying candidate may not knowingly make or authorize politicalexpenditures that in the aggregate exceed: (1) for a statewide judicial office, $2 million; (2) for the office of chief justice or justice, court of appeals: (A) $500,000, if the population of the judicial district is more than one million; or (B) $350,000, if the population of the judicial district is one million or less; or (3) for an office other than an office covered by Subdivision (1) or (2):

(A) $350,000, if the population of the judicial district is more than one million; (B) $200,000, if the population of the judicial district is 250,000 to one million; or (C) $100,000, if the population of the judicial district is less than 250,000. (b) A person who violates this section is liable for a civilpenalty not to exceed three times the amount by which thepolitical expenditures made in violation of this section exceedthe applicable limit prescribed by Subsection (a).Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 9, eff.Sept. 1, 1997.Sec. 253.169. Expenditure by Certain Committees Considered Expenditure byCandidate. (a) For purposes of Section 253.168, an expenditure by aspecific-purpose committee for the purpose of supporting acandidate, opposing the candidate's opponent, or assisting thecandidate as an officeholder is considered to be an expenditureby the candidate unless the candidate, in an affidavit filed withthe authority with whom the candidate's campaign treasurer appointment is required to be filed, states that the candidate'scampaign, including the candidate, an aide to the candidate, acampaign officer, or a campaign consultant of the candidate, hasnot directly or indirectly communicated with the committee inregard to a strategic matter, including polling data, advertising, or voter demographics, in connection with thecandidate's campaign. (b) This section applies only to an expenditure of which thecandidate or officeholder has notice. (c) An affidavit under this section shall be filed with thenext report the candidate or officeholder is required to fileunder Chapter 254 following the receipt of notice of theexpenditure .Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995. Amended by Acts 1997, 75th Leg., ch. 479, Sec. 10, eff.Sept. 1, 1997.Sec. 253.170. Effect of Certain Political Expenditures. (a) A complying candidate for an office other than a statewidejudicial office or a specific-purpose committee for supportingsuch a candidate is not required to comply with the limits oncontributions, expenditures, and the reimbursement of personalfunds prescribed by this subchapter if a person other than thecandidate's opponent or the principal political committee of thestate executive committee or a county executive committee of apolitical party makes political expenditures that in theaggregate exceed $5,000 for the purpose of supporting thecandidate's opponent, opposing the candidate, or assisting thecandidate's opponent as an officeholder. (b) A complying candidate for a statewide judicial office or aspecific-purpose committee for supporting such a candidate is notrequired to comply with the limits on contributions,expenditures, and the reimbursement of personal funds prescribedby this subchapter if a person other than the candidate'sopponent or the principal political committee of the stateexecutive committee or a county executive committee of apolitical party makes political expenditures that in the aggregate exceed $25,000 for the purpose of supporting thecandidate's opponent, opposing the candidate, or assisting thecandidate's opponent as an officeholder. (c) The executive director of the commission shall issue anorder suspending the limits on contributions, expenditures, andthe reimbursement of personal funds for a specific office notlater than the fifth day after the date the executive directordetermines that: (1) a declaration of intent to make expenditures

that exceed the limit prescribed by Subsection (a) or (b) is filed in connection with the office as provided by Section 253.163; or (2) a political expenditure that exceeds the limit prescribed by Subsection (a) or (b) has been made. (d) A county clerk who receives a declaration of intent to makeexpenditures that exceed the limit prescribed by Subsection (a)or (b) shall deliver a copy of the declaration to the executivedirector of the commission not later than the fifth day after thedate the county clerk receives the declaration. A county clerkwho receives a written allegation that a person has made apolitical expenditure that exceeds the limit prescribed bySubsection (a) or (b) shall deliver a copy of the allegation tothe executive director not later than the fifth day after thedate the county clerk receives the allegation. The county clerkshall, at no cost to the commission, deliver to the executive director by mail or telephonic facsimile machine copies ofdocuments relevant to the allegation not later than 48 hoursafter the executive director requests the documents. A countyclerk is required to act under this subsection only in connectionwith an office for which a campaign treasurer appointment isrequired to be filed with that county clerk. (e) An expenditure made by a political committee or otherassociation that consists only of costs incurred in contacting the committee's or association's membership does not counttowards the limit prescribed by Subsection (a) or (b).Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.171. Contribution from or Direct Campaign Expenditure by PoliticalParty. (a) Except as provided by Subsection (b), a politicalcontribution to or a direct campaign expenditure on behalf of a complying candidate that is made by the principal politicalcommittee of the state executive committee or a county executivecommittee of a political party is considered to be a politicalexpenditure by the candidate for purposes of the expenditurelimits prescribed by Section 253.168. (b) Subsection (a) does not apply to a political expenditurefor a generic get-out-the-vote campaign or for a written list oftwo or more candidates that: (1) identifies the party's candidates by name and office sought, office held, or photograph; (2) does not include any reference to the judicial philosophy or positions on issues of the party's judicial candidates; and (3) is not broadcast, cablecast, published in a newspaper or magazine, or placed on a billboard.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.172. Restriction on Exceeding Expenditure Limits. (a) A candidate who files a declaration of compliance underSection 253.164(a)(1) and who later files a declaration of intentto exceed the limits on expenditures under Section 253.164(a)(2)or a specific-purpose committee for supporting such a candidatemay not make a political expenditure that causes the person toexceed the applicable limit on expenditures prescribed by Section253.168 before the 60th day after the date the candidate filesthe declaration of intent to exceed the limits on expenditures. (b) A person who violates this section is liable for a civil penalty not to exceed three times the amount of politicalexpenditures made in violation of this section.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.173. Agreement to Evade Limits Prohibited. (a) A complying candidate may not: (1) solicit a person to enter a campaign as a noncomplying candidate opposing the complying candidate; or (2) enter into an agreement under which a person enters a campaign as a noncomplying candidate opposing the complying candidate. (b) A candidate who violates this section is considered to be anoncomplying candidate.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.174. Misrepresentation of Opponent's Compliance with or Violationof Subchapter Prohibited. (a) A candidate for judicial office may not knowinglymisrepresent that an opponent of the candidate: (1) is a noncomplying candidate; or (2) has violated this subchapter. (b) A candidate who violates this section is considered to be anoncomplying candidate.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.175. Judicial Campaign Fairness Fund. (a) The judicial campaign fairness fund is a special account inthe general revenue fund. (b) The judicial campaign fairness fund consists of: (1) penalties recovered under Section 253.176; and (2) any gifts or grants received by the commission

under Subsection (e). (c) The judicial campaign fairness fund may be used only for: (1) voter education projects that relate to judicial campaigns; and (2) payment of costs incurred in imposing civil penalties under this subchapter. (d) To the extent practicable, the fund shall be permitted to accumulate until the balance is sufficient to permit thepublication of a voter's guide that lists candidates for judicialoffice, their backgrounds, and similar information. Thecommission shall implement this subsection and shall adopt rulesunder which a candidate must provide information to thecommission for inclusion in the voter's guide. In providing theinformation, the candidate shall comply with applicableprovisions of the Code of Judicial Conduct. The voter's guidemust, to the extent practicable, indicate whether each candidateis a complying candidate or noncomplying candidate, based ondeclarations filed under Section 253.164 or determinations by theexecutive director or the county clerk, as appropriate, underSection 253.165. The listing of a noncomplying candidate may notinclude any information other than the candidate's name and mustinclude a statement that the candidate is not entitled to havecomplete information about the candidate included in the guide. (e) The commission may accept gifts and grants for the purposesdescribed by Subsections (c)(1) and (d). Funds received underthis subsection shall be deposited to the credit of the judicialcampaign fairness fund. (f) The judicial campaign fairness fund is exempt from Sections403.094 and 403.095, Government Code.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995.Sec. 253.176. Civil Penalty. (a) The commission may impose a civil penalty against a persononly after a formal hearing as provided by Subchapter E, Chapter571, Government Code. (b) The commission shall base the amount of the penalty on: (1) the seriousness of the violation; (2) the history of previous violations; (3) the amount necessary to deter future violations; and (4) any other matter that justice may require. (c) A penalty collected under this section shall be depositedto the credit of the judicial campaign fairness fund.Added by Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16,1995

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July 19, 1999

Honorable Tom Phillips
Chief Justice Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Honorable Nathan Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Judges:

Would you please review these suggestions regarding voir dire. Make whatever changes you want but, please, preserve voir dire.

Regards,

JJ:dd
Enclosure
via telecopy

(New)

Tex. R. Civ. P. 226b

EXAMINATION OF JURY PANEL BY *VOIR DIRE*

(a) After administration of the oath prescribed by Rule 266, each party shall be permitted to examine the members of the jury panel to determine if any of them are disqualified or should not serve on the case.

(b) The jury panel shall be examined in the following order unless the court should, for good cause stated in the record, otherwise direct:

(i) The party upon whom rests the burden of proof on the whole case shall first examine the jury panel. In the event there be more that one such party, such parties shall examine the jury panel in the order assigned by the court according the nature of the claims or defenses.

(ii) The adverse party shall then examine the jury panel. In the event there be more than one adverse party, such parties shall examine the jury panel in the order assigned by the court according the nature of the claims or defenses.

(iii) An intervenor shall occupy the position in the examination of the jury panel assigned by the court according to the nature of the claim.

