JUDICIAL RECUSAL AND ATTORNEY DISQUALIFICATION: AN ETHIC FOR LITIGATORS & OTHER ALIENS IN A STRANGE LAND

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Text of new statute governing tertiary recusal motions
Now there is nothing so deep as the ocean
And there is nothing so high as the sky
And there is nothing so unwavering as a woman
When she's already made up her mind

Lyle Lovett, "She's Already Made Up Her Mind"

I. INTRODUCTION
The possibility of judicial recusal or attorney disqualification adds a wrinkle to ordinary
litigation. The conduct or status of the parties is no longer the only concern. Instead, the alleged
actions or biases of actors in the legal proceeding itself become a subject of the litigation. This
paper addresses the unique ethical issues that arise when a party seeks the ouster of the judge or
an attorney from a lawsuit.

This paper relies on the scholarship contained in two fine CLE papers, which I gratefully
acknowledge. Justice Wanda Fowler and Karen Vowell authored a comprehensive paper for last
year's Advanced Appellate Practice Course, entitled "Come On and Let Me Know . . . Should I
Stay or Should I Go? Judicial Removal on Mandamus and On Appeal," which they updated for
presentation on July 16, 1999 at a CLE Seminar sponsored by the Houston Bar Association.
Their paper is a thorough procedural guide to the issues related to judicial removal. Denice Smith
authored a paper presented to the Houston Bar's Appellate Practice Section in 1996, entitled
"Recusal in Texas Civil Cases," which contains original research that remains relevant.

II. ETHICAL DUTIES OF LAWYERS AND JUDGES.
Appellate lawyers become involved in these issues in two basic contexts. First, recusal
and attorney disqualification are governed by technical rules, so we may be asked to handle or
assist during trial court proceedings. Second, we may be asked to assist or handle an appeal in
which we must explain to the appellate court why it was proper or improper to seek removal of
the judge or opposing counsel in the court below.

Both contexts require that an appellate lawyer understand the underlying ethical issues. In
contrast to our detachment from the facts of other cases, we become involved in the facts when
we seek removal of a judge or a lawyer. Therefore, our own conduct is likely to be scrutinized by
the trial judge, opposing counsel, and the reviewing court.

An attempt to disqualify, recuse, or strike a judge presents an even more striking contrast
from the usual case. Judges are not usually relevant to the facts of the case. An advocate's
attempt to insert these issues into a lawsuit is always "provocative" in the most dangerous sense
of that word: it "provokes" a dispute with the Court.

The following is an overview of the ethical rules that govern these disputes and help
explain why they sometimes arise.

A. Summary of an Advocate's Duties.
Every advocate owes duties to the client, the Court, and the opposing side. Attorney disqualification arises from the breach of these obligations. Sometimes, the observance of these duties compels an advocate to seek recusal or disqualification of a judge or an adversary.

The Texas Bar rules outline an advocate's duties as follows:

1. Duties to the client.
   Attorneys have a duty to abide by the client's decisions concerning the objectives and general methods of representation. 1.02(a)(1). This duty is tempered by the prohibition against asserting frivolous claims or defenses. 3.01. Attorneys are also subject to the conflict of interest rules: we are absolutely forbidden from representing opposing parties in the same litigation, 1.06(a), or from representing clients whose interests may be adverse to our own or another client's, unless all clients consent to the representation after full disclosure, 1.06(b).

2. Duties to the Court.
   Attorneys must not make affirmative misstatements of material fact or law to a Court. 3.03(a)(1). Further, we must disclose a fact to a Court when it is necessary to avoid assisting a criminal or fraudulent act. 3.03(a)(2). We must obey every order of a Court, and ensure our clients' obedience, except for an open refusal based on the good-faith assertion that no valid obligation exists, or unless the client is willing to accept sanctions. 3.04(d). We are required to refrain from improper ex parte contacts with the Court. 3.05. And we are forbidden from making improper statements about a pending case outside the courtroom. 3.07.

3. Duties to the other side.
   Attorneys are forbidden from obstructing the other side's access to evidence, or from falsifying evidence. 3.04(a), (b). We are also required to play by the rules of procedure and evidence. 3.04(c).
   Thus, to oversimplify, we have a duty to do whatever our clients ask us to do unless we limit the scope of our representation, or unless the client's request is criminal or fraudulent. We have a duty of candor and truthfulness toward courts, but no general duty of disclosure. The other side is entitled to nothing more than fair treatment within the rules of procedure and evidence. There is no duty for a lawyer to be "nice" to the Court or to opposing counsel (on the other hand, there is assuredly no duty to be disrespectful, discourteous, or abusive.)
   Many of us have chosen to practice appellate law because it can insulate us from the style of practice that was labeled "Rambo" litigation in the 1980s. This paper suggests that it is not necessary to descend to that level while zealously representing our clients' interests.

B. Summary of a Judge's Duties.
   A judge's duties are imposed by the Texas Constitution, Texas Rule of Civil Procedure 18, and the Code of Judicial Conduct. Some-not all-of these duties are relevant to judicial removal.

1. Constitutional Disqualification.
   Article V, section 11 of the Texas Constitution provides that a judge is absolutely
disqualified from presiding in three instances: (1) where the judge is interested in the case; (2) where the judge is related to any party within the third degree of affinity or consanguinity, as may be defined by law; and (3) where the judge has acted as an attorney in the case. Texas courts have long held these grounds are exclusive and no other bases for disqualification exist. See, e.g., Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515, 518 (1930); Taylor v. Williams, 26 Tex. 583, 587 (1863).

The "interest" spoken of in the constitution is a direct pecuniary or property interest in the subject matter of the litigation that would result in a pecuniary gain or loss to the judge as an immediate result of the judgment. Cameron v. Greenhill, 582 S.W.2d 775, 776 (Tex.1979).


