



Don't Do Me Like That: Motions for Disqualification and Recusal of Judge in Texas Criminal Cases

Peter M. Barrett & Sarah Duncan

The law surrounding recusal or disqualification of a judge in Texas is quite complex. It involves federal constitutional grounds, separate state constitutional grounds, and statutory grounds. In Texas, a judge may be removed from presiding over a cause of action for the following reasons: (1) s/he is disqualified under Article V, Section 11, of the Constitution of Texas; (2) her/his conduct violates the Fifth Amendment federal Due Process Clause; (3) s/he is disqualified under Rule 18 of the Texas Rules of Civil Procedure; or (4) s/he is subject to being stricken under Chapter 74 of the Texas Government Code. (Section 74.053 of the Texas Government Code permits each party in a civil proceeding the right to object one time to a visiting judge who has been assigned to a trial. This article does not address this rule.) A motion for recusal of a judge is typically brought for statutory or due process reasons, and it is usually brought for reasons enumerated in the Constitution of Texas. The procedural requirement for both types of motions is contained within Rule

18a of the Texas Rules of Civil Procedure.

Article V, Section 11, of the Constitution of Texas

Motions brought under Article V, Section 11, of the Constitution of Texas are referred to by Texas courts as “constitutional disqualification” motions. Article V, Section 11, is broader than the United States Constitution and disqualifies judges where: (1) either of the parties may be connected with the judge by affinity or consanguinity (within the third degree); or (2) when the judge has an interest in the case. The foregoing grounds for disqualification are codified under Rule 18b(a) of the Texas Rules of Civil Procedure and Article 30.01 of the Texas Code of Criminal Procedure. There is no time set within which a disqualification motion must be filed, and this issue can be raised for the first time on appeal or collateral attack. *See Williams v. State*, 492 S.W.2d 522, 524 (Tex. Crim. App. 1973). Recusal on

other grounds must be raised in a timely manner. See *id.*

Impartiality & Bias, Rule 18b(b) of the Texas Rules of Civil Procedure

Rule 18b(b)(1) [formerly Rule 18b(2)(a)] of the Texas Rules of Civil Procedure addresses a judge's impartiality and, therefore, hinges on what was in the mind of the judge. See *Gaal v. State*, 332 S.W.3d 448, 454 (Tex. Crim. App. 2011), citing *Liteky v. United States*, 510 U.S. 540, 563–564, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Under this section of the statute, recusal is proper where the trial court's rulings, remarks, or actions reveal “such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Id.* A hearing is typically necessary to determine whether the trial court's words, actions, and rulings meet the “impossibility of a fair judgment” test under *Liteky*, *supra*. However, judicial rulings, remarks, or actions “almost never constitute a valid basis for a bias or partiality motion . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Gaal v. State*, *supra*, 332 S.W.3d at 454, citing *Liteky v. United States*, *supra*, 510 U.S. at 555.

Rule 18b(b)(2) [formerly Rule 18b(2)(a)] of the Texas Rules of Civil Procedure states, “A judge must recuse in any proceeding in which the judge has a personal bias or prejudice concerning the subject matter or a party.” Under this standard, counsel need not prove actual bias or what was actually going through the mind of the trial judge. *Gaal v. State*, *supra*, 332 S.W.3d at 459. Rather, counsel only needs to prove that a reasonable person might question the court's impartiality. *Id.* However, this standard is only grounds for recusal where “bias is of such a nature and extent as to deny movant due process of law.” *Rosas v. State*, 76 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2002, no pet.); see also *Norton v. State*, 755 S.W.2d 522 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (trial court's refusal to consider full range of punishment constituted denial of due process). Rule 18b(a) & (b) of the Texas Rules of Civil Procedure set out all of the statutory reasons for disqualification and recusal. These provisions address either the trial court's relationship to a party or the judge's personal knowledge of the facts of the cause of action at issue. This article does not focus on such issues and, therefore, does not set out those portions of Rule 18b.

Fifth Amendment Due Process Grounds

Historically, under the Fifth Amendment to the United States Constitution (Due Process), only three situations have been upheld as grounds for recusal: (1) where a judge has a financial interest in the case; (2) where a judge acted as a “one man grand-jury” to both charge conduct and preside over case; and (3) where a party to the action had significant and disproportionate influ-

ence through political contribution, fundraising, or campaigning on behalf of the judge. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 2259–2264, 173 L.Ed.2d 1208 (2009). However, in *Caperton*, the Court addressed the issue of impartiality and bias as two additional grounds under the due process clause. *Id.* The Court held that extreme conduct, which violates the due process clause, requires recusal. *Id.* Judicial conduct that violates due process under the Fifth Amendment and/or Article I, Section 19, of the Constitution of Texas (due course of law) appears to be a developing area of the law—limited only by the creativity of the criminal law practitioner.

