2022 Regular Session

HOUSE BILL NO. 247

#### BY REPRESENTATIVE MAGEE

(On Recommendation of the Louisiana State Law Institute)

1 AN ACT 2 To amend and reenact the heading of Title XXII of the Code of Criminal Procedure, the 3 heading of Chapter 1 of Title XXII of the Code of Criminal Procedure, Code of 4 Criminal Procedure Articles 671 through 676, 678, and 679, the heading of Chapter 5 3 of Title XXII of the Code of Criminal Procedure, and Code of Criminal Procedure 6 Article 684, and to repeal Code of Criminal Procedure Article 677, relative to the 7 recusal of judges; to provide for the grounds for recusal; to provide for recusal on the 8 motion of the court; to provide for authority of judges; to provide for the procedure 9 for recusal; to provide for the selection of a judge to try the motion to recuse; to 10 provide for the selection of a judge after recusal; to provide for the recusal of an ad 11 hoc judge, appellate judge, and supreme court justice; to provide for review of 12 recusal rulings; and to provide for related matters. 13 Be it enacted by the Legislature of Louisiana: 14 Section 1. The heading of Title XXII of the Code of Criminal Procedure, the heading 15 of Chapter 1 of Title XXII of the Code of Criminal Procedure, Code of Criminal Procedure 16 Articles 671 through 676, 678, and 679, the heading of Chapter 3 of Title XXII of the Code 17 of Criminal Procedure, and Code of Criminal Procedure Article 684 are hereby amended and 18 reenacted to read as follows:

1	TITLE XXII	
2	RECUSATION RECUSAL OF JUDGES AND DISTRICT ATTORNEYS	
3	CHAPTER 1. RECUSATION RECUSAL OF JUDGES	
4	Art. 671. Grounds for recusation recusal of judge	
5	A. In a criminal case cause, a judge of any trial or appellate court, trial or	
6	appellate, shall be recused when he upon any of the following grounds:	
7	(1) Is The judge is biased, prejudiced, or personally interested in the cause	
8	to such an extent that he the judge would be unable to conduct a fair and impartial	
9	trial <u>;.</u>	
10	(2) Is The judge is the spouse of the accused, of the party injured, of an	
1	attorney employed in the cause, or of the district attorney; or is related to the accused	
12	or the party injured, or to the spouse of the accused or party injured, within the fourth	
13	degree; or is related to an attorney employed in the cause or to the district attorney,	
14	or to the spouse of either, within the second degree;.	
15	(3) Has The judge has been employed or consulted as an attorney in the	
16	cause, or has been associated with an attorney during the latter's employment in the	
17	cause <u>+.</u>	
18	(4) Is The judge is a witness in the cause;.	
19	(5) Has The judge performed a judicial act in the case cause in another court;	
20	or <u>.</u>	
21	(6) Would The judge would be unable, for any other reason, to conduct a fair	
22	and impartial trial.	
23	B. In a criminal cause, a judge of any trial or appellate court shall also be	
24	recused when there exists a substantial and objective basis that would reasonably be	
25	expected to prevent the judge from conducting any aspect of the cause in a fair and	
26	impartial manner.	
27	B.C. In any cause in which the state, or a political subdivision thereof, or a	
28	religious body is interested, the fact that the judge is a citizen of the state or a	
29	resident of the political subdivision, or pays taxes thereto, or is a member of the	
30	religious body is not of itself a ground for recusation recusal. In any cause in which	

a religious body or religious corporation is interested, the fact that a judge is a member of the religious body or religious corporation is not alone a ground for recusal.

