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Judicial Recusal: Rule 18a - Substance or Procedure 1981 Rules of Civil Procedure: Content and Comments.

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JUDICIAL RECUSAL: RULE 18a—SUBSTANCE OR PROCEDURE

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I. INTRODUCTION

In the last few years the controversial legal question of disqualification or recusal of a trial judge to preside over a particular case has received greater attention in both the trial and appellate courts.[1] A review of these cases indicates the majority of motions for disqualification of the trial judge occur in family law cases;[2] however, this problem has spread to the entire docket of our trial courts.[3] To clarify the rule for both bench and bar, as well as provide a procedure for the judiciary, the Texas Supreme Court en-

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1. *See, e.g.*, McLeod v. Harris, 582 S.W.2d 772, 774 (Tex. 1979); Wiegand v. Wiegand, 606 S.W.2d 352, 354 (Tex. Civ. App.—San Antonio 1980, no writ); Robb v. Robb, 605 S.W.2d 390, 391 (Tex. Civ. App.—El Paso 1980, no writ). *See generally* Figari, *Texas Civil Procedure*, 34 Sw. L.J. 415, 449 (1980).

2. *See, e.g.*, Wiegand v. Wiegand, 606 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1980, no writ) (divorce proceeding appeal); Robb v. Robb, 605 S.W.2d 390, 391 (Tex. Civ. App.—El Paso 1980, no writ) (award of child support); Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250, 251 (Tex. Civ. App.—El Paso 1979, no writ) (termination of parental rights).

3. *See, e.g.*, Cameron v. Greenhill, 582 S.W.2d 775, 776 (Tex. 1979) (state bar fee challenge); Sullivan v. Berliner, 568 S.W.2d 844, 844-45 (Tex. 1978) (removal of a sheriff); The Soc'y Of Separationists, Inc. v. Strobel, 593 S.W.2d 855, 856 (Tex. Civ. App.—Austin 1980, no writ) (slander action).

acted Rule 18a of the Texas Rules of Civil Procedure.[4] This new rule details a procedure for the determination of disqualification or recusal of a *district* court judge in a *civil* case.[5]

II. CONSTITUTIONAL GROUNDS FOR RECUSAL

To analyze the significance of this new rule, it is necessary to

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4. *See* TEX. R. CIV. P. 18a. *See generally* Soules, *Rule 18a Recusal or Disqualification of Trial Judge*, 43 TEX. B.J. 1005, 1009 (1980).

5. *See* TEX. R. CIV. P. 18a. The rule reads as follows:

Rule 18a. Recusal or Disqualification of Trial Judge

(a) At least ten days before the date set for trial or other hearing in district court, any party may file with the clerk a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to Article 200a.

Id.

review the law regarding disqualification of judges.[6] Under the common law, the requisite for disqualification of a judge was clear, as the exclusive basis for recusal was direct pecuniary interest.[7]

Historically, all Texas state constitutions since 1845 have expressly limited the grounds for the disqualification of judges.[8] Since 1891, article V, section 11 of the present constitution specifically enumerates the only grounds for disqualification.[9] The constitution mandates that no judge shall hear a case when the judge is related in blood to one of the parties,[10] when he has previously served as legal counsel to a party in the same case,[11] or, in the

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6. Disqualification of a judge is discussed both within the constitution and statutes as well as the new rules. *See* TEX. CONST. art. V, § 11; TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1969); TEX. CODE CRIM. PRO. ANN. art. 30.01 (Vernon 1966); The Code of Judicial Conduct, Canon 3(c) TEX. REV. CIV. STAT. art. 320-a, tit. 14, app. B (Vernon Supp. 1980-1981).

7. *See* TEX. CONST. art. V, § 11 (interpretive commentary); 1 R. MCDONALD, TEXAS CIVIL PRACTICE § 1.22.1 (1965). The English common law disqualification for financial interest was the only ground for recusation which carried over into the early American court system. *See* TEX. CONST. art. V, § 11 (interpretive commentary).

