Date: August 24, 2009

To: The Texas Supreme Court Advisory Committee

Re: Background Memorandum on Tex. R. Civ. P. 18b: The Grounds for Judicial Recusal, showing past SCAC recommendations and providing contextual information regarding recusal for campaign speech and campaign contributions

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

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EXHIBITS

Current Rule 18b

1. Present Grounds for Recusal. Under the current version of Tex. R. Civ. P. 18b(2), a trial judge must recuse himself/herself in seven situations: (a) if his impartiality might reasonably be questioned; (b) if he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (c) if he or a lawyer with whom he previously practiced law has been a material witness concerning the case; (d) if he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of the controversy, while acting as an attorney in government service; (e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter or in a party to the proceeding, or any other interest that could be substantially affected by the outcome; (f) he or his spouse or any relative within the third degree by blood or marriage is a party, or officer, director or trustee of a party, and is known by the judge to have an interest that could be substantially affected by the outcome, or is to the judge's knowledge likely to be a material witness; and (g) if he or his spouse, or person within one degree of relationship to either of them, is acting as a lawyer in the proceeding. A copy of current TRCP 18b is attached to this Memorandum as **Exhibit 1**. Rule 18b can be compared to the Federal statutes governing recusal in Federal courts, 28 U.S. Code §§ 144 & 455, copies of which are attached as **Exhibit 2**.

   Texas Rule of Appellate Procedure 16 relates to disqualification and recusal of appellate justices. Rule 16.1 says that the grounds for disqualification are determined by the Constitution and law of Texas. This choice of wording reflects an awareness that the Texas Constitution governs disqualification, and that nothing is gained by restating the terms of the Constitution in a rule, particularly if the Rule doesn't exactly match the Constitution, which is a failing of TRCP 18b(1). TRAP 16.2 says that the grounds for recusal "are the same as those provided in the Rules of Civil Procedure." But TRAP 16.2 adds one more ground for recusal: "In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending."

Recodification Draft of Recusal Rule

2. 1997 "Recodification Draft." In 1997, a subcommittee of the Texas Supreme Court Advisory Committee (SCAC) concluded a multi-year effort to modernize the Texas Rules of Civil Procedure, updating the language and restructuring the Rules along logical lines, grouping related rules into one section of the Rules, etc. The 1997 Recodification Draft was formally forwarded to the SCAC by Professor William Dorsaneo in March of 2000. The Recodification Draft version of TRCP 18a and 18b is attached as **Exhibit 3**.

SCAC Suggests Amendments to TRCP 18b in 2001

3. 2001 SCAC Suggested Changes to Rule 18b. In February, 2001, the SCAC suggested changes to Rule 18b. The revised Rule 18b proposed by the SCAC is attached as **Exhibit 4**. These suggestions were forwarded to the Texas Supreme Court but were never acted upon. One group of changes suggested by the SCAC was a slight restructuring of the existing grounds for recusal, with no substantive changes in content. The second change was the addition of a new ground for recusal, when a lawyer in the proceeding, or his/her law firm, is currently representing the judge, or the judge's spouse or minor child, in ongoing litigation (other than a government attorney in his/her official capacity). The third change was to add a new ground for recusal based on campaign contributions in excess of the limits set by the Texas Election Code. These latter two changes are discussed below.

Representing the Judge, the Judge's Spouse or Child

4. Representing the Judge, or Judge's Spouse or Child. The new ground suggested by the SCAC in 2001, regarding a lawyer representing the judge in an ongoing legal proceeding, was as follows:

> (9) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.[13]
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> FN 13. Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.

Excessive Campaign Contributions

5. Under the Common Law, No Recusal for Campaign Contributions. Texas courts have rejected the argument that campaign contributions can be used to establish a bias that would warrant recusal. *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex. App.--El Paso 1993, writ denied); *J-IV Investments v. David Lynn Machine, Inc.*, 784 S.W.2d 106, 107 (Tex. App.--Dallas 1990, no writ); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.--San Antonio 1983, no writ).

6. Recommendations of the Judicial Campaign Finance Study Committee. In October of 1999, the Texas Supreme Court forwarded to the SCAC recommendations its received from the Judicial Campaign Finance Study Committee. Supreme Court of Texas Misc. Docket No. 99-9112 provided, in part:

> 2. Recommendation B: Promulgate rules extending and strengthening the contribution limits of the Judicial Campaign Fairness Act. The Committee proposed new procedural rules requiring judges to recuse themselves from any case in which a party, attorney, or certain relations or affiliates have made contributions or direct expenditures exceeding the contribution limits of the Judicial Campaign Fairness Act. [FN9] The Committee also recommended amending the Code of Judicial Conduct to make failure to recuse in accordance with the rule or violations of the Act subject to judicial discipline. [FN10]
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> The Court accepts the Committee's recommendation, and refers the recusal proposal to the Supreme Court Advisory Committee on the Rules of Procedure for assistance in drafting appropriate amendments to Rule 18a or 18b, Texas Rules of Civil Procedure, and Rule 16, Texas Rules of Appellate Procedure.

7. The SCAC Proposal Regarding Excessive Campaign Contributions. The SCAC's February, 2001 recommended changes to TRCP 18b relating to campaign contributions were contained in two subparts, as follows:

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

Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.

(11)[14] a direct campaign expenditure as defined in § 251.001(7) of the Election Code which exceeds the limits in § 253.061(1) or 253.062(a) of the Election Code was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) of the Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

FN 14. Paragraphs (10) and (11) are based on proposals by the Judicial Campaign Finance Study Committee. . . .

8. Texas Election Code Contribution Limits. Under the February 2001 SCAC-proposed changes to TRCP 18b, a campaign contribution would be the basis for recusal if it exceeds the limits set out in Tex. Elec. Code § 253.155(b). This section says that judicial candidates and officeholders cannot accept contributions from a person that exceed $5,000 for a statewide judicial office, or $1,000 for a judicial district with a population under 250,000, or $2,500 for a judicial district with a population of 250,000 to 1 million, or $5,000 for a judicial district with a population of over 1 million. The relevant TEC provisions are attached as **Exhibit 5**.

9. Texas Election Code Aggregation Rules. Tex. Elec. Code § 253.157 sets out aggregation rules, such that a judicial candidate or officeholder can only accept contributions of $50 from law firms, or members of law firms, that have collectively contributed six times the cap set out in Section 253.155(b). The aggregation rule applies to political action committees controlled by the law firm. See **Exhibit 5**.

