# COMING AT THE KING: A SUMMARY OF THE 2021 AND 2022 AMENDMENTS TO THE RULES GOVERNING RECUSAL OF JUDGES IN LOUISIANA'S CIVIL DISTRICT COURTS

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*You come at the king, you best not miss.*[1]
Omar Little

## INTRODUCTION

Although Michael K. Williams's popular character in the HBO series *The Wire* was referencing a much more sinister topic—namely, an attempt on his life[2]—these words bear surprising relevance in the context of the legal system, particularly in the recusal of judges. After all, a judge has the power to decide the fate of a litigant's case. In turn, a litigant's constitutional right to a fair and impartial judiciary is an essential component of due process.[3] However, a litigant might be hesitant to file a motion to recuse the judge presiding over the case, fearing the loss of good favor with the judge in the event that the motion is denied and the judge remains on the case.

It follows that the recusal of judges is a "serious and important legal procedure."[4] In civil cases filed in Louisiana's district courts, recusal can happen in one of two ways: voluntarily or involuntarily.[5] The Louisiana Supreme Court explained the difference between voluntary recusal and involuntary recusal in *In re Lemoine*:

> Recusal may be voluntary as when a judge takes himself off a case for legally compelling reasons or simply because he believes that he cannot fairly and impartially judge a matter before him. It may be involuntary as when a litigant files a motion to recuse for stated legal reasons, the judge refuses to recuse himself, and court proceedings thereafter result in his being recused by another trial judge or by an appellate court.[6]

In either recusal situation—voluntary or involuntary—the Code of Civil Procedure dictates how the matter is to be resolved.[7] Nevertheless, the court in *Lemoine* further explained that "[i]n each possible recusal situation, there is a countervailing consideration which militates in favor of a judge's *not* recusing

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1. *The Wire: Lessons* (HBO television broadcast July 28, 2002).
2. *See id.*
3. *See* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION § 3541 (3d ed. 2022).
4. *In re* Lemoine, 96-2116 (La. 1/14/97), 686 So. 2d 837, 839.
5. *Id.*
6. *Id.*
7. *See id.*

himself."[8] This stems from the judge's professional and ethical obligations to preside over each case properly brought before the judge.[9] Indeed, as the court in *Lemoine* stated, 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."[10]

Thus, judicial recusal procedure in Louisiana is intertwined with the Louisiana Code of Judicial Conduct, which governs the ethical obligations of the state's judiciary.[11] A judge's violation of the Code of Judicial Conduct's Canons of Conduct, however, does not necessarily provide grounds for recusal in every case.[12] Expounding on this distinction between a judge's legal and ethical obligations in the context of recusal, the Louisiana Supreme Court in *Disaster Restoration Dry Cleaning, L.L.C. v. Pellerin Laundry Machinery Sales Company* explained that the Code of Judicial Conduct binds all judges and provides guidelines for their expected

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8. *Id.* at 839–40 (emphasis added).

9. *See Lemoine*, 686 So. 2d at 840.

10. *Id.*

11. 1 STEVEN R. PLOTKIN, LOUISIANA PRACTICE SERIES CIVIL PROCEDURE 165 (2021 ed.).

12. *Id.* In *Lemoine*, the Court explained:

> In the matter of recusal, there is a distinct difference between a legal review of the grounds for recusal and of a judge's decision not to recuse himself, on the one hand, and misconduct on the part of the judge, and imposition of discipline, on the other. Rarely, if ever, is it to be expected that the judge's call not to recuse himself after challenge will entail misconduct on his part. He has exercised a degree of discretion in that refusal, and his decision is subject to legal review and resolution in accordance with law. Nor is it likely that misconduct will arise in a situation where a judge, unchallenged, desists from recusing himself where there is no clear obligation on his part, statutory or otherwise, to do so. That judgment call is much like a judge's decision on substantive and procedural matters which daily come before him. The performance of his role as judge has him repeatedly exercising discretion, and misconduct, or ethical transgression, rarely ever comes into play.
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> . . . .
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> Misconduct and judicial discipline, on the other hand, is entirely different. Misconduct exposes a judge to punishment, anywhere from public censure (which may ultimately result in "removal" of the judge by the constituency that elects him) to removal from office by the Supreme Court. The Louisiana Constitution creates the Judicial Commission which has the power to recommend to the Supreme Court these extremes, as well as suspension, with or without pay, and involuntary retirement. LA. CONST. art. V, § 25(C). This punishment for misconduct, not reversal of a judge's decision in a court case before him, is what is involved when cases like this one are brought in this court by the Judiciary Commission. One of the assorted types of misconduct that can expose a judge to punishment is a judge's not recusing himself when he has a *legal* obligation to do so, even though he has not been challenged by a motion to recuse. In that circumstance, his legal failing (not complying with clear statutory law) is both misconduct and an ethical transgression.

*Lemoine*, 686 So. 2d at 840.

judicial conduct.[13] The court highlighted Canon 3(C), which provides that "[a] judge *should* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and *shall* disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule."[14]

As its text suggests, Canon 3(C) contains two recusal components: a voluntary component and a mandatory component. The first component suggests that judges *should* recuse themselves to avoid the appearance of impartiality or bias.[15] It does not, however, require recusal in such circumstances.[16] The second component mandates recusal in cases in which recusal is "required by law."[17] Examining Canon 3(C)'s mandatory recusal component, the court in *Lemoine* held that the "law" referred to in Canon 3(C) is found in Louisiana Code of Civil Procedure Articles 151 and 152.[18] Articles 151 and 152 have historically listed the scenarios in which district court judges are obligated to recuse themselves and those in which judges have the discretion to recuse themselves, respectively.[19] The *Lemoine* court recognized that "the list of grounds for recusal in these procedure code articles is *exclusive*, not illustrative, and there *must be a statutory ground for recusing a judge*."[20] To summarize the court's interpretation of Canon 3(C) in *Lemoine*, judges are not required to recuse themselves under Canon 3(C) unless at least one of the exclusive statutory grounds for recusal listed in Louisiana Code of Civil Procedure Article 151 or 152 exists. Notably, Articles 151 and 152 have never included

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13. Disaster Restoration Dry Cleaning, L.L.C. v. Pellerin Laundry Mach. Sales Co., 2005-0715, p. 4 (La. 4/17/06), 927 So. 2d 1094, 1097. The court added:

> In reviewing the duties of a judge, the Code of Judicial Conduct maintains that a judge shall uphold the integrity and independence of the judiciary. See, Canon 1. A judge shall avoid impropriety and the appearance thereof in all activities, thereby refraining from bias or prejudice in favor of any party and be objective in determining issues presented before him. See, Canon 2. A trial judge is also obligated to be impartial in performing its duties. See, Canon 3. A party, who challenges the non-compliance of this duty, has the burden to prove that a recusal is warranted by presenting evidence of a substantial nature and based on more than conclusory allegations.

*Id.*

14. *See id.*; LA. CODE OF JUD. CONDUCT, Canon 3(C) (2022) (emphasis added).

15. LA. CODE OF JUD. CONDUCT, Canon 3(C) (2022).

16. *Id.*

17. *Id.*

18. *Lemoine*, 686 So. 2d at 843.

19. *See* LA. CODE CIV. PROC. ANN. art. 151 cmt. (a) (2021).

20. *Lemoine*, 686 So. 2d at 843 (emphasis added).

Canon 3(C)'s voluntary recusal component as a statutory ground for recusal. Thus, because the Louisiana Legislature has not amended the statutory grounds for recusal to explicitly include "the appearance of impartiality or bias," Louisiana courts have been hesitant to order recusal of a judge based on the appearance of impartiality or bias.[21]

That said, the Louisiana Code of Civil Procedure's rules governing recusal in civil cases were substantially overhauled by Act 143 of the 2021 Regular Legislative Session.[22] Act 143, which went into effect on August 1, 2021, brought about five major changes to the rules governing recusal.[23] First, all of the statutory grounds for recusal in Article 151 are now mandatory grounds.[24] Second, a new "catch-all" mandatory ground for recusal was added to Article 151 in Paragraph B,[25] which ostensibly broadens the circumstances in which recusal is required. Third, all of the permissive grounds for recusal that were previously listed in Article 151 were deleted and their substance was moved to a new provision, Article 152, which requires judges to disclose all of the information in this latter article to the parties and their counsel—though the amended Article 152 fails to specify when or how judges are supposed to make these required disclosures.[26] Fourth, a judge who self-recuses must file written reasons containing the factual basis for his or her recusal under Article 151.[27] Fifth, a party must file a motion to recuse no later than thirty days after discovery of the facts constituting the ground for the motion, but in all cases before the matter is set for trial.[28] The only exception is in cases where the facts giving rise to the motion occur after the case is set for trial, in which instance the party must immediately file the

21. *See*, *e.g.*, Slaughter v. Bd. of Sup'rs of S. Univ. & Agr. & Mech. Coll., 2010-1114, p. 8 (La. App. 1 Cir. 8/2/11), 76 So. 3d 465, 471; *In re* Commitment of M.M., 53,577, p. 9 (La. App. 2 Cir. 9/23/20), 303 So. 3d 1095, 1101; *In re* Eleanor Pierce (Marshall) Stevens Living Tr., 2017-111, p. 13 (La. App. 3 Cir. 10/4/17), 229 So. 3d 36, 47; Chauvin v. Sisters of Mercy Health Sys., St. Louis, Inc., 2001-1834, pp. 2–3 (La. App. 4 Cir. 5/8/02), 818 So. 2d 833, 835; W.G.T. v. E.A.A., 14-4, p. 18 (La. App. 5 Cir. 9/10/14), 150 So. 3d 339, 351. This is also because the trial court has the discretion to determine if a valid ground for recusal exists, and its ruling is subject to the highly deferential abuse of discretion standard. *See Lemoine*, 686 So. 2d at 840.

22. *See* Act No. 143, 2021 La. Acts 1.

23. *See id*. at 1–11.

24. *Id*. at 1.

25. *Id*. at 3.

26. *Id*.