#### Comments - 2022

- (a) This Article generally follows Code of Civil Procedure Article 151, with such adaptations as are necessary to adjust the grounds for recusal to the special differences in criminal proceedings.
- (b) Subparagraph (A)(1) is the most important ground for recusal. It continues the rule that interest in the cause is a ground for recusal and includes the much-needed provision that bias or prejudice is also a ground for recusal. Bias or prejudice of the trial judge was not a ground for recusal prior to the 1928 Code. In State v. Phillips, 106 So. 375 (La. 1925), it was held that "interested in the cause" means that the judge must have some personal gain at stake before he can be recused. The Louisiana Supreme Court followed this rule after the 1928 Code in State v. LaBorde, 38 So. 2d 371 (La. 1948). Recognition of bias or prejudice as a ground for recusal is in line with the basic purpose of recusal procedure, i.e., to protect the defendant's right to a fair and impartial trial. The requirement that the bias, prejudice, or interest must be such that the judge would be unable to conduct a fair and impartial trial is a standard requiring that the disqualifying bias, interest, or prejudice must be of a substantial nature.
- (c) Subparagraph (A)(2) is similar to Code of Civil Procedure Article 152(A)(4) in specifying the degrees of relationship that will serve as a ground for recusal of the judge. In addition, Subparagraph (A)(2) clarifies that the district attorney is one of the attorneys to whom the relationships apply.
- (d) Subparagraph (A)(3) follows Code of Civil Procedure Article 151(A)(2). State v. Perkins, 50 So. 805 (La. 1910), held that the statutory provision was met when the judge was previously employed on the same matter in a civil proceeding.
- (e) Subparagraph (A)(4), in conformity with Code of Civil Procedure Article 151(A)(1), provides for recusal if the judge is a material witness in the cause. Construing Article 303 of the 1928 Code of Criminal Procedure, the Louisiana Supreme Court stated that it "contemplates and refers to the judge's being a material witness in the actual trial of the criminal cause and before the court not a witness at a hearing to determine whether he should be recused." State v. Riviere, 72 So. 2d 316, 319 (La. 1954). In State v. Kelly, 128 So. 2d 18 (La. 1961), the court stated that the testimony of the judge must relate to the defendant's guilt or innocence. Under this logical interpretation of the phrase "material witness," the judge would not be recused if he had been called to testify to a matter relating to something other than the guilt or innocence.
- (f) Subparagraph (A)(5) follows Code of Civil Procedure Article 152(A)(3) and makes no change in the law. Beginning with State v. Bill, 15 La. Ann. 114 (1860), it has been consistently held that a judge is competent to conduct the trial after a mistrial has been declared, and retrial of a case after a new trial is ordered may also be held before the same judge who originally tried the case.
- (g) The term "cause" rather than "case" is used in this Chapter. The broader word "cause" embraces the entire situation, in both its civil and criminal implications. The word "case" is limited to the particular criminal prosecution at bar. "Case is more of a limited signification, importing a collection of facts, with the conclusion of law thereon, whereas cause imports a judicial proceeding entire, and

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is nearly synonymous with lis in Latin, or suit in English." Black's Law Dictionary 2 (11th ed. 2019). 3 (h) Subparagraph (A)(6) is a catchall provision to include circumstances that 4 clearly indicate that the judge would not be able to serve fairly and impartially, even 5 though none of the specified grounds for recusal exist. 6 (i) A new Paragraph B has been added to provide an additional mandatory 7 ground for recusal when a substantial and objective basis exists that would 8 reasonably be expected to prevent the judge from conducting any aspect of the case 9 in a fair and impartial manner. This provision is intended to serve as a catch-all 10 supplementing the mandatory grounds for recusal set forth in Paragraph A and to 11 incorporate a clearer, more objective standard than the language of Canon 3C of the 12 Code of Judicial Conduct, which provides that a judge should recuse himself when 13 "the judge's impartiality might reasonably be questioned." 14 (i) Paragraph C, like Code of Civil Procedure Article 151(C), serves to 15 avoid frivolous claims that the judge is interested or prejudiced by reason of his 16 residence, or his membership in a religious organization that may be interested in the 17 prosecution. It will be significant in connection with the remaining provisions of this 18 Article. 19 (k) The terms "court" and "judge" are broadly defined by Article 931 to 20 include the various courts with criminal jurisdiction, except mayors' courts and 21 justice of the peace courts. 22 Art. 672. Recusation Recusal on court's own motion; by supreme court 23 A. A judge may recuse himself in any cause in which a ground for recusal 24 exists, whether or not a motion for his recusation recusal has been filed by a party 25 or not, in any case in which a ground for recusation exists. 26 On the written application of a trial judge, the supreme court may recuse him 27 for any reason that it considers sufficient. 28 B. Prior to the cause being allotted to another judge, a judge who recuses 29 himself for any reason shall contemporaneously file in the record the order of recusal 30 and written reasons that provide the factual basis for recusal under Article 671. The 31 judge shall also provide a copy of the recusal and the written reasons therefor to the judicial administrator of the supreme court. 32 33 Comments - 2022 34 (a) Paragraph A of this Article conforms with the generally accepted view 35 that a judge may recuse himself only if there is a valid ground for recusal. State ex 36 rel. Jones v. Judge, 6 So. 22 (La. 1889). This provision is broad enough to allow a 37 judge to recuse himself without a motion being filed. 38 (b) Paragraph B of this Article is new and requires the judge to file written 39 reasons containing the factual basis for the judge's self-recusal prior to the cause 40 being allotted to another judge. This provision also requires the judge to provide a 41 copy of both the recusal and the written reasons for the recusal to the judicial

