

XXX. RECUSAL

A. Code Section: O.C.G.A. §15-1-8, §15-11-23

B. Uniform Juvenile Court Rules: See U.J.C.R. 2.1 (Appointments by the Judge), 2.1(b) (Appointment of Judge Pro Tempore), 27 (Recusal), 27.1 (Motions), 27.2 (Affidavit), 27.3 (Duty of the Trial Judge), 27.4 (Procedure), 27.5 (Selection of Judge), 27.6 (Findings), 27.7 (Voluntary Recusal)

C. Code of Judicial Conduct: See Canon 1, Canon 2, Canon 3, Canon 3E(1), Canon 3F

D. Judicial Qualifications Commission Opinions

1. Announced candidacy by a practicing attorney against an incumbent Superior Court Judge does not require automatic recusal by the incumbent judge in all cases in which such attorney may appear. However, if such judge is in fact biased or prejudiced toward that attorney because of the political contest, then the incumbent judge has an affirmative duty to recuse. JQC Opinion No. 204, Docket No. 96-53.
2. It is inappropriate for any trial court judge to preside in any action wherein one of the parties holds a judicial office on the same or any other court that sits in the same circuit. JQC Opinion No. 220, Docket No. 97-78.
3. It is not inappropriate for a trial court judge to preside over a case in which one of the parties is employed by the Office of the Clerk in a multi-judge court. It is unlikely that any reasonable person would believe that a judge's ability to be fair and impartial would be impaired in any way. JQC Opinion No. 229, Docket No. 98-84.

E. Procedure

1. General.

Recusal is primarily regulated by The Canons of Judicial Conduct and O.C.G.A. §15-1-8 and §15-11-23. The Code of Judicial Conduct provides for a broader rule for disqualification than O.C.G.A. § 15-1-8, and the two provisions should be considered and applied together. Stephens v. Stephens, 249 Ga. 700 (1982). The procedure for recusal is set out in detail in Uniform Juvenile Court Rule 27 which essentially incorporates the procedure outlined in State v. Fleming, 245 Ga. 700 (1980). The Canons are enforceable to govern the conduct of judges. Judicial Qualifications Commission v. Lowenstein, 252 Ga. 432 (1984).

2. Code of Judicial Conduct.

CANON 1. Judges should uphold the integrity and independence of the judiciary.

CANON 2. Judges should avoid impropriety and the appearance of impropriety in all their activities.

Case Law:

Party did plumbing work for judge, and they briefly conversed about it during trial. Held that this does not rise to level of appearance of impropriety. Von Hoff v. Carmichael, 204 Ga. App. 760 (1992).

No recusal when victim was close relative to judge's bailiff. Thomason v. State, 199 Ga. App. 875 (1991).

A judge is not per se disqualified to try a cause when one of the parties is a church, lodge, or society of which the judge is a member. Blakeman v. Harwell, 198 Ga. 165 (1944).

CANON 3. Judges shall perform the duties of judicial office impartially and diligently.

CANON 3E(1) Disqualification.

1. Judges shall disqualify themselves in any proceeding in which their *impartiality might reasonably be questioned*, including but not limited to instances where:

Case Law:

Georgia courts have defined 'impartiality might reasonably be questioned' as a "reasonable perception, of lack of impartiality by the judge, held by a fair minded and impartial person based upon objective fact or reasonable inference." King v. State, 246 Ga. 386 (1980). Courts have held a reasonable person's perception of judicial bias to a stringent standard holding that "a reasonable person might conclude that the judge harbors a bias, stemming from an extra-judicial source, which is *of such a nature and intensity* that it would impede the exercise of impartial judgment." Wellons v. State, 266 Ga. 77 (1995).

a. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Case Law:

Judge is likely to be a real and essential witness. Russell v. State, 236 Ga. App. 645 (1999); Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (contempt case); In re Crane, 253 Ga. 667 (1985) (contempt case); Lynott v. State, 198 Ga. App. 688 (1991); Baptiste v. State, 229 Ga. App. 691 (1997).