27. Act No. 143, 2021 La. Acts 4–5.

28. *Id*. at 5.

motion upon discovering these facts.[29] If the mover fails to timely file the motion to recuse or fails to sufficiently state a ground for recusal under Article 151, the judge who is the subject of the motion can deny it outright.[30] As long as the motion sets forth a valid ground for recusal under Article 151, the judge who is the subject of the motion is required to either self-recuse or make a written request to the Louisiana Supreme Court to appoint an ad hoc judge to hear the motion.[31] After the 2021 amendments, the recusal motion can no longer be referred to another judge in the same district court.[32]

During the 2022 Regular Legislative Session, the legislature enacted Act 38, which made a couple of slight modifications to the recusal provisions enacted the previous year.[33] The biggest change brought about in 2022 concerned Article 154, to which Act 38 added a new time limitation that requires the judge who is the subject of a motion to recuse to act within seven days after receiving the motion from the clerk of court.[34] All of the 2021 revisions noted above were otherwise unchanged by Act 38.

This Article examines in depth the recent amendments to the recusal rules applicable to Louisiana's district court judges. Part I explains the statutory grounds for recusal under the amended Article 151 as well as the new disclosures requirement under the amended Article 152. Part II addresses the changes to procedures for voluntary and involuntary recusal under the amended Articles 153 and 154, respectively. Part III discusses the procedures for the selection of the person who presides over a recusal motion as well as the selection of who will preside over the case after a judge is recused, as set forth in the amended Articles 155 and 156, respectively. Part IV analyzes the effect, if any, of these recent amendments on the mover's burden of proof on a motion to recuse as well as the mover's likelihood of prevailing on the motion, and includes a detailed discussion of the first appellate opinion to offer guidance on the new recusal rules.

Importantly, since these new amendments only recently went into effect and the Louisiana Supreme Court has yet to address

29. *Id*.
30. *Id*. at 6.
31. *Id*.
32. Act No. 143, 2021 La. Acts 6.
33. *See* Act No. 38, 2022 La. Acts 1.
34. *Id*.

them in any reported decision, it is uncertain exactly how they will play out. For guidance, all that we lawyers can do is look to previous versions of the code articles governing recusal procedure and consider whether the new amendments would dictate similar or different results. We can also look to the opinion issued by the court of appeal offering the first interpretation of the new recusal provisions, and evaluate whether that court's interpretation of the new rules will be followed in other courts throughout the state.

## I. STATUTORY GROUNDS FOR RECUSAL

Under the new amendments, Article 151 sets forth the grounds for which recusal is required, and no longer provides for any merely permissive grounds for recusal.[35] In other words, all of the grounds for recusal in Article 151 are mandatory grounds.[36] Specifically, the new law states, in relevant part:

> A. A judge of any trial or appellate court *shall* be recused upon any of the following grounds:
>
> (1) The judge is a witness in the cause.
>
> (2) The judge has been employed or consulted as an attorney in the cause or has previously been associated with an attorney during the latter's employment in the cause, and the judge participated in representation in the cause.
>
> (3) The judge is the spouse of a party, or of an attorney employed in the cause or the judge's parent, child, or immediate family member is a party or attorney employed in the cause.
>
> (4) The judge is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that the judge would be unable to conduct fair and impartial proceedings.
>
> B. A judge of any trial or appellate court *shall* also be recused when there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner.[37]

35. LA. CODE CIV. PROC. ANN. art. 151.

36. *Id*.

37. *Id*. art. 151(A)–(B) (emphasis added).

Paragraph A retains the four mandatory grounds for recusal listed in the prior version of Article 151(A).[38] By contrast, Paragraph B is a new mandatory ground for recusal.[39] The official revision comments set out the purpose of the new mandatory ground for recusal in Article 151(B):

> This provision is intended to serve as a catch-all supplementing the mandatory grounds for recusal set forth in Paragraph A and to incorporate a clearer, *more objective standard* than the language of Canon 3C of the Code of Judicial Conduct, which provides that a judge *should* recuse himself when "the judge's impartiality might reasonably be questioned."[40]

The former Paragraph B of the prior version of Article 151, which set forth permissive grounds for recusal, has been deleted, and its substance has been moved to a new provision, Article 152, which provides for the mandatory disclosures that a judge must make to all parties and attorneys in the case.[41] The amended Article 152 states:

> A. A judge of any trial or appellate court *shall disclose,* to the best of his information and belief, the existence of any of the following *to all attorneys and unrepresented parties in the cause*:
>
> (1) The judge has been associated with an attorney during the latter's employment in the cause.
>
> (2) At the time of the hearing of any contested issue in the cause, the judge has continued to employ, to represent him personally, the attorney actually handling the cause or a member of that attorney's firm.
>
> (3) The judge performed a judicial act in the cause in another court.
>
> (4) The judge is related to any of the following:
>
> (a) A party or the spouse of a party, within the fourth degree.

38. Act No. 143, 2021 La. Acts 1–2.
39. LA. CODE CIV. PROC. ANN. art. 151 cmt. (b) (2021).
40. *Id*. (emphasis added).
41. *Id*. art. 151 cmt. (a) (2021).

> (b) An attorney employed in the cause, the spouse of the attorney, or any member of the attorney's law firm, within the second degree.
>
> (5) The judge's spouse, parent, child, or immediate family member has a substantial economic interest in the subject matter in controversy.
>
> B. Upon disclosure, any party may file a motion that sets forth a ground for recusal under Article 151.[42]

Again, the amended Article 152 interposes a new rule of recusal procedure for judges. However, the substance of this new rule should be familiar to judges, as it was "taken from former Paragraph B of Article 151, which previously set forth permissive grounds for recusal."[43] But instead of merely listing the factual grounds upon which recusal would be within the judge's discretion, the amended Article 152 now *requires* judges to affirmatively disclose those facts to the parties in every case.[44] This new requirement was likely designed to facilitate the adjudication of recusal motions as early as possible in each case. Indeed, the revision comments to the amended Article 152 acknowledge this, noting that "[i]f the information disclosed gives rise to a ground for recusal under Article 151, any party may file a motion to recuse the judge pursuant to the procedure set forth in Article 154."[45]

Accordingly, reading the amended Articles 151 and 152 together, the disclosures required under Article 152 may provide not only a basis for recusal under the mandatory grounds set forth in Article 151(A)(1)–(4), but also a basis for recusal under the new catch-all mandatory ground set forth in Article 151(B).[46] In other words, the information that the judge discloses under Article 152 may reveal that "there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner."[47] Effectively, this could require recusal upon the judge's disclosure of a relationship that previously did not require recusal, but merely permitted it.

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42. LA. CODE CIV. PROC. ANN. art. 152 (emphasis added).
43. *Id*. art. 152 cmt. (a) (2021).
44. *See id*.
45. *Id*.
46. *Id*. arts. 151–52.
47. LA. CODE CIV. PROC. ANN. art. 151(B).

For example, under the old law, if a judge was related to a party in the case within the fourth degree,[48] the judge had the discretion to recuse himself or herself, but recusal was not mandatory.[49] Now, although a judge's relation within the fourth degree to a party in the case is not explicitly listed as a mandatory ground for recusal in the amended Article 151, the judge's disclosure of this relationship pursuant to Article 152 may nevertheless provide "a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner," which triggers mandatory recusal under Article 151(B).[50]

Unfortunately, the amended Article 152 does not specify *when* or *how* a judge must disclose all of the required information to the parties. Moreover, there is no specific mechanism in Article 152 or any of the other amended procedural articles governing recusal by which a party can compel a judge to make the required disclosures if the judge has not done so.[51] Consequently, a litigant who thinks

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48. *See* LA. CIV. CODE ANN. art. 900 ("The propinquity of consanguinity is established by the number of generations, and each generation is called a degree."); *id*. art. 901 (setting out formula for calculating degrees of consanguinity).

49. *Id*. art. 151(B)(4) (2021).

50. *See* LA. CODE CIV. PROC. ANN. art. 152; *id*. art. 151(B).

51. Perhaps the appropriate remedy in this scenario would be to file a writ of mandamus seeking to compel the judge to carry out his or her statutorily required disclosures under the amended Article 152. *See* LA. CODE CIV. PROC. ANN. art. 3861 ("Mandamus is a writ directing a public officer, a corporation or an officer thereof, or a limited liability company or a member or manager thereof, to perform any of the duties set forth in Articles 3863 and 3864."); *id*. art. 3863 ("A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor."). The Louisiana Supreme Court has defined a ministerial duty as "one 'in which no element of discretion is left to the public officer,' in other words, 'a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.'" Crooks v. State Through Dep't of Natural Resources, 2022-00625, p. 3 (La. 1/1/23), 2023 WL 526075, at *2 (citing Jazz Casino Co., L.L.C. v. Bridges, 16-1663, p. 5 (La. 5/3/17), 223 So. 3d 488, 492). The high court further noted: "If a public officer is vested with any element of discretion, mandamus will not lie." *Id*. (quoting Hoag v. State, 04-0857, p. 7 (La. 12/1/04), 889 So. 2d 1019, 1024). Thus, because the disclosures under the amended Article 152 are mandatory, it seems the proper remedy for compelling a judge to perform this duty would be to file a writ of mandamus. However, practically speaking, the expense associated with this option will likely outweigh the potential reward, as it would necessarily require the party seeking to compel the judge's disclosures to file a separate lawsuit requesting issuance of the writ directing the judge to make the disclosures. This could also draw unwanted attention to that party—especially if the party had not previously indicated his or her desire to get the information Article 152 requires. Nonetheless, mandamus is likely the only potential avenue in which a party can enforce the amended Article 152.

that there is reason to question a judge's impartiality, but does not have hard evidence to substantiate its suspicion is left with something of a dilemma. Without proof of the judge's suspected conflict, the litigant has no valid basis for filing a motion to recuse. Hence, the litigant must ask itself the existential question—do I come at the king?