10. ABA Model Code of Judicial Conduct (2007) Regarding Contributions. The American Bar Association has promulgated a Model Code of Judicial Conduct. Rule 2.11 deals with disqualification. The Rule says that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be questioned, including but not limited to the listed circumstances. It lists as one such circumstance in subsection (4), when the judge knows, or learns by means of a timely motion, that a party, party's lawyer, or law firm of a party's lawyer "has

within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $ [insert amount]...." Rule 2.11 is attached to this Memorandum as **Exhibit 6**. This ground for recusal was added by the ABA in 1999. So far, only two states have adopted language similar to Model Rule 2.11, Alabama and Mississippi. Copies of the Alabama and Mississippi recusal provisions are attached as **Exhibit 7**.

11. U.S. Supreme Court's Decision in *Caperton v. A. T. Massey Coal Co., Inc.*. On June 8, 2009, the U.S. Supreme Court issued its decision in *Caperton v. A. T. Massey Coal Co., Inc.*, 2009 W.L. 1576573 (U.S. Sup. Ct. 2009). The Court essentially held, by a 5-to-4 vote, that Due Process of Law required a Justice on the West Virginia Supreme Court to recuse himself because the defendant in the proceeding "had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at *11. In this instance, the Justice in question decided his own recusal, and two dissenting Justices cried "foul play." The Chief Justice of the West Virginia Supreme Court recused himself after first voting for the defendant, when pictures surfaced of him partying with the CEO of the defendant corporation on the French Rivera while the case was pending. The jury had found that the defendant had committed fraud. The circumstances were troubling. The Majority Opinion said: "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* at *12.

    Chief Justice Roberts' Dissenting Opinion attacked the subjectivity of the standard for when recusal would be constitutionally required for campaign contributions, listing a "parade of horribles" in the form of 40 rhetorical questions that have no ready answer. *Id.* at *17-20. Justice Scalia's short Dissenting Opinion criticized the decision as creating a "vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges." *Id.* at *23. He also criticized a "quixotic quest to right all wrongs and repair all imperfections through the Constitution." *Id.* *23.

    A more detailed discussion of *Caperton v. A. T. Massey Coal Co., Inc.* is attached as **Exhibit 8**.

12. Section 527 Organizations. The political contributions that caught the U.S. Supreme Court's eye were contributions to a Section 527 group that operated during the 2004 West Virginia Supreme Court election. Details of the role of two Section 527

organizations in the election are set out in Justice Benjamin's July 28, 2008 concurring opinion, pp. 42-46. *See* <http://judgepedia.org/images/f/f0/Harman_v_massey.pdf>. As quoted by Justice Benjamin, the U. S. Supreme Court said this about Section 527 organizations:

> Section 527 political organizations are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.
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> *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 174 n. 67, 124 S.Ct. 619, 678 n. 67, 157 L.Ed.2d 491 (2003) (internal quotations and citation omitted). A Section 527 "political organization need not declare contributions, dues, or fund-raising proceeds as income if the organization uses this money for the influencing or attempting to influence the selection, nomination or appointment of any individual to any Federal, State or local public office." *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003) (internal quotations and citation omitted).

Caperton v. A.T. Massey Coal Co., Inc., 679 S.E.2d 223 (W.Va. 2008) (Benjamin, Acting C.J., concurring).

In the West Virginia Supreme Court race, the 527 organization working against Justice Benjamin's opponent (called "ASK") received $3,623,500 in contributions, of which $2,460,500 came from the defendant corporation's CEO Blankenship. *Id.* at 75. As Justice Benjamin noted: ". . . I had no role and no control in anything that ASK did during the campaign; nor did I have any role in causing Mr. Blankenship or anyone else to contribute to ASK or otherwise do or not do anything in the 2004 Supreme Court election. . . . The fact that ASK invoked its federal right to take a position against Justice McGraw is not a valid evidentiary basis upon which to establish that I could not fairly and impartially decide the merits of the instant case." *Id.* at 75.

Recusal for Public Statements by Judge or Judicial Candidate

13. U.S. Supreme Court's Decision in *Republican Party of Minnesota v. White.* In *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), a 5-to-4 majority of the U.S. Supreme Court held that Minnesota's Code of Judicial Conduct violated the First Amendment to the extent that it attempted to prohibit a candidate seeking to be elected to a judicial office from announcing his or her views on disputed legal or political issues. *Id.* at 768 and 788. Because the provision prohibited speech based on content and because the speech in question was at the core of First Amendment freedoms (i.e., the qualifications of candidates for judicial offices), Justice Scalia's Majority Opinion applied "strict scrutiny" constitutional analysis. *Id.* at 774-775. This required the state to justify its restriction as being narrowly tailored to serve a compelling state interest. It is narrowly tailored only if it does not unnecessarily limit protected speech. *Id.* at 775. The state advanced two compelling state interests: preserving the impartiality of the judiciary and preserving the appearance of impartiality of the judiciary. *Id.* at 775. The Majority examined the idea of judicial impartiality. If impartiality means lack of bias against a *party*, the restriction failed because it restricted speech about *issues.* If impartiality means no preconception about a particular legal view, the Majority said it is not a compelling state interest, since all judges have views about legal questions. *Id.* at 777-778. If impartiality means open mindedness, or a willingness to consider views opposing his or her pre-conceptions about legal issues, restricting speech during but not before or after campaigns, and ignoring expressions of a judge's opinions in books, articles and prior written court opinions, reflects that the interest in restricting speech during election campaigns is not compelling. *Id.* at 779-780. Justice O'Connor joined in the Majority Opinion, but authored a Concurring Opinion in which she lamented judicial elections, and particularly campaign donations. Justice O'Conner said: "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 790 (O'Connor, J., concurring). Justice Kennedy joined in the Majority Opinion but authored his own Concurring Opinion in which he said that content-based restrictions on free speech are always invalid. He believes, however, that states are free to adopt recusal standards based on free speech that are more rigorous than due process requires. *Id.* at 7933-794 (Kennedy, J., concurring). A Dissenting Opinion authored by Justice Stevens, and joined by three other Justices, contrasted the work of a judge from the work of other public officials. *Id.* at 798 (Stevens, J., dissenting). Justice Stevens felt that judicial candidates announcing positions on issues that might come before them hurt the appearance of "institutional impartiality" necessary to legitimize the judiciary in the public mind. *Id.* at 802. He said: "While the problem of individual

bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy." He therefore felt the restriction on judicial candidates was constitutionally permissible. *Id.* at 802. Justice Ginsberg wrote her own Dissenting Opinion, joined in by the other three dissenters. Her Opinion mostly concerns the constitutionality of the ban against judicial candidates pledging or promising to rule in a certain way (an issue not before the Court in the case), and then says the prohibition against announcing a position is just another way of banning pledges or promises, which she says should be constitutionally permitted. *Id.* at 803-821 (Ginsberg, J., dissenting).