Procedural Requirements

A motion for recusal of a judge must be raised in a timely manner. Rule 18a(b)(1) requires that it be filed “as soon as practicable after the movant knows of the ground stated in the motion,” but not after the tenth day before the date set for trial or hearing unless the movant neither knew nor should have reasonably known of the grounds. Rule 18a(b)(2) states that a motion to disqualify need only be filed as soon as practicable after the movant knows of such ground. Rule 18a(c)(1) states that any other party to the case may, but need not, file a written response before the motion is heard. Appealing a denial of a motion for recusal will not result in reversal of the trial court, under an abuse of discretion standard, where conduct was “within the zone of reasonable disagreement.” See, e.g., *Gaal v. State*, *supra*; *Wesbrook v. State*, 29 S.W.3d 103, 120–121 (Tex. Crim. App. 2000); *Kemp v. State*, 846 S.W.2d 289, 306 (Tex. Crim. App. 1992). A motion that is granted by the trial court, recusing itself, is not reviewable on appeal. See *Gaa v. Statel*, *supra*; see also Tex. R. Civ. Pro. 18a(j)(1)(B). Also, a motion that is denied is reviewable only on appeal from the final judgment. See *Gaal v. State*, *supra*; see also *Woodard v. Eighth Court of Appeals*, 991 S.W.2d 795 (Tex. Crim. App. 1998); Tex. R. Civ. Pro. 18a(j)(1)(A). Also, in extraordinary circumstances, a writ of mandamus may lie where the party seeking recusal does not have an adequate remedy available at law and the act sought to compel is purely “ministerial.” See *DeLeon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004). A judge who is the subject of a motion seeking recusal should not respond. See Tex. R. Civ. Pro. 18a(c)(2).

Code of Judicial Conduct Violations

Although conduct may violate the Code of Judicial Conduct, or other ethical considerations, such violation does not necessarily constitute grounds for recusal. See *Gaal v. State*, *supra*; *Wesbrook v. State*, *supra*, 29 S.W.3d at 121 (Texas Code of Judicial Conduct requires that judge shall perform duties without bias and prejudice and shall be “patient, dignified and courteous” to

all parties (Tex. Gov't. Code, tit., 2, subtit. G, app. B)). Canon 1 of the Texas Code of Judicial Conduct states, in part, "A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved." Canon 2(A) of the Texas Code of Judicial Conduct states, "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3(B) (4) states, "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. . . ." Canon 3(B)(5) states, "A judge shall perform judicial duties without bias or prejudice." Canon 3(B)(8) states, in part, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Similarly, Article I, Section 10, of the Constitution of Texas affords a defendant the right to be heard. It may be useful to inform the court that you would like the opportunity to be heard on the record and then state those violations that have occurred.

Proposition 9

The Texas State Commission on Judicial Conduct was created in 1965 through a constitutional amendment. Texas is among the longest state constitutions in the United States. On November 5, 2013, Texas voters overwhelmingly approved Proposition 9, known formally as the Texas Expanded Judicial Sanctions Amendment. This constitutional amendment (found at Article V, Section 1-a(8), of the Constitution of Texas) will allow the State Commission on Judicial Conduct the discretion to issue a private or public admonition, warning, reprimand, or requirement for additional training and education. The foregoing is in addition to the previously enacted constitutional authority to recommend removal or retirement to the review tribunal. According to the League of Women Voters of Texas, the enactment of Proposition 9 will "lead to greater public accountability for judges and justices; continue to promote public confidence in the integrity, independence, competence, and impartiality of the judiciary; and encourage judges to maintain high standards of conduct both on and off the bench." The League of Women Voters of Texas, "Voter Information" http://www.lwvtexas.org/PressReleases/2013/LWV-TEF--Texas_Voters_Will_Decide--Sanctions_for_Judicial_Misconduct_10-16-13.pdf.

