

**ETHICS AND THE LAWYER/JUDGE RELATIONSHIP  
JUDICIAL DISQUALIFICATION AND RECUSAL**

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**18<sup>TH</sup> ANNUAL ADVANCED CIVIL  
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# JUDICIAL DISQUALIFICATION AND RECUSAL

## INTRODUCTION

When the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted the Lawyers' Creed in 1989, it was an expression of hope that the mood of antagonism prevailing during that decade could be replaced by civil litigation that lived up to its name. Underscoring a general decline in civility in litigation, a 1996 study reported that public respect had eroded dramatically for the legal profession, prompting Justice Nathan Hecht to state that the problem of incivility was so large that "any deep seated change will take at least half a generation."<sup>1</sup>

Two decades after the 80's, American culture today is fast paced and growing more impatient. The litigants who find themselves in trial are often representative of their culture and frequently expect their lawyers to become an extension of the anger they hold for the opposing side. And all too frequently, if a lawyer wishes to remain counsel for that client then he or she will follow the client's directive. Unfortunately the result is regretful animosity between opposing attorneys and, increasingly, an unseemly antagonism between bench and bar. Tension can mount between lawyer and judge when an effort is made to remove the judge from presiding over the case.

Texas law provides three methods for the removal of a judge in a particular lawsuit – by constitutional disqualification, by recusal motion established in Rule 18a, T.R.C.P. and by statutory peremptory challenge of an assigned judge under Chapter 74 of the Government Code.

The stress level can be most apparent in removal proceedings. For the attorney, the decision of when to file and when not to file is crucial – crucial for the client being represented and crucial for the relationship between bench and bar. Filed appropriately, the motion can remove a biased and obstinate judge from the case but inappropriately filed as a tactical weapon, the consequence may involve sanctions against the moving party and the attorney. A prudent judge should know when to step aside and a wise lawyer will know how to file and, conversely, when not to file such a motion. The important balance of respect between lawyer and judge is at stake. Understanding the background and development of disqualification and recusal as well as the rules governing both concepts is important to the advocate filing or defending against the challenge to remove a judge from hearing a case.

## I. HISTORICAL BACKGROUND

### A. 1836 – 1845 (COMMON LAW DISQUALIFICATION)

When Texas declared itself an independent republic and adopted its constitution, no express provision was made for disqualification of judges. The constitution of 1836 provided in part that, "The Republic of Texas shall be divided into convenient judicial districts, not less than three, nor more than eight. There shall be appointed for each district a Judge, who shall reside in the same, and hold courts at such times and places as Congress may by law direct. - Article IV, Section 2

Even though no express provision was made for disqualification in its constitution, the common law of England was adopted (Article IV, Section 13) and by doing so, the Republic of Texas accepted the common law rule that direct pecuniary interest was the sole basis of judicial disqualification.<sup>2</sup> "English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges were disqualified only for financial interest. No other disqualification was permitted, and bias, today the most controversial ground for disqualification, was rejected entirely."<sup>3</sup>

### B. 1845 – 1974 (CONSTITUTIONAL DISQUALIFICATION)

When Texas became a state in 1845, the Constitution was rewritten and a standard of judicial disqualification was adopted that was followed in each successive state constitution with almost identical wording. Section 19 of the Constitution of 1845 stated "No Judge 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 such degrees as may be prescribed by law, or where he shall have been of counsel in the cause." Identical language was found in the Constitution of 1861 when Texas joined the Confederate States of America, and in the post Civil War Constitutions of 1866 and 1869, and finally in the present Constitution adopted in 1876.

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<sup>1</sup> John Marks, "the American Unavil Wars: How Crude, Rude and Obnoxious Behavior Has Replaced Good Manners and Why That Hurts Our Politics and Culture", U. S. News & World Repot, 22 April 1996, 66-72

<sup>2</sup> "The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?" Thomas McKeivitt 24 Hofstra Law Review 817

<sup>3</sup> "Disqualification of Judges, John P. Frank 56 Yale Law Journal 4, April 1947

For more than a hundred years Texas courts consistently held that the language in the Texas Constitution was the sole means of removing a judge in a lawsuit. The original standard, begun in 1845, and reaffirmed in each successive constitution, was held to be exclusive and the courts were emphatic in rejecting any effort at removal other than as the constitution provided. Two cases illustrated this very well. Narrowly construing the constitutional grounds, the Supreme Court, in Taylor v. Williams 26 Tex 583 (Tex. 1863), said, "If we depart from the plain language of the constitution, we shall be left without a rule for our guidance, and shall countenance a laxity of construction that may prove both dangerous and inconvenient." (pp. 586-587) Berry v. State, 203 SW 901 (Tex. Crim. App. 1918) was an appeal of a conviction for unlawfully selling liquor in a prohibited district. The defendant filed a motion to disqualify the judge because "he was prejudiced and had expressed his prejudice against the appellant." The court said the constitution names the circumstances under which a judge is disqualified, "...and the conditions named establishing his disqualification appear to be exclusive . . . prejudice against an accused does not disqualify the judge from trying the case . . ." (p. 902-903)

