## PROPOSED TEXAS RULE OF CIVIL PROCEDURE PATTERNED AFTER FEDERAL RULE 5.1

Texas Rule of Civil Procedure \_\_\_. Notice of Constitutional Question.

- (a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a <u>Texas</u> statute must promptly:
- (1) file a notice of constitutional question <u>identifying the statute</u>, stating the question and identifying the paper that raises it, if the <u>attorney general is not already participating in the litigation as either a party or counsel</u>; and
- (2) serve the notice and paper on the attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.
- (b) Certification by the Court. In the event that a constitutional question is raised *sua sponte* by a court, the court must certify to the attorney general that a statute has been questioned, identifying the statute, stating the question and identifying any paper that raises it, if the attorney general is not already participating in the litigation as either a party or counsel.
- (c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier: Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.
- (d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

INTERPRETIVE COMMENTARY

1. Federal Rule of Civil Procedure 5.1—on which Texas Rule of Civil Procedure \_\_ is modeled—is premised on certain fundamental principles. To begin with, our legal system is founded upon the understanding that adversarial process is an essential component of the fair and just resolution of disputes. And when it comes to disputes concerning the constitutionality of a state statute, adversarial process may include participation by state attorneys general. Accordingly, Federal Rule of Civil Procedure 5.1 specifies that state attorneys general have the right to notice and intervention to defend state statutes against constitutional attack in federal court. Likewise, the Texas Legislature has enacted Texas Civil Practice & Remedies Code § 37.006, to provide a similar right within the specific context of declaratory judgment actions in state court. The Advisory Committee recognizes that constitutional challenges to state statutes frequently occur in state court outside the context of declaratory judgments. Accordingly, the Advisory Committee believes that it is appropriate to adopt a rule of Texas civil procedure that mirrors the purpose and effect of Federal Rule of Civil Procedure 5.1.

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(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or §

(B) a state statute is questioned and

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**Deleted:** of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—

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- 2. The values served by Federal Rule of Civil Procedure 5.1 must be balanced against the interest in avoiding unnecessary burdens on private litigants. Towards that end, Federal Rule of Civil Procedure 5.1(a) expressly contemplates the possibility of electronic notification. The Office of the Attorney General has stated its intention to establish a method of electronic notification in order to facilitate compliance with these rules. The Advisory Committee believes that the availability of electronic notification should be sufficient to avoid the imposition of any unnecessary burden on litigants. Sufficient notice could be accomplished simply by sending a short letter; or a short message to an electronic address designated by the Office of the Attorney General for this purpose, stating the following: "In Smith v. Jones, No. \_\_\_\_ (\_\_\_\_ District Court), Plaintiffs/Defendants argue that Texas \_\_\_\_ Code Section \_\_\_\_ violates the Texas/U.S. Constitution," along with any relevant motions or briefing attached.
- 3. Federal Rule of Civil Procedure 5.1(c) grants state attorneys general a specific right to intervene when a state statute is subject to constitutional challenge. In the event that a state attorney general chooses to exercise this right, the state becomes an intervenor in the litigation. As a party to the litigation, the state is subject to the established authority of district courts to ensure that litigants are given reasonable opportunity to be heard, consistent with the need for the litigation to proceed in a fair and expedient manner. The Advisory Committee anticipates that, in cases in which the state intervenes in pending Texas court litigation to defend a state statute against constitutional attack, the state will not participate in a manner that will delay or hinder the efficient administration of justice, and that district courts will continue to discharge their duty to manage litigation in a fair and efficient manner.
- 4. Failure of notice under this Rule constitutes reversible error on appeal. But it does not result in the forfeiture of any constitutional claim or defense, as Rule \_\_(d) confirms. On remand, parties may renew their constitutional claim or defense, provided that they comply with the requirements of this Rule.
- 5. This Rule applies exclusively to state statutes that are subject to either state or federal constitutional challenge. It does not apply to state rules that are subject to constitutional challenge. Nor does it apply to municipal ordinances or franchises, unlike Texas Civil Practice & Remedies Code § 37.006.
- 6. Federal Rule of Civil Procedure 5.1 draws no distinction between facial and as applied constitutional attacks on state and federal statutes, and the Advisory Committee recommends adopting the same approach here.

