The National Instant Criminal Background Check System (NICS), The NICS Improvement Act of 2007 (NIAA), and H.B. 3352 (81st Texas Legislature)

The NICS is a computerized system established under the Brady Handgun Violence Prevention Act of 1993 (Brady Act), Public Law 103-159, to provide information to federal firearms licensees (FFLs) on whether a prospective purchaser is eligible to receive or possess firearms. The NICS was implemented on November 30, 1998, and is a coordinated effort between local, state, and federal agencies. NICS checks are conducted by both the NICS Section of the FBI's Criminal Justice Information Services (CJIS) Division, and by state agencies acting as points of contact (POCs) for processing NICS checks for FFLs in their state. Before transferring a firearm to a non-licensed individual, an FFL must, pursuant to Title 18, United States Code (U.S.C.), Section 922(t), contact the NICS for a background check on the prospective transferee. The NICS then checks automated databases and, in cases where additional information is needed, makes follow-up requests to agencies such as the police, prosecutors, or the courts, that may have relevant information demonstrating whether the individual is prohibited from receiving a firearm under state or federal law. The NICS has three business days to determine whether a proposed gun transfer is prohibited. If the NICS has not been able to make a definitive determination within that time frame, the FFL may lawfully transfer the firearm.

The NICS Improvement Amendments Act of 2007, Pub. L. 110-180 ("the NICS Improvement Act"), was signed into law on January 8, 2008. The NICS Improvement Act amends the Brady Handgun Violence Prevention Act of 1993 ("the Brady Act") (Pub. L. 103-159), under which the Attorney General established NICS. The Brady Act requires Federal Firearms Licensees (FFLs) to contact the NICS before transferring a firearm to an unlicensed person for information on whether the proposed transferee is prohibited from receiving or possessing a firearm under state or federal law.

The NICS Improvement Act was enacted in the wake of the April 2007 shooting tragedy at Virginia Tech, wherein the shooter was able to purchase firearms from an FFL because information about his prohibiting mental health history was not available to the NICS and the system was therefore unable to deny the transfer of the firearms used in the shootings. The NICS Improvement Act seeks to address the gap in information available to NICS about such prohibiting mental health adjudications and commitments and other prohibiting factors. Filling these information gaps will better enable the system to operate as intended to keep guns out of the hands of persons prohibited by federal or state law from receiving or possessing firearms. The automation of records will also reduce delays for law-abiding gun purchasers.

During the 2009 legislative session, HB 3352 was developed and passed in order to implement the requirements of the NICS Improvement Act. With regard to relief from disability, the following new section of the Health and Safety Code (civil commitment law) was adopted:

> Sec. 574.088. RELIEF FROM DISABILITIES IN MENTAL HEALTH CASES.
> (a) A person who is furloughed or discharged from court-ordered mental health services may petition the court that entered the commitment order for an order stating that the person qualifies for relief from a firearms disability.
> (b) In determining whether to grant relief, the court must hear and consider evidence about:

(1) the circumstances that led to imposition of the firearms disability under 18 U.S.C. Section 922(g)(4);

(2) the person's mental history;

(3) the person's criminal history; and

(4) the person's reputation.

(c) A court may not grant relief unless it makes and enters in the record the following affirmative findings:

(1) the person is no longer likely to act in a manner dangerous to public safety; and

(2) removing the person's disability to purchase a firearm is in the public interest.

During session we sought the guidance of the Bureau of Alcohol and Tobacco on the wording of our statute. ATF indicated that they have not yet formally been delegated the duty to review the legislation, but did send us the minimum criteria (below, see No. 7 in particular) that must be satisfied for a relief program to qualify as being compliant under the NICS Improvement ACT. ATF did indicate that no state law has met these criteria and that the one that came the closest essentially cut and pasted the criteria into statute.

STATE RELIEF FROM DISABILITIES PROGRAMS UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.

2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective[1] or committed involuntarily to a mental institution[2] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).

3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful

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[1] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

authority may only consider applications for relief due to mental health adjudications that occurred in the same State.

4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:

a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.

b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.

c. A record of the matter must be created and maintained for review.

5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive evidence concerning and consider the following:

a. the *circumstances* regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);

b. the applicant's *record*, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and

c. the applicant's *reputation*, developed, *at a minimum*, through character witness statements, testimony, or other character evidence.

6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:

a. the applicant will not be likely to act in a manner dangerous to **public safety**; and

b. granting the relief will not be contrary to the **public interest**.

7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials. *De novo* judicial review includes the following principles:

a. If relief is denied, the applicant may petition the State court of appropriate jurisdiction to *review the denial*, including *the record of the denying court* [emphasis added here], board, commission, or other lawful authority.

b. Judicial review is *de novo*, in that the reviewing court may, but is not required to give deference to the decision of the lawful authority that denied the application for relief.

c. The reviewing state court must have discretion to receive additional evidence necessary to conduct an adequate review.

Part 7, the *de novo* review portion, is what now challenges us. During session, we were confident that requirements 1-4 were met, and reasoned that because a court will always be the entity that receives and evaluates a petition for relief (and not a "board, commission or other lawful authority") the legislation also met requirements 5-7. Now I must conclude that this was an error. We are asking the Court to consider a rulemaking exercise that would create a *de novo* procedure within the court system.

SCAC Subcommittee Follow-up Report on
Poverty Law Problems and Proposals
September 23, 2009

The following report is an edited version of the Subcommittee's original report to the SCAC, annotated to reflect decisions the SCAC made on June 12, 2009 and decisions the Subcommittee and SCAC still need to make.

Problems 1-3, 6: The reported problems are that indigent litigants are charged by some clerks' offices for fees arising after the filing fee, there is no provision for exemption from e-filing fees, and some courts require affidavits of indigence to include unnecessary and sensitive information.

Proposed Redraft of Rule 145 (a) and (b). Affidavit on Indigency

(a) *Affidavit.* In lieu of paying or giving security for costs ~~of an orginal action~~ a party who is unable to afford costs must file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs.

Upon the filing of the affidavit, the clerk must docket the action, issue citation and, throughout the pendency of the suit unless and until any contest to the affidavit is sustained by written order, provide ~~such other~~ all customary services ~~as are provided any party~~ without advance payment. The clerk must also immediately notify Texas Online and all certified EFSP providers of the filing of the affidavit and of the filing of any order sustaining a contest to the affidavit.

The SCAC approved the proposed language, as modified to replace "charge" with "advance payment," except for the last sentence regarding e-filing. The SCAC concluded that the proposed last sentence fails to fix the problem of e-filing fees charged to indigents. The Subcommittee acknowledges that this language does nothing to require any entity to waive e-filing fees for indigents. That requirement would have to come through the contracts with NIC, Inc. and the Electronic Filing Service Providers (EFSPs). If, by contract, NIC and the EFSPs are required to waive fees, the proposed language provides them with the information they will need to do so. The Texas Department of Information Resources (DIR) is currently negotiating a new contract. The Subcommittee proposes that the SCAC vote on the last sentence at its next meeting since it does the most that can be done by rule

Regarding subsection (b) "*Contents of Affidavit*," the Subcommittee proposed adding this sentence: "The affidavit must not contain a social security number, a checking account number, or a place of birth."

By a vote of 18-3, the SCAC decided that the Rule should not forbid any particular information from being required in the affidavit. The Subcommittee acknowledges that if the listed information were provided *only in* a "Sensitive Data Form," concerns about identity-theft would be mitigated.

The Subcommittee Chair, who was not present at the June meeting, wishes to address concerns voiced at that meeting about the incontestability of the IOLTA certificate.

Problem 4: In eviction cases, Rule 749a of the Texas rules of Civil Procedure allows a tenant to appeal a justice court decision by filing a pauper's affidavit. However, there is no provision in the eviction rules similar to Rule 145 to prohibit contests to the affidavit when an IOLTA certificate is filed.

Rule 749a cannot be read alone as the legislature has addressed pauper's appeals on eviction cases also. Section 24.0052 of the Texas Property Code specifies the information a defendant must provide to the justice court when filing a pauper's affidavit to appeal an eviction, and this section does not mention the IOLTA certificate. A rule change alone, therefore, may not be appropriate or effective. To amend the rule, the Subcommittee proposes adding the IOLTA certificate language, paragraph (c) of Rule 145, verbatim, to Rule 749a in the third paragraph.

> **Proposed redraft of Rule 749a paragraph 3:**
> A pauper's affidavit will be considered approved upon one of the following occurrences: the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit, or (4) <u>if the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.</u>

Justice Hecht asked the Subcommittee if it believes the J.P. rule *should* conform to Rule 145, assuming that the statute is not an obstacle. Four of the five subcommittee members believe the two rules should conform to one another. Judge Lawrence believes that Justices of the Peace should continue to have discretion.

Problem 5: Whenever a landlord's petition includes an allegation of nonpayment of rent, the rules require a tenant wishing to appeal to county court to pay one month's rent into the court registry within five days of filing the affidavit on indigence. When the tenant has already paid rent for the month in which he appeals, the rule nonetheless requires him or her to pay, into the registry, another month's rent. The corresponding Property Code provision, § 24.0053, requires only that rent be paid "as it becomes due." The Property Code also addresses the situation in which the government pays a portion of a tenant's rent, but the rule has no corresponding provision.

The Subcommittee proposes that the problem and the inconsistencies can be resolved by amending Rule 749b as follows.

Proposed Redraft of Rule 749b Pauper's Affidavit in Nonpayment of Rent Appeals

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure;

~~(1) Within five days of the date that the tenant/appellant files his paupers's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.~~

(1) ~~(2)~~During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay rent ~~within five days of the due date under the terms of the rental agreement~~ into the county court registry.

(2) If a government agency is responsible for all or a portion of the rent under an agreement with the landlord, the tenant shall pay only that portion of the rent for which the tenant is responsible, as determined by the justice court.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file

a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall immediately issue a writ of possession.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

The Subcommittee also recommends a minor addition to Rule 748, to provide that the justice court will determine the rent and its due date. Finally, although it is unnecessary to redraft 748 further, or to redraft 749a and 749c, the Subcommittee proposes that they be redrafted to conform to the Property Code as follows:

Rule 748. Judgment and Writ

If the judgment or verdict is in the plaintiff's favor, the court must award the plaintiff possession of the premises and costs. The court may also award the plaintiff attorney's fees, if sought and established by proof, back rent, and post judgment interest, provided that such claims are within the court's jurisdiction. If the judgment or verdict is in the defendant's favor, the court must award the defendant possession of the premises and costs. The court may also award a defendant who prevails on the issue of possession a judgment for attorney's fees, if sought and established by proof, provided that such claim is within the court's jurisdiction. If the judgment is for the plaintiff for possession, the court must issue a writ of possession except that no writ of possession shall issue until the expiration of five days from the day the judgment is signed.

(a) An eviction judgment must be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

(1) possession of the premises:

(2) back rent, if any, and in what

amount;

(3) attorney's fees, if any, and in what amount;

(4) court costs; and

(5) post judgment interest and at what rate.

(b) An eviction judgment must contain findings that must include the following:

(1) whether there is an obligation to pay rent on the part of the defendant;

(2) a determination of the rent paying period;

(3) a determination of the day the rent is due;

(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the government;

(5) a determination of the date through which the judgment for back rent is calculated; and

(6) a determination of what rate of post judgment interest will apply.

(c) If the judgment of the justice court is not appealed then it remains in force and the prevailing party may enforce the party's rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b and the county court's jurisdiction is invoked, then the justice court may not enforce the judgment.

(d) The county court may rely on the justice court's judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the justice court's judgment in determining whether or not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination, either on its own initiative or on sworn motion of either party, as to the amounts and

due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Rule 749. May Appeal

(a) In eviction cases in which there has been an evidentiary trial on the merits no motions for new trial may be filed. A justice may set aside a default judgment or a dismissal for want of prosecution as justice requires anytime before the expiration of five days from the date the judgment was signed. Any dismissal or default set aside under this rule must be tried within seven days from the date the prior judgment was set aside.

~~(b)~~ A party may appeal from a final judgment in an eviction case to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) If an appeal bond is posted it must be:

(1) in an amount required by this rule;

(2) made payable to the county clerk of the county in which the case was heard;

(3) signed by the judgment debtor or the debtor's authorized agent; and

(4) signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the justice court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(e) *Deposit in Lieu of Appeal Bond.* Instead of filing a surety appeal bond, a party may deposit with the justice court:

(1) cash;

(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally

insured and federally or state chartered bank or savings and loan association; or

(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(f) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond must be filed with the county court.

(g) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing must give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

Rule 749a Affidavit on Indigence

(a) *Establishing Indigence.* A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:

(1) the party files an affidavit on indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) *Contents of Affidavit.* The affidavit on indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the tenant's identity;

(2) the nature and amount of the tenant's employment income;

(3) the income of the tenant's spouse, if applicable and available to the tenant;

(4) the nature and amount of any governmental entitlement income of the tenant;
(5) all other income of the tenant;
(6) the amount of available cash and funds available in savings or checking accounts of the tenant;

(7) real and personal property owned by the tenant, other than household furnishings, clothes, tools of a trade, or personal effects;

(8) the tenant's debts and monthly expenses; and
(9) the number and age of the tenant's dependants and where those dependants reside.

(c) *When and Where Affidavit Filed.* An appellant must file the affidavit on indigence in the justice court within five days after the justice court judgment is signed

(d) *Duty of Justice of the Peace.* Upon the filing of an affidavit on indigence the justice of the peace shall notice the opposing party, and the county clerk of that county, of the filing of the affidavit on indigence within one working day of its filing by written notification accomplished by first class mail.

(e) *No Contest Filed.* Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) *Contest to Affidavit.* The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice of the peace to the opposing party. The contest need not be sworn.

(g) *Burden of Proof.* If a contest is filed, the party who filed the affidavit on indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) *Hearing and Decision in Trial Court; Notice Required.* If the affidavit on indigence is filed in the justice court and a contest is filed, the justice court must set a hearing, notify the parties of the setting, and rule on the matter within five days.

(i) *Appeal From Justice Court Order Disapproving Affidavit on Indigence.*

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit on indigence.

(2) If a justice of the peace disapproves the affidavit on indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and, on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter. If the affidavit on indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit on indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) *Costs Defined.* As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the eviction action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

Rule 749c Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit on indigence approved in conformity with Rule 749a, the appeal by the

defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit on indigence is approved, the plaintiff's appeal is perfected. When an appeal is perfected, the justice court must make a transcript of all the entries made on its docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the approved affidavit on indigence with the county clerk of the county in which the case was heard. The county clerk must docket the case and the trial must be de novo.

No factual determination in an eviction action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

The SCAC Chair recognized that the bulk of this proposal comes from amendments to the eviction rules that the SCAC recommended to the Court years ago. The Court has not approved those recommendations. Justice Hecht indicated it was unnecessary to reengage in a discussion regarding those recommendations, so the SCAC focused on fixing the specific problem at hand.

Subcommittee member Lamont Jefferson suggested that the problem could be fixed relatively simply by removing the language in Rule of Civil Procedure 749b that refers to the payment of rent within five days of the date the tenant/appellant files the pauper's affidavit. In other words, he suggested striking paragraph (1) and the related five-day payment deadline in paragraph (2) of the rule. The SCAC did not vote on that proposal or the proposal on pages 4-5 of this report, and there was not enough discussion to get a good sense of where the SCAC stands on either proposal. The Subcommittee requests additional feedback from the SCAC.

Problem 7: Some Justice Courts occasionally close before 5:00 pm. Litigants who show up to file documents on such days may, as a result, miss a deadline.

The most obvious approach is to take, as a starting point, appellate Rule 4.1(b), which reads as follows:

4.1. Computing Time

(a) *In General.* The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed by these rules, by court order, or by statute. The last day of the period is included, but if that day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.

(b) *Clerk's Office Closed or Inaccessible.* If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

Copying this to a new Justice Court Rule, and making appropriate changes, yields this:

> **Proposed Redraft of Rule 523a. Court or Clerk's Office Closed or Inaccessible.**
>
> If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or justice, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

A more ambitious approach is to amend Rule 4, Tex.R.Civ.P., to read as follows:

Proposed Redraft of Rule 4. Computation of Time

(a) In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

(b) Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

(c) If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or judge, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

The SCAC did not make a decision regarding these proposals because Subcommittee member Judge Tom Lawrence expressed concern regarding the proposals and requested additional time to analyze the problem and proposals. The attached memorandum, dated September 9, 2009, contains the results of his survey of justice courts and his recommendation to the SCAC.

Problem – Dwindling IOLTA funds for poverty law programs. The State Bar of Texas Legal Services to the Poor in Civil Matters Standing Committee and Chuck Herring proposed amending Rules of Civil Procedure 191.3 and 215.2 to enable a court to order penalty sanctions to be paid into "the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent." The State Bar of Texas Board of Directors approved a resolution to this effect on April 17, 2009.

Trial courts have authority to order sanctions under statute (e.g., Tex. Civ. Prac. & Rem. Code chs. 9 and 10), rule (e.g., Rules 13, 191.3, 215.2), and inherent powers. Chuck Herring asks the Court to consider amending Rules 191.3(e) and 215.2(b)(2) as follows:

> Rule 191.3(e): "*Sanctions*. If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil practice and Remedies Code, or impose a monetary sanction to be paid into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."
>
> Rule 215.2(b)(2): authorizing ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sanction into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent. . . "

This wording comes from Tex. Govt Code § 82.0361, regarding pro hac vice fees:

> The comptroller shall deposit the fees received under this section to the credit of the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."

The concept raises three issues: (1) statutory authority, (2) standards for separating penalty sanctions from sanctions to compensate a party, and (3) policy.