On one hand, if the litigant asks the judge to make the Article 152 disclosures, the litigant risks "poisoning the well" of the judge's favor if the disclosures do not reveal any information that triggers mandatory recusal under Article 151. On the other hand, if the litigant feels strongly about seeking recusal and the judge has neither self-recused nor voluntarily made the Article 152 disclosures, the litigant realistically has very few options other than alerting the judge of this requirement in order to collect evidence to support a recusal motion. That said, members of the Louisiana Bar should have confidence that state judges will formulate their own processes for making their Article 152 disclosures once they familiarize themselves with these new rules.

## II. PROCEDURE GOVERNING VOLUNTARY AND INVOLUNTARY RECUSAL

As previously mentioned, recusal happens one of two ways: voluntarily or on motion of a party. Article 153 governs the procedure for a judge's voluntary self-recusal,[52] and Article 154 governs the procedure for motions to recuse.[53] While the procedures governing voluntary and involuntary recusal in the amended Articles 153 and 154 differ, it is apparent that they share a common goal—to resolve recusal issues as early as possible in each case. Under the new amendments, Articles 153 and 154 both require that there be a basis for recusal under Article 151, which now lists only *mandatory* grounds for recusal.[54]

The voluntary recusal process is expectedly less involved than the involuntary recusal process. The amended Article 153 states:

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52. LA. CODE CIV. PROC. ANN. art. 153.

53. *Id*. art. 154.

54. *See generally id*. art. 153(A), (C); *id*. art. 154(A). Notably, the 2021 amendments also made changes to the rules governing voluntary and involuntary recusal of supreme court justices and judges of the courts of appeal, which likewise require a basis for recusal under the new Article 151. *See id*. art. 157 (setting forth procedure for recusal of a supreme court justice); *id*. art. 158 (setting forth procedure for recusal of a judge of a court of appeal). That procedure, however, is outside the scope of this Article.

> A. A judge may recuse himself in any cause in which a ground for recusal exists, whether or not a motion for his recusal has been filed by a party.
>
> B. A district judge may recuse himself in any cause objecting to the candidacy or contesting the election for any office in which the district or jurisdiction of such office lies wholly within the judicial district of the court on which the district judge serves.
>
> C. Prior to the cause being allotted to another judge, a judge who recuses himself for any reason *shall* contemporaneously file in the record the order of recusal *and written reasons that provide the factual basis for recusal under Article 151.* The judge shall also provide a copy of the recusal and the written reasons therefor to the judicial administrator of the supreme court.[55]

The biggest change in the voluntary recusal procedure is Paragraph C's requirement that the judge file "written reasons containing the *factual basis* for the judge's self-recusal" under Article 151 before the case is allotted to another judge.[56] Under the old law, a judge who self-recused himself or herself needed to provide in writing only the specific grounds for recusal under the former Article 151.[57] The addition of the "factual basis" requirement ostensibly demands more from the judge than simply citing to the pertinent statutory ground for recusal.

Conversely, the amended Article 154 outlines the process when a party seeks to have the district court judge recused. Unsurprisingly, there is more to this process than the procedure governing a judge's voluntary recusal in Article 153. That makes sense, given the sensitive nature of involuntary recusal. The amended Article 154 provides:

> A. A party desiring to recuse a judge of a district court *shall* file a written motion therefor *assigning the ground for recusal under Article 151.* This motion *shall* be filed *no later than thirty days after discovery of the facts constituting the ground upon which the motion is based, but in all cases prior to the scheduling of the matter for trial.* In the event that the facts constituting the ground upon which the motion to recuse is

55. LA. CODE CIV. PROC. ANN. art. 153 (emphasis added).

56. *Id.* art. 153 cmt. (2021) (emphasis added).

57. *See id.* art. 153(D) (2021) (formerly cited as LA. CODE CIV. PROC. ANN. art. 152).

> based occur after the matter is scheduled for trial 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 such facts occur or are discovered.
>
> B. If the motion to recuse sets forth a ground for recusal under Article 151, 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 make a written request to the supreme court for the appointment of an ad hoc judge as provided in Article 155.
>
> C. If the motion to recuse *is not timely filed* in accordance with Paragraph A of this Article *or fails to set forth a ground for recusal under Article 151*, the judge *may* deny the motion without the appointment of an ad hoc judge or a hearing but *shall* provide written reasons for the denial.[58]

The amended Article 154 enacted several major changes to the procedure governing involuntary recusal. Perhaps the most important change is the new time limitation for filing motions to recuse. Paragraph A now requires "a motion to recuse to be filed no later than thirty days after discovery of the facts constituting the ground upon which the motion is based, but in all cases" before the case is set for trial.[59] Under the old law, a motion to recuse was only required to be filed "prior to trial or hearing unless the party discover[ed] the facts constituting the ground for [recusal] thereafter, in which event it shall be filed immediately after those facts are discovered, but prior to judgment."[60] The legislature added this new time limitation to prevent parties from delaying the proceedings by filing a motion to recuse as a way to obtain a continuance of the trial.[61] Notably, the Louisiana Fifth Circuit Court of Appeal recently examined the scope of the amended Article 154(A)'s time limitation in *Brandner v. Brandner*.[62] The court recognized that "[i]n the 2021 amendment to Article 154, the Legislature chose to eliminate the word 'hearing' and establish an exception to the time-bar only when the matter is 'scheduled for

58. *Id*. art. 154 (emphasis added).

59. *See id*. art. 154 cmt. (a) (2021).

60. *See* LA. CODE CIV. PROC. ANN. art. 154 (2021).

61. *Id*. art. 154 cmt. (a) (2021).

62. Brandner v. Brandner, No. 22-C-486, pp. 2–3 (La. App. 5 Cir. 10/6/22), 2022 WL 5240481 at *1–2.

*trial*.'"[63] As such, the court interpreted "this language to refer to a trial of the merits of the substantive claims and causes of actions made in the litigation, not *hearings* on miscellaneous, incidental motions that frequently arise in the course of litigation."[64]

Still, Paragraph A "recognizes that in some cases, the facts constituting the ground upon which the motion to recuse is based occur after, or could not have been discovered before, the matter is scheduled for trial."[65] In cases that fall under this exception, Paragraph A provides that the motion to recuse shall be filed "immediately after such facts occur or are discovered."[66] In any event, it is clear that the legislature intended for the amended Articles 153 and 154 to facilitate resolution of recusal issues as early as possible in each case.[67]

## III. PROCEDURE FOR SELECTION OF THE JUDGE WHO WILL PRESIDE OVER A MOTION TO RECUSE AND THE JUDGE WHO WILL PRESIDE OVER THE CASE AFTER RECUSAL

Another significant change enacted by the new amendments concerns the procedure for selecting the judge who presides over a motion to recuse, and for selecting the judge who presides over the case after the original district court judge is recused. The former initially depends on the mover's compliance with the amended Article 154(C)'s timing and substantive requirements.[68] If the mover satisfies those requirements, the amended Article 155 governs the selection of the judge to preside over the motion to recuse.[69] If the motion is granted, the amended Article 156 governs the selection of the judge to preside over the case moving forward.[70]

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63. *Id*. at *3 (emphasis added).

64. *Id*. at *2 (emphasis added).

65. LA. CODE CIV. PROC. ANN. art. 154 cmt. (a) (2021).

66. *Id*.

67. Practically speaking, under the amended Article 154, it would be most prudent for a litigant to file a recusal motion before filing his or her answer or promptly thereafter (that is, if the litigant has sufficient information warranting recusal of the district judge). This is because Article 1571(A)(2) prohibits district courts from assigning ordinary proceedings for trial until after an answer has been filed. *See* LA. CODE CIV. PROC. ANN. art. 1571(A)(2). Hence, by moving to recuse before or promptly after answering, the litigant could use Article 1571(A)(2) to avoid Article 154(A)'s time limitation.

68. *See id*. art. 154(C).

69. *See id*. art. 155.

70. See *id*. art. 156.

Incidentally, when a party moves to recuse the district court judge under the amended Article 154, the default rule is that the supreme court will appoint an ad hoc judge to hear the motion to recuse, pursuant to the amended Article 155.[71] However, if a party files an untimely motion to recuse or if the motion fails to set forth a valid ground for recusal under Article 151, Article 154(C) allows "the judge who is the subject of the motion to deny it without the appointment of an ad hoc judge or a hearing, provided that the judge gives written reasons for such denial."[72] If the mover disagrees with the judge's summary denial of the motion to recuse pursuant to Article 154(C), the mover may apply for supervisory writ to the court of appeal seeking review of the ruling.[73] In the 2022 amendment to Article 154, a new time limitation was added to Paragraph B, instructing "the judge who is the subject of the motion to recuse to act within seven days after receiving the motion from the clerk of court."[74] This deadline continued the legislature's efforts from the previous year to ensure that recusal issues are resolved as quickly as possible.

The applicable standard of review of a denial of a recusal motion is one for abuse of discretion.[75] Nevertheless, when the motion for recusal states a valid, mandatory ground for recusal under Article 151, the judge's failure to either recuse him or herself outright or refer the motion to another judge for consideration is an abuse of discretion.[76] Thus, considering that the amended Article 151 sets forth only *mandatory* grounds for recusal—including the new expansive catch-all provision in Paragraph B—it appears that a party who moves to recuse a judge now has better protection if the judge refuses to self-recuse or to request

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71. *Id*. art. 155.

72. LA. CODE CIV. PROC. ANN. art. 154 cmt. (c) (2021); *see* Vitaliano v. Blackstock, 2022-01397, p. 1 (La. 9/22/22), 346 So. 3d 785, 786 ("Having concluded the motion to recuse was not filed timely, the district court had authority to 'deny the motion without the appointment of an ad hoc judge.' . . . Accordingly, the judgment of the district court is vacated insofar as it orders a recusal hearing before an ad hoc judge.").

73. LA. CODE CIV. PROC. ANN. art. 154 cmt. (c) (2021).

74. *Id*. art. 154 cmt. (2022).

