

Eight Simple Rules for Removing Your State Court Judge

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Introduction

Disqualification of a judge requires the demonstration of one of the facts described in Tex. R. Civ. P. 18b(1) and should follow that demonstration. The facts to be demonstrated would be the same whether the judge presides over a hearing or a trial or is an appellate justice.¹

An “assigned judge” may be removed by objection, without any factual demonstration, as long as the objection is (1) made (and reiterated²) prior to the assigned judge having presided over any part of the case and (2) made as to a judge who is not a sitting judge.³ An assigned judge not subject to a “statutory strike” must nonetheless be subject to removal from a particular case by disqualification or recusal.⁴ The judge who hears a motion to recuse may be an assigned judge (who may or may not be a sitting judge) or the presiding judge of the administrative region.⁵

¹At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case.” Tex. R. Civ. P. 18a(a). “The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.” Tex. R. App. P. 16.1. “[I]n 1988 the Texas Supreme Court added Rule 18b to the Texas Rules of Civil Procedure. . . specifying and elaborating on the constitutional grounds for disqualification.” Charles Bleil & Carol King, *Focus on Judicial Recusal: A Clearing Picture*, 25 Tex. Tech L.R. 773, 791 (1994) (footnote omitted). *But see* F.S. New Products, Inc. v. Strong Industries, Inc., 129 S.W.3d 594, 598 (Tex. App.--Houston [1st Dist.] 2003, no pet.) (en banc) (“An appellate judge, however, unlike a trial judge, may be disqualified only on constitutional or statutory grounds, not on the basis of the rules of procedure.”).

²In re Approximately \$17,239.00, 129 S.W.3d 167, 168 (Tex. App.--Houston [14th Dist.] 2004, orig. proceeding, mand. appl. filed) (Relator’s objection was filed with the district clerk in a timely fashion, and, if the judge had been aware of the objection, he could not have presided over the hearing. Once relator appeared at the hearing and found that Judge Reiter was presiding, relator should have advised the judge of the objection immediately after the case was called for hearing. By failing to do so, and by allowing Judge Reiter to hear argument on real party’s motion to compel, we find that relator waived his objection.”).

³The statutory change effective September 1, 2003, V.T.C.A. Gov’t Code § 74.053 (West 2004), represented a major change from the previous method of attempting to remove an assigned judge.

⁴Robert P. Schuwerk and Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics*, § 40.07 (West 2004 edition). Practically, however, depending on the length of the assignment, time may simply not permit the discovery of grounds warranting the judge’s removal from assignment.

⁵Any question, prior to the 2003 statute, as to whether a presiding judge hearing a motion to recuse was an “assigned” judge and was subject to statutory strike, was resolved by the statute’s provision that a sitting judge is not subject to objection. The presiding judge is nonetheless subject to recusal or

In spite of the independently verifiable factual demonstration required for disqualification, approximately half of the bases for recusal (as opposed to disqualification) require interpretation and analysis⁶ and can, therefore, benefit from effective presentation by counsel. Case law suggests that the granting of a motion to recuse (and the avoidance of sanctions) depends more on rhetorical prowess than legal argument. “Rhetoric,” meaning persuasive discourse, incorporates and relies on the Aristotelian devices of ethos (ethical appeal), logos (logical appeal), and pathos (emotional appeal).⁷

Rule 1: Be Pure of Heart

Both ethically and practically, no party should attempt to remove a judge from a particular case as a litigation tactic. Such an act should stem from a legitimate concern regarding that judge’s ability to act as a neutral adjudicator. A movant without that motive will likely have difficulty overcoming the following hindrances to recusal and disqualification:

- a. The guidelines for recusal and disqualification could be clearer

Disqualification differs radically from recusal in Texas state court. Since judges who are disqualified should have never presided over a case or hearing, a determination of disqualification results in an erasure of everything done by that judge involving discretion.⁸ Recusal results in a replacement of the judge, with everything he or she has done prior to

disqualification if he decides to hear the motion to recuse himself.

⁶Compare, for example, the independently verifiable demonstration of a relationship within the third degree, Rule 18b(1)(c), with the factual conclusion that a judge’s impartiality might reasonably be questioned, Rule 18b(2)(a).

⁷See Robert F. Hanley, *Brush Up Your Aristotle*, Litig., Winter 1986, at 39; I Quintilian’s Institutes of Oratory, 137-41 (J. Watson trans. 1899); Kenneth Burke, *A Rhetoric of Motives*, 589 (1962); George Campbell, *The Philosophy of Rhetoric* (L. Bitzer ed. 1963).

⁸See *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982) (citations omitted) (“The constitutional prohibition has long been held to make any order involving judicial discretion by a constitutionally disqualified judge ‘absolutely void,’ ‘a nullity.’ ”); William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 St. Mary’s L.J. 599, 633 (1986) (“However, a disqualified judge is not prohibited from performing purely ministerial acts.”).

the filing of the motion remaining.⁹ Recusal may be waived, affirmatively¹⁰ and by silence¹¹; disqualification may not.¹²

(1) Tex. R. Civ. P. 18a ostensibly sets forth the procedures for recusal and¹³ disqualification. However, a number of the requirements simply do not apply to disqualification:

(a) Since disqualification may be raised at any time (even for the first time on appeal and on the motion of a trial or appellate court),¹⁴ Rules 18a(a) and 18a(e) must concern only recusal.

(b) A party moves for recusal but raises the issue of disqualification. Therefore, a party seeking disqualification need not file a motion or a verification regarding the statements that allegedly support the judge's removal from a case.

(c) Since Rule 18a(c) refers to recusal, then the requirement that the judge act on the raising of the issue of disqualification or refer it to the presiding administrative judge is inapplicable.¹⁵

⁹Tex. R. Civ. P. 18a(c).

¹⁰Tex. R. Civ. P. 18b(5).

¹¹See *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 560 (Tex. App.--Beaumont 1993, writ denied).

¹²See William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 St. Mary's L.J. 599 (1986); *Zarate V. Sun Operating Limited, Inc.*, 40 S.W.3d 617, 621 (Tex. App.--San Antonio 2001, pet. denied); *Greer v. State*, 999 S.W.2d 484, 487 (Tex. App.--Houston [14th Dist.] 1999, pet. ref'd).

¹³However, "or" is the connecting word.

¹⁴*Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 560 (Tex. App.--Beaumont 1993, writ denied); William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 St. Mary's L.J. 599, 629-30 (1986) (footnote omitted); *Sun Exploration 7 Production Co. v. Jackson*, 729 S.W.2d 310, 312 (Tex. App.--Houston [1st Dist.] 1987), *rev'd on other grounds*, 783 S.W.2d 202 (Tex. 1989).

