Enclosure to Agenda No. 6

(g) Repealed by Acts 1999, 76th Leg., ch. 251, § 2, eff. Sept. 1, 1999.

Added by Acts 1997, 75th Leg., ch. 887, § 1, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 251, §§ 1, 2, eff. Sept. 1, 1999.

Section 2 of Acts 1997, 75th Leg., ch. 887 provides:

"This Act takes effect September 1, 1997, and applies only to suits filed on or after the effective date of this Act."

Section 3 of Acts 1999, 76th Leg., ch. 251 provides:

"This Act takes effect September 1, 1999, and applies only to suits filed on or after the effective date of this Act. A suit filed before the effective date of this Act is governed by the law in effect when the suit was filed, and that law is continued in effect for that purpose."

§ 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.

(c) 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the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.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.

Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.

Section 2 of Acts 1999, 76th Leg., ch. 608 provides:

"(a) This Act takes effect September 1, 1999, and applies to all cases:

"(1) filed on or after the effective date of this Act; or

"(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

"(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose."

§ 30.017. Claims Against Certain Judges

(a) A claim against a district court, statutory probate court, or statutory county court judge that is added to a case pending in the court to which the judge was elected or appointed:

(1) must be made under oath;

(2) may not be based solely on the rulings in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and

(3) is automatically severed from the case.

(b) The clerk of the court shall assign the claim a new cause number, and the party making the claim shall pay the filing fees.

(c) The presiding judge of the administrative region or the presiding judge of the statutory probate courts shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of Subsection (a)(1) or (2).

Added by Acts 1999, 76th Leg., ch. 608, § 1, eff. Sept. 1, 1999.

Section 2 of Acts 1999, 76th Leg., ch. 608 provides:

"(a) This Act takes effect September 1, 1999, and applies to all cases:

"(1) filed on or after the effective date of this Act; or

"(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

"(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose."

AN ACT

relating to claims against, including motions for the recusal or disqualification of, certain judges.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 30, Civil Practice and Remedies Code, is amended by adding Sections 30.016 and 30.017 to read as follows:

Sec. 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.

(c) 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.

Sec. 30.017. CLAIMS AGAINST CERTAIN JUDGES. (a) A claim against a district court, statutory probate court, or statutory county court judge that is added to a case pending in the court to which the judge was elected or appointed:

(1) must be made under oath;

(2) may not be based solely on the rulings in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and

(3) is automatically severed from the case.

(b) The clerk of the court shall assign the claim a new cause number, and the party making the claim shall pay the filing fees.

(c) The presiding judge of the administrative region or the presiding judge of the statutory probate courts shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of Subsection (a)(1) or (2).

SECTION 2. (a) This Act takes effect September 1, 1999, and applies to all cases:

(1) filed on or after the effective date of this Act; or

(2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

(b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect

000057

immediately before that date, and that law is continued in effect for that purpose.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 788 passed the Senate on April 8, 1999, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 788 passed the House on May 26, 1999, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

February 23, 1999

Hon. Chris Harris
Texas State Senator
State Capitol — E1.704
Austin TX 78711

INTERAGENCY DELIVERY

Re: Rule 18a, Texas Rules of Civil Procedure and
Texas Government Code § 25.00255

Dear Senator Harris:

Thank you for suggesting that Rule 18a of the Texas Rules of Civil Procedure be amended to require that a motion to recuse be timely filed so that it cannot be used for ambush. The Court agrees and is inclined to change Rule 18a as follows:

(a) ~~At least ten days before the date set for trial or other hearing~~ Any party 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 and when the party learned of the grounds for recusal. 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. The motion must be filed not later than ten days after the party obtains actual knowledge of the grounds for the motion and before the date set for trial or other hearing.

* * *

~~(c) 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.~~

Succeeding subsections (f)-(h) would be renumbered, the reference in (h) corrected, and the following comment might be added:

> Comment: A party's failure to file a motion under this rule before the date set for hearing or trial waives the party's right to seek recusal of the judge as to that hearing or trial. It does not, however, prejudice the party's right subsequently to seek recusal of the judge from the case provided that the motion is filed within ten days after the party obtains actual knowledge of the grounds for recusal.

Following its customary procedure, the Court will submit this proposal to its Advisory Committee when that group is reconstituted within the next few weeks. We will instruct the Committee to expedite consideration of the proposal.