Date:

November 16, 2009

To:

The Texas Supreme Court Advisory Committee

Re:

Sample language of new grounds for judicial recusal

From:

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

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## 1. COMPARING CURRENT TRCP 18b(2) LANGUAGE TO RECODIFICATION DRAFT.

TRCP 18b(2) Current Language

18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:

(a) (his) impartiality might reasonably be questioned;

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

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

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(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

TRCP 18b Recodification Draft (1997)

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

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

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

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

(4) the judge has personal knowledge of <u>material</u> evidentiary facts relating to the dispute between the parties;

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

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.

- (6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;
- (7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;
- (8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

## II. COMPARING CURRENT TRCP 18b(2) LANGUAGE TO SCAC 3/27/2001 DRAFT.

TRCP 18b(2) Current Language SCAC 3/27/2001 Draft TRCP 18b(2) 18b. (2) Recusal. A judge shall recuse himself in any pro-(b) Grounds for Recusal. A judge must recuse in the followceeding in which: ing circumstances, unless provided by Subsection (c) (or, "unless waived pursuant to subdivision (c)"): (a) his impartiality might reasonably be questioned; (1) the judge's impartiality might reasonably be questioned (b) he) has a personal bias or prejudice concerning the subject → (2) the judge has a personal bias or prejudice concerning the matter or a party, or personal knowledge of disputed evidensubject matter or a party fiary facts concerning the proceeding; (3) the judge has been or is likely to be a material witness, (c) he or a lawyer with whom he previously practiced law has formerly practiced law with a material witness, or is related to a been a material witness concerning it; material witness or such witness's spouse by consanguinity or / 52mc 25 18b (f)(iii) affinity within the third degree; (d) he participated as counsel, adviser or material witness in the (4) the judge has personal knowledge of material evidentiary matter in controversy, or expressed an opinion concerning the facts relating to the dispute between the parties; merits of it, while acting as an attorney in government service: (e) he knows that he, individually or as a fiduciary, or his (5) the judge expressed an opinion concerning the matter while spouse or minor child residing in his household, has a financial acting as an attorney in government service; 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.

- (6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;
- (7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone known or disclosed to the judge to have a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;
- (8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding;
- (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.
- (10) the judge has accepted a campaign contribution, as defined in § 251.001(3) Election Code, which exceeds the limits in § 253.155(b) or § 253.157(a) of the Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a

party, or by a member of that law firm, as defined in §253.157(c) 253.157(e) of the Election Code, unless the excessive contribution is returned in accordance with §253.155(e) of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.

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

# III. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO 28 U.S.C. § 144 (Bias or prejudice of judge).

TRCP 18b. (2) Recusal. A judge shall recuse himself in any proceeding in which: . . .

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(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; . . . .

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

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice

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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.

## IV. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO 28 U.S.C. § 455 (Disqualification of justice, judge, or magistrate judge)

TRCP 18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:

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

(a) his impartiality might reasonably be questioned;

- (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:
- (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;
- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;
- (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;

- (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) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
  - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
  - (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

- (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (d) For the purposes of this section the following words or phrases shall have the meaning indicated:

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

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

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

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

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

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

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(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;

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(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.

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TRCP 186 (5) - parties can wrive any ground for recusal after full disclosure on the record.

Special (6) - If judge does not on the discount grounds (fixeneral interest) until the if specialization time if specializations.

(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.