(c) Each party shall have the opportunity to address and question the jury panel for a reasonable period of time. A party examining the jury panel shall be accorded the opportunity to state to the jury panel briefly the nature of its claim or defense and what it expects to prove and the relief sought. Each party shall be entitled to inquire into matters reasonably related to the kinds of issues presented by the case so as to adequately exercise the right to challenge a panel member for cause or exercise its allocated peremptory challenges. The time allocated to a party for examination of the jury panel shall not be unreasonably restricted.

Comments:

1. The right to conduct a proper voir dire is linked to the constitutional right to a fair trial. *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). Thus, although the trial court has broad discretion in ruling on the propriety of the voir dire, *Dickson v. Burlington N. R.R.*, 730 S.W.2d 82, 85 (Tex. App. — Fort Worth 1987, writ ref'd n.r.e.), the exercise of such discretion in the curtailment of a party's voir dire is subject to constitutional scrutiny.

2. The court should give the attorneys broad latitude during the examination of the jury panel. *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708-09 (Tex. 1989).

By: Cain S.B. No. 1863

(In the Senate - Filed April 13, 1999; April 14, 1999, read first time and referred to Committee on Jurisprudence; April 27, 1999, reported favorably by the following vote: Yeas 4, Nays 0; April 27, 1999, sent to printer.)

A BILL TO BE ENTITLED

AN ACT

relating to voir dire requirements in civil actions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.006 to read as follows:

Sec. 30.006. VOIR DIRE REQUIREMENTS. (a) In this section, "side" has the same meaning as in Rule 233, Texas Rules of Civil Procedure, or its successor.

(b) In any civil action to be tried before a jury, the trial court shall allow each side voir dire, as follows:

(1) in Level 1 cases, as defined by Rule 190.2, Texas Rules of Civil Procedure, at least one hour;

(2) in Level 2 cases, as defined by Rule 190.3, Texas Rules of Civil Procedure, at least two hours; and

(3) in Level 3 cases, as defined by Rule 190.4, Texas Rules of Civil Procedure, at least three hours.

(c) The time allocated in Subsection (b) shall not include time consumed in making preemptory challenges or challenges for cause to jurors or in making or responding to objections.

(d) The supreme court may adopt rules consistent with the provisions of this section. To the extent that any rule conflicts with the provisions of this section, this section controls.

(e) Section 22.004, Government Code, does not apply to this section.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

* * * * *

LI8030C LEGISLATIVE INFORMATION SYSTEM 76(R) DATE: 01/06/00
BILL TEXT REPORT TIME: 15:43:18
SB 1863 INTRODUCED VERSION * PAGE: 1

By: Cain S.B. No. 1863

Line and page numbers may not match official copy.
Bill not drafted by TLC or Senate E&E.

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(1) In Level One cases, as defined by Rule 190.2, TEXAS RULES OF CIVIL PROCEDURE, at least one hour;

(2) In Level Two cases, as defined by Rule 190.3, TEXAS RULES OF CIVIL PROCEDURE, at least two hours; and

(3) In Level Three cases, as defined by Rule 190.4, TEXAS RULES OF CIVIL PROCEDURE, at least three hours.

(c) The time allocated in Subsection (a) shall not include time consumed in making preemptory challenges or challenges for cause to jurors or in making or responding to objections.

(d) The Supreme Court may adopt rules consistent with the provisions of this Act. To the extent that any rule conflicts with the provisions of this Act, this Act controls.

(e) Section 22.004, Government Code, does not apply to this section.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an imperative public necessity that the constitutional rule requiring bills to be read on three several days is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

HON. SCOTT BRISTER
JUDGE, 234TH DISTRICT COURT
January 11, 2000

Mr. Charles L. Babcock
Jackson Walker L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002

Dear Chuck:

I noted that voir dire suggestions were on the agenda for the January SCAC meeting. If that's the case, I would like the Committee to consider the following proposals as well:

1. Adopt the voir dire rule proposed by the Jury Task Force (relevant pages from Task Force Report enclosed).

2. Adopt the Jury Task Force proposal to repeal Tex. R. Civ. P. 223 providing for a jury shuffle, at least in counties with random panels (relevant pages from Task Force Report enclosed).

3. Amend Tex. R. Civ. P. 233 to cut the number of peremptory strikes to three per side (relevant pages from Task Force Report enclosed [which did not adopt this proposal] as well as my article re same enclosed).

Please forward this to committee members for their review. Thanks!

Very truly yours,

Hon. Scott Brister
Judge, 234th District Court

support Arguments A.2. and A.3. No jurisdiction has adopted a standard questionnaire to be used in all trials.

2. UNIFORM JURY SUMMONS WITH QUESTIONNAIRE

Recommendation: That Texas have a statute mandating a uniform jury summons, accompanied by a questionnaire.

A. Arguments Favoring Recommendation:

1. Provide statewide uniformity with respect to basic juror information.

2. Reduce time for jury voir dire.

B. Arguments Opposing Recommendation: None.

C. Comment:

1. Most states now require a uniform summons.

2. Model for statute: W.Va. Code § 52-1-5a (see Committee Report).

3. REDUCTION OF PEREMPTORY CHALLENGES ("STRIKES")

Recommendation: That the number of peremptory challenges remain unchanged.

A. Arguments Favoring Recommendation:

1. Some potential jurors are biased but refuse to acknowledge it, leaving no basis for a challenge for cause.

2. Strikes eliminate jurors who are not legally disqualified but who are unfit to serve. (Examples: jurors who will be distracted or angered by economic hardship; jurors with marginal English or math skills.)

3. Strikes give litigants the sense of a fair shake from the system.

4. Fewer strikes would inhibit attorneys from vigorously questioning panelists for fear of giving offense.

5. Adequate strikes make verdicts more predictable by eliminating extreme views and unpredictable actors from the panel.

6. With fewer strikes additional time would be required to pursue information related to challenges for cause.

7. Committee consensus: it ain't broke; most practitioners seem to favor the present practice; judges oppose it.

B. Arguments Opposing Recommendation:

1. Discriminatory strikes continue despite *Batson*.

2. Strikes make juries less inclusive and less representative.

3. Strikes exclude a part of the community's full range of perspectives.

4. Strikes thwart citizen's interest in or right to participate in the process.

5. Strikes are of little value, given attorney's inability to accurately evaluate jurors.

6. Strikes make the dispensation of justice look rigged, manipulated.

7. Large venire required for numerous strikes wastes time and money (e.g. juror's fees, lost juror productivity).

8. *Reporter's Note: Some critics say that the increased effectiveness of paid jury consultants in directing strikes gives an unfair advantage to the affluent litigant.*

C. Comment:

1. No jurisdiction has eliminated strikes.

2. ABA Proposal: 3 strikes for 12 person juries in civil cases, 5 for felonies, 10 for capital cases. California and New York committees have recommended reduction but an Arizona study recommends no change.

3. States vary: 2 to 8 per side in civil cases, 3 to 20 in criminal cases; (Texas is at 6 and 10).

4. Studies:

   a. Chicago Study: Struck jurors wouldn't have changed outcome in criminal cases.

   b. Mock Trial Studies: Combined effect on outcome of Judge's disqualifications and strikes was nil.

   c. Post-Trial Interviews: Juror's personal characteristics far less significant to outcome than evidence and case characteristics.

   d. Federal Judge Survey: 2/3 favored current system in criminal cases; split on whether fewer strikes would speed voir dire.

   e. University of Chicago Survey: Under present system attorneys cannot predict jurors' votes -- reduced voir dire suggested.

   f. Student Note – Statistical Effects: Strikes eliminate extremes which do not contribute to representative juries.

   g. Subcommittee Internal Survey: Judges tend to favor reduction of strikes; lawyers and laypersons tend to resist change. Most believed fewer strikes would prolong the voir dire process.

4. LEADING QUESTIONS DURING VOIR DIRE EXAMINATION

Recommendation:

(1) That leading questions not be prohibited during voir dire examination (with a vigorous minority).

(2) That a new rule of civil procedure govern the procedure for voir dire examination, providing (a) an initial voir dire by the trial court; (b) that part of the attorney's voir dire examination be by written questionnaires; (c) that the court be specifically empowered to limit examination that is unduly invasive, repetitive, argumentative; (d) that rehabilitation questions will be permitted.

A. Arguments for Allowing Leading Questions:

1. Partly because of the courtroom setting, jurors are unlikely to volunteer critical information unless led.

2. Some panelists will lie or conceal; leading is a tool for getting the truth.

3. Blanket restrictions on leading questions interfere with the right to a fair trial.

4. Leading questions save time; they elicit specific information more efficiently than open-ended questions.

5. Leading questions can expose lack of candor or evasion to the judge resulting in a dismissal for cause.

6. Leading questions help persuade the jury about the case as part of the adversary process.

7. Leading questions are required for effective use of peremptory challenges (strikes) and challenges for cause.

8. Leading questions are not entirely prohibited on trial direct examination. There are exceptions.

B. Arguments Favoring Prohibition of Leading Questions:

1. Leading questions produce misleading answers about juror bias.

2. Leading questions "beg" for a legally disqualifying response by a juror who does not understand the consequences or implications.

3. Leading questions do not allow us to hear what the juror has to say, only the lawyer.

4. Other trial proceedings, such as the trial itself, limit leading questions.

5. Potential jurors are not adverse parties and should not be treated as such.

C. Comment:

1. No precedent in other jurisdictions. Panel questioning is ordinarily within the trial court's discretion.

2. Any rule change regarding voir dire should be tested in the civil courts before adoption in criminal courts.

3. The trial court should be able to impose reasonable limits on voir dire examination, including time limits.

4. The Committee was divided on whether there was an absolute right to ask (a) any question on a matter "reasonably related" to the exercise of peremptory challenges or challenges for cause; (b) rehabilitation questions.

