ARTICLE

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Judicial Disqualification and Recusal in Criminal Cases

Abstract. The United States Supreme Court has recognized circumstances in which the probability of judicial bias requiring disqualification or recusal is "too high to be constitutionally tolerable." At the same time, the Texas Constitution contains a number of provisions barring a judge from presiding over a case under specific circumstances, while statutes and procedural rules either disqualify a judge or require him or her to be recused. Thus, whether a particular judge may preside over a given criminal case may be questioned under the Due Process Clause, the Texas Constitution, statue, or the rules of procedure. This Article will examine the applicable constitutional, statutory, and procedural rules that determine whether a particular judge may preside over a specific criminal case in Texas.

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I. INTRODUCTION

As the United States Supreme Court has observed, "[i]t is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'"[1] Nevertheless, the Court opined, matters of judicial disqualification were best left to statutes and judicial codes, and for almost a century, were not considered to rise to the constitutional level.[2] By the early twentieth century, however, the Court began to recognize circumstances in which the probability of judicial bias was "too high to be constitutionally tolerable."[3] At the same time, the Texas Constitution contains a number of provisions barring a judge from presiding over a case under specific circumstances, while statutes and procedural rules either disqualify a judge or require him or her to be recused. Thus, whether a particular judge may preside over a given case may be questioned under due process, the Texas Constitution, the rules of procedure, or statue. This Article will examine the applicable constitutional, statutory, and procedural rules that determine whether a particular judge may preside over a specific criminal case in Texas.

Judges in criminal cases are subject to both disqualification and recusal.[4] A judge may be disqualified under due process, provisions of the Texas Constitution, Article 30.01 of the Code of Criminal Procedure, or Rule 18b of the Texas Rules of Civil Procedure.[5] She may also be subject

1. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 867 (2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

2. *Id.* (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

3. *Id.* at 877 (quoting Winthrow v. Larkin, 421 U.S. 35, 47 (1975)).

4. *See* TEX. CONST. art. V, § 11 (explaining when a judge may be disqualified in both the higher and lower courts); TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006) (providing the causes for which a judge can be disqualified); TEX. R. CIV. P. 18b (laying out the grounds for disqualification and recusal of judges); Gaal v. State, 332 S.W.3d 448, 452 (Tex. Crim. App. 2011) ("A Texas judge may be removed from presiding over a case for one of three reasons: he is constitutionally disqualified; he is subject to a statutory strike; or, he is subject to statutory disqualification or recusal under the Texas Supreme Court rules." (footnotes omitted)); Rhodes v. State, 357 S.W.3d 796, 799 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("A Texas judge may be removed from a case if he or she is (1) constitutionally disqualified, (2) subject to a statutory strike, (3) subject to statutory disqualification, or (4) subject to recusal under rules promulgated by the Texas Supreme Court."); *see also* Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (affirming the civil rules of recusal "appl[y] to criminal cases absent 'any explicit or implicit legislative intent indicating otherwise'" (quoting McClenan v. State, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983))). The rule permitting a party to strike a visiting judge specifically applies only in civil cases. *See* TEX. GOV'T CODE ANN. § 74.053 (West 2005) ("If a party in a civil case files a timely objection to the assignment, the judge shall not hear the case.").

5. TEX. CONST. art. V, § 11; CRIM. PROC. art. 30.01; TEX. R. CIV. P. 18b(a); *see Caperton*, 556 U.S. at 884–87 (concluding raising funds for a judge's election by a party's president created a

to recusal under Rule 18b of the Texas Rules of Civil Procedure.[6] The difference between the disqualification and the recusal are significant: while recusal is subject to the procedures and time limits set out in Rules 18a and 18b of the Texas Rules of Civil Procedure, a party may raise the issue of disqualification at any time during trial or on direct appeal;[7] the parties cannot waive a judge's disqualification;[8] and the acts of a disqualified judge are voidable.[9]

situation requiring recusal under the Due Process Clause); *see also Arnold*, 853 S.W.2d at 544 (applying the civil rules of recusal to criminal cases in the absence of legislative intent to the contrary).

6. TEX. R. CIV. P. 18b(b).

7. *Id.* R. 18a(a), (b)(2), (g)(3)(B). Traditionally, disqualification could be raised for the first time on appeal. *See* Whitehead v. State, 273 S.W.3d 285, 287 (Tex. Crim. App. 2008) (reiterating a defendant may raise issue of disqualification for first time on appeal); *Ex parte* Richardson, 201 S.W.3d 712, 714 (Tex. Crim. App. 2006, orig. proceeding) (asserting a defendant may raise the issue of disqualification during trial or direct appeal, but the issue is not cognizable on habeas); *see also* Lackey v. State, 364 S.W.3d 837, 846–47 (Tex. Crim. App. 2012) (holding a defendant made a timely preserved objection that the judge who presided over his pretrial motion to suppress was disqualified by filing a motion to set aside the suppression ruling as soon as discovering the suppression judge lacked statutory qualifications to serve as a visiting judge). *Compare* TEX. R. CIV. P. 18a(j)(2) ("An order granting or denying a motion to recuse may be reviewed by mandamus and may be appealed in accordance with other law"), *with id.* R. 18a(j)(1)(A)–(B) (proclaiming an order denying a recusal motion may be appealed only on final judgment and an order granting recusal may not be appealed). Recent changes to Rule 18a, particularly the requirement that a motion to disqualify must be filed "as soon as practicable," suggest disqualification need not be raised in the trial court to be preserved, though other portions of the rule are ambiguous. *Compare* TEX. R. CIV. P. 18a(b)(2) (providing the requirements for the time in which a motion to disqualify must be filed), *with id.* R. 18a(j)(2) ("An order granting or denying a motion to disqualify may be reviewed by mandamus and may be appealed in accordance with other law."). In prior cases, five judges on the Court of Criminal Appeals, in dicta, have suggested a defendant must assert a judge is disqualified at trial or risk waiving the issue, albeit under different theories. *Compare Whitehead*, 273 S.W.3d at 290 (Johnson, J., concurring) ("[T]he authority of a judge to act, as opposed to the jurisdiction of the court, is not a jurisdictional question and must therefore be raised in court; it may not be raised for the first time on appeal."), *with id.* at 290–91 (Keller, P.J., dissenting) (recommending the timeliness of an objection to a judge's authority to preside over a case should be controlled by Rule 33.1).

8. *See* Gamez v. State, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987) ("The disqualification of a judge may not be waived even by the consent of parties." (citation omitted)); *see also* Abram v. State, 20 S.W. 987, 988 (Tex. Crim. App. 1893) (holding a judge who had represented the defendant in the case before taking the bench was disqualified from the same case, notwithstanding the fact the defendant suggested appointment of the judge, and both parties agreed to appointment). *But see Ex parte Richardson*, 201 S.W.3d at 714 (concluding a defendant who pled true to revocation before a judge he knew had been the prosecutor in the original prosecution could not raise issue of disqualification on collateral attack).

9. *See Lackey*, 364 S.W.3d at 846–47 (asserting the ruling by a visiting judge who was disqualified to preside as a visiting judge was a nullity); Greer v. State, 999 S.W.2d 484, 487–88 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (declaring the condition of probation was void where it had been added by the judge who was disqualified from presiding over the case). *Compare Whitehead*, 273 S.W.3d at 289 (deciding a retaliation conviction was a "nullity" where a judge was disqualified on the basis that he was one of the individuals the defendant had threatened), *with Ex parte Richardson*, 201 S.W.3d at 714 (holding, though the judge was disqualified to try the case, since the rulings were

II. DISQUALIFICATION

There are three principal provisions under which a trial judge may be disqualified in a criminal case, though there is significant overlap between them. A trial judge may be disqualified under either Article V, section 11 of the Texas Constitution;[10] Article 30.01 of the Texas Code of Criminal Procedure;[11] or Rule 18b(1) of the Rules of Civil Procedure.[12] Article V, Section 11 provides:

> No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.[13]

Article 30.01 declares:

> No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree, as determined under Chapter 573, Government Code.[14]

Finally, Rule 18b(a) requires a judge to disqualify himself if: (1) "the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served" as counsel in the case; (2) he "knows that, individually or as a fiduciary, [he] has an interest in the subject matter of the controversy;" or (3) any "of the parties may be related to them by affinity or consanguinity within the third degree."[15]

In addition to the three primary provisions for disqualification, common law provides that a judge may be disqualified from presiding over a case in which he has developed a bias so extreme as to violate a party's due process rights.[16] There are also a number of statutory provisions that

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voidable, not void, the issue was not cognizable on habeas).

10. *See Ex parte Richardson*, 201 S.W.3d at 712–13 (concluding a judge may be disqualified under Article V, Section 11).

11. *See Whitehead*, 273 S.W.3d at 287–88 (holding a judge may disqualified under Article 30.01); *id.* (finding a judge may be disqualified under Article 30.01 or Article V, Section 11).

12. *See* Kennedy v. Wortham, 314 S.W.3d 34, 36 (Tex. App.—Texarkana 2010, pet. denied) (applying Rule 18b(1) but finding the judge was not disqualified); *see also* TEX. R. APP. P. 16.1 ("The grounds for disqualification of appellate court justice or judge are determined by the Constitution and the laws of Texas."); Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding Rule 18a applies in criminal cases).

13. TEX. CONST. art. V, § 11.

14. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006).

15. TEX. R. CIV. P. 18b(1)(a)–(c).

16. *See* Bracy v. Gramley, 520 U.S. 899, 904–05 (1997) ("[T]he floor established by the Due

prohibit a judge from participating in a case under specific administrative circumstances.[17]

Grounds for disqualification, thus, generally fall into the following broad categories: (a) the judge has an interest in the case; (b) the judge is, or is related to, a party in the case; (c) the judge actively participated as counsel for either party in the case; (d) the judge possesses such an extreme bias against the defendant as to violate due process; and (e) other miscellaneous grounds.[18]

Disqualification of appellate court justices and judges is narrower. Disqualification in an appellate court is governed by Rule 16.1 of the Rules of Appellate Procedure, which provides that "the grounds for disqualification of an appellate court justice or judge are determined by the constitution and laws of Texas."[19] Since the rule limits disqualification to constitutional and statutory grounds only, an appellate justice or judge cannot be disqualified solely on a ground set out in Rule 18b(a).[20]

A. *The Judge Has an Interest in the Case*

Article V, Section 11 of the Texas constitution provides that "no judge shall sit in any case wherein he or she may be interested."[21] Likewise,

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Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975))); McClenan v. State, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) ("[W]e limit the use of bias as a ground for disqualification to those cases in which the bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."); *see also* Celis v. State, 354 S.W.3d 7, 21 (Tex. App.—Corpus Christi 2011) ("The Due Process Clause guarantees a defendant a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (citing *Bracy*, 520 U.S. at 904–05)), *aff'd on other grounds*, 416 S.W.3d 419 (Tex. Crim. App. 2013).

17. *See, e.g.*, 28 U.S.C. § 455(a)–(b) (2012) (stating the circumstances in which a judge shall disqualify himself).

18. *See* TEX. CONST. art. V, § 2(b) (laying out the qualifications for a Texas Supreme Court justice); *id.* art. V, § 4(a) (providing the qualifications for a Texas Court of Criminal Appeals judge); *id.* art. V, § 7 (stating the qualifications for a district court judge); *id.* art. XVI, § 1 (establishing the requirement of an anti-bribery oath); *id.* art. XVI, § 5 (indicating disqualification results from offering or accepting a bribe).

19. TEX. R. APP. P. 16.1.

20. *See* F.S. New Prods., Inc. v. Strong Indus., Inc., 129 S.W.3d 594, 598–601 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding vicarious disqualification under [Rule 18b(a)(1)] does not apply to an appellate court justice where vicarious disqualification has never been applied under the Constitution and statute); Sears v. Olivarez, 28 S.W.3d 611, 615 (Tex. App.—Corpus Christi 2000, no pet.) (en banc) ("The grounds for disqualification of appellate court justices are determined by the [C]onstitution and the laws of Texas." (citation omitted)); *see also* TEX. R. APP. P. 16 Notes and Comments ("For grounds for disqualification, reference is made to the Constitution and statutes rather than the Rules of Civil Procedure.").

21. TEX. CONST. art. V, § 11. Similarly, the Supreme Court has opined that due process

under Rule 18b(a)(2) "a judge must disqualify in any proceeding" if "the judge knows that, individually or as a fiduciary, [he] has an interest in the subject matter in controversy."[22] The Constitution does not define what constitutes an "interest" in a case. Violating the maxim of logic that nothing should be defined in terms of itself,[23] the Texas Supreme Court has limited an "interest that disqualifies a judge" to an interest, "however small, which rests on a direct pecuniary or personal interest in the result of the case."[24] Similarly, Rule 18b defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."[25]

Though simply being named in a suit is not a sufficient "interest" to disqualify a judge from presiding over a criminal proceeding,[26] it does not follow that not being named will automatically insulate a judge from a disqualifying interest if the judge's rulings might influence an ancillary case in which the judge is a party.[27] A judge's personal view on an issue before her, however, does not constitute an "interest in the subject matter of the controversy"[28] sufficient to warrant her disqualification.[29]

requires that a judge who has "a direct, personal, substantial, [or] pecuniary interest" in a case be disqualified. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

22. TEX. R. CIV. P. 18b(a)(2).

23. *See* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 125–27 (11th ed. 2002) (defining something in terms of itself makes it too vague for purposes of logical analysis).

24. Cameron v. Greenhill, 582 S.W.2d 775, 776 (Tex. 1979) (per curiam) (citations omitted). Finding the justices of the Supreme Court had no greater pecuniary interest in suit over state bar fees than any other member of the bar and were not disqualified simply because they had been named in the suit. *Id.*

25. TEX. R. CIV. P. 18b(d)(4).

26. *See* Chamberlain v. State, 453 S.W.2d 490, 492 (Tex. Crim. App. 1970) ("If the mere filing of a civil action against the judge presiding [over a] . . . case would disqualify [the judge], then any judge would be subject to disqualification at the whim [of either party]."); *see also Cameron*, 582 S.W.2d at 776 (finding that being named in the suit was not sufficient to disqualify a judge as having an "interest" in the case, particularly where the judge enjoys judicial immunity over subject of suit); Kennedy v. Staples, 336 S.W.3d 745, 750 (Tex. App.—Texarkana 2011, no pet.) (asserting a party seeking nominal damages against a judge was not sufficient to disqualify the judge as having an interest in the controversy); Kennedy v. Wortham, 314 S.W.3d 34, 36 (Tex. App.—Texarkana 2010, no pet.) (declaring merely being named in a suit was not sufficient to disqualify a judge); Prince v. State, 677 S.W.2d 181, 183 (Tex. App.—San Antonio 1984, no pet.) (holding a judge was not disqualified from an attempted capital murder case on the basis the defendant had filed a civil suit against him).

27. *See* Aetna Life Ins. v. Lavoie, 475 U.S. 813, 824 (1986) (finding an appellate judge, who was not named in an insurance suit, nevertheless had an "interest" in the case as it set precedent for the claim and thereby "enhanc[ed] both the legal status and the settlement value of his own case," requiring disqualification under due process).