V. COMPARING CURRENT LANGUAGE OF TRCP 18b(2) TO ABA MODEL CODE OF JUDICIAL CONDUCT, RULE 2.11 Disqualification.

A great number of states treat CJC as de facto grounds for recousal

18b. (2) Recusal. A judge shall recuse himself in any proceeding in which:

ABA Model Code of Judicial Conduct, RULE 2.11 Disqualification

(a) his impartiality might reasonably be questioned;

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

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

(c) (he) or a lawyer with whom he previously practiced law has ABASSYS "publicky" Sec 2.11(6)(b) been a material witness concerning it;

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Compare to R. 211(6)(b) (d) he participated as coursel, 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 note ARA -> affected by the outcome of the proceeding;

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(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;

omits partnerships

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

not in 186 (5)(p)

(2) The judge knows\* that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship\* to either of them, or the spouse or domestic partner of such a person is: instin 186; reaches partnershys + LLCs

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

(b) acting as a lawyer in the proceeding; (Tacp186(2)(5) makes the 15th cashy)

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

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

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

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate\* contributions\* to the judge's campaign in an amount that is

Contributions

- (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 <u>first degree</u> of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

greater than [\$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

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

## (6) The judge:

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

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

- (c) was a material witness concerning the matter; or
- (d) previously presided as a judge over the matter in notals another court.

[\*indicates terms that are defined in the Model Code]

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### CAMPAIGN CONTRIBUTIONS VI.

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SCAC'S 3/27/2001 DRAFT. would require submoths

- some states have tried to ben direct sulicitation of campaign contributions (Kansas - Fox Dust Judge nullified 3 yearthy)

- few if any successful challenges to recusal cules; nearly all of the nullinging decisions are against restrictions on judicial behavior. Theremay array and be equivalent aute Justice Reasedy in Problem Party of Min vilutitis p. 19

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

Limitations perud completedt election cycle

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

# Bass bot coner signs TEXAS CODE OF JUDICIAL CONDUCT CANON 5.

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

### ABA'S MODEL CODE OF JUDICIAL CONDUCT 2.11 Disqualification. C.

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

#### D. ALABAMA STATUTES.

ALABAMA CODE § 12-2-1. 12-24-1. Recusal of justice or judge due to campaign contributions

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

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

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If

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

zayone whose cantibution is least then \$4,000 (\$2,000), or if over that ant recusal

### E. ARIZONA SUPREME COURT RULE 2.11.

17A A.R.S. Sup. Ct. Rules, Rule 2.11, Disqualification

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: enot coordinated with most recent electron cycle
- (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous four years made aggregate contributions to the judge's campaign in an amount that is greater than the amounts permitted pursuant to A.R.S. § 16-905. (Effective 9/1/2009).
- F. MISSISSIPPI CODE OF JUDICIAL CONDUCT, CANON 3.

. discretionary

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

G. CAPERTON V. A.T. MASSEY COAL CO., INC. LANGUAGE.

not just contribution, includes bundling "... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Caperton, 2009 WL 1576573 at \*11. Is not a money - 6 a sed fector

PUBLIC JUDICIAL

? judicial impartiality

CAMPAIGN SPEECH.

not as expassin when applied to that judges as sup ct justices. Te cases last ayes or less, butio Super-cracio 264 4x2701d

## ABA'S MODEL CODE OF JUDICIAL CONDUCT 2.11 Disqualification.

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(5) The judge, while a judge or a judicial candidate,\* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy. [\*indicates term with special definition in Model Code]

. Us Sycthes not held that -14this is not a compelling state restrictions to burst. Problem is that restrictions appearance of impartiality / have not been narrowly toolered enough

### B. TEXAS CODE OF JUDICIAL CONDUCT CANON 5.

Old Canon 5(1) was declared unconstitutional in *Smith v. Phillips* 2002 WL 1870038, and was rescinded by the Supreme Court on August 22, 2002. Old Canon 5(1) read:

"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 individuals' judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case."

Here is the relevant language of current Canon 5:

Canon 5. Refraining From Inappropriate Political Activity

not limited to

- (1) A judge or judicial candidate shall not:
- (i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;
- (ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or New Jork Times v. Sullivan & Landard required?
  - (iii) make a statement that would violate Canon 3B(10).

## 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.

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## C. TEXAS CODE OF JUDICIAL CONDUCT CANON 3.B(10).

Canon 3. Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(10) A judge shall abstain from public comment about a pending or impending proceeding which 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. 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 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.

Do we zeld to recess! Me & violation of Texas Lock of Jadicial Conduct