

H.B. No. 3475

1 amended by adding Section 29.013 to read as follows:

2 Sec. 29.013. REPORT TO TEXAS JUDICIAL COUNCIL. (a) The
3 secretary of the municipality in a municipality with a municipal
4 court, including a municipal court of record, or the employee
5 responsible for maintaining the records of the municipality's
6 governing body shall notify the Texas Judicial Council of the name
7 of:

8 (1) each person who is elected or appointed as mayor,
9 municipal court judge, or clerk of a municipal court; and

10 (2) each person who vacates an office described by
11 Subdivision (1).

12 (b) The secretary or employee shall notify the judicial
13 council not later than the 30th day after the date of the person's
14 election or appointment to office or vacancy from office.

15 SECTION 3. The following sections are repealed:

16 (1) Section 29.012, Government Code; and

17 (2) Section 22.073(c), Local Government Code.

18 SECTION 4. Subchapter A-1, Chapter 29, Government Code, as
19 added by this Act, applies only to a hearing or trial initially
20 filed in a municipal court on or after the effective date of this
21 Act.

22 SECTION 5. This Act takes effect September 1, 2011.

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President of the Senate

Speaker of the House

I certify that H.B. No. 3475 was passed by the House on May 11, 2011, by the following vote: Yeas 142, Nays 7, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 3475 was passed by the Senate on May 25, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

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AN ACT

relating to the recusal and disqualification of municipal judges.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 29, Government Code, is amended by adding Subchapter A-1 to read as follows:

SUBCHAPTER A-1. RECUSAL OR DISQUALIFICATION OF MUNICIPAL JUDGES

Sec. 29.051. DEFINITIONS. In this chapter:

(1) "Active judge" means a person who holds office as a district court judge or statutory county court judge.

(2) "Presiding judge" means the presiding judge of a municipal court, including a municipal court of record.

(3) "Regional presiding judge" means the presiding judge of the administrative judicial region appointed under Section 74.005.

Sec. 29.052. MOTION FOR RECUSAL OR DISQUALIFICATION. (a) A party in a hearing or trial in a municipal court, including a municipal court of record, may file with the clerk of the court a motion stating grounds for the recusal or disqualification of the municipal judge. The grounds may include any disability of the judge to preside over the case.

(b) A motion for the recusal or disqualification of a municipal judge must:

(1) be filed at least 10 days before the date of the hearing or trial, except as provided by Subsection (c);

1 (2) be verified; and
 2 (3) state with particularity the alleged grounds for
 3 recusal or disqualification of the judge based on:

4 (A) personal knowledge that is supported by
 5 admissible evidence; or

6 (B) specifically stated grounds for belief of the
 7 allegations.

8 (c) A motion for recusal or disqualification must be filed
 9 at the earliest practicable time before the beginning of the trial
 10 or other hearing if a judge is assigned to a case 10 or fewer days
 11 before the date set for a trial or hearing.

12 Sec. 29.053. NOTICE. A party filing a motion for recusal or
 13 disqualification under this subchapter shall serve on all other
 14 parties or their counsel:

15 (1) copies of the motion; and

16 (2) notice that the movant expects the motion to be
 17 presented to the judge three days after the filing of the motion
 18 unless the judge orders otherwise.

19 Sec. 29.054. STATEMENT OPPOSING OR CONCURRING WITH
 20 MOTION. A party may file with the clerk of the court a statement
 21 opposing or concurring with a motion for recusal or
 22 disqualification at any time before the motion is heard.

23 Sec. 29.055. PROCEDURE FOLLOWING FILING OF MOTION; RECUSAL
 24 OR DISQUALIFICATION WITHOUT MOTION. (a) Before further proceedings
 25 in a case in which a motion for the recusal or disqualification of a
 26 municipal judge has been filed, the judge shall:

27 (1) recuse or disqualify himself or herself; or

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1 (2) request the regional presiding judge to assign a
2 judge to hear the motion.