“In order to be disqualifying, the alleged bias must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The alleged bias of the judge must be of such a nature and intensity to prevent the defendant... from obtaining a (trial) uninfluenced by the court’s prejudgment”. Birt v. State, 256 Ga. 483 (1986), quoting other cases, McBride v. State, 213 Ga. App. 857 (1994).

Alleged prejudice or bias against the party’s attorney in the underlying case, rather than the party himself, is not per se grounds for disqualification. Mann v. State, 154 Ga. App. 677 (1980); Houston v. Cavanagh, 199 Ga. App. 387 (1991); however, actions in a pending case that show bias toward attorney can be vicariously applied to the party. State v. Davis, 159 Ga. App. 537 (1981).

- b. the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
- c. the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person or any other member of the judge’s family residing in the judge’s household:
 - (i) is a party to the proceeding, or an officer, director or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have more than *de minimis* interest that could be substantially affected by the proceeding;
 - (iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

Case Law:

There is an affirmative duty on a judge to disclose to the parties his relationship to an attorney within the prohibited third degree even without a challenge. In re Broome, 245 Ga. 227 (1980); See Also Official Commentary to Canon 3E(1).

3. Appointment of judge pro tempore; authority; emolument. O.C.G.A. §15-11-23.

In the event of the disqualification, illness, or absence of the judge of the juvenile court, the judge of the juvenile court may appoint any attorney at law resident in the judicial circuit in which the court lies, any judge or senior judge of the superior courts, or any duly appointed juvenile court judge to serve as judge pro tempore of the juvenile court. In the event the judge of the juvenile court is absent or unable to make such appointment, the judge of the superior court of that county may so appoint . . .

4. When judge or judicial officer disqualified. O.C.G.A. §15-1-8.

(a) No judge of any court, . . . , shall:

(1) Sit in any case or proceeding in which he is pecuniarily interested;

Case Law:

Judges not required to recuse themselves in case involving County when victim's husband sits on County Commission and County Commission supplements Judges' salary and operating budgets. Kelly v. State, 238 Ga. App. 691 (1999).

(2) Preside, act, or serve in any case or matter when the judge is related by consanguinity or affinity within the sixth degree as computed according to the civil law to any party interested in the result of the case or matter; or

Case Law:

The word "party" in the phrase "any party interested in the result of the case or matter" in Code §24-102 is not restricted to the technical limitation of party to the case, but includes those who are interested in the result in the case, although not parties to it. Ga. Power Co. v. Watts, 184 Ga. 135 (1937); Gray v. Barlow, 241 Ga. 347 (1978).

(3) Sit in any case or proceeding in which he has been of counsel, nor in which he has presided in any inferior judicature, when his ruling or decision is the subject of review, without the consent of all parties in interest. In all cases in which the presiding judge of the superior court was employed as counsel before his appointment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless he declines to do so.

Case Law:

Defendant was investigated by law enforcement for criminal offense when judge was District Attorney. Judge should recuse himself. King v. State, 246 Ga. 386 (1980).

(b) No judge, . . . , of any court, shall be disqualified from sitting in any case or proceeding because of the fact that he is a policyholder or is related to a policyholder of any mutual insurance company which has no capital stock.

(c) N/A

(d) In all cases in which a part-time judge has a conflict because such judge or his or her partner or associate represents a governmental agency or entity, a subdivision of government, or any other client, the judge will recuse himself or herself or, with the permission of the parties, transfer the case to the state or superior court, but such judge will not otherwise be disqualified or prohibited from serving as attorney for such governmental entities.

5. Remittal of Disqualification.

The judge may disclose the basis of their disqualification on the record and may ask the parties and their lawyers, out of the presence of the judge, to consider whether to waive the disqualification . If the parties and their lawyers agree to waive the disqualification (other than personal bias or prejudice), and the judge is then willing to participate, then the waiver shall be incorporated into the record of the proceeding and the judge may participate. Code of Judicial Conduct, Canon 3F.