I. Statutory Authority

Does the proposal require statutory authority?

If so, to what extent does the necessary statutory authority already exist?

Tex. Const. art 8, sec. 6 provides:

"No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; ... ."

"The appropriation of state money is a legislative function," the Texas Supreme Court has held, quoting art. 8 sec. 6. *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972). Noting that the Election Code did not expressly authorize the Secretary of State to spend public funds for the purpose, the Court refused to mandamus the Comptroller to pay warrants issued by the Secretary of State as chief elections officer to pay for primary elections.

Tex. Civ. Prac. & Rem. Code §10.004(c)(2) is a statute authorizing penalty sanctions. A court that orders sanctions for violation of §10.001's provisions concerning what the signing of a pleading or motion signifies may include in the sanction:

> "an order to pay a penalty into court."

Chuck Herring advises that there is a statute providing that "court" means "county treasury." He expects that David Escamilla will provide the citation.

Rule 191.3(e) provides that if a signed certification required in any disclosure, discovery request, notice, response, or objection" is "false without substantial justification, the court may ... impose ... an appropriate sanction as for a frivolous pleading under Chapter 10 of the Civil Practice and Remedies Code."

II. Standards for Penalty Sanctions

Should the Court provide standards for trial courts to use in deciding the amount of penalty sanctions and/or how to divide the minimum total sanctions needed to achieve the goals of sanctions between compensation to the party and penalty paid to the basic legal services fund?

If so, what standards?

Tex. Civ. Prac. & Rem. Code § 10.004(b) provides that

"the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated."

More generally, any sanction must "be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex. 1991).

The Texas Supreme Court held that penalty sanctions were within the trial court's discretion under Tex. Civ. Prac. & Rem. Code §10.004(c)(2), but remanded because "we cannot determine the basis" of the specific amount ordered by the trial court ($25,000 for each of two doctors sued without reasonable inquiry and evidentiary support). *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007).

The Court stated that a trial court "should consider relevant factors in assessing the amount of the sanction." *Id.* It called an ABA 1988 report listing 13 factors "helpful," but noted that list was "non-exclusive", and held "we do not require a trial court to address all of the factors listed in the report to explain the basis of a monetary sanction under Chapter 10 … ." *Id.* at 620-21 and n.5.

Tex. Civ. Prac. & Rem. Code § 10.004(c), in addition to penalty paid into court, authorizes

"(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees."

Rule 215.2(b) sets out a trial court's authority to order many different kinds of discovery abuse sanctions, including but not limited to eight listed ones. The

eighth is payment of "the reasonable expenses, including attorney fees, cause by the failure."

Low v. Henry does not address how a trial court divides the minimum legitimate sanction amount between a penalty sanction and a compensatory sanction.

Neither do the multiple opinions in *Unifund CCR Partners v. Villa*, 273 S.W.3d 385 (Tex. App. – San Antonio 2008) (en banc) (upholding as not excessive $18,685 in ch. 10 sanctions for inconvenience and harassment).

Neither does *Sterling v. Alexander*, 99 S.W.3d 793 (Tex. App. – Houston [14th Dist.] 2003, pet. denied) (reversing $3,340 in sanctions to be paid into the registry of the court for the use and benefit of two minors).

III. Policy Issues

Would rules extending penalty sanctions and requiring payment to the basic legal services fund result in significant funds for basic legal services?

Would such rules risk significant abuses difficult to police under the appellate review abuse of discretion standard?

Are there any reported data on the frequency with which Tex. Civ. Prac. & Rem. Code § 10.004(c)(2) or Rule 191.3(e) penalty sanctions are ordered, or the dollars involved? There are very few appellate opinions on penalty sanctions.

Would adoption of a rule broadening the situations in which penalty sanctions could be ordered and making penalty sanctions payable to basic legal services instead of to county treasuries lead to significantly more and/or larger penalty sanctions?

Would adoption of such a rule significantly increase the risks of the kinds of abuses of sanctions power addressed in *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991)?

At the meeting, Mr. Herring offered additional options for amending the rules to direct the funds to other sources: "a nonprofit provider of legal services to the poor in civil matters," "a nonprofit entity selected by the trial court from a list compiled by the State Bar of Texas of providers of legal services to the poor in civil

matters," and "the State Bar of Texas for use in providing legal services to the poor in civil matters." Also at the meeting, Texas Legal Services Center Executive Director Randy Chapman presented a fifth option: "permitting an award to be paid to the IOLTA grant fund administered by the Texas Access to Justice Foundation."

A majority (18) of the voting SCAC members thought it was a bad idea for a procedural rule to dictate the distribution of penalty sanctions. The general consensus seemed to be that this is a legislative function.

The SCAC continued to discuss the proposals, however, in case the Court wants to proceed and needs additional input. A SCAC member suggested the original proposal—to pay into the basic civil legal services account of the judicial fund—would be good because the money would go to a functioning, regulated system. Other SCAC members seemed to favor Mr. Chapman's IOLTA grant-fund option.

The SCAC discussed the possibility of fixing the amount of the penalty sanction at issue to reduce concerns about judges being encouraged to impose higher sanctions to increase the amount of money available for the indigent. The SCAC voted (20-3) against having the amount fixed as a percentage of a compensatory award. Then, the SCAC took a more general vote about whether the penalty sanction should be unlimited or limited at the court's discretion. A slim majority (10-8) voted in favor of imposing no limits on the amount of the penalty sanction.

Subcommittee member Pete Schenkkan suggested that the SCAC address the bigger question of what measures are within the Court's inherent rule-making authority and could be used to fund legal services for the indigent in civil matters. The SCAC Chair said the SCAC would caucus about that and determine how to proceed. The transcript does not reflect any other decisions on this topic.

MEMORANDUM

September 9, 2009

From: Judge Tom Lawrence
To: Supreme Court Advisory Committee

ISSUE: What happens if a party wants to file an appeal and the JP court is closed on the last day to file the appeal?

At the last Rules Committee meeting, or maybe the one before last, we discussed a letter from the Poverty Law Section that listed a number of issues including the one outlined above. No action was taken on proposed language on this issue at that meeting as a result of my request to be allowed to survey JP courts to determine the current practice.

I enlisted the Justices of the Peace and Constables Association to send out a survey to all JP's, which was done and I want to share the results now. There are about 850 JP's in Texas and 133 responded to the survey for a response rate of almost 16%. The results of the survey follow. The raw numbers are in ( ). As you will see not every judge answered every question.

Question # 1: Is your court open every day Monday through Friday for some period each day?
Response: 88.4 % (114) said yes and 11.6% (15) said no. 129 answered the question and 4 skipped the question.

Question # 2: Are you open the same hours each day or do your hours and days of operation vary each week?
Response: 87.7% (116) said same hours each day, and 13.5% (18) said their hours vary. 133 answered the question and none skipped the question.

Question # 3: If the days and hours you are open each week vary, do you post a sign indicating the hours you are open?
Response: 90.7% (78) said yes and 9.3% (8) said no. 86 answered the question and 47 skipped the question.

Question # 4: If your hours are the same each week but you are not open from 8AM until 5PM each day, do you have a sign posted indicating the hours you are open?
Response: 84.4% (81) said yes and 15.6% (15) said no. 96 answered the question and 37 skipped the question.

Question # 5: What do you do if a party wants to file an appeal bond on the last day to appeal but your court is closed?
Response: 115 answered the question and 18 skipped the question. The answers are listed below. **Each response is listed exactly as it was posted.**

1. Allow on the next business day that we are open
2. Allow until next business day that the court is open
3. File the next business day
4. If the party advises me that they tried to file an appeal bond during the time that we were closed and it was during a time that we would've normally been open, then I will accept the appeal bond provided they are at my office at the beginning of the next business day that we are open
5. My normal practice is that it's too late to file the appeal bond. Maybe we should consider a postmarked and or faxed notice of appeal with the bond to follow the next business day during business hours
6. My court is open every weekday, Mon.-Fri. Last day to appeal can not fall on a weekend or holiday
7. We honor as long as it is the following day open for business
8. We honor as long as it is the following day open for business
9. They are given the next day
10. Has not occurred yet, but most likely would deny it. We are open 8-5 Monday – Thursday, open 8-4 on Friday
11. Let them get it in the next business day
12. Tell them to mail it
13. Following business day
14. Accept next open day only
15. Accept appeal next working day
16. Following day
17. Haven't had this come up
18. Allow the appeal the next working day
19. Treat as if it were a holiday and go to next business day
20. Move appeal date to the next business day
21. Hasn't come up
22. Allow the appeal on the following business day
23. Have not had that happen
24. Never had that occur
25. This has not happened to us…but I would accept if the following business day….
26. I give them till the next working day
27. My court is open Monday-Friday, 8:00am-5:00pm, closed one hour for lunch
28. Extend to the next working day
29. Extend the appeal date to the following business day
30. If I was called out or attending a meeting I would give the party the next work day
31. It has to be received within our business hours; however, if the day you're referring to is a holiday, Saturday, or Sunday they have until the next day which is not a Saturday, Sunday, or holiday to file
32. Move filing date to the next Monday or next open day if it falls on a holiday
33. Accept it for filing the next day my office is closed
34. Never had this occur
35. Allow appeal on next open date

36. We treat it as a holiday and give them until the next day
37. They can do it the next working day
38. Does not apply. Court open Mon.-Fri., 8 to 5
39. Add until the next working day, treating the "closed" day as a weekend or holiday
40. We would give them the next business day
41. Let them file the next day of operation
42. Allow the filing on the next business day
43. I rarely have that to happen
44. If we had to close because of an emergency I would give them the next day
45. All parties are notified of the office hours and appeal time that is allowed. The only exception is for good cause shown in a motion
46. Clerk will contact me and I will come in to sign the appeal
47. We extend the appeal period to the next scheduled court day or defendant can mail the appeal so the post date can apply
48. Have them come in the following date we are open
49. Extend time to next date
50. They have to get it in before the deadline. Our hours hardly ever change
51. We treat this as if it were a holiday. Which means we would take care of this the first business day that we would be open again
52. They can file online and it is open 24/7
53. It's too bad
54. Allow to file next working day with one time perfected appeal
55. Next working day
56. Extend to the next work day
57. Accept the appeal
58. We accept on next business day
59. They have until the next working day if closed on the last appeal day
60. Give that party until the next business day to file
61. If its within the working hours and the office was closed will extend to next working day
62. If it is a legal holiday, our court would take the appeal on the next business day
63. Move to next day of business
64. They can file on the next business day
65. If are aware of it we will file it no matter the time of day
66. If are aware of it we will file it no matter the time of day
67. Let them file the appeal the next business day
68. Give them till the next working business day
69. The attorneys know to fax it in, so the date of the appeal filed is on the fax document
70. They have till the next business day to appeal
71. It carries until the following day open
72. Forwarded to the next working day
73. We take it the next day that the court is open, we are only closed on holidays
74. Advance to the next day

75. The county does not provide me any assistance with any of my duties. I try not to schedule the initial hearing where there might be a chance of my office being closed. I also inform both parties of this situation and provide my cell number where they may reach me. (unless there is illness, family emergency, etc.)
76. Mailbox rule which applies to faxes as well
77. If the court is closed due to a holiday, it rolls to the next business day. If the party allows the time to expire he/she must take another course of action
78. I've never had that happen, but if it did, it would be accepted and exception made due to court being closed during business hours.
79. N/A
80. Time stamp process received at the Constables Office
81. If it is faxed in on time it is accepted
82. Roll over to the next business day
83. Forward date until next day we are open
84. Allow the party to file the appeal bond when the court is open
85. We are open Monday-Friday 8:00am – 4:30pm so they have plenty of time to come in
86. Has not happened
87. I have a number posted on the door and I will come to the office, even at night, if it calls for it. I am a clerkless court.
88. 8 to 5 (Mon. thru Thurs.) and 8 to 4 on Friday we let them know our office hours. Our office is open daily and has not had a problem with appeals. If the last day falls on a holiday we do extend to next business day
89. They are allowed to appeal on the following working day
90. Our court is not closed
91. Never had that happen
92. I have not had that happen yet. I have very few civil cases per year
93. The court is open Monday thru Friday
94. I give them the last office day to file
95. We allow them that extra day for appeal
96. We accept appeals or any other business until 4:30pm on the last day
97. Take it the next working day
98. They have until 5pm on the next day we are open to file the appeal
99. Take it the next business day, contact is made by mail, email, or fax that an attempt was made on the final day
100. Closed means closed
101. Probably accept it, however, it is very clear at the end of a case when it must be filed. Have not had that happen in 11 years
102. The appeal is accepted until the close of the next business day
103. If the last day to appeal is on a county holiday, the appeal will be accepted on the next regular day the office is open. Time is up at 4:30pm on the last day unless we are notified before 4:30 and the appealer is at the office before 5
104. Observe "mailbox rule" if postmarked; we are open till 5pm on every working non holiday

105.. How would I know if we were closed? If I am aware of an litigant wanting to appeal and has time constraints, we will reasonably accommodate
106. I believe they would get to the next business day
107. Not applicable. My court is open 8-5 every weekday
108. Does not apply to this court...hours are 8-5 everyday
109. Give them until the next day
110. Accept it the next day
111. They may file the next business day
112. Give them the next day that the court is not closed, that is not a legal holiday
113. Have them come in the day before it closes
114. We are always open until 5pm
115. Take it on the next business day

Question # 6: Do you have clerks assigned to your court?
Response: 91.7% (122) said yes and 8.3% (11) said no. 133 answered the question and no one skipped the question.

Question # 7: If you have clerks assigned to your court, are they full time or part time?
Response: 88.4% (108) said full time and 11.5% (14) said part time. 122 answered the question and 11 skipped the question.

CONCLUSIONS:

1. Although a 16% response rate is less than I hoped for it is nonetheless the best information we have as no other records are kept. Also keep in mind that of the 3,513,053 cases filed in JP courts in Texas during the last reporting period 88 % were criminal cases and only 12 % were civil cases.

2. The responses indicate that 88% of the courts are open every day and 87% of those courts are open the same hours every day, which would be 650 courts open the same hours each day if you project the percentages onto all 850 courts in Texas.

3. For those courts whose hours of operation vary each week almost 91% post a sign indicating the hours they are open. For those courts whose hours are the same each week but are not open from 8AM until 5PM each day 84% post a sign indicating the hours they are open each day.

4. 8.3% of the JP courts in Texas, which projects out to 70 courts statewide, do not have clerks assigned. This means the judge must do everything without any clerical assistance. Of the 91.7% of the courts who do have clerks assigned only 88% of those have full time clerks and 11% have part time clerks. If you project those numbers out for all of the JP courts in Texas it means 86 courts have only part time clerks.

5. Assuming 850 JP courts in Texas at this time and assuming that the JP's who

answered the survey are representative then 70 courts do not have any clerks assigned and another 86 only have part time clerks. This means 156 or about 19% of the JP courts would have great difficulty maintaining office hours of 8AM until 5PM every day. Although I have no way to know for sure I suspect that most of these 156 courts are located in small counties with a minimal caseload, and most of what they have are probably traffic cases.

6. For those courts who are not open from 8AM until 5PM each day an average of 744 (again projected state wide) post a sign indicating what days and hours they are open. I would assume that at least some of those who did not answer did not do so because they are open from 8AM until 5PM every day.

7. From analyzing the answers to question # 5 it appears that only five of the 115 respondents (4.5%) would clearly not allow an appeal if it were filed late even though the office may have been closed all or part of the last day to appeal. Three other responders (2.6%) did not say they would refuse to accept a late filing but also did not say they would accept it late either so their answer, although ambivalent may indicate they would not accept a late filing. It is difficult to project these percentages statewide without knowing exactly how many courts are not open from 8AM until 5PM every day but clearly it is a relatively small number. There is no way to determine if any of those courts who indicated they would not accept a late filing have ever in fact denied one or if it has even come up. I thought the responses "closed means closed" and "it's too bad" were the pretty clear expressions.

8. All but a few of the other respondents said they would accept a late filing on the next business day if the court were closed when they tried to file an appeal. There were a significant number of responses, which said they had never had this problem occur. It appears that the JP courts have generally adopted an informal solution to insure a litigant has a right to appeal, even though their methods are not strictly within the rules. The problem is that about 156 JP courts may not physically be able to staff a court from 8AM until 5PM every day. For the other courts who are not open from 8AM until 5PM every day the decision as to the hours of operation is made by an independent elected official who is allowed to set the hours their court is open. I am not sure the Texas Supreme Court has the authority to regulate those hours of operation, but that is for the court to decide. Many JP courts are open from 8AM until 5PM every day but I do not know how many.

RECOMMENDATIONS:

Make no changes in the rules because it appears it is not a big problem. Some courts are open from 8AM until 5PM Monday through Friday. I estimate that about 751 courts are open every day for some period of time and most post those hours on a sign. Of those courts who are not open from 8AM until 5PM every day Monday through Friday I estimate 95.5% would probably accept an appeal filed the next business day, and at least 93.5% would definitely accept a late filing the next day. This assumes the responses received could be projected out for all of the JP courts in Texas.

Also if Rules 571 and 749 were changed to specifically provide for an appeal to be filed late if a JP court was closed on the last day to appeal, would you also allow the appeal to be filed late if the JP court was closed for only part of that last day to appeal? For example if the court were open until 4PM would that trigger the rule allowing the appeal to be filed the next business day or is there something magical about being open until 5PM?

Perhaps as few as 9.3% and as many as 15.6% of the courts who are not open from 8AM until 5PM every day do not post a sign to indicate the hours they are open. This could be between 79 and 132 statewide who do not post a sign and are not open from 8AM until 5PM every day. How would you resolve arguments over whether or not the court was actually open until 5PM on the last day to appeal?