5. A vigorous minority on the Committee would add to the type of questions that the court is specifically empowered to prohibit at (2)(b) the term "leading and suggestive."

5. JURY VOIR DIRE EXAMINATION: "COMMITTING" OR "CONTRACTING WITH" JURORS

Recommendation: Adopt by rule change the following limitations on questioning of jury panelists:

(a) Questions concerning a prospective juror's opinion of applicable law must be prefaced by a proper statement thereof.

(b) Clarification of prohibition on inquiries as to a juror's probable vote, or attempt to commit a prospective juror to a particular verdict or finding as to any issue or evidence.

A. Arguments Favoring Recommendation:

1. Questions regarding "leaning" and the weight to be given certain evidence are closely related to the forbidden question as to how the juror will vote.

2. This kind of question can be used to eliminate reasonable jurors based on outrageous claims or defenses.

3. These questions invade the unique province of the jury.

B. Arguments Opposing Recommendation:

1. Blanket prohibitions interfere with a fair trial. Any question related to bias should be permitted.

2. More information is better. Broad scope of questioning is essential to expose bias.

3. Peremptory challenge can be exercised for any reason even the weight a juror will give to certain evidence even though this is a matter within the "province of the jury."

4. The trial court has this power now as part of its broad discretion regarding voir dire examination, and can exercise it to prevent "leaning" and "weight of evidence" questions from becoming forbidden "contracting" or "committing" questions.

C. Comment: Some states prevent committing jurors to a given verdict or to "ask the juror what the juror's verdict might be under any hypothetical circumstance." Several jurisdictions prohibit any attempt to commit a potential juror to a verdict.

6. REHABILITATION OF JURY PANELISTS

Recommendation: That questions rehabilitating jury panelists be allowed within the trial court's exercise of discretion.

A. Arguments Favoring Recommendation:

1. Disqualifying answers can result from a panelist's haste, confusion, or misunderstanding of legal concepts.

2. Clarification by rule is required because of a widespread belief among lawyers and judges that the caselaw prohibits such questions.

B. Arguments Opposing Recommendation: No change is required. Cases are clear that rehabilitation attempts are futile after a panelist has given a clearly disqualifying answer.

C. Comment: Some Committee members believed that recourse to rehabilitation questions should be a matter of right while some thought the judge should be permitted to terminate such questioning once disqualification has become very clear.

7. ELIMINATE THE JURY SHUFFLE

Recommendation: That the jury shuffle be eliminated *except* when panelists have been reassigned after participating in jury selection in another case.

A. Arguments Favoring Recommendation:

1. Originally conceived to protect against jury stacking by unscrupulous officials, the shuffle is now outdated because of changes in selection methods.

2. Shuffles are used to discriminate against panelists based on appearance (race, gender, etc.) and may be constitutionally suspect under *Batson*.

3. Shuffle eliminates the benefit of randomness provided in the initial sequence.

B. Arguments Opposing Recommendation:

JURY PROCEDURES COMMITTEE
VI. SUBCOMMITTEE ON LIMITATIONS ON VOIR DIRE
A. PROHIBIT LEADING QUESTIONS

TABLE OF CONTENTS

I. PROPOSAL: Prohibit Leading Questions During Voir Dire.

II. ANALYSIS OF PROPOSAL: Pro/Con Debate.

A. Positive.

1. Lawyers often use leading questions as a tool to convert a peremptory challenge into a challenge for cause.[24] As one author points out, attorneys may lead a juror to give answers which imply bias or prejudice, when in fact, they have none.[25] Such practices lead to unnecessary excusals, frequent improper impaneling, and general uncertainty as to how to comply with the law.[26] Lawyers sometimes use leading questions to "stuff the most appalling mischaracterizations" into an unfavorable juror's mouth.[27]

2. Other lawyers use leading questions to "beg" a juror to admit a leaning toward one side or the other.[28] These questions are often asked in "legalese" so that the responses will have significance in the record for disqualification purposes, while jurors do not understand the exact consequences or implications of their responses and are being led to say something they may not mean.[29]

3. Leading questions do not allow us to hear what the juror has to say, only the lawyers.[30]

4. Other trial proceedings, such as the trial itself, limit leading questions.[31]

5. Potential jurors are not adverse parties[32] and should not be treated as such.

B. Negative.

1. Jurors are unlikely to volunteer information without being led. As one author notes, some panel members may fail to disclose information which would lead to a successful challenge for cause.[33] Many factors inhibit disclosure during voir dire, including formality of

the physical setting, the psychological formality, the brevity of the examination period, the public nature of disclosure and group conformity.[34]

2. Some panel members may intentionally lie.[35] Recent study of the voir dire process has indicated that deliberate falsities by some panel members to avoid a challenge are not uncommon.[36] If potential jurors are lying, it is important for lawyers to use all of the tools available to discover partiality and to choose the jury wisely.[37] Leading is one of those tools which may allow a lawyer to draw the information out of a juror who lies or fails to disclose.

3. Blanket restrictions on voir dire questions will ultimately unduly interfere with the right to a fair trial.[38] Arguably, any question which aims at exposing a juror's bias or prejudice against the litigants should be allowed by trial courts.[39]

4. Leading questions allow counsel to get a lot of information very quickly, thereby saving the court's and jurors' time. Judge Brister expresses concern over the juror's time[40] and another author notes that counsel must elicit meaningful responses within a tolerable length of time.[41] Open-ended questions allow much information to be retrieved from a willing juror, but are more time consuming.[42] More difficult panel members must be led to get at the same information. Leading allows the lawyer to get to the point much more efficiently.[43]

5. Leading allows the attorney the opportunity to show the judge that a "difficult juror" is hiding bias which may influence other jurors.[44] "The judge must see that the panel member should be removed for cause."[45] Even for those panel members who do not intentionally deceive, leading is often necessary.[46] Few jurors would ever admit in open court that they would not be fair, and leading is the only way to effectively demonstrate that to the judge.[47]

6. Leading is an important tool of the adversary process -- "persuasive questions" help persuade the jury about the case.[48]

7. Broad scope in questioning is more likely to elicit bias from potential jurors[49] and is important in exercising peremptory challenges wisely.[50] It is essential that attorneys obtain as much information about prospective jurors as possible so that they may challenge them, either for cause or peremptorily, if appropriate.[51] Any limit to voir dire which prevents the right of challenge should be condemned because it leaves the parties without access to a reasonable amount of information for making peremptory strikes.[52] Furthermore, much deeper probing is absolutely necessary in exercising peremptory challenges intelligently.[53]

8. While leading on direct examination is restricted during trial, there are numerous exceptions that allow leading questions on direct examination. These include situations where it is necessary to lead to develop the testimony of the witness[54] (e.g., in background or transition areas and where the witness is a minor, is of low intellect, or is infirm[55]). Also, leading on direct is permitted where the witness is a hostile witness, an adverse party, or is identified with an adverse party.[56]

III. OTHER JURISDICTIONS.

No rules or statutes were found in any other jurisdiction that would preclude leading questions. Very few states have statutes or rules of procedure regarding the scope or form of voir dire examination. Most of the states that have such rules do nothing more than state that the parties have the right to examine the panel, and that the scope of the questioning is within the discretion of the trial court. For example, the Alabama Rule 18.4 contains the following:

> (d) Scope of Examination. Voir dire examination of prospective jurors shall be limited to inquiries directed to basis for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their strikes.[57]

Some states do have more specific rules regarding the scope of voir dire questions. Idaho, for example, allows the trial judge to prohibit questions "not directly relevant to the qualifications of the juror, or is not reasonably calculated to discover the possible existence of a ground for challenge, or has been previously answered...."[58] Georgia's rule is stated inclusively, rather than exclusively:

> In the examination, the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning, or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror.[59]

The Arizona provision, Rule 47(b) of the Rules of Civil Procedure for the Superior Court of Arizona is as follows:

> 5. . . .
>
> 6. The court shall conduct a thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination. The parties, may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.[60]

The most extensive and helpful voir dire rule is a California provision. The rule begins by permitting a broad scope of questioning:

> During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.[61]

The rule then proceeds to authorize some reasonable limitations:

> The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed.[62]

The most restrictive rule in other states seems to be Wyoming's:

> (c) Examination of jurors. After the jury panel is qualified ,the attorneys, or a pro se party, shall be entitled to conduct the examination of prospective jurors, but such examination shall be under the supervision and control of the judge, and the judge may conduct such further examination as the judge deems proper. The judge may assume the examination if counsel or a pro se party fail to follow this rule. If the judge assumes the examination, the judge may permit counsel or a pro se party to submit questions in writing.
>
> (1) The only purpose of the examination is to select a panel of jurors who will fairly and impartially hear the evidence and render a just verdict.
> (2) The court shall not permit counsel or a pro se party to attempt to precondition prospective jurors to a particular result, comment on the personal lives and families of the parties or their attorneys, or question jurors concerning the pleadings, the law, the meaning of words, or the comfort of jurors.
> (3) In voir dire examination, counsel or a pro se party shall not:
>
> (A) Ask questions of an individual juror that can be asked of the panel or a group of jurors collectively;
> (B) Ask questions answered in a juror questionnaire except to explain an answer;

(C) Repeat a question asked and answered;
(D) Instruct the jury on the law or argue the case; or
(E) Ask a juror what the juror's verdict might be under any hypothetical circumstances.[63]

IV. RECOMMENDATIONS.

The committee recommends adoption of a rule of civil procedure giving the trial judge limited discretion to control the form and scope of the voir dire examination. See Proposed Rule, below. This proposal is in response to the concerns raised in the Proposals discussed in Tabs A, B and D. The committee generally concluded that such changes should be made in the criminal courts only after the rule has been tested in the civil courts for some time. Accordingly, no criminal rule is proposed.