¹⁵Courts, however, have tended to sidestep this issue, *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 560 (Tex. App.--Beaumont 1993, writ denied), or intermingle recusal and disqualification, *Manges v. Martinez*, 683 S.W.2d 137, 139 (Tex. App.--San Antonio 1984, no writ). As a practical matter, if disqualification cannot be determined on the alleged facts, such that an appellate court cannot assess whether the judge was disqualified, it will return the matter for a hearing anyway. 858 S.W.2d at 560.

(d) Rule 18a(d) instructs a judge who has received a motion to recuse essentially to take no action apart from referring the motion but provides no direction to a judge regarding whom a party has raised the issue of disqualification. If a judge is recused, he or she leaves the case from the time the motion is filed, and everything done by the judge to that time remains in place; if a judge is disqualified, everything the judge has done is erased.

(e) Rule 18a(f) provides for appellate review, with an abuse of discretion standard, after the final judgment. Since “mandamus is available to compel the judge’s mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal,”¹⁶ Rule 18a(f) does not apply to disqualification.

(f) Rule 18a(h) provides for sanctions when, under certain circumstances, a party may be sanctioned for filing a motion to recuse.¹⁷

(2) The identical language for one of the grounds for disqualification, Rule 18b(1)(b), appears in one of the grounds for recusal: “an interest [by the judge] individually or as a fiduciary . . . in the subject matter in controversy,” Rule 18b(2)(e). While it is only “an interest” in Rule 18b(1)(b), as opposed to “financial interest” in Rule 18b(2)(e), case law has defined the former as a financial interest,¹⁸ making the two grounds linguistically indistinguishable.¹⁹

b. Accessible guidance for practitioners is limited

¹⁶In re Union Pacific Resources Co., 969 S.W.2d 427, 428 (Tex. 1998).

¹⁷A party otherwise warranting sanctions may not avoid them by mistakenly (or purposefully) styling the motion as one for disqualification, and a court could levy sanctions in connection with a motion that raises *disqualification* under Tex. R. Civ. P. 13, although Rule 13 requires a finding of “good cause.” Rule 13 permits any sanctions available under Rule 215(2)(b). Finally, Tex. Civ. Prac. & Rem. Code § 30.016 (West 2002), *requires* a “judge hearing a tertiary recusal motion against another judge who denies the motion [to] award reasonable and necessary attorney’s fees and costs to the party opposing the motion.”

¹⁸Spigener v. Wallis, 80 S.W.3d 174, 180 (Tex. App.--Waco 2002, no pet.).

¹⁹See Ford v. GTE Market Resources, Inc., No. 05-96-0072-CV (Tex. App.--Dallas Oct. 21, 1997, pet. denied) (not designated for publication), 1997 WL 644897, at *2 (judge who recused himself because he was stockholder in party corporation “was not only appropriately recused but also was disqualified to preside over the case.”).

(1) Granted motions to recuse are not subject to review,²⁰ are generally buried in trial court files, and do not need to (and consequently usually do not) recite the reason(s) for the granting of the motions.

(2) Published opinions either refer to granted motions in passing or reflect review of denied motions at the trial level. Consequently, published opinions advise practitioners what *not* to do and only inferentially what they should do.

c. Case law is problematic for movants

(1) Opinions often treat “recusal” and “disqualification” as if they were interchangeable,²¹ often (no doubt) because that is what the movants did at the trial level.²² Also, however, “[i]n the past, the term ‘recusal’ was frequently used to refer to instances in which the judge was constitutionally disqualified.”²³

(2) Opinions often cite to federal case law regarding recusal and disqualification, where the terms *are* interchangeable. In fact, 28 U.S.C. § 455 and § 144, while both known as federal “recusal” statutes,²⁴ do not use the term “recuse.” Section

²⁰Tex. R. Civ. P. 18a(b).

²¹ See, e.g., *Kemp v. State* 846 S.W.2d 289, 306 (Tex. Crim. App. 1992) (“The refusal of a defendant’s motion to disqualify is reviewable only for abuse of discretion. Tex. R. Civ. Proc. 18a(f.)”); *In re Hopkins*, No. 05-99-00652-CV (Tex. App.--Dallas Dec 14, 1999, no pet.) (not designated for publication) 1999 WL 1140229, at *1 (“Relator’s motion to recuse the administrative judge does not intelligibly set out any ground, which if actually true at the time the motion was made, would automatically disqualify the administrative judge from hearing the motion to recuse the trial judge. Relator merely makes assertions of supposed, speculative and possible grounds of disqualification.”) (citations omitted); *Rio Grande Gas Co. v. City of Pharr*, 962 S.W.2d 631, 638-39 (Tex. App.--Corpus Christi 1997, pet. dismissed) (“Although the terms are often used interchangeably, and indeed were used interchangeably at the onset of this issue in the courts below, they have significant differences.”) (footnote omitted).

²² See, e.g., *Spigener v. Wallis*, 80 S.W.3d 174 (Tex. App.--Waco 2002, no pet.), where movant quoted Rule 18b(2)(e), requiring recusal, while also citing to state constitutional provision for disqualification, and court held the latter was intended; and *Vargas v. State*, 883 S.W.2d 256 (Tex. App.--Corpus Christi 1994, writ refused), where both terms appear in the motion.

²³ Charles Bleil & Carol King, *Focus on Judicial Recusal: A Clearing Picture*, 25 Tex. Tech L.R. 773, 774 (1994) (footnote omitted). For historical discussions, see Robert W. Calvert, *Disqualification of Judges*, 47 Tex. B.J. 1330 (1984); Elmo Schwab, *Who Determines Judicial Disqualification?* 43 Tex. B.J. 197 (1980); Luther Soules, *Rule 18a: Recusal or Disqualifications of Trial Judge*, 43 Tex. B.J. 1005 (1980).