75. Menard v. Menard, 2019-580 (La. App. 3 Cir. 3/11/20), 297 So. 3d 82, 95. Indeed, "the trial court has discretion to determine if there is a valid ground for recusal set forth in the motion." *Commitment of M.M.*, 303 So. 3d at 1102.

76. *See id*.; *see also* McDevitt v. Salisbury, No. 22-C-442, p. 1 (La. App. 5 Cir. 9/20/22), 2022 WL 4354165, at *1 (finding motion to recuse was "timely filed setting forth alleged recent acts of bias by trial court which [fell] within time limitation of [Article 154(A)]", and, thus, "trial judge erred in denying the motion to recuse as untimely").

appointment of an ad hoc judge to hear the motion to recuse.[77] In other words, so long as the mover shows that "there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner,"[78] the judge's failure to recuse or refer the motion would be an abuse of discretion.

The operation of the amendments raises an unsettled question. Now that Article 151 lists only *mandatory* grounds for recusal, and a party who moves to recuse a judge is required to assign a ground for recusal under Article 151, does the judge who is the subject of the motion, in fact, have *any* discretion to deny the motion (assuming the motion sets forth a valid basis for recusal)? It would seem that the answer to this question would be "no."

Consequently, the judge who is the subject of a motion to recuse lacks discretion to deny the motion if it is timely filed and sets forth a valid statutory ground for recusal.[79] Consistent with this premise, the amended Article 154(B) provides "that when a motion setting forth a ground for recusal has been timely filed, the judge who is the subject of the motion *shall* either recuse himself or request in writing that the supreme court appoint an ad hoc judge to hear the motion to recuse."[80] Under the old law, the judge who was the subject of the motion also had the option to refer the motion to be heard by another judge in the same district pursuant to former Article 155.[81] That scenario placed the judge who was assigned to hear the motion in the precarious position of having to determine whether one of that judge's colleagues in the same district court should not preside over a case that was assigned to him or her. As one court recognized, "[r]ecusal decisions are especially difficult for a judicial colleague assigned to hear a request for recusal of a fellow judge on the same bench."[82] Indeed, it is not hard to imagine the discomfort felt by the judge assigned to hear a motion to recuse one of the other judges in the same district court—particularly if the motion to recuse asserts that the subject judge is biased toward or against the parties or their attorneys. Moreover, the mover may perceive its chances of

77. *See* LA. CODE CIV. PRO. ANN. art. 151.

78. *Id*. art. 151(B).

79. *Id*. art. 154(B)–(C).

80. *Id*. art. 154 cmt. (b) (2021) (emphasis added).

81. *Id*. art. 154 (2021).

82. Daurbigney v. Liberty Personal Ins. Co., 2018-929, p. 4 (La. App. 3 Cir. 5/9/19), 272 So. 3d 69, 72.

prevailing on the motion to be virtually non-existent when one of the subject judge's colleagues from the same district court presides over the motion.

The amended Article 155 eliminates the foregoing concerns by providing that "in all cases where a motion to recuse has been referred for hearing, the motion *shall* be heard by an ad hoc judge appointed by the supreme court."[83] As the revision comments to Article 155 explain, "[t]his revision is intended to increase confidence in Louisiana's district courts *by reducing or eliminating the potential for impartiality or bias* that would result from allowing the motion to be heard by a judge of the same court as the judge who is the subject of the motion."[84] This change benefits the mover as well as the other judges in the subject judge's district court. The mover no longer faces the possibility of another judge in the same district court presiding over the recusal motion, and the other judges in the district court no longer have to preside over the motion seeking recusal of their judicial colleague.

After a judge is recused—either voluntarily or by motion—the case is assigned to a new judge pursuant to the procedure delineated in Article 156:

> A. When a district court judge of a court having two or more judges voluntarily recuses himself or is recused after a motion to recuse is heard, the cause shall be randomly assigned to another division or section of that court.
>
> B. When a district court judge in a single-judge district voluntarily recuses himself, the judge shall make a written request to the supreme court for the appointment of an ad hoc judge to hear the cause. When an ad hoc judge appointed by the supreme court to hear a recusal grants the motion to recuse, that judge shall request that an ad hoc judge be appointed to hear the cause.[85]

Paragraph A of Article 156 does not specify what would happen in a case where every judge in a multi-judge district court is recused.[86] Nonetheless, it would make sense that the ad hoc judge appointed to hear the motion to recuse would simply request another ad hoc judge to be appointed to preside over the matter, as

83. LA. CODE CIV. PROC. ANN. art. 155 cmt. (a) (2021) (emphasis added).
84. *Id*. (emphasis added).
85. *Id*. art. 156.
86. *See id*. art. 156(A).

outlined in Paragraph B for cases involving single-judge districts.[87] In short, the amended Articles 155 and 156 evidence the legislature's intention to further remove the potential for partiality or bias by outsourcing decisions on recusal motions to ad hoc judges.

## IV. BURDEN OF PROOF ON MOTION TO RECUSE AND THE EFFECT OF THE RECENT AMENDMENTS ON THE MOVER'S CHANCES OF PREVAILING

A question that has yet to be addressed by the Louisiana Supreme Court is how the 2021 and 2022 legislative amendments to Louisiana Code of Civil Procedure Articles 151 through 159 affect the mover's burden of proof on a motion to recuse and the mover's chances of prevailing on the motion. This Part attempts to answer that question while simultaneously providing necessary historical context in four sections. Section A examines the development of the codal provisions governing recusal of district court judges prior to the 2021 and 2022 legislative amendments, and highlights one particular statutory ground for recusal, Article 151(A)(4), which is based on the judge's bias, prejudice, or interest in the cause or its outcome. Section B outlines the onerous standard that courts have required for establishing recusal under Article 151(A)(4), as well as the recent shift in the courts toward a less demanding standard. Section C then dovetails into a more robust discussion of the new catch-all mandatory ground for recusal in the amended Article 151(B), and how that provision interacts with the Code of Judicial Conduct. Finally, Section D provides an in-depth analysis of the first Louisiana appellate opinion addressing the amended Article 151(B)'s catch-all mandatory recusal provision, and evaluates the likelihood that other courts will follow the same approach.

### A. HISTORICAL DEVELOMPENT OF LOUISIANA'S RULES GOVERNING RECUSAL PROCEDURE IN CIVIL CASES

As previously mentioned,[88] a party who files a motion to recuse must establish a basis for recusal under the amended

87. *See id*. art. 156(B). Notably, the 2021 amendments also allow for recusal of the ad hoc judge who is appointed to preside over a motion to recuse or over the case following recusal of the original judge. *See id*. art. 159 ("An ad hoc judge appointed to try a motion to recuse a judge, or appointed to try the cause, may be recused on the grounds and in the manner provided in this Chapter for the recusal of judges.").

88. *See* discussion *supra* Part II (discussing LA. CODE CIV. PROC. ANN. art. 154).

Article 151.[89] If the moving party fails to set forth a ground for recusal under Article 151, the judge who is the subject of the motion may deny the motion without appointing an ad hoc judge or holding a hearing.[90] It is well settled that the grounds for recusal enumerated in Article 151 are an exclusive list.[91]

Before the 2021 amendments, Article 151 provided for both mandatory and discretionary recusal of judges. This same article previously underwent substantial amendment by the 2008 Louisiana Legislature, which greatly increased the number of circumstances that required recusal of judges.[92] Prior to the 2008 amendments, the single mandatory ground requiring recusal of a judge was the judge being a witness in the case.[93] The 2008 amendments increased the grounds that required recusal under Article 151 to include the following circumstances, codified as Subparagraphs (A)(2), (3), and (4), respectively:

> (2) The judge has been employed or consulted as an attorney in the cause or has previously been associated with an attorney during the latter's employment in the cause, and the judge participated in representation in the cause.
>
> (3) The judge is the spouse of a party, or of an attorney employed in the cause or the judge's parent, child, or immediate family member is a party or attorney employed in the cause.
>
> (4) The judge is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that the judge would be unable to conduct fair and impartial proceedings.[94]

Prior to the 2008 amendments, the foregoing circumstances were merely discretionary grounds for recusal,[95] even in cases in which

89. LA. CODE CIV. PROC. ANN. art. 154(A).

90. *Id*. art. 154(C).

91. *See*, *e.g.*, *Slaughter*, 76 So. 3d at 471; *Commitment of M.M.*, 303 So. 3d at 1101; *Eleanor Pierce*, 229 So. 3d at 47; *Chauvin*, 818 So. 2d at 835; *W.G.T.*, 150 So. 3d at 351.

92. 1 PLOTKIN, *supra* note 11, at 165.

93. *Id*. at 167.

94. LA. CODE CIV. PROC. ANN. art. 151(A)(2)–(4).

95. 1 PLOTKIN, *supra* note 11, at 167.

a judge was biased, prejudiced, or interested in the case or its outcome.[96]

Not surprisingly, the ground for recusal set forth in Article 151(A)(4)—a judge's bias, prejudice, or interest in the cause or its outcome—generated the most litigation, even when it was only a discretionary ground.[97] One issue with this provision has been that it does not define any of its terms, nor does it establish standards or guides for litigants or judges.[98] The qualifier in the provision, "to such an extent that [the judge] would be unable to conduct fair and impartial proceedings," is vague and subjective.[99] As a result, the issue of whether recusal of judges is warranted under this provision has resulted in confusion and inconsistency.[100]

### B. THE EVOLVING STANDARD FOR ESTABLISHING RECUSAL BASED ON BIAS, PREJUDICE, OR INTEREST IN THE CASE OR ITS OUTCOME UNDER ARTICLE 151(A)(4)

In any event, a litigant who wishes to recuse a judge on the basis of bias, prejudice, or interest must overcome the *presumption* that a judge is impartial.[101] Thus, the mover bears a significant burden: "The party seeking to recuse cannot merely allege lack of impartiality; he must present some factual basis. Further, the bias, prejudice, or personal interest alleged must be of a substantial nature and based on more than conclusory allegations."[102] This requires more of the mover than simply complaining that the judge has consistently ruled against him or her in the case. Indeed, several appellate courts in Louisiana have explicitly held that "complaints of adverse rulings alone are not sufficient to establish bias to recuse a trial judge."[103] Moreover, "alleged bias or prejudice [that] 'emanates from testimony and

96. *Id*. (collecting cases).