As Bob Pemberton, the Court's Rules Attorney, has pointed out to your staff, Section 25.00255 of the Government Code contains recusal provisions governing probate court proceedings that are similar to those of Rule 18a, and with respect to the timeliness of motions, substantively identical. I respectfully suggest that the recusal provisions for probate judges would be more readily available to lawyers and litigants if found in the Rules of Civil Procedure instead of the general statutes, and the Court would be willing to move the provisions of Section 25.00255 to the Rules of Civil Procedure without substantive change if in so doing it would not contravene the intent of the Legislature. If the Legislature were unwilling for this change to be made, it should consider amending Section 25.00255 to be consistent with the proposed change in Rule 18a, as follows

(b) A motion for the recusal or disqualification of a judge must:

(1) be filed ~~at least 10 days~~ not later than ten days after the party obtains actual knowledge of the grounds for the motion and before the date of the hearing or trial~~, except as provided by Subsection (c)~~;

(2) be verified;~~ and~~

(3) state with particularity the alleged grounds for recusal or disqualification of the judge based on:

(A) personal knowledge that is supported by admissible evidence; or

(B) specifically stated grounds for belief of the allegations; and

(4) state when the party acquired actual knowledge of the grounds for recusal or disqualification on which the motion is based.

~~(c) A motion for recusal or disqualification may be filed at the earliest practicable time before the beginning of the trial or other hearing if a judge is assigned to a case 10 or fewer days before the date set for a trial or hearing.~~

Section 22.00255 was enacted in 1997 as part of H.B. 3086, which was sponsored by Representative Will Hartnett and Senator Jeff Wentworth. Because of their apparent interest in this matter, I am taking the liberty of providing them with a copy of this letter.

An additional problem with Section 25.00255 arises when the presiding judge of the statutory probate courts, who must assign a judge to hear a motion to recuse that is not granted by the trial judge, is also the trial judge. One can argue that a judge who is the subject of a motion to recuse should not ordinarily assign the judge who will hear the motion. The same problem arises under Rule 18a when the regional presiding administrative judge is also the trial judge. The Court will ask its Advisory Committee to consider changes in the rule that will eliminate the problem.

Finally, on a related subject, the Court has solicited advice concerning whether violations of the Judicial Campaign Fairness Act, Tex. Election Code §§ 253.151-.176, should be grounds for recusal. The same issue would be involved in Section 25.00255.

On the specific subject of your comment, the Court is presently inclined to make the change you have suggested as soon as the advisory process can be completed. If I may provide you with any other information, I am completely at your service, and Bob Pemberton is available to you and your staff to assist you in any way he can.

Thank you for your helpful comment on the rules.

Sincerely,

Nathan L. Hecht
Justice

cc. Hon. Thomas R. Phillips, Chief Justice
Hon. Jeff Wentworth
Hon. Will Hartnett
Mr. Robert H. Pemberton

MEMORANDUM

TO: Chip Babcock January 7, 2000

FROM: Bob Pemberton

RE: Revisions to Recusal Rule

Attached is a redlined draft of Rules of Civil Procedure 18a and 18b that incorporates changes that have been proposed to the Court during the last year.

1. Rule 18a(1) has been revised to require parties to assert recusal motions within ten days after acquiring actual knowledge of the grounds for recusal. These changes are modeled on two of the new discovery rules, Rules 193.4(c) and 193.7. Rule 18a(1) currently requires only that the party file the motion at least ten days before the hearing or trial from which recusal is sought. This has led to last-minute "ambush" recusal motions in attempts to blow trial settings. Senator Harris has taken an interest in this problem.

Because Rule 18a(e) is rendered obsolete by the changes in paragraph (a), it is deleted.

Consistent with Rules 193.4(c) and 193.7, we might add a comment to the effect that if a party knows of a potential ground for recusing the judge that is unknown to other parties, he or she could force other parties either to assert a recusal motion or waive it by disclosing the grounds to the other side. We might also impose a general duty on parties to disclose any grounds for recusal of which they are aware, and perhaps a coextensive rule of professional responsibility.