Language of the inclusive and exclusive nature of the constitutional grounds is found throughout appellate opinions. There are many cases prior to 1974 in which grounds for removal were alleged that would require recusal under present standards, but as challenges were made to remove judges, Texas courts routinely rejected any facts which lay outside the constitutional provisions. The Texas Constitution was interpreted to require a judge to hear a case if he was not disqualified. Love v. Wilcox, 28 SW2d 515 (Tex. 1930) was a mandamus action by Thomas Love to compel the State Democratic Committee to put his name on its ballot for Governor. Chief Justice C. M. Cureton thought himself disqualified because he was a candidate for the Democratic party's nomination for Chief Justice that year. Finding that the constitutional grounds were the exclusive means of removing a judge from a case, the Supreme Court held that the Chief Justice not only was qualified but had a duty to sit in any case except those constitutionally prohibited.

As late as 1972, the Amarillo Court of Appeals rejected the notion of recusal in Maxey v. Citizens National Bank of Lubbock, 489 SW2d 697 (Tex. App - Amarillo, 1972), reversed on other grounds, 507 SW2d 722 (Tex. 1974). The Court said, "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." (p. 702) After examining and rejecting the grounds alleged by the appellant, the Court said, "Because the constitutional and statutory disqualifying grounds are inclusive and exclusive, mere prejudice and bias are excluded as a disabling factor." (p. 702) The Court pointed out that error resulting from bias or prejudice would be demonstrated by rulings of the trial court and could be addressed by properly preserved points of error.

In Williams v. State, 492 SW2d 522 (Tex. Crim. App. 1973) the defendant objected on appeal that the trial judge who presided over his trial for murder was biased in having formed an opinion and should not have presided over his probation revocation trial. Even though finding that the defendant failed to timely object, the Court said, "Article V, Section 11, of the Constitution of Texas, provides for the circumstances under which a judge is disqualified. None of these are on the grounds mentioned by Appellant in his complaint. The constitutional grounds of disqualification are exclusive; that is, they specify all the circumstances that forbid a judge to sit." (p. 524)

In Davis v. State, 44 Tex 523 (Tex 1876), the Supreme Court held that in a trial for larceny, the fact that the property stolen belonged to the judge was not a ground for disqualification of the judge to try the case.

In Dailey v. State, 55 SW 821 (Tex Cr App 1900), the defendant raised a question of disqualification of the county judge to preside over her trial in Tarrant county for keeping a disorderly house because the judge had attended a meeting between county and district judges to discuss suppressing gaming and disorderly houses generally and the defendant specifically. The Court held this was not a disqualification.

The Court of Criminal Appeals, reviewed a conviction for delivery of heroin in Vera v. State, 547 SW2d 283 (Tex. Crim. App. 1977) in which the sentencing judge expressed doubt about the sufficiency of the law to deal with drug addicts selling heroin. The Court said, "But bias of a trial judge, standing alone, does not constitute error. An accused could complain of an erroneous ruling made by the trial court as the result of prejudice, but it would be the error in the ruling rather than the prejudice that would give him the right to complain." (p. 285)

Until 1977, Texas had no procedure for the referral of a disqualification motion to another tribunal or judge. The initial decision was made by the challenged judge. If incorrect, it was reversed on appeal. In 1882, the Supreme Court said, "An issue as to the disqualification of the judge may be made, and when made is to be determined by the judge upon the evidence adduced before him by the parties," Slaven v. Wheeler 58 Tex 23 (Tex. 1882). Thus, for many decades, Texas judges were assured of two absolutes in terms of removal; first, the only grounds for removal were those enumerated in the constitution, secondly the challenged judge alone conducted the hearing and made the decision as to disqualification.

Similarly, during this same span of time the Texas Legislature did not legislatively expand the grounds of removal. Restricting its involvement to prescribing the degree of prohibited relationship, the Legislature adopted

Article 1911 of the civil statutes, later to become Article 15 V.A.C.S and presently embodied in Section 21.005 Government Code which provides “a judge or a justice of the peace may not sit in a case if either of the parties is related to him by affinity or consanguinity within the third degree, as determined under Chapter 573.” And Article 30.01 of the Code of Criminal Procedure provides, “No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree, as determined under Chapter 573, Government Code.”