28. TEX. R. CIV. P. 18b(a)(2).

29. *See* Chastain v. State, 667 S.W.2d 791, 796 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd) (contending the judge's personal opinion of the death penalty was not a ground for

B. *The Judge Is, or Is Related to, a Party in the Case*

Article V, section 11 of the Texas Constitution mandates that a judge is disqualified from any case "where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law."[30] Article 30.01 of the Code of Criminal Procedure delimits the degree of affinity or consanguinity: "No judge . . . shall sit in any case where he may be the party injured, or . . . where the accused or the party injured may be connected with him by consanguinity within the third degree."[31] Rule 18b(a)(3) of the Texas Rules of Civil Procedure echoes Article 30.01 by providing that judges are disqualified when "either of the parties may be related to the judge by affinity or consanguinity within the third degree."[32]

Since the State is always one of the parties in a criminal prosecution and an individual person cannot be related to the State by ties of affinity or consanguinity,[33] a plain reading the Texas Constitution and Rule 18b suggests both only prohibit a judge from presiding over a case in which he is related to the accused. The Code of Criminal Procedure, going further, disqualifies a judge from presiding over a case in which she is related to the accused, she is the victim herself, or she is related to the victim.[34]

None of the rules prohibit a judge from presiding over a case in which she is related to counsel in the case.[35] Thus, a judge may not be disqualified in a case in which she is related to one of the attorneys before

disqualification); Templin v. State, 321 S.W.2d 877, 879 (Tex. Crim. App. 1959) (holding the judge's mere expression of disapproval of alcohol use and sale was not grounds for disqualification, absent showing that prejudice was sufficient to disqualify judge); *see also* McKenna v. State, 221 S.W.3d 765, 768 (Tex. App.—Waco 2007, no pet.) (claiming the judge had no "interest" in a bail bond forfeiture case simply due to the fact he served on the bail bond board).

30. TEX. CONST. art. V, § 11.

31. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006).

32. TEX. R. CIV. P. 18b(a)(3).

33. *See* Mosley v. State, 983 S.W.2d 249, 256 (Tex. Crim. App. 1998) ("In a criminal case, the only parties are the State and the defendant. It is not possible to have ties of blood or marriage to 'the State.'").

34. CRIM. PROC. art. 30.01; *see also id.* (finding "Article 30.01's 'parties injured' language appears to be intended to include the victim (complainant), and we so hold;" thus, the fact the judge was the uncle of the officer who was a "complaining witness" in a capital murder case did not disqualify him from presiding).

35. *See* Martinez v. Martinez, 608 S.W.2d 719, 720 (Tex. 1980) (reaffirming a lawyer is not a party to a suit within the meaning of Article V, Section 11 or the precursor to Rule 18b); McKnight v. State, 432 S.W.2d 69, 71–72 (Tex. Crim. App. 1968) (concluding the district attorney is not a "party" to a criminal case within the meaning of Article V, Section 11 or Article 30.01); Winston v. Masterson, 27 S.W. 768, 768 (Tex. 1894) (deciding a lawyer is not a "party" in a suit under Article V, Section 11).

her, though she may be subject to recusal.[36] Under Texas anti-nepotism statutes, however, a judge may not appoint a relative within the applicable degrees of consanguinity or affinity as counsel for an indigent defendant who will be paid from public funds.[37]

1. The Judge Is the Victim

Oddly, perhaps, neither the Texas Constitution nor the Rules of Civil Procedure specifically prohibit a judge from presiding over a case in which he is the victim, as the prohibition against sitting on a case in which the judge has an "interest" has been construed narrowly and both provisions bar a judge only if he is "connected" or "related" to a "party."[38] Article 30.01 of the Code of Criminal Procedure, however, disqualifies a judge "where he may be the party injured."[39] Though rare, judges have on occasion been disqualified under this provision.[40] Disqualification on the

36. *See McKnight*, 432 S.W.2d at 71–72 (finding a judge was not disqualified from a case his son-in-law prosecuted); *see also Martinez*, 608 S.W.2d at 720 (affirming the judge was not disqualified from a case in which his son-in-law represented one of the parties); *Winston*, 27 S.W. at 768 (holding a judge was not disqualified from a case in which his brother represented one of the parties); Kimmell v. Leoffler, 791 S.W.2d 648, 650 (Tex. App.—San Antonio 1990, no writ) (per curiam) (finding membership in the same branch of government or same professional organization does not amount to a relationship by affinity or consanguinity); Lyon v. State, 764 S.W.2d 1, 2 (Tex. App.—Texarkana 1988) (holding the judge was not disqualified from presiding over a case his son prosecuted), *aff'd*, 872 S.W.2d 732 (Tex. Crim. App. 1994).

37. *See* Bean v. State, 691 S.W.2d 773, 774–75 (Tex. App.—El Paso 1985, pet. ref'd) (affirming the judge's guilty verdict for official misconduct in violating the nepotism statute by appointing his uncle to represent indigent defendants in his court); *see also* TEX. GOV'T CODE ANN. § 573.041(1) (West 2004) ("A public official may not appoint . . . an individual to a position that is directly or indirectly compensated from public funds or fees if . . . the individual is related to the public official within a degree described by Section 573.002 . . . ."); Tex. Att'y Gen. Op. No. LA-111 (1975) (opining the nepotism law prohibits a district court judge from appointing a relative to represent indigent defendants); William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L. J. 599, 609–10 (1986) ("But, a judge should nevertheless beware of appointing a relative to represent an indigent. Article 5996a of the Texas Revised Civil Statutes, the anti-nepotism statute, has been interpreted in Attorney General Opinion LA No. 111, as prohibiting the appointment of a relative as attorney for an indigent when public funds are used to pay the attorney.").

38. *See* TEX. CONST. art. V, § 11 ("No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge . . . ."); TEX. R. CIV. P. 18b(a)(2) (disqualifying a judge when she "knows that, individually or as a fiduciary, [she] has an interest in the subject matter of the controversy; or either of the parties may be related to the judge"); Davis v. State, 44 Tex. 523, 524 (1876) ("The fact that the presiding judge was the person from whom the property was alleged to be stolen . . . is not a good ground of disqualification, because he is not thereby shown to be 'interested' in the 'case,' not being a party thereto or liable to any loss or profit therefrom, otherwise than as any other person in the body politic.").

39. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006).

40. *See* Whitehead v. State, 273 S.W.3d 285, 289 (Tex. Crim. App. 2008) (concluding a judge,

grounds that the judge is a "party injured" is not limited to whether the judge is the "victim named in the indictment" or information; rather, a judge will be considered the "party injured"—and therefore disqualified—"if the evidence shows that he was among the defendant's victims in the criminal transaction or episode at issue . . . such that a reasonable person would harbor doubts as to the judge's impartiality" even if he is not named as a victim in the indictment.[41] A judge is not always the "victim" of an offense committed in her court, so charges of perjury or fabricating evidence can be presided over by the judge in the court in which the offenses arose.[42]

It is unclear whether a judge may be disqualified on the basis that he was a victim of an offense introduced during the punishment stage. Literally, he would not be the "party injured" in the prosecution and would not be disqualified under Article 30.01.[43] The Fifth Circuit, however, has suggested that while a trial judge's admission of such evidence may not rise to the level of an "indicia of bias sufficient to declare the trial tainted," the evidence may be "'so unduly prejudicial'" that its admission may constitute

who was one of several threatened with retaliation in a letter from the defendant, was disqualified from presiding over the trial in which another one of those threatened in the letter was named in the indictment); January v. State, 38 S.W. 179, 179–80 (Tex. Crim. App. 1896) (deciding the judge, whose brother's hog was shot and killed, was an "injured party" under Article 606 of the Code of Criminal Procedure (the precursor of present Article 30.01) and, thus, disqualified from presiding over the criminal case against the shooter); *Ex parte* Ambrose, 24 S.W. 291, 292 (Tex. Crim. App. 1893) (asserting a justice of the peace, who was a victim of an assault, was disqualified from presiding over his assailant's guilty plea); *see also Ex parte* Sinegar, No. AP-76,340, 2011 WL 4067402, at *1 (Tex. Crim. App. Sept. 14, 2011, orig. proceeding) (per curiam) (not designated for publication) (holding a judge was disqualified from presiding over a probation revocation where one of the grounds alleged was that the defendant had personally threatened the judge); Burkett v. State, 196 S.W.3d 892, 896 (Tex. App.—Texarkana 2006, no pet.) (recognizing a judge who was sent a threatening letter by the defendant was disqualified from excusing various pool members who claimed statutory exemptions in the trial on a charge of terroristic threat). *But see* Tingler v. State, No. 09-06-00453-CR, 2008 WL 281841, at *2 (Tex. App.—Beaumont Jan. 16, 2008, pet. ref'd) (mem. op., not designated for publication) (finding a judge was not disqualified as a victim in the case where he requested additional security during trial due to a threat against his life made by the defendant's mother and where the defendant was not charged with having threatened the judge).

41. *Whitehead*, 273 S.W.3d at 288–89.

42. Lane v. State, 634 S.W.2d 65, 66 (Tex. App.—Fort Worth 1982, no pet.); *see* Aldridge v. State, 342 S.W.2d 104, 107 (Tex. Crim. App. 1960) (deciding a judge who was a member of commissioners court for only thirty-two days was not an "injured party" in a criminal libel action arising from an editorial accusing the commissioners court of fraud); *see also* Eggert v. State, No. 11-10-00177-CR, 2011 WL 817663, at *1 (Tex. App.—Eastland Mar. 10, 2011, no pet.) (per curiam) (not designated for publication).

43. CRIM. PROC. art. 30.01; *see also* Kimmell v. Leoffler, 791 S.W.2d 648, 650 (Tex. App.—San Antonio 1990, no writ) (per curiam) ("Clearly the disqualification requirement of [R]ule 18b(1) encompasses only relation by marriage (affinity) or by blood (consanguinity).").

constitutional error even if the judge could not have been disqualified.[44]

2. The Judge Is Related to the Accused or the Victim

As already observed, all three rules of disqualification prohibit a judge from presiding over a case in which he may be related to the accused either by affinity (i.e., marriage) or consanguinity (i.e., blood).[45] While the constitution does not set out the necessary degree of relation, except to provide that it must be "within such a degree as may be prescribed by law," both Article 30.01 and Rule 18b(1)(c) specify that it must be only to the third degree.[46] Rule 18b further provides that the degree of relationship must be calculated "according to the civil law system."[47]

Section 573 of the Government Code sets out the rules for assessing relationships by consanguinity and affinity.[48] Under the Government Code, two individuals are connected by blood if one is the progeny of another "or they share a common ancestor."[49] "The degree of relationship . . . between an individual and the individual's descendant is determined by the number of generations" between them.[50] Thus, "[a] parent and child are related in the first degree, a grandparent and grandchild in the second degree, and a great-grandparent and great-grandchild in the third degree."[51] Relationships of consanguinity in which individuals are not directly descended are calculated on a formula set out in

44. Bigby v. Dretke, 402 F.3d 551, 563–64 (5th Cir. 2005) (quoting Dawson v. Delaware, 503 U.S. 159, 179 (1992) (finding the trial judge who was attacked by the defendant during the trial was not required to recuse himself, but admission of evidence of the attack during the punishment phase may have violated the defendant's due process rights)); *see also* Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (recognizing a defendant's "deliberate attack on the trial judge calculated to disrupt the proceedings will not force [the] judge out of case," although the appellate court may review the judge's subsequent rulings for an indicia of bias).

45. *See* TEX. CONST. art. V, § 11 ("No judge shall sit in any case . . . where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law . . . ."); CRIM. PROC. art. 30.01 ("No judge or justice of the peace shall sit in any case . . . where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree, as determined under Chapter 573, Government Code."); TEX. R. CIV. P. 18b(a)(3) (requiring judges "must disqualify themselves in any proceedings in which . . . either of the parties may be related to them by affinity or consanguinity within the third degree"); *Ex parte* Vivier, 699 S.W.2d 862, 863 (Tex. Crim. App. 1985, orig. proceeding) (per curiam) (holding a judge was disqualified because he was related to the defendant).

46. CRIM. PROC. art. 30.01; TEX. R. CIV. P. 18b(a)(3); *see Ex Parte Vivier*, 699 S.W.2d at 863 (finding a judge was disqualified where he was related to the defendant within the third degree).

47. TEX. R. CIV. P. 18b(d)(2).

48. TEX. GOV'T CODE ANN. § 573 (West 2004).

49. *Id.* § 573.022(a).

50. *Id.* § 573.023(a).

51. *Id.*

Section 573.023(b) of the Government Code.[52] The result is that individual "relatives within the third degree [of] consanguinity are the individual's:

> (1) parent or child (relatives in the first degree); (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is the brother of a parent of the individual, . . . or [nephew or] niece who is a child of a brother or sister of the individual (relatives in the third degree)."[53]

Two individuals are related by affinity to each other under the Code if they are married or the spouse of one is related by blood to the other person.[54] "For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship of consanguinity."[55] Thus, a person's "relatives within the third degree of affinity are: anyone related by consanguinity to the individual's spouse" by the third degree or "the spouse of anyone related to the individual by consanguinity to the third degree."[56]

Curiously, under the Texas Constitution and Rule 18b, a judge is not disqualified from presiding over a case in which he is related to the victim, as victims are not "parties" in a criminal action and both provisions only prohibit a judge from presiding over a case in which he may be related to a "party."[57] Article 30.01, however, disqualifies a judge from presiding over a case "where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree."[58] As the "party

52. *Id.* § 573.023(b).

53. *Id.* § 573.023(c)(1)–(3).

54. *Id.* § 573.024(a).

55. *Id.* § 573.025(a).

56. *Id.* § 573.025(b)(1)–(2); *see* Lyon v. State, 764 S.W.2d 1, 2 (Tex. App.—Texarkana 1988) ("Affinity is defined as: [t]he tie which exists between one of the spouses with the kindred of the other[;] thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity." (quoting Washburn v. State, 318 S.W.2d 627, 639 (Tex. Crim. App. 1958))), *aff'd*, 872 S.W.2d 732 (Tex. Crim. App. 1994); *see also* Johnson v. State, 332 S.W.2d 321, 322 (Tex. Crim. App. 1960) ("Otherwise stated, the rule is that in determining whether two persons are related by affinity (marriage) the relationship does not exist where more than one marriage is required to establish it."); Cortez v. State, 161 S.W.2d 495, 497 (Tex. Crim. App. 1942) ("It may not be amiss to here call appellant's attention to the old and familiar adage: 'The groom and bride each come within. The circle of each other's kin, But kin and kin are still no more Related than they were before.'").

57. *See* Mosley v. State, 983 S.W.2d 249, 256 (Tex. Crim. App. 1998) (concluding "[i]n . . . criminal case[s], . . . [i]t is not possible to have ties of blood or marriage to 'the State'"; therefore, a judge cannot be disqualified due to relationship of consanguinity or marriage with the State).

58. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006).

injured" under the statute includes the victim,[59] a judge is disqualified under Article 30.01 from any case in which his sibling is the victim, for example.[60] A judge is not disqualified from presiding over a trial in which the prosecutor, the judge's son, "was the victim's brother's brother-in-law"[61] or in which the judge's wife was the "first cousin to the wife of a brother of the deceased"[62] because in neither case was the tie of "affinity within the third degree."[63]

C. *The Judge Was Counsel for Either Party in the Case*

All three rules for disqualification bar judges from sitting on cases in which they served as an attorney for one of the parties.[64] Texas courts have interpreted this ground for disqualification narrowly.[65] A judge is not disqualified simply because he prosecuted or defended the accused in

59. *Mosley*, 983 S.W.2d at 256.

60. *Compare* January v. State, 38 S.W. 179, 179–80 (Tex. Crim. App. 1896) (concluding the judge was disqualified under the Code of Criminal Procedure from presiding over a case in which the defendant was accused of killing a hog that belonged to the defendant's brother), *with* Davis v. State, 44 Tex. 523, 524 (1876) (holding the judge was not disqualified under the Texas Constitution, because "[t]he fact that the presiding judge was the person from whom the property was alleged to be stolen . . . is not a good ground of disqualification, because he is not thereby shown to be 'interested' in the 'case,' not being a party thereto or liable to any loss or profit therefrom, otherwise than as [a] person in the body politic").