Another issue, which would have to be addressed, is whether or not a rule change would only apply to appeals? For example there are other rules for JP courts which have 5 and 10 day deadlines to do something, so if a JP court were closed on the last day to file a motion for a new trial under Rule 569 would that deadline be extended to the next business day also? The other rules that involve deadlines to file a motion or take some action within 5 or 10 days are Rules 535, 537, 538, 544, 566, 567, 569, 744, 748, 749b and 749c.

If it is the sense of the committee to draft a rule in accordance with the Poverty Law Section letter then I ask that it be crafted to restrict the right to file a late appeal to the next business day the court is open without regard to the hours the court is actually open on that day. In other words it should be restricted to the next day only even if the court is not open from 8AM until 5PM on that day.

If the rule were changed when would a judgment become final if a court is not open until 5PM on the last day to appeal? For example in an eviction case would the judge have to wait an extra day to sign a writ of possession? If the trial were held today and a judgment was rendered for the plaintiff for possession the defendant would have 5 days to appeal from the date of the judgment. So if the trial was on Thursday the last day to appeal would be the following Tuesday and if there were no appeal filed then the plaintiff could come in for a writ of possession on Wednesday at 8 AM. However if the rule were changed then I suppose the plaintiff could not get a writ of possession until Thursday if the court were not open until 5PM on Tuesday because the court would have to wait and see if the defendant was going to come in on Thursday to appeal.

September 7, 2009

Rule 16-165a Subcommittee Report on the Proposed Civil Case Cover Sheet

Submitted by Richard R. Orsinger
Chair, Rule 16-165a Rules Subcommittee
Supreme Court Advisory Committee

1. Background. In the fall of 2008, the Texas Judicial Council approved model cover sheets for civil and family law cases, which can be modified for local use. The proposed cover sheets would be filled out by the plaintiff's lawyer or pro se litigant whenever a civil case is filed in a Texas District Court or County-level Court. There is one form for filing in District Court and another for filing in County Court, and a third form for family law cases, which in some counties can be filed in either the District or County-level court. These forms were presented to the Supreme Court Advisory Committee at its November 21-22, 2008 meeting, but have been slightly revised since that time. A copy of the current version of each form is attached to this e-mail. At the meeting, the Advisory Committee suggested that the three cover sheets be consolidated into one single cover sheet. Pursuant to that suggestion, OCA developed the attached proposed consolidated cover sheet, which it presented to the Texas Judicial Council at its meeting on August 28, 2009. The contents are the same, except for two minor changes.

During its August meeting, the Judicial Council approved a motion to post the proposed consolidated cover sheet that covers both civil and family law cases filed in both District and County-level Courts as a model form, which can be modified for local use, on the Office of Court Administration website for comments. At its next meeting, the Judicial Council will consider whether to: 1) make appropriate changes to the proposed consolidated model cover sheet in accordance with comments received; and 2) give approval to the consolidated model cover sheet.

2. Subcommittee Recommendation. This Supreme Court Advisory Committee subcommittee has been requested to make a proposal only on adopting a Texas Rule of Civil Procedure to require the filing of these forms. The current model cover sheets, and the subsequently proposed consolidated model cover sheet, were developed by the Office of Court Administration based on the cover sheets currently or previously used by several Texas counties, ith input from various civil and family judges, district and county clerks, the Supreme Court Advisory Committee and other interested parties. The Subcommittee accepts any model cover sheet approved by the Texas Judicial Council and proposes amending the Texas Rules of Civil Procedure to add a new Rule 78a.

3. When Cover Sheet is to be Filed. The forms themselves say that they should be filed "with the original petition" or, in family law case, when a motion for modification or enforcement of a final order is filed. The Subcommittee discussed with Mary Cowherd, Office of Court Administration Deputy Director and Director of Research and Court Services, whether we should try to capture information on all original claims for affirmative relief regardless of who

files them, including counter-claims filed by the defendant, cross-claims filed by a defendant against third parties, and third party cross-claims filed by the plaintiff in response to counterclaims asserted by the defendant. The requirement of a cover sheet could also apply not just to third-party practice (Rule 38), but also to interpleaders' petitions (Rule 43), intervenors' claims for relief (Rule 60), cross-claims (Rule 97(e)), petitions to take a pre-suit deposition (Rule 202), ancillary proceedings like garnishment, attachment, and sequestration (Rules 592-734), and to petitions relating to home equity loan foreclosures (Rule 735-736). Mary indicated that the Office of Court Administration does not want to try to capture information from any source other than the plaintiff's original petition, as the clerks currently report information only at the filing of the original petition (other than when a motion to modify or enforce is filed in a family law case).

4. Where to Put the Requirement to File a Cover Sheet. Under the Texas Rules of Civil Procedure, the pleadings rules are in Section 4, "Pleadings," which includes Rules 45 through 98. Subsection A is "General," Subsection B is "Pleadings of Plaintiff," and Subsection C is "Pleadings of Defendant." Intervenors are covered by Rules 60 and 61, under the "General" category. The relevant rules are appended to this memo. The Subcommittee suggests that the most logical place to insert the requirement for a civil case cover sheet directed solely to plaintiffs is between Rules 78 and 79.

5. Proposed New Rule. This Subcommittee Proposes the following new Rule 78a:

> Rule 78a.
>
> When a party files an original petition, that party must also file a civil case cover sheet that includes the style of the case, name and contact information of the attorney in charge or party filing the suit, state bar number of the attorney in charge (if applicable), names of the parties, the case type, and any other information required under local rules or in the form provided by the clerk of the court in which the pleading is filed. The filing of a cover sheet is for administrative purposes and does not affect or determine how the action is commenced in district or county court.

Part of this language is patterned after Rule 47, but transposed to a section dealing solely with the plaintiff's pleadings.

6. Relevant Existing Rules Set Out.

Rule 45. Definition and System

Pleadings in the district and county courts shall

(a) be by petition and answer;

(b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of

legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole;

(c) contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense;

(d) be in writing, on paper measuring approximately 8 2 inches by 11 inches, and signed by the party or his attorney, and either the signed original together with any verification or a copy of said original and copy of any such verification shall be filed with the court. The use of recycled paper is strongly encouraged.

When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

All pleadings shall be construed so as to do substantial justice.

Rule 46. Petition and Answer; Each One Instrument of Writing

The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of the supplemental answers.

Rule 47. Claims for Relief

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved,

(b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court, and

(c) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

Rule 48. Alternative Claims for Relief

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the

insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

Rule 49. Where Several Counts

Where there are several counts in the petition, and entire damages are given, the verdict or judgment, as the case may be, shall be good, notwithstanding one or more of such counts may be defective.

* * *

Rule 60. Intervenor's Pleadings

Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

Rule 61. Trial: Intervenors: Rules Apply to All Parties

These rules of pleading shall apply equally, so far as it may be practicable to intervenors and to parties, when more than one, who may plead separately.

* * *

Rule 74. Filing With the Court Defined

The filing of pleadings, other papers and exhibits as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk.

* * *

B. Pleadings of Plaintiff

Rule 78. Petition; Original and Supplemental; Indorsement

The pleading of plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit. The original petition and the supplemental petitions shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named, and indorsed.

Rule 79. The Petition

The petition shall state the names of the parties and their residences, if known, together with the contents prescribed in Rule 47 above.

Rule 80. Plaintiff's Supplemental Petition

The plaintiff's supplemental petitions may contain special exceptions, general denials, and the allegations of new matter not before alleged by him, in reply to those which have been alleged by the defendant.

Rule 81. Defensive Matters

When the defendant sets up a counter claim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable. Whenever the defendant is required to plead any matter of defense under oath, the plaintiff shall be required to plead such matters under oath when relied on by him.

Rule 82. Special Defenses

The plaintiff need not deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted.

CIVIL/FAMILY CASE COVER SHE

CAUSE NUMBER: _____ COURT _____

PROPOSED

STYLED _____

(e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the matter of the Estate of George Jackson)

This cover sheet should be completed and filed with the original petition or, in a family law case, when a petition for modification or enforcement is filed. The information should be the best available at the time of filing, understanding that the information may change before trial. This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Contact information for person completing case information sheet:	Names of parties in case:	Person completing cover sheet is:	Service Type
Name: _____ Email: _____ Address: _____ Telephone: _____ City/State/Zip: _____ Fax: _____ Signature: _____ State Bar No: _____	Plaintiff(s)/Petitioner(s): _____ _____ _____ Defendant(s)/Respondent(s): _____ _____ _____ [Attach additional page as necessary to list all parties]	☐ Attorney for Plaintiff/Petitioner ☐ Plaintiff/Petitioner **Discovery Level** ☐ Level 1 ☐ Level 2 ☐ Level 3	☐ Certified Mail ☐ None ☐ Personal Service ☐ Posting ☐ Publication ☐ Waiver of Service to be filed

2. Indicate case type, or identify the most important issue in the case *(select only 1)*:

Civil

Contract

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Mis-representation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity – Expedited
- ☐ Other Foreclosure
- ☐ Franchise
- ☐ Insurance
- ☐ Landlord/Tenant
- ☐ Non-Competition
- ☐ Partnership
- ☐ Other Contract: _____

Injury or Damage
- ☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____
- ☐ Motor Vehicle Accident
- ☐ Premises
- ☐ Product Liability
  List Product: _____
- ☐ Other Injury or Damage: _____

Real Property
- ☐ Eminent Domain/ Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass to Try Title
- ☐ Other Property: _____

Related to Criminal Matters
- ☐ Expunction
- ☐ Judgment Nisi
- ☐ Non-Disclosure
- ☐ Seizure/Forfeiture
- ☐ Writ of habeas corpus – pre-indictment
- ☐ Other: _____

Employment
- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Worker's Compensation
- ☐ Other Employment: _____

Other Civil
- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortious Interference
- ☐ Other: _____

Tax
- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax

Family Law

Marriage Relationship
- ☐ Annulment
- ☐ Declare Marriage Void

Divorce
- ☐ With Children
- ☐ No Children

Other Family Law
- ☐ Enforce Foreign Judgment
- ☐ Habeas Corpus
- ☐ Name Change
- ☐ Protective Order
- ☐ Removal of Disabilities of Minority
- ☐ Other: _____

Parent-Child Relationship
- ☐ Adoption/Adoption with Termination
- ☐ Child Protection
- ☐ Child Support
- ☐ Custody or Visitation
- ☐ Gestational Parenting
- ☐ Grandparent Access
- ☐ Parentage
- ☐ Termination of Parental Rights
- ☐ Other Parent-Child: _____

Post-judgment Actions (non Title IV-D)
- ☐ Enforcement
- ☐ Modification—Custody
- ☐ Modification—Other

Title IV-D
- ☐ Enforcement/Modification
- ☐ Parentage
- ☐ Reciprocals (UIFSA)
- ☐ Support Order

Family Law Case Management *(complete if family law case)*:
- ☐ Uncontested *(finalized within 6 months of filing)*
- ☐ Contested *(finalized within 1 year of filing)*

Requested Temporary Hearing
- ☐ None
- ☐ TRO Only
- ☐ Temporary Orders Only
- ☐ TRO & Temporary Orders

Estimated Length of Temporary Hearing
- ☐ <30 Minutes
- ☐ 30-60 Minutes
- ☐ 1-2 Hours
- ☐ ½ Day

Probate & Mental Health

- ☐ Guardianship – Adult
- ☐ Guardianship – Minor
- ☐ Mental Health
- ☐ Other: _____

Probate/Wills/Intestate Admin
- ☐ Dependent Admin
- ☐ Independent Admin
- ☐ Other Estate Proceedings

3. Has this case been previously filed, or does it relate to a case previously filed, in this county, or in another county or state?

- ☐ No
- ☐ Yes, in this county; Court:_____ Cause # _____
- ☐ Yes, in another county or state;
  County:_____ State:_____ Cause # _____

4. Indicate procedure or remedy, if applicable *(may select more than 1)*:
- ☐ Appeal from Municipal/Justice Court
- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-Judgment
- ☐ Prejudgment Remedy
- ☐ Protective Order
- ☐ Receiver
- ☐ Sequestration
- ☐ TRO/Injunction
- ☐ Turnover

EXHIBIT 09-23

PENGAD 800-631-6989

DISTRICT CIVIL CASE COVER SHEET

COURT: _____ **CAUSE NUMBER:** _____

This Civil Cover Sheet should be completed and filed with the original petition. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____
(e.g.: John Smith v. All American Insurance Co.; In re Mary Ann Jones; In the matter of the Estate of George Jackson)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Plaintiff(s) ☐ Plaintiff(s)

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Plaintiff(s) (list separately)

a. _____
b. _____
c. _____

4. Defendant(s) (list separately)

a. _____
b. _____
c. _____

[Attach additional page as necessary to list all parties.]

5. Indicate case type (check only one):

CONTRACT

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity - Expedited
- ☐ Other Foreclosure

☐ Franchise
☐ Insurance
☐ Landlord/Tenant
☐ Non-Competition
☐ Partnership
☐ Other Contract: _____

EMPLOYMENT

☐ Discrimination
☐ Retaliation
☐ Termination
☐ Worker's Compensation
☐ Other Employment: _____

INJURY OR DAMAGE

☐ Assault/Battery
☐ Construction
☐ Defamation
Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

☐ Motor Vehicle Accident
☐ Premises
☐ Product Liability
List product: _____
☐ Other Injury or Damage: _____

OTHER CIVIL

☐ Administrative Appeal
☐ Antitrust/Unfair Competition
☐ Code Violations
☐ Foreign Judgment
☐ Intellectual Property
☐ Lawyer Discipline
☐ Perpetuate Testimony
☐ Probate
☐ Securities/Stock
☐ Tortious Interference
☐ Other: _____

REAL PROPERTY

☐ Eminent Domain/Condemnation
☐ Partition
☐ Quiet Title
☐ Trespass toTry Title
☐ Other Property: _____

RELATED TO CRIMINAL MATTERS

☐ Expunction
☐ Judgment Nisi
☐ Non-Disclosure
☐ Seizure/Forfeiture
☐ Writ of habeas corpus – pre-indictment
☐ Other: _____

TAX

☐ Tax Appraisal
☐ Tax Delinquency
☐ Other Tax: _____

6. Indicate procedure or remedy, if applicable (may select more than one):

☐ Attachment
☐ Bill of Review
☐ Certiorari
☐ Class Action
☐ Declaratory Judgment
☐ Garnishment
☐ Interpleader
☐ License
☐ Mandamus
☐ Post-Judgment
☐ Prejudgment Remedy
☐ Receiver
☐ Sequestration
☐ TRO/Injunction
☐ Turnover

7. Has this case been previously filed, or does it relate to a case previously filed, in this county, or in another county or state?

☐ No
☐ Yes, in this county: Court: _____ Cause #: _____
☐ Yes, in another county or state:
County: _____ State: _____ Cause #: _____

8. Level of Discovery: ☐ Level 1 ☐ Level 2 ☐ Level 3

COUNTY-LEVEL COURT CIVIL CASE COVER SHEET

COURT: _____ **CAUSE NUMBER:** _____

This Civil Cover Sheet should be completed and filed with the original petition. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____
(e.g., John Smith v. All American Insurance Co.; In re Mary Ann Jones; In the matter of the Estate of George Jackson)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Plaintiff(s) ☐ Plaintiff(s)

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Plaintiff(s) (list separately)

a. _____
b. _____
c. _____

4. Defendant(s) (list separately)

a. _____
b. _____
c. _____

[Attach additional page as necessary to list all parties.]

5. Indicate case type (check only one):

CONTRACT

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity - Expedited
- ☐ Other Foreclosure

- ☐ Franchise
- ☐ Insurance
- ☐ Landlord/Tenant
- ☐ Non-Competition
- ☐ Partnership
- ☐ Other Contract: _____

EMPLOYMENT
- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Worker's Compensation
- ☐ Other Employment: _____

INJURY OR DAMAGE
- ☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

- ☐ Motor Vehicle Accident
- ☐ Premises
- ☐ Product Liability
  - List product: _____
- ☐ Other Injury or Damage: _____

OTHER CIVIL
- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortious Interference
- ☐ Other: _____

PROBATE & MENTAL HEALTH
- ☐ Guardianship – Adult
- ☐ Guardianship – Minor
- ☐ Mental Health
- ☐ Probate/Wills/Intestate Administration
- ☐ Other: _____

REAL PROPERTY
- ☐ Eminent Domain/Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass toTry Title
- ☐ Other Property: _____

RELATED TO CRIMINAL MATTERS
- ☐ Expunction
- ☐ Judgment Nisi
- ☐ Non-Disclosure
- ☐ Seizure/Forfeiture
- ☐ Writ of habeas corpus – pre-indictment
- ☐ Other: _____

TAX
- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax: _____

6. Indicate procedure or remedy, if applicable (may select more than one):

- ☐ Appeal from municipal/justice court
- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-Judgment
- ☐ Prejudgment Remedy
- ☐ Receiver
- ☐ Sequestration
- ☐ TRO/Injunction
- ☐ Turnover

7. Has this case been previously filed, or does it relate to a case previously filed, in this county, or in another county or state?

