SUPREME COURT OF TEXAS
JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE

REPORT AND RECOMMENDATIONS

FEBRUARY 23, 1999

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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.

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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

[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).

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

[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

[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.
>
> 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

[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

[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

[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

[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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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.

[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).

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

[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.