2. Rules 18a and 18b.

Rules 18a and 18b of the Texas Rules of Civil Procedure govern recusal of any court other than the court of appeals or the Supreme Court. See Tex. R. Civ. P. 18a, 18b, attached as appendices A and B. Rule 18a discusses the filing, form, and contents of the motion, the procedures the judges are to follow when confronted with a motion to recuse as well as waiver of the right to recuse and sanctions for filing a frivolous motion. Rule 18b(2) sets forth the grounds for recusal and pertinent definitions. Rule 18b(2) now contains nine instances in which a judge must not sit. See App. B.

A copy of proposed rule 18, which would consolidate rules 18a and 18b and introduce several changes to recusal procedure, is attached as Appendix C. The new rule 18 would liberalize recusal practice, by removing the current requirement that recusal motions be filed 10 days before trial or hearing. Instead, the motion could be filed at any time. The rule would also impose deadlines for courts that are considering recusal motions. (See App. C.) On the other hand, the rule would expressly allow judge who receive defective, unverified recusal motions to ignore them.


The Texas Code of Judicial Conduct contains ten canons that regulate the conduct of judges. Many of these canons relate to matters of judicial decorum and not impartiality, and are largely irrelevant to judicial removal. Canon 5, for example, regulates a judge's conduct of a judicial political campaign. The penalty for violating the Code is discipline by the Texas Judicial Conduct Commission. Violations of the Code, however, may coincide with laws requiring disqualification or removal. Canon3(b)(5), for example, requires that judges perform judicial duties without bias or prejudice.

Furthermore, the Code contains an express requirement that allows a judge to serve as a mediator in a case, but forbids the judge from continuing to preside in the case without the consent of the parties. Canon 3(b)(8) states that a judge is not prohibited from "conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties." This provision of the Code is enforceable pursuant to the rules of civil procedure governing recusal. See, e.g., App. D, a sample motion to recuse that is based on Canon 3(b)(8).

The Code of Judicial Conduct is also relevant to the issue of constitutional
disqualification, because Canon 8 provides a definition of the "interest" in a case that disqualifies a judge:

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

III. CONSTITUTIONAL DISQUALIFICATION.

Texas courts have simplified many of the ethical issues relating to constitutional disqualification, by treating it as a question of subject-matter jurisdiction that cannot be waived. Whether a party raises the issue or not, a Texas judge who is constitutionally disqualified has an absolute duty to withdraw from the case.

A. Disqualification is "rigidly enforced."


B. Disqualification may be raised at any time, even on appeal.
Thus, disqualification may be raised at any time. See Glaser, 632 S.W. 2d at 148; Fry, 202 S.W.2d at 222. It may even be raised for the first time in a motion for rehearing in the court of appeals, see Glaser, 632 S.W.2d at 148, or in a collateral attack on the judgment. See Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556, 560 (Tex. App.--Beaumont 1993, writ denied) (citing Lee v. State, 555 S.W.2d 121, 124 (Tex. CIV. App. 1977); and Ex parte Washington, 442 S.W. 2d 391,393 (Tex. CIV. App. 1969)).

Moreover, disqualification may not only be raised at any time by the parties, but either a trial court or an appellate court may raise the issue of disqualification on its own motion. See McElwee, 911 S.W. 2d at 186; Gulf Maritime, 858 S.W. 2d at 560.

C. Procedures for Disqualification.

It is unclear whether any true, mandatory procedures govern constitutional disqualification. Rule 18a of the Texas Rules of Civil Procedure purports to apply to recusal and disqualification. See Tex. R. Civ. P. 18a. Because a judge has an absolute duty to step aside when constitutionally disqualified, and disqualification cannot be waived in the trial court, the procedural requirements of rule 18a must be irrelevant to this issue. Therefore, many of the procedures outlined in rule 18a do not apply to disqualification. For example, subsection (a) of rule 18a states that a motion must be filed at least ten days before the date of trial or other hearing stating the grounds for the removal. See Tex. R. Civ. P. 18a(a).

Nevertheless, to avoid confusion, filing a motion to disqualify as soon as its necessity becomes apparent is the best course of action. See Cameron v. Greenhill, 582 S.W. 2d 775, 776 (Tex. 1979) (noting that party filed motion to disqualify).

D. Review of Disqualification Rulings.

1. Mandamus.

When a judge is constitutionally disqualified but refuses to remove himself from the case, the party seeking disqualification is entitled to mandamus relief. See In re Union Pacific Resources Co., 969 S.W. 2d 427, 428 (Tex. 1998).

Mandamus is appropriate to challenge a trial court's refusal to disqualify itself because any orders or judgments rendered by a constitutionally disqualified judge are void and without effect. See Union Pacific, 969 S.W.2d at 428 (citing Glaser, 632 S.W. 2d at 148; Fry, 202 S.W. 2d at 221). But see Wallace v. State, 138 Tex. CIV. 625, 138 S.W.2d 116, 117 (1940) (holding that order by disqualified judge requiring court reporter to make statement of facts was purely ministerial, non-discretionary act and not one judge was prohibited from rendering); Collocate Land Co. v. Houston Citizens Bank & Trust Co., 525 S.W. 2d 941 (Tex. CIV. App.--El Paso 1975, no writ) (holding that disqualified judge is incapacitated from taking any action that requires exercise of judicial discretion).

2. Appeal.

Though mandamus relief is available, this does not foreclose the right to complain of constitutional disqualification on direct appeal. See McElwee v. McElwee, 911 S.W. 2d 182, 186-87 (Tex. App.- Houston [1st Dist.] 1995, writ denied) (addressing issue of constitutional disqualification on direct appeal).

The filing of a writ of mandamus would, nevertheless, be a better procedure than awaiting the
outcome of a full trial on the merits because disqualification should not be allowed to interfere with the fair disposition of a suit. See Hall v. Brickfield, 718 S.W.2d 313, 322 n. 1 (Tex. App.--Texarkana 1986), rev'd on other grounds, 747 S.W.2d 361 (Tex. 1987).

