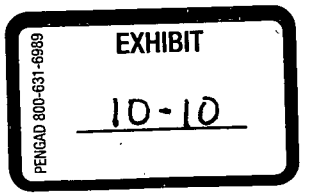
Date: November 16, 2009

To: The Texas Supreme Court Advisory Committee

Re: Sample language of new grounds for judicial recusal

From: Richard R. Orsinger, Chair of the Subcommittee on Rules 16 through 165a



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TRCP 18b(2) Current Language	TRCP 18b Recodification Draft (1997)
18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:	**(b) Grounds for Recusal.** A judge must recuse in the following circumstances:
(a) his impartiality might reasonably be questioned;	(1) the judge's 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;	(2) the judge has a personal bias or prejudice concerning the subject matter or a party;
(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;	(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;
(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;	(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;
	(5) the judge expressed an opinion concerning the matter 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.

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

II. COMPARING CURRENT TRCP 18b(2) LANGUAGE TO SCAC 3/27/2001 DRAFT.

TRCP 18b(2) Current Language	SCAC 3/27/2001 Draft TRCP 18b(2)
18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:	**(b) Grounds for Recusal.** A judge must recuse in the following circumstances, unless provided by Subsection (c) (or, "unless waived pursuant to subdivision (c)"):
(a) his impartiality might reasonably be questioned;	(1) the judge's impartiality might reasonably be questioned(4)
(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;	(2) the judge has a personal bias or prejudice concerning the subject matter or a party(5)
(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;	(3) the judge has been or is likely to be a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;
(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;	(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;(
	(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;(8)
(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.

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone known or disclosed to the judge to have a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding;

(9) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.

(10) the judge has accepted a campaign contribution, as defined in § 251.001(3) Election Code, which exceeds the limits in § 253.155(b) or § 253.157(a) of the Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in

§253.157(c) 253.157(e)of the Election Code, unless the excessive contribution is returned in accordance with §253.155(e) of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.

(11) a direct campaign expenditure as defined in § 251.001(7) of the Election Code which exceeds the limits in § 253.061(1) or 253.062(a) was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) of the Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

III. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO 28 U.S.C. § 144 (Bias or prejudice of judge).

TRCP 18b. (2) Recusal. A judge shall recuse himself in any proceeding in which: . . .

(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; . . . .

28 U.S.C. § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge

shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

IV. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO 28 U.S.C. § 455 (Disqualification of justice, judge, or magistrate judge)

TRCP 18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:	**28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge**
(a) his impartiality might reasonably be questioned;	(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
	(b) He shall also disqualify himself in the following circumstances:
(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;	(1) Where he has a personal bias or prejudice concerning 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;	(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer 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) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) 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;

(5) 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 acting as a lawyer in the proceeding;

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

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

(c) 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.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

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

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

(4) "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 sav-

ings 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.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

V. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO ABA MODEL CODE OF JUDICIAL CONDUCT, RULE 2.11 *Disqualification.*

18b. (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;

ABA Model Code of Judicial Conduct, RULE 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(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.

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that is greater than [$[insert amount] for an individual or

(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.

$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

[*indicates terms that are defined in the Model Code]

VI. CAMPAIGN CONTRIBUTIONS.

A. SCAC'S 3/27/2001 DRAFT.

. . . (10) the judge has accepted a campaign contribution, as defined in § 251.001(3) Election Code, which exceeds the limits in § 253.155(b) or § 253.157(a) of the Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in §253.157(c) 253.157(e)of the Election Code, unless the excessive contribution is returned in accordance with §253.155(e) of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.

(11) a direct campaign expenditure as defined in § 251.001(7) of the Election Code which exceeds the limits in § 253.061(1) or 253.062(a) was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) of the Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

B. TEXAS CODE OF JUDICIAL CONDUCT CANON 5.

(4) 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.

C. ABA'S MODEL CODE OF JUDICIAL CONDUCT 2.11 *Disqualification.*

. . . (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that is greater than [$[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]. [*indicates term with special definition in Model Code]

D. ALABAMA STATUTES.

ALABAMA CODE § 12-2-1. 12-24-1. Recusal of justice or judge due to campaign contributions

The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

ALABAMA CODE § 12-24-2. Filing by judges, justices, parties, and attorneys of disclosure statements concerning campaign contributions.

* * *

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

E. ARIZONA SUPREME COURT RULE 2.11.

17A A.R.S. Sup. Ct. Rules, Rule 2.11, Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous four years made aggregate contributions to the judge's campaign in an amount that is greater than the amounts permitted pursuant to A.R.S. § 16-905. (Effective 9/1/2009).

