

DISQUALIFICATION OF JUDGES & LAWYERS AND
RECUSAL OF JUDGES, INCLUDING THE VISITING
JUDICIARY:
INAPPROPRIATE BEHAVIOR

BRIAN L. WEBB
WEBB & TIHOLIZ, L.L.P.
717 N. Harwood, Suite 2730
Dallas, Texas 75201
(214) 871-2730
(214) 871-9339 fax

MIRIAM L. ACKELS
ASSOCIATE

MARRIAGE DISSOLUTION INSTITUTE
SAN ANTONIO, TEXAS
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SCOPE OF ARTICLE

DISQUALIFICATION. RECUSAL.

These are words that send a slight chill up the spines of all good attorneys. But how do you handle such situations GRACEFULLY?

This article attempts to give the practitioner a concise, basic and good understanding of how to handle disqualifications of judges and attorneys, along with recusing various types of judges.

The article is divided into two separate parts. Section I addresses “Removal of Judges.” Section II addresses “Disqualifying Attorneys.” Each section includes cases that carry the day on analysis and holdings, along with some not so well reasoned cases that the practitioner need to be on guard for.

Additionally, each section will cover the relevant rules and code sections that the courts apply to each set of facts. We have also attached some forms in the “Appendix” for your convenience.

We hope this article will assist you and only help you in RARE situations!!

I. REMOVAL OF JUDGES

“IF YOU SHOOT THE KING, YOU
BETTER KILL HIM!”

A. Introduction

1. Historical Foundation

The concept of a fair and impartial judiciary is **as old as** the history of the courts, and rules designed to assure impartiality have been recorded since ancient times. See Richard C. Flamm, *Judicial Disqualification in Florida*, 70 FLORIDA BAR JOURNAL 58

(1996). For example, under early Jewish law, a judge was not to preside in any case in which a party was a friend, kinsman, or someone the judge personally disliked. See THE CODE OF MAIMONIDES bk. xiv, ch. 23, 68-70 (A. Hershman trans., 1949). Similarly, under the Roman Code of Justinian, a litigant was entitled to recuse a judge thought to be “under suspicion,” even though he had been appointed by imperial power, because the Romans believed that all litigants were entitled to a fair trial. See CORPUS JURIS CIVILIS, codex, lib 3, tit. 1, no. 16 (trans. In 9 CORNELL L.Q.1, 3 n. 10 (1923)). These early procedures established the foundation for the recusal and disqualification rules that generally still prevail in most civil-law countries.

One of the earliest known cases in this country in which a judge removed himself from the bench is *Martin v. Hunters Lessee*, 1 Wheat. 304 (1816). In that case, Justice Marshall and his brother James were involved in negotiations for the purchase of the property that was the subject of the litigation before the Court. *Id.* Justice Marshall’s decision to remove himself because of a potential financial conflict illustrates the emphasis placed on a litigant’s right to a nonpartisan and objective judicial determination.

2. Removal in Texas

While judicial removal has only been of occasional wide-spread public interest, it has been of much concern to the state courts and legislatures.¹ When Texas became a state, it

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Recently the concept of judicial removal received considerable attention when during the O.J. Simpson trial, prosecutor Marcia Clark announced her intention to ask Judge Ito to recuse himself

adopted the settled common law rule that stated a judge could not preside in a case in which he or she had a direct pecuniary interest. *See* Robert w. Calvert, *Disqualification of Judges*, 47 Tex. B.J. 1330, 1332 (1984). Over time, we enacted Constitutional provisions, statues, and rules, which expanded the common law. This section of the paper will address the basic standards and recent case law governing judicial disqualification, recusal, and removal of assigned judges in civil matters.

B. The Difference Between Disqualification, Recusal, and Objections to Assigned Judges.

1. Types of Removal

Judges may be removed from a particular case because they are: (1) constitutionally disqualified, *see* TEX. CONST. art. V, § 11, TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998), TEX. R. CIV. P. 18b(1); TEX. R. APP. P. 16.1; (2) recused under rules promulgated by the Supreme Court, *see* TEX. R. CIV. P. 18b(2); TEX. R. APP. P. 16.2; or (3) subject to a statutory strike. *See* TEX. GOV'T CODE ANN. 74.053 (Vernon Pamph. 1998). The requirements and procedures for each type removal are fundamentally different. *See Union Pacific*, 969 S.W.2d at 428.

2. Not Synonymous

Black's defines recusal as "the process by

from further participation in the trial because of his marital relationship with a potential witness. Clark's request was dropped the following day.

which a judge is *disqualified* on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice." BLACK'S LAW DICTIONARY 1277 (6th ed. 1990) (emphasis added). This definition demonstrates why the terms "recusal" and "disqualification" are often used as synonyms; one is defined by reference to the other, and both describe a process that removes a judge from presiding over a case. In Texas, the terms have been used interchangeably. *See* William w. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 601 (1986); *Gulf Maritime Warehouse Co. V. Towers*, 858 S.W.2d 556, 559 (Tex. App.--Beaumont 1993, writ denied) (noting trial court's failure to distinguish between recusal and disqualification); *AmSav Group, Inc. v. American Sav. And Loan Ass'n of Brazoria County*, 796 S.W.2d 482, 485 (Tex. App.--Houston [14th Dist.] 1990, writ denied) (stating that *disqualification* of judge on non-constitutional grounds is waived if not raised by proper motion to *recuse*). Such use, however, is erroneous because recusal and disqualification are not synonymous terms. *See In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *Sun Exploration and Prod. Co. V. Jackson*, 783 S.W.2d 202, 207 (Tex. 1989) (Gonzalez, J., concurring); *Keene Corp v. Rogers*, 863 S.W.2d 168, 183 (Tex. App--Texarkana 1993, no writ); *Aguilar v. Anderson*, 855 S.W.2d 799, 809 (Tex. App--El Paso 1993, writ denied).

The third type of judicial removal is statutorily based. *See* TEX. GOV'T CODE ANN. § 74.053 (Vernon Pamph. 1998). While often referred to by courts and attorneys as disqualification or recusal, it is an independent basis for removal based on the assignment of a judge to preside over a case. *Id.* Referring to this type of removal in terms of the other two methods is incorrect and merely adds to the confusion.

3. Difference as to Grounds

a. Disqualification

The grounds for disqualification are expressly stated in the Texas Constitution. *See* TEX. CONST. Art. V, § 11. They are limited to the following three instances: (1) where the judge is interested in the case; (2) where the judge is too closely related to a party by affinity (marriage) or consanguinity (blood); and (3) where the judge has acted as an attorney in the case. These same grounds are reiterated in rule 18b(1) of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 18b(1). One of the bases for disqualification, relation by affinity or consanguinity within the third degree, has been codified in the Texas Government Code.² *See* TEX. GOV'T ANN. § 21.005 (Vernon Supp. 1998). The grounds for disqualification are inclusive and exclusive.

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Previously, all of the disqualification grounds delineated in the constitution were codified in the government code. *See* TEX. REV. CIV. STATE. ANN. art. 15 (Vernon 1969), *repealed by* Act of September 2, 1987, 70th Leg., R.S., ch. 148, § 2.01, 1987 Tex. Gen. Laws 543, 544 (current version at TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998)). After repeal, however, the government code only embodied one of the three grounds contained in the constitution, relation by affinity or consanguinity within the third degree. *See* TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998).

If the judge does not fall into one of the enumerated disqualifications, he or she cannot be disqualified.

b. Recusal

Recusal, however, is not as clearly defined; rather, recusal embraces the myriad of instances in which a judge's neutrality could be questioned. *See* TEX. R. CIV. P. 18b(2). Descriptions of the situations upon which recusal may be based are stated in rule 18b(2). *Id.*

c. Objections to Assigned Judges

The third method for removal of judges, which is found in Chapter 74 of the Texas Government, provides for the objections to assigned judges. *See* TEX. GOV'T CODE ANN. §§ 74.052(a), 74.053(b), (d) (Vernon Pamph. 1998). Removal under Chapter 74 arises when a judge is assigned to preside over a case. *See* TEX. GOV'T CODE ANN. § 74.053 (Vernon Pamph. 1998).

4. Difference as to Waiver

a. Disqualification and Recusal

(1) Motions

A most distinguishing feature between constitutional disqualification and recusal is that recusal is waived if not raised in a proper motion. *See Union Pacific*, 969 S.W.2d at 428; *Merendino v. Burrell*, 923 S.W.2d 258, 262 (Tex. App. --Beaumont 1996, writ denied). Disqualification, however, survives silence. *See Union Pacific*, 969 S.W.2d at 428; *Merendino*, 923 S.W.2d at 262; *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 560 (Tex. App. --Beaumont 1993, writ denied). While a party may certainly raise the issue of disqualification by filing a motion with the trial or appellate court, *see Cameron*

v. Greenhill, 582 S.W.2d 775, 776 (Tex. 1979), a motion is not required to preserve the issue for review. See *Union Pacific*, 969 S.W.2d at 428; *Merendino*, 923 S.W.2d at 262; *Towers*, 858 S.W.2d at 560. Disqualification may be raised at any time. See *Buckholts Indep. Sch. Dist. V. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Monroe v. Blackmon*, 946 S.W.2d 533, 542 (Tex. App. -- Corpus Christi 1997, orig. proceeding); *Alvarez*, 915 S.W.2d at 165 (citing *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221-22 (1947)). Moreover, either a trial court or an appellate court may raise the question of disqualification on its own motion. See *Monroe*, 946 S.W.2d at 542 (citing *Lee v. State*, 555 S.W.2d 121, 122 (Tex. Crim. App. 1977)); *City of Houston v. Houston lighting and Power Co.*, 530 S.W.2d 866, 868 (Tex. Civ. App. --Houston [14th Dist.] 1975, writ ref'd n.r.e.); *Pinchback v. Pinchback*, 341 S.W.2d 549, 553 (Tex. Civ. App. --Fort Worth 1960, writ ref'd n.r.e.); *Towers*, 858 S.W.2d at 560 (citing same).

(2) Texas Rule of Civil Procedure 18a(a)

Texas Rule of Civil Procedure 18a purports to apply equally to disqualification and recusal. See TEX. R. CIV. P. 18a (setting rules and procedures). It is obvious, however, that the procedures outlined in rule 18a are inapplicable to disqualification. See William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 601 (1986). For example, the rule requires that a verified motion, stating the grounds why the judge before whom the case is pending should not sit, be filed at least ten days before the date set for trial or other hearing. See TEX. R. CIV. P. 18a(a). This portion of the rule cannot be applicable to disqualification in light of the numerous decisions from the Texas courts holding that no motion is necessary, see *Union Pacific*, 969 S.W.2D at 428; *Merendino*, 923

S.W.2d at 262; *Towers*, 858 S.W.2d at 560, and that disqualification may be raised at any time by a party or the court. See *Glaser*, 632 S.W.2d at 148; *Monroe*, 946 S.W.2d at 542 (citing *Lee*, 555 S.W.2d at 122; *City of Houston*, 530 S.W.2d at 868; *Pinchback*, 341 S.W.2d at 553); *Alvarez*, 915 S.W.2d at 165 (citing *Fry*, 202 S.W.2d at 221-22).

b. Objections to Assigned Judges

Though many courts refer to removal under Chapter 74 of the Texas Government Code as “disqualification,” it is more like recusal on the issue of waiver. A complaint based on an assigned judge’s refusal to remove himself or herself is waived if the complaining party does not present a timely objection to the assigned judge. See *Perkins v. Groff*, 936 S.W.2d 661, 667 (Tex. App. --Dallas 1996, writ denied); *Alvarez*, 915 S.W.2d at 166. Without a timely objection, the assigned judge is not subject to mandatory removal under section 74.053. See *Tivoli Corp. V. Jewelers Mut. Ins. Co.*, 932 S.W.2d 704, 709 (Tex. App.--San Antonio 1996, writ denied).