8. *See* TEX. CONST. art V, § 11 (1869); TEX. CONST. art. IV, § 12 (1866); TEX. CONST. art. IV, § 14 (1861); TEX. CONST. art IV, § 14 (1845).

9. *See* TEX. CONST. art V, § 11. Article V, section 11 defines the circumstances of disqualification to include the following:

> No judge shall sit in any case wherein he may be interested, or 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, or when he shall have been counsel in the case . . . . When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

Id.

10. To be disqualified the relationship between the judge and a party must be within the third degree of affinity or consanguinity. *See, e.g.*, Natural Gas Pipeline Co. of America v. White, 439 S.W.2d 475, 475 (Tex. Civ. App.—Beaumont 1969, no writ) (judge's wife first cousin of party); Texas Employers' Ins. Ass'n v. Scroggins, 326 S.W.2d 606, 607 (Tex. Civ. App.—Texarkana 1959, no writ) (judge first cousin of attorney's partner's wife); Barnes v. Riley, 145 S.W. 292, 292 (Tex. Civ. App.—Galveston 1912, no writ) (judge's grandfather and plaintiff's grandmother brother and sister). An attorney, however, is not normally considered a "party" when determining disqualification of the judge. *See* Runyon v. George, 349 S.W.2d 107, 108 (Tex. Civ. App.—Eastland 1961, writ dism'd) (judge brother of attorney for party).

11. *See, e.g.*, Williams v. Kirven, 532 S.W.2d 159, 160 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (judge does not have to remember any consultations with party over matter at issue); Turner v. Chandler, 304 S.W.2d 687, 689 (Tex. Civ. App.—Texarkana 1957, no writ) (judge who had represented husband in divorce could not rule on same divorce); Gaines v. Hindman, 74 S.W. 583, 583 (Tex. Civ. App.—1903, no writ) (judge who prepared motion for new trial for party could not sit on subsequent appeal). If the matters in the suit

common law sense of recusation, when he possesses a pecuniary interest in the outcome.[12] These constitutional grounds were codified in article 15 of the Texas Revised Civil Statutes,[13] as well as being incorporated into a similar statute in the Code of Criminal Procedure.[14]

Traditionally, Texas courts have followed the English common law and have held the disqualifying language of article V, section 11 of the Texas Constitution is unconditional and mandatory, and further, that any order or judgment entered by a judge who was disqualified was void ab initio.[15] Texas courts have held the constitutional grounds for disqualification were exclusive and no other basis existed for involuntary disqualification.[16] In *Love v. Wilcox*,[17] the supreme court stated "our Constitution not only specifies the grounds for disqualification but such grounds have always been

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are different than when the judge acted as counsel, he may hear the suit. *See* City of Austin v. Cahill, 99 Tex. 172, 172, 89 S.W. 552, 552 (1905) (supreme court justice previously represented city on an unrelated matter).

12. *See, e.g.*, Narro Warehouse, Inc. v. Kelly, 530 S.W.2d 146, 149 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (pecuniary interest must be direct, real, certain, capable of monetary value); Nueces County Drainage & Conservation Dist. No. 2 v. Bevly, 519 S.W.2d 938, 951 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (direct pecuniary or property interest required); Casey v. Kinsey, 23 S.W. 818, 818 (Tex. Civ. App.—1893, no writ) (judge in possession of land cannot try case to determine title). Merely being a taxpayer, however, does not disqualify the judge. *See* City of Dallas v. Peacock, 89 Tex. 58, 59, 33 S.W. 220, 221 (1895).

13. *See* TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1969). "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." *Id.*

14. *See* Lee v. State, 555 S.W.2d 121, 122 (Tex. Crim. App. 1977); TEX. CODE CRIM. PRO. ANN. art. 30.01 (Vernon 1965).

15. *See, e.g.*, Fry v. Tucker, 146 Tex. 18, 20-22, 202 S.W.2d 218, 221-22 (1947) (judgment of disqualified trial judge absolutely void); Turner v. Chandler, 304 S.W.2d 687, 691 (Tex. Civ. App.—Texarkana 1957, no writ) (orders of disqualified judge held nullities); Pahl v. Whitt, 304 S.W.2d 250, 252 (Tex. Civ. App.—El Paso 1957, no writ) (disqualification of judge cannot be waived or cured).