14. Old Texas Code of Judicial Conduct Canon 5(1) Declared Unconstitutional. Prior to August 22, 2002, Texas Code of Judicial Conduct Canon 5(1) provided:

> (1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

In *Smith v. Phillips*, 2002 WL 1870038 (W.D. Tex. August 6, 2002), then-Texas Supreme Court candidate Steven Wayne Smith filed suit challenging the constitutionality of Texas Code of Judicial Conduct, Canon 5. Federal District Judge Jim Nowlin found Canon 5 to be indistinguishable from the Canon held unconstitutional in *Republican Party of Minnesota v. White*, and so declared Canon 5(1) to be unconstitutional.

15. Texas Supreme Court Amends Canons 3 and 5. In Miscellaneous Docket 02-9167 (8-22-2002), the Texas Supreme Court hurriedly amended Canons 3 and 5, in light of the U.S. Supreme Court's holding in *White* and the fast-approaching November election. The Canons were amended to provide:

> **Canon 3(B)(10).** (10) A Judge shall abstain from public comment about a pending or impending proceeding which may come before a judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. ***This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or***

impending in the court on which the candidate would serve if elected. A [~~The~~] judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge ***or judicial candidate*** is a litigant in a personal capacity.

Canon 5. Refraining From Inappropriate Political Activity

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

~~2~~] A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions oflaw that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties;

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

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

The Supreme Court also promulgated the following Comment to Canon 5:

COMMENT

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

Justice Hecht issued a concurring statement, as follows:

> Before promulgating any rule, the Supreme Court of Texas must, in my view, determine that the rule does not violate the United States Constitution, the Texas Constitution, or federal or state law. The Court should not adopt rules of doubtful validity. A strict adherence to this standard must yield to present circumstances.
>
> After the United States Supreme Court's decision in Republican Party of *Minnesota v. White*, 122 S. Ct. 2528 (2002), it is clear that Canon 5(1) of the Texas Code of Judicial Conduct violates the First Amendment to the United States Constitution and should be repealed. It is less clear whether other Code provisions relating to judicial speech - Canon 3(B)(10) and the remainder of Canon 5 - are likewise infirm. The eminent members of the advisory committee appointed by the Supreme Court of Texas are not of one mind on the subject, and the issues and arguments they have raised in their deliberations over the past few weeks deserve thoughtful consideration. This can be done, however, only at the expense of delaying guidance to the scores of judicial campaigns well underway across the State. I agree with the Court that some immediate action is necessary while the Code is reviewed further.
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> Therefore I join in the Code amendments approved today although I remain in doubt whether they are sufficient to comply with the First Amendment.
>
> /s/ Nathan L. Hecht

16. 2005 Report of the Task Force on the Code of Judicial Conduct. On August 29, 2003, the Supreme Court appointed a Task Force on the Code of Judicial Conduct. Its purpose was to review the Texas Code of Judicial Conduct "to ensure that the integrity and independence of our judiciary is preserved." *Order Creating Task*

Force on Code of Judicial Conduct, Misc. Docket No. 03-9148 (August 29, 2003) [on Westlaw at 68 TXBJ 514]. The Task Force submitted its final report in June of 2005. Regarding Canon 5, the Task Force recommended the following amendment:

Canon 5. Refraining From Inappropriate Political Activity.

(1) The judicial branch of government cannot serve its function if judges are not both independent and impartial. To that end:

(a) A judge or judicial candidate should maintain the dignity appropriate to judicial office and conduct a judicial campaign consistent with the impartiality, integrity and independence of the judiciary. A statement or action by a person, while a judge or a candidate for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

(2) A judge or judicial candidate shall not:

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

(ii) knowingly, or with actual serious doubts about the truth of what is said, ~~recklessly~~ misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

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

The Task Force explained its recommendations in this way:

Canon 5.(1): After much debate and careful analysis of the *White* decision, the Task Force cannot recommend eliminating the restrictions on political

activity contained in Canon 5. The Task Force recognizes the state's compelling interest in having a judiciary that is fair, independent, and impartial. Thus, the Task Force recommends making little substantive revisions to Canon 5. Instead, the Task Force recommends revising Canon 5 to contain an introductory section -- taken in part from the Comment to Canon 5 in the August 2002 revisions to the Code -- that is not mandatory but is an admonishment to judges and judicial candidates that sets out core values that the Court hopes judges and judicial candidates will voluntarily seek to achieve. This self-regulation is necessary so that the candidate is able to fulfill his or her duties once in office. The Task Force does not intend for this aspirational provision to form the basis of any disciplinary proceeding against a judge or judicial candidate.

Old Canon 5.(1), now Proposed Canon 5.(2): The Task Force recommends replacing the word "recklessly" in old Canon 5.(1), now proposed Canon 5.(2), with a definition -- "with serious doubts about the truth" -- so that the mental state of one making a false statement is defined in the same way courts have defined "actual malice" in the cases that have followed *New York Times v. Sullivan*, 84 S.Ct. 710 (1964).

17. Canon 5 as Recusal Standard. The Comment to existing Canon 5 suggests that recusal for violations of Canon 5 could be premised on the ground that the judge's impartiality might reasonably be questioned. Arguably a violation of Canon 5 might also reflect that the judge has a personal bias or prejudice concerning the subject matter. A violation of Canon 5 could be listed as an express ground for recusal, or it can be left to fall under the first two grounds of recusal (impartially might reasonably be questioned and personal bias or prejudice).

18. ABA Model Code of Judicial Conduct (2007) Regarding Campaign Statements. The American Bar Association has promulgated a Model Code of Judicial Conduct. Rule 2.11 deals with disqualification, and is set out in full as **Exhibit 8**. The Rule says that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be questioned, including but not limited to listed circumstances. It lists one such circumstance in subsection (5), when the judge or judicial candidate made a public statement (not in a court proceeding) "that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

19. September, 2008 Draft Report of the ABA's Judicial Disqualification Project. The American Bar Association has funded a study on recusal standards. The most recent draft report of the Project, dated September, 2008 is at: <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf>. Highlights of this draft Report are presented at: <http://www.abanet.org/judind/pdf/LawWeekCaseFocus.pdf>

20. Other Resources. There are other resources on the internet relating to recusal of judges. Here are a few. You should be able to block copy the internet address (between <>) into your browser and see the document:

- ABA Standing Committee on Judicial Independence: <http://www.abanet.org/judind/home.html>