- ☐ No
- ☐ Yes, in this county: Court: _____ Cause #: _____
- ☐ Yes, in another county or state:
  County: _____ State: _____ Cause #: _____

8. Level of Discovery: ☐ Level 1 ☐ Level 2 ☐ Level 3

FAMILY CASE COVER SHEET

_____ COURT CAUSE NUMBER: _____

This Family Cover Sheet should be completed and filed with an original petition or motion for modification or enforcement of final order. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____
(e.g., John Smith v. Jane Doe; In re Mary Ann Jones; In the Interest of J.G., M.G., and K.G., Children)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Petitioner(s) ☐ Petitioner(s)

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Respondent(s) (list separately):

a. _____
b. _____

4. Child(ren):

Name (use initials ONLY): _____
Minor? ☐ Yes ☐ No

Name (use initials ONLY): _____
Minor? ☐ Yes ☐ No

Name (use initials ONLY): _____
Minor? ☐ Yes ☐ No

Attach additional pages as necessary to list all parties.

5. Indicate case type (check only one):

MARRIAGE RELATIONSHIP	PARENT-CHILD RELATIONSHIP	POST-JUDGMENT ACTIONS
☐ Annulment ☐ Declare Marriage Void *Divorce* ☐ With Children ☐ No Children	☐ Adoption/Adoption with Termination ☐ Child Protection ☐ Child Support ☐ Custody or Visitation ☐ Gestational Parenting ☐ Grandparent Access ☐ Parentage ☐ Termination of Parental Rights ☐ Other Parent-Child: _____	☐ Enforcement ☐ Modification
OTHER FAMILY LAW		**TITLE IV-D**
☐ Enforce Foreign Judgment ☐ Habeas Corpus ☐ Name Change ☐ Protective Order ☐ Removal of Disabilities of Minority ☐ Other: _____		☐ Parentage ☐ Reciprocals (UIFSA) ☐ Support Order

6. Indicate sub-topic, if applicable:

☐ Bill of Review ☐ Declaratory Judgment ☐ Garnishment ☐ Protective Order

7. Has this case been previously filed, or does it relate to a case previously filed, in this county, or in another county or state?

(If this is **a suit for adoption**, note the court, county and cause number, if known, for the termination.)

☐ No
☐ Yes, in this county: Court: _____ Cause #: _____
☐ Yes, in another county or state: County: _____ State: ____
Court: _____ Cause #: _____

8. Case Management

☐ Uncontested (finalized within 6 months of filing) ☐ Contested (finalized within 1 year of filing)	**Requested Temporary Hearing** ☐ None ☐ TRO only ☐ Temporary Orders Only ☐ TRO and Temporary Orders	**Estimated Length of Temporary Hearing** ☐ < 30 minutes ☐ ½ day ☐ 30 minutes – 1 hours ☐ 1 hour – 2 hours

9. Service Type

☐ Personal Service ☐ Publication ☐ Posting ☐ Certified Mail ☐ Waiver of Service to be Filed	Name and Address for service:

OFFICE OF COURT ADMINISTRATION

CARL REYNOLDS
Administrative Director

TO: Members, Supreme Court Advisory Committee

FROM: Mary Cowherd
Deputy Director and Director of Research and Court Services

DATE: September 9, 2009

RE: Use of Civil Cover Sheets in Other State and Federal Courts

On November 22, 2008, the Supreme Court Advisory Committee discussed the promulgation of a Rule of Civil Procedure that requires an attorney or pro se litigant to submit a cover sheet (or case information sheet) when filing a civil or family law case in a district or county-level court. The Advisory Committee also discussed whether the attorney or pro se litigant filing a case should be required to sign the completed cover sheet and, if so, the appropriate consequence when the attorney or pro se litigant does not sign the cover sheet.

Currently, when a case is filed, the clerk must identify the case type. The purpose of the cover sheet is twofold: 1) to take the burden off clerks in categorizing cases and make the attorney or pro se litigant responsible for identifying what type of case is being filed, and 2) to increase the accuracy of monthly case activity reports that clerks must submit to the Office of Court Administration (OCA). Cover sheets would be particularly helpful to district and county clerks who will soon have to comply with more extensive reporting requirements in the reports that they submit to OCA. Last year, the Texas Judicial Council (TJC)[1] approved considerable changes to the monthly case activity reports, including an increase in the number of case type categories in the reports. The changes, which take effect September 1, 2010, are the result of a multi-year project—the Judicial Data Project—that involved many judges, clerks, and others who recommended changes to reflect more accurately the work of district and county-level courts.

[1] The Texas Judicial Council is the policy making body for the state judiciary. The Council was created in 1929 by the legislature to continuously study and report on the organization and practices of the Texas judicial system. One of the primary duties of the Council is to gather judicial statistics from judges and other court officials.

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P. O. BOX 12066, CAPITOL STATION • AUSTIN, TEXAS 78711-2066
http://www.courts.state.tx.us

OCA staff believe that without accurate identification of the case type, the value of the case activity statistics reported to OCA is greatly reduced. Accuracy is important not only at the state level, but also the national level. The Court Statistics Project of the National Center for State Courts, Conference of State Court Administrators, and others have been involved in an ongoing national effort to encourage states to report case activity in a comparable and meaningful way.

Last fall, the TJC approved the attached current three cover sheets as model forms that can be modified for local use. There are two civil cover sheets – one for district courts and one for county-level courts – and there is one family law cover sheet for both district courts and county-level courts. At the request of district and county clerks, certain items on the cover sheets that the TJC approved were designated as optional items. These items are service type, discovery level, family law case management, whether the case has been previously filed or relates to a case previously filed, and type of procedure or remedy. The clerks said this is information that not all clerks may want or need. The minimum information that must be included on a cover sheet is the style of the case, name and contact information of the attorney or party filing the suit, state bar number of the attorney (if applicable), names of the parties, and case types (the case types to be used will be selected by the local jurisdictions but must allow the clerks to easily classify the cases into the case type categories used to report to OCA).

At its meeting on November 22, the Advisory Committee suggested that the three cover sheets be consolidated into one single cover sheet. Pursuant to that suggestion, OCA developed the attached proposed consolidated cover sheet. The contents are the same, except for the following two changes: 1) the categories for enforcements and modifications in family law cases were slightly modified so those categories would match the categories that are in the new monthly reports; and 2) at the at the request of district and county clerks, children's initials in family law cases were eliminated.

OCA presented the proposed consolidated cover sheet to the TJC at its meeting on August 28, 2009. The TJC approved a motion to post the proposed consolidated sheet that covers both civil and family law cases filed in both district and county-level courts as a model form, which can be modified for local use, on the OCA website for comments. The motion was approved with the understanding that service type, discovery level, family law case management, whether the case has been previously filed or relates to a case that has been previously filed, and type of procedure or remedy are optional items.

At the conclusion of the November 22 meeting of the Advisory Committee, Chair Chip Babcock referred the matter concerning the promulgation of a Rule of Civil Procedure requiring cover sheets to the Rule 15-165a Subcommittee for further study.

To assist the Rule 15-165a Subcommittee and Advisory Committee in deciding whether to require an attorney or pro se litigant to sign cover sheets, OCA: 1) contacted a group of district and county clerks to get their input on whether a signature should be required; 2) conducted a survey of other states to determine how many states use cover sheets, whether they require a signature, and the consequences if a signature is required and the cover sheet is not signed; and 3) contacted federal courts to determine the consequences if a civil cover sheet is not submitted or signed, as required.

District and County Clerk Input Regarding Signature Requirement

In April 2009, OCA sent an email to a team of clerks that we previously assembled to assist us in understanding the issues and problems faced by the clerks in the implementation of the new reporting changes and to develop answers and solutions to them. We asked those clerks whether they think a signature should be required on the cover sheets. In addition, we explained our belief that requiring an attorney's signature will increase the accuracy of the identification of the case type by preventing a runner or administrative assistant who does not know anything about the case being filed from completing a cover sheet without the filing attorney's oversight.

The clerks responded that they do not believe that a signature should be required. They said there is no reason to require a signature because the petition already has a signature, the cover sheet is only for their information, and a signature serves no purpose. The clerks' primary concern about requiring a signature seems to relate to whether a clerk can accept a filing if the cover sheet is not signed by an attorney or pro se litigant. In the email we sent to the clerks, we discussed attached AG Opinion JM 727 (1987), which provides a clerk should not reject a document if it is unsigned. Specifically, the opinion provides, "Documents are filed when they are tendered to the district clerk. . . . The clerk should file the pleading even though the signature of the attorney (or the party not represented by an attorney) is not on the pleadings . . . ."

Use of Civil Cover Sheets in Other States

OCA conducted a survey in June 2009 to determine the use of civil cover sheets in other states, including whether a signature is required and, if so, the consequences when the cover sheet is not signed. OCA sent surveys to each of the other 49 states. OCA received responses to the surveys and to direct requests for the information solicited in the surveys from 46 states. OCA obtained data on the remaining three states through internet research.

The survey results are, as follows:

- A majority of states (27 states, 55 percent) require the use of civil cover sheets statewide. Another 6 states (12 percent) leave it to local jurisdictions to decide whether to require them.

- Among the 27 states requiring cover sheets statewide, policies vary regarding the filing of a case for which a cover sheet has not been submitted:

    - In 15 states, a case cannot be filed;
    - In 3 states, a case can be filed but a cover sheet must be submitted later;
    - In 7 states, a case can be filed regardless of subsequent submission;
    - In 1 state, each court sets its own rules about what happens when a cover sheet is not provided with the initiating document; and
    - One state could not provide a definitive answer as to whether the courts have a right to refuse a filing on the basis of not having a cover sheet.

- Of the 27 states that require the statewide use of cover sheets, 14 states require the attorney or pro se litigant to sign the cover sheet.

- Among the 14 states that require a cover sheet to be signed by an attorney or pro se litigant, policies vary regarding the filing of a case for which a cover sheet has not been signed:

  - In 7 states, a case cannot be filed;
  - In 6 states, a case is filed regardless of subsequent signature; and
  - In 1 state, a case could be dismissed if the cover sheet is not signed.

Use of Civil Cover Sheets in Federal Courts

Federal courts require that a cover sheet signed by the attorney be submitted when a civil case is filed. Civil cover sheets have been used in the federal courts since 1974. I contacted William Putnicki, the clerk of court for the United States District Court for the Western District of Texas (Western District), who referred me to David O'Toole, the divisional office manager for the Austin Division of the Western District, to determine the policies and practices regarding the use of civil cover sheets in the federal courts in the Western District. Mr. O'Toole relayed the following information to me:

- A case will be filed even though a cover sheet has not been submitted or signed. The only time the clerk would refuse to file a case is if the filing fee is not paid.

- If a cover sheet has not been submitted or signed, the attorney is sent a deficiency notice. The attorney is required to cure the deficiency.

- It is within the court's discretion whether to move forward with a case if a cover sheet has not been submitted or signed.

- If the clerk can determine from a case filed without a cover sheet the information needed (primarily the case type), then the court would most likely move forward with the case. If the clerk is not able to determine the needed information from the case, then there is a possibility the court would not move forward with the case until the cover sheet is submitted. Mr. O'Toole is not personally aware of a court refusing to move forward with a case in which the cover sheet was not signed.

- No one else can sign the cover sheet on behalf of the attorney (e.g., paralegal or secretary). However, electronic signatures are accepted.

- Policies and practices regarding the use of civil cover sheets probably vary among federal courts.

Conclusion and Recommendations

A majority of states require the use of civil cover sheets statewide; and, in slightly more than half of those states, a case cannot be filed when a cover sheet has not been submitted. Further, a majority of the states that require the use of civil cover sheets statewide also require the cover sheet to be signed by an attorney or pro se litigant; and, in half of those states, a case cannot be filed if a cover sheet has not been signed.

The federal courts require a cover sheet signed by an attorney to be submitted when a civil case is filed. In the Western District, a case will be filed even though a cover sheet has not been submitted or signed, but that practice may vary among federal courts.

The multi-year effort involving many judges, clerks and others, which culminated in considerable revisions to the monthly case activity reports submitted to OCA to have them reflect more accurately the work of the district and county-level courts, will be greatly enhanced through the use of cover sheets. If an attorney or pro se litigant, rather than the clerk, is made responsible for identifying the type of case being filed, this will result in more accurate identification of the case type and the increased value of the case activity statistics reported to OCA. Moreover, OCA staff believe that requiring an attorney's signature on the cover sheet will encourage attorney oversight of the completion of the cover sheets, thereby resulting in greater accuracy of the identification of case type.

In sum, we recommend that the Advisory Committee promulgate a proposed Rule of Civil Procedure requiring an attorney or pro se litigant to submit a cover sheet when filing a civil or family law case, and that the attorney or pro se litigant be required to sign the cover sheet.

Proposed Amendments to Rules 735 and 736 of the Texas Rules of Civil Procedure

PART VII - RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 1. PROCEDURES RELATED TO HOME EQUITY, REVERSE MORTGAGE, HOME EQUITY LINE OF CREDIT, AND TRANSFERRED TAX LIEN OR PROPERTY TAX LOAN FORECLOSURES

RULE 735. Home Equity, Reverse Mortgage, Home Equity Line of Credit, and Transferred Tax Lien or Property Tax Loan Foreclosures.

735.1 Applicability.

This section applies to foreclosure of a:

(a) Home equity loan agreement under Article XVI, Section 50(a)(6), Texas Constitution;

(b) Reverse mortgage loan agreement under Article XVI, Section 50(a)(7), Texas Constitution, that requires a court order under Article XVI, Section 50(k)(11), Texas Constitution;

(c) Home equity line of credit loan agreement under Article XVI, Section 50(a)(6)(F) and (t), Texas Constitution; or

(d) Transferred tax lien or property tax loan agreement as described in Sections 32.06 and 32.065, Tax Code, and Section 351.002(2), Finance Code.

735.2 Foreclosure Proceedings

(a) A person seeking to foreclose a lien described in Rule 735.1, except as provided in 735.2(c), must obtain from a district court or court with equivalent jurisdiction in a county where all or a major portion of the property is located:

(1) a judgment for judicial foreclosure; or

(2) an expedited order under Rule 736.

(b) A Rule 736 order resulting from a Rule 736 application may be obtained as part of a counterclaim, cross claim, intervention, probate or decedent related proceeding, or other third party proceeding brought in a district court or court with equivalent jurisdiction.

(c) If the debtor, mortgagor, property owner or owner of the property, or holder of a recorded preexisting first lien on the property is deceased and a personal representative has qualified for letters of administration in a dependent or creditor's probate administration, the judgment or order described in (a)(1) and (2) must be obtained in the probate court where the administration is pending.

(d) After a judgment or order is obtained under Rule 735 or 736, a person may proceed with the foreclosure process under the loan agreement and applicable law.

735.3 Definitions

In this section:

(a) "Account" means the servicing records and documents related to the debtor's loan agreement that are kept in the regular course of business in electronic or any other format.

(b) "Applicant" means the person seeking to obtain a Rule 736 order.

(c) "Commercial delivery service" means a document delivery carrier or enterprise that provides proof of delivery in the regular course of business.

(d) "Declaration" means a statement made by an officer or employee of the mortgage servicer obligated to service the debtor's loan agreement. The statement must be sworn before a notary or made under penalty of perjury.

(e) "Debtor" means the person liable for payment of the debt evidenced by the loan agreement that encumbers the property.

(f) "Heir" means in the context in which the term is used: (a) a person, including the surviving spouse, who is entitled under the statutes of descent and distribution to the property of a decedent who dies intestate; (b) a distributee entitled to the property of a decedent under a lawful will probated in the county where the property is located; or (c) the current personal representative of the decedent's estate.

(g) "Holder of a recorded preexisting first lien on the property" under Section 32.06(c-1), Tax Code, means the current owner or noteholder of a loan agreement secured by a "recorded preexisting first lien" as that term is defined in this rule.

(h) "Investor" means, for a loan agreement that is securitized: (a) a person who suffers the risk of loss if the debtor defaults; (b) a person for whose benefit the mortgage servicer remits the principal and interest received from the debtor's scheduled loan agreement payments; or (c) the legal, beneficial, or equitable owner or trustee of the debtor's loan agreement that may be held by a special purpose entity or government sponsored entity.

(i) "Last known address" means:

(1) For a debtor, mortgagor, property owner or owner of the property:

(i) the property address, if the person's residence is the property encumbered by the loan agreement; or

(ii) if the property encumbered by the loan agreement is not the person's residence, both the property address and the person's most recent address contained in the servicing records of the current mortgage servicer;

(2) For a holder of the current recorded preexisting first lien, the current address for the person described in Rule 736.7, who is to be served with citation; or

(3) For an heir, both the property address and the heir's residence or business address.

(j) "Loan agreement" means the note, security instrument, and any other document or instrument executed contemporaneously that evidences an obligation to pay a loan encumbering the property.

(k) "Mortgage Electronic Registration Systems, Inc." or any derivation of the name to include "MERS" means the book entry system referred to in Section 51.0001(1), Property Code, and may be the mortgagee of record in the official real property records or the nominee of the lender or the beneficiary of the security instrument encumbering the property.

(l) "Mortgage servicer" means:

(1) the last person to whom a debtor has been instructed to send payments for a debt evidenced by the debtor's loan agreement and may be an independent third party or the owner, noteholder, or transferee of the debtor's loan agreement;

(2) a person authorized to administer foreclosure of the property under Section 51.0025, Property Code; or

(3) If the debtor's loan agreement has been securitized, the person who:

(i) is obligated in writing to service the debtor's loan agreement account; and

(ii) remits the principal and interest received from the debtor's scheduled loan agreement payments to a person responsible for distributing the debtor's payments to the investors.

(m) "Mortgagee" means:

(1) the owner, noteholder, or investor of the debtor's loan agreement;

(2) the current grantee, nominee of the lender, beneficiary, or mortgagee of record of the recorded security instrument securing the debtor's loan agreement;

(3) the book entry system described in Section 51.0001(1), Property Code;

(4) the current mortgage servicer of the debtor's loan agreement; or

(5) the transferee of a transferred tax lien or property tax loan agreement.