²⁴ See, e.g., William W. Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, *Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 16-D, 16:179.3 (“Differences between recusal under § 144 and § 455(b): Although the ground for recusal (‘personal bias or prejudice’) is the same under both statutes, there are significant procedural and substantive differences . . .”).*

455, entitled “Disqualification of justice, judge, or magistrate judge,” repeatedly refers to disqualification. While three of the grounds for “disqualification” under federal law are the same as the three bases for disqualification under Texas law, all of the bases for recusal under Texas law appear as grounds for “disqualification” under federal law.²⁵

(3) Opinions that rely on federal case law invite a court hearing a recusal motion to merge what appear to be two independent bases for recusal in Texas—Rule 18b(2)(a) and Rule 18b(2)(b)—thereby increasing the movant’s burden (and/or limiting the movant’s options) and potentially leading to the imposition of the federal standard of “the impossibility of fair judgment.”²⁶

(4) What is arguably the “best” Texas Supreme Court opinion on certain aspects of recusal, *Rogers v. Bradley*,²⁷ is not an “opinion” in the conventional sense.²⁸ Also, some of the most thorough analysis in other cases does not appear in a majority

²⁵Compare Tex. R. Civ. P. 18b with 28 U.S.C. § 455. Also, in the seminar on “Disqualification [under the ABA Model Code]” at the American Judicature Society’s National College on Judicial Conduct and Ethics in Chicago in October 2004, the moderator clarified, “We are using the terms [recusal and disqualification] interchangeably.”)

²⁶See, e.g., *Ludlow v. DeBerry*, 959 S.W.2d 265, 281, 283 (Tex. App.—Houston [14th Dist.] 1997, no writ) (Court explained that, while “[a] reasonable person standard makes sense because the rule provides for recusal where a judge’s impartiality might *reasonably* be questioned,” it nonetheless was required to determine, due to *Liteky v. United States*, 510 U.S. 540 (1994), “whether the alleged act indicating bias or impartiality emanated from an extrajudicial source. . . . None of the actions by Judge Chambers indicate such a ‘high degree of favoritism or antagonism as to make fair judgment impossible.’”) (citation omitted). The “impossibility of fair judgment” standard troubled several of the justices on the Supreme Court. 510 U.S. at 559 (Kennedy, J., concurring, joined by Justices Blackmun, Stevens, and Souter). See also *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App.—Houston [14th Dist.] 1996, pet. ref’d) (“When bias is alleged as a ground for disqualification or recusal, a trial judge ruling on the motion must decide whether the movant has provided facts sufficient to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts about the impartiality of the trial judge.”); *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (“A trial judge ruling on a motion alleging bias as a ground for disqualification must decide whether the movant has provided facts sufficient to establish that a reasonable man, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge.”); *Aguilar v. Anderson*, 855 S.W.2d 799, 807, et seq. (Tex. App.—El Paso 1993, writ denied) (Barajas, J., concurring and dissenting).

²⁷909 S.W.2d 872 (Tex. 1995).

²⁸See *Ludlow v. DeBerry*, 959 S.W.2d 265, 281 (Tex. App.—Houston [14th Dist.] 1997, no writ) (“The main ‘opinion’ in *Rogers* is a declaration of recusal by Justice Gammage, not joined by any other justice. [909 S.W.2d] at 873-878 (including declaration and appendix). The standard to which *Ludlow* cites is found in Justice Enoch’s response to the declaration of recusal. *Id.* at 878-884 (response regarding recusal). Neither the declaration nor the response is an opinion of a majority of the court and we hesitate to hold that the discussion by Justice Enoch is controlling authority.”).

opinion.²⁹

(5) Case law has articulated an additional basis for *disqualification* if a judge displays bias (or prejudice) sufficient to deny a party due process.³⁰ While an analysis of the fathering opinion of this basis suggests that the court may have anticipated Rule 18b(2)(b)--a ground for recusal³¹--and some courts have indicated this view, other courts have accepted this additional basis for disqualification.³² Although this ground originated with the Court of Criminal Appeals and has been used (based on appellate opinions) in criminal cases, to the extent applicable, it may provide an additional ground for *disqualification* in civil cases, as well.³³

d. Even if affordable, appeal may not provide a practical solution for a litigant whose motion to recuse is denied

(1) Opinions reflect that appellate courts often (if not usually) defer to the assessment of the judge who heard the recusal motion, frequently without comment.³⁴

²⁹ See, e.g., *Keene Corp. v. Rogers*, 863 S.W.2d 168, 183 (Tex. App.--Texarkana 1993, writ stayed) (Bleil, J., dissenting); *Sun Exploration & Production Co. v. Jackson*, 783 S.W.2d 202, 207, et seq. (Tex. 1989) (Gonzalez, J., concurring).

³⁰ See *McClenan v. State*, 661 S.W.2d 108 (Tex. Crim. App. 1983).

³¹ See Robert P. Schuwerk and Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics*, § 40.01 (West 2004 edition).

³² *Id.*

³³ See Justice, 14th Court of Appeals, Wanda McKee Fowler, and Karen Vowell, "Come on and Let Me Know . . . Should I Stay or Should I Go?" *Judicial Removal on Mandamus and on Appeal*, State Bar of Texas, 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE, August 27-29, 2003--Austin, October 8-10, 2003 --Dallas, November 5-7, 2003--Houston, at 10 ("[T]he practitioner in a civil case might attempt the same argument in the proper case. After all, due process is recognized in the civil context as well as the criminal!"); *Bank of Texas, N.A., Trustee v. Mexia*, ___ S.W.3d ___, 2004 WL 957717, at *4 (Tex. App.--Dallas 2004, no pet. hist.).

³⁴ This is due to the review standard: "An abuse of discretion is shown if the trial court acts without reference to any guiding principles or acts arbitrarily or unreasonably." *Rio Grande Gas Co. v. City of Pharr*, 962 S.W.2d 631, 637 (Tex. App.--Corpus Christi 1997, pet. dismissed) (citation omitted). See, e.g., *Woodruff v. Wright*, 51 S.W.3d 727, 738 (Tex. App.--Texarkana 2001, pet. refused); *Enterprise-Laredo Associates v. Hachar's, Inc.*, 839 S.W.2d 822, 841 (Tex. App.--San Antonio), writ denied, 843 S.W.2d 476 (Tex. 1992) (per curiam) (court deferred to the decision of the judge who heard the recusal motion, in the absence of any particular way in which he abused his discretion); *Nacol v. McNutt*, No. 01-92-00660-CV (Tex. App.--Houston [1st Dist.] Dec. 23, 1992, writ denied) (not designated for publication), 1992 WL 387970, at *6 ("The assigned judge heard testimony from both parties and determined that the evidence did not require a recusal."); *Hollabaugh v. State*, No. 10-93-269-CR (Tex. App.--Waco, Apr. 20, 1994, no writ) (not designated for

(2) If inclined to review in any detail the bases for a denied motion to recuse (and even sanctions), in addition to viewing any record provided as favoring the decision,³⁵ an appellate court can be expected to speculate as to sound reasons for the court below deciding as it did, in the absence of a complete record.³⁶

(3) If an appellate court finds that the movant was denied some procedural right, such as a hearing, it will direct that the hearing occur.³⁷ Circumstances leading to such an outcome, however, may be fraught with complications.³⁸

(4) In the rare instances when an appellate court finds an abuse of discretion, it may nonetheless find that no harm resulted when a judge who should have been recused continued to sit.³⁹

Rule 2: Voice Your Concerns Correctly

Movants seeking disqualification with grounds for recusal may induce judges to view their request precisely as it is styled. Thus, any such “motion” for disqualification may be

publication)1994 WL 284093, at *1 (judge was assigned to hear unverified and untimely motion to recuse, and appellate court deferred to determination by that judge).