16. *See* Galveston & H. Inv. Co. v. Grymes, 94 Tex. 609, 609, 64 S.W. 778, 778 (1901); Taylor v. Williams, 26 Tex. 583, 587 (1863).

17. 119 Tex. 256, 260, 28 S.W.2d 515, 518 (1930); *cf.* Hoover v. Barker, 507 S.W.2d 299, 304 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (bias not grounds for disqualification); Quarles v. Smith, 379 S.W.2d 91, 92 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (prejudice not ground for disqualification); Lombardino v. Firemen's & Policemen's Civil Serv. Comm'n, 310 S.W.2d 651, 654 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (expressing opinion not ground for disqualification); Moody v. City of Univ. Park, 278 S.W.2d 912, 919 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (remote interest not ground for disqualification).

held by the Supreme Court to be *exclusive. . . .*"[18] Moreover, the disqualification of a judge is a matter which cannot be waived by either the parties or their counsel.[19]

III. THE CODE OF JUDICIAL CONDUCT

On September 1, 1974, the Texas Supreme Court adopted the Code of Judicial Conduct. A provision for self-recusal entitled "Disqualification" expressly states under what circumstances a judge should excuse himself from the case:[20]

> 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 personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b). He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as 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 the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding. . . .[21]

Prior to the adoption of the code,[22] the Texas courts had referred to its provisions, although not recognizing its categories of disqualification.[23] The Amarillo Court of Civil Appeals in *Maxey v.*

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18. Love v. Wilcox, 119 Tex. 256, 260, 28 S.W.2d 515, 518 (1930).

19. *See, e.g.*, Indemnity Ins. Co. v. McGee, 356 S.W.2d 666, 668 (Tex. 1962); Cain v. Franklin, 476 S.W.2d 952, 953 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); Natural Gas Pipeline Co. v. White, 439 S.W.2d 475, 475 (Tex. Civ. App.—Beaumont 1969, no writ).

20. *See* Code of Judicial Conduct, Canon 3(c) TEX. REV. CIV. STAT. ANN. art. 320a-1, tit. 14, app. B (Vernon Supp. 1980-1981).

21. *Id.*

22. The Code of Judicial Conduct became effective September 1, 1974. TEX. REV. CIV. STAT. ANN. art. 320a-1 (Vernon Supp. 1980-1981).

23. *See* Maxey v. Citizens Nat'l Bank, 489 S.W.2d 697, 702-03 (Tex. Civ. App.—Amarillo 1972), *rev'd on other grounds*, 507 S.W.2d 722 (Tex. 1974). The *Maxey* court relied upon the historical grounds for disqualification enumerated in the constitution:

> 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.

Citizens National Bank of Lubbock concluded that the principles of canon 3 did not "do violence to the legal principles followed in Texas,"[24] but chose not to impose the code's sanctions because it did not at that time have the status of law.[25] The Supreme Court of Texas thereafter affirmed the civil appeals opinion in *Maxey* regarding disqualification without substantive comment.[26]

In contrast, shortly after the adoption of the Code of Judicial Conduct, the El Paso Court of Civil Appeals in *Chilicote Land Company v. Houston Citizens Bank & Trust Company*,[27] reaffirmed that a judge disqualified under the constitution had no power to act, that his order was void, and that the validity of an order or judgment of a disqualified judge could not be waived by the parties.[28] The court commented regarding the code:

> Further, the Code of Judicial Conduct with its Canon 3, subsection C, became effective on September 1, 1974, prior to the entry of the summary judgment. Its adoption by the Supreme Court establishes the rule that when a judge now disqualifies he is without power to act for broader reasons than existed heretofore.[29]

> 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. 15, and the grounds therein enumerated are inclusive and exclusive.

Id. at 702.

24. *Id.* at 703.

