GROUNDS AND PROCEDURES TO RECUSE A JUDGE

Author:

RICHARD R. ORSINGER
ATTORNEY AT LAW
1616 Tower Life Building
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Telefax)
Email: richard@orsinger.com

Of Counsel to McCurley, Kinser, McCurley, & Nelson, LLP
5950 Sherry Lane, Ste. 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)
Email: richard@mkmn.com

State Bar of Texas
ADVANCED EXPERT WITNESS COURSE III
November 21-22, 2002 - Dallas, Texas
December 12-13, 2002 - Houston, Texas

Chapter 20

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (June, 2002)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar's Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001)

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002)

State Bar's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

State Bar's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); State Bar of Texas Advanced Civil Trial Course: Offering and Excluding Evidence (1995); State Bar of Texas Advanced Civil Trial Course: New Appellate Rules (1997); State Bar of Texas Advanced Civil Trial Course: The Communications Revolution: Portability, The Internet and the Practice of Law (1998); State Bar of Texas Advanced Civil Trial Course: Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); State Bar of Texas In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Association: Proving It Up and Getting It In: Foreign Law and Foreign Evidence (2001)

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GROUND AND PROCEDURES TO RECUSE A JUDGE©

I. SCOPE OF ARTICLE

This article touches on disqualification of judges under federal law, disqualification of judges under the Texas Constitution, and recusal of judges under Texas statutes and TEX. R. CIV. P. 18b. The article also discusses two possible new grounds for recusal recommended by the Supreme Court Advisory Committee, one based upon representing the judge in a legal proceeding and the other based upon excessive contributions to the judge's campaign. Note that the grounds for recusal based upon representing the judge in a legal proceeding and upon excess political contributions have not yet been adopted by the Texas Supreme Court.

II. RECUSAL OF FEDERAL JUDGES.

A. Federal Recusal Statutes

There are two federal statues that come into play regarding recusal of judges (in the federal system it's called "disqualification"). 28 U.S.C. §§ 144 & 455.

Section 144 provides:

> § 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.

Section 455 sets out the grounds for disqualification of a justice, judge, or magistrate judge of a federal court. Section 455 provides:

> § 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.

© 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.

B. The Extrajudicial Source Doctrine

On the issue of whether a federal judge should be disqualified because the judge's impartiality might reasonably be questioned as a result of conduct or comments of a judge, most federal courts of appeals had, up to 1994, either accepted or rejected the "extrajudicial source doctrine." That doctrine held that an alleged bias or prejudice of a judge must stem from an extrajudicial source to suffice as grounds for disqualification. *See United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), and cases citing it. The extrajudicial source *doctrine* was converted to a *factor* by the U.S. Supreme Court in *Liteky v. U.S.*, 510 U.S. 540, 554-55 (1994), and was then adopted for disqualification of federal judges. As explained in the *Liteky* case, the extrajudicial source concept does not preclude all unfavorable dispositions toward an individual, but merely those that are wrongful or inappropriate–

> either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).

Liteky, 510 U.S. at 549. The Supreme Court noted that it was not necessary to disqualification that an opinion held by a judge derive from a source outside judicial proceedings, nor was it sufficient for disqualification that there was an extra-judicial source for an opinion. *Id.* at 554-55. The Supreme Court did note, in *Liteky*, that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *Id.* at 555. "[Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555.

C. Other U.S. Supreme Court Rulings

There are two other U.S. Supreme Court rulings of note in the disqualification area. In *Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co.*, 122 S. Ct. 1290, 152 L.Ed.2d 346 (April 1, 2002), the Fifth Circuit directed a trial judge to recuse from a tobacco products liability case because, nine years before, his name appeared on a pro-plaintiff amicus curiae brief filed in tobacco litigation pending in state court. The record showed that the judge did not sign the brief, or even know about it, and that his name was typed on the brief pro forma, because he was then president of the Louisiana Trial Lawyers Association. The Supreme Court reversed, saying that a reasonable person, knowing all the circumstances, would not believe that the judge had any interest or bias.