6. Additional Case Law.

- a) Filing Requirements. Motion must be filed in writing accompanied by sufficient affidavit. Henry v. State, 265 Ga. 732 (1995). Affidavit must state facts and reasons for belief that bias or prejudice exists, which if true, would result in recusal. Hunnicut v. Hunnicutt, 248 Ga. 516 (1981); Stevens v. Wakefield, 160 Ga. App. 353 (1981). See also UJCR 27.2 (affidavits “shall clearly state the facts and reasons for the belief that bias or prejudice exists”, with specificity). Bare conclusions shall not be legally sufficient. See In Re L.M., 219 Ga. App 746 (1995); Carter v. State, 246 Ga. App. 328,329 (1980).
- b) Time Requirements. Time requirements for filing must be met unless good cause for delay. Foody v. State, 200 Ga. App. 230 (1991); Thomason v. State, 199 Ga. App. 875 (1991) (time computed under O.C.G.A. §1-3-1(3)); Threatt v. State, 211 Ga. App. 630 (1994) (motion after receipt of transcript not good cause for delay).
- c) Sufficiency of Recusal Motion. When a motion to recuse is filed, the judge must determine the timeliness of the motion, the legal sufficiency of the affidavit, and whether the recusal is warranted assuming the facts alleged are true. If all three conditions are not met, the trial judge shall deny the motion on its face, and there is no need to assign the motion to another judge to hear. It is as much the duty of a judge not to grant the motion when the motion is legally insufficient as it is to recuse when the motion has merit.

Henderson v. McVay, 269 Ga. 7 (1998); Gibson v. Decatur Federal Savings and Loan, 235 Ga. App. 160 (1998).

- d) Participation in Recusal Proceedings. A judge has no authority to select own replacement. A disqualified judge can take no judicial action in the case. State v. Evans, 187 Ga. App. 649 (1988), overruled on other grounds, 268 Ga. 75 (1997).

After a motion to recuse is filed, the judge against whom the motion is filed shall not contest the motion or participate in the proceedings to recuse. Issac v. State, 257 Ga. 126 (1987) (recusal is proper when judge hired attorney who participated in recusal proceeding even though judge did not).

- e) Appeal. Appeal from order denying motion to recuse requires application for interlocutory review, In Re. Booker, 186 Ga. App. 614 (1988), or direct appeal from an adverse final judgment. Chandler v. Davis, 269 Ga. 727 (1998). A decision on the recusal of a trial judge is an interlocutory matter that can never dispose of a criminal case, and the state cannot appeal the order. Ritter v. State, 269 Ga. 884 (1998).

F. Sample Forms and Orders

1. Waiver of Judicial Disqualification
2. Voluntary Recusal Order
3. Disqualification Order
4. Appointment of Judge Pro Tempore

WAIVER OF JUDICIAL DISQUALIFICATION

Pursuant to Canon 3F of the Code of Judicial Conduct, the Honorable _____ has fully and completely disclosed that the basis of his/her disqualification is _____, and not personal bias or prejudice concerning a party. This disclosure has been made on the record and the Judge has asked the parties and their attorneys to consider, outside the presence of the Judge, whether to waive the disqualification. After consultation with one another and outside the presence of the Judge, the parties and their attorneys knowingly and voluntarily consent to a joint waiver of the judicial disqualification. Furthermore, said parties and their attorneys agree that the Judge may preside over all proceedings in this case as if no reason for judicial disqualification existed. At no time did the Judge participate in, solicit, seek, or hear comment on possible waiver of the disqualification. This joint waiver of the disqualification shall be incorporated into the record of the proceeding and based on said waiver, the Judge is willing to participate in such proceedings.

So entered this _____ day of _____ 19____.

Judge, Juvenile Court

_____ or Attorney for _____

_____ or Attorney for _____