25. *See id.* at 703. The plaintiff at bar, Maxey, had proposed the 1972 American Bar Association Code of Judicial Conduct was controlling to demonstrate that Judge Moore's interest in the case disqualified him:

> As the only support for disqualification assertion apart from the constitutional provision, plaintiffs cite those portions of subsection 3 of Cannon 3 of the Code of Judicial Conduct adopted by the American Bar Association House of Delegates in August, 1972 . . . . We do not perceive that these provisions do violence to the legal principles followed in Texas; however, a discussion of conformity with Texas law is unnecessary since those canons of judicial ethics have not been adopted in Texas and do not have the status of law, particularly where they would contravene the clear concepts of the constitution.

Id. at 703. Even after adoption, however, a violation of the code has not necessitated a reversal of judgment. Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250, 253 (Tex. Civ. App.—El Paso 1979, no writ).

26. *See* Maxey v. Citizens Nat'l Bank, 507 S.W.2d 722, 726 (Tex. 1974).

27. 525 S.W.2d 941 (Tex. Civ. App.—El Paso 1975, no writ).

28. *See id.* at 943.

29. *Id.* at 943.

IV. Statutory Motions to Recuse

In August of 1977, article 200a, section 6 of the Texas Revised Civil Statutes was amended to include a provision for the recusal of district court judges.[30] The amendment briefly describes the procedure by which the trial judge arranges a recusal hearing.[31] Under article 200a, however, a party desiring to have a district judge recuse himself from the proceedings in main must request the judge to initiate the hearings himself. The article specifies that the district judge shall request the presiding judge to order a hearing in which an assigned administrative judge will decide upon the motion to recuse.[32]

The mandatory nature of the statutory procedure was at first uncertain. While it was clear article 200a, section 6 applied only to district court judges,[33] it was unclear to what extent a trial judge could overrule or refuse a party's recusation motion.[34] In *Shapley v. Texas Department of Human Resources*,[35] the El Paso court held that the trial judge violated canon 3A(6) of the Code of Judicial Conduct, but that this "unethical" conduct was not necessarily a legal ground for reversal.[36] The court further noted that the trial judge overruled the motion to disqualify himself and ignored the command of article 200a, section 6. The appellate court, however, did not reverse on that particular point holding that the fact the judge had failed to abide by the procedure set out in the article had not been presented on appeal.[37]

In 1979, the Texas Supreme Court made definite the mandatory application of article 200a, section 6. In *McLeod v. Harris*,[38] a mandamus action, the court held the requirements for recusal were

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30. *See* Tex. Rev. Civ. Stat. Ann. art. 200a, § 6 (Vernon Supp. 1980-1981).

31. *See id.*

32. *See id.* The statute reads in pertinent part: "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 . . . ." *Id.*

33. The statutory language of section 6 expressly includes only district judges. *See id.*

34. Although the statute states that the district judge should "request" the presiding judge for a hearing, the language is precatory in nature and discretionary in setting out under what circumstances the request should be made. *See id.*; Schwab, *Who Determines Judicial Disqualification?*, 43 Tex. B.J. 197, 201-02 (1980).

35. 581 S.W.2d 250 (Tex. Civ. App.—El Paso 1979, no writ).

36. *Id.* at 253.

37. *Id.* at 253.

38. 582 S.W.2d 772 (Tex. 1979).

mandatory and a district judge must request the presiding judge to assign a judge to hear any motion to recuse.[39] Justice Barrow, in writing for the court, went further stating:

> The basis for disqualification of a judge is contained in Article V, Section 11 of the Texas Constitution. . . This constitutional prohibition has been implemented by Art. 15, Tex. Rev. Civ. Stat. Ann., Art. 30.01 of the Tex. Code Crim. Pro. Ann., and by Canon 3C of the Code of Judicial Conduct as promulgated by the Supreme Court of Texas, amended as of February 18, 1977.[40]

The supreme court in *McLeod,* therefore, appears to have broadened the grounds for disqualification set out in article V, section 11 to include those under canon 3C of the Judicial Code, which is expressly not exclusive.[41] This broadening also carried with it an attempt to narrow or define the applicability of article 200a, section 6. In closing, Justice Barrow informed the bar that the article only ensures another court will determine the merits of the motion and does not guarantee disqualification of the challenged judge.[42]