The second case is *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), where the Court examined the use of the 14th Amendment due process of law clause as a basis for recusal. There a 5-4 per curiam decision of the Alabama Supreme Court recognized the rights of insureds to recover punitive damages in bad faith insurance claims practice cases, and made other significant rulings regarding bad faith claims. The insurance company defendant learned that the justice who authored the per curiam opinion and whose vote made a majority, had himself brought two bad faith insurance cases in which he was seeking punitive damages. This financial stake in the outcome of the case, by a judge whose vote carried the day and who authored the opinion of the court that affected the law applying to his own cases, offended due process of law, so the case was remanded to the Alabama Supreme Court for reconsideration without participation by the offending justice.

III. DISQUALIFICATION VERSUS RECUSAL

In Texas, "disqualification" of a judge occurs in those circumstances where the Texas Constitution states a judge is disqualified from acting in a case. Disqualification is automatic, and cannot be waived. "Recusal" of judges occurs when the judge himself or herself, or another judge sitting in a recusal proceeding, determines that the judge may not hear the case under the standards for recusal set out in Texas statutes or set out in TEX. R. CIV. P. 18b. As one student author described it: "[D]isqualification [is] based on judge's connection with parties while recusal [is] based on judge's ability to be impartial." Case-note, *Oil and Gas–Implied Covenants–Texas Oil and Gas Leases Contain Separate and Distinct Implied Covenant to Further Explore After Lucrative Production*, 20 ST. MARY'S L.J. 981, 981 (1989).

A justice of an appellate court can also be disqualified or recused. TEX. R. APP. P. 16.1, which lists the "Grounds for Disqualification" of an appellate court justice, provides:

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

A judge of a statutory probate court can be recused under TEX. GOV'T CODE § 25.00255, "Recusal or Disqualification of Judge." Those standards are not discussed in this article.

IV. DISQUALIFICATION UNDER THE CONSTITUTION

The ultimate authority on disqualification is the Texas Constitution. Article V, Section 11 of the Texas Constitution provides:

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

> Sec. 11. *No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.* [Emphasis added] When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

To be"interested" in a case so as to be constitutionally disqualified, "the judge must have so direct an interest in the cause or matter that the result must necessarily affect him or her to his personal or pecuniary loss or gain." *Sears v. Olivarez*, 28 S.W.3d 611, 614 (Tex. App.--Corpus Christi 2000, no pet.). "Connected within such a degree as may be prescribed by law" means within the third degree by affinity (marriage) or consanguinity (blood). TEX. GOV'T CODE ANN. §21.005.

These three constitutional grounds for disqualification are jurisdictional, cannot be waived, and may be raised for the first time after judgment. *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221-22 (1947). A judge who is disqualified under the constitution is without jurisdiction to rule in the case, and any judgment rendered by him or her is void. *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947). "If a judge is disqualified under the Constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack." *Zarate v. Sun Operating Ltd., Inc.*, 40 S.W.3d 617, 621 (Tex. App.--San Antonio 2001, pet. denied).

You can get good background information on disqualification in the article written by former Texas Supreme Court Justice William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L. J. 599 (1986).

V. TERTIARY RECUSAL MOTIONS

The Texas Civil Practice and Remedies Code contains a provision that is triggered by the filing of the third or subsequent recusal motion in one case. The provision reads as follows:

> **§ 30.016. Recusal or Disqualification of Certain Judges**
>
> (a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.
>
> (b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:
>
> (1) preside over the case;
>
> (2) sign orders in the case; and
>
> (3) move the case to final disposition as though a tertiary recusal motion had not been filed.
>
> © A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.
>
> (d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.
>
> (e) If a tertiary recusal motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

It is unclear whether the "tertiary recusal motion" means the third motion against the same judge, or the third motion filed in the case, even against different judges.

VI. DISQUALIFICATION OR RECUSAL UNDER TEX. R. CIV. P. 18b

Grounds for disqualification (TRCP 18b(1)) and recusal (TRCP 18b(2)) of trial judges are set out in TEX. R. CIV. P. 18b. One problem with Rule 18b(1) is that its language is not identical to the language of TEX. CONST. art. V, § 11, and yet the constitutional provision can neither be expanded nor narrowed by the Texas Supreme Court exercising its rule-making authority. Consequently, Rule 18b(1) can be ignored and the constitutional provision relied on instead.