97. *Id*. at 171.

98. *See id*.

99. *Id*.

100. 1 PLOTKIN, *supra* note 11, at 171.

101. *See Slaughter*, 76 So. 3d at 471; *Commitment of M.M.*, 303 So. 3d at 1101; *Eleanor Pierce*, 229 So. 3d at 47; *W.G.T.*, 150 So. 3d at 351.

102. *Commitment of M.M.*, 303 So. 3d at 1101; *W.G.T.*, 150 So. 3d at 351.

103. Frierson v. Frierson, 2014-0064 (La. App. 4 Cir. 7/2/14), 2014 WL 3045068, at *11; *see also* Lepine v. Lepine, 17-45, p. 10 (La. App. 5 Cir. 6/15/17), 223 So. 3d 666, 674; Earles v. Ahlstedt, 591 So. 2d 741, 746 (La. Ct. App. 1 Cir. 1991); Rodock v. Pommier, 2016-809, pp. 7–8 (La. App. 3 Cir. 2/1/17), 225 So. 3d 512, 518.

evidence set forth in the proceedings' is not of an 'extrajudicial nature' and is therefore insufficient to merit recusal."[104]

Until recently, courts in Louisiana required the party moving for recusal under Article 151(A)(4) to satisfy "the heavy burden of proving that the judge sought to be recused had 'actual bias.'"[105] Because proof of "actual bias" is subjective, courts repeatedly held that recusal was not required even when there was an "appearance of impropriety."[106] This was because Article 151 did "not include a 'substantial appearance of the possibility of bias' or even a 'mere appearance of impropriety' as causes for removing a judge from presiding over a given action."[107]

For the same reasons, courts had previously rejected the argument that a motion to recuse a judge for bias, prejudice, or interest in the cause should be determined by the "objective standard set forth in Canon 3(C)."[108] This was because Canon 3(C) "does not require that a trial judge recuse herself to avoid the appearance of impropriety but states that she should recuse herself if her impartiality might reasonably be questioned[;] [t]his recusal under Canon 3(C) is voluntary, not mandatory."[109] The Third Circuit articulated an additional reason for refusing to recuse a judge upon a motion by pointing to the reflective pronouns in Canon 3(C), which "pointedly indicates that '[a] judge should disqualify *himself or herself*' or 'shall disqualify *himself or herself*[.]'"[110] The court reasoned that "[t]he text does not provide an independent basis for recusal of a judge by another judge."[111] Thus, "a court considering a motion to recuse directed at another judge may be informed by the contours of the Code of Judicial

104. *Rodock*, 225 So. 3d at 518 (citing Augman v. City of Morgan City, 03-396, p. 3 (La. App. 1 Cir. 12/31/03), 864 So. 2d 248, 249).

105. *Daurbigney*, 272 So. 3d at 72 (collecting cases).

106. *See*, *e.g.*, *Slaughter*, 76 So. 3d at 471; *Commitment of M.M.*, 303 So. 3d at 1101; *Eleanor Pierce*, 229 So. 3d at 47; *Chauvin*, 818 So. 2d at 835; *W.G.T.*, 150 So. 3d at 351.

107. *Slaughter*, 76 So. 3d at 471; *Commitment of M.M.*, 303 So. 3d at 1101; *Eleanor Pierce*, 229 So. 3d at 47. *See also Chauvin*, 818 So. 2d at 835; *W.G.T.*, 150 So. 3d at 351 ("[The] statutory grounds for recusal in civil cases have not been amended by the Legislature to include 'appearance of impropriety' as a grounds for recusal . . . . Absent such an amendment or a contrary interpretation by the Supreme Court, 'a mere appearance of impropriety' not statutorily listed in [La. Code Civ. Proc. art. 151], cannot be a basis for recusal.").

108. *See*, *e.g.*, *Eleanor Pierce*, 229 So. 3d at 46; *see also W.G.T.*, 150 So. 3d at 352.

109. *W.G.T.*, 150 So. 3d at 352.

110. *Eleanor Pierce*, 229 So. 3d at 46 (emphasis added).

111. *Id.*

Conduct in its analysis of [Louisiana Code of Civil Procedure Article] 151(A)(4)," but the court's ultimate inquiry turns on a finding of actual "bias" or "prejudice" under that Article.[112] In other words, the Third Circuit declined to adopt the objective standard for recusal in Canon 3(C)—wherein judges should disqualify themselves when their impartiality might *reasonably be questioned*—in deciding a motion to recuse based on the mandatory ground for recusal in Article 151(A)(4). Instead, the court endorsed the subjective, "actual bias" standard.

The requirement of proving "actual bias" was a severely onerous burden, and, unsurprisingly, it was rarely satisfied. Perhaps the most telling example of this was in the case of *Southern Casing of Louisiana, Inc. v. Houma Avionics, Inc.*[113] In *Southern Casing*, the district judge had previously practiced law with the owner of the non-moving party, had represented the owner on several matters within the prior decade, had accepted gifts from the owner, and had attended social functions with the owner.[114] Based on these facts, the mover argued that the judge's recusal was required under Article 151(B)(4) "to avoid any appearance of bias" toward the non-moving party and its owner.[115] At the recusal hearing, the judge testified that "he was not biased toward or against the parties or interested in the litigation's outcome."[116] The district court denied the motion to recuse and the First Circuit affirmed.[117] In reaching its decision, the First Circuit reasoned that Article 151 "enumerates the exclusive grounds for recusal and it *does not list a 'substantial appearance of the possibility of bias*.'"[118] Instead, the First Circuit noted, "Article 151 require[d] a finding of *actual bias or prejudice*."[119] Under this standard, the judge's own testimony that he "was not biased" was sufficient to defeat the motion under the "actual bias" standard, despite all of the evidence showing the judge's relationship with the owner of the non-mover.[120]

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112. *Id*. at 47.

113. *See* S. Casing of La., Inc. v. Houma Avionics, Inc., 2000-1930 (La. App. 1 Cir. 9/28/01), 809 So. 2d 1040.

114. *Id*. at 1049.

115. *Id*.

116. *Id*.

117. *Id*. at 1051.

118. *S. Casing of La.*, 809 So. 2d at 1050 (emphasis added).

119. *Id*. (emphasis added).

120. *See id*. at 1049–50.

In spite of rulings like *Southern Casing*, Louisiana courts have recently recognized a series of United States Supreme Court opinions—*Withrow v. Larkin*,[121] *Caperton v. A.T. Massey Coal Company, Inc.*,[122] and *Rippo v. Baker*[123]—that change the initial inquiry from one of proof of actual, specific bias on the part of the judge at issue to an objective standard. Indeed, in *Rippo*, the United States Supreme Court vacated a judgment rendered by a Nevada court denying a criminal defendant's post-conviction relief application, wherein the Nevada court rejected the petitioner's argument that the trial judge was *actually biased*.[124] The Court held as a matter of constitutional law that the judge hearing the recusal motion *must* use an objective standard.[125] Accordingly, the Court concluded that "[r]ecusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[126] In the 2018 case *State v. Daigle*, the Louisiana Supreme Court held that *Rippo*'s mandate that "*evidence of actual bias is not necessary to require recusal*" applied in Louisiana courts.[127] As such, the *Daigle* court acknowledged that "recusal may be required as a constitutional safeguard against *the risk of bias*."[128]

Following *Daigle*, the Third Circuit held in *Daurbigney* that the trial court's determination that "actual bias" was required for the recusal of the judge at issue was an error of law.[129] The Third Circuit found that the trial court failed to ask the question that *Rippo* requires: "[W]hether objectively speaking, considering all the circumstances alleged, 'the risk of bias was too high to be constitutionally tolerable.'"[130] The Third Circuit then discussed the relevant criteria for courts to consider when deciding a recusal motion based on Article 151(A)(4), using the *Rippo* objective standard.[131] Notably, the court expressly stated that "[r]eference to the Louisiana Code of Judicial Conduct is helpful" in making

121. Withrow v. Larkin, 421 U.S. 35 (1975).

122. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009).

123. Rippo v. Baker, 580 U.S. 285 (2017).

124. *See id*. at 286.

125. *Id*. at 287.

126. *Id*. at 287 (quoting *Withrow*, 421 U.S. at 47).

127. State v. Daigle, 18-1634, p. 1 (La. 4/30/18), 241 So. 3d 999, 1000–01 (quoting State v. LaCaze, 2016-0234, p. 11 (La. 3/13/18), 239 So. 3d 807, 813) (emphasis added).

128. *Id*. at 1000. (emphasis added).

129. *Daurbigney*, 272 So. 3d at 74.

130. *Id*. (quoting *Rippo*, 580 U.S. at 287).

131. *See Daurbigney*, 272 So. 3d at 74.

that determination.[132] The Third Circuit further noted that the "objective standards implementing the Due Process Clause do not require proof of actual bias."[133] Instead, the Third Circuit, citing *Caperton*, articulated a standard for determining whether an objective basis for recusal under Article 151(A)(4) exists.[134] Under that standard, "the question is whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest '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.'"[135] The Third Circuit concluded that "[i]n keeping with the spirit of the applicable Canons of the Code of Judicial Conduct and controlling jurisprudence, we find that recusal . . . is required under the unique circumstances of this case."[136] In other words, the Third Circuit endorsed the objective standard for disqualification of a judge under Canon 3(C) as instructive for determining whether a judge must be recused for bias, prejudice, or interest in the cause or its outcome.