Though each party should have the right to conduct a voir dire examination of the panel, this right should be subject to reasonable limitations by the court. The court should, for example, have the authority to impose reasonable time limits. The proper scope of the voir dire questioning should be limited to matters "reasonably related to the exercise of challenges for cause or peremptory challenges." There was some disagreement among committee members over this provision, as some members advocated a *right* to examine any prospective juror concerning any matter reasonably related to the exercise of challenges for cause or peremptory challenges. A majority of committee members believed, however, that the judge should have some discretion regarding what matters are relevant to the voir dire process. Thus, the proposed rule uses the permissive "may", rather than the mandatory "shall." Additionally, the matter must be "reasonably related" to potential challenges for cause or peremptory strikes.

The proposed rule would also grant limited discretion to the court to control the form of the examination. The court would have the ability to prohibit unreasonably invasive examination that goes beyond what is necessary or appropriate to the intelligent exercise of challenges and strikes. Additionally, a trial judge would have authority to prohibit questions that are needlessly repetitive. Also, the court could preclude argumentative questions, that is, questions that do nothing more than attempt to make a friendly panel member into a witness for the questioning lawyer. Some members of the Committee believed that judges should only preclude unreasonably invasive questions, and not repetitive or argumentative questions. The basis of this opposition is that such control over the form of questioning impinges too much on the adversary nature of the lawyer's role.

Some committee members proposed allowing the court to sustain objections to leading questions. This was a hotly debated provision. Those in favor of it believe that it is necessary to prevent efforts of counsel to abuse the process by putting words in the mouth of the panel member that force the person into disqualification. Opponents of the provision believe that while leading questions may sometimes be abused, they are essential tools to ferret out bias or prejudice in many prospective jurors. These committee members were concerned that any rule that would prohibit the abusive use of leading questions would probably also eliminate the permissible and necessary uses of leading questions. Thus, a slight majority of the committee voted to omit the leading prohibition from the proposed rule. The provision advocated by the minority of committee members is shown in brackets in the proposed rule.

It should be pointed out that the discretion of the court to control the form of the question should not be lightly invoked, but rather used only in the case of serious abuses. Thus, the

proposed rule permits the court to prohibit only *unduly* invasive, repetitive or argumentative questions and only if the court finds the questioning to be *unreasonable* thereby.

The remainder of the proposed rule – in paragraphs 3 and 4 -- is intended to be nothing more than a codification of existing law so as to make its application uniform in all courts. Thus, paragraph 3 requires a proper and correct explanation of the law before a party may inquire as to a prospective juror's opinion of it. Also, paragraph 3 makes clear that it is impermissible to ask questions intended to commit a panel member to a verdict or a certain view of the evidence.

Paragraph 4 addresses the problem of rehabilitation questions. Some Texas courts presently do not permit rehabilitation questions when the court feels that a bias or prejudice has been established. Courts in other parts of the state freely permit rehabilitation questions whenever a prospective juror is challenged for cause. The committee believes the law to be that such questions are permissible, though they may be unavailing if the bias or prejudice is established as a matter of law. While the committee was unanimous in favoring a provision allowing rehabilitation questions, there was disagreement as to how this would be carried out. Some members advocated a "right" to ask rehabilitation questions. It was their opinion that a rule merely permitting such questions at the court's discretion would cause some courts now freely permitting such questions to exercise their discretion to limit their use. Other committee members believed that the trial judge should have some discretion to terminate questioning if disqualification was very clear. If the Task Force chooses to codify a right to ask rehabilitation questions, then paragraph 4 should include the word "shall" as indicated by brackets in the proposed rule.

Rule ___. Voir Dire of Prospective Jurors; Scope and Form of Examination.

1. **By the Court.** After giving the admonitory instructions in Rule 226a, the court shall examine the prospective jurors as to their general qualifications for jury service. The court in its discretion may make a brief statement of the case, and may examine the prospective jurors as to disqualifications for the particular case. However, no examination by the court shall preclude the parties from making their own statements or examination.

2. **By counsel.** Each party shall have the right to make a brief statement of the case and conduct a reasonable examination of the prospective jurors. In appropriate cases, the court may allow all or part of such examination to be conducted outside the hearing of the other panel members or by written questionnaire. The court may place reasonable time limits upon such statement of the case and examination in accordance with the provisions of Rule ___.

3. **Scope.** Each party may examine any prospective juror concerning matters reasonably related to the exercise of challenges for cause or peremptory challenges. The court may, in its discretion, limit any examination that is unreasonable because it is unduly invasive, repetitive, **[leading and suggestive]** or argumentative. Questions concerning a prospective juror's opinion of applicable law must be prefaced by a proper statement thereof. A party may not inquire as to a prospective juror's probable vote, or attempt to commit a prospective juror to a particular verdict or finding as to any issue or evidence.

4. **Rehabilitation.** The court may examine, or **[shall]** allow any party to examine, a prospective juror for the purpose of clarification or reconsideration of a previous answer given by that prospective juror.

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11. Julie A. Wright, "Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification," 46 Baylor Law Review 825 (1994).

Rules and Statutes

1. Al. R. Crim. Proc. 18.4.

2. Az. St. R.C.P. 47(b).

3. Cal. Civ. Pro. § 222.5.

4. Ga. St. 15-12-133.

5. La. C.C.P. Art. 786.

6. New York CPL Section 270.15.

7. St. R.C.P. 47(i)(1).

8. Wy. St. R.C.P., Rule 47.

TRIAL PROCEDURES COMMITTEE
VI. SUBCOMMITTEE ON LIMITATIONS ON VOIR DIRE
B. PROHIBIT QUESTIONS WHICH ASK WHETHER JUROR IS "LEANING" AND WHAT WEIGHT WILL BE GIVEN TO CERTAIN EVIDENCE

TABLE OF CONTENTS

I. PROPOSAL: Prohibit Questions Which Ask Whether a Potential Juror Is "Leaning" Toward One Side and What Weight Jurors Will Give to Certain Evidence.

II. ANALYSIS OF PROPOSAL: Pro/Con Debate.

A. Positive.

1. Nobody thinks it is proper to state the facts and ask how the panel member thinks he or she will vote.[64] However, both "leaning" questions and "weight of evidence" questions essentially ask how a juror will ultimately vote or what steps he or she will take to get there.[65]

2. If we allow these questions, outrageous claims and defenses become tools to eliminate the most reasonable people.[66] Litigants are entitled to a jury of their peers, not their supporters.[67]

3. Questions about what weight a juror will give a certain piece of evidence invade the unique province of the jury.[68]

B. Negative.

1. Blanket restrictions on voir dire questioning will ultimately unduly interfere with the right to a fair trial.[69] Any question which attempts to expose bias or prejudice should be allowed.[70]

2. Broad scope questioning is more likely to elicit bias from potential jurors.[71] This is important to the intelligent exercise of peremptory challenges.[72] Generally, lawyers should obtain as much information as possible.[73] Access to reasonable amounts of information is absolutely necessary to exercise the allocated strikes.[74]

3. While it is true that weight given to a particular piece of evidence is within the "province of the jury," it is equally true that peremptory challenges can be exercised for any reason other than race or gender or "without a reason stated, without inquiry, and without being subject to

the court's control."[75] Banning the question prohibits the attorney from exercising a peremptory strike on someone who is technically not biased but can seriously affect the outcome of the trial because of his or her views on a particular piece of evidence. That juror can legitimately be struck peremptorily regardless of whether such a determination on weight was in the "province of the jury." A very good example is a series of questions regarding a juror's views concerning the use of alcohol.[76] It may not be appropriate to dismiss that juror for cause but such information remains an appropriate basis for a peremptory strike.[77]

4. Finally, the trial court already has the authority to prohibit such questions. The court has virtually unlimited discretion in conducting voir dire.[78] Counsel can make an objection and if the court views the question as "improper," the judge may sustain the objection and give any appropriate instructions to the jury. Case law has already established some areas that are inappropriate inquiries including questions which get the jury to commit to certain views or conclusions.[79]

Asking jurors to commit to how they will find the facts or the weight they will give to particular evidence or matters is not permitted.[80] The judge can easily sustain objections to "leaning" and "weight" questions which may be interpreted as "committing jurors." The judge's decision will almost never be overturned because such decisions are subject to the abuse of discretion standard of review.[81]

III. OTHER JURISDICTIONS.

Very few states have statutes or rules of procedure regarding the form of voir dire examination. Several jurisdictions do, however, prohibit by rule any attempt to commit a potential juror to a verdict. Mississippi, for example, forbids "hypothetical questions requiring any juror to pledge a particular verdict...."[82]

The very restrictive Wyoming Rule 47 contains several provisions concerning commitment of panel members:

> (c) Examination of jurors. After the jury panel is qualified ,the attorneys, or a pro se party, shall be entitled to conduct the examination of prospective jurors, but such examination shall be under the supervision and control of the judge, ...
>
> (1) ****
> (2) The court shall not permit counsel or a pro se party to attempt to precondition prospective jurors to a particular result, ...
> (3) In voir dire examination, counsel or a pro se party shall not:
>
> (A) ***
> (B) ***
> (C) ***
> (D) ***
> (E) Ask a juror what the juror's verdict might be under any hypothetical circumstances.[83]

IV. RECOMMENDATIONS.

See Recommedations, LEADING QUESTIONS, *supra.*

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Rules and Statutes

1. Ms. R. Unif. Justice ct. Rule 1.20.

2. Wy. St. R.C.P., Rule 47.

TRIAL PROCEDURES COMMITTEE
VI. SUBCOMMITTEE ON LIMITATIONS ON VOIR DIRE
C. ELIMINATE THE JURY SHUFFLE

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I. PROPOSAL: Eliminate the Jury Shuffle.