- July 24, 2009, meeting of the Board of Commissioners of the State Bar of Michigan: <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-SBM.pdf>

- Justice At Stake Caperton v. Massey Resource Page <http://justiceatstake.org/node/106>

- Brennan Center for Justice *Fair Courts: Setting Recusal Standards* (April 1, 2008) <http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf>

- video presentation of James Sample's speech on judicial campaign television advertisements: <http://www.brennancenter.org/content/resource/experience_in_other_states_supreme_court_recusal_litigation>

- HB 4584, 81st Texas Legislature (2009)–bill died in Committee <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB04548I.pdf>

- Legal blog with links to proposed recusal statutes that have not yet become law <http://www.gavelgrab.org/?p=951>

Exhibit 1

Current Version of Tex. R. Civ. p. 18b

Rule 18b. Grounds For Disqualification and Recusal of Judges

(1) Disqualification

Judges shall disqualify themselves in all proceedings in which:

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

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

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

(2) Recusal

A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

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

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

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

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

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

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

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

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

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

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

(4) In this rule:

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

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

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

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

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

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

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

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

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

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

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

Exhibit 2
The Federal Recusal Statute
28 U.S. Code § 144

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

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

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

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

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

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

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

(ii) Is acting as a lawyer in the proceeding;

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse

or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Exhibit 3
The Recodification Draft of TRCP 18a & 18b

Rule 134. Grounds For Disqualification and Recusal of Judges

(a) Grounds for Disqualification. A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;
(2) the judge has an interest in the matter, either individually or as a fiduciary; or
(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) Grounds for Recusal. A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned;
(2) the judge has a personal bias or prejudice concerning the subject matter or a party;
(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;
(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;
(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;
(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;
(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;
(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

(c) Waiver. Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record.

(d) Procedure.

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

(2) Referral. The judge must sign an order ruling on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) Interim Proceedings. A judge who refuses to recuse may proceed with the case if a motion to recuse alleges only grounds listed in subparagraph (b)(1), (b)(2) or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) Hearing. The presiding judge of the region must immediately hear or assign another judge to hear the motion, and must set a hearing to commence before such judge within ten (10) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing. The assigned judge must rule within twenty (20) days of referral or the motion is deemed granted.

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

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

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

(e) Financial Interest. As used in this rule, "financial interest" means "economic interest" as defined in Canon 8 of the Code of Judicial Conduct. Financial interest does not include an interest as a taxpayer, utility ratepayer, or any similar interest unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to the judge within the third degree more than other judges.

[Current Rule: Tex. R. Civ. P. 18b]. [Original Source; New Rule].

[Official Comments]:

Change by amendment effective September 1, 1990. The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).

Exhibit 4
2001 Version of Amended TRCP 18b Approved by the SCAC

March 27, 2001 — Changes made per CLB from Transcript
February 28, 2001 ~~[Novctnbcr 28, 2000]~~
(Babcock's 2/28/01 changes appear with ~~strikeout~~ and double underline
From 01/12/01 Griesel changes: **Additions in Bold and Underlined**
From 01/12/01 Griesel changes. (~~[Deletions appear with strikeout and brackets]~~)
SUPREME COURT ADVISORY COMMITTEE
SUBCOMMITTEE WORKING DRAFT
OF DISQUALIFICATION AND RECUSAL RULE PROPOSAL

Rule___ **Disqualification and Recusal of Judges**

(a) Grounds for Disqualification.(2) A Judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law in association with someone while that person acted as counsel in the matter;

(2) the judge has an interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) Grounds for Recusal(3) A judge must recuse in the following circumstances, unless **provided by Subsection (c).; waived pursuant to subdivision (c);**

(1) the judge's impartiality might reasonably be questioned(4)

(2) the judge has a personal bias or prejudice concerning the subject matter or a party(5)

(3) the judge has been or is likely to be a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;(6)

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;(7)

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;(8)

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;(9)

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone known or disclosed to the judge to have a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;(l0)

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third(' 1) degree to a lawyer in the proceeding. (12)

(9) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.(13)

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

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

~~[(12) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.]~~

(c) Waiver.(15) Disqualification cannot be waived. The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(d) If a judge does not discover that there must be a recusal under subparagraphs (b)(7) until after substantial time has been devoted to the matter, the judge is not required to recuse if the person, with the financial interest, divests of the interest that would otherwise require recusal.

(e) Procedure.

(1) Motion. A motion to disqualify or recuse a judge, associate judge, or statutory master, other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail the factual and legal basis for recusal or disqualification and, if applicable, any exception under subparagraph (e)(2), and must be made on personal knowledge(16)or upon information and belief if the grounds for such belief are stated specifically.(17) A judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion. 18 A motion to recuse must be verified; an unverified motion does not invoke the proceedings under this rule except for sanctions.(19) A motion to recuse a judge for any ground listed in subparagraph **(b)(10) or (b)(11)** ~~[(b)(9) of (b)(10)]~~ may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.(20)

(2) Time to File. A motion to disqualify **or recuse** may be filed at any time. A motion to recuse [iswaived] if filed later than the tenth day prior to the date the case is set for **conventional** trial **must state one or more of the following** ~~[or other hearing except in the following instances]~~:

(A) [~~when~~] the basis for recusal did not exist before ten (10) days prior to the date the case is set for **conventional** trial [~~or other hearing~~]; [~~or~~]

(B) the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for **conventional** trial [~~or other hearing~~]; [~~or~~]

(C) the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for **conventional** trial [~~or other hearing~~]; or

(D) other good cause.

[~~Any motion filed after the tenth (10th) day prior to the date the case is set for tiral or other hearing is governed by subparagraph (c)(4)].~~ (21)

(3) Referral.

The judge in the case in which the motion is filed must, **without further proceedings**, promptly **recuse or disqualify or refer the matter motion to the presiding judge of the administrative region without** [~~sign an order ruling on the motion prior to~~] taking any other action in the case. If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules. **The** [~~If the judge refuses to recuse or disqualify, the~~] judge must promptly refer **every motion to recuse or disqualify** [~~the motion~~] to the presiding judge of the administrative region, if the judge refuses to recuse or disqualify. If the judge in the case in which the motion is filed does not promptly **recuse or disqualify** [~~grant the motion~~] or refer **the matter motion** [~~it~~] to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion does not comply with subparagraph (e)(1) **,and subparagraph (e)(2) if applicable**, the said presiding judge may deny the motion without a hearing. If the motion complies with subparagraph (e)(1) **and subparagraph (e)(2), if applicable**, the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it. Notwithstanding any local rule or other law, after a motion to recuse or disqualify has been filed, no judge may preside, reassign, transfer, or hear any matter in the case, except pursuant to subparagraph (e)(4), before the motion has been decided by the judge assigned by the presiding judge of the administrative region, **except by agreement of parties as described above**.