F. MISSISSIPPI CODE OF JUDICIAL CONDUCT, CANON 3.

. . . **(2) Recusal of Judges from Lawsuits Involving Major Donors.** A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

G. CAPERTON V. A.T. MASSEY COAL CO., INC. LANGUAGE.

". . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 2009 WL 1576573 at *11.

VII. CAMPAIGN SPEECH.

A. ABA'S MODEL CODE OF JUDICIAL CONDUCT 2.11 *Disqualification*.

. . . (5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy. [*indicates term with special definition in Model Code]

B. TEXAS CODE OF JUDICIAL CONDUCT CANON 5.

Old Canon 5(1) was declared unconstitutional in *Smith v. Phillips* 2002 WL 1870038, and was rescinded by the Supreme Court on August 22, 2002. Old Canon 5(1) read:

~~"a judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individuals' judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case."~~

Here is the relevant language of current Canon 5:

Canon 5. Refraining From Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

C. TEXAS CODE OF JUDICIAL CONDUCT CANON 3.B(10).

Canon 3. Performing the Duties of Judicial Office Impartially and Diligently

. . .

B. Adjudicative Responsibilities.

. . .

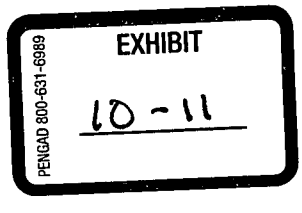
(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

To: Judge Tracy Christopher and the Texas Supreme Court Advisory Committee
From: Julie Kirkendall
Date: November 4, 2009
Re: Pattern Jury Instruction

I. Introduction: *Ford Motor Co. v. Castillo.*

The Texas Supreme Court recently considered a case in which a juror's misleading question during deliberations compelled the defendant to settle. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 659 (Tex. 2009). In *Ford Motor Co.*, the presiding juror sent an unsigned note to the judge to inquire about the maximum amount of damages that could be awarded to the plaintiff. *Id* at 659. Ford assumed that the jury had already determined the preceding question of liability and entered into a settlement agreement with the plaintiff. *Id* at 668. After the judge released the jurors, the other jurors revealed that they had not completed deliberations on the question of liability when the presiding juror sent the note. *Id* at 659. Ford requested the right to conduct post-settlement discovery, which the trial court denied. *Id* at 660.

While the Texas Supreme Court's opinion primarily discussed Ford's right to conduct discovery, Justice Wainwright wrote a concurrence criticizing the procedure for juror questions during deliberations. The note in this case came from a single juror, and there was evidence that the other jurors either objected to or did not know about the note. *Id* at 668. However, requiring the foreman to sign the jury question would not have changed the outcome in *Ford*, because the question in that case came from the presiding juror. Justice Wainwright believes that a single juror should not be allowed to send a note to the judge without at least informing the rest of the jury. *Id* at 669.



II. Current Texas law on communications between the judge and jury during deliberations.

Rule 285 of the Texas Rules of Civil Procedure states that: "The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their presiding juror, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 shall be followed."

Rule 286 of the Texas Rules of Civil Procedure states that: "After having retired, the jury may receive further instructions from the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their presiding juror state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court."

The current version of Texas Pattern Jury Charge 40.3 provides that it is the duty of the presiding juror to write down juror questions and give them to the bailiff, who will deliver the question to the judge. The instruction does not require that a minimum number of jurors support the question or sign the note.

III. Case law since 1984.

Ford was a case of first impression in the Texas Supreme Court. After an exhaustive search, it seems that there is no controlling case law on this particular topic since the pattern instruction was last amended in 1984.

IV. Pattern jury charges from states other than Texas.

See the attached document for the pattern jury charges of other states. Of the 29 states that have a relevant jury instruction that could be located, all but one requires that the instruction be in writing. 8 of the 29 states require that the question be signed by the juror that is sending it. 9 of the 29 states require that the question be sent by the foreman of the jury. None of the states require that the note indicate the number of jurors that join in the question.

Draft Proposal May 28, 2010

[Current Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a.

[Proposed New Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(a) *Request for Findings and Conclusions*

In any case tried in the district or county court without a jury, any party may request the court to make findings of fact and conclusions of law. Such request should be entitled "Request for Findings of Fact and Conclusions of Law" and must be filed with the clerk of the court within thirty days after judgment is signed. The clerk must immediately call such request to the attention of the judge who tried the case.