II. ANALYSIS OF PROPOSAL: Pro/Con Debate.

A. Positive.

1. Jury Shuffles have outlived their purpose. Originally conceived to protect against stacking of jurors by unscrupulous local officials, the jury shuffle is no longer necessary because of massive changes in the way panel members are selected.

2. Jury Shuffles are used to discriminate against panel members based upon their appearance -- namely, race or gender. Since the right to a shuffle is extinguished when voir dire examination by any party or lawyer begins,[84] the shuffle can only be based upon information gained by a visual examination of the panel. This makes the shuffle a tool for discrimination based upon appearance. Indeed, one author suggests that the jury shuffle is constitutionally suspect, based upon a *Batson* type of reasoning.[85]

3. Jury Shuffles eliminate the benefit of randomness in jury selection. While the usual justification for the shuffle is that it assures randomness, it is actually the opposite that occurs. The panel members are randomly selected when they enter the courtroom, but benefit of that randomness is eliminated by a shuffle.[86]

B. Negative.

1. Jury shuffles protect the litigants against unrepresentative jury panels. Though randomly selected, a particular jury panel might contain an inordinately large number of a certain category of person concentrated high on the list of the venire. Since a jury is selected from the top of the list, the panel from which the jury is taken is actually not a representative cross-section of the community. Randomness -- or pure chance -- produces a result that may not be fair. The shuffle could eliminate such an anomaly.

2. Jury shuffles don't discriminate against anyone because no one is excluded from jury service by a shuffle. Panel members are eliminated from jury service in three ways -- they are struck for cause, they are struck peremptorily, or they are not reached. The parties may effect the first two types of exclusion, but are not responsible for the third. Indeed, there is no guarantee that a shuffle will change the random result at all, and it could even increase the anomalous result.

III. OTHER JURISDICTIONS.

No other jurisdiction permits a jury shuffle as it is known in Texas.[87]

IV. RECOMMENDATIONS AND SUGGESTED RULE.

The committee recommends that the jury shuffle be eliminated in those cases in which the panel of prospective jurors is still random when seated in the assigned court. However, the committee recommends that the shuffle be retained in those cases in which the panel is no longer random because prospective jurors have been "recycled" after voir dire examination in another case. The committee therefore recommends that Tex. R. Civ. P. 223 be amended as follows:

Rule 223. Jury List in Certain Counties

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are randomly selected, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after ~~service~~ the completion of jury selection in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, ~~after such assignment to a particular court~~ upon re-assignment for a second or subsequent jury selection, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case where jurors are re-assigned for a second or subsequent voir dire.

The committee recommends the same rule for criminal cases in counties with interchangeable juries. Legislative action would be necessary for amendment of Tex. Code Crim. Proc. 35.11 as follows:

> The trial judge, on the demand of the defendant or his attorney, or of the State's counsel, shall cause a sufficient number of jurors from which a jury may be selected to try the case to be randomly selected from the members of the general panel drawn or assigned as jurors in the case, <u>but only if the panel so assigned contains persons who have been re-assigned for a second or subsequent jury selection</u>. The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a coy of the list to the state's counsel and to the defendant or his attorney.

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Rules and Statutes

1. Tex. R. Civ. P. 223.

TRIAL PROCEDURES COMMITTEE
VI. SUBCOMMITTEE ON LIMITATIONS ON VOIR DIRE
D. PERMIT REHABILITATION QUESTIONS TO PANEL MEMBERS

TABLE OF CONTENTS

I. PROPOSAL: Permit Rehabilitation Questions to Panel Members.

II. ANALYSIS OF PROPOSAL: Pro/Con Debate.

A. Positive.

1. Many times an answer indicating bias is based upon misunderstanding that can be cleared up by further questioning. Panel members are often confused or mislead into answers that disqualify them, when they are not in fact disqualified. Such an answer could also be due to a hasty reaction to a question, that might be retracted if given more time to reflect. In addition, such answers may be given because of the panel member's unfamiliarity with legal terms, standards or concepts.[88]

2. Even if the law is unclear as to whether such questioning is permitted, clarification is necessary because of a widespread belief that rehabilitation questions are improper. Even if the cases do not prohibit rehabilitation questions, there is a widespread belief among lawyers and judges that they do. Clarification of the law is needed.

B. Negative.

No change is necessary because present law does not prohibit questions that attempt to rehabilitate a panel member. The cases merely hold that such attempts do not save a panel member established by the record to be biased.[89]

III. OTHER JURISDICTIONS.

No similar provision, by rule or statute, was found in any other jurisdiction.

IV. RECOMMENDATION AND PROPOSED RULE.

See Recommendations, LEADING QUESTIONS, *supra*.

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BENCHMARK

Democracy Strikes Out

Peremptory strikes distort our juries, skew verdicts and waste money. Let's cut them in half.

by SCOTT A. BRISTER

In the parable of the wheat and the tares, Jesus tells of a farmer whose field is oversown with weeds by an enemy. The farmer orders his servants not to rip the weeds up, fearing some wheat might be ripped up in the process. Instead, the two are left to grow together until the harvest.

Though jury selection was hardly the subject of the parable, we might well take a lesson from it. Every panel has jurors who will turn out in the end to be "good" and "bad," depending on your perspective. But unlike the wise farmer, under the current rules of jury selection the venire is ripped up long before anyone can tell the difference, leaving hardly a stalk standing.

A number of rules and practices lay waste to those who might be jurors. Blanket exemptions for students, senior citizens and homemakers cut deep. Long trials make service impossible for all but a few. Lax voir dire rules that confuse initial impressions with bias cull many others.

Yet perhaps the most unkindest cuts of all are peremptory strikes. By definition, they are used on jurors as to whom no bias, disqualification or disability has been shown. They come at the end of a process that discards most of the public, and then give the litigants enough discretionary strikes to discard most of those left, just for good measure. Often they are based on little more than stereotypes, voodoo psychology or mere whim. Sometimes they say more about the biases of the litigants than the biases of any jurors.

Why are we doing this?

A Brief History of "Bias"

Historically, peremptory strikes developed long before anyone thought about making jury pools random. In ancient Rome, each litigant proposed 100 citizens as jurors. With good reason to suspect that some jurors were biased but wouldn't admit it, litigants had 50 peremptory strikes to use against their opponent's list without any proof of bias.

The Romans had little on the Founding Fathers when it came to hand-picking a jury venire. In Massachusetts, potential jurors were almost always white, property-holding, anti-British, male members of the established church.

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Again, litigants had reason to fear that the venire might be stacked by jurors who wouldn't admit bias, and a large number of discretionary strikes could lessen if not eliminate the problem.

Even through the 1960s, in most American courts, the jury pool was hand-picked, though somewhat less stacked. Jury commissioners proposed "responsible" members of the community for the venire. This tended to mean their friends and neighbors from the church, lodge and country club. Litigants outside those circles still had some basis to suspect bias might be implanted but not confessed by many of those jurors.

But we live in a different world today. Most jurisdictions spend a lot of money getting a broad, randomly selected cross-section of the community into the courtroom. To say they are then decimated is an understatement.

For over a century, the parties in Texas district courts have shared 12 peremptory strikes in civil cases, and 20 in criminal cases. That is, after those disqualified or biased are removed, the litigants can strike 50 percent of the jurors who might be reached and seated in a civil case, and 63 percent in a criminal case. Considering all the others already excused for disqualification, exemption or hardship, every jury in Texas represents a tiny minority of the cross-section originally summoned for the case [*See related chart, page 11*].

For example, jurors seated for trials in Harris County represent 6 percent of those summoned. With a population of over 3 million, very few are cut because they know the parties, the lawyers or the facts. No-shows, exemptions and disqualifications unrelated to the case cut 72 percent of the jurors summoned. Jury selection then eliminates most of the remainder, even though they are ready, able and (to some degree) willing to serve.

A definition of "bias" that routinely excludes a third or more of the qualified public "for cause" seems a bit too broad. But almost as many are excluded for no reason at all by discretionary strikes. No longer are voir dire and peremptory strikes tools to keep the government from hand-picking a jury. Instead they have become tools for the litigants to do exactly the same thing.

Of course, no one "picks" jurors — they are struck. Yet when strikes cut 60 to 80 percent of those eligible, there's little difference. A jury can be hand-picked simply by striking everyone else. A card shark with enough discards and draws needs nothing up his sleeve.

That doesn't necessarily mean that hand-picking works. There are more loaded hands in draw poker than in five-card stud, but no guarantee that *your* hand will be the most loaded. A system that allows too much winnowing and replacing is subject to "wild card" verdicts, but you never know which way.

OFTEN THESE STRIKES ARE MADE BASED ON STEREOTYPES, VOODOO PSYCHOLOGY OR MERE WHIM. SOMETIMES THEY SAY MORE ABOUT THE BIASES OF LITIGANTS THAN THE BIASES OF JURORS. BUT AT LEAST THEY GIVE LAWYERS THE ILLUSION OF CONTROL.