61. *Lyon*, 764 S.W.2d at 2.

62. *See* Washburn v. State, 318 S.W.2d 627, 639–40 (Tex. Crim. App. 1958) ("It is apparent that under the rules stated Judge Woodley could not be and was not related by affinity to those who are related to his wife only by affinity—which is the situation here presented.").

63. *See Johnson*, 332 S.W.2d at 322 (finding the judge, whose wife was the niece of the defendant's wife, was not disqualified because the judge was not related to the defendant by affinity); *Cortez*, 161 S.W.2d at 497 (deciding a juror, whose sibling married the victim's second cousin victim, was not disqualified because he was not related to the victim by affinity within the third degree). A relationship of affinity cannot exist "where more than one marriage is required to establish it." *Johnson*, 332 S.W.2d at 322.

64. *See* TEX. CONST. art. V, § 11 ("No judge shall sit in any case wherein . . . the judge shall have been counsel in the case."); TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006) ("No judge or justice of the peace shall sit in any case . . . where he has been counsel for the State or the accused . . . ."); TEX. R. CIV. P. 18b(a)(1) ("A Judge must disqualify in any proceeding in which . . . the judges has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . ."); *see also* Abram v. State, 20 S.W. 987, 988 (Tex. Crim. App. 1893) (deeming a judge, who had represented the defendant, including filing a motion for continuance and interviewing the defendant and witnesses, was disqualified from presiding over the same case).

65. *See* State *ex. rel.* Millsap v. Lozano, 692 S.W.2d 470, 475–76 (Tex. Crim. App. 1985) (explaining that a judge's qualification is presumed until proven otherwise on a motion to disqualify "based on strict constitutional grounds" that exclusively "specify all the circumstances that forbid a judge" from sitting, and distinguishing recusal from the concept of "strict constitutional disqualification").

the past.[66] To be disqualified as previous counsel, the judge must have been counsel in the specific case she is hearing; the fact that the judge may have represented or prosecuted the defendant in some other unrelated case,[67] or prosecuted or defended one of the convictions used for enhancement[68] or introduced during the punishment phase[69] is not sufficient grounds to disqualify her.[70] Moreover, to have "acted as counsel in the case" means that the judge, while an attorney, actually investigated, advised, or participated in the case in some way.[71] The party seeking to disqualify the judge must affirmatively demonstrate the judge actually served as counsel in the case in which she is sitting.[72] Absent such a showing, an act of participation will not be imputed to the judge for purposes of disqualification.[73]

Based upon this strict interpretation of the phrase "shall have been

66. *See* Holifield v. State, 538 S.W.2d 123, 125 (Tex. Crim. App. 1976) (finding the record did not show the judge participated in the case where he was the district attorney in Randall County when the offense was indicted in Potter County and there was no showing the case was connected to Randall County cases); *see also* Kuykendall v. State, 335 S.W.3d 429, 432–33 (Tex. App.—Beaumont 2010, pet. ref'd) (rejecting the contention the trial judge was disqualified because he had defended the accused in a previous case);Hathorne v. State, 459 S.W.2d 826, 829 (Tex. Crim. App. 1970) (adhering to the well-settled rule a judge is not disqualified because he had prosecuted the defendant in the past).

67. *See Holifield*, 538 S.W.2d at 125 (determining the record did not establish the judge participated in the case where he was the district attorney in Randall County, the offense was indicted in Potter County, and there was no showing that the case was connected to Randall County cases).

68. *See Hathorne*, 459 S.W.2d at 833 (holding "the mere inclusion in the indictment or information of allegations as to prior convictions (for enhancement of punishment only) does not disqualify the trial judge because he was of counsel in such prior conviction or convictions for either the State or the defense," thus finding the judge was not disqualified because he had prosecuted one of the prior convictions used for enhancement); *Kuykendall*, 335 S.W.3d at 433 (determining a judge was not disqualified where he had been defense counsel in two of the convictions used as enhancements (citing *Hathorne*, 459 S.W.2d at 829, 833)).

69. *See* Brown v. State, 108 S.W.3d 904, 908 (Tex. App.—Texarkana 2003, pet. ref'd) (rejecting the defendant's argument that the judge was disqualified on grounds he had prosecuted the defendant in a conviction which was introduced in the punishment stage of the trial as part of defendant's prior criminal record).

70. *See Hathorne*, 459 S.W.2d at 829 ("It has been held . . . that to come within the meaning of 'counsel in the case' in the statute prescribing [disqualification] of judges, it must appear that the judge acted as counsel *in the very case* before him.").

71. *See* Gamez v. State, 737 S.W.2d 315, 319 (Tex. Crim. App. 1987) (finding the judge was not a "counsel in the case" and, therefore, disqualified when, as assistant criminal district attorney, he did not prepare, sign, or stamp the State's written announcement of ready and which was signed with his stamped signature by someone else).

72. *See Hathorne*, 459 S.W.2d at 833 (declining to hold the mere allegation of a prior conviction, in which the judge was of counsel, would work an automatic disqualification).

73. *See Ex parte* Miller, 696 S.W.2d 908, 909–10 (Tex. Crim. App. 1985, orig. proceeding) (concluding that the necessary affirmative showing of "actual and active participation in the applicant's conviction" is apparent in the record, and thus finding the judge was disqualified).

counsel in the case" in Article V, Section 11[74] and "has been of counsel" in Article 30.01,[75] Texas courts have held for more than one hundred years that "the mere fact that a judge was district attorney at the time of the offense or at the time that the accused was examined or indicted does not work a disqualification if, when district attorney, he had nothing to do with the prosecution."[76] Rather, a judge who is a former prosecutor is disqualified only if the record affirmatively demonstrates that he actively participated in the very case as a prosecutor.[77]

74. TEX. CONST. art. V. § 11.

75. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006).

76. *Gamez*, 737 S.W.2d at 319 (citations omitted); *see also Ex Parte Miller*, 696 S.W.2d at 909–10 (finding the judge, who "had an actual and active participation" as a state's attorney in convicting appellant, was disqualified from presiding in a subsequent probation revocation since it was "part of the same ongoing case"); Carter v. State, 496 S.W.2d 603, 604 (Tex. Crim. App. 1973) (concluding a typewritten notation on the docket sheet was not sufficient, on its own, to establish the judge had been the prosecuting attorney in the case); Rodriguez v. State, 489 S.W.2d 121, 123 (Tex. Crim. App. 1972) (holding the judge was not disqualified where he had been the first assistant in the DA's office at the time the offense was committed and complaint filed, and his only act in the case was to read the file); Muro v. State, 387 S.W.2d 674, 676–77 (Tex. Crim. App. 1965) (holding the judge, who had been an assistant district attorney at the time the defendant was first indicted, was not disqualified where he was assigned to another division at the time and no evidence suggested that he had participated in the case); Trinkle v. State, 127 S.W. 1060, 1061 (Tex. Crim. App. 1910) (declaring a judge was not disqualified on grounds that he had once prosecuted the accused on similar charges); Koening v. State, 26 S.W. 835, 835 (Tex. Crim. App. 1894) (finding the judge was not disqualified simply because, as county prosecutor, he had once prosecuted the same defendants over the same charges where the record established the prosecutions were not connected); Utzman v. State, 24 S.W. 412, 412 (Tex. Crim. App. 1893) (judge was not disqualified from presiding over case that had been indicted when he was district attorney where the record reflected that he "had nothing to do with" the preparation of the case). In *Gamez*, the judge was found to not be disqualified where a signature stamp on the announcement of ready was the only evidence indicating the judge had participated in the case. *Gamez*, 737 S.W.2d at 319. The judge also testified he acted as third chair prosecutor and could not recall having acted in the case. *Id.* at 319.

77. *Compare Gamez*, 737 S.W.2d at 319 (finding no showing the judge acted as counsel where the only action he took was to file a form notice of the State's announcement of ready), *Muro*, 387 S.W.2d at 676–77 (finding no evidence to disqualify a judge who had been an assistant district attorney assigned to another division of the office when defendant's case was indicted and he had no recollection of participating in the case), Holifield v. State, 538 S.W.2d 123, 125 (Tex. Crim. App. 1976) (indicating the record did not show the judge participated in the case where he was the district attorney in another county and there was no showing the cases were connected), *Carter*, 496 S.W.2d at 603–04 (noting there was no showing the judge participated in the case as the district attorney where the pleadings, judgment, plea, and waivers were all signed by assistant), *Rodriguez*, 489 S.W.2d at 123 (stating the record did not reflect the judge had participated in the case where he left the district attorney's office before the indictment was filed), *and Utzman*, 24 S.W. at 412 (declining to hold the judge was disqualified from presiding over a case that was indicted after he resigned as district attorney and where the record reflected that he "had nothing to do with the prosecution" or the preparation of the case), *with Ex parte Miller*, 696 S.W.2d at 910 (agreeing the judge was disqualified where the judge who revoked probation was the same attorney who originally prosecuted the defendant and signed the first motion for revocation of probation), Lee v. State, 555 S.W.2d 121,

The promulgation of Rule 18b ostensibly places this line of cases in question.[78] Subsection (a)(1) requires judges to disqualify themselves in any proceeding in which they "served as a lawyer in the matter in controversy, *or a lawyer with whom* [*they*] *previously practiced law served during such association as a lawyer concerning the matter*."[79] A plain reading of the rule would appear to require former district attorneys or assistant district attorneys to disqualify themselves not only from any case in which they "actively" participated but also from any case prosecuted in the office at all during their tenure.[80] The Court of Criminal Appeals has long recognized the impracticability of applying such a broad rule to prosecutors, however.[81] Though the court has yet to specifically address the issue, it

122 (Tex. Crim. App. 1977) (pointing to the judge's act as prosecutor in writing a letter to defense counsel informing him that, as supervisor of the trial division, he would not recommend a sentence lower than life to support a finding of "participation" in the case sufficient to disqualify him), *and Ex parte* McDonald, 469 S.W.2d 173, 174 (Tex. Crim. App. 1971, orig. proceeding) (finding the judge was disqualified from presiding over defendant's probation revocation since the judge "was the district attorney who actively prosecuted the petitioner and obtained a conviction for burglary in the same cause").

78. In *Arnold*, the Court of Criminal Appeals specifically held only that Rule 18a applied in criminal as well as civil cases but did not address whether Rule 18b would also. *See* Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding TEX. R. CIV. P. 18a applies to criminal cases when lacking legislative intent stating otherwise (citing McClenan v. State, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983))). The court subsequently relied on Rule 18b without comment in *Gaal*. Gaal v. State, 332 S.W.3d 448, 453 (Tex. Crim. App. 2011); *see also Ex parte* Ellis, 275 S.W.3d 109, 115–16 (Tex. App.—Austin 2008, no pet.) (applying Rule 18b without comment). Lower courts have applied Rule 18a for a number of years. *See* Rhodes v. State, 357 S.W.3d 796, 799 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("Rule 18b(2) of the Texas Rules of Civil Procedure sets forth the law specifically pertaining to recusal of judges, including recusals in criminal proceedings." (citing *Gaal*, 332 S.W.3d at 452–53 n.12); *see also* Kniatt v. State, 239 S.W.3d 910, 914 n.9 (Tex. App.—Waco 2007, no pet.) (per curiam) (citing *Arnold* and declaring the Court of Criminal Appeals adopted both Rule 18a and 18b); Burkett v. State, 196 S.W.3d 892, 896 (Tex. App.—Texarkana 2006, no pet.) (applying Rule 18b without comment to reverse and remand); Vargas v. State, 883 S.W.2d 256, 259 (Tex. App.—Corpus Christi 1994, pet. ref'd) (relying on Rule 18a to hold the defendant did not preserve a Rule 18b ground for recusal).

79. TEX. R. CIV. P. 18b(a)(1) (emphasis added).

80. *See id.* (stating the judge is required to disqualify himself if "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter"); *see also In re* K.E.M., 89 S.W.3d 814, 819–28 (Tex. App.—Corpus Christi 2002, no pet.) (comparing the scope of Article 30.01 and Rule 18b(1)(a), which is currently embodied by Rule 18b(a)(1), and concluding that under the rule, former district attorneys and assistants are disqualified only if they actively participated in the case, but, under the latter, they are disqualified if they actively participated in the case *or* had "supervisory authority . . . at the time the case was investigated, prosecuted, or adjudicated over attorneys who actually investigated [the case]").

81. *See* Hathorne v. State, 459 S.W.2d 826, 831–33 (Tex. Crim. App. 1970) (noting the "harshness" of a rule that would disqualify judges from presiding over cases in which they had prosecuted one of the enhancements, tracing the history of the rule, and concluding that "[t]o permit the disqualification to be too easy could cause the cost and the delay of the administration of criminal justice to go out of bounds").

could limit the scope of Rule 18b(a)(1) by holding that the legislature, in repeatedly reenacting Article 30.01, adopted and approved of the courts' narrow interpretation, and thus the legislature's intent should control over the supreme court's promulgated rule.[82]

In the alternative, the court could give only limited effect to such a broad rule of disqualification by taking into consideration the purpose of the rule,[83] how federal courts[84] and other state courts[85] have interpreted similar rules, the Rules of Professional Conduct, and the Code of Judicial Conduct. In light of such authority, the court could limit the application of Rule 18b(a)(1), as at least one intermediate court has suggested, to the disqualification of any judge who was a former prosecutor who

(1) personally participated in any way, however slight, in the investigation or

82. *See* Miller v. State, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000) ("'[W]hen a statute is reenacted without material change, it is generally presumed that the legislature knew and adopted or approved the interpretation placed on the original act, and intended that the new enactment should receive the same construction as the old one." (quoting *Ex parte* Henderson, 565 S.W.2d 50, 54 (Tex. Crim. App. 1978) (Onion, P.J., concurring))); *see also* Frieling v. State, 67 S.W.3d 462, 471 (Tex. App.—Austin 2002, pet. ref'd) (explaining that if a legislature does not change a particular statute after a court has interpreted it, courts will presume that it was intended for the same judicial construction to apply); Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) ("[W]e . . . hold Tex. R. Civ. P. 18a applies to criminal cases absent '*any explicit or implicit legislative intent indicating otherwise.*'" (emphasis added) (quoting McClenan v. State, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983))). *But see* Tesco Am., Inc. v. Strong Indus., Inc., 221 S.W.3d 550, 553–54 (Tex. 2006) ("Accordingly, our statement in *O'Connor* that Rule 18b(1)(a) 'recognizes that a judge is vicariously disqualified *under the Constitution*' reflected our understanding that the Rule was intended to *expound* rather than *expand* the Constitution." (quoting *In re* O'Connor, 92 S.W.3d 446, 449 (Tex. 2002) (per curiam) (orig. proceeding))).

83. *See Tesco*, 221 S.W.3d at 559–60 (Hecht, J., dissenting) ("[T]he purpose of Article V, Section 11 is to preserve the appearance of judicial impartiality by prohibiting a judge from sitting in a case to which he or she has too close a relationship—financial, familial, or professional.").

84. *See, e.g.*, *In re* United States, 666 F.2d 690, 691, 697 (1st Cir. 1981) (holding a reasonable observer would not have felt the judge was so impartial as to require his disqualification where he had served in the past as the counsel of the governor who was the subject of the defendant's investigation that lead to his criminal charges).