(b) *Duty to Make Findings and Conclusions*

The judge must make findings of fact and conclusions of law on each ultimate issue raised by the pleadings and evidence. Unless otherwise required by law, findings of fact should be in broad form whenever feasible. The trial court's findings must include only so much of the evidentiary facts as are necessary to disclose the factual basis for the court's decision. Unnecessary or voluminous evidentiary findings are not to be made.

[Current Rule]
RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

[Proposed New Rule]
RULE 297. MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon timely request, the court must make and file its findings of fact and conclusions of law within fifty days after the date a final judgment is signed and promptly send a copy to each party. [The trial court may state its findings and conclusions on the record, in the presence of counsel, after the close of the evidence.]

Subcommittee Comment:

The subcommittee debated the merits of adopting the federal practice of allowing trial court the discretion to orally make findings of fact and conclusions of law at the close of the evidence and on the record. The following pros and cons were evaluated:

Pros:
Parties would be getting the trial court's fresh unscripted impression of the evidence and the court's findings (as opposed to findings drafted by counsel and

adopted by the court). The findings would likely be succinct and not numerous and voluminous. Findings rendered after the close of the evidence would expedite the time frame for the court to set forth the grounds relied upon in support of the court's judgment.

Cons:
Most cases are not appealed, so judicial resources are best preserved by the trial court making findings of fact only in those cases formally requested.

The trial court's rulings pertaining to the judgment may be misinterpreted as broad form findings of fact. It may be difficult in bench trials to discern if the court intends, in its pronouncements accompanying rendition of judgment, to be making findings of fact that trigger the potential necessity to file a request for additional or amended findings of fact. The failure to so act may have adverse consequences on appeal. (Presumed findings for example) Also, counsel will have to bear the expense of obtaining the transcript.

While the trial court's findings of fact will be of record, counsel will need to get an expeditious transcript of the court's recitals to determine if a request for additional or amended findings of fact is in order. How will an unavailable or uncooperative court reporter affect the timeframe to make such a request? What if the court reporter was not present when the court made its oral findings?

If the trial court's pronouncement of oral findings of fact is the trigger event on the time frame to request additional or amended findings, satellite litigation is likely to ensue: Were all counsel present in the court room when the court made its oral findings of fact? Are oral pronouncements of the court findings of fact or a mere announcement of the court of its rulings pertaining to the judgment? If the judge makes a broad pronouncement of its "findings" such as the Defendant is negligent and owes the Plaintiff $500,000 is that sufficient broad form findings of fact or are these findings at all? Now must the losing party request additional findings on causation or risk a presumed finding?

[Current Rule]
RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.

The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

[Proposed New Rule]
RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) *Request for Additional or Amended Findings and Conclusions*
After the court makes original findings of fact and conclusions of law, any party may file a request for additional or amended findings of fact or conclusions of law. The request must state the specific additional or amended findings of fact requested and be made no later than twenty days after the filing of the court's original findings of fact and conclusions of law [or the court's oral pronouncement of the original findings and conclusions as the case may be].

(b) *Duty to Make Additional or Amended Findings and Conclusions*
The court must make and file any additional or amended findings of fact and conclusions of law that are proper within twenty days after the request is filed and promptly send a copy to each party. Any additional or amended findings of fact and conclusions of law made by the trial court must be in writing and filed with the clerk.

[Current Rule]

RULE 299. OMITTED FINDINGS AND PRESUMED FINDINGS

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[Proposed New Rule]
RULE 299. OMITTED FINDINGS

(a) Omitted Grounds

Findings of fact filed by the trial judge shall form the basis of the judgment upon all grounds of recovery or defense embraced therein. If no request is made for a finding on any element of a ground of recovery or defense and the ground has not been found by the trial court, the unrequested ground is waived unless the ground has been conclusively established under the evidence.

(b) Presumed Findings

When the trial court has made findings on some but not all elements of a ground of recovery or defense, the omitted elements that are necessarily refererable to the elements found are presumed in support of the judgment when supported by factually sufficient evidence. There is no presumed finding on the omitted element if a finding on that element has been requested.

(c) Trial Court's Failure To Make Finding

A trial court's failure to make a requested additional finding will not result in a presumed finding. Refusal of the court to make a requested finding shall be reviewable on appeal.

[Current Rule]
RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

[Proposed New Rule]
RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact must be filed apart from the judgment as a separate document. [Original findings of fact stated orally and recorded in open court following the close of the evidence shall satisfy this requirement.] If there is a conflict between recitals in a judgment and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Rules 296-299a do not apply to any recitals of findings of fact in a judgment.