2. Before S.B. 788 was enacted, I had drafted a new Rule 18(e) to address the problem of multiple successive recusal motions. Some potential problems with this provision and the general concept of limiting recusal motions include:

a. What happens if the Chief assigns a judge who is subject to recusal under Rule 18b? On one hand, if the grounds for recusal are solely those set forth in Rule 18b, as opposed to statutory or constitutional grounds, then seemingly the Court could freely limit Rule 18b recusal motions by rule, at least in theory. But should it? Should the Court in this way permit the appearance of unfairness inherent in the possibility that the Chief could assign a judge who, under ordinary circumstances, would be subject to recusal?

b. A more practical problem is a potential conflict between the draft rule and a

1997 statute governing motions to recuse in probate courts. The draft rule avoids any potential conflicts with statutory or constitutional rights to strike or disqualify because it limits only motions to recuse. But Section 25.0255 of the Government Code also authorizes parties to file motions for recusal of probate judges. This unqualified statutory right to seek recusal would appear inconsistent with the draft rule's limitations on such motions.

c. However we formulate the limits, wouldn't a limit on the right to move to recuse judges appointed by the Chief merely invite parties to seek recusal of such judges by writ of prohibition? Perhaps this is an acceptable result — at least a court will finally adjudicate the right of a judge to hear the last recusal motion, enabling the proceedings to move along.

3. A new paragraph (j) has been added to clarify that the recusal rules apply to associate judges and magistrates. There currently is no recusal requirement expressly applicable to masters and associate judges.

4. Judge Bob McCoy of Fort Worth pointed out that the reference in Rule 18b(6) to subparagraph (f)(iii) makes no sense – if a judge's relative is a material witness, clearly the judge or his relative can't "divest[] himself of the interest that would otherwise require recusal." (Presumably, the judge isn't required to disown or kill the relative). The reference probably should be to subparagraph (f)(ii).

R.H.P.

Enclosure to Agenda No. 7

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 99- 9112

OPINION AND ORDER IMPLEMENTING RECOMMENDATIONS OF THE SUPREME COURT JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE

In Misc. Docket No. 98-9179, dated October 19, 1998, this Court, pursuant to its constitutional and statutory duties and powers relating to the administration of justice,[1] appointed a group of distinguished lawyers and jurists — the Judicial Campaign Finance Study Committee (the "Committee") — and requested them to propose both rule and statutory changes to improve the way in which campaigns for the Texas judiciary are financed.[2] This action was prompted by continuing public concern that practices relating to judicial campaign finance in Texas were undermining the

[1] Article 5, Section 31 of the Texas Constitution makes the Supreme Court "responsible for the efficient administration of the judicial branch" and mandates that it promulgate rules of administration and procedure "as may be necessary for the efficient and uniform administration of justice in the various courts." Tex. Const. art. 5, § 31(a) & (b); *see also* Tex. Govt. Code §§ 22.003, 22.004, 74.024. Additionally, the Supreme Court is constitutionally and statutorily empowered to, among other things, promulgate rules governing the professional conduct of lawyers, judges and other participants in the legal system. Tex. Const. art. V, § 31(a) & (c); Tex. Govt. Code §§ 52.002 (court reporters), 81.024 (state bar); *see also* Tex. Govt. Code § 81.011(b) (State Bar Act "is in aid of the judicial department's powers under the constitution to regulate the practice of law, and not to the exclusion of those powers.").

[2] Order in Misc. Docket No. 98-9179, ¶ 1. Members of the Committee were Wayne Fisher, Chair; Lisa Blue; James E. Coleman, Jr.; Hon. Rex Davis; Hon. David C. Godbey; Michael A. Hatchell; Hon. Katie Kennedy; Jorge C. Rangel; and Harry M. Reasoner.

public's confidence in the impartiality of the Texas judiciary.

The Committee was directed to consider prior Texas judicial campaign finance reform efforts, as well as those implemented or proposed in other states.[3] These included, most notably, the 1998 American Bar Association Report on Lawyers' Political Contributions, which had proposed several amendments to the ABA Model Code of Judicial Conduct[4] limiting judicial campaign contributions, enhancing disclosure, and restricting the aggregation of campaign "war chests."[5]

The Committee issued its Report and Recommendations to the Court in February 1999.[6] The Court immediately released the Report and Recommendations to the Legislature and the public. It

---

[3] Order in Misc. Docket No. 98-9179, ¶ 3.