TEX. R. CIV. P. 18b reads as follows:

> **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
>
> © 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;

© 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;

© "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.

A good background article on recusal is by former Texarkana Court of Appeals Justice Charles Bleil and Carol King, *Focus on Judicial Recusal: a Clearing Picture*, 25 TEX. TECH. L. REV. 773 (1994).

VII. PUBLIC STATEMENTS BY JUDGES AS GROUND FOR RECUSAL

A. Judicial Candidates and the First Amendment.

The biggest news regarding recusal of judges is a U.S. Supreme Court case that doesn't even deal with recusal–*Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 153 L.Ed.2d 2694 (June 27, 2002). In that case, a 5-4 majority of the Supreme Court held to be unconstitutional a Minnesota Supreme Court rule that prohibited a "candidate for a judicial office . . . [from] announc[ing] his or her views on disputed legal or political issues." This raises the spectre of judicial candidates in Texas campaigning on certain views about the law, and upon election being faced with cases requiring a ruling on that point of law. Can a judge be recused in such a circumstance?

B. Amendment to Texas Code of Judicial Conduct

In response to the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, the Texas Supreme Court hastily altered the Texas Code of Judicial Conduct to eliminate some restrictions on the speech of judges and judicial candidates. A copy of the amendments is attached as an Appendix to this article. Under revised Canon 3(B)(10), judges and judicial candidates must abstain from public comment about pending or impending proceedings that may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. Under new Canon 5, Texas judges and judicial candidates are prohibited from making pledges or promises of conduct in office regarding "pending or impending cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probably decision in cases within the scope of the judge . . . ." The Texas Supreme Court announced the following Comment to new Canon 5:

Canon 5 – Comment

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

See Miscellaneous Docket 02-9167 (8-22-2002).

Justice Hecht released the following statement regarding the amendments to the Code of Judicial Conduct:

> 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.

Hecht, J., Miscellaneous Docket 02-9167 (8-22-2002).

C. Rehnquist on Prior Public Statements as Ground for Recusal

In the case of *Laird v. Tatum*, 409 U.S. 824, 830-31, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972), Justice Rehnquist refused to recuse himself from a case, and published an opinion explaining his decision. In his opinion, Justice Rehnquist noted:

> [R]espondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:
>
> > 'And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position.' Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, supra, 56 Yale Law Journal, at 612.
>
> My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

409 U.S. 824, 830-31. Justice Rehnquist's opinion has set the de facto standard for federal judges around the nation with regard to recusal

based on the judge having taken a prior public position on a matter to be decided in the case.

VIII. RECUSAL DUE TO REPRESENTING THE JUDGE IN A LEGAL MATTER

The Supreme Court Advisory Committee (SCAC) has forwarded to the Texas Supreme Court for review a proposed amendment to TEX. R. CIV. P. 18b that includes the following ground for recusal:

> (1) Disqualification and Recusal of Judges
>
> (a) Grounds for Disqualification. A Judge is disqualified in the following circumstances:
>
> * * *
>
> (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.

A footnote to paragraph (9) of the proposed rule says that "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."

A few points about proposed paragraph (9):

- it is triggered by an attorney or anyone in his or her law firm.
- it applies to representation of the judge or his/her spouse, or minor child.
- it applies to representation in an ongoing legal proceeding other than a class action. Presumably representation of a judge in an out-of-court transaction would not be covered, such as a purchase or sale of real estate, the writing of a will, etc. since those are not legal "proceedings." It is also arguable that merely giving advice to the judge, even as to a legal proceeding, may not be "representation." The "ongoing" component means that the rule would not apply after the legal proceeding is concluded.
- it does not apply to the attorney general or his assistants, or to the district or county attorney or their assistants, when they are representing the judge only in his/her official capacity as judge.

The practical import of proposed paragraph (9) is that a lawyer cannot appear in court before a judge whom the lawyer is representing in an ongoing legal proceeding, such as a divorce, personal injury suit (other than class action), neighbor dispute, etc. Recusal applies if the lawyer is representing the judge's spouse in a divorce. However, if you are suing the judge on behalf of anyone but a spouse or minor child, this ground for recusal does not apply.