- THE CONSTITUTIONAL GROUNDS FOR DISQUALIFICATION -

1) “INTERESTED IN THE CASE”

To disqualify a judge, the interest must be direct and pecuniary. “...the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court.” Cameron v. Greenhill, 582 SW2d 775, 776 (Tex. 1979)

DISQUALIFIED

- ◆ In Nalle v. City of Austin, 22 SW 668 (Tex. 1893), the Supreme Court determined that the district judge who presided over the suit was indeed disqualified because he lived in and paid taxes to the City of Austin. The suit was brought by a property owner to enjoin collection of taxes and to cancel \$900,000 in bonds already issued. The injunction effectively prevented the tax levy. The Supreme Court said every holder of property not only has an interest but a direct pecuniary interest in the result. By living and paying taxes in Austin, the judge was disqualified.
- ◆ A judge who is a stockholder in a corporation is disqualified from hearing a case in which that corporation is a party – Pahl v. Whitt, 304 SW2d 250 (Tex. App. – El Paso 1957, no writ history)
- ◆ The employment of the judge’s wife by the defendant corporation was a direct pecuniary interest amounting to disqualification – Gulf Maritime Warehouse v. Towers, 858 SW2d 556 (Tex. App. – Beaumont 1993, denied);
- ◆ A trial judge’s entry in the lawsuit by filing an answer and seeking attorney fees against the party filing a recusal motion created a direct pecuniary interest sufficient to disqualify – Blanchard v. Krueger, 916 SW2d 15 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1995, no writ history)
- ◆ A trial judge whose pay was tied to the conviction rate in a drug impact court had a pecuniary interest and was disqualified – Sanchez v. State, 926 SW2d 391 (Tex. App. – El Paso 1996, Ref.)

NOT DISQUALIFIED

- ◆ City of Oak Cliff v. State, 79 SW 1068 (Tex. 1904), the annexation by the City of Dallas was to require the issuance of bonds and a resulting tax upon property within the city. The disqualification challenge was as to the Chief Justice who was a resident taxpayer in Dallas. Distinguishing the facts from Nalle v. City of Austin, the Court found no disqualification.
- ◆ The judge being a patron of the municipal water supply system involved in the litigation before the court does not establish a disqualifying interest – Hidalgo County Water Improvement District No. 2 v. Blalock, 301 SW2d 593 (Tex. 1957)
- ◆ Membership in the State Bar of Texas does not establish an “interest” disqualifying the judge – Alamo Title Co. v. San Antonio Bar Association, 360 SW2d 814 (Tex. App. – Waco 1962, Ref. n. r. e.)
- ◆ Campaign contributions, a challenge raised frequently, have been repeatedly held not to establish an interest in the suit – Rocha v. Ahmad, 662 SW2d 77 (Tex. App. - San Antonio 1983, no writ history); Metzger v. Sebek, 892 SW2d 20 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1994, denied); Degarmo v. State, 922 SW2d 256 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1996, Ref.)
- ◆ A judge is not disqualified because he is an alumnus of the university being sued even though he contributes monetarily to the athletic fund. A. H. Belo Corp. v. SMU, 734 SW2d 720 (Tex. App. – Dallas 1987, Denied)

## 2) “CONNECTED BY AFFINITY OR CONSANGUINITY”

## CONSANGUINITY

(a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. 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.

(b) 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 individual and the nearest common ancestor of the individual and the individual's relative; and
- (2) the number of generations between the relative and the nearest common ancestor.

(c) An individual's relatives within the third degree by consanguinity are the individual's:

- (1) parent or child (relatives in the first degree);
- (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and
- (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree). – Section 573.023 Government Code

## AFFINITY

(a) A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

(b) An individual's relatives within the third degree by affinity are:

- (1) anyone related by consanguinity to the individual's spouse in one of the ways named in Section 573.023(c); and
- (2) the spouse of anyone related to the individual by consanguinity in one of the ways named in Section 573.023(c). – Section 573.025 Government Code

An attorney may not appear before a judge or justice in a civil case if the attorney is related to the judge or justice by affinity or consanguinity within the first degree, as determined under Chapter 573 – Section 82.066 Government Code.

The first concern under relationship, particularly in modern litigation, is the identity of a “party” to the lawsuit. *Postal Mutual Indemnity Co. v. Ellis*, 169 SW2d 482 (Tex. 1943), was a worker’s compensation case in which the attorney for the plaintiff was the son of the presiding judge. The statute required the court to pass on and approve the fee to be paid to the attorney. The Supreme Court, finding the order void, said, “It appears to be settled that the word ‘party’ as used in the above statute [8306 V.A.C.S.], is not restricted to those who are named as parties in the pleadings, but that it includes all persons directly interested in the subject matter and result of the suit, regardless of any appearance of their names in the record.” (p. 484)

*Fry v. Tucker*, 202 SW2d 218 (Tex. 1947) was a complicated land title dispute involving many litigants and three separate suits tried jointly in a trial taking several weeks. The trial judge’s wife was the cousin to the wife of one of the parties. Reversing the judgment, the Supreme Court said that “disqualification by the rule prevents a judge from deciding any question affecting any person directly interested in the subject matter and result of the suit, regardless of the appearance or nonappearance of the persons named in the record.” (p. 222) The Court reasoned that