[4] Virtually every state supreme court has promulgated a code of judicial conduct patterned after the ABA Model Code of Judicial Conduct or its predecessors. These codes address, among other things, the political conduct of judges. *See, e.g.*, ABA Model Code of Judicial Conduct ("CJC") Canon 5; Texas CJC Canon 5; Alabama Code of Judicial Ethics Canon 7; Alaska CJC Canon 5; Arizona CJC Canon 5; Arkansas CJC Canon 5; California CJC Canon 5; Colorado CJC Canon 7; Connecticut CJC Canon 7; Delaware CJC Canon 7; Florida CJC Canon 7; Georgia CJC Canon 7; Hawaii CJC Canon 5; Idaho CJC Canon 7; Illinois CJC Canon 7; Indiana CJC Canon 5; Iowa CJC Canon 7; Kansas CJC Canon 5; Kentucky CJC Canon 7; Louisiana CJC Canon 7; Maine CJC Canon 5; Maryland Rule of Court 16-813, Canon 5; Massachusetts CJC Canon 7; Michigan CJC Canon 7; Minnesota CJC Canon 5; Mississippi CJC Canon 7; Missouri CJC Canon 5; Nebraska CJC Canon 5; Nevada CJC Canon 5; New Hampshire CJC Canon 7; New Jersey CJC Canon 7; New Mexico CJC Rule 21-700; New York CJC Canon 7; North Carolina CJC Canon 7; North Dakota CJC Canon 5; Ohio CJC Canon 7; Oklahoma CJC Canon 5; Oregon CJC Canon JR 4-101; Pennsylvania CJC Canon 7; Rhode Island CJC Canon 5; South Carolina CJC Canon 5; South Dakota CJC Canon 5; Tennessee CJC Canon 5; Utah CJC Canon 5; Vermont CJC Canon 5; Virginia CJC Canon 7; Washington CJC Canon 7; West Virginia CJC Canon 5; Wisconsin CJC 60.06; Wyoming CJC Canon 5.

[5] American Bar Association Task Force on Lawyers' Political Contributions, Report and Recommendations, Part II (July 1998) ["ABA Report"], at 19-59.

[6] Supreme Court of Texas Judicial Campaign Finance Study Committee, Report and Recommendations (Feb. 23, 1999).

then received testimony at two public hearings and invited public comment for two months.

The Committee's recommendations, and the Court's disposition of each, are discussed below.

1. ***Recommendation A: Enhance public access to judicial campaign finance-related information.*** The Committee recommended that Canon 5 of the Texas Code of Judicial Conduct be amended to require all judicial campaign disclosure reports to be filed in one central and accessible location[7] and that the Legislature allocate resources necessary to enable such reports to be posted on the Internet.[8]

The Seventy-Sixth Legislature has passed two bills that would largely fulfill the goals of this recommendation. S.B. 1726 would require candidates for "a judicial district office filled by voters of only one county" to file their campaign disclosure information with the Texas Ethics Commission, as judicial candidates from multi-county districts presently are required to do. H.B. 2611 would require many candidates, including many judicial candidates, to file their campaign disclosure information electronically and require the Ethics Commission to post the information on the Internet. If these bills are signed into law, the recommended amendments to the Code of Judicial Conduct will not be necessary.

---

[7] Under current Texas law, judicial candidates are required to file certain campaign-related information either with the Texas Ethics Commission or county election officials, depending on whether the candidate is seeking an office serving more than one county or the candidate is seeking an office serving one county or less. Tex. Elec. Code §§ 252.005, 254.097.

[8] Report and Recommendations at 15-18. These recommendations were derived in part from Recommendation I of the ABA Report. ABA Report at 19-23.

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.[9] 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.[10]

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. The Court at this time adopts the Committee's proposal to amend the Code of Judicial Conduct to make violation of the Judicial Campaign Fairness Act subject to judicial discipline. Thus, under the Supreme Court's powers specified in Article V of the Texas Constitution and Section 74.024 of the Government Code, the Code of Judicial Conduct is amended as follows, effective July 1, 1999:

---

[9] *Id.* at 19-25. This recommendation was derived in part from Recommendation III of the ABA Report. ABA Report at 34-44.

[10] Report and Recommendations at 25-26.

CANON 5
REFRAINING FROM INAPPROPRIATE
POLITICAL ACTIVITY

* * *

> (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.

As adopted, the provision applies only to those judges covered by the Act, not all judges in Texas.