5. Difference as to Relief Available

a. Disqualification

Whether a party is entitled to request mandamus relief, or must wait and raise the complaint on appeal, depends upon the type of removal procedure involved. When a judge sits in violation of a constitutional proscription, *mandamus* is available to compel the judge’s mandatory disqualification without showing that the relator lacks an adequate remedy by appeal. See *Union Pacific* 969 S.W.2d at 428; *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650, 653 (Tex. App. --Corpus Christi 1996, orig. proceeding [leave denied] (emphasis added)). The availability of mandamus relief does not, however, foreclose direct appellate review in instances where

mandamus is not sought. *See McElwee v. McElwee*, 911 S.W.2d 182, 186-87 (Tex. App.--Houston [1st Dist.] 1995, writ denied) (addressing judicial disqualification on direct appeal); *cf. Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 424 (Tex. 1996) (addressing attorney disqualification on direct appeal); *Arzate v. Hayes*, 915 S.W.2d 616, 618 n.2 (Tex. App. --El Paso, 1996, writ dismissed) (same). *See also Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) (stating that failure to file writ of mandamus does not prejudice or waive right to complain on appeal.)

b. Objections to Assigned Judges

Likewise, under section 74.053, once a party properly objects, any orders entered by the objectionable judge are void. *See Union Pacific*, 969 S.W.2d at 428 (citing *Mitchell Energy Corp. V. Ashworth*, 943 S.W.2d 436, 440-41; *Fry*, 202 S.W.2d at 221). Accordingly, the objecting party is entitled to mandamus relief without showing there is no adequate remedy by appeal. *See Union Pacific*, 969 S.W.2d at 428; *Mitchell Energy*, 943 S.W.2d at 437; *Dunn v. Street* 938 S.W.2d 33, 35 (Tex. 1997); *In re City of Wharton*, 966 S.W.2d 855, 857 (Tex. App. --Houston [14th Dist.] 1998, orig. proceeding), *overruled sub. non. on other grounds*, 41 Tex. Sup. Ct. J. 1354 (August 25, 1998).

c. Recusal

In contrast, the erroneous denial of a motion to recuse does not void or nullify the trial court's subsequent acts. *See Union Pacific*, 969 S.W.2d at 428. Thus, mandamus is not available to challenge an improper denial of a recusal motion. *Id. But see id.* (Hecht, J., concurring) (stating that the rule that appeal affords an adequate remedy for an erroneous denial of a motion to recuse cannot be without exception); *Monroe v. Blackman*, 946 S.W.2d

533, 536 (Tex. App. --Corpus Christi 1997, orig. proceeding) (holding that where attorney for litigant concurrently represented trial judge in another matter, appeal was inadequate to correct denial of motion to recuse). Rule 18a(f) specifically provides that the denial of a motion to recuse (or disqualify) may be reviewed for abuse of discretion *on appeal from the final judgement*. *See* TEX. R. CIV. P. 18a(f) (emphasis added).

Before *Monroe*, the only instance in which mandamus was been found to be appropriate to review action on a motion to recuse is where the trial court failed to comply with its duty under rules 18a(c) & (d) to either recuse itself or refer the motion. *See Monroe*, 946 S.W.2d at 540 n.1 (Dorsey, J., dissenting); *see also* TEX. R. CIV. P. 18a(c) & (d). When the trial court refuses to refer the motion to the administrative judge, or another judge designated by the administrative judge, the movant has no opportunity to develop a record on the motion, and without a record, has no adequate remedy by appeal. *See Winfield v. Daggett*, 846 S.W.2d 920, 922 (Tex. App. --Houston [1st Dist.] 1993, orig. proceeding). Accordingly, mandamus is appropriate in that situation. *Id.*

6. Difference as to Standards of Review

a. When Raised in the Trial Court

The only common element shared by all three types of removal is the standard of review. When any type of removal issue is raised in the trial court, and the court denies the requested relief, the standard of review upon appeal or mandamus is abuse of discretion. *See Union Pacific*, 969 S.W.2d at 428 (recusal and disqualification); *Mitchell Energy*, 943 S.W.2d at 437 (objections under section 74.053(d)); *Meredino*, 923 S.W.2d at 262 (recusal); *City of Wharton*, 966 S.W.2d at 858 (objections under section 74.053(d)).

b. When Raised for the First Time in the Appellate Court

When, however, the issue of disqualification is raised for the first time on appeal, the appellate court uses a *de novo* standard of review. *See McElwee*, 911 S.W.2d at 185. This standard is only applicable to disqualification, because neither recusal nor objections to assigned judges may be raised for the first time in the appellate court. *See Union Pacific*, 969 S.W.2d at 428 (recusal waived if not raised by proper motion in trial court); *Merendino*, 923 S.W.2d at 262 (same); *Perkins*, 936 S.W.2d at 667 (objections under section 74.053(d) waived if not raised by timely motion in trial court); *Alvarez*, 915 S.W.2d at 166 (same).

C. Disqualification

1. Introduction

The early common law approach to disqualification was simple: a judge with a direct pecuniary interest was disqualified. *See* TEX. CONST. art. V, § 11, interp. commentary (Vernon 1993). There were no other grounds for disqualification. The law soon recognized, however, that there might be other instances in which disqualification was appropriate. In the United States, contemporary disqualification practice is broader than the original common law. *Id*

When the authors of the first Texas constitution faced the issue of disqualification, they sought to draw a line that would prevent abuse of power by judges and abuse of the privilege of disqualification. *Id*. The original framers were apparently successful because the disqualification provisions contained in the Constitution of 1845 have been carried forward into all later Texas constitutions (ca. 1861, 1866, 1869), including the present one (ca. 1876). *Id.*; *see also Love v. Wilcox*, 28 S.W.2d 515, 518 (Tex. 1930) (stating that “[when our present judicial amendment was

adopted in 1891, without change of verbiage with respect to disqualification of judges, the court could not right give the language a different meaning from that ascribed to the same language in the previous constitutional provisions.”) The only change occurred in 1891, when the article was amended to include the Court of Criminal appeals and the intermediate appellate courts. *Id*.

2. Source of Law for Disqualification

The original source for disqualification in Texas is the constitution. Article V, section 11 enumerates the circumstances in which a judge is disqualified from sitting in a case. TEX. CONST. art. V, § 11. The Texas Supreme court has essentially restated the constitutional grounds for disqualification in rule 18b(1) of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 18b(1). Finally, the Texas Legislature has included and clarified one of the constitutional disqualification grounds in the statutes. *See* TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998); *see also* TEX. GOV'T CODE ANN. § § 573.021-573.025 (Vernon 1994 & Supp. 1998) (determining and computing affinity and consanguinity).

3. Grounds for Disqualification

Article V, section 11 provides that disqualification of a judge can occur in only three instances: (1) where the judge is interested in the case; (2) where the judge is related to **any** party by affinity or consanguinity, as may be defined by law; and (3) where the judge has acted as an attorney in the case. *Id*. Texas courts have long held these grounds are exclusive and no other bases for involuntary 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).

Section 21. 005 of the Texas

Government Code, which restates the ground relating to affinity and consanguinity, provides that neither a judge nor justice of the peace may sit in a case if either of the parties is related to him by affinity or consanguinity within the third degree. TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998); *see also* TEX. GOV'T CODE ANN. §§ 573.021-573.025 (Vernon 1994 & Supp. 1998) (determining and computing affinity and consanguinity).

Rule 18b(1) essentially restates the constitutional grounds and provides that judges must disqualify themselves in all proceedings in which: (1) they have served as a lawyer in the case, or *a lawyer with whom they previously practiced law served during that association as a lawyer in the case*; (2) they know that, individually or as a *fiduciary*, they have an interest in the subject matter in controversy; or (3) either of the parties may be related to them by affinity or consanguinity within the third degree. *See* TEX. R. CIV. P. 18b(1) (emphasis added). The italicized portions do not appear in Article V, section 11. These additions represent the interpretation placed on the constitutional grounds by the courts.

4. Disqualification Cannot Be Waived or Overcome

The disqualification rules in Article V, section 11 are expressed in unconditional language, and are regarded as mandatory and to be "rigidly enforced." *See Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221 (1947). Disqualification affects a judge's jurisdiction and power to act. *See Postal Mut. Indemnity Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482, 484 (1943). Therefore, disqualifications, like other jurisdictional barriers, cannot be waived. *See In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Indemnity Ins. Co. v.*

McGee, 356 S.W.2d 666, 668 (Tex. 1962); *Fry* 202 S.W.2d at 221; *Meredino v. Burrell*, 923 S.W.2d 258, 262 (Tex. App. --Beaumont 1996, writ denied); *McElwee v. McElwee*, 911 S.W.2d 182, 186 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

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. Crim. Appl. 1977); and *Ex parte Washington*, 442 S.W.2d 391, 393 (Tex. Crim. 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.

5. Procedures for Disqualification

The heading of this subsection is somewhat misleading. This is because 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. It is obvious, however, that many of the procedures outlined in rule 18a do not apply to disqualification.

a. Motion

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). The rule requires that the motion be verified and state with particularity

the grounds for removal. *Id.* These procedures must be followed to preserve error for recusal (*See* section D.11.a); however, as we have already stated, disqualification may be raised at any time, *See Glaser*, 632 S.W.2d at 148; *Fry*, 202 S.W.2d at 222, and thus, a motion is obviously not required to preserve the issue for appellate review. *See Jennings v. Garner*, 721 S.W.2d 445, 446 (Tex. App. -- Tyler 1986, no writ.)

We do not mean to suggest that practitioners should not file a motion. On the contrary, filing a motion to disqualify, as soon as it becomes apparent that the judge should remove himself, 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). We simply note here that a “timely,” “verified,” “particularized” motion is not required, as it is with recusal, to preserve the issue for later review. *See Glaser*, 632 S.W.2d at 148; *Fry*, 202 S.W.2d at 222.

b. Action by Judge

_____ Rule 18a(a) requires a judge to either recuse herself or forward the recusal motion to the presiding judge to assign a judge to hear the motion. *See* TEX. R. CIV. P. 18a(c). It is unclear whether this procedure is required for motions based on constitutional disqualification.

Before the adoption of rule 18a, several courts found it unnecessary for the trial judge to forward a true disqualification motion to the presiding judge. *See Maxey v. Citizens Nat’l Bank of Lubbock*, 489 S.W.2d 697, 702 (Tex. Civ. App.--Amarillo 1972), *rev’d on other grounds*, 507 S.W.2d 722 (Tex. 1974); *Pinchback v. Pinchback*, 341 S.W.2d 549, 553 (Tex. Civ. App.--Fort Worth 1960, writ *ref’d n.r.e.*); *Pahl v. Whitt*, 304 S.W.2d 250, 252 (Tex. Civ. App.--El Paso 1957, no writ).

Since the adoption of rule 18a, however, some courts have held that a motion to disqualify (which was, notably, combined with a motion to recuse) must be referred to the presiding judge for further proceedings. *See Bourgeois v. Collier*, 959 S.W.2d 241, 245-246 (Tex. App.--Dallas 1997, no writ); *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 560 (Tex. App.--Beaumont 1993, writ denied). In *Bourgeois*, the Dallas Court of Appeals specifically held the referral procedure of rule 18a(d) applied, and thus, the trial judge was not authorized to rule on the motion and was required to forward it to the presiding judge for further action. *Id.* at 246. In *Gulf Maritime*, the Beaumont court, after expressly noting the difference between recusal and disqualification stated:

Where the question of disqualification was raised by both appellee. . . and appellant . . . we believe that it became incumbent upon [the trial court] to give strict heed to the provisions of Rule 18a(c) and (d) **by** referring this matter to the administrative judge for further proceedings.

See Gulf Maritime, 858 S.W.2d at 560.

(1) Practical Pointers

In light of the confusion concerning the applicability of the referral procedures of rule 18a, those seeking disqualification may want to seek mandamus review if the trial judge sought to be disqualified rules on the motion himself. In support of the petition for writ of mandamus, the practitioner can argue: (1) rule 18a, by its own terms, applies to both recusal and disqualification; (2) some courts have *required* a disqualification motion to be referred to the presiding judge; and (3) it is illogical and unsupportable by sound legal

reasoning to allow a trial judge to rule on a motion to *disqualify* directed to him, but refuse to allow him to rule on a similarity directed motion to *recuse*.

The practitioner opposing the petition for writ of mandamus should argue rule 18a does not, in all respects, apply to disqualification, and therefore, should not with regard to referral. Moreover, there is a sound legal basis for allowing the trial judge to rule on disqualification motions, but not on recusal motions: the grounds for disqualification are limited and exclusive, while the grounds for recusal are legion (limited only by the attorney's imagination) and more intangible. It is one thing to ask a trial judge to determine if she has a direct financial interest in the matter, previously acted as an attorney in the matter, or is related to a party within the third degree. These things capable of determination from outside sources.

It is another matter entirely to ask a trial judge to rule that he has a personal bias or prejudice relevant to the matter or one of the parties.

(2) Supposition

If disqualification motions *are* referred to the presiding judge, one could reasonably assume the procedures governing the presiding judge's duties with respect to recusal motions control. (*See* section D.8.). The same would presumably be true as to the duties of the judge assigned by the presiding judge to hear the motion, subject to the procedures in article V, section 11 of the Texas Constitution. (*See* section D.8.).