85. *See* State v. Bunker, 874 A.2d 301, 313–14 (Conn. App. Ct. 2005) (concluding a judge was not disqualified where "there [was] nothing in the record to indicate that she had any direct involvement in either [of the defendant's prior] prosecution[s]"); W.I. v. State, 696 So. 2d 457, 457–58 (Fla. Dist. Ct. App. 1997) (declaring, under Florida law, a judge was disqualified because he prosecuted the defendant in a prior case); People v. Storms, 617 N.E.2d 1188, 1190 (Ill. 1993) (holding judges in Illinois are not per se disqualified simply because they prosecuted the defendant for prior offenses); State v. Presley, 94 A.3d 921, 926 (N.J. Super. Ct. App. Div. 2014) ("Because he had previously prosecuted Collins, the judge here had a non-waivable conflict that required his disqualification from matters involving her."); State v. Smith (*In re* Disqualification of Batchelor), 136 Ohio St. 3d 1211, 2013-Ohio-262, 6991 N.E.2d 242, at ¶ 5–6 (concluding Ohio judges are not disqualified from a case when they served as the prosecutor who obtained three prior convictions against the defendant).

> prosecution of the same case or of a case arising out of the same set of operative facts; or (2) [had] supervisory authority . . . as prosecutor at the time the case was investigated, prosecuted, or adjudicated over the attorneys who actually investigated or prosecuted the same case or a case arising [from] the same set of operative facts.[86]

D. *The Judge Is Biased*

Although the Court of Criminal Appeals initially limited the grounds for disqualification to those outlined in the Texas Constitution and Article 30.01,[87] the court, following Supreme Court precedent, eventually rejected such a narrow view and held that bias could serve as grounds for disqualification where "the bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."[88] The Due Process Clause "clearly" requires a "'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case."[89] Generally, the Supreme Court has recognized two kinds of judicial bias that may warrant constitutional disqualification: presumptive bias, which presumes bias under certain specific circumstances, and actual bias, which focuses not on the circumstances surrounding the case but the judge's mental and psychological attitude

86. *In re* K.E.M., 89 S.W.3d 814, 828 (Tex. App.—Corpus Christi 2002, no pet.).

87. *See* Bright v. State, 556 S.W.2d 317, 320 (Tex. Crim. App. 1977) ("[B]ias or prejudice of a trial judge not based upon [an] interest is not a legal disqualification." (quoting Vera v. State, 547 S.W.2d 283, 285 (Tex. Crim. App. 1977))), *overruled by* McClenan v. State, 661 S.W.2d 108 (Tex. Crim. App. 1983); *see also* Zima v. State, 553 S.W.2d 378, 379–80 (Tex. Crim. App. 1977) (identifying Article V, Section 11 and Article 30.01 as the exclusive grounds for disqualification), *overruled by McClenan*, 661 S.W.2d 108; Aldridge v. State, 342 S.W.2d 104, 107 (Tex. Crim. App. 1960) ("The constitutional prohibition does not disqualify a judge who is interested in the question to be decided, but who has no direct and immediate interest in the judgment to be pronounced."); Templin v. State, 321 S.W.2d 877, 879 (Tex. Crim. App. 1959) (determining the court has previously held disqualification cannot be based upon prejudice); Williams v. State, 69 S.W.2d 759, 764 (Tex. Crim. App. 1934) ("[T]his court [has] expressed the opinion that the grounds of disqualification of a judge set out in the Constituted and statute mentioned appeared to be exclusive."); Johnson v. State, 20 S.W. 985, 986 (Tex. Crim. App. 1893) (recognizing other states permit judicial disqualification due to "prejudice not based on . . . property interest" but "Texas has no such judicial disqualifications").

88. *McClenan*, 661 S.W.2d at 109; *see also* Cumpian v. State, 812 S.W.2d 88, 91 (Tex. App.—San Antonio 1991, no writ) (observing the Court of Criminal Appeals "has added judicial bias" to grounds for disqualification "where shown to be of such an extent as to deny a defendant due process" (quoting Crawford v. State, 719 S.W.2d 240, 242–43 (Tex. App.—Eastland 1986, no pet.))). For a detailed examination of the evolution of the court's approach to bias as a ground for disqualification, see generally 48B ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 40:9–10, at 829–60 (2015 ed.).

89. Bracy v. Gramley, 520 U.S. 899, 904–05 (1997) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975) (citation omitted)).

towards the parties.[90]

1. Presumptive Bias

Presumptive bias may be defined by asking "whether, 'under a realistic appraisal of psychological tendencies and human weakness,'" any judge's potential interest in a case "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"[91] "The inquiry," the Court has observed, "is an objective one. The Court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[92] Presumptive bias is not to be confused with the mere appearance of judicial bias.[93] As several federal appeals courts have acknowledged, the mere appearance of judicial bias alone is not sufficient grounds to disqualify a judge.[94]

The Court has identified at least three[95] circumstances "in which

90. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009) ("The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process."); *In re* Murchison, 349 U.S. 133, 136 (1955) (explaining due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties"); Richardson v. Quarterman, 537 F.3d 466, 475 (5th Cir. 2008) ("In general, the Supreme Court has recognized 'presumptive bias' as the one type of judicial bias other than actual bias that requires recusal under the Due Process Clause."); Buntion v. Quarterman, 524 F.3d 664, 672 (5th Cir. 2008) ("Generally, the Supreme Court has recognized two kinds of judicial bias: actual bias and presumptive bias.").

91. *Caperton*, 556 U.S. at 883–84 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)); *see also Richardson*, 537 F.3d at 475 ("Presumptive bias occurs when a judge may not actually be biased, but has the appearance of bias such that 'the probability of actual bias . . . is too high to be constitutionally tolerable.'" (quoting *Buntion*, 524 F.3d at 672)).

92. *Caperton*, 556 U.S. at 881.

93. *See Richardson*, 537 F.3d at 478 ("These cases have recognized that the Supreme Court does not require reversal of a defendant's case on due process grounds merely because a judge may have appeared to be biased.").

94. *See id.* (noting many other appellate courts, including this one, have arrived at the same conclusion); Davis v. Jones, 506 F.3d 1325, 1333 (11th Cir. 2007) ("[N]one of the Supreme Court cases relied upon by Davis establishes that an appearance problem violates the Due Process Clause."); Welch v. Sirmons, 451 F.3d 675, 700 (10th Cir. 2006) (showing multiple examples of federal appellate courts refusing to apply a principle of judicial disqualification for an appearance of bias); Johnson v. Carroll, 369 F.3d 253, 263 (3d Cir. 2004) ("In short, bad appearances alone do not require disqualification . . . ."); United States v. Lowe, 106 F.3d 1498, 1504 (10th Cir. 1997) ("[R]ecusal is not normally required where the judge has expressed 'a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense.'" (quoting United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1997))); Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1371–72 (7th Cir. 1994) (en banc) (stating appearance alone is something not often reviewable years later in an appellate setting).

95. Various appellate courts, after surveying the Supreme Court cases addressing

experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[96] Under due process, a judge is constitutionally disqualified as presumptively biased when: "(1) the judge 'has a direct personal, substantial, and pecuniary interest in the outcome of the case'" (such as financial gain for his constituency based upon the number of convictions);[97] (2) the judge "'has been the target of personal abuse or criticism from [one of] the part[ies] before him'" (such as a judge who conducts a contempt hearing concerning attacks made upon him);[98] or (3) the judge "'has the dual role of investigating and adjudicating disputes and complaints'" (such as determining whether the evidence is sufficient to hold a contempt hearing and then conducting the hearing and assessing punishment).[99] While intermediate federal courts have suggested there might be other circumstances under which a judge may be disqualified on the grounds of

disqualification under due process, have identified three sets of circumstances. *See Richardson*, 537 F.3d at 475 (identifying three circumstances requiring disqualification); *Buntion*, 524 F.3d at 672 (recognizing the three circumstances that constitutionally require disqualification: (1) when the judge has a pecuniary interest in the outcome of the case, (2) when the judge has been criticized openly by a party, and when a judge has both investigated and adjudicated the case); Bigby v. Dretke, 402 F.3d 551, 559 (5th Cir. 2005) (recognizing the three instances when disqualification is constitutionally required); Celis v. State, 354 S.W.3d 7, 22 (Tex. App.—Corpus Christi 2011) (applying federal precedent on constitutionally mandatory disqualification of a judge to a Texas case), *aff'd on other grounds*, 416 S.W.3d 419 (Tex. Crim. App. 2013). Although, the Supreme Court itself, after reviewing these cases, identified only two circumstances requiring disqualification. *See Caperton*, 556 U.S. at 876–881 (identifying and examining in detail "two instances" where the Court has required disqualification under due process).

96. *Caperton*, 556 U.S. at 877 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

97. *Richardson*, 537 F.3d at 475 (quoting *Buntion*, 524 F.3d at 672); *see* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (explaining an appellate justice who had a similar lawsuit against an insurance company was disqualified from hearing an appeal of issue in an ancillary suit); Ward v. Vill. of Monroeville, 409 U.S. 57, 60–61 (1972) (holding a mayor/justice of the peace was disqualified from a traffic court where the village benefitted from fines collected, notwithstanding that defendant could appeal de novo to a higher court); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (disqualifying the judge on grounds the village received a percentage of fines assessed by the mayor/justice of the peace).

98. *Richardson*, 537 F.3d at 475 (quoting *Buntion*, 524 F.3d at 672); *see* Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (disqualifying a judge from presiding over a case who was subject to personal attacks and was the losing party in a civil rights lawsuit filed by the defendant); Mayberry v. Pennsylvania, 400 U.S. 455, 465–66 (1971) (concluding a judge is disqualified from presiding over a contempt hearing in which he was the target of contemnor's attacks); Offutt v. United States, 348 U.S. 11, 17–18 (1954) (finding a judge, who "permitted himself to become personally embroiled" with counsel, was disqualified from conducting contempt proceedings against the attorney).

99. *Richardson*, 537 F.3d at 475 (quoting *Buntion*, 524 F.3d at 672); *see In re* Murchison, 349 U.S. 133, 137 (1955) (asserting a judge is disqualified from presiding over proceedings he initiated as a "'one man grand jury'").

presumptive bias,[100] as the Fifth Circuit has observed, almost every bias case in which the Supreme Court has found a violation of due process involved one of the three types of presumptive bias already described.[101]

There appears to be no Texas criminal case of presumptive bias rising to the level of a due process violation, probably because Article V, section 11 and Article 30.01 are sufficiently broad as to encompass the circumstances outlined by Supreme Court precedent. Thus, Texas courts would be more likely to address a disqualification issue under those more precise provisions than under due process.

2. Actual Bias

The Due Process Clause mandates a defendant be tried before a judge "with no actual bias against the defendant."[102] Defining what constitutes an "actual bias" sufficient to violate the defendant's due process rights has

100. *See Richardson*, 537 F.3d at 476 (noting the judge "did not stand to gain personally or professionally if Richardson were sentenced more harshly by the jury"); Del Vechio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc) (stating there are many things in a judge's background that could call for the appearance of bias).

101. *See Richardson*, 537 F.3d at 476 ("More importantly, it is only *clearly established* by Supreme Court precedent that presumptive bias exists in the three circumstances discussed above."); *Buntion*, 524 F.3d at 672 ("Almost every bias case before the Supreme Court that has found a due process violation has done so based on presumptive bias."). *Compare Caperton*, 556 U.S. at 886–87 (stating, given a party's "significant and disproportionate influence" in a judge's election, coupled with close temporal relationship between election and submission of case, "the probability of actual bias rises to an unconstitutional level" requiring disqualification), *Lavoie*, 475 U.S. at 825–26 (concluding an appellate justice who had a similar lawsuit against an insurance company was disqualified from hearing an appeal of issue in an ancillary suit), *Ward*, 409 U.S. at 60–61 ("This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" (alteration in original) (quoting *Tumey*, 273 U.S. at 534), *Johnson*, 403 U.S. at 215 (holding a judge who was the losing party in a civil rights lawsuit filed by the defendant was disqualified from presiding), *Mayberry*, 400 U.S. at 465 (affirming a judge was disqualified from presiding over a contempt hearing in which he was the target of the contemnor's attacks), *In re Murchison*, 349 U.S. at 137 (concluding a judge was disqualified from presiding over proceedings he initiated as a "'one-man grand jury'"), *Offutt*, 348 U.S. at 17–18 (declaring a judge who permitted himself to become "embroiled" with counsel was disqualified from conducting contempt proceedings against him), *and Tumey*, 273 U.S. at 522 (recognizing the general rule "that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided"), *with* Liteky v. United States, 510 U.S. 540, 556 (1994) (stating a judge is not disqualified under 28 U.S.C. § 455 on the on basis of personal bias where judicial statements at issue occurred in the course of judicial proceedings and neither relied upon knowledge acquired outside the proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible), *and* Berger v. United States, 255 U.S. 22, 36 (1921) (holding a judge was disqualified under the Judicial Code from presiding over a World War I espionage trial where he declared that German-Americans' "hearts are reeking with disloyalty").

102. Bracy v. Gramley, 520 U.S. 899, 905 (1997).

proved problematic.[103] Perhaps due to the fact that bias to such a degree is so rare, or more probably because personal bias and lack of impartiality are grounds for recusal under 28 U.S.C. § 455(a) and Rule 18b(b), neither the Supreme Court nor the Court of Criminal Appeals has yet to find it necessary to define "actual bias."[104] One Texas intermediate court has suggested that due process is violated when the impartiality of the judge so infects the entire trial process that it "robs" the defendant of basic protections and undermines the reliability of the trial to function as a vehicle for the determination of guilt or innocence.[105] Another court, adopting the Supreme Court's language in *Liteky*—which addressed grounds for recusal, not disqualification—has suggested the appropriate standard investigates whether a judge's behavior "reveal[s] such a high degree of favoritism or antagonism as to make fair judgment impossible."[106]

One area in which the Court of Criminal Appeals has held that a judge's bias violates due process is a judge's arbitrary refusal to consider the full range of punishment for an offense.[107] "Arbitrary" in this context "means capricious or unreasonable, or a decision based on uninformed opinion."[108] A judge acts arbitrarily, and thereby violates due process,

103. *See id.* ("The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes.").

104. *See* 28 U.S.C. § 455(a) (2012) (indicating a judge should disqualify himself in certain instances of potential bias); TEX. R. CIV. P. 18b(b)(1)–(2) (showing certain biases are already grounds for recusal); *see also Liteky*, 510 U.S. at 555 (examining actual bias under § 455(a)); Gaal v. State, 332 S.W.3d 448, 452–56 (Tex. Crim. App. 2011) (examining actual bias under Rule 18(b)).

105. *See* Abdygapparova v. State, 243 S.W.3d 191, 210 (Tex. App.—San Antonio 2007, pet. ref'd) (holding the judge's negative comments, consistently preferential rulings in the State's favor, and ex parte communications with prosecutor revealed bias that violated the defendant's due process right to impartial judge); *see also* Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (asserting a defendant who attacked a judge and later claimed judicial bias "must show that the refusal to recuse was a 'fundamental defect which inherently result[ed] in a complete miscarriage of justice'" (quoting Hill v. United States, 368 U.S. 424, 428 (1962))); Buckelew v. United States, 575 F.2d 515, 518–19 (5th Cir. 1978) (concluding allegations on collateral attack of judicial misconduct are not cognizable as violations of due process unless the defendant establishes that the misconduct "rendered . . . [the] trial fundamentally unfair"); *cf.* Kyles v. Whitley, 514 U.S. 419, 434 (1995) (finding a violation of a prosecutor's duty to disclose favorable evidence violates due process when absence of the evidence defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence").

106. Celis v. State, 354 S.W.3d 7, 22 (Tex. App.—Corpus Christi 2011) (quoting *Liteky*, 510 U.S. at 554), *aff'd on other grounds*, 416 S.W.3d 419 (Tex. Crim. App. 2013); *see also Buntion*, 524 F.3d at 673 (declaring disqualification on grounds of actual bias must show "a deep-seated, extreme favoritism or antagonism" (citing *Liteky*, 510 U.S. at 554)).

107. *See* McClenan v. State, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983) ("A court's *arbitrary* refusal to consider the entire range of punishment would constitute a denial of due process . . . .").

