

Rule 18a with suggested changes
[January 2010 clean 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 facts that, if proven, would be sufficient to justify recusal. The judge's rulings in the case alone may not be a basis for the motion. 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) Service of Motion. On the day the motion is filed, the movant must deliver a copy to the judge's office and send copies to the presiding judge of the administrative judicial region ("presiding judge") and all other parties. Any other party may file an opposing or concurring statement at any time before the motion is heard.

(c) Duties of Respondent Judge. The judge must, within three business days after receiving the motion, either recuse voluntarily or request the 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. 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. 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, when a motion is made after a case has been called for trial, the judge may proceed with the trial, 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), the presiding judge or the judge assigned to hear the motion may deny it, without an oral hearing, by written order stating the reasons why the motion does not comply.

(2) If the motion complies with subsection (a), 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 and

46 make such other orders, including orders on interim or ancillary relief in the pending cause, as justice
47 may require.

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49 (3) The judge who hears the motion:

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

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53 (b) may conduct the hearing by telephone on the record and may consider documents
54 submitted by facsimile or electronic mail which are admissible under the rules of
55 evidence.

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57 (4) [Two alternatives:]

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59 [a] A presiding judge who hears a recusal motion is not subject to recusal under this
60 rule or to objection under chapter 74 of the Government Code.

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62 [b] A presiding judge who hears a recusal motion is not subject to objection under
63 chapter 74 of the Government Code, and a motion to recuse a presiding judge has no
64 effect and may be disregarded, except by order of the Chief Justice of the Supreme
65 Court.

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

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

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73 **(f) Sanctions.** If, after notice and hearing, the judge hearing the motion to recuse determines that
74 it was frivolous, as defined in Rule 13, or was brought for delay and without sufficient cause, the
75 judge may (1) order the party or attorney who filed the motion, or both, to pay the reasonable
76 attorneys' fees and expenses incurred by other parties, and (2) enjoin the movant from filing other
77 recusal motions in the case without the presiding judge's prior written consent.

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

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

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

COMMENTS

Lines 9-11: The ten-day deadline for filing 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 9-10) to a *judge* being assigned to the *case* is meant also to encompass *cases* being assigned to a *judge*, and also to cases in multi-judge districts where Government Code § 24.303 and Rule 330 authorize judges to transfer cases and exchange benches without formal order.

Lines 11-12: This sentence contains two important elements. First, a motion must provide factual details because mere general allegations of unfairness (or that the judge's impartiality might reasonably be questioned) should not be sufficient to require a hearing. Second, to require a hearing the grounds alleged in the motion must rise to a certain level of sufficiency. Under subsection (d)(1) 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 12-13: Complaints about a judge's rulings in the case are not sufficient by themselves to trigger the right to a hearing. Two distinctions should be noted. First, this does not mean that evidence about rulings would be inadmissible at the recusal hearing. On the contrary, when sufficient other grounds have been alleged and a hearing is required, the judge who hears a recusal motion may admit evidence of the judge's rulings and may consider those rulings in deciding whether to grant the motion. Second, the term "rulings" is not meant to include the judge's remarks and statements in the case. That is, a judge's remarks (but not the judge's rulings) could constitute factual details in support of an allegation that the judge's impartiality might reasonably be questioned.

The previous draft said, "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 consensus at the November meeting was to eliminate the italicized language because it created more problems than it solved.

Lines 17-20: The movant must hand-deliver a copy of the motion to the judge's office, which should help ensure that the judge actually knows about it. Delivery by facsimile should also be permitted lawyers often practice in several counties, especially in rural areas. The movant must also send a copy to the presiding judge, who can be expected to ask questions if the respondent judge holds the motion instead of forwarding it with either an order of voluntary recusal or referral for hearing.

Lines 22-25: 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 business days, either recuse voluntarily or refer the motion for hearing. An exception is made in the third paragraph of section (c) for motions filed after trial has begun.

Lines 40-42: 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). When the presiding judge or the assigned judge denies a motion without an oral hearing, the order of denial must specify how the motion did not comply with section (a). This will allow the movant to refile, if the defects are curable.

Line 51: This language encourages prompt hearings and allows the presiding judge or the assigned judge to hear the motion *instanter*.

Lines 53-55: Telephone/fax/e-mail hearings are sometimes the most efficient approach, especially in rural counties. The new language expressly authorizes them.

Lines 57-65: Two alternatives are given. (1) *Objection*. The language of both alternatives 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) *Recusal*. 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. Each alternative allows the presiding judge to go ahead and hear the underlying motion to recuse the sitting judge. Alternative [b] allows a movant who is serious about recusing the presiding judge from hearing the motion to try to persuade the Chief Justice to intervene, pursuant to the authority mentioned in section (g).

Lines 69-71: 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. A litigant may seek the presiding judge's approval by submitting a written request specifying the discovery needed, which the judge may decide with or without a hearing. Paragraph (e) would not prevent discovery from third parties.

Lines 73-77: 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 and also an order prohibiting the movant from filing additional recusal motions without the presiding judge's prior written consent.

Lines 86-88: The procedures of this rule should govern both motions to recuse and motions to disqualify, with two exceptions. First, because disqualification cannot be waived, a disqualification motion is timely even if it is filed within ten days of the trial or hearing. Second, because the actions of a disqualified judge are void, the usual rules of appellate review should apply when a litigant asserts that a judge is disqualified.