If the issue of disqualification is raised for the first time on appeal, and it is unclear whether the trial judge should have been disqualified, the appellate court may abate the appeal and return the matter to the trial court for an evidentiary hearing. See McElwee, 911 S.W.2d at 186.

E. Ethical Duties.

In a sense, only the judge has any ethical duties when he or she is constitutionally disqualified. Canon 3(B)(3) requires judges to "dispose of all judicial matters promptly, efficiently and fairly." The spirit of this Canon would be violated by a judge who required a party to file a rule 18a motion to secure disqualification.

1. Duties of the Court.

In the real world, however, whether a judge is disqualified may leave issues open to litigate. Whether the judge has a significant "interest" that mandates disqualification may require adjudication. See, e.g., Palacia Royal, Inc. v. Partita, 916 S.W.2d 650 (Tex. App.-Corpus Christi 1996, orig. proceeding)(judge was not disqualified from hearing motion to certify class, even though his wife held a Palacia Royal credit card).

2. Duties of the Advocate.

a. Duties to the client.

An advocate's duty to the client conceivably imposes a duty to move for disqualification when there is a genuine question. Certainly, with the benefit of hindsight, an aggrieved client may accuse counsel of professional negligence if the question is not raised or, if necessary, litigated.

b. Duties to the system.

State Bar Rule 3.02 states: "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." A lawyer should not, therefore, raise a disqualification issue that is unreasonable. Appropriate sanctions under rule 18a(h) have been upheld against a lawyer who was found to have taken an unreasonable position. Palacia Royal, 916 S.W.2d at 654.

Conversely, an advocate who agrees that the judge is disqualified should not oppose the motion on a frivolous basis. State Bar R. 3.01 (lawyer shall not defend a proceeding on a frivolous basis).

In some cases, however, the issue will have to be litigated. This does not mean that either the advocates or the judge is guilty of unethical conduct. The right answer to the disqualification question, if it is difficult, is the one found by the fact-finder and affirmed by the highest reviewing court. In the context of judicial removal, however, there is a heightened potential for name-calling and accusations that the movant has no respect for the Court.

Thus, when there is a genuine question, each party should pay careful attention to the guidance of State Bar Rule 3.04(c)(3), which states that a lawyer shall not "state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant, except that a lawyer may argue on his analysis of the evidence and other permissible
considerations for any position or conclusion with respect to the matters stated herein...."  
This assumes, of course, that the parties are emotionally and intellectually capable of recognizing a legitimate legal question.

IV. JUDICIAL RECUSAL

The essence of fair judging is an open mind. Justice Anthony Kennedy wrote:

If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.


The Preamble of the Texas Code of Judicial Conduct states the same principle:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

There are numerous factors, however, that make a judge's recusal decision difficult. One is the human factor: It is difficult to recognize one's own biases. Tradition also weighs against recusal. For decades, Texas law required a judge to sit on a case unless he or she was impermissibly connected to the litigation by financial or close familial interests. There are other reasons why recusal is a difficult remedy, and all lead inescapably to the saying: "If you point the barrel of a recusal motion at a Texas judge, make sure it is loaded with a silver bullet."

A. Historical basis.

As long as we have had judges, we have expected them to be open-minded. The Talmud instructed that "[e]very judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One, blessed be He, in the work of creation."

The Code of Justinian provided for recusal: "Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before an issue joined, so that the cause go to another." In the seventeenth century, Lord Coke wrote: "Alecost non Debec esse Jude in propres causa" or "no man shall be a judge in his own case."

B. Texas background.

The Corpus Christi Court of Appeals recently provided a concise summary of the origin of
the Texas recusal rules. In re Rio Grande Valley Gas Company, 987 S.W.2d 167 (Tex. App.-Corpus Christi 1999, orig. proceeding). Before 1974, Texas judges were subject to constitutional disqualification but there was no positive law governing recusal. In 1974, the Texas Supreme Court adopted the Code of Judicial Conduct, which included a provision for self-recusal establishing guidelines for determining when a judge should recuse himself or herself or be recused upon a proper motion. "The adoption of the Code was undoubtedly a step towards a concept of fairness, a concept of recusal to be distinguished from the concept of strict constitutional disqualification." In re Rio Grande Valley Gas Company, 987 S.W.2d at 177 (citations omitted).

The predecessor of our current recusal rules was enacted by the Legislature. In 1977, the Texas Legislature amended article 200a of the Texas Revised Civil Statutes by adopting § 6 to establish a mandatory procedure for recusal. In re Rio Grande Valley Gas Company, 987 S.W.2d at 177 (citations omitted).

In 1979, the Texas Supreme Court held the requirements of article 200a, § 6 were mandatory and that a district judge could not consider a motion for recusal. Instead, the judge must request the presiding judge to assign a judge to hear any motion to recuse. In re Rio Grande Valley Gas Company, 987 S.W.2d at 177 (citing Macleod v. Harris, 582 S.W.2d 772, 775 (Tex.1979)).

The substance of article 200a, § 6 is now found in Texas Rule of Civil Procedure 18a, promulgated by the supreme court and effective January 1, 1981, and section 74.059(c)(3) of the Texas Government Code Ann. § 74.059(c)(3). In re Rio Grande Valley Gas Company, 987 S.W.2d at 177 (citations omitted).

C. Recusal Procedure.

1. On the court's own motion.

   Rule 18b states that a judge shall recuse herself when any of the nine enumerated circumstances are present in a case. Tex. R. Civ. P. 18b(2)(a) (App. B.) A judge may decide to recuse himself on his own motion and, if he does, he must sign an order. Dunn v. County of Dallas, 794 S.W. 2d 560, 562 (Tex. App.--Dallas 1990, no writ).

   Once the judge signs the order of recusal, he must refer the case to the presiding judge of the administrative region to assign the case to another judge in the district. Tex. R. Civ. P. 18a. After the judge signs the order and has referred the case to the presiding judge, he is not to enter any other orders in the case except for good cause stated in the order. See id.