3 (b) A municipal judge who with or without a motion recuses
4 or disqualifies himself or herself:

5 (1) shall enter an order of recusal or
6 disqualification and:

7 (A) if the municipal judge is not the presiding
8 judge, request the presiding judge to assign any other judge of the
9 municipal court, including the presiding judge, to hear the case;

10 (B) if the municipal judge is the presiding
11 judge, request the regional presiding judge to assign another judge
12 of the municipal court to hear the case; or

13 (C) if the municipal judge serves in a
14 municipality with only one municipal judge, request the regional
15 presiding judge to assign a judge of another municipal court in the
16 county to hear the case; and

17 (2) may not take other action in the case, except that
18 a judge who recuses himself or herself for good cause may take other
19 action as stated in the order in which the action is taken.

20 (c) A municipal judge who does not recuse or disqualify
21 himself or herself:

22 (1) shall forward, in original form or certified copy,
23 an order of referral, the motion, and all opposing and concurring
24 statements to the regional presiding judge; and

25 (2) may not take other action in the case during the
26 time after the filing of the motion for recusal or disqualification
27 and before a hearing on the motion, except for good cause stated in

1 the order in which the action is taken.

2 Sec. 29.056. HEARING ON MOTION. (a) A regional presiding
3 judge who receives a request for the assignment of a judge to hear a
4 motion to recuse or disqualify shall:

5 (1) immediately set a hearing before the regional
6 presiding judge, an active judge, or a judge on the list of judges
7 who are eligible to serve on assignment under Section 74.055;

8 (2) cause notice of the hearing to be given to all
9 parties or their counsel; and

10 (3) make any other orders, including orders on interim
11 or ancillary relief in the pending cause as justice may require.

12 (b) A judge who hears a motion for recusal or
13 disqualification under Subsection (a) may also hear any amended or
14 supplemented motion for recusal or disqualification filed in the
15 case.

16 (c) If none of the parties to an action object, a hearing
17 under Subsection (a) or (b) may be conducted by telephone.

18 Sec. 29.057. PROCEDURE FOLLOWING GRANTING OF MOTION. (a)
19 If a motion for recusal or disqualification is granted after a
20 hearing is conducted as provided by Section 29.056, the judge who
21 heard the motion shall enter an order of recusal or
22 disqualification, and:

23 (1) if the judge who was the subject of the motion is
24 not the presiding judge, request that the presiding judge assign
25 any other judge of the municipality, including the presiding judge,
26 to hear the case;

27 (2) if the judge who was the subject of the motion is

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1 the presiding judge, request the regional presiding judge to assign
2 another judge of the municipality to hear the case; or

3 (3) if the judge subject to recusal or
4 disqualification is located in a municipality with only one
5 municipal judge, request the regional presiding judge to assign a
6 judge of another municipal court in the county to hear the case.

7 (b) If the presiding judge is unable to assign a judge of the
8 municipality to hear a case when a municipal judge is recused or
9 disqualified under Section 29.055 or 29.056 because there are not
10 any other municipal judges in the municipality or because all the
11 municipal judges have been recused or disqualified or are otherwise
12 unavailable to hear the case, the presiding judge shall request the
13 regional presiding judge to first assign a municipal judge from
14 another municipality in the county or, if necessary, assign a
15 municipal judge from a municipality in an adjacent county to hear
16 the case.

17 (c) If the regional presiding judge is unable to assign a
18 judge to hear a case when a municipal judge is recused or
19 disqualified under Section 29.055 or 29.056 because there are not
20 any other municipal judges in the county or because all the
21 municipal judges have been recused or disqualified or are otherwise
22 unavailable to hear the case, the regional presiding judge may
23 assign a municipal judge from a municipality in an adjacent county
24 to hear the case.

25 Sec. 29.058. APPEAL. (a) After a municipal court of record
26 has rendered a final judgment in a case, a party may appeal an order
27 that denies a motion for recusal or disqualification as an abuse of

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1 the court's discretion.

2 (b) A party may not appeal an order that grants a motion for
3 recusal or disqualification.

4 Sec. 29.059. CONTEMPT. If a party files a motion to recuse
5 or disqualify under this subchapter and it is determined by the
6 judge hearing the motion, at the hearing and on motion of the
7 opposing party, that the motion to recuse or disqualify is brought
8 solely for the purpose of delay and without sufficient cause, the
9 judge may in the interest of justice find the party filing the
10 motion in contempt under Section 21.002(c).

11 Sec. 29.060. COMPENSATION. (a) An active judge who is
12 assigned to hear a motion to recuse or disqualify a municipal judge
13 under this subchapter is not entitled to additional compensation
14 other than travel expenses. A judge assigned to hear a motion to
15 recuse or disqualify who is not an active judge is entitled to:

16 (1) compensation of \$450 per day of service, prorated
17 for any day for which the judge provides less than a full day of
18 service; and

19 (2) travel expenses.