(4) Interim Proceedings.(22) After referring the motion to the presiding judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of except for good cause stated in the order in which the action is taken. However, in the following instances, the judge **against whom the motion is directed** may proceed [~~with the case~~] as though **the** [~~no~~] motion had **not** been filed, pending a ruling on the motion:

(A) ~~when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph (c)(11)(b) regardless of the facts and legal basis alleged,(23) or~~ when the motion to recuse or disquality if filed after the 10th day prior to the date the case is set for conventional trial on the merits.(24)**; or**

(B) when the motion is the third or subsequent motion filed in the same case by the same party.

(5) Abatement of interim proceedings.(25) If all parties to the interim proceedings agree that the interim proceedings should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The presiding judge of the administrative region or the judge hearing the motion to recuse or disqualify may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.(26)

(6) Order entered during interim proceedings.(27) If the judge who signed any order in an interim proceeding pursuant to subparagraph (e)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.

(7) Hearing.(28) Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph e(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone and facsimile or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.

(8) Disposition. If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region. If an associate judge or a statutory master is recused or disqualified, the [district] court to whom the case is assigned must hear the case or appoint a replacement(29)

(9) Appeal. If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.(30)

(10) Assignment of Judges by Chief Justice of the Supreme Court. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.(31)

(11) Sanctions. Sanctions are authorized as follows:

~~(a)~~

(A) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b)(32)

~~(b)~~

(B) Upon denial of three or more motions filed in a case [~~against a judge~~] under this rule by the same party, the judge denying the third or subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs**, unless the party making such motion can demonstrate that the motion was not frivolous**. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs.

~~(c)~~

(C) A sanction order shall be subject to review on appeal from the final judgment.

(12) Justice of Peace Courts. This recusal rule does not apply to Justices of the Peace.

Comment 1: A motion to recuse or disqualify a statutory probate judge is governed by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

Comment 3: The term "conventional trial on the merits" is borrowed from North East Independent School District v. Aldridge, 400 S.W.2d 893, 897-898 (Tex. 1966). It means a case tried on the merits of the parties' substantive claims and defenses to a jury or to the court in accordance with the rules of civil procedure and evidence. It does not include other forms of adjudication, such as summary judgment proceedings, default judgment hearings, or cases disposed of on nonsuit, dismissed on motion for dismissal because of noncompliance with statutory prerequisites to the commencement or prosecution of suit or for failure to comply with the rules of civil procedure, for want of prosecution, pleas to the jurisdiction or pleas in abatement.

Comment 4: Section (e) (3) of this rule states that a judge handling a motion to recuse or disqualify must "without further proceedings" promptly recuse or disqualify or refer the matter to the presiding judge of the administrative region. The rule contemplates that the trial judge shall make a determination on the motion based only on the arguments made in and the evidence presented in a party's motion to recuse or disqualify and any response to the motion. While the trial court judge may hold a hearing to hear arguments on the merits of the motion to recuse or disqualify, the hearing is not evidentiary and may not be used as an "opportunity to develop a record regarding the motions to recuse". See In re Rio Grande Valley Gas Co., 987 S.W.2d 167, 179 (Tex. App.—Corpus Christi 1999, orig. proceeding). Section (e)(3) expressly disapproves any type of action by a judge on a motion to recuse or disqualify other than making a decision to recuse or disqualify or to refer the motion to the presiding judge of the administrative region or holding a hearing on the motion restricted to hearing arguments based on the party's motion or response and contrary holdings are overruled. See In re Rio Grande Valley Gas Co., 987 S.W.2d 167, 179 (Tex. App.-Corpus Christi 1999, orig. proceeding) and Winfield v. Daggett,846 S.W.2d 920,922 .--Houston 11st Dist.] 1993, no writ).

1. This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.
2. Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.
3. This section is derived from current Rule 18b(2).
4. From current Rule 18b(2)(a).
5. From current Rule 18b(2)(b).
6. From current Rule 18b(2)(c) & (f)(iii).
7. From current Rule 18b(2)(b).
8. From current Rule 18b(2)(d).
9. From current Rule 18b(2)(f)(i).
10. From current Rule 18b(2)(f)(ii).
11. Currently first degree.

12. From current Rule 18b(2)(g).
13. Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.
14. Paragraphs (10) and (11) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.
15. ~~This section is from~~ From current Rule 18b(5).
16. This requires details of facts and the legal basis for the motion, former rule required "grounds".
17. This sentence is from current Rule 18a(a).
18. This sentence is new.
19. The requirement that a motion be verified is based on current Rule 18a(a).
20. This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.
21. There is no ending date by which the motion must be filed if based on any of the exceptions in (e)(2) (A), (B), (C), or (D).
22. This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

[~~23. This provision is based on S.B. 788. Like S. B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.~~]

24. North East Independent School District v. Aldridge, 400 S.W.2d 893, 897-98 (Tex. 1966).
25. This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph (e)(6), below.
26. See (e)(7), last sentence.
27. This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that orders entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.
28. The following two subparagraphs revise existing procedures to improve expeditiousness.
29. Masters and associate judges maybe recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.
30. From current Rule 18a(f).
31. From current Rule 18a(g).
32. From current Rule 18a(h).

Exhibit 5
Texas Election Code Provisions

TEC § 253.155. Contribution Limits

(a) Subject to Section 253.1621, a judicial candidate or officeholder may not, except as provided by Subsection (c), knowingly accept political contributions from a person that in the aggregate exceed the limits prescribed by Subsection (b) in connection with each election in which the person is involved.

(b) The contribution limits are:

(1) for a statewide judicial office, $5,000; or
(2) for any other judicial office:
(A) $1,000, if the population of the judicial district is less than 250,000;
(B) $2,500, if the population of the judicial district is 250,000 to one million; or
(C) $5,000, if the population of the judicial district is more than one million.

(c) This section does not apply to a political contribution made by a general-purpose committee.

(d) For purposes of this section, a contribution by a law firm whose members are each members of a second law firm is considered to be a contribution by the law firm that has members other than the members the firms have in common.

(e) A person who receives a political contribution that violates Subsection (a) shall return the contribution to the contributor not later than the later of:

(1) the last day of the reporting period in which the contribution is received; or
(2) the fifth day after the date the contribution is received.

(f) A person who violates this section is liable for a civil penalty not to exceed three times the amount of the political contributions accepted in violation of this section.