6. When the Judge Is Disqualified

a. Trial Judge

(1) The Applicable Law

When a judge, other than an appellate

judge, is constitutionally disqualified, the procedure for replacing that judge is governed by the Texas Constitution. *See* TEX. CONST. art. V, § 11. The constitution provides that when a trial judge is disqualified, there are two methods for replacing the judge: (1) the parties may agree to the appointment of a qualified judge to try the case; or (2) if the parties cannot agree, another judge may be appointed, as prescribed by law, to try the case. *Id.*

Chapter 74 prescribes the proper assignment of judges. Section 74.052 provides that judges may be assigned in the manner provided by Chapter 74 to hold court when necessary to dispose of business in the region. *See* TEX. GOV'T CODE ANN. § 74.052 (Vernon 1988). Section 74.054 provides that the presiding judge of the administrative region in which the assigned judge resides may assign certain judges as necessary to dispose of business in the region including: (1) regular district, constitutional county, and statutory county judges; (2) certain former and retired district and appellate judges; and (3) active appellate court judges who have had trial court experience. *See* TEX. GOV'T CODE ANN. § 74.054(a) (Vernon Pamph. 1998). The presiding administrative judge may not, however, assign a regular constitutional county court judge to hear a matter pending in a district court outside the county of the judge's residence, and can **only** assign a constitutional county court judge, as long as that judge is a licensed Texas attorney to sit for another constitutional county court judge. *See* TEX. GOV'T CODE ANN. § 74.054 (b)-(c) (Vernon Pamph. 1998).

(2) The Proper Procedure

When a trial judge determines that she is disqualified from hearing a case, the judge should request the presiding judge of the to appoint a proper judge to hear a case. *See* TEX. GOV'T CODE ANN. § 74.054(a)

(Vernon Pamph. 1998); *see also* William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 632 (1986) (citing *Hidalgo & Cameron Counties Water Control & Improvement Dist. No. 9 v. Starley*, 373 S.W.2d 731, 732-33 (Tex. 1964)).

b. Appellate Judge

(1) The Applicable Law

_____ When any member of the Texas Supreme Court, the Texas Court of Criminal Appeals, or the Texas Court of Appeals is disqualified, the constitution provides that the disqualification shall be certified to the governor. *See* TEX. CONST. art. V, § 11. The governor must then immediately commission the necessary number of judges for the determination of the case. *Id.*

(2) The Proper Procedure

The procedure to be followed is set forth in the constitution: the appellate judge who is disqualified certifies her disqualification to the governor, who then appoints a special judge to preside in her place. *See* TEX. CONST. art. V, § 11; *see also* William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 632 (1986) (citing *Nueces County Drainage & Conservation Dist. No. 2 v. Bevely*, 519 S.W.2d 938, 950 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e)); *Boynton Lumber Co. V. Houston Oil Co. of Texas*, 189 S.W. 749 (Tex. Civ. App.--Beaumont 1916, writ dism'd w.o.j.) (opinion on reh'g).

It is not necessary, however, in every instance of disqualification on an appellate justice or judge, to certify a disqualification to the governor, or for the governor to commission a judge or judges. The disqualification of one justice or judge does

not always mandate the appointment of a special judge by the governor because the remaining judges or justices, who are qualified, are of sufficient number to decide the case if they constitute a quorum. *See Nalle v. City of Austin*, 85 Tex. 520, 537-38, 22 S.W. 668, 671 (1893); *Long v. State*, 59 Tex. Crim. 103, 115, 127 S.W.2d 551, 558 (1910); *Marshburn v. Stewart*, 295 S.W. 679, 697 (Tex. Civ. App.--Beaumont, 1927, writ dism'd); *Hoyt v. Hoyt*, 351 S.E.2d 111, 114 (Tex. Civ. App.--Dallas 1961, writ dism'd w.o.j.) (opinion on reh'g).

7. Review of Disqualification Rulings

a. 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); *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650, 653 (Tex. App.--Corpus Christi 1996, orig. proceeding.)

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. Crim. 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); *Chilicote 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*). The supreme court has long held that mandamus

will lie in the case of a void order, and that it is unnecessary for the relator to pursue other remedies even if they exist. *See Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1967); *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961); *see generally* Karen R. Vowell, “Writ” Happens: *A Practical Guide to Seeking Extraordinary Relief When It Does*, Eighth Annual conference on State and Federal Appeals (1998) (discussing the relationship between mandamus and void orders). It would be anomalous to require an order, void upon its face, to be appealed from before it is treated as a nullity and disregarded. *See Fulton*, 346 S.W.2d at 830.

b. 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.) In other words, requesting mandamus relief is not a mandatory prerequisite to review by direct appeal. *See Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) (stating that failure to file writ of mandamus does not prejudice or waive right to complain on 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. Birchfield*, 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.

8. Sanctions

As with the procedures applicable to disqualification, there is a question as to the availability of sanctions for frivolous motions to disqualify. Rule 18a provides that if a party files a “motion to recuse” and the motion is brought solely for delay and without sufficient cause, the trial court may impose any sanction authorized by rule 215(2)(b) of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 18a(h).

As we noted before, rule 18a purports to apply to recusal and disqualification, but subsection (h) specifically refers to motions to recuse. *Id.* There is a solution to this problem, and it is found in rule 13 of the Texas rules of Civil Procedure.

If rule 18a(h) applies only to motions to recuse, and is thereby inapplicable to motions to disqualify, sanctions are still available under rule 13. Rule 13 applies not only to pleadings, but motions and other papers. *See* TEX. R. CIV. P. 13. The rule provides that the filing of motions or other papers containing groundless or false statements, for the purposes of delay, may subject a party to sanctions under rule 215(2)(b). *Id.* These are the same sanctions that are available under rule 18a(h). *Compare* TEX. R. CIV. P. 13. with TEX. R. CIV. P. 18a(h). The only difference is that rule 13 sanctions require a finding of “good cause” before sanctions are imposed, and rule 18a(h) states sanctions may be imposed “in the interest of justice.” *Id.*

9. The Caselaw and the Statutory Law

a. Issue: “Interested in the Case”

“No judge shall sit in any case wherein he may be interested . . .” TEX. CONST. art. V, §

11.

(1) Type of Interest that Mandates Disqualification

(a) *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979). This case recognizes the settled principle of law that the interest which disqualifies a judge is that interest, however, small, which rests upon a direct pecuniary interest in the result of the case at the time of the suit. *Id.* at 776. *See also Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 823 (Tex. 1972); *Hidalgo County Water Improvement Dist. No. 2 v. Blalock*, 157 Tex 206, 301 S.W.2d 593 (1957); *City of Dallas v. Peacock*, 89 Tex. 58, 33 S.W.220 (1895); *King & Davidson v. Sapp*, 66 Tex. 519, 2 S.E. 573 (1886); *Taylor v. Williams*, 26 Tex. 583 (1863); *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650, 653 (Tex. App. --Corpus Christi 1996, [leave denied]); *Blanchard v. Krueger*, 916 S.W.2d 15, 19 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding).

(b) *Love v. Wilcox*, 119 Tex. 256, 28 S.W.2d 515, 518-19 (1930). The case states that the disqualifying interest must be direct, real and certain, i.e., an interest that is capable of monetary valuation. *See also Hubbard v. Hamilton County*, 113 Tex. 547, 261 S.W.990, 991 (1924); *Narro Warehouse, Inc. v. Kelly*, 530 S.W.2d 146 (Tex. Civ. App. --Corpus Christi 1975, writ ref'd n.r.e.).

(c) *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650 (Tex. App.--Corpus Christi 1996, [leave denied]). For disqualification purposes, the pecuniary interest to the judge must be an immediate result of the judgement to be rendered in the pending case, and not result remotely, or at some future date, from the general operation of law upon the status fixed by the judgement. *Id.* At 653. *See also Love*, 28 S.W.2d at 519; *Narro*, 530 S.W.2d at 149. In *Partida*, the court found, among other

things, that a trial judge's potential interest in a class action suit, where the class was not yet certified, was too remote to automatically disqualify the judge. 916 S.W.2d at 653.

The court also found that the fact that the judge's wife was a credit card customer of one of the parties did not vest the judge with a direct pecuniary interest in the subject matter of the litigation. *Id.*

(d) *Macey v. Citizens Nat'l Bank of Lubbock*, 489 S.W.2d 697 (Tex. Civ. App.--Amarillo 1972), *rev'd on other grounds*, 507 S.W.2d 722 (Tex. 1974). Mere bias and prejudice do not constitute an "interest" sufficient to constitutionally disqualify a judge. *See also Taylor v. Williams*, 26 Tex. 583 (1863); *Querner Truck Lines, Inc. v. Alta Verde Indus., Inc.*, 747 S.W.2d 464, 470 (Tex. App.--San Antonio 1988, not writ). *But see McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (holding that in criminal cases bias might be grounds for legal disqualification if that bias was "shown to be of such a nature and to such an extent as to deny a defendant due process of law."); *Elam v. State*, 841 S.W.2d 937, 939 (Tex. App.--Austin 1992, no pet.) (recognizing *McClenan*); *Lovely v. State*, 894 S.W.2d 99, 103 (Tex. App. --Beaumont 1995, pet. ref'd) (same); *Stafford v. State*, 948 S.W.2d 921, 924 (Tex. App.--Texarkana 1997, pet. ref'd) (same).

Practical Tip: Because the Court of Criminal Appeals has obviously added "bias that denies due process" to the list of constitutional disqualifications, the practitioner in a civil case might attempt the same argument in the proper case. After all, due process is recognized in the civil context as well as the criminal! We recognize that the Texas Supreme Court rejected a specific "due process" argument in *Cameron v. Greenhill*, 582 S.W.2d at 776-77; however, the opinion was seemingly limited to the specific due

process argument raised in that case, i.e., whether it was a due process violation for the justices who ordered the submission of a referendum of the fee assessment to determine the legality of such assessment. *Id.* At 777. Moreover, *Cameron* was decided before *McClenan*, and the issue has not been recently revisited.

(e) *Blanchard v. Krueger*, 916 S.W.2d 15 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding). In *Blanchard*, a child custody case, the mother sought to recuse the trial judge alleging *ex parte* communications with the father. 916 S.W.2d at 17. The trial court referred the recusal motion to the presiding judge, and, before the recusal hearing, filed a general denial in the custody suit and asked for attorney's fees and court costs against the mother. *Id.* The mother sought mandamus relief and the court of appeals held the trial judge voluntarily joined the underlying suit as a party and secured a disqualifying pecuniary interest in the suit by asking for \$500.00 in attorney's fees. *Id.* at 19. The court found those cases holding that a party may not cause the recusal or disqualification of a judge by naming her as a party to the suit were inapplicable because in this case, the judge joined the suit of his own accord. *Id.* (citing *Cameron*, 582 S.W.2d at 776).

(f). *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631 (Tex. App. --Corpus Christi 1997, pet. For review and application for mandamus filed February 13, 1998.) This case recognizes the long-standing rule that an interest held by a judge which is common with that of the public at large is not disqualifying. *Id.* At 639 (citing *Elliott v. Scott*, 119 Tex. 94, 25 S.W.2d 150, 151 (1930)). See also *Hidalgo county Water Improvement Dist. NO. 2 v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957); *Nueces County Drainage & Conservation Dist. No. 2 v. Bevely*, 519 S.W.2d 938, 953 (Tex. Civ. App.--Corpus Christi

1975, writ ref'd n.r.e.) (also noting this is the law in most states).

Specifically, taxpayer status has never been deemed a sufficient interest to warrant disqualification. See *Rio Grande Valley*, 962 S.W.2d at 639; *Hubbard v. Hamilton County*, 113 Tex. 547, 261 S.W. 990, 991 (1924); *City of Dallas v. Peacock*, 89 Tex. 58, 22 S.W.220, 220-21 (1895); *Wagner v. State*, 217 S.W.2d 463, 464-65 (Tex. Civ. App.--San Antonio 1948, writ ref'd n.r.e.).