If subdivision (9) is adopted, some lawyers may be unwilling to agree to accept representation a judge before whom the lawyer appears, since it would lead to recusal of the judge in the lawyer's other cases in that court. Consider Texas Disciplinary Rule of Professional Conduct 1.06(b)(2), which prohibits a lawyer from representing a person if the representation of that person . . . "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client . . . ." Comment 4 to the Rule says that "[l]oyalty to a client is impaired . . . in any situation when a lawyer may not be able to consider, recommend, or carry out an appropriate course of action for one client because of the lawyer's . . . responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client." Rule 1.06(b)(2) would stop the lawyer from accepting employment by a new client when representation of the new client would be impaired by duties to an existing judge-client. Arguably the fact that the judge would be recused from the new client's case would be an impairment in representing the new client, although circumstances can be imagined when it would actually enhance the position of the new client to be able to recuse the judge from the new client's case. Although these ethics standards do not precisely apply where considering the impact of taking on the judge as a client while already representing clients in that court, an existing client might have cause to complain if recusal of the judge is forced upon the existing

client by the lawyer's decision to represent the judge. The impact of proposed subparagraph (9) could be substantial in a large law firm, where one lawyer's decision to represent the judge in an ongoing legal proceeding would require recusal in dozens of cases, if not more.

IX. RECUSAL DUE TO CAMPAIGN CONTRIBUTIONS

Texas courts have rejected the argument that campaign contributions might create 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). However, the Supreme Court Advisory Committee (SCAC) has forwarded to the Texas Supreme Court for review a proposed amendment to TEX. R. CIV. P. 18b that includes the following grounds for recusal. The grounds apply when campaign contributions or direct campaign expenditures are made in excess of the limits set in the Election Code.

> (1) Disqualification and Recusal of Judges
>
> (a) Grounds for Disqualification.(2) A Judge is disqualified in the following circumstances:
>
> * * *
>
> (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) 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.

These two grounds for recusal were taken from recommendations of the Judicial Campaign Finance Study Committee which were evaluated and edited by the SCAC at the request of the Supreme Court. *See Opinion and Order Implementing Recommendations of the Supreme Court Judicial Campaign Finance Study Committee*, 62 TEX. B.J. 946 (October, 1999), which includes the following recommendation and disposition by the Supreme Court:

> 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.

In the Supreme Court of Texas Misc. Docket No. 99-9112

Paragraph (10) applies to a "campaign contribution," which is defined as "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." TEX. ELEC. CODE § 251.001(3). A campaign contribution will be the basis for recusal if it exceeds the limits set out in TEX. ELEC. CODE § 253.155(b), which provides:

§ 253.155. Contribution Limits

(a) Except as provided by Subsection (c), a judicial candidate or officeholder may not 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

© $5,000, if the population of the judicial district is more than one million.

© 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.

As used in Section 253.155, a "general purpose committee" means a political committee that has among its principal purposes:

(A) supporting or opposing:

(i) two or more candidates who are unidentified or are seeking offices that are unknown; or

(ii) one or more measures that are unidentified; or

(B) assisting two or more officeholders who are unidentified.

Texas Election Code § 251.001(14) ("Definitions").

A campaign contribution will also be the basis for recusal if it exceeds the limits set in TEX. ELEC. CODE § 253.257, which provides:

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

(a) A judicial candidate or officeholder or a specific-purpose committee for supporting or opposing a judicial candidate 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, officeholder, or committee 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.

© 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".

As used in paragraph (11), a “a direct campaign expenditure” means a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. Texas Election Code §251.001(8) (“Definitions”).

The Election Code has an aggregation rule for law firms and PACs of law firms:

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

(a) A judicial candidate or officeholder or a specific-purpose committee for supporting or opposing a judicial candidate 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, officeholder, or committee 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.

There is also an attribution rule for spouses of lawyers and minor children:

§ 253.158. Contribution by Spouse or Child Considered to be Contribution by Individual

(a) For purposes of Sections 253.155 and 253.157, a contribution by the spouse or child of an individual is considered to be a contribution by the individual.