§ 253.157. Limit on Contribution by Law Firm or Member or General-Purpose Committee of Law Firm

(a) Subject to Section 253.1621, a judicial candidate or officeholder may not accept a political contribution in excess of $50 from a person if:

(1) the person is a law firm, a member of a law firm, or a general-purpose committee established or controlled by a law firm; and

(2) the contribution when aggregated with all political contributions accepted by the candidate or officeholder from the law firm, other members of the law firm, or a general-purpose committee established or controlled by the law firm in connection with the election would exceed six times the applicable contribution limit under Section 253.155.

(b) A person who receives a political contribution that violates Subsection (a) shall return the contribution to the contributor not later than the later of:

(1) the last day of the reporting period in which the contribution is received; or

(2) the fifth day after the date the contribution is received.

(c) A person who fails to return a political contribution as required by Subsection (b) is liable for a civil penalty not to exceed three times the total amount of political contributions accepted from the law firm, members of the law firm, or general-purpose committees established or controlled by the law firm in connection with the election.

(d) For purposes of this section, a general-purpose committee is established or controlled by a law firm if the committee is established or controlled by members of the law firm.

(e) In this section:

(1) "Law firm" means a partnership, limited liability partnership, or professional corporation organized for the practice of law.

(2) "Member" means a partner, associate, shareholder, employee, or person designated "of counsel" or "of the firm".

§ 253.160. Aggregate Limit on Contributions from and Direct Campaign Expenditures by General-Purpose Committee

(a) Subject to Section 253.1621, a judicial candidate or officeholder may not knowingly accept a political contribution from a general-purpose committee that, when aggregated with each other political contribution from a general-purpose committee in connection with an election, exceeds 15 percent of the applicable limit on expenditures prescribed by Section 253.168, regardless of whether the limit on expenditures is suspended.

(b) A person who receives a political contribution that violates Subsection (a) shall return the contribution to the contributor not later than the later of:

(1) the last day of the reporting period in which the contribution is received; or

(2) the fifth day after the date the contribution is received.

(c) For purposes of this section, an expenditure by a general-purpose committee for the purpose of supporting a candidate, for opposing the candidate's opponent, or for assisting the candidate as an officeholder is considered to be a contribution to the candidate unless the campaign treasurer of the general-purpose committee, in an affidavit filed with the authority with whom the candidate's campaign treasurer appointment is required to be filed, states that the committee has not directly or indirectly communicated with the candidate's campaign, including the candidate, an aide to the candidate, a campaign officer, or a campaign consultant, or a specific-purpose committee in regard to a strategic matter, including polling data, advertising, or voter demographics, in connection with the candidate's campaign.

(d) This section does not apply to a political expenditure by the principal political committee of the state executive committee or a county executive committee of a political party that complies with Section 253.171(b).

(e) A person who violates this section is liable for a civil penalty not to exceed three times the amount by which the political contributions accepted in violation of this section exceed the applicable limit prescribed by Subsection (a).

§ 253.1601. Contribution to Certain Committees Considered Contribution to Candidate

For purposes of Sections 253.155, 253.157, and 253.160, a contribution to a specific-purpose committee for the purpose of supporting a judicial candidate, opposing the candidate's opponent, or assisting the candidate as an officeholder is considered to be a contribution to the candidate.

§ 253.161. Use of Contribution from Nonjudicial or Judicial Office Prohibited

(a) A judicial candidate or officeholder, a specific-purpose committee for supporting or opposing a judicial candidate, or a specific-purpose committee for assisting a judicial officeholder may not use a political contribution to make a campaign expenditure for judicial office or to make an officeholder expenditure in connection with a judicial office if the contribution was accepted while the candidate or officeholder:

(1) was a candidate for an office other than a judicial office; or

(2) held an office other than a judicial office, unless the person had become a candidate for judicial office.

(b) A candidate, officeholder, or specific-purpose committee for supporting, opposing, or assisting the candidate or officeholder may not use a political contribution to make a campaign expenditure for an office other than a judicial office or to make an officeholder expenditure in connection with an office other than a judicial office if the contribution was accepted while the candidate or officeholder:

(1) was a candidate for a judicial office; or

(2) held a judicial office, unless the person had become a candidate for another office.

(c) This section does not prohibit a candidate or officeholder from making a political contribution to another candidate or officeholder.

(d) A person who violates this section is liable for a civil penalty not to exceed three times the amount of political contributions used in violation of this section.

§ 253.1611. Certain Contributions by Judicial Candidates, Officeholders, and Committees Restricted

(a) A judicial candidate or officeholder or a specific-purpose committee for supporting or opposing a judicial candidate or assisting a judicial officeholder may not use a political contribution to knowingly make political contributions that in the aggregate exceed $100 in a calendar year to a candidate or officeholder.

(b) A judicial candidate or a specific-purpose committee for supporting or opposing a judicial candidate may not use a political contribution to knowingly make political contributions to a political committee in connection with a primary election.

(c) A judicial candidate or a specific-purpose committee for supporting or opposing a judicial candidate may not use a political contribution to knowingly make a political contribution to a political committee that, when aggregated with each other political contribution to a political committee in connection with a general election, exceeds $500.

(d) A judicial officeholder or a specific-purpose committee for assisting a judicial officeholder may not, in any calendar year in which the office held is not on the ballot, use a political contribution to knowingly make a political contribution to a political committee that, when aggregated with each other political contribution to a political committee in that calendar year, exceeds $250.

(e) This section does not apply to a political contribution made to the principal political committee of the state executive committee or a county executive committee of a political party that:

(1) is made in return for goods or services, including political advertising or a campaign communication, the value of which substantially equals or exceeds the amount of the contribution; or

(2) is in an amount that is not more than the candidate's or officeholder's pro rata share of the committee's normal overhead and administrative or operating costs.

(f) For purposes of Subsection (e)(2), a candidate's or officeholder's pro rata share of a political committee's normal overhead and administrative or operating costs is computed by dividing the committee's estimated total expenses for a period by the number of candidates and officeholders to whom the committee reasonably expects to provide goods or services during that period.

(g) A person who violates this section is liable for a civil penalty not to exceed three times the amount of political contributions used in violation of this section.

§ 253.162. Restrictions on Reimbursement of Personal Funds and Payments on Certain Loans

(a) Subject to Section 253.1621, a judicial candidate or officeholder who makes political expenditures from the person's personal funds may not reimburse the personal funds from political contributions in amounts that in the aggregate exceed, for each election in which the person's name appears on the ballot:

(1) for a statewide judicial office, $100,000; or

(2) for an office other than a statewide judicial office, five times the applicable contribution limit under Section 253.155.