³⁵*Brousseau v. Ranzau*, 81 S.W.3d 381, 399-400 (Tex. App.--Beaumont 2002, pet. denied) (“Abuse of discretion does not exist so long as there is some evidence of a substantive and probative character to support the decision.”); *Rio Grande Gas Co. v. City of Pharr*, 962 S.W.2d 631, 637 (Tex. App.--Corpus Christi 1997, pet. dismissed) “[T]he reviewing court must view the evidence in the light most favorable to the trial court’s ruling and indulge every presumption in favor of that ruling” (citations omitted).

³⁶See, e.g., *Lohmann v. Lohmann*, No. 08-99-00115-CV (Tex. App.--El Paso Nov. 29, 2001, no pet.) (not designated for publication), 2001 WL 1515863.

³⁷*In re Healthmark Partners, L.L.C.*, ___ S.W.3d ___, No. 14-04-00743 -CV (Tex. App.--Houston [14th Dist.] Houston 2004, orig. proceeding) (mem.), 2004 WL 1899953, at *2 (“In the circumstances of this case, Judge Criss had only two options, recusal or referral. Because she took neither, we grant relator’s motion for reconsideration and conditionally grant the petition for writ of mandamus.”).

³⁸See *Brousseau v. Ranzau*, 28 S.W.3d 235, 240 (Tex. App.--Beaumont 2000, no pet.); *Brousseau v. Ranzau*, 81 S.W.3d 381, 400 (Tex. App.--Beaumont 2002, pet. denied); *Ludlow v. DeBerry*, 959 S.W.2d 265, 269-71 (Tex. App.--Houston [14th Dist.] 1997, no writ) (movant was not permitted to examine judge in recusal hearing, appellate court ordered such examination in new hearing, but judge had left bench). *But see Martin v. State*, 876 S.W.2d 396, 397-98 (Tex. App.--Fort Worth 1994, no pet.) (“An impartial fact finding, as delineated in the statute, is necessary to resolve this question. Accordingly, the appeal is abated, and the cause is remanded for an evidentiary hearing.”) (citation omitted).

³⁹*Richardson v. State*, 83 S.W.3d 332 (Tex. App.--Corpus Christi 2002, pet. filed Dec. 11, 2002) (error in the denial of the motion to recuse did not contribute to defendant’s conviction or punishment).

denied without any referral and any analysis of the merits, except as to their failure to support disqualification.⁴⁰ Similarly, movants who fail to indicate clearly that they are seeking recusal may induce a court to view their goal as disqualification and deny their “motion” because it fails to state bases for disqualification.⁴¹

Legitimate confusion as to which method of removal the possible grounds may suggest should occur only with the “interest” a judge may have in the case (Rule 18b(1)(2) versus Rule 18b(2)(e)) or bias (which, if of a certain degree or nature and if occurring in a particular type of case or under particular circumstances, may rise to a level to deny a party due process and be a ground for disqualification).

For a variety of tactical reasons, parties may file a motion for “recusal or disqualification” or “recusal and/or disqualification.” If they truly believe they have grounds for disqualification, they should focus on the demonstration of the facts supporting those grounds and urge a ruling specifically as to the disqualification. Otherwise, it will be the court hearing the motion and/or any reviewing court that makes such a clarification.⁴²

Rule 18a does not clearly call for a hearing or referral to the presiding administrative judge if a party raises disqualification (as opposed to moving for recusal) and clearly does not call for a verified motion stating the basis of the urging. Thus, a party who seeks mandamus regarding the raising of disqualification (or complains of a disqualified judge on appeal) may have little or no record for a reviewing court to consider, and the reviewing court may rule simply on what is submitted without ordering a hearing on the

⁴⁰ See, e.g., *Bowles v. State*, No. 14-99-01396-CR (Tex. App.—Houston [14th Dist.] Sept. 13, 2001, pet. ref’d) (not designated for publication), 2001 WL 1047026, at *4.

⁴¹ See, e.g., *Calderon v. State*, No. 07-03-0388-CR (Tex. App.—Amarillo 2004, no pet. hist.) (mem.), 2004 WL 1094993 (not designated for publication); *Long v. State*, ___ S.W.3d ___, 2004 WL 912506 (Tex. App.—Waco 2004, no pet. hist.). A propensity may exist for courts in criminal cases to view efforts to remove a trial judge as raising disqualification rather than recusal, regardless of how they are phrased. See Robert P. Schwerk and Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics*, § 40.04 (West 2004 edition).

⁴² See, e.g., *Stafford v. State*, 948 S.W.2d 921 (Tex. App.—Texarkana 1997, pet. ref’d) (majority and dissenting justice debated whether party sought recusal or disqualification).

disqualification in the court below.

A “motion to recuse *and* disqualify” should insure both referral to an administrative judge and a hearing and an order on both recusal and disqualification. However, if the motion to recuse is procedurally deficient (such as untimely filed), a judge may not refer it, resulting, again, in the absence of any record on the disqualification issue.⁴³ A granted “motion to recusal and/or disqualify” may merely prolong proceedings while another court sorts out whether the trial judge has been disqualified or simply replaced.⁴⁴

What a party seeking to remove a judge from a particular hearing or case really wants is to have his cake and eat it, too. That is, the party should welcome certain procedures of Rule 18a—those requiring granting of the request by the trial judge or referral to another judge, who will hear the matter and rule—even if it is disqualification that the party seeks. But the party seeking disqualification does not want the application of the requirement of timeliness or a verified motion, which are inappropriate with disqualification anyway. A party who

- ☞ reflects sincere concern about the ability of a judge to hear a matter and
- ☞ offers as reasons for that concern facts that
 - ! are independently verifiable, such as those underlying Rule 18b(1)(c) or Rule 18b(2)(d), or
 - ! may lead to a conclusion like that embodied in Rule 18b(2)(a) or (b)

could wind up enlisting the assistance of the targeted judge and/or the judge who hears the motion in arriving at a just decision, regardless of the specific words used.