administrator of the supreme court. This reporting requirement reflects the countervailing considerations of a judge's duty to sit and his obligation to recuse when a valid ground for recusal exists. A judge is "not at liberty, nor does he have the right, to take himself out of a case and burden another judge with his responsibility without good and legal cause." In re Lemoine, 686 So. 2d 837 (La. 1997).

(c) The factual basis for the judge's recusal must pertain to one of the grounds for recusal set forth in Article 671. The fact that a judicial complaint has been filed against the judge by one of the parties, without more, is not sufficient to constitute a ground for recusal.

## Art. 673. Judge may act until recused

A judge has full power and authority to act, even though a ground for recusation recusal exists, until he is recused, or a motion for his recusation recusal is filed. The judge to whom the motion to recuse is assigned shall have full power and authority to act in the cause pending the disposition of the motion to recuse.

### Comments - 2022

This Article provides a judge who has been selected to hear a motion to recuse with full power and authority to act in the cause, but such power and authority is discretionary. This provision is not intended to require the judge selected to hear the recusal to act on other matters in the cause.

# Art. 674. Procedure for recusation recusal of trial judge

A. A party desiring to recuse a trial judge shall file a written motion therefor assigning the ground for recusation recusal under Article 671. The motion shall be filed not later than thirty days after discovery of the facts constituting the ground upon which the motion is based, but in all cases at least thirty days prior to commencement of the trial. unless the party discovers In the event that the facts constituting the ground for recusation recusal occur thereafter, in which event it or the party moving for recusal could not, in the exercise of due diligence, have discovered such facts, the motion to recuse shall be filed immediately after the facts occur or are discovered, but prior to verdict or judgment.

B. If a valid ground for recusation is set forth in the motion to recuse sets forth facts constituting a ground for recusal under Article 671, not later than seven days after the judge's receipt of the motion from the clerk of court, the judge shall either recuse himself; or refer the motion for hearing to another judge or to a an ad hoc judge ad hoc, as provided in Article 675.

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1 C. If the motion to recuse is not timely filed in accordance with Paragraph 2 A of this Article or fails to set forth facts constituting a ground for recusal under 3 Article 671, the judge may deny the motion without referring the motion to another 4 judge or to an ad hoc judge for hearing but shall provide written reasons for the 5 denial. 6 Comments - 2022 7 (a) This Article follows Code of Civil Procedure Article 154 with such 8 changes as are necessary in criminal proceedings. A ground that is not urged timely 9 in conformity with this Article is waived. 10 (b) Paragraph A of this Article has been amended to require a motion to 11 recuse to be filed no later than thirty days after discovery of the facts constituting the 12 ground upon which the motion is based, but in all cases at least thirty days prior to 13 commencement of the trial. This time limitation has been imposed to prevent the 14 parties from delaying the proceedings by using a late-filed motion to recuse as a 15 manner of obtaining a continuance of the trial. This provision recognizes that in 16 some cases, the facts constituting the ground upon which the motion to recuse is 17 based occur after, or could not have been discovered before, thirty days prior to 18 commencement of trial. In cases that fall under this exception, Paragraph A provides 19 that the motion to recuse shall be filed immediately after such facts occur or are 20 discovered. 21 (c) Paragraph B of this Article requires a judge who is the subject of a valid 22 motion to recuse to either recuse himself or refer the motion to another judge for 23 hearing. A new time limitation has been added to require such action to be taken by 24 the judge within seven days after the judge receives the motion to recuse from the 25 clerk of court. 26 (d) When the judge is recused after the trial is commenced, it is necessary 27 to declare a mistrial and completely retry the case before the new judge. This 28 situation is covered by the ground for a mistrial stated in Article 775(5), i.e., physical 29 impossibility to proceed with the trial in conformity with law. 30 (e) If the motion to recuse is not timely filed or fails to set forth facts 31 constituting a ground for recusal, Paragraph C of this Article permits the judge who 32 is the subject of the motion to deny it without referring it to another judge or to an 33 ad hoc judge for hearing, but the judge must give written reasons for the denial. If 34 a party disagrees with the judge's denial of the motion to recuse pursuant to 35 Paragraph C, the party may apply for a supervisory writ or emergency supervisory 36 writ seeking review of the judge's decision. 37 Art. 675. Selection of ad hoc judge ad hoc to try motion to recuse 38 A. In a court having two judges, the judge who is sought to be recused shall 39 refer the motion to recuse to the other judge of that court. 40 B. In a court having more than two judges, the motion to recuse shall be 41 referred to another judge of the court through a random process as provided by the

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rules of court.