(b) In this section, "child" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

X. TEXAS PROCEDURE FOR RECUSING TRIAL JUDGES

The procedure for filing a motion to recuse is governed by TEX. R. CIV. P. 18a.

A. Rule 18a.

TEX. R. CIV. P. 18a provides:

Rule 18a. Recusal or Disqualification of Judges

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

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

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

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

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

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be

> reviewable, and the presiding judge shall assign another judge to sit in the case.
>
> (g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.
>
> (h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b). 3.

B. Some Points to Remember About Disqualification/Recusal Procedure.

1. Timing

TRCP 18a provides that a motion to disqualify or recuse must be filed at least ten days prior to the date set for trial or other hearing. The ten day requirement cannot be applied to grounds for disqualification, because disqualification is automatic and makes actions by the judge void. Some argue that the ten day rule applies to any hearing in the case, so that a party could still move to recuse a judge at least ten days prior to trial even if there have already been preliminary hearings before that judge. However, *Enterprise-Laredo Assocs. v. Hachar's, Inc.*, 839 S.W.2d 822 (Tex. App.--San Antonio 1992), *writ denied*, 843 S.W.2d 476 (Tex. 1992) (per curiam),upheld the imposition of sanctions because the parties seeking recusal were aware of grounds for possible recusal long before the motion to recuse was filed.

TRCP 18a(e) provides that, if the judge is assigned to the case within ten days of the date set for trial, the motion must be filed at the earliest practical time prior to commencement of trial. The ten-day requirement does not apply if the movant does not receive ten days' notice of the hearing from which he seeks to recuse the judge. *Metzger v. Sebek*, 892 S.W.2d 20, 49 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Also, one case has held that the ten-day requirement does not apply where a party cannot know the basis of the recusal until after a motion for recusal is no longer timely. *Keene Corp. v. Rogers*, 863 S.W.2d 168, 171 (Tex. App.--Texarkana 1993, no writ).

2. Notice of the Motion

TRCP18a(b) provides that the movant must give notice to other parties or counsel that the movant expects the motion to disqualify or recuse to be presented within three days. This proviso does not require that a hearing be had within three days, and it doesn't obviate the requirement under TRCP 21 of service and three days' notice of any hearing. Ordinarily a trial judge should wait at least three days before deciding on the recusal to allow other parties to file responses, although if recusal is unquestionably required perhaps no delay is warranted.

3. Must Decide Prior to Other Proceedings

Under TRCP 18(c), once a motion to disqualify or recuse is filed the court must decide the motion prior to any further proceedings in the case. If the judge disqualifies herself or himself, s/he cannot take any further action in the case. If the judge recuses, s/he can take no further action in the case *except for good cause stated in the order*. If the judge refuses to recuse, s/he cannot make no further orders or take further actions *except for good cause stated in the order in which further action is taken*. TRCP 18a(d).

4. Sanctions

The motion to disqualify or recuse must be verified and made on personal knowledge and set forth admissible evidence, although statements can be made upon information and belief if the grounds for such belief are stated. TRCP 18a(a). If a motion to recuse is denied, the judge who hears the recusal can, upon the request of the opposing party and after the hearing, impose any sanction under TRCP 215(2)(b), if s/he finds that the motion to recuse was filed solely for the purpose of delay and without sufficient cause.

C. Where to Get Campaign Contribution Information

Information relating to monetary contributions to judges is contained in campaign finance reports which are filed as follows:

> Judges sitting in one county only are required to file their reports both locally, with the County Clerk or County Elections

Administrator, and with the Texas Ethics Commission. However, reports prepared prior to January, 2000, were not required to be filed with the Texas Ethics Commission, so they would only be available locally.

Judges sitting in multiple counties are required to file their reports with only the Texas Ethics Commission.

You can get a copy of a campaign finance report, by writing to the Texas Ethics Commission, Post Office Box 12070, Austin, Texas 78711-2070, Attention: Disclosure Filing Section. However, you must pay for the report in advance. To determine the cost of the report, you should call the Texas Ethics Commission at 1/800/325-8506, or from Austin dial 512/463-5800.

The Texas Ethics Commission has a website, www.ethics,state.tx.us. Some reports may be on the website.