(n) "Mortgagor" means a person who is the grantor of a security interest evidenced by a security instrument encumbering the property.

(o) "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, limited liability company, limited liability partnership, or any other legal or governmental entity, enterprise, or organization.

(p) "Property" means the real property, fixtures, and improvements encumbered by a loan agreement sought to be foreclosed under Rule 735 or 736.

(q) "Property address" means the street address assigned by the U.S. Postal Service to the property encumbered by a loan agreement and, if the U.S. Postal Service has not assigned a street address, the legal description of the property.

(r) "Property owner" under Sections 32.06 and 32.065, Tax Code, means a debtor who is liable to pay a transferred tax lien or property tax loan agreement that encumbers the property, and the "owner of the property" who must be served with an application under Section 32.06(c)(2) and (c-1)(1).

(s) "Property tax loan" means a loan agreement, as provided for in 32.065(b), Tax Code, and as defined in Section 351.002, Finance Code.

(t) "Recorded preexisting first lien" under Section 32.06(c)(2) and (c-1), Tax Code, means a current contractual lien that encumbered the property at the time the transferred tax lien was recorded, which is evidenced by a recorded security instrument, other than a transferred tax lien, that was recorded first in time to any other contractual lien in the official real property records.

(u) "Respondent" means a person named as a responding party in a Rule 736 application.

(v) "Security instrument" means a deed of trust or other contractual lien document that evidences a security interest encumbering the property.

(w) "Servicing" means activities related to the administration of a debtor's loan agreement in the regular course of business and may include:

(1) accounting, record keeping, escrow administration, and communication with the debtor and third parties;

(2) receiving loan payments from a debtor and remitting to the owner or investor of the debtor's loan agreement the principal and interest less servicing fees received from the debtor; and

(3) administering foreclosure of the property in accordance with Section 51.0025, Property Code.

(x) "Transferred tax lien" or "property tax loan" means a lien, as provided in Section 32.065(b), Tax Code, and as defined in Section 351.002, Finance Code.

(y) "Transferee" or "property tax lender" under Sections 32.06(c) and (c-1) and 32.065, Tax Code, means a person authorized to pay the taxes of another and the person, or the person's successor in interest, who is the owner, noteholder, or investor of a transferred tax lien or property tax loan and a person as defined in Section 351.002, Finance Code.

RULE 736.1 Expedited Court Order Proceeding

(a) Before filing an application under this rule, notices in the sequence and time required by law must be sent to the person liable for the debt and include:

(1) a notice or demand to cure the default and a notice of intent to accelerate the maturity of the debt, which may be combined into one notice or document, unless the loan agreement provides otherwise;

(2) a notice of acceleration of the maturity of the debt, unless the debt has matured; and

(3) any other notice required by law that is a condition precedent for initiating a nonjudicial foreclosure sale prior to acceleration of the maturity of the debt unless the debt has matured.

(b) If a person provides a change of address in writing to the mortgage servicer of the debtor's loan agreement as provided in Section 51.0021, Property Code, beginning 20 days after receipt of the change of address, all notices required by this section must be sent to the person's new address. Previous notices properly sent to the person's former address are not required to be re-mailed or re-served.

(c) The application, declaration, and order filed with the court shall be the same or substantially the same or similar to the promulgated forms found in Rules 736.2 and 736.15.

(d) All requirements for allegations and statements of fact in a Rule 736.2 promulgated form are made a part of this rule by reference for all purposes.

RULE 736.2 Forms

(a) Home Equity, Reverse Mortgage, or Home Equity Line of Credit Application Form.

Cause No.: [_____]

IN RE *[Identify type of loan agreement – see Rule 735.1]* LOAN AGREEMENT	§	**IN THE [*Type of Court*] COURT**
	§	
	§	
	§	
	§	

APPLICANT: **[*Name of person seeking to enforce the debtor's loan agreement – see Rule 735.3(b) and (m)(1),(2) and (4)*] "Applicant"**	§	
	§	**[*Name*] COUNTY, TEXAS**
RESPONDENT: **[*Name of each debtor – see Rule 735.3(e) and (u)*] "Debtor"**	§	
[*Name of each mortgagor – see Rule 735.3(n) and (u)*] "Mortgagor"	§	
[*Name of each spouse, heir, or personal representative, if applicable – see Rules 735.3(f) and (u) and 736.8*] ["Spouse" or "Heir" or "Distributee" or "Personal Representative"]	§	**[*Court Designation*]**

THE APPLICANT IS SEEKING AN EXPEDITED ORDER TO ALLOW A NONJUDICIAL *IN REM* FORECLOSURE TO PROCEED AGAINST THE ENCUMBERED PROPERTY IN ACCORDANCE WITH CHAPTER 51, PROPERTY CODE, AND THE DEBTOR'S [*STATE TYPE OF LOAN AGREEMENT DESCRIBED IN RULE 735.1*] LOAN AGREEMENT AGAINST THE ENCUMBERED PROPERTY.

1. APPLICANT: [*state name of the person seeking to enforce the loan agreement*] ("Applicant"), whose address is [*state street address, city, state, and zip code*], is seeking to enforce a [*state type of loan agreement described in Rule 735.1*] loan agreement against [*state name of each debtor*] ("Debtor").

   The property encumbered by Debtor's loan agreement is commonly known as [*state property address*] ("Property"). With respect to Debtor's loan agreement:
   [*Note: complete (1-a) and (1-b), and, if applicable, (1-c) and (1-d)*]

   (1-a) [*State name of the person and choose as appropriate:* ("Owner"), ("Noteholder"), *or* ("Investor")] of Debtor's loan agreement is the person who has the legal, beneficial, or equitable right to receive the principal and interest received from Debtor's scheduled loan agreement payments.

   (1-b) [*State name*] ("Mortgage Servicer"), whose address is [*state street address, city, state, and zip code*], is the current mortgage servicer responsible for administrating and managing Debtor's loan agreement account for [*state name of Mortgage Servicer's principal, i.e. Owner, Noteholder, or Investor or if Owner or Noteholder is acting as Mortgage Servicer for its own account, state its own account*].

   (1-c) *(Note: if Mortgage Servicer is administering the foreclosure pursuant to Section 51.0025, Property Code, state)* As Mortgage Servicer of Debtor's account, [*state name of Mortgage Servicer*] is administering the

foreclosure of the lien against the property in accordance with Section 51.0025, Property Code.

(1-d) (*Note: If Mortgage Electronic Registration Systems, Inc., MERS, or a similar derivation of the name is the current mortgagee or record, nominee, or the beneficiary of the recorded security instrument, state)* "[The name or derivation of the name used in the security instrument for Mortgage Electronic Registration Systems, Inc., or MERS] ("MERS") is the mortgagee of record of Debtor's security instrument filed in the official real property records of [name of Texas county]. MERS is a book entry system referred to in Section 51.0001(1), Property Code.

2. RESPONDENT:

(*Note: in Paragraph 2 complete each subpart and make a separate sub-paragraph for each person named as a respondent*)

(2-a) [*State name of each person liable for the loan agreement debt sought to be foreclosed*] ("Debtor") is the person liable for payment of the debt evidenced by the loan agreement that encumbers the property sought to be foreclosed and shall have citation mailed to ~~may be served~~ by mailing at [*state last known address of each debtor*].

(2-b) [*State name of each mortgagor of the security instrument sought to be foreclosed*] ("Mortgagor") is a grantor of the security instrument that encumbers the property sought to be foreclosed and shall have citation mailed to ~~may be served~~ at [*state Mortgagor's last known address*]. Applicant is not seeking to collect a debt against a mortgagor who is not liable for the loan agreement debt.

(2-c) (*Note: if Debtor or Mortgagor is deceased, state as appropriate*) [*name of surviving spouse*] is the surviving spouse and [*state name of each heir and describe status, i.e., heir, distribute, or personal representative*] of [*state name of each deceased Debtor or Mortgagor*] ("Decedent") who was the [*state whether* Debtor, Mortgagor, *or both* Debtor and Mortgagor] of the loan agreement encumbering the property sought to be foreclosed. [*state name of person*] and shall have citation mailed to ~~may be served~~ at [*state the last known address of the surviving spouse, each heir, distribute, or personal representative, as applicable*]. Applicant is not seeking to collect a debt against a surviving spouse or heir who is not liable for the loan agreement debt.

3. PROPERTY: The real property, fixtures, and improvements sought to be foreclosed are commonly known as [*state property address of the encumbered property*] ("Property") and the legal description of the property is: [*state legal description*].

4. DEFAULT: According to Mortgage Servicer's records for Debtor's loan agreement account that are kept in the regular course of business, as of [*state a specific date – the date must be no more than 30 days before the date the affiant executes the Rule 736.2(c) declaration attached to the application*], Debtor breached Debtor's obligations under the terms and conditions of the loan agreement as described in the affidavit or declaration attached to this application and made a part of this application by reference for all purposes. Prior to filing

this Application, a notice or demand to cure the default, a notice of intent to accelerate, a notice of acceleration of the maturity of the debt, and any other notice required by law as of the date of acceleration was sent to each Debtor obligated for the loan agreement debt.

(Note: choose (4-a), (4-b), or (4-c) as appropriate)

(4-a) *(Note: if the default is a monetary default, state:)* "Under the terms of Debtor's loan agreement note, as of [*date stated in 4 above*], Debtor has not cured the default and at least [*state number of payments in arrears*] scheduled loan payments are in arrears. The amount necessary to cure Debtor's default, which includes principal, interest, escrow for taxes, and insurance, if any, and all other fees and expenses payable by Debtor under the terms of the loan agreement note and security instrument is at least [*state reinstatement amount in U.S. dollars*] as of [*date stated in 4 above*]. The amount necessary to pay off Debtor' loan agreement is at least [*state payoff amount in U.S. dollars*] as of [*date stated in 4 above*]. All funds paid by Debtor to Mortgage Servicer have been credited to Debtor's loan agreement account, to include any funds held in a suspense account. As of the filing date of this Application, Debtor has not cured the default.

(4-b) *(Note: if the default is a non-monetary default, state:)* "Debtor has breached Debtor's obligations under the terms of Debtor's loan agreement note and security instrument because [*state with specificity the reason for the non-monetary default*]. To cure the default, Debtor must [*state the acts or omissions necessary to cure the default*]. As of the filing date of this application, Debtor has not cured the default.

(4-c) *(Note: if the security instrument to be foreclosed is a reverse mortgage, state:)* "A default under Debtor's reverse mortgage loan agreement occurred on or about [*state date of default*] under [*state* Article XVI, Section 50(k)(6)(c), Texas Constitution; Article XVI, Section 50(k)(6)(d), Texas Constitution; *or* both Article XVI, Sections 50(k)(6)(c) and (d)]; and

(i) [*State the nature of the default as of the date specified in (4-c) above and state what must be done to cure the default*];

(ii) [*State how Applicant obtained the information necessary to form an opinion that the debtor was deceased and there was a default*]; and

(iii) The estimated fair market value of the Property as determined by [*state source for obtaining value, e.g. taxing authority, BPO, or other credible source*] was [*state amount in U.S. dollars*] as of [*state date*].

5. EXHIBITS: The originals or true and correct copies of the original documents related to Debtor's loan agreement or account are attached to this application and made a part of this application by reference for all purposes. The documents attached are listed and marked as exhibits in the order set out below:

(5-a) note and evidence of transfer, if any – Exhibit 5-a;

(5-b) the recorded security instrument and current assignment of the security instrument, if any, filed in the real property records with the county clerk's indexing information clearly legible – Exhibit 5-b;

(5-c) the notice or demand to cure the default, notice of intent to accelerate, notice of acceleration of the maturity of the debt, whether combined or in separate notices, which were sent to Debtor in accordance with Chapter 51, Property Code, and the loan agreement – Exhibit 5-c;

(5-d) proof of mailing by certified mail of all notices described in (5-c) *(A copy of an electronic image obtained from the U.S. Postal Service's official website, a copy of a return receipt or "green card", or a declaration under penalty of perjury by the Mortgage Servicer or its attorney that correlates to a particular 5-c notice sent by certified mail shall be proof of mailing unless a respondent files a specific denial)* – Exhibit 5-d;

(5-e) a statement by an officer or employee of the current mortgage servicer servicing Debtor's loan agreement account as provided in Rule 736.2(c), which must be sworn before a notary or made under penalty of perjury – Exhibit 5-e;

(5-f) in accordance with the Servicemember's Civil Relief Act, 50 U.S.C. App. § 521, a statement made under penalty of perjury that each Respondent who is a natural person is not in military service *(A copy of an electronic image obtained from the official SCRA website of the U.S. Department of Defense Manpower Data Center, at www/dmdc.osd.mil/scra/ or successor website, or a declaration from the mortgage servicer currently servicing the debtor's account that describes the respondent's military service status shall be accepted as true unless a respondent files a specific denial)* – Exhibit 5-f;

(5-g) a statement addressed to the clerk of the court providing: (a) the name and last known address and response date for each Respondent to be served under this rule, and (b) the property address – Exhibit 5-g; and

(5-h) all other notices, declarations, documents, or other instruments of any kind or form required by law and proof of mailing or delivery in any manner required by law up to and including acceleration as a condition precedent for conducting a non-judicial foreclosure against the Property – Exhibit 5-h.

6. OFFSETS AND CREDITS: According to Mortgage Servicer's records, each Debtor received the use or benefit of the funds advanced under the terms of the loan agreement and all lawful offsets, payments, and credits, including amounts held in suspense, if any, have been applied to the Debtor's account as of [*date stated in 4 above*].

7. RELIEF REQUESTED: Because Debtor breached Debtor's loan agreement obligations, Applicant is seeking a court order so that it may proceed with a non-judicial *in rem* foreclosure of the lien encumbering the Property in accordance with Chapter 51, Property Code, and the loan agreement.

[*Signature Block for Applicant in accordance with Rule 57*]

(b) Transferred Tax Lien or Property Tax Loan Application Form.

Cause No.: [_____]

IN RE PROPERTY TAX LOAN AGREEMENT ORDER § § **IN THE [*Type of Court*] COURT**

APPLICANT: **[Name of person seeking to enforce the debtor's loan agreement – *see Rule 735.3(b) and (m)(1),(2),(4) and (5)*]**	§	
RESPONDENT: **[*Name of each owner of the property who is a debtor – see Rule 735.3(r) and (u)*] "Debtor"** **[*Name of each property owner or owner of the property – see Rule 735.3(r) and (u)*] "Property Owner"** **[*Name of holder of the current preexisting first lien – see Rule 735.3(g) and (u)*] "First Lien Holder"** **[*Name of each mortgagor – see Rule 735.3(n) and (u)*] "Mortgagor"** **[*Name of each spouse, heir, or personal representative, if applicable – see Rule 735.3(f),(g) and (u)*] ["Spouse" or "Heir" or "Distributee or "Personal Representative"]**	§	**[*Name*] COUNTY, TEXAS** **[*Court Designation*]**

THE APPLICANT IS SEEKING AN EXPEDITED ORDER TO ALLOW A NONJUDICIAL *IN REM* FORECLOSURE TO PROCEED AGAINST THE ENCUMBERED PROPERTY IN ACCORDANCE WITH SECTIONS 32.06 AND 32.065, TAX CODE, CHAPTER 51, PROPERTY CODE, AND THE DEBTOR'S TRANSFERRED TAX LIEN OR PROPERTY TAX LOAN AGREEMENT.

1. APPLICANT: [*state name of the person seeking to enforce the property tax loan agreement*] ("Applicant") whose address is [*state street address, city, state, and zip code*] is seeking to enforce a transferred tax lien or property tax loan agreement against [*state name of each debtor*] ("Debtor").
The property encumbered by Debtor's loan agreement is commonly known as [*state property address*] ("Property"). With respect to Debtor's loan agreement:
[*Note: complete (1-a) and (1-b), and if applicable (1-c) and (1-d)*]
(1-a) [*State name of the person – choose as appropriate:* ("Owner"), ("Noteholder"), *or* ("Investor")] of Debtor's loan agreement is the person who has the legal, beneficial or equitable right to receive the principal and interest received from Debtor's scheduled loan agreement payments.

(1-b) [*State name*] ("Mortgage Servicer"), whose address is [*state street address, city, state, and zip code*], is the current mortgage servicer responsible for administrating and managing Debtor's loan agreement account for [*state name of Mortgage Servicer's principal, i.e. Owner, Noteholder, or Investor, or if Owner or Holder is acting as Mortgage Servicer for its own account, state its own account*].

(1-c) [*State name*], whose address is [*state street address*], is the current transferee or property tax lender ("Transferee") of Debtor's loan agreement debt encumbered by the Property.

(1-d) *(Note: if Mortgage Servicer is administering the foreclosure pursuant to Section 51.0025, Property Code, state)* As Mortgage Servicer of Debtor's account, [*state name of Mortgage Servicer*] is administering the foreclosure of the lien against the Property in accordance with Section 51.0025, Property Code.

(1-e) (*Note: If Mortgage Electronic Registration Systems, Inc., MERS, or a similar derivation of the name is the current mortgagee or record, nominee for the lender, or the beneficiary of the recorded security instrument, state:)* "[The name or derivation of the name used in the security instrument for Mortgage Electronic Registration Systems, Inc., or MERS] ("MERS") is the mortgagee of record of Debtor's security instrument filed in the official real property records of [*name of Texas county*]. MERS is a book entry system referred to in Section 51.0001(1), Property Code.

2. RESPONDENT:

(Note: in Paragraph 2 complete each subpart and make a separate sub-paragraph for each person named as a respondent)

(2-a) [*State name of each person liable for the loan agreement debt sought to be foreclosed*] ("Debtor") is the person liable for payment of the debt evidenced by the transferred tax lien or property tax loan agreement that encumbers the property sought to be foreclosed and may be served at [*state last known address of each Debtor*].