## 3) “FORMER COUNSEL”

## DISQUALIFIED

- ◆ Giving advice to one of the parties regarding the same subject matter of the litigation – Johnson v. Johnson 89 SW 1102 (Ct. Civ. App – 1905, no writ history)
- ◆ Judge who represented husband in divorce case was disqualified from sitting as judge in subsequent child custody case involving the same parties – Turner v. Chandler, 304 SW2nd 687 (Tex. App. – Texarkana 1957, no writ history)
- ◆ Writing title opinion regarding identical tract of land in dispute before court disqualifies judge - Williams v. Kirven, 532 SW2d 159 (Tex. App. - Austin 1976, Ref. n. r. e.)
- ◆ See also, In Re O'Connor, 92 SW3 446 (Tex. 2002) disqualifying judge in modification suit where judge’s former law partner had represented litigant in original divorce case.

NOT DISQUALIFIED

- ◆ Judge was not disqualified by reason of serving as counsel for one of the parties in an unrelated real estate transaction. Lade v. Keller, 615 SW2d 916 (Tex. App. – Tyler 1981, no writ history)
- ◆ A judge is not disqualified to preside in a criminal case where the judge was the prosecutor against the defendant in an earlier and different offense – Griffin v. State, 487 SW2d 81 (Tex. Crim. App. 1972); Madden v. State, 911 SW2d 236 (Tex. App. - Waco 1995, Ref.)
- ◆ Judge’s prior representation of defendant for a different offense did not disqualify her to preside over defendant’s trial for offense of escape – Cantu v. State, 802 SW2d 349 (Tex. App. – San Antonio 1990, Ref.)

**C. 1974 – to Present (The Emergence of Recusal)**

The judicial landscape began to change during the 1970’s. The nation saw a federal trial in which public criticism of the behavior of the trial judge in the courtroom was as great as that of the defendants. Texas elected a Justice to the Supreme Court who was subsequently convicted of lying to a grand jury. Public perception of the judiciary changed. U. S. News & World Report reported in March 1978 that “[a] broad attack on judicial misconduct and incompetence is developing in state capitols across the country.”<sup>4</sup>

In 1972, the American Bar Association promulgated and encouraged the adoption of its Model Code of Judicial Conduct and, in 1974, the Supreme Court of Texas followed the recommendation. Canon 3C(1) of the new code read as follows:

- C. DISQUALIFICATION. (ART. V, SEC. 11 TEXAS CONSTITUTION; ART. 15 V.A.T.S.; C.C.P. ART. 30.01)**
- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. including, but not limited to, instances where:**
- (a) he has a personal bias at prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;**
  - (b) he served as lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;**
  - (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to tile proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;**

<sup>4</sup> “Now, the States Crack Down on Bad Judges”, U.S. News & World Report, March 13, 1978

The new code, however, did not suffice to effectively address recusals because of the advisory nature of the canon. In a disbarment proceeding against an attorney, the Austin Court of Appeals said the canons were due utmost consideration but refused to accept the canons as binding on the Court, State v. Baker, 539 SW2d 367 (Tex. App. - Austin 1976, Ref. n. r. e.) In a recusal action against two appellate judges, the San Antonio Court of Appeals declined to elevate Canon 3C of the Code of Judicial Conduct to mandatory status, River Road Neighborhood Association v. South Texas Sports, Inc. 673 SW2d 952 (Tex. App. – San Antonio 1984, no writ history). And in Sun Exploration & Production Company v. Jackson, 729 SW2d 310 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1987, no writ history), the First Court of Appeals in Houston said, “As we understand Canon 3C, it provides that trial judges should recuse and disqualify themselves in the situation specified in the canon, but are not required to do so.” (p. 315)

But whatever calm seas judges may have enjoyed in the 1974 Code of Judicial Conduct, the winds changed dramatically in 1977 when the Texas Legislature amended Section 6 of Article 200a of the civil statutes to include a single sentence that was to greatly change Texas law. As passed by the Legislature the statute read:

**Section 1. Section 6, Chapter 156, Acts of the 40th Legislature, Regular Session, 1927 (Article 200a, Vernon's Texas Civil Statutes), is amended to read as follows:**