108. Roman v. State, 145 S.W.3d 316, 320 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

when he refuses to consider mitigating evidence or when he imposes a predetermined punishment.[109] A judge commits the former, for example, when he "strictly adheres" to an "ill-conceived mathematical formula" to calculate punishment,[110] or when he wholly rules out a portion of the permissible range of punishment before hearing punishment evidence.[111] A judge violates the latter when, for example, he places a defendant on probation, warns the defendant that he will give him a certain sentence if probation is revoked, and later awards the sentence upon revocation.[112]

109. *See* Sosa v. State, 230 S.W.3d 192, 194 (Tex. App.—Houston [14th Dist] 2005, pet. ref'd) (asserting a trial court should consider evidence when imposing a punishment); *see also* Jaenicke v. State, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("[A] court denies a defendant due process when it refuses to consider the evidence or when it imposes a predetermined punishment."); Buerger v. State, 60 S.W.3d 358, 364 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding a judge denies due process when he "arbitrarily refuses to consider the entire range of punishment for an offense or refuses to consider mitigating evidence and imposes a predetermined punishment"); Howard v. State, 830 S.W.2d 785, 787 (Tex. App.—San Antonio 1992, pet. ref'd) (arguing a denial of due process occurs when a trial judge fails to consider mitigating factors when imposing a predetermined sentence); Jefferson v. State, 803 S.W.2d 470, 471 (Tex. App.—Dallas 1991, pet. ref'd) (concluding courts should consider evidence when imposing a predetermined sentence).

110. *Compare* Hernandez v. State, 268 S.W.3d 176, 184 (Tex. App.—Corpus Christi 2008, no pet.) (discussing the judge's announcement at the punishment hearing that she intended to double defendant's pervious longest sentence), *with Jaenicke*, 109 S.W.3d at 796 (stating the record of the judge's comments reflects that he considered evidence in the case, and not a formula based on prior jury verdicts for similar crimes, in assessing maximum punishment).

111. *Compare* Earley v. State, 855 S.W.2d 260, 262 (Tex. App.—Corpus Christi 1993, pet. dism'd) (deciding the judge's warning that he would sentence the defendant to maximum upon revocation, coupled with his lament at the punishment hearing that he was unable to award even greater sentence, showed that the judge had "effectively decided the cases before listening to the evidence"), *and* Norton v. State, 755 S.W.2d 522, 523 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (finding the judge's declaration at the close of a suppression hearing, in response to his realization that the defendant had lied to a probation officer, that he would sentence the defendant to jail time even if the jury recommended probation, indicated that the judge "had dismissed arbitrarily a portion of the permissible range of punishment"), *with* Brumit v. State, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006) (concluding a judge who expressed extreme disgust at crime of aggravated sexual assault of a child while sentencing the defendant to life did not violate due process, in light of fact that his comments were made at end of the punishment hearing and based upon evidence introduced), *Sosa*, 230 S.W.3d at 194–95 (holding a judge, who at the close of sentencing expressed antipathy towards the offense of intoxication manslaughter and recalled witnessing an offense, did not violate defendant's due process rights in cumulating sentences), *and* Fielding v. State, 719 S.W.2d 361, 367 (Tex. App.—Dallas 1986, pet. ref'd) (concluding the trial judge did not violate due process in refusing to consider mitigating evidence that was not admissible at the time of the defendant's sentencing hearing, even though the judge had threatened the defendant with a sixty year sentence when placing him on probation).

112. *See Jefferson*, 803 S.W.2d at 471 (noting a judge threatened the defendant with the maximum sentence if he violated probation and later sentenced the defendant accordingly); *see also Howard*, 830 S.W.2d at 787–89 (asserting a judge threatened to assess ninety-nine years upon probation revocation and later sentenced the defendant to ninety-nine years); Cole v. State, 757 S.W.2d 864,

Though judicial bias that violates due process constitutes fundamental error, the Court of Criminal Appeals has declined to address whether a contemporaneous objection is necessary to preserve error.[113]

E. *Miscellaneous Grounds for Disqualification*

A number of constitutional and statutory provisions address a judge's qualifications to hold the office that, arguably, could constitute grounds to disqualify a judge, including the judge's personal qualifications to hold the office and the requirement of an oath.[114] The right of a judge to the office in which he functions may not be attacked collaterally; however, if a party wishes to challenge the judge's authority he must bring a direct action through a quo warranto proceeding.[115]

Although rare, a judge who has been convicted of or granted deferred adjudication for a felony or misdemeanor involving official misconduct is "automatically removed" from the bench.[116] The provision, however, does not take effect until there is a written judgment entered into the record.[117] In addition, a judge may be suspended from office pending the outcome of a disciplinary proceeding and thus, disqualified from presiding over any proceeding.[118]

865–66 (Tex. App.—Texarkana 1988, pet. ref'd) (holding a trial judge violated due process in deciding punishment before conducting a sentencing hearing, but error was waived by the defendant's failure to object).

113. *See Brumit*, 206 S.W.3d at 644–45 (holding the issue of the necessity of a contemporaneous objection need not be addressed since the record did not reflect judicial bias but suggesting that Marin v. State, 851 S.W.2d 275 (Tex. Crim. App. 1993), and Rule 33.1 of the Appellate Rules apply). *But see* Blue v. State, 41 S.W.3d 129, 132–33 (Tex. Crim. App. 2000) (concluding, under *Marin*, the defendant did not have to object to judge's comments to jury revealing existence of plea negotiations that may have created juror bias against defendant).

114. *See* TEX. CONST. art. V, § 2(b) (detailing the qualifications for Supreme Court justice); *id.* art. V, § 4(a) (outlining the qualifications for a Court of Criminal Appeals judge); *id.* art. V, § 7 (providing the qualifications for district court judge); *id.* art. XVI, § 1 (furnishing the requirement of an anti-bribery oath); *id.* art. XVI, § 5 (compelling disqualification for offering or accepting a bribe); *see also* Lackey v. State, 364 S.W.3d 837, 841 (Tex. Crim. App. 2012) (concluding a visiting judge was not statutorily qualified to serve); Espinosa v. State, 115 S.W.3d 64, 66–67 (Tex. App.—San Antonio 2003, no pet.) (holding a judge was not disqualified for failure to file an anti-bribery oath as required by Article XVI, Section 1 of the Texas Constitution).

115. *Espinosa*, 115 S.W.3d at 66; Gonzales v. State, 938 S.W.2d 482, 484–85 (Tex. App.—El Paso 1996, pet. ref'd).

116. TEX. GOV'T CODE ANN. § 33.038 (West 2004); *see also* Mastrangelo v. State, No. 09-05-00337-CR, 2007 WL 1052438, at *2–3 (Tex. App.—Beaumont Apr. 4, 2007, no pet.) (mem. op., not designated for publication) (confirming a judge will be automatically removed if convicted of a felony or misdemeanor).

117. *See Mastrangelo*, 2007 WL 1052438, at *2–3 (holding appellant did not show the trial judge was disqualified from sitting on the dates the judge presided over the case).

118. *See* Medina v. State, 743 S.W.2d 950, 953–54 (Tex. App.—Fort Worth 1988, pet. ref'd)

III. RECUSAL

Rule 18b(b) sets out eight grounds for recusal,[119] which are discussed in detail below. Subsection (c) of the rule requires each judge to "inform himself about his personal and fiduciary financial interests[] and make a reasonable effort to inform himself about the personal interests of his spouse and minor children residing in his household."[120] The provision seems superfluous in light of the extensive disclosure requirements of the Government Code.[121]

Rule 18b also provides "the parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record."[122] Though the subsection appears to suggest a potentially prejudiced party may not unilaterally waive recusal once it has been raised, more probably it merely constitutes an attempt to distinguish recusal, which can be waived, from disqualification, which cannot.[123] The rule does not address the mirror opposite of the parties agreeing to waive recusal: Can a judge, with the party's acquiescence, recuse himself when there is little or no basis for recusal, simply as a matter of expedience? The courts have suggested judges have a general obligation to decide matters brought before them and, therefore, they should not "unnecessarily" recuse themselves.[124]

(discussing constitutional mechanisms for suspending judges and holding, since the judge under the indictment was not suspended at the time he presided, he was not disqualified from the case).

119. TEX. R. CIV. P. 18b(b)(1)–(8).

120. *Id.* R. 18b(c).

121. *See generally* TEX. GOV. CODE ANN. §§ 572.021–.0252 (West 2004 & Supp. 2012) (discussing the personal financial disclosure requirements for government officials).

122. TEX. R. CIV. P. 18b(e).

123. *See* Gamez v. State, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987) (holding disqualification cannot be waived by the parties); *see also* Abram v. State, 20 S.W. 987, 988 (Tex. Crim. App. 1893) (concluding a judge who had represented the defendant in a case before taking the bench was disqualified from the same case, notwithstanding the fact the defendant suggested appointment of the judge and both parties agreed to his appointment). *But see Ex parte* Richardson, 201 S.W.3d 712, 714 (Tex. Crim. App. 2006) (finding a defendant who pled true to revocation before a judge, who he knew had been the prosecutor in the original prosecution, could not raise the issue of disqualification on collateral attack).

124. *See Ex parte* Ellis, 275 S.W.3d 109, 115 (Tex. App.—Austin 2008, no pet.) ("Judges are obligated to decide matters presented to them and must not unnecessarily recuse themselves."); *In re* K.E.M., 89 S.W.3d 814, 819 (Tex. App.—Corpus Christi 2002, no pet.) (stating judges have "as much of an obligation not to step down from a case when there is no reason to do so as they have to do so when there is a reason"); Sears v. Olivarez, 28 S.W.3d 611, 614 (Tex. App.—Corpus Christi 2000, no pet.) ("All judges have the duty to sit and decide matter brought before them, unless there is a basis for disqualification or recusal. In fact . . . this duty, on some occasions, overrides the judge's personal preference."); *see also* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 823–24 (Tex. 1972) (per curiam) (finding a justice who had voluntarily recused himself should not be recused and holding it was his "duty" to participate in the case).

A. *Judge's Impartiality Might Reasonably Be Questioned*[125]

As the Court of Criminal Appeals has observed, "there is much overlap between" the ground for recusal under Rule 18b(b)(1), that a judge's "'impartiality might reasonably be questioned,'" and the ground under subsection (b)(2), that the judge "'has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.'"[126] Indeed, unlike many statutes and rules, Rule 18b(b) appears to present its catch-all provision before setting out more specific rules; as the Court of Criminal Appeals has suggested, subsection (b)(1) "appears to be [a ground] that parties may use when in doubt as to any more concrete reason why the judge should not preside."[127] Perhaps in an attempt to give it more substance, the court concluded a judge's impartiality might be reasonably questioned "only if it appears that he or she harbors an aversion, hostility[,] or disposition of a kind that a fair-minded person could not set aside when judging the dispute."[128] This definition requires a complaining party to produce actual evidence of "aversion, hostility[,] or disposition," which must then be measured against the objective standard of a "fair-minded person" as a basis for recusal under the otherwise overly vague ground. In addition, the court acknowledged a "high degree of favoritism or antagonism" that would "make fair judgment impossible" might also require recusal under subsection (b)(1).[129]

125. The Rules of Civil Procedure provide for recusal when "[the judge's] impartiality might reasonably be questioned." TEX. R. CIV. P. 18b(b)(1).

126. Gaal v. State, 332 S.W.3d 448, 453 (Tex. Crim. App. 2011) (quoting TEX. R. CIV. P. 18b(b)(1)–(2) (noting similarities between two subsections of the rule)).

127. *Id.* (quoting 48B ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS, § 40.23, at 750 (2015 ed. 2015)); *see also* Ludlow v. DeBerry, 959 S.W.2d 265, 282 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("[Rule 18b(b)(1)] provides a broad ground, regarding reasonable questions as to the judge's impartiality. This broad ground may encompass actions other than those specifically enumerated in Sections [(2)–(8)].").

128. *Gaal*, 332 S.W.3d at 453 (quoting Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)).

129. *Id.* at 454; *see* Kniatt v. State, 239 S.W.3d 910, 918 (Tex. App.—Waco 2007, no pet.) (per curiam) (concluding a judge's opinions may not form the basis for recusal "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible" (quoting Liteky v. United States, 510 U.S. 540, 556–56 (1994)); *see also* Dow Chem. Co. v. Francis, 46 S.W.3d 237, 240 (Tex. 2001) (applying the "fair judgment impossible" test in civil cases). The *Gaal* court also noted, however, at least four justices of the Supreme Court have cast doubt on the relationship of such a test to the "impartiality might reasonable be questioned" standard embodied in the federal rule. *Gaal*, 332 S.W.3d at 454 n.22; *see also* Liteky v. United States, 510 U.S. 540, 563–64 (1994) (Kennedy, J. concurring) (finding the majority's standard too limited to achieve just results).

Thus, it appears a party seeking to recuse a judge under Rule 18b(b)(1) must show: *either* (1) the judge, through words or action, evinced an "aversion, hostility, or disposition" toward him, his counsel, or the offense (2) was of such a kind (3) that a "fair-mined person could not set [it] aside when judging the dispute"[130] *or* (1) the judge harbors favoritism toward his opponent or antagonism toward him, his counsel, or the offense (2) to such a degree (3) "as to make fair judgment impossible."[131]

Subsequent lower court decisions have ignored *Gaal v. State*,[132] however, and have relied instead upon an earlier Texas Supreme Court test, asking "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial."[133] The courts appear to be clinging to an appearance of impropriety standard that the Court of Criminal Appeals, other courts, and commentators have rejected.[134]

130. *Liteky*, 510 U.S. at 558.

131. *See Gaal*, 332 S.W.3d at 454 ("A judge's remarks during trial . . . will require recusal if they reveal 'such a high degree of favoritism or antagonism as to make fair judgment impossible.'" (quoting *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring))).

132. Gaal v. State, 332 S.W.3d 448 (Tex. Crim. App. 2011).

133. Duffey v. State, 428 S.W.3d 319, 325 (Tex. App.—Texarkana 2014, no pet.) (quoting Rogers v. Bradley, 909 S.W.2d 872, 881 (Tex. 1995)); Lewis v. State, No. 02-13-00367-CR, 2014 WL 7204708, at *6 (Tex. App.—Fort Worth Dec. 18, 2014, pet. ref'd) (mem. op., not designated for publication) (quoting *Duffey*, 428 S.W.3d at 325).