(2-b) [*State name of each mortgagor of the security instrument sought to be foreclosed*] ("Mortgagor") is a grantor of the security instrument that encumbers the property sought to be foreclosed and may be served at [*state Mortgagor's last known address*]. Applicant is not seeking to collect a debt against a mortgagor who is not liable for the loan agreement debt.

(2-c) [*State name of the holder of any recorded preexisting first lien on the property as defined in Rule 735.3(g)*] ("First Lien Holder") is the current holder of a recorded preexisting first lien encumbering the property that was filed in the real property records before the transferred tax lien sought to be foreclosed. The First Lien Holder may be served at [*state address and method of service as provided in Rule 736.7*].

(2-d) (*Note: if Debtor, Mortgagor, or First Lien Holder is deceased, state as appropriate*) [*name of surviving spouse*] is the surviving spouse and [*state name of each heir and describe status, i.e., heir, distribute, or personal representative*] of [*state name of each deceased Debtor or Mortgagor*]

("Decedent") who was the [*state whether* Debtor, Mortgagor, *or both* Debtor and Mortgagor] of the loan agreement encumbering the property sought to be foreclosed and may be served at [*state last known address of the surviving spouse and each heir, distribute, or personal representative, as applicable*]. Applicant is not seeking to collect a debt against a surviving spouse or heir who is not liable for the loan agreement debt.

3. PROPERTY: The real property, fixtures, and improvements sought to be foreclosed are commonly known as [*state property address of the encumbered property*] ("Property") and the legal description of the Property is: [*state legal description*].

4. STATUTORY ALLEGATIONS: [*State name of each property owner or owner of the property liable for the property tax loan agreement*] and [*state name of the transferee or property tax lender*] entered into a contract that is secured by a transferred tax lien or property tax loan agreement that encumbers the Property in accordance with Sections 32.06 and 32.065, Tax Code. As required to be alleged in this application by Section 32.06(c-1), Tax Code:

("A") "the lien is an ad valorem tax lien instead of a lien created under Article XVI, Section 50, Texas Constitution";

("B") "the applicant does not seek a court order required by Article XVI, Section 50, Texas Constitution";

("C") "the Transferee has provided notice to cure default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt to the property owner and each holder of a recorded first lien on the property in the manner required by Section 51.002, Property Code"; and

("D") "the Transferee has confirmed that the property owner has not requested a deferral of taxes authorized by Section 33.06, Tax Code."

5. DEFAULT: According to Mortgage Servicer's records for Debtor's loan agreement account that are kept in the regular course of business, as of [*state a specific date – the date must be no more than 30 days before the date the affiant executes the Rule 736.2(c) declaration attached to the application*], Debtor breached Debtor's obligations under the terms and conditions of the loan agreement as described in the affidavit or declaration attached to this application and made a part of this application by reference for all purposes. Prior to filing this application, a notice or demand to cure the default, a notice of intent to accelerate, a notice of acceleration of the maturity of the debt, and any other notice required by law as of the date of the acceleration was sent to each Debtor obligated for the transferred tax lien or property loan and First Lien Holder, as provided in Section 32.06(c-1)(C), Tax Code, and Section 51.002, Property Code.

(Note: Choose (5-a) or (5-b) as appropriate)

(5-a) *(Note: if the default is a monetary default, state:)* "Under the terms of Debtor's loan agreement note and security instrument as of [*date stated in 5 above*], Debtor has not cured the default and at least [*state number of payments in arrears*] scheduled loan payments are in arrears. The amount necessary to cure Debtor's default, which includes principal, interest, escrow for taxes and insurance, if any, and all other fees and expenses payable by Debtor under the terms of the loan agreement note and security

instrument is at least [*state reinstatement amount in U.S. dollars*] as of [*date stated in 5 above*]. The amount necessary to pay off Debtor' loan agreement is at least [*state payoff amount in U.S. dollars*] as of [*date stated in 5 above*]. All funds paid by Debtor to Mortgage Servicer have been credited to Debtor's loan agreement account, to include any funds held in a suspense account. As of the filing date of this application, Debtor has not cured the default.

(5-b) (*Note: if the default is a non-monetary default, state:)* "Debtor has breached Debtor's obligations under the terms of Debtor's loan agreement note and security instrument because [*state with specificity the reason for the non-monetary default*]. To cure the default, Debtor must [*state the acts or omissions necessary to cure the default*]. As of the filing date of this application, Debtor has not cured the default.

6. EXHIBITS: The originals or true and correct copies of the original documents related to Debtor's loan agreement are attached to this application and made a part of this application by reference for all purposes. The documents attached and marked as exhibits in the order listed below are:

(6-a) note and evidence of transfer, if any – Exhibit 6-a;

(6-b) the recorded security instrument and current assignment of the security instrument, if any, filed in the real property records with the county clerk's indexing information clearly legible – Exhibit 6-b;

(6-c) the notice or demand to cure the default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt, whether combined or in separate notices, which were sent to Debtor and each First Lien Holder, as provided in Section 32.06(c-1)(C), Tax Code, and Chapter 51, Property Code, and the loan agreement – Exhibit 6-c;

(6-d) proof of mailing by certified mail of all notices described in (6-c); *(Note: a copy of an electronic image obtained from the U.S. Postal Service's official website, a copy of a return receipt or "green card", or a declaration under penalty of perjury by Mortgage Servicer or its attorney that correlates to a particular 6-c notice sent by certified mail shall be proof of mailing unless a respondent files a specific denial)* – Exhibit 6-d;

(6-e) a statement made under penalty of perjury by an officer or employee of the current mortgage servicer servicing the Debtor's loan agreement account as provided in Rule 736.2(c), which must be sworn before a notary or made under penalty of perjury – Exhibit 6-e;

(6-f) in accordance with the Servicemember's Civil Relief Act, 50 U.S.C. App. § 521, a statement made under penalty of perjury that each Respondent who is a natural person is not in military service *(Note: a copy of an electronic image obtained from the official SCRA website of the U.S. Department of Defense Manpower Data Center, at www.dmdc.osd.mil/scra/ or the successor website, or a declaration from the mortgage servicer currently servicing the debtor's account describing the respondent's military service status shall be accepted as true unless a respondent files a specific denial)* – Exhibit 6-f;

(6-g) a statement addressed to the clerk of the court providing: (a) the name and last known address and response date for each Respondent to be served under this rule, and (b) the property address – Exhibit 6-g;

(6-h) all transferred tax lien documents required to be recorded in the real property records under Section 32.06(d), Tax Code, – Exhibit 6-h; and

(6-i) all other notices, declarations, documents, or other instruments of any kind or form required by law and proof of mailing or delivery in any manner required by law up to and including acceleration as a condition precedent for conducting a non-judicial foreclosure against the Property – Exhibit 6-i.

7. OFFSETS AND CREDITS: According to Mortgage Servicer's records, each Debtor received the use or benefit of the funds advanced under the terms of the loan agreement and all lawful offsets, payments, and credits, including amounts held in suspense, if any, have been applied to Debtor's account as of [*date stated in 5 above*].

8. RELIEF REQUESTED: Because Debtor breached Debtor's loan agreement obligations, Applicant is seeking a court order so that it may proceed with a non-judicial *in rem* foreclosure of the lien encumbering the Property in accordance with Chapter 51, Property Code, the loan agreement, and Section 32.06 and 32.065 Tax Code.

[*Signature Block for Applicant in accordance with Rule 57*]

(c) Declaration Form for Rule 736.2(a) and (b) Applications.

(*Note: choose one*: [NOTARIZED AFFIDAVIT *or* DECLARATION MADE UNDER PENALTY OF PERJURY]) IN SUPPORT OF AN APPLICATION FILED BY [*NAME OF APPLICANT*] RELATED TO THE PROPERTY COMMONLY KNOWN AS [*PROPERTY ADDRESS OF PROPERTY SOUGHT TO BE FORECLOSED*].

(*Choose one: state)* [Before me, the undersigned authority, personally appeared (*name of affiant*) who being by me duly sworn, deposed that the following statements are true and correct *or* Under penalty of perjury, I (*name of affiant*) swear that the following statements are true and correct]:

"My name is [*state name of affiant*] "Affiant." I am over eighteen years of age, of sound mind, capable of making this affidavit, and I am personally acquainted with the facts stated herein as to the status and circumstance of [*state name of each debtor*] ("Debtor's") loan agreement account that is being serviced by [*state name of mortgage servicer – see Rule 735.3(l)*] ("Mortgage Servicer"). I am [*state (officer) or (employee)*] of [*state name of Affiant's employer*], whose address is [*state street address, city, state, and zip code*], and my job function is [*state Affiant's title and job function*].

All the facts stated in this declaration are true and correct, were formed after a personal review of the business and public records related to the servicing of Debtor's loan agreement account or by an inquiry of a person under my supervision who personally reviewed the business records of Debtor's loan agreement account, and based on my: (a) knowledge of the customary mortgage servicing records and processes which are under my custody and control as to Debtor's account; (b) knowledge that all the records related to Debtor's account were made and prepared in the ordinary course of business of originating and servicing Debtor's account and that the persons or employees who maintained such accounts and records did so for the business purpose of maintaining a complete and accurate record of matters related to the servicing Debtor's loan agreement and account; and (c) familiarity with the manner and processes in which Mortgage

Servicer compiles and maintains the records and files related to Debtor's account, whether in paper or electronic form.

I adopt by reference the application, records, and declaration attached to the application on the date stated.

The documents attached to the application or my application were made and kept in the regular course of business for originating and servicing Debtor's loan agreement account; the documents were made at or near the date and time reflected in the documents; and the information contained in Debtor's servicing account file was recorded by a person with knowledge of the transmitted information. According to the mortgage servicing records of Debtor's account, the documents attached to the application are the originals or true and correct copies of the originals.

The business records of [*state name of Mortgage Servicer*] indicate that all the foreclosure related notices attached to the application were properly addressed to each addressee and timely delivered into the custody and control of the U.S. Postal Service.

According to mortgage servicing records of Debtor's account, [*state name of each Debtor*] is the maker of the note or the current obligor of the note evidenced by the loan agreement that encumbers the property sought to be foreclosed. Debtor has had the use and benefit of all funds advanced under the terms of the loan agreement by the original lender to Debtor and Debtor has not indicated that Debtor is not liable for the loan agreement debt. The property securing Debtor's loan agreement is commonly known as [*property address*] and is more specifically described as: [*legal description*].

According to a review of Mortgage Servicer's records relating to Debtor's account that was made on [*state date which must be no more than 30 days before Affiant executes this declaration and should be the same as the date contained in the application*], the number of Debtor's loan payments which were in arrears were [*state number*]. As of [*date – typically a date 30 days in the future of the date the application is prepared*] the amount necessary to cure Debtor's default is [*state reinstatement amount in U.S. dollars*], and the payoff amount is [*state amount in U.S. dollars*] according to Mortgage Servicer's records. All lawful offsets, payments, and credits to include funds held in suspense, if any, have been applied in the calculation of what Debtor owes under the terms and conditions of the loan agreement.

It is the customary business practice of Mortgage Servicer to terminate a foreclosure proceeding if Debtor's account is brought current at any time before the property encumbered by Debtor's loan agreement is auctioned at a foreclosure sale.

According to the servicing records of [*state name of the person servicing Debtor's account*], [*state name of the owner, noteholder, or investor of Debtor's account*] is the [*state "Owner" or "Noteholder" or "Investor"*] of Debtor's loan agreement and is the person: (a) for whose benefit Mortgage Servicer of Debtor's account remits the principal and interest received from Debtor; and (b) who suffers the risk of loss if Debtor defaults. *(Note: if applicable, state:)* [*state name of Mortgage Servicer*] is the duly authorized agent for loan service administration for [*name of Owner, Noteholder, or Investor*] and has been retained to administer all loan servicing activities related to Debtor's loan agreement to include foreclosure in accordance with Section 51.0025, Property Code.

(If Debtor's loan agreement is a transferred tax lien or property tax loan, state) Debtor's loan agreement is a transferred tax lien or property tax loan and [*state name and current address of transferee*] is the current transferee of Debtor's loan agreement. All conditions precedent required by Sections 32.06 and 32.065 of the Tax Code for initiating a foreclosure under Texas Rule of Civil Procedure 735 or 736 have been timely accomplished.

On the date I signed this declaration, the default status of Debtor's account had not been cured and all the information contained in the application and my declaration was true and correct as of the stated date.

Dated this ____ day of _____, _____.

[*Signature of Affiant*]
[*Printed name of Affiant and Title*]
[*Address of Affiant*]

(*CHOOSE ONE OF THE VERIFICATON OPTIONS BELOW*)

"I, [*state name of Affiant*] am the [*state title or job responsibility of Affiant*] am an [*state* (officer) *or* (employee)] of [*state name and address of Mortgage Servicer servicing Debtor's loan agreement*] and declare under penalty of perjury that I have read the application and all attached exhibits to which my declaration is to be affixed and the statements and averments made in the application and exhibits and my declaration are true and correct as of the date stated.

_____
[*Signature of Affiant*]

OR

STATE OF [*state*]
COUNTY OF [*county*]

Before me, on this day personally appeared [*state name of Affiant*] an [*state* (officer) *or* (employee)] of [*state name and address of the Mortgage Servicer servicing Debtor's loan agreement*] (*choose one, state* [known to me *or* proved to me on the oath of (*name of witness*) *or* proved to me through (*description of identity card or other document*)]) to be the person whose name is subscribed to the foregoing instrument and being sworn by me acknowledged to me that s/he read the application and all attached exhibits to which his or her declaration is affixed and the statements and averments made in the application and exhibits are true and correct as of the date stated.

Sworn to and subscribed on this [*day*] day of [*month*], [*year*].
[SEAL]

_____
[*Title of notary or officer*]
My commission expires: [*date*]

736.3 Duties of Applicant with Regard to Service

(a) Upon filing the application, the applicant shall provide the clerk of the court, for each citation required under this rule:

(1) sufficient copies of the application, declaration, and exhibits for attachment to each citation, unless the filing was made electronically and the clerk directs that copies are not required;

(2) a statement containing:

(a) the name and last known address for each person to be served with citation; and

(b) the property address of the property sought to be foreclosed.

(3) unless the clerk instructs otherwise, a self addressed postage prepaid envelope or wrapper for the return of all citations served by the clerk.

(b) The party requesting a citation shall be responsible for obtaining service of each citation with a copy of the application, declaration, and all attached exhibits attached.

(c) At the time of filing of an application, the applicant shall pay all filing fees, all citation preparation and service of citation fees due the clerk, and all other service of process fees due that may be due at the time of filing, as well as all other authorized costs and expenses of court, all of which shall be taxed as costs of court.

736.4 Citation

(a) A condition precedent for filing an application with the clerk of the court is the payment of all fees and costs due for filing the application, preparation of citation, and mailing ~~service~~ of citation in accordance with Rule 736.5, and collection of fees required for service under Rules 736.6, 736.7, and 736.8, if applicable. Upon request, the clerk of the court shall issue:

(1) one citation for each debtor and each mortgagor at their last known address;

(2) two citations for the property - one for mailing and the other served - by addressing the citations to "RESIDENT OF [*property address*]" at the property address;

(3) if a person who would otherwise be a respondent is deceased, as applicable:

(i) one citation for the personal representative of the decedent's estate; or

(ii) if no personal representative has been qualified,

a. one citation for the surviving spouse at the surviving spouse's last known address and one citation for each heir at the heir's last known address, or

b. if the name or last known address of the surviving spouse or an heir is unknown, one citation addressed to "surviving spouse of [*name of decedent*]" at the property address and one citation addressed to "heirs of [*name of decedent*]" at the property address; and

(4) for a Rule 736.2(b) property tax loan application:

(i) the citations described in (a)(1)-(3),

(ii) one citation for each property owner or owner of the property, and

(iii) one citation for any holder of a recorded preexisting first lien on the property.

(b) The cost for preparing and issuing each citation shall be in accordance with Section 51.317, Government Code, shall be paid to the clerk of the court at the time the application is accepted for filing, and shall be taxed as cost of court.

(c) The response date contained in a citation to be served by the clerk of the court on a person named as a debtor, mortgagor, property owner or owner of the property, surviving spouse, heir, or personal representative shall be the first Monday – unless the Monday is a federal or state holiday and then the next day – after the

expiration of 38 days of service of the citation by the clerk of the court made in accordance with Rule 736.5(c).

(d) The response date contained in a citation served on the holder of a recorded preexisting first lien encumbering the property shall be the Monday next following the expiration of 20 days after the date service is made under Rule 736.7.

(e) For a citation addressed to and served on the resident of the property, as provided in Rule 736.6, no return date is applicable.

(f) The clerk of the court shall attach to each citation a copy of the application, declaration, and exhibits.

(g) The clerk shall include the assigned cause or case number, court, court number, and date of filing on each application served with a citation.

(h) The clerk of the court shall prepare and have delivered other citations as directed by the requesting party.

736.5 Service of Citation by Court Clerk by First Class Mail

(a) The clerk of the court shall serve a citation by first class mail on each person named in Rule 736.4(a), as applicable.

(b) Service is complete when a citation and application, including the declaration and exhibits, are deposited into the custody and control of the U.S. Postal Service in a properly addressed, postage prepaid wrapper or envelope.

(c) The return date of a citation served by the clerk of the court is calculated from the date the citation and application were placed in the custody and control of the U.S. Postal Service in accordance with the clerk of the court's standard mailing procedures and Rule 736.4(c).