(b) A judicial candidate or officeholder who accepts one or more political contributions in the form of loans, including an extension of credit or a guarantee of a loan or extension of credit, from one or more persons related to the candidate or officeholder within the second degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, [FN1] may not use political contributions to repay the loans.

(c) A person who is both a candidate and an officeholder may reimburse the person's personal funds only in one capacity.

(d) A person who violates this section is liable for a civil penalty not to exceed three times the amount by which the reimbursement made in violation of this section exceeds the applicable limit prescribed by Subsection (a).

§ 253.1621. Application of Contribution and Reimbursement Limits to Certain Candidates

(a) For purposes of a contribution limit prescribed by Section 253.155, 253.157, or 253.160 and the limit on reimbursement of personal funds prescribed by Section 253.162, the general primary election and general election for state and county officers are considered to be a single election in which a judicial candidate is involved if the candidate:

(1) is unopposed in the primary election; or

(2) does not have an opponent in the general election whose name is to appear on the ballot.

(b) For a candidate to whom Subsection (a) applies, each applicable contribution limit prescribed by Section 253.155, 253.157, or 253.160 is increased by 25 percent. A candidate who accepts political contributions from a person that in the aggregate exceed the applicable contribution limit prescribed by Section 253.155, 253.157, or 253.160 but that do not exceed the adjusted limit as determined under this subsection [FN1] may use the amount of those contributions that exceeds the limit prescribed by Section 253.155, 253.157, or 253.160 only for making an officeholder expenditure.

Exhibit 6

ABA Model Code of Judicial Conduct, Rule 2.11

ABA Model Code of Judicial Conduct, RULE 2.11 *Disqualification*

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

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

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

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

(b) acting as a lawyer in the proceeding;

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

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

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

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

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

(6) The judge:

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

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

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

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

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

> (1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

Terminology

"**Aggregate**," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent. See Rules 2.11 and 4.4.

"**Contribution**" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.

"**De minimis**," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

"**Domestic partner**" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, 3.13, and 3.14.

"**Economic interest**" means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;
(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
(4) an interest in the issuer of government securities held by the judge.
See Rules 1.3 and 2.11

"**Fiduciary**" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"**Impartial**," "**impartiality**," and "**impartially**" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"**Judicial candidate**" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.

"**Knowingly**," "**knowledge**," "**known**," and "**knows**" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

"**Member of a judge's family residing in the judge's household**" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

"**Third degree of relationship**" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Exhibit 7

Alabama Statute on Recusal for Campaign Contributions

and

Mississippi Code of Judicial Conduct Canon on
Recusal for Campaign Contributions

Alabama Code 1975

Alabama Code § 12-24-1. Recusal of justice or judge due to campaign contributions.

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

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

(a) Any justice or judge of an appellate or circuit court of this state shall file, at least two weeks prior to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court within 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court

proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b) (2) (C, D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

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

Mississippi Code of Judicial Conduct, Canon 3

CANON 3 A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. * * *

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

COMMENTARY

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

* * *

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

COMMENTARY

Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of

disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a).

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

COMMENTARY

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a government agency, however, should disqualify themselves in a proceeding if the judges' impartiality might reasonably be questioned because of such association.

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or

in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

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

(ii) is acting as a lawyer in the proceeding;

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

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

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might be questioned by a reasonable person knowing all the circumstances "under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

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

COMMENTARY

Section 3E(2) recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality. The filing, consideration and appellate review of motions for recusal based on such donations are subject to

rules governing all recusal motions. For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a). This provision does not appear in the ABA Model Code of Judicial Conduct; however, see Section 3E(1)(e) of the ABA model.

F. Remittal of Disqualification. * * *

Exhibit 8

Caperton v. A. T. Massey Coal Co., Inc.

Analysis of *Caperton v. A. T. Massey Coal Co., Inc.*

In this case, a litigant (Caperton) recovered a $50 million jury verdict against a defendant (Massey), for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The verdict was returned in August 2002. *Caperton* at *4. In June 2004, the trial court denied Massey's attack on the jury verdict. In March 2005, the trial court denied Massey's motion for judgment as a matter of law. *Caperton* at *4. During 2004, West Virginia conducted judicial elections in which Massey, and its CEO Don Blankenship, supported judicial candidate Brent Benjamin in his effort to unseat the incumbent West Virginia Supreme Court Justice Warren McGraw. *Caperton* at at *4.

West Virginia law had a statute limiting individual contributions to judicial campaigns to $1,000. However, an organization called "And For the Sake of the Kids," formed under 26 U.S.C. § 527, supported Benjamin in his effort to unseat Justice McGraw. Blankenship donated nearly $2.5 million to the organization, constituting more than 2/3 of the organization's total contributions. *Caperton* at *4. Blankenship also spent $500,000 on direct mailings, solicitation letters, and television and newspaper ads supporting Benjamin. *Caperton* at *4. Blankenship's $3 million in contributions exceeded money spent by all other Benjamin supporters and three times the amount spent by Benjamin's campaign committee. Benjamin won the election by a 53.3-to-46.7% vote. *Caperton* at *4.

In October 2005, Caperton moved to disqualify Justice Benjamin based on the campaign contributions made by Blankenship. Justice Benjamin declined to disqualify himself, issuing a recusal memorandum in April 2006 saying that the evidence supporting the motion contained "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." *Caperton* at *4. Note that Justice Benjamin addressed the subjective standard for recusal, with no mention of the state's objective reasonable person test. In December 2006, the West Virginia Supreme Court granted appellate review, and in November 2007 reversed the $50 million verdict against Massey. *Caperton* at *4. The majority opinion authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, based on two doubtful legal propositions. *Caperton* at *4. Two justices dissented, with dissenting Justice Starcher calling the majority opinion "morally and legally wrong." *Id.* at *4. Meanwhile, photos surfaced of Justice Maynard vacationing with Blankenship in the French Rivera while the case was pending, and Justice Maynard recused himself. *Id.*

at *4. Justice Starcher also disqualified himself, saying that Blankenship's wealth, political tactics, and "friendship" "have created a cancer in the affairs of this Court." *Id.* at *5.