(g) *Gulf Maritime Warehouse Co. v. Tower*, 858 S.W.2d 556 (Tex. App. --Beaumont 1993, writ denied). In this case, the injured plaintiff sued Gulf Maritime, the corporation that had hired his employer to provide certain services. *Id.* at 557. The plaintiff also sued Quantum Chemical, the producer of the product plaintiff was unloading at the time he was injured. *Id.* During trial, Gulf Maritime became aware that the judge's wife was an employee of Quantum Chemical in a managerial capacity. *Id.* Resulting from her employment, the judge's wife received a salary and owned stock through the pension, stock ownership, and/or 401(k) plans. *Id.* at 558. The trial judge refused to disqualify himself, and on appeal, the court of appeals held the trial judge was disqualified because the evidence showed that he had a "direct ownership interest" *Id.* at 562. The evidence came from Quantum Chemical, which admitted the judge's interest. *Id.*

(h). *Pahl v. Whitt*, 304 S.W.2d 250 (Tex. Civ. App. --El Paso 1957, no writ). This case recognizes the long-standing rule that a judge, who is a stockholder in a corporation, is disqualified to sit in a case where the corporation is a party. *Id.* at 252. See also *Templeton v. Giddings*, 12 S.E. 851, 852 (Tex. 1889); *King & Davidson v. Sapp*, 66 Tex. 519, 520, 2 S.W. 573, 573-74 (1886).

When, however, a judge owns stock in a corporation that is a party, but is not directly interested in the outcome of the suit, the judge

is not disqualified. See *City of Pasadena v. State*, 428 S.W.2d 388, 399, 404 (Tex. Civ. App. --Houston [1st Dist.] 1968) (majority opinion on reh'g and Coleman, J., concurring on rehearing), *rev'd on other grounds*, 442 S.W.2d 325 (Tex. 1969). In *City of Pasadena*, the court reasoned that neither of the corporations in which the appellate justices held stock had an "interest" in the suit as that term is used for purposes of disqualification. *Id.* at 404-404. The court found that while the corporations were interested in the issue to be determined, neither company had an interest different from other members of the public and would not be subject to a pecuniary loss or gain based on the outcome. *Id.* at 404.

(i) *Hidalgo County Water Improvement Dist. No. 2 v. Blalock*, 157 Tex. 206, 301 S.W.2d 593 (1957). This case held that a judge's patronage of a municipal water system did not disqualify him from sitting in a case in which the water district was a party. *Id.* at 596. The court reasoned that the judge's interest, if any, was indirect, uncertain, and remote. *Id.*

The reasoning of *Hidalgo County Water* has been applied to utility districts as well. See *City of Houston v. Houston Lighting and Power Co.*, 530 S.W.2d 866, 868 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.). *But see Pahl v. Whitt*, 304 S.W.2d 250, 252 (Tex. Civ. App.--El Paso 1957, no writ) (holding that trial judge who was member of 5,000 member electric cooperative was constitutionally disqualified). We note, however, that the El Paso court likely did not have the benefit of *Hidalgo County Water* because the supreme court's opinion came out only a week before *Pahl* was issued.

(j) *Alamo Title Co. V. San Antonio Bar Ass'n* 360 S.W.2d 814 (Tex. Civ. App.--Waco, 1962, writ ref'd n.r.e.). Relying on *Hidalgo County Water*, the court held the trial judge was not disqualified by virtue of his

membership in the State Bar of Texas, a party to the suit. *Id.* at 817. The court reasoned that to sustain disqualification in such a case would be to hold that no State tribunal could exist. *Id.*

(k) *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App.--San Antonio 1983, no writ). This case holds that a judge is not constitutionally disqualified for having received campaign contributions from a party or someone else associated with the case. *Id.* at 78. See also *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App.--San Antonio 1984, no writ); *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd) (holding that judge was not disqualified from presiding over capital murder case by virtue of acceptance of \$500.00 campaign contribution from victim's parents).

b. Issue: "Related by Affinity or Consanguinity"

"No judge shall sit in any case . . . where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law . . ." TEX CONST. art. V, § 11.

(1) Computing Affinity and Consanguinity

(a) Texas Government Code section 21.005. This section of the code provides that no judge shall sit in any case where any party is related to him by affinity or consanguinity, *as determined by Chapter 573 of the government code*. See TEX. GOV'T CODE ANN. § 21.005 (Vernon Supp. 1998) (emphasis added).

(b) Texas Government Code section 573.022. This section of the code defines a relationship

by consanguinity. *See* TEX. GOV'T CODE ANN. § 573.022 (Vernon 1994). It states that two individuals are related by consanguinity if: (1) one is a descendant of the other; or (2) they share a common ancestor. *See* TEX. GOV'T CODE ANN. § 573.022(a) (Vernon 1994).

This section specifically provides that an adoptive child is considered a child of the adoptive parent for purposes of determining consanguinity. *See* TEX. GOV'T CODE ANN. § 573.022(b) (Vernon 1994).

(c) Texas Government Code section 573.024. This section defines a relationship by affinity. *See* TEX. GOV'T CODE ANN. § 573.024 (Vernon 1994). It states that two individuals are related by affinity if: (1) they are married to each other; or (2) the spouse of one of the individuals is related by consanguinity to the other individual. *See* TEX. GOV'T CODE ANN. § 573.024(a) (Vernon 1994).

The code further provides divorce or death of a spouse ends relationships of affinity *unless a child of that marriage is living*, in which case the marriage is considered to continue as long as the child lives. *See* TEX. GOV'T CODE ANN. § 573.024(b) (Vernon 1994) (emphasis added).

(d) Texas Government Code section 573.023. This section provides the proper method for computing the degree of consanguinity. *See* TEX. GOV'T CODE ANN. § 573.023(a) (Vernon 1994). The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. *Id.* For example, a parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on. *Id.*

If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree

of relationship is determined by adding: (1) the number of generations between the relative and the nearest common ancestor. For example, Karen and Pam are sisters, i.e., they are blood relatives, but are not descended from one another. To determine the degree of consanguinity of this relationship, you would add the number of generations each sister is separated from their nearest common ancestor. In this example, the nearest common ancestor for each sister is a parent. There is one generation between Karen and the parent. Thus, one and one does equal two: Karen and Pam are separated by two degrees of consanguinity.

Subsection (c) of section 573.023 purports to be a list of individual's relatives separated by the third degree. *See* TEX. GOV'T CODE ANN. § 573.023(a) (Vernon 1994) ("An individual's relatives within the third degree by consanguinity are the individual's . . ."). When you read the subsection, however, you will see that it is not a list of relatives separated by the third degree; rather it is a list of examples for first, second, and third degrees of separation. (NOTE: Apparently, there is no one in the Texas Legislature to proofread statues before they are enacted.)

In any event, subsection (c) probably exists because the Legislature, recognizing that most lawyers went to law school so they would not have to use what little math skills they may have, decided to give practitioners a list of common relationships and their degrees of separation.

1. Parent or child = first degree;
2. Brother, sister, grandparent, or grandchild = second degree; and
3. Great-grandparent, great-grandchild, great-aunt, great-uncle, first cousin = third degree.

See TEX. GOV'T CODE ANN. § 573.023 (c) (Vernon 1994).

(e) Texas Government Code section 573.025.

This section provides the proper method for computing the degree of affinity. See TEX. GOV'T CODE ANN. § 573.025(a) (Vernon 1994). A husband and wife are related to each other in the first degree by affinity. *Id.* For other relationships by affinity, the degree of separation is the same as the degree of the underlying relationship by consanguinity. *Id.* In other words, if two individuals are related in the second degree of consanguinity, the spouse of one of those individuals is related to the other individual in the second degree. *Id.* Taking again the example of the sisters, Karen and Pam. Karen and Pam are related in this second degree of consanguinity. Therefore, Pam's husband would also be related to Pam in the first degree, but by affinity rather than consanguinity.

(2) Specific Examples

(a) *Fry v. Tucker*, 146 Tex. 18,202 S.W.2d 218 (1947). This case held that the trial judge was disqualified to preside over a case where his wife was a first cousin of one of the parties. *Id.* at 222. The judge was related to a party by affinity in the third degree.

(b) *Milan v. Williams*, 119 Tex. 60, 24 S.W.2d 391 (1930). Where the plaintiffs were the brothers-in-law of the presiding judge, the judge was disqualified. *Id.* at 391-92. The judge was related to the plaintiffs by affinity in the second degree.

(c) *Texas Farm Bureau cotton Ass'n v. Williams*, 117 Tex. 218, 300 S.W. 44 (1927). In this case, the supreme court held that a judge who was related by affinity in the second degree to stockholders in the defendant corporation was not disqualified. *Id.* at 48. The court reasoned that the corporation, not the individual stockholders, was the defendant in the case, and therefore, the judge was not related to anyone with a direct interest in the case. *Id.* See also *Texas Farm Bureau Cotton*

Ass'n v. Lennox, 117 Tex. 94, 297 S.W. 743 (1927) (noting that the fact that a stockholder may be related within the prohibited degree to judge would not disqualify judge from trying case to which corporation was party).

(d) *Hidalgo and Cameron Counties Water Control and Improvement Dist. No. 9 v. Starley*, 373 S.W.2d 731 (Tex. 1964). Texas law notes an interesting exception to the rule of disqualification because of relationship to party. Apparently, when there are no judges qualified to sit, a disqualified judge may do so. In *Starley*, there was difficulty in finding a judge to preside over a huge case involving water rights to the American share of the lower Rio Grande River. *Id.* at 732. The case involved three counties, 3,000 defendants, would effect more than 25, 000 individual landowners, and was expected to last several years. *Id.*

During the course of the case, there had been several disqualifications and withdrawals, and ultimately Judge Starley was appointed to preside over the case. *Id.* at 733. Before the case began, Starley was single, but about a year later, Starley married, and it just so happened that his new wife was a niece of one of the parties. *Id.* The marriage caused Judge Starley to be related to a party by affinity in the second degree.

Clearly, Judge Starley was constitutionally disqualified, however, the supreme court ordered the judge to continue presiding over the case. *Id.* at 734. Noting the unique circumstance of the case, it was unlikely that any judge could be found to complete the case. *Id.* Thus, out of necessity, Judge Starley remained. *Id.* See also *Hidalgo County Water Control and Improvement Dist. No. 1 v. Boysen*, 354 S.W.2d 420, 423 (Tex. Civ. App.--San Antonio 1962, writ ref'd) (recognizing (early in the same litigation) that a disqualified judge might be compelled to preside out of necessity.).

(e). *Kimmell v. Leoffler*, 791 S.W.2d 648, 650 (Tex. App. --San Antonio 1990, writ denied) (stating there is no authority that membership in the same branch of government or the same professional organization constitutes relationship by affinity or consanguinity).

(3) Relationship to Attorney in the Case

(a) *Postal Mut. Indem. Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482 (1943). In this case, the supreme court was determining whether an attorney was a “party” for purposes of judicial disqualification. *Id.* at 483-486. The court defined the term “party” to include “all persons directly interested in the subject matter and result of the suit, regardless of any appearance of their names in the record.” *Id.* a 484. The court recognized that as a general rule, an attorney is not a “party.” *Id.* See also *Martinez v. Martinez*, 608 S.W.2d 719, 720-21 (Tex. Civ. App.--San Antonio 1980, no writ); *Runyon v. George*, 349 S.W.2d 107, 108 (Tex. Civ. App.--Eastland 1961, writ dism'd) (citing *Patton v. Collier*, 90 Tex. 115, 37 S.W. 413 (1896)).

(b) *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, (Tex. 1989) (Gonzalez, J., concurring). An attorney is generally not a “party” for purposes of disqualification. *Id.* at 207. Even if the attorney is to receive a contingent fee, she is not a “party” for purposes of disqualification decisions. See *Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 568 (1962); *Postal Mut. Indem. Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482, 484 (1943). See also *Winston v. Masterson*, 87 Tex. 200, 27 S.W. 768, 768 (1894) (holding that judge was not disqualified from presiding over case in which his brother-in-law was attorney with contingent interest in result).

(c) *Indemnity Ins. Co. of North America v.*

McGee, 163 Tex. 412, 356 S.W.2d 666 (1962). An attorney in a worker’s compensation case is a party because the trial judge, pursuant to the statutory law, is required to award attorney’s fees to the attorney out of the plaintiff’s recovery. *Id.* at 667-68 (citing *Postal Mut. Indem. Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482, 485 (1943)).

This exception to the general rule would obviously not apply, however, to appellate judges who may review the case on appeal. See William w. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY’S L.J. 599, 632 (1986) (citing *Texas Employers’ Ins. Ass’n v. Leavins*, No. C-2529 (Tex. App. --Beaumont, December 15, 1983, writ ref’d n.r.e.) (unpublished)). The reason is clear: the attorney’s fees have already been set by the trial judge, and therefore, the appellate judge would have no reason to disqualify himself.