3. ***Recommendations C & D: Promulgate rules to limit the aggregation of campaign "war chests"; Limit judicial donations to political organizations.*** To reduce the pressures on candidates to solicit and contributors to donate campaign funds, the Committee proposed limits on the amount of campaign funds that judges could retain between elections.[11] The Committee also proposed amending the Code of Judicial Conduct to limit judges' use of political contributions to make donations to political organizations.[12] This proposal was based in part on similar provisions in the ABA Model Code of Judicial Conduct that other states have adopted.[13]

---

[11] *Id.* at 29-32. This recommendation was derived in part from ABA Report Recommendation V(B). ABA Report at 49-52..

[12] Report and Recommendations at 32-35.

[13] ABA Model CJC Canon 5(A)(1)(e); Colorado CJC Canon 7(A)(1)(c); Connecticut CJC Canon 7(A)(3); Delaware CJC Canon 7(a)(3); Georgia CJC Canon 7(A)(1)(c); Hawaii CJC Canon 5(A)(1)(e);

While these recommendations are within the Court's province to address through amendments to the Code of Judicial Conduct, they involve decisions that the Court believes could better be resolved, at least for now, through the legislative process. The Court therefore requests the Texas Judicial Council to review whether legislation is appropriate to address these recommendations.

4. *Recommendation E: Limit judicial appointments of excessive campaign contributors and repetitious appointments.* The Committee proposed limits on judicial appointments of campaign contributors to positions from which the contributors could benefit, such as guardians or attorneys ad litem.[14] This recommendation, which paralleled its recusal proposal, was derived in part from Recommendation IV of the ABA Report.[15] Because it tracks the recusal proposal, the Court will defer further consideration of this recommendation until after the Advisory

---

Kentucky CJC Canon 7(A)(1)(c); Maine CJC Canon 5(A)(1)(e); Massachusetts CJC Canon 7(A)(1)(c); Minnesota CJC Canon 5(A)(1)(e); New Hampshire CJC Canon 7(A)(1)(c); New Jersey CJC Canon 7(A)(4); North Dakota CJC Canon 5(A)1)(e) & (f); Oklahoma CJC Canon 5(A)(1)(d); Utah CJC Canon 5(B)(3); Virginia CJC Canon 7(A)(1)(c); Wisconsin CJC 60.06(2); *see also* Arizona CJC Canon 5(A)(1)(c) (judge or judicial candidate can contribute to or solicit contributions for a political party or to a non-judicial candidate of no more than $250 annually); California CJC Canon 5(A)(3) (judge's contributions and solicitation for political party, political organization, or candidate capped at $500 annually per party and $1000 annually for all parties); Washington CJC Canon 7(A)(1)(c) & (d), (2).

Oklahoma, in fact, has a statute that forbids judges of its Court of Civil Appeals from "directly or indirectly" contributing to a political party. 20 Okla. Stat. Ann. § 30.19.

[14] Report and Recommendations at 35-39.

[15] ABA Report at 44-47.

Committee completes its review of the recusal proposal.

5. ***Recommendation F: Encourage efforts to develop voter guides to judicial elections.*** The Committee urged continued efforts to develop voter guides to judicial elections informing voters about judicial candidates, thereby reducing the need for candidates to raise and spend campaign funds.[16] The Court asks the Texas Judicial Council and the State Bar of Texas to study this recommendation, H.B. 59 as passed by the 76th Legislature, and the Governor's veto message thereof, and similar activities in other states.

6. The Clerk is directed forthwith to file a copy of this Order with the Secretary of State, 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*, and to send a copy of this Order to each elected member of the Legislature.

IT IS SO ORDERED.

By the Court, en banc, in chambers, this 21st day of June, 1999.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

[16] Report and Recommendations at 39. This recommendation was based in part on Recommendation V(C) of the ABA Report. ABA Report at 53-56.

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

James A. Baker, Justice

Greg Abbott, Justice

Deborah G. Hankinson, Justice

Harriet O'Neill, Justice

Alberto R. Gonzales, Justice

Enclosure to Agenda No. 8

Enclosure to Agenda No. 8

AN ACT

relating to summary judgments issued by a court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 40 to read as follows:

CHAPTER 40. SUMMARY JUDGMENT

Sec. 40.001. DEFINITION. In this chapter, "claim" means:

(1) a claim, counterclaim, or cross-claim under which a person seeks recovery of damages or other relief that may be granted by a court; or

(2) an action to obtain a declaratory judgment.