Judicial Criminal Conduct

In rare instances, judicial misconduct may be so extreme as to qualify as the offense of Official Misconduct, pursuant to Article 3.04 of the Texas Code of Criminal Procedure. Pursuant to Article

3.04, the offense of Official Misconduct is committed where: (1) A public servant; (2) intentionally or knowingly; (3) engages in a violation of law; (4) while acting in an official capacity. In order to constitute an offense, such conduct must be "both wilful and related to the duties of the defendant's office." See *State v. Denton*, 893 S.W.2d 125, 126 (Tex App.—Austin 1995, pet. ref'd). Conduct may also constitute the offense of Official Oppression pursuant to Section 39.03 of the Texas Penal Code. This section states, in pertinent part, that an offense is committed where a public servant, acting under color of his office or employment: (1) intentionally subjects another to mistreatment or arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or (3) intentionally subjects another to sexual harassment. Judges have absolute immunity from civil liability pursuant to 42 U.S.C. § 1983 as judicial officers. See *Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

Caution: Make Sure Brain Is Engaged before Opening Mouth

Motions to disqualify a judge are typically more cut and dried, while motions to recuse may be based on a myriad of grounds. Ultimately, any combination of abuse of judicial discretion, which rises to a due process violation, can form the basis of a recusal motion. The criminal law practitioner should proceed with caution before filing a motion for recusal of a judge. Typically, only extreme conduct rising to a due process violation is going to necessitate recusal in Texas. If you fail in your efforts, it may be more damaging to your client—and yourself.



Peter Barrett is a partner at the law firm of Barrett Bright Lassiter Linder Perez. He graduated from St. Mary's University School of Law in 1994 and has been in private practice since then. Peter concentrates on federal and state criminal defense and was President of the Dallas Criminal Defense Lawyers Association from 2004 to 2005. He has previously contributed to the Voice.



Sarah Duncan was born and raised in Dallas, Texas. She received her Bachelors of Fine Arts from Webster University in 2001 and her Juris Doctor from Thurgood Marshall School of Law in 2010. She focuses on state and federal criminal defense and juvenile law.

Cause No. _____

STATE OF TEXAS

§

IN THE DISTRICT COURT

§

V.

§

____ JUDICIAL DISTRICT

§

LIBER T. ORDEATH

§

DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION FOR RECUSAL OF JUDGE

TO THE HONORABLE _____, JUDGE OF SAID COURT:

COMES NOW LIBER T. ORDEATH, Defendant, by and through undersigned counsel, and files this Defendant's Constitutional Motion for Recusal of Judge, and would show the Court as follows:

- 1) Defendant was originally charged with the offense of _____.
- 2) Such case was filed in the _____ Court of _____ County, Texas, presided over by Judge _____.
- 3) [SET OUT FACTUAL BASIS FOR MOTION].
- 4) This Motion is brought pursuant to Rule 18(b)(2) of the Texas Rules of Civil Procedure, which states in relevant part that, "A judge shall recuse himself in any proceeding in which: (a) his impartiality may reasonably be questioned; [or] (b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" See *Gaal v. State*, No. PD-0516-10 (Tex. Crim. App. 2011).
- 5) Under part (a) of such rule, a judge must be recused where the petitioner demonstrates that the trial Court's "impartiality may reasonably be questioned." Rule 18(b)(2)(a) T.R.C.P. Under this standard, Counsel need not prove actual bias or what was actually going through the mind of the trial judge. See *id.*; see also *Litkey v. United States*, 510 U.S. 540, 555 (1994). Rather, Counsel need only prove that a reasonable person might question the Court's impartiality. *Id.* at footnote 26.
- 6) Additionally, Judge _____ should be recused pursuant to part (b) of Rule 18(b)(2) of the Texas Rules of Civil Procedure. Part (b) of T.R.C.P. 18(b)(2) addresses a judge's impartiality, and, therefore, does hinge on what was in the mind of the judge. Under this section of the statute, recusal is proper where the trial court's rulings, remarks or actions reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." See *State v. Gaal* at footnote 22 (citing *Litkey* at 563-4).
- 7) This Motion is also brought under the Fifth Amendment (Due Process Clause), Sixth Amendment (Right to Counsel) and Fourteenth Amendments to the United States Constitution, and Article I §§ 13, 14 and 19 of the Texas Constitution (Due Course of Law).

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court rule in favor of this motion and recuse himself from this case, and reassign this case to another qualified judge, and for all other relief both at law and in equity.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT

STATE OF TEXAS

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COUNTY OF DALLAS

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VERIFICATION

On this day personally appeared before me, the undersigned Notary Public, PETER BARRETT, who after being by me duly sworn, stated as follows:

"My name is PETER BARRETT. I am the attorney for LIBER T. ORDEATH, the Defendant in this cause. I have read and fully understand the foregoing Motion for Recusal of Judge. The allegations of fact contained therein are true and correct based upon my information and belief."

PETER BARRETT

SWORN TO AND SUBSCRIBED Before me, the undersigned Notary Public on this ____ day of _____,
20__.

Notary Public in and for
The State of Texas