(d) *Canavati v. Shipman*, 610 S.W.2d 200 (Tex. Civ. App. --San Antonio 1980, no writ). This case held that trial judge was not disqualified to preside over case after appointing his son-in-law as guardian ad litem. *Id.* at 203. The court stated that even though the judge would be setting the fees for the guardian ad litem, the public policy considerations present in workers’ compensation cases were not present in this instance. *Id.* See also *Niles v. Dean*, 363 S.W.2d 317, 320-21 (Tex. Civ. App. --Beaumont 1962, no writ) (holding that judge who appointed his son to represent defendants cited by publication was not disqualified even though judge set attorney’s fees for his son for services rendered). Neither the *Canavati* or *Niles* court, however, bothered to explain the distinction.

These cases are difficult to reconcile with the worker’s compensation cases: why is setting a fee in one instance disqualifying, and setting a fee in another is not disqualifying. The cases leave open the opportunity for

practitioners to argue the presence or absence of “public policy concerns” in disqualification motion based on affinity or consanguinity in cases where fees are set by the trial judge.

c. Issue: “Counsel in the Case”

“No judge shall sit in any case . . . when he shall have been counsel in the case. TEX. CONST. art. V, § 11.

(1) Judge as Former Counsel

(a) *Slavin v. Wheeler*, 58 Tex. 23 (1882). The supreme court, in considering the disqualification of a judge who, as an attorney in the case, had advised “as to a matter in dispute,” held the judge was disqualified because “he has then been of counsel in reference to the matter in dispute, and the reasons for his disqualification to sit in the case will never cease.” *Id.* at 26. *See also Williams v. Kirven*, 532 S.W.2d 159, 161 (Tex. Civ. App. --Austin 1976, writ ref’d n.r.e.) (citing *Hobbs v. Campbell*, 79 Tex. 360, 15 S.W.2d 282 (1891)). In *Slavin*, the court found that it made no difference that judge could not recall his involvement in the matter. 58 Tex. at 26.

The judge is disqualified even if no fee was charged as long as the judge, as an attorney, was consulted professionally. *See Slavin*, 58 Tex. At 26; *Williams*, 532 S.W.2d at 161.

(b) *Conner v. Conner*, 457 S.W.2d 593 (Tex. Civ. App. --Amarillo 1970, writ dism’d). This case recognizes the general rule that in order for a trial judge to come within the constitutional and statutory disqualifications from sitting as a judge in a case in which he has been counsel for some of the parties in the suit before him in some proceeding in which the issues were the same as in the case before him. *Id.* at 594. *See also Lade v. Keller*, 615

S.W.2d 916, 920 (Tex. Civ. App. --Tyler 1981, no writ) (holding that judge’s previous performance of legal services for parties in routine real estate transaction did not disqualify him). Thus, disqualification is required only when the subject matter and some of the parties are the same. *Id.*; *Matlock v. Sanders*, 273 S.W.2d 956, 958 (Tex. Civ. App.--Beaumont 1954, no writ).

In *Conner*, the court also recognized that it was unnecessary that a formal relationship of attorney and client exist for a judge to be disqualified. 457 S.W.2d at 594. In *Pinchback v. Pinchback*, 341 S.W.2d 549 (Tex. Civ. App. --Fort Worth 1960, writ ref’d n.r.e.), the court considered whether a judge was disqualified from presiding over a subsequent suit by a natural daughter to set aside an adoption, when, as an attorney, he had been present at a conference regarding the adoption. *Id.* at 551. The daughter, who had been excluded from her father’s will, was seeking to set aside the adoption on grounds of fraud. *Id.*

The only action taken by the judge in the prior adoption case was to make arrangements to have the children taken to the home of the adopting parents. *Id.* The court noted that a formal attorney-client relationship was unnecessary and that a judge who has performed acts appropriate to any attorney may be disqualified. *Id.* at 553. Based on the record, however, the court ultimately held the judge was not disqualified. *Id.*

(c) *Galveston & Houston Investment Co. v. Grymes*, 94 Tex. 609, 64 S.W. 778 (1901). This case hold that the fact that a judge may have tried a case in a lower court or participated in the decision therein does not *constitutionally disqualify* the judge from sitting in the case on appeal. *Id.* at 778. (emphasis added). *See also Monroe v. Blackman*, 946 S.W.2d 553, 539 (Tex. App.--Corpus Christi 1997, orig. proceeding) (Dorsey, J., dissenting) (recognizing *Grymes*

rule).

(2) Judge as Former Associate of Counsel or Firm Who Handled Case

(a) Texas Rule of Civil Procedure 18b(1). Though the Texas Constitution speaks only to judges having served as counsel in the case, rule 18b(1) provides that a judge is disqualified if he served as counsel in the case, or *if a lawyer with whom the judge previously practiced law served as a lawyer in the matter during the time the judge and the lawyer practiced together*. See TEX. R. CIV. P. 18b(1)(a) (emphasis added).

(b) *State ex rel. Routh v. Burks*, 82 Tex. 584, 18 S.W. 662 (1891). The addition to rule 18b(1)(a) to include disqualification based on practicing with an attorney who handled the case is not constitutionally infirm. Cases interpreting article V, section 11 have long interpreted the section to include disqualification because of an association with another attorney or firm. *Id.* at 662; *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889). *But see Walker County Lumber Co. v. Sweet*, 63 S.W.2d 1061-62 (Tex. Civ. App. -- Beaumont 1933, writ dismissed w.o.j.) (holding that judge was not disqualified where former partner undertook representation of defendant several years after partnership between attorney and judge was dissolved).

(c) *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. --Houston [1st Dist.] 1995, writ denied). In this case, the appellate court held the trial judge was not disqualified by virtue of having appointed the associate judge, who had previously practiced law with a person who served as an attorney in the matter. *Id.* at 187. The court found the ground argued for disqualification did not fit within the constitutional confines of article V, section 11 because it was not alleged that the trial judge

had previously practiced with a person who served as an attorney in the matter. *Id.*

D. Recusal

1. Introduction

As mentioned previously, the concept of having an unbiased judge preside over cases has existed for centuries. See Richard C. Flamm, *Judicial Disqualification in Florida*, 70 FLORIDA BAR JOURNAL 58 (1996). Thus, the Texas Constitution listed the three situations in which a judge was disqualified from hearing a case. See TEX. CONST. Art. 5, § 11. But, these were the only times a judge had the duty to step aside:

While delicate discretion might indicate a judge's withdrawal from a case in a contentious situation; there is no compulsion to step aside when the judge is not legally disqualified; indeed, unless legally disqualified, it is the duty of the judge to preside. Grounds of disqualification in civil matters dictated by Vernon's Ann. Tex. Const. Art. 5, Section 11, and by Vernon's Ann. Civ. St. art. 15³, and the grounds therein enumerated are inclusive and exclusive.

....

Because the constitutional and statutory disqualifying grounds are inclusive and exclusive, *mere prejudice and bias are excluded as a disabling factor*. (emphasis

³ Article 15 of the Texas Civil Statutes Annotated stated the following: "No judge or justice of the peace shall sit in any case wherein he may be interested or where either of the parties may be connected with him by affinity or consanguinity within the third degree, or where he shall have been counsel in the case." TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1969).

added)

Maxey v. Citizens Nat'l Bank, 489 S.W.2d 697, 702 (Tex. Civ. App. --Amarillo 1972), *rev'd on other grounds*, 507 S.W.2d 722 (Tex. 1974).

Apparently, the legislators and the Supreme Court concluded that these three situations adequately protected the parties from an unbiased judge and adequately protected the reputation of the judiciary. But, gradually, during the 1980's the seeds were sown that would enlarge the reasons for which a judge much be recused. Thus, by 1992, the idea that a judge could be recused because he was impartial had come to full fruition, as underscored by the following excerpt from an opinion.

Public policy demands that a judge who tries a case act with absolute impartiality. *Predergass v. Geale*, 59 Tex. 446, 447 (1883). It further demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L.Ed.2d 823 (1986). Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based. *Sun Exploration and Prod. Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989) (Spears, J., concurring).

CNA Ins. Co. v. Scheffey, 828 S.W.2d 785, 792 (Tex. App. --Texarkana 1992, writ denied).

The purpose of this portion of the papers is to review the law or recusal in the State of Texas and present it in a practical

useable form.

2. Source of Law

Currently, 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. TEX. R. CIV. P. 18a, 18b. 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. However, as noted in the introduction, the grounds for recusal only recently have been so expansive. Recusal, as opposed to disqualification, was first added to the rules of civil procedure in 1987. TEX. R. CIV. P. 19B, 50 TEX B.J. 852 (1987). The rule contained one section listing the grounds for disqualification (the old article 15 referred to in the introduction to this portion of the paper) and one section covering recusal. The recusal section was short.

(2) Recusal

Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter of a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

TEX. R. CIV. P. 18b, 50 TEX. B. J. 852 (1987). In the 1990, the rule was amended to its current form. *See* TEX. R. CIV. P. 18b.

Appellate recusal had an equally late genesis. The current rule governing recusal of

appellate judges is Rule 16. Its predecessors, rules 15 and 15a were adopted by the Supreme Court in 1986, to be effective on September 1, 1986.

Rules 18a, 18b and appellate rule 16 are the only rules governing recusal. Contrary to what some lawyers may think, the Code of Judicial Conduct does not govern when a judge must step down for reasons of bias or appearance of impartiality. The Code of Judicial Conduct discusses in a very general way that a judge should avoid the appearance of impropriety and perform his duties in an unbiased manner. *See* Cannons 2 and 3, TEX. CODE JUDICIAL CONDUCT. The Code also lists how a judge should act in particular circumstances so that he will be, and appear, impartial. However, the Code's provisions are not mandatory; The Code is only a guide, and is only intended to state "basic standards which should govern all judges." *See* TEX. CODE JUDICIAL CONDUCT, Preamble.

3. Grounds for Recusal

Rule 18b states that a judge *shall* recuse herself when any of the nine following circumstances are present in a case: (1) her impartiality might reasonably be questioned, (Rule 18b(2)(a)); (2) she has a personal bias or prejudice concerning the subject matter or a party, or has personal knowledge of *disputed* evidentiary facts concerning the proceeding (Rule 18b(2)(b)); (3) she or a lawyer with whom she practiced has been a material witness (Rule 18b(2)(c)); (4) she participated as counsel, advisor or material witness on the case or expressed an opinion concerning the merits of it while acting as an attorney in government service (Rule 18b(2)(d)); (5) she knows that she has either individually or as a fiduciary, a financial interest in the subject matter or in a party, or any other interest that could be substantially affected by the outcome (Rule 18b(2)(e)); (6) she, her spouse, or any relative within the third degree or their spouse

is a party or an officer, director, or trustee of a party (Rule 18b(2)(f)(I)); (7) she, her spouse, or any relative within the third degree or their spouse has an interest that could be substantially affected by the outcome of the case (Rule 18b(2)(f)(ii)); (8) she, her spouse or a relative within the third degree or their spouse likely to be a material witness in the proceeding (Rules 18b(2)(f)(iii)); (9) she, her spouse, or a relative within the first degree is a lawyer *in the proceeding*. We will discuss each of the recusal situations in more **detail** under the case law section of this paper.

4. Important Definitions

Rule 18b has three definitions that are crucial to proper application of the rule. They are set forth below.

a. Proceedings

The rule defines proceedings as including "pretrial, trial or other stages of litigation" - in essence, at any time while the case is before that trial court. But lawyers should beware, because there **is** a caveat to this rule. As discussed below, unless a party timely files a motion to recuse upon learning of a reason for recusal, the party waives the right to raise the complaint. *See, e.g. Logic Science, Inc. v. Smith*, 798 S.W.2d 394 (Tex. App.--Houston [1st Dist.] 1997, orig. proceeding.)

b. Degrees of Relationship

See section C.9.b.(I).

c. Financial Interest

The rule defines a financial interest as "ownership of a legal or equitable interest however small, or a relationship as director, advisor or other active participant in the affairs of a party," TRCP 18b(4)(d). Certain

exceptions to this rule exist.

(1) Mutual Funds - Ownership of mutual or common investment funds is not a financial interest if the judge does not manage the fund or participate in its management. TRCP 18b(4)(d)(I).

(2) Officer of certain non-profit groups - holding an office in an educational, religious, charitable, fraternal or civic organization does not constitute a financial interest in securities the organization holds. TRCP 18b(4)(d)(ii).

(3) Policyholder or Stockholder - A policy holder in a mutual insurance company stockholder of a publicly traded company, or a depositor in a mutual savings company, is holding a financial interest only if the outcome of the proceeding could substantially affect the value of the interest. TRCP 18b(4)(d)(iii).