134. *See* Bowen v. Carnes, 343 S.W.3d 805, 816 (Tex. Crim. App. 2011) (rejecting appearance of impropriety as the sole basis to disqualify the defense counsel); Landers v. State, 256 S.W.3d 295, 310 (Tex. Crim. App. 2008) (rejecting appearance of impropriety alone as the basis to disqualify the district attorney); State *ex rel.* Eidson v. Edwards, 793 S.W.2d 1, 5 (Tex. Crim. App. 1990) (overruling the trial courts disqualification of the district attorney's office on the sole ground of appearance of impropriety); *see also* Fero v. Kerby, 39 F.3d 1462, 1478 (10th Cir. 1994) ("Without an incentive for actual bias, however, disqualification is not required regardless of appearance. This is so because at some point a biasing influence becomes too remote and insubstantial to violate due process." (citations omitted)); Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc) ("When the Supreme Court talks about the 'appearance of justice,' it is not saying that bad appearances alone require disqualification; rather, it is saying that when a judge is faced with circumstances that present 'some [actual] incentive to find one way or the other' or 'a real possibility of bias,' a court need not examine whether the judge actually was 'biased.'" (first quoting Margoles v. Johns, 660 F.2d 291, 297 (7th Cir. 1981); and then quoting Bradshaw v. McCotter, 796 F.2d 100, 102 (5th Cir. 1986))); Waters v. Kemp, 845 F.2d 260, 265 n.12 (11th Cir. 1988) ("[A]n 'appearance of impropriety is too slender a reed on which to rest a disqualification order except in the rarest of cases. This is particularly true where . . . the appearance of impropriety is not very clear.'" (quoting Bd. of Ed. of N.Y. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979))); United States v. Judge, 625 F. Supp. 901, 903 (D. Haw. 1986) (rejecting appearance of impropriety as grounds for disqualification or recusal), *aff'd*, 855 F.2d 863 (9th Cir. 1988) (unpublished table decision); Haraguchi v. Superior Court, 182 P.3d 579, 589 (Cal. 2008) ("Only an actual likelihood of unfair treatment, not a subjective perception of impropriety, can warrant a court taking the significant step of recusing an individual

The courts have also made clear that, in general, the necessary showing may not be based "solely on judicial rulings, remarks, or actions" as they "can only[,] in the rarest circumstances[,] evidence the degree of favoritism or antagonism required"[135] and "will usually be grounds for reversal if in error, but not for recusal."[136] "'Expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women' may display, do not establish" partiality, so that a trial judge's ordinary efforts at courtroom administration will not make him subject to recusal.[137] Indeed, even violation of a rule of judicial conduct will not form a basis for recusal unless the conduct rises to the requisite level of partiality.[138]

prosecutor or prosecutor's office."); Haywood v. State, 344 S.W.3d 454, 463 (Tex. App.—Dallas 2011, pet. struck) (rejecting appearance of impropriety as basis to disqualify district attorney); Hanley v. State, 921 S.W.2d 904, 909 (Tex. App.—Waco 1996, pet. ref'd) (trial court did not err in overruling motion to disqualify on grounds of appearance of impropriety); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.4, at 319–23 (Practitioner's ed. 1986) (characterizing "appearance of impropriety" analysis as "illusory," "methodological[ly] weak[]," "irrelevant or redundant," and "unfortunate"); John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 511 (1998) (characterizing "appearance of impropriety" ground for disqualification as "unnecessary" and "paternalistic").

135. *Compare Gaal*, 332 S.W.3d at 454, 457–58 (holding recusal on grounds that impartiality might be questioned was not supported by the judge's mere rejection of a plea bargain with a comment that he would not accept any plea bargain lower than the maximum, in light of the defendant's repeated acceptance and then rejection of prior plea deals), *Rhodes*, 357 S.W.3d at 800–01 (finding a judge did not display a lack of impartiality in categorically rejecting any plea bargain that included placing the defendant in a diversion program where the judge indicated that he disagreed with the public policy behind the program), *and* Mwalili v. State, No. 14-11-00018-CR, 2011 WL 6287970, at *3 (Tex. App.—Houston [14th Dist.] Dec. 15, 2011, no pet.) (mem. op., not designated for publication) ("Here, [the judge] has the discretion to reject [certain DWI-affiliated] plea agreements."), *with* Berger v. United States, 255 U.S. 22, 29 (1921) (noting the judge remarked of a German-American defendant, "Your hearts are reeking with disloyalty"), United States v. Figueroa, 622 F.3d 739, 744 (7th Cir. 2010) (commenting a "litany of inflammatory remarks undermined" judge's protestations of impartiality), *In re* United States, 614 F.3d 661, 666 (7th Cir. 2010) (indicating the record revealed "unreasonable fury" toward government lawyers), *and Kniatt*, 239 S.W.3d at 911–12 (concluding a trial judge displayed impartiality by revoking the defendant's bond merely because he invoked his right to a jury trial).

136. *See Gaal*, 332 S.W.3d at 454 ("Almost invariably, [judicial rulings] are proper grounds for appeal, not recusal" (quoting *Liteky*, 510 S.W.3d at 555–56)); *Rhodes*, 357 S.W.3d at 800 ("Recusal is generally not required purely on the basis of judicial rulings, remarks, or actions, as they would not on their own typically 'evidence the degree of favoritism or antagonism required'; these will usually be grounds for reversal if in error, but not for recusal." (quoting *Gaal*, 332 S.W.3d at 457)); *see also Kniatt*, 239 S.W.3d at 918 (quoting *Liteky*, 510 U.S. at 555–56) (analyzing *Liteky*'s holding on judicial remarks and their effect on the recusal of judges).

137. *Gaal*, 332 S.W.3d at 454 (quoting *Liteky*, 510 U.S. at 555–56).

138. *See* Wesbrook v. State, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000) (indicating a judge was not subject to recusal for violating the rule against ex parte communications); Kemp v. State, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (noting the applicable provision of the Judicial Code was deleted by the time of the trial's conclusion but the violation would not have supported recusal even

B. *Judge's Personal Bias or Personal Knowledge*[139]

Subsection (b)(2), the Court of Criminal Appeals has observed, is more specific than (b)(1).[140] The next grounds for recusal under Rule 18b "covers how the judge feels and what the judge knows."[141] The subsections actually set out two separate bases for recusal: (1) that "the judge has a personal bias or prejudice concerning the subject matter or party" or (2) "the judge has personal knowledge of disputed evidentiary facts concerning the proceeding."[142] A party is not required to prove both to be entitled to relief.

1. Personal Bias or Prejudice

A bias or prejudice against the subject matter or a party that derives from an extrajudicial source is a "common basis" for disqualification or recusal.[143] A judge who reveals a bias or prejudice that stems from an extrajudicial source is subject to recusal because the favorable or unfavorable disposition or opinion is "somehow *wrongful* or *inappropriate*, either because it is undeserved or because it rests upon knowledge that the subject ought not possess."[144] For purposes of recusal, an "extrajudicial source" may be loosely defined as "something taking place 'outside [the] court' or 'outside the functioning of the court system'"[145] that "result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[146] A judge's mere personal acquaintance with a party or counsel, without more, does not require

if applicable); *cf.* House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997) (holding there was no need to examine a particular rule of appellate procedure because the defendant could show no actual prejudice); Brown v. State, 921 S.W.2d 227, 230 (Tex. Crim. App. 1996) (holding a violation of the ethical rules alone will not entitle the defendant to a reversal of his conviction unless he can establish a due process violation as well).

139. Rule 18b recuses a judge when "[the judge] has a personal bias or prejudice concerning the subject matter or a party," or "personal knowledge of disputed evidentiary facts concerning the proceeding." TEX. R. CIV. P. 18b(b)(2)–(3).

140. *Gaal*, 332 S.W.3d at 453.

141. *Id.*

142. TEX. R. CIV. P. 18b(b)(2)–(3).

143. *See* Liteky v. United States, 510 U.S. 540, 551 (1994) (stressing an extrajudicial source is the only common, rather than exclusive, basis for disqualification and a judge's predisposition may also be considered bias or prejudice).

144. Abdygapparova v. State, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd) (quoting *Liteky*, 510 U.S. at 550).

145. Roman v. State, 145 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (quoting *Extrajudicial*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

146. Kemp v. State, 846 S.W.2d 289, 306 (Tex. Crim. App. 1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

recusal on the basis of bias from an outside source.[147] A judge's involvement in prior proceedings, including an earlier prosecution of the defendant, the trial of a co-defendant, or the issuance of a search or arrest warrant, does not constitute an "extrajudicial source" under the rule.[148] On the other hand, a judge's ex parte communications with one of the parties concerning a proceeding may be considered an extrajudicial source, depending upon the circumstances.[149] Similarly, a judge's involvement in a prior unrelated case as counsel may not necessarily constitute bias from an extrajudicial source, depending upon the circumstances.[150]

147. *See* Woodruff v. Wright, 51 S.W.3d 727, 738 (Tex. App.—Texarkana 2001, pet. denied) (holding the fact that the judge performed a wedding ceremony for a party, and the party had performed heart surgery on the judge's mother, did not require recusal); *see also* Clark v. Smith Cty. Dist. Att'ys Office, No. 12-09-00353-CV, 2011 WL 3503138, at *2 (Tex. App.—Tyler Aug. 10, 2011, no pet.) (mem. op.) (concluding a judge need not be recused on the basis that he had once worked closely with the district attorney when he had been employed in the district attorney's office); Dallas v. State, No. 01-96-00169-CR, 1999 WL 681881, at *3 (Tex. App.—Houston [1st Dist.] Aug. 31, 1999, pet ref'd) (not designated for publication) (finding no abuse of discretion in overruling the motion to recuse on the basis the judge and the state's witnesses were close friends, where the judge received a special rate at auto shop owned by witnesses and one witness worked on the judge's campaign); Lueg v. Lueg, 976 S.W.2d 308, 311 (Tex. App.—Corpus Christi 1998, pet. denied) (determining there was no abuse of discretion in denial of the motion to recuse where the judge and counsel were close friends and counsel had served as the judge's campaign manager); Sonnier v. State, 764 S.W.2d 348, 353 (Tex. App.—Beaumont 1989, no pet.) (asserting a close friendship with the victim is insufficient to establish disqualification).

148. *See Kemp*, 846 S.W.2d at 306 (stating the fact the judge issued the search and arrest warrants did not constitute "extrajudicial source" requiring recusal); Durrough v. State, 620 S.W.2d 134, 143 (Tex. Crim. App. 1981) (asserting appellate judges who voted earlier to permit the State to seek mandamus could not be recused on the ground that they had developed an extrajudicial bias against defendant); *Roman*, 145 S.W.3d at 321–22 (establishing knowledge gained from trial of co-defendant does not constitute an extrajudicial source for purposes of recusal); *see also* Withrow v. Larkin, 421 U.S. 35, 56 (1975) (determining an administrative board that initially concluded there was probable cause to believe a defendant had committed certain acts was not "extrajudicially biased" against the defendant in a later hearing).

149. *Compare Abdygapparova*, 243 S.W.3d at 209–10 (declaring a judge's ex parte communications with the prosecution during voir dire was part of "an ongoing, continuous bias or prejudice" which justified reversal and re-trial before another judge), *with In re* Fifty-One Gambling Devices, 298 S.W.3d 768, 776 (Tex. App.—Amarillo 2009, pet. struck) (stating a judge's ex parte instruction to the district attorney to prepare a notice based upon a notice the judge had prepared in a case a year earlier did not require recusal), *and* Wesbrook v. State, 29 S.W.3d 103, 120–21 (Tex. Crim. App. 2000) (concluding the prosecutor's ex parte communications—three days before the start of trial—with the judge concerning investigation into the defendant's attempt to solicit murder of witnesses did not warrant the judge's recusal).

150. *Compare Ex parte* Ellis, 275 S.W.3d 109, 120–21 (Tex. App.—Austin 2008, no pet.) (stressing an appellate justice's statements as counsel in an earlier case, similar to the cause before the court, did not warrant recusal on the basis of extrajudicial bias), *with* De Leon v. Aguilar, 127 S.W.3d 1, 7 (Tex. Crim. App. 2004) (declaring a judge who was accused of misconduct as a lawyer by counsel in case, and who was ordered recused in a subsequent case involving same counsel, should have recused himself from present case as a matter of law).

Additionally, while campaign contributions cannot generally serve as a ground for recusal, in extreme circumstances, they may warrant not simply recusal but disqualification.[151]

At one time, Texas courts maintained that "personal bias" constituted grounds for recusal only when the bias stemmed from an "extrajudicial source."[152] Following more recent Supreme Court analysis,[153] however, the Court of Criminal Appeals and intermediate courts have acknowledged that while bias stemming from an extrajudicial source may be one ground for recusal, it is not the *sole* ground under Rule 18b(b)(2).[154] Thus, "'predispositions developed during the course of a trial will sometimes (albeit rarely) suffice' to establish judicial bias."[155] The standard the party seeking recusal must establish is the same as that under subsection (b)(1):

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a

151. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886–87 (2009) (emphasizing a corporation's "significant and disproportionate influence" on judicial election created probability of actual bias that violated due process). *Compare* DeGarmo v. State, 922 S.W.2d 256, 267–68 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (asserting $500 in campaign contributions from the victim's family did not establish bias), *with* Richardson v. State, 83 S.W.3d 332, 358–59 (Tex. App.—Corpus Christi 2002, pet. ref'd) (concluding the hearing judge erred in not ordering the recusal of the judge whose wife was active in Junior League, the League had supported the judge in his campaigns, the victim was a Junior League member, and both his wife and League members expressed disagreement with bond shortly before the judge raised bond to $1,000,000).

152. *E.g.*, *Kemp*, 846 S.W.2d at 305–06 ("[I]t is beyond rational dispute that before alleged bias becomes sufficient to warrant the disqualification of a judge, it must 'stem from an extrajudicial source . . . .'" (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1996))).

153. *See* Liteky v. United States, 510 U.S. 540, 550 (1994) ("It is wrong in theory . . . to suggest . . . that 'extrajudicial source' is the *only* basis for establishing disqualifying bias or prejudice. It is the only *common* basis, but not the exclusive one, since it is not the *exclusive* reason a predisposition can be wrongful or inappropriate.").

154. *See* Gaal v. State, 332 S.W.3d 448, 459 & n.48 (Tex. Crim. App. 2011) ("[S]uch bias or partiality *may* be grounds for a recusal motion, but only if it displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'"(emphasis added)); Celis v. State, 354 S.W.3d 7, 22 (Tex. App.—Corpus Christi 2011) (affirming there are two ways to disqualify a judge (1) by "an opinion that derives from an extrajudicial source" or (2) "a high degree of favoritism" (quoting *Likety*, 510 U.S. at 555)), *aff'd on other grounds*, 416 S.W.3d 419 (Tex. Crim. App. 2013); Avilez v. State, 333 S.W.3d 661, 675 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (restating the two valid bases for a motion to recuse); *Abdygapparova*, 243 S.W.3d at 198 (stressing extrajudicial source is not the exclusive basis for establishing bias); Roman v. State, 145 S.W.3d 316, 321–22 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (alleging there is only one other basis for bias other than extrajudicial source).

155. *Celis*, 354 S.W.3d at 21–22 (quoting *Liteky*, 510 U.S. at 554); *see also Gaal*, 332 S.W.3d at 459 n.48 ("Although our 1992 decision in *Kemp* quoted an earlier Supreme Court decision that had stated that *only* 'extrajudicial sources' of bias or prejudice may serve as a basis for disqualification or recusal, it was [superseded] by the 1994 *Liteky* decision.").

> deep-seated favoritism or antagonism that would make fair judgment impossible.[156]

The Supreme Court and the Court of Criminal Appeals have implied, but not explicitly stated, that the threshold for recusal arising from an extrajudicial source is lower than that for recusal based upon a bias arising solely from judicial proceedings by suggesting that courtroom remarks that reveal an extrajudicial source may establish bias sufficient to require recusal, while the same remarks without an extrajudicial source will support recusal only if they rise to the level favoritism or antagonism as to make fair judgment impossible.[157]

2. Personal Knowledge of Disputed Evidentiary Facts Concerning Proceedings

In what appears to be a variation of the extrajudicial source rule, subsection (2)(b) also mandates recusal when the judge possesses "personal knowledge of disputed evidentiary facts concerning the proceeding."[158] The exception requires recusal only when the judge possesses knowledge of "disputed" facts, so that, in theory, a judge with knowledge of facts agreed upon or not in dispute would not be subject to recusal under the rule.[159]

C. *Judge as a Material Witness in the Case*[160]

Subsection (b)(4) requires a judge's recusal where the judge "or a lawyer with whom he previously practiced law has been a material witness" in the proceeding.[161] Unlike subsection (b)(3), subsection (b)(4) is not limited to disputed facts, so a judge is subject to recusal under the rule even if he

156. *Gaal*, 332 S.W.3d at 454 (quoting *Liteky*, 510 U.S. at 555); *Avilez*, 333 S.W.3d at 675 (quoting *Liteky*, 510 U.S. at 555).

