

To Recuse or Not to Recuse: That is the Question

By Judge Patricia D. Wise

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Recusal is “the process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice.”¹ Not only can judges recuse themselves but most jurisdictions also allow the attorney to file a motion to recuse when the attorney can present an argument supporting the exclusion of the judge. In some jurisdictions, “a ruling on the merits of a recusal motion must be made by some other judge than the one whose recusal is sought.”² However, in Mississippi, the judge sitting before the case may also rule on a motion to recuse that judge. The question, however, is when should judges recuse themselves from a cause of action?

The legal system in Mississippi is rooted on the basic principle that an impartial judiciary will interpret and apply the laws. When that impartiality is questionable, parties look to rules which govern the recusal of judges. Specifically, Rule 1.11 of the Uniform Chancery Court Rules states,

Any party may move for the recusal of a judge of the chancery court if it appears that the judge’s impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party’s attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the

grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

Additionally, Rule 1.15 of the Uniform Rules of Circuit and County Court Practice states,

Any party may move for the recusal of a judge of the circuit or county court if it appears that the judge’s impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party’s attorney setting forth the factual basis underlying the asserted grounds for recusal and

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The Mississippi Supreme Court has examined questions concerning whether a judge should recuse himself. According to the Constitution of the State of Mississippi

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.³

Judges are also governed by the Code of Judicial Conduct. The purpose of the Code of Judicial Conduct is to establish rules and regulations which govern the ethical conduct of judges. The Code of Judicial Conduct should be applied in conjunction with the constitution, statutes, and other court rules and regulations.⁴

The issue of recusal was presented in the case of *Steiner v. Steiner*.⁵ Here, the court reasoned that "the decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standard."⁶ Specifically, Canon 3 Section E(1) states,

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or

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for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as 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 or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) 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:

(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 an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

In Steiner, the court further reasoned that "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality... A presumption exists that the judge, sworn to administer impartial justice, is qualified and unbiased, and where the judge is not disqualified under the constitutional or statutory provisions, 'the propriety of his

or her sifting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion.'" Here, the chancellor recused himself solely because the husband, one of the parties to the suit, was a practicing attorney in that district. The court reasoned that "most chancellors adhere to an unwritten rule not to hear the personal divorce suits of lawyers who routinely practice before their courts'... 'This Court commends such a practice, and it would be wise for appointing authorities and local lawyers to adhere to such practice.'" The court further applied Canon 2 of the Code of Judicial Conduct which states,

A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The comments following Canon 2 state that "public confidence in the Judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant scrutiny."

However, in Dodson v. Singer River System et al.,¹⁰ the Mississippi Supreme Court found that the trial Judge should have recused himself. Here, Dodson filed suit against the defendants seeking \$250,000.00 in damages resulting from the wheelchair transfer attendant running her wheelchair into a door. The judge ruled in favor of the defendants. Dodson alleged that the judge should have recused himself due to his prior relationship with the firm who now represented the defendants. The prior relationship stemmed from one of the members of the firm having previously represented the judge on more than one occasion. The Mississippi Supreme Court found that "a reasonable person knowing all the circumstances here would have a reasonable doubt regarding Judge Harkey's impartiality in this case."¹¹

A distinction should be made between an attorney representing a judge in personal matters and an attorney representing a judge based on his official capacity. In

Washington Mutual Financial Group, LLC. v. Blackmon et al.,¹² the court stated that "disqualification may not be required if the attorney before the judge has represented him on the basis of the judge's official acts."¹³ Here, the court found, among other things, that any personal animosity held by a judge against an attorney does not in and of itself mandate recusal. The court reasoned that "the recusal process must not degenerate into a technique for a lawyer to utilize in constructing a forum favorable to the positions which may favor the litigants represented by the lawyer."¹⁴ The court further reasoned that "our laws and rules governing recusal are written to allow remedy in the few cases where judges' conduct indicates that they may truly appear to fall short of the responsibility to make those distinctions. The recusal mechanism must be guarded carefully to check its use as a weapon to be wielded in a campaign to maneuver onto more favorable fields of battle."¹⁵

Similarly, the United States Code provides rules to aid in determining whether recusal is appropriate. According to the United States Code, there are two statutes, 28 U.S.C.A. §§ 455 and 144, that refer to judicial recusal. Section 455 states:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the