**"Sec. 6. It shall be the duty of any district judge of any district within the Administrative District to 'diligently discharge the administrative responsibilities of office, to rule on a case within three months after that case has been taken under advisement, to extend the regular terms of his court, and to call special terms, when necessary to carry out the purposes of this Act and dispose of pending litigation. It shall also be the duty of a district judge in whose court an election contest or suit brought for the removal of a local official is filed to request the Presiding Judge of the Administrative Judicial District to assign a judge of the Administrative District who is not a resident of the county to hold a special or regular term of court in that county in order to dispose of such suits. A district judge shall request the Presiding Judge to assign a judge of the Administrative District to hear any motions to recuse such district judge from a case pending in his court. If the term be extended as herein provided no other term of the court in such district shall fail because of said extension, but such other terms may be opened and held as usual. The Presiding Judge of one Administrative District may call upon the Presiding Judge of another Administrative District to furnish judges to aid in the disposition of litigation pending in any judicial district within the Administrative District in which such judge so making the request has been designated as the Presiding Judge. For the trial of cases and the entry of orders and the disposition of other business necessary, the judge of any district in this State, or any District Judge sent to any district in this State by the Presiding Judge of an Administrative District, shall have power, by entering an order on the minutes, to convene a special term of the court for the disposition of the business coming before the district court."**

Following this break from tradition, the Supreme Court considered the new statute in McLeod v. Harris, 582 SW2d 772 (Tex. 1979), a divorce case out of Galveston between Erle Douglas McLeod and Sara Helms McLeod in which Mr. McLeod filed a recusal motion against Judge Harris because of 1) the close personal relationship between Mrs. McLeod and Judge Harris and 2) political differences between Mr. McLeod and the judge. Judge Harris conducted a hearing and entered an order denying the motion. In this landmark opinion, the Supreme Court reversed the case, stating that under the new statute Judge Harris had a mandatory duty to request the Presiding Judge to assign another district judge to hear the motion to recuse.

This dramatic departure from more than a century of state jurisprudence did not come about without criticism. A year after the McLeod decision, the El Paso Court of Appeals considered the identical issue in Robb v. Robb, 605 SW2d 390 (Tex. App. - El Paso 1980, no writ history), also a divorce case in which the wife raised the issue of recusal after the trial in a motion for new trial, alleging political differences between the trial judge and Mrs. Robb's attorney. After an uncomplimentary reference to the legislative means of adopting the recusal provision of Article 200a, the Court pointed out that the statute had no guidelines, no form or content limitations but, nevertheless, the Court was bound to follow the Supreme Court's decision in McLeod. Although remanding the Robb case to the trial court, the Court of Appeals, expressed concern that, by Article 200a, trials “will be encumbered by the daisy-chain, or ripple effect phenomenon occasioned by the filing of multiple recusal motions.” (p.391)

Outlining the course of action to be followed under the code and statute, in 1981 the Supreme Court adopted Rule 18a as a rule of civil procedure, setting forth the procedures and time limits for the filing of disqualification or recusal motions. The rule has been expanded several times since its inception. The 1984 amendment made clear that

the procedure applied only at the trial level and not appellate courts of civil jurisdiction. The 1986 amendment added the Court of Criminal Appeals to the excluded courts. In 1988 the rule was changed to require verification of the motion by specific allegations of fact, deleted the reference to Article 200a – 1 and added subdivision (h) providing for sanctions.

The development of Rule 18a, like Article 200a, has not been free of criticism. Former Chief Justice Robert Calvert expressed grave concern that the combination of Canon 3C and Rule 18a would substantially increase the filings of motions on allegations of bias or prejudice with new motions and new judges assigned to hear them ad infinitum. He said, “Apparently, the century – old line of cases firmly establishing that the constitutional grounds of disqualification were both ‘inclusive and exclusive’ were wiped out in favor of an undefined category of disqualification included in the phrase “Any disability of the judge”.”<sup>5</sup> In an article entitled “Who Determines Judicial Disqualification”, Elmo Schwab, counsel for Mrs. McLeod in McLeod v. Harris wrote “[if] bias and prejudice become good grounds for recusal, then there are virtually no limits on counsel’s ingenuity in conjuring up same.”<sup>6</sup> In 1985 the Legislature repealed Article 200a allowing Rule 18a and the Code of Judicial Conduct to operate in tandem. That was followed in 1988 by the adoption of Rule 18b detailing grounds for disqualification and recusal.

With the advent of recusal in 1974, Texas judges observed the rule evolve through a combination of ethical canons, statutory requirements and court rules. The Fifth Circuit, in Neal v. Brim, 506 F. 2d 6 (5<sup>th</sup> Cir. 1975) abstained from granting injunctive relief to a state district attorney against a state district judge. Although declining to decide the recusal in deference to state court machinery, the Court noted that the grounds for “disqualification” had been extended.

Did recusal amend the state constitution? Justice Calvert feared so and in commenting on the phrase “any disability of the judge to sit in the case”, Sam Sparks said, “Such a requirement appears to enlarge the permissible scope for removal by the assigned judge beyond any constitutional grounds and/or the Code of Judicial Conduct.”<sup>7</sup>

Proponents of the recusal rule quickly pointed out that disqualification and recusal were entirely different concepts. It is true that disqualification and recusal are different concepts. But, despite legal differences, courts and statutes continue to use the terms interchangeably as if they were identical. Debate over the differences is academic. The practical effect on Texas law has been a broad expansion of the means of removing presiding judges from lawsuits.