Sec. 40.002. WRITTEN FINDINGS REQUIRED; SCOPE OF APPELLATE REVIEW. (a) The judge of a court who grants a motion for summary judgment with respect to all or any part of a claim shall specify the grounds, in writing, on which the motion is granted not later than the date on which the judgment is signed by the judge of the court.

(b) Notwithstanding any other law, any court hearing an appeal from a grant of a motion for summary judgment shall determine the appeal only on the grounds specified in the written findings.

Sec. 40.003. SUMMARY JUDGMENT IN CERTAIN CASES: NOTICE REQUIRED IN CITATION. In a claim for a liquidated money demand or a claim involving a sworn account that is brought in a justice court, the clerk of the court shall include a notice in the citation that, unless a sworn answer is filed on behalf of the defendant, a summary judgment against the defendant may result.

Sec. 40.004. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE. To the extent of any conflict between this chapter and the Texas Rules of Civil Procedure, including Rule 166a, this chapter controls.

SECTION 2. This Act applies only to a grant of a motion for summary judgment on or after the effective date of this Act. A grant of a motion for a summary judgment before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 1999.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

President of the Senate

Speaker of the House

I certify that H.B. No. 2186 was passed by the House on May 8, 1999, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2186 on May 27, 1999, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 2186 was passed by the Senate, with amendments, on May 26, 1999, by a viva-voce vote.

Secretary of the Senate

APPROVED:

Date

Governor

OFFICE MEMORANDUM
STATE OF TEXAS
OFFICE OF THE GOVERNOR

Pursuant to Article IV; Section 14, of the Texas Constitution, I, George W. Bush, Governor of Texas, do hereby disapprove and veto House Bill No. 2186 because of the following objection:

House Bill No. 2186 proposes an unnecessary and confusing change to summary judgment law in civil cases. The proposed new requirements for trial judges conflict with the existing rules adopted by the Texas Supreme Court. This bill would discourage the speedy resolution of civil cases and encourage frivolous lawsuits.

IN TESTIMONY WHEREOF, I have hereunto signed by name officially and caused the Seal of the State to be affixed hereto at Austin, this 20th day of June, 1999.

George W. Bush
Governor of Texas

Sept. 22, 1998

Mr. Robert Pemberton
Chambers of Judge Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Tx. 78711

Dear Mr. Pemberton;

As you know, when a trial judge grants summary judgment and doesn't state what theories are granted and denied, then any basis is grounds for appellate affirmation.

I think trial judges should be encouraged by the rules when granting a summary judgement to state which theories were granted and which are overruled. This would conserve judicial as well as the parties' resources and result in shorter written opinions.

It seems strange that a party has 30 days to answer discovery but only 14 days to respond to a summary judgment motion. I think this should be expanded to 30 days. I have been in situations where I had to drop everything in order properly to respond to a summary judgment motion.

In general there are too many "gotchas" in Texas law where cases are decided on technicalities and not on the merits. For example, Tex.R.Civ.P. 54 and the cases construing it. Rule 54 on its face would also apply to personal injury and not just contract. Is that what you really want?

Sincerely,

George B. Green

George B. Green

LAW OFFICES
SHANNON, GRACEY, RATLIFF & MILLER, L.L.P.
1600 BANK ONE TOWER
500 THROCKMORTON
FORT WORTH, TEXAS 76102-3899
817 336-9333

ANNE GARDNER
BOARD CERTIFIED CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELECOPIER 817 336-3735
DIRECT DIAL (817) 877-8133

May 27, 1999

Via Telecopy No. (512) 463-1849
Governor George W. Bush
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

Re: *House Bill 2186*

Dear Governor Bush:

As a lawyer with over thirty years of experience, board certified in civil appellate law, and a member of the board of directors of the Texas Association of Defense Counsel, I have deep concern for the negative impact which the above-referenced bill will have on the administration of justice. The proposed House Bill 2186 will greatly disserve the interests of the citizens of this State. I am writing to urge you to exercise your veto power to prevent the ill-conceived House Bill 2186 from becoming law.

I served on the State Bar Committee on Administration of Justice (now the Court Rules Committee) from 1984 until 1994. My service included drafting the prototype for the amendment for "no evidence" summary judgments ultimately adopted by the Supreme Court in 1997. In 1993, the Supreme Court of Texas appointed me to be a member of its thirty-six member Advisory Commission. In both of those capacities, I have participated in the study of summary judgment procedure over a period of 15 years. I also drafted the proposed House bill to amend summary judgment practice (which led to the Court's 1997 amendment), and I testified before the House Committee on Civil Procedure in favor of that bill.