The West Virginia Supreme Court granted rehearing, with Justice Benjamin acting as chief justice, and Benjamin selected two judges to replace the recused judges. *Caperton* at *5. Caperton filed a third motion to recuse, saying that Justice Benjamin failed to apply to his own recusal the objective standard of whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." *Caperton* at *5. Caperton submitted a poll reflecting that more than 67% of West Virginians doubted Justice Benjamin's impartiality. Justice Benjamin refused to recuse, calling the poll a "push poll" that was neither credible nor sufficiently reliable to serve as a basis for disqualification. *Caperton* at *5. The West Virginia Supreme Court again reversed the judgment by a 3-to-2 vote, the two dissenters labeling the majority opinion as "unsupported by the facts and existing case law," and "fundamentally unfair." The dissenters also noted "genuine due process implications arising under federal law," with respect to Justice Benjamin's failure to recuse himself. *Caperton* at *5. After petition for writ of certiorari was filed in the U.S. Supreme Court, Justice Benjamin filed a concurring opinion, defending the reasoning of the majority opinion, as well as his decision not to recuse, and rejecting due process grounds for his recusal. He denied any "direct, personal, substantial, and pecuniary interest" in the case, and rejected an "appearances" standard for recusal as being too subjective. *Caperton* at *5.

The U.S. Supreme Court, in a 5-to-4 decision, remanded the case to be reheard without Justice Benjamin's involvement, and presumably with new replacement judges filling in for the two previously-recused justices. The Majority Opinion was written by Justice Kennedy, who was joined by Justices Stevens, Souter, Ginsburg, and Breyer. A Dissenting Opinion was written by Chief Justice Roberts, who was joined by Justices Scalia, Thomas, and Alito. Justice Scalia wrote a separate Dissenting Opinion. The case was argued by two experienced Supreme Court advocates, Theodore B. Olson for the Petitioners and Andrew L. Frey for the Respondents. There were 22 Amicus Curiae briefs filed , by a variety of interested parties, including: the American Bar Association; the Academy of Appellate Lawyers; 27 former Chief Justices and Justices of state supreme courts (including Texas' Raul Gonzalez); a joint brief by the states of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah; the Supreme Court of Louisiana (which filed a brief discrediting a study on the effects of contributions on the

votes of Louisiana Supreme Court justices); and the National Association of Criminal Defense Lawyers.

The U.S. Supreme Court's Majority Opinion noted its own precedent that the Fourteenth Amendment Due Process Clause requires recusal when a state court judge has "a direct, personal, substantial, pecuniary interest" in the case. *Caperton* at *6. Precedent also indicated that personal bias or prejudice alone did not implicate the Due Process Clause. *Caperton* at *6. Precedent also recognized Due Process Clause issues arise, "as an objective matter," where the judge has a financial interest in the outcome of a case (e.g. where a Mayor's salary is partially funded by costs he imposed upon convictees or where the mayor's position as the chief executive of the municipal government conflicted with his impartiality as a magistrate). *Caperton* at *7. And precedent recognized a constitutional basis for recusal where a criminal judge presiding over an examining trial charged one defendant with perjury and held another in contempt for refusing to answer questions, then presided over the later trial on the question of guilt or innocence. *Caperton* at *8. Due Process also arose in a criminal contempt proceeding where the judge presiding over the contempt had been the target of a running, bitter controversy in which the judge was vilified by the contemnor. *Caperton* at *9.

Turning to the present case, the Majority passed by Justice Benjamin's self-assessment of impartiality, and also side-stepped the question of whether Justice Benjamin did or did not have actual bias. *Caperton* at *9. The Majority said that precedent had recognized an objective standard for recusal that did not require proof of actual bias. *Caperton* at *10. The standard previously articulated was "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton* at *10 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Majority concluded that there was a "serious risk of actual bias–based on objective and reasonable perceptions–when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton* at *11. The Majority concluded: "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Caperton* at *12.

Chief Justice Roberts wrote a Dissenting Opinion in which he criticized what he saw as an extension of precedent to include overturning a judge's failure to recuse because of a "probability of bias." *Caperton* at *15. The Dissenters believe that the availability

of this procedure would induce lawyers to allege bias, and "[t]he end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case." *Caperton* at *15. Chief Justice Roberts goes on to say that while the Majority applied an objective test, that its' "probability of bias" standard provides no "workable guidance for future cases." *Caperton* at *15. Chief Justice Roberts listed 40 questions he felt could arise in applying the new Due Process standards:

1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?

2. How do we determine whether a given expenditure is "disproportionate"? Disproportionate to what?

3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?

5. Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?

6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?

7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?

8. What if the "disproportionately" large expenditure is made by an industry association, trade union, physicians' group, or the plaintiffs' bar? Must the judge recuse in all cases that affect the association's interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?

9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received

"disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases?

10. What if the candidate draws "disproportionate" support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?

11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court's analysis apply if the supporter "chooses the judge" not in his case, but in someone else's?

12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (e.g., a facial challenge to an agency rulemaking or a suit seeking to limit an agency's jurisdiction)?

13. Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?

14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?

15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no "debt of gratitude" to the supporter? Does that "moot" the due process claim?

16. What if the judge voted against the supporter in many other cases?

17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly disclaims the support of this person?

18. Should we assume that elected judges feel a "debt of hostility" towards major opponents of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?

19. If there is independent review of a judge's recusal decision, e.g., by a panel of other judges, does this completely foreclose a due process claim?

20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?

21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?

22. Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?

23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?

24. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?

25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." Ante, at 2264. But elsewhere in the opinion, the majority considers "the apparent effect such contribution had on the outcome of the election,"ante, at 2264, and whether the litigant has been able to "choos[e] the judge in his own cause,"ante, at 2265. If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent's missteps?

26. Is the due process analysis less probing for incumbent judges-who typically have a great advantage in elections-than for challengers?

27. How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?

29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?

30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?

31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?

32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?

33. What procedures must be followed to challenge a state judge's failure to recuse? May Caperton claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?

34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under § 1983? What statutes of limitation should be applied to such suits?

35. What is the proper remedy? After a successful Caperton motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained?

36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?

37. Are the parties entitled to discovery with respect to the judge's recusal decision?

38. If a judge erroneously fails to recuse, do we apply harmless-error review?

39. Does the judge get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?

40. What if the parties settle a Caperton claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

Caperton at *17-20.

Justice Scalia's Dissenting Opinion states that the decision in the case would "create a vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges." *Caperton* at *23. Justice Scalia sees this type of recusal as another weapon in the "vast arsenal of lawyerly gambits" that will spawn many billable hours pouring over campaign finance reports. *Caperton* at *23. Justice Scalia regrets doing more harm than good, by seeking to correct imperfections through the expansion of the Court's constitutional mandate in a manner "ungoverned by any discernable rule." *Caperton* at *23.

Exhibit 9

Texas Code of Judicial Conduct Canon 5

Texas Code of Judicial Conduct Canon 5

Canon 5. Refraining From Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

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

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

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

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

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

COMMENT

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