2. On motion of a party.

   The rule requires the motion to be filed at least 10 days before the date set for trial or other hearing. Rule 18a(a). The rule makes one exception to the 10 day requirement when a judge is assigned to a case less than 10 days before trial or a hearing. In this case, the party is to file the motion "at the earliest practicable time." See Tex. R. Civ. P. 18a(e).

   a. Contents of the Motion.

      The motion must state "grounds why the judge should not sit in the case." Tex. R. Civ. P. 18a(a). The motion also must be verified and must "state with particularity the grounds why the judge should not sit." Id.
b. **Filing the Motion and Responding to It.**

Rule 18a(b) requires that a party filing a motion to recuse serve a copy of the motion on all other parties or counsel on the day that the motion is filed. The movant also is to include a notice that the movant expects the motion to be presented to the judge three days after the motion is filed, although the judge can order otherwise. See id. The rule allows responding or concurring parties to file statements at any time before the motion is heard. See id. Before a movant can complain on appeal about a motion not being acted upon, the movant should create a record showing that she brought the motion to the court's attention. See Wirth v. Massachusetts Mutual Life Ins. Co., 898 S.W.2d 414, 423 (Tex. App.--Amarillo 1995, no writ).

c. **Trial Judge Must Act.**

When a judge is confronted with a timely, procedurally sufficient motion, the trial judge must either recuse herself or refer the case to the presiding judge. See Tex. R. Civ. P. 18a(c),(d). When the judge refuses to recuse herself, two things must happen: (1) she must send all motions, responses, and concurring briefs, and the order of referral, to the administrative judge; and (2) she must take no further action and make no further orders in the case except for good cause stated in the order in which the action is taken. See Tex. R. Civ. P. 18a(d). Likewise, when a judge rebuses herself, two things must happen: (1) she must request that the presiding judge of the administrative judicial district assign another judge to the case; and (2) she must take no further action and make no further orders in the case except for good cause, which must be stated in the order in which action is taken. See Tex. R. Civ. P. 18a(c).

d. **Duties of Presiding Judge or Judge Assigned to Hear Recusal**

Rule 18a requires the presiding judge to immediately set a hearing before himself "or some other judge designated by him." Tex. R. Civ. P. 18a. The judge also is required to give notice of the hearing to all parties or counsel and to make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. See id. If the judge hearing the recusal grants the motion, the presiding judge shall assign another judge to hear the case. See Tex. R. Civ. P. 18a(f).

e. **Review.**

1. **Mandamus.**

As noted above, when a motion is procedurally sufficient in all respects, the trial judge must either recuse or refer the case to the presiding judge. Winfield v. Daggett, 846 S.W.2d 920, 921-22 (Tex. App.--Houston [1st Dist.] 1993, orig. proceeding). If the trial judge does not refer or recuse in such a case, he is subject to a mandamus. See id.

2. **Appeal**

If the motion to recuse is denied, that ruling is reviewable on appeal from the final judgment. See Tex. R. Civ. P. 18a(f). The ruling is not reviewable by mandamus, and, unlike disqualification, orders entered after the erroneous ruling are not void. See In re Union Pacific Resources Co., 969 S.W.2d 427 (Tex. 1998). If the motion is granted, the order is not reviewable. See Tex. R. Civ. P. 18a(f). The standard of review on appeal is abuse of discretion.
f. Sanctions

If the judge hearing the motion to recuse concludes that the motion is brought solely for the purpose of delay and without sufficient cause, the judge can, "in the interest of justice," impose any sanction authorized by rule 215(2)(b) of the Texas Rules of Civil Procedure. See Enterprise-Laredo Assoc. v. Hacker's, Inc., 839 S.W.2d 822 (Tex. App.--San Antonio 1992), writ ref'd per curiam, 843 S.W2d 476 (Tex. 1992).


Effective September 1, 1999, section 30.016 of the Civil Practice & Remedies Code governs "tertiary recusal motions," defined as "a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge in a case. This statute, attached as Appendix F, limits rule 18a in the following ways:

1. Under section 30.016, a judge declining to recuse "shall" continue to preside over the case.

   When a tertiary recusal motion is filed, rule 18a continues to require that the judge first determine whether to recuse herself or himself. If he or she decides recusal, the new statute changes the 18a procedures. The judge is mandated ("shall") continue to preside over the case, sign orders, and move to case to final disposition as though the recusal motion had not been filed.

2. The new statute requires an award of attorneys' fees if the motion is denied.

   Further, if the judge to whom the recusal motion is referred denies the motion, the statute requires (the "shall" word, again) the court to award reasonable and necessary attorneys' fees and costs to the party opposing the motion.

   The statute states that the party and its attorney will be jointly and severally liable for the fee award. This provision will make counsel especially wary about filing a third recusal motion.

   The fee award is payable on the 31st day after it is ordered, unless it is properly superseded. Thus, a party may be required to post a supersedeas bond before the final judgment is signed.

3. The denial of the motion is reviewable on appeal from the final judgment.

   Like rule 18a, the denial of a tertiary recusal motion is only reviewable on appeal from the final judgment.

4. If recusal is eventually sustained, all orders signed after its filing must be vacated.

   The new law provides that, "if a tertiary recusal motion is finally sustained," the new judge assigned to the case "shall" vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

5. Are successful recusal motions counted for purposes of the "tertiary" statute?

   The new statute is noteworthy because it is the first limitation created in reaction against the liberal provisions of rule 18a. By removing the incentive that rule 18a created for filing a motion to recuse--a mandatory stay of any proceedings by sitting judge--the statute will decrease
the likelihood that a party will file a succession of groundless recusal motions. The statute promises to be an effective deterrent.

On its face, however, the statute governs tertiary motions even if the first two motions were meritorious. Thus, even if a party files two recusal motions that were granted, the statute appears to apply to the third motion. This is probably an unintended effect. But if the statute is enforced as written, pity the fool who dares to file a third motion after "winning" two recusal motions in the same case.