(4) Government Securities - Ownership of a government securities if a “financial interest” only if the outcome could substantially affect the value of the interest. TRCP 18b(4)(d)(iv).

(5) Taxpayers/Utility ratepayers - A judge does not automatically hold a financial interest if the interest is the same as the public at large holds. TRCP 18b(4)(d). The examples the rule give are taxpayers and utility ratepayers. TRCP 18b(4)(d)(v). *See Hidalgo County Water Improvement Dist. v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957); *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631, 637-638 (Tex. App. --Corpus Christi 1997, applic. filed February 13, 1998, and pet. filed February 13, 1998); *Nueces County Drainage Conservation Dist. v. Bevely*, 519 S.W.2d 938, 951-952 (Tex. App.--Corpus Christi 1975, writ ref'd n.r.e.). The only time this type of interest would require the judge to step down would be if the outcome of the proceeding could substantially affect the outcome of the judge. TRCP 18b(4)(d)(v).

See Rio Grande Valley Gas Co. v. City of Pharr, 962 S.W.2d at 637-638. *Note: Rio Grande Valley Gas Co.* is the only case discussing this issue after the enactment of rule 186. As a consequence, the other cases discuss the issue in terms of disqualification rather than recusal. *See e.g. Hidalgo County Water Improvement Dist. v. Blalock*, 301 S.W.2d at 596.

5. Procedure for Recusal When No Motion is Filed

a. Order

Rule 18b(2) requires a judge to recuse himself if one of the nine enumerated situations is present. A judge may himself decide to recuse himself on his own motion and, if he does, he must sign an order recusing himself. *Dunn v. County of Dallas*, 794 S.W.2d 560, 562 (Tex. App. --Dallas, 1990, no writ).

b. Referral

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. *Id.*

c. Action after Referral

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. *Id.*

6. Procedure for Recusal When Motion is Filed

a. When to File Motion

_____ The rule requires the motion to be filed at least 10 days before the date set for trial or other hearing. Rule 18a(a). *See Waste Water, Inc. v. Alpha Finishing & Development Corp.*,

874 S.W.2d 940, 944 (Tex. App.--Houston [14th Dist.] 1994, no writ). However, other courts have said that the motion can be filed after the trial and the final judgment as long as the party files it more than 10 days before the hearing. *See Bourgeois v. Collier*, 959 S.W.2d 241, 246 (Tex. App. --Dallas 1997, no writ); *Brousseau v. Ranzau*, 911 S.W.2d 890, 893 (Tex. App.--Beaumont 1995, no writ). 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.” Rule 18a(e). The rule lists only this one exception and some courts have applied the 10 day requirement literally. In these districts, (the El Paso Court of Appeals, and possibly San Antonio) the motion must be filed 10 days before trial or 10 days before a hearing, even if the movant did not learn of the problem until the day the motion was filed. Note: See section B.8.e for how the courts have interpreted this requirement.

b. Contents of the Motion

_____ The motion must state “grounds why the judge should not sit in the case.” Rule 18a(a). The motion also must be verified and must “state with particularity the grounds why the judge should not sit. *Id.* If the motion is not verified, the party forfeits the right to complain about the judge’s refusal to recuse. *See McElwee v. McElwee*, 911 S.W.2d 182, 185-186 (Tex. App. --Houston [1st Dist.] 1995, writ denied); *Wirtz v. Massachusetts Mut. Life Ins. Co.*, 898 S.W.2d 414, 422-423 (Tex. App.--Amarillo 1995, no writ). The motion must be made on personal knowledge and must set forth facts that would be admissible in evidence. Rule 18a(a). In spite of this requirement, however, the rule also states that the motion may state facts upon information and belief if the grounds for the belief are specifically stated. Rule 18a(a)

c. 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. *Id.* The rule allows responding or concurring parties to file statements at any time before the motion is heard. *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 Wirtz v. Massachusetts Mutual Life Ins. Co.*, 898 S.W.2d 414, 423 (Tex. App. --Amarillo 1995, no writ).

7. Trial Judge Must Act

All courts agree that 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. Rule 18a(c), (d); *see Brousseau v. Ranzau*, 911 S.W.2d at 892. These are the only two options the judge has when a procedurally proper motion is filed. *Brousseau v. Ranzau*, 911 S.W.2d at 892.

In such a case, 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. Rule 18a(d). Likewise, when a judge *recuses* 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.⁴ Rule 18a(c).

If a trial judge does not take one of these two actions, the trial judge places herself at risk of being ordered by an appellate court to act in accordance with the rule. First, if the trial does nothing, she is subject to mandamus. *See Greenberg, Benson, Fisk & Fielder v. Howell*, 685 S.W.2d 694, 695 (Tex. App.--Dallas 1984, orig. proceeding). Second, if the trial judge transfers the case to another judge rather than referring the case to the presiding judge for referral, she is again subject to mandamus. Rule 18a; *Winfield v. Daggertt*, 846 S.W.2d 920, 922 (Tex. App.--Houston [1st Dist.] 1993, orig. proceeding). In addition, one court has held that a transfer made by the trial judge - not the presiding judge - would be void. *Lamberti v. Tschoepe*, 776 S.W.2d 651, 652 (Tex. App.--Dallas 1989, orig. proceeding).

Although all courts agree that a timely, procedurally sufficient motion imposes a duty on the court to either refer or recuse, some disagreement exist requiring the duty to rule on or to refer the motion when it is not timely, or otherwise procedurally, sufficient. Of the

courts addressing the issue in the last 10 years, only the Dallas court of Appeals has consistently held that a judge can do only one of two things - refer or recuse - when confronted with motion to recuse that is untimely or otherwise procedurally insufficient. *See Bourgeois v. Collier*, 959 S.W.2d 241, 245-246 (Tex. App.--Dallas 1997, no writ); *Lamberti v. Tschoepe*, 776 S.W.2d at 652.⁵

8. 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**." *Id.* 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.* *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. PRO. 18a(f).⁶

⁴ We have found no cases involving an order entered for good cause. However, one of the members of the Bar committee rewriting the rule - a district judge in the State - indicated that this was intended for emergency situations many of which are found in family law cases - family violence and depletion of assets, for example. It is the authors' understanding that judges in Houston have been told to refer emergency motions to the presiding judge for a ruling.

⁵ The proposed rule would resolve this conflict. It states that a trial judge may ignore an unverified motion. *See* Proposed rule 18(d)(1). The rule also deletes the 10 day requirement, stating that a motion to recuse may be filed at any time.

⁶ The new proposed rule has more deadlines imposed on the judge hearing the recusal than the current rule, which imposes no deadlines other than hearing the motion immediately. Under the new rule, the judge is to set the motion for a hearing within 10 days of the referral. In

9. Review of Rulings by Appeal or Mandamusa. Mandamus

As noted above, when a motion is procedurally sufficient in all respects, all courts agree that the trial judge must either recuse or refer the case to the presiding judge. See *Blanchard v. Krueger*, 916 S.W.2d 15, 17-18 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding); *Winfield v. Daggett*, 846 S.W.2d 920 (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 *Blanchard*, 916 S.W.2d at 17018; *Winfield*, 846 S.W.2d at 921-922.

b. Appeal

If the motion to recuse is denied, that ruling is reviewable on appeal from the final judgment. Rule 18a(f). The ruling is not reviewable by mandamus, and, unlike disqualification, orders entered after the erroneous ruling are *not* void. *In re Union Pacific Resources Co.*, 969 S.W.2d at 428; *McElwee v. McElwee*, 911 S.W.2d 182, 185 (Tex. App.--Houston [1st Dist.] 1995, no writ denied); *Thomas v. Walker*, 860 S.W.2d 579,

addition, the assigned judge must rule within 20 days of the referral, *or the motion is deemed granted*. Proposed Rule 18(d)(4).

Although the procedure varies across the state, in Harris County, recusal motions are heard by a visiting judge every other Thursday. Consequently, the motions are heard rather quickly in Harris County.

581 (Tex. App.--Waco 1993, no writ).

10. 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). See *Enterprise-Laredo Assoc. v. Hacker’s Inc.*, 839 S.W.2d 822 (Tex. App.--San Antonio), writ ref’d per curiam, 843 S.W.2d 476 (Tex. 1992).

11. Right to recuse may be forfeited or waived, and conditions warranting recusal may be divesteda. Forfeiture or Waiver

As noted above, the requirement that the motion to recuse be filed at least 10 days before a hearing or trial is considered mandatory. Consequently, the courts have uniformly held that the right to have a judge recused, and the right to complain about a refusal to recuse, can be forfeited by an untimely filing. *In re Union Pacific Resources Co.*, 969 S.W.2d 427 (Tex. 1998); *Buckholts Independent School District v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Jamilah v. Bass*, 862 S.W.2d 201, 203 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding); *Aguilar v. Anderson*, 855 S.W.2d 799, 810 (Tex. App.--El Paso 1993, writ denied); *Watkins v. Pearson*, 795 S.W.2d 257, 259-60 (Tex. App. --Houston [14th Dist.] 1990, writ denied). The parties also can affirmatively waive any ground for recusal *after it is fully disclosed in the record*. Rule 18b(5).

b. Divesting the condition warranting recusal

In addition, under very specific circumstances, a judge can rid himself of a ground for recusal. See Rule 18b(6). Under

this subsection, a judge (1) who, either individually or as a fiduciary, has a financial interest in the subject matter of the suit, or any other interest that could be substantially affected by the outcome of the suit, and (2) after spending substantial time to the suit discovers that he must recuse, can divest himself of the interest and continue sitting. *Id.* The judge also could continue sitting after he has spent substantial time on the suit, if his spouse or a relative within the third degree or their spouse divests and interest that could be substantially affected by the outcome of the proceeding. *See* Rule 18b(6) (referring to rule 18b(2)(f)(ii)). Note: The rule refers to 18b(2)(f)(iii) as the second situation in which a judge could rid himself of the recusing ground. I believe this is a typo and that the rule should refer to 18b(2)(f)(ii), because 18b(6) refers to interests that can be divested. Rule 18b(2)(f)(iii) does not involve an interest that can be divested; instead, it discusses when a spouse or relative is a material witness. Rule 18b(2)(f)(ii), on the other hand, *does* refer to an interest that can be divested, and that is why I believe the rule should refer to it. The proposed rule 18 does not contain a provision similar to 18b(6). Presumably, once a judge meets any of the grounds for recusal, he will not be able to **divest** himself of the interest and continue sitting.

12. Appellate Recusal

a. Grounds for recusal

Current rule 16 of the rules of appellate procedure controls recusal at the appellate level. *See* TEX. R. APP. P. 16. The grounds for recusal are the same as for a trial judge in rule 18b, but, in addition, an appellate judge is recused if the case was in another court while the judge was there, and the appeal presents a material issue that the judge decided or participated in deciding while in the other court.

b. Procedure for recusal

Just as in the trial court, the movant must file a motion to recuse. TEX. R. APP. P. 16. The motion must be **filed** promptly “after the party has reason to believe that the justice should not participate in deciding the case.” *Id.* Before anything else is done in the case, the challenged justice must do one of two things: recuse herself or certify the matter to the entire court. *Id.* If the matter is certified, a majority of the remainder of the court sitting en banc will decide the motion. The challenged justice does not sit with the remainder of the court when it decides whether to recuse the challenged justice. *Id.*; *see Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984); *Resendez v. Schwartz*, 940 S.W.2d 714 (Tex. App.--El Paso 1996, no writ)

13. Source of Law

A party’s right to remove an assigned judge is grounded in chapter 74 of the Texas Government Code. Chapter 74 provides for the assignment of judges, *see* TEX. GOV’T CODE ANN. § 74.052 (Vernon 1988), and objection to assigned judges. *See* TEX. GOV’T CODE ANN. § 74.053 (Vernon Pamph. 1998). This chapter also defines those judges subject to assignment, *see* TEX. GOV’T CODE ANN. § 74.054 (Vernon Pamph. 1998), and describes their powers, duties, and compensation. *See* TEX. GOV’T CODE ANN. §§ 74.054, 74.059, 75.061 (Vernon 1988 & Pamph. 1998).

14. Grounds for Objections Under Section 74.053

There is only one ground for removal under chapter 74 of the government code: assignment of a judge. *See* TEX. GOV’T CODE ANN. § 74.053 (Vernon Pamph. 1998).