20 (b) A municipal judge assigned under this subchapter to hear
21 a case in a court other than the one in which the judge resides or
22 serves is entitled to compensation provided by law for judges in
23 similar cases and travel expenses.

24 (c) The municipality in which a case subject to this
25 subchapter is pending shall pay the compensation and travel
26 expenses due or incurred under this subchapter.

27 SECTION 2. Subchapter A, Chapter 29, Government Code, is

RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

- (a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.
- (b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.
- (c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.
- (d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.
- (e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.
- (f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge

shall assign another judge to sit in the case.

- (g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.
- (h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

RULE 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

- (1) **Disqualification.** Judges shall disqualify themselves in all proceedings in which:
 - (a) they have 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; or
 - (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
 - (c) either of the parties may be related to them by affinity or consanguinity within the third degree.
- (2) **Recusal.** A judge shall recuse himself in any proceeding in which:
 - (a) his impartiality might reasonably be questioned;
 - (b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;
 - (d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
 - (e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

- (f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding or an officer, director, or trustee of a party;
 - (ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iii) is to the judge's knowledge likely to be a material witness in the proceeding.
 - (g) he or his 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.
- (3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (4) In this rule:
- (a) "proceeding" includes pretrial, trial, or other stages of litigation;
 - (b) the degree of relationship is calculated according to the civil law system;
 - (c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
 - (d) "financial interest" means 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, except that:
 - (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
 - (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
 - (iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
 - (iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

- (v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.
- (5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.
- (6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

REMOVAL OF JUDGES FROM TEXAS CASES: DISTINGUISHING DISQUALIFICATION AND RECUSAL

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One of the guiding principles of the American system of jurisprudence is the idea of an independent and neutral judiciary. Americans expect to have their day in court before a judge who will treat their case in an unbiased manner, with objectivity under the law. Similarly, Texas courts have echoed the sentiment that a fair judge is necessary to a fair trial.

Public policy demands that the judge who sits in a case act with absolute impartiality. Beyond the demand that a judge be impartial, however, is the requirement that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or integrity of the court. The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. The legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence.¹

The problem of realizing this ideal, of course, is that judges do not live in isolation. Judges have friends, families, and professional and business interests. Inevitably, this means that every judge faces the realistic possibility of having a case filed in his or her court that affects such personal interests. This is because either the judge is directly or indirectly related to a person involved in the case or the judge has a bias affecting his or her role as decision-maker.

Realizing this ideal is even more complicated in Texas municipal courts. Municipal courts come into contact with more people than all other Texas courts combined.² Most municipal judges preside in rural communities where defendants are more likely to be acquaintances than if he or she lived in a bigger city or town. Furthermore, there are no published appellate opinions explaining the interrelationship of specific municipal court

¹ *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559. (Tex. App. – Beaumont 1993) (footnotes omitted).

² W. Clay Abbott & Ryan Kellus Turner, *The Municipal Judges Book*, (TMCEC 2005) at 1-3.

statutes that may be applicable when recusal or disqualification is raised in municipal court.

In order to ensure the aims of justice and to protect the integrity of the judicial system, all judges must understand the law governing (1) disqualification and (2) recusal.³ While the “terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack.”⁴ The failure of a judge to recuse when recusal is appropriate can constitute a violation of the Code of Judicial Conduct.⁵ Failure to recuse may rise to the level of disqualification when it impacts a litigant’s right to due process.⁶

Figure 1 - Comparison of Disqualification and Recusal⁷

		Disqualification	Recusal
1	Source of Challenge	Constitutions, statutes, & rules	Statutes & rules
2	Discretionary or mandatory	Mandatory	Discretionary
3	Waivable	No	Yes
4	Parties may consent to judge	No	Yes
5	Effect if judge serves after valid challenge	Judgment void	Reversible error
6	Requires written motion	No	Yes
7	Judgment subject to collateral attack	Yes	No

1. Disqualification

Article V, Section 11 of the Texas Constitution provides three grounds for disqualifying a judge from sitting in any case:

³ The focus of this article is limited to these two challenges. Though less common, in limited circumstances, objections to a judge can also be raised in the form of (1) an objection to an assigned judge or (2) as a tertiary motion to recuse or disqualify. Section 74.053 of the Government Code contemplates the peremptory challenge to an assigned judge. An assigned judge is a person who is assigned under Chapter 74 of the Government Code by the presiding judge of the administrative judicial region. See <http://www.courts.state.tx.us/courts/ajr.asp>. The third (or later) motion to recuse or disqualify a judge in the same case by the same party is called a “tertiary motion.” Although the substantive law is the same as for motions to recuse, separate rules govern the procedure for tertiary motions.

