Rule 18a as presented and discussed
at September 25 SCAC meeting
with suggested changes
[October 31, 2009 strikeout version]

Rule 18a. Procedure for Recusal and Disqualification of Judges.

(a) Filing and Contents of Motion. At least ten days before the date set for trial or other hearing in any trial court, any party may file a motion stating one or more of the grounds specified in rule 18b why the judge before whom the case is pending should not sit in the case. If the judge was assigned to the case*, or the movant learned of the grounds,* within ten days of the date set for trial or other hearing, the motion must be filed at the earliest practicable time. The motion must be verified and must state with detail and particularity ~~the reasons why the judge should not sit,~~ *facts that, if proven, would be sufficient to justify recusal.* The judge's rulings *in the case* may not be a basis for the motion *unless they show a deep-seated favoritism or antagonism that would make fair judgment impossible.* The motion must be made on personal knowledge and must set forth facts that would be admissible in evidence, provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) ~~Notice.~~ *Service of Motion.* On the day the motion is filed, ~~copies shall be served on the judge~~ *the movant must send copies to the judge, the presiding judge of the administrative judicial region ("presiding judge"),* and all other parties. ~~or their counsel of record.~~ Any other party may file an opposing or concurring statement at any time before the motion is heard.

(c) ~~Voluntary Recusal~~. *Duties of Respondent Judge.* ~~Prior to any further proceedings in the case,~~ The judge must, *within three days after the motion is filed,* either recuse voluntarily or request the presiding judge ~~of the administrative judicial region ("presiding judge")~~ to assign a judge to hear the motion, *even if the motion does not comply with section (a). The judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.*

If the judge recuses voluntarily, the judge must enter an order of recusal and request the presiding judge to assign another judge to sit.~~, and must take no further action in the case except for good cause stated in writing or on the record.~~

~~(d) Referral to Presiding Judge.~~ If the judge declines to recuse voluntarily, the judge must forward to the presiding judge an order of referral and copies of the motion and all opposing and concurring statements. ~~Except for good cause stated in writing or on the record, the judge must take no further action in the case until the motion has been heard.~~ *If the judge fails to send to the presiding judge within three days an order either recusing voluntarily or declining to recuse, the movant may notify the presiding judge of this failure.*

Notwithstanding the other provisions in this rule, the judge may disregard any motion that is made after a trial or hearing has begun, but such a motion may be presented to the presiding judge with

a request for stay.

(d) Hearing.

(1) If the motion does not comply with subsection (a), ~~or is otherwise legally insufficient,~~ the presiding judge *or the judge assigned to hear the motion* may deny it, without ~~a~~ *an oral* hearing, *by written order stating the reasons why the motion does not comply.*

(2) If the motion complies with subsection (a), ~~and is legally sufficient,~~ the presiding judge may hear the motion or assign another judge to hear it, and must cause notice of such hearing to be given to all parties ~~or their counsel~~ and make such other orders, including orders on interim or ancillary relief in the pending cause, as justice may require.

(3) The judge who hears the motion:

(a) must hear it as soon as practicable, and may hear it immediately, and

(b) may conduct the hearing by telephone on the record and may consider *documents submitted by* facsimile or electronic *mail* ~~copies of documents as permitted by~~ *which are admissible under* the rules of evidence.

(4) A presiding judge *who hears a recusal motion* is not subject to objection under chapter 74 of the Government Code, and a motion to recuse a presiding judge has no effect *and may be disregarded*, except by order of the Chief Justice of the Supreme Court.

(5) If the motion is granted, the presiding judge must assign another judge to the case.

(e) Subpoena of Judge. *No subpoena or other discovery may issue to the respondent judge without the prior written approval of presiding judge or the judge assigned to hear the motion. Any subpoena or discovery request made in violation of this paragraph may be disregarded.*

(f) Sanctions. If the judge hearing the motion to recuse determines that it was frivolous, as defined ~~by~~ *in* Rule 13, or was brought for delay and without sufficient cause, the judge may ~~impose any sanction authorized by Rule 215.2(b)~~, *after notice and hearing, order the party or attorney who filed the motion, or both, to pay the reasonable attorneys' fees and expenses incurred by the party opposing the motion.*

(g) Assignment by Chief Justice. The Chief Justice of the Supreme Court may also assign judges and make rulings *in conformity with this rule and* pursuant to statute.

(h) Appellate Review. An order denying a motion to recuse ~~or disqualify~~ may be reviewed *only* for abuse of discretion on appeal from the final judgment. An order granting a motion is not reviewable by appeal, mandamus, or otherwise.

(i) Disqualification. *Paragraphs (a) through (g) of this rule apply to motions seeking disqualification under Rule 18b(1), but disqualification is not waived by failure to comply with time limits, and appellate review of disqualification is governed by other rules.*

COMMENTS

Note: In the interest of style, "shall" has been changed to "must" throughout.