This is not to say that peremptory strikes are all bad. An argument can be made for striking jurors at the extremes, even at the cost of some diversity. In a democracy, justice must reflect to some degree the most widely accepted views. Stability and predictability may be enhanced by throwing out the high and low scores before counting the rest. But when peremptory strikes equal or exceed the number of the jury itself, they don't just trim the extremes, they can cut out the center.

The high mortality rate for jurors is also expensive. Though jurors receive only $6 a day, Harris County alone spends $2 million annually on juror fees. Qualified jurors get paid whether selected on a jury or not. Under Government Code section 62.021, jurors struck in Harris County cannot be re-used. Obviously, if only a small percentage of those qualified are seated, a lot of money is going to those who serve only as strike fodder.

For the same reason, efforts to increase juror compensation are doomed to failure in a selection system where many are called, few are chosen, but all must be paid. No

doubt more jurors would be willing and able to serve if juror fees were higher. But those struck would also want the same consideration. Any plan to increase juror compensation must begin by stemming the flood of people necessary to pick a jury.

Limited Strikes

Justice Thurgood Marshall and others have proposed that peremptory strikes be banned completely. The American Bar Association has adopted a less dramatic proposal — simply reducing the number of peremptories. In 1983, the ABA approved 19 "Standards Relating to Juror Use and Management." Standard 9 limits peremptory strikes per side in civil cases to three, in felony cases to five and in capital cases to 10. For juries of less than 12, the limit would be two. As of today, over half the states using 12-person juries meet or slightly exceed the ABA standard. Texas, as noted, doubles it.

The ABA's commentary points out that limiting the number of peremptory strikes not only saves time and money by reducing those called and questioned in jury selection, it also makes it harder to exclude any cognizable group. If, as some suggest, *Batson*'s protection for minority jurors has proved illusory, fewer peremptory strikes might do more without the cumbersome process of inquiring into lawyers' reasons for peremptories, and maybe encouraging some to lie.

The ABA standard has a safety valve — judges can allow more strikes in special cases. Pretrial publicity or other circumstances may make this necessary, but not in every case. The standard also calls for litigants to make alternating peremptory strikes. Unlike the current "blind" strike method where litigants may double-strike a juror, alternating strikes would ensure that none of a smaller number of peremptory strikes are wasted.

How could Texas trial lawyers even think about limits on jury selection, including fewer peremptory challenges? After all, the received wisdom is that jury selection is the most important part of the trial, that cases are won or lost during jury selection.

But what if the received wisdom is wrong? What if it turns out that verdicts depend on the evidence presented at trial rather than the jurors?

In fact, the vast majority of social science studies show that to be the case. Worse, most studies by social scientists show that lawyers have about the same ability to predict a juror's verdict as a coin toss. Admittedly, if a judge allows lawyers to ask jurors how they will vote, the odds can be improved. But assuming you can't do that, most of the information you can get in voir dire won't help. One study of over 800 jurors found that their education, occupation, politics, gender, age and trial experience *combined* could account for less than 2 percent of the variance in their verdicts. Even with the most expensive demographic information, accurate prediction never exceeds pure chance by more than 5 or 10 percent, with much of that difference attributable to an improper reliance on race.

Struggle for Control

How can this be? How can so many people think they are good at voir dire when scientific research shows they are not?

In the first place, lawyers make the strikes, so naturally they believe they make good ones. Psychologists call this phenomenon the "illusion of control." It's the same sentiment felt by those who believe they are good at picking lottery numbers or rolling dice.

Secondly, the struck jurors never stay for the trial and vote, so bad strikes are never discovered. In one study where jurors were paid to remain behind, prosecutors actually made the jury worse (from the state's perspective) by using their strikes. Lawyers get feedback only from jurors they don't strike. If we win, it confirms our ability to pick a jury; if we lose, we simply add several new categories of people to

CONTINUED ON PAGE 12

AVERAGE JUROR USAGE — HARRIS COUNTY COURTS (1995)

	Average Venire	Strikes for Cause	Peremptory Strikes	Jurors Seated
District court — civil	38	14	12	12
District court — family	49	25	12	12
District court — criminal	52	20	20	12

Except for the first column, these figures are estimated because no actual figures exist. Strikes for cause are estimated by subtracting the jury (12) and peremptory strikes (12 or 20) from the average venire. "Cause" includes jurors struck (1) for bias; (2) for a few disqualifications on other grounds; (3) by agreement; and (4) as "extras" to ensure the panel is not exhausted (allocated here because potential strikes for cause make them necessary). The chart assumes all peremptories and a full-size jury are used; to the extent that they are not, the strikes for cause figure should be even larger.

CONTINUED FROM PAGE 11

strike next time. The information received always favors more strikes, never fewer.

Finally, when six people on a panel say they don't trust big corporations or favor tort reform, what does that tell you about the rest? Nothing. Maybe they didn't understand the question, or weren't listening. Maybe they're too embarrassed to respond. Maybe they've never thought about it, but you'll be sorry when they do. Maybe they're lying to get on the jury. If you strike those six volunteers, you may have just struck the only six jurors conscientious enough to try to separate their feelings from their duties.

This is not a criticism of lawyers or jury consultants. The problem is that it is simply impossible to predict what a person will do when placed among 11 strangers in an unfamiliar and multivariable situation like a trial. People are complex creatures, and as we have all said about jurors, "you never know what they're going to do."

Even if they do no good, are numerous peremptory strikes needed for other reasons? Peremptory strikes, it is sometimes said, guarantee not just impartiality, but the *appearance* of impartiality. Litigants will feel they have gotten a fair trial if they can strike jurors on a mere suspicion of bias.

There are several problems with this argument. First, under the ABA standard, litigants can still strike jurors based on pure speculation, just not quite as many. Second, it presumes a sense of sportsmanship not common among American litigants who don't usually admit that they lost "fair and square." Third, voir dire is strictly a lawyer's game — if the clients rarely know what's going on, how can they feel unfairly treated? And finally, litigants aren't the only people who need to feel satisfied — the public must as well. If the public believes litigants can hand-pick the jury, they won't believe we are dispensing impartial justice.

A more distressing argument is that we need many peremptory strikes to protect vigorous inquiry into whether jurors are biased. In other words, if leading questions, bullying and embarrassment aren't enough to produce an admission of bias, no problem — you can strike that juror anyway. This is just an excuse to handle jurors rudely and get away with it.

There is no excuse for regularly cutting vast segments of the community by allowing cases to run too long, striking jurors for attitudes that don't constitute bias, or allowing too many peremptory strikes. We must do something to plug this leak, and halving the number of peremptory strikes is a good place to start. TTL

TEXAS EXCHANGE

opinions · commentary · analysis

TRIAL PROCEDURE BY SCOTT A. BRISTER

Wanted: Docile, Uninformed Jurors?

IF WE WANT A TRULY REPRESENTATIVE JURY, THERE ARE 10 PRACTICES WE SHOULDN'T ALLOW IN VOIR DIRE

It may seem strange that Americans entrust their lives and fortunes to 12 randomly selected strangers. Faith in the jury system is due in part to tradition, but the institution is supported by more than just habit. The American jury system has broad support because it is deeply democratic. While the entire nation cannot vote on each case, designating a random portion to do so ensures that the decisions reached, when viewed as a whole, will reflect the community's sense of justice.

This support is undermined if parts of the community never participate in visible and important cases. Americans have always distrusted a verdict by an "unrepresentative" jury. Recognizing this, the courts have moved to expand the pool of potential jurors, eliminating exclusions based on race and gender.

But there remains a practice that regularly eliminates the vast majority of the community from important cases: voir dire.

The voir dire process has gone far beyond excusing personal enemies of the litigants. It has become a tool for eliminating everyone except the uninformed and the docile. When hostile lawyers are unleashed upon a panel of hundreds, the handful left sitting will never represent a cross section of the community. As more jurors are eliminated, the panel becomes less reflective of the whole. The legitimacy of the entire system suffers.

Without time or subject matter limits on voir dire, lawyers can get rid of almost any juror they want. There is no proof, though, that they will get a more favorable verdict, and the cost of this diversion is high. Lost time for judges, litigants and jurors never can be recovered. Jury consultants are not cheap; only the wealthiest can afford them. A verdict by the few jurors who offended neither lawyer may well offend the public. No one will believe we dispense justice for all if few are chosen.

Scott A. Brister is judge of the 234th District Court in Houston.

The "Rules" of Voir Dire

It's nearly impossible to convince lawyers to restrict voir dire. Consider the following quotes from lawyers and consultants around the country: "Jury selection is the most important part of the trial"; "Voir dire in civil trials is the whole tamale"; "Voir dire determines the victor."

Isn't there a problem if everyone agrees a case is over before one shred of evidence is introduced or one witness has testified? Has American justice decayed to the point that we can skip the trial?

TIM FOLEY

Part of the problem with voir dire is that there is no specific rule. The Texas rules of civil and criminal procedure contemplate voir dire, but you will look in vain for a rule that defines or even requires it. Court guidelines are also few and usually pertain only to the right to counsel in criminal cases.

Thus, in large part the "rules" of voir dire are left to the discretion of judges and the imagination of lawyers. Not surprisingly, they vary wildly from case to case and place to place. Even if in many cases there are few problems, in large and long cases where the legitimacy of the verdict may become an issue, we need to rethink jury selection.