In reaching its decision in *Daurbigney*, the Third Circuit found that the "unique circumstances" of the case required recusal.[137] The issue in *Daurbigney* involved the district judge's previous campaign ad that personally attacked a group of attorneys that contributed to a PAC supporting the judge's opponent.[138] Some of the attorneys targeted in the ad later represented a party in *Daurbigney* before that very judge.[139] The Third Circuit emphasized the need for an impartial judiciary, which encompasses the public's perception of judicial impartiality, and recognized that these impartiality concerns implicate due process.[140] In that vein, the Third Circuit explained that "[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[141] The Third Circuit then

132. *Id*.
133. *Id*. at 76.
134. *See id*.
135. *Id*. (quoting *Caperton*, 556 U.S. at 883–84).
136. *Daurbigney*, 272 So. 3d at 77.
137. *Id*.
138. *See id*. at 71.
139. *See id*. at 71–72.
140. *See id*. at 76–77.
141. *Daurbigney*, 272 So. 3d at 76–77.

explained that with regards to the targeted and adversarial nature of the district judge's campaign ad, which directly named and attacked the mover's attorneys, "it [wa]s implausible that this client, or any reasonable client under the circumstances, could have trust and confidence in the impartiality" of the district court judge.[142]

Accordingly, the Third Circuit's decision in *Daurbigney* demonstrates that at least one Louisiana appellate court has recognized that the present legal standard for recusal of a trial judge under Article 151(A)(4) does *not* require the mover to prove "actual bias."[143] Instead, recent Third Circuit jurisprudence requires only that "the moving party [be] required to prove that '*objectively speaking*, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[144] Despite this ostensibly less demanding burden of proof, the party seeking recusal still must present evidence to establish that the probability of actual bias rises to a level too high to be constitutionally tolerable under the circumstances and cannot rely on merely "conclusory allegations."[145]

### C. THE 2021 AMENDMENTS TO THE RULES GOVERNING RECUSAL IN CIVIL DISTRICT COURTS CONTINUED THE SHIFT TOWARD AN OBJECTIVE STANDARD

Despite the recent shift in the courts to an objective standard for determining whether a judge is required to be recused for bias, prejudice, or interest in the case under Article 151(A)(4), it was less clear what circumstances satisfy that objective standard—at least, prior to the 2021 amendments to the recusal procedural rules. For example, prior to the 2021 amendments, Article 151(B) set forth several discretionary grounds for recusal based on a judge's relations to a party or attorney in the case.[146] Although recusal was not required based on the sole fact of these relationships, neither courts nor the articles themselves clarified whether these particular relationships still posed a risk of bias too high to be constitutionally tolerable, such that recusal was required under

142. *Id*. at 77.

143. *Id*.

144. *Menard*, 297 So. 3d at 95 (citing *Daurbigney*, 272 So. 3d at 73) (emphasis added); *see also Daigle*, 241 So. 3d at 1000; *Commitment of M.M.*, 303 So. 3d at 1106 (Garret, J., concurring).

145. *Menard*, 297 So. 3d at 94.

146. *See* LA. CODE CIV. PROC. ANN. art. 151 (2008).

Article 151(A)(4). And, although reference to Canon 3(C) is helpful for evaluating the objective standard for recusal based on the judge's bias, prejudice, or interest in the case under Article 151(A)(4), it did not—and *still* does not—provide an independent basis for mandatory recusal itself.

Presumably due to this confusion, the 2021 amendments substantially overhauled the rules governing recusal procedure in an effort to increase confidence in Louisiana's judiciary by reducing or eliminating the potential for partiality. Pertinently, the amendments to Article 151 deleted all discretionary grounds for recusal and added a catch-all mandatory ground for recusal in Paragraph B to incorporate a clearer, more objective standard than the language of Canon 3(C).[147] The new Paragraph B requires recusal "when there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner."[148] This new provision is similar in phrasing to Subparagraph A(4), which requires recusal when "[t]he judge is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that the judge would be unable to conduct fair and impartial proceedings."[149] Indeed, both of the above provisions require recusal in circumstances where the judge would be unable to conduct fair and impartial proceedings.[150] But, Subparagraph A(4) is limited to instances of the judge's bias, prejudice, or interest,[151] whereas Paragraph B is seemingly much broader.[152] However, like Subparagraph A(4), Paragraph B does not provide any standards or guides for determining the circumstances that mandate recusal under this provision; all that Paragraph B requires is that there exists a "substantial and objective basis that would reasonably be expected to prevent the judge from conducting" fair and impartial proceedings.[153]

In *Daurbigney*, the Third Circuit cited the Canons of Judicial Conduct as guidance for determining whether the circumstances of

147. *See id*. art. 151 cmts. (a)–(b) (2021).
148. *Id*. art. 151(B).
149. *Id*. art. 151(A)(4).
150. *Id*. art. 151 cmt. (b) (2021).
151. LA. CODE CIV. PROC. ANN. art. 151(A)(4)
152. *Id*. art. 151(B).
153. LA. CODE CIV. PROC. ANN. art. 151(B).

the case satisfied the objective standard for recusal based on the judge's bias, prejudice, or interest in the case under Article 151(A)(4).[154] Because Article 151(B) also sets an objective standard for recusal,[155] it follows that courts might likewise consider the Canons of Judicial Conduct to be guidance for determining whether recusal is required under the new Paragraph B. Specifically, Canon 2's directive that judges shall avoid impropriety and the appearance of impropriety in all activities, and Canon 3's directive that judges shall perform the duties of office impartially and diligently are both pertinent.[156]

The Code of Judicial Conduct defines "impartiality" or "impartial" as "denot[ing] *absence of bias or prejudice* in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge."[157] Reading this definition together with Article 151(B), recusal is required "when there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause" in a fair, unbiased, and unprejudiced manner.[158] Hence, although the judge him or herself need not be biased, prejudiced, or interested in the outcome

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154. *Daurbigney*, 272 So. 3d at 72.

155. LA. CODE CIV. PROC. ANN. art. 151(B).

156. The Code contains multiple standards relating to impartiality, including the following provisions:

> A judge shall respect and comply with the law and shall act at all times in a manner that *promotes public confidence in the integrity and impartiality of the judiciary*.

LA. CODE OF JUD. CONDUCT, Canon 2(A) (2022) (emphasis added).

> A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment.

*Id.*, Canon 2(B) (2022).

> A judge shall perform judicial duties *without bias or prejudice*. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person.

*Id.*, Canon 3(A)(4) (2022) (emphasis added).

> A judge should disqualify himself or herself in a proceeding in which *the judge's impartiality might reasonably be questioned* and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.

*Id.*, Canon 3(C) (2022) (emphasis added).

157. LA. CODE OF JUD. CONDUCT, Canon 2(A) (2022) (emphasis added).

158. LA. CODE CIV. PROC. ANN. art. 151(B); *see* LA. CODE OF JUD. CONDUCT, Canon 2(A) (2022).

of a case to require his recusal under Article 151(B), the objective "risk of bias" standard articulated in *Daigle* arguably applies to recusal motions based on Article 151(B) as well.

### D. LOUISIANA FIFTH CIRCUIT COURT OF APPEAL PROVIDES EARLY GUIDANCE ON THE SCOPE OF THE NEW, CATCH-ALL PROVISION MANDATING RECUSAL IN THE AMENDED ARTICLE 151(B)

In the summer of 2022, one Louisiana appellate court offered the first guidance on how to apply the new, catch-all ground for recusal set forth in Article 151(B) under an unusual set of facts. In *Anderson v. Dean*, the Louisiana Fifth Circuit Court of Appeal reversed the district court's ruling denying a defendant's motion to recuse by granting that motion and ordering the district court judge recused from presiding over the matter, pursuant to Article 151(B).[159] *Anderson* involved a putative class action filed against the owner of the subject nursing homes on behalf of residents of various nursing homes in the Greater New Orleans area who had been evacuated to a warehouse in Independence, Louisiana in the wake of Hurricane Ida.[160]

The basis for the recusal motion that eventually made its way to the Fifth Circuit concerned the district judge's comments at a status conference about an attorney who had ties to both plaintiffs' counsel and to counsel for one of the defendants.[161] That remarked-upon attorney, however, was *not* enrolled as counsel for any of the parties in the case.[162] For ease of reference, that lawyer will be referred to hereafter as the "nonparty lawyer."

The Fifth Circuit's opinion in *Anderson* outlines the following relevant background facts that drove the court's ultimate decision that recusal was required under the newly amended catch-all ground for recusal, Article 151(B). The district court judge and the nonparty lawyer were neighbors and knew each other as such.[163] On January 31, 2021, the nonparty lawyer was involved in an automobile accident that caused damage to a tree on the district court judge's property.[164] The nonparty lawyer's sister, who was a

159. Anderson v. Dean, 22-233, p. 11 (La. App. 5 Cir. 7/25/22), 346 So. 3d 356, 364.
160. *Id.* at 358.
161. *See id.* at 363–64.
162. *Id.* at 359.
163. *Id.* at 362.
164. *Anderson*, 346 So. 3d at 363.

guest passenger in his vehicle at the time of the January 31, 2021 accident on the judge's property, filed suit against the nonparty lawyer.[165] The district court judge had a cell phone video of the accident that showed the nonparty lawyer's vehicle hitting a tree in the judge's front yard.[166] The attorney representing the owner of the nursing homes in the *Anderson* suit had been hired by the nonparty lawyer's automobile insurer to defend him in the suit filed by his sister.[167] The attorney representing the putative class in *Anderson* had started a joint venture with the nonparty lawyer through their respective law firms to handle Hurricane Ida insurance property damage cases in Houma, Louisiana.[168]

On May 4, 2022, the attorneys in the *Anderson* case participated in a status conference before the district court judge.[169] Near the end of the status conference, the district court judge asked the plaintiffs' attorney about her affiliation with the nonparty lawyer, in response to which she confirmed her joint venture with the nonparty lawyer's firm.[170] Upon learning of this business relationship between the plaintiffs' attorney and the nonparty lawyer, the district court judge declared that he, the judge, "may need to recuse himself."[171] Thereupon, the judge advised those present at the status conference of the nonparty lawyer's accident on his property and made some disparaging and derogatory comments about the nonparty lawyer that included the use of an expletive.[172] Counsel for the owner of the nursing homes immediately disclosed to everyone at the conference that he represented the nonparty lawyer in the pending suit arising from the accident on the district court judge's property, in which the judge might be a witness.[173]

Following the status conference, the owner of the nursing homes filed a motion in which he asserted that there were grounds for recusing the district court judge:

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165. *Id.* at 360.