XI. APPENDICES

Attached are the 2002 amendments to the Texas Code of Judiciary Conduct.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02-9167

APPROVAL OF AMENDMENTS TO THE TEXAS CODE OF JUDICIAL CONDUCT

In *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), the United States Supreme Court held that Minnesota's canon of judicial conduct, which prohibits judicial candidates from announcing their views on disputed legal and political issues, violates the First Amendment. In light of that decision, this Court determined it was appropriate to review the provisions of the Texas Code of Judicial Conduct to determine the extent to which changes to the Code were necessary. The Court appointed an advisory committee, composed of nationally recognized experts in the area of judicial ethics and free speech, to advise the Court about *White*'s impact on the Texas Code of Judicial Conduct. The Committee's performance of its charge was exemplary and provided valuable insights to the Court. We commend the following members of the Committee for their dedication to this task:

Mr. Charles L. Babcock, Chair
Professor Elaine Carlson
Mr. R. James George
Professor Douglas Laycock
Dean John B. Attanasio
Mr. Leon Carter
Professor David M. Guinn
Professor Roy Schotland

The Court, having carefully considered the Committee's comments and recognizing that a general election involving a substantial number of judges and judicial candidates will take place shortly, has determined that it is appropriate to make amendments to the Texas Code of Judicial Conduct. These amendments should be placed in proper context. While there is no doubt that *White* compels amendments to our Code, the immediacy of pending elections requires that these amendments be undertaken without the full and deliberate study the Court would ordinarily employ. Like many of our sister states, we are called upon to provide immediate guidance to judges, judicial candidates and the electorate before the next election in November 2002. Thus, while we are inclined to engage in an extended debate on the impact of *White* with scholars, judges, the media, the Commission on Judicial Conduct, and other interested parties, we must yield to the reality that hundreds of judicial races will be contested this November and that the judges and candidates involved in those races are entitled to some direction on the permissible limits on judicial speech during this election cycle.

These changes represent our initial attempt to satisfy the requirements placed on our judicial conduct code by *White*. The Court will continue to examine the extent to which these or additional changes to the Texas Code of Judicial Conduct are required. Subsequently, the Court will announce the formation of a committee to examine all of provisions of the Texas Code of Judicial Conduct.

Accordingly, it is

ORDERED that:

1. The Texas Code of Judicial Conduct is amended as follows:

   a. Canons 3(B)(10), 6(B), and 6(C)(1) are amended; and

   b. Canon 5 is amended and a comment is added

2. These amendments take effect immediately;

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

SIGNED AND ENTERED this 22nd day of August 2002.

Thomas R. Phillips, Chief Justice

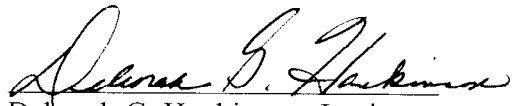
Nathan L. Hecht, Justice

Craig T. Enoch, Justice

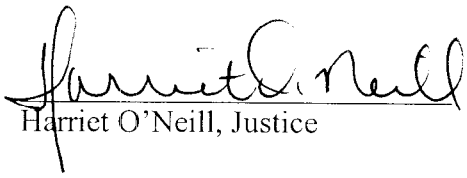
Priscilla R. Owen, Justice

James A. Baker, Justice

Misc. Docket No. 02 9167

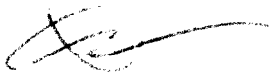


Deborah G. Hankinson, Justice



Harriet O'Neill, Justice

Wallace B. Jefferson, Justice



Xavier Rodriguez, Justice

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

(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 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*** [~~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).

(2) [~~(3)~~] 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) [~~(4)~~] 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) ~~[(5)]~~ A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

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.

CANON 6

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D (2), 4D (3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon ***(5)*** ***(3)*** ~~[5(4)]~~.

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to ex parte communications; in lieu thereof a justice of the peace or municipal court judge shall comply with Canon 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canon ***5(3)***[~~5(4)~~].

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02-9167

STATEMENT OF JUSTICE HECHT CONCURRING IN THE AMENDMENTS TO THE TEXAS CODE OF JUDICIAL CONDUCT APPROVED AUGUST 21, 2002

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.

Nathan L. Hecht
Justice