A party is entitled to unlimited objections to *former* judges and justices under section 74.053(d); however, parties are only entitled to one objection to assigned judges who are “regular” or “retired” judges. *See* TEX. GOV’T CODE ANN. § 74.053(b); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996); *Texas Employment Comm’n v. Alvarez*, 915 S.W.2d 161, 164 (Tex. App.--Corpus Christi 1996, no writ); *Garcia v. Employers Ins. Of Wausau*, 856 S.W.2d 507, 509 (Tex. App.--Houston [1st Dist.] 1993, writ denied).

15. Procedures for Section 74.053 Objections

a. The Objection

(1) When to File

The objection must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside. *See* TEX. GOV’T CODE ANN. § 74.053(c) (Vernon Pamph. 1998). Think of a section 74.053 objection like a special appearance, file it first or forget it! But, to complicate matters more, one court has held that an objection must be filed *before the case is called for trial and the parties announce ready*. *Thompson v. State Bar of Texas*, 728 S.W.2d 854, 855-856 (Tex. App.--Dallas 1987, no writ). The court reasoned that when the case is first called for trial on the merits “all of the time period “before the first hearing or trial has elapsed.” *Id.*

(2) What to File

The courts have held that for the objection to be valid, it must be in writing. *See Wolfe*, 918 S.W.2d at 541; *Kellogg v. Martin*, 810 S.W.2d 302, 305 (Tex. App.--Texarkana 1991, no writ). An oral objection is insufficient. *Id.*

As with any other motion, practitioners should comply with the requirement of rule 21

of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 21 (“FILING AND SERVING PLEADINGS AND MOTIONS”).

(3) Action by Judge

Disqualification of an assigned judge is mandatory if the objecting party has filed a timely, written objection. *See Mercer v. Driver*, 923 S.W.2d 565, 658-59 (Tex. App.--Houston [1st Dist.] orig. proceeding [leave denied]). Upon proper objection, the assigned judge must remove himself and ask the presiding judge to assign another judge to preside over the case. *See* TEX. GOV’T CODE ANN. § 74.054(a) (Vernon Pamph. 1998).

16. Important Definitions

a. “Hearing”

A “hearing” for the purposes of sections 74.053(b) and (d), occurs when a party files a motion requesting affirmative relief and the assigned judge considers the merits of the arguments and rules on the motion. *See Perkins v. Groff*, 936 S.W.2d 661, 666 (Tex. App.--Dallas 1996, writ denied). It is irrelevant whether oral argument or other actual courtroom proceedings have occurred. *Id.*

b. “Retired Judge”

A “retired” judge is a judge receiving an annuity under the Texas Judicial Retirement System. *See Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To receive such an annuity, a judge must meet requirements about either the length of service or service plus age. *Id.* Typically, a judge must be sixty-five years of age and have at least ten years of creditable service to become a retiree. *Id.*

c. “Former Judge” (Who is Not Retired)

According to the supreme court, a former judge, who is not a retired judge, is a judge who has not vested under the state judicial retirement system when she left office. *See Mitchell Energy*, 943 S.W.2d at 438-39. Any later-acquired status will not remove the judge from the category of former judges, i.e., those who may be removed by objection of either party under section 74.053(d). *Id.* The government code does not specifically define the term “former judge,” but it does require that both former and retired judges must have served as a regular judge for a minimum of forty-eight months. *See* TEX. GOV’T CODE ANN. § 74.055(c)(1), (e) (Vernon Pamph. 1998).

17. Objections Under Section 74.053 Can be Waived

An objection and subsequent appellate review of an objection under section 74.053 can be waived if the objecting party does not comply with necessary procedures. *See Dunn v. Street*, 938 S.W.2d 33, 34 (Tex. 1997); *Wolfe v. Wolfe*, 918 S.W.2d 533, 541 (Tex. App. --El Paso 1996, writ denied); *In re Hidalgo*, 938 S.W.2d 492, 498 (Tex. App. --Texarkana 1996, no writ); *Texas Employment Comm’n v. Alvarez*, 915 S.W.2d 161, 164 (Tex. App. --Corpus Christi 1996, no writ). *See also* TEX. GOV’T CODE ANN. § 74.053(b) (Vernon Pamph. 1998). The objection can be waived because the removal procedure of section 74.053 is nonconstitutional. *See Alvarez*, 915 S.E.2d at 164.

Practitioners should be sure to get a ruling on their objection. If the objecting party fails to obtain a ruling on the objection, the party waives the right to complain of the assignment on appeal. *Id.*

18. Review of Section 74.053 Objectionsa. Mandamus

When a proper objection under section 74.053 is filed, but the objectionable judge refuses to remove herself from the case, the objecting party is entitled to mandamus relief. *See In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998) (citing *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 440-41; *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221 (1947)). The objecting party is entitled to mandamus relief without showing there is no adequate remedy by appeal. *See Union Pacific*, 969 S.W.2d 428; *Mitchell Energy*, 943 S.W.2d at 437; *In re City of Wharton*, 966 S.W.2d 855, 857 (Tex. App.--Houston [14th Dist.] 1998 orig. proceeding), *overruled sub nom. on other grounds*, 41 Tex. Sup. Ct. J. 1354 (August 25, 1998).

Mandamus is appropriate to challenge a trial court’s refusal to remove himself after proper objection because any orders entered by the objectionable judge are void. *See Union Pacific*, 969 S.W.2d at 428 (citing *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 440-41; *Fry*, 202 S.W.2d at 221).

The supreme court has long recognized that mandamus is appropriate in the case of void orders, and that it is unnecessary for the relator transfer the case under rule 330(e) of the Rules of Civil Procedure; (2) section 74.053 objections are not effective when used against a transfer made pursuant to rule 330(e); (3) the policy concerns that prompted enactment of section 74.053(d) are not present in transfer situations; and (4) parties do not have a proprietary interest in have a case heard by a particular judge. *See Houston Lighting & Power Co.*, 41 Tex. Sup. Ct. J. at 1355-56. Accordingly, the supreme court found the trial judge properly refused to remove himself from the case. *Id.* At 1356.

One interesting aspect of the opinion is that the supreme court opinion did not acknowledge that an assignment had been made and was still pending at the time of the

order and amended order issued by the administrative judge. *See City of Wharton*, 966 S.W.2d 858. It also did not specifically respond to the court of appeals' concern that to allow a transfer to override an assignment would circumvent the right to object to the assignment of local, elected judges. *Id.*

E. Conclusion

Because each of the removal techniques requires asserting different grounds and following different procedures, and the relief available for each varies, practitioners must determine the type of relief sought, and attack or defend accordingly. Unless practitioners make the necessary distinctions, they risk losing the opportunity to challenge the trial court's ruling at the earliest possible opportunity, or at all.

Although we have treated the subject of disqualification and recusal in a straightforward, objective manner, we recognize the subject is an emotionally-charged one for both lawyers and judges. Most judges probably do not relish being involuntarily recused, and most practitioners probably cringe at the thought of having to file a motion to recuse. This is especially so when a judge is one they frequently practice before. But, even though emotions may run high when a lawyer believes the judge presiding over his case is biased, a lawyer must maintain his composure and dignity. Grabbing a judge and forcibly removing him from the bench is not an acceptable method of removal. The only methods that work are the three we have listed in the paper.

In closing, if you do find yourself wanting to remove a judge, remember to ask these three questions: what type of judge do I have?; what type of motion do I need to file?; and when do I have to file the motion? The answers to each of these lies within this paper.

II. DISQUALIFICATION

A. Introduction

The *Texas Family Law Practice and Procedure*, and its authors, the late John Montgomery, Brian L. Webb, and Sally Emerson, do an excellent review of the procedures for disqualification of attorneys. The *Texas Family Law Practice and Procedure* also has form motions for the practitioner to use. The following sections are based on the *Texas Family Law Practice and Procedure* authors' comments.

B. Disqualifying Other Party's Attorney and Grounds for Disqualification

9. *Conflict of Interest*

The Texas Supreme Court has adopted a standard requiring disqualification whenever an attorney undertakes to represent in litigation a client whose interest is adverse to that of a former client, as long as the matters embraced in the pending suit are substantially related to the factual matters involved in the previous suit. *Texas Disciplinary Rules of Professional Conduct Rule 1.09* ("Rule 1.09"). This strict rule is based on a conclusive presumption that confidences and secrets were imparted to the attorney during the previous representation. *Phoenix Founders, Inc. v. Marshall*, 887 S.W. 2d 831, 834 (Tex. 1994); *NCNB Tex. Nat's Bank v. Coker*, 765 S.W. 2d 398, 399 - 400 (Tex. 1989). The *Phoenix* case also defines confidential information as including any information relating to a case, even unprivileged information. *Id.* at 835, and *Texas Disciplinary Rules of Professional Conduct Rule 1.05(a)* ("Rule 1.05(a)").

Typical conflicts of interest that disqualify counsel include:

a. **One lawyer or firm representing two clients with adverse interests.** *Clarke v. Ruffino*, 819 S.W. 2d 947, 951 (Tex. App. — Houston [14th] 1991, dwoj). This situation may result from a lawyer’s originally undertaking to represent both parties to a divorce. If the interests of the parties diverge during the proceedings, a conflict results. The attorney will be prohibited from thereafter representing one spouse against the other in any contested proceeding, including an action to enforce or modify any agreement reached or decree entered. *Texas Disciplinary Rules of Professional Conduct Rule 1.06(d)* (“Rule 1.06(d)”);

b. **A lawyer moving from one firm to another when the two firms represent clients with adverse interests in ongoing litigation.** In this situation, a second conclusive presumption arises: that an attorney who has obtained confidential information shares it with other members of the attorney’s firm, because of the interplay among lawyers who practice together. *Petroleum Wholesale v. Marshall*, 751 S.W. 2d 295, 299 (Tex. App. — Dallas 1988); and

c. **A paralegal moving from one firm to another.** However, disqualification of the employer-lawyer will depend on whether the paralegal actually worked on the case of one of the clients having adverse interests. *In Re American Home Products Corp.*, 985 S.W. 2d 68 (Tex. 1998); *Arzate v. Hayes*, 915 S.W. 2d 616 (Tex. App. — El Paso, 1996 writ denied); and *Grant v. The Thirteenth Court of Appeals*, (Tex. 1994, writ denied).

According to *Rule 1.09*, unless a former client consents, a lawyer may not engage in representation adverse to a former client where the representation involves the

same or a substantially related matter.

Rule 1.09 states as follows:

“(a) Without prior consent, a lawyer who personally has formally represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

. . . (3) if it is the same or substantially related matter.

(b). . . when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by (a).”

To begin the analysis, one must determine if the matter is adverse to the former client. The Texas Supreme Court granted mandamus relief and disqualified an attorney from representing a class of plaintiff’s because there was a slight risk that, in vigorously pursuing claims against the former client’s employer, the attorney might be acting adverse to the former client. *National Med. Enter. v. Godbey*, 924 S.W. 2d 123, 131 (Tex. 1996).

The next question to ask is whether this is the same or a substantially related matter. According to the Texas Supreme Court, “to satisfy the substantial relationship test as a basis for disqualification a movant must prove that the facts of the previous representation are so related to the facts in the pending litigation that a genuine threat exists that confidences revealed to former counsel will be revealed to a present adversary.” *Metropolitan Life Insurance Co. v. Syntek Fin. Corp.*, 881 S.W. 2d 319, 320 (Tex. 1994) citing *NCNB Texas Nat’l Bank v. Coker*, 765 S.W. 2d 398, 400 (Tex. 1989). Syntek sought

to disqualify an opposing law firm, Hughes & Luce, on the ground that Hughes & Luce formerly represented Syntek's controlling shareholder in a divorce and subsequently drafted his prenuptial agreement. The new litigation arose out of a hotel purchase. In *Syntek* the information relevant to the hotel purchase dispute was available in the public domain and through discovery. Some of the information was available through an examiners report from a bankruptcy proceeding. The trial court also conducted an in camera review of documents from the former representation. Under these facts, the Court found that the trial court did not abuse its discretion in failing to disqualify Hughes & Luce. *Metropolitan Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W. 2d at 321.

Further, in *Centerline Industries, Inc. v. Knize*, 894 S.W. 2d 874, 875 (Tex. App. — Waco 1995, writ denied) plaintiff argued that, based on *Syntek*, an attorney could avoid being disqualified by showing that he had no confidential information or that such information was already publicly disclosed. The court rejected this argument and held that defendant's admission that opposing counsel formerly represented defendant in a substantially related matter disqualified the attorney and his law firm as a matter of law. *Id.*

The next question is if one attorney is disqualified under *Rule 1.09*, is the attorney's entire firm disqualified? When an attorney would be disqualified by *Rule 1.09(a)*, all other attorneys practicing in the disqualified attorney's law firm are also disqualified. *Rule 1.09(b) and comment 5*. Thus, upon a showing that the client's former attorney is disqualified from representing an adverse party in a substantially related matter, every attorney at the client's former attorney's firm is also disqualified in the matter.