166. *Id.*

167. *Id.*

168. *Id.* at 362. The joint venture was unrelated to the claims at issue in *Anderson*. *See id.*

169. *Anderson*, 346 So. 3d at 359.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 359–60.

> Based on [the district court judge's] comments at the status conference about [the nonparty lawyer], there [was] a substantial and objective basis to question whether he would be impartial in this case, given [the nonparty lawyer's] close working relationship in other matters with [plaintiffs' counsel], and [the nonparty lawyer's] being a current client of [counsel for the owner of the nursing homes] in the other suit that involve[d] the auto accident which occurred on [the district court judge's] property. As such, the motion argued that there exist[ed] a substantial and objective basis that would reasonably be expected to prevent [the district court judge] from conducting any aspect of this cause in a fair and impartial manner.[174]

After the district court judge declined to recuse himself, the Louisiana Supreme Court appointed an ad hoc judge to hear the motion.[175] At the contradictory hearing on the motion to recuse, the court heard testimony from the nonparty lawyer himself and from three of the attorneys who had been present at the status conference to hear the district court judge's comments about the nonparty lawyer.[176] After taking the matter under advisement, the ad hoc judge issued a written ruling making several findings and denying the motion to recuse:

> While there is no dispute that the trial judge expressed animus toward [the nonparty lawyer], there was no evidence to reflect any substantial and objective *bias* towards any of the parties or attorneys involved in this litigation. In fact, the parties admitted they believed the trial judge could be fair. Moreover, [the nonparty lawyer] has no interest or involvement in this litigation; thus, the trial judge's animus towards him is not germane to the recusal issue in this case. Given there are no grounds for recusal under La. C.C.P. art. 151, the motion to recuse is denied.[177]

The owner of the nursing homes filed an application for supervisory writ to the Fifth Circuit, asserting "that the *ad hoc* judge erred by applying the wrong legal standard in deciding the Motion to Recuse."[178] He further argued in his writ application

174. *Anderson*, 346 So. 3d at 358–59.
175. *Id.* at 359.
176. *Id.*
177. *Id.* at 356 (emphasis added).
178. *Id.* at 364.

that, "when evaluated under the correct standard, the evidence establishe[d] a substantial and objective basis for concluding that the [district court judge] may not be able to conduct [the] case fairly and impartially and that the risk of actual bias on his part was constitutionally intolerable" pursuant to Article 151(B).[179]

In considering the owner's writ application, the Fifth Circuit first addressed the ad hoc judge's determination that there was "no evidence to reflect any substantial and objective *bias* toward any of the parties or attorneys involved . . . ."[180] The court pointed out that "the newly revised language of Article 151(B) requires a finding of a 'substantial and objective *basis*' that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner."[181] The Fifth Circuit recognized that although "initially this argument may seem like mere semantics, the terms *bias* and *basis* refer to two different mandatory grounds for recusal."[182] The court acknowledged that "a finding of actual or substantial 'bias' is still a mandatory ground for recusal under" Article 151(A)(4).[183] But, the Fifth Circuit noted that "the term 'basis' refers to an *entirely new, broader mandatory ground for recusal*" in Article 151(B).[184] Thus, the Fifth Circuit determined that the circumstances warranted a de novo review of the district court's judgment.[185]

The Fifth Circuit then examined the effect of the 2021 amendments on the provisions of the Code governing recusal of judges. The court noted that before the revision, "Article 151(A) set forth mandatory grounds for recusal by which a judge must be recused, while Article 151(B) set forth permissive grounds for recusal by which a judge may be recused."[186] The court then explained how the 2021 amendments eliminated the statutory bases for *permissive* recusal in the former Article 151, added a

179. *Anderson*, 346 So. 3d at 364.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Anderson*, 346 So. 3d at 364 (emphasis added).

185. *Id.* ("We are not able to assume that the *ad hoc* judge merely misspoke when he used the term 'bias' instead of 'basis.' The *ad hoc* judge's statements indicate that he may have erroneously applied the incorrect legal standard by only considering the narrower ground of 'bias' for recusal and failing to consider the broader grounds of other 'bases' for recusal, which is the provision under which relator filed his Motion to Recuse.").

186. *Id.* at 365.

broad, catch-all basis for mandatory recusal in the amended Article 151(B), and modified the procedure governing motions to recuse in the amended Article 154.[187]

The Fifth Circuit initially spelled out how the substance of the permissive grounds for recusal enumerated in the former Article 151(B) were moved to the amended Article 152, which mandates specific disclosures by the judge to all attorneys and unrepresented parties in the cause.[188] The court added that once a judge makes these required disclosures, a party may file a motion to recuse the judge by setting forth one or more of the grounds for recusal under the amended Article 151.[189] The court further explained that "mandatory grounds for recusal set forth in Article 151(A) remain nearly identical following the revision, whereas new language was substituted for Article 151(B)."[190]

Having shown the significance of the amendments to Article 151, the court then observed that Subparagraph A(4), "which provides the mandatory ground for recusal where a judge is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys, remains basically identical to the previous iteration of the statute."[191] The court noted the historical basis for this ground for recusal, and outlined how courts have applied it over the years.[192] Nonetheless, the Fifth Circuit explained that "applying this law to the case *sub judice* would be legal error, because defendant has filed his Motion to Recuse [the district court judge] specifically on the grounds of the newly enacted [Article] 151(B), and did not identify or argue [Subp]aragraph A(4) as a basis for the recusal."[193] Therefore, because Article 154(A) requires a motion to recuse to identify the ground for recusal under Article 151, the Fifth Circuit found that an evaluation of the district court judge's actions under

187. *Id.* at 367 (quoting LA. CODE CIV. PROC. ANN. art. 151 cmt. (b) (2021)).

188. *Id.* at 367.

189. *Anderson*, 346 So. 3d at 365.

190. *Id.*

191. *Id.* at 366.

192. *Id.*

193. *Id.* at 367. Although the Fifth Circuit declined to address whether recusal was also required under the amended Article 151(A)(4), one could argue that the answer to that question is "yes," particularly given the recent jurisprudential shift away from the arduous "actual bias" standard and toward the objective standard outlined in *Daigle* and *Daurbigney*. That is a topic for another day, however.

Article 151(A)(4) would be erroneous where the mover only specified grounds under Article 151(B).[194]

The Fifth Circuit took the opportunity presented by the *Anderson* case to analyze and distinguish the new, catch-all mandatory ground for recusal in Article 151(B) and the proper standard for establishing that recusal is required under that provision. The court first looked to the plain language of the statute, and recognized that the legislature's use of the word "shall" in Paragraph B "excludes the possibility of [its] being 'optional' or even subject to 'discretion,'" and instead "means imperative, of similar effect and import with the word 'must.'"[195] Further addressing this point, the court examined the reference to Canon 3(C) in the 2021 revision comments to Article 151:

> [Paragraph B] is intended to serve as a catch-all supplementing the mandatory grounds for recusal set forth in Paragraph A and to incorporate a clearer, more objective standard than the language of Canon 3C of the Code of Judicial Conduct, which provides that a judge *should* recuse himself when "the judge's impartiality might reasonably be questioned."[196]

Regarding the revision comments' reference to Canon 3(C), the Fifth Circuit recognized that before the 2021 amendments, "courts examining Article 151 ha[d] held that it contained the exclusive grounds for recusal of a judge and specifically declined to apply the standard set forth in Canon 3(C) of the Code of Judicial Conduct."[197] The Fifth Circuit then examined the history of the Code of Judicial Conduct and noted that the language of Canon

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194. *Anderson*, 346 So. 3d at 367.

195. *Id.* (citing La. Fed'n of Tchrs. v. State, 13-0120 (La. 5/7/13), 118 So. 3d 1033, 1051).

196. *Id.* (citing LA. CODE CIV. PROC. ANN. art. 151 cmt. (b) (2021)) (emphasis added).

197. *Id.* (first citing Edwards v. Daugherty, 97-1542, p. 9 (La. App. 3 Cir. 3/10/99), 729 So. 2d 1112, 1120, *abrogated on other grounds by* Arshad v. City of Kenner, 2011-1579, p. 7 (La. 1/24/12), 95 So. 3d 477, 482–83; then citing Guidry v. First Nat'l Bank of Com., 1998-2383, pp. 4–5 (La. App. 4 Cir. 3/1/00), 755 So. 2d 1033, 1036–37; and then citing *W.G.T.*, 150 So. 3d at 352). However, the Fifth Circuit also acknowledged that there have been other cases in which courts favorably cited to the Canons of Judicial Conduct in the context of recusal. *Anderson*, 346 So. 3d at 367 (first citing Folse v. Transocean Offshore USA, Inc., 2004-1069, p. 1 (La. 5/7/04), 872 So. 2d 467, 467–68; then citing *Disaster Restoration Dry Cleaning, L.L.C.*, 927 So. 2d at 1097–1100; and then citing Dussouy v. Dussouy, 2016-1316, pp. 3–4 (La. App. 4 Cir. 5/10/17), 220 So. 3d 197, 199–200).