(d) Under this rule, a return of service that is regular on its face is prima facie evidence of proper service by the clerk.

(e) The clerk of the court may collect a reasonable fee not to exceed $10.00 for each citation served by the clerk of the court to compensate for the costs of handling and mailing. ~~in accordance with Chapter 118.137(C) and (D), Government Code, as may be amended.~~

(f) The clerk of the court shall provide the applicant with a return of service for each citation served under this subdivision.

(g) The cost of service of citation by the clerk of the court shall be paid by the applicant at the time of filing the application and shall be taxed as a cost of court.

736.6 Service of Citation on the Property by Delivery to the Property Address

(a) In addition to mailing ~~service of~~ a citation by the clerk of the court under Rule 736.5, the applicant shall deliver a citation addressed to "RESIDENT of [*property address*]" to any sheriff, constable, or other person authorized by Rule 103 to serve a citation on the property.

(b) The citation and application, including the declaration and all exhibits, shall be placed in a plain wrapper or envelope without any other markings except the following conspicuous notation:

TO THE RESIDENTS OF [*PROPERTY ADDRESS*]
IMPORTANT LEGAL DOCUMENT INSIDE

(c) The citation shall be personally served by the sheriff, constable, or other person authorized by Rule 103 by delivering the citation to any person over the age of sixteen (16) years residing at the property.

(1) If service on a person at the property address is unsuccessful, the citation shall be served by securely affixing the envelope or wrapper to the front door or main entry of the property.

(2) If the property cannot be accessed or is located in a gated community, within 24 hours of the attempted delivery of citation on the property, the authorized process server shall deposit the citation in a prepaid wrapper or envelope addressed to "RESIDENT at [*state property address*]" with the notation "DO NOT RETURN TO SENDER" into the custody and control of the U.S. Postal Service's express mail service or a commercial delivery service.

(d) The authorized process server shall state on the return of citation his or her name, and the date, time, and ultimate method of the service of citation under (c). If service is by prepaid express mail or commercial delivery service, the authorized process server shall attach the document tracking number and original receipt of payment of the delivery charge from the U.S. Postal Service or commercial delivery service.

(e) The recipient of a citation addressed to the resident at the property address is not required to file a response unless the recipient is otherwise named as a respondent in the application and a response is due from such person as provided in this rule.

(f) The return of service on the property address must be on file with the clerk of the court at least 20 days before a judge may sign a default order.

(g) The cost for service of a citation to the property at the property address shall be paid by the applicant and shall be taxed as a cost of court.

736.7 Service of Transferred or Property Tax Lien Application on the Holder of a Recorded Preexisting First Lien on the Property

(a) For a transferred tax lien or property tax loan application, the applicant shall obtain personal service on any person who is the current holder of a recorded preexisting first lien on the property by delivery of citation to any sheriff, constable, or other person authorized by Rule 103 to serve process.

(b) Service of citation on the current holder of a recorded preexisting first lien shall be by delivery of the citation to:

(1) the person, if a natural person;

(2) the person's current Texas registered agent;

(3) the person's president, vice president, or general counsel at the person's principal place of business;

(4) if the person is a non-resident, the Texas Secretary of State with a statement containing the name and address of the non-resident person's residence or home office in accordance with Section 17.045, Civil Practices and Remedies Code;

(5) the office manager or the person in charge who is over 21 years of age at the person's current principal place of business address, if the person is an unincorporated business association;

(6) the current mortgage servicer of the recorded preexisting first lien; or

(7) in the event that service cannot be effected under (1)-(6):

(i) the address of the holder of the recorded preexisting first lien on the property as listed in the document evidencing the lien recorded in the real property records; or

(ii) the person or persons otherwise entitled to service of a petition in the manner set forth in Rule 106(b).

(c) The cost for service of a citation on any person who is the current holder of a recorded preexisting lien on the property shall be paid by the applicant and shall be taxed as a cost of court.

736.8 Application and Service on Heirs of Decedent

(a) If a debtor, mortgagor, property owner or owner of the property, or holder of a recorded preexisting first lien on the property as defined in Rule 735.3 is deceased, the promulgated forms contained in Rules 736.2 and 736.17 must be modified to include the following:

(1) The deceased person shall be identified by name and last known address and thereafter identified as "Decedent" in the application, declaration, and order.

(2) If a probate proceeding has been opened for the decedent's estate, provide:

(i) the type of probate proceeding opened for the decedent's estate;

(ii) if the probate proceeding requires the appointment of a personal representative, the name, address, and date the person qualified as the personal representative of the decedent's estate;

(iii) the caption of the proceeding to include name of the decedent, case or cause number, court, county, state, and date of filing of the probate proceeding; and

(iv) a statement that [*name of personal representative*] is the qualified personal representative of the decedent's estate.

(3) If a probate proceeding has been opened for the decedent's estate requiring the appointment of a personal representative, but an order appointing a personal representative has not been entered or a personal representative has not been qualified, provide:

(i) the caption of the proceeding to include the name of decedent, case or cause number, court, county, state, and filing date of the probate proceeding;

(ii) the name and address of the person opening the probate proceeding and the person's attorney of record, if any; and

(iii) a statement that no person has qualified as the personal representative of the decedent's estate.

(4) A statement specifying whether the surviving spouse acquires all right title and interest of the decedent's interest in the property in accordance with Section 45, Probate Code, as it may be amended, and if so, the name and current address of the surviving spouse.

(5) If the surviving spouse does not acquire the decedent's interest in the property or the decedent's spouse predeceased the decedent and no personal representative for the decedent's estate has qualified, provide:

(i) the name and last known address of the surviving spouse and the name and last known address of each heir who has an interest in the property sought to be foreclosed under the statutes of descent

and distribution to the second/third degree of consanguinity as provided in Section 573.024, Government Code;

(ii) if the name, last known address, or whereabouts of the surviving spouse or an heir is unknown, describe the due diligence exercised to find or locate the whereabouts of the spouse or heir; and

(iii) if an heir is a minor child or *non compos mentis* person, state the name and last known address of such person and identify by name and last known address the parent, natural guardian, next friend, or person with a power of attorney for the person or if a guardianship has been opened for the person the name and last known address of the guardian of the person's estate.

(6) State the estimated "as is" appraised or fair market value of the property sought to be foreclosed, supported by documentation from two sources which may be a current appraisal, broker's price opinion (BPO), valuation from an official taxing authority, or automated valuation model appraisal (AVM) that is less than six months old.

(7) If the decedent's will has been probated in the county where the property is located, identify by name and last known address of all the distributees of the property under the decedent's will.

(8) State whether there is any equity in the property after deducting the payoff of the lien sough to be foreclosed, any known inferior liens, and the amount of any governmental liens to include ad valorem liens encumbering the property as of a date that must be within 60 days of the date of filing the application, and provide a schedule showing how the equity calculation was made.

(b) The applicant is responsible for obtaining personal service on:

(1) the personal representative of decedent's estate if a personal representative has qualified;

(2) if a personal representative has not qualified:

(i) the surviving spouse who acquires all of the decedent's right, title, and interest in the property under Section 45, Probate Code, as amended;

(ii) if the surviving spouse does not acquire the decedent's interest in the property under Section 45, Probate Code, as amended, the heirs of the decedent in the order of taking to the second degree of consanguinity under Section 573.024, Government Code, with service of citation for each heir who is a minor child or a *non compos menits* person on the person's legal guardian and if no legal guardian has been appointed, the person's natural guardian, next friend, or person with a power of attorney for the person's estate; and

(iii) the distributees under the decedent's will if it is probated in the county where the property is located.

(c) If a surviving spouse or an heir must be served and the name or whereabouts of the surviving spouse or heir is unknown, citation by publication is required under Rule 109 or 109a.

(d) Notwithstanding other provisions of this rule, if a dependent or creditor's probate administration is pending for a decedent's estate and a personal representative has

qualified for letters of administration, an application under Rule 735 or 736 must be filed in the probate court where the administration is pending.

736.9 Citation Form

A citation under this rule shall be sufficient if, when completed, the citation is regular on its face and is substantially the same or similar to the promulgated citation form contained in this rule.

THE STATE OF TEXAS
CITATION FOR A TEX. R. CIV. PROC. 736 ORDER

[NOTE: The clerk of the court may use the clerk's customary caption for a citation, but at a minimum, the caption must contain the name and location of the court, cause or suit number on the docket, the date the application was filed, the names of the parties, the property address or the name and address of the person to be served, and the date the citation was prepared.]

YOU HAVE BEEN SUED

You should carefully read and understand the allegations contained in the application, declaration, and exhibits attached to this citation because it may affect your rights in the described property. You may employ an attorney.

RESPONSE DATE

The response date marked below is the date you or your attorney should file a response with the clerk of the court.

□ (a) As a debtor, mortgagor, property owner, spouse, heir, or personal representative, you or your attorney must file a written response to the allegations contained in the application with the clerk of the court at the clerk's address listed below on [*the specific date certain the clerk of the court puts in this blank that is calculated in accordance with Rules 736.4(c) and 736.5(c)]*.

□ (b) As the holder of a current recorded preexisting first lien on the property, you or your attorney must file a response with the clerk of the court on or before 10:00 AM on the first Monday after the expiration of 20 days from the date the citation was served on you in accordance with Texas Rule of Civil Procedure 736.7.

□ (c) For a citation addressed to "RESIDENT at the Property Address", no response is required from you, unless you have been served with citation as a debtor, mortgagor, property owner or owner of the property, spouse, heir, or personal representative.

IF YOU OR YOUR ATTORNEY DOES NOT FILE A TIMELY WRITTEN RESPONSE WITH THE CLERK OF THE COURT, YOUR FAILURE TO RESPOND WILL BE DEEMED YOUR CONSENT FOR AN ENTRY OF A DEFAULT ORDER BY THE COURT WITHOUT A HEARING. AN ORDER WILL ALLOW THE APPLICANT OR ITS SUCCESSOR TO PROCEED WITH FORECLOSURE OF A LIEN ENCUMBERING THE PROPERTY.

If you file a written response, it must contain at a minimum the following information: (a) your name and the current mailing address for you or your attorney [so that a notice of the date, time,

and place of a hearing in this matter may be sent]; (b) the cause or case number and the name, county, and number of the court, which may be obtained from the application that was attached to the citation served on you; and (c) your response or defense to the allegations contained in the application.

[NOTE: The clerk of the court may use the clerk's customary form of citation verification. But at a minimum, the verification must include the date of issuance of the citation, signature block and seal of the court, and the name and address of person signing the citation on behalf of the clerk.]

------------------ ---- **RETURN** ------------------

Came to hand on the _____ day of [*month*], [*year*] at ______ o'clock ____M., and executed on the _____ day of [*month*], [*year*] at ________ o'clock __ M. by delivery of an original or a duplicate original citation to the person or property named in the citation, with a true and correct copy of the application, declaration, and all exhibits attached, by:

(MARK ONE)

- □ Mailing ~~Service~~ was made in accordance with Texas Rule of Civil Procedure 736.5.
- □ Mailing Service was made on the property at the property address in accordance with Texas Rule of Civil Procedure 736.6(c).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(c)(1).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(c)(2).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(d). Attached is the original payment receipt with tracking number as required by Texas Rule of Civil Procedure 736.6(d).
- □ Service on the current holder of the current recorded preexisting first lien against the property was made in accordance with Texas Rule of Civil Procedure 736.7, by delivering a citation to [*state name of person representing the holder of the current recorded preexisting first lien on the property in accordance with Rule 736.7(b)*] at [*state location where citation was personally served*] by [*state means or method of service in accordance with Rule736.7(b)(1)-(6)*] on [*state date*]. If the person served was the mortgage servicer of the current recorded preexisting first lien against the property state [*name of mortgage servicer*] is the mortgagor servicer for [*name of the current holder of the recorded preexisting first lien against the property*].
- □ Service on a spouse, heir, or personal representative was made by delivery of a citation to [*state name of person*] at [*state location where citation was personally served*] in accordance with Texas Rule of Civil Procedure 736.8.

[*Signature of Process Server*] _____
[*Printed Name of Process Server*] _____
[*Address of Process Server*] _________
[*State authority of Process Server, i.e. Sheriff, Constable, Rule 103*]

STATE OF TEXAS
COUNTY OF [_______________]

This instrument was acknowledged before me on [*date*] by [*name of officer or authorized person under Rule 103*], [*title or authority of person servicing citation*] acting in his/her official or authorized capacity.

_____ [SEAL]

Notary Public in and for the
State of [_____]
Notary Name: [*Printed*]
My commission expires: [*Date*]

736.10 Amended Application

If the servicing or ownership rights of a debtor's loan agreement are transferred or assigned to another person before an order is signed under this rule:

(a) the application must be amended to reflect the name, address, and status of the person's successor or assignee;

(b) the amended application must be served in accordance with Rule 21a on each person who filed a response with the clerk of the court; and

(c) if the mortgage servicer of the debtor's loan agreement is transferred or assigned before the response due date stated in a citation served on the respondent expires, and the respondent received notice of the change of servicing in accordance with 12 U.S.C. 2605 more than 30 days before an application was filed under this rule, an amended application must be re-served in accordance with Rules 736.4 through 736.8 on all respondents whose response due date has not expired.

736.11 Response

(a) A response shall be filed with the clerk of the court and a copy of the response with any affidavits, declarations, documents, or other attachments shall be served on the applicant or the applicant's attorney in accordance with Rule 21a.

(b) A response may be in the form of a general denial under Rule 92 except that a respondent must affirmatively plead:

(1) a person named as a debtor or mortgagor in the application did not sign or assume the loan agreement documents or instruments evidencing the debt;

(2) the dollar amounts claimed as due or in arrears as of the date specified in the application are materially incorrect;

(3) the default under the loan agreement was cured as of the date the response was filed;

(4) any document attached to the application is not a true and correct copy of the original; or

(5) proof of a payment in accordance with Rule 95.

(c) Each response filed by a natural person *pro se* shall contain the person's U.S. Postal Service mailing address, property address, phone number, and facsimile or email address, if the person desires to be contacted by facsimile or email. An attorney filing a response shall sign the response in accordance with Rule 57.

(d) No counterclaim, cross claim, third party claim, intervention, or other cause of action or claim may be filed or considered by the court in a Rule 736 proceeding. Such claims or causes of action must be brought in a separate and independent original proceeding filed in a court of competent jurisdiction. If a counterclaim,

cross claim, third party claim, or intervention is filed in a Rule 736 proceeding, the court shall strike such claims in the original Rule 736 proceeding.

736.12 Hearing When Response Filed

(a) If a response is filed before a default order is signed, applicant shall obtain a hearing date, time, and place from the clerk of the court. The hearing shall be held not earlier than 10 days and not less than 30 days after a request for a hearing is made. The applicant or applicant's counsel shall send notice of the date, time, and place of the hearing in accordance with Rule 21a to each person who files a response. A duplicate copy of the notice of hearing sent to each person filing a response shall be mailed or delivered to the clerk of the court. Proof of mailing or delivery of the notice of hearing to each respondent filing a response shall be retained by applicant or applicant's attorney.

(b) The only issue to be determined at a Rule 736 hearing is whether the applicant is entitled to proceed with foreclosure under Chapter 51, Property Code, the debtor's loan agreement, and, if the debtor's loan agreement is a property tax loan or transferred tax lien loan agreement, Sections 32.06 and 32.065, Tax Code.

736.13 Default

If a respondent fails to file a response prescribed by Rule 736.4, all matters alleged in the application and declaration shall be accepted as prima facie evidence of the truth of the matters alleged. Within 10 days after the due date for the respondent's response, the court shall sign a default order, without hearing, provided:

(a) the record shows the application and declaration conform to Rule 736.2;

(b) the record shows proper service on all respondents and that the return of service of citation has been on file with the clerk of the court for at least 10 days exclusive of the date of filing except the return of service on the property which shall be on file for 20 days exclusive of the date of filing; and

(c) a proposed default order conforming to Rule 736.15 was previously filed with the clerk of the court.

736.14 Discovery

No discovery of any kind shall be permitted in a Rule 736 proceeding.

736.15 Order

(a) An order granting or denying an application under Rule 736 is final and is not subject to a motion for rehearing, new trial, bill of review, or appeal.

(b) The presiding judge must provide the attorney for the applicant or respondent, if any, the reason an application, response, or order was denied and record the reason for such denial on the court's docket sheet.

(c) Any challenge to an order signed under this rule must be filed in the form of a new suit filed in a separate and independent original proceeding in a court of competent jurisdiction.

(d) An order under this rule shall expire 180 days after the date the order is signed.

(e) The form of a Rule 736 order shall be sufficient if it is substantially the same or similar to the following promulgated form.

CAPTION OF THE APPLICATION CURRENTLY
ON FILE WITH THE CLERK OF THE COURT

DEFAULT ORDER

1. On the _____ day of _____, the court considered the application filed in this cause by [*name of applicant and applicant's street address, city, state, and zip code*]. The court has determined that it has jurisdiction over the subject matter and the parties in this proceeding. Though properly served with the citation and the application, declaration, and exhibits, [*name or each party who failed to file a timely response – the court may conspicuously cross out the name of any person against whom the default order does not apply*], (hereinafter "Respondent") failed to file a response within the time required by law and wholly made default. The court deems a Respondent's failure to file a response as the Respondent's consent for the court to enter a default order. The citation and proof of service have been on file with the court in the time provided by Rule 736.13(b).
2. The property made the subject of the application is commonly known as [*property address*] and the legal description of the property is: [*legal description*].
3. Based on the declaration of the applicant or applicant's representative, any Respondent who is a natural person and who is subject to this default order is not a member of the United States military.
4. Therefore, the court GRANTS an order allowing the applicant to proceed with foreclosure under Chapter 51, Property Code, the loan agreement, and, if applicable, Sections 32.06 and 32.065, Tax Code.
5. This order is final and not subject to a motion for rehearing, new trial, or appeal. Any challenge of this order must in the form of a new suit filed in a separate and independent original proceeding in a court of competent jurisdiction at least 24 hours before the property described herein is auctioned at a foreclosure sale.
6. The clerk of the court is directed to hand deliver or mail by first class mail a conformed copy of this order to applicant or applicant's counsel and to each Respondent.
7. The applicant or its agents or attorneys may communicate with any party or other person as reasonably necessary to effectuate a foreclosure sale.
8. This order shall expire 180 days after the date this order is signed.