The need for this statute is unclear. Courts have long had the power to sanction frivolous recusal motions, and the published cases upholding such sanctions indicate that this power has not been neglected. It is also hard to believe that there are many cases in which a third motion to recuse is filed. The enactment may have symbolic value, as a manifestation of some dissatisfaction with the relatively liberal recusal system Texas has developed over the last decade.

V. ETHICAL ISSUES RELATING TO RECUSAL.

Motions for recusal for bias or prejudice probably generate more controversy than any other aspect of judicial removal. Unsuccessful litigants often believe the judge must be biased. Judges who are targeted by recusal motions sometimes react as though the motion is a personal attack. "Bias or prejudice" sometimes must be litigated because there are no bright lines. There is relevant precedent, however, that every advocate who considers seeking recusal should attempt to understand.

A. Recusal required only when bias is "wrongful or inappropriate."

What level of bias or prejudice mandates recusal? The United States Supreme Court has provided an answer, but not one that is very helpful as a pragmatic matter. Partiality, bias, or prejudice are grounds for removal when they are "for some reason, wrongful or inappropriate." Liteky, 114 S. Ct. at 1156.

The difficulty of determining whether bias is wrongful or inappropriate should not be surprising in an adversarial system such as ours. Advocates and judges will disagree over the question, and it is useless to hope we will ever arrive at a universal answer. Like many questions in litigation, it will only be answered case by case.

B. Bias acquired during judicial proceedings is normally not "wrongful."

One of the reasons for the difficulty is that the issue is never examined in a vacuum. Judges have an instinctive desire, even a duty, to continue presiding over a case in the face of charges of bias. Justice Craig Enoch once wrote:

I specifically believe that "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."

Rogers v. Bradley, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., dissenting from declaration of recusal) (quoting United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)).

1. "Impartiality is not gullibility."

The court's duties to decide legal issues, administer its docket, and perform its serious responsibilities explain why judges are not easily retused for bias or prejudice.
The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge does not form judgments of the actors in these courthouse dramas we call trials, he could never render decisions."

Liteky, 114 S.C. at 1155.

2. Adverse rulings support recusal in only the most exceptional cases.

In Liteky, Justice Scalia's majority opinion placed fundamental restrictions on recusal for bias or prejudice, in the context of bias acquired during judicial proceedings and manifested by adverse rulings. The Court held that judicial remarks will support a bias or partiality challenge only if "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. at 1157.

C. The appearance of impartiality is also important.

Justice Kennedy's concurrence in Liteky is an eloquent critique of one problem with the holding in Liteky:

When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

Liteky, 114 S.C. at 1162 (Kennedy, J., concurring).

D. Justice Enoch's "reasonable person in the street" test.

In truth, the Liteky court dealt primarily with a special problem: whether a judge who has presided over one trial can be sufficiently biased by this experience that it would be improper for that judge to preside over a second trial after an appellate remand. The Court's disposition of the problem led to its holding that recusal is necessary only when fair judgment is impossible.

Justice Kennedy's concurrence can be reconciled with the majority's reasoning, along the lines of Justice Enoch's opinion in the Rogers case: "I would ask whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial." Rogers, 909 S.W.2d at 881.

Justice Enoch's formulation was itself shaped by the question in that case: whether members of the supreme court should be recused from hearing a case involving a party that has aired campaign commercials identifying members of the court with its interests. Justice Enoch concluded that the "reasonable Texan" has to understand the reality of the untenable predicament
created by the Texas partisan judicial election system: "I would expect the reasonable person to know that both fund-raising and grass-roots support will come largely from those who are interested, financially or otherwise, in the work of the courts." Rogers, 909 S.W.2d at 883.

E. The mainstream view focuses on the judge's subjective knowledge.

A slightly different formula cited by Justice Enoch would serve the purpose of avoiding actual bias as well as the interest of bias:

[Whether a person of ordinary prudence in the judge's position knowing all of the facts known to the judge finds that there is a reasonable basis for questioning the judge's impartiality.]

Rogers, 909 S.W.2d at 881 (quoting Ex parte Cotton, 638 So.2d 870, 872 (Ala. 1994)). The Alabama test, by focusing on the facts known to the judge instead of those in the public domain, ensures that judges will consider their subjective, perhaps secret, biases in deciding whether to recuse.

F. Duties of the Court.

When confronted with a motion to recuse, the first duty of trial judges is to follow the procedures mandated by rule 18a: recusal or referral. "A judge abuses his discretion as a matter of law when he pursues an option other than the two available in the rule." In re Rio Grande Valley Gas Company, 987 S.W.2d at 179 (issuing mandamus to vacate order transferring case to another court, signed by judge facing motion to recuse).

Motions to recuse should not make personal attacks. But the trial judge who perceives a personal attack does the Court and the parties by responding wrathfully.

The first reason for a measured response from the judge is the inadequacy of written language to convey the true message. Motions to recuse have to be written motions, and the rules against ex parte contact forbid advocates from discussing the merits of the motion with the Court before or after it is filed, other than a judicial hearing. Some practitioners advise that a motion to recuse should be forceful and comprehensive, because the judge who decides the motion will be difficult to persuade. Faced with these realities, an advocate who is compelled to file a recusal motion may not be able to explain why the motion is not a personal attack.

The second reason lies in the need to maintain the decorum of the Court. Judicial Canon 3 provides:

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is appropriate.
(2) A judge ... shall not be swayed by partisan interests, public clamor, or fear of criticism.
(3) A judge shall require order and decorum in proceedings before the judge.
(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity....
(5) A judge shall perform judicial duties without bias or prejudice.

These canons impose a paradox: the motion to recuse may itself provoke a reaction from a judge that creates an appearance of bias or prejudice, even when the judge has in fact been impartial. Judges are humans, and fighting words may provoke a fight with the Court. The Judicial Canons counsel against such a reaction, but it is understandable that a judge may react
angrily. Under Liteky, however, it is doubtful that an angry response to a "reprehensible litigant" requires recusal. See Liteky, 114 S.C. at 1155.