## II. RECUSAL PROCEEDINGS

A Texas recusal proceeding is truly unique. The target of a contested court proceeding will not likely be present, will not be represented by counsel and will not speak on his or her own behalf. In fact, by merely seeking a role in the proceeding the judge may establish a basis for recusal, see Blanchard v. Krueger 916 SW2d 15 (Tex. App. – Houston [1<sup>st</sup> District] 1995, no writ history), holding that by hiring an attorney to resist the recusal motion and seeking attorney fees, the judge established a pecuniary interest in the case justifying disqualification. Judges are admonished to avoid any participation in recusal proceedings against them. Justice Hecht said, “The less a judge is involved in recusal proceedings, voluntarily or involuntarily, the better,” In Re Union Pacific Resources Co., 969 SW2d 427, 429 (Tex. 1998). Adding to the unusual nature of recusal is the practical consideration which is due from the opposing side resisting the motion. Recusal defense is not advocacy as it is routinely presented in Texas Courts. Caution must be exercised to avoid the appearance that the vigorous defense may be an indication of favoritism by the challenged judge, i.e. the defending side must keep the challenged judge on the case at all costs. Against that backdrop, the current standard for recusal in Texas is important.

### A. The Standards for Recusal

#### RULE NO. 1 – The Extrajudicial Source Rule

Rule 18b(2)(b), T.R.C.P. provides for recusal when a judge has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge or disputed evidentiary facts concerning the proceeding.

The law provides an appellate remedy for improper court rulings but little assistance for the black robed curmudgeon. No litigant is entitled to the perfect judge. Indeed, part of the trial lawyer’s skill is dealing wisely with

<sup>5</sup> “Disqualification of Judges”, Robert W. Calvert, 47 Texas Bar Journal 1330, (1984),

<sup>6</sup> “Who Determines Judicial Disqualification?”, Elmo Schwab, 43 Texas Bar Journal 197, (March 1980)

<sup>7</sup> “Rule 18a – Substance or Procedure, Sam Sparks, 12 St. Mary’s Law Journal 723 (1981)

the hard to please judge. Tyranny exists at every level of society and abounds within the legal profession – Rambo lawyers sometimes become Rambo judges, but a flawed personality is not the basis for recusal. With some notable exceptions, the things a judge does or says in the courtroom cannot be used as grounds for recusal. Instead the basis must rest on the extrajudicial source, something judges do or say apart from court rulings that underscores a prejudice against one side of the case.

For many years the source for recusal based on bias, prejudice or partiality has been extrajudicial conduct or statements of the judge. In U. S. v. Grinnell Corporation, 86 S. Ct. 1698 (1966), the Court said, “The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” (p. 1710) In Stein v. Frank, 575 SW2d 399 (Tex. App. – Dallas 1978, no writ history), a pro se litigant filed a motion to have appellate judges disqualify themselves as biased because they had decided a prior case against her. In denying the motion, the court emphasized that rulings by the court within the litigation process do not establish grounds for removal, “This fact, even if true, does not show bias . . .” (p. 401) Later, the same appellate court, in Grider v. Boston Co., Inc., 773 SW2d 338 (Tex. App. – Dallas 1989, Denied), “To require recusal, a judge’s bias must be extra judicial and not based upon in-court rulings . . . Plaintiff’s motion properly failed because it contained not allegations of personal bias from an extra judicial source.

The U. S. Supreme Court delivered a definitive opinion on the extra judicial source rule in Liteky v. U. S., 114 S. Ct. 1147 (1994). In that case, a motion for recusal was filed alleging that the trial judge displayed “impatience, disregard for the defense and animosity.” Four significant points are presented in the opinion:

- 1) “Impartiality is not gullibility” (p. 1155)
- 2) “Judicial rulings alone almost never constitute valid basis for a bias or partiality motion.” (p. 1157)
- 3) Legally incorrect rulings are properly addressed by appeal, not by recusal. (p. 1157)
- 4) Judicial rulings, routine trial administration efforts, and ordinary admonishments are immune unless (a) they are based on knowledge acquired outside judicial proceedings or (b) display a deep-seated and unequivocal antagonism that renders fair judgment impossible. (p. 1158)

“ . . . the party must show that the bias arose from an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless these actions during proceedings indicate a high degree of favoritism or antagonism that renders fair judgment impossible, In Re M.C.M., 57 SW3d 27 (Tex. App. – Houston [1<sup>st</sup> District] 2001, no writ history. However, the line of demarcation between judicial rulings and extra judicial source is not always clear. In Norton v. State, 755 SW2d 522 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1988, p.d.r. refused, 771 SW2d 560) the trial judge, after a motion to suppress a confession in a presentence investigation but before trial on the merits, rejected a proposed plea agreement for deferred adjudication and said, “. . . and if the jury gives her probation, I’ll give her jail time.” Before trial the Defendant’s motion to recuse was heard and denied by an assigned judge. After the jury found the Defendant guilty and granted probation, the original trial judge, true to his statement, ordered 20 days in jail as a condition of probation, even though the State made no request for it. Reversing the conviction for a new trial, the Court of Appeals said, “The trial court’s statements that he would give appellant jail time, regardless of the jury’s assessment, was an arbitrary refusal to consider the entire range of punishment and constituted a denial of due process.”