⁴ *Supra* note 1 at 559.

⁵ Judges must recuse themselves if in their discretion they feel they have a conflict of interest that would affect their ability to be fair and impartial. Canon 3(B)(5), Code of Judicial Conduct.

⁶ *Caperton v. A.T. Massey Co.*, 129 S. Ct. 2252 (2009).

⁷ *O’Connor’s Civil Trials 2006* (Jones McClure Publishing) at 246.

1. The judge was counsel in the case,⁸
2. The judge “may be interested” in the outcome of the case; or
3. One of the parties is related to the judge.

Similarly, Article 30.01 of the Code of Criminal Procedure provides instances in which the judge is disqualified regardless of the judge’s application of discretion. The defendant cannot waive the judge’s disqualification.⁹ The judge is statutorily disqualified as a matter of law when he or she:

1. Is the injured party;
2. Has been counsel for the State or the accused; or
3. Is connected to the accused or the party injured by consanguinity or affinity within the third degree as determined under Chapter 573 of the Government Code.¹⁰

Figure 2 - Relatives by Degrees¹¹

<u>1st Degree</u>	<u>2nd Degree</u>	<u>3rd Degree</u>
<ul style="list-style-type: none"> • Judge’s spouse • Mother & spouse • Father & spouse • Daughter & spouse • Son & spouse • Mother-in-law • Father-in-law • Stepdaughter • Stepson 	<ul style="list-style-type: none"> • Granddaughter & spouse • Grandson & spouse • Grandmother & spouse • Sister & spouse • Brother & spouse • Sister-in-law • Brother-in-law • Grandmother-in-law • Grandfather-in-law • Step-granddaughter • Step-grandson • Half-sister & spouse • Half-brother & spouse • Stepsister & spouse • Stepbrother & spouse 	<ul style="list-style-type: none"> • Great grandmother & spouse • Great grandfather & spouse • Great granddaughter & spouse • Great grandson & spouse • Niece, Nephew & spouses • Aunt, Uncle & spouses • Half-aunt, Half-uncle & spouses • Great grandmother-in-law • Great grandfather-in-law • Aunt & Uncle-in-law • Niece and Nephew-in-law

⁸ To be disqualified, the judge must have served as counsel to one of the parties in an earlier proceeding in which the issues were the same as in the case currently before the judge. If the judge represented one of the parties in the past, but the proceeding before the judge is not the same case, the judge is not disqualified. *Dean v. State*, 938 S.W.2d 764, 767 (Tex. App. – Houston [14th Dist.] 1997) (no writ).

⁹ *Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987).

¹⁰ Disqualification is mandatory even if the judge did not know about the relationship. *Ex parte Vivier*, 699 S.W.2d 862, 863 (Tex. Crim. App. 1985).

¹¹ *O’Connor’s, Texas Civil Appeals 2004-05* (Jones McClure Publishing) at 107.

		<ul style="list-style-type: none"> • Step-great-granddaughter • Step-great-grandson • Step-niece, nephew & spouses
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2. Recusal

While disqualification is mandatory, recusal lies in a judge’s appraisal of the individual situation.¹² While this determination can only be made in light of the specifics of a situation, the Texas Rule of Civil Procedure 18b(2) states that a judge shall recuse when:

- The judge’s impartiality might reasonably be questioned;
- The judge has a personal bias or prejudice concerning the subject matter or a party;
- The judge has personal knowledge of disputed evidentiary facts concerning the proceedings;
- The judge or a lawyer with whom the judge previously practiced law is a material witness;
- The judge participated as counsel, adviser, or material witness in the matter in controversy or expressed an opinion concerning the merits of it while acting as an attorney in government service;
- The judge, judge’s spouse, or a person within the third degree of relationship to either the judge or judge’s spouse is:
 1. a party to the proceeding or an officer, director, or trustee of a party;
 2. known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 3. to the judge’s knowledge, likely to be material witness in the proceeding;
- The judge, judge’s spouse, or a person within the first degree of relationship to either the judge or judge’s spouse is acting as a lawyer in the proceeding.