⁴³See *In re Johnson*, ___ S.W.3d ___, Nos. 14-04-00519-CV, 14-04-00520-CV (Tex. Civ. App.—Houston [14th Dist.] 2004, orig. proceeding), 2004 WL 1574616, at *1 (“We are unable to determine from the record before us whether relator’s motions to recuse were timely filed. Additionally, the motions are not properly verified. . . . Accordingly, we find no abuse of discretion by the trial judge in refusing to rule on relator’s recusal motions.”). A court may also, albeit erroneously, require that a “motion” to disqualify meet the timing requirements of a motion to recuse. See *Castano v. San Felipe Agricultural, Mfg., & Irr. Co.*, ___ S.W.3d ___, 2004 WL 839693, at *6 (Tex. App.—San Antonio 2004, no pet. hist.).

⁴⁴*Rio Grande Gas Co. v. City of Pharr*, 962 S.W.2d 631, 638-39 (Tex. App.—Corpus Christi 1997, pet. dism’d).

Rule 3: Voice Your Concerns Specifically

Rule 18a(a) provides that a “motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit.” Rule 18b is entitled “Grounds For Disqualification and Recusal of Judges.” Therefore, Rule 18a(a) appears to require parties to cite to the particular portions of Rule 18b that call for the recusal or disqualification of their judge. However, Rule 18a(a) also says that “[t]he grounds may include any disability of the judge to sit in the case,” without limiting them to the grounds in Rule 18b.

Precisely how the requirement to state grounds with particularity can be enforced is far from clear. Policy (along with case law⁴⁵) would take from the judge whose recusal or disqualification is sought the determination of the adequacy of the grounds. Moreover, procedural deficiencies may comprise a basis for the trial judge not to forward a recusal motion to the presiding administrative judge,⁴⁶ but not a basis for the presiding administrative judge or the judge who will hear the motion to deny the motion.⁴⁷ Simply, once the targeted judge has referred the motion, Rule 18a(d) suggests that a hearing has been triggered:

(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

⁴⁵*Metzger v. Sebek*, 892 S.W.2d 20, 50 n.24 (Tex. App.--Houston [1st Dist.] 1994, writ denied), cert. denied, 516 U.S. 868 (1995) (“The judge who has been asked to recuse should not be the one who determines whether the motion states valid grounds for recusal.”).

⁴⁶*Spigener v. Wallis*, 80 S.W.3d 174, 181 (Tex. App.--Waco 2002, no pet. (“This motion did not comply with Rule 18a because it was not verified and was not timely filed. Thus, Judge Kitzman had no obligation to refer it [to] the Chief Justice.”). *But see Mosley v. State*, 141 S.W.3d 816, 831-32 (Tex. App.--Texarkana 2004, pet. Ref'd) (“Even if a motion to recuse is procedurally defective, the challenged judge must either grant the motion or refer the motion, so another judge can determine the merits of the motion to recuse. See *McLeod v. Harris*, 582 S.W.2d 772, 775 (Tex.1979); *Jamilah v. Bass*, 862 S.W.2d 201, 203 (Tex.App.- Houston [14th Dist.] 1993, orig. proceeding).”).

⁴⁷Of course, if Rule 18a contemplates that the judge who hears the motion may not deny it for procedural deficiencies, but appellate courts are correct in requiring the judge who receives a procedurally deficient motion to refer it nonetheless, then who enforces the procedural requirements is also not clear.

concurring statements. . . . The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him⁴⁸

A Court of Criminal Appeals opinion has formally removed as a reason for a judge *not* forwarding a motion to a presiding judge any failure of the alleged grounds for recusal to match those set out in Rule 18b(2).⁴⁹ While the opinion is superficially limited to criminal court opinions, civil litigants should argue its application to their cases, as well, particularly in light of the above analysis of Rule 18a(d).

A second complication is that the term “grounds” undoubtedly has different meanings in the three consecutive sentences in Rule 18a(a) in which it appears. By alleging the fact that the judge “served as a lawyer in the matter in controversy,” a party has stated the ground for disqualification in Rule 18b(1)(a). Similarly, by alleging the fact that the judge “expressed an opinion concerning the merits of [the matter in controversy], while acting as an attorney in government service,” a party has stated the ground for recusal in Rule 18b(2)(d). However, a party may quote the “ground” of Rule 18b(2)(a) or (b) in a motion to recuse without providing any insight into the underlying facts. In such instances, Rule 18a(a) undoubtedly contemplates the party supplying all the facts *supporting* the ground in each case.

⁴⁸See *Moorhead v. State*, 972 S.W.2d 93, 95 (Tex. App.--Texarkana 1998, no pet.). See also *Soliman v. Soliman*, No. 05-99-01435-CV (Tex. App.--Dallas 2000, no pet.) (not designated for publication), 2000 WL 1716518, at * 3 (“Because this letter was not verified, it fails to meet the requirements of rule 18a as an effective motion for recusal. Accordingly, rule 18a(c) does not apply, and Judge Copeland was not required to cease further action on the case.”); *Sanchez v. State*, 926 S.W.2d 391, 394 (Tex. App.--El Paso 1996, writ. ref’d) (“If a recusal motion is timely filed and facially sufficient, a hearing must be held. . . . The trial judge acknowledged that the motions were timely filed. The only other exception to the requirement that a hearing be held is where the motion is clearly one that should not invoke the procedures of Rule 18a. See *Texaco Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex.App.-- Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert. dismiss’d*, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988) (not error to refuse hearing on motion to disqualify a retired judge's certification to sit as a judge at all, which may only be challenged in a quo warranto proceeding). We hold that is not the situation here. . . .”); *CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785, 793 (Tex. App.--Texarkana 1992, writ denied) (administrative judge erred by not holding hearing on basis that motion was not timely filed).

⁴⁹*DeLeon v. Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004) (“Rule 18a does not contemplate that a trial judge whose impartiality is questioned can nevertheless determine whether the allegations of bias against him state sufficient grounds for recusal.”).

A hearing on a motion to recuse is not like a trial, where reserving aces and playing them at appropriate times may effect dramatic desired results with the fact-finder. A party seeking disqualification or moving for recusal benefits from putting all cards on the table as early as possible. If the verification required by Rule 18a(a) speaks to most of the salient facts set forth in the motion,⁵⁰ a targeted judge may himself agree that they call for his recusal.

Similarly, a movant should not oppose and should even seek a hearing before that judge to urge the recusal (or disqualification) in as persuasive a way possible.⁵¹ If revealing to the opposition sooner than later facts underlying the movant's request better enables the opposition to rebut the facts, then recusal or disqualification is simply inappropriate anyway.