For many years, summary judgments in Texas have been governed by Rule 166a of the Texas Rules of Civil Procedure which were promulgated by the Supreme Court of Texas in the exercise of its rule-making power. Only twice in its history (in 1979 and 1997) has the Texas Rule been amended. Both of those amendments came only after years of experience and thorough study, not only by the Supreme Court but also by the lawyers of this State. In contrast, House Bill 2186 is based upon no such foundation of study or experience.

The fact is that this Bill will defeat the purpose of summary judgments. Since its inception, summary judgment procedure has been envisioned as a means of increasing judicial efficiency by eliminating unmeritorious claims and defenses. The intent of Rule 166a was to allow parties to cut through groundless allegations and to obtain early disposition of actions where a trial would be an empty formality, allowing the courts to devote their attention to those cases which have merit.

In order for the summary judgment procedure to work efficiently, it must operate smoothly and without wasted time and effort both by trial and appellate courts. When a summary judgment does not state the specific ground upon which it is granted, the Texas appellate courts have for many years consistently held that they may affirm such a judgment on any ground presented in the motion. In 1996, the Supreme Court further held that, even if the trial court judgment specifies the ground upon which it was granted, the judgment may be affirmed upon another ground presented by the motion.

House Bill 2186, sponsored by Harold Dutton and passed by the Senate yesterday, would specifically nullify those two judicially crafted rules which were designed to further streamline and make summary judgment procedure a useful vehicle for judicial efficiency. The House Bill would require a trial court to specify in writing the grounds upon which a summary judgment is granted. By an amendment tacked onto the bill in the Senate, the appellate courts could consider only those grounds upon which the motion was expressly granted, in determining whether to affirm.

By making the trial court specify a ground upon which a summary judgment is granted, and by taking away the appellate courts' ability to affirm on any other grounds, House Bill 2186 will discourage the use of the summary judgments by trial courts. Even worse, the Bill will greatly increase the number of reversals of summary judgments, requiring more trials, resulting in more appeals, culminating in undue delay and waste of judicial resources in the courts, and thereby defeating the whole purpose of the summary judgment procedure.

For these reasons, I again urge that you exercise your veto power to prevent House Bill 2186 from becoming the law of this State.

Yours respectfully,

Anne Gardner

Anne Gardner

AG:nj

cc: Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Ms. Patricia Kerrigan, President
Texas Association of Defense Counsel
400 West 15th Street, Suite 315
Austin, Texas 78701

Mr. David Davis
President-Elect
Texas Association of Defense Counsel
400 West 15th Street, Suite 315
Austin, Texas 78701

Enclosure to Agenda No. 9

MEMORANDUM

TO: Chip Babcock January 7, 2000

FROM: Bob Pemberton

RE: Service of Discovery With Original Petition

Plaintiffs in some locales have been experiencing difficulty getting discovery served with their original petitions because court clerks, relying on Rule 191.4, have been refusing to accept the discovery. Attached is a letter that I originally proposed to send to clerks explaining one means of reconciling Rule 191.4 and rules contemplating service of discovery with the original petition: accept the discovery without filing it, reference the discovery on the citation, and forward the citation, petition, and discovery to the constable for service.

I also have heard that many litigants are simply attaching the discovery as an exhibit to their petition or integrating it into the body of the petition itself.

Richard Orsinger had two reservations about this proposal, one procedural, one practical. Concerning the procedural issue, he pointed out that Tex. R. Civ. P. 99 comprehensively sets forth the contents of the citation in a manner that, in his view, leaves no room for adding references to unfiled discovery, as we proposed. Richard added that, for this reason, litigants in Bexar County would obtain service of discovery prior to appearance date under the old rules via a "precept." The sole reference to a "precept" in the Texas rules and statutes appears in Tex. R. Civ. P. 16, which contemplates that "[e]very officer shall endorse on all process and precepts coming to his hand the date and hour on which he received them . . . ." Blacks Law Dictionary defines the term as:

> An order, writ, warrant, or process. An order or direction, emanating from authority, to an officer or body of officers, commanding him or them to do some act within the scope of their powers. An order in writing, sent out by a justice of the peace or other like officer, for the bringing of a person of record before him. Precept is not to be confined to civil proceedings, and is not of a more restricted meaning than "process." It includes warrants and processes in criminal as well as civil proceedings.