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proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding. (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household. (d) For the purposes of this section the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation; (2) the degree of relationship is calculated according to the civil law system; (3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian; (4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund; (ii) An office in an educational, religious, charita-

ble, fraternal, or civic organization is not a "financial interest" in securities held by the organization; (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification. (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Section 144 states:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affi-

davit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

In 1998, the United States Court of Appeals decided Tramonte v. Chrysler Corporation et. al.¹⁶ Here, the plaintiff brought suit against the automobile manufacturer alleging paint defects caused by the manufacturing process. After researching automobile ownership records, the defendant discovered that one of the judge's family members owned a Chrysler, making that person a possible class member. The judge denied the defendants' motion to recuse. She reasoned that, "although members of my family are present and past owners of Chrysler vehicles, only one of them is a present owner and he has no interest in joining the punitive class in this case. I have no 'direct or immediate' interest in this case which requires my recusal."¹⁷ The court concluded that "where a judge, her spouse, or a minor child residing in her household is a member of a punitive class, there exists a 'financial interest' in the case mandating recusal under Section 455(b)(4)."¹⁸

Two years later the United States Court of Appeals examined 28 U.S.C. § 455(a) in Republic of Panama v. American Tobacco Co. Inc.¹⁹ Under 28 U.S.C. Section 455(a) a judge should recuse himself "in any proceeding in which his impartiality might reasonably be questioned...In order to determine whether a court's impartiality is reason-

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ably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer would question the court's impartiality.²⁰ The court further stated that "the purpose of § 455(a), and the principle of recusal itself is not just to prevent actual partiality, but to 'avoid even the appearance of partiality.'²¹ Each claim based on § 455(a), "must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim."²²

Here, the plaintiff filed an action in the Louisiana State Court, alleging that the defendants, tobacco companies, conspired to conceal the addictiveness and health risks of tobacco. The plaintiff sought damages for past and future health costs for diseases associated with smoking tobacco. The Circuit Court held, among other things, that Judge Barbier, the district court judge sitting before this cause of action, should have recused himself. The court noted that Judge Barbier was the president of the Louisiana Trial Lawyers Association (LTLA) from

approximately October of 1989 until 1990. In April of 1991, the LTLA filed an amicus brief against tobacco companies in Louisiana. Judge Barbier's name was listed on the "Motion for Leave to File Amicus Curiae Brief," as President of the LTLA. The court reasoned that "while arguably the facts of the Louisiana product liability suit and the present suit may be distinguishable, the amicus brief contained general statements about the tobacco companies... The amicus brief also stated that the defendant tobacco companies should be held liable because they were negligent in producing a product that was more dangerous than it was intended to be, and that the companies knew or should have known of the addictive nature of their cigarettes."²³ The court further reasoned that, "while there is no evidence of actual bias we must consider whether a reasonable person might harbor doubts about the trial judge's impartiality. The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to

doubt his impartiality."²⁴

In sum, the test to consider when determining a motion to recuse is whether "a reasonable person knowing all the circumstances... would have a reasonable doubt regarding"²⁵ the impartiality of a judge in a cause of action. Each question regarding recusal should be determined on a case by case basis. ■

¹BLACK'S LAW DICTIONARY 1277 (6th Ed. 1990)

²Carson v. McAdams, 908 S.W. 2d 228 (1st 1993)

³Miss. Code Ann. Art. 6 § 165.

⁴In Re: The Matter of the Mississippi Code of Judicial Conduct, Ct. R-34 (Miss. 2002)

⁵788 So. 2d 771 (Miss. 2001)

⁶Id. at 775.

⁷Id.

⁸Id.

⁹Id.

¹⁰839 So. 2d 530 (Miss. 2003)

¹¹Id.

¹²2004 WL 213400 (Miss. 2004)

¹³Id. at 8.

¹⁴Id. at 3.

¹⁵Id. at 15.

¹⁶136 F. 3d 1025 (5th Cir. 1998)

¹⁷Id. at 1027.

¹⁸Id. at 1030.

¹⁹217 F. 3d 343 (5th Cir. 2000)

²⁰Id. at 346.

²¹Id.

²²Id.

²³Id.

²⁴Id. at 347.

²⁵Dodson, 839 So. 2d at 533.

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