Rule 4: Voice Your Concerns Quickly

Rule 18a has two timing requirements for a motion to recuse: "At least ten days before the date set for trial or other hearing," Rule 18a(a), and "If within ten days of the date set for trial or other hearing a judge is assigned to a case . . . at the earliest practicable time," Rule 18a(e). The second requirement presumes that a movant has not received ten days notice of a hearing⁵² or has not discovered sooner the facts that would support a ground for recusal.⁵³ Neither requirement pertains if the judge recuses herself.⁵⁴

⁵⁰"[F]acts may be stated upon information and belief if the grounds of such belief are specifically stated." Tex. R. Civ. P. 18a(a).

⁵¹In re Rio Grande Valley Gas Co., 987 S.W.2d 167, 179 (Tex. App.--Corpus Christi 1999, orig. proceeding) ("When a trial judge is faced with a recusal motion, he may hold a hearing to determine if he will recuse himself from the case or refer the case to the administrative judge and enter an order.").

⁵²Metzger v. Sebek, 892 S.W.2d 20, 49 (Tex. App.--Houston [1st Dist.] 1994, writ denied), cert. denied, 516 U.S. 868 (1995).

⁵³*Id.* ("A contrary holding would be unreasonable; we cannot require a litigant to comply with a rule in a situation in which compliance, through no fault of his own, is impossible."). See *a/so* Keene Corp. v. Rogers, 863 S.W.2d 168, 181 (Tex. App.--Texarkana 1993, writ stayed) (Bleil, J., dissenting) ("I agree with and applaud the recognition that the law must allow a motion to recuse to be filed late when the grounds arise late or with due diligence are discovered late.").

⁵⁴Wright v. Wright, 867 S.W.2d 807, 811 (Tex. App.--El Paso 1993, writ denied).

If facts supporting recusal are not discovered until after a hearing or trial, a movant may seek recusal even at that time.⁵⁵ However, a movant will need to comply with any additional deadlines.⁵⁶

A party who fails to file within the ten-day window should be prepared to explain the delay, particularly if the trial court refuses to consider the motion and the party later appeals on this basis.⁵⁷

From the time that a party becomes concerned about a “disability of the judge to sit” in a particular case, determines facts that would support a motion to recuse, reaches the decision to file the motion, and drafts a detailed verified motion, a filing by the opposition that could prompt a ruling dispositive of the case or quite harmful to the impending movant may have been discussed if not actually made. Therefore, the movant may appear to be filing the motion to recuse to prevent the court from ruling in a way that would be unfavorable to the movant. A demonstration in the motion of the chronology leading to its filing could dissuade the targeted judge and the judge who hears the motion from engaging in such speculation.

Rule 5: Appreciate the Options Available to Your Judge

⁵⁵See Sun Exploration & Production Co. v. Jackson, 783 S.W.2d 202, 206 (Tex. 1989) (“The rule . . . does not contemplate the situation in which a party does not know of the disability of the judge to sit in the case until after trial has been completed.”) (Spears, J., concurring); *Id.* at 208 (“This rule does not apply because there is an allegation of after-acquired knowledge of facts or relationships that, if known before trial, would have given rise to a motion for recusal.”) (Gonzalez, J., concurring); Metzger v. Sebek, 892 S.W.2d 20, 49 (Tex. App.--Houston [1st Dist] 1994, writ denied), *cert. denied*, 516 U.S. 868 (1995) (“A contrary holding would be unreasonable; we cannot require a litigant to comply with a rule in a situation in which compliance, through no fault of his own, is impossible.”); *In re Healthmark Partners, L.L.C.*, ____ S.W.3d____, No. 14-04-00743-CV (Tex. App.--Houston [14th Dist.] Houston 2004, orig. proceeding) (mem.), 2004 WL 1899953, at *1 (“Relator’s motion to recuse alleges that Judge Criss evinced bias in comments and rulings she made on August 4, within ten days of trial. Therefore, Judge Criss could not refuse to act on respondent’s motion based on its untimeliness.”).

⁵⁶Bank of Texas, N.A., Trustee v. Mexia, 135 S.W.3d 356, 359 (Tex. App.--Dallas 2004, pet. filed Jul 6, 2004.) (“The Trustee’s supplemental motion for new trial urging recusal was filed March 6, 2003, the seventy-third day after the final judgment. Accordingly, this motion was untimely.”).

⁵⁷Hawkins v. Estate of Volkmann, 898 S.W.2d 334, 340-41 (Tex. App.--San Antonio 1994, writ denied) (“The motion to recuse was not timely, and no excuse for Hawkins’ inability to file it timely was offered; therefore, the judge was not required to rule on the motion or to refer it to the administrative judge for determination.”); Wright v. Wright, 867 S.W.2d 807, 812 (Tex. App.--El Paso 1993, writ denied) (recusal motion need not be considered, since it was not timely filed).

When presented with a motion to recuse, a judge certainly may recuse himself. In fact, through disclosure, a judge may even be the source of underlying facts leading to a request for recusal. A judge considering self-recusal surely weighs competing responsibilities, including Canon 3B(1) of the Texas Code of Judicial Conduct, which requires a judge to “hear and decide matters assigned . . . except those in which disqualification is required or recusal is appropriate.” Since cases often mention the “duty to sit” in the same sentence as disqualification and recusal,⁵⁸ the message seems to be that the job requirement is secondary to the duty owed to justice and the public. However, the public may be perceived as the people who elected her, to whom she may not be responsive if relieved of duty. Thus, to the extent they can control the outcome of recusal and disqualification motions, judges may feel conflicted and believe that keeping the case in their court will serve cost and other purposes and is a part of their doing their job.

If Rule 18b(2)(a) or (b) is the alleged ground for recusal, then the targeted judge—while perhaps well-positioned to verify the underlying facts as to herself—is poorly positioned to assess whether her impartiality could reasonably be questioned or whether she has any bias or prejudice regarding a party or the subject matter.⁵⁹ Moreover, even the judge who hears the motion may be challenged to assess from the standpoint of a reasonable member of society rather than a reasonable member of the judiciary.⁶⁰

Rule 6: Treat Your Judge as You Would Want to Be Treated

Because of the potential of a hearing and the adducement of evidence, attorneys

⁵⁸Rogers v. Bradley, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., concurring) (“All judges have the duty to sit and decide matters brought before them, unless there is a basis for disqualification or recusal.”).