¹² “The line between disqualification, which is mandatory, and recusal, which is discretionary, is not well defined. The grounds listed in Tex. R. Civ. P. 18b(2) under ‘Recusal’ may rise to the level of mandatory disqualification when they impact a litigant’s right to due process.” *O’ Connor’s Texas Civil Appeals*, *Supra* note 11 at 108.

The Court of Criminal Appeals has not expressly held Rule 18b(2) to be applicable in criminal proceedings.¹³ Nonetheless, more than one court of appeals has cited Rule 18b(2) in its consideration of recusal in criminal cases.¹⁴

3. Motions for Recusal or Disqualification

Though the Texas Rules of Civil Procedure do not generally govern proceedings in criminal cases, in *Arnold v. State* the Court of Criminal Appeals held that Rule 18a, which contains procedures for the recusal of a judge, applies in criminal cases.¹⁵

Despite Rule 18a being entitled “Recusal or Disqualification of Judges,” it is generally believed that the procedures set out in the rule relating to the removal of a judge have no application to disqualification, only recusal.¹⁶ While Rule 18b contains separate and distinct provisions regarding disqualification and recusal, Rule 18a does not. Thus, while the procedure governing recusal is substantive and technical, the motion to disqualify does not need to adhere to the procedure and timeline contained in Rule 18. As disqualification is a matter of law, there is no requirement that a motion be filed, let alone be filed in the manner prescribed by Rule 18a.

It must be emphasized that Rule 18a governs situations when a party (including the defendant or the prosecution in a criminal case) requests that the judge recuse him or herself from a case. Assuming that such a recusal motion is made in a timely manner, and otherwise complies with the rule, a judge has two options: (1) recuse and refer the matter to the presiding judge of the administrative judicial region, or (2) “decline to recuse” and refer the motion to the presiding judge of the administrative judicial region.

While the language of Rule 18a and its application in other Texas criminal trial courts is clear, questions remain about its application in municipal courts.¹⁷ Such long standing questions are compounded by specific provisions governing municipal courts contained in Chapters 29 and 30 of the Government Code.

4. Recusal or Disqualification without a Motion by a Party in Municipal Court

In comparison to other trial courts in Texas, the law governing recusal or disqualification without a motion by a party in a municipal court is complicated by the variance in

¹³ In *Arnold v. State*, 778 S.W.2d 172 (Tex. App. – Austin 1989), the Third Court of Appeals stated that Rule 18a and 18b do not apply in criminal cases. The Court of Criminal Appeals subsequently reversed the Third Court of Appeals opinion but only as it related to Rule 18a. 853 S.W.2d 543 (Tex. Crim. App. 1993).

¹⁴ *Ex parte Ellis*, 275 S.W.3d 109, 116 (Tex. App. – Austin 2008); *Kniatt v. State*, 239 S.W.3d 910, 913 (Tex. App. – Waco 2007); *Burkett v. State*, 196 S.W.3d 892, 896 (Tex. App. – Texarkana 2006).

¹⁵ 853 S.W.2d 543 (Tex. Crim. App. 1993).

¹⁶ William W. Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY’S L.J. 599, 601 (1986).

¹⁷ *State ex rel. Millsap v. Lozano*, 692 S.W.2d 470, 479, n.13 (Tex. Crim. App. 1985).

municipal court organization authorized by state law.¹⁸ Variety may be the spice of life; however, when it comes to recusal or disqualification in municipal court, it may be the root of confusion among judges and attorneys.

Consider this: while most trial courts in Texas have one judge (who is typically elected), a municipal court may have more than one judge (who, depending on the decision of the local government, may be either elected or appointed).¹⁹ Without consulting the specific statute that creates the position of judge, it is a mistake to generalize about the position of presiding judge in a municipal court.²⁰ The same may also be true in a non-record municipal court located in a home-rule municipality.²¹ Collectively, these statutes potentially set the stage for conflicting legal constructions when it comes to recusal and disqualification.