Rather than eliminating most jurors, we should consider eliminating the "Top 10" voir dire abuses, listed below.

#1. Leading

Leading questions are limited during trial because we want to hear what the witnesses, not the lawyers, have to say. Why shouldn't this apply to jurors? After all, this is voir dire, not ipse dixit ("he himself said it"). Lawyers often use leading questions as a tool to convert a peremptory challenge into a challenge for cause, not to gain information. In its most aggressive form, lawyers identify an unfavorable juror and then try to stuff the most appalling mischaracterizations into her mouth. Others use a more subtle approach: "Juror X, don't you think because of your background that you might possibly be leaning just a teeny-weeny bit toward my opponent?" This is not voir dire, it's begging. Potential jurors are not adverse parties. If we want them to speak the truth, leading questions should be barred.

#2. Leaning

Nobody thinks it's proper during voir dire to state the facts and ask potential jurors how they think they will vote. Yet many lawyers and judges apparently think it's proper to ask the same jurors if they are "leaning" toward or away from either side. There is no difference in these questions; both are improper. If we disqualify jurors based on their initial reactions to the facts, then outrageous claims and defenses become tools to eliminate the most reasonable people. Impartiality is not the absence of initial impressions but the willingness to keep an open mind. Litigants are entitled to a jury of their peers, not their supporters.

#3. Heavy evidence

A related practice involves asking jurors whether they will consider (or what weight they will give to) certain evidence. These questions compound the previous problem by asking not where jurors will end up, but what steps they might take along the way. In truth such questions are impossible to answer without all the facts, and, if based on all the facts, are nothing more than asking jurors how they'll vote. Further, giving varying levels of credence to evidence is not bias, it's why we have jurors in the first place. We invade the unique province of the jury if we disqualify jurors because they may give some evidence little or no weight.

#4. No rehabilitation

It is widely believed that jurors cannot be rehabilitated once they admit bias. Why should we give jurors less opportunity than felons? If the original statement was due to haste, misunderstanding or a misleading question, shouldn't a juror be allowed to set the record straight? Jurors are human, unfamiliar with the magic words that are the tools of the lawyer's trade. True, a prophylactic agreement to "follow the court's instructions" should not magically qualify a biased juror. But if rehabilitation means jurors can change their answers based on a better understanding of the law, the facts or the question, the rules need to allow it.

#5. Trading places

At some point in voir dire, a surprising number of lawyers throw open the floor to jurors with something like, "Do you have any questions for me?" Sure they do. They want to know about insurance coverage, prior convictions, settlement offers, traffic tickets, suppressed evidence and other topics we go to some length to exclude. We have rules of evidence to keep people from relying on things that history shows are not very reliable. If you give them an opening though, some jurors will head straight for the forbidden fruit. If lawyers run out of questions, they should have to sit down.

SEE TOP 10, PAGE 37

Top 10 Abuses of the Voir Dire Process

CONTINUED FROM PAGE 32

#6. Experts

Prejudice for or against a party disqualifies a juror. Yet judgments based on personal experience are quite different from those based on professional expertise. Experts can testify only if they will assist the jury, so the more expertise the better. If one side hires the world's best heart surgeon, forensic pathologist or trial lawyer, a juror who knows of and respects the expert shows brains, not bias. If we strike all jurors except the ones who are not impressed by the world's foremost authority, we will have a perverse jury indeed. Reasonable people take reputation and credentials into consideration. Parties hire experts and should not be penalized for getting good ones.

#7. Hypothetical damage awards

Lawyers often want to ask jurors whether they will consider a verdict of a particular type or size "if the evidence supports it." The problem with this inquiry is illustrated by a simple hypothetical: Suppose the amount suggested in a case with minor injuries is several billion dollars; do we really want a jury of people who (1) are crazy, or (2) weren't paying attention? Unlike criminal punishments, civil damages awards are not set by the Legislature; a juror who refuses to consider a particular amount is not refusing to "follow the law." If a verdict is going to seem reasonable to the community, we cannot prequalify jurors on its size.

#8. Shuffles

Most urban counties spend a great deal of money ensuring that the panel coming into the courtroom is in random order. It makes no sense to allow one side (and only one) to shuffle this arrangement. Any statistician will tell you the result is no longer random. Additionally, a shuffle request has to be made before any questioning, so it can be based only on what the jurors look like. There are very few things you can tell about people from just looking at them — and most of those things are suspect.

#9. Questionnaires

Many people swear by questionnaires, but none of them are jurors. Jury questionnaires inevitably broaden the scope of voir dire, allowing attorneys to ask what they would not dare ask aloud. Imagine asking jurors to state aloud their income, religious views, private reading material and psychiatric history. These questions are rarely relevant to the case; they are designed instead to eliminate jurors who don't fit a favorable psychological profile. That may have something to do with winning, but it has nothing to do with either bias or justice. Civic duty requires jurors to submit to jury service, but not to psychoanalysis.

JURY QUESTIONNAIRES INEVITABLY BROADEN THE SCOPE OF VOIR DIRE, ALLOWING ATTORNEYS TO ASK WHAT THEY WOULD NOT DARE ASK ALOUD.

#10. Unlimited time

It has been noted that the Ten Commandments are engraved over the bench of the U.S. Supreme Court. But another object suspended over the bench perhaps receives more attention from counsel: a large clock. Litigants arguing the most important cases in the country are allotted 30 minutes. Why then should voir dire last for hours? Time is as precious to jurors as it is to Supreme Court justices. Time limits have a remarkable power to focus a lawyer's attention. True, some jurors may confess bias after several hours of voir dire, but this may be due less to conscience than to convenience. Jurors are basically volunteers. When it becomes clear that no one cares about their time, they start looking for a way out. If we want a broad cross section of the community as jurors, we must be jealous of their time.

* * *

No doubt those of us who make a fine living in this business would prefer that nothing changes. But in case you hadn't noticed, we are under attack. Ten years ago most doctors thought the health-care system wasn't broken either; most of them now work at HMOs. Unless we all want to end up working for the Legal Services Corp., we must reform voir dire so that all Americans have a chance to serve on a jury, especially in the most important cases.

AN ACT

relating to summary judgments issued by a court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 40 to read as follows:

CHAPTER 40. SUMMARY JUDGMENT

Sec. 40.001. DEFINITION. In this chapter, "claim" means:

(1) a claim, counterclaim, or cross-claim under which a person seeks recovery of damages or other relief that may be granted by a court; or

(2) an action to obtain a declaratory judgment.

Sec. 40.002. WRITTEN FINDINGS REQUIRED; SCOPE OF APPELLATE REVIEW. (a) The judge of a court who grants a motion for summary judgment with respect to all or any part of a claim shall specify the grounds, in writing, on which the motion is granted not later than the date on which the judgment is signed by the judge of the court.

(b) Notwithstanding any other law, any court hearing an appeal from a grant of a motion for summary judgment shall determine the appeal only on the grounds specified in the written findings.

Sec. 40.003. SUMMARY JUDGMENT IN CERTAIN CASES: NOTICE REQUIRED IN CITATION. In a claim for a liquidated money demand or a claim involving a sworn account that is brought in a justice court, the clerk of the court shall include a notice in the citation that, unless a sworn answer is filed on behalf of the defendant, a summary judgment against the defendant may result.

Sec. 40.004. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE. To the extent of any conflict between this chapter and the Texas Rules of Civil Procedure, including Rule 166a, this chapter controls.

SECTION 2. This Act applies only to a grant of a motion for summary judgment on or after the effective date of this Act. A grant of a motion for a summary judgment before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 1999.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

_____ President of the Senate

_____ Speaker of the House

I certify that H.B. No. 2186 was passed by the House on May 8, 1999, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2186 on May 27, 1999, by a non-record vote.

_____ Chief Clerk of the House

I certify that H.B. No. 2186 was passed by the Senate, with amendments, on May 26, 1999, by a viva-voce vote.

_____ Secretary of the Senate

APPROVED: _____ Date

_____ Governor

OFFICE MEMORANDUM
STATE OF TEXAS
OFFICE OF THE GOVERNOR

Pursuant to Article IV; Section 14, of the Texas Constitution, I, George W. Bush, Governor of Texas, do hereby disapprove and veto House Bill No. 2186 because of the following objection:

House Bill No. 2186 proposes an unnecessary and confusing change to summary judgment law in civil cases. The proposed new requirements for trial judges conflict with the existing rules adopted by the Texas Supreme Court. This bill would discourage the speedy resolution of civil cases and encourage frivolous lawsuits.

IN TESTIMONY WHEREOF, I have hereunto signed by name officially and caused the Seal of the State to be affixed hereto at Austin, this 20th day of June, 1999.

George W. Bush
Governor of Texas

Sept. 22, 1998

Mr. Robert Pemberton
Chambers of Judge Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Tx. 78711

Dear Mr. Pemberton;

As you know, when a trial judge grants summary judgment and doesn't state what theories are granted and denied, then any basis is grounds for appellate affirmation.

I think trial judges should be encouraged by the rules when granting a summary judgement to state which theories were granted and which are overruled. This would conserve judicial as well as the parties' resources and result in shorter written opinions.

It seems strange that a party has 30 days to answer discovery but only 14 days to respond to a summary judgment motion. I think this should be expanded to 30 days. I have been in situations where I had to drop everything in order properly to respond to a summary judgment motion.

In general there are too many "gotchas" in Texas law where cases are decided on technicalities and not on the merits. For example, Tex.R.Civ.P. 54 and the cases construing it. Rule 54 on its face would also apply to personal injury and not just contract. Is that what you really want?