⁵⁹Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1217 (2002) (“First, bias and prejudice are notoriously difficult to recognize within ourselves. . . . Second, public confidence in the judiciary does not result from the judiciary’s perception of impartiality; it results from the public’s perception of impartiality.”).

⁶⁰*Id.* at 1446 (“[D]rawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under section 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.”).

with the most trial experience may take the lead in recusal and disqualification proceedings. They should keep in mind while, in some instances, the targeted judge may appear be the best person to testify as to certain facts, for tactical and ethical reasons, she is usually the last person who should be called to the witness stand.

From a practical viewpoint, since the movant will have already verified most of the relevant facts in the motion to recuse, a judge would be needed to testify only as to those facts that the movant has alleged on information and belief.⁶¹ To minimize potential alienation, movants should seek testimony from the targeted judge only if the information cannot be derived from any other source; and the judge presiding over the recusal hearing may not even permit the targeted judge to testify unless that is the case.⁶²

A movant seeking recusal based on Rule 18b(2)(a) or (b), or common law disqualification, should keep in mind not only that the judge suggested to be impartial, prejudiced, or biased must be determined to be such from the perspective of another—not that judge—but that eliciting testimony from the judge on that topic will likely wind up providing evidence to the contrary. Simply, people, when asked whether they are biased or prejudiced, particularly if their job description calls for them not to be so, are likely to say they are not.⁶³

⁶¹Of course, a dispute may develop as to whether supposed facts, though apparently true based on information available to the movant, are indeed facts and/or are complete. See, e.g., *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999).

⁶²See *Thomas v. Walker*, 860 S.W.2d 579, 581 (Tex. App.--Waco 1993, orig. proceeding) (Regarding a quashed subpoena, the appellate court explained that “[t]he questions Relator would have posed to Judge Black, as read into the record at the recusal hearing, and the *ex parte* communications which Relator contends have occurred between Judge Black and the opposition, involved facts that could have been substantiated in ways other than the direct examination of Judge Black and his wife.”); In re *Rodriguez*, ___ S.W.3d ___, 2004 WL 1903319, at *1 (Tex. App.--Waco 2004, orig. proceeding) (Vance, J., dissenting) (regional administrative judge refused to permit movant below to call as witness judge whose recusal was sought, causing movant to seek mandamus to order administrative judge to have second hearing at which trial judge would testify; dissenting justice observed that, since movant would have no opportunity to develop merits of recusal, she would have preserved nothing for review on appeal).

⁶³See, e.g., *Kelly v. State*, 18 S.W.3d 239, 242 (Tex. App.-Amarillo 2000, no pet.) (“Two attorneys present in or near the courtroom on that date testified to the events, but did not present evidence regarding any bias or prejudice by Judge Kiser against appellant. Judge Kiser testified that he felt no personal bias or prejudice toward appellant which would affect his rulings in the aggravated robbery case.”); *Shahmoradi v. Bing*, No. 1-93-00439-CV (Tex. App.--Houston [1st Dist.] Jul. 14, 1994, no writ) (not designated for publication),

In spite of the protection a judge hearing the recusal motion may be presumed to afford the targeted judge, some judges nonetheless acquire legal counsel prior to attending a recusal hearing to which they have been subpoenaed. Case law suggests that, by doing so, a judge may have indicated some “interest” in the proceeding, which could lead to recusal.⁶⁴ Movants cannot create an interest by the judge by filing a suit against him.⁶⁵ However, a judge may establish such an interest by a particular kind of response.⁶⁶

Rule 7: Keep Your Arguments Impersonal

While a stated ground for recusal is bias or prejudice, a lawyer will have a very difficult time proving that the apparent fact that his judge does not like him or his client should warrant the judge’s recusal. Since a judge is deemed human, she may come to dislike a lawyer and his client during trial and may even reveal that in her words without denying the client a fair trial.⁶⁷

1994 WL 362788, at *3 (judge rehabilitated herself after tirade against party after explaining that, “notwithstanding her perception of appellant’s behavior, she would give them a fair trial.”); Mitchell v. State, No. 06-00-00055-CR (Tex. App.--Texarkana Nov. 1, 2001, pet. dismissed, untimely filed) (not designated for publication), 2001 WL 1338058, at *3 (judge who reportedly said he didn’t “give a damn” about inmates, denied that in recusal hearing and said he would be as fair to defendant as to his own mother); Roman v. State, 145 S.W.3d 316, 319 (Tex. App.--Houston [14th Dist.] 2004, no pet. heard.) (When movant challenged that he was denied of due process because judge, based on comments in trial, was prejudiced because he could not consider full range of punishment, appellate court found that “the evidence presented at the recusal hearing refutes appellant’s claim. The recusal hearing record shows Judge Harmon expressly pronounced that if appellant elected to have him assess punishment, he would consider the full range of punishment”).

⁶⁴ See *In re Chavez*, 130 S.W.3d 107, 116-17 (Tex. App.--El Paso 2003, orig. proceeding) (Barajas, C.J., concurring) (judge who has legal counsel in recusal hearing no longer appears neutral).

⁶⁵ *Spigener v. Wallis*, 80 S.W.3d 174, 181 (Tex. App.--Waco 2002, no pet.) (quoting *Chandler v. Chandler*, 991 S.W.2d 367, 386-87 (Tex. App.--El Paso 1999, pet. denied); and referring to *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979)).

⁶⁶ See *Blanchard v. Krueger*, 916 S.W.2d 15 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding) (judge who filed general denial and sought attorney’s fees and costs in lawsuit filed by movant became participant in that lawsuit and created *disqualifying* interest).

⁶⁷ See, e.g., *Metzger v. Sebek*, 892 S.W.2d 20, 40 (Tex. App.--Houston [1st Dist.]--1994, writ denied), *cert. denied*, 516 U.S. 868 (1995) (“[E]ven considering the “cumulative effect” of all of the judge’s comments, we cannot say that Metzger’s right to a fair trial was compromised by the court’s behavior. Those instances where the court showed less patience or decorum than it should have do not amount to reversible error.”); *Steelman v. Pasadena Bayshore Hospital, Inc.*, No. 04-95-00205-CV (Tex. App.--San Antonio Mar. 12, 1997, pet. denied) (not designated for publication), 1997 WL 106564, at *2-*3 (On learning that the plaintiffs had sought a continuance and a writ of mandamus, the trial judge exclaimed, “They’re not going to mandamus me. . . . that’s fine, you bust this trial setting, great. But, tell your client you ain’t getting another one for three years.” Administrative judge denied motion to recuse that cited bias and possibility that trial judge’s

Movants who allege some bias or prejudice on the judge's part or suggest some basis for a reasonable person to question the judge's impartiality often point to unfavorable court rulings. Since the remedy for erroneous rulings is appeal, opinions repeatedly state that court rulings seldom support recusal.⁶⁸ For practical purposes, the opinions should say rulings *never* support recusal. One jurist with a demonstrated expertise in recusal and disqualification has indicated that an appellate court is well-positioned to infer bias and prejudice from a pattern of rulings.⁶⁹

A lawyer who feels that his judge does not like him should revert to Rule 1 and ask whether he is not simply upset that rulings are not going his way. If that is the case, he honestly believes that the judge is in error, and he thinks the error will ultimately prejudice his client, he should make a clear record, do the best job possible of briefing the points (in an effort to change the judge's mind), and prepare himself for appeal.