The Supreme Court of Texas addressed this issue in December of 1998 in a case styled *In re Epic Holdings, Inc.* In *Epic* the Supreme Court held that disqualification of counsel was warranted due to their prior affiliation with the law firm involved in corporation's formation. In a very complex and detailed fact scenario, the high court applied *Rule 1.09(a)(1)* to its holding. Justice Hecht, writing for the majority, stated "[the legal system's image is ill-served by lawyers criticizing the work of their former associates with whom they shared in the fees which paid for the work....Also it is most unfair for a client to be forced to defend the work of the former associates of his opponent's counsel."

10. ***"Chinese Wall" Defense***

When a lawyer or paralegal moves to another firm, the firm is not disqualified if it takes appropriate steps to separate the person from the sensitive case files and cautions the person against divulging confidential information to members of the firm. That is, putting a so-called "Chinese wall" around the newcomer to guard against any disclosure of confidences. On the other hand, disqualification will be required in some circumstances, notwithstanding these precautions, such as when information relating to the representation of an adverse client has in fact been disclosed, when the "Chinese wall" would be ineffective, or when the person necessarily would be required to work on the other side of a matter that is the same or substantially related to the matter on which the person previously worked. *Phoenix Founders, Inc. v. Marshall*, 887 S.W. 2d 831, 836 (Tex. 1994).

11. ***Planned as Witness***

An attorney may be disqualified if the attorney will testify on the client's behalf, and no exception in *Rule 3.08(a)* may be applied. *Mauze v. Curry*, 861 S.W. 2d 869, 869 - 870

(Tex. 1993); *Warrilow v. Norrell*, 791 S.W. 2d 515, 519 - 521 (Tex. App. — Corpus Christi 1989, den.).

The possibility that the lawyer will be called as a witness must be more than a “remote” possibility. *However see Spears v. Fourth Court of Appeals*, 797 S.W. 2d 654, 658 (Tex. 1990) where lawyer would be called as rebuttal witness only if another witness’s trial testimony conflicted with deposition.

Exceptions to this rule are provided by the Texas Disciplinary Rules of Professional Conduct. Disqualification is not warranted if one of the following conditions exists, pursuant to *Rule 3.08(a)*:

a. The testimony will relate to an uncontested issue. *White v. Culver*, 695 S.W. 2d 763, 765 - 766 (Tex. App. — El Paso 1985) where disqualification not warranted when fact to be proved by lawyer’s testimony has been stipulated;

b. The testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. *Audish v. Clajon Gas Co.*, 731 S.W. 2d 665, 673 (Tex. App. — Houston [14th] 1987, ref. n.r.e.) where testimony as to service of notice and storage of items with law firm related solely to matter of formality (decided under former rule);

c. The testimony will relate to the nature and value of legal services rendered in the case;

d. The lawyer is a party appearing pro se; and

e. The lawyer promptly notified opposing counsel that the lawyer expects to testify in the matter, and disqualification of the lawyer

would work substantial hardship on the client.

12. *Related to Judge*

An attorney may not appear before a judge in a civil case if the attorney is related to the judge by affinity (marriage) or consanguinity (blood) within the first degree, as determined for purposes of the antinepotism statutes. *Government Code section 82.066*.

Here is a look at the types of relationships that disqualify an attorney.

a. Relatives within the first degree of consanguinity (blood relatives), for purposes of the antinepotism statutes, are a person’s parents and children. *Government Code section 573.023 (c)(1)*.

b. Relatives within the first degree of affinity (relatives by marriage) are a person’s spouse and the spouse’s parents and children.

c. Moreover, if two people are related by consanguinity, the spouse of one of them is related to the other person in the same degree of affinity. *Government Code section 573.025 (a)*. Thus, a child’s spouse is related to the child’s parent in the first degree of affinity.

Note, however, that the ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives. *Government Code section 573.024(b)*.

13. *Anticontact Rule*

An interesting case to review is *In re News America Publishing, Inc.*, 974 S.W. 2d 97 (Tex. App. — San Antonio 1998, writ. overruled). In this case, the court of appeals

focused on the *Texas Disciplinary Rules of Professional Conduct Rule 4.02(a)*, which states as follows:

“In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized to do so.”

In the *News America* case the trial court denied the defendants’ motion requesting that plaintiffs counsel be disqualified for violation of *Rule 4.02(a)*, the “anticontract rule.” The court of appeals ordered the trial court to rescind its previous order and grant the motion, which included sanctions. Everyone at trial was represented by counsel. Just prior to a nonsuit of one of the defendants, the defendants attorneys learned that the plaintiffs had a meeting with the defendant who was to be nonsuited. The nonsuited defendant met with one of the plaintiff’s attorneys at the offices of Akin, Gump, Strauss, Hauer & Feld, L.L.P. The meeting was “in response to” the nonsuited defendant’s letter sent to Akin Gump stating he wanted to meet with them without his attorney present to discuss the lawsuit. In the letter, the nonsuited defendant told Akin Gump that he “decided to terminate” his attorney’s representation, and that he was “no longer represented by an attorney.” Shortly after the meeting plaintiffs nonsuited this defendant.

The nonsuited defendant had not discussed with his own attorney that he wished to terminate their relationship. No notice was given to the nonsuited defendant’s attorney

about the meeting or the letter, until seven months later in response to a subpoena duces tecum. The nonsuited defendant’s attorney never withdrew from the case.

The court relied on a 5th Circuit opinion to support its holding. In *Shelton v. Hess*, 599 F. Supp. 905, 909 (S.D. Tex. 1984), the 5th Circuit established a two prong test for movant to establish that some specific identifiable impropriety has occurred and that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer’s continued participation in a particular case, in deciding that Akin Gump should have been disqualified by the trial court.

14. *Status as Judicial Officer*

Generally, judicial officers cannot represent litigants in any court of record in Texas. The list of officers so disqualified include:

- a. Judge or clerk of the Texas Supreme Court;
- b. Judge or clerk of the Court of Criminal Appeals;
- c. Judge or clerk of a Court of Appeals;
- d. Judge or clerk of a district court; and
- e. County sheriff. *Government Code section 82.064.*

The disqualification rule is more narrow when the attorney is also a county judge or county clerk. A county judge may take a case in a district court, including a divorce case; but a county clerk cannot unless the court where the clerk serves has neither original nor appellate jurisdiction. *Government Code section 82.064(c)*. This

condition, thus, disqualifies county court-at-law clerks from appearing in district courts. Also, county judges and clerks who are lawyers are allowed to represent clients in county courts, but only in cases over which their court has neither original nor appellate jurisdiction. *Government Code section 82.064(b)*.

15. ***No Specific Disciplinary Rule Applies***

The Supreme Court of Texas decided *In re Dana Meador*, 968 S.W. 2d 346, in April of 1998. In *Meador* the defendant's filed a Motion to Disqualify plaintiff's attorney. Defendant's contend that the lawyer improperly used privileged documents which the lawyer's client (in another lawsuit) secretly removed from defendant's office. The trial court denied the motion. The Court of Appeals granted mandamus relief. The Supreme Court granted mandamus relief against the Court of Appeals, stating that the trial court was correct in its ruling.

The trial court denied the Motion to Disqualify, but ordered that all of the documents must be returned, and that the attorney could not use them in the Meador litigation. Plaintiff argued that the trial court could not disqualify plaintiff's attorney because he did not violate a specific disciplinary rule. Plaintiff contends that *ABA Formal Opinion 94-382*, on which the court of appeals relied is merely advisory, and does not impose a binding disciplinary standard on Texas attorneys.

The Supremes agreed with this contention. The Supremes also agreed with plaintiff that no specific Texas disciplinary rule applies to the circumstances of this case.

8. ***Procedure***

When grounds for disqualifications of

opposing counsel exist, a party should file a motion seeking an order that the attorney and firm is disqualified from appearing for the other party. *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W. 2d 398, 399 (Tex. 1989).

The usual motion practice governs, meaning that the motion should be filed and set for a hearing. A copy of the motion, with a notice of the hearing date, is then to be served on opposing counsel and attorneys for all other parties in the case by delivery, certified mail or fax. *T.R.C.P. 21, 21a*.

9. ***Remedy upon Disqualification***

The court's order granting or denying a motion for disqualification is interlocutory and not then appealable. *Hoggard v. Snodgrass*, 770 S.W. 2d 577, 581 (Tex. App. — Dallas, 1989). The only remedies are:

a. Petitioning a court of appeals for writ of mandamus, with the burden to establish a clear abuse of discretion resulting in harm to the moving party. *J. K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris*, 776 S.W. 2d 271, 275 (Tex. App. — Dallas, 1989).

b. Assigning the ruling on the motion as error when appealing from the final judgment. *National W. Life Ins. Co. v. Jones*, 670 S.W. 2d 752, 755 (Tex. App. — Austin, 1984).

10. ***Motion to Show Authority***

Although appropriate in only the rare instance, there is a procedure to "disqualify" an attorney who lacks the authority to represent the party he is attempting to represent in court. By filing a sworn written motion, stating the party's belief that the suit is being prosecuted or defended on the other party's behalf without authority, the party may cause the other party's attorney to be cited to

appear before the court and show his authority to act. *T.R.C.P. 12*. However, absence of a verification on a motion to show authority is a waivable defect. *Sloan v. Rivers*, 693 S.W. 2d 782, 783 (Tex. App. — Ft. Worth 1985, no writ).

The movant must serve notice on the motion on the challenged attorney at least 10 days before the hearing on the motion. *T.R.C.P. 12*. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial is not to be unnecessarily continued or delayed for the hearing. *T.R.C.P. 12*.

At the hearing on the motion, the burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the suit. If the attorney fails to show authority, the court will not permit the attorney to appear in the cause, and the court must strike the pleadings if no person who is authorized to prosecute or defend appears. *T.R.C.P. 12*; see *Vela v. Vela*, 763 S.W. 2d 601, 602 - 603 (Tex. App. — San Antonio 1988, den.) where attorney was hired by next friend, but party was competent to decline representation; *Sloan v. Rivers*, 693 S.W. 2d 782, 783 (Tex. App. — Ft. Worth 1985, no writ) where attorney admitted in court that he did not have authority to prosecute action for injunction on behalf of named parties.

11. *Mandamus is Appropriate Procedure*

There are a number of cases that state the correct procedure for the practitioner is to file a Writ of Mandamus from the trial court, instead of appealing the ruling of the trial court on a Motion to Disqualify. The ruling from the trial court is interlocutory, and not, then, appealable.

a. See *National Medical Enterprises, Inc. v. Godbey*, 924 S.W. 2d 123 (Tex. 1996) relief by appeal of denial of motion to disqualify opposing counsel would have been inadequate, as required to support grant of mandamus;

b. *NCNB Texas National Bank v. Coker*, 765 S.W. 2d 398 (Tex. 1989) mandamus would issue directing trial court to vacate order of disqualification, where trial court failed to apply proper standard of law in ruling on defendant's motion to disqualify plaintiff's counsel;

c. *Troutman v. Ramsay*, 960 S.W. 2d 176 (Tex. App. — Austin 1997) appeal is not adequate remedy for improper failure to disqualify attorney;

d. *Centerline Industries, Inc. v. Knize*, 894 S.W. 2d 874 (Tex. App. — Waco 1995) issuance of writ of mandamus is limited to those instances in which no adequate remedy by appeal exists, and disqualification of counsel is proper subject of mandamus proceeding; *and*

e. *Occidental Chemical Corporation v. Brown*, 877 S.W. 2d (Tex. App. — Corpus Christi 1994) mandamus is appropriate method to review improper disqualification of counsel.

III. Conclusion

The relief available for each varies, practitioners must determine the type of relief sought, and attack or defend accordingly. Unless practitioners make the necessary distinctions, they risk losing the opportunity to challenge the trial court's ruling at the earliest possible opportunity, or at all.

We recognize the subject is an emotionally-charged one for both lawyers and judges. Most attorneys probably do not relish being involuntarily removed, let alone having

a motion to disqualified filed against them. But, again, even though emotions may run high a lawyer must maintain his composure and dignity. The only methods that work are

the three we have listed in the paper.

Good Luck!!