157. *See Gaal*, 332 S.W.3d at 454 ("[A] judge's remarks during trial that are critical, disapproving or hostile to counsel, the parties, or their cases, usually will not support a bias or partiality challenge, although they *may* do so if they reveal an opinion based on extrajudicial sources, and they *will* require recusal if they reveal 'such a high degree of favoritism or antagonism as to make fair judgment impossible.'" (quoting *Liteky*, 510 U.S. at 555)).

158. TEX. R. CIV. P. 18b(b)(3); *see* Gentry v. State, No. 06-05-00237-CR, 2006 WL 932057, at *1 (Tex. App.—Texarkana Apr. 12, 2006, no pet.) (mem. op., not designated for publication) (concluding a judge was disqualified because he "explicitly stated on two occasions that he was making his ruling based on his personal knowledge about the sequence of events").

159. TEX. R. CIV. P. 18b(b)(3).

160. Rule 18b demands the recusal of a judge when "[the judge] or a lawyer with whom he previously practiced law has been a material witness concerning [the proceeding]." *Id.* R. 18b(b)(4).

161. *Id.*

testified to an uncontroverted material fact.[162] On its face, the rule does not require recusal if the judge or a lawyer from his former practice has testified concerning a non-material issue, even if the issue was controverted.[163] If the inclusion of the members of the judge's previous firm in the grounds for recusal is aimed at keeping a judge from presiding over cases in which another lawyer prepared documents at issue in the case, and thus the judge might possess some explicit or imputed privileged information about the case, the basis for recusal is overbroad, as its application is not limited in time.[164] More probably, the rule is designed to prevent public speculation that a judge took counsel's side in an issue merely on the basis of their prior relationship.

D. *Judge as an Attorney in the Case*[165]

Rule 18b(b)(5) requires a judge's recusal if he "participated" in a matter in controversy as a "counsel, adviser, or material witness," or conveyed his opinion concerning its merits, while "acting as an attorney in government service."[166] Since other rules of disqualification address potential conflicts of interest arising from a judge having participated in a case as a prosecutor,[167] subsection (b)(5) appears to be aimed at government attorneys "participating" in the drafting and passing of legislation, either as legislative counsel, an outside advisor, or a witness at a legislative hearing. The rule is broader than merely prohibiting lawyers who drafted a statute from ruling on its meaning or constitutionality; the subsection also requires recusal if the judge, while "acting as an attorney in government

162. *Compare id.* R. 18b(b)(3) ("A judge shall recuse himself in any proceeding in which . . . the judge has personal knowledge of disputed evidentiary facts concerning the proceeding."), *with id.* R. 18b(b)(4) ("A judge shall recuse himself in any proceeding in which . . . the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning it.").

163. *See id.* R. 18b(b)(4) ("A judge shall recuse himself in any proceeding in which . . . the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning it.").

164. *Cf.* Hathorne v. State, 459 S.W.2d 826, 829 (Tex. Crim. App. 1970) (concluding, in criminal cases, a judge is only disqualified due to his prior association with a law firm when "the judge acted as counsel *in the very case* before him;" he is not disqualified for all cases against the other party (emphasis added)).

165. Rule 18b provides for recusal when "the judge participated as counsel, adviser or material witness in a matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service." TEX. R. CIV. P. 18b(b)(5).

166. *Id.*

167. *See* TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006) ("No judge . . . shall sit in any case . . . where he has been counsel for the State . . . ."); TEX. R. CIV. P. 18b(a)(1) ("Judges shall disqualify themselves in all proceedings in which . . . they have served as a lawyer in the matter in controversy . . . .").

service," "expressed an opinion concerning the merits" of "a matter in controversy."[168] The rule thus requires recusal not only of any government lawyer who actually worked on the legislation but also any government lawyer who publically commented upon it either before or after its passage. Unless the phrase "acting as an attorney in government service" is narrowly restricted to public expressions of opinion issued in an official capacity, the prohibition is probably subject to First Amendment attack.[169] The rule does not bar a judge who, as a private attorney, acting either in her capacity as a citizen–lawyer or as an advocate for a client, may have "participated" in the preparation of legislation or may have commented upon it.[170]

E. *Other Judicial Interests Requiring Recusal*[171]

Rule 18b(b)(6) requires a judge to recuse himself when he, or his spouse, or a minor in his household have a "financial interest in the subject matter in controversy" or may be "substantially affected by the

168. TEX. R. CIV. P. 18b(b)(5).

169. *Cf.* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding the prohibition against judicial candidates announcing their views on disputed legal and political issues violated the First Amendment); Gentile v. State Bar of Nev., 501 U.S. 1030, 1051–52 (1991) (finding the state bar's limitation on a lawyer's speech unconstitutionally vague and addressing the balance of First Amendment rights of attorneys and the state's interest in a fair trial); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 431 (Tex. 1998) (asserting the standard in *Gentile* may broaden an attorney's protection under the First Amendment).

170. *See Ex parte* Ellis, 275 S.W.3d 109, 119 (Tex. App.—Austin 2008, no pet.) ("[O]pinions expressed by an individual prior to becoming a judge generally should not prevent him from sitting as a judge because there is a distinction between having personal views and complying with the obligations judges take an oath to uphold and because 'every good judge is fully aware of the distinction.'" (quoting *White*, 536 U.S. at 798 (Stevens, J., dissenting)); *cf.* Chastain v. State, 667 S.W.2d 791, 796 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd) (concluding a judge is not subject to recusal due to his expression of the belief that the death penalty was a deterrent).

171. Rule 18b has three provisions which relate to familial bases for judicial recusal:

> (6) The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (7) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person[] (A) is either a party to the proceeding, or an officer, director or trustee of a party; (B) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (C) is to the judge's knowledge likely to be a material witness in the proceeding[; and] (8) the judge or the judge's spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

TEX. R. CIV. P. 18b(b)(6)–(8).

outcome of the proceeding."[172] Similarly, subsection (7) requires recusal of a judge when he, or his spouse, or any person within the third degree of either, is a party to the proceeding, is known by the judge to have an interest in the proceeding, or is likely to be a witness.[173] Finally, subsection (8) requires a judge to recuse himself if "he, or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person" appears as a lawyer in the proceeding.[174] All three provisions expand the grounds of disqualification under Rule 18b(a) to include relationships by marriage that are not included under the statutory rules of affinity.[175] To put it another way, under subsections (6) through (8), personal relationships by marriage that do not require disqualification may nevertheless require recusal, depending upon the degree of relationship.

IV. PROCEDURE FOR DISQUALIFICATION AND RECUSAL

Rule 18a of the Rules of Civil Procedure governs the procedure for both disqualification and recusal "in any trial court other than a statutory probate court or justice court."[176] The Rules of Appellate Procedure provide no mechanism for raising the issue of disqualification in appellate courts, though it does spell out the specific grounds for disqualification, while Rule 16.3 of the Rules of Appellate Procedure controls the procedure for the recusal of appellate court judges or justices.[177] Rule 18a, though added by the Texas Supreme Court to the civil rules in 1980, was not held to apply in criminal cases until the early 1990s.[178] While the Rules of Appellate Procedure govern the procedure for recusal,

172. *Id.* R. 18b(b)(6).

173. *Id.* R. 18b(2)(7).

174. *Id.* R. 18b(2)(8).

175. *See id.* R. 18b(2)(6)–(8) (stating the various ways in which a familial relationship can require a judge to recuse himself); *see also* TEX. GOV'T CODE ANN. § 573.024(a) (West 2004) (characterizing the relationship of affinity); TEX. R. CIV. P. 18b(a)(1)–(3) (recognizing the conflict with having a party that is related to the judge).

176. TEX. R. CIV. P. 18a(a).

177. TEX. R. APP. P. 16.3.

178. *Compare* Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding explicitly that Rule 18a applies in criminal cases), *and* DeBlanc v. State, 799 S.W.2d 701, 705 (Tex. Crim. App. 1990) (holding implicitly that Rule 18a applies in criminal cases), *with* State *ex rel.* Millsap v. Lozano, 692 S.W.2d 470, 478 (Tex. Crim. App. 1985) (noting Rule 18a was adopted by order of June 10, 1980, effective January 1, 1981, and later amended by order of December 15, 1983, effective April 1, 1984, but observing "it is not clear that the rule applies to criminal cases"), *and* McClenan v. State, 661 S.W.2d 108, 110 n.2 (Tex. Crim. App. 1983) (concluding no procedure existed for recusal of judges in criminal cases and calling for the legislature to pass statute modeled on Rule 18a).

Rule 18b of the Rules of Civil Procedure sets out the grounds for recusal for both trial and appellate judges.[179]

A. *Rule 18a—Procedure for Disqualification and Recusal in Trial Courts*

Rule 18a sets out the procedure the parties and the court must follow to file and dispose of a motion to disqualify or to recuse a judge. The procedures for either type of motion are the same, except that the deadline for filing a motion to recuse do not apply to motions to disqualify; a motion to disqualify may not be dismissed for the failure of a party to comply with the requirements for filing and service under Rule 18a; the denial of a motion to disqualify may be reviewed by mandamus as well as appeal.[180]

Generally, Rule 18a provides that if a party files a motion to recuse, the challenged judge has the mandatory duty to either recuse herself or request the presiding judge of the administrative district to assign another judge to hear the motion.[181] The obvious purpose of the procedure is to avoid even the appearance of impropriety by requiring the respondent judge to step aside before ruling on the merits of a motion to recuse.[182] Under previous versions of the rule, the Texas Supreme Court declined to directly address whether a challenged judge must either recuse herself or request the appointment of another judge if a party files a defective petition,[183] while the Court of Criminal Appeals concluded, once a recusal motion has been timely filed, a trial judge has no discretion whether to recuse or refer, regardless of whether the motion properly pled prima facie grounds for recusal.[184] The statute now specifically provides that "regardless of

179. TEX. R. CIV. P. 18b(b); *see also* TEX. R. APP. P. 16.2 ("The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure.").

180. *See* TEX. R. CIV. P. 18a(b)(2), g(3)(b), (j)(2).

181. *Id.* R 18a(b)(1)(A)–(B); *see also* McLeod v. Harris, 582 S.W.2d 772, 775 (Tex. 1979) (orig. proceeding) (concluding once a proper motion is filed, the judge has mandatory duty to either recuse himself or refer the matter to the presiding judge, also interpreting 18a predecessor and indicating if the trial judge failed to comply, the supreme court would issue a writ of mandamus); *In re* Thompson, 330 S.W.3d 411, 418 (Tex. App.—Austin 2010, orig. proceeding) (showing once a proper Rule 18a motion is filed, a judge has mandatory duty to either recuse himself or refer the matter to the presiding judge).

182. *See In re* Norman, 191 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (stating, regardless of the grounds on which the judge's impartiality is challenged, the proper response for a judge is to recuse himself or refer the motion to disqualify the judge to another judge).

183. *See* Gonzalez v. Guilbot, 315 S.W.3d 533, 541 n.36 (Tex. 2010) (declining to address issue of whether judge must refer defective recusal motion to administrative judge).

184. *See* De Leon v. Aguilar, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004) (overruling *McClenan* and stating "Rule 18a does not contemplate that a trial judge whose impartiality is questioned can

whether the motion complies with the rule," a respondent judge must recuse herself or refer the motion "within three business days after the motion is filed," thus resolving the split.[185] A trial judge's error in failing to recuse herself or refer a timely motion is subject to harmless error analysis, however, where the record is sufficient to establish that the grounds for recusal were meritless.[186]

To avoid the disruption caused by filing a recusal motion on the eve of trial, Rule 18a requires a party to file a recusal motion "as soon as practicable after the movant knows of the grounds stated in the motion" but in no event "after the tenth day before the day set for trial or other hearing."[187] This ten-day requirement is not absolute where the movant could not have known of the possible grounds for recusal until after the motion would otherwise be untimely, as the statute provides the time limit does not apply if the movant "neither knew nor reasonably should have known" either that the judge whose recusal is sought would preside at the

nevertheless determine whether the allegations of bias against him state sufficient grounds for recusal"); Villareal v. State, 348 S.W.3d 365, 370 (Tex. App.—Austin 2011) ("Even if the motion is groundless, the trial court has no discretion to rule on the motion himself."), *pet. dism'd sub nom. as untimely filed*, *In re* Villareal, PD-1210-11, 2011 Tex. Crim. App. LEXIS 1589 (Tex. Crim. App. Nov. 16, 2011); *see also In re Norman*, 191 S.W.3d at 861 ("Even though a motion to recuse may be defective, the challenged judge must either recuse or refer the motion . . . ."); *Arnold*, 853 S.W.2d at 544–45 (concluding a defendant who filed an untimely motion to recuse waived an appellate complaint that the trial judge did not properly refer the motion to an administrative judge).

185. TEX. R. CIV. P. 18a(f)(1).

186. *See De Leon*, 127 S.W.3d at 6 ("[A] trial judge's failure to comply with Rule 18a can be harmless where the record demonstrates that a trial judge was not biased."); *McClenan*, 661 S.W.2d at 110–11 ("[B]ecause we find that the record before us is complete and that no bias is shown . . . we affirm the conviction and decision of the court of appeals."); *see also Villareal*, 348 S.W.3d at 370. *But see* Mosley v. State, 141 S.W.3d 816, 837 (Tex. App.—Texarkana 2004, pet. ref'd) (concluding actions taken by trial judge after motion to recuse filed are void); Crawford v. State, 807 S.W.2d 597, 598 (Tex. App.—Dallas 1991, no pet.) ("Because the trial court neither granted the motion to recuse nor referred the matter to the presiding judge, any other order made thereafter was void."); *see also* Davis v. State, No. 10-07-00206-CR, 2008 WL 3845284, at *1 (Tex. App.—Waco Aug. 13, 2008, no pet.) (per curiam) (not designated for publication) ("The proper remedy for a failure to comply with Rule 18a is not reversal, but abatement and remand for purposes of compliance with the rule."); Adames v. State, No. 01-94-01263-CR, 1999 WL 1174, at *1 (Tex. App.—El Paso Dec. 30, 1998, no pet.) (per curiam) (not designated for publication) (abating the appeal and remanding the cause where "the trial judge erred in failing to recuse himself or refer the motion for hearing to the administrative judge"); Sanchez v. State, 926 S.W.2d 391, 396 (Tex. App.—El Paso 1996, pet. ref'd) (per curiam) (holding the remedy for failure to comply with Rule 18a is abatement and remand to comply with rule).