G. Duties of the Advocate.

Advocates are also constrained, by rule 18a(h) and the other sanctions rules, from filing a frivolous motion to recuse. Beyond the question of sanctions, however, the advocate should carefully advise the client that a motion to recuse that is not a "silver bullet" will probably do the client's cause more harm than good. If a judge is not found to be subject to recusal for bias, the litigant will surely lose the benefit of the Court's doubt on any close discretionary ruling.

State Bar Rule 2.01 instructs that "[i]n advising or otherwise representing a client, a lawyer shall exercise professional judgment and render candid advice." Comment 2 to this rule provides wise advice:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

When the decision to file a motion to recuse presents a close question, counsel should advise the client that the possible adverse consequences of filing the motion outweigh any potential benefit. A disciplined cost-benefits analysis may be a useful tool for persuading the client.

Many litigants develop a paranoia from adverse rulings that is often unjustified. In these situations, appellate counsel has an express duty to refrain from blaming the Court for adverse rulings. The new Standards of Appellate Conduct state: "Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process." In the recusal context, it is especially important for the advocate to make every effort to maintain a detached opinion regarding the judges' motives.

VI. ATTORNEY DISQUALIFICATION

Attorney disqualification does not present the same potential for conflict with the Court. Nevertheless, a motion to disqualify an attorney is sure to present a bitter fight, because of the threat it presents to the lawyer's ethics and, perhaps more significantly for many, the lawyers' fee. In its most recent term, the Texas Supreme Court held that an attorney's breach of fiduciary duty, arising from an alleged conflict of interest, justifies the disgorgement of fees. Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999). There is no ethical rule that flatly forbids the filing of a non-frivolous motion for disqualification. An advocate who elects to file such a motion for mere tactical advantage, however, should be aware of the bitter fight such a strategy is likely to start. Read the Texas Lawyers' Creed and consider the consequences carefully before filing the motion.

Nevertheless, attorney disqualification motions are the most valuable weapon against attorneys who violate or ignore their duties to the client. In recent years, attorney disqualification has been a prolific source for mandamus opinions from the Texas Supreme Court. The following
is a summary of the recent supreme court case law interpreting the Texas State Bar Rules.

A. Party seeking disqualification of counsel because of representation in former proceeding has burden of showing substantial relation between the two representations.

The "severity of the remedy" of attorney disqualification, and the risk that it will be used as a dilatory tactic, places the burden on a former client to show that opposing counsel represented it in a previous proceeding "in which the factual matters involved were so related to the facts of the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary." NCNB Texas Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989).

B. Attorney who testifies as expert witness in controverting summary judgment affidavit risks disqualification.

In a legal malpractice case, an attorney who signs a summary judgment affidavit opining that the defendant lawyer committed malpractice is an expert witness who cannot continue representation of the plaintiff. Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993).

C. Disqualification of counsel because of hiring of opposing counsel's legal staff depends on the facts.

Even in the middle of a lawsuit, a law firm may hire a member of opposing counsel's staff if it is careful to construct an effective "Chinese wall." Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 836 (Tex. 1994, orig. proceeding). However, the presumption that a legal assistant received confidential information is not rebuttable. In re American Home Products Corp., 985 S.W.2d 68 (Tex. 1998). The key to avoiding disqualification is the implementation of effective procedures to prevent the dissemination of confidences at the new firm.

In protracted litigation, opposing counsel's hiring of opposing law firm's legal secretary made disqualification appropriate, where secretary had worked on the lawsuit at her previous firm and there were no safeguards in place to ensure that she did not betray client confidences. Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994, orig. proceeding). On rehearing, the Court stated that disqualification may be waived when there is delay in bringing the motion.

D. Personal representation of former client bars representation of other side by lawyer's new firm.

An associate at a law firm saw a clients' files, may have seen a settlement video, and may have proofread briefs. The associate switched jobs and joined the firm representing the client's adversary. The new law firm was disqualified from continuing representation, because there was no dispute that the associate had "personally" represented the client on the other side. The client need not show that confidences have actually been exchanged. Henderson v. Floyd, 891 S.W.2d 252 (Tex. 1995).

E. Law firm's representation of corporate representative bars representation in later suit against the corporation.

A law firm defended a corporate representative in litigation in which it received confidential information from the corporation. In a later suit, the same firm represented plaintiffs suing the corporation; the corporate representative was not a party, and different lawyers within
the firm worked on the two suits. The law firm was disqualified, because its lawyers were subject
to the presumption that the confidential information was shared. National Med. Enterprises, Inc.
v. Godbey, 924 S.W.2d 123 (Tex. 1996).

F. Attorney who inadvertently receives confidential materials is not necessarily disqualified.
When an adverse party accidentally supplies confidential documents to opposing counsel,
outside the normal discovery process, counsel is not disqualified if there is no prejudice and sever
hardship would result. In re Meador, 968 S.W.2d 346 (Tex. 1998).

G. Members of law firm cannot disavow access to confidential information of any one
attorney's client.
There is an irrebuttable presumption that an attorney in a law firm has access to client
confidences.

H. Meeting with opposing party in absence of counsel is not a rule violation per se.
When counsel is contacted by opposing party and a face-to-face meeting in the absence of
the party's counsel is requested, it is not always necessary to contact opposing counsel to confirm
the party's representation that its representation by counsel has been terminated. Still, it is a
"sensible course" in many instances. In re Users Sys. Servs., Inc., 42 Tex. Sup. Ct. J. 836 (June
24, 1999).