Lines 11-13: The ten-day rule is relaxed in two situations: (1) when the judge was assigned to the case within ten days of the hearing and (2) when the movant actually learned of the grounds supporting the motion within ten days. The rule's reference (on lines 11-12) to a *judge* being assigned to the *case* is meant also to encompass *cases* being assigned to a *judge*, and cases in multi-judge districts where Rule 330 authorizes judges to transfer cases and exchange benches without formal order.

Lines 14-15: A motion must provide factual details because mere allegations of unfairness (or that the judge's impartiality might reasonably be questioned) should not be sufficient to require a hearing. To require a hearing, the grounds alleged in the motion must rise to a certain level of sufficiency. Under subsection (d)(1) either the presiding judge or the judge assigned to hear the recusal motion may deny the motion without a hearing if the grounds alleged would not, if proven, support recusal.

Lines 15-17: This sentence implements the rule that a judge's bias must be extrajudicial and not based on in-court rulings, but if the adverse rulings rise to the level of "deep-seated favoritism or antagonism," the rule allows the presiding judge to schedule a hearing to assess the evidence. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 270-71 (Tex. App.—Houston (14th Dist.) 1997, no pet.); *Grider v. Boston Co., Inc.,* 773 S.W.2d 338, 346 (Tex. App.—Dallas 1989, writ denied). The extrajudicial source rule was summarized as follows in *Woodruff v. Wright*, 51 S.W.3d 727, 736 n.6 (Tex. App.—Texarkana 2001, pet. denied):

> [T]he United States Supreme Court discussed the "extrajudicial source" doctrine in *Liteky v. United States*, 510 U.S. 540, 554-56 (1994). . . . Although the Court was construing the federal disqualification rule, it contains essentially the same language as Rule 18b. The Court stated that opinions formed by the judge on the basis of facts introduced or events occurring during proceedings do not constitute a basis for a recusal motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. . . . Thus, the Supreme Court reasoned that judicial remarks during the course of a trial that are critical or disapproving or even hostile to counsel, parties, or their cases, ordinarily do not support recusal, but they may do so if they reveal an opinion deriving from an extrajudicial source and will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

8Complaints about a judge's rulings in the case are not sufficient by themselves to trigger the right to a hearing. But when sufficient other grounds have been alleged, the judge who hears a recusal motion may admit evidence of the judge's rulings and consider those rulings in deciding whether to grant the motion.

Lines 22-23: The movant must provide a copy to the presiding judge, who may be expected to ask questions if the respondent judge holds the motion instead of forwarding it with an order of voluntary recusal or referral for hearing. Copies are to be sent, not served.

Lines 26-46: Respondent judges are expressly told that they cannot deny a motion that fails to comply with section (a) (e.g., untimely, unsworn, no details, or adverse rulings only). Respondent judges must, within three days, either recuse voluntarily or refer the motion for hearing. An exception is made for motions filed after the trial or hearing has begun.

Lines 29-31: This language was moved from lines 39-40 and reworded.

Lines 50-52: The regional presiding judge and the assigned judge (not the respondent judge) are empowered to deny, without a hearing, motions that do not comply with section (a) (untimely, unsworn, no details, or adverse rulings only). They may, however, disregard motions filed after the trial or hearing has begun. When the presiding judge or assigned judge denies a motion without an oral hearing, the order of denial must specify how the motion did not comply with section (a).

Line 61: This language encourages prompt hearings and allows the presiding judge or the assigned judge to hear the motion instanter.

Lines 63-65: Telephone/fax/e-mail hearings are sometimes the most efficient approach, especially in rural counties. The new language would expressly authorize them.

Lines 67-69: (1) The language makes explicit the current rule that the objection procedure of Government Code chapter 74 does not apply because a presiding judge hears recusal motions pursuant to rule 18a, not by a chapter 74 assignment. *See In re Flores*, 53 S.W.3d 428 (Tex. App.—San Antonio 2001, orig. proceeding). (2) Under current law, even a frivolous motion to recuse a presiding judge stops the whole recusal process until the Chief Justice can act. This allows a de facto continuance. The new language will allow the presiding judge to go ahead and hear the underlying motion to recuse the sitting judge. A movant who is serious about recusing the presiding judge from hearing the motion must persuade the Chief Justice to intervene.

Lines 73-75: Subpoenaes and other discovery directed to the respondent judge are forbidden, unless the presiding judge or the judge assigned to hear the motion gives approval beforehand. Paragraph (f) would not prevent discovery from third parties.

Lines 77-81: The existing sanctions provisions are essentially toothless: they require a motion for sanctions *and* proof that the motion was brought *solely* for delay. The new language relaxes the

sanctions standard and allows the judge who hears the motion to grant sanctions sua sponte. The language requires notice and hearing and limits the available sanctions to attorneys' fees and expenses.

Lines 86-88: No change was made in the mandamus/appeal provisions because the committee did not reach consensus on these issues.

Lines 90-92: Though disqualification cannot be waived, a movant should not be able to avoid these procedures by labeling the motion as one to disqualify. And because the actions of a disqualified judge are void, litigants should be able to assert in the appellate courts that a judge is disqualified and any orders issued by the judge are void.