More recently, in DeLeon v. Aguilar, 127 SW3d,1 (Tex. Crim. App. 2004) the Court of Criminal Appeals granted mandamus relief to a movant in a recusal motion because the record established bias of a judge against the lawyers as a matter of law, based on remarks made off the bench by the judge against the lawyers, and the judge had been previously ordered recused in another case for bias against the same lawyer.

## RULE NO. 2 – The Reasonable Person Standard

Rule 18b(2)(a) T.R.C.P. sets a recusal standard when the judge’s impartiality might reasonably be questioned.

In Potashnick v. Port City Construction Co., 609 F. 2d 1101, (5<sup>th</sup> Circuit, 1980) the Fifth Circuit considered a case in which the trial judge’s father was a senior partner in a law firm representing one of the parties. Additionally, one of the other partners had ongoing business dealings with the judge. The Court reasoned that the overriding concern with the appearance of propriety stems from a need for unwavering confidence by the public in an unimpeachable judiciary. Ordering recusal, the Court stated “a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street.” (id. p. 1111)

In Aguilar v. Anderson, 855 SW2d 799 (Tex. App. - El Paso 1993, Denied), a recusal motion was filed against the presiding judge based on the judge's solicitation and acceptance of a campaign contribution from an attorney appearing on behalf of the opposing side. The court upheld the decision denying recusal, citing the dilemma that would exist if judges could not sit in cases involving contributing attorneys. The concurrence drew from Kansas law holdings that the standard must be whether "a reasonable person on the street – not the judge, the litigant or his attorney – would question the judge's impartiality . . . in states which elect judges, the 'reasonable' person must know that judges have to stand for election on a regular basis, that elections cost money . . . and that in judicial races most contributions are made by practicing attorneys." (pp. 804-805)

"Recusal is appropriate if the movant has provided enough facts to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial court, but only when the bias is of such a nature and extent as to deny the movant due process of law", Rosas v. State, 76 SW3d 771 (Tex. App. – Houston [1<sup>st</sup> District] 2002, no writ history).

## B. Rejected Standards

Inventive advocacy has frequently fallen short in efforts to devise new ways for removal of a judge.

### 1. Violation of Judicial Code of Conduct

Conduct violative of the judicial canons is not a per se basis for recusal. Shapley v. Texas Department of Human Resources, 581 SW2d 250 (Tex. App. - El Paso 1979, no writ history), is a good example of injudicious remarks stemming from evidence adduced in court. This was an appeal of a judgment terminating the parent-child relationship in which the trial judge, after the first hearing, (1) requested the D.A. investigate the case for criminal prosecution and (2) discussed the pending case with newspaper reporters, expressing statements of fact that were not reflected by any evidence. Newspaper articles then appeared about the case and the mother (respondent) filed to disqualify the trial judge under Art. V, Section 11 Tex. Const. because his statements effectively "put himself in the position as counsel . . ." and additionally because the judge's actions reflected bias to such an extent as to foreclose her right to a fair trial. The Court of Appeals reversed and remanded the judgment on Appellant's factual insufficiency but overruled the challenge to the trial judge. Even though rebuking him for inappropriate conduct, the Court of Appeals said, "The problem here presented is that the trial judge, after the proceedings had started, gave public vent to a bias and prejudice which he had acquired from hearing the evidence and seeing the exhibits introduced into evidence and not from any independent knowledge of the events . . . unethical conduct, however, is not necessarily a legal ground for reversal . . ." (id. p. 253)

### 2. Suing the Judge

"A party cannot create a constitutional disqualification by filing suit against the judge", Spigener v. Wallis, 80 SW3d 174, 179 (Tex. App. – Waco 2002, no writ); In Re Lincoln, 114 SW3d 724, 727 (Tex. App. – Austin 2003, no writ).

## C. Applying the Rules

An attorney presenting a recusal challenge or defending against a challenge must understand that the rules are strict.

### 1. No default judgment on recusal

Owing to the unique nature of recusal proceedings, there can be no default judgment if no written response is filed. In fact, the challenged judge's referral of the motion to the Administrative Judge constitutes the joining of the issue. There is no confession of pleadings and the judge assigned to hear the motion is required to decide from evidence presented whether the standard has been met.