C. When the ground assigned for the recusation of the judge of a district court having one judge is that he is biased, prejudiced, or personally interested in the cause, the judge shall appoint a district judge of an adjoining district to try the motion to recuse. When any other ground is assigned for the recusation of such a district judge, he may appoint either a district judge of an adjoining district or a lawyer domiciled in the judicial district who has the qualifications of a district judge to try the motion to recuse. In a city court, a separate juvenile court, or a family court, when the court has a single judge, the judge shall refer the motion to recuse to a district judge of his district. In a court having only one judge, the judge shall make a written request to the supreme court for the appointment of an ad hoc judge to try the motion to recuse.

D. The order of the court appointing a <u>an ad hoc</u> judge ad hoc shall be entered on the minutes of the court, and the clerk of court shall forward a certified copy of the order to the appointed <u>ad hoc</u> judge ad hoc. The motion to recuse shall be tried promptly in a contradictory hearing in the court in which the <u>case cause</u> is pending.

#### Comments - 2022

This Article is similar to the corresponding provisions of Code of Civil Procedure Articles 155 (applicable to district courts) and 4863 (applicable to city courts) with such changes as are necessary in criminal proceedings.

Art. 676. Judge ad hoc Ad hoc judge to try case cause when judge recused

A. When a district court judge, or a judge of a separate juvenile court or of a family court, recuses himself, a judge ad hoc shall be assigned to try the case in the manner provided by Article 675 for the appointment of a judge ad hoc to try a motion to recuse. When a city court judge of a court having a single judge recuses himself, he shall appoint to try the case either a city court judge from an adjoining parish or a lawyer who is domiciled in the parish and has the qualifications of a city court judge.

B. When a district court judge or a judge of a separate juvenile court or of a family court When a judge of a court having more than two judges recuses himself or is recused after a trial of the motion, the matter shall be randomly reassigned to

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1	another judge for trial of the case cause in accordance with the procedures contained
2	in <del>Code of Criminal Procedure</del> Article 675.
3	B. When a judge of a court having two judges recuses himself or is recused
4	after a trial of the motion, the cause shall be tried by the other judge of that court.
5	C. When a city court the judge of a court having a single only one judge
6	recuses himself or is recused after a trial on of the motion, the supreme court shall
7	appoint an ad hoc judge ad hoc who tried the motion to recuse shall appoint to try the
8	case cause either a city court judge from an adjoining parish or a lawyer who is
9	domiciled in the parish and has the qualifications of a city court judge.
10	C. When a city court has two judges, if a judge recuses himself or is recused,
11	the case shall be tried by the other judge of that court.
12	D. When a city court has more than two judges, if a judge recuses himself
13	or is recused, the case shall be tried by another judge of that court through a random
14	reassignment process.
15	E.D. The ad hoc judge ad hoc has the same power and authority to dispose
16	of the case cause as the recused judge would have.
17	Comments - 2022
18 19 20 21	The provisions of this Article are similar to Code of Civil Procedure Articles 156 and 4864. If a judge is recused, the cause will be allotted to another judge in the same court. In courts with only one judge, the supreme court will appoint an ad hoc judge to hear the cause.
22	* * *
23	Art. 678. Recusation of judge Recusal of ad hoc judge
24	A judge An ad hoc judge appointed to try a motion to recuse a judge, or
25	appointed to try the case cause, may be recused on the grounds and in the manner
26	provided in this Chapter for the recusation recusal of judges.
27	Comments - 2022
28	This Article is taken verbatim from Code of Civil Procedure Article 159.
29	Art. 679. Recusation Recusal of an appellate judge and a supreme court justice
30	A. A party desiring to recuse a judge of a court of appeal shall file a written
31	motion therefor assigning the ground for recusal under Article 671. When a written

motion is filed to recuse a judge of a court of appeal, he the judge may recuse himself or the motion shall be heard by the other judges on the panel to which the cause is assigned, or by all judges of the court, except the judge sought to be recused, sitting en banc.