Sincerely,

George B. Green

George B. Green

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May 27, 1999

Via Telecopy No. (512) 463-1849
Governor George W. Bush
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

Re: *House Bill 2186*

Dear Governor Bush:

As a lawyer with over thirty years of experience, board certified in civil appellate law, and a member of the board of directors of the Texas Association of Defense Counsel, I have deep concern for the negative impact which the above-referenced bill will have on the administration of justice. The proposed House Bill 2186 will greatly disserve the interests of the citizens of this State. I am writing to urge you to exercise your veto power to prevent the ill-conceived House Bill 2186 from becoming law.

I served on the State Bar Committee on Administration of Justice (now the Court Rules Committee) from 1984 until 1994. My service included drafting the prototype for the amendment for "no evidence" summary judgments ultimately adopted by the Supreme Court in 1997. In 1993, the Supreme Court of Texas appointed me to be a member of its thirty-six member Advisory Commission. In both of those capacities, I have participated in the study of summary judgment procedure over a period of 15 years. I also drafted the proposed House bill to amend summary judgment practice (which led to the Court's 1997 amendment), and I testified before the House Committee on Civil Procedure in favor of that bill.

For many years, summary judgments in Texas have been governed by Rule 166a of the Texas Rules of Civil Procedure which were promulgated by the Supreme Court of Texas in the exercise of its rule-making power. Only twice in its history (in 1979 and 1997) has the Texas Rule been amended. Both of those amendments came only after years of experience and thorough study, not only by the Supreme Court but also by the lawyers of this State. In contrast, House Bill 2186 is based upon no such foundation of study or experience.

The fact is that this Bill will defeat the purpose of summary judgments. Since its inception, summary judgment procedure has been envisioned as a means of increasing judicial efficiency by eliminating unmeritorious claims and defenses. The intent of Rule 166a was to allow parties to cut through groundless allegations and to obtain early disposition of actions where a trial would be an empty formality, allowing the courts to devote their attention to those cases which have merit.

In order for the summary judgment procedure to work efficiently, it must operate smoothly and without wasted time and effort both by trial and appellate courts. When a summary judgment does not state the specific ground upon which it is granted, the Texas appellate courts have for many years consistently held that they may affirm such a judgment on any ground presented in the motion. In 1996, the Supreme Court further held that, even if the trial court judgment specifies the ground upon which it was granted, the judgment may be affirmed upon another ground presented by the motion.

House Bill 2186, sponsored by Harold Dutton and passed by the Senate yesterday, would specifically nullify those two judicially crafted rules which were designed to further streamline and make summary judgment procedure a useful vehicle for judicial efficiency. The House Bill would require a trial court to specify in writing the grounds upon which a summary judgment is granted. By an amendment tacked onto the bill in the Senate, the appellate courts could consider only those grounds upon which the motion was expressly granted, in determining whether to affirm.

By making the trial court specify a ground upon which a summary judgment is granted, and by taking away the appellate courts' ability to affirm on any other grounds, House Bill 2186 will discourage the use of the summary judgments by trial courts. Even worse, the Bill will greatly increase the number of reversals of summary judgments, requiring more trials, resulting in more appeals, culminating in undue delay and waste of judicial resources in the courts, and thereby defeating the whole purpose of the summary judgment procedure.

For these reasons, I again urge that you exercise your veto power to prevent House Bill 2186 from becoming the law of this State.

Yours respectfully,

Anne Gardner

Anne Gardner

AG:nj

TSL:030

cc: Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Ms. Patricia Kerrigan, President
Texas Association of Defense Counsel
400 West 15th Street, Suite 315
Austin, Texas 78701

Mr. David Davis
President-Elect
Texas Association of Defense Counsel
400 West 15th Street, Suite 315
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RULE 166a. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or

served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

(j) Statement of Grounds. An order granting summary judgment should state the ground or grounds on which the motion was granted. No judgment may be affirmed on other grounds unless they are asserted by cross-point in the appellate court as alternative grounds for affirmance.

COMMENT

1. New paragraph (j) encourages courts to specify the grounds on which they have granted a motion that urged multiple grounds. When an order specifies grounds, the appellant will have to challenge only the grounds on which the trial court rested its ruling. If the appellee's brief brings forward additional grounds for affirmance, the appellant will be able to address them in a reply brief.

2. Paragraph (j) does not require findings of fact, conclusions of law, or any other explanation or statement of reasons. It requires only that summary judgments state which ground or grounds support the judgment when the court sustained some grounds did not sustain others.

3. Nothing in paragraph (j) forbids general orders or orders stating that judgment was granted on each ground presented.

A:\sumjudgt.rul.wpd

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May 19, 1999

VIA FACSIMILE (409) 838-6959
Gilbert I. Low, Esq.
Orgain, Bell & Tucker
470 Orleans St.
Beaumont, Texas 77701

Dear Buddy:

New Rule of Civil Procedure 199.5(f) provides that

> "An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading or secure a ruling pursuant to paragraph (g) (emph. added)."

This provision was not in the original draft suggested to the Supreme Court. Instead, it was added by the Supreme Court over the objection of several members of their handpicked committee.

The Supreme Court's explanation of the new rule makes it even worse. Note 4 reads, in part,

> "A witness should not be required to answer whether he has ceased conduct he denies doing, subject to an objection to form (i.e., that the question is confusing or assumes facts not in evidence) because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer."

The point of the rule may have been to prevent questions such as "Have you stopped beating your wife?", but the effect is now that any time any question "assumes facts not in evidence", the lawyer is justified in instructing his witness to not answer the question.

A far simpler proposal would have been to follow the Federal Rule in this area. Fed. R. Civ. Proc. 30(d)(1) provides that:

> "A party may instruct the deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)."

When one looks at the other federal rules referenced in the subpart, it very clearly allows (and encourages) trial courts to award sanctions and fees for filing frivolous motions regarding deposition questions.

I think that the Supreme Court's new rule is creating more havoc than it is worth.

I hope this helps.

Very truly yours,

FRANK L. BRANSON

FLB:cm:im

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May 20, 1999

Hon. Nathan L. Hecht, Justice
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

I have had several lawyers complain to me about new Rule 199.5(f). The typical complaint is the same one that Frank Branson has made to me in his letter of May 19, 1999. I think we need to take a look at this problem the next time we meet.

Thanks.

Sincerely,

ORGAIN, BELL & TUCKER, L.L.P.

Buddy
Gilbert I. Low

GIL/cc

Enclosure

MEMORANDUM

TO: Chip Babcock January 7, 2000

FROM: Bob Pemberton

RE: Service of Discovery With Original Petition

Plaintiffs in some locales have been experiencing difficulty getting discovery served with their original petitions because court clerks, relying on Rule 191.4, have been refusing to accept the discovery. Attached is a letter that I originally proposed to send to clerks explaining one means of reconciling Rule 191.4 and rules contemplating service of discovery with the original petition: accept the discovery without filing it, reference the discovery on the citation, and forward the citation, petition, and discovery to the constable for service.

I also have heard that many litigants are simply attaching the discovery as an exhibit to their petition or integrating it into the body of the petition itself.

Richard Orsinger had two reservations about this proposal, one procedural, one practical. Concerning the procedural issue, he pointed out that Tex. R. Civ. P. 99 comprehensively sets forth the contents of the citation in a manner that, in his view, leaves no room for adding references to unfiled discovery, as we proposed. Richard added that, for this reason, litigants in Bexar County would obtain service of discovery prior to appearance date under the old rules via a "precept." The sole reference to a "precept" in the Texas rules and statutes appears in Tex. R. Civ. P. 16, which contemplates that "[e]very officer shall endorse on all process and precepts coming to his hand the date and hour on which he received them . . . ." Blacks Law Dictionary defines the term as:

> An order, writ, warrant, or process. An order or direction, emanating from authority, to an officer or body of officers, commanding him or them to do some act within the scope of their powers. An order in writing, sent out by a justice of the peace or other like officer, for the bringing of a person of record before him. Precept is not to be confined to civil proceedings, and is not of a more restricted meaning than "process." It includes warrants and processes in criminal as well as civil proceedings.

Richard's practical objection was that the citation — even if amended in the manner we suggest — would not necessarily put parties on notice that both a petition *and* discovery is

being served on them. This is especially true with regard to *pro se* litigants.

Taking Richard's comments and suggestions into account, there are at least the following six options for resolving the problem of clerks not accepting discovery for service with an original petition:

1. Encourage parties to obtain service of discovery through a precept. While consistent with Rule 99 and providing specific notice of the discovery, it would also be more expensive and inconvenient than other options. If we employ this option, the expense and inconvenience factors might effectively eliminate service of discovery prior to appearance date.

2. Stick with our original proposal. But if we agree with Richard, adding any mention of the attached discovery to the citation would contradict Rule 99.

3. Stick with our original proposal except don't ask clerks to reference the discovery on the citation. While maintaining consistency with Rule 99, this option would, as Richard suggests, create a trap for the unwary litigant.

4. Encourage litigants simply to attach discovery as an exhibit to their petition, as many now are doing. Again, this creates a trap for the unwary.

5. Amend Rule 191.4 to permit filing of discovery served with an original petition. This would be the same procedure used under the old rules. But it also would create the same trap for the unwary as options (3) and (4).

6. Amend Rule 99 to permit mention of attachments other than the petition in the citation, and otherwise stick with our original proposal.

I lean toward (3) for now and later (6).

R.H.P.