The *McLeod* decision did not solve all of the troublesome problems in the area of disqualification of a trial judge. This was illustrated in a recent El Paso court opinion where the district court was reversed for not following the procedural mandate of article 200a, section 6.[43] In *Robb v. Robb,* the alleged ground for recusal was not constitutional;[44] however, the court reluctantly followed *McLeod*:

> Under Texas law, grounds of disqualification in civil matters are dictated by the Constitution, Article V, sec. 11, and by Article 15, Tex.

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39. *See id.* at 774; Figari, *Texas Civil Procedure,* 34 Sw. L.J. 415, 449 (1980).

40. McLeod v. Harris, 582 S.W.2d 772, 774 (Tex. 1979).

41. *See id.* at 774. A contrary view is expressed by at least one other author: "[A]rticle 200a, section 6 sets no guidelines, the question logically arises as to whether a hearing held thereunder can be expanded to consider generally allegations of bias, prejudice, partiality and improper judicial conduct on behalf of the judge sought to be recused." Schwab, *Who Determines Judicial Disqualification?,* 43 TEX. B.J. 197, 201 (1980).

42. McLeod v. Harris, 582 S.W.2d 772, 774 (Tex. 1979).

43. *See* Robb v. Robb, 605 S.W.2d 390, 391-92 (Tex. Civ. App.—El Paso 1980, no writ). In *Robb* a wife appealed the trial court judge's division of estate and award of child support alleging bias. *Id.* at 390-91.

44. *See id.* at 390-91. Appellant alleged the trial court judge was obligated to appellee's attorneys through campaign contributions, whereas, appellant had opposed the judge's re-election. The appellant alleged the judge should recuse due to bias and prejudice in violation of canon 3C of the Code of Judicial Conduct. *See id.* at 390-91.

> Rev. Civ. Stat. Ann. . . .
>
> These grounds of disqualification of a judge have long been held to be both inclusive and exclusive. . . . All of this has now been changed by the Supreme Court's decision in *McLeod v. Harris* . . . We are bound by that decision and follow it in this case, but we are not precluded from questioning its soundness, for the constitution cannot be amended by judicial fiat. Or, if we misconstrue the opinion, and bias and prejudice and the Code of Judicial Conduct are not grounds for disqualification of a judge, then what reason is there for mandating a hearing on a motion alleging such causes to recuse?[45]

Failure to follow the procedural mandate of article 200a, section 6 led to another reversal of a trial judgment in *The Society of Separationists, Inc. v. Strobel.*[46] In *Wiegand v. Wiegand,*[47] however, the San Antonio court did not reverse for the judge's failure to follow the procedure of article 200a, section 6, rather, the court held the appellant had waived his point of error by failing to request the trial judge to assign another judge to hear the motion to recuse.[48]

V. Recusal Under Rule 18a

Obviously, there are many problems regarding the substantive law of disqualification or recusal of district judges, and the procedure to be followed. It is under these circumstances that rule 18a has now been enacted. The procedures set out in this new rule are clear and easily followed. The rule is expressly limited to district courts. It *suggests* a motion for recusal be filed "ten days before . . . trial or other hearing," but there are no time limitations im-

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45. *Id.* at 391.

46. 593 S.W.2d 855, 856 (Tex. Civ. App.—Austin 1980, no writ).

In a suit for slander the recusant filed an "inartfully drawn" *pro se* pleading which recited two reasons why the trial judge should not preside. Immediately before trial, the same judge denied the motion requesting his recusation. The appellate court reversed the judgment stating a motion for recusal could be reviewed on appeal without the necessity for a writ of mandamus. *See id.* at 856-57.

47. 606 S.W.2d 352 (Tex. Civ. App.—San Antonio 1980, no writ).