VII. CONCLUSION
When litigation becomes heated in these types of cases, the ethical rules will be hard for
human advocates to follow. The advocate who benefits from the Court's rulings will also benefit
from encouraging the opposing party to believe that the judge is predisposed in favor of the
adversary. Both sides are likely to make mistakes in this environment. There is no ethical rule
that expressly prohibits sharp or oppressive conduct that does not cross the line into crime or
fraud. The Texas Lawyers' Creed was framed to address the need for civility in these
harshest of circumstances. The Creed specifically addresses disqualification, by encouraging
lawyers to make the following commitment:

I will not seek sanctions or disqualification unless it is necessary for protection of my client's
lawful objectives or is fully justified by the circumstances.

Texas Lawyer's Creed at ¶ 19.

Ethical rules deal not only with the prohibition of misconduct. As this paper suggests,
there is an abundance in Texas of rules, aspirational guidelines, and creeds that counsel against
pursuing removal of a judge or attorney unless the client's legitimate objectives require it. Most
litigators are intrinsically aware that it is counterproductive to use every tactic available simply
because it is there. This principle is especially relevant here.

By the same token, judges should not presume that a non-frivolous motion to recuse to be
an improper personal attack. As Justices Kennedy and Enoch have observed, the appearance of
partiality to the person in the street may compel recusal, or its pursuit, when the judge is
subjectively certain that he or she does not harbor actual partiality.
It is unlikely that the high profile these issues have assumed in recent years means that we are experiencing a crisis. The published cases and news stories reporting judicial and lawyer corruption are the worst case scenarios. We don't hear about the many instances in which judges and lawyers voluntarily remove themselves from a case in which there would be an appearance of impropriety. The current system seems to work in most cases, and further enactments like the new "tertiary recusal" rule would be a mistake.
APPENDIX A

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.

(c) 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 rebuses 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).
APPENDIX B

RULE 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:

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

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

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

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

(a) his impartiality might reasonably be questioned;

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

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

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

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

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

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

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

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

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

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

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;
(b) the degree of relationship is calculated according to the civil law system;

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

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, 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;

(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.
APPENDIX C

PROPOSED RULE 18. RECUSAL OR DISQUALIFICATION OF JUDGES

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

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

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

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

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

(d) Procedure.

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

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

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

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

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

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

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

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

NO. 95-999999-A

PLAINTIFF A and PLAINTIFF B, § IN THE DISTRICT COURT OF
Plaintiffs,

vs. § HARRIS COUNTY, TEXAS

DEFENDANT ONE and DEFENDANT TWO, § 999TH JUDICIAL
Defendants.

DISTRICT

NOTICE UNDER TEXAS RULE OF CIVIL PROCEDURE 18a(b)

Please take notice that, on October 8, 1999, Plaintiff A and Plaintiff B filed a motion to recuse in the above-numbered cause. Movants expect that the motion will be presented to the judge within three days of its filing unless otherwise ordered by the judge.

Pursuant to Texas Code of Judicial Conduct, Canon 3.B.(8)(b), Judge Alpha cannot hear any contested matters between the parties.

Respectfully submitted,

CALVIN & HOBBES, P.C.

John Calvin
State Bar No. 00000000
9900 Smith Street
Houston, Texas 77002
(713) 555-1212 (Phone)
(713) 555-1213 (Fax)

ATTORNEY FOR PLAINTIFFS
CERTIFICATE OF SERVICE

I certify that on October 8, 1999, a true and correct copy of the above and foregoing instrument was delivered by facsimile transmission to the following persons:

Boris Badunov 713/555-1214
P. O. Box 999999
Houston, Texas 77002

___________________________________

John Calvin
APPENDIX E

NO. 95-999999-A

PLAINTIFF A and PLAINTIFF B, § IN THE DISTRICT COURT OF

Plaintiffs,

vs. § §

HARRIS COUNTY, TEXAS

DEFENDANT ONE and DEFENDANT TWO, §

Defendants.

§ §

999TH JUDICIAL

DISTRICT

MOTION TO RECUSE
TO THE HONORABLE COURT:

Pursuant to Texas Rules of Civil Procedure 18a and 18b, and Texas Code of Judicial Conduct, Canon 3.B.(8)(b), Plaintiff A and Plaintiff B respectfully object to the Honorable John Alpha hearing any contested matters between the parties to these actions, and move for recusal.

I. Basis for motion.

With the consent of the parties' counsel, including Plaintiff B's counsel, John Beta, Judge Alpha conducted a mediation of three lawsuits between the parties on April 6 and 7, 1998. Judge Alpha conferred separately with the parties regarding two lawsuits pending in this Court and one pending in federal district court. (See Affidavit of Plaintiff A at ¶¶ 7-9.)

A. Judge Alpha's mediation was "community service, not judging."

Canon 3.B.(8) allowed Judge Alpha to perform this service, but it bars him from later hearing any more contested matters between the parties except with the consent of all the parties.

The Canon states:

This subsection does not prohibit [a judge from]:

. . . .
(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all the parties.

Texas Code of Judicial Conduct Canon 3.B.(8) (emphasis added). Judge Alpha's assistance in mediating these cases cast him as a mediator, not a judge: The time he spent in mediation "was community service, not judging." In re Asbestos Litigation, 90 F.3d 963, 1014 (5th Cir. 1996)(Smith, J., dissenting), vacated, 117 S.C. 2503 (1997).

B. Plaintiff A and Plaintiff B do not consent to Judge Alpha hearing any contested matters.

Plaintiff A and Plaintiff B are parties in each of causes number 95-999999, 95-999999-A, 95-999999-B. Plaintiff A and Plaintiff B do not consent to Judge Alpha hearing any other contested matters between the parties. Without "the consent of all the parties," Judge Alpha "shall . . . not thereafter hear any contested matters between the parties . . . ." Id. The Canon states no exceptions.

C. Rule 18b(2)(a).

Texas Rule of Civil Procedure 18b(2)(a) states that a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned. The appearance of partiality is a sufficient basis for recusal. Actual partiality is not required.