Rule 8: Do Not Misuse the Code of Judicial Conduct

The Code of Judicial Conduct is not a litigation tool.⁷⁰ Litigants cannot bring to the Commission on Judicial Conduct some complaint about a judge mid-trial, expecting the Commission to issue a ruling that will have any effect on their trial. Even if timing were such that the Commission were able to assess some unethical conduct of the judge during

impartiality could be questioned.); *Elcome v. State*, No. 06-00-00020-CR (Tex. App.--Texarkana Aug. 17, 2000, no pet.) (not designated for publication) 2000 WL 1160638, at *3 ("[T]he trial court did nothing more than acknowledge what was revealed by the evidence and then warn the parties that, if such behavior continued, it would result in substantial time in jail for both of them. This does not deny due process to any party.").

⁶⁸See, e.g., the well-reasoned opinion in *Rocha v. State Bar of Texas*, No. 04-95-00158-CV (Tex. App.--San Antonio Jul. 3, 1996, writ denied) (not designated for publication), 1996 WL 364823, at *2 ("Recusal will rarely be warranted on the basis of a trial court's in-court rulings. *Grider v. Boston Co.*, 773 S.W.2d 338, 346 (Tex.App.--Dallas 1989, writ denied). Although such rulings are invariably proper grounds for appeal, they are not generally a proper ground to support recusal. *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 1158, 127 L.Ed.2d 474, 490-91 (1994).").

⁶⁹*Sun Exploration & Petroleum v. Jackson*, 783 S.W.2d 202, 208 (Tex. 1989) (Gonzalez, J., concurring) ("While individual trial court rulings may not constitute reversible error, an appellate court can nevertheless perceive from the record whether a clear pattern of favoritism emerges. In such instances, the appellate court should have the right to reverse and remand because of bias evident in the record or to affirm because, in spite of the questioned relationship, the record manifests no bias on the part of the trial judge.").

⁷⁰Texas Code of Judicial Conduct, Canon 8A ("[T]he purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.").

the pendency of a trial, such conduct would not necessarily equate to error.⁷¹

Apart from Canon 5, movants may in certain circumstances productively reference relevant portions of the Code of Judicial Conduct (and, if they do so, they should make sure it is the Texas Code, and not the Model Code or the U.S. Code they are referencing) when seeking recusal. However, citation to judicial Canons without descriptions of specific behavior to which the Commission of Judicial Conduct has applied those Canons may appear to be not-so-veiled threats to the targeted judge that the movant will “report” the judge to the Commission if he or she does not self-recuse. A party that does not file with the Commission a copy of any motion that directly accuses a judge of violating one of the Canons simply indicates to the judge hearing the motion insincerity in those accusations, a conclusion that may attach to the balance of the motion, as well.

When the Texas Supreme Court amended Canon 5 in August 2002, it provided, for the first time, commentary to the Code: “A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge’s impartiality to be reasonably questioned in the context of a particular case and may result in recusal.” The current review of the ABA’s Model Code of Judicial Conduct and the Texas Code of Judicial Conduct may result in further changes to the Texas Code.⁷² However, comprehensive analysis of the change to Texas’ Code, as opposed to that in the Model Code, regarding campaign discourse, suggests that the Texas Supreme Court may have better sorted out potential issues and averted challenges based on constitutional grounds.⁷³

⁷¹Shapley v. Tex. Dept. of Human Resources, 581 S.W.2d 250, 253 (Tex. Civ. App.--El Paso 1979, no writ) (“Unethical conduct . . . is not necessarily a legal ground for reversal.”).

⁷²See also Statement of Justice Hecht Concurring in the Amendments to the Texas Code of Judicial Conduct, approved Aug. 21, 2002.

⁷³Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(e) of the Model Code of Judicial Conduct*, 104 Colum. L. Rev. 1072, 1072 (2004) (commentator suggests that the route the ABA took is fraught with First Amendment peril, while that taken by the Texas Supreme Court “is a constitutionally acceptable substitute”).

Once a trial is over, a lawyer who believes that her judge violated one of the ethical Canons--however her client ultimately fared--has a responsibility to other lawyers and their clients and her own future clients to report that. The Texas Disciplinary Rules of Professional Conduct require reporting if the lawyer knows “that a judge has committed a violation of the applicability rules of judicial conduct that raises a substantial question as to the judge’s fitness for office.”⁷⁴ Lawyers need not be experts on the Texas Code of Judicial Conduct to do this. All they need do is make a call to the Commission in Austin, talk to one of its lawyers, and let the Commission take it from there. Lawyers who make that call because they believe their judge presided in spite of being disqualified or meeting one or more of the recusal standards may need a determination of that fact from some other authority.⁷⁵

Conclusion

The same factors that make judges so suitable for their positions—sensitivity, prior legal experience, and involvement in their communities in particular, as well as the general activities of consumers and taxpayers—can occasionally cause judges to be unsuitable to preside over cases. Litigants who convey their sincere detection of reasons for such unsuitability will fare better in removing the judge from their case and avoiding sanctions if they are unsuccessful.

⁷⁴Rule 8.03(b).

⁷⁵See Judicial Ethics Committee Op. No. 127 (1989) (“The recusal provisions that were stated in Canon 3C of the Code of Judicial Conduct are now covered by the Texas Rules of Civil Procedure. The Committee concludes that a decision on recusal is an adjudicative responsibility of the judge and that the Committee should no longer undertake to answer questions concerning recusal.”). Note, however, that the Judicial Ethics Committee is not the same as the Commission on Judicial Conduct. The former was created by the Judicial Section of the State Bar in December 1974 and began to issue advisory opinions in 1975. The Commission, a state agency, was created by constitutional amendment in 1965. The Commission has rarely issued public sanctions on its own determination that a judge has presided when he/she was disqualified or should have recused.