In 1999, the Legislature passed into law Section 29.012 of the Government Code. Titled “Sitting for Disqualified or Recused Judge,” it provides that when a municipal judge is disqualified or recused, a judge from another municipal court located in an adjacent municipality may sit for that judge. Under this provision, however, a municipal judge may not sit in a case for another judge if either party objects in writing before the first pre-trial hearing or trial over which the judge is to preside.

Section 29.012 leaves many important questions unanswered. First, does it only relate to instances of recusal or disqualification *without* a motion by a party? While the statute can be read to govern instances where there is a motion by a party, such a construction is inconsistent with the Court of Criminal Appeals opinion in *Arnold*.²² At least one legal commentator believes that Section 29.012 applies “when the judge is disqualified or has recused himself [without a motion by a party].”²³ Second, what is an “adjacent municipality?” *New Webster’s Dictionary* defines “adjacent” as meaning “near, nearby” and “next, bordering.” Most Texas cities do not share contiguous borders with another municipality. This interpretation at best gives Article 29.012 limited utility and debatably frustrates the legislative intent.²⁴ At the same time, a legally operative word in a statute should have a meaning that is definite. (Is Wichita Falls, Texas “nearby” Vernon, Texas?

¹⁸ Consider the following: Section 30.00003(b) of the Government Code states that a municipality by ordinance or charter can have more than one municipal court. In contrast, Section 29.102 of the Government Code states that a municipality with a population between 130,000 to 285,000 can have as many as a four non-record municipal courts.

¹⁹ Section 29.004, Government Code.

²⁰ For instance, while Section 30.0006(b) of the Government Code provides for the appointment of judges in a municipal court of record, in El Paso, municipal judges are elected. The municipal judges then, in turn, select a presiding judge. Section 30.00128(b)-(e), Government Code.

²¹ “A home-rule city by charter or by ordinance may divide the municipal court into two or more panels or divisions, one of which shall be presided over by a presiding judge. Each additional panel or division shall be presided over by an associate judge, who is a magistrate with same powers as the presiding judge.” Section 29.007(a), Government Code.

²² See, *Supra*, note 13.

²³ David B. Brooks, 23 *Municipal Law and Practice*, Section 15.07 (Texas Practice 2d ed. Supp. 2009).

²⁴ Section 311.023(5), Government Code provides that in construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the consequences of a particular construction.

It all depends on who you ask – a person from Vernon is likely to give you a different answer than someone from Woonsocket, Rhode Island.) Third, assuming that there is more than one adjacent municipality, who decides which municipal judge to call? The law is silent on this point. Fourth, if Section 29.012 is a specific rule that supersedes the holding in *Arnold*, and Rule 18a is inapplicable, what happens if one of the parties objects? Then is Rule 18a applicable?

Until the Legislature or an appellate court clarifies Section 29.012 of the Government Code, prior to self-recusal or disqualification, municipal judges and court administrators should consider whether a provision in either Chapter 29 or 30 governing their particular municipal court authorizes that the case be transferred to another municipal judge or that judges exchange benches.²⁵ Alternatively, in a non-record municipal court, a judge could declare that he or she is “temporarily unable to act.” This, in turn, would trigger the statutory provisions authorizing the appointment of an alternate or temporary judge.²⁶ In a municipal court of record, Section 30.00008(b) of the Government Code may provide a similar alternative.²⁷

Conclusion

Judges and lawyers alike have long struggled with the distinction between “disqualification” and “recusal.” However, it is a struggle worth having because all parties deserve access to an impartial arbiter. While there remain unanswered questions about the mechanics of recusal and disqualification in municipal courts, the legislative intent is clear: the requirement of an impartial arbiter applies to all Texas trial courts.

²⁵ Sections 29.007(d)(2), 29.102(d)(2) and 30.00007(b)(4), Government Code.

²⁶ Sections 29.006 and 29.007(g), Government Code.

²⁷ “The governing body may appoint one or more qualified persons to be available to serve for a municipal judge who is temporarily absent due to illness, family death, continuing legal or judicial education programs or *any other reason*. The presiding judge, or the municipal judge if there is no presiding judge, shall select one of the qualified persons appointed by the governing body to serve during the absence of a municipal judge.” (Emphasis added).

Administrative Judicial Regions

(<http://www.courts.state.tx.us/courts/ajr.asp>)

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