Richard's practical objection was that the citation — even if amended in the manner we suggest — would not necessarily put parties on notice that both a petition *and* discovery is

being served on them. This is especially true with regard to *pro se* litigants.

Taking Richard's comments and suggestions into account, there are at least the following six options for resolving the problem of clerks not accepting discovery for service with an original petition:

1. Encourage parties to obtain service of discovery through a precept. While consistent with Rule 99 and providing specific notice of the discovery, it would also be more expensive and inconvenient than other options. If we employ this option, the expense and inconvenience factors might effectively eliminate service of discovery prior to appearance date.

2. Stick with our original proposal. But if we agree with Richard, adding any mention of the attached discovery to the citation would contradict Rule 99.

3. Stick with our original proposal except don't ask clerks to reference the discovery on the citation. While maintaining consistency with Rule 99, this option would, as Richard suggests, create a trap for the unwary litigant.

4. Encourage litigants simply to attach discovery as an exhibit to their petition, as many now are doing. Again, this creates a trap for the unwary.

5. Amend Rule 191.4 to permit filing of discovery served with an original petition. This would be the same procedure used under the old rules. But it also would create the same trap for the unwary as options (3) and (4).

6. Amend Rule 99 to permit mention of attachments other than the petition in the citation, and otherwise stick with our original proposal.

I lean toward (3) for now and later (6).

R.H.P.

Enclosure to Agenda No. 10

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
16TH FLOOR
HIGHLAND PARK PLACE
4514 COLE AVENUE
DALLAS, TEXAS 75205-4185

214-522-0200
D/FW METRO: 972-203-7452
FAX: 214-521-5485

FRANK L. BRANSON
DEBBIE DUDLEY BRANSON
GEORGE (TEX) QUESADA
JERRY M. WHITE
ROBERT D. CRAIN
WILLIAM B. CURTIS
THOMAS J. FARMER
CHARLES E. MOODY

OF COUNSEL
TED Z. ROBERTSON
J. HADLEY EDGAR, JR.

May 19, 1999

VIA FACSIMILE (409) 838-6959
Gilbert I. Low, Esq.
Orgain, Bell & Tucker
470 Orleans St.
Beaumont, Texas 77701

Dear Buddy:

New Rule of Civil Procedure 199.5(f) provides that

> "An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading or secure a ruling pursuant to paragraph (g) (emph. added)."

This provision was not in the original draft suggested to the Supreme Court. Instead, it was added by the Supreme Court over the objection of several members of their handpicked committee.

The Supreme Court's explanation of the new rule makes it even worse. Note 4 reads, in part,

> "A witness should not be required to answer whether he has ceased conduct he denies doing, subject to an objection to form (i.e., that the question is confusing or assumes facts not in evidence) because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer."

The point of the rule may have been to prevent questions such as "Have you stopped beating your wife?", but the effect is now that any time any question "assumes facts not in evidence", the lawyer is justified in instructing his witness to not answer the question.

A far simpler proposal would have been to follow the Federal Rule in this area. Fed. R. Civ. Proc. 30(d)(1) provides that:

> "A party may instruct the deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)."

When one looks at the other federal rules referenced in the subpart, it very clearly allows (and encourages) trial courts to award sanctions and fees for filing frivolous motions regarding deposition questions.

I think that the Supreme Court's new rule is creating more havoc than it is worth.

I hope this helps.

Very truly yours,

FRANK L. BRANSON

FLB:cm:im

ORGAIN, BELL & TUCKER, L.L.P.
ATTORNEYS AT LAW
470 ORLEANS STREET
P. O. BOX 1751
BEAUMONT, TEXAS
77704-1751
TELEPHONE (409) 838-6412
FAX (409) 838-6959
www.obt.com

OTHER OFFICES
HOUSTON
AUSTIN
SILSBEE

May 20, 1999

Hon. Nathan L. Hecht, Justice
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

I have had several lawyers complain to me about new Rule 199.5(f). The typical complaint is the same one that Frank Branson has made to me in his letter of May 19, 1999. I think we need to take a look at this problem the next time we meet.

Thanks.

Sincerely,

ORGAIN, BELL & TUCKER, L.L.P.

Buddy

Gilbert I. Low

GIL/cc

Enclosure