### 2. No agreed order of recusal

Just as no default order applies in recusal, there is not agreed order of recusal by both sides. If so, the two out of state corporations could effectively recuse an entire appellate court. Texas judges are frequently called on to require supporting evidence despite an agreement of the parties. Recusal is such a proceeding.

### 3. No testimony from the challenged judge

The mental process of the judiciary has long been protected from interrogation, U. S. v. Morgan, 61 S. Ct. 999 (1941), such examination found to be destructive of judicial responsibility and an interruption of the proper functioning of the courts, Gary W. v. State of Louisiana, Department of Health and Human Resources, 861 F. 2d 1366, 1369 (Fifth Circuit, 1988).

Unless (1) the threshold for that testimony has been met and (2) evidence is not available from any source other than the judge's testimony, judge may not be called as an adverse witness. Tate v. State, 834 SW2d 566 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1992, Ref.), was a criminal case in which the assigned judge was challenged in the defendant's motion for new trial. The defendant's attorney testified at the hearing to matters he contended prejudiced the judge against the full range of punishment and then attempted to call the trial judge as a witness. The recusal judge presiding at the motion for new trial, quashed the defendant's subpoena for the trial judge and refused to allow the defendant to call the judge to testify without a threshold showing of improper conduct. Finding no error in the ruling, the Court of Appeals said, "An exemption from compulsory testimony must necessarily exist for certain government officials to protect the integrity and individual responsibility of governmental officials whose duties involve the exercise of judicial . . . authority." (id. p. 570)

That threshold is met only when the movant presents evidence that prejudice or impartiality emanates from an extra-judicial source. Thomas v. Walker, 860 SW2d 579 (Tex. App. – Waco 1993, no writ history) defines the threshold and the reason it remains an important standard in recusal proceedings. This case began with a post divorce turn over order application, scheduled to be heard before the same judge who presided over the original divorce proceedings. The ex-husband's recusal motion was assigned to Judge David Walker who quashed the relator's subpoenas for the presiding judge and his wife.

The court made three important findings. First, the court pointed out that the "mental processes rule" affords strong protection against subjecting judges to explain the reasoning behind every decision except in the "most extreme and extraordinary circumstances." Secondly, the court said, "absent a threshold showing of improper conduct by a judge, an inquiry into his mental processes in arriving at his decision would be improper and would threaten the foundation of an honorable and independent judiciary." (id. p. 582) Finally, the court pointed out that the information relator wanted involved facts that could have been substantiated in ways other than the direct examination of the judge and his wife.

In Re Union Pacific, 969 SW2d 427 (Tex. 1998) was an unusual mandamus action challenging the mandamus order from the Corpus Christi Court of Appeals. In the underlying recusal hearing at the trial level, the challenged judge called himself as a witness, offered exhibits and presented oral argument. The Supreme Court directed the Court of Appeals to withdraw its order because Rule 18a(f) provides an adequate appellate remedy. In a concurring opinion, Justice Hecht aptly pointed out that "[j]udges should not inject themselves too far into recusal hearings . . . a hearing on a motion to recuse is simply not a trial of the judge's character and should not be treated as such. The less a judge is involved in recusal proceedings, voluntarily or involuntarily, the better." (p. 429)

### III. STATUTORY RECUSAL

The third method of removal under Texas law is the statutory challenge applicable to certain judges sitting by assignment and outlined in the Court Administration Act, Chapter 74 Government Code. Any active, retired or former judge may be assigned to hear a case under Section 74.054. Until September of 2003, a timely objection to the assigned judge rendered recusal automatic, Section 74.053, however the Legislature made substantial changes in the Act.

- A written objection must be filed no later than seven days after receipt of the notice of assignment, or seven days before the first hearing, whichever date occurs earlier
- Each side of the law suit is entitled to one objection
- Active judges are not subject to the statutory objection
- A defeated judge may not sit in a case if objection is raised
- If the objection is timely, the recusal is automatic, In Re Canales, 52 SW3d 698 (Tex. 2001)
- An objection filed the same day as trial but after the case was called for trial is untimely. Thompson v. State Bar of Texas, 728 SW2d 854 (Tex. App. – Dallas 1987 no writ history)
- Any orders made by an assigned judge after a timely objection is filed are void. In Re Union Pacific Resources Co., 969 SW2d 427 (Tex 1998)

### CONCLUSION

The trial advocate contemplating a recusal motion should bear in mind two principles, one legal and one practical. Recusal is not a tactical trial weapon to be used as a strategic ploy. It is designed to be available against a judge who should not be presiding over a particular case for reasons shown in Rule 18b, T.R.C.P. Finally, the trial advocate, before filing a recusal motion, should consider the practical value of requesting an in chambers discussion with opposing counsel and the judge. If the judge is subject to recusal, a polite suggestion to the judge and opposing

counsel can often bring a voluntary recusal order without a formal motion and hearing, helping to maintain an appropriate professional relationship between the lawyer and the judge.

John Hyde