While serving as a mediator, Judge Alpha "conferred separately" with the parties and their counsel. (See Affidavit of Plaintiff A at §8.) Thus, he was privy to ex parte communications from each side. There is no record of those communications. Frequently in mediation, candid and disparaging remarks are made about the relative merits of the parties' contentions. No judge should be expected to preside over a case in which he or she has served as a mediator. Whether Judge Alpha heard ex parte remarks, believed them to be true, or expressed an opinion about the merits of the case in mediation will reasonably enter into the perceptions of the parties and the public.

Rules 18a and 18b allow Judge Alpha to free himself of the burden of presiding over further contested matters between the parties. Canon 3 removes any discretion, and mandates recusal.

D. The ADR statute prohibits the judge who will hear the case from participating in mediation.

Texas public policy strongly favors the settlement of litigation. Texas law encourages settlement by ensuring the confidentiality of statements made in mediation. The ADR statute prohibits a mediator from sharing any matter disclosed in mediation, not even to the court: Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.


Canon 3 is consistent with the statute. Unless the parties unanimously consent, a judge
who conducts mediation or settlement conferences cannot continue to hear contested matters. Canon 3 is also consistent with rules 18a and 18b. A judge is subject to recusal when the average person in the street could reasonably doubt the judge's impartiality. Rogers v. Bradley, 909 S.W.2d 872, 881 (Tex. 1995) (Enoch, J., responding to declaration of recusal). A reasonable person would doubt whether a judge who has heard confidential mediation discussions could continue to preside impartially over contested matters between the parties. Under rule 18b, therefore, recusal is proper and necessary.

II. Procedure after recusal.
   A. Rule 18a(c).

   Canon 3 absolutely bars Judge Alpha from hearing any more contested matters. Rule 18a provides that after recusal, the presiding judge of the administrative judicial district (the Honorable John Omega, Presiding Judge, Second Administrative Judicial Region) must assign this case to another judge to sit. Tex. R. Civ. P. 18a(c). Only Judge Omega can assign the case to a new judge. See In re City of Wharton, 966 S.W.2d 855, 857-58 (Tex. App.-Houston [14th Dist.] 1998, orig. proceeding). This means that the local rules of the Harris County civil district courts, which allow the "transfer" of cases to other courts, are subordinate to Judge Omega's power to "assign" the case to a new judge. Id.

   B. Rule 18a(d).

   If Judge Alpha declines to recuse himself, rule 18a(d) requires that this motion be forwarded to Judge Omega, who has authority to set the motion for hearing and to make other orders that may be required by justice.

III. Timeliness of motion.

   This motion to recuse is timely filed, more than 10 days before the trial of either case. Tex. R. Civ. P. 18a(a), (e).

   On July 22, 1998, John Gamma filed a petition for receiver in cause number 95-999999-B. He set a hearing on his petition for receiver for six days later, on July 28, 1998. When a hearing is scheduled on less than 10 days notice, the 10-day requirement in rule 18a does not apply. Metzger v. Sebek, 892 S.W.2d 20, 49 Tex. App.-Houston [1st Dist.] 1994, writ denied); Jamilah v. Bass, 862 S.W.2d 201, 203 (Tex. App.-Houston [1st Dist.] 1993, orig. proceeding). The trial court's only options are either to either recuse or refer the motion to the presiding judge of the administrative judicial district. Metzger, 892 S.W.2d at 49. "There are no other options." Id.

   This motion to recuse was filed "at the earliest practicable time" after the July 22 notice of hearing was filed. Counsel's other professional and personal obligations prevented him from drafting the motion before the weekend preceding its filing. Counsel attempted to reach an agreement to postpone the Tuesday hearing, with an offer to stay any actions referred to in the petition for receiver, but Gamma's counsel refused to postpone its hearing, in a letter faxed at the end of the day on Thursday. This motion and its accompanying evidence were filed as early as possible.

   Furthermore, Canon 3 prevents this Court from proceeding in the absence of consent. This is the first contested matter that Plaintiff A or Plaintiff B have received notice of since the Court-conducted mediations.

   Finally, Gamma's petition for receiver can be timely decided by a judge appointed by Judge Omega. The petition states no emergency, and Gamma has not sought to have it decided on an emergency basis. Plaintiff A and Plaintiff B will submit to a hearing and decision on Gamma's pending motion as quickly as Judge Omega is able to assign these cases to a new judge, as
provided by rule 18a.

PRAYER

For these reasons, Plaintiff B and Plaintiff A respectfully request:

1. That Judge Alpha voluntarily recuse himself and refer the case to Judge Olen Omega for assignment to a new judge in accordance with Texas Rule of Civil Procedure 18a(c); or, alternatively,

2. That Judge Alpha refer this motion to Judge Omega in accordance with Texas Rule of Civil Procedure 18a(d).
Respectfully submitted,

CALVIN & HOBBES, P.C.

___________________________________
John Calvin
State Bar No. 00000000
9900 Smith Street
Houston, Texas 77002
(713) 555-1212 (Phone)
(713) 555-1213 (Fax)

ATTORNEY FOR PLAINTIFFS

VERIFICATION

STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned notary public, on the 8th day of October, 1999, personally appeared John Calvin, who being by me duly sworn, stated under oath that he is attorney-in-charge for Plaintiff B in cause no. 95-999999-A and for Plaintiff A, individually and on behalf of Plaintiff B in cause no. 95-999999-B; that he has read this motion; and that every statement contained in it is either within his personal knowledge and is true and correct, or is based on information and belief, based on the affidavits of Plaintiff A and Nastassia Kinski, attached to this motion.

_________________________________
John Calvin

SUBSCRIBED AND SWORN TO before me on this 27th day of July, 1998, to certify which witness my hand and seal of office.

_____________________________________
Notary Public in and for the State of Texas

My Commission Expires: ________________

CERTIFICATE OF SERVICE

I certify that on October 8, 1999, a true and correct copy of the above and foregoing
instrument was delivered by facsimile transmission to the following persons:

Boris Badunov 713/555-1214
P. O. Box 999999
Houston, Texas 77002

___________________________________
John Calvin
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;
(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.
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