B. When a judge of a court of appeal recuses himself or is recused, the court shall appoint randomly allot another of its judges to act for the recused judge in the hearing and disposition of the case cause.

C. If the motion to recuse fails to set forth facts constituting a ground for recusal under Article 671, the judge may deny the motion without a hearing but shall provide written reasons for the denial.

D. A party desiring to recuse a justice of the supreme court shall file a written motion therefore assigning the ground for recusal under Article 671. When a written motion is filed to recuse a justice of the supreme court, he the justice may recuse himself or the motion shall be heard by the other justices of the court.

D.E. When a justice of the supreme court recuses himself; or is recused, the court may have the <u>case cause</u> argued before and disposed of by the other justices or appoint a <u>sitting or retired judge</u> of a district court or of a court of appeal <u>having the qualifications of a justice of the supreme court</u> to sit as a member of the court in the hearing and disposition of the <u>case cause</u>.

### Comments - 2022

- (a) Neither this Article nor its source provision states the time when the motion to recuse a judge of a court of appeal or a justice of the supreme court must be filed. However, it is certain that the motion must be filed before the court has rendered its decision. State v. Jefferson Parish School Board, 19 So. 2d 153 (La. 1943). The general limitation of Article 674, that the motion for recusal shall be filed "at least thirty days prior to commencement of the trial," does not apply to this special situation. A ground for recusal of a judge of a court of appeal or a supreme court justice will sometimes become apparent, for the first time, during the hearing before that court.
- (b) This Article includes language from Code of Civil Procedure Article 158 that provides a specific procedure for the resolution of a motion to recuse an appellate judge.

1 (c) Paragraph C of this Article is similar to Article 674 in that it allows a 2 judge of a court of appeal to deny a motion to recuse that fails to set forth facts 3 constituting a ground for recusal without a hearing, but the judge must give written 4 reasons for the denial. 5 CHAPTER 3. REVIEW OF RECUSATION RECUSAL RULING 6 7 Art. 684. Review of recusation recusal ruling 8 A. If a judge or a district attorney is recused over the objection of the state, 9 or if an application by the state for recusation of a judge is denied, the state may 10 apply for a review of the ruling by supervisory writs. The defendant may not appeal 11 prior to sentence from a ruling recusing or refusing to recuse the judge or the district 12 attorney. 13 B. If a judge is recused over the objection of the state or the defendant, or if 14 a motion by the state or the defendant to recuse a judge is denied, the party's 15 exclusive remedy is to apply for a review of the ruling by supervisory writs. A 16 ruling recusing or refusing to recuse the judge shall not be considered on appeal. 17 C. Upon ruling on a motion to recuse a judge, the judge shall advise the 18 defendant in open court or in writing that the ruling may be reviewed only by a 19 timely filed supervisory writ to the appellate court and shall not be raised on appeal. 20 Comments - 2022 21 (a) Under Paragraph A of this Article, the manner in which rulings 22 concerning recusals of district attorneys are reviewed remains the same and has not 23 been changed. 24 (b) Paragraph B of this Article provides that if either party seeks to challenge 25 a ruling concerning the recusal of a judge, the party must do so in the form of a 26 timely filed supervisory writ. This is the party's exclusive remedy. This revision is intended to ensure that rulings concerning the recusal of a judge are reviewed prior 27 28 to the trial on the merits. 29 (c) Because Paragraph B of this Article creates an exception to a defendant's 30 constitutional right to an appeal, Paragraph C requires the judge to advise the 31 defendant that the recusal ruling may be reviewed only by a timely filed supervisory writ and cannot be raised on appeal. This notice must be given in open court or in 32

Section 2. Code of Criminal Procedure Article 677 is hereby repealed in its entirety.

writing, and the form of the notice will likely depend upon the manner in which the

recusal ruling is made. The failure of the judge to provide the required notice to the

defendant may give rise to the issue of recusal being reviewed on appeal.

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1	Section 3. The exis	sting Comments to Code of Criminal Procedure Articles 671	
2	through 679 and 684 are sup	perseded by the Comments appearing beneath those Articles in	
3	this Act. The Louisiana S	tate Law Institute is hereby directed to remove the existing	
4	Comments and to print only the Comments appearing in this Act.		
	$\overline{S}$	PEAKER OF THE HOUSE OF REPRESENTATIVES	
	$\overline{P}$	RESIDENT OF THE SENATE	
	G	OVERNOR OF THE STATE OF LOUISIANA	

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