187. TEX. R. CIV. P. 18a(b)(1); *see* Martin v. State, 876 S.W.2d 396, 397 (Tex. App.—Fort Worth 1994, no pet.) (explaining the purpose of the ten-day rule); *see also* DeBlanc v. State, 799 S.W.2d 701, 705 (Tex. Crim. App. 1990) (observing the ten-day rule serves to prevent litigants from halting the proceedings "at will" simply by filing motion to recuse).

trial or hearing or that the ground stated in the motion existed.[188]

As noted, this time limit does not apply to motions to disqualify. Under the rule, motions to disqualify must be filed "as soon as practicable after the movant knows of the ground stated in the motion."[189] The specific exception under Rule 18a(g)(3)(B) that a motion to disqualify "may not be denied on the ground that it was not filed or served in compliance with" Rule 18a appears to call into question even this broad requirement, however.[190]

Both motions to disqualify and motions to recuse must be verified; must assert one or more grounds for disqualification or recusal listed in Rule 18b; and must not be based "solely on the judge's rulings in the case."[191] A motion must also state with "detail and particularity" facts within the affiant's "personal knowledge," or upon information and belief "if the basis for that belief is specifically stated," would be admissible, and "if proven," would be sufficient to justify recusal or disqualification.""[192] A motion that is not verified or sworn to will not trigger the provisions of the rule.[193]

188. TEX. R. CIV. P. 18a(b)(1)(B)(i)–(ii) ("A motion to recuse . . . must not be filed after the tenth day before the date set for trial or other hearing unless, before that day, the movant neither knew nor reasonably should have known . . . that the judge whose recusal is sought would preside at the trial or hearing[,] or . . . that the ground in the motion existed."); *see also Villareal*, 348 S.W.3d at 369 n.2 ("Rule 18a does not account for the situation where the alleged ground for recusal could not have been known prior to ten days before trial."); Harris v. State, 160 S.W.3d 621, 625 (Tex. App.—Waco 2005) ("[I]f the basis for recusal does not become apparent until later, then the defendant preserves the complaint by promptly filing the motion when the basis for recusal comes to light."), *pet. struck sub nom. for non-compliance with written order*, *In re* Harris, PD-0408-05, 2005 Tex. Crim. App. LEXIS 1457 (Tex. Crim. App. 2005); Rosas v. State, 76 S.W.3d 771, 774 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("[I]f appellant did not know the grounds for recusal before ten days of the trial date, Rule 18a did not bar consideration of his complaint."); Stafford v. State, 948 S.W.2d 921, 925 n.6 (Tex. App.—Texarkana 1997, pet. ref'd) ("The ten-day requirement of Rule 18a is not absolute and does not contemplate a situation in which a party cannot know the basis of the recusal until after a motion for recusal is no longer timely."); *Martin*, 876 S.W.2d at 397 ("Rule 18a does not contemplate the situation in which a party cannot know the basis of recusal until after a motion for recusal is no longer timely.").

189. TEX. R. CIV. P. 18a(b)(2).

190. *Id.* R. 18a(g)(3)(B).

191. *Id.* R. 18a(a)(1)–(3).

192. *Id.* R. 18a(a)(4)(A)–(C).

193. *See* Kennedy v. Tex. Court of Criminal Appeals, 336 S.W.3d 382, 384 (Tex. App.—Texarkana 2011, pet. denied) (stating "[t]he procedural requisites for recusal in Rule 18a(a) are mandatory, and a party who fails to conform waives his right to complain of a judge's failure to recuse himself" and holding the judge who failed to refer a case did not err because the motion was not verified); *see also* Moorhead v. State, 972 S.W.2d 93, 95 (Tex. App.—Texarkana 1998, no pet.) ("We find that the judge did not err in overruling the facially invalid motion for recusal in this instance."); Vargas v. State, 883 S.W.2d 256, 259 (Tex. App.—Corpus Christi 1994, pet. ref'd)

Rule 18a(d) further requires the party filing the motion to serve a copy on every other party, "if possible" by the same method of service as the method of filing.[194] Any parties in the case may, "but need not," file a response.[195] The judge whose recusal is sought should not file a response but should instead recuse himself or refer the motion to the presiding judge."[196]

As already observed, disqualification, recusal, or referral is mandatory; though a failure to follow the correct procedure is generally not subject to mandamus unless the movant establishes the judge must be disqualified or recused as a matter of law,[197] or the challenged judge refuses to take any action at all.[198] A movant may, however, "notify" the regional presiding judge of the failure of the respondent judge to comply, presumably so that the presiding judge may take corrective action by assigning another judge to preside[199] or by issuing interim or ancillary orders "as justice may require."[200]

Regardless of whether the challenged judge signs and files an order of disqualification or recusal or an order of referral, the judge must take no further action in the case until the motion has been decided, if the motion has been filed before evidence has been offered at the trial or hearing, "except for good cause stated in writing or on the record."[201] The rule naturally does not address what might control if the original judge were to issue an order "for good cause" that might conflict with an order by the

(concluding a trial judge did not err in failing to refer a motion where the motion was not verified); *cf.* Arnold v. State, 853 S.W.2d 543, 544–45 (Tex. Crim. App. 1993) (noting the defendant who filed an untimely motion to recuse waived an appellate complaint that the trial judge did not properly refer the motion to an administrative judge).

194. TEX. R. CIV. P. 18a(d); *see also Ex parte* Sinegar, 324 S.W.3d 578, 582 (Tex. Crim. App. 2010) (noting presentment problems for pro se inmates in the former version of the rule but declining to address them).

195. TEX. R. CIV. P. 18a(c)(1).

196. *Id.* R. 18a(c)(2), (f)(1).

197. *Compare* De Leon v. Aguilar, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004) (holding mandamus is proper where bias is established as a matter of law), *with* Woodard v. Eighth Court of Appeals, 991 S.W.2d 795, 796 (Tex. Crim. App. 1998) (indicating appellate courts "should not grant mandamus relief to the complaining party on a recusal motion . . . because the party has an adequate remedy at law by way of appeal from the final judgment"), *and In re* Chavez, 130 S.W.3d 107, 114–16 (Tex. App.—El Paso 2003, orig. proceeding) (acknowledging *Woodard* controls but highlighting weaknesses in the decision).

198. *See In re* Thompson, 330 S.W.3d 411, 418–19 (Tex. App.—Austin 2010, orig. proceeding) (holding a petition for writ of mandamus was granted because of the refusal of a trial judge to rule on the a motion to recuse).

199. TEX. R. CIV. P. 18a(g)(1).

200. *Id.* R. 18a(g)(4).

201. *Id.* R 18a(f)(2)(A).

regional judge issued "as justice may require."

Though not required by the rule, it is "prudent" for the recused judge and assigned judge not to communicate about the case.[202] Communications concerning scheduling matters that do not rise to the level of an "order," however, do not violate the rule.[203] Furthermore, a judge's order prohibiting ex parte communications and a subsequent show cause order following a violation of the order do not violate the prohibition against further action taken by the judge both because such orders are within the inherent powers of the court and because they bear no relation to the merits of the underlying case.[204]

If the motion to disqualify or recuse has been filed after evidence has been introduced, the respondent judge may proceed, "subject to stay by the regional presiding judge."[205]

Once the challenged judge refers the motion to the presiding judge, the regional presiding judge may hear the motion herself or assign another judge in the region to preside over the hearing.[206] Should a party move to recuse the presiding judge, the judge may still assign another judge to rule on the original, referred motion, or may "sign and file with the clerk" an order referring the second motion to the Chief Justice for consideration.[207] The Chief Justice of the Texas Supreme Court may assign a judge to hear the second motion and issue any order permitted by Rule 18a or "pursuant to statute."[208]

The judge presiding over the motion to recuse—either the regional presiding judge or a judge assigned by her—may summarily deny the motion for noncompliance with Rule 18a without an oral hearing.[209] The order overruling the motion on the grounds of noncompliance must state the "nature of the noncompliance."[210] Even if the motion is corrected,

202. Mosley v. State, 141 S.W.3d 816, 833, 836 (Tex. App.—Texarkana 2004, pet. ref'd) (stating "[o]nce a judge is recused or disqualified from a case, the prudent approach is for the recused judge and the assigned judge to have no further communications with each other concerning any aspect of the case," but finding Rule 18a was not violated where communications involved scheduling the case for trial).

203. *See id.* (concluding the judge was not "tainted or biased" by virtue of conferring with a colleague concerning the motion for continuance).

204. *See In re* Easton, 203 S.W.3d 438, 442–43 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (recognizing the judge's show cause order and order prohibiting ex parte communications had no relation to the underlying guardianship case).

205. TEX. R. CIV. P. 18a(f)(2)(B).

206. *Id.* R. 18a(g)(1).

207. *Id.*

208. *Id.* R. 18a(i).

209. *Id.* R. 18a(g)(3)(A).

210. *Id.*

the motion will count for purposes of assaying whether a party has filed a tertiary motion and may be sanctioned under the Civil Practice and Remedies Code.[211]

The regional presiding judge or judge assigned to decide the motion may issue interim or ancillary orders in the pending case "as justice may require."[212] The statute specifically provides that the rulings of the regional presiding judge must be by written order.[213] Curiously, the statute says nothing about the rulings made by an assigned judge, but presumably they, too, must be in written form.

If the judge presiding over the motion decides to conduct a hearing, it must be set "as soon as practicable," and even may be heard "immediately after it has been referred" to the regional presiding judge or an assigned judge, provided all parties have been given notice.[214] The judge may conduct the hearing telephonically "on the record," and documents submitted by facsimile or email, that are "otherwise admissible under the rules of evidence," may be considered.[215] The statute proscribes the parties from using a discovery request or subpoena to conduct discovery on the respondent judge, "except by order of the regional judge presiding or the judge assigned to the case."[216] The challenged judge may disregard any discovery request or subpoena unless it is "accompanied" by the proper order.[217]

While the rule specifies that the judge's decision after a hearing must be by written order, it does not require the judge to provide an explanation of his decision or to make findings of fact and conclusions of law.[218] If the motion is granted, the regional presiding judge must transfer the case to another court or assign another judge to the case.[219]

If a recusal motion is ultimately denied by the presiding or assigned judge, Rule 18a itself dictates that the denial may be reviewed "for abuse of discretion on appeal from the final judgment."[220] A reviewing court must

211. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 30.016 (West 2007) (outlining the procedures and penalties for filing a third motion to disqualify or recuse).

212. TEX. R. CIV. P. 18a(g)(4).

213. *Id.* R. 18a(g)(2).

214. *Id.* R. 18a(g)(6)(A)–(B).

215. *Id.* R. 18a(g)(6)(C).

216. *Id.* R. 18a(g)(5).

217. *Id.*

218. *Id.* R. 18a(g)(2),(7).

219. *Id.* R. 18a(g).

220. *Id.* R. 18a(j)(1)(A); *see also* Gaal v. State, 332 S.W.3d 448, 456 (Tex. Crim. App. 2011) ("An appellate court should not reverse a recusal judge whose ruling on the motion was within the zone of reasonable disagreement.").

consider the "totality of the evidence and information elicited at the recusal hearing to see if the record reveals sufficient evidence to support the recusal judge's ruling that the trial judge was unbiased."[221] If the presiding or assigned judge grants the motion, the order "cannot be reviewed by appeal, mandamus, or otherwise"[222] Motions to disqualify, in contrast, whether granted or denied, "may be reviewed by mandamus and may be appealed in accordance with other law."[223]

If, after notice and hearing, the judge who hears the disqualification or recusal motion determines that the motion was either "groundless and filed in bad faith for the purpose of harassment" or "clearly brought for unnecessary delay and without sufficient cause," the judge may order the party, or attorney who filed the motion, or both to pay the "reasonable" attorney fees and expenses incurred by other parties.[224]

B. *Rule 16.3—Procedure for Recusal in Appellate Courts*

Recusal of appellate justices and judges is controlled by Rule 16.3 of the Rules of Appellate Procedure.[225] In contrast to Rule 18a, Rule 16.3 does not set any fixed deadline by which a motion for recusal must be filed. Instead, the rule requires only that the motion be "promptly" filed "after the party has reason to believe that the justice or judge should not participate in deciding the case."[226] Once a motion has been filed, but

221. *Gaal*, 332 S.W.3d at 456.

222. TEX. R. CIV. P. 18a(j)(1)(B). The logic of the rule is obvious: If the motion is granted, and another judge is substituted before trial, neither party is harmed by having an unbiased judge preside, thus, review is unnecessary. If the motion is denied, it is reviewable, but only after a trial during which the judge's potential bias may be tested. *See Gaal*, 332 S.W.3d at 456–57 ("[I]f the motion is granted, it is not a reviewable motion, the way the rule is drafted, because what harm can come from having a trial by a fair judge, even though it's not the fair judge you want. If it's granted, I mean if the motion is granted, it's not reviewable. If it's denied, it is reviewable, but only on appeal from the final judgment; not on an interlocutory basis." (quoting Appellant's Brief on the Merits at 8, Gaal v. State, 332 S.W.3d 448 (Tex. Crim. App. 2011) (No. PD-0516-10)).

223. TEX. R. CIV. P. 18a(j)(2).

224. TEX. R. CIV. P. 18a(h). *Compare* Sommers v. Concepcion, 20 S.W.3d 27, 44–45 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (concluding the court erred in granting sanctions against a party where the motion was filed "well in advance" of summary judgment hearing and, thus, there was no showing that the motion was filed for purpose of delay and the party "asserted at least one arguable ground for recusal"), *with* Enterprise-Laredo Assocs. v. Hachar's, Inc., 839 S.W.2d 822, 841 (Tex. App.—San Antonio 1992, writ denied) (noting the fact that the defendants were aware of the ground for recusal long before the motion was filed supported the judge's finding that the motion was filed solely for purpose of delay).

225. TEX. R. APP. P. 16.3; *Ex parte* Ellis, 275 S.W.3d 109, 115 (Tex. App.—Austin 2008, no pet.).

226. TEX. R. APP. P. 16.3(a); *see also Ex parte Ellis*, 275 S.W.3d at 123–24 (indicating a motion to recuse was presented after an appellate opinion was released was untimely, where movant was

before any further proceedings are conducted, the challenged justice or judge must either "remove" herself from participating in the case or certify the matter to the entire court.[227] Since the challenged justice is specifically barred from sitting with the court to consider it, the motion must be decided by the majority of the remaining judges sitting en banc.[228] An order of recusal under Rule 16.3 is not reviewable, but denial of the recusal motion is.[229] The rule does not address whether appeal may be taken immediately after the motion is overruled or whether the complaining party must wait until after the court decides the underlying issues in the case and hands down its opinion on the merits.

V. CONCLUSION

Though the principle of a fair trial in a fair tribunal is itself a simple proposition, ensuring an unbiased judge, and more importantly the appearance of impartiality, is subject to a myriad of overlapping constitutional provisions, statutes, and procedural rules. Parties to a case, and the judge presiding over it, must be aware not only of any circumstances that might threaten the trial's fairness but also the constitutional, statutory, and procedural rules that control who may preside.

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generally aware of the grounds for recusal but failed to uncover the specifics until after the opinion was handed down); McCullough v. Kitzman, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied) (holding a motion to recuse may not be filed after an opinion has issued).

227. TEX. R. APP. P. 16.3(b); *see also* Cannon v. City of Hurst, 180 S.W.3d 600, 601 (Tex. App.—Fort Worth 2005, no pet.) (recognizing, following Rule 16.3(b), the challenged justices had referred the motion to full court and had not participated in deciding the merits of the motion); F.S. New Prods., Inc. v. Strong Indus., Inc., 129 S.W.3d 594, 597 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (noting procedure and observing it is "the functional equivalent of the procedure for disqualification or recusal of a trial judge under" Rule 18a); *McCullough*, 50 S.W.3d at 88 (acknowledging the justices followed Rule 16.3 and certified the question of recusal to be considered by the whole court with each questioned justice being excluded in turn); Sears v. Olivarez, 28 S.W.3d 611, 615–16 (Tex. App.—Corpus Christi 2000, no pet.) (referring to the aforementioned recusal procedures).

228. TEX. R. APP. P. 16.3(b); *see also Cannon*, 180 S.W.3d at 601 (conveying how the motion to recuse was decided on by a vote of the non-challenged justices en banc); *F.S. New Prods.*, 129 S.W.3d at 597 (explaining how the court decided the motion to disqualify by a vote of the residual justices sitting en banc); *McCullough*, 50 S.W.3d at 88 (providing another example of the procedure for appellate judges to consider a motion to recuse); *Sears*, 28 S.W.3d at 615–16 (recognizing the entire court sat en banc and excluded one justice at a time to determine whether there was a reason to question the impartiality of any of the justices based on their political affiliation).

229. *Compare* TEX. R. APP. P. 16.3(b) (omitting any mention of a review process for an order of recusal in the "decision"), *with id.* R. 18a(f) (noting the denial of a motion of recusal may be reviewed).