SIGNED this ____ day of _____, 20__.

_____
JUDGE PRESIDING

736.16 Effect of the Order

An order and any determination of law or fact made under this rule is without prejudice and has no res judicata, collateral estoppel, or estoppel by judgment effect in any other proceeding or suit. The failure of a respondent to dispute the validity of the debt under this section may not be construed by any court as an admission of liability by the respondent.

736.17 Bankruptcy

(a) If a respondent files bankruptcy after an application is filed and a true and correct file stamped copy of the first page of the bankruptcy petition is filed with the

clerk of the court, the Rule 736 proceeding shall be dismissed unless, within 90 days after the respondent was served with citation under this rule, the automatic stay under the United States Bankruptcy Code, 11 U.S.C. § 362, is lifted or the bankruptcy case is closed, dismissed, or respondent is discharged.

(b) If a Rule 736 order has been signed and a respondent files bankruptcy, the Rule 736 order is void 180 days after the date the Rule 736 order was signed.

~~**736.18 Abatement, Dismissal, Annulment of a Rule 736 Proceeding or Order**~~

~~(a) A pending Rule 736 proceeding is automatically abated and dismissed if the respondent:~~

~~(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure process;~~

~~(2) files with the clerk of the court in which the Rule 736 application is pending a notice of the suit with a copy of the original petition or complaint attached; and~~

~~(3) delivers a copy of the original petition or complaint to the applicant or applicant's attorney in accordance with Rule 21a or by email or other electronic delivery.~~

~~(b) A signed Rule 736 order is void and automatically annulled and vacated if, no later than 5:00 p.m. the Monday prior to the posted foreclosure sale date, the respondent:~~

~~(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure; and~~

~~(2) delivers a copy of the original petition to the trustee, substitute trustee, or applicant's attorney by hand delivery, courier, facsimile, email, or other electronic delivery.~~

~~(c) The respondent shall be liable for all claims of any kind made against the applicant, owner, noteholder, investor, mortgage servicer, trustee, or substitute trustee or their attorneys, to include attorneys fees and court costs, by a purchaser of a foreclosure property at a void sale under (a) or (b), if the respondent in bad faith fails to timely deliver a notice of the filing of an original civil suit that would have reasonably prevented the property from being sold at the foreclosure sale.~~

736.18 Abatement and Dismissal

A Rule 736 proceeding is automatically abated and must be dismissed if, before an order is signed under this rule, the respondent:

(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure process, and

(2) files, in the court and under the cause number of the pending Rule 736 application, a notice of the filing of the separate original civil suit with a copy of the original petition or complaint attached,

.

736.19 Order of Foreclosure Void

An order signed under this rule Rule 736.15 is void and automatically vacated if, no later than 5:00 p.m. the Monday prior to the posted foreclosure sale date, the respondent:

(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure process, and

(2) files, in the court and under the cause number of the pending Rule 736 application, a notice of the filing of the separate original civil suit with a copy of the original petition or complaint attached.

The respondent must make a good faith, reasonable effort to provide actual notice prior to the foreclosure sale of the property to the trustee, substitute trustee, or applicant's attorney that a separate original civil suit has been filed. A respondent or respondent's attorney who fails, in bad faith, to make this reasonable effort is subject to monetary sanctions.

736.2019 Attachment of Order to Trustee's Foreclosure Deed

After foreclosure of the property described in a Rule 736 order, a conformed copy of the court's Rule 736 order shall be attached to the trustee or substitute trustee's deed.

736.2120 Supplementation of Citations and References

In accordance with Rules 818 and 819, wherever this section refers to any practice or procedure in any law, statute, or regulation, or to a title, chapter, section, or article of any law or statute, or contains any reference of any such nature, and the matter referred to has been supplanted in whole or in part by these rules, every such reference shall be deemed to be to the pertinent part of these rules.

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

Table of Contents

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]
>
> 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]
>
> 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.
>
> *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.
>
> 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 ~~[Novetnbcr 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;(10)

(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 trial 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.

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Judge David Peeples

RE: Revisions to Rules 18a and 18b

DATE: September 23, 2009

I. Revise Rule 18b in response to *Caperton*?

The Supreme Court held in *Caperton* that there can be such outrageously high campaign contributions on behalf of a judge that the judge must, as a matter of due process, recuse when the contributor's case is considered. Should Rule 18b be modified in light of *Caperton*?

For two reasons, the nine regional presiding judges feel that *Caperton* revisions to the Texas recusal system are not needed, at least for trial courts. (We express no opinion on the need to modify TRAP 16, which channels recusal motions to the other justices on the appellate court.)

First, under Rule 18a a recusal motion immediately stops the respondent judge from dealing with the case until a second judge, assigned by someone else, has decided the motion. By contrast, in *Caperton* the West Virginia system allowed the respondent judge to decide his own motion, and then to continue sitting on the case after he denied it!

Second, the current provision in Rule 18b allowing recusal of a judge whose "impartiality might reasonably be questioned" is adequate because it authorizes the judge who hears the recusal motion to recuse a respondent judge who has received large contributions from a litigant or lawyer. The presiding judges doubt that a more specific contribution provision will produce a net gain over current law.

II. Procedural Improvements to Rule 18a.

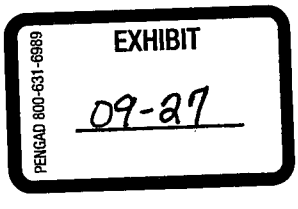
The presiding judges urge the committee to strengthen our trial court recusal procedures with the following revisions to Rule 18a:

(1) Express statements in the rule that: (a) the motion must state details (not just general allegations that a judge's "impartiality might reasonably be questioned") [lines 14-15], and (b) a judge's rulings in the case cannot be a basis for recusal [lines 15-16]];

(2) Express authority for the presiding judge to deny, without a hearing, motions that are untimely or legally insufficient (general allegations of unfairness, without details; complaints about rulings) [lines 43-44].

(3) A bulletproof presiding judge, who is not subject to recusal on the motion itself [lines 59-61];

(4) Stronger sanctions provisions [lines 68-72].



Present Rule 18a, with suggested ~~deletions~~ and *additions* [PJs]
[September 23, 2009]

Rule 18a. *Procedure for* Recusal *and* ~~or~~ Disqualification of Judges.

(a) Filing and Contents of Motion. At least ten days before the date set for trial or other hearing in any *trial* court ~~other than the Supreme Court, the Court of Criminal Appeals or the court of appeals~~, any party may file ~~with the clerk of the court~~ a motion stating *one or more of the* grounds *specified in rule 18b* why the judge before whom the case is pending should not sit in the case. If *the judge was assigned to the case* within ten days of the date set for trial or other hearing ~~a judge is assigned to a case~~, the motion shall be filed at the earliest practicable time. ~~prior to the commencement of the trial or other hearing. The grounds may include any disability of the judge to sit in the case.~~ The motion shall be verified and shall state with *detail and* particularity *the reasons* ~~grounds~~ why the judge ~~before whom the case is pending~~ should not sit. *The judge's rulings may not be a basis for the motion.* The motion shall be made on personal knowledge and shall set forth ~~such~~ facts ~~as~~ *that* would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

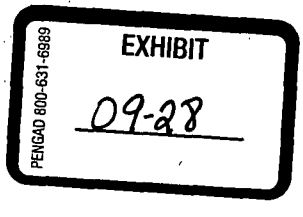
(b) Notice. On the day the motion is filed, copies shall be served on *the judge and* all other parties or their counsel of record., ~~together with a notice that movant expects the motion to be presented to the judge three days after the filing. of such motion unless otherwise ordered by the judge.~~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

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

(d) Referral to Presiding Judge. If the judge declines to recuse ~~himself~~ *voluntarily*, ~~he~~ *the judge* shall forward to the presiding judge ~~of the administrative judicial district region, in either original form or certified copy,~~ an order of referral *and copies of* the motion and all opposing and concurring statements. Except for good cause stated in ~~the order in which further action is taken~~ *writing or on the record*, the judge shall make no further orders and shall take no further action in the case ~~after filing of the motion and prior to a hearing on the motion.~~ *until the motion has been heard.*

(e) Hearing.

(1) If the motion does not comply with subsection (a) or is otherwise legally insufficient, the presiding judge may deny it without a hearing.



(2) *If the motion complies with subsection (a) and is legally sufficient,* ~~T~~the presiding judge ~~of the administrative judicial district~~ *may hear the motion or assign another judge to hear it, and* ~~shall immediately set a hearing before himself or some other judge designated by him,~~ shall cause notice of such hearing to be given to all parties or their counsel and ~~shall~~ make such other orders, including orders on interim or ancillary relief in the pending cause, as justice may require.

(3) The judge who hears the motion:

(a) must hear it as soon as practicable, and may hear it immediately; and

(b) may conduct the hearing by telephone on the record and may consider facsimile or electronic copies of documents as permitted by the rules of evidence;

(4) A presiding judge who hears a recusal motion is not subject to objection, and a motion to recuse a presiding judge has no effect and may be disregarded, except by order of the Chief Justice of the Supreme Court.

(5) If the motion is granted, the presiding judge shall assign another judge to the case.

(f) Assignment by Chief Justice. The Chief Justice of the Supreme Court may also ~~appoint and~~ assign judges *and make rulings* ~~in conformity with this rule and~~ pursuant to statute.

(g) Sanctions. If ~~a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that~~ the judge hearing the motion to recuse ~~is~~ *determines that it was frivolous, as defined in Rule 13, or was* brought ~~solely~~ for ~~the purpose of~~ delay and without sufficient cause, the judge ~~hearing the motion~~ may~~, in the interest of justice,~~ impose any sanction authorized by Rule ~~215(2)(b).~~ *215.2(b).*

(i) Appellate Review. ~~If the motion is denied, it~~ *An order denying a motion to recuse or disqualify* may be reviewed for abuse of discretion on appeal from the final judgment. ~~If the motion is granted, the order~~ *An order granting a motion* ~~shall not be~~ *is not* reviewable~~., and the presiding judge shall assign another judge to sit in the case.~~ *by appeal, mandamus, or otherwise.*

Comments

Lines 10-13: This sentence was moved from existing section (e) to section (a).

Lines 15-16: The new sentence implements the rule that a judge's bias must be extrajudicial and not based on in-court rulings. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 270-71 (Tex. App.—Houston (14th Dist.) 1997, no pet.); *Grider v. Boston Co., Inc.*, 773 S.W.2d 338, 346 (Tex. App.—Dallas 1989, writ denied). The extrajudicial source rule was summarized in *Woodruff v. Wright*, 51 S.W.3d 727, 736 n.6 (Tex. App.—Texarkana 2001, pet. denied), as follows:

> [T]he United States Supreme Court discussed the "extrajudicial source" doctrine in *Liteky v. United States*, 510 U.S. 540, 554-56 (1994). . . . Although the Court was construing the federal disqualification rule, it contains essentially the same language as Rule 18b. The Court stated that opinions formed by the judge on the basis of facts introduced or events occurring during proceedings do not constitute a basis for a recusal motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. . . . Thus, the Supreme Court reasoned that judicial remarks during the course of a trial that are critical or disapproving or even hostile to counsel, parties, or their cases, ordinarily do not support recusal, but they may do so if they reveal an opinion deriving from an extrajudicial source and will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Lines 43-44: Motions that contain only general allegations of unfairness or partiality, or only previous rulings, are legally insufficient. The regional presiding judge (not the respondent judge) should be able to deny such motions without hearing.

Lines 46-50: This language was moved from section (d) in the current rule.

Line 54: The new language encourages prompt hearings and allows a presiding judge to hear a motion instanter.

Lines 56-57: Telephone/fax/e-mail hearings are sometimes the most efficient approach, especially in rural counties. The new language would expressly authorize them.

Lines 59-61: Under current law, even a frivolous motion to recuse a presiding judge stops the whole process until the Chief Justice can act. This allows a de facto continuance. The new language will allow the presiding judge to hear the underlying motion to recuse the sitting judge unless the Chief Justice decides to halt the matter. The language also makes explicit the current law that the objection procedure of Government Code chapter 74 does not apply.

Lines 68-72: The existing sanctions provisions are essentially toothless: they require a motion for sanctions *and* proof that the motion was brought *solely* for delay. The new language relaxes the sanctions standard and allows the judge who hears the motion to grant sanctions sua sponte.

Clean Version of Present Rule 18a with Suggested Changes [PJs]
[September 23, 2009] s

Rule 18a. Procedure for Recusal and Disqualification of Judges.

(a) Filing and Contents of Motion. At least ten days before the date set for trial or other hearing in any trial court, any party may file a motion stating one or more of the grounds specified in rule 18b why the judge before whom the case is pending should not sit in the case. If the judge was assigned to the case within ten days of the date set for trial or other hearing, the motion shall be filed at the earliest practicable time. The motion shall be verified and shall state with detail and particularity the reasons why the judge should not sit. The judge's rulings may not be a basis for the motion. The motion shall be made on personal knowledge and shall set forth facts that would be admissible in evidence, provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) Notice. On the day the motion is filed, copies shall be served on the judge and all other parties or their counsel of record. Any other party may file an opposing or concurring statement at any time before the motion is heard.

(c) Voluntary Recusal. Prior to any further proceedings in the case, the judge shall either recuse voluntarily or request the presiding judge of the administrative judicial region ("presiding judge") to assign a judge to hear the motion. If the judge recuses voluntarily, the judge shall enter an order of recusal and request the presiding judge to assign another judge to sit, and shall take no further action in the case except for good cause stated in writing or on the record.

(d) Referral to Presiding Judge. If the judge declines to recuse voluntarily, the judge shall forward to the presiding judge an order of referral and copies of the motion and all opposing and concurring statements. Except for good cause stated in writing or on the record, the judge shall take no further action in the case until the motion has been heard.

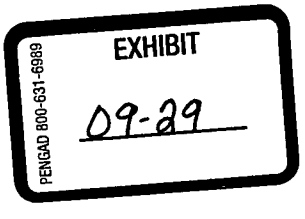
(e) Hearing.

(1) If the motion does not comply with subsection (a) or is otherwise legally insufficient, the presiding judge may deny it without a hearing.

(2) If the motion complies with subsection (a) and is legally sufficient, the presiding judge may hear the motion or assign another judge to hear it, and shall cause notice of such hearing to be given to all parties or their counsel and make such other orders, including orders on interim or ancillary relief in the pending cause, as justice may require.

(3) The judge who hears the motion:

(a) must hear it as soon as practicable, and may hear it immediately; and



(b) may conduct the hearing by telephone on the record and may consider facsimile or electronic copies of documents as permitted by the rules of evidence.

(4) A presiding judge is not subject to objection under chapter 74 of the Government Code, and a motion to recuse a presiding judge has no effect, except by order of the Chief Justice of the Supreme Court.

(5) If the motion is granted, the presiding judge shall assign another judge to the case.

(f) Assignment by Chief Justice. The Chief Justice of the Supreme Court may also assign judges and make rulings pursuant to statute.

(g) Sanctions. If the judge hearing the motion to recuse determines that it was frivolous, as defined by Rule 13, or was brought for delay and without sufficient cause, the judge may impose any sanction authorized by Rule 215.2(b).

(h) Appellate Review. An order denying a motion to recuse or disqualify may be reviewed for abuse of discretion on appeal from the final judgment. An order granting a motion is not reviewable by appeal, mandamus, or otherwise.

SECOND ADMINISTRATIVE JUDICIAL REGION
RECUSAL SUMMARY 9/1/08 - 8/31/09

GROUNDS ALLEGED FOR RECUSAL OF JUDGES WITHIN RULE 18b (Essence of Motion)	
(2)(a) his impartiality might reasonably be questioned; *This ground is included in almost every motion*	20
(2)(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;	37
(2)(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;	1
(2)(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;	1
(2)(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;	1
(2)(f) he or his spouse, or a person within the third degree 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.	2
(2)(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.	0
TOTAL	**62**

GROUNDS ALLEGED FOR RECUSAL OF JUDGES OUTSIDE RULE 18b (Essence of Motion)	
campaign contributions	3
adverse rulings	22
husband in DA's office, spouse counsel	2
friends with party or attorney	5
complaint filed, under investigation	9
exparte communications	6
no reason, frivolous pleading	4
judge overstepped his authority	1
judge to be witness	3
judge not qualified	2
jurisdiction questioned	2
TOTAL	**59**

TOTAL RECUSAL MOTIONS REFERRED TO PRESIDING JUDGE **121**

VOLUNTARY RECUSALS

VOLUNTARY RECUSALS WITH MOTIONS FILED	16
VOLUNTARY RECUSALS WITHOUT MOTIONS FILED	37
TOTAL VOLUNTARY RECUSALS	**53**

TOTAL RECUSALS FY 08-09 **174**

DISPOSITIONS

DENIED	84
GRANTED	19
WITHDRAWN	5
PENDING (As Of August 31, 2009)	13

MOVANT

FILED BY ATTORNEYS	79
FILED PRO SE	42