3(C) "was revised to its current form" in 1996.[198] Next, the Fifth Circuit outlined the mandatory versus permissive standards for recusal in Canon 3(C):

> Under this language ("shall" and "should"), a judge continues to be bound by the Code of Judicial Conduct to recuse himself or herself pursuant to the grounds for recusal stated in La. C.C.P. art. 151; however, it adds an additional permissive, but hortatory basis for recusal "where the judge's impartiality might reasonably be questioned." This language comes from the American Bar Association's Model Code of Judicial Conduct Canon 3(C) adopted in 1974. Since that time, this standard, which is known as the "appearance of impropriety" standard, has been adopted in many states and in federal courts. *Compliance with this standard remains voluntary in Louisiana*.[199]

Consequently, the Fifth Circuit surmised that had the Louisiana Legislature—which was presumptively aware of the existing laws on recusal—intended to adopt the "appearance of impropriety standard" of Canon 3(C) when drafting Article 151(B), it could have done so; yet, it did not.[200] Instead, the court added, "the Legislature decided to adopt new language intended to be clearer and more objective than the appearance of impropriety standard."[201]

Thus, the Fifth Circuit in *Anderson* determined that the legislature, in drafting the language in Article 151(B), "intended to broaden the mandatory grounds for recusal beyond the previously enumerated grounds, *including the ground for bias or prejudice enumerated in Paragraph A(4)*."[202] Expounding on this point, the court stated:

> Whereas prior law recognized this mandatory ground for recusal only where there was a high probability of actual bias (proved either directly or circumstantially), *the addition of Paragraph B recognizes that there may be instances in which actual bias or prejudice cannot be proven, but nonetheless*

198. *Anderson*, 346 So. 3d at 368 (citing LA. CODE OF JUD. CONDUCT, Canon 3(C) (2022)).

199. *Id.* (internal citations omitted) (emphasis added).

200. *Id.*

201. *Id.*

202. *Id.* (emphasis added).

> *require the recusal of the judge*. These instances occur where there exists a "substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the case in a fair and impartial manner."[203]

The court then offered further insight into what is necessary for recusal under Article 151(B), looking to the plain meaning of the operative words in Subparagraph B: (1) "substantial"; (2) "objective"; (3) "basis"; (4) "any aspect of the cause"; and (5) "reasonably expected."[204] First, "'[s]ubstantial' means something of substance, material, real, and not imaginary."[205] The Fifth Circuit posited that this may be understood as requiring the mover to support his motion to recuse with *"material evidence*, and *not mere allegations*."[206] Second, "'[o]bjective' means something externally verifiable, as opposed to the feelings of one individual."[207] Third, "'[b]asis' means some foundation or starting point on which something may rest."[208] The Fifth Circuit opined that "basis" "is a broad term *clearly intended to cover more instances than solely 'bias.'*"[209] Fourth, "[t]he phrase 'any aspect of the cause' additionally broadens the scope of this ground for recusal," as that phrase means "*beyond the obvious and public aspects of the judge sitting on the bench in the courtroom*."[210] Finally, the phrase "'reasonably expected' recognizes that there may be substantial and objective bases claimed that a neutral observer *would not expect* to prevent the judge from trying the cause in a fair and impartial manner."[211]

With these principles in mind, the Fifth Circuit determined whether recusal was required under the facts of the *Anderson* case. The Fifth Circuit concluded that recusal *was* required because the district court judge's comments about the nonparty lawyer "created a substantial and objective basis that would reasonably be expected to prevent [the district court judge] from conducting any aspect of the cause in a fair and impartial manner."[212] In reaching

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203. *Anderson*, 346 So. 3d at 368–69 (emphasis added).
204. *See id.* at 369.
205. *Id.* (citing BLACK'S LAW DICTIONARY (11th ed. 2019).
206. *Id.* (emphasis added).
207. *Id.* (citing BLACK'S LAW DICTIONARY (11th ed. 2019)).
208. *Anderson*, 346 So. 3d at 369.
209. *Id.* (emphasis added).
210. *Id.* (emphasis added).
211. *Id.* (emphasis added).
212. *Id.*

its decision, the Fifth Circuit reasoned that "[a] judge on the bench questioning his own ability to try the case impartially as [the district court judge] apparently did cannot help but undermine public confidence in the judiciary and raised doubts where previously there were none."[213] The court added that the judge's subsequent assurances to the contrary "are like trying to close the barn door after the horse has bolted."[214] Put differently, once the district court judge audibly questioned his own impartiality upon learning of the attorneys' ties to the nonparty lawyer, the damage had been done; the district court judge's comments were such that a neutral observer would reasonably question the judge's impartiality going forward in the case.

Additionally, the Fifth Circuit distinguished the district court judge's comments from the mandatory disclosure requirements set forth in Article 152.[215] The court noted that "[t]he purpose of such disclosures is to further public confidence in the judiciary by elucidating relationships and circumstances that may provide grounds for recusal under Article 151[;] [i]n contrast, *sua sponte* comments questioning one's own ability to remain impartial undermine this purpose."[216]

The Fifth Circuit also reiterated that its opinion was limited to the grounds for recusal set forth in the owner's motion.[217] Because the mover had confined himself to grounds under Article 151(B), the court "[made] no findings pursuant to Article 151(A)(4) as to whether the evidence introduced into the record at trial prove[d], directly or circumstantially, any bias or prejudice held by [the district court judge] towards any of the attorneys or parties involved in this cause."[218]

Thus, after analyzing the requirements of the new Article 151(B) and applying them to the evidence in the case, the Fifth Circuit concluded that "there exist[ed] a substantial and objective basis that would reasonably be expected to prevent [the district court judge] from conducting any aspect of the cause in a fair and impartial manner."[219] As such, the court granted the owner's writ

213. *Anderson*, 346 So. 3d at 369.
214. *Id.*
215. *Id.* at 370.
216. *Id.*
217. *Id.*
218. *Anderson*, 346 So. 3d at 370.
219. *Id.*

application, reversed the ad hoc judge's ruling denying the motion to recuse, granted the motion to recuse, and ordered the district court judge recused from presiding over the matter.[220]

In summary, the Fifth Circuit's holding in *Anderson* confirmed that Article 151(B) provides a new mandatory ground for the recusal of judges that is broader than the other mandatory grounds in Article 151(A), including the ground in Subparagraph A(4) that requires a showing of bias or prejudice against the parties or their attorneys. Nevertheless, the Fifth Circuit's decision in *Anderson* made clear that the mandatory ground for recusal in Article 151(B) does *not* codify the "appearance of impropriety" standard of Canon 3(C).[221] However, as the Fifth Circuit explained, Article 151(B) does recognize that there may be instances in which *actual bias or prejudice* cannot be proven, but which nonetheless require recusal anyway.[222] That is where the "clearer, objective standard"[223] for evaluating whether recusal is required comes into play, i.e., in instances where there exists a "substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the case in a fair and impartial manner."[224] In *Anderson*, the Fifth Circuit concluded that the district court judge's comments about the nonparty lawyer created one of those instances.[225]

Under the *Anderson* court's own interpretation of the standard it crafted for mandatory recusal under Article 151(B), recusal is required when: (1) the basis for recusal is of "substance, material, real, and not imaginary"; (2) the basis for recusal is "externally verifiable," as opposed to being grounded merely on the feelings of one individual; (3) the basis for recusal implicates the judge's ability to conduct *any* aspect of the cause—"beyond the obvious and public aspects of the judge sitting on the bench in the courtroom"—fairly and impartially; and (4) the judge's recusal would be expected by a neutral observer.[226]

Although this recusal standard responds to the facts in the *Anderson* case, which were admittedly peculiar, the Fifth Circuit's

220. *Id.*
221. *See id.* at 368.
222. *Id.*
223. *See* LA. CODE CIV. PROC. ANN. art. 151 cmt. (b) (2021).
224. *Anderson*, 346 So. 3d at 369.
225. *See id.* at 370.
226. *See id.* at 369.

interpretation of the proper legal standard for recusal under Article 151(B) is a logical one. The court's application of the facts in the case to the standard it articulated was also well reasoned. Thus, while the Fifth Circuit's holding in *Anderson* is not binding on all Louisiana courts, the court's opinion still offers sound guidance to other courts on how to resolve motions to recuse based on Article 151(B). Therefore, while it remains to be seen exactly how the 2021 amendments will affect a mover's likelihood of prevailing on a recusal motion, there is a good argument to be made in light of the *Anderson* opinion that the mover's odds are better now than before.

## CONCLUSION

In conclusion, the new amendments to the Louisiana Code of Civil Procedure's recusal articles ostensibly broaden the circumstances requiring a judge to recuse him or herself. Given the recent shift toward an "objective" standard for establishing a judge's bias, prejudice, or interest, the new catch-all mandatory ground for recusal in Paragraph B of the amended Article 151 may perhaps result in more recusals when there is only an "appearance of bias or impropriety." The amendments to Articles 154 through 156 further advance the ultimate goal of reducing the potential for partiality or bias by ensuring that timely, valid recusal motions in a given district are heard by judges from other district courts.[227]

Perhaps the *Southern Casing* case would have had a different outcome if the 2021 amendments had been in effect—especially considering how the First Circuit found that despite the judge's significant business and personal relationships with a litigant, recusal was not required despite there being a "substantial appearance of the possibility of bias."[228] Indeed, a quote from the district judge who presided over the recusal hearing in *Southern Casing* illustrates the virtual impossibility of satisfying the previous "actual bias" standard in cases where a motion to recuse was referred to another judge in the same district court under the prior version of Article 155:

> We have a small legal community here. Everybody comes in contact with everybody else in either an adversarial or a representative or a fiduciary capacity at some point in our

227. *See* LA. CODE CIV. PROC. ANN. arts. 154–56.

228. *S. Casing of La.*, 809 So. 2d at 1050.

> career, and nothing has been shown to me that would in any way indicate that [the judge] would be biased or prejudiced.[229]

The amended Article 155 was designed to "increase confidence in Louisiana's district courts by reducing the potential for partiality or bias that would result from allowing the motion to be heard by a judge of the same court who is the subject of the motion."[230] Now, given the Louisiana Legislature's great expansion of the grounds for mandatory recusal in Article 151, coupled with the recent shift toward an "objective" standard for deciding recusal motions, a litigant's chances of prevailing on a motion to recuse a judge for bias, prejudice, or interest in the case—and even based on the *appearance* of impropriety or bias—are probably not as grim as they once were. The Fifth Circuit's opinion in *Anderson* both illustrates these trends and indicates where they may lead. Perhaps the new recusal rules may give litigants less pause when they are deciding if they want to "come at the king." Only time will tell.

229. *Id.* at 1049.

230. LA. CODE CIV. PROC. ANN. art. 155 cmt. (a) (2021).