48. *See id.* at 353. In *Wiegand,* a divorce proceeding, appellant filed a motion for the judge to recuse himself, but did not request that another judge be assigned to hear the motion. The appellant, therefore, was found to have waived his right to have this point considered on appeal. *Id.* at 353.

posed.[49] Of course, disqualification on constitutional grounds can be made at any time and cannot be waived.[50] Rule 18a requires service of the motion to all parties or their counsel and notice that the movant will present the motion to the district judge three days after filing.[51]

Once the motion is filed, the procedure, like that of article 200a, section 6, is mandatory and the district judge must immediately either voluntarily recuse himself or request the presiding judge of the administrative district to assign another judge to hear the motion.[52] If the judge voluntarily recuses himself, rule 18a provides for the procedure of assignment of the case to another court.[53] If the judge does not voluntarily recuse, the rule requires an immediate hearing on the motion before the presiding judge of the administrative district, his assignee, or the assignee of the Chief Justice of the Texas Supreme Court.[54] This procedure is to be followed at whatever stage in the litigation the motion is filed, but there is no express abatement of the appellate timetables in the rule. Furthermore, there are no sanctions specified in the rule, and the potential for abuse by the filing of a motion to recuse remains the same as before the enactment of rule 18a. Finally, once a rule 18a motion is filed, it would appear that the parties may not thereafter withdraw or waive the motion, especially if a ground stated therein is a constitutional ground for disqualification.

Two other significant points of this rule should be considered. First, the filing of a rule 18a motion abates the power of the judge to act except for "good cause stated" in any order entered.[55] This limitation of power could be important when injunctive relief is being requested and the time of a temporary restraining order is expiring. Second, and more important, the rule requires the setting

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49. *See* TEX. R. CIV. P. 18a(a). Rule 18a, however, is not the only rule providing for a change in judges. *See* TEX. R. CIV. P. 528; Pope & McConnico, *Practicing Law With The 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 490 (1980).

50. *See* TEX. CONST. art. V, § 11. Constitutional grounds include pecuniary interests, blood relations, and having been previous counsel. *Id.*

51. *See* TEX. R. CIV. P. 18a(b). The time is extended to six days if service is made by mail. *See* TEX. R. CIV. P. 21a.

52. *See* TEX. R. CIV. P. 18a(d).

53. *See* TEX. R. CIV. P. 18a(c). After voluntary recusal the recusing judge shall enter an order of recusal so that the presiding judge can assign another judge to sit. *See id.*

54. *See* TEX. R. CIV. P. 18a(d), (g).

55. *See* TEX. R. CIV. P. 18a(c).

out of grounds for the alleged disqualification, but, in addition, states the motion "may include any disability of the judge to sit in the case."[56] Such a requirement appears to enlarge the permissible scope for removal by the assigned judge beyond any constitutional ground and/or the Code of Judicial Conduct. This becomes more important as the rule apparently provides exclusive appellate remedies. The order that a judge is disqualified under rule 18a is not appealable and an order denying the alleged disqualification, at least on non-constitutional grounds, is expressly interlocutory and only reviewable on appeal on an abuse of discretion standard following the entry of final judgment in the case.[57]

VI. CONCLUSION

Rule 18a by no means negates less formal avenues of recusal. Perhaps the best and most appropriate procedure for requesting recusal of a district judge is to request an in-chambers conference with the judge with all counsel invited before any motion to recuse is filed. During this conference the court can be advised of the particular problem in the case and the reasons for suggesting recusal. If the judge then voluntarily recuses himself, the constitutional procedure regarding transfer of the case may be followed and no written motion need be filed. This practice remains the most efficient and successful procedure for the recusal of any district judge in any given case.

In summary, the appropriate and efficient use of new rule 18a requires knowledge of the Texas law regarding disqualification of judges. The movant must select the alleged grounds for disqualification and/or recusal in the particular case, delineate the constitutional grounds from other grounds, and proceed accordingly in both the trial and appellate courts. The rule is by no means any "cure-all" but does provide assistance for the majority of the cases involving the delicate question of requesting a district judge to recuse.

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56. *See* TEX. R. CIV. P. 18a(a).
57. *See* TEX. R. CIV. P. 18a(f).